

CHAPTER 5

The Administration of Justice

Few areas of government in a nation state provide more compelling evidence of that state's commitment to the rule of law, and to the protection of human rights, than the administration of justice. Under the former apartheid regime in South Africa, the system of criminal justice – police, prosecution, courts and corrections – played a central role in enforcing the draconian laws which supported the apartheid structure. Under the guise of a set of legal rules and principles this system administered justice in a ruthless and efficient manner which paid scant regard to either the rule of law or basic civil liberties.

With the dismantling of the legal framework established by the apartheid state the entire South African system of criminal justice has been thrown into disarray. The vast enforcement apparatus put in place to administer these now defunct laws is still grappling with the task of identifying and responding to the needs of a new South Africa. Many of these needs and aspirations will eventually be incorporated into a new constitution. Almost certainly, that constitution will include a Bill of Rights which will set out the basic freedoms that all South Africans will enjoy. Such a constitution will place new responsibilities upon the courts and, to a degree largely unknown in the past, will require an independent judiciary to be the final arbiter of the rights of citizens.

Arriving as it did in the middle of this transition process, COMSA was able to observe at first hand the disarray in the criminal justice system. Most of these observations were of the police component of this system and much of this report is, therefore, taken up with descriptions of the police response to the problems of violence, and of the issues associated with the establishment of a new police service. However, COMSA members also formed impressions on the current status of the prosecution, court and correctional components of the system through, for example, discussions with faculty members of universities and criminological institutes; legal practitioners in both private and public practice; individual citizens, many of whom had been the victims of crime; and other informed observers of the contemporary administration of justice in South Africa.

Based on these sources of information, and on their extensive background reading of official reports and documentation on aspects of criminal justice in South Africa, COMSA formed the following views:

- The criminal justice system, already discredited by decades of associa-

tion with the structures of apartheid, has now lost the confidence and respect of most South Africans. This is especially so in the nation's townships where the formal justice system has in many cases been ignored in favour of an informal system administered by members of local communities.

This informal system has often been arbitrary and brutal. Swift and terrible retribution has been exacted upon some offenders in the form of 'necklacing' and other lethal punishments. In some communities, however, a more organised, fair but still informal justice system has been developed. In the Western Cape Province, for example, COMSA was impressed by the work of the Legal Education Action Project (LEAP), based at the University of Cape Town's Institute of Criminology, which has done much to assist with the development of such informal systems in local communities.

- As a result of the lack of public trust in the criminal justice system, few crimes are reported to the police, fewer still are detected and an even smaller number are prosecuted successfully. This Report contains many examples of the failures by the police to detect those responsible for the gravest crimes. Even when detection does occur, prosecution seems all too often to fail because of the intimidation or disappearance of key witnesses; the incompetence of those responsible for gathering the evidence for the prosecution; or the simple absconding of alleged offenders released on bail (see also Chapter 6).
- On the granting of bail in general, COMSA noted with surprise the release, sometimes on small sureties or bonds, of persons charged with murder or other very serious crimes. In cases of violence, the message sent out is that the courts are not interested in the protection of human life or limb.
- The courts are seen by the public as elitist and ill-equipped to quickly dispose of the volume of criminal cases which come before them. Despite the public's reluctance to report crime, which has been noted earlier, this volume is still very large. In the period from 1 July 1990 to 30 June 1991, for example, more than 2.2 million criminal cases were dealt with in the District Courts alone.

This volume of cases is reported to have caused a backlog of 20,000 persons in custody and awaiting trial. So overcrowded are South Africa's prisons that in early January 1993 the Correctional Services Minister announced that 7,500 convicted criminals were to be released from jails around the country to help relieve the pressure. The existing prison system, which was originally designed to hold 84,000 prisoners, is believed to currently hold 110,000, of whom 9,000 are children.

- The past sentencing practices of South African courts have been strongly influenced by the philosophies of deterrence and retribution. Apart from the massive use of imprisonment, South African courts have been

able to dispense capital punishment for murder and like crimes, as well as corporal punishment. A moratorium, which COMSA hopes becomes a permanent one, is in place on executing those sentenced to death. It is also COMSA's view that corporal punishment should have no place in the new South Africa.

- Given the overall severity of the sentences still available to and imposed by South African courts, COMSA noticed that the level of sentences sometimes provided for after conviction tends to convey the impression that violent crime, and even that ending in the loss of human life, is treated with less gravity than the simplest offences against property, such as the stealing of goods. For an effective control of crimes of violence this public perception of the sentencing practices of the courts needs to be removed.
- With regard to the expedition of criminal cases through the courts, the National Peace Accord contemplates the establishment of Special Criminal Courts to dispose of cases more quickly and effectively. However, COMSA was informed that rather than establish new judicial institutions, legislation had been enacted to permit existing courts to identify particular cases, involving politically motivated violence, to be handled in an expeditious manner. This legislation only came into operation in October 1992 and its effect and impact on the processing of criminal cases have yet to be determined.
- In the vast majority of the criminal cases which are processed through the courts defendants lack the benefit of legal representation. Until quite recently legal aid has only been available on a very limited basis in South African courts. A pilot public defender scheme has now been initiated in Johannesburg which if, as appears likely, is successful may well become a model for a much more expansive national programme with the commitment of substantially more funding to legal aid in general.

In late October 1992, a major conference was held in Johannesburg on the topic of 'The Right to Legal Representation: A Public Defender Service in a Democratic South Africa'. At this conference, which was attended by a COMSA member with legal qualifications, lawyers from a wide range of backgrounds and experience, including visiting experts from North America, Europe and a number of developing countries, discussed the difficult issues associated with the development of the right to legal representation in the new South Africa. It was recognised at this conference that even rich developed nations like the United States and Canada were finding the economic burdens of legal aid increasingly debilitating. Lawyers from countries like the Philippines and Chile stressed that, in the context of developing nations, competing demands for essential services like health care, housing and education often outstripped the need to invest funds in legal aid. There were also problems in delivering legal services of all types in the developing world because of the shortage of trained lawyers.

A shortage of this type undoubtedly exists in South Africa, where entry into legal practice has for decades been virtually the exclusive preserve of whites. Since the 1980s, that situation has begun to change slowly as more non-white students have gained admission to law schools. The composition of the benches of the nation's courts remains, however, overwhelmingly white and male.

Redressing the racial and gender balance of South African courts, and of the legal profession at large, will be just one of the challenging and time-consuming tasks which must be confronted by those committed to the process of democratic reform. Conferences like that held on the right to legal representation provide welcome and encouraging signs that these tasks are already being grappled with in a concerted and imaginative way.

Further evidence of the changes being considered or implemented was brought to the attention of COMSA by the Department of Justice. Following a press conference given by COMSA on 17 December 1992 in Johannesburg to describe some of the initial impressions gained by the group, including those relating to the administration of justice, the department issued its own press statement responding to many of the issues raised by COMSA. Copies of the statements by COMSA and the department, which were widely reported in the media, are attached at *Annex III* together with a number of clippings and editorial comments.

In early January, COMSA took up an invitation to meet with senior members of the Department of Justice to exchange views about the justice system. As a result of that meeting, which was attended by the department's Director-General and three of his deputies together with a representative of the NPS, COMSA hopes to hold a series of discussions with judicial officers, and other significant persons involved in the administration of justice, during the next phase of its mission. In addition to these discussions, COMSA intends to observe courts at work and to visit a number of correctional institutions in order to see at first hand how each of these components of South Africa's criminal justice system operates. From such discussions and observations may well flow proposals for ways in which practical advice and assistance can be provided by Commonwealth countries to those engaged in the daunting process of reform.