Community membership under living law and under state law.

Abstract:

In South Africa, state law largely ignores the practice and experience of communities. Relational models of pluralism recognize that communities create cultural meaning by strategically selecting indicators of difference. The process whereby a local community is generated is a "positioning" that builds upon custom and experience, ranges of meaning and emerges through interaction, engagement and struggle.

The Endorois decision emphasizes the following criteria to identify a "people" or community:

a) the voluntary perpetuation of cultural distinctiveness,
b) self-identification as a distinct collectivity, and
c) recognition by other communities.[1]

By contrast the relevant Namibian statute law governing recognition of a traditional or customary law community insists on the presence of indigenous, homogenous, endogamous and common ancestry features. South African land reform law similarly requires commonality, historic connection and shared rules of access to resources. Formalized customary law governance institutions resort to the imposed discretionary boundaries and powers of state appointed traditional chiefs.

The way in which a group describes itself in cultural terms relative to other communities are expressed as formal membership rules. The social boundaries of community are culturally produced. State law fails to recognize the markers provided in the Endorois decision and in living law practices.

The institutional imperative is this: What matters is not that things be done in the old ways. It is that things be done in ways – old or new – that win the support, participation and trust of the people, and can get things done.

South African statute law, as opposed to its constitutional and jurisprudential regime, straightjackets rural African communities into entities with prescribed membership. Self identification and voluntary membership is at the heart of cultural identity and, by implication, any system of local living law. This makes any claim to deep legal pluralism superficial and preposterous.

[1] 276 / 2003—Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, African C.H.R. (2010)

The structure of this paper:

1 introduction
2 the South African constitutional context
3 South African jurisprudence recognises self identification under living law
4 South African statute law lags behind

Annexures:
a) Bibliography
b) Definition of “community” in recent South African state law

Introduction

Given the great diversity of the world's indigenous peoples and communities living under customary law, trying to include them all under a single definition is difficult and any definition often contested. Moreover, a definition itself can be perceived offensive by those who are the object to be defined. Many say that "self-identification" is at the heart of community and indigenous identity. They are indigenous and or living under customary law because their ancestral roots are embedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. Their cultural patterns, social institutions and legal systems are different from the dominant sectors.

Despite the heterogeneity of these groups, a benchmark for their identification is represented by the ILO Convention # 169. Tribal peoples are described as those “whose social, cultural, and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulation.” Indigenous peoples are described as those “who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural, and political institutions.”

The term communities or "peoples" must attend to the broad range of associational and cultural patterns actually found in the human experience. The norm of self identification, self perception or self determination can be divided in two parts, substance of the norm (the precepts that define the standard) and remedial prescriptions that may follow the violation of the norm. During colonization remedial aspects led to independent statehood. In other contexts will vary according to circumstances, not necessarily leading to formation of new states. Self determination has an ongoing aspect, calling for the governing institutional order to be constantly assessed to make sure that people live and develop freely on a continuous basis. Thus decolonization represents the remedial aspect of self determination rather than its substantive element. Remedies to redress historical violations of self determination does not necessarily entail a reversion to the status quo ante but are to be developed in accordance with the present-day aspirations of the aggrieved groups. Self determination and sovereignty principles can work in tandem to promote a peaceful, stable and humane world.

The constitutional context:

Twenty years ago the World Bank issued operational directive 4.20.[2] The policy instrument O.D. 4.20 recognizes the rights of indigenous peoples to natural and economic resources, and urges their "informed participation" in Bank activities that affect them. The Bank, it suggests, should assist borrowing governments "in establishing legal recognition of the customary or traditional land tenure systems of indigenous peoples." "Self-identification and identification by others as members of a distinct cultural group" feature as an important characteristic of the target groups. OD 4.20 does not provide a single definition of IP, but rather lists several cultural and socio-economic criteria that characterize them. It also points out that national laws may include "specific definitional clauses and legal frameworks that provide a preliminary basis for identifying indigenous peoples."

The impact of the Bank's policy was evaluated in 2003. The study[3] found that in sharp contrast to the enumeration of the directive, a number of the country systems surveyed, use a legal "membership" definition, based on racial, ethnic and linguistic criteria. Some elements of the Bank definition match national identity criteria such as indigenous language and partially self-identification and identification by others as members of a distinct group.

In South Africa the trend is no different. The constitution recognises the right to culture and customary law as an independent source of law, but subsidiary state law attempts to define the and prescribe community membership and the contours of customary society.

The Interim Constitution of 1993 recognised the customary principle of "ubuntu" – simply defined as humanity. The right to culture was also protected in the Bill of Rights in the Interim Constitution in section 32. This is particularly notable because it was the first time that culture had been recognised as a fundamental right in South Africa. It guaranteed the people of South Africa the opportunity to live according to their cultural traditions.

The final Constitution protects and recognises customary law in various ways. Chapter 12 (ss 211 and 212) affords official recognition to indigenous law as well as to the institution, status and role of traditional leadership. Specifically, s 211(3) mandates the application of customary law by the courts, where applicable. In applying customary law, it is still subject to the Constitution as well as to any legislation that specifically deals with it. customary law is further protected within the Bill of Rights, most notably under the right to freedom, belief and opinion (s 15), the individual right to language and culture (s 30) as well as the collective right pertaining to cultural, religious and linguistic communities (s 31).

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[2] THE WORLD BANK OPERATIONAL MANUAL September 1991 OD 4.20 Operational Directive Indigenous Peoples; http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_IndigPeoples/$FILE/OD420_IndigenousPeoples.pdf

[3] World Bank (2003) "Implementation of Operational Directive 4.20 on Indigenous Peoples: An Independent Desk Review." Report No. 25332, Operations Evaluation Department, Country Evaluation and Regional Relations (OEDCR), World Bank (Washington, DC).

Significantly, section 39 of the Bill of Rights provides "when developing the common law or customary law, every court tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." Section 8(3) requires that, in the horizontal application of the bill of rights affecting natural and juristic persons, the court must apply or develop the common law to give effect to the relevant right to the extent that statute law does not address the matter. Section 173 refers to the inherent power of the higher courts to develop the common law. We would argue that the development of both customary law and the common law is implied in the wording of sections 8 and 173.[4]

Further, section 39(2) should be interpreted to require that whenever any court or even customary law dispute resolution mechanism such as a community or "tribal court" engages with, interprets, applies or develops customary law it must implement and promote the rights in the bill of rights. It requires more than merely taking into account the political, social and economic human rights contained in the constitution. (Davis & Klare, 2010, pp. 425-431). The Court held in Carmichele that section 39(2) imposes on all courts of law an obligation that law be developed so as to bring it in line with the substantive revolution and the objective normative order of the New South Africa. This obligation is imposed on the 'traditional authorities' as well, even if their freedom to change the law in accordance with their own practice of custom must also be respected.[5]

Finally, the constitution requires consideration of international law where relevant. This includes the community self determination imperative of the African Charter and interpreted in Endorois, and the ILO Convention # 169.

South African jurisprudence recognises self identification under living law; but weak or state law pluralism pervades

Recent South African statutes invoking the "community" as the beneficiary for reform and redistribution benefits, are ambivalent about self- determination. At least the Restitution of Land Rights Act of 1994, as interpreted by the courts, recognises community autonomy in determining community composition and membership. Subsequent legislation, and in particular the draft National Traditional Affairs Bill of 2011 require manifest culturally distinctive traits, adherence to customary law, and subjugation to state recognised traditional leadership structures.

The post apartheid state began to define the parameters that marks the jurisdictions of legal systems within its control and, in so doing, relegates customary law into separate and [allegedly] autonomous spheres.[6]

The Restitution Act of 1994 recognizes the existence of a community, which holds rights independently of its individual members. The individual members have rights against each other and against the community, but the community is the primary rights-holder

[4] Davis & Klare, 2010, p. footnote 73; Given that customary law is intricately connected to the cultural rights of people, the Constitutional Court has said that it is the community itself who is best placed to harmonise customary law and constitutional values, and that this should be encouraged. Shilubana and Others v Nwamitwa 2009 (2) SA 66 (CC) at para 45

[5] Shilubana para 48; (Cornell, 2011)

[6] In this sense the post apartheid state now emulates the colonial state. see Anne Griffiths, 2002, 'Legal Pluralism' in An introduction to Law and Social Theory 289-310 at 291.

which claims restitution and receives an award in its own name, not as representative of a number of individuals.

'Community' is defined in sec 1 of the Act as:[i]

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

This underlines the fact that the land is held in common – not by a number of individuals who have grouped together for convenience or for some other reason. Where a community claim is lodged, it is therefore not necessary to establish who are the direct descendants of the original individual members of the community – because the claim is not made by the descendants of original individual members. The claim is made by a community. What is necessary is to identify that community.

This is so both because of the structure of the Act, and because of the nature of a community. It is inherent in the nature of a community that some people leave it, and others join it. As the Land Claims Court put it in the **Kranspoort** case,

> *'As I have said, it is clear that there must be a community in existence at the time of the claim. Moreover, it must be the same community or part of the same community which was deprived of rights in the relevant land. However, this does not mean that the identity of the claimant community, in terms of its constituent members, should be identical to the one which was originally dispossessed. This would be an anomaly, something which a statute is assumed to avoid. Communities cannot be frozen in time. Changes in the constituent families and the admission of new members and departure of others must mean that the face of a community changes over time.'*[7]

If the membership of the community is constantly changing over time, is it necessary or desirable for the purposes of resolution of a community claim to establish who those members are at the time when the claim is resolved? Again, the answer is provided by the **Kranspoort** case:

> *It is so that it is not possible to say with precision, on the evidence before me, who each and every member of the community now is. In my view, provided the elements of commonality and cohesiveness are present, it does not matter that this precision is lacking. The problems in identifying the individuals in a community were recognised by this Court in* **In re Macleantown Residents Association: Re certain Erven and Commonage in Macleantown**[8] *when it said:*

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7 In re Kranspoort Community 2000 (2) SA 124 (LCC) para 34

8 In re Macleantown Residents Association: Re certain Erven and Commonage in Macleantown 1996 (4) SA 1272 (LCC) at 1278D-J. The problem in the Macleantown case was that there the claims were by individual persons, although they were represented in pursuing their claims by their Residents Association. It was not contended that this was a claim by a community.

> *'The Regional Land Claims Commissioner raised the question whether it is necessary to specify a list of individual claimants and he obtained legal opinion thereon. The opinion correctly points out that if the claim is by a community, the land will be transferred to the community (to be held in a manner as the court order may direct), and a list of members of the community will not be necessary. . . . On the other hand, if the claim is made by individuals, a list of the individual claimants must be submitted.'*[9]

A similar situation arose in the Richtersveld case. There, the Land Claims Court found as follows:

> *'Over time, the community expanded. Their composition changed. They admitted new members, not always homogeneous to the original population. Nonetheless, the community cohesion remained. The newcomers were allowed to share in the common rights to communal land. In my view, the first plaintiff, at the time of each alleged dispossession, complied with the definition of 'community' in that it had shared rules determining access to land held in common by its members. The present community (being the first plaintiff), augmented by the newcomers, is still a community with sufficient commonality with the community as it previously existed.'*[10]

This was not challenged on appeal, in either the Supreme Court of Appeal or in the Constitutional Court.[11]

From the above analysis the following conclusions may be drawn:

- The Constitution and the Act draw a clear distinction between community claims and individual claims, and where a claim is made by a community, the rights under that claim vest in the community as an entity.
- The membership of a community varies over time.
- Where a claim is made by a community, the award which is made is to the community as an entity, not to the individual members of the community.
- It is in the nature of a community that its membership changes. Some members leave, and others join.

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9 In re Kranspoort Community 2000 (2) SA 124 (LCC) para 45

10 Richtersveld community and others v Alexkor Ltd and another 2001 (3) SA 1285 (LCC) para 72

11 Richtersveld community and others v Alexkor Ltd and another 2003 (6) SA 104 (SCA) para 5; Alexkor Ltd and another v Richtersveld community and others 2004 (5) SA 460 (CC) para 19

- Membership of a community, and the benefits flowing from membership, depend upon the rules of that community.

The rules of the community and living local law:

The Constitutional Court in the Alexkor case elaborated on the content of the customary law in the Constitution. It really referred to the living form of that law:

> *…It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life…In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.*[12]

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

> *"The circumstances that the Richtersveld people, prior to being excluded from the subject land, occupied it and regarded it as their own, is evidenced by the fact that outsiders required permission before they could use the land (a requirement which they were not always able to enforce), and that grazing fees were extracted from outsiders whenever possible".*[13]

The Richtersveld SCA judgment [in para 18] similarly emphasises the central rule of permission of access to outsiders:

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

The Richtersveld rules persisted and in 2001 the Land Claims Court summarised the then current rules as follows:

> *" Mr Cloete explained that internal house rules (huisreëls) governed access by the Richtersveld community to common grazing. These rules*

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12 Alexkor Ltd and another v the Richtersveld Community and Others 2004 (5) SA 460 (CC) paras 52-54

13 Richtersveld Community and Others v Alexkor Ltd and Another 2001 (3) SA 1293 (LCC) para 65

> *limit the number of stock which each community member may graze.180 The rules also impose a liability to contribute to repair work, particularly of watering points (waterpunte). The rules had existed since the time of their forefathers. They were formalised in regulations adopted by an assembly of the Richtersveld community on 23 April 1903. The regulations drew a fundamental distinction between the rights of citizens, who were entitled to free use of grazing lands and to make gardens and sow the land, and non-citizens, who were restricted in the number of stock which they could graze on communal lands. The regulations also restricted grazing in the vicinity of the hoofdplaats..*
>
> *" Nonmembers (or inkommers) had no such rights. They had to acquire permission to use the land and its resources, for which they sometimes had to pay… Persons wishing to join the community had to be accepted. Paul Phillips testified that when his grandparents, who were of San origin, moved into the area, they first had to obtain permission from the Raad to do so. Jasper Cloete's grandfather,Ou-Kraai Cloete, was "taken on" by Paul (Bierkaptein) Links, and was given "drinking rights" by him."*[14]

If the participation rules depend on local living law, equally so membership rules should be derived from practice and living law. The new statute law of South Africa stand in stark contrast to the recent jurisprudence.

State law failing the test for community self determination

The Restitution Act of 1994 accommodates community self determination. The Interim Protection of Informal Land Rights Act, similarly insists that customary law and practice must determine the procedure for community consent to development and or disposal of communal land.

IPILRA's tribute to the democracy in action requirements of the new constitutional order comes in the form of an elaborate procedure for finalising the community mandate.

IPILRA prohibits the taking of land without the consent of the right holder. The right holder can only lose his or her rights to communal land if the custom and usage of the community is followed and if he or she is paid compensation. The Act deems custom to include the requirement of a majority community decision with enough notice and with opportunity to ask questions and participate before anyone can be deprived of their land rights. The directives[15] under IPILRA explain the notice and participation requirements.

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[14] Richtersveld community and others v Alexkor Ltd and another 2001 (3) SA 1285 (LCC) para 69 - 71

[15] a) "Interim Procedures Governing Land Development Decisions which require the Consent of the Minister of Land Affairs as Nominal Owner of the Land", Approved by Polcom On 20 November 1997 and amended on 14 January 1998 & Also In Terms Of Section 3(1)(A)(Ii) Of Act 112 of 1991 as amended by Act 34 of 1996;

b) The Entitlement of IPILRA and ESTA Rights Holders in respect of State Land Disposal Projects, Tenure Reform Directorate, PC.DOC 52/1999;

The directives must be followed before there is any new development on the land or land is sold or leased.

Firstly the community's customary law for decision making about the disposal of land must be followed. In addition, the following state law requirements must be followed: A community meeting authorizing land sales and development or investment projects must be attended and supervised by an official of the Department of Land Affairs. The notice must state the purpose of the meeting and arguments for and against the change must be debated and considered. The meeting must be attended by all sectors that are rights holders and all must be encouraged to participate. There are prescribed forms that must be completed. A register of all men and women who attended must be kept. The minister will consider the official report and then make a final decision. IPILRA exemplifies an attempt to harmonise localised practice with democratic imperatives.

Much has been written about the crude codification attempts by the the still born Communal Land Rights Act. In short: The benevolent and other remnants of customary law relating to land, tenure and control are done away with. The customary law of land tenure is extinguished once old order rights are cancelled and converted into new order rights and given content, or not, by ministerial decree. Remnants only may survive under the uncertain category of confirmed old order rights. The Act extinguishes some of the most valuable aspects of customary law in relation to tenure.

But the more cynical of the purported harmonisation laws is the draft National Traditional Affairs Bill currently marketed by the newly found department of native affairs. The draft bill recognises in its definition of community a measure of self determination, but then it continues to list a number of objective identity factors. More cynically, the determination process is only available to those communities which are not already covered by the wall to wall a tribal authorities established and chiefs appointed under the apartheid Bantu Authorities Act of 1951 perpetuated as traditional councils and leaders under the TLGFA of 2003.

For a Khoi San community to qualify for recognition in terms of the draft NTA bill it must get over several hurdles of endogamy and cultural distinction. Not even the Richtersveld community would qualify for community status under the NTA.

An evaluation of the latest new state laws in South Africa shows that unlike its constitution and its predecessors such as the restitution act and IPILRA, they subscribe to limited or weak state law pluralism and relegate and limit self determination to a minimum.

Meaning and organisation

What does recognition and self perception mean for community political organisation and articulation and enforcement of social and economic rights? Without self identification and the right to secede and reconstitute political organisation, the community under

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c) The Interim Procedures Governing Land Development Decisions which require the consent of the Minister of Land Affairs as Nominal Owner of the Land, http://land.pwv.gov.za/tenurereform/New_TenureReform/Policies/Policies.htm.

customary law would undermine its own foundations. Identity and culture is at the heart of the living law system, and arbitrary recognition by the state would undermine its strength and autonomy.

Communities self-constitute relationally, and specifically by reference to other persons and communities. (Gover, 2010, p. 11) In this way the community positions itself in the broader social and political arena.

It is not an appeal *to tradition*; it is an appeal *for legitimac*y … In some cases, this may mean that communities have to rethink their ideas of how to govern and invent new ways that better meet their needs. (Hunt & Smith, 2006, p. 14)

Assessments of legitimacy appear to relate primarily to the processes and institutions of governance, the way they are created, and decisions made and accountability secured.

Across all types of communities, certain local groups of people have the right to own particular tracts of land and resources, and to exercise authority and make decisions in respect to those things and related activities. Local autonomy and social expedience are balanced and legitimacy maximized.

The local living law approach emphasises legitimacy and recognises autonomy, social relatedness and subsidiarity. In South Africa, the constitution and the judiciary have recognised customary law in this expression. The challenge is for state law to follow suit.

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Hunt, J., & Smith, D. (2006). *Building Indigenous community governance in Australia: Preliminary research findings.* Australian National University: Centre for Aboriginal Economic Policy Research; Working Paper no. 31/2006.

Mantziaris, C., & Martin, D. (1999). *Guide to the design of native title corporations.* Perth: National Native Title Tribunal.

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Community and membership in South African Land Reform Law

Statutory definitions

RESTITUTION OF LAND RIGHTS ACT 22 OF 1994

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

INTERIM PROTECTION OF INFORMAL LAND RIGHTS ACT NO. 31 OF 1996
"community" means any group or portion of a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group

COMMUNAL PROPERTY ASSOCIATIONS ACT NO. 28 OF 1996
"community" means a group of persons, which wishes to have its rights to or in particular property determined by shared rules under a written constitution and which wishes or is required to form an association as contemplated in section 2;
"members" means the members of an association or the members of a community, as the case may be, including members who comply with the provisions of paragraph (i) of item 5 of the Schedule, and for the purposes of sections 12, 13 and 14, shall mean those members whose names appear on a list contemplated in the said item 5;

TRANSFORMATION OF CERTAIN RURAL AREAS ACT NO. 94 OF 1998
"resident" means a person who, at the date of commencement of this Act—
(a) ordinarily resides in a board area; or
(b) under law is liable for the payment of assessment rates, rent, service charges or levies to the municipality concerned in respect of land situated in a board area;

UPGRADING OF LAND TENURE RIGHTS ACT NO. 112 OF 1991
"community" means a group of persons of which its members have or wish to have their rights to or in a particular piece of land determined by shared rules;
[Definition of "community" inserted by s. 1 (a) of Act No. 34 of 1996.]

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

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

"tribe" includes—
(a) any community living and existing like a tribe; or
(b) any part of a tribe living and existing as a separate entity.

COMMUNAL LAND RIGHTS ACT, 2004 [declared unconstitutional]
"communal land" means land contemplated in section 2 which is, or is to be, occupied or used by members of a community subject to the rules or custom of that community;
"community" means a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group.

TRADITIONAL LEADERSHIP AND GOVERNANCE FRAMEWORK ACT, 2003.

2. (1) A community may be recognised as a traditional community if it-

(a) is subject to a system of traditional leadership in terms of that community's customs; and

(b) observes a system of customary law.

NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT
and PROTECTED AREAS ACT
“local community” means any community of people living or having rights or interests in a distinct geographical area;

NATIONAL ENVIRONMENTAL MANAGEMENT ACT
'community' means any group of persons or a part of such a group who share common interests, and who regard themselves as a community;

NATIONAL FORESTS ACT NO. 84 OF 1998
“community” means a coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law

MINERALS AND PETROLEUM RESOURCES DEVELOPMENT ACT 28/02 as amended by 36/08 [amendment not in operation]
‘community’ means a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law:
Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect by mining on land occupied by such members or part of the community.

INTELLECTUAL PROPERTY LAWS AMENDMENT BILL [B 8—2010]

- traditional performance’ means a performance which is recognised by an indigenous community as a performance having an indigenous origin and a traditional character;
- a traditional work, means the work which originated and acquired traditional character from an indigenous community;
- ‘indigenous community’ means any community of people living within the borders of the Republic, or which historically lived in the geographic area located within the borders of the Republic;
- ‘traditional intellectual property’ means an intellectual property that has an indigenous origin and is owned or could be owned by an indigenous community as determined by the Registrar;
- ‘traditional work’ means a literary work, an artistic work or a musical work which is recognised by an indigenous community as a work having an indigenous origin and a traditional character;’’.
- the community from which the work or a substantial part thereof originated is or was an indigenous community when the work was created.
- Notwithstanding the provisions of this section, any indigenous community may establish a legal entity, business or any other enterprise to promote or exploit traditional intellectual property.

Draft NATIONAL TRADITIONAL AFFAIRS BILL, 2011 Version 3 of 26 June 2011.

6. (1) A community may be recognised as a traditional community if it –
   (a) has a system of traditional leadership at a senior traditional leadership level recognised by other traditional communities;
   (b) observes a system of customary law;
   (c) recognises itself as a distinct traditional community with a proven history of existence, from a particular point in time up to the present, distinct and separate from other traditional communities; and
   (d) has an existence of distinctive cultural heritage manifestations; or
   (e) has a number of headmenship or headwomenship.

10. (1) A community may apply to the Premier concerned to be recognised as a Khoi-San community if it –
   (a) has a history of self-identification by members of the community concerned, as belonging to a unique community distinct from all other communities;
   (b) observes distinctive established Khoi-San customary law and customs;
   (c) is subject to a system of hereditary or elected Khoi-San leadership with structures exercising authority in terms of customary law and customs of that community;
   (d) has an existence of distinctive cultural heritage manifestations;
   (e) has a proven history of coherent existence of the community from a particular point in time up to the present;
   (f) is acknowledged by other Khoi-San communities as a distinct community; and
   (g) occupies a specific geographical area or various geographical areas together with other non-community members.

Comments on community, boundaries, membership [from LPC and other commentaries]

1 The applicant communities are concerned that the Communal Land Rights Act, read together with the Traditional Leadership and Governance Framework Act, confirms disputed tribal authority boundaries and undermines more localised decision-making at layered levels of social organisation. This jeopardises the ability of groups of users—whether at the level of the family, the user group, the village or the clan—to exercise control over their land.

2 State-imposed fixed boundaries of jurisdiction undermine indigenous mechanisms that mediate power and see it fluctuate depending on leaders' capacity to mobilise support. This problem is compounded by disputed former Bantu authority boundaries becoming 'default' community boundaries.

3 The history of South Africa indicates that the boundaries of authority of traditional leaders expanded and contracted all the time, depending on the outcome of wars and on any particular leader's capacity to preserve or extend his authority in the face of challenges from others. Sometimes the challenges came from rival groups, sometimes from 'royal' brothers disputing the chieftaincy, and sometimes from lesser 'chiefs' challenging the hierarchy of seniority, influence and control. Power was mediated by the existence of competing loci of power which existed in a state of constant tension (Schapera, 1956: 207; Gluckman, 1965: 49–52; Bennett, 1995: 67).

4 The 1951 Bantu Authorities Act made chiefs agents of government. According to Govan Mbeki (1964: 119–20),

> '[m]any Chiefs and headmen found that once they had committed themselves to supporting Bantu Authorities, an immense chasm developed between them and the people. Gone was the old give-and-take of tribal consultation, and in its place there was now the autocratic power bestowed on the more ambitious Chiefs, who became arrogant in the knowledge that government might was behind them.'

The Act, in s 2(3), provided for the government to determine the area of jurisdiction of Bantu authorities, with fixed boundaries published in the *Government Gazette*. This gave chiefs powers over people living within their 'jurisdictional' boundaries irrespective of whether those people supported them or not. It thereby undermined one of the key mechanisms of accountability: the opportunity for people to ally themselves with a challenger, who with their support would previously have been able to 'expand' his sphere of authority to include them.