# Books and Old Lawyers

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One day, Julian Barnes tells us in the last chapter of his delightful book, *A History of the World in 102 Chapters* [1], our hero dreamt that he woke up. And when he had woken up, a pretty woman in a neat uniform, his companion for some time to come – so it eventually turned out – came in carrying a breakfast tray. It was the perfect breakfast: three rashers of bacon (with the rind cut off) and two perfect eggs on a slice of toast. He enjoyed it so much that he had breakfast for lunch and breakfast for dinner as well and stayed in bed the whole day. He felt really good. The next day, and for months thereafter, things continued to be as good as they get: he had his breakfasts, he went on shopping sprees, he read only good news in the newspapers, he played golf increasingly well, he had sex increasingly often and he met the famous people he had always wanted to meet. And he didn't feel bad once. Eventually he was able to shoot 18 on a 18-hole course (he could do no better), to meet all the famous and not-so-famous people there were to meet, to eat all the rarest and strangest foods, and to do and experience all the things there were to do and experience.

But then he started worrying about all the things that he had been enjoying – he also started worrying because he was worrying. He sought advice on this. By this time he had already realized that he was in Heaven. He was informed that he should stop worrying: Heaven is democratic – people get the sort of Heaven they want. Most people want a continuation of their lives ... just better. It was the New Heaven, and it was different from the Old Heaven. In the Old Heaven people got what they deserved. In the New Heaven people get what they want. The Old Heaveners who were now in the New Heaven began to die off, because that was what they wanted – to die off – and all Heaveners get what they want. He was informed that actually all Heaveners eventually die off, because all, eventually (after a couple of millennia), decide that they have had enough. Those who ask for death earliest, he was told, are those who are most like him: they want an eternity of sex, beer, drugs, fast cars, that sort of thing. They come to realize that they're stuck with being themselves and therefore tend to die off soonest. The lawyers, on the other hand, last quite well and take forever to die off. This is because they love going over their old cases, and then going over everybody else's.

In the story, called *The Dream*, the conversation between out hero and his companion is set out:[2]

> "So. Well, I'm afraid – to answer your question – that the people who ask for death earliest are a bit like you. People who want an eternity of sex, beer, drugs, fast cars – that sort of thing. They can't believe their good luck at first, and then, a few hundred years later, they can't believe their bad luck. That's the sort of people they are, they realize. They're stuck with being themselves. They tend to die off soonest."
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> "I never take drugs," [Our hero] said firmly. [He] was rather miffed. "And I've only got seven cars. That's not very many around here. And I don't even drive them around fast."
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> "No, of course not. I was just thinking in general categories of gratification, you understand."
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> "And who lasts longest?"
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> "Well, some of those Old Heaveners were fairly tenacious customers. Worship kept them going for ages and ages. Nowadays > lawyers last quite well. They love going over their old cases, and then going over everybody else's. That can take for ever. Metaphorically speaking," she added quickly.

The sixteenth century French humanist scholar, Francois Rabelais, published a series of satirical chronicles, of which the third chronicle, *Pantagruel*, is the best known. The chronicles express, in satire and in farce, the scorn humanist scholars felt for the Gothic night of medieval scholasticism. Much of the satire is directed at the medieval jurists. *Pantagruel* contains Rabelais' best known legal satire, the trial of Judge Bridlegoose, who was charged with the most delicious of lawyerly sins in his decision-making, the sin of prevarication, the very sin, that is, that allows Barnes' Heaveners to go over their old cases, and everybody else's, forever. Bridlegoose defends his decision-making processes, where the merits of the case play no part, with a string of learned if inappropriate references to authority from the law-books. Asked to explain his method, Bridlegoose informs his accusers that he always decides a case by means of the throw of dice. The many references to the dice of judgment in the law books, confirms, of course, his obligation to decide cases by the throw of the dice. In accordance with judicial custom, he first views and reviews – but never actually reads – all the complaints, summonses, warrants, interrogatories etc which constitute the case. After thus acquainting himself with the legal documentation provided by the parties, he places the bags of documents provided by the defendant at one end of the table, and the plaintiff's bags at the other end. He then grants the defendant the first throw of the dice – in accordance with the rule of canon law that when the law is obscure, favour the defendant rather than the plaintiff. If there are many bags, it means that the matter is intricate and obscure. This means that he must use small dice, because the law states that in obscure matters, one must always adopt the lesser [ie, the least difficult] view. The fewer the bags, the less involved is the dispute and the bigger the dice that he must use. He gives judgment in favour of the party whom the throw of the dice first favours, in accordance with the well-established legal principle that he who is prior in time shall have the prior exercise of right [*qui prior in tempore potior in iure*]. Why view the mass of legal documents at all, if the throw of the dice determines the result in any event? The reasons, says Bridlegoose, are of course perfectly clear: for the sake of formality, for the sake of useful, healthy exercise, and, thirdly, in order for time to pass.

The third reason is particularly important, because it is well known in law that time ripens all things, brings about clarity and is the father of truth. Therefore, the longer a suit is delayed and protracted by drawn-out debate, examination and disputation, the better opportunity is there for the suit to ripen and mature, so that when the fateful dice is cast, the defeated party may endure his misfortune with

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patience and fortitude. He likens a law-suit to a bear. He then said:[3]

> "A lawsuit, when it is first born, impresses me, as it does you other gentlemen as being something imperfect and unformed. Just as a newborn bear has neither feet nor hands, neither skin, wool, nor head, and is but a piece of rude and formless flesh; it is the mother-bear who, by licking her cub, brings its members to perfection ... And thus, I observe, just as you other gentlemen do, that lawsuits at their birth, in their beginnings, are formless and without members; they have then but a paltry brief or two to stand on, and are an ugly enough beast. But once they have been well heaped, piled, and bagged up, why, then, they are what you might call fleshy and well formed ... Just as you other gentlemen, and likewise the sergeants, bailiffs, sheriffs, shysters, solicitors, trustees, lawyers, investigators, reporters, notaries, clerks, and standing judges ... by strongly and constantly sucking on the purses to the parties to a suit, beget for their cases heads, feet, claws, a beak, teeth, hands, veins, arteries, nerves, muscles and humors – by which, I mean the bags ... In this manner, they render the case perfect, comely and well formed ..."

Rabelais' portrayal of Judge Bridlegoose and his judicial antics is, of course, pure parody and farce, but – like all caricature – contains more than just a kernel of truth. The manner of litigation he holds up to ridicule is what Roscoe Pund characterized as the "sporting theory of justice." In such a conception of litigation the judge is but a referee in a game wherein litigants participate. The judge need not seek independently to discover the truth. Civil litigation of this type has also been described, in lighter vein, as "a game of chance and not a game of skill." The seventeenth century Frisian exponent of the Roman-Dutch law, Ulrich Huber,[4] described the civil process as a debate between two parties conducted in the presence of a judge. There are, he writes, three parties to a civil process: the plaintiff, the defendant and the judge. The subject of their debate is a dispute on the law or on the facts. The one party avers one thing and the other another, and the judge then has to resolve the dispute. A judge therefore has to be an honourable man with good judgment and skilled in the law. By and large, this seventeenth century conception of the civil process is still the current idea.

Civil procedure, like all other aspects of law, reflects the values and doctrines of its time. The medieval process, very like the one described by Rabelais, was characterized by the separation of the judge from the parties. He had to adjudicate according to the documents before him. He did not interrogate or question the parties. He was in a sense isolated from reality. *Quod non est in actis non est in mundo*. A strange mathematical law of evidence dominated: a distinction was made between full and half proof; some persons were excluded from the process, like madmen, the simpleminded, prostitutes, the keepers of brothels, and certain criminals. One witness was insufficient – *unus testis nullus testis* – unless that witness was the Pope himself! Atheists and Jews were not allowed to testify against Christians. In some cases women were forbidden to testify or their evidence carried less weight than that of a man. I could add here that not so long ago in my country women were precluded from being admitted as attorneys. One need look no further for the reason for these phenomena than at the values and conceptions of society. In a civil procedure governed by these rules the criticism of Rabelais is relevant. He refers to a case where the judge had to resolve a matter according to the documents placed before him – so many that four mules were unable to carry them – but then asked an unexpected question. He wanted to know whether the parties to the suit were still alive. When he received a positive answer he cried out:

> "Then what the devil ... is the use of all this mess of papers and briefs which you are handing me? Isn't it better to hear what they have to say from their own mouths than to read through all this monkey business, which is nothing but a lot of lies ... For I am sure that you, and all those through whose hands this case has passed, have so bungled it with your pro's and con's that, even though the dispute was a plain and easy one to judge in the first place, you have by this time rendered it thoroughly obscure with your stupid and unreasonable reasons, and with the foolish opinions of Accursius, Baldus, Bartolus ... and those other pompous old blockheads who never even understood the simple law of the Pandects, and who were never anything but big booby-calves ignorant of everything that is necessary to an understanding of jurisprudence."[5]

This view of the civil process has and is changing. The traditional civil process has been described as the "last refuge of individualism" but consumerism and the recognition of human rights have led to a more diversified approach to it. The South African Constitution allows an association acting on behalf of its members or anyone acting in his own interest; or on behalf of another who cannot act on his own; or as a member of or in the interests of a group or class of persons; or in the public interest to approach a competent court where any of the rights in the bill of rights has been infringed or threatened (section 38). These provisions justify both the public interest as well as a class action within its area of operation. Other sections of the Constitution [sections 172(1)(b) and 167(7)] allow a court to make any order that is "just and equitable" where an "issue involving the interpretation, protection or enforcement of the Constitution" is concerned. The powers of the courts and hence the range of remedies, including those stated in the Constitution, have consequently been enlarged. These new or adapted remedies will be crucial specifically in the development and exposition of socio-economic rights. In particular we may experience the evolvement of remedies directed at obtaining preventative (but not necessarily punitive) damages and expanding the supervisory jurisdiction of the courts. The protection and enforcement of the bill of rights will require the courts to be innovative in the construction of efficient remedies. The South African Law Commission in an instructive working paper addressed the introduction of a class action over the whole spectrum of civil procedure. It is unfortunate that the well-considered proposals have not been taken further. The idea of the civil process as a debate between two parties before an impartial but remote and detached judge is bound to be revised.

However, these developments do not mean that lawyers will no longer discuss their old cases or, when they have done that, those of their colleagues. Of course not. But hopefully, in discussing their old cases, lawyers would realise that by litigating and becoming involved in matters of public concern or involving classes or groups they can be instrumental in effecting major changes to society. We, lawyers, should not be readers only shifting the responsibility for social ills and injustices. I am referring to the titie of an outstanding novel, *The Reader*[6] by a German law professor, Bernhard Schlink, on the life and times of a young German lawyer during and after the Second World War and his relationship with a woman accused of war crimes. She could not read and he read to her novels, journals and other literature. But when during and after her trial the question

whether she could read became relevant and he was the only one who could inform the court, he declined and became detached – he always was – an outsider who never became involved except as a reader. Lawyers should not be readers but actors and participants implementing and initiating social change. If anything, the changes in civil procedure reflect the greater and increasing involvement of lawyers in social issues.

## Endnotes

[1] Julian Barnes *A History of the World in 10½ Chapters* Jonathan Cape Picador (1989).
[2] At page 306.
[3] *The Portable Rabelais* Colonial Press (1946) 5th printing at 501 ff.
[4] *Hedendaagse Rechtsgeleertheyt* (1742) (1939 ed translated by Gane) 4.15.3, 4, 5, 6, 25 ff.
[5] At 281-2.
[6] Phoenix House (1997) translated by Carol Brown. 🕮

## Pro bono initiative

*Continued from page 29*

The obligation ought to extend to every advocate, irrespective of seniority, but excluding juniors of three years standing. This would ensure that those starting out are not subjected to unduly onerous burdens and would simultaneously ensure that clients are represented by advocates with some experience.

- *Second,* each constituent Bar should establish a *pro bono* committee to implement the system. The envisaged committee would assume responsibility for ensuring a fair allocation of work and monitoring compliance with the obligation. The committee would also be the conduit through which requests for *pro bono* assistance would be channelled. The committee would be required to liaise with attorneys and other referral agencies.
- *Third,* the GCB should assume responsibility, at a national level, for publicising the initiative. It is of importance that the Bar be seen to be willing to perform public service (and to actually perform it) and to break the stereotype of a greedy, self-interested profession. The GCB committee would also liaise with other interested institutions at a national level.

The proposals referred to above require the active co-operation of attorneys and other referral agencies such as the LRC and legal aid clinics. I would accordingly suggest that once the *pro bono* committees at Bar and national level are established, co-operation with the law societies and other interested parties be initiated in order to ensure that the system is publicised and that, in the case of litigation, it operates in a way which respects the referral system. It is also important that there be co-ordination with the LRC and legal aid clinics if the obligation to perform *pro bono* work can be implemented by making advocates available to furnish advice to the clients of such institutions.

Finally, the GCB committee should liaise with statutory bodies such as the Human Rights Commission, the Commission for Gender Equality and the Public Protector in order to assist with legal representation and the like, flowing from the work of these bodies.

*The AGM noted the report and resolved that all Bars should consider ways to implement a pro bono initiative and report back to Exco.* 🕮