



CUSTOMARY LAW AND THE PROTECTION OF COMMUNITY RIGHTS TO RESOURCES

LRC

LEGAL RESOURCES CENTRE

LRC

LEGAL RESOURCES CENTRE

Authors: Henk Smith, Wilmien Wicomb

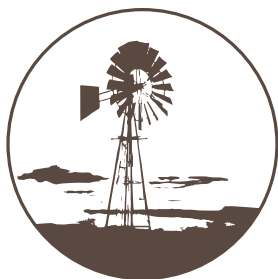
Acknowledgements: Estelle Hebron-Jones

Design: *Design for development*, www.d4d.co.za

Print:

CUSTOMARY LAW

AND THE PROTECTION OF COMMUNITY RIGHTS TO RESOURCES



LRC

LEGAL RESOURCES CENTRE

ICONS AND THEIR MEANINGS:



LRC voice



Case Study



Quote

CONTENTS

Problem statement	1
What is customary law?	3
Why use customary law?	6
Challenges and opportunities	11
What is the status of customary law?	13
The doctrine of aboriginal title	16
Customary law in international law	20
Conclusion: what does this mean for communities?	26



One of the most destructive impacts of colonialism on the continent was the imposition of Western forms of law – and in particular property law – on African countries and thus on customary law.

PROBLEM STATEMENT

Millions of African rural communities have for generations utilised land, forests, marine and other resources in terms of the customary laws of their communities.¹ Through occupying, utilising and governing resources in terms of customary law, these communities were owners or at least rights holders of the resources in terms of customary law. In addition, the community's relationship to the land and resources at their disposal oftentimes became an integral part of the identity and cultural existence of the community; in fact, in many instances communities could not practice their culture and custom if they did not have access to their land and resources.

One of the most destructive impacts of colonialism on the continent was the imposition of Western forms of law – and in particular property law – on African countries and thus on customary law. This imposition was so pervasive and absolute that the fiction that 'ownership' can only be proven through a title deed or similar written entitlement remains intact in most of Africa.

Much is written about the way in which land in Africa is grabbed by foreign interests. The term 'land grabbing' suggests that the land is taken 'unlawfully'. In fact, the problem is rather that the statutory legal systems of African countries and even the international law frameworks, whilst portending to protect community land, actually facilitate land grabbing. Corporations or countries are enabled to **legally** acquire huge tracts of

¹ Customary law, in this context, refers to the local and/or indigenous laws of communities in Africa. It has also been described as the law of small-scale communities. It generally refers to the system of rules and principles that communities use to govern themselves and their access to shared resources. As we describe later, we refer in particular to 'living customary law'. Conversely, we use the term 'customary community' here to refer to communities who regulate their lives, and in particular their tenure rights, in terms of customary law. This term is used to denote a far broader group of people than the narrow definition of 'indigenous' or 'tribal' peoples.



We believe that law should in principle assist vulnerable communities in changing power relations.

² Community development and law focus on legal strategies supporting political and organisational strategies to promote community self-determination and self-governance. Community development starts from the principle that within the community there is knowledge, skills and experience which can be strengthened through democratic action to achieve the community's desired development goals. Community organisation and institutional structures represent community knowledge and decision making in action. If law claims authority because it requires of community actions and decisions that they refer to legal rules, legal rights and legal obligations, then it follows that communities may turn to the system of living customary law as their preferred system or first point of reference.

community land without even seeking the consent of the community as owner or compensating the community for their rights in the land.

In Solwezi in North Western Zambia, a mining company acquired the rights to more than 500 km² of the land of the Musele community through a long-term lease agreement in order to develop a US\$2 billion copper mine. The mining company only compensated those community members who were removed from their individual plots and then only for the value of their individual crops. The company refused to compensate for the loss of the land because the community members did not have title deeds – even though they are clearly owners in terms of customary law.

This state of affairs is based on the continued disregard of indigenous forms of ownership and rights to access and control of resources.

We believe that law should in principle assist vulnerable communities in changing power relations. Law is fundamentally a 'neutral' set of rules that constrains power by requiring decisions and actions of those in power to comply with legal rules, rights and obligations. Unfortunately, we have seen the powerful appropriate law as a tool for only protecting and strengthening their interests.

There is a way in which communities can re-appropriate the law and use it to protect their rights *against* the powerful interests. This booklet argues for ways in which communities and human rights activists can advocate for such a change in power dynamics by asserting living customary law.²

This is not to say that customary law does not carry its own internal power dynamics. In fact, women often bear the brunt of male dominated customary communities

where the 'rules' are applied in discriminatory ways. The opportunities provided by customary law systems must be weighed up against its dangers as we discuss further below.

What is customary law?

Customary law, in this context, refers to the local law of communities who own and/or use resources on a communal basis. The majority of the African continent is covered by rural communities who live and work on communal land, and is thus governed by customary law. As such, customary law is fundamentally important as the source of both the rights and of the rules of communities.

Customary law operates at two levels: it provides for the internal rules of communities which regulate relationships between the members of the community and provides for the rights of individual members of the community. For example, customary law will provide that a woman has access to and the right to use a particular piece of community land to the exclusion of other members of the community. Her husband may have the right to control the same piece of land.

Secondly, customary law provides for communal rights; that is, rights of the community against the outside world.

It is at the first level that gender discrimination often occurs, when women are not granted the same land or decision making rights within the community as men. In colonial times, governments often allowed communities to continue to exercise their customary rights and apply customary law at this level; that is within the community boundaries. It was part of the system of indirect rule and allowed colonial

governments to transfer governmental powers to the traditional leaders of these communities.

However, the second level at which customary law operates – where it is a source of communal rights – is the focus of this booklet. This level only becomes relevant when the community is threatened by outsiders interested in its land or other resources. Then the community needs to assert its rights to these resources through customary law in order to ensure that they are not simply dispossessed of their rights.

When these ‘outsiders’ are neighbouring communities, the problem is simply one of a conflict of customary law and can be resolved in terms of the local arrangements. But when the ‘outsider’ is the government or a corporation, then these more powerful players will generally ensure that their interaction with the community is regulated in terms of state law and NOT customary law. In fact, they will argue that customary law either does not exist or is trumped by state law. As a result, they will deny communities the rights that they have under custom: and take land or resources without the community’s consent and without proper compensation or reparation. State law often ‘allows’ this to happen – by ignoring customary law or assuming that state law will simply override it.

This pamphlet addresses this second level of the application of customary law, namely where it is used to protect the community’s rights (rather than the rights of individuals *within* the community).

Here we must pause to say something about the term ‘community’. We tend to use the term as if we are clear of its meaning and clear of who constitutes the community. That is almost never the case in practice.

A community, we would argue, self-constitutes and organises in relation to its past and its desired future. In defining itself it

- a) **builds on its history and living customary law and**
- b) **develops out of engagement and struggle, and constitutes itself as a community different to its neighbour. This presentation is a process and the community boundary, is relatively fluid depending on changes in the social and physical environment.**³

The self-definition of a community may overlap with the definition that the state recognises in terms of state laws that recognise traditional institutions and their jurisdictions. But often these don't overlap – in particular where colonialism has distorted the official boundaries and leadership structures of communities. Communities should not be forced into definitions with which they don't identify.

The local community so constituted may emphasise a particular aspect of its identity depending on the nature of the political, organisational or legal engagement. So some of the first questions that one can ask a community in the process of defining itself may include:

- a) **What do we want and where do we want to go?**
- b) **What are the challenges to getting there, or what is threatening us?**
- c) **What are our rights under our own customary law, our country's law and under best international law?**



A community, we would argue, self-constitutes and organises in relation to its past and its desired future.

³ Different communities may share certain resources in certain seasons, and have exclusive access in other seasons.

Then the community gives itself a political and organisational definition and presents its representative structures for the purposes of the particular engagement based on its own experience and strengths. Community strengths often depend on how different interest groups with diverse interests join forces.

But just as a 'community' is dynamic, so is customary law itself. In addition, it is unwritten. So how and where do we find the content of customary law in order to assert the rights arising from it?

The South African Constitutional Court has given useful guidance in answering this question. In *Shilubana and Others v Nwamitwa*, the Court identified four factors in ascertaining the content of customary law. Before we discuss these factors, it should be noted that this Constitutional Court has held that the 'customary law' that is recognised by the South African Constitution as an independent source of law, is 'living customary law'. That is, it is the law of the community as developed by the community. It is not the distorted colonial versions of customary law and it is not (necessarily) what is written in academic textbooks.

The factors used to identify 'living customary law' then are:

- (i) The history of the community (that is, historical evidence of how the rules were applied in the times of the elders and ancestors);
- (ii) The community's current practice; and
- (iii) The feasibility of the customary rule in current circumstances; and
- (iv) Compliance with the Bill of Rights.

Why use customary law?

If we were to identify the moment when customary law was relegated to an inferior system of law, we need look no further than the famous case of *In re: Southern Rhodesia* (60) (1919) AC 211. In 1919, the highest court of appeal in the British Empire, the Privy Council, rejected a claim for indigenous ownership over land and minerals of the defeated Ndebele community under Chief Lobengula. The judge, Lord Sumner found that:

Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged.

Such a statement is today difficult to stomach in a world where equality and human rights are meant to be universal principles. And yet, quite astonishingly, the rights of rural communities held in terms of customary law are still treated with the same disrespect: in the absence of title deeds, their rights are simply ignored.

These communities often have no recourse to any rights in land and resources other than asserting their rights in terms of customary law (and these arguments are discussed below). For this reason at least, we argue that **it will not only be a mistake to disregard customary law due to the many problems associated with it,⁴ but that communities must be assisted to assert the rights that arise from customary law.**

Law should not be the purview of trained lawyers only and should certainly not be a tool to be applied in formal courts exclusively. On the contrary, law can be used by communities as a rallying point, as a language in which to formulate demands against those in power and as a way in which to empower the community to increasingly become the agents of their own development paths.



We argue that it will not only be a mistake to disregard customary law due to the many problems associated with it, but that communities must be assisted to assert the rights that arise from customary law.

⁴ These very legitimate problems include gender and other inequalities still pervasive in many customary laws, the uncertainty of unwritten law and the difficulties of litigating customary law in formal courts.



Customary law and rights are arguably the most effective form of lawfare against the overwhelming might of dominant and domineering economic interests.

As such, communities can use the law against those who have appropriated it as a tool in the hands of the powerful only. Just as powerful agents use the law to obscure and complicate issues to the point of eliminating those not versed in the law from the conversation, communities may appropriate other versions of the law to change the subject of the conversation from technical legal jargon to a language of rights and community agency. **Customary law and rights are tools for communities to change the topic – and the parameter of the conversation – in their favour. It is arguably the most effective form of lawfare against the overwhelming might of dominant and domineering economic interests.**

But do the benefits of organising in terms of customary law outweigh its dangers?

There is no simple answer to that question. – While we intuitively believe that the power imbalances within customary communities can be solved through statutory regulation, it has been shown repeatedly that an imposition of ‘foreign’ norms and standards on communities is not an effective way of changing the way people engage with each other. Forcing gender equality, for example, in an insensitive way onto patriarchal systems generally leads to one of two results: either the community ignores the imposed values (even if these are imposed in the form of state law) and continue with its own approach or the imposed principles create confusion that often further enhance inequalities. This is particularly true of property rights. As Claassens and Ngubane⁵ have argued:

⁵ A Claassens and S Ngubane ‘Women, land and power: the impact of the Communal Land Rights Act’ in A Claassens and B Cousins (eds) *Land, Power, Custom* (2008) at 155.

Property relations are created through processes of human interaction at the local level and are not established by the introduction of laws. While law per se cannot create new property relations (and is likely to have unintended consequences when applied beyond its limits), it is a critical factor in establishing the balance of power within which people interact to create property relations."

The better approach, we argue, is to start with the values the communities hold and *develop* these to be brought in line with, for example, international human rights principles. The fluidness of customary law provides opportunities for such development to happen rapidly and bottom-up.

A survey in three former homeland areas in South Africa released in February 2011, indicated that unmarried women were gaining increasing access to land despite any relevant legislation in place. These women were negotiating better deals for themselves despite the context of patriarchy and tradition, which militated against them. Asked how they did it, their descriptions employed the words of the 'new' South Africa, such as 'democracy' and 'women's rights'. They did not have rights as trumps. They could not assert a law that stated that single women had a right in land. However, they were empowered through the discourse of women's rights and, in turn, changed the relations between themselves and other in the community. The result was the emergence of new rules and new rights.





It is trite that the post-colonial era sadly continued the relegation of customary law to a separate and unequal system of law that rarely found its way into the formal, 'Western' courts.

CHALLENGES AND OPPORTUNITIES

The renowned scholar of customary law and related systems of tenure, the late Prof Okoth-Ogendo of Kenya, once recounted how, as the colonial era drew to a close in the 1950's and 60's, British legal scholars organised a series of conferences to discuss the 'future' of customary law in Africa and the need to 'construct a framework for the development of legal systems in the emerging states'.⁶ These initiatives assumed that the 'indigenous' legal systems of African countries and peoples of which they were well aware, were inadequate and inferior compared to the English common law.

These scholars must have felt vindicated when, upon independence, most African countries adopted the colonial legal framework wholesale – especially, as Okoth-Ogendo points out, in view of the development framework's "general ambivalence as regards the applicability of indigenous law".⁷ Indigenous law and customary legal systems were regarded as inferior, were never extended to areas covered by colonial laws and, when applied, it was done only to the extent that it was not repugnant to Western justice and morality or inconsistent with any written law.

It is trite that the post-colonial era sadly continued the relegation of customary law to a separate and unequal system of law that rarely found its way into the formal, 'Western' courts.



⁶ HWO Okoth-Ogendo, 'The nature of land rights under indigenous law in Africa' (2008) in A Claassens & B Cousins (eds) *Land, Power, Custom* (2008) p 95.

⁷ As above p 99.



We know that rights on paper mean very little if these cannot be realised.

⁸ Such recognition takes on many different forms in the various domestic constitutions. The relationship with statutory law is normally key to the status of customary law and is discussed further below.

⁹ Finding customary law requires effort. Legal text books and lawyers do not have ready-made answers to everyday social problems. Ordinary people and elders are the experts. But this provides important opportunities for communities to re-appropriate law.

However, many African countries adopted constitutions towards the end of the twentieth century which recognise customary law as an equal source of law to be applied by the courts where appropriate.⁸ This creates an important opportunity for communities, activists and lawyers to assert rights in terms of customary law and ensure that these are made real.

This will require significant effort, however. We know that rights on paper mean very little if these cannot be realised. This is particularly true of rights arising from customary law because of the following reasons:

- The legacy of discrimination against customary law means that despite the recent recognition, lawyers and courts still regard it as inferior.
- The status of customary law is often uncertain because of the uncertainty of its relation to statutory law.
- Customary law is largely unwritten and therefore it is sometimes difficult to establish its content.⁹
- Colonial governments often abused customary systems and in particular the systems of traditional leadership to use these leaders to make indirect rule possible. This means that many of the customary systems today still suffer from these colonial distortions.
- The same is true of the colonial codifications of custom which are often still on the lawbooks in African countries.
- Customary law is associated strongly with patriarchy and gender discrimination. This means that instead of the recognition of customary law

being seen as a human rights issue, it is seen as *opposite* to the human rights discourse.

We discuss some of these challenges here.

What is the status of customary law?

Given the steps taken in many African countries and by international and regional human rights instruments to recognise customary law as a proper source of law, it has become more complicated to determine its status within the legal frameworks of different countries. However, this provides communities with the space to strengthen the recognition of customary law by asserting their rights and their rules as law. In this section, we will discuss these strategies.

Before we do that, we need to answer an important question: what does the recognition of customary law mean? Perhaps it is easier to start with what the recognition of customary law should not mean.

Largely due to the distorting impositions of the colonial project and legislation, the richness of customary law systems was reduced to the recognition of traditional leadership structures only. In addition, these structures were often further adapted to provide for centralised leadership that the colonial masters could utilise in the project of indirect rule.

Regrettably, many African states who wish to recognise customary law in their modern day legal systems, do so simply by recognising the traditional leadership or its post-colonial remnants. This is not only incorrect, but dangerous in that it gives power to leaders without keeping in place the customary accountability mechanisms and deep democratic practices that characterised customary communities.

Of course, if the customary law of a community provides for leadership structures, as the majority does, then these leadership structures must be recognised *in terms of custom*.

The recognition of customary law also does not merely mean the recognition of customary rules to be applied within the community to regulate interactions between community members (or the first level as it was described above). While it is important that these rules are recognised (although not codified), the recognition of customary law cannot stop there.

Customary law must be recognised as a legal system in its own right and with an independent status. That means, for example, that the property rights that arise from customary law – to land and other resources – must be recognised alongside property rights arising from common law and statutory law.



In practice, this means that an investor that wishes to use community land, whether grazing land, residential sites or communal land used for other purposes, cannot even consider only compensating the community for its loss in the use of the land. The community also owns the land, and must be treated as any common law owner – and at least compensated as such (provided the community consents to the acquisition).

The recognition of customary law as an independent source of law also means that the way in which a community takes decisions about matters that affect it must be respected by other sources of law and by outsiders. Statutory law that requires a company, for example, to ‘consult’ with a community and report back on the outcomes within 30 days may well be in conflict with the customary law of that community. Many communities require, in terms of their custom, consultative decision making through various community meetings and discussions.¹⁰

¹⁰ This may include separate meetings of different interest groups and rights holders, and meetings at different levels, ie separate village meetings and meetings where all the affected village members come together

In addition, the customary law of many communities requires that the affected members of the community consent to any development that will change their rights in land or resources.



Does this mean that companies must follow the customary law requirements of communities with whom they deal in addition to the statutory requirements of the country concerned?

The relationship between customary law, properly recognised, and statutory law is not entirely clear. This means that communities have the space to lobby and advocate so as to ensure that the status of customary law which protects their rights to resources and to significant procedural rights, is elevated to stand shoulder to shoulder with statute law. As we will see below, international law standards are increasingly empowering communities to argue for this.

Some constitutions explicitly provide that customary law is recognised in as far as it is not in conflict with statutory law. But such formulations are often relics from colonial law and must be challenged – and this is becoming increasingly possible.

So what questions should communities ask when they are seeking to assert their rights in terms of customary law?

Do we need legal protection against the state or the investor which is interested in our land, or can we rely on political protection or political power to assert our bargaining position?

What does the statute law of our country say, and what protection does international law offer? For example, in certain areas of biodiversity property law, country statute law and international law may give protection equal to customary law and effective compensation measures.



Where do we find the strength for asserting the customary rights of our community (even when our country's laws don't allow it)?

How best are we going to investigate the content of living customary law of our community?

Is it the right time to test the strength of customary law against the power of common law and statute law?

Where do we find the strength for asserting the customary rights of our community (even when our country's laws don't allow it)?

The doctrine of aboriginal title

The doctrine of aboriginal title entails the recognition, *under colonial legal systems*, of the land rights and interests exercised by "aboriginal peoples" in pre-colonial times. The doctrine, also called native title, customary title or indigenous title, holds that under common law the land rights of indigenous peoples to customary tenure persist after the assumption of sovereignty under settler colonialism. The requirements for establishing an aboriginal title to the land vary across countries, but generally speaking, the aboriginal claimant must establish (exclusive) occupation (or possession) from a long time ago, generally before the assertion of sovereignty, and continuity to the present day.

That does not mean that we ignore all subsequent developments in property rights or that all current common law properties actually belong to customary communities. But it does mean that the rights of customary communities that have not explicitly been extinguished, remain intact.

The Canadian courts have articulated the spectrum of 'aboriginal' rights that should be recognised – from rights related to customs, practices or traditions to actual ownership rights.

The Canadian jurisprudence borrowed from the arguments made about customary law in Africa, however. In the decision of *Amodu Tijani v. Southern Nigeria* in 1921 the Privy Council laid the basis for several elements of the modern aboriginal title doctrine, upholding a customary land claim and albeit limited property rights urging the need to "study of the history of the particular community and its usages in each case".

But the dominant common law position remained that settled African communities a) held rights to occupy and use their lands but such rights were not defined to amount to ownership rights, and b) when the indigenous sovereign was replaced by the colonial power, often by war and conquest, the property rights were not regarded as socially evolved and cognisable. Finally unsettled land, and settled land occupied by marginalised communities, was regarded as terra nullius before the arrival European settlers.

In 1992 the assumption that Australia was terra nullius was rejected by the High Court in the Mabo v Queensland (No 2) decision, which recognised the Meriam People of Murray Island in the Torres Straits as native title holders over part of their traditional lands. The Court repudiated the notion of absolute sovereignty over Australia to the Crown at the moment of European settlement. The Court held, rather, that native title existed without originating from the Crown. The nature and content of native title was determined by the character of the connection or occupation under traditional laws or customs. Native title would remain in effect unless extinguished.

In Canada *Delgamuukw v. British Columbia* (1997) laid down the essentials of the current test to prove aboriginal title: "in order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria:



- (i) the land must have been occupied prior to sovereignty,
- (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and
- (iii) at sovereignty, that occupation must have been exclusive.

The court said that aboriginal title is a right to the land itself. Aboriginal title is a property right that goes much further than aboriginal rights of usage. Aboriginal title is a communal right. This means that decisions about land must be made by the community as a whole. No government can unduly interfere with aboriginal title unless the interference meets strict constitutional tests of justification .

These principles were introduced to the African continent through the case of the Richtersveld community.



The Richtersveld people are a Nama community who have, since time immemorial, inhabited an arid part of Namaqualand, south of the Namibian border along the west coast of South Africa. They traditionally moved, together with their livestock, in seasonal cycles dictated by access to water and the grazing needs of their livestock.

The Constitutional Court held that the situation in South Africa differs substantially from jurisdictions such as Australia and Canada, where aboriginal title to land has been recognised, in that the right to restitution for dispossessions of rights in land has been dealt with expressly in the Constitution. However, the Constitutional Court found that the nature and content of the

Richtersveld community's land rights prior to annexation and incorporation into the Cape Colony in 1847 should be determined with reference to indigenous law.

The Court said: While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by s. 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. It is clear, therefore, that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.

In 2010, the African Commission on Human and Peoples' Rights released a seminal decision for the purposes of protecting the customary rights of communities.

In 2003, the Endorois community asked the African Commission to declare that the Republic of Kenya had violated their rights to property, to culture, to religion, to their natural resources and to development.

The Endorois are a community of approximately 60 000 people who have for centuries lived in the area around Lake Bogoria in Kenya. They were dispossessed of their ancestral land through the creation of the Lake Hannington Game Reserve in 1973 (this was



subsequently regazetted as the Lake Bogoria Game Reserve in 1978). Prior to this the Endorois had for generations practised a sustainable way of life which was inextricably linked to their land. In 1997 members of the Endorois community lodged a claim in the Kenyan High Court for relief which included an order declaring that the land surrounding Lake Bogoria was the property of the Endorois community and should be held in trust on their behalf. The claim was dismissed.

The Commission recognised the property rights of the Endorois community held in terms of customary law. It also developed other rights contained in the Charter that are relevant for our purposes here. These are discussed in the next section.

Customary law in international law

Regional and international human rights instruments, binding on member states, and various soft law instruments such as voluntary principles and guidelines are increasingly recognising customary law as an independent source of law and the rights that arise from it. We list some of the notable ones here:

- The African Charter on Human and Peoples' Rights ('the African Charter') guarantees the protection of **the right to property** in Article 14. The Charter is binding on all 54 member states to the African Union.
- The African Commission on Human and Peoples' Rights ('the African Commission') released its guidelines and principles on the implementation of the socio-economic rights contained in the African Charter in 2011.¹¹ Its interpretation of Article 14, the right to property, includes the following statement:

¹¹The guidelines do not address the peoples' rights contained in the Charter.

Protected under this article are rights guaranteed by traditional custom and law to access to, and use of, land and other natural resources held under communal ownership. This places an obligation on State Parties to ensure security of tenure to rural communities, and their members.

- The African Commission adopted a Resolution on a Human Rights-Based approach to Natural Resource Governance in 2012 that reads as follows:

Mindful of the disproportionate impact of human rights abuses upon the rural communities in Africa that continue to struggle to assert their customary rights to access and control of various resources, including land, minerals, forestry and fishing...

Calls upon State Parties to [...] confirm that all necessary measures must be taken by the State to ensure participation, including the free, prior and informed consent of communities, in decision-making related to natural resource governance; [... and]

To promote natural resources legislation that respect human rights of all and require transparent, maximum and effective community participation in a) decision-making about, b) prioritisation and scale of, and c) benefits from any development on their land or other resources, or that affects them in any substantial way.

- The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National food Security (2012) seek to improve governance of tenure of land, fisheries and forests. They seek to do so for the benefit of all, with an emphasis on vulnerable



and marginalized people, with the goals of food security and progressive realization of the right to adequate food, poverty eradication, sustainable livelihoods, social stability, housing security, rural development, environmental protection and sustainable social and economic development.

The Guidelines provide:

- *State and non-state actors should acknowledge that land, fisheries and forests have social, cultural, spiritual, economic, environmental and political value to [...] communities with customary tenure systems.*

- *Communities with customary tenure systems that exercise self-governance of land, fisheries and forests should [have] equitable, secure and sustainable rights to those resources.*

- *Effective participation of all members, men, women and youth, in decisions regarding their tenure systems should be promoted through their local or traditional institutions, including in the case of collective tenure systems.*

- *States should provide appropriate recognition and protection of the legitimate tenure rights of [...] communities with customary tenure systems.*

- *Where [...] communities with customary tenure systems have legitimate tenure rights to the ancestral lands on which they live, States should recognize and protect these rights.*

- *States should protect [...] communities with customary tenure systems against the unauthorized use of their land, fisheries and forests by others.*

- States and other parties should hold good faith consultation with customary communities before initiating any project or before adopting and implementing legislative or administrative measures affecting the resources for which the communities hold rights. Such projects should be based on an effective and meaningful consultation [...] through their own representative institutions in order to obtain their free, prior and informed consent [...]

- In recent **Framework and Guidelines on Land Policy in Africa**, the African Union Commission, the African Development Bank and the UN Economic Commission for Africa encouraged countries to 'acknowledge the legitimacy of indigenous land rights' and 'recognize the role of local and community-based land administration/ management institutions and structures, alongside those of the State'.

There are also other international instruments that provide arguments to support the rights of communities to their customary tenure without explicitly recognising customary law. These include:

- The International Convention on the Elimination of all forms of Racial Discrimination (ICERD) protects all persons who belong to different races, national or ethnic groups from discrimination. It adheres to the principle that, on the one hand, discrimination is evident and illegitimate where states treat persons differently in similar positions without an objective and reasonable justification. On the other hand, states discriminate illegitimately when they fail to treat differently persons whose situations are significantly different – and who must be treated differently in order to achieve an equal society. This is the basis for affirmative action, for example: if people have radically different opportunities, then those who are

disadvantaged must be treated differently (or better) in order to allow them to compete on the same footing. Applied to communities who hold customary rights, these communities may argue that their rights have long been discriminated against and now require not only recognition, but special protection.

- ICERD further recognises, in Article 5(d)(v), without discrimination, the right to own property alone as well as in association with others.

Article 27 of the International Covenant on Civil and Political Rights protects **cultural rights**. This right has explicitly been linked to rights in land and other resources by the Human Rights Committee.



With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous people. That right may include such traditional activities as fishing or hunting and their right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

- The African Commission found, in the Endorois decision, that the Kenyan Government had denied the Endorois community their right to culture as protected in the African Charter by denying them access to their land and resources. The community was denied “access to an integrated system of beliefs, values, norms, mores, traditions and artefacts closely linked to access to the lake” which had “created a major threat to the Endorois pastoralist way of life.”

- The African Charter also protects the rights to **development** (Article 22) and to **natural resources** (article 21). These rights are peoples' rights and a community must thus assert that they are a people in order to claim these rights.

The African Commission has said the following about Article 21's protection of the rights of peoples – and therefore communities – to freely dispose of their natural resources:

The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the [African] Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society.

- The right to development has been interpreted by the African Commission to be a centrally important right in protecting communities' access to their land and resources. It is important as it guarantees that communities are properly engaged when their land or resources are under threat – allowing communities the right to assert their customary procedures of decision-making.

The African Commission is of the view that the right to development is a two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes



a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development. The African Commission notes the Complainants' arguments that recognising the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development. [...] Freedom of choice must be present as a part of the right to development.

- The **right to self-determination**, as contained in most international and regional instruments, is increasingly understood as a procedural right that guarantees persons the right to meaningful participation in any process that would affect their rights.

Conclusion:

What does this mean for communities?

Communities will be well-advised to assert their rights in terms of customary law: whether those are rights to resources or procedural rights. With this approach, one should never gloss over the difficulties inherent to customary law – but there are equal difficulties in other forms of law and we continue to use these when they can benefit the rights of vulnerable people.

The response, we argue, cannot be to therefore reject customary law as an illegitimate tool: that would spell the end of the sole source of law of community rights to resources. Even international law protections are based on the existence of customary law as a test of community rights. That is too high a price to pay.

Merely tolerating it is also not an answer. Rather, if the status of customary law is elevated to be applicable and

have force beyond the boundaries of the community, that will ensure greater engagement of such law with constitutional and other human rights standards. It is arguably because customary law was relegated to a separate and inferior space in the legal systems of Africa that customary law developed in ways sometimes inconsistent with generally accepted human rights norms.

Courts across the world have accepted that the discrimination against indigenous forms of law cannot be tolerated further. If that is the case, communities should ensure that the proper recognition of customary law benefits them – and all their members.

But customary law is of no effect if it lives only on paper or in the minds of a privileged few. Customary law becomes a rallying tool for communities if they live it, practice it, debate it, develop it and organise around it. That is how customary law is enriched and developed to become increasingly in line with constitutional principles and the changing needs and demands of communities. That is also how communities ensure that the law is truly local. There can be nothing more emancipatory and empowering.

LRC

LEGAL RESOURCES CENTRE

For more information please visit
www.lrc.org.za