BY Tony Mathews

APPEAL COURT AND EMERGENCY POWERS

(With acknowledgements to the Natal Witness)

The 1987 emergency, like its predecessors in 1985 and 1986, sought to establish an "act as you wish" charter for the security authorities. Amongst other things, they were empowered to detain virtually at will, to deny due process to detainees and to isolate them from everyone outside including their lawyers. The attempt to free the authorities from accountability to the law was substantially but not completely successful. Several court judgments in the Transvaal and Natal imposed some limited but nevertheless important restraints on the authorities. Though the Minister could order an extension of detention beyond the initial 14-day period, without giving the detainee a hearing or reasons, the detainee was entitled to make representations for his release after his detention had been extended and, for this purpose, to a statement of the reasons for his detention. The due process introduced by the courts in this instance was very limited in scope and came after the event (i.e the extension of detention) – but it was better than nothing at all.

Other judgments upheld the power to control access to the detainee, but not to deprive him or her of contact with lawyers. These judgments (despite being contradicted by the courts in the Cape and the Orange Free State) resulted in the practice of fairly regular visits by lawyers to emergency detainees in all provinces. For many detainees, this constituted a lifeline and a tiny window on the real world from which they had so arbitrarily been removed.

In all these judgments the courts reasoned that the State President's power to make emergency regulations, while clearly extensive, was not an absolute power but one which like any other subordinate law-making authority is subject to court control. Regulations made by the State President could therefore be declared to be beyond the limits of his authority or to be an unreasonable or improper exercise of it. The denial of all due process to detainees and of access to lawyers were declared by the Natal and Transvaal courts to be instances of the impermissible use of a broad regulatory power. In doing so they laid down and applied the important principle that the State President was not accountable to himself alone but to the law administered by independent courts. In short, they were doing what judges ought to be doing – subjecting state power to the control of the law, which is what we mean by adherence to the rule of law. They refused to accept that Parliament intended the State President to be an unaccountable despot.

The Appeal Court, in its latest judgment on the subject, (the Omar judgment) has wiped out the small advances in due process achieved in the lower courts and simultaneously enthroned the State President as a despot, in practical terms, when he exercises emergency powers. It declared that "the court cannot substitute its view of what measures would be necessary or expedient for that of the State President" and thereby gave him virtual carte blanche to make regulations that eradicate the basic rights of citizens.

Though the court did say that the State President was not completely immune from legal attack, it placed an almost insuperable burden on any person seeking to convince a court that regulations made by the State President should be set aside. Such a person, the court declared, would have to show that the State President did not apply his mind to the matter that was in issue, acted in bad faith or for purposes unconnected with the emergency. A finding that the State President had behaved in any of these ways in making emergency regulations is about as likely an event as the Government deciding to give up power in South Africa to the ANC.

It follows that the State President, when exercising his emergency powers, is an unaccountable despot in practical terms and that by courtesy of the Appeal Court he does indeed possess an "act as you will" charter.

The Omar judgment does not directly touch upon a number of other progressive judgments given by the Natal Supreme Court. There are two that are of particular importance. The first declared invalid certain aspects of the definition of a subversive statement in the earlier emergency regulations and the second struck down provisions of the former media regulations which allowed seizure of newspapers on the subjective decision of certain police officers.

Does the Omar judgment nullify these decisions and so enable the State President to restore what the Natal court had declared impermissible? The answer to this question is neither simple nor clear but it does appear that aspects of the Natal judgments have been called into question by the Appeal Court in the Omar case. Particularly vulnerable is the reliance by the lower court on the principle that the State President may not act unreasonably in passing emergency regulations, for example, by allowing the seizure of a newspaper to depend on the subjective decision of a police officer. The Appeal Court, in the Omar case, appears to hold that what the State President deems to be reasonable in the exercise of his emergency powers cannot or will not be declared unreasonable by it.

The grim message sent abroad from Bloemfontein in the Omar judgment is relieved only by the minority dissenting opinion of Judge Hoexter and by a Freudian slip in the majority judgment delivered by the acting Chief Justice (Rabie ACJ). In referring to the Court's earlier ruling in *Minister of Law and Order v Hurley,* the acting Chief Justice described the person arrested and detained in that case as "Hurley". (The detainee was in fact Paddy Kearney, the application having been brought before the court by Archbishop Hurley and by the detainee's wife.) Was this slip indicative of the judicial view of the proper treatment of turbulent priests – or, perhaps, just an opportune moment to recall the biblical injunction "Forgive them Lord, for they know not what they do"?□

Review by Marie Dyer

Not Either with Tranquillity

ed. Shula Marks: **Not Either an Experimental Doll** Natal University Press, 1987. R17,50

This is an astonishing book. It can be read like a short novel in two or three hours (and is difficult to put down in that time) but the story is a kind of focus in which is concentrated a complex range of insights – historical, psychological, educational, political – into what the editor calls "the South African condition".

The core of the story is a collection of letters, found in the papers of Dr Mabel Palmer some twenty years after her death. These letters, with an editorial introduction and epilogue, document some events in the lives of three South African women – Mabel Palmer herself, Lily Moya, a Xhosa schoolgirl, and Sibusisiwe Makhanya, a Zulu social worker and community organiser. The letters begin in 1949 when Lily, then a 15-year old schoolgirl in Umtata, applied to Mabel for admission to the Non-European section of Natal University in Durban.

The main writers – Lily and Mabel – reveal enough of themselves in their letters to make the correspondence dramatically compelling, and the story is a sad one. Mabel, with great, even sacrificial generosity, arranged for Lily to enter not (of course) the University, but Adams College, and maintained her there for a year; but she was