DIE SUID-AFRIKAANSE INSTITUUT VAN INTERNASIONALE AANGELEENTHEDE
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Volume 9, No. 2, 1985

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Smuts House Notes

If 1984 was a high-water mark for South Africa's external relations, the present year, 1985, is arguably close to the lowest mark, exceeded perhaps only by the situation in 1976 following the South African Defence Force intervention in Angola and the Soweto disturbances.

The present situation has rubbed off strongly at Jan Smuts House: the rapidly deteriorating political and internal security situation has precipitated more than corresponding increases in interest and concern about Pretoria's domestic policies and South Africa's place in the world. The Institute has been inundated with calls and visits by members, the media, visitors and the public at large, seeking accurate information on events, balanced opinions and realistic assessment.

Director-General John Barratt referred on a previous occasion to the professionalism of the Institute's staff at all levels in dealing with such situations, and this is being illustrated once again by the high standard of research, reports, publications and the holding of conferences and meetings. The greatest interest this year was initially concentrated on United States–South Africa relations, but more recently the emphasis has shifted to our relations with Western Europe.

Looking at the record more closely, eighteen months ago the South African Government rode high with the unfolding of its reform programme, the establishment of the Nkomati Accord, the subsequent establishment of the Joint Monitoring Commission in southern Angola, and the improved relations with several Francophone states. Then a few months later, the State President, Mr P. W. Botha, embarked on a tour of West European capitals to explain the progress, and although he was confronted with the odd chill, most notably in Paris, on balance he was received and was listened to with interest. The question arises: would Mr Botha still be welcome in Western capitals today? Perhaps not. His credibility has been undermined by a series of events this year, not least the Cabinda affair, the Botswana raid and the De Jonge issue, and more recently Pretoria's handling of the unrest and Mr Botha's apparent failure to meet international expectations on reform.

Of course, there are also the complications. It is true that Pretoria's case is often misrepresented abroad. But equally, Pretoria also has to face the consequences of its own record at home, and no less important, has often

proved extremely inept in presenting its case to the world both imaginatively and convincingly. Also true, is that Mr Botha has been adamant that South Africa must and will solve its problems alone, that his government will not tolerate meddling from other countries. Sadly, while Mr Botha may arguably have a case in principle, this very stance has already had the effect of alienating governments which were prepared to give Pretoria the benefit of the doubt. The Reagan, Thatcher and Kohl governments in particular are having increasing difficulty finding popular alternatives to disinvestment and sanctions.

A comforting view was that of Professor Sir Harry Hinsley, the Institute's fourth Bradlow Fellow, who spent the month of August studying local issues and addressing Institute branches throughout the country. He is Master of St John's College, Cambridge, a former Vice Chancellor of that University, a leading expert on the international order and a prolific writer.

Sir Harry forecast that the United States and most European nations would stop short of sanctions at this stage, favouring instead the policy of continued contact with South Africa. No one seriously concerned with the need for change expected an instant solution, he noted, and no one outside the country could expect to prescribe the terms. The South African authorities and most Western nations probably perceived that genuine political adjustment would take time, and would have to be done in stages. Sir Harry noted furthermore that those Western governments which had withdrawn their Ambassadors for consultations and were threatening sanctions, did so primarily to deflect the more radical demands of indignant minorities within their own societies. The majority view, to which most governments subscribed, was that political change could best be achieved, through dialogue and continued diplomatic contact.

One government suffering particularly because of its relations with Pretoria, is the Thatcher Government. This is the view of the Institute's Honorary Research Advisor, and former Pro-Vice Chancellor of Leicester University, Prof. Jack Spence, who has also just spent some time at Jan Smuts House. Prof. Spence focused attention on the Thatcher Government's relations with Commonwealth governments, and predicted that it would face considerable pressure at the forthcoming Commonwealth Summit in the Bahamas. Mrs Thatcher's handling of the situation should be interesting.

And finally we look forward to the views of John Barratt with considerable interest. Prof. Barratt has just spent seven weeks in the United Kingdom and the United States preparing a script for a book which he is writing jointly with Prof. James Barber of Hatfield College, Durham, on South African foreign policy issues. He was also to meet several leading figures during his visit.

Leon Kok
Director of Programmes

Guy Woolford

The United States Disinvestment Campaign: The Emergent Threat to South Africa

The role of economic sanctions or more specifically, disinvestment, as a tool of foreign policy towards South Africa is one of the most complex and contradictory problems the West has faced in recent years. Nowhere is this more evident than in recent United States–South African relations. Americans have been informed of the strategic significance of South African minerals[1] and the positive role US multinationals have played in South Africa[2] yet a wave of protest against continued economic involvement in South Africa has swept across the United States, which combined with a deteriorating dollar-rand exchange rate has made the United States appear for a time at least as the major threat to the political economy of South Africa. What fuels the disinvestment campaign? Is it pure repugnance for apartheid or does it represent a certain inability to formulate a cogent and efficacious policy toward South Africa?

With over 300 US companies generating between 5 and 6 billion dollars a year in bilateral trade and 2–3 billion dollars worth of investments, it is not hard to understand the concern felt within South Africa about the heightened prospect of US economic withdrawal. In 1983 as well as 1984 the United States was the most significant exporter to, and importer of South African goods.[3] In addition, US companies control 70 per cent of computer manufacturing, 44 per cent of the oil business and 33 per cent of auto manufacturing within South Africa.[4] The US also controls a significant slice of the pharmaceutical business. In 1984 South Africa's total foreign currency liability, direct and indirect, was approximately $45,5 billion and the United States accounted for approximately 25 per cent of this amount. The decline in the dollar-rand exchange rate during 1984 and 1985 has increased the percentage accounted for by the United States to as much as 40 per cent of South Africa's total foreign liabilities.[5] 23 out of 68 US banks have acknowledged that they have extended loans to South Africa. This includes six banks which have extended loans to the South African government and public sector.[6]

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The introduction of a number of disinvestment Bills by Democratic as well as Republican Senators into Congress this year, which typically include provisions for a prohibition of bank loans by US banks, a ban on the importation of Krugerrands[8] and a ban on new investment in South Africa represents a new dimension in disinvestment activity and is clearly a significant step forward for those who would seek the ultimate political and economic isolation of South Africa. Activity on the campuses, outside the South African Embassy, within Congress and at shareholder meetings, together with press releases would suggest that the momentum to disengage from the South African economy has reached unprecedented levels.

US multinationals and their South African associates and subsidiaries have since the initiation of the Sullivan principles in 1977, pursued policies in South Africa directed at the economic and social upliftment of Blacks in South Africa.[9] The construction of technical colleges in Soweto and elsewhere, financial assistance to schools and substantial housing, pension and scholarship benefits for Black employees are some of the areas where improvements in working and social conditions have taken place because of growing US pressure. The response, however significant in the context of South Africa or however integrative these measures may have been, has not been sufficient to mitigate the opinions of those critics who continue to see the multinationals or indeed capitalism itself as collaborators in apartheid. Even Sullivan himself complains that more constructive change is needed, and has extended the parameters of his principles for US firms operating in South Africa.[10] Sullivan has recently called for a total US economic embargo in the event that apartheid has not ended legally — and in practice — within the next 24 months. The multinationals for their part complain of cumbersome reporting procedures, and of pressure to develop high visibility public relations projects which detract from the more critical long range issues such as teacher training.

However, while it may seem to many in South Africa that American-controlled multinationals have occupied a pivotal position and played a crucial role in the quest for improved labour relations, employment practices and even race relations, this is clearly not recognized in the US itself.[11] The reasons are twofold. Firstly, corporations, despite considerable resources at their disposal have failed to communicate their position effectively to administrators and the public at large. Secondly, corporate management, lacking the inclination to involve itself too directly in politics, may subconsciously feel that pressure, external or otherwise, should continue to be applied on what it perceives to be a politically obdurate government. What it has underestimated however, is the resolve of those working within a plethora of Anti-Apartheid organizations in the US and elsewhere to alienate, embarrass and discredit those companies with South African dealings or

connections. What should be recognized is that the disinvestment movement reflects not only an anti-apartheid sentiment but an anti-business, and anti-multinational attitude in the United States. A survey conducted by the South Africa Foundation in Washington and published on 3 March 1980, revealed that of the 50 major corporate investors in South Africa that were interviewed, including 5 major lending banks, there was a 100 per cent affirmative response by corporations that the disinvestment movement was an expression of anti-corporate sentiment.[12]

The visit by Edward Kennedy in January 1985 is symptomatic or indicative of the desire within various activist groups, organizations and political parties within the United States to use South Africa for domestic political footballing (a fact which did not go undetected by South Africans of various political persuasions) and a desire on their part to broaden their constituencies, gain publicity and to increase their involvement or influence in the formation of US foreign policy. Organized labour, the Black Community, African liberation committees and organizations, church groups, campus movements and all those Americans who take for granted that America is capable of managing the world better than any other nation, have formed themselves into an anti-apartheid, anti-South African grouping which at present shows few signs of collapsing. Simon Barber, of "Business Day" writing in May 1985 refers to the "new McCarthyism" afflicting the United States, only now the witchhunts, blacklists and monomania are directed at all Americans favouring engagement, association or détente with South Africa.[13] A list of the multitude of organizations in the United States which support disinvestment in South Africa was published by the South Africa Foundation in Washington in 1980, a revised and expanded version of which is included below. (Table 3).

The set of assumptions that binds these organizations together has remained virtually the same since Carter took office in 1977. Generally speaking it can be stated that central to their beliefs is the premise that the Soviet Union is a détente power, that the demise of the white South African government is inevitable, that human rights are vital determinants of foreign relations, that US economic and mineral dependency on South Africa is decreasing, that trade with Black Africa is more important than with South Africa, that the US should get on the right side of history in its policies towards South Africa, that apartheid is incompatible with fundamental national values in the US, and that apartheid is morally wrong. While it is possible to question the motives and even understanding of those who support disinvestment in South Africa, one must accept that it does include a large section of concerned Americans who are committed to the eradication of apartheid in South Africa. However it can be argued that disinvestment together with a diminution of social, cultural and political links would reduce US influence and would only, in the words of Eagleburger, "assure

America's irrelevance to South Africa's future" (former Under Secretary of State, Lawrence Eagleburger—4 July 1983).

It is a paradox that those seeking more US influence with respect to Pretoria would destroy such linkages as already exist. And yet it is the illusory effect of sanctions that is most attractive; sanctions and disinvestment strategies at least create the illusion of doing something when doing nothing is regarded as tantamount to complicity, however harmful the consequences might be.[14]

Certainly the implementation of comprehensive sanctions would dissociate the United States from the moral outrage of apartheid but if recent experience of embargoes has taught the US nothing else, it is the fact that effective comprehensive sanctions cannot be unilateral. If they are, trade, aid and technology flows will simply be diverted with or without the use of intermediaries. For example, when the United States applied sanctions against Cuba in 1960, solidarity among the US and its allies was found to be weak: Cuban trade with Canada increased from $13m in 1960 to $31m in 1961; in 1962 British firms supplied the Castro regime with plant and machinery, and between 1962 and 1963 Cuban trade with Spain increased from $10m to $24m.

The United States itself was the first country to break overtly the embargo against the Smith regime in Rhodesia, over supplies of chrome ore (1971). Similarly, in 1981 when the US applied an embargo against the USSR over a Euro-Soviet gas pipeline project, the US failed to achieve solidarity of support amongst its allies.[15]

Despite the trade liberalization measures set out in GATT, of which both the United States and South Africa are signatories, Article 21 of the GATT regulations gives the contracting parties rights to take any action considered necessary for the protection of essential security interests,[16] a clause which is likely to have the effect of invalidating any obligation under the agreement.

With the prospect of rhetorical and unyielding exchanges taking place between government and interest groups in both countries, the Reagan Administration would do better to continue with hitherto employed diplomatic strategies: these may or may not include the threat of disinvestment, but what is important is that the initiatives should be directed toward specific and sustainable measures, a strategy of positive sanctions.

The relative uncertainty facing South African foreign policy makers with respect to disinvestment may be accounted for by the proliferation of bills put forward to Congress this year, the diffusion of responsibilities, and the conflicting or inconsistent policies which appear to be evident in the US relationship with South Africa. In 1975 Harald Malmgren, former deputy special representative for trade negotiations for the US President stated:

> The disarray in policy management hurts us domestically because our economy is sadly served by conflict and confusion in the management of our economic

> relationship with other nations. The disarray hurts us in our dealings with the governments of other nations because they sense the inconsistencies and lack of domestic consensus in support of our international initiatives, which leads them to wait us out, while we wrestle with ourselves at home.[17]

In any event, modern penological theory does not support punishment and retribution as a means for making people comply. Judging by the results of the 1977 Arms Embargo and the growth in the South African arms industry, together with the experience in Rhodesia and Cuba, an embargo would probably encourage development of a more self sufficient economy.[18] South Africa has a well developed infrastructure, with a high level of mineral independence. It is largely in capital intensive high technology equipment and machinery that dependency is critical. For example, Fluor Corporation, a US concern, was the principal contractor for SASOL II and III.[19] While some analysts have claimed that more labour intensive economic development is likely as a result of sanctions, the diversion of the bulk of this trade to other industrialized countries (primarily due to competition and persistent unemployment prevailing within these states) is a more likely prospect. Contrabandism will escalate. Military technology, for example, has continued to flow to South Africa despite the Arms Embargo. Research by various organizations including the American Friends Service Committee confirms this. The spectre of counter-sanctions makes total compliance unlikely.[20] The Reagan Administration has persistently reminded the sanctioneers that US mineral dependency on South Africa is critical. (Refer Table 1). As the OTA (Office of Technology and Assessment), a US government advisory body, pointed out in January 1985, the use of stockpiles, substitutes, alternatives, recycling and the exploitation of uneconomic resources are likely options to any strategy of resource denial.[21] South Africa for her part needs foreign exchange, particularly dollars in order to procure oil.

What is certain however, is that attention will be focused almost entirely on achieving economic survival and continuity. Political reform will, if anything, achieve a lower priority than before. As Galtung (Director of the International Peace Research Institute) points out, a target society is like an organism with a certain self-maintaining potential — when hit it reacts so as to restore the status quo ante and in so doing it might even be strengthened. Furthermore, attitudes are likely to harden, polarizing the society even further. Resources would be diverted from social programmes such as education and housing toward national security concerns and strategic funds for oil and essential technology. It is naive to think that the US would be able to achieve a total cessation of the trade and investment flowing to South Africa. There is hardly a single case in history where sanctions have been able to bring a government to its knees or to change dramatically the framework of the domestic political order. Besides, as Herman Nickel, the US

Ambassador in South Africa stated in January 1985:

> to adopt a policy that would quite coolly and deliberately reduce job opportunities seems an odd, not say perverse, way of expressing solidarity and support for the tens of thousands who flocked to Crossroads in a desperate search for work.[22]

In South Africa, Whites still regard black political enfranchisement in terms of personal costs and the fear of political and economic degeneration *à l'Afrique*. The withdrawal of US investments in South Africa will exacerbate this feeling of white insecurity: in many quarters it is believed that racial tension will increase correspondingly.

The Schlemmer report, published recently by the Natal University Department of Applied Social Sciences, emphasized black worker rejection of disinvestment. Significantly, the report showed that employees in US companies had a significantly lower sense of grievances than other companies' employees, that the Sullivan code of employment practices had a salutary effect on personnel policies in US companies; and that the promotion of total disinvestment by US companies operating in South Africa had little support amongst black production workers in South Africa. Seventy-five per cent of the 551 industrial workers questioned said they were against disinvestment. *The Economist* described this survey as the most scientific to date. It is not only the South African government which believes that Blacks will inevitably be the victims of disinvestment: any decline in employment and economic growth due to a drop in overseas demand will inevitably be felt most by migrant black labourers and employees in those sectors such as mining, which depend on overseas markets. (In 1977, 643 339 Blacks were employed in the mining industry, 90,35 per cent of the total.)[23]

This factor would also have the effect of limiting the political impact on white South Africans. Losman, writing on the failure of sanctions in Rhodesia, concludes:

> ... most of the internal effect of sanctions fell upon the "wrong" group, the African population, which wielded no political power. The position of whites was protected by adroit government policies so as to minimize white unemployment.[24]

Disinvestment will most certainly send a signal to those repressed peoples that the US is on the side of change, but will it accomplish change? Newspapers in South Africa are already filled with reports of Western and Third World repugnance for apartheid. Disinvestment will exacerbate feelings of "total onslaught", that "the world doesn't understand us"! As Holsti pointed out "In policy making the state of the environment does not matter so much as what government officials believe that state to be".[25] White Government will react by arguing that such moves are violations of sovereignty, international law and attempts to impinge on the government's right to govern. Many, perhaps justifiably, will argue that the measures are

selective and hypocritial. Sports boycotts and the arms embargo have demonstrated such negative and paranoid response. To quote Frankel:

> In a redundant fashion reminiscent of the Cold War at its coldest, the United Nations arms embargo on South Africa is, from the view of total strategy, the result of a communist plot engineered directly from Moscow or orchestrated through anti-South African elements within the Republic, throughout the Third World—the so-called "Afro-Asian" bloc—or black states on the African continent.
> The efforts of local African nationalists to promote political change, the expulsion of colonialism in the territories adjacent to South Africa, indeed the entire international abomination of the apartheid system is in one way or another attributed to Soviet attempts to seize South Africa as the strategic jewel of Africa.[26]

What about the virtues of constructive engagement, and the use of dialogue and diplomacy to nudge the government in a certain direction? One high ranking US State Department Official stated "I'd hate to deal with South Africa without any pressures in the background". Is not the threat of sanctions a preferred strategy to sanctions themselves? After all, are not economic growth and interchange motivators of racial progress? Chester Crocker, Assistant Secretary of State for African Affairs, despite evidence of his waning influence in Washington, has made this point all along. This line of reasoning is supported by such implacable opponents of the apartheid regime as Helen Suzman, Chief Gatsha Buthelezi and, until recently, Andrew Young.

What has also become evident in recent months is the appeal that the disinvestment campaign has evoked from the protectionist movement in the US. Reverend Jesse Jackson proclaimed in December 1984 that 1,5m jobs had been lost in America because of competition from "black slave labour in the South African copper, coal and steel industries". The growing protectionist mood has been affected by a strong dollar and a surge in US imports. (Between 1981 and 1984 exports fell 7 per cent while imports surged by 25 per cent). According to Jefferson, chairman of Du Pont, the rise in the value of the dollar since 1980 has put a 50 per cent surcharge on all US goods sold abroad, and a 50 per cent subsidy on all imports.[27] Financiers, lobbyists, and even Congressmen are calling for a surcharge on imports and these protectionist pressures will certainly influence the Congressional decision as to whether the US should disinvest in South Africa: unfortunately the drop in the dollar-rand exchange rate over recent months has made the repatriation of capital a very expensive option for US multinationals in South Africa. What has made the situation even more complex has been the enormous growth in the United States' external trade deficit and the perceived need by some economists for the United States to liquidate foreign investments in an attempt to redirect the flow of capital to the US. While in principle this line of reasoning makes sense (the current account deficit for the first three quarters

of 1984 was $200,8 billion), South Africa accounts for a relatively insignificant percentage of total US trade. It is estimated that trade with South Africa accounts for less than 0,2 per cent of United States GNP, while the 2,3 billion dollars that Americans hold in South African enterprises amounts to just one per cent of US direct investment abroad.

In some instances protectionist sentiments have already been combined with anti-apartheid thinking to affect corporate planning. Jeff Nichols, President of Precious Metals Advisory Inc, declared in January 1985 his intention to launch an investment company that will not hold any South African stock or gold:

> By investing only in North American precious metals we will have no social, political, and/or foreign exchange difficulties.[28]

It is understood however that his intention is to obtain support from those pension funds and institutions who wish to dissociate themselves from South Africa.

What is even more enduring and consequential to South Africa is the piecemeal disinvestment legislation already passed, and the continued lobbying by activist groups to pressure Congress, state legislatures, city government and universities as well as individual corporations to follow suit.

Legislation has already been passed in five state legislatures, viz. Connecticut, Maryland, Nebraska, Massachusetts, Michigan, in over forty universities and in more than 20 city governments. Similar legislation is under consideration in several others. Furthermore, lobbying by activist groups shows no sign of abating. The aim is to send a message to South Africa that "apartheid is unacceptable and will not receive financial support from public funds".[29]

Even small investors and institutions are being frightened away from South African-linked corporations. Portfolio managers are inundated with enquiries as to whether to dump South African stock. *The Wall Street Journal* reports:

> Many corporate planners and politicians believe that US involvement in South Africa is at a turning point. While American companies continue in public to fight the growing pressure, in private more and more are questioning the value of staying.[30]

The threat of procurement legislation, which aims at boycotting the sale of products manufactured or produced by US companies dealing in South Africa, together with the "hassle factor" which is jargon for the inordinate amount of time spent by US executives either defending or dealing with the South African issue, has contributed to the growing disillusionment felt within corporate America about South Africa.

In the first session of the 99th Congress of 1985, 28 bills relating to disinvestment in South Africa and US–South African relations were

introduced into the House of Representatives and 7 bills were introduced into the Senate. The most significant of these is the "Anti-Apartheid Act of 1985" sponsored and introduced into the Senate by Senators Edward Kennedy, William Proxmire and Patrick Moynihan. In an attempt to speed up the legislative process the identical bill is being introduced into the House of Representatives by Congressman Gray of Pennsylvania and Congressman Stephen Solarz, one of the most vocal critics of apartheid. Considering that there are 146 co-sponsors this bill will undoubtedly receive considerable attention in the House of Representatives as well as the Senate. Republican Senators, fearing that the Democratic Party may monopolize the South African issue have also reacted to the growing anti-apartheid mood in the United States. The "Anti-Apartheid Action Act" proposed by Senator Lugar and the "United States–South Africa Relations Act of 1985" sponsored by Senator William Roth, however takes a more constructive line.

Multi-million dollar scholarship programmes for Blacks, increased funding for the Kassebaum Human Rights Fund (which aids certain South African community groups), mandatory codes of labour practices, and selective and conditional involvement by the Export-Import Bank of the United States (EXIM) and the Overseas Private Investment Corporation (OPIC) are some of the measures introduced in both bills. The Roth-McConnell bill goes further and would terminate landing rights of South African Airways, would prohibit nuclear trade between the United States and South Africa and would direct the US Secretary of State to reduce the number of SA Consulates in the United States to the number of US Consulates in South Africa.

The Senate testimony given by US Deputy Secretary of State, Kenneth W. Dam on 22 April 1985 reflects the Administration's growing frustration with the legislation being presented to the Congress. He told the Senate that legislation proposing the curtailment of US economic relations with South Africa because of its government's apartheid policy would be counter-productive. Dam pointed out that sanctions would threaten black job opportunities, would discriminate against US firms operating in South Africa, and would deny to the United States companies the positive role they are presently playing in South Africa. A prohibition on bank loans, he stated, would create a dangerous precedent undermining the US policy that international capital markets should remain free of government interference and that lending decisions should be based on market rather than political considerations. In addition, he argued, an effective loan prohibition to cover foreign affiliates of branches of US banks would raise questions about the extraterritorial application of US law.[31]

The vast array of disinvestment legislation together with the well orchestrated protests taking place outside the South African Embassy in Massachusetts Avenue, Washington, has resulted in a surge of media

coverage on South Africa within the United States. The shootings in Uitenhage and the mounting unrest since, culminating in the declaration of a State of Emergency, has unfortunately, provided almost daily images of a government unable to control a situation of worsening racial conflict. When protestors are being killed due to police militancy, it does not mean very much to refer to high levels of literacy or the relative freedoms to be found in South Africa, when compared to many Third World States.

To examine developments in South Africa: institutionalized racism still exists. The public representatives of Coloureds and Indians are currently occupying separate parliamentary chambers and the Blacks still regard reform as hopelessly inadequate substitutes for real political rights. Dr N. Motlana, President of the Soweto Civic Association, has stated quite categorically:

> The new constitution is unimportant to Blacks: if anything it has united us in opposition.[32]

Nevertheless, there is some evidence of integrative forces emerging. Government recognition of the need to provide for Black civil rights within white South Africa has been a signal to many that the homelands policy no longer represents the cornerstone of government thinking. On the other hand the initiatives may be as contrived as the late B.J. Vorster's, "Give us six months" speech. It is perhaps too soon to comment upon government resolve: certain practices are much less encouraging than others. Government statements to the effect that forced removals for ideological reasons only will not continue will certainly do something to lessen the tensions which still exist. Influx control is being phased out and the pass law system is also being reconsidered. The government however is notorious for formulating policy for Blacks without consulting them. (The establishment of black local councils in 1983 is a classic example of this.) A new orientation is needed and there are signs that this may be forthcoming, although in politics nothing is inevitable.

Michael Spicer, a former director at the South African Institute of International Affairs, has remarked that the disinvestment lobby in the United States is not seeking incremental change but change once and for all. Regarding reform in South Africa, the government in South Africa and the disinvestment movement in the United States have very different expectations and perceptual frameworks. What may appear to be meaningful change in South Africa will not necessarily be similarly regarded in the United States.[33]

Certainly it is the government of South Africa that carries the ultimate responsibility for peace and stability; it alone has the capacity at present to create a climate that will generate investor confidence. Perhaps we need to be reminded of the views of John Kane-Berman, Director of the Institute of

Race Relations, who in December 1983, speaking out against disinvestment, stated that "it is the input from South Africans themselves that will be decisive".[34] Western governments may prove to be only peripheral agents in the quest for a new political configuration in South Africa. It may be too that South Africa is more afraid of introducing racial equality than of any combination of disinvestment measures that the US might impose. The tardy and even evasive official response to the more radical aspects of the Human Science Research Council Report is perhaps sufficient comment in itself on government's dilemma when faced with a need to be bold — as also is its lack of positive reaction to calls from even moderate political leaders for a declaration or statement of intent as to the envisaged future order of government.

Conclusion

The United States disinvestment campaign which is at present fuelled simultaneously by Liberal, social-welfare, anti-apartheid, protectionist, moralistic, anti-capitalist, demagogic, as well as nihilistic sentiments cannot, in my opinion, serve the process of reform in South Africa. To quote Dr Van Zyl Slabbert, Leader of the Opposition in the House of Assembly:

> The dismantling of apartheid, even though hesitant and cautious, must be subjected to the glare of the international spotlight rather than isolation. Change will more likely be brought about through involvement and interaction with the international community than by threats of isolation.[35]

Criticism of apartheid need not stop, but measures taken should be directed at sustainable and rehabilitative ends. The belief that in order to improve a situation you first have to make it worse is a crude and unenlightened one.

Incremental change is absolutely crucial if one is to avoid a total polarization of attitudes in South Africa and the concomitant racial violence that may well result. What South Africa needs from a United States which has had its own share of racial violence is encouragement as well as empathy. Disinvestment, will in my opinion, prevent the United States from playing such a meaningful role.

Notes

1. Refer Table 1 (Western Dependancy on Key Strategic Minerals from South Africa).
2. *The Washington Times* concluded in an editorial (16 February 1984)
   ... from these companies come the livelihoods and dreams of many South Africans — especially non-whites — who have better friends in their foreign employers than in their national government. Desegregation in the workplace, equal pay to equal work, better education, community development and black entrepreneurship would not even be what they are in South Africa without the push from foreign investors.

Refer also "Are transnationals good for South Africa?" *Financial Mail Supplement*, 27 June 1980, and Allan C. Brownfield "Campaign for disinvestment grows in the US and stimulates heated debate" in *ISSUP Strategic Review*, June 1984.

3. Table 2 (South Africa: Balance of Payments and Trade).
4. US News and World Report, 21 January 1985, p. 44.
5. *Reserve Bank Bulletin*, 1984. Provided by US Information Service, 111 Commissioner Street, Johannesburg.
6. *ibid.*
7. Senator William Proxmire is drafting disinvestment legislation which is expected to be submitted to both the Senate and House of Representatives.
8. According to Intergold, South Africa's principal selling organization of Krugerrands, the US is the biggest client accounting for 60–70 per cent of total purchases. Of this amount 70 per cent are on behalf of clients living outside the US. Thus although the US may account for only approximately 20–30 per cent of total sales the US is the principal intermediary for the majority of Krugerrands transactions. According to Recia Atkins of Intergold "the credibility of Krugerrands lies in their tradeability". The threatened closure of the US market through these measures has already done serious harm to the credibility of the Krugerrand as a liquid asset and must adversely affect South African foreign exchange earnings. In 1984 total Krugerrand sales to the US are estimated to have been as high as $450m (SABC, News Report, 16.2.85) approximately 5 per cent of total gold exports.
9. The brainchild of black Minister, Leon Sullivan, of Philadelphia, who is also a director of General Motors. The 128 signatories which account for 70 per cent of those employed by US firms in South Africa, agree to desegregate their workplaces, provide equal pay for equal work, improve job training, increase the number of non-white managers and improve housing, schooling and other nonwork conditions.
10. Late in 1984 as disinvestment became a sensitive issue, the Sullivan Principles were strengthened to include provisions that they must actively "influence" other companies in South Africa to follow such standards, support the ending of apartheid laws and back the abolition of influx control and those measures which restrict the freedom of Black employees.
11. *The Star*, 9 May 1985, p. 20.
12. According to Amcham (American Chamber of Commerce in South Africa), American controlled companies increased spending on education, health and housing from $35 per employee in 1978 to $383 in 1983. It also claims black wages in American owned firms have risen by more than 20 per cent (at least 6 per cent a year in real terms) for the past 5 years. *The Economist*, 23–29 March 1985, p. 17.
13. *Business Day*, 22 May 1985, p. 6.
14. This sentiment is summarized in a paper published by the Special Committee Against Apartheid, published in August 1980, which claimed:
    ... the South African economy had over the decades of its development as a capitalist formation become the repository of vast amounts of foreign investment from transnational corporations (TNCs), that the political representatives of these TNCs within the Governments of the capitalist countries constituted the main stumbling block to the call for mandatory sanctions ... Singly and collectively the TNCs' operations in South Africa constitute the foundations of the barbarous tyranny of white domination and exploitation in South Africa (A case for mandatory sanctions against South Africa, UN Document 80-20182).
    In 1981 at the Thirty-Sixth Session of the General Assembly the Report of the Special Committee against Apartheid reiterated this point:
    ... transnational corporations and other interests buttressing apartheid must be

treated as accomplices in the crime of apartheid (Paragraph 331, General Assembly Official Records, 36th Session, Supplement no. 22, A/36/22).

15. According to Schreiber it is still the symbolic or expressive function of sanctions which makes economic measures such an attractive option to foreign governments and thus, despite the fact that (i) they may be hard to apply effectively, (ii) the leverage it may give the sender state may be minimal, (iii) the effects are discriminatory, (iv) far from lessening support for the government it may actually increase that support. Refer Anna P. Schreiber "Economic coercion as an instrument of foreign policy". *World Politics*, 25, 3 April 1973, pp. 387–413.
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17. As quoted by S.D. Cohen, *The Making of United States International Economic Policy*, Praeger (1977), p. 107.
18. Refer T. Koenderman: *Sanctions the threat to South Africa*, Jonathan Ball Publishers (1982), pp. 200–202. He concludes on p. 202 "Clearly the arms embargo has totally failed in whatever objective it sought to achieve. Although arms are an extremely sensitive strategic commodity ... South Africa appears to have been in no way disadvantaged by the embargo".
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Table 1
WESTERN DEPENDENCY ON KEY STRATEGIC MINERALS FROM SOUTHERN AFRICA

Mineral and alloy/leading Southern African source	% of US consumption supplied (1976–1979)	% of EEC consumption supplied (1977)	% of free world reserve base	US public/private stockpiles in years of country's supply	US vulnerability to short-term (under 2 yrs) interruptions	EEC vulnerability to short-term (under 2 yrs) interruptions	Western vulnerability to midterm (2–7 yrs) interruptions	Non-stockpile alternatives in midterm interruptions
Chromium (South Africa):								
Ore	46	49	68	6,0	Little	Significant	Major	Foreign reserves — Zimbabwe. Substitution up to 33 % in stainless steel. Increased recycling.
Ferro alloy	40	(2)	NA	3,5	Little	Significant	Major	Foreign reserves — Zimbabwe. Substitution up to 33 % in stainless steel. Increased recycling.
Manganese (South Africa):								
Ore	15	41	75	24,0	Little	Significant	Major	Foreign reserves — Gabon, Brazil, Australia, India and Mexico.
Ferro alloy	42	(2)	NA	1,5	Little	Significant	Major	Foreign reserves — Gabon, Brazil, Australia, India and Mexico.
Platinum group metals (South Africa)	60	50+	98	2,0	Little	Significant	Major	Foreign reserves — Zimbabwe. Recycling of up to 70 % of major use as catalysts. Substitute catalysts. Reduction in non-essential uses (especially jewellery in Japan).

Source: Printed for the use of the Committee on Foreign Affairs, House of Representatives. Ninety-Seventh Congress, First Session, 8 July 1981.

Table 2
SOUTH AFRICA: BALANCE OF PAYMENTS AND TRADE
($US Millions, except as noted)

	1982	1983	% change 1982–1983	1st 6 mths 1984
Exports excluding gold, FOB	9 331	9 193	−0,7	4 738
Gold exports	7 937	8 936	15,1	4 229
Exports to the US (US data)	1 967	2 017	3,1	1 570
Imports, FOB	16 564	14 322	−11,6	7 995
Imports from the US (US data)	2 368	2 129	—10,1	1 283
Trade balance with the US	−401	−112	n.a.	187
Overall trade balance	704	3 807	n.a.	972
Current account balance	−2 953	254	n.a.	−612
Gold and foreign exchange holding at Reserve Bank	3 971	4 082	15,1	3 897
US Direct Investment (US *Billions*, Book Value)	2 513	2 319	−7,1	—

Source: Economic Trends Report for South Africa, CERP0004

Table 3
UNITED STATES DISINVESTMENT TYPOLOGY

	Organizational Framework/ Affiliation	Behavioural Description	Ethnicity Membership	Ethnicity Appeal	Principal Base Target	Style	Internation- Alliances	Est.	Publication
Interfaith Centre for Corporate Responsibility	Church/ Religious Affiliated	Left Centre	White	White Liberal	Corpora- tions and Congress	Protest- ing to Corpora- tions	WCC	1968	Corporate Examiner
American Committee on Africa	Socio- Political	Left Radical	White — Black	White Liberal Black	Corpora- tions and Univer- sities	Extra- Parlia- mentary	ANC, PAC SWAPO	1953	Action News
African-American Institute	Professional — Academic	Centre	White — Black	White Liberal Black	Corpora- tions and Congress	Politi- cal Process	loosely SWAPO	1953	Report
Institute for Policy Studies	Professional — Academic	Left Radical	White	White Liberal Third World	Univer- sities	Extra- Parlia- mentary	ANC UN	±1963	—
Washington Office on Africa	Professional Academic	Left Centre	White	White Liberal Black	Congress	Politi- cal Process	WCC	1972	Washington Notes on Africa
UN Centre against Apartheid	Socio Economic	Left Radical	Black Caribbean Asian	Black Third World	Corpora- tions	Extra- Parlia- mentary	OAU SWAPO PLO, ANC	1967	
Transafrica	Socio- Political	Left	Black Caribbean Asian	White Liberal Black	Congress	Politi- cal Process	PLO, ANC, PAC	1977	—
South Africa Catalyst Project	College — University	Left Radical	Black Caribbean Asian	White Liberal Black	Corpora- tions Univer- sities	Extra Parlia- mentary	UN, SWAPO	±1977	'A Luta Continua' — The Struggle Continues

Coalition for a new foreign and military policy	Socio-Political	Left Radical	White Black Caribbean Asian	White Liberal Black	Corporations Congress	Political Process & Demonstations	SWAPO, ANC PAC	1976	Coalition close-up
American Friends Service Committee	Church Religious	Left Centre	White	White Liberal Black Third World	Corporations Universities	Political Process corporating Protesting	WCC SWAPO	1917	Quaker Service Bulletin
Clergy and Laity concerned	Church Religious	Left Radical	White Black	White Liberal Black	Corporations	Extra parliamentary	WCC	1965	CALC Report
National Lawyers Guild	Professional Academic	Left Radical	White Black	White Liberal Black	Corporations	Political Process and Protesting to Corporations	No formal	1937	NLG Bulletin
Campaign to oppose Bank Loans to South Africa	Socio-Political	Left Radical	White Black	White Liberal Black	Banks	Picket lines Forums & Protesting to Banks	No formal coalition of organizations	1977	Newsletter (8/year) and Brochures

Sources: Yearbook of International Organizations (21st Ed) 1984/85 K. Sauer, München, New York Encyclopedia of Associations 1984 (18th Ed Gale Research Co, Detroit, Michigan.
The Disinvestment Movement in the US: A Strategic Analysis, The SA Foundation, Washington DC, 3 March 1980.

Laurence Boulle

Constitutional Safeguards and Checks and Balances within the context of Co-operative Federalism*

1. Introduction

It is appropriate at this juncture in South Africa's political history to investigate the topic of constitutional safeguards and checks and balances within the context of co-operative federalism. All key concepts in this descriptive title are intimately related to the doctrine of constitutionalism, with stable democratic government, and with individual rights and liberties, and they invite an examination of the comparative precedents provided by the societies with which they are associated. The precedents are rich and diverse — in Switzerland there is the collegial executive, the canton system, and the referendum and initiative; in West Germany proportional representation, the constitutional court, and the values and standards posited by the German basic law; in the United States the checks and balances, separation and division of powers, and the bill of rights; in Canada federal-provincial conferences and intergovernmental agreements, and in Australia the combination of the federal principle with the Westminster executive, the Senate Committee for the Scrutiny of Bills, and the "new administrative law". These institutions denote the primacy of law over force, of consensus over control, of responsiveness over repression.

Nevertheless this subject has a slightly dated ring to it. Firstly, the study of federalism is not as fashionable as it once was, the academic community being haunted by Laski's thesis that federalism is an obsolescent form of government, an impediment to effective administration rather than a topic for dispassionate investigation.[1] The sentiment has been echoed by other writers, who have provided empirical evidence on the failed federations, federalism in decline, the transformation of the federal ideal, and the limits of federal constitution-making. Federalism is also not as prominent a feature of the South African constitutional debate as was once the case. Secondly, these concepts are linked with a constitutionalist, that is a legal-institutional approach, to problems of political integration and the democratic process. Although the study of institutions has partially recovered from the revolt of behaviouralism and structural functionalism against analysing government

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in a descriptive, historical or legalistic manner, contemporary writers tend to be preoccupied with more pervasive themes than those implied by the title — with institutional legitimacy, organic crisis, political process, the nature of the state, class relationships, and other related and derived matters. Within these themes constitutional arrangements are one of the lesser variables which affect political behaviour.

There is also a minor antimony in the title of the paper. The concept of *constitutional safeguards* denotes primarily negative controls and limitations on the exercise of state power, as exemplified by the Rule of Law, the Rechstaat doctrine, and a Bill of Rights regime. While *checks and balances* shares this negative quality it also has a subsidiary more positive orientation — it denotes a pluralist participation in the exercise of specific power by more than one branch of government with the objective of attaining structured negotiation, compromise and consensus in the political process. As Vile observes,[2] the theory of checks and balances imports the idea of a set of positive checks to the exercise of power into the doctrine of separation of powers. In this paper the centre of gravity will be with checks and balances. After defining and illustrating several basic terms an attempt is made to depict how checks and balances work, or are reputed to work, predominantly in a single federal jurisdiction. An indication is given of why they are under threat in the contemporary state, after which suggestions are made as to how the theory underlying the checks and balances could be reincorporated into modern constitutional arrangements. The analysis is then related to the South African constitutional system.

2. Basic Concepts

Definitional attention is restricted to the concepts of *federalism* and *checks and balances*. The theory underlying each doctrine can lay claim to a long historical lineage and each has contributed to the gradual awakening of political men and women to the more inclusive principle of constitutional government.

(i) *Federalism*

The *federal principle* is understood in its conventional sense to denote the vertical division of public power between the central, regional and local institutions of a state system, with some measure of autonomy for each set, though federal government has greater complexity to it than this principle implies. The roots of federalism are found in the city states of ancient Greece, the Italian cities of the middle ages, and the thirteenth century Swiss confederation and its successors. From the eighteenth century onwards it attracted the attention of the great political theorists of the time, from Althusius to Montesquieu to Rousseau, who wrestled with problems of unit integrity and national unity. From a legal-institutional point of view there are

three defining characteristics of federalism—the distribution of powers between national and sub-national institutions of government, the supremacy of the constitution, and the authority of the federal judiciary. The "secondary" features of federalism, such as bicameralism and constitutional rigidity, are closely associated with the constitutional checks and balances. However the modern tendency is to describe federalism as a process, or in terms of the various reactions to a federal situation, and as a function not of constitutions but of societies. In this context the federal principle becomes a more elastic, if not elusive, concept and has given rise to much debate on the classification of contemporary systems. The principle can be identified in countries of Western Europe, (Switzerland, the Federal Republic of Germany), Eastern Europe (the USSR, Yugoslavia), North America (Canada, the USA), South America (Brazil, Argentine) and Asia (India, Malaysia). Some commentators have suggested that up to a third or half of the world's population live in federal arrangements of some sort. On the other hand those with more exacting criteria have identified only five "pure" federations—Switzerland, West Germany, Canada, Australia and the United States, but even this list would be shortened if one took Loewenstein's stricture seriously, namely that a state with a federal income tax is no longer a genuine federal state.[3] However such problems of definition and gradation are notoriously difficult to resolve; there is even a tendency to define federalism in terms of what it does not entail in practice—namely a constitutionally-fixed distribution of functions between the two levels of government, separation of functions such that there are no overlaps in jurisdiction among the levels of government, reservation of certain spheres of authority in the states that cannot be touched by the national government, financial independence for the states, and a relationship of coordinate equality between the states and central government.[4] Nevertheless the indispensable quality of the federal state remains the significant and persistent distribution of the powers of government between federal and unit institutions. It is conspicuous that there are no working federations in Africa, Nigeria having recently rejoined the ranks of the failed federations.

The Australian constitutional law scholar Geoffrey Sawer distinguished three kinds or stages of federalism.[5] *Coordinate or dual federalism*, which has never existed in a pure form, involves substantial formal equality between units and non-interference by the centre and units in each other's activities. *Cooperative federalism* does not denote a specific theoretical model but refers to the numerous forms of centre-unit cooperative activity, as well as horizontal cooperation between regions not involving the centre at all. *Organic federalism* is federalism in which the centre has such extensive powers and gives such a strong lead to regions that the system might be regarded as not federal at all. However by the late 1970s, in a work symptomatically entitled *Federation Under Strain*,[6] Sawer had modified his earlier views, and while maintaining

that these three stages could still be placed on a continuum felt that the first two were less distinct from each other; the important qualitative change is between cooperative and organic federalism. Thus cooperative federalism assumes a reasonable degree of autonomy for the respective parties who can then bargain about the terms of cooperation; in this situation there is no theoretical reason why the central authorities should always play a dominant role, and the situation could vary from federation to federation, and within federation from topic to topic and time to time. However, organic federalism demands that the centre play the dominant role in all substantive policy and spending choices, the regions becoming predominantly "mere administrators". Only the guarantees of the units continued existence enable this stage to be labelled federal. Sawer not only saw organic federalism, as he understood the concept, as having materialised in West Germany and Austria, and as being incipient in Switzerland, but he also espoused it as a normative system for Australia. In fact, notwithstanding its federal infrastructure Australia is now unitary in political style.

Despite these definitional problems and the apparent ineluctability of the progression to organic federalism it is possible to point to many examples of cooperative federalism within the various jurisdictions. In Canada there have developed many jointly financed and administered programmes in social security and public health as a result of federal initiatives in fields wholly or partly under provincial jurisdiction. Intergovernmental negotiation has become a principal institution for conflict-management, partly replacing the Canadian courts, though many of these processes are informal and extra-constitutional. A specific topical example of cooperative federalism from among many in the United States is the 1978 Clean Air Act's provision for shared federal and state government responsibility for standard setting, funding and enforcement in the field of environmental protection. While this entails a federal intrusion into an area formerly within the state's regulatory domain, the system involves a joint partnership in which the states implement federal objectives. There are also cooperative programmes in agriculture, highway construction, education, banking regulation and public utilities.

(ii) *Checks and Balances*

Checks and balances can be identified in republican Rome with its triple division of power between a "monarchical" element (in the form of the two consuls), an aristocratic element (embodied in the Senate), and a democratic element (in the meeting of people in various conventions). The same theory of dividing and balancing powers was associated with the three estates of the English realm — Crown, Lords and Commons — all of which had a share in the exercise of legislative power. Today checks and balances are predominantly associated with the separation of powers doctrine which is

concerned with a *horizontal* division of power between the traditional legislative, executive and judicial branches of government. Whereas the federal principle has been criticised for its elusiveness, the separation of powers principle has been described as "that antique and rickety chariot".[7] Marshall talks of the "disutility" of the separation of powers concept[8] and Olsen suggests that both it and the checks and balances doctrine apply to politics an eighteenth-century imagery of a mechanistic universe and as such have little practical meaning today.[9] It is in fact possible to unravel at least five different meanings of separation of powers, some of them mutually inconsistent:

1. *The differentiation* of the concepts "legislative", "executive", and "judicial".
2. *The legal incompatibility* of office-holding as between members of one branch of government and those of another, with or without *physical separation* of persons.
3. *The isolation, immunity or independence,* of one branch of government from the actions or interference of another.
4. *The checking or balancing* of one branch of government by the action of another.
5. *The coordinate status* and lack of accountability of one branch to another.

This diversity entails that the same doctrine can be used to support contradictory conclusions — in the United States to justify mutual checks by various organs of government on one another, but in France to prevent any interference by one branch in another's functions.

In the fourth illustration of the separation of powers (above) the checks and balances involve a verification of the doctrine and not its violation. While the initial distribution of legislative, executive and judicial powers derives from the separation of powers doctrine, the checks and balances provide controls and influence over each branch by allocating to another a minor role in the exercise of its power. Although strictly the term relates to interactions between the executive and legislative branches, including the crucial reciprocal matter of dismissal, it can be used more widely to include those between national and sub-national levels of government, and to incorporate the judicial branch. Because the clearest model of checks and balances is found in the United States system, illustrations are provided thereof in the following section.

The ideal matrix for a fully-fledged system of checks and balances occurs where a separation of powers system is imposed on a federal arrangement. The parliamentary or cabinet system, with its weak separation of powers, tends to concentrate power in the national and provincial executives, so that conflict is focussed on a small universe of monolithic actors. This has led to the emergence of so called "executive federalism" in Canada which, in the view of some writers, has aggravated the federal-provincial conflict in that

country. Australian commentators have also pointed to the tensions of Westminster-style responsible government in the context of a federal system. In the United States, by contrast, the separation of powers arrangement diffuses power so that conflict is more widely distributed through the system, although in this context cognizance should also be taken of the collegial Swiss federal executive and its relative autonomy from the national legislature, an institution much admired by the consociational school of writers. The clearest historical expression of the federal and separation of powers-cum-checks and balances principles in combination, was found in the 1787 Constitution of the United States. The separation of powers, the federal division of competence, and the checks and balances remain the three outstanding features of the American constitutional system.

3. Constitutional checks and balances: American patterns

While the theoretical underpinnings of the separation of powers and federal models predated the American constitutional convention, this was the first occasion on which they were integrated in a single system. Two assumptions about political power were influential in post-revolutionary America. First, all power was seen to derive from the people, the ultimate political sovereign. Secondly, there was a distrust of government, manifested in the perceived need to divide, diffuse, limit, share and control political power. These two principles were partially, but not wholly, compatible. Thus while majoritarian assumptions underlay the legislative and executive institutions, the constitutional amending procedure, and later the Bill of Rights, imposed significant limits on their practical sovereignty—the constitution qualified majoritarian democracy and did not allow even the people to be an absolute sovereign, except in the remotest sense.

Thus the oldest tenet of American constitutionalism is that power derives from the people and must be held in check to preserve freedom; as the leading constitutional scholar Lawrence Tribe has expressed it:

> From the thought of seventeenth century English liberals, particularly as elaborated in eighteenth century France by Montesquieu, the Constitution's framers had derived the conviction that human rights could best be preserved by inaction and indirection—shielding behind the play of deliberately fragmented centers of counterveiling power . . .[10]

Along the horizontal axis the separation of powers divided authority among the legislature, executive and judiciary, the two first having direct popular mandates. This structure has remained essentially unaltered since its inception, although different organs of government have come to dominate the political system at different times. Along the vertical axis power was divided among federal, state and local authorities, each set of institutions having a direct impact on citizens within its jurisdiction. The federal

distribution of competence and the status of each level of government was safeguarded through the supremacy of the constitution, which included a rigid amending procedure, and the review authority of the federal judiciary. Despite developments in the nature and style of American federalism this framework has also been left fundamentally intact. In overall terms no branch, department or level of government could achieve dominance on its own.

The effect of the diffusion of political authority was not only to check power negatively but also to achieve a positive balance in its exercise. The restraints on each department or branch of government necessitated joint cooperation in respect of significant political action, and the constitution provided an elaborate set of checks and balances which have not been emulated in any other state system. While the separation of powers ensured that the main exercise of each power was entrusted to one person or institution, the checks and balances introduced a minor participation for other persons or institutions which afforded them some influence and control. With the recent shift to a semi-presidential system in South Africa it is appropriate to outline some of these elements in the US presidential system. The most important of the internal checks and balances is the bicameral structure of the national legislature: the Senate and House of Representatives are each based on a different principle of representation but have virtually identical legislative and financial powers, and neither can override the other. The system of conference committees for resolving deadlocks is a product of organic development and the role of the committees as checks and balances is alluded to later. Of more prominence are the checks and balances that operate externally on each branch of government so that none can act without the approval and support of another, notwithstanding that the legislature and executive have separate popular mandates. Acting as restraints on *Congress*'s legislative capacity are the President's powers to initiate and veto legislation, although the veto can be overridden by a two-thirds majority in Congress (the check is reciprocal) and it does not apply to constitutional amendments. A further check on Congress is the court's power, not expressly provided but asserted early in the history of the constitution, to review the constitutionality of legislation. The *President* and members of the political executive are subject to removal by the Congress through the impeachment process and their actions can be invalidated by the court in its capacity as arbiter between government and nation, and between the branches of government. The President also requires senatorial approval for appointments to the Supreme Court and other key positions, and Senate ratification of treaties negotiated by him, and although he can appoint federal officials the power to create public offices vests in Congress. Congress, through its committees and sub-committees, also has powers of administrative oversight. Members of the *Supreme Court* are appointed by the

President (with senatorial approval) and are liable to impeachment by Congress. The court's structure and jurisdiction are controlled by Congress, and judges are dependent on the administration to implement their decisions. Thus Congress acquires a quasi-judicial function in relation to impeachments, the Senate an executive function in relation to the treaty-making and appointment processes, and the President a subsidiary role in the law-making process; the court, through its review powers can act as a "council of revision" or "super legislature" and final policy-maker for the nation. While the extent of these modifications to the separation of powers was not always precisely envisaged by the founding fathers, they are integral features of the contemporary constitutional system in the United States. Although there may be definitional disputes over the extent to which, say, the court's review powers are an exercise of the legislative function, it is clear that the checks and balances ensure that each power centre is dependent on others for the final efficacy of its social designs.

The federal dimension entails additional checks and balances, provided the term is understood in a wide sense. The composition of the federal chamber necessitates vicarious state cooperation and consent to legislation, financial measures and other matters requiring Senate involvement. More direct state participation is required for constitutional amendments. In some cases the federal division of competence requires combined federal-state and inter-state ventures through joint agreements, agencies, funding or programmes, such as the Clean Air Act programme referred to earlier. Although federal policy and legislation is generally administered by federal agencies and institutions on a uniform basis, other jurisdictions highlight possible variations. Thus in West Germany such activities are undertaken by the administrative organs of the component federal units, allowing for local variation and enhanced legitimacy. Switzerland and Austria make provision for both possibilities, and other variations besides. In fact, cooperative federalism implies a range of constitutional checks and balances along the vertical axis. Both definitionally and empirically it is characterised by the extent of inter-action and inter-dependence in governmental relations, by the sharing of functions, by bargaining and rivalry, and at times conflict. This kind of cooperative and balanced federalism is not primarily a constitutional-juridical phenomenon but a political, social and administrative set of relations.[11] Lists of checks and balances could be provided for other federal systems, for example West Germany or Switzerland, but in many non-American contexts party solidarity tends to unify the activities of formally separate organs of government.

Inevitably the efficacy of checks and balances has been affected by the vicissitudes of the political process. Thus, to remain with the American system, they have been eroded and ignored as one or other branch of government has achieved predominance at a particular historical juncture.

The inefficacy of the checks and balances is exemplified by the past inability of Congress to scrutinize and control the executive, in particular the President and his White House staff, a development which led to the "imperial presidency" in the 1970s. The crisis of Watergate has been described as the product of a long build-up in the concentration of presidential power and the failure to adhere to the limitations on authority explicitly and implicitly contained in the constitution. Schlesinger suggests that Richard Nixon concluded that the separation of powers had so frustrated government on behalf of the majority that the constitutional system had become intolerable — he tried to transform the presidency of the constitution into a plebiscitory presidency. The scope and extent of presidential influence diminished after the Watergate era to give way to a more stable balance of power between legislature and executive; this was achieved partly through an intensification of congressional oversight by way of its legislative and appropriation committees and sub-committees. Nevertheless, the bureaucracy continues to intervene in all fields of government, in contravention of the checks and balances doctrine. Similar fluctuations can be identified at other periods in American constitutional history. However, present trends suggest a revival of the checks and balances, particularly through judicial assertion. Thus under the particular influence of Justice Rhenquist there has been an attempt to re-establish federalism as a constitutional first principle, by reinforcing the notion of state sovereignty and there are indications of the imminent rehabilitation of the pre-New Deal non-delegation doctrine, which would also reinvigorate the separation of powers. This confirms that the whole notion of checks and balances needs to be assessed in the light of currently prevailing realities.

4. **Constitutional Government Under Seige**

Against this background of checks and balances in the context of American cooperative federalism one can pose a series of questions pertinent to this topic: What are the significant contemporary trends which are affecting the checks and balances and their original design? What modifications can be made in their operation to take account of late twentieth century social and political realities? And to what extent are the checks and balances relevant to the process of constitutional change in South Africa, given different historical, economic and cultural circumstances?

Attention is first given to the effect of two contemporary phenomena on constitutional checks and balances.

(i) *Shift of power to the bureaucracy*

The rise of the administrative branch of government, or the fourth estate, has affected not only the operation of constitutional checks and balances but

also the triple legislative-executive-judicial division of power.[13] The gradual decline in the importance of legislatures and the shift of power to political executives has been a long observable trend. The shift of power to the bureaucracy is a more recent development and it undermines the separation of powers and checks and balances institutions because of its scale, nature and impact. Unlike the old minimum or "night watchman" state its contemporary successor is involved in a wide range of functions, many formerly within the jurisdiction of the private sector — the regulation of the economy, the provision of social services, the development of infra-structure, and even the undertaking of entreprenеurial activities. In each case the tendency is to delegate vast discretionary competencies to the agency, department, official or para-statal concerned and to ensure to a greater or lesser degree its sovereignty in respect of the allocated power. Such discretionary power involves a collapse of the traditional three-fold classification of government functions, and also the distinction between policy and administration: modern bureaucracies without exception make policy in the process of administrating. Theorists such as Vile have tried to construct a more complex four-fold classification of functions, comprising rule-making, a discretionary function, rule application and rule-interpretation.[14] It is clear that the bureaucracy performs all four of these individual functions, and in the case of the discretionary function frequently more than one at the same time.

The rise of the bureaucratic-administrative state and the prevalence of discretionary power has left intact a residue of constitutional safeguards and checks and balances. In all jurisdictions administrative action must be legislatively sanctioned and the enactment might impose standards or guidelines. In the United States there is also a legislative veto over agency rule-making, although its constitutionality has been disputed in recent years. Congressional oversight of administrative actions remains an important form of bureaucratic control. The Australian federation has a new and effective pre-emptive control: the Senate Standing Committee for the Scrutiny of Bills investigates all federal bills and reports on whether they inappropriately delegate legislative power, insufficiently subject the exercise of legislative power to parliamentary scrutiny, or make rights and liberties unduly dependent on ill-defined or non-reviewable administrative discretions. Besides legislative influence and control, the courts also impinge on administrative discretion through judicial review. The efficacy of this check varies considerably from jurisdiction to jurisdiction and depends on the legal background, judicial traditions, and the nature of the relevant court. Thus in the Federal Republic of West Germany there is a separate system of administrative courts which can review virtually all administrative acts for abuse of discretion as well as errors of fact. In the United States, review is undertaken by the regular courts through a more formal process and under

the aegis of the Administrative Procedure Act, organic statutes and common law rubrics. Some of the most impressive developments among the federations in this area have taken place in Australia in furtherance of the "new administrative law" which has opened many areas of administration to detailed examination and scrutiny through an administrative appeals tribunal, ombudsman, and judicial review on the merits of administrative decisions. Finally, despite the growth of the bureaucratic arm of government the checks and balances principle still has some influence in federations such as West Germany where federal statutes are implemented by local bureaucracies.

Nevertheless the problem remains. With the rise of the administrative state political authority has been transferred to a relatively unaccountable administrative realm. South Africa is no exception to this phenomenon with its large, intrusive and politically powerful national public service, augmented by an array of sub-national bureaucracies, para-statals and public corporations which together had over a million and a half employees in 1984. Criticism of this leviathan based on free market ideology notwithstanding, it is likely to be a permanent feature of government in South Africa regardless of the political exigencies, yet it remains largely unaccountable in the new constitutional system. These realities require new approaches to issues of constitutional government.

(ii) *The Rise of Corporatism*

Corporatism refers to the organized, regulated and technologized structure of modern industrial societies in which the role of the individual participant, whether a political or economic or social actor, is of only marginal significance. Planning is undertaken by remote management in large organizations, either in the public sector, such as state departments, public corporations or quangos, or in the private sector, such as big business, trade unions, political parties, or religious and cultural organizations. This development has dissipated the alleged pluralist nature and political organization of western societies which is still assumed by their constitutional theories. Far from society consisting of a plethora of competing interest groups and organizations with multiple overlapping memberships in which individuals take active and decisive parts, it has come to comprise a limited number of functionally specialized, hierarchical, compulsory, non-competitive organizations recognized by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports.[15] Private power of this nature not only undermines prevailing theories of pluralism but it creates rival centres to state institutions which, despite their public nature (in the sense that they affect the public extensively and immediately), are immune

from even the faltering controls of constitutionalism such as checks and balances. Bureaucratic power, moreover, complements and inter-penetrates corporate power, giving rise to the mutual alliance Galbraith has labelled "bureaucratic symbiosis".[16] Here collaborative and mutually cooptive forms of action undermine the apparent authority of political actors and constituents, whilst serving the aims of the bureaucracy and private organizations.

South Africa has not been by-passed by the corporate phenomenon, despite its relative economic under-development. Evidence for this is found in the financial predominance of a few major corporations, institutions and organizations, the relative absence of competition in many areas of the market place, the monopolistic circumstances of several para-statal institutions, and the apparent strength of religious, cultural and sports organizations. The "bureaucratic symbiosis" or administrative corporatism is evidenced by the Carlton-Good Hope meetings, cooperative arrangements between the public and private sectors in joint ventures (economic development, armaments), increasing state regulation of "professions", and the rise of joint policy and advisory committees such as the State Security Council. With the decomposition of aspects of the apartheid system a new ideology is being constructed in terms of instrumental rationality; political problems are "depoliticised" and presented as administrative problems susceptible to expert and technical resolution. The "neo-feudalism" alluded to by Harrison is implicit in these developments.[17] Corporatism has been said to have threatened British parliamentary democracy directly by by-passing ministers, by-passing parliament and by-passing the people, and the same is undoubtedly true of South Africa's pre-1984 species of parliamentarism.

Inevitably bureaucratic and corporatist tendencies have undermined checks and balances. Constitutional government is under seige. The theories which assumed a small, uncomplicated, pluralist society require adaptation, as do the institutions which they predicated.

5. New Constitutional Orderings

What new constitutional prescriptions could serve to further the objectives of constitutional government in the light of the contemporary developments described above? It is appropriate to re-state the fundamental theory behind the checks and balances doctrine before considering alternative applications. It is, namely, that public authority should be divided according to its function among a variety of state institutions and that in its exercise there should be a balance between the predominant institution and one or more subsidiary institutions. The objectives in this theory are the protection of liberty, the attainment of compromise and consent, the perfection of peaceful negotiation, and the enhancement of accountable government.

(i) *Legislative Committees*

One aspect of federal government which catches the eye is the legislative committee system. While numerous non-federal systems have developed committee structures it is significant that in their study of national legislatures Lees and Shaw[18] found that the relative importance of the committee system was by far the highest in the United States (with two hundred and fifty sub-committees, mostly permanent) and the third highest in West Germany. (In unitary Japan it is a sham institution). The committee system is strongest in the context of presidentialism (or continental parliamentarism) and weak party control. Although only in West Germany is there significant constitutional reference to committees, they have elsewhere developed organically and served to supplement the decentralization and diffusion that results from the federal nature of the political process. The committees have wide-ranging functions—legislative, financial, investigative, housekeeping, and administrative oversight, the last being the most significant in this context. Oversight entails the efforts of Congress to discern what happens to legislation after it has been passed, and it enables Congress to determine the need for modifying existing law or enacting new law. Activities range from informal staff enquiries and casual information-gathering to formal oversight hearings, re-authorization and appropriations hearings, investigations, and evaluation studies. In some cases the patent objective of the activities is to influence the way in which officials administer the law, or to expose misconduct. In other cases oversight is used to examine an agency's future plans and intentions as well.

There is some variation in the extent to which a committee system constitutes a check and balance in the constitutional order. It depends, *inter alia*, on the committees' autonomy from the political executive and the party system which determines the extent to which they can become rival centres of power and sources of autonomous action against the government. In the United States the committees are relatively autonomous of both party and executive, and their institutional position is strengthened by the distinction between authorising legislation and appropriating funds for its implementation. In West Germany the autonomy from party and executive is less pronounced yet not insignificant, and there is a developing committee concern with resource allocation. Where the committee system develops towards a stage of enhanced autonomy for a few specialized elites who take effective decisions in secret it undermines the pluralist, balance of power nature of plenary legislative activities. Hence the depictions of the American committees, which have extensive discretion over all aspects of bills, as "Little Legislatures". Most commentators, however, regard the committee systems as not having displaced the role of the executive in initiating and framing legislation. Thus with the shift to a committee-based parliament in South Africa attention should be given to this potential check and balance.

(ii) *Bureaucratic participation*

A second possibility relates to administrative power at its site of execution. In the joint report of the Committee for Economic Affairs and the Constitutional Committee of the President's Council on *Local and Regional Management Systems in the Republic of South Africa*[19] reform in South Africa was depicted as a process of opening up social and economic opportunities in society and *the widening of participation in its decision-making processes*. The Council's report (and unfortunately the resulting constitution) adopted a conventional, restricted and formalistic approach to citizenship participation. Moreover neither gave any attention to the composition, functioning and accountability of the fourth estate. Nevertheless even the perfunctory reference to this factor is of significance, and it is appropriate to look at some comparative developments relating to citizen participation in the bureaucratic branch.

The definition and analysis of citizen participation has been described as a formidable task, rather like "grabbing hold of a marshmallow; it is of more rhetoric than reality".[20] It can be related to a redefinition of democracy which differs from the elitist theories which predominated in the last few decades — they are epitomized by modern writers such as Schumpeter and Dahl and draw on a so-called "classical" tradition which includes Bentham and James Mill. Adherents of participatory democracy draw on another "classical" tradition which incorporates Rousseau, J.S. Mill and G.D. Cole, and they define the system as "decentralisation of power for direct involvement of amateurs in authoritative decision-making."[21] This school, espoused by Pateman, Mason and others, operates with a different model of politics, of society, and of humanity. In Keim's words, "... part of what it is to be a human being is to partake in the affairs of the community".[22]

Whatever the normative disputes surrounding democracy and participation there is no disputing the sustained popular demands for increased participation in government within many western democracies during the last two decades. The decline in electoral involvement in the national institutions of government has been accompanied by increasing pressure for alternative forms of participation in new sites of government in West Germany, the United Kingdom and the United States. Several commentators explain the paradox of the "passivity-participation" syndrome in terms of the political alienation and individual impotence experienced in post-industrial societies; the structural weaknesses in the system have led citizens to exercise political rights in alternative spheres. Others see it in terms of increasing public dependence on the state; the transformation of the liberal minimum state into the managerial welfare state has given rise to a representation gap which has generated citizen action movements.

In the United States there were two main forms of citizen participation in

the 1960s and 1970s — citizen-initiated activities to monitor and influence governments, and government-initiated attempts to involve citizens in administrative decisions. Of the latter, the federal Administrative Procedure Act of 1946 formed the basis for subsequent administrative and judicial developments and it was supplemented by numerous federal and state legislative programmes in the 1960s and 1970s. This coincided with an explosion of agency rule-making in American administrative law which provided an appropriate site for public influence. There developed a new conceptual model of the administrative process.[23] The original *transmission belt* model coincided with the early development of the bureaucratic branch and depicted the agencies as conforming to specific directives issued by the legislature in the exercise of their duties. The New Deal embraced public authority as an antidote to the power of big business and this led to the emergence of the *expertise model* of the administrative process; extensive discretionary powers were vested in administrative agencies whose supposed professionalism, specialization and objectivity obviated the need for strict legislative controls. However, attention soon focussed on the procedures used by these bodies — it became apparent that their "expertise" was in fact deficient, and that many policy questions facing administrative agencies were not susceptible of technical resolution. The result was the emergence of the *interest representation model* of administrative procedure in which discretion is seen as an essentially "legislative process of adjusting the competing claims of various private interests affected by an agency policy."[24] The public interest is conceived not as an objective reality subject to expert ascertainment, but as a balancing of multiple, potentially conflicting, interests. This description of the model by leading administrative law scholars provides a modernised version of the checks and balances theory:

> The interest representation model attempts to promote the equitable exercise of agency discretion by assuring interested groups and parties the right to participate in formal agency decision-making. It acknowledges the "legislative" character of agency choice, and attempts to develop formal, legalistic modes of representation as a surrogate for the political mechanisms of representation applicable to legislatures. In so doing, the interest representation model tends to highlight the multiple trade-offs among values and interests that are at the heart of many administrative decisions.[25]

This model was developed by the legislative, executive and judicial branches and has three variants. **Formal rule-making** requires a range of trial-type procedures, including advance publicity, an oral hearing, cross-examination by participating parties, the submission of rebuttal evidence, and adversarial burden of proof, the submission of proposed findings and conclusions to parties, and a strict standard of review. It is sometimes referred to as "legislation by adjudication". **Informal rule-making** requires a public notice of proposed rule-making (this includes a statement of the time, place

and nature of public hearings and the terms or substance of the proposed rule), opportunity to comment, (an oral hearing is only discretionary but is often held), publication of the rules and a statement of their basis and purpose, and opportunity for the public to initiate both new and amending rules. The efficacy of this system has been enhanced by the judicial requirement that agencies generate a rule-making record in each case, which facilitates subsequent review. *Hybrid rule-making* incorporates elements of formal and informal procedures. It is also a feature of this development that administrative agencies themselves have assumed additional procedures to those statutorily or curially mandated in order to enhance public participation in their procedures.

Much of the recent writing on this topic does reflect a sense of disappointment in the experience, a reflection of the wider malaise affecting the citizen participation movement in the 1980s. Some of the problems have been attributed to the numerous exceptions which were allowed to the general scheme (such as military affairs, grants and benefits), others to the administrative agencies (such as their apparent bias, favouritism towards established interests, and inability to gainsay demands of powerful organisations), and yet others to the participants themselves (the under-representation of some groups, unfamiliarity with processes, lack of funding, and apathy). In short the legitimacy of the system has been seriously questioned. Specific attempts were made to ameliorate some problems, for example by direct public funding of participants and the awarding of legal costs. Such initiatives have been regarded as being moderately successful, although they have not resolved all problems of legitimacy.

Despite its shortcomings, however, the interest representation model has been judged an overall success by most leading commentators and its institutional basis and significant popular support have survived into the 1980s. The quality of technical and scientific decisions has improved, administrative officials have become more solicitous of and responsive to citizen views, the advance warnings for citizens have enabled them to develop strategies for protecting their interests, and the influence of groups has been strengthened by their ability to delay agency action. Much of the criticism is made in relation to the particularly high normative standards of one of the most developed systems of administrative law, and in respect of a development which is of relatively recent origins. Another crucial factor in evaluating this system is the reality that the administrative state had previously undermined the traditional checks and balances and this system achieves some of their basic objectives—it diffuses power, allows outside interests some influence over its exercise, and makes government more responsive and accountable. It allows for a more modern reformulation of the checks and balances doctrine which takes account of contemporary realities.

6. **South African Prospects**

In relating the above discussion to South Africa one is attracted by an African scholar's apotheosis of the federal option:

> Federalism is predicated upon the existence of a society composed of various geographically segregated groups divided by wide, fundamental differences of race, religion, language, culture or economics. Its purpose is to enable each group, free from interference or control by the others, to govern itself in matters of local concern, leaving matters of common interest to be managed centrally, and those which are of both local and national concern to be administered concurrently. By this, the differing interests and circumstances of the component groups are accommodated while at the same time securing the peace and stability of the country and its survival against the forces of division and conflict inherent in the heterogeneous nature of the society.[26]

There are federal elements in South Africa's past, present and emerging constitutional structures — the legal division of authority in the provincial system incorporated at Union and the homeland system dating to 1959, the confederal aspects of the constellation of states conception of the late 1970s, and the "corporate federalism" of the 1983 constitution currently being implemented. The federal principle is not an alien intruder in the debate, and an asymmetrical federation to accommodate ethnic and socio-cultural diversities has been frequently advocated as a normative constitutional model for the country. More recently there have been adherents (among them the President's Council, albeit in a distorted sense) of consociational democracy which, although it does not provide an analytical constitutional model, employs several of the institutional features of federalism. In his 1984 Bradlow Series paper entitled *Federalism and the Future of South Africa*, Forsyth was able to observe:

> I think it fair to conclude that in talking of a federal future for South Africa one is *not juggling with abstractions, and that the language of federalism provides a* possible framework for a constructive dialogue between the leaders of the different ethnic groups in South Africa about the political future of the country.

Forsyth's statement, however, is noticeably cautious. What cannot be overlooked in this regard is the thoroughgoing dualism in the South African economy. The potentially disruptive economic imbalance between the core republic and black homelands is so well-known as not to warrant statistical verification. There are also other warnings. Riker has concluded that the main beneficiaries of the institutional limits which federalism imposes on government have been capitalists, landlords, linguistic minorities and racists.[27] These factors are hardly conducive to the emergence of a federal system, particularly in the absence of a positive political or ideological commitment to the primary goal of federation as an end in itself among leaders and followers, one of the many prerequisites for federal government. The federations of West Germany, Switzerland, Canada, Australia and the

United States provide lessons (of varying success) in political union. Co-operative federalism in South Africa, by contrast, would require the disaggregation of the unitary state, yet the constitution of 1983 has paradoxically set in force certain centripetal forces; the inevitable demise of the provincial system which it implied was finally announced in November 1984, and resulted in an accretion of power to Pretoria. The government has also consistently rejected the "special status regions" option advocated by the Quail, Lombard and Buthelezi commissions and even this option would fall short of one of the basic guarantees of federal state: the continued existence of the regions and their legislative and administrative autonomy would be secured but they would not participate in the exercise of the power of the whole state, for example in a Bundesrat-type federal chamber. The "confederal" option between the republic and legally independent national states has not developed to any significant extent, and has even been "neglected" with the implementation of Act 110 of 1983. If it did eventually materialise, it would not vouchsafe the types of constitutional guarantees referred to here.

More recent developments, such as the State President's announcement in January 1985 concerning greater flexibility in homeland development, suggest that the ruling group has a more open-ended constitutional agenda than was hitherto the case and that federative developments might be in the offing. The extensive discrediting of the separatist option is also likely to lead to forms of controlled devolution, such as increased delegation of powers to local authorities and the new regional councils. It even appears that the Buthelezi report will be dusted off for official reconsideration. However, it is easy to say that federalism is a possibility for South Africa, but how probable it is as a practical reality is a different question. So far constitutional changes have allowed the dominant group to preserve itself politically and have not been attended by changes in the political economy. Such constraints have clear implications for future changes. The notion of a "quasi-federal" status for individual homelands between second-stage self-government and legal independence is also not new: in 1977 a bill providing for homeland "internal autonomy" was drafted but never passed. Even since the implementation of the new constitution, government in South Africa is still both centralised and imposed, and this factor, together with the rise of the bureaucracy and the corporatist phenomenon, indicates that federation or devolution alone will not engender the constitutional safeguards and checks and balances associated with cooperative federalism. As far as subordinate groups are concerned they understandably perceive freedom as a function of positive action by the state. Their focus is therefore on the national franchise and central institutions of government, and institutional arrangements which impose delays and restrictions on government and place certain laws beyond the power of the people's representatives to amend, will not have an immediate attraction.

It will nevertheless be profitable to re-assess the new constitutional system in South Africa in the light of the theory and practice of constitutional safeguards. Of the two matters to be touched on here the first is that of parliamentary committees. The joint committees, on which the new system hinges, have legislative, financial and housekeeping functions, but it would appear that their investigative and administrative oversight powers will be limited. The South African parliament has traditionally been caucus and not committee based and the establishment of the joint committees is largely a function of having three houses with nominally equal status which are not able to resolve their differences in plenary sessions. Comparisons should therefore be made with the American system of conference committees or the German mediation committees which are set up by the respective legislative chambers with the object of resolving differences between them.

Whatever the comparative practices the following factors will affect the local committees. First, they are geared to patterns of executive action and organisation and they scrutinize legislation before its consideration by parliament. Secondly they take decisions through a system of concurrent majorities, which entails that consensus among all committee members is not an institutional necessity. Thirdly their decisions are only contingent, in so far as subsequent legislative differences between the three houses can be resolved through the discretionary intervention of the State President and President's Council. Finally, the committee system is potentially conflictual with the strong party and caucus system in this country, and it is possible that effective power will remain with the party leaders and executives and not with the newly established committees. The fact that ministers do not sit on the committees and that in early practice they have taken to summoning officials and others before them suggests some potential autonomy and leverage, although it cannot be expected that this will result in a rapid shift to a public and probing type of parliamentary oversight of the administration. An example of a constructive development in this area would be if future appointments to high government positions were subject to committee ratification after public hearings, in emulation of one of the American Senate's most important functions.

Secondly, there is the question of wider public participation in the administrative branch of government. Barry Dean, in respect of the American experience of semi-autonomous agencies with wide-ranging functions, has observed:[28]

> One of the great advantages of bodies of this kind in the control of constitutional change in South Africa is that their creation provides a mechanism for functional decentralisation. Such decentralisation would involve the allocation of power to determine state policy in particular areas to bodies established for that purpose rather than the attempt to concentrate all policy formulation in the hands of the central government . . . It could provide for inter-group co-operation on an "issue" rather than a group basis. In other

words the control of activities in which people have a common interest can be determined by that interest rather than simply by group identity. The proposal could also provide a mechanism for insulation from party political influence, although, if the power exercised by these bodies is substantial, the risk of such influence is greatly increased. One of the greatest safeguards against such influence would be direct active public participation in the activities of these bodies. The proposal lends itself to such participation because it reduces the size of the policy making units and the range of issues which they will have to consider. Finally, functional decentralisation does not involve geographic division, a fact which could be of considerable significance in a situation in which there is marked disagreement as to whether there should be one unitary state or a number of 'states' in South Africa.

Any steps in this direction must take account of South Africa's peculiar political culture and its present constitutional-legal system, but subordinate and delegated legislation is already a pervasive feature of the politico-legal system and some statutes do entertain public involvement to some degree — through the discretionary or peremptory consultation of boards or councils and advanced notice and publicity requirements. In some cases a representative body can itself issue regulations, subject to a ministerial veto.[29] The notion, therefore, is not wholly alien to our constitutional system. In most cases, however, the participation is limited in scope, functionally circumscribed, or contingent in its effect. There is also an absence of a *universal minimal standard* of participation for all procedures. Developments in this area would have to take account of the different substantive areas which are subject to administrative regulation — sanctions, welfare, planning, and safety, health and environment. Given the present political situation, increased public participation is likely to be more realistic in some of these categories than in others. Thus the dominant group is unlikely to concede participation in the first category, but could do so more readily in the last. Politically subordinate groups are likely to make further distinctions within the categories. Thus although the President's Council has recommended their inclusion on group areas committees they might see this as a device for securing complicity in segregation measures, whereas they could be more amenable to other participatory planning schemes. A multi-dimensional feasibility investigation would be required to identify the most suitable areas for innovation.

7. Conclusion

The history of constitutionalism reveals that the deconcentration of policy-making and administration is an important factor in diffusing, controlling, and guiding state power. The comparative systems referred to here suggest a wide-range of institutional mechanisms for achieving this purpose — from the traditional institutions of federalism and checks and balances, to more innovative devices such as legislative committees,

participation in the bureaucracy, and quasi-federal dispersals of power. Their common denominator is that they require for certain kinds of state coercion the joint and co-ordinated use of different powers or the employment of different means. The delayed pre-occupation with constitutional change in South Africa at least provides the benefit of these comparative experiences.

This paper suggests that the inclusive constitutional system in South Africa falls well short of the constitutional safeguards and checks and balances associated with the doctrine of constitutionalism. In addition the common realities of modern societies, such as bureaucratism and corporatism, undermine traditional constitutional law concepts and necessitate new forms of constitutional engineering. The principles and practices of cooperative federalism, in particular its spatial division of public authority, provide a useful model for such restructuring. The new parliamentary committee system could also be developed so as to enhance its legislative role and allow for increased administrative oversight. Finally public participation in the bureaucracy could serve to complement franchise developments by rendering administrative power more diffuse, responsive and accountable. However, any constitutional machinations which do not contribute towards the goal of a fully representative system of democracy will have limited credibility and effectiveness.

Notes

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Reshaping the Antarctic Treaty, with Implications for South Africa

Introduction

Antarctica constitutes a huge continental land mass, surrounded by deep oceans (Fig. 1). An ice-sheet of up to several kilometres in thickness covers this continental mass of about 14 million km^2 — a surface area twelve times that of South Africa or roughly the size of Mexico and the USA together. At the end of the southern winter (September), the sea-ice around Antarctica covers over 20 million km^2 of the southern oceans, an area larger than Antarctica itself. By the end of the southern summer (February), this sea-ice coverage has shrunk to about 20 per cent of its winter area. This seasonal dynamic polar assymetry of our planet has a profound and measurable influence on a set of interdependent global systems such as the earth's climate, variations in the planet's ocean water temperatures and circulations, its atmospheric turbulence and weather patterns as well as on its biological activity and food sources. Critical variations in some of these systems can catalyse irreversible changes affecting the surface environments of the earth. In turn this could significantly influence the wellbeing of the global biosphere and the future welfare of mankind. Scientific investigations offer one way to monitor these possible changes. Antarctica is also a potential source for natural resources, such as oil, minerals, food (marine proteins) and fresh water. Scientists are presently evaluating some of these resources. Science is thus an essential tool for those interested in the Antarctic (and global) environment as well as in commercial, social and political exploitation of this continent. Today these interests are growing to such an extent, that it has placed the Antarctic Treaty in a vulnerable state. Here we examine some of the causes and consequences of this situation.

Antarctic Science: a new form of colonialism?

Each year in early summer, the South African Antarctic research-supply ship MV SA AGULHAS sails some 4 200 km south out of Cape Town to snug up against the Fimbul Ice Shelf of Antarctica. From there, expedition

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personnel, construction-maintenance crews, observers and supplies are off-loaded onto the ice-shelf. This is a routine procedure for the annual relief of some 15 people at SANAE, South Africa's scientific base station on the Antarctic continent. Most of these "over-wintering residents" have been conducting South Africa's comprehensive atmospheric science programme, which involves year-round studies and measurements of aurora, airglow, cosmic rays, geomagnetism, ionospheric and magnetospheric physics, meteorology and ultralarge frequency pulsations. During the relief period, whilst the station is being refurbished and replenished, an additional summer crew of researchers go about their scientific task for a period of up to 10 weeks. For example, geologists are flown by helicopter some 200 km south to a field base Grunehogna. Here they collect their field equipment and skidoos, and they are then airlifted or travel over-snow to their target areas for the season. Periodically, they can be re-supplied by air. At the end of the season, the field workers with their rock samples are flown back to SANAE, where they join the ship and return to South Africa. Whilst the geologists study the rock formations, marine scientists have in the meantime utilized the AGULHAS as a scientific laboratory during offshore investigations: marine geophysicists are probing the structures and history of the ocean floor and the Antarctic continental shelf, whilst marine biologists and zoologists are studying the ecosystems of these cold waters.

South African scientists have long been interested in Antarctica. In 1958, South Africa acquired the Norwegian base, Norway Station, in western Dronning Maud Land. The first South African National Antarctic Expedition left Cape Town for this base in December 1959. In 1962 the first South African base, SANAE, was constructed 20 km to the north of Norway Station at position 70°18'S, 02°21'W. By 1971 this base was buried so far beneath the surface that a second SANAE base had to be constructed in the vicinity. This, in turn, was replaced by a third SANAE base in 1980, also nearby at position 70°18'S, 02°26'W.

Geologic field-work continued uninterrupted from the 1960–1961 to the 1975–1976 summer seasons. By 1975–1976 most nunataks* reasonably accessible from SANAE and the makeshift Borga and Grunehogna field bases had been geologically studied and mapped by overwintering teams, using oversnow transport. Glaciological studies of the Fimbul Ice Shelf, the inter-nunatak ice sheet and the Jutalstraumen Glacier had also been carried out. Field-work came to a temporary halt in 1976 and the South African Antarctic Earth Sciences Programme went into a period of data analyses and assessment, in anticipation of air support becoming available sometime in the future for summer-only expeditions.

Air support, in the form of two long-range helicopters, materialised during 1980. By this time the basic ground-work for a new national Antarctic Earth Sciences Research Programme had been laid. During the 1980–1981

* Hillock or mountain of bare rock protruding through the ice cap.

summer season a four-man expedition visited SANAE and some outcrops to the south, to assess further the new research potential arising from the availability of air support. A site for a new field base in the vicinity of Gruvehogna (72°02'S, 02°48'W) was also selected. This base was subsequently erected during the 1982–1983 summer season. The first full field expedition in the new research programme was undertaken during the 1981–1982 summer season, during which a nine-man team of geologists and surveyors spent some 30 days in the field, supported by helicopters.

Nowadays, this sort of Antarctic programme is routine all over Antarctica. At the onset of the southern summer, international research activity stirs throughout the continent. Some 900 scientists at 34 permanent overwintering bases are joined by colleagues from all other continents of the globe. Occupied research stations during the short summer season increase to some 55; the number of scientists swell to almost 2000. More than thirty scientific and logistic ships, as well as numerous large transportation aircraft from all over the world converge on the continent ferrying these natural scientists and supplying their bases and laboratories. (1983 figures.)

All this activity in the Antarctic is legislated through the Antarctic Treaty, an extended "gentleman's agreement" arranged amongst twelve countries in 1957, and formally sealed in 1961 for thirty years (Table 1; for a precise wording of the Antarctic Treaty see the Bulletin's Vol. 9, No. 1, pp. 69–74). South Africa was one of the original twelve founder-members of this Treaty, which gave it full voting rights during meetings on Antarctic issues of the Antarctic Treaty members. Although seven of the founder countries lay claim to parts of Antarctica on historical, sectoral and occupational grounds, under the Treaty agreement for the time being, such claims are indefinitely frozen or, as some prefer, kept effectively "simmering". With considerable success, the consultative countries to the Treaty manage Antarctica as a type of trust territory, ostensibly as a common heritage for the benefit of all mankind (Antarctic Treaty Preamble). However, their collective policies are only partly publicised. Long-term plans can only be subject to speculation since member's meetings are held in secret. The Treaty "club" welcomes new members, but full membership with voting rights (Consultative Members) is allotted only to those who invest in a minimal amount of scientific investigation within the Antarctic region. Since 1961, only four countries, Poland (1977), West Germany (1981), India (1983) and Brazil (1983), have been able to afford this expensive scientific "entrance fee", which in the case of West Germany was in the order of one hundred million dollars. Thus, although scientific activity in Antarctica is effectively dictated by a monopoly on this continent, in reality the Treaty "club" shares executive power of Antarctic affairs by means of scientific colonialism; the latter is administered internationally through the Scientific Council for Antarctic Research (SCAR), a scientific committee of the International

Council of Scientific Unions (ICSU), headquarters in England. The Council for Scientific and Industrial Research (CSIR) co-ordinates the South African Scientific Committee on Antarctic Research (SASCAR) and represents it on SCAR.

Over the past decades, especially since the third International Polar Year, better known as the International Geophysical Year (IGY 1957–1958) there has been a notable increase of scientific activity in the Antarctic, as evidenced by the steadily increasing output of Antarctic scientific publications and the substantial increase in monetary expenditure on the region. The Annual US Antarctic budget is, today, around US $100 million, whilst that of the UK is around US $16 million and of South Africa around US $3 million. Concomitant with these increases, there has been an emergence of concern for environmental changes within the Antarctic region, and, by inference its potential impact on the entire planet. The most urgent appeals for concern have been exerted by environmental groups such as the Sierra Club, Friends of the Earth, Earthscan, and IIED—Institute for Environment and Development—as well as by persistent individual efforts of concerned scientists. This concern has now been officially recognized and is being examined by the Antarctic scientific community as a whole and also within the inner political circles of some of the consultative countries to the Antarctic Treaty. As a result, more rigid "club" rules vis à vis the protection of plant and animal life, as well as management of renewable resources such as seals, whales and krill, have come into force, (i.e. the Convention for the Conservation of Antarctic Seals in 1978 and the Final Act on the Convention of the Conservation of Antarctic Marine Living Resources—CCAMLE—which opened for signature in 1980 and entered into force in 1982). However, the effectiveness of these measures awaits further Antarctic developments and negotiations because with the expansion of scientific knowledge, familiar signs of economic entrepreneurship have emerged, and with it inevitable political overtones.

Today, Antarctica is visibly labouring under the birth-pains of evaluating economic costs, risks and returns. There are a number of well defined avenues for substantial economic returns via the exploitation of Antarctica. Commercial exploitation of fish, marine mammals and increasingly krill, is already well established, particularly by the Soviet, Japanese, and Polish fishing fleets. The "club" members feel that CCAMLR provides an adequate foundation for wise managements of this industry now involving 10 nations and total catches exceeding half a million tons per year. However, the convention suffers from serious shortcomings for effective management. There is, for example, no adequate allowance in the "club" formulas for (uncontrolled) entrance into this industry by non-members and neither the subject of the economic use of these resources, nor the granting of fishing permits is dealt with.

Similarly, tourism and adventurism have been responsible for more than two decades of economic exploitation in Antarctica. More than 31 000 people have visited Antarctica as paying tourists, adventurers, or as guests of scientific expeditions. Of these, more than 11 000 have visited the continent on day-flights, but the majority have travelled on ships, some of which are not registered in the Treaty-bound countries. Whereas most tour-operators apparently adhere to "club" safety guidelines, tourism has already inscribed its first tragic impact with a heavy death toll (257) from a DC-10 aircraft crash in 1979 and several potential ship disasters have been documented. However, no serious environmental impact studies on these issues have been conducted. Moreover, it appears from developments subsequent to these events that the Treaty "club" shows no great interest in laying down more stringent operational and safety regulations, nor are there any indications that they intend to embark upon collective enforcement to prevent accidents.

There is now also clear recognition by the earth-science community that oil-reserves are likely to be present, particularly offshore in the thick sedimentary basins of the Ross Sea and ice shelf, the Weddell Sea, Filchner and Ronne ice shelves, and the Amery ice shelf. Academic geologists have speculated on the size of oil reservoirs and their whereabouts, as also on the technical aspects of extraction in Antarctic waters. Although present opinion favours exploitation only in the case of discovery of giant oil fields (>0,5 billion barrels), such guidelines are of course subject to a complex array of economic and political factors. However, those aspiring to economic profits are probing ahead. Commercial oil companies such as BP, Texas Gulf, Elf, Hunt Oil, and Total, have shown interest in these Antarctic waters; some, to the extent of trying to obtain mineral and exploration rights, while others play influential advisory roles, as for example, Gulf Oil and Exxon who are both represented on the US State Department Advisory Committee on Antarctic Policy.

There is also a growing amount of literature published on on-shore mineralisation. Numerous accounts concerning the existence of Antarctica's potential exhaustible resources, including coal, uranium, base and precious metals, iron, chromium and even industrial materials have been presented. Despite the speculative nature of these scientific studies, they are one of the motivating factors for the United States, as one of the Treaty consultative parties, in proposing the development of an International Regime for Antarctic Mineral Resources: "The opportunity for the United States, including United States firms, to take part in any mineral resources activities permitted in Antarctica, on a non-discriminatory basis, is a United States objective in the development of a regime" (US Department of State 1982).

At present, there is an underlying theme of disbelief or scepticism vis à vis the technical or economic feasibility of exploration, let alone exploitation, of

on-shore mineral wealth within the following several decades, given the remoteness of Antarctica, its harsh climate, the amount of ice-coverage (98%), the lack of any suitable mining-related technology, the over-abundance of minerals elsewhere, and the potential opposition of environmental conservationists. However, against a background of mining technology developed in the Arctic over the last decade, a recent study by this author has shown that for certain precious and strategic minerals the aforegoing Antarctic prognosis is based on misleading assumptions. For example, it has been specifically shown that the economic climate is ripe for serious consideration of the exploitation of Antarctica's platinum potential, even though the decision as to whether or not to extract minerals from Antarctica requires far more stringently evaluated economic guidelines. It thus comes as no surprise to this writer, that increasingly apparent economic and political incentives have merged with the intended scientific endeavours proclaimed in the Treaty. This situation highlights the questions of exploration and exploitation rights and the collective environmental protection responsibilities in Antarctica. Furthermore, it focuses attention on the aspects of ownership and the legal processes of carving-up the unknown Antarctic natural resource pie amongst "club" members as opposed to international management and rent sharing by all. It is precisely these important questions which are presently arousing renewed interest in Antarctica by non-Treaty members of the world community, and it is because of this new focus, that the Antarctic Consultative Members are being forced into rapidly drawing up an Antarctic minerals management regime which will not only strengthen the Antarctic Treaty system, but which must also satisfy the world community vis à vis long-term advantage for everyone. How are the Treaty nations meeting this challenge?

The Antarctic Treaty and progress towards establishing a minerals management regime

The termination in 1991, of the first phase of the Antarctic Treaty will be a milestone of a very successful 30 years' co-operation in the fields of Antarctic science and politics. Numerous statements by representatives of world communities have by and large expressed satisfaction, and indeed praise, for an almost perfect record of guardianship of Antarctica by the 12 founder-members and the four subsequently adopted members of the consultative circle of the Antarctic Treaty (Table 1). This success is almost entirely due to the emergence of a co-operative bond between an international group of Antarctic scientists during the International Geophysical Year (1957–1958), and which led directly to the birth of the Antarctic Treaty in 1961. This long period of international scientific co-operation and development in Antarctica, together with the peaceful management of Antarctic affairs, is all

the more remarkable when projected against the background of the world's continuing tensions. The far sightedness of the scientists responsible for the formulation of IGY has thus made it possible to assess the forces and strengths of social and political stability in a framework of international scientific collaboration.

With hindsight, the conception, birth, and subsequent development of this Treaty has proved to be a major achievement of negotiation amongst a diverse group of nations with distinctly varied interests. For example, of the initial 12 founder members, seven claim sovereignty rights over various parts of Antarctica, three of which overlap considerably (Fig. 2; Table 1). Sovereignty claims, all established before IGY, are upheld on grounds which range from contiguity, discovery or recognition to purported effective occupation by explorers, scientists and military personnel. With the exception of the area claimed by Norway, the claims — in accordance with the "sector" principle — are all pie-shaped, their apices meeting at the South Pole. The undefined latitudinal boundaries of Norway's claim (Fig. 2) are assumed to be intentionally ambiguous because the "sector" principle is rejected by Norway in Arctic polar territory. The "left-over" area to the south of Norway's claim, together with a large unclaimed chunk of Marie-Byrd Land, are today effectively *res nullius* (i.e. the property of no one and consequently, potentially subject to the claims or exercises of ownership or sovereignty by states, based on occupation, though many international lawyers now believe that no further claim to exclusive sovereignty over any portion of Antarctica would be recognised today).

It is open to speculation why other nations with confirmed long-term Antarctic interests such as the USA or the USSR, have neither claimed this substantial remaining slice, nor on arguably legitimate grounds challenged other claims. There is a consensus of belief that this is related to an admixture of an acknowledgment of having missed the boat, and a recognition that the ambiguity of claims could be to their advantage. On the other hand, their refusal to recognise sovereignty rights over any parts of Antarctica benefits them by enabling them to retain a legitimate interest in the entire area.

Antarctic Treaty rules are careful to protect pre-existing claims, whilst simultaneously catering for those Treaty members that do not recognize these claims, through effectively freezing discussions on this topic for the period during which the Treaty is effective. Thus, until 1991, when the Treaty will be subject to potential re-negotiation, the signatories will have been able to avoid sovereignty issues. A spin-off of this arrangement has been the effective retention of Antarctica as an exclusion zone, almost free from military confrontations, nuclear experimentation and environmental pollution. Antarctica is a continent where peaceful scientific endeavours protect it from environmental damage and successfully buffer it from major political confrontations.

Co-operation and loyalty amongst the Treaty nations is unquestionable, as reflected in their strict adherence to the Treaty's regulations; although there have been serious breaches of the Treaty, including assertion of sovereignty while the Treaty is in force; failure to communicate required information, and failure to adhere to the Agreed Measures for the Protection of Antarctic Fauna and Flora. An example of close adherence to the Treaty, is their firm stand on the prohibition of nuclear waste disposal. The only known Antarctic nuclear power station was built under supervision of the United States military wings at the scientific colony McMurdo in 1961. Following reports of potentially dangerous damage to the unit, it was (under US Naval supervision) dismantled in 1973–1974 and, together with any contaminated indigenous soils and foundations, shipped back to the US by 1979.

It is therefore undeniable that forces mobilized through the Treaty obligations have given the Antarctic Treaty "club" a unique flavour of successful international co-operation. However, in the light of recent growing awareness of Antarctica's mineral potential the ultimate strength and flexibility of the Treaty is yet to be tested. Mineral activities in Antarctica are at a minimum, arguably because the Treaty nations agreed, in 1977, to an informal moratorium or policy of voluntary restraint, on such activities. This is conditional on adequate progress being made towards an acceptable minerals regime. The need, therefore, to formulate a pragmatic minerals regime before the potential renegotiation of the Antarctic Treaty in 1991 has become the most urgent task, all the more because to date, there is no provision in the Treaty expressly regulating mineral policies.

Serious negotiations amongst the Treaty nations towards establishing a framework for an acceptable minerals regime did not get under way until their eleventh consultative meeting in Buenos Aires in 1981. On this occasion, however, the signatories officially drew up guidelines recommending, *inter alia,* to their governments that "a regime on Antarctic minerals resources should be conducted as a matter of urgency". The most important reason for the urgency is that the issue of minerals in Antarctica, if left unsolved, may present a threat to the Antarctic Treaty and its regulatory system. This is because the issue is likely to bring back to centre stage the disputes over sovereignty which the Antarctic Treaty so successfully avoids.

A scheme ("the Beeby draft") for the establishment of a minerals regime was subsequently drawn up and approved at the first session of a special *consultative meeting on mineral resources in* Wellington, New Zealand (June 1982). Since then an informal seminar on this subject held in Antarctica at the Chilean Air Force Base "Teniente R. Marsh", (King George Island, South Shetlands, October 1982) has been followed by a more formal meeting in New Zealand, (Wellington, January 1983) and a second session of a special

consultative meeting on mineral resources in West Germany (Bonn, July 1983). Subsequently consultative meetings to further consolidate a minerals regime have been held in Washington (January 1984), Tokyo (May 1984), and Rio de Janeiro (April 1985).

It is believed that at the second session held in Bonn in 1983, the Treaty members proposed the establishment of a regime to govern exploration, which, whilst continuing to circumvent sovereignty issues, will permit prospecting and extraction on application by the Treaty nations or by countries which the Treaty "club" agrees to sponsor. Such a regime—premised on side-stepping the sovereignty question—now appears to have been accepted in principle as a working model. The proposed regime is likely to specify environmental protection standards, lay down conditions of access by operators, provide for a licensing authority, appropriate revenue collecting and enforcement agencies. There will also be some kind of commission to monitor the success of the machinery thus established, with the power to review and amend as required. It was also agreed that the regime could take 3 possible forms:

1. agreed measures under the Antarctic Treaty;
2. a protocol to the Antarctic Treaty, and
3. a separate Convention.

No decision was taken on this issue, but there is general consensus that a Protocol to the Treaty has the greatest merits for the future stability of the Antarctic Treaty system as a whole.

There is no evidence to suggest that the increasing concern of the Treaty members to develop a minerals regime can be attributed to long-term planning on their part. More probable is that various external pressures provided the principal impetus. The first of these is the fact that, by the early seventies, the world was forced to consider seriously the importance of natural resources, their possible future shortage and their strategic value. The Club of Rome report, "The Limits of Growth", was published in 1972. This was rapidly followed by the sharp rise in oil prices in the wake of the first oil crisis in 1973. International awareness of the need for secure sources of strategic minerals intensified from this time on, as evidenced by the 1979 OECD report "Facing the future", and the Brandt reports. Secondly, by the early eighties, independent institutions and private individuals had publicly stressed the need for a minerals regime and published specific models to, ensure *inter alia*, environmental protection in the face of potential Antarctic exploitation. Thirdly, and even more importantly, the lengthy United Nations discussions on the "common heritage of mankind", especially in the context of the management of the world's oceans, has had a profound influence on decision-making at Treaty "club" meetings.

From its initial limited ambit (focused especially on the Deep Sea Bed), the concept of the "common heritage of mankind" has won increasing recognition amongst the international community, and is gradually being invoked in an increasingly wide range of circumstances. It has also now been applied expressly to Antarctica, as evidenced by the call of the representatives of Sri Lanka, at meetings (in 1975 and 1977) of the United Nations Conference on the Law of the Sea, for the "common heritage" principle to be applied to Antarctica as well. The statement of principles (in articles 136 to 149) — introducing Part XI of the Convention of the Law of the Sea (1982) — underlines the importance of the "common heritage" approach and provides evidence of the international recognition the concept has now been accorded. This lends considerable force to the call by non-Antarctic Treaty nations for the same principle to be applied to Antarctica. By 1980, the impact of these developments on the Antarctic Treaty "club" was clearly evident, for the "club" then pronounced itself "mindful of the negotiations that are taking place in the Third United Nations Conference on the Law of the Sea" (Eleventh consultative meeting, recommendations XI–I).

Bold initiatives to include Antarctica in "common heritage" discussions within the United Nations General Assembly were made by India as far back as 1956. The negative response to such requests by Treaty-bound members at the UN was initially successful in defusing attempts to draw Antarctica directly into this arena; the situation seems now to have changed for two main reasons. First, the nature of the United Nations has altered since 1956 and the time (1958–1961) when the Antarctic Treaty was being formulated. During that period, the United Nations was still dominated by the Western industrialized nations, especially the United States. Today, it is the domain of the more numerous Third World nations. Secondly, during this transition period of power redistribution, the major occupation of the United Nations as regards the common heritage concept became the cumbersome and protracted Law of the Sea negotiations (UNCLOS). As a result, the principal interests and energies of the least developed countries over the last decade have been directed towards guiding the UNCLOS III deliberations to a satisfactory conclusion. This has now been largely achieved; it is therefore not surprising that United Nations' attention is once again being directed towards Antarctica as part of the "common heritage of mankind".

The majority of nations — which are not bound by the Treaty — clearly regard the United Nations, (with its emphasis on the "common heritage" concept) as the appropriate negotiating forum for formulating a new regime to govern Antarctic affairs.

The fact that Antarctica was, for the first time ever, included on the United Nations General Assembly agenda for discussion in November 1983, underlines the significance of this Third World impetus and the strength of

feeling upon which it is predicated. The General Assembly debate which followed in due course was noteworthy for the number of countries (40) which participated in the discussion. The resolution finally adopted by the Assembly called for the preparation by the UN Secretary-General of a comprehensive, factual, and objective study on all aspects of Antarctica, which was discussed at the 39th session of the General Assembly, in November 1984. Almost all the consultative parties to the Antarctic Treaty supported such a study; and an item entitled "The Question of Antarctica" was included in the agenda for this 39th session.

These developments herald the possible beginning of major reassessment of the Antarctic Treaty and its ability to meet the challenges that lies ahead, particularly as regards minerals exploitation and management. It may be that a new dispensation can be achieved which will allocate the resources of Antarctica on equitable principles, founded upon the concept of the "common heritage of mankind". However, if the Treaty is to be successfully reformulated along these lines, there will have to be considerable "real estate" concessions and surrenders of power by the original guardians of Antarctica. Unfortunately, however, most Treaty "club" representatives believe it would be quite unrealistic to entertain the notion that sovereignty will be abandoned; it is considered unlikely that the consultative parties will make any significant concessions to the "common heritage" approach. Thus, the heart of the problem relating to Antarctic resources—the absence of consensus as to the legal status of the territory—is likely to remain untouched.

Today, there is no agreement amongst the nations of the world as to who, if anybody, owns the resources of Antarctica or can purport to exercise jurisdiction over its vast land mass. To make the moral issue yet more complex, moreover, the Antarctic Treaty "club" members believe that the majority of non-Antarctic Treaty nations at the UN discussions do not have the best interests of Antarctica at heart, and that these countries will therefore not adhere to voluntary restraints of the kind which the present Antarctic "guardians" have nurtured for the needs and benefit of this continent. In the light of these complexities, progress in establishing a viable minerals regime for Antarctica is likely to be tortuous and protracted.

Implications for South Africa

For South Africa the ultimate outcome of the present negotiations remains of vital importance. On the one hand, the continuation of the *modus operandi* of the Antarctic Treaty offers South Africa some unique opportunities in Antarctic and other international spheres of co-operation and relations.

The Antarctic Treaty, through its provisions for co-operation amongst Treaty members in the field of scientific research and logistic support for

such research, offers an opportunity for the improvement of bilateral relations between member countries. This is of particular importance for South Africa, as bilateral political relations with most, if not all, of the member countries are not very satisfactory and in some cases, for obvious reasons, non-existent. Moreover, co-operation within the Antarctic Treaty system also provides for the establishment of bilateral ties and co-operation which under other circumstances would not be approved of by the other signatories.

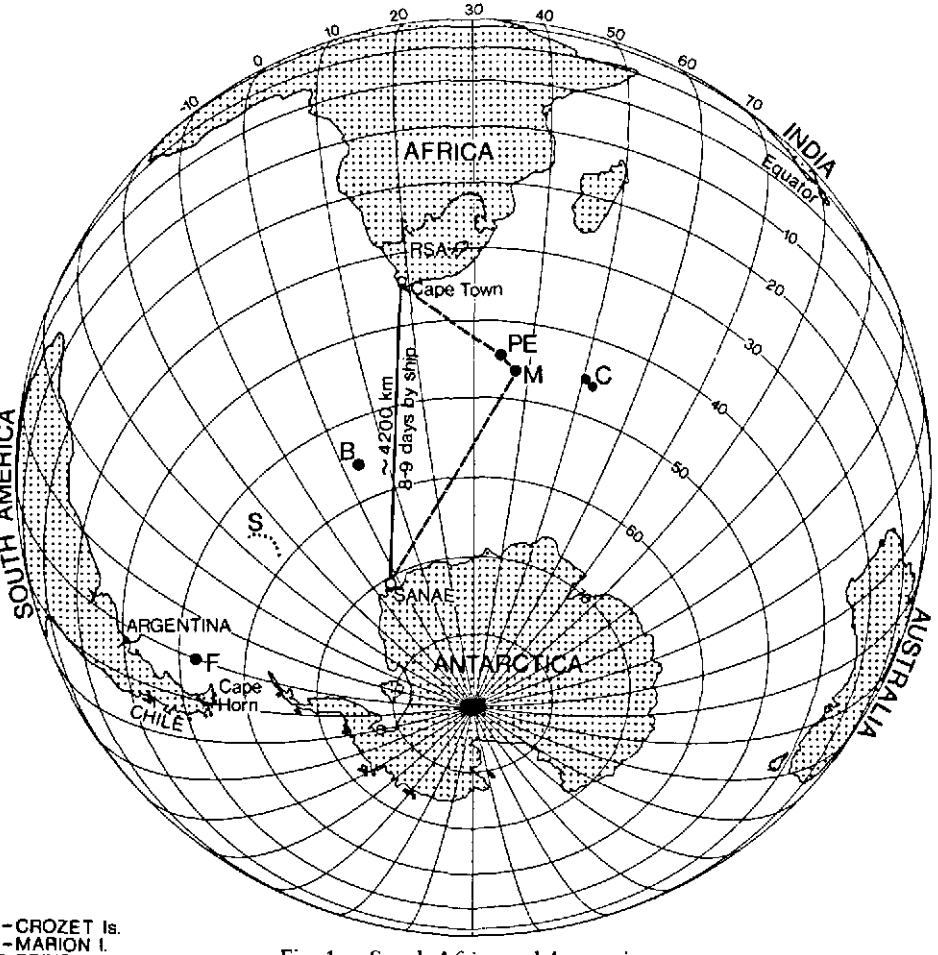
Co-operation in Antarctica in the field of science and logistics can only improve this position and lead to the establishment, however limited, of better relations between South Africa and other Treaty countries. In the interest of science and in support of South Africa's Antarctic effort, as well as in the interest of political relations, all forms of scientific and logistic co-operation therefore warrant careful nurturing by the South African authorities: by maintaining an active and prominent position within the present Antarctic Treaty, South Africa is also serving its interests beyond those of Antarctica.

On the other hand, if the present Antarctic Treaty nations should be willing to surrender their claims to sovereignty and/or overcome their distrust of other non-Treaty member states, this could lead to the recognition of Antarctica and its natural wealth as a "common heritage" of mankind. Another form of internationalized government of Antarctica would then become a distinct possibility. There are at least two good reasons why this might be a cause of concern for the South African authorities:

First, official demands for expulsion of South Africa from the Antarctic Treaty System would then be less likely to fall on deaf ears, as was the case following a recent demand for such a removal by some Caribbean nations within the UN forum.

More importantly, such a new basis for Antarctic government may well open the avenues for internationalized Antarctic mining of important strategic and industrial minerals from this continent. In that case, it is possible that further economic pressures could be brought to bear upon Pretoria to desist from its present racial policies by the threat to terminate the purchase of such minerals from South Africa and obtain supplies from Antarctica instead.

Readers who would like to pursue this subject further are referred to Dr de Wit's book: *Minerals and Mining in Antarctica: Science and Technology, Economics and Politics*, to be published later this year by Oxford University Press.



C – CROZET Is.
M – MARION I.
PE – PRINCE EDWARD I.
B – BOUVET I.
F – FALKLAND Is.
S – SOUTH SANDWICH Is.

Fig. 1. South Africa and Antarctica.

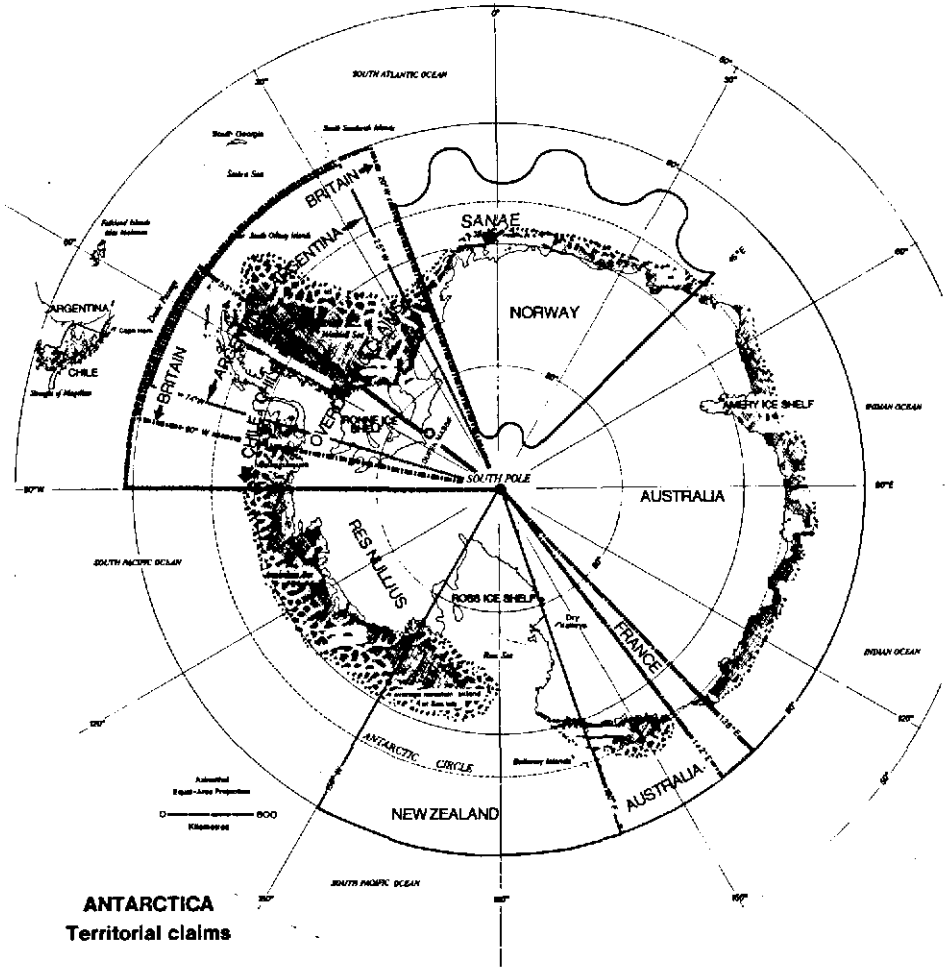

SOUTH ATLANTIC OCEAN
BRITAIN
SANAE
NORWAY
ARGENTINA
CHILE
BRITAIN
ARGENTINA
CHILE
QUEEN MAUD LAND
POLAR ICE CAP
SOUTH POLE
AUSTRALIA
AMERY ICE SHELF
INDIAN OCEAN
SOUTH PACIFIC OCEAN
RES NULLIUS
ROSS ICE SHELF
FRANCE
ANTARCTIC CIRCLE
AUSTRALIA
NEW ZEALAND
SOUTH PACIFIC OCEAN
ANTARCTICA
Territorial claims

Fig. 2.

Overview of Antarctic Treaty Membership and Antarctic Claims

Antarctic Treaty Membership — 32 Total (March 1985)

Consultative Members — Inner Circle, with Voting Rights (16)				Observational Members (16) (Status since 1983)
Founder Members (12)				
Claimants (7) (*)	Sectors Claimed (% of 360°)	Non-Claimants (5)	Adopted Members (4) (with date of adoption)	Acceded Members (15); Succeeded Members (1)* (with date of accession/succession)
Argentina (1943)	25°W–74°W (14 %)	Belgium	Brazil (1983) ←Brazil (1975)	Bulgaria (1978)
Australia (1933)	45°E–135°E and 142°E–160°E (30 %)	Japan	FRG (1981) ←Federal Rep. Germany (1979)	Czechoslovakia (1962)
Chile (1940)	90°W–53°W (10 %)	South Africa	India (1983) ←India (1983)	Denmark (1965)
France (1924)	136°E–142°E (2 %)	USSR	Poland (1977) ←Poland (1961)	Finland (1984)
New Zealand (1923)	160°E–150°W (14 %)	USA		German Democratic Rep. (1974)
Norway (1939)	20°W–45°E (18 %)			Hungary (1984)
United Kingdom (1908)	80°W–20°W (17 %)			Italy (1981)
				Netherlands (1967)
Total Area Claimed	(83 %)			Papua New Guinea (1981)*
Overlapping Claims				Peru (1981)
Chile–UK	80°W–53°W (8 %)			Republic of Cuba (1984)†
Argentina–UK	74°W–25°W (14 %)			Romania (1971)
Chile–Arg.–UK	74°W–53°W (6 %)			Peoples Rep. China (1983)
				Spain (1982)
Total Area Disputed	80°W–25°W (15 %)			Sweden (1984)
Unclaimed Territory	150°W–90°W (17 %)			Uruguay (1980)

International Composition of Antarctic Treaty Membership[ℓ] (number of countries; % of total)

	Voting Members	Total Members
United Nations	16; 100 %	32; 100 %
OECD	9; 56 %	15; 47 %
COMECON (CMEA)	2; 13 %	8; 25 %
Third World		
$230 } Average GNP/Capita	1; 6 %	2; 6 %
$477 } (US$ 1979)	1; 6 %	3; 9 %
$1 590 } (World Bank 1982b)†	5; 31 %	10; 31 %
Group 77	4; 25 %	9; 28 %
Non Aligned	2; 13 %	4; 13 %
EEC	4; 25 %	8; 25 %
OAS	4; 25 %	6; 19 %
OPEC and OAU	0	0

Antarctic Treaty: Signed 1 December 1959; entry into force 23 June 1961. Ratified by all 12 original signatories.
Area of Application: South of 60°S. Latitude, including ice shelves, without prejudice to International high seas rights.
* Date of claims consolidated; (ℓ) Source: Europa Year Book (1983); Yearbook of International Organizations 1983/1984.
† Cuba.
Acronyms: Comecon — Council for Mutual Economic Assistance — planned economic development; EEC — European Economic Community; OAS — Organization for American States; OPEC — Organization of Petroleum Exporting Countries; OAU — Organization of African Unity; OECD — Organization for Economic Co-operation and Development.

Fig. 3.

Clare Dillon

Innocent Passage in South African Territorial Waters

On 28 December 1984 the Marine Traffic Act of 1981 came into force in the Republic.[1] The provisions of the Act are intended to regulate shipping in South African territorial waters and are mainly directed towards the right of innocent passage through those waters. Although the Act, in its amended form, has clearly been drafted with reference to the 1982 Law of the Sea Convention,[2] of which South Africa is a signatory,[3] the definition of passage which is not innocent appears to go further than that contained in the Convention. Whether or not the South African interpretation of innocence in this context is acceptable, as being in line with current thinking internationally, is not without doubt.

The Geneva Convention on the Territorial Sea and Contiguous Zone 1958 provides:

> (1) The sovereignty of a state extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.
>
> (2) This sovereignty is exercised subject to the provisions of these articles and to other rules of international law.[4]

The precise width of that belt of sea has been one of the most vigorously and consistently debated topics in the Law of the Sea. It was because no general consensus could be reached that the 1958 Convention remained silent on the matter. However, article 3 of the Law of the Sea Convention allows a state to establish the breadth of its territorial sea up to a limit of twelve nautical miles. This represents a compromise which corresponds with increasing practice by states which indicates a wish to extend their control over a greater area of their coastal waters.[5] Over one hundred states now claim a territorial sea of twelve miles and it has been said that such claims have already brought about a hardening of the rule into customary international law.[6] South Africa is amongst those states claiming a territorial sea of twelve miles.[7]

The Territorial Sea Convention indicates that the sovereignty of a state over its territorial waters may be exercised subject to the provisions of the Convention and to other rules of international law. The main limitation on

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such sovereignty is the right of innocent passage which means that a coastal state must allow the innocent passage of foreign merchant ships through its territorial waters. In other respects the coastal state's jurisdiction in the territorial sea is not affected.[8] It is in relation to innocent passage that the distinction between territorial and internal waters may be found, since a state may exclude foreign vessels from the latter.[9]

Innocent passage is a concept which has resulted in a balancing of the conflicting interests of the requirements of sea communication, on the one hand, and the coastal state, on the other. It has been pointed out that almost all countries depend on shipping for most of their trade and therefore have an interest in maintaining maximum freedom of movement; in addition good seamanship demands that ships keep within twelve miles of convenient coasts " . . . because position fixes are more easily obtained, the weather is likely to be better, adverse currents such as the Agulhas currents can be avoided, and the voyage can be more economical, not only because it is shortened but also because of load capacity: for example, a ship that rounds the Cape of Good Hope more than fifteen miles off-shore crosses into the winter load-line zone."[10] Against this must be weighed the rights of states to regulate activities in their coastal waters. The reconciliation between this clash of interests, in the form of the right, or privilege, of innocent passage has been long established.[11] In 1927, the right was described as needing " . . . no supporting argument or citation of authority; it is firmly established in international law."[12]

The coastal state has absolute sovereignty in its territorial waters subject to the right of innocent passage. Once passage is no longer innocent the right is forfeited and the offending ship may be excluded. Both the Territorial Sea Convention and the Law of the Sea Convention entitle a state to take "the necessary steps" to prevent passage which is not innocent.[13] The type and extent of these steps is not defined but it is probable that they are not limited to merely excluding the particular vessel from the territorial waters, and would include a power of arrest if the circumstances demand it.[14]

It is readily apparent from this definition that innocent passage comprises two elements: the route taken and the purpose or nature of the voyage. In the 1982 Convention, which preserves the right of innocent passage, the definitions of "passage" and "innocent passage" are now dealt with in separate articles.[15] Passage, the route taken, gives little problem. Paragraphs 2 and 3 of the Territorial Sea Convention have been extended to include traversing the territorial sea without entering internal waters " . . . or calling at a roadstead or port facility outside territorial waters" and to proceeding to or from a call at such roadstead or port facility; stopping and anchoring is now specifically permitted " . . . for the purpose of rendering assistance to persons, ships or aircraft in danger or distress."[16] The extended meaning of passage has been incorporated into the Marine Traffic Act 1981, although it

should be noted that there it is also required that navigation be " . . . on a normal and customary route."[17]

The matter of the nature of the passage is far more troublesome. Innocent passage is defined in Article 14 of the Territorial Sea Convention as follows:

1. Subject to the provisions of these articles, ships of all states, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.
2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.
3. Passage includes stopping and anchoring, but only insofar as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress.
4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. Such passage shall take place in conformity with these articles and with other rules of international law.
5. Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal state may make and publish in order to prevent these vessels from fishing in the territorial sea.
6. Submarines are required to navigate on the surface and to show their flag.

The first point that should be made is that failure to comply with the laws and regulations of the coastal state will not necessarily mean that passage is no longer innocent. Paragraph 4 of Article 14 requires that passage take place in conformity with Articles of the Convention and with other rules of international law.[18] One of the Articles which must consequently be complied with is Article 17 which states that foreign ships exercising the right of innocent passage do so in accordance with laws and regulations enacted by the coastal state in conformity with the articles and other rules of international law and " . . . in particular, with such laws and regulations relating to transport and navigation."[19] If a breach of such laws or regulations is committed by a passing ship it means that the laws of the coastal state will govern the offences, but innocence will only be lost if the breach is also prejudicial to the coastal state's interests. It should be noted, however, that the exercise of the coastal state's criminal jurisdiction is limited by Article 19, which only permits that state to take action if the consequences of the crime extends to the coastal state; if the crime is of a kind to disturb the peace of the country or the territorial sea; if the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag she flies; or, if it is necessary for the suppression of illicit traffic in narcotic drugs.[20] The only instance where breach of the coastal state's laws or regulations will automatically result in loss of innocence of the passage is that provided for in Paragraph 5 of Article 4, namely a violation of such laws relating to foreign fishing vessels.[21]

Thus, according to the Territorial Sea Convention, passage will not be innocent if it is prejudicial to the peace, good order or security of the coastal state. The phrase "peace, good order or security" defies specific interpretation and would, at first sight, appear to encompass almost anything. Fitzmaurice has described it as " . . . affording a variety of possible pretexts for prohibiting or impeding passage."[22] The Law of the Sea Convention 1982 has attempted to define what would be considered prejudicial to the peace, good order and security of the coastal state. Article 19(2) states that passage will be considered to be so prejudicial if the ship in question engages in any of the following activities:

(*a*) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal state, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
(*b*) any exercise or practice with weapons of any kind;
(*c*) any act aimed at collecting information to the prejudice of the defence or security of the coastal state;
(*d*) any act of propaganda aimed at affecting the defence or security of the coastal state;
(*e*) the launching, landing or taking on board of any aircraft;
(*f*) the launching, landing or taking on board of any military device;
(*g*) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal state;
(*h*) any act of wilful and serious pollution contrary to this convention;
(*i*) any fishing activities;
(*j*) the carrying out of research or survey activities;
(*k*) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal state;
(*l*) any other activity not having a direct bearing on passage.

It was hoped that this extended definition of passage which is not innocent would provide more objectivity and reduce the number of "plausible pretexts" on which a state could abuse the right.[23] However, it is submitted that the new definition takes the position under the 1958 Convention very little further. The majority of the listed activities would, in any event, be considered to have fallen within the scope of passage which is prejudicial to the peace, good order and security of the coastal state. Paragraph (2) (*l*) is a catch-all provision which will now cover any activity not having a direct bearing on passage, whether it is prejudicial to the peace, good order and security of the coastal state or not.[24]

In general, it may be said that innocence is still dependent on the notion of prejudice to the coastal state rather than upon compliance with local laws and regulations. It has been suggested that this approach results in emphasis being

placed on the manner in which passage is carried out rather than such things as the object of the voyage, the cargo carried or the ultimate destination, and would therefore not allow for an interpretation of non-innocence where, for example, weapons are carried to a state helping guerrillas operating against the coastal state.[25] The words have been interpreted by others to extend to the object of the voyage.[26] O'Connell lists four tests for non-innocence representing the variety of views held on the matter. One such view is that passage will be non-innocent if the ship, whatever the intention, or whatever acts are done or not done, is a danger to the coastal state because of its cargo or the persons aboard. He says that this test is appropriate where the objective in assessing innocence is to prohibit entry into the territorial sea.[27] This view would, however, not appear to cover a situation where the cargo or persons concerned present no danger to the coastal state while in passage through the territorial sea.

The South African Marine Traffic Act 1981 provides that:

> . . . the passage of a ship which carries or has on board in the territorial waters cargo or any appliance or apparatus the use of which or persons who may constitute a threat against the sovereignty, territorial integrity or political independence of the Republic, shall be deemed to be not innocent, and that ship and cargo and those persons may be dealt with as provided by section 9.[28]

This section clearly allows for a much wider concept of non-innocent passage than that contained in Article 19 of the 1982 Convention; non-innocence is defined in terms of cargo or persons carried and requires no actual threat or use of force in terms of Article 19(2)(a) while in the territorial sea or indeed any other "activity" in terms of Article 19(2)(*l*). It is submitted that neither the 1958 Territorial Sea Convention nor the 1982 Convention can be said to permit such a wide interpretation of what may be considered as prejudicial to the peace, good order or security of the coastal state. Indeed, Article 19 appears to reinforce the notion that some activity or purpose unconnected with the passage itself is necessary to render passage non-innocent. Obviously, many of the activities which could possibly be engaged in by unfriendly states while passing through the territorial sea may be prevented on the ground that innocence has been lost, and on the loss of innocence the ship in question will be subject to the jurisdiction of the coastal state in the same way as if it were in internal waters.

Although a South African municipal court would be bound to follow the wide definition of non-innocent passage contained in the Marine Traffic Act, it is certainly arguable that, in the event of an international dispute over interference with shipping in the territorial waters on this basis, it might not be possible to justify the action in terms of customary international law. Nevertheless, in appropriate circumstances, it may be possible to argue that there is ground for interference with a ship in innocent passage on the basis of

self-defence; for example, to seize a cargo of explosives on their way to rebel groups in a neighbouring country. This argument was put forward by France in the 1950s, when she seized ships carrying arms to rebels in Algeria; the situation was different, however, in that the seizure took place on the High Seas and it was asserted that France had violated international law.[29] Of course, if self-defence is claimed, the strict rules relating to self-defence would have to be complied with.[30]

Footnotes

1. No. 2 of 1981 as amended by the Marine Traffic Amendment Act No. 5 of 1983; Proc 211 GG 9538 of 28-12-1984.
2. United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, not in force.
3. For a brief treatment of the legal consequences of signature see F.M. Luyt "Signature and Ratification: A Brief Note" *Sea Changes* (1) 1985 124.
4. Act 1.
5. Churchill and Lowe *The Law of the Sea* 1983 pp. 60–61.
6. See e.g. D.J. Devine "Some observations on South African Maritime Zone Legislation" *Sea Changes* (1) 1985 107 at n 1.
7. Territorial Waters Act 87 of 1963 as amended by Territorial Waters Amendment Act 98 of 1977, s 2.
8. See e.g. Churchill and Lowe *supra* 68.
9. Except possibly in the case of international maritime ports (see McDougal and Burke *The Public Order of the Oceans* 1962 109–116. Greig *International Law* 2 ed (1976) 283–284 and probably in the case of vessels in distress (see Churchill and Lowe *supra* 46–47).
10. D.P. O'Connell *The International Law of the Sea* 1982 I.A. Shearer (ed) vol. 1, 259.
11. For a concise history of the development of the concept see O'Connell *supra* 260–268.
12. Jessup *The Law of Territorial Waters and Maritime Jurisdiction* (1927) 120.
13. Art 16(1) Territorial Sea Convention 1958; Art 25(1) Law of the Sea Convention 1982.
14. For discussion on this point see Greig *supra* 292–293; Churchill and Lowe *supra* 68, 78; Sir Gerald Fitzmaurice "Some Results of the Geneva Conference on the Law of the Sea" *ICLQ* 1959 vol. 8 91–97.
15. Arts 17, 18, 19.
16. Art 8 Law of the Sea Convention 1982.
17. S 1 (as amended).
18. This is repeated in Art 19 Law of the Sea Convention 1982.
19. Cf Art 21 Law of the Sea Convention 1982.
20. Cf Art 27 Law of the Sea Convention 1982.

21. See Churchill and Lowe *supra* 68 where it is indicated that such laws need not relate only to fishing activities but would include such matters of storage of nets while the vessel is in transit.
22. *supra* 96.
23. See e.g. Churchill and Lowe *supra* 67.
24. Churchill and Lowe *supra* 67.
25. Brownlie *Principles of Public International Law* 2 ed. (1973) 205, and see the *Corfu Channel Case* ICJ Rep 1949, 4 at 30 where more emphasis was placed on the manner than the object of the voyage.
26. See e.g. Fitzmaurice *supra* 95–96; Sorensen 101 Hague Recueil (1960 II) 188; McDougal and Burke *supra* 258.
27. O'Connell *supra* 271–273.
28. S 8 (as amended).
29. See M.M. Whiteman *Digest of International Law* 1965 vol. 4 513–514.
30. On the right of self-defence in general, see e.g. Harris *Cases and Materials on International Law* 3 ed 1983 655–674.

Book Reviews

UP AGAINST THE FENCES: POVERTY, PASSES AND PRIVILEGE IN SOUTH AFRICA
Edited by Hermann Giliomee and Lawrence Schlemmer (David Philip: Cape Town and Johannesburg 1985).

Up Against the Fences is an excellent book. Unlike most collections of articles which are written by different authors it has coherence and an evenness of quality, and it gives a rounded overview of the issues involved. While the focus of attention is South Africa there is a recognition from the beginning that rapid urbanization — with its shanty towns, its poverty, and its impact on the rural as well as the urban economy — is a global phenomenon. Within the South African setting the main themes of the articles are the increasing urbanization of blacks, and the impact that this is having on "the homelands" — the rural base from which black labour has traditionally been drawn. The articles are divided into four main groups (rural underdevelopment; influx control and black urbanization; government policies; and the response of the private sector) followed by an overview from the editors. The book not only seeks to analyse past and present policies but to prescribe action for the future.

In the past the South African Government has sought to control and restrict the number and rights of blacks living in urban areas through a series of formal and informal steps. These have included the influx control laws which limit the right to urban residence; the bureaucratic allocation of work through the labour bureaux; restrictions on the building of urban dwellings and property holding rights; and the resettlement and repatriation of "illegal" blacks back to the homelands. The scale of the operation has been immense. In 1983 alone there were more than a quarter of a million prosecutions for breaches of the influx control laws, and many tens of thousands of people were forcibly removed in resettlement schemes. This involves a vast government apparatus of police and officials as well as disrupting the lives of so many Africans. The restrictions have been so comprehensive that the authorities must perceive virtually every urban black as a potential or actual law breaker. Yet despite all the government's endeavours, sustained over generations, the clear message of these studies is that the policies have failed and been harmful both socially and economically. The editors found that not only were the restrictions unpopular with blacks (even those with rights to permanent residence in urban areas) but they could find no academic who was prepared to defend them. Canute-like the government has tried by decree to turn a rising tide — in this case the tide of blacks who have been moving to the cities and towns of "white" South Africa, partly because of the pull of jobs and opportunities in the urban areas and partly from the push of overcrowding and underemployment in the rural setting.

While the urbanization of blacks has been an issue of considerable political controversy in South Africa, scholars have paid it relatively less attention. This book helps to remedy that by pointing up the main issues and demonstrating their scope and complexity. A brief mention of some of the articles will serve to illustrate this. Francis Wilson in his study of the relationship between mineral development and rural poverty traces the way the mining industry has helped to determine the nature and even the boundaries of the black homelands. Looking to the future he recognises that the replacement of the migratory labour system is long overdue, but he warns against the danger of even greater of the rural areas future—simply forgetting about them—because they will not be required for the recruitment of labour. Laurence Schlemmer and Valerie Moller have used attitude surveys in their article on the personal responses of the workers to their position, and, among other things, they found a high level of personal strain and anxiety. Nancy Charlton has made a detailed study of resettlement in the Ciskei where she concluded that the process is economically and socially destructive for the individuals and the society in general. Of the people resettled she says that many of them become "non-productive appendages of the State" (p. 263). In the section written by those working in private industry, Gavin Relly, the Chairman of the Anglo-American Corporation, argues that economic imperatives will be the main determinant of the country's future and if that fact is accepted and not resisted (including acceptance of a much freer movement of labour), all will benefit. While Relly does not underestimate the problems of rapid urbanization and political rights for blacks he argues that "planners must respond to the needs of people, not the other way round" (p. 299).

Relly's comments about responding to the needs of people are at the heart of the government's problems. Relly writes as though there is a generally agreed position but that is not the case. While there is a coincidence of interests between blacks moving into the urban areas and business concerns eager to have a free labour market, which they argue will be not only cheaper but more efficient, these interests are not shared by the "right wing" white opposition to the government. It wants to retain strict control of the movement of people, to deny blacks rights in urban areas, and to return increasing numbers of blacks to the homelands. A government struggling to retain white support, while introducing reforms, cannot afford to ignore that. To survive it must carry the white electorate with it, and that has been made more difficult by the recent disturbances in the black townships. The problems for the government of retaining both white electoral support and order within the black townships, are mentioned in the book but they are not central to it. For the government, however, they have to be central concerns.

There are therefore issues which inevitably cannot be covered adequately

in this study but overall it is a major contribution to a set of problems which has plagued South Africa in the past, and, with a rapidly increasing black population, will plague it even more in the future.

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ROOTS OF REVOLUTION: AN INTERPRETIVE HISTORY OF MODERN IRAN
Nikki R. Keddie with a section by Yann Richard
Yale University Press, 1981, 321 pp.

Nikkie R. Keddie is Professor of History at the University of California, Los Angeles and engaged in research and study on Iranian history and politics over more than two decades. She is author of nine books on modern Iran and the Middle East. In 1981 she was President of the Middle East Studies Association of North America. Apart from a number of printing errors and the absence of any indication that it is the section on modern Iranian political thought that was written by Yann Richard, the book is well-produced and provided with useful notes and bibliographies for those who want to pursue further research on specific topics.

The book was completed in March 1981. One of the problems with writing a book on a country in the process of radical change is that circumstances and personalities appear and disappear at such a rate that information becomes outdated almost before printing. In this case Abolhasan Bani Sadr, pictured on the cover in the company of Imam Khomaini, has since become a *persona non grata* living in exile in Paris. Nevertheless this study remains most relevant for a proper understanding of events in revolutionary Iran.

With the advantage of hindsight Keddie could indicate the remarkable role of the *ulama* (religious courts composed of Islamic authorities who determine the application of Islamic practices to daily life) in the political affairs of Iran over many years preceding the Islamic revolution. In some ways Iran's recent "Islamic Revival" is very new, with ideas never voiced before. In other ways it follows a long tradition in both Iran and in the Muslim world of expressing socio-economic and cultural grievances in the only way familiar to most people—a religious idiom arraying the forces of good against the forces of evil and promising to bring justice to the oppressed. The idea that rulers who have abandoned justice for oppression are following their own will, not God's, is natural to Shi'i thought.

A noteworthy aspect of the book is the continuous attention paid to the

position of women in Iranian society. It is more so since women are normally neglected in a political evaluation of a system in which Islam plays a dominant role. Keddie, being a woman herself, is in a favourable position to expose this aspect of the revolution with authority. She notes the significant role of the wide network of educated women *mollas* who cater to women's religious gatherings and ceremonies, giving readings and commentaries on the Quran and telling stories from the lives of *imams*. Peasant women do hard physical work and reports from the nineteenth century indicate that they were mostly unveiled. Veiling has been mainly an urban phenomenon. There were also professional women who served the needs of other women, like midwives, ambulant saleswomen who visited women at home, healers and others. Some women at the court had great power, especially queen mothers and favourite wives. On less elite levels ordinary women were often prominent in bread riots and other urban movements. This tradition was carried forward in their significant participation in the Tobacco Protest of 1891–1892, the Constitutional Revolution of 1905–1911, and especially the Revolution of 1978–1979. An early nineteenth-century treatise written by a woman of the educated upper class tells other women how to flirt, fool, or get around their husbands, and engage in other dubious pleasurable activities! Women's lives had more variation and possibilities for fulfilment than are acknowledged in the usual Western stereotypes about Muslim women.

The involvement of *ulama* in state affairs also has a long history in Iran. Under the first Safavid rulers the theologians who were paid by the government, were a firm pillar of political support. In the first constitution drafted in 1906 and 1907 provision was made for a group of *mujtahids* to pass on the compatibility of laws with Islam. The *ulama*, however, were not always in opposition to the Shah or in support of concessions proposed by the Shah, on behalf of the people. In May 1960, opposition by big landlords and important *ulama*, led by Ayatollah Borujerdi at Qom, brought such substantial amendment to a bill for land reform, that by the time it passed it was so full of exceptions as to be virtually meaningless. Borujerdi's declaration against it helped make it a dead letter. This was nevertheless his only important anti-regima *fatwa*. The sole *marja'-e taqlid* (source of imitation) until his death in 1961, he was not unfriendly to the Shah. In the Mosaddeq period and subsequently, some leading *ulama* had at first been pro-Mosaddeq, but had then backed off from opposition to the Shah's regime and had become relatively pro-Shah because they had feared the rise in secularist and Communist power under Mosaddeq. In the late 1950s Ayatollah Khomaini himself was closely associated with Borujerdi at Qom and politically rather quietist. Interestingly, even in a violent attack on the Shah delivered on 3 June 1963, he, like most of his colleagues, at this time presented himself as a defender of the (monarchical) constitution. Grand Ayatollah Shariatmadari indicated that, unlike Khomaini, he was not against a

constitutional monarchy with *mujtahids* participating in power. Together with several top *ayatollahs* he was pressured into silence in 1980.

Some *ulama* like Afghani, one of the precursors of the revolution in Iran, have in fact been secret secularists who used a religious guise in order effectively to arouse large masses of people. A leading theoretician of the revolution, Shariati was far more opposed to the average cleric than is often admitted. The immense appeal that Shariati had for students and young Muslims is partly to be explained by the originality of his position. Coming from a modest background he acquired, through his studies in France, knowledge of modern ideologies, including liberalism, capitalism, marxism, and existentialism, without ceasing to be a believer. Speaking a language accessible to Iranians who had only recently come to modern studies and who wished to understand, in order to refute, the ideologies of Western aggressors, he became celebrated by meeting their needs. He detached himself from the petrified official Islam rejected by idealistic youth, and he brought a new and combative meaning to Shi'i concepts. Even prayer in this renovated Islam took on a political meaning, tied to action. He wished to have an Islam without *ulama*.

The roots of Iranian disillusionment with the West lies in the 19th century, when Russia was involved in the first important anti-foreign incident of religious inspiration, which embodied the resentment of many Iranians against their treatment by Western powers. The incident reminds one of the 1979–1981 American Embassy hostage crisis. It involved a Russian mission, led by Griboyedov in 1829, which forced its way into impregnable harems and took away women reported to be Christians to question them as to where they wished to live. Following a *fatwa* (religious decree) by one of the Tehran *ulama* declaring the rescue of Muslim women as lawful, an uncontrollable crowd killed the whole mission, after Russian Cossacks shot a boy.

Ever since the Napoleonic Wars Iran had became more and more under the control of Great Britain and Russia, maintaining a *purely formal* independence. From 1920 onwards British control was replaced by American subversion. Thus the United States Central Intelligence Agency overthrew the popular Mosaddeq government in August 1953. The result was that 50 per cent of the profits, as well as effective control of oil production and marketing came into the hands of the foreign powers. Mosaddeq had worked to limit the shah's powers as intended by the 1906–1907 constitution, but although he succeeded in other spheres, he did not in the military. Mosaddeq's defence of Iran's independence, his defiance of the oil companies, his charisma, and his overthrow (with American and British support), helped make him an enduring national hero. The hatred of a group like the Bahai's derives from their being regarded as agents of Western imperialism. Iranians see these foreign powers as using them for their own purposes.

The main characteristic of Reza Shah's dictatorship from 1953–1970 was that the United States became the dominant foreign power in Iran through its stake in the oil consortium, its virtual monopoly of military supplies and advisers and involvement in many private and governmental programmes. Secondly, earlier hopes that the United States might help in supporting a more democratic government in Iran declined. Thirdly, the Shah himself was increasingly prepared to engage in repressive and dictatorial acts, covered over by superficially democratic or Western forms. Fourthly, from the 1950s onwards the Shah showed a growing interest in modernizing Iran's economy and society and in making the country Western in character and militarily strong. Fifthly, opposition was dealt with either by repression including jailing, torture and killing or co-optation of opponents in the government. Sixthly, after the Mosaddeq experience the Shah set up the large organization known by the acronym SAVAK in 1957 with the aid of the American CIA and the Israeli Mossad. Seventhly, as the Shah built up his autocratic powers and associated opposition with disloyalty or treason, his retinue hesitated to confront him with uncomfortable facts. Without anyone to contradict him, he may have really believed the picture he presented in his words and books of himself as an enlightened ruler leading his people to a better life in a strong, independent Iran. Eighthly, the vast majority of Iranians ultimately became more anti-Western, and more subject to the influence of opponents of the regime who stood against the Shah, the West, and Western ideas.

In a period when all society was at least formally Islamic, it was natural for many thinkers to blame Iran's problems on Islam and the Arabs, and to see in a nationalist interpretation of the distant Iranian past virtues that were often modern or Western ones. As Iran became more modern and Westernized, the evils of indiscriminate Westernization more obvious, and as Islamic ways for some receded into the background, it was natural for many after 1960 to blame evils on Western ways and to turn for salvation to an idealized Islamic past. The weakness of Shi'i ideology, according to Yann Richard, is that of all apologists — namely, they try to show that their religion has provided in advance the key to all difficulties.

Ironically, as Keddie convincingly indicates, the Carter human-rights programme encouraged opposition to the Shah. She examines the grounds for the Shah's conviction that the United States collaborated with the rebels in Iran to bring about the Islamic Revolution and the end of his rule and explains why he did not use his powerful army to maintain his authority. She indicates that minorities for whom Persian is a second language apparently constitute slightly over half of Iran's population which makes Khomaini's hold over them less natural. She argues that Khomaini's anti-imperialist and anti-Western sentiments sometimes outweigh his respect for Islamic law. She compares Iran's religio-political movement to that of other Muslim countries like Libya, Pakistan, Saudi Arabia and Egypt.

Her observations on the relationship between religion and politics and socio-economic affairs are valid not only for Iran but also for the Middle East and North Africa as a whole.

Written with humour and shrewd insight and combined with great learning *Roots of Revolution* is a fascinating and well-informed account of Iran's political and cultural evolution in recent centuries. It also contains much food for thought on the general progress of revolutionary action in a country where a large part of the population feels itself to be oppressed and excluded from the decision making process. For this reason alone it deserves a wider readership than those with a special interest in Middle Eastern affairs.

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