

Democratization and Traditional Authorities in the New South Africa

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Introduction

A tension of inconsistency exists in post-1994 South Africa's Constitution as well as legislation flowing from it.¹ On the one hand, it enshrines a bill of rights including democratic principles based on elected representative government. On the other, it acclaims the role of unelected traditional authorities² without any clarity regarding their functions and powers. This is irrespective of the fact that a large number of traditional authorities became "stooges" of colonial and apartheid regimes.

Recognizing traditional authorities has a number of far-reaching implications for control over land allocation, democratic local government, gender equality and the universal franchise. Chiefly authority is ascribed by lineage rather than achieved through elections and its patriarchal principles ensure that major decisions on land allocation and local government, for example, are almost invariably taken by men only. The catalogue of collaboration by traditional authorities, their autocratic abuse of power and corruption especially during the apartheid period after the introduction of the Bantu Authorities Act, self-government and "independence" of some Bantustans, is well documented.³ Although various chiefs responded differently to colonization, which tended to marginalize them,⁴ the implementation of Bantu Authorities firmly enlisted them in the local arm of the central state, thereby restricting the scope of this variation. As the apartheid state became vicious, so did traditional authorities. From revered and legitimate leaders, most traditional authorities became feared leaders by the majority of rural people.

At the same time, it is a constitutional requirement that elected local government structures be "established for the whole of the territory of the Republic," including rural areas, and that a person or community whose tenure of land is insecure consequent to racial laws or practices should have their tenure legally secured. With regard to local government, rural elected councilors called Transitional Representative Councilors (TrepCs) have been elected in most of the former Bantustans. As far as security of tenure is concerned, the Department of Land Affairs is in the process of promulgating legislation that will create various options to ensure tenure security for rural people.

A feature of rural local government during the apartheid

period, and to some extent the colonial period, was the concentration or fusion of administrative, judicial and executive power in a single functionary, the tribal authority. This fusion is well captured by Mamdani⁵ in his delineation of what he calls "decentralised despotism" or the "bifurcated state," namely, the Native Authority:

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

It is this "clenched fist" that Mamdani sees as central to despotism in colonial and post-colonial rural Africa. Dismantling it is seen by him as a condition for democratic transformation in the countryside. What Mamdani does not stress, though, is the hereditary nature of chiefly power, which rules out the universal franchise. Dismantling tribal authorities is a necessary, but by no means sufficient condition for democratic transformation.⁶

By establishing democratically-elected local government with "development functions" and democracy in decision making regarding land, the intention of post-1994 South Africa is to introduce separation of powers and democracy in the form of elected representation in local government and land, even in rural areas. Quite clearly, at least on paper, this is a major departure from tribal authorities, where power was concentrated in a single functionary, and almost no official was democratically elected. Traditional authorities are, of course, not happy with the above. They see rural elected councilors and the extension of democracy to land issues as deeply threatening attempts to undermine their political and economic powers. The refusal of traditional authorities to accept government policies and legislation is at the heart of current debate on tenure reform in South Africa's countryside.

Despite the commitment of the African National Con-

gress (ANC) to extending democracy to rural areas and to separation of powers previously held by the tribal authority, ambiguities in its relations with traditional authorities have led to a seeming resurgence or resilience of traditional authorities. As noted, despite the fact that traditional authorities were largely discredited, especially during the apartheid period, they managed to obtain recognition in the constitution. This paper argues that answers lie partly in the ANC's strategy during its struggle against apartheid, and in the negotiated settlement that was arrived at during the first half of the 1990s. One of the key strategies of the ANC was to mobilize support against apartheid on as broad a front as possible — hence its characterization as a multi-class and multi- or non-racial alliance. In 1987, during the dying moments of apartheid, a group of traditional authorities in KwaNdebele who opposed apartheid-style independence formed the Congress of Traditional Leaders in South Africa (CONTRALESAs) and immediately aligned itself with the ANC in exile.⁷ The establishment of CONTRALESAs proved to be crucial for the survival of traditional authorities. During the early 1990s, when it was clear that apartheid would not survive for any length of time, formerly discredited traditional authorities, some of whom were critical of CONTRALESAs when it was established, opportunistically jumped on the bandwagon and joined CONTRALESAs. Eager to gain votes in the run up to the elections in 1994, the ANC adopted an expedient position of not differentiating traditional authorities.

Linked to the above was the perceived need by the ANC and the then ruling National Party to involve the Inkatha Freedom Party, a regionally based political party in KwaZulu Natal led by Chief Mangosuthu Gatsha Buthelezi, in the negotiation process. Unlike CONTRALESAs, Inkatha declared war against the United Democratic Front (UDF), widely accepted as the internal front of the banned ANC Alliance in the 1980s. By the early 1990s, the war in KwaZulu Natal had spread to the former Transvaal, now Gauteng, in particular to the hostels that were occupied by migrant workers from KwaZulu Natal. The widely held view, which unfortunately has not been closely researched, was that Inkatha was behind the violence. The involvement of Inkatha in the negotiation process was thus seen as critical, and all efforts were made towards its involvement. Inkatha proved to be a difficult candidate to negotiate with. They went in and out of the negotiation process depending on whether their case was accepted or not. A key condition for the involvement of Inkatha in the negotiations, and later in the elections, was clarity on the role of traditional authorities in the “new” South Africa. Its eventual participation in the 1994 elections was based on the promise that the issue of traditional authorities in post-1994 South Africa would be discussed. Once the ANC yielded to Inkatha's demands, which were based on acceptance of traditional leaders throughout South Africa, it became difficult to discriminate against traditional authorities in other parts of the country. In recent times, there has been a convergence of interests among traditional authorities in favor of Inkatha's positions. At the same time, there seem to be tensions between CONTRALESAs and the ANC. The latter's strategy seems to be to strike an alliance with Inkatha, something

that would possibly lead to further compromises on the role of traditional authorities in South Africa.

The position of traditional authorities is further likely to be strengthened by what is perceived to be the failure of the post-1994 ANC-led government to deliver in rural areas. Hardly any support is given to newly elected rural councilors. They are few and cover scattered, often inaccessible, villages. They do not have transport, or even, in some cases, telephones. Consequently, they rarely visit their constituencies. The proportional representation system of election means that voters choose parties and not candidates. In addition, rural councilors are poorly remunerated. As a result, it has been impossible to attract good and sophisticated activists. The latter have moved to provincial and national politics where they have become part of the “grave train” with attractive packages, or have been absorbed by big business. To crown it all, the bulk of the legislation on rural areas has not been repealed. For example, land allocation is legally still the purview of traditional authorities. Although the Eastern Cape province has tried to repeal aspects of the Bantu Authorities Act that deal with development issues, elected rural councilors are not in a position to give effect to this simply because they lack support as outlined above. For day to day activities such as allocation of land and the resolution of minor local disputes, rural people continue to utilize traditional authorities.

Why is the state not supporting rural councilors? Part of the answer lies in the urban bias of the ANC, and the fact that after the clampdown on political opposition in the early 1960s, the focus of the struggle shifted to the urban areas. By the 1960s, South Africa was an industrializing country with manufacturing as the dominant sector. Migrant workers became more and more absorbed in urban struggles. Throughout the two decades of struggle against apartheid in the 1970s and 1980s, there was very little happening in rural areas. Rural resistance only became visible in the early 1990s when large scale retrenchments in urban areas forced some migrant workers to spend longer times in rural areas. Some brought with them the urban and trade union influences and started civic organizations that challenged traditional authorities. Rural struggles today, however, unlike the 1940s and 1950s,⁸ are no longer sustainable, largely because land is not the central issue that it was in the 1940s and 1950s. Urbanization, cash and jobs have influenced rural areas of the Bantustans irrevocably.

It is against this complex background that the Department of Land Affairs is trying to address tenure reform in South Africa's former Bantustans. This reform project was officially launched in April 1997, through the publication of the White Paper on Land Policy, as one of the three components of South Africa's land reform program. Land tenure reform aims, as one of its goals, to confirm the co-ownership rights of groups and communities living in the former Bantustans, where land in the “tribal” areas is still nominally state owned. It is proposed that these rights be registered in the national Deeds of Registry. This paper commences with a brief overview of land tenure in the Reserves, later called Bantustans/homelands, during the period upto 1990, goes on to look at tenure reforms during the

negotiation period of the early 1990s and the run up to the 1994 elections, and finally provides an account of tenure reform since 1994. Throughout, the paper will consider the role of traditional authorities, and will highlight the enormous problems encountered in implementing post-1994 democratic land tenure policies whilst recognizing traditional authorities. Study material from the Eastern Cape will illustrate the above complexities, at both provincial and local levels.

Land Tenure Before 1990

Land in the rural areas of the former Bantustans, with the exception of a few cases where title deeds and deeds of grant were issued, was, and still is “unregistered, unsurveyed state land.” There is a long and varied history to this state of affairs. In the Cape, the promulgation of the Glen Grey Act in 1894, introduced by its Governor Cecil John Rhodes, laid the foundation for latter-day apartheid policies. Following the military defeat of independent chieftaincies, the Act systematically curtailed the authority of chiefs by replacing them with a system of government appointed district councilors and introducing separate reserve areas under his version of communal land tenure.⁹ The key tenets of communal tenure were: the policy of “one-man-one-lot;” the division of the land into four or five morgen allotments; the restrictions on the alienation of land; and the liability of forfeiture in the case of non-beneficial occupation.

Soon after the Union of South Africa in 1910, “scheduled areas”¹⁰ acquired in terms of the 1913 Land Act were put aside for occupation by Africans. The latter were legally not permitted to acquire land outside the scheduled areas. After various reports and commissions on overcrowding in the Reserves, the Development Trust and Land Act No. 18 of 1936 was promulgated to purchase additional land, called “released areas” for consolidation of the Reserves.¹¹

In terms of this Act, occupation of land was based on a “permission to occupy” (PTO) system. Section 4 of Proclamation No. 26, 1936 as amended empowered the magistrate to grant permission

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

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

(N)ot more than one homestead allotment and one arable allotment shall be allotted...to any Native (*sic*), provided that if such Native (*sic*) is living in customary union with more than one woman, one homestead and one arable allotment may be allotted for the purpose of each household.¹²

In terms of the permission to occupy system, the holder of the site was entitled to remain in occupation until his death and elect the person to whom he would like the site to be allocated on his death. In theory, the holder’s rights could be forfeited for failing to take occupation or fence within a year of allocation and for non-beneficial use for two years.

In practice, these conditions were often not adhered to.¹³ At the same time, while the PTO guaranteed its holder per-

manent occupation, the holder thereof was vulnerable. For example, PTO holders could be forcibly removed without being consulted if the government, the nominal owner of land, deemed fit. This was the case when the government introduced its Betterment Plan,¹⁴ or when development schemes, such as irrigation schemes, tea factories, nature reserves, and so on, were introduced.¹⁵ Some PTO holders were victims of banishments in which case their houses would be demolished, often without compensation and recourse to law. Finally, PTOs were not recognized by financial institutions as collateral.

Traditional authorities played a critical role in land allocation after the promulgation of the apartheid Bantu Authorities Act in 1951. Initially sidelined by Cecil John Rhodes, whose main goal seems to have been to shore up the remains of the chieftaincy, they were given a semblance of power, and the colonial hope was that this would safeguard the allegiance and acquiescence of the reserve residents. A distinction was made between chiefs appointed by the Governor-General and those who would merely be recognized by the government. It is the former who were given limited powers; the role of the latter was not clarified. Chiefs were substantially deprived of the direct rule that they enjoyed before colonial defeat in favor of centrally appointed village headmen. In this regard Hammond-Tooke argues that this position of powerlessness “allowed the chiefs to maintain much of their traditional prestige and popularity, for in this bureaucratic system the centrally appointed location headmen¹⁶ ‘assumed the scapegoat role.’”¹⁷ This was reversed by the National Party as they tied traditional authorities to the local arm of the state. Writing about the role of chiefs in the implementation of rehabilitation schemes, Mbeki argues that the government turned to chiefs “offering to those whose areas will accept rehabilitation measures appropriate incentives: increased special stipends, increased land allotments, words of praise and places of honour, and, behind all, the right to continue as government appointed Chiefs.”

On the harshness and undemocratic methods applied by traditional authorities, Mbeki continues:

With these fruits of office dangling before them, the Chiefs often commit peasants to acceptance of the rehabilitation scheme without consulting them. Then, when preparations are made for the implementation of the scheme...the peasants question with surprise the cause of all this activity... And now the Chief hits back at them mercilessly. The instigators of the discontent are brought to the Bush Court (Chief’s Court) with the greatest haste and the least formality.¹⁸

In sum, land in the rural areas of the former Bantustans during the colonial and apartheid period was state land. During the apartheid era, in particular, traditional authorities, operating through tribal authorities, played a central role in the administration of land. Not only did traditional authorities have land administration powers they also had judicial and executive powers, as Mbeki’s quotation shows, thus fitting Mamdani’s thesis of a “clenched fist.” During this period, most traditional authorities derived their power from their viciousness, protected by an equally vicious apartheid system, leaving rural people with few options but to comply. By the late 1980s and early 1990s, though, mass mobilization, which was characteristic of most urban areas

in South Africa during the 1970s and 1980s, had shifted to rural areas. Tribal authorities became the chief target. At the same time, the National Party apartheid regime embarked on a reform path in the late 1980s and early 1990s, and indicated its willingness to negotiate change in South Africa.

The Transition to the 1994 Democratic Elections

This section focuses on developments in those Bantustans that opted for "independence" and the rest of South Africa, which remained under National Party rule until 1994. The "independence" of some Bantustans between 1976 and 1981 did not initially alter power relations in rural areas. If anything, the power of traditional authorities, from sub-headman to paramount chief, was strengthened. The two Bantustans in the Eastern Cape, Transkei and Ciskei, continued to issue PTOs in terms of the 1936 Land Act.¹⁹ By the late 1980s and early 1990s, mass mobilization had spread to the countryside. During this period, the Bantu (by this time Tribal) Authority System came under renewed attack. There were calls for the resignation of headmen — *pantsi ngozibonda* (down with the headmen). In vast areas of the Ciskei the tribal authority system collapsed and the civic associations took over.²⁰ Tribal authorities in most parts of the Transkei region were also affected.²¹ In KwaZulu Natal, an intense and bloody war took place mainly between the supporters of the Inkatha Freedom Party and the United Democratic Front, and later the ANC, when the latter was unbanned.

A second feature of the early 1990s is that this was when negotiations for a new South Africa began in earnest. Initially excluded from talks, traditional authorities were subsequently invited. There were two reasons for this. First, the ANC did not want to harm relations with CONTRALESA before the envisaged elections. Second, both the ANC and the National Party wanted to ensure the participation of the Inkatha Freedom Party in the negotiation process.

Finally, this period was characterized by the collapse of land administration in most of the Bantustans. In Mqanduli, for example, officials reported that they have not had applications for PTOs for the last three years or so.²² Along the Wild Coast in the Eastern Cape traditional authorities in Pondoland and Tshezi were implicated in illegal allocation of cottage sites to such an extent that the matter is being investigated by a Parliament-appointed Unit, the Heath Special Investigation Unit. Traditional authorities do not have any jurisdiction over the one kilometer zone from the sea. However, due to a collapse in administration, especially during the Transkei independence, traditional authorities exploited the situation and swelled their pocket through bribes. Some are alcoholics as a result of the amount of liquor — which is part of the bribe — they consume. Traditional authorities in these areas were not seriously affected by the wave of the early 1990s. In the Tshezi area no civic association was established. But this is not necessarily a sign that traditional authorities are legitimate, it could be that they are still feared, given their ruthlessness over almost four decades.

In "white" South Africa, some changes began to take

place in the early 1990s. Under the leadership of its reformer, F.W. de Klerk, the National Party introduced a land reform program. Its three elements were upgrading of land rights, land redistribution and land utilization. To address land rights, an Upgrading of Land Tenure Act was introduced in 1991. Two proposals that would have effectively eliminated the PTO system were made. In terms of section 19 of the Upgrading of Land Tenure Act, 1991:

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

Secondly, the Act created conditions to upgrade the PTO to full freehold title. The essence of the argument for the upgrading of PTO land rights was the view that the right to title deeds had been denied blacks in the past, as manifested in trust-held land and the system of PTOs. In terms of National Party thinking, the alternative to communal land tenure was individual freehold title, and it is this possibility that the Upgrading Act provided — the upgrading of PTOs and the transfer of communal land to tribes, with a preference in policy for the former.²³

This kind of National Party thinking came under attack from the National Land Committee (NLC), its affiliates and other critics. One of the shortcomings pointed out was that the National Party proposals ignored critical realities on the ground, namely, the problem of issuing title where there could be overlapping land rights. Secondly, the World Bank argument that individual title, as opposed to "communal" or group title, provides tenure security and thus enhancement of productivity was not supported by the findings of a study commissioned by the World Bank on the relationship between tenure security and agricultural production.²⁴

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

Post-1994 Developments, Land Tenure Reform, Traditional Authorities and Elected Councilors

Soon after the 1994 elections, the Department of Land Affairs (DLA) announced its program of land reform, based on three legs, namely, redistribution, tenure reform and restitution.²⁵ With regard to tenure reform in the Bantustans, one of the first targets of DLA was to amend the 1991 Upgrading of Land Tenure Rights Act in 1996. The relevant amendment involves revising the definition of "tribal resolution" which is substituted by the following definition:

Tribal resolution, in relation to a tribe, means a resolution

passed by the tribe democratically and in accordance with the indigenous law or customs of the tribe.

In April 1997 the DLA launched its White Paper on Land Policy, and at the beginning of 1998 it unveiled the following principles to guide its legislative and implementation framework.²⁶

It is necessary to recognize the underlying land rights, which belong to individuals, and groups (e.g. tribes) on most land which is nominally state owned.

These rights should vest 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 people and in other cases to individuals or families. Where the rights to be confirmed exist on a group basis, the rights holders must have a choice about the system of land administration, which will manage their land, rights on a day-to-day basis.

In situations of group-held land rights, the basic human rights of all members must be protected, including the right to democratic decision-making processes and equality. Government must have access to members of group-held systems in order to ascertain their views and wishes in respect of proposed development projects and other matters pertaining to their land rights.

Systems of land administration, 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.

Earlier on, in October 1997, the Minister of Land Affairs, addressing a congress of CONTRALESA made the following point most emphatically:

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.

Two implications of the above position must be highlighted. First, a distinction is drawn between landownership and governance. Members of particular communities (as co-owners), where they opt for transfer of land, will be regarded as the owners of land. This is a landownership issue. It will be up to them to decide on how they want their land to be administered. The latter is a governance issue, which involves, inter alia, land administration. It is important to note that during colonial and apartheid periods, no such distinction was made. The state was both the owner and administrator of land. Traditional authorities never (legally) owned the land, but were given certain administrative powers by central government. Bantustans that opted for "independence" also did not make the distinction as communal land remained state land. The guidelines and the Minister of Land Affairs insist on democracy in future decision-making processes, including the decision on who should administer "group" land.

The consequence of the above is separation of powers versus the fusion of authority characteristic of the past. Three main actors are suggested, namely, landowners, land administrators and local government. The latter will not be

the owners of land, and will not necessarily have the right to allocate land, unless specifically asked by the landowners to do so. However, no land rights are absolute, either in urban or rural areas. As a body representing public interests, local government, through the TrepCs, will have control and regulatory functions. Further, service delivery will continue to be the function of local government and in both instances, landowners are bound, legally and constitutionally, to cooperate with the TrepCs. Besides service delivery, control and regulatory functions, local government, in terms of the Constitution has "development functions." In this regard, the powers and functions of local government have been enhanced to support socio-economic upliftment and local economic development. Local government, in terms of the Constitution must "structure and manage its administration and budgeting and planning process to the basic needs of the community and to promote the social and economic development of the community..." In this regard, the Transitional Local Government Act and the Development Facilitation Act provide tools, namely, Integrated Development Plan (IDP) and Land Development Objectives (LDO) to implement the constitutional provisions.

It must be said, though, that both the amendment to the 1991 Upgrading Act and the guiding principles, by assuming the existence of "customs," "indigenous law" and "tribes," reinforce, rather than attempt to resolve, the tension of inconsistency between upholding democratic principles based on elections and democratic decision-making, on the one hand, and recognition of an institution that does not accept elected representation, on the other.

Be that as it may, the DLA is proceeding to formulate policies on land tenure and administration that are clearly going to weaken the powers of traditional authorities. In the province of the Eastern Cape, a Regulation of Development in Rural Areas Act was passed towards the end of 1997. This Act effectively strips traditional authorities in the Eastern Cape of their development duties as prescribed in the Bantu Authorities Act as amended. These include the allocation of land, a cornerstone of chiefly power.

Tenure Options

At the moment, there are two options for tenure security in the rural areas of the former Bantustans, namely, individual freehold and "group/communal" ownership. The former exists as an option, but would be difficult to implement. The key problem is that communal land in the former Bantustans is unregistered and unsurveyed. It is believed that the cost of surveying and registering the land is exorbitant. Given budget cuts and the perception that the state is not prioritizing rural areas, it is unlikely that the state will commit itself to shouldering these costs. This suggests that individuals who want freehold titles would have to bear the costs. The greatest majority of rural people are poor, which means that this is not a viable option for them. Further, a "tribal resolution" needs to be passed by the majority of members of the particular group or community.²⁷

Communities applying as groups for transfer of land must constitute themselves as a landholding entity. There are a number of legal entities, for example, companies, in their various forms, trusts and "tribes," in terms of the Na-

tionalist Party legislation. In 1996, the Communal Property Associations Act was promulgated to provide for the establishment of a Communal Property Association (CPA) or similar entity, primarily as a landholding legal entity. In terms of this Act, members, defined in terms of households,²⁸ must agree to a set of rules and regulations for landownership. A majority (for example, two-thirds) 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 Department of Land Affairs.

The CPA Act does not prescribe the rules and procedures for land allocation and decision making, or the manner in which the CPA Committee should be constituted. This must be decided by the majority of the membership. The only condition is that the legal entity must conform to the requirements of the South African Constitution, in particular, the Bill of Rights and democratic decision making. As far as registration of the CPA is concerned, a designated government official from the DLA officiates the registration process. This individual must be satisfied that all members of the community were informed about the CPA, and that a fully representative meeting endorsed the CPA Constitution and democratically and freely elected the CPA Committee. A two-thirds majority of those attending is required to approve the CPA and to disband it.

Although the CPA was the DLA's preferred landholding entity, it must be emphasized that it is not the only one. Whatever the legal entity, it must conform with the provisions of the South African Constitution enshrined in the bill of rights, such as democratic decision making, non-discrimination on the basis of gender, religion, race, language, and so on.

A third option is currently being drafted into legislation. This applies in instances where there has been no application for transfer of land from the state. In this case, the state remains the nominal owner of land, but, unlike in the past, will strengthen the land rights of occupants. The Land Rights Bill²⁹ proposes a category of "protected rights" created by law, to secure the basic rights of rural people in the former Bantustans. These rights would have the status of property rights in that the law would prohibit the deprivation of rights except with consent or by expropriation. The draft Bill goes on to declare that every holder of a protected right in respect of State land is 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 are registrable in the Deeds of Registry, although this will not be compulsory, but demand driven. In short, protected rights holders do not take transfer of the land, but their rights to land are secured by law.

Land Administration

In terms of land administration, we noted above that where communities opt to take transfer of land and establish a legal entity, they will choose the body to administer their land, subject to local, provincial and national government regulations. For protected rights holders, three struc-

tures are proposed. At a local level, the Bill proposes the establishment of "accredited rights holders structures," which can be applied for by "any land rights structures." In theory, a tribal authority could be such a structure. The application will be considered by a proposed Land Rights Board and will only be approved if the protected rights holders concerned have authorized the structure; the Land Rights Board is satisfied that the rights holder structure complies with set requirements and is capable of performing the expected functions.

A Land Rights Officer may be appointed by the Director General to monitor compliance with the proposed Act by rights holders and other persons and report any contraventions; confirm decisions of rights holders and rights holder structures; inform persons of their rights in terms of the proposed Act; endeavor to resolve disputes between protected rights holders regarding the exercise of their rights; and advise the Land Rights Board on the performance of its functions. The proposed Land Rights Officer will be given powers to enter upon any land at any reasonable time; investigate any relevant matter; inspect any document in the possession of any protected rights holder or any rights holder structure concerning land rights and make copies of such document; convene meetings of protected rights holders or rights holders structures and attend any meeting of protected rights holders or rights holders structures. Where land rights structures have not applied for "accredited rights holders structures," it is envisaged that the Land Rights Officer would convene a process to establish the decision of the majority of rights holders.

At a magisterial district level, the proposal is that a Land Rights Board will be established by the Minister. The proposed Board shall bring together different interest groups who would bring special expertise and experience regarding land tenure matters. The Land Rights Officer appointed for the particular district will be a member of the Board. Traditional authorities will not be excluded from the Board. Various functions are proposed for the Land Rights Board, including to safeguard the interests of protected rights holders; to resolve disputes between protected rights holders; to determine appeals against decisions of accredited rights holders structures; to advise the land rights official and the Minister as contemplated in the Act; and to advise local government on zoning land for occupation, use, access and development.

Once the Land Rights Bill becomes an Act, it will go a long way to protect rural people from arbitrary decisions by the state, local and tribal authorities, as has been the case in the past when people were forcibly removed, or had their homes destroyed without compensation. It will have far-reaching implications for traditional authorities who for over four decades have not been accountable or democratic. The Bill was temporarily shelved until after the June 1999 elections. It is expected that it may only become law in 2000. It is not clear how traditional authorities are going to respond to the Bill. However, their response is predictable given their position on transferring land to legal entities, in particular, the Communal Property Association. Traditional authorities are vehemently opposed to the transfer of land to

legal entities, and want land to be transferred to traditional or tribal authorities.

Traditional Authorities and Transfer of Land to Legal Entities

It is striking that traditional authorities, despite earlier divisions, seem to be drawing closer and closer to one another. We noted in the introduction that when CONTRALESA was established it aligned itself with the ANC. During the 1994 elections, CONTRALESA and most traditional authorities were known to be ANC supporters. Some, such as Patekile Holomisa, became card-carrying members, and are now ANC Members of Parliament. Throughout this period, the majority of traditional authorities in KwaZulu Natal, who support the Inkatha Freedom Party, were hostile to the ANC. Consequently, there was a perception that there were divisions between traditional authorities in CONTRALESA and in the Eastern Cape in particular, on the one hand, and traditional authorities in Inkatha. Their response to the proposed transfer of land to legal entities provides a good example.

In line with 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. A National Council of Traditional Leaders, composed of two representatives from the Houses of Traditional Leaders, has also been established. The precise role of these Houses and Council of Traditional Leaders has not been clearly spelt out. However, legislation setting up these Houses provides that no bill affecting rural areas should be passed by national and provincial legislatures without referring it to the National Council or provincial Houses. Where the latter are opposed to a proposed bill, legislation provides that they can delay the passing of the bill for a period not exceeding 30 working days, during which time they would be attempting to exercise their influence. They do not have a veto right and the bill can be passed after 30 days in the event the Houses of Traditional Leaders fail to convince legislators.

It is in this spirit, but also in keeping with the declared policy of the ANC-led government to consult stakeholders, that the Houses of Traditional Leaders and the National Council of Traditional Leaders were invited to respond to the DLA tenure reform policy in the former Bantustans. This invitation was also extended to CONTRALESA. It is argued in this section that despite initial differences between the House of Traditional Leaders of KwaZulu Natal, on the one hand, and the other Houses of Traditional Leaders, especially the Eastern Cape and CONTRALESA, both of which aligned themselves with the ANC, there seems to be a closer working relationship among the various Houses of Traditional Leaders over the last three years or so. This is clearly demonstrated by the common position they hold on transfer of land to legal entities, and on the role of traditional authorities in local government. Their response clearly indicates that they will resist any effort that threatens to dismantle tribal authorities as they exist. Having said that, the relationship between the Houses of Traditional Leaders and the National Council of Traditional Leaders on

the one hand, and traditional authorities at a local or "tribal" authority level produces interesting dynamics which the Tshezi communal area case study discussed below will illustrate. If traditional authorities are united at the level of the Houses and National Council, this particular case study shows a complex relationship between these traditional authorities and their counterparts at the "tribal" authority level.

Various meetings were held between the Department of Land Affairs and representatives of the Houses of Traditional Authorities and CONTRALESA during 1997. The speech by the Minister of Land Affairs at the annual congress of CONTRALESA in October 1997 was one such occasion. In February 1998, the Houses of Traditional Leaders and the National Council of Traditional Leaders were invited to the Parliament Portfolio Committee on Land to formally put forward their response and position. This paper will focus on the responses of KwaZulu Natal and Eastern Cape. It is these two Houses that presented their cases to the Portfolio Committee. The chairperson of the Portfolio Committee, Advocate/Chief Patekile Holomisa, who, apart from being an ANC Member of Parliament, is president of CONTRALESA and a member of the House of Traditional Leaders in the Eastern Cape, indicated during proceedings that the Eastern Cape position largely represents the views of CONTRALESA and the National Council of Traditional Leaders.

In their submission, the KwaZulu Natal House of Traditional Authorities agreed that land should be returned and were unequivocal that land belongs to traditional authorities and that the title deed should be in their name.

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

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

discussions would center around the "legal entity."

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

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

Another chief, Kakudi declared:

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

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

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

While there may be a growing community of interests and closer working relationship between traditional authorities in the Houses and National Council of Traditional Leaders, their relationship with their counterparts at a local, "tribal" level seems to be complex. The case study of the Tshezi communal area illustrates these complexities.³²

The Example of the Tshezi Communal Area in Mqanduli

The Tshezi communal area is situated along the Wild

Coast in the Transkei region of the Eastern Cape. It incorporates two resorts, namely Coffee Bay and Hole-in-the-Wall, and four administrative areas that currently comprise the Tshezi Tribal Authority. After the 1995 local government elections, the area fell under the Mqanduli Transitional Representative Council, which in turn is under the Kei District Council, with offices in Umtata. The area is one of four economic development nodes that were identified by the government-initiated Spatial Development Initiatives (SDIs).

One of the requirements of the SDI for investments in communal areas, including the Tshezi area, is the need to establish landholding legal entities that would enter into negotiations and sign contracts with investors. An SDI committee, made up of some members of the tribal authority and business people, with a gender breakdown of six men and two women, was set up. One of the tasks of the committee was to set up a legal entity. After a series of workshops on legal entities, the committee opted for a CPA. This decision was relayed to the local chief and his tribal authority.

The initial response, particularly from the chief, was enthusiastic. However, in subsequent meetings, the chief, some headmen and some villagers began to have doubts about the CPA. These concerns first emerged in a general meeting in April 1998 where the CPA was discussed. The chairperson of the SDI committee, who is also a headman, expressed concern that traditional authorities might lose their control if the CPA were established. Appealing to the meeting, he said, "we should guard and protect chieftaincy." The possibility of including women and youth in the CPA did not appeal to him, as he thought that women and youth would undermine the authority of traditional authorities. The chief's son, who is also headman of Lower Nenga, supported Mr Mbambazela. He suggested that traditional authorities should be given more time to consult with other traditional authorities outside the Tshezi area, including CONTRALESA. He pointed out that they would request CONTRALESA to draft a constitution for them, seemingly disregarding the draft constitution prepared with the SDI Committee. The chief did not attend the April meeting.

In subsequent meetings, the chief, who was initially enthusiastic, began to be unpredictable. In one meeting he would show enthusiasm, and would be the opposite in the next. It was clear that he was getting differing advice from various people. Questions/issues that came up now and again were:

Why is it that the CPA is established on his land first?

Where else has it been established?

He would be happy if there was a letter from the Government to the effect that his land is being transferred to him as the chief of the area.

A meeting should be arranged with CONTRALESA, and chief Nonkonyana in particular, to hear what their views are regarding the CPA.

Constant reference to CONTRALESA and specific chiefs in CONTRALESA clearly suggested that there was a quiet campaign to influence the chief and his tribal authority. It later turned out that the chairperson of the SDI com-

mittee is also a member of CONTRALESA.

Despite this, traditional authorities in the area are not united. One influential, development-oriented headman is strongly in favor of the CPA, as he sees it as an important tool for development in the area. The chairperson of the SDI committee is undecided. As a member of the SDI committee, he is in favor of the CPA, but his allegiance to CONTRALESA makes him cast doubt on the CPA. The chief's son is in a similar dilemma. He finds it difficult to articulate a position against the CPA. However, he claims that he finds it difficult to support the CPA given that his father is opposed to it. The fourth headman, who is acting in non-committal. He rarely attends meetings, and when he does, does not express an opinion.

The other resistance to the CPA comes from a tiny group in Mthonjana, the smallest of the four administrative areas. Their opposition to the CPA is seemingly contradictory. In one breath, they are opposed to the involvement at leadership level of traditional authorities. In the same breath, they claim they can only accept the CPA if it is introduced by the chief. What came out during the research, though, is that the two brothers who form the core of this resistance are being investigated by the Heath Special Investigation Unit for their involvement in illegal cottages. Quite clearly, they sense that the accountability required by the CPA would not suit their interests for personal gain.

In September 1998, a delegation from the Tshezi area led by the chief, held discussions with chief Nonkonyana, who is an advocate, chair of the House of Traditional Leaders in Bisho and provincial vice president of CONTRALESA. The discussions centered around the CPA in the Tshezi area. The meeting ended with the following resolutions:

Tshezi land should be transferred in the name of the Tshezi Tribal Authority, and that the constitution prepared with the SDI and interim CPA Committees be adjusted accordingly.

That the Tshezi Tribal Authority should write to the Minister of Land Affairs requesting him to appoint a lawyer to assist them to constitute and register the Tshezi Tribal Authority legal entity.

Subsequent to this meeting, yet another meeting was held at the Tshezi Tribal Authority to further resolve this issue. This meeting was attended by councilors, mostly traditional authorities, from the King's palace. After deliberations, largely to convince the chief that he should accept the CPA, there was a unanimous agreement that a Tshezi CPA be established. However, when once chief/advocate Holomisa, who is also a member of the ANC, and chair of the Parliament sub-committee on Land, heard about this decision, he went to the Tshezi chief and told him not to accept the CPA. He advised that the chief should ask for transfer of land to the tribal authority.

One might be interested to know the role of the ordinary members of the Tshezi area. In public meetings and interviews, the CPA is widely accepted. Given the high unemployment resulting largely from retrenchments in the mines over the last ten years or so, the CPA is seen as having the potential to attract investment opportunities, and with that, not only revenue in the sense of rent, but employment opportunities too. However, the majority of the Tshezi people

still look to their chief for direction. Most of them are illiterate and semi-literate. The more educated, especially the youth try to find employment away from home. Those who attend meetings where these crucial decisions are taken are "retired," elderly men. The younger retrenched members rarely attend meetings. They spend most of their days in shebeens, which mushroomed in the late 1980s. Elderly people fear the chief. This seems to emanate from the apartheid period when traditional authorities were ruthless and could not be challenged. Under such conditions, it is understandable why rural people are reluctant to challenge their chief. Their attitude is that he must be persuaded, rather than left behind. Alternatively, they argue, the King³³ must intervene.

Despite the promulgation of the Development in Rural Areas Act of 1997, which effectively transferred development functions to elected rural councilors in the Eastern Cape, rural councilors have not utilized any of these functions. The main reason for this is the neglect of these councilors at both provincial and national levels.³⁴

What the above suggests is that traditional authorities are not united in their opposition to the Communal Property Association. It is difficult to explain these disparities without doing more research, not only in the Tshezi area, but in a number of communal areas. But what is also evident is that traditional authorities in the National Council of Traditional Leaders, the Houses of Traditional Leaders and CONTRALESA are organizing traditional authorities at national, provincial and local levels to restore tribal authorities. At the same time, the government shows reluctance to implement and enforce its policies and legislation and to support democratic rural structures. It is not yet clear how this deadlock will be resolved, especially as grass roots level organization barely exists, and democratically elected structures are weak and lack the capacity to deal with these complex issues.

Conclusion

This brings us back to the argument raised in the introduction about democracy in rural South Africa. This paper examines Mamdani's thesis on democratic transformation in post-colonial Africa and the centrality of "detrribalisation" — dismantling the fused character of tribal authorities and making them accountable and subjected to elections. In so far as post-1994 South Africa has inherited rural areas that are still administered by tribal authorities, Mamdani's thesis poses a challenge for a democratic South Africa. By drawing a distinction between ownership and governance in land, and subjecting the latter to elections, post-1994 South Africa takes a bold step to dismantle tribal authorities, as they cannot both be landowners and administrators, on the one hand, and not be elected, on the other hand. However, recognizing traditional authorities creates a tension of inconsistency. Government's reluctance to resolve this tension means that while in the rest of the country South Africans can elect their representatives, in rural areas in the former Bantustans, the democratic, political revolution has yet to be achieved.

The question has been asked in recent times: "how can government policies and programs ensure that "rights in

law” become “rights in reality’?” The same author goes on to warn:

Land reform must thus make provision for the effective implementation of the new rights-based laws, or the rights defined so precisely in neatly printed Government Gazettes will be little more than “paper tigers,” and toothless tigers at that.³⁵

Tensions between all three levels of government and traditional authorities seem to be key in land tenure reform in the communal areas. This paper has presented examples drawn from the Eastern Cape. In that Province a deadlock on who owns communal land has now been reached which has a direct bearing on policy and delivery. How government will respond to the above deadlock is difficult to say. The position suggested in the DLA paper on “Current developments in South Africa’s land tenure policy” is that the issue of land transfer should best be avoided in favor of “statutory rights.”³⁶ Land transfer was seen as involving case-by-case investigation. According to this position:

Inevitably this would open-up boundary disputes between different groups. It would also open up major disputes as to whether title should be transferred to chiefs, tribal authorities, local authorities, provincial governments, tribes, subsections of tribes, groups of people or individuals. Preliminary investigations have found this route to be fraught with conflict and major disputes about power. It appears inevitable that such investigations would trigger massive instability, and also that they would get bogged down in a slow and intricate process similar to that of land restitution.³⁷

Having said that, the following qualification is made:

It should be understood that statutory rights are proposed because of advantages in terms of practical application. Transfer of title would remain an option and there are situations where it would be the most appropriate option. The system of statutory rights is proposed as complementary to the system of transfer and not in opposition to transfer of title.³⁸

This paper would agree with the principle that transfer should not be effected in all cases. What is more interesting are the “situations where it (transfer) would be the most appropriate option.” What would be those situations, and who decides? In the case of the House of Traditional Authorities in the Eastern Cape, and the recent decision of the Tshezi tribal authority, land transfer is seen by these two traditional authority bodies as an “appropriate option.” Indeed, except for a tiny group in Mthonjana, one of the administrative areas in the Tshezi area, those interviewed and consulted in the Tshezi area agreed that land should be transferred to them. The Spatial Development Initiatives, too, argue that land transfer to a legal entity will enhance development opportunities in communal areas. In a nutshell, the debate in the Eastern Cape, and in the Tshezi area in particular, is not whether land should be transferred or not, but the form in which land will be registered.

Traditional authorities are adamant that land should be transferred to tribal authorities. Although they haven’t presented a coherent account of a tribal authority as a land-holding legal entity whose constitution should be in keeping with the provisions of the South African Constitution, in particular, the Bill of Rights, it seems possible to assume that they have in mind tribal authorities as they currently exist, established in terms of the 1951 Bantu Administration

Act of the apartheid period. Yet, government policies are crystal clear about the procedure once transfer of land has been opted for, namely that it is the members of the defined group as co-owners who are the owners of land. The policy guidelines make it explicit that traditional and local authorities cannot be landowners. The policy goes on to say that it is up to members to decide who should administer land on a day-to-day basis. Traditional authorities know this policy position, but they reject it, and according to Chief Gwadiso, they can do so on behalf of “their people,” without necessarily having to consult them. How government deals with the current deadlock in the Tshezi area will give some idea of its commitment to the implementation of its policies.

It should be noted that traditional authorities in the Eastern Cape hold a similar position with regard to local government in rural areas, namely, that tribal authorities should be the primary structures.³⁹ It is thus clear that traditional authorities do not want their power dismantled. It is this fusion of power which Mamdani argues lies at the heart of decentralized despotism. Separation of powers, he suggests, is a necessary condition for democratization in rural areas. This paper, however, suggests that separation of powers, on its own, is not a sufficient condition for democratization but that it must be coupled with the principle of elected representation. The need for both separation of powers and elected representatives, is confirmed by the resistance of traditional authorities to anything that even remotely challenges the power of Tribal Authorities.

Notes

¹ See L. Ntsebeza and F. T. Hendricks, “Democracy and Despotism in Post-Apartheid South Africa: The Role of Chiefs/Traditional Authorities in Rural Local Government,” (1998); Paper presented to a conference on Comparing Experiences on Democratization Between South Africa and Nigeria, Center for African Studies, University of Cape Town, May 30-June 2; C. Walker, “Women, ‘Tradition’ and Reconstruction in South Africa,” *Comparative Studies of South Asia, Africa and the Middle East*, XV, 1, (1995), pp. 58-71.

² The term “traditional authorities” needs explanation. During the colonial period and up to the National Party’s electoral victory of 1948, traditional authorities were called chiefs. Apart from chiefs, headmen were appointed. With the introduction of the Bantu Authorities Act of 1951 by the apartheid regime, tribal authorities were established at the local level. These were made up of chiefs and headman, with sub-headman at the village level. At the regional level were paramount chiefs. This hierarchy of individuals was marketed by the apartheid regime as the “traditional” leaders of Africans. It is in this context that the term “traditional authorities/leaders” emerges. In the current post-1994 period, the unresolved question is whether headmen and sub-headmen are traditional authorities.

³ I. B. Tabata, *The Awakening of a People* (1961); G. Mbeki, *South Africa: A Peasants Revolt* (International Defense and Aid Fund for Southern Africa, 1984); F.H. Hendricks, *The Pillars of Apartheid: Land Tenure, Rural Planning and the Chieftaincy* (Uppsala: Acta Univ. Ups. Studia Sociologica Upsaliensia, 1990); Tabata and Mbeki were leading activists in the Transkei during the 1940s, 1950s and early 1960s. For more on this see A. Drew, “The Theory and Practice of the Agrarian Question in South African Socialism, 1928-1960,” *Journal of Peasant Studies*, 23, 2-3, (Jan.-April 1996), pp. 53-92.

⁴ N. M. Stultz, *Transkei’s Half Loaf — Race Separation in South Africa*, (New Haven: Yale University Press, 1979), p. 51.

⁵ M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, (Princeton: Princeton University Press, 1996), p. 23.

⁶ See also H. Bernstein’s review of Mamdani’s book in *Development and Change*, 29 (1998), and “Social Change in the South African Countryside? Land and Production, Poverty and Power,” *Journal of Peasant Studies*, 25,4, July 1998. Bernstein’s critique of Mamdani is based on the separa-

tion of the "native question" from the "labor question."

⁷ During the 1980s, the ANC gained recognition from a wide range of South Africans who had come to the conclusion that no everlasting solution to South Africa's problem was possible without the involvement of the ANC. A. Sparks, *Tomorrow is Another Country*, (Sandton: Struik, 1994), demonstrates clearly that by the mid-1980s, the apartheid regime had entered into secret negotiations with the ANC, including ANC leaders in prison and in exile.

⁸ Drew, "The Theory and Practice of the Agrarian Question in South African Socialism."

⁹ Hendricks, *Pillars of Apartheid*, pp. 60-65.

¹⁰ These made up seven percent of the total land in South Africa.

¹¹ This would increase land for African occupation to 13 percent.

¹² The allotment was traditionally for both residential and agricultural purposes but with the enormous pressure on land in some areas, people are willing to accept a residential site only.

¹³ Conversations with committee members of the Spatial Development Initiatives (SDI) and the Interim Communal Property Association (CPA) in Mqanduli, Eastern Cape, December 1997 - June 1998.

¹⁴ This was a form of "villagisation" that was introduced in the 1930s, but only implemented in the 1950s, as a conservation measure against soil erosion.

¹⁵ The majority of land claims in the Transkei region of the Eastern Cape are based on such removals.

¹⁶ These headmen were appointed by the British in the Cape when they established magisterial districts. These districts were run by magistrates, and in each village, a headman would be appointed as a local representative of the magistrate.

¹⁷ Quoted from Stultz, *Transkei's Half Loaf*, p. 51.

¹⁸ Mbeki *South Africa: The Peasants Revolt*, pp. 97-98.

¹⁹ To this day, the position remains unchanged.

²⁰ C. Manona, "The Collapse of the 'Tribal Authority' System and the Rise of Civic Associations," in C. de Wet and M. Whisson (eds.), *From Reserve to Region: Apartheid and Social Change in the Keikammahoeck District of (former) Ciskei, 1950-1959*, (Grahamstown: ISER, 1998); C. Manona, "The Big Lip of Sebe Has Fallen," *Indicator, South Africa Quarterly Report*, 8, 1 (1990).

²¹ Annual reports of Calusa and Health Care Trust (1990-1997), two NGOs operating in the Xhalanga magisterial district, Eastern Cape.

²² Interview with Mgweba, August 18, 1998.

²³ National Party thinking here was undoubtedly influenced by the World Bank thinking which linked tenure security with individual title deed.

²⁴ J. W. Bruce and Migot-Adholla, (eds.), *Searching for Land Tenure Security in Africa* (Dudque: Kendall/Hunt Publishing Company, 1994.). John Bruce works for the Land Tenure Center, Wisconsin University, Madison. From the early 1990s, the Land Tenure Center has offered courses and opportunities for NGOs and post-1994 government officials, some of whom were in NGOs before 1994.

²⁵ These "legs" are based on section 25 (5), (6) and (7) of the South African Constitution.

²⁶ G. Thomas, et. al., "Current Developments in South Africa's Land Tenure Policy," (1998), a memo issued by DLA.

²⁷ President Mandela's application for individual title for his farm in Qunu has been held up by the "tribal resolution" which had not been put into effect.

²⁸ It must be anticipated that there will be objections to defining membership in terms of household on the grounds that power relations within the household may be glossed over.

²⁹ What follows is taken from a "Draft — for discussion purposes only" dated June 30, 1998. The title as per this draft is "Security of Tenure Bill 1998," but I was later told that this was changed to "Land Rights Bill." There have no doubt been numerous revisions since the June 30 draft, but these are unlikely to alter the thrust and principle of the Bill.

³⁰ This and the following sections draw substantially from reports and field notes by Erik Buiten and Lungisile Ntsebeza. We were commissioned by the Department of Land Affairs to "resolve landownership and governance issues in the Tshezi Communal Area, Mqanduli, Eastern Cape." I am indebted to Erik Buiten but accept full responsibility for the interpretation of events.

³¹ Presumably "the usual order" refers to tribal authorities established under colonial and apartheid rule.

³² Because of the divergent histories and experiences of the former Bantustans, the Tshezi case cannot necessarily be generalized to other regions.

³³ This refers to the King of the AbaThembu, one of six "Kings" in the Eastern Cape.

³⁴ For details see L. Ntsebeza, "Rural Local Government in Post-Apartheid South Africa," *African Sociological Review*, 2, 1 (1998).

³⁵ B. Cousins, "How do Rights Become Real? Formal and Informal Institutions in South Africa's Tenure Reform Program," in *Proceedings of the International Conference on Land Tenure in the Developing World with a Focus on Southern Africa*, (1998), p. 90.

³⁶ See discussion on post-1994 developments above and specifically the category of "protected rights."

³⁷ Thomas, et al., "Current Developments in South Africa's Land Tenure Policy," p. 531.

³⁸ *Ibid.*

³⁹ Ntsebeza and Hendricks "Democracy and Despotism," p. 19.