

Traditional Leaders in the eThekweni Metropolitan Region: Their role in crime prevention and safety promotion

Research conducted by

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Summary

This report discusses the role that the traditional leaders play in the prevention of crime and violence in the eThekweni metropolitan region. It is part of a project undertaken in three of the metropolitan regions that contain large rural areas, that is, Tshwane, eThekweni and Ekurhuleni. The first section considers the history of the institution and how it has changed with the impact of colonisation and apartheid in South Africa. In particular, this section emphasises what the impact of colonisation (taking apartheid to be a form of colonisation) has been on the ability of the chiefs to carry out their traditional functions of promoting community safety and peace. It considers the extent to which the institution of Ubukhosi¹ has changed with time and in what way so as to better understand the role that Amakhosi can play in crime and conflict prevention. The report then considers briefly the experiences of other African countries in incorporating traditional leaders into democratic structures before outlining the South African context. The international literature that highlights the impact of community relations and economic development is reviewed briefly in order to better understand the possible role that the Amakhosi might have in reducing crime and violence.

The emphasis for the research was on the functioning of the traditional courts, however, given the influence that issues of land and the relationships between councillors and Amakhosi had on the possibility for crime prevention these are briefly discussed. The ways that courts function and some of the variations across the traditional courts in the region is also a key point for discussion. In addition, the views of the Amakhosi on the role that they can play in safety promotion as a result of their judicial function are important to their integration into a citywide strategy for crime prevention. This report also addresses some of the more concerning aspects of court functioning including the status of women and youth as well as the broader issues of integrating a human rights framework into court procedures. It also considers the role that some of the Amakhosi are playing in promoting restorative justice and preventing the escalation of conflict in their communities.

Background to the study

This project has been part of ongoing CSVR work with local governments in the six metropolitan regions in South Africa. It emerged from an increasing awareness that issues of marginalisation and social exclusion were central to peace and safety promotion in the cities, which are wealthy relative to their surrounding rural areas and small towns. Within this context, one of the issues to emerge was the disparity in service delivery and development between the urbanised core of the cities and the sometimes large rural areas that surround this core but still fall within the metropolitan boundaries. The rural safety project therefore focuses on the three metropolitan regions with the largest rural components, that is, Tshwane, Ekurhuleni and eThekweni.

In each of the cities this phenomenon of rural areas, existing within the metropolitan cities, has had different forms and impacts on crime prevention and safety. Therefore, each report focuses on the issues most relevant to that city. This report considers the impact of the structures of traditional leadership in the eThekweni metropole for the provision of safety services to these rural and peri-urban communities. The already difficult task of safety promotion has been further compounded by the (sometimes) uncomfortable relationships between local government and traditional leadership structures and, in particular, the complexities of access to land in the region. At times, this has hampered attempts to improve safety or resulted in the duplication of these efforts. In spite of this, traditional leaders continue to play an important role in the safety of their communities. This report will consider these issues in more detail and suggest ways for the cooperation between traditional leadership and local and other government functions where possible.

This report is based on interviews conducted with Amakhosi in the eThekweni metropolitan region. The interviews focused on issues of crime and violence and their prevention in the community. Each of the Amakhosi was interviewed in-depth. In addition, observations of traditional courts (seven in total) were conducted and records were made of the proceedings. An interview guide and the observation-recording sheet can be seen in appendix 1 and 2 respectively.

The research was conducted just prior to the 2004 elections. This was a time of uncertainty for the Amakhosi and many of them expressed anxiety about what the election results would mean for them as well as (occasionally) suspicion about the researchers' relationship with the ANC and/or Inkatha. This may mean that many of the complaints and anxieties that the Amakhosi raised may have been heightened. However, since the election outcome and the change in KwaZulu-Natal's provincial government from Inkatha to ANC, the issues that they raised in the interviews are more pertinent than ever. In the main instance, assurances that comments would be anonymous and would be used to relay their concerns to local authorities satisfied the Amakhosi. However, two Amakhosi declined to take part in the research. The areas under traditional leadership can be seen in the map in Appendix 3. Appendix 4 is a list of the communities that took part in this study.

Traditional leaders in KwaZulu-Natal during colonisation

Current debates on traditional leadership and their legitimacy tend to begin from the role of traditional leaders in the implementation of apartheid policy. It is, however, useful to consider their functions and forms over a longer historical period as this is central to the

legitimacy of the institution and the role that they can be expected to play in community safety in the present day. In addition, especially in KwaZulu-Natal, the structure and functions of traditional leaders has its roots in the relationship between early British colonists and local communities. A brief history of the interactions between Amakhosi and early British colonists in KwaZulu is, therefore, useful to understanding how the institution may have changed with time. The question of how much the institution has been influenced by colonisation remains central to the legitimacy of the Amakhosi. Some have argued (see McIntosh, 1990) that colonisation has led to the system of traditional leadership being irreparably damaged and chiefs have been isolated from their communities. For others, the legitimacy of the traditional authorities stems precisely from the fact that they existed prior to colonisation. A historical perspective can shed more light on these debates.

For the early colonial settlers, in the 1800s, colonial Natal was one of the areas where there was a need for a delicate balance between accommodating the chiefs and providing for white settlement in the area. Originally, Natal was under the control of Sir Harry Smith who explicitly wished to give magistrates increasing power over local governance in the region and reduce the chiefs to salaried officials by the 1840s. In reality this began to happen only in 1856 when Theophilus Shepstone became the Secretary for Native Affairs after the annexing of Natal to the Cape Colony. Although he, like Smith, used the system of chiefs for the administration of the region this had not been his original intention. Initially he had planned a system of British local government. However, when the treasury in London refused to finance these local structures there was no option but to make use of existing structures of chiefs. In spite of their reliance on the system of chiefs, colonial governors had a vested interest in reducing their power base because of their influence on local communities. Thus, although colonial rule offered chiefs the opportunity to increase their power through the accumulation of livestock and land, as the colony became more firmly entrenched and the British gained greater power in the region there were increasing attempts to reduce the authority that the chiefs had (Lambert, 1995).

Colonial documentation suggests that the intention of these early colonists (based on colonial experiences in Nigeria) was to create a class supportive of the colonial government in the Amakhosi. However, there was always a contradiction in this because while the interests of the Amakhosi and their communities could be furthered by affiliation with colonists, they were never identical. Similarly, chiefs were only useful to the colonists because of the support they had from the people and their ability to control unrest. With the introduction of, for example, hut taxes, the chiefs' popularity and support base began to be eroded making them increasingly less useful for the administration of the region (Lambert, 1995).

There was a great deal less resistance to colonial rule in Natal than in other parts of the country. According to Lambert (1995) this is likely to be due to the fact that many communities saw colonial rule as a means by which they could be released from the control of the Zulu king and could claim protection from a possible resurgence of Zulu power south of the Thukela River. Thus the success of the colonial influence over the Amakhosi in Natal can be attributed primarily to social upheavals taking place in the region at the time, most significantly, the expansion of the Zulu empire south of the Thukela and the slaving raids from Delgoa Bay. The initial support of colonial rule by some Amakhosi can be seen as a result of the British arriving in the region during a time when chiefs (many who had been subordinated to Shaka and later Dingane) were competing with one another to retain power.

In addition, conflicts in the region meant that many chiefdoms had been broken up and there was a constant stream of refugees into the region. Those without ties were placed under a chief or were organised into new chiefdoms by the colonial administrators (McIntosh, 1990). This too created the opportunity for smaller and new chiefdoms (as opposed to the stronger, primarily hereditary chiefs) to increase their power through alliances with colonial administrators. Of course this was not simply a selfish act of increasing their power but also a way for chiefs to secure land and the protection of colonial forces for their people.

The extent to which Shepstone manipulated unrest in the colony at the time and the ambivalent approach of the chiefs to colonial rule can be seen in the many alliances that were forged between chiefs and colonial administrators. For example, when Langalibalele and Phuthili refused to move from the Klip River, which had been assigned to the trekkers, Shepstone used the police forces of Sithole, Thembu, Chunu and Ngwane to remove them (Lambert, 1995; Maloka, 1996). In addition, aspects of traditional rule were also manipulated for the benefit of colonial administrators including the system of isibhalo. Under the colonial version of this system, chiefs were obliged to provide the State with one labourer for every eleven huts per year. Each labourer had to work for the colonial State for six months. This was justified on the basis that it was already a system in operation in the chiefdoms although its adaptation by the colonists and enforcement by the chiefs soured relationships between the chiefs and their people (Lambert, 1995).

Following the mid 1800s, in spite of the colonial administrators needing to preserve the system of chiefs, harsh sanctions were imposed on Amakhosi who challenged colonial authority, including banishment and dispossession. A well-known example was the banishment of Langalibalele after failing to register guns brought back from the diamond mines. However, the popular support of chiefs meant that such heavy-handed tactics were not always successful. For example, Fodo the hereditary chief of Hlangwini, had to be reinstated after people refused to obey the new chief that the colonial administrators had imposed. Similarly, when the colonists attempted a cattle census in 1850 the chiefs rejected this and they were forced to abandon it (Lambert, 1995).

In 1846 the 'Locations Commission' was established to suggest the best way to govern the African population. It recommended the segregation of the population into reserves with superintendents to manage the villages within the reserves. The report was accepted but reserves were created only in areas not wanted by white settlers. As a result, about 2 million acres were set aside for these reserves in 1860. This was hopelessly inadequate and most of the African population simply didn't move to the reserves. However, increasing white settlement in the area resulted in greater pressure on the land and pressure by these settlers on colonial administrators to enforce the system of reserves. This alongside the increasing reliance on waged labour reduced the financial significance of both land and cattle and threatened to undermine the people's dependence on the chiefs who controlled these resources.

As a result of increasing pressure on the land, some chiefdoms split up and one part of the chiefdom would be left under the authority of an Induna. To retain some coherence for the chiefdom, the Induna was given increasing authority with some ultimately taking on the status of chiefs. This resulted in a rapid increase in the number of chiefs in the region. In 1882 there were 173 chiefs in Natal, 99 of whom were hereditary, 46 appointed and 28

Izinduna.² Currently there are 285 chiefs in the KwaZulu-Natal region (Goodenough, 2002). These land shortages also resulted in people shifting their allegiance to chiefs with more land. The increasing pressure on land in the region is one of the key conflicts that remains today in KwaZulu-Natal. At its heart is the question of who has the authority to allocate land. Recent changes to the legislation (as will be discussed later) have led to claims by the Amakhosi that their right to allocate land has been undermined with the introduction of the Communal Land Rights Bill (2003). This Bill recommends the transfer of land rights from government held trust to communities who will then decide whether the land is to be owned communally or divided into individual plots (Paton, 2002).

Following the replacement of Shepstone with a new lieutenant Governor Garnet Wolseley the Native Administration Act (1875) was passed. At this time, there were increasing attempts to control and define the role of traditional leaders and simultaneously to limit their actions. One of the central sources of Amakhosi power within communities has been their ability to try cases. In 1850, magistrates were appointed in Natal as Administrators of Native Law in order to try criminal cases. The chiefs retained authority only over the civil and minor criminal cases. In addition, any crime between Africans and settlers was tried before the colonial judiciary. Thus, the most important restriction imposed by the new Act was to their judicial power. Although the chiefs retained the right to hear cases involving property, marriage, inheritance and other civil cases, appeals would go to the magistrate's court in their capacity as administrators of native law, and a native high court was established to hear appeals from the magistrate's court. In this way the judicial balance of power was shifted to the magistrates' in the region and away from the Amakhosi. In spite of this, there is evidence that many Amakhosi simply ignored this Act and continued hearing cases (including criminal matters) as they had previously. The magistrate's largely tolerated this as few of them could have coped with the increasing caseload anyway. This ambiguity over what cases traditional leaders can hear remains today and will be discussed further in other sections of the report. Until the passing of the Native Administration Act, chiefly jurisdiction depended on consensus of the people rather than on a written and unchanging set of laws imposed by the chief. Thus law-making was a function undertaken by the chief and his advisors and, as the Inkhosi could not act without the consent of his advisors, some abuses of power were prevented (Lambert, 1995).

This suggests that another key change documented in the system of traditional leadership has been the increasing rigidity in its structure and functioning. For example, prior to colonisation chiefdoms were held together by neighbourhood, kinship, clientship and marriage ties and any of these ties made a person part of a chiefdom. However, colonial interpretations of this system emphasised kinship (hence the reference which still persists today to 'tribes'). This served an important ideological function in maintaining chiefdom and reduced the possibilities of communities resisting the actions of their chief. It was at the time a source of much resentment as it meant that chiefdoms became more narrowly defined, confined to tighter geographical boundaries and restricted people's ability to change allegiance from one chief to another. What had been a fluid system with some checks on the abuse of power by Amakhosi became increasingly entrenched and inflexible. Speaking of systems in other parts of the country, Maloka (1996) therefore argues that colonisation created the system of headmanship as it exists today and has strengthened the system of chieftainship by making chiefs less accountable to the *khotla*.³ What was a flexible and dynamic institution became fixed and codified through colonial administrators,

anthropologists and missionaries (Maloka, 1996).

Traditional leadership under apartheid

Following colonisation, and leading into the apartheid era, there were several key developments that affected the system of traditional leadership. For the KwaZulu-Natal context, perhaps the most significant was the emergence of Inkatha as an organisation. The rise of Inkatha can be traced back to the destruction of the Zulu Kingdom by the British in 1879. In the 1920s, members of the Zulu elite began to campaign for recognition of their status as leaders under the British Empire. *Inkatha ye Sizwe sa ka Zulu*⁴ was one organisation established during this campaign which focused specifically on the reinstatement of the Zulu king. In 1975 Mangasutho Buthelezi revived this movement. His appeals to Zulu ethno-nationalism were used to justify his involvement in apartheid structures and, in particular, his support of separate development policies. Because of the ethnic basis of the party, the Zulu king was an important symbol in his campaign. Buthelezi's increasing dependence on apartheid structures, however, led to his condemnation by the ANC in the early 1980s as the 'enemy of the people' (Bekker, 1993).

It was largely through funding and training offered by the apartheid government that Inkatha was able to sustain the low intensity war in KwaZulu-Natal (Maloka, 1996). Thus the resistance of Buthelezi to the development of the ANC aligned Contralesa is understandable. One of the main concerns about the system of chieftainship is that, given that only 'black' (usually) men belonging to a particular ethnic group can be chiefs it may fuel racial, ethnic and gender divisions given the violent history of KwaZulu-Natal (Bekker, 1993; Maloka, 1996). The violence of the 1980s and 1990s is certainly evidence that this may have been the case in KwaZulu-Natal.

However, this collaboration with the apartheid regime was not limited to KwaZulu-Natal. During apartheid, many of the homeland governments gained a reputation for being extremely repressive. For example in 1986 there were 500 political detainees in the TVBC (Transkei Venda Bophuthatswana Ciskei) States as well as numerous bannings and harassment (Zuma, 1990a). Throughout apartheid there was a history of violence between chiefs and the civic associations and (in KwaZulu) between Inkatha and those involved in the liberation movement. The divisions between chiefs aligned with the apartheid government and those resisting it can be seen when in 1989 De Klerk called a meeting with all 'self-governing homelands'. All 'homeland' leaders except for those from KwaZulu and Qwa Qwa boycotted this meeting (Zuma, 1990a).

Maloka (1996) explains the alliance between some chiefs and apartheid as a result of the social changes taking place during the implementation of apartheid as well as during the change to democracy. As in colonial times, South Africa once more became contested terrain for the emergence of a new middle class. He argues that chiefs have often generalised their own interests to whole communities by mobilising and fetishising traditions and symbols of the community. Thus calls for tradition, custom and history tend to come from sections of the community that have the most to gain by the system of chieftainship (Maloka, 1996, Walker, 1994). During apartheid there was an increasing amount of wealth and power to be claimed by chiefs and being part of the apartheid machinery was an important source of upward mobility. Chiefs used the Bantustan

governments to suppress trade unions, political organisations and to outlaw other chiefs, as seen in the case of Mantanzima who detained and tried the 'real' king Sabata Dalindyebo because of his opposition to the Bantustan system, in a manner not unlike that of the British colonists.

Therefore when the Nationalist party began to develop and enforce a series of laws based on their 'separate development' thesis, chiefs played a central role in the implementation of these laws. The revolts in the 50s and 60s against the imposition of Bantu authorities are illustrative of people's frustration with the alliance between the apartheid policies and the system of chieftainship which was seen as colluding with apartheid. Dissatisfaction with the Bantustan system and the traditional leaders can be seen in the military coup in Ciskei, Venda and Boputhatswana. In contrast, however, in Lebowa, Kangwane and Transkei, those in power sought to identify with the ANC during the 1980s and 1990s (Zuma, 1990a). These revolts were suppressed and did not re-emerge for another two decades. Further revolts were clearly prevented by the power of the chiefs over land access and their ability to expel community members. Alliances that formed with chiefs and political parties emerged as a central rift within communities (Maloka, 1996). The revolts that re-emerged in the 1980s were led largely by youth and civic associations, which had moved into rural areas because of the collapse of schooling in urban centres. The uprisings peaked in 1990 with the unbanning of the ANC and demands by many Bantustan residents to be incorporated into South Africa.

As under colonisation, the apartheid government manipulated the system of traditional leadership in ways that undermined its credibility. For example, in instances where there had been significant resistance by chiefs and communities to the systems of governance in the Bantustans, the apartheid government appointed lower chiefs (and sometimes even commoners) and deposed others. For example, in the Ciskei, Lennox Sebe was a commoner who later became the 'president' of the Ciskei. In particular, the Bantu Authorities Act of 1951 legitimised imposing government appointed chiefs in some instances (Zuma, 1990a). Mzala (1988) in his book *Gatsha Buthelezi: Chief with a double agenda* explains how, as with early colonial rule, apartheid offered some chiefs political and financial power and how some became avid supporters of the apartheid regime.

Particularly in KwaZulu, the chiefs had already been a part of the colonial administration and had effectively become government employees through the introduction of salaries and the definition and curtailing of their roles and responsibilities. Apartheid continued this process even further. One of the central problems with the way colonisation and apartheid influenced the system of chiefdoms was that chiefs became accountable first and foremost to colonial administrators rather than to their own communities, and communities lost the systems that had existed previously to challenge the authority of the chiefs (McIntosh, 1990). During apartheid it is significant that the key role of the chiefs became to maintain law and order (particularly the apartheid laws), something that was already beginning to happen during colonisation in KwaZulu. They had a central role in reporting unrest to the Bantu Commissioner and dispersing unlawful assemblies (Bekker, 1993). The chiefs continue to play a role in maintaining safety and security in communities as will be discussed below.

A significant part of the resistance to chiefs during the colonial and apartheid eras was as a result of increasing association of rural communities with the liberation movement. In spite

of claims that the ANC are weak in rural areas (and the recent provincial government change in KwaZulu-Natal is evidence that this is perhaps not as accurate as it may seem) migrant labour workers formed a central core to the resistance in many traditional areas. For example, in Sekhukhuneland in the former Eastern Transvaal many of the customs and practices associated with traditional leadership were practiced in urban areas and integrated into relatively new practices such as savings groups and associations. With increasing numbers of rural men in urban areas, they were able to communicate the concerns of rural people to the ANC and were able to join the trade union movements associated with the liberation movement. This, linked with the ongoing role of the chiefs in implementing the apartheid system meant that opposition to traditional leaders grew in many areas (Delius, 1990).

The role of chiefs should not be seen as one of total compliance as some chiefs showed much resistance to apartheid legislation. For example, after the implementation of the Promotion of Bantu Self Government Act in 1959, Chief Luthuli resigned. Similar examples can be found from Pondoland, Sekhukhuneland, Witsieshoek (later known as Qwa Qwa) and Nqutu (Quinlan, 1986).

In the history of the ANC (and the struggle alliance more generally) the issue of chiefs has remained contested. When the ANC was formed in 1912 an upper house for chiefs was created and seven of the member chiefs were honorary presidents of the organisation. The ANC depended on the chiefs as representatives of their communities as well as for major financial contributions. For example, the ANC delegations of 1914 and 1919 to London to protest against the 1913 Land Act were largely financed by contributions from the chiefs (Maloka, 1996). However, by the 1920s, only a few chiefs still participated in the ANC conventions. Maloka (1996) attributes this firstly to a failure by the ANC to prevent the Land Act from being implemented as well as increasing urbanisation and a resulting movement of trade union organisations into rural areas, which spearheaded campaigns against the chiefs. Also it is attributed to the success of the Native Affairs Department (headed by Theopolis Shepstone) in winning over the chiefs and co-opting them into colonial governance structures. As a result, the ANC between the 1960 and 1990 took a hard line towards the chiefs as seen in their 1998 Constitutional guidelines which stated that 'the institution of hereditary rulers and chiefs shall be transformed to serve the interests of the people as a whole in conformity with the democratic principles embodied in the Constitution (cited in Maloka, 1996: p. 180).

However, this did not reflect the end of the relationship between chiefs and the anti-apartheid movement. In 1987, 38 chiefs met and formed Contralesa. One of the central aims of Contralesa was to fight against the Bantustan system and their first conference was held with the title 'Dawn of Freedom'. Their success grew and, in 1989, 150 chiefs including 50% of KwaZulu chiefs attended the conference. By 1994, Contralesa had 2000 members and a new phase of cooperation between the ANC and the chiefs began. However, Contralesa has faced difficulties as even chiefs who had a history of conflict with their own communities or had opposed the civic associations joined Contralesa and saw it as an opportunity, in the transition to democracy, to consolidate their power base (Zuma, 1990b). As a result we see cases such as in the Ciskei where Contralesa supported Oupa Gqozo - the military leader of Ciskei - in his conflict with the residents' associations. In spite of this Contralesa publicly stated 'apartheid has separated us from our people, now we are going back to them' (cited in Zuma, 1990b, p. 69). This statement was therefore a clear

acknowledgement of the past way in which traditional leaders had both exploited the colonial and apartheid systems, but also a statement of how the system had been manipulated and transformed into one where the power of chiefs could be consolidated but where accountability to their communities had declined.

Following initial excitement among the liberation movements about Contralesa there was little growth in the organisation and it faced criticism that it held too many conferences with little concrete action (Zuma, 1990b). In addition, its growth was hampered by open hostility by some chiefs in Bantustan governance as well as a lack of resources. Buthelezi was one of those most strongly opposed to the formation of the organisation and described it as 'trying to thrust a spear into the heart of Zulu unity' (Weekly Mail Oct 6-12 1989, cited in Zuma, 1990b: p. 71). Attacks on those who supported Contralesa were reported including on Prince Israel Mcwayizeni, whose house was vandalised. In addition, Chief Alpheus Molefe was suspended from his position because of his membership of Contralesa. Similarly, four chiefs in Northern Natal attempted to secede from KwaZulu because of their sympathy to Contralesa (Zuma, 1990b).

Even within KwaZulu where there was support for the apartheid system by many of the chiefs, following the dismantling of the Bantustans, the king declared his independence from Inkatha. This was based on a 20-year conflict between Buthelezi and the king and claims of Buthelezi abusing Bantustan resources. By losing the king as its emblem, Inkatha risked losing its nationalist following. Since this time, the king has openly attacked Buthelezi on several occasions. However, the relationship between Inkatha aligned chiefs and Contralesa is complex and in 1995, in response to the lack of provision for chiefs in the Eastern Cape, Contralesa joined with Inkatha to march to Pretoria. This resulted in tensions within Contralesa and the KwaZulu branch of Contralesa threatened to pull out of the organisation if relationships with Inkatha were strengthened (Maloka, 1996). Thus political affiliation remains one of the central divisions between chiefs in the KwaZulu region and this will be explored further in the report.

According to the Zulu Chiefs and Headman's Act of 1974, the roles of the traditional leaders are to act as the judiciary, maintain control and distribute land. The Black Administration Act of (1927) led to the system whereby the minister of justice for KwaZulu appoints indigenous local leaders as judicial officers. They are excluded from trying numerous crimes and can impose fines only up to R165 or corporal punishment. There have been challenges to the rights of chiefs to try cases at all and some have claimed that the chiefs are ignorant of the law they are supposed to impose. Also, concerns about poor court attendance and sometimes Izinduna and councillors being unable to attend because of working in the cities undermine the institution (McIntosh, 1990). On the other hand, their remuneration is low and inconsistent across areas, which means that high levels of dedication are unlikely. Indeed in this research the Izinduna, who took on a large role in the community, were not paid at all. The extent to which the traditional leaders rely on volunteers does indicate that the institution has popular support. This has been supported in other research. For example, in a survey in 1989, 10% of chiefs had never had cases taken on appeal to the magistrate's court and 90% of chiefs expressed satisfaction with their level of community support (McIntosh, 1990).

Thus, according to McIntosh (1990), although some writers have dismissed traditional leaders as coercive undemocratic structures that have been clinging to power in the face of

crumbling legitimacy, they have nonetheless been able to reassert their authority on several occasions and shown the extent of their support base. Where chiefs have greater legitimacy it has often been where there is strong local organisation, which has resulted in support and legitimacy from below.

In KwaZulu-Natal, the largest number of chiefs exist (285 with only 15 of these operating in the eThekweni metropolitan region). Being a traditional leader is more lucrative than ever with central government spending 4.1 million rand on the institution in 1994 and 2.2 million on the Zulu monarch (duPlessis and Scheepers, 2000). Chieftainship remains a mechanism for accessing State bureaucracy and resources. This creates further problems where some chiefs do not reside in the area they govern and in this sense at least are outsiders to the people. In spite of this, there are aspects of the traditional leadership structures that are severely under funded including, for example, the National House of Traditional Leaders (du Plessis and Scheepers, 2000).

Traditional leadership and democratic governance

The regional experience

According to Maloka (1996), in South Africa, unlike in other African countries, the ANC government was not as reliant on the chiefs for governance because of the extent to which their authority had been eroded by their involvement with the Bantustan system as well as the extent of the support for the liberation movement with Mandela as a national icon. In response, chiefs have attempted to improve their image by reminding people of their tradition and custom and aligning those opposed to the re-assertion of tradition with the anti-African movement. In South Africa, as in Namibia, claims to chieftaincy are on the increase to the extent that the Constitutional Assembly's Commission on Provincial Governance have recommended limits on the number of traditional leaders that should be recognised.

For many African countries, the role of the chiefs hardly changed after colonisation ended and they continued to serve the same functions: local administration; serving as a link between the people and the government; chairing tribal courts; and playing a symbolic or religious role. One of the primary issues that African democracies have had to contend with is how much power should be given to the chiefs. This has varied greatly and has often depended on how much the institution has been perceived to remain unchanged by colonisation (Bekker, 1993). In many cases (including Zimbabwe, Botswana, the Gambia, Lesotho, Nigeria, and Namibia) a house of traditional leaders has been established and some system for electing the members of this house has been created. Again their ability to influence the different levels of government varies. In the Zimbabwean case, members of the house of chiefs are represented in the Senate. In Malawi, by contrast, chiefs play no role in central government although section 6 of their Constitution states that 'the institution of chieftaincy shall be recognised and preserved in the Republic, so that Chiefs may make the fullest contribution to the welfare and development of the country in their traditional fields' (cited in Bekker, 1993: p. 202). In each case, there is no formal requirement that the advice of the chiefs be taken into account and in some cases it has been suggested that they have a symbolic rather than a functional role (Keulder, 1988). Lesotho has arguably given the most power to Chiefs through the recognition of the monarch who is the head of State. In addition, chiefs have a large share of parliament in Lesotho with the senate consisting of

22 principle chiefs and 11 senators nominated by the king on the advice of the Council of State. In Botswana, which, like South Africa, has created a house of chiefs, all matters relating to customary law have to be referred to the house.

In his comparison of Namibia, Botswana, Zimbabwe and Nigeria, Keulder (1998) notes that in Zimbabwe and Nigeria the central state has taken control of the customary courts with customary law being integrated into the formal legal system. He argues that this has deprived traditional leaders of one of their primary functions and, therefore, a central means of their authority. However, this replacement approach has not always gone smoothly and, in some cases, traditional leaders have continued to operate as they did before democracy. In Botswana, in contrast, the approach has been to make the traditional leaders paid members of the State, incorporating them into the current legal system. The justification for this has primarily been the value and legitimacy of the *kgotla* system. Where the local democratic systems of government have been stronger (such as in Botswana compared to Nigeria), the local authorities have been more capable of interfering with and overruling the authority of the chiefs, leading to increasing conflict between traditional and democratic systems of governance.

The South African case

The South African Constitution s211 of 1996 states that:

- (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
- (3) The courts must apply customary law when that law is applicable subject to the Constitution and any legislation that specifically deals with customary law.

Section 212 states that:

- (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
- (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law –
 - a. national or provincial legislation may provide for the establishment of Houses of Traditional Leaders; and
 - b. national legislation may establish a Council of Traditional Leaders.

Recently there have been further attempts to define the role of traditional leaders and the traditional courts. The Traditional Leadership and Governance Framework Act (2003) states that traditional communities should be governed by a traditional council. Significantly this Act recommends that one third of the council members must be women and at least 25% of the members must be democratically elected. This was not the case in any of the areas that were part of this study, and will require significant changes to the ways in which traditional councils are currently structured. The Act also allows for the President to refuse issuing a certificate of recognition to a traditional leader if there is evidence that

this leader was not appointed according to customary law. Thus efforts have been made in the Act to address past problems of identifying 'real' traditional leaders and concerns about the accountability of the institution to all sectors of the community.

The Act also makes provision for a national and a provincial house of traditional leaders. In terms of the KwaZulu-Natal Act on the House of Traditional Leaders of 1994, the Provincial House may make proposals to provincial government and Cabinet on any draft Bill or any of their activities that relate to traditional authorities, indigenous law, the status of land tenure and Zulu tradition and custom. What is not clear is how any objections that might be raised by the Amakhosi will be dealt with (duPlessis and Scheepers, 2000). In terms of the National House of Traditional Leaders Act of 1997 section 7(2), the National House also has the primary functions:

- To advise government and make recommendations regarding matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities;
- It may investigate and disseminate information on the above-mentioned matters;
- At the request of the President, it also has to advise him on any matter referred to in it;
- To submit an annual report to Parliament.

However, it would seem that this role has not really been recognised. For example, there is no obligation on parliament to refer matters or legislation to the house of Traditional Leaders. In this research it was clear that some of the Amakhosi had not even been involved in the process of drafting the Traditional Leadership and Governance Framework Act. This suggests that the National House of Traditional Leaders may be somewhat removed from the local Amakhosi. This was indeed a concern raised by the respondents in this study.

Questions have been raised (KwaZulu-Natal Violence Monitor, 2004) about whether the system of chiefs is Constitutional because it has the potential to contradict the Bill of Rights. For instance, some aspects of the current system may violate the rights of communities by 'selling' land, extorting money etc. These are not recent concerns and in 1975 Amakhosi in KwaZulu-Natal were warned by Buthelezi 'not to continue with the unlawful practice of receiving money in kind in return for the allocations of a site' (cited in McIntosh, 1990: p. 29). However, this practice is still common in the areas included in this study. A more recent development has been the establishment of private game farms on tribal trust land for the chiefs' personal gain, such as took place in the Mabaso tribal authority. This practice deprives communities of living and farming land and profits the chief individually (KZN violence monitor, 1994).

These incidents raise questions about the payment of Amakhosi and the amount that they are paid. This still remains inconsistent across the country. During apartheid, Amakhosi in KwaZulu were paid according to their level of education whilst those in the former Natal region were paid according to the amount of land they had under their control. The Remuneration of Traditional Leaders Act of 1995 attempted to standardise the payment of traditional leaders. However, a Constitutional court ruling in 1996 entitled KwaZulu-Natal to pass legislation that gave the province the sole power to pay traditional leaders (Goodenough, 2002). The court ruling did not, however, state that the Remuneration of

Traditional Leaders Act should fall away.⁵

The traditional courts have been recognised in a range of colonial and apartheid legislation as described above. More recently, they have also received indirect Constitutional recognition in section 166 of the 1996 Constitution as 'any other courts established or recognised by an Act of Parliament, which may include any court of a status similar to either the High Courts or the Magistrates' Courts' (see also du Plessis and Scheepers, 2000, p. 1). Although in this research magistrates' courts were sometimes used as a court of appeal, the Traditional Courts and the Judicial Function of Traditional Leaders draft Bill indicates that a customary court of appeal may be established by the Minister of Justice and Constitutional Development as recognised in customary law. The process for appeal would be to a higher customary court and, where there is no higher-level customary court to the magistrate's court. A version of this was in operation in the areas included in this study where cases were first heard by Izinduna and then were taken on appeal to the Amakhosi.

In terms of section 5 and 6 of the draft Bill, traditional courts will have jurisdiction over both civil and criminal cases with the exception of a range of cases including treason, fraud, murder, culpable homicide, public violence, rape, robbery assault and domestic violence. However, traditional leaders retain some authority in respect of marital disputes and 'shall not be precluded from engaging in a dispute resolution exercise aimed at reconciling the parties to a dispute relating to marriage' (section 8(3)).

In particular, the Bill, in section 8(1), excludes customary courts from hearing cases where:

- The claim is not determinable by customary law;
- Subject to subsection (2), where the claim of the value of any article claimed exceeds an amount determined by the Minister by notice in the Gazette;
- To determine the validity, effect or interpretation of any will;
- To dissolve any marriage;
- To determine custody or guardianship of minors; and
- To determine the liability of any person to maintain another.

Section 16 of the Bill states that 'a customary court may order that any fine, damages or other payment be paid in money or in kind, in one payment or by instalment and at a time it thinks just'. The Bill suggests that a special account be kept into which all fines should be paid. The money should be used to develop the area over which the court has jurisdiction and will be administered by the traditional authority. Members of customary courts are not permitted to take any reward for their part in the customary court.

The fine or part thereof can also be paid to the person injured by the act. If the aggrieved person accepts this then s/he cannot bring action to recover damages for the injury sustained. Community service, up to a period of three months may also be imposed rather than a fine.

Currently, in addition to their judicial role, the main function of the chiefs and their main sources of authority come from their ability to distribute land, particularly in the face of increasing demand for it (McIntosh, 1990). This will therefore be discussed in this report. Particularly in areas close to the city this can lead to corruption and abuse of power. For

example research in the 1980s suggested that nine out of 10 people in KwaZulu had paid the chief for land (Maloka, 1996). These two roles are the most important when considering the potential of the Amakhosi to be involved in crime prevention. It is therefore worth considering briefly the international literature on crime prevention as it relates to these two functions.

Rural urban linkages and the promotion of safety

The history of the system of chiefs as outlined above suggests that chiefs have historically played two key functions that are of relevance for crime and violence reduction in their communities. Firstly, their authority as local administrators has meant that they play a central role in social control of communities. This has historically included reducing community uprisings, hearing cases in court and promoting positive interactions between community members through the promotion of traditional ceremonies and other community wide activities. Much crime prevention literature suggests that the promotion of community cohesion is an important part of reducing crime and the Amakhosi could therefore play a role in crime prevention through such activities. Secondly, the Amakhosi have played a key role in the economic development of their communities. Although in the past this typically involved securing land for their people, in the present day, this includes a range of economic improvement projects such as small business support or farming projects. Each of these two crime reduction functions will be discussed in more detail below.

These two key functions are made more difficult by the close proximity of the areas in this study to the city centre. Although much of the international literature on crime in rural areas suggests that they have lower crime rates than urban areas, the exception to this rule has been for rural areas that lie on the outskirts of large cities. Typically, rural areas that are in close proximity to large urban centres seem to have a complex set of crime problems including those associated with both urban and rural areas (for example stock theft alongside high levels of burglary). Where rural areas lie on the outskirts of cities, they tend to experience higher levels of robbery, burglary and motor vehicle theft (crimes typically associated with urban areas) than rural areas that are not on the urban periphery (Lee and Ousey, 2001). In addition, Lee and Ousey (2001) found that this was particularly the case where poorer areas surround relatively wealthier areas suggesting that crime is more likely to be a result of inequality with wealthy and poor areas in close proximity rather than poverty *per se*. In South Africa it is difficult to provide statistics for only select parts of the city but [Pelser, Louw and Ntuli, \(2000\)](#) indicate in 2000 that 59.6% of the rural population had been a victim of crime in the previous five years. Two aspects on the international crime prevention literature are relevant to the traditional leaders in eThekweni metro, that is, the relationships between crime and community social relationships, and the relationship between crime and development.

Crime and social networks

The nature of social relationships has long been thought to have some influence on crime in all areas. In particular, areas where the population is stable and there are close community networks tend to have lower levels of crime, as there are more informal surveillance mechanisms within the community. Widespread rural-urban migration and the resulting pressure on single parent households that remain in rural areas are likely to reduce this social stability which can in turn result in increasing crime levels. In the areas included in

this study, it was often mentioned that people relied on the city of Durban for work and the rural areas for subsistence farming. This would result in changing population demographics with those remaining in the rural areas having the fewest opportunities for economic advancement.

Research suggests that social organisation and informal social control are most vulnerable when there are multiple forms of socio-economic disadvantage in an area such as poverty, single parent families, low levels of education (see for example Lee and Ousey, 2001). These researchers found that poverty alone was not significantly related to increased crime but when it was found alongside a high population turnover and a high number of single parents in a community it was. The kind of circular, migrant labour typical of rural areas that are in close proximity to cities is likely to create these conditions. These absences also reduce opportunities for developing relationships with other community members thereby decreasing social control and community based responses to crime. This begins to offer an explanation as to why crime may differ between two areas with similar levels of poverty (Moser, 1999). With the Amakhosi controlling access to the area and to land this could work to decrease crime by ensuring that those involved in crime do not gain access to the area or are evicted from land.

Recent research has shifted away from a focus on social factors leading to increased crime towards social factors and community characteristics that act as buffers to crime. This research is particularly useful in directing intervention programmes. High levels of social capital, often described as the 'glue that holds a community together' include a person's membership of groups and institutions, ability to access authorities such as local government and social networks with others (Castro-Leal, 1999). In particular, an increase in cultural activities such as religious participation has been associated with lower crime rates as has higher levels of family cohesiveness and higher levels of educational attainment (Glaeser and Sacerdote, 1999). Again, some of these are activities that the Amakhosi facilitate. However, although much is made of 'culture' in areas with traditional leaders, this cannot be seen in isolation from other factors that may make a community vulnerable to crime. Indeed social norms that are enforced too rigidly and for the benefit of some community members over others may render some more vulnerable to crime. For example, in a context where domestic violence is tolerated by social norms, women are rendered even more vulnerable to it.

Osgood and Chambers (2000) suggest that the factors associated with high levels of youth violence include:

- Residential instability and a high population turnover, which has been associated with increased levels of rape, aggravated assault, weapons violations and assault.
- Heterogeneity of communities, where people have different customs this can result in fear and mistrust and has been associated with increases some in violent offences.
- Family disruption (and particularly the creation of migrant labour systems or single parent families) puts a strain on carers time and resources thereby reducing their ability to supervise youth as well as to develop relationships with other community members that could assist with this. This is likely to be significantly affected by high rates of HIV and increasing numbers of child-headed households in South Africa.

These issues are clearly important to consider. However, crime prevention initiatives that emphasise these links between community relationships and crime have, at times, resulted in discriminatory practices. Crime prevention that pays attention to interpersonal relationships has tended to blame these individuals rather than considering the structural and economic conditions underlying what appear to be individual problems. For example, programmes that focus on single parents without considering South African systems (especially in rural areas) of migratory work risks locating the problem within the single parent rather than within exploitative working conditions and can further marginalise vulnerable families and individuals. Thus the promotion of community cohesion can have a positive or a negative effect on crime and justice in an area depending on the extent to which it accommodates the diverse needs of the community.

Crime and economic development

Although in South Africa there have been attempts to provide increasing development in rural areas, development has not always led to a reduction in crime. Research suggests that a prevalence of low skilled and poor quality jobs decreases mainstream labour force attachment and social control thereby increasing crime, particularly violent crime (Rephann, 1999). In many development based crime prevention programmes, the manufacturing sector has been seen as the key to crime reduction through increased economic opportunities. However, Lee and Ousey (2001) found that the size of the manufacturing company was what determined whether crime was increased or decreased as a result of more jobs having been created. They suggested that because large firms are very flexible they could afford to relocate if there are signs of economic downturn in an area. They therefore tend to invest less in a surrounding community and have fewer community ties. Small firms, on the other hand do not have such locational flexibility and tend to invest more in the safety of a community as their survival also depends on it. Often such firms play a role in holding the social fabric of a community together through their links with community institutions, community members and political leaders.

In addition to large manufacturing, regions where many people are employed in unskilled work tend to have higher crime rates (Rephann, 1999). This is particularly the case where work is cyclical or seasonal and workers are therefore kept mobile and poor. The interviews conducted for this research suggest that this is particularly the case for the communities on the outskirts of eThekweni metropolitan because of their reliance on the city for employment. Finally, tourism has been central to the economic strategies of KwaZulu-Natal. Research suggests that a boom in the tourist industry is only likely to reduce crime where it directly benefits local communities. Where this is the case, there are strong social sanctions against crimes targeting tourists because communities directly feel the economic benefits of this tourism. This requires a large degree of community participation and consultation. Many of the Amakhosi have supported tourist projects and, because of their control over land, are key stakeholders to all groups implementing tourism projects.

Thus development in eThekweni needs to take particular account of the unique aspects of the region including the economic and social linkages that exist between the rural and urban areas. This information from the international situation provides a useful background to consider the role that the traditional leaders have to play in crime prevention in the rural parts of the eThekweni metropolitan region before considering some of the more local and context specific factors that may influence crime prevention in the city.

The Amakhosi in eThekweni and their role in crime prevention

The main concern in this section of the report is the functioning of the traditional courts and the role of this court system in crime prevention and dispute resolution. It is, however, worth noting the issue of administration of land and the relationships between the Amakhosi and the councillors, as these are central sources of conflict that impact on economic development and conflict resolution in the area. These are also two issues that directly affect the legitimacy and authority of the Amakhosi and their potential crime prevention role.

Administration of land

The procedures for allocating land were fairly consistent across this study. A person needs to come to the chief with a letter from his previous chief stating that his behaviour was good and that the person paid a 'goodbye' fee to their chief, and their reason for leaving the area. Land is not given to people without a South African identity document or without a letter from a previous chief. In some cases the person had to be married to get land. The Izinduna usually allocate the land unless there is a dispute and the chief needs to get involved in the allocation of land. People paid to get a plot of land although some of the chiefs denied that it was payment. As one said:

We would not take it as money to be paid; because here in the rural areas it is money for thanksgiving to the chief that he has given me a place to stay in his land. We cannot take it as money you have to pay. We end up doing paperwork with that money, it ends up being known what it is for.

This process raises a number of concerns. Firstly it means that people from urban areas cannot access land in the area. This would work to keep the community relatively homogenous but may be a violation of rights. This certainly prevents integration and diversity across communities and reasserts the ethnic divisions, which were created under colonisation and apartheid. The process of demanding money for land is illegal (see McIntosh, 1990) and ensures that those with greater economic means have greater access to land. It also allowed for the prejudices of the chief to determine the basis for allocating land. As one Inkhosi said:

Even people coming from townships I do not like them [to have land] because they corrupt rural people.

This is particularly problematic because of the high demand for land in areas outside large urban centres by people wanting to find work in the city. These areas are therefore likely to be attractive to large, diverse numbers of people. One such example was given:

In 2001 Miss X came to the office with a young man of about 21 years old and told us she has adopted that boy and now wants a letter to go to Home Affairs to make an Identity Document for her boy [to be able to get land]. She had a letter proving that the boy is adopted and legally hers. We wrote a letter for her. When they got to home affairs they encountered problems because the boy could not even say one word in Zulu. They were chased out of the office and the Department treated us as if we continue to issue wrong information our office

will be closed. From then on we are not prepared to take anybody coming from outside the country or without a South African ID.

Several Amakhosi insisted the person applying for land must be Zulu. In this case, although the person had a legitimate claim to land through his adopted mother, the fact that he could not speak Zulu meant that land was not given to him. As mentioned earlier, economic development depends on the ability of people to access land, which is controlled by the Amakhosi.

The notion of trust land originated in colonial times when indigenous black populations were seen, by colonists, as ignorant of land ownership and not competent to have full land rights. The greatest land rights were therefore awarded to white settlers. The indigenous population was then settled on the poorest lands and their land rights were held in trust by the State. This was justified by a paternalist colonial ideology (Moyo, 2003). The result has been that South Africa has a dual and unequal system of land rights in which freehold and leasehold land rights guarantee greater security and are superior rights to customary land rights. In addition, as we have seen above, the fact that land rights were allocated based on 'ethnic' identity means that even today the different trust lands remain divided along ethnic lines. This has been a central reason why some researchers have feared that the system may result in further social divisions.

This high demand for land has also meant that there are increasing numbers of tenants renting land from those who have been allocated land. There had been complaints to the Amakhosi that tenants were not paying their rent of R100 per month and were demanding water and electricity. According to one Inkhosi, the councillors fuelled this by demanding to see the title deeds for the land thereby implying that community members did not have a legitimate claim to the land. Of course those who have land don't possess title deeds as they're held in trust. The councillors were accused of encouraging tenants not to pay because landowners do not have title deeds. Land was, therefore, a primary source of power for both chiefs and councillors and a major source of conflict between them. For both the councillors and the Amakhosi it was a means of gaining greater authority over and popularity with the community. The reliance of the community on the chiefs for land means that the chiefs have a great deal of power in areas where people depend on at least some subsistence farming.

The relationship between the Amakhosi and government

The relationship between the local ward councillors and the traditional leaders in South Africa generally is a difficult one. This is because prior to democracy, traditional leaders performed most local government functions such as basic service delivery. This was, however, done in the context of a highly centralised State and traditional leadership structures were increasingly weakened as discussed in previous sections. With democracy, South Africa opted for the entire country to be divided into electoral wards, which means that in most rural areas there are both elected ward councillors and traditional leaders. This has been especially problematic where the boundaries of the wards and the boundaries of the chiefdoms do not coincide. For example, in the eThekweni metropolitan region, Qadi has six separate pieces of land of which only three of these fall within eThekweni and Illanga has two pieces of land and only one is incorporated into eThekweni. This makes cooperation between councillors and Amakhosi even more complicated because

consultation needs to take place across a range of different chiefdoms and wards.

The primary source of conflict has been between the respective roles and functions of the ward councillors and the Amakhosi. According to the Traditional Leadership and Governance Framework Act (2003) section 4, a traditional council (which must be established by all traditional communities) has the following functions:

- Facilitating the involvement of the traditional community in the development or amendment of the integrated development plan of a municipality in whose area that community resides;
- Supporting municipalities in the identification of community needs;
- Recommending appropriate interventions to government that will contribute to the development and service delivery within the area of jurisdiction of the traditional council;
- Participating in development programmes of municipalities and of the provincial and national spheres of government;
- Promoting indigenous knowledge systems for sustainable development;
- Administering the affairs of the traditional community in accordance with custom and tradition;
- Assisting, supporting and guiding traditional leaders in the performance of their functions;
- Participating in the development of policy and legislation at local level;
- Promoting the ideals of co-operative governance, integrated development planning, sustainable development and service delivery;
- Alerting any relevant municipality to any hazard or calamity that threatens the area of jurisdiction of the traditional council in question, or the wellbeing of the people living in such area of jurisdiction; and
- Performing functions conferred by customary law, customs and statutory law consistent with the Constitution.

The Act therefore suggests that traditional leaders primarily play a supportive role to the municipalities and is, in turn, one of the key stakeholders that municipalities should consult in accordance with the principles of integrated development planning. Community development is one of the key functions for traditional leaders and this could include economic development, social development through the support of customs and social cohesion as well as improved service delivery. These are also some of the key functions of local authorities and as such a close working relationship between the two institutions is essential. Questions about who should approve development projects, who should provide the necessary resources such as land or labour, and who should be part of decisions made about the community are not entirely clear from the Act and will continue to require some negotiation.

One of the sources of disagreement between government and traditional leaders related to the development of the new Act. The views of the Amakhosi on the Traditional Leadership and Governance Framework Act varied a great deal. In particular, one Inkhosi emphasised that the most significant concern for him was the provincial laws that were in place and that would be developed in the future. These he felt would account for local conditions and be based on local cultural practices. Rumours that ANC members may entirely reject the system of traditional leaders were circulating among the Amakhosi that we interviewed.

Those who were more familiar with the Constitutional provision that the traditional leadership structures would not be removed were less likely to feel resistant to the Act.

At local level, relationships with councillors were particularly problematic and may intensify now that KwaZulu-Natal is under ANC leadership. Many of the Amakhosi pointed out, however, that it was with individual councillors that there was a problem (some of which had been telling the Amakhosi that their structures would be eliminated) rather than a problem with all councillors or with the city as a whole. They were particularly critical of the ongoing conflicts between members of Inkatha and members of the ANC. As one Inkhosi stated:

Especially in KwaZulu-Natal we have traditional leaders who are associated with politicians. So that is something that bothered us here in KwaZulu-Natal ... If the municipality is going to construct a road what must I do. If there are people who would be employed who is going to make those people available? Is it the councillor? How is the councillor going to make them available? ... We worked with our municipalities and the traditional leaders are saying 'wait wait!' The elections are coming ... the traditional leaders are not working with the municipalities [because they] might not win the elections.

For this Inkhosi, he had the authority to provide resources (in this case labour). He went on to say that:

[The] relationship between myself and the Thekwini municipality is fine. But not that fine because we have not really come closer. Maybe we are standing at 60%. We do not attend the full council until now. There are things that still need to be sorted out, you see ... But generally things are working well.

Some of the Amakhosi had given suggestions on how they should be part of council activities (such as suggesting that a traditional leader sit on the executive committee and providing offices for the Amakhosi). The council had positively received these and they were, therefore, optimistic that a good working relationship could be developed.

For others the relationship was much worse as implied by one Inkhosi who said: 'There would be bloodshed because that boy is not polite to us. I would like to ask forgiveness for calling him a boy – he is our councillor.'

Regardless of the quality of the relationships between Amakhosi and the councillors, both felt that a lack of clarity on the roles, and particularly, the authority of each affected service delivery in the area. The chiefs were especially offended by the councillors' failure to consult them before initiating development projects in the area. In one incident Inkhosi had this to say:

The problem we have with the councillors has to do with development. We wanted to build a hall. I went to the Induna and asked him we would like to build a hall in your area. The Induna showed me a place where to build the community hall. At the end when the work was supposed to start, a consultant was the one who had to do the job. I was not shown that consultant. An

engineer who examined the land was never brought to me to meet him. The constructor who had to do the job and the architect who drew the hall I never met him. After it was finished I was never told anything. What they did with me was PTO: Permission to Occupy ... There are organisation meetings held in that hall, they do everything in that hall I do not know anything about it.

The anger of this Inkhosi seems to be a result of fears that his authority in the region was being undermined and that the loyalty of the people may shift to the councillor. Therefore the frustration with divisions in KwaZulu-Natal over political affiliation meant that one Inkhosi argued that traditional leaders should play the role of civil servants rather than politicians and should be working alongside other local government officials. They argued strongly that traditional leaders should not be involved in politics. As a result, one Inkhosi was also very critical of the affiliation that Contralesa has tended to have with the ANC. They felt that removing all political affiliations would result in development for all areas rather than development according to political affiliation. As one Inkhosi said:

And if councillors call meetings, in their invitation they write their political party which is not acceptable if you're working for the people. They do not even tell us of the meetings which is very bad and humiliating to us.

Therefore, the main source of conflict between the Amakhosi and the councillors related to the legitimacy of each. For example, stories of corruption among both councillors and traditional leaders had undermined each institution and led to a situation where some councillors would not work with some traditional leaders and vice versa. Some of the Amakhosi felt the councillors were not committed to the area as they were only elected for five-year periods, and they were not meeting the promises they had made to communities. In spite of this, however, many of the Amakhosi said that relationships were improving and that the council was willing to consult with them. The problem, they felt, stemmed from people with political ambitions who had a vested interest in undermining the other institution. It was clear that each institution was eager to take credit for community development in order to boost their popularity and this often compromised development projects. As one Inkhosi stated:

There is a certain area here where a hall was built long ago. A key is still held by (the councillor). I can say I've never received it and there is a certain organisation using that hall for meetings. That is a problem because the councillor comes from an area that is led by another chief but he wants to be in control here. You must take the key to the chief. The hall belongs to the people it is not yours. Give the key to the chief and he must tell people that the hall is functioning and they can get the key from the clerk. But now he says this is my hall.

This raises the question of who represents the community and who claims to represent them. Of course both the Amakhosi and the ward councillors represent communities and both enjoy popular support. However, claims to represent communities are most often made when the individual claiming to represent has something to gain from it. This is most clear when it comes to claiming credit for development projects in an area where development is so desperately needed and when it comes to having control over community resources such as the hall. It is important to recognise that communities are diverse and their support for

representatives depends on context and other factors such as age and gender as will be discussed below. Recent research evaluating development projects has suggested that consultations with community representatives have often ignored the views of those most marginalised in the community because representatives seldom voice their views (Guijt and Shah, 1998). It is therefore necessary to avoid seeing communities as homogenous and recognise that the youth may have different access to community resources than, for example, the elderly in the community.

A further hindrance to the relationship between the councillors and the traditional leaders is that some of the traditional areas are very large. In one instance, one Inkhosi indicated that he had to work with five different councillors each of whose wards were within his area. This made cooperation even more difficult. Similarly, another Inkhosi felt that this was the primary reason that councillors were ineffective because they were working across different traditional regions.

There were also many assumptions about what government priorities are. For example some claimed that government helped those without electricity. Others claimed that government developed an area according to its political affiliation and so on. With reference to having a very beautiful court one chief stated:

So I was lucky. But we are many because the court in Chief X's place is being built. It means government is focusing on areas where there is electricity. You know because you stay in Johannesburg; you know that if you have money, you help those who are already in a better position. You do not go to those who would give you problems. You concentrate on those who are in a better position. They even installed computers. There is a computer. A computer helps when it comes to many things; CVs and all those things.

This was confirmed in the areas that were the most deprived and there were complaints that the government's priorities are not the priorities of the people. For example, one Inkhosi complained that:

There is a place where people dig holes to get water because we don't have taps to get running water. We have raised this several times with the councillor as a priority and he seems to be prioritising other things like to tar the road which is not a priority to the people. Now recently another councillor, I don't know if it's an election strategy, there's a truck that moves around to help people to dig a hole on the ground to access water closer to their homes and it only helps certain people like if you belong to a certain group like DA/IFP. That is when they help you.

Consistently water and electricity were the most important things that the Amakhosi raised and it was these basic services that they felt the local authority was not providing. In this way, the political climate and the lack of coordination between local authorities and traditional leaders compromised development in the region. Similarly, there were complaints that only certain people could use community resources. For example, one Inkhosi claimed that pensioners have been prevented from using the community hall for pension payouts because the councillor claimed they damaged the grass.

Finally, the role of the House of Traditional Leaders and their ability to engage with national government was considered to be equally problematic. For some of the Amakhosi in this study, the House was not sufficiently involved in parliamentary debates and was not sufficiently close to communities to represent their interests at parliament. Again, this was seen as a problem of chiefs who were members of the House being too involved in politics and not sufficiently engaged with community issues.

Amakhosi views on the nature of crime in eThekweni

When asking the Amakhosi about the main crime problems that they have in their areas, it was clear that they experienced a combination of very serious crime such as rape, burglary and shootings, alongside the more minor offences such as alcohol abuse and petty theft. This is in keeping with the international literature, which suggests that rural areas on the outskirts of urban centres tend to have a combination of crimes associated with the urban and rural setting. In addition, the Amakhosi made a clear link between the more minor offences and the more serious ones. As one Inkhosi said, 'the same serious crimes are a result of drugs'. Similarly, Amakhosi did recognise the importance of basic service delivery and its role in crime prevention through environmental design and emphasised lighting as an important way to reduce crime. They also recognised, for example, that the highways around some of the rural areas play a role in facilitating crimes such as car hijacking. Being able to identify these crime risks means that Amakhosi can be an important source of information and advice for the police and other crime prevention agents.

One of the primary explanations given for high crime rates was the youth in the area. On the whole the Amakhosi perceived the youth very negatively and some said that they turned to crime because they were lazy and no longer respected their community and its leaders. They said, 'it is the youth that rapes, steals and so on'. This view seemed to stem from the youth being affiliated to the ANC and not engaging much with traditional leadership structures. Several insisted that it was the councillors who were encouraging the youth to disrespect the chiefs and were using them to improve their support base. For example, one chief said:

People who are grown up, they still respect the chief. They still inform the chief in a good way. Even the Izinduna are still informing the chiefs in a good way. It's just the youth which despises traditional leadership. I do not want to hide that. The youth no. Maybe its one or two youths who still like the traditional leadership. Most of them do not want to hear a thing.

Another stated:

The youth in most cases are being influenced by the metro councillor not to respect Amakhosi. The metro councillors want the institution of Amakhosi to disappear. They see Amakhosi as a threat to their ambition of governing the place. They are using the youth to achieve this objective. When I call ibutho lezinsizwa (youth leadership) to a meeting they don't attend as they used to before these councillors were introduced.

In relation to crime prevention, the Amakhosi almost entirely relied on the police. Every Inkhosi identified more policing as central to improving safety. Although many of the

Amakhosi had very positive things to say about the police, all acknowledged that they were under-resourced and there were numerous examples where the police had simply not been able to assist. One Inkhosi stated:

It's great because they are many instances where they helped me ... [For example] if a corpse has been found and I contact them here at the dam, X dam then they contact those who dive or any police who deal with water. They then collect the corpse ... or if a person has died [not] a day goes by without them coming to take the corpse. Maybe if there is an instance whereby a young man pointed a gun at people they'll come. These days they come twice a week to see how I am doing, what problems I am experiencing.

However, another said that:

Although the police play a certain role in crime prevention it is not satisfying because sometimes when you call the station they tell you that the van is out and they cannot attend to your problem immediately. We have to wait for the van; sometimes they come the following day when we're desperate for their help. We do have policing forums that engage with the police but we find that although we [raise] our issues police always complain that they do not have enough vans to visit communities and cover all the community's needs.

The lack of resources clearly affects some communities more than others but the general attitude towards the police was that they were as helpful as possible. However, there was still some lack of communication as the Amakhosi often did not know of police plans such as plans to build satellite police stations or making changes to station locations. The police stations were also not easily accessible and one Inkhosi said that it took two taxis to reach the nearest police station.

Instead of seeing crime prevention as the responsibility of the police, many of the Amakhosi attributed high crime rates to unemployment of the youth and a lack of recreational facilities for them. Their own role in the functioning of courts and the promotion of community reconciliation was seldom recognised as crime prevention and this may suggest a gap where training would be useful. In addition, in one case the Inkhosi had made an agreement with South African Breweries to limit the number of shebeens they supplied because of the association of some shebeens with violence. Recognising Amakhosi as central to reducing violence and as key to providing other stakeholders with information about crime hotspots may be a central task for local government in the future.

In addition, some Amakhosi retained the practice of having the chiefs' police. Their functions were to issue summonses to appear at the chiefs' court and to watch over public events such as sports matches and weddings where fights could break out. Those who had kept this system acknowledged that there was resistance to it from government but argued that it was necessary given the lack of police capacity in the area.

Court functioning

The structure and functions of the customary courts varied in the areas considered for this study. In all the areas traditional courts were operating. Typically the court met once a week. Some courts sat during weekends to accommodate people's work schedules. The

Izinduna generally heard disputes first and the Amakhosi courts were used as a court of appeal from the Izinduna court. Izinduna are not paid and it was therefore especially important that some of the courts operated on weekends as some of the Izinduna work in the city. According to those involved in this study, any party to a dispute could take the matter to the Inkhosi if they were not satisfied with the decision of the Izinduna.

The Traditional Courts and the Judicial Function of Traditional Leaders draft Bill (2003) emphasises equal representation of women in the courts in the awareness that they have typically only consisted of men as well as the right of women to attend and participate in open court. They hear both civil and criminal cases although their jurisdiction over both is very likely to be limited, as described earlier. The Bill currently simply states that the procedures followed will be the customary law of procedure and evidence. The role of the Izinduna is not explicitly mentioned in the Bill which, given the central role that the Izinduna had in the courts in eThekweni, may be a significant shortcoming of the Bill.

According to our research, the Izinduna were the first point of access for community members on a range of matters. They mediated conflicts, allocated land and advised the chief in court. The number of Izinduna varied a great deal with some chiefs having only four and others having over thirty. This depended on the size of the area as well the extent to which the Inkhosi delegated functions to the Izinduna. Given the central role of the Izinduna, many chiefs' felt that government should pay the Izinduna. However, some felt that chiefs might be jealous if Izinduna were paid and that it was in fact the chiefs who had prevented Izinduna from being paid to avoid them becoming too wealthy.

Each Induna had councillors to assist with their tasks. The view that the Amakhosi held about the system of using councillors varied. Some chiefs suggested that councillors were not really necessary. On the other hand, some argued that councillors were important to avoid the Izinduna being authoritarian and taking decisions on their own, as councillors were often elected by the community and the Induna was required to take their advice into consideration. This is not unlike the role that the Izinduna play in respect of the chief.

The conflicts heard in the Izinduna and the chiefs' courts included family problems, arguments between neighbours, the payment of damages for pregnancy,⁶ one person defaming another, cattle damaging another person's garden, disputes over land boundaries and, in some cases, assault. However, the crimes that each Inkhosi dealt with varied a great deal. Some Amakhosi stated that it was their role to hear smaller cases and to prevent them escalating into much bigger ones. For others they felt that they should not interfere until cases were more serious. Typically the Amakhosi indicated that cases such as murder, rape and domestic violence were handed over to the police although it would seem that some chiefs hear cases of domestic violence especially where they considered the case to be 'less serious'. In addition, some were hearing maintenance cases. One major problem identified was people's ability to access the magistrate's court. Because the magistrate's court was too far and did not make allowances for a restorative approach to justice many people preferred to use the traditional court structure.

The fines given by the courts ranged between R500 and R600 in one case and between R50 and R200 in others. Again this indicates a great deal of variability in the procedures of different cases. Fines were also often in the form of cattle, or some other practical form of

reparation. The Izinduna courts also imposed fines although their emphasis was more on reconciliation and conflict resolution. The money from fines was put into a fund and was used to pay the chief, the secretary and other members of the court. As one Inkhosi said:

It is intended for the Chief to have something at the end of the month. The clerk must have something. Even those who are cleaning and the guards ... but there isn't enough money in the coffers.

This approach of paying fines to the chief is in keeping with the suggestions in the draft Bill on the Traditional Courts and the Judicial Function of Traditional Leaders which states in section 17(1) that 'A customary court must keep a special account into which all fines paid to the court must be deposited'. However, it goes on to state that '[M]onies from an account established under subsection (1) must be used for the development of the area over which the court has jurisdiction'. It later states in section 20 that members of customary courts may not receive any reward for their participation in the court. If the Bill is enacted in this form, practices such as the above will need to be monitored. This may be particularly complex where payment has been made in the form of livestock or crops.

The approach of Amakhosi taking part of the money paid as fines was also not an approach that was popular with all the Amakhosi. One chief in particular spoke out against this practice. He was critical of Amakhosi who see the courts as a way to profit. Another of the key problems with the court system as it currently functions is that because the fine often goes into a fund, the restorative aspect of the traditional courts is undermined because the victim is not compensated directly, although it is possible that there could be a payment made to both the Inkhosi and the victim.

You know the origin of cases started with old chiefs, our fathers' fathers'. They would come and then burn an *imphepho* [incense] and request that there should be more cases. Why? Because if he fines a person a goat it would go to his kraal; if he fines me a cow it goes to his kraal ... so the cases were a way to ensure that the chief's would have more food ... I am not a chief who eats because he dealt with a case. The government is paying me The government does not pay me because I dealt with cases, it pays me so that I should see to it that the court is being used, there is development, and all those things ... cases are not a main thing for me.

The extract above indicates that some of the Amakhosi did not believe that payments made to the chief were used to develop the community but rather went to paying those involved in the court hearing. This is problematic given the recent national and provincial government decisions about standardising and increasing the payment of traditional leaders.

⁷ As salaried officials, accepting other forms of payment, for example for hearing cases or allocating land would be illegal. Changing this practice is, however, likely to be difficult given its long history and general acceptability among the Amakhosi and the community. Inkhosi Holomisa has explicitly rejected the notion that the Amakhosi should be paid according to specific functions although this remains contested and some have argued that traditionally the Amakhosi are paid by the people and this practice should continue.

Access to the courts also varied significantly in the areas included in this study. For many

the key advantage of traditional courts was that they were easily accessible to deal with a range of everyday conflicts that would not always be considered sufficiently seriously by the magistrate's court. One of the main advantages that have been given for the traditional courts system has been that the entire community can attend and give input into the case thus promoting community understanding and conflict resolution. However, it was clear from our observations and from the interviews that attendance at court varied a great deal and the numbers of court participants varied between about five and about twenty. Either way, it would seem that particular groups (such as the youth or women) were not taking part in the court processes. In the case of youth, this may reflect a general disillusionment with the traditional leadership. This results in youth being further marginalised from their community, as there are few alternative forms of justice in these areas. Also, access to the court depended on the particular procedures of each court. For example, in one case the chief indicated that people had to pay (about R30) to have their case heard which is likely to reduce the level of access that the poorest community members have to traditional courts as well as violating the Remuneration of Traditional Leaders Act no 29 of 1995.

In spite of this, all of the Amakhosi emphasised the need to be available to the community if the system of traditional leadership was to function effectively. Many had a day or two when they made themselves available in their office to hear complaints against other community members or against themselves. According to one respondent the most important thing for a traditional leader is to be available to the people:

Sometimes you can wait for two weeks to see a king [or chief]. Sometimes you come and you're told that he went to Ulundi; he went to a workshop; he went to a second wife ... So I'm at work here.

Traditional courts and community reconciliation

According to Marshall (1998), restorative justice is an approach 'whereby parties with a stake in a specific offence resolve collectively how to deal with the aftermath of the offence and its implications for the future' (p.1). It involves restoration of the victim, the offender and the damage caused by the crime to the community. Reparation may be in the form of:

- Financial payments,
- work for the victim,
- work for a community cause selected by the victim or
- return of lost/stolen items
- compensation in kind
- any mixture of these.

Reparation is clearly in practice in the traditional courts as punishments often include a combination of a fine and restoration to the victim such as giving them a portion of the vegetables they have produced in a case where vegetables were being grown on another person's land. The restorative approach also allows for discussion of the future consequences of the offence and so is particularly useful in reaching an agreement, for example, on how the parties will behave when they meet one another again or what further contact they will have. It is, therefore, useful in a context where the conflict is within the community and the parties to the conflict are likely to continue to interact in the future. The court observations suggest that the cases people bring are ones where they feel another

community member has disrespected them and in addressing such issues, the court plays a role in building community relationships and preventing smaller conflict from escalating.

One of the key principles of restorative justice is that it rests on voluntary cooperation. This becomes a problem where there are members of the community that do not buy into the process. For example, the lack of interest by some young people in the courts may mean that conflicts between younger members of the community may not receive any attention. Again the problem with this is the lack of alternative arenas for conflict resolution.

Mediation is one aspect of restorative justice that was emphasised by the Amakhosi. As many of them are already practicing aspects of this, additional training in restorative justice principles would be useful in recognising and enhancing this aspect of Ubukhosi. In most cases the Amakhosi identified their role as primarily a peace building and reconciliation one. For example one Inkhosi described the process he follows with cases:

If you've quarrelled maybe two weeks or three ago. I [will] ask if they've had a chance to resolve it? And they say no. And I ask him 'as you're laying a charge against so and so would you like a chance to resolve it?' and then he says yes. You see? So you cannot just dismiss them, you have to ask the complainant ... Maybe there is no problem and we can resolve it. We get them into the office. The Induna comes accompanies them and they resolve it. In most cases you find they take it further [to the magistrate]. I get happy when they do this because I am not a magistrate. I am a 'symbol of unity'. I can try to deal with cases if there is a need. But [only] if there is a case whereby I can see that there could be reconciliation. I do not have a problem there. Because if I say 'your fine is two goats of I'll fine you R500' that does not build the nation. You have to build the nation so that people can be in good terms. Whoever made a mistake must see it so that there could be forgiveness.

For this Inkhosi, having fewer cases in the chief's court was taken as a good sign as it meant that issues were being resolved by the Izinduna. He also emphasised the importance of forgiveness and reconciliation in a context where the parties to a conflict are likely to continue to interact in the community. In addition to this, however, reconciliation, or a more restorative approach, was seen to be effective in preventing future conflict and was considered to be more efficient:

There would be lots of arguments [at a trial] but if you could take the two and lock them up in the office and talk to them. *Hauw!* 30 minutes is too much.

This belief that restorative justice is more expedient is somewhat problematic as, in many cases, meaningful reconciliation and restoration may be a great deal more time consuming than retributive justice. Indeed, the case studies below show some of this variation in how the Amakhosi implement principles of restorative justice as opposed to a more punitive approach. In spite of this, there was quite a sophisticated understanding of the process of restorative justice by some Amakhosi and, in particular, the role of a mediator in the process. Incorporating other aspects of restorative justice (such as community support for the victim) may further enhance their reconciliatory role. The restorative approach was especially popular at the Izinduna court and only serious conflicts or those that had not been adequately resolved went to the Amakhosi court. One Inkhosi explained the process in

this way:

... If there are five issues, you'd find that of those five issues they would reach a consensus on three issues. That is because they've never had a chance to resolve those issues ... So we have even started the Izinduna (implementing mediation). If Zondi and Bhengu have problems, you go to them and tell them I am here to unite you. I am trying to build a platform where you could discuss. I am not part of the problem. The problem is between you two and the solution will be reached by you two. I am just here to help you.

This Inkhosi went on to emphasise that this was a better system than relying on court cases as had been the case for previous generations of chiefs. This indicates the willingness, expressed by many of the Amakhosi, to recognise the flexibility of the system and change to meet the needs of the community. In this regard, many of the Amakhosi requested training to help them better deal with their role in the courts and as community mediators. This is a positive inroad for training as it can be integrated into the ways in which the Amakhosi already work and can work to highlight the important role they are already playing in the reduction of crime.

Although the above extracts are exemplary of those Amakhosi that saw their role as primarily one of community reconciliation, not all the Amakhosi or Izinduna operated their courts in this manner. Many simply fined offenders with the fine distributed among those involved in the court case as described earlier. Others were quite authoritative in imposing a punishment rather than the parties jointly reaching agreement on it. The extent to which restorative justice was a principle of court functioning, therefore, varied a great deal.

Traditional courts and Human Rights

The rights of marginalised groups were particularly contentious issues in the interviews that were conducted. As mentioned above, the relationships between the Amakhosi and the youth were seldom good and Amakhosi complained that youth were not interested in reporting to them or participating in the courts and other aspects of community life. When asked if there was any kind of youth forum one Inkhosi said:

The forum is no longer operational. I used to meet with the youth leadership of the area on a weekly basis to hear from them because they were monitoring gardens and shops at night. Now they seem to be reporting to the councillor and I seldom see them.

In addition, almost all the Amakhosi were very resistant to the idea of having youth representatives or women's representatives in court. They felt that liberalising the practices and simply stating that all people were now free to participate was sufficient. Indeed many felt that having structures to ensure that youth or women could have their views represented would divide the community. As one Inkhosi said:

I do not have a person representing a certain group of people. My committee represents all people. Why should I have youth representatives? I am Inkhosi for all the people and I do not want to form groups.

However, it was clear from the court observations that this was not sufficient and a more pro-active approach would be needed before some people felt able to participate in court proceedings. However, in one instance where there had been particular attempts to include youth such as specifying on notices that they could attend or creating youth meetings, these had failed. This suggests that there needs to be a broader process of re-building relationships between the youth and the rest of the community and ensuring that traditional structures have credibility with the youth. By way of further example, following a case of failing to pay damages for pregnancy, the researcher asked some of the women why they did not talk during the proceedings. The reason women gave was that culturally they are not allowed to participate in issues that relate to lobola⁸ and marriage. One Inkhosi interviewed said that women don't usually attend the court unless the case 'involved women'. His reason for this was that women were still 'traditional' and 'afraid to sit with men'. This significantly undermines one of the key advantages that traditional courts are often thought to have which is that they are not intimidating and that they allow for open discussion by the whole community. Similarly it was suggested to the researcher at one point that she was too young to be questioning the men involved in the case implying that both women and men do not enjoy full and equal participation in the court proceedings and that divisions within the community are entrenched in spite of the claim that the Amakhosi represent all the community. This shows the danger of referring to the community as if it were homogenous. What is a good system for some members of the community can be detrimental to others. One clear example of this was given in relation to domestic violence:

Cases like that [domestic violence] are very difficult because the man will say she is not respecting me that is why I'm beating her up and the men in the judicial committee will side with the man saying he paid lobola for her he can do what he pleases.

In addition, there is cause for concern where the courts hear cases that are not crimes but relate to issues of social control. Although strong social norms can work to prevent crime, they can also lead to the abuse of human rights. Vigilante action is one example of this. In this research the clearest example of this was virginity testing and court cases for pregnancy. It has been argued that these practices deny young girls their sexual and reproductive rights. The Amakhosi who had stopped practicing virginity testing said that they had done so because of complaints that it 'embarrassed' the girls and was an invasion of their privacy. The Amakhosi who did support virginity testing did so because they believed it could reduce HIV infection and unplanned pregnancy. One Chief had this to say:

The procedure teaches girls how to behave and respect their bodies. It used to start at the age of fifteen upwards but now because of the fast life that we are living it starts at the age of seven. This procedure helps girls to know that they are alive, alive in all the aspects of their life. This testing reduces the rate of unplanned pregnancy. However, metro councillors criticise this procedure. They say that it is violating the rights of girls, but they do not look on the positive side which is that of avoiding pregnancy or sexual activities before marriage.

His emphasis on 'teaching girls how to behave' clearly suggests a double standard in the sexual rights of boys and girls and the interviews indicate that there had been a great deal of resistance from women in the community to the practice. Practices such as these place the

responsibility for pregnancy and sexually transmitted diseases onto the woman and limit her movements and opportunities by seeing them as a threat to social norms. This is even more startling where it is implied that a young girl of seven should be responsible for the prevention of pregnancy and sexually transmitted disease at such an early age. In one case where there was a choice whether or not to be tested, this choice was given to the parents not the girl. Similarly in another example the Inkhosi stated that:

Virginity testing is very important but to me it is not that important. I want girls to be educated, raising awareness. Telling girls how precious they are, what would happen to them if they engage themselves in sex, how it is important for them to wait, why they should be at home at all times, not in the streets like their brothers.

It is well documented by women's groups and feminist researchers how practices that infringe on the equal participation and opportunities of women have been justified as being in their interests. The extract above is similar in this regard – virginity testing, a practice which many rural women's groups have strongly argued against is said to be of benefit to women by improving their safety. It is this kind of legitimating rhetoric that McClintock (1990) refers to as misogyny in the guise of chivalry. In this example social norms are used to place responsibility for pregnancy on the woman's shoulders and to legitimise restricting the activities of girls. Walker (1994) argued that the Amakhosi used romanticised notions of 'tradition', 'custom' and 'African culture' to legitimate patriarchal institutions. It has been well argued (see McClintock, 1990, Walker, 1994) that what is today cast as an unchanging cultural practice is rather a result of contested versions of history. The extent to which the current practices by the Amakhosi have been moulded and shaped within a particular context is clear from the previous discussion on the history of the institution of Ubukhosi. Having been reshaped in the past it can be reshaped once more to value gender equality. Walker (1994) states that 'both "tradition" and "custom" have to be critically deconstructed, so that rural policy is not developed on the basis of the ahistorical, partisan and essentially self-serving use that many male traditionalists make of these emotive terms' (p. 349).

Of course it is true that many women have supported such practices and virginity testing is usually carried out by women. This highlights the need to avoid a homogenous definition of women and rather consider how different women (such as older or younger women) may benefit and be disadvantaged at different times by patriarchal structures of Ubukhosi. It is also necessary to consider what women have to lose by resisting such practices especially given the power that the Amakhosi have to control access to land.

The following case studies highlight some of the points discussed in the above sections further.

Case study 1: Land dispute

This case was a land dispute. The complaint was heard within three days of being lodged. 12 men and three women attended the court. Most were over 40 years old. The secretary kept records of the court proceedings. The Induna and his two councillors heard the case. The councillors did most of the mediation. The complainant X was 40 years old and he had opened a case about land boundaries between him and his neighbour Y. He claimed that Y has planted vegetables on part of his land. When he demanded that Y remove these seeds, Y

refused and said that the part he had planted on belonged to him. The following day X went to remove the seeds. When Y saw this he insulted the victim and took sticks outside to fight with X. Violence broke out between the two families. The two older men were also about to fight when a neighbour intervened. This neighbour reported the matter to the Induna.

X was asked to explain his side first. He explained it as above. Y was then asked to give his account. He said that this was not the first time that he had used this piece of land and he felt that the only reason X was raising this issue now was because he had been successful and produced enough vegetables to sell to the village. He said that the manner in which X spoke to him was disrespectful and he had been called a thief who stole the land of his children. The councillor asked Y whom the land belonged to. Y said that it had been allocated to X but X did not use it and Y had been using it for the past two years. He acknowledged that he should have asked X before planting there. He said that it was X's disrespectful approach that had made him angry and had made him say that the land belonged to him. He said that he had thought X would apologise afterwards and the matter would then be resolved but this did not happen. Instead he found the garden vandalised and so he went to X with sticks to fight. The councillor asked X why he had been so disrespectful. X replied that Y had disrespected him by using his land. The councillor asked Y and X whether they would like to take the case further to the Inkhosi. They both said that they would accept the outcome.

The Induna then spoke for the first time and stated that both parties had been wrong for the way they had treated one another and that they should repair their relationship before the house. He then said to Y that no person should use another's land without permission and given that Y confirmed using the land for two years, X should be compensated for those years. It will then be up to X to decide whether Y can use the land in the future. The Inkhosi said that the compensation should be half the vegetables grown on that piece of land for two years. He asked Y whether he would be able to give this compensation. Y accepted and asked the Induna for six months to pay this since he has made R700 from the use of that land and would be able to pay half of this within six months. The Induna asked X if this time frame was acceptable to him and X agreed. X said that he wanted to mend the relationship with Y as they were neighbours. They both shook hands. In this case the members of the house did not speak.

Following the court case both men indicated to the researchers that they were satisfied with the outcome of the case. They said that they use the court because it is the only court in the area and to attend the formal court one would need transport. Also X said that the formal court would not address his interests. Y said that if he were to appeal it would be to the Inkhosi's court but that he would not be doing so. The case lasted for about an hour.

Case Study 2: Failing to pay damages for pregnancy

This case was for failing to pay damages for pregnancy. About 30 people attended the session of which seven were women. They were between 30 and 60 years old. The pregnant woman was in her twenties and was there with her mother and four other women who are neighbours. The Induna heard the case and his councillor did the mediating. The secretary took the minutes.

In this case, X had a relationship with Y and Y fell pregnant during this relationship. Y's

parents followed the usual procedure of reporting the matter to Xs parents so that the payment of damages could be facilitated. The parents of X were not receptive to Y's parents. Y's father therefore brought the matter to court. Y's father was asked to give his version of events. He said that Y had been sick often over the past two months and had not been able to help in the garden. She went to an Inyanga⁹ but it was not until another two months passed that she told her mother she was pregnant. When she was asked who had done this she told them it was X. When they went to the home of X to inform them Xs parents did not listen but left Y's father in the house and went to look at his cattle in the kraal. Although Y's father waited for Xs father to return he did not. After this, Y's father came to the court to open the case. He said that all he wanted was for the family of X to pay the damages. The councillor asked Y's father if this was true. He said that it was but that Xs father had come to the house very early when he was about to leave to take care of the cattle. X was not at home and he saw no reason to discuss the matter if X was not present. He said that X was a grown man and it was for him to deal with the matter. The councillor asked him why he did not simply tell Y's father this. Xs father said that he was angry at the time but at X not at Y's father because X had embarrassed him in front of the community. Xs father apologised to Y's father for having been disrespectful. The Induna asked X to stand up. He asked X if he knows Y and if he did impregnate her. X said he did. He said that he wanted to pay the damages but the small business he has started has not been profitable. As soon as the business starts to be profitable he will pay the damages. Induna asked what type of business it was and X replied that it was a craft business making shields and spears for tourists. Induna asked how long X had the business and X said six months. Induna asked what X would do if his business were profitable. X suggested that he return to the court in six months to review the situation. Induna asked Y's father how he felt about this. He said that he would not mind this provided X takes care of Y until the baby is born. Y's father said that he understood Xs difficulty but that he wanted the two families to meet and to do a cleansing ceremony to prepare for the baby. He also wants his name restored in the community. The father of X agreed to provide a goat for the ceremony and the Induna said that his councillor would attend this ceremony on his behalf.

The father's of both X and Y said that they were satisfied with the outcome of the case. In this case the house did not participate much and the girl who was pregnant did not take part in the negotiations at all. When Y was asked how she felt about the proceedings she said that this was the usual procedure for these types of cases.

Case Study 3: Damage to property

This was a case of malicious damage to property. It was heard eight days after the complaint was lodged. About 20 people attended the session and they were over the age of 50 years. Only two women attended and these women were family members of the victim. The Induna and two councillors who are elected by the community heard the case. Both councillors facilitated this session. The complainant, X reported that Y's cattle trespassed onto his land and ate almost half of his vegetables. He was therefore demanding compensation from Y. Y said that X should have fenced his garden and then the cattle would not have eaten the vegetables. He therefore felt X was equally to blame for what happened. X was asked to give his version of events and he said that when he came home in the evening he saw Y's cattle in his garden. The son of Y who was watching the cattle was not there. After steering the cattle out of his garden he went to Y to ask for compensation and show him the damage to the vegetables. Y told him that if he had fenced

the garden this would have been avoided. The councillor asked Y if this was true. Y said it was and that they had been told by Inkhosi to fence their gardens to avoid these kinds of events. He said that he had put a fence around his garden. The councillor said that they were not there to discuss whether the garden was fenced or not and that if Y agrees that his cattle damaged X's garden then he should have compensated X when he was asked to. The other councillor asked if anyone in the house would like to speak on the matter. One man stood up and said that these two men should have resolved the matter at home rather than bringing it to the court. He also said that Y was disrespectful of X and should compensate him and not waste the court's time. The house agreed. The Induna asked whether Y was in opposition to the view of the house. He also asked whether he wanted to take the matter to Inkhosi. Y said that he would accept the ruling from the house. The Induna then asked X what he wants as compensation. X replied that he wants his spinach and cabbages replaced. Y said that he did have cabbages and spinach in his garden. Induna told Y to give half of this to X when it was harvested. In this case the members of the community attending took part in the outcome of the case.

After the case, X said that he was happy with the outcome. He said that the traditional court is friendlier than the formal courts and respects traditional way of life by allowing all people to speak. He said that the magistrate's court would not have helped him because it would not have replaced his loss and may have sent Y to jail. This would leave his family uncared for. Y said appealing would not help because had the case gone to Inkhosi he may have been fined cattle and this would have been worse. He said that the magistrate's court was too far for him to go to and that it did not accommodate indigenous cultural values. He said that the magistrate's courts would only create more hatred between people.

Comments on the case studies

Each of these case studies highlights a number of the issues mentioned previously. Firstly, mostly older people attended the hearings. In some cases it was only the elderly. The integration of the youth into these structures is likely to remain a challenge but, given the lack of alternative structures for conflict resolution, is important. Similarly, although all the Amakhosi indicated that women were now permitted to participate in court proceedings, very few women attended and even fewer participated. Again this needs to be addressed if the courts are to begin to address women's needs.

Perhaps the major advantage of these proceedings is that the cases were heard extremely quickly (within three to eight days) and were dealt with efficiently. There were also major variations in the court proceedings. In particular they varied according to the emphasis they placed on reconciliation as opposed to punishment. Some of the Izinduna gave participants far less input into the nature of the punishment or restoration and there was less room to negotiate the terms of the restoration. Similarly, some involved the house far more than others. From the few observations made of the courts people did accept the outcome of the courts and no one indicated that they would appeal to the chief's court.

The councillors are clearly central to the functioning of the courts and in each case it was them that played the role of mediator. This suggests that training offered on restorative justice principles should include them. Also, an important benefit of the court system is that they deal with cases in a holistic manner and do not only deal with the parts of the case that technically constitute a punishable offence. For example, they may also address one person

acting disrespectfully towards another. In this way the emphasis is on reducing conflict in a broad sense and not simply dealing with crime after it takes place.

The relationships between courts

The relationship of the traditional courts to the magistrates' courts is crucial if the system of appeal envisaged in the Bill is to be successful. However, for many, the magistrate's courts were far from where they lived and few cases were reported to them. Because people had historically not made use of the magistrate's courts, there was not always a relationship between chiefs and magistrates. For many, the level of cooperation depended on the efforts of individuals within the court and individual Amakhosi. Some of the Amakhosi indicated the need for a workshop with magistrates to clarify their roles and make sure the system of appeal is clear. However, in some cases the Amakhosi sent a report to the magistrate's court for every case that they heard. In these cases, Amakhosi were often called to the court to assist. In spite of there being a fairly good relationship between the traditional courts and the magistrate's courts, many of the Amakhosi called for more training on the kinds of cases they could hear, how they could work better with the magistrate's court and the legislation that regulates their activities.

The Traditional Courts and Judicial Function of Traditional Leaders draft Bill (2003) emphasises the need for record keeping in the traditional courts. In addition it gives a great deal of detail as to what should be incorporated in these records. If the Bill is passed in its current form, then this aspect of the Bill will need to be widely circulated to ensure that cases can be easily transferred to the magistrate's court. Impressions from this research suggest that although records are kept they may lack the detail required by the magistrate's court.

One of the most significant concerns raised in the interviews was the fact that the Izinduna were not paid for their functions. The functions of the Izinduna were widespread and included sitting on the council, resolving disputes and allocating land. The fact that they were not paid meant many of them held jobs in the city and it was difficult, for example, to get the full council to hear a case as they could not leave their jobs. It would seem that the lack of payment for Izinduna means that they are increasingly removed from their communities by living in the cities, which has the potential to undermine their credibility as well as making their functions more difficult. However, one Inkhosi indicated that this would be complex as the number of Izinduna in an area depended very much on the chief's approach to community management. Some chiefs delegated to only a few Izinduna whereas others had a very large numbers of Izinduna reporting to them.

Conclusion

Perhaps the most important finding of this research is that there has always been flexibility and variation in the system of traditional leadership. In spite of this, the changes made since colonisation have been especially relevant to the current role of traditional leaders. The most significant changes to take place throughout colonisation and apartheid have been a decline in the judicial powers of the Amakhosi and an increasing rigidity in customary law and traditional practice. Of course, significant aspects of traditional governance have remained and some aspects of the Amakhosi functions have retained greater credibility than others. There has been a great deal of resistance to change by some Amakhosi but this

needs to take into account the changes that have already taken place within the system.

However, these debates cannot simply be about whether the system of traditional leadership should remain or not. For many of the communities included in this study, there are no alternative forms of conflict resolution or justice. Thus the central challenges are how to make the existing structures more accountable to communities and more representative of all sectors of the community. The Traditional Leadership and Governance Framework Act is an important first step in this direction. However, it is unlikely to make significant changes to practice on the ground for some time. There is therefore a role for NGOs and local government to work with the systems of traditional leadership to ensure that their strengths are incorporated into crime prevention practice and their practice is within democratic principles. Addressing inequality within the community and ensuring that the actions of traditional leaders do not further entrench these inequalities is an important challenge for the future.

In particular, the important role that the Amakhosi and Izinduna play in community reconciliation and their restorative approach to justice is their major strength. This restorative approach means that they are in touch with the needs of a community that rely on a combination of subsistence farming and waged labour and can impose sentences that are appropriate to this way of life. Also, by addressing conflicts that are not always crimes, they play a role in preventing the escalation of crime and violence in a way that other courts are unable to do.

However, traditional leaders in the eThekweni metropolitan region have had to deal with the complexities of being on the border of a large urban centre. This has created increasing changes in the community and is likely to have been one of the reasons that youth in this project did not engage much with the traditional governance structures. Increasing interaction between crime prevention agencies in the city, the magistrate's courts, the police and the Amakhosi and Izinduna is an important step in ensuring that the full potential of the Amakhosi to work towards crime prevention is realised. Perhaps most significantly, the relationships between local councillors and Amakhosi need to be improved. Although there has been progress in this area, political alliances and the potential overlap of their functions means that conflict persists. The Traditional Leadership and Governance Framework Act does provide an initial framework for clarifying the roles of each and its implementation can go a long way towards reducing this conflict.

Recommendations

Regarding crime in general

- Training for the Amakhosi on the range of activities that constitute crime prevention would be useful in helping to identify how they are already engaged in crime prevention and how they can enhance their role in it.
- The citywide crime prevention strategy should include specific reference to the rural areas and the traditional leaders. In particular, there is a need to consider the different types of crime that are taking place in the rural parts of the metropolitan region and the possible responses that may be appropriate. This is especially important given the emphasis on visible policing for the city centre as this strategy

is unlikely to extend to the rural areas because of lack of personnel.

- Building relationships with other stakeholders is essential if the conflicts that have been taking place in eThekweni are not going to continue to affect development and service delivery in the area. The most pressing relationship that needs attention is that between the councillors and the Amakhosi. The general levels of confidence that the Amakhosi expressed in the rest of the council means that the council is in a good position to facilitate this. Given the history of this conflict between councillors and traditional leaders, there may be a need for a dispute resolution system where complaints can be addressed.
- In order to facilitate relationship building in general, regular meetings between key crime prevention stakeholders, including the traditional leaders could be helpful. Stakeholders would include magistrates, SAPS, Durban Metropolitan Police among others.

Regarding court functioning

- The restorative justice role of the traditional leaders is a key strength and should be enhanced. This could be through additional training, in particular on mediation and conflict resolution skills.
- The lack of consistency in court functioning could be reduced if there were regular meetings between the Amakhosi and, particularly, the Izinduna in the region to discuss approaches to managing cases and effective ways to resolve conflict.
- The marginalisation of key groups such as the youth and women is a primary problem with the way in which the courts currently function. A system for monitoring this marginalisation and possibly human rights abuses may be necessary as would a system for monitoring their engagement and satisfaction with the functioning of the courts. Ensuring that these groups have the option to use the magistrates' courts may be a first step in ensuring access to justice although, as mentioned in the report this is complicated by the cost of travelling to magistrates' courts and their distance from the rural areas.
- Similarly, a system for increasing the knowledge of stakeholders (such as Amakhosi, Izinduna, Councillors, police etc) about new legislative developments may be needed alongside a system of monitoring adherence to it. In particular, ensuring that women are represented on council and the youth are participating in the court functioning will go some way towards making the system more credible. This could be made a central task of the House of Traditional Leaders, as they are likely to have direct access to parliament.

Notes:

¹ Ubukhosi refers to the institution of traditional leadership whereas Amakhosi refers to the chiefs themselves.

² Izinduna refer to the headmen that assist the Amakhosi in carrying out their functions.

³ Kgotla can be defined as a community advisory meeting. The more direct translation is a meeting place.

⁴ Inkatha of the Nation of the Zulu's.

⁵ Case number CCT1/96 of the 5th of July 1996, *In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995*. The court ruled that: 'all provincial laws are liable to be overridden by an Act of Parliament within the categories referred to in s126(3). The question whether the amendments, if enacted, would be inconsistent with the national Remuneration of Traditional Leaders Act, and if so, whether in terms of s126(3) they would prevail over, or be subordinate to such legislation, were not relevant to the Constitutionality of the amendments and therefore the Court left these questions open'.

⁶ These cases typically involved pregnancy before marriage and both the man and the woman would be required to appear before the court. An example is given in case study 2.

⁷ In 2001 President Mbeki announced that traditional leaders would receive R81,361 per annum (for more detail see Goodenough, 2002).

⁸ Lobola refers to bridewealth which may be paid by the man's family in cattle and/or money.

⁹ An Inyanga is a traditional healer.

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Zulu Chiefs and Headman's Act no 8 of 1974

Appendix 1: Interview Schedule

Crime (General)

- What are the main crimes in the area?
- Who do they think are the main perpetrators and victims?

- What should be done about crime? What do they think are the most effective solutions to crime in the rural areas?
- What are their views on the crime prevention activities of various other stakeholders e.g. metro police, SAPS or NGOs
- What is your role in crime prevention in the area?

Youth

- How would the Amakhosi describe their relationship with the youth? Are youth involved in projects / activities of the traditional authority? Or are there other forums for youth to raise their needs and express their concerns about crime?
- How are youth represented in the proceedings of traditional courts?
- Are procedures such as virginity testing in place?

Land distribution and the role of land in crime prevention

- How is land allocated in the area?
- Is land use related to crime (e.g. stock-theft)
- Are new migrants into an area ever allocated land? What are the procedures for being allocated land?
- Are women allocated land even if they don't have husbands?
- Is the authority of the Amakhosi to preside over land disputes and allocate land being recognised?

Logistics of traditional leadership

- What kinds of records are kept by the Amakhosi? E.g. on allocation of land, court proceedings, demographic information on the community etc. How do they feel about sharing such information with local authorities? What information do they need from local authorities e.g. crime hot-spots etc.
- What happens to money or goods (such as livestock) collected by the Amakhosi e.g. taxes and fines?

Networking

- What relationships do the Amakhosi have with others such as the house of traditional leaders, Contralesa, other CBOs and NGOs?
- What interaction do they have with council? Are they satisfied with the relationship? What is their relationship with the ward councillors like? What are their needs from council in relation to crime prevention?

Functioning of courts

- What are the main cases that come to the courts? How are the proceedings carried out? Who may speak / bring a case to the court? What kinds of punishments are handed out? Is the intention of the court proceedings restorative?
- Observations will also be made of court proceedings for cases of domestic violence.

Engagement with policy

- What are the views of the Amakhosi on the development of the Traditional Leadership and Governance Framework Bill? Have they been involved in its development? Are they satisfied with it?

Appendix 2: Observation Sheet

Instructions:

- Please make your comments as detailed as you can. If necessary, attach additional sheets of paper.
- Although all the sections should be filled in, you can add additional information that is not covered by the questions below as it arises.
- Each case should be filled in on a separate form

How many people attended the court session?

Describe the age and gender profile of those attending the court?

How many people were hearing the case?

Describe the position of those hearing the case (How many Izinduna, how many headmen etc.) and how many of each were women?

Describe the nature of the case (who was the victim – their age, gender etc- who was the perpetrator – age gender etc- what was the complaint)

Describe the proceedings in as much detail as possible (For example: X stated that Y had the Inkhosi then asked Y Y stated that he had not done)

What was the outcome of the case? (Was any punishment handed down, who was guilty etc)

Describe any norms or procedures required (e.g. when addressing the Inkhosi, some courts require young women to kneel down and others require women to be represented by their husband / father)

Who spoke in court? (For example was it only those involved, all people attending etc.)

What are your impressions of the difference between the actual proceedings of this case and the way it was described to you in the interview?

Did they mention the other courts at all or the right of the accused to appeal to the magistrate's court?

Were any records kept? If yes, explain what was recorded (e.g. was it a word for word record a summary, a statement of only the complaint and the judgement etc)

If it is possible to speak to any of the parties after the court proceedings ask them whether

they were happy with the outcome and why. Also ask why they had chosen to use this court and not, for example, a magistrates court. Also ask if they will appeal.

Other Observations:

Inkosi P.P. Luthuli
Inkosi B.F. Bhengu
Induna B. Shangase
Inkosi N. Cele
Dep-Inkosi M.M. Mthitayane
Dep-Inkosi B.M. Gasa
Inkosi M.W. Hlengwa
Inkosi B.C. Maphumulo
Inkosi B. Ngcobo