TRADITIONAL AUTHORITIES: KNOW WHERE TO LAND

(Traditional Authority and Land in KwaZulu-Natal)

1. History

2. Current debates and challenges

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Researched for:

Association for Rural Advancement

123 Loop Street
Pietermaritzburg
3200
KwaZulu-Natal

Email: Afra@sn.apc.org

By: Mark Butler

Critical Resource

Postnet Suite 210
P.Bag X9118
Pietermaritzburg
3200
KwaZulu-Natal

Email: butler@sn.apc.org

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HISTORY

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History

Introduction

On the one hand it is true that the affairs of Africans 'away in the locations' have been submerged and often overlooked – existing almost "outside the historical record" of much scholarship (Beinart et al 1987: 1)[1]. Nonetheless, the amount of material available to those interested in history is significant (even if, as is the case here, the history is limited to the kwaZulu-Natal region). So the task here is not reproduce it but to extract from it major themes and critical developments which might help unravel current challenges about land and traditional authority.

The first step is to periodise the historical account so that characteristic features in the evolution of these issues can be located against significant broader historical phases, changes and developments. Useful as periodisation is, it inherently runs the risk of imposing a generalised characterisation over dynamic and complex histories. That said, for the purposes of this section, the following periodisation is proposed: 1. pre-Shakan era; 2. Political centralisation; 3. Colonial and Union era; 4. Apartheid era.

The story of the 'land' plays out at least 3 levels which should be borne in mind though they do not constitute a formal organising principle for the discussion below:
a. 'micro'-level which is principally about the homestead (e.g., how land was acquired, used, passed on or lost)
b. 'meso'-level where land is understood in relation to a broader social group (e.g., chiefdom) and how its use is enabled and regulated through the activities and institutions of that social group
c. 'macro'-level where the function, meaning and extent of land for a group/s (e.g., clan, tribe, kingdom) is understood by reference to the location of that group against other groups and *their* activities and institutions which impact on the same land, as well as impacting on the broader political economy.

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[1] Beinart and Bundy point out that one of the reasons for this is that work on African political history tended to focus on formal organised political movements and their campaigns which usually represented and were led by urbanised and educated Africans. This is turn points to the underlying socio-economic reality that, at least from the colonial period, there was a discernible – but by no means impermeable – distinction within African society between 'Red' and 'School' responses to colonisation and modernity. These terms are used particularly by historians of the Eastern Cape area (see Beinart and Bundy 1987). 'Red' refers to those who either attempted to defend and maintain pre-colonial institutions in the context of colonial occupation or whose marginalisation from the dominant political-economy compelled them to draw on these pre-colonial resources for survival, while 'school' refers to those (mostly educated at mission schools) who tried to secure rights and position within the modernising process.

1. pre-Shakan era

to late 18th century

Although there is less historical evidence for this period than for later ones, it is possible to piece together a basic picture. 'Stone Age' and 'Later Stone Age' hunters and gatherers peopled the region for a long time but they were effectively absorbed or incorporated by 'later Iron Age' people who arrived between 2000 and 1500 years ago. These hunters and gatherers do not form an essential part of the remainder of this historical overview.

The 'Iron Age' people however were the direct ancestors of the current African population of the region. The people lived in scattered homesteads (*imizi*) established by the presence of a married man and his wives. Each homestead was essentially self-reliant: labour was drawn from among its members (on sexually differentiated lines); sustenance was drawn from the homestead's cattle and cultivated fields; and fuel came from firewood still sufficiently available in the area.

Good and sufficient land was important especially because of the centrality of both agriculture for homestead subsistence and cattle-keeping among the people (cattle required access to the grasslands). Cattle represented wealth, its transfer legalised marriage, and cattle were of ritual significance. Some land was also cultivated and this agricultural production was fundamental to feeding and sustaining self-sufficient homesteads but "the relatively inferior status of agriculture in a strongly patrilineal society is shown by the fact that it was normally the woman's task to cultivate and reap the crops" (Laband 1995: 5). Men and boys however were responsible for cattle.

Customs regarding succession reflected the partilineal character of society too. The household would break up on the death of the male head and each son would establish his own household. After the household, the clan was the social unit by which people were identified and this was defined through the male line descended from a common ancestor. Marriage within the clan was not allowed and wives were taken from other clans in exchange for cattle. Since the chief son of a household inherited the bulk of the property, including of the cattle, he could marry more wives, produce more children (a source of both productive labour and *ilobolo*) and so contribute to growing size and dominance of the particular lineage within the clan.

Dominant lineage within a clan was the basis for establishing chiefly power. A chiefdom comprised people from a number of clans with a degree of political power vested in the dominant lineage of the strongest clan. Chiefdoms existed at relatively small scale and chiefly powers were not terribly substantial. Perhaps chiefs could best be characterised as being 'first among equals' and they certainly would have chaired

the councils which regulated the tribe, and they extracted tribute from their subjects. Given that chiefs' authority was exercised in the name of the subjects and in consultation with a tribal council of elders, the extent of their authority and the scope of their powers expressed the extent to which authority was given to them through the council by the subjects. As such, 'chiefly power' was a dynamic outcome of social processes at a local level. Certainly the chief would have been looked to as the guarantor of tribal harmony (by playing a key role in conflict resolution); of economic viability of homesteads (by playing a key role in managing the allocation of land rights and land-use rights to households); and social and cultural coherence and continuity (by playing a key role in social and ritual aspects of tribal life).

For this period, land was broadly understood as being held in trust for the people. The notion of 'ownership' in the broadly modern, western sense would not be an appropriate characterisation. (This is not because African claims to land were necessarily understood to be any less definite and secure in the long run but because western notions of 'ownership' are so tied to the idea of individual owners who exercise complete and exclusive rights over a piece of property.) A tribe's claim to an area of land would have been established essentially through a recognised right of occupation. That right of occupation may have been established through processes of, for example, conquest, occupation or negotiated allocation by a previous authority. Boundaries between tribal areas may have been periodically contested but, as there was not yet any significant pressure on land (this was to come later), these were generally not critical sources of conflict. In any case, the extent of a tribal land area was not primarily defined by surveyor's maps but rather by the allegiance of subjects to a particular chief – in a sense then, as a chief, the land you controlled was defined by the homesteads who paid you tribute.

As the base source for agricultural and other resources within the tribe, a chief's ability to allocate good land was critical to sustained and effective leadership. Conversely, an inability to do so - to provide followers with adequate land – could well see a chief's subjects effectively voting with their feet, shifting their allegiance and choosing to live under the leadership of another chief.

The possibility of this degree of fluidity reflects the fact that a chief's authority was not primarily derived from coercive power but rather derived from patronage and ritual and symbolic power. Furthermore, it makes clear that a chief's authority was effectively given to the chief by the tribal community (formally through the councillors with whom a chief consulted on decisions and who 'represented' the interests of the subjects). Even 'paramount chiefs', who exercised authority over subordinated chiefs, did not command significant centralised military capacity. Because people could shift allegiances, chiefdoms could expand, contract, split up and even disappear over time and the boundaries were never particularly fixed.

2. Political centralisation

late 18th century to mid-19th century

Among Africans in the region, this period was characterised by political centralisation, movement towards state formation, conflict and, later, the ascendancy of the Zulu state under Shaka. What factors precipitated these dramatic changes are the subject of scholarly debate but foremost was the influence of expanding trade in slaves, ivory & other goods (largely at Delagoa Bay but linked also with the intrusion of Cape-linked settler communities). Other likely contributory factors which fed into and exacerbated the changing context include population pressures, ecological concerns in terms of access to a suitable range of grazing and periods of severe drought.

The result was a period with territorial expansion by chiefdoms and associated reinforcement of emerging state formation. The subsequent wave of conflict and relocation is often referred to as the '*mfecane*' (or the crushing) but this is ultimately misleading because it suggests a specifically 'Zulu' origin and cause. The subsequent rise of the Zulu kingdom under Shaka is better understood as a culmination or consequence of a far broader (and somewhat earlier) process of social change and political centralisation within African societies of the region precipitated by their responses to colonial expansion from the Cape and commercial expansion from Delagoa Bay.

It should be noted that the resultant social disruption did not result in an unpopulated region with no black occupants who could have made legitimate and competing claims against white settlers who moved into the region. It is fairly clear now that the subsequent settler historiography which makes such claims is essentially a self-serving myth justifying white occupation.

There is a wealth of fascinating detail about the various chiefly rivalries and wars that were waged over this period but this is not the forum for representing or even summarising it. Instead it is important to characterise key thematic developments around those central concerns of this overview – especially chiefs and land.

Even under conditions of growing political centralisation, pre-existing chiefdoms continued to function. Chiefs remained in place and continued to regulate affairs within the tribe with a fair degree of autonomy as they had done before. The extent of a chief's political autonomy in relation to emerging concentrations of state power varied. Whereas strong central control was exercised over a core area, chiefdoms

more on the periphery could claim and/or be given greater political autonomy. For the central authority, this dynamic would need to be calculated fairly carefully. On the one hand, the allegiance of chiefs on the periphery was important to the integrity and security of the core - but equally, that allegiance could be jeopardised if a chief experienced central authority as a burdensome or interfering imposition.

In general then, the emerging state form might therefore be described as more like a federation of chiefdoms than a directly centralised union. Subjects were still directly ruled by their chiefs, and the chiefs still allocated land – but the chiefs were more clearly subject to a central political authority. Tom Lodge argues that African tradition and custom was 'fluid and undergoing alteration' during the 19th century and that as political units became larger they became more authoritarian and less consensual (IPT, 2002: 8).

There was also continuity in terms of the underlying state economy which still rested on the productive homestead as its essential base unit. As before, access to grazing for cattle was allocated to tribal commonage and homesteads were given rights to residential and arable land. For at least these reasons the capacity of a chief (and now ultimately a king) to allocate sufficient good land to subjects remained critical to the overall system. Indeed, the political stakes were probably higher than before and leaders could ill afford to have any 'surplus' population without sufficient access to land who might cast about for another chief to whom they could pledge allegiance. While the essential economy remained rooted in the productive homestead there was no political space for 'unemployment' and political centralisation had to be secured without undermining the homestead.

This last imperative, of centralising political power behind the new states, was secured not only through political and military struggle and intrigue but critically through the adaptive use of the '*amabutho*' system. These groups of young men pre-dated the *mfecane* and Shaka – probably in the form of youth cohorts brought together by the chief for circumcision purposes.

The resource that this represented – of young men extracted from the homesteads and placed under a chief's authority for a period of time – provided the newly centralised authority structures with an opportunity to conscript the necessary coercive power for the processes of state formation and consolidation and wider territorial aggression and expansion.

Certainly under leaders like Shaka, the *amabutho* would be called upon to service the central polity in a range of ways; from working in the royal fields, to bolstering the ability to extract tribute from amongst subjects, and to waging war on neighbouring

rivals and political threats (and thereby extending the area from which tribute could be exacted).

In all this, the homestead remained the economic unit and chiefs still had to service the expectation of access to land. Indeed, the context of political upheaval made it imperative that favourites be rewarded and allegiances shored up. The currency remained cattle and their viability depended on good land.

One of the central challenges in getting to grips with the current issue/s of traditional authorities and land is that of succession and legitimacy and, whereas there is an abstract characterisation of traditional authority being hereditary down the dominant male line, the reality appears often more complex. If only for this reason, it is probably worthwhile noting that Shaka's claims to Zulu leadership were contested and argued on the grounds of both legitimacy and rights of succession by certain sections. The arguments continue today. For example, Laband's account of the circumstances of Shaka's route to leadership of the Zulu chiefdom (which for the early part of this period was itself only a small client chiefdom of the Mthethwa state under Dingiswayo) suggests many ways in which Shaka's legitimacy may have been suspect.

Shaka was the illegitimate son of the Zulu chief Senzangakhona and a young girl Nandi, a member of the Langeni clan. Laband says that:

> "When it was reported that [Nandi] … was pregnant, the Zulu unconvincingly tried to refute the claim by insisting that she had swollen up only because she was afflicted by a 'shaka', or intestinal beetle'. When the baby was born, that was the name duly given him. The consequence of her inopportune conception was that Shaka, although Senzangakhona's eldest son, was not recognised as his heir. That honour fell to Sigujana.… In about 1794 Senzangakhona eventually drove both Nandi and Shaka into exile…. [Later Shaka] placed himself under the protection of Jobe of the Mthethwa…. Jobe died in about 1807, and Dingiswayo assumed the Mthethwa chieftainship after deposing and killing his brother, Mawewe. … The new chief swiftly recognised Shaka's extraordinary military aptitude and courage … [and] Shaka continued high in Dingiswayo's favour. So, when Senzangakhona died in 1816 … Dingiswayo supported Shaka's claim to the chieftainship, even though Senzangakhona should have been succeeded by his favourite son and designated heir, Sigujana. … So, with the backing of his overlord, Shaka employed his half-brother to assassinate Sigujana. … Then, supported by a military force sent by Dingiswayo, Shaka grasped the chieftainship" (Laband 1995: 17-18).

There were a number of rival emerging states but the end result of this period was the dominance of the Zulus – and this dominance was certainly associated with Shaka's

effective, if brutal and aggressive, leadership. By the mid-1820s, Shaka ruled a kingdom of more than 100,000 people with a standing army of probably between 12–15 000 men.

There has been a tendency to exaggerate the extent to which Shaka's rule was a project in the development of a broader Zulu nationalism and identity - perhaps writers and historians need to create an *ex post facto* justification for more contemporary expressions and claims for Zulu-ness in kwaZulu-Natal. In this mode, it is suggested by some that, for example:

* Shaka fostered a new national identity by stressing the Zuluness of the state and that all subjects of the state became Zulu and owed the king their personal allegiance
* Zulu traditions of origin became the national traditions of the state
* Customary Nguni festivals, such as planting and harvest celebrations, became occasions on which Shaka gathered vast numbers of his people and extolled the virtues of the state, and that
* Through such means, Shaka developed a Zulu consciousness that transcended the original identities and lineages of the various peoples who were his subjects.

It is unlikely or improbable that such processes had the cumulative effect suggested here however. Having conquered 100 000 people of different tribes, the Zulu family and clan identity was not something automatically conferred on subjects. In fact, 'Zulu' remained far more descriptive of the central core, the royal family. Those outside the central core would not have been encouraged to assume that they had legitimate expectations to relate to, and make claims on, that central family. This is not necessarily to deny a degree of political and military dominance in the region by the Zulu polity but it does point to the fact that subsequent claims for the 'Zulu-ness' of the African people of the whole region are made on historically weak terms.

Furthermore, certainly not until the twentieth century would black people south of the Thukela have thought of themselves as 'Zulu'. Indeed a consequence of the period of instability and state formation (including the actions of Shaka's successor, Dingaan during the 1930s) was the displacement of tribes out of the Zulu kingdom but within what is now kwaZulu-Natal. Those people and chiefs only recently conquered by the Zulu kingdom who fled into Natal, effectively rejected political Zulu identity, although retaining cultural affinity (Africa Policy Information Center, 1997). For such people, the establishment of colonial authority in Natal was partly welcomed as the protection it gave, provided them an opportunity to consolidate in a way which they had not been able to do under the disruptive threat of the Zulu kingdom. Some such tribes developed relatively close relationships with the colonialists and the relative protection it offered them provided opportunities for trade and material advancement.

3. Colonial and Union era

mid-19th century – mid-20th century

In 1824, not long after Shaka became chief of the Zulu, European traders established the first more or less permanent settlement at the bay at Port Natal (which was to become Durban in 1835) and in 1837-8, Voortrekkers arrived in Natal from the Eastern Cape.

Voortrekker leader, Piet Retief, attempted to negotiate with Zulu king Dingane for permission to settle in relatively sparsely populated areas south of the Thukela River but conflict (including the killing of Retief himself in 1838 and the subsequent Voortrekker revenge at the Ncome River battle (the battle of 'Blood River')).

The Zulu kingdom split into warring factions after this defeat. One group under Mpande, a half-brother of Shaka and Dingane, allied with the Voortrekkers, and together they succeeded in destroying Dingane's troops and in forcing him to flee to the lands of the Swazi, where he was killed. The Voortrekkers recognized Mpande as king of the Zulu north of the Thukela River, while he in turn acknowledged their suzerainty over both his kingdom and the state that they established south of the Thukela. The Voortrekker Republic of Natalia (the basis of later Natal Province) was established in 1839. Every male Voortrekker who had entered Natal before 1840 received two farms and those who arrived afterward received one. By 1842 there were approximately 6,000 people occupying vast areas of pastureland and living under a political system in which only white males had the right to vote.

But only in the mid-19th century did the region see the establishment of the colonial system – first in Natal (which was annexed in 1843 and became a Crown Colony in 1844 after the British achieved supremacy over the Boers), and then Zululand (which was annexed by Natal in 1887. In 1879 the British had laid claims on the whole of that region, thereby placing unacceptable conditions on Zulu King Cetshwayo and sparking the Anglo-Zulu War which until it ended in victory for the British in 1887).

Capitalism, in colonial and other forms, has a very different view of land compared to the location of land in pre-colonial South African political-economy. Whereas in the latter, access to good land was a necessary condition for the sustained reproduction of the homestead over time, under capitalism, land - like all resources - tends to be commodified through ownership and exchange and is a means for producing profit (and typically for a small minority of owners). The question arises then as to how to mesh the two?[2]

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[2] And indeed, as this current project indicates – the question is not easily resolved!

Effectively, the colonial resolution included enabling white farmers to take what land they could (which varied in different areas) and sharply differentiating this land from the 'reserves' where Africans would access land. Locating Africans in 'locations' or 'reserves' signalled their marginalisation – politically, economically and in all aspects. In terms of governance of African in the reserves, the authorities explored two possibilities:

> "The first was to weaken the institution of the chieftainship and rule through the colonial bureaucracy and a council that attempted to involve 'non-traditionalists' in government – this was the system attempted in the Eastern Cape. The second was to rely on chiefs, appointed and hereditary, for (indirect) rule – the system developed in Natal. At first the first system was tried" (Mare et al 1987: 27).

In Natal, the colonial state was initially fairly weak. Some of its leading officials responsible for 'Native issues' (like Shepstone) understood part of their responsibility to interpose themselves between settlers and reserves since they recognised the possibly dangerous consequences of a complete erosion of the reserves which could well trigger political instability. Even so, reserves were insufficient and only accounted for about 1/6 of Natal. Nonetheless, largely as a result of the strength of Zulu resistance, Africans had not been completely decimated and they still retained access to enough land to enable them to secure a degree of livelihood security outside of the colonial economy. This meant that they could choose to take on short-term work on white-owned farms for cash payment – but the cash tended to be spent buying goods for improved production within the homestead economy. This remaining discretion meant that complete dependence on the colonial economy had not been achieved and it was a source of frustration within the settler community. (It was also a key factor behind the decision to draft in 'indentured' Indian workers to labour in the sugar cane farms of Natal.)

However this remnant independence was a declining characteristic and by the 1880s and 1890s the homestead economy was under sever strain as a generalised land shortage inevitably impacted. Once this process set in, non-discretionary migrant labour had to be increasingly resorted to. The migrant labour pattern kept alive the appearance of an ongoing homestead economy but it was increasingly a hollow shell without the key features which had sustained it (e.g., ability to access and allocate new land was stopped once rigid and limiting boundaries were enforced; young men now forced to take up wage labour were no longer deployed to service the system - neither directly in the homesteads nor in service of the broader polity in through periodic conscription into the *amabutho*).

As the resources and flexibility for patronage and governance (cattle, land, political power) which had characterised African society dried up, chiefs were increasingly disempowered. The colonial state, which had systematically sought to undermine the chiefs, recognised by the last decades of the 19th century that they needed to bolster the chiefs' powers in order to stabilise the remnant social structure in the reserves. The collapse of the homestead economy drove workers into wage labour but pass laws to prevent African urbanisation drove the same class back to the reserves when the work was done or oversubscribed. So from an instrumentalist perspective, homesteads in the reserves had become little more than a convenient mechanism for containing the costs of social reproduction within the African 'reserve' areas and re-producing cheap labour for the settler and colonial economy (whilst simultaneously inhibiting the development of a potentially dangerous black urban working class); and chiefs on the whole ruled over the reserves under colonial authority (the 'indirect rule' model characteristic of this colonial administration of Africans in the reserves for this period). In 1914 the Royal Commission on Natural Resources, Trade, and Legislation in Certain of His Majesty's Dominions heard just how useful black rural areas were as labour reserves. The reserve was "a sanatorium where [African workers] can recuperate; if they are disabled they remain there. Their own tribal system keeps them under discipline, and if they become criminals there is not the slightest difficulty in bringing them to justice. All this absolutely without expense to the white man" (cited in Bundy 1979, 126).

But there is a danger in characterising the whole enterprise as being simply driven by top-down coercive agenda – for many young men, returning to the reserve after a period of employment coincided with a desire to shift to 'manhood' and to mark such a shift with the establishment of a homestead with cattle. Anyway, while away doing migrant work, these men were dependent on the powers of the chief to look after their homestead resources - such as they were. So even if the actual currency of the homestead economy was so scarce as to make the whole system untenable in its earlier forms, there was at minimum the promise of some security and a residential plot that would be allocated to the chief's subjects. It is also the case that the ascendancy of colonial power did not signal the end of rural politics or resistance and at the local level, chiefs and others might align in various ways to respond to the power of the colonial project – some embracing it, others rejecting it, and yet others carving a path of ambiguity, but always from and within a marginal location in the broader South African context.

The basic shape and direction of themes continued from 1910 when South Africa became a racially segregated and white controlled Union (and thus assumed control of its internal affairs rather than being a colony of Britain).

Many of the central features already described took more explicit shape as they were nationally legislated. For example:

- perhaps most famously, the system of 'reserves' for Africans was concretised in the 1913 Land Act (setting aside 7% of the country for Native Reserves) and the later Native Trust and Land Act of 1936 ensuring that whites controlled the vast majority of land and resources and that black survival would be dependent on entering into wage labour as subjugated and right-less migrants in the dominant capitalist economy (in particular such sectors as mining)
- the 1927 Native Administration Act starkly illustrated the transformations of chiefly authority which had been wrought – the Act extended the system of tribal courts and tribal law and, as if the *modus operandi* of 'indirect rule' had not been clear enough until then, the Act formally imposed the white Governor General as the appointed 'Supreme Chief' with powers to appoint chiefs and *izinduna* and regulate their roles and privileges; to regulate land ownership in the reserves through the Department of Native Affairs[3]; intervene in local governance; and declare new tribal boundaries and force tribes to move between different areas (Letsoalo 1987: 37). Christiaan Keulder is quoted as saying that:
  > "The provisions of the Act are generally in line with most colonial policies implemented throughout the continent. The outcome of the policy in South Africa is accordingly similar to that experienced by many other countries, the hereditary principles of appointing traditional leaders to their stools and positions were ignored and consequently non-traditional leaders (government minions) were appointed to rule various communities on behalf of the oppressive government. These individuals ruled without much legitimacy, having their power base in the system that granted them extensive powers to rule, quite often by means of naked coercion rather than consent" (quoted in IPT 2002: 9).

Researcher Lungisile Ntsebeza concludes that the effects of these developments were that traditional leaders were effectively restricted to the homelands, their role was considerably redefined and their powers were reduced to traditional civil issues.
> "They were paid by the government and answerable to the magistrates and no longer their people, thus becoming instruments of colonial rule. For example, it was through them that unpopular measures such as land rehabilitation, which was meant to check overstocking and erosion, were implemented. This made them unpopular." (quoted in IPT 2002: 9). Ntsebeza notes that only a few chiefs did not act as colonial servants and that their influence was insignificant.

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[3] Run by white officials

As Shula Marks demonstrates in her seminal 1986 work on three African leaders in twentieth-century Natal, these various forces, while they certainly condemned the majority of the people to poverty and servitude, also continued to create ambiguities and opportunities for a range of responses from Africans. Since chiefs were a relative elite[4] some of them were able to exploit opportunities in their own interest, in alliance with other elite interests, or on behalf of their subjects. But in the historical context of South Africa, opportunities such as there might have been were flawed by structural relations of dependence and so the mask of resistance at one point might later be revealed to be the mask of a compromised puppet.

4. Apartheid era

1948 – 1990

Building on pre-existing systems, practices and fault-lines in South Africa, apartheid infused every aspect of life with the destructive imperatives of racist exploitation. Attempting a brief overview seems almost impossible but a focus on certain key themes - especially related to the unfolding story of African reserves – may allow it.

Under the National Party, who assumed power in 1948, racial segregation was recast as 'separate development' and in this ideology, the reserves occupied a central place. The ideological claim was that African reserves would be the basis for the gradual development of tribally/ethically defined independent countries. Introducing the 1959 Promotion of Bantu Self-government Act, the responsible Minister said he was offering the African "the possibility of bringing to fullest fruition his personal and national ideals within his own ethnic sphere… We grant to the Bantu what we demand for ourselves" (quoted in Harley et al 1999: 31).

It is fairly clear that the reserves never offered this potential – and that Nationalists making claims to the contrary were cynically well-aware that this was so. The 'separate development' myth was essentially an elaborate racist scam to deny rights to the majority of South Africans and ensure they had no access to substantial and independent livelihoods resources - whilst exploiting their labour power in the white South African industrial and agricultural economy.

Nonetheless the Nationalists were in power and the bizarre apartheid grand plan was rolled out with real consequences for the people – including chiefs, their subjects and their land. One of the major interventions required was to 'consolidate' the existing reserves into 'Bantustans' which would ultimately be the basis for the development of African nation states, independent of South Africa. 'Consolidation' demanded

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[4] keeping in mind however earlier comments about their marginal position in the broader context.

massive upheaval, removals, and the re-drawing of boundaries (this is a history with which AFRA is painfully familiar – see Harley et al 1999: 36-80).

Governance in the 'Bantustans' continued to be heavily dependent on the in-direct rule model and so the cooperation of traditional authorities was fundamental. The apartheid government secured this support partly through giving traditional authorities greater powers (and increasing their stipends) – but they were powers to be exercised in pursuit of, and within the confines of, the broader apartheid project. Indeed, Jacobs (2000) suggests that:

> "in the modern history of South Africa, traditional leadership in its present form reached its zenith under colonialism and apartheid where the British or Afrikaner rulers saw it as an effective and cheap way of indirectly ruling African people. Traditional leaders actively collaborated in colonial and apartheid rule as the chief agents of social control in reserve areas and as local government functionaries accountable to those above, rather than the broad mass of the population" (Jacobs, 2000).

It is widely accepted that as a result of this effective complicity by chiefs in the administration of apartheid, the popular legitimacy of amakhosi declined even further as they were forced to implement unpopular policies. Thus Tapscott is quoted as arguing:

> "The extension and strengthening of the tribal authority system was coupled with other measures of separation, including influx control. The homeland system and the incorporation of the institution of chieftainship into the state machinery by the Bantu Authorities Act laid the foundations for autocratic rule in the homelands. The attempt to place all Africans under the control of traditional leaders, however, was also an attempt to undermine the political power of the ANC and PAC, which were starting to show their muscle in the 1950s. …The tribal authorities in their reconstituted form lacked the consensual base which was a hallmark of traditional administrations. Chieftainship was no longer strictly a hereditary right, and the appointment of all new chiefs had to be ratified by the homeland governments. In addition, traditional principles for the appointment of tribal councillors were discarded, in that some were elected and the remainder (usually the majority) were appointed by the chief himself. The outcome of this state of affairs was that the tribal authorities lacked the subtle checks and balances that had traditionally moderated the power of the chiefs in the pre-colonial era" ("The institutionalisation of rural local government in post-apartheid South Africa" in *Traditional and Contemporary Forms of Local Participation and Self-Government in Africa.* Konrad-Adenhauer-Foundation, 1996; quoted in IPT 2002: 11; see also Bundy 1979: 226).

But the intervention was not merely geo-political. For example, government 'development' policies for the reserves – especially 'closer settlement' and 'betterment planning' – completely re-organised and distorted the spatial and livelihoods configurations of settlements within the reserves/homelands/bantustans and further undermining the integrity of traditional systems of land use management and livelihoods. 'Development' interventions like closer settlements and betterment planning illustrate well some of the contradictory characteristics of 'traditional' rural areas under apartheid. Even critics of apartheid generally concede such interventions reflected genuine alarm at the incipient livelihoods crisis within the homelands and that they were aimed at halting the disintegration of the rural economy. This was considered necessary because of the role these areas played in subsidising the cost of labour. The interventions were, however, only ever hesitantly and half-heartedly implemented and were predicated on a development model aimed at building the productive power of better off rural people and so tended to have the effect of making the poor poorer (Bundy 1979: 227).

As a result of direct and indirect pressures, life in the bantustans was not viable without access to supplementary resources drawn from outside the homelands – especially wages from formal labour[5]. Given the concentration of wealth and productive assets in white ownership, wage labour meant working in 'white South Africa'. For black South Africans, working in white South Africa may have been necessary but it was far from ideal. This was not just a typically exploitative capitalist world of work, it was a racist, authoritarian context too. The 'logic' of apartheid required that blacks in white South Africa were discouraged from feeling 'at home'. The single-sex hostels and bleak townships, accompanied by wide-ranging legislative and political measures to deny rights and permanence, were intended to accommodate a migrant work force - rather than a citizenry - whose real home was elsewhere – in the imperilled bantustans. Of course black South Africans resisted apartheid and never accepted their relegation to 'pariahs in the land of their birth'. Nonetheless for many it was true that 'tribal' systems in the homelands and bantustans offered relatively secure access to at least a piece of land and cultural identity with its roots and validation outside of white South Africa.

> "Traditional tenure systems offered poor people access to land and resources. Indeed, the traditional authorities' system was the only channel through which many poor households were able to access the free land and resources which were critical to their survival. The continued influence of traditional authorities hinged on this fact" (Vaughan and McIntosh 1998: 4).

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[5] Of course especially from the period of minerals discoveries on, this had always been the intended outcome – namely to compel a supply of cheap labour.

People's livelihoods and survival typically required multiple strategies which invariably required that extended families 'straddled' urban and rural bases to extract what they could from both.

Traditional authorities therefore came to occupy a very ambiguous position in the lives and minds of many black South Africans. On the one hand, traditional authorities could be seen as collaborators in an oppressive system and co-opted partners in the implementation of apartheid, while on the other hand, they mediated and (to a degree at least) guaranteed access to a range of entitlements denied to blacks elsewhere (like relatively secure tenure, and a degree of continuity in an African cultural and value system).

Despite this ambiguity, the processes which, from the colonial period on, had tended to undermine the popular legitimacy of traditional authorities continued and were even accentuated under apartheid. Furthermore, even the bases of their positive appeal (especially land, livelihoods, and 'traditional' governance systems and cultural values) were increasingly undermined too.

The productive capacity of the land (especially in relation to the numbers of people dependent on it in the homelands) had long been in decline and growing populations increased this pressure. Supportive inputs for productive land use in the homelands (e.g., agricultural infrastructure, inputs, investments, skills, planning and so on) were also absent or woefully inadequate (both in terms of sufficient scale and appropriate type). Decline and even collapse were the inevitable result. Furthermore, a range of pressures tended to undermine effective land management by traditional practices and rules[6].

'Traditional' governance, already distorted under colonial administration, was applied within - and sub-ordinate to – the rubric of apartheid. As discussed, the essential basis for governance was no longer drawn from the authority vested in ubukhosi by their subjects but from the laws and dictates of the broader apartheid project.

Cultural values across a number of fronts (but by no means all) were increasingly exposed to challenge too. The urban experiences of migrants and others also included exposure to, and involvement in, urban politics. This politics was defined not only by urban and industrial fronts of struggle but also by distinctly non-traditional systems of political thought and analysis. Furthermore this political world was one from which traditional authorities themselves were largely and effectively excluded – if only as a

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[6] "Processes of urbanisation have undermined traditional practices and rules on the urban peripheries. In rural contexts, the densification of settlement resulting from removals, farm worker evictions, and natural population increase has placed pressures on traditional land administration. In some areas, the rules have been abrogated" (Vaughan and McIntosh 1998: 9).

result of their geographic separateness since they stayed and governed the 'rural' areas. As the urban-led struggles coalesced into a more or less coherent popular struggle against apartheid, tensions inevitably arose between core struggle values of democracy and participation, of the empowerment of youth and women and the cultural values which underpinned the chiefly politics of hereditary male leadership and the representation of 'community' and the common good in the wisdom of elderly men.

Within this broader context, a more nuanced perspective is required to understand how the role of traditional authorities in relation to land and development evolved during this period. Vaughan and McIntosh (1998) point out that during the colonial period, even though their de jure powers were limited, traditional authorities were consulted on a wide range of matters of government policy by Native Commissioners and magistrates. Under apartheid and bantustan regimes however there was a progressive centralisation of service delivery functions into line departments and as a result, traditional authorities were "bypassed as officials from government line departments assumed increasing responsibility for decisions about the development and delivery of local services" (Vaughan et al, 1998: 3). The limited range of powers and functions which traditional authorities de facto exercised during the period still included land allocation and administration but even in this regard:

> "traditional leaders were severely neglected by the responsible government departments. With a few exceptions, traditional authorities as local institutions have obtained little funding. …Where local revenue raising abilities have been limited, traditional authorities have remained very modest institutions. They have often been unable to fulfil even their traditional functions adequately, let alone the development and service delivery functions provided for in the legislation of the old homeland legislatures.
>
> "These difficulties compromised the integrity of traditional leaders and encouraged them to seek political authority and wealth through participating in the party political arena. …Whatever the mode of access to power and resources, this derived from party loyalty, and compliance with the broader apartheid project of separate development, and was not rooted in a legitimacy and credibility derived from fulfilment of a local service delivery role" (Vaughan et al, 1998: 3-4).

The broad trends described above were true of the KwaZulu-Natal region too but, to some extent they were given particular shape and form by regional dynamics and political histories and developments. In the most recent history of traditional authorities in the KwaZulu and Natal region up to negotiations for democracy in South Africa (i.e., up to c. 1990), the political dynamics of the KwaZulu bantustan, Inkatha (later the Inkatha Freedom Party), and Chief Mangosuthu Buthelezi feature prominently.

Mangosuthu Buthelezi was born in 1928 and is the son of Chief Mathole Buthelezi and Princess Magogo ka Dinuzulu, the sister of King Solomon ka Dinuzulu. From 1953 he has been the chief of the Buthelezi tribe. In 1970 when the KwaZulu Territorial Authority was established in terms of the bantustan policy, Chief Buthelezi was its Chief Executive Officer. Two years later, he became Chief Executive Councillor of the KwaZulu Legislative Assembly and in 1976, Chief Minister of KwaZulu (Profile at http://www.mbendi.co.za/vpsamgb.htm).

He was pivotal in the revival of Inkatha in 1975, an effectively 'Zulu'-based political ('cultural liberation') movement which was closely intertwined with the KwaZulu bantustan. This combination was adroitly exploited to build a power-base in the KwaZulu and Natal region. Although the National Party was strongly centrist in many respects, the broader apartheid plan required allocating "many areas of competence and responsibility to the bantustans through the 'homeland' policy. Even without taking 'independence' the bantustans could legislate, have their own parliaments, police forces, civil services, defence force units, etc." (Forsyth et al 1992: 141). At the request of the KwaZulu Legislative Assembly, KwaZulu was granted even further powers of 'self-government' in 1977[7].

In parallel to these processes of consolidating institutional power (though never accepting 'independence'), Inkatha mobilised Zulu-speakers to consolidate political power behind Chief Buthelezi. "This task was given form both ideologically and through various political measures, including violence and coercion at the local level where chiefs were under constant pressure to produce Inkatha members" (Forsyth et al 1992: 143). Notwithstanding the historical limits of the Zulu kingdom in the broader KwaZulu and Natal region, Inkatha based its core politics on an appeal to some sort of Zulu identity - even nationhood - and history to which all Zulu-language speakers in the region were expected to subscribe. Early in Inkatha's history, Chief Buthelezi said: "All members of the Zulu nation are automatically members of Inkatha if they are Zulus" (KwaZulu Legislative Assembly debates, quoted in Mare and Hamilton 1987: 57). It is important to acknowledge the remnant appeal of pre-colonial resources (including institutions like traditional authorities, resources like land, and non-material resources too like a history and identity of resistance and power) for marginalised Africans in a hostile South African milieu. To a marginalised constituency in the 'Zulu reserves', a re-fashioned version of Zulu history and identity was presented as populist rhetoric to secure the ideological and ritual authority required to govern the bantustan.

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[7] Forsyth and Mare note that: "By the time serious consideration was given to merging the KwaZulu bantustan into a Natal region, Chief Minister Gatsha [sic] Buthelezi could say this would only occur if the powers of the *bantustan,* rather than those of the [white] *province* were retained" (Forsyth et al 1992: 142).

Chief Buthelezi was relatively influential in initiating and shaping deals with conservative white elements in industry and government relating to the KwaZulu and Natal region[8]. In the mid-1980s, the state restructured local government by creating Regional Services Committees (RSCs) to rationalise bulk service provision under the authority of central government-appointed provincial administrators. KwaZulu opposed them and instead proposed the creation of Joint Services Boards (JSBs) which effectively operated as RSCs for the KwaZulu and Natal region. JSBs were under the authority of a Joint Executive Authority (JEA) agreed to by the state in 1986 under pressure from both the Natal provincial council and KwaZulu, and launched in 1987. These sorts of manoeuvres meant that by the late 1980s, administration and service provision in the KwaZulu and Natal were under regional bodies made up of both bantustan and provincial government staff and "a local government structure, centrally involving chiefs in much of the region, [was] in place. … The existence of these structures led a central figure in their creation, Professor Lawrence Schlemmer, to comment that:

> 'the IFP [Inkatha Freedom Party] controls the regional administration of KwaZulu and could, theoretically, destabilise that administration if it were to fall into different political hands or have its powers or policies altered from above.'" (Forsyth et al 1992: 148).

The processes of consolidation of power within the bantustan structures and with existing provincial governance structures, together with ethnic Zulu political mobilisation and the overlays between them (remember that Chief Buthelezi headed both Inkatha and KwaZulu), produced a strong interest in aligning traditional authorities politically behind defending the regional power base as a foundation for broader national political ambitions.

Since the support-base for the project was:
a. very geographically specific within the KwaZulu and Natal region,
b. articulated in terms of Zulu ethnicity, and
c. held together with a significant degree of coercive power and patronage through the Bantustan system, Inkatha's political interests in the national context were threatened by the possibility of a straight-forward unitary and democratic South African dispensation. Instead, they had an interest in securing greater regional autonomy and protection for ethic groupings. (This created common ground with the National Party's fears and interests in the coming national negotiations for democracy, and they shared a strategic interest in working together to undermine the African National Congress and organisations within the Charterist tradition. This is key to explaining covert support from the apartheid state for violence by Inkatha against those forces.)

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[8] For example, the Buthelezi Commission process (1980), the Ulundi Accord and the 'Indaba' process.

This is not to suggest that traditional authorities' interests were looked after only because of some crudely instrumentalist political game. The social importance of traditional tenure systems for the poor has been noted and continued be recognised throughout this period. In KwaZulu, a Select Committee on Land Tenure (1975/76) reported in favour of reforming the tenure system in the interests of economic viability and environmental sustainability. Ultimately the reform proposals were rejected because of the linkages between traditional tenure and social security.

> "[A]mbivalence with regard to reforming traditional tenure was reflected once again in a Land Bill promulgated in 1988. The Bill was intended to bring about strategic changes in the land tenure system without undermining the powers of the traditional authorities. It attempted to shore up and protect the traditional authorities whilst eliminating some of the disabling aspects of the system. The traditional authorities were to be drawn into the business of determining and handing out freehold rights. The Bill routed the introduction of freehold, which would have been only an option, through the traditional authorities, thus providing for the preservation of traditional land allocation systems alongside a modest tenure reform. (See McIntosh et al, 1996.)" (Vaughan and McIntosh, 1998: 5).

Summary of argument

Homesteads, including residential and arable land allocated to particular families and communally accessed grazing land, were at the core of social organisation and reproduction of African society in the region. Patriarchal social structures also defined clan identity and succession and inheritance practice. Chiefs were drawn from dominant clan lineages. They derived authority from their subjects and exercised in consultation with (male) councils of elders. Chiefs provided leadership on a broad range of social matters, not least of which was the distribution of land-use rights within the subject community, and they were understood as holding communal land in trust for their people.

Even growing political centralisation and attendant conflict between emerging African polities in the 19th century did not fundamentally transform this essential core. It did ultimately impose a centralised over-arching authority over individual chiefs within the geographic area under Zulu domination.

Whereas many chiefdoms outside this area - some of whom had fled Zulu aggression – partly welcomed colonial protection, those under the Zulu kingdom provided significant resistance to colonial domination. Once the Zulu kingdom had been defeated, the colonials and later the apartheid government, adopted an 'in-direct rule' model of governance which assumed the continued existence of chiefs. Nonetheless, profound change followed because:
a. the self-sufficient homestead economy underlying traditional governance did not 'free up' sufficient labour to service the labour demands of mining and agriculture and so needed to be undermined, and
b. the social bases and subtle workings of 'traditional' governance were increasingly replaced with codified authority granted by, and in the interests of, colonialism and apartheid.

Despite the declining viability of life in the reserves and the distortions to traditional governance, traditional authorities still offered access to land and social/cultural resources that would otherwise likely be unavailable to poor Africans.

Traditional authorities, land and policy: Current debates and challenges

Introduction

Government is frequently charged with failing to finalise key policies relating to traditional authorities, for example, local government roles and functions, and communal land tenure. Whilst it is true that important issues remain unresolved, it is also true that the issues themselves are very complex and that some have become so politicised that rational debate is hindered. This section addresses some of these policy areas in a manner which hopefully enables rational debates and viable solutions.

First we propose a set of underlying themes and discuss the broader debates which frame the particular challenges ('Themes and perspectives in the current challenges and debates') and then (in "The issues') work systematically through some of recurrent policy issues to explore what's at stake and the grounds for their possible resolution.

Given the complexity of the terrain, the paper does not presume to be comprehensive and its conclusions may well be controversial. If this provokes feedback and debate it is to be welcomed and may contribute to finding appropriate solutions.

Themes & perspectives in the current challenges & debates

Understanding the broader debates underlying some of the issues may seem something of an academic exercise. In reality though, it is precisely because issues relating to traditional leaders reflect deeper debates that they have real significance in the political, economic and social realms in South Africa. They relate not only to pressing developmental imperatives but also to the broader national political context. This is has been clearly demonstrated in the policy differences between key political players like the African National Congress (ANC) and the Inkatha Freedom Party (IFP).

The historical discussion (in the preceding section) indicates the centrality of the institution of amakhosi for the IFP's political project. Not surprisingly then, the IFP has presented itself as a vocal defender of the interests of amakhosi during the process of negotiating a post-apartheid national dispensation and also in the continuing policy debates to the present.

The IFP in particular have argued vociferously for policies that would grant amakhosi wide and entrenched political power – especially at the local level (where as is discussed below, the argument is made that amakhosi should be granted the status of local government). Stober (1999) suggests that politically, 'traditionalists' within the IFP have the backing of many of KwaZulu-Natal's traditional leaders which are the backbone of IFP power and influence in the province. And, while IFP leader, Mangosuthu Buthelezi's ambitions may lay beyond the province, he is acutely aware that without the support of the amakhosi, he has no real political base and no claim to national prominence. Thus in key policy negotiations regarding land and local government issues especially, the IFP and formations of traditional leaders (like the Congress of Traditional Leaders of South Africa, CONTRALESA) have consistently favoured positions which appear to empower amakhosi.

The ANC has a rather more ambiguous position with regard to the political interests of amakhosi. In certain respects of its historical origins, the ANC was close to the issues of traditional leaders and land. The notorious Land Act (discussed in the history section) was a key driver in the formation of the ANC, and a number of traditional leaders or their representatives attended the founding conference and launch of the organization in 1912. In this regard, Odendaal (1994) notes that:

> "The chiefs represented the rural masses who were the majority at the time, and the section most affected by land dispossession. These chiefs were recognized spokesmen [sic] for the people; they had fought against colonialism and some of them had been victimized, deposed or banished. They could also provide much needed funds. … Following the example of the British and South African parliaments, the ANC … decided at its inaugural conference to create two houses in the 'native Parliament': a 'Lower House' of "Commoners" and an "Upper House" of chiefs and dignitaries" (Odendaal 1994: 6).

Although this history indicates an awareness (at the time anyway) of the political advantage of securing the support of traditional leaders, the ANC's ideological history does not reflect any significant integration of 'traditional' perspectives. This is partly explained by the class character of the early ANC which built on political work (especially in the eastern Cape but linking with like-minded formations across the country) by Africans whose vision of national unity was not only contrasted with the inequities of white domination but also with the divisiveness of 'tribalism'. The ANC's ideological development was effectively led by mission-educated lawyers, ministers, teachers and journalists. In his circular calling for a 'South African Native National Congress' (which effectively become the ANC), lawyer Pixley Seme (who was to become the treasurer in the first ANC secretariat) articulated the underlying view which indicates a desire to move away from 'tribal' parochialisms as the basis for political action:

> "The demon of racialism, the aberrations of the Xhosa-Fingo, the animosity that exists between Zulus and the Tongas, between Basothos and every native, must be buried and forgotten; it has shed among us enough blood. We are one people. These divisions, these jealousies are the cause of all our woes and all our backwardness and ignorance today" (quoted in Odendaal 1994: 5).

During the apartheid era, when traditional authorities had become effectively part and parcel of the system of African governance, the ANC's position remained broadly critical of tribal bases for political action and became perhaps more sharply critical of the role of traditional authorities in particular. Govan Mbeki's seminal *South Africa: The peasants' revolt* (first published in 1964) is at least partly a blistering attack on the role chiefs had come to play. In it Mbeki argues that:

> "If Africans have had chiefs, it is because all human societies have had them at one stage or another. But when a people have developed to a stage which discards chieftainship, when their social development contradicts the need for such an institution, then to force it on them is not liberation but enslavement.
>
> In all the colonial or former colonial countries the tendency is toward the unification of peoples who have been torn apart and set against another under colonial conditions. But in South Africa the Nationalist government is deliberately nourishing disunity, attempting to erode the very unity evolved over the years, in order to re-create manageable and weak tribal communities.
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> … Chiefs and government, therefore, have common aims: to resist movements advocating multi-racialism and modern social development" (Mbeki G 1964: 47 & 145).

Certainly in the long period of anti-apartheid struggle preceding the negotiations phase, the politics of the struggle were predominantly urban, 'modern', and democratic. As Jacobs argues:

> The popular view among supporters of anti-apartheid political movements was that traditional leadership was associated with apartheid and tribalism. As late as 1988 the ANC declared in its constitutional principles that traditional leadership was anachronistic to their modernist vision and that the organisation would abolish it with the advent of democracy. The ANC's supporters in largely provinces such as the Eastern Cape, Kwazulu-Natal, the North-West and the Northern Province suffered extreme oppression under the hands of traditional leadership which became subsumed in the apartheid homeland structures (Jacobs 2000 (a): 1).

Indeed, in the period immediately prior to - and during – negotiations to end apartheid, forces broadly allied to the ANC were locked in violent conflict with Inkatha in its kwaZulu and Natal base.

Since the negotiations phase, there have been various pressures on the ANC to grant greater status to traditional authority than their 'progressive' ideological predisposition would have indicated and the ANC's position vis-à-vis traditional leaders has shifted again. These pressures have come from a number of sources. For example, in the interests of the broader national democratic process, the ANC was determined to broker deals with the IFP to secure peace and greater political stability in the province of kwaZulu-Natal; there has also been a re-emergent realization of the advantage to be gained by securing political support from traditional leaders (who can, in turn, deliver a voting constituency); and finally, as the leading party in government, the ANC has also had to face the challenge of providing viable and affordable alternatives to traditional leadership and governance institutions in poor rural areas where they already exist. Nonetheless, the ANC-government has refused demands for traditional authorities to replace elected local government. As President Mbeki put it in a letter to traditional authorities:

> "The Government does not support the alteration of the existing local government model. The proposal to disenfranchise a section of our people negates the aspirations of millions, including some traditional leaders, who fought for democracy" (Mbeki 2000).

But the President concluded saying:

> "The challenge we are faced with at this moment in time is to find a way of stabilizing our system of governance in the rural areas by creating a climate within which the institution of traditional leadership and elected institutions of government can co-exist" (Mbeki 2000).

Notwithstanding these shifts and ambiguities however, one can argue that while the pressures have led to the possibility of greater political accommodation of chiefs, they have not precipitated any serious re-envisioning of the overall developmental vision within which political deals are articulated. In retrospect, and given how important and complex the issues have turned out to be, it is striking how little serious attention had been given to the question of traditional authority and land reform policy other than a broad assumption that perhaps these institutions would whither and die in the face of a modern, democratic political culture and an aggressive land reform programme which empowered those who worked the land.

There are those supporters of traditional authorities who suspect that this perspective still underlies the ANC's approach to the issue. They argue that while the ANC-led government strings along traditional leaders with promises to address the policy concerns they raise, the same government actively entrenches other policies aimed at undermining what authority traditional leaders currently have and undermining the long-term viability of the institution of traditional leadership itself. This sort of conspiratorial explanation is difficult to prove or deny objectively and is not at all necessary to explain government's slow progress finalizing the policy issues at stake.

Nonetheless it is worth noting that, if it were the case that the ANC-government hopes traditional authorities will 'disappear' in the foreseeable future, then the experience of the rest of the continent suggests they have a long and fruitless wait ahead!

Much of the discussion which follows however is premised **not** on the cynical insight that traditional leadership is unlikely simply to go away and that therefore it must be dealt with. Instead the premise is that traditional authority systems, particularly as they relate to land and poverty issues, must be substantially defended and integrated into a broader national developmental perspective. Such a perspective, which recognizes the needs of the rural poor, also recognizes the vulnerability of the rural poor – a vulnerability which is heightened by free-market oriented land and rural development policies but which may be reduced if access to land and livelihoods is secured through 'traditional' tenure management systems.

Failure to resolve the issues relating to traditional authorities and land could have serious implications but the issues are complex and multi-faceted. To try and make sense of this task, it is important to be able to locate the many and various specific challenges in a set of key themes or 'problematics' so that discussion of the particular issues is related to the broader, underlying debates. This should allow for a systematic discussion of the issues in a conceptual and principled framework. Even so, many, if not all, of the issues ultimately relate to, and impact on, each other so there are inevitable overlaps.

It is suggested the following themes provide a basis for this initial task:

- Legitimacy

- Authority

- Accountability

- Gender

- Culture, custom and tradition

- Governance for development

Legitimacy

Effective leadership in any context depends critically on legitimacy – essentially, to what extent do those who are led grant the authority to lead to the leader?; and what are the grounds on which that authority is earned in their eyes? Thus for example, it is said of the institution of chieftainship that ideally 'a chief is a chief through the people' (see Lestoalo 1987: 18).

Comments on the history of traditional authorities in South Africa have pointed to a number of factors which have undermined their legitimacy, for example: their historical role as paid agents of the colonial, apartheid, and bantustan governments; the extent of politically motivated interference by those authorities in matters of recognition, succession and arbitrary replacement; their being drawn into political violence in the 1980s in kwaZulu-Natal[9]; even personal qualities of particular traditional authorities have undermined the broader legitimacy, for example, alcohol and women abuse, and relatively low levels of education and professional performance.

Questions about the legitimacy of traditional leadership also emerge in the tension between democratic and traditional principles of representation and authority. The South African context is not especially unique in this regard. Many societies have faced and continue to face this challenge. There is a substantial body of relevant sociological work which distinguishes between value systems which give legitimate authority on the basis of 'ascribed' status and those where status is 'achieved'. The traditional authority system is an example of ascribed status because ascribed statuses are usually fixed at birth and claims to leadership are legitimated in terms of rules and norms which determine who the rightful leader is – not withstanding the fact that a bad inkosi might alienate his followers so much that he loses his position, he claims that position in the first place on the basis of rules of succession. Such systems are often termed 'aristocracies'. By contrast, in a 'meritocracy'[10], status, leadership and authority is the result of action and choice, it is earned on merit through performance.

So the very grounds of traditional authorities' claim to legitimately expect and exercise power in general is challenged in a democratising 'modernising' context like contemporary South Africa. This is not to suggest that all 'subjects' of traditional authorities necessarily assume that amakhosi are inevitably and completely illegitimate because the country is now a democracy. Indeed most have sufficiently

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[9] For example, in a 1996 discussion document, Dr Sipho Sibanda and Edgar Ntuli argued that: "Some of the chiefs in the eyes of the public have been perceived as part and parcel of the political conflict and confusion in the rural areas of KwaZulu-Natal. The involvement in violence by some of the chiefs has therefore tarnished the image of the chiefs in the eyes of the public." (quoted in IPT 2002: 42).

[10] Which is not necessarily equated with 'democracy' here.

good reason as black South Africans to be wary of accepting the 'modern' project uncritically.

In short, a significant number of people grant authority to amakhosi but there is underlying tension about how to square this with a broadly 'western'-style democratic political system. The tension plays out in a number of critical areas many of which will be discussed further below including for example, the relationship between traditional authority and elected local government; the vexed question of who holds ultimate rights in land under traditional authorities; and the demands for participatory and accountable engagement in certain approaches to development practice.

Democracy and tradition in the current institutional arrangements for land reform

"The institutional arrangements currently available for holding land through land redistribution and restitution processes are community trusts or Communal Property Associations (CPAs). These are legal entities which operate in terms of constitutions requiring beneficiaries to adhere to a range of pre-determined conditions relating to democratic decision-making and due process. There are critical differences between the way these legal entities are meant to operate, and the operation of traditional systems of land administration and allocation. These differences are pointed out in McIntosh et al (1996). 'The legislation on community trusts emphasises democratic election by the community and the accountability of elected bodies in administering land held by communities as a whole. The principles which govern traditional land administration systems are fundamentally different from those which govern the operation of the trusts. The egalitarian principles which are entrenched in the traditional system are founded in custom and oral tradition and operate within a hierarchy of ascribed power. The principles of equality which are the basis for the operation of the trusts are founded in law, and are realized in democratic practices which contradict hierarchies of authority'" (Vaughan et al 1998: 13).

Authority

Sorting through issues of the authority of traditional authorities is closely connected with the discussion of the grounds of their legitimacy. Authority is critically dependent on legitimacy although it is not the only basis of authority which might also include, for example, the ability to leverage power and capacity. In general it might be said that the more the exercise of authority has legitimacy, the less coercive it needs to be. Therefore, the historical processes undermining the legitimacy of traditional authorities may be understood as contributing to the emergence of increasing coercive authority (which paradoxically has the effect of further undermining legitimacy anyway).

In the context of traditional authorities and land, two critical dimensions of authority are explored here, namely 1. geography, and 2. responsibility.

Geography

By this is simply meant the geographic extent of a particular traditional authority's claim to land. At one level, this is constituted by the subject's who give allegiance to an inkosi. In turn this relies on people's self-definition and beliefs in terms of ethnic or tribal identity and the recognition of a particular person to be the legitimate current leader for that community of people. In this sense then, the authority of an inkosi and the definition of his/her tribal community is constituted in the hearts and minds of those people. In principle then, this need not be only connected with a geographically-defined and contiguous 'community-in-residence'.

However, at another level, all of the above factors link with living in, and claiming more or less exclusive rights to, a particular place – a piece of land – by right of occupation through conquest, occupation or negotiated allocation by a previous authority. Certainly bearing in mind the historical roots of traditional authority and the central importance of the allocation of land in that system, this is the fuller expression of the geographic component of chiefly authority – i.e., that it is constituted by the location and spread of those subject's homesteads who give allegiance to an inkosi.

However, given the extent of colonial and apartheid interference in the land holdings of tribal authorities and the scale of forced removals, both levels have resonance and legitimacy. Even in the pre-colonial period, tribal boundaries were not terribly precise and border disputes were not unknown. The implications of these histories and institutions in the current context of land claims and land reform are significant and manifest themselves in different ways.

One such manifestation has its roots in the fact that the geographic extent of different amakhosi's authority was not static – there was dynamic change in the pre-colonial period and substantial changes were subsequently imposed by colonial and apartheid governments. This gives rise to the possibility of competing, overlapping and imprecise historical tribal claims to land which may each have their own strengths and weaknesses and which may be based on different moments in history.

> The recent demarcation process defining new local government areas was confronted with some of the current difficulties in this regard. Chair of the Demarcation Board, Dr Sutcliffe has argued that the Board did consider traditional authority boundaries in the process "despite there being an incomplete record of all recognised traditional authority areas, difficulties around the legal description of each traditional authority, some traditional communities extending into state and privately-held land, and some traditional authorities consisting of separate pieces of land. In addition, there are some landless traditional leaders, there are some amakhosi who argue that their area of jurisdiction extends beyond the proclaimed area and there are a number of land claims that have not be settled" (in IPT 2002: 47-48, see also Section 4 of IPT 2002).

Another manifestation in the current context is the ability of land-claiming amakhosi to bolster their claims by packing 'beneficiary lists' with names of people who no longer have any substantial connection with, or interest in, the piece of land being claimed but who give allegiance to the particular inkosi.

Responsibility

This refers to the functional roles that amakhosi can and should be authorised to undertake. Clarity and finality on this matter seems a long way off and it is subject to substantial and heated debate. Achieving such clarity will necessarily involve considering at least three relevant components.

In the first instance, there is the matter of agreeing and deciding some sort of list of areas of responsibility over which amakhosi should be recognised as having authority. It was noted in the history section that 'chiefly power' was a dynamic outcome of social processes at a local level. Certainly the chief would have been looked to as the guarantor of tribal harmony (by playing a key role in conflict resolution); of economic viability of homesteads (by playing a key role in managing the allocation of land rights and land-use rights to households); and social and cultural coherence and continuity (by playing a key role in social and ritual aspects of tribal life). Whereas historically these roles were socially determined in relation to received cultural norms and local needs through dynamic dialogue between an inkosi and the tribal council, the powers and functions of amakhosi have been subsequently defined, codified and distorted by white authorities from the colonial era onward. In addition, the broader social context within which amakhosi and their people live changed substantially over time.

Secondly, there is a range of alternate and sometimes overlapping authorities which impact on people's lives and social processes. For example, traditional law administered more or less formally within ubukhosi, must articulate with the generally applicable and formally administered law of the land. Since this situation has obtained for some time there are large areas that have been already resolved between these two systems but new challenges arise e.g., from the existence of a national Constitution and Bill of Rights. An example with perhaps more direct relevance to the question of land administration is that of local government. Aspects will be discussed further below but for now it is sufficient to note substantial tension between certain traditional authority groupings and national government on this issue. This has arisen because democratic local government exists for all people and all areas but a formulation to incorporate or integrate traditional responsibilities in a way that satisfies everyone has yet to be found.

Thirdly, even if a 'list' of responsibilities is determined the question then arises as to how to assess the performance of traditional authorities in carrying out these responsibilities. Whereas in a pre-colonial era it may have been possible for dissatisfied subjects to 'vote with their feet' and terminate their allegiance to a particular inkosi in favour of another, the social fluidity and land availability that allowed this is no longer there. As a result, the degree of local accountability which could have influenced performance long ago is no longer available to recipients and users. Furthermore, the principle is accepted in South Africa that the professional performance of public servants (paid with public money) is reviewable against job descriptions and performance indicators (indeed many must now sign 'performance contracts' to be confirmed in a post) and yet there is no similar or equivalent provision for traditional authorities. Thus, the Independent Projects Trust (IPT 2002) reported that, whereas Nkosi Holomisa of CONTRALESA rejects the suggestion of amakhosi being paid for specific services saying that traditional leaders deal with everything:

> "several people from communities outside Durban suggest that the relationship between the amount that traditional leaders are paid and their performance warrants further consideration. The key issue here is one of accountability for public funds. Where an elected office bearer can be voted out of power and an appointed official can be dismissed, a traditional leadership position is acquired through birth. Systems of monitoring and evaluation would therefore need to be developed and put in place to deal with a paid position that is acquired by birthright.
>
> A 23 year old woman from Nene Traditional Authority said that historically amakhosi were paid by their people and that they should be paid according to their performances. A male of the same age from Embo Traditional Authority said that traditional leaders should be paid less than what they receive at present because 'they don't perform very well in the community'. This view is not accepted by all, however. Another respondent from Embo said that amakhosi should be paid more because of their performance in service delivery" (Independent Projects Trust, 2002: 20).

Accountability

The discussion above makes clear that it is imperative, even e.g. in terms of a defined and agreed list of responsibilities, that traditional authorities must exercise their authority subject to accountability mechanisms which enable transparent review and recall for both the local community they serve and the national governance system within which they operate. This imperative flows also from the more general issues explored thus far: if traditional authorities are to play a meaningful and credible role in South Africa then their accountability needs to established in relation to their functions as both local leaders representing the interests of a local community of people, and also as governance functionaries exercising recognised responsibilities. In a sense, the first describes accountability in the context of a democracy, the second describes accountability in the context of a meritocracy.

Gender

As shown in the history of traditional authorities, the values and principles which define the institution are inherently patriarchal. Leadership, authority, inheritance and succession are largely the preserve of men. This does not sit easily with the formal values of gender equality, tied with constitutional rights to enforce them, which are a national entitlement flowing from South Africa's democratic dispensation.

Transformation informed by gender concerns would have many implications for the institution of traditional authority. With regard to the question of land specifically, at least three key areas can be highlighted as requiring attention: namely, the extent to which traditional values and rules unfairly discriminate against women in so far as they define (i) inheritance rights, (ii) land-use and access rights, and (iii) participation in local governance and decision-making. Historically the traditional rules-systems governing these matters has defined women's rights according to their relationship to men (in particular in terms of their marital status) and not in terms of their individual status as people, citizens and women in their own right.

In this regard is worth noting however that, in the first instance, it would be misleading to imagine traditional authorities as patriarchal islands in a broader South African sea of gender equality and women's empowerment. Broader South African society is itself deeply patriarchal notwithstanding formal constitutional and legal rights to gender equality and the advances made by women and women's organisations.

Secondly, while it is certainly true that the terms of women's incorporation in traditional systems reflects their ascribed subordinate status, they are nonetheless incorporated and not excluded. For example, even if the terms are not satisfactory, traditional systems of land-use rights have provided women as part of their community a degree of access and a livelihoods foothold which is not guaranteed elsewhere.

Thirdly, exceptions to exclusively patriarchal governance do occur (and these might regarded as representing the beginnings of a process of un-even change). For instance, women have been elected as indunas in some traditional authorities[11], there are occasional women amakhosi[12] and some women with dependants are getting access to land in their own right (see, e.g., IPT 2002: Section 6 'Gender': 87 ff).

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[11] Since izinduna are not hereditary positions this innovation seems to be more easily made within traditional authority systems – women chiefs are more 'problematic' because of the rules of succession and so on.

[12] According to the IPT, at least 11 women amakhosi are now fully recognised by the Department of Traditional Affairs in KwaZulu-Natal (IPT 2002: 88). Often however, because of the difficulties in

And finally, the actual exercise of patriarchy is a complex negotiated social process which certainly reflects and entrenches male dominance but does not ultimately exclude women's participation but limits and controls it. The patronising ambiguity of these practices is captured in the IPT's report where a respondent is quoted saying:

> "gentlemen, let us be honest, in most cases we discuss issues and then consult our wives, then they give us advice as to how we should have approached the issues. In the following meeting, you find guys very constructive. All the ideas come from their wives" (quoted in IPT 2002: 87).

Culture, custom and tradition

For all the emphasis thus far on the tensions between democracy and traditionalism, it is as important to recognise that an indispensable ingredient in a vibrant democratic culture is the right of people to hold, express and be subject to values and institutions which they believe in. Ubukhosi both expresses and perpetuates such a system or culture which has value and meaning for many South Africans. Where elements are in tension with democratic rights and values these must be resolved in favour of democracy and especially our Constitutional order but in itself this is not at all sufficient justification for dismantling or undermining the whole structure. As a recent report from the Independent Projects Trust states:

> "Supporters of the institution of traditional leadership argue that the institution should be retained because it safeguards African value systems. The publication *epoliticsSA* states that bodies such as Contralesa[13] question the wisdom of abandoning traditional institutions in favour of government systems that were imposed by the West.
>
> 'They (bodies such as Contralesa) point out that abandoning cultural values, norms, traditions and customs has led to the disintegration of morality and the loss of respect for human life and dignity…They argue that traditional leaders play an extremely important and positive role in many communities. In fact, in African customary law the traditional authority is required to act at all times in the interests and according to the wishes of the people.'

Such attitudes are contained in an article written by Contralesa's Inkosi Phathekile Holomisa. He states:

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terms of succession mentioned above, these women amakhosi are really 'acting regents' who assume authority where the heir apparent (the male son) is too young to do so but the previous incumbent chief has passed away.

[13] Congress of Traditional Leaders of South Africa

> 'Ubukhosi, the cultural values, norms, traditions and customs, all combine to ensure that, even in the midst of extreme poverty, there shall be respect for human life and dignity, each person shall not sleep out in the open due to poverty, there shall be respect for law and order, and that whatever food there is shall be shared by all. This is the way of life that traditional leaders want to retain for their people. The present struggle is not about the retention of power for its own sake, it is for the retention of power so that it can be used to safeguard the African value systems which are the bedrock of society'"
> (IPT 2002: 6).

Perhaps part of the challenge in this regard is to specifically name what it is that needs to be protected and defended and how traditional authorities will do this. This is certainly linked with an earlier discussion regarding the specification of areas of responsibility for traditional authorities. The danger is that without specification, citizens will remain unclear about what traditional authorities can be held accountable against, and the arguments by traditional authorities themselves for greater powers remain generalised, non-specific and therefore ultimately unrealisable in a democratic order.

Respect for culture and tradition is a hallmark of a democratic disposition. At times those parties who should engage with traditional authorities[14] have not paid sufficient attention to this. Whatever progress is made in formally determining the role of traditional authorities in local governance, significant setbacks and tensions can (and do) arise where such players are ill-informed in matters of protocol, decision-making, custom, and basic respect for traditional authorities[15]. Equally important however is to recognise that culture is dynamic unless it is already dead or dying. Dynamic culture will therefore always be open to new ideas and approaches, and ready to relinquish 'traditional' ones where they have outlasted their utility or relevance.

Governance for development

Traditional authorities have played a role in the local governance of rural areas and they probably will continue to play some role for the foreseeable future. In many cases (especially for example, the former homelands), a characteristic legacy of South Africa's political-economic history is the spatial coincidence of traditional authority governance systems and deep poverty with urgent developmental needs.

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[14] E.g., elected local councillors, local government officials, officials of various government departments, development 'consultants' and non-governmental organisations

[15] see, e.g., Inkosi Gwala quoted by IPT (2002: 60) saying that amakhosi "are not treated by the city council people with the dignity that (they) deserve".

It is true that, on the one hand, the full role of traditional authorities is not only defined by development but on the other hand, development has become a very inclusive and wide-ranging agenda. In any case, the focus on land in this paper inevitably suggests a focus on development - and the deep poverty in rural areas requires that obstacles to development be resolved carefully and urgently.

One could say all citizens can relate and contribute to development. But traditional authorities are not just ordinary citizens because they have authority, responsibilities, and status. Discussion of the history of traditional authorities (see previous section) indicates clearly that land, and the developmental activity it sustains, is central to the authority, responsibilities, and status of traditional authorities. However, as argued, government's land reform programme/s did not and have not sufficiently recognised and integrated this insight. Aspects of the current complexities in this regard have been highlighted too and it is critical that they be addressed if development is going to be secured. The negative implications for development of unresolved challenges surrounding traditional authority systems are widely recognised. For example, the Environment and Development Agency remarked in their 1999 Annual Report (at http://www.eda.org.za/), that in situational analyses they had completed in different communal areas, findings pointed to:

- widespread insecurity of tenure;
- breakdown, chaos and probably illegal practices in the system of local land allocation and administration;
- conflict between traditional authorities and elected local authorities; insecurity of tenure experienced by women through discriminatory application of traditional inheritance laws;
- confusion around tenure and land administration which obstructs local land development;
- low productivity from the local natural resource base and environmental degradation from disintegration in traditional land use management systems.

More recently but in a similar vein, Director of the Programme for Land and Agrarian Studies (PLAAS), Ben Cousins has pointed out that:

> "In the densely settled former homelands a major constraint on development is lack of clarity around land. Disputes over land and governance result in long delays in planning and implementation. Potential investors are often unclear about who they should negotiate with…. Local residents are often excluded from decisions about the land they occupy and depend on for their survival" (Cousins B. 2001).

Even in pre-colonial times the configuration of amakhosi, land and development was dynamic and never fixed but at least then the 'traditional' configuration was the dominant – and for a time, the exclusive – configuration. In contemporary, democratic South Africa traditional authorities are patently not the only authoritative players. So the development nexus is a critical and difficult one to resolve – attempting to respond to a range of interests and players whilst establishing a sustainable configuration which facilitates optimal developmental outputs. Getting it right is vital because the need for development is particularly urgent in rural areas. Statistics recently published by the Municipal Demarcation Board stated that between 60 percent and 80 percent of the backlog of provisions of services such as water, electricity, telephones and sanitation occurs in traditional authority areas of KwaZulu-Natal (in IPT 2002: 53).

It is worth noting that current land reform processes involving land claims by traditional authorities appear to be in danger of even further undermining the developmental prospects of certain communities. The fact that traditional authority areas often coincide with areas of rural poverty has already been noted, as has the fact that government's rural development perspective has not sufficiently integrated traditional land use and production systems. As a result, the urgent developmental needs in traditional authority areas are being addressed in an unsatisfactory way in the short-term because claims for land etc. must be 'forced' through existing options and mechanisms within government's land reform programme which are not really suited to maintaining and developing the integrity of traditional systems[16].

McIntosh, Xaba and Associates (1998 (a)) argue that most redistribution applications involve traditional authorities in KwaZulu-Natal and that the result of critical institutional and policy weaknesses (as well as the incentive to 'pack' beneficiary lists so that claimants can meet the cost of the land through pooling their individual R15 000 grants), has been that:

> "large, unviable and poorly located settlements have emerged or are being planned for. …The location of projects has often been determined by the historical land and kinship links of beneficiary groups, and by political considerations. These projects offer very little in terms of livelihood generation and have tended to be located in remote rural areas without much agricultural potential" (MXA 1998 (a): 5).

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[16] In a sense, government has implicitly acknowledged this weaknesses by giving attention to these matters in the proposed Communal Tenure Bill – but even as it stands, this is not complete and, as discussed below, probably not satisfactory in key areas.

The issues

The preceding section shows clearly that specific challenges with respect to traditional authorities are framed by bigger principles and underlying themes. The following section aims to work through some of the more common specific challenges bearing in mind their location within these bigger debates but with a view to exploring pragmatic and viable approaches to their resolution. Even so, the discussion tries to avoid too local a level of specificity so that the conclusions might have some general application.

Local government

The role of traditional authorities in local government must be worked out in relation to two aspects of local government; firstly, its representative aspect, and secondly, its administrative or functional aspect.

Representative local government

Traditional authority currently exists uncomfortably side-by side with democratic institutions (Jacobs S. 2000 (a)).Some traditional authorities argue that amakhosi should constitute the first-tier or primary local government where they exist. However, in a constitutional democracy like contemporary South Africa, it is difficult to justify why, instead of elected local government, some citizens should not enjoy the full democratic rights that were at the heart of the broader struggle against apartheid[17] - and especially at the local level where it is frequently asserted that government is 'closest to the people' which is meant to convey the idea that citizens can engage most directly with their representatives, and exercise their democratic right to choose and hold leaders to account.

In practice however even local democratic government is not always sufficiently 'close to the people'. Since rural areas are generally more sparsely populated (and the geographic constituencies proportionally larger as a result) rural people are in general more likely to experience this 'distance' – a distance which will have grown all the more since the recent 'rationalisation' of local government into fewer units[18]. Thus notwithstanding the formal representivity and accountability of democratic local

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[17] To emphasise the point, it is perhaps worth recalling that democratic governance at the local level was specifically a key feature of many 'struggle' campaigns against apartheid as various forms of un-representative government were thrust upon black South Africans at the local level by the regime. In other words, the demand for democracy was not limited to transformation at the national level of government.

[18] See: Jacobs S. 2000 (b): "The decrease in the number of municipalities clearly has an impact on the powers of traditional leaders. The number of municipalities has been decreased from 843 to 284, which creates more powerful local governments that have more administrative control over their areas".

government, it is an imperfect system. Many traditional authorities function, and represent a known system of leadership, in precisely the spaces where these types of weakness are most manifest – in under-resourced, marginalised, and rural communities. The Independent Projects Trust report the views of an inkosi from the South Coast of KwaZulu-Natal who maintains that "the local people did not know the elected councillors and that it was difficult to hold them accountable for their actions and omissions" (IPT 2002: 35). This inkosi and others, including the Inkatha Freedom Party, argue that ubukhosi should rather **be** the first-tier, representative local government. Nkosi Mzimela, the chairperson of the National House of Traditional Leaders has stated clearly that:

> "Our view is that traditional authorities should serve and perform all functions of local government in rural areas within the area of jurisdiction of traditional leadership. That is, they should serve as primary local government responsible for development projects as this has been the case since time immemorial" (Nkosi Mzimela 2001).

In what IFP leader, Mangosuthu Buthelezi, characterises as a compromise position, there have also been proposals to adapt this basic model by agreeing to the democratic election of up to 50% of the traditional councils which would constitute local government in 'traditional' areas (Buthelezi 2000).

This position was advanced in the unsuccessful 'provincial constitution for KwaZulu-Natal' which would have it that: "The autonomy of the traditional leaders, as the primary local government administrators of their respective communities, shall be guaranteed and protected in terms of traditional and customary law, subject to this Constitution" (KZN draft constitution, 1996, quoted in IPT 2002: 26).

But this is an unnecessarily extreme conclusion and there is no compulsion to accept that, because of existing weaknesses with democratic level government, traditional authorities should be installed in their place[19]. Indeed, when the Constitutional Court considered this proposal, the judges were concerned about precisely such provisions which sought to establish traditional leaders as 'primary local government' in some areas, "organised under customary law but with the same status as municipalities or local councils. They questioned whether it would be appropriate for traditional leaders to administer electricity and schooling, when their positions were hereditary and they could not be removed if they did a bad job. Judge Johann Kriegler added: 'In some areas you would have a council of amakhosi only, without any suggestion of accountability. Of representative democracy there would be no sign'" (Carmel Rickard in Sunday Times, June 30 1996, quoted in IPT 2002: 26).

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[19] Furthermore, it should be noted that traditional authorities have never been local government equivalents in the sense of being responsible for planning and delivery of infrastructure and services – see Vaughan and McIntosh 1998: "traditional authority systems have not facilitated the provision of infrastructure, or the delivery of services".

Furthermore, the important mechanisms that gave a chief's subjects ultimate power to hold leaders to account are no longer available. In the past (as discussed earlier in the history section), disgruntled subjects could 'vote with their feet' where internal tribal consultative processes (especially tribal councils) did not satisfy their needs, and they could move and shift their allegiance to another chief. None of the conditions which allowed for this option to be exercised - like land availability, flexible boundary demarcations, the absence of an over-riding constitutional order and so on – are available anymore and there is no possibility of returning to the past. Thus, whilst acknowledging that under certain conditions, traditional authority systems might well have been consultative and representative, in the current South African context they cannot take the place of elected, representative primary local government where subjects can hold leaders to account and have the ultimate power to remove them by popular democratic vote[20].

Instead, what is suggested perhaps by the limitations of democratic local government, is that traditional authorities could play a useful role strengthening local government especially by ensuring greater degrees of engagement and participation in it at the local level. In so doing it is likely that traditional authorities would build (or maintain) their credibility with their constituents (in general and at the local level) by being seen to be advancing local interests and pressing demands for them to be serviced by local government. It would also deepen democracy at the local level by forcing greater accountability of elected representatives and officials.

For traditional authorities to fulfil such a role and to engage meaningfully with local government (and its development processes) there is a need for clear mechanisms for information exchange and decision-making as well as for building appropriate capacities. Provisions in the current legislative and policy framework governing local government go some way towards this by facilitating the participation of traditional authorities (on a non-voting basis) in municipal councils[21] and assuring them of their right to be consulted in decision-making that affects their areas.

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[20] This does not necessarily imply that efforts to 'democratise' traditional authority systems should be abandoned but only that such efforts should not be assumed to replace democratic local government. If processes and rules for democratising traditional authority systems were taken far enough to satisfy the tests of representative democracy, then they would not be 'traditional' in any meaningful sense.

[21] Section 81 of the Local Government: Municipal Structures Act and (subsequent Amendments) states that "traditional authorities that traditionally observe a system of customary law in the area of a municipality, may participate through their leaders…in the proceedings of the council of that municipality, and those traditional leaders must be allowed to attend and participate in any meeting of the council". According to the same Act traditional leaders were not allowed to exceed 10 percent of the council. This was subsequently increased to 20 percent in an amendment to the Act. (in IPT 2002: 30). The IPT also notes that: "An article in the *Local Government Law Bulletin* says that it appears that the Act expected another way of soliciting the view of the traditional leader rather than simply allowing the traditional leader to express his or her view during the council meeting where the matter is

Bearing in mind the focus in this paper on land, it is possible to point to critically important roles that traditional authorities can and do play at the local level. In particular the system of traditional leadership is often the only viable and/or existing leadership institution in poor and rural contexts. The ability and desire of amakhosi to advance the interests of their subjects in such contexts means that they play an important role as protectors of the poor and marginalised. Any developmental vision which takes seriously the interests of the rural poor must ensure that this function is recognised and integrated. As elaborated elsewhere in this paper (see section below: "Land use rights"), traditional land use systems offer the rural poor access and livelihood resources which they would tend not to afford outside those systems and which would be threatened (especially by market-related dynamics) where those systems are weakened.

The authority of traditional leaders would be enhanced if they were additionally assured of their reciprocal right to call elected representatives and local government officials to account before meetings or fora of the traditional authority's community convened by the traditional authority. A provision of this kind would reflect the particular authority of amakhosi and could be enabled through amendments to legislation regarding local government especially.

In the absence of clear and known mechanisms in this regard, the practice of some traditional authorities has been to exercise a de facto veto over development and other decision-making processes by being obstructive. This course - while perhaps understandable - is unhelpful, creates tension with elected local government, and may ultimately undermine the credibility of traditional leaders in the eyes of their constituencies if the effect is to frustrate and block development activities.

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considered. In terms of the Act, the provincial minister may prescribe a broader role for traditional leaders in the affairs of the municipality.

"Participation means that one could address a meeting; the traditional leader is therefore not merely a silent observer of proceedings. She/he may, subject to the rules and orders of the municipality and any regulation of the MEC…therefore participate in any debate on a matter if she/he is a councillor. This would include the right to submit motions, make proposals and ask questions. Her/his participation in a council meeting is not limited to the matters directly affecting the area of the traditional authority."

[Nonetheless]…KwaZulu-Natal's House of Traditional Leaders decided in April 1999 that it intended challenging the Municipal Structures Act in the constitutional court. Inkosi Mpiyezintombi Mzimela said that amakhosi were not happy with the government's intention to introduce the legislation in traditional areas because this would sideline and erode their powers" (IPT 2002: 31).

Participatory local government

Tensions and debate about the relation between traditional leaders and elected local government also extend to the 'participatory' fora associated with each system at the local level. For the purposes of this paper, some brief comment is required, focussing on the tension between 'development committees' (associated with traditional authorities) and 'ward committees' (which each ward councillor in Category A and B local governments is encouraged to establish in terms of new local government legislation[22]). Tension is almost inevitable because there is overlap of their intended broad function – both are meant to provide communities with a consultative space to inform local leadership of local concerns and developmental needs, and to involve local people in such discussions. Both structures relate to the development, land-use and planning inputs that drive integrated development planning at the local level in terms of the current local government regime and they therefore deserve at least brief comment in this paper with its focus on land issues.

According to the Department of Provincial and Local Government, ward committees facilitate community participation in the matters of local government. Each ward committee consists of the councillor who represents that ward and a maximum of 10 other persons from the ward area elected to the committee through a public election process. Ward committees are mainly advisory committees and may make recommendations on any matter affecting their ward. A municipal council may also delegate additional powers and duties to ward committees (www.local.gov.za/DCD/ as at 17 April 2002).

Development committees are not universal in all traditional authority areas but many were established in response to growing demand (from government departments and NGOs) for sustained, community-level input into development and service-delivery projects and decision-making. There is no legislation governing or requiring their operation, although provincial departments in KwaZulu-Natal actively encouraged their establishment and at one time drafted legislation that would have formalised their status (however this legislation was not adopted). In practice some development committees have enabled wider participation in development processes but others have only appeared to do so whilst in fact entrenching the control of an inkosi over such matters.

Notwithstanding such variations, a number of traditional authorities regard ward committees with concern because they may cover similar ground (in terms of issues and constituency) but are not accountable to the inkosi but rather, relate to an elected councillor in the local government. (For example, the IPT reports that traditional leaders in a focus group discussion "agreed that the introduction of ward committees

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[22] Category C (regional) councils do not have wards and therefore cannot create ward committees.

was causing tension. They said that the conflict arose because the committees have a right to call meetings and come up with decisions on their own without consulting inkosi" (IPT 2002: 56))[23]. Anecdotal evidence suggests that some elected councillors may be equally protective of their ward committees as the privileged route for local people to influence development planning at the local level. Since traditional authorities operate in areas where there is often a vacuum of alternative organisational and leadership possibilities and where developmental needs are frequently severe and urgent, existing development committees should probably be taken rather more seriously and integrated into development planning processes at the local level because these can be the only mechanism for articulating the interests of the rural poor. Obviously such structures should be encouraged to be as participatory as possible but it should be noted that development practitioners point to very low levels of effective participation by ordinary people currently anyway – in traditional authority areas and elsewhere.

Taking development committees seriously and ensuring their integration into planning processes and so on does not imply granting them particularly privileged status within the local governance regime (this would again raise the difficulties of giving status to un-elected authority systems in a democratic context discussed above). Furthermore, there are practical grounds for rejecting any significantly privileged status for traditional authority-driven development committees because, in such a scenario the state would be obliged to intervene and impose certain conditions regarding the constitution, composition and functioning of such committees (in much the same way as CPAs are required to follow a set of rules about such matters as representivity, gender issues, transparency and accountability). Given the 'problem set' that these proposals regarding local participation in development processes are intended to address, this hardly seems the most effective route to follow, particularly because:
a.   although they would be absolutely necessary, such interference would in all likelihood be seen by traditional authorities as just as problematic an imposition on their authority and governance systems as ward committees anyway[24]; and
b.   like CPAs, in practice such requirements invite either their more or less conscious subversion by paying lip-service to the required form without any substantial commitment to their intention, or the need for massive external support and capacity-building interventions in each locality to ensure that local people both fully understand the intention of these conditions and the rights they give rise to and also to have the real capacity to take up these rights within development committees – often in a hostile environment.

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[23] Note that these tensions and possible approaches to resolving them are briefly discussed in Annexure A: A further note on ward and development committees.

[24] And in fact would legitimately be seen as placing the bar even higher for traditional authorities than they are for ward councillors who are responsible for establishing ward committees where the applicable conditions are not as strenuous

Capacity building

For Amakhosi

The development terrain is broad and complex anyway, and the post-1994 policy and institutional context at local level has undergone significant change very quickly. Many amakhosi have not had sufficient means and opportunities to stay informed of these developments or to be exposed to new approaches and thinking. Because the (hereditary) status of chieftainship is more 'ascribed' than earned, and because there is no performance standard against which they are judged (as discussed above), there is no real compulsion currently built into the system of traditional leadership to turn this pattern around and ensure that amakhosi are sufficiently knowledgeable and up-to-date[25]. Nonetheless, the need to build the capacities of traditional authorities is quite widely recognised. Usually the emphasis in such discussions relates to broad areas of democracy and development (see IPT 2002: Section 8: 'Future role and needs', p 110[26]) but should also be cognisant of the institutional weakness of traditional authority systems from an administrative perspective which, as Vaughan and McIntosh argue "means that traditional authorities have little capacity to carry forward development processes. Their weakness also renders them vulnerable to corruption" (Vaughan et al 1998: 16). Given the hereditary nature of chiefdomship, it should be possible to explore how potential or future traditional authorities might be identified early on (i.e., before they assume the position of inkosi) and targeted for appropriate education and training. In light of the conclusions drawn thus far which suggest a key role for traditional authorities in defending and articulating the developmental interests of (certain elements of) the rural poor, capacity building could usefully focus on, e.g.,

- The development planning regime at local level especially
- Critical approaches to development
- The potential of traditional land-use management systems to secure livelihoods and development possibilities for the poor
- Participatory approaches to development planning and strategy
- Appropriate systems for recording, managing, and defending land-access and -use rights within traditional tenure systems
- Facilitation skills to support participation
- Negotiation skills for advancing local developmental interests and strategies.

[25] Note: this does not imply that elected councillors in local government have always proved themselves to be much better capacititated for the tasks than traditional leaders. The need for capacity building of elected councillors is also widely recognised.

[26] The IPT comment that training should include: "information about government laws and policies as well as the development of skills relating to functions that amakhosi and izinduna perform in their communities. An additional area of training could also include processes to negotiate and reach agreement with elected representatives and municipal structures about respective roles, responsibilities and mutual accountability mechanisms" (IPT 2002: 111).

For communities in 'traditional areas'

There is another important dimension where capacity building is required and this relates to the broader community, and to groups within communities, under traditional authorities. Whereas it is argued elsewhere in this paper that, in the absence of alternatives, traditional authorities can play a crucial role in protecting the interests of sections of the rural poor, it is unclear to what extent for many people, traditional authorities are the **only** alternative to free-hold title and the evident dangers this poses for the poor. It is almost certainly true that, as the IPT argues:

> "alternative leadership options are often limited in rural areas. Many local people either do not consider themselves capable or are wary of engaging in development because they do not want to challenge the authority of the inkosi." (IPT 2002: 59).

McIntosh, Xaba and Associates (1998 (a)) comment that, whereas in most land reform projects under the KZN Department of Land Affairs, traditional authorities appear to be accepted as representing a claimant community:

> "[t]he exceptions to this are those communities previously faced with black spot removals who have developed alternative structures of management within their communities, partly as a result of extensive support from NGOs, particularly the Association for Rural Advancement (AFRA). … With the former 'black spot' communities, where there is a history of non-traditional administration, … there is more openess [sic] to alternatives" (McIntosh, Xaba and Associates 1998 (a): 11).

These insights all tend to suggest that the ongoing dominance of traditional authority systems is at least partly explained by a lack of alternative power and institutional bases in rural areas reflecting a lack of diversity in terms of civil society[27]. Capacity building to address this could help build a more vibrant and open political culture in traditional rural areas and grow the possibilities for alternative authority structures and so on which in turn could enhance local capacities for more creative and more flexible answers to the challenges which face them.

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[27] Note that this is not the conclusion that MXA are prepared to draw however. They pose the question: "How should one understand this general acceptance of traditional authority leadership in land reform projects and the apparent indifference regarding (or active opposition towards) individual land rights amongst the beneficiary communities?" and answer that: "One argument is that with many of these areas access to communities can only be effected through existing power-holders, whether these are traditional authorities or whether they are NGOs. In the absence of a significant range of other empowered community-based organizations, government is obliged to secure access to communities through such `gatekeepers', even though this might mean conceding power to gatekeepers at the expense of individual rights and interests. By the same token, it has been demonstrated in the first section and within the case study examples, that traditional leaders are not all-powerful. They have minimal administrative capacity, often have relatively few sources of income and can become quite vulnerable when they have alienated their constituencies (eg. Zondo). That civil society weaknesses are on a par with those of traditional authorities, cannot account for the dominance of traditional authorities in land reform projects" (MXA 1998 (a): 12).

Thus, if people living in areas under traditional authorities are to make their full contribution to local discussion and decision-making on these critical issues, then it is likely that independent capacity- and institution-building is required. A comment by McIntosh, Xaba and Associates in their report on case studies of the role of traditional authorities in land redistribution in KwaZulu-Natal confirms this need where their report notes that "individuals remain silent on the issue of rights when in the presence of the Inkosi" (MXA 1998 (b): 20[28]). Experience in the use of Communal Property Associations as the legal entity for holding land also points to the need for capacity building of this nature. Here commentators note that the CPA might be an effective instrument for securing the group's tenure (which is directly protected by the state through registration with the deeds office) but the protection of individual rights within the CPA are not similarly legally registered and therefore, "[i]nternal protection of individual rights depends on individuals having a sense of their rights and responsibilities[29]" (Sapsford, P. and K Philp, 1997: 7).

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[28] See also the experience of the Institute for Multi-Party Democracy who run training programmes with traditional authorities and who have noted the difficulties of incorporating community members in workshops together with amakhosi, the reason being that community members are intimidated by the presence of amakhosi and hesitate to express opinions" (in IPT 2002: 112).

[29] The other implication is that individual rights should also be registered in an appropriate and manner. This is discussed elsewhere in this paper.

Constraints on the role of civil society in capacity building

Civil society in general, and non-governmental development organisations, are subject to their own capacity and programme constraints so one cannot suppose that they are in a position to simply or immediately 'fill this gap'. Nonetheless, independent developmental interventions (especially by civil society organisations (CSOs)) have often been regarded with suspicion – if not hostility – by certain traditional authorities. In this regard, the IPT has suggested that: "Many amakhosi are suspicious of non-governmental organisations because the organisations are often perceived as being supportive of the African National Congress due to their activist history. In addition, the values of participation and empowerment are often interpreted as challenging the position of inkosi" (IPT 2002: 63). To the extent that CSOs are precisely independent and may well bring into such communities alternative ways of thinking about development and governance, the fear of incumbent elites is perhaps understandable. Notwithstanding such fears, in a democratic society people have a right to information, to debating and assessing alternatives and ultimately making their own choices. Such individual rights are not valuable simply in and of themselves but they underpin broader social rights to organise and associate, and to develop the possibility of multiple organisational and leadership avenues.

Some development interventions into traditional authority contexts have failed to respect traditional authorities, either by being deliberately discourteous, or as a result of genuine ignorance of custom and protocol – such actions are unfortunate and the disapproval from local leaders which follows is perhaps justified. However the virtual 'no-go' which certain traditional authorities have effectively enforced and which keeps independent organisations from freely and openly working in such areas is unacceptable.

Administrative or functional local government

Consideration of the functional aspect of local government is clearly related to the earlier discussion regarding the scope of traditional authorities' responsibilities and the intersection of these with local government where many commentators have noted the potential for overlap and where a number of traditional authority interest groups have alleged a dilution of their authority. As Vaughan and McIntosh argue:

> "The establishment of constructive working relationships between traditional authorities and rural municipalities has become critically necessary for two reasons. The first is that services must be provided in ways which are affordable for rural municipalities, and for rural communities. The second is that conditions must be created under which rural municipalities can fulfill their planning responsibilities" (Vaughan et al 1998: 15).

With regard to responsibility for provision of (bulk) services, we should note in the first instance that such a possibility would not have existed 'traditionally' - neither local government nor bulk service and infrastructure even existed as 'goods' to be distributed, at least prior to the colonial era, and probably much later than that. In the current era, the IPT argues that "Traditional leaders often mobilised collective community action to provide services and perceive local government as treading on their terrain" (IPT 2002: 46) and that "[p]rior to the first democratic general election in 1994, all development in rural areas took place through the auspices of traditional authorities" (IPT 2002: 53). However, this is distinct from having the responsibility for **provision** and, as is argued elsewhere in this paper, mobilising demand or support for service delivery could be a valuable role which traditional authorities could exercise within the framework of democratic local government. Vaughan and McIntosh (1998) make clear that traditional authorities "have not facilitated the provision of infrastructure, or the delivery of services" and that in fact they were marginalised as government line-departments increasingly took over. Further, the Integrated Rural Development White Paper for KwaZulu-Natal (1998) stated that: "Traditional authorities have generally been excluded from development activities. Government's development-related field services have by-passed traditional leaders and other local organisations".

Perhaps what is most important in the perspective raised by the IPT is that such service provision and development work was done "through the KwaZulu government departments, which **fully recognised and promoted the legitimacy of traditional authorities**" (IPT 2002: 53, my emphasis). If this attitude was indeed characteristic of the KwaZulu departments, then part of the current resentment by traditional authorities might be understood in terms of competition for the political credibility of being acknowledged and associated with service delivery - especially where non-traditional leaders (in elected local councils) also desire such political credibility. This type of political competitiveness at the local level may well be threatening to some amakhosi (or indeed to any entrenched local leadership) but it is quite frankly intrinsic to a pluralist democratic system and should ultimately enrich local political culture. Local leaders who respond to competition by attempting to block local development will probably soon lose credibility while the converse is true – those who embrace it as an opportunity to champion local interests will probably build their credibility. Line departments who are responsible for service delivery in such areas should be responsive to, and where appropriate acknowledge the role of, local leadership who press developmental demands and assist in their delivery.

Returning to other functional aspects of local government, the critical difficulties emerge in relation to those functions impacting on planning and land-use for the purposes of this paper.

Analysis of current experiences of traditional authorities and land-use and development and planning issues suggests that, while certain themes and challenges recur, the conditions from case to case vary significantly.

The IPT point out that "the absence of formal role definition for councillors and amakhosi in development has meant that local areas have found their own solutions" (IPT 2002: 60) and that the resulting relationships between traditional authorities and local government can be either:

- *'cooperative'* (where well-known and trusted individuals are elected as councillors and work closely with the inkosi), or
- a *'division of roles'* (where the inkosi and the councillor implicitly delineate roles between them and, although they have limited interaction, respect each other's turf), or
- *'blocked'* (where councillors are prevented from working in the area or, alternatively, they work in the area without recognising or communicating with amakhosi), or
- *'open conflict'* (where the question of authority is unresolved and contested and different groups in the community end up taking sides) (IPT 2002: 60[30]).

Indeed, local contexts vary so significantly that it is perhaps more useful to approach their resolution flexibly rather than by the imposition of a generalised (and inevitably contested) ruling on the allocation of responsibilities. However, if a more flexible and pragmatic approach is to be adopted, then it is important to try and specify the principles and criteria which would guide its implementation, and the mechanisms for review of local outcomes[31].

The section which follows explores some possible bases which, taken together, could contribute toward building such an approach:

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[30] Given that the IPT here links 'cooperative' relationships with 'well-known or trusted' elected councillors and contrasts this with its opposite extreme of 'open conflict', it is interesting to note - and contrast this with - Vaughan and McIntosh's suggestion that "Where traditional authority systems have lost their legitimacy, conflict has arisen between traditional leaders and local councillors" (Vaughan et al 1998: 14).

[31] In this respect then, this approach is different from the IPT's conclusion that: "All roleplayers must focus attention on resolving roles and responsibilities at a local level **rather than waiting for policy and legal guidance** from national government" (IPT 2002: 118 my emphasis). In other respects however there are similarities. Thus in their 'conclusions and recommendations' - Section 9, the IPT conclude that "solutions should involve traditional authorities and local government structures holding discussions to determine their respective roles and functions in order to develop co-operative and constructive relationships that support rural development. This clarity would also provide the basis for both mutual accountability and training needs assessments" (IPT 2002: 116).

1. An assessment of 'pressures on the land' might be fruitful. Experience on the ground strongly suggests that administration of land-use (including residential, arable and common access land-use) under traditional authorities tends to be more viable (and perhaps sustainable) where there is relatively less pressure or demand on land. Conversely, significant pressures on land seem to undermine the effectiveness of traditional systems which tend subsequently to breakdown, becoming corrupted, un-evenly applied or not applied at all. Unsustainable pressures on traditional systems of land administration seem most likely to feature in urban and peri-urban contexts (see Sapsford, P. and K Philp (1997) who argue that "development is more difficult to implement on communally held urban land"[32]). In such contexts it is also more likely that land-use planning and the allocation of residential land and property and so on needs to be more closely integrated with broader and strategic urban planning and administration within which a particular 'community' is located. There will almost certainly be 'grey areas' in the determination of land pressures but some characteristics could be used to generate a more or less objectives set of indicators – e.g., those relating to population densities and proximity to urban centres. However, the argument that traditional tenure is not appropriate where land demand is intense should not always imply that freehold is the only alterative. One danger to be taken into consideration in this regard is the vulnerability of tenants because "tenancy often occurs in areas where there is high demand for land. In these circumstances the competition for land makes them most vulnerable"
(Sapsford, P. and K Philp, 1997: 10).

2. An assessment should be made from a local developmental perspective as to the appropriateness of traditional tenure and administration systems in relation to the proposed or dominant local development activities. In a flexible approach there should be a range of possibilities but the point being made can best be illustrated by contrasting on the one hand, a local development plan which envisages thoroughgoing commercialisation of agriculture at scale, with a vision for improving household-level subsistence and livelihoods resilience and securing communal food security. (Determination of such local development plans should be at local level through participatory processes, informed by local developmental conditions, and integrated with Regional-level development planning.) The experience suggests that traditional tenure is not the best vehicle for thoroughgoing commercialisation of agriculture at scale because limitations regarding, for example, the alienation of land from the broader community mean that it provides unsuitable security for leveraging in finance

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[32] Also see: IPT 2002: 69: "Tessa Marcus, Kathy Eales and Adele Wildschut say that in reality the practices relating to land allocation are clouded by 'corruption, patronage and, increasingly, the influence of market forces as they slip between the traditional and modern systems to sell the land they hold in trust for personal profit and to consolidate their power base'. Their observations are particularly true of peri-urban areas".

and other inputs at the scale required for commercialisation[33]. Accordingly, freehold tenure is usually regarded as the more appropriate form under such conditions. By contrast, it is precisely these 'limitations' regarding traditional tenure which are its enduring strength for securing some sort of land and livelihoods base for the rural poor.

3. An assessment of the stability and legitimacy of the particular traditional authority incumbent and system must inform decision-making about a community's future governance configuration. Although such assessment may be resisted by traditional authorities it seems unreasonable and irresponsible not to require that these matters are openly reviewed on a case-by-case basis. Certainly this requires that the affected people (the 'community' or communities) are canvassed both in relation to their preferences regarding the principle and extent of traditional administration in general, as well as their views regarding legitimacy and popularity of their particular incumbent traditional authority.

4. An assessment of the relative capacities of both the existing traditional authority and the local government must be made. On the one hand it is undoubtedly true that traditional authorities have historically not received substantial support as institutions and that they are therefore often 'weak' institutions. However, it is also generally acknowledged that formal local government in South Africa is very weak (e.g., in terms of their fiscal base and the personnel and skills base). In this vein, McIntosh (with others) has repeatedly argued that in reality, financial and other resource constraints limit the extent to which alternative local governance systems can replace traditional authorities systems in many areas[34] - traditional authorities exist and are cost-effective. Traditional authority systems provide social security and welfare functions and they have fulfilled some of the more basic administrative and control functions in rural areas, while keeping within the financial means of poor communities. Their judicial and dispute resolution functions have played a vital role in ensuring local stability. More important, traditional authorities, and the system of traditional tenure on which their power rests, have provided relatively secure, affordable, and equitable access to land for rural people (Vaughan et al 1998: 10, and

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[33] See Vaughan et al 1998: 10: "Research … suggests that traditional authority systems of land administration and allocation will inevitably be undermined by the introduction over extensive areas of commercial agriculture. Factors which impinge negatively on traditional authority power and legitimacy in commercial agricultural contexts are the tendency to de facto entrenchment of land rights, the increased demands on the traditional authorities as means for dispute resolution, the emergence of a class of relatively wealthy entrepreneurs through processes of social stratification, and the emergence of a demand for freehold tenure from such individuals, and even from less prominent landholders".

[34] e.g., "Recognition that the capabilities of the state are modest, and are likely to remain so within many of the vast areas which fall under traditional authorities implies conceding a continued role for traditional authority systems in facilitating the implementation of government programmes, and in managing land" (Vaughan and McIntosh 1998: 16, and also MXA 1998 (a): 16).

see MXA 1998 (b): 16). For these reasons, as well as the potential for traditional authorities to mobilise local contributions to management or labour costs of service delivery, affordable[35] service delivery for rural areas will likely have to draw on traditional authority systems rather than exclude them.

4(i). One reason many such areas have been 'cost effective' to govern is that they have never been expected to provide a real revenue base within a local government tax and rates system. The IPT (2002) found that one cause of opposition (expressed during the process of local government demarcation) to replacing traditional authorities with local government on the same basis as the rest of the country was the fear that this would result in the imposition of taxes on residents of such areas. The IPT suggests that rural people associated municipalities with the repressive tax policies of the apartheid regime and that they were concerned that they would have to pay additional taxes on services or opportunities that they already had as a result of communal life (IPT 2002: 51).

Where traditional authorities are, after consideration of the criteria suggested above, indeed granted authority and responsibility for land-use planning (or for certain more limited responsibilities within this), these responsibilities would still nonetheless be planned, integrated and carried out within the District Council-level planning regime (through the LDO and especially IDP processes for example). This configuration provides for at least a local government-level set of mechanisms for ensuring that land-use planning is done and reviewed, and that the planning is carried through to implementation. District Council could be tasked with ensuring compliance and empowered to enforce such where either its own review processes or a range of other trigger mechanisms indicate that land-use issues under a particular traditional authority require such intervention. Interventions could fall somewhere on a continuum between simply entering into consultation with a traditional authority on matters of concern, through issuing of binding directives for corrective action or additional information, to instituting a review process as to the suitability or competence of traditional authority. This last option could be based on the same broad set of criteria discussed above (relating to land pressures, stability, legitimacy, and capacity and so on). This is important because all such characteristics are dynamic and will change over time anyway. Accordingly the need for review from time to time should be anticipated and there must be open mechanisms to trigger such review. Trigger mechanisms must include not only internally-driven District Council-level reviews but also petition by members of the community under a traditional authority themselves or civil society organisations[36].

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[35] i.e. both to local government and to communities

[36] Note that for any of the proposals advocated above to become effective, there would need to be enabling legislation so that local practice and innovation within the proposed guidelines are articulated

Land-use rights

> "Traditional communities and mores are based on the shared ownership of the land and the role of traditional leadership in its administration. We regard access to land not as a mere property right, but as a fundamental human right. A community and its land are united by a mystical relationship, which ties together past, present and future generations. In our view, traditional leadership remains the final expression and the custodian of this relationship. The shared ownership of land is at the basis of our social communalism, culture of ubuntu and sense of social solidarity. The essential feature of traditional communities is the self-administration of land assigned by the community, via the action of traditional leadership, to each of its members to meet his or her needs. The institution of communal property and traditional leadership are two sides of the same coin and neither can survive without the other"
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> Edited version of a speech made by Inkosi Bonga Mdletshe, a KwaZulu-Natal member of parliament, to the Portfolio Committee of Land Affairs, quoted in IPT 2002: 66.

This section explores what the relationship should be between a functioning traditional authority, the relevant local community, and the ownership and usage rights to the land under the traditional authority. To proceed with discussing specifically the issues of rights in land under traditional authorities, we provisionally 'bracket off' related issues (like legitimacy of traditional authorities in general or in the particular, or boundary disputes between different claimants to land and so on).

The history shows that chiefs were able to allocate land-use rights on the prior foundation of authority invested in a chief by the subjects to do so. Thus the chief's powers to allocate land-use rights was not derived from 'land ownership' but by the chief's authority, given by the people, to hold land in trust for the tribe[37]. From the colonial era to the present, there are persistent difficulties aligning this understanding with the now dominant understanding of use-rights which derive from the prior foundation of authority invested in ownership (private or state). Notwithstanding the difficulties, it is clear that for a traditional land-use management system to be functional, authority must be vested in the traditional authority to allocate and manage land-use rights at the local level. According to the IPT, their research confirmed that amakhosi themselves believe this to be so too:

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with the formal systems of law and governance to give them effect. The same is true for proposals around land use rights and so on developed below.

[37] Thus IPT argue that: "the basis of the traditional system in relation to land is that the rights that tribal communities were given to land were essentially concerned with usage – rather than ownership – rights" (IPT 2002: 68).

> "In many discussions with amakhosi the comment is made that the control of land is a primary responsibility of traditional leaders. Even if amakhosi are unable to perform a number of other roles with which they are currently concerned, the allocation of land is a central responsibility that most traditional leaders are determined to keep" (IPT 2002: 66).

The management of land-use rights is not just important for the power and status of traditional leaders however. It is vital for rural poor too.

> "[T]he system of traditional tenure on which their [traditional leaders'] power rests, have provided relatively secure, affordable, and equitable access to land for rural people. The social security and welfare functions of land held under traditional tenure are evident in the reluctance of households to give up their rural bases. Rural land bases contribute to household incomes, even though subsistence agriculture is often an intermittent activity. Rural land bases provide security for the elderly, and for children. The importance of rural land bases is evident also, in the choices made by households which are beneficiaries of redistribution or restitution projects. Many of these households elect to retain the sites which they already hold. They use restitution or redistribution opportunities to establish a second base through which incomes can be augmented" (Vaughan et al 1998: 10).

However, it does not necessarily follow that land **'ownership'** by the traditional authority must necessarily be the basis for that system or for the authority of the chief. In fact, resolving the difficulties by proceeding in this direction distorts the fundamental premise of the traditional land-use system and inevitably leads to an unacceptable dilution of the rights to land and land-use by the subjects of traditional authorities. This is so because it makes an inkosi's authority derived from 'ownership' rather than being derived from the investment of that authority by the inkosi's subjects who ultimately should hold the most secure rights to the land. Currently, abuses by tribal administrators of land - in particular the "sale" of communal land - are already a source of substantial criticism of traditional tenure systems (Sapsford, P. and K Philp, 1997: 9). This reinforces the argument that it is vital to ground the ultimate authority and rights within traditional tenure systems in the subjects (and in particular in families[38]) rather than the amakhosi per se. The trends in communal areas which Sapsford and Philp go on to describe are also indicative of the dangers of tending in the other direction and granting the traditional authority greater powers over land as de jure or de facto 'landowners':

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[38] See IPT 2002: 67: "Ownership [sic] in a traditional sense is located in the family, not an individual, and is determined by what the household's ancestors recognise as being the family's land. Although this land traditionally cannot be sold, it can be bequeathed and transacted in other ways, such as loaning and transferring ownership". Although as noted, the IPT subsequently qualify the use of the word 'ownership' in this context by clarifying that "the basis of the traditional system in relation to land is that the rights that tribal communities were given to land were essentially concerned with usage – rather than ownership – rights" (IPT 2002: 68).

"Cross (1996:152-154) states that the endless evictions, clearances and removals under apartheid has lead to a "floating population" of people desperate for rural land to live on. That the price these people are willing to pay for a piece of land far exceeds the low administrative fees members of a community pay for communal land, often pushes unpaid or underpaid administrators to rather sell land to the outsiders.

"Research indicates that in the last eight to ten years tribal authorities districts have begun taking in more displaced people than private tenure communities. However, it is reported that charges on tribal land are now considerably higher[39].

"The result of this is that people become tenants and the administrators become presumptive informal owners of the once communal land. The poor community members who cannot compete with the outsiders prices may lose all their land, they may not receive enough new land to accommodate family members, or they may receive no new land at all" (Sapsford, P. and K Philp, 1997: 9-10).

This set of challenges is at the heart of the much current debate in South Africa regarding tenure reform policy as it relates to 'traditional' authorities and communities. For example, parts of the draft Communal Land Rights Bill (October 2001) and proposals from civil society (Zizubu, N et al 2001) recognise - and make proposals for ensuring - that cession of land to groups of people living under traditional authorities provides for the protection of the land-use rights of the subjects, and that rules and processes for defining and managing those rights are more transparent and effective than current arrangements.

The experience of using Communal Property Associations (CPAs - as rights-holding structures for land reform beneficiary communities in 'traditional' areas) has highlighted important weaknesses in the institutional forms currently available in terms of government land reform mechanisms. The failure of CPAs to effectively protect individual land-use and -access rights has already been noted. Vaughan et al (1998) also point out the following problems which have emerged with regard to community trusts and CPAs in the context of implementing land reform projects:

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[39] It should be borne in mind that chiefs have a material interest in maintaining control since the power to allocate access to land provides an income stream for many amakhosi which they could lose if people's access is mediated through other procedures and they no longer have to pay traditional leaders for sites.

1. they require compiling constitutions up-front, and establishing existing and future rights within a single 'snapshot' planning process where as collective decision-making is generally a long and difficult process, and potential beneficiaries are, in any case, not always in a position to know what rights they will be able to take up.

2. the communities are unlikely to have access to, or to fully understand the legal system through which rights must be defended

3. CPAs require an (expensive) army of professionals to ensure that requirements are adhered to, beneficiaries are educated about their rights, that concepts (e.g., ownership, and property rights) are effectively communicated and that planning, legal, and mediation processes are serviced. (Vaughan et al 1998: 13). In short, "Community Trusts (whether Community Property Associations, or other Trusts) … have been inordinately difficult to orchestrate and sustain as vibrant entities" (MXA 1998 (a): 13).

Any movement towards resolving these issues must include and address at least the following fundamental elements, especially:

• An open and participatory consultative process to determine in the first instance that a particular group of people chooses to administer elements of their communal life under a 'traditional' system having been informed of, and having considered, the range of alternatives[40]. It is worth re-iterating that this requires independent capacity- and institution-building with affected groups if they are to make informed decisions. Their relative lack of capacity to access and understand alternatives currently makes communities vulnerable to their choices being effectively made by others (and being determined by other groups' interests). In this vacuum, policy differences and political battles, even between different government departments, are fought out over the heads of affected people and quite possibly to their long-term developmental detriment[41].

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[40] Note that the draft Communal Land Rights Bill (2001) recognises the democratic right of persons to choose tenure forms but (a) this is not a sufficient reference because there not stipulations, as suggested above, for people on the land to be consulted nor effective mechanisms for democratic accountability of rights-holder structures under traditional authorities and (b) the provision has been dismissed as 'empty rhetoric' by Professor Ben Cousins of the University of the Western Cape's Programme for Land and Agrarian Studies (PLAAS) because "The law defines traditional communities as juristic persons capable of acquiring property, and includes traditional leaders in rights-holder structures. It allows any person or juristic person representing a community to apply for a land transfer" (quoted in Forrest 2001).

[41] For example, McIntosh, Xaba and Associates note conflict in certain cases over a preference for either individual or traditional communal rights between officials of the Department of Land Affairs and the Department of Traditional Affairs, where DLA tends towards individual rights whereas Traditional Affairs tends towards AmaKhosi, traditional powers and authority (MXA1998: 20).

- There has to be some form of self-definition of the group for purposes of land-use which provides clarity on who the 'community' is at present and how this identity (and its limits[42]) will be determined in an ongoing way into the future.

- A clear statement of the scope, and the principals, procedures and rules, that constitute the chosen traditional authority system for that group – this must include reference to the registration and protection of rights and responsibilities (e.g., in relation to tenure, land and resources) and would also define the inkosi's role/s and responsibilities (e.g., perhaps stipulating the inkosi as the responsible authority for final decision-making in relation to the allocation and management of land-use rights) and accountability mechanisms (e.g., consultative mechanisms like the tribal council, procedures for recall or censure and so on).

Note that the last two items above should be finalised on a case-by-case basis so that they reflect the choices of the affected people and also so that they reflect practices, rules and institutions that are familiar[43] but that this process would be enhanced by the preparation of a more limited set of pro-forma 'model' options (and the flexibility to make choices within those models) as well as a set of minimum 'national standards' aimed at ensuring, e.g., Constitutional compliance and protecting the integrity of the traditional authority system. These models and standards should be developed in consultation with at least traditional authorities, communities and civil society organisations. They should also stipulate the non-alienability of land under 'traditional' governance in order to protect the basis on which user-rights have any meaning in the long run. Whereas government's draft Communal Tenure Bill makes forms of traditional tenure some sort of 'stepping stone' in a hierarchy of land rights (and insists that all must 'progress' towards freehold-type ownership), the argument here is that, where it is appropriate[44], then traditional tenure and land-use systems deserve to be recognised as a permanent tenure option and as a viable and long-term set of arrangements that constitute an integral element in South Africa's rural development vision – they must offer people perpetual and secure rights.

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[42] The definition of the 'group' seems an unavoidable pre-requisite but it does raise a dilemma in a democratic context where the right of freedom of movement is nominally protected. This is so because the functioning of a 'traditional' system of land-use control must include the ability to control not just numbers of people with a right to live in an area but the ability to decide who is allowed to settle and who is excluded (see Vaughan et al 1998: "traditional leaders… insist on having a say as to who settles in an area"). It is also true that various 'private' property rules gives owners rights of exclusive access.

[43] McIntosh and others point out that the familiarity of traditional systems for many rural people and contexts – i.e. that they are well understood - is one of the compelling reasons for assuming their continued relevance and utility. For example, in their review of the role of traditional authorities in redistribution projects in KZN, MXA argue that: "What is evident is that Trusts are only likely to be successful in those instances where they have been developed largely along the lines of the Traditional Authority" (MXA 1998 (a): 14).

[44] i.e., having given consideration to the range of factors discussed above, including ongoing processes of review and possible adaptation

Clarity on the identity and definition of the group, together with certainty as to their overarching right to a defined area of land in the long run, in turn constitutes the definition of who the ultimate rights-holder is without granting formal 'ownership' to either the traditional authority in the person of the inkosi as a juristic person (which is a feature government's current proposals) or the current occupiers (the 'progressive liberal' position scorned by Dr Sibanda of the DLA[45] and a characteristic implication of certain civil society proposals).

This distinction between secure tenure in a traditional system and secure freehold tenure in a land-ownership system is critical. As noted above, 'ownership' is in tension with the basic rationale and premise of traditional systems of land-use. 'Land ownership' is historically and practically tied to a capitalist property regime and a market-based 'development' model - it commodifies land and creates a market in it. One must concede therefore that the commodification of land is indeed the optimal basis for enabling certain types of development (especially commercial) because the rights to the land are transferable and alienable (according to property transaction rules) and can therefore be security against inputs and loans etc.. But equally it must be conceded that it inevitably makes land which was previously outside of that market subject to market-driven processes and as a result, renders access to land and resources much less secure for the poor - even less secure than historically distorted traditional authority systems[46]. This is so because:

a. the extent to which the use of that land is subject to the strictures of traditional land-use rules will diminish, and individuals or families with their own title to land can make decisions that are at odds with that system – even if the decisions appear to offer the possibility of short term commercial gain, and

b. social stratification within 'traditional' communities will express itself (and inevitably grow) in terms of land access and holdings as the better-off create dependencies and settle debts through taking over the land and land-rights which relatively poorer people hitherto held[47].

This perspective is supported by Greenberg (1999) who quotes an official of the national DLA saying - off the record - that:

> "Tenure security for developmental purposes presupposes freehold title deeds.
> … No banks will consider alternative forms of tenure as being sufficient for
> collateral. The problem with this is that the rural poor are likely to lose their
> land if they are given freehold titles, because they lack resources and might be

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[45] Quoted in Kindra, J 2001: "Land affairs director Sipho Sibanda, who is responsible for the [draft Communal Land Rights] Bill, lashed out at those critical of the role of traditional leaders as 'progressive liberals'".

[46] Discussed further also in IPT (2002) in Section 4.6 'The land debate continues' (74).

[47] As Sapsford and Philp put it: "Very poor households are also placed at risk through freehold tenure, as land becomes alienable, and can be claimed to cover debts" (Sapsford, P. and K Philp, 1997: 10)

tempted to sell the land for short term income. The result is that a land mafiosi is formed, who buy up all the land and then charge rents for people to stay on it" (quoted in Greenberg 1999: 39).

Individual, freehold title and commercial 'development' then tend to go hand-in-hand and are likely to result in the weakening of both the traditional authority itself as well as the traditional land-use rights so critical to the livelihoods of the rural poor.

In addition, it appears that government policy is that, once land is 'owned' (even if this ownership results from land reform processes for poor, rural communities) then the state does not have a responsibility to provide services on such 'privately owned' land. While such reasoning is objectionable anyway, it further underscores the need to find tenure options for the poor which do not rely on 'ownership' in order to lock down people's security of tenure and access rights. Security of tenure is not simply an end in itself but should be understood as a platform for development. For the rural poor, the struggle for sustainable and dignified development undoubtedly implies an ongoing struggle for appropriate levels of state support and the provision by the state of at least basic services.

As highlighted elsewhere in this paper, Vaughan et al (1998) point out that extensive commercialisation of agriculture in 'traditional' areas undermines traditional land management systems. They go on to explain that the following factors contribute to this process:

"The entrenchment of de facto rights in land occurs with the introduction of commercial crop production. This has occurred in KwaZulu-Natal where traditional land has been established to sugar and timber. The informal grazing rights which cattle owners may have had on individual land-holdings are eliminated. Indeed, one of the reasons why timber and sugar have been attractive options has been because these crops so effectively entrenched rights to existing land holdings. …

"The introduction of a commercial crop places increased demands on the traditional authorities to resolve land disputes. These arise as a direct result of changes in land use. Conflicts of interest emerge between cattle owners and timber and sugar producers. …Disputes also arise with regard to the boundaries of land holdings under commercial crop production. …The increased value of land, which has become a source of real income, not only intensifies land disputes. It also leads to a significant escalation in the incidence of disputes. Such disputes cannot but stretch to the limit their meagre administrative resources of traditional land administration systems. Some Amakhosi (in the Glendale area, for example) have conceded that they are hardly able to cope with the high incidence of land disputes.

"A third powerful potentially undermining tendency which commercial smallholder production brings with it, is enhanced social stratification. Social stratification is enhanced not only because of the tendency to land agglomeration and consolidation, but also through the agriculture-related small business opportunities which arise in the context of small-scale a commercial agriculture. Given the poverty and poor educational levels of many traditional leaders, and given the historical neglect of the traditional authorities discussed above, it is perhaps unsurprising that educated or wealthy individuals should pose a serious threat to the status and position of traditional authorities. Amakhosi have long expressed doubts about whether wealthy, well-educated people can be made accountable to traditional authority systems (see McIntosh, 1990).

"A fourth factor which is likely to bring pressure to bear on the traditional authorities system in areas where commercial crops have been introduced is the emergence of a strong demand from within smallholder communities for an end to traditional tenure, and for the introduction of a freehold system. Once small holders begin to get reasonable returns from commercial production, they want to establish inalienable rights to their land, and they want to dispense with the controls which traditional authorities have a right to impose.

"An ultimate irony is that traditional leaders may use their own (increasingly vulnerable) political positions to gain economically from the introduction of commercial crops. The Inkosi for the Biyela irrigation Scheme is a powerful political figure who sees himself as pro development. He has become a substantial land holder on the Scheme, and thus has a vested interest in the success of this commercial venture. However, such success cannot but erode his position. A similar irony has prevailed in former KaNgwane areas where traditional land has been divided into 'economic units' and distributed to yeoman farmers since the early 1980s. The traditional authorities have been the means for selecting farmers, ratifying land re-allocation, but the commercialisation of agriculture on traditional land together with the pro-active role traditional leaders have played has led to a critical loss of credibility among farmers, and among the dispossessed"
(Vaughan et al 1998: 10-11).

The point must be emphasised that the vulnerability of the land rights of the poor is heightened whether the effective ownership right is granted to the traditional authority per se or to the individual group members who occupy and/or use the land in question. For this reason it has been argued above that secure tenure under traditional authority must result from the definition of the group and the identification of the land to which they have perpetual right and not from 'ownership' (by whatever route – neither through the nomination of a traditional authority as the juristic person to hold that right, nor through 'common-hold' tenure nor freehold tenure rights). For even the

relative security of tenure for rural people under traditional systems has been undermined in practice and historically when various factors tilted the balance of power in favour of amakhosi over the subjects. Lungisile Ntsebeza (in a 1997 paper prepared for PLAAS) is quoted by IPT pointing out that, with respect to communal tenure:

> "They depended on political patronage with little legal protection. It is this insecurity of tenure that was abused by the tribal authorities during the apartheid period. Nowhere was this more evident than in land allocation. Chiefs used land allocation as a mechanism of corruption and control. Shortage of land due to population growth and pass laws which restricted people to homelands created more demand for land. This gave chiefs and headmen more power which, as mentioned, was abused. Some individuals were arbitrarily removed by chiefs who did not want them" (IPT 2002: 73).

Thus, while 'freehold' ownership weakens traditional access- and use-rights, there is also insecurity of tenure currently in 'traditional' or communal areas which must be addressed through the processes of recording and defending these rights discussed elsewhere in this paper. The Environment and Development Agency (EDA) make the point that: "People living on the land need to have a sense of tenure security before they can engage in practices that will manage the land sustainably" (EDA 1999 Annual Report).

Even though it is argued here that ownership cannot vest in the traditional authority without undoing the integrity of traditional management systems, this perspective is rejected by some traditional leaders and interest groups who have "proposed that land rights vest in themselves, or 'the tribe', or even the tribal authorities created under apartheid" (Cousin B. 2001)[48]. Thus for example, chiefs such as ANC MP Phathekile Holomisa (and president of the Congress of Traditional Leaders of South Africa), and Inkatha Freedom Party MPL Hulumeni Gumede have backed government's recent policy proposals which would transfer ownership to traditional authorities as such.

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[48] If, as Cousins suggests here and as signalled in the draft Communal Land Rights Bill, government is indeed set on securing tenure reform on an 'ownership' basis, then certain fallback conditions must be insisted upon. On this assumption, the real possibility is created that 'traditional' land will also be allocated to commercial land-use at scale. This is undesirable as the two systems are essential incompatible (as discussed above) but, in such cases certain stipulations should be made which place limitations on any commercial transactions involving the land and land-use. In particular:

- the access- and use-rights of the people who constitute the 'traditional group' must be protected and the land cannot be alienated (acknowledging that this would likely limit the extent to which commercial investors and so on might be prepared to extend credit since the land cannot be held as security)

- any earnings and profit derived from the new uses of 'communal' property which may emerge as a result of ownership by a traditional authority (and which effectively alienate a resource that had previously been accessed through a commons regime) must be distributed equitably within the 'traditional group' (as distinct from the traditional authority) or, where such earnings are not distributed but invested instead, then such decision-making must vest in the broader 'traditional group' of rights holders.

Speaking at a land tenure summit in November 2001, iNkosi Holomisa argued that the legal title to communal land should be made in the name of the relevant traditional authority:

> "Not to do so would amount to the further erosion of the role of traditional leaders in the life of our people, and would serve to cut the ties between the land, the people and their ancestors who bequeathed the land to us" (quoted in Kindra, J. 2001).

Women's interests in, and access to, land use must also be carefully considered. It was noted above (see discussion of 'Gender') that traditional systems of land-use rights have provided women as part of their (admittedly patriarchal) community, a degree of access and a livelihoods foothold which is not guaranteed elsewhere.

Proposals for women's 'independent' rights to land which are not tied to their marital status run the risk of weakening existing land-access and land-use rights. To try ensure that this is not the perverse result of interventions into traditional land tenure systems, it is important that the processes of recording and protecting at least current practices in this regard are sensitive to this gender dimension.

Traditional authorities, the rural poor and tenure

At the risk of repetition, it is worth consolidating here some of the key arguments made - and conclusions drawn - regarding traditional authorities, the rural poor and land-tenure and land-use rights:

- For a range of historical and ideological reasons, South African land-related policy has not sufficiently integrated traditional land tenure and access systems into a broader vision of land and rural development.

- Traditional authorities do, and will continue to, play an important role in local governance, including matters relating to land access and the allocation of use-rights, in areas where they have authority.

- Areas where amakhosi have authority often coincide with deep poverty and urgent developmental needs.

- Traditional systems of land-use provide many rural poor with access and livelihoods opportunities not available outside of these systems - and without which the poor would be poorer.

- Commodification of land by granting 'ownership' (either to individual occupiers or traditional authorities as juristic persons) will powerfully weaken the access- and use-rights of those rural poor who had such access through traditional land systems.

- Poverty in many traditional areas can also include an 'institutional poverty' with the result that amakhosi are sometimes the only leadership institution which can give voice to the needs of sections of the rural poor, especially at the local level.

- By giving careful consideration to a range of factors at the local level, it is possible to assess the viability, legitimacy and appropriateness of traditional authority-based systems of land-use rights administration on a case-by-case basis.

- It is critical that the tenure-, access- and use-rights of the subjects are recorded and defended in the future governance of traditional authority-based systems of land-use.

The innovative work being done by AFRA, through its Piloting Local Administration of Records (PILAR) project, and the Legal Entity Assessment Project (LEAP) provides useful tools towards operationalising systems at the local level to give effect to this last-mentioned requirement.

PILAR and LEAP have investigated how tenure rights can best be secured noting that the recording of individuals rights to common property is weakly protected in current law and policy.

Their work suggests that systems for records of rights must build on local practices and that the mechanisms for updating and maintaining records must be accessible and understandable. Such systems of recording rights must also articulate with formal, national systems (like those in terms of the Registrar of Deeds and the Surveyor General) so that they are enforceable and recognised.

The administration system of land at the local level within such a system must be clear, known and used, and must have processes that address the following matters:

1. **Application** where a formal request to get or give land, change land use, or get assistance to resolve a land dispute is launched.
2. **Recording** where evidence about the extent of a right (**demarcation**) and the nature of the right as a basis for adjudication is created.
3. **Adjudication** where doubts about the right held are resolved. This can also involve dispute resolution.
4. **Transfer** where rights or the physical occupation of land move from one holder to another.
5. **Land use regulation** dealing with rules/practices about how members/individuals can use different portions of land as well as the mechanisms for enforcing these rules/practices.

Communal property rights-holding institutions must secure tenure for the group and its members, and do so in a manner which enables development. It is argued that key indicators for security of tenure related to the processes noted above within such common property institutions are that:

- The benefits and services are as accessible to common property institutions and their members as similar benefits and services are to others living under different tenure arrangements

- People have clear rights that are known to them and that they can defend

- Authority in such systems is clear, known and used

- The processes do not discriminate unfairly against any group or person

- The actual practice and the legal requirements are the same

- There are places to go to for recourse in terms of these processes, and people should know these and be able to use them.

LEAP's experience strongly suggests that the establishment of new communal property rights-holding institutions should focus on adapting what already exists locally and on that basis, forging hybrid institutions. Adaptation in such contexts should encourage incorporation of principles like equity, due process, and democracy.

This approach is congruent with the approach developed through the rest of this paper. If followed, it might be the basis for integrating genuinely South African elements into the broader national project of democratisation and development. And if that starts to work, it might in turn be possible to build on it further and deal with land hunger in traditional areas by providing a viable and secure basis for meaningful livelihoods on more land than that which the violent history of South Africa has bequeathed to its people – and that government's land reform programmes have yet to turn around.

Annexure A: A further note on ward and development committees

There are a number of plausible options for resolving the tensions between ward and development committees raised in the main body of this report (see section: "Participatory local governemnt"). If one excludes the possibility of resolving the problem by making traditional authorities the primary local government (the reasons for such exclusion have been discussed above), then one can proceed by either (a) insisting that there is no duplication of officially recognised development structures (e.g., per ward) or (b) by working with the reality of multiple fora.

In the former case, where only one similar structure is recognised as having status in terms of the envisaged functions, the policy would have to either
- decide on one or the other option (i.e.,. either development committees or ward committees) in general for all traditional authority areas[49]; or
- propose a mechanism for deciding on one option on a case-by-case basis; or
- insist on the amalgamation of the structures into one within the local government system.

(Note that if a particular traditional authority has been duly elected on a popular mandate as a ward councillor then presumably these tensions need not necessarily arise at all.)

The second approach would recognise the possibility of multiple fora - and perhaps too the special contribution of development committees under traditional authorities – and provide guidelines for their interaction and their articulation with local government and development planning processes. Such policies would stipulate that the local government has the final authority, and that ward councillors in traditional authority areas have special responsibilities which require them to:

- in the 1st instance, seek synthesis between ward and development inputs;
- in the 2nd instance (where synthesis is not possible) to forge consensus positions between ward and development inputs; and
- in the 3rd instance (where neither synthesis nor consensus is possible) to explicitly account for decisions which favour one option over another[50].

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[49] In this scenario, given the overarching constitutional and local government policy context, it is unlikely that traditional authority-driven development committees would cut it.

[50] i.e., this is distinct from a broad and usually non-enforceable requirement to 'consult' because it demands that reasons be made known and argued against specific inputs made by interested parties.

All of these modalities are more likely to be effective the more the two structures work together. Indeed, merging them may be a redundant wish since it is likely that a requirement that they develop a common programme of work and a commonly agreed agenda to deliver the inputs required at local level would go a long way to synergising their energies rather than remaining locked in debilitating conflict and tension.

However, recognising a multiplicity of fora at the local level inevitably requires that the approach must go further and recognise that, depending on local conditions, traditional authority-driven or –associated development committees may themselves be only one of a range of local, special interest groups with a legitimate expectation and right to make inputs and to be heard and that such rights be protected by the state.

Notwithstanding the tensions that exist between protagonists of different positions in these debates, it is important to point out that competition for substantive input into local developmental decision-making is not inherently negative – in fact, it is characteristic of local democracy[51]. The desire of traditional authorities (and potentially other interest groups) to have the political credibility associated with delivering development at the local level is understandable but (as argued elsewhere in this paper) in a constitutional democracy this cannot be satisfied by making traditional authorities as such into local government[52].

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[51] This is line with an argument introduced later in this paper regarding local-level competition for political credibility associated with development delivery.

[52] Again, the 'exception' would presumably arise where a traditional authority has been elected as councillor into the local government structure

Annexure B: Roles of traditional authorities in the Local Government: Municipal Structures Second Amendment Bill

The Local Government: Municipal Structures Second Amendment Bill, published in 2000 was concerned with amending the Municipal Structures Act, 1999 to make provision for the functions of traditional authorities, to make provision for municipal councils to delegate functions to traditional authorities and to make provision for the role of traditional leaders in certain community matters. However, the bill was subsequently withdrawn because of a procedural problem and discussions around the amendments continue in late 2001. Nonetheless, its lists of traditional authorities may be a useful contribution. The Bill defined the functions of traditional authorities as follows:

(a) to collect and administer all fees and charges which are, according to custom, payable to the traditional authority within the traditional area of that traditional authority;
(b) to receive fines and fees collected with regard to the exercise of customary law;
(c) to administer any funding allocated to it from any source;
(d) to make recommendations in connection with the appointment of headmen;
(e) to perform such functions as may be delegated to it by a municipal council;
(f) to provide direction and leadership in cultural activities;
(g) to be the custodian of culture and customs;
(h) to attend to matters relating to witchcraft and divination within its communities;
(i) to carry out all orders given to it by competent authorities;
(j) to make known the requirements of any new laws to the community;
(k) to convene meetings of community members;
(l) to promote the interest and well being of residents in its traditional area;
(m)to control the holding of initiation ceremonies;
(n) to facilitate the gathering of firewood;
(o) to co-ordinate first fruit ceremonies;
(p) to co-ordinate rainmaking ceremonies; and
(q) to co-ordinate the clearing of fields to ensure good harvests.

The role of traditional leaders in community affairs, according to the legislation, includes the following:
(a) officiating at the opening and closing ceremonies of municipal councils;
(b) presiding over the opening of customary proceedings;
(c) liaising with communities on behalf of municipal councils in respect of matters which affect the communities concerned;
(d) presiding over traditional customary and wedding ceremonies;
(e) participating in burials;
(f) mediating during ancestral worship; and
(g) presiding over the inauguration of headmen (in IPT 2002: 31-32).

Annexure C: Legitimacy of particular chiefs

A key question relating to legitimacy that arises frequently in the context of land claims and related issues is who is to be regarded as the legitimate traditional authority in a particular area for a particular group of people. The historical review makes it plain that even in the pre-colonial period, this issue could be contested notwithstanding the abstract model of chiefly succession. The extent of manipulation and distortion under the successive colonial and apartheid regimes however has greatly expanded the grounds for contestation. Over these periods, appointment and recognition of chiefs was made subject to political interests that were substantially removed from the local community affected, and that were antagonistic to the genuine will of the people. Chiefs had to be compliant instruments serving the colonial, then apartheid and kwaZulu projects. Those chiefs who were considered problematic or rebellious were likely not to be recognised or were removed and replaced by tamer, more loyal, lackeys at the whim on their ultimate political masters. It has been noted these developments undermined the legitimacy of traditional authorities in general. But their impacts are also specific and local, laying the ground for popular dislike (at the local community level) of particular incumbents and for rival claimants who might stake their claims to rightful leadership in contrast with state appointed incumbents. Within local 'traditional' communities such feelings and split allegiances may remain relatively hidden for long periods as people are fearful of the consequences of open discussion, contestation and even conflict. However, old wounds and contested histories at the local level have tended to be mobilised again and the conflicts made more visible especially in the post-apartheid period when land reform offers the promise of rewarding legitimate claims for land. Such developments bedevil the claims process itself and also indicate great instability in the particular traditional authority raising questions about the viability of a land claiming community's prospects going forward[53].

There are indications that national government's approach to this matter would be to finalise a listing of 'legitimate' chiefs (based on genealogical and succession grounds) as distinct from government appointed ones. On the other hand, development practitioners point out that the determination of the legitimacy of a particular incumbent inkosi is rather more complex – some 'appointed' chiefs have built substantial credibility by their performance at the local level for their communities.

This again points to the importance and necessity of the democratic involvement of affected groups in the determination of such matters[54] – and the need to create a culture and context of open and informed discussion based on a full set of available and viable alternatives.

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[53] For a good discussion based on case studies see MXA 1998 (a) and (b).

[54] This is not to suggest that democratic selection is the only principle which applies because it makes no sense to have open, democratic elections for traditional authorities – indeed, should that be the preferred route for a particular community, then they are effectively no longer a 'traditional community' in terms of their governance preferences. Thus the process would need to be conducted within a broader set of guidelines which ensured traditional continuity too – especially regarding selection from among candidates who can make legitimate claims to chiefly succession and which takes into account that community's historical and genealogical characteristics.

Bibliography[55]

Africa Policy Information Center, November, 1997. "Talking about 'Tribe': Moving from Stereotypes to Analysis", Background Paper, APIC, Washington at http://www.africapolicy.org.

Beinart, William, 1982. *The political economy of Pondoland: 1860 to 1930.* Ravan Press, Johannesburg.

Beinart, William, and Bundy, Colin, 1987. *Hidden struggles in rural South Africa: politics and popular movements in the Transkei and Eastern Cape 1980 – 1930.* Ravan Press, Johannesburg.

Bundy, Colin, 1979. *The rise and fall of the South African peasantry.* Heineman, London.

Buthelezi, Mangosuthu 2000. "Address to Meeting of Amakhosi of The Kingdom of Kwazulu Natal", http://www.ifp.org.za/ as at 28 February 2002.

Callinicos, Luli, 1993. *A place in the city: The Rand on the eve of apartheid.* Ravan Press, Johannesburg, Maskew Miller, Longman, Cape Town.

Claassens, A., 2000. "South African Proposals for Tenure Reform:The Draft Land Rights Bill" in Toulmin et al 2000.

Cousins, Ben 1995. "Common property institutions and land reform in South Africa", in *Development South Africa*, Vol. 12 No. 4, August 1995.

Cousins, B., 2000. "Tenure and Common Property Resources in Africa" in Toulmin et al, 2000.

Cousins, B. 2001. "A return to the apartheid era?" in *Mail and Guardian* November 23, 2001 at http://www.sn.apc.org/wmail/issues/011123/OTHER81.html as at 04 March 2002.

Cousins, Tessa, 2001. *"Communal Property Associations: Who is on the jury and what are they judging?"*, in Land and Rural Digest: September/October 2001, No. 20.

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[55] A note on referencing: many of the documents used in researching this paper were accessed in electronic format. As a result, where they are quoted, the page numbering referenced in this paper may not correspond to the original or other variant printouts. Also, information accessed off the internet, with the exception of PDF documents, cannot be page referenced.

Delius, Peter, 1983. ***The land belongs to us: The Pedi polity, the boers and the British in the nineteenth century Transvaal.*** Ravan Press, Johannesburg.

Department of Land Affairs, 2001. Communal Land Rights Bill (3rd Draft) 25 October 2001.

Environment and Development Agency, 2000. ***Annual Report 1999***.

Forrest, Drew 2001. "Uproar over land Bill" in ***Mail and Guardian***, November 23, 2001 at http://www.sn.apc.org/wmail/issues/011130/OTHER99.html as at 04 March 2002.

Forsyth, Paul and G. Mare, 1992. "Natal in the New South Africa", in Moss, G. and I. Obery (ed.s), 1992. ***South African Review 6: From 'Red Friday' to CODESA.*** Ravan Press, Johannesburg.

Gerhart, Gail M., 1978. ***Black power in South Africa: The evolution of an ideology.*** University of California Press, Los Angeles.

Greenberg, S. 1999. "Chaos in communal land allocation", in ***Land and rural digest.*** No. 7, July/August 1999.

Guy, Jeff, 1982. ***The destruction of the Zulu kingdom.*** Ravan Press, Johannesburg.

Harley, A and R Fotheringham 1999. ***20 years in the land rights struggle: AFRA.*** Association for Rural Advancement, Pietermaritzburg.

Hilhorst, T., 2000. "Women's Land Rights:Current Developments in Sub-Saharan Africa" in Toulmin et al, 2000.

Hodson, Timothy A., c. 1997. "South African Land Tenure, Past And Present: A Country Report", University of Maine.

Independent Projects Trust, 2002. ***Traditional Leaders : A KwaZulu-Natal Study 1999 - 2001.***

Jacobs, S. 2000 (a). "The politics of traditional leadership", ***E-Politics*** Issue 11, 2000-03-05, IDASA at www.idasa.org.za as at 28 February 2002.

Jacobs, S. 2000 (b). "The countdown to the local government polls", ***E-Politics*** Issue 25, 2000-11-02, IDASA at www.idasa.org.za as at 28 February 2002.

Kindra, J. 2001. "Land affairs officials push for 'African way of life'", in ***Mail and Guardian,*** November 30, 2001, at http://www.sn.apc.org/wmail/issues/011130/OTHER99.html as at 04 March 2002.

Laband, John 1995. ***Rope of sand: The rise and fall of the Zulu kingdom in the nineteenth century.*** Jonathan Ball, Johannesburg.

Lavigne Delville, P., 2000. "Harmonising Formal Law and Customary Land Rights in French-speaking West Africa" in Toulmin et al, 2000.

Letsoalo, Essy M., 1987. ***Land reform in South Africa: A black perspective.*** Skotaville, Johannesburg.

Mare, Gerhard & G Hamilton, 1987. ***An appetite for power: Buthelezi's Inkatha and the politics of 'loyal resistance'.*** Ravan Press, Johannesburg.

Marks, Shula, 1970. ***Reluctant rebellion: The 1906-1908 disturbances in Natal.*** Clarendon Press, London.

Marks, Shula, 1986. ***The ambiguities of dependence in South Africa: Class, nationalism, and the state in twentieth-century Natal.*** Ravan Press, Johannesburg.

Mbeki, Govan, 1964. ***South Africa: The peasants' revolt.*** IDAF reprint, London, 1984.

Mbeki, Thabo, The Honourable President, South Africa, 28 August 2000. "Government's Response To The Submission By Traditional Leaders On Their Role, Powers And Functions".

McIntosh, A. and Vaughan, A., 1999. "Experiences of Agrarian Reforsm in South Africa:The Limits of Intervention", Paper prepared for Land and Agrarian Conference, National Land Committee, McIntosh, Xaba and Associates and Institute of Social and Economic Research.

McIntosh, A. nd (a). "Traditional Leaders and Local Government in KwaZulu Natal", paper prepared for ICIC Workshop for Traditional Leaders.

McIntosh, A. nd (b). "Traditional Leaders and Local Government in KwaZulu Natal: Unresolved Issues", McIntosh, Xaba and Associates.

McIntosh, Xaba and Associates (MXA) 1998 (a). "The Role of Traditional Authorities in the Land Redistribution Programme in the KwaZulu Natal Province",

prepared for Directorate: Monitoring and Evaluation, Department of Land Affairs, Pretoria.

McIntosh, Xaba and Associates (MXA) 1998 (b). "The Role of Traditional Authorities in the Land Redistribution Programme in the KwaZulu Natal Province: Case Study Report", prepared for Directorate: Monitoring and Evaluation, Department of Land Affairs, Pretoria.

Murray, Christina and C. O'Regan (ed.s), 1990. *No place to rest: Forced removals and the law in South Africa.* Oxford University Press, Cape Town.

Nkosi Mzimela 2001. "A view from the National House of Traditional Leaders" in *Khanyisa*, Issue 0, 2001-08-30, IDASA.

Odendaal, Andre, 1994. "The roots of the ANC" in Liebenberg, Ian, Bobby Nel, Fiona Lortan and Gert van der Westhuizen (ed.s) , 1994. *The long march: The story of the struggle for liberation in South Africa.* Haum, Pretoria.

Okoth-Ogendo, HWO., 2000. "Legislative Approaches to Customary Tenure and Tenure Reform in East Africa", in Toulmin et al 2000.

Peires, J. B., *The house of Phalo: A history of the Xhosa people in the days of their independence.* Ravan Press, Johannesburg.

Ramphele, Mamphela (ed) 1991. *Restoring the land: Environment and change in post-apartheid South Africa.* Panos, London.

Sapsford, P. 1996 "Traditional Authorities and Land Reform", Diagnostic Valuation Study, KwaZulu Natal.

Sapsford, P. and K Philp, 1997. "Land Reform, Tenure and Proverty: Experience from KwaZulu Natal", Land and Agricultural Policy Centre.

Shillington, Kevin, 1985. *The colonisation of Southern Tswana: 1870 – 1900.* Ravan Press, Johannesburg.

Stober, Paul 1999. "Party Profile: Inkatha Freedom Party", at http://www.sabc.co.za/newsstand/online/prf_ifp.htm (as at 17 March 2002).

Toulmin C. and Quan, J., 2000. "Registering Customary Rights" in Toulmin et al, 2000.

Toulmin, C. and Quan, J., (ed.s)2000? Evolving Land Rights, Policy and Tenure in Africa.

van Niekerk, Gardiol, 1993. *Traditional African Courts.* Developing Justice Series, No. 19; Social Justice Resources Project, Legal Education Action Project, Institute of Criminology, University of Cape Town, 1993.

Vaughan, A. and, McIntosh, A. 1998. "The Role of Traditional Leaders in Land Development", Paper prepared for the National Development and Planning Commission.

Ziqubu, Ndabezinhle, Cousins, T., and Hornby, D., 2001. "Using local practices and records to secure individual tenure rights in common property situations.", Paper prepared for Department of Land Affairs National Land Tenure Conference, 26-30 November, AFRA, LEAP.