Retirement age of Judges

The British Lord Chancellor, Lord Mackay, has announced his intention to reduce the mandatory retirement age of judges from 75 to 70 years. The reason given is that the public is increasingly becoming sceptical over the quality of British justice — and the common perception of the judiciary as an out-of-touch body of ageing men. Currently more than half of the British judges are older than 70. The Lord Chief Justice is 73, while the Master of the Rolls is 71. Four of the ten Law Lords are older than 70. The Chairman of the Bar Council supported the proposal and said that ideally he would like to see the mandatory retirement age dropped by another five years, and added: "You have to draw a balance between experience and the capacity to retain an open mind and to maintain the public's confidence."

(Gazette, 11 March 1992)

So Britain is reverting to the situation where South Africa had been prior to the passing of Act 88 of 1989! This Act, as is known, established the "once a judge, always a judge" system. It is not difficult to visualise that if, under the new system, too many of our judges, after reaching 70, elect to render service on a fulltime basis until well over 70 or even until 75, the South African public might in due course also gain the perception of our "judiciary as an out-of-touch body of ageing men". Needless to say, this is a matter that calls for very careful monitoring, not only by Government but also the judiciary itself.

Women lawyers

Catherine Fraser has recently been appointed as the new Chief Justice of Alberta, Canada, and Chief Justice of the Court of Appeal for the North-West Territories. She is the first woman to become Chief Justice of a province.

There are at present one hundred women who are federally-appointed judges in Canada — 11 per cent of the total. (The Lawyers Weekly, 27 March 1992)

□ In the USA, female lawyers increased as follows over the years:

<table>
<thead>
<tr>
<th>Year</th>
<th>Females</th>
<th>Males</th>
</tr>
</thead>
<tbody>
<tr>
<td>1971</td>
<td>3 %</td>
<td>97 %</td>
</tr>
<tr>
<td>1980</td>
<td>8 %</td>
<td>92 %</td>
</tr>
<tr>
<td>1985</td>
<td>13 %</td>
<td>87 %</td>
</tr>
<tr>
<td>1988</td>
<td>16 %</td>
<td>84 %</td>
</tr>
</tbody>
</table>

(ABA Journal, June 1992)

Court system out of control

Writing in The Lawyers Weekly of 10 January 1992 Judge JF Bennett of the Ontario Court of Justice Provincial Division (Canada) remarks:

Am I alone in thinking that our court system is out of control — that society can't afford where law is taking us?

Hearings which used to take a day or two now take weeks or months. Judgments which used to be written in three or four pages now occupy 30 or 40. And hardly a week goes by without a decision coming down from somewhere to tell us how wrong we have been in the past.

Open-ended health care is under the gun. We just can't afford it any more. But, is our open-ended legal system not even more out of control?
The Judge proceeded to offer a number of suggestions to improve the system.

It is no doubt a salutary rule for judges not to take part in public debates on matters having a party political flavour but Viator has often wondered whether they should not be less reserved as far as other matters, especially those relating to the courts, are concerned. It is noted that judges in other jurisdictions do not hesitate to state their views on such matters.

Judges have wide experience and knowledge and it seems a pity that we very seldom enjoy the benefit of their views.

**State President’s detainees**

As is known, South African public law is largely based upon English public law and experience has shown that whenever a defect is detected in this branch of our law the same defect would have been detected in England and an acceptable solution would in all probability have been found by the English legislature having regard to the fact that England is much older and more developed than South Africa. A striking example in this connection are the defects in our Criminal Procedure Act dealt with by Prof John Milton in (1989)2 Consultus 117 under the heading “Law reform: the case of State President’s detainees”.

Briefly, those defects are the following: In terms of the Criminal Procedure Act an accused person may be ordered to be detained in a mental hospital or prison pending the signification of the decision of the State President if it is found that he was not responsible for his criminal act by reason of mental illness or defect. Such an order may be made even if the accused has fully recovered since the commission of the crime.

An even more disquieting instance is where the court finds that the accused is not capable of understanding judicial proceedings so as to make a proper defence. In such a case the court is obliged to order that the accused be detained in a mental hospital or prison pending the signification of the decision of the State President. The result is that the accused faces incarceration for an indeterminate period – not, as in the type of case referred to supra, because he has been found to have committed a crime for which he cannot be held responsible, but merely because he has been suspected of committing a crime and is incapable of making a proper defence.

At the end of his article Prof Milton proposes certain reform measures to improve the situation. Those proposals should be studied. In addition the authorities should study the English Criminal Procedure (Insanity and Unfitness to Plead) Act, 1991. It would serve no good purpose if Viator were to analyse the Act here in detail. Suffice it to say that the measure has clearly been given exhaustive consideration and our legislature will most probably find that it contains useful ideas aimed at removing the inconsistencies in our law referred to by Prof Milton.

It is recommended, therefore, that the matter be given further attention by the SA Law Commission.

As indicated under the heading “Coming into operation of declarations of nullity” in Obiter . . . of the previous issue of Consultus, the legislation in question will most likely be declared to be unconstitutional (detention of persons without a conviction by a court of law) once our Bill of Rights comes into operation. Considerable uncertainty and inconvenience may therefore be obviated if Viator’s recommendation is given effect to.

**Abolition of Law Reform Commission**

The Canadian legal community has been shocked by its Government’s recent decision to abolish the Law Reform Commission of Canada, which was created in 1971. The Commission – which had a budget of $4,8 million this year – is one of 46 government agencies, boards and advisory bodies which are being eliminated or consolidated to save an estimated $22 million per year. The Commission’s 37 employees (and 15 lawyers employed on contract) will be absorbed elsewhere within the public service.

The Government holds the view that the Commission’s functions can be “adequately fulfilled” by the federal Department of Justice which will now contract out research and consult with academics and private practitioners. (The Lawyers Weekly, 13 March 1992)

It is unthinkable that the SA Law Commission, which has been rendering remarkable services to the country since its establishment in 1973, will ever go the same way as its Canadian counterpart.


There is no longer a need for the commission. For years it has produced poorly thought-out, American-inspired, liberal mush. That function is now performed for us by the Supreme Court of Canada.

**Debat oor Justisie**

Hieronder volg interessante grepe uit toesprake gelever deur Parlements- lede tydens die bespreking van die Justisiepos op 29 April 1992, soos gerapporteer in Hansard:

By die verbreding van die demokrasie en die insluiting van elke burger daarby word die effektiewe skeding van die gesagagars van die Staat van kritieke belang om meerderheidsoorheersing te voorkom en minderhede teen ongebreidelde magsuitoefening te beskerm. (Mnr H.J Coetsee, Minister van Justisie en van die Nasionale Intelligeniediens; kolom 5750)

As die regters vonnisse oploë, wat nie uitgeoefen word nie, kom justisie in die gedrang.

Wanneer die doodstraf deesdae opgelê word, en ná al die geleentheid wat geskryf is ter versagting, spesiale onderzoekskomitees en automatisie van reg van apptê word daar bevind dit is in dié geval die enigste gepaste vonnis, word dit selfs dan nie uitgeoefen nie.

Ek wil inderdaad pleit dat ons die mense wat gedoodsaansprakelik word onafhanklik optree statuter onafhanklik te maak. (Adv CD de Jager, LP Bethal; kolomme 5757-58)

Ek dink die tyd het aangebreek om die landdroste wat reeds onafhanklik optree te onafhanklik te maak. (Adv GB Myburgh, LP Port Elizabeth-Noord; kolom 5767)

He (a previous speaker) joins, and so do I, several distinguished judges, including the Judge President of the Cape, who have expressed outrage at the manner in which long-term criminal convicts are released from prison,
Those of us who believe in a free market cannot complain of exorbitant advocates’ fees, but what we can and do complain of is the closed shop, the magic circle and the cartels which go against the grain of free choice and accessibility to justice. I refer here, for example, to the monopolistic practice of advocates granting only themselves the right of appearance in the Supreme Court. This requires urgent correction, if not by the profession itself, then by Parliament in the last resort. (Mr AJ Leon, MP Houghton; columns 5681-82)

Thirion in Natal spoke only last week that the Department of Correctional Services does not take over the judicial function. (Mr AJ Leon, MP Houghton; columns 5681-82)

I would like to call upon the Minister of Justice and of the National Intelligence Service to the monopolistic practice of granting only themselves the right of appearance in the Supreme Court. (Mr DJ Dalling, MP Sandton; column 5685)

I doubt if hon members or even the hon the Minister himself - I see he is now here - is aware of the fact that this debate, in effect, has a very historical feature to it, and that is the fact that 11 days ago the hon Minister of Justice became the longest-serving Minister of Justice in the history of South Africa. The previous long-term was also served by a Free Stater, and that was Minister Blackie Swart who served for 11 years and six months and 2 days. The present hon Minister was appointed on 16 October 1980 and as a result he has now served 11 years, six months and 13 days. That must be something of a record in the Western World. (Mr DPA Schutte, Deputy Minister of Justice and of the National Intelligence Service; columns 5696-97)

The Government is in favour of retaining the death penalty as an option for the Supreme Court in extreme cases of capital crime. However, it is equally convinced that the due process of law as a prerequisite for the death penalty, should be enshrined in the bill of fundamental rights. In view of the fact that such a bill of rights is already within reach of the negotiation process, it is only prudent to extend the moratorium on the execution of the death penalty until such time as the constitutionality of this form of punishment has been firmly established. (Mr DPA Schutte, Deputy Minister of Justice and of the National Intelligence Service; columns 5701-02)

Our baie dekades heen het die Suid-Afrikaanse regbank ‘n besonder stwewige en wellerverdiende reputasie ontwikkel vanwee die gehalte van sy regspraak, sy onafhanklikheid en sy onkruikbaarheid. Daarom is dit ook reg dat regsters hulle die afgelope tyd teen die vroeë vrylating van gevangenes uitgespreek het. Hierdie groot skoepse vrylating deur hierdie agh Minister was onvergeeflik. Die vrylating van mense wat ernstige misdade gepleeg het – ek praat nou van ‘seri­ous, horrible crimes’ – nadat hulle ‘n relatiewe kort tydjie van hul vonnisse uitgedien het, was werklik onvergeeflik. (Mnr JR de Ville, MP Standton; kolom 5792)

Dit is wat ons gedoen het, en ek vra nie om verskoning daarvoor nie, want dit was in die beste belang van Suid-Afrika en al die opposisieparteie, ins­luitende die KP, wat nou die voordeel van dit alles geniet, kan nie wag om na die buiteland te gei en van Suid-Afrikaners erken te word nie, interna­tionale sport te geniet, ens. Dit is waar dit in ‘n baie groot mate sy begin gehad het. Dit is wat gebeur het. [Tus­senwerpels.]

Asb lêe beïndruk niemand met hul sinisme nie. Die proses het vir my groot pyn veroorsaak. Daarom het ek moete gedoen om dit, in my woorde gestel, so gou moontlik weer op die spoor te kry. Dit is wat ons gedoen het deur daaradag daarvoor. Ek was ervoor te laat. Die reg is egter gehalte­laar en regverdig. Derhalwe het ons ook gekyk - daarom het ek net nou by gemeenregtelike misdade soos ern­stige aanrandings, onafhanklik verkeerd verstaan. Na hoeveel ander mense vir dieselfde soort misdaad in die gevangenis is. Hulle het dus ook die voordeel van ‘n algemene amnestie gekry wat hulle binne die bereik van parool gebring het.

Die gevolg was dus dat hulle in sommige gevalle reeds ‘n ryk gedeelte van hul vennisse uitgedien het en hulle dus vrygelaat kon word. In ander gevalle is hulle op parool vrygelaat.

Natuurlik is dit ‘n offer wat ek, die Department van Korrektiewe Dienste en die amptenaar van daardie departement moes bring. Ek dank hulle vandag daarvoor. Ek werklik diegene wat aanhoudend die situasie moedwillig verkeryd het. (Mnr DPA Schutte, Deputy Minister of Justice and of the National Intelligence Service; columns 5701-02)

The MINISTER: Nee, daardie agh lid het nie die koerante gelees nie. Die prokureurs-generaal was daarna by my op kantoor. Ek het vir hulle gesê hulle is my vriende en my departe­ment se senior beampte. Ek het een fout gemaak, en dit was om hulle nie deurlopend in te lig nie, want hulle sou verstaan het.

Ek wil vir die agh lid van Standeron sê die prokureurs-generaal het net daarna ‘n verklaring uitgereik dat hulle tevrede en gelukkig is.
The Madam Justice went on to say that the Court of Appeal should only interfere with a sentence where a judge has made the “wrong choice such as giving a suspended sentence to someone convicted of a serious sexual assault or when the sentence is, by all rational standards, crazy”. She added she had never seen a sentence which could be described as crazy. (The Lawyers Weekly, 20 December 1991)

Aboriginals in Canadian justice system

The Law Reform Commission of Canada is proposing an aboriginal justice system for any aboriginal community “willing and capable” of instituting one. Such systems must be negotiated on a community-by-community basis, the report says, since no one system will satisfy the needs of all communities.

The Commission also recommends that more aboriginal people be recruited at all levels of the criminal justice system “by affirmative action if necessary” – and that non-aboriginal lawyers and police officers be “sensitized” to aboriginal issues. (The Lawyers Weekly, 10 January 1992)

Familiar phenomena

The following is an extract from a speech by Anthony Scrivener QC, Chairman of the English Bar, delivered at the 1991 Bar Conference in London:

The sad fact is that the crime figures have rarely been higher and continue to escalate by the month. The conviction rate on the other hand has rarely been lower. Police morale has never been lower in the wake of highly publicised miscarriages of justice cases. The prisons have never been fuller and detention cells at police stations, now being used as prisons, are not only unsafe for that purpose, but they have nearly reached saturation point. The police complain as they fight through the night that they are stretched to the limit and desperately under resourced. From our perspective, law and order is in crisis and desperate needs of all communities.

Excessive cross-examination can violate Bill of Rights

In the Canadian case of R v Freed, the Saskatchewan Queen’s Bench Division recently held that excessive cross-examination by the Crown of an expert witness called by the defence can deny the accused his right to a fair trial as provided in the Canadian Charter of Rights. The Crown cross-examined the defence breathalyzer witness for a full day on credentials, which resulted in the accused being unable to afford further expert testimony at his trial. The accused was convicted but on appeal the conviction was set aside on the basis that the Crown had, by its actions, deprived the accused of his right to a fair trial. (The Lawyers Weekly, 13 March 1992)

These remarks could just as well have been made in relation to South Africa. It seems clear that the maintenance of law and order has become a major issue throughout the world and that solutions will have to be found soon otherwise we may be facing a bleak future.
Hormone levels in lawyers

According to a recent United States study, male litigators have “significantly higher” levels of testosterone than their boardroom brethren. The average level of testosterone in the saliva of young (under 49) male trial lawyers is 6.9 nanograms per decilitre as against 5.9 for their solicitor counterparts.

Professor James M Dabbs, who undertook the study, explained that trial lawyers “are a little higher in testosterone than non-trial lawyers and our guess is that they are made that way – that they start off with higher testosterone and that attracts them to the courtroom.” (The Lawyers Weekly, 13 March 1992)