The courts in the new South Africa

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Federal system

As in practically all areas, changes in the administration of justice will follow on the establishment of a new South Africa. I assume that the state will be a federation, although consensus on the matter has by far not been reached. Instead of using the word “federation”, some refer to strong regional governments. In practice, after all, this also amounts to federation provided that the regional governments are powerful enough. To adjust to the federal system, with more member states than there are provinces now, the structure of the courts will have to be accommodated. I anticipate, however, retention of the present set-up as far as possible. Still, not only the structure of the courts will change, but also the personnel thereof, as well as the total approach to the administration of justice.

Member states

The first issue is how many member states there should be. The Government speaks of nine, the ANC of ten or even eleven. It must be remembered that federation is a vastly
expensive affair. Each state will have a governmental system, houses for persons in authority, and smart cars. Nine, ten or eleven states are unnecessary. Six are enough, obtained by dividing the Transvaal and the Cape each into two.

Single court at top

I envisage a system of superior courts in three steps. At the top will be the Federal Appeal Court, serving the whole country. It decides questions of law only, especially questions arising from the Bill of Rights, which will form part of the constitution. A separate constitutional court such as the one existing in Germany, and which is often suggested here, I regard as unnecessary. Questions of law will often be linked to the Bill of Rights and then it will become a problem to which court it should go. The single court at the top will be more streamlined.

High courts

The next two steps down are high courts existing in each of the states. There is a High Court of Appeals and a High Court of First Instance. The Court of Appeals sits in bancs of three or two and deals with appeals from the Court of First Instance as well as all the lower courts. In appeals from lower courts two judges will sit. For a further appeal to the Federal Appeal Court, leave must be obtained. When leave is given the court must also formulate the question of law to be taken on appeal. The two high courts should preferably be housed in the same building, but have separate judges-president and separate registrars and administrations. The Court of First Instance takes circuits, and some of the judges may specialise in matters like law tax, insolvency, commercial disputes, labour relations, human rights and such like. It is not contemplated that issues of interpretation of the Bill of Rights should be reserved for the Federal Court of Appeal. If it arises in the lower echelons, the case should not be delayed until the highest court has spoken.

These proposals resemble the structure of courts supported by the Association of Law Societies. (See Mr Mervyn Smith’s article elsewhere in this edition.—Editor)

Lower courts

In regard to lower courts, the regional court should be separated from the civil service. It gets civil jurisdiction in addition to the criminal jurisdiction it now has, plus divorces. The court is manned from the magistrates, attorneys and advocates and these are eligible for promotion to the superior courts. The present magistrate’s court surrenders its civil jurisdiction to the regional court but retains the criminal jurisdiction it now has. It remains within the civil service and is further administered as at present. The existing small claims court should be strongly expanded, as well as the system of public defenders.

Appointment of judicial officers

The system of appointment of judicial officers should be reviewed. The appointment of judges of the Federal Appeal Court should rest with a committee consisting of the Chief Justice and the judges-president of the High Courts of Appeal of the various states. Appointment to the high courts is done by a committee consisting of the judges-president of the two high courts plus the attorney-general of the state, the chairman of the bar council and the chairman of the law society. When the chairman of the bar council is himself a candidate, the vice-chairman comes in his place. Appointments to the regional court are done in the same manner.

Political participation

This system concentrates appointments in the hands of judges and practitioners and excludes the Minister of Justice. He gets a veto however, and appointments to the superior courts are in any event a matter for the Cabinet. There is therefore no exclusion of political participation, but it is restricted because recommendations of such highly placed advisory bodies will not be lightly disregarded.

Perception of non-whites

The administration of justice is in a crisis of legitimacy. In an inquiry which the HSRC conducted in 1985 it was found that the administration of justice was under suspicion among large sections of the population. This followed in the wake of apartheid. The non-white portion of the population became aware that until very recently there was nowhere a single non-white on any bench of justice, whilst they were being tried in their thousands without legal representation in overburdened courts. There is now one non-white judge and a fair sprinkling of non-whites on magisterial benches. But that has not yet removed the perception that the court is an all-white preserve. It is not to be foreseen that a speedy end is in sight. Non-whites join the Bar in small numbers and there are non-white attorneys, but if we want to retain standards and that is the most important aspect — the general picture will not change soon. Much depends on with whom the decision will rest.

The nearly exclusively white occupation of the benches is however not the only ground of criticism. There is a strongly supported view that the courts up to their highest levels are executive-minded. The new era will have to set these minds at rest. Several articles have been published to show that the court is prejudiced in favour of the state, some on good grounds but others not so convincing. A case which to my mind still looks as if there was too much fastidiousness on the facts in favour of the government is S v Adams, S v Werner 1981 1 SA 187 (A). That was a case in which two accused in separate cases were charged with contravention of the Group Areas Act in that they moved into flats in a white group area. Necessity was pleaded on their behalf, on the ground of the scarcity of housing in the coloured group area. There was no other accommodation to be had. The court said the legislature must obviously have foreseen such a state of affairs but nevertheless enacted the law. The answer seems to be that if such a scarcity of housing had in fact been contemplated, the legislature must have considered that in such a case a further coloured group area would simply have to be proclaimed. A roof over one’s head is a primary need of man. The court also said there was no proof of an absolute scarcity of housing. What that means is not quite clear, but with respect there was ample evidence of a scarcity. It was in any event a well-known fact.

In the new set-up, such at any rate are the intentions, there will be fewer restrictions on movement.