Subverting Justice

A Reply to DA Botha SC

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Introduction

In his short note entitled 'Contempt of Court?' (*Consultus* (1989) 2 121) DA Botha SC seeks to answer some of the criticisms levelled at the government arising out of the provisions of the Alteration of Boundaries of Self-Governing Territories Bill (B 76-89 (GA)). Botha correctly points out that the Bill was held out as further evidence of how the Government undermines the authority of the courts, treats judicial decisions with contempt, disregards the judicial process and legal principle, lacks respect for the integrity and independence of the courts and is unwilling to tolerate interference with its plans, even from an independent judiciary. This criticism is attributed simply to 'parliamentary and academic circles'. It is unfortunate that Botha did not deem it appropriate to identify the sources of the criticism. Had he done so, readers would have been better placed to assess the validity of the criticism and, equally important, the cogency of Botha's response. I assume that Botha had in mind, amongst others, the article entitled 'Homelands Incorporation: The Courts Overruled' by H Corder and C Murray which appeared in *De Rebus*, July 1989, and the editorial in the same issue entitled 'Contempt of Court'.

In arguing that the criticism of the Bill was misconceived, Botha relies upon what he describes as 'some constitutional basics'. In essence, he argues that courts merely interpret the law and if their interpretation does not accord with Government

policy then the Government 'will be acting perfectly within its competence to attempt to have that law amended'. The 'base motives and contemptuous attitude ascribed to the Government towards the courts' are, on this argument, not justified since such criticism proceeds from the erroneous assumption 'that the Government is somehow acting wrongfully to initiate amendments to an Act once a court has handed down a decision based on an interpretation of that Act which impedes the carrying out of Government policy'.

For his exposition of the principle of parliamentary sovereignty, Botha cannot be faulted. After all, it is a 'plain principle that parliament may make any encroachment it chooses upon the life, liberty and property of any individual subject to its sway' (per Stratford ACJ in *Sachs v Minister of Justice* 1934 AD 11 37). But Botha has misconceived both the nature of the criticism levelled at the Bill as well as the true 'constitutional basics' which are at issue.

The criticism of the Bill focused on—

(a) The Government's stated purpose in seeking to validate unlawful action;
(b) The attempt to oust the jurisdiction of the courts;
(c) The draconian implications of the Bill.

In order to understand the basis of this criticism, it is necessary to have regard to the contents of the Bill. Botha's comments ignore some of the most objectionable features of the proposed legislation.

The Bill

According to its long title, the Bill was intended, 'to empower the State President to alter the areas for which legislative assemblies of self-governing territories have been established; and to confirm certain proclamations; and to provide for matters connected therewith'. Thus, in terms of clause 2(1), the State President would be authorised 'if he deems it expedient and after consultation by the Minister of Constitutional Development and Planning with the Cabinet of a Self-Governing territory' to incorporate or exclude from a self-governing territory any 'black' area. Put simply, this provision was intended to empower the State President to redefine homeland boundaries. The only criterion to govern the exercise of this discretion was the 'expediency' of the measure. Clause 2(3) specifically sought to oust the jurisdiction of the courts by providing

that 'no court of law shall be competent to enquire into or pronounce upon the validity of any proclamation issued under sub-section (1)'.

Clause 3(1) sought to validate previous unlawful actions taken in terms of the National State Constitution Act 21 of 1971 by providing that any proclamation issued under that Act 'or of any other law, for the alteration of the area for which a legislative assembly has been established, and which would not otherwise be valid, is in point of fact valid as from the date of its publication in the *Gazette*'. This provision, as Botha observed, was intended to overcome the decision in *Lefuo v Staatspresident* (1989 3 SA 924 (O)) in which the proclamation incorporating Botshabelo into Qwa-Qwa was declared invalid. At the time of the publication of the Bill, an appeal to the Appellate Division against the correctness of this finding was pending.

The Government's justification

The then Minister of Constitutional Development and Planning, Mr Chris Heunis, gave the following explanation for the introduction of the Bill:

> The history of various court cases affecting the boundaries of self-governing territories is well known. When a proclaimed boundary is changed by way of a court action with retrospective effect, the result can be administrative, political and legal chaos. This is especially so if the court action takes place a few years after the boundary has been proclaimed. (*Business Day* 24 April 1989)

The Minister's explanation at least had the merit of candour. But its implications were chilling. As J Browde SC, National Chairman of Lawyers for Human Rights, pointed out 'what the Minister is asking for is a free hand to act unlawfully, unhampered by the control of the courts. If anything can lead to chaos, that can' (*Business Day* 25 April 1989).

The Bill was attempting to subvert a fundamental constitutional principle long recognised by our courts that 'every legal power must have legal limits otherwise there is dictatorship' (Schwartz & Wade *Legal Control of Government* (1972) 254-5 cited with approval in *Ismail v Durban City Council* 1973 2 SA 362 (N) 372A-B and *Goldberg v Minister of Prisons* 1979 1 SA 14 (A) 35B-C and 48D).

Ousting the Court's jurisdiction

Whatever the precise legal ambit of the ouster clause in the bill might have been, it clearly sought to exclude judicial scrutiny of the State President's powers of incorporation and excision. It is difficult to avoid the conclusion that the use of ouster clauses by the legislature is indeed a mark of disrespect for the judicial process and the principle of legality. Most lawyers regard such provisions with grave disquiet. Over seventy years ago, Bristowe J observed that, 'experience has shown that individual liberty is safest not in the hands of rulers, statesmen, politicians or bureaucrats, however distinguished, but in the hands of Courts of Justice presided over by officials secure in their position by constitutional safeguards and removed from the necessity or temptation of weighing or even taking into account the approval or disapproval which their decrees may excite.' (*Dedlow v Minister of Defence and Provost Marshal* 1915 TPD 543 561). Kotze JA in *Union Government v Fakir* 1923 AD 466 471 made his distaste for ouster clauses clear:

> I should like, without attempting to dictate to the legislature, to point out the great danger involved in departing from a well known rule of constitutional law in all civilised countries – namely, that the courts of law alone are entrusted with deciding on the rights and duties of all persons who are within the protection of the courts.

Incorporation by decree

Botha's treatment of the principle of parliamentary sovereignty betrays an ignorance of the manner in which that doctrine operates in South Africa. In a political democracy the principle of parliamentary sovereignty is unobjectionable. The electorate can always vote an unpopular government out of office. In South Africa, by contrast, power is effectively entrenched in the hands of the white minority with coloureds and Indians enjoying a token vote. The black majority have no say in the laws which govern their lives. It is against this background that the State President's powers of incorporation and exclusion must be viewed.

The effect of incorporation into a homeland can ultimately mean exclusion from South Africa when the homeland becomes 'independent'. This may be seen merely as a modern refinement of the policy of forced removals. Instead of the physical removal of black communities, the same result is achieved by redefining boundaries. This extraordinary result can be achieved if the State President deems it 'expedient'. True enough, there must be consultation between the Minister of Constitutional Development and Planning and the Cabinet of the self-government territory concerned, but the State President need not accept their advice and the persons most vitally affected by a proclamation of incorporation have no say in the making of the law in terms of which the State President acts.

The Bill prescribed no guidelines to govern the State President's discretion. All that was required was that he deem the proclamation to be 'expedient'. For practical purposes, such a discretion is immune from review, save on the most limited grounds (see *Omar v Minister of Law and Order* 1987 3 SA 859 (A) 892B-H). It is this sort of power which is justifiably described as dictatorial. In a fundamental sense it is the embodiment of lawlessness – 'the exercise of state power . . . unconstrained by any limits or by any control by an independent system of judicial power' (Geoff Budlender 'Law and Lawlessness in South Africa' (1988) 4 *SA Journal on Human Rights* 139 140).

Conclusion

At least some of the criticism which Botha regarded as unjustified appears to have met its mark. The Government announced its intention to withdraw clause 2(3) of the Bill which sought to exclude the court's powers of review and the Bill has yet to see the light of day.

For those who value the importance of a truly independent judiciary and the moral imperative to treat all people with equal dignity and respect, the criticism levelled at the Bill was undoubtedly justified. The Bill was the product of a Government notorious for its disregard of legality and the due process of law and for its violations of human rights. Instead of protecting the Government from its critics, lawyers should be at the forefront of the protest against such measures. ■