Case Western Reserve Journal of International Law

Volume 23 | Issue 2

1991

Traditional Rights to the Land and Wilderness in South Africa

P.D. Glavovic

Traditional Rights to the Land and Wilderness in South Africa

*by P.D. Glavovic**

I. INTRODUCTION

This article focuses on developments in South Africa with a view to determining whether aboriginal rights to the land and natural resources, in particular the wilderness resource, should be accommodated within a post-apartheid legal system and, if so, how.

The position in South Africa is fundamentally different from the United States in that, although the rights of indigenous people to the land are accommodated by setting aside areas for their exclusive use and occupation (as Indian tribes have 'Indian country' in the United States), there is no separate and discrete recognition of their rights to harvest the fruits of the land. Although traditional land tenure rights are recognized in South African law, the customary law of property has been drastically modified by statute. Traditional rights to water, wildlife and wilderness only exist to the extent that they are implicit in land tenure rights. Examination of traditional natural resource harvesting rights necessarily involves discussion of the land tenure rights of indigenous people. Notwithstanding this fundamental difference between South Africa and the United States, namely the lack of specific recognition of aboriginal rights, there are remarkable similarities in the events which have occurred, and the policies that have emerged, in each country. There are also marked geographical, historical, political, constitutional, socio-economic and other differences between South Africa and the United States. South Africa has experienced the processes of reservations,[1] removals, allotments, assimilation, reorganization, termination and self-determina-

* Director, Institute of Environmental Law, University of Natal, Durban, South Africa. B.A. L.L.B. (Rhodes), Attorney of the Supreme Court of South Africa.

[1] In South Africa, the term "reserve" meant an area set aside for black residence, and sometimes other race groups. The term "location" had a similar meaning but usually applied to urban settlements. However, location also applied to rural settlements in Natal and the Cape. Although the 4,000 1820 Settlers brought to the Cape by the British Government were sent to locations, the term normally referred to black residential areas. *See* THE RIGHT TO THE LAND 7 (T. Davenport & K. Hunt eds. 1974) [hereinafter DAVENPORT & HUNT] (Doc. 13 being extracts from a dispatch by Henry Goulbur, Undersecretary for War and the Colonies, dated Aug. 14, 1819, and referring to the grants of 100 acres each on the basis of quitrent). Among white South Africans, urban areas came to be regarded as white-only areas. This had its origin in a 1922 Transvaal Local Government Commission enunciation that the towns had been built by and for white people, and "[t]he native should only be allowed to enter urban areas, which are essentially the white man's creation, when he is

tion, albeit with substantially different political and economic objectives, methods and consequences. This article will not embark on a detailed analysis of the adverse political, socio-economic and environmental consequences[2] of the imposition of the artificial political demarcations and land allocations which were involved in the process of establishing the apartheid system. It is beyond the scope of this work to do so. However, reference must be made to the historical, and therefore political, background of South Africa's land tenure laws so as to determine the framework within which proper accommodation of aboriginal rights may be provided in a post-apartheid land and resource dispensation.

II. HISTORICAL BACKGROUND

Land tenure concerns the relationship between man and the land. Not only does man depend on the land for his well-being, and indeed survival, but land is also a principal source of wealth and power in modern society. A society's land tenure laws relate to its particular needs, politics and social system at any given time in its development. What may be appropriate for the United States or the Soviet Union at a given time in history, will not necessarily be relevant at the same time in South Africa. The way in which a legislature deals with land is therefore largely a matter of current social ethics and political philosophy. Some understanding of the evolution of land tenure concepts in South Africa is essential before attempting any future legal prescriptions relating to spatial planning, concepts of a land ethic, or utilization of natural resources.

Traditional African Land Tenure

Land tenure systems reflect the needs of a society (or, in some cases, of its ruling class). The needs of an agricultural people are different from those of a nomadic pastoral people. At some stage after their entry into the Cape, the Bantu[3] tribes changed from a predominantly pastoral to an agricultural people, and their land holding requirements also changed.[4]

---

willing to enter and to minister to the needs of the white man, and should depart therefrom when he ceases so to minister. . . ." *Id.* at 70 (extracts from the 1922 Stallard Commission report).

2 For a brief discussion of the environmental consequences of aparthied, *See* Glavovic, *State Policy, Agriculture and Environmental Values*, in RACE AND THE LAW IN SOUTH AFRICA 41-51 (A. Rycroft, L. Boulle, M. Robertson & P. Spiller eds. 1987) [hereinafter RACE AND LAW].

3 *See*, Second Black Laws Amendment Act, STAT. REP. S. AFR., no. 102, § 17(2)[hereinafter Second Black Laws Amendment]. The word "blacks" has been "substituted for the word Bantu whenever it occurs in any law as a reference to a person or persons." *Id.* The Word "black" or "blacks" will be used accordingly in the remainder of this article.

4 In his foreword to A. KERR, NATIVE COMMON LAW OF IMMOVABLE PROPERTY IN SOUTH AFRICA v (1953), [hereinafter NATIVE COMMON LAW], the then President of the Native Appeal Court, Southern Division, J.W. Sleigh, described the transition as follows:

> No one can say with any degree of certainty when the Nguni invaders crossed the Natal border into the Cape. No doubt they were already settled in Pondoland at the begin-

In the earlier nomadic period the countryside was sparsely populated; there was no shortage of land; and dry climatic conditions and the poor quality of the land favored frequent movement. The chief exercised absolute power over the land occupied by the tribe. He would order a tribal move and then allocate land to his headmen, from who kraalheads would obtain permission to occupy a site. Because of their nomadic existence, demarcation or identification of residential and agricultural land was relatively unimportant. Until the latter part of the nineteenth century, the staple foods were meat and milk, and most of the land used by a tribe was grazing land. In the latter part of the century, the people depended more on agriculture for subsistence. With the transition to agricultural dependency the needs of the tribe changed and three distinct forms of landholding emerged: tenure of commonage for grazing, tenure of residential plots and arable allotments. Tenure was communal in regard to grazing lands and individual in regard to arable and residential land.

The grant of an allotment to an individual included the right to use the commonage for grazing. Although the individual's holding of his arable and residential land became more or less inviolable, it could be forfeited or expropriated in the public interest. The land was not treated as a source of capital or income. The individual did not pay for his allotment and, similarly, could not sell or let it. He could alienate it gratuitously to relatives or friends who were already members of the community, but strangers had to receive allotment from the chief. Residential lots were inheritable. The essential feature of traditional land holding is its communal nature. Tribal interests prevailed over individual interests. The following statement, attributed to the chief of a tribal group, gives an indication of traditional attitudes toward the land: "I conceive that land belongs to a vast family of which many are dead; few are living and countless members are still unborn."[5]

In a sense the chief, as ruler, "owned" the land as "trustee" for and

---

ning of the sixteenth century; but we do know of the utmost importance: any encroachment by neighbouring tribes was hotly disputed. On the other hand, agricultural land was of little consequence in the life of the people. The wooden hoe was the only agricultural implement known to them and was exclusively used by women and children who performed the agricultural work.

The southward movement of the Nguni was arrested by contact with European colonists. The tribes settled in fairly well-defined areas, and with the increase of the population both agricultural and pastoral lands became insufficient for the needs of the people. With the introduction of the plough necessitating the use of oxen, men were forced to take a hand in agricultural work. Gradually the importance of agricultural land for support of the family became paramount, with the result that today an arable allotment is among a man's most prized possessions.

[5] *See* R. Fisher, *Land and Land Tenure*, in ENVIRONMENTAL CONCERNS IN SOUTH AFRICA 442 (R. Fuggle & M. Rabie eds. 1983) [hereinafter Fisher].

with the tribe.[6] He controlled the distribution of unappropriated land, and exercised powers of expropriation.

There are many tribes in South Africa and a question which arises is whether "a multiplicity of tribes necessarily involves a multiplicity of laws. It is accepted that there is an African 'common' law of immovable property, which exhibits some, but few, tribal variations, and that there is 'an identity rather than a diversity of land tenure'."[7] Legislation has, however, substantially affected this common law (various powers of the chiefs, for example, passed to the national government) but, before touching on those statutory provisions which are relevant to aboriginal rights to the land and its resources, it is necessary to briefly consider what tenure systems were imported into the sub-continent by the white colonists.

Introduction of European Tenures[8]

In 1652, Jan van Riebeeck arrived in the Cape and The Dutch East India Company asserted sovereignty over the area.[9] The Company did not initially intend to establish a colony, but became committed to a pol-

[6] For the purposes of this brief overview it is not necessary to achieve a fine degree of terminological exactitude; but it should be noted that Roman-Dutch and English law terms such as "ownership" and "trusteeship" are not suitable to describe the chief's position relative to the land. In such terms, it would be inaccurate to describe him as trustee, because the individual tribesman's rights do not approximate those of a beneficiary under a trust. The distinction between trusteeship in the law of sovereignty and trusteeship in the law of property should also be borne in mind — the chief as sovereign has the right of allocation and withdrawal of tenure, and is therefore better described as a trustee in the law of sovereignty. Similarly, care must be exercised in employing terms such as "tenancy at will," "precarious" and "usufructuary" in describing individual rights. For more insight into the legal position of the chief, headman and tribesman in African common or customary law, *see generally* NATIVE COMMON LAW, *supra* note 4, at 1-33; A. KERR, THE CUSTOMARY LAW OF IMMOVABLE PROPERTY AND OF SUCCESSION 25-80 (2d ed. 1976) [hereinafter CUSTOMARY LAW]; Document 55 in DAVENPORT & HUNT, *supra* note 1, at 34-35 (an extract of the evidence Sir Theophilus Shepstone gave before the Cape Native Laws Commission (the Barry Commission) in 1883). Kerr remarks, in NATIVE COMMON LAW, *supra* note 4, at 10, on the value of the pre-1910 Commission Reports as an authoritative source of customary law "because the evidence is published as well as the report proper." On the question of terminology, *see* Bennett, *Terminology and Land Tenure in Customary Law; An Exercize in Linguistic Theory*, in ACTA JURIDICA 173-187 (1985); NATIVE COMMON LAW, *supra* note 4, at 3; CUSTOMARY LAW, *supra* note 6, at 7-12.

[7] NATIVE COMMON LAW, *supra* note 4, at 3.

[8] It is beyond the scope of this article to present any more than an outline of the European tenures introduced into South Africa by the white settlers. *See* DAVENPORT & HUNT, *supra* note 1, at 1-8, (describing extracts of historical documents which are quoted with commentary); R. JONES, THE LAW AND PRACTICE OF CONVEYANCING IN SOUTH AFRICA 1-13 (1963)(describing a brief history of land tenure and deeds registration in South Africa).

[9] It may seem strange that a trading organization would assert colonizing power and sovereignty over the area. The Company received its Charter in 1602, in terms of which it was invested by the Netherlands with public powers of acquisition and administration of colonies. It was in effect granted sovereign authority from the Cape of Good Hope eastward, together with the right to govern, administer justice, trade and make treaties. *See* D. HARRIS, CASES AND MATERIALS ON INTER-

icy of colonization when, in 1657, van Riebeeck announced the first freehold grants of farms at the Rondebosch (below the eastern slopes of Table Mountain) to nine free burghers (company employees whose contracts of service with the Company had expired). The grants were rent free for three years and then whatever land had been cultivated as stipulated in the grants became their property.[10] In 1679, Simon van der Stel became governor, and twenty additional settlers were granted land in what is now the district of Stellenbosch.[11] However, the Company disapproved of the freehold grants, and they were discontinued. Loan tenure was introduced and, after 1714, payment of a tithe on produce or a *recognitie*, a recognition payment or rental acknowledging the dominion of the governing Company, was required.[12] The needs of the company at this stage were simply to supply produce for its garrison and passing ships, and colonization as such was still not one of its aims. The Dutch government was reluctant to grant permanent concessions and the early freehold grants to discharged servants and immigrants from Holland, France and Germany were discontinued. Loan tenure became the common method of acquiring land rights.

Loan farm tenure was originally a grazing permit system free of payment, but it eventually developed into a practical form of tenure for agricultural purposes as well. When the tithe was introduced, the tenure acquired some of the characteristics of a lease. The company retained the right to withdraw grants and the grantee could not alienate the property. He could sell or bequeath the *opstal* or buildings on the farm. His successor then became subject to all the restrictions and obligations attaching to the tenure, which included the government's rights of resumption and prohibition of subdivision. Compensation for improvements was usually paid to grantees when loan places were revoked. Although renewal was never refused, and the loan places were freely bequeathed, transferred and even subdivided, and although there was inefficient enforcement of payment of *recognitie*,[13] loan tenure was clearly an insecure form of tenure.

Trekboers were moving rapidly inland[14] and away from official jurisdiction and taxation. To put loan grants on a more secure footing, a

---

NATIONAL LAW 155 (1983); T. DAVENPORT, SOUTH AFRICA, A MODERN HISTORY 28 (3d ed. 1987).

[10] DAVENPORT & HUNT, *supra* note 1, at 2.

[11] *See* T. DAVENPORT, *supra* note 9, at 22-23.

[12] DAVENPORT & HUNT, *supra* note 1, at 2 (translating an extract from the KAAPSE PLAKKAATBOEK ii, 31, referring to the resolution to levy *recognitie*).

[13] *Id.* at 6 (translating an extract from a 1793 order recorded in the KAAPSE PLAKKAATBOEK vi, 280-82 (refering to farmers being several years in arrear with their recognition fees of 24 riksdollars a year)).

[14] *Id.* (extract from an account of a German traveler, Mentzel, relating to the spread of the settlement during 1785 and 1787). The account suggests that, when a farmer had several sons, the

new form of tenure, quitrent or *erfpacht* tenure, was introduced in 1732. This provided for occupation for a fifteen year renewable term and subject to payment of an annual rental. Compensation was payable for improvements.[15]

Another attempt was made in 1743 to overcome the insecurity of revocable loan tenure. Governor General Baron von Imhoff recommended the conversion of loan tenure to loan freehold tenure.[16] The lands granted in freehold were measured from the land occupied on loan, and were limited to sixty morgen in extent. Government reserved a *recognitie* of twenty-four rixdollars, which could be increased or decreased according to the land's worth. Conversion involved a survey and the issue of a title deed with diagram. Authority was given for conversion of all loan places, about 400 of them, on request; but only 64 were in fact converted, notwithstanding the greater security offered by conversion. Thus, at this stage, there were three forms of tenure in the Cape: freehold, quitrent and loan tenure.

The transfer of the Cape Colony from the Dutch East India Company to the British took place in stages, but was completed by invasion in 1806.[17] Lord Caledon was installed as governor, and was succeeded in 1811 by Sir John Francis Cradock. Cradock felt that the loan tenure system was objectionable, primarily because the insecurity of possession hindered agricultural progress. Furthermore, much of the land remained uncultivated, it did not increase in value, and the property market stagnated. Cradock also felt that it did not improve the relationship between government and citizen. In 1813, he introduced perpetual quitrent tenure by proclamation.[18] This form of tenure was intended to apply to new grants and also to take the place of loan tenure on application. Perpetual quitrent gave the grantee all the incidents of ownership or freehold tenure, but subject to payment of an annual quitrent and reservation to the state of rights to precious stones and minerals. The grants in 1820 to the British Settlers were of perpetual quitrent title.[19] The administrative system for granting applications for perpetual quitrent was inefficient and lengthy delays ensued. As a result, during the 1820s "request" tenure sprang up, which was in effect a form of squatting, authorized by the local *landdrost* without any legal basis.[20]

---

inheritance went to the eldest, and the others were obliged to move on "to seek their fortunes elsewhere." *Id.*

[15] *Id.* at 3 (translated extract from the KAAPSE PLAKKAATBOEK ii, 151-52).

[16] *Id.* (extract from the Reports of De Chavonnes and Van Imhoff 138-39).

[17] T. DAVENPORT, *supra* note 9, at 40-42.

[18] DAVENPORT & HUNT, *supra* note 1, at 7 (extract from Theal Records ix 203-08 of Cradock's Proclamation of Aug. 6, 1813).

[19] *Id.* at 7. *See also* DAVENPORT & HUNT, *supra* note 1.

[20] *Id.* at 6-7 (*see* specifically document 12 for an early reference to request tenure).

Two relevant points emerge from this brief overview of the early tenure systems introduced by the colonial powers. There can be little doubt that insecurity of landholding was a contributory factor to the movement of the white settlers into the interior, which culminated in the Great Trek between 1836 and 1838.[21] It also encouraged attraction to a legal system which favored strong attachment to the land. The form of tenure introduced by the *voortrekkers* into Republican Natal was freehold, but subject to payment of twelve rixdollars per year for protection on farms of 1,000 morgen or over. When the British occupied Natal in 1843, the Cape land tenure principles were extended to Natal. The Transvaal Republic and Orange Free State adopted the same approach as Republican Natal. Both "occupational laws" were enacted to govern the taking of lands from defeated tribes and to impose conditions appropriate to military settlements. As in Natal, the Transvaal Republic's constitution provided for a tax on farms for protection.[22] The constitution of the Orange Free State guaranteed the right of property, *eigendomsregt*, apparently intending perpetual quitrent, although there was little if any practical difference between conditional freehold and perpetual quitrent.[23]

Dispossession of the Khoisan

The first indigenous people encountered by the Dutch settlers in the Cape in the seventeenth century were the Khoisan (a collective term for the Khoikhoi and the San, also referred to by the pejorative terms of "Hottentots" and "Bushmen" respectively). The pastoral Khoikhoi moved southward into the Cape about two thousand years ago, while the San were hunter-gatherers and direct descendants of the South African Late Stone Age people. The San lived in widely dispersed small groups. They neither tilled the soil, nor kept stock, and were entirely dependent on game and other natural products. The Khoikhoi were more elaborately socially structured in tribes at times numbering more than 2,500 members. They owned sheep and cattle, and traded with the blacks and subsequently the Dutch East India Company. Estimates vary, but there were probably at most 100,000 Khoikhoi in the Cape at the time of the Dutch arrival. Their customary land tenure was communal. Strangers required permission for hunting or grazing on their land, which was used equally by all the clan members, could not be alienated to individuals,

---

21 *Id.* at 9; *see also* T. DAVENPORT, *supra* note 9, at 52.

22 See Document 16 in DAVENPORT & HUNT, *supra* note 1, at 7-8 (extract taken from a report by a British officer commissioned to determine the western border of the Transvaal shortly before the outbreak of the war of independence in Decmber 1880 describing the informality in determining the size and locality of arms in the Boer Republic under frontier conditions).

23 *See Id.* at 1-2.

and was not regarded as belonging to the chief.[24]

With the expansion of the white settlement, frontier friction was inevitable. Thefts of livestock and property resulted in punitive expeditions against the Khoikhoi and the Company began to exercise jurisdiction over individual Khoikhoi in its courts. The Khoikhoi were decimated by a series of smallpox epidemics, and they gradually (but inexorably) became a subject people. In their land dealings, the Khoikhoi suffered from the same disadvantages as the American Indians did in negotiating treaties with the white settlers — difficulties of language and in understanding the European concepts of tenure. Davenport & Hunt suggest that the Khoikhoi "may well have thought that by 'selling' land they were merely granting a right to use it, without depriving themselves of the same right, and that the purchase price which they received was no more than a form of tribute."[25] As a result, the Khoikhoi, in giving up their lands, were "induced by trifling gifts to withdraw and travel further inland."[26] Ultimately they lost not only their pastoral lands, but their separate identity as well. Through intermarriage or illicit unions with slaves and others, they came to form the nucleus of the group of people now formally identified as "Cape Coloureds."[27]

The early eighteenth century *trekboer* was the Cape's first white frontiersman.[28] The loan farm system which applied at the time encouraged movement into the interior. The *trekboer* could lay claim to a large farm and retain it indefinitely, as long as he paid his annual *recognitie*. In practice, even if he failed to do so, he was unlikely to be evicted. Davenport records that "the requirements of *transhumance* (the seasonal trek with livestock to different regions for summer and winter grazing), the ease of acquiring informal title, and the ease with which the indigenous inhabitants could be persuaded to retreat or to enter service with their stock, ensured that the spread of the settlement was extremely rapid."[29] The San hunters presented a temporary obstruction to the advancing Boer frontiersmen. Resenting the alien poachers' settling on their hunting preserves and shooting their game, the San retaliated by raiding the poachers' homesteads and attacking their flocks. The San were hunted in turn, like vermin, and some because of their absorbtion in the Colony by intermarriage with the Khoikhoi and others, lost their ethnicity and unique cultural identity. A few became farm laborers, and the rest were exterminated or driven out of the Cape, retreating north in

---

[24] *See* T. DAVENPORT, *supra* note 9, at 3-6.

[25] *Id.* at 9.

[26] *Id.* at 11.

[27] *Id.* at 6, 24-5, 33-5.

[28] *Id.* at 30. A *trekboer* was a stockfarmer, as opposed to an *akkerboer*, who was a crop farmer. *Id.*

[29] *Id.* at 31.

pursuit of the game on which they depended. In 1863, the recommendation of a Bushman Reserve was made by the special magistrate in Bushmanland "[t]o locate the Bush-people on certain places to be set apart for that purpose in the lands which their tribes have for many generations occupied."[30] However, no such reserve was ever established. Davenport writes:

> By the end of the nineteenth century few San were to be found south of the Orange river. In the mid-twentieth there may have been fifty thousand north of it. By the 1980s those in Namibia were being torn from their traditional way of life through cooptation in the Angolan war.[31]

The Blacks: Confrontation and Conflict

Historians differ in their opinions about the times and the routes of the southward migrations of the blacks from their original home, probably northwest of the equatorial forests, but there appears to be little doubt that these migrations took place at a very early date, certainly well before the Europeans settled in Table Bay. They were, in fact, the first farmers in South Africa.[32]

The late eighteenth century witnessed inevitable confrontation and frontier conflicts between the white settlers and the black tribes. Inevitably, the same pattern of land appropriation occurred as in the case of the Khoisan, although the blacks offered more resistance than the Khoi and San groups had and they were not completely dispossessed. Three historically significant episodes produced the expansion of the white frontier: the *Mfecane*,[33] the Great Trek and the wars with the Xhosa, Tswana, Pedi, Zulu, Sotho, Ndebele and other tribes. The consequence of white settlement, conquest of the black tribes, and "acquisition" of territory by treaty or concession, was that the whites secured effective

---

30 DAVENPORT & HUNT, *supra* note 1, at 12-13. *See also id.* at 9 (commenting on the conflict over land on the Bushman (San) frontier).

31 T. DAVENPORT, *supra* note 9, at 125-26.

32 On early history and settlement, *see* CUSTOMARY LAW, *supra* note 6, at 3-6. *See also* T. DAVENPORT, *supra* note 9, at 7-12. The care with which they practiced farming is indicated in the following paragraph by Davenport:

> Work published by Daniel and Guy on the location of the royal kraal sites of the Mthethwa, Ndwandwe and Ngwane chiefdoms in the period 1800-20 has revealed something of the care with which these were selected with an eye to good rainfall, good alluvial soils, and good pastures at all times of the year. This meant, in practice, the use of Zululand lowveld between 1500 and 3000 feet above sea level in the summer months, when nagana and malaria were lowland health hazards, and the lowveld grasslands during the safer winter months. Transhumance was normal; and choice land was scarce, worth conserving, and worth fighting to obtain.

Id. at 17.

33 *Mfecane* in Zulu, *Difaqane* in Sotho.

ownership and sovereignty over most of southern Africa.[34]

The Mfecane

The *Mfecane* was the era of Shaka's conquests, a time of great unrest among blacks. Soon after their first contacts with the "vanguard" of the white frontiersmen, the black communities "began to tear each other apart in what is generally assumed to have been one of the bloodiest conflicts ever to have affected Africa in historical times."[35] Hundreds of thousands of Blacks were killed, and entire tribes were destroyed or scattered by the internecine wars of this period, most of which took place on the plateau west of the Drakensberg. One effect of the *Mfecane* may have been that the *voortrekkers* moved onto virtually vacant land; but historians disagree on the extent to which the Highveld was depopulated at the time of their arrival. If they moved into empty land, in effect *terra nullius* or territory belonging to no one, then indigenous people were not dispossessed of their land and traditional rights to natural resources. If, on the other hand, native people were displaced, there is perhaps greater theoretical justification for restoration of their traditional rights.[36] However, the issue is mainly of historical interest, because the central thesis of this Part is that tribal cultures have value and their traditional environmental "rights" and practices should be accommodated within our legal system, however founded and whether or not originally superseded. In any event, it seems that the answer to the question, "how empty was the Highveld?" will have to await further archaeological research.[37]

The Great Trek

Several thousand whites left the Cape Colony permanently for the interior between 1834 and 1840.[38] These were the *voortrekkers*, as opposed to the *trekboere*, who, since the 1820s, had been crossing the Orange River periodically in search of seasonal grazing and always with the intention of returning. In their emigration from the Cape, the *voortrek-*

---

[34] Although conquest is no longer a good basis for title, until the early years of this century it was a recognized and important method of acquisition of territory by states. *See* HARRIS, *supra* note 9, at 170-71.

[35] T. DAVENPORT, *supra* note 9, at 14.

[36] Colonization of *terrae nullius* by occupation would result in unilateral acquisition of original title to the territory. If the territory were occupied by tribes, derivative acquisition would have to be by means of cession or treaty, or they would have to be conquered. In any event, it is probably more correct to say that the Voortrekkers were acting as individuals and not as a sovereign state or nation, so that customary international law principles of occupation, discovery and conquest would not have applied. *See, e.g.*, D. HARRIS, *supra* note 9, at 151-79.

[37] *See* DAVENPORT & HUNT, *supra* note 1, at 9-10; T. DAVENPORT, *supra* note 9, at 12-21.

[38] The estimates vary between 6,000 and 15,000. *See* T. DAVENPORT, *supra* note 9, at 50. For a brief discussion of some of the reasons for the Great Trek, *see id.* at 49-53.

kers created new frontiers and increased black-white confrontation and the struggle for possession of the land. The *Mfecane* and the Great Trek hastened the penetration of white settlement into the highveld and Natal.

The Wars

The eastern frontier of the Cape Colony was the interface between the white colonists and the Xhosa, which produced nine wars in the period 1778 to 1878. At least some of the motivation for official frontier policy was benign, although ill-conceived. Sir George Grey, governor from 1854-61, for example, attempted socio-economic integration of black and white by promoting white settlement among the blacks with a view toward teaching them Christianity and European agriculture, law and concepts of individual title; but, as Davenport suggests, his efforts "to penetrate tribal territory with white-owned farms and military roads was as widely resented as his plan to substitute European for traditional cultural values."[39] Further frontier conflicts and wars followed with the Pedi (or northern Sotho), Ndebele, Venda, Zulu and others, and by the end of the nineteenth century, the tribes had ceased to be a military threat and most of South Africa had effectively passed into white hands.[40]

The Treaties

Cession of territory, which may be made with or without compensation, transfers sovereignty from the cedent to the cessionary and usually takes the form of an agreement, following peaceful negotiations or war, and is embodied in a treaty.[41] Treaties were not used as extensively in South Africa as in the United States for the acquisition of land from the indigenous people.[42] When they were used, similar questions arose: questions of interpretation, legality, and the morality of the process. Even if the process is viewed as power-based, and an imposition of the conqueror's will, natural law principles and ethical considerations cannot

---

[39] *Id.* at 135. The resentment produced the 1857 cattle-killing episode, when Nongqawuse, a young girl, prophesized that if the Xhosa killed their cattle and destroyed their crops, their ancestral spirits would drive out the white man. *Id.* The population of the affected chiefdoms was substantially reduced as a result of the many deaths from starvation and exodus into the Colony by surviors desperate for food and work. *Id.* at 134-35.

[40] *Id.* at 123-83 (providing a brief history of territorial confrontation in Chapter 7).

[41] *See* D. HARRIS, *supra* note 9, at 177.

[42] A formal system of treaties with the chiefs was applied in the Cape Colony for a few years from 1833, but this was after there had already been some definition of boundaries. DAVENPORT, *supra* note 9, at 129-32. The treaties clarified the boundaries, laid down that customary law would be applied in the tribal territories, and provided for the appointment of diplomatic agents. *Id.* The system, which was aimed at maintaining good relationships with the chiefs, proved to be unsuccessful in the long run. *Id.*

be entirely ignored in weighing the merits of recognizing or reintroducing traditional aboriginal rights.

Unlike the native American treaties, no rights were explicitly "reserved" by South African tribes in their concessions. The difficulties attendant upon determination of reserved rights did not arise, except perhaps to the extent that an argument may be advanced that there were implied reservations. However, as in the United States, an important question, in relation to widely defined "rights" arises: What precisely did the tribes surrender — was it ownership of the land, its tenure, or merely sovereignty over it? Other questions relate to the authority of the contracting parties, whether they were truly *ad idem*, and whether the tribal representatives understood the terms of the contracts. What did Shaka and then Dingane intend when, between the two of them, they ceded the same part of Natal to whites at least four times between 1824 and 1838?[43]

Establishment of Reserves

The general policy of successive governments in the Cape was to leave tribes in possession of their lands, and this policy developed into one of setting aside, as had occurred in the United States with native Americans, reservations ("reserves" or "locations") for the blacks (but without any rights to off-reservation natural resources). They were seen as "necessary for the safety of this [the white] community,"[44] places of protection,[45] rehabilitation or refuge, and labor pools. The purpose of rehabilitation for dislocated tribes is suggested by the distinction drawn by Sir Theophilus Shepstone, in his map of Natal locations submitted to

---

[43] In 1824, "Chaka, King of the Zulu and of the Country of Natal, as well as the whole of the land from Natal to Delagoa Bay. . .in consideration of divers goods received, [did] grant, make over and sell unto F.G. Farewell and Company, the entire and full possession in perpetuity. . ." DAVENPORT & HUNT, *supra* note 1, at 19. The grant then proceds to describe Port Natal and its hinterland, the major part of Natal. *Id.* The purchase price is not stated, no rights are reserved, and the grant is of "possession," not of ownership or sovereignty. *Id.* In 1828, Shaka granted "free and full possession [of the same area to his] friend J.S. King, in consideration of the confidence I repose in him, of various services he has already rendered me, presents he has made." *Id.* In 1836, Dingane ceded the same area to Captain Allen Gardiner, and in 1838 to Piet Retief as "Governor of the Dutch emigrant South Afrikans [for having retaken and returned his cattle] which Sinkonyella had stolen. . .for their everlasting property." *Id.* at 19-20. Quite obviously the Zulu chiefs had a different understanding of the transactions from that of the white people. *See* DAVENPORT & HUNT, *supra* note 1, at 19-20. *See also* T. DAVENPORT, *supra* note note 9, at 109.

[44] *See* DAVENPORT & HUNT, *supra* note 1, at 13-14.

[45] . . .the natives appear generally to understand that their present occupations are on sufferance, and that the lands on which they may permanently reside have still to be pointed out to them. Almost all the chiefs of tribes within the district have waited upon the Lieutenant-Governor, and have unanimously expressed their desire to proceed to any lands that may be assigned to them, and their thankfulness for permission to reside under the protection of the British Government.

Id. at 14.

the Cape Native Laws Commission in 1884, between " 'Aboriginal tribes', 'Collections of remnants of aboriginal tribes', 'tribes which entered the territory between 1812 and 1843', and 'tribes which entered Natal during the first five years after its establishment as a British Colony'."[46]

III. THE TRUST RELATIONSHIP BETWEEN GOVERNMENT AND THE TRIBES

The concept of trust tenure gained official recognition partly because of a perception that tribesmen were unable to understand the complexities of European tenure or benefit from it, and partly because it was considered likely to provide more efficient land use control in the tribal areas which were becoming increasingly degraded through overpopulation, overgrazing, and consequent removal of vegetation and soil erosion. By the 1930s, the land was not providing enough food for the people. Trust tenure, with a modified traditional one-man-one-lot and communal grazing approach, resulted in farmers in the reserves (later to be known as "homelands") not being able to subsist without off-reserve earnings. This dependence on outside income served the need for migrant labor in the white towns. Davenport & Hunt contend that

> [t]he limitation of land imposed by the segregation policy had destroyed the efficiency of peasant farming by depriving it of the broad acres which it needed and might otherwise have acquired. . . [and the trust tenure system that was finally adopted] involved a reversal of the trend towards individualization; it was a variant of the communal system, a form of tenancy-at-will, with control removed now from the hands of the chief and placed in those of departmental officials.[47]

The first government-controlled "Native Trust" for land in tribal locations was created in 1864 by the Colonial Office via Letters Patent in Natal, with the Governor and Executive Council as trustees, having power to "grant, sell, lease, or otherwise dispose of the same Lands in such ways as they shall deem fit, for the support, advantage or well being of the said Natives."[48]

In the Transvaal, the trust concept for tribal land was adopted, pursuant to the Pretoria Convention,[49] by Proclamation in 1881 in the fol-

---

[46] *Id.* at 14-15 (including a map of Shepstone's locations).

[47] *Id.*

[48] *See id.* at 40.

[49] The hostilities which ensued after annexation of the Transvaal by Sir Theophilius Shepstone in 1877 ended by the signing of the Pretoria Convention in 1881. This was superseded by the London Convention in 1884, but it was term of both conventions that blacks would be allowed to acquire land only on the basis that such land would be registered in the name of the Commissioner for "Kaffir" Locations. The London Convention envisaged that land could be acquired by tribes, but would have to be held in trust for them, as individuals were prevented from holding property

lowing terms:

> TO all Paramount Chiefs, Chiefs and Natives of the Transvaal. You will be permitted to buy land or acquire it in any manner, but the transfer will be registered on your behalf in the name of those gentlemen who will comprise a Native Location Commission. The Commission will delimit Native Locations which the great Native tribes will be able to occupy in peace. In the delimitation of these locations, existing rights will be strictly preserved, and the Transvaal Government on the one hand, and the Native tribes on the other, shall respect on all occasions the boundaries so determined. In the same way the various tribes shall respect each other's locations; and where this is not done, the injured tribe shall be able to lay its complaints before the Government of the country.[50]

In the Cape, the Barry Commission in 1883, while recommending individual title for blacks in the long term, proposed as an interim measure that "the lands in the Territories now occupied by the tribes. . .shall, by formal title deeds. . .be. . .vested in Boards of Trustees nominated by Government, one of such trustees in each case being a chief . . . ."[51]

There was no recognition of black tenure in the Orange Free State outside of the Rolong and Sotho districts of Thaba'Nchu and Qwaqwa.[52]

In the context of this discussion of the trust relationship between central government and the tribes, there are three highly significant "modern" statutes, and these will be referred to briefly in chronological order. Soon after Union in 1910, the general policy of segregation became effective law in terms of the 1913 Native Land Act,[53] which provided for "scheduled areas," in essence the existing reserves, for exclusive black occupation. In 1927, the Black Native Administration Act[54] was passed, section 1 of which made the State President the supreme Chief of all blacks in South Africa. In 1936, the Natal model of a central government trust, which differed from the Cape approach of localized trusts in which chiefs had a role to play as trustees,[55] was applied throughout the

---

because of the terms of an early Volksraad Besluiten of 1855. Such trust land became treated as Crown land when the Commissioner for Native Affairs took over the functions of the Native Location Commission after the demise of the South African Republic in 1900. *Id.* at 40. See also *Id.* (Document 65, the VRB was repealed by Proclamation 34 of 1901, and it was decided in Tsewu v Registrar of Deeds, 1905 T.S. 130, that there was as a result no law in the Transvaal which prohibited natives from owning fixed property).

50 *Id.*

51 From the Report of the Cape Native Laws Commission, 1883, presided over by Sir J.D. Barry, Judge President of the Griqualand West Court. *Id.* at 37.

52 *Id.* at 31. *See also* T. DAVENPORT, *supra* note 9, at 447.

53 Native Land Act, STAT. REP. S. AFR., no. 27 (1913).

54 Native Administration Act, STAT. REP. S. AFR., no. 38 (1927).

55 *See* DAVENPORT & HUNT, *supra* note 1, at 39.

Union of South Africa by the Native Trust and Land Act.[56] The 1936 Act is an extension of the 1913 Act in the sense that it provided for "released" areas (areas released for black occupation) to be added to the "scheduled" black areas created in the earlier statute. The State President may by proclamation declare such areas, or add to or subtract from them, or declare any area to cease to be a released area. The futher lands "released" for black occupation resulted in an increase in the size of the black areas from about seven to thirteen percent of the surface area of South Africa.[57]

The 1936 Act also established the South African Bantu Trust (now the South African Development Trust), a corporate body, the sole trustee of which is the State President (with power to delegate his functions to the relevant minister). The trust is stated as being established "for the settlement, support, benefit, and material and moral welfare of the Bantu of the Republic."[58] All State-owned land earmarked for occupation by blacks, including scheduled and released areas, vests in the Trust.[59] Where land is withdrawn by the State President from a released area, the State must give land of an equivalent pastoral or agricultural value in exchange. The Trust can also acquire land and has powers of expropriation.[60] The trustee may, in accordance with prescribed regulations grant, sell, lease or otherwise dispose of property of the Trust to blacks.[61]

The powers relating to land allotment and utilization that formerly vested in the chiefs are now exercised by the central government. The State President is not only the Supreme Chief of all tribesmen, but is also trustee of the trust fund comprised of all land and assets vesting in the South African Development Trust. The beneficiaries of the trust are the tribes in the reserves (or homelands or Bantustans). This trust relationship, with all corresponding fiduciary responsibilities, was deliberately created and assumed by the state as sovereign and is, in many respects, similar to the trust relationship between the U.S. federal government and native American tribes. This relationship has been described as that of guardian to ward, discussed in the previous chapter.[62]

---

56 Native Trust and Land Act, *amended as* Development Trust and Land Act, no. 18 (S. Afr. 1936) [hereinafter Development Trust and Land Act].

57 These percentages are those accepted by most commentators. *See, e.g.* Buthelezi, *Kwazulu and Wilderness*, in VOICES OF THE WILDERNESS (I. Player ed. 1979) 106. *See also* Robertson, *Black Land Tenure: Disabilities and Some Rights*, in RACE AND THE LAW, *supra* note 2, at 123.

58 Development Trust and Land Act, *supra* note 56, § 4.

59 *Id.* § 6

60 *Id.* § 13.

61 *Id.* § 18(2).

62 There is a distinction between a trust in the law of property and a trust in the law of sovereignty, but in the final analysis nothing of any great significance turns on this distinction for the purposes of this discussion, save that a sovereign is not legally bound (although it may accept ethical responsibility, and pragmatically must respond to public opinion) by the strictures imposed on a

IV. INDIVIDUAL TENURES BEFORE AND AFTER THE 1969 REGULATIONS

Before 1969, communal, freehold, quitrent and trust tenures were all to be found in the reserves,[63] a potpourri almost equal in its complexity to the admixture of introduced European tenures referred to above. In 1955, the Report of the Tomlinson Commission[64] contained the following relevant findings and recommendations:

> A revision of the system of land tenure is regarded as one of the prerequisites to the stablisation of the land in the Bantu Areas and the full economic development of their potential. . . .
> The principle of "one-man-one-lot". . . reduces every Bantu to a low level of uniformity with no prospects of expanding his activities nor of exercising his initiative. It is essential to make opportunities for the creation of a class of contented full-time Bantu farmers with holdings of sufficient size to enable them to farm profitably and to exercise their initiative and to develop according to their individual ability and resources. The abolition of the 'one-man-one-lot' policy is accordingly recommended, but care should be exercised to avoid the centralisation of all the land in the hands of a few individuals *i.e.* to avoid the creation of a class of land barons. . . .[65]

The Union Government's reaction to these recommendations was that it was "not prepared to do away with tribal tenure of rural land and to substitute individual tenure based on purchase, nor [did] it propose to give preference to individual acquisition of land above Tribal and Trust

---

trustee in the law of property. The concept of trusts in the law of property comes to us from English law, in which there is trust ownership (bare dominium or conduit function) and beneficial ownership. Kerr quotes an English decision, Civilian War Claimants Ass'n Ltd. v. The King, 1932 A.C. 14, in support of the proposition that trusteeship in the law of property does not apply to a sovereign unless the sovereign deliberately chooses to act as a trustee. *See* NATIVE COMMON LAW, *supra* note 4, at 36. The State President as trustee is responsible to parliament and not directly to the public or individual beneficiaries. Kerr concludes that the Trust is a trust in the law of sovereignty and not in the law of property. An important consequence of this conclusion is that ownership of land by the Trust does not exclude an African from acquiring rights under African law over the land. Traditional African law and custom co-exist with African statutory law. Kerr argues that one must therefore start from the principle that allotment of land to tribesmen is a grant of ownership in African law to the allottee. *See* NATIVE COMMON LAND, *supra* note 4, at 38. However, it must be borne in mind that this book was written in 1953, before the 1969 Regulations referred to in the text below and deeming all grants to individuals as grants of quitrent title. *See also* CUSTOMARY LAW, *supra* note 6, at 74-80 (arguing on the basis of certain South African cases that "ownership" is the correct term to apply to the individual's right to both residential and arable land in customary law).

[63] DAVENPORT & HUNT *supra* note 1, at 52. (Document 84, a field investigation into the effects of different kinds of land tenure on African village life, 1949).

[64] The full title of the Tomlinson Commission Report was "Report of the Commission for the Socio-Economic Development of the Bantu Areas within the Union of South Africa." *Id.* at 53.

[65] *Id.*

purchase in the released areas."[66]

Although perhaps partially or wholly inspired by political or economic motives, the following two ministerial statements extracted from parliamentary debates are consistent with what is being mooted in this chapter, namely the accommodation within our legal system of tribal cultures and traditional rights for so long as the tribal people themselves desire their retention.

The Southern Rhodesian Minister of Lands, in 1969, after referring to 40 million of the 96.5 million total acreage of Rhodesia (now Zimbabwe), which is reserved for use by tribesmen on a communal basis:

> I think that we can fairly claim. . .that we in Rhodesia have done rather more and better than the founders of America or the pioneers of Canada, to set aside reservations where the indigenous people could continue to enjoy their traditional style of living until such time as they were ready to play their full part in a modern economy.[67]

The South African Minister of Bantu Administration and Development[68] in 1971:

> . . . land ownership outside the towns is communal. . .They are tribal communal tenants. . .[T]o abolish the system of communal tenants would drastically affect the Bantu tribal traditions and systems of government. . .[T]heir tribal system of government is based on the concept of land tenure. It is a very important matter.[69]

In 1969, the Bantu Areas Land Regulations were published.[70] All trust land was placed under the control of the Bantu Affairs Commissioner.[71] His permission is required for occupation of any portion of land. Chapter 3 provides for common use of commonages, subject to reservation of mineral rights to the Trust. The Commissioner may issue permits for temporary residence thereon. All trading, arable, residential and farming lots are declared, in effect, to have been granted under quitrent title.[72] Provision is made for the survey of new arable and residential lots, the extent of which, however, is not to exceed four morgen and half a morgen respectively without "special approval."[73]

The essential thrust of the 1969 Regulations is the transfer of traditional tribal authority and control to state officials, although there is

---

66 *Id.*

67 *Id.* at 55.

68 The South African Minister of Nabtu Administration and development is now the Minister of Plural Relations and Development. *See*, Second Black Laws Amendment, *supra* note 3, § 17(1)(b)(1978). Laws Amendment Act, No. 102 (S. Afr. 1978).

69 DAVENPORT & HUNT, *supra* note 1, at 54.

70 Proc. R188, GG 2486 (1969).

71 *Id.* ch. 2, § 5.

72 *Id.* ch. 4, § 13.

73 *Id.* § 14.

some provision for consultation with the tribe. For example, the Commissioner may grant permission for residence on arable lots, after consultation with the tribal or community authority, or the headmen and residents of the area.[74] The sections dealing with inquiries into the distribution of arable and residential allotments also make provisions for consultation with the chiefs or headmen concerned.[75] When an allottee dies, his allotment, arable or residential, devolves to his heirs, failing whom, to some other person determined by the Commissioner giving formal notice to the chief or headman to call a public meeting for the purpose of reallotment.[76] Testate succession is prohibited,[77] and permanent residence requires the Commissioners's permission. It is the duty of the chief or headman to report contraventions.[78] Within their areas of jurisdiction, tribal and community authorities, or chiefs if such authorities have not been established, have power to investigate and settle, administratively, disputes relating to occupation, grazing or commonage rights, subject to a right of appeal to the Commissioner.[79]

The annual quitrent stipulated is nominal,[80] and the Commissioner may, paternalistically, waive payment in certain cases of need (for example, mental illness, leprosy, and tuberculosis). On application, a holder may redeem the quitrent by paying twenty times its annual amount, which raises the question whether redeemed quitrent amounts to individual ownership. The extent of official control is indicated by various other provisions which provide, *inter alia*, that the consent of the commissioner is required for any transfer, mortgage, lease or other disposal of quitrent land to a black, and the consent of the Minister if to a non-black.[81] The Minister's consent is also required for subdivision, or for more than one person holding the land. There are many other provisions in similar vein, too numerous to discuss. The overall effect of the regulations has been total state assumption of authority and therefore, it is submitted, trust responsibility for the welfare and culture of tribal communities.[82]

---

[74] *Id.* § 19.

[75] *Id.* §§ 48, 49.

[76] *Id.* § 53.

[77] Succession to quitrent land in terms of section 35 is as per Annexure 24 to the Regulations. For the terms of succession to quitrent land, *see id.* § 35, annex 24.

[78] *Id.* § 64.

[79] *Id.* § 67.

[80] Originally ranging from 25 cents to R1.50, increased in 1979 by Proc. R48 to range from R1 to R3. *Id.* § 17, annex 8.

[81] *Id.* § 20.

[82] Other examples of all-embracing official control are the following. Section 25 provides for appropriation of quitrent land or termination of rights, subject to payment of compensation. The compensation under section 30 is an alternative site, if available, or money. Improvements may be removed under section 34, provided that this is done without damage to the land. Section 41 provides for land titles registries in the offices of the Commissioners. Section 62 provides for advances to blacks from Trust funds for the purchase of freehold and quitrent title. This reference to freehold

It is beyond the scope of this article to discuss the precise nature of the individual tenures created by the statutes and regulations referred to above. They do have some resemblance to the *emphyteusis* of Roman Law in their treatment of occupiers substantially as proprietors or owners.[83] There is also some similarity to Cradock's perpetual quitrent referred to above. The emphasis on occupation rather than ownership is more consistent with the approach of customary law. It represents a shift away from Roman Law toward feudal concepts, or at least the notion that people do not own the land but enjoy an estate or time in it subject to conditions imposed in the interests of society, or a section of it. The system also bears some similarity to land law in the Soviet Union.[84] However, it is not important for the purposes of this discussion to find the correct legal label for tribal land holdings. What is important to note is the extent of state intervention, first by redistribution of the land on racial lines and, secondly, by substitution of the tenures referred to above for tribal systems and land law. The social and environmental consequences of such intervention have been disastrous. There may have been some justification in the past for imposition of near-total state control over peasant farming methods, and there is no doubt that the system did serve to provide the migrant labor required in the white towns. There is now an urgent need for an entirely new paradigm. The state must discharge the trust responsibility that it assumed by donning the mantles of guardian and "supreme chief" of the tribes. That paradigm must recognize and protect tribal cultures and their traditional laws in rural areas, for so long as the tribal communities themselves desire recognition and protection, and until such time as they may become assimilated into the greater South African society. This cannot be achieved without effective protection of the environment on which they depend, including the wilderness resource.

V. MAPUTALAND: AN ILLUSTRATION

Introduction

KwaZulu is that part of South Africa which has been set aside under apartheid laws for occupation by the Zulu nation. The distribution of land, which took place mainly during the nineteenth century, produced

---

is apparently to chapter 2, which deals with grants of land for church, school or mission purposes. The conditions of title to land are set out in the annexures and provide, even in the case of the grant of church lots, for reversion to the Trust for failure to comply with the conditions. Chapter 5 provides for allocation of unsurveyed lots to individuals under "permission to occupy." *See* A. KERR, *supra* note 6, at 88-101, for discussion of this form of tenure.

[83] *See* NATIVE COMMON LAW, *supra* note 4, at 38-39; CUSTOMARY LAW, *supra* note 6, at 92-93.

[84] In both systems land is essentially *res extra commercium*, incapable of commercial alienation.

forty-eight larger blocks as one hundred fifty-seven smaller areas being incorporated into KwaZulu. In terms of the 1975 consolidation proposals, these various fragments were combined into ten areas, four relatively large and six small, the northernmost large area being Maputaland.[85] Although KwaZulu is substantially legislatively independent of the Republic of South Africa with respect to laws relating to the conservation of natural resources,[86] with the current volatile South Africa political situation, its status as an independent homeland will probably change. In that event, the provisions of a South African National Wilderness Act will be applicable to the region. If not, because of the close liaisons which exist between the official conservation agencies concerned, similar legislation will likely be enacted in KwaZulu. In either event, the situation in Maputaland is directly relevant to the topic of statutory wilderness in South Africa.

Maputaland has also been chosen for illustration of the principles and arguments presented in this work because it clearly reflects the dilemmas posed by conservation and development in the third world. It has been described as " a microcosm of Africa's problems — rapidly increasing human populations, lack of firewood, emigration of able-bodied workers, rural poverty, a decrease in grassland quality and dwindling biotic diversity."[87] No two wilderness areas are the same, and any such areas set aside in Maputaland will require different treatment from wilderness areas set aside, for example, in the Drakensberg mountains or in the Cape Province, insofar as such matters as visitor access and buffer zones are concerned. However, the basic principles and propositions discussed below will be relevant to all South African wilderness areas.

At the request of the KwaZulu Government, the area which was previously known as "Tongaland" is now referred to as "Maputaland." It is located in northeastern Zululand, and is bounded in the north by the Mozambique border, which is immediately to the north of the Kosi chain of lakes, in the east by the Indian Ocean, in the south by St. Lucia estuary, and in the west by the western scarp of the Lebombo mountains.[88]

Maputaland is an isolated, underpopulated (210,000 people), poor, rural area. It is administered both by the KwaZulu government and the

---

[85] *See* Bruton, *Conservation and Development in Maputaland*, in STUDIES ON THE ECOLOGY OF MAPUTALAND 498 (M. Burton & Cooper ed. 1980) [hereinafter ECOLOGY OF MAPUTALAND].

[86] KwaZulu is a self-governing territory — Proc R 69 of 1973. *See also* National States Constitution Act, STAT. REP. S. AFR., no. 21 (1971) [hereinafter Constitution Act]. The legislative assembly of a self-governing territory is empowered to legislate with respect to matters enumerated in Schedule 1 of the Act. *Id.* § 3, sched. 1. Items 8 and 31U of the schedule are "Nature conservation" and "Conservation of the environment" respectively. *Id.* sched. 1.

[87] Introduction, in ECOLOGY OF MAPUTALAND, *supra* note 85, at xvii.

[88] Bruton, *Gazetteer of Localities in Maputaland*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 536. *See also id.* at xvi (Landstat photograph of north-eastern Zululand).

South African Department of Development Aid (the latter having jurisdiction over state land in the Ubombo and Ingwavuma towns, and the "Admiralty reserve" between Sodwana Bay and the border with Mozambique). This divided administration has contributed to the lack of services and infrastructure in the area. The people of Maputaland were never conquered by the whites, and no lasting treaties were entered into.[89] They were simply dispossessed of the land by declaration that it was Crown land. The population depends largely on subsistence agriculture and access to the region's wealth of natural resources (a species diversity of over 3,000 plants and animals, which exceeds that of the Kruger National Park which is three times its size). Only twenty-eight percent of the adults are functionally literate. The tourist potential of the area is exceptional. It has been described as a natural wonderland, having both national and international significance,[90] and the plants and animals of the region as forming "one of the most interesting, valuable and diverse biotas in southern Africa."[91] The area also has substantial agricultural potential, although it is considerably degraded at present.[92] Overpopulation and poor self management have resulted in the ('sweetveld') pasturage of the Makatini Flats, for example, being reduced by overgrazing, the effect of which has been widespread soil erosion and the spread of mixed sourgrass and dense scrub. This has been compounded by reduction of vegetation cover through removal of trees for fuelwood and building, and the burning of dung and crop residues which would otherwise have regenerated the soil.[93]

---

89 The Thonga Queen, Zambili, had granted a concession in the Kosi Lakes to G. Bruheim, a German trader, and in 1887 sent him to negotiate a treaty with the British. A treaty was provisionally signed in 1887, but the following year the Queen withdrew her request. *See* Bruton, Smith & Taylor, *A Brief History of Human Involvement in Maputaland*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 453; Bruton, *A Note on the Name "Maputaland," id.* at 534.

90 CENTRE FOR COMMUNITY ORGANISATION, RESEARCH AND DEVELOPMENT, UNIV. OF NATAL, OVERCOMING APARTHEID'S LAND LEGACY IN MAPUTALAND (NORTHERN NATAL) 3 (1990) (working paper) [hereinafter CORD].

91 Bruton, *Conservation and Development in Maputaland*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 497.

92 According to the KwaZulu Bureau of Natural Resources, eighty percent of the tribal forest reserves in KwaZulu have been destroyed completely, or

> damaged so severely that they will never recover, or will recover only with vast injections of money and ecological expertise. . .[H]owever, the major forest areas such as Ngoye, Ngome, Qudeni and Nkandhla are still preserved intact. They will provide "living laboratory" facilities and a source of genetic material for any future plans to revive despoiled indigenous forest areas.

Greig, *The Kwazulu Bureau of Natural Resources*, 36 AFRICAN WILDLIFE 137 (1982).

93 *See* CORD, *supra* note 90:

> Despite the fact that most of Maputaland lies on low nutrient, saline marine sediments, large areas are considered to have high agricultural potential due to the favourable bioclimatic conditions. . . High standards of farming and soil conservation are, however, imperative. Although these coastal soils need correct and judicious fertilizing, some of the most

The purpose of this discussion is to demonstrate that it is essential that the people dependent on these resources, natural and agricultural, be directly involved in their development, management and controlled utilization. The goal should be a holistic and integrated environmental and agricultural management policy.[94] A contribution towards that goal would be formal recognition of the aboriginal tenure and special harvesting rights of the inhabitants of the area, notwithstanding any legal constraints on access to those resources which may be imposed on other persons,[95] by accommodation of those rights within the national legal system. The Wilderness Act proposed in this work must be designed so as to be consistent with this approach.

Historical Background

The southward migration of the blacks into the general Tongaland area (roughly the northernmost portion of Natal KwaZulu and southernmost portion of Mozambique) took place at an early date, variously estimated, on the basis of archaeological evidence, as being between the

---

important soil-related problems are physical in nature (low moisture capacity, shallow depth, poor drainage, high erosion risk. . .On the whole grazing is of poor quality and the veld is much despoiled by heavy stocking. Nguni stock cattle are considered to be better adapted to this bioclimatic zone than exotic breeds. . .As a result, a bioclimatic region which has great potential for cattle and game ranching and for field and horticultural crops under irrigation is nearly ruined. Future development plans will first have to concentrate on the reclamation of denuded areas, the protection and re-establishment of pasture species on lands withdrawn from cultivation and the development under guidance of a correct system of land use.

Bruton, *Conservation and Development in Maputaland*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 500-03. On a global scale, it has been estimated that "[f]uelwood scarcities in some fifty-seven developing countries affect more than one billion people. . . this scarcity farmers to burn about four hundred million tons of animal dung a year. If this dung were used to improve soil fertility, grain production could be about twenty million tons a year more." R. REPETTO, WORLD ENOUGH AND TIME: SUCCESSFUL STRATEGIES FOR RESOURCE MANAGEMENT 73 (1986). *See also* WORLD RESOURCES INST. & INT'L INST. FOR ENVTL. & DEV., WORLD RESOURCE 68 (1986).

[94] Bruton suggests that:

Many of the problems related to agriculture in Maputaland could be overcome by integrating agricultural and environmental management. Furthermore, bold steps may have to be taken, such as the restructing of the social community, the restriction of human population growth, the reservation of certain areas for winter grazing only, the withdrawal of some lands from cultivation, the establishment of woodlots, strict control of the cutting of indigenous trees, and an extensive education and interpretation service. Short term schemes to supply immediate needs for fuel, food and shelter will have to be implemented in the meantime.

Bruton, *Conservation and Development in Maputaland*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 504. *See id.* at 504-07 (referring to forestry and fishery potential).

[95] This suggestion has been made by the writer before. *See* Glavovic, *Dilemmas in Wilderness Designation and Management in Southern Africa: A Legal Perspective*, 1 NATAL U. L. & SOC'Y REV. 115, 117-121 (1986). *See also* Glavovic, *Human Rights and Environmental law: The Case for a Conservation Bill of Rights*, 21 COMP. & INT'L L.J. S. AFR. 52, 60-61 (1988).

second and fifth centuries A.D.[96] Although there is some doubt concerning the precise dates and migration patterns of the southward movement of black people from equatorial Africa, there is little doubt that Maputaland experienced very early human habitation. Excavations from the Border Cave archaeological and palaeontological site in the Lebombo mountains have revealed implements from the Middle and early Late Stone Age, and human remains from the Middle Stone Age. By the year 290 A.D., Iron Age people were living in Maputaland, and charcoal from an iron-smelting furnace found in Ndumu game reserve has been dated about 630 A.D.[97]

When the sea retreated from the lowlands, it left coastal plains which provided an important route for the migrant blacks, and wet, warm conditions more conducive to settlement than the drier west coast. Modern pastoral and agricultural man with knowledge of iron and pottery working, for example, reached the Mkuze game reserve by about 1450. The indigenous people of Maputaland are a mixture of the Nguni and Thonga branches of the southern Bantu. The Tembe clan is one of the largest Thonga clans, having settled in the vicinity of Delagoa Bay in Mozambique by 1545, before moving southward. Today they are to be found on both sides of the border.[98] Over time, a number of sub-clans formed. Other Thonga clans in Maputaland are the Mabso, Manukuza, Mashabane, Mnqobokazi, Myeni, Nibele, Siqakati and Zikali, some of whom migrated from the Pongola area south of Swaziland during Dingaan's reign in the early nineteenth century, and others from the hinterland of Delagoa Bay. Because of fever and the infertility of the lowlands, the expansionist militarism of Shaka and Dingaan (1816-1840) did not affect these areas to the same extent as the rest of Zululand, although they were conquered by the Zulu invaders, and they enjoyed relative calm, and as a result, other Zulu and Swazi groups also settled there. The amaThonga still adhere to many of their social and cultural traditions, but their way of life has been affected by contact with these groups and, of course, white influence.[99]

The name "Thonga" was given to the people of the region by the

---

[96] *See* T. DAVENPORT, *supra* note 9, at 7-12.

[97] *See* Bruton, Smith & Taylor, *A Brief History of Human Involvement in Maputaland*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 432-34.

[98] There are Thongas in Natal in Maputaland, in the Transvaal in the Lydenburg, Zoutpansberg and Waterberg districts, in Zimbabwe on the border of Mozambique, and in Mozambique in the Maputo, Inhambane, Manica and Sofala districts or provinces. The amaThonga are also sometimes referred to as the Tembe-Thongas or Rongas. *See* Torres, *The AmaThonga People of Maputaland with Special Reference to the Inhabitants of the Pongolo Flood Plain Area*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 460-67.

[99] *See* Bruton, Smith & Taylor, *A Brief History of Human Involvement in Maputaland*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 434-37 (discussing the different cultural influences on the AmaThonga).

Zulus, and one interpretation means a conquered or subject people, which because of this derogatory meaning, many Thonga men prefer to call themselves Zulus.[100] It is also said to derive from "Ronga" meaning the east, which in turn comes form "buronga" meaning the dawn.[101] In 1871, a schooner which was registered in Britain anchored in the Maputo River to pick up an early pioneer trader, D. Leslie, along with the ivory, hides and other goods which he had traded from the Thonga King Noziyingili. It was seized by a party of Portuguese sailors. The result of this incident was a dispute between Britain and Portugal about the right of passage on the Maputo River and the control of Mozambique south of Delagoa Bay. The dispute was resolved in 1875 by arbitration. The arbitrator was Marshall McMahon, President of France, who awarded all the disputed lands to Portugal. The effect of the McMahon Award was to cut the southern clans of the Thonga tribe in half. The Maputaland area south of the present border was proclaimed a formal protectorate by the British Crown in 1895, and was annexed to Zululand in 1897. In December 1897, the whole of Zululand, including Maputaland, was incorporated into Natal. For some time the two Maputaland areas were known as Portuguese Maputaland and British Maputaland respectively, but the former name is no longer used, and "British" has been dropped from the latter.[102]

Tribal Culture, Structure and Disruption

The amaThonga have had contact with Europeans over a period of four hundred years. Early Portuguese chronicles disclose that Delagoa Bay was discovered by the crew of a ship which lost its way en route to India. They found a large settlement of "negroes" with whom they traded. In 1545 the bay was explored by a merchant whose name was given to the town that developed there, Loureno Marques (now Maputo), and since then the native people have had contact and trade with various

---

[100] The derogatory implication is part of the reason for the name "Tongaland" falling into disfavor amongst the local inihabitants and not being recommended by the KwaZulu government. It would also be an inaccurate description of the area because the Thonga tribe is distributed from Lake St. Lucia northwards across the Mozambique border to the Sabi River. *See* Bruton & Cooper, *A Note on the Name "Maputaland,"* in ECOLOGY OF MAPUTALAND, *supra* note 85, at 534.

[101] Torres, *The AmaThonga People of Maputaland with Special Reference to the Inhabitants of the Pongolo Flood Plan Area*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 460 (*citing* H. TUNON, THE LIFE OF A SOUTH AFRICAN TRIBE (1962)).

[102] *See* Bruton, Smith & Taylor, *A Brief History of Human Involvement in Maputaland*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 441-43. At the beginning of the twentieth century there was virtually no white settlement in Zululand apart from eighty-nine storekeepers, seventy-two mission stations and a few squatters, but after Anglo-Boer War (1899-1902) the Zululand Lands Delimitation Commission of 1902-4 set aside reserves for blacks and opened up other areas, including land "coveted by white entrepreneurs, largely for the purpose of growing sugar," for European occupation. DAVENPORT & HUNT, *supra* note 1, at 29.

nationalities, but for most of that time without any marked changes to their traditional cultures and way of life. Today, because of a variety of influences, such as intermarriage and the official languages in schools having been English and Zulu for many years, the amaThonga refer to themselves as Zulus and are in danger of losing their separate cultural identity. Their language is still being kept alive, but mainly by the women and pre-school children. In spite of all these influences, they still preserve their traditions and customs "to a remarkable extent."[103]

The amaThonga chief is the head of his clan or tribe, but exercises less direct control over his clansmen or tribesmen than his Zulu counterpart. He appoints headmen, izinDuna, who are more directly involved in administration, usually a member of his family to head a district, or someone from one of the original families in the area to be in charge of a sub-district. Permission to settle in a district is required from both the relevant sub-district and district izinDuna. Although not officially constituted or recognized, the district izinDuna's court is the effective judicial forum of the amaThonga. The Chief's Court, which consists of the chief and his councellors, is the court of appeal. The izinDuna also exercises considerable local legislative power, but is answerable to the Chief's Court, or Tribal Authority. Witchcraft is still practiced, and many izinDuan are witchdoctors as well as political, legislative and judicial functionaries. They also control fishing rights and access to other natural resources. The Authorities are answerable to the Regional Authority, which is represented on the KwaZulu Legislative Assembly. For any conservation or development proposal to succeed, it needs popular support, which means that there should be consultation with and participa-

---

103 The extent to which those traditions and customs have been determined by their environment is well illustrated in the following extract:

> The amaThonga. . .are divided into a number of independent chieftainships, like the Zulus were before Shaka united them under a paramount chief. Unlike the Zulus, the clan structure has persisted as a functional feature of their social structure up to the present day. Although these clans from the beginning of the nineteenth century were overrun by groups of Nguni-speaking peoples of Zulu and Swazi origins, they were neither exterminated nor completely assimilated into the traditional social and political systems of their conquerors. The amaThonga retired farther into the bush and floodplains where ecological conditions were such as to compel those who settled there to adopt a particular way of life, i.e. to plant their crops close to the ox-bow lakes formed along the course of the Pongolo River, and near the small lakes or pans which resulted from the periodic flooding of the area. The people resorted to fishing to obtain one of the main sources of protein. They practised a form of shifting horticulture on the banks of pans, or during droughts even on the beds of alluvial soil exposed when lack of flooding or rain caused part of the pans to dry up. Crops were often swept away by flash floods. In the Mosi swamp zone which stretches down the length of central Maputaland, the amaThonga retired into places that were difficult of access and unattractive to their Zulu invaders.

Torres, *The amaThonga People of Maputaland with Special Reference to the Inhabitants of the Pongolo Flood Plain Area*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 461-62.

tion by recognized representatives of the people (*i.e.* recognized by the people themselves) at every level of this hierarchy of traditional authority.[104]

Harvesting of Natural Resources

The amaThonga depend on and make good use of their natural resources. Although they make use of domestic stock and crops, they still rely on indigenous food sources.[105] The three main ecological zones of Maputaland are the Makatini Flats, the Mosi swamp and coastal zone, and the Pongolo floodplain.[106] The plains provide food in the form of fish and water plants, as well as drinking water and building materials (reeds and sedges). The amaThonga practice subsistence agriculture, trap game and graze their stock on the floodplain. Their major source of protein is fish, around which several of their cultural traditions revolve. Two examples of their subsistence fishery practices are *fonya* (thrust-basket fishing) and *utshwayelo* (fish kraals). Headmen, in consultation with the *sangomas* (withchdoctors), organize *fonya* drives in which hundreds of people participate.[107] At Kosi Bay there is a network of *utshwayelo*, fences made from local materials with valved traps, which depend on the tides and seasonal movements of fish in the system, and which provide fish throughout the year.[108] The traditional capture methods of the local

---

[104] *See id.* at 462-63. *See also* Bruton, *General Discussion*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 530, 531.

[105] *See* Torres, *The amaThonga People of Maputaland with Special Reference to the Inhabitants of the Pongolo Flood Plain Area*, in ECOLOGY OF MAPTULAND, *supra* note 85, at 463. *See also* Bruton, *General Discussion*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 530, 531. The traditional dietary habits of the amaThonga are such that fish remains an important source of protein for them. They consume livestock meat primarily on ceremonial occasions. Although not strictly observed, the consumption of eggs, milk and red meat by women and children is a traditional taboo, and lack of animal protein in their diets may be a contributory factor in the incidence of "Mseleni joint disease," an unusual form of arthritis which occurs in the Mseleni area near Lake Sibaya. *See* Bruton, *Conservation and Development in Maputaland*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 525. *See also* Fellingham & Lockitch, *The Etiology of Mseleni Joint Disease*, in ECOLOGY OF MAPUTLAND, *supra* note 85, at 480 (discussing the Mseleni Joint Disease).

[106] Torres, *The amaThonga People of Maputaland with Special Reference to the Inhabitants of the Pongolo Flood Plain Area*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 464. Apart from its natural beauty, scientific interest as the southern distribution limit of several tropical aquatic organisms, and importance as a winter feeding ground for a large number of waterfowl, the Pongolo floodplain is regarded as being "of immense importance in the subsistence economy of the local inhabitants." Heeg, Breen & Rogers, *The Pongolo Floodplain: A Unique Ecosystem Threatened* in ECOLOGY OF MAPUTALAND, *supra* note 85, at 379.

[107] *See* Wood, *Fishing — The Fonya Way*, 43 AFRICAN WILDLIFE 249 (1989) (describing Fonya Fishing). *See also* Merron, *Fishing the Fonya Way*, 44 AFRICAN WILDLIFE 116 (1990) (comment on the article by Wood).

[108] The fish kraals or traps of the Kosi system are a good example of the way in which the inhabitants of a natural area as a group may receive preferential treatment by being exempted from the conservation laws applicable to all other persons. The estuary is an important nursery area for a

people ensure a sustained yield of the fishery resource, but population pressure, social disruption, environmental degradation and outside influences are producing changes which are threatening the old balance. Fishing practices will have to be monitored in the future.[109]

There is still game outside of proclaimed reserves, which is trapped with snares or hunted with spears and dogs. Species utilized include nyala, common reed buck, bushbuck, duiker, bushpig, cane rat, scrub hare, porcupine, and vervet and samango monkeys. The meat is used for food and the hides for clothing and for making drums and other musical instruments. The *nanga* is a flute made from the tibia of a goat or other animal, and the *timbalambala* trumpets are made from antelope horns. Music and dancing play an important role in the lives of the amaThonga. Most birds are eaten, and various traditional trapping methods are employed, but air-guns are now also being used. Tortoises, sea turtles, and occasionally monitor lizards are also eaten. Crocodiles and snakes are used for medicinal purposes. Insects are also utilized. Flying ants, locusts, various large caterpillars and border larvae are all eaten, as are honey and bee larvae. Termitaria are used for walls and floors in the construction of huts, and thatch grasses for roofing and mats. The Kosi Bay raffia palm is used in the construction of huts and rafts, and for making baskets, mats and ropes. The ilala palm is also used for baskets, mats, and binding material, and is tapped to provide a nutritious alcoholic beverage, ubuSulu wine. These are some of the age-old customary uses to which the indigenous people put the natural resources of Maputaland.[110] It is abundantly clear that they and their culture are dependent

large number and variety of marine fish species. They enter the system to spawn, seeking food and relative safety from predators. The fish kraals are designed in such a way that the fish are not obstructed in their entry into the system. However, on their way back the bigger fish are trapped in the kraals, which are made from local natural materials and are designed in such a way that the smaller fish may pass through the traps. A kraal is usually handed down from father to son, and the building of new kraals is strictly controlled — permission must be obtained from the family in whose area the proposed site lies, and also from the kraal owners on either side. The local induna or headman must also be consulted. Although the kraals constitute an obstruction to the free passage of fish, they are the traditional fishing method and it has been demonstrated that they represent a form of controlled exploitation which does not have any serious long term effects on the fish populations. As such, they are and should be exempt from any nature conservation laws which would otherwise prohibit such obstruction. They provide an essential source of protein for the local people in an area which lacks arable soils and employment opportunities.

109 Bruton, *Conservation and Development in Maputaland*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 505. In addition to traditional methods of fishing, multifilament gillnets and rods are becoming increasingly used. *Id. See also* Pooley, *Some Notes on the Utilization of Natural Resources by the Tribal People of Maputaland*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 468-70 (discussing the different methods of fishing in Maputaland); Torres, *The AmaThanga People of Maputaland with Special Reference to the Inhabitants of the Pongolo Floodplan Area*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 464.

110 Bruton, *Conservation and Development in Maputaland*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 523. *See also* Rogers, *The Vegetation of the Pongolo Floodplain: Distribution and*

on wilderness and direct access to natural resources.

Because proclaimed nature and game reserves require boundaries, and usually fences, game becomes artificially concentrated and this results in the culling of some species. To the extent that culling is necessary, it should be properly provided for in a management plan for the area; but should also relate to the needs of local populations. As an example of sensitivity to local needs, the Natal Parks Board some years ago instituted a system of regular hippopotamus culling at Lake Sibaya to maintain population stability and reduce damage to nearby crops — the meat was given to the local inDuna for distribution amongst his clansmen.[111]

The Need for Local Participation

It has been said of the Zulu people that they "have a tradition of understanding nature. Their conservation awareness goes back to the foundations of their society. Because they lived close to nature, they lived in harmony with it and a balance was maintained between man and his environment."[112] A Zulu elder has expressed it as follows:

> KwaZulu was once a land full of wild animals like the elephant, rhino, kudu and crocodiles. We lived with and knew these animals. . .I know the white rhino very well as I was born amongst them. This animal is highly respected by our people. . . He [King Dinizulu] did not allow people to kill the animals and any person caught was severely punished. . .I think it is a very good thing that we should stick to the old traditional ways of living so as to protect the future for our children, so that our children will understand what a wild animal is. . .I understand the plants and the animals, birds and insects. I can tell when rain is coming. All this knowledge is in my blood. . .We once had a way of living in the world and knowing what was happening on the land. We were in tune with all that lived and sang.[113]

Conservation programs should draw on traditional wisdom. It would be foolish not to do so. Local participation in natural resource management and development should occur at three levels: determina-

---

Utilization in ECOLOGY OF MAPUTLAND, *supra* note 85, at 69 (discussing of the traditional practices of harvesting natural products and the extensive use of indigenous frutis and vegetables). *See also* Bruton, *Conservation and Development in Maputaland*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 522-24 (for a list of the uses of various plants species by the people of Maputaland).

111 Pooley, *Some Notes on the Utilization of Natural Resources by the Tribal People of Maputaland*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 468. Hippopotamus meat provides much needed animal protein to the local people.

112 Steele, *Kwazolu - Conservation in a Third World Environment*, in FOR THE CONSERVATION OF EARTH 115 (V. Martin ed. 1988) [hereinafter CONSERVATION OF EARTH].

113 M. Ntombela, *The Zulu Tradition*, in CONSERVATION OF EARTH, *supra* note 112, at 288-91. The editor describes Mr. Ntombela as an eighty-seven-year-old "living repository of the ancient oral tradition of his people." *Id.* at 289.

tion of the boundaries of protected natural areas (including wilderness), preparation and implementation of management plans, and sharing in the income generated from tourism and related activities. The notion that local communities should participate directly in the long term planning of natural areas is not novel.[114] It is proposed that their participation rights be legally entrenched and not left to administrative policy, as policies can and do change with changes of administrations, and even within administrations.

In a careful review of conservation and development in Maputaland, Bruton draws the following important conclusions, which are directly relevant to these submissions:

> It is. . .clear that economic growth cannot be sustained by Zulu or Thonga society in its traditional pure form. The people will have to lose some of their traditional norms and values in the interest of economic growth. It is important, however, that this process of change is not too rapid, and that traditional social groupings, such as the family and the clan, remain intact and play a role in the decision-making and development process.
>
> * * *
>
> [I]t is clear that the proper management and development of the living resources of the area has crucial role to play in the economic betterment of the people. This conclusion is supported by the strong indications that wilderness-orientated tourism, in association with specially protected areas, will provide a vital economic input into the area. Any conservation or touristic initiatives will however, have to take into account the needs and aspirations of the local people, and every effort would have to made to ensure that the economic benefits reach grassroots level.[115]

Policy and the Need for Effective Legal Regulation

The KwaZulu Nature Conservation Act provides that "twenty-five percent of all fees or charges collected in respect of any authorization issued in terms of this Act shall accrue to the Tribal Authority in respect of whose area such authorization was issued."[116] Authorization is required, for example, for the hunting of "any exotic or other wild animal."[117] There is thus some legal prescription for local participation

---

[114] *See* Bruton, *Conservation and Devleopment in Maputaland*, in ECOLOGY OF MAPUTULAND, *supra* note 83, at 516. In 1978, for example, the following statement was made: "Perhaps the most important recent advance in conservation thinking in the African context has been the realization that the active and economic participation by local human populations is essential to the long term planning of any national park." *Id.* (*quoting* B. Huntley, *Ecosystem Conservation in Southern Africa*, in BIOGEOGRAPHY & ECOLOGY OF SOUTHERN AFRICA (M.Werger ed. 1978)).

[115] *Id.* at 510-11.

[116] Section 2(2) of Act 8 of 1975.

[117] *Id.* § 5(1)(b).

in conservation; but because it is limited, it is necessary to consider the nature and effectiveness of official conservation policy, as opposed to law, in KwaZulu.

The KwaZulu Bureau of Natural Resources was established in 1981, and reports directly to the Chief Minister. In 1987, the Director of the Bureau delivered a paper at the Fourth World Wilderness Conference held in Colorado, USA, which was important for two reasons. First, because it was a formal and responsible declaration by a senior government administrator to the international community of official conservation policy; and second, because of the sound principles contained in the statement.[118] The statement will be referred to in some detail *infra*, not only because of the soundness of the principles stated as having been adopted in KwaZulu, but because there is some controversy about the application of those principles and declared conservation policy. The very fact there is controversy, whatever its merits, supports the suggestion that policy in such vital matters should, as far as is practically possible, be converted into appropriate legislation. The Director stated:

> The necessity of establishing the bureau arose out of a growing awareness that the classical approaches to conservation in nations with Third World characteristics are incapable of achieving their aims. Establishing inviolate wildlife sanctuaries or game reserves in order to preserve animals which had almost become extinct ..has little relevance to poverty stricken people preoccupied with survival. Indeed, these island sanctuaries contain a conspicuous but inaccessible wealth of natural resources and they are resented or are even a source of hostility among the people who live in poverty along their borders. Therefore, in order to make conservation relevant to people who have to live at the fragile interface between survival and starvation, the Bureau . . .is pursuing a conservation philosophy that is centered around three basic principles which Dr. Buthelezi has termed the ABCs of conservation. . . .[119]

The statement then elaborates the "ABCs of conservation." The "A" stands for Alternatives, for example the establishment of woodlots and medicinal plant nurseries to protect forest habitats and endangered plants, since "rural people usually have no real alternative but to degrade their environment in an attempt to survive." They must have access to natural resources within or at the edges of protected areas, or be provided with alternative sources, or both.

The "B" stands for Bottom line:

> [f]or people to value conservation they must receive some tangible benefit from it. There must be a bottom-line profit for the local commu-

---

118 *See* Steele, *supra* note 112, at 115.

119 *Id.*

> nity. . .[t]he needs of the local people have been considered in determining the objectives of the [Tembe Elephant Park, which was established in 1983]. The local people have. . .not been shut out of the reserve, but instead were guaranteed controlled access to those natural resources that they traditionally obtained from the reserve area. For example, the people are allowed to collect reeds in the reserve for building their houses, provided they obtain a permit and harvesting is done at the appropriate time of the year. A percentage of all revenue earned by the reserve, including that from tourism, will be paid directly into tribal coffers. Income generated in this way will be used to build schools, clinics and other community projects. . .As new reserves are proclaimed, so the bureau will concentrate on integrating them into the local economy so that people will see that there is a bottom-line profit in it for them.[120]

The "C" stands for the "principle of Communication," which is based on the belief that:

> the success or failure of conservation in a developing region ultimately depends on the degree of support for, and active participation by, the people of the region. It therefore is vital that efficient two-way communication links be established between those who plan and administer conservation programs and those who have to live with the consequences of that planning and administration.[121]

The Director declared:

> In KwaZulu the philosophy of 'conservation by consensus' is actively pursued through close liaison with the local communities and the tribal authorities. Many tribal authorities have appointed conservation liaison officers who act as a link between the Bureau. . .and the community they represent. These liaison officers attend all management meetings for game and nature reserves within their wards, where they represent the interests of the local people. In this way, no action that may affect the local community can be implemented without their being aware of it and having an opportunity to influence the decisions taken. In addition, through this communication procedure, the community is able to request assistance and advice on conservation-related matters.[122]

In his concluding remarks, the Director said that the "battle for survival makes conservation in a Third World environment seem a luxury. [But]. . .there is a realization that sound conservation is an essential

---

120 *Id.* at 116-17.

121 *Id.* at 117.

122 Steele, *supra* note 110, at 117. The Director gave as another example of "conservation by consensus," "the recent move by some tribal authorities to establish tribal game reserves. . .that will be 'run by a management committee, with representatives from the community, the tribal authorities and the Bureau'." *Id.* at 117-18.

weapon in the fight for survival."[123] He stressed the need for understanding the relationship between conservation and survival, and stated, "[d]espite the omnipresent depressing realities facing KwaZulu. . . [a]dopting a pragmatic approach, coupled with a genuine desire to help people attain their legitimate needs and aspirations, has minimized conflict between environmentalists and local communities. The resulting cooperative effort argues well for long-term ecological stability in the region."[124]

In 1984, the Director of the Bureau announced the transfer of management of the Kosi Bay Nature Reserve from Natal Parks Board to the Bureau, stating that

> the people living on the land surrounding the Nature Reserve will benefit by a 25% share of all revenue earned. This will ensure a better standard of living for the local people, which can only result in a greater appreciation of the Reserve and the need for conserving the natural resources of the area.[125]

Notwithstanding the above formal policy statements and statutory provision for revenue sharing by local communities, a 1990 research report presents an entirely different perspective of the Bureau's conservation efforts. Those efforts are described as "dispossess[ing] local people of their natural heritage and its [Maputaland's] development potential." Lake Sibaya "is the largest freshwater lake within the system [Maputaland's coastal lake system] and which has a capacity to provide pure water to 400,000 people, is now being conserved in pristine condition for small groups of tourists with little regard of the ecological contribution that the indigenous population have made." The report accuses the Bureau of consulting with local tribal authorities in its conservation programs and paying "scant attention to indigenous knowledge in the maintenance of a unique ecosystem."[126] It is difficult to reconcile these

---

123 *Id.*

124 *Id.*

125 NATAL WILDLIFE, Apr. 1984, at 3 (statement by Director, KwaZulu Bureau of Nat. Resources).

126 *See* CORD, *supra* note 90, at 4-5, the full statement being as follows:

> Their ongoing conservation efforts within Maputaland dispossesses local people of their natural heritage and its development potential under the guise of "consultation with and conservation for sustained yield development for the indigenous population. This is well evidenced in the Bureau's development/conservation strategy in Maputaland's coastal lake system. Thus for example, Lake Sibaya which is the largest freshwater lake within the system and which has a capacity to provide pure water to 400,000 people, is now being conserved in the pristine condition for small groups of tourists with little regard of the ecological contribution that the indigenous population have made. Consultation by the Bureau's conservation programmes is with local tribal authorities and pays scant attention to indigenous knowledge in he maintenance of a unique ecosystem. The extent of current and ongoing dispossession in this region can be gauged by the fact that almost 80% of the

criticisms with the remarks of the director of the Bureau of Natural Resources, which are indicative of well conceived and articulated conservation and agricultural policies. As far as agriculture is concerned, there have in the past been misguided, or at least unsuccessful, attempts at intensive crop cultivation. At one stage an attempt was made to grow coconuts commercially in the Kosi catchment, as well as cassava, cashew nuts and coffee in the coastal lowland areas, all of which failed, although some measure of success has been achieved with various types of silviculture.[127] In order to avoid such criticisms and *ad hoc* experimental projects, clearly what is required is a well-designed legal framework for conservation and agricultural policy, a framework which effectively recognizes and protects the interests of tribal cultures.

Tourism

Access to the land and wildlife is so vital to the indigenous people of Maputaland that it is difficult, on superficial examination, to justify the setting aside of natural areas, such as wilderness areas and game reserves, for strict protection. Tourism is one such justification because of the finance and job opportunities that it generates. The region has immense tourism potential. This represents a form of capital which would be foolish to squander because it is irreplaceable. Its judicious investment is entirely compatible with, and will promote the interests and culture of, the tribal communities, while at the same time serving the interests of conservation and the greater community. Tourism, viewed as a form of land use, will certainly have far less impact on tribal cultures than other forms of land use such as commercial agriculture, mining, and industry.[128] One of the unique tourist attraction areas would be the Kosi Bay

---

Bureau of Natural Resources' annual budget is spent on conserving and controlling an environment which is only unique because it has not been mismanaged and abused by the indigenous population.

Id. The implication of the CORD report is that tribal authorities do not always represent the interests or reflect the attitudes and opinions of the people in their areas of jurisdiction. (For a discussion of the lack of consultation with the people themselves and the inadequate protection of their interests). *See* ASSOCIATION FOR RURAL ADVANCEMENT, SPECIAL REPORT NO. 6, MAPUTALAND: CONSERVATION AND REMOVALS (1990).

127 *See* Begg, *The Kosi System: Aspects of its Biology, Management and Research*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 361. *See also* Bruton, *Conservation and Development in Maputaland*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 518.

128 *Id.* at 507-08. Bruton suggests that "an intensification of indigenous practises, such as mixed agriculture, bee-keeping, fishing, basket- and mat-making, pottery, and the development of a tourist and recreation industry would make the best long term use of the natural attributes of the area." *Id.* at 518. He describes the diversity of tourist attractions available in Maputaland as "unrivalled by any other area of similar size in South Africa," including "[w]ilderness-orientated activities such as hiking, horse-riding, boating and underwater trails," and refers to several reports which have "emphasized that Maputaland is one of the last wilderness areas along the southern African coast, and [which have] noted that economic common sense and prudence demand the protection of the

area, one of the few remaining pristine estuarine systems in southern Africa. It is not actually a bay, but four interconnected lakes, each possessing different ecological characteristics. The Kosi system has no counterpart anywhere in southern Africa. One of its attractions is the strand of raffia palms at Lake Amanzimnyzna, which means dark water, and is so called because of its peat-stained colour. The palms are spectacular, having leaves of up to ten meters long. The Kosi area can accommodate several wilderness trails, which are becoming more and more popular in South Africa, as in other countries. In fact, the demand for wilderness trails generally cannot be met. In the Kruger National Park, for example, eight trails are conducted every week for eleven and one half months of the year — the trails are fully booked a year in advance and the percentage of occupancy is just below one hundred percent, which is far higher than the busiest, most popular hotel or holiday resort in South Africa. The Wilderness Leadership School and the Natal Parks Board present statistics of a similar nature.[129]

The Proposed Maputaland National Park

A comprehensive and holistic approach towards conservation and development of this unique region, with its rich cultural heritage and exceptional diversity of wildlife, would be promoted by inclusion of all its marine, coastal, lake and terrestrial ecosystems in one all-embracing environmental or biosphere reserve.[130] A large nature reserve or Maputaland National Park has been environmentally degraded for many years.[131] The Minister of Environment Affairs has announced plans to

---

delicate ecosystems which support the diverse life on which a prosperous tourist industry could be based." *Id.* at 516. There is no doubt that the region is eminently suited to tourism and outdoor recreation. What is most important, however, is the fact that these activities are compatible with the interests and lifestyle of the tribal communities, which is a point also made by Bruton, in the following terms:

> The *suitability* of Maputaland for outdoor recreation and the *compatibility* of this form of land use with the indigenous way of life are obvious. The diversity of natural resources in the area provides for a multitude of recreational activities. Furthermore, the development of wilderness-orientated recreation would have far less impact on the lives of resident people compared with other possible forms of land use, such as intensive agriculture, mining or industrial development, and would also be less disruptive than the present migrant labour system.

Id. at 518.

[129] *See* Chapman, *The Professional Trail Ranger: An Endangered Species*, in WILDERNESS (No. 22, Dec. 1986) (Official Newsletter of the Wilderness Leadership School).

[130] There is no other region in South Africa that presents the range of ecosystems that is found in Maputaland. *See* Bruton, *Conservation and Development in Maputaland*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 517.

[131] *Id.* at 511. During 1947 through 1949, a series of expeditions led by Dr. G.G. Campbell were conducted to Maputaland. These expeditions investigated the possibility of establishing a national park, but did not recommend it because of the high resident native populations. Bruton,

acquire privately owned farms between St. Lucia and the Mkuzi Game Reserve with a view toward consolidating the whole of this area with Eastern Shores and the Sodwana State Forest into what will become the third largest conservation area in South Africa (270,000 hectares).[132] According to one model, it "would be composed of a complex of strict and ordinary environmental reserves and resource areas" stretching in the west from the Usutu gorge eastwards to Kosi and southwards to St Lucia estuary, and would include Ndumu Game Reserve and Kosi Bay National Park.[133] The exact boundaries would have to be decided by the KwaZulu people. In the strict environmental reserves there would be stringent control over public access and there would be no removal of flora and fauna. The second category would permit small human populations, restricted public access and controlled removal of flora and fauna. The third, resource areas, would be "[i]mportant resource areas with moderate to high human populations, less restricted public access and an extensive living natural resource-based economy."[134] The park would incorporate features of historic and biotic value. Conservation areas would need to be set aside outside of the proposed national park as well. For example, Border Cave and Dingane's grave would be strict historical reserves, and Mkuze and St. Lucia game reserves would be strict environmental reserves.[135]

The proposed national park is consistent with traditional land tenure and natural resource harvesting rights, and with holistic "natural resource-based development [which] may provide the most economical return on long term investments as there are *few economically viable alternate land uses* in eastern and northern Maputaland." Not only will the park "bring *international prestige to KwaZulu*," it will "*increase the local people's awareness of and pride in the cultural and natural history of their country.*"[136]

> [Maputaland] has the potential of becoming one of the world's great national parks and natural resource areas, comparable to the

---

Smith & Taylor, *A Brief History of Human Involvement in Maputaland*, in ECOLOGY OF MAPUTALAND, *supra* note 85 at 447-52. In 1964, Ian C. Player pleaded for establishment of a large nat reserve in Maputaland. Bruton, *Conservation Development in Maputaland*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 516. The Wildlife Society of Southern Africa proposed its establishment in 1971. *Proposed Mining on Eastern Shores of Lake St. Lucia*, 44 AFRICAN WILDLIFE 121 (1990) [hereinafter AFRICAN WILDLIFE].

132 The announcement was made in early 1990. *See* AFRICAN WILDLIFE, *supra* note 131, at 121.

133 *See* Bruton, *Conservation and Development in Maputaland*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 516.

134 *Id.* at 513.

135 *Id.* at 513-526 (general discussion of proposed conservation areas and the greater national park).

136 *Id.* at 519 (emphasis in original).

> Everglades, Okavango swamps, Serengti, Kinabalu in Borneo, the Great Barrier Reef, Gran Paradiso in Italy or the Henri Pittier National Park in Venezuela. The preservation of its natural heritage is as important to the world as the preservation of the cultural heritage of developed countries.[137]

The amaThonga and the Wilderness Ethic

The natural resources on which the amaThonga have traditionally depended have been severely adversely affected by widespread environmental degradation, brought about in the main by increased human population pressure. The following extracts present an excellent summary of the position in Maputaland:

> The amaThonga settled some centuries ago in an area which was, on the whole, low-lying, inclement and unhealthy, and not well-suited to stock-farming or extensive agriculture. As a result, they explored other ways of making a living. They hunted and snared wild game, made extensive use of indigenous fruits and vegetables, and fished extensively in the coastal lagoons, lakes and rivers, which is unusual among the southern Bantu. The fabric of their society is therefore closely interwoven with the seasonal and diel (sic) availability of natural resources, and they have developed a remarkable knowledge and understanding of natural principles and processes.[138]

> [W]resting a living from Maputaland has not been easy, and . . . this situation is likely to continue into the future, even with major technological advances. The construction of dams, the introduction of better communications and capital investment in intensive agriculture and forestry can never overcome the fact that the lowlands of Maputaland are relatively unhealthy and infertile, and subject to very changeable climatic conditions. It is absurd to anticipate development in this area on the same level as in the fertile, well-watered and relatively mild coastal regions of Natal. Development in Maputaland needs to be determined by the limitations and potential of the climate and natural resources of the Mozambique Plain environment, and herein lies the second lesson which this brief history has taught us — ever since man entered the scene he has been destroying forests, degrading habitats, reducing biotic diversity and generally decreasing the capacity of Maputaland to support people and other forms of life. The longer we allow this process to continue the more opportunities will be lost for the people of Maputaland to reach their full potential.[139]

The application of the wilderness ethic to resource management,

---

137 Bruton, *Conservation and Development in Maputaland*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 518.

138 *Id.* at 508.

139 Bruton, Smith & Taylor, *A Brief of Human Involvement in Maputaland*, in ECOLOGY OF MAPUTALAND, *supra* note 85, at 455-56.

while at the same time respecting traditional cultural values and harvesting rights by legal prescription, will contribute immeasurably to the goal of conservation and appropriate human development in Maputaland.

VI. CONCLUSIONS

It is beyond the scope of this article to attempt to project or prescribe how, when, or indeed whether, tribal cultures should be assimilated into the mainstream of South African society; or to suggest what that mainstream is. Certainly the present dispensation of "one man one lot" with insufficient and degraded pastoral or agricultural land cannot continue.[140] Western influences and prescriptions have disrupted traditional cultures and values.[141] The time has come for a new dispensation. Present indications suggest that the new South Africa will come about through negotiation,[142] in which event it is hoped that the politicians and other negotiating parties will recognize the international trend discussed in the previous chapter, and seek to arrive at a settlement which will permit of retention of tribal cultures and traditional wisdom for so long as the people affected wish to retain their tribal status. The legal provision for access to the wilderness resource which is suggested in this work is posited on the assumption that, for all practical purposes, there will at least be some passage of time before South African tribal cultures disappear and, in the meantime, their needs and values should be accommodated.

The major conclusions of this article are:

(i) because of their historical background and the traditional values that reside in them, tribal cultures deserve protection and accommodation within our national legal and political system;
(ii) such cultures are in transition, but must be protected in their transition phase;
(iii) they depend on the wilderness and wildlife resources, which must therefore be appropriately protected with due regard to such dependence;

---

140 Fisher, *supra* note 5, at 442-43. Fisher refers to the "symbiotic equilibrium that a cognatic system holds with its ecological environment [which] is thrown out of balance when the amount of land available is no longer sufficient to sustain the community." *Id.* He predicts that by the year 2000, cognatic tenure will have ceased to exist in South Africa.

141 The National Party's policy of apartheid "envisaged the strengthening and restoration of the tribal system and the re-establishment of the authority of the chiefs." *See* Devenish, *The Development of Administrative and Political Control of Rural Blacks*, in RACE AND THE LAW, *supra* note 2, at 28. However, the way in which the land is held and distributed as a result of apartheid has instead caused major disruption of traditional cultures.

142 This section of the text was written in early 1990, shortly after the release of the African National Congress leader, Nelson Mandela, and regular reports in the news media that all relevant political organizations favor a negotiated settlement of the political impasse in South Africa.

(iv) they must be directly involved in the determination of the boundaries of conservation areas and their protection and management;
(v) they must be allowed controlled access to natural resources within or on the peripheries of those areas consistent with their traditional harvesting practices; and
(vi) they must be allowed direct participation in the economic benefits derived from wilderness-orientated tourism.

Above all, while acknowledging that the aforegoing propositions may not be novel or untried, it is vital that they be elevated from the status of mere policy to law by inclusion in the relevant legislation dealing with natural and agricultural resources, so as to ensure effective, enduring and consistent application. The legislation providing for the statutory dedication of wilderness and the establishment of a national wilderness preservation system should be drafted accordingly. In drawing these conclusions, two principle points emerge which require some elaboration and further brief comment. Does the very concept of wilderness exclude any notion of human habitation or extractive utilization? Secondly, does the extension of special treatment to local groups not amount to the creation of racial "group" rights?

Inhabited Wilderness: An Oxymoron?

People's perceptions of wilderness depend upon their cultural, geographical and historical circumstances. The perceptions of wilderness in the third world are understandably different from those of people in developed countries such as the United States. Man has a hierarchy of needs, and while he is involved in satisfying his lower needs, his awareness of higher levels is inhibited. Because he does not enjoy the affluence and leisure permitting time for relaxed and informed contemplation, third world man may not yet appreciate the less tangible benefits of wilderness. However, even in the third world, indeed more so than in the first world because of greater dependence on natural resources, wilderness areas require protection for the preservation of species and the maintenance of gene pools for biotic diversity, so as to provide the nucleus for sustainable yield of plants and compounds for food, medicine, fuel and building materials, as well as education, tourism, and job opportunities. And it is precisely because of this dependency, this greater emphasis on the instrumental values of wilderness, that different definitions and degrees of protection than those applied in other countries may be necessary in South Africa. South African wilderness is not the same as wilderness on other continents. We should learn from the experience of other countries, but the models of protection which work in America and Australia, for example, will not necessarily work for African wilderness. The South African wilderness heritage is unique. We are part of Africa. African problems require African solution. What is appropriate for the

first world is not necessarily appropriate for the third world. What is appropriate for the third world is not necessarily appropriate for South Africa, which is a mixture of first and third world elements. South Africa needs to look to its own roots in formulating concepts, laws and policies for the protection of its few remaining wild places.

There are sound social and ecological reasons for extending the concept of wilderness to include inhabited wilderness, notwithstanding the inherent contradiction in the notion of inhabited wilderness. Conceptual purity must at times bow to practical politics. If wilderness is narrowly defined, then much if not all of Kosi Bay, for example, is not wilderness because it is inhabited. The notion of inhabited wilderness is consistent with such category designations as biosphere reserve, anthropological reserve or natural biotic area, which are all basically areas in which the native technologies, knowledge and resource utilization have little adverse impact on natural processes. It may be argued that inhabited wilderness should be given some other such designation, thus not detracting from the concept of true wilderness. However, the support of indigenous people for the pure wilderness ethic is more likely to be given and maintained if wilderness is more widely defined so as to permit varying gradations of accessibility and use. If local communities are allowed to derive tangible benefits from areas designated as wilderness, albeit inhabited, they will more readily accord value and respect to all wilderness. In any event no two wilderness areas are the same, and none is entirely free from the impact of man. Where such impact is minimal or substantially unnoticeable, as in the case of the Indians and eskimos of North America, and the San of South Africa, why should traditional utilization not continue?

Historically and demonstrably, native cultures practiced their subsistence harvesting with respect for their wilderness environment, and in harmony with it, and their shelters blended more readily into their natural surroundings. Why should the San not continue their nomadic, wild existence for so long as they wish to do so, even in a declared desert wilderness? They are in effect a component of the wilderness, a part of the natural balance. As hunter gatherers, without stock or pastoral or agricultural activities in their traditional culture and lifestyle, their continued presence is compatible with the wilderness ethic. Wilderness areas would then be areas bearing no signs of having been tramelled by modern man. Laws for the protection of wilderness must be devised and implemented in such a way as to produce recognizable, immediate and tangible benefits to local populations, while at the same time, where this is necessary, inculcating in them an awareness that their continued survival and quality of life are dependent on conservation of their natural resources. The involvement of local communities in wilderness protection should be part of their regional economy and lifestyle. To this end,

controlled taking of flora and fauna must be permissible and, to a limited and clearly defined extent, human habitation should also be permitted.

A reorientation of attitude and of our conservation laws is therefore required. In some way the traditions, culture and needs of indigenous people must be accommodated in those laws. The cultural heritage of the blacks in Africa is founded in a unique wilderness ethos. Unless something of this heritage is captured in our thinking with respect to wilderness; unless we eschew all semblance of paternalism or transplanted philosophy, there is the danger that wilderness may be perceived as a neo-colonial white man's luxury. An unfortunate, holdover from colonialism and apartheid is an understandable suspicion and distrust of government by indigenous people,[143] and a perception that laws relating to hunting and the protection of wildlife reflect economic privilege or class interests, and that wilderness and game sanctuaries are the "playground" of an elite group. Wilderness will not survive in Africa unless it incorporates of the tradition, culture and spirit of the African.[144] Our

---

[143] South Africa is not alone in this respect, as will appear from the following extracts from a review of "native justice" in three other jurisdictions. D. GETCHES & C. WILKINSON, INDIAN LAW: CASES AND MATERIALS 868-72 (2d ed. 1986) (*quoting* Keon-Cohen, *Native Justice in Australia, Canada and the U.S.A.: A Comparative Analysis*, 7 MONASH U.L. REV. 250, 264-65, 322-25 (1981)).

> Unfortunately, but understandably, major elements of indigenous peoples in all three countries harbour a deeply entrenched distrust, dislike, and active antagonism towards governments of whatever political or policy inclination, and their agencies and officials. All three countries look back to a tragic and manifestly unjust history of extermination, exploitation, deceit, dispossession, and cultural destruction. Current indigenous generations are mindful of that past, and view current governments as essentially no better than their forbears. . . [T]he potential for achieving justice is maximized if an ethnocentric stance is avoided, especially when dealing with radically different cultures. Only by attempting to "see things as native peoples see them" can results be achieved which are meaningful to the parties involved. This approach requires considerable flexibility in the majority justice system, and understanding by those administering it. . . "Anglo-based" legal systems, imposed upon native communities and often controlled by non-native bureaucracies, have by and large failed to achieve native justice. . .Cultural factors are important to the application of the majority legal system to native peoples. As cultural divergences increase, so too does the potential for native injustice. . .For such groups, native justice is more likely to be achieved through maximizing the use of existing customary law ways, and encouraging their development. This form of legal pluralism accords with philosophies underlying plural democratic societies, and should have the desirable effect of supporting the survival and development of native cultures in the future. . .As one moves across the cultural spectrum towards semi-acculturated native populations, so the focus shifts towards sensitizing and requiring flexibility of the majority legal system. Finally, with fully assimilated native communities, the rationale and needs for special justice mechanisms on a cultural basis disappear — though rationales and special needs for affirmative action may still exist, these exist in common with many disadvantaged poverty-stricken or minority groups in the community.

Id. at 868-72.

[144] *See* E. Mabuza, *The African and Wilderness*, in WILDERNESS 42-44 (V. Martin ed. 1982): The traditions and culture of the African peoples were, in bygone days, interwoven with

legal dispensation for its protection therefore requires a degree of flexibility that may be regarded as intolerable in other countries, or inconsistent with pure notion of wilderness.

The Concept of Environmental Group Rights in the South African Context

Wilderness, along with its constituent animal and plant wildlife, has instrumental value to all mankind, but particularly to indigenous people, communities with subsistence economies, or what has been referred to as the third world. For this reason, and because of their special relationship with wilderness, such communities deserve special rights or treatment relative to the wilderness. But any notion of community or group rights which savors racial differentiation is anathema in South Africa to many who are concerned with the lack of basic human rights amongst large sections of the indiginous community. However, there are sound social and ecological reasons for entertaining this notion in clearly defined and restricted circumstances—as has been done in the United States with respect to Native Americans. By virtue of their close contact with and dependence on their natural environment, indigenous people have, over a long period of time, developed a unique and rich traditional conservation knowledge and understanding of natural processes. They surely have the right to be involved in the control and planning of the use of those resources.[145] This is not a racial or political right. Affording local commu-

---

the wilderness. . .For many centuries the African was a pastoral farmer and a hunter, and while hunting was both a sport and a way of living, a balance between farming and hunting was maintained because of the awareness that survival was dependent upon the wilderness. There were no laws to protect the fauna and flora against injudicious human use of the environment because there was no need for such laws. . .It is said that it was the white explorers who illuminated the Dark Continent with the intellectual and spiritual legacy of Europe. Little is said about the calm and balance that existed between the "primitive" African peoples and the wilderness of this dark continent during the pre-exploration and colonial periods. . .The wilderness, with its hunting grounds and teeming game, became a dream of the past. The war that had been declared on the wilderness forced the Swazi to become more dependent upon the Western way of life. Our young people, who normally received part of their education in the wilderness while looking after the goats, the calves, the cattle and the corn-fields, had to give up this form of education in favour of a new education system completely divorced from the environment. Although they could now become successful teachers, clerics, or lawyers, they had lost touch with the spirit of the wilderness which had inspired their forebears. . .the days of fables and fairy kingdom when people and wild beast could talk to and understand one another much better than today. . .What I am trying to emphasize is that the wilderness of Africa cannot be conserved without capturing and blending into it the spirit of the African. Most African countries may be blessed with wildlife in game sanctuaries, but as long as these are seen only as a white man's luxury they will become targets of poaching and denudation.

Id.

145 The following statement from New Zealand NEWSLETTER 7 neatly summarizes the point made in the text:

nities environmental privileges or, more correctly expressed, continuance of their customary practices, is simply sound environmental and socio-economic planning, harmonizing local needs with conservation and the interests of the greater society.

We should learn from the many years of experience in other countries, especially the United States in resolving the conflicts and dilemmas presented at the first and third world interface in such communities. The extension of group rights is not only possible and desirable, at least in the context of utilization of natural resources, but also achievable even if not founded in treaties. Tribal cultures deserve this special treatment notwithstanding the commercial and other values to the rest of society of the timber, water and wildlife that they will have preferential access to. Recognition of aboriginal rights would not be "granting too much to too few."[146] Indeed, this may well be a case of granting too little too late.

In drawing on the experience of other countries we should endeavor to avoid some of the mistakes they have made. The use of modern technologies for the exercise of traditional harvesting needs and rights must be carefully monitored and controlled. Only traditional uses should not be subject to legal regulation. In accommodating these needs and rights, a proper balance with the interests of others and of the environment must be sought. To avoid a "collage of jurisdiction that is sensitive to legal principles but not to the realities of wildlife management," local groups and public sector authorities should enter into cooperative "wildlife managers and the coordination of resource management goals."[147] Resolution of the problem of protecting and preserving wilderness in South Africa along these lines may well provide guidelines, if not a model, for many other developing countries throughout the world.

The sponsors of the World Conservation Strategy should, in the future development of their thinking, reflect the unique environmental ethics of indigenous peoples, and the accrued riches of traditional conservation knowledge.

They should also recognise the need for cultural diversity as much as biological diversity in conservation.

Indigenous peoples have the right to self-determination, including the right to control the use of their traditional territories and resources. Where resources are shared with other peoples, rights to those resources should be respected on a reciprocal basis.

146 This is a question which has been asked about the preferential treatment of native Americans. *See* D. GETCHES & C. WILKINSON, *supra* note 142, at xxviii.

147 *Id.* at 729 (discussing traditional hunting and fishing rights in North America).