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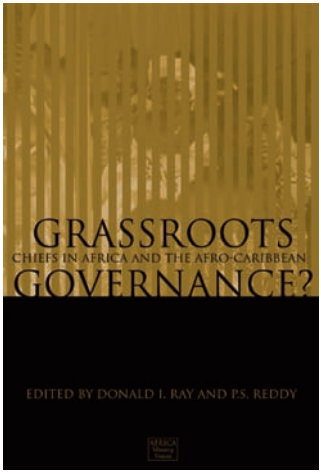
Grassroots governance?: chiefs in Africa and the Afro-Caribbean



GRASSROOTS GOVERNANCE?
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Traditional Authorities, Local Government and Land Rights[1]

CHAPTER 7

LUNGUSILE NTSEBEZA

LUNGISILE NTSEBEZA is a senior researcher in the Programme for Land and Agrarian Studies, a unit of the School of Government at the University of the Western Cape, Cape Town, South Africa. Since the advent of democracy in South Africa in 1994, he has been exploring the tension arising out of the roles, functions, and powers of a hereditary institution of traditional authorities in a post-1994 South Africa that is based on principles of democratic decision-making and elected representative government. His current research and analysis focuses on rural local government and the relationship of traditional authorities to elected representatives and how this relationship impacts land tenure and land administration in the rural areas of the former Bantustans. Ntsebeza has held a number of research fellowships at institutions such as the Land Tenure Center, University of Wisconsin; University of York; St. Antony's College, Oxford; and the Institute of International Studies, University of California, in Berkeley, and has published his work as book chapters and a wide range of academic and advocacy journals. He is a member of the South Africa Country Team of the IDRC-funded Traditional Authority Applied Research Network (TAARN) research project.

INTRODUCTION

This chapter examines land tenure and rural local government reform in post-apartheid South Africa, with specific reference to the role, powers, and functions of traditional authorities[2] in the Eastern Cape province. Tenure reform is one of the three main legs of the land reform program that is run under the auspices of the Department of Land Affairs, the others being land restitution and land redistribution. Government policy on the reform of land tenure is outlined in the 1996 constitution:

> A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress (Sec. 25, 6).

Before 1994, there was no distinction between landownership, administration, and management. These were centralized in the central state and, during the apartheid period, Tribal Authorities. As will be clear below, the aim of tenure reform in post-apartheid South Africa is to separate these functions.

The current local government reform policy in rural areas, led by the Department of Provincial Affairs and Constitutional Development, is based on section 151(1) of the constitution, which stipulates:

> The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.

Prior to the first democratic elections in 1994, municipalities existed only in urban areas. These municipalities were made up of elected councillors. There were no municipalities in rural areas in the former Bantustans. Municipal functions such as service delivery were provided by unelected traditional authorities, who acted as representatives of relevant government departments. The aim of local government reform in post-1994 South Africa is to establish municipalities that are made up of elected councillors throughout the country, including rural areas.

The overall aim of the chapter is to contribute to the formulation of appropriate and feasible policies at provincial and national level for implementing land tenure and local government reform. The chapter draws on in-depth field research in the Eastern Cape contained in a case study area, Tshezi.

The key questions addressed by the chapter are:

- What is the history of land tenure and local government in the rural areas of the former homelands in the period up to the demise of apartheid in 1994? What was the role of traditional authorities?

- What policies and legislation on land tenure and local government have emerged (and are emerging) since the advent of democracy in 1994? What, precisely, is the role of traditional authorities in the new dispensation?
- To what extent is the recognition in the South African Constitution of an unelected "institution of traditional leadership," on the one hand, and municipalities made up of elected councillors throughout the country, on the other, promoting and/or hindering current initiatives to implement policy and legislation on local government?
- To what degree does the District Council model of local government for rural areas provide an effective "check" to the previously unaccountable rule of locally (village and Tribal Authority) based traditional authorities?
- What is the response of traditional authorities to post-apartheid policies and legislation on land tenure and local government reform?

In attempting to answer these questions, the chapter, as indicated, draws on in-depth research conducted in the case study of Tshezi. No attempt is made to generalize.

"DECENTRALIZED DESPOTISM"

As indicated, a feature of African administration during the period after colonial conquest and land dispossession, in particular during the apartheid period, was the concentration or fusion of administrative, judicial, and executive power in the tribal authority. This fusion is well captured by Mamdani (1996, 23) in his delineation of what he calls "decentralized despotism," the "bifurcated state" or the "clenched fist," namely, the "Native Authority." This paper uses this theoretical framework to understand the role of traditional authorities in land tenure and local government in South Africa.

Mamdani's book examines contemporary Africa and the legacy of late colonialism. His thesis is wide-ranging and complex. He deals with a number of interrelated themes

and notions, to wit, nineteenthcentury pre-colonial Africa and the nature of chiefly rule, notions of customs, tradition, customary law during colonialism, communal tenure, the rural-urban divide, resistance to colonialism, the post-colonial African state, and lessons for post-apartheid South Africa in its attempts to democratize rural areas. This paper, however, concentrates on one aspect of his argument, the Native Authority or clenched fist.

The chief, according to Mamdani, was pivotal in the local state, the Native Authority. Key to his authority was the fusion of various powers in his office, rather than a separation thereof. In his words:

> Not only did the chief have the right to pass rules (bylaws) governing persons under his domain, he also executed all laws and was the administrator in "his" area, in which he settled all disputes. The authority of the chief thus fused in a single person[3] all moments of power, judicial, legislative, executive, and administrative. This authority was like a clenched fist, necessary because the chief stood at the intersection of the market economy and the non-market one. The administrative justice and the administrative coercion that were the sum and substance of his authority lay behind a regime of extra-economic coercion, a regime that breathed life into a whole range of compulsions: forced labour, forced crops, forced sales, forced contributions, and forced removals.

The chief and his personnel, Mamdani asserts, were protected from "any external threat." They were "appointed from above" and "never elected." They had no term of office, and remained therein for as long as "they enjoyed the confidence of their superiors" (Mamdani 1996, 53).

It is this clenched fist that Mamdani sees as central to despotism in colonial and post-colonial rural Africa. Dismantling it is seen by him as a condition for democratic transformation in the countryside of Africa, including South Africa. Mamdani describes a system of "indirect rule" that was used by British colonialists in all their colonies, South Africa included. As indicated, this paper uses Mamdani's thesis to understand and explain land tenure reform, traditional authorities, and rural local government in post-apartheid South Africa.

In the case of post-apartheid South Africa, efforts are made to simultaneously retain and dismantle the clenched fist. An attempt is made to introduce separate, democratically elected structures for local government, on the one hand, and land management, on the other. Quite clearly, at least on paper, this is a major departure

from tribal authorities, in which, as noted, these functions were concentrated, and where almost all its officials were appointed by government and the chief, rather than being democratically elected. However, by recognizing unelected traditional authorities, who during the apartheid period in particular, were largely discredited and feared,[4] while remaining vague about its precise role in land tenure and local government, prospects of extending representative democracy to these areas, and implementing emerging policies and legislation become extremely doubtful.

WHO ARE TRADITIONAL AUTHORITIES?

In this chapter, "traditional authorities" is an all encompassing term to refer to "chiefs" of various ranks, who have jurisdiction over rural people. Historically, at least at the point of contact between colonialists and Africans, the majority of the latter were organized into small groups (*tribes*) which had their leaders (*chiefs*/*iinkosi*/ *amakhosi*/ *kgosi*). Some of these groups were large and divided into smaller groups, each under the leadership of a chief. The larger groups were led by a *paramount chief*/*ikumnkani*. There were also *smaller chiefs* or *headmen/iinkosana*.

What is important for the purposes of this chapter is that these leaders were, at the time of conquest, hereditary. Things started to change soon after colonial conquest and land dispossession. Some of the African groups, led by their leaders, waged wars against colonialists, but were defeated. Whenever colonialists defeated Africans and dispossessed them of their land, they set aside a portion of land for African occupation. In these areas, colonialists adopted the traditional institution that ruled Africans, namely, one based on chieftaincy. They adapted this institution, however, and made it an instrument of *native administration*. Under colonialism, chiefs were expected to owe their allegiance to the colonialists. For this chiefs got a salary.

At the same time, chiefs who resisted colonial encroachment were deposed and replaced with compliant chiefs who were appointed by the colonialists. This marked a major break with the hereditary form of traditional authority. Although Beinart and Bundy (1987) point out that often these appointments were made from members of the chiefly family, a brother or uncle, this did not alter the fact that the government appointments were a departure from the rule, in that the wrong lineage was followed. This practice to appoint chiefs and paramount chiefs reached its peak during the

apartheid period where recognized paramount chiefs such as Sabata Dalindyebo in the Eastern Cape, and Sekhukhuni among the Pedi in the (after 1994) Northern/now Limpopo Province were deposed and replaced by government appointees. In other words, the titles were retained, but the incumbents did not follow tradition. What is common, though, between hereditary and government appointed leadership, is that both are not based on election.

Traditional authorities are a highly differentiated lot. Apart from the above mentioned hierarchy; colonialism, segregation, and above all, apartheid divided them economically and socially. In their *civilizing* function, missionaries introduced Africans, including traditional authorities, to Christianity and Western education. Some traditional authorities were educated. When the National Party came to power in 1948 and introduced the Bantu Authorities Act in 1951 as a precursor to preparing Africans to become *self-governing* and *independent*[5] under traditional authorities, the latter needed to be prepared for this task. In the Transkei, for example, a school for the sons of chiefs and headmen was set up in Tsolo. During the apartheid period in particular, when, according to Govan Mbeki (1984) "chiefs" were "in the saddle," there was further differentiation among them. Some became politicians, business people, lawyers, teachers, and a combination of the above. Often, these traditional authorities spent their lives away from the areas of their jurisdiction, or had regents standing for them. They only periodically visited their areas of jurisdiction.

However, a significant portion of them was illiterate/semi-literate, poor, and lived permanently in their areas of jurisdiction. The majority of them used the enormous powers given to them by the apartheid regime to tax rural people, including the poorest of the poor. Some of these traditional authorities have become alcoholics as a result of the amount of liquor they get as part of the tax. Tapscott (1997, 292) has argued that it is this poverty and poor remuneration of traditional authorities at the grassroots level that made them corrupt. While this may be the case, Tapscott does not explain why those traditional authorities that were well off were also corrupt.

Until recently, the terms used for the groups and their leaders were *tribes* for the former, and *chiefs* for the latter. During the late 1980s, when some *chiefs* decided to throw their weight behind the ANC, there was resentment by the enlightened chiefs to the use of the terms *paramount chief, chief* or *headman*, on the grounds that these were pejorative terms that were used by colonialists. They prefer the all-embracing term *traditional authority* or *traditional leader*. Some prefer to use terminology drawn from an indigenous language. This study follows the new trend and uses the all-

embracing term *traditional authority*. Where distinctions need to be made regarding rank, the appropriate term(s) are used.

SITUATION IN THE RURAL AREAS OF BANTUSTANS PRIOR TO 1994

The period prior to the democratic elections in 1994 divides into various phases: the pre-colonial times, or more accurately, the colonial encounter; the period before the Union of South Africa in 1910; after union to the introduction of apartheid in 1948; the apartheid period to its demise in the late 1980s; and the transition to the 1994 democratic elections. A thread that goes through this period was the concentration of power, at a village level, in traditional authorities' structures which were formalized during the apartheid period under tribal authorities established in terms of the 1951 Bantu Authorities Act. Traditional authorities, though, did not wield absolute power. They were accountable to colonial, later apartheid regimes. This was South Africa's version of indirect rule.

The Colonial Encounter

At the time of encounter with colonialists, traditional societies were composed of groups that were under the authority of independent chiefs (traditional authorities). In establishing indirect rule through traditional authorities, colonialists exploited an ambiguity in the relationship between traditional authorities and their people, in particular on the question of accountability and how traditional authorities derived their legitimacy. Some traditional authorities were openly autocratic and feared (Edge and Lekowe 1998, 5–6; Lambert 1995, 270). Peires' analysis of the relationship between chiefs and commoners among the amaXhosa is revealing:

> Royal ideology implied not redistribution but dominion. It sought to entrench and accentuate the distinction between chief and commoner. Symbolically, the chief was thought of as a "bull" or an "elephant" whereas commoners were referred to as "dogs" or "black men." … His decisions were regarded as infallible, and any

> mistake would be blamed on the "bad advice" of his councillors. Each chief was saluted by a special praise-name, and commoners who accidentally neglected to salute could be beaten…. No commoner could raise his hand against "a person of the blood" (umntu wegazi) even when, as sometimes happened, the chief's sons raided his herds and gardens. (Peires 1981, 32)

Yet there are those who argue that the chief derived legitimacy from popular support. Tapscott, clearly under the influence of Hammond-Tooke, represents this view in noting that

> traditional leadership structures prior to European settlement in South Africa … were not as autocratic and tyrannical as is sometimes suggested. Chief in Xhosa-speaking societies, for example, did not wield absolute and unchallenged power, and their influence was mediated by the community at large – in effect, by civil society. (Tapscott 1997, 292)

By community at large or civil society, Tapscott is presumably referring to the general assembly (*imbizo/pitso/kgotla*), which was attended only by married men. What is interesting is that both Peires and Tapscott are writing about *Xhosa-speaking societies*, yet they differ in their depiction of the relationship between *chiefs* and *commoners*. This, it is contended, demonstrates how complex and ambiguous the relationship was.

The same ambiguity existed with regard to land and how it was owned, allocated, managed, and administered. According to Hendricks, who wrote mainly about Western Phondoland, private ownership of land was unknown in African societies such as that of the amaMphondo.[6] With regard to the relationship between the traditional authority and his people, Hendricks notes:

> All members were entitled to the use of plots, the distribution of which was the responsibility of the chief. It is known that the latter usually had the best land and more wives and cattle than other tribesmen, but there was no shortage of land. (Hendricks 1990, 44)

As far as the ownership of land and the power of traditional authorities in land allocation were concerned, Hendricks points out:

> It is commonly accepted that all the land belonged to the chief, but he did not wield absolute authority in this regard. He was obliged to consult with his group of councillors and there were clearly stipulated conditions determining where and when he could

> appropriate land. His rule was therefore not arbitrary and in reality he only had power over unallotted land…. A married male member of the tribe had the right to request a plot of arable land as well as a homestead site. Polygamy was condoned in that one male could house a number of wives in different homesteads. (Hendricks 1990, 45)

The issue of ownership of land seems to have been complex. Peires draws a distinction between ownership and possession. According to him:

> Above all, the chief participated in production through his role as owner of the land. It is important to differentiate between ownership and possession. In pre-colonial Xhosa society, the commoners possessed the means of production but they did not own them.

Peires, though, qualifies the above by quoting the following from a colonial commission: "although it [land] was held in the name of the chief, he had no right to disturb me in my garden." Having said this, Peires nevertheless argues that "ownership was no mere form of words, since it was precisely by virtue of such ownership that the lord was entitled to extract part of the serf's labour." (Peires 1991, 33)[7]

Despite the complexity of establishing the precise meaning of landownership in pre-colonial African society, it would appear that once land was allocated to members, the traditional authority and his councillors no longer had any claim to the allocated land. Even Peires does not suggest that land was confiscated from commoners, once it had been allocated. Whatever these commoners owed to the traditional authority, their labour was extracted in exchange.

Given the power wielded by traditional authorities over land, in particular unallocated land, it is difficult to see how this unallocated land could be referred to as communal. As stated above, it is this ambiguity and the power of traditional authorities that colonialists exploited. According to colonialists, the centre of authority in African societies was the traditional authority-in-council. The latter could take binding decisions on any matter without the need to consult the wider community, not even the general assembly of married men. This view was given legal muscle in the case of *Hermansberg Mission Society* v. *Commissioner of Native Affairs and Darius Mogale*, 1906. The court rejected the argument that "a chief may not alienate land without the direct consent of the community," and held that "an African chief, as trustee of the community's land, may alienate land with the consent of the chief's council and without the direct participation of the community."

The question that arises is, How did people deal with unpopular traditional authorities? Traditional authority was hereditary, not elected – representative government emerged with the development of capitalism in Europe and was unknown at the time of colonial intrusion – but rural people could decide to vote with their feet and move to areas of more popular leaders (Tapscott 1997, 277; Lambert 1995, 277). Alternatively, traditional authorities could be deposed or even killed. In theory, the next leader was supposed to be chosen from the next in line in the lineage. In reality, the transition was not smooth, given political competition between chiefs (Peires 1981, 29).

These options were, however, restricted by colonial conquest and land dispossession. The decision to depose a traditional authority was removed from the people and could only be taken by the state. Killing became an offence that was presided over by government officials. As land became limited and the procedure for moving from one area to the next became tighter, it was no longer easy for rural people to vote with their feet. This meant that rural people were left with virtually no option for dealing with unpopular traditional authorities.

Even when Africans started to organize themselves as political organizations, the relationship between traditional authorities and their people, including the options available for rural people in cases of unpopular traditional authorities, was not taken up as an issue. The ANC, from its establishment in 1912, wooed those traditional authorities who had been marginalized by colonialists, but without any clear strategy as to their role in a society based on the universal suffrage that the ANC was fighting for.

Before the Union of South Africa in 1910

Before the Boer War (1899–1902) and the subsequent Union of South Africa in 1910, the country was divided into two British colonies (the Cape and Natal), and two Boer Republics (the South African Republic/Transvaal and the Orange Free State). This subsection will consider land tenure and local government under British and Boer rule during the nineteenth century leading up to the Union in 1910. It does not attempt to provide a detailed analysis of land tenure and local government issues in these areas, but rather it seeks to make the case that the Union of South Africa incorporated *colonies* and former *republics* that had their own specificities. Despite policy and legislative attempts to bring uniformity to the various Bantustans, there are still major differences among them. This makes it extremely dangerous to generalize on the basis

of studying one Bantustan, and almost impossible to conduct an in-depth analysis of all, or even a few Bantustans.

British Rule

Whenever the British conquered and dispossessed Africans, they set aside land for African occupation (*reserves*). The British colonial answer to the question of how to administer Africans was indirect rule. The traditional structures based on the leadership of traditional authorities were adapted to suit the ends of colonialists. Rebellious chiefs were marginalized, dethroned and replaced with appointed chiefs and headmen. The appointed chiefs and headmen were directly accountable to colonial structures, particularly the magistrate. Lastly, they were paid a salary, which confirmed their new role as paid servants of the government.

The appointment of traditional authorities marked a departure from the then existing African tradition of hereditary leaders. Although, according to Beinart and Bundy, the appointees were often drawn from the ranks of relatives; for example, a brother or an uncle (Beinart and Bundy 1987), and in the case of Phondoland (Hendricks1990; Beinart 1982) chiefs were appointed, this still did not alter the fact that the appointees were not necessarily in the line of lineage.[8] Above all, the appointment of traditional authorities was made by the colonial power, and not by councillors and elders. As will be seen below, by being paid a salary, traditional authorities became accountable to the government. This further weakened the little power rural communities had to make traditional authorities accountable to them.

Colonial policy governing land reserved for African occupation in South Africa goes back to the early part of the nineteenth century. Land was owned by the state. However, there was fair protection for those who were in occupation of land. An 1829 proclamation issued by the governor of the Cape, Lt. Gen. William Butler, generally accepted that land belonged to the chief, but that allocated land belonged, for all practical purposes, to the occupying household (Hendricks 1990, 61).

When the British annexed the Transvaal from the Boers in 1877, they changed the regulations governing African occupation. Prior to this regulation, Africans in the Boer Republics were allowed to purchase land, although they could not register it in their own name, but in the name of missionaries. After the annexation of the Transvaal, land bought by Africans was registered in the name of the Secretary of Native Affairs, in trust for the people concerned. This phased out the missionaries.

With the establishment of the Transvaal Location Commission in 1881, the Location Commission held land in trust. From July 1918, after the union, the minister of Native Affairs (Mbenga 1998, 5) held land bought by Africans in trust. The Glen Grey Act of 1894, which was promulgated when Cecil John Rhodes was the governor of the Cape, and the same year that Phondoland was annexed, established a system of local government and land tenure that was to be influential in determining policy after the union of South Africa. There were three major elements to the Act: a change in the nature of land tenure; local District Councils in the African areas; and a labour tax. With regard to land tenure, its key tenets were:

- policy of *one-man-one-lot*
- division of the land into four or five morgen allotments
- restrictions on the alienation of land, and
- liability of forfeiture in the case of non-beneficial occupation (Hendricks 1990).

Commenting on this version of land tenure, Beinart has noted that "[c]ommunal tenure was to be replaced by a system of individual tenure under which title would be given to plots of land which could be neither alienated nor accumulated" (Beinart 1982, 43). The question that arises is how different this tenure system was from the one based on the 1829 proclamation, and to what extent it affected the powers of traditional authorities. The difference brought about by the Glen Grey Act was that title would be granted, but such title would have severe limitations; namely, it could not be alienated nor accumulated.

As regards local government, the 1894 act established a council system (*iBhunga*) made up of a mixture of elected and nominated members. The council system was initially[9] meant to undermine the power of traditional authorities who had led a series of frontier wars against the British (Mbeki 1984, 33). It operated at two levels; namely, a District Council in each magisterial area, and the United Transkeian Territories General Council (UTTGC). The District Councils consisted of six members. To ensure that the traditional authorities did not dominate the council, only two members were nominated by the paramount chief. Two were nominated by the Governor-General and the remaining two elected. In areas where there were no paramount chiefs, the government nominated two and the rest were popular representatives (Mbeki 1984, 35). The Bhunga dealt with a wide range of issues such as education, roads, agriculture, irrigation, customary law, and limitation of stock.

This might seem to be a radical plan to transform rural local government by introducing the notion of elected representation, albeit partial, thus undermining traditional authorities, hereditary and appointed. However, this partially elected representation was only at a district and territorial level, not at the grassroots village level where the real power of traditional authorities lay. At village level, traditional authorities were left largely intact. The only major difference was that headmen and compliant chiefs were appointed to replace recalcitrant traditional authorities. The former were given a semblance of power, and the colonial hope was that this would safeguard the allegiance and acquiescence of the reserve residents. A distinction was made between traditional authorities appointed by the GovernorGeneral, and those who would merely be recognized by the government. The former were given limited powers, while the role of the latter was not clarified. Traditional authorities were substantially removed from the direct rule they had enjoyed before colonial defeat, in favour of centrally appointed village headmen. Hammond-Tooke argues that this position of powerlessness allowed the chiefs to maintain much of their traditional prestige and popularity, for in this bureaucratic system the centrally appointed location headmen[10] "assumed the scapegoat role" (Stultz 1979, 51). In areas that were annexed, for example, Phondoland, the system of appointing headmen was largely unsuccessful and chiefs who were prepared to collaborate with the colonial power were not removed (Hendricks 1990; Beinart 1982), but had to operate under the magistrate who could remove them if they proved recalcitrant.

With regard to the powers of traditional authorities over land, the case of *Hermansberg Mission Society* v. *Commissioner of Native Affairs and Darius Mogale*, 1906, that has already been quoted, strengthened rather than diminished the power of traditional authorities at a local, village level. As noted, the court rejected the argument that "a chief may not alienate land without the direct consent of the community," and held that "an African chief, as trustee of the community's land, may alienate land with the consent of the chief's council and without the direct participation of the community."

The Boer Republics

The situation in the Boer Republics was slightly different. In these Republics, no *reserves* were created. For the purposes of this study, we will consider the case of the BaFokeng people in the *Transvaal* (from 1994, the North West Province). The BaFokeng were initially invaded by the amaNdebele and later collaborated with the Voortrekkers who fought the amaNdebele and defeated them in 1837. Despite this, the

Voortrekkers considered themselves the owners of the land and as having jurisdiction over the BaFokeng. Africans were, however, allowed to purchase land, but could not register it in their name. According to Mbenga:

> Africans acquired land they could call their own only as a "grant" or, much later, through purchase from the Boers. In the western Transvaal, the earliest cases of land "grants" to Africans by the Boer emigrants [sic] date back to 1837 when the commandants … "rewarded" the Barolong chiefs … with grants of land for having assisted the Voortrekkers in expelling Mzilikazi out of the Transvaal…. In fact, throughout the Transvaal, the Voortrekker commandants gave land to black groups "for services rendered" or loyalty. This was ratified by a Volksraad resolution of November 1853 which formerly authorised commandants to grant land for African occupation, but conditional "upon good behaviour and obedience," because … the land was not for the Africans property but for their use only. (Mbenga 1998, 2–3)

Grants, therefore, were one way of gaining access to land but not to full title. Only much later, from the late 1860s, could Africans *buy* [their] land, but the land could still not be transferred to them. According to Mbenga:

> Africans … could only buy land in the name of a missionary or through a 99-year lease from any white person. Regarding the first method, the land was paid for by an African group, but registered in the missionary's name in trust for them. Through the second method, the Africans paid for a 99-year lease and the white person then promised to transfer the land to the Africans concerned, "as soon as the laws of the country permitted Natives to hold land in their own names." … This type of lease, because it was not registered, was a major disadvantage for the African purchasers who frequently lost their properties through deceit by the white lessors. (Mbenga 1998, 4)

As previously discussed, when the British annexed the Transvaal in 1877, the regulations governing African landownership changed. Land bought by Africans was registered in the name of the Secretary of Native Affairs, in trust for the people concerned. This phased out the missionaries. When the Transvaal Location Commission was established in 1881, land was held in trust by the Location Commission. From July 1918, land bought by Africans was held in trust by the

minister of Native Affairs (Mbenga 1998, 5). This was well after the 1910 union of South Africa which brought the British colonies and Boer Republics together.

The BaFokeng, once again, offer an example.[11] One question that arises is how the BaFokeng purchased the land. In the first place, land was not bought by individuals, but by the BaFokeng as a group under their traditional authorities. According to Mbenga, traditional authorities "collected the purchase price from the people, mainly in cattle, and the missionary arranged the transaction. The Bafokeng also paid for farms in cash even as early as that time," by sending young men to the mines to earn money for the group to buy farms (Mbenga 1998, 4). Although land was bought with funds contributed by the group, traditional authorities continued to play a key role in land allocation.

In short, the British and Boers left structures at the local, village level largely intact. The attempt to democratize local government in the Cape did not affect this local level of government. Elected representation was not extended to the grassroots village level. The villages were under the rule of collaborating hereditary and appointed traditional authorities. These remained the main link between the colonialists and the rural people, and continued to play a vital role in the allocation of land.

After Union in 1910

After the union of 1910, the Cape system of local government was endorsed. The Transkei became the testing ground. By the early 1930s, district councils had been established in the twenty-six districts of the Transkei.

The first major legislative attempt to bring uniformity to rural local government was the promulgation of the Native Affairs Act. The Transkei experience was used as an example. According to Mbeki:

> Africans in reserves elsewhere in the country were brought to the Transkei by the government to see how good the Bhunga system was. The Ciskei General Council was formed after the Transkei model, and attempts were made to bring Zululand and the Transvaal reserves into line by the Native Affairs Act of 1920. (Mbeki 1984, 34)

From the establishment of the Union of South Africa, which excluded the so-called non-whites of the country, a tension existed between British and Boers. The Cape, and to a limited extent Natal, allowed Africans a qualified franchise. The African hope was

that this franchise would be extended to other provinces. The Cape, as we have noted, introduced the Bhunga, which had elected candidates. Afrikaners were not entirely happy with developments in the former British colonies. The Pact Government of the 1920s gradually moved towards a policy of segregation. In this project, "chieftaincy in a modified form came to be seen by segregationist ideologues as a means to defuse agrarian and industrial class conflict in the 1920s" (Beinart 1982, 6). In 1927, the Native Administration Act was passed. Its intention was 'to shore up the remains of the chieftaincy in a countrywide policy of indirect-rule, which would allow for the segregation of the administration of justice" (Ntsebeza and Hendricks 1998, 5). The segregationist project culminated with the notorious 1936 Natives Acts.

One of these acts, the 1936 Natives Land Act, was promulgated to purchase additional land, called *released areas* for consolidation of the Reserves.[12] In terms of this act, rural people applying for land would be granted a *permit to occupy* (PTO), as proof that the piece of land had been allocated to the holder of the document. Section 4 of Proclamation No. 26, 1936 as amended, empowered the magistrate to grant permission

> to any person domiciled in the district, who has been duly authorised thereto by the tribal authority, to occupy in a residential area for domestic purposes or in an arable area for agricultural purposes, a homestead allotment or an arable allotment, as the case may be.

The allocation of land according to the Act was, inter alia, subject to the following condition:

> [N]ot more than one homestead allotment and one arable allotment shall be allotted … to any Native [*sic*], provided that if such Native [*sic*] is living in customary union with more than one woman, one homestead and one arable allotment may be allotted for the purpose of each household.[13]

The pervasive influence of the Glen Grey Act can be seen here.

In terms of the *permission to occupy* system, the holder of the site was entitled to remain in occupation until his death and to elect the person to whom he would like the site to be allocated on his death. In theory, the holder's rights could be forfeited for the following reasons:

- failing to take occupation or to fence within a year of allocation, and
- non-beneficial use for two years.

In practice, the above conditions were often not adhered to.[14] At the same time, while the PTO guaranteed its holder permanent occupation, the holder thereof was vulnerable. For example, PTO holders could be forcibly removed without being consulted if the government, the nominal owner of land, deemed fit. This was the case when the government introduced its Betterment Plan,[15] or when development schemes, such as irrigation schemes, tea factories, nature reserves, and so on, were introduced.[16] Some PTO holders were victims of banishments, in which case their houses would be demolished, often without compensation and recourse to law. Finally, PTOs were not recognized by financial institutions as collateral. It is this latter limitation of the PTO that seems to dominate current discussions around the security of tenure derived from PTOs. It is precisely because financial institutions do not recognize PTOs that they are seen as limiting investment opportunities, more productive use of land, and prospects of getting housing subsidies.

The question that may arise is how communal or individual this system of tenure was. This study argues that the system was neither communal, in the sense that the community(ies) concerned had full ownership and control of land, nor individual; that is, freehold. Hence the conclusion by some commentators that the system was a distorted version of communal tenure (Hendricks 1990). We have seen that the 1829 proclamation, the Glen Grey Act of 1894, and the 1936 Native Land Act adopted, by and large, a similar position regarding the rights of those who had been allotted land. Once land has been allotted to a family, it becomes virtually individualized:

> As far as possible, land is kept in the family of the previous holder unless it has been lost by forfeiture. The theory is that the land is a joint possession of the family, administered by the head thereof – his right is not a purely personal one and on his ceasing to hold the office of head of the family, the new head becomes the managing director, as it were. (Hendricks 1990, 64)

Commenting on the difficulty of categorizing communal tenure under colonization, and questioning the very notion *communal* in African societies, it has been argued that:

> under the system of quit-rent all arable land is individually registered at the magistrate's court in the name of the family head, who then accepts liability for the annual rent. All such land is vested in and revertible to the state. By this token, are not all peasant cultivators in the reserves, far from being owners of land, tenants of the State in the strict sense? … but registered plots are heritable according to African customary law…. In practice, it means that particular

> descent groups are able to hold the original plots in perpetuity. What is communal about that? (Hendricks 1990, 64)

What the above suggests is that it is not accurate to refer to rural areas that are controlled by traditional authorities as *communal* areas. What could be referred to as *communal* land is, in fact, land that has not been allotted for residential and/or arable purposes; for example, grazing land, forests, and so on. It is this category of land that will be dominating debates about ownership rights in the countryside in post-apartheid South Africa.

The National Party Rule

After the Second World War, the Bhunga became more and more radical, and started to make demands for individual franchise for all Africans in South Africa. Outside South Africa, colonialism was also under pressure. Against this background, the National Party came to power in 1948 on the ticket of apartheid. One of their prime objectives was to resolve the question of *native administration*. Three years after coming to power, they introduced the Bantu Administration Act. This act put traditional authorities at the helm of things. It abolished the Native Representative Council that was set up in terms of one of the 1936 Natives Acts. Bantu authorities were organized at three levels; namely, tribal, regional, and territorial authorities. At all three levels, traditional authorities were dominant. It is this dominance of traditional authorities at all levels that marked a major shift from the Bhunga system, the aim of which was to undermine the power of traditional authorities, save those at the local, grassroots level. This dominance caused Mbeki to remark:

> It is clear from the composition of these bodies that they represent merely the messengers of government will; the elected element is so small and so remote from the voters that it can hardly be held even to contribute to popular participation. The thesis of government policy is clear – Africans are still in the tribal stage, chiefs are the natural rulers, and the people neither want nor should have elected representatives. (Mbeki 1984, 40)

In restoring the powers of traditional authorities, the act represented one of the building blocks of apartheid policy by consolidating *reserves*, which were later to become *self-governing*, and for some, *independent*. Although traditional authorities were placed

firmly in charge of local administration, during the period up to the introduction of self-government in the early 1960s they were directly linked to the central government through the Department of Native Affairs.[17] The minister of Native Affairs had ultimate control. In terms of the 1956 proclamation which gave effect to the Bantu Authorities Act, the minister had the power to: depose any chief, cancel the appointment of any councillor, appoint any officer with whatever powers he deemed necessary, control the treasury and budgetary spending, and authorize taxation. As was the case during the preceding colonial period, new loyal traditional authorities were appointed, and new lineages were recognized and created. When Bantustans became *self-governing* and (some) *independent*, the responsibilities of the Department of Native Affairs fell into the hands of the Bantustan governments, with support from the apartheid regime.

During the 1950s, traditional authorities were used by the apartheid government to implement the draconian and hated conservation measures, called *betterment schemes*. The catalogue of their abuse of power during this period is well documented. Mbeki has written that the government turned to chiefs "offering to those whose areas will accept rehabilitation measures appropriate incentives: increased special stipends, increased land allotments, words of praise, and places of honour, and, behind all, the right to continue as government appointed chiefs." On their harshness and the undemocratic methods they applied, Mbeki continues:

> With these fruits of office dangling before them, the chiefs often commit peasants to acceptance of the rehabilitation scheme without consulting them. Then, when preparations are made for the implementation of the scheme … the peasants question with surprise the cause of all this activity…. And now the Chief hits back at them mercilessly. The instigators of the discontent are brought to the Bush Court (Chief's Court) with the greatest haste and the least formality. (Mbeki 1984, 97–98)

There was resistance to the introduction of the Bantu Authorities Act and the implementation of the *betterment scheme* in the 1950s and early 1960s.

Corruption and repression were features of traditional authority during *self-government* and *independence*; the period after the 1951 Bantu Authorities Act up to the demise of apartheid in the late 1980s. One of the instruments traditional authorities had at their disposal was control of land allocation. Their power in this regard, was largely enhanced, as Tapscott (1997, 295) has noted, by the fact that Africans' access to land was restricted to the Bantustans, the latter being "the only place where the majority of Africans could legitimately lay claim to a piece of land

and a home … for an individual's family and a future place of retirement." Although not the owners of land, traditional authorities had enormous power in the allocation thereof. This is despite the fact that it is the magistrate that finally granted the PTO. Traditional authorities derived their power in the sense that no application could be considered without the signature of the head of the tribal authority, some councillors, and the secretary of the tribal authority. Traditional authorities abused this power by charging unauthorized fees (*iimfanelo zakomkhulu*) to applicants. These fees ranged from alcohol, poultry, sheep, to even an ox. This practice reached its zenith in the early 1990s when some cottage sites were illegally allocated to some *whites* along the Wild Coast. These sites were dubbed *brandy* sites, as it was imperative that applications be accompanied by a bottle of brandy.

The *independence* of some Bantustans between 1976 and 1981 did not alter land tenure and power relations in rural areas. If anything, the power of traditional authorities, from sub-headman to paramount chief, was strengthened. The two Bantustans in the Eastern Cape, Transkei and Ciskei, continued to issue PTOs in terms of the 1936 Land Act.[18]

The other areas in which traditional authorities abused their power were state pensions, tribal courts, and applications for migrant labour. The situation in rural areas was such that a vast number of rural people could not even get the benefits that they were entitled to without the approval of traditional authorities, who had to witness applications for these benefits. In the absence of alternatives, rural people were forced to recognize these authorities. In this regard, traditional authorities derived their authority, not from popular support, but from the fact that they were feared and that rural people did not have any alternative ways of accessing their benefits. A large proportion of rural people were affected by this, especially the elderly (for pensions) and migrant workers (to renew their contracts).

The role of traditional authorities in infrastructural development and service delivery, mainly roads and water, education, and development (to the extent to which such existed), was marginal. They acted largely as representatives of the relevant government departments. The secretaries of tribal authorities administered the budget for these services.[19] This meant that traditional authorities were not empowered to deal with development issues.

Part of the reason for this was that traditional authorities are a highly differentiated lot. As with most Africans, some took advantage of Western formal education initially offered by missionaries. Those who live permanently in the rural areas are often

illiterate or semi-literate, and poor. They thus could/cannot cope with the demands of development planning.

It is worth noting that traditional authorities responded differently to the pressures imposed by the Bantu Authorities Act. Hitherto, traditional authorities that were marginalized during the colonial and segregation periods ironically, as Hammond-Tooke noted, gained legitimacy among their people at a local level. Because they were excluded, they were not viewed as government stooges. However, as the apartheid regime tightened its grip of power, there was little room left for this variation. They were forced to comply. This even applied to traditional authorities such as Victor Poto of Western Phondoland and Sabata Dalindyebo of Tembuland, both of the Transkei. At the heart of this compromise was the fact that traditional authorities were paid a salary by the government. Hendricks quotes Victor Poto as having made the following pledge:

> I have pledged my loyalty and trust to Dr. Verwoerd's government which has brought so many benefits for the enjoyment of the Bantu people. (Hendricks 1990, 48)

Dalindyebo's case is somewhat different. According to Goven Mbeki, Paramount Chief Dalindyebo had "been in a state of continuous conflict with the government over Bantu Authorities." Despite this, though, when the Recess Committee of the Transkei Territorial Authorities, which included Dalindyebo, was required to endorse Bantu Authorities, "all twenty-seven members," including, according to Mbeki, "those who during the session were to oppose its major aspects," signed. Paramount Chief Dalindyebo was one of those who was to oppose. His reason for signing, as quoted in Mbeki, was given in the form of the following question: "Are you aware that when I was requested to sign I *had* to sign because I am a government man?" (Mbeki 1984, 58).

The above clearly demonstrates how difficult it became, even for the most progressive traditional authority, not to toe the apartheid line. Having said this, traditional authorities did not all relate in the same way to the apartheid system. There were those traditional authorities, such as K. D. Matanzima, who shamelessly collaborated with the apartheid regime. Others, such as Sabata Dalindyebo, were reluctant participants in the apartheid game. Dalindyebo was eventually stripped of his power as paramount chief, prosecuted, and finally hounded out of the country by K. D. Matanzima. He joined the ANC in exile, where he died. Others included Albert Luthuli and Nelson Mandela. With regard to the latter, though, it should be said that

it is as leaders of political organizations, and not as traditional authorities, that they won their recognition.

In sum, land in the rural areas of the former Bantustans during the period from colonialism to apartheid was state land. Initially sidelined, especially by the Glen Grey Act, traditional authorities became central in the plans of the apartheid architects to establish Bantustans that would become *self-governing* and *independent*. During the apartheid period, traditional authorities dominated all three levels of power; namely, tribal, regional, and territorial. They became a highly differentiated group, some becoming politicians, business people, or lawyers, but the majority were illiterate or semi-literate and poor. Tribal authorities became the primary level of rural local government and played a key role in the administration of land, in particular, land allocation. They also had judicial and executive powers, thus fitting Mamdani's thesis of a clenched fist. During this period, most traditional authorities derived their power from their viciousness, protected by an equally vicious apartheid system, leaving rural people with few options but to comply. By the 1980s, the majority of traditional authorities had discredited themselves and were seen as an extended arm of the detested apartheid regime.

The Demise of Apartheid and Transition to the 1994 Democratic Elections

Given the above, it is surprising to note that traditional authorities have won recognition in the post-apartheid dispensation. Only in the late 1980s and early 1990s, mass mobilization, which was characteristic in most urban areas in South Africa during the 1970s and 1980s, had shifted to rural areas. Tribal authorities became the chief target. During this period, the Bantu (by this time Tribal) Authority system came under renewed attack. There were calls for the resignation of headmen – *pantsi ngozibonda* (down with the headmen) – and for the first time the system of tribal authorities was challenged in some areas, in favour of alternative, democratically elected civic structures. In vast areas of the Ciskei, the Tribal Authority system collapsed and the Civic Associations took over (Manona 1990; 1998). Tribal authorities in most parts of the Transkei region were also challenged,[20] but it was not always clear what was being challenged. In some case, civic organizations wanted to replace traditional authorities. In others, the corrupt practices of traditional authorities were questioned. Some drew a distinction between *genuine* traditional authorities, with which they were happy,

and *illegitimate* traditional authorities. In KwaZulu-Natal, an intense and bloody war took place mainly between the supporters of the Inkatha Freedom Party (IFP) and the United Democratic Front, and later the ANC, after the latter was unbanned. The IFP's support base was the rural areas of Natal and they strenuously defended traditional authorities.

In order to understand the current recognition of traditional authorities, a number of factors need to be taken into account. First is the nature of rural society. As has been shown above, traditional authority structures were the only structures through which rural people could access a whole range of benefits; notably, land, renewal of contracts for migrant workers, and pensions. There were no alternative channels. Due to the migrant labour system, and the fact that young and educated rural people are inclined to seek work outside their home areas and in the urban areas, the majority of people who reside in these areas are children, married women, and retired elderly men. Most of these people are not entirely aware of their rights. They are thus not willing to challenge traditional authorities. Migrant workers who have been retrenched since the late 1980s and have returned to their rural homes, often do not regard themselves as permanent residents. They see themselves as job seekers. Consequently, they do not participate in rural activities and meetings. In the case study, retrenched migrant workers spend most of their time in rural areas in shebeens, or looking for work. This also applies to the youth and to students.

Linked to the above is that when the focus of resistance shifted to rural areas, the youth, students and retrenched migrant workers became the main leaders of these struggles. This intervention, by the youth in particular, received mixed reactions from rural people, especially from the less educated and from elderly men. As indicated, the latter were fearful of traditional authorities. The youth saw this as an endorsement of the rule of traditional authorities. The militant youth was often not tactful in dealing with the elderly and ended up alienating large sections of this category. Given generational considerations, these elderly men preferred traditional authorities to *boys*.

Secondly, the position of the ANC towards traditional authorities has always been ambivalent. To a large extent the historical division between *loyalists* and *rebels* has influenced this. It has been noted above that when the ANC was formed, some traditional authorities were among the founding members. As the ANC started becoming a radical organization from the 1940s onwards, with strong pressure from the Youth League and a growing alliance with the communists, two broad streams began to emerge; namely, those who supported traditional authorities who were critical of government policies, and those who, clearly under the influence of communists,

argued that the institution belonged to a previous feudal era and needed to be replaced by democratic structures. Mbeki represents the latter in this often- quoted statement:

> If Africans have had chiefs, it was because all human societies have had them at one stage or another. But when a people have developed to a stage which discards chieftainship, when their social development contradicts the need for such an institution, then to force it on them is not liberation but enslavement. (Mbeki 1984, 47)

However, the ANC was inclined to continue its strategy to woo *progressive* traditional authorities, rather than to evolve a strategy to establish alternative democratic structures, which would replace traditional authorities in rural areas. In the same book, Mbeki argues that if traditional authorities failed "the peasants," the latter would "seek new ones" (Mbeki 1984, 46). Here he is not arguing that the peasants would create alternative structures in keeping with the ANC's demands for a universal suffrage, but that they would seek new traditional authorities.

The ANC strategy of broadening its support as widely as possible, which reached its height in the mass mobilization period of the 1980s, was exploited by the Congress of Traditional Leaders in South Africa (Contralesa). Contralesa proved to be critical in the recognition of traditional authorities. The organization was established in 1987 by a group of traditional authorities from KwaNdebele who were opposed to the declaration of apartheid-style independence. By this time, Bantustans had been discredited and there was no prospect that they would ever be recognized. At the same time, apartheid was in its decline, and the ANC was seen as a government in waiting. It had been fashionable for individuals and organizations to visit the ANC in exile. Contralesa was no exception. Keen to broaden its support base, the ANC was driven to woo traditional authorities. During the dying moments of apartheid, a large number of traditional authorities jumped on the bandwagon and joined Contralesa. By the mid-1990s, Contralesa was dominated by the formerly discredited traditional authorities.

The exception was those traditional authorities that were members of the IFP. The latter continued to challenge the UDF, and later the ANC, when it was unbanned in 1990.

When negotiation talks, initiated by the NP government and the ANC, resumed after the collapse of Codesa, traditional authorities, which were initially excluded, were invited. There were basically two reasons for this. First, the ANC did not want to harm relations with Contralesa before the envisaged elections. Second, both the ANC and

the National Party wanted to ensure the participation of the Inkatha Freedom Party, led by Chief Buthelezi, in the negotiation process.

The third and final factor in the current recognition of traditional authorities is the collapse of land administration in most of the Bantustans during this period. As noted above, land administration in rural areas has always been a problem, precisely because colonial and apartheid regimes relied on traditional authorities to assist them, rather than establishing alternative structures of their own. What characterized the late 1980s and, in particular, the early 1990s was the degree of degeneration. In Mqanduli, for example, officials reported that they had not had applications for PTOs for some three years or so.[21] Along the Wild Coast in the Eastern Cape, traditional authorities in Phondoland and Tshezi were implicated in the illegal allocation of cottage sites to such an extent that the matter is being investigated by a unit appointed by Parliament, the Heath Special Investigation Unit. Traditional authorities do not have any jurisdiction over the zone extending one kilometre from the sea. However, due to the collapse in administration, especially during Transkei *independence*, numbers of traditional authorities exploited the situation and swelled their pockets through bribes. Traditional authorities in these areas were not seriously affected by the wave of resistance of the early 1990s. In the Tshezi area, no civic association was established. But this is not necessarily a sign that traditional authorities are considered legitimate; it could be that they are still feared, given their ruthlessness over almost four decades.

In white South Africa, some changes began to take place in the early 1990s. Under the leadership of its reformer, F. W. de Klerk, the National Party made radical proposals that would alter the role of the state as the nominal owner of communal land in favour transferring land to *tribes* and upgrading PTOs to full ownership, thus effectively repealing the 1913 and 1936 Natives Land Acts.[22] In 1991, a White Paper on Land Reform was launched. The objective of the *new land policy* is set out in the introduction in these terms:

> The new policy has the definite objective of ensuring that existing security and existing patterns of community order will be maintained. The primary objective is to offer equal opportunities for the acquisition, use and enjoyment of land to all the people within the social and economic realities of the country. The government firmly believes that this objective can best be achieved within the system of private enterprise and private ownership.

The White Paper was supported by five bills; namely, the Abolition of Racially-Based Land Measures Bill,[23] the Upgrading of Land Tenure Rights Bill,[24] The Residential

Environmental Bill, the Less Formal Township Establishment Bill, and the Rural Development Bill.

The White Paper and the bills were challenged by, inter alia, the National Land Committee (NLC), the Legal Resources Centre (LRC), and the Centre for Applied Legal Studies (CALS). One of the shortcomings pointed out was that the National Party proposals ignored critical realities on the ground; namely, the problem of issuing title where there could be overlapping land rights. Secondly, the World Bank argument that individual title, as opposed to communal or group title, provides tenure security and thus enhancement of productivity, was not supported by the findings of a study commissioned by the World Bank on the relationship between tenure security and agricultural production (Bruce and Migot-Adholla 1998).[25] Eventually, three of the bills were passed into legislation. This study will focus on the Upgrading of Land Tenure Act.

Two proposals were made. In terms of section 19 of the Upgrading of Land Tenure Act, 1991:

> Any tribe shall be capable of obtaining land in ownership and, subject to subsection 2 [which deals with limitations on land disposal], of selling, exchanging, donating, letting, hypothecating, or otherwise disposing of it.

Secondly, the act created conditions for upgrading the PTO to full freehold title. The essence of the argument for the upgrading of PTO land rights was the view that the right to title deeds had been denied blacks in the past, as manifested in trust-held land and the system of PTOs. In terms of National Party thinking, the alternative to communal land tenure was individual freehold title, and it is this possibility that the Upgrading Act provided for; the upgrading of PTOs to freehold title. It also provided for the transfer of communal land to tribes, but the policy preference was for upgrading PTOs.[26]

As can be seen, there was a great deal of fluidity during the early 1990s. Traditional authorities in most parts of South Africa, with perhaps the exception of KwaZulu-Natal, were uncertain about their future. Although they were no longer repressive under these uncertain conditions, there is evidence that corruption never abated. It is also during this period that they were recognized in the constitution without sufficient guidelines as to their role in land reform and local government. At the same time, the same constitution upheld democratic principles, including elected representation and democracy in local government and land. This spells out the context within which

the ANC-led government attempted to formulate and implement its land and local government reform programs.

Tenure Reform, Traditional Authority, and Local Government in Post-Apartheid South Africa

As noted in the introduction of this paper, post-apartheid South Africa's Constitution is attempting to separate land tenure and local government functions which were concentrated in traditional authorities during previous periods, giving a minimum role for traditional authorities. However, the role of traditional authorities is still upheld in the constitution. The central argument of this paper is that implementation of post-apartheid policies on land tenure and local government is hampered by the recognition of the institution of traditional authorities and government's reluctance to enforce its policies, in the face of rejection by traditional authorities. This is well demonstrated by the Tshezi communal area case study.

Land Tenure Policy – The Process

The Department of Land Affairs (DLA) is required by the constitution to ensure security of tenure for all South Africans, especially women. Government policy on the reform of land tenure is outlined in the constitution:

> A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. (Sec. 25 (6))

A positive policy and legislation on land tenure reform in the rural areas of the Bantustans have been slower to emerge than the other components of the land reform program. A Tenure Research Core Group (TRCG) to guide the land tenure reform

process was only established in 1996. Since then, the following pieces of legislation and policy affecting tenure reform in the Bantustans have been developed.

- Amendment of the 1991 Upgrading and Land Tenure Rights Act, 1996, to ensure that the opinions of rural people are sought before any major decisions are made about their land.
- Interim Protection of Informal Land Rights Act, 1996, to formalize the process by which decisions are taken. It lays down a rigorous procedure for major decisions affecting people with so-called informal rights, including people in rural areas.
- A document issued by the minister of Land Affairs in 1997, which declares that decisions pertaining to ownership rights in communally owned land are most appropriately made by the majority of the members of such communal systems
- Communal Property Associations Act, 1996, which established an accountable land-holding entity, the Communal Property Association (CPA), as a model for group ownership.
- White Paper on Land Policy, April 1997. The policy, among others, draws a distinction between *ownership* and *governance* of communal land. The state is no longer both owner and administrator. Ownership can be transferred from state to the communities and individuals on the land.

Most of the above is interim legislation that protects land rights of rural people against abuse (Claassens and Makopi 1999). At the beginning of 1998, DLA developed a set of principles to guide its legislative and implementation framework (Thomas, Sibanda, and Claassens 1998). The key features are:

- Landownership is separated from governance. This means that members of particular communities can co-own the land and decide how they want their land administered.
- A clear separation of powers as opposed to the fusion of authority characteristic of the past. Tribal authorities and local government will not be the owners of land, and will not have the right to allocate land, unless specifically asked by the landowners to do so.

This means that tribal authorities, whose function it was in the past to administer land under the guidance of magistrates, are no longer guaranteed this function. Neither are the newly elected local government structures. These structures can only administer land if elected by the landowners; namely, members of communities. As far as DLA is concerned:

> Systems of land administration, which are popular and functional, should continue to operate. They provide an important asset given the breakdown of land administration in many rural areas. The aim is not to destroy or harm viable and representative institutions. Popular and democratic tribal systems are not threatened by the proposed measures. (Thomas, Sibanda, and Claassens 1998)

This document, though, does not provide any evidence of "popular," "functional," and "democratic tribal systems" in existence after years of colonial and apartheid distortion of traditional systems.

Land Tenure Options

Currently, there are two options for tenure security in the rural areas of the former Bantustans: individual freehold and group/communal ownership. Individual freehold is difficult to implement because:

- communal land in the former Bantustans is unregistered and unsurveyed
- individuals who want freehold would probably have to bear the cost of surveying and registering. Most occupants of land could not afford this, and
- a tribal resolution also needs to be passed by the majority of members of the particular group or community before freehold is granted.

As regards communal ownership: Communities applying as groups for transfer of land must constitute themselves as a legal landholding entity such as a CPA. Members are defined in terms of households and must agree to a set of rules and regulations for landownership.

During the course of 1998, a legislation drafting team was assembled to draft appropriate tenure legislation. The draft Land Rights Bill proposal argued:

- A new form of ownership, *commonhold*, which bypasses the requirements for establishing a legal entity. *Commonhold* would mean that the land vests in the members of a community as co-owners; decisions in respect of the land are made on a majority basis; and co-owners choose or elect the body to manage their land- related affairs on a day-to-day basis.
- The creation of statutory rights, which apply where transfer of land from the state has not been applied for; the state would remain the nominal owner of land but protects the rights of people on the land. These rights will have the status of property rights and cannot be removed except with consent or by expropriation. (Claassens and Makopi 1999, 10)

Land Administration

In terms of land administration, the Land Rights Bill proposes various levels. At a District Council and magisterial district level, a Land Rights Board to be established by the minister is proposed. This will bring together different interest groups, including the proposed Land Rights Officer and elected rural councillors.

At a local level, it proposes a rights holders structure to be accredited by the Land Rights Board. It is further proposed that a Land Rights Officer be appointed by the directorgeneral to monitor compliance with the proposed Land Rights Act.

If this proposed bill were to become an act, it would go a long way towards protecting rural people from arbitrary decisions by the state and tribal authorities. It will have far reaching implications for traditional authorities, which for over four decades have not been accountable and democratic.

LOCAL GOVERNMENT POLICY

Policy on rural local government is guided by the constitutional requirement that the local sphere of government should consist of municipalities. Over and above the traditional service delivery and regulatory functions of municipalities, the constitution en-

hances the powers and functions of local government by placing greater prominence on the role of local government in supporting socio-economic upliftment. Section 153 (a) of the constitution stipulates that a municipality must

> structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community.

The District Model

Policy and legislation on local government is contained in the following documents: the constitution, the Transitional Local Government Act of 1993, the Development Facilitation Act, the White Paper on Local Government, and various research documentation on the White Paper process. More documentation will be generated by the White Paper on Traditional Affairs that has been drawn up to resolve the thorny question of the roles, functions, and powers of traditional authorities.

A feature of the negotiation process that began in earnest in the early 1990s was its urban bias. The 1993 Transitional Local Government Act was initially silent on the form that local government would take in rural areas. In the urban areas, transitional structures called Negotiation Forums were set up. Nothing of this kind was provided for rural areas. However, the ANC-led Government of National Unity recognized this deficiency, and in June 1995 passed amendments to the Local Government Transition Act of 1993. These amendments focused specifically on local government in rural areas. They provide for a district council model for rural areas. The district council model is a two-level structure which consists of Transitional Local Councils (TLCs) for urban areas, and Transitional Rural Councils (TRCs) or Transitional Representative Councils (TrepCs), established at a magisterial district level.

The TrepCs were seen as representatives and brokers who would evolve into effective and democratic local authorities. They were thus not accorded the powers of a fully-fledged local authority. The functions of a TrepC were envisaged as follows:

- to nominate from among its members a person or persons to represent the council on the district council in question
- to secure, through the said person or persons, the best services possible for the inhabitants of its area

- to serve as the representative body of its area in respect of any benefits resulting from the reconstruction and development program, and in the development of a democratic, effective, and affordable system of local government
- in general, to represent the inhabitants of its area in respect of any matter relating to rural local government.

During this transitional period, the district councils would undertake all service delivery in the rural areas.

In November 1996, further amendments were made regarding the powers and functions of the Transitional Representative Councils. This was to ensure that they were given powers to establish themselves as fully-fledged local government structures in rural areas. In terms of section 10(d)(2) of the Local Government Act, second amendment, 1996:

> A representative council shall within the area of jurisdiction have those powers and duties as the MEC may, in consultation with the minister and after consultation with:
> the representative council concerned, and the district council concerned, by notice in the Provincial Gazette, identify as a power or duty of the representative council concerned, whereupon such representative council shall be competent to exercise such power or perform such duty within the area of its jurisdiction….

This section further provides that the district council shall, with the approval of the local council, rural council, and representative councils concerned, formulate, and if so requested, implement an Integrated Development Plan (IDP) in respect of each local council, rural council, and representative council within the area of jurisdiction. If so requested, the district council will also ensure the proper functioning of and the provision of financial, technical, and administrative support services to all the local councils, rural councils, and representative councils within its area of jurisdiction.

With regard to the composition and election of TrepCs, the act stipulates that a Transitional Representative Council (TrepC) shall consist of:

- members elected in accordance with a system of proportional representation, and if the MEC considers it desirable,
- members nominated by interest groups recognized by the MEC.

Provided that:

- no single interest group shall nominate a number of members

which exceeds 10 per cent of the total number of members to be elected and nominated in respect of the relevant Transitional Representative Council;

- the total number of members nominated by interest groups shall not exceed 20 per cent of the total number of members to be elected and nominated in respect of the relevant Transitional Representative Council.

Interest groups are defined as:

- levy payers
- farm labourers
- women, and
- traditional leaders.

The election of councillors is, thus, by means of proportional representation only. In other words, in terms of these amendments, rural people voted for political parties only, and unlike their urban counterparts, were not given the opportunity to vote both on proportional representation and for candidates.

Traditional Authorities in Local Government

Traditional authorities were excluded from the initial negotiations around the Conference for a Democratic South Africa (CODESA) in 1991 and 1992. The talks temporarily collapsed in 1992. When negotiations resumed at the World Trade Centre, traditional authorities were invited. There were basically two reasons for this. First, the ANC did not want to harm relations with the Congress of Traditional Leaders of South Africa (Contralesa) before the envisaged elections. (See also Ntsebeza and Hendricks 1998.) Second, both the ANC and the National Party wanted to ensure the participation of the Inkatha Freedom Party, led by Chief Buthelezi, in the negotiations process. The upshot of these negotiations was a compromise that led to the recognition of the institution of traditional authorities. Consequently, on the eve of the 1994 elections,[27] a clause was included in the interim constitution recognizing the institution of traditional authorities. However, no guidelines were given as to the roles, functions, and powers of traditional authorities in a society that had opted for elected representation. Principle XIII of the interim constitution merely states that:

> The institution and role of traditional leadership, according to the indigenous law, shall be recognized and protected in the constitution. Indigenous law, like common law, shall be recognized and applied by the courts, subject to the fundamental rights contained in the constitution and to legislation dealing specifically therewith.

The final constitution of 1996 is also not helpful in resolving this tension between the recognition of the institution of traditional leadership, which is an unelected structure, and a commitment to a democracy based on elected representation. Furthermore, it is also vague about the roles, functions, and powers of traditional authorities. Chapter 12, one of the shortest (if not *the* shortest) chapter of the constitution provides that:

> The institution, status, and role of traditional leadership, according to customary law, are recognized, subject to the constitution.

On the role of the institution, ART. 212 has this to say:

> (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
>
> (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law, and the customs of communities observing a system of customary law:
>
> (a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and
>
> (b) national legislation may establish a council of traditional leaders.

It should be noted that the constitution does not provide a specific role for traditional authorities in local government. Their role *may* be provided for by national legislation. Their recognition is extended to customs and traditions in "communities observing a system of customary law." However, whatever the concrete powers of traditional authorities, the constitution requires that such powers be performed "subject to the constitution."

Further, we have seen that the Transitional Local Government Act provides an extremely limited role for traditional authorities in local government, defining them as an *interest group* with no more than 10 per cent representation.[28] Their role in the Provincial Houses of Traditional Leaders and the National Council of Traditional Leaders as government advisors on customary law, traditions, and customs is, to say the least, dubious. What counts as customary law, tradition, and custom in a late-twentieth-century, rapidly urbanizing South Africa? As Maloka quite rightly argues,

"African political and socio-economic structures were significantly transformed by the combined impact of merchant capital, missionaries, and colonialism" (T. A. Maloka 1996, 174; see also E. Maloka 1995). The exact meaning of this role in contemporary South Africa needs urgent explanation.

The much-awaited publication of the White Paper on Local Government in March 1998 did not resolve the issue of local government in rural areas, especially the roles of traditional authorities. The White Paper makes what appear to be broad and sweeping statements about the possible role which traditional authorities can play. On the vital issue of who will represent rural people at a local, village level, the White Paper remarks:

> It is proposed, in accordance with the constitution, that there will be elected local government in all the areas falling under traditional authorities. Traditional leadership should play a role closest to the people. Their role will include attending and participating in meetings of the Councils and advising Councils on the needs and interests of their communities. (South Africa 1998, 77)

On the issue of development, a task that has been added to local government by the constitution, the White Paper boldly asserts:

> There is no doubt that the important role that traditional leaders have played in the development of their communities should be continued. (South Africa 1998, 77)

The above statements do not seem to take into account the roles played by traditional authorities from the time of colonial conquest, but more specifically during the apartheid period. They generalize about traditional authorities and do not take into account the differentiated nature of traditional authorities as dealt with in the introduction to this study. It is not clear on what basis these statements are made, as they clearly are not borne out by the roles that traditional authorities played in South Africa from colonialism to apartheid. This paper has argued that traditional authorities were marginalized when it came to development issues, and, according to Hendricks, were a dismal failure. Above all, it is not clear from the above statements how unelected traditional authorities will coexist with democratically elected representatives (Ntsebeza and Hendricks 1998, 20–21).

The White Paper makes suggestive statements such as the above, but does not resolve the issue of rural local government, in particular the role of traditional authorities in this. Instead, it proposes a White Paper on Traditional Affairs to deal with

the structure and role of traditional leadership and institutions:

- principles relating to remuneration
- a national audit of traditional leaders
- the role of women
- the role of traditional leaders in politics

the future role of the Houses and Council of Traditional Leaders:

- the rationalization of current legislation dealing with traditional leadership and institutions. (South Africa 1998, 76)

During the course of 1998, the Department of Constitutional Development announced a program for the process to be expanded in developing the White Paper on Traditional Affairs. In terms of this proposal, a Discussion Paper was supposed to be ready for comment by the end of 1999, to be followed by a Green Paper, that would ultimately lead to a White Paper by May 1999. In 1999 alone, the Department of Constitutional Development voted about R 32 million for salaries, including benefits, for traditional authorities. These salaries have been voted without regard to the role of traditional authorities. In practice, transferring some of their local government functions to elected rural councillors has diminished the functions of traditional authorities. Further, these salaries are paid ahead of the promised national audit on traditional authorities to determine who genuine traditional authorities are.

During 1997, the Eastern Cape Legislature passed the Regulation of Development in Rural Areas Act. This act transfers all development functions enjoyed by tribal authorities in terms of the Bantu Authorities Act of 1951, as amended, to elected councillors. This is in line with the development functions of local government as prescribed in the constitution. One of these functions relates to the role played by tribal authorities in making recommendations about the allocation of land. This aspect of the act has the potential to clash with the policy of the Department of Land Affairs, which clearly states that the question of who allocates land will be determined by the owners of land. We have seen above that, according to the Department of Land Affairs, rural people who have been living on land that they have regarded as their own for generations must be treated as the owners of land, even though existing legislation does not accord them legal ownership.

The passing of the Regulation of Development in Rural Areas Act highlights what this study regards as one of the fundamental stumbling blocks to delivery; namely, poor communication, co-ordination, and co-operation within and among departments.

PROBLEMS OF PRACTICE

Both departments are encountering serious problems in implementing the above. This study will highlight four; namely, structural/organizational constraints, budgetary constraints, lack of democratic structures at a local level, and tensions around traditional authorities.

Inter-Departmental Coordination Constraints

Poor communication, coordination, and co-operation, both inter and intra departments is one of the major reasons why implementation of these policies has been unsatisfactory. A number of departments, at national, provincial, and local level, need to coordinate with each other in order to implement land tenure and local government reform. Some of the land policies developed by DLA, for example, policies on land allocation, will be difficult to implement if the Bantu Authorities Act, which falls under the Department of Constitutional Development, has not been repealed. However, there is poor coordination and co-operation among these departments.

As regards DLA, there are also problems of coordination and co-operation. For example, policy on land tenure reform is developed by DLA at national level, but a number of departments and structures are involved in its implementation. DLA has established offices at provincial level (PDLA) to implement its policy. At the same time, at provincial level in the Eastern Cape, there is a Department of Agriculture and Land Affairs (DALA) that is part of the Eastern Cape government. Eastern Cape DALA has regional (sometimes coinciding with District Council boundaries), and magisterial district offices. Often there is no communication and/or co-operation among these departments, especially between PDLA and DALA, although all are, in theory at least, accountable to DLA for implementing policies; for example, land allocation. It is not surprising, as the case study shows, that government officials in these departments are often not aware of DLA policies.

A similar situation exists in the Department of Constitutional Development. In the Eastern Cape, the provincial department that is supposed to implement national policies is Housing and Local Government. This department has regional offices as well as Local Government offices. The boundaries of the region and local government areas are not necessarily the same. In general, it is difficult to see whose jurisdiction begins and ends where. Here too there is a great deal of communication breakdown,

confusion, and conflict. To compound matters, the Department of Trade and Industries is leading Spatial Development Initiatives (SDI) along the Wild Coast in the Eastern Cape, many of which are areas falling under tribal authorities. The Department of Economic Affairs, Finance, and Tourism in the Eastern Cape is implementing the SDI project. Finally, there is the House of Traditional Leaders and Contralesa, both representing traditional authorities.

Budgetary Constraints

Closely linked with the above are budgetary constraints. In most cases, new staff have had to be employed, and the old staff had to adjust to new demands. New structures have had to be established. All this led to capacity problems. Financial resources become critical to develop effective and efficient human resources. Government, though, claim that they are encountering budgetary constraints and often have to put up with cuts. Ideally, functions such as service delivery are paid for through taxes generated from users. The rural areas of the former Bantustans are made up, for historical reasons, of a large number of poor people who cannot afford to pay for services. This is the dilemma of rural areas. Invariably, newly elected rural councillors are affected by this situation as they are seen as not delivering. This dilemma is vividly captured in the Green and White Papers of Local Government in South Africa.

> It is generally true that few powers and duties have been devolved to rural municipalities due to their lack of capacity…. Although TRCs have taxing powers, they have very limited potential to generate adequate tax and service charge revenue, and thus very little ability to sustain a level of fiscal autonomy. They are reliant on grants from and through the District Councils. This fiscal support is limited, and the basis for transfer is not entirely clear and so does not generate fiscal certainty. The limited powers and resources of rural municipalities, and their consequent inability to serve local communities, has lessened their credibility. This loss in credibility poses a threat to the future development of local government in these areas.

The White Paper on Local Government, which was launched in March 1998, resolved the above dilemma by recommending that the number of councillors be reduced. It further propagates an amalgamated model of urban and rural municipalities. By so

doing, so the thinking goes, there will be some saving, and it is hoped (?) that a leaner administration will be more efficient.[29] What the White Paper does not address is the difficulty of administering and managing resources from a distance, especially in often inaccessible and remote rural areas.

Lack of Accountable Structures at a Local (Village) Level

In the event the recommendation to reduce the number of elected councillors be implemented, rural areas that are in remote parts are most likely to be further marginalized, and it will be difficult to manage such areas as this will be too big a task for few officials. Already, there are complaints among rural people that they hardly see the existing elected rural councillors. These councillors are few and cover vast areas without infrastructure; for example, transport, to support them. Fewer councillors will certainly aggravate matters. The only structure that stands to gain from this proposal is the unelected tribal authority. This is the only structure that in the past has been, and still is, closer to the people. Previous regimes never attempted to replace this structure. Instead, they used it to achieve their ends. Post-apartheid South Africa has retained and recognized the institution in the constitution. As we have seen, the White Paper on Local Government unequivocally proposes unelected traditional authorities at local level.

This means that in so far as local government and tenure reform is extended to rural areas, democratically elected structures are removed from the people, and unelected ones left intact. This, it seems, is a recipe for failure on the part of elected structures and will, by comparison, make traditional authorities, despite their past record, look credible. Moreover, the White Paper does not take into account the differentiated nature of traditional authorities, the majority of whom may not carry out what is expected of them, while there may be some people who could carry the tasks. Traditional authorities on the other hand, have not demonstrated that they are ready to embrace democracy, and this is the fourth and final constraint that this study has identified.

Tensions Around Traditional Authorities

This chapter argues that it is mainly tensions around traditional authorities that have so far proved to be a major stumbling block in implementing policy. It is striking that traditional authorities, despite earlier divisions, mainly between traditional authorities in Contralesa and Inkatha, seem to be drawing closer and closer to one another. Their response to land tenure and local government reform provides a good example.

With regard to land tenure, DLA, in keeping with the declared policy of the ANC-led government to consult stakeholders, invited traditional authorities, through their structures, the Houses of Traditional Leaders, the Council for Traditional Leaders, and Contralesa, to respond to the DLA tenure reform policy in the former Bantustans. In their submission, the KwaZulu-Natal House of Traditional Authorities agreed that land should be returned and were unequivocal that land belongs to traditional authorities, and that the title deed should be in their name.

> We hope that central Government will not create obstacles to the transfer of title to Traditional Authorities which will sanction that our initiatives have set KwaZulu Natal several years ahead of the rest of the country in the process of returning land title to our people.

On the question of whether land should be transferred from the state, the House of Traditional Leaders in the Eastern Cape endorsed the government position, but, unlike their KwaZulu-Natal counterparts, were less clear on the question of landownership. The submission tended to dwell on the allegedly democratic nature of pre-colonial traditional authority rule and their betrayal by the ANC during the negotiation talks in the early 1990s. Their position has since become clearer; namely, that land should be transferred to tribal, some would say, traditional authorities. This position became clear in two meetings, one in July and the other in August 1998, that I attended in the House of Traditional Leaders in Bisho.[30] In the July meeting, traditional authorities were still equivocal. Whilst some agreed that land belongs to the people, others argued that land belongs to the chief or king. The latter were of the opinion that the title deed should be registered in the name of the chief or king of the area. Be that as it may, by the end of the meeting, there was an agreement that land belongs to the people, and not to an individual or representatives. What remained to be resolved, according to the agreement, was the *legal entity* that will hold land. The meeting resolved that officials

from the national office of the Department of Land Affairs should be invited, and the understanding was that discussions would centre around the *legal entity*.

The follow-on meeting was held in August, and it was attended by a large delegation from the Department of Land of Affairs led by the chief director of the Land Tenure Directorate, Glen Thomas. At this meeting, traditional authorities changed the goalposts. Some went back to their earlier position that communal land belongs to the chief. According to chief Mgcotyelwa:

> Why bring CPAs (Communal Property Associations) to traditional land? Minister Hanekom knows very well that we want land to be transferred to traditional authorities. The House of Traditional Leaders is opposed to CPA.

Another traditional authority, Kakudi declared:

> There has always been a system that governed traditional systems, with administrative guidelines. CPA constitutes another system. That is the creation of conflict. This act was passed in 1996, and we were never consulted. Two years thereafter the DLA consults. Already under this government, there are elements to change the usual order.[31]

Although Chief Ngangomhlaba Matanzima confirmed the agreement of the previous meeting when reminded, Chief Gwadiso announced that traditional authorities were conducting discussions on these issues at the highest level involving Minister Hanekom and Deputy President Thabo Mbeki. He went on to declare their position that they want land to be transferred to traditional authorities. The meeting was also informed that Contralesa holds the same position. The meeting ended on that note.

As regards local government reform: traditional authorities reject the notion of municipalities in rural areas. They also regard the 10 per cent representation in local government, as an *interest group* as an insult. In the Eastern Cape, they do not send any representative to Transitional Representative Council. Here, too, they demand that tribal authorities should be the main structures for rural local government. In other words, traditional authorities want to cling to apartheid-style structures that were created to set them up as undemocratic, unaccountable structures, quite contrary to the spirit of the constitution.

Where civic organizations and elected TrepCs are active in rural areas, as is the case in Guba, there are often titanic struggles between traditional authorities and these structures. Traditional authorities in the Transkei did not participate in the local government elections as they were opposed to the notion of municipalities, elected

rural councillors, and the fact that they were given a mere 10 per cent representation. Where they agree with the principle of elected councillors, it is only in so far that these councillors will be part of tribal authorities.

Traditional authorities in the Eastern Cape, through their bodies, the House of Traditional Leaders in Bisho and Contralesa, reject the Regulation of Development in Rural Areas Act of 1997. They claim, wrongly,[32] that they were at the forefront of development in rural areas, and have threatened to disrupt initiatives by elected rural councillors to effect development in *their* areas. In practice, as the case study will illustrate, the Regulation of Development in Rural Areas Act has not been implemented, largely because of capacity constraints on the part of rural councillors.

Government, as represented by the Departments of Land Affairs and Constitutional Development, had not taken any position regarding the rejection of policy by traditional authorities. This is despite clarity of policy on these matters. As indicated, the much-awaited White Paper on Local Government avoided a clear policy on the role of traditional authorities on local government.

How do we explain this convergence of ideas and actions on the part of traditional authorities in the Houses of Traditional Leaders? Part of the answer lies in the fact that when the demise of National Party apartheid rule was imminent in the early 1990s, a vast number of traditional authorities who collaborated with the apartheid regime abandoned the sinking ship and jumped on the bandwagon, Contralesa. As noted, the ANC, given its anti-apartheid broad front, and the need to get votes, did not discriminate. By 1994, the bulk of the membership of Contralesa was made up of the collaborating traditional authorities. It is the latter that also make up the majority of the members of the Eastern Cape House of Traditional Leaders. Most of them have concluded that the ANC is hostile towards traditional authorities and have begun to look to allies elsewhere. Some have joined the newly formed United Democratic Movement of Bantu Holomisa and Roelf Meyer, while it is widely rumoured that others are in the National Party. Some are impressed by what is perceived to be Chief Buthelezi's tough line towards the ANC, and the concessions Buthelezi seems to be getting. Any explanation should take this combination of factors into account.

CASE STUDY: TSHEZI COMMUNAL AREA

The case study of the Tshezi communal area in the Eastern Cape illustrates the complexities involved in implementing land tenure and local government reform.[33] The Tshezi case study identifies three major constraints to delivery. First is the difficulty of implementing policy, such as land tenure reform, that is based on democratic principles whilst at the same time recognizing traditional authorities. The issue is not simply the question of recognizing traditional authorities, it is that government, represented in this case by the DLA, has not demonstrated commitment to implementing its policies. Secondly, the case study illustrates the problem of relating detailed research to policy and implementation strategies. Lastly, the case study shows the lack of inter-departmental coordination that delays development projects which are crucial to the livelihoods of poor rural communities such as the Tshezi.

Establishing a CPA in the Tshezi Area

The Spatial Development Initiatives (SDI) led by the Department of Trade and Industry, and the identification of the two resorts of Coffee Bay and Hole-in-the-Wall, which fall under the Tshezi communal area, made the Tshezi area a test case for the implementability or otherwise of the policies and legislation of the DLA and the Department of Constitutional Development. The initial concept study of 1996, which led to the identification of the area for SDI purposes, identified land and local authority as posing major blockages to development in the area. Following this study, the DLA was invited onto the SDI team, specifically to help resolve the land-related issues.

One of the requirements of the SDI was the need to establish a legal entity for the Tshezi community to place the community in a position to be able to negotiate and contract with potential developers and to be able to receive and disburse funds for SDI-related development in the area. An SDI Committee was to facilitate this process, but did not know how to proceed. The DLA tenure process brought the landownership issue into stronger focus and resulted in several workshops with the SDI Committee to assess the pros and cons of different legal entities. Eventually, the Committee decided to opt for a CPA for the Tshezi area. From that point on, the focus was on assisting with the establishment of a CPA for the Tshezi area (referred to as the Tshezi Communal Property Association or TCPA), in particular, the development with

the SDI Committee of a TCPA Constitution with rules, regulations, and procedures for land use.

Throughout this process, the chief of the area, Chief Dubulingqanga, and his son, Ngwenyathi, were kept informed about the process. Their initial response was supportive. They were excited at the prospect of getting *their land* back. The SDI Committee was chaired by one of the four headmen, Mr. Mbambazela, and he too was very supportive of the land transfer process. The idea of the legal entity also received the support of the *legal* cottage owners and the Ocean View Hotel.

By the middle of June 1998, public meetings (involving the department and the researchers) had been held on the CPA in all the four administrative areas. The CPA concept was well received at the meetings held in three administrative areas; Lower Nenga, Lower Mpako and Nzulweni, with the headmen for these three areas supporting the CPA. It was not possible to hold a meeting in the fourth, Mthonjana. A small, but vociferous group refused to be involved in meetings that had not been called by the chief. This is despite the fact that the group leader had earlier expressed a vote of no confidence in chiefs as leaders in development. This group also indicated that they rejected the CPA, without, it should be noted, any knowledge of what it really entailed. It is the selfsame leader who unilaterally withdrew his participation and that of the other representative of Mthonjana in the SDI committee. An interim Tshezi Communal Property Association (TCPA) was established. Chief Dubulingqanga's son, Ngwenyathi, was elected as chair.

By this time, Chief Dubulingqanga was prevaricating, expressing doubts about the CPA. In fact, these doubts were initially expressed at the tribal authority meeting in April 1998. At this meeting, Mr. Mbambazela, the chairperson of the SDI who, as earlier stated, is also a headman at Nzulwini, expressed concern that traditional authorities might lose their control if the CPA were established. He made an appeal to the meeting that "we should guard and protect chieftaincy." He was supported by the son of the chief, Ngwenyathi. The latter suggested that traditional authorities should be given more time to consult with other traditional authorities outside the Tshezi area, including the Eastern Cape branch of Contralesa. He suggested that they would ask Contralesa to draft a constitution for them, seemingly disregarding the draft constitution prepared with the SDI Committee and discussed with him and his father. Chief Dubulingqanga did not attend the April meeting.

It became apparent with the march of time that the chief's position was strongly influenced from outside by people like chiefs Nonkonyana, Patekile Holomisa, and Gwadiso who were arguing and advising him against the CPA in favour of the transfer

of the land to the tribal authority. On one occasion, whilst the researchers were conducting fieldwork in the area, the chief, his son, and councillors announced that Chief Patekile Holomisa had paid an unexpected visit to Chief Dubulingqanga where the CPA process was discussed. Chief Holomisa advised Chief Dubulingqanga and his son to request a meeting of the DLA with the House of Traditional Leaders in Bishop to discuss the CPA in the Tshezi area.

Two meetings with the House of Traditional Leaders in Bishop resulted from this; one on 2 July 1998 attended by Lungisile Ntsebeza as DLA consultant. The next meeting was on 17 August 1998, and the DLA was powerfully represented by the chief director of the Land Tenure Reform Directorate in Pretoria, Glen Thomas. The position of the House of Traditional Leaders was that they accepted transfer of land, but rejected the DLA policy that land be transferred to land rights holders as co-owners. They declared that land must be transferred to tribal authorities. Further, they informed the DLA delegation that this matter was in the hands of the deputy president and the minister of Land Affairs.

When the outcome of the July 1998 meeting was reported to the SDI and interim TCPA committees in the Tshezi area, committee members, including headman Mbambazela and Chief Ngwenyathi, felt strongly that the establishment of the CPA should proceed. At that stage, the view held by committee members was that CPA opposition was not against the content of the legal entity (which accommodated the tribal authority), but the name, particularly the use of the word *Communal* in CPA. The proposal was that the name should be changed to *Tshezi Property Association* or *Tshezi Tribal Property Association*. However, it soon became apparent that nothing less than the transfer of land to the chief or the tribal authority itself would satisfy Chief Dubulingqanga. For example, in September, a delegation from the Tshezi area, led by the chief, held discussions with Chief Nonkonyana, an advocate, the vice-president of Contralesa, and the Chair of the House of Traditional Leaders in the Eastern Cape. The meeting resolved that:

- Tshezi land should be transferred into the name of the Tshezi tribal authority, and that the constitution prepared with the SDI and interim CPA committees should be adjusted accordingly.
- The Tshezi tribal authority should write to the minister of Land Affairs requesting him to appoint a lawyer to assist them to constitute and register the Tshezi tribal authority.

Attempts on the part of the TCPA to involve the *king* of the abaThembu, Paramount Chief Buyelekhaya Dalindyebo, who was also supportive of the CPA, were not successful. Chief Dubulingqanga, under the influence of key traditional authorities in Contralesa and the House of Traditional Leaders in the Eastern Cape, rejected the CPA outright, and began to mobilize opposition.

DLA avoided taking a clear-cut position on the rejection of the CPA by some traditional authorities and a tiny minority of individuals in Mthonjana. Instead, in March 1999, the chief director of the Tenure Directorate visited the Tshezi area, to inform the Tshezi tribal authority that the DLA had abandoned the establishment of the CPA in the Tshezi area. He further explained the procedure to be followed in the event that development projects requiring the consent of the minister were proposed. The chief directorate also addressed similar meetings with the interim TCPA committee, effectively telling them that they should disband.

Relationship Between DLA and Researchers

Over two years or so, the DLA commissioned research in the Tshezi area in order to facilitate SDI development, and to test its policies on land tenure reform. This section takes a critical look at the relationship between the DLA and the researchers, and the extent to which the detailed research has informed ongoing policy development and implementation.

Despite pleas from the researchers, no feedback on the research reports, which were regularly submitted, was forthcoming. The researchers reached such levels of frustration that they sent copies of their reports to whoever they considered to be keen to understand and comment on their work. It is the well-considered opinion of the researchers that some of the problems encountered in the Tshezi area could have been avoided had there been responses to the proposals and findings of the research.

The DLA decision to abandon the CPA in the Tshezi area was never discussed with the researchers, despite the fact that they were commissioned to help resolve landownership and governance issues in the area. It was abundantly clear that the recommendations made by the researchers had never been taken into account. In fact, representatives from the national office of the DLA who had been assigned to the Eastern Cape had not been properly briefed about the Tshezi case. They had not read the numerous reports and field notes that were prepared and regularly submitted to the

DLA. When the chief director visited the Tshezi area in March 1999, he had not read the progress report that had been compiled by the researchers.

Lack of Interdepartmental Coordination

One of the SDI projects in the Tshezi area is infrastructural development in the resort area in the form of beach and parking facilities. This project was implemented in February 1999 as a Public Works program. However, the Public Works Department did not properly consult the following:

- DLA, as the nominal owner of land
- The Heath Special Investigation Unit, who issued a moratorium on development along the Wild Coast
- Department of Environmental Affairs for environmental impact studies
- The Tshezi people, including the TCPA and the tribal authority.

This led to legal action being taken by Chief Dubulingqanga and one of his head-men, and to interventions by DLA landowners and the Heath Special Investigation Unit. Ultimately, this development was delayed as a result of this confusion, caused by a lack of interdepartmental co-operation and coordination.

CONCLUSION

The central argument of this chapter is that current initiatives to implement policy and legislation on land tenure and local government are frustrated by a fundamental contradiction in the South African Constitution. On the one hand, the constitution enshrines a bill of rights based on elected representative government, while it also recognizes the unelected institution of traditional authorities which are hereditary and/or appointed by previous regimes. The chapter has looked at current attempts to mix elected representation and unelected traditional authorities[34] in land tenure and local government in the rural areas of the former Bantustans.

The chapter argues that the existing model of rural local government that is based on a District Council model is too remote from rural people to make elected representatives effective in delivery and accountable to their rural constituencies. The District Council is made up of urban Transitional Representative Councils (TLCs) and rural Transitional Representative Councils (TrepCs). The latter are elected at a magisterial district level, resulting in a few councillors elected for vast, scattered and often inaccessible areas. This makes it difficult for rural councillors to be visible and available when needed. The recommendation by the White Paper on Local Government that there should be fewer councillors will thus further discredit elected councillors. This, coupled with the proposal that traditional authorities "should play a role closest to the people," will enhance the position of traditional authorities, with negative consequences for democracy based on elected representation.

The chapter does take into account other factors that affect delivery, such as, problems of poor communication, coordination, and co-operation, within and among departments. Also taken into account in the study are budgetary constraints. While a case can be made that these various constraints impede delivery, this study argues that it is the fundamental contradiction of recognizing unelected institutions in an elected representative democracy that is at the heart of nondelivery. The Tshezi case study brings out this tension starkly.

The Tshezi case study illustrates the difficulties involved in implementing policies based on principles of democracy while recognizing unelected traditional authorities. We have seen how tenure reform in the area, in the form of transferring land to the Tshezi people through a Communal Property Association (CPA), or a similar entity, have constantly and consistently been frustrated by the chief of the area and a handful of self-serving individuals who are benefiting from the land administration vacuum. Despite the Department of Land Affairs' clear policy on the role of traditional authorities in land tenure reform, there is reluctance on the part of government to confront traditional authorities on their rejection of DLA policy. Instead, the department has been forced to reconsider its policy on land transfer by discouraging the *upfront* transfer of land, in favour of confirming land rights, with the state still holding ownership of land. Although land transfer has not been discarded, it is not seen as an immediate option. The absence of local, village level democratic structures, including NGOs and CBOs, in the area that could take advantage of favourable land and local government policies, aggravates the position.

The other lesson that can be learnt from the Tshezi case study is about poor communication, coordination, and co-operation. For example, the Department of Housing and Local Government and the Department of Land Affairs (DLA) are not co-operating on service delivery in the Tshezi area, especially the resort area. The decision by the Public Works Department to implement the infrastructural programs of the SDI, namely, beach facilities and parking facilities, without consulting DLA as the landowner, shows poor communication, coordination, and co-operation.

The same problem has also manifested itself in the Regulation of Development in Rural Areas Act of 1997 passed by the Eastern Cape Legislature. This act transfers all *development* functions that tribal authorities were given by the Bantu Authorities Act to elected rural councillors. One of the functions of tribal authorities was to make recommendations regarding land allocation. By October 1997, when the act was passed, the DLA had already launched its White Paper on Land Policy six months earlier. In terms of DLA policy, the decision as to who should allocate land in the rural areas of the former Bantustans must be taken by the affected rural people, who are regarded as the owners of land by the department, despite the existing legal position. The Eastern Cape law thus contradicts the policy of the DLA, which creates insecurity of tenure, and is a recipe for unnecessary tensions.

Another lesson to be drawn from the Tshezi case study, is about the role of commissioned research. In the Tshezi case, research was commissioned by the DLA. After two years of detailed research, mainly, but not exclusively, in the form of in-depth interviews and fieldwork, followed by recommendations and proposals, there was little evidence that the steps taken in the Tshezi area were in any way informed by the research, which was specifically commissioned to inform practice. Where it is used, it was used eclectically, and the researchers were not consulted when decisions were made, neither was there any response to their recommendations and proposals.

The major conclusion of the chapter is that if government is committed to extending democracy to land tenure and local government reform, traditional authorities cannot play a decisive role in decision-making. If they want to be involved in decision-making structures, they must put themselves up as candidates and be elected. Government should make this clear to traditional authorities. This is not to say that traditional authorities should be abolished. They may well have a role in other aspects of rural life.

The chapter draws its theoretical basis from Mamdani's thesis on "decentralized despotism." Mamdani argues that a feature of Native (tribal) Authorities was the fusion of administrative, judicial, and executive powers in one authority, the *native*

authority. Dismantling the fused character of tribal authorities and making them accountable and subjected to elections is seen by Mamdani as a prerequisite to democratic transformation in the rural areas of Africa.

References

Beinart, W. 1982. *The Political Economy of Phondoland 1860 to 1930*. Johannesburg: Ravan Press.

Beinart, W., and C. Bundy. 1987. *Hidden Struggles in Rural South Africa*. Johannesburg: Ravan Press.

Beinart, W. and D. Saul, eds. 1995. *Segregation and Apartheid in Twentiethcentury South Africa*. London: Routledge.

Bruce, J. W., and Migot-Adholla, eds. 1998. *Searching for Land Tenure Security in Africa*. Duduque: Kendall/Hunt.

Claassens, A., and S. Makopi. 1999. South African Proposals for Tenure Reform; the Draft Land Rights Bill: Key Principles and Changes in Thinking as the Bill Evolved. Paper presented to an international conference organized by the Department for International Development, U.K., on Land Tenure, Poverty and Sustainable Development in Sub-Saharan Africa, Sunningdale, Berkshire, U.K., 16–19 February.

Edge, W. A., and M. H. Lekowe, eds. 1998. *Botswana: Politics and Society*. Pretoria: J. L. van Schaik.

Hendricks, F. T. 1990. *The Pillars of Apartheid: Land Tenure, Rural Planning and the Chieftaincy*. Uppsala. Sweden: Acta Universitatis Upsaliensis.

Lambert, J. 1995. Chiefship in Early Colonial Natal, 1843–1879, *Journal of Southern African Studies* 21, no. 2.

Maloka, E. 1995. Traditional Leaders and the Current Transition, *African Communist*, 2nd Quarter.

Maloka, T. A. 1996. Populism and the Politics of Chieftaincy and Nation-Building in the New South Africa, *Journal of Contemporary African Studies* 14, no. 2.

Mamdani, M. 1996. *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*. Princeton: Princeton University Press.

Manona, C. 1990. The Big Lip of Sebe has Fallen, *Indicator South Africa*, Quarterly Report 8, no. 1.

Manona, C. 1998. The Collapse of the "Tribal Authority" System and the Rise of Civic Associations. In C. de Wet and M. Whisson, eds., *From Reserve to Region: Apartheid and Social Change in the Keikammahoek District of (former) Ciskei, 1950–1990*. Grahamstown: ISER.

Mbeki, G. 1984. *South Africa: The Peasants' Revolt*. London: International Defence and Aid Fund.

Mbenga, B. 1998. The Acquisition of Land by Africans in the Western Transvaal, South Africa: The Case of the BaFokeng of the Rustenburg District, 1902–1931. Paper presented to the African Studies Association of America (ASA) Conference, Chicago, 29 October to 1 November.

Ntsebeza, L., and F. Hendricks. 1998. Democracy and Despotism in Post-Apartheid South Africa – The Role of Chiefs/Traditional Authorities in Rural Local Government. Paper presented to an international conference on Comparative Experiences on Democratization between South Africa and Nigeria, Centre for African Studies, University of Cape Town, 30 May to 2 June.

Peires, J. B. 1981. *The House of Phalo*. Johannesburg: Ravan Press.

South Africa [Ministry for Provincial Affairs and Constitutional Development] 1998. *The White Paper on Local Government*. Pretoria: Department of Provincial Affairs and Constitutional Development.

Stultz, N. M. 1979. *Transkei's Half Loaf – Race Separation in South Africa*. New Haven: Yale University Press.

Tapscott, C. 1997. The Institutionalisation of Rural Local Government in Post-Apartheid South Africa. In W. Hofmeister and I. Scholz, eds., *Traditional and Contemporary Forms of Local Participation and Self-government in Africa*. Johannesburg: Konrad Adenhauer.

Thomas, G., S. Sibanda, and A. Claassens. 1998. Current Developments in South Africa's Land Tenure Policy. A memo issued by the DLA.

NOTES

1. This is a reworked version of a paper originally prepared for a Land and Agrarian Reform Conference held at the Alpha Training Centre, Broederstroom, 26–28 July 1999. The paper was, in turn, an overview of a research report titled "Land Tenure Reform, Traditional Authorities, and Rural Local Government in Post-Apartheid South Africa." I wish to acknowledge the financial support of the Swiss Agency for Development and Co-operation, which made this study possible, and the many individuals who helped me in various ways. I am, however, solely responsible for the analysis and interpretation of events. This work was partially carried out with the aid of a grant from the International Development Research Centre, Ottawa, Canada.
2. The term *traditional authority/ies* is used throughout as an all-encompassing term to refer to chiefs of various ranks. It is used in this paper to refer to people, and not to structures. Tribal Authorities were structures established by the Bantu Authorities Act of 1951 and are composed of traditional authorities (the chief and his headmen), appointed councillors, and a tribal secretary. The extent to which chiefs can be regarded as traditional, as will be seen in the section dealing with traditional authorities, is highly disputed. The use of the term is not intended as acknowledgment that chiefs are necessarily legitimate leaders in their areas.
3. Mamdani seems to suggest that the *Native Authority* was dominated by the chief. In the case of apartheid South Africa, the tribal authority was made up of the chief of the area, his headmen, councillors (some – the majority – appointed by the chief, the rest elected), and a tribal authority secretary. Some chiefs, though, were more autocratic than others.
4. One of the objectives of this research was to identify and research a "popular and democratic tribal system," as assumed by the DLA quote at the beginning of the chapter. The choice of the Tshezi communal area was partly influenced by that. As will be clear from the analysis of this case study, the *tribal system* in the area is certainly not democratic. Its popularity is questionable.
5. The terms *self-government* and *independence* have been put in italics to register my rejection of these areas to having been self-governing and independent. They were a creation of a system that excluded the vast majority of South Africans in decision-making processes.
6. The amaMphondo are situated in the Transkei region of the Eastern Cape, along the Wild Coast. They were victims of the *Mfecane*, "the massive upheaval and dispersion of African people throughout Southern Africa in the 1820s and 1830s, principally as a result of the rise and consolidation of the Zulu kingdom in Natal." (See Glossary in Beinart and Saul, 1995, 287.)
7. Peires compares pre-colonial chieftaincy to Western Europe in the Middle Ages, where the relationship was between *lord* and *serf*.
8. We have noted above, in the quote from Peires, that, due to "political competition between chiefs," it was not always smooth going to establish who the next *chief* in line was.
9. The system was later put forward as an alternative to African representation in Parliament. During the apartheid era, the council system was replaced by Bantu Authorities, which was a major step towards the establishment of *self-governing* territories in the Bantustans. Some of these were granted *independence*.

10. These headmen were appointed by the British in the Cape when they established magisterial districts. These districts were run by magistrates, and in each village, a headman would be appointed as the local representative of the magistrate.
11. This is merely an example, and no attempt is made to generalize.
12. This would increase land for African occupation to 13 per cent.
13. This means that for each additional wife, a new homestead site would be allotted. The allotment was traditionally for both residential and agricultural allotment, but with the enormous pressure on land in some areas, people are willing to accept a residential site only.
14. Conversations with committee members of the Spatial Development Initiatives (SDI) and the Interim Communal Property Association (CPA) in Mqanduli, Eastern Cape, December 1997 – June 1998.
15. This was a form of *villagization* that was introduced in the 1930s, but only implemented in the 1950s as a conservation measure against soil erosion.
16. The majority of land claims in the Transkei region of the Eastern Cape are based on such removals.
17. This section on the Bantu Authorities Act is drawn largely from Ntsebeza and Hendricks 1998, 5, and Tapscott 1997.
18. The position remained unchanged.
19. Interview with secretaries of tribal authorities in Mqanduli, 10 March 1999.
20. Annual reports of Calusa and Health Care Trust (1990–97), two NGOs operating in the Xhalanga magisterial district, Eastern Cape.
21. Interview with Mgweba, 18 August 1998.
22. As noted, the 1936 Act is still used in the Transkei to issue PTOs.
23. Which provides for the repeal of all laws regulating the acquisition of rights in land according to race, including the 1913 and 1936 Natives Land Acts, and for the rationalization of other laws that directly or indirectly restrict access to such rights.
24. For the rationalization of land registration systems and the upgrading of lower-order land tenure to full ownership.
25. John Bruce works for the Land Tenure Center, University of Wisconsin, Madison. From the early 1990s, the Land Tenure Center has offered courses and opportunities for NGOs and post-1994 government officials, some of whom were in NGOs before 1994.
26. National Party thinking here was undoubtedly influenced by World Bank thinking that linked tenure security with individual title deed.
27. It should be pointed out, though, that as early as 1993, the issue of entrenching the recognition of traditional authorities in the constitution was considered.
28. This does not mean that traditional authorities do not have a role to play in the lives of rural people. As has been mentioned, they could, depending on their acceptance and popularity, still play an important role in the maintenance of law and order, dispute resolution, and so on.
29. It may be difficult, though, to sustain this argument, given the approval of huge amounts, around R 32 million to remunerate traditional authorities, at a time when their roles and functions are far from clear.
30. This and the following sections draw substantially from reports and field notes by Erik Buiten and Lungisile Ntsebeza (author). Both of us were commissioned by the Department of Land Affairs to "resolve landownership and governance issues in the Tshezi Communal Area, Mqanduli, Eastern Cape." I am fully indebted to Erik Buiten, but accept full responsibility for the interpretation of events.
31. Presumably "the usual order" refers to tribal authorities established under colonial and apartheid rule.

32. It is argued that traditional authorities were never empowered and merely acted as local representatives for line departments.
33. For details of these two case studies, see my research report cited in endnote 1.
34. The term *traditional authority(ies)* was explained in the introduction to be used in this study as an all encompassing term to refer to *chiefs* of various ranks. It is used to refer to people, and not structures. *Tribal authorities* is used to refer to structures that were established by the Bantu Authorities Act of 1951 and are composed of traditional authorities.