

A Mixed bag

Democracy and the Judiciary editor Hugh Corder
(Published by Idasa, November 1989) 185 pages.

This book is the outcome of a national conference on the subject of democracy and the judiciary organised by IDASA and held in Cape Town in October 1988. Its dedication to Anton Lubowski illustrates the hazards of conferring honours in a time of political turbulence. This is not to suggest that Anton Lubowski was in fact an agent of the SADF; nor does it imply approval of the unfortunate procedure employed to establish receipt of Defence payments by him. Nonetheless, the dedication leaves this reviewer with a sense of unease in the light of the "revelations". The unease almost escalated to alarm after reading Anton Lubowski's paper. (He was a participant in the conference.) His paper was an introductory one dealing with (or, more strictly, purporting to deal with) the relationship between the courts, the government and the people in a democratic society. It is far too facile, simplistic and confused to fulfill that objective. Out of partial deference to the principle *de mortuis nil nisi bonum* (of the dead nothing but good) I will mention only two examples: the suggestion that the notion of law as a value-free, neutral instrument of social control can be attributed to the doctrine of natural law; and the categorical assertion that a white judge cannot know "anything" about black attitudes and concerns. The latter remark implies a kind of reverse racism and ignores the record of several judges who have through the power of imagination shown considerable understanding of, and empathy for, black concerns.

The alarm engendered by Anton Lubowski's paper gives way to despair on reading Adrienne van Blerk's defence of the judiciary against its critics. What can one say about a person who, at five minutes to midnight, speaks of the legal system as one which "supposedly" lacks credibility and who seems to think that perceptions that the legal order is unjust are due in substantial measure to unfounded criticism of the courts. Her spirited defence of the sentence in *State v Hogan* overlooks the important principle of civilised jurisprudence that guilt is personal and should not be attributed by association. Finally, she has much to say about the use of unreliable statistics to prove racial bias in sentencing but little about what she believes to be **the** reliable statistics and what they reveal. Fortunately Hugh Corder, in a good paper, sets the record straight by pointing out that the notion of the judiciary "as a watchdog over those who wield public power" has suffered great harm partly through the judiciary's own inaction, especially in the sphere of state security.

The argument that moral judges should resign, which flitted across the landscape like a single summer swallow, is addressed and discounted in a paper by John Dugard that is theoretically lucid and full of good practical sense. The same theme is examined by M.K. Robertson without the addition of much illumination; and by Jules Browde in

relation to the participation of legal practitioners, in this case with compelling examples of the value of imaginative litigation. Recent history has relegated the "no participation" argument to where it belongs – among the dead relics of the past.

In a short paper on the role of the judiciary in a future democratic South Africa, Essa Moosa does **not** emphasize the need for the courts to remain watchdogs over the exercise of public power, perhaps because he (unwisely) does not believe that this will be necessary. Gerhard Erasmus, in a paper notable for the perceptive way in which adjudication is related to the political and structural features of society, explores the dilemma of a judiciary which is imbedded in a legal system widely regarded as unjust and illegitimate. He argues convincingly that in such circumstances, reliance on the 'political question' doctrine to avoid responsibility for protecting basic rights is inappropriate and that it constitutes a politically unwise abdication. While recognising the difficult dilemmas that confront judges in the South African situation he nevertheless recommends that they should bite the bullet (the reviewer's choice of words) and give expression to fundamental values in the legal system which are worth preserving. This theme is taken up by Etienne Mureinik in a sophisticated analysis of the performance (or more accurately, the lack of it) of the Appeal Court in reviewing the exercise of emergency powers. Mureinik's critique of Appeal Court judgements during the emergency is devastating and concludes by charging that the highest court has abandoned "the fundamental principles which it is charged to protect". Lawrie Ackermann's paper also looks at the emergency but in a wide-ranging comparative context which brings out the extravagant excesses of emergency government in South Africa, and the important principle that it is morally illegitimate for a government that is suppressing rights to use emergency powers to deal with the response. His paper also deals extensively with the practice of torture and emphasizes the point, highly relevant in the light of South African legislation, that the "extent of torture is in inverse proportion to the extent of judicial control over detention". And speaking of judicial control, it is disappointing that John Trengrove's paper should under-rate the possibilities of creative court intervention in South Africa especially as it was the author of the paper who sometimes demonstrated, when an appeal court judge, that with a little imagination ways can be found to control public power even under a sovereign parliament.

The book ends with two papers on street committees and peoples' courts which, while rightly condemning the excesses of informal adjudication in the townships, make a convincing case for not rejecting out of hand the value of these informal institutions in a new South Africa.

Though the chapters in this book constitute a mixed bag, there are a number of truly thought-provoking and perceptive papers which make it a useful addition to the literature. Considered overall there were two major disappointments: Firstly, there should have been an extended discussion of the acceptability in a democracy of granting to the courts the power to nullify legislation; and of the **extent** to which this power should be exercised

by a future judiciary. Secondly, while a number of contributors accused the courts of forsaking fundamental principles of adjudication in their judgements, nowhere are these principles justified and elaborated in a compelling way. There must be many judges who would willingly "enter the thicket" and protect fundamental rights if convinced that their intervention would accord with a defensible theory of the judicial role. □

by Randolph Vigne —

Programmes unfolding

Benjamin Pogrand *How can man die better. Sobukwe and Apartheid* Peter Halban, £14,95.

Robert Mangaliso Sobukwe (1924-78) transformed South Africa, and did it in a single day. The day was 21 March 1960, when he led the country's first "positive action campaign" of Africans against white authority. The nationally planned campaign, staged by the Pan Africanist Congress, of which Sobukwe had become the founding president 11 months before, gained world headlines through the shootings at Sharpeville. The members of the PAC had split away from the African National Congress partly because the ANC's many campaigns had all been directed at protest at the Africans' lot or persuasion towards its amelioration, never at direct action aimed at ending white rule. Sobukwe planned the PAC campaign, led it from the front and inspired Africans all over the country with the first glimmerings of belief that they could overcome the whites' conquest of their country by re-conquest – by non-violent action followed by negotiation.

After the campaign both the Pan Africanist Congress and the African National Congress were banned for the next 30 years, and the PAC, without its imprisoned leader, went into decline in exile. Also without its imprisoned leader, Nelson Mandela, and also in exile, the ANC flourished, not least through the contacts of its Communist party and Indian Congress allies (the latter merging their identity fully with the ANC). The "armed struggle" and the sanctions campaign replaced local non-violent confrontation, and the rest is history.

Sobukwe, son of poor Xhosa-speaking parents in the Karoo *dorp* of Graaf-Reinet, moved from student leader, Fort Hare University graduate, ANC Youth League activist, to secondary school teacher, Methodist lay preacher and family man. He was one of the first Africans to occupy a post at Witwatersrand University, albeit only as a "junior language assistant" in the Bantu languages department. On the eve of launching the campaign, he resigned his "Wits" post, sacrificing the sanctuary it gave him in a white preserve.

His beliefs are set out here in full from a 1949 Fort Hare speech which is still impressive as a testament of African nationalism, were the basis of an "unfolding programme". Benjamin Pogrand, then of the *Rand Daily Mail* and a

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friend of Sobukwe's from 1957, takes us through it with great clarity. He was with Sobukwe in the days before the launching, and one of the handful of white pressmen in the unarmed, peaceful crowd when the police opened fire at Sharpeville. The programme ended with Sobukwe and his executive in gaol as planned, but without the country grinding to a halt and Sobukwe being brought from gaol to negotiate direct with Verwoerd. That part of it took another 30 years, with Mandela and De Klerk as the negotiators and the ANC justifiably taking most of the credit.

The author has a second story to tell, of wider human interest and significance. It is that of his own relationship with Sobukwe during the latter's 9 years of imprisonment (a three-year sentence in Pretoria, and the rest alone on Robben Island in accommodation equivalent to "that of a high-ranking officer in time of war", as the Justice Minister, B.J. Vorster, put it). A further 9 were spent under close surveillance in Kimberley, where he qualified and practised as a solicitor until his death from lung cancer (hastened, as the author shows, by official obstruction of an emergency operation in Johannesburg).

The author's matter-of-fact modesty does not conceal his role as Sobukwe's greatest friend, supporter and comforter throughout those 18 years. He cared for Sobukwe's family needs, health, reading, studies, religious life (the record of the prison chaplains was, with the two exceptions of a Catholic in Pretoria and a Methodist on the island, appalling), visits, clothing, innumerable small wants and endless appeals for his release as, every session, the Sobukwe Bill came before the South African parliament to keep him on the island for another year.

The book depicts a great leader of men who never lost the common touch, defeated and unfulfilled at his early death but somehow justified now as Mandela, the Tembu nobleman, leading the ANC which Sobukwe had left, completes the process begun on that March morning in 1960. Doubts that this process can accommodate both black and white may be dispelled by this book, showing, as it does, how a black nationalist Christian political prisoner and a white liberal Jewish journalist conducted a relationship with love and decency even in the stygian darkness of Verwoerd and Vorster's South Africa. □