

1992

# In a Time of Trouble: Law & Liberty in South Africa's State of Emergency

Stephen Ellmann

*New York Law School*, [stephen.ellmann@nyls.edu](mailto:stephen.ellmann@nyls.edu)

Follow this and additional works at: [https://digitalcommons.nyls.edu/fac\\_books](https://digitalcommons.nyls.edu/fac_books)

---

## Recommended Citation

Ellmann, Stephen, "In a Time of Trouble: Law & Liberty in South Africa's State of Emergency" (1992). *Books*. 72.  
[https://digitalcommons.nyls.edu/fac\\_books/72](https://digitalcommons.nyls.edu/fac_books/72)

This Book is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Books by an authorized administrator of DigitalCommons@NYLS.

IN A TIME OF TROUBLE

*Law and Liberty in South Africa's  
State of Emergency*

STEPHEN ELLMANN

CLARENDON PRESS . OXFORD

1992

KTL  
2020  
.E45  
1992

Oxford University Press, Walton Street, Oxford OX2 6DP  
Oxford New York Toronto  
Delhi Bombay Calcutta Madras Karachi  
Petaling Jaya Singapore Hong Kong Tokyo  
Nairobi Dar es Salaam Cape Town  
Melbourne Auckland  
and associated companies in  
Berlin Ibadan

Oxford is a trade mark of Oxford University Press

Published in the United States  
by Oxford University Press, New York

© Stephen J. Ellmann 1992

All rights reserved. No part of this publication may be reproduced,  
stored in a retrieval system, or transmitted, in any form or by any means,  
electronic, mechanical, photocopying, recording, or otherwise, without  
the prior permission of Oxford University Press

This book is sold subject to the condition that it shall not, by way  
of trade or otherwise, be lent, re-sold, hired out or otherwise circulated  
without the publisher's prior consent in any form of binding or cover  
other than that in which it is published and without similar condition  
including this condition being imposed on the subsequent purchaser

British Library Cataloguing in Publication Data  
data available

Library of Congress Cataloging in Publication Data  
Ellmann, Stephen.

*In a time of trouble: law and liberty in South Africa's state of  
emergency*/Stephen Ellmann.

Includes index.

1. Rule of law—South Africa. 2. Civil rights—South Africa.  
3. War and emergency legislation—South Africa. 4. Apartheid—South  
Africa. I. Title.

342.68'085—dc20 [346.80285] 91-18575  
ISBN 0-19-825566-3

Typeset by Butler and Tanner Ltd, Frome and London  
Printed in Great Britain by  
Biddles Ltd  
Guildford & King's Lynn

*Remembering my parents*  
Richard Ellmann  
Mary Joan Donahue Ellmann

## Preface

No American who seeks to know South Africa is likely to be unaffected by the experience, for South Africa inescapably reminds its American observers of home. South African white rule reminds us of white rule here, not only in the heyday of the South's *de jure* segregation but also in the *de facto* patterns of power and poverty that remain in North and South. Visitors to South Africa, however, find not only oppression but also dedicated struggle against it. This book is an effort to describe one arena of this struggle: the efforts of some lawyers and judges to temper the outrages of apartheid through the use of the law.

Perhaps readers will not be surprised that what I found resembled, and reaffirmed, lessons I had learned in the United States. Before coming to Columbia I had the privilege, and the pleasure, of clerking in Atlanta, Georgia, for the Honorable Elbert Parr Tuttle of the United States Court of Appeals for the Eleventh Circuit, a judge whose courageous decisions have played a significant part in the battle against segregation and injustice in America's southern states. There are courageous and humane South African judges as well, though their role, as this book will reflect, is more constrained. From Atlanta I went to Montgomery, Alabama, where I practised law at the Southern Poverty Law Center. There, in civil rights cases of many sorts, I learnt a style of practice which was, in its way, quite traditional. We were, I would say, self-consciously professional rather than political, devoting our best lawyerly efforts to the wholly untraditional cases we took. I realize now that in South Africa I have come to know a group of lawyers who are pursuing a somewhat similar course, under much more difficult, and more morally chastening, circumstances. I have been moved by what I've seen, and this book is in a sense my explanation of the difficulty, and the value, of these lawyers' work.

Many people have helped me to become acquainted with South African law. I have had the pleasure of learning about this field while teaching on it with a series of South African lawyers who have been both instructive and patient: Dikgang Moseneke, Felicia Kentridge, Sydney Kentridge, Arthur Chaskalson, T. Lewis Skweyiya, and George Bizos. Arthur convinced me that I needed to visit South Africa in order to begin to understand it, and he and his wife Lorraine Chaskalson were inordinately hospitable in the course of the two visits I have now made to South Africa. In South Africa a great many people were very generous with their time and thoughts; some I will mention for other help in a moment but I am particularly grateful to Johann van der Westhuizen, Geoff Budlender, and Etienne Mureinik for all their assistance.

A number of people have read this manuscript, or parts of it, in earlier drafts and have helped to correct its errors (those that remain are my responsibility).

Some of them I have already referred to, but I also thank—among others—Rick Abel, Bob Amdur, George Bermann, Vince Blasi, Edwin Cameron, Martin Chanock, Marvin Chirelstein, Steve Cohen, Lori Damrosch, John Dugard, Hal Edgar, Gail Gerhart (who also provided me with very helpful news-clipping files), Kent Greenawalt, Lou Henkin, Karen Johnson, Tom Karis, John Leubsdorf, Jerry Lynch, Gilbert Marcus, Anthony Mathews, Eben Moglen, Henry Monaghan, Richard Neumann, Mark Osiel, Dick Pierce, Rick Pildes, Peter Strauss, Lucie White, and Mike Young. This book reflects what I have learnt from these and other people in ways too numerous to detail, but I will occasionally refer to specific debts in its footnotes.

Nadine Havenga translated virtually all of the Afrikaans materials which I use in this project. Without her diligent work on my many translation requests, I would have been unable to proceed with this project. Several Columbia law students have done valuable research for me (mostly in English), including Sara Corello, Jim Hennessey, Jon Klaaren, and Brad May. Lydia Levin and Ferial Heffajee of the Centre for Applied Legal Studies have also been very helpful, in the course of my research, as have Mark Bernstein, Phil Oxley, and others at the Columbia Law Library. My assistant Sally Otos has helped cope with the various burdens of the production of this manuscript, and Dr Murray Fisher prepared the index.

Columbia Law School and the Parker School have provided support for my work. I am grateful as well to the *New York University Review of Law and Social Change* for their editing of my article, 'Legal Text and Lawyers' Culture in South Africa', forthcoming in the Review; much of this article is now incorporated in Chapter 6 of this book, and I also thank them for permission to incorporate it here. Similarly I thank the *South African Journal on Human Rights* for permission to use here a revised version of 'Lawyers Against the Emergency', published in that journal, and the *Columbia Human Rights Law Review* for permission to incorporate brief passages from an article published there, 'A Constitution for All Seasons: Providing Against Emergencies in a Post-Apartheid Constitution.'

Nancy Rosenbloom, my wife, has discussed these ideas with me for years, edited my drafts, and given me much, much more besides.

Stephen Ellmann  
New York, N.Y.  
20 June 1990

## Contents

Abbreviations	xi
Introduction	1
1. South African Internal Security Law: Constitutional Framework and Statutory Designs	11
A. Parliamentary Supremacy and the Constricted Field of Judicial Review of Legislation	12
B. South African Internal Security Statutes	15
2. <i>Hurley's Case</i> and the Doctrinal Basis for Human Rights Jurisprudence in South Africa	26
A. <i>Hurley</i> and the Character of Legislative Intention in South Africa	28
B. The Interpretation of Intention	32
3. The Rabie Court and the Judicial Protection of the State of Emergency	57
A. The Rabie Era	57
B. The Rights Denied	71
4. The Rabie Court's Protection of Human Rights	115
A. The Rights Not Lost	116
B. The Rights Protected	118
C. The Demands of the Emergency against the Claims of Human Rights	129
5. The Corbett Court and the Emergency	139
A. The Change in the Court's Decisions	142
B. The Common Doctrinal Ground of the Corbett and Rabie Courts	153
C. The Immediate Causes of the Change in the Court's Approach	158
6. Explaining the Court's Performance: Visions of Law in South Africa	163
A. The Rabie Court: Adherence to Law in South African Culture	165
B. The Corbett Court: The Bar and the Judiciary as Carriers of a Human Rights Tradition	205
Conclusion	244

7. Lawyers against the Emergency	248
A. Lawyers' Moral Responsibility for Their Work	250
B. The Value of Emergency Law Work	253
Conclusion	268

<i>Index</i>	275
--------------	-----

## Abbreviations

ABF Res. J.	American Bar Foundation Research Journal
Am. J. Int. L.	American Journal of International Law
Am. J. Leg. Hist.	American Journal of Legal History
Am. Soc. Int. L. Proc.	American Society for International Legal Process
Brit. J.L. and Soc.	British Journal of Law and Society
BULR	Buffalo University Law Review
Calif. L. Rev.	California Law Review
Cardozo L. Rev.	Cardozo Law Review
Case W. Res. L. Rev.	Case Western Reserve Law Review
Colum. HRLR	Columbia Human Rights Law Review
Colum. L. Rev.	Columbia Law Review
Duke LJ	Duke Law Journal
Harv. L. Rev.	Harvard Law Review
HRLJ	Human Rights Law Journal
HRQ	Human Rights Quarterly
Ind. LJ	Indiana Law Journal
Int. J. Soc. L.	International Journal for the Sociology of Law
J. Afr. Hist.	Journal of African History
J. So. Hist.	Journal of Social History
Law Q. Rev.	Law Quarterly Review
N.Ca. L. Rev.	North Carolina Law Review
NYU L. Rev.	New York University Law Review
NYU Rev. L. and Soc. Ch.	New York University Review of Law and Social Change
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
Stan. J. Int. L.	Stanford Journal Of International Law
Stan. L. Rev.	Stanford Law Review
Tul. L. Rev.	Tulane Law Review
Tex. L. Rev.	Texas Law Review
U. Chi. L. Rev.	University of Chicago Law Review
UCLA L. Rev.	University of California at Los Angeles Law Review
U. Pa. L. Rev.	University of Pennsylvania Law Review
U. Pitt. L. Rev.	University of Pittsburgh Law Review
Va. L. Rev.	Virginia Law Review
Vand. L. Rev.	Vanderbilt Law Review
Wash. and Lee L. Rev.	Washington and Lee Law Review
Wash. ULQ	Washington University Law University
Wisc. L. Rev.	Wisconsin Law Review
Yale J. L. and Human.	Yale Journal of Law and the Humanities
Yale LJ	Yale Law Journal