

## CHAPTER 5

# **DEMOCRATIC DECENTRALIZATION AND TRADITIONAL AUTHORITY: DILEMMAS OF LAND ADMINISTRATION IN RURAL SOUTH AFRICA**

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## Summary

Post-apartheid South Africa embarked on an important democratization process that included reforms in local government and land administration in the former Bantustans. A new conception of ‘developmental local government’ introduced the notion of elected local leadership and an emphasis on improving the quality of life of previously disadvantaged sectors. Nevertheless, this democratization process risks serious compromise due to the concessions being made to traditional rural authorities—the same autocratic local authorities who enjoyed significant powers under apartheid. In particular, the legal transfer of land administration to elected officials has not occurred, leaving this important power under the authority of unaccountable local chiefs and headmen. Is democratic decentralization compatible with traditional authorities (chiefs of various ranks) who inherit their posts? While some chiefs and headmen may choose to promote local participation, the freedom to choose ones’ leaders is automatically excluded, seriously limiting downward accountability. The article argues that the central government must recognize this incompatibility and support the rights of rural residents to full citizenship.

## Introduction

Since the advent of democracy in 1994, South Africa has embarked on its own version of democratic decentralization in a range of areas. In this article, the issue of decentralization will be interrogated primarily through a focus on local government reform and land administration. This focus illuminates problems that are on the horizon for natural resources, such as forests, wildlife and fisheries, especially as these latter resources are to be managed through similar structures that are being constructed and contested in the local government and land policy arenas. Within this context, the role of traditional authorities<sup>1</sup> and municipal councilors will be assessed.

The Constitution of the Republic of South Africa establishes three distinct, interdependent and interrelated spheres of government, to wit, national, provincial and local government.<sup>2</sup> The local sphere of government is made up of municipalities. In terms of the Constitution, municipalities must be established throughout the country, including rural areas<sup>3</sup>. The Constitution further states that the national or a provincial government ‘may not compromise or impede a municipality’s ability or right to exercise its powers or perform its function’<sup>4</sup>. The Constitution and White Paper on Local Government define post-1994 local government as ‘developmental’, involving integrated development planning. This requires municipalities to co-ordinate all development activities within their areas of jurisdiction [*Pycroft, 1998: 151*].

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<sup>1</sup> The term ‘traditional authorities’ is used in this article as an all-encompassing term to refer to ‘chiefs’ of various ranks. It is thus used to refer to *people*, and not structures. The term used to refer to structures is ‘tribal authorities’, which were set up by the Bantu Authorities Act of 1951 and are composed of chiefs, headmen, appointed councilors and a tribal secretary. The term that is used in government documentation is ‘traditional leaders’, without any clarity as to whom precisely this term refers to. For example, are headmen ‘traditional leaders’? The extent to which traditional authorities/leaders are legitimate leaders is highly disputed. This partly explains the range in terminology.

<sup>2</sup> See *Section 40(1)*.

<sup>3</sup> See *Section 151(1)*.

<sup>4</sup> *Section 151(4)*.

Developmental local government thus seeks not only to democratize local government, by introducing the notion of elected representatives even in rural areas, but also to transform local governance, with a new focus on improving the standard of living and quality of life of previously disadvantaged sectors of the community [Pycroft, 1998: 155]. In addition, developmental local government requires that citizens should actively participate in development initiatives in their areas [see *section 152(1)(e) of the Constitution*; also, *African National Congress, 1994: 2-3; Ntsebeza, 1999; 2001*].

A legacy of the colonial and apartheid periods is that most land in the rural areas of the former Bantustans is owned by the state and the Development Trust, and administered and managed (during the apartheid period) by government-created tribal authorities. Although rural inhabitants are the effective owners of land, in the sense that they have lived in these areas for long periods of time, landholding based on the permit-to-occupy (PTO) system does not provide them with legally secure title comparable to freehold title. It is, above all, this insecurity of tenure that has created conditions for the exclusion of rural inhabitants from the administration and management of what is essentially their land. Land tenure reform aims to correct these imbalances.

Tenure security is addressed in South Africa's Constitution as follows: '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 legally secure tenure or to comparable redress'<sup>5</sup>. These constitutional provisions, coupled with the democratic principles enshrined in the Constitution and in various pieces of post-1994 legislation, establish conditions for new democratic and accountable institutions, with significant community participation, for land administration and management. The new structures that will perform the land administration and management functions will not necessarily be the new development local governments. However, whether land administration and management functions are performed by local government or not, local government will still be obliged to play its former regulatory and control roles, and, since 1994, fulfill its developmental mandate.

Despite the fact that a large number of traditional authorities became collaborators and stooges in the colonial and apartheid systems, the institution of traditional leadership gained recognition in South Africa's 1993 Interim Constitution, and 1996 Final Constitution. However, in these documents, there was no clarity as to the precise roles, functions, and powers of traditional authorities in rural local government or land administration. The recognition of the institution of traditional authorities raises a host of questions about the nature of democratic decentralization in the rural areas under traditional authorities. In particular, it raises the conceptual question of whether an inherently undemocratic, hereditary institution can exist in a South African democracy, purportedly modeled on the liberal tradition of representative government. Indeed, upholding a Constitution that enshrines democratic principles in the Bill of Rights, whilst acknowledging a political role, or roles, for un-elected and unaccountable traditional authorities, is inconsistent and contradictory. This contradiction also raises questions about the possible resolution of the identity of rural inhabitants in the former Bantustans in post-1994 South Africa. The issue here is whether rural residents will continue to be subjects under the political rule of un-elected traditional authorities, or will enjoy citizenship rights, including the right to choose leaders and representatives, that the South African Constitution confers on all South Africans.

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<sup>5</sup> *Section 25(6)*.

This article, in a nutshell, examines the institutional arrangements put in place in the name of decentralization and the impacts of these arrangements on land administration in particular in the rural areas of the former Bantustans of South Africa<sup>6</sup>. Of critical importance will be a discussion of the role of traditional authorities in post-1994 South Africa, particularly how they have responded to current policies and laws. At the heart of the discussion will be an assessment of the relationship between theory and practice.

### **Decentralization: key concepts**

An outline of two key concepts, ‘political/democratic decentralization’ and ‘decentralized despotism’, is useful for understanding South Africa’s dilemma inherent in democratizing rural areas while recognizing hereditary traditional authorities.

*Mamdani’s [1996]* thesis is that the colonial state in Africa was ‘bifurcated’, with different modes of rule for urban ‘citizens’ and rural ‘subjects’. The colonial strategy of ‘divide and rule’ took two related forms: an enforced division of Africans along ethnic lines, and an enforced division between town and countryside. According to Mamdani, the African was ‘containerised’, not as a native or indigenous African, but as a ‘tribespersion’. Colonialists justified ‘indirect rule’ on the basis that ‘tradition’ and ‘custom’ were indigenous forms of social organization. But, they reinforced and used these identities to divide and manage rural Africans. In order to enforce their dual policy of ‘ethnic pluralism’ and urban-rural division, colonialists, Mamdani asserts, exercised ‘force to an unusual degree’. In this way, colonial despotism was highly decentralized [1996: 22-4].

The chief, according to Mamdani, was a pivotal actor in the local state, the Native Authority. His authority was rooted in the fusion of various powers—judicial, legislative and executive — in his office, rather than the classic liberal democratic notion of a separation thereof. Mamdani uses the analogy of a ‘clenched fist’ to delineate this concentration of power. Native Authorities, according to him, were protected from threats by anyone but their colonial rulers. Their officials 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 argues that the colonial legacy was reproduced after independence. However, no nationalist government was content to reproduce the colonial legacy uncritically. Each attempted to reform the colonial state, but in doing so reproduced a part of that legacy, thereby creating its own variety of despotism. Post-colonial African states, whether conservative or radical, de-racialized the colonial state, but, according to Mamdani, did not democratize it. On democratic transformation, Mamdani proposes ‘nothing less than dismantling’ the ‘bifurcated state’. This will entail ‘an endeavor to link the urban and the rural—and thereby a series of related binary opposites such as rights and custom, representation and participation, centralization and decentralization, civil society and community—in ways that have yet to be done’ [1996:34].

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<sup>6</sup> Bantustans/reserves/homelands are areas that colonialists put aside for African occupation as early as the nineteenth century. The size of this land comprised about 13 percent of the South African land. After the 1994 democratic elections, these areas were reincorporated in South Africa.

These features of Native Authorities aptly capture the central features of Tribal Authorities that were set up during the apartheid period in South Africa. It is arguably in response to these that the post-apartheid state is making efforts to 'dismantle' Tribal Authorities. It is not clear, however, how far these new local political-administrative arrangements move away from the system of 'decentralized despotism' and toward a more democratic form of rural governance. The constitutional recognition of the hereditary 'institution of traditional leadership' without any clarity as to its roles, functions and powers makes these questions about democratizing rural governance even more urgent.

'Political/democratic decentralization' is said to occur when powers and resources are transferred to authorities that are 'downwardly accountable to local populations' [Agrawal and Ribot, 1999:478]. The aim is to increase public participation in local decision-making. Advocates of this kind of arrangement believe that locally accountable representatives with real public powers and greater community participation will increase efficiency and equity in the use of public resources. This notion of decentralization can be contrasted with other kinds of decentralization reforms taking place in the name of democratization and development. For example, deconcentration or administrative decentralization, and privatization, which are not democratic in nature, often accompany or take place in the name of democratic decentralization reforms. Deconcentration occurs when the central state transfers some responsibilities to its local branches. In this regard, local branches are primarily upwardly accountable to the central state, and not necessarily downwardly accountable to the communities they are serving. Proponents of democratic decentralization consider this form of decentralization as 'weak' precisely because it is not downwardly accountable and therefore not democratic.

Whether privatization could be regarded as a form of decentralization is a hotly debated issue. Those in dispute argue that decentralization concerns public resources, while privatization entails transferring public resources to private groups and individuals that may or may not serve public interests. As with deconcentration, these groups and individuals are not necessarily obliged to be 'downwardly accountable' to the communities they serve. Also, the logic of privatization is quite different from that of decentralization (Agrawal and Ribot 1999).

Manor [2001:2] has recently argued that studies of democratic decentralization indicate three essential conditions for democratic local government: substantial resources (especially financial resources) from higher levels of government; substantial powers to be devolved to local authorities; and mechanisms to ensure that bureaucrats are accountable to elected representatives, on the one hand, and mechanisms to ensure that elected representatives are accountable to voters, on the other.

Through the lens of land tenure and control, this article investigates the degree to which rural political administration is shifting away from the closed fist policies of colonial and apartheid decentralized despotism towards more democratic and enfranchising forms of rural authority.

### **Current dynamics in South Africa's countryside**

Almost ten years since the advent of democracy in South Africa, there is still confusion as to the form local government and land administration will take in South Africa, including the precise

role of traditional authorities. In the run-up to the 1994 elections, the majority of rural areas in the former Bantustans were characterized by deep tensions and clashes between traditional authorities and groups in civil society led by residents associations. The most popular civil organization that emerged from around 1993 was the South African National Civic Organisation (SANCO). At the center of these struggles was control over land, in particular, land allocation. In many rural areas residents associations led by SANCO took over the land allocation functions from traditional authorities. By 1994, there was a breakdown in land administration, including the issue of permits to occupy (PTOs), in many rural areas.

After the 1995/96 local government elections, these tensions manifested themselves between elected rural councilors and SANCO on one side, and traditional authorities on the other. The majority of rural councilors were drawn from SANCO activists. The confusion as to whose function it was to allocate land continued unabated. This was particularly true in the case where civic structures and traditional authorities had equal popular support. There are two levels at which this dilemma could be understood and explained: the law and practice. The laws governing the allocation of land in the rural areas of the former Bantustans have not been repealed. In this regard, the South African Constitution is clear that existing laws will remain in force until such time as they have been replaced by appropriate legislation. As will be seen below, the processes of establishing legislation to clarify land allocation procedures in post-1994 rural South Africa have borne no fruit. Hence, apartheid laws regarding allocation of land in rural areas remain in force.

Most rural residents, including rural councilors themselves, and indeed many South Africans, thought that land allocation was to be one of the responsibilities of the newly elected councilors. After all, control over land was the cardinal issue in rural struggles in the early- to mid-1990s. The perception of most rural residents was that all the functions that were performed by Tribal Authorities, including land allocation, would be taken over by elected councilors. These residents and rural councilors in particular, got a rude shock when it turned out that the old apartheid laws were still in place. Above all, government officials still use, with minor adjustments, the apartheid procedure and do not recognize elected councilors as having the powers to allocate land. The extent of the above confusion, the dilemma of rural residents, and the role of government officials over land allocation in areas falling under the jurisdiction of traditional authorities are well captured in testimony of one rural resident who was sympathetic to SANCO:

This is the reason why we still use chiefs. Rural councilors run in circles. This makes us a laughing stock and divides us. People will tell you: 'Go to your rural councilor, you won't succeed'. You end up going to the chief, even if you did not want to. At the magistrate's offices they ask you about the stamp [of the Tribal Authority]. If you do not have the stamp, they will say: "Don't waste our time". The land issue is complex. There is a struggle between TrepCs [Transitional Representative elected rural Councilors] and the headman. The former brought electricity and telephones, but land is in the hands of chiefs. You are forced to be flexible (*kufuneka ubemvoco*), otherwise you won't get your benefits. When we wanted land for pre-schools we were told to go to the headman, something that made the headman boastful. Sometimes you may have spoken badly about the headman, and you end up bowing down to it, as it is often necessary that you get what

you want. With chiefs and headmen it takes a few days to get what you want, whereas with rural councilors it takes months, and even then you end up not succeeding<sup>7</sup>.

The above reflects experiences in one administrative area in the Transkei where inhabitants were divided between supporters of the headman, and civic structures and rural councilors. In this area, civic structures under the auspices of SANCO demarcated land and allocated plots to its supporters, an indication that control of local governance by elected officials rather than traditional authorities is possible. However, those who were allocated plots were not granted PTOs as the government officials did not recognize their process. It is partly to this dilemma that the above informant was referring<sup>8</sup>.

The above quotation also says something about the performance of rural councilors. It is quite clear from interviews with many rural inhabitants across gender and generation that there was a lot of expectation that a developmental local government would transform their lives. By the end of the transition period in 2000, though, rural councilors had lost the confidence of ordinary rural residents who initially supported them. The main cause of the disgruntlement seems to have been lack of delivery of even basic services such as water and road maintenance. There are a number of reasons why performance has been poor, especially lack of adequate support from government in the form of allowances that could attract capable and skilled people, and a budget that could provide capacity building for councilors and finance essential services.<sup>9</sup> The lack of skill among councilors became evident when Integrated Development Plans (IDPs), so critical to developmental local government, had to be prepared. In many parts of the countryside, the IDP process was either not started, or never finalized. Where it was 'completed', consultants were the driving force behind the process and there was barely any participation of communities as required by the Constitution and legislation.

In short, serious deficiencies among rural councilors, partly as a result of lack of government support, have the potential of weakening democracy as rural residents lose confidence in their elected representatives and end up preferring unaccountable Tribal Authorities and their incumbents.

Before embarking on a further analysis of the current dilemma in the democratization of rural areas, it is worth situating the issue of traditional authorities in a brief historical context.

### **Traditional authorities in historical perspective**

Prior to the introduction of democracy in South Africa in 1994, especially during the apartheid period, local government and land administration were concentrated or fused in tribal authorities. These structures, which were made up of chiefs, headmen and councilors and a tribal secretary, were imposed on resisting rural inhabitants and were an extended arm of the central state. They were, not surprisingly, undemocratic, unaccountable, autocratic, and, in many instances, feared [Ntsebeza, 2001, 1999; Manona, 1998; Mbeki, 1984; Lodge, 1983]. The allocation of land provides an excellent example.

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<sup>7</sup> Interview with Mr. Jama, Cala, 9 September 2000.

<sup>8</sup> There are many similar cases.

<sup>9</sup> For details, see Ntsebeza 2001; 1999.

The process of allocating land started at a local, sub-headman area and was finalized with the issuing of a PTO by the magistrate/district commissioner<sup>10</sup>. In theory, a person, usually a man, who wanted land first identified the land and approached people in the neighborhood to establish if there were other claimants and solicit their support. In the event that the land was available, the applicant approached the sub-headman of the ward in which the property was situated. The sub-headman then called a ward general assembly (*imbizo*). The purpose of the meeting was to offer people an opportunity to comment on the application. If there were no objections, the sub-headman submitted the application to the headman of the administrative area. The headman verbally verified that the general assembly was called, and that no objections had been lodged. In addition, the headman established whether the applicant was a married, registered taxpayer. In this regard, the sub-headman had to produce a receipt issued by the magistrate as proof. If the applicant could not produce a receipt, the headman would have to accompany the applicant to the magistrate's office where he would be duly registered. The applicant could not go to the magistrate's office on his own, he had to be accompanied by a headman or the chief.

Upon production of the receipt, the headman then normally granted the application. This was seen as a formality. As one headman stated: 'As a headman, I accept and respect the decision of the sub-headman'. The headman submitted the application to the Tribal Authority. This was also seen as a formality. The Tribal Authority completed the application form that was submitted to the district commissioner. The application form had to be signed by the chief, councilors and the Tribal Authority Secretary. At this point the applicant was expected to pay an application fee to the Tribal Authority. This was the only fee that the applicant was supposed to pay.

In practice, though, the system of land allocation was complex and often did not adhere to the letter of the law. The main problem was how to monitor the system and make local authorities accountable. In the majority of cases, traditional authorities were upwardly accountable to the government, rather than to the rural residents. The apartheid and Bantustan regimes gave traditional authorities such powers that they were feared rather than respected by their communities [*Delius, 1996; Ntsebeza, 1999*]. This made it extremely difficult for ordinary rural residents to hold traditional authorities accountable.

Some traditional authorities exploited the lack of 'checks and balances'. There were basically two forms of violations, allocating land without going through the procedure, and illegal taxation. Traditional authorities abused their power by charging unauthorized fees, in the name of the 'rights of the great place' (*iimfanelo zakomkhulu*) to applicants. These included alcohol, poultry, sheep, and even an ox. This practice reached its zenith in the early 1990s when, for instance, some cottage sites were illegally allocated to some 'whites' along the Wild Coast in the old Transkei. These sites were dubbed 'brandy sites', as it was imperative that applications be accompanied by a bottle of brandy. It was standard practice in some parts that ordinary rural residents present the sub-headman with a bottle of brandy (or some suitable gift) [*De Wet and McAllister, 1983:50*]. Further, in a number of cases, traditional authorities allocated land to rural residents bypassing the district commissioner. These rural residents were consequently not issued a PTO.

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<sup>10</sup> This account is based on interviews with various rural residents, sub-headmen, headmen, chiefs and government officials.



It is against the background of collapse in land administration, tensions between traditional authorities and democratically elected civic structures and the imperative of democracy following the first non-racial elections in 1994 that policy on rural governance and its implementation in South Africa should be understood.

### **Policy on rural local government and land administration in post-1994 South Africa**

The post-1994 ANC-led South African government attempts to separate, amongst others, local government, land ownership and administration functions and powers, and decentralize them to democratically accountable local institutions, with an emphasis on the active participation of communities in decision-making processes. The tension though, as will be seen below, is that the same government also recognizes the hereditary 'institution of traditional authorities' without, it appears, questioning its role during the colonial and apartheid periods, and without clarifying its roles, functions, and powers in post-1994 developmental local government and land administration and management.

#### *Rural local government*

The local sphere of government, according to the Constitution, consists of municipalities, established throughout the country, including rural areas. A 'transitional' policy on rural local government in the former Bantustans was initially established in 1995. The 1995 law established a two-level structure, consisting of a district council at a sub-regional level, and a range of possible structures at the local (primary) level<sup>11</sup>. In rural areas, the primary structures, established at the magisterial district level, would either be transitional rural councils (TRCs), or transitional representative councils (TrepCs). The main difference between TRCs and TrepCs was that the former were accorded the powers of a full-fledged local authority, while TrepCs were accorded far fewer powers, and were seen as fulfilling representative and brokering functions. The District Council performed local authority functions on behalf of TrepCs. In theory, TrepCs could eventually evolve into effective and democratic local authorities. In practice, however, these structures never, at the end of the transitional period in 2000, evolved into local authorities. This is an important point to keep in mind given that almost all the rural areas in the former Bantustans had TrepCs.

An integral aspect of developmental local government is integrated development planning, which requires municipalities, in addition to providing services, to coordinate all development activities within their jurisdiction in order to improve the standard of living and quality of life of previously disadvantaged sectors of the community. In this regard, all municipalities are required to produce Integrated Development Plans (IDPs) and Land Development Objectives (LDOs). According to the White Paper on Local Government (DPACD 1998), the LDOs should be seen as part of the IDPs and not as a separate planning process. Both the Constitution and legislation emphasize the need for community participation in the formulation of IDPs to ensure that these plans are expressive of the needs and priorities of local people, rather than central government.

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<sup>11</sup> The sub-regional level consisted of a couple of magisterial districts. A magisterial district consisted of a district town and a number of administrative areas.

The role of traditional authorities (chiefs of various ranks) in a post-1994 democracy, including local government, was never explicitly stated from the beginning of the political negotiation process that led to the first democratic election in 1994. In the past, as already shown, these authorities enjoyed unrivaled powers over a range of activities in the rural areas of the former Bantustans. Both the interim and final Constitutions merely incorporated a clause recognizing 'the institution of traditional leadership' without any clarity or guidelines as to its roles, functions and powers. The Local Government Transitional Act of 1993, as amended in 1995, provided an extremely limited, if not vague, role for traditional authorities in local government. Defining them as an 'interest group' along with women and farm workers, the Act gave traditional authorities not more than ten percent representation in an *ex officio* capacity.

### *Land administration*

Attempts to empower rural residents by involving them in decision-making processes on land issues were given a boost with the launch of the White Paper on Land Policy in April 1997 (DLA, 1997). The White Paper drew a crucial distinction between 'ownership' and 'governance' in land issues in rural areas. This distinction was blurred in the colonial and apartheid eras, as the state was both legal owner and administrator of land. By drawing the distinction, the White Paper introduced a separation of the functions of ownership and governance, 'so that ownership can be transferred from the state to the communities and individuals on land' [1997:93].

By the beginning of 1998, the Department of Land Affairs (DLA) had developed principles that would guide its legislative and implementation framework. These included that:

- These rights should be vested in the people who are holders of the land and not in institutions such as tribal or local authorities. In some cases, the underlying rights belong to groups and in other cases to individuals or families. Where the rights to be confirmed exist on a group basis, the rights holders must have a choice about the system of land administration, which will manage their land rights on a day-to-day basis.
- In situations of group-held land rights, the basic human rights of all members must be protected, including the right to democratic decision-making processes and equality. Government must have access to members of group-held systems in order to ascertain their views and wishes in respect of proposed development projects and other matters pertaining to their land rights.
- Systems of land administration that 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 *et al.*, 1998:528].

Three issues need to be highlighted in this regard. First, we should consider the distinction between land ownership and governance. Following the DLA principles, members of particular communities become co-owners of land. This is an ownership issue. As co-owners, the principles imply, it will be up to them to decide how they want their land to be administered. The latter is an issue of governance.

A further implication of this distinction is that the concentration or fusion of functions in tribal authorities would be undermined. There would, instead, be a clear separation of the functions. The four main actors are: landowners (the broad community), land administrators or managers (the officials/bureaucrats), traditional authorities, and local government. The latter two will not be the owners of land, and will not necessarily have the right to allocate land, unless specifically asked by the landowners to do so. However, as a body representing public interests, local government will continue to perform its control, regulatory and (in terms of the Constitution) development functions.

Lastly, it is quite clear from the above that the Department of Land Affairs intended to subject traditional authorities to a system that would make them more representative and accountable to their communities. However, as noted, establishing democratic and accountable structures while recognizing an undemocratic and unaccountable institution of traditional leadership, especially in the form that has been inherited from the apartheid past, is a fundamental contradiction. I develop this further below.

Law that would give effect to the above policies laid down in the White Paper on Land Policy has yet to see the light of the day. The unresolved question of the role of traditional authorities in local government and land reform seems central to this delay<sup>12</sup>.

#### *Traditional authorities and government shift*

Traditional authorities are vehemently opposed to the moves of the ANC-led government to introduce decentralization and democratization in rural areas under their jurisdiction. What is striking about the post-1994 period is that traditional authorities, despite earlier divisions, seem to be drawing closer and closer to one another [Ntsebeza, 2001,1999]. While the initial collaboration was around local government, it is quite clear that the main issue that brings traditional authorities together is their opposition to the notion of introducing new democratic structures. They would be happy to be the only primary structure in rural areas and insist on preserving the concentration of functions they enjoyed under apartheid. With regard to land-tenure reform, traditional authorities agree with government that land in the rural areas of the former Bantustans should not be the property of the state. But they want land to be transferred to them or their structures, the Tribal Authorities, rather than transferred to individuals or democratically constituted and accountable legal entities such as Communal Property Associations.

Government seems to have succumbed to the above pressure exerted by traditional authorities. As we have seen, policy and legislation in the immediate post-1994 period seemed, on the whole, to have been driven by a commitment to extend participatory and representative notions of democracy to rural areas. An expression of this radicalism was the promulgation of the Regulation of Development in Rural Areas Act, 1997 by the Eastern Cape Legislature. This Act

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<sup>12</sup> It is worth noting that a draft Communal Land Rights Bill was gazetted on 14 August 2002. This bill proposes the transfer of registrable land rights to individuals, families and communities. On land administration, it divests traditional authorities of their land administration functions, including land allocation in favor of democratically elected administrative structures. Where applicable, 'legitimate' traditional authorities are accorded *ex officio* representation not exceeding 25 percent. It is difficult to predict how events will unfold, and whether a clear-cut piece of legislation defining a clear role for traditional authorities in land and local government will finally emerge.

sought to divest traditional authorities of all their development functions and transfer these to elected councilors. This, of course, was in line with new functions of local government. However, since the end of 1997, the pendulum seems to have swung in favor of traditional authorities [Ntsebeza, 2001]. The White Paper on Local Government published in March 1998 makes broad and sweeping statements about the possible role that traditional authorities can play. Traditional 'leadership' is assigned 'a role closest to the people'. On the issue of development, a task that has been added to local government by the Constitution, the White Paper [1998:77] boldly asserts: 'There is no doubt that the important role that traditional leaders have played in the development of their communities should be continued'.

The recommendation in the White Paper that 'the institution of traditional leadership' should 'play a role closest to the people' flies in the face of the recommendation of the 1994 ANC election manifesto, the Reconstruction and Development Programme (RDP). The RDP was emphatic that democratically elected local government structures should play this role. The White Paper thus marks a major shift in government policy, and has grave consequences for the possibility of democracy in rural areas. Similarly, the Constitution has explicitly added development functions to democratically elected local government structures. Yet, the White Paper recommends that traditional authorities should continue performing these tasks. Moreover, the statement that traditional authorities played an important role in development among their communities must be viewed with suspicion. No evidence is adduced to support this statement. Existing evidence shows that traditional authorities were never directly involved in development projects. These projects were implemented by government line-departments. Where traditional authorities acted as a link between government departments and their communities, research has shown that they have often been corrupt. An example is the illegal taxes that traditional authorities imposed in the land allocation process [Ntsebeza, 1999]<sup>13</sup>.

The issue of the role of traditional authorities was the subject of much discussion and negotiation in the run-up to the second democratic local government election in December 2000. It was instrumental in causing the postponement of announcing the date for the election. The position of the government was, in the run up to the election, still ambivalent. After a series of meetings between the government and traditional authorities, the government made some concessions. The first significant one was an amendment of the 1998 Municipal Structures Act that was successfully rushed through Parliament just before the local government elections. The amendment increases the representation of traditional authorities from ten percent to twenty percent of the total number of councilors. Further, traditional authorities would not only be represented at a local government level, but also at a district and, in the case of KwaZulu Natal, metropolitan level. Traditional authorities, though, would not have the right to vote.

This concession seemed to have encouraged traditional authorities to ask for more. They rejected the twenty percent increase. They wanted nothing short of amending the Constitution and legislation flowing from it regarding municipalities in rural areas in the former Bantustans. They wanted municipalities to be scrapped in these areas in favor of apartheid era Tribal Authorities as the primary local government structures. Traditional authorities have claimed that the President

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<sup>13</sup> This shift in ANC thinking regarding traditional authorities should be seen against the backdrop of a wider conservative shift in the ANC soon after the 1994 election. The announcement of the Growth, Employment and Redistribution (GEAR) economic policy was the first major expression of this shift [Fine and Padayachee 2001; Bond 2000; Marais 1998].

had promised them, in word and in writing, that their powers would not be tampered with. If anything, they would be increased<sup>14</sup>. On his part, the President has neither denied nor endorsed the traditional authorities claim. This makes it difficult to know the implications of this statement in terms of policy, law and practice.

The manner in which this vexed issue of the role of traditional authorities in a post-1994 democratic South Africa is handled and negotiated is intriguing. In so far as local governments are concerned, traditional authorities fall under the Department of Provincial and Local Government. In practice, though, traditional authorities do not seem to be recognizing this Department. They prefer that the Nation's President and the Deputy President handle their matters. For example, traditional authorities have submitted almost all their requests to the Office of the President. They seem to think that the Minister of Provincial and Local Government is not as favorably disposed towards them as the President. Alternatively, this might be a deliberate strategy to pit the President against the Minister.

The response of government to the requests by traditional authorities was, for the second time in as many months, to present a bill to parliament to amend the Municipal Structures Act. The bill did not address the central demand of traditional authorities, the scrapping of municipalities in rural areas in favor of Tribal Authorities, but merely sought to give local government powers to delegate certain powers and functions to traditional authorities. In addition, a range of peripheral duties would be assigned to traditional authorities. Predictably, traditional authorities rejected the bill and threatened to boycott the 2000 local government election. They also threatened that there would be violence in their areas if their demands were not met. The bill was subsequently withdrawn on a technicality. It would seem that the President made some undertakings, given that traditional authorities eventually participated in the election.

A much shorter draft amendment of the Municipal Structures Act was published on 20 November 2000 for public comment. It seems clear from this draft amendment that a trade-off is proposed. The government has resisted amending the Constitution regarding municipalities in rural areas. However, the draft amendment to the Municipal Structures Act gives traditional authorities control over the allocation of land in so-called communal areas. *Section 81(1) (a) of the Municipal Structures Second Amendment Bill [2000]*:

Despite anything contained in any other law, a traditional authority observing a system of customary law continues to exist and to exercise powers and perform functions conferred upon it in terms of indigenous law, customs and statutory law, which powers and functions include—(a) the right to administer communal land.

The South African Legal Resources Centre, a public-interest law clinic with offices in key South African cities, has, with due cause, objected to this clause. In its submission to the Portfolio Committee on Provincial and Local Government, the Legal Resources Centre has pointed out that the phrase, 'Despite anything contained in any other law', has the effect of overriding 'a vast but indeterminable number of laws in a vast but indeterminable number of areas of our national life'. The Legal Resources Centre interpreted the phrase to mean that, 'as far as development and the management and use of natural resources are concerned, this Act overrides the requirements

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<sup>14</sup> It has not been possible to get a copy of or verify this commitment on the part of the President.

of other critical national laws'<sup>15</sup>. These national laws would include laws on environmental affairs and local government, and insist that citizens should be accorded the right to democratic participation in decisions that affect them. At the time of writing this article, however, the draft amendment had not been discussed in the Portfolio Committee. In this committee, the public is given an opportunity to make an input before the bill is presented to parliament.

### **Decentralization in rural South Africa: What type?**

It is difficult to neatly classify decentralization in rural South Africa into any of the categories described above: decentralized despotism and democratic/political decentralization. There is a sense in which it could be argued that by insisting on decentralized representative and participatory structures, post-1994 policies on local government and land reform, for example, meet the requirements of political decentralization. Problems, though, arise when the thorny issue of the role, functions and powers of traditional authorities has to be considered, especially given the constitutional recognition of the 'institution of traditional leadership'. The key question that needs to be addressed is whether the institution of traditional leadership is compatible with democratic decentralization or not.

There are two cardinal principles of democratic decentralization that are worth recalling: downward accountability of public officials and of elected representatives. The institution of traditional leadership can potentially be democratic in one important respect: the involvement of rural residents in decision-making processes. This was indeed the hallmark of governance in most southern African societies at the advent of colonialism<sup>16</sup>. However, during colonialism and apartheid, decisions taken at these gatherings, including land allocation decisions, were merely advisory, and needed the final endorsement of the magistrate. In addition, as has been shown, the system was open to abuse. There is, however, a critical sense in which the institution in South Africa cannot be democratic. In so far as so-called traditional leadership is based on ascribed, hereditary rule, the possibility of rural residents having the freedom to choose which institution and/or individuals should rule them is automatically excluded. Yet, it is precisely this right upon which democratic decentralization and indeed the South African Constitution are based.

The Department of Land Affairs has attempted to marry the two systems by suggesting that there may be examples of a 'popular and democratic tribal system'. However, it is not clear what this statement means. More precisely, what is the mechanism for determining the popularity of traditional authorities and their institutions? The argument that traditional authorities and their structures are popular because rural residents utilize them is specious because using alternative authorities is not practical and the options of rural residents to oppose are very limited. The interview with the rural resident of Transkai, quoted above, clearly illustrates this point.

How do we explain the South African government's ambivalence on the issue of traditional authorities? The reason could be that the government is mindful of the bloody conflict in rural

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<sup>15</sup> Submission by the Legal Resources Centre to the Portfolio Committee on Provincial and Local Government, 18 January 2001.

<sup>16</sup> It should be pointed out, though, that only men participated in these gatherings (*imbizo/pitso/kgotla*). Further, these systems differed, with some more autocratic than others (*Ntsebeza 1999*).

KwaZulu-Natal in the 1980s and 1990s and the need to avoid its repetition. Recently Lodge [quoted in *Dladla, 2000:15*] has argued that government accommodation of traditional authorities was 'a compromise to avert a threatened boycott of the first general elections by the Inkatha Freedom Party if the institution was not recognized and protected in the constitution. If it was not for the pressure from the IFP, the institution would have been destroyed by now'. He argues further that: 'Rather than abolishing it, the ANC is creating legislation conditions through local government that will allow for the gradual phasing out of the institution which is done to avoid resistance from traditionalists... the ANC has become more tactful and has recognized that abolishing the institution will cause serious political conflict in the country'. Another reason could be that government does not have the capacity to set up and monitor new structures.

However, even if this were the case, the issue of the meaning of democracy in post-1994 rural South Africa would stand. More specifically, whether rural residents should continue to be 'subjects' after 1994, when their counterparts in urban areas enjoy citizenship rights, would still haunt us. My position is that democracy should, at least, be both participatory and representative, rather than one or the other. Ensuring that rural residents enjoy the right to choose their representatives remains one of the key challenges of the ANC-led, post-1994 government.

It is important to note that the system of electing representatives in rural South Africa is not without its problems. During the transition period, the system adopted for rural areas was proportional representation. This contrasted with the situation in the urban areas, where the electoral system was based on a combination of constituency and proportional representation. Following the demarcation of municipal boundaries in 2000, new municipalities were established. A model amalgamating several urban and rural municipalities was adopted. The electoral system combining constituency and proportional representation that applied to urban areas was extended to all post-2000 municipalities with wards. The proportional representation system, it must be noted, is the dominant one. According to this system, citizens vote for political parties. In terms of the constituency system, on the other hand, voters vote for a candidate. The main problem with the proportional representation system is that councilors are prone to be primarily accountable to their political parties or the leadership thereof rather than downwardly accountable to voters.

The main difference between elected rural councilors and traditional authorities in South Africa, though, is that there is always the possibility of replacing councilors or their political party in an election, an option that is not available with traditional authorities.

In a nutshell, the ambivalence of government regarding the role of traditional authorities in a democratic dispensation and the lack of support for elected rural councilors throws the prospects of democratic decentralization in rural areas into serious doubt. Clearly, the unresolved question of the role of traditional authorities creates a state of confusion on the ground, especially as to who has rights over land administration in rural areas between traditional authorities and rural councilors.

## Conclusion

Post-1994 South Africa is moving from an authoritarian apartheid regime to a post-1994 democracy strongly influenced by liberal democratic values that include representative government. But how far has this transition gone? This article employed two key concepts to analyze the implications of decentralization reforms in rural South Africa: decentralized despotism [*Mandani, 1996*] and democratic decentralization [*Manor, 2001; Agrawal and Ribot, 1999*]. It examined the institutional arrangements put in place to give effect to decentralization, and their impact on land administration in the rural areas of South Africa's former Bantustans.

It is not possible to assess the impact of democratic decentralization in rural South Africa for the simple reason that decentralization in this sector is at best incomplete. In the area of land administration, the law that would establish a post-1994 system of land ownership and administration has not been promulgated after almost ten years. Although laws exist to establish developmental local government, full implementation has yet to happen.

The major stumbling block to implementing democratic decentralization is the unresolved question of the roles, powers and functions of traditional authorities in land and local government reform. Democratic decentralization, with its insistence on elected representatives, is incompatible with the recognition of a hereditary institution of traditional leadership. The lack of adequate government support for the newly established democratic structures also poses a serious obstacle.

Both these problems have led to a state of confusion with potentially disastrous consequences for land administration. The absence of rules, formal and informal, in many rural areas in the Eastern Cape, with regard to grazing and to harvesting of natural resources, raises serious questions about the future of these resources and impact on the environment.

The post-1994 ANC-led government must reformulate the roles, functions, and powers of traditional authorities in a democracy, taking into account the incompatibility of democratic decentralization and hereditary rule that underlines traditional authority. The central issue that the government must decide is whether rural residents should continue to be subjects, when their counterparts in urban areas enjoy full rights as citizens.

Ensuring that rural residents enjoy the right to choose their own representatives and leaders is the key challenge.



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