

Obiter...

by *Spectator*

The real trial of the century

UNDER the heading "The Real Trial of the Century" *The American Lawyer* devotes the main feature of its September 1995 issue to an in-depth analysis of the international criminal tribunal for the former Yugoslavia, established by the UN Security Council in February 1993.

The article, in typical investigative fashion, deals with all facets of the trial – the establishing of the tribunal, appointment of the judges and prosecutors, formulation of the rules and a "primer" on the accused and participants. Chief Prosecutor Richard Goldstone is singled out for special treatment with nearly two well-researched pages describing his background and also his role as chairman of the Goldstone Commission.

Proceedings and rules of more than passing interest are the following:

- The trial takes place in the tribunal's customized state-of-the-art courtroom that includes simultaneous video and audio translation into English, French, and Serbo-Croat. A nearly instantaneous transcript of the proceedings appears on a colour monitor that every participant in the trial has at his or her fingertips. That same monitor is used to flash up visual and documentary evidence. It is connected to a participant's laptop computer or may be tuned in to the live feed of the trial from one of the courtroom's four television cameras. Those cameras are operated by the tribunal, but a live feed has been given to four primary networks. Witness security being a paramount

concern, many sessions may be held *in camera*. Also, testimony may be transmitted from a remote location, from disguised witnesses whose voices may be altered.

- The main defence lawyer is Prof Michail Wladimiroff, Dutch, part-time professor of economic criminal law at the University of Utrecht, and senior partner in The Hague law firm Wladimiroff & Spong. He was appointed in April 1995 and is being paid at the rate of \$23 an hour for a maximum of \$200 a day! (His usual rate is \$350 a day.) He is assisted by one of his law firm partners and several law students.
- Some of the rules:
 - No jury; as in civil law systems, the judges both find facts and determine guilt.
 - Guilt must be proved beyond a reasonable doubt.
 - Maximum sentence is life imprisonment. Sentences will be

served in one of eleven countries that have agreed to house tribunal prisoners.

- Jurisdiction is concurrent with national courts, but a double jeopardy clause applies.
- Territorial jurisdiction is limited to the former Yugoslavia.

Court dress

In Western European countries (and also South Africa) a distinctive dress for judges and lawyers in court has long been known. It is, therefore, understandable that a debate concerning the mode of dress of attorneys appearing in the Supreme court, should arise. According to *De Rebus - the SA Attorney's Journal* (January 1996) the Association of Law Societies has decided to glean the views of attorneys on court dress. There is little doubt that there will be no unanimity on this issue. Views will probably range from those in favour of dispensing altogether of gowns in courts to those in favour of gowns and bibs for advocates and attorneys.

The history of court dress makes interesting (and amusing) reading.* In England judicial robes seem to have been green in the 14th century! In some



"... who hid beneath the cloak of a high-ranking person ... were pardoned ..."

* See Hargreaves-Mawdsley *History of Legal dress in Europe* and *Criminal Justice through the Ages* published by the Mediaeval Crime Museum, Rothenburg ob der Tauber.

cases an *armelausa*, a loose mantle fastened on the right shoulder, originally part of the dress of nobles in France and originating in the *lorum* worn in the later Roman and Byzantine Empire, was worn. In the 15th century judges' robes assumed the general shape they have possessed ever since, and scarlet displaced green as the universal colour for the full dress. They also wore a skullcap and coif. Chief justices wore a scarlet tabard or sleeved *supertunica* with an *armelausa* on important occasions, and a hood and shoulder-piece or cape, all lined and trimmed with miniver. In fact, court dress went through various stages and fashions – witness the disappearance of the wig in South Africa, but still in use in England.

South African court dress originated in England and, if one has regard to the modes of dress of lawyers in other commonwealth countries (e.g. New Zealand, Zimbabwe and Canada) we are still the closest followers of the English style.

Clothing was originally only protection against the exigencies of the weather. However, its symbolic significance in legal history is as old as clothing itself. Clothing became an integral part of various ceremonies. At coronations, the granting of fiefs or inaugural ceremonies they became the outward sign of the powers conferred. In the event of dethronement

or removal from office, they were removed from the person concerned. The memory of such customs is preserved in some of our figures of speech; for instance we speak of vesting a person with authority or divesting him of his rank, especially in official, military and spiritual spheres.

Cloak or mantle

The cloak is a very old and widespread legal symbol. All custom and usage involving the cloak or mantle point to the original purpose of the garment: the attainment and granting of protection and safety. Fugitives who hid beneath the cloak of a high-ranking person, especially high-born ladies(!), or touched their cloaks were saved from pursuit or were pardoned. The cloak also played a part in the adoption or legitimation of premarital children. Legitimation during the wedding ceremony was customary in Germany from the 13th century onwards. The premarital children took cover under the mother's cloak, and when they emerged from beneath it, this was considered a symbolic new birth as "genuine" children of the now married mother ("cloak children").

A widow who placed her cloak on her husband's grave was exempted from payment of the husband's debts, and, therefore, from claims by creditors!

Interestingly under German law,

judges and assessors were not permitted to wear hats, cloaks or gloves. This uncovered state was intended to demonstrate openness and honesty and thus protect plaintiffs and defendants from any machinations from the courts which might be to their disadvantage.

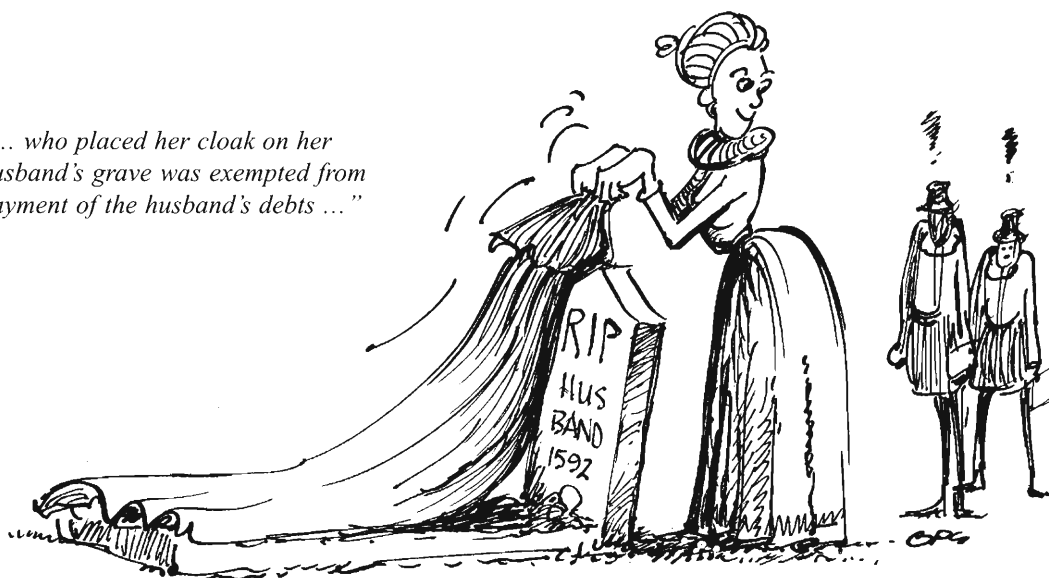
Hats

The hat was not merely an article of clothing, but a legal symbol of greatly varying significance. Even among the Romans it was a mark of freedom and, following that example, in the Middle Ages only the free were allowed to wear a hat; the unfree had to make do with a cap! Removal of the hat indicated submission and keeping it on was an expression of ruling authority, i.e. it was a symbol of power. Examples are the judge's hat (e.g. in England the "black cap") still worn on special occasions, such as taking oaths or pronouncing judgment, and a wig worn by judges and officials.

"Clothes make the man"

Rank, position and wealth were indicated by the type of clothing people wore. The old adage "clothes make the man" was therefore of much greater significance to people of earlier times than it is today. To counteract "clothing fraud" (and also extravagance), the authorities promulgated clothing regu-

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lations – even imperial diets, e g the diet of 1530 which divided the urban populace into three estates, dealt with clothing regulations.

Clothing regulations not only detailed the cut of clothes, types of material, etc but also sought to punish craftsmen who failed to comply with the regulations.

The battle against fashion, however, was not always successful. In Elizabethan England a craze for bizarre costumes developed, echoed by Petruchio where he rails at Katharine's dress in *The Taming of the Shrew*:

O mercy, God! What masquing stuff is here?

What's this? A sleeve? 'tis like a demi-cannon:

What, up and down, carved like an appletart?

Here's snip and nip and cut and slish and slash,

Like to a censer in a barber's shop:
Why, what I' devil's name, tailor,
call'st thou this?"

Englishman's quandary

Fashion enslaved both the men and women of Elizabeth's day. An old

woodcut caricatures the frequent changes in its depiction of a naked Englishman, armed with shears and a roll of cloth, wondering what he shall wear next: I am an Englishman and naked I stand here,

Musing in my mind what raiment I shall wear:

For now I will wear this and now I will wear that,

And now I will wear I cannot tell what.

(From Stubbes *Anatomy of Abuses* (New Shakespeare Society))

Ex China aliquid...

Evidence by video

Legal history was made in the High Court, Hong Kong, recently when a witness gave evidence by live video link. It was the first time



"... wondering what he shall wear next."

such technology had been used in a Hong Kong trial. A lawyer who appeared in the trial said that compared to taking evidence on commission from witnesses unable to come to Hong Kong, using a video link was far superior. "This is much more satisfactory because the judge can actually see the witness and assess the demeanour of the witness I think the technology is very good, the picture quality is excellent. I think this is the trend for the future". These sentiments were echoed by the Hong Kong Chief Justice. (*Hong Kong Lawyer* January 1996)

Bilingualism

With the coming handover to Chinese sovereignty in 1997 lawyers in Hong Kong face a "long and hard" road towards bilingualism. English has always been the language of law but that is changing. Legal terms, case law and court records will have to be translated into Chinese. Compounding this task is the issue of accurate translation. Many translators do not feel confident in translating legal concepts. It would seem as if a fully operational bilingual system is many years away – the first case in Cantonese was heard by the High Court as recently as 1995. (*Hong Kong Lawyer* January 1996)

Business courts

According to a recent report in the *ABA Journal* (December 1996) business courts may become a white knight, rescuing an overburdened justice system. Fifteen states that together comprise more than half of the United States population either have commercial divisions or are considering a commercial division. Generally no new judges are appointed for commercial cases, but, instead, judges are assigned to manage business sessions, committing them to become very efficient in handling complex commercial cases. It is felt that business courts also may keep businesses from leaving the public court system for a private system of justice – they offer hope that courts can resolve disputes promptly and efficiently. ➤

Judging the judges

"... more than parliament more than the Presidency, the police or any other branch of government, the courts are our most important institution. ... Last week an interesting suggestion was made to the Hoexter Commission which is enquiring into rationalising aspects of the Supreme Court: presiding officers should undergo tests to determine traits such as the disguise of anger, over-reaction, stress levels, fairness, objectivity and humility".

Extract from an editorial in *The Star* 15 January 1996.

We believe most people will agree that the suggestion is a good one and that it should be put into practice as soon as possible.

No doubt advocates are ideally suited to comment on the above suggestion – especially those with some knowledge of psychology! Contributions are invited.

The salutary effect of cameras in court

In a recent article in *Counsel* (September/October 1995) the author argues that there is strong evidence that televising proceedings increases public confidence in the justice system. Exposing the public to a dose of reality means that lawyers and judges sometimes look incompetent. However, if the



"... traits such as ... over-reaction..."

system is moving slowly, people should know that and should know why. The author, Steven Brill, founder of *Court TV* and chairman and editor-in-chief of *American Lawyer Media*, states that out of 197 judges, 196 have told *Court TV* that the camera experience had not impeded the process of justice and had, they felt, enhanced the public's understanding of the justice system.

Defending legal territory

According to a report in *The Lawyer* (7 November 1995) the concept of multi-disciplinary practice by accountants and lawyers in France has effec-

tively been stopped. A decree was passed in August 1995 in terms of which from 1997 law firms or advocates may not be allowed to make public reference to any links with accounting firms. In terms of the same decree only those with a first degree in law can go on to law school – thus effectively denying business graduates access to law studies.

Another bone of contention has been the uniting of the *avocat* and *conseil juridiques* professions, roughly translated as trial lawyer and legal adviser. Before the merger, the *conseil juridiques* were open to foreigners and were extremely successful.

International Bar Association – 26th Biennial Conference

OVER 2 500 lawyers and their guests are expected to attend this conference, which will constitute an important event in the international legal calendar.

Conference working programme

All 56 specialists committees of the three sections will present programmes covering current topics of significance worldwide. Guest speakers will address the meetings, providing the most up-to-date information and an informed perspective on specialist issues.

Berlin has been chosen to host the International Bar Association's 26th Biennial Conference from 20 to 25 October 1996.

Social programme

The working schedule of the conference is complemented by a full social programme which will provide much needed relaxation and the opportunity to establish and maintain both business contacts and friendships with the legal profession worldwide.

Scholarships

The IBA's Section on Business Law (SBL) is particularly keen to encourage young law-

yers from the conference region to attend the IBA's 26th Biennial Conference and to join in future activities of the IBA and SBL. The SBL has allocated funds to be awarded to selected young lawyers who would otherwise be unable to attend due to financial constraints. Depending on personal circumstances, the scholarships will include a contribution to some or all of the conference and travelling expenses.

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