Article

Land Rights and Democratisation: rural tenure reform in South Africa's former bantustans

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Background

A daunting task facing the South African state is the establishment of a system that will address the chronic land shortage, insecurity of tenure and ineffective, inefficient and undemocratic systems of land administration and management in the former bantustans.[1] One of the legacies of the colonial and apartheid periods is that the state through the Development Trust, established in terms of the Native Trust and Land Act of 1936, owned most land in these areas. Although rural inhabitants are the de facto 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. At the same time, rural inhabitants were largely excluded from the administration and management of the land. The pervasive system of land administration and management in these areas was (during the apartheid period) based on tribal authorities, dominated by hereditary chiefs and headmen.[2] Although in apartheid official circles tribal authorities derived their legitimacy from 'tradition', in practice, these structures were incorporated into the structures of government and became the extended arm of the government at a local, administrative and tribal authority level. During the apartheid period in particular, these structures became highly authoritarian and despotic (Lodge 1983, Southall 1983, Mbeki 1984, Hendricks 1990, Delius 1996, Ntsebeza 1999).

The ANC identified the need to redress conditions in rural areas in the run up to the first democratic election in April 1994. Its election manifesto, the Reconstruction and Development Programme (RDP), identified, inter alia, land reform as the driving force in South Africa's rural development initiative (African National Congress 1994). Soon after the election, the

ANC-led government, represented by the Department of Land Affairs (DLA), announced a wide-ranging land reform programme based on three key related components: restitution, redistribution and tenure reform. All these components have a constitutional standing. With regard to land tenure reform, the subject of this paper, section 25(6) of the South African Constitution states: 'A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress'. Parliament is further obligated to enact legislation. Additionally, in keeping with the democratic principles enshrined in the Constitution and various pieces of legislation, the post-1994 South African state also aims, at least in theory, to establish new democratic and accountable structures, with significant community participation, as far as land administration and management are concerned.

More than seven years after the first democratic election in South Africa in April 1994, the conditions in the rural areas have, despite the expectations raised by the Constitution, policies and legislation, remained, by and large, unchanged. Land shortage and insecurity of tenure are, as during the colonial and apartheid periods, in need of urgent attention. Land administration and management have in some areas virtually collapsed, while in others there is contestation as to who has the power of allocating land. At the heart of the problem is the unresolved issue of the roles, functions and powers of traditional authorities in South Africa's democracy.[3] Despite the post-1994 state's claim to representative government, and despite the role played by chiefs and headmen during the apartheid period, a compromise was reached during the constitutional talks of the early 1990s, resulting in the recognition in the South African constitution of the 'institution of traditional leadership', without much clarity about its role. Although by no means the only problem delaying the land tenure programme, the unresolved issue of the role of traditional authorities in land tenure reform in particular, and in post-1994 South Africa in general, is central. This, as the paper argues, raises serious questions about the government's commitment to rural democracy.

This paper explores the issue of land tenure in the rural areas by first examining the various attempts by the Department of Land Affairs to address this matter.[4] Particular focus will be given to the role of traditional authorities in land tenure reform. I then proceed to show how traditional authorities have responded to these reforms, and how the government has

in turn dealt with the reaction of traditional authorities. By way of conclusion, I will assess the viability of land tenure reform in the rural areas given the inherent tension in trying to establish democratic and popularly accountable structures while continuing to recognise undemocratic and unaccountable structures.

The tenure reform process in South Africa 1994-1999

A positive policy on land tenure reform in the rural areas has been slower to emerge than the other components of the land reform programme. This has led some commentators to conclude that tenure reform is, despite its potential to impact on more people than all other land reform programmes combined, probably the most neglected area of land reform to date (Lahiff 2001:1). The White Paper on Land Policy has attempted to justify the delay in terms of the complexity of tenure reform in rural areas, particularly the possibility that solutions 'may entail new systems of land holding, land rights and form of ownership, and therefore have far-reaching implications' (DLA 1997:60). However, while not denying these complexities, it is worth considering that the ANC, the dominant party in the Government of National Unity, never really thought through an approach towards rural areas. Consequently, government policies, which invariably reflect the views of the dominant party, had a strong urban bias. For example, when the Local Government Transitional Act was introduced in 1993, there was no reference to rural areas. This gap was only addressed through an amendment when the gap became glaring in the run-up to the first democratic local government elections in 1995 and 1996. Secondly, the meagre proportion of less than one per cent in the national budget devoted to land reform speaks volumes about the limited extent to which the ANC-led government is committed to rural development (see Mingo 2002). This despite the complaint in the White Paper on Land Policy as early as 1997 'that the funding of land reform is not commensurate with its importance' (1997:35). ANC urban bias must have been heavily influenced by the nature of the South African liberation struggle, especially from the 1970s. Urban-based civic organisations, students and trade unions dominated the struggle during this period (Seekings 2000). It is from these organisations that the ANC drew most of its support. This does not deny the fact that most predominantly rural provinces also gave their overwhelming support to the ANC. However, given that rural communities were not as organised as their urban counterparts, it could be argued that the ANC-led government would prioritise urban concerns.

The immediate challenge of tenure reform in the rural areas is to introduce legislation that would meet the constitutional obligation of redressing legally insecure land tenure as a result of past racially discriminatory laws and practices. Most land in the rural areas is legally owned by the state, despite the fact that many rural inhabitants are the de facto owners of land, in the sense that they have lived in these areas for long periods of time. As already indicated, the landholding system based on permits to occupy (PTOs) does not provide them with legally secure title comparable to freehold title. The consequence is that rural residents are often excluded from decision-making processes regarding their land rights (Adams et al 2000:117). This was particularly the case during the colonial and apartheid periods. The status of the PTO in the post-1994 dispensation has become uncertain. Precisely who owns and has the power to administer and manage common resources in these areas has become highly contentious with dire consequences for development initiatives and common resource management (Kepe 2001, Ntsebeza 2001).

It must be mentioned at the outset that tenure reform in the rural areas cannot be adequately resolved without addressing chronic land shortage and forced overlapping rights consequent to colonial conquest and land dispossession. I will return to this point in the course of this paper.

Holding and interim measures

In order to meet its constitutional obligation, the DLA adopted a two-pronged approach: introduction of 'holding' and 'interim' measures on the one hand, and embarking on a legislative process on the other. The two relevant pieces of holding legislation were the 1996 amendment of the Upgrading of Land Tenure Rights Act of 1991, and the Interim Protection of Informal Land Rights Act of 1996. The amendment of the 1991 Upgrading Act seeks to ensure that the opinions of rural residents are sought before any major decisions are made about their land, including the upgrading of 'lower land rights (permission to occupy certificates)' (DLA 1997:62). It must be noted that, in its original form, the Upgrading Act was introduced to, inter alia, transfer communal land from the state to 'tribes' and to create conditions for upgrading PTOs to full freehold title. The 1996 amendment was an attempt to put tighter controls on these measures, especially as there was evidence of abuse in some of those instances where land was transferred to tribes in parts of the Northern Province (Claassens 2001).

On the other hand, the Interim Protection of Informal Land Rights Act protects informal land rights and formalises the process by which decisions are taken by laying down a rigorous procedure for major decisions affecting people with so-called informal rights (DLA 1997:62, see also Claassens and Makopi 1999). These measures would apply pending long-term reform measures that would be addressed by relevant legislation. Another relevant law that was passed in 1996 was the Communal Property Associations Act. This Act aims to establish accountable, land-holding entities, the Communal Property Associations (CPAs), as a form of group land ownership. According to the Act, members, defined as households, must agree to a set of rules and regulations for land ownership. A majority of the members must agree to these rules and regulations, and must confirm and publicly declare them. These rules and regulations need to be written into a Constitution that will be lodged in the DLA. What is common to these laws is their emphasis on democratic decision-making and accountability, with an emphasis on the active participation of the rural residents.

Ownership and governance

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 drew a crucial distinction between 'ownership' and 'governance' in land issues in rural areas. This distinction had been blurred in the colonial and apartheid eras when 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). These principles were confirmed by the Minister of Land Affairs in an address to the Congress of Traditional Leaders in South Africa (Contralesa) in October 1997:

> This means that no level of government, whether national, provincial or local can disregard the views and concerns of the groups, tribes or individuals who have underlying historical land rights to land which is registered as 'state owned'. Any actions to simply disregard the rights holders in such areas and dispose of or develop the land as 'state owned' are unlawful. (*Tenure Newsletter* 2(1) 1998:14)

By the beginning of 1998, the 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

rights 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 much 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 wishes in respect of proposed development projects and other matters pertaining to their land rights;
- Systems of land administration, which are popular and functional, should continue to operate. They provide an important asset given the breakdown of land administration in many rural areas. The aim is not to destroy or harm viable and representative institutions. Popular and democratic tribal systems are not threatened by the proposed measures (Thomas 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 community members to decide how they want their land to be administered. The latter is an issue of governance. It is precisely the blurring of this distinction that was at the heart of colonial and apartheid rule. Bantustans that opted for 'independence', such as Transkei, also did not make this distinction as communal land remained state land.

A further implication of this distinction is that the concentration or fusion of power in tribal authorities, what Mamdani (1996) metaphorically refers to as a 'clenched fist' leading to a 'decentralized despotism', which was characteristic of the apartheid epoch, would be undermined. There would instead be a clear separation of powers. 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. With regard to local government, however, it is important to note that no

land rights are absolute, either in urban or rural areas. As a body representing public interests and given that, in terms of the Constitution, municipalities should be established throughout the country, local government has control, regulatory and (in terms of the Constitution) development functions.

Lastly, it is quite clear from the above that the DLA intended to subject traditional authorities to a system that would make them more representative and accountable to their communities. However, my argument is that establishing democratic and accountable structures while recognising an undemocratic and unaccountable institution of traditional leadership, especially in the form it has been inherited from the apartheid past, is a fundamental contradiction. The DLA has suggested that there may be examples of a 'popular and democratic tribal system'. Given that no examples of these 'tribal systems' are given, it is not clear what this statement means in late twentieth century South Africa.

If the 'tribal systems' referred to incorporate the 'institution of traditional leaders', I would argue that a 'democratic tribal system' is a contradiction in terms. The institution of traditional leadership can be democratic in one important respect: the involvement of rural residents in decision-making processes. This was indeed the hallmark of governance in most African societies at the advent of colonialism.[5] However, there is an important 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.

It is possible to argue that the proposed accommodation of popular and functioning 'tribal systems' was a pragmatic move, especially considering that government does not have the capacity to set up and monitor new structures. It could also be argued that given the violent struggles of the 1980s and 1990s in the rural areas of KwaZulu-Natal in particular, coupled with the reconciliation agenda of former President Mandela, there is a need to be accommodative of traditional authorities. Even if this were the case, the issue of the meaning of democracy in post-1994 rural South Africa would still 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 present government.

The legislative process: the draft 1999 Land Rights Bill

An intensive consultative/drafting process that would fulfil the constitutional obligation of the government of addressing tenure and land rights administration in the rural areas got underway towards the end of 1997. It was anticipated that the process would culminate in a Land Rights Bill. Consistent with the policy thrust to empower rural residents, the proposed Bill sought to provide for the establishment of various institutions that would constitute a decentralised system of land rights management, ensuring that rights holders made the key decisions in respect of their land rights.

Although the initial thrust of the DLA was based on the notion of transferring land nominally registered as state land to new legal entities representative of the land rights holders, in particular to CPAs, there was a change of emphasis from 1998 away from land transfer to another conception of rights that were intended to convey the same benefits as ownership. The rationale for this 'paradigm shift' was based on experiences from test cases that were commissioned by the DLA (see Claassens and Makopi 1999, Claassens 2000, Cousins 2000).[6] A range of problems were identified regarding transferring land including membership, boundaries and difficulties in defining the 'unit of ownership' in rural areas, for example, whether land should be transferred to 'tribes' or 'nations' or to inhabitants within Tribal Authority or administrative areas. There was also the problem of the form of ownership, whether land should only be transferred to legal entities or 'tribes'. Transferring land to 'tribes' raised all sorts of implications regarding democratic decision-making so central to the post-1994 land tenure process. The 'test cases' also brought to the fore how intensive, intricate and time-consuming transferring land was, and how it is prone to triggering disputes that 'hardly existed or were latent' (Claassens 2000:254).

The above reservations regarding direct transfer of land from the state to land rights holders did not mean that the draft Bill discarded the notion of transferring land. As Claassens and Makopi (1999:9) point out, transfer of ownership should take place 'only after (and if) the group/tribe can show that there is majority consensus about the unit of land under discussion and the entity in whom it will vest'. A test case experience that was at the disposal of the DLA but which was unfortunately not given equal prominence

by Claassens and Makopi would have been one that demonstrated how the intervention of traditional authorities and the government's ambivalence regarding the role of traditional authorities led to the abandonment of an attempt to establish a CPA in the Tshezi Tribal Authority in the Eastern Cape.

The Tshezi area was one of four economic development nodes identified by the government-initiated Spatial Development Initiatives (SDIs). One of the requirements of the SDI was the need to establish legal land holding entities that would enter into negotiations and sign contracts with investors. After a series of workshops on legal entities, participants, including headmen, opted for a CPA. This decision was relayed to the local chief and his Tribal Authority, and received their unswerving support. However, over time, some traditional authorities in Contralesa influenced the chief to oppose the CPA, in line with a countrywide rejection of CPA by Contralesa. In the end, the CPA was not established and the promised SDI development did not take place.[7]

Proceeding from the basis that there were problems with upfront land transfer as outlined above, the drafting committee of the Bill focussed on a model that would create a category of 'protected rights' that would be created by law to secure the basic rights of rural inhabitants. Although not equal to full ownership rights, the protected rights would have the status of property rights in that the law would prohibit the deprivation of rights except with consent or by expropriation. Every holder of a protected right would be entitled to make decisions regarding the management of that right, and entitled to any benefits arising from the exercise of the protected right, including, where applicable, the proceeds of any sale, lease or other disposition of the protected right. These rights would be registerable in the Deeds Registry (Claassens 2000:255, Cousins 2000:19-21).

With regard to addressing the chaotic and, in some places collapsed, land administration and management systems, the draft Bill proposed new institutions for managing land rights and resolving conflicts. At a local level, it proposed the establishment of 'accredited rights holders structures', which could be applied for by 'any land rights structures'. The drafters of the Bill saw these structures as to some degree a way of relieving the capacity constraint faced by government. In theory, a Tribal Authority could be such a structure. The fundamental difference, though, would be that, whereas tribal authorities were essentially unaccountable, the land rights holders would, according to the draft Bill, be able to replace any

structure managing their land rights, including a Tribal Authority if they chose, if the majority deemed it necessary.

In order to make the accredited structures effective, the draft Bill proposed a Land Rights Officer that would be appointed by the Director-General of DLA and based at the magisterial district level.[8] Some of the envisaged responsibilities of the proposed Land Rights Officer included monitoring compliance with the proposed Act by rights holders, accredited structures and other persons and reporting any contraventions. The Officer would also confirm decisions of rights holders and rights holder structures, inform persons of their rights in terms of the proposed Act, and endeavour to resolve disputes between protected rights holders regarding the exercise of their rights (Claassens 2000:259, Cousins 2000:23). In many ways, the proposed Land Rights Officer would play a similar role to that magistrates performed before 1994, although it must be assumed that the envisaged role of the Land Rights Officer would not be despotic but service-orientated.

At a District Council level, the draft Land Rights Bill proposed the establishment of Land Rights Boards.[9] These Boards would be established by the Minister, and would bring together different interest groups, including traditional authorities and elected rural councillors, who would bring special expertise regarding land tenure issues. Some of the functions of the proposed Boards included endeavouring to safeguard the interests of protected rights holders, resolving disputes between protected rights holders, determining appeals against decisions of accredited rights holders structures and advising local government on zoning land for occupation, use, access and development. This model was clearly influenced by the Botswana model (Cousins 2000).

Lastly, the draft Bill argued that tenure reform should not be seen in isolation from the all-important question of land redistribution. The 1913 and 1936 Land Acts had created reserves for African occupation whose land was only 13 per cent of the South African land. This invariably led to overcrowding and, in most cases, competing claims over scarce land. The draft Bill noted that in cases of competing claims on land, resolving tenure security would entail acquiring additional land (Claasens and Makopi 1999). In this regard, the draft Bill established a connection between tenure reform and the land redistribution component of the land reform programme. A vital issue to consider concerning the thrust of South Africa's land reform programme is whether the state would have the capacity to purchase the needed land given the 'willing buyer, willing seller' principle and the

fact that land reform in South Africa is essentially market-led albeit with a vaguely defined expropriation provision. The meagre budget allocated to land reform casts doubts about the possibility of purchasing the amount of land needed for effective land redistribution.

Overall, there is little doubt that, if the draft Bill had become law and been effectively implemented, it would have gone a long way towards protecting rural land holders from arbitrary decisions by the state and Tribal Authorities, especially given that in the past the state and Tribal Authorities collaborated in forcibly destroying and removing the homes of rural inhabitants without adequate compensation. In addition, it would have far-reaching implications for traditional authorities who were for over four decades not accountable or democratic. By raising the need for land redistribution, the draft Bill sought to address land shortage and the racial inequalities in land that are a painful legacy of colonialism and apartheid.

However, the above at least so far remains a moot point. Immediately after the ANC won the second democratic elections in June 1999, the new President, Thabo Mbeki, announced a cabinet reshuffle. A new Minister of Agriculture and Land Affairs, Thoko Didiza, was appointed. By the end of 1999, the new minister had disbanded the drafting team and thus effectively brought to a halt this particular phase of the legislative process. In its place, she appointed a new advisory team.[10] The question that compels itself upon us is why the process was stopped.

Traditional authorities and government shift

The reaction of traditional authorities

One of the key problems contributing to the difficulty in meeting the constitutional obligation to establish law guaranteeing tenure security for all South Africans, including those in the rural areas, is the unresolved issue of the roles, powers and functions of traditional authorities in land matters and, indeed, in the new democracy. The response of traditional authorities to tenure reform was and still is vehement. They are opposed to the moves of the ANC-led government to introduce decentralisation and democratisation 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. In the late 1980s and early 1990s traditional authorities were deeply divided. Some formed Contralesa in 1987 and struck a deal with the ANC while others,

organised around the Inkatha Freedom Party (IFP), maintained a hostile attitude towards the ANC. In the run-up to the first democratic local government elections in South Africa in 1995/1996, the IFP and Contralesa began to work together. Traditional authorities in both Contralesa and IFP took the ANC-led government to the Constitutional Court, challenging the government over the issue of establishing municipalities throughout the country, including rural areas under their jurisdiction. The president of Contralesa, Chief Patekile Holomisa took 'an increasingly defiant stand' towards the ANC.[11] He called for a boycott of the first democratic local government elections.

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 separation of powers. They would be happy to preserve the concentration of power they enjoyed under apartheid. Not only are they opposed to the idea of separation of powers, they are also opposed to any attempt to introduce alternative structures that would compete with them. With regard to land tenure reform, traditional authorities agree with government that land in the former bantustans should not be the property of the state. However, they reject the notion that, where land is held on a group basis, it should be transferred to democratically constituted and accountable legal entities such as CPAs. In their submission to the portfolio committee on land regarding the DLA land tenure policy following the publication of the White Paper, the KwaZulu-Natal House of Traditional Leaders averred:

> We hope that central Government will not create obstacles to the transfer of title to Traditional Authorities which will sanction that our initiatives have set KwaZulu-Natal several years ahead of the rest of the country in the process of returning land title to our people. (KwaZulu-Natal House of Traditional Leaders April 1998)[12]

It is important to note the ambiguity between transferring title to 'Traditional Authorities' and 'returning land title to our people'. Transferring title to 'Traditional Authorities', whatever is meant by the term, is not the same as transferring title to the people. The legal implications if land were to be transferred to institutions rather than vesting title in the people, in this case, land rights holders, are enormous. As an analogy: a company belongs to its shareholders, rather than the Board of Directors who run it. Transferring title to the Board of Directors has all sorts of negative implications for the shareholders as they would not have much say against the Board of

Directors if these are legally recognised owners. The same principle would apply if land were transferred to institutions such as Tribal Authorities or individual chiefs. In the Tshezi case, traditional authorities in the Eastern Cape also held a similar position in rejecting the transfer of land to legal entities and arguing in favour of transferring land to Tribal Authorities or even individual chiefs (Ntsebeza 1999). Even if land were transferred to Tribal Authorities, these institutions, as has been pointed out, are inherently undemocratic and, certainly in their existing form, make it extremely difficult for ordinary rural residents to hold them accountable.

The position of the government between 1994 and June 1999

The drafters of the land tenure policy and legislation in the period between 1994 and 1999, it seems, were driven by a commitment to extending participatory and representative notions of democracy to rural areas. Although sometimes contradicting themselves by suggesting that traditional authorities and their Tribal Authority structures could be accommodated in this form of democracy, the broad thrust of policy was to subject traditional authorities to popular pressure and remove them from power in the event the majority of land rights holders so decided. One of the expressions 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. The establishment of the United Democratic Movement (UDM), by an expelled member of the ANC, was critical. Some members of Contralesa were attracted by the idea of joining the UDM. In fact, some, for example chief Gwadiso, joined and were awarded with executive positions in the UDM. These widely reported 'defections' of traditional authorities led to the emergence of former President Mandela as the chief ANC actor in issues dealing with traditional affairs. He organised meetings with traditional authorities in the Transkei region. In the run up to the June 1999 national election, Mandela became a familiar figure in election rallies in rural areas. He made it a point that traditional authorities were honoured guests. Hardly any public statements were issued about jettisoning traditional authorities as an alliance partner. Despite the vast powers conferred on elected councillors by the Regulation of Development

in Rural Areas Act of 1997, this Act has not been implemented in the Eastern Cape. I would attribute this partly to the change towards traditional authorities as depicted above.

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. One of the first major shifts was on the economic policies that the ANC-led government would follow. At the time of the 1994 elections, the ANC's economics policies were guided by the RDP. The RDP was an election manifesto of the ANC in the run-up to the 1994 elections. This was a highly ambiguous and contradiction-ridden document. In this regard, Bond has correctly pointed out: 'There are at least three ways to read the RDP: from Left (or "socialist"), Centre ("corporatist") and Right ("neo-liberal")' (Bond 2000:91). The period immediately after the 1994 elections was characterised by the active participation of the Left in debates as to how the RDP could be used to meet the basic needs of all South Africans. It is largely out of these debates that five year targets such as a million new low-cost houses, electrification of 2.5 million houses, job creation, redistribution of 30 per cent of agricultural land, clean water and sanitation, and so on, emerged (Bond 2000:95). However, when the economic strategy of the Government of National Unity, the Growth, Employment and Redistribution (Gear) was formally unveiled in June 1996, an accelerated programme of privatisation, deregulation, and fiscal restraint was proposed (Aliber 2001:8). As Fine and Padayachee (2001:271) explain: 'Fiscal restraint ... was to be achieved through the rationalisation of the public sector, the elimination ...of some social services, budgetary reform, overhaul of the tax structure, and the establishment of more efficient mechanisms for revenue collection'. While the RDP as interpreted by the Left laid stress on growth through redistribution, Gear's formula was growth and redistribution (Marais 1998:192).[13] One casualty of this shift, for purposes of this paper, was the promised redistribution of 30 per cent of agricultural land by the end of 1999. Only about one per cent of agricultural land had been redistributed at the end of 1999 (Bond 2000:173). Whether this target would have been achieved had there been no shift to Gear, given the capacity problem in the DLA and the urban bias of the ANC, is a moot point.

Similar shifts towards traditional authorities can be detected with regard to rural local government. The White Paper on Local Government published in March 1998 makes 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 RDP. The RDP was emphatic that democratically elected local government structures should play this role. The White Paper 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 (Ntsebeza 1999). These clauses in the White Paper seem to back the view that since 1997, there has been a gradual shift in government policy in favour of traditional authorities.[14]

In a nutshell, I argue that the Minister of Agriculture and Land Affairs' announcement towards the end of 1999, disbanding the drafting team of the Land Rights Bill, should be seen against the background of shifts within the ANC and a more accommodative stance towards traditional authorities outlined above. One of the lessons of the Tshezi case in the Eastern Cape is that the government's ambivalence towards traditional authorities was evident even during the tenure of the first Minister, Derek Hanekom (Ntsebeza 2001, 1999). Having said this, I must state that the new minister has made some major departures from the principles laid out in the 1997 White Paper of Land Policy and proposals that were made in the draft Land Rights Bill.

Land tenure reform in rural areas between June 1999 and August 2002

Until August 2002, it was not possible to get a clear indication as to where tenure reform was going. This was particularly the case after Minister Didiza terminated the drafting process of the Land Rights Bill at the end of 1999. After almost eight months of silence, the minister unveiled in February 2000 her 'strategic objectives' regarding land tenure reform in the rural areas. The Minister indicated that there was a need to consolidate and rationalise land administration laws and create an integrated system of land tenure and statutory rights that could be legally registered. Some of the goals that she later laid down were:

- To divest government of the responsibilities of land ownership in the former homeland areas – a colonial and apartheid legacy;
- To transform the current land administration and tenure systems into a unitary system of land tenure – ownership (freehold) and statutory rights which can be legally registered;
- With regard to the governance aspects of land administration, to build on the existing local institutions and structures, both to reduce the costs to the government and to ensure local commitment and popular support (Lahiff 2000:63).

While, as Lahiff (2000:63) suggests, it was not clear how these principles would be operationalised, some implications can nonetheless be drawn, especially in relation to the direction the 1997-1999 process was taking. Firstly, on the question of divesting the government of land ownership, it appears as if this was a departure from the caution that was raised by the drafters of the Land Rights Bill, based on the experience of the test cases. It has been shown that while these drafters were not against the eventual transfer of land to legal entities, they cautioned against upfront transfer. It is not clear whether this caution will be heeded by the post-1999 policy and legislative thrust. This caution becomes all the more important given the form of landholding suggested in a Status Report issued by the Ministry of Land Affairs: that land in the rural areas would be transferred to 'African traditional communities'.[15] This report based the wisdom of transferring land to so-called African traditional communities on what it considered as the achievements of transfers to 'tribes' in terms of the Upgrading of Land Tenure Rights Act of 1991. These transfers were made between 1991 and 1994 in present-day Limpopo Province (Claassens 2001).

Claassens' (2001) research conducted in Rakgwadi, one of the areas where these transfers took place, is highly instructive. The research shows that, in theory at least, the land is invested in the 'tribe', rather than the chief. This implies that the chief cannot take unilateral decisions regarding the land and how it is managed. In practice, though, the chief of the area behaved and acted as if the land was his. Claassens depicts a sorry picture of helplessness on the part of the rural residents of the area, captured in the phrase: 'It's not easy to challenge a chief' – also the title of the research report. The report laments the fact that the DLA seems to be embarking on the route of upfront transfer of land to 'tribes' without apparently researching and drawing lessons from the apartheid era transfers, and expresses the hope that there would be adequate consultation with all stakeholders before transfers are made. Other difficulties regarding the question of transferring land in the rural areas falling under the jurisdiction of chiefs, and where, in particular, rural residents are illiterate or semi-literate, are highlighted in my research in the Tshezi Tribal Authority in the Eastern Cape. Here, as has been indicated, traditional authorities in the Eastern Cape rejected the establishment of a CPA, arguing that the Tshezi land should be transferred to the Tshezi Tribal Authority (Ntsebeza 2001, 1999).

The second implication of the principles set out by the ministry relate to 'the governance aspects of land administration' and the need 'to build on the existing local institutions and structures' in order 'to reduce costs to the government budget and to ensure local commitment and popular support'. In the first place, there is no necessary connection between reducing costs 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?

The drafters of the 1999 Land Rights Bill, as already stated, had emphasised the need to create new institutions. Above all, they vested the power to decide who should administer the land rights of land rights

holders on the holders themselves. The strength of this approach is that it makes local institutions and structures directly accountable to the rights holders as the latter can remove from power these institutions and structures in the event that they no longer serve the interests of the majority of the rights holders. It is, as already argued, this choice that rural residents do not have under unelected and unaccountable institutions such as Tribal Authorities.

In the course of 2000, the advisory team appointed by Minister Didiza issued 'Draft 2' of the 'Communal Land Administration Bill'. This draft sought a compromise between using existing local institutions and structures, for example 'traditional authorities' on the one hand and 'legal entities' on the other. It was not clear whether these 'legal entities' would fall under existing structures or not. It must be said that there was an element of continuity with the 1994-1999 thrust of the DLA in terms of democratic decision-making. For example, on the land allocation procedure, the draft Bill stated:

> Prior to allocation of any communal land right, the traditional authority or the legal entity, shall convene a meeting or members of a local community to table the application. The application shall only be proceeded with if it enjoys the majority support of the adult members of the local community.

Applications for land for business or public purpose would, according to the draft Bill, need to 'be ratified by the Department and the municipality within which the land is situated, respectively'. The draft adopted, without any elaboration, a gender and generation neutral approach in not discriminating against women and young people. For example, it stated that traditional authorities or legal entities should, upon allocation of communal land, provide the Department of Land Affairs with particulars, including that such right shall be capable of being held and exercised without regard to the gender, and marital status, of the applicant. The Bill also proposes setting up of a Communal Land Rights Tribunal that would deal with local disputes.

The major difference with the pre-1999 situation is that the DLA had lain great emphasis not only on majority decision-making but also on giving land rights holders the power to choose the institutions and structures that would administer and manage their land. Whereas Draft 2 of the Communal Land Administration Bill does appear to be accommodating the need for decisions that enjoy majority support, it is not explicit about the need to

allow land rights holders to choose their institutions and structures. Dropping the latter requirement is consistent with the argument that by 1999 the ANC-led government was making concessions to traditional authorities. These concessions were disguised under the guise of 'tradition' and 'custom'. For example, the draft Bill required that a 'traditional authority or legal entity shall, in accordance with the indigenous law and custom or community rules, allocate any communal land right in respect of any portion of communal land' without defining critical terms such as 'traditional authority', 'indigenous law' and 'custom'. Indeed, what counts as indigenous law and custom in a society that has been disrupted by land dispossession, Christianity, Western Education and the migrant labour system? It is important to bear in mind that the South African constitution bases its recognition of 'the institution of traditional leadership' on 'customary law' without locating customary law in the context of the dual legal system colonialists introduced as part of freezing Africans as subjects rather than permitting them to become citizens.

A National Land Tenure Conference held in Durban in November 2001 failed to give clarity about how land tenure reform would unfold in the rural areas of the former bantustans. This was despite the positive theme of the conference: finding solutions, securing rights. A copy of a draft Communal Land Rights Bill was supposed to have been circulated in advance for discussion at the conference. However, no official draft had been circulated at the commencement of the conference.[16] The conference ended up being a brainstorming session on some principles that would inform the Communal Land Rights Bill. At the end of the conference, the DLA committed itself to producing a draft Bill in 2002 for public comment.

At the heart of all these delays is the unresolved issue of the role, functions and powers of traditional authorities in a democracy based on principles of representative government. 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 still ambivalent in the run-up to the election. After a series of meetings between the government and traditional authorities, the government made some concessions. The first significant one 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 are not only represented at a local government level but also at a District and, in the case of KwaZulu-Natal, Metropolitan level. Traditional authorities, though, do 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 there in favour of the old Tribal Authorities as the primary local government structures. Traditional authorities have claimed that the President had promised them in word and in writing, not to tamper with their powers. If anything, these would be increased.[17] On his part, the President has neither denied nor endorsed the traditional authorities' claim. This makes it difficult to know its implications.

The manner in which this vexed issue of the role of traditional authorities in democratic South Africa is handled is intriguing. Insofar as local government issues are concerned, traditional authorities fall under the Department of Provincial and Local Government. In practice, though, traditional authorities do not seem to be recognising this Department. They prefer that the President and the Deputy President handle their matters. For example, traditional authorities have submitted almost all their submission 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.

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.

A much shorter draft amendment of the Municipal Structures Act was published on November 20, 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. 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....

The South African Legal Resources Centre has, with justice, 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 undeterminable number of laws in a vast but undeterminable 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 of other critical national laws'.[18] These national laws would include laws on environmental affairs and local government. These laws insist that citizens should be accorded the right to democratic participation in decisions that affect them. At the time of writing this paper, 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.

The draft Communal Land Rights Bill

The long-awaited draft Communal Land Rights Bill was finally gazetted on August 14, 2002. This draft has retained some of the key principles of Minister Didiza's 'strategic objectives' regarding land tenure reform in the rural areas of the former bantustans discussed above. This is particularly the case with regard to the objective of 'divesting the government of land ownership'. However, whereas in 2000 the Minister had suggested transferring land to African Traditional Communities, the draft Bill proposes

the transfer of registerable land rights to individuals, families and communities. This formulation thus excludes the possibility of transferring land to institutions, including the institution of traditional authorities.

On land administration, the draft has again deviated from the 2000 strategic objectives of building on existing institutions. It divests traditional authorities of their land administration functions, including land allocation, in favour of democratically elected administrative structures. According to section 33(2):

> Where applicable, the institution of traditional leadership which is recognized by a community as being its legitimate traditional authority may participate in an administrative structure in an *ex officio* capacity; provided that the *ex officio* membership of the administrative structure should not exceed 25 percent of the total composition of the structure; further provided that the *ex officio* component of the administrative structure shall have no veto powers in the decision making of the structure.

The draft Bill clearly attempts to 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 recognised in the constitution. However, it is not clear what is meant by a 'legitimate traditional authority'. Does this refer to a traditional authority that is born from the correct lineage? Or does this mean one that has the support of the community?

According to the draft Bill, the provisions of the proposed legislation will apply in all the communal areas. This is important to note given that earlier drafts excluded Ingonyama land from the ambit of the proposed legislation. Ingonyama Trust Land is a large piece of land that comprises most of the former KwaZulu. Indications are that traditional authorities are going to reject the 'Draft Communal Land Rights Bill, 2002'. Chiefs Holomisa of Contralesa and Mzimela of the National House of Traditional Leaders have already indicated that they are going to oppose the envisaged legislation and will take up the issue, as in the past, with the President (*Sunday Times* and *City Press*, August 25, 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*, November 2, 2002)

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

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. Apart from the role of traditional authorities in land tenure reform, there are a number of problems and lack of clarity with the draft Bill. A 60 day period was provided for public comment. At the end of this period in October, DLA officials made a submission to the Minister to have the period extended by another 60 days.[19]

Conclusion

This paper has dealt with the processes undertaken by the DLA regarding land tenure reform in the rural areas of the former bantustans in post-1994 South Africa. These processes have been divided into broadly two periods, the period between 1997 and 1999, and the period from 1999 to the end of October 2002. I have argued that the policies developed up to 1999 tended to marginalise the role of traditional authorities. It has been shown that, in the apartheid period, traditional authorities (chiefs of various ranks), operating in Tribal Authorities, were an extended arm of the state. After 1994, particularly between 1997-1999, a policy was adopted by the DLA vesting decision-making powers in land rights holders, rather than structures such as Tribal Authorities and Local Government. The guiding principle established by the 1997 White Paper on land policy was that, where land is held in a group form, the land rights holders should be the owners of the land through landholding legal entities such as CPAs. On the question of land administration and management, the guiding principle was that the landowners, as co-owners, should decide who should administer and manage their land.

I have argued that a grave implication for traditional authorities, based as they are on hereditary rule, is that the principle of giving rural residents the right to choose their institutions means that traditional authorities and their institutions and structures will no longer be the automatic 'choice' or enjoy a privileged status. Consequently, traditional authorities are strongly opposed to any attempt to play with the powers they enjoyed under apartheid. On the question of landownership, they want land transferred either to them as individuals, or to the apartheid created Tribal Authorities. I have argued that this would have grave implications for the land rights of

ordinary rural residents. Traditional authorities are showing similar resistance to attempts to democratise land administration and management. In short, they are opposed to the separation of powers implied in the distinction made in the White Paper on Land Policy between land ownership and governance and insist on the fusion of power they enjoyed under apartheid.

The response of the ANC-led government to the opposition of traditional authorities has been described in this chapter as ambivalent. The case study of Tshezi, where the government showed great reluctance in facilitating the establishment of a CPA as a result of opposition from traditional authorities, is a good illustration of this ambivalence. This ambiguity was already evident even before June 1999, when there was a change of ministers in the DLA. After June 1999, the new minister made announcements that in many ways challenged some principles established earlier.

The main departures related to reverting to the principle of divesting the government of land, which has been interpreted by DLA to mean upfront transfer of land. Initial proposals in 2000 were that land would be transferred to so-called African traditional communities. Regarding land administration the suggestion now is to build on existing institutions. It was not clear, however, whether rural residents could choose their own institutions and structures. The draft Communal Land Rights Bill, it has been shown, has not departed from the fundamental 2000 objective of transferring land. It has modified the original proposal by suggesting that land should not be transferred to so-called African traditional communities but to individuals, families and communities. The drafters of the 1999 Land Rights Bill had cautioned against upfront transfer of land without resolving critical issues such as agreement on the unit and form of ownership. The draft Bill has also introduced administrative structures to be democratically elected, in which traditional authorities will be given not more the 25 per cent representation. It has, however, been argued that these structures face an onerous task with hardly any support from the government. A lesson that can be learnt from the Tshezi case study is that forming a legal entity to ensure tenure security and transparent land rights administration goes far beyond the drawing up of constitutions and legal documents. Such a process of institutional transformation and development requires a clear commitment on the part of the government to support these new structures.

Rural tenure reform has yet to be resolved in South Africa. I have shown that there is still no clarity in policy and legislation demanded by the

constitution for tenure security has not been promulgated. These unresolved questions have grave implications for the land rights of rural residents and democracy in the countryside.

Notes

1. Unless specified, the term 'rural' will be used throughout to refer to the rural areas of the former bantustans falling under the jurisdiction of chiefs and headmen, as distinct from commercial farms.
2. In the rural areas of Phondoland and KwaZulu, for example, headmen are also referred to as 'chiefs' given that they are often relatives of hereditary chiefs. It is worth noting that the colonial and apartheid system of appointing paramount chiefs and chiefs has cast doubt as to whether existing chiefs are from the correct lineage or not. Despite promises, commissions to establish who is, or is not a genuine 'traditional' leader have yet to be established by the post-1994 government.
3. The term 'traditional authorities' is used in this chapter 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 councillors 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. 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.
4. According to the 1997 Rural survey, about 31.4 per cent of the population lived in rural areas in the former bantustans of South Africa. These bantustans comprise less than 13 per cent of the South African land area.
5. 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).
6. Unless otherwise stated, the justification for the shift is drawn from these texts.
7. For details of this case study, see Ntsebeza 2001, 1999.
8. It is worth noting that since 2000, new boundaries have been demarcated, resulting in fewer and larger municipalities, amalgamating rural and urban areas. This change in municipal boundaries would have to be taken into account in assessing the position of a Land Rights Officer.
9. District Councils were established in non-Metropolitan areas as part of Local Government reform in South Africa. In these areas, a tier system of Local Government was proposed, to wit, primary structures made up of municipalities across the country and District Councils made up of representatives from a number of municipalities.

10. A draft Bill that was produced by this team will be assessed below.
11. Mark Gevisser , 'The other Holomisa' in http://web.sn.apc.org/wmail/issues/960913/NEWS66.html. Chief Holomisa is also an ANC Member of Parliament and, until the beginning of 2002, chairperson of the portfolio committee on land affairs.
12. These Houses were established in terms of the constitutional requirement that provincial Houses, and a National Council, of Traditional Leaders be established. Six Houses of Traditional Leaders have been established, one in each of the six provinces that have traditional authorities. The National Council of Traditional Leaders has also been established. The precise role of these Houses and the National Council of Traditional Leaders has not been spelt out, apart from the provision that any law that may affect their areas of jurisdiction should be referred to the Houses. However, these Houses do not have a veto right and the Bill can be passed after 30 days in the event that the Houses fail to persuade legislators against it.
13. This shift drew heavy criticism from the alliance partners of the ANC, the South African Communist Party and the trade union federation COSATU. Relations between the ANC and its alliance partners have been particularly tense over privatisation, in particular in the run up to the Racism Conference that was held in Durban at the end of August 2001.
14. It is worth noting that the ambivalence of the ANC towards traditional authorities and questions around tradition and transformation could already be seen in the constitutional negotiations of 1993 (Walker 1994).
15. Ministry of Agriculture and Lands Status Report on Land Reform. Draft, June 4, 2000.
16. The DLA refused to claim ownership of a 'draft' that was leaked out before the conference. For an analysis of this draft, see Ben Cousins' analysis in *Mail & Guardian* November 23-29, 2002.
17. It has not been possible for me to get a copy of, or to verify, this commitment on the part of the President.
18. Submission by the Legal Resources Centre to the Portfolio Committee on Provincial and Local Government, January 18, 2001.
19. This was disclosed at a workshop that was organised by the DLA on October 14, 2002 in Pretoria.

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