

SPEECH TO JOHANNESBURG BAR

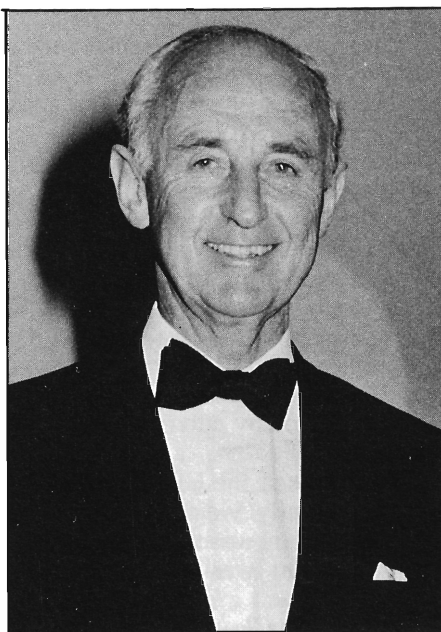
By the Honourable M M Corbett, Chief Justice of South Africa

Mr Chairman —

I feel greatly honoured to be invited to speak at a dinner given by the Johannesburg Bar. You know, to me, as someone whose professional career was in the backwaters of the Cape Bar, the Johannesburg Bar always had a mystique all of its own. It was bigger, and said to be better, than any other Bar in South Africa; the cases which came its way were bigger and better than elsewhere; and — dare I say it? — fees charged by members of the Johannesburg Bar were reputed to be bigger and better. All in all, it represented a kind of barristers' El Dorado, to which the more adventurous members of the profession went in search of fame and fortune. I think, for example, of Judge Roper and Judge Faure Williamson (originally at the Cape Bar) who in the thirties did just that, and of course, generations before them, General Smuts.

Attending this occasion has also given me great pleasure. It has enabled me to meet a number of new people and it has also provided the opportunity to see a number of old friends. Of the latter there are three I should like to single out by name. The first is Louis le Grange. Louis and I were at school together (he was a couple of years ahead of me) and also at the same university, but it must be nearly 50 years since we last saw each other. The second is Gie Kotzé, my old friend and AD colleague who came all the way from Cape Town to attend this dinner. And the third is my old friend, colleague, mentor and golfing partner Oscar Galgut, who as you have heard celebrates his 83rd birthday today. I should like, on this occasion, to record my grateful thanks to Oscar for his wise counsel and guidance in the many cases where we sat together in the AD over a period of 10 years or so.

Mr Master of Ceremonies, thank you for your kind, if flattering, introduction. I may say, however, that since assuming office as CJ I have become fairly accustomed to flattery. You may



not realise this, but one of the burdens of office is that one becomes a prime target for all the gaol letter-writers in the country. Some of these letters are classics in their own way. Take, for example, one which I received recently. Dit het begin:—

'My hoog edele ekselensie, Beleefd en vriendelik versoek ek as bogenoemde gevangene, u met alle nederigheid en respek om 'n skrifte-like verhoë vir oorweging voor te lê, wat ek nie voorheen te berde kon bring nie weens gebrek aan die geleentheid tydens die hofsitting, Wet 8 van 1959, art 121(1).'

(Tussen hakies wil ek daarop wys dat Wet 8 van 1959 die Wet op Gevangnisse is, maar art 121 is ongelukkig nie in die Wet te vinde nie.) Die brief gaan voort om te verduidelik hoe die 'Judge' fout gemaak het toe hy die skrywer aan moord, roof, poging tot moord en onwettige besit van 'n vuurwapen skuldig bevind het; en die brief eindig:—

'My edele majesteit, ek neem aan dat ons regstelsel eerbaar is, en dat ons Howe se grondslag *pro deo* of

deo volente verhoor. Ek beroep my op u, my hoogheid, wetend dat u volgens u diskresie met wysheid u oordeel sal vel.'

Ek vra u almal: wie kan so 'n versoek weerstaan?

Serious matters

Well, now to more serious matters. The topic on which I have been asked to speak is: 'The Role of the Courts in a Changing Society'. In doing so, I must of course first identify the changes which have taken place, and are at present taking place, in our society.

I think that these changes become very clear if one compares the South Africa of today with what it was like in my youth, before World War II, ie 50-odd years ago.

Population

In 1936 the total population of South Africa was 9,5m, of whom 2m were White, $\frac{3}{4}$ m were Coloured, 200 000 were Asian and 6,5m were Black. Whites thus then represented 20,8% of the total population. Today (June '89) the population of greater South Africa (ie including the TBVC countries) would seem to be about 35m, of whom 5m are White, 3m are Coloured, 900 000 are Asian and 26m are Black. Whites today thus represent 14% of this total population. If the TBVC countries be eliminated, the figure for Blacks reduces to 20 m and the White percentage rises to 17%.

Industrial revolution

The second feature which emerges, if one examines the 50-year period since the late 30's, is that during this time South Africa has undergone — and is still undergoing — an industrial revolution as intense, and even more complex, than that experienced in Britain in the 19th century. The goldmining industry had, of course, always been there; but after the War it expanded enormously, as did other types of min-

ing. In this period light and heavy industry was started; and they expanded and flourished. Before World War II South Africa imported nearly all manufactured goods and many processed foodstuffs. Today most of these are produced locally, either wholly or in part.

This industrial revolution has made its impact on society in various ways. It has drawn very large numbers of rural dwellers to the urban areas. Urbanisation has generally taken place too quickly and on too large a scale for the available facilities, in the form of housing, services, schools, etc, to cope. In the past, certain policies and a lack of forward planning have also not helped. Vast urban slums, very often consisting of squatter dwellings, have attached themselves to the fringes of our major cities.

At the same time there has grown up a large industrial labour force, ranging from unskilled labourers to blue-collar workers. All this has changed the face of society.

In addition, the commercial life of the country has burgeoned, bringing in its train a proliferation of corporations, large and small. The multi-nationals, too, have staked their claims: and some of them are now very busy unstaking. Throughout the country the transaction of business has become more high-powered, more sophisticated and more complex.

Ordering of society

The third feature which emerges — and this is to some extent a product of the first two — has been what I shall call 'an ordering of society', which is unique, certainly in the Western World. Some call it social engineering. Its popular name is, of course, 'apartheid'. It was conceived and put into practice by the White group — or rather the majority of them — as the group vested with political power, in order to cope with the social and political problems resulting mainly from the population explosion and Black urbanisation. It involved much legislation, much regulation, much bureaucratic control. Today it appears to be regarded by most Whites as an experiment which failed and there is a general groping for another solution.

Allied to this, there has, over the past decade or so, been social unrest on a large scale; sporadic outbursts of violence have cost many lives and caused much material change; legislation

drastically interfering with the freedom of the individual has been passed in an endeavour to deal with the situation; and, as you know, we are now entering the fourth year of a state of emergency.

Human Rights

And finally I would allude to a feature which characterises the whole Western world today, and which has a particular impact on the situation in South Africa: a general concern for human rights. Going back plus-minus 50 years to the pre-war days of my youth, I would venture to say that one never heard the term 'human rights'.

Several Western European countries practised internal policies which were in fact gross violations of human rights and, when the opportunity presented itself, their behaviour towards foreign communities was no better. Race discrimination, in some form or another, was evident in many parts of the British Commonwealth; and in the Southern States of the USA it was imposed particularly viciously. And in those days nobody was the least bit interested in what was happening in South Africa.

But World War II and its aftermath changed all that. I think that the horrors of the War itself, analyses of why it occurred, and revelations as to what had been happening, particularly in Nazi Germany and the occupied countries, before and during the War, brought home to mankind the constant need to protect man from the excesses of his fellow-men. We were all reminded of the famous words of Robert Burns:

'Man's inhumanity to man makes countless thousands mourn.'

And so the notion of human rights was born — or perhaps I should say 're-born'; and it became enshrined in instruments such as the Universal Declaration of Human Rights and the constitutions of many modern states, including that of Western Germany.

And I need hardly remind you how in the last few decades the political and social policies pursued in this country have, on grounds based on human rights, been the subject of universal criticism from abroad and have resulted in ostracism, boycotts, sanctions and so on.

Well, broadly-speaking, these are the principal changes, as I see the situa-

tion, which have taken place in our society over the past 50 years. And these trends provide the dynamics for what is likely to happen in the future. What in these circumstances is the role of the courts? What has it been, and what should it be in the future? Well, there are many aspects to this subject; and, as my time is limited, I shall mention but a few.

Misdaadsyfer

Die bevolkingsontploffing, die industriële revolusie, die vinnige — meermal ongeordende — verstedeliking en, meen ek, grootskaalse groepverskuiwings het onvermydelik 'n reuse-toename in die misdaadsyfer teweeggebring. 'n Aanduiding hiervan is die feit dat toe ek in 1948 Balie toe gegaan het, die strafsessies in die Kaapse Provinsiale Afdeling al om die ander maand plaasgevind het en in party maande het die strafwerk slegs drie weke in beslag geneem — en dit was nog voor die streekhoe gestig was; terwyl vandag se hoe (wat slegs met ernstige misdaad gemoeid is) feitlik die hele jaar deur sit; en daar te eniger tyd gedurende die termyn minstens agt of nege hoe sal wees wat strafsake verhoor.

Toename van doodvonnis

Die toename in die misdaadsyfer het die werkklas van al die hoe in die land geweldig verswaar. Baie van die sake het te doen met uiters ernstige misdrywe, soos gewapende roof en moord (of 'n kombinasie van die twee); en party van hulle is polities-gemotiveerd. Ek meen dat dit met reg gesê kan word dat gedurende die ongeveer 50 jaar sedert die invoering van die begrip 'versagtende omstandighede', die hoe die kwessie van versagting op 'n al hoe meer ruimhartige wyse benader het en dat die proporsie skuldigbevindings aan moord waar geen versagting bevind kan word nie, of deur die verhoorregter of op appèl, vandag baie klein is. Tog, ingevolge die bestaande reg, is die onverminderbare aantal sake waar geen versagting bevind kan word nie (en waar die doodvonnis verpligtend is) onaanvaarbaar groot — en dit skyn elke jaar groter te word. Gedurende die onlangse sitting van die Parlement het die Minister van Justisie na hierdie probleem verwys. Hy het te kenne gegee dat, hoewel die Regering teen die afskaffing van die doodvonnis gekant is, hy en die Regering vatbaar is vir voor-

stelle met die oog op regs hervorming op hierdie gebied. Ek glo dat dit die plig van ons almal wat by die regspleging betrokke is, om ernstige aandag hieraan te skenk.

Civil litigation

Together with this increase in criminal work, the superior courts have in recent years experienced an enormous upwelling in civil litigation, novel not only in volume, but also in complexity. This has been a direct product of industrialisation and the growth in the commercial life of the nation. In order to deal with this litigation the courts have had to work harder and have had to acquire greater expertise in certain areas; and in some respects the common law has had to be developed and expanded. Take, for example, the law relating to what is these days termed 'intellectual property'. The first time I ever encountered patent litigation at first hand was in 1971 when I was acting for the first time on the Appellate Division. This was the well-known case of *Gen-tiruco v Firestone*, the case about synthetic rubber in which just about every point in the book was canvassed. Fortunately, I (a complete tiro) was privileged to sit in the case with that master of the patent law, Bill Trollip, and in the 5 or 6 weeks for which the argument in the AD ran, and thereafter, I managed to learn a bit about the subject.

Statistics about patent cases in the Appellate Division make interesting reading; and underscore the point I am trying to make. In the 30 years from 1910 to 1940 there were four reported patent judgments emanating from the AD. During the past 30 years (ie from 1959 to 1989) there have been some 33 reported AD judgments in patent matters — 16 of them in the last ten years.

As examples of the development and expansion of the law to accommodate the needs of the time and the expectations of the commercial community, I would cite the extension of the Aquilian action to cover claims for economic loss caused by negligent misrepresentation; and claims based on unlawful competition. Another novel and important area of law is labour relations, for which a special court of first instance has been created.

Judicial appointments

Of course all these types of litigation — and others — demand from the

Bench expertise of the highest order; and this in turn means that the natural and proper recruiting ground for the Bench, viz the Bars of South Africa, must be prepared to supply the Bench with their best. Regrettably this does not always happen. And, at the risk of becoming a bore, I would like to take this opportunity to repeat an appeal which I made some time ago to leading advocates to accept judicial appointments. I think that it is imperative, in the interests of the proper administration of justice, that they do so. And, when all is said and done, can the Bar legitimately claim a monopoly in regard to judicial appointments if its leading members do not respond to what I consider to be the correlative duty of accepting appointments, when offered?

Under modern conditions there is also demanded of judges a complete dedication to duty — which is to provide the community with justice, impartially, competently and expeditiously. I would emphasise the element of expedition, for this ideal is not always attained. It entails hearing cases as soon as is reasonably possible; ensuring that the hearing proceeds smoothly and without undue protraction; and giving judgment as soon as possible. Nothing can be more frustrating to parties involved in the judicial process, or more calculated to give the administration of justice a bad name than the 'law's delay' — at whatever stage it occurs.

Administrative law

I turn now to another aspect: that of human rights. I have referred to legislation passed to cope with social unrest and the state of emergency. I have also referred to the legislation, regulation and bureaucratic control associated with certain political policies. Much of this has meant in practice severe impingements upon the ordinary rights and freedoms of the individual. Inevitably the individuals affected have often had recourse to the courts for relief. This has resulted in much litigation concerning the individual versus the State, or one of its agencies; and the courts have been called upon to do justice between them. This involves tricky areas of administrative law and matters upon which there may be sharp differences of opinion. The judgments of the courts have not always met with

the approval of the profession, especially of academic lawyers. Criticism has at times been very sharp and very personal. In my opinion, sometimes excessively so. Judges perform their functions under difficult circumstances — time is very often at a premium — and they do so conscientiously, according to their lights. I would say to some of our critics: You are perfectly entitled to criticise decisions of the court. It may well be that in some instances you are right and the court wrong. But recognise that both of us are fallible. Avoid being personal. Play the ball and not the man. And remember that greater impact is generally gained by the understatement than by overstatement.

Personal credo

Perhaps at this point it is appropriate that I declare, to some extent, my own personal credo. I believe firmly in the importance of the liberty of the individual — in the importance of human rights. I nevertheless recognise, under our present system, the power of legislative authorities to restrict that liberty. Where the meaning or validity of such legislation is in issue, and the language is plain or the validity clear, then the proper administration of justice demands that it be given effect. In the grey areas of uncertainty, however, I believe that our common law and our legal tradition require that the importance of human rights should be kept well to the fore.

Proper balance

Very often, in such cases, the role of the courts must be that of finding a proper balance between the interests of the individual and the needs of the community, as represented by state authority. Neither should be unduly emphasised at the expense of the other. And in the final resort there are these two considerations: (i) if the courts do not, in appropriate cases, come to the aid of the individual, who will? and (ii) if legislation does not initially achieve the object desired by the legislature, it can always try again.

Bill of Rights

Finally, everything that I have said, the history of the past 50 years, the present

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ANNUAL GENERAL MEETING

The following press statement issued by the General Council of the Bar of South Africa at the conclusion of its annual general meeting held in Cape Town is published for general information:

1. On Friday and Saturday, 21 and 22 July 1989, the General Council of the Bar of South Africa (GCB) held its 44th annual general meeting in Cape Town.
2. The meeting was attended by 323 advocates representing over 1 000 practising advocates in South Africa, as well as representatives of the Bars in neighbouring States.
3. The meeting considered a variety of matters affecting the administration of justice in South Africa and the role played by advocates therein. Amongst the numerous important matters discussed were the death penalty in South Africa, the system of criminal defences undertaken by advocates in capital cases (the *pro Deo* system), proposals to improve access to justice, the recent report of the South African Law Commission on "Group and Human Rights", the remuneration for judges, and the holding of a second National Bar Conference.
4. With regard to the death penalty, it was unanimously resolved to request the South African Law Commission to investigate, as a matter of urgency, all aspects of this form of punishment in South Africa, including the desirability or modification thereof.
5. It was further unanimously agreed that the GCB would investigate improvements in the present *pro Deo* system and would press for its reform by requiring it to be administered by the Legal Aid Board, as well as by requiring the appointment of attorneys in all such cases to assist advocates who at present have no such a system. The meeting discussed the adoption of other measures designed to improve the effectiveness of defences in such cases.
6. The GCB noted with concern the general lack of funds provided by the state for legal assistance in deserving cases and in particular the recent cut-back in funding for criminal and civil appeals and in industrial court disputes.
7. The GCB resolved to continue to explore means, consistent with maintaining high standards, in the administration of justice of rendering easier and less costly access to the courts for all citizens.
8. As regard the recent report of the SA Law Commission on "Group and Human Rights" the GCB welcomed the report and expressed itself to be unanimously in favour of a Bill of Rights for South Africa as the best means of ensuring the establishment and the promotion of the Rule of Law in this country. The GCB further resolved to encourage individual advocates and Bar Councils to submit contributions and representations to the Commission in respect of a Bill of Rights prior to the closing date of the 31st August 1989, provided for in the report.
9. The GCB welcomed the recently announced improvements in the remuneration of judges.
10. It was further decided to organise a second National Bar Conference, possibly in Durban during 1991.
11. Adv Milton Seligson SC, of the Cape Bar was elected chairman of the GCB in succession to Adv Ralph Zulman SC of Johannesburg. Adv Keith McCall SC, of the Natal Bar was elected vice-chairman. ■

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situation and the state of the law, all demonstrate, in my view, the need for a Bill of Rights — not as a panacea for everything, not even as an infallible guarantee, but as something which articulates the ideals to be striven for and which may perhaps, given time and in the context of a new constitutional dispensation, become as in other Western (and Eastern) countries, a formidable bastion for individual freedom. I said

this at a conference ten years ago. I think that at the time only a few people took my remarks seriously. Today we have the working paper of the South African Law Commission, which in time will no doubt be translated into a fully-fledged report along the same lines. We have also the assurance of the Minister of Justice that the Government views the working paper in a favourable light. So much has happened in the intervening ten years and in this sphere that I am hopeful for the future.

Conclusion

In conclusion, I would like to wish the Johannesburg Bar everything of the best for the future. May the younger generation of members, present and future, maintain as successfully as their predecessors the record of the Johannesburg Bar for fearless independence, for skill and expertise and for the conscientious representation of the client's interests. At the same time I would put forward this plea: please try to make your cases a bit shorter; or, if you can't do that, don't bring them on appeal! ■