

# Traditional land matters – a look into land administration in tribal areas in KwaZulu-Natal

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## 1. Introduction

Traditional leaders appear to be enjoying a legislative comeback with parliamentary approval of the Communal Land Rights Bill and the Traditional Leadership and Governance Framework Act. Yet some say traditional structures are inimical to democracy and will threaten the extension of the civil rights benefits of 1994 to all people in the country. For others, including traditional leaders, they are the only form of indigenous African leadership and therefore a base from which to develop home-grown notions of democratic governance. However, what the debates about these laws appear to have missed is that the structures of traditional leadership are not the same as traditional institutions, which include the systems and practices of community based land administration. The structures are mere pinnacles of deeply rooted institutions that make up and frame the daily realities of millions of rural (and many urban) South Africans. A focus only on structure does not therefore bring us closer to resolving the complexity of whether, and how, to marry traditional and western forms of governance, including land administration.

The issue has not been an easy one to consider partly because the colonial and apartheid governments encouraged traditional institutions to fulfill and/or facilitate multiple functions at local level that are the legal duty of government departments at other levels of the society. These functions include:

- facilitation (or organization) of services and their administration – a function that overlaps with municipal government;
- facilitation of, and/or provision of, welfare – a function that overlaps with the private and public sector providers of welfare and pensions;
- resolving and adjudicating disputes – functions that overlap with the justice system;
- land administration including use of land, allocation, demarcation, rules for transacting in land and land taxes or fees – functions associated with municipalities and property regulating organisations such as Deeds Offices, Surveyor Generals Offices and the surveying and conveyancing professions.

This paper is concerned primarily with the functions of land administration. Its purpose is to describe the current land administration practices as understood by traditional structures with a view to unpacking some of the components of the existing African tenure arrangements in KwaZulu-Natal. This, it is hoped, will help to create a base to understand how communal land systems operate, regardless of which structure governs them, in order to support practices that secure tenure effectively.

## 2. Background to the research

The necessity for this research emerged out of work being undertaken by the Legal Entity Assessment Project (LEAP). LEAP has worked with communal land systems, primarily those created under land reform, since 1999. At the start of the project, land NGOs and Department of Land Affairs' (DLA) officials were expressing concern about the disfunctionality of land reform communal property associations (CPAs) and land reform trusts set up to take transfer of land redistributed to groups of people. There was not much agreement, however, on the nature or causes of the disfunctionality or on

indicators with which to assess communal property institutions (CPIs). In attempting to develop such indicators, LEAP and DLA agreed that the primary purpose of communal property institutions is to secure the tenure of the group, as well as members of the group, as a necessary but not sufficient base for facilitating equity, improving livelihood strategies, accessing development and services and managing natural resources more effectively.

This focus on tenure security brought to the fore a range of issues.

Firstly, although ownership is considered the most secure form of tenure available to South Africans, this presumption is not necessarily true for poor people who use land as a livelihood base rather than an economic asset. Available tenure options are the result of extremely bifurcated land administration systems with no linkages between them. On the one hand, the formal system offers highly technical registered rights that theoretically can be used as an economic asset and on the other hand, the informal (often communal) system gives rise to officially invisible, off-register rights that often form the basis for multiple livelihood strategies. There is therefore currently no possibility of shifting land rights gradually, incrementally and affordably from informal to formal with all the attendant implications for development, services and private investment.

Secondly, the official approach has tended to correlate securing tenure with transferring land. In communal or group systems, this has resulted in ownership vesting in a legal entity created through a community constitution (or trust deed). As a consequence, perceptions of community homogeneity are reinforced, which obscures the multiple interests people have in land. It has also enabled an official practice that has rendered invisible actual community processes for managing and mediating these interests, with state resources thus being directed at legal forms for effecting transfer rather than institutional support for community processes and practices around land and the structures administering these.

Thirdly, it would seem that bureaucratic land reform practice has tended to deal with "beneficiaries" as though they are empty of history rather than people caught up and living in existing social processes and structures that make day-to-day activities possible and meaningful. This is evident in many groups that have engaged with land reform and who follow traditional systems and practices of land administration rather than what is set out in their official legal entity constitutions. LEAP's research has shown that in some cases traditional structures are undertaking functions that are supposed to be carried out by new, elected committees according to these constitutions. In other cases, there is confusion about roles, conflict between "new" and "old" structures and systems, and the emergence of new "hybrid" structures blending traditional with new structures. In yet other situations, people use traditional systems and practices for administering land although there are no traditional structures operating in the communities and neither do these groups want traditional structures in their areas. (Cousins T & Hornby D:2000; Cousins T:2002; Trench T: 2004)

Clearly, there is a vast gap between actual practice in communities and the requirements in constitution documents, which some land reform practitioners interpret as a lack of community capacity, which thus requires training as a solution. However, LEAP is skeptical. It seems that trying to replace traditional systems of land administration with CPA constitutions is a bit like remodeling a mountain peak with paper mache, leaving it up there and expecting it to have real substance. This is clearly not simply a case of poor capacity, which a focus on the constitution-making process and its objectives demonstrates.

What is apparent is that the registered constitutions do not acknowledge existing community systems and practices. Indeed they say little about practical land administration and focus instead on committee procedures for the establishment and functioning of a new structure. LEAP suggests that the process needs to be understood as one of reaching agreements on the institutional arrangements for managing land, which is then captured in a constitution document, rather than simply a process of constructing a document to give effect to legal instruction. But to derive agreements that have real effect (particularly in the context of poor state support), it is necessary to begin from people's knowledge through use of their own land administration systems, practices and structures. From this base of agreement around lived experience, an external facilitator can assist a group of land reform beneficiaries to adapt their institutions to make them more relevant to new land use needs or political values. In other words, LEAP argues that traditional institutions for administering land should be adapted rather than replaced if the rural poor are to benefit from improved tenure security. (Cousins T & Hornby D: 2002)

It is apparent, however, that the understanding of community based land administration is very shallow indeed. These practices are largely unseen by officialdom as a system, while certain aspects, often focusing on structure, are highlighted to demonstrate "backwardness", lack of democracy or inequity. This research grew out of the need to understand better traditional land administration practices, systems and structures in order to work with them in a practical way.

This paper begins by describing the debates around the future role of traditional institutions. The intention here is not to praise or attack traditional institutions but simply to locate them in current debates in order to contextualise the political complexity of deciding about their future. Against this backdrop, the research objectives and methodology are described and the findings of the research presented.

### **3. The debate about the role of traditional institutions in a democracy**

The debate about whether traditional institutions can cohabit with democracy rests on two central arguments, one relating to the impact of colonialism and apartheid on structure of these institutions and the other to their patriarchal nature.

That colonialism and apartheid altered the legal nature, structure, function and jurisdiction of traditional leadership is not in dispute. (Tapscott: 1996, Zungu:1996, Keulder: 1998, Ntsebeza: 1996, Zuma: 2000, Lodge:1995, Holomisa: 2000) The institutional context in which they began to operate under apartheid rule did make it possible for traditional authorities in their reconstituted form to lack the consensual base that had been the hallmark of traditional administrations. But to argue from this, as some appear to do, that traditional institutions should therefore be destroyed as inimical to democracy simply does not follow.

The damage the colonial and apartheid governments inflicted on structures of consensual government was not reserved for traditional forms of governance. All organs of governance in South Africa were affected; hence the ongoing focus on institutional transformation in post-apartheid South Africa that includes government departments, the operations of parliament, the police, schools, hospitals etc.

It would seem that traditional institutions were excluded from these transformative initiatives for political reasons. These included a push for a form of western democracy that would enable a capitalist growth path with its corollary, private property as an economic commodity, and emphasis on the urban rather than the rural and the

individual rather than the communal. The rural constituency, with its often politically conservative traditional structures and enduring systems and practices, is not pliable; nor is it easy to articulate its demands with those of a national economy gearing itself for globalisation.

To the extent that traditional institutions have recently been re-incorporated into transformation, the legal and political focus has been on representation and elected leadership rather than the systems and practices that also make up these institutions. Between them, the Traditional Leadership Governance Framework Act and the Communal Land Rights Bill tightly define the structure and composition of the tribal council and strip traditional structures of all functions except land administration and cultural affairs. However, they then fail to give content to land administration outside of providing for privatization and individualization. LEAP argues that this focus on structure has obscured other equally important issues.

Firstly, the attempts of liberation governments throughout Africa to destroy traditional institutions have generally failed and a "return to the customary" has become an increasingly recognized and legitimate option for securing tenure and providing land rights administration. There are suggestions that South Africa is no different. Despite the changes made to them in the past, for instance, traditional structures, systems and practices have persisted into the post 1994 period for a range of reasons. These seem to include deep-rooted familiarity, local legitimacy of practice (Trench T: 2004) and sometimes structure, and possibly, a lack of realistic, state supported alternatives (or even any evidence of functioning alternatives).

Secondly, the reasons that traditional institutions have survived in Africa are clearly complex. However, they include constrained state resources, which make it difficult for state structures to extend alternative administration to very local levels. As noted by Walker (2003), South Africa is not exempt from this. A tiny allocation of national budget to land issues (averaging 0,3% annually since 1994) combined with "a growing erosion of confidence, across the political spectrum, in the ability of the state to manage a significant land reform programme", suggests recognition of serious constraints. The key issue this poses is how, in a democracy, to structure the land administration functions that tribal institutions currently undertake given these constraints.

Thirdly, land tenure is deeply embedded in culture and the values contained in culture, which makes it difficult to eradicate the structures traditionally responsible for it and new ones risky and costly to set up and sustain. Experience around CPAs referred to above has already confirmed the validity of this observation. A key implication of this recognition is that the legal and practical dualism evident around property in Africa and in South Africa cannot simply be eradicated through legal injunction. An official approach and practice that aims to secure tenure should therefore adapt systems, practices and structures rather than eradicate and replace them and in the process create links or bridges to formal state processes to enable gradual formalisation if and when necessary.

### **3.1 Gender equity**

Democracy is not by its nature gender equitable. The parameters of democracy in South Africa post 1994 are, however, defined in the South African Constitution, which, in the Bill of Rights, renders illegal any law, practice or action that discriminates against a group of people on a number of grounds including their sex. The Communal Land Rights Bill also provides for joint titling, the formalisation of women's *de facto* rights to land and the right of spouses to inherit, while the Recognition of Customary Marriages Act redefines spouse thus opening up space for women in non-civil marriages to obtain legal rights to land. Democracy in South Africa therefore includes an explicit commitment to gender equity.

The reality, however, for most women is that many of the social, economic and political institutions in the country continue to benefit and privilege men over women. Traditional institutions are not exempt from this. Like many other institutions, they not only fall short of the gender equity provisions of the Bill of Rights but also are complicit in reproducing gender inequities through their patriarchal structures and practices, including those dealing with land administration.

Analyses of how traditional institutions reproduce gender inequality in land administration tend to focus on the intersection of customary and statutory law. Thus, the Women's Legal Centre, in their submission on the Communal Land Rights Bill, argued that (2003):

The story of black women's access to land begins with the collusion between two legal systems. Customary law denied women the capacity to be allocated land in their personal capacity. Their tenure was linked to their status in relation to other male members of the family as wives, mothers, daughters and sisters. The formal legal system gave ad hoc recognition to customary law by creating a legal framework that enabled customary law to remain undeveloped.

The most patriarchal aspects of African customary law have thus become embedded in statutory law and are only now being challenged legally in terms of constitutional equity provisions. (S'khosana judgement 2001, Bhe judgement 2003) The highly gendered nature of the laws and structures operating in communal areas do create challenges to making women's entitlement to tenure security real.

However, while legal interventions clearly impact on people's lives, living frameworks and social structures are much more elusive, ambiguous and nuanced than analysis of law suggests. Customary systems, practices and structures of land administration have been interpreted in particular ways by the judicial system but they are not the same as those interpretations. Neither are they fixed, isolated and ahistorical. Indeed, there is some evidence that customary practice has responded to women's changing needs, although perhaps erratically, by drawing on old values embedded in customary law. But this evidence is localised and scant, suggesting that the intricacies of customary land administration practices in South Africa are relatively unexplored; therefore how their structuring differentiates between women and men and for what purposes is not well understood.

It is perhaps as a result of this that gender concerns have often focussed on the male dominated nature of traditional leadership structures and the lack of women's representation in decision-making. While the question of representation is clearly an important one, LEAP argues that representivity can become an all-consuming strategic focus at the expense of other equally important mechanisms for working with gender equity. This research attempts to focus on some of those other mechanisms, namely local land administration. A focus on where and how systems and practices of land administration are gendered should enable concrete proposals on how to secure women's tenure rights.

Walker (2003) summarises the challenges posed: "Advancing the rights of women within customary tenure systems that are strongly patriarchal, without undermining the social networks on which these systems rely, is not a simple task." LEAP suggests that the first step in doing this is to better understand the actual practices making up customary tenure systems.

## 4 Research objectives and methodology

The primary objective of the research was to better understand the current structure, systems and practices of traditional institutions around land in order to inform debates about how local land administration in communal areas should be structured if the purpose is to secure tenure.

Nine interviews were conducted. Five of these were with *amakhosi* or their regents, each of whom was interviewed together with a number, if not all, of their councilors, *izinduna* (headmen) and some *ibandla* (gathering of older, wise men). These were with *Inkosi* Kunene (Wasbank), *iBamba* (regent) Gumede (KwaJobe), *Mntwana* (prince) of the Tembe (Manguzi), *Inkosi* Dlamini (Ntembeni) and *Inkosi* Mchunu (Weenen/Msinga). The other four interviews focused on specific issues that required more detail. One was with the former *nduna nkulu* (chief headman) of the AbaThembu (Weenen/Msinga), another with the *ibandla* of an *isigodi* (ward) of the AbaThembu, the third was with a woman *nduna* under *Inkosi* Mdlose of Mondlo and the fourth was with a lawyer working in a small rural town on the intersection between customary and statutory laws and systems.

We used two approaches to select which *amakhosi* to interview. One was a requirement for some geographical spread on the grounds that historical movements would have influenced tribal values and structure and that tribes in close proximity to one another would probably be quite similar. The second approach involved the assistance of the Chief Director: Traditional Land Administration, Mr B.L. Shabalala, an official in the provincial Department of Traditional and Local Government Affairs. We asked him to select a group of *amakhosi* who had either been in office for a lengthy period of time (and thus had considerable experience) or whom Shabalala believed retained the respect of their 'subjects'. From this list, we selected the smaller group listed above based on who was available, contactable and lived in the geographical areas we were targeting.

The method used in the interviews was open-ended discussion on a set of issues identified by a research reference group consisting of LEAP core team members, the Church Agricultural Project (CAP) and the Association for Rural Advancement (AFRA). (The questionnaire guide is attached as an appendix). Interviewees were asked to describe how various land administration procedures worked in their areas based on recent actual examples rather than general rules or understanding. Changes in practice were explored to understand what had caused the change. Variations, particularities and links to other themes were then explored through further questions.

Although the discussions were focused, each interview developed in a distinct way with new areas being explored. This was partly attributable to the open-ended nature of the discussion but also to questions that previous interviews had raised and that were subsequently incorporated into the research. The result of this is that we do not have 'answers' from every interviewee on every issue.

The research is a limited exercise reflecting the experience of a number of traditional structures in KwaZulu-Natal. It is likely that research focusing on other provinces or other groups within traditional systems will further deepen knowledge about how these systems operate. Nevertheless, the focus on a description of the current practices of land administration and the commonalities and variations between tribes creates an important base of understanding that should give land reform practitioners a better sense of the land administration mechanisms needed to secure tenure.

## 5 Research findings

LEAP (Cousins T & Hornby D: 2000, 2002) has argued that tenure security is not a finite product (like a title or diagram) of a once-off event (like registration or survey). It is a process that unfolds through a system and practices that give people confidence about their access to land and use of it. Tenure is therefore never absolutely secure. Rather, property rights are always moving towards or away from being secure. In an attempt to measure these processes and security as a possible outcome, LEAP developed a set of indicators that, if they described an existing reality, would lead to the conclusion that the tenure of the group/s and individual/s is secure. These indicators are:

- Clarity about who holds what rights where.
- Clear, known and used processes of land administration, namely, application, transfer, adjudication, recording and land use regulation.
- Clarity about where authority in these processes resides, that it is not disputed and that it is known and used.
- That these processes do not discriminate unfairly against any person or group.
- That there are accessible, known and used places to go to for recourse in terms of these processes.
- That there is not a contradictory gap between law and practice in terms of these processes.
- That benefits and services are as available to people living in communal systems of land administration as to any other system of administration.

This research organizes itself loosely around these indicators, focusing particularly on land administration processes, discrimination, authority and recourse. This section is divided into two parts, the first dealing with how traditional institutions are structured and the second with land administration issues.

The section that deals with the structures of traditional institutions attempts to unpack authority and interrogate recourse options in tribal systems. The questions are whether there are balances in the structure to prevent arbitrary exercising of power and how the structure is able to respond to needs from people subject to it. In terms of tenure security, LEAP has found that conflicting authority around land administration is a significant factor in determining whether people are secure or not. Understanding exactly where decisions are made, the roles and responsibility of different levels of the structure and how they fit into a broader decision-making system is therefore important. The question of authority also begs the question of the accountability of this authority, an issue often raised in debates about the non-democratic nature of traditional structures. The key issues around accountability are whether people have a say in who governs them and how they are governed, and whether there are avenues for recourse if the decision-making structure fails people either as individuals or as a group. This raises questions of how leaders are appointed and remunerated and whether there are procedures for challenging decisions.

The second section focuses on land administration processes, which are the operational components in securing tenure. For a system to operate there must be procedures or practices that are governed by more or less accepted rules and norms, which are both familiar to and used by the people subject to the system. The research considers these practices and rules at a number of 'points' in the land administration system, namely, access to, allocation, use and alienation of land and dispute resolution mechanisms around land as core areas of communal systems that often remain invisible to legislators and officialdom. A key element in these discussions is whether women and men are treated differently and if so, how and why.

## 5.1 Structure

The relationships between parts of the traditional governance structure are not strictly hierarchical although the *inkosi*-in-council is recognized as the highest decision-maker in the tribe. The *inkosi* himself also has the highest individual status in the community. To one side of the *inkosi*-in-council, in a position that seems to be neither above nor below this structure but parallel to it, is the royal family. The *inkosi*'s jurisdiction extends over the *isizwe* (a nation within a geographically defined space) and a tribal secretary paid for by the state assists him and his council with various administrative activities.

Each level of authority is accompanied by specific responsibilities over a particular space. The second level down in hierarchy is the *nduna inkulu* (chief headman), whose primary function is to assist the *inkosi* in the administration of justice by acting as a prosecutor of sorts and as a witness if the matter is referred to a magistrate's court. The geographical space of jurisdiction corresponds with the area covered by the tribal court, which in turn corresponds with Regional Authority boundaries determined by provincial legislation. The *nduna inkulu* also mediates disputes, adjudicates conflicts between *izinduna* and people subject to them, and relays important information about the tribe to the *inkosi*.

The governance structure then extends downwards into geographically defined wards (*izigodi*) in which *izinduna* (headman) administer land issues with the assistance of a functionary, *ipoyisa* (tribal police officer), and *amagosa* (leaders of the men) and their female equivalents, *amaqhikza*, regulate the behaviour of men and women respectively, particularly at cultural ceremonies. During times of war, the *nduna* subsides in prominence while the *igosa* becomes the primary *isigodi* leader. Below the wards are *imihlathi* (sub wards), where the behaviour of young men is regulated by *amapini* (*igosa*'s deputy).

The tribal council is a body that has changed over time. It was originally a space filled by people the *inkosi* wished to have advise him on a regular basis and included members of the royal family, respected men in the community, chief *ndunas* and *ndunas*. With the creation of regional authorities, *amakhosi* found themselves having to engage government on development issues. They therefore began to include on their councils *amakhansela we-inkosi* (counselors of the chief), who were often educated tribal members, to advise them on development technicalities. With the election of local government councilors in 1999, a distinction occurred between *amakhansela we-inkosi* and *amakhansela epoletiki* (councilors of politics or municipal councilors), which, in some tribal structures, is beginning to blur. That is, in some places, elected councilors are also serving as advisors to *amakhosi* in keeping with the past function they have performed around development. This trend is likely to continue in terms of the new Traditional Leadership Governance Framework Act, which regulates the structure of tribal councils, their representivity and the election of tribal councilors.

A significant structure in decision-making is the *ibandla*, which is always a group of men (who are either married or no longer 'youth') who are meeting to discuss an issue of common concern. The members of the *ibandla* shrink and expand depending on the geographical entity affected by the issue. An *ibandla* can therefore be a group of neighbours witnessing a demarcation and allocation, a group of farmers deciding about planting dates, an *isigodi* discussing fire control or the tribe meeting about an issue the *inkosi* wants discussed. Less important, in the sense of less often referred to, is the meeting of *isizwe* (the nation) or *umphakathi* (community), which include men, women and the youth.

The tribal court, with either the *inkosi*-in-council or the *nduna nkulu* (chief headman) presiding, is the final (internal) arbiter on a wide range of issues. These issues derive from subjects who remain dissatisfied with the outcome of *izinduna* or *amagosa*



attempts to resolve disputes and once the *nduna* has requested the tribal police (*ipoyisa*) to place the matter before the court. The *nduna nkulu* acts as a prosecutor unless it seems probable that the matter will be referred to the magistrate court, in which case the *nduna nkulu* replaces the *inkosi* as the 'judge'. This is because the magistrate could call the presiding 'officer' of the tribal court to give evidence and an *inkosi*, "who speaks the truth", should not be put in the position of having his evidence dismissed or refuted.

Below each of the two governance structures is the unit to whom that governance applies. In terms of space, the smallest spatial unit is *umuzi* (a household with structures on the land). It is this unit that has citizenship, not an individual. A head of household, *umnumzani*, represents this unit. He will also attend meetings of the *ibandla* and, if he is still viewed as a young man, be subject to the *igosa's* governance. Thus:

The solid arrows indicate the direction of seniority or authority, which more or less correlates with decision-making powers and scope. Thus, for instance, *izinduna* are lower in hierarchy than *izinduna inkulu*, while ultimate authority resides with the chief-in-council. The relationship with the *ibandla* is a two-way relationship in that the *ibandla* may meet in order to discuss a grievance or it may be called to receive information from the *inkosi* conveyed through a *nduna inkulu* or *nduna* if not the *inkosi* himself.

In some tribal structures, *izinduna* sit on the tribal council but in others they are represented on tribal councils by the chief *ndunas*. *Ndunas* also frequently engage directly with the *inkosi* over a range of land issues, including bringing newcomers to meet the *inkosi*, discussing specific land allocations and requesting letters releasing people from the area (this is discussed further in the next section). While subjects relate to the *nduna* on all land related matters, on some issues, such as livestock destroying crops, they report directly to a tribal councilor and not an *nduna*.

The dotted arrows to and from the family of the *inkosi* represent alternative paths of accountability. (We'll return to this later.)

The other set of dotted arrows indicate a possible but not necessary relationship between the *igosa* and either the *inkosi* or the *nduna*. However, because the *igosa* is the head of a system of peer regulation, he is not obliged to report to either the *nduna* or the *inkosi*. The governance of young men is basically an 'in-house' matter and is necessary because "*indoda iyinkinga*" (men are trouble-makers) and is only referred to the *nduna* or *inkosi* if women or older/younger people are affected or the *igosa* is unable to keep control of a particular man.

### **5.1.1 Appointments**

Methods and procedures for appointments to the positions of *igosa*, *nduna* and *nduna nkulu* vary from tribe to tribe. There are also indications of change in how appointments are made. Nevertheless, one pattern is as follows, beginning with the *igosa*:

The current appointee calls together *izinsizwa* (young men) in his jurisdictional area and announces that he wishes to retire. Follow up meetings are called ("and often postponed" to give the men an opportunity to consider their response), at which the current incumbent calls for nominations for people who are trustworthy and honest ("*indoda ehlonipekile othembekile*").

When an *nduna* is appointed, the current holder of the position calls the *ibandla* to choose a new appointee. The *ibandla* together with the current holder of the position

then report to the *inkosi* that a new *nduna* has been agreed to. Should the *ibandla* not be able to agree on a nomination, the *inkosi* will choose a person on advice from the current *nduna* and the *ndunda nkulu*. If the person refuses the position, he is asked to hold it temporarily, which in time becomes permanent. If he really refuses, he is fined for refusing a duty to the *inkosi* and thus showing disrespect to the tribe.

With the position of *nduna nkulu*, the *inkosi* plays a much more determining role. In this example, the *inkosi* announced at a meeting of the tribe's men that a particular person had been appointed *nduna nkulu*, without this person knowing that he'd been appointed. The process had involved the *inkosi* consulting the older men of the various wards about who to choose. Again, refusal to accept the position would result in a fine of a bull.

The variations investigated revolve around the role of the *inkosi*. In another area, the "*inkosi* puts *izinduna* in place". He does this after consulting with others until there is agreement on who should be appointed. The interviewees added: "*Inkosi* cannot prevent someone who is recommended and approved by others from becoming *nduna*. He simply 'signs' the appointment in these cases." A second tribal council described a similar process – "*inkosi* appoints them" – but noted that the appointments tend to be from the royal family as a result of a particular history. This relates to a former *inkosi* who had many sons and who made them *izinduna* in order to provide them with livelihoods. Where the blood-line has died out, the *inkosi* asks the ward for nominations.

Suggesting procedure has changed, another tribal council said: "In the past, *izinduna* were chosen by the *inkosi* together with his council. They chose a man they thought fit for the position. Now, because of the constitution, people choose the *nduna* they want." Similarly, one *inkosi* described the procedure as follows: "In the old days, the *inkosi* asked the men, the *ibandla*, who they thought could do the job of *nduna* and then he appointed that person if he was acceptable. But since there's democracy, people have changed ("*abantu bayagoloza*") and so now they want to elect *izinduna*. So now they nominate a number of people and then *inkosi* selects one who becomes *nduna*. If the people give *inkosi* unsuitable names, he asks for more nominations until he gets someone he is also happy with."

These changes appear to have created space for women to be elected into the position of *nduna*, although this is not frequent. *Nduna* Betina Mazibuko of the Mdlalose tribe describes years of dedicated community work, including organizing schools, crèches, sewing and knitting schools, water and roads provision. Describing her appointment, she said:

In 1997, I was elected to the committee for peace [the area had been caught up in IFP/ANC violence]. Government gave us money to do work. Then the community elected me in 1997 and 1998 to be *nduna* of *inkosi*. They elected me because they see the development that I bring. The *inkosi* too welcomed me and brought me close to him.

However, in a story similar to that of *Nduna* Ntombenkosi Gumede who was made *nduna* by *Inkosi* Mzimela of the Zingwenya community near Empangeni (Goodenough:2002), Mazibuko worked initially as a vice-*nduna* with a man. While Mazibuko took over full *nduna* functions when this man died some years later, Gumede was appointed to the full position when *Inkosi* Mzimela replaced the existing incumbent who he said was not performing adequately.

Criteria for who can be appointed an *nduna* thus vary from place to place and have changed over time. However, one interviewee said specifically that *izinduna* do not have to be relatives of the *inkosi*. "Some *ndunas* are relatives of the *inkosi* but others are not. This is not a significant criterion. If the men chose you and you are *inkosi's* relative, then we have an *nduna* who is *inkosi's* relative." Most commonly, criteria for appointment, if

they were mentioned, were described as leadership skill, honesty, reliability and conscientiousness.

While the research did not focus on the appointment of councillors, one tribal council suggested that the appointment procedures are similar to those of *izinduna*:

There are many routes to become a councillor. The existing councillors look out for people who could do the job or the *nduna* recommends someone to the *inkosi*. If the *inkosi* chooses a person himself, he first asks the *nduna* about that person. He can also ask other councillors about their opinions.

In contrast, one tribal council said that "*inkosi* puts *izinduna* in place and the nation puts councillors in place". What this means precisely wasn't explored. And in one tribe, one of the tribal councilors is also an elected local government councilor.

### **5.1.2 Roles and responsibilities**

This section focused on primarily distinguishing the roles and responsibilities of *izinduna* from tribal councillors but also includes the roles and responsibilities of the *igosa*.

At a broad level the key distinction in role between *izinduna* and councilor is that the *inkosi* acts at all times in public with his council present. "Councillors sit with *inkosi* all the time," said one interviewee. They are the *inkosi's* advisors, protectors, confidants and often, spokesmen. A young *inkosi* may be silent throughout public proceedings while his councillors engage although the outcome of the proceedings will be viewed as his opinion and statement on the issue. Councillors will express the contention, grievance and partial interests that an *inkosi* is not allowed to express, in order to ensure that a range of views and opinions inform the *inkosi's* judgment.

Practically, the councillor also has responsibility for certain kinds of issues on the ground that are not related to land. An example is described as "cattle eating food off the fields", which would result in disputes and the guilty party fined. The councilor may also be called if people need a grazing camp and to have it fenced. S/he would demarcate this camp but the *nduna* would address any transgressions relating to the demarcation. The *nduna* has the authority to describe as evidence how the councilor demarcated the land.

The *nduna* is the "eyes and ears" of the *inkosi* on the ground. He conveys information back and forth from people to *inkosi*. may ask for the *nduna's* opinion but the *nduna* does not counsel the *inkosi* in the way that councillors do although *izinduna* do sit on the tribal council. Practically, the *nduna* deals with land and land needs on behalf of the *inkosi*. The *nduna* is the first 'official' approached when people want land allocations or want to vary land use (like applying to run a business). The *nduna* is also the first person to deal with disputes over boundaries or rights. Councillors are simply not mentioned in relation to land issues. The *nduna* is therefore the lowest level land administrator in tribal institutions.

In contrast, the *igosa*, who operates in the same geographical unit as the *nduna*, namely the ward or *isigodi*, is primarily responsible for the behaviour of young men. The *igosa* and the *nduna* each has his own tree where meetings are convened and they govern men on distinct issues.

You have to lead the dancing at ceremonial functions and keep the men in line. When there are disputes or fights, it is your job to stop them and to fine the wrongdoers. The

*igosa* also fines men who take out another man's girlfriend and presides at trials involving men's issues inside the *isigodi*.

### 5.1.3. Remuneration

The official position is that *izinduna* and *izinduna nkulu* do not receive salaries for their duties. Historically their position allowed them to require 17 head of cattle for *lobola* (bride price) when their daughters got married. However, fewer and fewer people are reported to be getting married and where they are, they seldom "have the strength" to pay the *izinduna lobola*. Informally, an *nduna* and neighbourhood can expect a person who is allocated land to provide *umqombothi* (Zulu beer) and meat for a braai.

One *nduna* did admit to the existence of practices viewed locally as corrupt. People being allocated land have to pay a *khonza* fee. When asked what happens to this fee, he said: "The money is supposed to go to *inkosi* but sometimes the *nduna* will keep it. He will just say if *inkosi* asks that he hasn't put anyone there yet, or that the person hasn't paid yet."

Questions were not asked about *amakhosi* remuneration. Legally national government determines and pays remuneration but it wasn't clarified whether this is the only remuneration *amakhosi* receive in practice.

### 5.1.4. Recourse and accountability

Interviews focused on what processes existed should subjects be unhappy with their *nduna* or *inkosi*.

In the event of a dispute between an ordinary person and an *nduna* over a common matter (like a shared boundary), the person would be expected to raise the issue with the *nduna* first. If the *nduna* were to be unwilling to settle the matter amicably, then the person could either call on a neighbouring *nduna* or go to the *nduna nkulu* for assistance.

Asked if an *nduna's* office could be terminated and how this could be done, one interviewee replied:

Yes, this can be done. The *isigodi* will tell *inkosi* that the *nduna* is not carrying/governing (*akaphathi*) us properly. For instance, if the *nduna* has taken *inkosi's* money for site allocations or he is taking sides in a dispute. The *inkosi* will fire him and replace him with someone else.

Asked the same question later about the *nduna nkulu*, the interviewee responded:

Yes, *nduna nkulu* can be taken out of his job if there is a good reason to do it. *Isizwe* (the nation) will tell you as the *nduna nkulu* the reason. They will say you're not doing your job – you're not prosecuting offences and resolving disputes. At that meeting, where *inkosi* will be present, they will tell *inkosi* that they don't want you anymore. This would have to be said at a series of meetings until it is clear that you do not want to change your ways, which would indicate that you do not want this job any longer. Then *inkosi* will change you.

Another tribal council said they followed a similar process. Their procedure also required ward residents to initiate proceedings and they also defined legitimate grievances as those relating to poor performance of duty or corruption. Recourse was also to the *inkosi* who would replace the *nduna* if he did not mend his ways.

The situation with the *inkosi* is more complicated given his position in the tribe and that he would expect his *izinduna* and councillors to have advised and cautioned him long before a grievance became serious. One interviewee also noted that procedures exist for reporting complaints about *inkosi* but that replacing *inkosi* is very difficult.

It has never happened that the whole tribe is not satisfied with the *inkosi*. Some from some wards may not be satisfied and others from other wards may be satisfied so it doesn't happen often that the whole tribe is dissatisfied at the same time. The *inkosi* can only lose his position if he has done something very serious.

Nevertheless, interviewees consistently described a similar procedure for reporting grievances, which could in very serious instances result in the replacement of an *inkosi*. People, most likely a ward level *ibandla*, would report to their nearest person in authority, namely, the *nduna*, who would report grievances to the *nduna nkulu*. The *nduna nkulu*, who is "the father of the tribe", would report these grievances to the royal family, where the issue would be discussed and, if necessary, the *inkosi* asked to change his behaviour. In some variations, the *nduna nkulu* would report firstly to the tribal council, which would advise the *inkosi* to change his ways if necessary. If he ignored the advice, then the matter would be reported to the royal family. In another variation, *nduna nkulu* would report simultaneously to the tribal council and the royal family, who would then meet to discuss a resolution.

The only significant variation on this theme (which may have related to detail rather than procedure) was one tribe where an issue concerning the *inkosi* is reported to a "particular person whose job it is to monitor the *inkosi* at all times and to speak on his behalf when necessary". If this fails, then the report is taken to the royal house through "*umntwana omkhulu*" (the oldest prince who is not *inkosi*). This royal family member will take the issue to the *inkosi's* brothers and other royal men who will find ways to admonish the *inkosi*.

Asked if this procedure had ever been followed with any known *inkosi*, one interviewee said yes, *Inkosi* Ngubane at emBovini near Keat's Drift had lost his position in this way. The tribe under *Inkosi* Mdlalose also replaced their *inkosi* for the *inkosi's* brother after the first incumbent had actively supported a particular political party, which had resulted in major violence and significant loss of life, and then fled to Johannesburg. It was also pointed out that the removal of an *inkosi* requires "the consent of Ulundi" (the Department of Traditional and Local Government) since the law regulates the appointment and dismissal of *amakhosi*.

The existence of clear procedures to remove a powerful incumbent from his/her position is an important indicator of accountability, and possibly legitimacy. In a democracy, election is supposed to perform this function. Asked how an *inkosi* would know he is still legitimate in the eyes of his subjects given that he is not elected to his position, one *inkosi* answered that he judges by how people respond to him performing his functions. For example,

People come if I call them to a meeting. Also, if they have problems they come to my court here and they don't go to the magistrate. If they wanted to go to the magistrate, they could go there but they choose themselves to come here. And then, when I request collections for things of any kind, people still donate. If they stopped doing these things, I would know they don't need me as *inkosi* anymore.

## **5.2. Land administration**

In this section, four broad areas are discussed, namely, access to land, land use, alienation and/or transfer of land and rules and disputes.

### **5.2.1. Land access – procedures, criteria and costs**

Although the procedure across tribes is generally similar, there are variations in criteria for who can access land, who must be present at allocation and the costs incurred. What is described below is primarily land allocated for residential purposes. Arable field allocations follow similar procedures but are dependent on land being available. Only if a household has vacated the area or is no longer using a field can the field be reallocated to another household.

#### **5.2.1.1. Tribal members**

At a general level, insiders to the tribe who wish to be allocated land for residential purposes or who wish to move to another *isigodi* would approach the *nduna* with the request. If the applicant has already identified land, the *nduna* verifies that it is available, notifies *inkosi* and 'points out' boundaries in the presence of other members of the tribe.

In one tribe, the *nduna* points out boundaries in the presence of the councillors while the others demarcate boundaries in the presence of the *isigodi* or immediate neighbours, sometimes called an *ibandla*. This is the group that provides evidence in the event of a boundary dispute. One tribe requires people moving from one *isigodi* to another to obtain a letter from the *nduna* of the *isigodi* they are leaving, which must be presented to the *nduna* in the new area. This letter is described as a reference. Another requires that the *izinduna* of the two areas meet and discuss the application.

While four tribes said insiders moving or being allocated land for the first time do not have to pay a *khonza* fee, one said the fee is R60 to move from one *isigodi* or site to another and the other tribe said insiders pay R10 for a new site allocation or change in site.

#### **5.2.1.2. Outsiders**

Outsiders would begin by either approaching someone they already know in the area and asking for assistance in identifying land or they would approach the *nduna* directly who would identify a potential piece of land. Every tribe expects an outsider to provide a 'reference' letter. If the person were from another tribe, the letter would have to be from that tribe's *inkosi*, who may have charged him R5 to write the letter. If the person were from a township, the letter would have to be provided either by an elected councilor or magistrate. The purpose of the letter is to ensure that the person is not attempting to run away from unacceptable or criminal behaviour and gives the new tribe an explanation for why the person wishes to settle in the area.

From here the procedure varies from tribe to tribe. In some tribes, the *nduna* calls a meeting of the *isigodi* and introduces the newcomer by reading the letter of reference. If *isigodi* welcomes him, then the *nduna* takes him to *inkosi* and council. In one area, the procedure is described as follows:

A person begins by asking me as a person with the land s/he wants to use. I say OK but I must talk to my neighbours. If my neighbours agree, one neighbour goes with me to report to the *nduna*. The *nduna* calls the *ibandla* of the sub-ward through the *ipoyisa* (tribal police) to a meeting at the land that is to be demarcated and allocated. The newcomer must buy drink and meat for the *ibandla*. The *nduna* demarcates the boundary in front of the *ibandla*, the members of which set the parameters of the demarcation by stating that they don't want a township or that the new site is too close to the existing one. The *nduna* follows these guidelines and demarcates accordingly.

In the above description, the *isigodi* appears to be more important than the *inkosi* in terms of approving a newcomer. However, most tribes explicitly required that the *inkosi*-in-council meet and approve the newcomer, in some cases before the *isigodi* had been informed.

Once the *nduna* has identified a suitable residential site, which usually comes with a garden, the person is expected to pay a *khonza* fee to the tribal authority structure. The fee varies from R15 at allocation payable to the *inkosi* in order to pay employees at the tribal court, R26 annual levy payable to the *inkosi* for the performance of various official functions, R40 annual levy plus an unspecified fee at allocation, R80 or a cow which goes into the *inkosi's* kraal for official functions and not the *inkosi's* personal use, R100 at allocation which goes to *inkosi* for unspecified purposes and R200 at allocation, R150 of which goes to a community fund and R50 to the tribal council for unspecified purposes. None of the interviewees said that these fees became the personal property of either the *inkosi* or the *nduna*.

The *khonza* fee, which signifies membership of the tribe, imposes duties on the newcomer. One of these is to obey the rules of the area. "You get told the rules of the area [and that] those rules are important to prevent conflict between people. Being a member, if you break these rules, you are told and corrected." The rules vary but one tribe includes that burying can only take place in the cemetery, that everyone must attend an annual meeting of the tribe on the 27 December and may not arrange any functions for that day, payment of annual levies and abiding by dipping regulations.

### **5.2.1.3. Women**

The question of women's access cannot be separated from who can get access generally. Hence, in one tribe only "married people" can be allocated a site. In this case, subdivisions of a site can occur with the consent and presence of the *nduna* and the family can give an unmarried relative, male or female, a site within the site but new allocations will only be made to married people. All the tribes asked were at least as cautious about allocating to unmarried women as they were about allocating to unmarried men although the reasons may have been different. However, while most tribes will allocate to unmarried women under some conditions, only one tribe said it has started to allocate to unmarried men.

Generally, most of the tribes stated that a woman would not be allocated a site on her own but would require a male relative "to represent her", such as a father, uncle or brother. The concern, according to the interviewee, is "whose house is it if there is no man?" Only one tribe said single women would be treated the same way as single men. "We would wonder what had happened that you had not married. Women are the same as men. We just check where she came from and why she's alone."

Some tribes acknowledged changes in the society, particularly that fewer people are getting married, and argued that this has resulted in changes to unmarried women and men being allocated land. But the approach is cautious.

We do allocate land to women here, particularly to those who have lost their husbands. We ask that the husband's brothers accompany the woman and the allocation takes place in their presence. The other women are women who are not married. People no longer get married – it is a rare event now. In these cases, the *muzi* (household) is registered in the oldest son's name if the woman has sons.

A second tribe has a very similar approach. "We will allocate land to a widow who would go to the *nduna* for assistance but an unmarried woman wanting land would have to be

accompanied by a relative to confirm that she really needs her own separate piece of land."

One tribe will allocate independent sites for residential purposes only to unmarried women with sons and not to women with no sons. The same group said other women would have to negotiate sites within the household's site but added that, "We don't give sites to single men unless those men also live in their brother's yards".

Women's most uncontested access is therefore to sites within the household's residential site, which nevertheless requires the *nduna's* presence. Generally, only married couples (or men) and widows (in the presence of their deceased husband's male relatives) are allocated independent sites. However, some unmarried women with children can access independent sites under various conditions, such as accompaniment by a relative or the existence of a male child.

Asked why this issue is so difficult for tribes, one interviewee responded:

Letting single women have their own land will cause men to fight. Men will come to her place and eventually there will be fighting. Women who have sons will have *isithunzi* (throw a shadow – respect). We look at a woman and ask who is below her. Who is there to give the home a surname? The women with only girl children will eventually be left alone and that will cause problems for the community.

The issue of the household surname is a complex one. For instance, one interviewee suggested that the site must belong constantly to one surname, and that if an illegitimate son were to change his name from that of his father, he would have to be allocated alternative land. "The son can be allocated land on his own because if he has a different surname from the father, it means he is not the heir." Surname is closely linked to the role of ancestors in mediating the past and the future and who ancestors are able to recognize. Land is integral to this mediation because ancestors are only able to recognize communication that takes place from a specific, ritualised place on the homestead plot. A specific piece of land is thus integrally connected with a specific family whose name is carried in the male line and is a critical link in the fortunes of that family because of the protection the ancestors give to the living.

#### **5.2.1.4. Group allocations**

None of the tribes interviewed noted any issues with group allocations, most usually for community gardens or agricultural projects. The procedures are same as any other allocation. The group would approach the *nduna* with a request for land. If they had already identified land, the *nduna* would verify its availability, confirm the boundaries and make the allocation. One interviewee noted that group allocations have become popular while another observed that where there is a government grant allocated, the group must declare the amount. There was no suggestion that the allocation is any different if the group is women.

#### **5.2.2. Land use**

Land uses investigated during the research include commercial (eg. tourism, tuckshops or any other commercial enterprise), public purpose (eg. schools, clinics), commonage and natural resource management and creation of townships.

In terms of commercial ventures, people wanting land would approach the *nduna* with a request. None of the tribes had direct experience of large-scale commercial ventures with outside partners except one on a tourist route. This tribe had within it a small town



and had had land expropriated from it for eco-tourism purposes, about which people remained bitter. Commercial enterprises for the other tribes therefore referred to small family businesses such as tuckshops.

The procedures for accessing land are different from residential use applications in that they require more formal processes, such as letters written to the *inkosi* and his council, which may be referred to the traditional authority and the Department of Agriculture for demarcating. The community with tourism development experience requires a tribal resolution to approve applications, which cost R800. However, costs are less in other tribes, with one saying business people are supposed to pay a levy of R50 a year but in fact only pay the levy other residents pay, which is R25. Another said if the application is for business only, there is an initial application fee but residents pay more because they have access to grazing and arable land as well. The procedure and the costs are the same whether the person is from inside or outside the community and is not exclusive to particular ethnic or race groups.

Individual large scale farming enterprises would be difficult to establish because of the size of land involved. Asked how they would respond to an application for a sizable piece of land, possibly for commercial agriculture, one tribe said: "The land here is for all of us to live well on. It is not written how much land you can have but we would never give one person a very big piece. We also care about the others and where would they go?" Likewise, another tribe answered: "If you have asked for a business site, you can as a citizen then ask to build a house and ask for a field. But a huge piece of land does not happen here." However, when probed further, this tribe then added: "If you want a bigger piece of land, then that's a project and you would need to re-apply and we would have to agree on an amount to go to *inkosi*. But this has not happened."

In terms of land for public purposes, the general consensus was that no *inkosi* would refuse land allocation for a use that benefits the 'nation' and the government department would not be charged for the allocation. However, some tribes said the government department would still require the *inkosi's* consent to proceed with the development or at least that he be consulted. None of the tribes had experienced government driven development that had undermined their authority or people's rights to land as has been reported elsewhere in terms of housing and road development. Development in the interviewees' experiences generally referred to schools, clinics and roads.

The interviewees were also all in agreement that once an area became a "location" or township, it would have fallen outside of their authority for all practical purposes. Their explanations for this included that people in townships are "independent so do not respect leaders like *inkosi*" and are allocated sites without following the criteria ("it does not matter whether you are married or not") and procedures used in tribal areas. As one interviewee put it: "Once the area is a township, *upuciwe* (it has been taken from you)."

However, one tribe has within its area of jurisdiction a town. The *nduna nkulu* administers it. This tribe said if an area were declared a township, then the *inkosi*-in-council would negotiate with the municipality about how to administer it.

A very different land use from those described above is commonage and the management of natural resources found on the commonage. The use of grazing for livestock is without exception free open access to all members of the tribe. There are only two limitations to use. One relates to whether a person has "the strength" or wealth to own livestock. If s/he doesn't, s/he will not use the commonage and will not be compensated by others who do. The other limitation relates to the type of use – no one may build or bury on the commonage. Particular *isigodi* have their own summer grazing areas or commonages set aside, which are usually not fenced, but people living in that *isigodi* are free to graze their cattle on the commonages of other wards. "The people are

the owners of the land and we therefore cannot stop them from benefiting from their own resources in the area," is how one tribe put it. This particular tribe said people from outside the area would need to ask the *nduna*'s consent to use any natural resources. Although the research did not explore in detail issues relating to inter-tribal grazing, conflicts emerging from this have escalated into legal battles in the magistrate's and High Courts because there is no other arbiter of inter-tribal land issues. (Kruger, 2003)

The degree of management around natural resources other than grazing, specifically thatching grass and firewood, appears to differ from area to area, possibly because of the resource availability and how it is used. For instance, one tribe said all people from the tribe are permitted to cut thatching from anywhere on the tribal land and at any time and not just from their own sites. Another tribe said the same, noting that in the past people cut only from the edges of their own fields and sites but "since people no longer plough or fence their land, they can now cut from anywhere". Another tribe, however, said women are supposed to cut from the grazing land first for inkosi in June and then for their selves after that. "But sometimes people cut earlier than this – like in April – because they can sell this grass for R500 and this practice has even resulted in deaths because of the fights it causes."

Firewood is also open access to members of the tribe. Outsiders are expected to ask permission from the *nduna*. However, one tribe noted that the *inkosi* has said they should not cut down green trees.

In one tribe, close regulation occurs of a palm used to produce alcohol, which is a lucrative business in the area. The *nduna* allocates the palms exclusively to people on the basis of application and availability.

Where arable lands are managed collectively, they take on a communal 'flavour'. In the research example, specific fields within a communally maintained boundary are allocated to particular people or households who choose what to plant on them and where and how to plant it. However, planting and harvesting times are decided collectively because cattle graze the land after harvest during winter and fences are maintained collectively (guarded and mended). Tribal police 'impound' cattle and fine owners who allow their cattle to graze the lands outside of agreements. The arrangements are thus co-operative but they are not always harmonious. For instance, "sometimes people threaten to shoot the *ipoyisa* ('police') until it ended up with nobody wanting to be *ipoyisa* anymore." Owners are fined R50 a head, which the *nduna*, whose kraal is the pound, pays over to the *ipoyisa* as remuneration for their guarding the fields.

### **5.2.3. Alienation of land**

Alienation of land refers to any processes or practices that result in land moving from the 'ownership' of one person or household to another or back to the tribal collective ("*inkosi*"). Issues discussed under this included eviction and abandonment, inheritance, sale and privatization of land.

Most tribes reported changes around the authority to evict and the consequences of this. One tribe said that in the past, misdemeanors would be reported and adjudicated in the tribal court if necessary. Very serious misdemeanors could result in eviction.

Because eviction is now regulated by the Extension of Security of Tenure Act, which tribal councils interpret as preventing eviction, these processes are no longer followed and a person "can now be assaulted or even stabbed" rather than brought before the tribal court. Another tribe noted, however, that non-formal discipline always existed and continues to exist. "The *isigodi* boys catch him and urge him to behave." This tribe also noted that in the recent past serious criminals are taken, or reported, to the police, while

a third tribe said the *inkosi* can apply to the magistrate to evict a person "who does not behave well", suggesting that restrictions on the power to evict may have resulted in improved recourse to state regulatory institutions. However, the state's reduction of *inkosi* authority appears also to have resulted in increased 'self-help' justice. As one *inkosi* noted:

People die from the lack of allocated authority on this issue. The *inkosi* used to be able to banish someone before I came to power 50 years ago or so but the white government took this power away. As a result, I've never evicted anyone. However, people just shoot others now as there is no legal way of dealing with them. All I can do now is to take an accused person aside and explain the strength of public sentiment and the likely outcome of people's dislike of him and allow him to move to another tribe.

An issue around abandonment of residential land is how to determine when land is abandoned. One tribe said it would go and look for a person who has vacated and not notified the tribal authority that s/he has left permanently since it does not have a cut-off date after which it can declare the land abandoned and available for re-allocation. Others were less clear, saying that unless the person has said they are leaving, the land remains theirs and cannot be re-allocated. For instance, one said "if a person does not come home for three years, we would expect him home in the fourth year. If after four years, he does not come home, we would ask his relatives why he is not coming home." This same tribe eventually stated that after five years, it would treat the land as vacant and the "*nduna* will look after that home until someone interested comes along".

Relocation, which involved notifying the tribal authority, is dealt with in a similar way by most of the tribes in that the land reverts to the tribe and is then available for re-allocation. To clarify this, one tribe added: "If his sons should ever come back, they will be allocated another piece of land, not necessarily the one that they left." An issue in re-allocation is the previous households' graves. In order to prevent disputes amongst ancestors, newcomers to the site would not build on the same spot as the previous land-holders.

Arable land was clearer. A number of tribes said land not used for three consecutive years would become available for re-allocation to those who need arable land and one tribe added that they had changed this from three years to two years. The original owners would not be allowed to claim ownership "since if he thought it was his he should have wrapped it up and pocketed it when he left".

Inheritance is generally thought of as a family matter that the family is expected to resolve. However, conflicts that the family fails to resolve can be referred to the tribal authority and there are legal and customary guidelines around property distribution after the death of a household head. For instance, one tribe said: "If the male head of household dies, his wife takes responsibility. This used to go to the son but it now goes to the mother since sons often abandon their homes." This was confirmed by a second tribe, in which the head of household's wife has authority over the property until her death. For instance,

Only a widowed wife can decide to sell her husband's property – his cattle or any of his property. It is better that she consults her sons but only she can make the decision to sell. Her son can tell her the decision is wrong and advise her against it but he cannot decide. If there is a dispute between an heir and his mother about the property of the father, the family can call the *nduna* to resolve it. The correct thing for the *nduna* to do is to evict the son from the house and advise the son to go and get his own house, which he can sell if he wants to.

This draws attention to the distinction between heir and widowed wife, who appears to have decision-making powers over the household property while she is alive. The interviewed tribes do not seem to be saying that the widowed wife is heir. For instance, "An heir is the first son of the household head." However, he appears unable to act as owner and head of household while his mother is alive.

Not a single tribe allowed or agreed with ideas of land privatization or sale. One said: "This cannot work here since only those with money would be able to do it and if s/he borrowed money and failed to repay it, the lender would take the land resulting in only the rich having land." Another said simply, "land is not sold here because it belongs to the nation", adding that selling of land would result in *inkosi* "not having land, which will be the end of *ubukhosi*". Similarly, another said that "land has no price and we cannot sell it to the people because they are the owners. If government wants to give us title, it must be a communal title not individual title." An exception was the sale of top structures, which is allowed, but the land itself goes through the normal allocation procedures described above.

Asked how the tribal authority might value its land in order to sell to investors, all answers indicated that there is no experience around valuation because the tribal authorities have never sold land and are not entitled to do so since the land belongs to the nation.

#### **5.2.4. Rules, demarcation and disputes**

Tribal rules and amendments to them are not often written down except for one tribe where the *inkosi*, *izinduna* and councilors meet, make rules, record them and keep these at the tribal court for successors to refer to. None of the others reported any written record of rules. As one tribe put it, "This is history. It is not written down, it's just known." Changes to rules come through reports from *izinduna* and councilors to the tribal council, where problems are discussed and resolutions put forward. However, all the tribes also acknowledged that government often initiates changes, which are documented, usually through the Department of Traditional and Local Government Affairs. An example cited is inheritance laws, which were gazetted and *amakhosi* told about the changes.

Tribal boundaries are also all known, although one tribe asserts that neighbouring commercial farmers have altered the original boundaries. Another tribe said that although boundaries are known because they are pegged, they have had people settle on the boundary. In this incident, councilors pointed out the beacons and suggested that those settled on the boundary could either '*khonza*' to the *inkosi* or move off the boundary. One tribe also said where confusion over boundaries arise, maps and pegs are used to clarify the boundaries.

Disputes over boundaries and other land matters between tribal members are referred in the first place to the *nduna* who calls together the original neighbours who witnessed the allocation. This *ibandla* will recall where the boundaries are that were originally pointed out. If parties to the dispute remain dissatisfied with the outcome, the issue is referred to *inkosi* who makes a ruling. Where the dispute involves an *nduna*, the issue is referred to the chief *nduna* or to a neighbouring *nduna*.

## **6. Conclusions**

After nearly five years of assessing communal property institutions, LEAP has concluded that land reform can serve as a developmental base if tenure is secured but that tenure can only be secured by working with, and adapting, the practices and systems that people living in communal areas are already familiar with and using. This research

therefore set out to look at some of the practices that make up traditional land administration in order to contribute to a base of knowledge that communal property system practitioners and policy makers can use to secure the tenure of individuals and groups in the country. This was in the context of, on the one hand, communal property institutions set up under land reform persistently failing to meet the expectations of land reform and municipal officials, planning and development professionals and, sometimes, community members. On the other hand, new legislation appears to focus more on the structures of traditional leadership rather than on how the functions of land administration are carried out in traditional areas and thus neglects critical aspects of tenure security.

What emerged from the research is that there are clear rules about who can access land and clear procedures and practices for accessing, demarcating, transferring and using land. The systems and structures administering these procedures and rules are also generally clear, as are mechanisms of communication or accountability within the structure. This confirmed LEAP's view that there are systems and practices around land administration that people use, that are familiar and that can be described. Indeed, adapted patterns of traditional land administration understanding and practice can be found even in groups that have lived outside traditional authority structures for decades.

This is important for any external intervention because it demonstrates powerfully that the assumption of a void that new systems and practices must fill is wrong. Moreover it points to the detail of which decisions need to be taken into account and what the processes are for making them. Land reform, and tenure reform specifically, does not enter an empty terrain but one that is full of systems and practices that hold meaning for people. This finding also begins to suggest that official practice that ignores this reality is at risk of being undermined by the persistence of traditional practice, which will result in a gap between the official or legal and the de facto or practice, thereby decreasing tenure security.

Although there is strong similarity between tribal systems, there are variations that are important to specific tribes. Broadly, these include who can be allocated land, land transfers (specifically inheritance and abandonment of land), costs related to allocations and the appointment of *izinduna*. It is therefore not possible to generalize practice across tribes, which means that the notion of a 'generic' constitution or set of community rules developed outside of a particular community must, by its very nature, clash with the existing practices and systems of that community. This confirms that the process of documenting and making explicit rules of land administration must be specific to a group and should not be imposed externally.

In terms of the two big political concerns, namely elected, representative leadership and gender, the picture is much more mixed.

Tribal leadership, as the research shows, is not democratic in any sense of the western tradition that defines governance in the country. *Amakosi* are not elected leaders and cannot be held accountable through a vote. However, they are subject to powerful mechanisms of accountability, recourse and communication within the tribe. At a general but significant practical level, the *ibandla* is any gathering of older men organized to discuss social issues. It is the *ibandla* that can initiate a process to have an *nduna* or even *inkosi* removed from authority. Although the *ibandla* is not a decision-making structure in the unambiguous way that parliament is, it is highly influential. It is also a fluid and rapidly responsive mechanism that creates a direct communication between the leadership and people. At highest levels of leadership, the tribal council is an *ibandla* that advises and counsels the *inkosi*, who should not take decisions unilaterally outside of this council. The *inkosi* can also be removed from his position by the royal family, who may

do so in response to issues raised by the *ibandla* and taken to the tribal council through the *nduna*.

Other levels of leadership are less clear-cut on the question of representivity than the position of *inkosi*. There is clear evidence that some tribes, perhaps as a result of political pressure or in response to political change, have instituted procedures for people to choose their own *izinduna*. These procedures do not include a secret ballot but they do involve ward *ibandlas* in putting forward their own nominations for *nduna*. The same trend appears to have occurred with tribal councilors with local government elected councilors being drawn into the tribal council in some areas.

Most tribes also explicitly do not allocate independent sites to women. Neither do they allocate such sites to single men. The tribal 'citizen' (*'isakhamuzi'*), or unit to whom land can be allocated, is the household, which generally appears to be understood in patriarchal terms as a married man, his living family, his ancestors and his descendants through the male line. The property (land, cattle, implements, furniture) does not belong to this man but to the household, although he, as household head, has enormous control and influence over the use and allocation of it. Nevertheless, partly as a result of social pressure internally (fewer people marrying and increased spouse mortality) and externally (equity as a constitutional and political duty), the practical definition of household is changing in some tribes to accommodate women with dependents and, in one case, unmarried men. In these situations, women with children can access their own independent sites under certain conditions. Other women and men who are single can access land from their own families within the household site and only more rarely an independent site. Despite these changes, the notion of an individual to whom certain rights attach remains foreign to the land allocation system, and this appears to be in tension with the formal, official property system.

LEAP has pointed out that most CPA constitutions are contradictory in their definitions of "membership", precisely because those drawing up the constitutions have found it difficult to bridge the divide between the western concepts of individual owners and the traditional focus on households. However, working with the concept of the household as the unit of "citizenship" (or "membership" in CPA terms) offers space to engage people on the question of what kinds of households they recognise as qualifying for land allocation, which has also enabled fruitful discussions on gendered rights. Although lawyers, steeped in legal traditions based on individual notions of accountability, often find it uncomfortable to allocate legal rights to the household, LEAP, on advice from the Legal Resources Centre, has drawn two distinctions based on observed practice that begin to bridge this legal/traditional divide. The first is that the household is the receiver of a substantive right (like land) while adult individuals retain procedural rights (like participation in governance), which is why the male dominated nature of the *ibandla* is an issue. The second is that while rights are allocated to the household, individuals within the household make decisions about those rights. The focus in tenure reform and local constitution or rule-making processes thus needs to be on how decisions are made in households and how they might be regulated around property rights.

However, the research does show that women are gradually being incorporated into leadership structures as *izinduna* and councilors. Although this remains infrequent, the fact that it has happened in some tribal structures and that there is some openness to it in those where it hasn't happened, suggests the possibility for future change in this direction, which is consistent with the shifts in the rest of the society. Perhaps of greater significance to the equity debate are the lower level institutional initiators of social change, namely, the *ibandla*, which consistently across the tribes remain male structures.

While at one level these conclusions do indeed confirm concerns about the patriarchal and undemocratic nature of tribal structures and systems, they also draw attention to the capacity of these structures to adapt and respond to the broader social and political context in which they function. This is an important consideration in a country where every structure and institution is subject to transformation pressures and where transformation of traditional institutions is needed to improve external recourse and accountability, particularly in situations where tribal structures are corrupted or collapsing for various reasons including urbanization and rapid change.

Critiques, however, that focus only on the 'unelected' nature of these institutions seem to serve very narrow interests, of establishing particular forms of political hegemony, rather than broader transformation objectives, which seek to expand security and developmental opportunities across urban and rural areas. Evidence of adaptation creates opportunity for directed transformation through a regulatory framework. Such a framework could emerge through a combination of internal critique and dialogue with government. However, the process should be guided by the contribution traditional institutions could make to the broader social and economic project of the state and against which adaptations to them should be measured.

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## 8 Appendix 1

### Interview schedule

We start with a description of practice on a specific issue and then move to variations on the same theme. From here we explore other links and see if there are any stories people can tell us about the issue we are probing. We note what's changing and ask what has caused the change. This should enable us to create a base from which to evaluate the practices.

| Issue   | Particular   | Other links   | Story  |
|---|--|---|--|
| Land acquisition for an insider   | <ul style="list-style-type: none"> <li>residential</li> <li>farming</li> <li>shop</li> <li>commercial agric use– sugar forestry with eg private business partnership</li> </ul>  | What criteria are used for deciding and assessing – experience<br>What can't you do with that's been allocated to you?<br>What are your obligations as a person who has received land?<br>Looking for criteria especially women               | If a person came from a different part of your tribe – sgodi or etc what would he need to do   |
| Land acquisition for an outsider  | <ul style="list-style-type: none"> <li>residential land</li> <li>farming land– grazing ploughing</li> <li>shop</li> <li>commercial agric use– sugar forestry with eg private business partnership</li> </ul>   | What criteria are used for deciding and assessing – experience<br>What obligations do you incur as a result of joining the tribe?<br>Looking for criteria especially women<br>Issues considered in making decisions (eg. change of land use?) | If a person from another tribe came to this tribe what process would he be expected to go through to get land– and who are they can they be these other groups<br><br>If a forestry company wanted 100 hectares, what issues would affect the decision about whether or not to give it the land? |
| What are the issues with women, groups, investors relatives wanting land – what with single men<br>Minerals<br>Graves | Would they be expected to do things differently, what and why<br>Need to interrogate practices that vary from men to women (eg. why do husband's brothers have to accompany widows when they are allocated land? / why is umuzi in the name of the son not the widow?)<br>What is appropriate behaviour for a man and for a woman? | What if the families have other practices as opposed to inkosi's and which takes precedence   |  |
| Inheritance/lfa   | Does inheritance change depending on whether the wife is married or not?<br>What say does a woman have over her own fields and houses once her husband has died? (eg. if there's a   | If this dissolves or a person leaves where does the decision making authority rest – on that land- does it return to Traditional Authority  |  |



|   |  |   |  |
|---|--|---|--|
|   | dispute between son and mother?)<br>Friends and family sub allocations and how does the ta view this   |   |  |
| Problem people  | How are they dealt with around land being repossessed from them and if they leave–<br>Actual example/story of eviction from your tribe   | Who carries authority to repossess and reallocate post leaving or death   | Stock thief<br>If he has say– what criteria    |
| Abandonment/ukubunguka  | When is person seen as departed– time– why this amount of time?<br>Is the land a loan from the tribe that you can use while you stay here and abide by the rules, or is it YOURS once it is allocated?                                       | Who carries authority to reposes and reallocate post leaving  |  |
| Demarcation   | How have tribal boundaries been dealt with? How should they be dealt with in the future?   | The CLRB will require surveyed demarcation.   |  |
| Land use<br>Grass<br>Grazing<br>Minerals                            | Allocation and control of common land, wood chopping, grazing of post harvest fields, rezoning grazing eg to housing<br><br>What can't common land be used for?<br><br>What are a citizens obligations in return for use of the common land? | Enforcement - how exactly are rules enforced? Give a story about enforcement...<br><br>Procedures for rezoning or change of land use eg grazing to residence<br><br>If things are changing, ask what's causing the change |  |
| What happens with business use –outsiders in commercesugar/forestry | Compensation for this - how does it happen, who gets paid, what principles underlying wealth in land. If there's a lease with a PTO, how are the benefits distributed and to whom? If it hasn't happened then how would it.                  | Land valuation if CLRB happens<br>When a land user has felled his/her trees or closed down a business, who does the land go to?   | Partnerships with external business donors etc |
| Communal – and ... towns<br>schools tourism/conservation            | Compensation for this - how does it happen, who gets paid, what principles underlying wealth in land. If there are benefits, how are they distributed and to whom? If it hasn't happened then how would it                                   | Land valuation if CLRB happens  | Public purpose land                            |
| Land value  | Does land have or is it able to have a cash value – where does/would the money go to   | If CLRB comes and a community member wants to alienate land could they fix a price?   |  |
| Disputes  | Who carries responsibility to resolve disputes amongst fellow residence– why them<br><br>Who has final authority if there is a dispute between ibamba and a traditional leader around land? How are these disputes resolved?                 | Rights over generations – ama-vezandlebe<br>Women coming back with children   |  |

|   |  |   |                             |
|---|--|---|-----------------------------|
| Townships   | How does the Traditional Authority deal with (mirror laws) laws that at opposites within one T/A | With these dual management systems –(farms– townships– tribal land)what if tribal land wanted a township system imposed on them |                             |
| Popular support<br>Regent transitional  | Is there a measure for popularity of a T/A and is it an issue and does it matter                 | How was historical disposing done – why – can we learn from it –  |                             |
| Izindunas or land do'ers  | How are Nduna's chosen given that they are so crucial in land admin                              | Can the be removed how and why  |                             |
| Democracy   | How do people take issue with land laws that they feel out of date                               | Tradition opposition systems  |                             |
| If there were a need to change land laws of community land who and what would do this |  |   | Is there an updating system |
| Events/msebenzi   |  |   |                             |