



# Cornell International Law Journal Online

**Editor's Foreword:** In September, one of our colleagues at the *Emory International Law Review* had the opportunity to sit down with Johan Van der Vyver, a professor at the Emory University School of Law who helped guide the development of South Africa's post-apartheid constitution. The following is an essay about Van der Vyver's role in the anti-apartheid struggle and his views on what is to come. We hope you enjoy.

- Byron Crowe II, Senior Online Editor

## **Defying Apartheid: An Interview with Johan Van der Vyver**

by Matthew Cavedon\*

At first, he just wanted to be "a bit obnoxious." But three decades after he began needling conservative classmates about their support for apartheid, law professor Johan Van der Vyver found himself dialoguing with exiled members of the African National Congress (ANC). He got there by way of an ingrown toenail. Today, he still needles the powerful, critiquing the South African government and forecasting the difficult years to come.

Van der Vyver's story begins in the 1950s, when he was a student at South Africa's Potchefstroom University (now North-West University). The school was affiliated with a conservative branch of the Dutch Reformed Church and had fully implemented racial segregation.<sup>1</sup> Van der Vyver, who was a Calvinist but not an adherent of Potchefstroom's variety, first opposed apartheid to needle his fellow students who studied theology. "The policies which you advocate on a political platform," he told them, "[are] not in conformity with what you preach from the pulpit on Sunday." Van der Vyver originally meant the criticism as a joke, but "the more angry they became, the more I realized that what I was saying was actually the truth."

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<sup>1</sup> See Pdraig O'Malley, *Extension of University Education Act 45*, NELSON MANDELA CENTRE OF MEMORY, <http://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01898.htm> (last visited Oct. 1, 2013); M. Elaine Botha, *Christian Scholarship for Reconciliation? The Free University of Amsterdam and Potchefstroom University for Christian Higher Education*, in RACE AND RECONCILIATION IN SOUTH AFRICA 121, 123 (William E. Van Vugt & G. Daan Cloete eds., 2000).

He came to identify with their style of Calvinism—which he saw as the basis for that truth—just as he started vocally rejecting their politics.

He did not take a popular stand within his community. Van der Vyver's fellow Afrikaners, descended from Dutch settlers forced to move north by English colonists following the British occupation of the Cape Peninsula in 1806,<sup>2</sup> were more supportive of apartheid than any other group of people in South Africa. The policy promised Afrikaners self-government in the tribal-dominated north of the country where they eventually settled. Van der Vyver faced hostility for his political beliefs from colleagues, friends, and family members.

Tensions that had long been rising surfaced in 1978 while Van der Vyver was a professor at Potchefstroom. At a South African Law Society conference that Van der Vyver attended, Minister of Justice Jimmy Kruger defended a national security law that allowed the government to designate anyone an enemy of the state.<sup>3</sup> A designee could not bring a judicial challenge—but he could be detained indefinitely. The law was often used to target African nationalists opposed to apartheid. Kruger posed a challenge to critics of the law: “You guys always just criticize the government. You must realize that we have very difficult problems to deal with. And instead of just criticizing us, why don't you tell us what we should do instead?”

Van der Vyver answered the call. He wrote an op-ed piece answering two questions: what was wrong with the law? And—“in a good Calvinistic trend”—how could it be improved? Despite issuing the challenge in the first place, Minister Kruger was not pleased with Van der Vyver's colorful attack on the law, in which he declared:

If the Minister can order your detention without external control, he can order your detention for no reason at all, *or simply because he may happen to have ingrown toenails.*

He says he is still cajoled to this day for his “ingrown toenails article,” but the image hit a nerve. Potchefstroom's Member of Parliament contacted the university to demand that its council launch an inquiry into whether “this University [should] allow the publication of such irresponsible critique.” Van der Vyver saw it as a cheap attack. When confronted by the university president regarding the inquiry, he hit back: “How dare you try to discipline me on the basis of politics, instead of on the basis of principle?” He later told the council that he was happy to take criticism from his colleagues in law, “but I'm not going to be censored by a bunch of retired theologians.”

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<sup>2</sup> See HERMANN GILIOME, *THE AFRIKANERS: BIOGRAPHY OF A PEOPLE* xiv (2003).

<sup>3</sup> See Internal Security Amendment Act (Act No. 79/1976) (S. Afr.).

Van der Vyver resigned his position shortly thereafter. Within the year, he was offered a new position at the more liberal University of the Witwatersrand.

The country as a whole was moving in the direction of abolishing racial segregation, and Van der Vyver helped guide it to the conclusion he had reached more than twenty years earlier. In the 1980s, he became active in a group of Afrikaans-speaking legal academics who met with the African National Congress (ANC) to design a democratic constitution for South Africa. The ANC was a banned organization at the time,<sup>4</sup> and meeting with its members was a criminal offense, but Van der Vyver believes the government turned a blind eye to the dialogue effort. He knew that his phone was tapped and spoke about meeting ANC leadership on telephone calls, but was never harassed by police.

That is not to say that the meetings were easy. They had to take place outside of the country, most often in Zimbabwe. And at first, “you were meeting with people that you regarded as terrorists, and they regard[ed] us as a bunch of racists.” But social gatherings, especially ones hosted by Cuba’s ambassador in Harare, helped. “After you have gone through a few of those socials, then you begin to distinguish between who are really your friends.”

Van der Vyver kept some of those friends for years, including one ANC representative, Penuell Maduna, whose LL.M. studies he supervised. The student’s work was so good—despite being done from exile—that Van der Vyver tried to convince the law faculty to accept it as a PhD dissertation. Faculty members’ political ambitions kept them from accepting his recommendation. However, things turned out all right for the LL.M. student. In 1999, Mr. Maduna was named South Africa’s Minister of Justice.<sup>5</sup> He took the same office once held by Van der Vyver’s most prominent political opponent, Jimmy Kruger.

Things turned out well for Van der Vyver, too. In 2003, Potchefstroom awarded him an honorary doctorate. It cited the position that he took in the 1970s, for which he was forced to resign. One reporter who had often covered Van der Vyver during his early career covered the event. She crafted her story as a retelling of the Prodigal Son, who does wrong, comes home humbled, and is welcomed by the community.

Her Prodigal Son was not Van der Vyver. It was Potchefstroom.

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<sup>4</sup> See Unlawful Organisations Act (Act No. 34/1960) (S. Afr.), available at [http://www.disa.ukzn.ac.za/index.php?option=com\\_displaydc&recordID=leg19600407.028.020.034](http://www.disa.ukzn.ac.za/index.php?option=com_displaydc&recordID=leg19600407.028.020.034).

<sup>5</sup> Pdraig O’Malley, *Maduna, Penuell Mpapa*, NELSON MANDELA CENTRE OF MEMORY, <http://www.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv02426/05lv02552.htm> (last visited Oct. 1, 2013).

Van der Vyver still sees prodigal sons who have yet to come home to the principles of racial reconciliation and democracy. Despite his early engagement with the ANC, Van der Vyver “never found a safe haven” in any of the political parties that drafted the 1996 South African Constitution.<sup>6</sup> He served on several subcommittees, but lacking a party to sponsor him, he was not otherwise an active participant in the Constitutional Assembly. His first joke to his fellow students at Potchefstroom had been that “principle is sacrificed on the altar of party political loyalty,” and he refused to make that offering at the Constitutional Assembly. Now, Van der Vyver’s commitment to principle gives him a balanced, if critical, view of South African politics.

“South Africa has a wonderful constitution,” he says. “It has a very powerful judiciary, especially the Constitutional Court.” And he thinks the media is vigilant about uncovering corruption in high places. But the government’s patience is growing thin, and it seeks to “put a burden on press freedom” to stop the constant stream of exposés.<sup>7</sup> This rising authoritarianism is different from the spirit that prevailed in the 1990s. Van der Vyver fondly remembers when “a wonderful man like Nelson Mandela [was] in charge . . . [and he] said, ‘Let’s forget our differences and move forward toward reconciliation.’”

He does not believe Mandela’s successors have shared the same attitude. “I think the president we have at the moment [Jacob Zuma] doesn’t have the faintest idea what this is all about. He’s uneducated, he’s unsophisticated, he’s not highly intelligent.” Under Zuma, “anti-white sentiments have strong political clout.” “[T]here’s some truth in saying, well, it’s always the fault of the white people that have discriminated against us for so long,” Van der Vyver acknowledges. He believes, though, that many South Africans, especially in the black community, blame whites because they lack education and live in poverty. “[P]eople living in those conditions always look for a scapegoat.” And where there’s popular demand, there’s a politician to “exploit it through very strong anti-white statements” — South Africa’s hate speech ban<sup>8</sup> notwithstanding.

Van der Vyver sees parallels between this mentality and that of his fellow Afrikaners in the nineteenth century. Defeated by the British in the Anglo-Boer War, the

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<sup>6</sup> CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA (No. 108/1996), *available at* <http://www.info.gov.za/documents/constitution/1996/a108-96.pdf>.

<sup>7</sup> *See, e.g.*, Protection of State Information Bill, B6D-2010, (Apr. 13, 2013) (S. Afr.) (awaiting signing by President Zuma); Faranaaz Parker, *Zuma’s Positive Reporting Call is Plain Bad News*, MAIL & GUARDIAN (Sept. 13, 2013), <http://mg.co.za/article/2013-09-13-00-zumas-call-is-plain-bad-news> (criticizing Zuma’s call for more “patriotic news”).

<sup>8</sup> *See* Promotion of Equality and Prevention of Unfair Discrimination Act § 10(1) (Act No. 4/2000) (S. Afr.), *available at* <http://www.justice.gov.za/legislation/acts/2000-004.pdf> (“no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to . . . promote or propagate hatred.”).

Afrikaners suffered high poverty rates. “We also always pointed the finger and said, ‘That’s what the English did to us.’” When the Great Depression arrived, Afrikaners realized that they needed to take a new approach. “[T]he leaders of our community said, ‘Let’s rather do something about it.’ So, starting in the 1930s, there was a concerted effort for the educational, cultural, [and] social uplift[ing] of the Afrikaans nation.” Over the following decades, Afrikaners “became as learned, as sophisticated, [and] as intelligent as our English-speaking counterparts. And as represented in commerce and industry.” Although few Americans are familiar with Afrikaner history, Van der Vyver considers its development “the biggest economic success story of the twentieth century.” Afrikaner leaders helped their community to grow strong, and “[t]hat normalized the relations between Afrikaans- and English-speaking white South Africans, because they had no reason to look down upon us, and we had no reason to feel inferior.”

Today, Van der Vyver believes the black community needs the same mindset. He credits the government’s Black Economic Empowerment program<sup>9</sup> as one that “many, many blacks benefit [from].” But he believes demographics will undercut any progress that is made. Because of uneven birth rates, “the tail-end of people that remain poor and uneducated becomes longer and longer.” In terms of raw numbers, Black Economic Empowerment helps many South Africans find good jobs. “[B]ut [it’s] not that high of a percentage.”

The constant expansion of the number of people without opportunities, or even adequate social services like health care and housing, is combining dangerously with another social reality: over-education. “We are producing lawyers like a sausage machine,” Van der Vyver says. “Academic standards have been lowered to accommodate this. For example, law training in South Africa is down to undergrad training.” The legal profession cannot keep up with the influx, and Van der Vyver is concerned. “[I]f you see people who are not so learned and not so sophisticated, etc. [who] are unemployed, that’s unfortunate, but you can deal with that. But if you have people [who] are academically qualified and can’t find a job, that’s a recipe for disaster” —the kind of disaster that recently destabilized North Africa and the Middle East. “[T]he problem [behind the Arab Spring] . . . has got little to do with democracy. It is young people that are well-educated and intelligent, but don’t have a job.” Van der Vyver predicts that “sooner or later,” South Africa, too, will face major social conflict. It’s in the demographics.

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<sup>9</sup> See generally Codes of Good Practice on Broad-Based Black Economic Empowerment, 997 Gov. Gazette at 3 (Nov. 26, 2012) (S. Afr.).

Van der Vyver still believes racial reconciliation will happen, “perhaps [in] a few generations.” He tends to take the long view, as is clear from his sharp memories of what things were like when he was a student, and his appreciation of Afrikaner history over the past century. But he also takes a broad view of South African society as it currently stands and believes that our generation has much to do before justice and reconciliation can triumph.

As it did during Van der Vyver’s youth, our world will need people who are willing to be more than just “a bit obnoxious” to the hypocrites who choose politics over principles. And it will demand jokers to be meddling critics of the injustice and division Van der Vyver thinks South Africa’s future holds.