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OLDMAN AND ENVIRONMENTAL IMPACT ASSESSMENT: AN INVITATION FOR COOPERATIVE FEDERALISM

Steven A. Kennett

INTRODUCTION

This paper describes, from a constitutional perspective, the implications for environmental impact assessment (EIA) of the Supreme Court of Canada's decision in *Oldman*.¹ In particular, *Oldman* indicates that both levels of government will frequently have jurisdiction to conduct EIAs of environmentally significant projects. If they choose to exercise their respective authority, coordination is necessary to avoid regulatory duplication and reduce the risk of intergovernmental conflict. While governments were already moving in the direction of greater coordination in EIA,² *Oldman* should provide additional impetus.

The paper begins with a brief overview of the *Oldman* litigation. Three elements of the judgement relevant to shared jurisdiction over EIA are then discussed. First, the Court took an expansive view of the "environment" and of the role for EIA. Second, it rejected arguments, based on Crown and interjurisdictional immunity, which could have limited federal EIA authority regarding the Oldman Dam. Third, the Court's constitutional analysis of environmental management and EIA suggests multiple points of regulatory leverage for both levels of government. The constitutional limitation on EIA is then discussed. In the final section, *Oldman* is related to the general problem of environmental management in a federal system.

OVERVIEW OF THE CASE

The *Oldman* litigation resulted from the Government of Alberta's decision to construct an irrigation dam on the Oldman River. One of the strategies pursued by opponents of the dam was to request a federal EIA. The province, which had conducted its own environmental review of the project, opposed federal intervention and the federal government had refused to apply the *Environmental Assessment Review Process Guidelines Order*³ under its fisheries jurisdiction, stating that potential problems were being addressed and that "long-standing administrative arrangements ... are in place for the management of fisheries in Alberta."⁴ In addition, the federal Minister of Transport granted approval for the dam under s.5 of the *Navigable Waters Protection Act*⁵ without conducting an EIA. It is an irony of *Oldman* that the case, which would be hailed by environmentalists as a strong affirmation of federal jurisdiction,⁶ was initiated

to force an unwilling federal government to evaluate the environmental effects of the dam.

The Friends of the Oldman River Society brought an application for an order in the nature of *certiorari* to quash the federal approval of the dam and an order in the nature of *mandamus* requiring the Ministers of Transport and Fisheries and Oceans to conduct an EIA. Jerome A.C.J. of the Federal Court Trial Division dismissed the application, finding the *Guidelines Order* to be inapplicable and exercising judicial discretion not to grant relief on the grounds of delay and unnecessary duplication if a federal EIA were ordered.⁷ This decision was reversed on appeal.⁸ Stone J.A. of the Federal Court of Appeal held that the *Guidelines Order* was triggered by the decision-making authority of both ministers and was mandatory. In addition, he overturned the trial judge on the exercise of discretion. Leave to appeal was granted by the Supreme Court of Canada.

The Supreme Court addressed five issues: (1) the statutory validity of the *Guidelines Order*; (2) its applicability to the Oldman Dam (the proponent of which was the Crown in right of Alberta); (3) whether the *Guidelines Order* was mandatory; (4) the interference with the trial judge's discretion; and (5) whether the breadth of the *Guidelines Order* offended s.92 of the *Constitution Act, 1867*.⁹ La Forest J. wrote for the eight justice majority, upholding the federal EIA process. Stevenson J. dissented on two issues (Crown immunity and the exercise of discretion) and on the costs award.¹⁰

On the first issue, the Court held that the *Guidelines Order* was validly enacted under the *Department of the Environment Act*¹¹ and was consistent with other statutory authority regarding the dam because it simply created a "superadded" duty to review environmental effects.¹² Second, the Court held that the licensing requirement under the *Navigable Waters Protection Act* gave rise to an "affirmative regulatory duty" on the part of the Minister of Transport, making that Minister an "initiating department" and triggering the federal EIA requirement for the dam.¹³ In addition, the *Navigable Waters Protection Act* was found to be binding on the Crown in right of Alberta.¹⁴ The Court held, however, that the *Fisheries Act*¹⁵ does not create a regulatory scheme triggering the *Guidelines Order*.¹⁶ Third, the *Guidelines Order* was held to be a mandatory regulatory scheme enacted as subordinate legislation.¹⁷ Fourth, the

interference with the trial judge's discretion was justified since he failed to weigh adequately the sustained legal effort to challenge the project and the absence of prejudice to Alberta resulting from any delay in bringing the application.¹⁸ Finally, the Court held that the *Guidelines Order* is constitutionally valid as a means of facilitating decision-making (under the particular heads of federal power related to the dam) and as a procedural or organizational device governing the internal operations of the Government of Canada (under the "peace, order and good government" power).¹⁹

At several points in the judgement, La Forest J. emphasised the broad scope of environmental management and EIA, refused to insulate the Oldman Dam from federal authority and noted the constitutional basis for both federal and provincial roles in environmental management. These elements, reviewed in the following three sections, establish overlapping federal and provincial responsibility for EIA as a central feature of environmental decision-making in Canada.

THE EXPANSIVE VIEW OF 'ENVIRONMENT' AND EIA

The first element of *Oldman* relevant to shared jurisdiction over EIA is the Court's expansive view of both the environment as a subject matter of government activity and of the role of EIA in decision-making. While this reasoning is not, strictly speaking, constitutional, it lays the groundwork for extensive jurisdictional overlap in the EIA of environmentally significant projects.

La Forest J.'s interpretation of the scope of the Minister's duties under the *Department of the Environment Act* emphasises the broad ambit of authority regarding environmental quality. He states:

I cannot accept that the concept of environmental quality is confined to the biophysical environment alone; such an interpretation is unduly myopic and contrary to the generally held view that the "environment" is a diffuse subject matter ... Surely the potential consequences for a community's livelihood, health and other social matters from environmental change are integral to decision-making on matters affecting environmental quality, subject, of course, to the constitutional imperatives....²⁰

At another point, La Forest J. remarks that "the environment is comprised of all that is around us and as such must be a part of what actuates many decisions of any moment."²¹ This broad view of environmental quality suggests that EIAs have a role in a wide variety of contexts and may be far-reaching in their scope.

The potential ubiquity of the EIA process is also suggested by La Forest J.'s statement that EIA is "a planning tool that is now generally regarded as an integral component of sound decision-making.... In short, environmental impact assessment is simply descriptive of a process of decision-making."²² It is thus clear that EIA — the evaluation of activities in terms of their consequences for environmental quality — may be an adjunct of virtually all government decision making.

THE REJECTION OF CROWN AND INTERJURISDICTIONAL IMMUNITY

The second element of *Oldman* relevant to shared EIA jurisdiction is the Court's rejection of arguments, based on Crown and interjurisdictional immunity, that the dam should be insulated from federal authority. The first argument was that the *Navigable Waters Protection Act*, which triggered the *Guidelines Order*, was inapplicable to the Crown in right of Alberta. The issue arose because the Act does not explicitly bind the Crown. La Forest J.'s conclusion that the Crown in right of Alberta is bound by necessary implication is based in large part on his discussion of the *Interpretation Act*²³ and the common law right of navigation. His discussion also contains reasoning which is relevant to environmental regulation in general. Noting that navigation systems may be integral to interprovincial transportation networks which are vital for international trade and commerce, La Forest J. states that:

The regulation of navigable waters must be viewed functionally as an integrated whole, and when so viewed it would result in an absurdity if the Crown in right of a province were left to obstruct navigation with impunity at one point along a navigational system, while Parliament assiduously worked to preserve its navigability at another point.²⁴

The need for an integrated approach, a common feature of environmental management, supported the application of federal legislation to the Crown in right of a province even absent explicit terms binding the province.

The second argument addressed by La Forest J. is that the Oldman Dam is "a 'provincial project' or an undertaking 'primarily subject to provincial regulation.'"²⁵ Following Dickson C.J. in *Alberta Government Telephones*,²⁶ La Forest J. rejects the "erroneous principle that ... there exists a general doctrine of interjurisdictional immunity to shield provincial works or undertakings from otherwise valid federal legislation."²⁷

The Supreme Court of Canada thus indicates its unwillingness to recognize a privileged provincial position with respect to environmental management. While the

provinces may, by virtue of their proprietary rights²⁸ and broad legislative powers,²⁹ exercise the preponderance of environmental jurisdiction in Canada, federal authority over environmental matters has equal constitutional legitimacy and is unlikely to be restricted by claims of provincial immunity.

THE BASIS AND EXTENT OF ENVIRONMENTAL JURISDICTION

The third element of *Oldman* relevant to authority regarding EIA is the Court's analysis of environmental jurisdiction. La Forest J. explains the constitutional implications of his broad view of the environment as follows:

I agree that the *Constitution Act, 1867* has not assigned the matter of "environment" *sui generis* to either the provinces or Parliament. The environment, as understood in its generic sense, encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government.³⁰

He also states that, in constitutional terms, EIA has an "auxiliary nature"³¹ in that it is dependent on other heads of power. There is no separate constitutional jurisdiction with respect to EIA; rather, authority to require an EIA exists whenever governments exercise jurisdiction.

La Forest J.'s approach is to examine the catalogue of powers in the *Constitution Act, 1867* in terms of their use to address environmental issues.³² Since provincial jurisdiction was not at issue in *Oldman*, his focus is federal powers. Two illustrations of federal environmental jurisdiction are discussed. The first is based on federal jurisdiction over an area of activity. In the second example, environmental jurisdiction arises from the effects of an activity on an area of federal authority.

La Forest's first example arises from federal authority over interprovincial railways.³³ On this basis, the federal government has broad latitude for environmental regulation including both "biophysical environmental concerns" and "the national and local socio-economic ramifications" of decisions regarding these railways.³⁴

The second example is jurisdiction under the "navigation and shipping" power³⁵ to regulate "biophysical environmental concerns that affect navigation."³⁶ La Forest J. cites ss.21 and 22 of the *Navigable Waters Protection Act*, which prohibit the deposit of substances liable to interfere with navigation into navigable waters. Legislation of this type, he notes, must have a clear nexus with the head of power relied on. This analysis is supported by the *Fowler*³⁷ and

*Northwest Falling*³⁸ cases concerning anti-pollution sections of the *Fisheries Act*. In *Fowler*, a general pollution prohibition was struck down on the grounds that a link with harm to fisheries was not established. In contrast, *Northwest Falling* upheld a section prohibiting the deposit of deleterious substances (defined as being harmful to fish, fish habitat or to the human use of fish) where they might enter waters frequented by fish.

Environmental jurisdiction, then, may be based on constitutional authority over activities or on authority to regulate the environmental effects of activities for areas of jurisdiction. As a result, projects like the Oldman Dam, which have significant consequences for environmental quality, likely will affect both federal and provincial heads of power. La Forest states:

What is important is to determine whether either level of government may legislate. One may legislate in regard to provincial aspects, the other federal aspects. Although local projects will generally fall within provincial responsibility, federal participation will be required if the project impinges on an area of federal jurisdiction as is the case here.³⁹

Federal jurisdiction in *Oldman* arose from the effects of the dam on navigation, fisheries, and Indians and lands reserved for Indians. Since jurisdiction over the dam is shared, both levels of government are competent to undertake EIAs in the exercise of their respective regulatory authority.

THE CONSTITUTIONAL LIMITATION ON EIA

Although projects having consequences for both federal and provincial jurisdiction may be subject to EIA by both levels of government, the scope of these EIAs is not necessarily coextensive. La Forest J. recognizes the risk that EIA might serve "as a constitutional Trojan horse enabling the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far-ranging inquiry into matters that are exclusively within provincial jurisdiction."⁴⁰ His response is that the *Guidelines Order* restricts EIA panels to examining only "matters directly related to the areas of federal responsibility affected."⁴¹ Consequently, it cannot be used as a "colourable device" to extend federal control to aspects of the project unrelated to federal heads of power.⁴² Since federal jurisdiction over the dam relates to the project's effects on fisheries, navigation, and Indians and land reserved for Indians, *Oldman* suggests that a federal EIA must be limited to evaluating these areas of concern.

This restriction on the scope of EIA makes constitutional sense, but raises two practical problems. First, there remains a risk of duplication, delay and

intergovernmental conflict if two separate EIAs of a single project are required. Evaluating a project's consequences for fisheries, for example, will involve many of the same considerations of a general assessment of the its effects on water flow and quality, issues likely to be addressed in a provincial EIA. Second, there is a certain contradiction between the policy rationale for EIA and the constitutional restriction. EIA is promoted as a holistic process for reviewing and weighing the environmental effects (and the options for their mitigation) of entire projects. Can this objective be achieved if EIA is restricted to an examination of only a few consequences, or only part of a project?

CONCLUSION

The *Oldman* decision suggests that jurisdiction to require an EIA of environmentally significant projects frequently will be shared. The broad definitions of "environment" and of the role of EIA, the rejection of provincial arguments based on Crown or interjurisdictional immunity and the basing of environmental jurisdiction on the activities regulated (e.g. interprovincial railways) or the effects of activities on areas of jurisdiction (e.g. effects on navigation) give both levels of government ample grounds for environmental regulation. The constitutional limitation on EIA leaves room for considerable overlap in practice.

Oldman illustrates a general tension between environmental management and federalism.⁴³ Since virtually all decision-making raises environmental issues, the decentralization that characterizes Canadian federalism means that both levels of government will be engaged in environmental management. This inevitable fragmentation of authority, however, brings with it certain risks. Regulatory duplication or conflict may result and the integrated approach to environmental issues, necessary to take account of interrelationships within ecosystems, is made more difficult. These problems are illustrated by shared jurisdiction to conduct EIAs of a project like the Oldman Dam. Dividing EIA responsibility on constitutional lines raises the possibility of duplication and the risk that a restricted EIA (in this case federal) will provide an inadequate basis for decision-making.

As is frequently the case in Canadian federalism, the solution is likely to be political rather than constitutional. By confirming that both levels of government have solid constitutional grounds for involvement in EIA, the Supreme Court of Canada is effectively inviting governments to work out a cooperative approach.

Overlapping authority should be acknowledged and a coherent and effective structure for joint EIA should be put in place.

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1. *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 2 W.W.R. 193 (S.C.C.).
2. The *Canadian Environmental Assessment Act* (Bill C-13, 3d Sess., 34th Parl., 1991-1992), ss.40-42 provides for joint EIAs. Agreement has also been reached to conduct a joint EIA of Hydro-Quebec's Great Whale project.
3. SOR/84-467 [hereinafter *Guidelines Order*].
4. *Oldman*, *supra*, note 1 at 207.
5. R.S.C. 1985, c. N-22.
6. See E. May, "Oldman Dam Victory: Federal Environmental Power Affirmed" *The Sierra Report* (February/March 1992) 1.
7. [1990] 1 F.C. 248 (T.D.)
8. [1990] 2 F.C. 18 (A.D.)
9. *Oldman*, *supra*, note 1 at 214-215.
10. The majority awarded costs on a solicitor and client basis, a significant development for public interest litigants.
11. R.S.C. 1985, c. E-10.
12. *Oldman*, *supra*, note 1 at 215-221.
13. *Oldman*, *supra*, note 1 at 223-226.
14. *Oldman*, *supra*, note 1 at 227-236.
15. R.S.C. 1985, c. F-14.
16. *Oldman*, *supra*, note 1 at 226-227.
17. *Oldman*, *supra*, note 1 at 215-217.
18. *Oldman*, *supra*, note 1 at 246-250.
19. *Oldman*, *supra*, note 1 at 244-245.
20. *Oldman*, *supra*, note 1 at 218.
21. *Oldman*, *supra*, note 1 at 242.
22. *Oldman*, *supra*, note 1 at 242-243.
23. R.S.C. 1985, c. I-21.
24. *Oldman*, *supra*, note 1 at 235.
25. *Oldman*, *supra*, note 1 at 241.
26. *Alberta Government Telephones v. Canada (C.R.T.C.)*, [1989] 2 S.C.R. 225.
27. *Oldman*, *supra*, note 1 at 241.
28. *Constitution Act, 1867*, s.109.
29. *Constitution Act, 1867*, ss. 92(13), 92(16) and 92(10).
30. *Oldman*, *supra*, note 1 at 237.
31. *Oldman*, *supra*, note 1 at 243.
32. *Oldman*, *supra*, note 1 at 238.
33. *Constitution Act, 1867*, ss. 92(10)(a) and 91(29).
34. *Oldman*, *supra*, note 1 at 239.
35. *Constitution Act, 1867*, s.91(10).
36. *Oldman*, *supra*, note 1 at 239.
37. *Fowler v. The Queen*, [1980] 2 S.C.R. 213.
38. *Northwest Falling Contractors Ltd. v. The Queen*, [1980] 2 S.C.R. 292.
39. *Oldman*, *supra*, note 1 at 241.
40. *Oldman*, *supra*, note 1 at 243.
41. *Oldman*, *supra*, note 1 at 243.
42. *Oldman*, *supra*, note 1 at 243.
43. See M. Walters, "Ecological Unity and Political Fragmentation: The Implications of the Brundtland Report for the Canadian Constitutional Order" (1991) 24 Alta. L. Rev. 420.

LIVING TREE?

Allan C. Hutchinson

One of the most popular metaphors in constitutional law is "the living tree". Originally coined by Lord Sankey to justify a large and liberal interpretation of the British North America Act, it has become commonplace to read that, with the Charter, Canada "planted a living tree capable of growth and expansion within its natural limits".¹ On the tenth anniversary of its ceremonial planting, it is instructive and revealing to take stock of how the Charter tree has grown and what fruit it has borne.

To begin with, it bears repeating what many are prone to forget — that the Charter was planted. Contrary to developing folklore, the Charter was not a naturally germinating shoot in indigenous soil. It was the product of ideological haggling and institutional seed-trading. A deeply undemocratic process, the constitutional circus of 1980 to 1982 was an exercise in high politics and another occasion for the continuing power play between Ottawa and the provinces. Indeed, while planting the Charter tree, the founding fathers of Canada's new constitutionalism also sowed the seeds of contemporary discontent that sprouted at Meech Lake and its aftermath.

Transplanted and spliced together from other cultures by a brood of contending politicians, its origins are as distinctly political as its continuing cultivation is politically distinctive. Yet the Charter's planting is mistakenly thought of in lyrical and mystical terms as a romantic moment of national self-definition. The Charter sapling has already become a national treasure, emblem and monument — the constitutional equivalent of the fabled maple.

In the exclusive care of its judicial custodians, the Charter has blossomed and bloomed ever stronger each season. After some initial hesitation, this privileged group of enthusiasts has warmed to its national undertaking and actively nurtured the Charter's expansive growth. The Supreme Court of Canada has become a markedly public law forum and constitutional matters now dominate its docket. In the first few years of the Charter, the courts upheld Charter claims and struck down laws with relative abandon. Settling in to a more measured pace, the Supreme Court began to worry about its own competence to take such an active posture once it grasped the importance of its invigorated role in Canadian politics. Coincidentally, this stutter of confidence and concern about its lack of expert knowledge only occurred when the Court had to deal

with requests by unions and workers to enter the Charter arboretum. But more about this later.²

The major force of the "living tree" metaphor is, of course, directed at the process of constitutional interpretation. And it is in that context that Charter judges have invoked its arboreal assistance and authority. Despite bold statements by the present Chief Justice that "adjudication under the Charter must be approached free of any lingering doubts as to its legitimacy,"³ the judges remain deeply (and rightly) troubled by the exact scope and terms of their mandate to affect the constitutional review of legislation. Mindful that the line between law and politics is increasingly more imagined than real, they have taken refuge under the convenient and capacious shelter of the Charter's living tree. Although at times reluctant, the judges have become, with the urging of a sophisticated and ambitious legal corps, the new aristocrats of Canadian culture.

At an early stage, the courts decided it was time to thaw the "frozen rights" approach that was popular under the discredited Bill of Rights. The Charter was not to represent and hold in place those rights recognized and declared to exist at its enactment in 1982.⁴ Instead, the courts used this interpretive run-off to water the Charter shrub and to feed its future growth. What might have been a legal performance of ice-sculpting turned into a judicial exercise in constitutional gardening. Under the green-fingered encouragement of Bud Estey and Tony Lamer, it was emphasized how care must be taken not to "stunt the growth of the law and hence the community it serves".⁵ As Brian Dickson put it, the Charter "must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."⁶

In carrying through on this horticultural undertaking, the Supreme Court emphasized at an early stage that, if they are to produce a truly organic stand of jurisprudence, they must not be hampered by the original intentions of the Charter's foresters. To allow for growth and adjustment, the Charter must not be held hostage to the design and ambitions of those who supervised its planting.⁷ However, in typical fashion, the Supreme Court has been less than consistent in its commitment to this approach. When the Charter tree threatens to become unruly and grows in unanticipated or undesired directions, judges have been quick to invoke the superior authority of the original political foresters to warrant the odd bough being lopped off or the occasional branch

trimmed. Again, this technique curiously has been relied upon when the Charter challenge has come from one of the under-privileged groups in society, mainly working people and women.⁸

In cultivating the Charter tree, judges have disagreed strongly over the tools to be used and the horticultural philosophy to be embraced. Among those gardeners who have been elevated to the highest garden shed on Canadian grounds, LaForest and Wilson represent the most marked and opposing styles. The former takes a more hands-off approach. Apart from an occasional act of tree surgery, LaForest's philosophy is to rest content with letting democratic nature take its course: "in the absence of unreasonableness or discrimination, courts are simply not in a position to substitute their judgment for that of the Legislature."⁹ The latter has a more interventionist, hands-on style of constitutional gardening. For Wilson, the challenge is to keep a strict check on the Charter tree's growth so that its cut and appearance comport with a very definite view of what a Charter tree should look like: "the rights guaranteed in the Charter erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the court is to map out, piece by piece, the parameters of the fence."¹⁰

Although the Court began with a fairly shared vision of its horticultural responsibilities and the pruning techniques to be used, it soon became apparent that there was considerable disagreement among the eclectic ensemble. Whereas thirteen of the first fifteen decisions were unanimous, there were dissents in sixteen of the next thirty-two. Moreover, it now seems that no Supreme Court decision can be handed down without at least one and sometimes as many as four dissents. This lack of unanimity, while not conclusive, does little to resist the broadening chorus of criticism that the work of the court is ideological in nature and operation.

Accordingly, instructed and informed by only their amateur gardening skills, the judges have become political topiarists and have shaped the Charter much to their own preferences.¹¹ As such, the Charter's growth and expansion has come to look naturally conservative, favouring established interests and traditional values over more progressive positions. With a bunch of judicial gardeners that are drawn exclusively from the ranks of the middle-class and middle-aged, this should come as little surprise. This is perhaps best illustrated by the double-limbed, means/ends interpretation of s. 1 which gives heavily presumptive weight to a retention of the status quo.¹²

The Charter tree was planted with the proclaimed intention of providing constitutional shelter and civic

nourishment to ordinary Canadians. In this it has surely failed. While the courts have opened themselves up for constitutional challenges through a liberalization of the rules of standing and non-party intervention, the price of admission remains outrageously high. Estimates range between \$100,000 and \$300,000 to take a case all the way to the Supreme Court of Canada. With its dazzlingly colourful and seductively scented foliage, it has proved to be more an ornamental shrub for the bulk of Canadian citizens. It tickles the aesthetic fancy, but does little to satisfy more substantive cravings.

Whether one agrees or disagrees with his mission, Joe Borowski's ten-year odyssey through the courts is a travesty of any kind of democratic process. Having first filed his case in September 1978, it took three years, \$150,000 and a visit to the Supreme Court to establish that he had standing to bring his constitutional challenge. In October 1988, after two more trials, seven years and another \$200,000, Borowski was back in the Supreme Court only to be told that his case was moot because of the recent decision in *Morgentaler*. At the very least, Borowski was entitled to a more conclusive and more expeditious decision on the validity of his constitutional challenge. In such circumstances, constitutional gardening becomes an indulgence that no sane society should endure or encourage. There are more nourishing and constructive pursuits to be fostered.

Confined to a rather elite arboretum, it is the corporate sector that has gained the most access to the Charter tree. Able to influence and reinforce the judges' horticultural instincts, corporations and their members have procured a constitutional crop that is to their liking. They have persuaded the courts to recognize their rights to free speech, religion, equality, to be tried within a reasonable time and to be free from unreasonable search and seizure. It is a bumper crop and must have surpassed even the most optimistic expectations of the corporate establishment.

In contrast, workers and other ordinary Canadians have been hard pressed to catch sight of, let alone benefit from, the Charter's reputed bounty. Efforts by the unions to secure a reasonable share of the Charter's fruit in the form of a right to strike or bargain collectively have been bluntly and unsympathetically rebuffed. So bleak is the situation that, as a face-saving manoeuvre, some union lawyers are minded to pass off as victories those decisions that simply leave in place benefits that took long years of political struggle to obtain.¹³ Furthermore, by way of adding insult to injury, the Supreme Court has refused to grant rights to unions because they are not fundamental and are not expressed dimensions in the Charter. Remembering the economic *raison d'être* of corporations and that corporations are

nowhere mentioned in the Charter, Le Dain's conclusions are perverse:

Since trade unions are not one of the groups specifically mentioned by the Charter, and they are overwhelmingly, though not exclusively, concerned with the economic interests, it would run counter to the overall structure and approach of the Charter to accord by implication special constitutional rights to trade unions.¹⁴

Indeed, the Charter's fruit has a delicate blush, is easily bruised and appeals to an acquired taste. While there has been the occasional produce for more general consumption of benefit, its choice berries only satisfy the palates of the privileged few. Costly to reap, it has not been the substantial and sustaining harvest that was promised or hoped for. For instance, equality rights have been effectively ambushed and held hostage by the more privileged sectors of society. The provision has been used to deal with charges such as drunk driving and the manufacture of pop cans. In the first three years after its planting, there were approximately 600 court decisions under the equality provisions and 44 or 7% of these involved sexual equality. Most alarmingly, only 7 of the 44 cases were initiated by or on behalf of women; the other 37 decisions were based on claims by men.¹⁵

Perhaps the most serious problem with this constitutional conifer is that the maintenance of its luxuriant growth seems to have become almost an end in itself. Casting a large shadow over the body politic, the Charter has insatiable organic needs. It requires constant and expensive attention, stymies the cultivation of other promising popular saplings and, most worryingly, sucks the political soil dry of its vital democratic spirit. This is particularly true of the failure by embattled and pusillanimous politicians to exercise their power to override the Charter under s. 33.

A topical illustration of the Charter tree's deleterious effect on other Canadian political fauna is the government's unwillingness to place spending limits on any referendum campaign. Taking the government at its word (a dangerous course), it defended its decision on the basis that such limits would be vulnerable to successful challenge under the Charter. As the purpose of spending limits is to ensure that democratic decision-making does not become hostage to the interests and views of the wealthy, the effect of the Charter has been to handcuff efforts to retain the semblance of democratic legitimacy that exists in Canadian politics. Wealthy individuals and corporations can use the broad reach of the Charter to shelter them from the refreshing rains of participatory democracy. Rather than be a democratic haven from a world of unequal wealth and power for the least advantaged, the Charter tree has become an elitist

hideaway for the privileged sectors of society who seek to evade the egalitarian instincts of a democratic polity.

While it is too late to nip this constitutional scion in the bud, it is not too soon to prune the Charter tree to more modest proportions. The judicial gardeners can best fulfil their democratic mandate by engaging in such a worthy project. Reduced to a less prominent position on the Canadian political landscape, the Charter tree might have a useful and limited role to play. Small is not only ecologically beautiful, but is also constitutionally sound.

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1. *Edwards v. Attorney General for Canada*, [1930] A.C. 124 at 136.
2. See *Dolphin Delivery*, [1986] 2 S.C.R. 573 and *Alberta Labour Reference*, [1987] 1 S.C.R. 313.
3. *Re Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 497 per Lamer J.
4. See *Big M Drug Mart*, [1986] 1 S.C.R. 103.
5. See *Re Motor Vehicle Act*, *supra*, note 3 and *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357.
6. *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155.
7. See *Re Motor Vehicle Act*, *supra*, note 3.
8. See *Alberta Labour Reference*, *supra*, note 2 at 313 per MacIntyre and *Morgentaler v. R.*, [1988] 1 S.C.R. 30 per MacIntyre.
9. See *Edward Books Limited v. R.*, [1986] 2 S.C.R. 713.
10. See *Morgentaler*, *supra*, note 8.
11. See Petter and Hutchinson, *Private Rights and Public Wrongs: The Liberal Lie of the Charter* (1988) 38 U.T.L.J. 278; Hutchinson and Petter, *Rights in Conflict: The Dilemma of Charter Legitimacy* (1989), 23 U.B.C.L.J. 531; and Hutchinson and Petter, *Daydream Believing: Vision Reformalism and the Constitution* (1990), 22 Ottawa L. Rev. 365.
12. See Hutchinson, *Waiting for Coraf (Or the Beatification of the Charter)* (1991) 41 U.T.L.J. 332.
13. See *Lavigne v. OPSEU*, [1991] 2 S.C.R. 211.
14. See *Alberta Labour Reference*, *supra*, note 2.
15. See G. Brodsky and S. Day, *Canadian Charter Equality Rights For Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989).

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Canadian Council of Churches v. The Queen
PUBLIC INTEREST STANDING TAKES A BACK SEAT

June Ross

In *Canadian Council of Churches v. The Queen*,¹ the Supreme Court of Canada altered its previous course of expanding the scope of public interest standing to sue. While the Court did not overrule its previous decisions, its application of the test of public interest standing is restrictive and discouraging to the public interest litigant. Despite the ever increasing importance of *Charter* litigation in the development of social policy, for the first time in this series of decisions, the Court denied standing to the public interest litigant.

THE PREVIOUS STANDING DECISIONS

Before considering the case in detail, a brief summary of the Supreme Court's prior rulings may be of assistance. Traditionally litigants obtained standing only if involved in a suit to protect personal or property rights immediately threatened. This requirement was largely done away with in the constitutional context by the "trilogy" which established the parameters for a discretionary grant of public interest standing.² Subsequently the same approach was applied in the administrative law context in *Minister of Finance of Canada v. Finlay*.³

The first of the trilogy was *Thorson v. Canada (Attorney General)*.⁴ Thorson, as a taxpayer suing in a class action, challenged the constitutionality of the *Official Languages Act* and the expenditure of funds to implement it. Public interest standing was granted because the claim raised a justiciable issue that would not otherwise be subject to judicial review, as the statute was declaratory rather than regulatory and the Attorney General had declined to commence or agree to proceedings. *Thorson* also dealt with the rationale offered in support of the requirement of standing, that "grave inconvenience", in other words a flood of lawsuits, would accompany a relaxation of this requirement. Laskin J. (as he then was), for the majority, doubted that such a flood would occur and indicated that the courts possess adequate tools to deal with any problems by staying proceedings or imposing costs.

In the second case, *Nova Scotia Board of Censors v. McNeil*,⁵ a newspaper editor concerned about the wide powers of the Nova Scotia Board of Censors, and particularly about its decision to prohibit the exhibition of the film "Last Tango in Paris", launched a constitutional challenge of the *Theatres and Amusements Act*. While this was a regulatory statute, the regulated theatre owners had had not seen fit to challenge it, and the

statute also affected members of the public in that it limited the films they might view. The only way to bring this interest before the courts was through a grant of public interest standing.

The third case in the trilogy was *Minister of Justice of Canada v. Borowski*,⁶ a challenge under the *Canadian Bill of Rights* to the abortion provisions of the *Criminal Code of Canada*. Martland J. for the majority held that Borowski, a well-known "right to life" advocate with a history of involvement in the issue, had standing to enforce the alleged rights of foetuses under the *Bill of Rights*. The provisions of the *Code* challenged in the action were exculpatory and thus unlikely to be directly raised in criminal proceedings pertaining to those directly regulated (doctors, hospitals, pregnant women). Others directly affected (foetuses or, arguably, husbands) could not challenge the legislation given practical or time constraints. Summarizing the requirements of public interest standing which he found to have been met, Martland J. held that a plaintiff must demonstrate:

1. "a serious issue";
2. "that he is affected by it directly or that he has a genuine interest as a citizen" in the issue; and
3. "that there is no other reasonable and effective manner in which the issue may be brought before the Court."⁷

Laskin C.J.C., dissenting in this case, wrote a judgment that forecast the approach of the Supreme Court in *Canadian Council of Churches v. Canada*. He described an additional rationale for the requirement of standing: a desire to confine the courts, generally speaking, to a dispute-resolving role, and to avoid dealing with questions that are not sufficiently precise for judicial determination. He would have denied standing on the ground the legislation generally was likely to be challenged in criminal proceedings, and the exculpatory provisions specifically could be challenged by persons directly affected. Even if such proceedings were not to be completed prior to abortion or birth, the existence of directly affected persons would nonetheless give "concreteness" to the case.⁸

The discretionary approach to public interest standing was applied in an administrative law context in *Minister of Finance of Canada v. Finlay*.⁹ This was a challenge by a recipient of provincial social assistance to the legality of federal transfers to Manitoba under the *Canada Assistance Plan*. It was argued that the Manitoba *Social*

Allowances Act did not comply with conditions of federal cost-sharing payments provided by the *Plan*.

Le Dain J. for the Court held that the policy considerations which justify the discretionary grant of public interest standing to challenge the constitutional limits of legislative authority, also apply to challenges relating to the statutory limits of administrative authority. He summarized concerns underlying the expansion of public interest standing and linked them to specific requirements of public interest standing which operated to meet the particular concerns. Two concerns were "the allocation of scarce judicial resources and the need to screen out the mere busybody."¹⁰ These were linked to the first two requirements, referred to in *Borowski*, of a serious issue and a genuine interest in the issue. Another concern was that "in the determination of issues the courts should have the benefit of the contending points of view of the persons most directly affected by them."¹¹ This was met by the third requirement that there be no other reasonable and effective manner in which the issue might be litigated.

THE LOWER COURT DECISIONS

This brings us to *The Canadian Council of Churches v. The Queen*. The Canadian Council of Churches (the "Council") is a federal corporation that represents the interests of a group of member churches. It coordinates church work relating to the protection and resettlement of refugees, and comments on the development of refugee policy and procedures.

A large number of amendments to the *Immigration Act, 1976*¹² dealing with the processing of refugee claims came into effect on January 1, 1989. The Council commenced the subject action immediately, challenging 81 provisions of the amended *Act*.

Rouleau J. in the Federal Court, Trial Division¹³ first heard the motion of the Attorney General of Canada to strike out the statement of claim on the grounds that the Council lacked standing and that there was no reasonable cause of action. Rouleau J. found that the Council met the established criteria for public interest standing. There was a serious and justiciable interest in the constitutionality of the amendments. The Council had a genuine interest in the issue as demonstrated by virtue of its involvement in the refugee process, and because its members assisting refugees may subject themselves to criminal sanctions under some of the challenged amendments. There was no reasonable or practical way for refugees to raise the constitutional issues because the new provisions made them subject to a 72 hour removal order. An injunction against the removal order could not be considered by the court in this time, and might not

even be commenced because a claimant might not have time to retain counsel.

In the Federal Court of Appeal,¹⁴ MacGuigan J.A. for the Court held that the serious issue requirement was generally met, except with respect to some aspects of the claim that did not raise a reasonable cause of action. The genuine interest requirement was also met. The fact that the Council was a corporation did not disentitle it from seeking public interest standing, and it had demonstrated a public interest motivation.

Regarding the third criterion, the Court of Appeal noted that it stipulated a "very limited" test.¹⁵ Public interest standing should be allowed only where there is no directly affected group which could itself challenge the legislation or where, although a group exists, no member is likely to do so. In this case both refugee claimants and those liable to prosecution were directly affected by the amendments. The amendments were certain to produce real cases. The Court took judicial notice of the fact that such were actually coming forward for judicial review. Standing should be granted only pertaining to those aspects of the claim that could not otherwise reasonably be expected to be litigated.

To determine which aspects of the claim met this requirement, the Court of Appeal engaged in a detailed examination of each of the allegations in the statement of claim. It held that the parts of the claim concerning criminal sanctions in relation to humanitarian assistance to refugees raised issues which would be brought forward in criminal prosecutions, so that public interest standing should not be granted. Of the remaining parts of the claim, many would be dealt with in judicial review applications by refugee claimants, and public interest standing again should not be granted. However, for the issues raised in the statement of claim relating to time limits (72 hour removal orders and 24 hour appeal periods), it would be difficult for refugee claimants to obtain counsel and mount challenges, particularly to the time periods themselves. For those claims, public interest standing was accordingly appropriate.

THE SUPREME COURT DECISION

In the Supreme Court of Canada, the judgment of the Court was written by Cory J. He commenced his consideration of standing with a survey of approaches in other common law jurisdictions regarding the granting of status to bring an action. He concluded that the approaches of the United Kingdom, Australia and the United States were all more restrictive than Canada. Further, in Canada as in these other jurisdictions, the traditional mode of proceeding dealt with individuals. Not only is this the traditional mode, implicitly it is the preferred mode, as "one great advantage of operating in

the traditional mode is that the courts can reach their decisions based on facts that have been clearly established." The role of the courts operating in the traditional mode is an important one and, to ensure that it continues to be fulfilled, the courts must ensure judicial resources are not overextended.

This concern for the court's traditional role must be balanced against the importance of access to the court in its role as protector of public rights. This balance was addressed prior to the passage of the *Charter of Rights and Freedoms* in the trilogy, and the subsequent entrenchment of the *Charter* indicates a continued need for a generous and liberal approach to standing to ensure that *Charter* rights and freedoms are enforced.

How is the concern for the proper allocation of judicial resources to be met? "This is achieved by limiting the granting of status to situations in which no directly affected individual might be expected to initiate litigation." Cory J. referred to *Finlay* in support of this statement, but in *Finlay* this concern was said to be met by the serious issue and genuine interest factors. In *Finlay*, the consideration of whether there is another reasonable and effective way to bring the matter before the court was said to address the concern of hearing the contending views of the persons most directly affected.

Why would the court wish to hear the persons directly affected? Perhaps it is believed that they would be motivated to provide the best advocacy. If advocacy is the underlying concern, then the expertise and commitment of a public interest advocate may allay any fears.¹⁶ Alternatively, the desire to hear from affected parties may reflect a concern with prejudice to their rights.¹⁷ There was a real potential for prejudice to third parties as a result of the *Canadian Council of Churches* action. A single action challenging 81 provisions of the *Immigration Act* might not offer the same perspective, or the same care or detail, as would occur in a judicial review proceeding focused on a single provision.

But the Supreme Court did not address advocacy or third party rights. Rather, it considered the potential for private litigation as a means to allocate scarce judicial resources. It emphasized a concern with an onslaught of public interest litigation, stating that "it would disastrous if courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations." To avoid this, public interest standing should not be granted if "on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public interest standing...need not and should not be expanded." The Court's preference for the traditional form of litigation was thus made even more clear.¹⁸

The change in attitude is striking. The strong focus on protection of judicial resources against an unworthy flood of public interest litigation reflects a fear dismissed as unrealistic in *Thorson*. Review of the seriousness of an issue and the genuineness of a plaintiff is no longer an adequate guarantee that scarce judicial resources are appropriately used, as was suggested in *Finlay*. Rather, the allocation of judicial resources is to be determined by the potentially much more limiting requirement that there be no reasonable prospect for private litigation on the issue.

The Supreme Court then proceeded to apply each of three parts of the test for public interest standing. First, a serious issue of invalidity was demonstrated by the Court of Appeal's review of the reasonableness of the various causes of action alleged. While there were problems with certain allegations, the Supreme Court was prepared to accept that "some aspects" of the statement of claim raised a serious issue. The serious issue requirement is thus met by the showing of a reasonable cause of action of a type, constitutional or administrative, for which public interest standing is available. In the context of constitutional litigation, this criterion does not appear to have any distinctive content but simply requires the showing of a reasonable cause of action, as would be required of any litigant.

Second, a genuine interest was clear as "[t]he Council enjoys the highest possible reputation and has demonstrated a real and continuing interest in the problems of refugees and immigrants." This makes clear that public interest standing is available to corporations, at least those with a history of involvement with an issue or interest group. Public interest corporations sufficiently involved to finance constitutional litigation likely would pass this aspect of the test.

This brings us to the last aspect, and the only one, at least in the constitutional context, that presents any significant barrier to public interest standing. Is there another reasonable and effective way to bring the issue before the court?

The Supreme Court found that this requirement was not met in the case as the *Immigration Act* is regulatory and directly affects all refugee claimants, each of whom would have private standing to challenge the constitutionality of pertinent amendments. The Court rejected the argument that the disadvantaged position of refugees would preclude their effective use of access to the court, accepting the judicial notice taken by the Federal Court of Appeal that "refugee claimants were bringing forward claims akin to those brought by the Council on a daily basis."

The Court also rejected the argument that the imposition of a 72 hour removal order would undermine

a refugee claimant's ability to litigate these issues, for two reasons:

1. the Federal Court can grant injunctive relief against a removal order;
2. information provided by the government indicated that refugee claimants were in no danger of speedy removal. The report of the Auditor General indicated that as of March 31, 1990 it required an average of 5 months to consider a claim at the initial "credible basis" hearing stage. This would give claimants adequate time to prepare for the possibility of rejection. Further, when claims were rejected the majority of removal orders were not carried out.¹⁹

As a result, the Supreme Court held, there were other reasonable methods to bring these matters to court, and public interest groups could convey their own perspectives through obtaining intervenor status in private proceedings.

Again, the change in approach from earlier decisions is striking. Rather than seeking out differences in perspective between this lawsuit and those likely to be commenced by private litigators, as in *Borowski*, such differences were ignored. The position of the Federal Court of Appeal that private judicial review is unlikely with respect to the effect of time limits themselves seems unanswerable. The only private litigants who commence proceedings will be those who, by definition, were not precluded from access to counsel or the court by such time limits. Their interest in challenging the limits will be minimal or non-existent. The argument that the average claimant, or that most claimants, will not be affected by the time limits is of little comfort to unusual claimants who may, by the terms of the legislation, be so affected. Relying on the Auditor General's report of problems in the prompt administration of the Act as demonstrating that no real harm is done, when the report itself calls for greater efficiency, also seems highly suspect.²⁰

A point referred to by the courts below, but not by the Supreme Court, was the Council's interest by virtue of the potential subsection of its members to criminal prosecution. The Federal Court of Appeal held that the constitutionality of the provisions imposing criminal sanctions could be dealt with in criminal prosecutions, but did not indicate any awareness of any ongoing prosecutions. Surely the court should consider whether or not it is reasonable to await such prosecutions. If there are ongoing prosecutions, it would seem to be *prima facie* reasonable that constitutional issues be dealt with in that context.²¹ If there are none, one should consider the nature of the regulated activity and class of persons. In some situations, the mere potential for prosecution may impose a significant chill on

constitutionally-protected activities, and the regulated class may be unwilling to risk prosecution,²² so that it may be unreasonable to await actual prosecutions to determine the constitutional issues. Conceivably, Council members are deterred from providing constitutionally-protected assistance to refugees, because they are unwilling to risk criminal sanctions. It is also conceivable the Council may have difficulty attracting volunteer workers, for the same reason.

One underlying theme in the case seems to be a concern with the abstract nature of the challenge, and a desire to ensure that the issues are considered against "concrete factual backgrounds". This reflects a concern of Laskin C.J.C. in his dissent in *Borowski*, and likewise a concern that has been raised independently in recent *Charter* cases.²³ While this is certainly legitimate, it seems an unfortunate reason to take a restrictive approach to public interest standing. It is a concern that may apply equally to the litigant whose private rights are affected. Further, it can be dealt with as an independent issue, by requiring parties to produce appropriate evidence.²⁴

CONCLUSION

Canadian Council of Churches v. The Queen has the potential to seriously restrict public interest litigation. While the Supreme Court of Canada continues to acknowledge the need for access to the courts for the resolution of public rights, public interest litigation is treated as a secondary task. The traditional form of private litigation is seen as the courts' primary occupation. Does this signal a trend? Less than two months before the *Council of Churches* decision the Supreme Court delivered its judgement in *Conseil Du Patronat Inc. v. Quebec (Attorney General)*.²⁵ In that case it summarily allowed an appeal and upheld the public interest standing of a corporation, formed to represent the interests of Quebec employers, to challenge anti-strike-breaking legislation. The apparent irreconcilability of these two decisions may mean that the Court is still struggling to define its attitude towards public interest litigation.

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1. (1992), 132 N.R. 241 (S.C.C.).
2. *Thorson v. Canada (Attorney General)* (1974), 43 D.L.R. (3d) 1 (S.C.C.); *Nova Scotia Board of Censors v. McNeil* (1975), 55 D.L.R. (3d) 632 (S.C.C.); *Canada (Minister of Justice) v. Borowski* (1981), 130 D.L.R. (3d) 588 (S.C.C.) ("*Borowski* #1").
3. (1986) 33 D.L.R. (4th) 321 (S.C.C.).
4. *Supra*, note 2.
5. *Ibid.*
6. *Ibid.*
7. *Ibid.* at 606.

(Notes continued on page 106)

WHATEVER BECAME OF THE WESTMINSTER MODEL?

Frederick C. Engelmann

A septuagenarian may be allowed a brief initial reflection. In 1939, I became acquainted with the American model of government. One year later, I was taught the Westminster model of responsible (or cabinet) government. How simple it seemed, and how responsive, when compared to the American system with its close to a dozen of built-in vetoes. A parliamentary majority could fulfil its policy mandate, obtained in an election, and an opposition could keep the government accountable at every step. Three fifths of my life since I have lived under the Westminster model. I have come to know its warts — and it has many — but most of those governed by it, from Victoria through London to Tokyo and from Reikiavik to Wellington, appreciate it for its simplicity and sensitivity. In Canada, the recruitment and exercise of leadership, and the set of organizations making leadership possible — the party system — are constructed according to the Westminster model. It forms the keystone of our politics.

What is government (and politics) according to the Westminster model? The voter has one vote, and one vote only. This vote is cast for one of the candidates for the main (or first, or lower) chamber of Parliament from the voter's constituency. In this chamber, the party obtaining a majority of seats (or a coalition of parties, or a minority party supported by enough others to form a majority) forms the government; its members are appointed, removed, or transferred to other positions by the party's leader, who will have been designated as prime minister (or premier) by the head of state (or province). In the model's pure form, he/she will have been selected by the members of the party's parliamentary caucus. The government (or Cabinet) is responsible to the entire Parliament. "Responsibility" means that the prime minister or ministers explain their actions, as demanded by Parliament (usually, the opposition). In turn, Parliament is expected to pass all legislative proposals of the government, which, under the pure model, arise from the election program of the victorious party. Defeat of such a proposal, or the passage by Parliament of a motion of want of confidence in the government, originally led to the Cabinet's resignation. However, for nearly two centuries now, it has led to the dissolution of Parliament on the advice of the prime minister, bringing on a new election. If confidence is maintained, Parliament expires five years after it is formally constituted. In practice, however, it is dissolved earlier, at the personal discretion of the prime minister.

To the extent to which the ensuing discussion can be taken as a defence of the Westminster model, my argument is based on its effectiveness. I feel that, unless we thoroughly change our system of government, a party obtaining a majority of seats in an election should be able to enact its program. For me, at least up to now, this consideration outweighs all of the model's shortcomings, the worst of which is the quasi-dictatorial position of the prime minister or premier.

There is one important modification the Westminster model has undergone in Canada earlier and more thoroughly than elsewhere.¹ In 1919, the Liberals found themselves with a small and unrepresentative caucus. A leader was needed to succeed Laurier, and to select him the party chose an approximation of the American national convention. This mode of leader selection has since become the universal mode in Canada. It modifies the Westminster model in one important way: the leader is now the creature of the entire party, and no longer solely of its parliamentary caucus. This tends to make the prime minister irremovable except by a lost election or an unrealistic special convention. In the United Kingdom, the leader of the Conservative party is still selected by his/her peers (party colleagues) in Parliament. Thus, Thatcher could be and was removed by her caucus — Mulroney is immune to this fate.

The remainder of the Canadian system of government and politics is firmly grounded in the Westminster parliamentary system. Over the past quarter century, we have been bombarded with efforts to change our constitution. None of the serious of these efforts employs a building set that overtly dispenses with the keystone of our governmental system, the Westminster model.

I say "overtly," because the two federal building sets, *Shaping Canada's Future Together* and *A Renewed Canada*, contain some blocks and beams and other building materials hardly compatible with the never openly questioned keystone. What makes serious Canadians seriously propose structures that might severely endanger the system? Is it oversight, or is it a pious hope that somehow a model under which British government has functioned for three centuries, and ours for one and one quarter of a century, will prove compatible with any amount of tinkering? Before looking for an answer, let us seek out the various possibly or probably incompatible elements of the Clark and Beaudoin-Dobbie papers.

The Clark proposals, *Shaping Canada's Future Together*, contain a 14-point Canada Clause, acknowledging "who we are as a people, and who we aspire to be."² Its thirteenth point is "a commitment to a democratic parliamentary system of government."³ The second of its three parts, "Responsive Institutions for a Modern Canada," deviates from one core principle of the Westminster model, that the country is to be governed according to the wishes of the majority as determined by the immediate past election of the House of Commons.

The modifications proposed for the House of Commons need not thwart the workings of the model. The key one entails changes now in effect in the United Kingdom: the reduction of the application of votes of confidence. The change would permit the Commons to defeat a government measure without forcing the government to dissolve the House and call an election. The Canadian tradition is never to defeat a majority government in the House and, therefore, to pass each one of its measures, no matter what. The pure manifestation of the Westminster model would restrict the government to introduce only such measures as were contained in the mandate of the last election, but a fast-changing environment in the late twentieth century renders such a restriction inoperative. Proof that a negative vote need not be incompatible with Canadian parliamentarism came when Lester Pearson stayed in office after a defeat in the House. The Clark proposal would require the government to maintain the confidence of the Commons after the defeat of a measure.

For the Senate, the Clark paper proposes direct popular election. The argument for an elected Senate is that a federal system requires representation at the centre of the components of the federation, the provinces, as well as of the population at large. The argument continues that a "non-elected Senate is unique among federations."⁴ This latter argument is weak. Of the six federations that are liberal democracies, three (U.S., Australia, Switzerland) have directly elected second chambers. Only one of these, Australia, is patterned according to the Westminster model. The Australian Senate, I submit, is not a stellar model for Canada, having represented parties rather than Australian States. The majority of recent Australian elections have been brought on by constitutional crises caused by partisan disagreement between the two chambers.

Those favouring a directly elected Senate for Canada certainly do not deny the strong possibility of a Senate that would be in structural disagreement with the House of Commons, and that two different wills are possibly or probably expressed in the election of the two chambers. I disagree with them over the basis of such disagreement. I doubt that it would be a province or

region; I rather suspect that it would be partisan majorities. In any case, the Westminster model would lose if we had two elective chambers. The seamless web of popular mandate and governmental will would be torn in predictable instances. While there would, with considerable probability, be two different popular mandates, only one, that expressed in the Commons election, would be reflected in the composition of the government. The crucial factor in operations would be the rule for resolving conflict between the chambers. The Clark proposals would emasculate the Senate in all fiscal matters (thus avoiding the long squabble over the G.S.T). It would (tacitly) prescribe inaction in other matters of disagreement, giving to the Commons, however, overriding powers in matters of national defence and international issues. The proof of this institutional pudding would be in the eating, but short of persuading Cabinet to yield whenever the Senate objects — a strange manifestation of the model in any case — the Westminster model's operation would be seriously curtailed.

The most constitution-minded person of the French Revolution, the Abbé Siéyès, opposed a second chamber by saying that it would be superfluous if it agreed with the first chamber, and mischievous if it disagreed. While his was not an argument for the Westminster model but for unicameralism, I would extend it to an elective second chamber by warning that it could create major mischief in the operation of the Westminster model.

The Clark paper proposes that major federal appointments — "the Governor of the Bank of Canada and... the heads of national cultural institutions... as well as the heads of regulatory boards and agencies,"⁵ but *not* judges of the Supreme Court of Canada — be ratified by the Senate. Such a provision fits the system of separation of powers in the United States. What kind of horse-trading in Canada would result is difficult to predict. In any case, the operation of the Westminster model with its clear lines of responsibility (the Crown's advisers make all appointments) is likely to suffer.

The impact of the Beaudoin-Dobbie Committee's report, *A Renewed Canada*, on the Westminster model does not differ much from that of the Clark report. The Committee felt that revision of federal legislation "should be the primary function of a reformed Senate."⁶ The impact on the operation of the Westminster model would be similar to that of the Clark proposals.

Like the Clark report, Beaudoin-Dobbie recommends the direct election of Senators. Election by proportional representation from multi-member constituencies may make it less probable that the partisan composition would be the opposite of that of the House; it also makes it less

probable that the two majorities would be identical in the partisan sense. Either way, a popular mandate, no matter how indistinct, is likely to differ from that of the Commons, again jeopardizing the operation of the Westminster model. Diversity between the two chambers may also be furthered by the proposal that Senators be elected for a fixed term.

Beaudoin-Dobbie suggests that all non-fiscal legislation be treated equally in Senate review, but that Commons have the power to override. The Committee is protective of Commons legislation and favours a limit of 180 days for its disposition by the Senate. That this may prove to be the saving of the Westminster model operation is felt by the Committee's Liberal members, who for this reason dissented from the proposed dispatch. Regarding supply bills, the Committee denies any role to the Senate, turning the role of defining supply bills over to the Speaker of the House of Commons.

On the ratification of federal appointments, Beaudoin-Dobbie does not differ from the Clark report.

There is, in conclusion, no definitive answer to my initial question. Constitutional reformers may or may not be mindful of the Westminster model. It seems, in any case, that they feel their reforms would not jeopardize our parliamentary system any more than past modifications, in Ottawa or London.

In 1986, I wrote that only regional representation short of direct election was compatible with the Westminster model, and that those favouring an elective Senate should consider abandoning the model

altogether.⁷ I, for one, have not changed my mind. Lest I be accused of engaging in constitutional niceties, let me become quite practical and close with an argument based on our federal system.

Friends and foes of an elective Senate would, I believe, agree that the Westminster model makes for effective decision-making. Nobody I know of suggests that the provinces give up their version of the model which gives full decision-making powers to the premiers and their governments. An abandoning or jeopardizing of the Westminster model for Ottawa would tend to give us strongly governed provinces and a weaker federal government, regardless of the division of powers. Unless this is what we want, let us be a bit more solicitous about maintaining and protecting the Westminster model at the federal level.

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1. In a recent conversation, Kenneth D. McRae persuaded me to emphasize this modification in this context.
2. *Shaping Canada's Future Together: Proposals* (Ottawa: Minister of Supply and Services, 1991) at 12.
3. *Ibid.*
4. *Ibid.*, p. 16.
5. *Ibid.*, p. 21.
6. *A Renewed Canada: The Report of the Special Joint Committee of the Senate and the House of Commons* (1992) at 43.
7. Frederick C. Engelmann, "A Prologue to Structural Reform of the Government of Canada," *Canadian Journal of Political Science*, Vol. 19, no. 4 (1986), pp. 667-678.

(Public Interest Standing continued from 103)

8. *Ibid.* at 598.
9. *Supra*, note 3.
10. *Ibid.* at 340.
11. *Ibid.*
12. S.C.1976-77, c.52, as amended by S.C.1988, c.35 and c.36.
13. [1989] 3 F.C. 3.
14. [1990] 2 F.C. 534.
15. *Ibid.* at 550.
16. *Canadian Civil Liberties Association v. Canada (Attorney General)* (1990), 74 O.R. (2d) 609 (H.C.) took this approach. The Ontario Law Reform Commission, *Report on the Law of Standing* (1989) at 58 ("*Ontario Report*"), and T. A. Cromwell, *Locus Standi* (Toronto: Carswell, 1986) at 173 both take the position that the absence of a traditional legal interest does not mean a plaintiff will present a case with less competence or zeal.
17. *Ontario Report, ibid.* at 60, and W.A. Bogart, "Understanding Standing, Chapter IV: *Minister of Finance of Canada v. Finlay*" (1988) 10 Sup. Ct. L.R. 377 at 392 discuss this concern.
18. *Ontario Report, ibid.* at 47 notes that the "floodgates" argument assumes that the types of claims now advanced in the courts are to be preferred to the "new" claims that constitute the threatened flood, and suggests that it is not self-evident that present consumers of court services deserve access to the courts any more than person with claims that the law does not now

recognize.

19. *Report of the Auditor General of Canada to the House of Commons*, (1990) at 352-353, 383-384.
20. *Ibid.*
21. *Canadian Abortion Rights Action League Inc. (C.A.R.A.L.) v. Nova Scotia (Attorney General)* (1990), 69 D.L.R. (4th) 241 (N.S.S.C., A.D.); leave to appeal to denied (1990), 127 N.R. 158 (S.C.C.) denied standing to C.A.R.A.L. on the basis that precisely the same issues were being raised in an ongoing prosecution of Dr. Morgentaler.
22. In *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, McLachlin J. justified the choice of remedy in the case (striking down a regulation prohibiting dentists' advertising, rather than addressing only its application in the case) on the basis that the continuing existence of the regulation would "chill" the freedom of expression of dentists, who as professionals would be unwilling to challenge their governing bodies.
23. *McKay v. Manitoba* (1989), 61 D.L.R. (4th) 385 (S.C.C.); *R. v. Danson* (1990), 73 D.L.R. (4th) 686 (S.C.C.).
24. *R. v. Danson, ibid.*; *Ontario Report, supra*, note 16 at 57-58, and Cromwell, *supra*, note 16 at 173.
25. (1991), 87 D.L.R. (4th) 287 (S.C.C.); *rev'g* (1988) 55 D.L.R. (4th) 523 (Que. C.A.). The Court allowed the appeal expressing essential agreement with the dissenting decision of Chouinard J.A.

CONSTITUTIONAL REFORM IN SOUTH AFRICA

Richard W. Bauman

THE REFERENDUM

On March 17, 1992, the eyes of the world were fixed on a pivotal event in modern African history. Eligible white voters in South Africa lined up at polling stations to vote on the following question:

Do you support the continuation of the reform process which the State President began on February 2, 1990, and which is aimed at a new constitution through negotiation?

Pollsters radically underestimated the striking margin of votes favouring an affirmative answer to this question. Almost 70 per cent of the voters who cast ballots endorsed President F. W. de Klerk's approach to constitutional reform. In an extraordinary departure from its usual antagonistic attitude toward white-only elections, the African National Congress (ANC), the major organized body of multi-racial opposition to the government, urged white voters to turn out and vote "yes". The Conservative Party (CP), led by Dr. Andries Treurnicht, had spearheaded the "no" campaign.¹ Less than a month before the referendum, the CP had staged an upset victory over de Klerk's National Party (NP) candidate in the Potchefstroom by-election. This was an important catalyst in de Klerk's decision to seek a mandate on constitutional reform.² From the temporary heights of that by-election victory, the CP were cast down to the depths of electoral humiliation in the referendum.

As soon as he had announced the referendum, and again during its triumphal aftermath, de Klerk, formerly noted for his staunch and unimaginative conservatism, was hailed for his brilliant stroke in holding this vote and, through it, consolidating white support for his own vision of a new South Africa.³ The project entrusted to him is, through negotiation with traditionally oppressed groups, nothing less than re-founding the legal order in South Africa. During the campaign, the affirmative option was presented, in both English and Afrikaans, as "vote yes for F.W."⁴ As R. W. Johnson noted in *The Times* of London, the referendum allowed de Klerk to "personalize" the issue of constitutional reform: it was framed as a stark choice between de Klerk or chaos.⁵ It was reported that this strategy owed something to the advice of the NP's British advertising consultants, Saatchi and Saatchi.⁶

How did South African politics reach this critical juncture? What does the resounding "yes" portend?

Some members of the Canadian media, for example, have interpreted the results as a final blow to the policy of apartheid or racial segregation in South Africa and as the harbinger of unswerving progress toward the establishment of democracy in that troubled country. The dawn of non-racial democracy, according to most reports, is a matter of months away. This view is perhaps unduly optimistic. The process of constitution-making currently underway in South Africa is a fascinating business that, even after the referendum, will take place in the midst of brutal racial violence, excruciating poverty, and demagogic politics. Many of the basic rights of people in South Africa are still determined according to the colour of their skin.

It would take a writer of the stature of Ryszard Kapuściński to capture the extraordinary mood and texture of the events that have unfolded in South Africa.⁷ This article briefly and modestly tries to explain how South Africa has made some progress in recent years toward racial equality and how the future might be shaped out of the crucible of constitutional change. Despite the euphoria in many quarters about de Klerk's success in the referendum battle, there are hard times ahead for all peoples in South Africa in the next couple of years.

DISMANTLING APARTHEID

The 1980s were a discouraging decade for those keen on promoting civil rights in South Africa. The nine-month long state of emergency declared by President P. W. Botha in July, 1985 justified extremely repressive security measures against Africans in particular.⁸ These included arrests, bannings, detentions (even of children), treason trials, and the use of torture against anti-apartheid activists.⁹ The government used its emergency powers to suppress any publicity about the actions of the security forces.¹⁰ Various declarations of a national state of emergency were renewed up to as recently as 1990. Even the repeal of the notorious "pass" laws did not mark the end of apartheid.¹¹ These laws were supposed to achieve "influx control".¹² They required blacks to present identity documents in order to account for their presence in such cities as Johannesburg, Durban, Port Elizabeth or Cape Town. Their purpose was to restrict the presence of Africans except as the need for a source of cheap labour justified it. Enforcement of the pass laws led to the arrest of huge numbers of Africans: as high as 381,000 in 1975-76.¹³ As had been the case for decades, employment,

education, residence, land-ownership, health care, access to public services, freedom of movement, and the right to vote were available until very recent times only on racial lines.¹⁴ South African blacks, who make up approximately 70 per cent of the country's population, were especially disadvantaged in all these respects.

One of the most important changes in modern South African politics occurred when Parliament began a new session in February, 1990. At that time the ban on such popular black organizations as the ANC, the United Democratic Front (UDF), the Pan-Africanist Congress (PAC), and the South African Communist Party (SACP) was removed.¹⁵ De Klerk, who had been State President for only 6 months, announced that the government would initiate a process of negotiation for adopting a new constitution. The prohibition on political gatherings was lifted. Many of the disabilities imposed on non-white South Africans under the policy of apartheid have subsequently been withdrawn. Charismatic black leaders such as Nelson Mandela and Walter Sisulu, released from twenty-seven years' imprisonment, have been able to play lawful and prominent roles in South African politics.¹⁶ Mandela is now the president and Sisulu the deputy-president of the ANC.

For years to come blacks will continue to suffer under severe economic disparities created by an appalling

history of discriminatory government policy: for instance, 87 per cent of the land in South Africa is owned by whites, who constitute only 13 per cent of the total population.¹⁷ The immense wealth associated with industrial and commercial enterprises is almost totally controlled by whites.¹⁸ While many legal prohibitions in relation to non-whites may have been removed, one of the basic props to the abhorrent apartheid regime remains. Under the current South African constitution, adopted in 1983, white domination continues to be entrenched and blacks are denied some of the basic rights of citizenship.¹⁹ They are treated as inferior citizens, unable to participate in national government in any meaningful way. Blacks still are not entitled to vote or to sit in Parliament. Even the defection, in April 1992, from the Democratic Party to the ANC of five sitting members gives the ANC white-only representation in the House of Assembly.

DENATIONALIZATION AND DISPOSSESSION

Apartheid connotes not only social segregation based on odious notions of white supremacy, it also has justified territorial segregation and the creation of institutions for "separate political development", ironically as, in part, a reaction to decolonization movements elsewhere in Africa.²⁰ Under this policy, by the late 1950s the NP government had formulated the strategy of

A CHRONICLE

Adam Hochschild has provided an account of how the policy of forced relocation affected Mogopa, a black village of about 5,000 inhabitants in the Transvaal, during the 1980s:

The village of Mogopa was an extraordinarily prosperous one by the standards of black South Africa, or of anywhere on the continent. Its several hundred families had had title to their home for more than seventy years. They also communally owned several thousand acres of fields and pasture, on which they grazed their cattle and grew maize, beans, and other vegetables. They grew enough crops to feed themselves and to sell the surplus. With that money, plus wages earned by some of the men who went off to work in Johannesburg or to nearby white farms, the people of Mogopa bought cars, trucks, even tractors. With no government subsidy whatever, the people of the village collected money and built an elementary school, a high school, and a clinic.

For almost all of this century, Mogopa lived in peace, a self-sufficient island in an economy built on exploitation. Then the pace of "removals" increased dramatically, as bureaucrats trucked millions of protesting Africans away from their homes and resettled them in the rural slums of the homelands. Mogopa, surrounded by many miles of white-owned farmland, was designated a black spot, scheduled to be rubbed off the map. As the 1980's began, the Mogopa people sent delegations to Pretoria and filed legal briefs, asking to be allowed to stay where they were.

Fearful of losing white votes, the government did not want to appear to be appeasing blacks. Officials came and painted numbers on the stone houses of Mogopa. In June 1983, when most Mogopa residents still refused to move, government bulldozers showed up and bulldozed three churches. They removed the engines from the water pumps. They bulldozed some homes. They destroyed the medical clinic. They bulldozed into rubble the cut-stone schools, paid for by the villagers themselves.

The bulldozers were from the Department of Cooperation and Development.

setting up ten independent states, known as bantustans or homelands. These were designed to accommodate black needs and aspirations by providing for rights to political participation within the governance of each African's relevant homeland. By becoming citizens of the homeland, the blacks would cease to be South African nationals. It did not matter that those blacks might continue to live within South Africa itself, for example in one of the townships located outside a major white city. They would be stripped of their South African citizenship by government decree. At present, four independent homelands have been established: Transkei, Bophuthatswana, Venda, and Ciskei. They are often referred to as the TBVC states. The total population of these homelands has been variously estimated, but amounts to around 7 or 8 million blacks. The six remaining homelands, including KwaZulu, presided over by Chief Mangosuthu Gatsha Buthelezi, which so far have attained only a limited degree of self-government, have refused to accept independence and wish to remain within South Africa.²¹ The process of taking away citizenship in relation to the independent homelands was stopped only in 1986, when mounting international criticism impelled the NP to soften its policy on denationalization.²²

The proportion of South African land that, by legislation, could be owned by the indigenous African

population was originally fixed at about 7 per cent.²³ Blacks were prohibited from acquiring land outside the reserves designated in elaborate schedules attached to the 1913 Black Land Act.²⁴ The proportion of land set aside for reserves was increased in 1936 to 13 per cent.²⁵ To advance its policy of territorial segregation, the NP government engaged in a series of "forced removals" between 1959 and 1988. The purpose was to transport Africans away from white-owned farms and from so-called "black spots" near white areas. Approximately 3.5 million people were forcibly removed from their traditional communities and resettled many miles away in impoverished, often arid areas that usually lacked adequate housing or municipal infrastructure.²⁶ Also, they were so distantly located from sources of employment that many Africans have been forced to become migrant workers. This disrupted family and community life and has left a pall of apathy over the homelands.²⁷

The 1913 and 1936 Acts were finally repealed in 1991.²⁸ Vocal opposition to this change was raised by white farmers, who identified this territorial legislation as part of the divine dispensation that was signalled to them in the course of Afrikaner national history.²⁹ The farmers' cause has been taken up by the CP, which described the NP's actions in this context as "treasonous".

OF DISPOSSESSION

The state hoped these actions would force the remaining people of Mogopa to leave. It offered them new land at a place called Pachsdraai, more than a hundred miles away. But the land was not their ancestral land and it had little water. More ominously, the new land was scheduled to become part of the "independent" homeland of Bophuthatswana, which was the last place anyone from Mogopa wanted to be; since then they would lose what fragmentary rights they still possessed as South African citizens. Furthermore, the only available housing in Pachsdraai was tin shacks. Most people still refused to move. The women were particularly militant, cleaning up some of the damage at Mogopa and refusing to accept removal notices from the police...

The rest of the story is said best in a report from TRAC, the Transvaal Rural Action Committee, ...:

In the early hours of February 14, 1984, Mogopa was surrounded by armed police. At 4 a.m. the people were informed through loud hailers that they must load their possessions into trucks and go to Pachsdraai. All the leaders were handcuffed and put into police vans. Their families refused to pack their possessions — government labourers did so. Women were carried into the lorries and buses. People tried to run away and children were loaded with the furniture and dispatched to Pachsdraai. All of this happened in the presence of armed policemen who had dogs at their disposal. People caught standing together outside their houses were beaten with batons...

No outsiders were allowed in. The press, diplomats, priests, lawyers and members of the Black Sash, were turned back at the entrance to Mogopa. Those who managed to sneak in through back ways were caught and charged. The police initially said Mogopa was an "Operational Area" but subsequently corrected this; they said that since it was black land, no whites were allowed to enter — excepting the police of course, and the white farmers who had free access in and out to buy the people's livestock at a tenth of its value.

After that traumatic night, bulldozers leveled what remained of Mogopa. The authorities told villagers that if they returned to the ruins of their homes, they would be guilty of trespassing.

From *The Mirror at Midnight: A South African Journey* (Harmondsworth: Viking Penguin, 1990) at 230-32

Repealing restrictions on land ownership by non-whites is an important measure, though not capable by itself of erasing the inequalities that have been created. The legislative changes in 1991 only pulled down part of the structure of apartheid. They did not address apartheid's legacy. One of the most pressing issues in the constitutional negotiations will be the manner in which both historical and contemporary injustices in relation to property ownership will be treated. Will a new constitution reflect a policy aimed at restoring land to those peoples that, only recently, were forcibly deprived of it?

DEALING WITH POLITICAL OPPOSITION

In addition to racial discrimination, another integral part of apartheid was the rigid system of security laws that became increasingly repressive after 1948. After the 1960 police massacre of 69 demonstrators against the pass laws at Sharpeville in the Transvaal, the NP government invoked a state of emergency which lasted for 156 days.³⁰ During this period, both the ANC and the PAC were banned from political activities. Later, the SACP was also outlawed.

Additional security laws enacted between 1963 and 1985 fortified the security force's ability to deal with "terrorism". This was widely defined to include almost any form of unlawful political activity.³¹ For instance, the law permitted detention for up to 90 days without trial for the purpose of interrogation. This period was later extended to 180 days.³² Other legislation permitted detention without trial simply at the discretion of a senior police officer. Prisoners could be held *incomunicado*. They had no right to receive visits from families, doctors, or lawyers. The interrogation methods of South African security and police forces resulted in a long string of cruel injuries, psychological torture, and suspicious deaths. One of the single most notorious and tragic was the death in 1977 of Steve Biko from a severe beating administered by South African police.³³ Biko was the leader of the Black Consciousness movement.³⁴ To quell violence in the townships, stemming from such causes as rent increases or corrupt authorities, the police resorted to rubber bullets, whips, tear gas, and bird shot. The government responded by banning political meetings, detaining hundreds of individuals without trial, and calling in the army to help suppress the protests.

In 1991, amendments were passed by the NP government that were designed to obliterate some of the blotches on South Africa's human rights record. For instance, the practice of "banning" individuals, which restricted their personal and political freedom through such measures as house arrest, was abolished.³⁵ Moreover, detention without trial for interrogation was

made subject to a maximum ten-day period. Any extension would require an application to a court for approval.

STIMULATING CHANGE

Why did the NP finally realize that the process of constitutional change had to begin? One of the major reasons was the (at least partial) effectiveness of the economic sanctions that had been brought against South Africa. These can be traced back as far as the 1940s, with an important new wave of financial and trade sanctions swelling up in 1985 and 1986.³⁶ They were designed to embargo such essential items as oil, arms, and electronic equipment as well as to create a general economic strain within the country. This would undermine the morale of apartheid's supporters and encourage the efforts of those fighting against white domination. The Commonwealth Committee of Foreign Ministers, created originally at a 1987 conference in Vancouver, viewed the period of 1989-91 as extremely vulnerable for the South African economy. Within that period, terms regarding the repayment of immense amounts of foreign debt would have to be renegotiated in the face of a continued drop in the price of gold.³⁷ Contributing also to the economic pressure were the effects of internal boycotts by Africans against white-owned businesses.

It became emphatically clear that one area in which white South Africans have felt the pinch of international pressures is the boycott in entertainment, intellectual, and sporting spheres. The referendum campaign coincided with the return of South Africa to the international cricket community. Live television and radio broadcasts from Australia of the Springboks' matches in the World Cup of cricket were carried alongside political debates over the merits of constitutional reform. One of the likely consequences of a victory by the "no" side in the referendum would have been the return to sporting isolation.³⁸ The return of South African footballers to world championship play is also eagerly anticipated.

Another impetus for reform lay in the ruinous cost of paying for the administrative structure designed to maintain apartheid. Despite the stringent security measures of the past decade, South Africa has seen "millions of ordinary people, multiplying and migrating and overrunning the barricades".³⁹ An instructive example of the magnitude of African migration into and near the industrial centres is the relentless growth of squatter camps. Crossroads, originally a temporary black community located outside Cape Town, was supposed to have been eradicated: instead, it has become a permanent settlement which continues to be unmanageable with the arrival of fresh migrants looking

for shelter in corrugated tin shacks sprawling across an ecological wasteland.⁴⁰ The pressure is so great that another vast camp, Khayelitsha, located a few miles beyond Crossroads, has been established to absorb thousands more squatters arriving from Transkei and Ciskei. These camps have become the scene for factional quarreling that often erupts into riots, firebombing of shacks, and murder. Recently, the so-called "taxi wars" taking place in Crossroads between two rival groups that ferry workers in and out of Cape Town led to 18 deaths in a two-week period.⁴¹

The members of the NP pressing for a negotiated settlement that would transform South Africa into a non-racial democracy took note of a new spirit and direction in the ANC. They pointed to the legalization of that party, the unmooring of the ANC from its former sponsors in Eastern Europe, and a willingness on the part of ANC leaders to work towards national reconciliation. Having ANC leaders as partners in the formulation of a new constitution would help legitimate the resulting new structures of government. These NP supporters feared that without some means of effective political consultation of the vast majority of the population, South Africans were proceeding headlong to an eventual civil war and vicious bloodbath.

PROPOSALS FOR A NEW CONSTITUTION

The prospect of a new constitutional dispensation arose out of several significant changes of direction. Under de Klerk's leadership, the NP has relaxed its obsession with retaining strict, arbitrary control over South Africans. The stringent measures adopted had turned the country into a virtual police state. For its part, the ANC, while still in exile, had published in 1988 a set of constitutional guidelines for a democratic South Africa.⁴² The South African Law Commission, a government-appointed agency, recommended the adoption of a bill of rights.⁴³ In early 1990, de Klerk stated his government's commitment to a fresh, democratic constitution, universal enfranchisement, an independent judiciary, and the protection of the rights of minority groups and individuals. By August 1990, the ANC had pledged to suspend armed actions against the government and had negotiated with the government the outside date of April 1991 for the release of all political prisoners. However, the ANC has not yet dissolved its armed wing, Mkhonto we Sizwe, of which Nelson Mandela remains the commander-in-chief.

The path to a new constitutional deal has not been altogether smooth. The violence that continues to surge between different African groups has hampered the progress of constitutional talks. The ANC has accused

the government of failing to control the belligerence of Inkatha's Zulu supporters.

Another impediment to useful discussions was the initial failure to agree on a procedure for drafting or adopting a new constitution. The ANC has favoured an elected constituent assembly with an interim transitional government.⁴⁴ The NP has insisted that any negotiations must involve a multiparty conference that would draft an interim constitution. This would then be presented, first to Parliament, and then to a referendum in which votes would be counted on a racial basis. The idea here is that the NP government would continue to play a central role in the drafting of a new constitution. The NP fears, of course, that if a black majority were to control the constituent assembly, it would be able simply to draft its own constitution.

The ANC has continued to publish working documents to encourage discussion about constitutional reform. Its *Bill of Rights for a New South Africa* was aimed at stimulating discussion both within and outside the ANC.⁴⁵

During 1991 and early 1992, the task of pushing along the constitutional reform process has fallen to a body called Convention for a Democratic South Africa (widely known by its acronym, Codesa). This body is made up of nineteen of the most important political groups in South Africa. Prominent among these are the NP, the ANC, the Democratic Party, the South African Communist Party, the Inkatha Freedom Party, and governments of each of the independent and dependent homelands. The parties refusing to take part in Codesa include the CP, the PAC, and the Azanian People's Organization (Azapo). The last of these is the major black consciousness organization. Co-chairing Codesa are Stoffel van der Merwe, general-secretary of the NP, and Mac Maharaj, who once served ten years in prison on Robben Island before being banned from South Africa for five years. He is now a member of the ANC's National Executive Committee.

The mission assigned to Codesa includes identifying general constitutional principles; devising an appropriate process for adopting a new constitution; advising on how South Africa should be governed until a new constitution is in place; recommending on the future of the TBVC states; and recommending appropriate time lines for completing the jobs assigned to Codesa. To go about these tasks, Codesa has set up five working groups, each designated to deal with one or other of the foregoing issues.

The working groups have been feverishly researching and debating these issues. Considerable talent to

support the tasks of the working groups has been enlisted from universities, political parties, and non-governmental organizations. During the referendum campaign the work that has already been devoted to Codesa's projects hung in the balance. Dozens of participants in Codesa waited breathlessly for an affirmative vote that would authorize their work to continue.

As the discussions within Codesa have made clear, the primary political groups strenuously disagree over fundamental issues. These include: the nature of the future South African state; the composition of Parliament; the future of the independent homelands; the constitutional measures that might be adopted to protect minorities; and the contents of a bill of rights.

NEW GOVERNMENTAL STRUCTURE

The NP has continued to press for a federal state. They envision the creation of nine regions within South Africa, each with a government having constitutionally protected powers. Like its liberal oppositionist predecessor (the Progressive Party), the Democratic Party has also officially approved of some kind of federal arrangement. Inkatha, in particular, proposes federal states that would be virtually sovereign within their own boundaries. Among the independent states, only Bophuthatswana has indicated a desire to retain the degree of sovereignty it has already been granted by South Africa. Extremist right-wing factions continue to advocate partition of South Africa along racial lines. These are voices emanating from the contemporary equivalent of a white *laager*. When discussion of this sort is held, the areas typically targeted for exclusive white dominion are the Transvaal, the Orange Free State, or northern Natal. These are conceived as traditional Afrikaner territories. Lately, there have been Afrikaners actually taking steps to retreat to the northern Cape to set up an intended *boerestaat* (Afrikaner state).⁴⁶

The ANC favours a unitary state with some regional governments that would be elected, though they would still be subordinate to the central, national government. As emphasized in its 1988 constitutional guidelines, the ANC is strictly opposed to federalism. Regions would not be racially or ethnically based. All ten of the homelands would be immediately reincorporated into the South African state. From the ANC point of view, another reason for a strong central government is that a future black government will need a full array of powers to engage in an overhaul of the South African economy and society. Officially, the ANC has been linked in the past with a socialist ideology.⁴⁷ This connection has been attenuated somewhat, and there is significant discussion within the ANC about its future orientation on economic

issues and the scope for state intervention in the economy.⁴⁸

THE COMPOSITION OF PARLIAMENT

To date, all of the leading political groups within Codesa have agreed on the establishment of a bicameral Parliament in which both houses would be elected. The lower house at least would be elected by proportional representation. The NP has proposed that the upper house would have equal representation from each of the nine regions. The upper house would have a complete veto over decisions of the lower house.

The ANC agrees that the upper house, to be called a Senate, should reflect regional representation, though on the basis of proportion of population. Moreover, the upper house would have only a suspensive veto that would delay, rather than block, legislation made by the lower house.

PROTECTION OF MINORITIES

The introduction of the universal franchise is inevitable in South African constitutional reform. A large amount of energy is being spent by minority political and ethnic groups to argue for some constitutional checks that would keep the majority from using its legislative power to dominate minorities. Among the devices that have been suggested are a minority veto, proportional representation, and a powerful upper house.

Both the ANC and the NP have indicated that they would be receptive to proportional voting arrangements. The ANC has opposed, however, any suggestions from the NP that any particular ethnic, linguistic, or racial group be granted a veto power over legislation made by Parliament.

ADOPTION OF A BILL OF RIGHTS

South Africa has never developed a legal culture devoted to a bill of rights protecting fundamental human rights. In the past decade, South African legal and political academics have re-examined the history of liberalism in South Africa in order to help trace the contemporary debates over the uses and application of rights discourses.⁴⁹ When the Universal Declaration of Human Rights was being endorsed in 1948, South Africa was at that very moment setting up its system of racial injustice and white privilege. The adoption of the Freedom Charter in 1955 by a Congress of the People, behind which the ANC stood, was an important event in the liberation struggle.⁵⁰ The Freedom Charter included economic and social rights that foreshadowed the contents of many of the international documents of later

decades. Successive NP governments used their parliamentary sovereignty to enforce race discrimination and to silence dissident voices. South African courts had very limited means with which to interfere with the essentially unbridled power of Parliament to infringe human rights.⁵¹

When the South African Law Commission, a statutory body with government-appointed members, was given the task in 1986 by the Minister of Justice, H. J. Coetsee, to investigate how courts might be empowered to protect human rights, it was not immediately clear why the NP government had taken this course. One of the more cynical appraisals was that the government was trying to further entrench the collective rights of whites against any future black government. Another suggested reason was that South Africa, during this period of a declared state of emergency and arbitrary police tactics, was trying to forestall further sanctions by showing a willingness to model its constitution on that of the U.S.

The Law Commission reported in March, 1989.⁵² Its report contained a draft bill of rights, with an emphasis on individual rights. It mentioned most of the basic civil and political rights to be found in modern international instruments, including a right to vote for all adult citizens and a guarantee against discrimination on the grounds of race or gender. All the rights would be enforceable through judicial review of legislation or administrative action. The omission of any significant endorsement of a concept of group rights in the Law Commission's draft bill caught many observers by surprise. The Law Commission thought that cultural, linguistic, or religious rights attached to any particular group ought to be protected by means of individual rights.

The NP, of course, was not wildly enthusiastic about the draft bill proposed by the Law Commission. In his important speech in February, 1990, de Klerk asserted that a "well-rounded" regime for protecting rights in a heterogeneous population must include formal recognition of "collective, minority and national rights".⁵³ How tenaciously the NP will continue to cling to this concept of group rights will be an important factor in the direction that further constitutional negotiations will take.

One of the most intractable problems in South Africa's constitutional remaking will be the matter of property rights. There understandably will be tremendous pressure on any future black government to redistribute land and wealth. Consequently, how a bill of rights offers protection against expropriation or nationalization will be a vital issue to whites and non-whites alike. Both the NP and the CP have been quick to

label any redistribution of ownership as simply "socialist". The PAC has advocated the immediate return of land, without compensation, to the African communities that were dispossessed of it. The ANC's constitutional guidelines and working drafts of a bill of rights have consistently offered protection to "rights to own and acquire property". Any expropriation by the government in the public interest would be subject to the payment of just compensation.

There have been suggestions that a land claims process be set up in a future South Africa, either through ordinary legislation or perhaps in constitutional form. For the moment, the land claims process in South Africa takes what one might call its traditional form. Geoff Budlender, a lawyer with the Legal Resources Centre in Johannesburg, has related how land claims have been asserted by some of his rural clients in Zevenfontein.⁵⁴ The tactics used largely have amounted to self-help and civil disobedience.

Budlender is concerned primarily with the right of the propertyless (the homeless and the dispossessed) to obtain what they need for a decent life. This has not been the manner in which constitutionally entrenched property rights are typically conceived. He would like to see included in a bill of rights (either as a directive principle, or as a justiciable guarantee) an explicit duty on government to take appropriate steps to make suitable land and housing available to the landless and homeless.

SOUTH AFRICAN JUDICIARY

The ANC is justifiably worried about whether the current judiciary in South Africa should be entrusted to interpret and protect the rights contained in a future bill of rights. The current judiciary, almost totally, is white and affluent.⁵⁵ The vast majority of ordinary South Africans are black and poor. Judges have been deeply complicitous in enforcing the race and security laws that have caused such great injustice.⁵⁶

The Law Commission recommended that a future bill of rights be placed in the hands of ordinary superior court judges. This has been called a "naive estimation" of the standing of the judiciary.⁵⁷ There are real problems with widespread perceptions that the existing South African judiciary cannot be reformed. It will have to be replaced. It is, however, improbable that a brand new judiciary will be created. Therefore, the ANC Constitutional Committee has considered recommending that a constitutional court be established that would reflect the "experience and talents" of the whole population. It might be easier to install a new court, taking into special account the human rights records of potential appointees, than to wait for non-white lawyers

to become eligible to sit on the South African Supreme Court.⁵⁸

CONCLUSION AND PROSPECTS

Since the start of constitutional negotiations, neither the heartbreaking poverty nor armed violence has abated in South Africa. Africans are still not fully recognized as people in the eyes of the law.⁵⁹ Much of the political violence, which accounted for several thousand deaths in 1991, takes place between supporters of the ANC and those who represent the Inkatha Freedom Party. Both Mandela and Chief Buthelezi have issued calls for peace, but this has had little impact on the violence, especially across the Witwatersrand, where constant clashes have arisen between Zulu migrant workers housed in all-male hostels and township residents sympathetic to the ANC.⁶⁰ It is unclear how much responsibility for the continued violence rests with the police or the mysterious "third force" of the government's security forces who allegedly are inciting the combatants.⁶¹

A new constitutional settlement will be unable to solve at a stroke monumental problems that afflict South Africa. The public bureaucracy must be reformed and made more accountable. Serious disparities in income levels must be cured. Language policy, which has traditionally been used to intensify ethnic divisions, must be re-evaluated. Education, formerly based strictly on the principle of segregation, has been administered unequally, with average spending on each white student more than five times greater than that for an African.⁶²

In the days after the referendum was held, there was a spate of happy stories in the print media about de Klerk's sagacity and the bright prospects for a peaceful solution to South Africa's troubles. What we must not forget is that there continues to be a formidable body of dissent within that country to revolution through constitutional means. The military and security forces are still controlled by white Afrikaners. The supporters of Inkatha or the PAC remain resolutely opposed to the proposals being put forth by the ANC. There is still scope for the NP to form into a coalition with such groups as the CP or Inkatha and wreck the process of negotiation. Though it has been urged that the ANC ensure that such ideological rivals as the PAC or Inkatha join the process of constitutional negotiation, this advice has so far gone unheeded.⁶³

Most importantly, it should not be forgotten that de Klerk's NP has almost two years before it has to call a general election. The referendum victory is liable to be interpreted within his caucus as an overwhelming endorsement of whatever policy of constitutional reform de Klerk wishes to follow in the crucial months to come.

The State President can construe the recent show of popular white support as justifying some very hard-nosed bargaining indeed. The referendum is not necessarily the end of the NP's influence over the constitutional framework of South Africa: it is also a powerful, fresh mandate for the NP to score significant points at the constitutional roundtable.

For observers who are passionately interested in seeing an end to apartheid and the beginnings of a solution to the terrible problems this hateful policy has caused, it is salutary to keep in mind Gramsci's words:

The old is dying and the new cannot be born; in this interregnum there arises a great diversity of morbid symptoms.⁶⁴

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1. Treurnicht left the National Party in 1983 to set up the CP. He had objected to the creation of the tricameral Parliament: see Vincent Crapanzano, *Waiting: The Whites of South Africa* (New York: Random House, 1985) at xvii.
2. The announcement of a referendum appeared immediately to divide the right-wing opposition forces: see Anthony Johnson, "Crisis caucus as CP decides", *Cape Times* (Cape Town) (25 February 1992) at 1.
3. See Phillip van Niekerk, "The metamorphosis of F. W. de Klerk", *The Globe and Mail* (Toronto) (20 March 1992) at A1 and A7.
4. By contrast, the Democratic Party's slogan was "vote yes for peace".
5. See R.W. Johnson, "De Klerk outflanks diehards in their hour of triumph", *The Times* (London) (21 February 1992) at 13. "F.W.'s gamble: Either he wins ... or you lose" was the banner headline in *The Weekly Mail* (Johannesburg) (21 February 1992) at 1.
6. See Peter Fabricus, "Nats use top UK agency in 'yes' drive", *Saturday Star* (Johannesburg) (29 February 1992) at 1.
7. For a sample of his acutely-observed dispatches from foreign places in ferment, see Ryszard Kapuściński, *The Soccer Wars* (New York: Vintage, 1992).

8. The State President is empowered to declare a state of emergency under the Public Safety Act, No. 3 of 1953, s. 2, Stat. Repub. S. Afr. — Criminal Law and Procedure (Butterworths).
9. Reports of children as young as ten years old being subjected to physical abuse, including electric shocks, are referred to in Rian Malan, *My Traitor's Heart* (New York: Vintage, 1990) at 264. How children already by five are drawn into the fractious, often violent world of Soweto politics is described in *ibid.* at 307-19. Malan's book is a grim and haunting account which, read in isolation, would make one despair about the political future of South Africa.
10. For a summary of this period, see Leonard Thompson, *A History of South Africa* (New Haven: Yale University Press, 1990) at 235-40. A fictional narrative based on this "deranged year" is contained in André Brink, *States of Emergency* (London: Faber and Faber, 1988).
11. After the repeal of the pass laws (see *infra* at n. 12), the government continued to exert control through the requirement of work permits and the imposition of penalties for living illegally in township accommodation: see Elaine Unterhalter, *Forced Removal: The Division, Segregation, and Control of the People of South Africa* (London: International Defence and Aid Fund for South Africa, 1987) and Colin Murray, "Displaced Urbanization: South Africa's Rural Slums" (1989) 86 Afr. Aff. 311.
12. See the Group Areas Act, No. 36 of 1966, Stat. Rep. S. Afr. — Group Areas (Butterworths). Legislation restricting the movement of Africans has a long history in South Africa. An overview is given in T. R. H. Davenport, *South Africa: A Modern History*, 3rd ed. (Toronto: University of Toronto Press, 1987) at 554-57. See also the Abolition of Influx Control Act, No. 68 of 1986, Stat. Rep. S. Afr. — Group Areas (Butterworths).
13. Thompson, *supra* n. 10 at 193.
14. See, e.g., the Reservation of Separate Amenities Act, No. 49 of 1953, Stat. Un. S. Afr. and the Discriminatory Legislation Regarding Public Amenities Repeal Act, No. 100 of 1990, Stat. Rep. S. Afr. — Blacks (Butterworths).
15. An excellent treatment of the genesis of opposition groups, as well as their differences, can be found in Tom Lodge, *Black Politics in South Africa Since 1945* (Johannesburg: Ravan Press, 1983). The ANC has been the subject of two recent histories: Heidi Holland, *The Struggle: A History of the African National Congress* (New York: George Braziller, 1990) and Francis Meli, *History Belongs to Us: A History of the ANC* (Bloomington: Indiana University Press, 1989).
16. For an intriguing account (combining texts and photographs) of Mandela's struggle, see Alf Kumalo and Es'kia Mphahlele, *Mandela: Echoes of an Era* (Harmondsworth: Penguin, 1990). See also, George M. Fredrickson, "The Making of Mandela", (Sept. 27, 1990) N.Y. Rev. Books 20.
17. See Albie Sachs, *Protecting Human Rights in a New South Africa* (Cape Town: Oxford University Press, 1990) at 105.
18. See *ibid.* at 165-67 and Robin McGregor, *Who Owns Whom?* (Cape Town: Juta, 1989). The process by which lucrative concessions were granted to corporate enterprise is detailed in Duncan Innes, *Anglo American and the Rise of Modern South Africa* (New York: Monthly Review Press, 1984).
19. See the Republic of South Africa Constitution Act, No. 110 of 1983, Stat. Rep. S. Afr. — Constitutional Law (Butterworths) which enfranchised Coloureds and Indians and set up a tricameral Parliament comprising separate legislative chambers for whites (the House of Assembly), Coloureds (the House of Representatives), and Indians (the House of Delegates). Under the 1983 Constitution, the most powerful body is the House of Assembly, which consists solely of 178 white members.
20. On H. F. Verwoerd's policy in this regard, see Davenport, *supra* n. 12 at 389-94.
21. See Roger Southall, "Buthelezi, Inkatha and the Politics of Compromise" (1981) 80 Afr. Aff. 453.
22. Restoration of South African Citizenship Act, No. 73 of 1986, Stat. Rep. S. Afr. — Aliens and Citizens (Butterworths).
23. Thompson, *supra* n.10 at 163.
24. Black Land Act, No. 27 of 1913.
25. Development Trust and Land Act, No. 18 of 1936.
26. See Laurine Platzky and Cheryl Walker, *The Surplus People: Forced Removals in South Africa* (Johannesburg: Ravan Press, 1985) and Christina Murray and Catharine O'Regan, eds, *No Place to Rest* (Cape Town: Oxford University Press, 1990).
27. Allister Sparks, *The Mind of South Africa: The Story of the Rise and Fall of Apartheid* (New York: Alfred A. Knopf, 1990) at 203.
28. Abolition of Racially Based Land Measures Act, No. 108 of 1991, referred to in David Welsh, "The outlook for a democratic South Africa" (1991) 67 Int'l Aff. 739.
29. See T. Dunbar Moodie, *The Rise of Afrikanerdom: Power, Apartheid, and the Afrikaner Civil Religion* (Berkeley: University of California Press, 1975) and Robert Edgar, *Because They Chose the Plan of God* (Johannesburg: Ravan Press, 1985).
30. Davenport, *supra* n. 12 at 395.
31. Terrorism Act, No. 83 of 1967, Stat. Rep. S. Afr. — Criminal Law and Procedure (Butterworths), s. 2(1) of which lists a large number of acts as constituting offences.
32. See the account of a prominent civil rights lawyer imprisoned in the 1960s under these regulations in Albie Sachs, *The Jail Diary of Albie Sachs* (Cape Town: David Philip, 1990).
33. See Donald Woods, *Biko*, rev. ed. (New York: Henry Holt, 1987).
34. See Steve Biko, *Black Consciousness in South Africa*, ed. Millard Arnold (New York: Random House, 1978) and Steve Biko, *I Write What I Like*, ed. Aelred Stubbs (London: Bowerdean Press, 1978).
35. 1991 amendments to the Internal Security Act, 1982, as described in Welsh, *supra* n. 28.

36. See The Commonwealth Committee of Foreign Ministers on South Africa, *South Africa: The Sanctions Report* (Harmondsworth: Penguin, 1989) at 15-16.
37. *Ibid.* at 167.
38. Arthur Goldstuck, "Sports enthusiasts would be stumped", *The Weekly Mail* (Johannesburg), February 28, 1992 at 5.
39. *Sparks*, *supra* n. 27 at 372.
40. See Josette Cole, *Crossroads: The Politics of Reform and Repression, 1976-1986* (Johannesburg: Ravan Press, 1987).
41. See "Police, SADF patrol townships", *The Cape Times* (Cape Town) (24 February 1992) at 5. For a discussion of the structure of the black taxi industry and the violence that has erupted among rival groups see Meshack M. Khosa, "Routes, Ranks and Rebels: Feuding in the Taxi Industry" (1991) 18 J. S. Afr. Stud. 232.
42. African National Congress, *Constitutional Guidelines for a Democratic South Africa*, reprinted in Sachs, *supra* n. 17 at 197-201 and in (1989) 5 S. Afr. J. Hum. Rts. 129.
43. South African Law Commission, *Working Paper on Group and Human Rights*, Project No. 58 (Pretoria: The Commission, 1989).
44. For an outline of the various parties' respective positions, on which my account draws heavily, see Welsh, *supra* n. 28 at 744-50.
45. Included in Sachs, *supra* n. 27.
46. See Jerelyn Eddings, "Planting the seeds of a new Fatherland", repr. in *Edmonton Journal* (21 March 1992) G2.
47. See David Everatt, "Alliance Politics of a Special Type: the Roots of the ANC/SACP Alliance, 1950-1954" (1992) 18 J. S. Afr. Stud. 19.
48. See, e.g., Nicoli Natrass, "Controversies About Capitalism and Apartheid in South Africa: An Economic Perspective" (1991) 17 J. S. Afr. Stud. 654.
49. See especially André Du Toit, "Understanding Rights Discourses and Ideological Conflicts in South Africa" in Hugh Corder, ed., *Essays on Law and Social Practice in South Africa* (Cape Town: Juta, 1988) 237.
50. The Freedom Charter, June 26, 1955 (adopted at Kliptown, Transvaal), repr. in M. Hamalengwa; C. Flinterman; and E. Donkwa (eds.), *The International Law of Human Rights in South Africa: Basic Documents and Annotated Bibliography* (Dordrecht: Martinus Nijhoff, 1988) 99.
51. For a history of the bill of rights debates, see John Dugard, "A Bill of Rights for South Africa?" (1990) 23 Cornell Int'l L. J. 441.
52. *Supra* n. 43.
53. See Dugard, *supra* n. 51 at 451.
54. Geoff Budlender, "The Right to Equitable Access to Land", a paper presented February 28, 1992 at the Land and Property Rights Conference, Centre for Applied Legal Studies, Johannesburg.
55. See D.D. Mokgatle, "The Exclusion of Blacks from the South African Judicial System" (1987) 3 S. Afr. J. Hum. Rts. 44.
56. For a portrait of the South African courts in this century see Hugh Corder, *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary, 1910-1950* (Cape Town: Juta, 1984) and Christopher Forsyth, *In Danger for Their Talents: A Study of the Appellate Division of the Supreme Court of South Africa, 1950-1980* (Cape Town: Juta, 1985). An interesting jurisprudential analysis is David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Clarendon Press, 1991).
57. Christopher Forsyth, "Interpreting a Bill of Rights: The Future Task of a Reformed Judiciary?" (1991) 7 S. Afr. J. Hum. Rts. 1 at 3.
58. For suggestions along this line, see Dennis M. Davis, "Social Power and Civil Rights: Towards a New Jurisprudence for a Future South Africa" (1991) 108 S. Afr. L. J. 453 at 471.
59. For a magnificent story on this theme, see Mtutuzeli Matshoba, "Call Me Not a Man" in André Brink and J. M. Coetzee, eds, *A Land Apart: A Contemporary South African Reader* (New York: Viking, 1987) 94.
60. See Lauren Segal, "The Human Face of Violence: Hostel Dwellers Speak" (1991) 18 J. S. Afr. Stud. 190.
61. See Welsh, *supra* n. 28 at 742 and John Brewer, "The Police in South African Politics" in Shaun Johnson, ed, *South Africa: No Turning Back* (London: Macmillan, 1988) 258.
62. These and other crucial issues are examined in Robert Schrire, ed, *Critical Choices for South Africa: An Agenda for the 1990s* (Cape Town: Oxford University Press, 1990).
63. See Heribert Adam, "Transition to Democracy: South Africa and Eastern Europe" (Fall, 1990) 85 Telos 33.
64. From Antonio Gramsci, *Prison Notebooks*. This quotation was used by Nadine Gordimer as an epigraph to her *July's People* (New York: Viking, 1981).