Redaksioneel

Legitimering van regstelsel

Die geloofwaardigheid van die land se regstelsel is van die allergrootste belang, en in 'n nuwe Suid-Afrika sal die belangrikheid daarvan toeneem. Die gebrek aan legitimiteit van die regspleging onder swartmense soos bevind in 'n RGN-ondersoek (sien die eerste hoofartikel in die Oktober 1988-uitgawe van *Consultus*) is dus 'n probleem wat nie onopgelos gelaat kan word nie.

Soos onder meer aangetoon in die betrokke RGN-verslag is die oplossing van die probleem in 'n sekere mate daarin geleë om meer swartmense by die regspleging te betrek – ook as regters en landdroste. Ons het rede om te vermoed dat, veral gegewe die drang na demokratisering op alle vlakke wat sedert die Staatspresident se toespraak op 2 Februarie 1990 posgevat het, sowel die Regering as die regsprofessies gretig is om swartmense aldus te betrek. 'n Mate van vordering is dan ook reeds gemaak. Die land se dilemma is egter die nie-beskikbaarheid van genoeg – veral ervare – swart regsgeleerdes. Die aanduidings is dus dat dit nog betreklik lank sal duur voordat volwaardige demokratisering van die howe op die gewone wyse verwesenlik sal word. Nuwe metodes wat demokratisering sal aanhelp moet derhalwe oorweeg word.

Daar was 'n voorstel 'n tyd gelede dat die juriestelsel weer in Suid-Afrika ingestel moet word, aangesien swartmense saam met ander rasgroepe op juries sal kan dien en op hierdie wyse by die regspleging betrek sal kan word. Soos ander kommentators elders reeds uitgewys het, is hierdie idee egter nie aanvaarbaar nie, en is dit selfs nie eers nodig om dit verder te debatteer nie. Veral vanweë Suid-Afrika se heterogene bevolkingsamestelling sal so 'n stelsel die teenoorgestelde uitwerking hê as wat beoog word, en die geloofwaardigheidskrisis inderdaad laat toeneem.

'n Ander idee wat onlangs geopper is, is om landdroste te magtig om van leke-assessore in strafsake gebruik te maak. 'n Landdros sou dan, benewens blankes, ook mense van kleur kon nooi om saam met hom op die regbank sitting te neem. Ook hierdie idee skyn min vooruitsigte tot lewensvatbaarheid te hê, hoofsaaklik om twee redes: Eerstens omdat dit nie ingevolge ons regstelsel doenlik is dat 'n professionele funksionaris, wat besluitneming betref, op presies dieselfde vlak funksioneer as volslae leke nie; en tweedens omdat die gebruikmaking van leke-assessore die duur van 'n strafverhoor minstens sal verdubbel en landdroste dus nie daarin sal slaag om hulle reeds oorvol hofrolle binne die beskikbare tyd af te handel nie. Indien leke-magistrate soos hieronder in die vooruitsig gestel, aangestel word, sal hulle – soos ook in Engeland gedoen word – met groot voordeel as assessore in streek- sowel as hoër howe aangewend kan word aangesien hulle paslike akademiese en praktiese opleiding sal ondergaan. Maar om totaal onopgeleide persone as assessore aan te stel sal nie deug nie.

Editorial

Legitimising the legal system

The credibility of the country's legal system is of paramount importance and in a new South Africa its importance will grow. The lack of legitimacy of the administration of justice among black people, as was found in a HSRC enquiry (see the first editorial in the October 1988 edition of *Consultus*), is therefore a problem that cannot be left unsolved.

As was shown *inter alia* in the relevant HSRC report, the solution to the problem lies to some extent in the involvement of more black persons in the administration of justice – as judges and magistrates as well. We have reason to believe that, especially in view of the urge for reform in all spheres that was triggered by the State President's speech on 2 February 1990, both the Government and the legal professions are eager to involve blacks in that way. Some progress has already been made. The country's dilemma, however, is the non-availability of a sufficient number of – particularly experienced – black lawyers. The indications, therefore, are that in the ordinary course of events it will take a comparatively long time before full democratisation of the courts will be achieved. New methods that will enhance democratisation will accordingly have to be considered.

A proposal was mooted some time ago that the jury system should be re-introduced in South Africa, since blacks would then be able to serve on juries together with members of other racial groups and in that manner become involved in the administration of justice. As other commentators have already indicated elsewhere, this idea is, however, not acceptable; in fact it is not even necessary to debate the matter further. Especially in view of the heterogeneous composition of South Africa's population, such a system would have the opposite effect to what was intended, and would indeed cause the credibility crisis to grow.

Another idea that was broached recently was to authorise magistrates to make use of lay assessors in criminal cases. Under such a system magistrates would be enabled to invite people of colour, in addition to whites, to sit with them on the bench. This idea too seems to have little prospect of viability, mainly for two reasons: First because, as far as decision making in terms of our legal system is concerned, it is not practicable for a professional functionary to function on exactly the same footing as out-and-out laymen; and secondly because the utilisation of lay assessors would at least double the duration of a criminal trial, and magistrates would consequently not be able to dispose of their already heavy court rolls within the time available for this purpose. If lay magistrates are appointed, as envisaged below, it will be possible to use them to great advantage as assessors in both regional and superior courts – as is also done in England – since they will

Veral wat die regspleging betref, is dit fataal om geforseerde stelsels, of stelsels wat hoofsaaklik deur politieke oorwegings gemotiveer is, te loods. Inteendeel, om geslaagd en geloofwaardig te wees, moet 'n stelsel uit die gemeenskap groei en aan 'n werklike behoefte voldoen.

Die sogenaamde volkshowe (''people's courts'') het talryke ongerymdhede tot gevolg gehad en 'n herinstelling daarvan word nie bepleit nie. Wat wel daarvan afgelei kan word, en met voordeel opgevolg kan word in die soeke na 'n oplossing vir die legitimiteitsvraagstuk, is 'n begeerte by die mense om self-beregtiging toe te pas. Hierdie begeerte herinner trouens sterk aan 'n waarborg vervat in die beroemde *Magna Carta*, naamlik om deur jou gelykes/eie mense (''peers'') verhoor te word. En wanneer gesoek word na 'n manier om uiting aan daardie begeerte te gee, kom die leke-magistrate- of vrederegterstelsel wat reeds vir ongeveer agt eeue in Engeland bestaan en oor die jare gegroei en diep wortels in die Britse leefwyse geskiet het – klaarblyklik juis omdat dit 'n produk van die volk se aspirasies was en deur die volk verkies word – pertinent na vore.

Etlike boeke en tydskrifartikels is reeds oor die Engelse stelsel geskryf. Verskeie kommissies van ondersoek het ook verslae daaroor uitgebring. En wanneer hierdie stof bestudeer word, kom 'n merkwaardige prent tevoorskyn. Kortweg kom dit daarop neer dat sowat 85 persent van alle strafsake in Engeland deur die leke-magistrate verhoor word en dat die stelsel 'n reusesukses is en steeds groei. (Hulle het ook jurisdiksie in sekere siviele aangeleenthede). In 1948 was daar 16 800 sodanige magistrate, in 1977 het die getal met 50 persent toegeneem tot ongeveer 23 000 en teen 1983 was daar 'n verdere toename van 10 persent tot omtrent 26 000. 'n Stelsel van heeltydse professionele magistrate (''stipendiary magistrates'') is in 1792 ingestel en inagnemende die feit dat Engeland oor genoeg regsgekwalifiseerde persone beskik of genoeg kan produseer is dit des te merkwaardiger dat die leke-stelsel desondanks nie alleen staande gebly het nie maar steeds gegroei het. (Teen 1989 was daar slegs 55 professionele magistrate, 40 in Londen en 15 in verskeie ander besige sentra).

Verhore waarby leke-magistrate voorsit, vind vanselfsprekend op 'n geordende grondslag plaas, onder die oorhoofse toesig van die Hooggeregshof. Daar is dus geen sprake van onbeheerde ongerymdhede soos wat in die volkshowe voorgekom het nie. Die magistrate word uiteraard met groot sorg geselekteer en ondergaan basiese opleiding. Daarby is 'n regskundige beskikbaar indien tegniese vrae tydens 'n verhoor sou ontstaan.

Afgesien van ander voordele, is die stelsel uiters voordelig vir die belastingbetaler vir sover die magistrate geen salarisse ontvang nie – slegs onderhouds- en reistoelaes is betaalbaar. (Hulle funksioneer op deeltydse basis en beoefen 'n verskeidenheid van beroepe of het uitgetree). Die belangrikste voordeel is egter die feit dat gewone lede van die publiek direk by die regspleging ingeskakel word en dat daar geen sprake van 'n legitimiteitskrisis kan wees nie. Soos een geleerde skrywer dit stel: dit is 'n kwessie van demokratisering van die howe. Daarby (aldus dié skrywer) is die regbanke (meer as een – gewoonlik drie – magistrate vorm 'n regbank) 'n refleksie van die betrokke gemeenskap. 'n Beter illustrasie van ''trial by peers'' is skaars denkbaar. 'n Interessante byvoordeel van die stelsel is dat dit die toename van misdaad aan bande lê omdat die magistrate fisies deel uitmaak van die gemeenskappe wat hulle dien en dus geredelik uiting aan die gemeenskapsgevoel kan gee. So 'n stelsel hou ook die voordeel in dat verhore ter plaatse kan plaasvind. Groter oriëntasie van die plaaslike bevolking ten aansien van die regspleging en die problematiek rondom misdaad word aldus verseker. Dit blyk voorts dat Regeringsinstansies deeglik ag slaan op menings uitgespreek deur die magistrate oor voorgestelde wetgewing, en so meer, blykbaar omdat hulle beskou word as gesaghebbende mondstukke van die gemeenskap.

Weliswaar bestaan daar groot verskille tussen Engeland en Suid-Afrika te meer wat betref die ontwikkelingspeil van hul bevolkings. Andersyds moet onthou word dat toe die leke-magistraatstelsel sowat 800 jaar gelede in Engeland begin is, die Britse bevolking se ontwikkeling sekerlik nog op 'n veel laer vlak as dié van ons huidige bevolking was en tog was daar klaarblyklik nog altyd genoeg geskikte persone om as leke-magistrate aan te stel. Bowendien moet Suid-Afrikaners se vermoëns nie onderskat word nie en meer as genoeg persone wat geskik is om as leke-magistrate op te tree, sal waarskynlik gevind word. Die stelsel waarvolgens vrederegters (gewone lede van die publiek) onder andere ook strafsake verhoor het, wat tot 'n aantal jare gelede in Suid-Afrika gefunksioneer het, het vrederegters opgelewer wat 'n strafverhoor met groot onderskeiding en waardigheid kon hanteer en wat groot aansien geniet het. 'n Verdere oorweging – soos tereg uitgewys deur een van die geleerde skrywers – is dat die leke-magistraatstelsel baie aanpasbaar is. Die Engelse stelsel, met die nodige aanpassings, is dan ook met groot welslae in sekere lande in Afrika, Indië en ander Statebondslande in werking gestel. Hoe dit ook al sy, indien die nodige wetgewing aanvaar

undergo appropriate academic and practical training. But to appoint totally untrained laymen as assessors would not be a feasible proposition.

Particularly in the administration of justice, it is incongruous to embark on forced systems or systems primarily motivated by political considerations. On the contrary, in order to succeed and to acquire credibility, a new system must stem from the community and fulfil a real need.

The so-called "people's courts" resulted in numerous irregularities and their revival is not recommended. However, something which can be deduced from those "courts" and which can be followed up with advantage in the quest for a solution to the legitimacy question, is an eagerness among the people to engage in self-adjudication. As a matter of fact, this eagerness forcefully reminds us of a guarantee contained in the famous *Magna Carta*, namely of being tried by one's peers. And when one starts looking around for a method to accommodate that inclination, then the lay magistrate or justice of the peace system, which has been in operation in England for about eight centuries and which has been growing over the years and has become deeply rooted in the British way of life – exactly because it has been a product of the people's aspirations and is preferred by the people – presents itself as an obvious possibility.

A number of books and articles have already been written on the English system. In addition, various commissions of inquiry have brought out reports on the system. And when this material is studied a remarkable picture emerges. Briefly, it appears that approximately 85 per cent of all criminal cases in England are tried by lay magistrates and that the system is a huge success and is still growing. (They also have jurisdiction in certain civil matters). In 1948 there were 16 800 such magistrates, by 1977 the number had increased by 50 per cent to about 23 000 and by 1983 there was a further increase of 10 per cent to roughly 26 000. A system of full-time professional magistrates ("stipendiary magistrates") was launched in 1792 and, regard being had to the fact that England certainly has or can produce enough legally qualified persons, it is all the more remarkable that the system of lay magistrates nevertheless not only remained in existence, but in fact grew progressively. (In 1989 there were only 55 professional magistrates, 40 in London and 15 in several other busy centres.)

The trials presided over by lay magistrates are naturally conducted in an orderly manner, under the overall supervision of the Supreme Court. There is therefore no question of uncontrolled irregularities as happened in the "people's courts". In the nature of things, these magistrates are selected with the utmost care and they undergo basic training. Furthermore, a lawyer is available in the event of a technical question cropping up during the trial.

Apart from other benefits, the system is extremely advantageous to the tax-payer inasmuch as the magistrates receive no salaries – only subsistence and transport allowances are payable. (They function on a part-time basis and follow a variety of callings or are retired). The most important advantage, however, is the fact that ordinary members of the public are directly linked up with the administration of justice and that there can be no question of a legitimacy crisis. As it is put by one of the learned authors: it is a matter of democratisation of the courts. In addition, according to this author, these benches actually mirror the society in question (more than one – normally three – magistrates sit together). A better illustration of "trial by peers" can hardly be visualised. An interesting fringe benefit of the system is that it tends to curb the increase of crime since the magistrates physically form part of the societies they serve and are therefore in a position to give prompt expression to public feeling. Greater orientation of the local community to the administration of justice and problems generally arising from crime is also ensured by the scheme. Moreover, it appears that Government agencies take due note of the views of magistrates on proposed legislation and so on, presumably because they are looked upon as authoritative mouthpieces of the community.

There are admittedly profound differences between England and South Africa, especially as regards the level of development of their populations. On the other hand, it is to be remembered that when the lay magistrate system was commenced some 800 years ago in England, the British people's level of development must have been much lower than that of South Africans at the present moment and yet it is clear that there have always been enough suitable persons for appointment as lay magistrates. Moreover, the ability of South Africans should not be underestimated and more than enough suitable persons will probably be found to appoint as lay magistrates. The system which until a number of years ago operated in South Africa, whereby justices of the peace (ordinary members of the public) tried criminal cases *inter alia*, produced justices of the peace who were able to handle a criminal trial with great distinction and dignity and enjoyed great esteem. A further consideration – as also correctly pointed out by one of the learned authors – is that the lay magistrate system is extremely

word, kan die stelsel algaande, aanvanklik by wyse van loodsprojekte, gevestig word en kan dit gaandeweg aangepas word om aan behoeftes wat eie aan Suid-Afrika is te voldoen. Al wat ons werklik van Engeland hoef oor te neem is die basiese gedagte dat gewone lede van die algemene publiek, afgesien van ras of kleur, regstreeks by die regspleging ingeskakel kan word en dat dit 'n logiese en effektiewe wyse is om die howe te demokratiseer en die legitimiteitsvraagstuk te verlig.

Daar word dus aan die hand gedoen dat 'n komitee of kommissie, wat paslik saamgestel is, aangewys word om die wenslikheid van 'n lekemagistraatstelsel vir Suid-Afrika te ondersoek en aanbevelings te doen.

Bronne:

1. Sir Thomas Skyrme: *The Changing Image of the Magistracy*, Second Edition, Macmillan London (1983)
2. JR Spencer (Red): *Jackson's Machinery of Justice*, Cambridge University Press (1989)
3. Keith J Eddey: *The English Legal System*, Fourth Edition, Sweet and Maxwell London (1987)
4. Shari Seidman Diamond: "Revising Images of Public Punitiveness: Sentencing by Lay and Professional English Magistrates" *Law and Social Inquiry* Vol 15 (1990)

Nota:

By ons ter perse gaan het die Staatspresident aangekondig dat dit beoog word om groter status en betekenis aan die amp van vrederegter of 'n gelyksoortige amp te verleen vir die beslegting van minder ernstige, gedekriminaliseerde misdrywe.

● *Dit sal 'n stap in die regte rigting wees.* ■

Die openbare verdedigerstelsel

Die Regshulpraad verdien lof vir die openbare verdedigerstelsel wat onlangs geloods is, soveel meer omdat so 'n wye groep instansies daarby betrek is en die projek dus inderdaad 'n nasionale inslag het: die Algemene Balieraad, die Vereniging van Prokureursordes, die Departement van Justisie, die Legal Resources Centre, die Lawyers for Human Rights, die Black Lawyers Association en die National Association of Democratic Lawyers. Hierdie demonstrasie van saamhorigheid en onderlinge onderskraging is prysenswaardig en sal noodwendig daartoe lei dat die bes moontlike resultate behaal word. (Sien die mediaverklaring van die Regshulpraad elders in hierdie uitgawe.)

Dit blyk dat die taak wat voorlê van geweldige omvang is. Die mikpunt is blykbaar dat ten minste alle beskuldigdes wat gevaar loop om direkte gevangenisstraf opgelê te word verdedig moet word; en meer as 100 000 onverdedigde beskuldigdes word jaarliks in laerhowe sodanige straf opgelê. 'n Oomblik se nadenke laat 'n mens besef dat dit haas onmoontlik blyk om daardie mikpunt in die nabye toekoms te bereik. Selfs indien genoeg fondse beskikbaar sou wees, beskik Suid-Afrika vermoedelik nie oor voldoende regslui (bo en behalwe advokate en prokureurs wat normaalweg funksioneer) wat ingevolge die stelsel in diens geneem kan word om die verdediging van 100 000 aangeklaagdes jaarliks te behartig nie. Die Regshulpraad se projek kan dus in hierdie stadium hoogstens as 'n ideaal aangemerk word. Dit is nogtans 'n ideaal wat hopelik algaande in al hoe ruimer mate verwesenlik sal kan word en wat almal se heelhartige ondersteuning – finansieel en andersins – verdien.

Maar veral aangesien dit blykbaar lank sal duur alvorens daardie ideaal ten volle verwesenlik is, is dit wenslik dat oorweging ook geskenk word aan ander instrumente wat daarop gerig is om te verseker dat onskuldige persone nie skuldig bevind word nie en dat dié wat wel skuldig bevind word gepaste vonnisse opgelê word. In die verband kom voorsittende regterlike beamptes – regters en landdroste – sonder meer in fokus. In die finale instansie is dit immers hulle verantwoordelikheid om toe te sien dat reg in hulle howe geskied, ongeag of die aangeklaagde verdedig word of nie. Wat hoërhowe betref, skyn daar geen bedenkinge te bestaan nie. Bedenkinge wat wel bestaan, is beperk tot laerhowe. Hierdie bedenkinge sou sekerlik minder gewees het indien die Regering die Hoexterkommissie se aanbevelings oor die opgradering en strukturering van laerhowe, wat sowat agt jaar gelede reeds gedoen is, aanvaar en geïmplimenteer het. Ons kan nie begryp waarom daardie aanbevelings nog nie in werking gestel is nie en die tyd het bepaald aangebreek dat die Regering dit weer in oënskou neem.

Indien laerhowe op 'n gesonde grondslag geplaas word – ooreenkomstig die Hoexterkommissie se aanbevelings – sal daar veel minder redes tot kommer oor die verdediging van aangeklaagdes bestaan. Opgradering van laerhowe sal met een meebring dat hulle beter toegerus sal wees om die groeiende misdaadgolf effektief te hanteer. Op hierdie wyse sal dié howe se geloofwaardigheid verhoog word uit die oogpunt van sowel die aangeklaagdes as die algemene publiek.

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adaptable. The English system, with the necessary adaptations, was indeed put into operation in certain countries in Africa, India and other Commonwealth countries, with great success. Be that as it may, if the necessary legislation is passed the system can be introduced gradually, initially by way of pilot projects, and thereafter adapted systematically to fulfil the peculiar needs of South Africa. All that we really need to take over from England is the basic idea that ordinary members of the general public, irrespective of race or colour, can be drawn directly into the administration of justice and that it would be a logical and effective manner of democratisising the courts and alleviating the legitimacy problem.

It is accordingly suggested that a committee or commission, suitably constituted, be appointed to investigate the desirability of a lay magistrate system for South Africa and to make recommendations.

Sources:
1. Sir Thomas Skyrme: *The Changing Image of the Magistracy*, Second Edition, Macmillan London (1983)
2. JR Spencer (Ed): *Jackson's Machinery of Justice*, Cambridge University Press (1989)
3. Keith J Eddey: *The English Legal System*, Fourth Edition, Sweet and Maxwell London (1987)
4. Shari Seidman Diamond: "Revising Images of Public Punitiveness; Sentencing by Lay and Professional English Magistrates" *Law and Social Inquiry* Vol 15 (1990)

Note:
At the time of going to press it was announced by the State President that the Government proposes to confer greater status and meaning on the office of justice of the peace or a similar office to decide on less serious, decriminalised offences.

● *This would be a step in the right direction.* ■

The public defender system

The Legal Aid Board deserves praise for the public defender system that was launched recently, particularly so since such a wide-ranging group of organisations are involved, thus giving it a national character: the General Council of the Bar, the Association of Law Societies, the Department of Justice, the Legal Resources Centre, the Lawyers for Human Rights, the Black Lawyers Association and the National Association of Democratic Lawyers. This demonstration of solidarity and mutual support is praiseworthy and will inevitably lead to the achievement of the best possible results. (See the press release by the Legal Aid Board elsewhere in this edition.)

It seems that the scope of the task that lies ahead is tremendous. The object apparently is that at least all accused persons who are at risk of receiving prison sentences, should be defended; and more than 100 000 undefended accused persons each year receive such sentences in lower courts. Only a moment's reflection is necessary to realise that it would be almost impossible to achieve that object in the near future. Even if enough public funds were to be available, South Africa presumably does not have a sufficient number of lawyers (over and above advocates and attorneys functioning normally) who could be employed under this system to undertake the defence of 100 000 accused persons annually. The Legal Aid Board's project can therefore at this stage at most be described as an ideal. Nevertheless, it is an ideal that will hopefully be achieved gradually and all the more rapidly as time goes by. Accordingly, it deserves everybody's full support, financially and otherwise.

But especially since it will apparently take a long time before that ideal will be fully realised, it is desirable that consideration also be accorded to other instruments designed to ensure that innocent persons are not convicted and that those who are convicted receive appropriate sentences. In this connection the presiding judicial officers – judges and magistrates – automatically come into focus. In the final analysis it is their duty to see to it that justice is done in their courts, irrespective of whether the accused is defended or not. There seem to be no misgivings insofar as superior courts are concerned. Misgivings which do exist are limited to lower courts. These misgivings would surely have been less had the Government accepted and implemented the Hoexter Commission's recommendations made about eight years ago concerning the upgrading and structuring of lower courts. We are unable to understand why those recommendations have not yet been put into operation and the time has certainly arrived for the Government to reconsider them.

If lower courts are placed on a proper footing – in accordance with the Hoexter Commission's recommendations – there will be much less reason for concern over the defence of accused persons. The upgrading of lower courts will at the same time result in their being better equipped to handle the growing crime wave effectively. In this way the credibility of these courts will be enhanced from the point of view of both the accused and the general public.

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