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in this issue . . .

EDITORIALS

1. IS APARTHEID DYING?

When Dr Piet Koornhof told an American audience in June, "Apartheid as you know it in the United States of America is dying in South Africa", there was consternation at home. Reactionary Nationalists, headed by Dr Andries Treurnicht, said that if Dr Koornhof had been correctly reported, he would have some explaining to do. Mr P. W. Botha played for time, saying he must first see the text of the speech. Having done so he came out in support of Dr Koornhof. All this is good. Confusion in the top Nationalist ranks is infinitely preferable to the monolithic certainties of Dr Verwoerd's day.

And of course some of Dr Koornhof's actions since he took over his newly-named post as Minister of Co-operation and Development would have made Dr Verwoerd very unhappy. His intervention to stop the demolition of Crossroads at the last moment is a case in point. The fact that he was prepared to sit down and talk to the Crossroads leaders was something quite unheard of. Previous Ministers in his portfolio had just managed to bring themselves to the point where they would talk to homeland and urban council leaders (although they didn't often seem to listen to what they said), but talking to urban leaders not operating within the organs of apartheid wasn't to be thought of. Well that **has** changed, as further evidenced by the names of some of the people Dr Koornhof later invited to serve on the local committees he has set up to discuss the situation of urban blacks – Dr Motlana of Soweto's Committee of 10, Dominee Buti and Bishop Tutu of the Council of Churches, newspaper editors Percy Qoboza and Obed Kunene, and Professor Sibusiso Nyembezi represent anything but a list of stooges. Then there is Dr Koornhof's publicly expressed hatred of the "dompas", the pass-system. And finally his last-minute decision to put a moratorium on the application of the new influx control regulations which will impose a fine of up to R500 on any employer who gives a job to an unregistered black person. All these are important departures from past practice and very welcome. We must be forgiven though if after more than 30 years of experience of apartheid we approach these new manifestations of ministerial flexibility with some important questions in our minds. Dr Koornhof told his American audience "Apartheid as you know it is dying in South Africa." What we have to find out about this statement is where the emphasis lies. Is it **apartheid** that is dying, or is it apartheid **as we know it** that is dying?

The difference, of course, is crucial, and there are signs that it may only be the latter.

Of the people we have listed above who were invited to be on Dr Koornhof's committees Dr Motlana, Bishop Tutu, Mr Qoboza and Mr Kunene declined to do so. They no doubt felt that if they did they would be seen to be working within an apartheid framework, and lose credibility, particularly with the young black urban constituency to which they have access. Ds Buti and Professor Nyembezi agreed to serve, but within weeks both had resigned. It seemed that their experience confirmed what the others had feared, that they were not being invited to talk about getting rid of apartheid but only about how to make it look and feel better.

As far as Crossroads is concerned there are real fears amongst community leaders that the security of the people who can establish the right to live in the new township to replace Crossroads may have been bought at the cost of the removal to the homelands of everyone who cannot establish such a right. And it has also been said that the price Dr Koornhof had to pay to his verkrampte colleagues for his Crossroads concessions was acceptance of the R500 fine on future employers of illegal black workers, this being seen by good cynics as a far more effective means of controlling the entry of new black workers into urban areas than the old system where the penalty was borne by the worker. And, of course, many frustrations and heartbreaks and anomalies have appeared in the operation of the moratorium on the implementation of this new regulation.

The optimistic view of Dr Koornhof's efforts is that he is not only having problems with his verkrampte colleagues in the Cabinet, but that he is also having difficulty in moving that vast new empire of generally verkrampte bureaucrats, which he inherited from the old Bantu Administration Department in the direction in which he wants it to go.

The pessimistic view looks at the growing population of the homelands, swollen daily by new evictions from "white" South Africa, people either without work or having to commute to it under conditions of acute strain and discomfort, and unable to improve those conditions because of their exclusion from trade union rights. These people are being moved by Dr Koornhof's Department.

The pessimistic view is that once the numbers of black people with Section 10 Urban Areas rights in 'white' South Africa have been reduced to manageable proportions, where they no longer seem to threaten white control, such people will indeed be given rights, perhaps even all the rights, while the vast and less fortunate majority are converted into homelands citizens, tolerated as contract workers in hostels, those superfluous appendages, their families out of sight somewhere else.

At that stage Nationalist propagandists might well argue that everyone in "white" South Africa enjoyed the same rights, discrimination had ended, and apartheid was dead. Those millions of contract workers and commuters and their dependants were foreigners, who must look to where they came from for political fulfilment. And from a distance the argument might sound convincing. But from our close quarters we would know that apartheid was neither dead nor dying, just dressed up in new (and unattractive) clothes.

Our experience of the Nationalists has taught us to be pessimists rather than optimists. Nevertheless, if we are to avoid the road to destruction, somebody has to break the apartheid cycle sometime. Has Dr Koornhof realised this? Bishop Tutu wrote to him at the time of his invitation to join Dr Koornhof's regional committee asking him, as a sign of good faith, to abolish the pass system completely, abolish Bantu Education, stop enforced removals and associate himself with the call for a new National Convention. A lot to ask a Nationalist Cabinet Minister to take at one swallow, but even if Dr Koornhof were to undertake these steps one at a time (he could stop all removals tomorrow) there would then be some hope that apartheid was indeed dying. □

2.
GET MOVING!

There is consolation in the fact that negotiations over Namibia are continuing, but none in the deteriorating situation there.

Mr Dirk Mudge keeps saying that he can't wait much longer for independence. The Nationalist Party leader has been threatening to lead his white followers out of the territory and back to South Africa. A white terrorist organisation has emerged and has decided that a meeting as innocuous as that of the local freemasons is a fitting occasion for it to throw a bomb and kill a man.

Meanwhile from the "operational area", wherever that may be, the list of 'incidents' and deaths lengthens, and a picture seems to emerge of a slow slide towards a Rhodesian-type tragedy.

So, let the negotiators get a move on, before things get even further out of hand.

And let them, pray heaven, come up with a solution that the world can support. Anything else will be a disaster, if not immediately, sometime. □

THE EMPEROR'S CLOTHES: RACE, POVERTY AND DUE PROCESS OF LAW

by Julian Riekert.

> ". . . every country . . . gets the law it deserves; the law after all, is only the expression of society's beliefs about the order that shall prevail. The breakdown of law is not, as is usually maintained, a threat **against** society; it is a threat **by** society."
>
> — Bernard Levin

In 1969 and 1970 The South African Law Journal published an article by Professor Barend van Niekerk of the University of Natal.[1] It was entitled ". . . Hanged by the Neck Until You are Dead" and was a scholarly and incisive study of the law and some sociological aspects of capital punishment in South Africa. In his search for empirical data the author had circulated a questionnaire among the judges and practising advocates in South Africa, in which he solicited their views about certain aspects of capital punishment. Two of the questions, namely "Do you consider, for whatever reason, that a Non-European tried on a capital charge stands a better chance of being sentenced to death than a European?" and "If your answer to (the previous question) is 'Yes' or 'Only for certain crimes', do you think that the differentiation shown to the different races as regards the death penalty is deliberate?" drew an interesting response. Almost 50 percent of the advocates who replied[2] answered the first question in the affirmative. Of that 50 percent, 41 percent believed that the discrimination was conscious and deliberate.

For publishing these views, which were not his own, but those of practitioners familiar with this unhappy aspect of our criminal law, Professor van Niekerk was indicted and tried for contempt of court.[3] He was acquitted for the technical reason that he lacked the necessary intention for the crime. However, with the stated purpost of showing that the prosecution "cannot be blamed for having brought this matter to court", the judge in Van Niekerk's case went on to discuss the published replies and concluded that the information which they contained might well have been in contempt of the courts in South Africa.

Reading between the lines of the Van Niekerk case, one comes to the conclusion that the truth or otherwise of the advocates' opinions was irrelevant. It is sufficient for one's statement to be unlawful if its effect would be to impute even unconscious racial bias to the judiciary. This was not always the case. In a case decided in 1956 Judge Ogilvy Thompson stated that "I imagine no fair-minded and adequately informed person would assert that injustices, or what appear to persons not knowing the full facts to be injustices, never occur in our courts . . . in cases where whites and non-whites are involved."[4] D. D. T. Jabavu recorded the private comment of a judge to the effect that "the natives got a stinking deal in the courts." He also attacked the racial bias of all-white juries and detailed several instances of disparity in sentencing, including one where:

> "a native youth with no previous record against him received at East London the brutal sentence of six weeks' imprisonment with hard labour, solitary confinement, and spare diet on two days in each week for being 'insufficiently clothed in the vicinity of the bathing houses set aside for natives' on the sea front."[5]

Since both extra- and intra-curial discussion of racism in South Africa unlooses such deeply-seated and hypersensitive springs of emotion, let us repair to the more tranquil waters of the United States Supreme Court and its decision in **Furman v Georgia.**[6] This was a case brought to test capital punishment against the "cruel and unusual punishment" prohibition contained in the Eighth Amendment to the United States Constitution. In his opinion Mr Justice Douglas made the following observations:[7]

> "The President's Commission on Law Enforcement and Administration of Justice recently concluded:
>
> 'Finally there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.'
>
> A study of capital cases in Texas from 1924 to 1968 reached the following conclusions:
>
> 'Application of the death penalty is unequal: most of those executed were poor, young, and ignorant. Seventy-five of the 460 cases involved co-defendants, who, under Texas law, were given separate trials. In several instances where a white and a Negro were co-defendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty.
>
> Another ethnic disparity is found in the type of sentence imposed for rape. The Negro convicted of rape is far more likely to get the death penalty than a term sentence, whereas whites and Latins are far more likely to get a term sentence than the death penalty.'
>
> Warden Lewis E. Lawes of Sing Sing said:
>
> 'Not only does capital punishment fail in its justification, but no punishment could be invented with so many inherent defects. It is an unequal punishment in the way it is applied to the rich and to the poor. The defendant of wealth and position never goes to the electric chair or to the gallows. Juries do not intentionally favour the rich, the law is theoretically impartial, but the defendant with ample means is able to have his case presented with every favourable aspect, while the poor defendant often has a lawyer assigned by the court. Sometimes

such assignment is considered part of political patronage; usually the lawyer assigned has had no experience whatever in a capital case.'

Former Attorney General Ramsey Clark has said, 'It is the poor, the sick, the ignorant, the powerless and the hated who are executed.' One searches our chronicles in vain for the execution of any member of the affluent strata of this society. The Leopolds and Loebs are given prison terms, not sentenced to death."

This opinion raises the issue of structural inequality within systems. On the basis of these remarks it is clear that even if the judiciary is totally devoid of bias the weight of criminal sanctions leans more heavily on the poor, and ipso facto therefore, upon the blacks and other disadvantaged groups. Few lawyers would dispute that in non-criminal litigation the quality of representation a litigant receives is to a large extent determined by his financial resources. Yet a fundamental postulate of our adversary system of justice is the equality of each party's champion. True, the system of legal aid is intended to overcome this disadvantage but in South Africa the funds available for such purposes are pathetically inadequate.[8]

To revert to the position in the United States, Friedenberg comments that:

"Administrative delay effectively tips the scales of justice in favour of the state in criminal cases and the wealthier and, especially, the corporate litigant in civil cases. The poor must settle sooner; they cannot risk the possibility of extended court costs, they have no staffs and files prepared to hold litigation in abeyance for a period of years. By setting bail higher than they can raise, poor defendants may be punished without trial, a common practice with those charged with highly unpopular or quasi-political offenses like draft evasion or for those, like young offenders or blacks, whom many judges regard as "uppity" if they behave as if they had any legal rights at all.

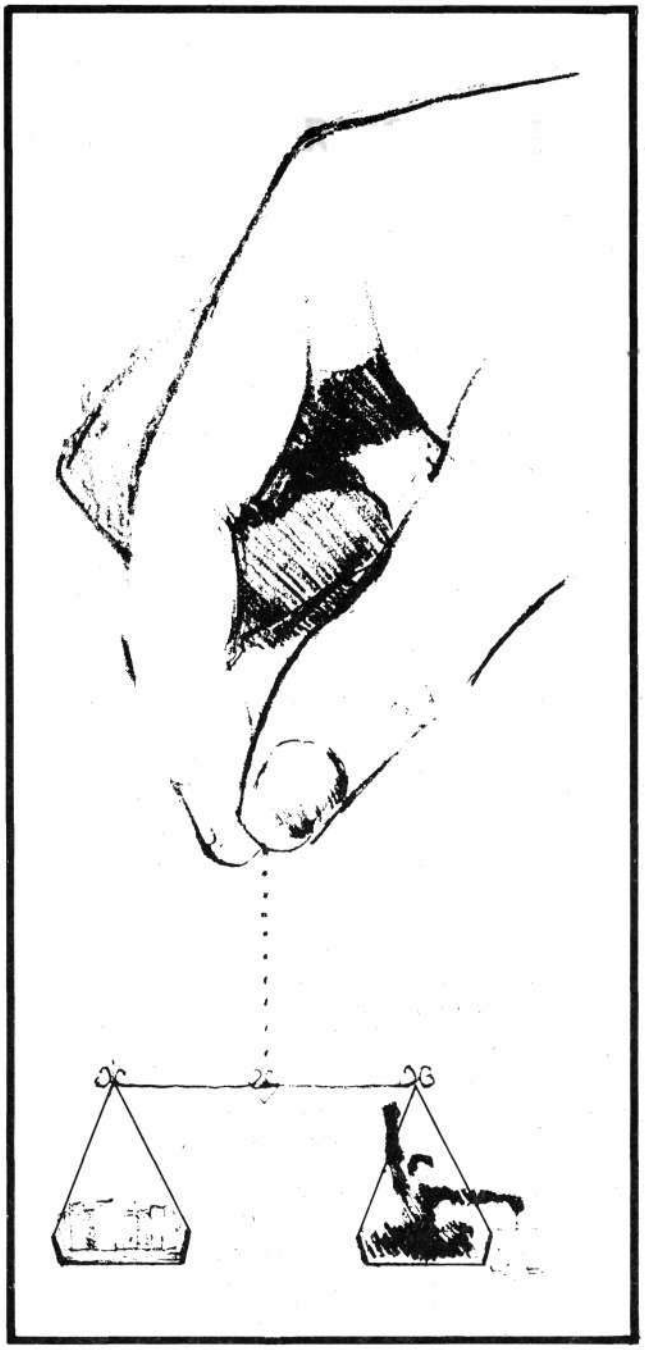
The fact that the quality of legal service available to the poor is inferior to that available to the wealthy would hardly be worth mentioning except that it may be useful to point out that more is involved here than the simple question of having a less qualified attorney and fewer services from him. Except in actions covered by insurance and cases taken on a contingency basis the civil courts are unavailable to poor plaintiffs. If charged in the criminal courts, their defense is likely to be hampered at least as much by the late entry of their defense attorney into the proceedings, and the peculiarities in the way his role is institutionalized, as by his casualness or incompetence."[9]

Is the position in South Africa any different?

Another structural disadvantage which operates against the poor and ignorant is the whole atmosphere which prevails in court. As Herbert Read has written of the English courts:

"The independence of the judiciary is symbolized in various ways. By means of wigs and gowns, the participants are dehumanized to an astonishing degree. If by chance, in the course of pleading, a hot and flustered barrister lifts his wig to mop his brow, an entirely different individual is revealed. It is as if a tortoise had suddenly dispensed with its shell. The whole business is carapaceous; a shell of custom and formality against which life, plastic and throbbing, beats in an effort to reach the light."[10]

Where the disparity in status, class and culture between the judges and the people is even greater, as in South Africa, the effect can be even more debilitating, as this item from an early South African Law Journal records:



Daryl Nero

"An energetic Judge of the High Court went on circuit and reached Solot, then the Ultima Thule of civilised Ugands. A learned and humane judge, he little guessed how cataclysmic his visitation would be. Despite the fact that it was the dry season and the temperature was uncomfortably high, he took his seat in the "Courthouse" (a grandiose term for an insignificant mud building), fully bewigged, powdered, and caparisoned in flaming red. The prisoner was brought in – a wild Sabei, who till his arrest for a harmless, necessary homicide had never seen a white man. He gave one look at the judge, let loose a terrified yell, and fell into a dead faint."[11]

Does the mediaeval costuming of both judges and practitioners serve any purpose other than to make a powerful class statement?

These are all issues which are as, if not more central, to any discussion of the administration of justice in South Africa as they are abroad. And yet as Professor van

Niekerk has pointed out on a number of occasions, they are very seldom raised in articles or papers by legal academics, let alone practitioners. The shroud of silence which surrounds these issues is, at least in part, due to the vigour with which the crime of contempt of court is prosecuted in South Africa.

Contempt of court is a unique species of crime in that it provides an exception to the rule of natural justice that no man may be a judge in his own cause. In effect the judges use the crime of contempt of court to define the bounds of permissible criticism of the judiciary and the administration of justice. The purpose of punishing contempt of court said Wilmot CJ in an eighteenth century English case "is to keep a blaze of glory around (the courts), and to deter people from attempting to render them contemptible in the eyes of the public."[12] A great deal of water has flowed under the bridge since then and most twentieth century lawyers would find Lord Denning's dictum in the Quentin Hogg case more compatible with contemporary notions on the nature and function of the judiciary. In dismissing the application for a **mandamus** he said "This is the first case, so far as I know, where this court has been called to consider an allegation of contempt against itself. It is a jurisdiction which undoubtedly belongs to us but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter. Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself."[13]

In his remarkable book "The Politics of the Judiciary" J. A..G. Griffith applies the analysis of realist jurisprudence to the English judges. In the opening chapter he delves into the socio-economic background of England's senior judiciary between 1820 and 1968 and concludes that 75,4 percent of the judges came from the upper and upper-middle classes. He goes on to postulate that this fact, combined with educational and other social factors, leads to the senior judges having a bias in favour of certain classes of litigant and against others. He illustrates the latter category by reference to some controversial cases involving trade unions and students. He concludes:

> "Students are not one of the more popular minorities and Her Majesty's judges in recent times seem to have shared much of the prejudice shown by other, equally senior, members of society . . . And as we have already seen, the judges have never taken kindly to trade unions in their relations with employers and the Government."[14]

A critical review of his book touched off a storm of controversy in The Times Literary Supplement but the sky did not fall down : nor for that matter was there any indication that anything but healthy dialogue came from his provocative analysis. And there certainly was never any question of a prosecution for contempt of court.

In South Africa the accused charged with an offence for which capital punishment is a real possibility is entitled to a pro deo or dock defence. The Sunday Express published an article on 21 May 1978 under the heading "Accused face 15 years jail with pro deo defence". In the article the reporter quoted an academic as saying that pro deo defence counsel were often inexperienced and that this prejudiced the accused in such cases. Shortly after the article appeared the newspaper company, its editor and a reporter were indicted for contempt of court and criminal defamation (of one of the advocates concerned).[15] As a result of evidence led by the defence the court accepted that pro deo defence counsel were often inexperienced. Mr Justice Milne observed that "Courts permit such persons to appear because they have a right to appear and, furthermore, they consider that some representation by counsel is better than none."[16]

While accepting the bona fides of the Attorney-General in the present case he added: ". . . there are two principles involved here, one the administration of justice and the other the right of free speech. Both require protection in the public interest, and it is what is best in the public interest overall and in the long term, that should prevail. Attorney-Generals should be wary of instituting prosecutions for contempt of Court lest they have the effect of stifling healthy and legitimate criticism . . . in considering whether a prosectution would be wise or expedient it is also necessary to consider whether a prosecution is not going to give the allegations in question a publicity which they would not otherwise have had."[17]

One hopes that this decision will mark a turning of the tide against the gradual erosion of the right to criticise the administration of justice in South Africa, and particularly in Natal.

If the Attorney-Generals continue to prosecute for contempt for even the mildest criticism of the judiciary or of the administration of justice, as in the **Gibson** case and if the judges convict in such cases the consequences could be disastrous. The judges are deliberately made independent of every other branch of government. They enjoy absolute security of tenure and remuneration. Their independence is further emphasised by the physical structure of their courtrooms and by their dress in court. They are required to exercise the strictest circumspection in both their private and public lives.

Inherent in all this is the real danger that they may lose contact with the lives and ideas of those who submit to their jurisdiction and particularly the poor. There are already signs that this may be happening. A Natal judge is on record as saying "If anything the non-whites get a better deal. We are always more benevolent in our approach to them."[18] While a white observer may regard the leniency shown by the Courts in cases with black accused, and involving witchcraft or faction fighting, as proof of their sensitivity to racial issues, it is interesting to note that Transkei has abolished the mitigating effect of witchcraft by statute. The contemptuous behaviour of some accused in trials under the security laws may also indicate that the courts are increasingly being seen as part of the system and not as the bulwarks of individual liberty.

All lawyers can and should play a role in preventing this. In the words of Gustav Radbruch:

> "Ultimately the task and duty and responsibility for legal knowledge and legal science of the nation . . . belong to the legal profession and particularly to the law faculties of our universities. We must first again become conscious of the proverbial opposition between law and caprice and between law and might, and we must see law again . . . as an attempt to achieve justice."[19] □

References on back cover

MORATORIUM

by Pat Tucker

Apartheid, proclaimed Dr Piet Koornhof stridently in America "is dead".

And, while South Africa's black population was digesting that bit of news along with their often inadequate rations in their separate group areas, he came home and quintupled the maximum fine for employing an "illegal". (Which curious South African term refers to black people who have no "rights" to be living or working in the area they have chosen).

So . . . dead in America, perhaps, but alive and very lustily calling out for more legal muscle back home in the urban areas.

As white employers rushed to sack their "illegal" employees, of short and long standing, the minister made what, on the face of it, is both an unusual and a magnanimous gesture.

He announced a moratorium, gave the "illegals" a chance to be legal-for-a-year and initiated a rush on Administration Board offices (though not in the Western Cape where the moratorium does not apply) that left his bureaucratic underlings gasping.

The moratorium, which extends until the end of October, allows for the registration of previously unregistered and unregisterable employees who can prove they have worked continuously for one employer for one year from July 31 or the past three years continuously in the area in which they wish to be registered.

In fact, is the moratorium that magnanimous? Is it a real move to help the victims of influx control, is it merely a stay of execution or is it, cynically, not intended to help the employees at all but to calm down their white employers, particularly in the business sector which faces the prospects of mass fines or mass firing of employees?

First of all, there was catch 22 – as employers who hurried along to take their places in queues normally only occupied by blacks found out – to be registered, employees had to be able to prove they had legal accommodation – to have legal accommodation, they had to have employment.

Says a Johannesburg attorney, well-versed in the intricacies of influx control: "unless this problem is eliminated administratively by their registering people who have been offered jobs regardless of their accommodation situation, this will be a non-starter."

A West Rand Administration Board spokesman told the Financial Mail there were two ways out of the situation. One was for an employer to apply for hostel beds to be reserved for his employees, the other was for an applicant to obtain a letter from his township superintendent stating that if he were registered, lodger accommodation would be available.

The problem with either of these solutions is that there is a chronic shortage of accommodation of any sort, at least in townships on the West Rand.

What more?

Even as the queues formed, Brigadier Jan Visser, head of the public relations division at police headquarters in Pretoria stated that unregistered black workers would continue to be arrested for pass offences because "the law has not been changed."

While Press headlines and politicians hazarded guesses that the increased penalties were the price Koornhof had to pay for staying the demolition of the Crossroads settlement, Sheena Duncan, director of the Black Sash's Johannesburg advice office was tracing its history back to an announcement last year by the then Minister of Justice.

Employers, threatened Mr Jimmy Kruger, would have to go to court instead of paying admission of guilt fines for employing "illegals".

The legislation increasing the fines was passed some time before it was gazetted last month (July) and the advice office saw the trickle and then the flood of "illegals" pouring in.

They were either sent by their employers to try to seek registration or sought help because their employers had jumped the gun and fired them out of hand – one after 21 years of service.

"There was a sudden throwing out into the streets of people with no other means of survival."

The move was to be echoed by a recommendation in the Riekert Report that recruitment of labour from the bantustans be clamped down upon.

"But", continues Ms Duncan "I don't think the authorities had understood how many illegal workers there were and what pressures would build up on both sides – employers and employees".

The concession announced by Dr Koornhof, says Ms Duncan "is immediately and enormously helpful to people who comply with it but there are thousands who don't comply – there are a million reasons why thousands of people won't be helped."

And, she points out, even those who qualify under the moratorium "aren't being urbanised". In a way, they will be more tied to their employers than ever before.

If they lose their current jobs after October 31 this year "they are finished." They will only be registered to work for their present employer and to be re-registered under the migrant system but if they leave nobody else will be able to employ them for fear of prosecution and the possibility of incurring the huge fine.

The move is, as Ms Duncan sees it, an employer-orientated device.

Who is not being helped by the moratorium, asks the attorney?

Firstly, he says, and is backed up by Brig. Visser's statement, it doesn't protect a person who is not yet registered and who is picked up by the police.

"There is no defence to a criminal charge, because the law remains unchanged."

Neither does the registration confer any permanent rights of residence on employees and it should not be seen as the start towards permanent residence in urban areas. "It just isn't that at all."

The moratorium does not include foreign blacks (Rhodesians, Zambians, Malawians) whose position, no matter how long they have worked in South Africa is now hopeless.

The concession, added the lawyer, "above all must not be seen as a liberalising of influx control laws which remain quite unaltered.

"All that is happening is that labour officers are being told to register certain people on one-year contracts under Section 10(1)(d). This they have always had the discretion to do. Now, at ministerial behest they are being told to do so."

He agreed with Ms Duncan that the move was designed to assist employers not labourers.

"This appears to be a one-timer. After the first year's contracts have expired, if an employer does not choose to re-engage the same labourers, he or she will be confined to recruiting from other, qualified people to avoid being prosecuted."

In that case, for the temporarily legal "illegal" it will be back to the bantustan. □

SOUTH AFRICAN LOVE SONG

by Vortex

My husband
is a strong man.
His sisters and brothers
always admired his strength.
But he is gentle,
and he makes jokes,
and he loves our children.

I love him.

He can be difficult:
he has his moods,
and he sometimes gets angry.
He is a passionate man.
He is a warm lover.

I appreciate him.

He is proud,
and he is just.
He dislikes cheating and unfairness.
He hates oppression.
He cannot tolerate it.

I support him.

But it was this that divided us,
it was this that has left me
lonely and poor:
he is on Robben Island,
for the rest of his life. □

BANNING

by David van Vuuren

"Sitting down to a meal of pickled fish and beans with some friends is not the sort of action that is likely to endanger the security of the state." True. No one could argue with a statement like that, although why it should be necessary to make it at all is puzzling. Or rather it would be, if the place were not South Africa, the setting S Regional Court Durban, the speaker Ismail Mohamed SC, recently appointed Appeal Judge of Botswana, Lesotho and Swaziland. But it is not as a judge that he is talking at this moment, – in this country there is no tradition of an Indian ever being appointed to that position, justice is white, – but as the defence in the trial of two people accused by the State of breaking their banning orders. What he is attacking is the reasonableness of the order itself. It is a test case. Neither of the accused denies being at the dinner, yet both plead not guilty. What is in question is not the niceties of the law, but the moral premise on which it is based. "These two people are being accused because they have a highly developed social conscience which has put them into conflict with the establishment." Their "crime" is that they feel for their fellow men and said that they disagreed with the way they were being treated. What we are seeing is the continuing debate about the form civilisation should take. At stake is the right to disagree. Dissent must be seen nor merely as a right but as a necessity if society is not to fall into the stagnation of self-congratulatory smugness. "People campaigned for the abolition of slavery. They were heretics. Slavery was abolished and their views became respectable. People campaigned for rights for women. Their views were heretical. When women got the vote, they were on the other side. It is people like these who utter a hundred heresies until those heresies become the orthodoxies of tomorrow." Governments and their laws are temporary, but the pursuit of justice is eternal. "These are two of the finest people that South Africa has ever produced. They must not be treated like common criminals." ("The finest people that South Africa . . ." words which are mouthed as a litany by the party faithful, about State-Presidents, Prime Ministers, Administrators and the other gods of the Nationalist Party heaven. But to use them on a non-white . . . Is this not heresy, Mr Mohamed?)

Fatima Meer is indeed a remarkable woman, one of the country's most distinguished sociologists and writers. Her name is synonomous with fearless criticism of the government. Her co-accused is Bobby Marie, her son-in-law. He has a degree in Philosophy and Political Science, has just completed his Honours. Recently he received permission from the Minister of Justice to take articles as an attorney, in spite of being banned. Both of them have on a number of occasions suffered for not keeping quiet. During the Soweto emergencies of 1976, both were arrested and spent much of the second half of the year in Transvaal prisons. Both are banned. (Fatima's son, Rashid, suffered the same fate. Unable to continue at university when he came out of prison, he eventually left the country illegally, and is now in Britain.)

The banning order is a roneod document of a variable number of pages, stapled in the top left hand corner. The specifics of name and special conditions and possible exceptions to its various clauses, are typed in. It has an embossed seal of the Minister in the bottom left corner of each page and his signature and the date on the last. "Whereas I, JAMES THOMAS KRUGER, Minister of Justice, am satisfied that you engage in activities, which endanger, or are calculated to endanger the maintenance of public order, I hereby in terms of section 9(1) of the Internal Security Act, 1950, prohibit you . . . from attending . . . any social gathering, that is to say, any gathering at which the persons present also have social intercourse, with one another." All very well, but what IS a social gathering? How many people does it need to make a gathering? What must they be doing? Is it simply enough that there should be two people together for whatever purpose? It is a question that nobody can answer with any certainty. "I have no clarity in my mind what, in terms of the Act, is a social gathering, or what a gathering is at which the persons present shall have social intercourse with one another." Justice Beyers, Judge President of the Cape Division of the Supreme Court, 1964.

To complicate matters further, different judges have at different times adopted different points of view. In the case of the State v. Hjul, 1964, the accused had been in the bar of a club in the company of another person with whom he subsequently played a game of snooker. The court held that this was NOT a social gathering, but in another case, it was accepted that the accused who had taken part in a game of bridge with three other persons, HAD attended a social gathering.

If judges of the Supreme Court cannot agree, how then can the ordinary citizen be expected to know?

Ignorance of the law is never regarded as an excuse anywhere in the world, least of all here, yet it does not seem unreasonable to expect that the law should at least make sense, that it COULD be understood. One can hardly be held responsible for breaking a law that nobody is able to understand – neither the Special Branch lieutenant who served the order, the two who received it, the Defence Attorney, nor, by implication anyone else in the court, including the prosecution and the magistrate.

Is it too cynical to suggest that the vagueness and ambiguity is deliberate? That the confusion is intentional? A part of the mechanism calculated to unsettle the nerves and unbalance the mind? Whatever the case, it is a bad law, indefensible on moral grounds. It is curious that the calculated barbarism of its effects on individuals and its intentions which are so patently in conflict with Christian principles, should be the work of supposedly God-fearing

Christians. It matters not that Jimmy Kruger, now that he has been relieved of his portfolio, should bleat that it pained him to restrict people. "Actually by nature I am not a very aggressive sort of person. I like people . . . Restricting people you don't know personally is a very very difficult thing for a person to do." The hundreds whose lives have been permanently scarred, if not totally destroyed by his official signature on that official bit of paper, must wonder why it is only now, out of office, that he shows the first sign of regret.

Fatima Meer and Bobby Marie are in court because on a night in December 1977, the Special Branch burst in on a dinner party at a friend's house and took flashlight photographs of the eleven people round the table. They had been watching Andrew Verster's house in Essenwood Road, from about six that evening and had seen a Volkswagen arrive round seven. They made a note of the five passengers, including Mrs Meer, her son-in-law, her two daughters and a friend on holiday from university in England. A while later, another car had arrived with two guests, and another arrived by taxi. The last to arrive had been a woman doctor on her own. About eight, the police had changed their position to the side of the house to get a better view and had watched the guests sit down and begin their meal. It was a hot midsummer night, and the windows and curtains were open. Nothing was hidden. They watched for an hour and then, round nine, climbed over the back wall and made their way into the house quietly through the back door which was open. On such occasions it is necessary to be quiet, as the element of surprise is important. There were eleven of them, the same number as the guests (there was one woman with them, presumably in deference to Mrs Meer. Her only function was to escourt her to the toilet and back at some stage during the raid, an unnecessary precaution lest she should try to escape). Nobody made any attempt to move when the bulbs kept flashing. Names were taken, diagrams made of the seating, the empty plates counted, a list of the wine bottles made, the exact names of the various dishes noted. The party was over. Everyone left. The raid had gone according to plan, it was smooth and efficient.

Eighteen months later the case too was over, the magistrate found them guilty. Before passing sentence he listened as Ismail Mohamed argued that as the law did not lay down a minimum punishment, he had various options open to him. He could postpone the passing of sentence conditionally or unconditionally, he could discharge them with a caution and reprimand, he could detain them until the rising of the court, or should he wish to, he could take the strongest step of passing a suspended sentence. "The question whether you accept the most extreme sentence will depend on one question. Ask yourself: Do I need that extreme punishment to deter these people from repeating this behaviour? You must not impose a sentence that will render anyone . . . the unfortunate victim of political dissension by excessive severity. These are the men and women who make civilisation possible. The basic truth is that the courts must do justice and we must not discourage these citizens from having that wonderful spirit of love and dedication and heightened social conscience without which our society would be the poorer . . . Civilisation does not come from obedience only, but from a lively social awareness . . . In the process of evolution there will be constant dissent as to what direction society should take." In 1954, an attorney had engaged in a campaign to disobey certain laws to which he objected. The Transvaal Law Society had wanted him struck off the Roll. "The court has to decide whether the facts which have been put before us on which the accused was convicted show him to be of such character that he is not worthy to be in the ranks of an honourable profession." The answer was a resounding NO, and Nelson Mandela was not struck from the roll. Arguing against a suspended sentence, Ismail Mohamed said that it was possible to break the law unwittingly. This would be an intolerable situation. The magistrate listened, and then sentenced them each to three months imprisonment, suspended for three years.

Obviously it is an unsatisfactory situation as the basic questions are still unclear — what is and what is not a gathering? — and it will be in a higher court that the debate will go on. But for the moment, for the two of them as for every other banned person, daily life continues to be a minefield of regulations and restrictions, some visible, some hidden, some obvious, some obscure. At any given moment, they are likely to be breaking the law without even being aware of it. "I hereby, in terms of Section 10(1)(a) of the Internal Security Act 1950, prohibit you . . . from . . . absenting yourself from the magisterial district of . . . being within . . . any Bantu area . . . the premises of any factory . . . any place or area which constitutes the premises of any public or private university, university college, college, school or other education institution . . . performing any of the following acts . . . preparing, compiling, printing, publishing, disseminating or transmitting in any manner whatsoever, any document, (which shall include any book, pamphlet, record, list, placards, poster, drawing, photograph) picture . . . giving educational instruction in any manner or form to any person other than a person of whom you are a parent . . . communicating in any manner whatsoever with any person whose name appears on any list in the custody of the officer referred to in Section 8 of the Internal Security Act 1950 . . ."

For the banned person the question is whether to take the order seriously and become his own policeman, so opting for a state of permanent conflict with his inner conscience which inevitably must lead to a serious distortion of his personality, or live in continuous emotional revolution against the order. Most survive precisely because they do not take their order seriously, and are thus vulnerable to arrest and conviction at any time. The magistrate had said that Meer and Marie were "distinguished citizens and not criminals" yet the fact remains that these "non-criminals" are convicted in South African courts in such a way that it makes no difference finally whether they are criminals or not. The result is the same. The courts are bound by the security acts passed by the Nationalist government to ensure its own survival, and this deflects attention from the fundamental issue, the freedom to disagree, to the contrived issue of the measure of punishment that should be imposed on those who dare to dissent. The principle that a person should be considered innocent until proved guilty has been abandoned. The accused must prove his innocence, whilst the police have the widest possible latitude in building up their case, including detention of witnesses. Under such circumstances can the testimony they give be regarded as open, willing and true?

Normality means accepting that you are always being watched, a car perhaps casually parked outside your house, someone driving at a not too discreet distance behind you, an unannounced visit at any time of day or night, to look through your house, your papers, your books, to take some away for examination for this or that, "just a routine check", interference with your mail, eaves-dropping on the phone and the like. But these are petty annoyances. There are more serious happenings. You can be taken away and held incommunicado for as long as they please. Some never return, except as a corpse.

It is however a most effective law. The banned person cannot be quoted and what they write cannot be published. And that means not only what they say and write now and in the future, but everything that they have ever said, everything they have ever written. It is as if a skin grows over the wound. They no longer exist. And what is not seen or heard is soon forgotten. Occasionally their names appear in the press to remind the world that they are still

living – maybe it is a court appearance because of some infringement of their order – but as time goes on, the references become shorter, the interest less.

"One of the conditions attached to permission for Mr Jones to attend his own wedding by a Somerset West magistrate was that there be no political reference. His banning order prohibits him from attending gatherings and at the reception, Mr Jones sat in a separate room. The long queue of guests – some from as far as King William's Town, waited in turn to congratulate the groom." The report is from the Rand Daily Mail of 30th April this year. The man is Peter Jones who was served with a banning order soon after release from detention in February. He was held with Steve Biko in August 1977. In March, David Gaza, a former director of the Umlazi Residents' Association was found guilty of contravening his banning order, and ordered to be detained until the rising of the court. However, he had already been convicted on four other contraventions of his ban, for which he had received a suspended sentence. The magistrate's leniency was not popular, and Mr Gaza is now in prison serving a twenty month sentence on the other count.

It is a most effective law. The conspiracy of silence is just as apparent in the so-called liberal press, the English language papers, as it is in the Nationalist press. The trial of a person of the importance of Fatima Meer should have been headline news. It didn't rate more than a handful of paragraphs on some inside page. Some papers shunned it completely. One cannot escape the conclusion that despite their avowed dedication to the cause of freedom and justice, the English press here has other priorities, the first being to sell papers, other issues being peripheral to this. Arguments, however compelling, about the right of the individual to disagree in what purports to be a democratic society, are not news, and do not sell papers. That the questions that these arguments raise affect every single person in this country and not merely the two unfortunate victims in the dock, is conveniently ignored. When the press willingly censors itself, it is obvious that the suggestion that it needs enactments from above to keep it in line is superfluous. It is sad but true that after thirty years of Nationalist Party rule, the very foundations on which democracy is based have become so affected and enervated that they have all but ceased to function, except in name. We witness an opposition in parliament offering near identical policies as the government but framed in different words, a judiciary overseeing laws that are the antithesis of justice, and a press paying lipservice to its role as custodian of the right to free speech, whilst in fact supporting the status quo, that is, white supremacy for ever. South Africa is acting out a play, written and staged by the Nationalist Party, for the benefit not of South Africa but of the Nationalist Party. So clever is the direction that everyone has a part, however unwilling they might seem to learn their lines. □

Diakonia Council

Statement on Prisoners' Right to Study

The Diakonia Council, which consists of official representatives of the African Methodist Episcopal, African Presbyterian, Anglican, Congregational, Evangelical Lutheran, Methodist, Presbyterian and Roman Catholic Churches, meeting in Durban on 29th May,1979, unanimously approved the following statement on the prisoners' right to study:

"The Diakonia Council **believing** in the God-given right of all people to read and study, and **noting** that in terms of the Regulations to Prisons Act of 1959 (as amended) the Commissioner exercises his discretion as to which prisoners may study and at what levels, and **recalling** Our Lord's words that what is done to those in prison is done to him (Matt 25), and the instruction of the Letter to the Hebrews that we should "Remember those in prison as though in prison with them . . . . . ." (Heb. 13:3) **urges** all members of our member churches:

1. to support the campaign for amendment to the legislation so that all prisoners will have a legally-recognised right to study, and

2. to give whatever practical support they can to prisoners wishing to study e.g. by making contributions towards the costs of studies by correspondence or for the purchase of texts." □

THE FRAGMENTATION OF ZULULAND, 1879-1918

by T. R. H. Davenport.

History is largely about the exploitation of the weak by the strong. The history of civilization begins at the point where such exploitation stops. Even the constructive phases of British imperialism were commonly preceded by a period of military confrontation and conquest. The question, where Zululand is concerned, is whether such a constructive phase occurred at all. This article advances the view that there were constructive aspects of white rule in Zululand, but that the undermining of the Zulu state and its socio-economic system were a heavy price paid by the Zulu for benefits received.

It is a commonplace that the European empires of the nineteenth century resulted from a combination of different and complementary thrusts – by missionaries, soldiers, proconsuls, hunters, traders and investors. The exact chemistry of imperialism is a controversial topic, but exploitation of economic resources led to exploitation of people, to unstable frontiers in turn, and on the rebound to the periodic extension of imperial authority into new areas. Colonists and traders, in the pursuit of prosperity, often fell foul of the indigenous societies, missionaries and sometimes magistrates saw the protection of these societies as an important function. The resultant tensions between these dominant elements produced colonial constitutions which normally gave explicit protection to voteless minorities. The real problem was to make these constitutional safeguards effective in practice in those reaches of government where the wielders of local power found them inconvenient. It was a particularly tough problem in Zululand, which experienced a double penetration by both Colonial Natalians and Boers from the direction of the Transvaal.

The boundary of the Voortrekker Republic, Natalia, on the Black Umfolosi was brought back to the Buffalo-Tugela line when the Colony of Natal was established in 1843. Zululand continued as a single kingdom under Dingane's successors, Mpande (1840-72) and Cetshwayo (1872-79). The state had been weakened, but its political economy had not been shattered, as a result of Blood River. Under Mpande's long and relatively peaceful rule there was a rebuilding of resources, and an expansion of the **amabuthe** (age-regiments) commensurate with population growth. Like the Sergeant King of Prussia in the eighteenth century, Mpande did not exhaust his military strength by making too much war.

Equilibrium, however, was not attained. Important changes undermined Zulu stability in the two decades immediately preceding 1879. The population grew substantially, nearly doubling itself. Cattle numbers diminished, through drought, and the export of beasts in return for trade goods (notably fire-arms). Over-mighty subjects soon began to arise in their own home districts, and Cetshwayo found them increasingly difficult to control. Loss of land in the north, to Boers infiltrating down from the Transvaal provided a further point of friction, until the stage was reached at which Sir Theophilus Shepstone, whose relations with the Zulu were not as intimate as he often claimed them to be, announced that he could no longer hold the impis in check unless the Transvaal were annexed to Britain.

British annexation of the Transvaal in 1877 merely diverted Zulu antipathy to the Transvaal's new rulers. A boundary commission, appointed to investigate the frontier dispute in the Blood River region between the Zulu and the Boers, reported substantially in favour of the Zulu. Sir Bartle Frere, who had been appointed High Commissioner in 1877, decided to suppress the report, on the advice of the Lieutenant-Governor, Sir Henry Bulwer, who discounted the Transvalers' case and recommended that the best policy was to enforce a just settlement without spelling out the detailed reasons for it. Cetshwayo now found he could neither control his people on the Colonial frontier nor bend to the demands of the High Commissioner, whose determination to punish the Zulu for breaches of the peace was fired by an apparent conviction that the Zulu state was too volatile to be allowed to survive. The fact that the unrest on the Zulu border was part of a much wider manifestation of instability in the African world, which had already affected the northern Transvaal, Griqualand West, and the Ngqika and Gcaleka peoples on the Cape eastern frontier, gave Frere's posture a measure of plausibility.

Under these circumstances, it would have been very difficult to prevent the war of 1879, which lasted for six months and resulted in acceptance of the defeat by the Zulu King. Although his forces had performed impressively during the first month of the campaign, they had neither weapons nor resources for a sustained war.

After Ulundi, the Zulu leaders accepted the dismantling of their state. Sir Garnet Wolseley, sent to replace Frere in South-East Africa as High Commissioner, disarmed the Zulu, sent Cetshwayo into exile in the Cape, and with the help of the trader John Dunn, divided the kingdom into thirteen chiefdoms, ostensibly in order to bring back the pre-Shakan political dispensation, and destroy the Zulu military capacity without the burden of direct annexation. Guy has argued that Zulu resistance was not destroyed, but that their leaders deemed it prudent to admit defeat in return for a promise, which Wolseley made, that they would be allowed to keep their cattle, their property and their land.

It involved trusting the promise of a high commissioner who was out of sympathy both with the missionary and with the white colonial as to the correct policy for Zululand. If the Colensos wanted the Zulu monarchy left intact, the white Natalians preferred a British annexation of Zululand so that farms could be found there for development, and so that Natal could advance her influence northward towards the rich areas of Swaziland and the gold-bearing eastern Transvaal. Even Shepstone was thwarted by Wolseley's independent line, but if Guy is

right, it was the Shepstone policy, rather than that of Wolseley, which triumphed in the long run. It lived on through the influence of a man who became in turn British Resident, Resident Commissioner, and Chief Magistrate of Zululand in 1880-93, namely Melmoth Osborn.

Politically, the 1879 settlement proved unworkable. By 1883, the supporters of the exiled Cetshwayo were beginning to regroup their forces and challenge Wolseley's leading nominees, Chiefs Hlubi (a Sotho), Zibhebu (leader of the Mandlakazi and Osborn's special protegé) and Hamu (half-brother of Cetshwayo, who had helped the whites in 1879), and the master-spider John Dunn. The British Government now felt the need to build a Zulu counterpoise against the newly independent Transvaal, and therefore began in 1883 to yield to Treasury and other pressures in Britain for the restoration of Cetshwayo himself. The ex-king was allowed to return. His Usuthu then attacked bettered Zibhebu who fled. But at this point Osborn intervened and persuaded the British Government, instead of scrapping the 1879 settlement, to modify it by partitioning Zululand into three separate areas: first, a Reserve in the south, for Dunn and Hlubi, to be placed under the control of John Shepstone, second, a territory for Cetshwayo himself, comprising the large central area between the White Umfolosi and the Mhlatuze rivers; and third, an independent territory for Zibhebu in the north.

Osborn's settlement settled nothing. Zibhebu and Hamu still fought the Usuthu, and in July 1883 Cetshwayo retreated to the Nkandla forest, from where he waged guerrilla war with success. In 1884, he died, perhaps from poisoning at the hands of his opponents.

Meanwhile Boers in the north began to revive their land claims. They offered support to Dinuzulu, Cetshwayo's son and heir, whom they recognized as king. In May 1884, Coenraad Meyer and a party of Boers from the South African Republic helped Dinuzulu to defeat Zibhebu, and in return claimed a vast area of land "in extent more or less 1,355,000 morgen with the right to establish there an independent republic." The "remaining portion of Zululand and the Zulu Nation" were to be "subject to the supervision of the said New Republic". Dinuzulu agreed to these terms on the advice of William Grant, who was at the time, and remained, a trusted confidant. The importance of Dinuzulu's action, whether or not he realized it then, was that it was taken by white Natalians as a release from Wolseley's undertaking in 1879 that the land of Zululand should be kept for the Zulu people. Dinuzulu's biographer, C. T. Binns, has argued that the king and Grant were both misled. At a subsequent meeting before Grant and the leading Usuthu chiefs disagreed as to whether the former had explained to the chiefs the implications of what they were signing. Bulwer himself, a man of normally balanced judgement, felt sure that Dinuzulu was aware of what he had signed. So did Sir Arthur Havelock, who succeeded Bulwer as Governor. But it is very likely that Dinuzulu was taken by surprise when the New Republic extended its boundaries in December 1885 to include the whole area between the Reserve and the Mkuze River, and began to mark out a township at St Lucia Bay. It is also doubtful whether he really accepted the Republic as a protector power.

The expansion of the New Republic threw the Zulu on the mercy of the British, who were first able to persuade the Republic's leaders in May 1886 to pull back their frontiers so as to leave Ulundi in Zulu hands, and then to secure in October, in return for British recognition of the New Republic (from which the Mtonjaneni district, referred to as 'Proviso B' in the treaty, was excluded), Republican recognition of a British protectorate over the rest of Zululand. The Zulu leaders resented this deal. Their resentment was directed not against the British protectorate, however, but at Britain's refusal to allow them to challenge the Boer leaders in London to establish their claims to the borders laid down in the agreement. British intervention had actually won back for the Zulu a large area of land, and this at a time when the only Englishmen to settle in Zululand were there with the agreement of the Zulu authorities. The question was whether this could last.

After conducting the negotiations with the Boers, Melmoth Osborn allowed his protége, Zibhebu to return from the Reserve, into which he had fled, to his own lands north of the Black Umfolosi, where in the meantime some 5,000 Usuthu had settled. This precipitated a revival of the internal Zulu conflict, and when Osborn brought Natal troops as well as Zulu levies into the fight against Dinuzulu's Usuthu, the latter threw himself on the mercy of the Boers of the New Republic (which the Z.A.R. incorporated in 1888). At the urging of Harriette Colenso, Dinuzulu handed himself over to the British authorities in Pietermaritzburg. It did not help him. He was tried, convicted of treason, sentenced to ten years imprisonment and exiled to St Helena.

There he remained, while the whites of Natal brought to a climax their long drawn out debate over the merits of responsible government. Here black-white relations played a crucial role, for not only did the Indian franchise cause political tempers to rise until it was eventually abolished by legislative subterfuge in 1896, but there also developed a major dispute over the powers of the Governor as supreme chief, as defined in the Natal Native Code of 1891. The issue was whether, in exercising these very wide powers after the grant of responsible government, the Governor was to be allowed to act at his discretion, or solely on the advice of his ministers. The Colonial Office was adamant that the Natal ministers were not to be allowed to control the Governor's use of arbitrary power. The Colony eventually accepted this ruling, but the Natal politicians obtained what they desired through discreetly amended Royal Instructions, which required that before exercising the powers, the Governor should inform the ministers of his intentions and plan his actions jointly with them, while retaining ultimate responsibility.

In 1893 Osborn retired and was superceded by Sir Marshal Clarke as Resident Commissioner in Zululand. Clarke, who, unlike Osborn, viewed Zulu problems from an Imperial rather than a Natalian perspective, worked for the restoration of Dinuzulu as the best way of ensuring peace and a renewal of Zulu confidence – not as a reinstated paramount, but as a humble government advisor on native affairs, with a house near Eshowe and a salary of £500 a year. Sir Walter Hely-Hutchinson, the new Governor, accepted Clarke's proposals in May 1894. Dinuzulu therefore received a free pardon in January 1893, but his return was delayed by Natal governmental opposition: they now demanded incorporation of Zululand into Natal as a condition of his return.

This desire for incorporation of Zululand had not been very articulate before Natal acquired responsible government in 1893, and fears had been expressed that incorporation would be a security risk. Some Natal whites considered that their access to the trade of Zululand, and to the lion's share of Zululand customs revenue, which they had enjoyed since 1888 made trade incorporation unnecessary. But others who wanted incorporation argued the need for better control of Zululand minerals (gold in the Nquthu and Nkandla districts, and coal in Nkandla, Mtonjaneni, and Hlabisa), and also urged that land in Zululand be made available either for white settlement or for the resettlement of blacks from Natal. Such people came to see the restoration of Dinuzulu as a possible lever to hasten incorporation.

By December 1897, Dinuzulu and his fellow exiles were at last allowed to return from St Helena, and Natal had been

accorded the right to incorporate Zululand as a kind of *quid pro quo*. Significantly, this right now included the opening of Zululand to white settlement with British approval, provided a decent interval of five years, should elapse before redistribution of land occurred.

All that the annexation agreement had laid down was that there should be no grants or alienation of Crown Lands in Zululand until 'other provisions shall have been made in that behalf', though township lands, lands to be reserved for mining, and lands already alienated, were not to be so protected. This provision was included at the instance of the Secretary of State for the Colonies in a Minute of 17 May 1897; but on 17 June, Chamberlain accepted a qualification proposed by Harry Escombe, the Prime Minister of Natal, that H.M. Government would be prepared to consider 'any representations from the Natal Government made with the concurrence of the Boundary Commissioners in favour of opening up within the term of five years special localities and under special circumstances, with due regard to the state of feeling in the country'.

The outbreak of the Anglo-Boer war helped the five years to pass quickly. Then two delimitation commissioners, Brigadier-General Sir J. G. Dartnell representing the Imperial Government (who was replaced for health reasons by R. H. Beachcroft on 16 March 1904) and C. J. R. Saunders for Natal, were appointed on 1 August 1902. Their assignment was to delimit "sufficient Land Reserves in the Province of Zululand for Native Locations", confining their investigations "to an inspection and general survey of the lands along the Coast belt, comprising the Umlalazi, the greater portion of the Umfolosi, and the low-lying portions of the Hlabisa, Ubombo, and Ingwavuma districts . . . and to report as to what portions of the lands within the said area should be reserved for Native locations". They had to look into the rights of 72 missionary bodies and those of the 89 storekeepers, 64 of whom lived in the areas set aside as Reserves, and examine the claims of 27 (mainly white) squatters. They were also instructed to find an area of ten to twelve thousand acres in Umlalazi for the family of John Dunn.

On 15 May 1903 the Commissioners telegraphed the Prime Minister of Natal and asked permission to "deal with lands outside the limit of the coastal belt as we see fit", in the interest of greater expedition. The Governor referred the matter to the Secretary of State, who, in a telegraphic reply of 18 June, saw "no objection to Joint Commission completing their labours without delay, as I understand your Ministers do not propose to give them more detailed instructions, and Commission are prepared to continue their work without them". This cryptic reply, in which the specific request to conduct investigations outside the coastal belt was not answered, was taken by the Prime Minister as sufficient authority for him to tell the Commissioners that "it is not the intention of Ministers to issue any further detailed instructions and the Commission are accordingly authorised in their discretion to continue the work of delimitation outside the Coastal Belt."

The Commission went ahead. They produced nine interim reports before the final one, of 18 October 1904. Their work was interrupted after the second report so that they could meet Joseph Chamberlain during his visit to Pietermaritzburg on 30 December 1902, along with the Governor Sir Henry McCallum, the Prime Minister Sir A. H. Hime, and C. A. S. Yonge, M.L.A. for Melmoth, who had objected to their approach. Chamberlain then told the Commissioners "that their first duty was to provide liberally for the Natives, and in doing so they were to consider the present and future requirements for some years to come, and to allow for a natural increase in population".

The Commission understood when it began its work that areas excluded from the Reserves would be available for purchase by blacks as well as whites. Sir Charles Saunders (as he later became) explicitly told the Beaumont Commission a decade later that he and his colleague 'had no doubt whatever that (natives) would be allowed to purchase there, and we were under that impression until we had gone on with our work probably for a year or more'. If he had been aware of this restriction, he added, he would not have agreed to so much land being thrown open to European occupation. What in fact happened was that the Prime Minister of Natal told the Commission on 16 December 1903, that the Government had recommended to London that 'natives should not be allowed to enter into competition with Europeans for the acquisition of Crown Lands in the Province of Zululand'. The Secretary of State asked for the Commission's reaction to this suggestion. The Natal Government accordingly asked the Commission to accept such a ban on African ownership as 'the only possible means of completely carrying out the wishes of the Zulu people, and the recommendation of the Delimitation Commission, that under no circumstances should lands in the Province of Zululand be alienated to people of Asiatic extraction'. (This was a reference to a desire expressed by chiefs, and noted in the Commissions Fourth Report).

Next day the Commissioners replied that because it was of 'paramount importance to the Natives that people of Asiatic extraction should be very strictly precluded from acquiring land . . . we shall be prepared to acquiesce in the proposal'. Saunders had clearly allowed the passage of time to inflate the significance of his stand on principle.

So work did not proceed as the Commissioners claimed, exactly "on the lines on which it was initiated". But on 7 September 1904 when they were told by the Prime Minister of Natal that the Government could not accept their proposals in the 7th interim report (dealing with Eshowe) and the 8th report (dealing with Nquthu, Nkandla and Mahlabatini), this time they stood their ground and asserted that if the Natives of this Province are to be fairly dealt with . . . they cannot be deprived of any more land and . . . what we have delimited as Reserves is none too much for their requirements".

They went on to state that, as a result of their labours, they had set aside 3,887,000 acres as Reserves, and excluded from the Reserves 2,613,000 acres. As the native population was calculated at 220,000 souls, this meant about 17 acres per head in the Reserves. (The Zululand sugar planters' Native Land Committee, working on a basis of 18 acres per head, later told the Beaumont Commission that, by any standard taken, this did not imply overcrowding).

The Saunders-Dartnell Report does in fact reveal much evidence of a concern to preserve the land rights of the Zulu people, but they were also under strong pressure to find land for white settlement, the more especially because in key areas like the Nquthu cattle country, whites coveted "the most densely populated part", and because Europeans they met appeared to be labouring under the impression that all the Commission was required to do was to indiscriminately throw open the whole of the lands suitable for European occupation, irrespective of the interests of the Natives occupying those lands. The Commission claimed that it had resisted pushing Africans into fever-ridden lowveld areas. It also paid attention to the sites of ancestral graves, and drew criticism by leaving some forest land in the Reserves. At the same time, it tried to placate the whites by claiming that "we have been actuated by a desire to exclude from the Reserves as much land as we conscientiously could". All the same, Europeans complained that not enough land was found for the market, Africans asked rather for a simple assurance: that whatever conclusions the Commission reached, worse should not be allowed to follow. "They point to the Zulu war settlement, when they were distinctly promised that Zululand was to be left to its own people, to the acquisition by the Boers

of a large extent of the country, to the annexation by the British Government of what remained, when they were again promised that it was being annexed for their use; and finally to the annexation of the Province by Natal, under which they are again to be deprived of tribal lands".

A Natal Act of 1904 brought coastal land under private ownership and cane cultivation, under leases of 2s. or less, which were to run for 99 years, with freehold title to follow at the end of that period. Occupiers had to reside for nine months in the year, and build a dwelling. Millers' monopolies were also established under the leases, but many leases were surrendered in favour of later 20-year purchase agreements under a Union Act of 1912. The surveying of white areas began immediately. Whites moved in quickly in 1905-07. But of 501 lots surveyed in the Tugela coastal area, Umfolosi valley, Amatikulu, Empangeni, Nquthu, Qudeni, Kwabonambi, and in the Umhlatuzi, only 294 were occupied by 1910. Then, in A. J. Christopher's words, the Government for the first time in many years had a greater number of good class farming lots available than were immediately needed. There was a further inflow as a result of the soldier settlement scheme at the end of the first world war.

While these settlement schemes were getting under way, rebellion broke out in Natal and Zululand in 1906. Although this outbreak has been attributed to a number of different causes, the Natal Native Affairs Commission of 1906-07 saw "apprehension in several districts about the alienation of lands for European occupation" as one of these, and recommended "the cessation of further alienation of land in Zululand and the strict reservation of all Locations and Reserves for Native occupation" as a necessary remedy. One Nquthu witness, Archdeacon Charles Johnson, attributed the decision of Mehlokazulu to join Bambatha "mainly to that, for the land taken away from him to be given to Europeans was the best part of his tribe's grazing ground".

Nothing daunted, white settlement proceeded apace. But the Beaumont Commission of 1914, following its instructions, looked for ways of increasing the area of the Zululand Reserves, and recommended considerable additions, to the scheduled black areas, especially in north central Zululand, notably in Ngotshe, Nquthu and Nkandla. It found an extra 3,840,341 acres in Natal and Zululand. But the local Natal Natives Land Committee of 1918 pared the Beaumont recommendations down to 934,340 acres, very few of the extra areas it selected being located in Zululand. That committee felt that Natal was being asked to find relatively more land for blacks than the other provinces, which was true, and proposed a new category of 'neutral areas', where both black and white could theoretically buy land, as a way of redressing the balance. Sir William Beaumont, the chairman, argued that the Land Act ought not to be applied in Natal at all. The Commission's minutes of evidence show that there was a great deal of opposition among farmers in what had once been the New Republic to the establishment of Reserves in those parts, even though the black population there had once been very heavy in the long memory of J. D. Rudolph of Paulpietersburg, and no native areas had ever been set apart in the New Republic. Farmers in Nquthu were divided into two groups: those in the poorer areas were generally prepared to be bought out and compensated elsewhere, but those in the good cattle country preferred to stay. The sugar planters further south, whose Native Land Committee denied that the Reserves were overcrowded, went on to assert that the Beaumont Commission, by not visiting the area, to the north of Empangeni, had greatly underestimated the amount of immensely rich farmland there, which in the opinion of local magistrates whose views they ignored, could have been brought under commercial production and realized £11 millions in a year, an asset equal in importance to that of the Witwatersrand itself. For the black witnesses, though, of whom there were a good number, the position was pretty desperate. There was resentment at exclusion from good arable land, as shown in the evidence of Chief Lugugu in the Vryheid district. He complained of "a zigzag boundary made for the purpose of keeping out the lands that are easily ploughed and giving us the hills". W. W. Ndhlovu, a **kholwa** from Vryheid East, resented being turned off good grazing land, and suggested the forming of black syndicates to buy commonage for their beasts. Yet others, like Chief Maxidana from the same area, resented expulsion to the lowveld: "It is impossible to keep cattle. We own nothing there, not even goats," he said. "There is fever, famine and funerals".

The reports of the local land committees of 1918 were accepted by the Smuts Government in 1922 as the basis for territorial division of South Africa under the Land Act, and this principle remained undisturbed in its essentials, though the amount of land released for black occupation was reduced, by General Hertzog. By 1918, therefore, the pattern of land distribution had been laid down, some thirty years after the Zulu had lost their political autonomy, some twenty years after they had been incorporated into Natal. It would be unfair to criticize those who divided the land in 1918 for not anticipating the population explosion of the second half of the twentieth century, which even the Tomlinson Commission failed to discern, though the drawing of these tight boundaries around Zulu settlement is at least noteworthy. In December 1977, some 12,052 hectares of quota land still had to be found in Natal and Zululand in terms of the 1936 allocation, though according to an earlier estimate the consolidation plans for KwaZulu which were announced in 1972 allowed for the provision of extra quota land in Natal. Consolidation involved cutting three broad paths of white settlement through KwaZulu by means of the elimination of 'black spots' (for which compensation is intended), and placing almost the entire coastal strip in white hands. This may have strategic implications and suggest an echo both of 19th century Boer expansionism and of British containment strategy, but it can only aggravate the demographic problem so clearly set out by D. C. Grice in his presidential address to the S.A. Institute of Race Relations in 1973, even though the most recent policy decisions allow for the inclusion of more and more large black towns in KwaZulu to absorb the bulk of the people. There is a further aggravating factor, of which Dinuzulu complained with a little justice in 1886, and Buthelezi with much more in 1973: the operation was carried out without the consent of those most affected. □

THE BORDER WAR: CINEMATIC REFLECTIONS

by Keyan G. Tomaselli.

It has taken the American film industry more than 10 years to come to terms with the Vietnam war. Apart from a few isolated allegorical references to America's conduct in South East Asia in films like Lawman and Easy Rider, American film has, until recently, ignored this area of social and political experience. The reasons for this were manifold. At the height of the war more than 45% of the United States economy was dependent on income derived from war related industries. Big business therefore ensured continuing involvement. The ordinary public wrenched apart by the savagery of the war were psychologically shattered and unwilling to face the real issues. Watergate ensured status-quo-oriented impulses from the media, while 50 000 American dead was considered more of a social indictment of the arrogance of US foreign policy than of romantic heroism.

One of the first films to confront the reasons underlying aims of Vietnam was **Twilight's Last Gleaming.** Using rather dated techniques, this film was significantly made in Germany, away from the system-maintaining influences of Hollywood. In 1979, no less than five years after the termination of hostilities did the American film industry dare to broach this subject openly. **Coming Home** and **The Deerstalker** dominated the 1979 Academy Awards. They deal not with the Vietnam war per se, but with the social problems and personal guilt experienced by demobilized soldiers back home. These films are highly critical of America's involvement in South East Asia and all point to the devastating social consequences wreaked on American society.

In contrast to the American experience, the South African film industry followed the troops into action with no qualms at all. The clumsy and superficial images seen in **Kaptein Caprivi** (1972), **Aanslag op Kariba** (1973), **Ses Soldate** (1975) and **Hank, Hennery and Friend** (1976) are indicative of a society which confronts reality and the complexities of life by a simplistic reduction to binary opposites – good vs. bad, war vs. peace, black vs. white, cops vs. robbers, communism vs. capitalism etc. The oppositions found in most local films with a war theme can be likened to terrorist (black) = bad; soldier (white) = good and 'loyal' black = good + bad (a sort of reformed black). The same dialectic was true for the early Westerns made in Hollywood, viz., "The only good Indian is a dead Indian".

Terrorist (1978), based on the Grootfontein murder, encapsulates this process without questioning. Yet this film offers possibly the truest and most disturbing reflections of white South African perceptions regarding the guerilla war – the mindless slaughter, the tacit acceptance that black must kill white, the lack of motivation for such killings, the ubiquitious Kenyan who fled from the Mau Mau who talks endearingly about "black bastards" – are all true to type. **Terrorist** is a window to the perceptions of an unthinking white population which cannot comprehend that 'terrorists' may also have valid reasons to account for their actions. In contrast, **Wild Geese** (1978) is an embarrasing example of racial moralizing where black and white solve their problems under the auspices of official government policy.

The Angolan border war has become part of our traditional linguistic patterns. The implication that someone is at "the border" is seen in an increasing array of films of all genres, even those intended for the overseas market where references to the border are meaningless – for example, **Someone Like You** and **Fifth Season.**

The two most recent offerings in this vein are **Grensbasis 13** and **40 Days. Grensbasis 13** is action, an accurate reflection of battle in the bush. This facade, however, does not last and is simply camourflage for yet another Elmo de Witt conflict-love-type story. The classic triangular love affair involving a police lieutenant, a female doctor and a stay-at-home girlfriend is further complicated by elements of what Robert Greig calls the 'key plot' which can be conceptualized as the insider versus the outsider. The outsider in this instance is a smooth, materialist Afrikaner "wat die Land wil vlug". He is predictably rejected by his girlfriend who remains torn between him and her mortally wounded lieutenant ex-fiance. The lieutenant, on the other hand, has no doubt what his true mission is: to rescue his captured comrade-in-arms from the dastardly terrorists. This is the surface structure. The hidden unconscious meaning is contained in de Witt's treatment of his subject matter. Firstly, like all other references to 'the border' no motivations or reasons for this state are offered – it's there, omnipresent and continuous, a state to be expected, inevitable – like sleeping or death. Secondly, implicit in this film is the assumption that border duty is voluntary. The South African Police and not the Defence Force is involved. A passing reference to the possible expose on foreign TV, that the captured policeman might be forced to acknowledge that his role was not voluntary, is given as the official reason for a daring raid to secure his rescue. Thirdly, this conflict is not related to the larger politico-economic situation, the battle of opposing ideologies. The reasons for the war and the resulting social dislocations are ignored. The rescue has nothing to do with social remorse or societal guilt, but is a device to satisfy the conventions of melodrama in that the lieutenant considers himself responsible for the safety of his captured friend, simply because he promised the family that he would look after him.

As with all de Witt's love stories, one of the lovers dies an unnatural death (usually at the hand of the jilted party). This film departs slightly from this formula for the lieutenant is shot, not by his lover, but by the enemy. Hence the breakdown of the various relationships is implicitly blamed on the enemy and not on the personal foibles of the partici-

pating characters. The enemy of Afrikaner society is shown to be influences emanating from outside that society, rather than attributable to sources within Afrikaner society. The group remains closed and is symbolically cemented in a military ceremony honouring the dead lieutenant and his comrades.

40 Days is frivolous, fast moving and humorous. Its surface structure camouflages a deeper ideological tension. The dialectic is quite blatant: police (good) versus disco subculture (bad), Defence Force (good) versus personal chaos (bad) which in a broader context can be seen as Institutionalism (good) versus Individualism (bad).

The police are portrayed as charming, friendly fellows, always ready to help and paternalistically guide young men in danger of falling into bad ways. It is significant that scriptwriter Pieter Dirk Uys and director Franz Marx should have chosen the disco scene to characterize civilian life, which is, afterall, a highly atypical experience for a returning troopie. In this case the disco represents the shady and sinister activities of the underworld.

The film reveals a social dependence on the Defence Force and Police as the only viable agents of stability, law and order. Throughout the film is the insistence and reiteration of the help and guidance offered by the Defence Force which is contrasted with a demonstration of the pitfalls of going it alone: "I don't need the army – they ran my life for two years" is shown to be wilful and counter-productive. Predictably, it is police who save the two ex-soldiers from their own determined obstinacy.

A recurring thematic element of the film is the socially condoned submerged violence. The most obvious example of this is where the hero attacks and robs a homosexual who solicits him in a bar. In a later scene the attacker is remorseful only over the fact that he is guilty of robbery; it is almost as if violence against homosexuals is justified.

40 Days marks a departure from the films hitherto in that it attempts, albeit in an incomplete way, to account for the difficulties experienced by young men in a war situation and separated from their families for two years. However, despite the two nightmare sequences, the effects of the traumatic experiences are not adequately dealt with, nor is the adjustment to ordinary civilian life for which the two characters and thousands like them are completely unprepared. These should be the primary themes of the film, but are submerged in the drawn out disco sequences and the strident upbeat soundtrack which consistently works against the picture.

Whereas America's post-Vietnam war films provide an almost painful self-examination of both the reasons for the war and the effects of that war on American society as a whole, and particularly on the men involved in it, South African films are more superficial and even glib. In both **Grensbasis** and **40 Days,** the war is there – a fact of life, not discussed or rationalized – simply accepted. In both films the police who represent Institutionalized South Africa are lauded and made out to be pillars of society. Both portray the population back home as uncaring, uninterested and unable to comprehend the rigours of Border Life. These issues are best left to those who know – the Defence Force and Police Force.

In the same way as American film ignored Vietnam during the war itself, South African film is still at a stage where it shies away from an honest examination of conscience. The salient question is, however, is this a stage in the development of our film, or is it more symptomatic of the general malaise afflicting South African society? □

DIALOGUE
by Vortex

We're rather proud
of our racial plan:
it's a way of dividing
man from man.

The blacks are with us
but we say they're not:
we give each nation
a barren plot.

It's all quite just,
it's all quite fair:
each tribe has its own
little volume of air.

It's a bit of a ruse,
but who would guess?
The blacks, you say?
We couldn't care less.

The outside world
makes a bit of trouble?
We don't count **them:**
their standards are double.

By our fine scheme
we've proved we're right,
we've shown that – well –
we 're bright, and white.

Ah no, my friends,
you've got it wrong:
you've shown something else
in your little song.

You've shown quite well
by your strong intent
that you don't belong
in this continent.

How can you claim
this is your home
when you send black people
out to roam?

Your very acts
define your fate:
you've said 'separation'
and that you'll get.

Some will leave
for other lands,
bemoaning the work
of their own hands.

Others will stay
and fight till they're dust, proclaiming (no doubt)
that life's unjust. □

Mantis Poets (Guy Butler and Patrick Cullinan)

Ed. Jack Cope.

David Philip, Cape Town,

Chosen by Marie Dyer

Instead of a review of this collection, we print two extracts which are likely to be of interest to readers of **Reality.**

1) from **Natal 1497. Words for a Christmas Cantata:** Guy Butler.

(Guy Butler writes of this poem: "As the performance of miracle plays on board ship was common practice in the fifteenth and sixteenth centuries, I imagined the feast of the Epiphany being celebrated on the flagship of Da Gama's small fleet during the Christmas Season, 1497, when Natal was given its name. In mediaeval times the three kings were given the names I use and allocated to the three continents; from which three continents the present population of Natal comes." This extract consists of the words of these three kings.)

Melchior, King of Macedon

The Fateful star burns fixed above a ruined stable.
Is this the cosmic concord our philosophers foresaw?
How kneel upon these cobbles, bow to Hebrew peasants,
How leave my gold among these animals and straw?

Chair' O Panmegiste.

Yet why should I now recall how the woman of Mantinea,
Diotima of mysteries, replied to Socrates:
'Great love is always poor, roughskinned and weatherbeaten,
And couches out of doors with those of low degree'?

Chair' O Panmegiste.

I kneel within the centre of my burning question:
Can this poor swaddled thing among the colts and calves
Be that half god, half man, nor mortal, nor immortal,
Who saves the Universe from falling into halves?

Chair' O Panmegiste.

III

Casparo, King of India

'Whenever virtue fails
And lawlessness arises
There do I bring myself
To powerful incarnation.'

Recalling Krishna's words
To the trembling charioteer,
When all the signs were dark,
Incense I bring, and prayer.

O may your house, dear Prince, be peace,
And not walled in on every side.
And may the windows be large and open
That changing airs from all the oceans
May move through quiet rooms.

Chorus

Shantih, shantih, shantih

May you be cooled and fed by them,
And not dismayed, nor blown about.
May none of your followers try to capture
Your house for a restless inn or a prison;
O may your house be peace.

Shantih, shantih, shantih

IV

Balthazar, King of Africa

O boy with the oxen
    you ask a hard riddle
far darker than battle
    that none here can answer,
Our prophets hear thunder —
    a terrible river —
they say you will cross it;
    they stay in the mountains.
We know when you've crossed it,
    we know that your mother
will wash from your body
    red mud of that river.
We pray that all peoples
    will bind up your spear wounds,
and so we have brought you
    this myrrh, my small master.

Chorus

Bayete, bayete,
    bayete, bayete

THE FIRST DANGER
Patrick Cullinan

With the first danger we gave ourselves
Another name. We made
Less noise in the evenings
And used dry fuel for the fires,
Though by then it was known where we lived.

Threatened again we changed our language
Entirely, using the tongue our neighbours spoke.
Alert, we moved our fields
After the first sowing. From then on there could be
No ceremony of the first fruits.

We lay silent in the forest,
Not sure what we would surprise. It seemed, turning,
The path would ambush us. How could we kill
If we did not know the hunted? To disembowel
The unknown would be wrong. It could die wrongly, being

A thing not to be played with, touched: as
Above so below.
But when it did not rain we knew
That we were lost, and knew
We could not speak our own language.

We had forgotten the songs and how to dance
The old way: the slow revolving steps,
The rites of coupling. What we ate
Was raw or half charred, the meat
And pelt and gut of rats.

We had ambushed the shadows,
Stuck knives into the shade of ourselves.
A threat was not caring, power was
Lightning that bloomed on the horizon,
A fire that left us arid, untouched. □

* I should like to acknowledge the assistance of Professor John Milton who read the drafts of this article and offered his usual helpful advice. The responsibility for the opinions expressed must, of course, remain my own.

1. (1969) 86 **SALJ** 457, (1970) 87 **SALJ** 60.
2. Of the 448 advocates circularised, 158 replied.
3. See **S. v. Van Niekerk** 1970 (3) SA 655 (T).
4. **R v Torch Printing & Publishing Co (Pty) Ltd** 1956 (1) SA 815 (C) at 822.
5. In Schapera (ed) **Western Civilisation and the Natives of South Africa,** Routledge (1934).
   An interesting example of judicial reasoning on disparate sentencing in similar fact cases is **S v Thamaga** 1972 (2) PH H 143 (T). The fuller account of that case which follows is from B. van Niekerk **Class, Punishment and Rape in South Africa** (1976) 1 Natal University Law Review pp 299-300:

   "Sentencing the accused — a Black man — to four years imprisonment and six lashes for the rape of a Black girl of fourteen years, Hiemstra J felt constrained (against the background of a sentence of ten years imposed the previous day upon a Black man for the rape of a White teenager) to add an explanatory note on the discrepancy between the two sentences:

1. In both instances the complainant is a young girl of about fifteen years of age.
2. In both instances the assailant used a weapon with which to intimidate the complainant.
3. In both cases the act took place in the open veld in circumstances where it cannot be said that the complainant had been imprudent or had unduly exposed herself ('blootgestel') to danger.
4. The previous convictions of the two accused are almost the same.

'These are the most important points of similarity. In the case where the ten year sentence was imposed the complainant was a White girl who had been raped by a Bantu male. In the instant case we have a Bantu girl who had been raped by a Bantu man. The difference in sentence could give rise to the allegation that the Court is less anxious to protect the honour and safety of Bantu women than is the case towards white women. That is not so. The Court is equally desirous to protect Bantu women against this kind of assault. For this reason I shall furnish more details about the factors which had been weighed (against one another).

'There is a variety of aspects which are relevant concerning sentence for rape. One is the degree of shock suffered by the complainant and the emotional damage which she will carry through life. Here I take the following factors into consideration:

'1. The question whether or not the rapist hails from the same class ('stand') in society. It cannot be denied that there exists an enormous difference between a man from the class of unschooled labourers and a White school girl from the middle class. It is obvious that the shock and emotional disturbance would be particularly severe in such a case. It is a case where intercourse with consent is absolutely unthinkable with the result that violent intercourse is more shocking. In the case of the Bantu girl the accused was someone who was known to her family and who was even allowed to have an amorous relationship with the complainant's older sister. There can be no question here of social class differences and there is even the additional fact that the assailant had been an acquaintance and not a stranger. It is obvious that the experience would be much less horrific to the girl.

2. The Bantu girl in this case is someone who had previously had intercourse with a male. She denied this in the witness box but I do not believe her. She admitted to the doctor that she had previously had intercourse and I assume that to be so. The way in which she replied in the witness box convinces me that she was telling a lie. If such a girl had previously had intercourse the experience is much less traumatic. The White girl was a virgin and under the circumstances she suffered a much greater shock than was the case here. This is the reason why in this instance an appreciably lighter sentence is imposed.'"

6. 33 L Ed 2d 346.
7. Ibid at p 355-6.
8. In 1977 the total budget for legal aid in South Africa amounted to R2 million. This was reduced to R1,5 million in 1978. For comparison, in 1976/77 the fees paid to practitioners in England and Wales for legal aid work were R83 million.
9. Edgar Z. Friedenberg **The Side Effects of the Legal Process** in R P. Wolff (ed) **The Rule of Law**, Touchstone (1971) p 39.
10. Herbert Read **The Chains of Freedom** in **Anarchy & Order,** Faber and Faber (1954) at p 188.
11. J. H. Driberg **Black and White Law** (1933) 50 **SALJ** 335.
12. **R v Almon** (1765) Wilmot 243 at 270, 97 ER 94 at 105.
13. **R v Commissioner of Police for the Metropolis, ex parte Blackburn (No 2)** 1968 2 QB 150 (CA) at 154-5.
14. **The Politics of the Judiciary**, Fontana (1977) at 167, 170.
15. **S v Gibson and Others,** Supreme Court of South Africa, Durban and Coast Local Division, Case No. CC 157/78.
16. Ibid at p 23.
17. Ibid at pp 53, 76.
18. Mr Justice J. S. Henning, **Sunday Times** 14 June 1970.
19. B van Nieker **The Warning Voice from Heidelberg — The Life and Thought of Gustav Radbruch** (1973) 90 SALJ 234 at 243 (Prof. van Niekerk's tranlation).

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