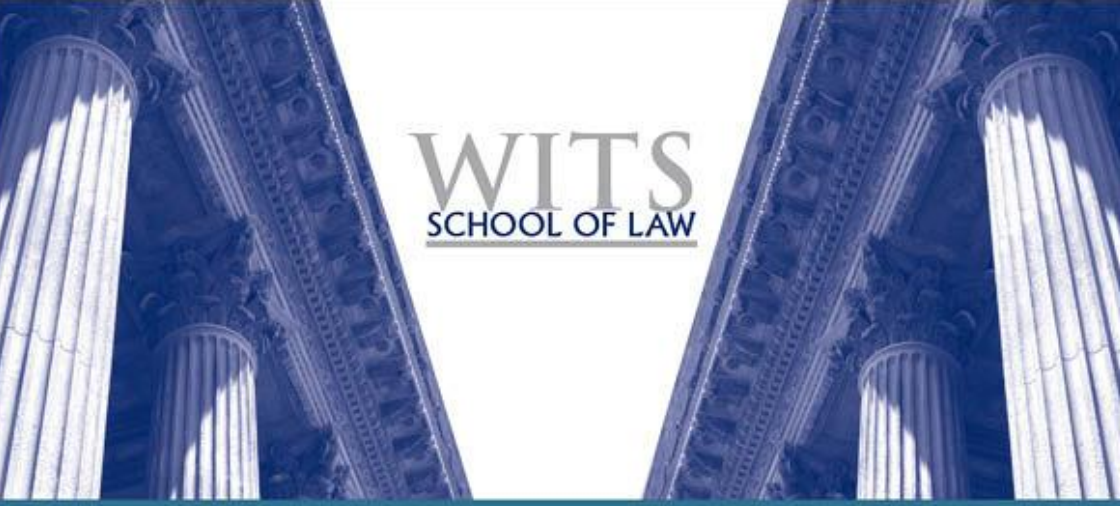

Working Paper Number 3

REPORT ON THE RABIE REPORT

an examination of security legislation in South Africa

by

J Dugard (ed)

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CALS
Centre for Applied Legal Studies

UNIVERSITY OF THE WITWATERSRAND
JOHANNESBURG

A REPORT ON THE RABIE REPORT

an examination of
security legislation
in South Africa

On 6 March 1982 a seminar of thirty-six advocates, attorneys and academic lawyers, with experience in the field of security legislation, was held at the University of the Witwatersrand under the auspices of the Centre for Applied Legal Studies. This seminar, which was chaired by Mr S W Kentridge SC, examined the Report of the Rabie Commission of Inquiry into Security Legislation and reached a broad consensus on its response to this Report. The present study, which reflects that general consensus, was compiled by the following persons:

J Dugard	-	General Editor and rapporteur
P Benjamin	-	rapporteur
B Doctor	-	rapporteur
G J Marcus	-	rapporteur
A S Mathews	-	author
H G Rudolph	-	author
D van Zyl Smit	-	rapporteur

Each of the above persons assumed responsibility as rapporteur or author for a particular section of the Report. The contribution of each rapporteur or author appears in the Table of Contents. Where a subject was discussed in detail and the section reflects the discussion of the seminar, the writer is described as rapporteur of the proceedings. Some subjects were not thoroughly discussed, however, and the writers of these sections are more accurately described as authors.

PARTICIPANTS IN THE SEMINAR HELD ON 6 MARCH 1982
UNDER THE AUSPICES OF THE CENTRE FOR APPLIED LEGAL STUDIES

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1. INTRODUCTION

South Africa's security laws and their implementation have long been a source of fear, suspicion and controversy. In 1977 the security laws were starkly brought to the attention of South Africa and the international community by the death of Steve Biko while a detainee under section 6 of the Terrorism Act, and by the crackdown of 19 October, in which eighteen organizations, three newspapers and seven prominent citizens were banned and forty-seven Black leaders were detained under the Internal Security Act. These events led to a new questioning of the security laws by both lawyer and layman, and culminated in 1979 in the appointment of a commission of inquiry to examine the necessity, adequacy, fairness and efficacy of legislation relating to the protection of internal security. The Commission consisted of the following members:

- The Hon Mr Justice P J Rabie, Judge of Appeal (Chairman)
- Advocate J P J Coetzer, SC, Secretary of the Department of Justice
- Advocate S W McCreath, member of the Pretoria Bar, appointed a judge in 1980
- Professor C F Nieuwoudt, Dean of the Faculty of Economic and Political Sciences at the University of Pretoria
- Professor P Oosthuizen, Professor of Law and Vice-Rector of the University of Pretoria
- Mr S W van der Merwe, Attorney, Johannesburg.

The report of this Commission was tabled in Parliament on 3 February 1982.

The "Rabie Report" as inevitably the Commission's Report has come to be known - examines security legislation in considerable detail and recommends a number of amendments to existing legislation. Both the findings of the Commission and its recommend-

ations have important implications for South Africa. In order to gauge the response of lawyers to the Rabie Report, the Centre for Applied Legal Studies of the University of the Witwatersrand arranged a one-day seminar on 6 March attended by thirty-six lawyers whose names appear on page (ii). Although these lawyers attended in their personal capacities, and not on behalf of the professional bodies to which they belong, their views merit serious consideration as they are all lawyers who have gained first-hand knowledge of the implementation of the security laws as advocates or attorneys, or who have studied and written on security legislation. Generally advocates, attorneys and academics meet separately, in their own professional organizations, to discuss matters of this nature. A meeting of members of all three branches of the legal profession is therefore in itself unusual. When it is attended by acknowledged experts in the field it gains an even greater significance.

The views expressed in this publication do not necessarily reflect the precise views of all participants at the seminar sponsored by the Centre for Applied Legal Studies. The seminar, which was chaired by Mr S W Kentridge SC of the Johannesburg Bar, examined the main issues raised by the Rabie Report and reached a general consensus on such issues. However, as the seminar was concerned with principle rather than detail, it delegated the preparation of the present report, which reflects this general consensus, to a small group of rapporteurs, whose names appear on page (i). Reflecting as it does the broad consensus of opinion of a number of acknowledged experts on security legislation, the present report must be seen as an authoritative response to the Rabie Report. It is hoped that it will be seen in this light by

lawyers, politicians, the general public and - especially - those decision-makers charged with the awesome task of constructing a new security legal order. It is our ardent hope that they will be guided by the present report and that they will enact legislation in this field which gives effect to those values upon which our legal system is founded.

JOHN DUGARD

Director of the Centre for Applied Legal Studies, University of the Witwatersrand

Johannesburg, March 1982

2. FACTUAL BACKGROUND

The Rabie Report does not confine itself to a study of security legislation. It embarks on a lengthy examination of the "factual background" to the present security situation and makes certain findings on political factors and forces which have given rise to the present security laws and which continue to make such laws necessary (chapters 6 and 7). The present report does not enter the political terrain. The seminar did, however, agree that it was impossible to consider the security threat facing South Africa without having regard to the basic social, political and economic grievances of the Black community. Until these are resolved - or squarely faced - there can be no peace in our land, however efficient and harsh the system of security enforcement. Although the Rabie Report acknowledges this obvious truth (paras 3.18; 7.55), it fails adequately to emphasize that the disaffected political groupings it classifies as security threats have real cause for disaffection.

One of the most common justifications for the security laws - and it is to be found again in the Rabie Report - is that South Africa faces a total onslaught. In fact it is a justification which has been offered throughout the past twenty years in which these laws have been progressively made more severe in their impact. Despite this awesome weaponry at the command of the State, it is clear that the security situation has deteriorated. Surely this suggests that we should not look to harsh security laws for real peace and security.

The issue is fundamentally a choice between building a

society based on the participation and consent of all people, and thereby one which gains their loyalty, or attempting to govern by power and force.

The Rabie Commission itself highlights this issue when it comments that Post referred to the Silverton accused not as terrorists but as "guerillas" or "gunmen" (6.177). When one man's "terrorist" is another's "hero" the divide in society is one which leads to civil war, that most awful of all wars, in which your child will take up arms against the child of your friend, in which the white boy goes to the border and the black boy to exile and training abroad - ultimately to meet in armed struggle.

Security legislation, however sophisticated, cannot avert that fate for South Africa. Only immediate social, political and economic reforms can hope to achieve this.

The seminar did not pause long over the political dimension because it concluded that, even if one accepts the Rabie Commission's assessment of the present security threat, the existing security laws and those recommended by the Rabie Commission reflect an overreaction and a failure to pay adequate attention to elementary human rights.

3. POSITIVE RECOMMENDATIONS

The Rabie Report makes a number of recommendations that were welcomed by the seminar. If translated into law, these recommendations will remove some of the extraordinary features of procedure and sentencing that at present discriminate severely against the offender under the security laws.

These positive recommendations are:

(a) The abolition of mandatory minimum five-year sentences of imprisonment under the Internal Security Act 44 of 1950, the Terrorism Act 83 of 1967 and the "Sabotage Act" (s 21 of the General Law Amendment Act 76 of 1962); and the restoration of the court's discretion in respect of sentencing (Report, para 8.4.61). In terms of this recommendation courts will once more be empowered to impose suspended sentences and to direct that juveniles be dealt with in accordance with the special procedures relating to the punishment of juveniles laid down in the Criminal Procedure Act 51 of 1977.

(b) The abolition of the provisions in the Terrorism Act (s 5(h) of Act 83 of 1967) and "Sabotage Act" (s 21(4)(g) of Act 76 of 1962) which violate the principle of *res judicata* (*autrefois acquit*; double jeopardy) by providing that a person acquitted on a charge under either of these statutes may be charged again with another common law or statutory offence arising out of the same conduct (Report para 8.47).

(c) The abolition of the death penalty for conduct not including acts of violence. At present the offences created by the Terrorism Act, the "Sabotage Act" and the Internal Security Act (s 11(b) *bis* and 11(b) *ter*) all carry the death penalty as a possible, discretionary sentence, although the offender may not have committed any act of violence. The Rabie Report redefines these offences and distinguishes between terrorism, which requires the

commission or threat of an act of violence (9.2.1 - 9.2.1.19), subversion (9.2.2 - 9.2.2.3) and sabotage (9.2.3 - 9.2.3.4). By recommending that the death penalty be retained for terrorism (and assisting terrorists) only, the Rabie Commission has reduced the area of criminal conduct in respect of which the death penalty may be imposed.

(d) The abolition of the provisions in the Terrorism Act (s 2) and the Internal Security Act (s 11(b) ter) which place the onus of proof on the accused to rebut certain presumptions of guilt with proof beyond a reasonable doubt. The Rabie Commission recommends that the normal rule of our law that a presumption created by law may be rebutted with proof on a balance of probabilities should apply to these offences (8.4.5; 14.4.8.2).

(e) The amendment of s 32 of the Police Act 7 of 1958 to provide for the suspension of the six month period of prescription for civil claims brought by detainees. This would enable a person held under section 6 of the Terrorism Act to sue the Minister of Police for damages for an assault on him by a policeman during the period of his detention even where the action is commenced later than six months after the claim first arose. At present such a right is denied him under the Police Act if he fails to institute proceedings within six months from the date on which the claim arose. The Commission acknowledges that it is unfair that a person who is assaulted while held under section 6 of the Terrorism Act should be precluded from suing the Minister of Police for damages if he is held in custody during the period of prescription (13.6.5). Unfortunately this recommendation is considerably weakened by the Commission's qualification to the effect that it should be investigated and seriously considered by the Government (13.6.7). In effect therefore, this important recommendation to remove an obstacle, which the Commission itself describes as "unfair", is reduced to the status of a mere quasi-recommendation.

The Report of the Rabie Commission contains a number of

recommendations which constitute some improvement on the existing system. For example, the recommendations relating to the review of the "banning" of persons and organizations under the Internal Security Act represents a step forward. However, in this instance, and in others, the seminar took the view that the recommendations did not go far enough. These recommendations are therefore considered later in greater detail and in a more critical context.

4. MODUS OPERANDI OF THE COMMISSION

A THE COLLECTION AND INTERPRETATION OF EVIDENCE PRESENTED TO THE COMMISSION

Misgivings have been expressed about the heavy reliance of the Commission on evidence of the police. This is particularly evident in the Commission's investigations into the system of detention for the purposes of interrogation in Chapter 10 of the Report, in which frequent reference is made to the views of the police. It is quite clear that the Commission received evidence concerning the dangers of the present system of detention for the purposes of interrogation from non-police sources. The general nature of this criticism is set out by the Commission in paragraphs 10.21 - 10.29 in substantially the following form:

(i) A person may be deprived of his liberty for an indeterminate period under section 6 of the Terrorism Act and may be detained on a purely discretionary basis.

(ii) The police officers' discretion under section 6 is not confined to the question of whether a person is a "terrorist" but also covers the question whether the person has any information relating to "terrorist" activities. In view of the fact that the definition of "terrorist" is so wide it necessarily follows that the police officer concerned has a wide discretion.

(iii) Over and above the fact that the police exercise control over the arrest of the detainee and the duration of the detention, they also exercise complete control over the circumstances of the detention. The detainee's relatives and friends, legal adviser and doctor of his own choice have no right of access to him. This situation places the detainee in the complete control of the police and can be potentially abused. The detainee may be subjected to physical or psychological torture or pressure without the knowledge of the outside world and without the ability to take preventive measures.

(iv) It is possible that because the detainee knows that the police control the duration and circumstances of his detention he will of his own volition make an incriminating statement in order to ensure his release.

(v) It is also possible that the police may, by means of physical and psychological pressure, induce a detainee to make a false declaration and that they may threaten him with a charge of perjury if he deviates from his statement at the trial.

(vi) It is possible that the drastic nature of the provisions and the potential that they hold for the abuse of power, could have the effect that a guilty person is allowed to go free. If witnesses in court allege that they have been assaulted by the police and induced to make certain statements, the absence of independent controls over the circumstances of the detention may lead to the result that such allegations, even if untrue, are difficult to rebut. This places the police in a vulnerable position.

(vii) Critics of section 6 have pointed to the question of deaths in detention. A person who is in a good physical and mental condition may be arrested under section 6 and detained for interrogation. His relatives and friends lose contact with him. If at a later stage they learn that he has died in detention, this necessarily leads to an outcry and all sorts of allegations. Even if thereafter a judicial officer, on the strength of medical evidence, finds that the detainee committed suicide, this will be insufficient to reassure the public at large. Such deaths in detention, whatever the true cause may be, may give rise to damaging propaganda and protests against South Africa.

(viii) Critics have expressed the view that whether or not abuse of power takes place, the existence of section 6 creates such a climate of suspicion, both within and without South Africa, that great damage may be done to the image of the police as the upholder of law and order and the protector of public safety.

(ix) The present system of allowing a magistrate to visit the

> detainee fortnightly, if circumstances so permit, has also been criticised. Since the police exercise control over the circumstances of the detention they may decide simply to keep the detainee away from the visiting magistrate if this will suit their purpose. Even if the magistrate visits the detainee, it is said that it is possible for the police to force the detainee not to make any complaints to the magistrate and it is accordingly possible that the detainee will not be frank with the magistrate because he regards him as part of the "system", in spite of his impartiality.

It is thus clear that the Commission was not unaware of the problems relating to detention without trial. However, the criticisms mentioned above were simply noted by the Commission in the above manner without any indication as to whether or not they were considered to be justified. Moreover, there is nothing in the report to suggest that the validity of these criticisms was investigated by the Commission. The inference to be drawn from the fact that the Commission saw fit to recommend the continuation of detention for the purposes of interrogation and from the express approval of police testimony (10.78) is that these criticisms were not taken seriously. It seems, therefore, that undue reliance was placed on the evidence of the security police without examining the other side of the case.

The names of persons and organizations which gave written or oral evidence to the Commission appear in Annexure B to the Report (pp 248-250). From this it is clear that a wide range of views on security legislation was presented to the Commission. While a person restricted under the Internal Security Act gave evidence to the Commission, it does not appear that any ex-

detainee testified before the Commission. Nor is it clear that any district surgeon, medical practitioner with experience of visiting detainees or psychiatrist with expert knowledge of the effects of solitary confinement was heard by the Commission. If no ex-detainee or medical practitioner of the kind described above was heard in evidence, as the Report suggests, this constitutes a serious weakness in the evidence before the Commission. It was clearly within the power of the Commission to sub-poena such a witness and the failure of the Commission to do so must inevitably reflect on the willingness of the Commission to obtain a full picture of the human and medical effects of detention on the detainee. In this respect the Report contrasts poorly with reports on security legislation in Northern Ireland in which evidence of this kind has been taken from ex-detainees and doctors (see Bennett Committee Report, 1979, Cmnd 7497, paras 7 and 8).

The Report gives no indication that the Commission studied highly relevant legal materials and writings on security legislation and detention without trial; despite the fact that this material was readily accessible or referred to the Commission by witnesses. The failure of the Commission to examine the following materials in particular is hard to understand:

1. Existing court records containing evidence of torture and maltreatment of detainees.

The Commission could quite easily have undertaken its own independent research of reported cases dealing with the treatment of detainees. The Commission in fact refers to some cases in paragraphs 10.73-10.74. The case of S v Hassim 1973 (3) SA 443 (A) and the unreported case of S v Gwala (case number 58/1978) are by no means the only ones, however. For example the recent, and highly

relevant, decisions of the Appellate Division in S v Mogale (unreported judgment of Rabie JA of 2 June 1981) and S v Christie 1982 (1) SA 464 (A) are not examined. It is probably not untrue to say that allegations of police torture are made in most trials under the Terrorism Act. One would have thought that the number of deaths in detention alone would have been sufficient to prompt an in-depth inquiry by the Commission into the whole process of detention and interrogation and that the records of cases would have been a primary source of information.

2. Medical Evidence

The Commission could have investigated the effects of solitary confinement on detainees by questioning suitably qualified medical practitioners or by studying the available medico-legal writings on this subject. No South African court has gone so far as to hold that solitary confinement constitutes a form of torture. On the other hand, the European Court of Human Rights and the American Supreme Court have declared solitary confinement to be a form of inhuman and degrading treatment (see Chapter 5). There are sufficient medical research findings to support the conclusion that solitary confinement constitutes torture per se, yet the Commission did not see fit to refer to this literature or to comment on the harmful effects of solitary confinement.

3. The Bennett Report (Cmnd. 7497: 1979)

The Commission went to great lengths to examine security legislation in other countries, particularly Northern Ireland. In many cases, the Commission justifies its conclusions by finding support in the procedures adopted in Northern Ireland.

Inexplicably, however, the Commission does not even refer to the 1979 Bennett Committee Report into Police Interrogation Procedures in Northern Ireland (Cmnd 7497: 1979) which today governs police conduct. The Bennett Report examined in great detail the methods of interrogation employed by the police and made certain important recommendations concerning such methods of interrogation. The Committee recommended, inter alia, the following:

(a) Detainees are to be allowed visits from their lawyers after 48 hours.

(b) Interrogations are to be monitored by closed circuit television.

(c) Police interviews should not last longer than the interval between normal meal times, or extend over meal breaks, or continue after midnight except for urgent operational reasons.

(d) Not more than two officers at a time or six in all should interview one prisoner.

(For a further reference to these recommendations, see Chapter 5).

4. The Royal Commission on Criminal Procedures (Cmnd 8092: 1981)

Although not concerned specifically with security legislation, the Royal Commission on Criminal Procedure investigated the whole system of the prosecution and investigation of crime in England and Wales. Despite that fact that it was the most comprehensive inquiry of its type ever undertaken in England, it is not referred to by the Rabie Commission. The Royal Commission recommended that the entire system of police interrogation be regulated by a Code of Conduct. The Code should contain a specific prohibition on violence, threats of violence, torture and inhuman or degrading treatment and should make provision for

the following:

(i) limitations on the duration of interviews.

(ii) requirements for the interruption of interviews for refreshments and meals after specified times.

(iii) a prohibition on interviewing at night if the detainee has been interviewed for any substantial period in the day or immediately after a suspect has been woken up.

(iv) a prohibition on questioning after a detainee has been held incommunicado beyond a specified period.

(v) a prohibition on interviewing of persons substantially under the influence of drugs or alcohol.

(vi) limitations on the number of interrogators present during the interrogation at any one time.

(vii) conditions relating to lighting, ventilation and seating in the interview room.

(See further, Chapter 5.)

5. Legal Writings

There is a wealth of legal writing on the subject of security legislation and detention without trial which was not referred to by the Commission. The Commission did not refer to the strong criticisms of security legislation in general, and the interrogation of detainees in particular, in Professor A S Mathews' Law, Order and Liberty in South Africa and Professor John Dugard's Human Rights and the South Africa Legal Order, nor to the many articles in South African legal publications. The Commission actually cites Professor Mathews selectively to support its views on certain topics - which is hardly a fair reflection of the views of one of the most consistent opponents of South African security legislation. It is particulary unfortunate that the Commission did not refer to Professor Mathews'

article (written in conjunction with Ronald Albino, a Professor of Psychology) entitled "The Permanence of the Temporary - an Examination of the 90 and 180 day Detention Laws", which contains a cogent analysis of both the psychological and the legal implications of detention without trial ((1966) 83 South African Law Journal 16).

B THE COMPOSITION OF THE COMMISSION

While the consensus of the seminar was that it would be improper and unfair to question the qualifications of the members of the Commission for an inquiry into security legislation, it was also the view of the seminar that it was regrettable that the Commission had not been more broadly based so as to include representatives of the black community as well as lawyers with specialized experience in the defence of persons tried under security laws.

C THE GENERAL APPROACH OF THE COMMISSION

The Commission's apparent willingness to accept without question the evidence of the police has already been discussed. There are, however, other factors which suggest that the general approach of the Commission lacked balance.

The Commission does not appear to have adequately investigated the application of the security laws in practice, as the Report contains an analysis of the laws as they appear on paper rather than an examination of their effects in practice. The terms of reference of the Commission were to review security legislation, but surely this required an examination of actual

cases and a study of empirical data on the subject and not only an analysis of the law itself. In South Africa there have been several cases of detainess held for over eighteen months under the Terrorism Act (see Annexure B). There are many instances of detainees held for no apparent reason for lengthy periods and then released without charges being laid. One could not have expected the Commission to investigate all cases of apparent abuse, but it was surely a grave omission not to investigate some cases at least.

5. DETENTION FOR THE PURPOSE OF INTERROGATION

Introduction

In 1963 the "90-day detention law" (s 17 of Act 37 of 1963) introduced the principle of interrogation in police custody for long periods of time into our law. But the period of detention was limited to 90 days and the law itself required annual renewal. It was not renewed after 1965. Instead, in that year a new measure, the "180-day detention law" (s 215 *bis* of the Criminal Procedure Act 56 of 1955 inserted by s 7 of Act 96 of 1965), was introduced to authorize the detention of prospective witnesses for the prosecution for six-month periods. Shortly afterwards, the fourteen-day detention law (s 22 of the General Law Amendment Act 62 of 1966) was enacted to allow persons suspected of terroristic activities to be held for fourteen days for the purpose of interrogation. And in 1967, section 6 of the Terrorism Act 83 of 1967 was passed to allow a person to be held indefinitely for the purpose of interrogation where a senior police officer suspects him of being a terrorist or of withholding information relating to terrorists. No court of law may order his release and no person, other than an official of the State, may have access to him. Persistent police interrogation in solitary confinement for an indefinite period is thus a permanent part of our law.

Since 1963 forty-six persons have died in detention in suspicious circumstances. There is incontrovertible evidence that some detainees have been physically assaulted and others mentally tortured. Calls for a judicial inquiry into deaths in

detention and allegations of brutality have repeatedly been rejected by the Government. Civil claims against the Minister of Police alleging assaults have often been settled out of court. Judges have generally avoided a thorough inquiry into methods of police interrogation in trials under the security laws.

In the wake of the death of Steve Biko came the Rabie Commission of Inquiry. To many lawyers and laymen it seemed inevitable that at last interrogation in detention would be investigated; that what happens to section 6 detainees would be revealed by an incisive inquiry into police methods of interrogation. But we were wrong. For the Rabie Commission does not tell us what happens to detainees, nor does it express any real concern over a system which has brought the South African legal system into disrepute at home and abroad.

Detention for the purpose of interrogation is the focal point of our security system. It is dealt with in Chapter 10(1) of the Rabie Report under the heading "Aanhouding vir die Doel van Ondervraging" in ten pages of a 219-page report. In the opinion of the seminar, the failure of the Rabie Report to fully consider this subject is the most disappointing feature of the Report. For this reason most of its discussions were devoted to this topic.

In a wide-ranging discussion on detention for the purpose of interrogation, the seminar examined:

A The main weaknesses of the Rabie Report.

B Safeguards to protect detainees.

C The admissibility of confessions from detainees.

D The admissibility of section 335 statements.

E Legal assistance to a detainee brought to court.

Before turning to these matters, it is necessary, briefly, to describe present law and practice on detention for interrogation and the recommendations of the Rabie Report.

Section 6 of the Terrorism Act 83 of 1967

In terms of this provision a person may be arrested by a police officer of or above the rank of Lieutenant-Colonel if he has reason to believe that such person is a terrorist or is withholding information relating to terrorists. Terrorism is widely defined under the Act and can be interpreted to include any politically-motivated illegal action. A person so arrested may be detained for interrogation without any time limit - "until the Commissioner of Police orders his release when satisfied that he has satisfactorily replied to all questions at the said interrogation or no useful purpose would be served by his further detention". No person other than a State official may have access to a detainee or shall be entitled to information relating to or obtained from the detainee: which means that he may not be visited by his family, his lawyer or his doctor. No court of law may order the release of such a detainee.

In short, section 6 allows a person to be held indefinitely in police custody for the purpose of interrogation. In law the only safeguards are:

(a) A detainee shall be visited in private by a magistrate at least once a fortnight - if circumstances so permit.

(b) A detainee may make written representations for his release to the Minister of Justice. The Minister shall also receive monthly reports on the reasons for holding a detainee from the Commissioner of Police. The Minister may at any time order the release of a detainee.

In practice:

(a) Detainees may be visited by medical officers in State employment - district surgeons - in the discretion of the police.

(b) Detainees may be visited by persons other than State officials in the discretion of the police. (For example, after the death in detention of Dr Neil Aggett, family members were allowed to see detainees briefly to reassure them about the detainees' state of health.).

(c) Detainees are visited by special inspectors. In June 1978, in the wake of the public outcry over the death of Steve Biko, the Minister of Justice appointed two retired senior officials in the Department of Justice - an ex-Attorney-General and an ex-Chief Magistrate - to visit section 6 detainees in private and to report confidentially on their conditions of detention and treatment to the Minister of Justice.

Recommendations of the Rabie Commission

The Rabie Report finds on the basis of police evidence that it is essential to retain this measure on the ground that "information obtained from persons in detention is the most important, and to a large extent, the only weapon of the Police for anticipating and preventing terroristic and other subversive activities" (14.5; 10.78). It accordingly incorporates the substance of section 6 in clause 29 of its Draft Bill - subject to "certain modifications aimed at protecting detainees". The recommended "modifications" are:

(a) That a detainee shall not less than once a fortnight be visited in private by a magistrate.

(b) That a detainee shall be visited not less than once a fortnight by a district surgeon.

(c) That the position of inspectors of detainees be given legal recognition.

(d) That the Commissioner of Police be authorized in law to allow persons other than State officials to visit detainees.

(e) That a detainee may not be detained for more than 30 days unless so authorized in writing by the Minister after he has considered an application for such further detention from the Commissioner of Police.

f) That, if a detainee has not been released after six months, the Police shall advance reasons before a board of review as to why he should not be released; that this board may consider written or oral representations from the detainee, and shall report its findings to the Minister. Presumably, although this is not clear from the Report or the Draft Bill, the Minister may, on the basis of this report, either order the release or the further detention of a detainee.

(See further on this review committee, chapter 6.)

Although these "modifications" may offer some relief to the detainee, it is clear that they do not go much beyond the present law. Rather they seek to give peremptory form and statutory recognition to practices that already exist.

THE MAIN WEAKNESSES IN THE RABIE REPORT

) Sources and Evidence

One might be forgiven for having expected that a Commission Inquiry comprising distinguished lawyers and academics, pre-

sided over by a Judge of Appeal, would have carefully presented and examined the evidence both for and against section 6 of the Terrorism Act before reaching its conclusions. The Report, however, gives the distinct impression that the police evidence, supported by unnamed judges (7.44), was viewed as paramount (10.30 -10.34; 10.57; 10.64; 10.78) and that inadequate attention was paid to other testimony or available material.

The Report does not consider the evidence of police misconduct in a number of trials and inquest proceedings (notably S v Mogale, unreported judgment of Rabie JA of 2 June 1981, Appellate Division; the prosecution of a number of police officers for culpable homicide arising from the death of Joseph Mdluli; and the inquest into the death of Steve Biko), the critical views of South Africa legal scholars in authoritative publications, the seminal judgment of the European Court of Human Rights in Ireland v UK (1978) on the compatibility of in-depth methods of interrogation with the prohibition on "inhuman and degrading" treatment in Article 3 of the European Convention on Human Rights, the 1979 Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland ("Bennett Report", Cmnd 7497) or the 1981 Report of the Royal Commission on Criminal Procedure (Cmnd 8092). Nor does the report indicate that the Commission considered the evidence of ex-detainees on their experiences or that of psychiatrists on the effects of interrogation in solitary confinement. (See further, Chapter 4.)

(2) Deaths in Detention

At the time of the deliberations of the Rabie Commission

orty-five persons had died in detention under section 6 or one of its precursors. The Commission acknowledges that such deaths have occurred, but suggests that they have been satisfactorily explained in inquest proceedings. The Report fails to discuss this important issue in any detail and makes no mention of the inconclusive (and to our minds unsatisfactory) findings in many cases. In particular it does not refer to the inquest proceedings into the deaths of Looksmart Ngudle, James Lenkoe, the Imam Abdullah Haron, George Botha and Steve Biko. Nor does it refer to the prosecution of four policemen for culpable homicide arising out of the death of Joseph Mdluli. (For full details of these deaths and the unresolved questions surrounding them, see The Star 11 March 1982 (Annexure A to this Report.)

The absence of a comprehensive examination of these deaths and the failure to consider the question what causes death in detention constitutes a startling omission in the Rabie Report. After all, the main impetus for the establishment of the Commission was the death of Steve Biko and it is difficult, therefore, to understand why this central question was overlooked.

(3) Number of Persons Held and Length of Detention

Although the Rabie Report provides figures of the number of persons held under the preventive detention provisions of section 10(1)(a) bis of the Internal Security Act (11.3.18), and of the number of persons restricted or "banned" under that Act (page 171), it makes no attempt to give an indication of the extent to which section 6 is enforced. This accords with the general failure of the Commission to place detention for inter-

rogation in a realistic, factual context. To cite but a few figures in this connection: in September 1977 the Minister of Justice (J T Kruger) told the Natal National Party Congress that 2 430 people had been detained since June 1976 for questioning in terms of the security laws (1977 Survey of Race Relations in South Africa 144). Although 1976-77 was a particularly bleak period, it is clear that several hundred persons are held each year under section 6. In 1981, for example, 320 persons were held under this law (Rand Daily Mail 11 March 1982, citing the Minister of Police). Furthermore, it is not uncommon for detainees to be held for many months, or over a year without being brought to trial. Indeed, in one instance, a detainee, Benjamin Ramotse, was brought to trial almost two years after he had first been detained. (For details of such detentions, see Annexure B.) Presumably the Rabie Commission was aware of this information. Readers of the Rabie Report may not, however, be so well informed and might be led to believe, from a reading of Chapter 10 of the Report, that section 6 is applied in isolated cases only. This would be unfortunate.

(4) The Methods of Interrogation Employed

According to police evidence to the Commission, section 6 is a vital instrument for obtaining information to anticipate and prevent terroism and to bring persons to trial. The Commission accepts this evidence (14.5; 10.79). But it fails to consider, let alone answer, two basic questions:

(i) What methods of interrogation are employed?

(ii) What methods of interrogation are lawful or permissible?

(a) What methods of interrogation are employed?

The failure of the Rabie Commission to examine the methods of interrogation employed by the security police is even more extraordinary than its failure to consider the subject of deaths in detention. After all, it is these methods of interrogation that have given rise to the greatest fears and suspicions and that, together with the death of Steve Biko, contributed to the public disquiet which led to the appointment of the Rabie Commission. At the very least, one expected an account of the police testimony on matters such as the normal length of interrogations, the number of police officers usually present at interrogations, whether interrogations take place after midnight, whether a regular record is kept of interrogations, whether there is any internal police code of conduct regulating the methods of interrogation, and so on.

Although the Rabie Commission seeks comparative guidance from the reports of investigative committees into the operation of the security laws in Northern Ireland, it makes no attempt to relate the conclusions of these committees on the subject of police interrogations of detainees to the South African scene. Why is there no reference to the Compton Report (Cmnd 4823 (1971)), the Parker Report (Cmnd 4901 (1972)), the Diplock Report (Cmnd 5185 (1972)), or the Bennett Report (Cmnd 7497 (1979) on the permissible limits of police interrogation? Why is there no discussion of the question whether the South African police employ methods of the kind ruled to be forms of inhuman and degrading treatment by the European Court of Human Rights in Ireland v UK (1978) - that is, wall-standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink in order

to create an atmosphere of stress conducive to interrogation? In the absence of any discussion of this subject, inevitably many will conclude that the Commission considered that police methods of interrogation would not stand up to public scrutiny of this kind.

There is considerable evidence, given under oath in legal proceedings, of the methods of interrogation employed.

Physical assault

Although physical coercion is clearly unlawful, it is equally clear that it is not infrequently employed. Several examples may be cited: In S v Ndou (1970) the State called a number of witnesses to testify for the State who had been held in detention up to the time of their being called to give evidence, thereby removing any possibility of collusion. Yet witness after witness gave strikingly similar testimony about interrogation methods.[1] They were assaulted. They were deprived of sleep. They were made to stand for long hours in some cases with each foot on a brick, until on the verge of collapse ((1970) 87 SALJ 289). In S v Mogale the Appellate Division set aside the conviction of the accused, holding that a confession he was alleged to have made was not admissible because it was made only after he had been so severely assaulted by a policeman that he lost some teeth. Judge Rabie himself delivered the judgment of the court in this case.

Physical assaults have been alleged by ex-detainees in many other cases; and in several of the inquest proceedings referred to above the deceased sustained injuries which were

strongly suggestive of an assault (See Annexure A).

The authorities have done their best to prevent any full-scale judicial investigation into such assaults in detention. Calls for a judicial enquiry have repeatedly been refused. Civil claims for unlawful assault have been settled out of court - witness the substantial out of court settlements made in the case of claims by the families of Joseph Mdluli and Steve Biko. Other civil claims have prescribed. In terms of section 32 of the Police Act 7 of 1958, notice of any civil claim arising from the alleged unlawful acts of the police must be given to the Minister of Police within five months from the date of the existence of the claim and the action itself must be commenced within six months. Yet, by a strange coincidence, several detainees have been held under section 6 for more than five months after the date of the assault, thereby forfeiting the possibility of bringing a claim against the Minister. Furthermore, courts have on occasions refused to enter into an investigation of claims of assaults in detention made by accused persons on the ground that such assaults are not relevant to the guilt or innocence of the accused. Only in a few cases, where a confession has been adduced in evidence against an accused, has there been a full investigation of police conduct - and here, as illustrated by S v Mogale, there has often been evidence of physical assault.

This is not the place to detail the forms of physical assault alleged: they range from brutal fist assaults to sophisticated electrical shocks.

Psychological coercion

Interrogation in police custody over a long period of time clearly causes mental strain and psychological tension - even where the detainee is not subjected to physical assault. Indeed psychiatrists and psychologists have categorized this form of treatment as highly damaging to the mental health of the detainee: a conclusion borne out by the number of detainees who have been obliged to undergo psychiatric treatment during or after their detention.

Degrading and humiliating treatment

There is evidence that in some instances the detainee has been interrogated in a state of nakedness and abused with coarse language. This is clearly done in order to humiliate the detainee and to emphasize his total subjection to his interrogator. (For an allegation of crude language, see S v Christie 1982 (1)SA 464 (A) at 477.)

Standing

In many cases it has been alleged that the detainee was forced to stand for long periods of time during interrogation (S v Christie 1982 (1) SA 464 (A) at 472, 478-9; S v Weinberg 1966 (4) SA 660 (A) at 667).

Long and persistent interrogation

The evidence given in many cases indicates that detainees are continuously and persistently interrogated for long periods of time - sometimes for uninterrupted periods of several days and nights (S v Weinberg 1966 (4) SA 660 (AD) at 667; Gosschalk v Rousseau 1966 (2) SA 476 (C) at 481; S v Christie 1982 (1) SA

464 (A) at 472).

Deprivation of sleep

For allegations of deprivation of sleep, see S v Weinberg 1966 (4) SA 660 (A) at 667; Gosschalk v Rossouw 1966 (2) SA 476 (C) at 478, 481-82.

Subjection to Noise

For allegations of subjection to noise, see Gosschalk v Rossouw (supra) at 481-82.

Deprivation of Food

For such allegations see S v Weinberg (supra) at 667.

Solitary Confinement

Solitary confinement and spare diet is generally viewed as an extreme form of degrading treatment. According to the Viljoen Commission of Inquiry into the Penal System of South Africa (RP 78/1976) it is "a form of punishment which cannot be tolerated in a civilized community" (8.1.16), while in 1945 Krause AJ (as he then was) described it as "a form of cruelty reminiscent of the middle ages" (R v Kumbana 1945 NPD 146). It was abolished as a court-imposed punishment for criminal offences in 1977 and is today retained only as a penalty to be imposed as a last resort on recalcitrant prisoners in prison who have committed some offence in prison and cannot be disciplined in any other way. The Prisons Act 8 of 1959 (ss 51, 54, 79, 80) and the Prison Regulations (Regulation 101 of the Consolidated Prison Regulations, GN R2080 of 31 Dec 1965) acknowledge its

severity and allow it to be imposed subject to a number of safeguards: it may not normally exceed a maximum of three months; it must be authorized by a medical officer; and it must not exclude a period of exercise.

Are section 6 detainees, who have been convicted of no offence and who have demonstrated no opposition to prison discipline, subjected to such a regime or a substantially similar one? The Rabie Commission does not tell us. It does not examine the question whether this species of cruelty is inflicted upon section 6 detainees.

In practice it seems that section 6 detainees are held in police cells and not in the special isolation cells used for solitary confinement. In other respects, however, it seems that their conditions of detention resemble those of solitary confinement. They are segregated from other prisoners; they are denied regular exercise; and they are prevented from participating in the normal prison work and routine afforded to convicted prisoners. Moreover it seems that their detention is not subject to the normal safeguards for this drastic form of treatment: the detention is not approved by a medical practitioner; it is not accompanied by regular exercise; and it is unlimited in time. To aggravate the situation, it appears that detainees are sometimes chained - witness the case of the late Steve Biko. And chaining or mechanical restraint is also viewed as a drastic measure by the Prisons Act (s 80) and Regulations (102).

The above picture is the general one that emerges from

accounts of section 6 detentions given in trials under the security laws. Is this the standard treatment of detainees? Is it authorized by law? Is it accepted by magistrates, inspectors and district surgeons? Unfortunately we are not told by the Rabie Commission.

Cessation of Interrogation

In some instances detainees have been held for long periods of time (several months) without being interrogated at all. Apparently, it is not uncommon for a detainee to be questioned after his arrest and then left alone for several months. As section 6 is specifically designed for the purposes of interrogation it is difficult to justify the continued detention of a person in such circumstances.

(b) What methods of interrogation are lawful or permissible?

The Rabie Report adds nothing to the existing broad judicial pronouncements on the limits of interrogation. Physical assaults are clearly unlawful and unauthorized by section 6. But what about the other forms of treatment described above?

Judicial decisions on the limits of interrogation have been couched in general terms. Section 6 "does not give the police interrogators any special powers in conducting the interrogation" (S v Gwala, unreported judgment cited in the Rabie Report in 10.74); it does not authorize "any form of coercion beyond that necessarily flowing from the fact of detention" (S v Gwala, ibid); it does not sanction "third degree" methods of interrogation - that is, "severe and prolonged cross-questioning designed to overcome the power of resistance of the person being interrogated"

(Gosschalk v Rossouw 1966 (2) SA 476 (C) at 492-493); and it does not permit the police to impair the health and resistance of a detainee by inadequate food or living conditions (Sachs v Rossouw 1964 (2) SA 551 (A) at 561). Courts, which deal with specific cases are by nature reluctant to categorize forms of police interrogation falling short of direct physical assault as unlawful unless a decision is required in respect of a certain method in the case before it. This is illustrated by S v Christie 1982 (1) SA 464 (A) at 479 in which the Appellate Division carefully left unanswered the question whether the fact that a detainee had been aggressively and persistently interrogated all night in a standing position would render inadmissible a confession so obtained on the ground that it was unnecessary for the Court to make such a decision in the case before it. Where a court is confronted with a challenge to the admissibility of a confession, it will limit its inquiry to the question whether, in the particular case before it, the accused was treated in such a way that his confession lacked the required degree of voluntariness. It will not embark upon a wider inquiry into the methods of interrogation generally employed and the permissibility of such methods.

While a court of law may only be expected to pronounce on the immediate issue before it, a judicial commission of inquiry has a wider duty. It would surely have been proper for the Rabie Commission to examine the various methods of interrogation employed by the police - as disclosed not only in the police evidence but in court records - and to pronounce on the lawfulness of such methods. In particular, it would have been appropriate for the Commission to comment on the lawfulness of forced standing, uninterrupted interrogation for very long periods by teams of

interrogators, interrogation of the detainee while naked, solitary confinement and the psychological damage to a detainee by a combination of lengthy solitary confinement, uninterrupted interrogation, subjection to noise and the deprivation of sleep and food.

In many quarters the type of treatment authorized by section 6 is categorized as mental torture or inhuman and degrading treatment. Psychologists and lawyers increasingly see this treatment simply as a more sophisticated form of torture than that employed by medieval inquisitors. The United States Supreme Court, in Miranda v Arizona (384 US 436 (1966) at 457-58, 448) has castigated lengthy custodial interrogation in the following terms:

> "It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiners. The atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity ...
>
> As we have stated before ... this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition."

In 1978 the European Court of Human Rights found that interrogation techniques, apparently not very dissimilar from those practised in South Africa, employed by the British in Northern Ireland, amounted to inhuman and degrading treatment in violation of Britain's obligations under Article 3 of the European Convention on Human Rights, which provides that "No one shall be subjected to torture or to inhuman or degrading treatment". Commenting on the five techniques used - wall-standing, hooding, noise, deprivation of sleep and deprivation of food and drink - the European Court

held:

> "The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3. The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical and moral resistance ..."

And, of course, it should be added that the British Government desisted from such techniques of interrogation well before the Court's judgment and gave the Court the assurance that such techniques would "not in any circumstances be reintroduced as an aid to interrogation".

The Rabie Commission does not refer to this subject - although it was directly brought to its attention in evidence. What inference must be drawn from this silence? That the Commission disagrees with the United States Supreme Court and the European Court of Human Rights and does not regard interrogation of this kind to be a form of inhuman and degrading treatment? Or that it condones it?

* * * * *

Lawyers do not normally indulge in moral philosophy. However, the seminar did acknowledge that section 6 of the Terrorism Act might be condoned by an extreme utilitarian argument -

that treatment of the kind authorized by section 6 is justified on the ground that it is in the long-term interest of the common good, or in the short-term interest of saving life and property from terrorist attacks. Put more crudely, this argument amounts to the old hoary justification for state-directed political violence - the end justifies the means.

The seminar rejected this extreme utilitarian position. In the course of this discussion several participants recalled Lord Gardiner's rejection of this argument in his minority report to the Parker Committee Report:

> "In ... the first Compton report the Committee say 'We consider that brutality is an inhuman or savage form of cruelty, and that cruelty implies a disposition to inflict suffering, coupled with indifference to, or pleasure in, the victim's pain.' Lest by silence I should be thought to have accepted this remarkable definition, I must say that I cannot agree with it. Under this definition, which some of our witnesses thought came from the Inquisition, if an interrogator believed, to his great regret, that it was necessary for him to cut off the fingers of a detainee one by one to get the required information out of him for the sole purpose of saving life, this would not be cruel and, because not cruel, not brutal" (Cmnd 4901 (1972) at 13).

(5) <u>The Effectiveness of Visits by Magistrates and Inspectors</u>

The Rabie Commission assumes that visits by magistrates and inspectors offer real protection to the detainee against police abuse (10.35 - 10.44). The seminar was unable to endorse this assumption.

Although magistrates and inspectors faithfully record a detainee's complaints and write reports on their complaints, it appears that in practice such complaints are often brought to the attention of the interrogators. There are cases in which detainees have been warned, after they have made complaints, that their situation will further deteriorate if they persist in making such complaints (S v Mogale case no 101/79 WLD).

Requests to magistrates and inspectors for medical attention are generally referred to the station commander, who in turn informs the interrogators. In at least one instance no doctor was called as the interrogator contended that the detainee told him that he did not require the services of a doctor - despite the fact that he had complained to the station commander that he had been assaulted by the interrogator and had made a similar report to the magistrate (S v Shongwe, Johannesburg Regional Court, February 1981).

Inspectors and magistrates are not willing (or permitted) to testify in court on allegations of ill-treatment of detainees. In S v Sithole and Others (Durban Regional Court, September 1980), where the admissibility of statements made by detainees was in issue, the inspector of detainees claimed privilege, and the plea was upheld. In another case, a magistrate's plea of privilege was upheld in similar circumstances (S v Shongwe, Johannesburg Regional Court, February 1981).

It is not clear whether magistrates or inspectors are prepared to surprise interrogators or detainees or whether their visits are announced in advance. If the latter is the case, it

is possible for a resourceful interrogator to ensure that the detainee is not seen - for instance, by taking him out of the police station to point out certain matters in an inspection *in loco*.

In these circumstances, it is unfortunate that the Commission did not undertake a more detailed study of the effectiveness of visits by magistrates and inspectors.

(6) The Effectiveness of Visits by District Surgeons

Although the Rabie Commission recommends that fortnightly visits by district surgeons be made compulsory (10.85 (iii)), it does not examine the question whether such visits have in the past afforded relief to detainees.

Some district surgeons have shown considerable compassion in their treatment of detainees. Unhappily this has not always been the case. The conduct of the doctors who treated Steve Biko is too notorious to warrant repetition. And in *S* v *Mogale* a detainee who complained of an assault and whose teeth were broken was apparently not asked by the district surgeon how it had happened.

In practice it appears that medical examinations of detainees sometimes take place in the presence of the police (Biko, Mogale), or that complaints of assault to a district surgeon are handed over to the interrogators (Mogale).

Since the death of Steve Biko in 1977 there has been much

criticism of the conduct of district surgeons and a questioning of the ethical responsibilities of district surgeons when they treat detainees. Cetainly there is a widespread belief that district surgeons are subordinate to the security police as far as the police authorities are concerned, and that the instructions of doctors are easily overruled by the security police. In these circumstances, and in the light of the intense debate in medical quarters over the conduct of the "Biko doctors", it is surprising that the Rabie Commission made no attempt to examine the status of district surgeons vis-à-vis the security police and the effectiveness of medical visits as a safeguard.

B SAFEGUARDS TO PROTECT DETAINEES

The seminar was generally of the opinion that section 6 of the Terrorism Act should be repealed. It likewise considered the modifications proposed by the Rabie Commission to be totally inadequate. Discussions in the seminar indicated a consensus that if our law is to retain a provision for detention for the purposes of interrogation, it should be subject to a number of real, rather than illusionary, safeguards designed to control the exercise of police power and to protect both the mental and physical health of the detainee. The following safeguards, it was believed, would impose realistic restraints upon the power of the police and ensure that the central security measure in the legal order accords more fully with the basic principles of our legal tradition.

(1) Time Limitation

It is essential that some time limit be placed on the period

of detention. The failure of the Rabie Commission to seriously consider this matter is quite extraordinary; particularly if one bears in mind that before 1967 indefinite detention without trial was considered inconceivable in a legal system claiming to be civilized; and if one has regard to the time limitations on detention for interrogation purposes in other jurisdictions.

The Rabie Report accepts the principle of indefinite detention without trial for the purpose of interrogation subject (a) to written Ministerial approval for any detention exceeding 30 days and (b) to Ministerial approval, following consideration of a review committee's report, for any detention exceeding 6 months (10.82). As the decision to detain will rest throughout the period of detention with the executive authority, this proposal does not depart in substance from the existing statutory provision authorizing indefinite detention. The intervention of the review committee does not change the situation: first, the review committee will simply be an agency of the executive authority; and secondly, its recommendations will not be binding on the Minister. (See below, Chapter 6.)

In Northern Ireland, which is subject to a greater security threat than South Africa, the period of detention for interrogation is limited to 3 days under the Northern Ireland (Emergency Provisions) Act of 1978 and to a maximum of 7 days under the Prevention of Terrorism (Temporary Provisions) Act of 1976. The police in Northern Ireland seem quite capable of securing convictions and of curbing terroristic activities with this limited power of detention. Why, it may then be asked, do our police need more than 7 days for this purpose? No doubt it will be

argued that geographical distances are greater in South Africa and that it may take several days for a person to be transported from the border or "operational zone" to police headquarters. So be it. But what conceivable justification is there then for detaining a person for more than 14 days for interrogation (as opposed to preventive detention)?

(2) Judicial Control

Section 6(5) of the Terrorism Act provides that "No court of law shall pronounce upon the validity of any action taken under this section, or order the release of any detainee". The Rabie Report recommends the continued exclusion of judicial supervision in in clause 29(6) of its Draft Bill. In essence the Report advances two justifications for this recommendation: first, that judicial supervision "nie prakties is nie" (to quote the police evidence); and secondly, that provision is made for ministerial control.

The seminar did not find the reasons for excluding the jurisdiction of the courts convincing. Judicial control, it believed, was a prerequisite for any public confidence in the implementation of section 6. Ministerial control would certainly not produce such confidence. Moreover concern was expressed over the effect of the exclusion of the courts' competence on the police who now often regard themselves as being accountable to no one. It was recalled that in the Biko inquest the investigating officer, Colonel Goosen, stated when asked what statute gave him the authority to hold Mr Biko in chains, that he did not work under any statutes!

The Rabie Commission's rejection of the necessity for judicial supervision of section 6 (10.57 - 10.69) is premised on the assumption that only terrorists or persons withholding information about terrorists from the police are detained under this provision. It takes little account of the awful dilemma in which an innocent person held under this law finds himself. For once he is arrested he will be held and interrogated until the police are satisfied that "he has satisfactorily replied to all questions" or that "no useful purpose will be served by his further detention". In practice it is often impossible for the detainee to establish his non-involvement or innocence when the police retain their suspicions, based on false information. In these circumstances it is essential for the detainee to have recourse to a court of law to decide whether the police have reasonable grounds for holding him. The ancient writ of habeas corpus (or interdictum de homine libero exhibendum) is premised on an appreciation of the need for judicial supervision of the authority's power to deprive a person of his liberty. Surely the lesson of history required more serious attention than it received from the Rabie Commission. Innocent people have been held under section 6; and will continue to be so held. As in the past, their protestations of innocence will be met with more intensive interrogation. The Rabie Report does nothing to alleviate the lot of the innocent.

Despite the present exclusion of the courts' jurisdiction to pronounce on action taken under section 6, it is clear that a court retains the competence to inquire into allegations that a detainee has been assaulted and to grant an interdict restraining the police from assaulting a detainee. Our courts have granted such interdicts in only a small number of cases, however, as at present it is impossible for a detainee to give evidence in a

court of law to substantiate allegations of assault. This is the result of the decision of the Appellate Division in Schermbrucker v Klindt NO 1965 (4) SA 606 (A) in which the Appellate Division held that the 90-day detention law, on which section 6 is modelled, does not allow a detainee to testify in court under any circumstances - even where allegations that he has been tortured are in issue. Although Didcott J in Nxasana v Minister of Justice 1976 (3) 745 (DCLD) held that it might be possible for a court to direct the Chief Magistrate to interview a detainee on its behalf in such a case, it is clear that the judgment in Schermbrucker v Klindt NO constitutes an obstacle in the way of the protection of the detainee by the courts. The seminar was therefore of the opinion that at the very least legislation should be introduced to provide for access of a detainee to a court of law to testify in support of an application for an interdict to prevent the police from interrogating him unlawfully.

(3) Visitors

The seminar did not consider visits by magistrates, inspectors or district surgeons to constitute an adequate safeguard against the abuse of power on the part of the police. (For the reasons for this conclusion, see above.) The general consensus was that greater protection to the detainee, and hence greater public confidence in the well-being of detainees, would be afforded by visits by the following persons:

(a) Family

Visits by members of the detainee's family would serve a number of purposes: they would give the family the necessary

assurances about the detainee's state of health; they would remove a source of anxiety from the detainee, who is generally in need of assurance that his family are well and cared for; and they would prevent the police from exploiting the anxieties of family and detainee over each other's well-being to the detriment of both. (In S v Gumenge, Port Elizabeth Regional Court 6/419/78 (1980), in order to obtain incriminating evidence, the police informed a detainee's family that he had been shot while crossing the border and that they could make funeral arrangements after they had made statements to the effect that they knew he had left the country to receive military training. A note from the detainee smuggled out of detention later informed the family that he was alive.)

Visits from family are generally more effective a safeguard than visits from lawyers and independent doctors as few black detainees have ready access to lawyers and doctors. For them family visits will be the only contact with the outside world.

* * * * *

At present families are not even entitled to be informed of the arrest of a detainee and are frequently not so informed. This is totally unjustifiable and provision should be made for notifying the families of such detention as soon as possible - a view endorsed by the Bennett Committee in respect of Northern Ireland (para 281).

(b) Lawyers

The seminar reaffirmed its belief in the basic common-law right of access of a lawyer to his client - confirmed by section 73(1) of the Criminal Procedure Act 51 of 1977. In Northern Ireland, where lawyers are more divided along sectarian lines than in South Africa, and where the security risks are greater, lawyers are granted access after detention for 48 hours. It is difficult to understand why South African lawyers should not likewise be granted this right as they are in other cases.

The seminar expressed its concern over the unwarranted reflection cast upon South Africa lawyers in paragraphs 10.53 - 10.56 in which it is suggested that lawyers may not be trusted and that they might misuse their professional position to convey messages to or from a detainee. This suggestion, which is simply reported by the Commission without criticism, is aggravated by two further innuendoes: first, the comparative reference to the notorious lawyers of the Baader-Meinhof gang (p 150 fn 2) and, secondly, the reference to South African lawyers who have engaged in subversive activities. There is no evidence whatsoever to support the suggestion that South African lawyers have or might further the activities of their clients in an unprofessional manner. Moreover, it is unfortunate that in naming South African lawyers who have engaged in subversive activities the Commission did not show more circumspection, as there is no evidence that any of the five lawyers named by the Commission abused their professional positions in respect of detainees. Abram Fischer was himself detained and arrested in 1964 soon after the introduction of the 90-day detention law. Oliver Tambo and Joe Slovo left South Africa before the introduction of the detention-without-

trial laws. Alexander Hepple, an ex-member of Parliament, was not a lawyer at all. (Perhaps the Commission had his son Bob in mind? If so, the slur is again unwarranted as he left South Africa in 1964.) And Joel Carlson was not involved in political activities until after his departure from South Africa in 1971.

It is unfortunate that the Commission reported these unsubstantiated innuendoes without at least presenting the other side of the picture. South African lawyers have acquired a reputation both at home and abroad for the fearless and professional manner in which they have represented clients charged with "political crimes", viz offences under the security laws. Lawyers are still viewed by the general public as persons who might effectively safeguard the detainee's interests if permitted to visit. Hence the repeated demands from the public for this safeguard. It is a sad reflection on the Commission that it failed to make this acknowledgement.

(c) Doctors

The conduct of the doctors attending the late Steve Biko, and the failure of the Medical and Dental Council to take disciplinary action against these doctors, has understandably produced a lack of confidence in State-appointed medical practitioners as a check on the abuse of police power. In these circumstances the seminar concluded that there was a real need for access to independent doctors, chosen by the family of the detainee, or by some independent authority - such as the detainee's employer or a panel of private medical practitioners. Significantly there is no bar on the detainee's own medical practitioner in Northern Ireland (Bennett Report, para 147).

(d) Independent Visitors

If the authorities are determined to exclude family, lawyers and doctors from having access to a detainee, the legislature should at least provide for visits by independent persons, not linked with the executive. However well intentioned and well-qualified magistrates and inspectors (in practice ex-magistrates or ex-Attorneys-General) may be, the fact remains that they are part of the executive arm of government and are perceived so to be by the public. It can hardly be expected therefore, that the public will be able to place its confidence in such persons. In these circumstances consideration might be given to allowing visits by judges or by an inspector appointed by some independent authority (for example, the General Council of the Bar). Such an inspector might play the role of a "detainee ombudsman" with the right to visit detainees at any time of the night or day without prior notice.

(4) Supervision of Interrogation

The seminar was concerned about the lack of accountability on the part of the security police under the present system. It was suggested that, at the very least, the Station Commander or his designate (belonging to the uniformed police) should keep a full record on each detainee. Such a record should reflect the names of all interrogators, the times of each interrogation, the apparent state of health of a detainee at the beginning and end of each interrogation session, the time allowed for sleep and exercise, the times of serving meals, the times of visits by doctors, magistrates and inspectors, etc. (Records of this kind are kept in Northern Ireland and made available to the court in

legal proceedings: Bennett Report, para 93.)

The Bennett Committee recommended that interrogations be supervised by closed-circuit television cameras used by the uniformed supervisory staff on duty (paras 225, 226). This is a method of supervision worthy of serious consideration, as is the further recommendation by the Bennett Committee that viewing lenses ("spyholes") should be installed in all interrogation rooms for use by uniformed supervisory staff (para 222). While closed-circuit television might prove expensive, no such objection can be raised in the case of spyholes.

(5) Code of Conduct

It is essential that a Code of Conduct be introduced to guide interrogations. This is a matter that received consideration from both the 1979 Bennett Committee (Cmnd 7497) and the 1981 Royal Commission on Criminal Procedure (Cmnd 8092); and it is unfortunate that the Rabie Commission paid no attention to this subject. On the basis of the two British commissions' reports, it is suggested that a Code of Conduct be introduced to provide for the following matters:

a) Limitation on the duration of interrogation sessions. The Bennett Committee suggests that interviews should last no longer than the interval between normal meal times, and should not extend over meal-breaks, or continue after midnight except for urgent operational reasons (para 181).

b) A prohibition against the unlawful use of force against a detainee. Although this is a prohibition that should be well-known to policemen, the evidence adduced in a

number of security trials and inquests suggests that it requires reaffirmation.

(c) A prohibition on degrading or humiliating treatment. The Bennett Committee recommends (para 180) that the following should be specifically prohibited:

- any order or action requiring a prisoner to strip or expose himself or herself
- any order or action requiring a prisoner to carry out unnecessarily any physically exhausting or demanding action or to adopt or maintain any such stance (this would clearly prohibit forced standing during interrogation)
- the use of obscenities, insults or insulting language about the prisoner, his family, friends or associates, his political beliefs, religion or race
- the use of threats of physical force
- the use of threats of sexual assault.

(d) A limitation on the number of interrogators present during the interrogation at any one time. Here the Bennett Committee recommends that not more than two officers should be present at the interview of one detainee at any one time (para 181 (iii)).

(e) A limitation on the number of interrogating "teams" interviewing one detainee. The Bennett Committee recommends that not more than three teams of two officers each should be concerned with interviewing one detainee.

(f) A prohibition on the interrogation of women by all-male teams of interrogators. The Bennett Committee recommends that a female detainee should not be interrogated except in the presence of a female police officer (para 177).

(g) A prohibition on the interrogating of persons under the influence of drugs or alcohol.

(h) Requirements for the interruption of interviews for refreshments and meals after specified times.

(i) Requirements for the provision of adequate sleep and exercise.

(j) Proper lighting, ventilation and seating during interrogations.

(k) The identification of interrogators to detainees by name or number (Bennett Report, para 182).

The Bennett Committee Report shows clearly that the complaints against the police in Northern Ireland are substantially similar to those raised against our own police force. Furthermore the sectarian conflict in Ulster is not without its parallel in our own divided society. In these circumstances, we can learn much from the Bennett Report and its recommendations.

There are a number of ways in which such a Code of Conduct might be enforced. Ideally it should be enacted by statute so that a violation of its provisions constitutes a criminal offence. If this is unacceptable, it should be enforced

- by disciplinary action within the Department of Police
- by monitoring by magistrates and inspectors of detainees
- by excluding confessions obtained in violation of the Code.

This final sanction - the exclusion of confessions obtained in breach of the Code - would in practice constitute the most effective form of enforcement if the Code is not enacted in law.

C THE ADMISSABILITY OF CONFESSIONS FROM DETAINEES

The Rabie Commission Report does not dwell for long on the question of confessions and admissions obtained from persons held under section 6 of the Terrorism Act. The subject is briefly dealt with in paragraphs 10.70 - 10.76 where reference is made to the use as evidence in court of information obtained from detainees.

The Commission states that the police are thoroughly aware that the exercise of pressure "in any form" on a detainee with a view to obtaining a confession from him is useless because they know that the courts approach the evidence of section 6 detainees with the greatest circumspection (10.71). In this connection the Report refers to S v Hassim 1973(3) SA 443(A) where the court said that in each case the evidence from a detainee must be approached in its own light, but "met groot omsigtigheid" (with great circumspection). One could add that the same approach has been taken by the Appellate Division in the more recent case of S v Christie 1982(1) SA 464(A) at 485.

The Report does not, however, say why the courts should approach the confessions of section 6 detainees with the greatest circumspection, or indeed with any greater circumspection than they would approach the confession of any other accused. It is particularly strange that the courts should adopt this attitude if, as the Rabie Commission found, the police are aware that any form of pressure is useless.

The obvious answer as to why such evidence must be approached "with the greatest circumspection" is not stated by the Rabie Report (nor by the courts in Hassim and Christie's case) but it must surely be this: indefinite detention in solitary confinement is in itself, and without more, an awesome form of pressure inducing the detainee to confess or to speak. This view is strongly supported by psychologists. See, for example, A S Mathews and R C Albino, "The Permanence of the Temporary", (1966) 83 S A L J 16, at 23-25; 30-33; and "The Mind in 'Solitary'": report on the views of Professor Charl Vorster of the Rand Afrikaans University in Rand Daily Mail 11 February 1982. According to Professor Vorster: from a psychological point of view admissions made by people who had undergone solitary confinement were worthless and should be rejected because the people who made them were not in a sound frame of mind. See ANNEXURE C.

The decisions in S v Ismail, 1965(1) SA 446(N) at 448-9 and R v Kumbana 1945 NPD 146 afford examples of judicial acknowledgements that solitary confinement is in itself an extreme form of punishment or pressure. Similarly, the recent decision in S v Christie (supra) contains an interesting observation by the court that if the State had tried to tender in evidence a statement made by the accused during an all-night interrogation in which he stood for 11 hours, the court "may have looked on an all-night interrogation with jaundiced eyes and may well have excluded the statement" (at 479). One only has to pose the question "Would the normal person, given the choice, choose to stand all night for 11 hours or to be

incarcerated in solitary confinement for an indefinite period", in order to realise which is the lesser of the two evils. If an all-night interrogation renders a confession inadmissible, is not solitary confinement an a fortiori case?

Yet the Rabie Report does not deal in any depth with the reliability or admissibility of evidence obtained from persons in solitary confinement. In a cryptic footnote (fn. 3 to 10.64) the Commission reflects that it was told (presumably by the police) that the prosecution is usually hesitant to use the confession of an accused made while he is a section 6 detainee. This hesitation is assumed by the Commission to arise from the view that it would be difficult for the prosecution to show that such a statement was made free from pressure or improper influence. In view of the hesitation of the courts, of which the Commission was obviously aware, it becomes all the more odd why the Commission failed to deal with the question of the reliability of such evidence generally since confessions by the accused or statements by other witnesses who have been in section 6 solitary confinement are often the crux of security trials. The Commission expresses no view as to whether the security of the State can really be secured by the indefinite incarceration of its opponents in conditions of solitary confinement with a view to inducing them to speak. (In passing it may be mentioned that the Rabie Commission's Report, again, contrasts poorly with the Report of the Bennett Committee, which considers in detail the admissibility of confessions obtained from detainees: pp 24-32.)

The Commission also fails to deal with the fact that when the confession or admission has been reduced to writing in front of a magistrate, there is a presumption in terms of s 217(b) of the Criminal Procedure Act 51 of 1977 that such a statement was freely and voluntarily made and that the onus is on the accused to demonstrate otherwise. It is difficult enough for an accused in normal circumstances to rebut the onus. How is an accused to do this when he has been in solitary confinement for long periods of time and during which time pressure was brought to bear on him? There can be no corroboration of his submission from another witness since the only person who would have had contact with him are the police, against whom the allegations are being made. No doubt it was considerations of this kind which prompted the Appellate Division in S v Christie to describe this onus as one "which no accused person would seek to discharge with enthusiasm" (1982(1) SA 464(A) at 474).

These difficulties may be considered irrelevant when the security of the State is involved and may have been so considered by the Commission. If so, the Commission ought to have said why. There should have been some attempt at least to reconcile a system based on the extensive use of statements obtained from detainees in solitary confinement with the words of Holmes, J.A. in S v Lwane, 1966(2) SA 433(A) at 444:

> ".... the pragmatist may say that the guilty should be punished and that if the accused has previously confessed as a witness it is in the interests of society that he be convicted. The answer is that between the individual and the day of judicial reckoning, there are interposed certain checks and balances in the interests of a fair

trial and the due administration of justice. The rule of practice to which I have referred is one of them, and it is important that it be not eroded. According to the high judicial traditions of this country, it is not in the interests of society that an accused should be convicted unless he has had a fair trial in accordance with accepted tenets of adjudication."

D THE ADMISSIBILITY OF S 335 STATEMENTS

The Commission recommends that s 335 of the Criminal Procedure Act 51 of 1977, which provides that written statements made to a policeman shall be furnished to the person making such a statement if he is subsequently charged in connection with that matter, shall be amended to exclude statements made by a section 6 detainee during his detention. The Commission justifies this recommendation on the ground that information obtained from a detainee may be of such a nature that its disclosure could hamper the combating of terrorist activities. This recommendation is, however, made subject to the qualification that if any part of such a statement is put to the accused (ex-detainee) in cross examination, he shall be entitled to secure a copy of this statement (10.84).

The effect of this recommendation is to overrule the decisions of the Natal Provincial Division in S v Hassim 1971(4) SA 120(N) and of the Transvaal Provincial Division in S v ffrench-Beytagh 1971(4) SA 333(T) (overruling S v Ndou 1970(2) SA 15(T)), in which it was held that s 6(6) of the Terrorism Act, which provides that no-one other than an official in the service of the State shall be entitled to any official

information obtained from a detainee, does not deprive the detainee of the right to obtain a copy of the statement he made to the police.

The seminar found this recommendation unacceptable. To deny an accused and his counsel access to a statement made in detention, places the defence at a serious disadvantage which cannot be rectified by later making the statement available if the accused is cross-examined on the statement. The effect of this recommendation is that, whereas a State witness will be allowed to refresh his memory from a statement made to the police before giving evidence, the accused will not be permitted to do so. It may also hamper the handling of the defence case as the accused may make disclosures under the pressure and disorientation of detention which he fails to make to his own counsel at the time of trial.

In essence the recommendation undermines the adversary nature of the criminal trial as it means that the prosecution will have access to information from the accused obtained in a pre-trial inquisition which is not made available to the defence. In many respects it is tantamount to denying the defence access to a statement made by an undefended accused at a preparatory examination. It is surprising that the Commission should make such a recommendation without any consideration of the judicial decisions it overrules or of the important principle it overrides.

E LEGAL ASSISTANCE TO A DETAINEE BROUGHT TO COURT

In terms of sections 112 and 115 of the Criminal Procedure Act 51 of 1977, when an accused person is charged in court and pleads guilty or not guilty he may be questioned by the presiding magistrate as to the basis of his plea. This procedure is designed to identify the issues in dispute between prosecution and defence and cannot be faulted in principle - provided the accused is legally represented.

In recent times there have been instances in which persons held under section 6 of the Terrorism Act for several months have been released, immediately rearrested and charged under the Terrorism Act before a magistrate. In such instances the accused is totally disorientated after his lengthy detention and in no mental condition to plead and be subjected to questioning by a magistrate.

In S v Gibson 1979(4) SA 115(N) at 136-9 Milne J commented critically on this practice; but it is clear that it still persists. In S v Tsotsobe, Shabangu and Moise CC 154/81 heard by the Transvaal Supreme Court in June - August 1981 it appeared that the accused had been released after several months detention under s 6 of the Terrorism Act while waiting in the magistrate's court to be brought before the magistrate, had immediately been rearrested and within minutes of such rearrest had been brought before the magistrate to plead to charges of treason and terrorism. Two of the accused, who were not legally represented, then made admissions on many important issues relating to the case. These admissions were later referred to by the trial

judge as evidence in support of the conviction of the accused on charges of high treason. The accused were sentenced to death.

Unfortunately this subject is not examined by the Rabie Commission. The seminar was of the opinion that it is grossly unfair to subject ex-detainees to questioning in terms of sections 112 and 115 of the Criminal Procedure Act immediately after their release from s 6 status with no legal assistance. In such a case there is an absolute necessity for providing legal assistance at the stage of plea. If this is not provided it will inevitably affect the fairness of the subsequent trial.

6. THE REVIEW OF ADMINISTRATIVE ACTION

By H G Rudolph*

A ACTION AGAINST INDIVIDUALS

At present administrative action taken by the executive against individuals who are perceived by the executive to be, in broad terms, a threat to the security of the state or to the maintenance of public order, is of three types:

(a) preventive detention or internment;

(b) "banning" or restriction; and

(c) detention for the purpose of interrogation or for holding as a witness.

The legislative provisions in regard to (a) and (b) are set out in s 10 of the Internal Security Act 44 of 1950 and provide for a review of action taken in terms of (a) but not in terms of (b). The law in regard to (c) is contained in s 6 of the Terrorism Act 83 of 1967 and s 12B of the Internal Security Act 44 of 1950. Neither of these sections, however, provides for any form of review of the actions taken.

(1) Preventive Detention (Internment)

(a) The current law

Section 10(1)(a) bis of the Internal Security Act empowers the Minister of Justice to order the arrest and detention of any person "if he is satisfied" that such persons "engages in activities

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* As the seminar devoted most of its attention to detention for the purpose of interrogation, there was only a short discussion of the subject of this chapter. Mr Rudolph is therefore best described as the author of the present chapter.

which endanger or are calculated to endanger the security of the State or the maintenance of public order.". Such persons are not held as criminals, suspects or witnesses, but on the ground that their activities, albeit lawful are calculated to endanger the security of the State.

A review committee of three persons, consisting of a sitting or retired judge or magistrate and two other persons is created (by section 10 sex) to investigate the Minister's action in respect of a detainee within two months of his arrest, and thereafter at intervals of not more than six months. The recommendations of this review committee are, however, not binding upon the Minister, and no court of law has jurisdiction to pronounce upon the functions or recommendations of the review committee.

(b) The Commission's comments and recommendations

The Rabie Commission considered review systems of various countries, such as Israel (11.4.1.2 - 11.4.1.12), Northern Ireland (11.4.1.13 - 11.4.1.24), Great Britain (11.4.1.25 - 11.4.1.28) and Bophuthatswana (11.4.1.29 - 11.4.1.43) and concluded that there are in general three different types of review applicable to administrative procedures.

First, the review of the decision of the functionary (normally a Minister of State) by a committee, of which the chairman is usually the holder of a judicial office. This committee makes its decision on the merits, after consideration of all the papers upon which the functionary made his decision. Whether the functionary is bound to follow the decision of the committee varies from country to country (11.4.2.6).

Secondly, the review of the actual decision by a single

person who makes a recommendation to the functionary. Here the functionary is generally not bound by the recommendation (11.4.2.7).

Thirdly, the review of the functionary's decision upon limited legal grounds by the holder of a judicial office. Here the functionary is generally bound by the recommendation and must give effect to it (11.4.2.8).

After making it clear that its approach was that the final decision as to what actions should be taken in the interests of the safety of the state must remain with the executive, the Commission stated that an intolerable situation would be created if the executive's responsibilities in respect of the safety of the state were to be transferred to any other person or body, including a court (11.4.2.9).

In order to maintain a separation of the executive and judicial authorities, the Commission recommended that the system of review of administrative actions taken against individuals should operate on two levels:

> at the first level the review should be of the particular functionary's actions, taking into consideration all the facts and merits of the case;
> at the second level the review should be of the functionary's decision and should be based upon limited legal grounds (11.4.2.12).

In regard to the first level, the Commission recommends a review board consisting of three persons, appointed by the State President acting on the recommendation of the Minister of

Justice. The chairman of the board shall be a judge (or a former judge), or a former chief magistrate or magistrate of a regional court, or any person who has acquired the necessary qualifications to be admitted to practice as an advocate and who has been concerned in the application of the law for a continuous period of not less than ten years. At least one of the other two members shall hold legal qualifications.

As far as the second level is concerned, the Commission recommends that the review shall be carried out either by the Chief Justice or by a Judge of Appeal appointed by the Chief Justice (11.4.2.14).

The Commission advanced several reasons why the investigation that precedes the taking of preventive action should be referred to a review body after and not before the action is actually taken. First, it is sometimes necessary to act urgently against a particular individual. Secondly, it is relatively easy for an individual to flee should he become aware that his activities are subject to investigation. According to the Commission there was therefore very little doubt that it was more practical to first act against the individual and thereafter to review whatever actions have been taken.

The Commission recommends the following procedure for the issue of a preventive detention order:

(i) The decision to place a person in preventive detention is to be taken by the Minister of Law and Order on the basis of information furnished to him by the Directorate of Internal Security. This information, normally supplied by the South African Police, should, prior to its sub-

mission to the Minister, be carefully examined by a team of legally qualified officials in the office of the Director of Internal Security, who should consider the question whether or not action against the particular person is justified. All the particulars, together with a report and a recommendation from the Directorate of Internal Security, should then be laid before the Minister.

(ii) If the Minister, after considering this information, is of the opinion that action against the particular individual is both justified and necesary, he shall issue an order to that effect, together with his reasons therefor.

(iii) The person affected by the order is then given a limited time (say fourteen days) within which to make written representations to the Minister.

(iv) Thereafter all the data upon which the Minister based his decision, together with such other facts that he wishes to place before the review board, as well as any written representation by the affected individual, shall be placed before the review board.

(v) The review board shall have a discretion to hear further evidence including that of the detainee, and shall give the detainee an opportunity to testify personally before it when he so requests, unless the chairman of the review board believes that this would not be in the public interest. (In passing, it may be observed that it would very rarely, if ever, be in the public interest not to give the detainee a personal hearing. After all, the hearing will take place in camera, and, as will be shown below, the detainee will not have the benefit of legal assistance during the hearing. One can scarcely therefore conceive of circumstances in which a detainee should not be given a personal hearing.)

(vi) Afer considering all the data before it, the board shall report on the merits of the case to the Minister. In its report the review board shall state whether in its opinion, there are any grounds which would justify an amendment to or withdrawal of the Minister's original order. The detainee shall, as soon as possible, be advised of the

board's finding.

(vii) The Minister is not obliged to give effect to the recommendation of the review board. In this respect the Commission's recommendation is similar to the present position. The Commission does, however, attempt to ameliorate the position by providing that, should the Minister's final decision contain stricter measures than those recommended by the review board, all the papers that had been laid before the review board, together with its report and recommendation and any further report that the Minister may wish to append, shall be placed as soon as possible before the Chief Justice. The Chief Justice shall either review the proceedings or appoint a Judge of Appeal to do so.

(viii) The reviewing judge may set aside the Minister's decision if he is convinced that the Minister

(i) exceeded his authority; or

(ii) acted in bad faith; or

(iii) based his decision on considerations not related to the maintenance of the safety of the State or of law and order.

If the reviewing judge is not so convinced, he shall certify that there are no grounds for setting aside the Minister's decision. The reviewing judge's decision is final. If the Minister's order is set aside the detainee shall be released, unless he is held for some other lawful reason (11.4.3.2 - 11.4.3.11).

While judicial review at the second level is to be welcomed, it should be noted that, judged by the performances of the present review board, few cases are likely to reach the Chief Justice. Between 1977 and 1981 the review board recommended that the detainee be released in only nine of the 366 cases it considered (House of Assembly Debates, col 991 (16 February 1982)).

(ix) After the expiry of a period of six months from the date of the disposal of the matter by the original review procedure, the detainee may make written representations to the Minister to the effect that different circumstances have arisen that justify the amendment or withdrawal of the detention order. The Minister is obliged to place

these representations, together with a report on the matter, before the review board. The review board shall, after investigating the matter, make a recommendation to the Minister. The Minister is still not bound by the recommendation of the review board but where he chooses not to follow the recommendation, he must submit the whole matter for review, once again, to the Chief Justice (11.4.5.4 - 11.4.5.6). Thereafter, at intervals of not less than six months, the detainee may continue to make written representations to the Minister and the whole procedure will be repeated (11.4.5.7).

(c) Critical Analysis of the Commission's Recommendations

Although the Commission's recommendations are an improvement on the existing situation, they are not without blemish.

(i) The composition of the review board clearly cannot go unchallenged. While the Commission's recommendations are silent on the issue, the question may be asked whether specific mention should not have been made of the racial composition of the board. Should there not have been a recommendation that at least one of the members of the review board be Coloured, Indian or Black?

A further recommendation that should have been made in this regard is that the identity of the members of the board be made public. As far as is known the identity of the members of the present review board for s 10 detainees has never been disclosed. As the Rabie Commission has now recommended that the detainee be given the right of personal audience before the review board, the need for concealing the identity of the members of the review board must surely have fallen away.

(ii) A second criticism relates to the recommendation that the Minister need not give effect to the recommendations of the review board. This, of course, flows naturally from the Commission's opinion that the final decision regarding any administrative action taken against an individual, rests with the executive. This is obviously the point of departure for many persons who believe that the final decision should rest with the judiciary and not with the executive. While the review committee per se is not part of the judiciary, it does at least have as one of its members a sitting or retired judicial officer, as well as one other person who is legally trained. If the identity of these persons was made known, and their recommendations were made binding on the executive, much of the criticism directed at the security legislation and its application would be diluted. A compromise solution might be that if the review board were to recommend on two consecutive occasions that the detention order be withdrawn or amended, that the Minister be bound by the review board's recommendation.

(iii) The right of personal audience to the detainee, recommended by the Commission, may not be as meaningful as would initially appear. As will be shown below, the Commission recommends that the detainee be not allowed the benefit of legal assistance during the hearing. The Report, in addition, is not explicit in regard to the details of such right. It seems that the detainee will have no right to be present during the presentation of the evidence of other witnesses and that his presence be confined to the period when he himself is giving evidence (11.4.7.3). Furthermore the question may be asked whether the detainee will be informed of the specific allegations against him, or whether he will be asked to present, in vacuo, his version of the particular events that possibly led to his detention?

(iv) The attitude of the Commission towards legal assistance is difficult to accept. While it is readily conceded that certain lawyers have in the past been guilty of "subversive activities", it surely does not follow that all detainees should be denied all access to all lawyers. Although it is accepted that it would be invidious to deny only certain lawyers access to detainees (11.4.8.14), it is suggested that it does not follow that all lawyers should be excluded. Preventive detention, no matter how it is clothed, still amounts to a form of punishment, to detention without trial. There can be little doubt that the evidence on behalf of the Minister will be presented to the review board by a competent and legally trained person. If minimum standards of procedural fairness are to be observed it necessarily follows that the detainee should be granted this same privilege.

This "privilege" could be exercised in one of at least four ways:

(a) by allowing the detainee to choose his own legal adviser; or

(b) by allowing the detainee to choose his own legal adviser from a panel of lawyers submitted to him by either or both the Bar Council and the Law Society; or

(c) by allowing the State to choose a legal adviser for the detainee from a panel submitted to the State by either or both the Bar Council and the Law Society; or

(d) by allowing the State to appoint a lawyer for the detainee.

The first suggestion is obviously the most desirable from the detainee's point of view, while the last is the most advantageous from the State's point of view. Although many would argue that the appointment by the State of a lawyer to act on

the detainee's behalf would not be in the interests of the detainee, it is at least worth considering. In military court martials the accused is given the "benefit" of a Defence Force appointed lawyer. If the detainee were given the right to refuse the assistance of such a state-appointed lawyer the advantages of such an appointment might well outweigh the disadvantages.

Suggestion (b) is probably the fairest compromise, taking into consideration both the rights of the detainee and the interests of the State. Suggestion (c) is likewise a suggested compromise solution which should be mutually acceptable to both parties. It does, however, tend to favour the State unduly and for that reason must be placed below that of the second course suggested.

(v) The interval that must elapse between the end of one review and the beginning of another - namely six months - is unreasonably long. The suggestion is therefore made that the Minister's decision be reviewed at least every three months. This would serve to emphasize the seriousness of the invasion of liberty at issue.

(vi) A final suggestion relates to the publication of the deliberations of the review board. While the details of a particular review may legitimately be withheld in the interests of state security, it would be helpful if the rules and principles of review developed by the review board could be published - in the same was as the reasons for some other administrative decisions are published. This would help to build up a body of rules to guide the board and might increase public confidence

in its deliberations.

(2) Banning or Restriction Orders

The review procedure recommended by the Rabie Commission for banning or restriction orders, is basically the same as that recommended for the review of preventive detention orders. The criticisms levelled at that procedure are therefore equally applicable here.

One significant difference, however, relates to the length of time that must elapse between the disposal of one review and the beginning of the next. In this regard the Commission recommends that the interval be twelve months and not six. The reason advanced for this difference is that a restriction order is not as onerous as a detention order. Is this approach correct? A person who labours under what he considers to be an unjustly imposed restriction order may feel as aggrieved as the person who is in detention. If one takes into consideration that restriction orders are usually of five years duration, as opposed to a probable maximum of one year in detention, a review every six months would appear to be justified.

(3) Detention in Terms of s 6 of the Terrorism Act and s 12B of the Internal Security Act

(a) The Commission's recommendations

The Commission recommends that the Act be amended to provide that no detainee may be held for longer than 30 days

unless the Minister of Law and Order, having considered a written application from the Commissioner of Police furnishing full reasons why the detainee should not be released, is satisfied that his further detention is necessary for the purpose of interrogation. If a detainee has not been released after six months the police shall adduce reasons before a board of review why he should not be released. The board may consider written representation from the detainee and, in its discretion, may also hear his oral evidence or representations. In order to ensure the secrecy of such proceedings the Commission recommends that such proceedings be held in camera. At the conclusion of these proceedings the board shall submit a written report on its findings to the Minister (10.82).

(b) Criticism of the Commission's recommendations

With the greatest respect, the Commission's recommendations do not contain any real safeguards for a section 6 detainee. The review board's recommendations to the Minister are not binding on him; the right to a hearing by the detainee before the review board is not absolute; the detainee is denied the assistance of his legal adviser; and nothing is said in regard to the question whether the detainee shall be apprised of the reasons for his detention when he makes representations to the review board.

The Commission's further recommendation that, pending the decision of the Attorney-General whether or not to prosecute the detainee, the detention may continue, even though the interrogation of the detainee is complete, must be deplored - especially as no mention is made of any time limit within which the Attorney-

General must make his decision (10.83). It may well happen that after the actual interrogation has been completed, the Attorney-General may require a substantial period of time - possibly in excess of three months - in order to decide whether or not to prosecute the detainee. Should the Attorney-General decide not to prosecute the detainee, but to use him as a State witness, the Commission makes the further totally unsatisfactory recommendation that he be released - unless he is detained as a witness in terms of s 12B of the Internal Security Act. It will be of very little comfort to the detainee to know that his continued detention is now in terms of s 12B of the Internal Security Act and not in terms of s 6 of the Terrorism Act 83 of 1967 when for all practical purposes his conditions of detention remain the same.

The Commission's recommendations concerning the detention of witnesses in terms of s 12B of the Internal Security Act are likewise unfortunate. The Commission recommends the retention of this principle but makes no provision for any form of judicial review whatsoever. Indeed the Commission states (10.115) that everything reasonable is being done to make the detainee's detention pleasant and bearable. It is strange that the Commission should make no comment at all about the fact that the mere detention of the person per se is a harsh form of treatment.

B ACTION AGAINST ORGANIZATIONS

(1) The Commission's Recommendations

The Commission recommends the consolidation of the provisions of two Acts in regard to the "banning" of organizations, viz the Internal Security Act 44 of 1950 and the Unlawful Organizations Act 34 of 1960. It further recommends that the following procedure should be adopted prior to any organization being declared unlawful (11.3.3.21 - 11.3.3.31):

When the Minister is considering declaring an organization to be unlawful, he shall request the State President to appoint an advisory committee to inquire into the organization concerned. Such an advisory committee shall be constituted in the same way as the board of review discussed in A(1)(b) above. The advisory committee shall inquire into all matters relevant to the question whether the Minister shall declare the organization to be unlawful. The chairman of the committee shall, unless he is satisfied that it would not be in the public interest, notify the organization that it is being investigated, and extend to it an invitation to make both written and oral representations. Should it not be possible to notify the organization concerned, because, for example, no office of the organization can be found, the Commission recommends that notice be given to the organization by way of publication in the Gazette.

After the investigation has been concluded the Committee shall report to the Minister and recommend whether or not the particular organization should be declared unlawful. The

Minister is, however, not bound to follow the recommendations of the Committee.

If the organization is declared unlawful, any of its office bearers may, in writing, request the Minister to furnish reasons for the declaration and the Minister is obliged to furnish such reasons.

The Commission recommends that, when an organization has been declared unlawful, an office bearer of the organization may petition the Minister to submit the relevant order to the Chief Justice for review. The Minister shall then submit to the Chief Justice the petition, the report and recommendation of the advisory committee which inquired into the case, the reasons and all information which induced him (the Minister) to issue the order, as well as any additional information on the matter which came to his knowledge subsequently. An organization which has not received notice of the investigation of the advisory committee may include written representations on the matter in its petition to the Minister, and the Minister shall submit these to the Chief Justice. The powers of the Chief Justice (or a judge of appeal designated by him) to set aside the order concerned are the same as those in the case of the review of orders relating to persons, discussed in A(1)(b).

(2) Critical Analysis of the Commission's Recommendations

The procedure recommended by the Rabie Commission is an improvement on the current position, especially in regard to the application of the maxim audi alteram partem.

The present law in respect of the banning of organizations in terms of the Internal Security Act 44 of 1950 is as follows: the State President may, "without notice" to the organization concerned, declare it to be unlawful if he is satisfied, inter alia, that it engages in activities calculated to further the achievement of any of the objects of communism. Before the State President takes such action the Minister of Justice must consider "a factual report in relation to that ... organization ... made by a committee of three persons appointed by the Minister, of whom one shall be a magistrate". There are thus three stages in the banning of an organization: the Minister of Justice appoints a fact-finding committee; he considers its factual report, together with other information he may have; the State President then considers the facts placed before him and exercises his power. In South African Defence and Aid Fund v Minister of Justice 1967 (1) SA 263 (A) the Fund applied to court for an order setting aside the proclamation that had declared it to be unlawful, on the ground that it had not been given any advance opportunity of being heard in its own defence, and that this violated the audi alteram partem rule. The Appellate Division dismissed the application largely on the basis that the audi alteram partem rule was not expressly or by clear implication included, which meant that it was impliedly excluded. The audi alteram partem rule, said the court, was impliedly incorporated only where the statute empowered a body to give a decision that affected the rights of another, which was not the case here. The fact-finding committee did not itself make a decision affecting the Fund, but only compiled a report that may or may not have influenced the Minister and the State President in making their final decision. There was, the court concluded,

no direct causal relationship between the State President's decision and the report of the fact-finding committee which would justify the conclusion that the rights of the Fund were affected by the committee's report.

It is clear that the Rabie Commission envisages the application, to a greater extent than is currently the case, of the audi alteram partem rule and this approach is to be welcomed. Whether it be at the first level of the committee stage, or at the second level of review by the Chief Justice or another judge of appeal, the procedure does seem to incorporate the opportunity to be heard.

A criticism that might be levelled at the recommendation is that the right of the organization to be heard is not absolute in the sense that the obligation to provide it with a hearing is not mandatory. Nevertheless the obvious intent of the Commission is to afford the organization a hearing if at all possible and this is certainly an advance on the present legislation.

C ACTION AGAINST PUBLICATIONS

(1) The Present Law

Apart from the provisions of the Publications Act 42 of 1974 there are at present two other Acts that cater for the banning of various types of publications. They are the Internal Security Act 44 of 1950 and the Riotous Assemblies Act 17 of 1956.

Section 6 of the Internal Security Act empowers the State President, by proclamation in the Gazette, to prohibit the printing, publication or distribution of periodical publications, or the distribution of other publications if he is satisfied, inter alia, that the publication furthers the aims of communism, or that it is being published by an unlawful organization, or will serve the aims and objects of such organization, or will furnish information the publication of which will endanger the safety of the State or the maintenance of law and order. Section 7 of the Act provides that the Minister of Justice may appoint an official to investigate the circumstances surrounding a publication if he is of the opinion that the printing, publishing, or distribution of that publication ought to be prohibited. The State President may only exercise his authority in terms of s 6 if the Minister of Justice has considered a factual report which has been drawn up in connection with the publication by a committee of three members of whom at least one member must hold the rank of a senior magistrate.

Section 3 of the Riotous Assemblies Act empowers the State President to prohibit the publication or distribution of documentary information which in his opinion, is calculated to engender feelings of hostility between the White inhabitants of the Republic on the one hand and any other section of the inhabitants of the Republic on the other. Any person who is effected by such a prohibition may apply to the Supreme Court for an order setting aside the prohibition, and if such person can show the court that the documentary information is not of such a nature that the natural and probable consequences of its publication or distribution will be to engender a feeling of hostility between the Whites and any other section of the inhabitants of the Republic, then the court may set aside such a prohibition. Where the publication of documentary information is prohibited in terms of the Act, the Minister of Justice must report this fact to Parliament. To date no publication has been prohibited in terms of s 3 of the Riotous Assemblies Act.

The following publications have, however, been prohibited in terms of s 6 of the Internal Security Act: The Guardian; Advance; New Age; Fighting Talk; The African Communist; Pro Veritate; The World; and Weekend World (11.3.4.8)

(2) The Commission's Recommendations

The Commission states (11.3.4.14) that it cannot recommend the repeal of the above provisions. This recommendation is, apparently, in accordance with the balance of the evidence given before the Commission. Although there were requests made for the scrapping of these sections, the majority of the evidence given

before the Commission was in favour of their retention, provided that the actions taken under these laws were made subject to review.

As far as s 3 of the Riotous Assemblies Act is concerned, the Commission recommends that the wording be changed to that of "feelings of hostility between different population groups or parts of population groups in the Republic". This amendment must be welcomed as it places all the population groups in South Africa on the same footing as that of the Whites and does not preserve a special protection for the Whites alone (11.3.4.17).

Dealing with s 6 of the Internal Security Act, the Commission recommends that the Act be amended to enable the State President to prohibit, if necessary, a periodical publication for a specified period of time rather than, as is currently the case, for an indefinite period of time (11.3.4.19). This recommendation, too, must be welcomed. Circumstances change, societies mores and views change, and it may well be that views on publications also change with the passage of time. Certainly the experience of the Publications Act 42 of 1974 shows that publications found to be undesirable a few years ago are now no longer "undesirable".

The Commission recommends further amendments concerning the power to prohibit publications. As with the power to ban an organization, the Commission recommends that the Minister may not exercise his power unless he has first considered the report of an advisory committee appointed to investigate the particular

publication. The appointment, composition, functions and reports of this advisory committee are to be the same as that of the advisory committee set up to deal with the banning of organizations (11.3.4.21).

D ADVISORY COMMITTEES AND REVIEW BOARDS COMPARED

The Commission makes it clear that the advisory committee it recommends to deal with the prohibition of organizations and publications are substantially similar to the review boards established to deal with the banning of individuals. The main difference is that the advisory committees will act prior to the particular action being taken, whereas the review board will act only after such action had been taken (11.4.2.15). The reason for this difference is that as far as organizations and publications are concerned there are usually no reasons for extreme urgency , as opposed to the situation with individuals.

All proceedings of the advisory committees,like those of the review board, are, in terms of the Commission's recommendations, to take place in camera (11.4.7.2). Where any person gives evidence before the committee and/or the review board only that person, the Director of Internal Security or his authorized representative, those members of the secretariat of the board or committee whose presence the chairman deems necessary, and those state officials whose presence for security reasons is deemed by the chairman to be necessary, may be present (11.4.7.3). In addition a ban is placed on the publication of

any information furnished to the board or committee or reviewing judge. As far as the review before the Chief Justice (or his appointee) is concerned (i.e. the reviews on limited legal grounds), the Commission recommends that the review should take place on the papers before the judge and that no-one should be able to appear before him (11.4.7.4).

GENERAL CONCLUSION

The Rabie Commission's recommendations concerning the review of administrative action taken in terms of South Africa's security legislation are, as a whole, disappointing. Certain of the changes that it recommends are improvements on the present system and are therefore to be welcomed, but the bulk of the recommended procedures do not substantially change the present position.

The power to arrest and detain, to outlaw and prohibit, remains with the Executive. The suggested "safeguards" do not materially change the law and may possibly be seen simply as an attempt to minimize the harshness of the present laws.

7. SHORT TERM DETENTION

A. INTRODUCTION

The Rabie Commission makes provision for a new form of detention for a maximum period of fourteen days. The Commission claims that preventive detention for short periods is necessary in order to cope with recurrent outbursts of public disorder. It finds that the existing means of detention such as s 22 of the General Law Amendment Act 62 of 1966 and s 6 of the Terrorism Act 83 of 1967 are not, strictly speaking, applicable to preventive detention although they might have been used for this purpose in the past (paras 11.5.9 - 11.5.11). It is also concerned about the adverse criticism "in certain circles" of use of the Terrorism Act against children (11.5.12). The Commission therefore appears to foresee the possibility that the new legislation will be used against children in the future.

B. PROPOSED LEGISLATION

The substance of the new form of detention is set out in s 50 of the Draft Bill. According to this proposal, a policeman of the rank of warrant officer or above may arrest a person without a warrant and detain him in a prison or a police cell if the policeman is of the opinion that the actions of the person contribute to the continuation of a state of public disturbance, disorder, riot or public violence which exists at any place in the Republic and that the detention of the person will contribute to the termination or combating of that state of affairs. Alternatively, action may be taken in terms of this provision if the

detention of the person would contribute to the resumption of such a state of affairs being prevented.

A person who has been detained by a policeman in terms of this section may be released at any time. If, however, he is to be detained for a period of longer than 48 hours a warrant for his further detention must be obtained from a magistrate. Such a warrant may be issued by a magistrate if a policeman appears before him behind closed doors and gives him information on oath that the further detention of a person is justified in terms of this section. Detention may not exceed fourteen days on any specific occasion. However, a magistrate may order the release of a detainee at any time before the expiry of the fourteen day period. Persons held under this section have the status of awaiting trial prisoners. Their names must be submitted by the Commissioner of Police to the Minister of Law and Order as soon as possible after their detention, unless they are released before this can reasonably be done.

C. CRITICAL ANALYSIS

The new form of short-term detention is open to a number of criticisms:

(1) It allows policemen of a far lower rank than has hitherto been the case to exercise powers of detention without trial - a development which is inherently undesirable.

(2) The necessity of obtaining a warrant and the fact that the detainees will have the status of awaiting trial prisoners (and will thus, presumably, have access to a lawyer), does offer some protection to the detainee. This is not sufficient, however, to ensure the fairness either of the initial detention or of its subsequent continuation. The warrant procedure makes no provision at all for the audi alteram partem rule to be applied. The detainee is not even invited to make written representations to the magistrate who authorizes his detention. Nor is there provision for personal appearance before the magistrate and assistance by counsel. Similarly, there is no explicit procedure for a detainee to follow in order to have his warrant of detention withdrawn. If lawyers do have access to detainees they might be able to make representations on their behalf. However, not all detainees have the knowledge or the means to instruct attorneys.

(3) The new form of detention could be abused by it being used for purposes other than those envisaged by the Commission. Thus it was suggested that the section could in practice be used for the preliminary interrogation of large numbers of suspects. If such interrogation proved to be "fruitful", the detainee, now a "suspect", could be redetained in terms of s 6 of the Terrorism Act. In other words , short-term detention could be used as s 22 of Act 62 of 1966 has been used in recent years - as a prelude to a longer period of detention under a harsher regime. The fact that the Rabie Commission recommends the abolition of the present "fourteen-day detention law" in s 22 of Act 62 of 1966 (10.81) on the ground that it overlaps with s 6 of the Terrorism Act hightens suspicions that the new short-term

detention provisions may be used in this manner.

(4) It should be noted that although detention is limited to fourteen days "on any particular occasion", the same words in the context of the now moribund "90 day detention law" (s 17 of Act 37 of 1963), were interpreted by the Appellate Division in Loza v Police Station Commander, Durbanville 1964(2) SA 551(A) to allow a further period of detention where there had been a change in the suspicious circumstances which had caused the police officer to order the initial detention. Although a similar interpretation will not necessarily be attached to the words in the present context, this possibility cannot be discounted.

In sum, the new form of short-term detention is not innocuous. It is not merely a way of dealing with minor disturbances of the peace but is potentially another serious threat to civil liberties and the citizen's right to freedom from arbitary arrest and detention.

8. NEW OFFENCES

A TERRORISM, SUBVERSION AND SABOTAGE

The Commission acknowledges that the present definitions of terrorism, sabotage and communism in certain statutory offences are unsatisfactory. Consequently it recommends that the offences of participation in terroristic activities (s 2 of the Terrorism Act 83 of 1967) and sabotage (s 21 of the General Law Amendment Act 76 of 1962) be replaced by three new offences - terrorism, subversion and sabotage - and that the offence of furthering the aims of communism be retained with a new definition of "communism" (14.4.2 - 14.4.7).

The seminar's general view was that the new statutory crimes of terrorism, subversion and sabotage, together with the other statutory offences provided for in Chapter 6 of the Draft Bill, cover substantially the same areas of activity as are at present covered by the Terrorism Act 83 of 1967, the "Sabotage Act" (s 21 of Act 76 of 1962), the Internal Security Act 44 of 1950, the Unlawful Organizations Act 34 of 1960 and the Criminal Law Amendment Act 8 of 1953. The main relief to be found in the recommendations relates to punishment. Terrorism, which will consist in the commission of an act of violence with intent to overthrow or endanger the State authority or to bring about political, social or economic change, is the only statutory "political" offence that will henceforth carry the death penalty as a possible punishment. (The common-law offence of treason will continue to be a capital crime.) The other offences, according to the Commission's recommendations, will be punish-

able by heavy prison sentences.

Generally the seminar found this aspect of the Commission's Report, contained in Chapter 9, a welcome improvement on existing law. Not only does the Commission recommend a redefinition of notoriously vague statutory offences and the abolition of the death penalty in the case of conduct not involving acts of violence, but in addition it recommends the abolition of minimum punishments, the reinstatement of the principle of res judicata (or autrefois acquit) and the reduction in the quantum of proof that an accused is required to produce to rebut certain statutory presumptions of guilt. (For a more detailed description of these improvements, see Chapter 3.)

The seminar was, however, concerned about clause 69(7) of the Draft Bill. This provides that in a prosectuion for terrorism or subversion, a court may take judicial notice of the fact that the objects of certain organizations are to overthrow the State by violence. The organizations in question - the ANC (including Umkhonto We Sizwe), PAC and the South African Communist Party - are listed in Schedule 4 to the Draft Bill. As the Commission points out, evidence has been led of the objects of these particular organizations in many trials and it is therefore unnecessary, and highly repetitive, to have such evidence led on every occasion. Clause 69(7) goes further than this, however, as it will allow the State President to add other organizations to Schedule 4 by proclamation in the Gazette. This would permit the executive to add any organization it pleases to the list - the Christian Institute, the PFP or the newly formed Conservative Party - simply by proclamation in the Gazette. It would then be un-

necessary for the State to prove that the objects of the organization in question were to overthrow the State by violence in a prosecution of a person associated with such an organization for terrorism or subversion. The seminar therefore took the view that it was dangerous to extend the right of a court to take judicial notice of the objects of organizations to bodies other than those presently included in Schedule 4 of the Draft Bill.

B INTIMIDATION

The Commission laments the difficulties faced by the State in securing convictions in cases of intimidation under both common law and statute law. It notes that it is not an offence to threaten damage to the property of another and that it is a defence in a charge of intimidation in terms of the Riotous Assemblies Act 17 of 1956 to show that the acts of intimidation were unconnected with the acts of others.

The Commission's response is to recommend the introduction of an all-embracing crime of intimidation. It covers any attempt to coerce or persuade anyone to do or abstain from doing any act or to adopt or abandon a particular standpoint by means of assault , causing damage or the threat of murder, assault or damage. The damage caused or threatened need not necessarily be physical and may be directed at anyone. In order to commit the offence the accused must act with intention and without good reason. The onus will be on the accused to prove the existence of a "good reason", unless he makes a statement setting out the reason prior to the state closing its case. The maximum penalty is 10 years imprisonment, a fine of R10 0,00 or both.

The ambit of this new definition is alarmingly wide and uncertain. All intimidation involving violence or the threat of violence will be unlawful. But what threats of damage or loss of a non-physical (especially economic) nature will be considered to be intimidation is unclear.

The effect (and intention) of the proposed legislation can be gauged by looking at it in the light of recent boycotts. Clearly, a threat to induce someone not to attend school will be unlawful. The recent consumer boycott in support of trade union demands presents a more difficult problem. A threat to a shop-keeper, for instance, that if he stock a certain line of goods he will be boycotted will presumably be illegal. Other situations that could be covered by the definition include the case where an individual writes to a company indicating that he will not buy their goods until they change their attitude toward trade unions. Clearly, he is threatening the company with financial loss in an attempt to induce them to alter their political position. Surely, however, it would be absurd for the individual to be prosecuted in such a case because he is under no obligation to buy the company's products in any event.

Whether this innocent type of action will be viewed as intimidation will depend on how the courts interpret the phrase "without lawful reason." In different contexts our courts have held that these words means "unlawfully" or "without legitimate reason". While it is suggested this is the appropriate meaning the words could be interpreted more restrictively.

An additional problematic situation is the position of organizers or advocates of a consumer boycotts. They are undoubtedly threatening the company with economic loss but whether they can be said to have a "lawful reason" is unclear.

9. THE OFFICIAL SECRETS ACT

by A S Mathews*

A. THE COMMISSION'S ANALYSIS OF THE OFFICAL SECRETS ACT 1956

In Chapter 12 the Commission recognizes that the Official Secrets Act 16 of 1956 is vulnerable to criticism on the ground that it is both broad and vague. It refers to dissatisfaction with similar legislation elsewhere and to reform programmes in the British Commonwealth. Yet the Commission seems to have seriously underestimated the harmful effect of the law and the need for extensive reform. The Commission's inadvertance to these matter is evident from:

(a) Its failure to recognize the close link between effective decision-making and the democratic process on the one hand, and access to relevant information, on the other;

(b) The lack of reference to the laws of progressive societies on access to information, especially Sweden and the United States of America;

(c) The apparent assumption (for example, 12.6) that because there have been few prosecutions under the Act, there is not really a serious problem. (It is widely recognized in Britain that even without many prosecutions, the corresponding British law acts as a powerful deterrent upon officials in disclosing non-sensitive information);

(d) The extremely modest reforms which it has put forward in respect of the Act.

The two key provisions of the Act requiring drastic reform are section 2, creating the crime of espionage, and section 3(1) prohibiting the disclosure of official information.

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*Although this paper was before the seminar, time did not permit discussion of its contents.

This chapter will concentrate on these two provisions and the Commission's proposed reforms to them. The Commission's proposed amendments go only a small way towards satisfying legitimate criticism of sections 2 and 3(1).

B THE PROPOSED SECTION 3 - THE CRIME OF ESPIONAGE

(1) As redefined by the Commission espionage will be committed by any person who constructs, assembles, makes, obtains or receives -

(a) a secret official code or password, or a document, model, object or information relating to a prohibited place; or

(b) a document, model, thing or information relating to (i) a prohibited place; (ii) the defence of the Republic, a military or security matter or the prevention of terrorism; (iii) any other matter which he knows or ought to know will be of use to a foreign state or hostile organization (as defined by the State President) and which in the security of other interests of the Republic ought not to be disclosed to such state or organization

for the purpose of disclosure thereof to a foreign state or organization (or member etc. thereof). The penalty prescribed is imprisonment for a maximum period of 20 years (see proposed section 3 of Annexure C to the Report).

(2) This re-definition of espionage is unsatisfactory for several reasons:

(a) Espionage should require an intention to benefit a foreign power (or hostile organization) or to harm the interests of the Republic. The mens rea required by the proposed draft is simply an intention to disclose - prejudicial intent need not be established.

(b) The information disclosed need not be sensitive material for a successful prosecution - it must simply be, to his actual or contructive knowledge, directly or indirectly useful to the foreign power or hostile organization and harmful to any interest of the Republic.

(c) The State President has unchecked power to declare any foreign organization to be hostile (proposed section 14).

(c) Unless the intent specified in 2(a) above is made a requirement of the crime and unless the matter communicated is restricted to defence and security matters, people who communicate abroad (or gather for such communication) innocuous material (e.g. non-sensitive economic information) and who are not hostile to the Republic, could fall foul of this crime.

(4) The proposed section 2 of the draft Act, which punishes a person who approaches, inspects etc. a prohibited place with intent to injure the Republic, is also apparently a form of espionage. Though the harmful intent is required in this case (unlike the position under section 3) it may be proved by a presumption (section 10(1)) and, in the light of this and nature of the actus reus (being near a prohibited place, for example) a punishment of 20 years seems excessive.

C SECTION 4(1) - DISCLOSURE OF OFFICIAL INFORMATION

(1) The present law makes it a crime to disclose without authority any information which a person has obtained either by virtue of office in government (or with government contractors) or in contravention of the Act in confidence from a government

official. The provision is a true "catch-all" or dragnet law since it touches every kind of official information from the most momentous to the most trivial, and from the most sensitive to the completely inocuous.

(2) The Commission accepted that the law is excessively broad but its proposed remedy does not do nearly enough either to restrict the scope of the prohibition or to make the law reasonably clear or precise.

(3) The Commission's remedy is not to narrow the range of information which it is prohibited to transmit by limiting that information to certain sensitive categories, as has been done or proposed in other countries. Its solution is to make guilt depend upon proof that the accused knew or ought to have known that the security or other interests of the State required that the information be kept secret. This "solution" has two serious defects:-

(a) The defect of uncertainty - how is one to determine whether any of the interests of the State require secrecy; no criteria are provided;

(b) Interests of the State is a broad concept and almost any kind of information will touch some interest of the State. This means that the prohibition still has an astonishing breadth.

(4) The Commission proposes a drastic increase in the penalty for breach of this section (R10 000 or 10 years) where the information is communicated to a foreign government or hostile organization. In that case, although the information could well be non-sensitive, the penalty prescribed is a maximum of 20 years

imprisonment.

(5) It is submitted that the only way to effectively cut down, and render more precise, the crime of disclosing official information, is to limit the categories of information to which it applies. I suggest that a criminal prohibition on the release of information simpliciter (i.e. not incorporating communication to a foreign power) should be limited to codes and intelligence, military weapons, tactical defence and security operations and strategies and the identification of intelligence agents.

D PRESUMPTIONS

The Commission's proposed new Official Secrets Act would retain some sweeping presumptions to aid the State in proving guilt. These presumptions should either be narrowed or eliminated to give effect to the principle of "innocent until proved guilty".

10. GENERAL CONCLUSION

There is little doubt that harsh security laws such as the Terrorism Act 83 of 1967 and the Internal Security Act 44 of 1950 have been effective in deterring certain persons from engaging in politically-motivated acts of violence and in assisting the police to combat such conduct. On the other hand, it is equally certain that these laws and their implementation have alienated large sections of the community and have engendered an hostility to the authorities which has often been translated into violent acts against the State. Although there is no evidence of the extent of the alienation caused by the security laws (see Rabie Report p 41, 5.11 and fn.3) it is significant that a recent market research survey, conducted by Markinor in conjunction with Gallup International, shows that South Africans have little confidence in the legal system. While 39% of the Afrikaners interviewed had a "great deal" of confidence in the legal system only 18% of English speakers, 24% of Blacks, 11% of Coloureds and 23% of Asians shared this confidence (Sunday Express 14 March 1982). It is surely not inconceivable that the abolition of habeas corpus and the introduction of practices incompatible with notions of fairness, justice and the Rule of Law by the security laws have contributed to this disturbing loss of confidence in our legal system.

This sense of alienation produced by the security laws is most apparent in the black community which increasingly sees the apparatus of the law, and particularly the security laws, as the white man's method of maintaining his dominant position.

This is an understandable response as the laws are made by white legislators, applied by white judicial officers and largely enforced by white police. Moreover, although the security laws in theory do not discriminate on grounds of race, in practice they do discriminate, or at least they are perceived by blacks as discriminatory. Although this perception was brought to the attention of the Rabie Commission, it declined to investigate the matter (3.33).

Blacks are conscious of the fact that forty five blacks and only one white (Neil Aggett) have died while held under the detention-without-trial laws; that a disproportionately high number of blacks have been held under section 6 of the Terrorism Act and section 10(1)(a) bis of the Internal Security Act; that blacks appear to be more frequently "banned" under the Internal Security Act; and that black organizations are more readily outlawed than white organizations. Indeed the stage has been reached at which many Blacks believe that no black leader operating outside the framework of separate development can politically survive the tentacles of the security laws; and that no black man held under section 6 of the Terrorism Act can confidently expect the protection of the law. It must not be forgotten that, while opposition to the system of black education sparked off the Soweto riots of 1976, it was the detention of black schoolchildren under the security laws that fanned the fires of discontent and kept then burning.

Many whites have likewise been alienated by the security laws. The death of Neil Aggett two days after the tabling of the

Rabie Report and the detention of many young whites in 1981 has increased this alienation and led to a new hardening of attitudes in the white community.

Generally, it can be stated that South Africans of all colours and creeds who have been brought up to believe in the Rule of Law find it impossible to identify with a system that resorts to methods commonly associated with the excesses of totalitarianism.

On the international front there is also alienation. Our western allies have been compelled to dissociate themselves from South Africa when it comes to the implementation of the security laws. This is illustrated by Resolutions 417 and 418, unanimously adopted by the Security Council in October/November 1977, in which limited, but mandatory, sanctions were imposed on South Africa as a result of the implementation of the security laws (viz, the death of Steve Biko while in detention under section 6 of Act 83 of 1967, and the banning of organizations, newspapers and individuals and the detention of prominent blacks under the Internation Security Act 44 of 1950). Inevitably these sanctions, directed at the acquisition of arms, have weakened the country's defence capability.

The view that over stringent security laws may be counterproductive and cause more hostility than they suppress is not novel, nor is it confined to South Africa. In 1972 Lord Gardiner, in his minority Report of the Parker Committee Report (Cmnd No 4901 (1972)) into allegations of maltreatment

of detainees arising out of techniques of interrogation in Northern Ireland, stated:

> "If the view is taken that the use of the procedures [techniques of interrogation] may initially have saved lives, this has to be balanced against the fact that in a guerilla-type situation the position of the forces of law and order depends very much on how far they have the sympathy of the local population against the guerillas. If the sympathy of a large part of the population is lost, the difficulties of the forces of law and order are increased. How far loss of that sympathy .... is due to internment or to the procedures [interrogation of detainees] or how far in the end they have saved lives or cost lives, seems to me impossible to determine."
>
> (Cmnd No 4901 (1972) p 19)

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The Report of the Rabie Commission contains a number of positive recommendations. But even if <u>all</u> its recommendations are translated into law, our security legislation will still be viewed with fear and suspicion and continue to alienate large sections of the community at home and our friends abroad. This, in essence, explains why the seminar of lawyers held on 6 March, 1982 found the Report of the Rabie Commission a disappointment.

This abridged list of people known to have died in detention was compiled from records kept by the SA Institute of Race Relations and the Detainees' Parents Support Committee. It is as accurate as it can be in circumstances where the Security Police consistently refuse to assist The Star with lists regarding security detainees. Two names omitted were Jacob Mashabane and Fenual Mogatusi. Both died in 1976. Observers such as the SA Institute of Race Relations believe they were security detainees, but the Prisons Department said they were awaiting-trial prisoners, one for robbery and the other for theft. Story by David Braun.

Thermometer of Justice

Mystery of dead detainees

Over the last two decades 50 people are known to have died while in detention under security laws of South Africa, Transkei, and Venda.

Of these, half were said to have committed suicide, seven died accidentally and 10 died of natural causes. The circumstances of the deaths of eight detainees are not known.

Figures kept by the SA Institute of Race Relations show that only 31 of the 50 deaths resulted in inquests. A dozen bodies had mysterious marks, wounds, bruises or swellings which were not necessarily the cause of death.

Of the 25 detainees who committed suicide, 18 hanged themselves in their cells, using items of clothing or bedding. Five were said to have jumped out of tall buildings and two committed suicide in an undisclosed manner.

Explanations given by the security police for the accidental deaths of detainees were: slipped in the shower room; slipped on a piece of soap; fell down the stairs; fell on a chair; hit head on a desk while in a faint; hit head against a wall while in a scuffle; and fell in floors from a window ledge.

Of those who were said to have died naturally, four died of heart failure and one died of a stroke. No details of the ailments of the other five are recorded.

Several of the detainees appeared to have died in mysterious circumstances.

They included:

● **Solwandle Looksmart Ngudle**, who was found hanged in his cell in 1963.

At the inquest the State said Ngudle had given information to the police which led to arrests the day before he died. He apparently then realised he faced death either by the proper processes of the law or at the hands of his previous associates.

Counsel for the widow said that an advocate who had seen another prisoner was informed that Ngudle had not committed suicide but had died as a result of torture.

● **Nicodemus Kgoathe** died of bronchial pneumonia. At the inquest a doctor said Kgoathe had first told him he had slipped in the shower but then changed his story to having been assaulted by policemen during interrogation.

The doctor said the marks, wounds and abrasions on the body were more likely the result of an assault than a slip in the shower room.

Two members of the security police testified Kgoathe slipped in the shower room. The magistrate was unable to conclude any person was to blame for Kgoathe's death.

● **Solomon Modipane** died three days after he was detained in 1969. According to a Press report the head of the CID said Modipane had received "certain injuries" when he slipped on a piece of soap, but this was not necessarily the cause of death.

The magistrate endorsed the post mortem report that death was due to natural causes and found that no inquest was necessary.

● **James Lenkoe** hanged himself with his belt in Pretoria local prison. The prison surgeon found death was due to hanging. The family insisted on another post mortem, to be carried out by a doctor appointed by the widow.

Counsel for the widow told the inquest there was medical evidence that proved beyond doubt Lenkoe had been given an electric shock on the day he died. Three pathologists testified there was a mark on his toe consistent with a very recent electric burn mark.

Verdict: death by self-inflicted hanging.

● The body of the **Imam Abdullah Haron** had 26 separate bruises on its front, back and side. A police officer testified that Haron had fallen down stairs.

A pathologist testified that some bruises were older than others and not all could have been caused by the fall. The official finding was that Haron had died of heart failure, brought on in part by his fall.

● **Mthayeni Cuthsela's** body had bruises, weals and a cut on the head. The official cause of death was natural causes.

● **Joseph Mdluli** was found dead in his cell the day after he was detained. Mrs Mdluli claimed after viewing the body that it showed injuries on the forehead and lip, and the stomach was dilated to twice its normal size.

Three months later the Minister of Police announced that four policemen would be charged with culpable homicide arising from the death of Mdluli, hence no inquest would be held.

Police witnesses at the trial said Mdluli struggled with police officials as he attempted to escape. He staggered and fell, hitting his chest or neck on a chair.

Doctors testified that the injuries were too diffuse to have been caused by a single fall over a chair.

The judge acquitted the four policemen but said medical doubts on the evidence of the policemen who testified for the State.

● **Luke Mazwemba** died in Cape Town on the same day that he was detained under Section 22 of the General Laws Amendment Act. He hanged himself with a noose made of strips of blanket cut with a razor-blade and tied together with twine.

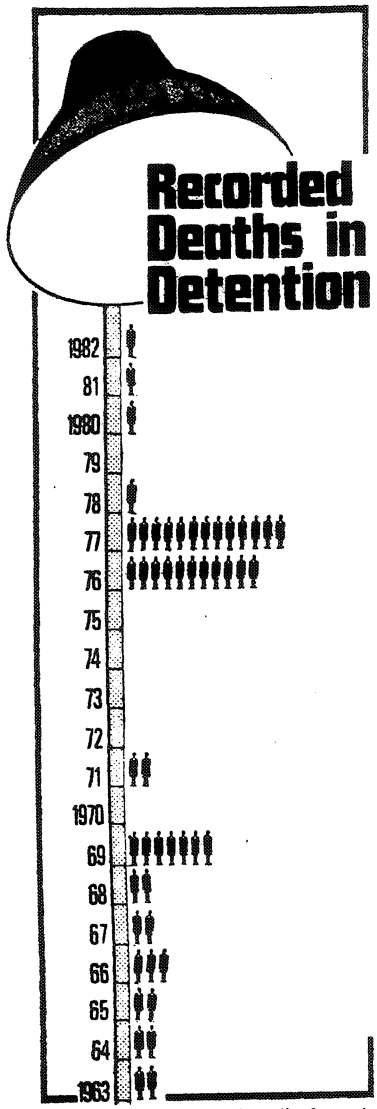
Police were uncertain how he obtained the razor and twine. The post-mortem found several wounds on the body, including swelling and bruising of the right cheek bone, slight swelling of the lower scrotum, abrasions on an ankle and on both shoulder-blades. Police were unable to explain these injuries.

Verdict: suicide by hanging.

● **George Botha** jumped a railing and fell six floors down a stairwell of the security police headquarters in Port Elizabeth.

The pathologist's evidence was that he found skin abrasions on the shoulder, upper chest, right upper arm and armpit which indicated wounds probably two to six hours before death.

The inquest magistrate said he was not able to judge how these injuries had been sustained as no relevant evidence had been led. He found that Botha had died of a head injury sustained when he fell which was not due to any offence committed by any person.



This graph, reading chronologically from the bottom, shows the number of people who have died in detention over the last 20 years. Notable features include the cessation of deaths for four years after the outcry which followed the death of Ahmed Timol in 1971; a sharp increase probably associated with the many detentions after the Soweto riots in 1976; and a decrease after the much-publicised death of Steve Biko.

● Steve Bantu Biko died as a result of a brain injury consisting of three main lesion areas. The post-mortem also found slight injuries to the left of the chest wall and to the anterior abdominal wall. There were various skin abrasions between 12 hours and eight days old. There was a cut on the top lip and on the left forehead.

Evidence at the inquest was that Biko was kept naked in his cell while in detention in Port Elizabeth and chained in legirons and handcuffs while in the interrogation room.

Police evidence was that Biko became violent at one interrogation session and had to be subdued by the entire interrogation team. In the scuffle that ensued, Biko hit the back of his head against a wall.

After the incident the police asked the district surgeon to examine Biko. This doctor, Dr Lang, signed a certificate stating that he had found no evidence of "abnormal pathology."

At the inquest Dr Lang admitted he signed this certificate incorrectly as Biko had refused food and water, was weak in all four limbs, had a laceration on his lip, a bruise near his second rib, swollen feet, ankles and hands and slurred speech and could not walk properly. Dr Lang said the police suggested to him that Biko could be shamming.

Biko's condition had deteriorated so it was decided to send him to the prison hospital in Pretoria. Biko was in a state of semi-coma when he was helped into a police Land Rover and was placed naked on cell mats on the vehicle's floor with blankets over him.

Professor Proctor, a leading neurosurgical pathologist testified that at least three blows were needed to inflict the brain injuries.

The magistrate found that no one was criminally responsible for Biko's death.

● **Elmon Malele** died after undergoing two brain operations by a neurosurgeon. Police evidence at the inquest was that Malele fainted while being interrogated and had hit his head against a desk. The magistrate found that his death was not due to any act or omission by anyone.

● **Neil Aggett** was found hanged in his cell. Mrs Helen Suzman, Opposition spokesman on Justice and Civil Rights, told Parliament she had received a letter which alleged Aggett was made to stand naked and do exercises while being beaten with rolled up newspapers by security police interrogators.

The inquest into Aggett's death is still to be completed.

* * *

Of the 50 people who have died in detention, at least seven were under 25. At least five were older than 50 and at least 16 died within four days of being detained.

Although one death did lead to the charging of four police officers, no member of the security police has been convicted in connection with any of the deaths.

DEATHS OF PEOPLE IN DETENTION UNDER SECURITY LAWS

Date	Name	Place	Attributed cause
5.9.63	Solwandle Looksmart Ngudle		Suicide by hanging
Sep 1963	Bellington Mampe	Worcester	No details available
24.1.64	James Tyita		Suicide by hanging
9.9.64	Suliman Saloojee	Johannesburg	Jumped from seventh floor
9.5.65	Ngeni Gaga		Natural causes
9.5.65	Pongolosha Hoye		Natural causes
Aug 1966	James Hamakwayo		Suicide by hanging
9.10.66	Hangula Shonyeka		Suicide (no further details given)
19.11.66	Leong Pin	Leeuwkop Prison	Suicide by hanging
5.1.67	Ah Yan	Silverton	Suicide by hanging
9.9.67	Alpheus Madiba		Suicide by hanging
11.9.68	J B Tubakwa	Pretoria Prison	Suicide by hanging
1968	Unnamed person mentioned in Parliament		No details available
5.2.69	Nicodemus Kgoathe	Pretoria	Slipped in the shower
28.2.69	Solomon Modipane	Pretoria	Slipped on the soap
10.3.69	James Lenkoe	Pretoria	Suicide by hanging
1.6.69	Caleb Mayekiso	Port Elizabeth	Natural causes
16.6.69	Michael Shivute		Suicide. No further details
10.9.69	Jacob Monnakgotla	Pretoria	Natural causes
27.9.69	Imam Abdullah Haron	Maitland	Fell down the stairs
1970	No deaths		
21.1.71	Mthayeni Cuthsela	Umtata	Natural causes
27.10.71	Ahmed Timol	John Vorster Square	Jumped through 10th floor window
1972	No deaths		
1973	No deaths		
1974	No deaths		
1975	No deaths		
19.3.76	Joseph Mdluli	Durban	Fell on a chair
5.8.76	Mapetla Mohapi	East London	Death by hanging
2.9.76	Luke Mazwenbe	Cape Town	Suicide by hanging
25.9.76	Dumisani Mbatha (16)	Modder B Prison	Natural causes
6.10.76	Unnamed	Carletonville Police Cells	No details available, but head injuries
9.10.76	Edward Mzolo	Johannesburg Fort	No details available
14.10.76	William Namodi Tshwane	Modder B Prison	No details available
19.11.76	Ernest Mamashila	Balfour (Natal)	Suicide by hanging
26.11.76	Thalo Mosala	Butterworth	No details available
11.12.76	Wellington Tshazibane	John Vorster Square	Suicide by hanging
15.12.76	George Botha	Port Elizabeth	Jumped six floors down a stairwell
9.1.77	Nanoath Ntshuntsha	Leslie	Suicide by hanging
9.1.77	Lawrence Ndzanga	Johannesburg Fort	Natural causes
20.1.77	Elmon Malele	Johannesburg	Hit head against a desk after fainting
15.2.77	Mathews Mahelane	John Vorster Square	Fell from 10th floor
15.2.77	Iswafifeni Joyi		No details
22.2.77	Samuel Malinga	Pietermaritzburg	Natural causes
26.3.77	Aaron Khoza	Pietermaritzburg	Suicide by hanging
7.7.77	Phakamile Mabija	Kimberley	Jumped through sixth floor window
1.8.77	Elijah Loza	Cape Town	Natural causes (stroke)
3.8.77	Hoosen Haffejee	Durban	Suicide by hanging
13.8.77	Bayempin Mzizi	Durban	Suicide by hanging
12.9.77	Steve Bantu Biko	Pretoria	Hit the back of his head against a wall
16.11.77	Bonaventure Sipho Malaza (18)	Krugersdorp	Suicide by hanging
10.7.78	Lungile Tabalaza	Port Elizabeth	Jumped through fifth floor window
1979	No deaths		
10.9.80	Saul Ndzumu	Umtata	Natural causes
12.11.81	Tshifhiwa Muofhe	Venda	"Found deadin his cell". No further details
5.2.82	Neil Aggett	Johannesburg	Still to be determined

ANNEXURE B

PERIODS OF DETENTION

Persons held under section 6 of the Terrorism Act 83 of 1967 and section 12B of the Internal Security Act are often held for long periods of time. The following examples give some indications of the more lengthy periods of time for which detainees have been held:

1. Benjamin Ramotse
   Detained 16 July 1968 - charged 12 July 1970
   (Race Relations Survey 1970 pp 61-65).

2. Sabelo Stanley Ntwasa
   Detained 3 February 1977 - released December 1978
   (Voice 2 December 1978).

3. Joe Thloloe
   Detained 1 March 1977 - released 1 September 1978
   (Rand Daily Mail 2 September 1978).

4. Mary Masabata Loate
   Detained 17 June 1977 - released February 1979
   (Rand Daily Mail 4 March 1982).

5. Barney Pityana
   Detained 17 August 1977 - released 10 August 1978
   (Cape Argus 10 August 1978).

6. Tembani Phantsi
   Detained 17 October 1975 - released 12 March 1977
   (Daily Dispatch 30 March 1977).

7. Z W Nkondo
   Detained 17 October 1975 - released 5 November 1976
   (Daily Dispatch 23 March 1977)

8. Mapapa George Wauchope
   Detained 17 June 1976 - released 23 March 1977
   (Rand Daily Mail 24 March 1977).

ANNEXURE C

THE MIND IN 'SOLITARY'

Rand Daily Mail

11 February 1982

ESKIMOS never walk alone, because the sheer monotony of their snowy landscapes could unbalance their minds.

That is why human beings should not be kept in solitary confinement, because the monotony, the lack of stimulus, will unbalance them.

And that is why any confession or acknowledgement of guilt made after a period of solitary confinement should be rejected by the courts.

That is the view of Professor Charl Vorster, of the department of psychology at Rand Afrikaans University.

Experiments

"This is not my idiosyncratic viewpoint — it is the finding of numerous well-controlled laboratory experiments around the world," he said in an interview yesterday. "You only have to look at the literature."

That, for purely academic reasons, is what this young professor did. And now he is calling for the outlawing of solitary confinement, and the rejection by the courts of any confession or admission of guilt made after solitary confinement.

"Solitary confinement is a most severe mental torture. It is at the same level as the giving of electric shocks or other physical torture — it is just that it appears more innocent," he said.

Only at the point at which a country was prepared to accept the need for electrical shock treatment or other physical torture for detainees, should it consider whether solitary confinement should be permitted.

And then solitary confinement should be under the supervision of a psychiatrist or psychologist to prevent permanent damage being done to the detainee, and no statement should be accepted unless it has been made after a "cooling off" period, again supervised by a psychiatrist or psychologist.

Why? What does solitary confinement really mean? And why should it be so devastating?

The technical term for solitary confinement is sensory or perceptual deprivation. It means a person is placed in a monotonous environment where nothing changes, where there is no incoming stimuli to break the monotony.

Balance

That environment might be the high seas — and your lone yachtsman will begin to hallucinate. Or the skies, or outer space.

Or it may just be an empty room — it does not have to be a pitch dark, soundproof chamber to disturb the balance of the human mind.

"To maintain a healthy mental balance you have to be in constant interaction with your environment and consciously or unconsciously test your perceptions.

"If you are cut off from the ability or opportunity to test yourself and measure yourself, you become more and more distanced from reality because you have no yardstick," said Prof Vorster.

Any group of people placed

THE death in police custody late last week of Dr Neil Aggett, and the illness of two other detainees, has again thrown the spotlight on the conditions of solitary confinement to which most Section 6 detainees appear to be subjected. LIN MENGE reports on the views of Rand Afrikaans University psychologist Prof Charl Vorster . . .

in a dark room with a single light against one wall will testify to the movement of the light, even when the light has been quite still.

"You are totally dependent on your environment for your perception and your testing of reality."

More than 2 000 investigations, he said, had been undertaken around the world into the concept of "brain-washing", which first surfaced when United States servicemen kept prisoner by the communists in the Korean War made amazing confessions and denounced their country.

These investigations showed the technique of brain-washing centred on solitary confinement.

Laboratory tests involving personality tests, clinical observation and measurement of the brain waves by electro-encephalograph provided

tion deprivation underwent changes.

And the researchers used such terms as "startling" to describe reactions to solitary confinement.

"In just about all these studies it was found that people, sometimes in a matter of hours, started hallucinating," Prof Vorster said.

Reality

"If confinement is kept up the person loses contact with reality, he becomes totally disorientated and he exhibits symptoms you find in a person with psychosis — imbalance of the mind — such as high levels of anxiety, panic, delusions.

"He hallucinates, hears voices. Everything is distorted in terms of distance and height. Walls bulge, the figure of a policeman looms huge . . .

"He might not even be able

Then — and this is most important — a state of depression could follow, making him more susceptible to persuasion and propaganda."

With severe depression could come thoughts of suicide or actual attempts at suicide.

"I hesitate to say this could explain the high figure of suicides among political detainees, but it certainly can't be ruled out that this is a contributing factor," said Prof Vorster.

Even a person who was not considered to be the "suicidal type" could be brought to that state.

"This is a state of severe torture. If you can't escape you get quite desperate," he said.

Solitary confinement could push a person with latent psychosis "over the brink". The sheer isolation of a US base at the South Pole drove one man to full-scale psychosis.

Physical ailments might be aggravated because depressed people suffered physically — they would not eat and they lost weight and became more susceptible to pain.

So there was no need to inflict pain — solitary was torture in itself.

Solitary definitely led to temporary, but not necessarily permanent imbalance of mind, Prof Vorster said.

The vast majority of people would become unbalanced to some extent by

not every single individual, Prof Vorster said.

It would depend on their personality structure and how they handled the situation. People could even be trained to resist the effects to some extent.

Interviews with those American PoWs indicated that people who exercised, or who played mental games, could keep selves together.

It would be interesting to know if people detained under Section Six of the Terrorism Act, and most of whom appeared to undergo solitary confinement, were permitted exercise, Prof Vorster said.

The American PoWs had been expressly forbidden exercise.

Of course the moment any detainee came into contact with someone else, even his interrogator, there was no longer sensory deprivation.

Questions

But the detainee was in contact with others within a certain frame of reference only — there were the same kind of questions, over and over again, and perhaps the same questioner.

"And because those stimuli are the only ones to which he is exposed, their impact is so much stronger."

Detainees would not be helped by the Rand Daily Mail's suggestion that relatives observe the detainees through a glass panel — the detainees needed to interact

"Why can't they talk with their relatives? There can't be any security risk. I suspect it is purely for the purpose of stimulus deprivation."

From a psychological point of view admissions made by people who had undergone solitary confinement were worthless and should be rejected because the people who made them were not in a sound frame of mind.

No court would accept a statement made under the influence of alcohol. Solitary was so much worse.