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13 - 15 JULY 1994

UNIVERSITY OF THE WITWATERSRAND

HISTORY WORKSHOP

THE SIGNIFICANCE OF MIXED GOVERNMENT IN SOUTHERN
AFRICAN STUDIES:
A PRELIMINARY ASSESSMENT

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Draft

The Significance of Mixed Government
in Southern African Studies:
A Preliminary Assessment¹

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Everywhere in Africa today, the architects of government are building new structures on political foundations that are traditional as well as modern. Often they appear to be constructing a new form of government, one that conserves traditional authority as a political resource without diminishing the authority of the sovereign state. To express this idea, I borrow a concept from the history of political thought, namely "mixed government." In modern Africa, it is normal for traditional political jurisdictions to occupy a second dimension of political space -- a dimension behind the sovereign state; Janus-like, or back-to-back. The political officials of these "second" states are known generally as traditional authorities; they hold positions of public trust in accordance with customary rules, although their appointments and functions are normally regulated by statutory law as well.

In the history of political thought, the idea of mixed government has appeared in ancient and in modern times. The ancient form, described by Plato, Aristotle, and Polybius, involved a mixture of institutions designed to safeguard the rich with other institutions devised to promote the interests of the poor. Modern forms of mixed government, created during the 16th and 17th centuries, such as the Estates-General in France and "mixed monarchy" in England, united the historic "estates" of society behind sovereign nation-states. But in medieval, unlike either ancient or modern, Europe, political

¹Prepared for the History Workshop Conference on "Democracy: Popular Precedents, Popular Practice and Popular Culture," at the University of the Witwatersrand, Johannesburg, South Africa, July 13 - 15, 1994.

life was bifurcated, or dualistic, in a manner that has something in common with the primary political cleavage of modern Africa. Sovereign, unified states did not emerge throughout Europe until the 16th century. The most common arrangement was coexistence of two self-subsistent realms of government, at arms length from one another, known as *Princeps* and *Populus*, or King and Kingdom (including judicial and municipal officials who were independent of the king). The leading political idea of medieval Europe was "double majesty."¹

Heretofore, historians of political thought have used the concept of mixed government with reference to unified, rather than dualistic, political systems. I wish to suggest that it is particularly relevant to the political structure of modern Africa, specifically the African pattern of dualistic authority within the framework of unified states. In Africa, back-to-back domains of authority often govern the same people, or communities of citizen-subjects. However, the second dimension of "traditional" states-behind-the-state rarely competes with the first dimension for sovereignty, although second dimensional rulers and office holders can exercise immense moral and political authority.

Increasingly, such authority is being recognized in Africa as a potential resource of great value, for it can help to maintain civic morale and social order during the extremely difficult transitions that lie ahead. A separate source of political authority, embedded in tradition, could powerfully reinforce social stability without the abandonment of democratic reforms. Traditional governments could prove themselves to be superior shock absorbers for the African ships of state during the stormy passages of these turbulent times.

Elsewhere I have identified the African form of mixed government as a research "frontier" for political scientists.² In this paper, I wish to consider the implications of mixed government for constitutional democracy in the anglophone countries of Southern Africa.

Degrees of Incorporation

In most African countries, the constitutional powers of traditional rulers are severely circumscribed. They and their subordinate title-holders perform advisory, ceremonial, and extra-constitutional functions mainly. For example, in Nigeria, where the influence of traditional authority is pervasive, the federal constitution declares plainly that no executive, legislative, or judicial power has been conferred on traditional authorities or councils by those provisions of the constitution that recognize, and thereby legitimate, their existence. With few exceptions, similar patterns of interdimensional authority obtain throughout eastern, western, and central Africa. However, in southern Africa, the emerging forms of mixed government are highly variable. The constitutions of Botswana, Namibia, South Africa, Lesotho, and Swaziland, in that order, represent a gradation from marginal to maximal constitutional authority for traditional rulers. I shall consider each of them in turn.

In the Republic of Botswana, traditional rulers regularly hold public meetings, known as *dikgotla* (plural of *kgotla*) to discuss proposed public policies which are expected to have direct local impacts. In this manner, many communities "buy into" legislative proposals before they become laws. Patrick P. Molutsi and John D. Holm conclude that, in Botswana, evasion of the political "gauntlet of *kgotlas* ... would seriously compromise a program's legitimacy." Furthermore, they find, "some policies have gone through numerous reformulations because they could not pass muster in *kgotla* when it came to implementation."³ Chief Lerchwe II, a leading practitioner of modernized and socially-responsible traditional authority in Botswana, has justified its perpetuation thus: "Botswana needs to build a political structure in which the Westminster-type of [parliamentary] government and our traditional government coexist for the preservation and development of our unique form of democracy."⁴

Dikgotla are strictly extra-constitutional agencies of government. Insofar as they participate in the formation and implementation of public policies, the traditional rulers of the Tswana people complement constitutional office-holders without infringing their legal jurisdictions. They perform governmental functions that are not authorized by the prescribed constitutional arrangements. A slightly higher degree of incorporation ob-

tains in the Republic of Namibia, where vast distances separate the traditional homelands of diverse peoples. As in South Africa, the traditional political institutions of the Namibians were severely compromised by colonial rule and, subsequently, the apartheid regime. This legacy is addressed in the Independence Constitution of 1990, which prohibits the manipulative practice of "ethnic engineering" and does not provide for the inclusion of traditional authorities in local government councils. However, the constitution does establish a national Council of Traditional Leaders, which shall be consulted by the President on matters relating to the control and utilization of communal land.⁵

In South Africa, European rulers manipulated African political traditions to solidify their control of subject populations throughout the colonial, dominion, and apartheid eras. Since 1927, powers to appoint, recognize, and remove chiefs, and to compel their service as administrative functionaries, were vested comprehensively in the head of state -- Governor-General until 1961, thereafter State President until 1994. "Chiefs who were not amenable to government policies, no matter what traditional legitimacy they might enjoy, were ousted from office or passed over in matters of succession. The result," as T. W. Bennett writes, "was the creation of a compliant cadre of 'traditional' rulers which was to provide the infrastructure for the independent homelands."⁶ Yet the stigma of its association with apartheid does not appear to have delegitimized African traditional rulership in South Africa to any greater degree than other forms of European domination produced that effect elsewhere in Africa. The norms of traditional political culture prove to be durable. While they have been modified by the intrusive forces of imperialism, they have also adapted to the necessity of coexistence with European settlers and the conditions of subordination to them.

The current attachment of many South Africans to traditional political values was indicated by this guideline formulated by the African National Congress (ANC) in 1988:

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.⁷

In December 1991, a broadly based Congress of Traditional Leaders of South Africa, aligned with the ANC, became active in the arena of constitutional politics, as did the Zulu king, who was aligned with the Inkatha Freedom Party (IFP), an adversary of the ANC. The constitutional proposals of the IFP called for the recognition of "traditional rulers and authorities as well as courts."

The "interim" constitution of 1993 provides for the establishment of Houses of Traditional Leaders by provincial governments. Such bodies, which shall consist "of representatives elected or nominated" by traditional authorities, shall advise the provincial governments and legislatures on "matters relating to traditional authorities, indigenous law or the customs of traditional communities within the province." The Constitution also establishes a Council of Traditional Leaders, with similar advisory functions, at the national level; it shall consist of a chairperson and 19 representatives, elected by members of the provincial Houses of Traditional Leaders. At the level of local government, the traditional leaders of communities that observe systems of indigenous law shall be entitled to *ex officio* membership in local government bodies in addition to their eligibility for elected office.⁸

In April 1994, a threatened boycott of South Africa's first non-racial election by the IFP was narrowly averted by an agreement to amend the interim constitution before the date of election. The amendments were designed to authorize the establishment of a constitutional monarchy as the form of government for the province of KwaZulu/Natal. Thus, section 160 was amended to permit provincial constitutions to "provide for the institution, role, authority and status of a traditional monarch" in the provinces, particularly "for the Zulu Monarch in the case of the province of KwaZulu/Natal."⁹

The creation of a constitutional monarchy within a sovereign republic, as an integral part of the constitutional order of that republic, is a striking innovation in modern constitutional practice. It differs from the standard practice of monarchy within a dualistic polity, which is a normal practice in Africa; for example, the widely heralded restoration of kingship by the Buganda of Uganda in 1993. Although "republican monarchy" is a constitutional oxymoron, it does also exemplify the constitutional tradition of mixed

government. The challenge it poses for constitutionalism in South Africa has been described by a thoughtful observer thus:

The powers of ... a monarchy [such as the constitutional monarch of Kwa-Zulu/Natal] would be bounded, to be sure, by both national legislative competence and the constitutional guarantees of human rights -- but exactly how those limits will interact with possible provincial constitutional provisions dealing with the "institution, role, authority and status of a traditional monarch" remains to be seen.¹⁰

We turn to the small mountain kingdoms of Lesotho and Swaziland, where the degree of incorporation (of traditional institutions into modern governments) is literally elevated. The Kingdom of Lesotho is a constitutional monarchy; the constitution provides that Paramount Chiefs, or their designated representatives, shall occupy two-thirds of the seats in the Senate, an inferior legislative chamber that is empowered merely to delay the enactment of bills passed by the elected National Assembly.¹¹ By contrast, Swaziland has been governed in an absolutist fashion by a traditional monarch ever since the late King, Sobhuza II, repealed that country's independence constitution in 1973. Recent changes signify a gradual return to constitutional monarchy, including multiparty elections. However, the Swazi King retains executive power, albeit shared with a Prime Minister appointed by the King, who also appoints two-thirds of the Senate as well as the judiciary. Furthermore, 40 members (four-fifths) of the House of Assembly are elected in single member districts that correspond to the nation's 40 tribal councils (*Tinkhundla*); 10 additional members are appointed by the King.¹²

Swaziland represents an exception to the normal pattern of subordinate status for traditional rulers who have been incorporated into the constitutional systems of sovereign states. Does the capture of sovereign authority by a traditional ruler negate the very idea of dual authority? Not to my mind. Each dimension (the sovereign and the traditional) of the African mixed state exists in its own right; each has an independent foundation in the structure of society. Each does routinely encroach upon the other's domain and incorporate elements of it; but neither can extinguish the other during the current

era. Should the heavens fall on a sovereign entity and destroy it, or cause it to be acquired by another sovereign power, traditional authority would still continue to exist in that country's second dimension of political space.

Constitutional Implications

It is important to distinguish between the concepts of mixed government and dual authority. Mixed government implies cooperative interaction among distinct and relatively autonomous governmental institutions, each of which is rooted securely in the "estates" (or functional interest groups) of society. Dual authority, on the other hand, implies an arms-length relationship between parallel governments, which may, or may not, function harmoniously regardless of the fact that their operations are inter-related. When the concept of mixed government is applied to situations of dual authority, it accentuates the premise of mutual accommodation relative to that of institutional conflict.

In African studies, most political scientists have been wary of the intellectual trap that spuriously pits modernity against tradition. For this reason, I think, they have shied away from the ambiguous concept of dual authority. Yet there is a classic study of political dualism in Africa, *The Politics of Tradition* by C. S. Whitaker,¹³ that avoids the pitfalls of both incompatibility and simple linear change from tradition to modernity. I have adopted his conception of a durable symbiotic relationship between parallel authorities, and render it typologically as mixed government.¹⁴

In anthropological thought, dual authority is frequently, and logically, represented as an adversarial relationship. Thus Gordon R. Woodman, following Sally Falk Moore, discerns a direct, causal relationship between the "weakness of the state" and the relative strength of those indigenous laws that regulate non-state "semi-autonomous social fields."¹⁵ While I am persuaded by Woodman's argument for the application of "a legally pluralist paradigm" to constitutional studies, I do not think it should ordain a theorem of incompatibility between the component systems of law. The main premise of mixed

government is not antagonistic conflict among the constituent elements, but systemic complementarity.

Power in society cannot be compartmentalized by the analytical boundaries of coexisting realms of authority. Indeed, mixed government entails the existence of systematic linkages between the sovereign and the "second" states. Incorporation is a form of linkage involving the transfer of authority from one dimension to another, as in the establishment of a constitutional monarchy in KwaZulu/Natal, or the reservation of places in a legislative chamber for traditional rulers. The formal appointment of traditional authorities by heads of government, or their bureaucratic subordinates, is also a form of incorporation. But it remains the case that traditional legitimacy does not derive from the act of appointment. "Pretenders" to a throne and other dubious occupants of traditional office have often been rejected and ostracized by their communities when the method of appointment has been unacceptable. In brief, traditional authorities will not become legitimate merely by virtue of their appointments; on the contrary, they are appointed because the office itself is, or has been, or is becoming, legitimate.

Perhaps the most important interdimensional linkage in African mixed governments is the system of justice, including courts and the law. Court systems, both statutory and customary, function to maintain the integrity of their respective dimensions of the law. When conflicts of law arise, members of the judiciary are called upon to resolve disputes involving indigenous customary law, including the rules of succession to a throne. Since the judicial establishments are relied upon to link the two dimensions of government, and regulate their relations, judicial independence is crucial to the vitality of mixed government. This structural requisite of viable mixed government is also a prime condition for the development of constitutional government in Africa. It portends a far brighter future for the cause of liberty under law in Africa than pessimists, who cite the fragility of governments in a multitude of newly independent states, are able to discern.¹⁶

The existence of a multitude of vibrant "second" dimensions of political authority, organized by traditional rulers, their councillors, and customary courts, should not be

idealized as a continental school for democracy. However, the African bedrock of traditional political identity could prove to be a relatively stable foundation of political order upon which to construct new and experimental governments, including constitutional democracies. Conversely, the second dimensions will surely change in response to the influence of democratic thought and practice in the sovereign states. Thus, in the new South Africa, "traditional leaders" have organized to "protect and promote the institution of chieftainship" by harmonizing their interests with popular "aspirations for a democratic society."¹⁷ Many leaders of the "second" states are proficient in the arts of coexistence with sovereign overlords. Their authority can be expected to persist for as long as the ramparts of their domains are secured by a goodly number of faithful guardians.

ENDNOTES

1. Francis D. Wormuth, *The Origins of Modern Constitutionalism* (New York: Harper, 1949).
2. Richard L. Sklar, "The African Frontier for Political Science," in Robert H. Bates, V. Y. Mudimbe, and Jean O'Barr, eds., *Africa and the Disciplines* (Chicago and London: The University of Chicago Press, 1993), pp. 83-110. A few passages in this paper are derived substantially from that source.
3. Patrick P. Molutsi and John D. Holm, "Developing Democracy when Civil Society is Weak: the Case of Botswana," *African Affairs*, Vol. 29 (July 1990), p. 334.
4. Chief Linchwe II, "The Role a Chief Can Play in Botswana's Democracy," in John Holm and Patrick Molutsi, eds., *Democracy in Botswana* (Gaborone: Macmillan, 1989), p. 102.
5. Christian D. Petersen, "The Namibian Constitution and Dual Authorities" (seminar paper, UCLA), 1993; *Constitution of the Republic of Namibia*, 1990, Art. 102 (5).
6. T. W. Bennett, "Administrative Controls over Chiefs' Customary Powers of Removal," *The South African Law Journal*, vol. 10, pt. 2 (May 1993), pp. 280-81.
7. African National Congress, *Constitutional Guidelines for a Democratic South Africa* (1988).
8. *Constitution of the Republic of South Africa*, 1993, chapter 11.
9. *Constitution of the Republic of South Africa, Second Amendment Act, 1994*.
10. Stephen Ellmann, "The South African Constitutional Amendments," *South Africa: The Countdown to Elections* (Lawyers' Committee for Civil Rights under Law), Washington, D.C., May 3, 1994, p. 4.
11. *Draft Constitution of Lesotho*, 1991, sections 1 & 55, and sched. 2; on the role of chiefs in Lesotho, see Sam Rugege, "The Future of 'Traditional' Hereditary Chieftaincy in a Democratic Southern Africa: The Case of Lesotho," in Sehoai Santho and Mafa Sejanamane, eds., *Southern Africa after Apartheid* (Harare: Southern Africa Political Economy Series Trust, 1990), pp. 148-174.
12. *The Establishment of the Parliament of Swaziland Order*, King's Order-in-Council 1 of 1992.

13. C. S. Whitaker, Jr., *The Politics of Tradition: Continuity and Change in Northern Nigeria, 1946-1966* (Princeton, N.J.: Princeton University Press, 1970); see Sklar, "The African Frontier," pp. 92-96, for additional references to works of a similar import.
14. This concept was previously used by Maxwell Owusu, who argued that political thinkers in Ghana have formulated conceptions of government that resemble Aristotle's concept of mixed government. Owusu, "Chieftaincy and Constitutionalism in Ghana: The Case of the Third Republic," in *Studies in Third World Societies*, No. 24 (June 1983), pp. 29-54. In that essay, Owusu does not relate mixed government to the idea of dual authority, although he does acknowledge the importance of that relationship in a recent comment on my "African Frontier." See Sklar (note 2); Owusu, "Different Cultures, Different Democracies? An Anthro-Historical Perspective on Political Reforms in Africa," paper presented at the Annual Meeting of the American Anthropological Association, November 1993.
15. Gordon R. Woodman, "Constitutionalism in a World of Powerful Semi-Autonomous Social Fields," *Third World Legal Studies* (1989), pp. 1-20.
16. For example, H.W.O. Okoth-Ogendo, "Constitutions without Constitutionalism: Reflections on an African Paradox," in Douglas Greenberg et al. (eds), *Constitutionalism and Democracy* (New York/Oxford: Oxford University Press, 1993), pp. 65-82.
17. Khanya B. Motshabi and Shereen G. Volks, "Toward Democratic Chieftaincy: Principles and Procedures," *Acta Juridica* (1991), p. 110.