

# POLITICS BY OTHER MEANS

LAW IN THE STRUGGLE  
AGAINST APARTHEID, 1980-1994



# RICHARD L. ABEL

■ AFTER THE LAW

■ A F T E R T H E L A W

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# **POLITICS BY OTHER MEANS**

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APARTHEID, 1980–1994**

■ **RICHARD L. ABEL**

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WITH A FOREWORD BY NELSON MANDELA

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## FOREWORD

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BY NELSON MANDELA

This book documents the diverse struggles of the people of South Africa to resist and challenge the policies and practices of legalized racism, known as apartheid. In particular, the book reveals the significant part played by the law and the lawyers in these struggles. That some lawyers played a crucial role in these struggles is evident in this collection and indicates that these lawyers had more than a narrow professional concern for their clients. They employed their ingenuity in prying open the ever-widening cracks of apartheid's legal edifice.

This book, however, also documents the hardships endured and the courage displayed by many ordinary South Africans. Above all, it reveals that these South Africans had and have an enduring faith in justice. Our collective triumph in establishing a just and non-racial democracy, based on the rule of law, owes as much to these ordinary people as to their political and legal representatives, if not more. It is their consistent demand for justice, in the face of injustice, that now informs our constitutional vision.

## FOREWORD

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BY JOHN DUGARD

South Africa now has a Constitution with a Bill of Rights protected by a Constitutional Court representative of all the people of the land. The Constitution is a response to apartheid, and memories of past injustices have guided those who drafted its provisions.

Apartheid was not merely a flawed and failed political policy, as some have suggested, but also an evil ideology. Fortunately, it was abandoned by its architects without war or bloody revolution, which has undoubtedly facilitated the process of healing. At the same time, the peaceful fall of apartheid has encouraged forgetfulness. For many, in the words of the novelist L. P. Hartley, "the past is a foreign country; they [did] things differently there." The foreign country that was the apartheid state is thus fast being forgotten.

Already, South African lawyers and scholars, excited by their new Constitution and the challenge of constitutional litigation, have started to address the future with little regard for the past. This makes the appearance of the present study both timely and necessary, for it reminds us of our recent history and of the legacy that we will have to overcome if we are to build a decent society.

Law played a pivotal role in the apartheid state. Racial discrimination and political repression were not practiced outside the law in an arbitrary and unregulated manner. On the contrary, racial injustice was perpetrated in accordance with legal rules, and political repression was administered according to carefully defined legal procedures. There was respect for rules of law, but not for the Rule of Law. These legal rules, abhorrent as they were, provided some opportunities for relief. Some good was to be found in the interstices of the laws of apartheid. This meant that while the law generally served as an instrument of oppression, on occasion it might present a salvation for the oppressed. It was both foe and friend.

Such was the anomaly of the apartheid state. And it is this anomaly that Abel portrays in ten case studies about the struggle of lawyers against the law in the last decade of apartheid. Abel's selection includes the pass laws, territorial apartheid, labor disputes, torture, censorship, conscription, and

treason. Each case is examined in careful detail so as to provide a complete picture of the law, its socio-political impact, the opportunities it provided for creative lawyering, and the strategies employed by lawyers and community to obstruct the consequences of the law. Together these studies provide a comprehensive overview of apartheid through the eyes of one of today's leading exponents of sociological jurisprudence.

This study is about the role of law in an unjust society. It is about the role that lawyers may play in an unjust society. It is about how lawyers may advance the cause of justice without a Bill of Rights or a "human-rights-friendly" Constitution. On the face of it, it is about that peculiar society that was Apartheid South Africa. But its lesson goes beyond South Africa, for many of the issues explored by Abel are not confined by place or time. They are universal jurisprudential issues that must be perpetually re-examined and re-assessed if law is to be brought closer to justice.

## FOREWORD

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BY GEOFFREY BUDLENDER

South Africa in the 1980s presented a paradox. On one hand, a repressive state systematically discriminated against the majority of its citizens, even to the extent of declaring that some of them were not citizens at all. On the other, there was an extensive and active human rights “industry,” apparently thriving under these conditions.

The major source of the paradox is that the repression and discrimination were, for the most part, carried out through the mechanism of law. This book explains the nature of this paradox and demonstrates how it worked in practice. If the state is to use law to legitimize oppression then, in the words of E. P. Thompson:

The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion by actually *being* just.<sup>1</sup>

Lawyers in South Africa sought to exploit this internal tension in the use of law as a means of enforcing and legitimizing unjust power.

In reviewing those areas where there was success in this enterprise, it is necessary to analyze what distinguished the successes from the failures.

In the first instance, there was clearly no possibility of success if the legal attack threatened the very foundations of the system. A technically valid attack on the legality of racial discrimination per se, or on the constitutional foundations of the state, would have been either rejected by the courts or (if upheld) promptly reversed by legislation. The court’s acquiescence to the government’s abuses during the state of emergency shows once again that when courts perceive that “society” is under attack, they tend to close ranks with those in power. It is particularly striking that the reactionary position of the courts on “security” issues coincided with a more open-minded approach on racial issues, as shown by some of the cases described in this book.

Secondly, the legal work was most successful when its strategies were used in support of mass movements. At the obvious level, no number of suc-

successful court challenges could have stopped the removal of Oukasie (Chapter 12) if the authorities had succeeded in bullying the residents into abandoning their homes. But more fundamentally, what breathed life into all of the successful legal work was a spirit of resistance and a rejection of unjust rule. It was the resistance and courage of the women of KwaNdebele that toppled the despots in that homeland (Chapter 11). Law was simply the mechanism that happened to be available because of the paradox of the South African legal system.

Thirdly, it was local and international opposition to apartheid that made it more difficult for government to reverse through law the gains that had been achieved through law. I have little doubt that if the successes in the “pass law” cases (Chapter 3) had been achieved in the early 1970s, they would promptly have been overturned through legislation. The reason this did not happen in the 1980s was due to the government’s need and desire, at a time of growing local and international pressure, not to be seen to be acting in a reactionary or regressive manner.

This book vividly demonstrates the interplay between law and politics in a repressive society. We South Africans have reason to be grateful for the skill and care with which Rick Abel has analyzed the use of law in the struggle against apartheid. But I believe that this work has a significance that goes beyond South Africa. It speaks directly and in a telling manner to all who are concerned with the uses and limits of law and lawyers in fighting injustice.

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## PREFACE

During one of my field trips to South Africa it struck me for the first time that I had reached the furthest inhabited place on earth from my home in Los Angeles. Some explanation seemed in order for why I had embarked on this project.

Like many Americans reaching adulthood in the early 1960s, I saw the newly independent African nations as enormously hopeful and exciting. After law school I studied African law at the School of Oriental and African Studies in London and conducted research in Kenya on how the transformation of its judicial system had affected customary law. But when I returned to teach law in the United States I drifted out of African studies. American law students were uninterested. And I could neither uproot my family nor leave it for long periods.

At the end of the 1980s, when I finished a lengthy research project and my youngest daughter was about to go to college, I considered what to do next. I had long been interested in the relationship between law and fundamental social change. But most of the countries engaged in radical experiments did not speak English, and I had become resigned to incorrigible monolingualism. When I put a grid over the world with two variables—revolution and English—they crossed only in South Africa.

I had three reservations. If my concern was racism, there was plenty to study at home. I accept the criticism that my fascination with South Africa contains elements of escapism and exoticism. Yet the value of comparing the American and South African experiences is vividly illustrated by the work of historian George Frederickson and Judge Leon Higginbotham. The second objection was the cultural boycott. Talks with several ANC leaders—Kader Asmal, Aziz Pahad, and Albie Sachs—convinced me that the boycott was not intended to prevent research on the role of law in the struggle against apartheid. Finally, I worried about intellectual imperialism. Surely the South African human rights lawyers could tell their stories better than I. The brief answer is that they have done so, but the constant demands of their clients deny them the control over their time that is the greatest luxury of academia.

Even before I visited South Africa I was encouraged and aided by many people. Geoffrey Bindman, who chaired the 1987 International Commission of Jurists investigation, was endlessly helpful with documents, contacts, and advice. I was fortunate to teach Reagan Jacobus as a graduate student at

UCLA and to meet John Dugard in London, Dennis Davis in Los Angeles, Arthur Chaskalson at Columbia, and Richard Goldstone at Harvard.

My first exposure to South Africa in February-March 1989 immediately followed P.W. Botha's stroke and coincided with the massive hunger strike by detainees, which forced their release and signified another breach in the apartheid state. Like so many other visitors I found the experience overwhelming and contradictory. On my first day in Johannesburg I made an unplanned (and probably unwise) trip by a third-class (i.e., black) train to Springs and then combi (mini-bus taxi) to its township, KwaThema, where I met with considerable suspicion from a very large comrade and spent the afternoon with a proto-capitalist, watching football on his wide-screen television and hearing him extol investment opportunities. Later that week I met Raymond Suttner, recently released from indefinite detention in solitary confinement for two years and still severely restricted, and Azhar Cachalia, the UDF treasurer, also just out of detention, as well as many human rights lawyers: Ismail Ayob, George Bizos, Priscilla Jana, Krish Naidoo, Kathleen Satchwell, and Raymond Tucker. I shared a compartment in the overnight train to Cape Town with three young white conscripts, who spoke mostly Afrikaans and seemed indifferent to my presence rather than hostile. At the University of Cape Town, Dennis Davis, Dirk van Zyl Smit, Hugh Corder, Sandra Burman, and Wilfried Schärf showed me the most beautiful city in the world, the verdant farmlands of Stellenbosch and the miserable townships of Crossroads and Khayelitsha. I met human rights lawyers at Bernardt, Vukic & Potash, Mallinicks, and the Legal Resources Centre. Himan and Jean Bernardt introduced me to their founding generation of opponents of apartheid.

Financial support from the National Science Foundation's Program in Law and Social Science (SES-9012250) and UCLA's International Studies and Overseas Programs, Academic Senate Research Committee, and Law School Dean's Fund allowed me to spend nine and a half weeks in Johannesburg in 1990 and 1991. Despite the regime's awesome security apparatus, I had no difficulty obtaining a tourist visa by declaring (truthfully) that I was not a journalist—a practice a Nationalist MP has denounced as an "execrable defrauding of the hospitality of a country" [*Hansard* col. 5869 (J.G. van Zyl, April 19, 1989)].

I am deeply indebted to many people and institutions within South Africa. The University of the Witwatersrand Law School provided me with an office, computer, photocopying, telephone, and fax and arranged accommodation and car rental. Dean Etienne Mureinik and his wife Amanda added their personal help and hospitality. At the Centre for Applied Legal Studies the successive directors, John Dugard and Dennis Davis, offered information and interpretation, and librarian Lydia Levin provided invaluable documentation. Cherie van Onselen translated the Afrikaans. CALS also is publishing more comprehensive versions of the ten case studies. I am grateful for the friendship of Denis Kuny, Cathi Albertyn, Janet Hirsch, Matthew Kentridge, Vicki

Bernstein, Heinz Klug, and Gaye Seidman. The human rights lawyers whose cases I studied gave me full access to their documents and spent hours answering my questions: Amanda Armstrong, Paul Benjamin, John Brand, Martin Brassey, Geoffrey Budlender, Edwin Cameron, Arthur Chaskalson, Halton Cheadle, Peter Harris, Nicholas Haysom, Carrie Kimble, Denis Kuny, Norman Manoim, Gilbert Marcus, Edwin Mohahlehi, Peter Mohtle, Clive Plaskett, Mpueleng Poee, and James Sutherland. I also benefitted greatly from conversations with parties, witnesses, and activists: Obed Bapela, David Bruce, Aninka Claassens, Nan Cross, Lydia Kompé, Wendy Orr, Mandy Taylor, Gabu Tugwana, and Joanne Yawitch. Three academics who have written essential books about South African law during this period provided helpful guidance: David Dyzenhaus (University of Toronto), Stephen Ellmann (New York Law School), and Michael Lobban (University of Durham).

Two South African institutions made it possible to complete the research from thousands of miles away. The Institute for Contemporary History at the University of the Orange Free State provides a well-indexed clipping service, at reasonable cost, for the dozens of South African newspapers unavailable in the United States. The Government Printer heavily subsidizes the production and distribution of Parliamentary debates, perhaps in the belief that they will enhance the regime's image abroad. It shipped eight years of *Hansard*—57 thick gold-tooled, leather-bound volumes containing upwards of 100,000 columns—to Los Angeles for about \$200!

In the United States, I am grateful to the Ford Foundation for helping to distribute this book in South Africa, Cecelia Cancellaro at Routledge and the series editors Christine Harrington and John Brigham for accepting it on the basis of a brief prospectus, Adam Bohannon and Claudia Gorelick at Routledge for production and promotion, Austin Sarat for inviting me to present an early version of the conclusions at an Amherst conference (to be published by University of Michigan Press as “The Paradoxes of Rights” in 1995), UCLA law and graduate students Richard Marcus, John Muñoz, Farouk Abrahams, and Kathy Thomas for research assistance and tape transcription, and Emily Abel, William Forbath, Joel Handler, and Lucie White for comments on drafts.

My greatest debt, however, is to those who suffered in the struggle against apartheid. Like many, I was drawn to law by its aspiration toward justice. Most lawyers, law teachers and law students, however, lose sight of that ideal in the quotidian preoccupation with making a living. We become obsessed with craft at the expense of ends—what Charles Derber calls ideological proletarianization. The dedication of South African lawyers and litigants to the struggle against apartheid redeems law's promise by reminding us of its potential nobility.

Santa Monica, California  
February 1994

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# GLOSSARY OF ACRONYMS AND FOREIGN WORDS

AAC	Alexandra Action Committee (Mayekiso's group)
ACA	Alexandra Civic Association (Bee's group)
ACC	Alexandra Crisis Committee (organized funerals)
ACLA	Advisory Commission on Land Allocation
ACO	Alexandra Civic Organisation (successor to AAC)
AD	Appellate Division (of Supreme Court)
ALC	Alexandra Liaison Committee (became ATC)
amabutho	warriors (Zulu)
amaqabane	comrades (UDF/ANC supporters) (Xhosa)
ANC	African National Congress
AO	Adjutant Officer (subordinate police officer)
ARA	Alexandra Residents Association
askari	former MK member turned state agent (Swahili for soldier)
ASCO	Alexandra Student Congress
assegai	spear (traditional Zulu weapon)
ATC	Alexandra Town Council
AWB	Afrikaner Weerstandsbeweging (Afrikaner Resistance Movement, Eugene Terre'Blanche's organization)
AWO	Alexandra Women's Organisation
AYCO	Alexandra Youth Congress
AZAPO	Azanian People's Organisation (black power)
AZASO	Azanian Student Organisation (black power)
BAC	Brits Action Committee
balaclava	mask concealing all but eyes
Black Sash	white liberal women's group opposed to apartheid
boer	farmer (Afrikaans; pl. boere)
Bophuthatswana	one of four "independent" homelands, ruled by Lucas Mangope
Broederbund	elite Afrikaner secret society
buffel	armored car
CALS	Centre for Applied Legal Studies
casspir	armored car
charterist	movement associated with ANC Freedom Charter
combi	minibus or taxi
comrade	UDF/ANC supporter

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comtsotsi	gangster (tsotsi) pretending to be comrade
CONTRALESA	Congress of Traditional African Leaders of South Africa (UDF/ANC supporters)
COSAS	Congress of South African Students (black student group)
COSATU	Congress of South African Trade Unions
COSEG	Conscientious Objector Support Group
CP	Conservative Party
CTDB	Cape Town Development Board
CTrDB	Central Transvaal Development Board
dagga	hemp, hashish
DET	Department of Education and Training (Black)
dikgosana	heads of lineage groups (Tswana)
dompas	pass book (Afrikaans)
donga	gully
DP	Democratic Party (successor to PFP)
EAC	Ekrankala Action Committee
ECC	End Conscription Campaign
ERAB	East Rand Administration Board
ERADEBO	East Rand Development Board
ETDB	Eastern Transvaal Development Board
FCI	Federated Chambers of Industry
FOSATU	Federation of South African Trade Unions (Cosatu predecessor)
FRELIMO	Mozambique liberation movement
Hansard	Official record of South African Parliament
hippo	armored truck
HNP	Herstigste Nasionale Partie (to the right of the National Party)
ICFTU	International Confederation of Free Trade Unions
IDASA	Institute for Democratic Alternatives in South Africa
IFP	Inkatha Freedom Party (Mangosuthu Gatsha Buthelezi's group)
impi	warrior phalanx (Zulu)
impimpi	informer (Xhosa)
interdict	injunction
ISA	Internal Security Act
kaffir	derogatory word for Black (Afrikaans)
kgoro	lineage group, clan (Tswana)
kgotla	council (Tswana; properly lekgotla, pl. makgotla)
kitskonstabel	instant policeman (Afrikaans)
KLA	KwaNdebele Legislative Assembly
knobkierrie	walking stick with knob on end (Zulu traditional weapon)
kombi	minibus or taxi
kraal	courtyard (often fenced)

KwaNdebele	one of six “national states” (Simon Skosana the original chief minister)
KWAYCO	KwaNdebele Youth Congress (UDF/ANC supporter)
KwaZulu	one of six “national states” (Buthelezi chief minister)
KZP	KwaZulu Police
Lebowa	one of six “national states” (Cedric Phatudi chief minister)
LLG	Louis le Grange Square Police Station (Port Elizabeth)
LP	Labour Party (in “Coloured” House of Representatives)
LRC	Legal Resources Centre
MACWUSA	Motor Assemblers and Component Workers Union of South Africa
MASA	Medical Association of South Africa (establishment professional group)
matric	examination at end of secondary school qualifying for university entrance
MAWU	Metal and Allied Workers Union (later NUMSA)
mbokotho	KwaNdebele vigilantes (alternative spellings: imbokhoto, mbokoto, mbhokoto, mbokodo)
MDM	Mass Democratic Movement (successor to banned UDF)
MI	Military Intelligence
MK	Umkhonto we Sizwe (Spear of the Nation in Xhosa; ANC armed wing)
mkhukhu	shack, hut (pl. mekhukhu)
MLA	Member of Legislative Assembly (homeland MP)
MLO	Municipal Labour Officer
Mogopa	Western Transvaal “black spot” whose people (Magopa) were moved next to Bophuthatswana
Moutse	North Sotho speaking area taken from Lebowa and given to South Sotho speaking KwaNdebele
MPLA	Mozambique People’s Liberation Army
NAAWU	National Automobile and Allied Workers Union
NADEL	National Association of Democratic Lawyers (ANC supporters)
NAMDA	National Medical and Dental Association (ANC supporters)
NCAR	National Committee Against Removals
NECC	National Education Crisis Committee
NGK	Nederduitse Gereformeerde Kerk (Dutch Reformed Church) (white)
NICRO	National Institute for the Correction and Rehabilitation of Offenders
NP	National Party
NPU	National Press Union
NRP	New Republic Party
NTA	Ndzundza Tribal Authority
NUM	National Union of Mineworkers
NUMSA	National Union of Metalworkers of South Africa
NUSAS	National Union of South African Students (white)
OCA	Oukasie Civic Association
PAB	Publications Appeal Board

PAC	Pan African Congress
panga	machete (Swahili)
Pass Laws	Until 1986 adult Blacks were required to possess a pass and present it on demand
PE	Port Elizabeth
PEBCO	Port Elizabeth Boycott Committee
PEYCO	Port Elizabeth Youth Congress
PFP	Progressive Federal Party
Pondo	tribe related to Xhosa
Poqo	PAC armed wing
PPSA	People's Party of South Africa (Indian House of Delegates)
R	rand (worth thirty-five to forty cents during 1980s)
Reef	Witwatersrand gold mining area
Renamo	Mozambique guerrilla movement backed by South Africa
SAAWU	South African Allied Workers Union
SABC	South African Broadcasting Company (government owned)
SACBC	South African Catholic Bishops' Conference
SACC	South African Council of Churches
SACLA	South African Christian Leadership Assembly
SACP	South African Communist Party
SACTU	South African Congress of Trade Unions (banned ANC affiliate)
SADF	South African Defence Force
SAMDC	South African Medical and Dental Council (self-regulatory body)
SANSCO	South African National Student Congress (banned)
SAP	South African Police or Save Alexandra Party
SARMCOL	South African Rubber Manufacturing Company Ltd (British Tyre & Rubber subsidiary)
SASO	South African Student Organisation (banned)
SAWCO	Sarmcol Workers' Co-operative
SAYCO	South African Youth Congress
SC	Supreme Court or Senior Counsel
SEIFSA	Steel and Engineering Industrial Federation of South Africa
sjambok	leather whip
SRC	Student Representative Council
SWAPO	South West African People's Organisation (Namibian liberation party)
TFCC	Trust Feed Crisis Committee
toyitoyi	dance with singing (associated with protest)
TPA	Transvaal Provincial Administration
TRAC	Transvaal Rural Action Committee
tsotsi	gangster
UAW	United Auto Workers (American union)

UCT	University of Cape Town
UDF	United Democratic Front
Umkhonto we Sizwe	Spear of the Nation (Xhosa); ANC armed wing
UNISA	University of South Africa
UNITA	Jonas Savimbi's rebel movement in Angola (South African supported)
UWUSA	United Workers Union of South Africa (Inkatha affiliate)
veld	rural land
verkrampste	strict believer in apartheid (Afrikaans)
verligte	enlightened reformer of apartheid (Afrikaans)
Voortrekkerhoogte	monument to Boer great trek; location of SADF training camp
WCAB	Western Cape Administration Board
witdoek	vigilantes (white headbands in Afrikaans; pl. witdoeke)
Wits	University of the Witwatersrand
WO	Warrant Officer (subordinate police official)
workerist	belief that workers are revolutionary vanguard
WRAB	West Rand Administration Board

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## CHAPTER 1

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# SPEAKING WITH THE OGRE

The Ogre does what ogres can,  
Deeds quite impossible for man,  
But one prize is beyond his reach  
The Ogre cannot master speech.

W.H. Auden\*

The struggle against apartheid is one of the great contemporary moral dramas. Together with proletarian revolutions, the defeat of fascism, wars of liberation, and the labor, civil rights, and feminist movements it defines our century. The April 1994 election, which launched democracy in South Africa, signified the end of the colonial era and official racism.

Law has played a central role in this struggle for several reasons. The white regime effectively excluded Blacks from the political arena. Africans could not vote for national offices.\*\* Their local governments had little autonomy. No foreign country recognized the ten "homelands," whether "independent" or "self-governing." Elections were infrequent and often rigged, and military coups were common. The South African military kept homeland leaders in power (and restored them when overthrown), and the central treasury heavily subsidized their unviable economies. Although the regime purported to leaven totalitarian white control over urban Blacks with appointed and then elected black township councils, these were just as corrupt as their homeland counterparts and less legitimate, if anything, since

\*O 26 (9.8.68). This was Auden's response to the Soviet tanks that crushed the Prague spring. I encountered it in Francis Wilson's foreword to the 1989 reissue of Charles Hooper's powerful account of women's resistance to the pass laws in the Western Transvaal in the 1950s.

\*\*It is impossible to write about South Africa without employing the regime's racist terminology. I generally use Black as synonymous with African and as distinguished from "Coloured" and Indian. Beginning with the black power movement of the 1970s, however, the three groups sought to weld a united front in opposition to apartheid, so I use black to include all three.

local elections were frequently boycotted. Although the 1983 constitutional “reform” created Houses of Representatives and Delegates for “Coloureds” and Indians in the new tricameral Parliament, the United Democratic Front boycotted elections to those bodies (securing minimal turnouts), and the white-dominated President’s Council could and did override their vetoes.

The principal opposition groupings—ANC, SACP, and PAC—had all been outlawed by 1960. Although they re-established themselves in exile, often with considerable diplomatic and media visibility, they could only operate underground within the country. Using detention without trial, torture, informers, and agents provocateurs, the security police managed to infiltrate and disrupt much of the underground movement. The ANC military wing, Umkhonto we Sizwe (Spear of the Nation), greatly strengthened by the exodus of youths after the crushing of the 1976 Soweto rebellion, smuggled arms and personnel back into the country. But though it demonstrated an increasing capacity during the 1980s to detonate bombs and land mines (hitting “soft” civilian targets more easily than “hard” military objectives), it never posed a threat to the regime or seriously impaired white morale. Staffed through the universal conscription of white men, who served two years and did reserve duty for another two, and endowed with the most advanced technology, the South African Defence Force exceeded the military capacity of all the rest of sub-Saharan Africa combined. Despite its name, the SADF actually defended white power by patrolling black townships, preserving colonial rule in South-West Africa (Namibia), assisting insurgents in Angola and Mozambique (Unita and Renamo), and freely attacking ANC targets (and innocent civilians) in the front-line states (Botswana, Zimbabwe, and Zambia).

Other forms of extraparliamentary politics were severely curtailed. Government either banned all outdoor meetings or refused to issue the requisite permits. It outlawed numerous organizations. It excluded and deported foreign correspondents and television crews. It regulated the entry of all foreign books, newspapers, magazines, and films. It controlled television and dominated radio. It severely limited what the domestic media could publish, seized offending issues, banned books, and punished publication and even ownership with fines and prison terms. It curtailed access to scenes of unrest or opposition. It prosecuted and jailed opponents for long terms—most notoriously Nelson Mandela and the other Rivonia accused for life on Robben Island. Using ever more restrictive security legislation it detained opponents indefinitely without trial or banned and restricted them (so they could not be quoted, meet with others, or even leave their homes). During the 1985–90 Emergency it jailed more than 35,000 people, some for years.

If the opposition had few avenues other than litigation through which to challenge the regime, there also were good reasons for choosing law as a means of struggle. South Africa repeatedly proclaimed its respect for the rule of law, to both foreign and domestic audiences. Courts occasionally invalidated racist actions by the executive or legislature, such as segregation of

public accommodations, or disenfranchisement of Cape Coloured voters. If such decisions were exceptional, they also were repeatedly lauded as evidence of the independence of the judiciary. White politicians never tired of making comparisons with the one-party authoritarian regimes prevailing throughout black Africa. Because the regime used legal institutions to construct and administer apartheid, it was vulnerable to legal contestation. All this helps to explain why the opposition might choose law strategically. But it also embraced legality as a fundamental principle—most notably the ANC in its Freedom Charter.

Yet law was an unpromising ally. The South African Parliament was supreme. No bill of rights restrained it, nor was there any tradition resembling the unwritten constitution that inhibits its Westminster antecedent. The National Party ruled for nearly half a century—from 1948 to 1994—generally disregarding an opposition that dwindled to the lonely voice of Helen Suzman for thirteen years. Well before the 1980s the Nationalists had appointed every judge, increasingly guided by political loyalty. Legal challenges to the regime rarely succeeded and hence were rarely attempted. The legal profession, naturally conservative and timid, remained silent.

South Africa, therefore, presents the ideal setting in which to explore the central question of jurisprudence: the circumstances under which, extent to which, and ways in which legality constrains state power. Law claims authority by offering reasons for the exercise of power. It relies on human speech rather than brute action. Could the South African ogre speak? Would it heed opposing arguments? Reflecting on eighteenth-century England, E.P. Thompson declared that “the regulation and reconciliation of conflicts through the rule of law” is “a cultural achievement of universal significance.”<sup>1</sup> Alan Paton (who testified for Mandela and the other accused in the 1964 Rivonia trial) unconsciously echoed this sentiment. The rule of law “is one of the noblest achievements of sinful man,” “the greatest political achievement of humankind,” “a miracle.”<sup>2</sup> Would South Africa fulfill or disappoint these hopes in the 1980s?

This book seeks to understand the value and limits of legality in resisting authoritarian regimes—the art of speaking with the ogre—by examining ten pivotal legal campaigns during the last years of apartheid. In choosing them I sought to cover the three principal arenas of struggle—political authority, land, and labor—and the two strategic postures—law as shield and as sword. The victories and defeats, the resort to legality and its evasion, all illuminate law’s potential for the oppressed. Here I preview the stories in chapters 3–12.

Chapter 3. The pass laws (which regulated the residence of Africans and required them to produce identity documents on demand) were one of the most pervasive and hated facets of apartheid, separating husband from wife, parent from child, banishing “surplus” labor and “unproductive” Blacks to impoverished “homelands” while exposing millions of urban residents to brutal bureaucrats, midnight raids, summary arrest, demands for bribes (of

money or sex), and imprisonment or forced labor. Two challenges tested the utility of South Africa's first public interest law firm and the judiciary's capacity to control street-level bureaucrats.

Chapter 4. Resistance to conscription was one of the few contributions by whites to the struggle against apartheid (and one of the most visible). Those who failed to meet the narrow criteria for conscientious objection (or refused to apply) faced up to six years in prison. The handful willing to pay this heavy price to be absolved from complicity with apartheid became the focus of a highly effective campaign against conscription. The challenge to their sentences forced the Appellate Division to interpret unusually clear statutory language mandating fixed prison terms.

Chapter 5. Responding to big capital's insistence on greater productivity, government created a structure for collective bargaining by black trade unions, which allowed them to grow rapidly in membership and influence. For years the Metal and Allied Workers Union (the second largest black union and the most militant) engaged in frustrating contract negotiations with a recalcitrant SARMCOL (owned by the multinational British Tyre & Rubber). In 1985 the company retaliated against a wildcat strike provoked by growing worker anger, locking out and then dismissing the entire workforce and negotiating a sweetheart contract with the far more compliant United Workers Union of South Africa. MAWU's complaints about unfair labor practices led to the longest labor trial in South African history and an ambiguous judgment on the protection that law offered labor in disputes with management.

Chapter 6. After the Inkatha-linked (and government-financed) UWUSA ousted MAWU (which sympathized with UDF and the ANC), Inkatha launched a campaign to take over Mpophomeni, the SARMCOL company town. It sent a hundred armed youths to stage a deliberately provocative rally. During the preceding night they kidnapped four MAWU activists (murdering three) and murdered a fourth Mpophomeni resident the next day. Summoned to the township, the police intervened to protect Inkatha from the angry populace, escorting them out of town with their weapons. The inquest tested the will of the legal system to name and punish the killers despite intimidation of witnesses by an armed Inkatha warlord, police delays, and prosecutorial indifference.

Chapter 7. The security forces routinely used torture to extract information, repress the masses, eliminate leaders, and take revenge. When government declared the Emergency in July 1985, Eastern Cape security police rounded up and systematically tortured hundreds of prisoners. Wendy Orr, working for the Prisons Department in her first job since qualifying as a doctor, was horrified by the wounds she treated and the stories she heard. Eight years earlier her superior had certified the tortured Steve Biko as fit for the 800-mile trip to Pretoria, which killed him. Fearing a new scandal, he instructed Orr to photocopy all the medical records to ensure that any blame fell on the security

police rather than the Prisons Department. Her affidavit in support of an injunction, and those of the prisoners, illuminated the role of courts in restraining state abuses by exposing evil and mobilizing public opinion.

Chapter 8. Government also used the Emergency to strengthen its already elaborate censorship apparatus by empowering the Minister of Home Affairs to suspend a newspaper for three months—a sanction that could bankrupt it. The principal target was the “alternative press” and especially the *New Nation*, the largest black weekly, sponsored by the South African Catholic Bishops’ Conference. The court had to decide whether the requirement that the Minister conclude that the paper fanned uprisings or unrest, stirred up feelings of hatred toward the security forces, or promoted the public image of any unlawful organization placed sufficient limits on his discretion to allow judicial review.

Chapter 9. In the mid-1980s the government launched three major treason trials, the first two targeting the UDF. A judge dismissed one when transcriptions of video- and audio-taped meetings proved hopelessly inaccurate. Heavy prison sentences in the second—the longest trial in South African history—were overturned on procedural grounds. Consequently, government had a great deal riding on the third, intended to discredit the trade unions and civic associations by accusing them of aspirations to “dual power” and implicating them in the excesses of people’s courts. Justice van der Walt, educated during the trial by his first visit to a black township and lengthy colloquies with the accused about South African politics, had to decide whether the activities of the Alexandra Action Committee, documented in its fortuitously preserved minutes, demonstrated treason, sedition, or subversion.

Chapter 10. Grand apartheid was South Africa’s ultimate obscenity, compared to the Holocaust, the destruction of aboriginal communities in the Americas and Australia, and contemporary “ethnic cleansing.” In a vain effort to consign all Blacks to independent homelands so as to justify treating them like aliens, South Africa forcibly removed an estimated 3.5 million Blacks. The Magopa were the last victims. Three months after losing its nerve under the scrutiny of television cameras, security forces swooped down in the middle of the night to cart off residents. Although the Appellate Division later invalidated the removal, government had already nullified this victory by expropriating the land. After years of wandering in the wilderness, Magopa began to return, first to clean ancestral graves and then to resume farming and herding. Although the Supreme Court granted an eviction decree, the Appellate Division had to reconcile the government’s legalistic entitlement with its commitment to reform after the unbanning of the ANC and release of Mandela.

Chapter 11. When the government no longer could remove Blacks physically, it tried to incorporate them into the homelands and persuade the six that had not done so to accept “independence.” Only the corrupt rulers of KwaNdebele could be swayed, bribed by the offer of Moutse, an adjacent

territory nearly as large and far better endowed. Justifiably terrified of KwaNdebele oppression, Moutse invoked the apartheid ideology of ethnic purity, asking the courts to nullify incorporation because of linguistic and cultural differences between the two groups. While this case was pending, many KwaNdebele residents continued to resist independence. One tactic was to attack the disenfranchisement of women by arguing, in the world's only country with a racially-exclusive franchise, that a sexually-exclusive franchise violated natural justice.

Chapter 12. Government's remaining tactic was to make life so unpleasant for black township residents that they would move "voluntarily." In Oukasie, the "old location" of Brits, a court ordered the white superintendent to reallocate vacant houses and plots to residents, moved in part by his vulgar rebuff of an applicant. Government responded by "disestablishing" the township and then declaring it an "Emergency Camp," which authorized government to promulgate intolerably restrictive regulations on movement and economic activity and to raise rents. This time residents asked one of the more conservative judges to invalidate the declaration on the ground that people living in their own houses, however miserable, were not homeless.

To lay a foundation for these narratives of resistance through law, the next chapter offers a framework for approaching the relationship between law and politics and an overview of the pertinent post-war South African history. After presenting the ten case studies I synthesize what we have learned about the roles of law in the struggle against apartheid and extrapolate this experience to post-apartheid South Africa and resistance to other oppressive regimes.