

CHAPTER FIVE

VINDICATING INDIGENOUS PEOPLES' LAND RIGHTS IN COMPARABLE JURISDICTIONS: THE CASE OF SOUTH AFRICA AND NAMIBIA

5.1 Introduction

This chapter examines legal resources that vindicate indigenous peoples' land rights in two jurisdictions in Africa: South Africa and Namibia. The choice of these two countries for comparative study is primarily motivated by the fact that, while their indigenous peoples are faced with relatively similar concerns as their counterparts in Kenya, they have both instituted certain legal measures that allow for the vindication of indigenous people's land rights, even if the implementation of these measures remains fraught. The two countries also share a common law tradition with Kenya and as such their jurisprudence and interpretation of their legal framework have persuasive value in Kenyan courts. Additionally, a focus on two African states as case studies - which have a lot in common on land related issues with Kenya and perhaps their take on 'who is indigenous' in their jurisdictions - is more acceptable in political terms than would be the case with other jurisdictions such as Australia, Canada and New Zealand, despite their notable progressive legal developments on indigenous peoples' land claims. That is particularly so when making a case for legal reforms- which is done in chapter six- which are more dependent on political will than legal considerations as would be expected in the case of interpretation of the legal framework by courts of law.

South Africa and Namibia's legal responses to their indigenous peoples' land rights are clearly distinguishable. However, both countries provide lessons that may inform Kenya's quest for a

legal framework that vindicates indigenous peoples' land rights. Some of the legal resources emerge from reforms in their constitutions and legislation as well as progressive interpretation of the legal framework. The focus of this chapter is on those legal reforms that restore and accord legal recognition to indigenous peoples' land rights.

5.2 The case of South Africa

South Africa can be said to have been colonized twice, first by the British and then by its white minority rulers. Despite gaining independence in 1910, South Africa remained under white minority rule until 1994.⁷³⁶ Although the British introduced various laws to govern South Africa during their reign, it was upon South Africa's nominal independence in 1910 that the present legal system became established.⁷³⁷ From this time, South Africa's legal system was developed on the express basis of racial inequality.⁷³⁸ While not uniquely South African in that almost all other colonised states across the world had adopted laws that gave preferential treatment to the colonisers, in South Africa the legal system sanctioned comprehensive racial segregation.⁷³⁹

⁷³⁶ See M Chanock *The making of South African legal culture 1902-1936: Fear favour and prejudice* (2001) 3; 30; see also C Heyns (ed) *Human rights law in Africa* (2004) 1506.

⁷³⁷ See Chanock (n 736 above) 3.

⁷³⁸ As above 31.

⁷³⁹ As above 31 & 32.

In 1994, a democratically elected government ended the notorious apartheid regime under an interim Constitution which was modified and finalised in 1996.⁷⁴⁰ Among the first priorities of the new democratic Government was to rectify a history of racially discriminatory policies and laws.⁷⁴¹ The question of land ownership, redistribution, access and security of tenure reforms was high on the new Government's agenda in order to facilitate an effective mechanism to redress past land injustices.⁷⁴² The level of land dispossession under colonial and apartheid regimes was extensive.⁷⁴³ Various measures were therefore adopted to deal with historical land injustices in South Africa.⁷⁴⁴ These reforms may be classified into three main programmes: land restitution, land redistribution, and security of tenure.⁷⁴⁵ While the reforms were meant to benefit all people who had suffered under the two regimes, as will emerge in this chapter, some of them are particularly important to groups in South Africa self-identifying as indigenous peoples.⁷⁴⁶

⁷⁴⁰ R Chennels and A du Toit 'The rights of Indigenous peoples in South Africa' in Hitchcock & Diana Vinding (n 96 above) 100.

⁷⁴¹ See Note (n 689 above) 422.

⁷⁴² See Van der Walt (n 536 above) 285; see also M Tong '*Lest we forget, restitution digest on administrative decisions (2002)* 61-63.

⁷⁴³ B Cousins 'More than socially embedded: The distinctive character of 'communal tenure' regimes in South Africa and its implications for land policy' (2007) 7(3) *Journal of Agrarian Change* 283.

⁷⁴⁴ Apart from the Constitution, some of the land reforms laws include Restitution of Land Rights Act 22 of 1994; Land Reform (Labour Tenants) Act 3 of 1996; Interim Protection of Informal Land Rights Act 31 of 1996; Communal Property Associations Act 28 of 1996; Upgrading of Land Tenure Rights Act 112 of 1991.

⁷⁴⁵ See Van der Walt (n 538 above) 287; see also W Joubert *The Law of South Africa*, (2004:14 2nd ed) para 76.

⁷⁴⁶ For a more detailed expose on the question of 'who is indigenous in South Africa' see N Crawhall *Indigenous peoples of South Africa: Current trends project to promote ILO Policy on Indigenous and Tribal Peoples* (1999) 2-11; see also Chennels and du Toit (n 740 above) 98.

It is important to be reminded, at this juncture, that, as is the case with other states in Africa, the question of who is indigenous in South Africa is controversial.⁷⁴⁷ Indeed, the term ‘indigenous’ in South Africa’s legal discourse has been used in reference to the languages and legal customs of the majority black African population, distinguishing it from other races.⁷⁴⁸ However, in terms of the criteria proposed by the African Commission’s Working Group of Experts on Indigenous Populations/Communities, whose emphasis is on self-identification and groups that are in a structurally subordinate position, the term has been employed to refer only to the various San and Khoe ethnic groups.⁷⁴⁹ In South Africa, these are peoples who, despite the gains made since the end of apartheid, remain in a subordinate position, are discriminated against, and marginalized. They also continue to demand recognition as indigenous peoples and protection of their fundamental human rights and freedoms.⁷⁵⁰

Given that the focus of this thesis is on groups self-identifying as indigenous peoples, this section discusses the legal reforms that affect indigenous groups in South Africa. While the reforms are not specifically tailored for those groups, some of these reforms have a bearing on the land rights of indigenous peoples. The relevant reforms began in the run-up to the first democratic elections

⁷⁴⁷ n 746 above.

⁷⁴⁸ Sec 6 and 26 Constitution of South Africa.

⁷⁴⁹ ACHPR & IWGIA (n 35 above) 15-17; 89; see also Stavenhagen South Africa Mission Report (n 74 above) 2; Crawhall (n 746 above) 1-11; Chennels and du Toit (n 740 above) 98.

⁷⁵⁰ See Concluding Observations of the Committee on the Elimination of Racial Discrimination on South Africa, CERD/C/ZAF/CO/3, 19 October 2006, para 19 (CERD Concluding Observations on South Africa 2006).

of 1994 and sought to abolish the racially-based land laws of the apartheid state.⁷⁵¹ Some of the pre-1994 reforms also included laws aimed at guaranteeing equal access to land and secure land tenure.⁷⁵² Such reforms were inevitable and generally reflected the political desire at the time to prepare for the enactment of comprehensive land reform laws by the majority-elected Government in 1994.⁷⁵³

After 1994, South Africa embarked on extensive land reform measures⁷⁵⁴ in accordance with the 1996 Constitution.⁷⁵⁵ A brief survey of each of these measures and the extent to which they vindicate indigenous peoples' land rights in South Africa follows.

5.2.1 Restitution of land rights

In a bid to restore land and provide for remedies to individuals and groups who were dispossessed of their lands as a result of past racially discriminatory laws and policies, the post-apartheid legal framework provides for a process of land restitution.⁷⁵⁶ Section 25(7) of South

⁷⁵¹ See Van der Walt (n 538 above) 286; see also Joubert (n 745 above) 87 para 78; the racially discriminatory laws included the Black Land Act 27 of 1913 and the Development and Trust Land Act 18 of 1936.

⁷⁵² See the Abolition of Racially Based Land Measures Act 108 of 1991; the Upgrading of Land Tenure Rights Act 112 of 1991 and the Less Formal Township Establishment Act 113 of 1991.

⁷⁵³ Van der Walt (n 538 above) 287.

⁷⁵⁴ See South Africa's White Paper on Land Policy Para 2.3 <http://land.pwv.gov.za/legislation_policies/white_papers.htm> accessed 3 May 2008; see also Cousins (n 743 above) 283.

⁷⁵⁵ Sec 25 South Africa Constitution.

⁷⁵⁶ See T Roux 'The Restitution of Land Rights Act' in G Budlender, J Latsky & T Roux *Jutas new land law* (1998) chapter 3; see also Van der Walt (n 538 above) 289-307; Tong (n 742 above) 61-78.

Africa's 1996 Constitution provides that 'a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress'.⁷⁵⁷

The framework and processes of seeking restitution is provided for by the Restitution of Land Rights Act.⁷⁵⁸

Claimants for restitution of land rights in South Africa are either individuals or communities who satisfy the criteria stipulated by the Constitution and the implementing legislation.⁷⁵⁹ According to the Restitution Act, the relevant dispossession is one of a 'right in land', which need not be registered.⁷⁶⁰ A provision that recognizes that there are rights in land that may not be registered is useful for indigenous peoples, even in the Kenyan context. As surveyed in chapter four of this thesis, indigenous peoples' rights in land in Kenya are neither recognized nor registered in accordance with their customs and preferred way of life. It is instructive that the 'right in land' in South Africa can be one of a customary law nature.⁷⁶¹ In Kenya, where most indigenous peoples

⁷⁵⁷ Sec 25(7) Constitution of South Africa.

⁷⁵⁸ The Restitution of Land Rights Act 22 of 1994. The Act has been amended severally through Restitution of Land Rights Amendment Act 84 of 1995, Land Restitution and Reform Laws Amendment Act 78 of 1996, Land Restitution and Reform Laws Amendment Act 63 of 1997, The Land Affairs General Amendment Act 61 of 1998 and the Land Restitution and Reform Laws Amendment Act 18 of 1999 see Tong (n 742 above) 69.

⁷⁵⁹ The Restitution of Land Rights Act as above.

⁷⁶⁰ See sec 1 of the Restitution of Land Rights Act; see discussion of the impact of the expanded definition of a 'right in land' in the Act in Van der Walt (n 538 above) 292-293.

⁷⁶¹ As above; see also Roux (n 756 above) 3A 15.

claim their land rights on the basis of their customary law, a similar or equal provision would be important to safeguard the interests of such communities.⁷⁶²

In accordance with the South African Constitution and the Restitution of Land Rights Act, one may only lodge restitution claims for dispossessions that took place after 19 June 1913.⁷⁶³ The 1913 cut-off date is based on the date when the Black Land Act,⁷⁶⁴ which consolidated most of the colonial-era dispossessions, came into force.⁷⁶⁵ Since most land dispossession in South Africa preceded 1913, it has been argued that the 1913 cut-off date was a political and pragmatic compromise.⁷⁶⁶ The South African political compromise could serve as an example to Kenya. As in South Africa, it is probable that political and practical considerations would determine the most appropriate cut-off date for restitution claims in Kenya. This is because, although it was upon the imposition of colonial rule that the land dispossessions were legally sanctioned in favour of the colonialists, ‘the dispossessions among various communities predate colonialism’.⁷⁶⁷ Certain historical writings in Kenya indicate that the Ogiek, for example, lost most of their lands through invasion by other communities, such as the Kikuyu and the Kalenjin, long before colonialism.⁷⁶⁸ However, it appears that that the imposition of colonial rule and laws

⁷⁶² See Gilbert (n 34 above) 610.

⁷⁶³ Sec 25(7) South Africa Constitution; sec 2(1) Restitution of Land Rights Act.

⁷⁶⁴ Black Land Act 27 of 1913 (repealed 1991).

⁷⁶⁵ Van der Walt (n 538 above) 293; see also J Pienaar & J Brickhill ‘Land’ in Woolman *et al Constitutional law of South Africa* (2nd ed 2007) 48-1.

⁷⁶⁶ As above, 194; see also Roux (n 756 above) 3A, 16.

⁷⁶⁷ Spear (n 13 above) 46-68.

⁷⁶⁸ As above.

was the significant turning point in Kenya's land tenure and land relations. 15 June 1895, the date of declaration of the East African Protectorate, is therefore a possible cut-off date for restitution in Kenya, if such a process is ever adopted.

The South African Restitution of Land Rights Act establishes a specialized Commission⁷⁶⁹ and Court⁷⁷⁰ to deal with the restitution process. The specialized nature of these institutions ensures that they devote their resources and time to redress the question of land dispossession falling within the ambit of the Act. The merits of establishing such institutions for a specified period of time include the need to promptly and efficiently dispense with the restitution process. Since 1995, when the process began in South Africa, close to 94% of all land claims for restitution have been settled.⁷⁷¹ Although it has taken longer than initially intended, that is a significant success.⁷⁷² However, according to Bertus de Villiers, despite the remarkable statistics in terms of settlement of the land claims, they have not contributed to land reform in South Africa.⁷⁷³ This is due to, among others, the fact that most of the settlements have been through cash compensation for land lost and that most of the remaining settlements are rural claims which have been slow and complicated.⁷⁷⁴ That is a useful lesson for a comparable scenario in Kenya given that the majority of indigenous peoples' land claims would fall within the rural category.

⁷⁶⁹ See Restitution of Land Rights Act 22 of 1994, Chapter 2 on Commission on Restitution of Land Rights.

⁷⁷⁰ Sec 22 Restitution of Land Rights Act - The Land Claims Court which has equal status and powers as a High Court within its sphere of jurisdiction.

⁷⁷¹ See B de Villiers 'Land Reform- Commentary (2008) 4 Policy Paper 4.

⁷⁷² See Van der Walt (n 538 above) 298 note 54.

⁷⁷³ See De Villiers (n 771 above) 5.

⁷⁷⁴ See De Villiers (n 771 above) 5.

Ironically, South Africa's restitution policy initially envisaged that the restitution process would be aimed at sustainability rather than once-off settlements. According to South Africa's former Chief Lands Claims Commissioner, Thozamile Gwanya:

the policy framework for settlement of rural claims developed from one of 'equitable redress', i.e. (making sure the claimants are 'put in a similar position to that which they were at the time of dispossession') for the period from 1995, to a broader perspective and a new dimension in 2002 of 'social justice'; ensuring that the settlement is 'sustainable' and the award is more future focused than historic.⁷⁷⁵

However, the former Chief Lands Commissioner acknowledges that the new policy has largely remained pious wishes, principally due to 'lack of commitment and serious lack of capacity [on the part] of the implementing institutions'.⁷⁷⁶ Indeed, despite the fact that the deadline for submission of restitution claims lapsed in December 1998, the South African public has continued to agitate for the 're-opening of the period of the lodgement of claims'.⁷⁷⁷ While that is yet to happen, the continued clamour for such reopening is indicative of the possible inadequacy of the settled timelines or a failure of the restitution process to meet its objectives.⁷⁷⁸

⁷⁷⁵ T Gwanya 'Commission on Restitution of Land Rights: A reflection on what has been achieved and what must still be addressed' paper presented at a conference on land, memory, reconstruction and justice: perspectives on land restitution in South Africa: 13-15 September 2006, Cape Town available at <<http://www.plaas.org.za/events/Past-Events/landmemory/papers/Gala%20dinner%20speech%20-%20Tozi%20Gwanya.pdf/view>> accessed 20 July 2008.

⁷⁷⁶ Gwanya (n 775 above).

⁷⁷⁷ As above.

⁷⁷⁸ As above.

That said, it is important to appreciate the constraints of a process that seeks to restore land rights to communities that were dispossessed a considerable time ago. Restitution of land is undoubtedly a complex affair in terms of the ‘processing and adjudication of land claims’.⁷⁷⁹ The financial implications of the process are also high, a problem that is exacerbated by the fact that funding for the land restitution process in South Africa is mainly reliant on state coffers.⁷⁸⁰ Budgetary constraints are bound to continue to hamper the process as would be the case in Kenya. Land restitution requires a substantial amount of finances to compensate adequately the current title holders of pieces of land that are claimed by indigenous peoples. Additionally, a ‘successful restitution [process] must not only address landlessness. It must also go to the core of unjust expropriation and extinction of one entity’s rights and the terms of their transmission to another entity’.⁷⁸¹ According to Kameri-Mbote:

Justice entails that that the terms of restitution be mutually agreed by all concerned parties. Failing to do this will amount to perception by those whose rights have been expropriated as legal validation of injustice and will colour their perception of the rights protected by law making their enforcement onerous.⁷⁸²

⁷⁷⁹ A Dodson ‘Unfinished business: The role of the Commission on Restitution of Land Rights after restoration’ available at <<http://www.plaas.org.za/events/Past-Events/landmemory/papers/Dodson.pdf>> 1 accessed 10 August 2008.

⁷⁸⁰ See S Sibanda ‘Land reform and poverty alleviation in South Africa’ paper presented at the SARPN conference on land reform and poverty alleviation in Southern Africa held at the Human Sciences Research Council, Pretoria 4-5 June 2001 available at <www.sarpn.org.za/EventPapers/Land/20010604Sibanda.pdf> 1 accessed 1 August 2008.

⁷⁸¹ Kameri-Mbote (n 354 above) 6.

⁷⁸² As above.

It is therefore imperative that in carrying out restitution, the rights of those who currently occupy the land claimed by indigenous peoples are respected and protected. To balance the interests of both parties is an onerous exercise, which can not be compromised without endangering the rule of law. The funding that is required for such an exercise, particularly in order to support the post-restitution process is considerable. However, the scope of this thesis is limited. Accordingly, apart from suggesting that international development agencies and donors should be asked to assist in providing bridging finance to drive a successful restitution process, this subject is left for other research. The limited scope of the thesis also does not allow for a thorough interrogation of the important issue of post-restitution support, which has been lacking in many of the claims that have been settled in South Africa.⁷⁸³

While the South African Government is not solely to blame, given the many other socio-economic challenges it faces in seeking social justice for all South Africa's people after apartheid, it is crucial that at least adequate support is accorded to a process that was at the core of the liberation struggle. At the very least, the State should sort out the institutional weaknesses, inadequate support and inadequate resources which are often cited as causes of the slow progress made with rural claims.⁷⁸⁴ Over and above such support, South Africa should comprehensively address the concerns of indigenous peoples and rural communities, if it is to avoid the kind of social unrest that has emerged in other parts of the continent, such as Kenya and Zimbabwe.⁷⁸⁵

⁷⁸³ B de Villiers, *Land reform issues and challenges: A comparative overview of experiences in Zimbabwe, Namibia, South Africa and Australia*, Konrad Adenauer Foundation, Occasional Papers, Johannesburg, 2003, 69-72.

⁷⁸⁴ See R Hall & L Ntsebeza 'Introduction' in L Ntsebeza & R Hall (ed) *The land question in South Africa: The challenge of transformation and redistribution* (2007) 9; see also De Villiers (n 781 above) 1.

⁷⁸⁵ See Sibanda (n 780 above) 1; see De Villiers (n 783 above) 1.

As highlighted in the introduction to this thesis, frustration and continued disregard by the State for the concerns of the marginalised was identified as a root cause of the Kenyan conflict. Siphosiphanda, a Director of Tenure Reform, Department of Land Affairs in South Africa notes with caution that ‘in South Africa too, land and land reform, are unquestionably emotive issues, and matters related hereto need to be handled with circumspection and sensitivity by the Government’.⁷⁸⁶ Without a doubt therefore, there is enough motivation for South Africa to be committed, politically and resource wise, to resolve the land issues, lest they get out of hand.⁷⁸⁷

However, the existence of democratic and independent institutions in South Africa, as exemplified by the Constitutional Court, despite recent challenges to that institution,⁷⁸⁸ provides at least some hope and an avenue for the disenfranchised to ventilate their rights. Indeed, a number of communities, including some indigenous peoples in South Africa, have invoked the restitution clause in the Constitution and statutory processes to get back their ancestral lands.⁷⁸⁹

One such community is from the Richtersveld, a large area of land situated in the north-western

⁷⁸⁶ Sibanda (n 780 above) 1; De Villiers (n 783 above) 1.

⁷⁸⁷ See Sibanda as above, 2 the reference by Sibanda on a few sporadic and perhaps isolated instances where the slow process of restitution and land reforms has instigated violence and destruction of property. He cites the case of ‘burning of cane sugar fields in Kwa Zulu Natal where a land claim had been lodged and still needs to be resolved and threatened land invasions in the Wakkerstroom district of Mpumalanga’; see also De Villiers (n 783 above) 1.

⁷⁸⁸ See H Zille ‘The retreat of constitutionalism’ *Wits Public Lecture* 22 July 2008 available at <http://www.law.wits.ac.za/helen_zille_const_lecture.doc> 7 & 12 accessed 30 July 2008.

⁷⁸⁹ See generally Tong (n 742 above); see also Stavenhagen South Africa Mission Report(n 74 above) para 37: ‘Khoen and San communities that have benefited from the land restitution programme include the Riemvasmaak Nama Community, ongoing claims by Steinkopf and Richtersveld Namas; the !Xun and Khwe San communities who were displaced from Schmidtsdrift by a counter-claim; the Kleinfonteintjie Griqua community as well as the Khomani San Community in the southern Kalahari; and resettlement projects in Gudaus, Pella and Witbank. Griqua groups in the Northern Cape have also shown some success with land claims and redistribution projects, including the use of trust laws to gain collective land rights’.

corner of the Northern Cape Province, in South Africa.⁷⁹⁰ The community applied to the Land Claims Court for restitution of their land rights. They alleged that they were dispossessed of their land through racially discriminatory laws as contemplated in the Restitution Act. Although the Land Claims Court dismissed the case,⁷⁹¹ the community, undeterred, appealed to the Supreme Court with success.⁷⁹² The Supreme Court decision was affirmed by the Constitutional Court⁷⁹³ after an appeal by Alexkor Limited, the state-owned company that had benefitted from the dispossessions. The *Richtersveld* case has been hailed as a landmark decision that has the potential to inspire many other communities who have been dispossessed of their land.⁷⁹⁴

While express provisions in the Constitution and legislation in South Africa provide a clear route for restitution of lands through the courts, her indigenous peoples have attempted to explore alternative claims based on their African customary laws.⁷⁹⁵ Although the Richtersveld Community abandoned the aboriginal rights claim they had launched at the Cape High Court in favour of their restitution claim, it is instructive that the Constitutional Court went to great

⁷⁹⁰ *Alexkor Ltd v Richtersveld Community* (n 72 above) para 4; see Y Trahan 'The Richtersveld Community & Others V. Alexkor Ltd: Declaration of a "Right in Land" through a "customary law interest" sets stage for introduction of aboriginal title into South African legal system, 12 *Tulane Journal of International & Comparative Law* 565. The present Richtersveld population descends from the Nama people, who are thought to be a subgroup of the Khoe people. These people were a "discrete ethnic group" who "shared the same culture, including the same language, religion, social and political structures, customs and lifestyle." The primary rule of these people was that the land of their territory belonged to their community as a whole.

⁷⁹¹ *Richtersveld v Alexkor Ltd* (LCC) (n 735 above) para 43.

⁷⁹² *Alexkor v Richtersveld* (SCA) (n 688 above) para 111.

⁷⁹³ *Alexkor v Richtersveld Community* (n 72 above) para 103.

⁷⁹⁴ See Bennett & Powell (n 687 above) 450; see also Chan (n 687 above) 117.

⁷⁹⁵ *Richtersveld v Alexkor Ltd* (LCC) (n 735 above) para 6; see also T Roux 'Pro poor court, anti-poor outcomes: Explaining the performance of the South African Land Claims Court' (2004) 20 *South African Journal of Human Rights* 522.

lengths to illustrate the applicability of African customary law in proving indigenous land rights.⁷⁹⁶ Indeed, while the Constitutional Court found that the community was entitled to their right to land through the more direct route of the Restitution Act, it acknowledged that the community's rights in the subject land were based on their indigenous law.⁷⁹⁷

In particular, the Constitutional Court found that the indigenous Richtersveld community had a right to the land, not by virtue of the common law, but by virtue of the Constitution.⁷⁹⁸ In what can be termed an affirmation of the independent status of African customary law under the South African Constitution, the Court held that:

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 [T]he Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system [I]ndigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.⁷⁹⁹

It is worth noting that the Constitution of South Africa limits the applicability of African customary law only on the basis that it comports with the purpose and values set forth in the Bill

⁷⁹⁶ *Alexkor v Richtersveld* community (n 72 above) para 50-82.

⁷⁹⁷ As above para 62 & 64.

⁷⁹⁸ As above para 51.

⁷⁹⁹ As above para 51.

of Rights.⁸⁰⁰ Importantly for indigenous peoples in South Africa relying on African customary law, the South African Constitution recognizes rights emanating from this system of law.⁸⁰¹ Such rights would likely include land rights of indigenous peoples based on African customary law. The recognition of African customary law by the South African Constitution and the affirmation by the Constitutional Court that it forms part of the South African legal system is significant. The fact that, unlike in Kenya, African customary law in South Africa is not subjugated to other written laws or limited by repugnancy clauses is important for groups and individuals relying on that law to claim their fundamental human rights.⁸⁰² The issue of recognition and status of African customary law is revisited in chapter six.

The South African Constitution further obliges courts of law to apply African customary law whenever it is applicable, ‘subject to the Constitution and any legislation that specifically deals with customary law’.⁸⁰³ This means that African customary law in South Africa has equal force alongside other sources of law, such as legislation and common law, as long as it is in conformity with the Bill of Rights.⁸⁰⁴ A similar provision in Kenya would guarantee indigenous peoples’ rights in their traditional lands since they mainly rely on African customary law to prove these rights.

⁸⁰⁰ Sec 39 (2) Constitution of South Africa; see also *Alexkor v Richtersveld* community (n 72 above) para 51 (referring to customary law) see also para 7 n.8 stating that customary law is synonymous with indigenous law.

⁸⁰¹ Sec 39 (2) Constitution of South Africa.

⁸⁰² See *Mabuza v Mbatha* 2003 (7) BCLR 43 (C) para 32.

⁸⁰³ Sec 211 (3) Constitution of South Africa.

⁸⁰⁴ Sec 39 (3) Constitution of South Africa.

The express acknowledgement that indigenous laws form part of the constitutional framework of South Africa's legal system⁸⁰⁵ is particularly useful for a comparable argument in Kenya, where express provisions for restitution are lacking. Indeed, it has been argued that for those who cannot meet the requirements of the Restitution of Land Rights Act, aboriginal title could provide an alternative ground of action.⁸⁰⁶ As discussed in chapter four, proof of aboriginal title is dependent on the traditions and customs of indigenous peoples.⁸⁰⁷ South Africa's Constitutional Court cited the observations of the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria*,⁸⁰⁸ which held that native title required a determination based on the evidence of indigenous law. The Constitutional Court also cited jurisprudence in other jurisdictions seeking to right the wrongs suffered by indigenous communities through dispossession of land, or rights in land based on their indigenous laws.⁸⁰⁹ However, it noted that South Africa's circumstances were unique in that its Constitution expressly made provision for addressing these problems.⁸¹⁰ Such a finding seems to imply that, had the Court not had the express constitutional route of remedying the land dispute, it may have resorted to the concept of aboriginal title. However, given that the South

⁸⁰⁵ *Alexkor v Richtersveld* community (n 72 above).

⁸⁰⁶ See Bennett & Powell (n 687 above); see also TW Bennett *Human rights and African customary law* (1995) 148; see also Chan (n 687 above) 118, see *Richtersveld v Alexkor Ltd* (LCC) (n 746 above) para 48 where the Court intimated that the doctrine of indigenous title is an alternative remedy to restitution under the Restitution Act but fell outside the LCC's jurisdiction a position since overturned by the SCA and the CC.

⁸⁰⁷ See *Mabo v Queensland* (n 72 above) 58; Gilbert (n 34 above) 585.

⁸⁰⁸ *Amodu Tijani v The Secretary Southern Nigeria* (n 726 above) cited in *Alexkor v Richtersveld* community (n 72 above) para 56.

⁸⁰⁹ *Alexkor v Richtersveld* community (n 72 above) para 34 footnote 21 citing: *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145 (SCC); *Hamlet of Baker Lake v Minister of Indian Affairs and Others* (1979) 107 DLR (3d) 513 (SCC); *Mabo v Queensland* (n 72 above); *R v Adams* (1996) 138 DLR (4th) 657 (SCC); *R v Van der Peet* (1996) 137 DLR (4th) 289 (SCC); *Delgamuukw and Others v British Columbia and Others* (1997) 153 DLR (4th) 193 (SCC); *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.

⁸¹⁰ *Alexkor v Richtersveld* community (n 72 above) para 34.

African Constitution and legal framework made provision for restitution, it was not necessary to delve into the applicability of the concept of aboriginal title.

Before moving on to discuss the next issue on the land reform agenda in South Africa, land redistribution, it is important to appreciate that land restitution and indeed the entire land reform agenda should endeavour to consider and balance other public interests. Beyond restoring land rights that were dispossessed during apartheid, the state must also ensure that economic development is not seriously compromised. In other words, while it is important to return previously dispossessed land rights to their indigenous owners, it is equally imperative that, in doing so, the interests of those who previously held them and the goal of economic development are not put in jeopardy.⁸¹¹ Therefore, apart from paying adequate and prompt compensation to current land holders, land restored to claimants should as much as possible remain productively utilised. Otherwise the whole purpose of land reform and the pursuit of poverty alleviation would amount to nought.

In fact, ‘under certain circumstances, it is impossible or even impractical for restitution to take the form of actual physical restoration of the dispossessed land’.⁸¹² However, to avoid a situation where the state uses arbitrary criteria to determine when economic development interests outweigh the actual physical restoration of indigenous peoples’ land rights, there is a need for precise guidelines as to how and when developmental interests should take preference over the return of lands rights. The choice of what should take precedence over the other would need to be

⁸¹¹ See S Nadasen ‘Restitution, reconstruction, reconciliation and redistribution: Land reform-balancing the interests of the dispossessed, the homeless and development’ 1997 (3) *Stellenbosch Law Review*, 363.

⁸¹² As above 360.

made after free, prior and informed consultation with indigenous peoples and due consideration of international norms and standards.⁸¹³

It is instructive that South Africa's Constitution obliges courts of law to consider international law when interpreting the Bill of Rights.⁸¹⁴ Inevitably, such consideration would include the UN Declaration on the Rights of Indigenous Peoples, which, although not binding, is part of public international law.⁸¹⁵ The South African Constitutional Court in *S v Makwanyane* held that 'in the context of section 35(1) (South African Constitution), public international law would include non-binding as well as binding law'.⁸¹⁶ The UN Declaration on the Rights of Indigenous Peoples provides guidance, where physical restoration is not possible, by providing that restitution should then take the form of 'just, fair and equitable compensation'.⁸¹⁷ South Africa envisages such a possibility in its restitution laws, which provide for either 'restitution of property,' or 'equitable redress'.⁸¹⁸ In Kenya, such an alternative is crucial, as will emerge in the next chapter.

⁸¹³ See art 28 UN Declaration on the Rights of Indigenous Peoples.

⁸¹⁴ See sec 39(1) Constitution of South Africa.

⁸¹⁵ See Anaya (n 37 above) 63-66.

⁸¹⁶ *S v Makwanyane* (n 427 as above) para 35; see also J Dugard 'International law and the "Final" Constitution' (1995) 11(2) *South African Journal on Human Rights*, 242.

⁸¹⁷ Art 28(1) UN Declaration on the Rights of Indigenous Peoples.

⁸¹⁸ See sec 25(7) Constitution of South Africa.

5.2.2 Land redistribution and access

Given the inequalities in land holding in South Africa during apartheid, it became imperative to redistribute this resource to previously disadvantaged groups,⁸¹⁹ including indigenous peoples. According to a study by the Human Sciences Research Council of South Africa, approximately 90% of land in South Africa was appropriated by the white settlers.⁸²⁰ Black Africans were ‘confined into reserves in the remaining marginal portions of land’.⁸²¹ It is against this backdrop that the post-apartheid State embarked on an ambitious programme of redistributing land held by the whites to previously disadvantaged groups.⁸²²

Through the property clause, South Africa’s Constitution accords legitimacy to land reform, including land redistribution.⁸²³ While providing that no one may be arbitrarily deprived of property,⁸²⁴ the Constitution allows expropriation of property for public purposes subject to compensation.⁸²⁵ For the avoidance of any doubts, the Constitution defines public interest to

⁸¹⁹ See Joubert (n 745 above) 97 para 88; see also Hall & Ntsebeza (n 784 above) 3.

⁸²⁰ Hall & Ntsebeza (n 784 above) 3.

⁸²¹ As above 3.

⁸²² Hall & Ntsebeza (n 784 above) 8.

⁸²³ See sec 25 of the Constitution.

⁸²⁴ Sec 25(1) as above; see *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002(4) SA 768 (CC), 2002 (7) BCLR 702 (CC) (FNB case) paras 61-109. see a thorough expose of the FNB case with regard to deprivation of property in T Roux ‘Property’ in Woolman *et al Constitutional law of South Africa* (2nd ed 2003) 46:1-37;

⁸²⁵ Sec 25(2) as above; see Roux (n 824 above) 46-2; 28-36 citing the South African Constitutional Court decision in the *FNB* case (n 824 above) para 50 where the Court held that: The purpose of section 25 has to

include ‘the nation’s commitment to land reform and to reforms to bring about equitable access to all South Africa’s natural resources’.⁸²⁶ Those provisions are the basis of the State’s adoption of various land reforms initiatives to facilitate equitable access to land resources, which are significant for indigenous peoples in South Africa.

The purpose of South Africa’s land redistribution programme ‘is to provide the disadvantaged and the poor with access to land for residential and productive purposes. Its scope includes the urban and rural very poor, labour tenants, farm workers as well as new entrants to agriculture’.⁸²⁷ It is based on the need to make land available to previously disadvantaged groups and individuals who may otherwise not be able to do so, on the free market.⁸²⁸ Although the purpose of land redistribution in South Africa is to diversify land ownership, it has the potential to restore indigenous peoples’ land rights. Given that the process of land restitution is limited by the 19 June 1913 cut-off date for racially based land dispossession and by the 31 December 1998 cut-off date for submission of claims, the land redistribution programme, which has no time limit, may provide a mechanism for satisfaction of some indigenous land claims.

The focus of the first five years of the land redistribution programme, up to the end of 1999, was on the landless poor in South Africa.⁸²⁹ The poor were categorised as households whose monthly

be seen as protecting existing property rights as well as serving the public interest, mainly in the sphere of land reform, but not limited thereto, and also striking a proportionate balance between these two functions.

⁸²⁶ Section 25(4) (a) as above; see Van der Walt (n 538 above) 244.

⁸²⁷ See South Africa’s White Paper on Land Policy para 2.3.

⁸²⁸ See Reconstruction and Development Programme (*RDP*): *A policy framework*, ANC, 1994, 19-20; see also see South Africa’s White Paper on Land Policy para 2.2.

⁸²⁹ See Sibanda (n 780 as above) 5.

income was less than 1500 Rand, which is the equivalent of about 200 US dollars.⁸³⁰ Although poverty levels among that category of people in South Africa, which includes indigenous peoples, remain high, the programme has been relatively successful.⁸³¹ The Programme is reported to have ‘succeeded in embracing the rural poor and placing productive assets in their hands’.⁸³² Therefore, despite the small number of beneficiaries, with the right kind of support, commitment and resources, the programme has great potential to uplift the condition of poor and marginalized communities.

A major constraint of the land redistribution programme is the fact that so far the State has generally relied on market-based land acquisitions.⁸³³ The principle of ‘willing buyer-willing seller’ may present obstacles to land redistribution programmes where there are few willing sellers or where such land is not the land indigenous peoples would claim as ancestral land. While liberal market principles for land redistribution in South Africa are cited as one of the principal reasons for the slow pace of land redistribution,⁸³⁴ any failing in the programme is not due to the lack of a comprehensive legal framework.⁸³⁵ The Constitution of South Africa is

⁸³⁰ As above.

⁸³¹ As above.

⁸³² As above citing, J May, B Roberts, J Govender & P Gayadeen ‘Monitoring and evaluating the quality of life of land reform beneficiaries’ Department of Land Affairs, March 2000.

⁸³³ See R Hall ‘Transforming rural South Africa? Taking stock of land reform’ in Ntsebeza & Hall (n 785 above) 98; see also L Ntsebeza ‘Land redistribution in South Africa: the property clause revisited’ in Ntsebeza & Hall (n 784 above) 107-131; see also De Villiers (n 783 above) 51.

⁸³⁴ Some of the other limiting factors include institutional weaknesses of the relevant departments (land affairs and agriculture); limited budgets for purposes of acquisition of land for redistribution; see Hall & Ntsebeza (n 784 above) 9; see ‘Zuma says land reform must be speeded up’ in *Mail and Guardian Online* 2 May 2008.

⁸³⁵ De Villiers (n 771 above) 1; see also Hall & Ntsebeza (n 784 above) 9.

explicit about the possibility of expropriation of land for purposes of land reform.⁸³⁶ Accordingly, as long as just and equitable compensation is paid to the land owner, the State may employ compulsorily acquire land for redistribution.⁸³⁷ The current slow pace of land redistribution in South Africa can therefore not be blamed primarily on market forces and the lack of a legal framework for such purposes, but rather on politics.⁸³⁸ Indeed, beyond politics, part of the State's reluctance to expropriate land is the fact that it is faced with the enormous challenge of post-transfer support.⁸³⁹ Merely transferring land from whites to blacks does not solve the question of food security and productivity.⁸⁴⁰

In order to achieve land redistribution that benefits indigenous peoples whose lands may not become available on a 'willing buyer-willing seller' principle, the state would need to take a more proactive land expropriation stance within the legal parameters. That would entail the state taking over land compulsorily, especially 'in areas where there is a great demand for it and where land owners are not willing to sell'.⁸⁴¹ Such likelihood is indeed foreseen. Thozamile Gwanya, the former Chief Lands Claims Commissioner and current Director-General of Land Affairs, has indicated that 'where negotiations deadlock after intensive negotiations, expropriation will be

⁸³⁶ Sec 25(2) Constitution of South Africa.

⁸³⁷ Sec 25(2) & 25(3) Constitution of South Africa; see Roux (n 822 above) 46: 28-36.

⁸³⁸ See Hall (n 833 above) 99; see also Van der Walt (n 538 above) 307.

⁸³⁹ Hall (n 833 above) 99.

⁸⁴⁰ As above, 100; De Villiers (n 771 above) 6.

⁸⁴¹ Hall (n 833 above) 99-100.

considered'.⁸⁴² Although, Gwanya envisages expropriation in the context of restitution claims, it is instructive that the Minister of Public Works has tabled an Expropriation Bill in Parliament that will also see land redistribution and access covered.

The draft Expropriation Bill was tabled in Parliament in April 2008.⁸⁴³ Once the Bill becomes law, it is expected that the process of compulsory land expropriation will be speeded up. However, the proposed Bill has been criticized. Critics of the Bill argue that it was conceived in bad faith and designed to flout the constitutional private property protection.⁸⁴⁴ According to Kane-Berman, the Chief Executive of the South African Institute of Race Relations; the Bill 'is both a smokescreen to deceive the supposed beneficiaries of land reform and a means of making the free market a scapegoat for the government's ineptitude'.⁸⁴⁵ Kane seems to argue that the 'willing buyer- willing seller principle', if effectively administered, can rectify the problem of land redistribution. While that could be true, in that the principle guarantees private property owners their land rights, in the circumstances of massive land inequality that South Africa finds herself in, it is necessary that a more radical land acquisition method be adopted. This is particularly so where groups that were historically dispossessed of their land, such as indigenous peoples, may not have the financial resources or political clout to influence land becoming

⁸⁴² Gwanya (n 775 above).

⁸⁴³ See 'New Bill aims to speed up land reform' in Dispatch Online (<http://www.dispatch.co.za/article.aspx?id=193844>) accessed 17 April 2008.

⁸⁴⁴ See 'Bad-faith Expropriation Bill not grounded in South Africa's land realities' sourced at <http://www.sairr.org.za/press-office/institute-opinion/bad-faith-expropriation-bill-not-grounded-in-south-africa2019s-land-realities.html> accessed 17 April 2008.

⁸⁴⁵ As above.

available for sale. In such cases, the State should have the power to expropriate land to rectify the wrongs of the past, as long as it is within the constitutional and legal framework.

5.2.3 Security of land tenure reforms

Security of tenure reforms in South Africa, are aimed at improving the ‘tenure security of all South Africans and to accommodate diverse forms of land tenure, including types of communal tenure’.⁸⁴⁶ The South African Constitution guarantees land tenure security or equitable redress for persons or communities whose land tenure was insecure as a result of racially discriminatory laws and policies.⁸⁴⁷ According to Van der Walt, ‘tenure reform is necessary because apartheid land law had effects on the land rights and interests of black land users that cannot be rectified by the abolition of the apartheid land statutes, by restitution or by improved access to land only’.⁸⁴⁸ In order to secure existing land rights and interests in land that were not adequately protected by the apartheid legal framework, legal reforms that would accord sufficient tenure security to those rights had to be instituted.⁸⁴⁹ The 1996 Constitution of the Republic of South Africa mandated Parliament to enact laws that would provide ‘a person or community whose tenure of land is legally insecure as a result of racially discriminatory laws or practices ... either to tenure which is legally secure or to comparable redress’.⁸⁵⁰

⁸⁴⁶ See South Africa’s White Paper on Land Policy para 2.3.

⁸⁴⁷ Sec 25(6) Constitution of South Africa.

⁸⁴⁸ Van der Walt (n 538 above) 309.

⁸⁴⁹ As above; see also AJ van der Walt ‘The fragmentation of land rights’ (1992) 8 *South African Journal of Human Rights* 431-450.

⁸⁵⁰ Sec 25(6) & (9) Constitution of South Africa.

To give effect to the constitutional requirement that Parliament enact legislation to govern and regulate the constitutional guarantee of security of land tenure,⁸⁵¹ various laws have since been promulgated. The focus of this section is on those laws whose enactment was designed to secure the land rights of previously marginalized communities who lacked such tenure security. These communities in South Africa inevitably include indigenous peoples. While some of the laws predate the post-apartheid state,⁸⁵² the focus is on those laws that were adopted after 1994. Admittedly, the legislation generally applies to all South Africans who were historically discriminated against on the basis of race. Land tenure security for indigenous peoples in South Africa, as is the case in most other colonized states across the globe, was affected by the imposition of colonial laws that subjugated African customary laws.⁸⁵³ This section seeks to examine select legal reforms in South Africa that have sought to reaffirm and recognize customary land rights. That survey is useful for comparable lessons in Kenya that is made in chapter six.

Land tenure reform in South Africa was necessary because the mere abolition of apartheid-based laws, land restitution and improved access to land through land redistribution was not enough to rectify the adverse effects of the apartheid legal regime on the land rights and interests of the

⁸⁵¹ Some of that legislation includes but not limited to: Interim Protection of Informal Land Rights Act Act 31 of 1996; Communal Property Association Act No 28 of 1996; Upgrading of Land Tenure Rights Act No 112 of 1991; Land Reforms (Labour Tenants) Act No 2 of 1996; Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998; Communal Land Rights Act No 11 of 2004; Establishment of Less Formal Townships Act No 113 of 1991 and Extension of Security of Tenure Act No 62 of 1997.

⁸⁵² See for example Upgrading of Land Tenure Rights Act No 112 of 1991 and the Establishment of Less Formal Townships Act No 113 of 1991.

⁸⁵³ See C Toulmin & J Quan, *Evolving land rights, tenure and policy in Sub-Saharan Africa* in C Toulmin & J Quan (Ed) *Evolving land rights, policy and tenure in Africa*, DFID/IIED/NRI, London, 2000, 9-10; see also Bennett (n 806 above) 129-132.

state's black population.⁸⁵⁴ The Apartheid State diluted and violated the existing land rights of the Black population.⁸⁵⁵ Pitted against the property regime of the colonizers and the Apartheid State, the land tenure regime of the Black communities was 'weakened and legally undermined'.⁸⁵⁶ In order to revive, upgrade and strengthen these rights, it became imperative that substantive laws in that regard were enacted.

However, the Director of Tenure Reform, Department of Land Affairs of South Africa, Sipho Sibanda, acknowledges that land tenure reforms have been 'the slowest and most difficult aspect of the land reform programme'.⁸⁵⁷ Like the constraints on the other land reform programmes (restitution and land redistribution), lack of capacity by the Department, and inadequacy of resources, are cited as hampering security of tenure reform.⁸⁵⁸ Despite those limitations, some laws have been enacted aimed at securing land tenure of previously dispossessed communities that would provide useful lessons in a similar context in Kenya. Admittedly, the laws enacted in South Africa to secure land tenure of previously marginalised groups are more than the three surveyed below.⁸⁵⁹

⁸⁵⁴ Van der Walt (n 538 above) 309.

⁸⁵⁵ See DL Carey Miller (with A Pope) *Land title in South Africa* (2000) 456-458 cited in Van der Walt (n 538 above) 309.

⁸⁵⁶ Van der Walt (n 538 above) 309.

⁸⁵⁷ See Sibanda (n 780 above) 4.

⁸⁵⁸ As above.

⁸⁵⁹ Some of the other laws enacted in South Africa to provide for security of tenure for previously marginalised communities include: Land Reform (Labour Tenants) Act 3 of 1996, the Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction from and Unlawful Occupation Act 18 of 1998. Most of these laws are peculiar to the South African situation given its history of labour tenants and occupiers of lands during the apartheid period. Those statutes were therefore aimed at protecting the occupiers from unfair evictions while granting them some certain land rights where applicable. For a brief legal overview of

5.2.3.1 Communal Land Rights Act of 2004

Of considerable importance to indigenous peoples in South Africa is the Communal Land Rights Act of 2004.⁸⁶⁰ The Act seeks to provide legal ‘security of tenure by transferring communal land to communities, or by awarding comparable redress’.⁸⁶¹ The majority of rural communities in South Africa, including indigenous communities, hold land communally,⁸⁶² which means that the Act is relevant for a wide cross-section of South Africa’s population. The Nama (Khoe), for example, ‘particularly the Richtersveld, communities have managed to maintain communal land for grazing. This extends into the Richtersveld National Park’.⁸⁶³ However, traditional communal landholding during apartheid was largely unregulated, and this left most community members dependent on the whims of the tribal authorities.⁸⁶⁴ ‘At the root of the problem is the fact that during the apartheid era, customary law was interpreted so as to give legal land ownership to traditional leaders, rather than to community members’.⁸⁶⁵ The Communal Land Rights Act,

some of these laws see Van der Walt 308-353. Since the survey in this chapter is aimed at providing comparable lessons that could apply in a Kenyan context the choice of the three laws for a brief examination is done with the Kenyan circumstances in mind. The three laws are seen as offering perhaps the closest and applicable lessons in Kenya.

⁸⁶⁰ Communal Land Rights Act No 11 of 2004; for a critical expose of this Act see Cousins (n 743 above) 281–315.

⁸⁶¹ As above sec 1; see Van der Walt (n 538 above) 334; see also Cousins (n 743 above) 287; see also T Bennett & C Murray ‘Traditional leaders’ in S Woolman et al *Constitutional Law of South Africa* (2005) 26:56.

⁸⁶² See Cousins (n 743 above) 283.

⁸⁶³ See Crawhall (n 746 above) 8.

⁸⁶⁴ Van der Walt (n 538 above) 334; see also C Toulmin & J Quan, Registering customary rights in Toulmin & Quan (n 853 above) 225.

⁸⁶⁵ Toulmin & Quan (n 853 above) 225 citing A Classens & S Makopi ‘South African proposals for tenure reform: The draft Land Rights Bill-key principles and changes in thinking as the bill evolved’ Paper

sought to rectify that misinterpretation of customary law, since traditionally, community land rights vest in the community and not traditional authorities, whose role was purely management of the resource.⁸⁶⁶

Communal lands during apartheid were equally plagued by weak and insecure tenure and inequitable distribution.⁸⁶⁷ The Act therefore sought to rectify that situation by promoting security of tenure, equitable access and fair use, as well as an open and just land administration system of communal lands.⁸⁶⁸ Of key significance to indigenous peoples in South Africa, particularly for those who continue to hold such lands on the basis of African customary law, is the requirement in the Act that community land is to be allocated and administered in accordance with the ‘community’s rules’.⁸⁶⁹ Although such rules are required to be registered with the Director General of Land Affairs,⁸⁷⁰ adoption of such rules is a community affair that is governed by the customary laws, traditions and values of the community. Such rules can be amended or revoked by the community in a general meeting to reflect the changing needs of the community. That possibility is very important given the fact the culture is not static.⁸⁷¹ As will be argued in the Kenyan context in chapter six, it is important to record and restate important rules and

presented at the DFID workshop on Land rights and sustainable development in Sub-Saharan Africa: Lessons and ways forward in Land tenure policy, Sunningdale, UK, 16-19 February 1999.

⁸⁶⁶ Bennett (n 806 above) 152.

⁸⁶⁷ Van der Walt (n 538 above) 334.

⁸⁶⁸ See sec 14-18 of the Communal Land Rights Act of 2004.

⁸⁶⁹ See sec 19 Communal Land Rights Act of 2004.

⁸⁷⁰ As above sec 19(4).

⁸⁷¹ See contrary views that suggest that customary laws once recorded loses its dynamism in TW Bennett, *Source book of African customary law for Southern Africa* (1991) 139.

customary laws governing land relations, in order to have them easily available for interpretation and application. Such recording or restatement does not in any way take away the important attributes of customary law or its dynamism, but rather enhances its applicability when pitted against written sources of law.

Although the Communal Land Rights Act, of South Africa is designed to improve the security, management, and distribution of communal land in line with the non-discrimination and equality norms of the Constitution, it is bound to cause tension as it is likely to be in conflict with certain community customs and traditions.⁸⁷² Such conflicts may arise for instance with regard to the registered administrators⁸⁷³ of communal land and traditional authorities of the community.⁸⁷⁴ That is notwithstanding the fact that a traditional council may exercise the functions of the land administration committee, which is required by the Act to be democratic and gender sensitive given that this is not always the case with traditional authorities.⁸⁷⁵ In fact, one of the criticisms levelled against the Communal Land Rights Act is that it accords traditional authorities too much power relative to the governance of the land resource, which could lead to misuse of those powers to the detriment of the community members.⁸⁷⁶ It is instructive to note that a constitutional case has been launched by some community members challenging *inter alia* that

⁸⁷² Van der Walt (n 538 above) 338.

⁸⁷³ See sec 21 Communal Land Rights Act of 2004; see also sec 24 on the duties of administration Committee.

⁸⁷⁴ Cousins (n 743 above) 285; Bennett & Murray (n 861 above) 26:64.

⁸⁷⁵ See sec 21 & 24 Communal Land Rights Act of 2004; see also section 24; Cousins (n 743 above) 285: see Bennett & Murray (n 861 above) 26:64.

⁸⁷⁶ Cousins (n 743 above) 291; see also Hall (n 833 above) 97.

particular aspect of the Act on the basis that according so much power to traditional authorities is likely to water down the land rights of community members occupying the communal land.⁸⁷⁷

The implementation of the Act is yet to commence and as such, there is limited information on how such conflicts are being resolved. It is important to note that the Act provides for a land administration committee.⁸⁷⁸ Although a recognised traditional authority may perform the powers and duties of a land administration committee,⁸⁷⁹ the Act makes specific provision for the representation of the interests of vulnerable community members.⁸⁸⁰ The additional statutory required membership is likely to safeguard the interests of the community whenever a traditional authority exceeds its powers. They can for instance draw any abuse of power to the attention of relevant authorities in terms of available dispute resolution mechanisms, including courts of law.

Therefore, despite some of the shortcomings of the Communal Land Rights Act, particularly those related to the excessive powers of the traditional authorities, the Act contains important safeguards to secure land tenure of communities, including indigenous peoples, who elect to hold land communally on the basis of African customary law.⁸⁸¹ The Act guarantees security of tenure for individuals and members who constitute the community, through principles of equality and

⁸⁷⁷ See Cousins (n 743 above) 285.

⁸⁷⁸ See sec 21 and 22 Communal Land Rights Act of 2004.

⁸⁷⁹ As above sec 21 (2).

⁸⁸⁰ As above, sec 22.

⁸⁸¹ Sec 19 Communal Land Rights Act of 2004; Cousins (n 743 above) 291; see also Bennett & Murray (n 861 above) 26: 64.

non-discrimination.⁸⁸² Once the implementation of the Act commences, clearer illustrations of its effectiveness to secure the land rights of indigenous communities will become apparent. In the mean time, the Community Property Associations Act, which is discussed immediately below, contains useful provisions whose implementation provides some insight into how the administration of the Communal Land Rights Act may operate in South Africa.

5.2.3.2 The Communal Property Associations Act

The Communal Property Associations Act (CPAs)⁸⁸³ enables communities in South Africa to acquire, hold and manage property communally.⁸⁸⁴ The ‘initial purpose of the CPAs was to enable landless groups and people in receipt of land grants under South Africa’s market-assisted land redistribution programme to pool their resources and acquire land as a joint asset’.⁸⁸⁵ The CPAs are aimed at granting communal rights in land to communities who did not have registered land rights through a group. The CPAs are to provide democratic safeguards to the community as opposed to having traditional communal lands at the hands of unregulated traditional authorities, some of whom abused their power and the community’s trust.⁸⁸⁶

⁸⁸² Sec 4 Communal Land Rights Act of 2004; Given the possible overlaps of powers of traditional leaders and registered administrators which could breed conflict there is need for strict enforcement of the Act if tenure security of communal lands is to be guaranteed as suggested by Bennett & Murray (n 861 above) 26: 65.

⁸⁸³ Communal Property Association Act No 28 of 1996.

⁸⁸⁴ Sec 1 as above.

⁸⁸⁵ See Toulmin & Quan (n 853 above) 224.

⁸⁸⁶ As above.

Some indigenous peoples in South Africa have utilised this Act to register their communal land rights.⁸⁸⁷ Once registered in accordance with a written constitution,⁸⁸⁸ the community may not alienate the common property save for a resolution of the majority of its membership at a general meeting.⁸⁸⁹ Such a provision, if implemented, could guard against unscrupulous officials of the Communal Property Associations from disposing of the property of the association without the consent of the membership.⁸⁹⁰ The requirements of the Act are also aimed at ensuring that there is accountability and proper management of the land resource whilst retaining the communities' values and traditions.

However, South Africa's Communal Property Associations Act has been criticised for its imposition of foreign conditions that are often in conflict with indigenous peoples' traditions.⁸⁹¹ According to Bertus de Villiers, 'in many instances communities have perceived a Community Property Association to be artificial and not reflective or responsive to local needs, and some new landowners were even forced to agree to a legal mechanism simply to speed up their restitution, although the mechanism did not suit their customary, community or cultural purposes'.⁸⁹² He

⁸⁸⁷ See De Villiers (n 783 above) 70; see for example the Richtersveld Community Property Association and some of its achievements to date in Richtersveld declared a World heritage site <http://www.sagoodnews.co.za/environment/richtersveld_declared_a_world_heritage_site.html> accessed 20 May 2008.

⁸⁸⁸ See sec 9 of the Communal Property Association Act No 28 of 1996. The written constitution among others stipulates for elaborate mechanisms and procedures to guarantee fairness and equity in decision making, membership, democratic processes and access to the property by all members.

⁸⁸⁹ See sec 12 (1) as above.

⁸⁹⁰ Cousins (n 743 above) 283-284.

⁸⁹¹ See De Villiers (n 783 above) 71.

⁸⁹² De Villiers (n 783 above) 71.

adds that ‘many Communal Property Associations have become a battle ground for in-fighting, dominance and despotism’.⁸⁹³ This is not surprising given the conflicts of interest that might arise when managing communal property especially where the daily management is vested in a few elites among the community. The Community Property Associations are also seen as a ‘threat to the authority and vested interests of traditional leaders’.⁸⁹⁴ Traditional leaders argue that the imposition of the CPAs is in contravention of the traditional tribal systems which have their own rules and regulations.⁸⁹⁵

Similar problems rocked the Maasai group ranches scheme in Kenya surveyed in chapter three. As discussed there, the Maasai group ranches scheme collapsed partly due to power struggles between the registered representatives of the schemes and the traditional authorities. The schemes were also said to be inconsistent with the community’s concept of land ownership.⁸⁹⁶ While similar problems threaten to undermine the Community Property Association in South Africa, the State has generally failed to provide direction and assist in the ‘development and management of corporate procedures that are appropriate for the land the Community Property Association are holding’.⁸⁹⁷

⁸⁹³ As above.

⁸⁹⁴ See Toulmin & Quan (n 853 above) 224.

⁸⁹⁵ As above.

⁸⁹⁶ See Lenaola *et al* (n 169 above) 248-253.

⁸⁹⁷ See De Villiers (n 783 above) 71.

Therefore, although the concept of CPAs in South Africa, unlike the group ranches scheme in Kenya, seems to be motivated by genuine concerns and need to secure the land rights of previously marginalized communities, they need to reflect the values and needs of the communities they purport to protect. It is crucially important that the interests of the community and the concerns of the traditional leadership are amicably resolved. It has been noted that ‘where CPAs have been imposed on traditional societies, they have not worked; the new structures exist only on paper; there is no capacity to enforce the legal rights of CPA members, and they have proved irrelevant to the day-to day management of land rights’.⁸⁹⁸ Accordingly and as will be argued in the Kenyan context in chapter six, it is imperative that the role of traditional authorities is not be dispensed with. Their role and mandate with regard to the management of community land rights should rather be augmented by the democratically elected officials and regulated by the constitutional values and norms enshrined in the Bill of Rights. These include democratic principles of inclusive decision making, fairness, equality and justice. Failure to uphold such standards should be grounds for any member of the community to resort to the legally established dispute resolution mechanisms within the community and the courts of law.⁸⁹⁹

5.2.3.3 The Interim Protection of Informal Land Rights Act

The Interim Protection of Informal Land Rights Act of 1996 is briefly mentioned here but without a critical analysis of the extent to which applies in South Africa due to the dearth of relevant information. However, the statute is a useful legal framework that seeks to secure land

⁸⁹⁸ See Toulmin & Quan (n 853 above) 224.

⁸⁹⁹ See Bennett (n 806 above) 136-137.

rights of previously marginalised communities in South Africa whose rights were previously unrecognised. The Act provides an insight into the possibility of interim legal measures that can be adopted pending the adoption of comprehensive ones to secure the land rights of marginalized communities whose security of tenure remains unprotected. In other words, given the possibility of overlapping land claims by communities, which may arise upon the reform of laws resulting in the recognition and protection of previously unsecured land rights, adoption of interim legal measures to secure those rights, pending the resolution of the claims, is important.

The Interim Protection of Informal Land Rights Act of 1996⁹⁰⁰ seeks to accord temporary legal protection to land rights of individuals and communities whose land rights were not recognised during the colonial and apartheid regimes.⁹⁰¹ The purpose of the Act is to secure those land rights that are in existence but not formally recognized or protected. Such rights inevitably include indigenous peoples' land rights on the basis of their African customary laws.⁹⁰²

Although the Act was meant to have lapsed on 31 December 1997, the Minister has powers to extend the application of its provisions for a period of 12 months at a time with approval from Parliament, which has been consistently done to date.⁹⁰³ Enacted as an interim measure, perhaps pending the adoption of a permanent statute to secure informal land rights, the Act continues to accord communities whose rights were otherwise not recognized on the basis of their indigenous

⁹⁰⁰ Interim Protection of Informal Land Rights Act 31 of 1996.

⁹⁰¹ See sec 1 as above.

⁹⁰² As above sec 1(1).

⁹⁰³ Sec 5(2) as above; see Van der Walt (n 538 above) 311-315.

law, some temporary protection. It is expected that permanent legislation to this effect will eventually be enacted.⁹⁰⁴

In the mean time, the Act remains an important legal instrument for indigenous peoples as it protects, amongst others, the ‘people who use, occupy or have access to land in terms of any tribal, customary or indigenous law or practice of a tribe’.⁹⁰⁵ On the basis of the Interim Protection of Informal Land Rights Act, indigenous peoples’ customs, traditions and practices regulate and govern their relationship to their lands.⁹⁰⁶ The Act does not confer any rights in land but merely protects rights already existing but previously not recognised due to racially discriminatory laws and practices.⁹⁰⁷

5.3 The case of Namibia

Namibia was largely administered by South Africa after 1915, following the defeat of Germany in the First World War. South Africa extended its policy of racial segregation to Namibia until this country attained independence in 1990.⁹⁰⁸ The racially discriminatory laws and policies including the regulation of land rights were therefore prevalent during South Africa’s

⁹⁰⁴ Van der Walt (n 538 above) 312.

⁹⁰⁵ Sec 1 (1) Interim Protection of Informal Land Rights Act 31 of 1996.

⁹⁰⁶ As above sec 2.

⁹⁰⁷ As above sec 1(2) (a).

⁹⁰⁸ See Heyns (n 736 above) 1357.

administration of Namibia.⁹⁰⁹ However, land dispossession in Namibia did not commence with the coming of the South Africans. The indigenous San, Himba and Nama people⁹¹⁰ had long been displaced by other black communities, a position that was entrenched and exacerbated by the German colonialists.⁹¹¹ Indeed, ‘while the San are among the original inhabitants of Namibia they were pushed to the margins of their own lands by the southward migration of Bantu cattle herders, beginning around the sixteenth century’.⁹¹²

By the time Namibia got its independence in 1990, land distribution was divided along racial lines.⁹¹³ ‘At independence, 52% of the agriculture farmland was in the hands of the white commercial farmer community, who made up 6% of the Namibian population. The remaining 94% of the population had to put up with owning only 48% of the agricultural land’.⁹¹⁴ According to Hunter, ‘the majority of Namibians populate the communal areas ... without

⁹⁰⁹ See Our land they took, San land rights under threat in Namibia, Legal Assistance Centre 2006, 2.

⁹¹⁰ ACHPR & IWGIA (n 35 above) 16-18; 24; 28-29; see also Daniels (n 200 above) 44; Suzman (n 180 above); J Suzman *Minorities in post independence Namibia* (2002) 20 Like in the case of South Africa this chapter mainly concentrates on the San and the Nama who are the most marginalised community in Namibia in as much as the Himba-an indigenous community- equally face similar land problems in Namibia. For a detailed expose of the problems faced by the Himba with regard to their land rights see generally, SL Haring "God gave us this land": The Ovahimba, the proposed Epupa dam, the independent Namibian state, and law and development in Africa' (2001) 14 *Georgetown International Environmental Law Review* 35-100.

⁹¹¹ See De Villiers (n 783 above) 30; see also Suzman (n 180 above) 3-4.

⁹¹² Legal Assistance Centre (n 909 above) 1.

⁹¹³ As above 33.

⁹¹⁴ See J Hunter ‘Who should own land? An introduction’ in J Hunter (ed) *Who should own the land? Analyses and views on land reform and the land question in Namibia and South Africa*, (2004) 1; see also SL Haring ‘Indigenous land rights and land reform in Namibia’ in Hitchcock & Vinding (n 96 above) 63.

owning it'.⁹¹⁵ While the majority of the black population in Namibia suffered massive human rights violations under the colonial and apartheid regimes,⁹¹⁶ her indigenous peoples, the San, Nama and Himba, continued to do so even after independence.⁹¹⁷ Namibia's indigenous peoples, especially the San, Nama and Himba, have endured double discrimination from the apartheid regime and the majority black population.⁹¹⁸ As minority groups without adequate political representation and clout, they remain at the margins of development and legal processes.⁹¹⁹

Upon independence, the Government of Namibia, like that of post-apartheid South Africa, instituted legal measures to redress land inequalities.⁹²⁰ However, Namibia's reforms have largely ignored the distinct problems faced by her indigenous peoples with regard to recognition and protection of their land rights.⁹²¹ During the apartheid regime, black Namibians including the San, Nama and Himba indigenous peoples were confined to communal areas known as 'homelands'.⁹²² Under a policy known as the 'Odendaal plan', named after its originator Fox

⁹¹⁵ Hunter (n 914 above) 2; Haring (n 914 above) 63.

⁹¹⁶ As acknowledged in the Preamble to the Constitution of Namibia.

⁹¹⁷ Haring (n 914 above) 64.-65; see also ACHPR & IWGIA (n 35 above) 16-18; 24; 28-29.

⁹¹⁸ Suzman (n 180 above) 3-4; Suzman (n 910 above) 20; see also Legal Assistance Centre (n 909 above) 2; ACHPR & IWGIA (n 35 above) 16-18; 24; 28-29.

⁹¹⁹ As above.

⁹²⁰ See Government of the Republic of Namibia, White paper on National Land Policy (1997); see also National Conference on Land Reform and the Land Question, Conference Brief, Windhoek, 1991, 2.

⁹²¹ Haring (n 910 above) 64-66.

⁹²² As above, 64; see also ACHPR & IWGIA (n 35 above) 16-18; 24; 28-29.

Odendaal, tenure in these communal lands was legally insecure and designed to turn black people into a source of cheap labour for the white farms.⁹²³

To appreciate the magnitude of Namibia's land reform needs, it is useful to briefly trace the peculiar issues that face indigenous peoples in that country. Although colonialism and apartheid affected all black people in Namibia, particularly with regard to land relations, the Nama, San and the Himba lost virtually all their lands.⁹²⁴ Through the 'homelands' policy, different ethnic groups were placed in specific communal lands which were largely in their traditional areas and within redrawn boundaries.⁹²⁵ 'The San, for example, were allocated a 'homeland' known as Bushmanland in the northeast, which included some of the lands that they had occupied historically'.⁹²⁶ The Nama were also allocated a homeland known as 'Namaland'.⁹²⁷ However, the lands allocated to these indigenous peoples were but a tiny fraction of their ancestral lands and are mostly desert land.⁹²⁸

⁹²³ As above, 64-65; see also W Werner 'A brief history in land dispossession in Namibia (1993) *Journal of Southern African Studies* 135.

⁹²⁴ See Haring (n 910 above) 71; see also J van Wyk 'The Namibia land conference-a first step towards addressing a burning problem' (1992) *SA Public Law* 31.

⁹²⁵ Haring (n 910 above) 70, 71.

⁹²⁶ As above 71.

⁹²⁷ As above 71.

⁹²⁸ Haring (n 910 above) 71.

Apart from losing most of their lands through colonial and apartheid legal processes, which alienated their arable lands through the creation of freeholds for white farmers,⁹²⁹ the indigenous peoples' land tenure system was substantially altered.⁹³⁰ While the San and Nama had ancestral rights to their traditional lands under their customary laws, the state regulated those rights by classifying all land in Namibia into State, private and communal lands.⁹³¹ According to Amoo, 'the classification was based on the native-settler dichotomy, which made access to private land the exclusive right of the white settlers. The communal lands were the creation of legislation, which, inter alia, deprived the indigenous peoples of their allodial rights'.⁹³² The communal lands, especially among the San and Nama, who according to the state were less organised and therefore had no recognisable traditional authorities, had limited security of tenure.⁹³³ As a result, their land could be alienated at will.⁹³⁴ Indeed, most of the lands under white ownership were appropriated from the traditional lands of the San and Nama who occupied the central and southern part of the country.⁹³⁵ Although the lands occupied by the Bantu tribes (Ovamboland), mainly in the northern part of the country, were classified as communal lands, they largely

⁹²⁹ See F Adams & W Werner *The Land issue in Namibia: An inquiry* (1990) 37; H Bley *South West Africa under German Rule 1894-191* (1971) 104-107; see also Wyk (n 935 above) 31; see also SK Amoo 'Towards comprehensive land tenure reform in Namibia (2001)17 *South African Journal of Human Rights* 88-93.

⁹³⁰ Amoo (n 929 above) 87.

⁹³¹ As above.

⁹³² As above.

⁹³³ As above; see also Haring (n 910 above) 70-81; MO Hinz 'Traditional governance and African customary law: Comparative observations from a Namibian perspective' in N Horn & A Bosl (Ed) *Human rights and the rule of law in Namibia* (2008) 70.

⁹³⁴ As above.

⁹³⁵ See Hinz (n 933 above) 75.

remained unaffected by the colonial and apartheid land dispossessions.⁹³⁶ The fact that the northern part of the country in Ovamboland was less affected by the land dispossessions and that the current ruling elites and political power base of Namibia mainly hail from that region, explains the trajectory of the land reform process.⁹³⁷

The colonial and apartheid regimes imposed their legal systems on Namibia vesting the entire territory in the State.⁹³⁸ However, the State reserved certain pieces of land to the blacks in what became known as tribal or communal lands.⁹³⁹ African customary law applied in the areas reserved for the blacks but they did not enjoy complete ownership rights of the lands. Rather, they ‘had rights of occupation and use or usufructuary rights’.⁹⁴⁰ Upon independence, it became of utmost importance that the laws were reformed to review the relationship of the majority black population relative to their communal land rights. A national land conference was held in 1991⁹⁴¹ to deliberate on the question of land reform in Namibia. The key resolutions that emerged from this conference were the need to redistribute land, and reform the administration of communal land.⁹⁴² The land earmarked for redistribution was private land mainly situated *in commercial*

⁹³⁶ See De Villiers (n 783 above) 40.

⁹³⁷ As above.

⁹³⁸ See Amoo (n 929 above) 91. Some of the laws that vest the entire Namibia territory on the State include: The Transvaal Crown Land Disposal Ordinance of 1903; Crown Land Disposal Proclamation 13 of 1920.

⁹³⁹ As above.

⁹⁴⁰ Amoo as above 91.

⁹⁴¹ See Namibia National Conference (n 920 above).

⁹⁴² See Hinz (n 933 above) 75.

*agricultural lands and held on freehold basis.*⁹⁴³ With regard to communal land, the conference resolved to retain the *status quo* whereby the State would continue owning the communal lands but reform its administration.⁹⁴⁴

So far, Namibia's land reform process has mainly been driven by market forces. The State has ruled out land restitution as an option and retained the communal land tenure system.⁹⁴⁵ A brief survey of the options that Namibia elected to pursue is useful in order to appreciate the extent to which indigenous peoples' land rights in Namibia have been vindicated.

5.3.1 Land restitution in Namibia

Namibia elected not to insist on the return of ancestral lands but rather grant lands to any citizen of the country who did not have land.⁹⁴⁶ This seems to have been a political decision as mentioned earlier based on the fact that most of the colonial and apartheid land dispossessions in Namibia took place 'outside the political base of the governing party'.⁹⁴⁷ Therefore, the question of restoration of land rights to people who had been disposed of their ancestral lands as a result of

⁹⁴³ See presentation by the Permanent Secretary of Namibian Ministry of Lands and Resettlement, Mr. FK Tsheehama, titled 'Land reform in Namibia: Implementation and challenges sourced at <http://land.pwv.gov.za/publications/Land_Summit/Conference_Papers/NAMIBI~1.DOC> accessed 1 June 2008.

⁹⁴⁴ See Hinz (n 933 above) 75.

⁹⁴⁵ As above 41.

⁹⁴⁶ See De Villiers (n 783 above) 35.

⁹⁴⁷ Hunter (n 915 above) 3. The ruling party in Namibia is the South West African People's Organisation, SWAPO main base is in Ovambo land where ancestral lands were not taken to the same extent as in other parts of Namibia where some of the indigenous peoples like the San inhabit; see De Villiers (n 783 above) 35; see also W Werner Land Reform in Namibia: The first seven years. The Namibian Economic Policy Research Unit 1997, 5, cited in De Villiers (n 783 above) 41 note 172.

racially discriminatory laws and policies was rejected.⁹⁴⁸ The effect was to foreclose land restitution in Namibia as an option for the restoration of her indigenous peoples' ancestral land rights. Therefore, unlike in South Africa, Namibia's indigenous peoples were left with little option but to rely on the general provisions of land redistribution to get access to land.

Due to the failure by the State to provide for restitution of land rights, indigenous peoples in Namibia remain under a serious threat of extinction.⁹⁴⁹ Most of the ancestral lands which were lost before and during colonial rule remain in the hands of private individuals.⁹⁵⁰ Since indigenous peoples do not wield influence in the independent political dispensation, they remain marginalised and discriminated against.⁹⁵¹ Their only hope in the realisation of land rights lies in the limited recognition of their communal land rights, which is surveyed later in the section.

5.3.2 Land redistribution in Namibia

After independence in 1990, the Government embarked on land tenure reforms calculated to secure the tenure rights of the black population, increase their access to land and redistribute it.⁹⁵²

The independence Constitution of Namibia entrenched a property clause that guarantees 'all persons in Namibia the right to acquire, own and dispose of all forms of immovable and movable

⁹⁴⁸ See Clause 2 of the National Conference on Land Reform and the Land Question: Conference Brief Windhoek, 1991, clause 2 of the Resolutions cited in De Villiers (n 783 above) note 157; see also Hunter (n 914 above) 3.

⁹⁴⁹ See generally Legal Assistance Centre (n 909 above).

⁹⁵⁰ As above.

⁹⁵¹ As above 2.

⁹⁵² See Namibia White Paper on National Land Policy.

property individually or in association with others and to bequeath their property to their heirs or legatees' subject to possible restriction through legislation on non-citizens.⁹⁵³ Pursuant to this provision, indigenous peoples can apply to own property individually or communally.

However, Namibia's Principles of State Policy as stipulated in the Constitution states that 'land water and natural resources ...shall belong to the state if they are not otherwise lawfully held'.⁹⁵⁴ Accordingly, lands that are not individually owned in Namibia vest in the State.⁹⁵⁵ This means that all communal lands, since they are not registered to an individual or corporation, belong to the State.⁹⁵⁶ This is particularly so since Namibia 'does not legally recognise an 'indigenous' land title in the communal lands'.⁹⁵⁷ According to Haring, the policy of Namibia towards communal lands formerly held by black Africans seems to entrench the inequality and racial discrimination of the past.⁹⁵⁸ On the one hand, the State seeks to protect the land rights of

⁹⁵³ See art 16 (1) Constitution of Namibia.

⁹⁵⁴ See article 100 Constitution of Namibia.

⁹⁵⁵ See Schedule 5 as above.

⁹⁵⁶ Haring (n 910 above) 66; see also Schedule 5(1) Constitution of Namibia which provides: All property of which the ownership or control immediately prior to the date of Independence vested in the Government of the Territory of South West Africa, or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1980), or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or Authority immediately prior to the date of Independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia.

⁹⁵⁷ As above.

⁹⁵⁸ Haring (n 910 above) 68.

individuals who held land under individual land tenure system, and on the other hand, it declares lands held under communal land tenure, as State land.⁹⁵⁹

Notwithstanding this position, Namibia's Constitution envisages the adoption of affirmative action measures to redress the effects of apartheid. Article 23(2) of the Constitution of Namibia provides that Parliament may enact 'legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices.' Accordingly, Namibia's supreme law provides a legitimate basis for the adoption of laws and policies that are aimed at redressing not only the majority of her previously disadvantaged peoples but also those indigenous peoples who continue to suffer marginalization. Such measures include recognizing and securing indigenous peoples' land rights through various acts of Parliament.

One such law is the Agriculture Land Reform Act,⁹⁶⁰ which was enacted to provide for the acquisition of land by the Government for purposes of land reform and redistribution. The Act establishes a Land Reforms Advisory Commission and a Lands Tribunal.⁹⁶¹ According to the Act, the beneficiaries of the land acquisition programme are:

⁹⁵⁹ See art 100 the Constitution of Namibia read together with Schedule 5 of the Constitution; see Haring (n 910 above) 66-69.

⁹⁶⁰ Agriculture Land Reform Act 6 of 1995.

⁹⁶¹ As above.

Namibian citizens who do not own or otherwise have the use of agriculture land or adequate agricultural land, and foremost to those Namibians who have been socially, economically or educationally disadvantaged by past discriminatory practices.⁹⁶²

Similar to South Africa, where the land redistribution programme is based on market forces, Namibia's land redistribution programmes is also based on the 'willing buyer-willing seller principle'. The Agriculture Land Reform Act provides for acquisition of freehold land on a willing buyer-willing seller basis. Although the Government may expropriate land upon payment of compensation, this has not yet happened in Namibia.⁹⁶³ The market-based principle of acquiring land for reform has been criticised on the basis that the owners of the lands that should be compensated if appropriated did not acquire the lands fairly and, if anything, not for the value they now demand.⁹⁶⁴ As a result, despite losing their ancestral lands on the basis of racially discriminatory laws and policies Namibia's land reforms process has failed to respond to the indigenous peoples' land claims largely for lack of political will to resolve them.⁹⁶⁵

A case in point is the current stalemate over the proposed construction of Epupa hydro electric power dam pitting the Himba indigenous community on one hand and the State on the other.⁹⁶⁶

The State has failed to adequately consult the Himba indigenous community whose ancestral

⁹⁶² Sec 14 as above.

⁹⁶³ See De Villiers (n 783 above) 35.

⁹⁶⁴ De Villiers (n 783 above) 35, citing Debates of the National Assembly 42, 19-28 October 1998, p 98.

⁹⁶⁵ Legal Assistance Centre (n 909 above) 1-2, note 3.

⁹⁶⁶ See ACHPR & IWGIA (n 35 above) 18; 28-29; see a detailed account of the Himba and their opposition to the construction of Epupa dam see Harring (n 910 above) 35-1000; see also A Corbett 'A case study on the proposed Epupa hydropower dam' in IWGIA *Dams, indigenous peoples and ethnic minorities* (1999) 85.

lands the proposed dam would inundate, including what they term as most important, ‘the graves of their ancestors’.⁹⁶⁷ The graves and the lands the Himba inhabit are of such cultural and spiritual significance that the least the State could have done was to constructively engage them with the aim of reaching consensus. Although plans to construct the dam have temporarily been shelved owing to international pressure, it is telling that Namibia has failed to accord her indigenous peoples due recognition and respect for their land rights.

The Himba case has illuminated and affirmed the notion that since her indigenous peoples’ lack political clout, their land rights can be dispensed with without following due process of law. Indeed, had the principle of ‘wiling buyer-wiling seller’ equally applied to the Himba indigenous peoples’ land rights, the State’s attempt to compulsorily acquire their lands for purposes of construction of the Epupa dam might have taken a different trajectory. That is due to the fact that in respecting the principle of ‘willing buyer willing seller’ principle the Government only buys land that becomes available.⁹⁶⁸ Where such lands are unavailable for acquisition, which has actually been the case for most lands claimed by Namibia’s indigenous peoples, they are left at the margins of the reform process.⁹⁶⁹ It is therefore mischievous of the State to attempt to compulsorily acquire the land of the Himba for ‘public interest’ yet fail to do the same for purposes of the land reform process.

⁹⁶⁷ See Corbett (n 966 above) 85.

⁹⁶⁸ See De Villiers (n 783 above) 41.

⁹⁶⁹ As above.

5.3.3 Security of land tenure reforms

5.3.3.1 Communal land tenure

As mentioned earlier, the 1991 Namibia National Conference on Land Reform and the Land Question resolved to retain the *status quo* whereby ownership rights of communal lands are vested in the State.⁹⁷⁰ However, since the majority of the black population in Namibia occupied and continue to utilise communal lands, it became imperative to improve the administration and tenure security of the communal lands.⁹⁷¹ In this regard, another conference was held in 1996 aimed at deliberating ‘on the role of traditional leaders in the administration of communal land and in the allocation of rights on communal land’.⁹⁷²

This conference resolved to grant traditional leaders the power to allocate communal land rights in accordance with a community’s customary laws.⁹⁷³ The Communal Land Reform Act⁹⁷⁴ has since been enacted to make provision for this relationship and to regulate the administration of communal lands. Pursuant to the Act, the allocation of communal land rights would still be

⁹⁷⁰ See sec 17 Communal Land Reform Act, 5 of 2002; see Hinz (n 933 above) 75; see also MO Hinz ‘Communal land, natural resources and traditional authority’ in M D’Engelbronner, MO Hinz and J Sindana (eds) *Traditional Authority and Democracy in Southern Africa, Proceedings from the workshop, Traditional Authority in the 1990s – Democratic Aspects of Traditional Government in Southern Africa*, 15–16 Nov 1995, CASS 183-88.

⁹⁷¹ See presentation by the Permanent Secretary of Namibian Ministry of Lands and Resettlement, Mr. FK Tsheehama (n 943 above).

⁹⁷² Hinz (n 933 above) 76.

⁹⁷³ Hinz (n 933 above) 76.

⁹⁷⁴ See Communal Land Reform Act No 5 of 2002.

subject to the approval of the Land Board.⁹⁷⁵ This qualification is merely for administrative purposes since ‘ratification can only be refused under circumstances described in the Act, which are basically of a technical nature’.⁹⁷⁶

An important tenure reform with regard to communal lands is the possibility envisaged by the Communal Land Reform Act of conversion from communal lands to leasehold.⁹⁷⁷ Such conversion can only be done by the Minister of Lands upon consultation and permission by the traditional authorities.⁹⁷⁸ Conversion of certain communal lands to leasehold would accord the leaseholders tenure security and the additional advantages of individual title, such as access to finances from financial institutions. Such conversion would be useful for indigenous peoples in Namibia who may opt to convert their communal lands into leaseholds and thereby derive the benefits attendant on such tenure. Indeed, in the absence of restoration of their ancestral lands through restitution of land rights, some of the communal lands indigenous peoples currently hold may not be viable for the traditional livelihoods. They may therefore elect to convert them into leaseholds in order to access private funding to develop the lands, which may not be available in the case of the less secure communal land rights. This is particularly so given the restrictions placed by the Communal Land Reform Act with regard to governance and management of the communal land resource.⁹⁷⁹

⁹⁷⁵ Sec 20 & 24 as above.

⁹⁷⁶ Hinz (n 933 above) 76; sec 24 as above.

⁹⁷⁷ See sec 30 of the Communal Land Reform Act.

⁹⁷⁸ As above.

⁹⁷⁹ See sec 17 Communal Land Reform Act, 5 (2002); see Hinz (n 933 above) 75.

An important advantage of the communal lands to indigenous peoples is that they access, control and utilize their traditional land in accordance with their African customary law. Namibia's Constitution recognises and gives legitimacy to traditional authorities that govern on the basis of African customary law and traditions. The authorities' advise the President on control and utilisation of communal lands.⁹⁸⁰ Traditional authorities in Namibia also exercise various powers, including allocation of access to and control of communal lands in accordance with the community customary laws and traditions.⁹⁸¹ Accordingly, traditional leaders who would also include those from indigenous communities, have some influence on issues related to their peoples' ancestral lands. However, during the colonial and apartheid regimes, the San and Nama indigenous peoples did not have State-recognised traditional authorities.⁹⁸² Indeed, 'while all other communities enjoyed some type of recognition in the apartheid-bound constitution of so-called separate development a representative authority was never established in Bushmanland, the home of some San groups and earmarked for the whole Namibian San population by the apartheid administration'.⁹⁸³ The San traditional authorities and form of governance were therefore not recognized, which meant that their issues, including land concerns, were neglected and largely unaddressed. It is therefore not surprising that the colonial regime continues to alienate the San and Nama lands as if they were owned by no one.⁹⁸⁴

⁹⁸⁰ See sec 102 (5) as above.

⁹⁸¹ Hinz (n 933 above) 76.

⁹⁸² As above 70.

⁹⁸³ As above (footnotes omitted).

⁹⁸⁴ See Haring (n 910 above) 71-81.

The establishment of a Council of Traditional Leaders in 1997 through an Act of Parliament⁹⁸⁵ addressed the issue of official recognition of the traditional authorities of some of the indigenous peoples, particularly the San groups. Pursuant to this Act, three San communities have been accorded traditional authority status.⁹⁸⁶ The Council of Traditional Leaders in Namibia comprises two representatives of each of the 42 officially recognised traditional authorities pursuant to the Traditional Authorities Act of 2000,⁹⁸⁷ which amended an earlier similarly named Act.⁹⁸⁸ However, some of the indigenous groups, including some San groups, such as the Khwe, continue to face reluctance by the state to recognise their traditional authorities.⁹⁸⁹ Consequently, such indigenous communities encounter numerous hurdles in the administration of their communal land rights.⁹⁹⁰

Of note is a recent decision by the Council of Traditional Leaders to require traditional communities in Namibia to restate their African customary laws.⁹⁹¹ According to Manfred Hintz, who is a member of the team that assists traditional communities in Namibia to restate their laws, the restatement of the customary laws is not an attempt to codify the laws but rather to put in writing what a community considers important for its future generations in accordance with

⁹⁸⁵ Council of Traditional Leaders Act, 13 of 1997.

⁹⁸⁶ Hintz (n 933 above) 74.

⁹⁸⁷ See Traditional Authorities Act, 25 of 2000.

⁹⁸⁸ See Traditional Authorities Act, 17 of 1995.

⁹⁸⁹ See Daniels (n 200 above) 50.

⁹⁹⁰ As above, 56-58; see also Hintz (n 933 above) 81.

⁹⁹¹ See Hintz (n 933 above) 85.

constitutional requirements, and for persons who deal with these laws outside the community.⁹⁹²

The restatement project, which is being carried out in collaboration with the University of Namibia, Faculty of Law, is expected to document and publicise these laws for future reference.⁹⁹³ The importance of the African customary restatement project can not be overemphasized given the historical marginalisation and exclusion of these laws from the mainstream legal framework. It is expected that by documenting these laws, disputes will be resolved expeditiously in line with the Bill of Rights, especially in view of the establishment of Community Courts.⁹⁹⁴ The establishment of these courts is bound to have positive ramifications for indigenous peoples relative to their indigenous land rights since the courts will adjudicate matters on the basis of African customary law.⁹⁹⁵

Beyond the legal reforms that are aimed at improving land access and tenure security in Namibia, it is significant that international law standards and norms are also applicable. According to article 144 of Namibia's Constitution, 'unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia'. Namibia is party to some of the international instruments that accord indigenous peoples protection of their rights, including their land rights. These instruments include: the African Charter on Human and

⁹⁹² Hinz (n 933 above) 85.

⁹⁹³ As above.

⁹⁹⁴ See Community Courts Act No 10 of 2003.

⁹⁹⁵ See sec 19 as above.

Peoples' Rights,⁹⁹⁶ the International Covenant on Civil and Political Rights,⁹⁹⁷ the Optional Protocol to the International Covenant on Civil and Political Rights,⁹⁹⁸ the Convention on the Elimination of Racial Discrimination,⁹⁹⁹ and the UN Convention on Biological Diversity.¹⁰⁰⁰ These instruments contain relevant provisions that protect and provide a forum for indigenous peoples to vindicate their fundamental human rights at the international level.

However, despite the ratification of these instruments and the constitutional provision that such laws form part of Namibia's legal order, they still require domestic incorporation, which is yet to be done.¹⁰⁰¹ Even without the domestication of these instruments, Namibian courts of law are increasingly relying on the jurisprudence emerging from international treaty monitoring bodies and foreign case law.¹⁰⁰² It is therefore expected that indigenous peoples' rights will find legal recourse in courts of law through an interpretation of the domestic legal framework and applicable international standards, as is the case in South Africa, as exemplified by the *Richtersveld* case.¹⁰⁰³

⁹⁹⁶ Ratified by Namibia on 30/08/1992.

⁹⁹⁷ Ratified by Namibia on 28/11/1994.

⁹⁹⁸ Ratified by Namibia on 28/11/1994.

⁹⁹⁹ Ratified by Namibia on 11 November 1982.

¹⁰⁰⁰ Ratified by Namibia on 16 May 1997.

¹⁰⁰¹ See Heyns (n 736 above) 1358.

¹⁰⁰² As above 1357.

¹⁰⁰³ See *Alexkor v Richtersveld* (n 72 above).

5.4 Chapter conclusion

The South Africa and Namibia case studies illustrate that, despite the numerous odds faced by indigenous peoples with regard to the recognition and protection of their land and resource rights, some legal avenues are available to vindicate their land rights. While some are quite comprehensive, as is the case in South Africa, they are not purposely enacted with indigenous peoples in mind, but are meant to redress past and historical discriminatory laws and practices for the black majority population. That said, these reforms invariably apply with equal force to benefit indigenous peoples. However, political considerations seem to play a huge role in the measures that are adopted by a state to redress past racial injustices. While the two countries' racial discrimination histories are very similar, South Africa took a rather more progressive and radical stance, perhaps based on the fact that its black majority was almost completely dispossessed of its lands. Indeed, whites in South Africa under apartheid occupied about 90% of arable land as compared to about 43% in Namibia.¹⁰⁰⁴ In Namibia, the ruling elite and its political support base seems content with the land reforms adopted, save for the pace of those reforms. Indigenous peoples in Namibia on the other hand remain dispossessed and aggrieved.

The land reforms that have been adopted in both countries are reflective of the political environments present in those countries and take into account negotiated compromises. Similarly, a legal framework that protects and recognises indigenous peoples land rights in Kenya would have to be tailored to suit and take into consideration the current and past injustices that have shaped the current legal framework. The recent ethnic clashes in Kenya that are traced to

¹⁰⁰⁴ See Hall & Ntsebeza (n 785 above) 3; De Villiers (n 771 above) 33.

historical land injustices have intensified demands for comprehensive resolution of the underlying root causes of the violence. It is therefore an opportune moment to harness the political momentum to take into account and balance the interests of indigenous peoples as well as those of the majority communities. The next chapter suggests a legal framework for Kenya that would take these issues into account drawing on the lessons that emerged from a review of the situation in Namibia and South Africa.