Habeas Corpus

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THE South African system of criminal procedure has in recent years undergone a fairly major change in its nature; this is nowhere more true than in the field of *habeas corpus*.

The remedy of *habeas corpus* is derived from the Roman Dutch *interdictum de homine libero exhibendo*. The rationale behind the grant of the interdict is that because every man is presumed in our law to be innocent until proved guilty in an open court of law, any detention or deprivation of liberty of such person against his will is *prima facie* unjust and unlawful. As a result the person who is detained should be released unless his jailor can justify his detention.

The tradition concerning the grant of *habeas corpus* in South Africa goes back many years. One of the earliest cases is that of *In re Kok and Balie* 1879 Buch 45 at 66. Certain Griquas had been arrested in Griqualand East for taking up arms and joining in a disturbance against the colonial government. These persons were not brought to trial and an application was brought for their release.

The State opposed the application on the ground that 'the country (was) in such an unsettled state, and the applicants are reputed to be of such a dangerous character, that the Court ought not to exercise a power which under ordinary circumstances might be usefully and properly exercised' (66).

Chief Justice de Villiers in a famous judgment granted the application and said: 'The disturbed state of the country ought not in my opinion to influence the Court, for its first and most sacred duty is to administer justice to those who seek it, and not to preserve the peace of the country.'

He went on to say that 'if a different argument were to prevail, it might so happen that injustice towards individual natives has disturbed and unsettled a whole tribe, and the Court would be prevented from removing the very cause which produced the disturbance'. (p 66).

Another case illustrative of the courts' attitude was that of *Ganyile* v *Minister of Justice and others* 1926 (1) SA 647 (E) where de Villiers JP said at 653-4 '... the Supreme Court is the protector of the rights of the individual citizen and will protect him against unlawful action by the executive in all its branches.'

The normal situation is governed by the Criminal Procedure Act 51 of 1977 which provides that a person arrested with or without a warrant must be brought to a police station as soon as possible where he may not be detained for longer than 48 hours unless he is brought before a lower court and his further detention for the purposes of his trial on a specified charge is ordered by the court.

Unfortunately, however, we have witnessed in South Africa in recent years a deliberate whittling away by the legislature of the Court's powers to protect individual citizen's rights to the extent that in many matters allegedly concerning the security of the State the courts' jurisdiction has been almost completely ousted and the detainee is left helpless with virtually no access to the courts or recourse to law.

This unhappy situation is the result of the combined effect of a number of laws passed in South Africa in the past 15 years. The first was section 17 of the General Law Amendment Act of 1963 which empowered a commissioned police officer to arrest without warrant and detain any person whom he suspected on reasonable grounds of having committed or having information about the commission of the crime of sabotage (section 21 of Act 76 of 1962), or of offences under the Internal Security Act 44 of 1950 or the Unlawful Organisations Act 34 of 1960.

Such a detainee could be held for the purpose of interrogation until he, in the opinion of the Commissioner of the South African Police, replied satisfactorily to all questions at the interrogation or for 'ninety days on any particular occasion'.

Section 17(2) provides that 'no person (i.e. not even a legal adviser) shall .. have access to any person detained... provided that not less than once during each week such person shall be visited in private by the magistrate... of the district in which he is detained.' Section 17(3) provides that 'no court shall have jurisdiction to order the release from custody of any person so detained ...'

So the writ of *habeas corpus* was swept away in this context. The section went on to provide that it was to be in force for periods of less than 12 months at a time and that fresh periods had to be proclaimed by the State President. The section was in operation from May 1, 1963,

to January 10, 1965, when it was withdrawn. It has not been renewed since. Nevertheless it remains on the statute book and can be renewed at any time.

One thousand and five persons were detained under this section of whom 575 were subsequently charged in a court of law and 272 were convicted. 73,94 per cent of the persons detained under this measure were either not brought to court or if they were, were acquitted of the charges brought against them.

As Professor Mathews in his book 'Law, Order and Liberty in South Africa' (1971) p 136/7 says 'The restrictions upon the detainee's liberty which the 90-day clause expressly authorises are severe. Though no cause has been shown, he may be held in solitary confinement without the benefit of legal and medical advice, and without the right to communicate with family or friends. Whilst in this vulnerable position he may be subjected to unlimited interrogation by investigating officials.'

Section 22 of the General Law Amendment Act 62 of 1966 provides for a period of 14 day detention, which period can be extended upon an application made to a judge of the Supreme Court. This section is not used much in practice.

Hard on the heels of the 14 day detention law came section 6 of the Terrorism Act 83 of 1967.

The wording contained in the Terrorism Act *resembles that of the 90-day Act except for* three major deviations:

(1) Whereas the 90-day law was temporary, the Terrorism Act is permanent;

(2) Whereas the 90-day law was limited in time, the Terrorism Act provides for indefinite detention; and

(3) Whereas under the 90-day law the visits of the magistrate were mandatory and had to take place at least once a week, under the Terrorism Act the visits of the magistrate to a detainee are discretionary ('if circumstances so permit') and take place only once a fortnight.

As can readily be seen there are no limitations whatsoever on the powers of detention. The courts' power to order the release of the detainee is absolutely excluded and the detainee may now be held in solitary confinement without trial for life. His isolation from the outside world is made absolute by the provision that no person is entitled to information relating to or obtained from the detainee. Little wonder that the provisions are described as *'draconian'*.

Section 13 of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971 ('Drugs Act') empowers a magistrate to authorise the indefinite detention of a person for the purpose of interrogation when it appears to him on the ground of information submitted to him on oath by the public prosecutor that there is reason to believe that the person is withholding information relating to the offence of dealing in drugs or relating to the failure to report the commission of a drug offence in a place of public entertainment. Such a person may be detained until the magistrate is satisfied that he has replied satisfactorily to all questions or that no useful purpose would be served by his further detention.

Section 13(4) provides that no court of law shall pronounce upon the validity of any action taken under this section or order the release of the person so detained. Like the detainee under the Terrorism Act his isolation from the outside world is complete.

The detention may be for life.

The only glimmer of hope for the detainee is that whereas under the Terrorism Act the detainee has to satisfy the Commissioner of Police (who after all is a representative of the State) that he has satisfactorily replied to all questions put to him, here, under the 'Drugs Act', the detainee has to satisfy a magistrate.

The statutes dealt with above all dispense with 'the safeguards in favour of freedom from arbitrary arrest and detention contained in the Criminal Procedure Act. In particular they dispense with the procedure of arrest by warrant, the right of a person arrested without warrant to be informed of the cause of his arrest, the right to be brought before a court within 48 hours and the relief provided by the word of *habeas corpus* or the *interdictum de homine libero exhibendo*'. (*John Dugard — South African Criminal Law* and Procedure — vol IV Introduction to Criminal Procedure p 71).

These statutes all however at least relate to persons suspected of having committed certain crimes or of having information about the commission of such crimes. However, there are other statutes which go further than the ones mentioned above in that they provide for the detention of persons who are not suspects at all but who are merely witnesses.

The Criminal Procedure Act 51 of 1977 contains detailed provisions in order to secure the attendance of a witness at criminal proceedings. This is done by the issuing of a subpoena at the instance of either the prosecution, the defence or the court. If there is any likelihood that a witness in criminal proceedings is about to abscond the presiding judicial officer is empowered to issue a warrant for his arrest.

In regard to the serious non-political offences, e.g. murder and arson, section 185 of the Criminal *Procedure Act provides that where any person* is, in the opinion of the Attorney General, likely to give evidence on behalf of the State in any criminal proceedings relating to the offences mentioned above, and the Attorney-General, from information placed before him is 'of the opinion that the personal safety of such person is in danger or that he may abscond or that he may be tampered with or that he may be intimidated' or 'he deems it to be in the interests of such person (sic) or of the administration of justice'

that he be detained pending the relevant proceedings.

If the Attorney-General is of the opinion that such person should be detained immediately, he may order his detention, but such detention may not continue for more than 72 hours unless the Attorney-General applies within that time to a judge for an order that the witness be detained.

The hearing, as can be seen, takes place behind closed doors and no information relating to the proceedings may be made public. In addition, the witness and his legal adviser are not allowed to be present at such a hearing and the witness is not given an opportunity to present reasons either in person or on affidavit why he should not be detained.

The judge's decision is final and the detainee, if the judge grants the application, will be detained for a period ending on the day on which the criminal proceedings in question are concluded or for a period of six months, whichever period is the shorter. The detainee must be visited once a week in private by a magistrate.

However, no court of law has jurisdiction to order the detainee's release or to pronounce on the conditions of his detention. There is a limited safeguard contained in the provision viz that the order for the witnesses' detention must be granted by a judge. This safeguard is not, however, very strong because the witness is not allowed to present his side of the story and consequently the judicial control exercised will be minimal.

Regarding the political offences (sedition, treason, sabotage, participation in terroristic activities, contravention of the provisions of the Internal Security Act (the old Suppression of Communism Act) and any conspiracy, incitement or attempt to commit such offence), no control exists whatsoever over the Attorney-General's power to detain witnesses.

They are dealt with in terms of section 12B of the Internal Security Act 44 of 1950 which provides that any person likely to give material evidence for the State in any criminal proceedings relating to the abovementioned offences may be detained for six months or until the conclusion of the criminal proceedings whichever period is the shorter, whenever in the opinion of the Attorney-General there is any danger of tampering with or the intimidation of the witness or of the witness's absconding or whenever the Attorney-General deems it to be in the interests of the witness or of the administration of justice.

Like section 185 no person may have access to the detainee and no court may order his release, the writ of *habeas corpus* again having been done away with.

Finally, there is section 10(1)(*a*)*bis* of the Internal Security Act which deals with persons who are neither accused nor are they witnesses. The section empowers the Minister of Justice to order the arrest and detention of any person 'if he is satisfied' that such person 'engages in activities which endanger or are calculated to endanger the security of the State or the maintenance of public order'. These persons are detained because their activities, albeit lawful, are calculated to endanger the security of the State.

This provision was brought into operation in 1976 following the riots in Soweto and other parts of South Africa and 135 people were held under this provision during that year. The provision, providing as it does for internment or preventive detention, is to be in force for periods not exceeding 12 months at a time.

A review committee of three, consisting of a sitting or retired judge or magistrate and two other persons must investigate the Minister's action in respect of a detainee within two months of his detention and thereafter at intervals of not more than six months. However, the recommendations of the review committee are not binding on the Minister of Justice and as such are virtually meaningless.

The hallowed concept of *habeas corpus* is virtually dead in South Africa, and South Africa's system of criminal procedure is much the poorer for its passing.