

# Preventative Detention in Pre-and Post Apartheid South Africa: From a Dark Past to a Brighter Future

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## 1. Introduction

Two papers have previously been read at conferences of this society dealing with aspects of preventative detention. The first, entitled *Preventative detention – latest developments in the UK*, by Ken Macdonald QC illustrated the use of preventative detention for awaiting-trial alleged offenders, as well as in response to the increased threat of global terrorism. The second paper, by Ben Power reviewed the practice of preventative detention of terrorist suspects in the laws of Australia, Canada and the United Kingdom.

One can possibly evaluate preventative detention from various angles and for different purposes: for security purposes, for purposes of rehabilitation, preventative detention of convicted offenders, or preventative detention where no criminal trial is envisaged.

Firstly the question: What is a “detained person”?

One UN document, the *Body of Principles for the Protection of All Persons under any form of Detention*<sup>2</sup> defines it as: “any person deprived of personal liberty except as a result of conviction of an offence”.

Detention defined as the incarceration of a person is by far not the only method of restricting/limiting the freedom of movement or (as the UN document puts it) the “personal liberty” of a person. One should not underestimate the limiting effect of other “preventative measures”. I therefore argue that preventative measures, for lack of a better descriptive word, could also make serious inroads into the personal liberty of a person, and should therefore be read together with preventative detention. Examples of such preventative measures would be things like:

- Banning orders
- Gag orders
- Restrictive conditions
- Arbitrary searches/roadblocks etc

In this paper I will briefly examine preventative detention for security reasons under the previous Apartheid system. Next I will indicate how the constitutional and political framework has changed in that country, and lastly say a few words on current preventative detention provisions in South African law.

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<sup>2</sup> Adopted by the UN General Assembly on 9 December 1988

## 2. Preventative detention under Apartheid

Security Legislation and State of Emergency regulations

### Security legislation

The history of detention in South Africa demonstrates that it was directly linked with political events and a central device to control and suppress democratic black opposition to white minority domination. Detention without trial was one of the central elements in the repressive apparatus of the South African state. And in the minds of many people the notions of detention and torture were synonymous, despite state claims to the contrary.<sup>3</sup> As time went by, and the perceived threat of a communist-inspired, black dominated overthrow of the white minority government increased, security provisions became increasingly draconian in order to silence growing opposition and protest. The “violent-action campaign” adopted by the ANC, PAC and SACP in the latter stages of the struggle, added fat to the fire of legislative and executive “counter-revolutionary” actions. Detention, including preventative detention, was only some of the methods employed to suppress unrest and protest.

Historical overview:

- April 8 1960 - banning of African National Congress and the Pan African Congress.
- 1963 : temporary “90 day” detention clause
- 1965: “180 day” detention – also solitary confinement (for 6 months period).
- 1976: Soweto uprising by the youth
- 1977: Death in Detention of Steve Biko
- 1982: revision of Security legislation
- 1985: Declaration of a State of Emergency – lasting till 1990.
- 1990: Release of political prisoners and unbanning of various organisations
- 1994: inclusive democratic elections and new Constitutional order

Legislative framework: (in chronological order)

- Urban Areas Act 25 of 1945 – if the presence of an individual is detrimental to the maintenance of peace in the area, the local authority (municipality) may declare him “undesirable” and have him evicted.
- Internal Security (Suppression of Communism) Act 44 of 1950 – penalising the advocacy of the doctrine of communism.
- Public Safety Act 3 of 1953 – empowering the declaration of a State of Emergency + summary arrest and indefinite detention without trial of any person suspected of anti-government activity during the existence of the SoE.
- Riotous Assemblies Act 17 of 1956 – introduces the statutory crime of “intimidation”. Empowers detention of persons participating in unlawful protest actions. Later to be replaced by the Intimidation Act of 1982.
- Unlawful Organisation Acts 34 of 1960 – banning the ANC, PAC and SA Communist Party.

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<sup>3</sup> Foster D and Sandler D, *A study of detention and torture in South Africa*, Institute of Criminology, University of Cape Town 1985

- Sabotage Act 76 of 1962
- Terrorism Act 83 of 1967 – defining a wide variety of conduct that might endanger the maintenance of law and order as acts of terrorism. Section 6 allowed someone suspected of involvement in terrorism to be detained for an indefinite period without trial on the authority of a senior police officer. No requirement to release information on who is being held – so people tended to “disappear”.
- Gatherings and Demonstrations Act 52 of 1973
- Affected Organisations Act 31 of 1974 – umbrella effort to try and restrict mushrooming organisations

## **Steve Biko**

The death of Steve Biko in 1977 in police custody whilst being detained under the Terrorism Act aroused widespread controversy, internally as well as internationally. He is probably internationally the best-known of persons to die in “protective custody”. Donald Woods wrote the book *Cry Freedom* (later made into a movie) about the life and death of this high-ranking leader of the Black Consciousness Movement. His death was initially labelled by the security police as suicide by hanging, but the post-mortem report identified serious brain injuries. An inquest into the activities surrounding his death found that no-one could be held accountable for his death, saying:

“the available evidence does not prove that the death was brought about by any act or omission involving or amounting to an offence on the part of any person.”

*Later those responsible did indeed apply for amnesty at the Truth and Reconciliation Commission, but were denied because they were deemed by the Commission still not prepared to tell the whole truth.*

It is estimated that at least 80 people died in detention under the security legislation prior to 1982.

## **Rabie Commission 1979**

Partly as result of the outcry over the Biko “cover-up” a judicial commission of investigation into all aspects of security legislation was led by Judge of Appeal (later to become Chief Justice) Rabie. It delivered its report in 1982

Resulting from the recommendation of the commission, the following legislation was enacted:

- Demonstration in or near Court Buildings Prohibition Act 71 of 1982
- Intimidation Act 72 of 1982 – replacing the Riotous Assemblies Act of 1956
- Protection of Information Act 84 of 1982
- Internal Security Act 74 of 1982 – providing for:
  - Potentially indefinite preventative detention – imposed by notice by the Minister. No outer limit to the period. May be used in times of peace and in the absence of any “emergency” – section 28. Provisions such as “if in

his opinion”, “if satisfied”, “has reason to suspect” – all highly subjective discretion clauses. **Used for high-profile persons**

- Short term preventative detention – ordered by a police officer for 48 hours, which can be extended by a magisterial warrant to a maximum of 14 days-section 50. **low-key repression through detention**
- Indefinite detention for purposes of interrogation – on the order of a senior police officer. Detainees are isolated from all contact with the outside world - section 29
- Detention of state witnesses or potential state witnesses – until the proceedings in question terminated (remember the so-called Delmas-trial lasted a whole 4 years!), or for a period of 6 months if no proceedings were initiated – section 31
- Anyone being detained in terms of sec 28 of the Act is automatically “listed” and may thus be effectively silenced because he may never be quoted etc unless the Minister can be persuaded to remove his name from the list.
- Banning order – this is not an official legal term, but a popular description of arbitrary forms of administrative action. It referred to the banning of organisations, individuals, publications, etc. A banned individual could be restricted from attending gatherings, restricted from certain places or areas, restricted to certain places, restricted from communicating with certain persons etc.
- Departure from the basic principles of criminal justice – a wide range of security action were still beyond the jurisdiction of the courts.

However – the revised ISA also contained certain protective measures:

- Security detainees had to be visited regularly by a magistrate and/or district surgeon.
- Statutory recognition of the office of inspector of detainees;
- The onus of proof no longer rested on the accused to prove his innocence (accused previously had to rebut certain presumptions of guilt into Terrorism Act and ISA)
- Terrorism, subversion, sabotage and communism were more precisely defined;
- The discretion of the courts with regard to sentencing were restored;
- A Review Committee was introduced to review individual cases of preventative detention and banning orders, although the Minister was not bound by its findings.
- The *audi alteram partem* principle was extended in certain cases.

George Bizos, a leading human rights lawyer states that, quite paradoxically, as a result of greater protection, as well a heightened attention to the plight of security detainees by amongst others Detainee’s Support Committees, and NGOs like the South African Council of Churches, it resulted in a rise in covert police “death-squads” who abducted and killed their enemy and then put the blame on alleged tribal factions or inter-political

fueled. They burned or buried the bodies of those they had murdered and pretended that their victims had fled the country and joined the armed struggle.<sup>4</sup>

1991 saw some extensive amendments<sup>5</sup> to the Internal Security Act with the scrapping of all, bar one, sections which allow for preventative detention for security reasons.

### **State of Emergency**

A State of Emergency can be proclaimed by the State President in terms of the Public Safety Act 3 of 1953.<sup>6</sup> In terms of the Act, the State President can, after proclaiming a SoE, make regulations which he (subjectively) deem necessary, or expedient, for the restoring of law and order. The purpose of imposing a State of Emergency was to enforce the laws and to restore the existing (unjust) order – which was the very reason for the emergency in the first place. Since any form of protest had been branded as “subversive”, it left very little room for legal opposition to the government. “Subversive statements” was defined as anything a person says or publishes which is likely to have the effect of:

- Promoting the object of a banned organisation
- Inciting the public to take part in an illegal strike, any boycott action, any unlawful (and they were always regarded as such) demonstration, gathering, or take part in any act of civil disobedience
- Inciting anyone to resist or oppose the government, or any official or any member of the security forces
- Engendering or aggravating feelings of hostility in the public
- Weakening or undermining the confidence of the public etc, etc.

Detention provisions of the regulations:

- Any member of the security forces may arrest any person whose detention is, in the opinion of that member, necessary for the maintenance of public order or the safety of the public or that person himself.
- The detention is initially for 14 days, but may be extended by the Minister for any period he chooses until the Emergency is lifted.
- Detainees have not right to visits by anyone and no one is entitled to any information about a detainee.
- Emergency detainees are to be held separate from other detainees/prisoners, and their names/identities could be withheld.

The state of emergency, imposed by the Botha government during 1985, was finally lifted on October 1990

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<sup>4</sup> Government Gazette 12802 Proc 186 of 18 October 1990

<sup>5</sup> Internal Security and Intimidation Amendment Act 138 of 1991

<sup>6</sup> VanZyl-Smit p. 230 and 274

## **Evaluation:**

- the real effectiveness of these extensive detention provisions have been questioned. Often detention only achieved the temporary removal of those persons identified as so-called “ringleaders” off the streets and out of circulation for a limited period of time. It most certainly did not endear the legislator, executive and specifically the security forces to the majority of the population.
- torture was never statutorily authorised, but independent research clearly shown that torture, both in physical and psychological forms had been practised systematically on a widespread basis as part of the coercive treatment of security-law detainees in South Africa. Example of psychological torture/intimidation: foreign national (Australian citizen of Greek descent) held as awaiting-trial prisoner – in the DEATH CELLS.
- in the absence of proper, independent oversight, abuse of power and police brutality did take place. A picture is presented of detainees almost entirely in the hands of the security police. Dictum: power corrupts, absolute power corrupts absolutely!
- “only the end of the system, and the return to the normal proceedings of the law will suffice if we were to have no more Aggets or Bikos or other detainees whose death shock all people who believe in the rule of law”<sup>7</sup>

## **Where were the lawyers?**

This is indeed a valid question. But since the political system was a Westminster-type system of superiority of parliament, the ruling party would simply enact the legislation specifically excluding judicial scrutiny. Both the Association of Law Societies as well as the General Council of the Bar criticized the Rabie Report and declared the safeguards for detainees recommended therein as inadequate. Various prominent lawyers and legal academics vilified the security provisions in journals and other publications. And though there were valiant attempts by defence council to challenge the fundamentals of preventative detention, and from time to time high-court judges that required the Minister to furnish reasons for his “opinions”, and who recognised the incompatibility of the security legislation and emergency regulations with fundamental common-law rights, they were ultimately thwarted by the executive-mindedness of the Appellate Division. Prof Raymond Wacks<sup>8</sup> in an article in the SA Law Journal titled *Judges and Injustice* argued that South African judges properly allowed themselves to be guided by the “morality” or “institutional history” of the white community in exercising their choices.

## **3. South Africa as a Constitutional Democracy**

### Constitution of 1996

A new legal order came into existence when the interim Constitution (of 1993), followed in 1996 by the Constitution of the Republic of South Africa,<sup>9</sup> came into force. The exercise of public power is now restricted through a justiciable Bill of Rights, the rule of

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<sup>7</sup> *The Citizen* as quoted in Bizoz, p.437

<sup>8</sup> *Judges and Injustice* 1984 SALJ 266

<sup>9</sup> Constitution of the Republic of South Africa Act 108 of 1996

law is established and democratic values of human dignity, equality and freedom are guaranteed. Whereas before 1994 criminal procedure was subject to the sovereignty of Parliament and the whims of the executive, the Constitution now rules supreme, protecting the rights of individuals, including accused, detained and convicted persons. The courts are, for the first time, placed in a pivotal position to prevent abuse of the criminal justice system by the state. In this way the discretionary power which played such a huge role in creating the possibility for abuse in the past is also kept in check.

Supremacy of the Bill of Rights limits the legislative power of parliament and ensures that rationality and reasonableness must permeate from every decision and exercise of power.<sup>10</sup>

Specific rights in the Bill of Rights which have possible application regarding detention, are: (in order of appearance in the bill)

- 10: Human Dignity – everyone has inherent dignity and right to have it respected and protected
- 12: Freedom and Security of the person
  - (1)(a) not to be deprived of freedom arbitrarily or without just cause;
  - (1)(b) not to be detained without trial;
  - (1)(c) to be free from all forms of violence (public and private sources);
  - (1)(d) not to be tortured in any way;
  - (1)(e) not to be treated or punished in a cruel, inhuman or degrading way.
- 14: Privacy – protection against search and seizure
- 16: Freedom of expression
- 17: Assembly, demonstration, picket and petition – peaceful and unarmed protest
- 18: Freedom of association
- 33: Just administrative action – right to admin action that is lawful, reasonable and procedurally fair, also to be given written reasons for such action.
- 34: Access to courts
- 35: Arrested, detained and accused persons
  - Arrested for allegedly committing an offence – right:
    - To remain silent (and to be informed of such right)
    - Not to be compelled to make confession or admission
    - To be brought before court as soon as reasonably possible (but not later than 48 hours after arrest)
    - To be charged or to be informed of the reason for the detention, or to be released.
  - Everyone who is detained (including sentenced prisoners) has right:
    - To be promptly informed of reason for detention;
    - To choose and consult with a legal practitioner (or have one assigned at expense of state in relevant cases);

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<sup>10</sup> N.C. Steytler *Constitutional Criminal Procedure – a commentary of the Constitution on the Republic of South Africa* (1996) at 1.

- To challenge the lawfulness of the detention before a court – similar to English common law writ of *habeas corpus* or Roman-Dutch equivalent *interdictum de homine libero exhibendo*;
  - To conditions which are consistent with human dignity;
  - To communicate with others (spouse, family, doctor etc).
- Every accused has right to fair trial .....
- 37: State of Emergency – discussed later.

Obviously no right, even those protected in the Bill of Rights, is absolute. However, any limitation needs to be justifiable in terms of the constitutional values of democracy, protection of equality and dignity and fundamental freedoms.

#### 4. Preventative detention in the New South Africa

Distinguish: Security detention v non-security detention

##### 4.1 Security detainees:

- Remaining sections of Internal Security Act
- Emergency Legislation

#### Internal Security Act<sup>11</sup>

Section 50 is the only remaining provision of this act which authorises preventative detention. It provides that a police officer (of a certain rank) may, without arrest warrant, detain a person for 48 hours for the purpose of preventing a state of public disturbance, disorder, riot or public violence. The purpose of the detention is therefore not to prevent *the commission of a specific offence, but a general state of public disturbance*. The section may also only be imposed when an area has been identified as an “unrest area”. After the initial period of 48 hours, a magistrate may extend the detention for a maximum of 14 days.

#### Emergency legislation

The State of Emergency Act of 1997 provides for the declaration of a state of emergency. According to the constitution, a state of emergency may be declared only when

*"the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency, and the declaration is necessary to restore peace and order".<sup>12</sup>*

The act permits the president, by proclamation in the Government Gazette, to declare a state of emergency for the whole country, or parts of the country. During a state of

<sup>11</sup> Act 74 of 1982

<sup>12</sup> Section 37(1) Constitution of the Republic of South Africa Act 1996

emergency, the president may make such regulations as are necessary or expedient to restore peace and order. Regulations governing the detention of persons must provide for international humanitarian organisations to have access to persons detained under such regulations. A declaration of a state of emergency may be effective for no more than 21 days, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. No act of parliament that authorises a declaration of a state of emergency, and no action taken in consequence of a declaration may permit any derogation from a number of provisions in the bill of rights, such as the right to life, human dignity, or the right of an arrested person to remain silent and not to be compelled to make any confession or admission that could be used in evidence against him.

According to the bill of rights, whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, certain conditions must be followed. These include:

- The detainee must be allowed to choose, and to be visited at any reasonable time by, a medical practitioner and legal representative.
- The detention must be reviewed by a court as soon as reasonably possible, but no later than 10 days after the date the person was detained. The court must release the detainee unless it is necessary to continue the detention to restore peace and order.
- The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.
- The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee.
- If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person

#### **4.2 Non-security detainees.**

- Convicted
- Unconvicted

#### **Preventative detention of Convicted persons:**

The Criminal Procedure Act<sup>13</sup> provides for two forms of indeterminate sentences, other than life imprisonment, that a court can apply.

- Section 286: Habitual criminals

A Superior court may, on conviction of a person, and if it is satisfied that the person habitually commits offences and that the community should be protected against him/her,

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<sup>13</sup> Act 51 of 1977

declare him a habitual criminal. The effect of such declaration is that the person will spend an unspecified period in prison not exceeding 15 years. The present crime of which the person is convicted is not important, but the list of previous convictions. The cumulative effect of all his crimes, and the threat it holds for the community are the factors which will sway the court. The actual length of time spent in prison then becomes a matter of his conduct whilst being incarcerated and a favourable finding of the Parole Board.

- Section 286A: Dangerous criminals

A superior court may, on conviction of a person, and if it is satisfied that the person represents a danger to the physical or mental well-being of other persons and that the community should be protected against him, declare him a dangerous criminal. This section is in principle directed at accused who suffer from psychopathy or related anti-social disorders. Similar to section 286, the person will spend an indefinite period in prison. The court will also order that the person be brought before court again on the expiry of a period determined by it to re-assess the release or further incarceration of the person. New evidence may be introduced at the subsequent appearances and the court may also alter the sentence into correctional supervision or order the conditional release of the person.

- Section 296: Detention (of convicted person) for purpose of treatment

In addition to these forms of indeterminate sentences, the court can also, in addition to or in lieu of any sentence in respect of an offence committed by a person, order that the person be detained at a treatment centre (established under the Prevention and Treatment of Drug Dependency Act<sup>14</sup>). This sentence will usually follow where the criminal behaviour of the person is deemed by the court to be as a result of his/her addiction to substances.

### **Preventative detention/committal of Unconvicted persons**

This refers to a situation where a person is being lawfully detained without being convicted and sentenced to imprisonment.

- Awaiting trial accused (charged/to be charged with committing an offence) – right to be released from detention (on bail or otherwise) if the interests of justice permit, subject to reasonable conditions.<sup>15</sup>
- Accused suffering from mental illness – where person is either not triable or lacked criminal capacity at the time of the commission of the offence and who may pose a danger to themselves or society due to their mental illness.<sup>16</sup>

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<sup>14</sup> Act 1992

<sup>15</sup> Section 35(1)(f) Constitution Act 1996 and Section 51 of Criminal Procedure Act 1977. VanZyl-Smit p. 261

<sup>16</sup> Section 78-79 CPA, see also VanZyl-Smit p. 229 + 272

- Detention/committal for purposes or rehabilitation. Once again directed at the person with substance abuse problems, but the criminal court is halted and converted into an Inquiry in term of the Prevention and Treatment of Drug Dependency Act. The court therefore does not convict the person, but compulsory residential attendance at a treatment facility may be ordered.
- Conversion of trial into Children's Court enquiry. At a trial of a juvenile accused, the court may order the discontinuation of the criminal trial and convert it into an enquiry in terms of the Children's Act. Various possible outcomes, including referral to a children's home or school of industries may result from such enquiry.

## CONCLUSION

A state has a duty to maintain law and order and to protect itself and the people living in its territory from dangerous conduct and dangerous people. In the ordinary course of events, security measures constitute an important and essential component of any legal order. The legitimate exercise of such measures, however, ought at all times to remain conditioned by the norms of justice embodied in the rule of law and the due process of law. Universally security legislation (or anti-terrorist legislation) confers extraordinary powers of arrest and detention to security forces in order to preserve the security of the state. Extraordinary power without adequate safeguards may lead to abuse of power. Various concerns need to be weighed up and a balance needs to be struck between invasions of fundamental rights and freedoms, and the legitimate requirements of the state. The South African example illustrates how it can (or rather did) go wrong.

I suggest that, even where detention without trial takes place, a number of things can be done in order to allow some measure of protection from abuse:

- Assuring that detainees are held in safe and dignified conditions;
- Allowing unlimited reasonable access to legal counsel and other professionals;
- Ensuring communication with the outside world
- And placing judicial checks and balances on the exercise of discretion.

May I, in conclusion and concurrence, refer to the three criteria Lord Goldsmith illuminated yesterday in his analysis of the Counter-Terrorism Bill presently being debated in England, namely of:

- Respect for the Rule of Law – including judicial scrutiny;
- Respect for fundamental Rights and Freedoms;
- The test of proportionality and necessity