Umbutho Wamalungelo Obuntu

CIVIL RIGHTS LEAGUE

Burgerregtevereniging

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EDITORIAL

Peace by Confrontation out of Mistrust?

It was to be expected that bringing South Africa out of the nightmare of apartheid into the daylight of civilized, humane government would be difficult.

Our hopes now rest on the All- or Multi-Party Conference at which there is to be "hard bargaining" leading eventually to an agreed constitution for a democratic South Africa. That's good. It is in bargaining skills that we need practice.

What isn't so good is the supposition on nearly all sides that the first requirement is to mobilize power blocs with a view to winning the day at the conference - by weight of numbers?

Some groupings, like the CP and AZAPO, do not want a conference at all, the one insisting on mandatory partition, the other on a total take-over. Presumably both look forward to the great trial of strength to end all differences.

The least consistent participant, perhaps, is the Government. Without apparently contemplating its past record, it seems to imagine that the significant changes it has made in the law entitle it to unquestioning public confidence even though it has continuously failed to respond adequately to disclosures of its own improper conduct in both high and low places.

The ANC seems to suffer from a mixture of real vision and poor coordination: the making of conciliatory statements from the top while, at lower levels of responsibility, ideologues scare the pants off the moneybags with threats of nationalization and wealth levies - to prove to their constituencies that they are still fighting fit? - for the multi-party conference?

But it happens across the board. Take VAT. "No taxation without representation" is not a slogan one can expect a white South African government to take fully to heart after so little practice. But it isn't a bad precept for an Age of Conciliation. If VAT really is a good and fair tax (which it seems to be, if properly applied) then it should have been possible to sell it by better methods than over-simple TV references to holes in the bucket, dear Liza. But conversely, if VAT is a bad tax, why did it take COSATU and its allies until the eve of implementation before they really mounted a campaign against it? Why the general strike? To deliver a protest which should have come earlier, or to make political capital by making sure that the tax can be turned into a disaster, and to heil with the need for more money to feed the poor and oil the wheels of industry? - all with the multi-party shouting shop in mind? (Recall Harald Harvey's observation after the UCT strike that "industrial relations are not made of logical arguments ... [but] are born out of conflict over resources, and are essentially about power").

But what about that UCT strike? In spite of many agonised letters to the press, the total experience just could point the way ahead. Why? It may be inappropriate to call the cleaning staff of UCT "aristocrats of labour" as seems to be implied by the statement that their pay rates compare favourably with those at other universities. And it could have been bad timing, as some have suggested, that their wage increases were not

"Pity! He's one of my better English students."

announced at the same time as those of the academic staff. It is certainly regrettable that the reputation of the police was such that they could not be called on to the campus to perform normal duties like ensuring that people with grievances do not trample on the rights of third parties with tactics rooted in blackmail.

Yet the UCT "bosses", as the strike leader called them, managed to contain a disruptive onslaught without calling in the police. By making a revised offer which won acceptance, however much critics may reject it as weakness or brutal class dominance (it can hardly be both), by starting disciplinary proceedings, they also furthered the peace-making process.

There are lessons to be learnt from such restraint under provocation. We liberals frequently can't decide whether to pussyfoot or bulldoze our way through chinashops. Must the Left always be right, because the Right is even wronger? (Some, like John Kane-Berman of the Institute of Race Relations, prefer the sound of broken china, as in the recent pamphlet *Mau-Mauing the Media*, which warns against a new censorship in the new South Africa. See also Anthea Jeffery's recent *Forum on Mass Mobilisation*, which provides an across-the-board exchange of views about that topic). In a sense, we are in the Connor Cruise O'Brien debate all over again. Only this time, it seems, UCT may have got the answer right. Tolerance without bending on principle could be the only way to a peaceful New South Africa. But it will require a lot of patience and self-discipline, and more common sense from lots of people who should know better.

The release of Terry Waite, and his self-controlled yet morally firm denunciation of body-stealing on his release, have provided us with food for thought at just the right moment.

Rodney Davenport, Editor, P.O. Box 23394, Claremont 7735

ANNUAL GENERAL MEETING, 26 SEPTEMBER 1991

Summary Of Minutes

Present: Sir R.Luyt (President), Mrs M. Burton, Prof. H. Corder, Prof. R. Davenport (chair), Mr P. Hill (treasurer), Dr K. Hughes, Mrs C. McGaffin (secretary). Mr J. Sarkin-Hughes, and 16 other members.

Apologies: Mr and Mrs B. Corder, Mrs N. Robb, Dr O. Wollheim, Mr and Mrs R. Aitchison, Dr M. Nash, Prof. Kader Asmal.

Minutes of the 1990 annual general meeting were confirmed.

Chairman's Report (summarised below).

Treasurer's Report: The Treasurer reported a total income from subscriptions and donations for the financial year ending 30 June 1991 of R5201 and expenditure of R5419, making a shortfall of R218. The balance of accumulated funds stood at R2435. The accounts had been audited without charge by Messrs De Loitte Pim Goldby, and were duly signed. A vote of thanks to the auditors was carried.

Election of Committee: The following were elected: Mr B. Adams, Mrs M. Burton, Prof. H. Corder, Prof. R. Davenport, Mr A.Dodson, Prof. G. Ellis, Mr P. Hill, Dr K. Hughes, Sir R. Luyt (ex officio), Mrs C. McGaffin, Mr K. Motshabi, Mrs N. Robb and Mr J. Sarkin-Hughes.

Other business: (1) *Lt. Gregory Rockman:* a proposal that funds be collected to help Lt. Rockman, a previous recipient of the League's Award of Merit, who is in dire financial straits was moved by Mrs B. Scoble, who agreed to pass on donations received.

(2) *Members' meetings:* various proposals for improving contact between members were passed on to the incoming committee.

Address by Ms Dene Smuts, M.P., who spoke on "The Role of Affirmative Action in the Reconstruction of South Africa" [text given below].

The meeting, which was followed by a social, closed at 9.30 p.m.

EXTRACTS FROM THE REPORT FROM THE CHAIR

Professor Davenport handled domestic issues briefly, noting the difficulties resulting from the late or non-payment of subscriptions, which it has been found necessary to raise if the League is to survive.

His statement that Mrs Dot Cleminshaw had accepted her election as a patron of the League was greeted with applause.

He continued: There have been, and again will be, occasions to protest. In the past year some of us lined up with the Sash on the steps of St George's on Human Rights Day, or took part in the march to Parliament over the Harms Report, or marched at night in protest against the burgeoning assaults on women.

On the positive side, *we are involved in the promotion of a civil rights culture in a country which has received no direction from the top for many a long year.* The Government is still not a signatory of the Universal Declaration of Human Rights, though it has taken steps in recent years to catch up in certain areas - notably by deciding to rethink the horrors of Death Row, and to promote the idea of a bill of rights in a future constitution.

We decided in 1991 to concentrate mainly in two areas: educatiom and the constitution.

Education has come to matter because the authorities have come round to the idea - at last - that the civil rights culture which we have tried to promote for forty years is not a way of undermining public authority. That is certainly good news.

Two of us have been meeting a small group of Khanya College students on a weekly basis since March, and we have been appalled to discover how little the concept of human rights, in its various ramifications, is understood by a generation which needs to know a great deal more. Or should one say, how deeply a community's awareness of the need for rights can be undermined in a township at war within itself? We will have to review the Khanya College exercise, however, as it has been too demanding of time for people involved in other CRL activities, unless it can be mounted again, with the help of volunteers, in a different way next year.

More hopeful is the approach to schools. Seven Civil Rights Leaguers made a very successful presentation at Westerford last week, in a follow-up of the one arranged by the previous committee at Wynberg Boys' High, and I want to congratulate Khanya Motshabi, of the UCT Law Faculty, for so successfully conjuring up the reality of a squatter community taking over its ancestral lands on the Westerford playing fields. This caused the tongues of Standard 9 to wag vigorously in very different ways, and we think that the class came away with a

sense that the issues of civil rights really are important, and potentially very close to us, and above all difficult to solve unless one starts from valid premises.

We have also been talking with Lawyers for Human Rights, who have some good teaching material, with a view to cooperating on the school front. It seems that we are very close to them in approach, and could dovetail fairly easily into a strategy which they have already started to develop. *This is certainly an area in which more members of the CRL could become involved, and we are keen to get the names of volunteers.* Michelle Morris, who has experience in civil rights education in New York, has also become involved in this exercise.

The focal point of our year was undoubtedly the constitutional conference at UWC in early August. Only a few of our members were there, but we put out a full report in the September *Newsletter,* and hope that in this way you were able to get a picture of what seems to have been a useful occasion. The venue was right. We had a good panel of speakers who covered a lot of ground and the feed-back was satisfactory. The success of the operation was due in no small measure to the support of the Black Sash, and of the Community Law Centre at UWC, and enthusiastic promotion by Jeremy Sarkin-Hughes, a member of our committee. It was made possible by the gift of nearly R2,000 by a small number of contributors, and the generosity of UWC in providing a venue without charge and cut-price meals. An offer to pay for a follow-up publication has been made to us by US-AID, for which we are very grateful. The constitutional issue is now so topical that we hope to put something out which will help a wider public to grasp not only the differences between the parties over the shape of our constitution to be, but also the significant amount of common ground which is beginning to emerge.

You will have noticed changes in the format and style of the *Newsletter.* For this we have to thank Shell South Africa, who have given us this year's issues free of charge, with the encouragement of Pat Hill, our Treasurer. In any one issue, fewer themes have been taken up and the articles have been longer. This is not the result of a deliberate policy change, but has been determined largely by the shape of the contributions offered. You may or may not like the result. I don't think we have the resources to turn the *Newsletter* into a journal, and I'm not sure members want that. *We would like it to have the character of a forum, and it is in the power of members to make it so, by writing in and making it their own* (Could we run to a bill of rights/constitutional agony column? This issue contains contributions which are capable of opening up debate. Please tell us what you think). Meanwhile I want to thank those contributors who have given us some thought-provoking articles.

I hope my remarks have made it clear that there is still work, and plenty of it, for the Civil Rights League to do. But we are stretched. We need volunteers, especially for work among the youth.

1. *We need a new secretary,* for Camilla McGaffin has to resign. We are looking, ideally, for a person who lives in the Newlands/Claremont area, who can type, take minutes, handle straightforward tasks on a word processer, and would be prepared to handle mail and receive, bank and acknowledge subscriptions. On average, the work involves about one half-day per week, and the honorarium is negotiable within our limited resources.

2. *We need more and active young people on the committee,* above all people who could take part in the kinds of activity outlined in this report, and help in any way to promote the values to which the League is committed. If you feel so moved to join, please write to the League at P.O. Box 23394, Claremont, or phone 61-0336.

THE ROLE OF AFFIRMATIVE ACTION IN RECONSTRUCTING SOUTH AFRICA"

(Address by Dene Smuts, M.P. for Groote Schuur, at the annual general meeting. This address was also published in the *Cape Times* on 17 October 1991. *It received a very positive response from members at the a.g.m. But affirmative action is a thorny topic, and members should feel free to join issue with the speaker through these columns).*

Sectors of our society are becoming nervous about affirmative action, the corrective aspect of change.

Few people, when they fought for equal rights, anticipated that the life circumstances of disadvantaged people would have to be corrected before they could exercise equal life chances in any meaningful way. Merely proclaiming equal rights and opportunities is not enough - and the greater the historic disadvantage, the greater the corrective measures are going to have to be.

It seems to me that many people construe affirmative action as unfair advantage.

There is a lot of huffery puffery nowadays about reverse discrimination, about the disadvantages of affirmative action; about the contradiction of the idea of equal rights and opportunities; many voices raised in defence of merit as the only criterion.

Yes - it is a serious and a difficult question. But let us get something very simple straight: persons in the present South African elite are not where they are solely on merit in the first place. They are there because we have had a system in place which not only effectively but explicitly excluded most of the competitition. Of course merit is the best, the only, criterion. But it can only become the sole criterion for places, posts and promotions where everyone has had the benefit of equal preparation and when the people exercising the judgment on merit are more representative of society as a whole, and less likely to have an inbuilt bias, however unconscious.

To cite one example of an area where merit has not been the only criterion: an economist, advising working women "to choose an occupation which has traditionally been the domain of the white male" points out that "together with a somewhat artificially created shortage of skilled human resources the Peter Principle has been strongly at work and many men would have been promoted beyond their level of competence".

Now put one of those men in the position where he decides who gets promoted, a male or a female. How can we be sure he is truly going to decide on merit? How do we know he does not unconsciously consider old school tie attributes meritorious?

And what is merit in the field of admission to a university? No-one with even the vaguest understanding of what has been done to black education will deny that means other than matric and conventional criteria have to be used to find black students with the appropriate talent, and that support programmes are necessary. If these steps are not taken, the uuiversities will simply remain white in complexion and we are back to square one, with a white population enjoying access to the tools of promotion, not, please note, on merit, but because it had unfair advantage in the first place, and the competition remains disqualified.

Affirmative action is, among other things, a way of making the institutiions of society more representative of its component parts.

The need to correct the unrepresentative nature of our government in one massive exercise in democratisation is accepted on all but a few sides. We are entering negotiations and creating a new order.

It is for exactly the same reason that we need affirmative action programmes in other fields. The vote will achieve a government of a new and different complexion, and the new constitution will enshrine individual rights. But that does not yet ensure the levelling of the playing fields. It does not address the heartstoppingly huge backlogs in housing, in the socio-economic field generally. That is why the subject of the constitutionalisation of second and third generation rights has become such an important point of debate. You are familiar with the arguments: how can things that cost money be built into a Bill of Rights? If a government for good financial reasons cannot deliver those rights, the classic first-generation rights are devalued.

I am not addressing that particular debate here. What I do wish to say is that if the second and third generation rights are dubious, or difficult, then that is all the more reason to institute affirmative action programmes. In other words, if we doubt that the new government will be able to improve the socio-economic conditions of the disadvantaged sectors of the population, then that is all the more reason to make room in the existing institutions and business enterprises for people who have previously been excluded.

We will need, at the very least,, an affirmative clause in the Constitution permitting temporary ameliorative measures.

The key word to remember in affirmative action is "temporary". It is the *temporary* abandonment of equal rights and opportunities in order to correct the balance that makes it acceptable.

I think we should remind ourselves of the alternative. South Africa could very easily now have entered upon a period where the power simply shifted to a new government, a new hegemony that practised patronage and looked after its own. To a degree, that will no doubt happen in any case. We are extremely fortunate in having as the NP government's main opponent an organisation that proposes a Bill of Rights and a constitutional framework with which few liberals can have much difficulty - rather than a liberation movement which proposes to do unto others what was done to it!

But even such an organisation will have to look after its people. Don't let's get too fancy in our objections to affirmative action in various forms. I think we will see affirmative action anyway, and that it is excellent to have it governed by formal instruments, in other words to have it constitutionalised.

Both Canada and Australia have affirmative action Acts which require enterprises employing more than 100 people to report on advancement programmes, in the case of Australia to a Director of Affirmative Action who assists and advises . The Australian Act is described as conciliatory and catalytic, unlike its Discrimination Act which is complaints-based aand punitive.

The emphasis in this form of affirmative action should be on what I call trawling and training. We are all familiar with the problems of tokenism. Appointments and promotions for the sake orf equal opportunity appearances do more harm than good. Affirmative action, if properly practised, should encourage

(1) the identifying of talent; (2) training, mentoring, career planning, and not empty tokenism. The talent is there, of that there is no doubt, both among females and blacks. It simply does not occur to people to look for it and use it because they are set in their patterns of thought and of behaviour, in drawing from pools of people whom they know.

THE CONSTITUTIONAL DEBATE CONTINUED: FURTHER CONTRIBUTIONS TO THE THEME OF THE SEPTEMBER NEWSLETTER.

(1) The Conference Report: a Correction

by *Vincent Maphai,* who made the final contribution to the August conference, and has asked us to amend the report of his speech.

He writes: "Thank you very much for your newsletter (Volume 38 No. 3). On page 6 you refer to the presentation ... I understand that to summarize [it] in a few lines was bound to be difficult. I am concerned about one sentence where I am reported to have claimed that 'the way up ... was via one's bootstraps, not via hand-outs'. Reference to 'bootstraps' is particularly unfortunate. I have never used this phrase, nor will I use it because it is generally used by right wingers for different purposes. Besides, my article in *Social Dynamics* will reveal that my position on this isue is much more settled than that ..."

We apologize, Vincent. Readers please see *Social Dynamics* Vol. 15,2 (1989) pp. 1-24 - Ed.

(2) "The National Party Supports Civil Rights"

by *Sheila Camerer,* M.P., National Party Director of Information, Transvaal. (She is keen to ensure that the NP's role is given full recognition on the ground that the NP was a front runner and that it has been a protagonist of both individual and group rights).

There is a fundamental difference between the rights of a citizen as protected against a state or state interference, which are basically regarded as Human Rights and the rights of a citizen as against other citizens pursuant to the constituton if a country or a code or Charter of Human Rights of that country. The National Party's attitude is that a more developed system of civil rights should follow naturally once a Charter of Human Rights has been adopted. Accordingly the question of a Charter of Human Rights should be addressed first. The question of the rights of association or disassociation will inevitably also be raised and will have to be addressed by clearly defined National Party policy.

The initiative in the current debate with the view to adopting a Charter of Human Rights has come from the National Party Government. The present Minister of Justice, Mr Kobie Coetsee, announced in Parliament in April 1986 that he had asked the S.A. Law Commission to investigate and make recommendations on protection of group rights in the context of the South African constitution and the possible extension of existing protection for individual rights, as well as the role the courts play in this connection. Right from the start the protection of group rights in terms of the constitution and the rights of individuals as protected by the courts were distinguished. The gist of the Law Commission's preliminary report on this issue published in 1989 was that individual human rights should be protected in terms of a Charter of Human Rights. Any group rights with a political connotation could be protected in terms of a constitution, but such protection would have to be negotiated. The National Party and the Government have expressed support for the principle of a Charter of Human Rights. The public has had ample opportunity to submit recommendations and

comments in connection with such a Charter to the Law Commission. The initiative in this debate of historic significance is squarely in the hands of the National Party and the Government.

Once a new constitution and the Charter of Human Rights is in place, it is envisaged that legislation will emanate from Parliament to implement the philosophy of human rights in the inter-personal sphere. For example, white discrimination by the state has now been abolished by statute. There is no legislative prohibition on discrimination by individual citizens against others. While a Charter of Human Rights would set the general parameters indicated above, decreeing the equality of all citizens, legislation might flow from this to deal with particular cases.

Recently human rights were again in the news with the presentation to Minister of Justice, Kobie Coetsee, of the Law Commission's interim report on a Charter of Fundamental Human Rights. [Since Mrs Camerer wrote this article, the Report has been published]. In the draft Bill attached to the earlier working paper of the Law Commission, protection of a number of fundamental human rights is suggested. It is probably safe to say that the National Party would support a Charter of Human Rights which contained clauses to the effect that every person shall have equality before the law and that no person shall be discriminated against or favoured or prejudiced by any law or executive or administrative order or decree on the basis of his or her race, colour, language, sex, belief, ethnic origin, social level, political views or personal characteristics.

The National Party would also support a Charter entrenching fundamental rights and freedoms such as freedom of speech, freedom of movement, freedom of association, freedom of religion and freedom to participate in the economy. The National Party would support the right of all adults to exercise an equal vote to establish and participate in political parties and to hold meetings and to own property. According to the National Party's constitutional proposals, it supports an equal vote in central and regional level. On local level, property owners are given votes concomitant to their interests. It would also support the right of the individual to protection under the law, and to safety as well as many other rights and freedoms which have been spelt out in the working paper.

Accordingly the National Party supports the principle of the recognition and protection of the fundamental individual rights which form the constitutional basis of most western democracies. We acknowledge, too, that the most practical way of protecting those rights is vested in a Charter of Fundamental Human Rights justiciable by an independent judiciary. The National Party believes that this justiciable Charter, in which the fundamental rights of the individual, as well as his language, culture and religious values will be effectively protected against intervention, must form part of a new constitution.

The National Party, however, believes that a system for the protection of the rights of individuals should form a well-rounded and balanced whole together with protection of minorities and national entities. South Africa has its own national composition and our constitutional dispensation has to take this into account. The National Party's recently published constitutional proposals accommodate this. The formal recognition of individual rights does not mean that the problems of a heterogeneous population will disappear. Any new constitution that disregards this reality will be inappropriate and even harmful. Naturally the protection of collective, minority and national rights may not bring about an imbalance respect of individual rights. Yet it is increasingly recognized by international and South African jurists that the rights of the individual are the most important vehicle for protection of minority and collective rights and interests - the individual being the smallest minority. It is neither the National Party's policy nor its intention that any group in whichever way it may be defined should be favoured over or in relation to any of the others.

(3) "<u>A Bill Of Rights: The Other Half</u>"

by *Professor George Ellis,* University of Cape Town. (He wants us all to take the duties of citizenship more seriously, and proposes the American way to ensure this).

The present discussion on civil rights protection in a new South African constitution, probably entrenched in a Bill of Rights, focuses on something badly needed in this country. It is certainly important to include such a provision (realistically based on achievable goals), and to consider in depth how best to do this; and we have seen much activity on this front. However it is basic to the concept of meaningful rights that they carry with them obligations; and this seems to be hardly discussed at present. It seems worthwhile at least considering if this kind of element should not also be part of our vision of a new South Africa.

Most of our readers will have seen in films the process whereby an immigrant (having fulfilled other requirements) becomes an American citizen. The aspirant studies the history and constitution of the United States, demonstrates a knowledge of these topics and of the basic duties of citizenship by passing an examination; and then is sworn in as a citizen, at a ceremony celebrating their achievement of this new status and its associated duties.

It seems worth considering if such a process should not apply to every person who is to be a citizen of the South Africa of the future. The present situation is really quite unsatisfactory, when one thinks about it: one becomes a citizen without any ceremony to mark what ought to be an important occasion, and without any requirement of thought about the issue by the new citizen, much less some kind of proof they have any idea of what the basic concept means, nor the duties associated with this status. The whole procedure apparently supports the idea that one should have privileges without responsibility. Surely a serious concept of citizenship does not endorse this view?

I realise that the idea will at first seem threatening to some; indeed I can imagine many at first decrying the concept as unfair or undemocratic. But of course this is quite untrue. It is totally democratic; indeed anyone who has taken a serious interest in their country and its political structure would have no difficulty in fulfilling the requirements one would set, which would not be of the nature of difficult or catch questions, but rather a simple demonstration of basic understanding of the new role one is taking on, and an undertaking to take this role seriously. Indeed, if a potential citizen cannot or will not do these things, either their ability to fulfil the task properly, or their intention to do so, must be in question (provided of course the requirement is made equally across the board for all citizens).

Naturally if this were undertaken great care would have to be exercised in deciding the precise details of the requirements set forth, and how the requisite understanding and commitment would be demonstrated; these would have to be agreed by all parties across the political spectrum: it would represent the basics of what we would all expect from citizens. We have here the United States case as one example. Particular problems would arise in the case of the illiterate, but one must presume that resourceful education methods could handle the problem.

I understand that many hackles will rise at this suggestion. However if one reflects on it, it becomes clear that without some provision marking the two-way nature of the social contract, in the end the value of citizenship is lessened. There are other options, and the suggestion above is just one of many; one can for example follow the Australian example of fining citizens who do not vote at elections. If you compare that with the present proposal, it is a lesser way of tackling the issue.

The present proposal is put out to stir up some thought and some reaction. There are undoubtedly better ways this issue could be tackled; if some of them are clear to you, why not let us know about them?

(4) "Federalism - How Necessary Is It?"

by *Albie Sachs* (abbreviated from the text of his Ernie Wentzel Memorial Lecture. This is a lucid presentation of the case against a federal constitution, but is that case as relatively one-sided as Dr Sachs suggests? This article presents a challenge to believing federalists).

At one stage, there was support for federalism from those who hoped thereby to preserve for themselves areas of white control and privilege, but there just are not any districts in the country, let alone regions, where whites are in a majority, so this idea has quietly receded into the background. The reality is that given intensive development over several decades, the proposed Oranjestan might just make it as one of the tinier municipalities in one of the sub-regions of the Northern Cape.

What we are left with is federalism virtually as a metaphysical principle, good in itself and to be defended for its own sake even if there are no beckoning units to give it substance.

To my mind, whether we have a federal or a unitary state is not a matter of principle like, say, one person one vote, or a common voters' roll. It all depends upon the nature of the particular state and the way it came into being. Federalism can be a great barrier to dictatorship, but it is far from being the only one, and there are many unitary states that have been far more open and democratic than federal ones.

United States experience goes both ways ... The Federalist Papers, written by John Madison and others to persuade the reluctant voters of New York

to go into the Union, ... show three things: in the absence at that time of universally held views on the nature of good government, certain truths were simply declared to be self-evident, and then a few rather weak ancient texts were quoted in their support; the concept of a balance between federal powers, state rights and individual rights did not emerge from any theory, but rather the theory came out of the compact agreed upon; the main thrust of Madison's argument was that pooling of sovereignty was more protective of freedom and commerce than retaining separate states would have been.

Without doubt, the existence of strong region-state governments limits the power of the centre. Yet the doctrine of state rights did little to stop McCarthyism, while it did much to facilitate racial domination and segregation. It was federal and state troops that escorted black students into previously segregated universities, and federal rather than state law-enforcement agencies that prosecuted violations of civil rights legislation.

The doctrine of state rights was used to justify slavery and led to the terrible Civil War. Later on the doctrine was relied upon to permit prohibitions on the teaching of evolution and anti-choice bans on a variety of matters, including contraception, abortion ... homosexual love-making and cremation.

Federalism thus can lead as much to the erection of stockades around intolerance as it can help to block excessive concentration of powers. When one thinks of all the armed forces and regular and irregular law enforcement agencies in our country, and how easily ethnicity can be mobilised and armed, one longs for some system of national standards, coherent supervision and generalised accountability. State powers could easily give constitutional immunity to warlordism. We could have more dictatorship, not less, a devolved authoritarianism rather than a devolved democracy, multiple autocracies instead of one. We could have constitutional no-go areas where all affirmative and creative aspects of the Bill of Rights were nullified, where what are declared to be traditional cultural weapons assume ideological and administative as well as physical forms.

On the assumption that ethnic particularity is to be excluded from the federal idea, it becomes possible to ask what the substantive objectives are which federalism is intended to serve and then see how best they can be incorporated into a new constitution. There appears to be one negative and one positive reason in principle in favour of federalism. The negative one is that it prevents the concentration of power in institutions that are vulnerable to take-over by a dictatorship. The positive one is that it encourages regional initiative and destroys passive dependence on the centre.

Both these objectives can be achieved in ways which do not require a rather forced carving up of South Africa and an equally artificial and rigid fragmenting of powers. What our country clearly needs is effective democratic government at a national level to deal with national tasks, effective democratic government at regional level to deal with regional tasks, and effective democratic government at local level to deal with local tasks.

National tasks would includes foreign relations and defence, but also general economic policy for the country and the establishment of guidelines and a financial and institutional framework for dealing with great social and human issues such as schooling, health, shelter, employment, nutrition and a minimum family income programme.

Regional tasks would cover questions of implementation in the light of local resources of national policies, together with regional development in all its forms.

Local tasks would touch upon all aspects of day to day living so important for citizens. It is the area of the greatest direct participation of the people in running public affairs, and also the area where public opinion most directly affects the lives of citizens. Without doubt, the real battle against apartheid will be fought at the level of local government.

It may be said that the two crucial social issues facing South Africa are how to change relationships on the land, and how to enable new non-racial cities to grow; neither of these is facilitated by the federal option, both are helped by an integrated system of non-racial, three-tier government, with clearly defined responsibilities at each level within a coherent and unified whole.

What is proposed, then, is that instead of starting off with a pre-defined constitutional-territorial model and attempting to fit South Africa into it, we establish appropriate relationships between local, regional and national levels of government, and then leave it to the professors to define for us what system we have ended up with. There are many intermediate positions between a pure unitary and a pure federal state. The indications are that South Africa will be a unitary state with federal features,

but my learned colleagues might have other and better descriptions to offer.

Fragmentation of sovereignty is thus just one possible way of protecting democracy from attack. There are many others, which, it is felt should be pursued, and which in South African conditions are less likely to be associated with schemes to preserve racial privilege and ethnic division. The classic separation of powers is one, with a representative and respected Constitutional Court playing a key role in ensuring that the constitution is respected. Political pluralism, proportional representation and guaranteed space for independent non-governmental organisations are others. We need mechanisms to guarantee freedom of speech, secure the right to information and ensure that government is clean and open at all levels. We have to find constitutional means for ensuring as much bottom-up participation in government as possible.

The libertarian dimension also needs special attention, and it is here that the Bill of Rights has to assert itself on a nation-wide basis. Rights cannot be more fundamental, just as people cannot be more human, in one part of the country than another. The Constitutional Court and the whole judiciary would have a special responsibility for guarding fundamental rights and freedoms. We envisage a Human Rights Commission investigating patterns of human rights violations, taking up individual complaints and initiating appropriate proceedings where necessary. We look forward to creating the office of Ombud to receive and investigate claims of bureaucratic abuse and impertinence. We would need clear procedures to deal with corruption, nepotism, warlordism and terrorisation.

Above all, we will require clear and acceptable principles to provide for an orderly equalisation of life chances and opportunities in this country. If we turn our backs on the problem, we invite demagogues and chauvinists to step in with their facile solutions and easy scapegoats. There are few people today who think that the market alone can solve the question of structured inequality, nor are there many who believe that the state on its own provides the answer. Clearly there has to be an active, flexible and intelligent relationship between the public and the private sectors. The question is whether the constitution has any role to play in requiring, regulating or even preventing re-distribution of wealth.

(5) "Promoting Democratic Chieftaincy"

by Khanya Motshabi, Faculty of Law, UCT. (He argues for a retention of chieftainship, purged of distortions which have crept in but without removing its traditional character. This is an abridged version of an article written with Shereen G. Volks, "Towards Democratic Chieftaincy: Principles and Procedures", 1991 *Acta Juridica,* published here with the kind permission of the Editorial Board of *Acta Juridica*.)

South Africa is bound for deep and momentous change, and the opportunity now arises of setting the nation on new moral and political foundations. We anticipate a future in which there is wide participation in national life. This is one meaning of the principle of democracy. The challenge is to translate this principle into reality at all institutional levels.

My concern here is the institution of chieftaincy. The need to democratise this institution is recognised by organisations such as the African National Congress. Clause (C) of the ANC's Constitutional guidelines reads:

"The institution of hereditary rulers and chiefs shall be transformed to serve the interests of the people as a whole in conformity with the democratic principles embodied in the constitution".

In what follows I attempt to build on this conception of the role of chiefs. I describe a few features of the chief's office; I note the tendency to abuse it; and then suggest some ideas for rendering chieftaincy democratic.

Nature Of Chieftaincy

Succession to the chief is hereditary and limited to first-born males in the agnatic line. The formal powers of the chief are formidable. they range from law-making, military, religious, through the political and economic and fiscal. Allocation of land remains an important economic power. The chief was previously not accountable for the management of public moneys.

These wide powers did not make the chief an autocratic despot. He was constrained by custom, tradition and the need to maintain a following. Effective government depended on cooperation from his councils and people. He was expected to consult his advisers, selected by him to advise on

policy. The views of the council of headmen were especially important. Decisions taken in conjunction with this council were assured of general acceptance. Where the council opposed a policy proposed by him, the chief tended to abide by its decision. To do otherwise would court disaster. The chief was expected to consult his relatives, who were among his most influential advisers. Like other advisers, the relatives provided an avenue of redress to persons aggrieved by the chief.

The chief, then, was more like the apex of a government system based to a fair degree on consensus and mutual deference. His main duty was to cherish his people and to govern well and fairly. In a sense, he was the trusted centre of the commmunity. Where the trust broke down, a whole gamut of controls was there to protect the people.

Manipulation Of Chiefs

The imposition of colonial rule disrupted the relationship between the chief and his people. The colonists paid the chief a salary which lessened his dependence upon the people. Financial and political inducements encouraged him to put first the interests of the colonists. When his decisions encountered resistance, he could rely on the support of an external force.

The chief could now operate above the community, and traditional checks and balances fell apart. Many chiefs became servants of the colonial administration, shifting their basis of authority and accountability. In turn, the colonists assisted these chiefs in imposing their continued rule.

The types of abuse fall into two broad categories: administrative and constitutional. At the administrative level, the use of the land allocation power to extract bribes; misuse of the judicial function; and abuse of the power to grant or refuse state pensions are relevant. At the constitutional and political level, the main problem is the complicity, with some important historical exceptions, of chiefs in the implementation of apartheid and white domination generally. The legislative thread can be traced through the Black Administration Act of 1927; the Black Authorities Act of 1951; and the Status Acts which created the TBVC states, and resulted in the denial of African political rights in the 70s and 80s.

Making Chieftaincy Democratic

What we need is to reform chieftaincy along democratic lines. The basic constitutional principles include representative government based on a universal adult suffrage, and equality bewtween men and women of all kinds. Happily, these principles have the support of the Congress of Traditional Leaders of South Africa (Contralesa) for whom the reform of chieftaincy is a major objective.

Constitutional Principles

But applying the principles is more difficult than formulating them. There are difficulties of culture, history and context which cannot be explored in the space available. I offer instead a rough indication of the principal concerns: hereditary succession; primogeniture; patriarchy; and powers of the chief.

Although hereditary succession does not square with democratic principle, it should be retained because the mystico-religious element it provides is essential to the stability of chieftaincy. In this connection, there is evidence that commoner chiefs would not be effective for failure to command the loyalty and obedience of the people. But all royals should be eligible for selection as chief. An election should be used to choose the chief as this would introduce accountability. To buttress the mystico-religious element, the electors should be limited to headmen and women, who would in turn be chosen by the community.

The principle of non-discrimination on grounds of sex would suggest that women should be eligible for election. There are, of course, ways of exempting chieftaincy from this requirement, but it would be preferable not to do so. Moreover, women rulers are not totally strange to African traditional government. The chief should serve a fixed term with no limits on eligibility for re-election. Considering that the danger of abuse is not as great here as in national office, this does not pose such an unacceptable danger of personal aggrandisement. If the same person were returned many times to office, accountability and tradition would coincide quite happily.

As regards power, the chief might be a ceremonial ruler, with substantive power entrusted to elected councillors. The specific powers of allocating land should be dealt with in this way, whereas the power to adjudicate legal matters should be exercised personally, largely because of

the ceremony attached to it. Financial controls on the chief should be introduced. Perhaps a declaration of personal holding at the beginning and end of office would be appropriate. To promote rectitude, chiefs should be paid a salary that provides reasonably for their requirements.

Administrative Principles

Good and clean government is an antidote to administrative abuse. A variety of norms can be derived from the modern legal duty to act fairly. I attempt to indicate broadly what some of these norms might be. I think here of the duty to act reasonably, and the duty to consult and to hear all sides to a dispute or question. Also relevant is the principle that the maker of a decision should apply his or her mind to the matter in hand. From this it follows that decisions may not be taken for improper motives, ulterior purpose or in bad faith. The ban on consideration of irrelevant factors may be hard to apply because of cultural differences in criteria of relevance. A rule against bias could be applied moderately because the personal and official roles of decision-makers are often fused in African law.

Enforcement

Enforcement is necessary to ensure that the above principles are respected. Here I suggest a statute embodying all these principles. The statute should create an administrative agency with the task of supervising their application. To minimise government manipulation, the agency should not be based within regular government departments. The agency would, in the main, review the legality of action taken by the chief and his council. All complaints would go first to the chief or council or both, depending on the circumstances. If no relief was obtained, then the agency would be activated. The agency would have power to depose the chief in very serious cases, which the legislation would define. No doubt the agency could perform other tasks like offering technical and administrative advice and counsel.

Court Supervision

It is important that the courts should, through their review power, have a right to supervise the work of the agency. This is particularly so in deposition cases where sensitive political issues arise. This would serve to protect both the chief and the community by minimising the number of wrong decisions.

Concluding Remarks

Attempts to reform chieftaincy must fully recognise the particular history of affected communities. Such sensitivity can be developed through inclusive and extensive debate. This is essential because it is unlikely that this country can be governed effectively without traditional structures.

CONGRATULATIONS!

(1) to the *Organization of African Unity*, on the occasion of the fifth anniversary of the coming into force of the AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS. This Charter, the formulation of which was entrusted to a Commission set up under the OAU Secretary General in 1979, resulted from a meeting of the OAU Heads of State and Government, and took two years to compile. Of the 51 members states of OAU in early 1991, 41 had ratified the Charter. A *Guide to the African Charter* has recently been published by Amnesty International. Of interest to South African readers is the fact that Articles 18 to 24 of the African Charter recognize rights of peoples as well as of individuals to freedom from domination, to self-determination, to dispose of their wealth, from foreign economic exploitation, to development, to peace, and to a "general satisfactory environment". An interesting historical document, it could present some problems for us down south!

(2) to the *Human Rights Trust of Port Elizabeth* on the occasion of its fifth birthday in October. Through its regular conferences and the publication of its excellent *Monitor,* the HRT under Rory Riordan's inspiration has made a notable contribution to the on-going South African debate.

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The Grogan cartoon is from *The Cape Times* of Wednesday, 2 October 1991.