CUSTOMARY LAND LAW

Far too much of the legal profession considers customary law as a practical irrelevance. This is profoundly mistaken. Customary law norms – either directly or indirectly - permeate private and public law relationships in which the vast majority of South Africans are embedded. Customary law can impact on custody and guardianship of minors,[1] the recognition of marriages,[2] the distribution of property upon death or divorce,[3] the recognition of the right to succeed to political offices.[4] These are all fundamentally important legal issues.

Customary land law is one of the most important areas of customary law. And it is only going to get more important. Vast tracts of land are held and used under customary law systems. Although much of this land is registered as owned (in the common law sense) by the state, the recognition of customary law land rights – entrenched in section 211 (3) of the Constitution and the Interim Protection of Informal Land Rights Act 31 of 1996 ("IPILRA") – means that the state owns the property subject to "communal" or "indigenous" title. Any legal issue or dispute relating to that land (including mining and prospecting rights – see section 2 (b) of IPILRA) necessarily raises issues relating to customary law interests. As South Africa's economy, cities and population all expand, access to, and use of, land governed by customary law will take on increasing significance in legal practice.

In short, customary law can only be considered irrelevant to legal practice if one takes an extremely narrow (and profoundly dull) view of what legal practice is.

[1] Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.
[2] Recognition of Customary Marriages Act 120 of 1998.
[3] Bhe v Magistrate, Khayelitsha 2005 (1) SA 580 (CC).
[4] Shibulana v Nwamitwa 2009 (2) SA 66 (CC).

In this part of the course, we will consider the foundations of customary land law, including its recognition and protection in the Constitution and IPILRA. We will then consider the various ways in which customary law has been characterised and applied, both by the Constitutional Court in the case of ***Alexcor v the Richtersveld Community* 2004 (5) SA 460 (CC)** – which you should read, if you have not already done so – and by experts in the field.

The Constitution and IPILRA

Section 211 (3) of the Constitution provides that –

"*(3) The courts must apply customary law when it is applicable, subject to the Constitution and any legislation that specifically deals with customary law.*"

When is customary law applicable? In the case of land law, IPILRA provides part of the answer. Section 1 (a) of IPILRA includes within the definition of "informal right to land" –

(a) the use of, occupation of, or access to land in terms of-

(i) any tribal, customary or indigenous law or practice of a tribe;

(ii) the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in-

(aa) the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act 18 of 1936);

(bb) the government of any area for which a legislative assembly was established in terms of the Self-Governing Territories Constitution Act, 1971 (Act 21 of 1971); or

> *(cc) the governments of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei.*

IPILRA was adopted, in large part, to protect customary law interests in land. It was meant to be replaced quickly by a more permanent statute, but this is yet to happen (see section 5 of the Act which provides for its terms to be extended annually – the latest extension lasts until 31 December 2013).

We can fairly infer from subsection (a) (ii) that customary law rights apply at least in the former "self-governing territories" (for example KwaZulu) and the "independent" republics of Venda, Ciskei, Bophuthatswana and Transkei.

But under subsection (a) (i), customary law rights also extend to wherever use, occupation or access to land is governed by "*any tribal, customary or indigenous law or practice of a tribe*", which is much broader territorial limit than the former Bantustans. We will see below that customary law rights have been recognised as having at least historical application far outside Bantustans.

Accordingly, wherever traditional land management practices persist, customary land rights are recognised and protected. On the letter of the statute, this could potentially include some of the older urban informal settlements (this is underscored by, and subject to, the pre-1997 5-year beneficial occupation requirement in section 1 (c) of the Act). It would certainly extend to any traditional leadership structures which may endure outside the former Bantustans.

But what is a "tribal, customary or indigenous law or practice of a tribe"? IPILRA isn't much help there. Section 1 of IPILRA simply defines "tribe" as "any community living or existing like a tribe". This is (probably intentionally) circular, and the drafters of the statute appear to be content to leave the definition of the word "tribe" to the courts.

There are other indications of what customary land law is in IPILRA. Section 2 of IPLIRA refers to "land held on a communal basis" (section 2 (2)) according to rules based on the custom or usage of a community (section 2 (3)). It also deems the custom or usage of a community to be basically democratic (section 2 (4)).

Crucially, Section 3 of IPILRA provides that sales or other dispositions of land are subject to the informal land rights existing over them. So informal land rights will survive sales and transfers of land for at least as long as IPILRA does.

The Nature of Customary Rights to Land – The Richtersveld Case

The problem still remains – how do we define a customary right to land? In ***Alexcor v the Richtersveld Community*** **2004 (5) SA 460 (CC)**, the Constitutional Court provided the seeds of an answer.

The Richtersveld Community is a large indigenous community living at the far north-western border of South Africa. It occupied a vast tract of land south of the orange river. In the 1920s, it was excluded from that land by the Union Government, because large alluvial deposits of diamonds were discovered.

After the adoption of the 1996 Constitution, the Richtersveld Community brought a claim to be restored to the land from which it had been excluded. Crucial to the claim was whether the Community had any rights to the land at the time of their exclusion. Alexcor (the state-owned company responsible for alluvial mining in the area – which had an obvious interest in having the claim rejected) argued that the Richtersveld Community's rights were extinguished long before they were excluded from the land. Whatever rights the Community had, Alexcor argued, were extinguished by the British annexation of the area in 1847. The Community argued that this was wrong. It

argued that it had rights – "indigenous" or "customary" rights – which survived annexation by virtue of the common law doctrine of "**aboriginal title**". Briefly, the doctrine of "aboriginal title" is that indigenous customs, practices and laws survive colonial annexation, so if a customary law right to land existed prior to the invasion and occupation of an area by a foreign power in an act of colonisation (say Britain annexing Namaqualand) those rights are not extinguished merely by the act of annexation (they may subsequently be extinguished by an act of expropriation or sale, but that need not concern us here).

The Land Claims Court – in a frankly dismal judgment[5] - sided with Alexcor. It held that the Richtersveld Community's ancestors had no rights to the land after 1847, because the Richtersveld's ancestors' nomadic lifestyle, and the practices that came with it, would not have been considered sufficiently civilised by the British to merit recognition as a legal system. While the British would have recognised a more sedentary, agricultural community as having a system of "land law", the LCC reasoned the people of Namaqualand at the time would not have been so recognised. While that view is objectionable today, it is the view the British would have taken at the time which is relevant to deciding whether indigenous rights would have survived British annexation.[6] Because the Community's rights were extinguished by annexation in 1847, it was dispossessed before 14 June 1913, and so did not qualify for restitution.

The Community was successful on appeal to the SCA, and Alexcor then appealed again to the Constitutional Court. The Constitutional Court dismissed Alexcor's

[5] See 2001 (3) SA 1293 (LCC).
[6] paras 41 to 42.

appeal. In doing so, it (albeit implicitly) upheld and applied the doctrine of aboriginal title. It also set out important principles for the recognition of customary land law –

[50] The nature and the content of the rights that the Richtersveld Community held in the subject land prior to annexation must be determined by reference to indigenous law. That is the law which governed its land rights. Those rights cannot be determined by reference to common law. The Privy Council has held, and we agree, that a dispute between indigenous people as to the right to occupy a piece of land has to be determined according to indigenous law 'without importing English conceptions of property law'.

[51] While in the past indigenous law was seen through the common-law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by s 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights. Our Constitution
'. . . does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill (of Rights)'.
It is clear, therefore, that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.

[52] In 1988, the Law of Evidence Amendment Act provided for the first time that all the courts of the land were authorised to take judicial notice of indigenous law. Such law may be established by adducing evidence. 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. As this Court pointed out in Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996:
'The [Constitutional Assembly] cannot be constitutionally faulted for leaving the complicated, varied and ever-developing specifics of how . . . customary law should develop and be interpreted, to future social evolution, legislative deliberation and judicial interpretation.'

[53] 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.

[54] Without attempting to be exhaustive, we would add that indigenous law may be established by reference to writers on indigenous law and other authorities and sources, and may include the evidence of witnesses if necessary. However, caution must be exercised when dealing with textbooks and old authorities because of the tendency to view indigenous law through the prism of legal conceptions that are foreign to it. In the course of establishing indigenous law, courts may also be confronted with conflicting views on what indigenous law on a subject provides. It is not necessary for the purposes of this judgment to decide how such conflicts are to be resolved.

[55] This case does not require us to examine the full range of problems concerned. In the present matter extensive evidence exists as to the nature of the indigenous law rights exercised by the Richtersveld Community as they evolved up until 1913. As we stressed above, to understand them properly these rights must be considered in their own terms and not through the prism of the common law.

The Court went on to hold that the determining the content of indigenous land title involves the study of the history of a particular community and its usages. It found that under indigenous Nama law, land was held in common by the whole community. Each individual had occupation and use rights, subject to communal control. Outsiders had no such rights, and paid for them on lease-like terms when they sought to acquire them. The Court quoted the Supreme Court of Appeal judgment on this question at length –

"One of the components of the culture of the Richtersveld people was the customary rules relating to their entitlement to and use and occupation of this land. The primary rule was that the land belonged to the Richtersveld community as a whole and that all its people were entitled to the reasonable occupation and use of all land held in common by them and its resources. 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. There are a number of telling examples. A non-member using communal grazing without permission would be fined "a couple of head of cattle"; the Reverend Hein, who settled in the Richtersveld in 1844, recorded in his diary three years later a protest by the community that Captain Paul (Bierkaptein) Links had, without the consent of the "raad", let ("verpacht") some of its best grazing land at the Gariep River mouth; and the trader McDougal established himself at the mouth of the Gariep River in 1847 only after obtaining the permission of Captain Links on behalf of the community and agreeing to pay for the privilege. 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 Court also held that there was significant evidence of indigneous mining activities on the land, both before and after annexation, suggesting that indigenous rights had in fact survived annexation.

Having regard to all of this, the Court held that the community had indigenous land rights before annexation. These were not extinguished by the annexation. The Court held that the Community was in fact dispossessed of the land sometime after they were excluded from the land in the 1920s. They were accordingly entitled to apply for restitution of it.

Chiefly Authority vs. "Nested" Systems

The Constitutional Court's characterisation of customary land law as communal title subject to individual occupation and use rights is a common one. It is, perhaps, a fundamental feature of customary land law.

However, the way in which customary land law systems operate within the broad strokes set out in IPILRA and by the Constitutional Court in Richtersveld varies widely. They are not susceptible to easy characterisation.

In LAWSA vol 38, para 45 a very narrow view is taken – one which places a "chief" or traditional leader at the centre of a land allocation system. There, we are asked to accept that customary land tenure consists in allocation by a traditional leader "in consultation with his (sic) council" whereafter the holder of the land gains access to the land in the form of some sort of strong usufructary sense, subject only the traditional leader's authority to terminate the right. Under European influence, only men were allowed to hold land rights. (This has now changed after the decision of the Constitutional Court in Bhe v Magistrate Khayaletisha, which struck down the so-called "rule" of primogeniture in the customary law of sucession.)

Ben Cousins has proposed another way of understanding communal land tenure.[7] He argues that it is rather a "nested" or federalised system of land administration. Drawing on a much richer array of expert writings than LAWSA, he suggests that customary land law can really be understood as a series of layers, with decisions about land use being taken at different levels of authority within a community. Decisions about how to use residential land (either to live on or for subsistence farming) are taken primarily at the household level, while decisions about how to allocate land and use resources held in common (waterways, mineral resources etc), were taken at a higher level of authority, or a broader communal level.[8] Cousins also argues that individual customary land rights are not necessarily terminable by traditional authorities and sometimes approximate ownership far more than usufructary rights.[9]

[7] See Ben Cousins, "Characterising 'communal' tenure: nested systems and flexible boundaries" in Claassens and Cousins (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (UCT Press) (2008).
[8] See pp 123 – 126.
[9] p 117.

In any event, it would be wrong to accept LAWSA's highly authoritarian and simplistic view of communal land rights and land administration – reliant as it is caricatures of the chieftaincy developed under colonialism and apartheid. Nor should we kid ourselves that communal land administration practices are always perfectly "democratic" – or that there is even one "democratic" way of administering land. Subject to the broad outline above, what customary land law is in any particular time or place must generally be ascertained through gathering evidence, rather than relying on authority.