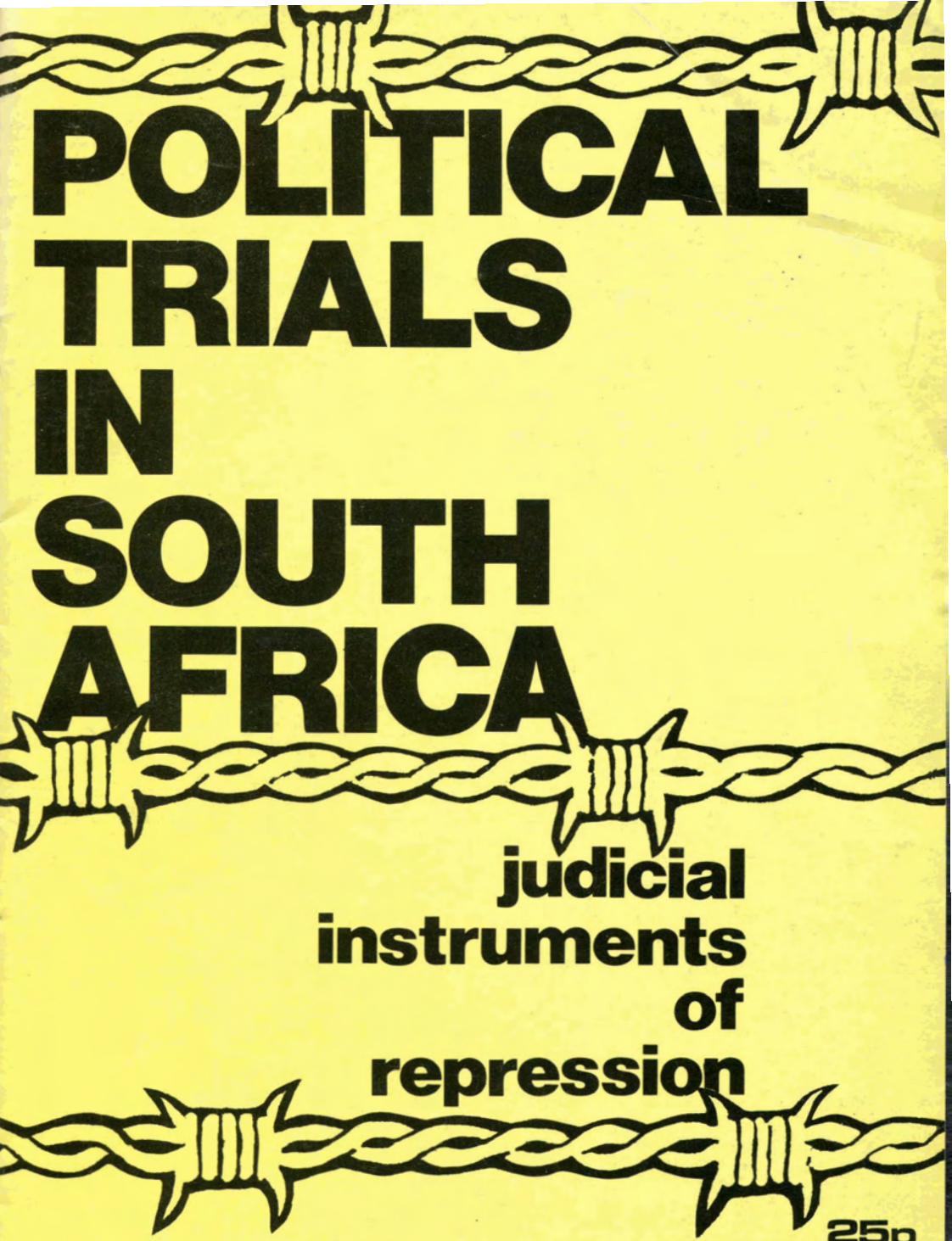
POLITICAL TRIALS IN SOUTH AFRICA



judicial instruments of repression

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PREFACE

'...I fear I will not be given a fair and proper trial... I consider myself neither legally nor morally bound to obey laws made by a parliament in which I have no representation. In a political trial such as this one, which involves a clash of the aspirations of the Africans and those of the whites, the country's courts, as presently constituted, cannot be impartial and fair... In its proper meaning equality before the law means the right to participate in the making of the laws by which one is governed, a constitution which guarantees democratic rights to all sections of the population... The white man makes all the laws, he drags us before his courts and accuses us, and he sits in judgment over us.'

Nelson Mandela's statement to the court in 1962 tragically holds as true now as it did more than 20 years ago. If any change has come about, it is rather a change for the worse, as the 'security' laws which apartheid's courts enforce today are even harsher and all-embracing. Yet a myth persists in some quarters that, whilst detention without trial and other repressive practices are to be condemned, at least opponents of apartheid can expect a 'fair' trial once brought before the courts. Indeed, such ideas find an airing even in the British Foreign Office. Following the arrest of leaders of the United Democratic Front in December 1984, Foreign Office Minister Malcolm Rifkind told the House of Commons that 'the South African courts have a healthy reputation for independence'. This view has been consistently voiced by the British and other western governments. Representations to the British government to intervene on behalf of those facing political trial in South Africa have been met time and again with a refusal to consider any action 'until all legal procedures have been exhausted'.

This pamphlet has been published to demonstrate the real nature of political trials in South Africa, and how the legal processes involved make fair trials impossible. It highlights the frequent practice of lengthy detention, accompanied by torture, to which opponents of apartheid are subjected before they ever reach a court room; the increasing detention of state witnesses who are compelled to give 'evidence' against those accused or face prison terms themselves; the extent to which 'confessions', extracted from accused persons under

torture or threat of torture, are used as 'evidence' in the courts; and the subordination of the judiciary to the state. Yet the outcome of many political trials in South Africa is all too often a long prison sentence, or even, on several occasions in the past few years, the death sentence. These repressive aspects of the legal process are also seen in Namibia, illegally occupied by South Africa.

As the struggle against apartheid intensifies, we must expect a further increase in the number and seriousness of political trials. This pamphlet will make a useful and important contribution to the efforts of those in Britain and elsewhere who are campaigning against political repression in South Africa, in exposing the country's courts as no more than another weapon in apartheid's war against the oppressed people of South Africa.

INTRODUCTION

Political trials are a key part of the repression of resistance to apartheid. The courts of South Africa are instruments whose usefulness to the regime depends on the extent to which it is believed that they meet internationally accepted norms of justice and legality, and that the judiciary is independent of the regime.

This pamphlet explains the nature of political trials in South Africa and how they are an integral part of the repressive machinery of the apartheid system.

As long as a wider public, and above all the international community, accepts South Africa's claim to have a legal system which can provide fair and just trials, then the regime can use the courts to brand as criminal the efforts of the oppressed majority to free themselves and bring about a just society.

As far as the black majority is concerned, it has never been true that the South African legal system is fair and impartial. But in recent years, in particular since the early 1960s, this has become obvious to even more people. As the struggle for freedom has advanced, so the regime's use of the courts has become steadily more naked. The legislation outlawing the most effective forms of resistance has become more comprehensive in its scope. The rules governing evidence and the conduct of trials have been repeatedly altered, destroying almost all the requirements of a fair trial, in order to make it easier to procure convictions. In the face of this process the judiciary has acknowlegded its impotence to do anything else but apply the laws made by the parliament of the apartheid regime. Indeed with few exceptions the judiciary has shown itself an eager and willing servant of the regime.

The political trial is a regular and constant feature of the maintenance of apartheid. As the level of resistance rises or falls, so the number of trials increases or declines. While the forces of liberation have grown and strengthened, whether in the form of open popular resistance and defiance, activity in underground structures or intensifying armed struggle, so the legal weapons adopted by the regime have sharpened.

During the 1960s, in the wake of the banning of the mass organisations of opposition and when the foundations of the bantustan system were being imposed in the face of fierce resistance, over 120,000

people went through the courts in political trials. In the three years after the uprising of 1976, over 40,000 people were convicted as a result of their participation in political struggle.

Today the courts of apartheid are again handling an unusually large number of trials. This comes after several years in which resistance to apartheid has been expressed with increasing openness and growing unity and effectiveness; after several years of steady advance in the armed struggle and in the influence of the ANC; and after a turbulent year of defiant challenge to the establishment of the new segregated parliament and to the imposition of apartheid councils in the black residential areas of South Africa.

The regime is well-prepared for this operation, having in 1982 adopted new security legislation on lines recommended by one of its judges, P J Rabie. The Internal Security Act of 1982, together with some other lesser known laws, gives the regime vast powers to use the courts as a weapon or, in its own words, to treat opposition as 'a problem of law and order'. Some of these powers lie in reserve, still unused, while others are now being tested for the first time.

Those who go through the courts are drawn from every sector of struggle. People who participate in mass actions such as demonstrations and protests or funerals for victims of police violence are charged with 'illegal gathering', 'public violence' and similar offences. The largest number of political trials are of this kind and the bulk of them are scarcely reported in the press, despite the fact that heavy prison terms and even death sentences may result.

People who occupy leading positions in legal organisations engaged in mobilising opposition face more serious charges with potentially heavier sentences, such as furthering the aims of banned organisations, subversion or treason. This pamphlet focuses on such trials along with those arising out of underground activities, including the armed struggle of the ANC. Trials of this last kind reveal the most violent aspects of South Africa's legal system and are regularly characterised by evidence of torture during detention.

A PROFILE OF POLITICAL TRIALS

There is great variety in political trials, each following a slightly different path, but conforming to a broadly similar pattern. All are part of a long and often violent process in which the label of criminality is forced on those struggling for freedom.

Detention

In most political trials the first and crucial stage is that of detention. The regime has extensive powers to detain people for the purpose of interrogation. These powers, under section 29 of the Internal Security Act, authorise the police to detain people to interrogate them for an indefinite period until the Commissioner of Police is satisfied that the detainee, in the words of the act, 'has satisfactorily replied to all questions at the interrogation or that no useful purpose will be served by his further detention'. Detainees are held for long periods in solitary confinement, deprived of all contact with family and friends. In particular they have no right to legal advice or representation.

The regime justifies this form of detention as necessary for finding out information about activities planned against the state and, more frequently, for getting evidence for trials. A lawyer recently described detention as 'a witness factory, a place where evidence is manufactured for court'.

A priority of the security police is to obtain statements from the detainees which are then sworn in the presence of magistrates. Many are then released without charge while others are charged with political offences. Still others are held as potential state witnesses.

Once detainees appear in court they are awaiting-trial prisoners and as such have a right to legal advice and representation. However, in many cases the first and vital court appearance, usually in a magistrates' court, is made alone and unrepresented. This is often due to the secrecy surrounding detentions (in particular those of people suspected of being involved in armed struggle). Appearance in court may be the first confirmation that someone is detained, and on some occasions families have only learnt of a detention through press reports of court appearances.

The lack of trained advice is especially serious where charges have been fully formulated and the defendant is asked to plead immediately.

Even where this is not done straight away, defendants whose trial is due to be heard in a superior court can be asked to plead in a magistrates' court — a procedure that is often used in political trials, making defendants plead before they have had time to take adequate legal advice.

Trial of four people under the Terrorism Act — 1982-1984
Outcome: three years' imprisonment for each defendant (after three years in custody)

> **'In answer to a question by Mr M T Moerane, for the defence, Lt Van Wyk said it was a standing instruction that whenever detained persons were taken from prison for interrogation or any other reason, they were to be handcuffed.**
>
> **He said when they wrote down notes or statements, the arm not used for writing had to be handcuffed to a chair.**
>
> **Asked whether it could be said that people who wrote down statements under those conditions had written "freely and voluntarily" Lt Van Wyk said he could not say what the people thought.'**

Report from a South African newspaper

'Pleading' is a sometimes lengthy procedure during which the presiding magistrate examines the defendant to determine which parts of the charges are not in dispute. In this way he may elicit very damaging 'admissions' from the undefended accused. These can be used against them in the trial. Since 1979 all admissions are presumed to have been made voluntarily, with the onus on the defendant to prove otherwise.

In some cases defendants have to make repeated court appearances before charges are properly formulated. This usually results in long periods in custody as bail is rarely granted for serious political offences.

It also prolongs the legal process excessively. In many cases the defence is kept in ignorance of the details of the charges until the eve of the trial. It is then often necessary for them to request a further adjournment to prepare a proper defence. In other cases, after months of delay, the state is unable to formulate a case and charges are withdrawn. There have been a number of cases in which two and even three years have passed between detention and conviction.

The charges

During the last twenty years South African law has enacted a number of laws aimed specifically at controlling political opposition. Most of them have now been amalgamated in the Internal Security Act of 1982, which defines various forms of opposition as 'terrorism', 'subversion',

'sabotage', 'furthering the aims of a banned organisation', 'illegal gathering', and so on. Defendants frequently face a multiplicity of alternative charges under the act, as well as lesser charges under such laws as the Explosives Act, Arms and Ammunition Act, Publications Act, etc. It is possible for the defendant to face a number of charges (and therefore potentially a multiplicity of sentences) for what is basically the same offence — for instance, membership of the ANC, furthering the aims of the ANC, contributing to the funds of the ANC.

Defendants may also face prosecution for common-law offences such as high treason. In recent years this has sometimes been used to combine the trials of defendants who have not committed a common offence or possibly even met each other. They are alleged nevertheless to have shared a common conspiracy. The use of common law charges as opposed to overtly political statutes also suits the regime in its aims of presenting its opponents as criminal.

Even after conviction people may be recalled to court and tried again on new charges relating to the same alleged offences — in a recent example, three people whose death sentences had been commuted to life imprisonment were sentenced to a further fifteen years.

Character of the court

South Africa has no system of trial by jury. Political trials are heard by a judge or a magistrate depending upon the seriousness of the charges. Local magistrates, in contrast to regional magistrates, cannot impose prison sentences of more than three years. Only judges are empowered to impose the death sentence. Judges and magistrates may sit with two assessors, although this is not compulsory unless the judge thinks that the death sentence might be imposed. Assessors need not have legal training and their function is to assist the court in ascertaining matters of fact. Although judges alone decide on matters of law, since 1982 assessors have taken part in decisions concerning the admissibility of evidence.

State witnesses

Since the 1960s the state has given itself increasing powers to detain people as potential witnesses for the prosecution in political trials. Much of the evidence for the state is provided by unwilling witnesses who have been coerced into testifying. Section 31 of the Internal Security Act allows potential state witnesses to be detained for the duration of a trial providing it begins within six months of detention. Even these generous powers are exceeded as people may be detained first for interrogation and only transferred to state witness status when a trial is imminent. During their initial detention many witnesses make incriminating statements which are then used to compromise

Trial of five youths under the Terrorism Act — 1981-1983
Outcome: prison sentences of 13, 12, 11, 10 and 10 years

> **'A teenage Galeshewe youth, giving evidence in the trial of five Galeshewe youths . . . told a Kimberley Regional Magistrate yesterday morning he felt he would rather die in solitary confinement because he had not been allowed to talk to anybody.**
>
> **He also said that he felt the time would come when he would go mad because he had spent all the time in the cell talking to himself.**
>
> **He said he felt he was being ill-treated by being kept in solitary confinement.**
>
> **The youth said he had not complained to the security police about being kept in solitary confinement.**
>
> **The youth said he would like very much to be free from solitary confinement.'**

Report from a South African newspaper

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them. Like people held for the purpose of interrogation, potential state witnesses are held in solitary confinement and have no right to legal advice. State witnesses face severe hardship in detention whether or not they eventually give evidence, especially when trials are extensively prolonged.

In spite of pressure from the state an increasing number of witnesses are refusing to testify when brought to court, even though this offence now carries a sentence of up to five years' imprisonment. Other witnesses face similar penalties for perjury when their evidence in court differs from their earlier statements. As most witnesses detained under these powers are called to give evidence *in camera*, those who refuse may be imprisoned without their names being publicly known. Even those witnesses who do testify often tell of the torture and intimidation which brought them to court.

A trial of four youths on a charge of sabotage — 1980
Outcome: five years' imprisonment for each defendant

> **During the trial a schoolboy witness whose age was not given denied the truth of a statement he had made to the police. He said, 'They hit me so that I should tell lies. What I have told now is the truth.' The prosecutor applied for the arrest of the youth on a perjury charge.**

Evidence

The bulk of the convicting evidence in political trials is increasingly provided by statements and admissions made by the accused them-

selves. These statements are 'confessions' which have been made by the defendants to magistrates during their period in detention. As with 'admissions', such 'confessions' are assumed to have been made voluntarily unless the defence can prove otherwise.

If the defendant challenges the admissibility of a statement on the grounds that it was made under duress the matter is dealt with in a 'trial within a trial'. In recent cases these arguments over what

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Trial of two people under the Terrorism Act — 1983
Outcome: five years' imprisonment for one defendant and three years for the other
In a 'trial within the trial' concerning the admissibility of statements made during detention, one of the defendants, Nomakephu Ntsatha, told the court how she was tortured:

> **'Miss Ntsatha told the court she was arrested in Aliwal North by a Warrant Officer Bezuidenhout on November 22, 1981.**
>
> **She said she was taken to the security offices there where W/O Bezuidenhout slapped her until she fell on her back. He then sat on her stomach and suffocated her with a small blanket she had wrapped her baby in and asked her how she felt.**
>
> **Miss Ntsatha said the officer hit her again on her face with his open hands when she stood up. At one stage W/O Bezuidenhout asked a policeman to hold her hands behind her as he assaulted her. She said the officer and a policeman pulled out her hair and showed it to her, saying they were going to shave her head in that manner.**
>
> **W/O Bezuidenhout pulled a bag that looked like a canvas "bank" bag over her head and tightened it around her neck. It felt wet and suffocated her and she could not speak. After a while he took it off.**
>
> **Miss Ntsatha said on the following day she was taken to the King William's Town security offices. W/O Bezuidenhout entered the office with other men. Mr Hattingh had a money bag that appeared to have something inside. Between six and eight men held her on her back. Some held her by her shoulders, some by her waist and others by her legs.**
>
> **Miss Ntsatha said Mr Hattingh pressed what was contained in the money bag against her from the jaw down to her lower parts. He pressed it against her breasts and arms as well.**
>
> **The "thing" shocked her and she felt cramps in her body. She was screaming all the time because of pain.**
>
> **Later Mr Hattingh said he was tired and gave it to Mr Fouche.'**

The magistrate ruled that the statement she made in detention was admissible as evidence.
From a South African newspaper.

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constitutes duress have dominated political trials. It is at this stage of the proceedings that defence lawyers have been able to expose the methods used by the security police to force detainees to incriminate themselves. Some are threatened or deceived. Many suffer serious physical assault and torture. However, in almost all cases, no matter how detailed and well-supported the allegations of assault, they are dismissed by the presiding judge or magistrate.

It is possible to be convicted on the strength of a confession alone and it is usual for supplementary evidence to establish that a crime took place, rather than that the defendant committed it.

Even though South African law requires evidence to be freely and voluntarily given if it is to be admissible, the courts have refused to acknowledge the internationally recognised fact that prolonged detention in solitary confinement for indefinite periods is itself a form of coercion which makes statements both involuntary and unreliable.

Conditions of the trial

The state keeps tight control over the circumstances of political trials. This is aimed specifically at defusing possible public reaction. Members of the public are frequently harassed by security checks. Nevertheless the local community gives full support to its members on trial and in 1982 the government tried to restrict this by means of the Demonstrations In or Near Court Buildings Prohibition Act. There have been several prosecutions of people who, in support of people on trial, have sung freedom songs or in other ways demonstrated in or near courts. In some instances trials have been moved to remote areas.

Much of the evidence and in some cases the whole trial is held *in camera*. Press reporting is strictly monitored and individual journalists

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A trial of an alleged combatant for sabotage — 1983
Outcome: 18 years' imprisonment

> **'Fears have been raised that a Supreme Court Judge's decision this week to bar the Press from court and issue summaries of evidence instead could set a precedent for future security trials.**
>
> **Mr Justice van Heerden ruled in the Maritzburg Supreme Court this week that a summary of the evidence given by three State witnesses in the trial of Mr Siphiwe Makhatini be jointly prepared by the defence and prosecution counsel and made available to the Press.**
>
> **The court was cleared in terms of the Criminal Procedure Act while evidence was given.'**

Report from a South African newspaper

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or the press itself may be barred from court. In the case of youths (persons aged under 18 years) evidence is normally *in camera* although often their parents request otherwise. Some trials go completely unreported.

Legal defence

In addition to the disadvantages to the accused inherent in the system and outlined above, there are many obstacles put in the way of the defence of the accused. There is the initial delay in allowing access to professional advice. Defendants may be assigned to a *pro deo* lawyer by the state in the absence of their own and a lawyer of the defendant's choice only found once the case has proceeded. An undefended person may plead guilty to a serious charge and the lawyer then has to reverse that plea.

Trial of three alleged combatants on charges of high treason — 1981
Outcome: death sentence commuted to life imprisonment

> **'Defence counsel for three alleged ANC members on trial yesterday asked for certain "extremely prejudicial admissions" made by them to be ruled inadmissible... In his application before Mr Justice Theron, Mr Unterhalter said that when the men appeared for the first time in court they had been detained... This meant they did not have access to legal advisers, friends or family. Because of this they were not represented in court. Mr Moise's lawyer arrived when the pleadings had been going on for 1½ hours... Pages of complicated charges and preamble were read to Mr Tsotsobe and the magistrate had elicited from him certain admissions after reading the charges.'**

The judge ruled the pleadings in the magistrates' court admissible.
Report from a South African newspaper

Defence lawyers frequently complain of being denied details of the charges against their clients or having relevant documentation withheld from them.

Conviction and sentence

In many political cases, once the matter of admissibility of statements has been settled, the trial concludes quickly, almost abruptly. The conviction rate is high, particularly for the most serious terrorism and treason trials. Sentencing, which is the sole responsibility of the presiding judge or magistrate, is becoming increasingly severe. Active participants in the armed struggle have been sentenced to death in eleven instances since 1980.

After conviction defendants may ask leave to appeal to a higher court. If granted this is a very slow process. There has been no successful legal appeal against the death sentence for participating in armed struggle. After all legal procedures have been exhausted, the State President can be petitioned for clemency.

Not only do the accused in political trials have to face a procedure whose rules are designed to achieve the aims of the security police, but those who apply the rules, the judges and the magistrates, have proven to be effective agents of the apartheid regime. Both their legal views and their political attitudes shape them for this role.

The courts are bound by a principle of parliamentary sovereignty. The South African constitution states that 'no court of law shall be competent to inquire into or pronounce upon the validity of an Act of Parliament', and judges have repeatedly affirmed their adherence to this principle. This has been used by judges to defend their application of the harshest provisions of the regime's security legislation.

In a case in 1976 a judge said, referring to section 6 of the Terrorism Act (now replaced by section 29 of the Internal Security Act):

> In providing for detention for indefinite periods of those who have not been convicted of crimes, for their isolation from legal advice and from their families, and for their interrogation at the risk of self-incrimination, the legislature has pursued its object by the enactment of measures which are undoubtedly foreign to the ordinary principles of our law.

He concluded, however, that his job was to apply the law or, as he put it, he had to give effect to 'stringent enactments which are positively shown by Parliament's choice of plain words to have been meant, however offensive to conventional legal standards they may be'.

More succinctly, another judge, in 1979, said: 'An Act of Parliament creates law but not equity. As a judge in a court of law I am obliged to give effect to the provisions of an Act of Parliament.'

A professor who suggested that the judiciary could make the Terrorism Act less useful to the authorities 'by denying, on account of the built-in intimidatory effect of unsupervised solitary confinement, practically all creditworthiness to evidence procured by detention', was prosecuted and convicted on a charge of attempting to obstruct the course of justice.

Because indefinite detention for interrogation is sanctioned by law, the courts have refused to accept that the pressure and effects of detention can deprive a confession of its voluntary character.

Judges often express their political attitudes in remarks in court or

by the sentences they give. In various cases when defendants have pleaded in mitigation that they were resisting an unjust regime, judges have remarked that their function is to apply the law, not to consider how history will judge the actions of the accused.

Other judges go further than defend their actions in this way and express their political condemnation of the accused. In a recent study by the Johannesburg-based Lawyers for Human Rights, a series of cases tried by regional magistrates and judges shows a pattern of sentencing which varied on the lines of colour and politics: people who were black or opponents of apartheid received consistently higher sentences than others convicted of similar offences.

The political role of judges has also been highlighted and questioned by lawyers. A leading advocate drew attention in 1982 to the fact that most political trials were heard by a small number of judges, a fact confirmed in a recent study by the Lawyers for Human Rights. The report of the study also noted growing criticism that the South African judiciary 'is merely part of the repressive, racist machinery'.

CONCLUSION

This brief account of political trials should make clear why those opponents of apartheid who find themselves in the courts cannot expect a fair trial, even if in a small number of cases the legal process appears superficially to meet the criteria of justice.

The courts of South Africa accept that their task is to apply the laws of apartheid. The judiciary is government-appointed and it belongs to the white minority which rules the country and oppresses the majority of the population. The rules and procedures of political trials have been shaped in the interests of maintaining the system and specifically to achieve the goals of the security police, giving the security police the opportunity to coerce and torture, without fear of being punished for their actions, those who will appear in court.

SATIS: SOUTHERN AFRICA–THE IMPRISONED SOCIETY

SATIS brings together a number of organisations concerned about political repression in South Africa and Namibia, and was launched at a conference to mark Human Rights Day in December 1973. It initiates and coordinates campaigns for the release of political prisoners and detainees in South Africa and Namibia, and against the many forms of repression employed by the regime against those struggling for freedom from apartheid rule.

Our work must continue until South Africa and Namibia are no longer 'imprisoned societies'. As the liberation struggles in those countries intensify, so too does repression. To campaign successfully we urgently need your support. Please contact SATIS at the address below for more information.

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