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# The Death of Justice

*How the once-healthy South African bar had its life-blood drained away*

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E. GOODMAN

THE BAR OF A NATION—its lawyers and judges—is the living vessel through which its system of justice flows. Few Bars of the world have developed such a tradition of independence as will enable them to maintain their loyalty to principles of justice in the face of a government committed to a course of repression and persecution. Of course, no Bar can for long oppose itself to absolute state power. But many Bars have resisted, while the people changed their government or its policies.

The Bar of South Africa had established, over a period of many years, an honourable tradition among the nations of the world, of independence and legal integrity. Based upon an amalgam of Roman, Dutch and British law, its administration of criminal law developed in the accusatorial Anglo-Saxon tradition. It also retained the British type division of the Bar into attorneys and advocates.

By custom and convention, judges were appointed from among the most highly trained and qualified advocates, and their impartiality and good faith was generally accepted and rarely impugned.

Due process of law, within the limited context of a society based on racial distinctions, was vigorously defended and uniformly upheld in the courts. The right of trial by jury in serious criminal cases remained intact. The Writ of Habeas Corpus was available to everyone. Excesses of the police were circumscribed by rules such as that which prohibited the use of a confession unless made before a Magistrate, after warning.

THIS WAS THE TRADITION of the South African Bar when the Nationalist government was elected in 1948 and began to consolidate its power around its racial programme of apartheid.

The first important clash between the judiciary and the government's political drive toward apartheid, occurred when the government passed the Separate Representation of Voters Act in 1951, which removed the Cape Coloured voters from the common voting roll. In 1952, the Appellate Division of the Supreme Court declared the Act invalid.

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Bitter attacks on the court in Parliament followed, and the government succeeded in obtaining passage of the High Court of Parliament Act by which it overruled the decision of the Appellate Court. A few months later, the Appellate Division declared this Act illegal. Whereupon the government adopted the Senate Act, which enlarged the upper house sufficiently to permit it to amend at will the fundamental law—the Act of Union—by the necessary two-thirds majority and thus insured the future constitutional legality of its apartheid programme.

The government retaliated against the judiciary by passing the Appellate Division Quorum Act, which provided that appeals challenging the validity of an Act of Parliament be heard by the full bench. It then proceeded to appoint five additional judges to the six-judge Appellate Court to insure a favourable future judicial forum for government policies. And during the following years, judges were appointed and promoted on the basis of their political background, rather than solely on the basis of their ability, experience and seniority, as had been the uniform practice. At this point it would seem that the

## The Isolation of "Boeta L"

Atteridgeville in 1964

THAT SINGLE LONG STRETCH of road from Pretoria West; and then; the sharp left turn. Another brief blind view of gently rolling hills; and then; the first lonely, shattered, deserted outpost—the "Watchboys" office. From that point, hidden in a valley one can see the myriad doll-like houses of the township, Atteridgeville.

Possibly nothing can adequately describe the complete isolation of a community like Atteridgeville. To the eye of the stranger it is an island in itself and its people live and move with the close fellowship of an island community. One thought, one action can occur to many people at the same time. For instance, it is now a prevalent trend for mothers to "fix" the hair of girl children from about the ages of five upwards with a harsh chemical called "cold-straight". This fad may soon cease, however, as many children now have large bald patches on their heads. The chemical destroys the hair cells.

BESSIE HEAD

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government could reasonably have expected that the judges and the lawyers would have become compliant to its racial policies.

The big test came in 1956, when 156 persons were arrested on charges of high treason. The defendants included the outstanding leaders of the principal African organisations seeking political equality. A brilliant team of defence counsel raised repeated objections to the form and scope of the indictments, and were sustained on appeal. Finally, in 1959, the Crown proceeded to trial against 30 of the defendants before a specially appointed three judge court. The trial lasted until March 1961, when the court unanimously acquitted all defendants on the factual finding that while the evidence showed that the organisations involved had sought to replace the existing form of state with one based upon the principles of the Freedom Charter, the defendants were not shown to have advocated change by violent means.

THE VERDICT WAS HAILED by the South African bar as a vindication of the independence of the judiciary against

government intimidation and efforts to corrupt and subvert it.

During the following two years, advocates continued to fight in the courts for due process, against the growing body of apartheid laws under which a thousand arrests a day were not uncommon. Though inadequate to stem the enveloping police state, their efforts revealed, for all to see, the illegal and inhuman police procedures.

The illegality of much of the police repression is disclosed in figures published recently by the Defence and Aid Fund of Cape Town for a six-month period in those few cases where it was able to provide legal aid. Of 83 persons arrested and charged with offences ranging from Public Violence to Incitement, advocates retained by the Fund obtained acquittals in 78 cases. The government was able to convict only 5—less than 10% of those accused.

The government began to crack down on the Bar. More and more lawyers were served with "banning" orders by Minister of Justice Vorster under Section 10 of the Suppression of Communism Act of 1950. The following is typical of such a "ban."

ANOTHER TREND is for young girls to have babies outside marriage. In fact it is most difficult for the young to marry as most parents look upon their daughter's lovers as "criminals". The term "criminal" may apply to anyone who won't work because he does not care to wake at four or five in the morning and journey some eight to thirty six miles to a place of employment. If you have a job in Silverton you have to wake up at five as there is one early train at five forty five. The next train is many hours later. In winter, when it is dark in the early morning you lose your job because you are late for work. People are condemned to a far-flung area with hazardous transport. In this area there is no scope for business enterprise. The Municipality owns this and the Municipality owns that. So, the young girls accept their illegitimate babies and the unemployed young men become increasingly violent and restless in their frustration. People have learnt to live with frequent and brutal murders. No one moves a step to assist a voice crying for help in a dark street. It is incredible -- this daily battle against fear, sudden violence and extreme poverty.

Politically, Atteridgeville strikes an outsider as rather cowardly.

People say: "Let the people of Lady Selborne do the fighting but please leave us alone. Lady Selborne is a powder keg but we are just big luggage. You can't move us."

Then they laugh indulgently and add: "You see what happened to the bus boycott? We did not want to walk. Everybody in Lady Selborne walked. Then the Government withdrew the buses in Atteridgeville so that it could give us a train service."

Transport is awful. Most trains run hourly and are extremely congested. People working in Pretoria go in by taxi which costs them thirty cents a return trip. From a wage of R8 per week, very little is left over for household needs.

There was once a fierce political individualist in Atteridgeville called "Boeta L". He has now been converted to religion. Some people say he was converted to religion because he was sad and despairing that no one would support his cause. But, the people argue that "Boeta L." was only acting for "his own sweet self." For instance, he never informed anyone that he was going to rush up to Dag Hammerskiold that day with a Bible and say: "Take back your Bible, White Man. This is an eye blind. You tell us to

go to church while you are in the battle-field!"

Afterwards everyone admonished him: "Boeta, you must not do such things. They will put you in jail. Besides, Dag Hammerskjold did not invent the Bible."

THIS IS SO TYPICAL of the tough, cynical humour of the people of Atteridgeville. They like to say that they are very good at following funerals but not so good at following politicians.

It is difficult to get a clear account of the shattered "Watchboys" office at the entrance to the Township. It might be Atteridgeville's one political action. A few years ago there used to be a "Watchboy" and several police stationed at the office. All visitors or strange cars used to be stopped and a policeman would then climb into the car and accompany the occupants to wherever they wished to go. One night, the "Watchboy" went out on a spree and the office was smashed good and thoroughly. Soon after, all "Watchboys" and police were removed. The authorities said it was expensive to maintain. To-day, the "Watchboys'" office is a curious and deserted outpost that cannot help but give one a twitch of amusement as one passes by.

"From this date and expiring on February, 1968, I hereby prohibit you from:

1. Absenting yourself from the magisterial districts of (local areas are here listed).
2. Being within:
  - (a) Any area set apart under any law for the occupation of Coloured or Asiatic persons.
  - (b) Any location, native hostel or native village as defined in the Natives Consolidation Act.
  - (c) Any place or area which constitutes the premises on which any public or private university, university college, college, school or other educational institution is situate.
  - (d) The premises of any factory as defined in the Factories, Machinery and Building Work Act.
  - (e) Any place which constitutes the premises on which any publications as defined in Section One of the said Suppression of Communism Act is prepared, compiled, printed or published.
  - (f) Any place which constitutes the premises of any organization contemplated in the Government Notice No. R2130.
3. Communicating with any person whose name appears on any list in the custody of the officer referred to in Section Eight of the said Suppression of Communism Act.
4. Performing any of the following acts, that is to say—
  - (a) Contributing, preparing or compiling in manner whatsoever any matter for publication in any publication as so defined.
  - (b) Giving any educational instruction in any manner or form to any person."

The personal indignity and the professional obstacles faced by "banned" lawyers, is revealed in the following excerpts from a letter I recently received.

"You write that 'lawyers are no special class when persecution strikes'. Unfortunately in South Africa that statement is not quite accurate. Not that lawyers receive any immunity. On the contrary, Minister of Justice Vorster has since his assumption of office singled out lawyers for special attack. Since the law weighs so heavily on the African people, the whole apartheid regime being 'legalised' by an unending stream of legislation, Africans have tended to look towards their lawyers for help to a degree probably without parallel in any other country.

The lawyer here has come to occupy the position in relation to African society that the doctor or priest might occupy elsewhere. Not that the lawyers have been able to accomplish anything radical. At best the lawyers have been able to defend certain individuals from attack, to reduce the scope of restrictive legislation around the edges, to expose really gross incidents of arbitrariness and inhumanity, and to encourage the giant mass of statutes to trip over its own feet of contradictoriness and inhumanity. The lawyer has accordingly had considerable nuisance value in relation to authority—he is always getting in the way, advising clients against self-incrimination, pressing for bail, harassing policemen in the witness box (in the presence of non-whites) and generally boosting the morale of prisoners, political and otherwise.

For a number of years now, prominent government leaders have threatened legislation to deal with 'troublesome' lawyers. A draft bill was published last year incorporating provisions which would enable the Minister of Justice to disbar advocates at will, without recourse to the Courts. The Bill raised considerable protest from the profession and sections of the public, so it was shelved for a year and its main effect achieved by indirect means. In terms of the recently passed General Laws Amendment Act of 1963 political suspects may be detained incommunicado for spells of up to 90-days in solitary confinement. At this moment nearly 20 people are being so held, and the numbers can be expected to increase rapidly. (In the Transkei literally thousands have been detained from time to time under a similar provision in the past two years). Thus suspects are cut off from their lawyers. Lawyers are also cut off from would-be clients. This is where the bannings come in.

Quite a few lawyers have in the past year been subjected to restrictions by Ministerial decree—without any prior charge, or the right to make representations, or any form of trial or subsequent redress. One must give the Minister his due, though—despite of pro-Nazi background (he was detained during the war for alleged pro-Nazi fifth column activities) he dishes out his banning orders on an entirely non-racial basis. Lawyers of all hues and quite a variety of political beliefs (none, of course, pro-apartheid though) have been restricted.

They are confined to certain areas and prohibited from communicating with a long list of people including nearly all the well known anti-apartheid activists whom they accordingly may no longer defend. The indirect consequences in their practices are also quite considerable. They must feel sometimes as though they were radioactive. Attorneys find it preferable to brief other counsel. Judges, magistrates, prosecutors, warders and even district surgeons regard one rather more warily, and so on. All changes of residence or places of work have to be notified to the police, and about half of the con-fraternity have to report regularly, either weekly or daily to the police. The casualties in the profession have been quite high.

Amongst recent bannees—Richard Canca (attorney, Idutywa in the Transkei); Royley Arenstein (Durban); Joe Slovo (barrister, Johannesburg); Ben Kies, (a beloved man at the Cape Bar); Albie Sachs (barrister at the Cape Bar and long-time thorn in the side of the Nationalists); H. J. Bhengu (Durban), L. Mtshizana (East London). Also previously banned is Braam Fischer, Q.C., one time leader of the Johannesburg Bar, largest in the

## What on Earth could Hooter say?

LIONEL FORMAN

"I MOVE, Sir, an amendment", said the delegate from Afghanistan, "which will place defined restrictions on fishing for fossil fish of Madagascar."

It was a surprise amendment, and at once the atmosphere in the hall became tense. For several minutes distinguished minds considered pros and cons.

"Wonder how Hooter will react to that?" Turkey whispered to Peru.

"Wonder how Bongovitch will react to that?" Poland whispered to Czechoslovakia.

They were not to be kept in suspense for long.

The Big Two finished their meditation simultaneously and jumped up as one delegate.

The Chairman sighed. "Eenie meenie minie mo," he muttered in Iranian, working it out on his fingers. "Thanks be—it always comes out in favour of the Americans." He called Mr. Hooter.

Mr. Hooter took his place at the rostrum, glowered for a hostile moment at the delegate from Afghanistan and turned to address his remarks to Mr. Bongovitch.

He stressed that he had every respect for the good

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*The tragically early death of Lionel Forman, a former Communist student leader, Treason Trialist, rising advocate and writer, took place in 1959. This posthumous fragment is published by kind permission of his widow, Mrs Sadie Forman.*

country, son of a Judge and from a distinguished Afrikaner family. A number of Indians in Natal have been banned. I think they include the following: M. D. Naidoo and Hassan Mall, at the Bar; M. T. Naicker, L. N. Singh, Ismail Meer at the Side Bar."

Despite "bans" and continuous persecution, lawyers continued to defend the rights—limited though they be—of the African people. And the courts upheld them where possible.

Finally, the government apparently concluded that it could not control, buy or crush the South African system of justice. It decided to circumvent it. On 2 May 1963, the government adopted the General Law Amendment Act. Section 17 empowered the police to arrest:

"without warrant . . . any person . . . who in his opinion is in possession of any information relating to the commission of any such offence (under the Suppression of Communism Act or the Unlawful Organisations Act or sabotage) or the intention to commit any such offence, and detain such person . . . in custody for interrogation . . . at any place he may think fit, until such person has, in the opinion of the Commissioner of the South African Police, replied satisfactorily to all questions . . ."

faith of the delegate from Afghanistan in moving his amendment, but it was one of the inalienable rights of peoples to be able to fish in any waters at any time. In the Afghanistan amendment, Mr. Hooter said, he very much feared that Moscow pressure had played an important part. He recognised the cunning game of sewing dissension between the free peoples on the vital question of fossil fish.

"The amendment must be defeated," he concluded. "The people of the free world can never accept restrictions on the freedom of fossil fishing, fossil fishing,—can never accept restrictions. Never!"

Hardly had Mr. Hooter finished this denunciation when Mr. Bongovitch was at the microphone. He smiled for a friendly moment at the delegate from Afghanistan and turned to address his remarks to Mr. Hooter. He regretted that though he had clearly indicated his desire to speak first, the delegates had been subjected before him to a torrent of lies and abuse. Everybody knew that the so-called fishing for fossil fish was no more than a Washington inspired pretext for establishing aggressive bases in the Indian Ocean. Fishing for fossil fish had nothing to do with the matter at all. His country was able and willing to supply the whole world with adequate quantities of the best quality fossil fish on ordinary trade terms.

In an inspired image which has come to be immortalised in text-books on diplomacy he warned "Behind the fossil fisheries stands Wall Street." and concluded "There is an apt Russian proverb of which Mr. Hooter may be unaware --Don't fish in troubled waters."

The distinguished delegates were greatly excited by this clash of opinion, and there was general regret at the fact that the press was not present to chronicle it all. An adjournment was called for and agreed to unanimously.

No person may be "detained" for more than 90 days for any one questioning, but on release may be immediately redetained for further questioning *ad infinitum*. The detainee is not allowed any visitor except that a magistrate is required to visit him in private once a week. And the courts have no right to question into the grounds or validity of the detention—by habeas corpus or otherwise. More and more political dissidents are being arrested under this section. Over 500 persons were known to have been "detained" and they continue to be arrested.

Recently, the Minister of Justice has begun to "detain" lawyers who have been most active in accepting the defence of victims of apartheid laws. The first of the lawyers now languishes in solitary confinement, without charge, without hearing, without trial. Thus far, no member of the judiciary has been arrested.

The system of justice in South Africa has ceased to exist as an effective force in the enforcement of legal rights for persons opposing apartheid. To its credit, it can be said that the South African Bar refused to be corrupted and to accept the role of lackey. It forced the government to disclose its inability to rule by law. But, its lifeblood has been drained. As an instrument of justice against repression, it is all but dead. ●

"TRANSMIT a telegram", said the secretary of Mr. Bongovitch. "To the capital. Full text of Afghanistan Amendment. Am supporting enthusiastically. Alexei."

"Cable this off", said Mr. Hooter's stenographer. "To the boss. Afghanistan Amendment in full. Firmly opposed. Hugh."

"WOULDN'T it be a lark to reverse these?" said the telegraphist who hardly ever had any fun.

"Ooh, you wouldn't", squeaked the girl behind the counter. So he did.

"EXCELLENT" said the Commissar for Fossil Fisheries. "To take a telegram please. Very pleased. Continue opposition Afghanistan provocation. Fossilfishcom."

"The boy's doing swell" said the Director of the Fossil Fish Administrative Network, New York. "Wire him, Attaboy. Back Afghans to hilt. F-Fanny."

THERE WAS A LONG LIST of speakers next morning and the debate was taking its course. Mr. Parkinson-Noodle expressed the doubts of Her Majesty's Government in the wisdom of going all the way in lifting controls on fossil fishing but taking all things into account, he must support the views of the United States delegate.

India's Doctor Hogansputta Rawat pleaded for a solution satisfactory to all. Fossil fishing should be unrestricted during the months whose letters began or ended with vowels, restricted during the months ending in Y, with a commission of neutral nations to decide on what should happen during the other four months. "The countries of Asia are restive at being overlooked. Because for untold centuries of oppression we have been denied our rightful place in the fossil fishing seas, this does not mean . . ." he was saying, when there was a loud interruption