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Justice in a post-apartheid South Africa

Penny Andrews

Democracy in South Africa will be measured by its ability to create a new legal order.

During my lifetime I have dedicated my life to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony with equal opportunities. It is an ideal which I hope to live for, and to see realised. But my lord, if needs be, it is an ideal for which I am prepared to die.

(Extract of Nelson Mandela's speech from the dock at the Rivonia Trial, 1963, which led to his long term of imprisonment.)

South African society is painfully and reluctantly moving towards a democratic future. The content and structure of that future society still remains unclear. What is certain, however, is that the new South Africa will be based on

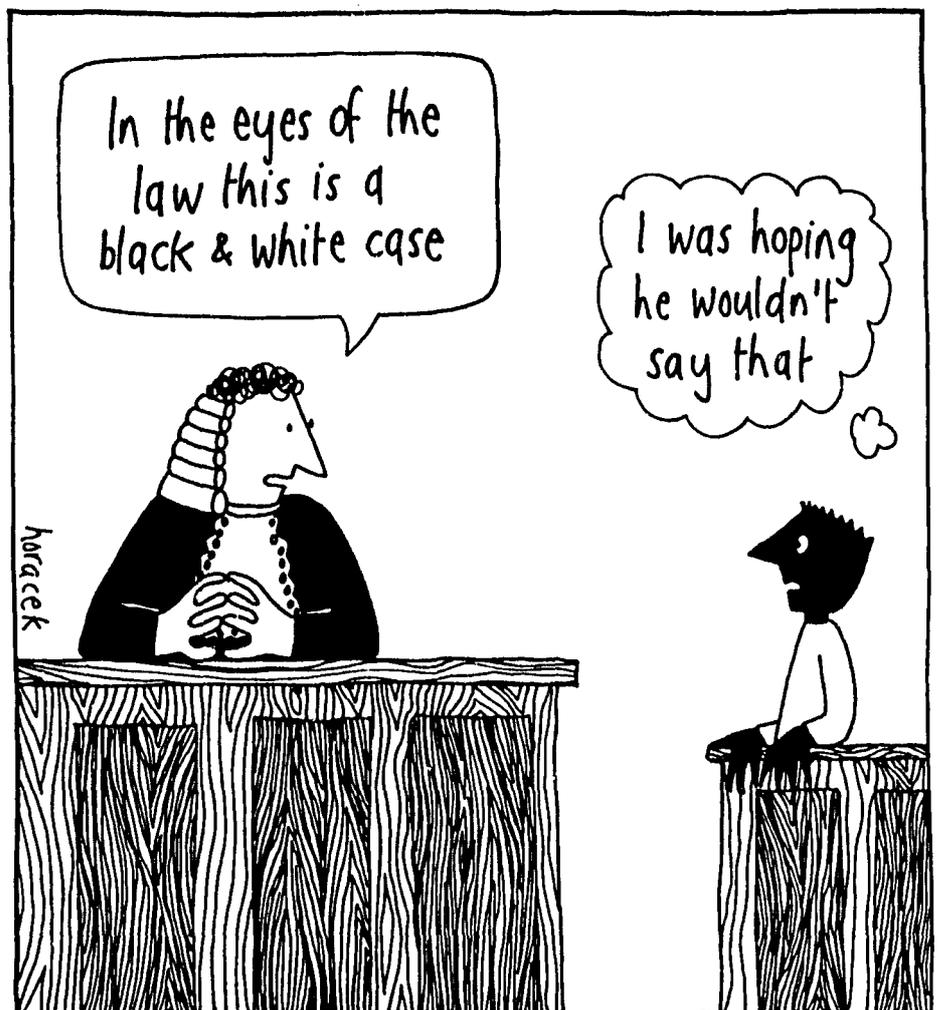
the uncompromising assumption that the official preoccupation with racial classification and racial hierarchy will be discarded. In other words, all the apartheid structures and institutions will either be destroyed or fundamentally transformed.

The legal system which has been a pivotal structure in the system of racial segregation has come increasingly under scrutiny. This has been particularly the case as the discussion about a new constitutional framework is conducted in opposition circles, and as the debate about the appropriateness of a Bill of Rights continues.

Genuine equality

The first question to be addressed is how the administration of justice can be geared towards genuine equality and away from the discredited notions of racial hierarchy and inequality. The second question is how the administration of justice, and indeed the entire legal order, can recapture legitimacy, and the respect of the majority black population.

For black people the law has been a vicious instrument of repression. The law has, for example, allowed the South African authorities to forcibly remove



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hundreds of thousands of people from their traditional lands to alien areas where the chances of constructing a decent existence are slim. So too the law has allowed the indefinite detention by the security forces of alleged opponents of the South African government's racial policies, without any right of access to lawyers, doctors or family members — and without necessarily ever being charged with any crime.

The hurdles to be overcome on the road to justice and equality are immense. The most important hurdle is clearly the 'crisis of legitimacy' of the South African legal system. This crisis of legitimacy exists because of the unrepresentative structure and operation of the legal system — from the passage of the laws to their implementation and administration.

Human rights

South Africa is fortunate in having a sophisticated international 'human rights industry' from which to learn and benefit. The principles and culture of human rights in international law are now firmly established. So too are the various international bodies that give effect to this culture.

Since the passage of the Universal Declaration of Human Rights, many international instruments document what have now become accepted human rights norms. The right of citizens to vote, the right of freedom of thought, belief and conscience, the right to peaceful assembly and association, the right to freedom of movement, the right to life, to liberty and to the security of person, the right not to be arbitrarily detained or imprisoned, the right to equality before the law, the right to protection from inhuman or degrading punishment — these human rights norms are of universal application.

Despite the specificity of the South African situation, it could be argued that many of the human rights norms are applicable to a future democratic South Africa. This does not in any way simplify the issue - there still remain further questions about which rights take precedence. Other questions are about rights to which a future government could not always give effect, such as the right to shelter, the right to food.

Accessibility

The issue of access to justice in a post-apartheid society is crucial for all South Africans. For the black, poor and powerless it is absolutely critical. The question is how the system can be made equally

accessible to all, and whether it can ensure results that are individually and socially just.

For the majority black population, decades of denial of access to basic education, combined with the culture of white superiority, have resulted in a frightening ignorance of rights. These circumstances have also generated widespread illiteracy that renders people easy victims of anyone who chooses to take advantage of their vulnerabilities. Consumers sign documents unaware of their contents; they hand over cash for goods purchased (very often substantial amounts) without asking for receipts; they appoint shady agents to handle their business dealings without ascertaining the proper identity of these individuals. At the end of the day they are caught in a web of poverty, hopelessness and dependency.

Parliamentary supremacy

What are the obstacles to be removed if access to justice is indeed to become a reality? The suggestions that follow are not exhaustive. They stem from two fundamental weaknesses of the South African legal order: the crisis of legitimacy, and the historical powerlessness of the judiciary due to the doctrine of parliamentary supremacy, a doctrine which also applies in Australia, but which operates differently in South Africa where there is no universal franchise. The courts are precluded from pronouncing on the substantive validity of a particular piece of legislation, however unjust such legislation might be. The court's power to declare legislation invalid is limited to an examination of its procedural validity.

The majority of black South Africans despise or do not trust the legal system for several reasons. Firstly, blacks have no say in the making of the laws which govern their lives. It is clear that the legislature is undemocratic, given the absence of the universal franchise. More insidious, however, is the delegation by the legislature to the executive of the power to make laws by regulation and decree. This effectively removes any accountability to the citizenry. The executive has enthusiastically utilised that power during the state of emergency of the last few years. In the process fundamental freedoms of speech, assembly, movement and association have been severely curtailed. The courts have been unable to mitigate the effects of these actions on the part of the executive because of the doctrine of parliamentary supremacy.

Secondly, the laws passed by this unrepresentative legislature are administered almost completely by whites. Except for the temporary appointment of an Indian judge for a month in 1987, no black or non-white person has ever been appointed to the bench in South Africa. At the magistrate's court level, there have been black appointments. But even at this level the number of black magistrates or black prosecutors still remains relatively small.

The South African judiciary has in the past few decades come under criticism for its perceived acquiescence in, and sometimes enthusiastic administration of unjust laws. Allegations of bias (particularly in political trials) have been made on numerous occasions.² This criticism is most poignant in relation to the use of the death penalty in political trials; the doomed are almost always blacks.

Thirdly, despite brave attempts by certain judges the doctrine of parliamentary sovereignty has limited the activities of the judiciary. Because full legislative authority has been conferred by statute on the legislature, state power can be exercised without the checks and balances found in an independent system of judicial power.³

Fourthly, the legal process is expensive, remote and hostile for most of the population. Access to affordable legal representation is virtually impossible. Law suits drag on for months, often years, with relief or success not always guaranteed. Even relief or success lose their value a few years down the road. For most people, particularly poor people, what is expected of the legal system is a speedy and expeditious resolution of their complaints. This concern is not confined to South Africans. Law reformers everywhere are preoccupied with the efficiency of the legal process. In the South African context, however, because of the repressive and exploitative nature of the society, for black people the need for efficiency takes on a more urgent tone.

Gaining respect for the law

The words of President Kenneth Kaunda of Zambia strike at the heart of these issues:

Without the law the whole structure of society must collapse, but equally without the respect of the law society is doomed. The question is, how do we win that respect? I believe the answer is to be found in my central theme: that the people must recognise the police and the courts as *their* police and *their* courts; that they must recognise the law as *their* law, as reflecting *their* needs and aspirations.⁴

Ensuring safeguards

I have attempted to highlight some of the maladies of the present South African legal order. The most obvious question that follows is how they can be overcome: how a future government can ensure that equality before the law becomes a reality, and how access to justice can be guaranteed.

The first safeguard is obviously the vote. All South Africans must be able to participate in genuine legislative representation. People must also be properly informed and educated about the policies of the individuals offering to represent them. Moreover, structures should exist for people to articulate values and goals, and have an influence on the laws that are eventually passed. The existence of the universal franchise is clearly not sufficient: an *informed* electorate is a precondition for genuine democracy.

The second safeguard must be the introduction of a constitutional document which will ensure that legislative and executive power is regulated.⁵ A corollary must be the right of the judiciary constitutionally to restrain the powers of the people who make the laws.

The third safeguard will be the appointment of black judges in substantial numbers. The entire citizenry must be reassured that the people who administer the laws come from within their ranks. This is crucial in South Africa where there is no jury system.

The fourth safeguard will be a commitment by the judiciary and the legal profession to a fundamental rethink of the administration of justice. This must involve scrutiny of almost every area of law practice and the legal profession. It must also include scrutiny of other factors such as:

Language barriers: the problem of language is particularly acute in an officially bilingual and *de facto* multi-lingual country like South Africa. Very often black clients cannot speak, or speak very little, of either of the official languages (English or Afrikaans) and their lawyer often does not speak an African language. The mere mechanics of being poor can complicate communications, for example, when a functionally illiterate person misses an appointment because of the inability to remember the date or time of such appointment, or when unreliable public transport means a person cannot make an appointment.

Costs of litigation: which effectively exclude a substantial proportion of the population as there is very limited availability of legal aid.

Alternative methods of dispute settlement: arbitration and mediation have only just begun to be accepted, on a small scale. Structures of 'informal justice' such as people's courts, and tribal courts ought also to be considered.

Legal education: needs to be reconsidered, particularly the way lawyers are prepared for a new legal order.

There will inevitably be divergent views about the most appropriate approaches and structures. But the difficulty of the task should not be a deterrent; the benefits far outweigh the immediate stumbling blocks.

The extent of the victory of democracy in South Africa will be measured by the access to justice and equality that the majority of her citizens will enjoy. If that cannot be guaranteed, much of the struggle will have been in vain.

References

1. Quoted in Meer, Fatima, *Higher than Hope: the Autobiography of Nelson Mandela*, Hamish Hamilton, London, 1990, p.258.
2. For an excellent informed analysis of the role of the judiciary, see Dugard, John, *Human Rights and the South African Legal Order*, Princeton University Press, 1978.
3. *ibid.*
4. Quoted in Mohamed, Ismail, *Towards a Human Rights Culture*, paper delivered at Conference 'A New Jurisprudence for a Future South Africa', University of Pretoria, October 1989.
5. See for example the Constitutional Guidelines of the African National Congress published in *South African Journal of Human Rights*, 1989, Vol. 5, Part 2, pp. 129-132.

LEGAL STUDIES

1. As a class, gather all the information you can about apartheid and the current situation in South Africa. Is it optimistic to talk about 'post-apartheid South Africa'?
2. What does Penny Andrews mean by 'the crisis in legitimacy' of the South African legal system?
3. Where did the Universal declaration of Human Rights originate? What sorts of rights does it include? Does it apply in Australia?
4. What do you understand by the doctrine of the separation of powers? (Why wouldn't you ask Joh Bjelke-Petersen about it?)
5. Both Australia and South Africa operate on the basis of parliamentary supremacy. What does this mean and are there any differences in the way it works in the two countries?
6. What do you think is meant by the term 'judicial neutrality'? Does it apply in South Africa? Does it apply in Australia?
7. The author talks of the effects of the culture of white supremacy and of decades of denial of access to basic education for blacks in South Africa. Is the situation any different in Australia with regard to our black population?
8. What are the four safeguards that the author puts forward to guarantee access to justice for all in South Africa?
9. Are there other countries where there is no jury system? Might such a system deliver justice more efficiently than our system?
10. Having read the article, comment on the ways in which the legal system is

'pivotal' in the creation and maintenance of basic human rights.

Discussion

Have groups prepare and make a presentation to the class on the following:

- that it is easy to change the laws but difficult to change people's attitudes;
- that white Australia is guilty of practising apartheid;
- that there is no such thing as judicial neutrality;
- that we should abolish the jury system.

Lynne Spender

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