David Webster's role in the DPSC: a fearless defence of the principles of legality and due process by Glenda Webster

In the days after David's death I received many letters and expressions of condolence. Among them was a letter from Prof Etienne Mureinik, the erstwhile Chairman of the Governing Committee of the School of Law at the University of the Witwatersrand where I was employed as a tutor at the time.

The letter stood out for me because it referred to David as 'a fearless defender of values, such as legality and due process'. Prof Mureinik concluded his letter with this: 'I do think that it is important to remember that David's assassination is necessarily testament to the significance of his work, and the effectiveness of his contribution.'

In this essay I sought to explore the validity of Prof Mureinik's perception of David's contribution.

Before I begin that exploration there are a few things I need to explain:

As I understood the letter, Prof Mureinik was referring to David's contribution to the work of the Detainees' Parents' Support Committee (DPSC) because of the organisation's focus on the violation of values such as legality and due process. David was involved in other organisations with different, but equally important, agendas: he played an active role in the formation of the Five Freedoms Forum;[1] he was involved in the End Conscription Campaign, and others[2] not as relevant to the focus of this essay.

At the time when Prof Mureinik wrote the letter he, the Professor, was not aware of the disclosures that were made in the wake of David's death about the full gamut of the 'total strategy' that the apartheid government used to suppress, silence and physically destroy what it referred to as the 'total onslaught'[3] against it. Some of its activities had their basis in legislative provisions that gave the police and other public servants vast amounts of discretionary power. Other activities, such as assassinations, bombings, military attacks on anti-apartheid activists in neighbouring territories were 'extra-judicial' – they were not based on any law, or on the grant of any legislative discretion. David's contribution lay in his brave and persistent pursuit of the truth about these activities. He made his defence through the nib of a ballpoint pen.

The last preliminary point I need to make is that David was a modest, unassuming person who was publicity-shy. As Phillip Bonner, a close friend and colleague, said in his speech in St Mary's cathedral, central Johannesburg on 6 May 1989: 'David's … contributions remained half hidden to any single one of his friends'. He would have been uncomfortable and embarrassed by any writing that did not show clearly that he was a member of a dedicated and highly effective team, which was part of a movement, which was part of a

[1] Freedom from poverty, fear and discrimination; and, freedom of association and conscience. After informal meetings under the leadership of Zwelakhe Sisulu (editor of the New Nation), Geoff Budlender (Legal Resources Centre) and Dr Beyers Naudê, well-known anti-apartheid activist, the FFF was established in 1987 as a direct result of the state of emergency. Sheena Duncan of the Black Sash also helped establish this Johannesburg-based coalition of progressive organisations. Nelson Mandela Centre of Memory, compile and authored by Padraig O'Malley, available online at http://www.nelsonmandela.org/omalley/index.php and accessed on 31 October 2013.

[2] South African Musicians Association, UDF Cultural Desk, Detainees Education and Welfare Group. In the early 1980s he initiated the establishment of Academics for a Democratic Society at Wits.

[3] For more on the use of these terms see Gavin Evans 'General Magnus Malan: Feared and notorious politician who waged a dirty war against the enemies of apartheid' *The Independent* 20 July 2011 available online at: www.independent.co.uk/news/obituaries and accessed in August 2013

nationwide explosion that came at the end of years and years of resistance in which there were thousands and thousands of victims.

Introduction

In 1989 South Africa was yet to become a constitutional democracy. Values such as legality and due process, which are constitutional rights in South Africa today, were common-law principles at that time. They had been handed down through the courts for nearly eight hundred years.[4] As such they were available to South African judges in their judicial review of the conduct of public officials to determine whether procedures adopted and action taken had been lawful, reasonable, and fair. As an administrative law specialist teaching and researching in this area of law, Prof Mureinik wrote extensively[5] on the importance of these values, especially to judges in their role as 'independent arbiters'[6] under the rule of law.

The concept of the rule of law is generally not precisely described. Originally, the meaning of this concept was derived from clauses 39 and 40 of the *Magna Carta*.[7] For the purpose of this essay I have relied on the definition of the rule of law provided by WJ Hosten , AB Edwards, Frances Bosman and Joan Church. They contend that since the Second World War the rule of law has —

> come to be known as a general yardstick for democratic values … (that) embrace principles such as …
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> - no arbitrary exercise of power by the executive;
> - control over the exercise of discretionary powers and over subordinate legislatures;
> - independent courts;
> - legal certainty;
> - the limitation of governmental power by way of checks and balances;
> - minimum procedural standards to ensure that no-one can be found guilty unless he has been duly proved guilty;
> - equality before the law, which implies more than equality before the courts; and
> - effective judicial remedies for the enforcement of fundamental rights.'[8]

Today the principles are enshrined in South Africa's Bill of Rights.[9] However, the principle of legality *per se* remains part of the common law and may still be applied by our courts in their review of the conduct of public officials in the execution of their duties.

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[4] The principles of legality and due process have their origin in the Great Charter (the *Magna Carter*) that was executed by the English King, John, in June 1215. The Charter contains 63 clauses and most of them handed over power from the King to the barons (landowners). At that time all power had been vested in the King. Title to land was granted by the king, often in exchange for favours. Judges were representatives of the King – hence the tradition in English courts of wearing robes. The King made the law, he executed the law, he decided who had broken the law and he determined the punishment. Clause 39 states: 'no freeman shall be taken, imprisoned, disseised (have his estate confiscated), outlawed, banished or in any way destroyed, nor will we (the King) proceed to prosecute him, except by the lawful judgment of his peers and by the law of the land'. This clause was introduced almost verbatim as the fourteenth amendment to the US Bill of Rights in 1788. It is commonly referred to as the 'due process' clause. Clause 40, which reads: 'To no one will we sell, to no one refuse or delay, right or justice', is regarded as the clause which guarantees that no one is above the law, not even the King. Today the courts in Britain regard the *Magna Carta* as a statute. Geoffrey Rivlin *First Steps in Law* 2 ed (OUP 2002) 60 and 200-201.

[5] David Dyzenhaus 'Law as justification: Etienne Mureinik's conception of legal culture' 14 (1998) 14 *South African Journal of Human Rights* 11 at 12.

[6] A term used by Prof Cora Hoexter in 'The principle of legality in South African administrative law' (2004) vol 4 *Macquarie Law Journal* 165.

[7] See note 4.

[8] *Introduction to South African Law and Legal Theory* 2 ed (Butterworths 1995) 959–960.

[9] Chapter 2, Constitution of South Africa Act 108 of 1966.

- Section 9
  Everyone is equal before the law and has the right to equal protection and benefit of the law.

- Section 12
  Freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily and without just cause; not to be detained without trial, to be free from all forms of violence; not to be tortured; nor treated or punished in a cruel, inhuman or degrading way.

- Section 35
  Anyone who is arrested has the right, inter alia, to 'be brought before a court as soon as reasonably possible but not later than 48 hours after the arrest'. Every person who is detained has the right to be informed promptly of the reason for being detained; to choose and to consult with a legal practitioner.

- Section 33: This right to 'just administrative action' protects us specifically from the conduct of public officials that the courts consider to be illegal:[10]

  'Everyone has the right to administrative action that is *lawful*, *reasonable and procedurally fair.*'[11]

In the context of administrative law there is a distinction between the conduct of public officials which is strictly 'lawful' because it falls within the parameters of a legislative provision, and conduct which is also 'legal'. In addition to acting lawfully, legality requires that public officials should act reasonably, fairly and in accordance with procedures laid down by law. A useful way to think of the distinction is to consider drone attacks — so topical in our news of the world today. The first question to ask is whether the law permits the use of drones. If the law does then the second question is whether the decision to use a drone *in the particular circumstances* was justifiable. This second enquiry will include questions such as whether the attack was justified in the circumstances, whether it was necessary, whether there were other means available and whether the use of a drone was in proportion to the size of the problem and so on.

How David's involvement began

I have taken the liberty of starting my exploration with my own experience of how David became involved.

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[10] According to Andrew JH Henderson in 'The curative powers of the Constitution: Constitutionalism and the new *ultra vires* doctrine in the justification and explanation of the judicial review of administrative action' (1998) 115(2) *SALJ* 346 at 347, the principle of legality forms the 'basis of the judicial control of administrative action'. Administrative action includes, for example, the authority to arrest, to issue fines, to grant licences, to award contracts, to reject applications, to buy or sell goods needed for the government and many other government functions. All these actions generally involve granting a right to a citizen, eg, a right to buy land, a right to receive medical treatment, a right to receive an education, a right to provide a service to the government. Administrative action may also involve denying a right, taking away an existing right, or even threatening to do so, eg, denying a right to build a building, to receive free legal assistance, to drive a car, etc.

[11] Emphasis added. The Promotion of Administrative Justice Act 3 of 2000 (commonly referred to as the PAJA) 'gives effect' to section 33 of the Bill of Rights. However, according to Prof Cora Hoexter, this simple expression of the right has been made unnecessarily complicated by certain sections of the PAJA. 'The term "administrative action" soon became a focal point of our post-democratic administrative law. The courts began to sort out what sort of action did and did not count as "administrative"' Cora Hoexter (see note 6 at 173–174). This focus was at the expense of a proper consideration of the substantive issues of what constitutes lawfulness, reasonableness and procedural fairness in relation to the particulars of the case brought before them.

On the 22 September 1981 I was standing in the reception area of SACHED Trust[12] where I worked before I became a member of staff in the Law School at Wits University. I was doing some photo-copying. Suddenly a small posse of uniformed policemen entered the door, spoke to the receptionist and marched down the passage. After a few seconds they returned with our colleague, Robert Adam,[13] in handcuffs. The receptionist and I were stunned. It did not even occur to me to ask if they had had a warrant to arrest our colleague. The sight was a shocking demonstration of how detention without trial begins: the arrest of a person for no apparent reason, and without a warrant — as I was to find out that evening.

When I returned home that evening David told me that one of his students, Barbara Hogan,[14] had been detained that day as well as two former students: Barbara Klugman and Joanne Yawitch.[15] In addition, three members of the Crown Mines[16] community in which we lived had also been detained: Gavin Anderson, Cedric de Beer and Caroline Cullinan. Another person we knew personally was Maurice Smithers. The ninth detainee that day was Herbert Barnabus.[17]

The response in our Crown Mines community was swift. A meeting was called that evening in the home of Geoff Budlender who was soon to become the Director of the Legal Resources Centre in Johannesburg and lived at the other end of the row of terraced wood-and-iron miners' cottages in which we lived. With him was Nicholas ('Fink') Haysom, an attorney, who was at that time a researcher at the Centre for Applied Legal Studies as Wits University.[18] The two attorneys informed us that our friends and colleagues had all been detained in terms of section 22 of General Laws Amendment Act 62 of 1966 (the GLA).[19] The section gave a police official of the rank of lieutenant-colonel[20] or higher the power to

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[12] South African Committee for Higher Education, a non-governmental organisation, involved in distance learning.

[13] Robert was a scientist course-writer at SACHED Trust. Between 1999 and 2006 he held the position of Director General of the Department of Science and Technology in the ANC government.

[14] Barbara Hogan was doing a Master's degree on the survival strategies of unemployed African women, that is, women considered to part of the 'informal sector'. At the same time David was also doing research on the informal sector, mainly in Soweto, a black township outside Johannesburg. As a Social Anthropology lecturer David advised her on certain aspects of her research.

[15] DESCOM NEWSLETTER NO 1, unpublished, December 1981. Barbara Klugman had majored in Social Anthropology and had completed an Honours Degree in Development Studies – both degrees in which David had provided courses. Joanne Yawitch had also completed an Honours degrees in Development Studies.

[16] Crown Mines was a village which was built for Cornish tin miners who came to work on the Gold Mines in the early 1900s. Miners no longer lived in the village and the owner of the village, Rand Mines Properties Ltd, let the houses out at a relatively low rental.

[17] DESCOM (note 15). This newsletter shows that Caroline Cullinan was released on 22 September 1981; Joanne Jawitch, on 1 October 1981; Barbara Klugman, on 2 October 1981; Maurice Smithers on 5 October 1981, but redetained on 24 November 1981. Herbert Barnabas and Gavin Anderson were both subsequently released but no date was given. In August 1982 Barbara Hogan was charged with high treason, and under several sections of the Terrorism Act 83 of 1967. She was convicted and sentenced to 10 years imprisonment. Historical papers, Wits University available online at www.historicalpaperswits.ac.za and accessed on 31 August 2013. On 1 June 1982 Robert Adam, who had also been involved in underground activity for the ANC, was sentenced to 10 years imprisonment, available online at www.wikipedia.org and accessed on 20 August 2013.

[18] Geoff Budlender has since become a Senior Council; and Nicholas Haysom is currently the United Nations Deputy Special Representative for Political Affairs in Afghanistan.

[19] DESCOM (note 15 above).

[20] Non-commissioned officers are constables, sergeants and warrant officers. Commissioned officers, in ascending order of rank, are lieutenants, captains, majors, lieutenant-colonels (commonly referred to as 'half colonels') and colonels. Senior management officials are brigadiers, major generals, lieutenant generals and generals. The highest rank is the National Commissioner. These ranks may have changed. See: www.saps.gov/careers/saps_rank_structure.htm and accessed on 1 August 2013.The rank that a police commissioner holds depends on the number of officers under his command. A 'half colonel' will be in charge of at least 13 officers. Whatever the size of the police force at that time, it is therefore likely that thousands of

arrest without a warrant if 'he had reason to believe' the person was 'a terrorist or (had) committed an offence under the Suppression of Communism Act 44 of 1950'. The lieutenant-colonel had the power to detain the person for questioning for 14 days 'subject to such conditions as the Commissioner (of Police) may from time to time determine'.[21] The fortnight could be extended for another period as determined by a judge of the Supreme Court (now High Court). At this point the judge had the discretion as to whether it was 'necessary' to give the detainee an opportunity 'to give reasons in writing' why he should not be detained.[22]

Section 22 of the GLA violated the principle of due process in ways that are familiar to us. Inter alia: an arrested person is entitled to know the reason for his (or her) arrest; an arrested person is entitled to legal representation and a 'fair trial' before a decision is made to imprison him or her. Part of that fair trial is the right to be heard: *audi alteram partem.* An arrested person should not have to explain why he deserves to be released *after* he has been imprisoned. An arrested person remains innocent until *the state* proves his guilt beyond a reasonable doubt — an arrested person should not have to prove his own innocence. Section 22(4) therefore also reversed this principle about the burden of proof.

Very often after the 14 days were up, detainees were moved from detention under the GLA to detention under section 6 of the Terrorism Act 83 of 1967. Similarly, this section gave 'any commissioned officer of, or above, the rank of Lieutenant-Colonel' the power to arrest a person without warrant and detain the person 'if he (the commissioned officer) had reason to believe' the person was 'a terrorist',[23] or was withholding information relating to terrorists from the South African Police (the SAP). The purpose of the detention was to interrogate the detainee 'subject to such conditions as the Commissioner (of the SAP) may, *subject to the directions of the Minister of Justice*, determine'.[24] The Minister of Justice also had a determining role to play in the continued interrogation of persons detained under the Terrorism Act.

Nicholas Haysom had had experience of the conditions which were 'subject to the directions of the Minister' of Justice. Detainees were kept in solitary confinement: this meant they had no contact with anyone except their jailers and the police who interrogated them. Nicholas described the psychological effect it had on them. The alienation from loved ones for a

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police officials throughout the land had the power to detain without warrant. In 2013 media reports differed between 185 000 and 200 000.

[21] Section 22(1) of the GLA.

[22] Section 22(4).

[23] The definition of a terrorist was very wide, complicated and open to conjecture. The Terrorism Act defined a 'terrorist' as any person who committed an act of terrorism as defined in section 2(1); or who committed an act which had or was likely to have had any of a number of different results as listed in section 2(2). Section 2(1)(*a*) related to acts that were considered to be a danger to the maintenance of law and order; 2(1)(*b*) related to undergoing training which 'could be of use to any person intending to endanger the maintenance of law and order'. This section reversed the usual onus of proof in criminal trials by adding: 'and who fails to prove beyond a reasonable doubt that he did not undergo or attempt, consent or take any steps, to undergo, or incite, instigate, command, aid, advise, encourage or procure such other person to undergo such training for the purpose of using it or causing it to be used to commit any act likely to have any of the results referred to in subsection (2) in South Africa or elsewhere. Section 2(1)(*c)* related to the possession of explosives, ammunition and fire-arms. There were 12 illegal results listed in section 2(2). They included (*a*) hampering any person assisting in the maintenance of law and order; (*b*) promoting, by intimidation, the achievement of 'any object'; (*c*) causing 'general dislocation, disturbance or disorder'; (*d*) crippling or prejudicing any industry or the distribution of commodities or foodstuffs at any place; (*e*) causing or furthering an insurrection or forcible resistance to the Government or the Administration of the territory; and (*f*) furthering or encouraging 'the achievement of any political aim, including the bringing about of any social or economic change, by violence or forcible means or by the intervention of or in accordance with the direction or under the guidance of or in co-operation with or with the assistance of any foreign government or any foreign or international body or institution'.

[24] Emphasis added. Section 6(1) of the Terrorism Act.

period of days, weeks or months in an unfamiliar and hostile environment led to self-doubt, severe anxiety and depression, and in some cases suicidal depression. For those who were parents, or had dependants, the anxiety was extreme; and it was aggravated by the possibility of physical abuse. Detainees were often tortured to make them produce incriminating statements about themselves, and about their friends and colleagues.

The two attorneys explained that the only contact we, the friends and colleagues of the detainees, might be allowed to have with our people in detention was through the delivery of parcels to bring them clean clothes and a limited amount of food. Parcels containing these items were not a right; police officials considered them to be a privilege, which the police could refuse to accept at any time. Nicholas provided useful guidance on the contents of parcels: no sharp objects, no glass bottles, no books (other than a bible) but we should include something personal of our own such as a scarf or a shirt that would remind the detainee about our relationship with him or her as a gesture of concern and ongoing care. It would help to alleviate the detainee's sense of alienation, isolation and the growing fear that no one cared. It was important advice. Writing from Pretoria Central prison immediately after his (David's) death Barbara Hogan paid tribute to 'David … and the care which I could feel inside all the time.'[25]

Finally, the two attorneys advised us to contact the parents and families of those detained. Some parents were likely to be bewildered and some, who were not involved in the struggle against apartheid, might even be embarrassed that their offspring had been arrested. We were to assure parents that their sons and daughters were not criminals but had been arrested because of their opposition to apartheid. The irony of this possible parental concern was yet to be revealed.

David was suited to the task of contacting parents, reassuring them and inviting them to join the care-groups that had sprung up in support of different detainees. As Phillip Bonner has said: 'His empathy (enabled him) to win … affection and … trust.'[26] His unassuming disposition and his courteous manner left people feeling comfortable and relaxed.

Two days later another seven people were detained under the same law. Some were students who David knew, others were friends and the seventh was another colleague of mine: Auret van Heerden, Alan Fein, Robin Bloch, Stan Maseko, Mohammed Omar, Yunas Hanoff and Mandla Mthembu. The first 16 detainees were all from Johannesburg.[27]

By the end of October at least another eight people David knew personally, or knew of, had been detained. They included Wits students Keith Coleman and Clive van Heerden; trade unionist Emma Mashinini; Ida Motha; Jacob Musi; Hanchen Koornhof; and Alec and Thandi Mbatha. In addition some 17 or 18 trade unionists from Port Elizabeth had also been detained.[28]

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[25] Phillip Bonner 'Tribute from friends' delivered at David's funeral in St Mary's Cathedral, Johannesburg, 6 May 1989, unpublished.
[26] Ibid.
[27] DESCOM (note 15). Robin Bloch and Stan Maseko were released some time before 11 December 1981.
[28] Ibid. Many of these people had been detained because of a list containing their names that was given to the security police by an *agent provocateur*. Unbeknown to Barbara Hogan and Rob Adam, who were members of the underground movement of the ANC, a man referred to as 'Sipho' with whom they had been dealing, was working for the security police. Via Robert, 'Sipho' informed Barbara that 'High Command' in Botswana (who they assumed was the ANC) needed to know the names of people who were members of the 'ANC and others, to check if any were already under suspicion in Lusaka of working for the security police.' For more reading on this, see Beverley Naidoo *Death of an Idealist: in Search of Neil Aggett* (Jonathan Ball 2012) 184.

As the list of detainees continued to grow the number of care-groups proliferated. In November and early December the names of at least another 65 people[29] from around the country had been added to DESCOM's list. Many of them were part of our Crown Mines community, and others we knew of because of the prominent roles they played in the struggle against apartheid. I have listed some of their names because they are people who have and do hold prominent positions in South Africa today. In addition, their names are familiar to me as friends and associates of David:

- Monty Nasoo, Oupa Masuku, Cecil Sols, Rita Ndzanga, Nicholas Haysom, Neil Aggett, Firoz Cachalia, Debbie Elkon, Liz Floyd, Rene Roux, Colin Purkey, Cedric Mason, Rev Frank Chikane and others from Johannesburg;

- Jacob Molebatsi, Vincent Papane, Samson Ndou, Jabu Ngwenya and others from Soweto;

- John Issel and Mark Kaplan from Cape Town;

- trade unionists Thozamile Gqweta, Sisa Njikelana[30] and Eric Mntonga from East London;

- Merle Favis, Pravin Gordhan,[31] Yunus Mahomed and Prema Naidoo from Durban; and

- 22 or more people from Venda of whom one had died in detention, Tshifhiwa Isaac Muofhe, and another was rumoured to be dead. Six more had been assaulted.

The formation of the Detainees Support Committee (DESCOM)

Ad hoc meetings of care-groups for individual detainees continued to meet every week from 22 September 1981 onwards. With the growing list of detainees it became necessary to formalise the work of these groups. A proposal for an ongoing 'Detainees Support Group' describes the need for a permanent committee, and it illustrates that at first detainee support was more about personal assistance, domestic care, information, and legal representation than it was about the defence of legal values.

> An ad hoc detainees' support group … comprises care-groups whose specific responsibility is to look after the needs of detainees – pay their rent; take them food and clothing; liaise with lawyers, police, etc. … This group has been meeting weekly to share problems/news of detainees, etc. Arising out of these discussions it has become clear that there is a need for a more permanent group that can take on the task of caring for detainees (particularly beyond the confines of the white community), but that can also fulfil a whole series of broader functions. …
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> 1. To make information about detentions/detainees available and to monitor detentions. ….
> 2. To make sure that care-groups are set up for all detainees …
> 3. To make sure that all detainees have legal representation;
> 4. To put dependents of detainees, where necessary, in touch with bodies such as the Dependent's Conference;[32]

[29] DESCOM (note 15). These statistics are not accurate. They were compiled from information passed on by word-of-mouth and could not be verified from official sources. The figures are likely to be higher, especially regarding the rural areas.

[30] Thozamile and Sisa were detained on 14 different occasions. This was the greatest number of detentions any detainees have ever experience. Max Coleman, personal communication.

[31] Minister of Finance at the time of writing, August 2013.

[32] The Dependant's Conference was an NGO which raised funds to support the families of detainees and to assist them if and when detainees came to trial.

5. To create public awareness of detentions through all means available …
6. Make sure that detainees who are charged/convicted are put in touch with groups like SAPET;[33]
7. Parents/relatives group. To bring relatives out of the dark and to give them emotional support, legal information and a sense of activity within the context.
8. Research on detention, political trials, legal rights, political repression.[34]

The start of the DPSC's defence of legality and due process

From early on the parents decided to form a group of their own. As with DESCOM, it became necessary for these parents and relatives to constitute themselves into an organisation. It was to be known simply as 'The Detainees Parents Support Committee'.

The DPSC made its intentions known to the public at a meeting held on 23 November 1981 in the Methodist Central Hall, Johannesburg. The meeting was attended by some 600 members of the public. At the end, the meeting unanimously passed a resolution which pledged its participants 'to restore the habits of democracy without which there can be no peaceful future in this country.' In so doing they would 'give every possible assistance to the families of detainees' and 'protest and publicise continuously the fact that there were people in South Africa held *in communicado*[35] in detention.'[36]

The 'habits of democracy' to which this statement referred were specifically those that denied detainees their common-law right to due process, and which led to the wholesale, indiscriminate and treacherous abuse of legislative authority given to police officials — ie, illegality.

In the context of detention without trial, the word 'restore' was appropriate. Detention without trial was first introduced into South African law by the National Party in 1963, when the ANC's 'high command' was captured at Lilliesleaf Farm in Rivonia:

> To accommodate the capture of these senior ANC members, the General Laws Amendment Act, Number 37 of 1963 was rushed through Parliament and applied retroactively to June 27th 1962, mainly but not exclusively so that the people arrested at Rivonia could be detained and held in solitary confinement. …
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> Under this General Law Amendment Act the security police, also known as the Special Branch, were given the authority to arrest anyone they suspected of being engaged or involved in any act against the State and to hold them *in communicado* for 90 days at a time. The once highly respected and almost sacred *habeas corpus*[37] fell away. …This Act was passed to give the Special Branch the authority to interrogate and to extract information, and the public was not entitled to any information including even the identity or whereabouts of people being detained. Detainees could literally and effectively 'disappear'. If no charges were to be laid, the Special Branch had to release the individual or individuals after 90 days. At the

[33] SAPET is likely to stand for the 'South African Prisoners' Education Trust'. A prisoners' education project was started by Neville Alexander to provide those detained and imprisoned with access to education during those years.
[34] 'Proposal for an ongoing detainees support group' November 1981, unpublished.
[35] Prisoners held *in communicado* have no means of being able to communicate with anyone.
[36] DESCOM (note 15).
[37] This Latin term means 'let us have the body'. It was a court order, called a writ, which was granted by a court to order a detaining authority to produce the detained person in court to show just cause for holding the person in detention.

> time Vorster (the Prime Minister at that time) boasted that this was repeatable 'until this side of eternity'. [38]

The organisation's first, 'Our View' column, published in *The Star* on 25 January 1982, stated: 'We aim however not only for the release of children or spouses (of the DPSC) but also for the total abolition of the clauses in any laws which abrogate the principle of *habeas corpus*.'

The legal context in which the DPSC worked

The clauses in the laws which violated the principle of *habeas corpus* I have described so far were section 22 of the GLA, which provided for 14 days' repeatable detention, and section 6 of the Terrorism Act, which provided for indefinite detention for the purpose of interrogation.

Among the many apartheid laws that violated the rule of law and 'abrogate(d) the principle of *habeas corpus*'[39] that the DPSC had vowed to have abolished, the Terrorism Act may serve as an example. For the purpose of this exploration, it is necessary to examine its 'vast discretionary powers' more closely. I suggest that metaphorically these powers provided the police with a bastille in which to imprison and torture without charge and without redress to any outside agency.

Section 6 ignored the principle of due process, while the discretionary power that it gave to police officials led to unrestrained and usually brutal and cruel breaches of legality. In addition, it failed to make proper provision for the important principle of the separation of powers in a system of checks and balances. Most important, the section sought to oust the jurisdiction of the courts. In other words, the section sought to prevent the courts from applying the common-law principle of legality to control the conduct of the police in whose hands these vast powers had been placed. It is worth repeating section 1 in full.

Section 6(1)

> Any commissioned officer … of or above the rank of Lieutenant-Colonel may, … detain … such person[40] for interrogation … until the Commissioner (of the SAP) orders his release *when satisfied that he has satisfactorily replied to all questions at the said interrogation* or that no useful purpose will be served by his further detention or until his release is ordered in terms of subsection (4).[41]

Section 6(2) provided that the Minister of Justice was the person to whom the Commissioner (of the SAP) was required to provide information about a detainee. There was no provision requiring the police to provide the detainee himself (or herself) with a reason for the

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[38] Robert Vassen *Detentions without Trial during the Apartheid Era* South Africa: Overcoming Apartheid Building Democracy, Michigan State University et al, available online at: http://overcomingapartheid/msu.edu/sidebar.php?id=65-258-9 and accessed on 8 October 2013.

[39] In addition to the GLA and the Terrorism Act, in 1981 other Acts included the Internal Security of 1950; Suppression of Communism Act 44 of 1950; and the Public Safety 3 of 1953 which gave authority for the declaration of a State of Emergency. The Criminal Procedure Second Amendment Act 96 of 1965 provided for detention without trial in the case of people suspected of crimes that were not considered to be politically motivated. By 1982 much of this security legislation was consolidated in a new Internal Security Act 74 of 1982. Section 28 of this Act provided for indefinite 'preventative' detention for people who the detaining officer suspected would ('will') commit an offence under section 54 of the Act; [39] and section 29 provided for indefinite detention for the purpose of interrogation of anyone who the detaining officer had 'reason to believe' had committed an offence listed under section 54.

[40] A person who the Commissioner has 'reason to believe' is a terrorist. For the definition of terrorist, see note 24 above.

[41] Emphasis added.

detention, and there was no legal obligation to inform the detainee's relatives, employer, legal representative or any other person:

> The Commissioner shall, as soon as possible after the arrest of any detainee, advise the Minister (of Justice) of his name and the place where he is being detained, and shall furnish the Minister once a month with the reasons why any detainee shall not be released.

The only recourse that a detainee had was to the Department of Justice:

Section 6(3):

> Any detainee may at any time make representations in writing to the Minister (of Justice) relating to his detention or release.

Section 6(4):

> The Minister (of Justice) may at any time order the release of any detainee.

The section was silent on whether the Minister of Justice (Kobie Coetzee at that time) was obliged to do anything about a representation made to him by a detainee. He could therefore presumably ignore the representation with impunity.

The provisions which gave the Minister of Justice — as opposed to the Commissioner of Police — control over detainees were, in my view, a meaningless sop thrown at the doctrine of the separation of powers. The section abrogated this principle even further by striving to remove judicial review completely:

Section 6(5):

> No court of law shall pronounce upon the validity of any action taken under this section, or order the release of any detainee.

Section 6(6) provided that the detainee be held *in communicado*:

> No person, other than the Minister (of Justice) or an officer in the service of the State acting in the performance of his official duties, shall have access to any detainee, or shall be entitled to any official information relation to or obtained from any detainee.

Finally, even the requirement that a magistrate 'shall' visit the detainees once a fortnight was subject to the discretion of the detaining authorities:

> *If circumstances permit*, a detainee *shall* be visited in private by a magistrate at least once a fortnight.[42]

When legislation provides for enormous discretionary powers it weakens the rule of law. Certainty about what the law is, is an important aspect of the rule of law. Great discretionary powers are the antithesis of certainty: discretion leads to arbitrariness which leads to no law at all. As Prof Ben Beinart explained:

> Law is obviously preferable to discretion, and discretionary power, apart from being more capable of abuse than powers defined by law, leaves the citizen's rights uncertain and subject to the rules of chance.[43]

The 'generally feeble'[44] response of the courts

[42] Section 6(7) of the Terrorism Act, emphasis added.
[43] B Beinart 'The rule of law' (1962) *Acta Juridica* 99 at 101.
[44] Cora Hoexter (note 5) at 167.

In the years before SA's constitutional democracy Acts of Parliament could not be subjected to judicial review and therefore could not be struck down as being unconstitutional, as they can today. Parliament was supreme.[45] Therefore, the Acts of Parliament which laid the foundation for the construction of the bastille could not be challenged in a court of law, nor, as we have seen, could any act perpetrated under the Terrorism Act. The apartheid legislature had virtually given its security police *carte blanche*. The legislature[46] had built a bastille for its executives in the Ministries of Law and Order and of Justice. The doors into the bastille were wide open, and there were thousands of them throughout the land.[47] There were only two doors out: they were controlled by the Minister of Justice, and the Commissioner of Police. There were no windows to let in the light; nor judges to act as independent arbiters to control the practices of these police officials even though, as stated above, the principles of legality and due process were, and still are, part of the common law.

With few exceptions, the Appellate Division (now the Supreme Court of Appeal) judges capitulated to the ouster clauses and so relinquished their role as 'independent arbiters' of the uncontrolled abuse of state power.[48] Prof Mureinik was one of the administrative law academics who persistently criticised the appellate division judges for their failure to intervene between the power of the state and those who suffered from the abuse of that power. According to Prof Dyzenhaus —

> By far the bulk of his published work consists of articles which relentlessly criticise the Appellate Division for its failure to fulfil its role in considering the legality of executive decisions and action taken to sustain apartheid.[49]

Yet, the apartheid government prided itself on the independence of its judiciary. In his opening address to Parliament in 1986, State President PW Botha said:

> We believe in the sovereignty of the law as a basis for the protection of the fundamental rights of individuals as well as groups. We believe in the sanctity and indivisibility of law and the just application thereof. There can be no peace, freedom and democracy without law. Any future system must conform with the requirements of a civilized legal order, and must ensure access to the courts and equality before the law. We believe that human dignity, life, liberty and property of all must be protected, regardless of colour, race, creed and religion.[50]

These words fly in the face of practically everything the apartheid government had done, was doing, and continued to do thereafter. It is then not surprising that the particular role of the DPSC in its mission to defend due process and expose the full extent of the administration's abuse of power cut away the ground on which the apartheid government struggled to maintain its 'rule-of-law' stance.

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[45] In other words, there was no formally written Constitution and no Constitutional Court to review the statutes passed by Parliament – and, if necessary, set them aside if unconstitutional. However, under Parliamentary Sovereignty (as it was called) subordinate legislation, for instance, the rules of Ministers drawn up from authority delegated to them from Acts of Parliament, could be reviewed and struck down by the courts.

[46] In addition to the GLA and the Terrorism Act, in 1981 other Acts included the Internal Security (1950); Suppression of Communism Act (1950); sections of the Criminal Procedure Act (1965) and the Public Safety 3 of 1953 which gave authority for the declaration of a State of Emergency, which will be considered below.

[47] As already stated, the definition of a terrorist was wide (see note 23) and the power to decide whether someone was a terrorist was left to thousands of officers on or above the rank of lieutenant colonel all around the country.

[48] Cora Hoexter (see note 6).

[49] David Dyzenhaus (see note 5).

[50] Quoted by David Dyzenhaus in *Hard Cases in Wicked Legal Systems* 2 ed (OUP 2010) 161.

Prof Cora Hoexter describes the response of the courts as 'generally feeble',[51] but she states that there were notable exceptions. She cites the case of *Minister of Law and Order v Hurley* 1986 (3) SA (A), which was an appeal against a provincial division decision that was decided in 'a time of extreme deference'.[52] The case is about the defence of a detainee and illustrates the role that the courts could have played at that time. It is worth taking a closer look at how the principle of legality could have been sustained.

On 26 August 1985 Gerald Patrick Kearney, the director of Diakonia, was detained in terms of s 29(1) of the Internal Security Act of 1982. Diakonia was an organisation of Christian churches established to encourage and facilitate Christian social concern among its members. The Archbishop of Durban, Denis Hurley, and Kearney's wife, Carmel Rikard, approached the Durban High Court[53] (called the Durban and Coast Local Division at that time) to obtain an order for Kearney's release. In his application the Archbishop stated under oath that 'no person acting reasonably could come to the conclusion that Kearney had committed an offence in terms of s 54 of the Act, which was referred to in s 29(1).' Inter alia, Kearney was opposed to violence as a means of attaining any purpose whatsoever. Therefore the 'jurisdictional fact' which gave the police officer 'reason to believe' that Kearney had committed an act of violence or had withheld information in terms of section 29(1) could not 'even on a balance of probabilities' have existed.

The judge, Leon, left open the question of whether the onus of providing the 'jurisdictional fact' lay with the police or with the detainee. He held that even if it could be assumed that the onus of proving the non-existence of the fact lay with the detainee, the detainee had done so. He had presented a *prima facie* case which the Commissioner of Police, Colonel Coetzee, had declined to refute. The Commissioner had therefore failed to supply the court with the facts upon which the police's belief had been based. If there were no facts on which to base his decision, then the Commissioner had acted unlawfully. The court ordered Kearney's immediate release.

In an appeal from the Minister of Law and Order, a full bench of the AD upheld the lower court's decision. Chief Justice Rabie held that the words 'if he has reason to believe' should be construed as constituting an objective criterion, ie, there must be a fact on which the belief is based, and the police had had the onus proving it. The court held:

> An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person would bear the onus of proving that his action was justified in law.[54]

The court held further that ouster clauses prevent judicial review of action taken 'in terms of' or 'under' the legislation; ie, they do not apply to police action that is not within the terms of the legislative provision. Since the police had not discharged that onus of proving the existence of the fact on which their 'reason to believe' was based, the detention had *not* been 'in terms of' the Internal Security Act's remit. In other words, judicial review was ousted only where there was *no* illegality. Judicial review could not be ousted if the police had acted unlawfully, ie, not strictly in terms of the law's requirement that a decision to detain must be based on facts.

Against this legal background, the DPSC set to work to 'give every possible assistance to the families of detainees' and 'to protest and publicise continuously the fact that there were people in South Africa held *in communicado*.'

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[51] Cora Hoexter (note 5) at 167.
[52] Ibid at fn 11.
[53] *Hurley and Another v Minister of Law and Order and Another* 1985 (4) SA 709.
[54] *Minister of Law and Order v Hurley and Another* 1986 (3) 568 at 589 C and E.

The DPSC's strategies

So far we have seen how DESCOM and the DPSC arose organically out of the care-groups that sprang up spontaneously in the wake of the detentions of 22 September 1981. It is, however, important to point out that these two organisations were not the only organisations that protested and publicised this form of repression;[55] and these were not the first detentions.[56] What distinguished these two organisations was their focus on the use and abuse of the legislative authority to detain without trial those who opposed apartheid.

For instance, some 11 days after the DPSC public meeting on 23 November 1981, the Institute of Race Relations and the Black Sash, both civil rights organisations covering a wider field of issues, organised another in St Mary's Cathedral in central Johannesburg. The meeting called on the state to 'repeal the so-called "Security Legislation"' and to release unconditionally all those in detention. The meeting expressed support and sympathy for Mr Isaac Muofhi from Venda who had died in detention on 12 November 1981, only two days after he had been detained.[57]

The DPSC's public expression of its aims was the start of an entirely public, but brave and dangerous journey of discovery, protest and disclosure. As Yvette Breytenbach, a friend of Neil Aggett whose visit to Neil had been arranged by the DPSC that Christmas, was to recall some 27 years later:

> There is nothing like the determination of parents who want to protect their offspring and who are empowered by their standing in society, ie, they were … respected in the community, educated, able to express themselves and their demands clearly and persuasively, and they were strategic.[58]

In short, there is nothing like the love of parents for their children; and there is nothing like a commitment to justice and respect for order that is based on the rule of law.

The success of the DPSC's strategy lay also in the openness and lawfulness of its strategies:

- weekly placard protest outside John Vorster Square and the Supreme Court;

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[55] It is not possible to list every civil rights organisation that sought to uphold human rights within South Africa. It is important to note that the ANC's manifesto, the Freedom Charter, was essentially a civil rights document. One of its clauses provided: 'No one shall be imprisoned, deported or restricted without a fair trial; No-one shall be condemned by the order of any Government official.' Available online at: http://anc.org .za and accessed on 20 August 2013. Apart from the Black Sash and the SAIRR mentioned below, other prominent apartheid opponents known to me were the SA Council of Churches, the Anglican Church, the Methodist Church, the Catholic Bishops Conference, the National Detainees Forum, Lawyers for Human Rights, the Progressive Federal Party (PFP, now the Democratic Alliance, DA), Legal Resources Centres, the Centre for Applied Legal Studies at Wits, and many other organisations including University Councils and Student Representative Councils. Others such as the United Democratic Front (UDF) and numerous civic associations were soon to be established (see below).

[56] In 1960, 11 727 people were detained under a partial state of emergency that ran from 29 March to 31 August that year after the Sharpeville riots which broke out when 69 protesters were shot and killed in township of Sharpeville. Between 1963 and the end of 1981 a total of 9 922 people had been detained for interrogation, as witnesses or as preventative detention in South Africa, including Homeland detentions. These statistics come from David Webster & Maggie Friedman *Suppressing Apartheid's Opponents: Repression and the State of Emergency, June 1987–March 1989* (Southern African Research Service and Ravan Press 1989) 8.

[57] DESCOM (note 15).

[58] Beverley Naidoo (note 28) 234.

- deputations to Security Police Chiefs and the Ministers of Justice, and Law and Order for the purpose of challenging them on Detention Without Trial and other forms of political repression;
- establishing DPSC advice offices throughout the country to provide material, medical, legal and moral support to detainees and their families. ….
- monitoring and exposing human rights violations perpetrated by the Apartheid State.[59]

David's contribution to DPSC strategy

While it is true to say that David became involved in detainee support work in defence of his friends and students, it is also true that his values, his compassion and his empathy with the effects of apartheid on the lives of ordinary men and women drew him deeply into the work of the DPSC and other organisations.

According to Dr Coleman:

> (A)s a dedicated anti-apartheid activist David quickly recognised the importance of such an organisation in countering the Apartheid State's most powerful weapon of repression, namely Detention Without Trial. Such detention was designed to neutralize political opponents by removing them from society, torturing them – sometimes to death – banning & restricting them on release; and generally promoting a climate of fear and intimidation. …
>
> David threw himself into the work of establishing the DPSC, providing a venue for its weekly meetings within his department at Wits University and helping to strategise activities.[60]

David's specific role lay in monitoring and publicising human rights abuses:

> David brought his considerable talents and skills to bear in contributing to the weekly DPSC 'Our View' articles in *The Star* newspaper; and to the DPSC Monthly Report which was widely circulated to the media, both local and international, to many foreign diplomatic missions and governments, and to Anti-Apartheid Movements throughout the world. …
> It was in this capacity that I grew to admire and respect him, and worked closely with him.[61]

The monthly reports were a comprehensive compilation of all the data that was available to the DPSC from its own sources and from published sources, including questions answered in Parliament. The reports included detailed lists about —

- Detentions: the names of those in detention, the place of each detention, the date, the section under which the detainee had been detained and any other information such as political affiliation, profession and whether the detention was preventative or interrogative etc. The lists of detainees were then analysed by area and activity showing for instance, how many trade unionists, scholars and church workers had been detained and from which areas they had come. Their fate was listed: how many had been released, after how long; how many had been charged, how many were awaiting trial or had been acquitted; as well as the names of any who may have died in detention.
- Bannings: the names and locations of people, organisations, publications or gatherings banned under the Internal Security Act 74 of 1982, with some detail about the content of the banning orders.
- Political prisoners: the names and location of those in prison and those facing life sentences.

[59] Max Coleman 'David Webster and the Detainees Parents Support Committee' a tribute paid at the opening of the David Webster Park in Bertrams, unpublished, Johannesburg, 1 May 2009. Emphasis added.
[60] Ibid.
[61] Ibid.

- Political trials and inquests: a month-by-month list of those still on trial, in which jurisdiction, the charge, and the possible sentence; and a month-by-month list of trials completed during the month showing the charge, the outcome and the sentence, if any.
- Court actions against the police, including inquests: names of the litigants, the claims and the trial dates.
- Finally a summary of legislative amendments during the month, if any, and the implication of the amendments for the work of the DPSC.

While these monthly reports provided data, the weekly column, *Our View*, provided critical comment that ranged more widely over changes in the law, the effect the changes were likely to have on political opposition;[62] police conduct and political trials;[63] analysis of state tactics to criminalise the activities of political opponents.[64]

The apartheid cabinet's vengeful retaliation

This strategy of 'monitoring and exposing human rights violations' was the activity that was to incur the wrath of the apartheid government's cabinet ministers, perhaps more than any other. It was an attack on the Achilles heel of the apartheid state that professed, as we have seen, to be a state in which the rule of law prevailed:

> Even in its most defiant posture against world opinion, the South African government claimed that it deserved respect because it operated under the rule of law.[65]

In January 1982 the DPSC requested a meeting with the Ministers of Law and Order, and of Justice. The request was followed by a telegram listing the following subjects for discussion:

1. Principles of detention provisions of security legislation.
2. Official parameters of interrogation practices.
3. Departmental safeguards against interrogation malpractices.
4. Ultimate responsibility for decisions to detain, transfer, charge, release.
5. Role of the attorney-general's office in the investigation, formulation, and prosecution of charges against detained persons.[66]

The Minister did not agree to a meeting until six weeks later.[67] The most likely reason for this delay, and perhaps even for the agreement to see the DPSC at all, was the tragic death of Neil Aggett in detention on 5 February 1982.

News reached us in Crown Mines that Neil Aggett had been found hanging in his cell in John Vorster Square in the early hours of that morning. Details of how Neil and others were being tortured at the time of the DPSC's visit to Johan Coetzee were to come out during the inquest into Neil's death that started on 3 March 1982.[68] The maniacal treachery of certain members of the special branch gave the lie to the Police Commissioner's assurances only a few weeks before that 'safeguards' existed.[69]

That day, the DPSC sent the following telegram to the Minister of Justice, Kobie Coetsee:

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[62] 'Our View' *The Star* August 1982. Cutting not fully dated.
[63] 'Our View' *The Star* 16 August 1983.
[64] 'Our View' *The Star* August 1985. Cutting not fully dated.
[65] Dyzenhaus (note 5) at 21.
[66] Detainees Parents Support Committee, Historical Papers, Wits University, AG 2523.
[67] Ibid.
[68] Naidoo (note 28) at 344.
[69] 'Detainees – letting in a chink of light?' *The Star* early December 1981, cutting not dated.

> Appalled at death in detention of detainee Dr Neil Aggutt (*sic*). This death confirms that detention and interrogation place intolerable pressures on detainees. Demand immediate release of all detainees, total abolition of detention legislations and the return to the rule of law forthwith. Detainees Parents Support Committee.[70]

The next month the DPSC sent another telegram to the Minister of Law and Order, Louis le Grange:

> How many detainees have been hospitalised? For what complaints are they being treated? Have their families been informed? Has the Minster taken any steps to alleviate the conditions leading to the hospitalisation? Has the Minister taken any steps to modify interrogation techniques?[71]

In spite of the Minister's refusal to 'take part in an organised question and answer campaign by telegram,'[72] a month later on, 11 March 1982, he advised the DPSC that he was prepared to meet with them.

The visit took place in April 1982. It was clearly not a successful in drawing the Minister's attention to the illegality taking place on his watch. Louis le Grange, Kobie Coetsee and the Commissioner of Police, Johan Coetzee, met with the DPSC delegation.[73] Apart from the issues listed in the January telegram, the DPSC had prepared a Memorandum on Torture. Before the meeting the DPSC had sent an embargoed copy of the memorandum to the press.[74]

Louis le Grange made his feelings known about this meeting during a debate on the Police Appropriation Bill that took place in Parliament on 7 May 1982.[75] Helen Suzman, the PFP's representative for Houghton, raised her concern about methods of interrogation and requested that the Minister appoint a commission of inquiry. The Minister refused to comply with her request and denied her allegations about the number of people still being held in detention, ie, 300.

'However,' he said, 'I want to begin with … the Detainees Parents Support Committee'. He then went on to complain that the DPSC had given a copy of their memorandum to the press before coming to see him. He, and the other officials, had not discussed the memorandum in detail with the DPSC because the DPSC had not given them time 'to obtain the necessary information' with which to address the memorandum. Moreover, more disturbing was his complaint that because of this, 'the meeting' was not afforded the opportunity to decide 'to what extent the particulars should be made public'.[76] He described the allegations made in the memorandum as 'wild' and 'scandalous'.[77]

It is clear from the Minister's comments that publicity and exposure was the strategy that angered the cabinet ministers most. However, in spite of these comments, the DPSC

[70] Naidoo (note 28) at 299.
[71] Ibid at 344.
[72] Ibid.
[73] The delegation from the DPSC included Dr Coleman, Dr Koornhof, Mr Floyd, Mr Mashinini, and Mrs Gordon (of Durban).
[74] Hansard 7 May 1982 at 6379–6381.
[75] Ibid at 6378.
[76] At 6380.
[77] At 6383.

continued to produce a National Memorandum on Torture which was published and distributed widely, both locally and internationally, in September 1982.[78]

In 1983 the antagonism of the cabinet towards the DPSC's 'sensational Press-oriented behaviour' was to grow loud and clear. Later, during a no-confidence debate held in Parliament, Colin Eglin, the leader of the Progressive Federal Party, raised questions about special standing instructions that had been issued to security police after the death of Steve Biko in 1978. Because of 'accepted and admitted facts at the Aggett inquest', he said, it was clear that the instructions had simply been ignored. 'Who,' Eglin asked the Minister, 'is going to make sure that the 1982 code is carried out?'[79]

To this question, Helen Suzman added her concerns about upholding the value of legality:

> I say again, as I have said before, that as long as the *system of indefinite detention without trial exists*, it is uncontrollable. As long as the Security Police continue to have vast powers under the security laws which enable them to hold and interrogate people without it being monitored — the new code does not lay down monitoring — and as long as access by relatives, private doctors and lawyers to detainees is prohibited, I believe tragic deaths in detention will occur over and over again with all their traumatic aftermath. I want to point out to the hon the Minster that law and order is not the only thing that matters. What also matters is that *legality is preserved* by those who are given these vast powers over the public. For otherwise public confidence in the administration of justice is totally undermined; and thereby the very fabric of civilized society is threatened.[80]

The Minister of Law and Order replied that he did not intend 'subjecting (him)self to the cross-examination of the hon. Member for Houghton' that afternoon.[81] However, later on he again raised his concerns about certain 'friends of the PFP', meaning the DPSC.[82] He went on to describe affidavits collected from detainees and presented to him via the DPSC's attorney, Raymond Tucker, as —

> notes (which) were deliberately drawn up for propaganda purposes, and … were never intended to serve as the basis for a police investigation. These are the friends of the hon. Member for Houghton.[83] ….

Once again, the publication of these 'notes' nettled him the most:

> This is the kind of report which is blazoned abroad by these people. We had those cases investigated. I have already divulged details with regard to people who are abroad. I could give hon. Members many details concerning these people, who have repeatedly been found to be liars in specific court cases, people whose evidence has been rejected.[84]

He went on to justify the illegality of police conduct in terms that the apartheid government used *ad nauseum* to defend its actions: the 'total onslaught' against South Africa from the enemies outside. Monotonous they may have been, but irrelevant they were not.[85]

> An analysis of the DPSC's published statement and/or documents, their official standpoints, their association with certain people and/or organizations, as well as their sensational, Press-oriented behaviour, leaves me in no doubt that this organization is a pressure group that

[78] Max Coleman 'Timeline for the History of the Detainees Parents Support Committee', unpublished, July 2013.
[79] Hansard 3 February 1983 at 343.
[80] Ibid. Emphasis added.
[81] At 344.
[82] At 347.
[83] At 350.
[84] At 351.
[85] At 352.

> *serves the enemies of South Africa*. They publish calculated poisonous propaganda against the Republic of South Africa using well-known communist terminology, and they are, in fact, already a support organization for the communists and the ANC in the Republic of South Africa, and I shall treat them as such. … I just wish to conclude by saying that there are elements in South Africa, apart from those I have identified for the hon. members here today, in church circles, in other organizations and in certain sections of our Press where reports are deliberately published and I shall qualify this on another occasion – who act to the benefit of the radical leftist communist onslaught on South Africa, to the detriment of the Republic and of our security forces. These reports are deliberately published with that benefit in view. … I wish to say to the hon. Member that she can go and tell her friends that things cannot continue in this manner. All the efforts made by the law and by the security forces simply cannot be ridiculed all the time. … *Somewhere a limit has to be set.*[86]

The aggravated and ominous tension between the DPSC and the government's cabinet ministers was soon to be overtaken by developments that were taking place *inside* the country. The government's response was to attempt to suppress rather than address the concerns of millions of its citizens. This suppression of township unrest was to broaden and intensify the pressure on the DPSC in its quest to support detainees and their families; and to publicise and expose the consequences of state repression. Detentions had been rising steadily from 293 in 1982, to 418 in 1983 and 1109 in 1984.[87]

Townships in turmoil

One of the most important causes of this steady increase in detentions was profound discontent amongst the black population about the fact that the entire black population had been excluded from a referendum that was held on 2 November 1983. The question the white electorate had had to answer was: 'Are you in favour of the implementation of the Constitution Act 1983, as approved by Parliament in 1983?'[88] The purpose of the referendum was to pave the way for the implementation of that Act.

This 'new' Constitution provided for a tricameral parliament for 'coloured', 'Asian' and 'white' people. At the same time, the Black Local Authorities Act 102 of 1983 (the BLA) provided for urban black people to elect their own local authorities. As a direct result of this legislation, leaders and representatives of a broad spectrum of some 600 anti-apartheid organisations within the country formed a 'United Democratic Front' (the UDF) in August 1983.[89] Its purpose was, inter alia, to oppose the black local government elections which were due to take place in November 1983. White elections were to take place in August 1984. The DPSC affiliated to the UDF at its National launch on 20 August 1983.[90] David was one among thousands who attended the launch in Cape Town.

Writing about this event 30 years later, Finance Minister Pravin Gordhan, one of the 1981 detainees, and a founding member of the UDF, described it as —

> the most formidable internal opposition to apartheid since the 1960s … . (I)t is important to reflect on the lessons of that period of mass resistance to apartheid. The UDF spirit and values are as relevant for us today in the struggle against poverty and unemployment as they were when we fought apartheid.

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[86] At 352–353. Emphasis added.
[87] Webster & Friedman (note 56) at 8.
[88] Act 110 of 1983. Available online at http://en/wikipedia.org/wiki/South_African_constitutional_reform_referendum_1983 and accessed on 19 August 2013.
[89] Barbara Creecy 'UDF – the State's red herring' 1985 28(2) *Sash* 36.
[90] Coleman timeline (note 78).

> The UDF was imbued with the spirit of volunteerism and robust debate. Its character was one of inclusiveness. It understood that people, rather than money, were key to the success of its campaigns and its activist core believed in hard work, sacrifice and integrity.[91]

The 1983 Constitution Act commenced on 3 September 1984. Two days later unrest broke out in the Vaal townships of Lekoa, Evaton, Sharpeville, Sebokeng, Bophelong and Boipatong — with a total population of some 300 000 residents.[92] While the unrest in these Vaal townships had been sparked by a rent increase, many different underlying causes aggravated the general discontent concerning the tricameral Parliament:

- disillusion with community councils and administration boards largely appointed by the government[93] to govern township affairs and run township services;
- ongoing dissatisfaction with 'bantu' education;
- discontent over police conduct;
- economic and social hardships (unemployment, increasing prices including rents and electricity); and
- internal power struggles within the black communities themselves.[94]

In each township the spark that ignited violent confrontation between civic organisations — such as citizens' civic associations, trade unions and student representative councils — and community councils, administration boards and other government authorities was different.[95] The police became a prominent presence in the townships. According to a report by the Catholic Bishops Conference for the period August to November 1984 '(i)n a number of cases the very presence, and especially the attitude of the police has provoked public violence.'[96]

The unrest escalated until by the end of 1984 the SA Defence Force (SADF) became a permanent presence in the townships, with Magnus Malan, the Minister of Defence, in charge:

> Within South Africa … mass-based protests, consumer boycotts and other forms of opposition escalated, prompting the military to assume roles previously taken by the police. Malan, whose special talent was for macro-management, spearheaded the creation of the National Security Management System, which brought policing, intelligence and civic affairs under the sway of the generals. It was headed by the State Security Council, which set up the Civil Cooperation Bureau (CCB) – a death-squad network whose task was to assassinate opponents at home and abroad.[97]

Undaunted by the ominous threats of the Minister of Law and Order in Parliament, but aware of the presence of assassination squads (albeit not in that name), the DPSC carried on its exposure of apartheid violations of the rule of law.

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[91] 'A formidable show of resistance' *Sunday Times* 25 August 2013.
[92] Barbara Creecy 'The Vaal uprising' (1985) 28(2) *Sash* 20.
[93] The Black Local Authorities Act 102 of 1983 provided for black people to vote for representatives to these councils. The Lekoa Town Council was the first to be elected under the provisions of the BLA. Only 14,7% of the people who were eligible to vote turned out to vote. This was above the national average of people voting for black local authorities. South African History Archive of the Nelson Mandela Foundation available online at: www.saha.org.za/udf/civics.htm .
[94] Barbara Creecy, Gill de Vlieg, Margaret Barker, Gus McDonald 'Townships in turmoil' (1985) 28(1) *Sash* 20.
[95] Ibid 20–24.
[96] Quoted by Barbara Creecy in 'The State's whole repressive machinery' (1985) 28(2) *Sash* 7.
[97] Gavin Evans (see note 3).

According to Dr Coleman:

> Invitations soon started flooding in from international bodies & governments to appear before them and submit evidence about the human rights abuses of the Apartheid State. Amongst the earliest of these invitations was one from the United Nations Human Rights Commission which conducted annual hearings on Apartheid and its Effects.
>
> DPSC responded by accepting the invitation and in August 1984 David and I travelled to Lusaka, where we appeared before the Commission and submitted extensive evidence running into 38 pages. In the verbatim record of the hearings we appear as Witness A and Witness B, in order to protect our identities which at that time were a subject of some concern.[98]
>
> Amongst the headings covered by the UN annual enquiry was the subject of **Extrajudicial Executions** (i.e. executions outside of the law) or put simply, political assassinations.[99]

South Africa's darkest hour — so far

Throughout 1985 the situation of civil unrest in the townships became progressively worse. Words such as 'mayhem', 'civil war' and 'revolution' were often used to describe the situation in the townships.[100] The unrestrained use of force knew no bounds, while forms of retaliation became increasingly crueller.

- *Police presence in the townships*
  On 21 March 1985, on the 25th anniversary of the Sharpeville massacre, the police fired point-blank into a crowd of protesters in Langa township outside Uitenhage, killing 22 people and injuring 50.[101] By August 1985 at least 400 township residents had been shot and killed, mainly by police.[102] In spite of this, the killing continued. By March 1986 the Minister of Law and Order reported to Parliament that 763 people had been killed by the SA Police 'during the execution of their duties'.[103] Funerals attended by thousands of people became the political platforms of the period.

- *Children and youths in conflict*
  Many of the victims in this dark hour were children and youths. Of the 763 people killed by the police throughout the year and up until March 1986, 209 were juveniles.[104]

  In March 1985, while Audrey Coleman was attending a Black Sash conference in Port Elizabeth, parents who wanted help in finding their children approached the Black Sash. A detainee, who had just been released from Port Elizabeth's 'Rooihel' prison, informed the Black Sash that he had seen '100 children being abused by older prisoners'.[105] Apart from this failure to protect children in custody, the police inflicted their own abuse. On 5 July 1985 a boy of 12, Johannes 'Witbooi' Spogter,

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[98] Coleman (note 59).
[99] It has been estimated that 96 political assassinations occurred between 1985 and the end of 1989. David Bruce *Leadership*19 July 2013 available online at http://www.leadershiponline.co.za/articles/political-violence-on-the-increase and accessed on 31 August 2013.
[100] Glenda Webster 'A South African revolution?' (1985) 28(3) *Sash* 16.
[101] Ibid
[102] Creecy 'The State's whole repressive machinery' (note 96).
[103] Isobel Douglas-Jones & Glenn Oettle 'The children's emergency' (1986) 29(1) *Sash* 13.
[104] Ibid.
[105] Audrey Coleman 'Uitenhage police station – on a Sunday afternoon' (1985) 28(1) *Sash* 25. Along with the Black Sash, the DPSC started 'The Children's Campaign'. In March 1987 the SAP Commissioner finally ordered an investigation into the abuse of child detainees.

died of head injuries while in police custody.[106] The work done by Audrey and the DPSC in an alliance with other organisations is beyond the topic of this essay. It merits singular, comprehensive attention.

In a special enquiry conducted by the Truth and Reconciliation Commission in 1998, Dr Coleman reported that the state had 'waged an undeclared war on children and youth in which they became primary targets of detention, torture, bannings, assassination and harassment of every description.'[107] The report states that 'thousands of children, some as young as seven years old, were arrested and detained'. In these dark years as many of 26% and 45% of the detainees were children below the age of 18.'[108]

- *'Extra-judicial' forms of repression*
  The trend of a variety of forms of 'surrogate' repression began to surface in 1985.[109] These activities included not only assassinations, but arson, bombing, and vandalism. The police gave 'free rein … to vigilantes and other "third force" or "contra" groups who perform(ed) the same divisive and disruptive work which the police formerly undertook.'[110]

  The use of vigilantes, in particular, followed in the wake of two government announcements about 'black local authorities' in July 1985.[111] The first announcement was that community councillors would be required to sign codes of conduct. This amounted to an admission about the corrupt activities of these unpopular public officials. The second announcement was about the implementation of a section of the Black Local Authorities Act 102 of 1983 that gave community councillors the power to employ their own 'law enforcement agencies'. Community councillors started the practice of surrounding themselves with groups of vigilantes, sometimes as many as 12–15 vigilantes. The conduct of these vigilantes included flogging their victims with sjamboks and knob kieries, assaulting them with pangas, or even murdering them.[112]

- *Township retaliation*
  The wanton acts of violence on the part of police, township police, covert contras ('a third force'),[113] and vigilante groups was met with extreme acts of violence on the part of their opponents. The *Sunday Times* of 2 June 1985 reported that between September 1984 and March 1985, 109 councillors had been attacked and five had been killed; 66 councillors' houses had been attacked, burned and sometimes wholly destroyed.

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[106] *Sash* vol 28(2) 1985 at 23.
[107] Dr Max Coleman, special report on children, Truth and Reconciliation Commission of South Africa Report, 29 October 1998, ch 9 available online at: www.justice.gov.za/trc/report/finalreport/Volume%204.pdf and accessed on 30 August 2013.
[108] The difficulty with statistics about the number of children affected by police repression is that the statistics differ according to the age group referred to. Some statistics refer to 'juveniles'; some refer to people below the age of 25; or to children between the ages of 12 and 16, and then omit statistics about those between the ages of 16 and 18.
[109] Webster & Friedman (note 56) at 26.
[110] Ibid at 25.
[111] Audrey Coleman and the Community Education and Information Research Group (ECI) 'Vigilante violence' (1985) 28(2) *Sash* 32–34.
[112] SAHO South African History Online contends that by 1987, 170 people had been killed as a result of political violence and vigilante activities; available online at: www.sahistory.org.za/archive/chapter-1-introduction-0 and accessed on 30 August 2013.
[113] Webster & Friedman (note 56) at 24–25.

Suspicion and lawlessness abounded on both sides of the conflict. On 23 July 1985 Bishop Tutu, who was then the Anglican Bishop of Johannesburg, attended the funeral of a man who had been burnt alive in Duduza township on the East Rand.[114]

> I say to you that I condemn in the strongest possible terms what happened in Duduza on Saturday. I deplore all forms of violence … Our cause is just and noble — that is why it will prevail and bring victory to us. You cannot use methods to attain the goal of liberation that our enemy will use against us.[115]

The perpetrators of this cruelty suspected that their victim was a police informer. Unfortunately, this was the first of over 500 instances of 'necklacing'.[116]

The first (partial) state of emergency

On 20 July 1985, the State President, Mr P W Botha, announced that a state of emergency had been declared in 36 magisterial districts throughout the country because of —

> the conditions of violence and lawlessness which … have increased and have become more cruel and more severe in certain parts of the country, especially the black townships. These acts of violence and thuggery are mainly directed at the property and persons of law-abiding black people.[117]

As far as due process and legality are concerned, the regulations drafted by the Minister of Justice under the powers delegated to him by the Public Safety Act 3 of 1953 extended the vast powers that state officials already had. Geoff Budlender, Director of the Legal Resources Centre, reported[118] that the regulations differed from the regulations which had been drawn up when a state of emergency had been declared in 1960. Some of the powers, such as detention without trial, the suppression of 'subversive' organisations, and the power to ban and disperse gatherings in the 1960 emergency had been incorporated, and sometimes extended, by the ordinary law of the land. The purpose of the 1985 state of emergency was to —

- widen the network of authorities with the power to detain for 14 days. This power was extended to every officer in the forces — police, railway police, army and prisons;[119]
- give these authorities power to suppress information, which meant press censorship;[120]
- widen police powers, for example, to close any place, organisation, industry or even business,[121] to impose curfews,[122] to disperse crowds;[123]

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[114] He was 'necklaced': a motorcar tyre was put around his neck and set alight.
[115] *Sash* vol 28(2) 1985, back cover.
[116] In his submission to the Truth and Reconciliation Commission of South Africa (TRC) in March 2003 FW de Klerk contended that the TRC had not paid sufficient attention to the 541 incidents of 'necklacing' that had occurred between 1 September 1984 and 31 March 1993. The submission is available online at: www.nelsonmandela.org/omalley/index.php/site/q .
[117] *Sash* vol 28(2) 1985, inside front cover.
[118] Mr Budlender's address to NUSAS students at Wits on 24 July 1985 was reported in *Sash* by Glenda Webster in 'License to?' (1985) 28(2) *Sash* 31.
[119] Schedule II, section 3(1) and (2) of Proclamation 9877 GG 3859 21 July 1985.
[120] Section 6*(i)*.
[121] Section 6*(b)* and *(e)*.
[122] Section 6*(h)*.
[123] Section 6*(c)* and *(f)*.

- provide the state and its officers with protection against civil and legal prosecution by means of an indemnity clause;[124]
- give the state and its officers protection from interdicts to stay or set aside any rule, notice or order issued under these state of emergency regulations.[125]

According to Prof Hoexter, the courts proved largely 'unable or unwilling' to use administrative law to prevent the abuse of power under this ouster clause in the emergency regulations as well.[126]

Mr Budlender concluded that −

> the purpose of the state of emergency is to give the authorities a free hand to do as they wish. It's true there is escalating violence. But the way to control the escalating violence is not to introduce official lawlessness.[127]

By November 1985, PW Botha had apparently decided that Louis le Grange, who was still Minister of Law and Order at that time, was not effective. On 4 November 1985 his post was handed to Adriaan Vlok. Parliament clearly needed a minister with military know-how.

Before Adriaan Vlok became Minister of Law and Order he had been Deputy Minister of Defence[128] under Magnus Malan, who had in turn been Minister of Defence since October 1980. Both were members of the State Security Council which effectively ran the country through the establishment of 500 regional Joint Management Councils (JMCs). These councils comprised several committees of which one was the 'security committee'. Members of these committees included 'security strategists' and, inter alia, the notorious *kitskonstabels* (instant police). These committees were responsible for covert activities such as Vlakplaas C1, an assassination unit. The existence of this unit came to light on 20 October 1989 when Almond Nofomela was due to be hanged for a non-political murder. The day before his execution he decided to reveal his involvement in Vlakplaas C1. The information he revealed was subsequently confirmed by a previous commander of Vlakplaas, Dirk Coetzee, when he was interviewed by a journalist from *Vrye Weekblad*, Jacques Pauw.[129] Dirk Coetzee subsequently left the country.

In January 1990 the Minister of Justice, Kobie Coetsee, announced the establishment of the Harms Commission of Enquiry to investigate the allegations of Dirk Coetzee, Almond Nofomela and David Tshikalanga, another officer who alleged that he had been involved in a death squad. The judge's task was to investigate more than 70 unsolved political killings in South Africa in the previous ten years. [130]

The Harms Commission was seriously flawed. In another alarming example of judicial deference, he said that there was no evidence to support widely publicised claims that a 'death squad' existed in the police force. The judge, who had flown to London to interview

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[124] Section 11(1).
[125] Section 11(2).
[126] Hoexter (note 6) During 'the state of emergency declared by the government in the 1980s, one of our darkest periods, the courts proved largely unable or unwilling to use administrative law to prevent the abuse of power.'
[127] Glenda Webster (note 118) at 31.
[128] South African History on Line, available at http://www.sahistory.org.za/dated-event/ and accessed on 20 October 2013.
[129] Available online at http://www.sahistory.org.za/sites/default/files/olivia_cassidy_-_final_paper_draft_final.pdf .
[130] John Carlin 'No death squads within SA police' *The Independent* (UK) November 1990. No day provided on the newscutting.

Dirk Coetzee, said, inter alia, that his only doubt was whether the captain was mentally unbalanced and not criminally responsible.[131]

Ironically, Adriaan Vlok himself admitted to the political crimes his government had committed when he appeared before the Truth and Reconciliation Commission in 1996. (See below.)

However, to return to November 1985: David and Dr Coleman went to Lusaka again to appear before the UN Commission Human Rights Commission.

> This time around the verbatim record revealed our identities. …
> On both occasions we provided lists of assassinations perpetrated by the apartheid state and its agents.[132]

By the end of the partial state of emergency, in March 1986, emergency detentions had risen to four short of 8 000, while detentions under non-emergency security law had quadrupled to 4 389 by December 1985.[133]

Nationwide states of emergency

A nationwide state of emergency was declared in June 1986. It was to last until June 1987.

Immediately thereafter the declaration of nationwide emergency rule, the police, now under the command of Adriaan Vlok, seized the power given to them by section 5 (Power of entry, search and seizure)[134] to raid the DPSC office in Khotso house where they carried off piles of documents. The DPSC fought back. In an application heard by Justice Goldstone on 14 June 1986, the DPSC obtained the return of some of the documents on the grounds that the statements were intended for legal advisers and therefore constituted privileged information. The statements had been collected from people who were likely to become parties to court action against the Minister of Law and Order himself! The Minister offered the return of the documents so no ruling was necessary.[135]

It was not the only time that emergency powers were used against the DPSC, nor did Adriaan Vlok and PW Botha confine themselves to the use of legislative powers, however wide. In April 1987 the DPSC issued a statement about the 'systematic and apparently co-ordinated harassment' it had suffered:

- raids on its offices in Johannesburg, Bloemfontein, Durban and Kimberley;
- confiscation of pamphlets and documents;
- the issue of a subpoena to one of its members, Audrey Coleman, relating to the publication of details about the torture and abuse of children;
- the detention of two Durban members and four in East London.[136]

Since these forms of harassment were clearly not enough for the Minister of Law and Order, he used his power to issue further regulations under the state of emergency. On 10 April

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[131] Ibid.
[132] Coleman (note 59).
[133] Webster & Friedman (note 56) at 8.
[134] Proclamation No 10280 *GG* 3964 12 June 1986.
[135] Even an ouster clause cannot validate everything purportedly done under the regulations. In this instance, the courts would probably have said that if the intention of the President was to abolish professional privilege, he had to say so explicitly, and this intention was not to be inferred or implied. (Explanation provided by Geoff Budlender.)
[136] 'DPSC statement on the new regulations' Historical Papers, Wits University, 15 April 1987.

1987[137] the Commissioner of Police acquired the authority to 'identify' certain listed 'acts' which had the effect of 'threatening the safety of the public' or 'the maintenance of public order' or of 'delaying the termination of the state of emergency' as 'subversive statements'.

For example, an act that could be identified as a subversive statement would be 'any action' aimed at accomplishing the release of a person detained under section 28 or 29 of the Internal Security Act. Such an action could involve 'signing a document' calling on the government to release the person. The Commissioner even had the power to 'identify' the simple act of 'calling on the government' in writing, orally, by means of a telegram, 'or any other way whatsoever' to release the 'said person' from detention as a 'subversive statement'.

The DPSC teamed up with the Black Sash, the Release Mandela Campaign and others to launch an application in the Durban and Coast Local Division on 26 April 1987.[138] They sought to have the regulation declared 'of no force and effect' on the grounds that it was '*ultra vires'*, ie, the Commissioner had exceeded his power; or that the regulation was void for vagueness. As with the *Hurley* case described above, the matter was heard by Justice Leon. The applicants' arguments succeeded and the judge declared the regulation of no effect. The Ministers took the matter on appeal and, as with the *Hurley* case, the matter came before a full bench headed by Chief Justice Rabie.[139] This time, Justice Leon's decision was reversed with one judge, Van Heerden, dissenting. Rabie CJ did not agree that the regulations were so unreasonable that 'no right-thinking person could have enacted them'.

A second nationwide state of emergency was imposed from June 1987 to June 1988. Under these emergency regulations the DPSC, DESCOM, the UDF, and 15 other civil rights organisations, many of which were UDF affiliates, received restriction orders in February 1988. The regulations prohibited them from 'carrying on or performing any activities or acts whatsoever'.[140] The banning was challenged but without success.[141] It was finally lifted in at the opening of Parliament in February 1990.

In the early hours of the morning on 31 August 1988, during a third nationwide state of emergency (June 1988–December 1988), a bomb was placed in the basement of Khotso House, the headquarters of the SA Council of Churches, the DPSC and the Black Sash. When the bomb exploded it damaged the building so badly that it became too unsafe to use. A night watchman was injured, as were some 30 other people in the vicinity of the six-storey building.[142]

Some eight years later, on 26 February 1996, Adriaan Vlok applied for Amnesty to the Truth and Reconciliation Commission (TRC). He was the first member of the apartheid cabinet in those dark years to approach the TRC to obtain amnesty. He confessed to the political crimes his government had committed during the apartheid era, and he alleged that he had received instructions from the state president, PW Botha, to render Khotso House

[137] Government Notice No 10713, *GG* 4075 10 April 1987.
[138] *Release Mandela Campaign and Others v State President and Others* 1988 (1) SA 201 (N).
[139] *Staatspresident en Andere v Release Mandela Campaign en Andere* 1988 (4) SA 903.
[140] Webster & Friedman (note 56) 14.
[141] Coleman (note 78).
[142] *Los Angeles Times*, 31 August 1988, available online at: http://articles.latimes.com/1988-08-31/news/mn-1317_1_anti-apartheid -movement and accessed on 20 October 2013.

'unusable', but to do so without loss of life. Vlok took this to be an instruction to bomb the place.[143]

Detention without trial becomes an emotive issue

In the last six months of 1988 detentions under emergency regulations declined to an estimated 3 000 from their estimated peak of 25 000 in the first nationwide emergency (June 1986 to June 1987). During these last months of 1988 detentions under security legislation declined to 178.[144] In his report for the year 1988 David stated that the reason for this decline was due to new strategies employed by both the state and the detainees themselves.[145] Inter alia, detainees had embarked on hunger strikes to draw attention to their plight while state strategy had shifted from the detention of individuals to the banning of organisations and individuals. David provided the following explanation of the state's motivation:

> The strategy of imposing restrictions on both organisations and individuals instead of employing wholesale detentions has another spin-off for the State. Detentions have been an emotive issue around which sympathy can, and has been effectively used to mobilise opposition to the system both local and internationally.[146]

December 1988 was the 40th Anniversary of the United Nations Declaration of Human Rights. The state of emergency was renewed again and emergency rule did not come to an end until June 1990 when the last state of emergency was lifted by FW de Klerk.[147]

The report which David co-authored with Maggie Friedman[148] was his last report on the apartheid state's entire armoury of 'legal' and 'extra-legal' measures to suppress its opponents. It covered the years of emergency from June 1987 until just before his death in March 1989. Its focus was on South Africa's breach of the rule of law, and the principles of legality and due process in particular:

> The (United Nations) Declaration contains 30 Articles, and South Africa infringes every single one of them to varying degrees.
>
> Article 9 is brief and to the point: 'No one shall be subjected to arbitrary arrest, detention or exile.' The South African authorities' systematic breach of Article 9 of the Declaration is the focus of this work.[149]

The report graphically depicts the full gamut of the apartheid state's repressive measures, including the reach of its illegal practices in the diagram below.[150]

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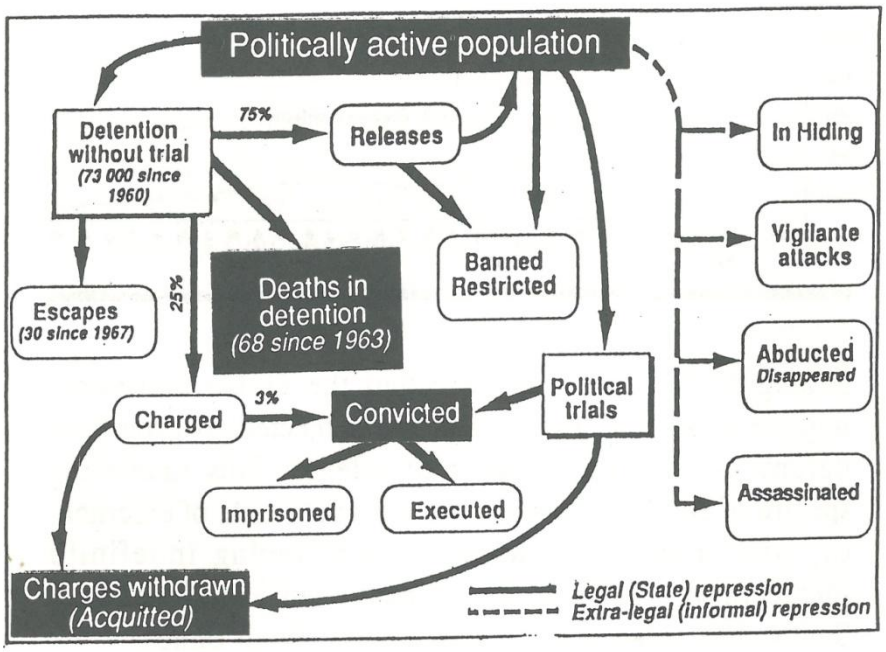
[143] *Truth and Reconciliation Commission of South Africa Report: Findings and Recommendations* 'Holding the State accountable' 6(2) ch 2 para 113, available online at www.info.gov.za/otherdocs/2003/trc/5-2.pdf and accessed on 31 August 2013.
[144] Webster & Friendman (note 55) at 8.
[145] *Human Rights Update: 1988 Review* , Human Rights Commission in association with Centre for Applied Legal Studies, University of Witwatersrand, published posthumously, 1989 at 1.
[146] Ibid at 4.
[147] Frederik Willem de Klerk took over as State President after PW Botha's retirement in September 1989.
[148] See note 55.
[149] Ibid at 1.
[150] Ibid at 6.



The 'extra-legal' assassins

David became the victim of the 'extra-legal' forms of repression that he monitored and sought to expose. Seven years later, on 3 May 1996, Maggie Friedman, who was David's partner at the time of his death, appeared before the Truth and Reconciliation Commission. Her courageous statement was a comprehensive expose of the entire command structure and the individuals in it who were responsible for David's death:

> The assassination of Webster and the subsequent attempts to identify the perpetrators and planners of this can't be seen in isolation nor viewed as an individual incident. …
>
> The chain of command and hence responsibility for these illegal acts and conspiracies reach high into the structures of the state and government and certainly included cabinet ministers,[151] military intelligence, the CCB, the South African Police, the State Security Council and additionally other institutions and individuals associated themselves with these conspiracies like suppressing information, hindering investigations and failing to fulfil duties and tasks which they were legally bound to undertake.[152]

The statement contains the names of the following individuals: '

> Firstly those immediately involved in the assassination which are the CCB Region 6 Operatives: Wouter Basson also known as Christo Britz, Staal Burger, Chappie Marie, Ferdie Barnard, Calla Botha, Slang van Zyl. I would also have included Eugene Riley who has since died a violent death, allegedly by suicide. Secondly those having responsibility and knowledge of the planning of the assassination: Magnus Malan, the Minister of Defence, Eddie Webb, the head of the CCB who has been obliged to apply for amnesty in his own

[151] The Parliamentary Register 1984–1994 shows who the members of cabinet were at the relevant time: Pieter Willem Botha (State President); JCG Botha (Home Affairs); RF Botha (Foreign Affairs); HJ Coetsee (Justice); FW de Klerk (National Education); DJ de Villiers (Industries, Commerce, Tourism); BJ de Plessis (Finance); JC Heunis (Constitutional Development and Planning); GJ Kotzé (Environmental Affairs); E van der M Louw (Transport/Manpower); M A de M Malan (Defence); DW Steyn (Mineral and Energy Affairs); CJ van der Merwe (Information, Broadcasting Services); WA van Niekerk (National Health and Population Development); G van N Viljoen (Education and Development); AJ Vlok (Law and Order); JJG Wentzel (Agriculture).

[152] The statement is available online at: http://www.justice.gov.za/trc/hrvtrans%5Cmethods/friedman.htm.

> cover-up evidence, Joe Verster, the 'managing director', of the CCB, Witkop Badenhorst, the Chief of Staff Operations, and direct superior of Eddie Webb.[153]

Only one of those responsible, Ferdi Barnard, has ever been prosecuted. He was tried on 17 September 1997 on 24 charges including two of murder, of which David's was one, and three attempted murders, which included that of Dullah Omar, who was to become post-apartheid South Africa's Minister of Justice. The charges included illegal possession of firearms and ammunition, and diamond fraud.[154] In June 1998 Ferdi Barnard was sentenced to two life sentences plus 63 years in jail.[155]

A 'fearless' defence?

Prof Mureinik described David's defence of the values of legality and due process as 'fearless'.

Patrick Pearson, a close friend of David's since the early 1970s, contends that David was not fearless in the sense of having no fear. David's determination superseded any fear he may have had. It certainly must be true of his contribution to monitoring and publicising human rights abuses, which involved exposure of the use of assassinations from as early as August 1984 when he went with Dr Coleman to Lusaka to report to the United Nations on 'extra-judicial executions'.

There is a story which David's mother[156] told me that illustrates this determination in the face of danger from a very young age. When David was a toddler of about three he was sitting on the back seat of the car which she was driving along a dusty gravel road in Luanshya (where he was born). As she turned a corner the back door of the car flew open and David fell out. Anxiously she looked into the rearview mirroor to see what had happened to him. There he was running along the road trying to catch up with the car and as he ran he was frantically dusting off his clothes.

One of my own experiences relates, sadly, to the day Neil Aggett died. David had gone to work, I was still at home in Crown Mines. The phone rang: it was Mrs Floyd, mother of one of the detainees. She phoned to find out if we knew whether Liz, her daughter who had had a relationship with Neil, knew about his death. I told Mrs Floyd I did not know whether any of the other detainees knew but I did know that the DPSC had arranged for parents and families to visit their respective detainees. People who wanted a visit had to make an appointment. Since Mrs Floyd was in Cape Town I offered to join the queue to make an appointment for her while she flew up to Johannesburg. She accepted my offer and then I was faced with the prospect of facing Colonel Muller on my own. I was terrified. I phoned David and asked him to come with me.

Just after I had joined the queue in the waiting room in John Vorster Square the outside gate was slammed shut. No more 'queuers' were to be allowed in. I waited anxiously. Suddenly David appeared and took a seat beside me.

'How did you get in?' I whispered. 'I waited until a truck came in through the gate and I walked in behind the truck,' he replied under his breath. 'Did anyone see you?' I asked. 'Yes,' he said, 'a policeman on guard kept yelling 'hey, you!' David kept walking. Eventually

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[153] Ibid.
[154] South African Press Association (SAPA) available online at http://www.justice.gov.za/trc/media/1997/9709/s970917a.htm
[155] SAHO available online at www.sahistory.org.za/dated-event/two-life-sentences-plus-sixty-three-years-prison-are-inflicted-ferdi-barnard-former-member-CCB-civil-cooperation-bureau-found-guilty-johannesburg
[156] Susan Boyd Webster, personal communication.

David turned on his heel and yelled back: 'Don't you call me "hey, you"! I have a name!' The policeman was apparently so stunned he remained silent while David walked up the stairs and into the waitingroom. The manners his parents inculcated were obviously instinctive — to David's advantage in this case.

Max Coleman had a similar tale to tell. During the emergency years the DPSC changed the nature of its weekly meetings with the parents, families and friends of detainees to 'tea parties', at which tea, milk and sugar was provided. This was to avoid the possibility that the meetings would be construed as 'political activity' and therefore fall under the radar of emergency powers. Of these meetings Max Coleman said:

> What particularly angered the authorities was the concept of DPSC Tea Parties in which David played such a prominent part and which proved so difficult for them to deal with. These parties were designed to provide a forum or venue for detainees' relatives and released detainees to meet with one another and with DPSC support staff, counsellors, medics and lawyers to discuss their problems. Such meetings proved difficult for the Security Branch to classify as illegal gatherings under the then current legislation, but they did make several attempts to interfere with our Tea Parties, usually with acrimonious results, and often involving David at the interface.[157]

An 'effective' contribution to the defence of legality and due process?

The final question is whether David's contribution was effective. All those who knew David would agree that he would have considered the role of others in the organisations in which he worked to have been indispensable to his own contribution. One of his favourite quotations encapsulates this idea:

> No man is an island, entire of itself;
> Every man is a piece of the continent, a part of the main;
> …
> Any man's death diminishes me, because I am involved in mankind;
> And therefore never send to know for whom the bell tolls; it tolls for thee.[158]

As I pointed out in the beginning, David was part of a team. And that team was part of a groundswell of opposition to these forms of repression. There were many organisations and many professions which played a crucial role in monitoring and publicising the abuse of state power: journalists, lawyers, doctors, nurses, social workers, students, members of the opposition, priests, ministers of religion and thousands of ordinary citizens. As I have already suggested, the publicity given to these abuses abroad was a direct attack on the Achilles' heel of the apartheid state.

In spite of his own brave and sustained determination, and that of all others in the DPSC who sought to restore 'the habits of democracy', Dr Coleman paid this tribute to David at the opening of the David Webster Park:

> There can be no doubt that it was because of his effectiveness in countering the apartheid system that he was perceived as a threat to its continued existence.[159]

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[157] Coleman (note 38).
[158] John Donne (1572-1671) The extract is today regarded as a poem, yet it was not so originally. The words come from one of Donne's meditations: *Devotions upon Emergent Occasions* published in 1624. This was pointed out to me by Ria de Kock. Available on line at http://en.wikipedia.org/wiki/Devotions_upon_Emergent_Occasions.
[159] Coleman (note 59).

There is no doubt in my mind that it is thanks to the steadfast commitment of all those who courageously defended *principles,* no matter what the cost to themselves, that South Africa has a constitutional democracy today. It was their 'hands-on' involvement in numerous civil, legal, labour, educational, social and economic rights' organisations which worked to achieve these values; and that has informed the detailed wording of the rights in our bill of rights.

A commitment to the rule of law is a cornerstone of our democracy. Section 1 of the Bill of Rights provides:

1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
   (a) …
   (b) …
   (c) Supremacy of the constitution and the rule of law.

Germane to this essay, I refer again to section 33 in order to show the simple clarity of its intent to protect citizens from the irregular, unlawful, unfair and abusive use of public power:

> Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

Of the rights of children, inter alia, with its special concern about child detention:

> Section 28*(g).* Every child has a right not to be detained except as a measure of last resort, in which case, in addition … the child … and has the right to be –
>
> (i) kept separately from detained persons over the age of 18 years.

These are merely examples. Sections 9, 12 and 35 mentioned above are others. There are many more in the Constitution.

Prof Mureinik was one of the advisers serving on the Constitutional Committee at CODESA,[160] which was chaired by Authur Chaskalson.[161] With regard to the appointment of judges, the committee chose the Judicial Services Commission model that we have today. Prof Mureinik, with his concern about the role of judges in the protection of our rights, was influential in ensuring political representation *for all parties* on the JSC.

> Section 174(3): The President … after consulting the Judicial Service Commission and the *leaders of parties represented in the National Assembly*, appoints the President and Deputy president of the Constitutional Court and, after consulting the Judicial Service Commission, appoints the Chief Justice and Deputy Chief justice.[162]

Section 174(4) lays down a procedure for the appointment of the other judges. The President must consult with the Chief Justice and the *leaders of political parties* represented in Parliament. These judges are to be chosen from a list of nominations drawn up by the JSC. Section 178, dealing with the JSC, provides that, inter alia, six members of the JSC must be chosen by members of parliament from among themselves. Of the six, at least three must be *members of opposition parties*.

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[160] Conference for a Democratic South Africa, the multi-party constitutional negotiations that took place between the apartheid government, political parties, liberation movements and tribal chiefs from December 1991. It culminated in the adoption of an interim Constitution, Republic of South Africa Act 200 of 1993, which laid the foundation for the first democratic elections on 17 April 1994.

[161] Judge John Dugard, personal communication.

[162] Emphasis added.

The Bill of Rights provides the blocks on which we now stand, and it is the more malleable concept of the rule of law that fills the small gaps and crevices to give us a solid foundation. After an analysis of three Constitutional cases[163] that were reported in 1999 and 2000, Prof Hoexter concludes:

> The cases … show the constitutional principle of legality, part of the Rule of Law, to be a wonderfully useful and flexible device. In the first place it operates as a residual repository of fundamental norms about how public power ought to be used. It thus acts as a kind of safety net, catching exercises of public power that do not qualify as administrative action.[164]

Alas, the question of effectiveness does not end there.

The struggle continues

A sound Constitution is not enough. The state has three arms: the legislature which makes the law; the executive, which comprises the public officials tasked with carrying out their public functions in terms of the law; and the judiciary who review the law in terms of the Constitution, and who are required to be strong, unbiased independent arbiters of the executive's administrative action.

History has taught us that if we are to maintain 'the habits of democracy' it is imperative that we have a free press. There were dozens of courageous journalists around the country whom I knew of and whom I have not acknowledged. Their role was crucial to the DPSC's determination to protest and publicise continuously the fact that there were people in South Africa held *in communicado*.

In addition, history has taught us that government officials who do not uphold the tenets of the rule of law must be exposed and dismissed.

Thus far, our top-heavy and bloated executive arm of state, which contains individuals who profiteer, pilfer and pillage, and who fail to carry out their tasks with diligence and commitment, are, in my opinion, a betrayal of those who suffered unspeakable cruelty, months and even years in detention and decades in prison; and those who sacrificed their time, their livelihoods, their family life and even their lives to place this executive in its position of trust. The scramble for cash to obtain parvenu palaces, designer labels, and big shiny 4X4s comes from the sadly misguided belief of a consumerist culture that status and honour come from owning baubles, bangles and other facile trappings of a *noveau riche* lifestyle.

[163] *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC); *President of the Republic of South Africa v South African Rugby Football Union* 2000(1) SA (CC); *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC). (See note 6 at 181-183).
[164] Ibid at 183.