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INSTITUTION OF TRADITIONAL LEADERSHIP :
EXECUTIVE AND LEGISLATIVE FUNCTION

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**INSTITUTION OF TRADITIONAL LEADERSHIP : AND THEIR EXECUTIVE
AND LEGISLATIVE FUNCTION**

Mr Chairperson, Ladies and Gentlemen although my paper will be of a general nature emphasis will be placed on the position in the Cape Province which will include Ciskei and Transkei. In this discussion we seek to demonstrate that the institution of traditional leadership was essentially democratic and to a large extent succeeded in accommodating some of the virtues that are extolled in the Constitutional Principles of the Interim Constitution namely, the promotion of equality and national unity.

It needs to be said from the outset that the doctrine of separation of powers was not known. It was always the Chief-in-Council, the Chief being merely the *primus inter pares*. Even after establishment of the rural local government structures in terms of the Black Authorities Act No.68 of 1951 there was no clear separation of functions.

In order to present a clearer picture about the institution . I have considered it appropriate to approach the discussion from a historical perspective. This paper will therefore be divided into three parts, namely, a brief exposition of the period before the white rule, the advent of the latter and finally the transition period leading to political independence. It is felt that this kind of background will help dispel some of the myth about the institution of traditional leadership.

1. Pre-colonial period

Before 1835 the effect of white settlement in the Cape Province did not have any significant impact on the administration of justice among the Xhosa speaking people. The chiefs and their subjects continued to live in accordance with their own laws and customs without any interference. This was in accordance with the declared intention of the British colonial office which was to the effect it had intended to conduct the relations with the

Xhosas on the basis of justice, humanity and principles of international law. Dracapoli in his books quotes Lord Glenelg, then in charge of the colonial office, as saying :

"The general principles by which the British policy towards the Aborigines of Southern Africa should be governed, are obvious, and beyond the reach of doubt

...

In our relations with these tribes, it yet remains to try the efficiency of a systematic and persevering adherence to justice, conciliation, forbearance and the honest acts by which civilisation may be advanced, and christianity diffused among them and such a system must be immediately established and rigidly enforced".

This policy was reiterated in a response to a dispatch from Sir Benjamin D'Urban in connection with the treaties which he had concluded with the various Xhosa chiefs. In that dispatch Lord Glenelg raised concerns as to whether such treaties rested on any solid foundation of international law or justice.

It is appropriate at this stage to give a brief exposition of the nature of the chiefly rule before it was corrupted by the super imposition of Western norms.

Nature of the chiefly or tribal government.

It is important to note that during period we are discussing important tribes existed as independent chiefdoms.

Commenting on the of system governance among the Cape Nguni Soqa, in his penetrating work states that the government was theoretically patriarchal.

"The Supreme chief being head of what may correspond to the Three Estates of Scotland, having authority under the law over other chiefs of the tribe, the commoners and priest diviners. In practice, however, the rule of the supreme or paramount chief partook rather of the character of a limited monarchy".

In Soga's own words a Xhosa chief had no autocratic powers. He could not want only take the life of any of his subjects, nor could he in any sense be a law unto himself "His chieftainship comes through the tribe, but the tribe does not come into being through the chief. Chieftainship was an embodiment of African religion in the form of ancestor-worship.

It has been asserted that this religious feeling has helped guarantee the ordinary tribesman a voice in the pre-colonial tribal government in line with the thinking that the voice of the people represented the will of God. The social organisation was hierarchical in nature - it was assumed that at the top structure there was God who was known in various names.

Below him was the Great Paramount chief (Ukumkani)

below that

were the

chiefs

Chiefs (Inkosi)

Councillors (Amaphakathi)

Head of families(intloko zemizi)

Women and children (abafazi nabantwana)

One striking feature in most chiefly systems was the rule by consultation and discussion - This was the case whether one deals with the Ashanti in Nigeria, the Nqwato of Botswana, the Bemba of the Tanganyika plateau of the erstwhile north Eastern Zimbabwe, the Shona of Zimbabwe and the various chiefly communities of South Africa.

The chief was held in high esteem because he was regarded as the symbol of unity. Among the Ashanti, for example, upon installation an Ashanti chief was required to take an oath in which he undertook to uphold the Ashanti laws and customs, the rule by consultation and to obey the ancestors.

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Hammond-Tooke, who has done a great deal of research among the Cape Nguni tribes, states that in the past a chief always had his councillors:

"These men were his advisors on matters of law and order. Even during times of crisis a chief would have to listen to their advice on what action to take ... In making a new law a chief had to consult his close advisors and discuss the intended law with them. Then a meeting of the whole tribe would be called and the matter laid before them ... after a full discussion the chief and his councillors would withdraw so that councillors could voice their opinion as to whether they felt that the majority were in favour of the matter or not". A meeting at which matters of national importance are discussed and new bye laws promulgated is called Imbizo and was seen by man as outstanding proof of the essentially democratic nature of the chiefly government. This shows that the decision making process was diffused over a much wider group.

There were checks and balances in that if the chief went against the wishes of his people he could lose their support - they could secede. On the other hand, if consensus had been reached on an issue the decision could be executed and enforced with the backing of the court or in some cases, the army .

The existence of the Court of Councillors provided another principal safeguard against an abuse of power by a Nguni chief. According to Soga this court was ever in session, for matters affecting tribal and private life were daily brought before the chief for decision.

The chief was the head of the Council. From the mass participation in the decision making process relating to tribal matters it would seem that the chiefly government relied on the support of the councillors and that the latter would also inform him if he was acting contrary to the popular will.

In his Minority Report included in the Report of the Government Commission on Native Laws and Customs 1883 (Cape), J. Ayliff Esq. described the tribal government in the following terms :

"Its leading feature no doubt is that of a monarchy, but by no means an irresponsible despotism; on the contrary, the power of the Great Chief, as now well understood, is always subject to checks and balances, and the Amaphakathi (middlemen) successfully maintain an equipoise between his authority and the rights of the other members of the tribe which make their mutual relations so acceptable as to have implanted in the hearts of the people a loyalty and devotion to their chiefs which cannot easily be uprooted". Most writers regard the existence of the aforementioned consultative groups in the constitutional arrangement of the most tribes as striking and important agent of conciliation and consensus.

From the academic contributions advanced in a number of doctoral theses on the subject stretching from 1974 to 1991 it would seem that while the central authority of the king or chief in chiefly societies was buttressed by such factors as his control of the national regiment and his power of appointment and removal of subordinate chiefs, Western African tribes, as those in Southern Africa, possessed the countervailing option of secession. They could insist that the chief observes the rites and ceremonies designed for the protection of their welfare. A dramatic change in the chiefly authority occurred with the advent of colonialism.

The effect of White Rule on the Traditional Government

Although elsewhere in Sub-Sahara N Africa the British Colonial policy was one of indirect rule, in the Cape the colonial government adapted direct rule, thereby greatly

reducing the authority of the chief vis-a-vis that of the magistrate. Despite the broad policy guidelines from the British Colonial office relating to the manner in which the British government wanted to conduct its relations with the chiefdoms the various successive governors in the Cape adopted policies that clearly undermined the authority of the chiefs.

This took various forms in both Ciskei and Transkei. In both areas the authority of the Chiefs was superseded by that of the magistrate. The chiefs' areas of jurisdiction were sub-divided into districts under headmen who were paid by the crown.

Introduction of Local Government

In 1894 the Government passed the Glen Grey Act No. 25 of 1894 which initially applied in the district of Glen Grey in the Ciskei. This act introduced for the first time local government structures to the Africans and it made provision for the election of location councils by the registered land owners. There were also district councils consisting of six members elected by location councils.

In the same year the Glen Grey Council system was extended to some areas of Transkei and was later introduced to other areas in 1937. The Council system became unpopular and there was a general clamour from certain areas, particularly in Pondoland, for the restoration of chiefly authority "with a more meaningful participation in local government".

In many South African black communities local government was introduced in the rural areas by means of the Black Authorities Act 68 of 1951 which established local government authority at regional authority under the chairmanship of the Paramount Chief in those regions with paramount chiefs and tribal authority structures under the chairpersonship of a chief.

In terms of section 4 of the Act a tribal authority shall subject to the provisions of the Act,

- (a) generally administer the affairs of the tribe and communities in respect to which it has been established.
- (b) render assistance and guidance to its chief or headman in connection with the performance of his functions and duties.

The Act has been described as having introduced some kind of indirect rule at the local government level. Hammond-Tooke interprets the changes brought about by the act "as an attempt to effect a synthesis between the three strands of local governmental structure that existed side by side in the Transkei...

The new system envisaged a logical step in the integration of these structures into one. Under the new system administration was to be based not as formerly on the location, headmen, but, on the chief".

They were differing views on the local government structure that was introduced by the Bantu Authorities Act. For example one commentator ascribed the new system to the failure of the Council system.

"The turning point for chieftainship was not the Bantu Authorities Act of 1951 which formally reconstituted chiefly power, but the failure of the Glen Grey Act of 1894, which marked the high-point of the liberal attempt to destroy it entirely. The Bantu Administration Act of 1927 formerly provided for the recognition of chiefs. The survival of chieftainship during his period should be seen as part of the wider resistance of the Africans to the imposition of colonial control following the European military conquest, chieftainship was supported because it was the symbolic focus of the cultural, religious, political and economic life of the people, and the chiefs had been in the forefront of resistance to the Europeans .

Mayer, on the other hand, attributes the new system to the Nationalist ideology of cultural pluralism which

"requires that every section of the Southern African population should develop according to its own culture and traditions. And 'Bantu culture' is seen as requiring chieftainship while western governmented institutions belong exclusively to 'white culture'. But beneath these ideological considerations one can discern chieftainship as a particularistic governmental institution; it is by definition limited to the tribe ..."

However it does seem that even before the Nationalist came into power the question of the restoration of the tribal system of government was in vogue. Bellwood for example, quotes General Smuts as saying that;

"if the bonds of native tribal cohesion and authority are dissolved, the African governments will everywhere sit with the vast hordes of detribalised natives in their lands, for whom the traditional restraints and the discipline of the chiefs and the elders will have no force or effect. In the interest of Natives as well as those of the European administration responsible for their welfare, we are called upon to retrace our steps, to take all proper measures which are still possible to restore or preserve the authority of the chiefs, and then to maintain the bounds of solidarity and discipline which have been supported by the tribal organisation of the Natives in the past".

Another important factor to consider in the local government structure introduced by the Bantu Authorities Act was that

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although the members of the tribal authority, excluding the chief who is an ex-officio member, are elected, the Act has introduced the traditional chief-in-Council rule. In this regard Hammond-Tooke has this to say :

"The Architects of the Bantu Authority system have appreciated the basic feature of the traditional political system, viz, that the chief never ruled on his own but always consulted with a group of Councillors. It thus defined a tribal authority as a chief-in-council and laid down specification of the composition of this group. In the traditional Nguni system every adult male had the right to attend the tribal moots and take full part. Everyone knew what was going on and there was full and constant interaction between the chief and his people".

It seems to me ladies and gentlemen that in the envisaged rural local government one just needs to improve on the existing structures.

I now turn on the position of traditional leadership in the transitional period.

When the colonial yoke was finally thrown off in most countries in Africa the problem of accommodating traditional leadership often came to the fore. Professor J H Proctor commenting on the position in Botswana in 1968 says that a major problem encountered by the builders of many of the new states in Africa has been that of defining a satisfactory position for the traditional tribal authorities in a more integrated and democratic political system.

"In Botswana a solution has been sought not only at the level of local government where much of the chiefs power has been transferred to elected district

councils but also at the national level where a House of Chiefs has been created to advise Government and Parliament. This body merits examination as a constructive effort to synthesise indigenous and imported institutions, and to accommodate the interest and demands of the hereditary rulers and their more conservative subjects, who remain deeply rooted in the tribal structure in a manner which is acceptable to the new elite and their supporters who are eager to modernise quickly".

In the discussions that were held on the position to be accorded to chiefs in the national government the following scenario was presented :

1. That there should be no special arrangements.
2. That there should be a Council of Chiefs, consisting of the heads of the eight principal tribes ex-officio and two sub-chiefs from outside the tribal territories, which could be available for consultation by the Government on a specified range of matters affecting the tribes, and to which a bill touching the recognition and removal of the traditional authorities, the powers and duties of chiefs, African courts and tribal land would have to be referred for advice before it could be considered by the legislature;
3. That there should be reserved seats for the chiefs or some of them, in a unicameral legislature,
4. That there should be an upper chamber of a bicameral legislature composed of the chiefs, or some of them, alone or with other members who might be elected or appointed, possessing powers similar to those of the House of Lords,
5. That there should be a federal system in which the tribal administrators would function as regional governments and be represented equally in an upper house of the legislature.

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According to Proctor it was readily agreed that the first of these alternatives would be inappropriate because traditional institutions were considered to be of considerable importance to the majority of the people in Botswana and there was a need to cultivate harmonious relations between the tribal structure and the central government.

The fifth alternative was also rejected on grounds, inter alia, of costs and the size of the country. The chiefs themselves preferred the House of Lords solution. The latter was not acceptable to the politicians who thought that a chiefly chamber in a bicameral legislature would seriously impede the modernisation that was so urgently needed. Politicians felt that it would be undemocratic and perhaps anachronistic to give delaying power over the whole range of legislation to a small group of men who held power merely by accident of birth. Conflict with such a body and popularly elected, forward looking assembly was inevitable and could not be tolerated in the modern world.

- the idea of reserved seats was equally not appealing. The fear was that a chiefly bloc would hold a balance of voting power if one party won only a narrow majority of seats at the polls. Instead the politicians were prepared to accept an advisory Council of chiefs.

Houses of chiefs were also established in Ghana and Zambia. The latter institutions could only deal with matters referred to them by the President or matters relating to customary law or tribal administration. Although in Botswana the House of chiefs enjoyed delaying powers their advice could be disregarded with impunity

Writing on the position status and role of chiefs.

1. In Botswana the late Professor James Chipasula makes the following observation on the Botswana experience.

"Although the House of chiefs has no law-making power it continues to create, by its mere existence, the impression in the minds of many, particularly the rural people, that their chiefs are participating at national level, in the running of the affairs of state ... But as far as the chiefs are concerned they have never been satisfied with the House of Chiefs. This is because Chiefs suspected that they are confined to a merely consultative institution intended to contribute to the liquidation of chieftaincy".

I want to conclude this discussion by referring to an observation by Professor Noman Miller who saw the accommodation of chiefs as some kind of synthesis and reconciliation of the opposing forces of traditionalism and modernity. He sees the process as one of accommodation and compromise. It is a reconciliation of demands from the traditional custom bound elements of rural society and the modernising bureaucratic groups made up of local administration and political party leaders. Professor Miller stresses that this kind of approach implies a search for some form of a synthesis between European culture and traditional values. Some commentators see chieftainship as affording a "rallying point", a sense of belonging and a symbol of tribal solidarity in a changing social and economic conditions.

Footnotes

1. J L Dracopoli Sir Andries Stockenstrom 1729-1864. The Origins of the Racial Conflict in South Africa. Balkema Cape Town, 1969
2. Ibid
3. Rev John Henderson Soga The AmaXhosa : Life and Customs University of Witwatersrand, University Press 1931.
4. Ibid
3. See generally the references cited by the present writer in "Consensus and Conciliation in the Traditional Legal System of the Cape Nguni IJD Thesis, Fort Hare 1991 Chapter 2.
6. Ibid
7. Hammond-Tooke Command or Consensus : Development of Transkeian Local Government. David Philip, Cape Town 1975.
8. Ibid
9. Soga Ibid
10. Iabuschagne J M T Blanke Bestuurstelsels en hulle invloed op die tradisionale Politieke Instellinge in die Transkei M A Thesis. Potchesfstrom University for Higher Education.
11. See the list of doctoral theses quoted in the writers doctoral theses at 18.
12. See the present writer Traditional and Modern Law of Procedure and evidence in the Chief Courts of the Ciskei ILM Thesis 1986 Rhodes University pp 33-52.
13. Ibid

14. Hammond-Tooke "Chieftainship in Transkeian Political development" 1964 Journal of Modern African Studies si 3
15. Mayer "The Tribal Elite and the Transkeian Elections of 1963" in Llyod (ed) The New Elites of Tropical Africa. Oxford University Press 1966.