

JUSTICE SYSTEM -- ITS PROBLEMS

For the democratization process to succeed, and for an effective, lasting nonracial democracy to be established, a major overhaul of the justice system of South Africa is urgently needed.

The justice system in South Africa encompasses the third branch of government -- the judiciary -- as well as important elements of the executive branch such as the Ministries of Justice and Law and Order.

At present, there are stark racial and gender imbalances in the justice system. Of the 965 magistrates, only one is African; all South African judges, with the exception of one black and one woman, are white males; judges are appointed from the ranks of the Senior Counsel and there are only four (4) black Senior Counsel; all the Attorneys General are white; all but one of the prosecuting Supreme Court Advocates are white; and there are only 28 Africans among the 1,994 prosecutors in the Magistrates' courts. Clearly, the justice system is not representative in terms of race and gender.

Racial and gender imbalances in the legal profession itself are equally abysmal. In 1987, there were over 6,000 attorneys in South Africa, of whom only 651 were black. This means one black lawyer for approximately 50,000 black citizens. (The U.S. ratio is one to 20.) Of the 871 advocates in 1987, only 77 were black and, of these, only 26 were African. Over the past few years, more blacks have entered the profession, but the black-white ratios have not changed significantly.

Black lawyers, moreover, are often confined to the bottom of the legal market; namely, criminal defense, divorce, motor vehicle accidents and small business transactions. Lucrative corporate and tax work remain generally the preserve of white lawyers.

The situation at the Law Schools, while improving somewhat, remains a major area of concern. Before 1985, black law students were confined to seven (7) exclusively black universities. Since then, however, increasing numbers of blacks have enrolled in the "white" universities, particularly the Universities of Witswatersrand, Cape Town and Natal. Unfortunately, however, an LL B. degree does not equal professional qualification.

An aspiring attorney must also complete a two-year period of clerkship with an licensed attorney. With few exceptions, most black lawyers still experience intractable difficulties in obtaining articles of clerkships with reputable white firms.

Given the situation as it stands today, the justice system in the "new" South Africa will remain white dominated and incapable of protecting the fundamental rights of the vast majority of South Africans. Further, the income from the increased foreign investment and the free market system, many hope for, will probably end up in the pockets of the same white lawyers, many of whom assisted at the birth of apartheid or tolerated its perpetuation.

Most Western democracies recognize that while the State cannot guarantee that no citizen will be impoverished, the State does have the obligation to ensure that justice is not meted out on the basis of a citizens' net worth. Despite the enactment of the Legal Aid Act in 1989, and the 1992 pilot Public Defender Project in Johannesburg, a large percentage of defendants continue to appear in court without legal representation. It is estimated, that more than 100,000 undefended accused persons are jailed each year in South Africa and the overwhelming majority of them are black.

Another problem facing the justice system is that few, if any, members of the judiciary and legal profession have had any training or experience with constitutionalism and the implications of a bill of rights. The adoption of a new constitution and bill of rights, while long overdue, will bring the judiciary and the entire legal profession face to face, for the first time, with a new, dynamic jurisprudence involving constitutional interpretation, judicial review and the "art" of judging in a multi-racial society. For a society long accustomed to Parliamentary supremacy, this is a sea change. Accordingly, there is a desperate need to begin a program to provide training for the judiciary, both the existing judiciary and, more importantly, the potential pool of black lawyers whom might well be appointed to the bench. Furthermore, there is an equally critical need to provide small black law firms with an opportunity for rigorous training in constitutionalism and constitutional litigation. Otherwise, the process will once again be monopolized by the large white law firms.

Given the deplorable situation described above, and its potential to undermine or jeopardize the democratization process, it is urgent to focus attention now -- and not in one or two years -- on the changes that need to be made in the justice system, the institutional options available, the timeframe for implementation and the level of human and financial resources that will be required.