

**Rural governance in post-1994 South Africa: Has the question of citizenship for rural inhabitants been settled 10 years in South Africa's democracy?**

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**ABSTRACT**

Against the background of rural local governance that was dominated by apartheid created authoritarian Tribal Authorities, the post-1994 South African state has committed itself to the establishment of an accountable, democratic and effective form of governance throughout the country, including rural areas falling under the jurisdiction of traditional authorities (chiefs of various ranks). However, I argue that the promulgation of the Traditional Leadership and Governance Framework Act and the Communal Land Rights Bill (CLRБ) runs the risk of compromising this project. The Framework Act establishes traditional councils which are dominated by unelected traditional authorities and their appointees, while the CLRБ gives these structures unprecedented powers over land administration and allocation. This raises, I argue, serious questions about the meaning of democracy and citizenship in post-1994, in particular for rural people. Rural citizens do not seem to enjoy the same rights as their urban counterparts who elect their leaders.

## Introduction

The post-1994 South African state has committed itself to the establishment of a democratic, representative and accountable form of governance throughout the country.<sup>1</sup> This is by far a most challenging task especially given the authoritarian and despotic histories of colonialism and apartheid in this country. An area where these highly undemocratic practices and injustices of the past manifested themselves and which forms the basis of this chapter is the rural areas falling under the jurisdiction of traditional authorities.<sup>2</sup> The post-1994 state has inherited a system of administration in these areas that was based on the concentration of all power in these areas in the hands of unaccountable traditional authorities (chiefs and headmen).<sup>3</sup> Despite claims by the apartheid architects that this form of rule was based on pre-colonial African institutions, in reality, the “institution of traditional leadership”, in the form of apartheid created Tribal Authorities, was incorporated into the structures of government as an extended arm. Tribal Authorities were, in the mould of their apartheid creators, highly authoritarian and despotic. As a result they were discredited, hated and feared.

Soon after the advent of democracy in 1994, the ANC-led government embarked on the all important democratization process. In the rural areas of the former Bantustans, this included attempts to dismantle the concentration of powers in Tribal Authorities in the form of reforms in local government and land administration.<sup>4</sup> As will be seen below, 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. Attempts are also being made to democratise the

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<sup>1</sup> See the 1996 South African Constitution on the Bill of Rights and Local Government.

<sup>2</sup> The term “traditional authorities” is used in this paper as an all-encompassing term to refer to “chiefs” of various ranks. It is thus used to refer to *people*, and not structures such as Tribal Authorities. Since the 1990s, the use of the term “chiefs” has increasingly been viewed by traditional authorities, government officials and some analysts as derogatory. A range of names is thus used, the most popular being “traditional leaders”. The extent to which traditional authorities/leaders are legitimate leaders is highly disputed. This partly explains the range of terminology.

<sup>3</sup> See Mamdani (1996) and his notion of a “clenched fist” leading to a “decentralised despotism”.

<sup>4</sup> Bantustans/homelands/reserves are areas which colonialists put aside for African occupation as early as the nineteenth century. The size of this land comprised about 13% of the South African land. It is in the rural areas of these Bantustans that traditional authorities were given wide ranging powers. After the 1994 democratic elections, these areas were formally reincorporated in South Africa.

system of land administration with a focus on including women in land administration structures.

However, it is argued in this paper that this democratization process risks serious compromise. After years of ambivalence and prevarication, the ANC-led government passed through parliament two Bills, the Traditional Leadership and Governance Framework Act and the Communal Land Rights Bill which make concessions to traditional authorities, effectively resuscitating the powers they enjoyed under the notorious Bantu Authorities Act of 1951. As will be seen below, the Framework Act accepts Tribal Authorities as a foundation for establishing what it refers to as Traditional Councils, while the Communal Land Rights Bill recognises these Traditional Councils as having the authority to administer and allocate land in the rural areas. This raises critical questions about citizenship and the nature of democracy in South Africa. Is liberal democracy as espoused in the South African Constitution compatible with traditional authorities who inherit their posts? To what extent is the granting of separate and different rights to rural and urban South Africans a continuation of colonial and apartheid divisions between the urban and the rural? Is the denial of the right to elect one's leaders compatible with democracy and full citizenship?

This paper explores the manner in which the South African state has attempted to extend democracy to the rural areas falling under traditional authorities with particular focus on the tension in the constitution between enshrining democratic principles largely modelled along liberal democratic lines of representative government, on the one hand, and recognising and giving wide ranging powers to an inherently undemocratic hereditary institution of traditional leadership. The role of traditional authorities will be investigated against the backdrop of the role they played during the colonial and apartheid periods. The discussion of the role of traditional authorities in post-1994 rural development will be explored through the prism of local government and land administration. The cardinal issue here is whether rural residents must continue to be "subjects" under the rule of unelected traditional authorities, or whether they will enjoy the citizenship rights, including the right to elect leaders and representatives, the South African constitution confers on all South Africans, or both.

## **Conceptual and Historical Background**

The main conceptual issue confronting the post-1994 state is whether it is possible to democratize rural local governance along enfranchising forms of rural authority while at the same time recognizing and giving powers to an unelected, hereditary institution of traditional leadership. This is a question that does not only affect South Africa, but many African countries that have hereditary traditional institutions. There seem to be two schools of thought on this matter, what I call a co-existence thesis and a common citizenship approach.

Mamdani's (1996) is by far the foremost advocate of the common citizenship school. His 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 'tribesperson.' 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 pivotal in the local state, the Native Authority. His authority was rooted in the fusion of various powers, judicial, legislative, executive and administrative, 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 any external threat. 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, deracialised 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 endeavour 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).

On their part, Bank and Southall (1996) have argued that democracy in post-colonial Africa would be compromised if traditional authorities were accorded an active role in politics. They doubt the capacity of traditional authorities in political administration. Drawing from the South African experience, Bank and Southall point out that a large number of traditional authorities became collaborators with the apartheid regime and were unaccountable and corrupt when they administered the former Bantustans. They also argue that there is a conflict between the patriarchal values of traditional leadership and gender equality that is entrenched in the constitution. For Bank and Southall the role of traditional authorities should be confined to ceremonial functions. They, however, do not elaborate on what these would be in concrete terms.

Ismail (1999:1-5), on the other hand, is critical of the manner in which post-colonial African states have addressed the role of traditional authorities. He accuses those who were engaged in the South African political negotiation process in the early 1990s of merely raising and making 'platitudinous statements regarding the future role of chiefs' without any concrete suggestions. According to him, and here he would presumably include Bank and Southall, the general trend 'has been dramatic marginalisation' of traditional authorities and their 'traditional roles' or 'a mere symbolic retention of the institution'. He suggests a model that he considers to be 'effective, yet realistic' that would engage traditional authorities 'and some aspects of indigenous governance in liberal democratic governance'. Ismail strongly proposes that 'indigenous governance' has its 'democratic elements' that 'can strengthen rather than weaken current efforts to build a democratic culture among the African people'.

According to him, this kind of engagement could lead to the democratisation of the 'institution itself'.

The meaning of democracy has also been revisited in the context of the advent of multi-party democracy and decentralisation in the 1990s. According to Agrawal and Ribot (1999:478) 'political/democratic decentralization' is said to occur when powers and resources are transferred to authorities that are 'downwardly accountable to local populations'. Manor (2001:2) has elaborated on this notion and recently argued that studies of democratic decentralization point out 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 hand.

Apart from the conceptual and theoretical issues that the ANC-led government has to grapple with, there is also the legacy of traditional authorities that is important to take into account. Indeed, the features of Native Authorities that Mamdani depicts in general terms aptly capture those of Tribal Authorities in South Africa. These apartheid-era structures fitted Mamdani's notion of a 'clenched fist' in the sense that all power, including local government and land administration in the rural areas of the former Bantustans were concentrated or fused in them. They comprised of chiefs, headmen and councilors and a tribal secretary.

Tribal authorities were imposed on resisting rural inhabitants and were an extended arm of the central state. A prime objective of the National Party when they came to power in 1948 was to resolve the question of 'native administration', what Hendricks (1990) appropriately refers to as retribalisation. Chiefs and headmen were roped in and were given greater administrative powers than during the segregation period. Their main function, as Evans puts it, was 'to contain and discipline the reserve army of African labour: those Africans prevented by law from departing to the urban areas, the "idle or disorderly" evicted from the urban areas, and the "excess labour"

skimmed off the white farming areas' (1997:260).<sup>5</sup> According to Hendricks, 'the state's policy was transformed from a stated commitment to "saving the soil" to an attempt to reinvigorate tribalism in the reserves as a cooptive device bringing African chiefs and headmen into the local machinery of government' (1990:122).<sup>6</sup> They were, not surprisingly, discredited, undemocratic, unaccountable, autocratic, and, in many instances, feared (Ntsebeza 2001, 1999; Manona 1998; Mbeki 1984; Lodge 1983).

The involvement of traditional authorities thoroughly discredited even those who may have enjoyed some degree of legitimacy during the segregation period prior to apartheid, by virtue of their marginalization. Hammond-Tooke (1975) has argued that some traditional authorities gained legitimacy among their people for the simple reason that they were not identified with government policies.<sup>7</sup> Those that are often cited as having retained their legitimacy include paramount chiefs Sabata Dalindyebo of abaThembu and Morwamoche Sekhukhune in the Northern Transvaal, now Limpopo (Delius 1996; Lodge 1983). Van Kessel and Oomen have even made an unsubstantiated claim that Sabata 'headed the revolt in Tembuland' (1997:563). Some residents in western Thembuland in the Eastern Cape and political activists such as Tsotsi (1989) also regarded chief K.D. Matanzima as a "progressive" chief. However, with the introduction of the Bantu Authorities Act, there was little room left for this variation. As paid government agents, they were forced to comply (for details and examples see Ntsebeza 2004; 2002).

Having said this, traditional authorities did not all relate in the same way to the apartheid system. There were those, such as K.D. Matanzima, who shamelessly collaborated with the apartheid regime. Others, such as Sabata Dalindyebo, were reluctant participants in the apartheid game.<sup>8</sup> Yet chiefs such as Albert Luthuli and

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<sup>5</sup> See also Hendricks 1990; 1989. To ensure that unemployed Africans were restricted to the reserves, the National Party adopted the Unemployment Labour Preference Policy (ULPP). This policy was meant to serve both as a measure to curb African urbanization and at the same time act as a social and political control over the youth problem (Posel 1991:131).

<sup>6</sup> See Mafeje 1963:7

<sup>7</sup> It is important to bear in mind, though, that the Native Administration Act of 1927 had already undermined the independence of chiefs. For example, the Act provided that the chief or headman carry out orders given "through the Bantu Affairs Commissioner or any other officer of the Government", on pain of summary dismissal.

<sup>8</sup> 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 in 1985. For details of the power struggle between Sabata and Matanzima, see Ntsebeza 2002, chapter 6.

Nelson Mandela never collaborated with the apartheid system and Luthuli was even willing to renounce his chieftainship. However, both the latter were minor chiefs and it is as leaders of political organisations, and not as traditional authorities, that they won their recognition.

Tribal Authorities were set up even in areas where there were no chiefs, a recognition on the part of the apartheid regime that rural areas were very uneven and not homogeneous. In these areas, Community Authorities, headed by headmen, were established.<sup>9</sup> By making chiefs central in apartheid administration in the rural areas of the former Bantustans, the Bantu Authorities Act thus represented one of the building blocks of apartheid policy of consolidating reserves/Bantustans/homelands. These Bantustans were later to become self-governing, and for some, independent.<sup>10</sup>

Given its significance in the post-1994 period, it is worth noting that the powers of traditional authorities and their structures were, even during the apartheid period when they were given greater powers, subject to endorsement by magistrates, from the chief magistrate downwards to District Commissioners. As Spiegel noted, magistrates were as concerned with administration of agriculture and roads, engineering, health, welfare and education, land allocation and tenure, and the collection of taxes, as they were with local administration of justice (1992:34). The allocation of land, one of the contentious issues in the current period of democracy in South Africa, provides an excellent example.

The process of allocating land started at a local, sub-headman area and was finalised with the issuing of a PTO by the magistrate/district commissioner.<sup>11</sup> In theory, a person, usually a man, who wanted land first identified the land and approached people in the neighbourhood to establish if there were other claimants and to solicit their support. In the event that the land was available, the applicant approached the

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<sup>9</sup> It should be noted that with time, the term “Tribal Authority” was used as a general term.

<sup>10</sup> None of the Bantustans was recognized as independent countries other than by the apartheid regime that gave birth to them and other Bantustans.

<sup>11</sup> This account is based on interviews with various rural residents, sub-headmen, headmen, chiefs and government officials.

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. In the event of there being 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. Only at this point was the applicant expected to pay an application fee to the Tribal Authority in order to augment the funds of the latter. 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 those charged with authority to be accountable. In the majority of cases, traditional authorities were upwardly accountable to the government, rather than to the rural residents. This was made possible by the fact that the apartheid and Bantustan regimes gave traditional authorities such powers that they were feared, rather than, respected by their communities (Delius 2000; Ntsebeza 1999). This made it extremely difficult for ordinary, elderly rural residents to hold traditional authorities accountable.

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 with a PTO.

### **Dealing with the legacy of ‘decentralized despotism’**

The framework for developing a policy on rural local governance in South Africa is provided in the 1996 Constitution of South Africa. As indicated, it is contradictory in the sense that while providing a basis for ‘dismantling’ the ‘clenched fist’ of Tribal Authorities by means of democratically elected representatives, the constitution recognizes a role for the hereditary institution of traditional leadership. The constitution itself is silent on the specific roles, functions and powers of the institution of traditional authorities in a democracy. It only provides guidelines for legislative processes that will clarify the roles, functions and powers. For almost 10 years, the ANC-led government has been attempting to introduce the necessary legislation that would bring some degree of clarity on these matters. The Leadership and Governance Framework Act (the Framework Act) and the Communal Land Rights Bill and the Traditional have gone a long way in this regard. Earlier legislation, as will be seen, seemed to avoid defining roles for traditional authorities.

A significant step that the ANC-led South African government took in its attempts democratize rural local governance was to separate the functions of local government and land administration, thus undoing a major legacy of apartheid of concentrating and fusing power in one authority, the Tribal Authority. With regard to local

government, the division between the rural and the urban was abolished in the sense that municipalities made up of elected councilors were extended to all parts of the country, including rural areas under traditional authorities where municipalities did not exist before. At the same time, there were various attempts made to phase out Tribal Authorities as the land administration and allocation authority.

***Rural local government reform, democratizing land administration and traditional authorities***

The Constitution of the Republic of South Africa establishes three distinct, interdependent and interrelated spheres of government, to wit, national, provincial and local government (see Section 40(1)). The local sphere of government is made up of municipalities which, as already indicated, must be established throughout the country, including rural areas (see Section 151(1)). The Constitution and the 1998 White Paper on Local Government define post-1994 local government as “developmental” local government, involving integrated development planning. This requires municipalities to co-ordinate all development activities within their areas of jurisdiction (Pycroft, 1998: 151). 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).

Local government in post-1994 South Africa went through two phases: a transition phase between 1995 and 2000, followed by the establishment of fully-fledged municipalities in December 2000. After an initial silence, the 1993 Transitional Local Government Act was amended in 1995 in order to define local government in rural areas. The amendment provided for a “district council” model for these areas, establishing a two-level structure, consisting of a district council at a sub-regional

level, and a range of possible structures at local (primary) level.<sup>12</sup> Unlike in urban areas, where municipal transitional structures were accorded the powers of a fully-fledged local authority, structures in many rural areas were seen as fulfilling representative and brokering functions, and as bodies that would eventually evolve into effective and democratic local authorities.<sup>13</sup> In practice, however, these structures never, at the end of the transitional period in 2000, evolved into local authorities. The urban bias was also shown in the electoral system. Whereas in the urban areas the system was based on a combination of the constituency and proportional representation, the system that was adopted for rural areas was proportional representation. This meant that rural people voted only for political parties, rather than political parties and independent candidates.

Following the demarcation of municipal boundaries in 2000, new municipalities were established. A model amalgamating several urban and rural municipalities was adopted. This resulted in the creation of fewer and geographically larger municipalities. The number of municipalities was drastically reduced from 834 between 1995 and 2000, to 284. The number of councilors was also reduced, meaning that fewer councilors would be responsible for larger municipalities. The electoral system combining constituency and proportional representation that applied to urban areas was extended to all municipalities with wards.

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. The White Paper provided a guide for the legislative process that would define the land tenure rights of rural people and a system of land administration. By the beginning of 1998, the Department of Land Affairs (DLA) had developed principles that would guide its legislative and implementation framework. The principles emphasized that where land rights `to be confirmed exist on a group basis, the rights holders must have a choice about the system of land administration,

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<sup>12</sup> See Ntsebeza 2003a for details.

<sup>13</sup> The rationale for district councils model is based on attempts to move towards equity and redistribution in terms of which the wealthier urban councils will be amalgamated with poorer neighbouring communities, and so extend basic services to the latter. This argument, though, does not address the widespread problem in the former Bantustans: here the towns that are surrounded by large poverty-stricken rural communities are themselves small, poorly run, and lack a strong revenue base.

which will manage their land rights on a day-to-day basis'. In addition, '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'. (Thomas et. al. 1998:528).

It seems quite clear from the above that both the Departments of Provincial and Local Government and Land Affairs intended to subject traditional authorities to a system that would make them more representative and accountable to their communities. The notion of developmental local government sits well with Agrawal and Ribot's (1999) and Manor's (2001) views on democratic decentralization outlined above. The Local Government Act of 1993, as amended in 1995, provided an extremely limited, in 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 per cent representation in an *ex officio* capacity. However, the main challenge was how these principles would translate into concrete practice. In fact, as it turned out, it would take the two departments and indeed, the ANC-led government almost 10 from the advent of democracy to come up with laws that reasonably clarify the role of traditional authorities in rural areas. Part of the delay was the attitude of traditional authorities towards the emerging policies and laws.

Moves by the ANC-led government towards democratizing rural local governance drew fierce criticism and resistance even from the Congress of Traditional Leaders of South Africa (CONTRALESA), an organization that is made up of traditional authorities who collaborated with the ANC in the pre-1994 period. In fact, the ANC was instrumental in setting up this organization in the late 1980s (Van Kessel and Oomen 1997). By 1994, traditional authorities in South Africa were divided broadly between those who were members of CONTRALESA and those owing allegiance to the Inkatha Freedom Party (IFP) of Chief Mangosuthu Buthelezi. The latter were violently opposed to the ANC. However, post-1994 government policies and laws have almost closed the ideological gap between members of CONTRALESA and those traditional authorities who are sympathetic to the IFP (Ntsebeza 2004; 2002).

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, in particular land administration.

### ***Government's reaction up to 2002***

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 extending 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 sought to divest traditional authorities of all their development functions and transfer these to elected councillors. 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 favour of traditional authorities (Ntsebeza 2004; 2002). 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 traditional authorities imposed in the process of land allocation as outlined above (see also Ntsebeza 2004; 1999).

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 concession was the amendment of the 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 per cent to 20 per cent of the total number of councillors. 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 20 per cent 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 favour of apartheid era Tribal Authorities as the primary local government structures. Traditional authorities have claimed that the President had promised them, in word and in writing, that their powers would not be tempered with. If anything, they would

be increased.<sup>14</sup> On his part, the President has neither denied nor endorsed the traditional authorities claim.

The response of government 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 favour of Tribal Authorities. The Bill 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.

The manner in which this vexed issue of the role of traditional authorities in a post-1994 democratic South Africa has been handled and negotiated is intriguing. In so far as local government issues are concerned, traditional authorities fall under the Department of Provincial and Local Government. In practice, though, traditional authorities did not seem to be recognising this Department. They preferred that the 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 favourably disposed towards them as the President. Alternatively, this might be a deliberate strategy to pit the President against the Minister.

With regard to land administration, the Department of Land Affairs similar shifts in favour of traditional authorities were taking place. We have seen above that the guiding principles of this department towards land administration were that where land was held on a group basis, the land rights holders would have a choice about the system of land administration. However, when Minister Thoko Didiza replaced Derrick Hanekom as minister of Land Affairs, she unveiled in February 2000, after disbanding the drafting team of the Land Rights Bill she inherited from Hanekom, her 'strategic objectives' regarding land tenure and administration in rural areas. With

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<sup>14</sup> I have not been in a position to get a copy of this statement by the president.

regard to land administration, she committed herself to building on 'the existing local institutions and structures, both to reduce costs to the government and to ensure local commitment and popular support' (Lahiff 2000:63).

This statement raises a number of issues. In the first place, there is no necessary connection between reducing costs, on the one hand, and ensuring 'local commitment and popular support'. If anything, I would contend that, given the legacy of colonialism and apartheid, including the effects of Bantu Education, the task of ensuring that effective governance structures are created in rural areas, would not be a cheap exercise. In the second instance, this principle makes dangerous assumptions about 'local institutions and structures' that clearly demonstrate poor knowledge and understanding of conditions in the rural areas. Given existing conditions in rural areas, the principle raises all sorts of questions, for example: What if local institutions and structures are dysfunctional? What if they are unpopular and corrupt? What about situations where there is contestation between or within various structures? Is building on existing structures necessarily a cheap option?

By August 2002, there was no clarity as to how the question of land administration would be resolved in rural areas. Neither was it clear how the issue of the role of traditional authorities in local government would be handled. The promised amendment to the Municipal Structures Act had not been finalised. A draft amendment published on 20 November 2000 for public comment seemed to propose a trade-off rather than amending the Constitution. The draft amendment gave traditional authorities control over the allocation of land in so-called communal areas. According to section 81(1) (a) of the Municipal Structures Second Amendment Bill:

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 ...

It is not clear what happened to this draft amendment. The promulgation of the Traditional Leadership and Governance Framework Act (Framework Act) and the Cabinet approval of the Communal Land Rights Bill (CLRБ) in 2003 seem to have rendered the amendment no longer relevant.

## **Traditional Leadership and Governance Framework Act, the Communal Land Rights Bill and traditional authorities**

One of the problems facing government was that despite the fact that an attempt was made to separate the various powers that were concentrated in Tribal Authorities and allocating them in various departments, in our case, the Departments of Provincial and Local Government and Land Affairs, there was very little communication between these departments. For example, interviews with some Land Affairs senior officials suggest that the Department of Provincial and Local Government did not consult these officials when proposing the amendment to the Municipal Structures Act regarding giving traditional authorities powers to allocate land. Yet, the task of deciding who should allocate land in rural areas is the competency of the Department of Land Affairs. Under the circumstances, a trade-off of the nature proposed by the Department of Provincial and Local Government was not going to be easy to negotiate. A significant feature of the 2003 legislative process involving the two departments is that when once cooperation took place, it was possible, as will be shown below, to clinch the trade-off.

### ***Traditional Leadership and Governance Framework Act***

An objective of the 2003 Framework Act that is pertinent for purposes of this chapter is the provision for the establishment and recognition of traditional councils. A traditional council, according to section 3(1) will be established in an area which has been recognised by the Premier as a traditional community. This would take place, in terms of the pre-amble, within the context of transforming 'the institution of traditional leadership', 'in line with constitutional imperatives ... so that democratic governance and the values of an open and democratic society may be promoted'. The Act provides for a role for traditional leadership, not only in the local government sphere, but in all three spheres of government. It does not specify a role for traditional authorities in land administration. This is dealt with in the Communal Land Rights Bill.

The introduction of the Act and its establishment of traditional councils again raise the question of the meaning of democracy and citizenship in rural areas. How should we understand notions such as transforming 'the institution of traditional leadership', 'democratic governance and the values of an open and democratic society' in the preamble? These questions become all the more pressing considering that the Act recognises existing Tribal Authorities which were established in the apartheid era and in terms of the 1951 Bantu Authorities Act traditional councils. Although a four year transition period for their transformation (whatever this means) is allowed, there is no provision, as Cousins and Claassens have pointed out, for sanctions in the event the Tribal Authorities have not been transformed.<sup>15</sup>

Secondly, the traditional councils are undemocratic in their nature, resembling the Tribal Authorities they are meant to replace. Although there is provision for a minimum of 30 per cent representation of women in the councils, the majority of the members are not popularly elected. Initially, there was a recommendation that a mere 25 per cent of members should be elected. After strong protests from NGOs and other civil society organisations, this number was increased to 40 per cent. This, however, still gives unelected traditional authorities and their appointees a majority.

On the question of the incompatibility of 'traditional leadership' and democracy that was taken up by civic organisations, the Portfolio Committee has responded that 'traditional leadership ... is certainly reconcilable with the basic principles and values of our Constitution including democracy and gender equality'.<sup>16</sup> The Committee further reminded: "After all, the institution of traditional leadership is provided for in the Constitution". However, the Committee did not spell out the type of democracy they had in mind that was reconcilable with an unelected institution of traditional leadership. They would surely not be referring to representative democracy inscribed in the Constitution and which requires that leaders should be popularly elected. Moreover, the fact that the institution of traditional leadership is provided for in the Constitution does not nullify the significance of the question.

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<sup>15</sup> Ben Cousins and Aninka Claassens, "Looming land disaster", in *Mail and Guardian*, 31 October to 6 November 2003

<sup>16</sup> Report on Traditional Leadership and Governance Framework Bill to the National Assembly, 28 October 2003.

It seems clear from discussions in the Portfolio Committee on Provincial and Local Government that establishing traditional councils dominated by traditional councils and their appointees was a trade-off to persuade traditional authorities not to push for a constitutional amendment. Members of the portfolio committee agreed that a constitutional amendment could be made after the finalisation of the Framework Bill and if there was 'significant consensus between the traditional leaders, South African Local Government Association and other key stakeholders'.<sup>17</sup> The Committee has suggested in the same report that 'transformation in the areas of custom and tradition have to be phased in appropriately' and that 'all stakeholders should be prepared to compromise in this phase'.

### ***The Communal Land Rights Bill***

A last minute amendment to the Communal Land Rights Bill by the cabinet on 8 October 2003, at more or less the same time the Framework Bill was being considered, seems to have resolved, at least for now, the thorny issue of the role of traditional authorities in local governance. The cabinet amendment provided that the traditional councils established in terms of the Framework Act as described above, will have land allocation and administration powers and functions in communal areas. This gives enormous powers to a structure with a majority of unelected members. According to reporter Christelle Terreblance, the amendment was made shortly after a meeting involving Deputy President Zuma, King Zwelithini and IFP's Chief Buthelezi, leading to speculation that the amendment was a deal (Cape Time, 28 January 2004).

It is worth noting that this was an amendment to a draft Communal Land Rights Bill which was gazetted on 14<sup>th</sup> August 2002. This draft Bill proposed the transfer of registrable land rights to individuals, families and communities. On land administration, it divested traditional authorities of their land administration functions, including land allocation in favour of democratically elected administrative structures. Where applicable, 'legitimate' traditional authorities were accorded *ex officio* representation not exceeding 25 per cent. The draft Bill clearly attempted to

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<sup>17</sup> Report on Traditional Leadership and Governance Framework Bill to the National Assembly, 28 October 2003.

strike a balance between the constitutional obligation to extend democracy to all parts of the country, including rural areas, and accommodating the institution of traditional leadership, which is recognized in the constitution. What was not clear in the draft, though, was the meaning of a “legitimate traditional authority”. Did it refer to a traditional authority that is born from the correct lineage, as opposed to colonial and apartheid appointed traditional authorities? Or did it mean one that has the support of the community?

Traditional authorities rejected this draft Bill. Chiefs Holomisa of CONTRALESA and Mzimela of the National House of Traditional Leaders indicated that they were going to oppose the envisaged legislation and will take up the issue, as they did in the past, with the President (Sunday Times and City Press, 25 August 2002). According to Chief Holomisa:

In 2000, we (traditional leaders) held three meetings with him (Mbeki), where he categorically stated that in no way would the power of traditional leaders be reduced or diminished by his government. We asked him to put it in writing, and he took exception, saying it looked as though we doubted his word (Daily Dispatch, 2 November 2002).

Some traditional authorities apparently threatened bloodshed (Daily Dispatch 2 November 2002).

The amended and cabinet approved version of the Communal Land Rights Bill gives traditional authorities unprecedented powers. This is particularly the case with regard to the allocation of land. We have seen that under the colonial and apartheid systems, the final authority in the form of issuing permits to occupy land in communal areas lay with magistrates and later District Commissioners.

The amended draft of the Communal Land Rights Bill drew criticism from a range of civil society organisations, gender and land rights activists that were organised under the auspices of the University of Western Cape based Programme for Land and Agrarian Studies (PLAAS) and the National Land Committee (NLC). It also received

criticisms from some ANC Members of Parliament.<sup>18</sup> The uproar was based on the view that traditional councils are 'a retreat from democracy' and an attempt to revive a defunct apartheid institution which, amongst others was deeply discriminatory of women. Cousins and Claassens have argued that under 'customary law' women will be dependent on men and vulnerable to loss of their land and other property on divorce or the death of their husbands (Mail and Guardian, 31 October to 6 November 2003).

Despite the protest, the controversial Bill was bulldozed through and passed unanimously by parliament on 27 January 2004.<sup>19</sup>

### ***Traditional authorities and their response***

For the first time in more than ten years traditional authorities have given their overwhelming support for the Communal Land Rights Bill.<sup>20</sup> In a Business Day article dated 2 December 2003, the chairperson of the National House of Traditional Authorities, Chief Mpiyezintombi Mzimela, supported the second draft of the Communal Land Rights Bill with these words: 'The Communal Land Right Bill aims to restore to rural communities ownership of the remnants that they occupy of land that the colonial and apartheid government took from them by force – giving the communities registered title, so that it cannot happen again'.

Mzimela gave an indication, though, that the push for a constitutional amendment may not be over. According to him: 'Our communities wish to govern their own areas and want traditional communities to constitute the local government, not a fourth tier, but part of the third tier'. He averred that the institution of traditional leadership is the 'only institution that does not have its powers and duties set out in the Constitution', an 'omission' he urged should be 'rectified'. It is important to note that in the past traditional authorities insisted that there should be a constitutional amendment making them the primary local government structure in rural areas. The

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<sup>18</sup> This is based on my own observation and participation in some of the meetings.

<sup>19</sup> For the Bill to become law, it has to be considered, inter alia, by the various Provinces with traditional authorities. This process has been delayed by the 14 April 2004 election.

<sup>20</sup> Disagreements between traditional authorities and government about their role in a democracy go back to the political negotiation period in the early 1990s.

Framework Act, as has been seen has avoided the constitutional amendment and still recognises municipalities made up of elected councillors as the primary form of local government in rural areas. But the establishment of traditional councils has arguably given traditional authorities more powers than elected councillors. A question that forces itself on us is how to explain government's shifts.

### **Why is the ANC-led government making these concessions?**

Shifts in ANC thinking regarding traditional authorities should be seen against the backdrop of a wider conservative shift in the ANC particularly after the Cold War in the late 1980s and early 1990s and the compromises made in the political negotiation process of the early 1990s. Some of these shifts were already evident in the 1994 ANC election manifesto, the Reconstruction and Development Programme (RDP). On the question of land, for example, the RDP document committed the ANC, albeit cautiously, to a market-led land reform programme. This was a sharp reversal of the position expressed in the Freedom Charter that land and other major sectors of economy would be nationalised. Two years thereafter, the ANC-led government formally embraced conservative neoliberal economic policies in the form of GEAR (Growth, Employment and Redistribution) (see Fine and Padayachee 2001; Bond 2000; Marais 1998).

The justification for the shift is often couched along similar lines as elsewhere where these turnabouts have been made: "there is no alternative" (TINA) to global capitalism. But analysts such as Marais have commented that this marked a victory for the more conservative, capitalist inclined forces within the ANC, thus suggesting that the ANC and most definitely the Tri-partite Alliance of the ANC/SACP/COSATU are not unanimous on this issue. The same could be said about the question of traditional authorities and their institution. The ANC is not unanimous on the issue of the role of traditional authorities in a democracy. Historically, the ANC has been divided on this question between pro- and anti-chief factions. Former President Nelson Mandela, who is pro-chief and Govan Mbeki, the father of President Thabo Mbeki and a strong critic of chieftainship, epitomise this division (Ntsebeza 2002). It seems clear that the pro-chief lobby won the debate in 2003.

The other reason could be that government may be mindful of the bloody conflict in rural KwaZulu-Natal in the 1980s and 1990s and the need to avoid a repetition.

Lodge 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 ... 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 (quoted in Dladla 2000:15).

Given the passing of the two pieces of legislation in 2003/4 as discussed above, it is difficult to see how these laws are creating legislative conditions for the gradual phasing out of the institution and its incumbents. What can be said, though, is that traditional authorities have been recognised in the Constitution, their existence legitimised in the provincial Houses of Traditional Leaders, they are handsomely remunerated and given power to allocate land. This contrasts sharply with the minimal support to rural elected councillors. It could be that the macro-economic policies substantially constrain the government from setting up and monitoring new democratic structures government in rural areas. As Hart has lamented: 'GEAR sits uneasily astride the emancipatory promises of the liberation struggle, as well as the material hopes, aspirations, and rights of the large majority of South Africans' (2002:7). In addition, it has not always been clear how, in wooing traditional authorities, the ANC would dismantle tribalism and the reserves. Indeed, tribalism is inherent in the recognition of separate chieftaincies (Hendricks and Ntsebeza 1999).

There is also the view that some traditional authorities are popular and legitimate and that alienating them would make the ANC lose the rural vote. Analysts such as Cousins and Claassens make sweeping claims that in some areas 'traditional leaders do enjoy support and have legitimacy' (Mail and Guardian, 31 October to 6 November 2003). But it is not clear how this support and legitimacy are determined, especially as these analysts seem to agree that 'the right to choose' one's leaders is 'the fundamental principle of democracy'. 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>21</sup> However, there is 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 the South African constitution is based.

Lastly, but equally important, rural civil society is still relatively weak and unorganised. Although there are signs of a resurgence of rural organisation and mobilization, the formation of the Landless People's Movement (LPM) in 2001 being the most significant development, it is perhaps too early to judge how resilient rural civic organisation structures are.<sup>22</sup> More research needs to be done on these emerging structures. Without a strong and organised voice, rural inhabitants are going to find it hard to influence government. By contrast, traditional authorities are much more organised and consistently apply pressure on government. Ironically, they are made strong by the state resources they have at their disposal, from the salaries they draw to facilities such as the Houses of Traditional Leaders at their disposal. None of these resources are available to rural residents.

## **Conclusion**

For almost ten years since the birth of South Africa's democracy, there was ambivalence on the precise role, functions and powers of unelected traditional authorities in local government and land administration in particular, but also in a democracy modelled along liberal values of representative government in general. The passing through parliament in 2003 and 2004 of two controversial pieces, the Traditional Leadership and Governance Framework Act and the Communal Land Rights Bill bring a greater degree of clarity about the role of traditional authorities in local government and land administration. Whereas the position of traditional

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<sup>21</sup> It should be pointed out, though, that only men participated in these gatherings (*iimbizo/pitso/kgotla*). Further, these systems differed, and some were more autocratic than others (Ntsebeza 1999).

<sup>22</sup> Stephen Greenberg is currently doing an assessment of the LPM in the Gauteng area. We are eagerly looking forward to his findings.

authorities in local government remains that of having a 20 per cent *ex officio* capacity, the Communal Land Rights Bill gives them unprecedented powers in the critical area of land allocation. This means that in one respect, namely, local government, rural residents enjoy the same citizenship rights that are enjoyed by the urban counterparts, in the sense that they elect their councillors. However, on the vital issue of land allocation, rural people become 'subjects' in the sense that decisions are taken by traditional councils which are dominated by unelected traditional authorities and their appointees.

This raises critical questions about citizenship and the nature of democracy in South Africa. Mamdani (1996) as we saw above has proposed that 'dismantling' the 'clenched fist' of Tribal Authorities entails 'an endeavour 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). To what extent has post-1994 South Africa succeeded in 'dismantling' the apartheid created 'clenched fist' of unaccountable Tribal Authorities? As indicated in this contribution, while some traditional authorities may choose to promote local participation, the fact that they are hereditary limits the possibility of rural residents to elect or reject their leaders on questions of land administration and allocation. This compromises a fundamental, though not the only principle of democracy and full citizenship.

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