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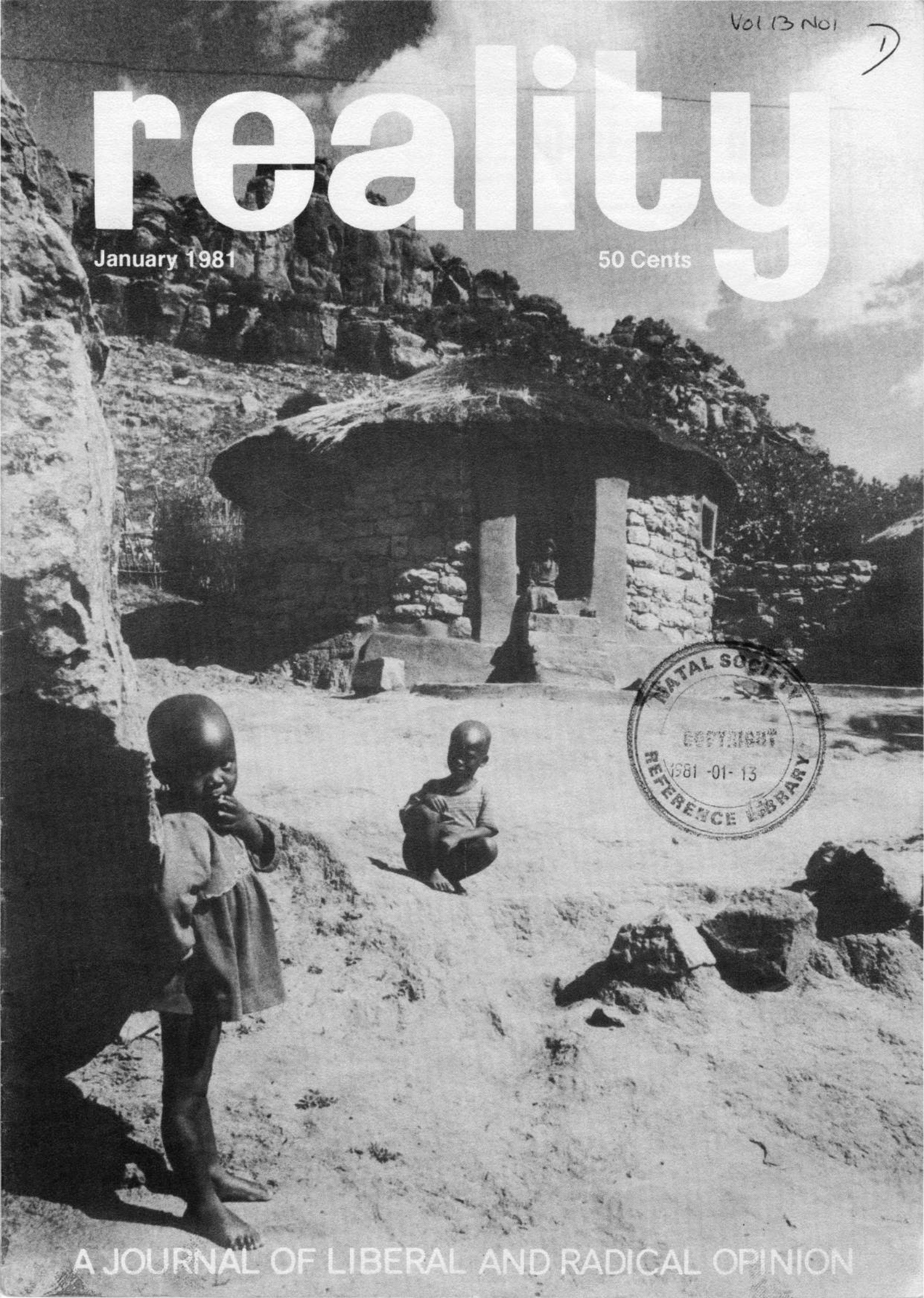

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in this issue . . .

EDITORIALS

1. "FREE ENTERPRISE" AND THE "BLACKSPOTS"

"Free enterprise" is the catch-phrase of the day, the magic formula the P.W. Botha administration has discovered to sort our problems out. The implication surely is that if you show enterprise you should from now on be given every freedom and encouragement to use and develop it.

How seriously is the present government committed to this proposition? Which will win out when the interests of "free enterprise" and "apartheid" clash? There has been a not very encouraging hint from recent developments in Natal. In that province growing pressure is being put on a number of "blackspot" communities to move from where they are presently happily settled in "white" South Africa, to where they don't want to go to in Kwa-Zulu. Matiwane's Kop is a case in point.

The black settlement of Matiwane's Kop was established in 1870 when a group of 120 members of the Shabalala, Hlophe and other families clubbed together to buy a farm in freehold where they and their chief could live in security at a time of considerable uncertainty and upheaval. The farm had been abandoned by its previous white owner and no new one could be found who was prepared to buy it. It was too swampy and inhospitable. The forefathers of its present owners decided to buy it in spite of these shortcomings. They then proceeded to develop it slowly, over the years, draining the swamps to increase the area of cultivable and habitable land, building homes, shops, schools and churches, until now they are a settled, contented and relatively prosperous community of some 10,000 souls. There are 19 school buildings, twelve shops and numerous churches, all built out of the community's own resources.

But in recent years the one asset more precious to them than any other, the security provided by their title-deed, has begun to be threatened. The Government has told them it is going to move them. They are a "blackspot" in "white" South Africa, and so, offensive to Pretoria's planners. That treasured title-deed, which in 1870 they were told was inviolable, carrying with it the promise of perpetual security, it seems is really not worth anything. If the land to which it applies falls on the wrong side of an arbitrary line drawn by a faceless apartheid ideologue in Pretoria, obsessed with separating black from white – well that's that.

Matiwane's Kop is in some respects not a typical blackspot. It is less crowded than many, although it suffers, as most others do, from the pressure of a growing population, some of it from natural increase, some of it from an influx of tenants who over the years have found in the blackspots a haven of relative freedom from white control. But in one respect it is a typical blackspot, for it shares with all the others the common threat of losing all its people hold most dear, and being moved, lock, stock and barrel, to a hostile and alien environment in Kwa-Zulu.

During the last thirty years many long-established black freehold communities in Natal have been destroyed to satisfy the dictates of Government policy, but there are still some 150 left. That earlier wave of destruction was defended on the basis of the slogan of the day – "apartheid". But the slogan of today is "free enterprise", and what possible defence for their destruction can there be in the name of that system? For have the blackspots not been a magnificent example of free enterprise at work? Is not that sacred title-deed and its promise of perpetual security an absolute corner-stone of the free enterprise system? Are not the people who have lived in the blackspots, and those who still live in them, and who would like nothing better than to stay in them and build them up, some of the first black converts to free enterprise? Was not their building of homes and schools and shops and churches, out of their own resources, the very thing that free enterprise is all about?

It is true that many blackspots have become overcrowded and overstocked and eroded and are now desperately in need of rehabilitation. But whose fault was that? Would it have happened if the free enterprise system, to which they were such a clear example of a new black commitment, had, for black people, extended beyond their boundaries? If the people who lived in them had been free to sell their skills on the best market? Had not been actively prevented by law from acquiring most of those skills which would have made it possible for them to accumulate capital – and, if they did manage to accumulate capital, had not been prevented by law from using it to expand their land holdings to accommodate the growing population which, over the years, has placed such enormous pressure on the resources of the blackspots?

The story of what white South African governments, not always Nationalist, have done to the blackspots in the past is a blot on the name of everyone who ever voted for them. But in those days such actions could be justified, however spuriously, on the grounds that they were being done in the name of "segregation with justice" or "apartheid". But today's rallying-call is "free enterprise". How could a regime seriously committed to that slogan do anything but encourage the people of the blackspots to build on what they have already created, develop the institutions they have evolved, and become examples of settled and industrious communities for other people to emulate?

In our eyes and those of black South Africa Mr Botha's commitment to free enterprise will not be judged by what he says to the captains of industry and commerce in the Carlton hotel, but by what he does to the people of Matiwane's Kop. What happens to them will show us whether free enterprise or apartheid is his first concern. □

2. THE DEATH SENTENCE

South Africa may not yet be able to bring itself to abolish the death sentence completely but we sincerely hope that it has reached the point where it will become official policy to commute that sentence whenever it is imposed for a political offence.

We cannot afford to go into the future carrying with us, along with all our other problems, the burden of bitterness which the carrying out of such sentences will leave with us. □

MARION FRIEDMANN

By Alan Paton

The death of Marion Friedmann, in London recently means the loss of one of the foundation members of the Liberal Party. The party was founded in 1953 for the purpose of rejecting and resisting the racial laws of the Nationalist Government, and of endeavouring to establish an organisation which would help to counter the racial polarisation that its members felt must inevitably result from laws like the Group Areas Act, the Bantu Education Act, the Extension of University Education Act, and many others.

In those early days the influence of the Cape was very strong in the councils of the party, and this accounted in large measure for the adoption of a non-racial but qualified franchise, the educational qualification being Standard VI.

It was largely due to Marion Friedmann that the party adopted the universal suffrage in 1954. She argued that the qualified franchise was a white device to perpetuate white supremacy, and that such a provision was incompatible with true liberalism. What was more, she argued that it was incompatible with what had become the party slogan, *Towards a Common Society.*

She was very powerful and persuasive in debate in spite of her frail physique. It was extremely difficult to defeat her in argument. Intellectually she was one of the most gifted members of the party. It could be said that she used her debating powers to push the party "to the left".

In the early days of the party, it declared one of its main aims to be to combat all forms of totalitarianism including fascism and communism. This aroused considerable controversy within the membership. Some argued that any form of totalitraianism was totally incompatible with liberalism. Others argued that one must not appear to be supporting the government in its anti-Communist mania, or in its anti-Communist legislation such as the Suppression of Communism Act.

Marion was torn in two by this issue. She regarded the anti-Communism of a member like Patrick Duncan as pathological, and a danger to clear thinking and sensible action. But she herself was strongly anti-Communist. She distrusted the Congress of Democrats which was the white wing of the Congress Alliance. It had been formed the year before the Party came into being, largely as a result of the Defiance Campaign. It was not a communist party, but many of those who had resigned from the Communist Party to avoid total banning from public life, joined the Congress of Democrats. The Congress was devoted to the cause of racial justice, but many of its members had a quality of ruthlessness that is alien to liberalism. What is more, they believed, or liberals believed that they believed, that the end justifies the means. Publicly they espoused "bourgeois" values like the freedom of the press, the autonomy of the university, the rule of law, but Marion and many others, believed that if they came to power, they would destroy them all.

Matters came to a head in 1955 when a great Congress of the People was planned. The Liberal Party was invited, and the delegates came back from the planning meeting with the conviction that they had been manipulated. In the event they did not attend the Congress, and many of them, Marion amongst them, firmly believed that the Congress of Democrats always intended that the Liberal Party should appear to rat from this great movement of the people.

I wrote above of her considerable intellectual gifts. Her two loves were politics (and in her case that meant the pursuit of justice), and literature. She wrote some fiction but was not successful as a creative writer. Her outstanding literary gifts were those of analysis and criticism. Her monograph on Olive Schreiner was brilliant and penetrating, and was in my opinion the best thing ever written about that strange, sad woman. I should add that I have not read the latest biography co-authored by Ruth First, because her books cannot be distributed in South Africa.

I asked Marion several times why she had never written a life of Olive Schreiner, but after a while I desisted. That was because she would give me a look compounded of sadness and wistfulness. She never said to me, but she could easily have done so, because that was her idiom – "Why do you have to speak to me about what I might have been?"

Her lethargy, if one could call it that, was largely due to her health, because she contracted emphysema, the disease that is so painful to the sufferer and to those who watch them. But there was another factor also, a diffidence about her powers. She was indeed a woman of both confidence and diffidence, but as she grew older and as her health deteriorated, the confidence to a large extent disappeard.

The house of Allan and Marion Friedmann was my home whenever I went to London, which I did very often in the seventies. I had a great affection for them both. Although she was never well, Marion was most solicitous about my welfare. Her solicitide was partly because of affection for me and partly because of affection for the Party, and in rememberance of things past. Those of us who knew her in those early days will always remember her clear and compelling and challenging way of speaking. She was devoted to the cause of justice, and was as keen as any of us that the Party should be a microcosm of what South Africa could be. And thanks to herself, and others, so it was.

REALITY sends its deepest sympathy to Allan her husband and to Julian, her son. □

ENOCH MNGUNI

by John Aitchison

Enoch Mnguni died before the end of apartheid. For me that timing of his death has not added to the loss. I have often mourned for a person-thinking, if only, if only South Africa had been a just and democratic society, if only there had been no discrimination, then to what height might he not have risen, what potential might not have been developed. With Enoch I do not feel that loss. Oh, Yes, indeed he might have been 'somebody' in a free South Africa. But to me he was already a fulfilment of what it means to be a human being – and that fullness of humanity he expressed in his struggle against injustice.

I first met him when I was a young Liberal Party member. We were gathered in a mud hut at a place called Swamp – a black spot whose people were forcibly removed in 1978 – and there can have been no more than about 15 people present plus 4 Special Branch policemen who had driven up from Pietermaritzburg. The latter did not have a warrant to attend the meeting. Mnguni suggested in no uncertain terms that they leave. They didn't, but neither did our awareness that here was a man who feared no one. I discovered later that he had already suffered for his political bravery. He had tried to organize a trade union at a bakery in Pietermaritzburg, been fired, detained during the 1960 emergency, and was never allowed back into Pietermaritzburg as a migrant worker. He lived out the remaining years of his life as a tenant smallholder at the black spot called Stepmore which is a few miles along the road from Himeville.

He may not have been able to continue to organize workers in Pietermaritzburg but he set to work with a vengeance organizing Liberal Party branches in the rural areas of Underberg and Impendle. Subsequent to the banning of the African National Congress (of which he had also been a member) and the Pan African Congress, the Liberal Party was the only party that continued to strive for one man one vote and the ending of every facet of apartheid.

The early sixties were a time of economic boom and political cowardice. Government and in particular the Special Branch were engaged in a systematic campaign of harrassment and intimidation. For Enoch Mnguni it meant raids, threats, arrests for trivial pass or poll tax offences just prior to important meetings. In spite of all this the Liberal Party was growing rapidly in the area when he, together with a number of other active members and organizers in Natal were banned. Banning was the then and still fashionable way of destroying political parties and trade unions while still allowing South African diplomats to claim that non-racial political parties had perfect freedom to operate in South Africa. (Later of course came the discovery of 'improper interference' that led to the prohibition of the Liberal Party's right to exist).

I was able to visit Mnguni many years later (I was also banned for a total of ten years). I remember his kraal on the top of a hillside in the foothills of the Drakensberg. It was a good place to be and somehow reflected his sturdy independence. I visited the place again last year. It was deserted, the cattle kraal a mass of weeds, the wattle and daub huts already beginning to deteriorate. From people nearby I leaned that he had moved in anticipation that Stepmore was next on the Governments forced removal list. His son, a migrant labourer in Durban, had been stabbed to death. He was sick. Shortly afterwards he was admitted to a TB hospital and died in November 1980. Another victim of apartheid? Yes – but also No. He did not see the end of apartheid (though the person who signed his banning order has already disappeared into a richly deserved obscurity in the Port Elizabeth area). But his spirit breathed the wholeness of humanity that will one day destroy apartheid. I and many others caught a vision of what a world without apartheid could be like. I salute him. He was a man. And to be that in South Africa is a victory. □

SENTENCING IN A MULTI-RACIAL AND MULTI-ETHNIC SOCIETY

(Address to the Law Reform Conference at Sun City, Bophuthatswana, August 13th, 1980)

by Barend van Niekerk

It seems that I am doomed – or is it *pre-destined,* in our more Calvinistic parlance? – to continue speaking the unspeakable and mentioning the unmentionable in this complex-ridden society of ours.[1] There can be no gainsaying one basic fact and that is that there is a heavy pall of silence, both formally imposed by the law and informally bolstered by social taboos about the possible obtrusion of race and also ethnic origin as a factor which influences sentencing in the Republic of South Africa and possibly also in other societies[3]. In this paper I shall endeavour to look at a few aspects of the possible interaction between race and sentencing, especially in a South African context.

There are, I think, two fundamental sociological propositions about which I confidently submit there can be no serious qualms either in an audience of this standing or even in any group of serious academic standing, despite the fact that the very statement of these propositions is very rare – at times even perilous – and their analysis of their implications even rarer. First, race is one of the most important social phenomena of South African society. It is a phenomenon as stark in its reality as it is at times ineffable in its tragedy for the peoples and the destiny of this part of the world and nowhere is this reality more vividly entrenched than in South African law. Even at a time long before race was written large on the banner of the dominant political group in South Africa this fundamental reality was understated as follows in a judgment of an Appeal Court judge:

> 'The statement that all are equal before the law cannot be accepted unreservedly. It is undoubtedly subject to important qualifications and as far as the Transvaal (Province) is concerned, it is manifest that Europeans and Non-Europeans have in important respects never been equal. Separation runs through our complete social structure in the Union (of South Africa).'[4]

The other proposition which, I believe, will hardly commend itself to dispute in any society where but the faintest knowledge obtains about the great verities of the jurisprudential school of modern realism is that there is an obvious and direct but by no means uncomplicated link between sentencing policy on the one hand and societal norms on the other hand. Interlinked with the previous phenomenon of the pervasiveness of race in the South African kaleidoscope of social realities, this latter phenomenon of the realtionship between dominant societal norms and criminal sentencing policy can at times become a cause of deep injustice. From the opulent array of facts flowing from the interrelationship of these two basic social phenomena I wish to highlight only four broad constellations of issues or factors which more than merit our concern as lawyers if social justice had any place in our hierarchy of values. However, before someone else does so, let me first illuminate a basic conscious premise on which my depiction of these issues will be based. It is this: racism in the sense of penalizing a man for the race he belongs to is a scourge upon which the larger part of civilized humanity has overwhelmingly turned its back, in the same way as it once did upon slavery and, theoretically also, upon torture as an instrument of crime detection and for that basic reason also it ought never to constitute – or be suspected of constituting – a factor of aggravation in sentencing policy. This is a proposition which I shall not defend here, despite the regularity of its inapplication in our clime. It is a proposition which stands or falls on the basis of one's Weltanschauung here in the evening of the twentieth century which has turned its back on race as a criterion of someone's worth.

To come now to the four constellations of issues which I wish to highlight; first, the mere consideration of a person's race or ethnicity in sentencing need not always and necessarily trigger off one's early warning system of injustice. Circumstances often arise where beliefs prevalent in a certain community – witchcraft being the obvious example in our black communities – would have to be considered as mitigating or exonerating or simply explaining factors.[5] Where such beliefs are genuine or understandable their ethnic or racial origin can obviously not be ignored since they would often provide a key – albeit perhaps a dangerous one – to a fuller understanding of someone's psyche. *Where* lines must be drawn and *where* certain beliefs must be discounted I do not now consider beyond stating that the process must involve wisdom of the first order of a kind which a truly competent and independent judiciary would find the intellectual resources to muster.

But there is, secondly, the other side of the coin where lack of wisdom and of spiritual independence may lead a judicial

officer to apply racial considerations against an accused either in the sense of additionally penalizing such accused for racial reasons or, more broadly, exonerating accused essentially for racial reasons in a way dictated not by compassion or wisdom but by simple racism, albeit perhaps inverted racism. We approach here the crux of what we may term *open racism* for which there is in South Africa ample ground for grave suspicion. In this context race – and mostly race alone – becomes either a badge for repression or a kind of qualified carte blanche for crime. In South Africa there is little doubt that the obtrusion of racial considerations in this fashion is widely suspected in wide circles and there is little doubt also that this suspicion is a major reason why aspects of our essentially white administration of justice is viewed with deep suspicion by large – perhaps overwhelming – sections of our black population. What then is some of the evidence on which these suspicions are fueled?

From the host of possibilities as regards 'open racism' I choose but four readily available bits of evidence to substantiate the suspicions of a direct unjust obstrusion of racial factors into the sentencing policy of South Africa. Firstly, the comments of knowledgeable observers from whose ranks I choose a man with unrivalled experience as criminal lawyer, Harry Morris KC[6] writing in 1948:

> 'A white man is rarely hanged. The privilege is reserved for the Native. Lashes for the White man have almost been entirely forgotten, and caning is only half remembered . . .
>
> When a White man, in cold blood, lashes a Native to death, the worst that, so far with one exception, has happened to him is a fine . . . When a Native fatally stabs another Native in a drunken brawl he gets lashes and plenty of time to think over the pronouncement of the Court – 'The Court will not tolerate the use of a knife' . . .(S)erious offenders are too often punished with scandalous inadequacy, except in the case of Natives.
>
> I have never heard of a European being sentenced to death for rape. Natives have been hanged.
>
> The tenderness for the white man and the penal differentiation between white and black in Transvaal are by now part of our traditions.'

If a change has come about since 1948 in the situation depicted by Morris – and it may well have – I am awaiting the first analysis of it. Many overt signs seem to point in the contrary direction.

Secondly, apart from cross-racial crimes to which I shall presently turn, there are the simple statistics that since Union only three executions have taken place of whites for rape of children of tender age whereas the figure for blacks is nearing 200, mostly (although the statistics are not entirely clear) for the rape of white women.

Then there is thirdly the notorious South African custom of what may perhaps be termed 'farm murders' or 'farm assaults', i.e. the callous beating to death or near death over long and protracted periods of black labourers under circumstances where I submit not only indirect *malice* or *dolus eventualis* but *dolus directissimus* is palpably present in the absence of insanity.[7] All of us know these cases where in the past the finding has often been culpable homicide and where despite the most callous brutality, the sentence would perhaps even be a fine, sometimes of negligible importance.

Fourthly, as evidence of the unjustified direct obtrusion of racial factors there is also the circumstance of unjustified leniency on racial grounds. In this regard the overt racism of our juries in the old days is a matter of public record. There has been talk in a recent Botswana judgment of the *Kafakarotwe* theory,[8] named after the Rhodesian case ('as it then was', I should say) of the same name where Tredgold CJ formulated the nonsense that imprisonment is more onerous to whites than to blacks and should therefore be more sparingly used towards whites.[9] As a general proposition this is about as correct as the proposition that Bophuthatswana will stage the next Olympics. There is another version of this cockroach sounding *Kafakarotwe* theory and that is excessive leniency by a white judiciary as regards violence committed by black on black; a situation amply documented also in the Southern states of America before the civil rights reforms of the last two decades.[10] Mr Justice Claassen readily admitted to the existence of this state of affairs in homicide cases in South Africa when, in a kind of valedictory postscript to the first *Van Niekerk* contempt judgment, he readily admitted that in many cases involving blacks only a conviction for culpable homicide instead of murder is returned and he documented also the leniency of our attorneys-general in the same regard.[11] What he was referring to is of course known in the corridors of the *pro deo* section of the Johannesburg bar as 'Soweto culp'!

The third major and possibly most contentious question concerning racial considerations entering sentencing policy in South Africa is that relating to cross-racial crimes, especially of violence. The change here, needless almost to say, is that a consistent pattern of differential sentences would indicate a kind of hierarchy or scale of differential worths for the various races. Is there substance for suspecting the presence of such a danger in South Africa? I have already hinted that in the case of so-called 'farm murders', or simply 'farm assaults' of labourers there has indeed been an incredible leniency towards white farmers – broken obviously by some exceptions proving the rule – who displayed a callous brutality which in almost any Western state would have earned a prison sentence of between 10 and 20 years. And looking at the pattern of death sentences generally for rape and murder, one will be hard put to find that considered as a whole since Union these patterns do not display a consistent pattern of discrimination against blacks. These are the statistics: No death sentence ever *imposed* let alone executed since 1910 on a white man for the rape of a black woman, whereas the vast majority of the almost 200 executions of blacks seem to have been for the rape of whites. There can be no doubt that the judicial rule against the death sentence for whites for rape in practise is as strong as that of a statute, with only apparently three exceptions breaking the rule for the rape of children of tender age.[12] In this context it is not without interest to note that there is evidence – at least it was the case a few years ago – that more black women were raped by whites than vice versa. The same holds true, it seems, for murder and assault.[13] For the ultimate crime of murder the pattern is equally disturbing.

Although the statistics are not entirely clear there seems to have been in the full sweep of the history of the Union and of the Republic of South Africa not more than ten – let's say a dozen – executions of whites for the murder of blacks and the number of death sentences imposed would probably be about double that figure.[14] Transposed against the murder rate of blacks by whites this situation constitutes its own telling commentary.

Now of course these bland statistics tell their own story but – and I don't need another prosecutor to tell me that –

they obviously do not tell the full story. At the very least, however, they do tell a story which must inevitably lend strong support to the suspicion on the part of the larger part of the population that in certain areas of the law and under certain circumstances different standards obtain and that the highest legal value, the sanctity of life, may not be pitched so high when a black is involved. It would, however, be surprising if this suspicion is confined to the question of interracial crime where the death penalty may be involved.

At least two other important factors may enter the picture of interracial crimes and indeed the whole picture of sentencing in a multi-racial and multi-ethnic society; first, different economic statuses leading to different possibilities for adequate and sympathetic defence – a situation so obvious but yet so pervasive that I need say no more beyond stating that in the ultimate analysis one needs no Marxist theory to comprehend that in this *de facto* situation of massive poverty resides the greatest built-in factor of inequality in our legal system towards blacks, a situation where the legal aid system has only most recently started to make a dent. From this inequality of wealth which runs quite eerily along the racial Rubicon in our society flows also the basic racial inequality of monetary sentences where a R50 fine in the one case can be laughed off and where in the other case it will mean the end of a man's freedom as surely as if it were a compulsory prison sentence.

But there is yet another factor of potential racial inequality in sentencing which dare not be ignored, despite the fact that it may in a sense be more elusive than any other although not less real. I refer here to the presence of a constellation of factors which we may label *cultural discrimination* and which refers to the situation, partly undoubtedly inevitable, that the customs, views, attitudes, idiosyncrasies and the like which would go into and be reflected in the judicial lawmaking at this time – also as far as sentencing is concerned – would largely be reflective of the particular part of the white community from which they derive or which set the tone in the matters concerned. This problem is a multi-faceted one, but what is basically involved here is the psychological inability of an average judicial officer, perhaps more especially of our lower courts, to gain a sufficient understanding of and insight into the problems and stresses besetting the average black who passes through the floodgates of our criminal courts. The problem is well illustrated by the *kafakarotwe* case itself where Tredgold CJ gave a clear indication of his inability even to *begin* to comprehend what effect imprisonment may have on blacks. Echoes of this inability, which, in the view of some, approximate undiluted racism, are also to be found in older decisions of certain civil courts where the pain and suffering of blacks were assessed on, as it were, a different Richter scale of pain as that for whites.

Finally, having delineated in very broad outline some of the basic threads of racism in the fabric of criminal law I wish to delineate in very tentative terms only a possible solution to what is undoubtedly a very real and grave problem. I offer merely two very broad indications of the direction in which our legal system must move in order to escape the label which it undoubtedly now carries of being impregnated by subtle and not so subtle forms of direct and indirect forms of racism – in short, in order to be legitimized as a national system of justice and not a racial system of injustice. In the first place, the problems must be recognized and they must be openly talked about. There has to this very day been a conspiracy of silence, co-perpetrated to some extent by all of us (or most of us!) on the problem of racial inequality within and before the law. No subject has been more subjected to stultifying taboos which ill-befit an academic and journalistic community like ours which so often vaunt their own spiritual freedom.[15] If there is one message which the jurisprudential school of American realism imperatively teaches us it is surely that any civilized legal system must be able to tolerate open discussion about its problems as a first step towards possibly solving them. Now racism – need I say it at all? – is like the problem with your wife which you can never solve, but which you can only defuse and learn to live with by scaling it to manageable levels. By not even talking about it we are obviously not even beginning that process of adaptation. If I plead for anything here I plead for frankness about a problem which deeply bedevils our legal system's claim to being civilized.

Of course, in the second place and in the long run, there must be an infusion of black ideas, concepts, visions and dreams, and also of realities from the black human condition into the practically lily-white legal system before it will become, albeit haltingly and never perfectly, a truly South African legal system and, as far as sentencing is concerned, a cause for pride and not for shame. And if I may just pinpoint one very obvious area where there is a crying and palpably obvious need for the infusion of black concepts and especially black realities into the judicial process it would be in the field of psychiatric services. To put the situation very bluntly and boldly it can be said that as far as blacks are concerned these services are practically meaningless and largely non-existent, despite the fact that such important legal consequences may flow from their operations. But this is a story I have told elsewhere and for which time is not available at this stage.[16] □

Footnotes on p. 20

A POSTSCRIPT – OUR MAN IN MMABATHO?

A personal comment by Julian Riekert on the reception of Professor Barend van Niekerk's paper, *Sentencing in a Multi-Racial and Multi-Ethnic Society,* at the Conference on Southern African Law Reform which took place at Sun City, Bophuthatswana, from August 11 to 14, 1980.

If it seems incongruous that a conference on law reform should take place at Sun City, Sol Kerzner's extravaganza in the Pilanesberge, better known for its venal pleasures than its academic rigours, it is not incongruous that it should have taken place in Bophuthatswana. Despite the fact that it owes its existence as an "independent" state to the South

African homeland policy with all that that entails. Bophuthatswana is a remarkable entity in many ways. Not the least of these is its very promising programme of law reform which is currently being undertaken. It is also the only state in southern Africa, other than Zimbabwe, to have a Bill of Rights in its constitution.

It was against this background that the Chief Justice of Bophuthatswana, Mr Justice V. G. Hiemstra, welcomed delegates to the Conference. He reminded them of the fact that they were now in a country which offered them complete freedom of speech which was guaranteed by the Constitution. This assurance produced spontaneous applause from the audience, many members of which were from South Africa. The Conference then proceeded with a paper on the legal status of black women in South African society by Mrs Carmen Nathan of the University of the Witwatersrand.

The fourth paper on the third day of the Conference was that of Professor van Niekerk, who, in his opening remarks, reminded delegates that they were, technically speaking on foreign soil. On a lighter note, he added that he had been advised that contempt of court was not an extraditable offence. As can be seen from the paper, it was a thoughtful and stimulating attempt to persuade his fellow-lawyers to admit to the unwelcome realities which intrude into the judicial sentencing process. It was, a plea from a lawyer to lawyers to admit what outside South Africa is unremarkable – the fact that judges are human beings, spared none of the human weaknesses.

To the astonishment of the delegates, one of the earliest speakers from the floor was the Chief Justice who accused Professor van Niekerk of "using Bophuthatswana as a launching pad for his attacks on the RSA". He was visibly angry and after he sat down his remarks received applause from a handful of delegates. Professor van Niekerk looked surprised at this development but, in accordance with the procedure which had been followed with other papers, did not comment immediately. Many of the delegates commenced whispered discussions.

Professor Marinus Wiechers, of the University of South Africa, came to Professor van Niekerk's defence by gently reminding the Chief Justice of his opening remarks. He went on to add that there was surely nothing improper in delivering such a paper at such a conference. After all, Bophuthatswana was a country which was moving away from racialism and if such factors were a part of the sentencing process, it was well that everyone should know that. He added that it was common knowledge that thousands of blacks went to jail every year in South Africa for so-called "black crimes" and that the resultant statistics were sometimes used to support claims that blacks were criminally-minded. He appealed to delegates not to refrain from raising "sensitive" issues.

In his reply to the questions raised, Professor van Niekerk stated that he was not attacking South Africa, but what was wrong in South Africa, and that if any price had to paid for the exercise of freedom of speech he would continue to pay that price by refusing to be intimidated. Both Professor van Niekerk and Professor Wiechers were cheered by the great majority of the delegates at the conclusion of their speeches.

If, as was suggested at the Conference, the choice of venue was an attempt to demonstrate the vigorous independence of the fledgling Bophuthatswana, then the Chief Justice's outburst could not have been more ill-considered, for it raised a number of important questions. These are:–

a) why does the Chief Justice of Bophuthatswana feel that he owes allegiance to the Republic of South Africa? His action in confirming that allegiance supports those critics of Bophuthatswana who argue that the Republic and its seconded officials are *in loco parentis* to Bophuthatswana. (One of the speakers inadvertently raised this point by stating that it was absurd to suggest that the Republic was *in loco parenthesis!*)

b) did the Chief Justice not act improperly as a judicial officer in making what was essentially a political point? In other contexts members of the South African judiciary have steadfastly maintained that they may play no rôle in active public political life. This point derives some support from the fact that Bophuthatswana's Minister of Law and Order, Mr A. T. Gaelejwe, was present at the time of Professor Niekerk's address.

   According to accepted conventions he, as the member of the executive charged with responsibility for justice, should have made any statement which required to be made. However he congratulated Professor van Niekerk on his paper and requested that a copy of it should be made available to him.

c) does the Chief Justice dispute the facts set out in Professor van Niekerk's paper? If so, why did he not dispute them, or at least call upon Professor van Niekerk to substantiate them? He, as a very senior member of the judiciary, and as the Chancellor of the University of South Africa, should have known that this would have been a proper course to adopt at a law reform conference.

d) does the Chief Justice's statement indicate a view that the Bophuthatswana Bill of Rights will be applied selectively i.e. by excluding foreign visitors from its operation? If so, it augurs ill for the future.

e) can anyone now deny that a frank discussion of race as a factor influencing the sentencing process has become a taboo, which one breaches at one's peril?

There can surely be little doubt that the Chief Justice, having spoken in haste, must now be repenting at leisure. □

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CISKEI INDEPENDANT?

by Nancy Charton

The Ciskei is situated between the Kei and the Fish Rivers, and the Stormberg Mountains and the sea. It comprises some 530 000 ha, and consolidation proposals will add another 300 000 ha transforming it into one block. It has a de facto population of 660 000; 1 433 000 'Ciskeians' live outside the territory itself. Geographically it is encapsulated by 'white' South Africa, without its own outlet to the sea.[1]

In both rural and urban Ciskei poverty is endemic. Only 13% of the land is arable, and much of it is eroded and exhausted. The Ciskei does not feed its own resident population. Many are forced to sell their labour in 'white' South Africa, bleeding the territory of its manpower. In return it gains irregular remittances which go, not into development of the land, but into feeding hungry mouths. Few rural dwellers have access to fields or grazing land; most are landless, keeping body and soul together by means of migrant labour. Investigations in Mdantsane in 1976 revealed an unemployment rate of 25%, with a further 14% working in the informal sector; almost 50% lived below the poverty datum line. A continuous flow of rural migrants and work seekers ensures low wage levels in the whole region.[2]

The Ciskeian government has attempted to alleviate the situation by the construction of capital intensive irrigation settlements in the rural areas. There are now three, and more are projected; however they involve only a miniscule section of the rural population. The Republican government has encouraged industrialisation in the East London/Berlin Kingwilliamstown triangle. There are two modest growth points in the Ciskei itself, at Sada and Dimbaza. This development strategy has created jobs in, or in close proximity to the homeland, at vast capital expense to both public and private sectors. However, it has increased rather than reduced the dependence of the Ciskei on the Republic for capital, technology, skilled personnel, raw materials and markets.

The proximity of the territory to the white areas, and two centuries of interaction between white and black means that most Ciskeians aspire to the affluent standards of living set by whites. Thus the level of consumption in the Ciskei is influenced by white standards, which will continue for the foreseeable future to skew the process of distribution in the territory. The rapidly expanding middle class of politicians, chiefs, civil servants, teachers and merchants are all dependent on the state for salaries or loans; and the Ciskeian state is dependent on South Africa. These people form a privileged class tied to South Africa's chariot wheels by bonds of common economic interest.

In 1979/80 the Ciskei generated only 23% of its revenue of R64,9m.[1] Although it currently enjoys the status of a 'self governing' territory its constitutional autonomy is completely negated by its dependency at fiscal level. Real political autonomy requires an autonomous tax base. Otherwise it does not exist.

Finally the communication system is controlled by 'white' South Africa. Chiefs and headmen control the traditional channels operating through the village councils. The newspapers circulating in the area mediate news to blacks from white political perspectives.

The social and economic fabric of the Ciskei has grown over the centuries. Its economic, social and political dependence on South Africa is structural; it cannot be terminated at the stroke of a constitutional pen; dependence can only be broken by the painstaking building up of an autonomous, integrated economic base.

Chief Minister Sebe has been cautious in committing himself to indipendence. His first election manifesto did not mention it at all. During the second election in 1978 he stated that it was a possibility only after land and economic issues had been resolved. In June 1978 his party won every seat in the legislature, and thirteen opposition candidates lost their deposits. Since then the drift towards independence has been rapid. In August of that year a Commission was appointed to report upon the feasibility of independence. The report of the Quail Commission was published early this year.[3] Well aware of the structural nature of Ciskei's dependence, they laid down five pre-conditions which they felt would ensure at least the internal legitimacy of the new state, and a reasonably autonomous economic base.

The first pre-condition was that there should be a 'carefully supervised' referendum which would reflect the will of the people of the Ciskei, both in the Ciskei, and in the rest of South Africa. A majority in both areas would be necessary before taking independence.

The second pre-condition concerned Ciskeian citizenship. In view of the existing pressure of population on land this is a vital issue. The Republic has the right at present to re-patriate arbitrarily any 'Ciskeians' it might regard as 'surplus'. The Quail Commission calculated that 323 000 were liable to be resettled in terms of the government's declared policy. These people are 'illegal urban dwellers' or they live in 'black spots' in white areas. In reality this is a very modest estimate, for it makes no allowance for the constant movement of Ciskeians from the white farm areas into the homeland. Such people become 'surplus' on the farms due to the increasing size of farms, and mechanisation; they are without residential rights anywhere in the Republic; their Homeland is their only recourse. The Ciskei government has been powerless to resist the impetus towards re-settlement, planned or voluntary. This is clearly demonstrated by figures showing that 365 020 people have been re-settled in the Ciskei during the past two decades.[4]

A decision in favour of independence which left the Ciskei open to having the nearly one and half million citizens beyond its borders arbitrarily re-patriated, is clearly hazard-

ous. It would amount to economic suicide. The Commission was very conscious of this danger, and felt too that the rights of Ciskeians to seek work and to remain employed in South Africa needed to be safeguarded.

The third pre-condition related to the land. The Ciskei claims all the land between the Stormberg mountains and the Indian Ocean and between the Fish and the Kei Rivers. The Quail Commission endorsed this claim; they felt that an independent Ciskei would need to control a relatively large, coherent economic region with a well developed infrastructure, access to the sea, and the nucleus of an industrial sector.

Finally the Commission felt that South Africa should guarantee the Ciskei 'equitable financial support'.

Press reports during the past month reveal that the bargaining which has been taking place between the Ciskei government and the Republican government has indeed revolved around these issues. It is obvious that Chief Sebe has yielded ground on the two most fundamental to economic autonomy. It is rumoured that the van der Walt Commission has awarded King Williamstown and Berlin to the Ciskei. East London and the white corridor along the Kei remain in the Republic. The Quail Commission's dream of a coherent territorial base for economic development has been ignored. We are told that there is to be regional development across national boundaries – a so called 'co-prosperity zone.' Unhappily national independence seldom facilitates regional development; in the past in Africa it has more often than not destroyed it.

Chief Minister Sebe says the citizenship issue has been settled to his satisfaction. The Ciskei is to be part of a confederation of states, and will share South African nationality. Of course this might well resolve the problem of passports for Ciskeians in a world which obdurately refuses to recognise independent 'Bantustans'. However, it by no means guarantees the right of domicile of 'Ciskeians' in the common area. And that is the crux of the issue. Any agreement that lays the Ciskei open to the process of re-settlement as it has been experienced in the past twenty years will negate whatever economic development may take place.

It is obvious from statements made to the press that considerable economic inducement has been offered to the Ciskei. Chief Minister Sebe remarked that those territories which had become independent were noticably better supported by the Republic. Precisely what commitments have been made is not clear. However, it should be obvious that a settlement which accepts subventions from South Africa as adequate compensation for the lack of a coherent territorial base for economic development is short-sighted in the extreme. It will simply perpetuate the dependence experienced heretofore, at both economic and political levels. And what guarantee is there that the next Republican government will honour past pledges in this respect? Homeland leaders know all too well that the path of homeland development is strewn with broken promises.

The referendum is to take place on 4th December. Who is supervising it is not clear at the time of writing. However, French lawyers and foreign journalists have been invited to observe. The Ciskei is a one-party 'state'; opposition to the official party line is not tolerated, and the result of the referendum will presumably be a vote for independence, which has now become official party policy. Ciskeians not living in the Ciskei tend to be alienated from Ciskeian politics. In order to vote they must register as Ciskeian citizens, and many of them refuse to do this on grounds of political principle. In the circumstances a referendum, however carefully supervised, when confined to registered Ciskeian citizens, can have only one predictable result – a resounding YES vote. However, it will not reflect the feelings or the aspirations of the majority of those in the common area. The procedure now adopted certainly negates the spirit and the intention of the Quail Commission recommendation.

What advantages are to be found in the type of independence outlined above? The Ciskei will gain constitutional autonomy, which means nothing in view of the lack of an adequate economic and tax base. It will gain international status, which means nothing because it will not be recognised by the international community. It will gain some land, but not enough. It will allow its people to retain South African nationality, but it lays itself open to an endless process of re-settlement and impoverishment because the right of domicile in the common area is not secured. It gains promises of economic support, promises which will be subject to the whims and fancies of the government of the day in South Africa.

On the other hand the Nationalist government gains a singular victory, and can once more point to the 'success' of its multi-national policy.

The Ciskei, once it has accepted independence loses whatever political bargaining power it might have had. Minister Koornhof said: "Independence: we'll make it attractive!"

He did, in the short term. And Ciskei politicians are ready to settle for short term economic advantages. In the game of political chess we are now witnessing check mate is coming up – and it is the black king which is laying himself open to defeat. □

FOOTNOTES

1. 'Agricultural Development in the Ciskei: Review and Assessment' J. B. M.C.I. Daniel. Presidential Address to S.A. Geographical Society, 25/7/80.
2. Ciskei: Ed N. Charton (Croom Helm: 1980)
3. Report of Ciskei Commission (Conference Associates: Pretoria: 1980)
4. "Draft Report on Re-settlement in the Ciskei 1958–1980" Grahamstown Diocesan Council: 1980;

Editor's Note

The result of the referendum was 295,891 in favour of independence, 1,642 against and 2,198 spoilt papers. There was a 59,5% poll. In the Port Elizabeth area, for one, where 87% of the people are Ciskeians, most people did not vote.

Two Reviews by James Moulder

1. CONCILIATION OR CONFRONTATION?

C. H. Mike Yarrow *Quaker Experiences in International Conciliation* New Haven and London, Yale University Press, 1978. 300 pages plus index, preface, and foreword by Anatol Rapoport. S.A. price R16,80.

C. H. Mike Yarrow was the secretary of the International Division of the American Friends Service Committee from 1963 to 1972. His book is a description and evaluation of three Quaker experiences in international conciliation: between the two Germanies from 1962 to 1973; between India and Pakistan in the War of 1965; and between the Nigerians and the Biafrans in their Civil War of 1967-1970. In each of these three tense situations a small group of Quakers were involved as unofficial "third party" conciliators. From 1962 to 1973 Quaker representatives in Berlin travelled back and forth through the Berlin Wall to support the voices of detente on each side. Their main aim was to interpret one side to the other. In the uneasy cease-fire following the war between India and Pakistan over Kashmir in 1965 a Quaker team helped to strengthen the hands of the moderates on both sides. In the Nigerian Civil War of 1967-1970 Quaker representatives tried to assess the possibility of a negotiated peace. They visited Nigerian and Biafran headquarters several times and covered the negotiations organised by the Organisation of African Unity in Addis Ababa.

HONESTY

This, of course, is only a description of the book's skeleton. From a more substantial perspective Yarrow's work is a superb blend of three elements: an introduction to Quaker beliefs and the tradition of conciliation which they have developed; an ample description, analysis and evaluation of the three case studies; and a discussion of Quaker contributions to national and International conciliation within the framework of some of the new and fundamental questions which are being asked by those who are engaged in peace research. In addition, Anatol Rapoport has written a hard-headed foreword which approaches Yarrow's questions about conciliation from a more theoretical and secular point of view. All these ingredients are presented with modesty, simplicity and conviction. But the most outstanding feature of the whole enterprise is the honesty with which Yarrow has described both the strengths and the weaknesses of the Quaker involvement in these conciliation experiences. His book therefore contains a great deal which is of ordinary human interest, as well as a substantial amount of material for analysis by those who are engaged either in peace projects or peace research. More specifically, Yarrow has opened a number of important windows on some of the latent and manifest conflicts which exist within South Africa's political life. I therefore want to recommend his studies by hinting at some of the ways in which he illuminates practical and theoretical problems which have to be faced by anyone who believes that it is still possible to work for conciliation (or reconciliation) rather than confrontation between black and white South Africans.

NEUROSIS

What is conciliation? According to Yarrow, it is "the process of promoting better understanding and agreement between persons or groups in conflict by helping to change their perceptions and images". Those who involve themselves in this process believe that improved communication is the essence of peace. Yarrow's case studies contain many examples which seem to confirm this conviction. But the most useful is his extended discussion of Roland Warren's "social-psychological analysis" of the conflict between the two Germanies. Warren applied the analogy of individual neurosis to society and to various groups within a society. He argued that a whole society, rather like a neurotic person, could have a concept of historical trends and present events that was at variance with reality, and conflicted with the quite different perceptions of the same realities held by the opposing group. Sometimes a society, rather like an individual, is unable to face the realities of a problem. Its members resort to mechanisms such as projection (blaming their failings on the enemy) and phantasy (finding satisfaction in a dream world) to enable them to adapt to a situation. But adaptations of this kind are unrealistic. And so they only make the problem of how to adjust to reality more difficult than it already is. More seriously, reality appears so different from each side that negotiation and compromise are not possible until the two sides to the conflict can expand the area of common perception.

CREDIBILITY

Against this background of how complicated conflict is, it is obvious that conciliation cannot take place until there is a radical alteration of the steoretyped images and language by means of which those who are in conflict approach one is a radical alteration of the stereotyped images and language Yarrow confesses that Quakers "have an almost mystical faith in the healing powers of communication between

contending groups". This is true. At the same time, however, Quakers are aware that improving communication in political conflicts involves more than simply bringing people together to talk about their problems. Amongst other things, it requires a "third party" individual or team whose credibility as a peacemaker is accepted by both sides. And one or more individuals of this kind have to be present, because to improve communication it is necessary to clear up initial misunderstanding, to make an accurate diagnosis of the causes of the conflict, and to explore alternative means, goals and areas of commonality. Quakers, of course, have a great deal of credibility as conciliators. But if one wants to understand why this is so, then one must attach more weight to Quaker beliefs and history than Yarrow does. And this emphasis has to be provided because their credibility has been achieved only because of a set of sincerely held beliefs and a great deal of hard work. The work has been exemplified in work camps, in peace and international relations seminars, and in relief projects. The beliefs which have established their credibility as conciliators include their renunciation of war and of political power; their tradition of "speaking truth to power"; and their conviction that they are required to work both for individual conversion and social reform.

HOLLOW RING

In other words, and with special reference to South Africa, anyone who believes that he, or his religious tradition, can bring peace between men and women who are in conflict, may need to invest at least as much time in the scrutiny of his beliefs, his style of life, and his religious tradition as he does in the construction of programmes which bring people together. For example, statements about the horrors of violence and war have a hollow ring when they come from Christians who provide either or both sides of the irregular war in which we are involved with military chaplains. And statements about the abuse of privilege and power have a hollow ring when they come from Christians who ask for special laws to govern what people do on Sundays, or for exemption from paying rates and taxes on church property. Similarly, denominations who use the vast amounts of money which they do use to employ clergy simply do not have the resources to run the kind of relief and similar programmes which have enabled Quakers to establish their credibility as peacemakers.

And so one could continue until one begins to despair about the ability of Christians to contribute anything tangible to conciliation between black and white South Africans. But there is no need for this kind of despair. More specifically, one of the things that one can gain from reading and reflecting on Yarrow's discussion of how Quakers acquired and have maintained their credibility as conciliators is a better understanding of what a genuine renewal of the churches would involve. At the same time, this book contains many examples of how individuals and groups of people can become credible peacemakers.

HARM OR HELP?

Yarrow's careful analysis of his three case studies sheds a great deal of light on what conciliation involves and how conciliation is possible. But with characteristic Quaker honesty he ends his book with a detailed discussion of a question which both official and unofficial peacemakers in South Africa dare not ignore: Are efforts to build bridges between peoples of opposing political ideologies sometimes harmful rather than helpful? This question arises because there is a danger that conciliation may lend itself to oppression. More specifically, it is not at all obvious that conciliation is helpful in those conflicts in which there is a glaring political and economic inequality between the two parties.

Yarrow does not even try to provide us with a definite answer to this problem. This is a good thing because it enables him to do something which is much more useful: namely, to increase our understanding of why this question is being asked both inside and outside the Quaker tradition. And the hub of the matter is straightforward enough: "many conflicts are a matter of objective structure rather than attitudes or behaviour and hence are not resolved by changing attitudes". Nevertheless, the spokes in this hub are far from straightforward ones. And so Yarrow's book ends on a more positive note which attempts to blend the legitimate demands of confrontation and conciliation and of "justice research" and peace research.

But when all this has been acknowledged there are questions which remain. I am certain that Yarrow will admit this and will want to insist that these questions ought not to be avoided. For example, and in a South African context, there are questions about the extent to which both black and white South Africans have to discover that the articulation of our conflict in racial (or ethnic) terms rather than in economic ones distorts our perception of reality and therefore makes it more difficult to develop more just alternatives to the present economic, political and social structures.

There are questions about how to develop educational and relief programmes that are a necessary condition of future attempts to bring about conciliation and reconciliation. There are questions about why there is such an alarming absence of individuals and agencies which have the necessary credibility to be genuine "third party" conciliators in the South African context. There are questions about how black South Africans can confront white South Africans with the challenge to translate our desire for conciliation into a desire for the kind of justice without which reconciliation cannot take place. The last set of questions are perhaps the most important of all because for far too long white South Africans have taken it for granted that they are able to write unilateral agendas for peace. This is "the black man's burden" – to bring humane civilization (humanitas) to the unjust masters of the bureau-cratic and technocratic jungles of Southern Africa. This, of course, is easier said than done. But perhaps one way in which black South Africans can continue to grow in dignity and in selfconscious awareness of their humanity is to take the initiative in the writing of agendas for peace projects of the kind which Yarrow has described.

I have only scratched some of the surfaces of Yarrow's attempt to share his understanding of Quaker experiences in international conciliation. But I hope I have said enough to demonstrate that his reflections deserve the thoughtful attention of anyone who believes that conciliation is better than confrontation. And so I hope that this book will find its way onto the shelves and into the minds of those who are involved in the work of justice, reconciliation and peace; of those who wish to translate vague talk about reconciliation and about Christians being "an alternative community" into operational projects and programmes; and of those who are searching for ways in which both justice and peace can become the inseparable realities that they need to be in South Africa's economic, political, and social life. □

2. CAN WAR BE CONTROLLED?

RESTRAINTS ON WAR: STUDIES IN THE LIMITATION OF ARMED CONFLICT, Oxford University Press, 1979, 173pp. with select reading list and index. South African price equals about R16,00. Edited by Michael Howard.

It seems to me a funny thing to make rules about war. It is not a game. What is the difference between civilized war and any other kind of war?

Pancho Villa

Pancho Villa was a Mexican insurgent leader, the Fidel Castro of his time and place. His comment and question was a response to a copy of the 1907 Hague Convention's rules to restrain war. It is easy to understand why he was perplexed. At the same time, however, it is important to remember that his question does have a number of straightforward answers: it is the difference between a total war and a limited war; between a war which does, and a war which does not, recognize the difference between civilians and combatants. In addition, it is the difference between a "holy" or a "just" war, and a war in which "the question of the justice or injustice of the war is irrelevant for the purpose of observing the rules of warfare as between the belligerents".

This quotation comes from Hugo Grotius (1583-1645) and encapsulates his humanitarian convictions about war. And in one way or another each of the eight papers which Michael Howard has collected and edited explores this idea more fully. The contributors are historians, lawyers and political scientists. Three essays deal with attempts to place restraints on war by land, at sea, and in the air before 1945. Three other essays deal with contemporary ideas about a limited war in "conventional", in nuclear, and in maritime terms. All six essays cover a great deal of ground and manage to find a sensible balance between idealism and despair. But the first and the last chapters are the best parts of this very good book.

Michael Howard introduces the collection by asking whether or not war can be controlled. He believes it can: "war without social organization is inconceivable". In other words because war cannot be conducted without armed forces that are disciplined and controlled, it is not inherently impossible to place restraints and controls on how a war is conducted. He gives a brief survey of attempts to do so from the "just" war theory of Augustine and Aquinas, through the humanitarian jurists like Grotius, to the various Hague and Geneva Conventions. But this survey does more than set the stage for the discussions from the other contributors; it also enables Howard to place a firm finger on some of the obstacles to restraints on war. Amongst these obstacles he gives a prominent place to the development of mass democracy, and of a technology which created weapons that make indiscriminate destruction possible.

G.I.A.D. Draper concludes the collection with a survey of recent attempts to draft regulations for restraints in wars of national liberation. The attempts were initiated by the International Red Cross in 1971. And in 1977 the negotiations gave birth to some Protocols to the 1949 Geneva Conventions on War. These Protocols afford the benefit of the law of war to national liberation movements, especially to "armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations". Unfortunately, South Africa declined to participate in the deliberations after the first formal session in 1974. And this is unfortunate because these Protocols have a particular relevance for our situation. They place restraints both on national liberation movements and on the governments with whom they are in conflict. More specifically, according to Article 96(3) of Protocol 1, the 1949 Geneva Conventions and the new provisions apply equally to a national liberation movement and to its adversary.

Draper underlines the way in which the Protocols attempt to protect civilians and to outlaw reprisals. But in the end he is critical of the fact that, in the terms of international law, they provide a right "to rebel for certain specified 'causes', racial in nature". And he raises these criticisms, not because he is in favour of racism, but because he fears that the Protocols are a step away from Grotius' conviction that "the justice or injustice of the war is irrelevant for the purpose of observing the rules of warfare". In other words, he fears that these Protocols may help to revive the idea of a "just", and therefore of a "holy", war.

This, of course, is no more than a sketch of the many important problems which are explored in this collection of essays. At the end of it all there is no unqualified answer to the question, Can war be controlled? But anyone who employs these essays to stimulate his thoughts will appreciate the two rules and the problem which occur at the end of Michael Howard's contribution. The one is an ethical rule: one does not cease to be a moral being when one takes up arms". The second is a prudential rule: "one should not behave to one's adversary in such a way as to make subsequent reconciliation impossible". The problem is to help people understand the force of these rules so that they can see that, even in a war, "order can be given to spare as well as to destroy". □

A ROSE BY ANY OTHER NAME:

A PRELIMINARY EXAMINATION OF THE THREE DRAFT BILLS WHICH TOGETHER COMPRISE Dr KOORNHOF'S "NEW DEAL PACKAGE" FOR THE URBAN BLACKS.

by Julian Riekert

One's immediate reaction upon reading the Local Government Bill, the Laws on Co-operation and Development Amendment Bill and the Black Community Development Bill [1] is to echo the words of Scrutton, L.J., in *Green v Premier Glynrhonwy Slate Co. Ltd.*[2] "If I am asked whether I have arrived at the meaning of the words which Parliament intended I say frankly I have not the slighest idea." However, since, in the words of the General Notice, "any comment or representations thereanent should be forwarded to the Director-General of Co-operation and Development . . . within 14 days of publication hereof" the luxury of bewilderment can be ill-afforded.

The confusion begins with the headings to the second- and third-mentioned Bills which have been transposed, presumably by the Government Printer's bilingual gremlins, so that the Bill which follows has absolutely no bearing on the heading. The confusion ends with the schedule of legislation repealed by the last Bill of the trilogy, which must surely have established some form of world record for obscurity.[3] Since it is this legislation which may in future determine the residential and employment rights of the urban blacks it is little wonder that the newly formed Association of Lawyers for Human Rights has chosen these three Bills for its first seminar, at which some of South Africa's finest legal minds will endeavour to unravel their complexities.

In this note I will attempt to outline some of the outstanding features of the Bills, and particularly of the Black Community Development Bill, which will assume the responsibility for influx control from the Blacks (Urban Areas) Consolidation Act, which it will repeal if enacted in its present form. It is a masterpiece of faulty draftsmanship and, if enacted unamended, it will give rise to a wave of litigation of unprecedented dimensions. Apart from a host of deeming clauses (of which A.P. Herbert's Lord Mildew remarked "there is too much of this damned deeming") the Bill incorporates sizeable portions of several other statutes by reference.

There are also some passages which are sheer nonsense. For example, the words "controlling interest" are defined in relation to any company or any incorporated or unicorporated association of persons as "a majority of its shares". Since only a company or an incorporated association is likely to have shares, the reference to unicorporated associations must have been inserted in a fit of zeal by the draftsman, who may have felt that the section of the Group Areas Act from which he lifted the wording, did not go quite far enough.

There are two key concepts in the Black Community Development Bill. These are the concepts of "disqualified persons" and "the controlled area". The first of these concepts is defined in the Bill as follows:—

" 'disqualified person' means—

(a) in relation to immovable property, land or premises in a township, any person not authorised by this act to be therein;

(b) in relation to any immovable property, land or premises outside a township and for any other purpose (including employment), a black."

On the face of it, and ignoring the tautologous repetition of "immovable property" and "land", these definitions appear to be quite straightforward. In townships, disqualified persons, who are subject to the penalties provided which include fines, imprisonment and "repatriation", are those persons whose presence in the township is not authorised by the Act (Bill). In all other areas all blacks are disqualified persons. If this were the meaning then only those blacks who are lawfully resident in townships would be immune to prosecution. However, the matter is not as simple as that.

Chapter V of the Bill goes on to provide that, subject to certain conditions, bona fide employees, servants, visitors and dependents may lawfully occupy land or premises in a controlled area. There is no definition of a controlled area in the Bill. However, section 31(1) provides a clue. It states that:

"For purposes of the application of the Group Areas Act. 1966 . . .

(a) an administration area outside a township shall be deemed to be a controlled area as defined in section 1 of that Act."

From this it would seem that the principle instrument of control of the lives of urban blacks is to be the Group Areas Act. A qualified person will be deemed to comply with the provisions of that Act, while a disqualified person will be deemed not to do so and will therefore be liable to prosecution. But, once again, the question is not clear cut. It is by no means clear just which categories of persons can be sure that they will be regarded as being qualified for the purposes of the Bill.Nor is the definition of "controlled area" satisfactory. Although administration areas outside townships are deemed to be controlled areas "as defined in section 1" of the Group Areas Act, the definition in that Act expressly excludes the very land to which the Bill applies. It is thus a self-defeating definition.

The main thrust of this Bill would seem to be to render lawful the occupation of land in urban townships when the occupier is:—

(1) in lawful employment in the area or is living in approved accommodation in the area;
(2) a person who formerly held rights under section 10 (1)(a) or (b) of the Blacks (Urban Areas) Consolidation Act;
(3) a person who is lawfully employed or accommodated in another controlled area;
(4) the owner or lessee of a house in a township;
(5) a bona fide visitor of a lawful resident in a township. In the case of a visit lasting not more than 30 days in a calendar year no permit is required for the visit;
(6) a bona fide hotel guest, patient, scholar or student, subject to certain qualifications;
(7) a bona fide dependant of a lawful resident. Dependant is defined to include a wife, customary union partner, unmarried child and a person who by reason of age or ill-health is in fact a dependant.
(8) a disqualified person who at the time of commencement of the Act was ordinarily resident in a township. This is however a special class, the rights of which can be terminated by the Minister of Co-operation and Development by notice in the Gazette;
(9) a person to whom consent had been granted in terms of section 10(1)(d) of the Blacks (Urban Areas) Consolidation Act to remain in an area while in lawful employment. This authority will lapse upon the date stated in the original consent.

As will be seen from the foregoing, the proposed amendments are in fact very similar to the present position. Although some commentators[4] have suggested that the principal reform is the introduction of the Riekert Commission's touchstones of lawful employment and approved accommodation, these have always been implicit in section 10(1)(d) of the Blacks (Urban Areas) Consolidation Act. In fact, in one sense, the proposals are more prejudicial to the rights of urban blacks since the criteria are now *approved* accommodation and lawful *regular* employment. The latter concept is defined as being "bona fide employment to the extent and subject to the conditions (if any) as the Minister may by notice in the Gazette prescribe". Thus two new areas for the exercise of administrative discretion have been opened up

The following are the principal reforms introduced by the Bill. Firstly, the 72-hour provision of the Blacks (Urban Areas) Act has been relaxed to 30 days, but only for bona fide visiting purposes. Secondly, a black person who is registered in one administration area may, it would seem, reside in another administration area until he is able to acquire approved accommodation in the first-mentioned area. Thirdly, the Bill permits those who are at present ordinarily resident in a township and who, under the new proposals, would become disqualified persons, to lawfully remain in the township, but under the Damoclesian sword of the Minister's power to abolish this right by notice in the Gazette. Fourthly, a capital development fund is established for the advancement of black areas.

The disadvantages of the proposals are more numerous. Firstly there is no relief for the unemployed, unless they are able to prove dependency upon a lawful resident. Secondly, the Bill provides, for the first time, for a penalty of R250 or three months imprisonment for any black who, while a disqualified person, remains in any controlled area, or in unapproved accommodation. Any person who introduces such a person to a controlled area, or who permits him to remain there, is liable to a fine of R500 or six months imprisonment. By means of a clumsy and highly unsatisfactory deeming provision, the offence in each case is deemed to be one under the Group Areas Act. Thirdly, in the case of most of the criminal offences created by the Bill, the onus of proof of various aspects of his innocence is cast upon the accused person. Fourthly, the Bill prohibits any person, other than an attorney or advocate practising as such, from accepting or receiving any money or reward for any service rendered to a black person in connection with the registration and employment provisions of the Bill. This section is clearly aimed at the informal group insurance schemes which operate in black areas in terms of which a member of the scheme pays a monthly contribution to the scheme, in return for which the scheme will pay any legal charges which the member may incur in complying with influx control requirements. Fifthly, the Bill proposes the establishment of so-called "community guards" which are clearly informal tribal policemen, whose activities in connection with the notorious *makgotla* system have been the subject of much criticism.

The last of the principal disadvantages of the Bill is the proposal contained in section 62 that the proper court for all matters arising out of the Bill is the Commissioner's court. Although the section commences with the words "subject to the provisions of the Black Administration Act", the ordinary effect of which would be to limit the effect of the section to blacks, it goes on to add "irrespective of whether or not the matter is ordinarily beyond the jurisdiction of such a court." If this section means what it appears to mean, whites and members of the other race groups may yet experience the perils of prosecution and litigation in the Commissioner's court, which until now, has been the exclusive and dubious privilege of the black group.

It is also interesting to note that although section 65(1) purports to repeal the whole of the Blacks (Urban Areas) Act, section 65(2) retains the two notorious "idle or undesirable Blacks" and curfew sections, sections 29 and 31, until the State President abolishes them by proclamation in the Gazette.

After reading this confused, confusing, imprecise and poorly drafted Bill, one begins to empathise with Harman, L.J., who declared in *Davy v Leeds Corporation:*[5]

> "To reach a conclusion in this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a Slough of Despond through which the court would never drag its feet, but I have, by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side . . ."

How any layman can be expected to come to grips with the provisions of this Bill is beyond my understanding. It is the best example I have yet encountered to prove the absurdity of the rule that all men are presumed to know the law.

Its two companions, the Local Government Bill and the Laws on Co-operation and Development Amendment Bill, are less contentious and better drafted. The former, as its title suggests, is intended to substitute a limited form of local government in the form of town and village councils, for the present urban black councils and black advisory boards. It will go some way toward the development of autonomous black urban areas, but a major shortcoming in that regard will

be the low revenue to be derived from the rating of township land, due to the very low incidence of commerically rateable property.[5]

The Laws on Co-operation and Development Amendment Bill is intended to effect consequential amendments arising out of the enactment of the first two Bills. Its first section, which is reproduced here in the form in which it appears in the Gazette, brackets indicating deletions and italics insertions, creates a sense of unease. Firstly, it broadens the scope of the crime to include all race groups which would seem to fall outside the context of the Black Administration Act. Secondly, it is merely a reiteration of section 1 of the General Law Amendment Act, 94 of 1974, which "(1) Any person who utters any words or (does) *performs* any other act or thing whatever with intent to (promote any feeling) *cause, encourage or foment feelings* of hostility between (Blacks and Europeans) *,different population groups of the Republic* shall be guilty of an offence and liable on conviction to (imprisonment for a period not exceeding one year or to a fine of one hundred pounds, or both) *a fine not exceeding two thousand rand or in default of payment to imprisonment for a period not exceeding two years, or to both such fine and such imprisonment";*

Footnotes on p. 19

THE STORY OF AN AFRIKANER

by Natie Ferreira
Published by Ravan Press
A Review by Abraham de Vries

It is characteristic in the anatomy of suppression that it sometimes forces the suppressed into tiresome soul searching. At best this search leads to good literature, at it's worst to futile explorations beyond the limits of the situation, into metaphysical guilt and anxiety.

The Story of an Afrikaner by Natie Ferreira (subtitled "The revolution of the children") does not escape metaphysical vagaries and a resulting exaggerated emotionality, but at the same time it is an honest and daring account of a man's fight against what he terms Dwurg ("acronym for *doodwurg"*), meaning the strangling Ideology of Apartheid, the smothering System where the individual has no lebensraum except in submission. The book is obviously meant as faction ("This is a true account recorded in different appearances of reality." (p.18) and "Not according to the tiresome restrictions of the god Literature." (p.4) It is also meant as a „testament", which accounts for the form of the book: two long letters to his daughter, Nadine, arising from her questions: "Tell me about the real world" and "Explain God to me". The second letter forms an introduction and a conclusion, a framework for the most interesting part, the first letter. In this he writes about his career as political correspondent of *The Citizen* and later of the *Transvaler.* But these letters also form a very personal document which deals basically with the wresting from a situation of fear of rejection, rejection by what Freud would have called the father figures: the Party, God, the System." ("The only real sin is to point out the Lie. Remember, the System is never wrong. That is rule number one. The only God (but never say it) is the "national interest', the only justice that which protects and perpetuates 'the System', the only truth complete identification." p.69).

The book is in parts a chilling account of the ruthless dishonesty, the lack of willpower in leadership (Vorster telling Ferreira's Editor that he expected a 'shooting war' and admitting his helplessness; Wimpie de Klerk placing his hope on the role of the unexpected in history!) the deceit and the dangers in deviation from the System (" . . . Afrikaans newspapers and the SABC start in on what they call a 'knife job'. This simply means that the culprit is discredited, smeared, written off and buried" or in a "subtler version": the *doodswyg-metode,* the kill-by-silence method" p.4.)

Ferreira does not draw his punches and spares nobody. His disillusion with the "theatre of cynicism" (parliament) is spelt out clearly, and so are his views about church, opposition and Mr English ("In his heart of hearts he despises the Afrikaner and considers the African a savage. He lives his life quietly and efficiently in the company of these two uncouth giants and is always slightly irritated by the fact that his obvious superiority is not recognised." p.73.)

Unfortunately some of these cynicisms have a deja vu character—or could it just be that there is in our situation, as Adam Small once argued, nothing new to be said?

It would be possible to go even further and say that Ferreira's book is nothing more than the work of an embittered man who makes no bones about it that he was pushed out and left out in the cold on several occasions. (He had at one time advocated a Government supporting English newspaper built on the ideal of the sovereignty of the individual!) It would be easy to discredit Ferreira's observations, but I believe it would be wrong. In a book like this "objectivity" is obviously no criterion and even distortions are sometimes more true than the "truth".

Ironically Ferreira is not always at his best where he wilfully exposes or discredits, but in "throw away" cameos such as the following:

> "Uncle M was a tall educated farmer and town councillor. He spoke beautiful Afrikaans, his son, D, played Chopin and his wife served tea in the most delicate cups and won prizes for her canned fruits.
>
> But something went wrong, something, I think, in connection with his work as councillor. He was in charge of 'Native Affairs' and apparently insisted on certain changes. Eventually he was branded a 'kafferboetie' and ended up in a mental home, a hollow man who accused his few visitors of avoiding him."

Which gives me reason to believe that Ferreira has more strings to his bow than those used in the greater part of this book. And sharper arrows. Because, whereas many readers could regard Ferreira's disillusionment with the System as growth pains out of naïvety, the story quoted above can not easily be discredited. It is a variation on the story of many Afrikaners. □

THE DIARY OF MARIA THOLO

by Carol Hermer. Ravan Press, Johannesburg.

Reviewed by Marie Dyer

The Diary of Maria Tholo recounts Maria Tholo's experiences during the riots in the black townships of Cape Town from August to October 1976. At that time she was running a crêche in Guguletu, as well as keeping house for her husband and two daughters. Her story has been put together in diary form by Carol Hermer from tape-recorded interviews conducted while the disturbances were going on; and the consequent immediacy of the events, as well as the obvious scrupulousness of the reporting, makes the diary an authentic and convincing document. Maria wasn't closly involved in any of the violence: no near relative of hers was arrested or injured, and neither of her daughters was attending high school. (It was the boycotting high-school students who were at the centre of the troubles). But nobody in Guguletu could avoid participation.

The particular interest of this book is in its 'insideness'. Many of the main incidents have been reported elsewhere from different points of view, and Carol Hermer adds to Maria's narrative a supporting commentary – including contemporary newspaper reports – giving a general account of the course of events. But the diary gives a view of vivid local details: the progress of a parents' meeting which the committee successfully keeps from being taken over by community council 'stooges'; schoolchildren, although continually harassed off the streets by police, appearing as if miraculously at a large gathering, having approached it with their uniforms concealed under raincoats or their mothers' overalls; the decision of the creche teachers to leave the doors open during any street riots, to avoid violence or subsequent reprisals from students fleeing from the police and wanting to run through; children so much in control of the society that even at a funeral feast they are served first; the fate of the large windows and expensive furniture of a prosperous shebeen, smashed to pieces among the bottles as the school-children pursue their campaign against liquor.

Some of the worst recollections of the riots are given new and horrifying life in Maria's first-hand accounts: the brutal beatings and tear-gas attacks by police on children, even inside school grounds; the massive casualties; the large numbers of apparently random arrests and shootings; the encouragement by some police units of violence against the township residents by migrant workers in the hostels. (It was mainly the hostel dwellers in Nyanga who became aggressive; Maria suggests that the close proximity of the hostels to family houses there had resulted in a chronic state of social tension. She records relatively cordial relationships during the riots between the residents and the more suitably-sited hostels of Langa).

The diary is a record of Maria's experiences rather than an expression of her opinions, attitudes or feelings; and so although emotions like frustration – even desperation – distress, compassion, and horror are often revealed, there is often also an air almost of neutrality in the reporting, which is difficult to interpret. Like most adults in the townships, Maria seems to have been stimulated, excited, gratified by the original boycotts and demonstrations; and to have sympathised and identified – at least inwardly – with the students' militancy; but the students proceeded to direct their hostility not only against the authorities, but also – and ruthlessly – against adults who collaborated in any way; so that the students themselves became a threat which was difficult for the adults to respond to. Maria never offers any personal political judgement; although something of her allegiance can be deduced by the eagerness – almost avidity – with which she hastens to be present at or to witness any potentially significant action or confrontation, however exposed this may lead her to be, or however preoccupied she may have been with family or social affairs. (Various suburban activities like women's committee meetings or Tupperware parties obviously continued in Maria's circle during and in spite of the riots). But the book doesn't in fact set out to be any kind of personal testament: its combination of first-hand reporting with carefully collated background information makes it a unique account of a historically crucial set of event. □

COLOURFUL JINGLES

Black hands may nurse our babies,
Black hands may cook our food,
Black hands may make our beds, and do our washing,
    and that's GOOD.
Black hands may do the dishes,
Black hands may keep us clean . . .
But would you shake a black hand? NO!
    You don't know where it's been.

The curfew tolls the knell of parting day,
Last buses trundle, laden overly,
As thousands homeward wend their weary way;
But that applies to darkies – not to me.

Stephanie Warren.

Footnotes to Julian Riekert's article "A Rose by Any Other Name" from p. 15

FOOTNOTES

1. Published as General Notices 774, 775 and 776 of 1980, respectively on 31 October 1980.
2. (1928) 1 KB 561 at 566.
3. This is the schedule of laws repealed and amended by the Bill:

No. and year of law	Short title	Extent of repeal or amendment
Act 18 of 1936	Development Trust and Land Act	1. The repeal of sections 25, 26, 26bis, 27, 27bis, 28 28bis, 29, 31, 31bis, 32, 33, 34, 35, 36, 37, 38, 38bis, 38ter, 38quat, 38quin, and 38sex. 2. The repeal of sections 41 (3) and 42. 3. Section 48 (1) is amended by the deletion of paragraphs (q)bis, (u), (v), (w)bis, (w)ter, (w)quat and (w)quin. 4. Section 49 is amended by the deletion of the definitions of "Black employee", "labour tenant" and "squatter".
Act 46 of 1937	Black Laws Amendment Act	The repeal of sections 1 to 32, inclusive, 38 and 39.
Act 17 of 1939	Development Trust and Land Amendment Act	Section 10.
Act 25 of 1945	Blacks (Urban Areas) Consolidation Act	The repeal of the whole.
Act 42 of 1946	Blacks (Urban Areas) Amendment Act	The repeal of the whole.
Act 45 of 1947	Black Laws Amendment Act	The repeal of sections 1 to 7 inclusive.
Act 54 of 1952	Black Laws Amendment Act	The repeal of sections 27 to 38 inclusive.
Act 67 of 1952	Blacks (Abolition of Passes and Co-ordination of Documents) Act	1. Section 1 is amended by the deletion of the definition of "Urban Areas Act". 2. Section 10 (1) is amended by the substitution for the expression "location, Black village or Black hostel established under section two of the Urban Areas Act" of the expression "township referred to in the Black Community Development Act, 1981".
Act 18 of 1954	Development Trust and Land Amendment Act	The repeal of sections 4, 5, 6, 7, 8, 9, 10, 11 and 12.
Act 16 of 1955	Blacks (Urban Areas) Amendment Act	The repeal of the whole.
Act 69 of 1956	Blacks (Urban Areas) Amendment Act	The repeal of the whole.
Act 73 of 1956	Development Trust and Land Amendment Act	The repeal of sections 8 and 9.
Act 36 of 1957	Black Laws Amendment Act	The repeal of sections 23 to 51 inclusive.
Act 79 of 1957	Black Laws Further Amendment Act	The repeal of sections 8 and 9.
Act 41 of 1958	Development Trust and Land Amendment Act	The repeal of section 4.
Act 76 of 1963	Black Laws Amendment Act	The repeal of sections 6 to 11 inclusive.
Act 42 of 1964	Black Laws Amendment Act	The repeal of sections 18 to 25 inclusive, 27 to 31 inclusive, 39 to 76 inclusive.
Act 67 of 1964	Black Labour Act	The repeal of the whole.
Act 36 of 1966	Group Areas Act	1. Section 1 amended by the deletion of paragraph (a) (v) of the definition of "Minister"; 2. Section 13 (2) amended by the substitution for the expression "Bantu (Urban Areas) Consolidation Act, 1945 (Act 25 of 1945)" of the expression "Black Community Development Act, 1981"; 3. Section 20 (2) amended— (i) by the deletion of paragraph (i); (ii) by the substitution for paragraph (k) of the following paragraph: "(k) in pursuance of a licence issued to the occupier of the land or premises under section (9 (4) of the Bantu (Urban Areas) Consolidation Act, 1945 (Act 25 of 1945)) 42 of the Black Community Development Act, 1981;"; (iii) by the deletion of paragraph (1); (iv) by the substitution for paragraph (p) of the following paragraph: "(p) In pursuance of written permission to reside on the land or on land on which the premises are situated granted in terms of section (34 of the Development Trust and Land Act, 1936) 43 of the Black Community Development Act, 1981;"; 4. Section 23 (6) (c) amended by the substitution for subparagraph (ii) of the following subparagraph; "(ii) any (Bantu residential area) township referred to in section 1 of the (Bantu (Urban Areas) Consolidation Act, 1945 (Act 25 of 1945)) Black Community Development Act, 1981.
Act 63 of 1966	Black Laws Amendment Act	The repeal of section 4.
Act 56 of 1968	Black Laws Amendment Act	The repeal of sections 2, 3 and 4(1).
Act 101 of 1969	General Laws Amendment Act	The repeal of section 28.
Act 19 of 1970	Black Laws Amendment Act	The repeal of sections 3 to 15 inclusive.
Act 30 of 1972	Second Black Laws Amendment Act	The repeal of section 6.
Act 7 of 1973	Black Laws Amendment Act	The repeal of section 10.
Act 70 of 1974	Black Laws Amendment Act	The repeal of sections 8 and 15 (1).
Act 9 of 1975	Black Laws Amendment Act	The repeal of sections 2, 3 and 4.
Act 4 of 1976	Black Laws Amendment Act	The repeal of sections 7, 8 and 11.
Act 115 of 1977	Second Black Laws Amendment Act	The repeal of section 1.
Act 119 of 1977	Black Laws Amendment Act	The repeal of sections 3, 4, 5, 6 and 9.

Continued at foot of page 20

Footnotes to Barend van Niekerk's article from p.8.

FOOTNOTES

1. Cf S v Van Niekerk 1970 (3) SA 655 (T) and Estate Pelser v SAAN and another (Van Niekerk) 1975 (1) SA 34 (N) and 1975 (4) SA 797 (AD).
2. Cf my article 'The Uncloistering of the Virtue. Freedom of Speech and the Administration of Justice' in (1978) 95 SALJ 362 & 534.
3. In the seminal case of Furman v Georgia 408 US 238, 33L Ed 2d 246 (1972) race was found to be one of the most basic realities determining the imposition of the death penalty in America.
4. My translation from the Afrikaans. Per Beyers JA in Minister of Posts and Telegraphs v Rasool 1934 AD 167.
5. Cf my note on the well-known case of S v Mokonto 'A Witch's Brew from Natal' in (1972) SALJ 169 and, especially, Adrienne van Blerk 'Sorcery and Crime' in (1978) CILSA 330.
6. Harry Morris The First Forty Years (1948) 124-6.
7. See in this regard as regards the form of dolus in a kind of case like this my note 'Dolus Eventualis Revisited' in (1969) 86 SALJ 136 (on the case of S v De Bruyn 1968 (4) SA 498 (AD)).
8. From the case of R v Kafakarotwe 1951 SR 162. See my article 'Mentioning the unmentionable: race as a factor in sentencing' in (1972) 3 SA Journal of Criminal Law and Criminology 151.
9. 'It may be accepted that generally speaking, a sentence of imprisonment upon a European bears much more severely than does a sentence for the same period imposed upon a Native. The social and economic consequences are much more far reaching. These consequences may properly be taken into account in assessing the quantum of sentence.'
10. Eg by Gunnar Myrdal in his classic 'An American Dilemma'.
11. S v Van Niekerk 1970 (3) SA 655 (T): 'The accused having been found guilty I find it necessary to add the following. I have sat on the Supreme Court Bench in this province and in South-West Africa for more than seventeen years. I can claim to have an intimate knowledge of the handling of criminal cases in which the death penalty may be imposed. It is true that in some rape cases of Black on White some judges have imposed the death penalty. Many again have not done so and we do not know the gravity or the cases in which such a sentence was passed. Yet is it true that by far the greatest number of cases in which the death sentence can be imposed are those in which Non-Europeans have on the available preparatory evidence been properly and legitimately charged with murder. We all know that when a person plunges a sharp instrument into the body of another person, being quite reckless as to whether death results or not, and if it does under those circumstances result the perpetrator is guilty of murder. Nevertheless in the vast majority of such cases the judges in their mercy come to the conclusion that they are not satisfied beyond reasonable doubt that the perpetrator has had the requisite intention to commit murder. The result is that only in a small minority of such cases is the perpetrator convicted of murder. Then in a large number of such cases **again** extenuating circumstances are found, and the judges strain in every nerve so to find, and the death penalty is then not imposed. One must also look at the extremely lenient attitude taken by the Attorneys-General and public prosecutors in the lower courts. In those cases where the complainant has been stabbed or otherwise seriously injured, but the complainant survived and although the perpetrator could justifiably have been arraigned for attempted murder or assault with intent to commit murder, yet in the vast majority of such cases he is brought before a lower court on a charge of assault with intent to do grievous bodily harm, and if convicted again in the vast majority of cases a very lenient sentence of imprisonment of a few months, usually not more than six months, is imposed.'
12. For an attempt to analyse these statistics, see 1970 Acta Juridica 211 ff.
13. See my analysis in (1967) Annual Survey of SA Law 466. More recent figures of interracial crime generally seem also to suggest that statistically (and especially if a slight adjustment is made for the much larger black population) Whites are more prone to assault, kill or rape Blacks than is the case vice versa. See (1979) Survey of Race Relations 96.
14. See here my article '. . . Hanged by the Neck Until you are Dead' in (1969) 86 SALJ 457 and (1970) 87 SALJ 60. My tentative indication in this article that a certain percentage of advocates believed that racial considerations dictated the death penalty pattern led to the prosecution referred to in notes 1 and 11.
15. See my article 'The Uncloistering . . .' op cit 554 ff and especially at 559-560. In this regard I recall also the fact that a note of mine criticizing the judgment of Hiemstra J (as he then was) of S v Thamaga 1972 2 PH H 143 (T) was returned to me by an editor of a legal periodical with a note stating that although it was worthy of publication and the criticism justified, he could not risk publication. The note 'Class, Punishment and Rape in South Africa' was then published in 1976 Natal University LR 299 where it can be judged by my readers.
16. See my address 'The Death Penalty in South Africa: Some Psychiatric and Psychological Elements in (1977) 3 Bulletin of the American Academy of Psychiatry and the Law 276. Some of the conclusions are summarized in (1979) Survey of Race Relations 100.

Footnotes from article "A Rose by Any Other Name" continued from p. 19

Act 12 of 1978	Black Laws Amendment Act	The repeal of sections 2, 3, 4, 5 and 11.
Act 97 of 1978	Blacks (Urban Areas) Amendment Act	The repeal of the whole.
Act 102 of 1978	Second Black Laws Amendment Act	The repeal of sections 1 and 16.
Act 16 of 1979	Laws on Plural Relations and Development Amendment Act	The repeal of sections 6, 7 (1) and 8.
Act 98 of 1979	Laws on Plural Relations and Development Second Amendment Act	The repeal of sections 4 to 9 inclusive.
Act 3 of 1980	Laws on Co-operation and Development Amendment Act	The repeal of section 3.

4. See, for example, *The Financial Mail,* 7 November 1980 page 621.
5. (1964) 3 All ER 390(CA) at 392. Harman, L.J., was extending the metaphor of Lord Denning who had observed that, "I must say that rarely have I come across such a mass of obscurity, even in a statute. I cannot conceive how any ordinary person can be excepted to understand it. So deep is the thicket that . . . both of the very experienced counsel lost their way."
6. Would-be readers of the "new deal" legislation may take comfort in the fact that they are not alone in their bewilderment. Section 48 of the draft Local Government Bill provides that:

   "If any provision of this Act or any other law is found to be ambiguous or to give rise to administrative difficulty in the application thereof to a council, or any provision of this Act is found to be in conflict with any other law, the State President may by proclamation in the Gazette amend this Act or any other law as he may deem necessary."

   So much for the sovereignty of Parliament!

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