In the changed circumstances, Bishop Tutu arrived to give his scheduled speech right in the middle of the most controversial debate of the whole Synod. He rose splendidly to the occasion, urged delegates to "begin to act like God's children" and to realize that they belonged to one family. His speech, and the Archbishop's sermon at the Eucharist next morning, gave God His breakthrough, and in an amazing show of unity, the resumed Synod, with hardly any further debate, passed almost unanimously a motion which, while avoiding giving approval to the W.C.C., nevertheless declared that we shared with them in their aim for a nonracial, just society in South Africa, and recognized that guerilla, S.A. soldier and conscientious objector might each be trying, in the best way that he knew, to serve God obediently.

And so Synod ended – and it ended, as it began, with a focus on Fr Russell. At the final Eucharist, the Archbishop invited any who wished to come forward and share with him in prayer and the laying on of hands over David Russell as he returned to Cape Town to face the consequences of his attendance at Synod.

In His own way, God had showed that He was still Father, and Jesus Christ the Lord. □

THE IMPULSE TO PUNISH: SOME RECENT CASES

By J.G. Riekert

'Mistrust all in whom the impulse to punish is strong!
They are people of a bad breed and a bad descent . . . . .
Mistrust all those who talk much about their justice!
Truly, it is not only honey that their souls lack.'

–Nietzsche, Thus Spoke Zarathustra : Of the Tarantulas

State-sanctioned punishment of criminal offenders would seem to have at least five purposes, namely retribution, individual deterrence, general deterrence, the protection of society (prevention) and rehabilitation.[1] Two of these objectives, retribution and rehabilitation are potentially antithetical, and much of the controversy among penologists centres around the proper weight to be given to each in the sentencing process.

In Western societies there has been a clearly discernible trend away from retributive punishment and toward rehabilitative considerations. It would be mistaken, however, to maintain that retribution can be totally disregarded. Some penologists and many members of society insist on the retention of a vestigial Lex Talionis. South Africa has not been spared this controversy.
In a fairly recent case the court opined that:
'. . . . . both counsel for the applicants are losing sight of a fundamental fact – that rehabilitation is not the only issue. It has long been debated whether prisons protect society most effectively by being operated primarily for custody and punishment or for custody and rehabilitation. The two theories, the punitive versus the rehabilitative theory, run counter to each other and both are recognised in general terms in the legislation with which we are concerned (the Prisons Act and Regulations.'[2]

The official attitudes of both the courts, which impose sentences of imprisonment, and the Department of Prisons, which executes them, can be gleaned from official written sources like the reports of criminal trials and the Annual Reports are also a source of another type of information. On rare occasions, usually at the instance of a prisoner, the courts are called upon to review the actions of prison officials who must act within the framework of the Prisons Act and Regulations.

If one only looks at the former sources one gains the impression that the South African judges and the South African prison authorities are, generally speaking, and within the distorted parameters of the apartheid system, in touch with current trends. Particularly since the introduction of the 1977 Criminal Procedure Act, there seems to have been a concerted effort to make punishment fit not only the crime, but also the criminal.

However, if one looks at the latter sources, one soon discovers that there is a special class of prisoner who, principally because of statutory intervention, but also because of judicial

interpretation of those statutes, has become marooned on an island in the mainstream of penal reform. He is the 'political' prisoner, convicted of a contravention of one of South Africa's rigorous security laws.
It has been generally known for some time that political prisoners are not allowed the usual remission of sentence for good behaviour. One has also heard of instances in which they have been callously treated when applying for special concessions on compassionate grounds. There was, for example, the instance of Jeremy Cronin, one of the applicants in the Goldberg case discussed below.

'In March relatives of Jeremy Cronin, who was jailed for seven years in September 1976 in terms of the Terrorism Act, applied for permission for him to visit his wife who was dying of a brain tumour. Mrs Cronin died before permission was granted. Subsequently, a prisons department spokesman said that the application was delayed because it did not seem to require immediate attention. Mr Cronin was also refused permission to attend his wife's cremation.'[3]

Breyten Breytenbach too was refused permission to attend his mother's funeral. Alexander Moumbaris, David Rabkin and Denis Goldberg have all not been permitted to receive visits from their wives. Denis Goldberg last saw his wife in 1966.[4]

In March 1977 ten Robben Island prisoners asked the Cape Supreme Court to order the Commissioner of Prisons to allow them access to lawyers in connection with proposed litigation arising out of alleged assaults on them by prison personnel. The court found that the Commissioner of Prisons had not exercised his discretion properly and ordered him to exercise it afresh.[5] The Minister of Prisons appealed unsuccessfully against this order. The appeal court held that a prisoner who was, or was about to become a party to, or witness in litigious proceedings was entitled, as of right, to receive a visit from his lawyer. In other cases the matter remained within the Commissioner's discretion.[6]
However the most serious deprivation affecting political prisoners relates to their ability to study and obtain access to reading material while in prison. One of the early cases on the right to education is Hassim and Another v Officer Commanding, Prison Command, Robben Island and Another 1973 (3) SA 462 (C).

Kader Hassim was an attorney in Pietermaritzburg until his arrest on charges under the Terrorism Act. He was convicted by the Judge President of Natal, sitting with assessors, on three counts of participation in terrorist activities. An appeal failed and the effective sentence of eight years imprisonment was confirmed. He was then transported to Robben Island. According to affidavits before the court:

During September, 1972, a certain Head Warden Carstens was placed in charge of the cell block. The said Carstens almost immediately set about making life very difficult and unpleasant for the prisoners. There were numerous incidents where Head Warden Carstens made summary changes in routine which invariably adversely affected the prisoners. Requests to Head Warden Carstens to be more reasonable were met with abuse and threats of punishment. By way of example, the literacy classes were summarily stopped, the blackboard removed and the opportunity for recreational and washing activities curtailed. Exercise time was limited. On occasions, prisoners were summarily and arbitrarily deprived of up to three meals per day. Head Warden Carstens gave orders in Afrikaans and frequently refused to speak English despite prisoners' protestations that they had difficulty in understanding him. Matters were aggravated by the fact that another warder, Head Warder Jonker, adopted a similar excessively authoritarian attitude to prisoners and together with Head Warder Carstens frequently swore at, belittled and abused prisoners.'

Complaints were made but as this brought about no improvement the prisoners resolved on concerted action; they decided to record all their grievances in a document to be handed to first respondent. As second applicant was an attorney proficient in the English language he was asked to compile this document. This he proceeded to do and the document was handed to first respondent by a fellow prisoner, one Lingise. Hassim denied that he had handed over the document or that the manner in which it was handed over was either challenging or impertinent. Some days later he was questioned by the officer in charge of security when he admitted that he had drafted the document on behalf of all the prisoners.

'On or about 2nd November, 1972, Lieutenant van der Westhuizen, with Head Warder le Roux acting as his interpreter, spoke to all the prisoners in our cell block. He stated that because we had addressed the document mentioned above to first respondent without asking for prior permission and since we had all acted in concert, the smoking, sports, recreation, study, reading, visits and correspondence privileges which we had previously enjoyed would be forfeited retrospectively with effect from 1st November 1972, and the forfeiture would continue for an indefinite period. He said that all fifty prisoners in the cell block would be thus affected and that the only privileges to which we would henceforth be entitled were a visit for special reasons and one letter written and received per month.'

The next incident took place a few days later and since it led to Hassim's segregation it is necessary to give his version of what happened.

'14. On Monday, 6th November, 1972, Warder Swart came to our cell block and ordered all the prisoners to hand over their library books. He asked me to collect books from the prisoners but I pointed out to him that I could not do so because I did not consider the deprivation of this privilege as lawful. I was immediately called before the said Lieutenant van der Westhuizen who enquired from me why I had disobeyed the command, in regard to library books, given me by Warder Swart and I respectfully pointed out to him that the command was unlawful in that it was in pursuance of an unlawful deprivation of privileges. Lieutenant van der Westhuizen adopted a menacing and threatening attitude towards me and told me that I would be severely punished.

15. The same day I was taken to a section of the prison where there were a number of single cells. I was locked in one of these cells which measured 7ft x 8ft. Since that date, viz 6th November 1972, I have remained segregated from my fellow prisoners in isolation in that cell and I have not been allowed to work either alone or with my fellow prisoners, until 14th February 1973, when I was told that, upon application, I would be allowed to work alone.

16. On Saturday, 11th November 1972, I enquired from Chief Warder Mann the reasons for my segregation and isolation and he replied that this was my punishment because of my refusal to obey the 'lawful command' given me by Warder Swart in regard to the library books and as is mentioned in the preceding paragraph. I was however allowed to write a letter to first respondent in which I protested that it was unlawful to deprive me of my privileges and to place me in isolation.'

Hassim stated that in reply to his letter he was called before first respondent and Brigadier Aucamp; the latter informed him that he would "get about six months isolation", as punishment for his rôle in compiling the document. His request to consult his legal advisers was refused."[7]

According to replying affidavits filed by the Respondents, these steps were necessary as Hassim's presence in the prison and his insubordinate attitudes were adversely affecting discipline.[8]

The court considered at the same time an application by another prisoner who alleged that he had been refused permission to study for an LL.B degree.[9] It was, he said, the policy of the prison authorities that security trial prisoners should be denied the right of studying law, although at that stage it was still possible to study in other fields. He also alleged that he was being denied access to the prison library. What follows is a series of extracts from the official report of the two applications:

"The next enquiry relates to the opportunities for study. The applicant, Hassim, complains that whereas he was previously allowed to read both fiction and non-fiction the only reading matter which he is now allowed is the Bible and the record of his appeal case. He states further that he was permitted to study for a B. Com. degree. He is no longer allowed to study. And finally he avers that two books ('The Annual Survey of S.A. Law' for 1970 and 1971) were dispatched to him by a bookseller but are being withheld.

The applicant, Venkatrathnam, complains that he wished to study for an LL.B. degree but that he was not allowed to do so. He was given permission to study for a B.Com. degree but all permission to study has now been withdrawn. He too, is no longer allowed to read novels or other books.

Mr Dison argued that the prisoners had the right to study, the right to use the prison library and the right to receive books and periodicals emanating from outside sources and that these were rights which were actionable. This submission he based on the general policy and purpose of the Prisons Act, more particularly sec. 2(2) (b) of the Act which provides that:

'(2) The functions of the Prisons Department shall be —
(b) as far as practicable, to apply such treatment as may lead to their reformation and rehabilitation and to train them in habits of industry and labour;'

He referred also to regs. 98 and 117, the relevant portions of which read as follows:

'98 (1) The regulations in this sub-division shall with due regard to the differences in individual characteristics and the reactions to treatment and discipline on the part of the various types of prisoners, be applied in accordance with the following principles:
(c) The aim in treating the prisoner shall at all times be to promote his self-respect and to cultivate a sense of responsibility in him.'

and

'117 (2) Subject to appropriate security measures and the avoidance of familiarity, and in order to promote the aims set out in sub-reg. (1) the undermentioned principles shall be strictly observed and applied in the treatment and training of a sentenced prisoner:
(d) regular encouragement to pursue a course of studies within the limits of the aptitude and leanings of the prisoner.'

Mr Hunt, for the applicant Venkatrathnam, based much of his argument on reg. 109(1) which reads:

'A prisoner shall, with due regard to the period of his sentence and personal aptitude, at all times be encouraged to pursue an appropriate course of study in his free time.'

He contended that Venkatrathnam was a man with a B.A. degree who had been an articled clerk; he had a personal aptitude for law and working for an LL.B. degree would be an appropriate course of study. Respondents had closed their minds to these factors and fettered their discretion . . . .[10]

It is true that the reasons which they have advanced for their decision in these two cases are most unconvincing. I cannot think that there is any merit in allowing a prisoner to work for a first degree and refusing him leave to work for a second degree, and I think the Commissioner is most unwise to say that he will not allow a man to study for an LL.B. degree because he will not in due course he admitted to the Bar or the Side Bar. That is a decision which the Commissioner can, with confidence, leave in the hands of the Supreme Court when, and if, the applicant applies for admission. I must also point out that Venkatrathnam annexes to his replying affidavit a document (annexure "XX") which is a copy of a memorandum handed to all prisoners who desire to study. Para. 4 of this memorandum reads as follows:

'4. (a) No post-graduate studies will be allowed.
(b) No studies in law, i.e. B.A. LL.B., B. Juris or any other course pertaining to any legal aspect will be allowed.'

I find the Department's aversion to legal studies quite extraordinary; it is to be hoped that a more enlightened approach will soon be adopted. But although I find some of the reasons advanced by respondents for their decisions most unsatisfactory it does not follow that the Court can interfere with those decisions . . . . ."[11]

So far as the prison library is concerned, *I accept that being deprived of books is for an intellectual a hardship, but it is also a hardship for some persons to go without cigarettes.* In short this is a case, once more, of a privilege withheld and not a right transgressed. Nor can I make any order in respect of the two law books which have been withheld. It is clear that first applicant followed the wrong procedure in dispatching these books to her husband and respondents were entitled to withhold these books"[12] (emphasis supplied)

Hassim succeeded only in obtaining his release from solitary confinement and in obtaining access to the Prisons Act & Regulations. His co-applicant obtained the Act and Regulations. In the years that elapsed between Hassim's case and the Goldberg case, decided in September 1978, the grounds for punishment by solitary confinement were widened and political prisoners lost the right to postmatriculation study completely. It was alleged that some such prisoners had abused this "privilege" by using study materials to smuggle messages out of prison. On 17 May 1978 Minister of Prisons told the House of Assembly that "Robben Island Prisoners were not susceptible to rehabilitation which was the intention behind granting study privileges."[13]

The next case is Goldberg and Others v Minister of Prisons 1979 (1) SA 14 (AD). In this case, the Applicants (D. Goldberg, I. Kitson, J. Mathews, A. Moumbaris, R. Suttner, D. Rabkin, J. Cronin and A. Holiday) were all security law prisoners in a special section of the Pretoria prison. The facts of the case have been pithily summarised by Professor Barend van Niekerk:

'In very broad summary the most salient facts were as follows: The appellants — a number of persons serving various long prison sentences for crimes committed for what

they termed "political" reasons – had applied unsuccessfully to the court below for relief against the provisions made applicable to them whereby they were totally deprived of all news about current affairs at home and abroad. This they claimed inter alia constituted "cruel, inhuman and unnecessarily harsh punishment and double deprivation" unauthorised by the enabling statute . . . The total prohibition included Panorama and S A Digest (both propaganda publications of the erstwhile information departments), S A Financial Gazette, To the Point, Newsweek and New Nation! (In the case of New Nation one wonders whether the fact that this publication has been discontinued for about a lustrum now has not yet penetrated behind the prison walls!)

Now it should be clear, I confidently submit, that on any analysis which has any relationship with common sense as commonly understood by averagely intelligent persons, the banning of these journals per se – not to speak even of some of the more "mystifying" examples of excisions from such exciting journals like Rooi Rose, the Farmers' Weekly and the Landbou-weekblad furnished at 46 – can only be squared with a guideline which is in fact no guideline at all, namely that no current news will be allowed to reach the political prisoners.[14]

A majority of four Appellate Division judges held that, ". . . . in general a prisoner is only entitled to enjoy such privileges as are permitted; he is not entitled to all the facilities enjoyed by persons outside of prison except those which are in terms permitted either by the Act, the regulations or by the Commissioner . . . . ".[15]
The majority also found that it was unnecessary:

'to deal with the distinction between necessaries or basic rights, on the one hand, and privileges or comforts, on the other hand. . . Such basic rights or necessaties as, e.g. food, clothing, accommodation and medical aid, are dealt with in the regulations. The fact that these regulations deal with facilities generally regarded as basic to the maintenance of a reasonably civilised minimum standard of living may no doubt be relevant to the question whether it was intended to confer rights of the kind referred to above. *In my opinion, access to the publications mentioned in reg. 109(4) and to sources of news of current events cannot be regarded as being basic to maintaining the minimum standard of living above referred to. . . . . .*

The appellants, however, appear to be sophisticated persons and some of them are academically well qualified. I accept that a denial to them of having access to sources of news of current events in the Republic and abroad and to reading matter of their choice must of necessity result in severe hardship. They are all long term prisoners and any prolonged isolation from news of current events must, so it would seem to me, necessarily result in frustration and possibly in some degree of disorientation eventually.[16] (Emphasis Supplied)

In my opinion . . . appellants are not entitled to an order declaring that respondents are not entitled to apply a general policy depriving them of access to news of current events in the Republic and abroad. The fact that this Court may, on the information placed before it, entertain grave doubts as to the wisdom or reasonableness of the determination made by the Commissioner in regard to the appellants' access to news, other than that of a domestic and sport nature, is not relevant to the determination of the issue under consideration. At best, it is a factor which the Commissioner may possibly take into account if and when his earlier determination comes to be reconsidered.'[17] (emphasis supplied)

Mr Justice Corbett could not accept these views and advanced a contrary opinion in his dissenting judgment. He held that:

'It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed. Of course, the inroads which incarceration necessarily make upon a prisoner's personal rights and liberties (for sake of brevity I shall henceforth speak merely of "rights") are very considerable. He no longer has freedom of movement and has no choice in the place of his imprisonment. His contact with the outside world is limited and regulated. He must submit to the discipline of prison life and to the rules and regulations which prescribe how he must conduct himself and how he is to be treated while in prison. Nevertheless, there is a substantial residuum of basic rights which he cannot be denied; and, if he is denied them, then he is entitled, in my view, to legal redress.'[18]

The significance of this dissenting judgment is that it was reached on the same facts. It could have been a majority or even a unanimous decision of the Appellate Division. It shows that the hands of our judges are not always tied, except by their own perception of their rôle, when it comes to questions of human rights.[19] It also underlines the extent of our deviation from internationally accepted norms.

The Universal Declaration of Human Rights provides simply that "everyone has the right to education", and this utopian ideal has been embodied in Bills of Rights in the United States, in many European countries and also in the International Standard Minimum Prison Regulations. By contrast it would seem that our political prisoners are so hated by those who govern our society that they are doomed to become non-persons in the grey twilight of our prisons.[20]
Winston Churchill once said:

'The mood and temper of the public in regard to the treatment of crime and criminal is one of the most unfailing tests of the civilisation of any country. A calm, dispassionate recognition of the rights of the accused, and even of the convicted criminal, against the State – a constant heart searching by all charged with the duty of punishment – . . . , unfailing faith that there is a treasure, if you can only find it, in the heart of every man. These are the symbols which mark and measure the stored-up strength of a nation, and are a sign and proof of the living virtue in it.'[21]

Judge for yourself, if you will, the strength and virtue of our nation. □

FOOTNOTES

1. For a concise discussion of the objectives of punishment see M.A. Rabie and S.A. Strauss, Punishment: an introduction to principles, Lex Patria (1979).
2. Hassim v Officer Commanding, Prison Command, Robben Island and Another 1973 (3) SA 462 (C) at 475, per Diemont J.
3. A Survey of Race Relations in South Africa 1977, S A Institute of Race Relations (1978) p 121.
4. A Survey of Race Relations in South Africa 1978, SA Institute of Race Relations (1979) p 84.
5. Cooper and Others v Minister of Prisons 1977 (4) SA 166 (C)
6. Minister of Prisons v Cooper & Others 1978 (3) SA 512 (C).
7. At pp 466–7.
8. At p 468F.
9. Venkatrathnam and Another v Officer Commanding, Prison Command, Robben Island & Another 1973 (3) SA 462 (C).
10. Ibid at pp 475–6.
11. Ibid at p 477.
12. Ibid p 477H.
13. A Survey of Race Relations in S.A. 1978 (supra) p 82. Amendments to the Prison Regulations in 1973 and the Prisons Act in 1978 have placed the Commissioner's powers beyond question. Regulations 109(3) and 109 (6) now provide that:

    '(3) A properly organised library containing literature of constructive and educational value shall, as far as possible, be established and maintained at a prison and may in the discretion of the Commissioner be placed at the disposal of all prisoners detained in such prison. . . .

    (6) Permission to study or the utilisation of any library in terms of this regulation is subject to the discretion of the Commissioner and the provisions of the said regulation may in no way be so construed as implying that such permission and/or utilisation of any library allows any prisoner a right which he can legally claim.'

Section 22(2) of the Prisons Act now reads as follows:

'The Commisioner may in his discretion –
(a) grant such privileges and indulgences as he may think fit to any prisoner;

(b) notwithstanding anything to the contrary contained in any law, withdraw any privilege or indulgence granted in terms of paragraph (a) to any prisoner without furnishing any reasons and without hearing such prisoner or any other person.'

14. B van D van Niekerk, "Nought for their (or our) comfort", in Vol. 3 (1979) S A Journal of Criminal Law and Criminology pp 55–6.
15. Goldberg's case (supra) at 36–7 per Wessels A C J.
16. Ibid at pp 30–31.
17. Ibid at p 34.
18. Ibid, at p 39. Mr Justice Corbett, to his great credit, also made the following observations at pages 41 and 49–50 respectively:

    a) "It is said that a prisoner has no right to study or to access to libraries or to receive books; that these facilities are privileges not rights, comforts not necessities. To my mind, this is an over-simplification. To test the position, suppose that an intellectual, a university graduate, were sentenced to life imprisonment and while in gaol was absolutely denied access to reading material – books, periodicals, magazines, newspapers, everything; and suppose further that there was no indication that this deprivation was in any way related to the requirements of prison discipline, or security or the maintenance of law and order within the prison and that, despite his protests to the gaol authorities, he continued to be thus denied access to reading material. Could it be correctly asserted that in these circumstances he would be remediless? That all that he could do was to fret for the comforts which he was denied? I venture to suggest that it could not be so asserted and that he would not be remediless."

    b) ". . . this is a serious matter, amounting to a drastic inroad upon the basic rights of the appellants. In this regard respondents sought to rely upon an affidavit sworn to by the medical officer to the Pretoria prison, in which the deponent stated:

        "(b) Ek het die verklaring van Denis Theodore Goldberg gelees aangaande sy bewerings dat die optrede van die gevangenisowerhede neerkom op 'psychological mistreatment'.

        (b) Ek besoek die afdeling van Pretoria-gevangenis waarin die genoemde Denis Theodore Goldberg en ander aangehou word op gereelde grondslag. Volgens my waarneming toon geeneen van die persone psigiese afwykings nie."

    I am not particularly impressed by this evidence. The deponent does not state what his qualifications are to determine the existence of psychic deviations ("psigiese afwykings") or what real steps he took to diagnose their absence or presence. Moreover, it is not clear to me that "psychological mistreatment" would necessarily lead to discernible psychic deviations. In truth, it does not require medical evidence, one way or the other, to satisfy me that to cut off a well-educated, intelligent prisoner from all news as to what is happening in the outside world for a long period of time, in one case for life, is a very serious psychological and intellectual deprivation indeed."

19. This phenomenon is fully and interestingly discussed by J. Dugard, Human Rights and the South African Legal Order, Princeton (1978), especially in Part Four.
20. According to a report in the Sunday Tribune of 9 November 1979, the Minister of Prisons, Mr le Grange, refused to meet a delegation from the Prisoners Education Committee, a private group which had collected 10,000 signatures on a petition urging the Minister of Prisons to allow political prisoners to study beyond matriculation level while in prison.
21. House of Commons speech, 25 July 1910.