POLICY ISSUES AND ACTORS

Detention Without Trial: Past, Present and Future

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Introduction

Detention without trial can be a formidable government weapon against political opponents. In South Africa this weapon has been fashioned into a multiple warhead. There are currently seven security law detention provisions on the statute book, of which one is dormant but can be activated by the State President. Non security law detention, for example detention under drug laws, will not be discussed in this paper. While the seven detention laws are of varying severity and serve different purposes, they are best classified and explained under two main categories or groups - preventive detention and pre-trial detention.

Preventive Detention

The ostensible aim of preventive detention is to remove from society individuals the State believes would be dangerous if left at large; people whose conduct may become violent, subversive or disorderly. Such detention is usually justified on the ground that the ordinary legal processes, especially criminal trial processes, are inadequate or inappropriate. Where the detention remedy is directed at future rather than past conduct, the inappropriateness of the trial system is obvious; where the remedy is directed at past conduct, the justification is that court-room evidence is too difficult or time-consuming to acquire. These justifications illustrate the threat of such laws to freedom and open politics. Detentions, by their very nature, rest upon conjecture rather than proof; they are provoked by smoke rather than by fire. The conjecturing, moreover, is usually done by officials of the ruling party with the ever-present temptation of political bias and self--serving interests. The regular use of preventive detention undermines individual freedom and democratic politics.

There are four preventive detention laws available for use by the authorities. They range from indefinite detention to short-term detention. These laws may be described briefly as follows:

1. **Indefinite detention**

Section 28 of the Internal Security Act of 1982 empowers the Minister of Law and Order to order the detention of any person he believes is likely to commit the crimes of terrorism, subversion or sabotage (which together criminalise a broad and very hazy class of activities, including political activities) or if he is satisfied that the detainee will endanger the security of the state or the maintenance of law and order. This detention may be indefinite, or renewed indefinitely, and it rests upon ministerial opinion, not on proven facts. An Appeal Court decision in 1986 required the minister to furnish the detainee with meaningful reasons for his detention, thereby putting an end to the previous practice of informing the detainee only of the statutory ground on which he was being detained. Since that decision, Section 28 detention has waned in favour of emergency detention.

2. **Emergency detention**

This is another potentially indefinite form of detention which authorises incarceration for an initial maximum period of six months but which may be extended for further periods of five months at a time. With the regular renewal of emergency regulations, detainees can be held for many years. The initial decision to arrest and detain may be taken by any member of the security forces (down to the raw recruit) but ministerial authority is needed if the detention is to extend beyond 30 days. Both the initial arrest and detention and the minister's extension thereof depend upon official opinion that the detention is necessary for the safety of the public, the maintenance of order or the termination of the emergency. Once again, the detention need not rest upon proven facts, for example, proof of past conduct indicating that the detainee has been a threat to public safety or order. On 3rd February 1990, by amendment to the emergency regulations, courts were directed to regard an affidavit by the minister that he had formed the required opinion as *conclusive* proof of his allegation.

If this amendment is valid, legal challenges to a ministerial decision to detain will become futile. The detainee must be told of the reasons for his arrest but it appears from the judgments that little more is required than the statement that he is being arrested under the emergency regulations. The regulations exclude the right to detailed reasons or to any kind of hearing.

3. **Fourteen-day detention**

Police officers, of or above the rank of warrant officer, may without warrant arrest or detain any person for an initial period of 48 hours which may be extended to 14 days by a magisterial warrant. The initial arrest and the magisterial extension of detention depend upon the belief that actions of the person in question are contributing to a state of public disturbance, disorder, riot or public violence. There need be no proof that the detainee's actions have in fact

contributed to disorder etc. When the magistrate is asked to extend the initial 48 hours detention, he need not give the detainee a hearing.

4. **180-day detention**
In this case, an initial detention of 48 hours may be ordered by a police officer of or above the rank of warrant officer; and may be extended to 180 days by a commissioned officer of or above the rank of lieutenant-colonel. Both decisions depend upon official opinion that the detention will help to combat public disturbance, disorder, riot or public violence but this need not be proved. If the detainee has not been released at the end of three months, the detention must be considered by a government-appointed review board with powers of recommendation only. The 180-day detention provision has not yet been used but may be activated at any time by proclamation in the Gazette, something that is likely to happen if the State of Emergency is withdrawn.

Pre-trial Detention

The purpose of pre-trial detention is to obtain information or evidence, or to ensure that witnesses or accused persons appear in court. It is sometimes called "interrogational detention" because of the practice of extracting information from these detainees. In its severest form this kind of detention is indefinite and involves solitary confinement for the victim. In the course of the Rabie Commission's investigation into internal security laws it was found that the security forces support this extreme form of interrogational detention because they claim it yields valuable information about subversion. However, for persons concerned with human rights and the rule of law, interrogational detention in South Africa gives rise to at least three major concerns:

(a) the almost complete vulnerability of the detainee to his interrogators. In Breyten Breytenbach's vivid image, the detainee is like a paralysed mouse being eaten by a snake. The result is that many detainees have died in suspicious circumstances that suggest illegal treatment. Torture appears to be commonplace.

(b) the vague and broad grounds for ordering a detention and the restricted capacity of the courts to monitor detentions;

(c) the impact of pre-trial detention on the rules of fair trial.

There are currently three forms of pre-trial detention in use:

1. **Indefinite Detention**
This may be ordered under Section 29 of the Internal Security Act of 1982 by a police officer of or above the rank of lieutenant-colonel if he has reason to believe that the detainee has committed, or is about to commit, the crimes of terrorism or subversion or that he has information about the commission of such crimes.

In an important decision, the Appeal Court (in *Minister of Law and Order v Hurley*, 1986 (3) SA568(A)) ruled that the decision to detain is not simply a matter of official opinion and that the detention may be challenged on the basis that actual grounds for it did not exist. Although this decision has been rendered less helpful by lower court readiness to accept police assertions of the existence of statutory grounds for detention, a few detainees have managed to secure their release by an approach to the courts. Once the process of detention has been legally carried out, however, court control over the detainee is reduced to vanishing point because its jurisdiction over the conditions of detention is eliminated by statute and because the detainee has no direct access to the courts. Detention for longer than 6 months is subject to an internal review procedure that has proved to be of no value to detainees.

2. **Detention of Witnesses**

The attorney-general may order the detention of persons who he believes have evidence to give in criminal trials regarding specified security crimes such as treason, sedition, terrorism, subversion, sabotage, furthering the aims of communism, etc. He may do this if he is of the opinion that the person in question, if not detained, will be tampered with or intimidated, or will abscond or that detention is in the detainee's own interests. The detainee may be held for a maximum period of six months if no trial is commenced within that period; but if the trial commences (by service of the indictment) the detainee may be held until the proceedings are concluded - a period which may be far in excess of six months. In this case, the detention (unlike Section 29 detention) rests on official opinion and cannot be investigated by the court. The detainee is subject to a no-access provision which means that he can be held in solitary confinement. Detainees are clearly vulnerable to their interrogators, who are not restrained by the controls against 'tampering' or 'intimidation'.

3. **Withdrawal of Bail**

Persons charged with certain security offences (those mentioned in paragraph 2 above) may be deprived of their right to seek bail from the courts by order of the attorney-general. This means that the courts' traditional function of granting or refusing bail is withdrawn and the accused person becomes a detainee for the duration of the trial. The Appeal Court has held that the attorney-general may not withdraw the right to bail without granting the detainee a hearing; once again the decision is based on subjective opinion.

History and Use of Detention Law

In earlier times detention (then known as internment) was a phenomenon of the great wars and was employed in South Africa during the 1914-18 and the 1939-45 world wars. Peacetime detention has a shorter history and goes back to the early 1960s when, in response to post-Sharpeville unrest (especially the Poqo killings of that period), 90-day detention was introduced as a temporary measure. This soon hardened into permanence with the introduction of interrogational detention as part of the Terrorism Act 83 of 1967. This law also replaced limited detention with indefinite detention. The early forms of preventive detention were of limited scope but these too have hardened into tougher forms, and some are permanent and indefinite. Though peacetime detention has a brief history in South Africa it does appear to have a disturbingly virile future.

Since their introduction some 25 years ago, detention laws have not been allowed to gather dust on the legislative shelf. The total number of persons detained in SA under all detention provisions is approximately 68 000, with a further 5 000 in the "homelands."

These totals disguise fluctuations and variations in the employment of detention. Predictably the emergencies declared under the Public Safety Act of 1953 have produced a large crop of detentions:

1960	Emergency	11 727
1985/6	Emergency	7 996
1986-9	Emergencies	32 600 (estimated)

Emergencies therefore account for more than 52 000 detentions. The other 16 000-odd non-emergency detentions are somewhat unevenly spread over the years, the greatest number occurring in the periods following the 1976 Soweto disturbances and the 1985 national unrest arising out of the introduction of the tri-cameral constitutional system.

Fluctuations may also be observed in the popularity of particular detention measures. The most notable are the virtual abandonment of indefinite preventive detention (section 28 detention) in 1986 following the Appeal Court decision requiring the minister to provide these detainees with meaningful reasons for incarceration; and a substantial drop in emergency detention following hunger strikes by detainees in the early part of 1989. For the moment, emergency detention has not been superceded by a resort to non-emergency detention laws but rather by more extensive use of restriction or banning orders imposed under emergency regulations. Interrogational detention continues to be used quite extensively, as indicated by an official statement in April 1989 that 89 persons were then being held under this provision. By the end of the year this number had apparently dropped to 24 in line with the general decline in the use of detention powers. Despite the 'seasonal' fluctuations and shifting popularity of the various provisions, there

is no period since the early 1960s when detentions have been insignificant. It has been, and remains, a continuing reality of South African politics.

Detention and the Courts

The "legitimacy" of a system of detention (insofar as an instrument which limits the most basic human right can be legitimate), depends in part on the extent to which it is supervised and controlled by the courts. This control becomes even more important when detention becomes a permanent institution in society rather than a temporary measure; under emergency, restricted court involvement is more understandable and tolerable because the suspension of basic rights is a short-term expedient designed to ward off attacks by persons hostile to free institutions. Detention in South Africa, as we observed earlier, is neither a temporary nor a limited institution. The role of the courts therefore becomes crucial.

When the South African legislature enacted our present detention laws it clearly envisaged an insignificant or perhaps non-existent role for the judiciary. Two techniques have been used to neutralise the courts in relation to detention.

The first technique is to confer the discretion to detain in such a way clauses which imply that the detaining authority need not base a decision to detain on grounds that can objectively be proved to exist. The detaining authority is merely required to believe that the grounds for detention do exist; they need not actually exist or be proved to exist. This subjective discretion applies in six of the seven forms of detention described at the beginning of this paper. It is only in the case of section 29 detention (indefinite interrogational detention) that the detaining authority is required to rely on grounds that must be proved to exist in the objective sense.

The second technique used to exclude the courts from the detention process is what lawyers call the 'ouster clause'. These are clauses that explicitly deprive the courts of jurisdiction: for example, section 29 detention is governed by a clause which declares that 'no court of law shall have jurisdiction to pronounce upon the validity of any action taken in terms of this section, or to order the release of any person detained in terms of the provisions of this section.' Ouster clauses have also been inserted into the law that regulates the detention of witnesses by the attorney-general and the detention of persons for 180 days under the presently dormant provisions of the Internal Security Act of 1982. In February 1990 the State President introduced a regulation which purports to oust court jurisdiction to review the minister's decision to detain under emergency regulations.

Legislative intent to limit the role of the courts is quite clear. However, the extent to which the judiciary is in fact excluded depends in large measure upon the courts themselves. The legislative scheme to disarm the courts will only be fully effective if the

judges are submissive and complaisant. Nowhere is this better illustrated than in the response of many courts, here and abroad, to attempts to destroy their jurisdiction by ouster clauses. Judges have frequently held that before their jurisdiction can be removed by an ouster clause, it must be clear that the authority in question (in this case, the detaining authority) has acted strictly in terms of the requirements of the law. Thus in the Hurley case (involving the detention of Paddy Kearney, Director of Diakonia in Durban) the court decided that if the detaining authority had ordered the detention without having the grounds for it specified by the Act, the detention was not in accordance with the requirements of the law and the jurisdiction of the court to release the detainee was therefore not ousted. As a result, Paddy Kearney was released by court order. In effect, the courts neutralised the ouster clause rather than their own power to intervene.

However South African judges have in general declined to rigorously tackle subjective discretion clauses. The traditional legal doctrine in regard to these clauses is that since the decision to detain is statutorily declared to depend on the opinion or belief or state of satisfaction of the authority in question, the court's only function when the detention is challenged is to determine whether the authority did in fact hold the necessary opinion or belief or whether it was 'satisfied' that a justification existed for the detention. The corollary is that it is not the court's function to enquire into the grounds upon which the state of satisfaction, opinion or belief of the detaining authority was based - investigation of the actual merits of the decision is precluded. Even though the judge's enquiry is therefore focussed on the existence of the opinion or belief rather than upon grounds which might justify it, the traditional doctrine does recognise some grounds for attacking the decision. If it could be demonstrated to the court that the authority in question failed to apply its mind to the issue at all, or that it formed its opinion or belief in bad faith or for an ulterior purpose, the court would nullify the decision to detain because it was not based on a properly formed opinion or belief. However, it is part of the traditional doctrine that the person challenging the decision to detain carries the burden of proving that it was based on an improperly formed opinion or belief; and since the challenger usually has no means of knowing how and why the decision was taken, this burden becomes virtually impossible to discharge. It is not surprising therefore that challenges to decisions taken under subjective discretion clauses rarely succeed, partly because the grounds for attacking such decisions are narrow (the court does NOT investigate the merits of the decision) and partly because the burden of proof is put upon the challenger.

The traditional doctrine described in the preceding paragraph had two related consequences: it enabled the authority vested with subjective discretionary power to exercise that power in an arbitrary fashion knowing that the courts would refrain from testing it; and, further, it disabled the courts from protecting the basic rights of detainees and from assisting victims of the arbitrary exercise of authority. In short, the power to deprive persons of liberty became virtually absolute and the courts' traditional

jurisdiction in respect of fundamental freedoms was virtually eliminated. The executive autocracy permitted by the traditional doctrine has long been a focus of criticism in academic writing and some of the bolder spirits on the bench have recently been moved to modify the doctrine so as to provide detainees with more protection. These attempts at modification have taken several forms:

1. **Re-interpretation of Standard Phrases Used to Confer Discretion**
   Following the lead of British courts, South African judges have re-interpreted language which was previously taken to confer a subjective discretion to mean the opposite. In the Hurley judgment referred to earlier, the court decided that the words 'reason to believe' do not confer a subjective discretion; rather they require the decision to detain to be based on objectively existing facts. A Namibian court held the same to be true of the expression 'is satisfied'. A person could not be satisfied, it said, unless there were actual grounds on which the state of satisfaction was based. The Namibian decision received short shrift from the Appeal Court in Bloemfontein and this brought the trend to re-interpret legal language to an abrupt halt. The result is that phrases like 'is of the opinion' and 'is satisfied' (which appear in all but one of the detention laws) must be read as conferring a subjective discretion which cannot be tested against the facts by the courts.

2. **Increasing the Burden of Justification on the Detaining Authority**
   By making use of the rule that an authority that deprives a subject of liberty carries the onus of justifying the deprivation, some courts have required the detaining officer to provide a degree justification for his decision even where he acts in terms of a subjectively conferred discretion. The detaining officer, these courts have said, must demonstrate that he formed the kind of opinion envisaged by the statute; and this means that he has to offer a justification for the detention which the court is empowered to examine (and, potentially, find wanting or inadequate.) The classic example of this concerned the detention of a nun in one of the black townships near Cape Town. According to the evidence of the nun, Sister Harkin, she was arrested and detained after she attempted to prevent a policeman from assaulting a man during a security operation in the township. The version of the arresting officer (which seems the less likely) is that Sister Harkin had subjected his conduct to a foul-mouthed query and then interfered with action being taken by him to deal with unrest. The Cape court, accepting for purposes of the decision the correctness of the arresting officer's account of the events that preceded the detention, nevertheless found that the decision to detain was not based upon a properly formed opinion, since the police officer had not considered the obvious alternative procedure of charging Sister Harkin in a criminal court with obstructing the course of justice. An opinion formed without considering alternatives to the drastic procedure of detention was not, the judge said, the kind of opinion required by the legislature; and the court therefore ordered the

release of Sister Harkin. This eminently reasonable approach did not find favour with the Appeal Court in Bloemfontein which overruled the lower court decision and held (in this and in another case) that it is for the arresting officer to determine whether alternative courses of action will be more appropriate than detention. The Appeal Court thereby underlined the subjectivity of the decision to detain and reaffirmed the predominance of opinion over fact.

The Appeal Court also reversed another attempt to impose a burden of justification on the detaining authority. An Appeal Court judge had held, in a minority judgment, that even when the decision to detain is subjective, the detaining officer is required to demonstrate that he considered and understood the nature and limitations of his powers and that the action taken (the detention) was ostensibly within these powers. The Appeal Court once again rejected this impressively rational rule for limiting the arbitrariness of detention by decreeing that there is no such burden of justification on the detaining authority and by requiring the challenger to prove that the official opinion that detention was necessary was in fact improperly formed. It did not explain how this could be done in the absence of information as to the basis of the decision to detain.

3. A third method of modifying the harshness of the traditional doctrine has taken the form of a ruling that the statutory obligation to provide detainees with reasons imposes upon the authorities the duty to give meaningful reasons that will enable the detainee to argue his case. Unfortunately, this ruling (made in 1986) applies only to indefinite preventive detention (section 28 detention) and not to the other six detention provisions available to the authorities. This ruling has had a beneficial effect insofar as section 28 detention has not been used since the introduction of the ruling. However, the authorities have relied instead on emergency detention which is not governed by a statutory duty to give reasons.

The outcome of these developments is that the courts, partly due to their own attitudes as expressed in decided cases, stand impotently on the side-lines in the harsh game of detention that is being played out in South Africa. Their rulings (particularly the Appeal Court rulings) mean that they are unable to police and enforce even those standards for the use of the detention power that the legislature has itself prescribed. The legislation in question always contains some criteria for the use of the detention power (for example, that detention is necessary for the preservation of public safety or order) but the courts' rulings described above render them pretty well impotent to hold detaining authorities to these purposes. It is true that the Hurley ruling on section 29 detention (indefinite interrogational detention) is an exception to the judicial policy of non-involvement. But since the Hurley ruling, several lower court decisions have watered down its power to control the authorities when they order interrogational detention. In these decisions the courts have accepted generalised assertions, based in some

instances on untested statements by informers, that the detainee is being held for a purpose authorised by the legislation in question. Moreover, following a ruling of the Appeal Court itself, such detainees cannot be ordered to appear in court to refute the evidence presented by the detaining authority. It is sadly no longer possible to view the courts in the way they once saw themselves - as a bulwark against executive interferences with basic rights.

The Conditions and Treatment of Detainees

The notoriety of detention without trial measures is directly related to the regime under which detainees are held. If that regime permits indefinite or extended incarceration in a solitary confinement cell and if it does not incorporate adequate controls against ill-treatment and torture, then detention policy is likely to forfeit any claim to even a shred of legitimacy. Four of the seven detention laws on the South African statute book contain "no-access" clauses - clauses which enable the authorities to isolate the detainee and to deny visits from family, friends, personal doctors and lawyers. A fifth detention law permits the Minister of Justice to determine the conditions of detention and he is apparently free to impose a no-access clause in this case too. Extended solitary confinement has therefore become a standard feature of detention in South Africa, especially where the detainee is held for interrogational purposes. This isolation has meant that the very persons who are most concerned about the detainees' health and well-being and the most likely to set in motion legal proceedings designed to protect them from ill-treatment are deprived of the opportunity and means necessary for securing effective redress. The result is that torture has been so prevalent that rehabilitation units for its victims have been set up; death in detention has become a built-in feature of the system. Since 1963, when detention became an institutionalised feature of government in South Africa, over 60 deaths in detention have occurred. The surrounding circumstances of a great number of these point towards induced suicide or interrogation getting out of hand. Such a system cannot hope to avoid an evil reputation.
The plight of South African detainees is due in large measure to the statutory regime which has been created. However, there is no doubt that the attitude and response of the judicial and executive branches of government to detainees has considerably worsened that regime.

So far as the judiciary is concerned, there are three failures that stand out:

* In an early Appeal Court decision involving the conditions of the detention of Albie Sachs, the judges showed that they lacked an imaginative grasp of a detainee's desperate plight by refusing to allow him reading matter and writing materials (even though the statute was silent on the question) and by beseeching the legislature to free the courts from the burden of ruling on the conditions of detention. This case set an alarming standard of court inadvertence to the

vulnerable state of detainees. This inadvertence reached an extreme in another Appeal Court case in which the court recorded the horrifying details of the torture of a detainee (including the breaking of some of his teeth during attempts to extract them with a pair of pliers) but did not condemn the authorities responsible except by implication. (This case - the Mogale case - may be contrasted with a recent Zimbabwean judgment in which Chief Justice Dambutshena expressly demonstrated the court's revulsion at the torture of a convicted South African spy and reduced the sentence partly because of the torture.)

* The second judicial failure is represented by a decision in which the court ruled (over a more persuasive minority judgment) that it could not order a detainee held for interrogation to appear before it to give evidence about alleged maltreatment. This ruling still applies to indefinite interrogational detention (but not to the other forms of detention) and much of the misery suffered by detainees held for interrogation can be attributed to it.

* In the third place, the courts, in a series of cases, have not been sufficiently critical of evidence extracted from detainees interrogated in solitary confinement. Had this evidence been more robustly discouraged, there would have been a reduced incentive to pressurise detainees into confessing or testifying in court. Such discouragement would also have done much to preserve the integrity of the criminal justice system in political trials.

If the judicial response to detention has been disappointing, that of the executive can only be described as cynical and reprehensible. Case after case has demonstrated a crying need for an independent public enquiry into the treatment of detainees. Of these cases, the Biko inquest was alone sufficient to provoke a wholesale reappraisal of the practice of detention in South Africa. The inaction of the South African government contrasts revealingly with the response of the British government to allegations of the ill-treatment of Northern Ireland detainees where there have been no deaths in detention and only 'mild' forms of torture. Reacting to a much less frightening situation than our own, the British government appointed a number of commissions, of which the Gardiner and Compton enquiries stand out. The changes recommended by these commissions have virtually eliminated the practice of torture in Northern Ireland detention cells. The South African authorities have been guilty of more than the 'crime' of omission in responding to charges of ill-treatment and torture. Until February 1990, the emergency regulations contained a provision which made it a criminal offence to publish information about the treatment and circumstances of emergency detainees. Removing the public accountability of security officials for the treatment of detainees is surely an encouragement to abuse.

Detention Policy

Detention is only one of the weapons in the formidable security arsenal built up over the past four decades by the ruling party in South Africa. It reflects a policy of controlling perceived threats to national security through virtually untrammelled executive power. Such a policy is only one of three major responses that a government might adopt in framing its national security policy. There are:

1. **Arbitrary Executive Action**
   South Africa is a prime example of the belief, shared by many governments, that an effective security policy involves the assumption by the executive of virtually absolute power to suspend or withdraw basic rights or to take other action against perceived State enemies. Such arbitrary powers have been transferred to the executive government in South Africa both under permanent and temporary legislation (the latter being the 'temporary' emergency regulations). We have seen that the authorities have virtually absolute power to detain and they also have similar power to ban persons or organisations and to control public and private assemblies. The regular use of arbitrary executive authority quite obviously involves a denial of human rights and the rejection of democratic consensus as a basis of governing. This policy is therefore likely to create a legitimacy crisis in the government that adopts it.

2. **The Regular Process of Law**
   A security policy that is more consistent with fundamental rights and democratic rule is the one which Clive Walker (an expert on security law in Northern Ireland) refers to as a resort to 'the more painstaking, but ultimately more effective and acceptable, due process of criminal detention and prosecution.' This policy seeks to minimise executive measures (but seldom excludes them altogether) and to deal with security threats through the courts and the ordinary law. Current security policy in Northern Ireland exemplifies this approach.

3. **Counter-Insurgency**
   This involves the use of arms to neutralise or eliminate the 'enemies of the State'. It usually involves a mixture of legal and extra-legal actions and, in its worst form, incorporates a substantial 'dirty tricks' component. The latter frequently involves the security forces in clandestine operations that include assassination and bombing. Such a policy inevitably results in the creation of a new and potentially dangerous force in the state and can have alarming implications for civil government and the right to dissent and oppose.

   The evolution of South African security policy may be described as one in which the regular processes of the law were displaced, at first gradually and later overwhelmingly, by uncontrolled (or barely controlled) executive action. This was followed by increasing resort to extra-legal retribution against persons and groups

deemed to represent a security threat with the result that current security policy is a contradictory mix of elements of all three of the basic responses described above. The regular processes of the law are still employed mainly to prosecute persons under exceptionally wide and vague security crimes. The integrity of these processes is being additionally undermined, however, by the concurrent use of arbitrary executive powers and more especially by the use of detainees as witnesses to secure convictions in criminal trials. Standing alongside this almost fastidious use of the criminal process to dispatch state enemies to the jail house, and in sharp contrast to the legalism of that approach, is the relatively new but menacing and semi-covert programme of extra-legal 'justice' for opponents of the regime. Recent revelations from within the security forces suggest that state sponsored terror is a serious cancer in the system and that it extends to (or from) the centres of political power. It follows that the institution of detention in South Africa must be seen as part of a confused and incoherent policy of preserving the *status quo* in the country.

The Legitimacy of Detention

The practice of detention without trial will inevitably attract serious questioning if not outright moral denunciation in any society in which freedom and democracy are valued social goals. It is possible nevertheless to speak of the legitimacy of detention where it is being employed by the government of a democratic country against the enemies of freedom. The threat of German national socialism after the rise to power of Adolf Hitler was generally believed to justify the wartime interment of those suspected of being the supporters of his totalitarian ambitions in Britain, even though particular rules governing interment were sometimes heavily criticised. But even where detention is used by a democratic government in defence of free institutions it has no claim to legitimacy unless detention is a temporary measure which is withdrawn as soon as circumstances permit. Prolonged detention is itself a threat to freedom and may easily subvert the institutions of an open and democratic society.

It follows that detention in South Africa cannot surmount the most important hurdle to recognition as a legitimate instrument of government. The rulers are an unrepresentative minority who have institutionalised detention as a permanent measure in a fairly blatant attempt to preserve sectional power and privilege. Though presented and justified as an instrument of law and order, detention is manifestly not being used to protect free institutions against subversion by their enemies; rather, it is part of a government-sponsored process of undermining those very institutions as afar as the majority of the population is concerned. However, it does not follow that the use of detention by an unrepresentative minority can never attract a measure of legitimacy. An unrepresentative government that was seriously committed to laying the foundations for full participation in politics and the wider enjoyment of basic rights, might conceivably make a good case

for the use of detention during the period of transition towards a reformed society. Such a case would be strengthened if the society were seriously divided and if major and unresolved social and political problems would inevitably produce a high level of social conflict both about ultimate goals and the means of achieving them. In short, while unrepresentative governments can never fully legitimise the practice of detention, they could make out a case for it as a necessary if unwelcome expedient. Such a case would clearly be dependent upon the existence of rules and institutions that would confine the practice of detention to the achievement of acceptable objectives and prevent its misuse for other purposes. This presents a second hurdle which the South African government is presently unable to surmount.

Detention laws in South Africa, as we observed earlier, are largely unconfined by rules and by external controls. They are, moreover, not transitional measures but permanent features of the legal and political landscape. Those who manage the system of detention are free to use it for whatever purposes or objectives they choose, and very prominent among those purposes and objectives has been one of political control. Anyone who is acquainted with a representative sample of the victims of detention without trial, will know that the greater number consist of critics of official policy, ideological opponents, active dissenters and extra-parliamentary community leaders. This is not to say that detention measures are not sometimes, and perhaps quite frequently, invoked against the instigators and perpetrators of violence and civil unrest. But more likely it is ancillary to the use of detention as a form of coercive political control.

Another obstacle to detention being accorded even a qualified legitimacy is the tragic record of torture and the death of detainees. Detention in South Africa inevitably calls to mind the death of persons like Steve Biko and Neil Aggett and horrifying descriptions of physical abuse and the psychological collapse of detainees under the pressure of extended isolation. Unless such associations are ended by effective rules and practices for detainee protection, all attempts to justify the system will deservedly earn little more than disbelief and scorn.

The inability of the system of detention in South Africa to attract to itself even a shred of credibility is one of the main reasons for the partial success achieved by the 1989 hunger strike. The hunger strike was a truly remarkable event in the recent history of national security in South Africa. It was remarkable for much more than the courage and determination of those who sought to dramatise their detention in this way. In fact, though the hunger strike itself was a remarkable event in that few had foreseen it or the success that it would achieve, it was the official response that astonished even experienced observers of law-and-order politics in South Africa. There was the previously undreamt-of spectacle of government officials, right up to the minister, eagerly announcing the latest releases of detainees and seeking to reassure a bemused public that more releases were being regularly considered. Though emergency regulations backed by heavy penalties prohibited news about the release of detainees or the circumstances

or conditions of their detention, frequent reports about the medical and psychological state of the hunger strikers and about those who had been released flowed through the media, with the SABC taking a leading role. The government itself seemed anxious to ignore the harsh machinery of censorship that it had set up as part of the emergency regime. For a brief and heady time citizens of South Africa glimpsed the meaning of open government. How is one to explain so stunning a suspension of closed and authoritarian rule in South Africa?

In accounting for the hunger strike, and more especially the official response to it, one should not overlook factors such as the skilled advocacy and earnest commitment of Archbishop Desmond Tutu and others who were involved in discussions and negotiations with the minister; nor should one forget the courage of those who risked their health and even lives by refusing nourishment for extended periods. But advocacy, commitment and courage were not lacking before the hunger strike and explanation must go beyond these factors. There appear to be four developments which fortuitously came together at the critical moment for the success of the campaign. These are:

(a) A conviction on the part of detainees and their lawyers that recourse to the courts for relief from oppression by detention had become futile. The hunger strike followed soon after a series of judgments by the Appeal Court (briefly alluded to in the earlier part of this paper) had made it abundantly clear that the courts were not inclined towards judicial activism in the protection of detainees. The Appeal Court shifted itself onto the sidelines and laid the foundations for a growing conviction of its irrelevance.

(b) Partly as a result of the development described in the previous paragraph, the detention system was finally stripped of the last vestiges of credibility when the wholesale arrest and detention of activists was accompanied by a retreat on the part of the judiciary.

(c) The hunger strike coincided with intensified pressure from abroad on the South African government and (following glasnost in the Soviet Union), with a renewed campaign for the extension of human rights. South Africa was therefore experiencing simultaneously the bite of the external sanctions campaign and the condemnation of human rights lobbies. This condemnation became much more telling as the Soviet Union began to repair its human rights record at the very moment that South Africa was subjecting its citizens to wholesale detention.

(d) The hunger strike coincided also with the first stages of the decline of the P W Botha era in South African politics. The domination of politics by the so-called securocrats had been a feature of his government. He was apparently responsible for the ascendancy of the State Security Council in political decision-making and security hawks clearly had great power during the 'imperial presidency'. The

interregnum which has followed his departure has been characterised by a less hawkish handling of security issues, both internally and across the borders. The hunger strikers appear to be the first beneficiaries of a less confrontational attitude towards the targets of security action, even though the apparatus of the state security remains the same.

These factors explain why detention in 1989 became an albatross which the government was anxious to lift, even if temporarily, from its collective neck. It could not afford to have its detention laws and practice opened up to general scrutiny at a time when they had become utterly indefensible and when external pressure groups were seeking new reasons for tightening the international stranglehold on the South African economy. The decline of the old order permitted government to introduce a measure of diplomacy into security policy.

Welcome though the release of most emergency detainees may be, the success achieved by the hunger strike is a limited one. All the detention laws remain on the statute book and many persons - although the total is considerably less - remain in detention cells. (At the beginning of 1990 approximately 60 persons were in detention) Emergency detention has been temporarily over-shadowed by a new device to contain the government's enemies - restriction orders similar to the earlier banning orders imposed under the Internal Security Act, 1982. A large number of detainees (in the region of 650 restricted persons towards the end of 1989 and 550 at the beginning of the new decade have not actually been freed but merely shackled by a different technique). Many have had their homes converted into a place of detention by house arrest orders.

The government has managed to deflect attention from its human rights violations by the substitution of this less visible form of repression. The hunger strike has purchased some respite for those involved in the extra-parliamentary struggle in South Africa; it has not however brought about any reform of the detention system or the national security programme in general.

Detention in the Future

Civil liberationists quite understandably balk at the notion of reforming the system of detention; nothing less than its outright abolition should be contemplated. While this cannot be faulted as the ultimate goal, the hard reality learnt from conflict societies around the world is that the process of its achievement is likely to be a difficult and extended one. Even countries with a stronger and longer tradition of democratic rule than ours have made use of detention, the prime examples being the British government in Northern Ireland, and Israel. It seems to follow that, in South Africa, a period of reform is an inevitable prelude to the abolition of detention.

Because detention in South Africa is in large measure a form of political control, change is scarcely conceivable without movement in the political arena. Detention, and other repressive elements of the security system, are by-products of a domination model of containing political conflict and are likely to remain on the statute book until the process of demolishing that model is begun. The reform or abolition of detention can only follow an increased emphasis on democratic consensus. The South African Law Commission Report on Group and Human Rights (popularly known as the Olivier Report) has squarely faced this issue and declared that the enjoyment of political rights by all is a pre-condition of an effective system of human rights protection.

It is inevitable that movement towards democratic consensus will release social forces held in check but never fully subdued by detention and the other measures of state security. Major political transformations are never easy and will necessarily be attended by conflict and by an unpredictable measure of social disorder. The period of transition, irrespective of the party or group then in control, must be characterised by fairly extensive use of special security measures if the transformation of society is to be an orderly one; and, regrettably, it seems that detention is likely to be one such measure. But it will have to be a form of detention as far removed from its present reality as can be achieved by legal reform. Detention during a period of transition to a new social order will have to be harnessed to different and more defensible purposes.

One such purpose is (belatedly) illustrated in the use of emergency detention in the strife-torn region of Pietermaritzburg. A so-called Inkatha warlord, against whom there have been numerous allegations of the brutal murder of township residents perceived to be comrades or activists, has recently been detained under the emergency detention regulations while charges are investigated against him. Pre-trial detention of people charged with political violence, particularly where there is widespread intimidation and even elimination of witnesses, may be a defensible measure in a situation of rampant political conflict if, of course, it is used without discrimination against all sides involved in the violent struggle. But the detention law must be so framed that it can be employed, and only employed, for these ends. There is no reason why it should not be subjected to judicial control and why mechanisms aimed at protecting detainees from abuse should not be included. No effective controls exist over emergency detention, which appears to be used only rarely for the purpose of coping with actual violence.

If there is the political will to reform security legislation, including detention without trial, there are several helpful models that might be turned to with profit. In Northern Ireland there is the 7-day pre-trial detention provision used to obtain information about terrorism. Israel has subjected its system of preventive detention to court control with correspondingly greater protection against misuse of the law. However, the rationalisation of detention should always be undertaken with a view to its abolition. However modified, detention is invariably attended by the drawbacks described by the Gardner Commission in Britain - that it brings the law into disrepute, that it causes deep

resentment and increases the 'terrorist legend' as well as the proficiency of the detainees to perpetrate violence. In a nutshell, prolonged use of detention is self-defeating as well as morally illegitimate. The only acceptable policy is to take the shortest possible route to its abolition.