In early 1994 Her Majesty’s Government announced details of its planned ceremonies and festivals to mark the 50th anniversary of D-day. The Tory Government’s hopes of using the events to divert attention away from an array of simmering political scandals was rather short-sighted. Within days of the announcement, veterans’ organisations were up in arms (pun unintended!) about the insensitivity of the proposed festivals. In short the veterans thought it singularly inappropriate to turn the occasion into a series of frivolous celebrations. What was needed, they argued, was commemoration, not “spam burger” celebrations.

Crisis averted

Notwithstanding Mr Major’s attempts to explain the Government’s thinking behind the proposed celebrations, the veterans remained outraged. By late April 1994, so intense was the veterans’ reaction that the Prime Minister was on the back foot defending the Government’s decision in the Commons. Then Dame Vera Lynn threatened to pull out of the planned celebrations. The Government rushed into a number of meetings with the veteran organisations and soothed ruffled feathers. Another crisis was averted and the D-day ceremonies and festivals proceeded swimmingly. But 1994 will also be remembered as marking the beginning of a very different end.

Slowé breaks monopoly

On 9 February 1994 Mr Richard Slowé (47), a former barrister who heads the “advocacy group” at a London solicitors firm, acted as junior counsel to Alan Steinfeld QC in a High Court commercial dispute heard in the Royal Courts of Justice. Slowé was the first solicitor to exercise his fledgling rights of audience in the High Court, breaking the Bar’s 200 year monopoly. Slowé was one of 32 solicitors with advocacy experience awarded “automatic qualifications” to exercise their rights of audience as solicitor-advocates by the Law Society’s Higher Courts Qualification Case Work Committee in February 1994.

A total of 13 solicitors were granted “all proceedings” qualifications by the Law Society, entitling them to appear in both civil and criminal cases. “Criminal only” qualifications were awarded to a further 16 and “Civil only” qualifications awarded to 3. These awards were made upon the basis of the applicant’s advocacy experience and without having to undergo the Law Society’s proposed courses and examinations. The Law Society’s first examinations commenced in June 1994 with the practical advocacy courses beginning in November/December 1994.

Slowé entry

Unlike the relatively painless entry of Slowé et al to High Court practice, solicitors wishing to take the advocacy courses and examinations will not only have to find the time but also the money. Registering with the Law Society for the course will cost £117,50 (R661,52). The “Evidence and Procedure Test” will be in the order of £146,88 (R826,93) and the “Advocacy Courses” in excess of £200,00 (R11 260,00). A hefty bill of £264,38 (R12 748,46). Many solicitors have expressed their dismay at the proposed cost. The New Law Journal described the proposed examinations and courses as being “not worth the cost”.

Gordon Aber
Johannesburg Bar
**Slowe unwigged**

More immediate issues have arisen concerning solicitors appearing in the High Court. Do they appear as barristers or solicitors — robed and wigged or simply robed? Slowe had no doubt in his mind as to how he should appear as Steinfeld’s junior. His starched collar and bands were reportedly couriered from his Kensington home to court (as was his wig). The Law Society’s president, Mr Roger Pannone, has already taken up the issue with the Lord Chancellor, Lord MacKay. Pannone emphasised the need for uniformity in appearance and expressed his fear “that juries could draw adverse inferences if a solicitor-advocate was not wearing a wig, but his or her opponent was wearing one. There might be a suspicion that a solicitor was in some way a second class advocate on whom less reliance could be placed”.

This fear expressed by the President of the Law Society found little favour with a Crown Court Judge who reported a solicitor to the Solicitor’s Complaints Bureau (SCB) for appearing before him wearing a wig. No doubt the SCB had little difficulty in coming to the conclusion that no breach of professional conduct emanated from their member’s attire. However, the Lord Chancellor had expressed a view that solicitors ought to appear robed only: “I believe that this practice [of appearing sans wig] should continue now that rights of audience can be exercised more widely. I am confident that solicitors will be able to show that not wearing a wig does not imply in some way a second class advocate”.

**Slowe commanded to sit**

Perhaps the Lord Chancellor’s view is a little more “over-trusting” of the bench than it ought to be and might be a touch naive. One can only hazard a guess as to the impression created in the minds of a jury when a judge, hostile to the idea of solicitors appearing before him, wishes to “get the boot in”. Picture this scene: the Judge calls for counsel’s assistance. The solicitor-advocate leaps to his feet (being far more keen than his barrister opponent to impress the Judge) and seeks to assist his Lordship. The Judge, part indignant, part humiliated, waves his hand in the manner more akin to commanding a dog to sit, repeats his request for counsel (this time engaging the eye of the barrister) to assist him. Although the example may be somewhat extreme, it illustrates the point made by Pannone.

**Clean up campaign**

Apart from this entertaining and passionate battle about who wears what, the Bar’s counter to the solicitors new rights of audience is finally hitting the right mark. The Bar has embarked on a campaign to clean up its act and portray a professional and competent image. Peter Goldsmith QC, Vice-Chairman elect of the Bar Council, has spoken of the need to ensure that the public know that if they want a full time advocate with experience they should look to the Bar. The Chairman of the Bar, Robert Seabrook QC, has also launched a major review of performance standards, appointing Lord Alexander of Weedon QC (Chairman of National Westminster Bank) to examine the issue. Seabrook QC was clear about the need to clean up the Bar: “We cannot ignore the fact that the finger has been pointed at us by the Royal Commission on Criminal Justice and others ... shoddy work by any barrister lets us all down”.

**Fresh look**

A process that began in the autumn of 1983 when Mr Austin Mitchell MP introduced a Private Members Bill which sought to allow licensed conveyancers to compete with solicitors, ended in February 1994 when solicitors finally broke the Bar’s monopoly. But many still say that the battle has not ended. Employed solicitors, including solicitors employed by the Crown Prosecution Service and Government Legal Service, have not as yet been granted rights of audience. The Lord Chancellor’s Advisory Committee on Legal Education and Conduct are to take a fresh look at this issue. Apparently the reason for the delay is the Legal Services Act 1990; it requires amendment to adequately ensure control over the exercise of audience rights by the Crown Prosecution Service and Government Legal Service.
Hypermarket stop

Only when the Law Society’s courses and examinations have been up and running for some years, will one properly be able to assess the impact upon the Bar. A number of the large London firms have established litigation departments with a view to offering clients a “one-stop litigation shop”. Given the fact that firms of solicitors are now entitled to form professional associations with other professional practitioners such as accountants and auditors, the idea of offering clients a total “hypermarket” stop may well lend impetus to the large city firms establishing High Court litigation departments.

Lessons

So much for legal developments in England. What lessons might be learnt from all this in our own back yard? Perhaps a number, but surely a fundamental lesson is this; attorneys will win the right to appear in the various divisions of the Supreme Court in South Africa. The only question in the light of the Milne Commission’s Report is when? Accepting this fact will be difficult for many. Some members of the Bar would think our fate is obvious; like lambs to the slaughter we will be swamped by the attorneys. Others would wish the Bar to challenge the attorneys head on; why not simply deregulate the parameters within which the profession now function and allow members of the Bar to seek clients “off the street”? These two diverse views (amongst many) are clearly symptomatic for a more pervasive pathology of fear — where to now?

A preoccupation with the debate concerning attorney’s rights of audience prevents the legal profession as a whole from addressing far more important issues. Wim Trengrove SC has pointed to our myopia in this regard and the need to address issues such as accused persons being tried without legal representation and the skewed composition of the Bar. The former Chief Justice of Zimbabwe Enoch Dumbutshena’s personal reflections of his experience in practice highlight a number of important shortcomings within the legal profession in South Africa in general and the Bar in particular. 7

The Bar’s track record in protecting the rights of those who were victims of an oppressive state can best be described as patchy and episodic. This is not to say that the effort of individual members of the Bar were insignificant or unimportant. It was the lack of a collective, consistent voice and action that was most noticeable. But pious analysis of our individual and collective shortcomings, when many of us found ourselves in the rarefied atmosphere of chambers settling pleadings and consulting with our attorneys and captains of industry to the sounds of mass protest, achieves very little if anything.

New jurisprudence

The time for fighting rear-guard actions to stave off attorneys appearing in the Supreme Court is not only short-sighted but prevents us from creatively examining far more important issues including those alluded to by Win Trengrove SC. Confronting the important issues that face us as an institution is vital. We stand on the threshold of a new jurisprudence. A new constitution entrenching fundamental rights and freedoms will demand a very different kind of commitment from the legal profession as a whole. Practising lawyers in South Africa today are by definition constitutional lawyers. Virtually all disputes now function within a constitutional matrix. Unless we creatively tackle the challenges arising from our new constitution in addition to the baggage of the past, we may well become victims of self-opinionated indifference to the detriment of our society as a whole.

1. In early 1994 the Tory Government found itself engulfed in a number of scandals arising from several MP’s sexual misadventures. The Prime Minister’s catch-phrase at the time “back to basics” and his attempt to get Britain to return to basic moral standards and values were simply torpedoed by these scandals.

2. A burger made of spicy luncheon meat, usually pork, apparently popular at the time of the Second World War.

3. A number of the D-day events were almost cancelled due to heavy rain!

4. To suggest that solicitors only won rights of audience in the High Court of England in 1994 is not altogether correct. In 1985, following the libel action brought against Mr Cyril Smith MP by Radio Trent and twenty-five other Members of Parliament, the then Lord Chief Justice, Lord Lane, announced on behalf of all the High Court and Appeal Court Judges that the rules were to be changed to allow solicitors to appear in formal and uncontested matters. On 13 May 1985, three solicitors appeared in the High Court as spokesmen for their clients — see Zander, M: A matter of Justice — The Legal System in Ferment p 26 Oxford Univ. Press. See also Practice Direction [1986] 2 All ER 226.

5. For a synopsis of the history of the legal profession in England and the recent battle between solicitors and barristers concerning rights of audience in the High Courts, see Zander, M: Cases and Materials on the English Legal System (6th Ed) 628 — 689


Footnotes