THE ROLE OF THE SOUTH AFRICAN CRIMINAL CODE IN IMPLEMENTING APARTHEID

I. INTRODUCTION

On November 4, 1977 the United Nations Security Council, by a unanimous vote, ordered a worldwide mandatory embargo on arms sales to South Africa to condemn that country's apartheid policy. This action was taken just a few days after the United States had vetoed a Security Council resolution proposing a trade embargo against South Africa. Because of this active, international concern with South Africa's domestic policies, it is instructive to examine the role that that country's criminal law plays in implementing apartheid. This Note will describe the South African criminal code and judicial interpretations of the laws and procedures which effectuate apartheid. An examination of the major statutes which codify the apartheid policy, along with the case law will be presented. Particular attention will be paid to the procedural devices in these statutes which afford the prosecution special advantages in criminal cases. The focus of this Note, however, will be limited to recent case law interpreting parliamentary statutes rather than presidential proclamations.

II. BACKGROUND

The Criminal Procedure Act provides the basic procedural rules for criminal cases. It grants special powers to the State and details rules of

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2 Atlanta Journal and Constitution, Oct. 29, 1977, § A, at 3, col. 6. Despite mounting international pressure, Foreign Minister Roelof Botha vowed that South Africa would fight to the "bitter end."
4 The term "Bantu" was substituted for the term "native" in all legislation relating to black Africans by the Bantu Laws Amendment Act, (No. 42, 1964).
5 South African society is stratified by color into three categories. The descendents of the Dutch pioneers who came to Capetown three hundred years ago, today's Afrikaaners, control a country about one-eighth the size of the United States. These 4.5 million people control totally the lives of 20 million non-whites, 17.5 million of whom are Bantu and 2.5 million of whom are of mixed race, "coloureds." About 750,000 Asians reside within the borders.
6 For a listing of all Bantu regulations with annotations, see F. DuRandt, MANUAL OF BANTU LAW (G. Davis ed. 1971).
evidence and trial procedure which work to the State's advantage. The Minister of Justice may convene a criminal court anywhere in the country. As of July 1977, summary trial, without a preparatory exam (preliminary hearing) is now the rule in South Africa, although the Attorney-General, if he chooses, may permit a magistrate's (pre-trial) hearing. Additionally, the State has the power to change venue for pending trials if it chooses, while the accused cannot request a hearing to oppose such a motion. The Act provides for still further limitations, including trial by judge rather than jury, trial in absentia, and the inclusion into evidence of even inadmissible confessions. Also, any document, including newspapers and books, containing a name similar to that of the accused, which reveals that the accused made an impermissible statement outside the Republic, is prima facie evidence that the accused was outside the State and made the statement. Thus, the Criminal Procedure Act affords the prosecution advantages that better enable the State to effectuate its apartheid policy. In addition to the above rules, the individual statutes examined below often have their own special evidentiary rules to assist the prosecution.

III. TERRORISM ACT

The Terrorism Act is one of the broadest of the apartheid statutes. It prohibits anyone from intentionally endangering the maintenance of law and order or encouraging, advising, attempting or conspiring with anyone to do so. Section 2(1)(b) of the Act prohibits anyone from undergoing,

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5 Criminal Procedure Act, supra note 4, § 111(1). The direction of the Minister is final and not reviewable. Id. § 111(5). The State President may convene a special trial upon the recommendation of the Minister of Justice where the accused is charged with violating the security of the State. Id. 148(1).

6 Section 75 of the Criminal Procedure Act, supra note 4, requires that an accused be tried in a summary proceeding shortly following arrest, unless mentally unfit (§ 119) or unless the Attorney-General orders a magistrate's hearing (§ 123).

The pre-1977 rule generally provided for a magistrate's hearing, but the State could prohibit it on its own motion. If the State did not want such a hearing, then the accused could not request one. See Giovanni My v. Attorney-General, Transvaal, 1970(1) S.A. 213 (W) and Isaacs v. Attorney-General, Natal, 1967(1) S.A. 552 (N).

7 Criminal Procedure Act, supra note 4, § 111(4). See S. v. Mkaba, 1864(2) S.A. 280 (E).


9 Criminal Procedure Act, supra note 4, § 75 and Abolition of Juries Act (No. 34, 1969).

10 Id. § 159.


14 Terrorism Act, § 2(1)(a), Section 4(1) which vested any court with jurisdiction regardless of where the alleged offense took place and section 5 providing for summary trial were re-
attempting to undergo, or encouraging or aiding another person to undergo training, which could be of use to any person intending to endanger the maintenance of law and order. Section 2(1)(c) punishes anyone who possesses explosives or other weapons in the Republic and cannot prove beyond a reasonable doubt that he did not intend to endanger the maintenance of law and order.

Under section 2(1)(a) of the Terrorism Act, in order to endanger the maintenance of law and order an act must be directed either at the constituted authority or the general body of citizens. In *S. v. Cooper* the court held that a conspiracy among officers of the South African Student Organization (SASO) and the Black Persons Convention (BPC) to recruit non-whites to form a Black Power Block constituted such an act. Section 2(1)(a) also provides that the State must prove beyond a reasonable doubt that the accused committed or attempted to commit an act with the intent that law and order be threatened. Once the State has established that the accused participated in such an act and that the act had or would have had any of the enumerated effects listed in section 2(2) the State is aided

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5 1976(2) S.A. 875 (T).

1 Among other activities, these groups promoted the idea that the State was the enemy, that there should be a Sharpeville commemoration meeting, and that the South African government should be isolated from the world community. *Id.* at 882.


16 Terrorism Act, *supra* note 13, § 2(2):

(2) If in any prosecution for an offense contemplated in subsection (1)(a) it is proved that the accused has committed or attempted to commit, or conspired with any other person to aid or procure the commission of or to commit, or incited, instigated, commanded, aided, advised, encouraged or procured any other person to commit the act alleged in the charge, and that the commission of such act, had or was likely to have had any of the following results in the Republic or any portion thereof, namely—

(a) to hamper or to deter any person from assisting in the maintenance of law and order;
(b) to promote, by intimidation, the achievement of any object;
(c) to cause or promote general dislocation, disturbance or disorder;
(d) to cripple or prejudice any industry or undertaking or industries or undertakings generally or the production or distribution of commodities or foodstuffs at any place;
(e) to cause, encourage or further an insurrection or forcible resistance to the Government or the Administration of the territory;
(f) to further or encourage the achievement of any political aim, including the bringing about of any social or economic change, by violence or forcible means or by the intervention of or in accordance with the direction or under the guidance of or in co-operation with or with the assistance of any foreign government or any foreign or international body or institution;
(g) to cause serious bodily injury to or endanger the safety of any person;
(h) to cause substantial financial loss to any person or the State;
(i) to cause, encourage or further feelings of hostility between the White and other inhabitants of the Republic;
by the statutory presumption that the accused committed the act with the intent of endangering law and order. The only way the accused can overcome this presumption is by proving beyond a reasonable doubt that he did not intend any of the specified results.

The operation of this presumption is illustrated by S. v. Hosey where the court upheld a conviction based upon the presumption in section 2(2). The appellant handed over a parcel containing, among other things, false identity documents to a plainclothes South African policeman after an exchange of secret passwords. The court held the state must show that:

a) the accused has "committed or attempted to commit . . . the act alleged in the charge . . ." and

b) it must be found that such act had or was likely to have had any of the results specified in subpars. (a) to (1) of the subsection

The second requirement was met by considering only the act which the accused attempted to commit, not his intent. Therefore, the court concluded that the State did not have to prove that the appellant knew that the persons were terrorists, but merely that the appellant, in fact, attempted to give the parcels to terrorists.

Despite appellant's arguments that he believed he was conveying trade union documents, because of this presumption of intent, the conviction was affirmed. Thus, unless the defendant can prove beyond a reasonable doubt that he did not intend to endanger the Republic by his action, he will not have a defense, because the Terrorism Act operates similarly to a strict liability statute: once a prohibited action has been committed, no mens rea is required for conviction.

(j) to damage, destroy, endanger, interrupt, render useless or unserviceable or put out of action the supply or distribution at any place of light, power, fuel, foodstuffs or water, or of sanitary, medical, fire extinguishing, postal, telephone or telegraph services or installations, or radio transmitting, broadcasting or receiving services or installations;

(k) to obstruct or endanger the free movement of any traffic on land, at sea or in the air;

(l) to embarrass the administration of the affairs of the State.

the accused shall be presumed to have committed or attempted to commit, or conspired with such other person to aid or procure the commission of or to commit, or incited, instigated, commanded, aided, advised, encouraged or procured such other person to commit, such act with intent to endanger the maintenance of law and order in the Republic, unless it is proved beyond a reasonable doubt that he did not intend any of the results aforesaid.

Id. at 1.

Id.

1974(1) S.A. 667 (A.D.).

Id. at 677.

Id. at 678. The court believed that this would shift the burden of proving intent from the accused to the State.

In arriving at their decision the court in Hosey distinguished S. v. Essack, 1974(1) S.A. 1 (A.D.) in a confusing fashion. In Essack, the defendant was convicted of violating the Act after his fingerprints were discovered on posted envelopes containing clandestine literature
In conspiracy cases, too, the State must allege and prove an illegal act or an attempted illegal act before it can benefit from the presumption of intent. However, the State is aided by special rules in conspiracy charges. Thus, in *S. v. Moumbaris*, because the State had established that the defendants underwent or attempted to undergo terrorist training and that the training was "likely" to have one of the effects enumerated in section 2(2), the presumption of intent was operative. Additionally, the acts of one conspirator were admissible against his co-conspirators.

Sections 2 through 9 provide certain procedural and evidentiary rules to assist the prosecution in trials under the Terrorism Act. Under section 2(3) any document, book, record, pamphlet, or written instrument taken from an accused person, removed from his office, or bearing a name similar to his, and any photocopy thereof is prima facie proof of the contents. Anyone who harbors or conceals directly or indirectly anyone whom he has reason to believe to be a terrorist has breached section 3 of the Act.

Special jurisdiction and venue rules of section 4, which vested any court with jurisdiction for violations of the Terrorism Act, have been repealed since the new Criminal Procedure Act now gives any court jurisdiction for any offense. In *Ndhlovu v. Minister of Justice* two of the defendants convicted of violating both the Terrorism Act and the Suppression of Communism Act appealed their convictions alleging that the court was without jurisdiction over them. Because they had been granted political asylum across the border in Swaziland in the 1960's, the exiled South Africans argued that as a matter of law the South African police had violated Swaziland's sovereignty in seizing them without the foreign government's

from the South African Communist Party. Arguing in the alternative, the State submitted that since the defendant had stamped and posted envelopes, and since upon the receipt of those letters there was a strong possibility of their having some of the results in subparagraphs (a) to (1), then the defendant had committed the requisite act for a conviction under section 2 of the statute, since he failed to prove beyond a reasonable doubt that he did not intend any of the aforesaid results. But the court held that the presumption was ineffective until the State proved the defendant's knowledge of the contents of the envelopes. The court went on to explain that the legislature could never have intended the result urged by the State, because, otherwise, the mere handling of letters by a postal clerk could render him liable. The court in *Hosey*, however, stated that making the State prove that the accused knew that the recipients of the parcel were terrorists would make it prove that the accused acted with "intention to endanger the maintenance of law and order in the Republic," a burden which is already satisfied by §2(2). *Id.*

*Id.* at 685. By "likely" the court meant "probably" and did not refer to results which were mere possibilities or remote contingencies. In other words, "likely" is used objectively. Whether or not the defendants subjectively intended such a result is not relevant. See *S. v. ffrench-Beytagh*, 1972(3) S.A. 430, 434, 457-58 (A.D.).


1976(4) S.A. 250 (N).

consent. Although the court held that the burden of proof was on the appellants to show they were captured in Swaziland and not in South Africa, the court cited foreign authority to sustain its position that the court was vested with jurisdiction, even if the appellants' version of the facts was correct.

Section 6 provides for custodial interrogation to induce those persons who have knowledge of terrorist activities to tell what they know. Under section 6(1) a police officer of at least the rank of lieutenant colonel who has reason to believe that someone is a terrorist as defined in the Act, may have that person arrested without a warrant and detained for interrogation at a place determined by the Commissioner of the South African police. The Commissioner is required to inform the Minister of Justice of the arrest and the place of detention, as well as furnish monthly reports stating why the prisoner cannot be released. The detainee may petition the Minister of Justice for release, but unless the Minister of Justice releases the prisoner, detention may continue until the arresting officer is satisfied with the detainee's responses to all questions and concludes that continued detention would serve no further purpose. The statute explicitly precludes the courts from making a determination that the detainee should be released. In fact, under section 6(6) no person other than the Minister of Justice or an officer in the service of the State may have access to a detainee or his statements. The only exception to this rule is that if "circumstances permit" a magistrate may visit the detainee every two weeks.

The manner of interrogation experienced by a detainee is immaterial in any subsequent trial. In S. v. Hassim, the defendants argued that their
interrogation continued long after they had already properly answered all of the interrogator's questions. Moreover, they asserted that they were subjected to long periods of interrogation where leading questions were asked. But the court refused to permit the defendants to introduce this evidence, holding that evidence of their interrogation was irrelevant to the issue of whether or not they participated in terrorist activities.4

In S. v. Moumbaris42 the defense objected to the admissibility of certain evidence obtained under interrogation on the ground that, under section 6(6) of the Terrorism Act, it constituted “official information” and therefore, could not be disclosed to the court. The court overruled this, stating that the purpose of the provision was to give the police the discretion to reveal or conceal the information at their discretion.43 While this ruling means the courts are powerless to interfere with the interrogation process—for example, in compelling a habeas corpus-style personal appearance44—until recently it was still possible to inquire into the health of the detainee, because his interrogation or isolation would not be interrupted significantly by a magistrate’s visit.45 However, in a recent case the court apparently limits this right drastically by construing the evidence that a magistrate discovers of abuse or torture as “official information,” which the police may withhold at their discretion.46

In order for the court to inquire into the prisoner’s treatment, direct evidence of mistreatment would have to be procured. In Nxsana v. Minister of Justice47 the wife of a detainee arrested under the Terrorism Act testified of her concern for her husband. Shortly, after her husband’s arrest, police had returned his torn clothes to her, ordering that she mend them. She testified that she had heard rumors of beatings, mutilations, and torture and alleged that a police officer had claimed her husband was dead. The police denied that her husband was dead or in poor health. Four magistrates who had a total of nine visits with the detainee during his nineteen months of incarceration could detect no injury or ill treatment of him. The court refused to accept the wife’s argument that her husband would be afraid to complain to the magistrates for fear of retaliation, because the court reasoned that the detainee must have known that the magistrate’s purpose was to discover whether or not the detainee required assistance. In addition, a doctor who visited the detainee on seven occa-

the Terrorism Act, was held incommunicado, there has been renewed national and international criticism of South Africa’s laws which provide for detention without trial. See Murphy, Attack on Detention Law Widens in South Africa, Wash. Post, Feb. 12, 1978, § A, at 24, col. 1.

41 Id. at 459-60.
42 1973(3) S.A. 109 (T).
43 Id. at 756.
45 Nxsana v. Minister of Justice, 1976(3) S.A. 745 (D).
46 Cooper v. Minister of Police, 1977(2) S.A. 209 (T).
47 1976(3) S.A. 745, 757 (D).
sions testified that there was no medically related problem connected with the interrogation. Upon these facts, the court refused the wife's request. The court ruled that the burden of proof required of the petitioner was a "preponderance of probability,"4 which had not been met. But, the court noted that if the wife had presented direct evidence of the prisoner's mistreatment, the outcome might have been different. However, since access to the detainee is closed to all except the Minister of Justice, such evidence is difficult to obtain.

The Terrorism Act provides wideranging procedural and evidentiary devices to aid the State in combating what it considers to be terrorist activity. Before getting or even seeking a conviction the State has the authority under section 6(6) to detain and interrogate the arrestee for as long as it wants, without fear of judicial interference. The detainee is provided no remedy with which to protest the manner or method of his interrogation. After interrogation, if the State decides to go to trial, its case is substantially enhanced by the presumption in section 2(2) which effectively transfers to the defendant the burden of proving his innocence beyond a reasonable doubt. Thus, the Terrorism Act gives the State special advantage in thwarting what it views as resistance to its policies.

IV. INTERNAL SECURITY ACT

The Suppression of Communism Act,9 renamed the Internal Security Act50 in 1976, provides for the suppression of Communism and all unlawful organizations promoting Communism51 or otherwise endangering state security. It is an offense for any person to be a member of an organization declared to be unlawful.52 The broad scope of the Act, its procedural devices, and its oppressive sanctions give the State a means of punishing those whom the State considers to be its enemies as well as a powerful tool in fighting those activities the State perceives as Communist inspired.

A. Scope of the Act

Section 2 of the Act designates the Communist party as an unlawful organization. "Communist," as defined in the Act, means a self-professed Communist or a person deemed to be a Communist by the State President.53 In addition, the State President has the authority54 to declare any

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4 Id. at 760.
5 § 19 (No. 44, 1950).
50 Internal Security Act Amendment §8 (No. 79, 1976).
51 Internal Security Act, supra note 29, preamble.
52 Id. preamble, §5.
53 Id. § 1. However, the term "Communist" does not include officers or members of the African National Congress, since the Congress has been banned under the Internal Security Act. Also, members or officers of communist societies whose connections were severed before the Act was passed are not to be considered Communists. S. v. Ranta, 1969(4) S.A. 142 (T). See also R. v. Mokgatle, 1952(2) S.A. 124 (T); R. v. Sisulu, 1953(3) S.A. 276 (A.D.); R. v. Alwyn, 1955(3) S.A. 207 (A.D.).
organization unlawful which he believes will promote Communism and its objectives, or otherwise threaten the State.\textsuperscript{33} Declaring an organization unlawful and banning it may occur without notice to the organization concerned.\textsuperscript{34} The President's determination cannot be overturned for failure to be heard,\textsuperscript{37} even though it may be based upon incorrect facts.\textsuperscript{38}

Once the President declares an organization illegal, no one may continue to hold office or membership in the organization.\textsuperscript{39} "Branch" offices of an unlawful organization are also declared illegal if they purport to be a branch or section of the main body, regardless of the name used by the branch, if their objectives and activities substantially conform to those of the main body of the organization.\textsuperscript{40} Furthermore, no one may advertise, solicit, contribute, or in any way take any direct or indirect interest in the organization once it has been declared illegal.\textsuperscript{41}

Section 3(iii) prohibits the carrying of a badge identifying oneself as a member of, or associating oneself with, an organization declared to be illegal. Keeping such a badge in one's pocket or using it to pin one's trousers does not violate the Act,\textsuperscript{42} but displaying a picture in the sitting room of an outlawed group such as the African National Congress contravenes the Act.\textsuperscript{43}

Since persons other than members may take part in activities of illegal organizations, they may also be prosecuted;\textsuperscript{44} however, a conviction for being a member of an unlawful organization precludes a separate prosecution for taking part in its activities.\textsuperscript{45}

\textsuperscript{33} Internal Security Act, \textit{supra} note 29, § 2(2).
\textsuperscript{34} Employers' organizations or trade unions which comply with the Industrial Conciliation Act (No. 28, 1956), are exempt from this provision.
\textsuperscript{37} Internal Security Act, \textit{supra} note 29, § 2(2).
\textsuperscript{39} South Africa Aid and Defense Fund v. Minister of Justice, 1967(1) S.A. 263 (A.D.).
\textsuperscript{40} South Africa Aid and Defense Fund v. Minister of Justice, 1967(1) S.A. 31 (C). However, the President's decision may be declared invalid if his decision was activated by \textit{mala fides} or ulterior motives. Evidence of this nature may be admissible on the assumption that this information was presented before the Executive Council. However, the challenging party will naturally have difficulty obtaining such evidence. Moreover, the trial court may exclude evidence on the ground that producing the evidence is contrary to public policy. The author has found no reported case reversing the President's decision.
\textsuperscript{44} South Africa Aid and Defense Fund v. Minister of Justice, 1967(1) S.A. 263 (A.D.).
\textsuperscript{45} South Africa Aid and Defense Fund v. Minister of Justice, 1967(1) S.A. 31 (C).
**B. Restrictions on Assembly**

Under section 5 of the Internal Security Act, the Minister of Justice may impose specified restrictions on Communists and officers, members, and active supporters of unlawful organizations. Not only may he demand their resignations from the proscribed organization and abstention from the organization’s activities, but he may generally prohibit their attending “any gathering” or “any gathering of a particular nature, class or kind.” This provision has been strictly enforced. Courts have held that a “listed” person prohibited from attending a social gathering violates the Minister’s order merely by being physically present at the gathering, regardless of whether or not he converses with anyone. However, the gathering must be somewhat purposeful and not just casual or fortuitous. Thus, a bus line, a crowd at a street fire, or even a chance meeting of listed individuals does not fall within the purview of the Act. But, in S. v. Njongwe, a number of persons interested in buying pigs traveled together with a listed person in order to look at his stock. The court reasoned this was not the unavoidable or purely coincidental consequence of an otherwise lawful gathering; therefore, the conviction was affirmed. Similarly, councilmen attending a meeting of the city council are “persons assembled to achieve a common objective by concerted action;” thus, such an assembly can also be a gathering proscribed by the statute.

The State may also stop what it fears to be potentially disruptive meetings through section 9 of the Act. This section outlines the actions which may be taken by the Minister to curtail gatherings. If the Minister of Justice believes that a person is participating in activities which are furthering the achievement of Communism, endangering the security of the State, or jeopardizing the maintenance of public order, he may by notice to that person, prohibit him from attending any gathering at all for any length of time.

The meaning of social gathering for purposes of section 9 is substantially the same as used in section 5. However, use of the term “gathering” in section 9 has been given its own peculiar interpretation by the courts. A social gathering for purposes of section 9 may be any gathering at which the participants have social intercourse with each other. But in order for

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66 Internal Security Act, supra note 29, § 5(b).
67 Id. § 5(c).
68 Id. § 5(e)(i).
69 Id. § 5(e)(ii).
72 1972(2) S.A. 903 (E).
73 Desai v. Attorney General, 1964(4) S.A. 90 (C).
74 Internal Security Act, supra note 29, § 9(1).
75 It is not necessary that social intercourse be the sole purpose of the gathering, only that social intercourse did occur. S. v. Ntwasa, 1974(3) S.A. 671 (N). Thus, section 9 has
a social gathering to be the sort envisaged in the Act, there must be an element of cohesion or mutuality among those present. For example, in S. v. Keegan, a listed person who was opening a bookstore arranged for an inaugural wine and cheese party. He was not able to attend the party, but as the guests were leaving, he arrived to help clean and lock up the store. Before beginning he had a glass of wine and talked with the remaining eight guests. Nine minutes later the police arrived. The shop proprietor was convicted under the Act in the trial court, but the appellate court reversed the conviction. That court held that the State failed to prove beyond a reasonable doubt that this gathering fell within the contemplation of the Act, reasoning that a proscribed gathering does not exist where the purpose of a gathering has ended and the people remaining were there only for the subsidiary purpose of waiting to leave. Thus, there must be mutuality and cohesiveness in a social gathering for a conviction to be affirmed. Similarly, conversations which are casual and spontaneous do not fall within the purview of the ban. Finally, there must be a concerted action or a common objective for a gathering to occur.

A person notified by the Minister of Justice that he is prohibited from attending a gathering may request the Minister to furnish him with a written statement explaining the reasons for his decision. Unless such information cannot be disclosed without detrimentally affecting public policy, the Minister must comply. If the Minister refuses to disclose this information on the ground of public policy, the court will not inquire into this exercise of the Minister's discretion. Nor may the Minister be served with a subpoena duces tecum to produce that information.

Since the objective of the notice requirement in section 9 of the Internal Security Act is, in the view of the courts, preventive rather than punitive,
restrictions placed upon a person are imposed not to punish for past conduct, but rather to frustrate the achievement of any of the actions prohibited in the Act.\(^8\) Therefore, the notice to a person is effective immediately.\(^9\)

The preventive measures in sections 5 and 9 of the Internal Security Act can prevent persons deemed undesirable by the Minister of Justice from contacting any member(s) of an illegal group or participating in any political or social activity. Consequently, the Act may be utilized to harass listed persons and keep them from having any contact with society.\(^5\)

C. *Effect on Periodicals*

Under section 6 of the Act, if the State President believes that a periodical or publication is promoting the spread of Communism, being disseminated by an unlawful organization, conveying information endangering the security of the State, or continuing a banned periodical, he may, without notice to any person concerned prohibit its publication or distribution.\(^6\) This prohibition may also be rescinded without notice. This section has been broadly construed. A person may violate section 6 by possessing proscribed materials even if he bought them before they were banned.\(^7\) In addition, a publication may be banned not only for its contents, but also because of the status of the organization publishing it.\(^8\) Thus, seemingly innocuous materials may come under the Act’s purview and a purchaser may have little ability to predict which items are legal or illegal.

Courts have limited the defendant’s ability to make certain challenges to the prosecution. The indictment may not be challenged for being “void for vagueness” merely because it omits a description of the publication or fails to state whether the publication is a newspaper or magazine.\(^9\) Furthermore, at trial the prosecution is not required to provide the name of the publisher or the date of publication.\(^10\)

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\(^{8}\) S. v. Cheadle, 1975(3) S.A. 457 (N).

\(^{9}\) A notice to report to the police every day between noon and 2:00 signed on October 11, 1962 and delivered on October 12 was held effective when delivered. S. v. Joseph, 1964(1) S.A. 659 (T).

\(^{10}\) In S. v. Cheadle, 1975(3) S.A. 457 (N), the court held that even a tea party, where the appellant discussed with five guests furniture, pictures he had drawn, and home made bread, may provide an adequate opportunity for the appellant to further the goals of an unlawful organization. The focus of the court was not on what did actually happen, but on what could have happened at the tea party. The court feared that the tea party could have provided the opportunity for the appellant to “further the goals of Communism.”


\(^{12}\) See S. v. Pogrund, 1974(1) S.A. 236 (A.D.).

\(^{13}\) *Id.*

\(^{14}\) S. v. Malkinson, 1967(2) S.A. 162 (C).

\(^{15}\) *Id.* at 164.
D. Other Restrictions

Section 10 of the Internal Security Act authorizes the Minister of Justice to order a person to leave a place, or refuse to allow him to enter for any length of time. Thus a banned person may be prohibited from communicating with certain persons or receiving visitors; however, he may not be barred from speaking to an attorney, unless the attorney is also a banned person. The Minister may even prohibit a listed person from absenting himself from his residence or from receiving any visitor except a doctor. Even a visit from the sister of a banned person has been held to contravene the Act. However, there are some limits to the scope of the Act. Entering a listed person's residence merely to pick up a grocery list has been held not to be in violation of the Act. In addition, where a listed person shared an apartment with her sister, mere proof that an outsider was present was insufficient to prove violation of the Act without also showing that the outsider was received by the listed person. Also, where children moved in with a listed parent, even though they could have lived separately with their other parent, they were held not to be visitors. Thus, because of the Act's wide scope most communications can be punished.

In order to facilitate tracking a listed person and his activities, the Minister may require the listed person to register periodically with the police. The legislature did not intend for an innocent failure to comply

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91 Internal Security Act, supra note 29, § 10.
92 Id.
93 Id.
94 Minister of Justice v. Hodgson, 1963(4) S.A. 535 (T). That such detention could work immeasurable hardship on an individual was deemed necessary in view of the evil which the act was intended to remedy. Even though the appellant was a disabled military pensioner, the court held the Minister was under no duty to inquire into the appellant's particular circumstances.
95 Bunting v. Minister of Justice, 1963(4) S.A. 531 (C).
97 S. v. Mandela, 1972(3) S.A. 231 (D).
98 Id. at 238.
99 S. v. Pityana, 1976(4) S.A. 823 (E). However, communications between a banned person and his wife using their children as intermediaries is punishable.

The following notice was sent to the appellant:

"Whereas I, Petrus Cornelius Pelser, Minister of Justice, am satisfied that you engage in activities which are furthering or may further the achievement of the objects of communism, I hereby, in terms of sec. 10(1)(a) of the Suppression of Communism Act, 44 of 1950 prohibit you for a period commencing on the date on which this notice is delivered or tendered to you and expiring on 28 February 1978, from

(5) receiving at your residential premises any visitor other than
(a) a medical practitioner for medical attendance on you or members of your household, if the name of such medical practitioner does not appear on any list, and
(b) your mother, Mrs. Ruth Pityana."

100 Internal Security Act, supra note 29, § 10 quat(1).
with an order to be punishable. Nevertheless, it has been decided that mere inadvertance to register with the police after receipt of such notice establishes sufficient *mens rea* to convict the defendant.

E. **Procedural Nuances**

The prosecution is aided by certain presumptions and rules of evidence under the Internal Security Act. Anyone who has attended a meeting of an unlawful organization, advocated, advised, defended or encouraged such an organization, or even assisted in the distribution of an unlawful organization's literature, is presumed to be a member and active supporter of that organization.

Other draconian procedural devices included in the Act allow the Attorney General to deny bail, detain witnesses under warrant, and declare property forfeited following a conviction. Additionally, non-residents may be removed from South Africa if they are declared to be undesirable persons. Finally, there is no civil or criminal action possible against persons who report alleged Communists to the authorities when the persons named are subsequently convicted.

V. **Riotous Assemblies Act**

The Riotous Assemblies Act was designed to consolidate the laws relating to riotous assemblies and to prohibit activity which promotes hostility among the races. In order to control disruptive assemblies the Act gives broad powers to magistrates. Whenever a magistrate has reason to believe that the public order may be threatened by a gathering at a particular place in his district, he may prohibit any or all meetings within his jurisdiction. The Minister of Justice has similar authority and powers for the State. The magistrate or Minister must follow certain procedures in promulgating orders. He must publish notice of his decision, identify the particular gathering prohibited, specify exactly the public place to which the order is applicable, and select the best method for implementing his decision.

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101 S. v. Arenstein, 1964(1) S.A. 361 (D).
102 Id. at 364.
106 Id. § 12(B).
107 Id. § 13.
108 Id. § 14.
109 Id. § 17 bis.
111 Id. § 2.
112 Id. § 2(3).
113 S. v. Turrell, 1973(1) S.A. 248 (C). Convictions were overturned for four reasons. First,
The requirement that a magistrate may restrict "public" meetings has been liberally construed by the courts. In *Bozzoli v. Station Commander*, the Minister of Justice prohibited all open air public gatherings. Sixty-nine students at the University of Witwatersrand were arrested for demonstrating on the campus in violation of the order. In filing a writ of habeas corpus the principal of the university contended that the campus was not a "public place"; therefore, the arrests were illegal. In denying the writ the court cited *R. v. Cooke* for the proposition that a public place is any place to which the public has access, including, in some cases, private property. Since the public does have the right to cross the campus, and since all outdoor gatherings were banned the court decided that the arrests by the police were within the scope of the Act. Thus, the Minister or a magistrate can control almost any gathering by labeling it a meeting in a "public" place.

The requirement that the Minister or a magistrate publish notice of his orders is also a flexible one. The magistrate may publicize his decision by notice in the official government *Gazette*, in a newspaper, over the radio, on a billboard, or any other form of public announcement. Personal delivery to an individual not to attend a meeting is the best possible notice; however, if delivery is not possible, publication in the *Gazette* is adequate notice. Furthermore, proof of this publication negates the defense that the arrestee had no knowledge of the publication. Actual notice of the prohibition is not necessary. In *S. v. O'Malley*, the *Gazette* on September 25, 1974 published an order of the Minister of Justice prohibiting attending, promoting, convening, and encouraging a meeting of the South African Students' Organization (SASO) and the Black People's Convention (BPC). His notice was published in Capetown and about 900 copies of the order were available by 9:00 a.m. that day. The government printer also phoned various newspapers to inform them of the order; however, no evidence was presented by the State to show that news of the notice had reached Durban. At 2:30 p.m. that day the Durban *Daily News* published a report that a rally sponsored by SASO and BPC would take place. The court determined that actual notice of the prohibition was not necessary because the *Gazette* was "published" when it was made available to the magistrate could only prohibit a specific meeting, and he prohibited an entire class of public gatherings. Secondly, the notice did not specify the gathering with sufficient particularity. Furthermore, the magistrate, himself, must issue the notice and cannot allow the police to take exclusive control over its publication. Finally, the police's notice was defective in that it failed to warn those in attendance that force would be used if they failed to disperse.

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114 1972(3) S.A. 934 (W).
115 1939 T.P.D. 69.
116 *Riotous Assemblies Act*, supra note 110, § 2(2).
117 Id. § 2(5)(a)(b).
118 Id. § 2(7)(b).
119 1976(1) S.A. 469 (N).
public for sale. Furthermore, where the Minister authorized publication in a Gazette, it was not essential that publication be effected in the place where the offense was actually committed; all that was required was that the "publication" occurred before the offense was committed.

The statute also provides separate punishment for such inchoate offenses as conspiracy, attempt, and aiding and abetting a crime. Thus, for example, there is the statutory offense of conspiracy under the Act in addition to the common law crime. The conspiracy itself is the actus reus; even if the conspirator has nothing further to do with the actual offense, this portion of the Act is applicable to him. Sexual relations between the races, for example, have resulted in convictions for conspiracy under this section.

Relatively few cases have been brought under the Riotous Assemblies Act, perhaps because, unlike the other statutes, there are no special procedural or evidentiary laws to aid the prosecution. However, the mere existence of the Act indicates the power of the State to control the right of assembly.

VI. IMMORALITY ACT

Although it was not the main reason for its enactment, the Immorality Act does provide for substantial prohibitions against the normal relations of the races. The fact that the parties are of different races is as unlawful as the fact that they engaged in illicit sexual relations. Like most statutes of this kind both parties can be punished. However, unlike most morals legislation, such as statutory rape, which require strict liability, the Immorality Act, because of the peculiar nature of the crime, has been construed by the courts to require a finding of mens rea.

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120 Id. at 480.
121 Id.
122 Riotous Assemblies Act, supra note 110, § 18(1)(2).
123 S. v. Moumbaris, 1974(1) S.A. 681 (T).
125 S. v. M., 1971(1) S.A 207 (T). R. v. S., 1960(2) S.A. 466 (T) and S. v. Magistrate, Regional Division, 1972(3) S.A. 377 (N). No court has addressed the issue of how avoiding hostility among the races is served by such prosecutions.
127 Id. The presumption in § 21(2) of the Immorality Act can be rebutted only by evidence which would be sufficient in terms of the definition in § 1 of the Act to place the defendant in another race group. It could not be rebutted by evidence that, in a classification in terms of another Act, the person would be placed in a race different from the one which he has been deemed to be. S. v. F., 1970(2) S.A. 484 (T). In S. v. D., 1976(3) S.A. 675 (E), an appellant's offer to submit her passport as evidence of European parentage was rejected. Although it might have been relevant for other statutory classifications, it could not be relevant for the Immorality Act, because appearance alone is the sole criterion of race.
128 See note 129 infra. However, if the defendant makes a good faith error regarding his paramour's race, he may assert such error as a defense. Immorality Act, supra note 126, § 16(3).
The *mens rea* necessary to convict a defendant under the Act is defined by section 16(3); however, section 16(3) also establishes a defense,

... if it is proved to the satisfaction of the court that the person charged at the time of the commission of this offense had reasonable cause to believe that the person with whom he or she committed the offense was a white person if the person charged is a white person or a coloured person if the person charged is a coloured person.

Merely because a "white" man is found with a "coloured" woman in suspicious circumstances is not proof beyond a reasonable doubt that an offense under the Immorality Act has been committed. "If a reasonable inference can be drawn which points to innocence, however suspicious the circumstances may be, then the accused is entitled to be discharged."[119]

The recent case of *S. v. D.*[130] illustrates how the Immorality Act operates. Racial classifications in the Immorality Act are different from those in other statutes. Section 1 of the statute defines a white person as "any person who in appearance obviously is or who by general acceptance and repute is a white person," while a "coloured" person is any person other than a white person.[131] Furthermore, there is a presumption in the statute that "[a]ny person who seems in appearance obviously to be a white person or coloured person, as the case may be, shall for the purpose of this Act be deemed to be such unless the contrary is proved."[132]

The facts showed that the parties were arrested in the white male's bedroom. He was acquitted because he genuinely believed the woman to be white, a permissible defense under section 16(3). The woman appealed her conviction on the ground that she did not appear obviously to be a coloured person. The court held that once the appellant introduced evidence to dispel the presumption, then the burden of proof rested on the

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[119] R. v. B., 1960(2) S.A. 424 (T). The case of *S. v. S.*, 1961(4) S.A. 792 (N), illustrates how the *mens rea* requirement works. The appellant appealed his conviction on the ground that he was a chronic alcoholic, and consequently, the State failed to establish the requisite *mens rea* on his part. He further argued that he was incapable of distinguishing right from wrong. Nonetheless, the court reasoned that since a specific intent was not an essential element of the crime, then the burden of proof was on the accused to prove that he lacked *mens rea*. Moreover, inability to distinguish right from wrong is a test for establishing insanity and is not related to alcohol consumption. *Id.* at 795.

Even so, where the accused seeks to negate *mens rea* by a defense of automatism or drunkenness, his burden of proof apparently is only that on a balance of probabilities (not beyond a reasonable doubt) he was in a state of automatism. *R. v. H.*, 1962(1) S.A. 197 (A.D.); *S. v. H.*, 1962(3) S.A. 248 (E).


[132] The State may also prosecute for "enticing, soliciting, or importuning" in contravention of § 16(2)(a)(iii). In such a prosecution, the State need not specify what the allegedly indecent or immoral act was. *R. v. G.*, 1961(4) S.A. 718 (T). It is an open question whether conduct which is not indecent or immoral as between persons of the same race may become indecent or immoral between persons of different races. *R. v. E.*, 1960(4) S.A. 445 (C).

[132] *Id.* § 21(2).
State to prove beyond a reasonable doubt that the appellant was a coloured person. Since the State failed to do so the conviction of the woman was overturned.\footnote{Not one, but three witnesses testified for the state. The first two were the arresting officers who claimed that the appellant was coloured. On cross-examination an officer conceded that there was nothing about her dress, manner of speech or deportment to suggest that she was not obviously white. The third state witness, a man who ran a modeling school for young women and who organized a coloured persons' and Indians' beauty pageant, claimed that the appellant's color and facial characteristics were those of a white person.}

The Immorality Act is indicative of pervasive State regulation of interracial contact. Even though the rules are neutral, and may even be impartially applied, their purpose is to maintain apartheid. There are a number of cases arising under this Act which underscore the government's policy that enforced separation of the races in South Africa is based on race rather than immorality.\footnote{See cases cited in notes 129-132 infra.}

\section{VII. Conclusion}

The statutes promulgated by the South Africa legislature provide effective control of the nonwhite person in that country. While the statutes are not limited to the nonwhite, they have a special impact on him, for they prevent any change in the present social system. Once an executive decision labels an individual a "listed" person, the State can decrease substantially that person's freedom, for the statutes control every facet of a "listed" person's existence: when he may leave his home, where he may go, whom he may see, and when he may go to meetings. Indeed, the State is authorized by statute to conduct custodial arrests where it can interrogate an individual for long periods of time, without giving him relief. These restrictions may be imposed on a person without the sanction of a court, and the judiciary has acquiesced in these executive and statutory practices, which take place without a trial. Even in litigation under these statutes, the State has the advantage of presumptions, shifts in the burden of proof, and other rules of evidence. Those oppressed individuals who actually defend themselves against such charges as "having visitors," "attending a gathering," "promoting hostility among the races," or "endangering the maintenance of law and order" are effectively precluded from adequately redressing their grievances in court against the State, since many cannot afford the expense of an appeal. Thus, these statutes, as carried out by the executive branch and enforced by the judiciary,
provide a structure fundamental to the implementation and maintenance of apartheid in South Africa.\footnote{See, e.g., \textit{Political Imprisonment in South Africa: An Amnesty International Report} (1978).}