Legal Resources Centre Working Paper Series

14 September 2012

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Working Paper Series No. A1/2012

Recommended Citation:

Henk Smith & Federica Carugati 'Community Membership Under Living Law and Under State Law' (2012) A1 *Legal Resources Centre Working Paper Series.*

*COMMUNITY MEMBERSHIP UNDER LIVING LAW AND UNDER STATE LAW*

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ABSTRACT

*Given the great diversity of the world's indigenous peoples and communities living under customary law, trying to include them all under a single definition that provides objective criteria for identification is difficult and any such definition is often contested. Rather than static and objective definitions, recent legal developments suggest that the dynamic principle of self-identification or self-determination ought to be placed at the heart of community and indigenous identity. The paradox of South African legislation is that, as opposed to its constitutional and common law regimes, South African statute law straightjackets rural African communities into entities with prescribed membership and fixed rules. The present paper aims at exposing the SA statute law dilemma in order to challenge communities and lawmakers to give meaning to the constitutional and jurisprudential recognition of customary communities and their practices.*

## I INTRODUCTION

Given the great diversity of the world's indigenous peoples and communities living under customary law, trying to include them all under a single definition that provides objective criteria for identification is difficult and any such definition is often contested.

Namibian legislation, for example, defines a community as:

> 'an indigenous homogeneous, endogamous social grouping of persons comprising of families deriving from exogamous clans which share a *common ancestry, language, cultural heritage, customs and traditions, who recognizes a common traditional authority*

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> *and inhabits a common communal area, and may include the members of that traditional community residing outside the common communal area*.'[1]

We argue that definitions that emphasise elements such as descent and shared rules are too narrow to provide viable models. Their reliance on the past in search for legitimacy thwarts the full recognition of the community as a living entity.

The rejection of definitions such as the one quoted above has far-reaching implications. Under colonial rule, foreign powers gradually came to realise that they could utilise customary institutions of governance to achieve the subjugation of the local communities. Consequently, legislation was passed to ensure that the powers of the favoured leaders were entrenched: these statutes were based on a distorted colonial understanding of custom skewed to benefit colonial interests.[2] When the legislative frameworks were entrenched in post-independent states, the colonial distortions of customs were also entrenched. Throughout this period, customary law developed in spheres largely invisible to the dominant legal system(s).

Towards the end of the twentieth century, many African countries adopted constitutions that recognised customary law as an equal source of law to be applied by the courts where appropriate. Formal recognition, however, led to two equally unsatisfactory outcomes: on the one hand, recognition remained purely aspirational, in that customary law utterly failed to achieve the 'equal weight' that constitutions attribute to it; on the other hand, customary law became an entity frozen at the moment in which recognition occurred - a static entity that has little to share with actual community practices.

Relational models of pluralism recognise that communities create cultural meaning by strategically selecting indicators of difference. The process whereby a local community is generated is therefore a positioning that builds upon custom, experience and ranges of meaning and it emerges through interaction, engagement and struggle. Communities, thus, self-constitute relationally and, specifically, they do so by reference to other communities.[3]

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[1] See "traditional community," Traditional Authorities Act, 2000 (Act 25 of 2000), (emphasis added). For more definitions, see Appendix B.
[2] See Aninka Claassens. & Ben Cousins (eds). *Land, Power & Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) at 95.
[3] Cf. Kirsty Gover *Tribal Constitutionalism: States, tribes and the governance of membership* (2010) at 11.

African customary law is a community-based system of law in which rights are generally relational and not held by individuals as atomistic beings, but as members of a group.[4] Moreover, while underlying values and commonalities can be identified in customary practices, rules are not treated as a fixed structure that regulates societal organisation with some occasional leeway for exceptions. As in all legal systems, so too - and to a much greater extent - in customary law systems, a measure of flexibility is imperative. Recognition of customary law merely as a body of rules thwarts the ability of customary law to adapt contextually. More specifically, such kind of recognition blurs the meaning and the content of customary law and practices, both synchronically - in their validity at a given time - and diachronically - in their development over time. We therefore need a definition of communities and peoples that is capable of reflecting the relational and flexible nature of customary law as an independent source of law.

In the literature, the definitions provided by the ILO Convention 169 have come to represent a benchmark for the identification of indigenous peoples and communities. Tribal peoples are described as groups 'whose social, cultural, and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.'[5] Indigenous peoples are described as those

> 'who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural, and political institutions.'[6]

In addition to these guiding factors, the ILO Convention notably asserts that, '[s]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.'[7] We fully endorse the ILO

[4] See e.g. Ben Cousins 'Characterising "communal" tenure: Nested systems and flexible boundaries' in Claassens & Cousins op cit note 2 at 119.
[5] International Labour Organization, Indigenous and Tribal Peoples Convention, 1989 (No. 169), Article 1.1 (a), (emphasis added).
[6] Ibid, Article 1.1 (b), (emphasis added).
[7] Ibid, Article 1.2, (emphasis added). See also Albert Kwokwo Barume *Land Rights of Indigenous Peoples in Africa* (2010) at 20-31.

Convention's recognition of the importance of the principle of self-identification. However, we contend that, by distinguishing between tribal and indigenous communities, these definitions ultimately miss the point.[8]

The *Endorois* decision, endorsing the principle of self-determination enshrined in the African Charter on Human and Peoples' Rights, provided a more comprehensive set of criteria to identify a people or community:

- the voluntary perpetuation of cultural distinctiveness;
- self-identification as a distinct collectivity;
- recognition by other communities.[9]

The *Endorois* decision draws attention to the fact that the term "communities" or "peoples" must attend to the broad range of associational and cultural patterns actually found in the human experience. Moreover, the term must attend to the dynamic nature of the life of these communities as it develops over time and not merely as it appears in the specific moment frozen in time when recognition occurs.

In South Africa, state law largely ignores the practice and experience of communities. South African land reform law, for example, requires commonality, historic connection and shared rules of access to resources.[10] Similarly, formalised customary law governance institutions resort to the imposed discretionary boundaries and powers of state-appointed traditional chiefs.[11]

The paradox of South African legislation is that, as opposed to its constitutional and common law regimes, South African statute law straightjackets rural African communities into entities with prescribed membership and fixed rules. Instead, self-identification and voluntary membership ought to be placed at the heart of cultural identity and, by implication, at the heart of

[8] In Africa, the discourse of the protection of community rights to land and resources has been dominated by the Indigenous Peoples' movement. The movement is, internationally, one of the best funded social movements and it has had remarkable success in lobbying for the principle of Free, Prior and Informed Consent to be applied to 'indigenous peoples.' The success of the movement, however, depended, at least in part, on the willingness to narrow the definition of 'indigenous peoples.' On the African continent, where 'indigenous' communities with an 'alternative' way of life are not the kind of extreme minority they represent in Latin America and even the South Pacific, this discourse has proved uttely inadequate.

[9] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (*276 / 2003*-2010) available at *http://www.hrw.org/sites/default/files/related_material/2010_africa_commission_ruling_0.pdf,* accessed on 23 August 2012.

[10] Cf. Appendix A.

[11] Ibid.

any system of local living law. Until this result is achieved in state law practice, any claim to meaningful legal pluralism cannot but appear superficial and preposterous.

The present paper aims at exposing the South African statute law dilemma in order to challenge communities and lawmakers to give meaning to the constitutional and legal recognition of customary communities and their practices. The South African Constitution and recent jurisprudence are considered here as models for development. The paper proceeds as follows: section 2 discusses the constitutional provisions for the recognition of the right to culture and of customary law as an independent source of law.[12] The section focuses in particular on issues of interpretation concerning the implementation of the protection and recognition of the constitutional rights of customary communities. Section 3 illustrates the contribution of the Restitution of Land Rights Act 22 of 1994 ("Restitution Act") to the development of a concept of community-as-an-entity. The section discusses the steps made by the Land Claims Court toward the recognition of a measure of self-determination in community practices. The section further focuses on the concept of living law as an instrument to achieve meaningful self-determination. Section 4 discusses recent South African statutes and emphasises the extent to which they fall short (and increasingly so) of their constitutional and jurisprudential counterparts. Our conclusions follow.

## II THE SOUTH AFRICAN CONSTITUTIONAL CONTEXT: A MODEL FOR DEVELOPMENT

The Interim Constitution of 1993 recognised the customary principle of *ubuntu*, simply defined as humanity. Moreover, the Bill of Rights protected the right to culture and, for the first time, it guaranteed the people of South Africa the opportunity to live according to their cultural traditions.[13]

The 1996 Constitution protects and recognises customary law in various ways.[14] First of all, chapter 12 (sections 211 and 212) affords official recognition to indigenous law as well as to

[12] According to paragraph 7 of General Comment 23 (Article 27) of the UN Human Rights Committee, 'culture manifests itself in many forms, including a particular way of life associated with the use of land resources.' Human Rights Committee, General Comments, available at *http://www2.ohchr.org/english/bodies/hrc/comments.htm*, accessed on 22 August 2012.
[13] The Constitution of the Republic of South Africa Act 200 of 1993, (section 31).
[14] The Constitution of the Republic of South Africa, 1996.

the institution, status and role of traditional leadership. Moreover, according to section 211(3), '[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.' Secondly, customary law is protected by the Bill of Rights - most notably under the right to freedom of belief and opinion (section 15), the individual right to language and culture (section 30) as well as the collective right pertaining to cultural, religious and linguistic communities (section 31).

The implementation of the protection and recognition of these constitutional rights requires specific attention. Section 8(3) provides that, in the horizontal application of the Bill of Rights affecting natural and juristic persons, the court must apply or develop the common law to give effect to the relevant right to the extent that statute law does not address the matter. Moreover, section 173 refers to the inherent power of the higher courts to develop the common law. In accordance with section 39 of the Bill of Rights, which states that 'when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights,' we would argue that the development of both customary law and the common law is implied in the wording of sections 8 and 173.[15]

Further, it is our contention that section 39(2) should be interpreted to require that whenever any court or even customary law dispute resolution mechanism such as a community or "tribal court" engages with, interprets, applies or develops customary law it must implement and promote the rights enshrined in the Bill of Rights. This process requires more than merely taking into account the political, social and economic human rights contained in the Constitution.[16] The Court held in *Carmichele* that section 39(2) imposes on all courts an obligation that law be developed so as to bring it in line with the substantive revolution and the objective normative order of the New South Africa.[17] This obligation is imposed on the traditional authorities as well, even if their freedom to change the law in accordance with their own practice of custom must also be respected.[18]

[15] This position is endorsed, among others, by Davis and Klare who contend that, given that customary law is intricately connected to the cultural rights of people, the Constitutional Court has said that it is the community itself who is best placed to harmonise customary law and constitutional values, and that this should be encouraged. Cf. Dennis M. Davis & Karl Klare 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *SAJHR* 403; See also *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) at para 45.
[16] Cf. Dennis M. Davis & Karl Klare op cit note 15 at 425-431.
[17] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).
[18] *Grootboom* supra note 15 at para 48.

Finally, we would argue that, according to the constitutional mandate to consider international law models where relevant, the ILO Convention 169 and the community self-determination imperative enshrined in the African Charter and interpreted in *Endorois* decision ought to be taken into account.

## III SOUTH AFRICAN JURISPRUDENCE AND THE CONCEPT OF LIVING LAW: A MODEST PROPOSAL

At least one recent South African statute invoking the community as the beneficiary of reform and redistribution benefits has begun to develop a definition of community that reflects the principle of self-determination.

The Restitution Act recognised the existence of a community which holds rights independently of its individual members. The individual members have rights against each other and against the community, but the community is conceived as the primary right-holder - an entity empowered to claim restitution and receive an award of title in its own name and not as a representative of a number of individuals.

Section 1 of the Restitution Act defines the community as: *'any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group* (emphasis added).' This definition underlines the fact that the land is held in common by the group, not by a number of individuals forming that group who have come together for convenience or for some other reason. Such a definition implies that when a community claim is lodged, it is not necessary to establish who are the direct descendants of the original individual members of the community. In fact, the claim is not made by the descendants of original individual members but by the group - the community as an entity. It is therefore necessary to identify not the individual descendants but the community itself.

### *(a) Community-as-an-entity: the Macleantown and Kranspoort cases*

As interpreted by the Land Claims Court, the Restitution of Land Rights Act recognises community autonomy in determining community composition and membership and it thus accommodates a measure of self-determination in the communities' practices.

In *Macleantown*, the Court suggested that,

> 'The Regional Land Claims Commissioner raised the question whether it is necessary to specify a list of individual claimants and he obtained legal opinion thereon. The opinion correctly points out that if the claim is by a community, the land will be transferred to the community (to be held in a manner as the court order may direct), and a list of members of the community will not be necessary. (…) On the other hand, if the claim is made by individuals, a list of the individual claimants must be submitted.'[19]

In *Kranspoort*, the Court further stressed the point,

> 'As I have said, it is clear that there must be a community in existence at the time of the claim. Moreover, it must be the same community or part of the same community which was deprived of rights in the relevant land. However, this does not mean that the identity of the claimant community, in terms of its constituent members, should be identical to the one which was originally dispossessed. This would be an anomaly, something which a statute is assumed to avoid. Communities cannot be frozen in time. Changes in the constituent families and the admission of new members and departure of others must mean that the face of a community changes over time.'[20]

If the membership of the community is constantly changing over time, it is neither necessary nor desirable for the purposes of resolution of a community claim to establish who those members are at the time when the claim is resolved.

*(b) Local Living Law: Richtersveld*

A similar situation arose in the *Richtersveld* case:

[19] *Macleantown Residents Association Re: Certain Erven and Commonage in Macleantown* 1996 (4) SA 1272 (LCC) at 1278D-J. The problem in the *Macleantown* case was that the claims were lodged by individual persons. Even though the persons were in turn represented by their Residents Association, the claims in *Macleantown* were not lodged by a community.
[20] *In re Kranspoort Community* 2000 (2) SA 124 (LCC) at para 34.

> 'Over time, the community expanded. Their composition changed. They admitted new members, not always homogeneous to the original population. Nonetheless, the community cohesion remained. The newcomers were allowed to share in the common rights to communal land. (…) The present community (being the first plaintiff), augmented by the newcomers, is still a community with sufficient commonality with the community as it previously existed.'[21]

This ruling was not challenged on appeal, either in the Supreme Court of Appeal or in the Constitutional Court.[22] The Constitutional Court, in particular, elaborated on the content of the customary law in terms of the living form of that law:

> 'It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life. (…) In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practiced and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.'[23]

The Constitutional Court and the Supreme Court of Appeal relied on findings of the Land Claims Court concerning the nature and the content of the rules and the legitimacy of the local legal system. The Land Claims Court describes one of the rules of exclusion as follows:

> 'The circumstances that the Richtersveld people, prior to being excluded from the subject land, occupied it and regarded it as their own, is evidenced by the fact that outsiders required permission before they could use the land (a requirement which they were not

[21] *Richtersveld community and others v Alexkor Ltd and another* 2001 (3) SA 1285 (LCC) at para 72.
[22] *Richtersveld community and others v Alexkor Ltd and another* 2003 (6) SA 104 (SCA) para 5; *Alexkor Ltd and another v Richtersveld community and others* 2004 (5) SA 460 (CC) at para 19.
[23] *Alexkor Ltd and another v the Richtersveld Community and Others* 2004 (5) SA 460 (CC) paras 52-53.

> always able to enforce), and that grazing fees were extracted from outsiders whenever possible.'[24]

The *Richtersveld* SCA judgment similarly emphasises the central rule of permission of access to outsiders:

> 'All members of the community had a sense of legitimate access to the land to the exclusion of all other people. Non-members had no such rights and had to obtain permission to use the land for which they sometimes had to pay… The captain and his 'raad' enforced the rules relating to the use of the communal land and gave permission to newcomers to join the community or to use the land.'[25]

From the above analysis the following conclusions may be drawn:

- The Constitution and the Restitution of Land Rights Act draw a clear distinction between community claims and individual claims, and where a claim is made by a community; the rights under that claim are vested in the community as an entity.
- It is in the nature of a community that its membership changes: some members leave and others join. The identity of the individuals ought not to compromise the identity of the community.
- Membership of a community, and the benefits flowing from membership, depend upon the rules of that community.

The *Richtersveld* case illustrates that participation and membership rules depend on local living law. If local living law is relational and flexible, the recognition of a measure of self-determination is therefore crucial to the meaningful recognition of a customary community. It is our contention that recent South African statute law lags far behind its jurisprudential and constitutional models and should thus be accordingly developed.

[24] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1293 (LCC) at para 65.
[25] *Richtersveld community and others v Alexkor Ltd and another* 2003 (6) SA 104 (SCA) at para 18.

## IV STATE LAW FAILING THE TEST FOR COMMUNITY SELF-DETERMINATION

Of particular concern is not only the fact that South African statute law generally lags far behind its jurisprudential and constitutional models. In addition, there has recently been a significant reversal in the direction of development of customary law in South African courts and other legislative organs of state. Unlike the Constitution and unlike laws such as the Restitution Act and the Interim Protection of Informal Land Rights Act 31 of 1996 ("IPILRA"), more recent laws patently subscribe to limited or weak state law pluralism and relegate self-determination to a bare minimum. To illustrate this point, the following section compares the IPILRA with the more recent Communal Land Rights Act 11 of 2004 ("CLaRA") and National Traditional Affairs Bill.

### *(a) The Interim Protection of Informal Land Rights Act*

As suggested in the previous section, the Restitution Act accommodated a measure of community self-determination. Similarly, the IPILRA insisted that customary law and practice must determine the procedure for community consent to development and/or disposal of communal land.

The IPILRA prohibits the taking of land without the consent of the right holder. This means that the right holder can only lose his or her rights to communal land if the custom and usage of the community is followed and if he or she is paid compensation. Custom, according to the IPILRA, includes:

> 'the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate.'[26]

The procedure for community consent involves a series of steps. First, the community's customary law for decision-making about the disposal of land must be followed. In addition,

[26] Section 2(4).

state law requirements must be followed: any community meeting authorizing land sales and development or investment projects must be attended and supervised by an official of the Department of Land Affairs; the notice must state the purpose of the meeting and arguments for and against the change must be debated and considered; the meeting must be attended by all sectors that are rights holders and all must be encouraged to participate; prescribed forms must be completed; and a register of all men and women who attended must be kept. Once the process is concluded, the minister must consider the official report and then make a final decision.[27]

The IPILRA's tribute to the democracy-in-action requirements of the new constitutional order thus came in the form of an elaborate procedure for finalizing the community mandate. Such a procedure constitutes a qualified attempt to harmonise localised practice with democratic imperatives.

### *(b) The Communal Land Rights Act*

Much has been written about the crude codification attempts of the stillborn CLaRA.[28] The Act constituted a form of direct intervention aimed at strengthening customary institutions of land administration as a means of strengthening tenure rights. Through the process envisioned by the Act, customary institutions, rather than property rights, gained lawful recognition.

The provisions of the CLaRA illustrate the dangers involved in the process of recognition-though-codification that we discussed in the introduction. Statutory enforcement in terms of the Act directly affects and transforms the internal organization of the community: in fact, strengthening customary institutions involves centralisation of power; centralisation, in turn, undermines the meaning of recognition as a process that ought to take place within the community, rather than being bestowed upon it from above. In addition, the customary law of land tenure is extinguished once old order rights are cancelled and converted into new order rights and given content - or not - by ministerial decree. As a consequence, the Act would

[27] Cf. "the Interim Procedures Governing Land Development Decisions which require the Consent of the Minister of Land Affairs as Nominal Owner of the Land", Approved by Polcom On 20 November 1997 and amended on 14 January 1998 & Also In Terms Of Section 3(1)(A)(Ii) Of Act 112 of 1991 as amended by Act 34 of 1996; The Entitlement of IPILRA and ESTA Rights Holders in respect of State Land Disposal Projects, Tenure Reform Directorate, PC.DOC 52/1999; The Interim Procedures Governing Land Development Decisions which require the consent of the Minister of Land Affairs as Nominal Owner of the Land available at *http://land.pwv.gov.za/tenurereform/New_TenureReform/Policies/Policies.htm*, accessed on 23 August 2012.

[28] See e.g. Claassens & Cousins op cit note 2.

extinguish some of the most valuable aspects of customary law in relation to tenure - self-determination as an outcome and multi-layered recognition as a process whereby the outcome is achieved.

### *(c) The National Traditional Affairs Bill*

The draft National Traditional Affairs Bill of 2011 is perhaps the most cynical of the so-called 'harmonization laws.' Although the draft bill purports to recognise a measure of self-determination in its definition of community, objective identity criteria remain critical to the definition - among these, manifest culturally distinctive traits, adherence to customary law and subjugation to state-recognised traditional leadership structures.[29] In addition, the determination process contemplated by the bill is only available to those communities that are not already covered by the wall-to-wall tribal authorities, established under the apartheid Bantu Authorities Act of 1951. These authorities have now been perpetuated as traditional councils and leaders under the Traditional Leadership and Governance Framework Act 41 of 2003.[30]

## V CONCLUSION

> 'The concept community has been used in many different ways in recent land tenure legislation, but it generally indicates a group of people living together on a specific piece of land and exercising communal land tenure rights on that piece of land. The clarity and legal certainty brought about by legislation (especially the Communal Property Associations Act 28 of 1996 and the Communal Land Rights Act 11 of 2004) and case law regarding the incorporation of such communities as juristic persons in order to obtain registered rights (ownership or other land tenure rights) in land, are to be welcomed.'[31]

The repeated attempts at codification of customary law in South Africa ought not to mislead: in this context, as in many others, quantity and quality do not necessarily overlap. We urge communities and lawmakers to move beyond legalistic definitions of communities, such as

[29] Cf. Appendix A.
[30] Ibid.
[31] Gerrit Pienaar 'The Meaning of the Concept Community in South African Land Tenure Legislation,' (2005) 16 *Stellenbosch L. Rev.* 60 at 75.

the one above and the ones we began our paper with. Such definitions thwart the full enjoyment of the rights they purport to recognise in that they do not recognise the dynamic nature of the lives of the communities, the diachronic existence of their customs and rules and, crucially, the possibility to develop and adapt their rules as they see fit.

What do recognition and self-determination mean for the community's political organization and for the articulation and enforcement of its social and economic rights? Without self-identification and the right to secede and reconstitute a political organisation, the community under the type of customary law that recent bills purport to endorse would undermine its own foundations. This paper suggests that self-determination and voluntary membership are at the heart of the living law system. Arbitrary recognition by the state, instead, undermines both its strength and its autonomy.

As Hunt and Smith put it, '[i]t is not an appeal *to tradition*; it is an appeal *for legitimac*y …' In some cases, this may mean indigenous communities have to rethink their ideas of how to govern and invent new ways that better meet their needs.'[32] The local living law approach emphasises legitimacy and recognises autonomy and social relatedness. In South Africa, the constitution and the judiciary have recognised customary law in this expression. The challenge is for state law to follow suit.

## VI APPENDIXES

*Appendix A: Community and membership in South African Land Reform Law - Statutory definitions*

RESTITUTION OF LAND RIGHTS ACT NO. 22 OF 1994

"Community" means any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group.

INTERIM PROTECTION OF INFORMAL LAND RIGHTS ACT NO. 31 OF 1996

[32] J. Hunt & D. E. Smith 'Building Indigenous community governance in Australia: Preliminary research findings' (2006) Australian National University: Centre for Aboriginal Economic Policy Research; Working Paper no. 31/2006 at 14.

"Community" means any group or portion of a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group.

COMMUNAL PROPERTY ASSOCIATIONS ACT NO. 28 OF 1996

- "Community" means a group of persons, which wishes to have its rights to or in particular property determined by shared rules under a written constitution and which wishes or is required to form an association as contemplated in section 2;
- "Members" means the members of an association or the members of a community, as the case may be, including members who comply with the provisions of paragraph (i) of item 5 of the Schedule, and for the purposes of sections 12, 13 and 14, shall mean those members whose names appear on a list contemplated in the said item 5.

TRANSFORMATION OF CERTAIN RURAL AREAS ACT NO. 94 OF 1998

"Resident" means a person who, at the date of commencement of this Act—

(a) ordinarily resides in a board area; or

(b) under law is liable for the payment of assessment rates, rent, service charges or levies to the municipality concerned in respect of land situated in a board area.

UPGRADING OF LAND TENURE RIGHTS ACT NO. 112 OF 1991

- "Community" means a group of persons of which its members have or wish to have their rights to or in a particular piece of land determined by shared rules; [Definition of "community" inserted by s. 1 (a) of Act No. 34 of 1996.]
- "Community resolution" means any decision taken by a majority of the members of the community over the age of 18 years present or represented at a meeting convened for the purpose of considering the disposal of a right in land lawfully occupied by or allocated for the use of such community, of which they have been given sufficient notice, and in which they had a reasonable opportunity to participate; [Definition of "community resolution" inserted by s. 1 (a) of Act No. 34 of 1996.]

- "Tribal resolution", in relation to a tribe, means a resolution passed by the tribe democratically and in accordance with the indigenous law or customs of the tribe: Provided that for the purposes of this Act any decision to dispose of a right in tribal land may only be taken by a majority of the members of the tribe over the age of 18 years present or represented at a meeting convened for the purpose of considering such disposal, of which they have been given sufficient notice, and in which they had a reasonable opportunity to participate; [Definition of "tribal resolution" substituted by s. 1 (b) of Act No. 34 of 1996.]
- "Tribe" includes—
  (a) any community living and existing like a tribe; or
  (b) any part of a tribe living and existing as a separate entity.

COMMUNAL LAND RIGHTS ACT NO. 11 OF 2004 [declared unconstitutional]

- "Communal land" means land contemplated in section 2 which is, or is to be, occupied or used by members of a community subject to the rules or custom of that community;
- "Community" means a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group.

TRADITIONAL LEADERSHIP AND GOVERNANCE FRAMEWORK ACT NO. 41 OF 2003

2. (1) A community may be recognised as a traditional community if it-
(a) is subject to a system of traditional leadership in terms of that community's customs; and
(b) observes a system of customary law.

NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT NO. 10 OF 2004 AND PROTECTED AREAS ACT NO. 57 OF 2003

"Local community" means any community of people living or having rights or interests in a distinct geographical area.

NATIONAL ENVIRONMENTAL MANAGEMENT ACT NO. 107 OF 1998

"Community" means any group of persons or a part of such a group who share common interests, and who regard themselves as a community.

NATIONAL FORESTS ACT NO. 84 OF 1998

"Community" means a coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law.

MINERALS AND PETROLEUM RESOURCES DEVELOPMENT ACT NO. 28 OF 2002 (as amended by Act No. 36 of 2008 - amendment not in operation)

"Community" means a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law.

INTELLECTUAL PROPERTY LAWS AMENDMENT BILL [B 8—2010]

- "Traditional performance" means a performance which is recognised by an indigenous community as a performance having an indigenous origin and a traditional character;
- A traditional work, means the work which originated and acquired traditional character from an indigenous community;
- 'Indigenous community' means any community of people living within the borders of the Republic, or which historically lived in the geographic area located within the borders of the Republic;
- 'Traditional intellectual property' means an intellectual property that has an indigenous origin and is owned or could be owned by an indigenous community as determined by the Registrar;

- 'Traditional work' means a literary work, an artistic work or a musical work which is recognised by an indigenous community as a work having an indigenous origin and a traditional character;
- The community from which the work or a substantial part thereof originated is or was an indigenous community when the work was created;
- Notwithstanding the provisions of this section, any indigenous community may establish a legal entity, business or any other enterprise to promote or exploit traditional intellectual property.

NATIONAL TRADITIONAL AFFAIRS BILL, 2011 (Draft -Version 3 of 26 June 2011)

6. (1) A community may be recognised as a traditional community if it –

(a) has a system of traditional leadership at a senior traditional leadership level recognised by other traditional communities;

(b) observes a system of customary law;

(c) recognises itself as a distinct traditional community with a proven history of existence, from a particular point in time up to the present, distinct and separate from other traditional communities; and

(d) has an existence of distinctive cultural heritage manifestations; or

(e) has a number of headmenship or headwomenship.

10. (1) A community may apply to the Premier concerned to be recognised as a Khoi-San community if it –

(a) has a history of self-identification by members of the community concerned, as belonging to a unique community distinct from all other communities;

(b) observes distinctive established Khoi-San customary law and customs;

(c) is subject to a system of hereditary or elected Khoi-San leadership with structures exercising authority in terms of customary law and customs of that community;

(d) has an existence of distinctive cultural heritage manifestations;

(e) has a proven history of coherent existence of the community from a particular point in time up to the present;

(f) is acknowledged by other Khoi-San communities as a distinct community; and

(g) occupies a specific geographical area or various geographical areas together with other non-community members.

*Appendix B: Definitions of 'community' in Kenya, Mozambique, Zimbabwe and Namibia*

**Kenya**

Source: Constitution of Kenya

63. (1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.

Source: Community Land Bill, 2011[33]

"Community" refers to a clearly defined group of users of land, which may, but need not be, a clan or ethnic community. These groups of users hold a set of clearly defined rights and obligations over land and land-based resources.

**Mozambique**

Source: Norfolk and Tanner, 2007

The legal definition of the "local community" is wide ranging:
*… a grouping of families and individuals, living in a circumscribed territorial area at the level of a locality or below, which has as its objective the safeguarding of common interests through the protection of areas of habitation, agricultural areas, whether cultivated or in fallow, forests, sites of socio-cultural importance, grazing lands, water sources and areas of expansion*.

[33] The same definition of community appears in the Land Registration Bill, 2012 and the National Land Commission Bill, 2012.

Source: Knight, 2010

The law [Land Act, 1997] defines a local community as: "a grouping of families and individuals, living in a territorial area that is at the level of a locality or smaller, which seeks to safeguard their common interests" (art. 1§1).

**Zimbabwe**

Source: Chiefs and Headmen Act

"Community" means a community of persons who recognize and are subject to customary law.

**Namibia**

Source: Traditional Authorities Act

"Traditional community" means an indigenous homogeneous, endogamous social grouping of persons comprising of families deriving from exogamous clans which share a common ancestry, language, cultural heritage, customs and traditions, who recognizes a common traditional authority and inhabits a common communal area, and may include the members of that traditional community residing outside the common communal area.

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