Editorial

The courts in a new dispensation

The SA Law Commission deserves praise for the gigantic task it has performed in its reports on Group and Human Rights and Constitutional Models. This material will certainly make an important contribution towards laying the foundations for the proposed new constitutional dispensation in South Africa. The Law Commission consists exclusively of lawyers and it is hardly necessary to state that the advocates' profession, too, is called upon to play a major part in constructing those foundations, in order to formulate a constitution which would be suitable for the rich diversity of the South African community. We have accordingly studied the reports with interest and wish to make a few comments thereon, not really to advance firm standpoints but rather to stimulate debate on the Commission's recommendations.

First, the Commission's proposed bill of human rights. A striking aspect of the bill is that it simply provides that an accused person has a right to be tried by a court of law and that everyone has the right to have civil disputes settled by a court of law – without adding the usual requirements that such a court must be competent, independent and impartial. The requirement of independence in particular is of the utmost importance and should not be omitted. If such a requirement is not included in the bill, it would be possible for the legislature to embody in an ordinary Act of Parliament provisions that would materially affect the independence of a judge or other judicial officer.

Another provision which is lacking is that an accused person is entitled to be tried within a reasonable time or without undue delay. Such a provision normally appears in bills of rights and it is hardly necessary to stress the necessity of such a requirement being included in the South African version.

The Law Commission, throughout in its proposed bill, only refers to a "court of law" while the wider concept of "tribunal" (or "court of law or other tribunal") normally appears in clauses of bills of rights of other countries dealing with a person's rights in respect of a fair hearing. The latter concept is to be preferred since it provides wider protection. If the relevant protective measures are limited to a "court of law", the door will be left wide open for the legislature to create all sorts of tribunals – not labelled as courts of law but nevertheless given powers to determine a person's rights and duties – which need not meet with the requirement of independence or impartiality. To give an example: The legislature should be forced to ensure that an institution such as the present Industrial Court will function on an independent and impartial basis despite the fact that it is not a court of law in the narrow sense of that term.

A proposal of the Commission which should also be studied very carefully is that the Appellate Division should be divided into two chambers and that one of the chambers should serve as a constitutional court. If the only or most important issue is a constitutional one, the Chief

Redaksioneel

Die howe in 'n nuwe bedeling

Die SA Regskommissie verdien lof vir die kolossale taak wat hy verrig het met die verslae oor Groeps- en Menseregte en Grondwetlike Modelle. Hierdie stof sal sekerlik 'n belangrike bydrae lewer tot the vorming van boustene vir die beoogde nuwe grondwetlike bedeling in Suid-Afrika. Die Regskommissie bestaan uitsluitlik uit regsgeleerdes en dit is nouliks nodig om te meld dat ook die advokaatsprofessie geroepe is om 'n wesenlike rol te speel ter afronding van daardie boustene, ten einde 'n grondwet tot stand te bring wat geskik is vir die ryke verskeidenheid van die Suid-Afrikaanse samelewing. Ons het die verslae dan ook met belangstelling bestudeer en wil enkele opmerkings daaroor maak, nie soseer om finale standpunte in te neem nie dog eerder om 'n debat oor die Kommissie se aanbevelings te stimuleer.

Eerstens, die Kommissie se voorgestelde akte van menseregte. 'n Opvallende aspek hiervan is dat die akte bloot bepaal dat 'n beskuldigde geregtig is op 'n verhoor deur 'n geregshof en dat elke persoon die reg het om siviele geskille deur 'n geregshof te laat besleg sonder dat die gebruiklike vereistes dat so 'n hof bevoeg, onafhanklik en onpartydig moet wees, bygevoeg is. Veral die vereiste van onafhanklikheid is allerbelangrik en behoort nie weggelaat te word nie. Indien so 'n vereiste nie by die akte ingelyf word nie, sal dit vir die wetgewer moontlik wees om in 'n gewone wet van die Parlement bepalings in te sluit wat wesenlik afbreuk doen aan 'n regter of ander regsprekende beampte se onafhanklikheid.

'n Ander bepaling wat ontbreek, is dat 'n beskuldigde daarop geregtig is om binne 'n redelike tyd of sonder onbehoorlike vertraging verhoor te word. So 'n bepaling kom gewoonlik in sulke handveste voor en dit is skaars nodig om op die noodsaaklikheid van so 'n vereiste in ons menseregakte te wys.

In sy voorgestelde akte verwys die Regskommissie deurgaans slegs na 'n "geregshof" terwyl die wyer begrip "tribunaal" (of "geregshof of ander tribunaal") gewoonlik in klousules van menseregaktes van ander lande, wat handel met 'n persoon se regte ten opsigte van billike beregting, voorkom. Laasgenoemde term word verkies aangesien dit wyer beskerming bied. Indien die betrokke beskermingsmaatreëls tot 'n "geregshof" beperk word, word die deur vir die wetgewer oopgelaat om allerlei tribunale – wat nie as 'n geregshof ingeklee word nie dog wat met bevoegdhede beklee word om persone se regte en verpligtinge te bepaal – te skep wat nie aan die vereiste van onafhanklikheid of onpartydigheid hoef te voldoen nie. Om 'n voorbeeld te noem: Die wetgewer behoort verplig te word om te verseker dat 'n instelling soos die huidige Nywerheidshof op 'n onafhanklike en onpartydige grondslag funksioneer ten spyte daarvan dat dit nie 'n geregshof in die eng sin van die woord is nie.

'n Voorstel van die Kommissie wat ook met besondere aandag bestudeer moet word, is dat die Appèlafdeling in twee kamers verdeel moet word, en dat een kamer as 'n konstitusionele hof

Justice must place the appeal on the roll of the Constitutional Chamber whereas in all other cases the appeal must be placed on the roll of the General Chamber. Furthermore, it is proposed that in contrast to the present practice whereby only serving judges are considered for appointment to the Appellate Division, legal academics and presumably also other types of lawyers should qualify for appointment directly to the Constitutional Chamber; in this way they would be placed on the same footing as judges of appeal in the General Chamber. An important object of this proposal, so it seems, is to make it possible for all population groups to be represented in the Constitutional Chamber right from the outset.

A significant point to bear in mind is that the Constitutional Chamber will not consider constitutional matters only. It is quite conceivable that the constitutional question which has led to the referral of an appeal to the Constitutional Chamber might during the course of the hearing of the appeal be reduced to a triviality or might even disappear from the scene altogether, resulting in the court giving its judgment mainly or even exclusively on non-constitutional matters. It can also be foreseen that in considering a constitutional issue, the court will in some cases necessarily also have to consider and decide non-constitutional aspects of the law. Furthermore, it should be noted that it is proposed that the Constitutional Chamber should also hear issues arising from the field of administrative law.

It therefore appears that the Constitutional Chamber will to a large extent play the same dynamic role as the General Chamber in relation to the shaping of our ordinary law as well. And if the Constitutional Chamber's bench is packed with lawyers who do not comply with standards set for judges of appeal up to the present time, this may give rise to a lowering of the standard of Appeal Court judgments and the consequent impoverishment of our law generally.

It is also difficult to accept that a constitutional academic, whatever great heights he may have reached in his field of study, would indeed do better in the Constitutional Chamber than a judge of a provincial division of the Supreme Court who, in the nature of things, had practised at the Bar for many years and had thereafter for a considerable time sat on the bench. Judging from the law reports on constitutional issues in foreign countries, a practical lawyer with wide experience on the bench would in fact be better equipped for the task of a judge of appeal in a constitutional matter than an academic constitutionalist, or say an attorney who has practised somewhere on the platteland and who, therefore, may be said to have gained a sound knowledge of the sense of justice of persons at grassroots level.

A recommendation of the Commission which is certainly not reconcilable with the idea of a Constitutional Chamber of the Appellate Division, is that constitutional issues in lower courts and in provincial and local divisions of the Supreme Court are to be adjudicated by ordinary magistrates and ordinary judges, respectively. By far the majority of such issues will surely end in lower courts and provincial and local divisions, and will consequently not receive the attention of the Constitutional Chamber. Our law on constitutional questions will therefore largely be determined in these divisions of the Supreme Court. And if ordinary judges are regarded as suitable and competent for this purpose, there can be no good reason why such questions reaching the Appellate Division should be dealt with by a different type of judge. In other words: If indeed a constitutional issue, by reason of its distinctive nature, requires the attention of a distinctive bench, it does not make sense to have such an issue adjudicated by a conventional bench at lower court and provincial Supreme Court levels. The Law Commission itself has, however, come to the conclusion that it would not be meaningful to create distinctive benches for constitutional issues at lower court and provincial Supreme Court levels. If this conclusion is correct – and we support it – the creation of a distinctive bench for the disposal of such issues at Appeal Court level can definitely not be justified.

It is also pointed out that as a result of its heterogeneous composition the juridical philosophical approach of the Constitutional Chamber may differ materially from that of the ordinary courts. Judges in the provincial and local divisions of the Supreme Court may therefore find it difficult to harmonise their judgments with those of the Constitutional Chamber.

All things considered, it would seem that the idea of a Constitutional Chamber stems mainly from a desire to ensure that judges of appeal of all races are appointed in that Chamber. We fully agree with the idea that the courts should be democratised as far as possible, inasmuch as all races should be adequately represented on the various court benches. We cannot agree, however, that the administration of justice at the highest level of the judicial hierarchy should be allowed to deteriorate solely in order to achieve that object, no matter how commendable or justifiable such an object may be. Care should also be taken that the bench in the Constitutional Chamber is not composed in such a manner as to have no legitimacy among people who will

moet dien; indien die enigste of vernaamste geskilpunt 'n konstitusionele een is, moet die Hoofregter die appèl vir verhoor op die rol van die Konstitusionele Kamer plaas – in alle ander gevalle moet die appèl op die rol van die Algemene Kamer geplaas word. Die voorstel is ook dat in teenstelling met die bestaande gebruik waarvolgens slegs dienende regters oorweeg word vir aanstelling in die Appèlafdeling, regsakademici en vermoedelik ook ander tipes regsgeleerdes direk in die Konstitusionele Kamer van die Appèlafdeling aangestel moet kan word; hulle word aldus op dieselfde vlak geplaas as appèlregters in die Algemene Kamer. 'n Belangrike oogmerk met dié voorstel is blykbaar om dit moontlik te maak dat alle bevolkingsgroepe van meet af aan in die Konstitusionele Kamer verteenwoordig word.

'n Betekenisvolle aspek wat onthou moet word, is dat die Konstitusionele Kamer nie alleen konstitusionele vraagstukke sal oorweeg nie. Trouens, die konstitusionele punt wat daartoe gelei het dat die appèl na die Konstitusionele Kamer verwys word, kan tydens die verhoor van die appèl tot 'n nietigheid gereduseer word of kan selfs heeltemal in die niet verdwyn, met die gevolg dat die hof se uitspraak grootliks of selfs uitsluitlik op nie-konstitusionele aspekte gebaseer sal word. Dit is ook goed denkbaar dat by oorweging van 'n konstitusionele geskilpunt die hof in sekere sake noodwendig ook nie-konstitusionele aspekte van die reg sal moet oorweeg en beslis. Verder moet daarop gelet word dat dit beoog word dat die Konstitusionele Kamer ook geskilpunte voortspruitende uit die administratiefreg moet aanhoor.

Dit blyk dus dat die Konstitusionele Kamer tot groot hoogte dieselfde dinamiese rol as die Algemene Kamer sal vervul ter vorming van ook ons gewone reg. En indien die Konstitusionele Kamer se regbank gevul word met regsgeleerdes wat nie voldoen aan standaarde wat tot dusver vir appèlregters gestel is nie, kan dit lei tot 'n verlaging van die gehalte van Appèlhofuitsprake en 'n verarming van ons reg in die algemeen.

Dit is ook moeilik om te aanvaar dat 'n konstitusionele akademikus, watter groot hoogtes hy ook al in sy vakgebied behaal het, juis beter as appèlregter in die Konstitusionele Kamer sal vaar as 'n regter van 'n provinsiale afdeling van die Hooggeregshof wat uiteraard vir baie jare aan die Balie gepraktiseer het en daarna vir 'n geruime tyd op die regbank gesit het. Te oordeel na hofverslae oor konstitusionele geskilpunte in ander lande sal 'n praktiese regsgeleerde met wye praktiese ervaring op die regbank inderdaad beter toegerus wees vir die taak van 'n appèlregter in 'n konstitusionele aangeleentheid as 'n akademiese konstitusionalis of sê 'n prokureur wat êrens op die platteland gepraktiseer het en dus na bewering goeie kennis van die regsgevoel van mense op grondvlak opgedoen het.

'n Aanbeveling van die Kommissie wat ook hoegenaamd nie te rym is met die idee van 'n Konstitusionele Kamer van die Appèlafdeling nie, is dat konstitusionele geskilpunte in laerhowe en provinsiale en plaaslike afdelings van die Hooggeregshof onderskeidelik deur gewone landdroste en gewone regters bereg moet word. Verreweg die meeste sodanige geskilpunte sal sekerlik in laerhowe en in die provinsiale en plaaslike afdelings eindig, en dus nie die Konstitusionele Kamer se aandag geniet nie. Ons reg aangaande konstitusionele vraagstukke sal dus grootliks in genoemde afdelings van die Hooggeregshof neergelê word. En indien gewone regters hiervoor as geskik en opgewasse geag word, kan daar geen goeie rede bestaan waarom dié vraagstukke in die Appèlafdeling deur 'n ander tipe regter bereg moet word nie. Anders gestel: Indien dit so is dat konstitusionele vraagstukke vanweë eiesoortigheid 'n eiesoortige regbank verg, maak dit nie sin om dié vraagstukke op laerhof- en provinsiale Hooggeregshofvlakke deur konvensionele regbanke te laat bereg nie. Die Regskommissie het egter self tot die gevolgtrekking gekom dat dit nie sinvol sal wees om eiesoortige regbanke vir konstitusionele vraagstukke op laer- en provinsiale Hooggeregshofvlakke te skep nie. Indien dié gevolgtrekking korrek is – en ons steun dit – kan dit werklik nie geregverdig word om 'n eiesoortige regbank vir dié vraagstukke op Appèlhofvlak te skep nie.

Dit word ook daarop gewys dat die Konstitusionele Kamer, vanweë sy heterogene samestelling, se regsfilosofiese benadering wesenlik mag verskil van die gewone howe se benadering. Regters in die provinsiale en plaaslike afdelings van die Hooggeregshof mag dit derhalwe moeilik vind om hul uitsprake te harmoniseer met dié van die Konstitusionele Kamer.

Alles in ag genome wil dit voorkom asof die idee van 'n Konstitusionele Kamer hoofsaaklik voortspruit uit 'n begeerte om appèlregters van alle rasse by dié Kamer te laat betrek. Ons stem heeltemal saam met die gedagte dat die howe so ver moontlik gedemokratiseer moet word, in soverre dat alle rasse in 'n voldoende mate op die verskillende regbanke verteenwoordig moet word. Ons kan egter nie saamstem dat toegelaat word dat die howe se regspraak op die boonste vlak van die judisiële hiërargie verswak word bloot ter verwesenliking van daardie oogmerk nie, hoe lofwaardig of geregverdig so 'n oogmerk ook al mag

constitute the minorities in South Africa after the coming into operation of the new constitution. These minorities will to an appreciable degree rely upon the Supreme Court for the protection of their fundamental rights, and if they do not have confidence in the Constitutional Chamber the whole basis of the proposed new dispensation will be jeopardised.

It is accordingly suggested that the idea of a Constitutional Chamber should be given further attention. ■

The death penalty once again

According to the article on the death penalty appearing elsewhere in this edition, the new legislation whereby the courts have been vested with a discretion to decide whether or not the death sentence should be imposed for murder, is functioning fairly well in practice. And judging by the available statistics, the legislature has largely succeeded in its object of having the death sentence imposed only in extreme cases: from the coming into operation of this legislation on 27 July 1990 up to 31 December 1991, 125 persons were sentenced to death for murder whereas 296 persons were so sentenced for the same crime during the corresponding period from 27 July 1988 to 31 December 1989. These figures indicate that the legislation in question resulted in a decrease of about 58 per cent in death sentences imposed for murder. If these statistics even only approximately reflect a true picture, the legislation can be described as a success.

But unfortunately there is another side of the death penalty that reflects a darker picture of this form of punishment. It appears that the last execution in South Africa took place as long ago as 14 November 1989 and that on 31 December 1991 295 persons on whom the death penalty had been imposed, were in detention. An accumulation of people who presumably are awaiting execution has therefore occurred – because quite obviously, in terms of established norms, a reasonable percentage of these 295 persons will not receive a remission of sentence. It is to be remembered that as a result of the legislation mentioned *supra* murder cases undergo an intensive screening process in the courts and that persons remaining on death row after all the court processes have been completed, will in the normal course of events hardly be entitled to a reprieve.

It is assumed that large-scale executions are out of the question. A possible solution would be to abolish the death penalty and to commute the sentences of all death row prisoners. The legislature is, however, faced with the problem that, particularly in relation to a subject such as the death penalty, it is obliged to give expression to public opinion. And the preponderance of public opinion among all population groups in this country, as far as we are aware, is in favour of the retention of the death penalty – especially taking into account the alarming increase of murders and other violence-related crimes in recent times. Many people still regard the death penalty as a strong deterrent to potential murderers.

We therefore have a classic case of checkmate in regard to a matter that literally involves life and death. How the Government proposes to resolve this impasse is difficult to visualise. However, for obvious reasons the matter cannot be allowed to remain in a vacuum for much longer. A solution will have to be found soon. ■

wees. Daar moet ook daarteen gewaak word dat die regbank in die Konstitusionele Kamer só saamgestel word dat dit nie legitimiteit sal hê by mense wat na die inwerkingtreding van die nuwe grondwet die minderhede in die land sal uitmaak nie. Dié minderhede sal in 'n aansienlike mate staatmaak op die Hooggeregshof om hul fundamentele regte te beskerm en indien hulle nie vertroue in so 'n Konstitusionele Kamer het nie sal die grondslag van die beoogde nuwe bedeling in gevaar gestel word.

Dit word dus in oorweging gegee dat die idee van 'n Konstitusionele Kamer verdere aandag verg. ■

Weer eens die doodstraf

Volgens die artikel oor die doodstraf wat elders in hierdie uitgawe verskyn, funksioneer die nuwe wetgewing, waarkragtens die howe met 'n diskresie beklee is om te besluit of die doodvonnis vir moord opgelê moet word of nie, heel goed in die praktyk. En te oordeel aan die beskikbare statistiek het die wetgewer grootliks in sy doel geslaag om die doodstraf slegs in uiterste gevalle te laat oplê: sedert die inwerkingtreding van hierdie wetgewing op 27 Julie 1990 tot 31 Desember 1991 is 125 persone weens moord ter dood veroordeel terwyl 296 persone gedurende die ooreenstemmende tydperk 27 Julie 1988 tot 31 Desember 1989 weens dié misdaad ter dood veroordeel is. Hiervolgens het die wetgewing daartoe gelei dat die getal terdoodveroordelings weens moord met sowat 58 persent afgeneem het. Indien hierdie syfers selfs net naastenby 'n ware beeld na vore bring, kan die wetgewing as geslaagd bestempel word.

Maar onglukkig is daar 'n ander kant van die doodstraf wat 'n donkerder beeld van hierdie strafvorm tevoorskyn bring. Dit blyk dat die laaste teregstelling so ver terug as 14 November 1989 in Suid-Afrika plaasgevind het en dat daar op 31 Desember 1991 295 terdoodveroordeeldes in aanhouding was. 'n Opeenhoping van mense wat vermoedelik tereggestel moet word het dus plaasgevind – want dit is duidelik dat indien gevestigde norme toegepas word 'n redelike persentasie van hierdie 295 persone se vonnisse nie versag sal word nie. Daar moet onthou word dat moordsake vanweë vermelde wetgewing 'n intensiewe siftingsproses in die howe ondergaan en dat persone wat in die dodeselle oorbly nadat al die hofprosesse afgehandel is, in die gewone gang van sake nouliks op begenadiging kan reken.

Grootskeepse teregstellings is tog seker buite die kwessie. 'n Moontlike uitweg sou wees dat die doodstraf afgeskaf word en dat alle terdoodveroordeeldes se vonnisse versag word. Die wetgewer se probleem is egter dat hy, veral ten aansien van 'n onderwerp soos die doodstraf, uiting aan die openbare mening moet gee.

En die oorwig van die openbare mening onder alle bevolkingsgroepe, so ver ons bewus is, is ten gunste van die behoud van die doodstraf – te meer inaggenome die skrikwekkende toename van moorde en ander geweldsmisdade in resente tye. Baie mense beskou die doodstraf steeds as 'n sterk afskrikmiddel vir potensiële moordenaars.

Hier is derhalwe 'n klassieke geval van skaakmat met betrekking tot 'n aangeleentheid wat letterlik van lewensbelang is. Hoe die Regering hierdie knoop gaan deurhak is moeilik om te visualiseer. Om voor die hand liggende redes kan die aangeleentheid egter nie vir veel langer toegelaat word om in 'n lugleegte te bly hang nie. 'n Oplossing sal spoedig gevind moet word. ■