Umbutho Wamalungelo Obuntu

Civil Rights League

Burgerregtevereniging

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The Annual General Meeting

Will members of the Civil Rights League and other interested persons please note that this will take place in Lecture Room 2 of the Education Faculty at U.C.T. on thursday 26 September at 8 p.m.

The guest speaker will be Dene Smuts. M.P.

We look forward to seeing you there.

Editorial

The Constitutional Debate

This month we devote the Newsletter to the conference on "The Route to Democracy in the New South Africa", held at the University of the Western Cape on 3 August.

The conference could hardly have been better timed.

The ANC congress a few days earlier, had debated some wide-ranging constitutional proposals. These included an executive presidency (either directly or indirectly elected), and a two-chamber parliament with a dominant lower house and a regionally based senate. The will of the majority, to be made "effective but not all powerful", would operate at central, and by delegation at regional and local levels, and be hedged within a rigid constitution containing a bill of rights enforceable by an independent judiciary. With its advantage of numbers and its disillusionment over the unfair treatment Blacks have received over the years from minority controlled governments, the ANC's preference for majority rule is fully understandable, and its preparedness to impose checks on the sovereign will of parliament is therefore a noteworthy gesture in a sensitive area. Noteworthy, too, is the careful wording of its plea for remedial action by government "towards a guaranteed and expanding floor of social, economic and educational rights for everybody", and the toning down of what once looked like an attraction to democratic socialism, even though the alliance between the ANC and the SACP remains in being.

The Government, at its Natal Congress, has since proposed a constitutional formula designed to get rid of discrimination and domination, and to promote democracy, private initiative and cultural diversity, through the agency of a two chamber parliament (a lower house elected by adult suffrage under proprep, and an upper house with equal representation for nine federal provinces and some power to veto legislation). There would also be entrenched clauses requiring special majorities for repeal or amendment. The Government also proposes a collective presidency formed from the 3 largest parties in the lower house, with a rotating chairmanship. Second and third tier governments at the provincial and municipal levels would be democratic and non-racial in composition, but at the municipal level property owners would be assured of half the seats. All this represents a substantial reversal of the ethnic, group based thinking which characterized the constitutions introduced by the National Party in 1961 and 1983. Its emphasis is on participatory democracy rather than party rule, and on the protection of a market-oriented economy "with private initiative and social responsibility", and a desire (also stressed by the ANC and the DP) to accommodate cultural differences.

The Democratic Party likewise proposes a federal constitution, with 8 to 12 geographically defined provinces, each receiving substantial rather than delegated powers. Only the DP has come out unambiguously for a single popularly elected president. S/he would appoint a prime minister (as

proposed also by the ANC), who would in turn choose the cabinet from parties represented in the democratically elected lower house, on a proportional basis. Like the NP and the ANC, the DP wishes to protect the constitution and individual rights by entrusting their interpretation to the courts. The DP and ANC want a special constitutional court; the DP wants the appointment of judges by a judicial commission, to balance the ANC's insistence that the courts should reflect thebroad composition of the community as a whole.

The DP has been concerned, like the Liberal and Progressive parties before it, to control the abuse of power by elected parliamentary majorities, in the knowledge that power corrupts. The NP, having been corrupted by its own power in the past, even in very recent times, is keen to stop others following its own example. The ANC, as a recipient of past injustice with an understandable confidence in its own good will, seems relatively less concerned about future abuse of power, if this can be inferred from their preference for a unitary rather than a federal state. All have a good case!

Arising out of the turbulent events of a year, marked by continuous township violence and improper conduct by most parties, including the government, the demand for inter party negotiations has become insistent, and the alternative remains too ghastly to contemplate. The Statement of Principles in the National Peace Accord to be signed in Pretoria on 14 September can only have meaning if such negotiations take place. There are signs that, bar the right wing, all parties may be willing to bargain. The Patriotic Front of ANC, PAC and Azapo have plans to talk through their differences. The ANC and the NP are engaged in continuing talks over problem areas.

If the above comparison of constitutional thinking among the main contributors to the debate is carefully considered, it seems fair to conclude that they are well within range of each other. The biggest danger is that individual parties, through an excessive desire to gain or retain power, will lose sight of the first priority: to create durable structures which merit the continuing trust of all the people.

T.R.H. Davenport
J. Sarkin Hughes
editors

The Conference At U.W.C. On Saturday 3 August

"The Route to Democracy in the New South Africa"

This was a conference first mooted in the committee of the Civil Rights League, and promoted jointly by the League, the Black Sash, the Community Law Centre at UWC, and the National Association of Democratic Lawyers.

Of all the topics which the organizers might have chosen as its theme, one handling a new constitution and an accompanying bill of rights had to be high on the list for selection. South Africa had already witnessed far too many setbacks in the way of the inter party conference which has been on the agenda of most political organizations as the best way to prepare the way for a new political dispensation. The latest of these setbacks had arisen out of the funding of Inkatha and the D.T.A. from South African government sources, as revealed by the Weekly Mail. This made it urgent to increase public awareness of the need for hard negotiations about real political change.

The urgency was not diminished by the outbreak, barely a week after the conference, of violence between armed right wing elements and the police on 10 August, as the former sought to disrupt the State President's meeting in Ventersdorp. "Making South Africa ungovernable" had become as much an objective of the far right as it had previously been (and possibly still is) of the far left. It is high time for "jaw, jaw" to supersede "war,war".

It looked until the Friday as if the conference might fall victim to the Cape's foul weather. But between 100 and 150 people gathered in Great Hall "One" at UWC, to hear the League's president, Sir Richard Luyt, open the proceedings.

Short presentations had a good impact

The organizers were naturally keen to hear favourable reports of the day. They were by no means disappointed. To begin with, we had met with very gratifying responses from invited speakers who represented organizations across much of the political spectrum, though it is important to stress that we were not primarily out to present party positions as such, less still to promote inter-party conflict. We were mainly interested in engaging scholarswho could explain constitutional issues to an audience whose skills generally lay outside the field of law. Speakers

responded well to our wishes, notably Albie Sachs, Denis Worrall and Sakkie Pretorius M.P., who set the tone of proceedings. At least four of the speakers claimed ANC affiliation.

Two judges and a leading advocate who were approached were clearly keen to help but prevented by unavoidable commitments. But in Heribert Adam, Kader Asmal, Lawrence Boulle and Albie Sachs, we were able to draw in leading scholars curtently or until recently resident overseas. Gerhard Erasmus, who had been one of the three legal advisers to the Namibian constituent assembly, and Laurie Ackermann, both of the Stellenbosch Law Faculty, made important contributions respectively to the discussion of the control of power and the definition of human rights.

But perhaps the most encouraging feature of the conference was the high level of contriburions by speakers throughout the day. We decided to go for a large number of ten minute presentations rather than a few formal lectures, hoping that this would encourage discussion from the floor. To a point it did, though the morning session was rather too crowded. Certainly the restricted time allocation forced speakers to get straight to the point which is a point we could well remember for future occasions.

An initial focus on constitutions

The morning programme was divided into two main sessions. The first dealt with problem areas in the making of a constitution, with special reference to South Africa's needs.

Speakers agreed that we need a constitution which is not only legal in the sense of being properly adopted by those who are to live under it, but also legitimate in the sense of being grounded in the values of our society. Before a new constitution is formulated there has to be prior conceptual agreement as to its main features at a multi-party conference, and these should include an entrenched bill of individual rights (to which the National Party spokesman added a desire to protect "national diversities" as well).

Agreement was clear on the need for a political system which guarantees against both minority rule and the tyranny of the majority. This could be met by provision for a multi party system, regular elections, and special procedures for constitutional amendment. An independent judiciary and professional security forces drawn from the community as a whole and above politics were likewise seen as important.

There was concern to avoid a power vacuum during the transition.

ANC speakers insisted that the conference should be preceded by the formation of an interim government of national unity, however arrived at, and argued, like DP spokesmen, that recent revelations about its secret funding programmes disqualified the present government from the role of referee. Did the ANC put too much trust in the wisdom of democratic majorities? Its leaders understandably insisted on majority control after decades of bad white minority rule. Understandably, too, Worrall questioned the depth of South Africa's democratic culture, which he described as "skin deep in all of us", and hardly yet part of the "habits of heart and mind" which De Tocqueville saw as important. He reminded us that some truths are "self evident" and ought not to be made dependent on majority permission, like the right to "life, liberty and the pursuit of happiness" in the American constitution. Heribert Adam, too, would later remind us of some unpleasant facts: that Hitler got into power by the democratic process, and that referenda can be manipulated by skilful use of the media a danger of which South Africans have good reason to take note. Sarkin Hughes was to argue in another session that a democratic culture has arisen in the extra parliamentary structures, and of this there are clear signs; but whether the liberation movements have yet come to grips with the problem of controlling a revolution of rising expectations in a desperately poor society remains to be demonstrated.

Constitutions should not dictate economic structures, but the fact that speakers generally seemed to avoid subscribing either to hard line socialist or unrestricted free market economies suggests that there would be space within which to negotiate at the conference. One must expect hard bargaining based on suspicion rather than on trust, however, for as Adam observed, "stalemate is the real condition for constitution making".

This led into a discussion of how to distribute and control political power, chaired by Dullah Omar who filled the dual role of conductor and lead soloist with the skill of a Barenboim let loose on a Mozart concerto. Gerhard Erasmus reminded us of the ways in which democracies are normally controlled: by adhering to the convention that government is accountable to the voters; by acceptance that the whole constitution is binding on the government (not merely the bill of rights), and can be amendedonly by its own procedures; by acceptance that the courts should have the power to test laws against the constitution (a principle which has been ignored in

South Africa on the dubious argument that Parliament can make any law it likes); by ensuring the separation of powers of government (executive control, law making, and law enforcement); by distributing power between centre and localities; and by the institution of procedures whereby citizens can obtain redress for governmental wrongs (e.g. through an official ombud).

Heribert Adam's warnings about the corruptibility of voters came at this point, and included the thought that although proportional representation is useful for ensuring the representation of minorities in parliament, it leaves the choice of candidates to parties rather than voters (which has disadvantages but could for the first reason be a good thing).

The closest the conference came to a doctrine of parliamentary sovereignty was Dullah Omar's appeal for a constitutional framework which shifted the emphasis from power to rights, but did so without weakening his insistence on majority rule by a non-racial majority prevented by law from trampling on the cultural rights of anybody. This would certainly be an improvement on the present situation. The only problem, it could be argued, is that it would leave South Africa as exposed to the whims of a parliamentary majority as was done by the nefarious constitution of 1909. In view of the shallowness of our democratic culture, and the precedents which exist for trampling on conventions of the constitution, isn't it time to seal off that danger? Even the counter argument, that a new government would need special powers to redress accumulated wrongs, does not meet the difficulty, for how can one persuade a government endowed with such powers to give them up? How indeed?

Questions from the floor homed in on the procedures for drafting and enacting a new, foolproof constitution. How could one avoid leaving the National Party in control, in view of its record? Who would actually do the drafting? How would a new constitution actually acquire legality? Preferred answers included the suggestion that the Government either would or would not contrive to secure control of the constituent assembly if it acted as convenor, and that convening could best be done by an independent body (perhaps the churches?). The actual drafting, however, was a matter for experts, provided that the step by step adoption of the constitution was done by the representatives of all who will have to live under it: that was the lesson of Namibia, where the value of combining professional advice with democratic procedures was well learnt, and the final draft approved unanimously in the constituent assembly (Gerhard Erasmus). And a constituent assembly could be elected by democratic procedures, for one should not underrate the responsibility of illiterate people where their interests are concerned. If not, as Omar pointed out,there is the danger of a "Muzorewa" constitution emerging.

A look at new emphases in the judicial system

After tea the conference moved on to a discussion of the place of the courts of law in the constitution the need both to safeguard judicial independence and also to make sure that the system of justice reflects the real values of the communities which it has to serve.

On the first point, Khanya Motshabi of UCT reminded us of the traditional independence of the judiciary, the blindness of justice to issues external to the case before it, such as the wealth or poverty of a party to a dispute; and the expectation that a judge will recuse himself if he has an interest in thecase. He dwelt also on the appointment of judges, commending the Namibian constitution because it limits the president's choice to a panel submitted by a judicial commission, thus reducing executive interference. He stressed how hard it is to obtain the dismissal of judges on the ground of misbehaviour, because misbehaviour is often hard to define (e.g. when sentences are too harsh or too lenient), but how important it is that such provisions should exist.

Lawrence Boulle led us away from Motshabi's account of "autonomous law" to the notion of "responsive law", which today increasingly exercises judicial minds. For this approach, law has to be concerned with principles, policies and community values no less than rules; with decisions affecting the custody of children or prevention of pollution, with sentences on drug traffickers or damages againsr doctors. These new areas of judicial concern reflect in turn on the question of appointment, for the social awareness of judges may be as important as their formal independence.

Ilse Olckers from UWC added comments on the "dilemma of difference", suggesting that issues affecting sex and colour can easily affect judgements, especially if, as Heribert Adam had noted, courts are normally manned by middle aged bourgeois males; or, as Sarkin Hughes added, they were 100% white. This was to add nuance to the new dimension outlined by Boulle.

The need for a community based legal system

Further community aspects of justice came to light through a group of presentations by Jeremy Sarkin Hughes, Johnny de Lange, Sarah Christie, Derek Fine and Clifford Shearing.

Sarkin Hughes stressed the need to bring the law close to the people in a variety of ways: by refashioning legal aid and instituting it as a right; by reconsidering the jury system (if the considerable difficulties it affords, especially in inter-racial cases can be overcome); by increasing the weight of assessors in judge run trials by giving them powers beyond questions of fact; by making courts inquisitorial (though not in a medieval sense) rather than adversarial, fusing bar and side-bar, bringing in a comprehensive legal insurance scheme, and placing a ceiling on fees by statute all in the interest of removing the cost barrier to justice. He also stressed the need to protect individual rights by instituting a constitutional court whose main function would be to handle cases concerned with the rights of the subject vis a vis the state for which judges could well be appointed by a more democratic process than nomination.

De Lange, representing the Radical Lawyers, was for a more emphatic democratization of judicial process, so as to counter a prevalent impression that the judiciary is by definition executive minded. He urged that this could be done through the use of community courts in civil disputes, in the hope that, with supervision and practice, the miscarriages which had occurred in peoples' courts could be eliminated and respect for the law thus increased.

Sarah Christie's emphasis was on problems of conflict resolution, on the enormous cost of litigation, on a tendency to arrogance seen in the judiciary, marked sometimes by flippancy even in rape cases. She found the modern industrial courts a useful experiment, but wanted rapid action to bring the projected labour appeal court into being, as well as a small claims court on dismissal cases. The Community Dispures Legal Centre projected by NADEL and the Wits University Centre for Applied Legal Studies could helpfully handle family disputes and those between landlord and tenant, by procedures partly mediatory and partly judicial.

Derek Fine's concern, as a representative of the Legal Education Action Project, was to make justice more accessible in the rural areas, where it is unaffordable and unreachable, and often inoperable on account of language barriers between court and people. LEAP tries to promote community education, train paralegals in statement taking, report writing, office management and other skills, and seeks to integrate legal services with welfare activities and the work of community courts. He urged that rural people should be invited to take part in future conferences of this kind.

Clifford Shearing, a Canadian scholar, was concerned with the police, for they constitute by far the greatest part of the legal system. They are "a critical depository of coercion" used by government to strengthen its hand at the negotiating table. The problem as he saw it was to reduce the use of the police force for non-democratic ends. His answer lay in a variety of approaches: to place them under non-partisan control in the interim process; to re-educate the police for a new role; to bring in the communities in defining that new role; to lift the shroud which hides police activities; and to appoint an ombudsbody as a receiver and investigator of complaints and initiator of research into police activities, and as advisor to police commanders, acting under blanket UN or other external jurisdiction with assistance from officers from international police forces. The recommendations attracted a lot of interest, even if implementation appeared difficult.

In question time, doubts were expressed about the appropriateness of the jury system, to receive the answer that the debate "isn't over yet". Some saw a role for the ombud in preventing the politicization of the legal sysrem through its being made more democratic. All in all, a good many problem areas had been usefully probed.

Civil rights defined

The conference ended after a good lunch with a less dense discussion of the human rights issue during the afternoon.

Kader Asmal and Laurie Ackermann set the scene. The former led in with a particularly lucid historical account of how the notion of human rights had originated. His central thesis was that they had arisen out of struggle, of which a good example is the modern feminist movement. In the first category come class demands, whether of the feudal baronage of England in Magna Carta, or of slaves under Toussaint L'Ouverture in San Domingo. Next comes the assertion of claims of the individual to freedom of speech and expression, freedom from arrest without cause shown, and eventually freedom to vote, which was a collective form of self expression. Finally, he

saw the right to equality and freedom from discrimination, as asserted grandiosely in the Atlantic Charter, and more explicitly on the local scene in the ANC's wartime pamphlet African Claims. The Universal Declaration of Human Rights of the UN set the seal on the rights issue for the modern world, embracing a polychrome display of "blue" rights relating to civil liberty, "red" rights reflecting the right to welfare, and collective "green" rights which include, suitably, the right to a clean environment, but also the right to peace.

Laurie Ackermann defined civil rights as rights claimed by allpeople against or through their governments, as distinct from claims against other people: the right to life and bodily integrity; the right to physical, intellectual and spiritual freedom; and the right not to be discriminated against. The "blue", "red" and "green" categories were helpful provided they are not seen in watertight compartments, and are seen as having positive and negative attributes, all being attempts to deal witha paradox: that freedom is good, but unlimited freedom is not.

Debate ensued as to whether, in a world of rich and poor nations, a "right to development" can exist for the latter, as was implicit according to Asmal in the promotional activities of the World Bank. The possibility of development must depend on availability of resources, and the right to it made conditional on a willingness on the part of the recipient to invest wisely.
There was also discussion of the role of state power in the redistribution of assets. Some considered that this constituted illegitimate interference with the right of property; others that unfair distribution (of land, for example) provided a case for compensation so long as the right to property as an extension of human freedom is not itself taken away.

How can rights be protected, and when is affirmative action desirable?

The content of the presentations at this point was influenced by a strong interest in women's rights by the first two speakers, Bridget Mabandla and Raylene Keightley. The former, who lectures at UWC, made a dead set for the lack of awareness of the need to address women's rights among the membership of the ANC. Customary law reduces women to a subordinate position (as, for that matter, has been the case in the Roman Dutch law, but not to the same extent), and the traditional outlooks of customary law persist among African males. She noted that, despite the revolution in Maputo, the position of women remained unchanged. The ANC needs to set up a commission on equality, she urged, or democracy would not come about.

Raylene Keightley of UCT presented arguments to illustrate the systemic inferiority of women's positions in the law generally, which lies beyond the remedy of mere equal treatment clauses in a constitution. Yet affirmative action would conflict with anti-discriminatory principles. She thought that an equal opportunities commission might lead to the protection of mothers and childbearers under statute, while a women's desk in government might help with the allocation of housing and welfare, along with education through the media.

Paddy Terry, also of UCT, concerned herself with the need to build up a human rights culture, involving the promotion of respect for persons, from childhood upwards, beginning in the pre primary schools, and continuing after school in the streetlaw programmes. She deplored the lack of awareness on the part of educational authorities who saw proposals to introduce the theme as little more than an attempt to force more subjects into an over crowded syllabus.

Or does this lack of awareness also extend to parents, who bring children into this world without ensuring that they are given a proper chance in life? This question, posed from the floor, seemed to resonate through the conference; but the answer was left to our imaginations.

The promotion of affirmative action in some carefully defined form seemed to be implicit in the first two papers on the protection of rights. The importance of Vincent Maphai's contribution, as a political philosopher from UWC, was that it questioned affirmative action as a double edged slogan. He argued that affirmative action implied an admission of inequality, whether it came from the victim talking to his/her oppressor or the victor talking to his/her ex oppressor. The way up, he argued, was via one's bootstraps, not via handouts, and the levelling of the playing fields should be limited to the creation of equal opportunity.

In question time he suggested that this could be done in the matter of housing, simply by using the housing need to create jobs. Kader Asmal pointed out that positive ameliorative action, as laid down in Article 13 of the ANC Bill of Rights as a permissive but not a mandatory option seemed to strike the right note.

The conference ended at 5 p.m. with a vote of thanks to UWC, as hosts, and to the individuals and organizations which had contributed financially to the day.