

CAN THE INSTITUTION OF CHIEFS BE DEMOCRATISED?BACKGROUND

South Africa abounds with controversies and one of these is the question of chiefs. Given the co-option of this institution into the oppressive system of Apartheid and the actual utilisation to that end of this position by some chiefs, it is hardly surprising that the first reaction to the involvement of chiefs as an institution in a future democratic government is one of rejection.

The institution of chiefs has not always been associated with oppression. However the fact that it has misdeveloped to this vis-a-vis its relation the people is also hardly surprising. These were the accredited leaders of the various tribes of South Africa that the colonial regimes had to first contend with in the whole struggle over natural resources. The land was in the control of the chiefs as the administrators of their peoples. Rights over land and stock, access to rivers and mineral resources for individuals and the communities as a whole was regulated in accordance to the customary laws of the respective communities. So that in the stubbles that ensued to dispossess the indigenous people of their land and related resources, it was the chiefs who led the people into battle. Also in the subsequent colonialisations and imposition of an alien legal system overturning all property law and regulation of relations thereof, it was the chiefs that the white governments looked towards to enforce over the people that they ruled.

In fact the institution of chiefs as a concept in South Africa, developed at the turn of the century with the creation of the ANC. Up till then separate tribes had fought their separate specific battles against colonialism and land dispossession. It was with the call for unity under the auspices of the ANC that chiefs were brought together as representatives of those tribes under one House of Chiefs in 1912. By doing this it was felt that chiefs would be able to participate and guide the organisations in decisions and events relating to the particularities of their respective communities. It was also felt that these joint decisions could then be communicated back to those respective communities and co-ordinated national campaigns could be effectively launched. So that the institution of chiefs was a vehicle of national unity and an integral part of the fight for democracy.

So what went wrong?

The enactment of Land Trust laws dispossessing the Africans, and the various other racist legislation creating Bantustans

and transforming the status of chiefs as legitimate administrators (who occupy those positions in accordance to the customary laws of their people) to African administrators in accordance to the will of the white regime has distorted the nature of this grouping. The effectiveness of chiefs in law now depended on the limited geographic jurisdiction as defined by the Land Legislation. Furthermore, their participation in the various Bantustan legislative assemblies depended on the extent of their allegiance to the overall Central government. A case in point is the appointment of Chief Gatsha Buthelezi as the head of KwaZulu. He is not the legitimate chief of AbakwaButhelezi in accordance to the customary Zulu law, (being a second son of the senior wife where the first son is to be the designated chief) however due to his willingness to execute the commands of the central authority, which other legitimate chiefs resisted against the same authority, he was placed in a position of presiding over the body promulgating regulations as affecting the people of KwaZulu in local matters (KwaZulu Legislative Assembly).The regulations have proven to be most undemocratic in nature.African people living in this area have found themselves overburdened with all kinds of provisions that coerce them to be willy-nilly members of his party, Inkatha before they qualify for access to all sorts of local amenities and necessities such as education, training grants , employment in the area, trading licences etc.It has been said that this has been the single most dominating factor that has caused endless strife in the area as Inkatha under the leadership of Gatsha brooked no resistance to this.

Then again we have the collaboration of certain chiefs in undemocratic activity as with, for example one certain chief of the Botlokoa during the Removals of the clan in the early 80s. Of the three chiefs who were the accredited leaders of the clan occupying the area, he was the one who agreed with the Pietersburg municipality that the people should be shifted from their ancestral home as it was a "black" spot within an area designated by the Group Areas Act as land belonging to whites.Despite the protests of the other two chiefs and his own constituency notwithstanding, everybody was moved because the law provided that the assent of only one authority in the area is required to carry out this action.

The examples of the undemocratisation of this institution are legion. The issue now is whether this would warrant the total rejection of the institution of chiefs with one strike of the pen as being totally without place in a future democratic South African constitution. Quite beside the aforementioned, with the greater industrialisation of South Africa has come the loss, for many Africans, of links with the rural areas which are the domain of chiefs. Generations of South Africans have been born and bred in the urban areas and even been part of a greater South African culture that is different from their rural

forebearers. The attempts to foster these links by the racist regime and stress on ethnicity (in some cases even sub-dividing the tribe as in the case of the Xhosa-speaking people) thus alienating Africans from their citizenship has always been met with resistance from the democratic forces.

On the other hand, there are those who still permanently reside within the domain of chiefs, and legitimately owe their allegiance to them. So that it cannot be said that the existence of chiefs no longer has a bearing on any African's life. Moreover to declare all chiefs as unjust and undemocratic because under the present regime their positions have been reduced to such quotients that they are associated with the homeland system and its injustices, would be tantamount to throwing the baby out with the bathwater. Indeed one notes the roles of leading protest in the rural areas of such chiefs as Mahlangu of KwaNdebele, Maphumulo and Molefe of KwaZulu, and many others most of whom are members of the Congress of Traditional Leaders of South Africa (CONTRALESA) which is part of the democratic movement.

What then should be the future position of chiefs?

When examining the constitutions of Zimbabwe, Zambia and Swaziland one finds that constitutional provision has been made for chiefs to participate in the organs of government in those countries. The following is an overview of those provisions.

ZAMBIA.

Legislature.

In the case of Zambia, the constitution provides for the establishment of two parallel law-making bodies, viz the House of Chiefs and the National Assembly.

Chiefs are elected to the House of Chiefs in a fixed quota and according to the region from which they come as stipulated by the constitution. The relevant provision for this is Article 95 of the 1964 Constitution (as amended in 1977), which is as follows:

1. **Composition:**
 - a) Four chiefs each for the Northern, Western, Southern, and Eastern provinces.
 - b) Three chiefs each representing the North-Western and Luapula provinces.
 - c) Two chiefs each representing the Central and Copperbelt provinces.
 - d) One chief for the Lusaka province.
2. **Qualification:** Each member:
 - a) has to have been elected to this position by the Chiefs Provincial Council. Further on in the schedule it is stated that each province is to have such a council consisting of all chiefs within that province.

b) must not be a member of the National Assembly.

In the case of the Chairman of the House, it would appear that they are not required to be chiefs elected by the Chiefs Provincial Council of whatever province. However, the Chairman shall not be the President, Vice president, or a Cabinet Minister.

It has to be mentioned at this point that albeit not specified in the constitution, the legislation provides that the chiefs appointed to represent the tribe at the level of the provincial council are themselves elected by the Chiefs District Council. The Chiefs District Council is a collection of all chiefs in each of the various districts.

3. **Vacation of seat:** This is to be after a term of three years or

in the event that the member should cease to be a chief, or on the occurrence of disqualifying events.

The vetting of the chieftainess/chief's appointment.

The procedure for the establishment of the chief, although not specified in the constitution is provided for in the legislation. The position of the chief/chieftainess is a non-elective one. It is a hereditary position defined by the norms and traditions of the community in question. However in the case of Zambia, on independence, it was thought expedient to place extra provision for this institution so as to ensure that it truly reflects the aspirations and spirit of national interest.

During the colonial days various chiefs who would not collaborate with the oppressive actions of the colonialists were deposed. In their place were installed those more amenable to the system.

As of the time of independence regulations for the appointment of chiefs were enacted. In terms of these, the name of any chief appointed in accordance to the customary laws was to be submitted to the President who was to confer recognition by gazette on the same. If in the President's opinion the said chief/chieftainess' past activities had shown that it would not be in the national interest to have them acting as leaders of the people, then he would decline recognition and suggest an alternative person to be appointed (often the next in line of succession to the throne). If this person was not acceptable to the tribe then a form of compromise would be negotiated so that at least the majority is satisfied with the final decision.

Matters discussed at a sitting of the House of Chiefs

The President refers such matters in which a question of customary law is at issue. For example, in 1989 was passed the Law of Succession Act, in terms of which the law of intestate succession was made uniform and standard for all citizens

irrespective of their tribal background. The bill had been referred to the house for consideration. Prior to its promulgation intestate succession was by and large governed by the norms of whichever tribe, with tragic consequences for some people. Some tribes stipulate that unless the widow remarries another male member of her deceased husband's family, then she is not entitled to inherit the deceased's estate. She was not even entitled to her own half-share of the property in the situation where the couple was married in community-of-property.

After deliberation in the house it was decided that in the interests of citizen's rights and those of the children of these marriages, this customary practise should be abolished and a law of general application be enacted that would safeguard the widow's interests in her deceased husband's estate.

Judicature.-checks and balances.

Chiefs are barred by the legislation (and by implication the constitution) from hearing any criminal matters in the customary courts. These being cases where the possible outcome involves the deprivation of the citizen's liberties, it is hoped that in this way they can be protected from the often severe punitive measures of customary courts as they were in the pre-independence days.

Their jurisdiction in respect of civil cases is limited to those causes of action arising from customary law issues, for example dowry disputes and the dissolution of customary-law marriages.

There only hierarchy of appeal in customary courts is from a court in which the headman presides to the court in which the chief presides. Persons dissatisfied with a decision of a customary court in which a chief presided, seek redress by instituting action in the magisterial courts.

Legislation of general application also protects citizens from other possible abuses of power by chiefs. For example the Land Reform Act ensures that nobody can be ejected from land that they have developed. This means that the previous powers of the chief to evict any of their subjects who did not conform to their rules as a form of punishment no longer exist.

ZIMBABWE.

Legislature.

The Constitution of Zimbabwe provides for a bicameral system of legislature, being the Senate and the House of Assembly, of which the Senate is superior.

1. **Composition and Qualification.:**Section 38 of the Constitution (as amended by Act6/1987) provides that of the 40 members of the Senate: a) Ten(10) would be chiefs of which the breakdown is 5 from Matebeleland and 5 from Mashonaland. Each allocation of chiefs is to be elected by an electoral college of chiefs in either area who are members of the Council of Chiefs in each of the two areas.
 - b) Twenty-four (24) senators are elected by an electoral college consisting of members of the House of Assembly. It should be noted that prior to this amendment of this 24, ten senators were elected by an electoral college of white members of the House of Assembly. This was all part of the terms of the Lancaster agreement which provided for a special reserved dispensation for the white electorate.

2. **Procedure for legislation:** A bill is introduced for deliberation for a specified period and then re-introduced to the Senate for deliberation in the Senate where on the basis of a positive majority vote it is presented to the President for assent and upon then is passed as an Act of Parliament which is binding.

Judicature.

It would appear that Zimbabwe has similar provisions for the functioning of chiefs in this aspect as Zambia.

SWAZILAND.

Legislature.

Swaziland has no special provision for the representation of chiefs in the legislature.

Judicature.

There exists in Swaziland a Dual Legal System in terms of which there exist two court structures side-by-side. One regulated by the legislated procedural regulations and the principles of the Roman-Dutch law; and on the other hand, a court system regulated by Swazi law and custom both procedurally and in terms of the content of the law practised therein.

The Customary-law courts are presided over by Chiefs and elders as per the government gazette- which actually stipulates the situation of these courts. Court officials are appointed by the King (or in the absence of the King the Indlovukazi/Authorised Person).

Generally chiefs have jurisdiction to hear civil/criminal matters of all Swazi Subjects within their areas. The exceptions to this are questions of civil marriages; and those crimes as stipulated by law (these are generally the more severe crimes Eg murder, treason, sedition etc.).

EVALUATION AND RECOMMENDATIONS.

1. Chiefs or regional representatives.

The philosophy of the democratisation of the institution of chiefs in Zambia is worth considering in the South African situation, if only so as not to alienate those citizens who daily live under chiefdoms.

However, care should be taken that we do not provide double representation of those individuals living in the rural areas within the legislature. Stressing the separate existence of a house of chiefs would also trap us in the rut which the forces of democracy have struggled to get South Africa out of. This is the movement towards a unified South African national identity and a movement from the divisiveness of the stress on ethnicity. If we are to have a separate House of chiefs then what of those urban Africans who do not have a chief? What of the so-called Coloured and Indian? Do we not again play into the hands of the White Right-wing which would demand that they have reserved seats for the "authentic" Afrikaner leaders and their own homeland? What rules of universal applicability can we emerge with that define a traditional leader across the races? These would be the problematic areas in the representation of chiefs as an institution in the legislature.

Rather it would appear more expedient to have something nearer to the Zimbabwean constitution. Here we should consider regional representation as opposed to that of chiefs per se. So that there is an equitable distribution of regional interest. We may consider also dividing our regions in such a way so as to allow for the presence of chiefdoms as counting for separate entities. So that if at all chiefs are represented in the senate, then it is as regional representatives alongside with other urban representatives.

2. Vetting the Senate.

Care should be taken that a vetting system be devised towards the development of a representative that the nation can identify with. Such that the principle of national interest is safeguarded. In the interests of democracy and to safeguard against the possible abuses of power by any individual, a body

of people should do the vetting. It is suggested here that the vetting committee could be made up of the heads(or deputies) of the parties represented in the house of assembly, in equal proportion to each other.

3. Consultants on customary aspects.

The apparently best use of the institution of chiefs is making constitutional provision that they may be called upon to advise the Legislature on customary aspects.

4. Codification of customary law.

Although chiefs should be allowed to hear and preside over matters arising out of customary law, the dual system of Swaziland would be impractical for the purposes of South Africa. Such a system would probably be ideal for a country in which the existed only one tribe applying a uniform customary law. In south Africa, however it would mean that the Magisterial courts sitting with assessors be the courts of appeal. This should be with the provision that the latter have a customary-law expert as an assessor other than the one who heard the matter.

Also in the interests of certainty there should be a code of customary laws.

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