Is this Act really necessary?

THE Second Police Amendment Act 1930 ('the Act') amends the Police Act 1958 by inserting, after section 27B, the following provision:

Prohibition on the publication of certain information —

27C. (1) Subject to the provisions of subsection (2) no person shall publish in any newspaper, magazine, book or pamphlet or by radio any information in relation to —

(a) the constitution, movements, deployment or methods of any member or part of the Force concerned in any action for the prevention or combating of terroristic activities as referred to in section 2 of the Terrorism Act, 1967 (Act No. 83 of 1967);

(b) any person against whom or group of persons against which any action referred to in paragraph (a) is directed, or in relation to any action by such person or group of persons;

(c) any action referred to in paragraph (a) by any member or part of the Force together with any member or part of the South African Defence Force or the South African Railways Police Force;

(2) The provisions of subsection (1) shall not prohibit the publication of information released for publication by the Minister or the Commissioner or by a person authorised thereto by the Minister or the Commissioner.

(3) Any person who contravenes the provisions of subsection (1), shall be guilty of an offence and liable on conviction to a fine not exceeding fifteen thousand rand or to imprisonment for a period not exceeding eight years or to both such fine and such imprisonment.

The Act is in substitution for the amendment originally proposed by the Minister of Police which triggered immediate and

● **Sketch by Anne Pogrund**

vociferous public protest. The original proposal would have prohibited 'disclosure' (by word of mouth alone) of the fact of the arrest or detention of any person under the 14-day or indefinite detention laws.[1] The present Act is clearly more limited in ambit in that 'disclosure' has been replaced by 'publication' in any newspaper, magazine, etc; and this change is to be welcomed. However, it is strongly arguable that in other respects the changes made are purely cosmetic — and that the effect of the Act is still to prohibit publication (without authorisation) of the fact of the arrest or detention of an individual.

Looking at the provisions of the Act, it is clear that the words: '. . . the methods of any member . . . of the [Police] Force in any action for the prevention or combating of terroristic activities . . .' in subsection 2(a) are *prima facie* wide enough to cover arrest, interrogation and detention. Moreover, 'terroristic activities' (in sub-section

2(a)), fail to be defined by reference to section 2 of the Terrorism Act of 1967. The definition of 'terrorism' in this section is notoriously wide. The section is too long to quote *in extenso,* but its wide-ranging ambit has been emphasised by the Appellate Division in S v ffrench-Beytagh (1972) (3) SA 430 (AD)).[2] It is clear, accordingly, that the words 'terroristic activities' are wide enough to extend not only to incidents such as Sasol or Silverton, but also to participation in strikes and school boycotts.

Further, the clear provisions of the Act contain no limitation to action taken under the Terrorism Act itself:[3] all that is required is that the action be taken by the Police 'for the prevention or combating of terroristic activities'. (Note that this is even wider than action taken 'to prevent or combat').

The Act is, accordingly, clearly open to the interpretation that the media are now prohibited, without the consent of the Minister or Commissioner, from publishing any information (including, therefore, even the name) of any person against whom any action (including arrest and detention) is taken for the prevention or combating of terroristic activities — in the broad Terrorism Act sense.

If this interpretation of the Act is correct, it follows that the 'lacuna' in sub-section 6(6) of the Terrorism Act — which left possible the publication of information from an **unofficial** source of a person's detention — has now been closed.[4] And South African law has reached the point where people — like Steve Biko and Joseph Mavi — may simply disappear without the public being informed in any way.

INADEQUATE SAFEGUARDS

It is clear, therefore, that the interpretation placed on the Act is of crucial importance. In this regard, it is noteworthy that the possibility of the Act being interpreted so as to prevent publication of the names of persons arrested or detained was confirmed by the Minister of Police in Parliamentary debates on the Bill.[5] The fact that the Minister also undertook that the Act would be applied 'selectively' and would not be used to 'smother rightful criticism'[6] is a totally inadequate safeguard. First, unless written into the law, such assurances have no binding legal effect. Moreover, by virtue of the rules of statutory interpretation — which exclude reference to such 'travaux préparatoires' — they may not be referred to by courts of law faced with the task of interpretation. Further, our courts tend, in general, to the 'literalist' rather than the 'teleological' approach to statutory interpretation and are more inclined to give effect to the 'clear wording' of an act than the purpose underlying its adoption.[7] Hence, to avoid a wide-ranging interpretation of legislation, it is essential that appropriate limitations be incorporated within the statute itself. The present Act, however, contains no such restrictions upon its ambit.

It is true that a wide-ranging interpretation may not be correct and may not be adopted if the matter were to come to court. From the practical viewpoint, however, a newspaper editor (for example) faced with the decision of whether to risk unauthorised publication and weighing the heavy penalties imposed for contravention, is likely to 'err' on the side of caution. Moreover, given the broad terms of the Act, it will be extremely difficult to challenge the Minister's refusal to allow publication of particular information. This factor, coupled with the high cost of litigation, will inevitably militate against Court proceedings being brought to test the validity of any such refusal. Hence, the mere presence of the Act upon the Statute Books will undoubtedly have a stifling effect on publication. Freedom of the Press will most certainly be curtailed — and, with it, the right of the public to know the truth.

WHY WAS IT NECESSARY AT ALL?

The Act accordingly presents a serious threat to the democratic foundations of our society. It is therefore all the more disturbing that the need for the introduc-

tion of this further legislation is far from clear.

In the first instance, it would seem that the interests of the State are already adequately served by pre-existing legislation. In particular, subsection 3(2) of the Official Secrets Act, 1956, makes it an offence, subject to heavy penalties, to 'publish' or 'communicate' — 'in any manner or for any purpose prejudicial to the safety of the Republic' — 'information which relates to a . . . police or security matter'.

'Police matter' is defined in sub-section 3(2)(b) as —

> 'Any matter relating to the preservation of the internal security of the Republic or the maintenance of law and order by the SA Police'.

'Security matter' is defined as —

> 'Any matter relating to the security of the Republic'.

Prima facie, therefore, the Official Secrets Act is competent to regulate situations such as Silverton and Sasol — the alleged rationale for the new Act.

That the Official Secrets Act is apt to cover such situations was tacitly conceded by the Minister: who claimed, however, that further legislation was nevertheless required because —

1. the Official Secrets Act is so wide that both Police and Press find it difficult to apply; and
2. the Official Secrets Act requires proof (by the State) that publication is 'for any purpose or in any manner prejudicial to the safety and interests of the Republic'; and evidence of this may only be available after publication — when (to paraphrase his words) — the horse has already bolted and it is pointless to shut the stable-door.[9]

As regards the first point, the new Act is equally, if not more, wide-ranging. As for the second, the absence of any such burden of proof upon the State under the new Act means that, in this respect at least, different and additional power has indeed been conferred upon the State. But the change is one which undermines the Rule of Law and which should not have been countenanced without clear demonstration of the need for it.

Note further that the Act was introduced without first consulting the National Press Union,[10] or attempting to establish the liaison between Police and Press advocated by the Steyn Commission[11] (and which has operated so effectively in countries such as the United Kingdom with regard, for example, to the Iranian Embassy saga). Again, this inevitably raises a question-mark as to the need for the new Act.

DISREGARD OF STEYN COMMISSION

Finally, and perhaps most disturbingly, the Act goes far beyond the legislation proposed by the Steyn Commission itself. The Steyn Commission drafted and included in its Report[12] a new sub-section 27(c) in the following terms —

> . . . 27(c) Improper disclosure of in*formation relating to the combating of* terrorism.
>
> No persons shall publish in any manner whatsoever —
>
> (1) any information, which can be of use to any person or organisation participating in terroristic activities, whether directly or indirectly, relating to the composition, movement or disposition of —
>
> (i) that portion of the Police Force involved in operations for the prevention or suppression of terrorism, or
>
> (ii) any terrorists or terrorist group being the subject of such police operations.
>
> (2) any information, whether directly or indirectly, relating to any joint operations with the South African Defence Force and/or the South African Railway Police and conducted for the prevention or suppression of terrorism . . .'.

The difference between this proposal and the wording of the new Act speak clearly for themselves. It is accordingly all the more disturbing that no explanation or

reason for the changes appear to have been given by the Minister in Parliamentary debates on the Bill, notwithstanding specific questioning on this point by the Official Opposition.[13]

DRACONIAN

In conclusion, the Steyn Commission also recommended, in paragraph 176 of its Report, that —

> '. . . The SADF and the SAP ought to make available as much information as possible and not as little as possible. The media, as well as the SADF and the SAP, are in favour of healthy relations based on respect and trust . . .'[14]

A draconian measure such as the Act will inevitably militate against the establishment of such a relationship. And this in itself — apart from any other considerations — is reason enough to regret the introduction of the Second Police Amendment Act of 1980.

FOOTNOTES

1. House of Assembly Debates No 16 Col 7803 2 June 1980: Mr R A F Swart.
2. At 457. See also C J R Dugard: 'Human Rights and the South African Legal Order' 176 and 348-9; and note that the Appellate Division in **S v Hosey** (1974 (1) SA 667 (AD)) appears to have retreated from the restrictive interpretation in **S v ffrench-Beytagh** supra and **S v Essack** (1974 (1) SA 1 (AD)).
3. House of Assembly Debates No 16 Col 7883 3 June 1980: Mrs H Suzman.
4. House of Assembly Debates No 16 Col 7884 3 June 1980: Mrs H Suzman.
5. House of Assembly Debates No 16 Cols 7834 and 7884 2 and 3 June 1980: Mr S van der Merwe and Mrs H Suzman.
6. House of Assembly Debates No 16 Col 7920 3 June 1980: The Minister of Police.
7. D V Cowen: Tydskrif vir Suid-Afrikaanse Reg': 1976 Vol 2 131 esp at 147-148.
8. House of Assembly Debates No 16 Col 7819 2 June 1980: Mr B W R Page.
9. House of Assembly Debates No 16 Col 7918 3 June 1980: The Minister of Justice.
10. House of Assembly Debates No 16 Col 7914 3 June 1980: The Minister of Justice.
11. House of Assembly Debates No 16 Col 7850 2 June 1980: Mr A B Widman.
12. At 193, quoted in House of Assembly Debates No 16 Col 7850/1 2 June 1980: Mr A B Widman.
13. House of Assembly Debates No 16 Col 7853 2 June 1980: Mr A B Widman.
14. At 113. Quoted in House of Assembly Debates No 16 Col 7847 2 June 1980: Mr A B Widman.

Which is my beloved country?

An Affidavit drawn up in the Johannesburg Advice Office

VUSI, born on 10th February 1969, and SETSEKA, born on 10th August 1971, both in Alexandra, are my sons.

For social reasons I procured a Travel Document for VUSI in 1979 so that he attends school in Umtata, Transkei.

In 1980, VUSI lost his travel document. I have tried to procure a duplicate travel document for him in vain from the same office, the Transkeian office in Tembisa.

Attached please find a 'REFUSAL DOCUMENT' from above office.

We were requested (ordered) to take attached document to the Commissioner's office Alexandra where the Transkeian citizenship was imposed on us.

I was greatly hurt by the rebuff, especially by the attitude of the officials who attended to us. They were blatantly rude. My mother is witness to the above.

I was born and brought up in Alexandra. I have never been to Transkei but only sent my child to school there for social reasons.

Since the Transkei does not want to accept us and I also do not want their citizenship, nor any other citizenship, except the citizenship I rightly possess — the South African citizenship. I now apply to retain my SA citizenship, together with my children, or rather remain stateless.

Attached please receive above two children's birth certificates. Please change their citizenship from Transkei to South African or stateless.

I will keep my son, VUSI, out of school until the citizenship matter has been settled.