COMMENT

Detention and Torture Without Trial: Section 29 of the Internal Security Act

Mohamed Yusuf Cassim*

INTRODUCTION

South Africa is a relatively sophisticated, fast developing young state, facing the twin problems of a modern industrial revolution, and of the search for a just and practical *modus vivendi* for the various groups of people who make up her population. These problems are sharpened and complicated by the fact that virtually the entire world has become concerned about what happens in Southern Africa. The general thrust of world opinion has become increasingly critical of the policies presently pursued by the South African government and impatient for the changes which it sees as imperative and inevitable. The pace of change in the world, especially in the "dark continent" of Africa, has so quickened over the past few decades that, while at one level white South Africa appeared to have time on her side, it is now clear that under prevailing circumstances time is a precious and rapidly diminishing commodity. Moreover, in this day, the problems of South Africa are unique. There is no easy answer for the South African situation—no ready blue print for success. No country in contemporary history has been confronted with quite the same situation. The road that lies ahead is a difficult and complex one, a mystery just like the African continent once was to the "civilized world."

The trend of liberating Africa[1] clearly suggests that the hegemony of whites will not last indefinitely. In the foreseeable future, radical changes are likely to take place in the social and political structures of South Africa. Majority rule is the only logical alternative and it is inevitable.

Individual freedoms and basic human rights have been severely curtailed in contemporary South Africa. This is particularly apparent in areas such as: the freedom of movement, speech, and association; the right to opportunity; freedom of assembly and the right to be free from arbitrary detention or arrest.[2] This paper will concentrate on one major aspect of these curtailments,

---

* Presently a candidate to receive a Juris Doctorate degree in May 1989 from the University of California, Los Angeles. J.S.M. Stanford Law School 1984, L.L.B. University of Natal 1982; B.A. University of Witwatersrand 1980. Member, Attorney's Bar, South Africa.

1. Modern examples of former colonies becoming independent include Mozambique in 1974, Angola in 1974, and Zimbabwe in 1981.

2. Recent South African trends in labor suggest that in the area of freedom of association, positive developments are taking place. Such progress is welcomed and it is hoped that such action will spread to the other areas of individual rights. However, it is the opinion of this author that one should not be too optimistic of any such development in the near future. This article attempts to suggest reasons for this submission.

"detention without trial" and the use of torture or "cruel and unusual punishment."

The doctrine of human rights has many pitfalls and every theory based upon its basic assumption is probably open to destructive critique. Nevertheless, the underlying idea it attempts to convey is a praiseworthy one and should be taken seriously by all governments of the world. The general principle involved can be reduced to a sacred concern for the intrinsic value of human life and an unconditional insistence upon the appraisal of every human being according to his/her individual merit. The thrust of human rights ideas is specially addressed to people in authority, especially to governments that are capable of exploiting the basic human attributes of their subjects, reducing the status of its subjects to a condition of slavery. The major premise of the idea of human rights is to protect a small territory of individual rights, freedoms and competencies of the subordinate of the state against governmental encroachments in order to preserve the dignity and worth of the individual within a political society. Governments that breach the tenets of human rights ideals and disregard the basic essence of human dignity risk their own survival. Harold J. Laski aptly warned against such arbitrary behavior:

> For men, in fact, will not obey law which goes counter to what they regard as fundamental. Their notion of what is fundamental may be wrong, or unwise, or limited; but it is their notion, and they do not feel free unless they can act by their own moral certainties. It is useless to tell them that an assumption on their part that they are entitled to forgo obedience will result in anarchy. Every generation contains examples of men who, in the context of ultimate experience, deliberately decide that an anarchy in which they seek to maintain some principle is preferable to an order in which that principle must be surrendered.[3]

Discontent on the part of an oppressed people can be inhibited to a large extent, by the repository of the coercive means of compulsion within a particular political community. South Africa has reached the point where government actions have lost track of a sense of justice. The government since 1948 has ceased to function with the inspiration of what is right and just. It has introduced extensive executive powers in order to cope with the threat of unrest increased by a general feeling of discontent. The power conferred upon the executive branch of government in state security matters can in fact be described as arbitrary.

Executive powers are by definition arbitrary if officials are not subject to any legal restrictions or judicial control. When executive authorities are entirely free to exercise their administrative discretions according to the dictates of their own subjective whims and fancies, such power amounts to governmental lawlessness, which constitutes the worst form of anarchy.[4]

In light of the political and legal system that exist in South Africa, it is a gross violator of human rights. The United States government report on human rights described the situation in South Africa as follows:

> South Africa's fundamental human rights situation did not change in 1983. There remained no effective judicial remedy against the denationalization of blacks in independent tribal homelands or against forced resettlements. Indefinite detention without charge or access to attorney and other judicial

3. H. LASKI, LIBERTY IN THE MODERN STATE 67-68 (1949).
4. J. VAN DER VYFER, SEVEN LECTURES ON HUMAN RIGHTS 51 (1976).

> acts without due process, such as bannings, continue. The 83.3 percent of South Africa's population which is not part of the white minority, suffers from pervasive discrimination which severely limits political, economic, and social life.[5]

Drastic reform will be needed to bring South Africa's political and legal system in conformity with international rights standards. Human rights will continue to be a thorny issue in the South African context. What makes South Africa particularly unique from other countries is that she is a gross violator of human rights. It remains to be seen whether South Africa will continue to be so in the post-revolutionary state, where the new government will have to enact measures for survival.[6] Will she follow the trends of Mozambique and Zimbabwe?

Part I of this article will discuss section 29 of the Internal Security Act.[7] Part II will analyze the recommendations of the Rabie Commission.[8] Part III will propose a partial solution to the present position. Finally, this paper concludes that the South African government will remain a major violator of human rights and a potential threat to international peace; that section 29 of the Internal Security Act is routinely invoked by the South African government to silence political opposition to its legitimacy. The Rabie Commission dismally failed to recommend meaningful changes to the laws governing detention without trial and the safeguards proposed by that Commission are inadequate.

PART I

Van der Vyfer defines the basis of the idea of human rights in the following terms:

> The idea of human rights simply portrays an endeavor to preserve as great a field of individual freedom within a political society as peace and security permit, and to secure respect by the government of a state for this private enclave of individual freedom by defining and entrenching, by means of legal restrictions, those rights and competencies of every individual that cannot be abridged by the depository of state authority, either at all or unless certain specified circumstances are present.[9]

Two categories of human rights emerge from this definition, procedural human rights and substantive human rights. The former consist essentially of rules of procedure and evidence designed to ensure that the individual enjoys a system of administration of justice which is impartial and fair, and to which access is open. In essence, substantive human rights are: right to private ownership of property and to freedom of contract and testation; right of personality, such as a right to a good name and reputation; the right to enforce legal

5. N.Y. Times, February 11, 1984, col. 58, p. 45.

6. *Human Rights Violations in Zimbabwe*, N.Y. Times, February 11. 1984, col. 58, p.40.

7. Internal Security Act 74, (S. Afr. 1982).

8. On August 29, 1979 a commission was appointed to examine the necessity, adequacy, fairness and efficacy of legislation relating to the protection of internal security under the chairmanship of Chief Justice P.J. Rabie. The other members of the commission were Justices Coetzee (Director-General of the Department of Justice), S. W. McCreath, Professor C. F. Niewwoudt (Dean of the Faculty of Economics and Political Science at the University of Pretoria), Professor P. Oosthuizen (Professor of Law-University of Pretoria) and S. W. Van der Merwe (a prominent Johannesburg attorney). This commission was referred to as the Rabie Commission.

9. Van der Vyfer, *supra* note 4, at 57.

obligations owing to one by another party; the right to freedom of speech; the right of free movement; the right to a family life; rights of freedom of religion and freedom of association. Presently the trend is to incorporate economic rights into human rights. These economic rights include the right to work and to have a free choice of employment, the right to a just renumeration, the right to form trade unions, and the right to reasonable working hours and to holidays.

This paper will focus primarily on procedural human rights. The idea of incorporating principles of procedure into the concept of human rights dates as far back as the thirteenth century. The original document which contained procedural human rights was the Magna Carta of 1215 in which King John undertook to serve a fair trial in the following terms:

> No freeman shall be taken, or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor we will not pass upon him nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.[10]

The American Bill of Rights[11] was enacted to limit the powers of the Federal Government and guarantee individual rights.[12] The Fourteenth Amendment was later enacted to ensure the equal rights for newly freed Blacks after the Civil War, and to prohibit the states from "depriving any person of life, liberty, or property without due process of the law." [13]

Although the notion of incorporating procedural human rights in constitutional documents outlining fundamental rights and freedoms did not originate from the United States Constitution, the contribution of America towards recognizing the importance of insisting upon humanitarian and equitable procedures in the area of the administration of justice must be recognized. In the case of *Malinsky v. New York*[14] Justice Frankfurter succinctly describes the American position: "The history of American freedom, is in no small measure, the history of procedure."

This paper will primarily focus on procedural human rights and in doing so will analyze section 29 of the Internal Security Act.[15] It will show that

10. *Id.* at 83.

11. U.S. Const. Amend. I-X.

12. *E.g.,* the fourth amendment safeguards the people against unreasonable searches and seizures; the fifth amendment stipulates that no person shall be subjected to double jeopardy for the same offense or compelled to be a witness against himself in a criminal case; that no one shall be deprived of life, liberty or property without the due process of law; the sixth amendment guarantees a speedy and public trial by an impartial jury, and confers a right upon all accused to be informed of the nature and cause of the accusations against them and to be represented in a criminal trial by counsel; the eighth amendment prohibits excessive bail and fines, and cruel and unusual punishment.

13. U.S. Const. Amend. XIV. S 1.

14. 324 U.S. 401, 404 (1945).

15. The contents of procedural human rights has been categorized by Van der Vyfer as follows:

1. No one can be arrested, detained, or exiled, arbitrarily, and every person arrested must be informed promptly of the charges against him and must be brought before a court within a reasonable time.
2. A person's right to life, liberty and property, cannot be infringed without due process of law.
3. An accused is to be presumed innocent until he is proven guilty.
4. A person cannot be charged for the same offense more than once.
5. Every person who stands to lose something on account of any state action is entitled to legal representation.

section 29 of the Act violates nearly every major aspect of procedural human rights as defined by Van der Vyfer.[16]

The South African Experience: Section 29 of the Internal Security Act.

Section 29 of the Internal Security Act, implemented in 1982 grants broad discretion to South African authorities to make warrantless arrests and detain persons for interrogation who are suspected of terrorist activity.[17] Section 29 of the Internal Security Act re-enacts section 6 of the Terrorism Act 83 of 1967 subject to the modifications recommended by the Rabie Commission.[18] Since their implementation, the security laws of South Africa have been a source of fear, suspicion and controversy. As of 1982, 56 people have died in detention while being held under section 6 of the Terrorism Act 83 of 1967.[19]

---

6. Every person who stands to lose something on account of any state action must be provided an opportunity to state his case.
7. No one can be compelled to be a witness against his own interests.
8. The judiciary must function independently and must act impartially.
9. Newly acted crimes and increased penalties cannot come into force retroactively.
10. Cruel and unusual punishment shall be obsolete.

Van der vyfer, *supra* note 4, at 88-89.

16. *Id.*

17. Internal Security Act 74, (1982). The Internal Security Act serves two purposes. First, it consolidates existing security laws and brings under one statutory umbrella laws such as the Internal Security Act 44 of 1950, the Criminal Law Amendment Act 80 of 1953, the Riotous Assembly Act 17 of 1956, Section 21 of the General Law Amendment Act 76 of 1962 and the Terrorism Act 83 of 1976. Second, the Internal Security Act recognizes the recommendations of the report of the Rabie Commission.

Section 29 in pertinent part provides:

Detention of certain persons for interrogation—

(1) Notwithstanding anything to the contrary in any law or the common law . . . any commissioned officer above the rank of Lieutenant-Colonel may, if he has reason to believe that any person who happens to be any place in the Republic

(a) has committed or intends to commit an offense which is related to a terroristic activity, or

(b) is withholding from the South African Police any information relating to the commission of an offense referred to in paragraph (a) or relating to an intended commission of such an offense or relating to any person who has committed or who intends to commit such an offense, without warrant arrest such a person or cause him to be arrested and detain such a person or cause such a person to be detained for interrogation in accordance with such direction as the commissioner may, subject to the direction of the Minister, from time to time issue, until the said person has satisfactorily replied to all the questions of the said interrogation, or that no useful purpose will be served by his further detention or until his release is ordered by the Minister.

Section 2(a). The commissioned officer referred to in sub-section (1) shall as soon as possible after arrest in terms of that sub-section notify the Commissioner of Police thereof and the Commissioner shall as soon as possible after having been so notified advise the Minister thereof. In addition;

(i) once a month furnish the Minister with reasons why the said person should not be released, and

(ii) if the said person has at the expiration of a period of six months as from the date of arrest not yet been released from detention in terms of this section and thereafter at intervals of not less than three months while such a person is so in detention, in person or through a commissioned officer, designated by him for that purpose, adduce reasons before a board of review as to why the said person should not be released.

18. *Id.*

19. Dugard, *A Triumph For Executive Power—An Examination of the Rabie Report and the Internal Security Act 74 of 1983*, 199 S. AFR. L.J., 590 (1982). The Rabie Commission Report recommended the adoption of legislation to regulate internal security, provide for the protection of information, prohibit intimidation and outlaw demonstrations in or near court buildings. Draft legislation

Subsection 6 of the Internal Security Act excludes the courts from exercising any jurisdiction. Therefore no court of law can pronounce upon the validity of any action taken under section 29 of the Act or order the release of any person so detained in terms of the provisions of this section. The only safeguards for such a detainee are to be found in sections 7 and 9 of the Internal Security Act. Section 7 provides that no person other than the Minister or any person acting under his authority, in the service of the state, shall have access to any detainee, or shall be entitled to any official information relating to or obtained from such a person. Section 9 assures that in addition to any visits under this Act by an Inspector of Detainees, such a detainee will also be visited in private once every fortnight by a Magistrate and by a district surgeon, who is in the employment of the state.

Terrorism is defined broadly under the Act so that it brings virtually every criminal within its statutory scope. The task of interpreting the provisions which define the crime of terrorism is fraught with difficulty.[20]

The Rabie Commission noted that detention for the purpose of interrogation under section 6 of the Terrorism Act 83 of 1967 although a drastic measure, is justified as being the only means at the disposal of the police for protecting internal security. The recommendations of the Commission lead to the enactment of Section 29 of the present Internal Security Act. Section 29 is substantially the same as section 6 of the Terrorism Act and section 10(6) of the Internal Security Act 44 of 1950. Therefore the Terrorism Act and the case law which developed from it, will still serve as an important guideline in the interpretation of the Internal Security Act.

Generally, a detainee has no right of access to the courts, or to see his legal advisor or any other visitors including his family. The family of the detainee has no access to any information pertaining to the detainee.

Section 29 of the Internal Security Act does not prescribe any time limits for the detention of detainees (except for those stipulated in section 2(9) of the Act). Incommunicado pre-trial detention for the purpose of interrogation has become a regular feature of investigators into political offenses. Most of the accused persons and the state witnesses who have appeared in recent political trials have undergone lengthy periods of detention under the said Act, before being brought to trial.

The Internal Security Act is a permanent feature of the South African legal system[21] and its drastic nature justifies a return to the *in favourem libertatus* rule of interpretation. This submission is unlikely to gain any sup-

for these matters were included in the Report. In 1982 these recommendations were translated into the Internal Security Act of 1982, the Protections of Information Act of 1982, the Intimidation Act of 1982 and the Demonstration in or near Court Buildings Prohibitions Act of 1982.

The author is unable to provide updated statistics regarding deaths in detention from 1983 to date since such information was not published by the Institute of Race Relations, which is the primary source for such statistics within South Africa.

20. *See e.g.* A.S. Mathews, *The Terrors of Terrorism*, 91 S. Afr. L.J. 381 (1974).

21. The present structure of superior courts in South Africa was initiated in 1910. The Appellate division was created to exercise appellate jurisdiction to hear appeals from the various provincial divisions of the Supreme Court of South Africa. The appellate division is situated in Bloemfontein, the capital of Orange Free State. The appellate division does not exercise original jurisdiction. Besides the appellate division of the Supreme Court, there are other divisions of the Supreme Court, corresponding roughly to the provincial units that existed when the country was under colonial rule. Each provincial division of the Supreme Court exercises original or inherent jurisdiction. In addition

port, when compared to the interpretation that section 6 of the Terrorism Act has received from the courts.

In the unreported case of *Shitunwete v. Commissioner of Police*,[22] The Applicant was detained under section 6 of the Terrorism Act. He smuggled a note to some friends who were appearing in another trial, alleging that he was being unlawfully interrogated. An application was made for an order restraining the police from using third degree methods of interrogation.[23] Justice Rabie held that the courts have no power to grant an interim restraining order, prohibiting the police from using third degree methods of interrogation against a detainee held under section 6 of the Terrorism Act, as interrogation was specifically provided for by the provisions of the said act.

The judicial philosophy enunciated in *Shitunwete*, had a profound influence on the provincial divisions, in which a number of courts declined to interpret the detention laws in favor of individual liberty. In 1976 however, Justice Didcott of the Natal Supreme Court in the case of *Nxasana v. Minister of Justice*,[24] departed from those precedents in approving an interpretation of section 6 of the Terrorism Act which provided some relief and comfort, however minimal, to the family of a detainee. In this case the wife of the detainee had received a report that her husband had been killed or seriously injured in detention. Alarmed at the recent death of another person in detention, she brought an application seeking an order directing that a Magistrate visit her husband and obtain an affidavit from him relating to his health. The application was opposed by the Minister of Justice. Justice Didcott conceded that the court had no authority to order the detainee to appear in court to testify on his own behalf as a result of the decision in the case of *Schermbrucker v. Klindt*.[25] Relying on the approach to society's right to testimony adopted by Justice Rumpff, in his dissenting opinion in *Schermbrucker*, Justice Didcott held that the court was competent to direct the Chief Magistrate to interview the detainee and to obtain from him replies to a number of questions drawn up by the court with a view to ascertaining what the detainee had to say about his health and well-being and about the cause of any damage to either.

This is an important decision, both for the small relief it provides and for the method of interpretation employed. In essence this judgment illustrates how purposeful interpretation in favor of the individual can achieve an equitable solution within a framework of permissible statutory interpretation. Justice Didcott declared his approach towards interpretation in the following terms:

> Our courts are constitutionally powerless to legislate or to veto legislation. They can only interpret it and then implement it in accordance with their interpretation of it. When there is a real doubt about the meaning of a stat-

to the supreme court system there exist in each province an inferior court system known as the magistrate courts.

22. C. Nicholson, A Collection of cases and materials on detention (private collection, not published).In preparing this paper, I spoke to Chris Nicholson of the Legal Resources Center, Durban, South Africa. Through him I obtained a report which had a collection of unreported cases and materials on detention. Mr. Nicholson generously consented to my using this report for the purpose of writing this paper. To him, my thanks.

23. Third degree methods of interrogation include both physical and psychological custodial torture.

24. 1976(3) SA 745.

25. 1971(4) SA 741.

> ute, their tradition is to construe it so that it provides for the least amount of interference with the liberty of the individual that is compatible with the language used. The tradition has been observed for so long and has permeated so many fields of law, that it is unnecessary to cite authority for its acceptance. It is familiar to all lawyers. Its justification is the judicial assumption, deeply rooted in our legal heritage, that Parliament contemplated no greater infringement of personal freedom than is clearly and unmistakably apparent from the language in which it has expressed itself. Effect is then given to what is taken to have been Parliaments intention to limit the area of constraint to the minimum.[26]

Unfortunately, in the cases that followed *Nxasana*, too little attention has been paid to Justice Didcott's analysis.

Section 29 of the Act has become an important and integral part of the South Africa security system and will be put to use frequently.[27] Since 1963, 48 people have died in detention under suspicious circumstances.[28] There is incontrovertible evidence that some of the detainee's have been physically assaulted and others mentally tortured. From the Act's language it is obvious that the purpose for interrogating detainee's is two fold: (a) to extract information, and (b) to reinterpret the detainee's reality.[29]

Despite the fact that it is the Internal Security Act which sanctions the detention of persons, it remains the function of the courts to evaluate the evidence emanating from the various people so detained. In South Africa the accusatorial or adversary system exists for the administration of criminal justice. Under that system, it is expected that both the pre-trial and trial procedures are characterized by an equal and open confrontation between the accuser and the accused while the judicial officer acts as an umpire who ensures that the rules are observed. Dugard is of the view that the South Africa lawyers see the inquisitorial system as an evil product of the continental mind in which the accused is incarcerated and tortured while he confesses to a sinister state official and is then brought to trial where he is presumed guilty until he establishes his innocence.[30]

Section 29 of the Act creates an atmosphere which prevails under an inquisitorial system and is contrary to the adversarial system which supposedly exists in South Africa. Mathews correctly submits that the indefinite detention provisions of the Terrorism Act (now also the Internal Security Act) undermine the adversary system of justice by making the trial a kind of appeal from the pre-trial interrogation.[31]

Section 29 of the Act constitutes a radical inroad into the accusatorial nature of the South Africa criminal procedure, because it provides for a pretrial conducted by a team of police interrogators, who usually extract a confession from the detainee. When the detainee is finally brought to trial the "real" trial is over. The accused may either be confronted with his own admission or confession or the testimony of a co-detainee who has turned into a state witness and will testify against his former colleagues in order to obtain indemnity

26. *Nxasama, supra* note 24.

27. As recently as 1985 with the implementation of the State of Emergency, the South African government has repeatedly used s 29 of ISA to detain political activists.

28. *See* Dugard, *supra* note 19.

29. *See infra*, notes 65-81 and accompanying text.

30. DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER(1978).

31. *See e.g.*, A. MATHEWS, LAW, ORDER AND LIBERTY 188 (1971).

against a solitary confinement, or a further period of prolonged detention, or being imprisoned for a long time as a recalcitrant witness.

Sometimes witnesses concede that they were pressured into giving evidence by third-degree methods of interrogation. Sometimes they deny it. In the latter example, however, one suspects that the witness will be inclined to suppress such memories in his eagerness to obtain indemnity. Convictions obtained on the evidence of such witnesses held under such circumstances leaves one with a feeling of uneasiness. The source of this uneasiness is found in the feeling that the contrast between the morality professed by society and the morality practiced on its behalf makes for contempt of court.[32]

By contrast, the United States Supreme Court in *Miranda v. Arizona* declared:

> It is obvious that such interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our nations most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion in custodial surroundings, *no statement obtained from the defendant can truly be the product of his own choice.*[33]

In the case of *State v. Ismail*,[34] the failure to show that it was not the fear of further detention that induced an accused to make a confession resulted in such a confession being held inadmissible.[35] This question was left open in the case of *State v. Alexander*.[36] The court in the case of *State v. Hassim*,[37] in passing stated that evidence from detainee's should be subjected to close scrutiny. Finally, the recent case of *State v. Christie*,[38] in which Justice Rabie concurred, followed the same line as *Hassim*. These cases do not say "why" such evidence should be treated with great circumspection. The answer is obvious, indefinite detention in solitary confinement is in itself and without more an awesome form of pressure inducing the detainees to confess or to speak.

There is considerable evidence, some given under oath, of the methods of interrogation used. It is implicit from the statement of Lieutenant General Johan Coetzee, Chief of Security Police, who said that torture is employed on detainees in order to extract information from them.[39] He stated that the security police detain people in order to obtain vital information from them not necessarily to bring them before a court of law. He continued, "our intention is not to try criminals, but to obtain information that can be used for highly confidential, operational, diplomatic, and other activities."[40]

32. A. BARTH, LAW ENFORCEMENT V. THE LAW 107 (1954).
33. 384 U.S. at 457-58 (1966) (emphasis added).
34. 1965(1) SA 446 (Natal Prov. Div.).
35. *See also* section 217 of the Criminal Procedure Act 51, (1977) under which confessions were only admissible if they were freely and voluntarily made without the person having been unduly influenced therein.
36. 1965(2) SA 796 (App. Div.).
37. 1973(3) SA 443, 454 (App. Div.)
38. 1982(1) SA 464, 485 (App. Div.).
39. Natal Mercury, May 6, 1982 at 7.
40. *Id.*

In the case of *State v. Mogale*,[41] the Transvaal Provincial Division, set aside the conviction of the accused, holding that the confession which the accused made was inadmissible because it was made after the accused was severely assaulted by a policeman to the extent that he lost all his teeth. This case illustrates that physical assault is exercised on detainees in order to extract information from them. The forms of physical assaults vary from brutal fist assaults to sophisticated electric shocks.[42] The defendant in *Christie* was subjected to degrading and humiliating treatment. He was interrogated in a state of nakedness, being abused with foul language.[43] In *Gosschalk v. Rossouw*, the detainee was continuously kept awake by loud noises or by being jolted.[44]

The object of such treatment is to humiliate the detainee and to make him aware that he is at the mercy of his interrogators. In addition to such physical torture, detainees are subjected to psychological coercion. The joint result of the two forms of torture is the following: The detainee now begins to believe what he is told and confesses in order to reduce the pressure that is exerted upon him.

These circumstances raise the possibility that the Security Police induce in the detainee a state of mind which make him: (a) readily agree with the suggestions put to him while under interrogation thereby departing from the truth, or (b) voluntarily depart from the truth in order to ingratiate himself with the police, or (c) unwillingly depart from the sworn statement which he has given to the police for fear that this may lead to a prosecution for perjury.

The likelihood that such circumstances will occur imposes a duty upon the courts to reject the admissions and confessions of detainees as evidence. Excluding such confessions in total, will automatically discourage the police from employing bad interrogation methods. Further it would not be in accordance with justice to convict an accused person on the basis of statements obtained from them by improper means.

Detention under section 29 also constitutes psychological torture. Doctor West, the famous American psychologist, developed his Debility, Dependency, Dread (DDD) paradigm on the subject of psychological torture.[45] This paradigm theory originated in the American case of *Bradford v. Johnson*.[46] Dr. West's evidence was restricted to American prisoners of war in Korea. Detainees in South Africa experience similar conditions to that of the American detainee during the Korean War, therefore there is no reason why the Korean experience should not be applicable to detainees under section 29 of the Act. Dr. West himself is of the view that detention under section 29, permitting individuals to be held for indefinite periods of time and to be subjected to severe interrogation—until the interrogators were satisfied—is similar to the American experience in Korea.[47]

DDD is defined as follows:

(1) Debility: is induced by semi-starvation combined with lack of sleep

41. 1981 unreported judgment.
42. *Id.*
43. *Christie supra* note 38.
44. 1966(2) SA 476, 481 (Cape Prov. Div.)
45. *See* Nicholson, *supra* note 22.
46. 354 F.Supp. 1331 (E.D. Mich. 1972).
47. Nicholson, *supra* note 22.

and unhygenic facilities; the result of which is physical pain, loss of energy and subsequent inability to resist any minor abuse.
(2) Dependency: where the detainee becomes totally dependent on his interrogators, especially under circumstances of food and sleep deprivation and prolonged isolation.
(3) Dread: the types of anxiety, fear, apprehension, and concerns varying from worry to terror employed in the process of ensuring compliance of behavior.[48]

Under DDD it is possible to get detainees to say anything. Evidence extracted under such circumstances is tainted. The effects of DDD are the following:

(i) DDD may produce new responses which actively interfere with wanted behavior and produces:
(a) reduced or monotonous stimulation associated with solation and confinement; or
(b) reduced energy.
(ii) Biological relations which makes it possible for people to distort or misremember or even completely forget things that were associated with trauma at the time they were experienced.[49]

Dr. West gives the example of Cardinale Menzente, who, when he was shown the notebook of his interrogation, was able to trace back the point at which he began to accept things as being true to appease his captors, even though in one part of his mind he knew that they were not true.[50]

(iii) DDD affects one's habitual ways of looking at and dealing with oneself by disorganizing the perception of those experimental continuities constituting the self-concept and impoverishing the basis for self-consistency.
(iv) The impoverishment of thinking may increase susceptibility to arbitrary and violent training procedures leading to relatively automatic and uncritical imitative responses.

Resistance under conditions of DDD is minimal and may vanish completely over a long period of time. A case in point is Cardinal Menzente, his resistance vanished over a period of only 35 days. If any form of resistance is displayed, the intensity of DDD is increased until one's resistance lowers. Therefore, a form of indefinite resistance is not possible.

Detainees under section 29 of the Act are subjected to extreme coercive persuasion. Under circumstances of DDD, Dr. West is of the opinion that it is possible to get people to say anything, sometimes without the captor deliberately construing to make the prisoner tell a lie, especially if the captive thinks he knows the truth.[51]

Sometimes after this process, the detainee is unable to distinguish between what is true and what is not, all the detainee is aware of is that he is trying to oblige the interrogator and keeps repeating himself. Dr. West concludes that such evidence is all tainted in that one would never know the difference between the truth and falsehood and should be viewed with a jaundice eye.[52]

The DDD paradigm is extensively used by the security police. In the

48. *Id.*
49. *Id.*
50. *Id.* at 238.
51. *Id.*
52. *Id.*

case of *State v. Azania Ndbelle*,[53] the accused was charged with the offense of recruiting people for military training with the African National Congress. The court relied on the testimony of William Zondi, a detainee under section 6 of the Terrorism Act, to charge Ndbelle. Ndbelle had recruited Zondi for Trade Union training. After a prolonged period of detention, Zondi substituted military training for trade union training believing that that is what the security police wanted him to say.[54]

The witnesses in this trial were all informed by Colonel Dreyer that they would be held in detention until they replied to all questions in a satisfactory manner and until they served no useful purpose while detained. From the evidence in this trial, it is evident that the police did apply a system of "coercive persuasion."

During cross-examination, Colonel Dreyer characterized the African National Congress as a Communist movement and asserted that South Africa was at war with it. The security branch also believed that the detainees were terrorists or had information relating to terrorists. Colonel Dreyer authorized objectives of the special branch (security police); they are primarily interested in the information secured by interrogating detainees under section 6 to prevent the security of the country from being endangered. A considerable body of police witnesses conceded that if circumstances warranted, they would subject detainees to prolonged periods of interrogation to secure information.[55]

The circumstances of this case lead Dr. West to conclude that section 6 of the Terrorism Act (now section 29 of the Internal Security Act), which permits the detention of persons for an indefinite period in a state of isolation and subjected to intense periods of interrogation, is very much like the DDD paradigm.[56]

In its judgment the court said:

> In the light of all the evidence, [it is not relevant] whether the security police employed a set pattern or system of investigation calculated to reduce detainees to a state of debility, dependency and dread; *whether they did so for the purpose of inducing potential witnesses to make false statements* and whether there is any factual basis for drawing an inference that apparently truthful and unbiased witnesses have not only given false evidence against the accused but also falsely denied that any ill-treatment or undue influence led him to do so.[57]

Under such circumstances, witnesses could make statements which even those who extracted them may believe to be true yet it may all be false.

Not surprisingly the court then held that this case hardly adds up to a set pattern or system designed to produce the DDD syndrome and induce detainees to make false statements. This holding is incorrect since not only is it apparent that the detainees were subject to cruel and unusual punishment (i.e., the solitary confinement itself is sufficient to establish this) there was sufficient evidence to show that the police gave false information to the detainees in order to induce the detainee to comply with the viewpoint of the interrogators.

Despite the court holding that the DDD paradigm was not employed by

53. *Id.* (unreported case).
54. *Id.*
55. *Id.*, at 260.
56. *Id.*
57. *Id.* at 524 (emphasis added).

the security police, the security police use this syndrome in their daily contact with detainees under the Internal Security Act. What follows is a description of the common methods which the security police utilize when interrogating detainees discussed with reference to the general principles of the DDD paradigm.

Isolation

Isolation is the key to the DDD system.[58] All detainees are subjected to isolation which takes the form of either complete physical isolation or solitary confinement. Isolation deprives the detainee of any social support making him dependent on his interrogation. Isolation further produces:

(a) regression, resulting from the prisoner's complete dependence on his captors;
(b) mental constriction characterized by a great preoccupation with bodily functions and a narrowing of his immediate surroundings;[59]
(c) identification with aggressor which is an unconscious adjustment to the intolerable sensation of being powerless in a frightening situation.[60]

To overcome his sense of complete incompetence the detainee tries to share in his captor's power by associating with him, seeking his approval and eventually adopting his ideas and views.

The following conditions are conducive to producing the DDD syndrome:

(a) the person must be held in solitary confinement;
(b) for more than a few days;
(c) the ultimate duration of the confinement must be uncertain;
(d) there must be total dependence on the captor; and
(e) there is no significant contact with the outside world for support.[61]

This is the exact situation the section 29 detainee experiences. What follows is an examination of cases that depict the impact of the DDD paradigm on Section 29 detainees. On the subject of isolation, detainee Lawrence Kuny's ordeal reflected the following:

> It (isolation) was beating him down and he was losing his sense of reality; he was becoming paranoid and stupid, he used to count the bricks on the cell wall, and if the number ended in an odd figure, he would be killed . . . he then developed his imagination and acted out plays working out different plots for a book and tried to remember some of the speeches from Shakespeare and so forth . . .; the cell would become very big and he would be there lying on his mat, growing in size, crying continuously, crying with a sense of hopelessness and finally got to the stage where he began planning his suicide . . .[62]

There is sufficient medical evidence to illustrate that the short-term and long-term detention effects of solitary confinement is more damaging to one's health than many extreme forms of physical abuse. The South African case is an aggravated one in which psychological torture is always accompanied by physical torture.[63]

58. Nicholson, *supra*, note 22.
59. *See e.g., infra* note 62 and accompanying text. (repeatedly counting objects in the cell).
60. Nicholson, *supra* note 22, at 297.
61. *Id.*
62. *Id.*
63. *See generally, Christie, supra* note 38.

Joseph Mduli[64] a detainee under section 6, died during the course of interrogation. Dr. Straaten, the district surgeon who conducted the post mortem, noted that the death was chiefly caused through the application of force to the detainees neck; abrasions were found over both cheek bones, the left elbow, the right upper thigh, the right shin and the right and left ankles. There was extensive deep bruising of the left frontal, the left temporal, as well as subconjunctual hemorrhaging in both eyes. The neck was severely bruised.

In *Gumede's case*,[65] the police tied a brick to Gumede's testicles with a string and told him that they would continue with the treatment until he agreed to make the statement they wanted him to make.

In *Phaswana's case*, the Reverend was so badly assaulted, suffocated, and electrically shocked, that he falsely "confessed" to crimes he had not committed.[66] During the course of the investigation, one Isaack Muothe died during interrogation.

Prisoner detainee, *Knuzwayo*, who earlier had refused to speak about a certain person called Osborne Mthunywa, had his buttocks suspended in the air and had to stretch his hand forward and flick his fingers at a fairly rapid speed.[67] This was maintained until Knuzwayo was hot, exhausted, and his thighs felt weak; his body collapsed through exhaustion. All this time he was being asked where Osborne Mthunywa was.

Another common form of enforced suspension is the method, notoriously referred to as the "helicopter," in which the detainee is handcuffed at the wrists and at the ankles and while in a crouching position, a pole is inserted through the detainee's legs and arms. He is then suspended on the pole between a table and a chair, sometimes for hours on end, while being subjected to a barrage of questions and sometimes blows. This suspension causes acute and excruciating pain which destroys any tolerance that is displayed.

Degradation

For Nxasana, detention hurt his pride, belittled him, and deprived him of self-respect. The denial of toilet facilities, apart from physical comfort, had a humiliating effect, especially when the detainee is no longer able to control himself, and is then compelled to clean up the room. Verbal abuse and ridicule has been reported in several cases,[68] sometimes combined with enforced self-abuse of a personal or racial nature. Washing facilities are denied and detainees virtually forced to scrub the interrogation room.

Debility and Exhaustion

Deprivation of sleep is a common feature; detainees are usually not allowed to sleep for periods of many days and nights.[69] Nxasana said that he suffered from lack of sleep while in detention which made him feel physically and mentally tired. This is a common symptom of prolonged sleep

64. *See*, Nicholson, *supra* note 22.
65. *Id.* at 280.
66. *Id.*
67. *Id.* at 284.
68. Rand Daily Mail, August 11, 1982, 5.
69. *See e.g. Christie supra* note 38, *supra* note 44.

deprivation.[70]

On the subject of prolonged interrogation Colonel Dreyer said the following:

> Depending on the urgency of the situation, the security branch does not spare themselves nor do they spare the detainee, and will take any period of time to interrogate the detainee in order to gain information. The reason for having persons relieving each other while interrogating detainees is fourfold; first, each interrogator has a different approach. Second, one will get a friendly interrogator and a harsh interrogator, and it may be that the detainee will respond either to the harsh or friendly interrogator. Third, in order to stop frustration which might occur with one interrogator, in that the detainee feels refreshed by the change. Fourth, the interrogator is available for other duties.[71]

Dependency

Demonstrating Omnipotence and Omniscience

Nxasana said that from the manner the security police spoke to him, they seem to know everything about him. Colonel Dreyer said that section 6 (now section 29 of the Act) empowered him to detain any person and to interrogate him at anytime whether it be midnight, early morning, or mid-day. Kuny said that he felt useless and completely dependent on his interrogator.[72]

Occasional indulgences

Nxasana said that he was given reading material only after he started cooperating with the police. Colonel Dreyer admitted that the extension of small favors are completely dependent upon the whim of a particular interrogator.

Dread

Threats:

Nxasana was threatened with indefinite detention unless he spoke. While detained, Kuny was threatened by Colonel Steenbkamp who told him: "I will crush you...the time for playing is over. I'm warning you, if you do not talk by 12:00, I will hand you over to the KGB . . ."[73]

Apart from verbal threats, firearms are used to threatened detainees. The interrogators usually inserted and cocked the firearm in the detainees mouth or will hold an open knife at his throat.[74] Detainees have also been told that they would be dropped from high buildings or thrown out of windows.[75]

Threats relating to children, parents, wives, and close friends have been relayed by other detainees.[76] These include threats to kill or detain such relatives. One woman alleges she was assaulted in the presence of her baby,[77] while another had her two and a half year old child taken into custody with

70. Nicholson, *supra* note 22 at 284.
71. *Id.* at 297-307.
72. *Id.*
73. *Id.* at 341.
74. *Id.* at 342.
75. *Id.*
76. *Id.* at 344.
77. *Id.* at 345.

her, then forcibly removed a day later.[78]

In one case, the detainee was told that her young child would be removed from her custody unless she made a statement.[79]

A final consequence of the DDD system on the detainee is that he accepts his guilt as being literally true and he makes behavioral choices indicative of the complete identification with and commitment to his captors. Kuny began to identify with the police and had developed a deep friendship with them and his mental state was shifting towards the police.

The courts should take cognizance of the effects of "coercive persuasion" and treat all such evidence as inadmissible. In *Christie*[80] the Appellate Division carefully left unanswered the question as to 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 as the basis that this was not an issue before this court.

The Appellate Court instead should have embarked on an activist approach to judicial reasoning and should have followed the American example enunciated in *Miranda* rendering any such evidence inadmissible *per se*.[81]

Moreover, section 335 of the Criminal Procedure Act, provides that written statements made to a policeman shall be furnished to the person making such a statement if he is subsequently charged in a criminal matter. Acting upon the recommendation of the Rabie Commission, section 335 was amended to exclude statements made by section 29 detainees during their detention. The accused and his counsel no longer have access to the statement made by the accused during his detention, thereby placing the accused at a serious disadvantage which cannot be rectified by later making the statement available if the accused is cross-examined on the contents of the statement.

PART II

This part will examine the recommendations of the Rabie Commission. It will analyze its proposals and highlight its shortfalls.

The Rabie Commission and its Recommendations

The Commission found that detention for the purpose of interrogation under section 6 of the Terrorism Act is justified as the only means available to the police for protecting the internal security of the country. In addition, it is an essential tool by which the police fulfill two necessary functions:

(a) to obtain information concerning the planning and organization or terroristic activities, and
(b) to obtain information which can be used as evidence at the trial of persons charged with such related offenses.

The recommended modifications are:

(a) that in private, a magistrate shall not less than once a fortnight visit a detainee.
(b) that a district surgeon visit a detainee not less than once a fortnight.
(c) that the position of inspector's of detainee's be given legal recognition.

78. *Id.*
79. TORTURE IN SOUTH AFRICA, RECENT DOCUMENTS 13 (1983 collection) (unpublished).
80. 1982 (1) SA 464, 485 (App.. Div.).
81. *Supra* note 33.

(d) the Commissioner of police be authorized in law to allow persons other than state officials to visit detainees.
(e) the detainee may not be detained for more than 30 days unless authorized in writing by the Minister.
(f) that if the detainee is not released after six months, the police shall advance reasons before a board of review as to why the detainee should not be released. This board may consider written or oral representation from the detainee and the board shall report its finding to the Minister. The Minister may on the basis of this report, order the release of the detainee or the further detention of such a detainee.

Listed below is a table comparing the previous position under section 6 of the Terrorism Act, the Commissions proposals and the present Act. It is apparent from the table that the modifications may offer some relief to the detainee, in reality, there is no improvement with regard to the position of the detainee as a consequence of the Commissions proposals.

The safeguards enacted by the new Act following the Commissions recommendations are hopelessly inadequate. A case in point being section 29(9) of the Act, which provides for the post of an Inspector of Detainees, who shall visit detainees and make written representation to the Minister as to the conditions of such detainees. The Commission was of the opinion that such visits offer the detainee real protection against police abuses. This is not so. When the inspector wanted to visit Dr. Neil Aggett, who was held in detention under section 29 of the Act, he was informed by the police that the detainee was presently undergoing interrogation and was therefore not available. Upon his subsequent visit the following day, the Inspector was informed that Dr. Aggett had killed himself.[82] It could well have been that Dr. Aggett was already dead on the Inspector's first visit. Further, the new Act does not ensure that a detainee will be visited by a Magistrate and a district surgeon once every fortnight. Instead it should have provided a sanction that any failure to comply with such visits will render the detention unlawful.

Section 29(2)(a) of the Act, provides for the creation of a Review Board which will review the detention of detainees who are held under detention for a period of six months. Although the Rabie Commission considered this two stage system of review, involving both the review committee and the judiciary, as an important jurisprudential innovation and a major advancement, in practice it is unlikely to bring much relief to the affected person. First, the Review Board is unlikely to adopt an activist approach, that is, a pro-individual stance, if the records of the pre-1982 Review Board for preventative detention is anything to go by.[83] Between 1977 and 1981 the Review Board recommended that the detainee be released in only 9 out of 366 cases it considered.[84] Secondly, the minister is not obliged to accept the decision of the Review Board and the Chief Justice has only limited power to overrule the Minister's rejection of the Board's findings. The Chief Justice may only set aside the Minister's decision where he is satisfied that the Minister has exceeded his powers, acted in bad faith or based his decision on incorrect considerations. In these circumstances one cannot seriously quarrel with those critics who have labelled the Rabie Commissions recommendations as ineffectual and

82. J. Dugard, *Report on the Rabie Report* at 50.
83. *Id*, at 53.
84. *Id.* at 51.

Previous detention regulation	Rabie proposals	Section 29 of the Act
Visits to detainee's by a Magistrate every two weeks, section 6(7).	Visits to detainee's by a Magistrate every two weeks, *in private.*	Enacted in section 29(0).
Visits where necessary by district surgeon. Section 8.	Visit to detainees by district surgeon every two weeks.	Enacted in section 29(9).
Section 2, Commissioner of Police or head of security police, empowered to give access to other people to visit the detainee.	The Commissioner be empowered to allow people not connected with the interrogation to see the detainee.	Enacted in section 29(9).
Section 6(2), once a month the police must inform the Minister why each detainee should continue to be held under section 6.	A 30 day limit placed on detention, unless the Minister on the advice of the police authorize further detention. the Minister on the advise of the police authorizes further detention.	Enacted in section 29(3)(a).
Review proceeding existed under section 10 of the Internal Securities Act of 1950. In terms of section 6(3) of the Terrorism Act, detainee may at any time make written representation to the Minister why he should be released. Section 6(4), the Minister may at any time order such a detainee's release.	After 6 months of detention, a review board appointed by the Minister must examine the case. The Board then reports to the Minister, who may or may not accept their recommendations as to release or continued detention of the detainee.	Enacted in section 29(2)(a).

cosmetic.[85]

Dugard, submits that the following safeguards would impose realistic restraints upon the power of the police and ensure that the central security measures in the legal order accord more fully with the basic principles of our legal tradition with its strong Roman-Dutch roots:[86]

Time Limitations

The failure of the Commission to consider the question of time limitations, seriously undermines the worth of the report, especially since detention without trial is viewed as inconceivable in most civilized countries. In Northern Ireland, detention for interrogation is limited to 5 days.

Judicial Control

The only way to win public support is to subject the implementation of section

85. *See e.g., id.*.
86. *Id.*. at 53.

29 of the Act to judicial control. The Commission rejects the necessity of section 29 of the Act being subjected to judicial control on the naive assumption that only terrorist or person withholding information about terrorists are detained.

Visitors

There is a general feeling that if the following people are permitted to visit detainees, greater protection and subsequently public confidence in the well-being of the detainee, will be established.

(a) *Family:*
Presently, families are not entitled to be informed in the arrest of a detainee and are on many occasions never informed of any such detentions. The general consensus is that visits by family members is a more effective safeguard than visits by lawyers. In this regard, the Commission made no recommendations.

(b) *Lawyers:*
The basic common law right of having access to a lawyer should be made absolute. The Commission made no mention of this anomaly.

(c) *Doctors:*
The detainees personal medical practitioner should be permitted to examine him. Alternatively, the detainee should be visited by independent doctors chosen by the detainee's family or by the South African Medical Council.

PART III

A Partial Solution

Detention without trial and other such draconian legacies will continue to be part of the South African legal order. As time goes by, these laws will become more stern in order to maintain the present status quo. Ideally, South Africa needs a major constitutional revolution to remedy this anomaly, however, it is the submission of this paper that such thinking is utopian.

South Africa presently is in the throes of constitutional changes. The parliamentary system will be replaced by the presidential system.[87] The new order will consist of a tri-cameral system in which the "whites" will command absolute power, with a white President having the veto power. The "coloreds" and "Indians" will be designated observer status. Despite this transformation, nowhere is any direct reference made to incorporate a Bill of Rights into this new constitutional order. Leading South African constitutional experts have all voiced a strong support for the incorporation of a Bill of Rights which would safeguard the press and people against infringements upon their rights and freedoms, or at least to acquaint the subordinates of state authority with the exact extent of their rights and freedoms and the circumstances under which the government will be competent to sanction infringements upon the protected human rights.[88]

The American constitutional model with its Bill of Rights and the concept of judicial review, whereby the American courts assert the right to enforce the Bill of Rights and, in so doing, to declare legislation—federal or state—unconstitutional and invalid if it conflicts with the Bill of Rights, *is not*

87. *See generally,* Boulle, SOUTH AFRICA AND THE CONSOCIATIONAL OPTION (1984).
88. *Id.*

for export.[89]

In the first place, a bill of rights can only be effectively introduced as part of a constitutional compact entered into between all the people in a state by way of some form of national convention. A national convention such as the one necessary, is out of the question. The present government is not prepared to have dialogue with all the people of South Africa (i.e. black and white).[90] Africans are not treated as South African citizens and under the "Homeland Policy" they must seek their political, social, and economic rights, in their respective "independent states."[91] With regard to the Coloreds and Indians, their status is in a state of transition. On the one hand, the white government is prepared to give them limited rights in order to lure them into the "white laager." While on the other hand the government is not prepared to treat them as full-fledged citizens. With this position persisting, a national convention is not within the realms of practicality or reality.

In the second place, a bill of rights can protect human rights only if there exists a court powerful enough and independent enough to proscribe all attempted infringements thereof, whether they be of executive, administrative or legislative origin. What is required is judicial review in the American sense. The new constitution which is to be implemented soon, does not establish an independent judiciary, therefore the parliamentary position which is presently in existence will prevail. The sovereignty of the South African parliament is absolute.[92] In terms of section 59(2) of the Constitution Act, no court of law is competent to inquire into or pronounce upon the validity of any act passed by Parliament, except an act which repeals or amends the provisions of an entrenched section.[93] It is apparent that the American form of judicial review does not exist in South Africa and is not being adopted under the new constitution.

In addition, the tact of upholding a bill of rights requires a court to play an activist role in a political field. This court would have to maintain a fine balance between its duty to protect the constitutional rights and liberties of individuals and its duty to interfere in the affairs of the executive and legislative branches of government. Professor Archibald Cox correctly points out that such a court can operate with efficacy only if it possesses "the power of legitimacy" i.e., the power to command acceptance and support from the community so as to render force unnecessary or necessary only upon a small scale

89. A case in point being the American Labor Code which MacArthur exported to Japan, which was a failure. The American constitutional history clearly shows that the success of the American system is unique and limited to the United States only. Its success was the result of many factors, its people and the thinking which existed with the American people.

90. The definition of "Black" includes African, Colored and Indian.

91. The Bantu Self-Government Act 46 of 1959 in its preamble declared that the African people of South Africa do not constitute a homogeneous people, but form eight separate national units on the basis of language and culture, which would become independent states. Thirteen percent of South Africa has been carved out to make up the separate national units in which 78 percent of the population will be resettled. This constitutes a major violation of the individual's basic human rights, in which through the stroke of a pen, he is stripped of his South African citizenship and is conferred the citizenship of an independent state.

92. Section 59(1) of the Constitution Act of 1961.

93. The entrenched sections being section 108 and 118 of the Constitution. Section 108 ensures the equality of the Africans and English language. Section 118 provides for the procedure whereby an entrenched section can be amended. This procedure requires a two-thirds majority of the total number of the House of Assembly to repeal or amend section 108 or 118.

against a few recalcitrants.[94] He goes on to emphasize:

> that the Judicial Branch is uniquely dependent upon the power of legitimacy when engaged in constitutional adjudication; and belief in the legitimacy of its constitutional decisions is therefore a matter of prime importance. The rulings thwart powerful interests. The issue arouses the deepest political emotions. Although the courts control neither the purse nor the sword, their decrees often ran against the Executive, set aside the will of the Congress, and dictated to a State. Compliance results from the belief that in such cases the courts are legitimately performing the function assigned to them, and that it is important that the function be preserved.[95]

The South African practice is directly opposed to the American legal practice. Two former South African Chief Justices have spoken out strongly against participation of judges in party politics. Chief Justice L.C. Steyn expressed his view in this regard as follows:

> "It would be an evil day for the administration of justice if our courts should deviate from the well recognized tradition of giving politics as wide a berth as their works permits. It is one thing, and a very proper one, for a judge to point out defects in a statute and to draw attention to results, in all probability not anticipated or appreciated, which work hardship or injustice, i.e., to matters which Parliament might presumably want to rectify. It is a very different thing, and in my view, a very improper one, for a judge to rush into a political storm or into the making of it, in a strongly contested matter in which Parliament has, by way of firm, deliberate policy, knowing what it is about and in the valid exercise of its legislative power, laid down what is to be done. In such a matter, it is not our function to write an indignant codicil or will of Parliament. If, in the eyes of some, there is any blame in avoiding such a course, I have no doubt that our judges, one and all of them, will not thereby be pressed into unwise participation before or after the event, in political conflict."[96]

Ogilvie Thompson, is in accord with Steyn and believes that in order to maintain the credibility of the judiciary, judges should be apolitical:

> A judge is . . . required to be wholly divorced from politics . . . the expression in public, and in particular, in the press or other media, by judges of opinions on controversial issues, whether or not such issues have political overtones, is to be deprecated. Independence, detachment and impartiality are the essence of judicial office . . . It is . . . highly desirable that the independence, detachment and impartiality of judges should be seen to be observed.[97]

The South African judiciary should employ the influence of their office to a greater extent than they have done in the past to bring about legal reform or to liberalize unjust laws. South African judges should free themselves from the positivistic approach which they favor, restricting themselves to a more or less mechanical discovery of the fictitious will of the legislator. Instead they should embark on an active an conscious interpretation of the law in favor of racial equality and individual liberty.[98]

---

94. A. Cox, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 103 (1976).

95. *Id.*, at 103-04.

96. Steyn, *Regbank en Regssfakulteit* J. of Contemp. Rom. Dutch L. 101, 107 (1967).

97. *See* Thompson, *Centenary Celebrations of the Northern Cape Division of the Supreme Court of South Africa*, 89 S. AFR. L.J. 32 (1972); *see also* State v. B.V. Van Niekerk 1972(2) SA 711 720 (App. Div.).

98. South African law does allow judicial officers a limited scope to read libertarian principles into statutory laws. That is the case when a statute, which curtails the right of individuals, is found

Despite the professed unwillingness of South African judges to be a party to policy-making in politically sensitive areas, they have been unable to escape this involvement, as has been illustrated by their various decisions on issues of race and internal security.[99] More often than not, the courts have taken a course which has coincided rather than run counter to established Government policy. Dugard refers to these actions as a "process of choice" and submits that Government policy has inevitably been influenced by such policy, it can correctly be categorized as a policy choice.[100]

For a Bill of Rights to succeed in South Africa, the judiciary will have to do away with its positivistic thinking. However, it is the opinion of this writer that as long as the present status quo prevails, positivistic thinking will only flourish. Professor Matthews succinctly summarizes the situation in the following manner:

> Positivism has always flourished when the laws favor the groups of which the legal administrators are representative. It enables the courts to take the laws at their face value and to avoid functional enquiries which might disclose the sectional interests advanced by these laws. The peculiar vice of positivism is that it allows the courts to conceal the "inarticulate major premise" of a decision behind seemingly objective legal forms.[101]

Because of the enormous powers wielded by a court exercising judicial review, the composition of the court is of extreme importance. In South Africa, the power to appoint judges lies in the hand of the Executive, therefore, politics are likely to play a significant part in the selection of the members of a court. To date, no black lawyer has been appointed as a judge. South African judges are all drawn from one small section of the population—the white group—and whether they support the Government or not, most have on basic premise in common—loyalty to the status quo.[102] This factor enhances the earlier submission that under the present conditions, positivistic thinking in the judicial area will flourish. As a consequence, the incorporation of a bill of rights is not within the realm of practicality.

The "partial solution model" discussed below will offer immediate and greater relief to detainees than a Bill of Rights.[103] In the case of *Ireland v. United Kingdom*,[104] it was held that the extensive methods of interrogation employed by the British authorities in Northern Ireland constituted inhumane and degrading treatment. Such activities constituted a violation of Britain's obligation under the European Convention of Human Rights. These methods, sometimes termed "disorientation" or "sensory deprivation" techniques consisted of:

---

to be ambiguous. *See Rossouw v. Sachs*, 1964(2) South Africa 551, 562 (App. Div.); *Ncube en naner v. Zikalala*, 1975(4) SA 508 (App. Div.).

99. *See generally*, Dugard, *supra* note 30.

100. *Id.* at 367.

101. Mathews, *supra* note 31.

102. Dugard, supra note 30 at 380. For Studies of White South African attitudes which support this view, *see* I. MacCrone, RACE ATTITUDES IN SOUTH AFRICA 263, 295, 308-10 (1965); W. Hudson, G.F. Jacobs, and S. Biescheuvel, ANATOMY OF SOUTH AFRICA, Cape Town Purnell 34, 38, 77 (1966).

103. The "partial solution model" is only to be treated as a temporary measure, bringing relief to detainees. As soon as the judicial as well as the societal thinking in South Africa is ready for a Bill of Rights, a bill of rights should be implemented without delay. Since one ideal solution to the problem of South Africa lies in a new constitution incorporating a Bill of Rights.

104. European Court of Human Rights, Series A, Judgment of January 18, 1978.

(a) wall standing: forcing the detainees to remain for periods of some hours in a "stress position," described by those who underwent it as being "spreadeagled against the wall, with the fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers;
(b) hooding: putting a black or navy colored bag over the detainee's head and, at least initially, keeping it there all the time except during interrogation;
(c) subjection to noise: holding the detainees in a room where there is continuous loud and hissing noise;
(d) deprivation of sleep: pending their interrogation, depriving the detainee of sleep;
(e) deprivation of food and drink, subjecting the detainee to a reduced diet during their stay . . .[105]

The British authorities have done their best to counter allegations of mental torture in Northern Ireland. Presently, a detainee may not be held for longer than five days in police custody for the purpose of interrogation. Moreover, in terms of the 1979 *Bennet Committee Report*,[106] into police interrogation methods in Northern Ireland, *which today guides police conduct.* This report recommended that interrogations be supervised by close circuit television cameras. In addition, it recommended a *Code of Conduct* to guide interrogations. These recommendations are quoted verbatim from the report:

(a) Limitations of the durations of interrogation sessions. Interviews should not last longer than the interval between normal meal times and should not extend over meal breaks except for urgent operational reasons.
(b) A prohibition against unlawful use of force against a detainee.
(c) A prohibition on degrading or humiliating treatment. The report stated that the following should be specifically prohibited.
(1) Any order or action requiring a prisoner to strip or expose himself or herself.
(2) An order requiring a prisoner to carry out any unnecessary physically exhausting or demanding action or to adopt or maintain any such stance.
(3) The use of insults or insulting language about the prisoner, his family, friends or associates, his political or religious beliefs, or race.
(4) The use of threats of physical force.
(5) The use of threats of sexual assaults.
(6) A limitation on the number of interrogators present during the interrogation session at any one time. Not more than two officers be present at the interviews of one detainee at any one time.
(7) A prohibition on the interrogation of women by an all male team of interrogators.
(8) A prohibition on the interrogation of person under the influence of drugs or alcohol.
(9) Requirements for the interruption of interviews for refreshments and meals after specified times.
(10) Requirements for the provision of adequate sleep and exercise.
(11) Proper lighting, ventilation and seating during interrogations.
(12) The identification of interrogators to detainees by name or number.[107]

The recommendations of the *Bennett Report* offer genuine protection to a

105. *Id.*
106. Bennett Reports CMNS (1979).
107. *Id.*

detainee. A similar code of conduct should be enforced in South Africa and it should be enacted by statute making it a criminal offense if any of the provisions are violated, rendering any further detention illegal.

CONCLUSION

The Internal Security Act of 1982 constitutes an improvement on previous legislation. The failure to provide effective safeguards for detainees held for the purpose of interrogation does, however, negate the positive features of the new legislation. The Rabie Commission cites various other reports concerning security laws in Northern Ireland, interestingly it does not cite the all important Bennett Report, which had a profound impact in reforming the position of detainees. The Rabie report is a disappointment as it fails to come to terms with the harsh realities of the operations of the security laws.

Foreign governments, especially those from the Western block, should formulate their foreign policy toward South Africa based upon South Africa's human rights violations. They can pressure the South African government to redefine its internal situation. It was such world pressure, especially pressure from the Carter Administration, which compelled the South African government to appoint a commission (the Rabie Commission) to investigate death in detentions.[108] A further case in point is Zimbabwe; during the reign of the Smith government, the international community applied effective sanctions which finally did contribute to the creation of Zimbabwe from Rhodesia.

Detention without trial is in conflict with two notions basic to any criminal law system: that illegal acts are to be deterred by the threat of subsequent punishment rather than by prior confinement and that imprisonment should not be imposed without the conviction of a crime. Further, as Barth noted, the fight against lawless man, if waged by forbidden means is degraded almost to the level of a struggle between two law breaking groups.[109]

It may be necessary in some cases to detain people in the interest of public safety or in the administration of justice. But when the fear is one of further criminal conduct or violent act, one obvious alternative would be to provide a speedy trial.

Finally, it has been said that a war could not be conducted on the principles of the Sermon on the Mount. It might also be said that a war could not be carried out according to the principles of the Magna Carta. While this may be true, what is required is a bridle for the unruly horse.

108. The Rabie Commission was established after the death in detention of the Black Consciousness Leader, Steve Biko, in 1977.

109. Barth, supra note 32 at 14.