

# OBITER

by  
viator



## Position of Attorneys-General

In the first editorial of (1990)3 *Consultus* 3 it was argued that the office of the Attorney-General should be totally divorced from Government. This matter can hardly be over-stressed. It is therefore of the utmost importance that a proper study be made of this office – including a comparative study of similar offices elsewhere in the world – so that a meaningful decision, with due regard to South Africa's peculiar circumstances, can be made when a new constitution is drafted. Note should *inter alia* be taken of the misgivings existing in Britain concerning the office of the Attorney-General in that country. In this regard the following remarks made by Sir Peter Rawlinson, a former Attorney-General (1971-74) are interesting:

The case of *Gouriet v HM Attorney General* and others brought to the surface the doubts which lurk in some minds that no person can, or no person nowadays appears to, carry out the quasi-judicial duties of Law Officer while at the same time serving in a

modern Ministry. The system, according to this view, which was acceptable in the 19th century, is no longer acceptable in the second half of the 20th [century].

(See John L J Edwards, *The Attorney General, Politics and the Public Interest*, p 63, (Sweet & Maxwell 1984)).

*Unlike Britain where the Attorney-General is a member of the Ministry, our Attorneys-General are public servants subject to the control and directions of the Minister of Justice, who may reverse a decision of an Attorney-General and may himself exercise the authority of an Attorney-General. This state of affairs, as indicated in our editorial, is quite unsatisfactory. Our position is even worse than that of Britain. In Britain the Attorney-General takes direct responsibility. In South Africa the Minister is in a position where he can pull all the strings behind the scenes and thereafter take shelter behind the Attorney-General.*

## Bar develops notwithstanding fusion

New Zealand has a fused bar and a side-bar but in addition it has a *de facto* bar. According to New Zealand literature the *de facto* bar, also referred

to as the "separate" or "independent" bar, has been a feature of the New Zealand legal profession in recent years. It appears that about 200 barristers, of whom 25 are Queen's Council, practise at the *de facto* bar. However, by comparison with those practising in the field of litigation as barristers and solicitors, the separate or *de facto* bar is relatively small. The influence of the *de facto* bar is nevertheless very great and the barristers have been fulfilling a perceived need in respect of litigation work – as specialist advocates.

All practising lawyers in New Zealand are controlled by the Law Society. It appears, though, that the formation of a Bar Association is contemplated in New Zealand. Barristers will retain the right (and obligation) to continue to remain full members of the Law Society. (1990 *New Zealand Law Journal* 113)

*The New Zealand experience provides strong support for our standpoint that it would be wrong to do anything that might endanger the continued existence of a strong Bar and thereby depriving litigants of the services of specialist advocates.*

## Agterstallige uitsprake

Voorbehoue uitsprake wat uitermatig vertraag word, skep uiteraard vele probleme vir die betrokke partye, soos finansiële ontberings en spanning vanweë die onsekerheid wat voortsleep. Omdat die lewering van 'n uitspraak deel vorm van 'n regter se regsprekende funksies kan direkte druk op hom om die lewering van so 'n uitspraak te bespoedig nie uitgeoefen word nie. Alaska het egter 'n interessante oplossing uitgedink. In dié Staat van Amerika mag 'n regter nie sy maandelikse salaris trek as hy meer as ses maande agterstallig met 'n uitspraak is nie. (Sien VG Hiemstra, "Die Howe in Amerka" *Scintilla Iuris*, 1970 32 te 35.)

Die Hoexterkommissie het die volgende aanbeveling gedoen om die lewering van voorbehoue uitsprake in ons Hooggeregshof te probeer bespoedig:

... dat by die kantoor van die griffier van elke afdeling van die Hooggeregshof van Suid-Afrika 'n kennisgewing prominent vertoon en maandeliks op datum gebring word waarin besonderhede verstrek word van elke saak in daardie afdeling waarby uitspraak voorbehou is en nog nie gelewer is nie, en die datum waarop uitspraak aldus voorbehou is. Afskrifte van al die sodanige kennisgewings moet jaarliks aan die Raad van Justisie voorgelê word. (Vol I van *Verslag*, par 4.2.6)

*'n Raad van Justisie is nooit ingestel nie en die Kommissie se aanbeveling is vermoedelik nie opgevolg nie.*

## Female president

Judith Potter made history in New Zealand. She was elected as President of the Law Society and therefore became the leader of the 120 year old New Zealand legal profession. She was due to take over the presidency in April 1991.

In the 113 year history of the American Bar Association, it has never had a woman president or a woman chair of its House – a position seen as an important stepping stone for presidential hopefuls. And only two women in the Association's history ever ran for president. One lost and one withdrew. On the administrative side, the ABA has had in recent years only one woman chief executive – former Watergate prosecutor Jill Wine-Banks, who resigned a year ago. (*ABA Journal*, July 1991, p 58)

*South Africa has one female Judge. But no woman, as far as we know, has as yet reached great heights in the managements of the legal professions.*



Judith Potter  
.....

## Regsgeskiedenis

Regsgeskiedenis is onlangs in Brittanje gemaak toe 'n Britse koerant gelas is om ongeveer R170 000 aan 'n seun van ses jaar as skadevergoeding weens laster te betaal. Die koerant het die seun die "stoutste snuiter" in Brittanje genoem omdat hy sy ouers se huis verwoes het, sy eie oor afgesny het, die kat in die wasmasjien doodgemaak het, twee keer meubels aan die brand gestek het, die badkamer oorstrom het deur pype uit die muur te ruk, die hond blou gevef het, twee video-opnemers stukkend geslaan het, en insekdoder gedrink het. Die feitelike posisie – waarvan die koerant nie bewus was nie – was dat die seun by geboorte breinvliesontsteking opgedoen het wat gedragsversteurings veroorsaak. Gevolglik is aangevoer dat aangesien hierdie feite nie genoem is nie, die indruk gewek is dat die seun moedswillig stout is.

Dit was die eerste maal dat 'n kind in Brittanje weens laster gedagvaar het. (*Beeld*, 25 Mei 1991)

## Economic slump not limited to South Africa

Profit margins in law firms throughout England and Wales were down for 1990 – with profit sheets showing a slump of up to one-third in some regions, according to *Gazette*, 13 March 1991, p 8.

## Death row growth

It would seem that problems arising from the death penalty are not limited to South Africa. In the United States of America the number of "inmates on death row" is increasing at an alarming rate: 475 in 1978, 1642 in 1985 and 2400 in 1990. One of the

reasons given for this unhappy state of affairs reads as follows in the March 1991 issue of the *American Bar Association Journal*, p 8:

The tragic truth is that our system has been found wanting in too many capital cases as demonstrated in the recent report of the Criminal Justice Section's Task Force on Death Penalty Habeas Corpus. The Task Force reported disturbing practices: cases where representation was provided by a third-year law student, where racial epithets were routinely used by both defense counsel and the prosecution, where the defense attorney first met his client on the day of trial, and where, when given an opportunity to provide mitigating testimony at the all important sentencing phase of a capital trial, counsel stood mute.

*For clarity sake it is pointed out that the USA has a fused bar*

## Selection of judges

In Britain the current system of selection of judges depends largely on word-of-mouth recommendations by serving judges to the Lord Chancellor. (In South Africa a similar system is in force.)

The British Law Society has now recommended that a judicial appointments commission consisting of judges, lawyers and lay persons be established. The Society also recommended the implementation of selection methods similar to those used for senior civil servants including tests and interviews (with less emphasis on the views of individual serving judges). (*Gazette*, 13 March 1991, p 6)

## TV in courts

A private member's Bill initiated by the Bar – the Courts (Research) Bill – which proposed that experimentation and research be carried out concerning the televising of the courts and jury trials, failed to achieve the necessary majority in the British House of Commons recently. (See also *OBITER*. . . by Viator, 4(1991) *Consultus* 65.) The (British) Bar is, however, confident that the government will take steps to pave the way for the necessary pilot project. (*Gazette*, 27 February 1991, p 10.)

## Confidence crisis in British judiciary

An unprecedented uproar in the British news media and elsewhere was precipitated by the occurrences

surrounding the so-called "Birmingham Six" and other similar cases.

It will be recalled that on 21 November 1974, 21 people were killed and 162 were injured when two public houses in Birmingham were bombed as part of the campaign of terrorism by the Provisional Irish Republican Army (IRA). Six Irishmen, (the "Birmingham Six") were unanimously convicted by a jury and sentenced to life imprisonment for the bombings. The prosecution case was based on admissions made by the six men in police custody, on circumstantial evidence and on scientific evidence which indicated that two of the men had recently handled explosives. In 1987 the case was referred to the Court of Appeal and after a hearing of five weeks the appeals were dismissed. The case was referred back to the Court of Appeal in August 1990 after new information relating to apparent discrepancies in the record of a police interview of one of the six men came to light. On 14 March 1991 the Court of Appeal quashed the convictions of the six men. They were therefore wrongly incarcerated for over 15 years. (There were at least two other similar cases.)

The following extract from an editorial in the April 1991 issue of *Counsel* (the Journal of the Bar of England and Wales) aptly reflects the reaction of the legal profession:

This is a sombre hour for English justice. The Birmingham, Guildford and Maquire cases, taken together, constitute the gravest miscarriage of justice in the history of our system.

It is the sheer enormity of the failure that must shake every one of us. The number of people wrongly convicted was as many as 17. The crimes for which they were imprisoned were the gravest imaginable. The time it took for the errors to be recognised was over 15 years. Whichever way one looks at these cases, the scale of the wreckage is daunting. It was not just one police force whose interview evidence has been impugned. The shoddy forensic evidence came from the Home Office, whose scientific reputation had formerly been so high. The trial judges were of the greatest distinction: but the trials still went wrong.

We had thought there were many safeguards against such a mishap – the role of the DPP in preparing the prosecution, the exposure of unreliable witnesses to cross-examination at trial, the common sense of the jury, the longstop of the Court of Appeal. Yet none prevented the tragedy. It is almost as if some pestilence of Biblical proportions has descended on our

system of criminal justice and devastated the entire landscape.

The shock of these cases has precipitated a crisis of public confidence in the judiciary. The concept of "reform" is now altogether too mild to satisfy the country's sense of outrage. The mood is for scapegoats and sweeping change. It is said we cannot wait for the deliberations of a Royal Commission. The cry is for a court of laymen in place of lawyer-judges. We are told to adopt the Scottish system, or the French, or the Italian.

These developments touch the Bar deeply. A barrister who has practised in the criminal courts feels pulled in conflicting directions. There is first the shock: few of us in 1975 or 1976 would have contemplated the possibility that the three major terrorist trials of that period would all produce wrong verdicts. Then there is concern that some of the drastic changes now suggested could endanger the very liberties which they are intended to enhance. (P 3)

*It should be interesting to see what recommendations are made by the Royal Commission to obviate a recurrence of similar cases. The SA Law Commission may therefore be well advised to obtain a copy of the Royal Commission's report.*

The Royal Commission will consider whether changes are needed in:

- the conduct of police investigations, particularly the gathering and preparation of evidence, and their supervision and control by senior police officers;
- the role of the prosecutor in gathering evidence and deciding whether to proceed with a case, and the arrangements for the disclosure of material to the defence;
- the role and responsibilities of experts in criminal proceedings, and the relationship between the forensic science services and the police;
- the arrangements for the defence of accused persons and access to legal advice and expert evidence;
- the opportunities available for an accused person to state his position on the matters charged and the extent to which the courts might draw proper inference from primary facts, the conduct of the accused, and any failure on his part to take advantage of an opportunity to state his position;
- the conduct of trials and the duties and powers of the courts, and the possibility of their having an investigative role;
- the role of the Court of Appeal in considering new evidence on appeal, including directing the investigation of allegations; and

- the arrangements for investigating alleged miscarriages of justice when appeal rights have been exhausted.

## Judicial law-making

Today the expectations amongst people all over the world, and particularly in developing countries, are rising, and the judicial process has a vital role to play in moulding and developing the process of social change. The Judiciary can and must operate the law so as to fulfil the necessary role of effecting such development.

It sometimes happens that the goal of social and economic change is reached more quickly through legal development by the Judiciary than by the Legislature. This is because Judges have a certain amount of freedom or latitude in the process of interpretation and application of the law. It is now acknowledged that Judges do not merely discover the law, but they also make law. They take part in the process of creation. Law-making is an inherent and inevitable part of the judicial process.

(The Full Bench of the Zimbabwe Supreme Court in *Zimnat Insurance Co Ltd v Chawanda* 1991 (2) 825 at 832)

## Overcrowding of Prisons

Under the heading "The Crisis in Corrections" in the May 1991 issue of *ABA Journal* John J Curtin Jr comments as follows:

- America has the highest known rate of incarceration in the world – higher than South Africa's, higher than the Soviet Union's.
- The number of inmates in state and federal jails and prisons has doubled since 1980.
- America spends about \$16 billion a year to incarcerate a population of over one million.
- Approximately 40 states are under court order because of unconstitutional conditions in their correctional facilities.
- One out of four black males between the ages of 20 and 29 is under the control of the criminal justice system.

What do these striking numbers mean to our justice system and to our society? Prison crowding threatens safety in correctional facilities, as well as safety on our streets as wholesale releases are forced by court-imposed population caps. Prison crowding diverts money from more beneficial domestic programs to pay for new facilities.

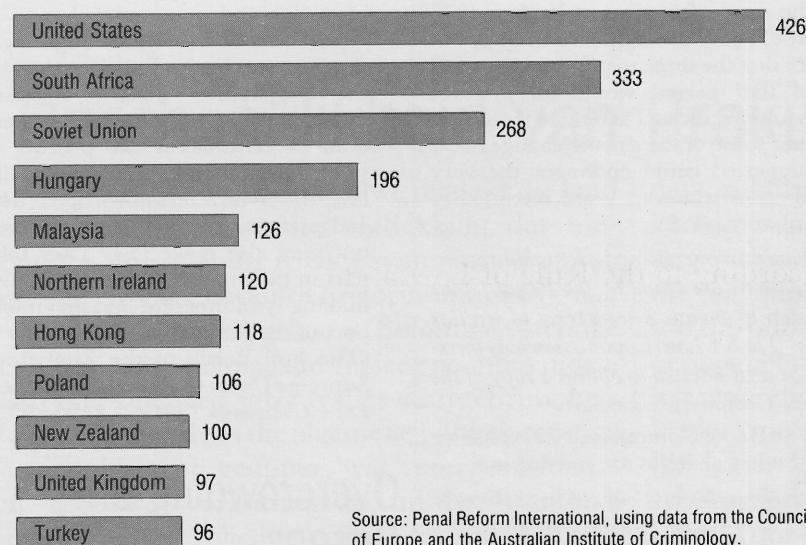
The author's scenario for the future is:

We face a future in which prisons will have to be reserved primarily for the dangerous. It follows that we will have to explore alternatives to incarceration for the non-dangerous. Many alternative techniques – intensive probation supervision, higher fines, community service, house arrest, electronic surveillance, frequent drug testing and drug treatment – already exist. We must encourage their broader implementation.

The graph below, showing the rates of imprisonment per 100,000 population, is illuminating.

*As is known, the South African authorities recently solved our overcrowded prison problem in a rather unconventional fashion: by simply opening the doors of gaols and releasing 57,000 prisoners, thus bringing South Africa probably down to the bottom part of the graph. Naturally, such large scale and indiscriminate releases are not likely to have beneficial results in the long term, and the application of the scenario quoted supra seems to be the only sensible alternative.*

(See also "Korrektiewe Toesig: 'n Soepel Vonnisopsie" by D van Z van der Merwe elsewhere in this issue.)



## Foutiewe identifikasie

'n Saak wat mens koue rillings gee: 'n Man is in die Streekhof Pretoria weens handsakdiefstal aangekla. Die klagster, sowel as die persoon wat die dief kort na die diefstal gevang het, het die aangeklaagde in die hof as die werklike dief uitgeken. Laasgenoemde het egter alles ontken. Hy is nogtans skuldig bevind. Die saak is daarna uitgestel. By hervatting van die verhoor het die ondersoek-beampte egter na vore gekom en verklaar dat die verkeerde persoon voor die hof was. Die aangeklaagde was wel gearrester maar op 'n ander aanklag. Op hersiening is die skuldigbevinding deur Swart R ter syde gestel (Saak A275/89).

In sy uitspraak het die Regter daarop gewys dat die "gebeure weer eens staving [is] van hoe bedrieglik en onbetroubaar getuienis omtrent identifikasie kan wees . . .". (Die Regter het gelas dat die aangeleentheid verder ondersoek word in 'n poging om te voorkom dat 'n soortgelyke voorval weer plaasvind.)

*Viator het baie jare praktiese ervaring van die regspleging. Dis egter die eerste maal dat hy 'n geval teëkom waar die verkeerde persoon vanweë 'n amptelike fout aangekla en boonop skuldig bevind is. Hoe dit sy, dis miskien goed dat regsprekende beamptes kennis neem van hierdie geval. Klaarblyklik behoort so iets nooit te gebeur nie.*

