THE LEGAL SYSTEM A N D JUDICIARY

IN SOUTH AFRICA. -

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The Legal System and Judiciary

I Basic purposes

This paper begins by considering the basic purposes which are served by a legal system and the official structure which exists to operate it, that is, the judiciary. There would seem to be three such basic purposes, of which two are universal and the third optional.

The first purpose is associated with the criminal law. It is to enforce those rules of behaviour which society considers necessary by punishing those who breal the rules. Progressive thinkers have tended to deprecate the criminal law as being an instrument of coercion by the ruling class and in its interests, and have looked forward to a future society in which the criminal law will be unnecessary. This is a noble objective and the progressive critique of criminal law is very pertinent to South Africa, where the enforcement of unjust, discriminatory laws accounts for a large part of the activity of the criminal courts. The repeal of unjust laws should lead to an immediate, substantial reduction in the work of the criminal courts and therefore of the members of prosecutors, magistrates, prison officers, etc. The objective, however, of a society with no criminal law has not yet been achieved, anywhere in the world. Even the most advanced socialist countries still find it necessary to use criminal law and criminal proceedings to protect state property, prevent economic sabotage and corruption, suppress violence by one individual against another and so on. Therefore, as far as human experience goes to date, we must consider this to be a universal purpose of legal systems. It will certainly continue to be relevant in South Africa for the foreseeable future.

The second purpose is associated with the civil law. It is to decide disputes between individuals or between companies and firms. Such disputes are often about property, so that the civil law of a country must be considerably influenced by the extent to which property is in private hands. Certain branches of civil law, such as company law, are characteristic of capitalist society. The nationalisation of property, however, does not put an end to disputes about it and even a socialist country needs rules about property and machinery for settling disputes in accordance with those rules. In a country, such as South Africa, which trades on a large scale with other countries, an important aspect of the civil law is that it must be able to deal with disputes between South Africa and their foreign trading partners in a manner which will command sufficient confidence among the foreigners to encourage them to continue their trade. Three other important branches of the civil law relate to compensation for injuries, family relationships and relationships between employer and worker. These are topics which crop up in every society and civil law in one form or another and therefore a universal requirement.

The third purpose, and the most difficult to characterise, is associated with constitutional or administrative law. Its subject matter is the rules about the choice of a government, the functioning of the government and the relationship between the citizen and the government. Obviously, every organised community must have some rule which says who is in charge and what the persons in charge have power to do. Throughout the centuries, there have been societies in which the rule on this poin has been crude, simple and capable of being stated in a single sentence -

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"the strongest person is in charge and he can do whatever he likes." Such a rule, however, is hardly worthy of the name of law, neither can it give any satisfaction to the aspiration of the people to rule themselves. In any community larger than a village, self-rule depends on representative institutions and the functioning of these requires fairly elaborate rules. Government also requires the activity of a number of officials and there must be rules about their duties and powers. These represent the minimum subject matter of constitutional and administrative law in any society other than the crudest tyranny.

Having said this, we come to an area which is open to debate. The question is, who ensures that the rules are obeyed and by what machinery is this done? The question has to be answered in relation to government officials and in relation to law-making bodies.

Growth both in the numbers of government officials and in their functions has been a feature of the twentieth century. It can be observed in the capitalist countries of Western Europe and North America, in Africa and Asia both during the colonial period and since liberation and in the socialist world as well. It goes with large-scale industrial production and the forms of society which that creates. In those countries which can be described as bureaucratic, this growth has taken place in the absence of external controls upon the official machinery. It is not that the officials have no rules to govern their behaviour; on the contrary, bureaucracy loves elaborate rules. But the officials themselves are the judges of their own compliance with the rules. A citizen aggrieved by the action of one official can only complain to a more senior official, who may hear the complaint in secret and give no reasons for his decision on it.

Administrative law attempts to provide a better solution. It lays down rules which are known to the general public and provides an authority standing outside the bureaucratic machine to enforce those rules. That authority - a court of some kind - usually hears complaints in public and gives reasons for its decisions.

There has been a long-running dispute between two different variations on this theme. The continental European tradition is that these should be seperate administrative courts, specialising in disputes between citizens and officials, with a set of rules and procedures specially laid down for the purpose. The virtue claimed for this system is that the specialist judges of the administrative courts have a profound understanding of the official machinery and their special rules and procedures are well adapted to the problems which have to be dealt with.

The English tradition, which has been followed in America and also in South Africa, is that the courts which deal with disputes between citizens and officials should be the same courts which deal with disputes between one citizen and another and the rules which they administer should be broad principles of "common law". The virtue claimed for this system...

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...is that the courts are completely unconnected with the official machinery and therefore capable of keeping a genuinely independent check upon it. Our experience in South Africa suggests that the claim is dubious. The fact that judges and officials are members of one ruling class sets limits to the value of a formal seperation between courts and bureaucracy. The advantages claimed for the specialised system of administrative law may be more substantial.

Probably the most difficult question in constitutional law is whether (and, if so, how) the highest law-making authority in the land is itself to be made subject to law. The two alternative views on this question are well illustrated by the contrast between Britain and the USA. In Britain it is clearly understood that no court has power to query the decisions of Parliament. In the USA, the Supreme Court can and often does strike down acts of Congress as being contrary to Constitution. The practical results of this power have varied at different periods of American history. In the late nineteenth and early twentieth centuries, the American Supreme Court played a reactionary role, functioning essentially as the guardian of private property against even the mildest attempts at legislation in a socialist direction. Since the Second World War, however, the Supreme Court's role has been progressive, with the emphasis on the idea that discriminatory laws are against the Constitution.

The South African constitution of 1910 was in many respects modelled on the British, though it shared with the American the basic feature that it was a written constitution. For years, South African lawyers debated whether the Supreme Court had power to judge the legality of Acts of Parliament or not. In 1936, the Supreme Court failed to rise to the challenge when it was invited to disallow the Act by which African voters in the Cape were disenfranchised. In 1953, the opposite result was reached over the question of disenfranchising Coloured voters. Thus the role which the Supreme Court was invited to play was progressive. In the outcome, however, it proved to be only a minor hindrance to the reactionary plans of the Government.

In current debates about the constitution of South Africa, the question of a role for the Supreme Court in controlling the legislative authority looms large. There can be no doubt that both phases of the history of the U.S. Supreme Court are in people's minds. There are those who are looking for a guardian of private property against socialist legislation and there are those who are looking for a safeguard against any revival of racial discrimination, once democracy has been introduced. Both roles are conceivable.

What should be clear is that when the courts are given such a role, it is inevitably a political role. It is naive to think in terms of an absolutely impartial court which will be influenced only by considerations of "pure law". Therefore, if such powers are to be conferred on the courts, it must be done with a political object in view and the relevant rules must be framed accordingly. From our point of view,

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....the essential thing is that the powers of the relevant Court should not be capable of being used to prevent the achievement of revolutionary objectives but should be appropriate to the defence of revolutionary gains.

II The Present South African System

a) Legal System

The common law of South Africa (that is, the law which applies to areas not covered by any Act of Parliament) has complex historical origins. The law of the ancient Roman Empire survived the downfall of that Empire and formed the basis of the legal systems of Western Europe in the Middle Ages and thereafter. Over the centuries, it was adapted in different ways to the needs of different parts of Europe. Thus in Holland in the seventeenth and eighteenth centuries there was a system of Roman origin, known as Roman-Dutch law. Its rules were to be found in a large number of books written in Latin or Dutch.

One of the fruits of the French Revolution in Western Europe was that ancient legal systems of this kind were drastically modernised. The model was the French Code Napoleon, in which the traditional Roman-French law was rationalised, updated and written down in a single book, a couple of hundred pages long. A similar code was promulgated in Holland in the early nineteenth century, so that the traditional Roman-Dutch law ceased to exist in its country of origin. By this time, however, the British had taken over the Dutch settlement at the Cape and they decided to leave the legal system undisturbed. The Boers subsequently carried this same system with them into the Orange Free State, Natal and the Transvaal, South African law has never been codified and the old, seventeenth and eighteenth - century Dutch law books are still be to be found in our law libraries and may still be referred to in cases argued in the South African courts. Their importance is in practice not great. So many areas of the law have been dealth with by Acts of Parliament and the remaining areas have been so extensively expounded in recorded decisions of the Supreme Court that it is seldom necessary to refer to the "old authorities." An advocate may go for years without even needing to look at them. Nevertheless, there they are, and the possible need to consult them is the reason why a knowledge of the Latin language is a requirement in the training of advocates. This requirement is undoubtedly an obstacle in the way of black South Africans wishing to enter the legal profession, as they have few opportunities to learn Latin at school.

The African societies of South African prior to colonisation had, of course, their own legal systems. These were not written down but were embodied in oral tradition. The colonists never attempted a total abolition of traditional African law. Particularly in the Eastern Cape and Natal, where the structure of African society remained intact to a greater extend than elsewhere, African law was given a measure of recognition by the colonial authorities and continued to be applied in certain areas.

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The role of traditional African law under the racist regime has been a shadowy and ill-defined one. It has no influence on constitutional law, administrative law or criminal law. In the sphere of civil law, it applies only to disputes between one African individual and another African individual. In a dispute between white and black, white law prevails and the law applying to companies and firms is of entirely white origin. Land Tenure in the reserves of "Bantustans" is largely governed by rules of African origin (though the original rules of African law have often been changed by statute or regulation) while Land Tenure in the "white areas" is governed by Roman-Dutch rules or statutory rules inspired by Roman-Dutch principles, irrespective of the race of the persons occupying the land. Apart from its limited application to land tenure, the one area in which traditional African law still plays a vigorous part is that of marriage and the family.

By comparison with the resources devoted to the study and teaching of Roman-Dutch law, those devoted to African law are pitifully inadequate. Many problems remain to be solved in order to integrate the heritage of African traditional law into a modern system based on equality and non-discrimination.

(b) Judiciary

The Supreme Court of South Africa has unlimited jurisdiction to try any case, whether in the field of criminal, civil, constitutional or administrative law. It is divided on a territorial basis into four provincial divisions, one for each of the four provinces, and four local divisions for the Eastern Cape, the Kimberly area, the Johannesburg area and the Durban area. There is no specialisation by subject matter. The same judges sit in cases of all kinds. The appellate Division exists solely to hear appeals from the provincial and local divisions and its jurisdiction is country-wide

There are at present 130 supreme court judges. All of them are white and all except one are male. To be eligible for appointment as a judge, it is necessary to be an advocate. Attornies are not eligible. The vast majority of appointments have been made from the ranks of advocates in private practice, though advocates in government employment have occasionally been appointed. Once appointed, a judge cannot be dismissed except by any elaborate procedure involving resolutions of Parliament, which has never in practice been used. This security of tenure, together with the fact that the judges come from an independent professional background, has given them a certain measure of independence in action and a willingness to contemplate the possibility of giving decisions against the government. Acceptance of the post of judge does, however, imply a willingness to implement the law as it stands. Those advocates who are radically opposed to apartheid laws do not become judges (one could name several whose professional eminence should certainly have put them in line for judicial appointments, but who have never been appointed). The Supreme Court has accordingly played a modest progressive role from time to time but has never been a major participant in the struggle against apartheid.

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The jury is an institution on which the English legal traidtion sets much store and it is indeed capable of representing a way of participation by the ordinary people in the process of justice. Its history in South Africa, however, is a sorry tale. Juries were introduced into South Africa under British rule in the nineteenth century but the system was fatally flawed from the outset by the rule that only white men were eligible to sit on juries. White juries acquired a reputation for racial prejudice for worse than that of white judges or magistrates. They would never convict a white man for a crime against a black, while their zeal for convicting blacks was legendary. Things became so bad that even racist governments had to do something about it. The first step was to allow the accused person to opt for trial by a judge alone if he wished. Africans coming from the Supreme Court on criminal charges rapidly learned that they ought to exercise this option and juries disappeared from cases involving African accused - e.g. the great majority of cases. The second step was to empower the Minister of Justice to order that there should be no juries in cases where a white was accused of a crime against a black. This power was always excercised in practice and so only cases of white against white were left. The jury system has therefore fallen into disrepute and almost total disuse. The one possibility which has never been considered is to have juries on which all sections of the population are represented.

The majority of court cases, both criminal and civil, are not heard in the Supreme Court but in magistrate's courts. The whole country is divided into 309 districts, each one of which has a magistrate's court. There are a total of 800 magistrates in South Africa.

The powers of the magistrates are limited. They can impose sentences up to a certain maximum in criminal cases and can hear civil disputes where the claim does not exceed a certain value.

Magistrates are not appointed from among the ranks of the legal profession. They are civil servants. A young man joins the civil service, takes a law degree or the civil service legal examination, then very often serves as a public prosecutor for a number of years before being appointed as a magistrate. This background obviously produces men with far less independence of the government than is the case with supreme court judges.

Next there is the special category of magistrates formerly known as a "native commissioner" and nowadays simply as a "commissioner". These are appointed in districts which have a more or less exclusively African population. They have the same criminal and civil jurisdiction as a magistrate but they are supposed to be experts in traditional African law and it is in their courts that this law is applied to disputes in which both parties are Africans. They do not, however, themselves belong to the traditions in which they are supposed to be experts. They have in the past all been white, though power does now exist for the mister to appoint Africans to these poses.

There is a special appeal court, formerly the "Native Appeal Court" and now the "Appeal court for Commissioner's courts" which hears appeals from commissioners' courts. Its judges are again supposed to be experts on African traditional law but they, too, are white. The judges of these courts also have jurisdiction in divorce cases between Africans.

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A recent government Commision recommended the abolition of these seperate courts and the transfer of their functions to the ordinary magistrate courts or (so far as appeals are concerned) the Supreme Court.

Finally, a chief or headman in an African area may be authorised by the minister "to hear and determine civil claims arising out of indigenous law and brought by a black against another black resident within this area." Pople living in the area of jurisdiction of such a chief's court have a choice to bring their disputes before the chief or before the commissioner. An appeal may be brought to the commissioner against any judgement of a chief.

III Policy Options

Codification. The codification of the South African common law is a task which ought to be undertaken in any event, simply for the sake of bringing the system up to date and getting rid of the need to refer to ancient Latin and Dutch Texts. In post-liberation South Africa, it can be made to serve a number of further purposes. Although the basic task of codification is to write down, as clearly and briefly as possible, the rules of the existing law, it also presents an opportunity to reform the law. Rules which are inappropriate to a democratic society can be changed.

Codification must obviously not be confined to the Roman-Dutch law but must extend to the traditional African law, much of which has never been adequately studied and recorded. A proper basis for the interaction of the two common laws must be found and clearly laid down.

This is not a task which can be completed overnight. It will be necessary to appoint a commission of "wise men" with a programme of work extending over a number of years. It should be possible for them to divide their programme into a number of self-contained topics, so that parts of the code can be enacted while others are still in course of preparation.

Although the need to refer to "old authorities" will not finally come to an end until the code is complete, that need is already insufficient to justify the requirement of Latin as an essential part of the training of a lawyer and that requirement should be abolished immediately.

Reform of the Supreme Court

Broadly speaking, the tasks which the Supreme Court exists to perform now will still have to be performed after liberation. It is important that they be performed by an institution which commands public confidence. The present composition of the Supreme Court is not such that it could command public confidence unaltered. The number of experienced black advocates is not sufficient to permit an immediate rectification of the racial imbalance if present rules about eligibility for appointment of judges are to be maintained. Certain minor changes in the rules can readily be envisaged - e.g. that attornies should be eligible on the same footing as advocates. It seems necessary, however, to raise some more fundamental questions, such as these:-

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(i) do all the present functions of the Supreme Court have to be carried out by the same institutions?
(ii) are professional lawyers the only sort of people who can carry out those functions?
(iii) how should judges be chosen?

The answers to questions (i) and (ii) are both "No". There are numerous examples to be found in other countries of courts which exist to look after certain specialised branches of the law and which are not necessarily staffed only by professional lawyers. Among the possibilities which seem worth considering from South Africa are the following:

a) a seperate Constitutional Court. If we are to have a written constitution and a Bill of Rights, there must be some impartial authority to decide whether the constitution and the Bill of Rights are being observed. This need not be the same authority which tries ordinary civil and criminal cases. The decisions of a constitutional court inevitably have a political content and, while the court must be impartial as between political parties, and as between government and citizen, it is an illusion to expect it to be apolitical. It will not need to sit every day and it can be staffed by part-time judges. These might include one or two judges of the highest civil court, together with some elder statesmen and eminent persons from different walks of life, who do not have to be lawyers.

b) seperate Administrative Courts. The Constitutional Court would attend only to important cases involving the actions of Parliament or of Ministers. Cases in which citizens complain of the actions of individual officials, police officers, etc. need to be heard by subordinate courts. While the ordinary civil courts can be used for this function, there is much to be said for courts staffed by specialists in administrative problems, who need not be lawyers.

c) seperate Commercial Courts. These have been known for conturies in France, Germany, Holland and Belgium. They exist to decide disputes between businessmen about commercial matters. They make use of part-time judges, who may be experienced businessmen, officials of Chambers of Commerce, etc. Their procedure is simpler and more flexible than that of the civil courts, partaking somewhat of the nature of arbitration. This could offer a good solution to the problem of providing a system which commands the confidence of Foreign traders.

If these areas are hived off, we should be left with a substantially smaller Supreme Court to tackle the most important criminal cases and those civil cases which do not come under any of the specialised courts. Given that the most politically sensitive cases would be heard by the Supreme Court, the political composition of the bench would be less important. Many present judges could probably be continued in office, while the appointment of a comparatively modest number of black advocates and attornies

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...would make an impact on the racial composition of the bench. As to the method of choosing judges, the main question which arises is whether election has any role to play. In the majority of countries (as in South Africa), judges and magistrates are appointed by the government. In the U.S.A., Supreme Court judges are appointed by the President with the "advice and consent" of the Senate (in practice this means that the Senate can block the appointment of a candidate whom it does not like but has no way of securing the appointment of candidates of its own choice.) In the U.S.S.R. judges of the higher courts are appointed by the relevant Societ (e.g. the Supreme Societ of the U.S.S.R. in the case of the Supreme Court of the U.S.S.R., or the regional societ in the case of a regional court). In both the USA and the USSR, judges of lower courts are elected at general elections by the inhabitants of the district concerned. This applies in the U.S.S.R. to all the judges of the People's Courts, which are roughly equivalent to our magistrates courts In the U.S.A., the details of the system vary from state to state but election of city and district judges is fairly a general rule. This means, of course, that there are opposed elections fought on a party-political basis in the U.S.A., while in the U.S.S.R there is normally a simple list of candidates. The American system is often criticised on the ground that party-political elections detract from the impartiality of the courts

There is some force in this criticism but the election of judges is a powerful way of underlining the principle that justice ought to be administered in the name of the people and in accordance with their wishes. In a country such as South Africa, where in the past the people have been excluded and alienated from the judicial system, there may be a strong case for election of at least some judges. This would bring it home to the people that a genuinely new system is being instituted, in which they can have confidence.

The jury system. For the same reason, it is worth considering whether the jury system, reconstituted on a non-racial basis, can be rescued from the disrepute into which it has fallen in South Africa. The rule that a person can be convicted of a serious crime only by the verdict of a group of his fellow citizens chosen at random is a powerful guarantee against laws which lose touch with popular opinion.

A possible variation on the jury system as we know it is the Soviet system of "People's Assessors". In the early years after the revolution, twelve people's assessors were required in criminal cases - thus the system was very similar to the Anglo-American jury system. Nowadays, two assessors sit with a judge in most cases. Elections are held at neighbourhood or factory level for individuals to be listed on the panels of assessors (in the USSR as a whole these are about a million names on the list.) Each individual serves in court for about two weeks a year, so that a substantial number of different assessors officiate in the course of a year. Though they have no legal training and are in no sense professional judges, the assessors do acquire a certain amount of experience which may perhaps make them more useful participants in the judicial process than the totally inexperienced people who go to make up a jury.

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Magistrates Courts

There are 800 magistrates in South Africa and only about 650 black lawyers. Thus it would present a major problem in the short to medium term if a future democratic government were to attempt to create a magistrates' benc of the present size and with the present qualifications, with a reasonable mix of the different communities making up the population.

Is it necessary, however, to have 800 legally qualified, magistrates? The first consideration which suggests that the answer may be "No" is that the repeal of unjust laws will lead to a substantial drop in the number of criminal cases coming before magistrates' courts. The next point is that the majority of magistrates' courts cases do not involve difficult questions of law. More often than not, the task of the court is to decide what happened in the matter under dispute, the legal consequences being clear beyond argument and the facts are established. Therefore it is not essential that all those who hear such cases should be officials who have passed law examinations. In England, part-time magistrates with no legal qualifications (justices of the peace) play a large part in dealing with minor criminal cases. In the Societ Union, people's judges (roughly equivalent to magistrates) do not have to possess legal qualifications, though nowadays the majority of them in fact do so.

A possible scheme for the lower courts in a democratic South Africa might be along the following lines. The 800 existing full-time professional magistrates might be replaced by about 300. Then, a substantially larger number of part-time unqualified magistrates - say 3,000 - might be appointed or elected. Minor cases would then be heard by a bench consisting either of one full-time magistrate or two or more part-time magistrates. More serious cases would be heard by a full-time magistrate sitting together with two part-time magistrates. The fact that many cases would come before a court consisting of more than one judicial officer would have the advantage that the bench could frequently be multi-racial in character. This would help to promote public confidence in the early stages, before the public in general becomes "colour blind".

The position of traditional African law would also fall naturally into place, since in areas where the bulk of the population consists of people belonging to a particular African tradition, the "justices of the peace" would also belong to that tradition and could apply its legal principles in appropriate cases. In the urban areas, panels of justices qualified in particular traditional systems could be formed, to be available for those cases where this expertise is required.

General Conclusion

The details of the suggestions made above require further study and debate before decisions are taken. The seminar is invited to take a view on the basic principle which underlies all these suggestions, that is, that maximum use should be made in the judicial system of persons without formal legal qualifications, drawn from all sections of the population, with election playing a role in their appointment.

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