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Submission to
T.C. on Repeal of
Discriminatory Legislation.
1/6/93.

Repressive legislation prohibiting free political activity.

Schedule 1.

No. and year of law	Title of law	Extent to which repealed or amended
Act. no 44 of 1950 of the Parliament of the republic of South Africa	Internal Security Act, 1950	The repeal of the whole
Act no. 3 of 1953 of the Parliament of the Republic of South Africa	Public Safety Act, 1953	The Repeal of the whole
Act no. 17 of 1956 of the Parliament of the RSA	Riotous Assemblies Act, 1956	(a) The repeal of section 2;
		(b) the amendment of section 4 by the deletion of expression "section 2(4) or";
		(c) the amendment of section 5 by the deletion of the expression "2 or";
		(d) the repeal of section 6; and
		(e) the repeal of Chapter VIII;
		(f) the repeal of Chapter IX, except in so far as it relates to the payment of salaries, pay and allowances and allowances of auxiliary services who are such members immediately before the commencement of this Proclamation;
		(g) the repeal of sections 103bis, 103ter and 103quat; and
		(h) the amendment of section 118 by the deletion of paragraph (b) of subsection (1).
Act no. 44 of 1958 of the Parliament of the RSA	Post Office Act, 1958	All sections that enable the State or government or any of its agencies to, in any manner whatsoever, interfere with the privacy of the citizens of this country
Act no. 34 of 1960 of the Parliament of the RSA	Unlawful Organisations Act, 1960	The repeal of the whole
Act no. 76 of 1962 of the Parliament of the RSA	General Law Amendment Act, 1962	The repeal of the whole
Act no. 37 of 1963 of the Parliament of the RSA	General Law Amendment Act, 1963	The repeal of sections 3, 4, 5, 6, 7, 14, 15, 16 and 17
Act no. 62 of 1966 of the Parliament of the RSA	General Law Amendment Act, 1966	The repeal of sections 3, 4, 5, 6, 22 and 23

Act no. 83 of 1967 of the Parliament of the RSA	Terrorism Act, 1967	The repeal of the whole
Act no. 21 of 1975 of the Parliament of the RSA	Publications Act, 1975	The amendment of section 47 by the deletion in paragraph (e) of subsection (2) of the words "safety of the State"

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PRIMARY POLITICAL CRIMES AGAINST THE STATE*

1. INTRODUCTION

The marked political instability and high level of violent conflict which characterize present day South Africa is a source of great concern and ought to be given priority in legislation. This is especially true during the transitional phase in South African politics, for, as suggested below, the level of political violence during this stage is likely to escalate. This proposition should not be underestimated: indeed it is suggested that this should be the primary concern of national security. Mathews goes as far as recommending that the use or threat of serious violence as well as the use, in circumstances likely to cause it, of language or rhetoric of violence be made two of the major security crimes in South Africa.[1]

It is submitted that South Africa needs specific violence measures in its national security legislation to combat the potential problem. Before we embark on discussion of the proposals for reform during the transitional period, it is necessary to briefly outline basic assumptions about transitional society. This document will primarily be concerned with the operation of law, within a political vacuum, as future arrangements for the government of South Africa are shrouded in uncertainty.

1.1 VIOLENCE AS A FEATURE OF TRANSITIONAL GOVERNMENT

Transitional government is often characterized by political instability and rising violent conflict.[2] For South Africa, the problem is aggravated by its legacy of apartheid, whereby the problem facing a post-apartheid government

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* We are indebted to Professor Tony Mathews for his invaluable contribution and comments on an earlier draft. His guidance and assistance at various stages of this work is greatly appreciated.
Special thanks to Professor John Milton for sharing with us his expertise in the field of criminal law.

[1] Mathews AS *Freedom, State Security and the Rule of Law* Juta (1984) 290.

[2] See generally Arlinghaus BE (ed) *African Security Issues: Sovereignty, Stability and Solidarity* Westview Press, Colorado (1984) and Archetti EP (et al) *Sociology of 'Developing Societies': Latin America* Macmillan Education, London (1987).

will be one in which the complex heritage of apartheid, personal prejudice and institutional inequity will have to be reckoned with. As Ellman points out, South Africa, characterized by entrenched pluralism and an array of political convictions, cannot 'escape the possibility of serious domestic violence despite the achievement of majority rule'.[3] Furthermore, the implementation of reforms, particularly in an already unstable society, carry the risk of further destabilization.[4]

A basic problem facing a society in transition therefore appears to be its ability to effectively deal with the issue of escalating domestic violence.[5] For South Africa, the dilemma is further aggravated by the fact that the current disorder is often attributed to the persistence of the authorities by trying to solve social problems (which should be addressed politically) with harsh security measures.[6] The reach of security laws in South Africa is not confined to violence or subversive attacks upon the State, but extends to extra-parliamentary dissent so that black opponents of the government are bound to come into conflict with the security system. The ~~system~~ security laws thus inevitably encourages confusion between black extra-parliamentary resistance and the more internationally accepted version of terrorism. It has as its objective, political control and the containment of political violence appears to have taken a secondary role.

Since the security legislation is framed to inhibit the articulation of non violent pressure against the State, the growth of violence is not surprising. There is no better means of encouraging revolutionary resistance than to suppress the ordinary channels of grievance articulation. As Mathews aptly states, there is a direct relationship between this phenomenon and 'government policy of holding down the lid and simultaneously sealing outlets and safety valves.'[7]

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[3] Ellman S A Constitution for All Seasons: Providing against Emergencies in a Post-Apartheid Constitution (1989) Vol 21 *Columbia Human Rights Review* 163.

[4] Mathews op cit note 1 at 287. He quotes De Tocqueville who points out that the 'most dangerous moment for a bad government is usually that when it enters upon the work of reform.'

[5] Our basic assumption is that such violence will largely be political in nature.

[6] Mathews 'South Africa Security Law and the Growth of Local and Regional Violence' 2.

[7] Mathews op cit note 6 at 7.

It has also been argued that in the new government the political context is likely to be similar to that of other divided societies, such as Northern Ireland and Israel, where the possibility exists for the development of a 'relatively tightly organized, radical and violent white group' and, in South Africa, coupled with a radical black group.[8] This increase in radicalism is also likely to be a contributory factor to the rising spiral of violence.

It is for these reasons that it is submitted that the role of national security should be firstly, to protect the State from violent overthrow, and secondly to attempt to address directly the problem of violence, leaving the issue of political dissent to the arena of politics. Furthermore, a national security system must attempt to balance the interests of the State and society at large, against the rights and freedoms of individuals. Basic democratic principles must therefore, be used as a guideline.

1.2 BASIC PRINCIPLES

For national security laws to be legitimate they must, firstly, comply with general principles of the Rule of Law and secondly, with principles governing fair and democratic national security systems. Thus the practical importance of national security compels the search for an approach that could make security goals compatible with democratic values and human rights.[9] In societies where there exists a crisis of human rights due to the implementation of national security policies, it is because *national security* has put democracy in jeopardy. The task is therefore to make national security policies compatible with democracy and the rule of law.[10] Mathews[11] succinctly lays down the basic principles of the rule of law as:

a) laws that touch on the basic rights of citizens shall be narrowly defined and precisely drafted so as to constitute a clear guide to official action

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[8] Heyman P 'Criminal Justice in Conflict-Ridden Societies' 5.

[9] Tapia-Valdes 'A Typology of National Security Policies' in (1982) Vol 9 *Yale Journal of World Public Order* 10 at 15.

[10] Ibid at 35.

[11] Mathews op cit note 1 at 219.

and citizen conduct;[12] and

b) the application and interpretation of such laws shall be under the control of impartial courts operating according to fair procedures.

Furthermore national security must subject policies and institutions to the fundamental laws of the land including a coherence with national values and standards. This entails the adherence to the following basic principles:[13]

(i) the protection of individual liberties should occupy a favoured position in the hierarchy of democratic values;

(ii) the burden of proof to demonstrate its case rests upon the government;

(iii) the threat to national security must be direct, imminent and serious and must not be vague and speculative;

(iv) where the rights of individuals are restricted, constraints must take the narrowest possible form; and

(v) clear and unambiguous rules should be formulated and applied which are not subject to arbitrary discretion.[14]

It is within the above framework that crimes against the State will be discussed and proposals will be made.

1.3 BASIC OUTLINE OF DOCUMENT

The purpose of this document is firstly to evaluate the existing law and secondly to make recommendations that would be appropriate to South Africa during its transitional phase. Due to the extensive scope of security legislation, this document will be limited to discussion of what is considered to be the more serious political offences in the common law and the Internal Security Act[15]. The less

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[12] This requirement of the Rule of Law may be best expressed in the maxim *nullem crimen sine lege*, which requires that persons should be able to properly determine the law and structure their conduct accordingly.

[13] Emerson T 'National Security and Civil Liberties' (1982) Vol 9 *Yale Journal of World Public Order*' 78 at 85.

[14] See also Mathews AS 'National Security, Freedom and Reform' in Schrire R (ed) *Critical Choices for South Africa: An agenda for the 1990s* Oxford University Press, Cape Town (1990) 57 at 60.

[15] Act 74 of 1982.

serious offences contained in this Act and other statutes will be considered in a second document. Furthermore, recommendations will be made in relation to issues raised in the above analysis, including the problem of intimidation and private armies.[16] For the purposes of clarity, the structure of this document will take the following format: the present law (in bold print); some observations on the present law (in normal print) and proposals for reform (in italics).

2. COMMON LAW CRIMES AGAINST THE STATE

There are three common law crimes which can be broadly classified as crimes against the State, namely treason, sedition and public violence. The discussion which follows below illustrate a wide range of problems inherent in the application of these crimes: they fail to provide a clear guide to prohibited conduct: there is a severe lack of clarity regarding the ambit of these crimes, and there appears to be an immense overlap between them. Our general observation is that these crimes, like the statutory crimes against the state, have been used by the South African judiciary to attempt to make punishable almost all forms of extra-parliamentary dissent.

Each of these crimes will be examined separately, and where necessary, proposals for their reform will be recommended. It is further recommended that these crimes be codified into the statute to make for clarity and certainty.

2.1 TREASON

2.1.1. THE PRESENT LAW

Broadly speaking, treason consists in assisting the external enemies of the State, or in promoting or bringing out unlawful revolutionary change in the government or the State.[17]

(A) DEFINITION:

There has been no consistent definition of treason that has been applied by the courts. Burchell and Milton define treason as consisting "in any overt

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[16] This discussion will appear in the second document.

[17] Burchell JM and Milton JRL *Principles of Criminal Law* (1991) Juta, Cape Town 608.

act unlawfully committed by any person owing allegiance to a State, with intent to overthrow, impair, violate, threaten or endanger the existence, independence or security of the State, or to overthrow or coerce the government of the State or change the constitutional structure of the State'.[18] Hunt offers a somewhat more limited definition of treason consisting 'in any overt act unlawfully committed by a person owing allegiance to the State possessing *majestas* who intends to impair that *majestas* by overthrowing or coercing the Government of the State.'[19] In *R v Leibbrandt*[20] the court extended the definition to include not only the threat to the independence or safety of the State, but also to the 'authority' of the State.

In an attempt to 'codify the law relating to the common law crimes of treason, sedition and public violence', the South African Law Commission drew up a draft bill in 1976.[21]

The main reasons for the recommendation was 'lack of clarity' with regard to common law crimes against the State, and the overlapping of common law crimes with each other, and with many statutory offences. The Commission recommended, however, that there should be no departure from the common law as it has developed to date. One of the main aims of the codification would be to adequately set out and clarify the law in this regard. The recommendations were never followed in Parliament. Clause 2 (1) of the Bill defines treasonable acts as follows:

> 'Any person who, owing allegiance to the Republic, commits an act within or outside the Republic, with the intention of
>
> (a) unlawfully impairing, violating, threatening or endangering the existence, independence or security of the Republic:
>
> (b) unlawfully changing the constitutional structure of the Republic:
>
> (c) unlawfully overthrowing the government of the Republic: or

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[18] Ibid.

[19] Hunt PMA *South African Criminal Law and Procedure* (2nd ed) Vol II (1989) 14.

[20] 1944 AD 178.

[21] *The South African Law Commission Report on the Codification of the Common law relating to crimes against the State* RP 17/1976.

(d) **unlawfully coercing by violence the government of the Republic into an action or into refraining from any action.**'[22]

The wide and overwhelming range of words used to define the crime illustrates the initial problem with its scope: its vagueness: uncertainty and extremely wide ambit. It would appear that the scope of the crime tends to cover a broad spectrum of human activity. Moreover, the wide definition lends itself to overlap within the scope of the crime itself. This is apparent in the examples of inconsistency and different standards of liability, especially with the inclusion of the threat to the 'authority' of the State. These definitions, evolved by the courts over the years, are astutely designed to cover almost all forms of political opposition. It is our view that the definition of this crime should be clarified and severely limited.

(B) ORIGIN[23]

Treason has its origin in the Roman law crime of *perduellio*, (the existence of a hostile intent against the State)[24] and later *crimen laesae majestas*[25] (any offence against or encroachment upon the dignity, authority or power of the State). South Africa has followed the elements of the Roman-Dutch law of treason.

It must be pointed out at the outset that treason is based upon a medieval concept formulated during the time of state absolutism and before democracy.

(C) ESSENTIAL ELEMENTS

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[22] This definition was quoted with approval and adopted in *S v Banda* 1990 (3) SA 466. Snyman also uses this definition with approval in 'Crimes Against the State and Administration' in *The Law of South Africa* 1981 vol 6 at 158.

[23] For a comprehensive analysis of the old authorities, see *S v Mayekiso and others* 1986 (4) SA 738. See also Burchell and Milton op cit note 17 at 609, and Snyman CR *Criminal Law* (1989) Butterworths at 309-310.

[24] *S v Zwane* 1989 (3) 253 (W) 256.

[25] Ibid at 257.

The following essential elements of treason have been identified:[26]

(i) unlawful

The act in question must be unlawful. Constitutional mechanisms for replacing or changing State institutions are not unlawful and cannot be treason.[27] **Thus State channels for the replacement of legislation and structures of the government does not constitute treason.**

In the South African context. Blacks lack the right to participate in the process for legitimate removal of the government, and therefore any opposition may well fall within the broad definition of treason. This problem is further aggravated by the fact that there has been no proper clarification as to what constitutes 'unlawful' opposition, and hence which acts will be punishable as treason. The crime has been used to punish extra-parliamentary opposition to the State which would have been acceptable in most other democracies, such as the organisation of peaceful protest against an unjust law. The Delmas treason trial prompted the US State Department to say it is inconceivable that their political activities would have qualified as treason or terrorism in this country or any other democracy.'[28]

(ii) overt act

In *Leibbrandt*[29] the court defined an overt act as any act, which, apparently innocent in itself, may be an act of treason if accompanied by hostile intent. Any overt act suffices and it is not essential that the conduct involved should have progressed beyond the stage of the commencement of the consummation.[30] **Not only an attempt, but**

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[26] Burchell and Milton op cit note 17 at 610.

[27] *S v Banda*, supra at 474.

[28] 'The Delmas Treason Trial' in *South African Journal on Human Rights* (1989) 105.

[29] Supra at 284.

[30] Burchell and Milton op cit note 17 at 610.

also incitement and conspiracy to commit the offence are acts of treason.[31] Every person, who with hostile intent, assists in the commission of the crime, 'conforms to the wide definition of the crime'.[32] Therefore, even an omission to act, if accompanied by the hostile intent constitutes treason in our law.[33] A person who 'knowing of the commission of an act of treason, refrains from giving information to the authorities, ... must be regarded as having taken part in the treasonable conduct.'[34] This is the exception to the rule requiring the commission of an overt act to be punishable. Violence, actual or contemplated, against the State is not a necessary element of the crime.[35] As the common law stands, it is impossible to describe categories of acts as prerequisites for treason.[36] The act need not only threaten the independence or safety of the State, but also the 'authority' of the State to constitute treason.[37]

The use of the 'overt act' in the definition indicates that some positive or actual conduct has to occur before an act can qualify as treason. Yet attempts, incitements, conspiracies and even omissions to act constitute treasonable offences. This illogical and bizarre interpretation of the term 'overt act' by the South African judiciary has resulted in a confusing mish-mash of the law. To make matters worse, a totally innocent act (accompanied by the dubious proviso of hostile intent) is made treasonable in our law. Any act, no matter how minor, committed with the requisite intent may constitute treason in our law. The act need not be violent or

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[31] *Zwane* supra at 256 and *Banda* supra at 474.

[32] *Banda* supra at 474.

[33] Snyman op cit note 23 at 314.

[34] *Banda* supra at 511.

[35] *Mayekiso* supra at 751.

[36] *Banda*, supra at 473. See also the list of acts offered by Burchell and Milton op cit note 17 at 611-2, and Snyman op cit note 23 at 312-3.

[37] *Leibbrandt* supra at 280.

forceful, nor result in force or violence, to be treasonable. This is a departure from internationally accepted principles of the law of treason.

(iii) allegiance

Treason can only be committed by one who owes allegiance to the State. Factors which create allegiance include citizenship, domicile and residence.[38] It is immaterial whether a person accused of treason believes, on ideological grounds, that he owes no allegiance to the State.

The concept of allegiance is, in most western democracies, a mutual relationship between the individual and the State, with reciprocal rights and obligations. Citizenship does not necessarily create a climate of allegiance on the part of people to the State. In what circumstances and by whom allegiance is owed is not always an easy question. In a society where the rights to participate in government and freely express one's opinions are given constitutional protection, the question to whom the offence of treason is to extend will be less difficult to answer. Here, the notion of reciprocity would create a vested interest for people to help preserve a state of affairs in which individual rights and freedoms may be exercised. This requirement of treason illustrates its archaic nature and inconsistency with features of modern democratic states. The concept of allegiance is based on an outdated principle of loyalty to a sovereign which runs counter to the modern philosophy of human individuality and autonomy. The original basis of the crime was the feudal allegiance owed by a vassal to his lord, and has no place in modern law. Allegiance is too broad and artificial a criterion to assess the persons to whom the scope of the crime extends, and a better approach would be to focus on the reason for imposing liability as expressed in the notion of repricocity.[39] The class of persons to whom the crime extends should be stated with more clarity and precision.

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[38] Burchell and Milton op cit note 17 at 613.

[39] *Crimes against the State* Law Reform Commission Of Canada Working Paper 49 1986 at 33.

(iv) State

The State must possess *majestas* (i.e. it must be independent and sovereign).[40] For the purposes of treason the government is wholly identified with the State,[41] and to seek to overthrow the government is treason even if there is no intention of changing the nature of the State or its institutions.[42]

For the purposes of the law of treason there is no distinction between the State and the government of the day. It is submitted that this is an unsatisfactory approach as the purpose of these offences is to protect the institution of the State and not a particular ruling political party (and its accompanying ideology).

(v) hostile intent

Hostile intent is the definitive element of high treason. Intention is judged subjectively, and the accused must know or foresee that his conduct is unlawful and amounts to treason.[43] This requirement is uncertain in its application, and it has been held that a person who tends merely to pressurize the government into a course of action has a hostile intent.[44] Further, the court has stated that 'acts may be committed which, although they do not show an intention to subvert the State as such, yet amount to treason: as where a person out of malice or hostility to the *ruler, or to some act of maladministration*, attempts to oppose and resist his authority.'[45] (my emphasis). In *R v Strauss* it was held that hostile intent 'does not mean that the accused must have been animated by feelings of hatred or ill-will towards

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[40] Ibid.

[41] *Zwane* supra at 258.

[42] Burchell and Milton op cit note 17 at 614.

[43] Ibid.

[44] Ibid.

[45] This was quoted in *Zwane* supra at 259.

that State, but merely that he was intentionally antagonistic towards it'.[46] In *Banda* the court said that hostile intent is not restricted to overthrowing the State, but also includes an intention to bring pressure to bear upon, or coerce the government unlawfully.[47] This would include an intention to force the government to adopt or refrain from adopting a certain line of action.[48] The hostile intent does not have to be accompanied by acts of violence, actual or contemplated.[49]

The courts have drawn a distinction between hostile intent and motive. It is the hostile intent with which an act is intended and not the motive by which it is done.[50] In other words, while the motive behind which an act is committed may be noble or righteous, if that act is hostile and is ultimately intended to weaken or impair the State, then it constitutes treason.

The practical consequences of the intention requirement are disturbing. In the first place, the precise definition of what constitutes a hostile intent is unclear, and is not limited to acts which show an intention to subvert the State. Hostile intent is present when an act is committed due to mere antagonism against the State. As indicated above, the courts have gone far as to extend the scope of treason to protect the State even where there is protest against maladministration on the part of the government. Furthermore, the courts have rejected narrow views of the Roman jurists (which restrict intention to overthrow of the State or government) and have adopted wider approaches that define 'hostile intent' as an intention to endanger the independence or security of the State.[51]

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[46] 1948 (1) SA 934 (A) at 940.

[47] *Banda*, supra at 478.

[48] Snyman op cit note 23 at 314.

[49] *Mayesiko* supra at 751.

[50] *Leibbrandt* supra at 281.

[51] Snyman op cit note 23 at 314.

(D) JURISDICTION

The South African courts have jurisdiction to try treason committed against the country anywhere in the world (unlike other crimes where the general rule is that a State will punish only crimes committed within its own territory). The court may impose the death sentence for treason if committed during time of war.[52]

It would seem that it is being recognised that, internationally, the most important form of treason is acts of disloyalty during time of war, with the inclusion in the statute that the court may only impose the death penalty for treason committed during time of war.

2.1.2 GENERAL OBSERVATIONS OF THE LAW OF TREASON

It must firstly be noted that the crime of treason was formulated during the period of state absolutism with an over-emphasis on the monarchy. It is a concept based on the view that the rulers of the State were all-knowing superior beings who were beyond the reproach of the ordinary people.[53] Despite centuries of political evolution during which the importance of the monarchy was eclipsed by parliament, the crime of treason has not been substantially modified. It is submitted that the law of treason as it stands represents an outdated and unprincipled law, and needs substantial qualification to fit into a system of democracy. It would seem that the interpretation of the phrase 'overt act' in the context of treason stems from the medieval concern with criminalising attempts to commit treason, as in those days there was no general law of attempts and it was thus necessary to punish inchoate crimes in this way.[54]

The above analysis of the law of treason shows that it is 'alarmingly elastic in character' and the scope of the application includes 'robust

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[52] Section 277 of the Criminal Procedure Act of 1977 as amended.

[53] Op cit note 39 at 35.

[54] Ibid.

form of political activity'.[55] The elasticity of the scope of the crime is made worse by the fact that South Africa lacks a consistent and coherent definition of the crime and no single definition has been consistently applied by the courts. This problem of uncertainty is further compounded by the fact that the South African courts have chosen to reject the narrower view of Roman jurists on the subject of treason, and have preferred to adopt wider, all-embracing views. This approach seems to be line with the overall intention of punishing most forms of political opposition to the State. This is clear from the leading case of *R v Erasmus*,[56] where the court 'rejected the narrow view of Voet that treason is restricted to acts aimed at the overthrow of the State', and adopted the wider view of writers such as Mathaeus that treason will be committed when the security of the State is injured.[57]

The requirements for the law of treason in the form of 'overt act' with 'hostile intent' are fraught with difficulties and have serious implications for political protest in South Africa. Treason may consist of any act no matter how innocent it may be when viewed objectively, as well as an omission to act, and the hostile intent, as we have seen above may take many forms.

The most alarming and blatant departures from international norms are, firstly, the lack of a requirement of force, actual or envisaged, as a requirement for treason during times of peace. Secondly, it is clear that the crime of treason is internationally used to punish acts of disloyalty and plotting with the enemy during time of war. As stated above, treason is based on the fundamental notion of betrayal, and the most unambiguous form that this could take is plotting with the enemy during times of war, when a State is at its most vulnerable.

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[55] Mathews op cit note 1 at 219.

[56] 1923 AD 73.

[57] Snyman CR 'Sedition Revisited' in *South African Law Journal* (1980) 19.

U.S. Const., Art III Assisting enemy during war and providing some aid & comfort. No conviction w/o (1) open confession in open court or (2) testing of 2 witnesses of the "overt act" of treason. (i.e. thinking not enough!)

The all-embracing reach of the crime of treason has resulted in the deviation from the principle of law that guilt is personal.[58] In *Hogan*, the accused was convicted for non-violent activities on behalf of the ANC. The court ruled that 'a person can never support the ANC without being guilty of treason even if that person's actions are lawful social activities that were not intended to further the ANC policy of overthrowing the government in South Africa'.[59]

For the purposes of treason there is no distinction between the State and the government of the day. As suggested above, this is an unsatisfactory approach, and the government of the day should be protected only in its role of custodian of official State policy. The lack of distinction between the government and the state for the purposes of treason results in the criminal law protecting the ruling party's ideology. It is clear that this should not be the case. The joinder of the government with the state has further, more alarming implications in a multi-party democracy where it is not inconceivable that the law of treason would be used to serve the interests of more than one party political affiliation. It is submitted that, for the purposes of treason, the government needs to be identified as a neutral protector of the State, and should only be safeguarded in this capacity.

The concept of allegiance to determine the class of persons to whom treason applies, is a vague and artificial one. There will always be those who believe that the State does not serve their interests and therefore they owe it no allegiance. It is recommended that the concept of allegiance be replaced with a specific listing of those persons to whom the scope of the offence extends.

As has been illustrated there is a vast overlap between the statutory crimes against the State and the common law.

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[58] *S v Hogan* 1983 (2) SA 46 (W).

[59] Mathews op cit note 1 at 220.

PROPOSAL

GENERAL COMMENTS:

In a fully democratic society, crimes against the State serve to protect democracy as well as society and the State. There should clearly be limits as to what can be protected by the criminal law in a democratic society. The criminal law cannot be used to secure the government from non violent political opposition which is at the very core of a democratic State.[60] *We believe that the common law crimes against the State, to avoid the shortcomings outlined above, should be codified.*[61] *We believe that through codification there can be no departure from the fundamental principles on which the proposed reform are based. Codification of these crimes will ensure that there will no different interpretations of the law and this will result in clarity, precision and certainty. The codified version which we propose will attempt to set out the conduct necessary to constitute the crime of treason, and the persons to whom it applies. We are of the opinion that the most important form of treason should be that which concern[s] [a]ct of disloyalty in time of war.*[62]

PROPOSED DEFINITIONS:

'Time of War' means when there is an external threat, invasion or threat of invasion by foreign forces, and when war has been declared by the government against another state.

'Citizen' means any person who is entitled to vote in national elections in the Republic.

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'Persons voluntarily in the Republic' means those persons who are not citizens and are in the country out of their own free will or who are engaged in business, employment or a course of study and who have taken up permanent residence in the Republic for the duration of their business, employment or study.

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[60] Op cit note 39 at 42.

[61] Although this has been the proposal of the South African Law Commission in 1976, the recommendations contained in this document differ from those proposals to ensure certainty, clarity and uniform application of the law.

[62] 'Treason, sedition and allied offences' in *The Law Commission Working Papers* Vol 9 71 at 102, say 'that is in its strict sense in which it is regarded by international law'.

PROPOSAL

1. Any person who during time of war-

a) intentionally engages in war or armed hostilities against the Republic;

b) intentionally assists the enemy by:

i) taking up arms with the enemy;

ii) accepting an appointment with the enemy; or

iii) engaging in any conduct which is directly or indirectly intended to assist the enemy.

2. Any person who during time of peace uses force or violence to overthrow the constitutional government of the Republic

shall be guilty of the offence of treason and upon conviction shall be liable for punishment as the court may deem fit, notwithstanding the provisions of any other law.

This offence applies to any person who is a South African citizen in respect of treason committed anywhere, and to any person who is voluntarily in the Republic in respect of treason committed in the Republic.

2.2 SEDITION

2.2.1. THE PRESENT LAW

The crime of sedition has been used as the chief means of suppressing calls for political and social reform in South Africa. The crime is committed by persons gathering to protest or engage in revolutionary activity. This crime has had the effect of inhibiting political action and freedom of speech and assembly.[63]

(A) DEFINITION

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[63] Burchell and Milton op cit note 17 at 616.

Burchell and Milton, and Hunt[64] define sedition as the 'unlawful gathering, together with a number of people, with the intention of impairing the authority of the State by defying or subverting the authority of the government but without the intention of overthrowing or coercing that government'.[65] Snyman includes the intention of 'challenging or resisting' as well as use of the word 'violently' in his definition.[66] The South African Law Commission recommended that sedition be codified as follows:

'Any person who unlawfully and intentionally takes part in a concourse of persons violently resisting or defying the authority of the Republic or who unlawfully and intentionally causes such a concourse shall be guilty of the crime of sedition and upon conviction be liable to such penalty as the court may deem fit'.[67]

As a whole the definitions present a vast and confusing range of conduct and intention for the crime, and has been described as 'having a forbidding range of application'.[68] The main point of contention within the scope of the crime is whether the use of violence is a necessary element of the crime. While Snyman concludes that it is, it is omitted from the definition by Burchell and Milton, and in both *Mayesiko* and *Twala*, the court concluded that it was not a necessary element of the crime. As with treason, it is clear that the scope of the crime is alarmingly vague and uncertain.

(B) ESSENTIAL ELEMENTS

The following essential elements have been identified.[69]

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[64] Hunt op cit note 19 at 45.

[65] Burchell and Milton op cit note 17 at 616.

[66] Snyman op cit note 23 at 316.

[67] Clause 3 of the Bill.

[68] Mathews op cit note 1 at 220.

[69] Burchell and Milton op cit note 17 at 617.

(i) unlawful

Here the court must determine whether the gathering was unlawful, and the main criterion would be the purpose of the gathering.[70]

(ii) gathering or causing a gathering

The absence of a gathering of people cannot be sedition. The courts have held that two persons are a gathering for the purposes of sedition.[71] The gathering need not be unruly and it is sufficient that the people come together for an unlawful purpose[72]. Not only those who take part in the gathering but those who 'incite, instigate or arrange it' are also guilty.[73] However, if the gathering does not in fact materialize from the incitement, instigation or arrangement, one could be charged with incitement or conspiracy to commit sedition. Does the gathering have to be accompanied by violence or threats of violence? This important question does not appear to be clear in our law, and the case law appears to provide that violence is not a prerequisite for the crime.

Some important and disturbing issues are raised in this part. In the first place, the court in *Twala* held that two persons are sufficient to constitute a gathering for the purposes of sedition. Snyman shows how this interpretation is not in line with those of the Roman jurists[74], and that something more 'serious, sinister or threatening'[75] is required by the authorities. He also points out that it is difficult to envisage how two people could endanger the authority of the State.

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[70] Ibid.

[71] *S v Twala* (1979) 3 SA 864 (T).

[72] Burchell and Milton op cit note 17 at 617. In *Zwane* the gathering was for the purpose of conducting a peoples court.

[73] Snyman op cit note 23 at 318.

[74] Snyman op cit note 57 at 20.

[75] Ibid.

Secondly, the crime is committed not only by those taking part in the gathering, but also by one who has caused the gathering in some way, even if he is not present at the actual gathering.[76] This is in direct contradiction to the principles of criminal law which provide that those who merely incite others to commit the crime, or merely conspire with each other to commit it, would not be guilty of sedition, but merely of incitement or conspiracy to commit it.[77]

Thirdly, there appears to be a lack of clarity in our law regarding the use of violence for the commission of the crime. The court has ruled that violence is not an essential element of the crime. This judgment has been criticized on the basis that it is not in keeping with the view of Roman-Dutch authorities on the subject. The jurists speak of 'mobs armed with stones and sticks, a concourse of mutinous soldiers, or a crowd plotting the death of the sovereign'.[78]

The above elements would effectively mean that almost any unlawful gathering of two or more people, even if dispersing peacefully at the request of the police, would be committing sedition. In other words, there need be no consequence flowing from the 'seditious' gathering, only that they came together with an intention to impair the authority of the State.

(iii) impair authority

The purpose of the gathering must be to challenge, resist or defy the authority of the government.[79] In *Zwane* it was held that the conducting of a 'people's court' could qualify as sedition in that the accused impaired the authority of law enforcement channels of the State.

The primary difficulty with this element is the actual meaning of the word 'authority'. There does not appear to have been a strict interpreta-

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[76] Ibid at 21.

[77] Ibid.

[78] Ibid at 22.

[79] Burchell and Milton op cit note 17 at 618.

tion by the courts of its meaning,[30] and many forms of otherwise unpunishable activity can be said to impair the authority of the State.

(iv) intention

The intention must be to defy, challenge or resist the authority of the State.[31] The element which distinguishes treason from sedition is the requirement for the former of a hostile intent. For the purposes of sedition a hostile intent is not required. It is not necessary that the gathering succeed in its aim of impairing the authority of the State: the intention to do so is sufficient.[32]

The stark feature of this element is the fact that no actual consequences need flow from the gathering if the necessary intention is present.

2.2.2 GENERAL OBSERVATIONS OF THE LAW OF SEDITION

The first problem seems to be the difficulty in distinguishing between treason and sedition. Some distinguishing factors appear to be the following:

(i) In *Twala* it was held that treason protects the existence of the State, whereas under sedition it is the authority of the State or government that is protected. However, Snyman submits that the difference between treason and sedition is not that easy to define, because by challenging the authority of the State one is also endangering the existence or security of the State.[33] Furthermore, in *Leibbrandt* the court said that the act need not only threaten the independence or safety of the State, but also the 'authority' of the State to constitute

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[30] *Twala* supra, offers a definition of the words 'defy' and 'authority' at 870.

[31] Burchell and Milton op cit note 17 at 618.

[32] Snyman op cit note 23 at 319.

[33] Snyman op cit note 57 at 19.

treason.[84] This makes distinction between the crimes on this basis difficult.

(ii) Sedition can only be committed by a number of people acting in concert, whereas treason can be committed by a single person.[85]

(iii) Treason can be committed by someone owing allegiance to the Republic, while sedition can be committed by a person owing no such allegiance.[86]

(iv) While there can be no attempted treason, there is no reason why there cannot be attempted sedition.[87]

(v) It is not clear whether violence or the threat of violence [88] is a requirement for sedition, but it is clear that it is not a prerequisite for treason.

Thus it is clear that the distinction between treason and sedition is not so easy to determine. Indeed, in *R v Malan*,[89] the court said that all acts constituting sedition would fall under the scope of high treason or public violence. One is forced to question the necessity of the different crimes if there is such a large degree of overlap.

It would appear that the offence of sedition provides another example of an outdated law based on medieval principles. Here too the offence seems to be a result of the once prevalent view that rulers were beyond the reproach of the people.[90] The law of sedition in its present form has

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[84] See note 20.

[85] Snyman op cit note 57 at 20.

[86] Ibid.

[87] Ibid.

[88] *Mayekiso* supra at 751.

[89] *R v Malan* 1915 TPD 180.

[90] Op cit note 39 at 35.

no place in a democratic society which recognises the right of its people to freely criticize and debate political issues.

As in the case of treason, the law with regard to sedition is unclear and vague. If an essential element such as the use of violence in the commission of the crime is unclear, it makes for grave uncertainty and confusion both for a person to structure his conduct accordingly, and for the accused who needs to prepare his defence.

We find that in the case of sedition, the views of the Roman-Dutch jurists have not just been exploited, but they have been in some cases totally ignored. As pointed out above, the common law authorities specifically require the element of violence to be present, yet this was not followed by the judiciary.

It appears that the large amount of security legislation in South Africa has made the crime of sedition almost superfluous, and consequently there have not been too many prosecutions for sedition [91] (Since 1950 *S v Twala* in 1979 was the first case of sedition that was tried in our courts, and it extended the scope of sedition far beyond the authorities). It is arguable that this was a cunning strategy on the part of the State, because the decision to try the accused under the common law crime of sedition rather than under existing security legislation was welcomed as the common law offences are well known throughout the western world, and adverse criticism of the South African authorities for prosecuting political dissent lost some of its sting.[92] However, what was not brought to the attention of the international community was the fact that the interpretation of the crime made it not as oppressive as existing security legislation.

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[91] Snyman op cit note 57 at 16.

[92] Ibid. It can also be argued, however, that this was a response to complaints by civil rights groups against the use of the Internal Security Act.

Mathews has observed that 'until the courts limit the scope of these crimes by a stricter interpretation of their basic requirements, their elasticity will make them a serious threat to persons who engage in extra-parliamentary political opposition. If the judiciary continues to regard non-violent coercion of the executive (or any of its organs or departments) in order to bring about a change of policy as treason, and gathering for non violent purposes as sedition, it will in effect countenance the drastic limitation of democratic rights by the common law.'[93]

GENERAL COMMENTS

The main question we need to ask is whether there is any need for the crime of sedition in the codification of the common law crimes in the first place. In order to answer this question, it is important to consider whether conduct punishable under sedition would go unpunished if the crime was abolished. We are of the opinion that such conduct would in fact be punishable under statutory provisions.[94]

PROPOSAL (1)

The complete deletion of this crime.

PROPOSAL (2)

If this crime is to be retained, then we recommend that the scope of the crime be substantially curtailed.

PROPOSED DEFINITIONS

'Gathering' means an unlawful assembly or procession of persons in numbers large enough to constitute a serious threat to State institutions or to the general public.

Any person who unlawfully and intentionally takes part in a gathering, violently resisting or defying the authority of the Republic shall be guilty

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[93] Mathews op cit note 1 at 220.

[94] For example, provisions for unlawful gatherings are contained in Chapter 5 of the Internal Security Act 74 of 1982.

of the crime of sedition and upon conviction be liable to such penalty as the court may deem fit.[95]

2.3. PUBLIC VIOLENCE

2.3.1 THE PRESENT LAW

The distinguishing characteristic of public violence is that it does not directly serve to protect the interests of the State as with treason and sedition, but public peace and tranquility.[96] The crime of public violence will not be analysed in the same manner as treason and sedition for two reasons: firstly, it is not a primary crime against the state and thus does not serve to protect its interests, and secondly, it is our view that the crime of public violence does not contain the difficulties and hidden agendas inherent in the above two crimes. The crime of public violence may even overlap with malicious injury to property, arson and robbery, but the dangerous dimensions of the conduct could result in a charge of public violence.

(A) DEFINITION

Public violence consists of the unlawful and intentional commission, together with a number of people, of an act which is intended to forcibly disturb public peace and tranquility or to forcibly invade the rights of others.[97] This definition is in agreement with the South African Law Commission's proposed codified one.

As with other crimes against the State, no single definition has been followed by the courts, and in *R v Tshayitsheni*[98] the court admitted the vagueness of the offence and the difficulty of giving it an exact definition.

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[95] This proposal is an amended version of Clause 3 of the South African Law Commissions recommendations on codification of the common law crimes against the state.

[96] Snyman op cit note 23 at 322.

[97] Ibid at 321.

[98] 1918 TPD 23.

(B) ESSENTIAL ELEMENTS

(i) unlawful

Both the acts and the participation must be unlawful. but participation may not be unlawful if someone was coerced into joining the group.[99]

(ii) intentional

This element involves awareness on the part of the individual of the group's aims, and there must exist a common purpose in the group.[100]

(iii) number of people

Public violence cannot be committed by a single person. It can only occur if there are a number of people acting in concert.[101]

(iv) use of force

Snyman lists the following examples of conduct that may constitute public violence: faction fighting; violence resistance to lawful action by the police by a mob: rioting; forcible coercion by strikes of other workers and breaking up and taking over a meeting.[102] It is not necessary that actual force is used. but it is sufficient that there is an intention or threat to disturb the peace or invade the rights of others.[103]

(v) public peace and tranquility

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[99] *R v Samuel* 1960 (4) SA 702 (R), Snyman op cit note 23 at 324.

[100] Snyman op cit note 23 at 324.

[101] See Snyman op cit note 23 at 322 where he also points out the difficulty of specifying the minimum number of people required to commit the crime.

[102] Ibid.

[103] Ibid at 324.

The mere disturbance of the peace is not sufficient to constitute the crime. In order to prevent abuse, the intended violence by the group must assume dangerous dimensions, for example, if the safety of others is threatened. Although this concept is in itself vague, no single factor may cause the conduct to assume serious dimensions. Some of these factors include the time, locality and duration of the fight, the cause of the quarrel, whether the participants were armed and whether there are actual assaults on people or damage to property.[104]

2.3.2 GENERAL COMMENTS

This crime is *prima facie* adequate to deal with public violence, and does appear to contain major defects except for the problem of vagueness. Codification is recommended for this crime, together with a few amendments to the present law. It is anticipated that codification will result in clarity and certainty of the law, and alleviate the problem of vagueness. There should be room for varying interpretations of the requirements for liability. As suggested above a prominent feature of transitional South Africa will be the problem of escalating violence. The importance of the crime of public violence is indicated by the fact that it is through these measures that public order and the problem of violence should be regulated, rather than resorting to the extreme measures of crimes against the State.

PROPOSAL (1)

The public order crimes contained in the British Public Order Act of 1986 would be a model for South Africa given its similar problems of public violence.[105]

The sections of the Public Order Act which are relevant to this crime are the ones relating to riot,[106] *public disorder*[107] *and affray.*[108] *It appears*

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[104] Ibid.

[105] See generally Walker C *The Prevention of Terrorism in British law* 1986.

[106] Section 1.

[107] Section 2.

[108] Section 3.

that the key difference between these crimes is the number of persons required to create liability.

PUBLIC VIOLENCE

Where three or more persons who are present together use or threaten unlawful violence and the conduct of them taken together is such as would cause a reasonable person present at the scene to fear for his personal safety, each of the persons using or threatening unlawful violence is guilty of the crime of public violence.

PROPOSAL (2):

Retention of the common law crime of public violence in codified form as recommended by the South African Law Commission.

Public violence consists of the unlawful and intentional commission, together with a number of people, of an act which is intended to forcibly disturb public peace and tranquility or to forcibly invade the rights of others.

3. THE INTERNAL SECURITY ACT

The Internal Security Act has been severely criticized as a grave inroad into the rights of individuals in South Africa.[109] and this section of the document will examine the provisions of this Act in so far as they proscribe various political offences.

The basic premise on which this document rests is that crimes of a political nature are intended only to protect the State.[110] It is against these presumptions that the Internal Security Act shall be evaluated.

As the Act provides for a variety of offences which differ considerably in the 'mischief' they are intended to avert and the extent of punishment.

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[109] See for example, Dugard J 'A Triumph for Executive Power - An Examination of the Rabie Report and the Internal Security Act 74 of 1982' in (1982) *South African Law Journal* 589 at 602 and Dugard J *Human Rights and the South Africa Legal Order* Princeton University Press, Princeton (1978).

[110] Basson D & Viljoen H *South African Constitutional Law* Juta, Cape Town (1988) 246.

the crimes will be divided into primary offences (i.e those crimes which purport to suppress the overthrow of the State) and secondary offences (i.e those which purport to serve ancillary functions, for example, the curtailment of protest action). The secondary offences will be discussed in the second document.

PRIMARY SECURITY OFFENCES

These crimes are contained in section 54 of the Act, and are characterized by harsh maximum penalties and provisions which purport to protect State security. These crimes include terrorism, subversion and sabotage. For purposes of clarity, these crimes are briefly described before a more detailed analysis can take place. Terrorism is committed by a person with the intent to overthrow or endanger the State authority in the Republic, to bring about constitutional, political, industrial, social or economic change, to induce the government to do or abstain from or to adopt a particular standpoint or to put in fear or demoralize the inhabitants of the Republic. This intent must be coupled with the commission of an act, threat or attempt of violence, or any act which causes or contributes to the commission of an act of violence. Subversion in broad terms is committed where a person has the intent to overthrow or endanger the State authority in the Republic, to bring about constitutional, political, industrial, social or economic change, to induce the government to do or abstain from or to adopt a particular standpoint or to put in fear or demoralize the inhabitants of the Republic. (This intent requirement is the same as for terrorism). This intent must be coupled with a wide range of activities, including the crippling, interruption, damaging or destruction of of any industry, undertaking, public service or installation in the Republic. There is no requirement that violence must have occurred. Sabotage is committed where a person has a wide range of intent, including the intention to endanger the safety, health or interests of the public and to destroy or contaminate any water supply in the Republic, coupled with the commission of of an act, the conspiracy, aiding or encouraging a person to commit an act. It is clear from this cursory description of the primary crimes that they cover a wide range of social activities. In order to assess these crimes adequately, it is important to discuss in detail the various requirements for each of the crimes.

3.1 TERRORISM[111]

The crime of terrorism is deemed to be committed when both the requirements of intention and conduct have been met. The Act sets out specific forms of intention and conduct which will constitute the crime. The forms of intention required are as follows:-

(a) To overthrow or endanger the State authority in the Republic.

This provision appears to require an intent to 'render the established institutions for the government of the State completely or substantially unworkable.'[112]

(b) To achieve, bring about or promote any constitutional, political, industrial, social or economic aim or change in the Republic.

This provision is extremely broad and vague in that it goes far beyond politically motivated intent, and includes other forms of change in society. This provision seems bent on preventing any form of change, be it political, constitutional, industrial or social. The stark impression is one of the protection of the *status quo*, rather than the protection of the State and the public at large. Furthermore, the prevention of acts which are geared towards social or industrial change seem ill-fitted in this definition, and is based on the assumption that such change can only occur when and how the current government desires.

(c) To induce the Government of the Republic to do or to abstain from doing any act or to adopt or to abandon a particular standpoint.

Such a provision is undesirable as it serves to protect a specific ruling political party (as embodied in the government) from criticism of existing policies.[113] As Mathews points out the government includes provin-

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[111] Section 54 (1).

[112] Mathews op cit note 1 at 35.

[113] Emerson op cit note 13 at 81 where he is critical of the position whereby the interests of administration in power are often cited as justification of interests of the nation.

cial and local authorities[114].

(d) To put in fear or demoralize the general public, a particular population group or the inhabitants of a particular area in the Republic, or to induce the public or such population group or inhabitants to do or to abstain from doing any act, in the Republic or elsewhere.

It is internationally accepted that the very nature of terrorism is an indiscriminate attack on members of the public. However, such intent is associated with an ideological or political motive,[115] a requirement lacking in this subsection.

3.1.1 GENERAL OBSERVATIONS OF THE INTENTION REQUIREMENT

It appears that most forms of normally accepted political dissent would fall within the ambit of the intention requirement. The broad and numerous forms of intent have the effect of extending the scope of terrorist intent beyond the mere protection of the State. Mathews illustrates this point by using the example of a group of people who storm the offices of a local authority which has announced rent increases and a few windows are broken. This will fall within the ambit of the crime of terrorism as they have the intent to dissuade the authority from 'doing an act' or to 'abandon a particular standpoint'.[116]

The forms of conduct that must accompany the intent are as follows:

(i) The commission of an act of violence, or a threat or an attempt:

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[114] Mathews op cit note 1 at 36. See also section 54 (8) of the Act.

[115] See generally Murphy JF 'Defining International Terrorism: A Way out of the Quagmire' (1989) Vol 19 *Israel Yearbook on Human Rights* 13 and Y Dinstein 'Terrorism as an International Crime' (1989) Vol 19 *Israel Yearbook on Human Rights* 55.

[116] Mathews op cit note 1 at 37.

Academic writers appear to believe that the essential nature of this crime is the commission of acts of violence.[117] However, it is obvious from terms used that conduct includes a mere threat of or an attempt at violence. The term 'act of violence' is wide enough to include not only any bodily harm or killing or endangering of any person, or the damaging or destruction or endangering of any property but also the undergoing of military training.[118] Firstly, the use of the word 'include' means the definition of violence is not limited to those forms of conduct mentioned in the Act.[119] Furthermore, there is no indication of the degree of violence necessary, and as Mathews points out, 'the language of the statutory definition covers trivial assaults and minor damage to property' if the intent is present.[120]

(ii) Any act which is aimed at causing, bringing about, promoting or contributing towards such act or threat of violence, or attempts, consents or takes any steps to perform such act.

This subsection effectively creates a burden of vicarious liability on any person who indirectly contributes to the commission of violence or a threat of violence. Furthermore, the taking of steps to perform an act that *might* result in violence at some future stage is also punishable.[121]

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[117] Burchell and Milton op cit note 17 at 621. See also Mathews AS op cit note 1 at 34; and *S v J & Another* 1988 (1) SA 85 N where the conduct of the accused involved the throwing of grenades at the house of a teacher causing damage.

[118] See section 54 (7) which provides that the word 'act' for the purposes of terrorism includes the undergoing of specific training or the possession of a substance or thing.

[119] See further Mathews op cit note 1 at 34.

[120] Ibid.

[121] See for example, *S v Bacela* 1988 (2) SA 655 (E) where the accused was arrested while attempting to enter Lesotho for the purpose of joining the African National Congress (which was banned at the time) and found guilty of terrorism because the conduct of attempting to cross the border was construed as 'taking of a deliberate step towards the performance of acts aimed at the commission of terrorism and violence'.

(iii) Conspires with any other person to commit, bring about or perform any act or threat of violence:

The activity need not include the commission of violence. It is sufficient if a mere discussion to commit an act of violence occurs.

(iv) Incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or threat.

This form of conduct overlaps to a large extent with the previous forms of conduct. If a person has the required intent, the use of language (as opposed to actual violence) may attract liability in terms of this subsection, even though the conduct 'is at least two removes from a manifestly terroristic act'.[122]

3.1.2 GENERAL OBSERVATIONS OF THE CRIMINAL CONDUCT REQUIREMENT

In its vigorous attempt to capture all forms of political dissent, the legislature has ultimately encapsulated a ludicrously wide and ill-defined, and sometimes innocent, range of conduct within the scope of terrorism. This also results in a clumsy overlap of provisions in an incoherent manner. One of the more serious flaws of the terrorism provision is its incorporation of non violent forms of conduct. Terrorism in most democracies is limited to violent political or ideological activity,[123] a characteristic sadly lacking in the South African legislation. The basis for our proposals is the firm belief that the essential nature of terrorism is not the occurrence of unlawful violence *per se*, but the recourse to violence as a means to political or ideological ends.[124]

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[122] Mathews op cit note 1 at 35.

[123] See generally Murphy op cit note 115 at 13. See also S 14 of the Prevention of Terrorism Act in Britain where terrorism is broadly defined as the use of violence for political ends, and includes the use of violence for the purpose of putting the public or any section of it in fear. Although there is no crime of terrorism in Britain, this definition is used for detention purposes.

[124] Dinstein op cit note 115 at 55. For example, the hope of political change in the form of mass uprisings. In this regard, see Heyman op cit note 8 at 4.

3.1.4 PROCEDURE

On a procedural note, the Internal Security Act is a harsh digression of established principles of common law in that it creates presumptions against the accused:-

(i) Where the conduct of the accused was likely to achieve the intents specified in the Act, the accused is presumed to have acted with the intent, unless the contrary is proved.[125]

This provision shifts the onus of proof to the accused (contrary to clear criminal law principles), thereby making it easier for the State to prove its case against the accused.

(ii) Where the accused is in unlawful possession of dangerous weapons such as automatic rifles, rocket launchers, grenades or explosives, the presumption of the necessary intent to commit an act of terrorism is present.[126]

The effect of this provision is to draw too broad a presumption, namely, that the unlawful possession of arms and ammunition is associated with a terroristic intent. Mathews illustrates this point by using the example of an accused in unlawful possession of a single round of ammunition for a specified weapon. The accused would then be placed in the position of having to disprove both the intent and conduct requirements of the crime of terrorism.[127]

PROPOSAL:

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[125] See section 69 (5).

[126] Section 69 (6) (a). See also section 64 which provides that the prosecution of the accused requires the written authority of the Attorney-General; Section 65 which provides that the trial may be held in camera; Section 67 which provides that separate offenders may be prosecuted together; and Section 68 (1) & (2) (as amended by section 26 of Act 138 of 1991) which provides that the trial may be held where the Minister may determine.

[127] Mathews op cit note 1 at 36.

The crime of terrorism should be deleted in its entirety from the Act.[128] *As in the United States of America, conduct which is essentially terroristic in nature should be prosecuted under the ordinary criminal law.*[129] *This does not mean that politically motivated crimes would go unpunished, as prosecution of offenders may still occur under the more internationally accepted common law.*

3.2 SUBVERSION[130]

This form of criminal conduct requires that the accused has the intent[131] as specified for the act of terrorism. The conduct requirement, however, differs from that of terrorism and takes the following forms:-

(a) Causes or promotes general dislocation or disorder at any place in the Republic, or attempts to do so.

It appears that this subsection relates to the protection of public order. This subsection is unnecessary in the light of the adequate common law crime of public violence.

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[128] Most societies have not seen the necessity to create the crime of terrorism.

[129] Murphy op cit note 115 at 23. In the United States of America the legislator has refrained from defining terrorism and has instead prosecuted terrorist activities under statutes covering murder, kidnapping, explosives, etc. See however, Mathews op cit note 1 at 291 where he proposes that the punishment of persons who use violence for political ends should go further than the common law as these acts are inadequately covered by the common law. Persons who use violence for political ends should therefore be given a special criminal status in a conflict ridden society and threats of dangerous violence need to be 'elevated to a higher level of seriousness for purposes of punishment'.

[130] Section 54 (2).

[131] *Minister of Law and Order v Pavlicevic* 1989 (3) SA 679 (A) where it was held that the mental element required for this crime did mean *mens rea* as in common law crimes, but excluded *dolus eventualis* i.e. the knowledge that conduct may result in certain consequences. This judgment was approved in *S v Nel* 1989 (4) 845 (A). See also Mare MC '*Minister of Law and Order v Pavlicevic* 1989 (3) SA 679 (A): Aspects of the Offence of Subversion' (1991) 4 *South African Criminal Journal* 107; Snyman CR 'Dolus Eventualis in the Offences of Terrorism, Subversion and Sabotage' (1990) 107 *South African Law Journal* 365.

(b) Cripples, prejudices or interrupts at any place in the Republic any industry or undertaking, or industries or undertakings generally, or the production, supply or distribution of commodities or foodstuffs, or attempts to do so.

This provision falls outside the ambit of national security, and is geared towards the protection of economic entities, and creates the impression of a symbiotic relationship between State and capital.[132] Under the guise of national security, the State is seeking to protect the interests of industries and undertakings. This situation is totally undesirable as it brings non-State crimes into the realm of national security. For example, a person with the intent to 'achieve, bring about or promote any .... industrial aim or change in the Republic'[133] (the necessary intent) and interrupts an industry in South Africa could be guilty of subversion. This set of circumstances falls squarely within the domain of industrial relations and labour legislation and certainly falls outside the field of security law.

(c) Interrupts, impedes or endangers at any place in the Republic e manufacture, storage, generation, distribution, rendering or supply of fuel, petroleum products, energy, light, power or water or of sanitary, medical, health, educational, police, fire-fighting, ambulance, postal or telecommunication services or radio or television transmitting, broadcasting or receiving services or any other public service, or attempts to do so.

This provision may afford purely criminal activity a political status. An example which immediately springs to mind is that of a person who with the intent of putting in fear the inhabitants of a particular area,[134] interrupts the postal service for a short period in that area. The person may be guilty of subversion for a purely criminal, non-political act.

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[132] For a detailed analysis of this concept see Yudelman D *The Emergence of Modern South Africa*, David Phillip (1984).

[133] Section 54 (1) (b).

[134] Section 54 (1) (d).

(d) Endangers, damages, destroys, renders useless or unserviceable or puts out of action at any place in the Republic any installation for the rendering or supply of any service referred to in paragraph (c), any prohibited place or any public building, or attempts to do so.

This is an unnecessarily unwarranted overlap with subsection (c), coupled with cumbersome and confusing language. This subsection extends the scope of subversion to include damage to public buildings. Envisage the following scenario: an individual spray-paints graffiti on the wall of a public hospital with the intention to induce the government to abandon its standpoint on the implementation of Value Added Tax. This person may well have committed the crime of subversion.

(e) Prevents or hampers, or deters any person from assisting in, the maintenance of law and order at any place in the Republic, or attempts to do so.

This subsection appears to anticipate an obstruction of justice in its ordinary meaning with the necessary intent, and is ill-suited for the purposes of protection of the state.

(f) Impedes or endangers at any place in the Republic the free movement of any traffic on land, at sea or in the air, or attempts to do so.

Once more, one can envisage purely criminal activity being afforded a political status.

(g) Causes, encourages or foments feelings of hostility between different population groups or parts of population groups of the Republic, or attempts to do so.

This provision is one of the few forms of conduct that appear to constitute a threat to internal security. One presumes that this subsection intends to prevent racial hostility. Ironically, this section was promulgated by the very government which endorsed institutionalized racism.

(h) Destroys, pollutes or contaminates any water supply which is intended for public use in the Republic, or attempts to do so. This provision is baffling since it is difficult to envisage precisely the intention of the legislature in this regard.

(i) In the Republic or elsewhere performs any act or attempts, consents or takes any steps to perform any act which results in or could have resulted in or promotes or could have promoted the commission of any of the acts or the bringing about of any of the results contemplated in paragraphs (a) to (h), inclusive.

Not only are persons who have committed the all above acts liable, but those who promote such conduct may be guilty of subversion.

(j) Conspires with any other person to commit, bring about or perform any of the acts or results contemplated in paragraphs (a) to (h), inclusive, or any act contemplated in paragraph (i), or to aid in the commission, bringing about or performance thereof;

or (k) incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or result.

Mathews points out that a 'statement advising conduct that is likely to cause an act which will result in an obstruction to the free movement of traffic (for example) constitutes a form of conduct prohibited by the crime of subversion.'[135]

3.2.1 GENERAL OBSERVATIONS

Taken in its entirety, the number of criminal acts that fall within the crime of subversion are too numerous to imagine.[136] The ambit of these provisions is too wide, creating vast uncertainty and lack of clarity in the law.[137] This provision is one in serious need of curtailment, as its effect

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[135] Mathews op cit note 1 at 39.

[136] Ibid at 38 where he argues that the number of crimes may well run into several hundred.

[137] Mathews AS 'The Newspeak Version of Subversion' (1988) 1 *South African Criminal Journal* 174 where he states that the forms of social conduct that are regular, unremarkable and in some instances arguably beneficial, are treated as acts of subversion or sabotage. At 180 he illustrates the extent of triviality that may arise: the tripping of a waiter in a restaurant and the blowing up of a train are both cases of sabotage because the perpetrator committed an act which interrupts the supply of commodities and foodstuffs.

is to close off any avenue of protest, and there is no requirement that violence must have been used to achieve these ends. The only purported limitation is that there must be the necessary intent, but as discussed earlier, this requirement is equally wide. Legislation geared towards the protection of capital cannot be condoned, as market forces should determine the nature of the relationship between capital and labour.[138]

3.2.2 PROPOSAL:

Complete deletion of this crime, as it is not clear what it is intending to protect.

3.3 SABOTAGE[139]

The distinction between this crime and the crime of subversion is not entirely clear.[140]

Intent Requirement:

(a) endanger the safety, health or interests of the public at any place in the Republic:

(b) destroy, pollute or contaminate any water supply in the Republic which is intended for public use:

(c) interrupt, impede or endanger at any place in the Republic the manufacture, storage, generation, distribution, rendering or supply of fuel, petroleum products, energy, light, power or water, or of sanitary, medical, health, educational, police, fire-fighting, ambulance, postal or telecommunication services or radio or television transmitting, broadcasting or receiving services or any other public service:

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[138] Brand J 'A Severance form Principle: Forcing the Employer to Pay Severance' (1990) *Employment Law* 115.

[139] Section 54 (3).

[140] See for example *S v Radebe* 1988 (1) SA 772 (A) where the accused went to a school to persuade pupils not to attend school. This action resulted in stone-throwing between the accused and pupils. A conviction was of subversion was set aside on the basis that the pupils did not constitute a particular group of population, but the accused was convicted of sabotage because he intended to interrupt educational services in terms of section 54 (3) (c). This case clear illustrates the extent of overlap between subversion and sabotage.

(d) endanger, damage, destroy, render useless or unserviceable or put out of action at any place in the Republic any installation for the rendering or supply of any service referred to in paragraph (c), any prohibited place or any public building;

(e) cripple, prejudice or interrupt at any place in the Republic any industry or undertaking or industries or undertakings generally or the production, supply or distribution of commodities or foodstuffs; or

(f) impede or endanger at any place in the Republic the free movement of any traffic on land, at sea or in the air in the Republic or elsewhere.

The statutory disorder created by the Internal Security Act is blatantly displayed in this subsection. Here the conduct which was required for the crime of subversion has now become the intent requirement for the crime of sabotage.

3.3.1 CONDUCT REQUIREMENT

This involves the commission of an act, the attempt of such an act, or the conspiracy with other persons to commit such act or the aiding, incitement, commanding or encouraging of person to commit such act.

The vast breadth of the conduct requirement is only limited in that it seems to exclude an omission.

3.3.2 GENERAL OBSERVATIONS

The scope of the crime of sabotage is so wide as to include persons involved in school boycotts and unlawful industrial action within its ambit. Again, a wide range of activity is included, and there is a serious need to limit activities to those directly threatening the security of the State. Furthermore, a limitation on the conduct to a physical act of achieving this end is needed, and indirect acts, such as advising or commanding person to perform act should be excluded. In the case of *S v Nel* [141] the accused

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[141] (1987) 4 SA 276 (O).

damaged the planning office of a shaft of a gold mine by blowing it up with explosives to redress a grievance against the production manager of the mine. He was held to be guilty of sabotage even though there was a lack of political motive or a threat to State security or the community. The court held: 'Conduct not directed at the safety and well-being of the State, albeit that such conduct may coincidentally touch thereon, should not be subjected to the same drastic consequences and punishment.'[142]

3.3.3 PROPOSAL:

This subsection should be deleted in its entirety.

4. PROPOSALS REGARDING PRIMARY SECURITY CRIMES

We are of the firm belief that the primary crimes contained in s 54 of the Internal Security Act in their present form are so repugnant that there is no need to modify them. While we accept that there are forms of violent conduct against the State that ought to be punishable, the present arrangement of the Act leaves nothing to be desired. Furthermore, the inclusion of inchoate crimes in the statute leads to unnecessary confusion and is sufficiently dealt with by the common law. It is in view of these factors that the following proposals are made.

PROPOSAL (1):

The first possibility is not to replace these crimes at all, but to rely totally on the common law crimes such as treason, sedition, public violence, as well as malicious damage to property, assault, etc. In addition, the crime of intimidation would serve to complement the common law.[143] *This proposal is recommended where there is a State policy to undermine the political impact of terroristic conduct.*

PROPOSAL (2):

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[142] Findlay AJ at 295. This decision was, however, overruled on appeal in S v Nel (1989) 4 SA 845 (A).

[143] The crime of intimidation will be analysed in the second document. The proposed bill on intimidation will also be dealt with under this section.

We are in agreement with the recommendation[144] that violence or encouragement of violence be included as primary security crimes, in keeping with the notion that the use of violence, actual or threatened, ought to be the primary concern of crimes against the State, particularly during the interim phase. In addition, it has been recommended that espionage[145] also be declared by law to be the concern of security authorities.

VIOLENCE OR THE ENCOURAGEMENT OF VIOLENCE

DEFINITION

'violence' means substantial or serious harm to persons and or property.

Any person who with a political or ideological aim, or for political purposes

(a) uses or threatens the use of violence against persons or property; or

(b) incites, causes, or encourages or is likely to incite, cause or encourage the use of violence by words or conduct

shall be guilty of an offence and will be liable to whatever penalty the court may deem fit.

5. CONCLUSION

Given the potential for violent conflict during the transitional phase we are of the opinion that this aspect of reform must be given due consideration. At the same time the general principles of security law must be limited so as not to infringe on the rights of individuals. While it is recognize that this is a difficult task, a failure to do so could result in increased violence rather than its suppression. Mathews has suggested several general principles of security law reform. These include the need for special measures but the avoidance of the temptation to overreact, elimination of powers that lead to gross violations of the standards of

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[144] Mathews op cit note 1 at 291.

[145] Ibid. s crime, however, is dealt with in the second document.

civilized behaviour, prescription of clear and defensible objectives for the use of security apparatus, adherence to the rule of law, and the provision for democratic control of the security establishment.[146]

'National security in a democratic society involves taking some risks and allowing some flexibility. It entails faith that an open community is better prepared to adjust to changing conditions than a closed one.'[147]

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[146] Mathews op cit note 1 at 290.

[147] Emerson op cit note 13 at 82.

APPENDIX I

SUMMARY OF PROPOSALS

The proposals have been appended for easy reference.

TREASON

PROPOSED DEFINITIONS:

'Time of War' means when there is an external threat, invasion or threat of invasion by foreign forces, and when war has been declared by the government against another state.

'Citizen' means any person who is entitled to vote in national elections in the Republic.

'Persons voluntarily in the Republic' means those persons who are not citizens and are in the country out of their own free will or who are engaged in business, employment or a course of study and who have taken up permanent residence in the Republic for the duration of their business, employment or study.

PROPOSAL

1. Any person who during time of war-

a) intentionally engages in war or armed hostilities against the Republic;

b) intentionally assists the enemy by:

i) taking up arms with the enemy;

ii) accepting an appointment with the enemy; or

iii) engaging in any conduct which is directly or indirectly intended to assist the enemy.

2. Any person who during time of peace uses force or violence to overthrow the constitutional government of the Republic

shall be guilty of the offence of treason and upon conviction shall be liable for punishment as the court may deem fit, notwithstanding the provisions of any other law.

This offence applies to any person who is a South African citizen in respect of treason committed anywhere, and to any person who is voluntarily in the Republic in respect of treason committed in the Republic.

SEDITION

PROPOSAL (1)

The complete deletion of this crime.

PROPOSAL (2)

If this crime is to be retained, then we recommend that the scope of the crime be substantially curtailed.

PROPOSED DEFINITIONS

'Gathering' means an unlawful assembly or procession of persons in numbers large enough to constitute a serious threat to State institutions or to the general public.

Any person who unlawfully and intentionally takes part in a gathering, violently resisting or defying the authority of the Republic shall be guilty of the crime of sedition and upon conviction be liable to such penalty as the court may deem fit.

PUBLIC VIOLENCE

PROPOSAL (1)

The public order crimes contained in the British Public Order Act of 1986 would be a model for South Africa given its similar problems of public violence.

The sections of the Public Order Act which are relevant to this crime are the ones relating to riot, public disorder and affray.

PUBLIC VIOLENCE

Where three or more persons who are present together use or threaten unlawful violence and the conduct of them (taken together) is such as would cause a reasonable person present at the scene to fear for his personal safety, each of the persons using or threatening unlawful violence is guilty of the crime of public violence.

PROPOSAL (2.

Retention of the common law crime of public violence in codified form as recommended by the South African Law Commission.

Public violence consists of the unlawful and intentional commission, together with a number of people, of an act which is intended to forcibly disturb public peace and tranquility or to forcibly invade the rights of others.

TERRORISM

PROPOSAL:

The crime of terrorism should be deleted in its entirety from the Act. As in the United States of America, conduct which is essentially terroristic in nature should be prosecuted under the ordinary criminal law. This does not mean that politically motivated crimes would go unpunished, as prosecution of offenders may still occur under the more internationally accepted common law.

SUBVERSION

PROPOSAL:

Complete deletion of this crime, as it is not clear what it is intending to protect.

SABOTAGE

PROPOSAL:

This subsection should be deleted in its entirety.

PROPOSALS REGARDING PRIMARY SECURITY CRIMES

PROPOSAL (1):

The first possibility is not to replace these crimes at all, but to rely totally on the common law crimes such as treason, sedition, public violence, as well as malicious damage to property, assault, etc. In addition, the crime of intimidation would serve to compliement the common law. This proposal is recommended where there is an intention to undermine the political impact of terroristic conduct.

PROPOSAL (2):

We are in agreement with the recommendation that violence or encouragement of violence be included as primary security crimes, in keeping with the notion that the use of violence, actual or threatened, ought to be the primary concern of crimes against the State, particularly during the interim phase. In addition, it has been recommended that espionage also be declared by law to be the concern of security authorities.

VIOLENCE OR THE ENCOURAGEMENT OF VIOLENCE

DEFINITION

'Violence' means substantial or serious harm to persons and or property.

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(b) incites, causes, or encourages or is likely to incite, cause or encourage the use of violence by words or conduct

shall be guilty of an offence and will be liable to whatever penalty the court may deem fit.

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SECONDARY CRIMES AGAINST THE STATE

1. INTRODUCTION

This document complements a previous document which dealt specifically with primary crimes against the State. Its purpose is to make recommendations about secondary crimes and matters ancillary to the primary offences against the State during a transitional phase in South Africa. It will broadly deal with crimes contained in the Internal Security Act,[1] the Intimidation Act,[2] the Protection of Information Act[3] and private armies. In addition, some of the proposals outlined in the Criminal Law Second Amendment Act[4] will be considered.

2. SECONDARY CRIMES IN TERMS OF THE INTERNAL SECURITY ACT

The Internal Security Act, while providing for the criminalization of a wide range of activities aimed at the protection of the State, has also included within its wide net a range of other activities not exclusively or even largely directed towards the protection of the State. Amongst these 'secondary crimes' are crimes related to terrorism, subversion and sabotage, crimes in connection with unlawful organizations[5] and crimes of protest.

2.1. CRIMES RELATED TO TERRORISM, SUBVERSION AND SABOTAGE

This section makes provision for criminal sanctions for conduct related to the crimes of terrorism, subversion and sabotage. It provides for criminal liability where the accused assists (directly or indirectly) persons who are suspected of having committed the crimes of terrorism, subversion or sabotage. In order to fall within the ambit of this crime, the accused, firstly, must suspect that a per-

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[1] Act 74 of 1982.

[2] Act 72 of 1982 (as amended by section 32 of the Internal Security and Intimidation Amendment Act 138 of 1991).

[3] Act 84 of 1982.

[4] Act 126 of 1992.

[5] Unlawful organizations are not dealt with here as they fall beyond the scope of this work.

[6] Section 54 (4) of the Internal Security Act.

son has committed or intends to commit the crime of terrorism, subversion or sabotage, and must be aware of the presence of such a person at a particular place and, secondly, the accused must render some assistance to such a person. Each of these elements are dealt with separately:-

(a) The accused must have reason to suspect that some other person intends to commit or has committed terrorism, subversion and sabotage;

The crimes of terrorism, subversion and sabotage are couched in such broad terms as to include many forms of political dissent. They are fraught with ambiguities that make it difficult to decide precisely when these crimes have been committed.[7] The accused is then burdened with the onerous task of deciding whether or not he or she reasonably suspects that one of these crimes has been committed or that a person intends to commit such a crime.

(b) The accused must be aware of the presence at any place of some other person who is so suspected of intending to commit or having committed such offence.

There is no definitive statement of the exact meaning of 'be aware' of the presence of a person at any place. It is not clear whether it would include vague knowledge of the presence of a person in a particular place, for example by virtue of having heard it from a third person with no physical proof that such a person is in a particular place. Alternatively, this phrase may have a limited meaning in that the accused would only be liable if it could be shown that he was reasonably certain that such person was at a particular place, for example, where the accused had actually seen the person.

Once it had been established that the accused was aware of a person who is suspected of having committed, or intends to commit terrorism, subversion or sabotage, the accused will be liable if he or she has rendered assistance to such a person. The Act provides that a person will be guilty of rendering assistance under section 54 (4) if he or she:

(i) harbours or conceals that other person;

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[7] For example, *S v Redebe* 1988 (1) SA 772 (A) where the accused went to a school to persuade pupils not to attend school. This action resulted in stone-throwing between the accused and pupils. A conviction of subversion was set aside and the accused was then convicted of sabotage. See further the discussion of these crimes in Document One.

It is assumed that the accused would have to perform some positive act to fall within this subsection, for example, by actively providing accommodation for the person, or concealing such person while he or she is being sought by the authorities.

(b) directly or indirectly renders any assistance to that other person:

The use of the word 'indirectly' expands the scope of activity which might bring the accused within the ambit of this crime.[8] It creates further uncertainty as 'indirect assistance' may include an indeterminate number of possibilities. The words 'rendering assistance' have a very broad scope and many forms of activity may fall within this ambit. For example, it would appear to be an offence under this subsection to indirectly assist a suspected terrorist by bandaging a wound or providing such person with a glass of water.

(c) fails to report or cause to be reported to any member of the police such presence of that other person at any place.

This subsection creates a burden on the accused to report the suspect to the authorities. As mentioned earlier, this may be a cumbersome burden as the crimes are framed in broad and vague terms, putting the accused in the difficult position of having to make a decision whether the person falls within the ambit of the crimes of terrorism, subversion and sabotage.

Such accused is liable to the same punishment as is provided for the crime which the other person committed or intended to commit.[9]

GENERAL COMMENTS

As shown above, this crime is vague and uncertain and places an unwarranted burden on the accused to 'police' suspects of terrorism, subversion and sabotage.[10]

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[8] See for example, *S v Fibi* 1990 (2) PH H 142 (E), where it was held that a person who conveyed explosives on behalf of known terrorists, and provided transport and accommodation did not fall within the ambit of section 54 (1) (which is the crime of terrorism) but under the offence under section 54 (4).

[9] Punishment for the crime of terrorism is akin to that of treason; subversion is punishable to a maximum period of imprisonment of twenty years, but resulting violence increases the penalty to a maximum of twenty-five years; and the crime of subversion may be punishable up to a maximum of 20 years.

[10] See AS Mathews *Freedom, State Security and the Rule of Law* (1986) Juta 44 where he argues that it is generally accepted that persons who harbour, assist or fail to report terrorists and saboteurs in the true sense are punishable. However, such a

There is no justification for:

(a) broad, all encompassing provisions which render the accused liable even where the conduct is unintentional and where the person assisted is not really a terrorist or saboteur; and

(b) penalties that are identical to those for terrorism, subversion and sabotage.

PROPOSAL:

This section should be deleted in its entirety. This provision would become redundant if the crimes of terrorism, subversion and sabotage are repealed.[11]

2.2. CRIMES OF PROTEST

The basis of this crime is the introduction by the Government of 'fierce penalties' for activities geared towards the protest against discriminatory laws, which was known as the defiance campaign.[12] It provides for criminal liability for protest crimes, increased penalties where a crime is committed by way of protest against any law; liability of persons who incite others to commit a crime by way of protest; and assistance to unlawful conduct by way of protest.

a) Increased penalties[13]

Any person who is convicted of any offence which is proved to have been committed by way of protest against any law may attract increased penalties of a fine not exceeding R 3000 or 3 years imprisonment.

This provision does not create a new crime, but merely provides for increased penalties. It requires that the person must have committed a crime, and it must

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One that the crimes of terrorism, subversion and sabotage be repealed.

[11] Even if terrorism is re-enacted in a much narrower sense, to include only terrorists in the accepted sense, it would be unwise to retain the penalty for failing to report the presence of a terrorist. The objective is far better achieved by offering rewards, or by confidential telephonic reporting lines. Positive co-operation is hard to enforce through the criminal law; in fact it could result in community alienation.

[12] Mathews op cit note 10 at 52.

[13] Section 58.

be established that the crime was in furtherance of the object of a change in any law.[14] The key problem with this provision is that the commission of any trivial offence falls within the ambit of this crime. Thus one envisages a scenario where a person refuses to pay a traffic fine in order to bring about a change to a traffic law.[15] This person may be liable not only for the traffic fine, but for increased penalties for protest against the law. It does not require the protest to be unlawful, but merely that there will be increased penalties if a crime is committed. The basis of this crime appears to be an intention to prevent the breach of the peace.[16] The Act makes no mention of a concert of people, therefore a single person who commits a crime would be liable. However, where the accused commits the offence in the company of several other persons, he will be presumed, unless he can prove the contrary, to have acted with the motive of protest.[17]

PROPOSAL:

This kind of criminalization has no place in present da[illegible]th African law which ought to afford full recognition of the right to protest. It is outdated and the purposes for which it was enacted a[illegible] not justi[illegible]le.

We recommend deletion in its entirety.

b) Inciting Protest Crimes[18]

It is offence under this Act to encourage persons to commit any offence by way of protest against any law.

The Act provides:

Any person who-

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[14] This does not include the commission of an offence incidental to the protest. The offence must have been committed *by way* of protest. In this regard see *S v Peake* 1982 (3) SA 572 (C) where the accused was held not liable because the crime had been committed incidental to the protest.

[15] See for example *S v Pungula* 1980 (2) SA 760 (N).

[16] *S v Pungula*, supra.

[17] Section 69 (8). See also *S v Pungula*, supra, where this presumption made the accused liable for the increased penalties.

[18] Section 59.

(a) in any manner whatsoever advises, encourages, incites, commands, aids or procures any other person or persons in general;

(b) uses language or does any act or thing calculated to cause any person or persons in general,

to commit an offence by way of protest against any law or in support of any campaign against any law or in support of a campaign for the repeal or modification of any law or for the variation or limitation of the application or administration of any law, shall be guilty of an offence and liable on conviction to a fine not exceeding five thousand rand or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

This provision is extremely broad, and provides harsh penalties for the person who *encourages* the commission of the offence by way of protest action, even though the accused commits no offence by way of protest action.[19] The breadth of this provision is illustrated by Mathews[20] where he states that a speaker who 'says to an audience of blacks that they will never free themselves of their servitude if they do not [more discriminatory laws' will be guilty of this offen
The laws w[ ]ction was [ ]ended to main[ ]ere mor[ ]

PROPOSAL:

Deletion in [ ]ntety

c) Assistance to Protest Offence[21]

This section prohibits the rendering of material assistance for the purpose of assisting a protest against a law.

Any person who solicits, accepts or receives from any person or body of persons, whether within or outside the Republic, or who offers or gives to

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[19] See [ ]example, *S v Nathie* 1984 (3) SA 588 (A) [ ]re the court exp[ ]
view [ ]vocative political speech in w[ ]h [ ]ent was give[ ] th[ ]
tions [ ]who defied an ap[ ]d law was [ ]antion of a similar pr[ ]
sion.

[20] [ ]athews op cit note 10 at 53.

[21] Section 60 (1).

any person or body of persons any money or other article for the purpose of-

(a) assisting any campaign (conducted by means of any unlawful act or omission or the threat of such act or omission or by means which include or necessitate such act or omission or such threat) against any law, or against the applic or adm ration o. ny ; or

(b) enabling or assisting any person to commit any offence by way of protest against any law or in support of any campaign against any law or in support of any campaign for the repeal or modification of any law or for the variation or limitation of the application or administration of any law; or

(c) unlawfully assisting any per on who has committed any offence referred to in paragraph (b),

shall be guilty of an offence and liable on conviction to the penalties prescribed in section 59.[22]

criminal conduct that falls within e ambit of is provision is basical ny material assis ance to the protest crimes contained in section 58 and sectic 9. Subsect 2) pro es for the forfeiture to the Sta ey or goods in ion or u the ne pu. ses ined in subse 1). re

The court co icting any per or r ceiving or accepting any m ney or other article for any purpose referred to in subsection (1) shall, in addition to any penalty which it may lawfully impose, declare the mo y or that article forfeit to the State if such money or article is found in the possession or under the control of the person convicted, or declare so much of that money or article as was found in possession or under the control of the said person to be so forfeit.

PROPOSAL:

Deletion in entirety.

ENERAL COMMENT ON SECO RY CRIMES CO INED I THE INTERNAL SECURITY ACT

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[22] That is, a fine not exceeding R5 000 or a maximum of five years imprisonment or both.

These crimes create severe penalties for actions which, in effect, amount to breaches of administrative orders.[23] They are intended to prevent civil disobedience. but the manner in which they are worded is so wide so as to encompass a wide range of activities. We firmly believe that these crimes have no place in the Internal Security Act and that their repeal would not create any serious loopholes that would lead to a threat to national security. The loose criminalization of a vast range of political activity cannot be condoned. These laws were enacted to protect apartheid structures. and have no place in present day South Africa.

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[23] Mathews op cit note 10 at 56.

3. PROTECTION OF INFORMATION ACT

As with other areas of national security, there has to be a reconciliation between absolute public disclosure of official information and complete government discretion in this regard.[24] Public disclosure of administrative acts is important, but there is a need for maintaining secrecy in matters that involve state security and public interest.[25] A balance between these two extremes requires restrictive laws to be drawn narrowly so that only sensitive information can be suppressed. The present Act[26] does not maintain this balance, and its effect has been described as to punish the unauthorized disclosure of virtually the whole range of official government information.[27]

Section 2 of the Act makes it an offence for any person to be in the vicinity of a prohibited place[28] for any purpose prejudicial to the security or interests of the Republic.

The broad definition of a 'prohibited place' to include, inter alia, factories, docks and telegraph and telephone offices, as well as the uncertain meaning of 'interests of the Republic',[29] could result in a situation whereby innocent acts are punished under this provision (which provides for a maximum period of imprisonment of 20 years). The list of prohibited places is not exhaustive and the State President has the power to extend the list.[30] The prosecution need not

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[24] AS Mathews 'Disclose and be Damned' in 1975 *THRHR* vol 38 348 at 350.

[25] This balance is required by the Westminster system of government. See JD Van Der Vyver 'State Secrecy' in *Professional Secrecy in South Africa* GC Oosthuizen (et al) (eds) 1983.

[26] Protection of Information Act 84 of 1982, which replaced and repealed the Official Secrets Act 16 of 1956.

[27] Mathews op cit note 10 at 161.

[28] Defined in section 1 to mean any work of defence belonging to or occupied or used by on behalf of the Government. This includes any military establishment or station, as well as factories, docks, ships aircraft and radio telegraph or telephone installations. In addition, the State President has the power under section 14 to declare other places to be prohibited places.

[29] See J Milton and M Cowling *South African Criminal Law and Procedure* Vol III Chapter A 5 (1991) at 4 for a discussion of the meaning of this phrase.

[30] ...

show that an accused was actually gathering information, and mere physical presence at the place is sufficient.[31] In addition, this provision does not have the effect of protecting information from disclosure, sensitive or otherwise.

PROPOSAL (1):

If this section is to be retained, we recommend a very restrictive definition of a prohibited place.[32]

PROPOSAL (2):

Much of the mischief targeted in this provision is punishable under other provisions of the Act.

Deletion in entirety.

3.1 THE ESPIONAGE CLAUSE

Section 3 of the Act deals with espionage: the Act prohibits the gathering and disclosure of certain information.

This provision makes it an offence to deal with certain information for purposes of disclosure to a foreign state (including agents, employees or inhabitants as well as organizations, parties, bodies or movements in foreign tar) or to ny hostile organization (incl ng any e bearer, officer, member or active supporter). The provisi otects the following c gor es of information:

(a) any secret official code or password or any document, model, article ~~or information used, kept, made or obtained in any prohibited~~ place:

(b) any document, model, article, or information relating to

(i) any prohibited place, or anything in a prohibited place, or to armaments:

(ii) the defence of the Republic, any military matter any security matter or the prevention or combating of terrorism:

(iii) any other matter or article.

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[31] Ibid.

[32] While it is impractical to draw up a complete list of places that should be legitimately prohibited, examples would include atomic energy plants, areas relating to defence and security police headquarters. To safeguard against administrative abuse, the definition of a prohibited place must be subject to review by a review board appointed for this purpose, such as a Multi-Party Parliamentary Standing Committee, or a Committee of Judges.

No person may obtain, receive, prepare, compile or make any such information for the purposes outlined above.

GENERAL OBSERVATIONS

The generally accepted reason for such a provision is to prohibit the passing of military secrets to the enemies of the country. Mathews points out that this clause - the espionage clause - extends far beyond the commonly understood version of spying and as a result the provision is unrecognizable as an anti-espionage measure,[33] especially due to its wide-reaching ambit. Activities not constituting spying in any meaningful sense are also covered by the crime. In the first place, the inclusion of passing information to a 'hostile organization' does not exclude internal organizations from the ambit of this provision. It is apparent that the inclusion of 'hostile organization' within the definition of espionage was an attempt by the legislature to preclude internal extra parliamentary groupings from obtaining certain information. The generally accepted definition of espionage requires that there should not be communication of sensitive information to a foreign state or any other external, hostile organization. The fact that the Act does not create a distinction between the interests of the state and the government of the day means that, for the purposes of this section, there is bound to be an organization that is hostile to official policy or ideology.

The provision does not specifically deal with the act of passing on information to an enemy agent. It tends to focus strongly on the act of accessing and gathering the information for the purpose of spying. The provision makes no mention of actual transmission, and it is clear that only intended transmission is sufficient for the crime. In addition, upon a charge under section 3, the Act creates a number of presumptions: where it is proved that the accused communicated or attempted to communicate with an agent;[34] or that the accused is an agent or is reasonably suspected of being used by a foreign or international body or institu-

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[33] Mathews op cit note 10 at 169.

[34] 'Agent' is defined in section 1 to include past and present agents of a foreign state or hostile organization for the purposes of committing any act prejudicial to the security or other interests of the Republic, or reasonably suspected of having committed or attempting to commit any such act in the interests of a foreign state or hostile organization.

tion, or has entered the Republic in contravention of any law; then the accused is presumed to have received, prepared or disclosed the information for the purposes of foreign communication.[35] The accused will be presumed to have communicated with an agent if he has visited the address of an agent or the address of an agent is found in his possession.[36] Section 9 of the Act creates a further presumption that if the accused was an agent or is reasonably suspected of having been used by a foreign body or institution, then the information in question was of use to a foreign state or hostile organization. All these presumptions serve to make the task of the prosecution in convicting the accused easier. A provision that does not allow for a level playing field, and one in which the accused is heavily prejudiced, should be taken off the statute books.

The provision does not concentrate on information that is of a sensitive nature, but tends to cover a whole range of information that does not have an effect on security or defence issues. For example, the provision includes information relating to the prevention or combating of terrorism. The wide-ranging definition of terrorism to cover almost all forms of extra-parliamentary opposition would in effect mean that state information relating to such opposition would be protected from disclosure under the Act. Mathews provides an even more alarming example of academic research which is sent to foreign universities being capable of falling within the reach of the crime of espionage.[37]

PROPOSAL:

It is clear that in a situation in which the interests of the government and the citizen needs to be balanced, there cannot be uncontrolled power by the government. As in the US, the courts need to have the final power of adjudication where there is a dispute between the parties as to the nature of the information sought to be protected. Independent assessment of rival claims will assure a fair balance.[38]

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[35] Section 8 (1).

[36] Section 8 (2).

[37] Mathews op cit note 10 at 171.

[38] AS Mathews 'State Secrecy' in *Professional Secrecy in South Africa* GC Oosthuizen (et al) (eds) 38 at 43.

ESPIONAGE[42]

PROPOSED DEFINITIONS

'Classified national security information' means any clearly marked information which has been defined as such according to a uniform classification scheme approved by parliament and with respect to which secrecy is required in the interests of national security, safety or defence of the Republic.

'Prejudicial information' means any information other than classified national security information, which directly or indirectly assists a foreign state or external organization to prejudice or threaten to prejudice the interests or security of the State.

Any person who with the intent to prejudice the safety of the State:

(a) unlawfully communicates or makes available classified national security information or prejudicial information to another state, its agent or any external hostile organization or attempts to do so; or

(b) unlawfully obtains, colle s or records classified national security information or prejudicial information for the purposes of (a) or attempts to do so,

shall be guilty of the offence of espionage and upon conviction be liable for whatever penalty the court may deem fit.

A superior court of law shall be co etent to enquire upon the appropriateness of such a classification, and an improper classification will be a defence to the charge.

3.2 THE ANTI-DISCLOSURE CLAUSE

Section 4 prohibits disclosure, publication, retention, or endangering the safety of any secret official code or password or specific categories of any document, model, article or information[43] which the accused has in his possession or under

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[42] This recommendation has been drawn from, and is similar to, the recommendation of the Law Reform Commission of Canada of 1986. Ibid at 47.

[43] 'Document' is defined in section 1 as any note or writing, or any copy, plan, picture, sketch (section 1 (*a*)) or photographic or other representation of any place or article, (section 1 (*b*)) or any disc, tape card, perforated roll or other device in or on which sound or any signal has been recorded for production. 'Model' includes any design, pattern or specimen.

his control or at his disposal. Section 4 (1) (*b*) creates five different categories of protected information regarding any document, model, article or information:

(i) **Information which the accused knew, or reasonably ought to have known, is in any way related to a prohibited place, or to armaments, the defence of the Republic, a military matter, a security matter or the prevention or combating of terrorism;**

Mathews comments that *any* information relating to *any* of these matters is covered if the accused knew or reasonably ought to have known that it was so covered.[44]

(ii) **Information which has been made, obtained or received in contravention of this Act:**

(iii) **Information which has been entrusted in confidence to the accused by any person holding office under the Government;**

(iv) **Information which the accused obtained by virtue of the fact that has held a government post, or by virtue of a contract with the government, and which he knows should be kept secret due to the security or 'other interests of the Republic.'**

This provision is extremely broad, vague and uncertain. As Mathews points out, it results in a situation where if the accused should have realised that *any* interest of the Republic requires that the information be kept secret, then it may not be disclosed.[45] Furthermore, there are no criteria to determine what is in the interests of the Republic.

(v) **Information that the accused has in his possession which he knows,** or ought to know, has been obtained in the manner described in **paragraphs (iii) or (iv):**

It would be an offence to deal with a document, model, article or information falling into any of the above categories, as well as any secret official code or password in the following ways:

(aa) **Unauthorized or unlawful disclosure of the information. The Act also makes provision for a duty to disclose when it is in the interests of the Republic to do so:**

This subsection suggests that the government has the unquestionable authority to declare that information be protected, and that dis-

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[44] Mathews op cit note 10 at 161.

[45] Ibid at 162.

closure of that information is punishable. The courts, have unfortunately, not interpreted the 'duty to disclose' clause as meaning that unauthorized disclosure, if in the interests of the Republic, would be justifiable.[46] This would effectively mean that even government maladministration may fall into the realm of protected information unless the disclosure was authorized by the government.

(bb) Publication of the information in a manner or for purposes which is prejudicial to the security or interests of the Republic;

Even if the intention of the accused was not to prejudice the interests of the State, he will be liable if he did it in a *manner* which is prejudicial to the State. Here again, the problem as to what constitutes the interests of the Republic is unclear.

(cc) Unlawful retention of the information, or non-compliance with lawful instructions regarding the return or disposal of the information;

This subsection requires the accused to have dealt with the information in a manner which accords with official instructions.

(dd) negligence or failure to take care of the information, or conduct which endangers its safety.

This would mean that the accused must have taken all reasonable precautions to ensure the safety of the information. This subsection has the effect of punishing not only intentional disclosure, but also negligent behaviour.

Section 4 (2) provides that any person who receives any information while knowing or having reasonable grounds for believing that the information was obtained in contravention of this Act is guilty of an offence, unless he proves that the disclosure of the information to him was against his wish.

GENERAL OBSERVATIONS

This section has a 'coverage of cosmic proportions'[47] and appears to make any disclosure of official information by both state servants and private citizens

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[46] Ibid at 162-3.

[47] Mathews op cit note 24 at 353. He was referring here to the old Official Secrets Act. The comment, however, still applies.

There can be no doubt that the crime of espionage needs to be retained in the statute books. The crime of espionage clearly represents a threat to national security even where no state of war or armed hostilities exists. However, the existing provision appears to be widely drafted, repetitious and confusing. We recommend complete deletion and replacement of the subsection, with a power of adjudication by the courts regarding the nature of the information. Because of the difficulty in catching a spy in the act of communicating secret information to a foreign agent, it is necessary to criminalize attempts as well, but without the cumbersome detail of the present provision. The offence of obtaining, collecting or recording information for the purposes of communicating it is also included.[39]

We are in agreement with the recommendation that for information to be protected it would have to be classified[40] into national security information (for espionage) and government information (for anti-disclosure). Such a classification procedure could only be enforced if there is a well defined system of classification and effective procedures for authorizing disclosure and declassifying information once the need for secrecy has passed. In every classification case the test should be whether there would be any real injury if the information were to be disclosed.[41]

The only hostile organi... that ... ...cluded within the scope of espiona... are those external organizations involved in hostile or threatening activities against the State.

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[39] See *Crimes Against the State* Law Reform Commission of Canada Working Paper 49 1986 49.

[40] The Law Reform Commission of Canada have suggested the following guidelines for the classification procedure:

(i) the classification scheme must be subjected to parliamentary scrutiny;
(ii) the classifications would have to be clearly defined so as to avoid uncertainty concerning the application of the scheme;
(iii) the would have to be uniform procedures for classifying, authorizing disclosure of, and declassifying information;
(vi) the classification would have to be reviewable by the courts; and
(vii) classified information must be clearly marked to give notice to those handling the information.

Ibid at 48.

[41] Ibid at 55.

punishable. Instead of creating specific categories of punishable disclosure, the kinds of information protected by criminal sanctions are so far reaching as to make almost any disclosure prima facie unlawful.[48] As with section 3, this section is extremely wide and vague, especially in relation to the expression 'other interests of the Republic.'[49] Mathews points out that the provisions of the section could well prohibit disclosure of government irregularities such as that which occurred during the Information Scandal.[50]

PROPOSALS

In favour of retaining an anti-disclosure clause, the following points can be made:

(i) it would be wrong to leak national security information to anyone, not just foreign States;

(ii) some government policies require at least short term secrecy: and

(iii) some information about private individuals that is held by the government requires secrecy especially for the safety of these individuals.[51]

It is clear that in a democratic society a balance of interests must be maintained by the law and a fair weighing of interests will not be achieved where the government is empowered by statute to determine with finality what and how much the citizens are entitled to know.[52] The heavy bias in favour of the government in our secrecy laws makes for a climate conducive to government corruption and maladministration in a shroud of secrecy. The citizen must be armed with a legal right to be informed about public affairs, and only sensitive information, the disclosure of which would be prejudicial to the interests of the State ought to enjoy protection. In the US the only legislation providing for

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[48] Ibid at 354.

[49] Mathews comments that the expression results in a situation where virtually anything could be found to be undisclosable because harmful to such interests. Op cit note 10 at 164.

[50] Ibid at 165. He states that this is in the absence of court rulings that the disclosure is in the interests of the Republic, a fear not unfounded in view of previous decisions. See page 166.

[51] Op cit note 39 at 53-4. Private and personal information would be protected by a separate set of provisions, usually in the form of a Privacy Act.

[52] Mathews op cit note 38 at 41.

secrecy is limited to military secrets, intelligence data, atomic energy and information relating to privacy.[53] Federal and state laws which arm the citizen with a right to know also exist, and only certain sensitive information is prohibited from disclosure. The most important feature is that the courts have the final power of adjudication in the event of a dispute regarding the nature of the information.[54]

It is recommended that there should be a positive right to official information which should not be nullified by the anti-disclosure clause.[55] A provision which grants its citizens access to official information is an important recognition of public rights in a democratic society. Moreover, this right is conducive to 'clean government' since there will be continuous scrutiny of governmental and state action. This notion is based on the assumption that 'state officials are likely to refrain from extravagance in the exercise of their wide powers if they know that their administrative ploys may become public knowledge...'[56] Information that is protected must fall within certain clearly defined categories, with a power of adjudication vested in the courts.

The anti-disclosure clause is distinguishable from espionage and is a less serious crime because it would not involve grave dangers to national security as in the case of espionage. The communication of national security information to persons other than a foreign state or its agent will be punishable under the anti-disclosure clause.

The South African anti-disclosure clause is very similar to that of the Official Secrets Act of 1911 (Great Britain). The Official Secrets Act of 1989 (Great Britain) repealed the anti-disclosure clause of the 1911 Act and replaced it with

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[53] Ibid at 43.

[54] Mathews op cit note 38 who argues in favour of administrative hearings to settle disputes with a power of appeal to the ordinary courts. He also argues against the contention that sensitive information will leak out during the court hearings. See page 44.

[55] Such a positive right to official information is a complicated matter which would have to be dealt with in a separate Act or a detailed set of provisions. For example, the Freedom of Information Act 1966 of the US confers upon citizens a positive right to information. See generally AS Mathews *The Darker Reaches of Government* (1978) at 65 - 100. While we recommend a similar set of provisions, it will not be

provisions protecting more limited classes of official information. The new British Act makes it a criminal offence to disclose information in the following categories:

(i) security and intelligence matters;

(ii) defence;

(iii) international relations: and

(iv) law enforcement matters - crime and special investigation powers.

The Act makes it a criminal offence to disclose information in areas where the disclosure would be sufficiently harmful. The test of harm varies according to the category.[57] In each category it is a defence for the accused to prove that he did not know, or had no reasonable cause to believe, ..t the information related to one of the protected categories or that the disclosure would be damaging.[58]

Notwithstanding these safeguards, the new British anti-disclosure clause 'cannot be saic ... ncrease access to government information'[59] and would not serve as a model for the reform of the South African provision. It has been described as leaving 'unchanged the ethos of secrecy in the United Kingdom.'[60] and does not provide an adequate balance between state secrecy and disclosure.

PROPOSAL: [61]

PROPOSED DEFINITIONS

'Classified government information' means any clearly marked information which has been defined as such according to a uniform classification scheme approved by parliament and with respect to which secrecy is required in the inter-

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[57] See generally S Palmer 'Tightening Secrecy Law: The Official Secrets Act 1989' in 1990 *Public Law* 243 at 244-5 for a full discussion of these tests.

[58] This rule excludes the category of security and intelligence.

[59] Palmer op cit note 57 at 243.

[60] The Act is criticized mainly for the blanket ban on security disclosure, the failure to provide a public interest defence, and the inadequacy of the 'harm' test. For a full discussion of these criticisms, see Palmer op cit note 57 and S Palmer 'In the Inter-

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ests of the security or the proper functioning of a government programme.[62] *It includes information likely to be helpful in the commission of offences, to assist prisoners to escape or to impede the detection or prosecution of offences to any unauthorized person.*[63]

'Classified national security information[64] *means any clearly marked information which has been defined as such according to a uniform classification scheme approved by parliament and with respect to which secrecy is required in the interests of national security, safety or defence of the Republic.*

'Prejudicial information' means any information other than classified national security information, which directly or indirectly assists a foreign state or external organization to prejudice or threaten to prejudice the interests or security of the State.

DISCLOSURE OF PUBLIC INFORMATION

Any person who unlawfully and intentionally:

(a) communicates or makes available classified national security information to any unauthorized person; or

(b) obtains, collects or records classified national security information for the purposes of (a); or

(c) communicates or makes available classified government information to any unauthorized person; or

(d) obtains, collects or records classified government information for the purposes of (c); or

(e) communicates or makes available prejudicial information to any unauthorized person; or

(f) obtains, collects or records classified prejudicial information for the purposes of (e)

shall be guilty of an offence and liable on conviction to whatever penalty the court may deem fit.

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[62] Op cit note 39 at 62.

[63] This was one of the recommendations of the Franks Committee, and was quoted by Mathews op cit note 24 at 356.

[64] See note 40 for a recommendation for the classification procedure.

Any superior court of law shall be competent to enquire into the validity of classification of information in terms of (a)-(f) above and an improper classification will be a defence to the charge.

In addition to the above proposal, it is also recommended that personal or private information be protected from disclosure. Certain information about private individuals held by the government often requires secrecy in the interests of the security or privacy of those individuals. While the protection of this information would fall outside of the classification procedure outlined above, it would be governed by a similar guideline of real injury to the protected interest if the information were to be publicly disclosed. Personal and private information would be protected by a separate set of provisions, usually in the form of a Privacy Act or other similar legislation.[65] Such legislation must provide that an unreasonable invasion of privacy or a threat to the security, safety and well-being of the individual would result from disclosure.

5. RELATED PROVISIONS

Section 5 of the Act deals with the prohibition of certain acts prejudicial to the security or interests of the Republic. Section 5 (1) provides that a person shall be guilty of an offence if for the purpose of gaining or assisting any other person to gain admission to any prohibited place, or for any purpose prejudicial to the security or interests of the Republic:

(a) Unlawfully uses or wears any official uniform of the Republic, or one which is intended to pass as an official uniform of the Republic;

(b) Knowingly makes any false statement;

(c) forges or has in his possession a forged official document;

(d) impersonates or falsely represents a government official, or falsely represents himself to be or not to be a person to whom an official

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[65] For example, in the US the Privacy Act of 1974 controls the disclosure of personal information collected by agencies. However, Mathews points out that this Act provides only limited control over the dissemination of this information, and citizens have to turn to the sixth exemption to the Freedom of Information Act 1966 for redress. See Mathews op cit note 55 at 82. The Privacy Act does not protect privacy, but rather controls information held by federal state or private agencies. See DJ McQuoid-Mason *The Law of Privacy in South Africa* (1978) at 48.

document or information has been disclosed, or knowingly makes a false statement with intent to obtain an official document or information; or

(e) unlawfully uses or has in his possession any official die, seal or stamp or one which is intended to pass for an official die, seal or stamp of the Republic.

Section 5 (2) provides that it is an offence for any person:

(a) to unlawfully retain for any purpose prejudicial to the security or interests of the Republic any official document;

(b) allow any other person to unlawfully have possession of any official document, or to unlawfully have in his possession any official document, or upon unlawfully receiving the official document, fails to hand it over to the authorities; and

(c) unlawfully manufactures or sells any die, seal or stamp referred to in (e) above.

This subsection is prima facie without serious defects, save for the vagueness and uncertainty of the phrase for a purpose 'prejudicial to the security or interests of the Republic', as well as the wide ranging ambit of the definition of a 'prohibited place' in section 1.[66] What is lacking in this subsection is a clear and uniform guideline as to the nature of the protected information, as well as the purpose for which it is being used. As with the above subsections, the information that should be protected here should be classified national security and defence information which is especially sensitive. The definition of a prohibited place should be limited to those areas where defence or military matters are dealt with, and areas in which matters relating to classified national security information is discussed or housed.

Section 7 concerns the harbouring or concealing of certain persons and failing to report information relating to agents. It is an offence for a person:

(a) to knowingly harbour or conceal any person who he knows or suspects of having committed an offence under this Act, or knowingly permit any such person to meet or assemble on his premises;

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[66] See note 28.

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(b) having done the acts referred to in (a), to fail to disclose to the SAP any information he knows of; and

(c) to fail to report to the SAP any information that he is aware of regarding his knowledge of any agent or any person who has been in communication with an agent.

This section makes it an offence for anyone to fail to inform the authorities of conduct in contravention of the Act. Section 7 (a) creates accessory liability (adequately dealt with under the common law), and section (b) and (c) makes it an offence to fail to disclose to a peace officer information about anyone who is believed to have committed an offence under this Act or who is suspected of being an agent.

This section has the effect of creating an onerous affirmative duty to warn the authorities of crimes that have been committed or are to be committed. This duty to act is contrary to the principles of criminal law, which does not require this duty even for murder.[67] A private citizen should not shoulder the responsibility of assisting the authorities to prosecute those who are suspected of having committed crimes against the State. This is undue and excessive State interference with the liberty and privacy of an individual, and this section should be repealed to allow the ordinary criminal law take its course.

PROPOSAL (1):

Deletion in entirety.

PROPOSAL (2):

The Law reform Commission of Canada reached a compromise and recommended that there be a duty to warn the authorities of a crime against the State only during times of war.[68] *This would be consistent with the principle of reciprocal rights and obligations between the individual and the State when the existence of the State was being threatened.*

PROPOSED DEFINITION

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[67] However, see *S v Banoa* 1990 (3) SA 466 (B) at 511 where the court confirmed that such an affirmative duty exists for the crime of treason. See further Document One where it was recommended that this duty should exist only during times of war.

[68] Op cit note 39 at 51.

Time of War' means when war has been declared or there is an external threat, invasion or threat or invasion by foreign forces.

(1) Any person who, during times of war:

(a) is aware that an offence is being committed or has been committed under this Act; and

(b) fails, unless there is serious risk to himself or another, to take reasonable steps to prevent the commission of the offence; or

(c) fails to inform a peace officer of the offence as soon as is practicable,

shall be guilty of an offence and liable upon conviction to whatever penalty the court may deem fit.

Sections 8, 9 and 10 contain presumptions of guilt in certain circumstances.

For the reasons outlined under discussion of section 3, deletion in entirety is recommended.

PROPOSAL:

Deletion in entirety.

Section 12 provides that the written authority of the attorney-general is required for prosecution under this Act.

This provision should be retained, as it may serve as a limiting factor if the attorney-general refuses to give his written permission for a prosecution.

Section 13 provides for criminal proceedings to take place behind closed doors if the court deems necessary for considerations of safety.

This provision should also be retained since it will preempt a situation of a leak of sensitive material that the government may be entitled to protect, especially in the adjudication by the courts of the classification cases.

Section 14 provides that the State President has the power to declare any place to be a prohibited place, and any organization to be a hostile organization.

As suggested above, the emphasis will now be on classified information according to certain guidelines. It is submitted that this classification procedure also apply to the categorization of prohibited places and hostile organizations. A provision such as this gives the authorities carte blanche to extend the scope of [illegible] and their realm.

4. INTIMIDATION

The problem of intimidation and private armies have been isolated as particularly significant issues to be addressed both at present and for the future stability of this country. Presently the problem of intimidation is dealt with (unsatisfactorily, we believe) by the Intimidation Act 72 of 1982, the Internal Security and Intimidation Amendment Act 138 of 1991 and the provisions of the Criminal Law Second Amendment Act 126 of 1992. Thus the crime of intimidation is governed by three separate pieces of legislation.

The Intimidation Act has its basis in the provisions of the Riotous Assemblies Act[69] which criminalized various forms of intimidatory conduct. The Intimidation Act[70] repealed the provisions of the Riotous Assemblies Act and replaced them with the single crime of intimidation which has largely been used in relation to strike action.[71] This Act was further amended and new offences of intimidation were created by the Internal Security and Intimidation Amendment Act 138 of 1991[72] and the Criminal Law Second Amendment Act.[73]

Section 32 (1) of the Internal Security and Intimidation Act provides that:

Any person who -

(a) without lawful reason and with intent to compel or induce a person or persons of a particular nature, class or kind or persons in general to do or to abstain from doing any act or to assume or abandon a particular standpoint -

(i) assaults, injures or causes damage to that person or any other person; or

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[69] Sections 10 to 15 of the Riotous Assemblies Act 17 of 1956.

[70] This was a result of recommendations of the Rabie Commission. See generally J Dugard 'A Triumph for Executive Power - An Examination of the Rabie Report and the Internal Security Act 74 of 1982' in (1982) *South African Law Journal* 589.

[71] See Mathews op cit note 10 at 57 and C Plasket 'Industrial Disputes and the Offence of Intimidation' (1990) 11 *Industrial Law Journal* 669.

[72] Section 32. This amendment envisages a broader offence and increased penalties.

[73] Section 7.

(ii) in any manner threatens to kill, assault, injure or cause damage to that person or persons of a particular nature, class or kind; or

(b) acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication -

(i) fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person; and

(ii) is induced by his fear to do or to abstain from doing any act or to assume or to abandon [illegible]rticular standpoint,

shall be guilty of an offence and liable on conv[illegible]n to a fine not exceeding forty thousand rand or to imprisonment for a [illegible]iod not ex[illegible]g ten years or both.

Subsection 2 of the Act provides:

In any prosecution for an offence under subsection (1), the onus of proving the existence of a lawful reason as contemplated in that subsection shall be upon the accused, unless a statement clearly indicating the existence of such lawful reason has been made by or on behalf of the accused before the close of the case for the prosecution.

4.1. GENERAL COMMENTS[74]

We are of the opinion that this crime is badly structured and needs to be completely redefined. We thus will not consider each subsection in detail, but will offer the following general observations.

The motivation for amending the Intimidation Act in 1991 was to 'render certain acts intimidatory' in order to 'ensure normal and free political activity'

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[74] See generally C Plasket and R Spoor 'The New Offence of Intimidation' (1991) 12 *Industrial Law Journal* 747.

in South Africa,[75] and a lack of success in convictions under the Intimidation Act of 1982.[76] We agree that there is a necessity for such offences to be made punishable; however we are of the view that the legislature has extended the scope of the crime far beyond its purposes to 'ridiculous proportions' [77] The danger of this approach is the possibility of selective prosecutions. The legislature should have restricted the crime to more serious harm or threats of harm or damage to property. The primary problem with this section as it stands is its 'breathtaking ambit', and will inevitably criminalize normal and acceptable political activity.[78]

In terms of this offence, the fear for safety need not be reasonable but is dependent on a perceived threat by the affected party. Furthermore, section (1) (2) of the Intimidation Act of 1982 provides that the onus is on the accused to prove that a lawful reason exists for the conduct. Such an onus flies directly in the face of accepted criminal procedure. In addition, the penalty prescribed by the Criminal Law Second Amendment Act is excessive.[79]

The provisions of the Criminal Law Second Amendment Act[80] amends the Intimidation Act so that a new section is created.[81] This new provision is drawn directly from section 54 (1)(d) of the International Security Act in the definition of terrorism. It ~~therefore transforms~~ what was an act of terrorism, into the crime of intimidation. The legislature is in effect juggling statutory provisions under

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[75] Ibid at 749.

[76] For example, the accused escaped liability under the 1982 Act in *S v Mohape* 1984 (1) SA 270 (O) because the threat was not directed at a particular person. In the 1991 amendment, the offence was been broadened to include a threat to persons in general, thereby circumventing the decision in *Mohape*.

[77] Plasket and Spoor op cit note 74 at 750.

[78] Ibid at 751.

[79] The accused is liable on conviction to imprisonment for a period not exceeding 25 years or a fine which may be imposed at the discretion of the court or both such imprisonment and fine.

[80] Chapter 2.

[81] Section 7 of the Criminal Law Second Amendment Act provides for the addition of section 1A to the principal Act.

the guise of solving the problem of intimidation. It is difficult to understand what material difference it would make to alter the name of the offence, when all the elements of lability remain the same for that of terrorism.[82] The purported motivation for this legislative rotation is to bring within the crime of intimidation indirect forms of intimidation.[83]

The new section of the Criminal Law Second Amendment Act reads as follows:

1A (1) Any person who with intent to put in fear or demoralize the general public, a particular section of the population or the inhabitants of a particular area in the Republic, or to induce the said public or such population group or inhabitants to do or to abstain from doing any act, in the Republic or elsewhere -

(a) commits an act of violence or threatens or attempts to do so;

The term 'act of violence' includes the inflicting of bodily harm and killing or endangering of any person, or the damaging or destruction or endangering of any property.[84] The use of the word 'include' means the definition of violence is not limited to those forms of conduct mentioned in the Act.[85] Furthermore, there is no indication of the degree of violence necessary, and as Mathews points out, 'the language of the statutory definition covers trivial assaults and minor damage to property' if the intent is present.[86]

(b) performs any act which is aimed at causing, bringing about, promoting or contributing towards such act or threat of violence, or attempts, consents or takes any step to perform such act;

This subsection effectively creates a burden on any person who indirectly contributes to the commission of violence or a threat of violence. Furthermore, the taking of steps to perform an act that *might* result in

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[82] See Document One where it was recommended that the crime of terrorism be deleted in its entirety.

[83] See Memorandum on the objects of the Criminal Law Second Amendment Bill [B149-92 (GA)].

[84] Section 7(4) of the Criminal Law Second Amendment Act.

[85] See further Mathews op cit note 10 at 34.

[86] Ibid.

violence at some future stage is also punishable.[87]

(c) conspires with another person to commit, bring about or perform any act or threat referred to in paragraph (a) or act referred to in paragraph (b), or to aid in the commission, bringing about or performance thereof; or

The activity need not include the commission of violence. It is sufficient if a mere agreement[88] to commit an act of violence occ . or an act which will lead to violence.

(d) incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or threat,

This form of conduct overlaps to a large extent with the previous forms of conduct. If a person has the required intent, the use of language (as opposed to actual violence) may attract liability in terms of this subsection.

shall be guilty of an offer and liable on conviction to a fine which the court may in its discretion deem fit or to imprisonment for a period no. exceeding 2. years or to both such fine . such imprisonment.

While it is accepted that there is a serious need to curb intimidatory conduct, it is submitted that such provisions must adhere strictly to the requirements of the Rule of Law. Thus such provisions must be reasonably certain and unambiguous so as to avoid abuse and wide interpretation. As discussed in the previous document where terrorism was critically evaluated, this provision is repugnant and should not find a place in our statute books.

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[87] See for example, *S v Bacela* 1988 (2) SA 655 (E) where the accused was arrested while attempting to enter Lesotho for the purpose of joining the African National Congress (which was banned at the time) and found guilty of terrorism because the conduct of attempting to cross the border was construed as 'taking of a deliberate step towards the performance of acts aimed at the commission of terrorism and violence'.

[88] The crime of conspiracy is defined as 'an agreement between two or more persons to commit, or to aid or procure the commission of, a crime'. The agreement between the parties constitutes the unlawful conduct, while the *mens rea* is an intention to commit the crime in question. See further J Burchell & J Milton *Principles of Criminal Law* (1991) 391 - 395.

Furthermore, this wide provision is coupled with a number of presumptions which deny accepted common law principles.

Section 1A (2) of the Intimidation Act of 1982 (created by the Criminal Law Second Amendment Act) provides that accused will be presumed to have the required intent if the act co[illegible]ted resulted in or was likely to result in the objects specified. Furthermore, where the accused was in possession of specified arms then he is presumed to have the arms for the objects of intimidation.[89]

4.2. INTIMIDATION AS A 'SPECIAL OFFENCE'

Chapter 5 of the Criminal Law Second Amendment Act confers upon the Attorney-General the power to declare the crime of intimidation[90] a 'special offence', whereby a simplified criminal procedure for trial of the offence is proposed.[91] In the memorandum to the Bill it is stated that the object of the proposal is for the community to 'observe that these offenders are tried speedily and called to account for their deeds'.

Section 18 (1) empowers the attorney-general to classify certain offences as 'special offences' - irrespective of the actual charge- by means of the issue of a certificate which will then form part of the record of the court.[92] A court that tries a special offence shall sit on any day of the week in order to ensure that the trial be concluded as soon as possible.[93] If the court is satisfied that the State has failed to take all reasonable steps to commence with the presentation of its case within 60 days of the issue of the certificate, it must strike the case from the roll and dismiss the accused, or if the accused has already pleaded to the

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[89] Section 1A (3) of the Intimidation Act.

[90] Other potential 'special offences' include murder, robbery with aggravating circumstances and violence.

[91] This Act also makes provision for a 'no-bail' clause which is similar to the provision of section 30 of the Internal Security Act. The effect of the Act is to limit the [illegible]licability of section 30 only to potential 'special offences' (which includes intimidation). The provisions of the no-bail clause will not be discussed as it is beyond the scope of this document. See generally Mathews op cit note 10 at 98 - 100 for the effect of this clause.

[92] Section 18 (1) read with section 18 (2) of the Criminal Law Second Amendment Act.

[93] Section 19 (1) of the Criminal Law Second Amendment Act.

charge, release him on bail or on warning.[94] Where the defence is not ready to commence with the presentation of its case within 60 days of the issue of the certificate, the court must order that the trial be proceeded with as soon as possible, but not later than 90 days after the issue of the certificate.[95]

4.2.1. PLEA AT TRIAL OF 'SPECIAL OFFENCES'

During a trial of a special offence, a summary of substantial facts on which the State relies must accompany the indictment.[96] Where a plea of guilty is entered, the presiding officer must question the accused regarding the summary of substantial facts, and if he is satisfied that the accused admits the allegations and is guilty of the offence, convict the accused on his guilty plea.[97] If the court is in doubt that a guilty plea should have been entered, it may record a plea of not guilty.[98] However, any allegation legally admitted by the accused up to the change of plea shall stand as proof of the allegation.[99]

Where the accused pleads not guilty, he will be requested to indicate the nature of his defence to the charge, as well as the extent to which the summary of sub-

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[94] Section 19 (2) *(a)* and *(b)* of the Criminal Law Second Amendment Act.

[95] Section 19 (3) of the Criminal Law Second Amendment Act.

[96] Section 20 (1) of the Criminal Law Second Amendment Act. In ordinary criminal trials this is provided for in section 144 (3) of the Criminal Procedure Act 51 of 1977. The indictment is accompanied by a summary of the substantial facts of the case, which in the opinion of the attorney-general, are necessary to inform the accused of the allegations against him.

[97] Section 20 (2) of the Criminal Law Second Amendment Act. See also the discussion below on the possible effect that this has on chapter 19 of the Criminal Procedure Act.

[98] In this case the procedure relating to pleas of not guilty will be applicable. Under the Criminal Procedure Act, the presiding officer may accept a guilty plea without questioning the accused only if the offence is a minor one (i.e. if he is of the opinion that the offence does not warrant a punishment of imprisonment without the option of a fine, or a whipping or a fine not exceeding R300). (Section 112 (1) *(a)*). For serious offences the court will question the accused to ensure that he has no defence. If it is satisfied that the accused admits to all the allegations conviction can follow without evidence being led by the State, except in cases where the death sentence may be a competent sentence. (Section 112 (1) *(b)*).

[99] This approach is also that of the ordinary criminal process. See Du Toit (et al) *Comment on the Criminal Procedure Act* 1991 18-11.

stantial facts is being disputed.[100] If he fails to do this, then the court may, in its discretion, draw an unfavourable inference if it is of the opinion that it is justified in the light of the evidence presented.[101] The court must inform the accused that an unfavourable inference has been drawn.[102] If the accused does not dispute the allegations (or portions thereof) in the summary of substantial facts, the presiding officer must enquire whether the undisputed allegations may be recorded as formal admissions in terms of section 220 of the Criminal Procedure Act.[103]

4.2.2. GENERAL COMMENTS

The provisions of the Criminal Law Second Amendment Act make serious inroads into both the Rule of Law requirements and the rights of the accused. In the first place the Act has the effect of derogating from the accused's fundamental common law right to remain silent as expressed in the maxim *nemo tenetur se ipsum prodere*.[104] This right is based on the premise that the accused is entitled at common law to adopt a passive attitude and insist that the State proves its allegations.[105] In *Evans*[106] the court imposed a duty on the judicial officer to

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[100] Section 20 (4) *(a)* (i-ii) of the Criminal Law Second Amendment Act. This procedure differs slightly from that of ordinary criminal trials. Section 115 (1) of the Criminal Procedure Act provides that where a plea of not guilty is entered, the presiding officer *may* ask the accused if he wishes to make a statement indicating the basis of his defence. The presiding officer *may* question the accused to determine which allegations in the charge are in dispute (section 115 (2) *(a)*, but the accused is not compelled to give an explanation of the plea. The court is obliged to inform the accused that he is not obliged to answer questions. (*S v Daniëls en 'n ander* 1983 (3) 275 (A)). Under the provisions of the Act, however, the presiding officer *shall* ask the accused to make such a statement.

[101] Section 20 (4) *(b)* (i) of the Criminal Law Second Amendment Act.

[102] Section 20 (4) *(b)* (ii) of the Criminal Law Second Amendment Act.

[103] Section 20 (5) of the Criminal Law Second Amendment Act. S 115 (2) *(b)* of the Criminal Procedure Act contains a similar provision which applies in respect of ordinary criminal trials.

[104] The literal translation of this maxim is 'no one is obliged to incriminate himself'. See, however, *S v Robinson* 1975 (4) SA 438 (RA) where the court acknowledged the right of the legislature to limit the common law right to silence.

[105] See Du Toit op cit note 99 at 18-6. It is also a principle of a fair criminal trial that the onus of proof rests with the State.

[106] 1981 (4) SA 52 (C).

inform the accused of his right to remain silent. This decision was confirmed by the Appellate Division in *Daniels*.[107] Under ordinary criminal procedure, silence during the explanation of plea is the exercise of a common law right which does not give rise to an adverse inference.[108] The Act expressly grants the presiding officer to draw such an inference in these circumstances.

It has been held that the purpose of the explanation of plea in ordinary criminal procedure is to shorten the trial 'in that the State will then be apprised as to the aspects of the case on which its evidence should be concentrated.'[109] By permitting an unfavourable inference to be drawn from the accused's decision to remain silent, the Act is designed to secure convictions by greatly assisting the prosecution in making its case against the accused.[110] Moreover, the evidentiary burden on the prosecution has been substantially limited.

In this sense the provisions of the Act are an abrogation of the Rule of Law requirement that the application of laws shall be controlled by impartial courts operating according to fair procedures.[111] The chances of a fair trial in cases of 'special offences' as envisaged by the Act is substantially reduced.[112] The deviation from standard procedure in this section is similar to those created by the Internal Security Act which also seriously threaten the chances of a fair trial.[113] The departure from standard procedures in the Act is also a departure

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[107] *S v Daniels en 'n ander* 1983 (3) SA 275 (A).

[108] Van Der Merwe, Barton and Kemp *Plea Procedures in Summary Criminal Trials* 1983 106-108, *Evans* supra. See, however, *S v M* 1979 (4) SA 1044 (BT) where the Bophutatswana court stated that an adverse inference may be drawn from the accused's silence during the explanation of plea subject to certain conditions.

[109] *S v Mayedwa* 1978 (1) SA 509 (E).

[110] In ordinary criminal trials, it is common practice for the accused to request, and be granted, a discharge after the State case on the basis that the prosecution did not make out a *prima facie* case against the accused. The effect of the Act is to create a *prima facie* prosecution case even before the start of the trial, which would make it almost impossible for the accused to request a discharge after the State case has been presented.

[111] Mathews op cit note 10 at 219.

[112] The essence of a fair trial is not in the correctness of the decision made, but in the procedures by which the correctness of the decision is guaranteed. See NC Steytler *The Undefended Accused on Trial* (1988) 6.

[113] For a full discussion of this question, see Mathews op cit note 10 at 224-231.

from due process of law. With the objectives of speedy repression of criminal conduct and disregard for legal controls, the proposals fall squarely within the definition of the crime control model.[114]

It is debatable what effect the Act has on Chapter 19 of the Criminal Procedure Act, which provides for the taking of a plea in the magistrate's court on a charge justiciable in a Superior Court.[115] Under ordinary criminal procedure, where the accused pleads guilty, the magistrate shall, after questioning in terms of 112 (1) *(b)*,[116] stop the proceedings and in terms of section 121 (3) adjourn the proceedings pending the decision of the Attorney-General.[117] Section 20 (2) of the Criminal Law Second Amendment Act provides that if the magistrate is satisfied that the accused is guilty of the offence to which he has pleaded guilty, he may convict the accused on his plea of guilty and impose any competent sentence. The Act has no requirement that the decision of the Attorney-General must be sought after the guilty plea is entered.[118] It is therefore arguable that the provisions of the Act in effect empowers the magistrate to convict the accused on a charge justiciable in a Superior Court on a plea of guilty.[119]

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[114] See H Packer *The Limits of the Criminal Sanction* 1969 at 159. He comments that 'in order to operate successfully the process must produce a high rate of apprehension and conviction... and there must be a feeling of speed and finality.'

[115] Section 119 of the Criminal Procedure Act provides that, where an accused appears in a magistrate's court and the alleged offence may be tried by a Superior Court, the prosecutor may on the instructions of the Attorney-General put the charge to the accused, and the accused shall be required to plead. See *S v Mabaso and Another* 1990 (3) SA 185 (A).

[116] Section 121 (1) of Criminal Procedure Act.

[117] Section 121 (2) *(a)* of the Criminal Procedure Act. If the magistrate is not satisfied that the accused admits the allegations in the charge, then in terms of section 121 (2) *(b)* he may record his dissatisfaction and enter a plea of not guilty.

[118] The attorney-general has the power to arraign the accused in the same magistrate's court. Section 122 (3) *(a)* of the Criminal Procedure Act.

[119] The Criminal Law Second Amendment Act does not, however, *expressly* provide that section 119 proceedings are to be deviated from. It can also be argued that the use of the word 'trial' indicates that the ordinary criminal procedure be adopted (and that section 119 be adhered to) since section 119 proceedings are not trial proceedings but preparatory examinations. This, however, poses the additional problem of the Criminal Law Second Amendment Act turning the preparatory examination into a trial, by creating circumstances which may force the accused to disclose his defence at the preparatory examination.

It is submitted that the procedures governing the crime of intimidation must adhere to the basic principle of equal justice in accordance with all the principles of a fair trial.

The provisions of this section will have effect for only one year, after which the State President may extend the period in concurrence with Parliament.[120]

In the light of the above discussion of both the provisions of the Intimidation Act and the Criminal Law Second Amendment Act, this area of law is in need of reform. We therefore propose the following:

PROPOSAL:

Any person who-

without lawful reason and with intent to compel or induce any person to do or to abstain from doing any act or to assume or abandon a particular standpoint -

(a) assaults, injures or causes damage to any person or persons or property; or

(b) threatens to kill, assault, injure or cause dam[illegible] to that [illegible] or persons or property; or

c) uses towards another person threatening, abusive or insulting words or behaviour;

d) distributes or displays to another person any writing, sign or other visible presentation which is threatening, abusive or insulting,

and causes that person to reasonably believe that immediate unlawful violence will be used against him or another or his property shall be guilty of the offence of intimidation and shall be liable for a penalty which the court may deem fit.[121]

PROPOSAL (2)

Any person who unlawfully and intentionally commits any action or set of actions that is designed to disrupt or interfere with the legal rights of an individu-

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[120] Section 24 (2) of the Criminal Law Second Amendment Act.

[121] Section 4 (1) of the Public Order Act (Britain) was the basis of this proposal.

al[122] *by the use or threat of use of force or violence shall be guilty of intimidation and will be liable for a penalty which the court may deem fit.*[123]

The increase in the use of mock trials and burning of effigies as a form of protest has evoked sharp reactions from both critics and defenders.[124] Despite the controversy, the question that often arises is whether such conduct should be penalized by law. It is often argued that this type of protest incites hatred and violence against political figures, since the visual impact of such trials is stronger than verbal rhetoric. Nevertheless, it is submitted that there is no need to criminalize this specific form of protest for the following reasons:

(a) the indirect incitement or encouragement of violence is adequately covered by a previous recommendation;[125]

(b) mock trials and the burning of effigies are a universally accepted form of protest; and

(c) to penalize such forms of protest leads to overcriminalization of the legal system.

It is therefore recommended that no specific provision is necessary in this regard.

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[122] Such legal rights include the right to freedom of expression or opinion, the right of freedom of association and the right to freedom of movement.

[123] This proposal has been drawn from the CODESA Working Group One definition of political intimidation. See further F Cachalia 'A Report on the Convention for a Democratic South Africa' (1992) *South African Journal on Human Rights* 249.

[124] *The Natal Witness* August 4, 1992 page 7.

[125] See Document One where it was recommended that the encouragement of violence be made punishable.

5. PRIVATE ARMIES[126]

There can be no doubt that private armies exist in South Africa, both on the right and left of the political spectrum. There has been very little attempt by the legislature to criminalize private armies largely because much of the potential activities of these armies would be punishable under the existing common law. It would, for example, qualify as an act of treason for members of an organization which has as its aim the violent overthrow of the State to terrorize members of the public. However, the problem of *training* members of military organizations does not appear to be adequately covered by existing law. It is submitted that unlawful military training of persons for political purposes is undesirable in any society, and carries with it grave implications for the potential safety of society.

The provisions of the Criminal Law Second Amendment Act represent an attempt by the legislature to create a specific offence in this regard. The heading to chapter 4 of the Act refers to 'offences in respect of organizations with military or similar character'. Section 13 makes it an offence to be involved with an organization[127] which prepares its members or supporters to take over certain functions of the South African Police or the South African Defence Force. The involvement which is criminalized extends to the control, administration or management of the organizing, training, equipping or arming of members or supporters[129] as well as the undergoing of training[130] for the purposes of taking over or usurping some of the functions of the South African Police and Defence

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[126] The concept of 'private armies' is an extremely difficult one to define. However in this document the term is used to denote non-state, military training organization which has specific political objectives.

[127] Defined in section 12 of the Act as meaning 'any association of persons, incorporated or unincorporated and regardless of whether or not it has been registered in terms of a statute, and also any branch, section or committee of such an organization or any local, regional or subsidiary body which forms part of such an association.' Note that in the actual definition, there is no requirement that the organization must be of a military nature.

[128] Section 13 *(a)* of the Criminal Law Second Amendment Act.

[129] Section 13 *(b)* of the Act.

[130] Section 13 *(c)* of the Act.

Force as contemplated in section 5 of the Police Act[131] and section 3 (2) of the Defence Act.[132] The functions as set out under section 5 of the Police Act include the preservation of the Internal Security of the Republic, the maintenance of law and order, the investigation of any offence or alleged offence and the prevention of crime.[133] Under section 3(2) of the Defence Act the South African Defence Force may at any time be employed for the functions as set out under section 5 of the Police Act,[134] as well as 'on service' in the defence of the Republic; the prevention or suppression of terrorism: prevention or suppression of internal disorder in the Republic; and the preservation of life, health or property or the maintenance of essential services.[135]

Section 14 of the Criminal Law Second Amendment Act creates a presumption against a person who holds a position of leadership or a position in any executive committee of an organization described in section 13. If it is proved that the person occupies such a position in the organization, it shall be presumed that such person participates in the control, administration and management of the organization, and that he was aware of the fact that the members and supporters were being organized, trained, equipped or armed to take over the functions of the security forces as contemplated in section 13.

5.1. GENERAL COMMENTS

While the purpose of this provision is said to be to 'prohibit the organizing, training, equipping or arming of organizations with a military or similar character',[136] it appears to limit liability to those organizations which have as their objectives the taking over of some of the functions of the South African Police and Defence Forces. The Act therefore excludes those military organizations which, while providing training for their members, do not have as their aims the usurping of the above functions. It is submitted that a provision prohibiting training

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[131] Act 7 of 1958.

[132] Act 44 of 1957.

[133] Section 5 (a) - (d) of the Police Act.

[134] Section 3 (2) (b) of the Defence Act

of private armies should extend beyond those organizations which merely wish to take over the functions of the security forces and should include organizations with political objectives.[137]

The problem of private armies is not limited to South Africa. In Northern Ireland the approach has been to proscribe certain organizations which are involved in terrorist activities. The Northern Ireland (Emergency Provisions) Act of 1978 prohibits the wearing in public of a disguise or uniform that arouses apprehension of membership of a proscribed group,[138] as well as the wearing of a disguise including a hood, mask or any other method of concealment is prohibited.[139]

PROPOSAL:

Any person who without lawful authority and with a view to achieving a political objective:

(a) instructs or trains another; or

(b) rec[illegible]es instructions or training

in the making or use of firearms, explosives or explosive substances shall be guilty of an offence and sh[illegible] be liable on conviction to whatever pen[illegible]y the c[illegible]urt deems fit.[140]

However, it must be noted that the enactment and enforcement of such provisions may have the following consequences:

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[137] For example, wartime regulations prohibited the presence of a person at any gathering at which the persons present, or any of them, practice or are taught the use of arms. It also prohibited the presence of a person at a gathering of more than five people at which persons present take part in tactical exercise or other military movements, or are drilled, or take part in physical exercises. See section 10 of the War Measure 4 of 1941 made in terms of Section 1 (bis) of the War Measures Act 13 of 1940 GG No 2851 Proclamation No 20 of 1941. This regulation did not effectively deal with the problem of private armies as the gathering need not have had a political aim.

[138] Section 25.

[139] Section 26.

[140] This proposal is drawn from section 23 (1) of the Emergency Provisions Act of 1978 (Northern Ireland). See generally Hogan and Walker *Political Violence and the Law in Northern Ireland* (1989) 143-4.

(a) an increase in intensity of the group's campaign of violence against the State, as the group becomes locked in political power-play with the State;

(b) the effect of enforcement might place such organizations on a higher political and ideological plane, giving such organizations an undue legitimacy; and

(c) there is a strong possibility of increased support and membership as a result of enforcement.

6. CONCLUSION

As can be seen from the above proposals, we strongly suggest that the number of 'political crimes' be limited to few, basic offences that are unambiguous and deal directly with the security of the State. There is no need to overcriminalize the security system, since this may lead to a vast overlap in crimes and uncertainty as to the ambit of these crimes. We cannot over-emphasize the need for security crimes to fall squarely within the principles of the Rule of Law, so that there is a limited infringement on the rights of individuals, thereby limiting the possibility of protest. Draconian laws which are strict and unyielding to the changes in society can only fuel the resort to violent means of protest, rather than to curb them. It must be remembered that the security system cannot be the vehicle for achieving political assent and control. The security system, at best, can attempt to provide protection to the State and society at large.

STATUS MILITATING AGAINST FREE POLITICAL ACTIVITY

1. Internal Security and Intimidation Amendment Act 138 of 1991

Section 29 still provides for detention without trial for a period of ten days, which period can be renewed by a judge on application by the commissioner of the police. Section 4 as amended still provides for the banning of organisations by the Minister if he has reason to believe that the organisation behaves in a certain manner.

2. Disclosure of foreign funding Act 26 of 1989

The Act provides for the declaration of certain organisations or persons as reporting organisations or persons whose duties amongst others will be to furnish the Registrar of the amount of the money and the purpose for which the money was provided by the supplier.

3. Demonstrations in or near court buildings prohibition Act 71 of 1982

The Act prohibits all demonstrations and gatherings in any building in which a court room is situated or at any place in the open air within a radius of five hundred metres from such buildings, unless so permitted by the magistrate.

4. Affected Organisations Act 31 of 1974

The Act provides for the prohibition of the receipt of money by certain organisations as for contributions moneys already possessed by such organisations have been declared as affected ones.

5. Gatherings and Demonstrations Act 52 of 1973

The Act prohibits certain gatherings and demonstrations in a defined area, in the city of Cape Town without the permission of the Chief Magistrate of Cape Town.

6. Gathering and Demonstrations in or near the Union Buildings Act 105 of 1992

The Act prohibits demonstrations and gatherings in the vicinity of the Union Buildings.

7. Criminal Procedure Act 51 of 1972

Section 205 is being used by the Police to compel journalists to act contrary to their ethics by disclosing the sources of their information.

LAW REFORM PROJECT

LAWYERS FOR HUMAN RIGHTS

5 NOVEMBER 1992

LAWS WHICH VIOLATE FUNDAMENTAL FREEDOMS

1. Local Government Franchise Act 117 of 1984

The Act regulates the voting rights in respect of local government bodies. In terms of Section 2 only whites, indians and coloureds are entitled to be registered as voters and can vote in any election for the local government body established for the area (wherein his registered address is situated where his ratable property is situated).

2. Electoral Act 45 of 1979

Regulates the registration of voters and the election of members of Houses of Parliament. Section 3 classifies votes into whites, coloureds and indians in respect of the three Houses of Parliament i.e. the House of Assembly, House of Representatives and the House of Delegates respectively. Blacks are totally excluded.

3. Electoral Amendment Act 129 of 1992

The amending Act has not brought about fundamental changes.

4. Referendum Act 108 of 1983

Provides for the holding of referendum in [illegible] certain the views of voters in the Republic. In terms of Section 2 the State President may declare the holding of a referendum to ascertain the views of voters or a category of voters. It is whites, coloureds and indians who can vote and as such no blacks' views can be ascertained through a referendum.

5. Referendum's Amendment Act 97 of 1992

The Act disregards colour as a criteria in voting when it only applies to referendums.

6. Defence Act 44 of 1957

Provides for the defence of the country. Every citizen is liable for training and service in terms of this Act. However Section 2 states categorically that the Act is not applicable to persons who are not white.

7. The Defence Amdnemnt Act 132 of 1992

The Act is still premised on race.

8. Social Pension Act 37 of 1973

This Act consolidates and amends laws relating to pensions and allowances for aged, blind and disabled persons. In terms of Section 18 the State President may assign the administration of the provision of this Act in respect of persons belonging to a specified populati n group defined by him to any minister. Section) excludes the application of this Act to coloured persons.

9. Social Assistance act 59 of 1992

The Act took away the right of blind persons to a grant.

10. General Pensions Act 29 of 1979

It regulates pension matters generally. In terms of Section 16 it is presumed that any white, coloured or indian person who immediately before the 26/10/76 complied with all the requirements of laws relating to citizenship or residence in the Republic such person shall be deemed to be a South African resident. The Act is silent on blacks.

11. tic of illegal squatti g Act of 1951

Act provides for the preve a fo il gal squatting on public or private l Although the Act does not refer explicitly to racial groups, its provisions are only applicable to blacks as there was never a single incident of white squatters.

12. Coloured Persons Education Act 47 of 1963

Provides for the control of education of coloured persons by the House of Representatives (coloured House of Parliament)

13. National Education Policy Act 39 of 1967

Provides for the general policy to be pursued in respect of education for white persons in South Africa to the exclusion of other race groups as classified in the Population Registration Act.

14. Black Administration Act 38 of 1927

The Act provides for the better control and management of black affairs. The Act is foreign to whites or other race groups and applies to blacks only.

15. Education and Training Act 90 of 1979

It provides for the control of education for blacks by the Department headed by a white Minister in the white House of Assembly and it is the same Minister in consultation with the Council whose members are appointed by him that policies in this regard are made. The Council is entirely white.

16. Black Local Authorities Act 102 of 1982

Provides for the establishment of local authorities' committees, town councils, city councils and town committees for black persons in specified areas by the Administrator of the Province in which such local authority is situated. The administrators are all white.

17. Black Communities Development Act 4 of 1984

Like the above Act this one also applies to blacks. It provides for the purposeful development of black communities by the board established by the Minister of Constitutional Development and Planning.

18. Excision of Released Areas Act 54 of 1988

Provides for the excision of certain land from the defined released areas and transfer of same to the Administrator of the Province for the administration and control thereof and rendering of services to the residents of the said land, in this instance Soshanguve and Letlhabile black townships.

19. Self-Governing Territories Constitution Act 21 of 1971

The Act provides for the establishment of legislative Assemblies and executive councils in black areas. The Act is only applicable to blacks to the exclusion of coloureds, indians and whites who have their "Assemblies" in the House of Representatives, House of Delegates and the House of Assembly respectively. It is in these respective Houses that different race groups exercise their voting powers on separate voters' rolls.

20 Indians Education Act 61 of 1965

Provides for the control of indian education to the exclusion of other race groups.

21. Indians Advanced Technical Education Act 12 of 1968

Provides for the establishment of technikons for indians, their control, administration and regulation of same.

22. Housing Development Act 4 of 1987

This Act provides for a Board and a Fund in order to effect or promote the acquisition and alienation of land for the purposes of indian townships development for instance, the granting loans to enable indians to acquire land and buildings.

23. Republic of SA Constitution Act 10 of 1983

Section 41, 42 and 43 provides for three Houses of Parliament and each being for whites, indians and coloureds respectively. In terms of Section 14 matters dealt with in the Parliament constituted under this constitution are divided into own affairs and general affairs. Own affairs are matters affecting a particular population group in relation to the maintenance of its identity and the upholding and furtherance of its way of life, culture, traditions and customs.

24. Community Welfare Act 104 of 1987

This Act provides for the establishment of a Community Welfare Advisory Council and of regional welfare boards and of certain committees for matters relating to [illegible] Where certain medical acts are performed. This Act [illegible] affair [illegible] representatives the coloured racial group to the exclusion of other race groups.

25. Probation Services Act 98 of 1986

Its provides for the rendering of welfare services in respect of accused and convicted white persons and their families. It is also an own affair matter in the House of Assembly (for whites only) to the exclusion of other race groups.

26. The Probation Services Act 116 of 1991

The Act is not an own affair one for whites unlike its predecessor. Although it repealed the 1986 Act, its date of commencement was at the time of printing this document not yet known. Almost a year later meaning that until date for commencement is set by the State President the repealed Act will continue to apply thus benefitting whites only.

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27. Promotion of Constitutional Development Act 86 of 1988

It provides among other things the affording to Black South African citizens of a voice in the process of government. In furtherance of this Act's purpose a Council, whose other members are elected by blacks only is constituted.

28. Prohibition of the exhibition of films on Sundays and Public Holidays Act 6 of 1992

The Act is religiously prescriptive like the country's constitution. The Act provides that the local authority's permission must be sought first before filming on Sundays.

29. Education and Training Amendment Act 55 of 1992

It gives the Minister power to authorise the admission of other race groups into certain schools.

30. Interception and Monitoring Prohibition Act 127 of 1992

It authorises the interception of postal articles and communications by a directive from the Judge based on an application made by a police officer.

31. Cultural Institutions Act 3 of 1992

It is applicable to whites.

32. Abattoir Hygiene Act 121 of 1992

It is generally against the killing of animals at any place other than an abattoir. There are no abattoirs readily available in the rural areas.

33. Secret Services Account Amendment Act 142 of 1992

The Act provides for the allocation of funds by Parliament for undisclosed projects - the Inkathagate scandal and the CCB's were nurtured form the same account.

34. Criminal Law Second Amendment Act 33 of 1992

The Act provides for arbitrary declaration of certain offences as special ones by the Attorney General. It further creates serious inroads into the accused persons recognised rights.

35. Aliens Control Act 96 of 1991

Provides for detention and summary deportation of persons who by international standards would qualify as refugees.

The following is a list of some of the Acts which apply to persons according to race classifications:

- Pa[illegible] Appropriation Acts 649, [illegible] and 657 f[illegible] whites, coloureds and indians respectively.
- Pension Benefits for Councillors of Local Authorities Amendment Act 1144 of 1991 (blacks)
- Development Aid Laws Amendment Act 152 of 1991 (blacks)
- Local Government Affairs Council Amendment Act 152 of 1991
- Local Authorities Rating Ordinance Amendment Act 806 of 1991 (whites)
- Suid [illegible]ense Akademie vir Wetenskap en Kuns Amendment Act 8[illegible]99[illegible] (whites)
- T[illegible]n Plan[illegible]ng and [illegible]p O[illegible] [illegible]nt [illegible] 805
- Local Aut[illegible]rit[illegible] Capital Development Fund [illegible]nce Amendment Act 6[illegible] of 1991 (whites)
- Transvaal Board for the Development of Peri-urban Are Ordinance Amendment A[illegible] 676 of 1991 (whites)
- Less Formal Townships Establishmetn Act 113 of 1991
- Blacks Communities Development Amendment Act 77 of 1991

LAW REFORM PROJECT

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