Redaksioneel

Prokureurs-Generaal in 'n nuwe bedeling

Gegewe dat 'n nuwe grondwetlike bedeling in Suid-Afrika onafwendbaar skyn te wees, sal dit kortsigtig wees indien nagelaat word om alle bestaande strukture of instellings noukeurig in oënskou te neem ten einde sover moontlik te verseker dat die land se mense met die grootste mate van regverdigheid, billikheid en menslikheid onder die beoogde bedeling behandel word.

Tradisioneel word 'n land se staatsbestel in drie dele verdeel, naamlik die wetgewende, uitvoerende en regsprekende bene. Wat eersgenoemde twee bene betref, word aanvaar dat 'n bedeling wat in die omstandighede so regverdig moontlik is, uitgewerk sal word. Maar al sou die heel beste oogmerke in 'n nuwe grondwet vasgelê word, moet daarmee rekening gehou word dat die wetgewende en uitvoerende gesagsorgane deur gewone mense beheer sal word en dat onregverdige, onbillike of selfs onetiese besluite nooit geheel en al uitgesluit sal wees nie. In baie gevalle sal die howe die enigste toevlugsoord wees vir die individu wat verontreg voel en daarom is dit so besonder belangrik dat – soos reeds betoog in vorige uitgawes van hierdie tydskrif – ons howe op alle vlakke op so 'n wyse moet funksioneer dat absolute onpartydigheid en onafhanklikheid verseker sal wees. (Sien ook Gauntlett SC se artikel 'Appointing and promoting Judges: Which way now?' elders in hierdie tydskrif oor wat gedoen behoort te word om te verseker dat persone suiwer op meriete op die regbank aangestel word.)

Ons wil vermelde standpunt verder voer deur die aandag te fokus op 'n losstaande dog uiters belangrike arm van die regsbedeling. Ons verwys na die prokureurs-generaal wat die bevoegdheid besit om in naam van die Republiek vervolgings in die howe in te stel en om alle ander werksaamhede wat met so 'n bevoegdheid verband hou te verrig. Prokureurs-generaal se bevoegdhede is sekerlik nie regsprekend van aard nie, dog dit kan ook nie as 'n uitvoerende optrede van die Staat beskryf word nie; dit moet dus as *sui generis* aangemerk word.

'n Oomblik se nadenke laat 'n mens besef dat 'n prokureur-generaal se magsposisie verreikend is, inderdaad verreikender as die howe s'n vir sover die uitoefening van 'n prokureur-generaal se bevoegdhede nie deur wette begrens word nie en alles inderdaad, soos dit al deur die howe gestel is, aan sy 'onbelemmerde goeddunke' oorgelaat word. Daarby hoef 'n prokureur-generaal, in teenstelling met die howe, nie redes vir sy besluite te verskaf nie en bygevolg kan sodanige redes normaalweg ook nie, soos in die geval van die howe, aan openbare ondersoek en debatvoering onderwerp word nie. Origens is 'n prokureur-generaal se besluite gewoonweg nie aan hersiening deur 'n geregshof onderhewig nie.

Die bestaande stelsel bevat etlike in-die-ooglopende swakhede. In eerste instansie is 'n prokureur-generaal 'n staatsamptenaar en dus onderworpe aan die Staatsdienswette en -regulasies. Tweedens, is hy onderworpe aan die beheer en voorskrifte van die Minister van Justisie. Daarby kan die Minister 'n besluit van 'n prokureur-generaal ongedaan maak en self, in die algemeen of in 'n besondere geval, enige deel van 'n prokureur-generaal se bevoegdhede uitoefen en enige deel van sy werksaamhede verrig. Hierdie stelsel bied dus 'n ideale skerm waaragter 'n Minister kan skuil ten einde 'n prokureur-generaal, wat vanweë sy posisie in die Staatsdiens weerloos teenoor die regering van die dag mag staan, te beïnvloed of selfs te manipuleer, op so 'n wyse dat dit na buite kan blyk dat die prokureur-generaal die besluite neem terwyl dit inderdaad die regering s'n is. In die alternatief staan dit 'n Minister natuurlik vry om openlik aan 'n prokureur-generaal voor te skryf of die besluite self te neem.

Vanselfsprekend word nie geïnsinueer dat die Minister van Justisie of Regering tans optree of in die verlede opgetree het soos in die hipotese hierbo gestel is nie. Inteendeel, die Hoexter-kommissie het in sy verslag (Volume III, Deel VIII, 1.14) verklaar dat hy geen getuienis van misbruike in dié verband aangehoor het nie en dat hy verseker is van 'n beleid van nie-inmenging deur agtereenvolgende Ministers van Justisie. Die Kommissie het egter ook verklaar dat hy nie die betrokkenheid van die Minister as politieke figuur

Editorial

Attorneys-General in a new dispensation

Given that a new constitutional dispensation in South Africa seems inevitable, it would be short-sighted not to review all existing structures or institutions in order to ensure, as far as possible, that the people of this country will be treated with the greatest degree of justice, fairness and humaneness under the proposed dispensation.

Traditionally the system of government of a country is divided into three parts: the legislature, the executive and the judiciary. As far as the first two are concerned, it is accepted that a dispensation that is as just as possible in the circumstances will be worked out. But even if the best possible objectives are embodied in a new constitution, it must be taken into account that the legislative and executive authorities will be controlled by ordinary human beings and that unjust, unfair or even unethical decisions can never be entirely excluded. In many instances the courts will be the only refuge of the individual who feels aggrieved, and that is why it is so particularly important that – as already advocated in previous editions of this journal – our courts should at all levels function in such a way that absolute impartiality and independence will be ensured. (See also the article 'Appointing and promoting Judges: Which way now?' by Gauntlett SC elsewhere in this journal, on what should be done to ensure that persons are appointed to the Bench purely on merit.)

We should like to take this view further by drawing attention to a separate but extremely important arm of the legal system. We are referring to attorneys-general, who have the authority to institute prosecutions in the courts in the name of the Republic, and to perform all other functions relating to this authority. The functions of attorneys-general are undoubtedly not judicial, but they can also not be described as executive action by the State; they must therefore be classified as being *sui generis*.

A moment's thought leads one to the realisation that the authority of an attorney-general is far-reaching, indeed more extensive than that of the courts in that the exercise of the powers of an attorney-general is not delimited by laws and that everything is in fact, as our courts have also stated, left to his 'unfettered discretion'. In addition, in contrast to the courts, an attorney-general need not supply reasons for his decisions, and in consequence such reasons cannot normally, as in the case of the courts, be subjected to public scrutiny and debate. Furthermore, the decisions of an attorney-general are usually not subject to review by a court of law.

The existing system has several obvious weaknesses. In the first instance, an attorney-general is a public servant and is thus subject to the Public Service laws and regulations. Secondly, he is subject to the control and directions of the Minister of Justice. In addition, the Minister may reverse a decision by an attorney-general and may himself, in general or in a specific matter, exercise any part of the authority of an attorney-general and perform any part of his functions. This system thus offers ideal cover behind which a Minister can influence or even manipulate an attorney-general – who, on account of his Public Service position, may be powerless against the government of the day – in such a way that it may appear from the outside that the attorney-general is taking the decisions while they are in fact those of the government. Alternatively, a Minister is of course free to prescribe openly to an attorney-general or to take the decisions himself.

This is not of course to insinuate that the Minister of Justice or the Government is acting or has in the past acted in accordance with the above hypothesis. On the contrary, the Hoexter Commission stated in its report (Volume III, Part VIII, 1.14) that it had heard no evidence of any impropriety in this regard and that it was assured of a policy of non-intervention by successive Ministers of Justice. The Commission also stated, however, that it did not regard the association of the Minister as a political figure with the prosecuting authority as eminently desirable. What is important, however, and what should indeed be decisive, is the fact that the time now is opportune to reconsider the position of attorneys-general in the context of the proposed constitutional reforms

by die gesag wat vervolg vanuit 'n beginseloogpunt as die mees wenslike beskou nie. Wat egter belangrik is en trouens deurslaggewend behoort te wees, is die feit dat die tyd nou geleë is om die posisie van prokureurs-generaal in die konteks van die beoogde grondwetlike hervormings te heroorweeg en om toe te sien dat die betrokke wetsbepalings so geformuleer word dat dit prinsipieel absoluut billik en suiwer is.

Daar blyk slegs een aanvaarbare oplossing te wees en dit is dat teruggekeer word na die situasie soos geskep deur artikel 139 van die Zuid-Afrika Wet van 1909, dws ons oorspronklike grondwet. Daarvolgens het alle bevoegdhede en ampspligte met betrekking tot die vervolging van misdade by die prokureurs-generaal berus. Geen voorsiening vir ministeriële beheer of inmenging het derhalwe bestaan nie.

'n Argument wat meermale ten gunste van behoud van die *status quo* aangevoer word, is dat indien die prokureurs-generaal op 'n onafhanklike vlak geplaas word en die Minister se beheer dus verwyder sou word, laasgenoemde nie langer verantwoording vir prokureurs-generaal se optredes in die Parlement of elders sal kan doen nie. Hierdie argument is egter nie oortuigend nie. Daar bestaan vele statutêre instansies wat volkome onafhanklik van die Staat funksioneer maar ten opsigte van wie se doen en late die betrokke Minister tog verduidelikings in die Parlement en elders verskaf. Dieselfde kan ten opsigte van die prokureurs-generaal geskied. Bowendien kan gereël word dat die hoof-prokureur-generaal (klaarblyklik sal so 'n pos, met prokureurs-generaal onder sy beheer, geskep moet word) jaarliks 'n verslag oor sy afdeling se werksaamhede by die Parlement indien en kan hy verplig word om voor 'n komitee van die Parlement te verskyn ten einde vrae oor die wyse waarop hy of prokureurs-generaal hulle bevoegdhede uitgeoefen of hulle werksaamhede verrig het te beantwoord. Op dié wyse kan effektiewe Parlementêre toesig uitgeoefen word.

Indien volkome onafhanklikheid nie aan prokureurs-generaal toegeken word nie, behoort daar minstens uitvoering gegee te word aan die Hoexter-kommissie se aanbevelings, naamlik dat statutêre beskerming ten opsigte van ampsbekleding aan prokureurs-generaal verleen word, en dat hulle wat salaris en ampsvoordele betref, naastenby op dieselfde vlak as 'n direkteur-generaal in die Staatsdiens geplaas word, en so meer. Sodanige aanpassings sal egter op lapwerk neerkom en totale herstrukturering van die amp soos hierbo bepleit, behoort dus oorweeg te word. ■

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and to ensure that the relevant laws are formulated in such manner as to be absolutely fair and sound in principle.

There appears to be only one acceptable solution, and that is to return to the situation as created by section 139 of the South Africa Act of 1909, ie our original constitution. Under that Act, all powers and functions relating to the prosecution of crimes were vested in the attorneys-general. No provision for ministerial control or intervention therefore existed.

An argument often put forward in favour of the retention of the *status quo* is that if attorneys-general were placed on an independent footing and the control of the Minister thus removed, the latter would no longer be able to take responsibility for the actions of attorneys-general in Parliament or elsewhere. This argument is not convincing, however. There are many statutory bodies that function quite independently of the State, but in regard to whose activities the Minister concerned nonetheless supplies explanations in Parliament and elsewhere. The same should apply to the attorneys-general. Moreover, it could be arranged for the chief attorney-general (obviously such a post, with attorneys-general under its control, would have to be created) to submit a report annually to Parliament on the activities of his division, and he could be obliged to appear before a Parliamentary committee to answer questions on the way in which he or attorneys-general had exercised their powers or performed their functions. In this way effective Parliamentary supervision could be exercised.

If complete independence is not granted to attorneys-general, the recommendations of the Hoexter Commission should at least be put into effect, namely that attorneys-general should be afforded statutory protection as regards tenure of office and that they should be placed on approximately the same level as a director-general in the Public Service as regards salary and official benefits, and so on. Such adjustments would only be stop-gap measures, however, and the total restructuring of the office, as proposed above, should therefore be considered. ■

The Delmas Trial

'The law is an ass.' This and similar statements are regularly made or endorsed by ordinary members of the public. And we as jurists unfortunately have to admit that such statements are often justified, since the results of court cases or occurrences during court proceedings, regarded from a purely practical point of view, sometimes seem totally indefensible. A good example is what happened in the so-called Delmas trial. After the longest criminal hearing ever (it lasted more than three years) and also probably the most expensive (see (1989) 2 *Consultus* 57), some of the accused were found guilty and sentenced. The Appellate Division of the Supreme Court decided, however, that the trial judge's decision to discharge one of his assessors half-way through the trial was legally incorrect and the convictions and sentences were consequently set aside. The law took its course and that was that. But can it ever be justified to the general public that the trial court which, after the discharge of the assessor, was a nullity in law, continued for more than a year, that both the State and the defence, in addition to the many thousands of rands that had already been spent on the case, spent even more thousands and that the accused, who had already been in detention for some years, were detained for a further lengthy period? Wholesale waste of time, wholesale waste of money on both sides and considerable deprivation of freedom were thus the result. Common sense suggests that the trial should have been postponed temporarily and the relevant decision of the trial judge referred to the Appellate Division. After a ruling by that Division the trial could have been finally abandoned, or another appropriate decision could have been taken. In this way the waste of time and money and unnecessary deprivation of freedom referred to above could at least have been prevented.

The reason why the obvious procedure suggested above could not be followed is that our law does not provide for adjudication by the Appellate Division of questions of law or appeals in regard to the decisions of a trial court about interlocutory matters. Although the decision of the trial judge was obviously controversial and there were probably doubts from the start in legal circles about its correctness, the trial court was, in terms of existing law, obliged to continue with the long drawn-out, expensive and laborious trial and to finish it before there could be any question of a review of the decision by the Appellate Division.

Our law, as stated above, is assuredly based on sound principles as far as ordinary cases are concerned. It would obviously be unsound for questions of law or appeals in a case to be submitted to the Appellate Division before the conclusion of the trial. Provision should be made, however, for extraordinary cases such as the one in question. In other words, the Criminal Procedure Act should be amended so as to authorise the trial judge to give leave in certain circumstances for such an interlocutory decision to be referred to the Appellate Division and for the hearing of the case to be adjourned meanwhile. Such an amendment should ensure greater fairness in our courts, as well as greater credibility for our legal system among the general public. Last but not least, it would reduce the pressure on the trial judge, which, in a case of the nature and extent of the Delmas trial, must be considerable.

This is not a new idea. Section 4 of Act 30 of 1910 of Natal specifically provided for a procedure similar to that which we are now proposing. (It applied to the Black High Court, which was abolished in 1954.) Further support for the proposed amendment is to be found in the order given by the Appellate Division that the question of law concerning the discharge of the assessor should be heard by it *in limine*, ie before the appeal in regard to the convictions and sentences was considered. This question of law could therefore just as well have been heard by the Appellate Division as soon as possible after the relevant decision by the trial judge. ■

Note:
It is interesting to note that in another exceptionally long criminal trial, the so-called High Treason case (see *R v Adams* 1959 3 SA 753 (A)), the trial court also considered it necessary and desirable at an early stage in the proceedings to refer a question of law (relating to the indictment) to the Appellate Division, and postponed the trial. The Appellate Division decided, however, that unless there had been a conviction, and the case had thus been finally disposed of, it could not intervene.