

Jar book

MCH91-910-1-5

13/7/92

Their position in the new democratic constitutional order should be such

### THE FUTURE CONSTITUTIONAL POSITION OF TRADITIONAL LEADERS

Traditional leaders are entitled to a dignified and respected role which enables them to take their place in and make their contribution towards building a new democratic South Africa. In positive terms, they should be enabled to recapture the prestige undermined by colonialism, segregation and apartheid.

do to permit enable them to

They have an important role to play in helping the development of a united, non-racial, non-sexist democratic country. The new constitution should find a place for traditional leaders which minimises the possibility of their being manipulated so as to keep the people divided.

Traditional leaders who have political ambitions should be free like any other citizen to campaign for high office; they should not, however, be allowed to use their position as traditional leaders for personal and political advancement.

There is no inherent or inevitable tension between traditionalism and democracy. Both can in their different ways serve the same national interest, namely, the development of good government in the interests of all South Africans. The key to achieving this is to ensure that each functions in its appropriate sphere without intruding on the other. Verwoerd tried to tribalise democracy. It did not work. Similarly, it would be inappropriate to attempt to 'democratise' the chieftainship. Chiefs and chieftainesses can work democratically and should be encouraged to do so. The institution of traditional leadership, however, cannot be democratic.

Democracy and traditional leadership operate according to different principles. Democracy is based on the principle of electoral choice and majority decision. The hereditary principle is based upon the rules of birth and lineage. Democracy involves periodical accountability. Traditional rule is interrupted only by death or abdication. Attempts to force the two concepts into a single system end up by being damaging to both. Thus, some Presidents have sought to establish the institution of President for Life, and even to establish a dynasty by nominating their heirs as successors.

Conversely, it would not make sense to require traditional leaders to subject themselves to periodical elections. Their bonds with their communities are based on rules of traditional law. Their symbolical position for the community, their religious and ceremonial functions, their relationship with the land and with the spirit of the

Dr. Verwoerd sought to mobilise ethnicity as a substitute for acknowledging democratic rights. He attempted to keep the majority of the people divided along tribal and ethnic lines. He tried to give individual traditional leaders a stake in apartheid by offering them fruits of office as subalterns of the apartheid state. By his efforts to elevate the traditional leaders above the people, and by setting one against the other, he almost destroyed the institution he was purporting to promote.

Patriotic traditional leaders provided the answer. They saw that the best interests of their particular communities were served not by separating themselves off from the rest of society but by combining forces with all other sections of the population. Many individual chiefs and chieftainesses paid with their positions and even with their lives and liberty because of their refusal to go along with the devices of Pretoria.

In more recent times Contralesa has shown the way by enabling traditional leaders in different communities to hold hands and use their positions and prestige to re-inforce national unity.

In the same spirit, they have campaigned actively for the principles of generalised non-racial democracy, refusing to be shunted off from the mainstream of South African life. Once the principle of equal rights and non-racism is firmly established, the diverse character of South African society can be accommodated and even welcomed without difficulty. It is only when cultural differences are used as a pretext for domination and division that they become harmful.

Traditional leaders have <sup>seen</sup> a particularly important, and extremely delicate, role to play in advancing non-sexism. Traditional societies all over the world tend to be patriarchal. As we have said before, the one non-racial institution in South Africa is patriarchy. Patriarchal attitudes leap across cultural boundaries and reinforce each other. A number of traditional leaders have recognised that, ~~as in so many other spheres,~~ the roles of men and women are constantly changing. The secure, if junior position, that women had in traditional society has been undermined by the development of a wage economy and restrictive land laws. African women, in rural areas particularly, have been left unprotected, getting the support neither of one legal system <sup>or another.</sup> *of the other.*

Progressive-minded traditional leaders have welcomed the upsurge ~~of a spirit~~ of self-reliance and affirmation by women. It is women who in practice head the great majority of rural families. It is women who manage the household economy and defend the family against the ravages of the migrant labour system. The social fabric of many communities is largely dependent on women.

In some areas, women have in terms of traditional law succeeded to office in the traditional system. The number of chieftainesses, however, is small. The system of traditional leadership is essentially a system of male leadership, which makes it all the more important for gender sensitivity to be applied.

One of the main tasks that will face the new court system in South Africa will be to integrate all sources of law - the constitution, statutes, Roman-Dutch law, English law and African law - into one system of South African law. The broad principles of the Bill of Rights, including non-sexism, will apply throughout. The question will be to harmonise this principle of gender non-discrimination with the concrete rules found in all areas of law which impose disabilities on or create obstacles for women. The issue will require sensitive handling with the maximum involvement of all those with an interest in the matter. The wise traditional leader, imbued with the spirit of the times, will have no difficulty in acknowledging the role that the female members of his <sup>the</sup> community are playing, and will not hold back from supporting their claims to full equality of treatment under the law. This would affect matters such as the rights to possess and inherit land, to enter into contracts and receive credit, as well as equal rights within the family.

having

live in their bodies, organs.

Women are not just men with different sexual parts. Women lead lives of their own, have their own needs and aspirations. When the women's movement demands equal rights, what it is asking for is not that women should be equal to men, but that there should be equal rights for women as they are and for men as they are. In the context of rural society, this would mean that women would expect the backing of the law to enable them to have a better quality of life and to be freer to follow their personal wishes. It would cover everything from ensuring educational possibilities for girl children and adult women, to electrification and piped water to lessen the daily burdens of women, to health care, contraception and social security based on the actual needs of women, to voter education and

In any event, these are questions of constitutional rights. <sup>through</sup> Changes will not be forced on anyone in a confrontational way, every man and woman will be entitled if he or she wishes to enforce his or her constitutional rights. Foremost among them is the right to be treated

skills-enhancement programmes to enable women to take their rightful place in public life.

Traditional leaders are at present playing a major role in local government in many rural areas. This role can be expected to continue for many years to come. As rural development gets seriously underway, their responsibilities will increase rather than decrease. At the same time it can be expected that there will be an increasing tendency towards creating democratically elected local councils to work with the chiefs and chieftainesses in local administration. This will be partly to take account of the need for a variety of technical and professional skills which the traditional leader cannot be expected to possess of his or her own. Yet its main justification will be the democratic one, namely that the people should have a direct say in their own government at all levels. Increasingly then, the role of the traditional leader will be like that of a Mayor or Prefect in other countries, who presides over the affairs of the local community in a non-partisan way. Their religious and cultural functions will continue. The special relationship that traditional leaders have with the land and their role as custodians of the land of the community could be recognised in as much as they will continue to allocate land but will do so on the advice of councils accountable to the community.

growing

No transition is easy. The objective should be to prevent a head-on clash between values and diverse cultures. The key to advance is for the rural communities, including the traditional leaders, themselves to take the initiative in deciding the forms of administration that they want.

Traditional leaders form an important component of South African society. The problems and dilemmas they face throughout the country tend to be the same. They have every reason to come together as a body to defend their interests and to find collective means of making their contribution to the new South Africa.

Conventional constitutional notions tend to base themselves on the existence only of the state, political parties and individuals. More recently emphasis has been put on a fourth element, namely organisations of civil society. Such organisations are getting increasing constitutional recognition not as part of the state, nor as transmission belts for political parties, nor as mere aggregates of individuals. They are regarded as collective bodies contributing towards the richness and texture of social life and enjoying the right to autonomous spheres of action

We must develop a whole new way of doing things in South Africa. Instead of the Minister or the magistrate deciding, the community must make up its own mind.

constitutional

provided their activities do not suppress or interfere with the rights of others.

To a large extent, their functions are self-determined, that is, their right to exist and to operate is not dependent on recognition by the state, but, rather, the state acknowledges and is constitutionally bound to accept their existence. Well-known examples include religious bodies, trade unions and sporting and cultural associations. Many have argued that they should enjoy a right to be consulted in relation to actions which affect their interests.

One can envisage the institution of traditional leaders taking an honoured and active place in South African society. Their strength and vitality would come from the intrinsic support which they would enjoy, not from their position in the state.

privileged

At the same time, they will <sup>any</sup> lend dignity to state occasions, be rewarded with appropriate stipends and provide the sense of continuity between the past and the present that has always been at the heart of their functions.

ancestors, is deeply bound up with the customs and ethos of the particular community. In earlier times, functioning together with their councils, they exercised a considerable degree of what today would be considered state power. They commanded military forces, exchanged diplomatic envoys with other traditional leaders, and stood at the summit of the judiciary.

Traditional leaders can behave in a democratic way and many have distinguished themselves by their contribution towards the fight for democracy in South Africa. Yet the institution of chieftainship can never in itself be democratic, nor should it in contemporary conditions be seen as competitive with or antagonistic to democracy. It simply has a different sphere. We should not seek to traditionalise democratic institutions, nor should we set out to democratise traditional ones. The objective is not to democratise traditional institutions but to constitutionalise them.

Just as religious bodies can enjoy vast popular respect and be important agencies for promoting harmony and development without compromising their autonomy within their field, so can the traditional leaders play a major role in public life without negating their special relationship with their communities. Similarly, just as we support the idea of not having an established religion, so, in a country like South Africa where we have a plurality of traditional leaders would we be against having any particular family invested with official functions. *single out to be*

There is no contradiction in the idea of traditionalism modernising itself. As their name indicates, traditional leaders are expected not only to be traditional but to lead. Leadership means going forward, not back. It presupposes taking the best of the past into the future, not pushing the present into the past. *Shaka and Mosheshwe were two examples of traditional leaders who were great modernists in their time. Both were pioneers of change who adapted to the great tasks of their age, transforming the function and role of kingship in the process.* *all*

*great greenstep*  
The great task of the present era is to build a country in which all can live in equality and dignity, in which the great resources of the land are opened up to everybody and in which all people are free to speak their minds, profess their faith and express their culture. Traditional leaders have a major contribution to make in all these respects.

Traditionalism can accommodate to and contribute towards unity, non-racialism and non-sexism.

*Makana,*

*Sekhukhuni  
and Khama*

freely. So is a question of who  
we are, of worth, of dignity,  
of status in our world.

Equally, we all desire health  
and education and somewhere  
to live and employment and  
reward for our efforts. We feel

as human beings we have an  
~~equal~~ <sup>equal</sup> claim at least to an  
~~equal~~ <sup>employment</sup> minimum in ~~these~~ <sup>to an</sup> ~~respects~~ <sup>no</sup>.

If we possess, we seek not to  
be arbitrarily dispossessed. If  
we are dispossessed, we ~~claim~~ <sup>claim</sup>  
that we ~~should no longer~~ <sup>no longer</sup> ~~possess~~ <sup>possess</sup>  
we ~~may~~ be unjustly denied.

Nowhere is this more evident  
than in relation to property.

You cannot negotiate human  
rights. If by their nature they are  
inalienable, then by the same  
token they must be non-negotiable.  
What you negotiate is how to  
express them, not their

essential content.  
~~detail~~ <sup>out of universal experience,</sup>  
You ~~sense~~ them, discover them,  
articulate them, find the best  
words in which to formulate  
them. But you do not bargain  
over them. There is no give and  
take, no compromise, no trading  
in hard rights. You seek flexible  
and efficacious means of realizing  
them. You acknowledge the  
concrete situations in which  
~~their materialization~~ they become

problematic and demand expression.  
You realise that just as  
human beings develop and their  
societies change, so their concepts  
of rts. evolve. You appreciate  
that rts. collide with each  
other and need harmonisation.

But you do not broker them.  
They are not on the market.

Rights are for everybody. They  
are indivisible.

You do not <sup>as some have suggested</sup> trade first gen.  
rts for first world people against  
third gen. rts for 3rd world people.

We are all S. Africans. We  
all want to be free to speak  
our minds, to vote, to move

# PROPERTY

In a power framework, property represents exclusivity and inequality.

In a human rts. context, property is something to which all can

~~aspire equally and which deserves~~  
~~independence of quantity or value.~~  
equal respect. The property rts. of the poor are even more significant

than the property rights of the rich. They are more fragile, more easily overlooked, more ignored, more trampled upon.

This has special meaning in SA, where past property rts. have been systematically violated by successive govt. Whether or not as-provoked is supposed to have said, all property is theft, in SA all transactions in relation to

land were based on a species of robbery. A firm's approach does not necessarily seek to punish the original despoliation, nor ~~does it~~ <sup>does it</sup> automatically ~~to~~ <sup>set out</sup> expropriate the expropriators. But it does take the consequences of <sup>property</sup> dispossession into account when seeking to construct a legitimate system of property <sup>rights</sup> for the future.

If property is seen as power, then legal title is everything. The only role of the state is to defend that power. If property is theft, then dispossession is all, and the only function of the state is to destroy title and restore

~ Natural relation to things.  
If property is <sup>regarded as</sup> a human right, then  
it is something that both the  
possessed and the dispossessed  
claim. Everyone is entitled to a  
spot on this earth where he or  
she can feel safe and <sup>be</sup> inviolate,  
sheltered not only from the elements  
but from the <sup>unwanted</sup> intrusions of other  
people. Each person and every  
family has a right to secure space  
within which to sleep, eat, read  
and dream, <sup>a place in which</sup> to live out the  
intimate side of life. We are all  
entitled to the basic necessities  
of living in such space. <sup>to the</sup> clean  
water, electricity and waste

disposal that go with dignified  
and healthy habitation.

In SA we do not even attain the  
level of formal ~~level~~ of Anatole France's ~~own~~  
declaration that the law in its  
majesty protects with equal rigour  
the right of the rich to sleep in  
their castles and the poor to  
sleep under bridges. <sup>in this country, this is not true</sup> ~~The poor~~ <sup>from</sup>  
family living under a bridge would  
be evicted as a squatter. ~~Their~~  
~~few possessions~~ ~~would be bulldozed~~  
home would be called a shack  
and bulldozed or torched.  
~~They~~ <sup>they</sup> would have no claim <sup>equipped</sup> to water  
or electricity or sewerage facilities  
even if willing to pay.

Get land back.

Labour tenants.

People who want to build own  
homes. To farm. <sup>People concerned  
re soil resources  
Eco. character.</sup>  
Not exclude title, <sup>compensation</sup>

Principles: Bourgeoisie system - all.  
procedures  
Legitimise. Title in future corresponds

The issue is not whether land  
should be redistributed, but  
how, i.e. to what criteria and  
procedures and who shall make  
the determination. A humanistic  
approach seeks to take account  
of all dimensions and to  
establish principled means of handling  
problems.

and how much do we mistrust  
govt? ~~What~~ How do we  
~~create mechanisms to~~  
protect the ~~or~~ to privacy and  
intimacy ~~of some~~ without destroying  
the ~~or~~ privacy and intimacy ~~we seek to protect~~ of others?  
How do

## GOVERNMENT

Our mistrust is not only of  
the rascals, ~~and the~~ ~~corrupt people~~ ~~and the gossamers~~  
whom we inherit from the past  
not only of the many so-called  
ordinary people who are so steeped  
in the values and assumptions of  
spch. society that they automatically  
replicate them in their behaviour.  
It is of ourselves.

We need to entrust the govt,  
empower it to ~~deal with this~~  
to undo the damage of past  
govts & undertake the responsib.  
of govt. everywhere in the world  
to ~~look after~~ <sup>responsibility to</sup> the basic  
needs of the citizens. At the  
same time, we must ensure  
that it functions well and  
fairly, that it does not become  
a new source of oppression,  
alienation and abuse. Oppression  
can come under any slogans, in  
any colours and with any anthem.  
None, neither king nor freedom-fighter

has any divine rt. to rule. No one is automatically immune to the seductions of power.

Our biggest contribution now will be to imbue the new constit with the values and principles that will ~~last~~ and provide an enduring link between our aspirations for freedom in the past and ~~our~~ ~~desire for freedom~~ the lived reality of freedom in the future.

Tyranny and abuses in the name of evil are easy to detect and denounce; those in the name of the good are more worrisome, for it is not cynicism that says physician heal thyself, constit utocratist

constitutionalise yourself! <sup>the legalised mix of distrust and distrust</sup>  
freedom fighters predominate yourself.

The more we entrust the more  
we distrust. <sup>that is what constitutions are about</sup> We need strong  
checks of both <sup>elements active</sup>  
with each other. <sup>relationship</sup> The <sup>answer</sup>  
is not absence of <sup>the duty which</sup> govt.  
govt. <sup>render it impossible without</sup> <sup>paralysis</sup>  
govt. <sup>what</sup> <sup>without</sup> <sup>constraint</sup> <sup>effective</sup>  
functioning are to  
constitutional principles.

Private - public: no vacuum,  
but good remedies  
good intimacy (non-harmful  
to others)  
good - organs of civil society.

Big problems: Certainty / uncertainty.  
 Trust / mistrust  
 Public / private  
 State / individual  
 parties

Consts. need both the certainty of principles and the uncertainty of procedures, <sup>instts.</sup> We need certainty as to principles, and uncertainties as to outcome.  
 Thus, the need to hold free and fair elections must be certain.

Limited view of nature of the outcomes of elections must be uncertain. The ~~basic~~ rules governing criminal trials must be certain. <sup>constit.</sup> <sup>debate</sup> (unitary / fed)

We need certainty in some areas and welcome Certainty / uncertainty in others. [State / indivis] [structure of govt - principle of governing] Floors / ceilings [min] [max]  
 to enable political process to function peacefully  
 re outcomes of democratic process, (with w/e elections) [should welcome]

It's not just the past record  
and the future structure of power  
Williams that whole the ideas  
of democratic transformation.

The gov't objective is  
not to democratize but  
to legitimize <sup>the institutions of</sup> SA society.  
This requires some elements  
of democracy. The objective,  
however, is to secure the

possible minimum level of democracy  
to achieve <sup>maximum degree of</sup> legitimation.  
This produces tension and crisis.

[Legit. is seen more in  
terms of international  
acceptance & acceptance by  
business than internal, mass  
acceptance].

What is the minimum we  
can get away with?  
How much can we  
continue to hold on to?

# PRIVACY

Constitutionalism abhors vacuums.

Const. vts also

It does not stop at the front door or the factory gate or

the farm entrance <sup>with the limits on gov.</sup>

~~It~~ <sup>yet it does not</sup> ~~deal~~ <sup>start</sup> ~~with~~ <sup>principle</sup> ~~the~~ <sup>Constitutionalism</sup> ~~It~~ <sup>deals</sup> ~~with~~ <sup>the</sup> fundamental

rights and dignity of all,

the essential status of <sup>all</sup> members of the community. It declares

that none should live in

terror, none should feel

worthless. It has a positive and a negative dimension

[Never again  
at the very least.]