

**REVIEW OF NATIONAL LAWS AND POLICIES THAT SUPPORT
OR UNDERMINE INDIGENOUS PEOPLES AND LOCAL
COMMUNITIES**

SOUTH AFRICA



NATURAL JUSTICE



FORDFOUNDATION

“Land is the foundation of the lives and cultures of Indigenous peoples all over the world... Without access to and respect for their rights over their lands, territories and natural resources, the survival of Indigenous peoples’ particular distinct cultures is threatened.”

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TABLE OF CONTENTS

	Page
LIST OF ACRONYMS.....	6
INTRODUCTION.....	8
 PART 1: COUNTRY, COMMUNITIES & INDIGENOUS PEOPLES' AND LOCAL COMMUNITIES' RIGHTS.....	 9
1.1 COUNTRY	9
1.2 COMMUNITIES & ENVIRONMENTAL CHANGE.....	10
1.2.1 INDIGENOUS PEOPLES, LOCAL COMMUNITIES AND LIVELIHOOD STRATEGIES.....	10
1.2.2 DRIVERS OF BIODIVERSITY LOSS AND LAND/RESOURCE APPROPRIATION.....	12
1.2.3 THREATS TO CULTURAL AND LINGUISTIC DIVERSITY.....	13
1.2.4 INITIATIVES TO CONSERVE AND SUSTAINABLY USE BIODIVERSITY.....	14
PART 2: HUMAN RIGHTS	15
2.1 HUMAN RIGHTS LAWS AND POLICIES.....	15
2.2 STATE AGENCIES MANDATED TO DEVELOP AND IMPLEMENT LAWS AND POLICIES.....	21
2.3 EXTENT AND EFFECTIVENESS OF IMPLEMENTATION.....	21
PART 3: LAND, FRESHWATER AND MARINE LAWS & POLICIES.....	21
3.1 LEGISLATION RELEVANT TO COMMUNITY TERRITORIES, TITLE OR TENURE & SUB-SOIL RESOURCE RIGHTS.....	22
3.2 STATE AGENCY MANDATED TO DEVELOP AND IMPLEMENT LAND/FRESHWATER/MARINE LAWS AND POLICIES.....	26
3.3 RECOGNITION OF NATURE OR ABORIGINAL TITLE.....	27
3.4 CUSTOMARY LAW & PROCEDURES FOR LOCAL STEWARDSHIP OR GOVERNANCE.....	27
PART 4: PROTECTED AREAS, ICCAS AND SACRED NATURAL SITES.....	28
4.1 INDIGENOUS PEOPLES' AND LOCAL COMMUNITIES' CONSERVED TERRITORIES AND AREAS (ICCAS).....	28
4.1.1 THE RANGE, DIVERSITY, AND EXTENT OF ICCAS.....	28
4.1.2 COMMUNITY GOVERNANCE AND MANAGEMENT OF ICCAS	28
4.1.3 MAIN THREATS TO LOCAL GOVERNANCE.....	28
4.1.4 MAIN INITIATIVES UNDERTAKEN TO ADDRESS THE THREATS TO ICCAS.....	29
4.2 PROTECTED AREAS	29
4.2.1 LAWS AND POLICIES THAT CONSTITUTE THE PROTECTED AREA FRAMEWORK.....	29
4.2.2 DEFINITION OF PROTECTED AREA.....	29
4.2.3 STATE AGENCIES MANDATED TO DEVELOP AND IMPLEMENT LAWS AND POLICIES.....	30
4.2.4 IMPLEMENTATION OF ELEMENT 2 OF THE PROGRAMME OF WORK ON PROTECTED AREAS.....	31
4.2.5 PROTECTED AREA FRAMEWORK & RECOGNITION OF INDIGENOUS PEOPLE AND LOCAL COMMUNITIES' RIGHTS	34
4.3 SACRED NATURAL SITES.....	35
4.4 OTHER PROTECTED AREA-RELATED DESIGNATIONS.....	35
4.5 TRENDS AND RECOMMENDATIONS.....	36

4.5.1	DIRECTION OF PROTECTED AREAS LAWS AND POLICIES.....	36
PART 5: NATURAL RESOURCES, ENVIRONMENTAL AND CULTURAL LAWS AND POLICIES.....		
	POLICIES.....	36
5.1	NATURAL RESOURCES & ENVIRONMENT	36
5.1.1	LAWS AND POLICIES SUPPORTING INDIGENOUS PEOPLE AND LOCAL COMMUNITIES' OWNERSHIP OF NATURAL RESOURCES.....	36
5.1.2	STATE AGENCIES MANDATED TO DEVELOP AND IMPLEMENT LAWS AND POLICIES.....	38
5.1.3	LOCAL COMMUNITY STEWARDSHIP OF TERRITORIES, AREAS OR NATURAL RESOURCES	38
5.2	TRADITIONAL KNOWLEDGE, INTANGIBLE HERITAGE AND CULTURE.....	38
5.2.1	LAWS AND POLICIES RELATING TO TRADITIONAL KNOWLEDGE OR COMMUNITIES' INTANGIBLE HERITAGE OR CULTURE.....	38
5.3	ACCESS AND BENEFIT SHARING	41
5.3.1	LAWS AND POLICIES WITH RESPECT TO ACCESS AND BENEFIT SHARING.....	41
5.3.2	FREE, PRIOR AND INFORMED CONSENT, CONSULTATIONS AND CUSTOMARY DECISION-MAKING.....	41
5.3.3	FAIR AND EQUITABLE SHARING OF BENEFITS ARISING FROM ACCESS TO GENETIC RESOURCES AND RELATED TRADITIONAL KNOWLEDGE.....	41
5.3.4	STATE-IMPLEMENTED LAWS, POLICIES AND FRAMEWORKS GOVERNING PROCESSES.....	42
5.3.5	STATE AGENCIES MANDATED TO DEVELOP, IMPLEMENT LAWS AND MONITOR LAWS AND POLICIES.....	43
PART 6: NATURAL RESOURCE EXPLORATION AND EXTRACTION, LARGE-SCALE INFRASTRUCTURE/ DEVELOPMENT PROJECTS AND AGRICULTURE.....		
	INFRASTRUCTURE/ DEVELOPMENT PROJECTS AND AGRICULTURE.....	43
6.1	NATURAL RESOURCE EXPLORATION AND EXTRACTION.....	43
6.1.1	NATURAL RESOURCES BEING EXPLORED AND EXTRACTED.....	43
6.1.2	LAWS AND POLICIES WITH RESPECT TO NATURAL RESOURCES EXPLORATION AND EXTRACTION	44
6.1.3	INTERACTION BETWEEN NATURAL RESOURCE EXTRACTION LAWS ENVIRONMENTAL AND HUMAN RIGHTS LEGISLATION	44
6.1.4	NATURAL RESOURCES EXTRACTION LAWS AND OTHER LEGISLATION.....	45
6.1.5	THE IMPACT OF NATURAL RESOURCE EXTRACTION ON OTHER NATURAL RESOURCES.....	46
6.1.6	NATURAL RESOURCE EXTRACTION LAWS: RELATIONSHIP TO THE RIGHTS OF INDIGENOUS PEOPLES AND LOCAL COMMUNITIES'	47
6.1.7	NATURAL RESOURCE EXPLORATION AND EXTRACTION IMPACTS ON INDIGENOUS PEOPLES AND LOCAL COMMUNITIES	49
6.1.8	CONFLICTS WITH DOMESTIC PROPERTY LAWS GOVERNING LAND FORMALLY OWNED	51
6.1.9	FREE, PRIOR AND INFORMED CONSENT, CONSULTATIONS, CUSTOMARY DECISION-MAKING, AND THE FAIR AND EQUITABLE SHARING OF COSTS AND BENEFITS ARISING FROM RESOURCE EXTRACTION.....	52
6.1.10	STATE AGENCIES MANDATED TO DEVELOP, IMPLEMENT AND MONITOR LAWS AND POLICIES.....	53
6.2	LARGE-SCALE INFRASTRUCTURE/DEVELOPMENT PROJECTS	53

6.2.1	LARGE-SCALE INFRASTRUCTURE AND DEVELOPMENT PROJECTS AND IMPACT ON COMMUNITIES’	53
6.2.2	STATE AGENCIES MANDATED TO DEVELOP, IMPLEMENT AND MONITOR LAWS AND POLICIES	55
6.2.3	LAWS AND POLICIES WITH RESPECT TO THE GENERATION OF INFRASTRUCTURE AND / OR DEVELOPMENT PROJECTS	56
6.2.4	INFRASTRUCTURE LAWS AND THE EXTENT TO WHICH THEY TAKE INTO ACCOUNT ENVIRONMENT AND/OR HUMAN RIGHTS AND THE RIGHTS OF INDIGENOUS PEOPLES AND LOCAL COMMUNITIES.....	56
6.3	LARGE-SCALE AGRICULTURE	57
6.3.1	LARGE-SCALE AGRICULTURE IN SOUTH AFRICA	57
6.3.2	IMPACT OF LARGE-SCALE AGRICULTURE ON OTHER NATURAL RESOURCES...	58
6.3.3	LAWS AND POLICIES WITH RESPECT TO LARGE-SCALE AGRICULTURE.....	58
6.3.4	LARGE-SCALE AGRICULTURE LAWS AND POLICIES, THE ENVIRONMENT AND HUMAN RIGHTS.....	59
6.3.5	INTERACTION OF LAWS AND POLICIES WITH OTHER LEGISLATION SUCH AS ENVIRONMENTAL & HUMAN RIGHTS LAWS.....	60
6.3.6	EFFECTS OF LARGE-SCALE AGRICULTURE ON INDIGENOUS PEOPLES AND LOCAL COMMUNITIES	62
	PART 7: NON-LEGAL RECOGNITION AND SUPPORT.....	63
7.1	NON-LEGAL GOVERNMENT SUPPORT.....	63
7.2	NON-LEGAL NON-GOVERNMENTAL SUPPORT	66
7.3	KEY ISSUES.....	67
	PART 8: JUDGMENTS.....	68
8.1	CASE LAW AND JUDGEMENTS THAT SUPPORT OR HINDER INDIGENOUS PEOPLE AND LOCAL COMMUNITIES’ RIGHTS	68
	PART 9: IMPLEMENTATION.....	71
	PART 10: RESISTANCE AND ENGAGEMENT.....	75
10.1	INDIGENOUS PEOPLES AND LOCAL COMMUNITIES’ ENGAGEMENT WITH OR RESISTANCE OF LAWS AND POLICIES.....	73
10.2	TYPES OF DISPUTES THAT HAVE EMERGED.....	73
10.3	BROAD SOCIAL MOVEMENTS AND TRENDS.....	74
10.4	RESPONSE OF INDIGENOUS PEOPLES AND LOCAL COMMUNITIES’ TO LAWS AND POLICIES THAT AFFECT THEM.....	75
	PART 11: LEGAL AND POLICY REFORM.....	75
11.1	INSTITUTIONAL, LEGAL AND/OR POLICY REFORMS REQUIRED.....	76
	PART 12: CASE STUDIES	76
	CASE STUDY 1: MKUZE WETLANDS & CONSERVATION EXPERIENCES.....	77
	CASE STUDY 2: THE CASE OF KGALAGADI TRANSFRONTIER PARK	78
	PART 13: ADDITIONAL COMMENTS.....	79
	REFERENCES.....	81

LIST OF PHOTOS

Photo 1.1:	Indigenous rock art, Cederberg (2012)	11
Photo 1.2:	Khoi-San Chief describing traditional language during training (2014)..	14
Photo 6.1:	Acid mine drainage in Witswatersrand (2012)	47
Photo 6.2:	Poster by Treasure the Karoo Action Group (2013)	48

LIST OF BOXES

Box 2.1:	The Richtersveld Land Claim: <i>Alexkor Ltd v Richtersveld Community</i> <i>2004(5) SA 460 (CC)</i>	18
Box 2.2:	Bengwenyama's Stalled Land Claim.....	19
Box 4.1:	Sustainable use in Kglagadi Transfrontier Park	32
Box 4.4:	Customary fishing in Cwesa-Dwebe Nature Reserve.....	33
Box 6.1:	De facto precedence of the use of water by the mining industry	49
Box 6.2:	The paradoxes of being the "richest tribe in Africa"	50
Box 6.3:	The Bengwenyama Case: Faultiness of consultation under MPRDA	53
Box 6.4:	amaMpondo divided over construction of a toll road	55

ACRONYMS

ABS	Access and Benefit Sharing
ANC	African National Congress
ASGISA	Accelerated and Shared Growth Initiative for South Africa
BABS	Bio-prospecting Access and Benefit Sharing Regulations
CARA	Conservation of Agricultural Resources Act
CBNRM	Community-Based Natural Resource Management
CLARA	Communal Land Rights Act
CMA	Catchment Management Agencies
CPA	Community Property Association
CSIR	Council for Scientific and Industrial Research
DCNR	Dwesa-Cwebe Nature Reserves
DEA	Department of Environmental Affairs
DME	Department of Minerals and Energy
DMP	Development and Management Plan
DTA	Department of Traditional Affairs
EIA	Environmental Impact Assessment
EMP	Environmental Management Programme
GDP	Gross Domestic Product
GEAR	Growth, Employment and Redistribution
GM	Genetically Modified
GMO	Genetically Modified Organisms
ICCA	Indigenous Peoples' and Communities Conserved Areas
IP	Intellectual Property
IPILRA	Interim Protection of Informal Land Rights Act
IUCN	International Union for the Conservation of Nature
JAO	Joint Administrative Order
JMB	Joint Management Board
KGNP	Kalahari Gemsbok National Park
KNP	Kruger National Park
KSNLB	Khoi-San National Language Board
KTP	Kgalagadi Transfrontier Park
MLRA	Marine Living Resources Act
MPA	Marine Protected Area
MPRDA	Mineral and Petroleum Resources Development Act
NDP	National Development Plan
NEMA	National Environmental Management Act
NEMBA	National Environmental Management: Biodiversity Act
NEMICM	National Environmental Management: Integrated Coastal Management
NEMPAA	National Environmental Management: Protected Areas Act
NFA	National Forestry Act
NFPAS	National Forests Protected Areas Systems
NHRA	National Heritage Resources Act
NIP	National Infrastructure Plan
NKC	National Khoi-San Council

NWA	National Water Act
PanSLAB	Pan South African Language Board
PGM	Platinum Group Metals
PICC	Presidential Infrastructure Coordinating Commission
PoWPA	Programme of Work on Protected Areas
RCC	Richtersveld Community Conservancy
RDP	Reconstruction and Development Plan
RLRA	Restitution of Land Rights Act
SANBI	South African National Biodiversity Institute
SANParks	South African National Parks
SASI	South African San Institute
SIP	Strategic Infrastructure Projects
TK	Traditional Knowledge
TLGFA	Traditional Leadership Governance Framework Act
TM	Traditional Medicines
UNEP	United Nations Environment Programme
WHCA	World Heritage Convention Act
WIMSA	Working Group of Indigenous Minorities in Southern Africa

INTRODUCTION

This report provides a holistic review of South Africa's laws and policies relating to the recognition of indigenous peoples' and local communities' rights. It identifies the legal and policy measures and mechanisms that are useful to indigenous peoples and local communities and the impact natural resource exploration and extraction, large-scale agricultural land use and infrastructure and/or development projects have on their rights. It is intended to help the reader to understand the ways in which different legal and institutional arrangements either support or undermine such rights. It also explores strategies for promoting community participation in the management of these resources and in the local and national development process. The review covers the following key sectors and thematic areas:

Part I - General background on the country, communities, indigenous peoples and local communities;

Part 2 - Human Rights;

Part 3 - Land and water laws and policies;

Part 4 - Protected Areas, Indigenous Community Conserved Areas (ICCAs) and Sacred Natural Sites;

Part 5 - Natural Resources, Environmental and Cultural Laws and Policies;

Part 6 - Natural Resource Exploration and Extraction, Large-Scale Infrastructure/Development Projects and Agriculture;

Part 7 - Non-Legal Recognition and Support;

Part 8 - Judgements;

Part 9 – Implementation;

Part 10 - Resistance and engagement;

Part 11 - Legal and Policy Reform;

Part 12 - Case studies; and

Part 13 – Additional comments.

For each thematic area, the report highlights relevant provisions of South Africa's Constitution, as well as general environmental and sector specific laws and policies, as appropriate. Institutional arrangements for natural resources governance, ownership, use and access are also addressed. Case studies are provided for particular thematic areas.

The review seeks to:

- Deepen understanding of the dynamics of environmental, cultural, and human rights law and policy as they relate to the local level, particularly regarding recognition of communities' rights in the context of large-scale agriculture, natural resource extraction and infrastructure/development projects;
- Provide relevant and easily understood recommendations for local-level engagement with national laws and policies;
- Provide a resource for national policy recommendations in the future;
- Be used more widely by individuals and groups from or working with local and mobile communities on issues related to self-determination, governance, and customary sustainable uses of natural resources for a variety of purposes.

1. COUNTRY, COMMUNITIES & INDIGENOUS PEOPLES' AND LOCAL COMMUNITIES' RIGHTS

1.1 Country

The Republic of South Africa covers roughly 1,221,000 square kilometres of southern Africa and shares borders with six countries: four to the north (Namibia, Botswana, Zimbabwe, and Mozambique); and two effectively landlocked within South Africa (Lesotho and Swaziland, the latter also sharing a border with Mozambique). Its distinct geographical features include ocean boundaries, namely, the Atlantic Ocean to the west and the southern Indian Ocean on its south and east coasts. South Africa also features a vast desert environment situated in the central west and north-west, where it borders the Namib Desert of Namibia and the Kgalagadi (Kalahari) Desert of Botswana respectively. It has nine provinces, varying in size from the small but highly urbanised Gauteng Province (home to major urban centres) in the north-east, to the vast and arid Northern Cape Province in the northwest.

The South African population consists of the Khoi and the San, the Nguni (comprising the Zulu, Xhosa, Ndebele, and Swazi people); Sotho-Tswana (who include the Southern, Northern, and Western Sotho); Tsonga; Venda; Afrikaners; English; coloured people (this category describes people of mixed race); Indian people; and those who have immigrated to South Africa from the rest of Africa, Europe, and Asia, and who maintain a strong cultural identity (Louise 2012). According to the 2013 mid-year population estimates, the South African population is 52.83 million. Official breakdown of the population profile indicates that the African population group is in the majority (42.28 million), constituting almost 80% of the total South African population. The white population is estimated at 4.6 million, the coloured population at 4.77 million, and the Indian/Asian population at 1.33 million (Statistics South Africa 2013).

With well-developed mining, transport, energy, manufacturing, tourism, agriculture, and service sectors, the nominal GDP at market prices during the second quarter of 2013 was R836 billion (Statistics South Africa 2013), indicating that South Africa enjoys the largest economy in southern Africa. The manufacturing sector occupies a considerable share of the South Africa economy, despite its relative importance declining from 19 percent in 1993 to about 17 percent in 2012 in real terms (Statistics South Africa 2014). As is increasingly acknowledged however, GDP is a poor and crude measure of a nation's genuine progress, failing to account for the degradation of the natural resource base in market-based production (Fioramonti 2013). Other indices of progress paint a more sobering picture. In terms of the Happy Planet Index, South Africa scores a dismal 28.2, resulting in a ranking of 142 out of 151 countries (New Economics Foundation 2014), while the Global Footprint Network shows that South Africa has been exceeding its biocapacity since the late 1960s and that the gap between ecological footprint and biocapacity has been widening ever since (Global Footprint Network 2014). The scale and intensity of extractive and natural resource intensive economic activities are clearly implicated in this decline.

In addition to South Africa's current unsustainable development trajectory, it is also one of the most unequal nations in the world with a high level of social inequality in

the population. For instance, the Gini index (measuring the extent to which the distribution of income or consumption expenditure among individuals or households within an economy deviates from equity) rated South Africa a staggering 65% in 2011 (The World Bank 2011). Hence, since the establishment of a democratic government in 1994, there have been numerous state interventions to address the legacies of apartheid, which include high levels of poverty combined with social inequity, high unemployment, and associated social ills.

A commitment to interventions is evident in different developmental policies put in place beginning with the Reconstruction and Development Plan (RDP) 1994, which seeks to mobilize people and resources toward 'the final eradication of apartheid and the building of a democratic, non-racial and non-sexist future'. As strategies to address poverty, the RDP identifies the provision of basic needs including land reform, housing and services, water and sanitation, environment and health care (RDP 1994). In a subsequent policy document titled Growth, Employment and Redistribution (GEAR), the government acknowledges that a land reform programme including asset redistribution and enhancement of tenure has a significant role in improving the rural economy (GEAR nd). The [Accelerated and Shared Growth Initiative for South Africa](#) (ASGISA) indicates a national aspiration to halve poverty and unemployment by 2014 (ASGISA 2006). More recently, the government has formulated a National Development Plan (NDP) which embodies a roadmap including the protection of the environment, transition to a low carbon economy and an inclusive rural economy as viable options to eliminate poverty and drastically reduce inequality by 2030 (NDP 2011).

1.2 Communities & Environmental change

1.2.1 Indigenous peoples, local communities and livelihood strategies

In the South African legal context, the term indigenous peoples is not generally employed in the sense it is understood in international human rights law. This is evidenced respectively in articles 6 and 26 of the **Constitution of the Republic of South Africa** (1996) (hereafter "**Constitution**"), where the term "indigenous" is used in reference to the languages and legal customs of the majority black African population, as distinguishable from the other races. Also, the Preamble to the **Traditional Leadership and Governance Framework Act** (Act no. 41 of 2003) provides that "South African indigenous people consist of a diversity of cultural communities". This is also confirmed with the adoption of a cabinet memorandum in 2004 that would lead to an official policy recognizing the "vulnerable" indigenous peoples of South Africa (Mukundi 2009).

In indigenous peoples' discourse, there is no standard definition of "indigenous peoples", although criteria for the identification of indigenous peoples exist. For Africa, the criteria proposed in the *Report by the African Commission's Working Group of Experts on Indigenous Populations / Communities* includes the following: self-identification, close dependence on land, historical subjugation, and a structurally subordinate position to the dominating groups and the State (Working Group Report 2005). Relying on this report, the term "indigenous peoples" would apply only to the various San and Khoi ethnic groups in South Africa. Also reinforcing this position is the 2006 *Concluding Observations of the Committee on the*

Elimination of Racial Discrimination on South Africa, which noted that these peoples self-identify as indigenous peoples and remain in a subordinate position, discriminated against, and marginalised, despite the gains made since the end of apartheid (CERD 2006).

A number of studies reinforce the San and Khoi ethnic groups' self-identification as indigenous peoples in South Africa seeking recognition of their fundamental human rights, which they feel have been violated on the basis of that identity (Chennels & du Toit 2004; Crawhall 1999; UN Special Rapporteur Report 2005; Pule 2014). According to the 2005 report of the *UN Special Rapporteur on Indigenous Peoples Mission to South Africa*, relying on information presented to him during his mission, as well as the study by Crawhall (1999) and Chennels & du Toit (2004), the names, number and presence of the indigenous peoples in South Africa are as follows: Khomani San: 1,000, Khwe San: 1,100, Xun San: 4,500, Nama (Khoi): 10,000, Griquas: 300,000. The group also includes the Korana Khoi-San (Gabie 2014). These groups are "mostly resident in the sparsely populated Northern Cape Province" (UN Special Rapporteur Report 2005). The Griquas, according to the Special Rapporteur, are located in the Northern and Western Cape Provinces, but with significant communities in the Eastern Cape, Free State, and KwaZulu-Natal (UN Special Rapporteur 2005). However, the ethnic boundaries of these groups are not fixed, and "the dividing lines between the Khoi and the San are not always evident" (UN Special Rapporteur Report 2005).



Photo 1.1: Indigenous rock art, Cederberg (2012). Source: Stephanie Booker

While these groups are engaged in diverse forms of sustenance

and livelihood activities, the Khomani San, a sub-group of the Khoi-San, are probably the only San ethnic group that still relies on traditional hunting and gathering in South Africa (Mukundi 2009). Even then, due to severe land constraints and government regulations on hunting, they have largely taken up some subsistence economic activities. In 1999, the government signed a land restitution deal with a Khomani San Community Property Association (CPA) for 25,000 hectares inside the then Kalahari Gemsbok National Park (KGNP) and 40,000 hectares outside the KGNP for farming, subsistence economic practices, and other development (Crawhall 1999). While other San ethnic groups (Kung; Xam descendants; //Xegwi; !Xû; and Khwe) could still be involved in traditional hunting and gathering on a very small scale (mainly for medicinal plants) due to land constraints, it is not certain that any of the //Xegwi Community owns land. Rather, they are mostly labour tenants on farms with "a small amount of subsistence gathering" (Crawhall 1999). The Xam descendants in the Prieska area of the Northern Cape "are semi-nomadic farm labourers known as Karretjie Mense or Swerwers (cart people or wanderers)". The Nama (Khoi) are also practising some form of mixed economy, but rural groups, "particularly (in) the Richtersveld have managed to maintain communal land for

grazing, while some of this group engage in limited hunting and plant gathering” (Crawhall 1999). As far as the Griqua, Koranas, and revivalist Khoi-San communities are concerned, there is little evidence, if any, demonstrating that they practice traditional and cultural lifestyles and ways of life such as “subsistence hunting, gathering, or pastoralism, principally due to lack of land”. Rather, they are generally assimilated within some of the dominant communities (Crawhall 1999).

Turning again to the broader understanding of indigeneity in South Africa, coupled with certain features distinguishing indigenous peoples in a narrower sense – dependence upon the land for instance – there are many local communities whose rural livelihood strategies have been severely impacted upon by extractive and resource intensive industries. Many of their stories are covered in this report, however by way of illustration one can point to the Bafokeng Landbuyers Association, a federation of communities impacted by platinum mining operations in the North-West province (Bafokeng Landbuyers Association 2014).

1.2.2 Drivers of biodiversity loss and land/resource appropriation in South Africa

South Africa is richly endowed with a diversity of plants and animals (marine and terrestrial), some of which are notable for their endemism and largely found where indigenous peoples and local communities traditionally reside. According to the 1998 *Report Under the Convention on Biological Diversity* (South African Fourth National Report), the species richness for the country is higher than eight of the twelve “mega-diversity countries” identified by McNeely et al. (1990), namely Australia, Ecuador, India, Indonesia, Madagascar, Malaysia, Peru, and the Democratic Republic of the Congo. Cowling and Taylor (1994) identify eight biodiversity hotspots in South Africa, including the north-eastern Transvaal Escarpment (Wolkberg); the KwaZulu-Natal Drakensberg and associated uplands (Eastern Mountains); the coastal forelands of Maputaland, Pondoland and Albany; the entire Cape Floristic Region (Cape); and the Succulent Karoo.

Given this richness in biodiversity, there have been law and policy efforts aimed at conserving natural biodiversity, as exemplified by the **National Environmental Management: Protected Areas Act** (Act no. 57 of 2003) (NEMPAA), which stipulates that natural biodiversity covers roughly 7% of the country’s terrestrial surface area. South Africa is also rich in marine biodiversity, with 12,000 identified species, of which approximately 31% are endemic (DEA 2011). It has about 530,000 hectares of indigenous forest, found mainly along the southern and eastern escarpment, along the coastal belt, and in fire-protected ravines in the mountains of the southern and south-western Cape (DEA 2011). The Natural Forests Protected Areas System (NFPAS) guides the designation of natural forests as protected areas. Natural forests serve as increasingly important sources of building material, fuel wood, food, and medicine (DEA 2011).

Main drivers of biodiversity loss

Human activity underlies critical biodiversity loss in South Africa, largely in the form of rapid agricultural and industrial development. Present estimates suggest that agriculture, expanding urban areas and developments, afforestation, commercial fishing, development of transportation corridors, mining, and dams have led to the transformation and degradation of a substantial proportion of natural habitat (DEAT

1998). As a result of this trend, 3,435 (15%) of South Africa's plant species, 102 (14%) bird, 72 (24%) reptile, 17 (18%) amphibian, 90 (37%) mammal, and 142 (22%) butterfly species are listed as endangered (The Red Data Book, Unknown Date).

Pollution due to mining activities also has contributed immensely to biodiversity loss. Rivers and other water bodies often rich in species are severely polluted, in some cases due to acid mine drainage, as reported in areas including the Witwatersrand Gold Fields, Mpumalanga and KwaZulu-Natal Coal Fields, the O'Kiep Copper District, and other regions. The impact of acid mine drainage on freshwater sources in the upper reaches of the Vaal and Olifants River Systems, for instance, is reported to be of potential major concern (The Council for Geoscience 2010). Additionally, pressures from cultivation activities such as afforestation may lead to the loss of at least 14% of the country's land surface (Biggs & Scholes 2002). Another threat to biodiversity is biofuel plantations (Blanchard et al. 2011). Biofuel plantations exist in areas including the North West Province (Mafikeng) and KwaZulu-Natal (du Plessis 2007). Finally, South Africa also currently hosts approximately 8,750 alien plant species, 180 of which are invasive (i.e., species that have established themselves and are encroaching on natural vegetation), covering about 8% of the country's surface area. Future expansion of invasive plants could reduce the integrity of all South African biomes by reducing indigenous species richness by roughly 60–80% (Van Wilgen et al. 2007).

1.2.3 Threats to cultural and linguistic diversity

Dispossession of land and non-recognition remain a major threat to the cultural and linguistic diversity of the indigenous peoples such as the Khoi-San communities of South Africa. In relation to cultural diversity, according to the UN Special Rapporteur in his 2005 report:

“The root cause hindering economic development and intergenerational cultural survival, has been the forced dispossession of traditional land that once formed the basis of hunter-gatherer and pastoralist economies and identities. This historic dispossession of land and natural resources has caused indigenous people to plunge from a situation of self-reliance into poverty and a dependency on external resources. The most pressing concern of all the Khoi-San communities is securing their land base, and where possible, re-establishing access to natural resources necessary for pastoralism, hunting-gathering or new land-based ventures such as farming.”
(E/CN.4/2006/78/Add.2)

This observation remains valid to date considering that the current legal institutions do not recognize their cultural distinctiveness and continue to classify them as “Coloureds”. Official statistics in South Africa do not capture the presence of Khoisan people in South Africa. For example, according to South Africa's 2011 Census, the country's 51 million people are comprised of 79.2% Black Africans; 8.9% Whites; 8.9% Coloureds; 2.5% Indians; and 0.5% Other (Le Fleur and Jansen 2013).

Although section 6 of the constitution refers to the word “indigenous” in reference to a number of African languages as official languages, it does not include the Khoisan indigenous languages. None of the Khoisan indigenous languages such as

Khoekhoegowab; Khwedam; !Xu or N/u are recognized as official languages. Reference to Khoisan languages by way of section 6 only indicates that government will “promote, and create conditions for, the development and use of the Khoi, Nama and San languages ...” In terms of article 6 of the Constitution, the Pan South African Language Board (PanSALB) is responsible for the protection and promotion of the language rights of the different Khoisan-language speakers. In 1999 it established the Khoisan National Language Board (KSNLB), which has raised the issue of endangered languages and the absence of indigenous languages and



Photo 1.2: Khoi-San Chief describing traditional language during training (2014) Source: Stephanie Booker

knowledge systems in the public school system and in governance (Le Fleur and Jansen 2013). However, the KSNLB has fallen short of meeting its expressed aims, as it has not resulted in any further legislative and institutional measures to protect these endangered languages other than ad hoc project initiatives in limited parts of the country (Le Fleur and Jansen 2013).

1.2.4 Initiatives to conserve and sustainably use biodiversity

Indigenous peoples of South Africa have been involved in the co-management of Contract Parks. This is in line with the obligations of South Africa under the Convention on Biological Diversity and the Accord reached at the 5th World Parks Congress of the IUCN titled “Benefits Beyond Boundaries” (Durban Accord). This accord emphasised the need for protected areas to economically and financially benefit neighbouring communities and indigenous peoples. Hence, in responding to land claims by indigenous peoples and local communities, the government has stated that land claims by individuals and groups must be reviewed in the context of national interest by taking into consideration the intrinsic biodiversity value of the land in question, and seeking outcomes that will combine the objectives of restitution with the conservation and sustainable use of biodiversity (Hall-Martin & Carruthers 2003).

For instance, as part of South Africa’s land restitution programme, the Khomani San community was awarded land inside and outside the Kgalagadi Transfrontier Park in May 2002 (Bosch & Hirschfeld 2002). South African National Parks (SANParks) was tasked with co-managing the acquired land inside the park on behalf of the local communities as contractual parks (Reid et al. 2004). As a result, relying on the input of the Khoi-San, SANParks developed resource-use protocols on the details of permissible hunting, plant use, and plant harvesting (Hughes 2010). In another example, since 2009 the Netshidzivhe, Netvhutanda, Ramunangi, and other clans in Venda, a rural part of north-eastern Limpopo, have been carrying out an “eco-cultural mapping” exercise. Tuning-in to local surroundings and actively mapping the landscape without the need for technical skills or expensive equipment and materials, these communities have been able to connect with their territory’s

culture, language, and traditional ecological practices for protecting sacred natural sites (UNEP 2013).

2. HUMAN RIGHTS

2.1 Human rights laws and policies that support or hinder Indigenous peoples' and local communities' rights

As mentioned above, in South Africa the term “indigenous people” is used both in a broad sense, to distinguish the language and customs of the majority black population from other races, and more narrowly, to refer to peoples that meet the criteria proposed by the African Commission’s Working Group of Experts on Indigenous Populations / Communities in Africa. For the purposes of this section, references to “indigenous community” must be deemed to include the latter group, as well as communities falling within the broader group that Wicomb and Smith have described as “customary communities”; that is, communities that regulate their lives, and in particular their tenure rights, in terms of customary law (Wicomb and Smith 2011).

(i) Self-determination, self-governance, connection with and governance of territories, areas or natural resources

The Bill of Rights in the **Constitution** articulates a number of rights that are of seminal importance to indigenous people and customary communities. These include a right to environment (section 24); a right to property, including an entitlement to land restitution (section 25); a right to language and culture (section 30); and a right to belong to and practise as a member of a cultural, religious, or linguistic community (section 31). In addition to these substantive rights, indigenous and customary communities enjoy the procedural rights of access to information (section 32); just administrative action (section 33); and a right of access to the courts (section 34). A description of the outworking of these rights in law and policy to the extent that they are relevant to the self-determination of indigenous and customary communities, and their protection of cultural systems of control over natural resources, follows.

The right to environment in section 24 of the **Constitution** consists of two parts, guaranteeing firstly a right “to an environment that is not harmful to health or well-being”, and secondly, a right “to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”. From the perspective of indigenous and customary communities, the environmental right is weakly formulated, guaranteeing no right of access to, control over or, use of natural resources. The right also invokes the perception of a passive citizenry, entitled to protectionist environmental measures instituted by the State. To the extent, however, that the right requires the State to take reasonable legislative and other measures that “promote conservation”, and taking into account the profound shifts in the narrative of conservation over the last century – a shift that has emphasised the importance of community participation, the protection of biodiversity, and the

linkages between conservation and socio-economic development – it could be argued that the environmental right goes some way towards supporting indigenous and customary communities’ governance of territories, areas, and natural resources. In compliance with the injunction to formulate “reasonable legislative measures”, the South African government has enacted an extensive suite of environmental legislation over the past twenty years that does to some extent address the concern of the self-determination of indigenous and customary communities as regards control over territories, areas, and natural resources. The centrepiece of this suite of legislation is the **National Environmental Management Act 107 of 1998 (NEMA)**. Section 2(4) of the **NEMA** articulates a number of environmental management principles, which “apply throughout the Republic to the actions of all organs of State that may significantly affect the environment” (section 2(1)). Principles that could support indigenous and customary communities having a greater degree of control over their territories, areas, and natural resources include the following:

- Sustainable development requires that “the disturbance of landscapes and sites that constitute the nation’s cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied” (section 2(4)(a)(iii)).
- Equitable access to environmental resources, benefits and services required to meet basic human needs and ensure human wellbeing must be pursued (section 2(4)(d)).
- The participation of all interested and affected parties in environmental governance must be promoted (section 2(4)(f)).
- Decisions must take into account the interests, needs, and values of all interested and affected parties, including recognising all forms of knowledge, including traditional and ordinary knowledge (section 2(4)(g)).

Legislation subsequently enacted under the **NEMA** framework operationalizes some of these principles. Protected areas legislation (discussed in Part 4.2. below), for example, allows for “local communities” to participate in the establishment and management of protected areas and, if the management rules of the areas allow for it, to make sustainable use of the resources of the protected area.

(ii) Right to property

The **right to property** is of critical importance to indigenous communities’ self-determination over their natural resources, given South Africa’s historical context of racially motivated property dispossession and legally insecure tenure. The most important constitutional provision in this regard is section 25(7), which entitles a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices, to restitution of that property or to equitable redress, to the extent provided by an Act of Parliament. Such an Act or Parliament, in the form of the **Restitution of Land Rights Act 22 of 1994 (RLRA)**, was passed following the provision for the restitution of rights in land under the so-called “interim Constitution” of 1993. The RLRA established a **Commission on Restitution of Land Rights** as a body tasked to review applications for the restitution of rights in land, investigate the merits of such applications, and mediate and settle any disputes arising with a view to the expeditious finalisation of claims. The process envisaged thus entails lodgement of claims; followed by the Commission conducting an investigation (in most cases through one of its regional offices); followed by the use

of mediation and negotiation to resolve disputes. Upon completion of its investigation and/or attempt to have the matter resolved by mediation and negotiation, the Commission refers a claim to the Land Claims Court for the latter to determine, most critically, whether a right to restitution of any right in land should be granted in accordance with the RLRA, and/or whether compensation or other appropriate relief should be awarded. The Richtersveld community's successful land claim under the RLRA is illustrative of the potential of this legislation to support indigenous communities in the self-determination of their resources (see Box 1: The Richtersveld Land Claim). However, the Act's processes and criteria also appear to be used strategically to stall certain communities from controlling or benefiting from natural resources on their ancestral lands (see Box 2: The Bengwenyama's Stalled Land Claim). In February 2014 the RLRA was amended by the Restitution of Land Rights Amendment Act 15 of 2014, an enactment that reopens the land claim process, allowing persons who failed to lodge claims before the previous cut-off date the opportunity to do so until 30 June 2019 (Joubert 2014).

Other than restitution, protection of customary rights to property has proceeded haphazardly. Shortly after the democratic elections in 1994, Parliament enacted the **Interim Protection of Informal Land Rights Act** 31 of 1996 (IPILRA). The IPILRA would have become permanent upon the entry into force of the **Communal Land Rights Act** 11 of 2004 (CLARA), which, amongst other objectives, provided for the democratic administration of communal land. The CLARA, however, was declared unconstitutional in the case of *Tongoane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC), on the basis that the Bill was incorrectly tagged as a section 75 rather than a section 76 Bill. The CLARA had, however, been trenchantly criticised for failing to deal with the socio-political complexities of customary tenure, possibly rendering the tenure of some even more insecure than before (Wicomb 2013).

In 2011, the Department of Rural Development and Land Reform published a *Green Paper on Land Reform* to give effect to resolutions on agrarian change, land reform, and rural development taken at the African National Congress's (ANC) Polokwane conference. The *Green Paper* affirms the centrality of land as a fundamental element in the resolution of the race, gender, and class contradictions that still plague South Africa. Interestingly, it also draws a link between *ubuntu*, an African philosophy of human solidarity, and land access and ownership. Mutuality, both horizontal and vertical, was a strong feature of *ubuntu*, as expressed through the ability to give (*izinwe*). When people were dispossessed of their land they lost this vital nexus to *ubuntu* as an overarching way of life. Without land restoration, any attempt at reviving *ubuntu* would be futile (Green Paper 2011).

Notwithstanding this insight, from the perspective of indigenous communities spurred by the desire for self-determination, the *Green Paper* is not unproblematic. The vision of land reform that the document emphasises includes clearly defined property rights, effective land use and planning, and regulatory systems, as well as the reconfiguring of land rights into a four-tier system of land tenure. The four-tier system of land tenure would allow for communally owned land, held under communal tenure with institutionalised use rights, to be recognised as the "4th tier". The *Green Paper* goes on to state, however, that because of its complexity (the need for extensive consultations and constitutional compliance), and the recent

nullification of the CLARA by the Constitutional Court, communal land tenure “will be treated in a separate policy articulation” (Green Paper 2011), thus perpetuating the uncertainty associated with this form of land tenure. There remains a tension between the broader vision and underlying policy principles of the *Green Paper* – which foreground “a sustained production discipline for food security”, for instance – and the objective of giving effect to indigenous communities’ right to self-determination. These objectives are potentially irreconcilable if indigenous communities’ regulation of natural resources is expected to fit in with overarching governance and regulatory frameworks.

Box 2.1: The Richtersveld Land Claim

Alexkor Ltd v Richtersveld Community 2004 (5) SA 460 (CC)

The Richtersveld community, living in the arid reaches of the North West Province bordering Namibia, is descended from the original Nama and Khoi inhabitants of the area. Unlike other ethnic groups in South Africa, the Richtersveld community’s land dispossession did not occur as a result of explicitly racially discriminatory laws. Instead, following annexation of the area by Britain in 1947, the South African state used the **Precious Stones Act** 44 of 1927 to exclude the community from large, diamond-rich portions of their land. Thereafter, the land was registered in the name of “Alexkor”, the state diamond mine (Claassens 2011). When the Land Claims Court considered the Richtersveld community’s claim to their land, lodged in terms of the RLRA, it was dismissed on the basis that the community had not been dispossessed in terms of racially discriminatory legislation. However, the Supreme Court of Appeal upheld the restitution claim, including the community’s rights to the minerals and precious stones. When the Constitutional Court heard the matter in *Alexkor Ltd & another v Richtersveld Community & others* 2003 (12) BCLR 1301 (CC) (discussed further in Part 8), it upheld the community’s claim on the basis that it was the owner of the land, as determined in accordance with indigenous law. On the basis of the statutory framing provided by the RLRA, the *Richtersveld* case now stands as one of only a handful of cases in which a customary community’s interest in land trumped the interests of a wealthy, powerful outsider (Wicomb 2013). However, the community had to appeal to the highest court in South Africa for this to be affirmed.

Box 2.2: The Bengwenyama's Stalled Land Claim

Since 2006 the Bengwenyama-ya-Mazswazi community in Sekhukhuneland have been trying to obtain prospecting rights to the minerals on their ancestral lands, which include the farm Eerstegeluk. Section 104 of the **Mineral and Petroleum Resources Development Act** 28 of 2002 allows for a community to apply for a preferential prospecting or mining right in respect of land which is "registered or to be registered in the name of the community concerned". Prior to lodging an application for a section 104 prospecting right in respect of Eerstegeluk, the Bengwenyama community lodged a land restitution claim with the Mpumalanga Regional Land Claims Commission in 1997. The claim was gazetted ten years later as notice 1017 of 2007. A research report on the case was apparently compiled, but was mislaid when the matter was transferred to the Limpopo Regional Land Claims Commission. Since then, a period of 18 years after the lodging of the initial application, the Bengwenyama's attempts to have their land claim settled appear to have been stalled at every turn. In early 2011, the Minister of Mineral Resources refused to grant the community a preferential prospecting right for the second time, citing as a reason the fact that they were "neither owner nor occupier of the land". The Bengwenyama launched a review application of this decision in 2011, with a judgment being handed down in June 2013 (*Bengwenyama-ya-Maswazi Community & others v Genorah Resources (Pty) Ltd & others* (unreported decision, North Gauteng High Court, Case No. 27136/2011). In his decision, Makgoba J recognised that while only the Land Claims Court could finally determine whether the Bengwenyama community were entitled to restitution of Eerstegeluk, for purposes of section 104 it could be accepted that the land was "to be registered" in the name of the Bengwenyama community. Upon a review of this decision to the Supreme Court of Appeal, the court decided, in a judgment handed down in September 2014, that the lack of registered title did not militate against the grant of a preferential prospecting right to the community. The court granted an order substituting the Bengwenyama Traditional Council and its corporate investment vehicle as the prospecting rights holder over Eerstegeluk.

(iii) Rights over traditional knowledge systems and innovations

Notwithstanding the available restitutionary measures in respect of land, South African law also provides some form of protection for "indigenous biological resources". The **National Environmental Management: Biodiversity Act** 10 of 2004 (**NEMBA**) gives effect to the Convention on Biological Diversity's provisions on access and benefit sharing, in line with the **NEMA** principle of equitable access. Chapter 6 of this Act regulates bioprospecting of "indigenous biological resources". For purposes of the Act generally, "indigenous biological resources" is defined to mean any living or dead animal, plant, or other organism of an indigenous species, as well as any derivative or genetic material of such animal, plant or organism (section 1, **NEMBA**). For purposes of NEMBA's provisions on bioprospecting, access, and benefit sharing, the definition is broadened to include indigenous biological resources gathered from the wild, or bred or cultivated in captivity; any "fertile version" of any indigenous species of any animal, plant, or organism (including cultivars, strains, hybrids, etc);

exotic animals, plants, or other organisms to the extent that they have been altered by genetic material or a chemical compound found in any indigenous species (section 80(2), NEMBA). “Bioprospecting” is in turn defined as “any research on, or development or application of, indigenous biological resources for commercial or industrial exploitation” (section 1, **NEMA**). It specifically includes the bioprospector’s search for, collection or gathering of indigenous biological resources, and the making of extractions of such resources for research, development, or application, as well as the use of information regarding any traditional uses of indigenous biological resources by “indigenous communities” and research on (as well as the application, development, or modification of) such uses for commercial or industrial exploitation.

In this way, indigenous knowledge systems also fall within the protective scope of the provisions relating to bioprospecting. These resources, uses and forms of knowledge are protected by the regulatory system outlined in Chapter 6, which includes the need for anyone engaging in bioprospecting to obtain the prior informed consent of certain “stakeholders”, which include “indigenous communities” (though this term is not in itself defined).

Prior to a permit being granted by the Minister (or other designated issuing authority), the person wishing to engage in bioprospecting must disclose all material information regarding the proposed bioprospecting operation to the stakeholder concerned, and conclude a benefit-sharing agreement (section 82, **NEMBA**). The benefit-sharing agreement must set out the manner and extent to which indigenous biological resources will be utilized or exploited, and the manner and extent to which indigenous communities will share in the benefits that may arise from such bioprospecting (section 83, **NEMBA**).

The Minister, as issuing authority, is legally obliged to protect the interests of stakeholders when bioprospecting is being proposed (section 82(1), **NEMBA**). Although the **NEMBA** is silent on the question of who represents indigenous communities as “stakeholders” for purposes of the provisions of Chapter 6, the potential for agreements to sideline the majority of the members of an indigenous community is reduced through the establishment of a **Bioprospecting Trust Fund** (section 85, NEMBA). The **Bioprospecting, Access and Benefit Sharing Regulations 2008** (hereafter “BABS Regulations”) supplement the provisions on bioprospecting in the NEMBA. Both are supported by amendments to the **Patents Act 57 of 1978**, which require patent applicants to disclose the origin of genetic material and traditional knowledge, and demonstrate how they have obtained prior informed consent and shared benefits (Department of Environmental Affairs 2012). Rights over traditional knowledge systems and innovations will also be potentially protected by the Protection of Traditional Knowledge Bill, discussed further in Part 5.

(iv) Freedom of culture and religion/belief

The Constitution also protects the rights of persons belonging to a cultural, religious, or linguistic community to enjoy their culture, practise their religion, and use their language (section 31(1)(a), **Constitution**). Section 31(2) expressly provides, however, that these rights may not be exercised in a manner inconsistent with any provision of the **Bill of Rights**. Section 31 could potentially safeguard the cultural practices of indigenous communities insofar as these related to the use and control of natural

resources. However, of the four cases to date in which section 31 has been judicially considered, none have related to the issue of control over natural resources.

(v) Procedural Rights

While numerous cases have been brought under the mantle of procedural constitutional rights, none pertain directly to the rights of indigenous communities as regards self-determination over their natural resources.

2.2 State agencies mandated to develop and implement laws and policies

In terms of Schedule 4 of the **Constitution**, indigenous law and customary law are functional areas of concurrent national and provincial legislative and executive competence. Traditional leadership is also a schedule 4 competence, as is nature conservation. At a national level, the **Department of Co-operative Governance and Traditional Affairs** administers a number of laws pertaining to indigenous communities (e.g., the **Traditional Leadership and Governance Framework Act 41 of 2003**), but its work in this regard appears to be overshadowed by its focus on co-operative governance. The **Department of Rural Development and Land Reform** has a critical role to play in both promoting the socio-economic development of rural South Africa, and in ensuring that the land reform programme stays on track and responds to shifting political objectives. **The Commission on Restitution of Land Rights** (with its national and regional offices) and the **Land Claims Court** fall within the ambit of this ministerial portfolio and department.

Seven of South Africa's nine provinces have **provincial departments dedicated to "traditional affairs"**, paired with either "local government" or "co-operative government". Almost all these provinces also have separate **departments dedicated to "rural development"**, mostly paired with "agricultural development". Separate **provincial departments deal with environment**, which is variously paired with agriculture, tourism, and other portfolios. Particularly at provincial level, there is therefore an extensive degree of fragmentation of matters pertaining to the self-determination by indigenous communities of natural resources under their control.

The **South African Human Rights Commission** is constitutionally mandated to promote respect for human rights and a culture of human rights; promote the protection, development, and attainment of human rights; and monitor and assess the observance of human rights in the Republic (section 184, **Constitution**). Of the current commissioners, Commissioner Janet Love's portfolio of environment, natural resources, and rural development responds to the issues dealt with in this report.

2.3 Extent and effectiveness of implementation

The extent to which the human rights framework in South Africa supports self-determination of indigenous communities as regards natural resources is uneven. In some areas – bioprospecting for instance – good progress has been made, and the laws and policies that have flowed from both South Africa's international obligations under the Convention on Biological Diversity and the entrenchment of the environmental right affirm the principle of free, prior, and informed consent, and ensure that indigenous communities will share in the benefits of bioprospecting. This contrasts sharply, however, with the granting of prospecting and mining rights (discussed further in Part 6.1 below), where, at best, indigenous communities have

only a right of consultation, and no right to share in the substantive benefits of the extractive project. The protection of human rights in the **Bill of Rights** has also not led to a robust, respected, and resilient regulatory framework for customary land rights.

The ambiguous position of indigenous communities within the human rights framework can be ascribed to a number of dynamics. Foremost among these is the consideration that must be given to the constitutional imperative of establishing a unified South Africa. The **Constitution** opens by affirming the Republic of South Africa as “one, sovereign, democratic state” – an understandable emphasis given the nation’s history of ethnic division and previous establishment of pseudo-independent *bantustans* and homelands. The goal of self-determination on the part of defined indigenous communities does not sit at all well within this frame. Even though the **Constitution** protects the institution of traditional leadership, and recognises the rights of persons belonging to “cultural communities” to “enjoy their culture”, it contains no specific, explicit protections for customary rights to land or other natural resources, other than rights to restitution or legally secure tenure. Customary systems of allocation, use, and control over natural resources are therefore not protected, and their relation to and possible precedence over state and common law systems is not acknowledged.

Related to this dynamic is the imperative of transformation and pursuit of the “national interest”, which in many instances may not align with the interests of indigenous communities. While it may be in the interests of indigenous communities to protect the cultural systems that have determined the allocation, use, and control of natural resources for centuries (and it is debatable whether those systems persist unaltered), those same systems conflict with national interests in food security, the exploitation of fossil fuels for internal energy security, the exploitation of mineral resources to boost export earnings and foreign exchange, and so on. It is therefore unsurprising that the South African State would approach the protection of customary rights with a certain degree of lassitude. In this regard it is telling that the term “indigenous” features less than five times in the *National Development Plan 2030: Our Future – Make it Work* (and then primarily in connection with the protection of indigenous languages), and the term “customary” not at all.

3 LAND, FRESHWATER AND MARINE LAWS AND POLICIES

3.1 Legislation recognising forms of community title or tenure, local management of land, freshwater and marine resources and aspects that undermine or hinder community stewardship

(i) Land

The legislation most clearly applicable to the recognition of communal land tenure is the **Communal Land Rights Act** 11 of 2004 (**CLARA**). As noted in Part 2, however, this legislation was declared unconstitutional in the case of *Tongoane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC). At present, therefore, communal rights to land are protected by **customary law** and the **Interim Protection of Informal Land Rights Act** 31 of 1996 (**IPILRA**).

The **IPILRA** aimed only to provide for temporary protection of informal rights to land. An “informal right to land” is defined to include the use of, occupation of, or access to land in terms of any tribal, customary, or indigenous law or practice of a tribe (section 1, **IPILRA**). The protections afforded by **IPILRA** include a right against deprivation of an informal right to land without consent (section 2(1), **IPILRA**); and a right to compensation where a land or an informal right to land has been disposed of by the community in accordance with its customs and usage (section 2(2) and (3), **IPILRA**). In the case of disposal of land or an informal right to land by the community, the customs and usage of the community must be deemed to include principles relating to democratic consultation, participation, and decision-making (section 2(4), **IPILRA**). In the absence of informal rights to land being disposed of along with the disposal of land, such rights continue to exist, notwithstanding the sale or disposition of any land (section 3, **IPILRA**). Apart from the fact that **IPILRA** was envisaged as “interim” protection, its protective scope is limited by not having provided for the registration of informal rights to land in the name of the communities or individuals concerned.

It is not known whether regulatory objectives and mechanisms established by the **CLARA** will survive post-*Tongoane*, or whether the Act’s design will be substantially changed. As it stands, the **CLARA** establishes institutions and processes for determining and reviewing a range of so-called “old order” rights in communal land. These encompass tenure, or other rights in or to communal land that exist immediately prior to a ministerial determination contemplated in terms of section 18 of the Act, and that are derived from or recognised by law, including customary law, practice, or usage. They may be formal or informal in nature and need not have been registered (section 1, **CLARA**). The legislation provides for the minister responsible for land affairs to institute a land rights enquiry in order to enquire into all such rights, in the context of a variety of policy directives. These include, for instance, the provision of access to land on an equitable basis, but also the directives of spatial planning, land-use management, and land development, particularly “the necessity of conducting a development or a de-densification or other land reform programme” (section 14, **CLARA**).

While conservation could feature in the deliberations of a land rights enquiry, it would thus do so as an incidence of spatial planning and land-use management. After receiving a report from a land rights enquirer, the minister responsible for land affairs has to determine whether an old order right must be confirmed, converted into ownership or a comparable “new order” right, or cancelled (section 18, **CLARA**). As part of this process, in respect of communal land, the minister has to determine which rights have to be registered or remain registered in the name of the community, and whether the whole or parts of such communal land should rather be subdivided and registered in the name of individual persons (section 18, **CLARA**). In making this determination, the minister is required to have regard to “all relevant law, including customary law and law governing spatial planning, local government and agriculture”, amongst other factors (section 18(1)(b), **CLARA**).

The **CLARA** thus makes provision for *communities themselves* to hold registered title to communal land (section 5(1), **CLARA**). To this end, it also allows for the juristic personality of communities to be recognised, and for a community to thus have

perpetual succession, the capacity to acquire rights and incur obligations, and the capacity to own or otherwise deal with movable or immovable property (section 5, CLARA). A “community” is defined on the basis of communal property; that is, the cohesion of the group of persons is derived from “shared rules determining access to land held in common by such group” (section 1, CLARA). However, before a community can acquire juristic personality and be instituted as the holder of communal land, it must make, adopt, and have registered community rules relating to such land (section 3, read together with section 19, CLARA).

As outlined more fully in Part 6.1 below, from an early stage of South Africa’s history, mineral rights could be severed from land ownership and a separate system of registration of such rights developed. Additionally, with the coming into effect of the **Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA)**, all mineral resources are subsumed under the custodianship of the Minister of Mineral Resources. The Minister is in turn responsible for the development of the nation’s mineral resources, and to this end allocates prospecting and mining rights to suitable applicants. Generally therefore, communal ownership of land or use rights to such land does not extend to minerals on or beneath such land.

(ii) Freshwater

In South Africa the **National Water Act 36 of 1998 (NWA)** governs the protection, conservation, use, management, control, and development of the nation’s water resources. This legislation was revolutionary in moving freshwater governance away from the riparian principle as a basis for the allocation of water resources, to an administrative system driven by the constitutional imperatives of ensuring equitable access to water resources and the protection of water resources to meet the basic needs of present and future generations. Sustainability and equity are thus identified as the central guiding principles of the Act. As is the case with mineral resources, the NWA essentially nationalises water resources, placing them in the public trusteeship of the national government, with the Minister of Water Affairs responsible for ensuring that water is used equitably and beneficially in the public interest while promoting environmental values (section 3, NWA).

No natural or juristic person, including customary communities, therefore has any form of title or tenure over freshwater resources. In order to use freshwater resources it is necessary to fall within or have one of four different types of authorisation, namely a “Schedule 1” water use, an existing lawful water use, water use under a general authorisation, or a water use licence. Any entitlement to use water under any other law (which presumably includes customary law) falls away and is replaced by water use under these other forms of authorisation (section 4, NWA). Schedule 1 uses include many water uses that may have been governed by customary rules, such as the taking of water for reasonable domestic use in that person’s household from any water resource to which that person has lawful access, or the taking of water on land owned or occupied by such persons for small, subsistence gardening or the watering of animals on that land (provided that they graze within the grazing capacity of the land).

Existing lawful water uses, which contemplate larger-scale water use – the watering of crops for non-subsistence purposes, for instance – potentially include water uses authorised by customary laws. An existing lawful water use means a water use that

has taken place at any time during a period of two years immediately prior to the date of commencement of the NWA, and which was authorised by or under “any law in force” immediately before such date of commencement (section 32, NWA). Given the Constitution’s recognition of customary law as a distinct source of law, “any law in force” should be deemed to include customary laws. A person or that person’s successor-in-title may continue with an existing lawful water use subject to any existing obligations or conditions attaching to that use, subject to such use being registered and verified by the water authorities (sections 34, 35, NWA).

(iii) Marine resources

The **Marine Living Resources Act** 18 of 1998 (MLRA) regulates the subsistence and commercial fishing industry in South Africa. The Act has been amended once since its entry into force, and a new amendment is currently being considered (**Marine Living Resources Amendment Bill**, published as GN 434 *Government Gazette* 36413 of 25 April 2013). Like other transformation legislation, the MLRA articulates multiple, potentially conflicting objectives. At present the objectives include conserving marine living resources for present and future generations; protecting marine ecosystems as a whole; applying the precautionary approach to the management of marine ecosystems; preserving marine biodiversity; and preventing marine pollution; at the same time as ensuring the “optimal” utilisation of marine living resources and the use of marine living resources to achieve economic growth, human resource development, employment creation, and the need to restructure the fishing industry (section 2, MLRA). The **Marine Living Resources Amendment Bill** proposes to amend this list of objectives in a manner that gives far greater prominence to the promotion of small-scale fisheries, the alleviation of poverty, and promotion of food security and local socio-economic development, incorporation of a community-based rights approaches to the allocation of marine living resources, and recognition of the complementary value of indigenous and local knowledge, amongst others.

Originally the MLRA contained no express provision on tenure over marine living resources, similar to the “custodianship” models introduced by the MPRDA and the NWA. The **Marine Living Resources Amendment Bill**, however, proposes to amend the MLRA through the insertion of a new section 1A that, like these other forms of transformation legislation, institutes the national government as the public trustee of the nation’s marine living resources. The minister responsible for agriculture, forestry, and fisheries will be responsible for ensuring that marine living resources are equitably accessed and used beneficially and in the public interest, whilst ensuring long-term ecological sustainability and social and economic development. As with mineral and water resources, no individual or juristic person has tenure in or title over marine living resources, whose various use rights are allocated by the state.

Currently, no person may undertake commercial or subsistence fishing, or engage in mariculture or operate a fish-processing establishment, without a relevant right allocated by the Minister (section 18, MLRA). A “subsistence fisher” is defined as “a natural person who regularly catches fish for personal consumption or for the consumption of his or her dependants” and may include someone who engages from time to time in the local sale or barter of excess catch, but excludes persons who engage in the substantial sale of fish on a commercial basis (section 1, MLRA).

Without deleting this provision, the **Marine Living Resources Amendment Bill** adds a new definition of “small-scale fisher”, seemingly to refer to natural or juristic persons that are also engaged in fishing in order to meet food and basic livelihood needs, but who may also harvest, process, or market fish on a commercial basis. The draft Bill attempts to distinguish such small-scale fishers from their wholly commercial counterparts by pointing to their location (traditionally operating on or near shore fishing grounds), and their methods (predominantly employing traditional low technology or passive fishing gear, and undertaking single-day fishing trips). Having recognised small-scale fishers and fisheries, one of the specific objectives of the **Amendment Bill** is to *prioritise* the small-scale fisheries sector within the fishing sector as a whole, and to introduce mechanisms and structures that will promote “a community orientation, co-management and community-based approach in the harvesting and management of marine living resources...” (section 2(i), (j) substituted by **Marine Living Resources Amendment Bill**). Toward this end, the state intends amending the MLRA to allow for communities to apply for, and be declared a “small-scale fishing community (s 18(2), as substituted by the *Marine Living Resources Amendment Bill*).

3.2 State agencies mandated to develop and implement laws and policies

The **Minister of Rural Development and Land Reform** administers the IPILRA, and will similarly administer the CLARA if and when it is enacted into law. The CLARA establishes a number of additional agencies of governance, namely land administration committees and land rights boards. **Land administration committees** will function at a community level, and play a role in registering and administering rights in communal land (section 24, CLARA). A community must establish a land administration committee, but if it has a recognised traditional council, the land administration committee of such council may also undertake the responsibilities prescribed in the CLARA (section 21, CLARA). Various other state agencies at national, provincial, and local levels of governance may designate a person as a non-voting member of a land administration committee (section 22(5), CLARA). The articulated powers and duties of land administration committees do not expressly mention sustainable development or conservation. At a higher level of governance, the **Minister of Land Affairs** may establish one or more land rights boards having jurisdiction as prescribed (section 25, CLARA). **Land rights boards** play an advisory, guiding, and monitoring role. Nominees of state agencies, the provincial houses of traditional leaders, persons in the commercial and industrial sector, and communities must be represented on such boards (section 26, CLARA). Land rights boards must, in particular, “advise the Minister and advise and assist a community generally and in particular with regard to matters concerning sustainable land ownership and use” along with the “development of land” (section 28(1)(a), CLARA).

While the NWA instituted the **Minister of Water Affairs** as the custodian of the nation’s water resources, it also envisaged the progressive devolution of rights and duties to a number of **catchment management agencies (CMAs)** as institutions that would govern water use at a regional or catchment level with the involvement of local communities. To be established upon the initiative of the communities and stakeholders concerned, and in addition to representation by various organs of state and bodies representing different sectors and other interests, CMAs could also

include representation of particular communities. Section 81(10) of the NWA, in particular, allowed for the Minister to appoint additional members to the governing board of a CMA in order to achieve representation of disadvantaged persons or communities which had been prejudiced by past racial or gender discrimination in relation to access to water. The rate of establishment of CMAs has been disappointing and only two CMAs (for the Inkomati-Usuthu and Breede-Gouritz water management areas) have been established. In March 2012, the Department of Water Affairs indicated that it had reduced the number of planned water management areas from nineteen to nine, indicating that another seven CMAs would need to be established. Even if such CMAs are established, however, they are geared toward balancing the interests of diverse stakeholder groups, rather than specifically protecting or promoting the interests of indigenous communities.

The **Minister of Agriculture, Forestry and Fisheries** oversees the governance of marine living resources. The **Marine Living Resources Amendment Bill** provides for the establishment of an administrative tribunal, the **Marine Living Resources Review Board** that may hear administrative appeals in terms of the Act. These may include appeals submitted by persons aggrieved by the establishment of a small-scale fishing community.

3.3 Recognition of Native or Aboriginal title

Collective, Native or Aboriginal title is not recognized in South Africa.

3.4 Customary law and procedures for local stewardship or governance

With respect to land, the underlying assumption of the **IPILRA**, with its recognition of informal rights to land, is that customary laws and procedures are used for local stewardship of communal land. This stewardship is qualified only to the extent that customary laws and procedures must be deemed to include democratic consultation, participation, and decision-making when the community disposes of land or informal rights (section 2(4), IPILRA).

The **CLARA**, meanwhile, envisages a process of codification of community rules relating to communal land, prior to the juristic personality of a community being recognised (section 3, read together with section 19, CLARA). The CLARA is not very prescriptive of the content of such community rules, indicating merely that community rules must regulate “the administration and use of communal land by the community as land owner within the framework of law governing spatial planning and local government”, such matters as may be prescribed, and any other matters considered by the community to be necessary (section 19(2), CLARA). While it is fair to assume that customary law and procedures will make their way into the contemplated community rules, at present there is nothing in the CLARA to require or facilitate this. Rather than the provisions of customary law framing the development of community rules then, the law governing spatial planning and local government tends to be fore-grounded.

The **NWA** largely replaces all other sources of law relating to the governance of freshwater resources, including common law and customary law. There is still potentially some space for customary law norms to be applied, for example in

determining what constitutes “lawful access” to a water resource for purposes of Schedule 1 uses, or for determining whether a particular use qualifies as an existing lawful water use by virtue of having been authorised by customary law prior to the coming into effect of the NWA. Overall, however, customary law rules governing freshwater resources would seem to have been largely overwritten.

As noted above, the **Marine Living Resources Amendment Bill** refocuses the governance of the fishing industry on small-scale fisheries. To this end, it allows for the recognition of “small-scale fishing communities”. In terms of a framework yet to be declared by the Minister of Agriculture, Forestry and Fisheries, small-scale fishing communities would be established as both legal and business entities with certain planning and regulatory functions. In this manner, a co-management and community-based approach to marine living resources seemingly will be instituted, and may allow for the rearticulation and adaptation of customary rules on fishing. However, in the process of drawing up “benefit distribution” and other plans, such rules may also be overshadowed by other discourses.

4. PROTECTED AREAS, ICCAS, AND SACRED NATURAL SITES

4.1 Indigenous Peoples’ and Local Communities’ Conserved Territories and Areas (ICCAs)

As noted in Part 1.2.5 above, indigenous people have been involved in the management of Contract Parks. Further to this **Indigenous and Community Conserved Areas (ICCA)** have been included in National Biodiversity Strategy and Action Plans in South Africa.

4.1.1 The range, diversity, and extent of ICCAs in South Africa

The territories of the Khoi-San people identified in Part 1.2.2 above are mainly located in the sparsely populated and arid Northern Cape, but the Griquas also have significant communities in the Western and Eastern Cape Provinces, the Free State, and KwaZulu-Natal.

4.1.2 Community governance and management of ICCAs

Indigenous people in both the broad and narrow senses described above govern their territories, areas, and natural resources in terms of customary law; i.e. community-based systems of law “in which rights are generally relational and not held by individuals as atomistic beings, but as members of a group and relational to the other members” (Wicomb & Smith 2011: 427). As discussed in section 3.1(i) above, there has been an ongoing struggle for the statutory recognition of customary forms of tenure.

4.1.3 Main threats to local governance

The major threat to communities’ customary forms of governance is that they do not carry the same formal legal weight as forms of governance rooted in legislation or the common law. The manner in which customary law is recognised in the **Constitution** may be the root of the problem, since the **Constitution** requires that the courts apply customary law when that law is applicable, but subject to the

Constitution and any legislation that deals with customary law (section 211(3)). Thus when an activity authorised in terms of customary law conflicts with formal legislation, the former yields almost automatically to the latter. For example, government regulations on hunting coupled with formal titles to land being allocated to the State or other private parties have resulted in almost all of South Africa's narrowly defined indigenous peoples being forced to give up traditional hunting and gathering (Wachira Mukundi 2009).

4.1.4 Main initiatives undertaken to address the threats to ICCAs

While codification of customary law may resolve the problem of the weight of customary law vis-à-vis other sources of law such as common law, statute and precedent, in South Africa there is also a long history of legislative formalisation corrupting and distorting living systems of customary law. For example, the majority of San and Khoi communities were theoretically excluded from the definition of "traditional communities" because they did not exhibit established structures recognising traditional leadership (these structures having been dismantled by the assimilationist policies of the apartheid regime) (*ibid*). As such there is no formal legal framework for the leadership structures of these communities to be recognized. However, in some cases the Traditional Leadership and Governance Framework Act continues to legitimize leadership structures established during the apartheid era.

The **Communal Property Associations Act** 28 of 1996 allows recipients in land reform processes to jointly own land through Communal Property Associations (CPAs). But a ministerial memorandum has since halted the transfer of title deeds to CPAs in respect of land won through restitution and redistribution, ostensibly to pander to the sensitivities of traditional leaders who wish to maintain control over communally owned land (Van der Westhuizen 2013). This undermines indigenous peoples' governance of natural resources as the formal legal recognition of their ownership – manifest through title deeds held by a CPA – remains elusive.

4.2 Protected Areas

4.2.1 Laws and policies that constitute the protected area framework

The South African government is constitutionally bound to protect the environment, for the benefit of present and future generations, through reasonable legislative and other measures that, amongst other objectives, promote conservation (section 24(b)).

In the democratic era, this responsibility has been exercised through the enactment of the **National Environmental Management: Protected Areas Act** 57 of 2003 (NEMPAA), which, along with the **National Environmental Management: Biodiversity Act** 10 of 2004 (NEMBA), the **Marine Living Resources Act** 18 of 1998, and **provincial statutes** dealing with conservation, constitute the nation's protected area framework.

4.2.2 Definition of "protected area"

According to section 17 of NEMPAA, the **purposes of the declaration of areas as protected areas include**, amongst other things:

- Protecting ecologically viable areas representative of South Africa's biological diversity and its natural landscapes and seascapes in a system of protected areas;
- Preserving the ecological integrity of and biodiversity in those areas;
- Protecting areas representative of all ecosystems, habitats, and species naturally occurring in South Africa, but in particular, protecting South Africa's threatened or rare species, and protecting areas that are vulnerable or ecologically sensitive;
- Assisting in ensuring the sustained supply of environmental goods and services;
- Providing for the sustainable use of natural and biological resources;
- Creating or augmenting destinations for nature-based tourism;
- Rehabilitating and restoring degraded ecosystems and promoting the recovery of endangered and vulnerable species; and
- Managing the interrelationship between natural environmental biodiversity, human settlement, and economic development.

Consolidating prior protected areas laws, the NEMPAA recognises various types of protected areas, including: special nature reserves, national parks, nature reserves (including wilderness areas), World Heritage Sites, marine protected areas, specially protected forest areas, and mountain catchment areas (section 9, NEMPAA). It also provides for the declaration of protected environments to serve as a buffer zone for the protection of a special nature reserve, national park, World Heritage Site, or nature reserve, amongst other objectives (section 28(2), NEMPAA).

Contrary to expectations, the legislation does not specifically require exact geographical coordinates of a protected area to be published in the notice establishing a protected area. In this respect, the protected area definition may fall short of that outlined in the Convention on Biological Diversity and proposed by the International Union for the Conservation of Nature. The NEMPAA does, however, require that protected areas be managed for specific conservation objectives.

4.2.3 State agencies mandated to develop and implement laws and policies

The **Department of Environmental Affairs** (led by the **Minister of Water and Environmental Affairs**) is responsible for policy and legislative development in the field of conservation. South Africa's leading conservation authority, however, is **SANParks**. SANParks is a statutory body responsible for 3,751,113 hectares of protected land in 20 national parks (SANParks 2013). There are also **conservation authorities in each province**, of which the KwaZulu-Natal and North West authorities have arguably made the greatest strides towards the practical implementation of people and parks policies (De Villiers 2008).

In addition to the usual difficulties that arise from the need to balance competing and divergent interests when fertile land is set aside for conservation, the establishment of protected areas in South Africa is dogged by the memories of dispossession of land, forced removals, and perceptions that a higher value was placed on the protection of animals and plants than on meeting the developmental needs of people (*ibid*). Relying on the **Restitution of Land Rights Act** 22 of 1994, many communities have lodged land claims in conservation areas. Some 138

restitution claims, estimated to affect up to a third of the Kruger National Park and some provincial reserves in their entirety, were lodged, of which 58 have been settled to date (Paterson 2013). The remaining 70 restitution claims in protected areas amount to approximately 2,500,000 hectares. Efforts to establish a coherent policy and procedural framework for guiding the resolution of these claims have also borne tangible results in the past five years. In 2007 the national conservation and land reform authorities concluded a Memorandum of Agreement to clarify their roles regarding the settlement of land restitution claims in protected areas, and in 2010 a **National Co-Management Framework** was published to guide the settlement of such claims (*ibid*).

4.2.4 Implementation of Element 2 of the Programme of Work on Protected Areas

The South African conservation authorities have responded to the concerns articulated in Element 2 of the Programme of Work on Protected Areas (PoWPA) under the Convention on Biological Diversity in terms of the thematic area '**People and Parks**'. The South African authorities endorsed the **Durban Accord**, the outcome of the fifth World Parks Conference held in Durban in September 2003 (De Villiers 2008). The Accord has a number of synergies with the PoWPA, including an emphasis on empowering local communities through active participation and equitable sharing of costs and benefits from protected areas. The NEMPAA has subsequently entrenched sustainable use of biological resources within protected areas, active participation of local communities in the establishment and management of protected areas, and benefit sharing, as detailed below.

(i) Sustainable Use

One of the key objectives of the NEMPAA is to promote sustainable utilisation of protected areas for the benefit of people, in a manner that would preserve the ecological character of such areas (section 2(e), NEMPAA). Section 50(1)(b) of the Act allows the management authority of a national park, nature reserve, or World Heritage Site to enter into a written agreement with a local community living inside or adjacent to the park, reserve, or site, that would allow members of that community to use the biological resources of the protected areas in a sustainable manner. The agreement must be in line with the management plan for the area, and the taking of biological resources must not negatively affect the survival of any species in, or significantly disrupt the integrity of the protected area (section 50(2), NEMPAA). This provision has been implemented with partial success in some contexts (see Box 3), but in other contexts conflicts over sustainable use in protected areas remain (see Box 4).

(ii) Participation in the Establishment and Management of Protected Areas and Benefit Sharing

One of the key objectives of the NEMPAA is to promote the participation of local communities in the management of protected areas, where appropriate (section 2(f)). A local community is defined as "any community of people living or having rights or interests in a distinct geographical area" (section 1, NEMPAA). The co-management of protected areas is principally governed by section 42 of the NEMPAA, which provides that the management authority of a protected area (initially either a national or provincial organ of state) may enter into an agreement

with, amongst others, a local community for the co-management of the area by the parties, or the regulation of human activities that affect the environment provided this co-management does not lead to fragmentation or duplication of management functions (section 42, NEMPAA). A co-management agreement may provide for a range of matters, including (amongst others):

- The delegation of powers by the management authority to the other party to the agreement;
- The apportionment of any income generated from the management of the protected area or any other form of benefit-sharing between the parties;
- The use of biological resources in the area;
- Access to the area;
- Occupation of the protected area or portions thereof; and
- Development of economic opportunities within and adjacent to the protected (section 42(2), NEMPAA).

The Minister or a Member of the Executive Council responsible for environmental affairs may however cancel a co-management agreement after giving reasonable notice to the parties if the agreement is not effective or is inhibiting the attainment of any of the management objectives of the protected areas (section 42(4), NEMPAA).

Box 4.1: Sustainable use in the Kgalagadi Transfrontier Park

The Kgalagadi Transfrontier Park (formerly known as the Kalahari Gemsbok Park) is situated in the sparsely populated Northern Cape Province. The Khomani San and Mier communities who border the park both lodged successful land claims to land in or adjacent to the park during the late 1990s. In 1999, the Khomani San signed a land restitution agreement with the South African government in terms of which 25,000 hectares within the park would be co-managed by the Khomani San and SANParks as a continuing protected area, while 40,000 hectares outside the Park could be used for farming, subsistence economic practices, and other development (Wachira Mukundi 2009). In 2002 the Mier community's land claim – adjacent to the Khomani San's claim – was also successfully settled with a trilateral agreement between the three parties. A joint management board with representation by the Mier community (3–5 members), Khomani San (3–5 members), and SANParks (3–5 members) was subsequently established to oversee the Management Plan for the protected area (SANParks 2008). The trilateral agreement recognised the Khomani San's rights of symbolic and cultural use of resources (including medicinal plant utilisation and traditional hunting) in their section of the Park. However the current version of the Management Plan (which dates from March 2008, but will be revised during 2015/2016) notes that the regulations applicable to the park are currently not harmonised with the recognition of these rights, and indicates that the Joint Management Board must formulate resource-use protocols as a matter of priority (SANParks 2008).

Box 4: Customary fishing in the Dwesa-Cwebe Nature Reserve

The Dwesa-Cwebe Nature Reserves on South Africa's Wild Coast (functionally managed as one reserve) were initially declared as forest reserves in the 1890s. Their status as protected areas subsequently followed a turbulent and at times violent course, which included forced removals, incorporation of the reserve into one of the so-called independent homelands, and community invasion of the Reserves in 1994. After formal proclamation as the Dwesa-Cwebe Nature Reserves (DCNR) under the Transkei Conservation Act 6 of 1971, parts of the reserves were fenced off, precluding community access. In 1992, the Dwesa-Cwebe Marine Protected Area was proclaimed adjacent to the DCNR, thereby also precluding community access to the area's marine resources (Paterson 2013). The community lodged a land claim to the DCNR in 1996, and after five years of protracted negotiations a series of agreements were concluded. Amongst other actions, the agreements make provision for the DCNR to be co-managed by the Dwesa-Cwebe Land Trust and the Eastern Cape Department of Economic Affairs, Environment, and Tourism for a period of 21 years. A Co-Management Committee comprising equal community and government representation was established and tasked to develop a Management Plan for the area. However, to date the Co-Management Committee has not endorsed an official management plan, and in practice the management of the DCNR is guided by the Draft Integrated Reserve Management Plan (*ibid*). This plan does not at the moment appear to provide for sustainable use, although in terms of the agreements, the community does have preferential access to the biological resources subject to law.

The above context sets the scene for the case of *S v Gongqose*. In that case members of the Hobeni community were criminally charged in 2010 for contravening a number of conservation statutes, including section 43(2)(a) of the **Marine Living Resources Act** 18 of 1998 (MLRA). The marine protected area (MPA) adjacent to the Cwebe Reserve is one of only two breeding sites for the critically endangered white steenbras, and is hence a no-take MPA. Community members accessed the Cwebe Reserve without a permit and engaged in customary fishing. In their defence they maintained that since their community owned the reserve, they did not need a permit. The court acknowledged the existence of customary marine practices, and thus customary rights to fishing. Evidence presented by the accused also pointed to the sensitive manner in which the fishing was conducted. However, the magistrate found that the ban on fishing in the reserve in terms of the MLRA completely extinguished the customary rights of the Hobeni community. Since Magistrates Courts do not have right to declare a law unconstitutional, the accused were found guilty. An account of David Gongqose's story can be accessed here: <https://www.youtube.com/watch?v=QXmVoP7Q5YY>.

4.2.5 The protected area framework and recognition of Indigenous peoples and local communities' rights

Although participation by indigenous and customary communities in protected areas management theoretically admits a wide range of governance options, and while

section 42 of the NEMPAA appears to facilitate that broad range, in practice the government authorities in land restitution processes have relied somewhat blindly upon the co-management model established in terms of one of the first settled land restitution claims in a protected area, namely the settlement of the Makuleke claim in respect of the Pafuri region of the Kruger National Park (Paterson 2013). In terms of this model, ownership of the land within the Park was restored to the community and held by a communal property association. The community in turn leased the area back to the government for a period of 50 years, with the proviso that the area be used for conservation and ecotourism purposes. The settlement agreement provided for the establishment of a Joint Management Board (JMB) comprising of three community and three SANParks officials to jointly manage the area. In consultation with the JMB, the community was allowed to grant concessions for trophy hunting and the establishment of two luxury resorts in their area of the park, with the proceeds accruing to the Makuleke Community Development Trust (Paterson 2010).

Paterson highlights three concerns with this particular co-management model: Firstly, it is not clear whether it amounts to joint management or mere consultation; secondly, it is unclear whether the initial co-management arrangements are a first step toward autonomous community management of the protected area at a later stage, or whether co-management will be maintained in perpetuity; and thirdly, since the Makuleke solution has been labelled as financially unsustainable by some commentators, the desirability of replicating it in other contexts in South Africa is open to question (Paterson 2013).

4.3 Sacred Natural Sites

South Africa has no legislation specifically providing for indigenous peoples' or customary communities' stewardship of sacred natural sites. However, sacred natural sites may be included in the definition of the "national estate", in terms of the **National Heritage Resources Act 25 of 1999 (NHRA)**. The national estate comprises those resources which are of cultural significance or other special value for the present community or for future generations. These may include landscapes and natural features of cultural significance (section 3, NHRA). The NHRA provides for a three-tier system of heritage resources management:

- National level functions, which are the responsibility of the South African Heritage Resources Agency;
- Provincial level functions, which are the responsibility of provincial heritage resources authorities; and
- Local level functions, which are the responsibility of local authorities (section 8, NHRA).

4.4 Other Protected Area-related Designations

South Africa has a number of World Heritage Sites, biosphere reserves, and Ramsar sites, with World Heritage Sites included in the definition of protected areas in terms of the NEMPAA. In terms of the **World Heritage Convention Act 49 of 1999 (WHCA)**, the participation of all interested and affected parties in the governance of natural and cultural heritage must be promoted, and all people must have the opportunity to develop the understanding, skills, and capacity necessary for achieving equitable

ad effective participation (section 4(d), (e), WHCA). World Heritage Sites are managed by an Authority, which may be an existing organ of state, or a new authority appointed by the Minister responsible for Environmental Affairs. In theory, there is nothing to prevent a member of an indigenous people or local community being appointed as the Authority, as long as they are able to channel their authority through a juristic person. Representation of directly affected adjacent communities and affected adjacent tribal authorities on the boards of World Heritage Site Authorities is also specifically allowed (section 14, WHCA).

One of South Africa's World Heritage Sites, the Richtersveld Cultural and Botanical Landscape, is managed by the local Nama community through the Richtersveld Community Conservancy (RCC). The idea for the site began as a concept paper in 1998, and the world heritage application process emerged together with the support of a number of international and local heritage agencies (specifically the Norwegian Agency for Development Cooperation and the Northern Cape Department of Arts and Culture). Planning for the protected area took place in terms of a broader Integrated Development Planning process for the region. A number of management plans were formulated, and in 2004 a management committee was elected. The RCC benefited from the support of the Department of Environmental Affairs and Tourism, which donated R6 million to the RCC to develop infrastructure and accommodation at the site in 2005. Research on the Nama community's involvement in the Richtersveld Community Conservancy, as regards free, prior and informed consent; full and effective participation; benefit-sharing; capacity-building; and respect for cultural and spiritual values, does not appear to have been conducted.

4.5 Trends and Recommendations

4.5.1 Direction of protected areas laws and policies

South Africa has been moving in the direction prompted by Element 2 of the Programme of Work on Protected Areas (PoWPA) under the Convention on Biological Diversity for a number of years, but significant challenges clearly remain. In his recent analysis of the governance arrangements pertaining to the DCNR (see Box 4 above), Paterson (2013) identified a number of key challenges. These include:

- The practical difficulties associated with identifying relevant community stakeholders for involvement in consultation and negotiation processes, and ensuring parity in their capacity to participate.
- The extent to which the framing of community tenure in protected areas is workable; firstly by the "all or nothing" approach of the land restitution process, and secondly by the continuing failure to develop a formal, post-1994 communal land tenure regime.
- The uncertain relationship between communal property institutions and traditional authorities.
- Failure to consider a broader range of options for community involvement in the governance of protected areas, with the co-management model being automatically favoured.

5. NATURAL RESOURCES, ENVIRONMENTAL AND CULTURAL LAWS AND POLICIES

5.1 Natural Resources & Environment

5.1.1 Laws and policies supporting Indigenous peoples' and local communities' ownership of natural resources

There are limited legislative frameworks within South African legal frameworks that support or govern indigenous and local community ownership of natural resources. In addition to what has been set out in 3.1 above, there are other principles underlying the national environmental management framework of laws recognise the rights and interests of indigenous and local communities to environmental resources, and their participation in decision-making regarding issues that affect them.

NEMPAA specifically recognises the need to work in partnership with people in order to achieve its goals, even though its main objective is to provide for the declaration and conservation of protected areas, which historically used an exclusionary approach. The Act also provides for the participation and conclusion of written agreements with local communities residing within or adjacent to a protected area to manage cultural heritage resources.

NEMBA establishes mechanisms for the conservation and sustainable use of South Africa's biodiversity, the protection of particular species and ecosystems, and provides for the fair and equitable sharing of benefits arising from bioprospecting. The **Bioprospecting, Access and Benefit-Sharing Regulations** (BABS Regulations) provide for the further regulation of the permit system established in Chapter 7 of the NEMBA, insofar as it relates to bioprospecting, and sets out the criteria and requirements for concluding benefit-sharing and material transfer agreements.

The **National Environmental Management: Integrated Coastal Management Act** (no. 24 of 2008) (NEMICM) applies to the coastal zone of South Africa and seeks to (a) determine the coastal zone of the Republic; (b) provide for the coordinated and integrated management of the coastal zone; (c) preserve, protect, extend, and enhance the status of coastal public property as being held in trust by the State on behalf of all South Africans, including future generations; (d) secure equitable access to the opportunities and benefits of coastal public property; and (e) give effect to the Republic's obligations in terms of international law regarding coastal management and the marine environment. The Act makes provision for the declaration of special management areas (section 23, NEMICM), where a special management area may be declared only if the area's environmental, cultural, or socio-economic conditions require measures to more effectively promote sustainable livelihoods for local communities.

The **Marine Living Resources Act** 18 of 1998 provides for the conservation and sustainable use of marine living resources, as well as access to and the fair and equitable control over these resources. In terms of section 18, no person is allowed to engage in mariculture or a fish-processing establishment, commercial or otherwise, without the consent of the minister. However, with regards to previously disadvantaged sectors of society (such as local communities), the minister may

declare a specific community as a fishing community, and its members as subsistence fishers (section 19). In its current form, however, the MLRA fails to provide for the small-scale fishers who rely on fishing for their livelihoods. **The Marine Living Resources Amendment Bill** has recently been drafted to address the non-recognition of small-scale fishers. If passed, the Bill will facilitate the reconstruction of the economies of the fishing communities who were previously excluded from obtaining fishing rights.

The **National Forestry Act** 84 of 1998 (NFA) is intended to (a) promote the sustainable management and development of forests for the benefit of all; (b) create the conditions necessary to restructure forestry in State forests; (c) provide special measures for the protection of certain forests and trees; (d) promote the sustainable use of forests for environmental, economic, educational, recreational, cultural, health, and spiritual purposes; (e) promote community forestry; and (f) promote greater participation in all aspects of forestry and the forest products industry by persons disadvantaged by unfair discrimination.

Part 3 of the NFA provides for communities wishing to engage in community forestry, allowing for community or individual forestry agreements with government, setting out the requirements and procedures to do this, and making provision for assistance, financial or otherwise, for such communities and individuals. Moreover, in the 1996 *White Paper on Sustainable Forest Development*, the Department of Water Affairs and Forestry aimed to redress past inequities and improve living conditions suffered by the rural poor by promoting sustainable forest development, underscoring participatory policy development and decision-making. To this end, the department has adopted a participatory forest management strategy that includes benefit-sharing and development projects, and a restitution programme to facilitate community ownership of forests.

In the absence of comprehensive communal land legislation, the **Traditional Leadership Governance Framework Act** (TLGFA) is possibly South Africa's most progressive legislation supporting communal governance of natural resources by indigenous peoples and local communities. Providing for the recognition of traditional communities and enabling national and provincial governments to enact legislation that empowers their leaders to make decisions regarding land administration and the management of natural resources, the TLGFA was a result of government's obligation under Chapter 12 of the **Constitution** to enact laws that recognise the institution, status, and roles of traditional leadership according to customary law.

In its current form, however, the TLGFA is problematic in that it subjects communities to the powers vested in traditional leaders without community consent, and as such, it is unlikely that it would withstand constitutional challenge. Thus, while the intention of the Act is to recognise the traditional leadership of communities to manage land administration and natural resources, it is criticised for vesting too much power in traditional leaders. Some communities have successfully challenged the constitutionality of some of the Act's provisions relating to tenure security, as well as the exclusion of others through its implementation. As such, this Act is currently in the process of being revised. **The proposed National Traditional**

Affairs Act – the legislation proposed to replace the TLGFA – envisages a consolidated national law encompassing traditional leadership and specifically including consideration of communities who were previously excluded and/or marginalised in the TLGFA. The proposed **National Traditional Affairs Act** is currently still in Bill form, and has recently been approved by Cabinet for publication and public comment before it is tabled before Parliament for enactment.

5.1.2 State agencies mandated to develop and implement laws and policies

The Department of Cooperative Governance and Traditional Affairs derives its mandate from Chapters 3 and 7 of the Constitution. Its primary function is to develop national policies and legislation with regard to provinces and local government, and to monitor and support the implementation of certain laws and policies, and, among other things, create enabling mechanisms for communities to participate in governance. Its mandate is to monitor the implementation of, amongst others, the TLGFA.

The primary mandate of the **Department of Traditional Affairs** (DTA) is to support the transformation of traditional and Khoi-San leadership institutions to become strategic partners with government in the development of their communities. The DTA is also responsible for the development of policies, systems, and a regulatory framework that governs traditional affairs. Established by government, the DTA's mandate is underpinned by Chapter 12 of the **Constitution**.

5.1.3 Laws and policies affecting indigenous ownership, stewardship and management of territories, areas or natural resources

The TLGFA provides for the recognition of the leaders of traditional and Khoi-San communities. It also provides for a statutory framework within which these leadership structures will operate. The Act sets out the criteria by which the traditional and Khoi-San leaders will be appointed.

5.2 Traditional Knowledge, Intangible Heritage & Culture

5.2.1 Laws and policies relating to traditional knowledge or communities' intangible heritage and culture

In South Africa, it has been an on-going struggle to protect traditional knowledge (TK). Bio-piracy has been a serious threat to the protection of TK over the years. 'Bio-piracy' is used to define the process **"...through which the rights of indigenous cultures to genetic resources and knowledges are erased and replaced for those who have exploited indigenous knowledge and biodiversity"** (Shiva, Jafri, Bedi and Holla-Bahr 1997). Bio-piracy not only prevents socio-economic development, it also causes harm to the traditional knowledge, honour and natural resources of indigenous communities.

Although bioprospecting, the process of collecting genetic resources, is not new, the ways in which the genetic resources are used by most indigenous communities are. It is these uses that are novel to bio-pirates and without national and international laws to regulate bioprospecting, bio-piracy is likely to occur, with, for example, pharmaceutical companies continuing to patent the genetic materials they

accumulate from rural communities, without their consent - thus, inevitably restricting these communities from using their own resources in the long term.

The rights and interests of communities over their traditional knowledge associated with indigenous biological resources is protected under the access and benefit-sharing legislation in South Africa; specifically the **National Environment Management: Biodiversity Act** (no. 10 of 2004) (NEMBA) and the **BABS Regulations**.

In 2005, the **Patents Act** (no. 57 of 1978) in South Africa was amended to provide additional protection to traditional-knowledge holders with regards to knowledge associated with indigenous biological resources. The **Patents Amendment Act** 20 of 2005, which took effect in December 2007, is linked to the NEMBA in that it recognises traditional knowledge associated with indigenous biological resources as contemplated in the NEMBA, and requires patent applicants to disclose the origins of indigenous biological resources, whether or not traditional knowledge for their use was obtained, and by whom. However, since the enactment of the **Patents Amendment Act**, there has been much debate among intellectual property lawyers and traditional knowledge experts over the appropriateness of using conventional intellectual property rights to protect traditional knowledge. South Africa is currently reviewing its intellectual property legislation, and has called for public comment and submissions for consideration.

The **Protection of Traditional Knowledge Bill** (hereinafter referred to as 'the Bill') was born out of widespread criticism for the government's **Intellectual Property Laws Amendment Bill** (hereinafter referred to as 'the old Bill'). The old Bill was seen to be inadequate and impractical for TK protection.

The new TK Bill has a number of objectives including: to provide legislative mechanisms to protect the different species of indigenous knowledge; to recognize indigenous knowledge by defining indigenous knowledge systems components; to protect traditional knowledge as a new category of intellectual property and provide how said intellectual property rights will be protected; to determine what is eligible for traditional knowledge intellectual property right protection and the conditions for the subsistence or termination of said protection; to provide for ownership of traditional knowledge intellectual property rights; to provide for the duration, nature and scope of traditional knowledge intellectual property rights; to provide for the enforcement of traditional knowledge rights; to regulate the licensing of traditional knowledge intellectual property rights; to provide for the establishment of a National Register of traditional knowledge; to provide for the establishment of a National Council in respect of traditional knowledge to facilitate the commercialization of indigenous knowledge and the application of income generated to the benefit of indigenous communities; to provide for the establishment of a national trust and trust fund in respect of traditional knowledge; to provide for the regulation of the applicability of the Bill to foreign countries; and to provide for the protection of performers.

The Bill attempts to move the protection of TK into a *sui generis* system of protection. It categorises TK as a new type of intellectual property, terming it as 'traditional knowledge intellectual property rights', deals with ownership of the TK intellectual property through the communities that own the knowledge, the

duration of protection, eligibility of TK intellectual property protection, its sustenance or termination of the protection, enforcement of the TK intellectual property rights and to regulate the licensing of these rights.

It furthermore provides for the establishment of a National Register of TK and Registration Office and Register of Traditional Knowledge where the TK rights shall be registered, a National Council in respect of TK which will comprise of 12 members selected by the Minister of Trade and Industry who will be representative of the different cultures and tribes of the Republic. At all times, the Council members will consist of:

- “(i) at least two persons with extensive knowledge in, and patronage of, traditional cultures and the value of traditional communities;
- (ii) at least two persons with extensive knowledge in, and patronage of, artistic, literary, and musical works and the performing arts; and
- (iii) at least two members with extensive knowledge of the law of intellectual property”.¹

Chapter 6, Section 36 of the Bill focuses on the establishment of a **National Trust Fund for Traditional Knowledge**. The Fund is to take hold of all license fees paid in respect of the use of any item of TK. An administration fee is then deducted from this amount and is then paid to the community representative of the originating community where the TK came from. The Administrator, who is responsible for keeping records and managing the Fund, is obligated to submit annual reports to the Council.

The Bill focuses on three (3) main traditional rights, namely, traditional work rights (linked to copyright), traditional mark rights (linked to trademarks) and traditional design rights (linked to designs). There is close connection to the IP protection laws in terms of the scope of what will be protected and the duration of such protection. It actually makes reference to the **Copyright Act**, (no. 98 of 1978); the **Designs Act**, (no. 195 of 1993) and the **Trademarks Act**, (no. 194 of 1993). As with IP laws, there are certain protection periods and a published traditional work right shall be protected for a period of 50 years from the date of 1st publication or if it is not published, then it will be protected indefinitely. For the traditional design rights, protection is for 15 years from the date of its first publication if the design is published or indefinitely if it is not. Finally, the traditional mark right shall be protected indefinitely.

Interestingly, ownership of TK is vested in the community representative or proxy on behalf of the other community members but cannot be assigned by operation of law. Therefore, the TK remains with the respective communities and the whole community can exploit their TK and collectively benefit from it.

Surprisingly, there is no mention of the protection of traditional medicines (TM), which also fall under traditional knowledge. TM accounts for a huge proportion of TK and its omission is noteworthy.

¹ Section 34(4)

Another major concern is that TK protection is still being drawn under the umbrella of IP protection. It has been universally understood, particularly in the work of the World Intellectual Property Organisation (WIPO) that indeed, a *sui generis* system of protection is required to adequately protect TK. It is feared that protecting TK under IP protection may limit the term of TK protection. TK holders may feel that they are being short-changed because to obtain protection will now mean that there is a relatively short period of protection compared to the length of time the knowledge has been known for. It would be imperative to educate the holders to make them understand the benefits of protecting their rights in this manner.

5.3 Access and Benefit Sharing

5.3.1 Laws and policies with respect to access and benefit sharing

South Africa's access and benefit-sharing (ABS) laws are contained in the **National Environmental Management: Biodiversity Act** (no. 10 of 2004) (NEMBA). In particular, Chapter 6 sets out the specific provisions that govern bioprospecting activities, access to indigenous biological resources and/or associated traditional knowledge, as well as the fair and equitable sharing of benefits derived from such use. The regulation of the issuing of bioprospecting permits is provided for in Chapter 7. In addition, pursuant to section 97 of the NEMBA, the **Bioprospecting, Access and Benefit-Sharing Regulations** (BABS Regulations) were enacted to give effect to the provisions in the NEMBA to further regulate the permit system.

5.3.2 Free, prior and informed consent, consultations and customary decision-making

The prior, informed consent of providers of traditional knowledge and/or genetic resources is a prerequisite to obtaining a permit to access an indigenous biological resource and/or the traditional knowledge associated with it. Before issuing a permit to an applicant, an issuing authority must be satisfied that, among other things, all relevant information has been disclosed to the providers, and that on the basis of that disclosure, the providers have given consent to provide access to and/or traditional knowledge about the indigenous biological resource in question (section 82, NEMBA). The prescribed permit application form requires the applicant to not only affirm that material disclosure has been made, but also to provide details about the information disclosed to affected communities.

Although the NEMBA provides for the prior, informed consent of affected communities, thus recognizing the importance of traditional governance systems and customary decision-making, it does not provide clear guidelines or procedures for obtaining such prior, informed consent, or what the content of that consent should be. However, bio-prospectors, in their permit applications, must demonstrate that they have exercised due diligence in identifying and obtaining prior, informed consent from affected communities.

5.3.3 Fair and equitable sharing of benefits arising from access to genetic resources and related traditional knowledge

The fair and equitable distribution of benefits arising from access to indigenous biological resources and associated traditional knowledge is one of the guiding

principles informing South Africa's policy and legislation on the conservation and sustainable use of its biodiversity. The **NEMBA** provides the regulatory framework for fair and equitable sharing of benefits, and has mandatory procedural requirements that include the submission of the benefit-sharing and material transfer agreements.

When applying for a permit, applicants must provide proof that a benefit-sharing agreement has been concluded with the relevant providers. Moreover, the application must also be accompanied by a material transfer agreement when indigenous biological resources are being transferred. Both the benefit-sharing and material transfer agreements must be approved by the Minister. The Minister or the Issuing Authority making the decision whether or not to approve a permit application, may consult with any person to provide advice on the agreement, and may also invite public comment on whether or not the agreement is fair and equitable.

Before a permit can be issued, the issuing authority must establish that the benefit-sharing agreement is fair and equitable to all parties. To this end, the issuing authority:

- May engage the applicant and stakeholder on the terms and conditions of the benefit-sharing or material transfer agreement;
- May facilitate negotiations between the applicant and the stakeholder and ensure that those negotiation are conducted on an equal footing;
- On request by the Minister, must ensure that any benefit-sharing arrangement agreed upon between the applicant and stakeholder is fair and equitable;
- May make recommendation to the Minister; and
- Must perform any other functions that may be prescribed by legislation (section 82 (4)).

Furthermore, an issuing authority is obliged to protect the interests of a community that provides access to indigenous biological resources, by ensuring, among other things, that all requirements have been complied with.

5.3.4 State-implemented laws, policies and frameworks governing processes

The laws governing processes and relations between interested parties and indigenous peoples and local communities with respect to access and benefit-sharing; free, prior, and informed consent; and the equitable sharing of benefits can be found in Chapter 6 of the NEMBA, in conjunction with the BABS Regulations.

Section 81 of **Chapter 6 of the NEMBA** provides that no person may engage in bioprospecting activities or export any indigenous biological resource for the purpose of bioprospecting without first obtaining a permit from the issuing authority. Moreover, issuing authorities have to consider and protect the interests of the person, indigenous community, or organ of state providing or giving access to the indigenous biological resource (section 82).

The **BABS Regulations** (Bioprospecting, Access and Benefit Sharing Regulations) further regulate the permit system, outlining the criteria and requirements for

benefit-sharing and material transfer agreements. These regulations provide that permits will be issued only to juristic persons registered in South Africa, natural persons insofar as they are South African citizens or have permanent residency. However, juristic or natural persons who do not meet these criteria may apply jointly with juristic or natural persons who do meet the criteria. In other words, foreign individuals, companies, and institutions cannot apply for a permit on their own; they must be affiliated with a South African citizen or institution. Applications for permits must be accompanied by signed benefit-sharing and material transfer agreements. These agreements must be approved by the Minister before a permit is issued. If the applicant was unable to secure these agreements, a request for the intervention of the Minister for the purposes of negotiating such agreements may be submitted.

Model benefit-sharing and material transfer agreements have been included in the BABS Regulations with the purpose of assisting bio-prospectors to conclude such agreements with communities and/or other stakeholders. These model agreements set out the type of information required, as well as the level of detail that needs to be included in the agreements.

If an application is refused, the Act and the Regulations (that is, NEMBA and BABS) provide for an appeals process for aggrieved applicants. An appeal must be lodged within 30 days of receiving notification of the decision to refuse the application, together with the prescribed fee. All stakeholders must be served with a copy of the appeal, and the proof of service on these stakeholders must be attached to the appeal. The Act and the Regulations also provide for penalties against those who contravene or fail to comply with the provisions in the Act, published notices, and/or directives issued by the Minister. Detailed descriptions of offences and penalties under the Act are provided in Chapter 9.

5.3.5 What State agencies mandated to develop, implement and monitor laws and policies

The **Department of Environmental Affairs (DEA)** is mandated to ensure the protection of the environment and the conservation of biodiversity, balanced with sustainable development and the equitable sharing of benefits derived from natural resources. The mandate empowering the DEA to develop, implement, and monitor laws and policies relating to access and benefit-sharing is derived from the NEMBA and the BABS Regulations, and is further underpinned by provisions in the Constitution of the Republic of South Africa, 1996.

6. NATURAL RESOURCES EXPLORATION AND EXTRACTION, LARGE-SCALE INFRASTRUCTURE / DEVELOPMENT PROJECTS & AGRICULTURE

6.1 Natural resource exploration and extraction

6.1.1 Natural resources being explored and extracted

South Africa has one of the most extensive mineral endowments in the world, and exploration and extraction of the following minerals are taking place: Platinum Group Metals (PGM), gold, chromite, manganese, vanadium, refractory metals (alumina silicates), coal, iron ore, titanium, zirconium, nickel, vermiculite, and

phosphate, amongst others (SIMS 2012). Regarded as the most historically significant extractive natural resource in South Africa, minerals include substances – whether in solid, liquid or gaseous form – occurring naturally in or on the earth, or under water, including sand, stone, rock, gravel, clay, or soil (but excluding water, petroleum, and peat).

The world's third-most bio-diverse State, South Africa's bioprospecting industry may be regarded as an emerging area of natural resource exploration and extraction. This aspect of natural resource extraction, governed by the National Biodiversity Act 10 of 2004, is dealt with under the section dealing with access and benefit sharing (Part 5.3 above). The discussion here accordingly focuses on minerals extraction.

6.1.2 Laws and policies with respect to natural resource exploration and extraction

The **Mineral and Petroleum Resources Development Act 28** of 2002 (MPRDA) entered into force in May 2004 and governs the prospecting for and mining of minerals and petroleum products in South Africa.

The MPRDA is transformational legislation (Agri SA 2011) that places minerals at the centre of South Africa's developmental path. One of the most significant changes the MPRDA introduced was to institute the State as "custodian" of the nation's mineral resources, which are identified as the "common heritage of all the people of South Africa". Although the State is not the owner of mineral resources, in the view of many, the reform amounted to a nationalisation of mineral resources, coupled with an administrative system for the allocation of extractive rights (either "prospecting" or "mining").

Although the institution of the State as "custodian" of the nation's mineral resources was integral to the legislation's economic and social objectives, it has also had the effect of undercutting any claims on the part of communities living under customary law to minerals located on their lands. The first amendment of the **MPRDA, Amendment Act 49** of 2008, (mostly) entered into force in June 2013, and another amending Act is currently being discussed in Parliament. The amendments do not alter the basic scheme set out in the existing MPRDA as regards the ownership of minerals. However, the definition of community has been tinkered with, as has the way in which communities are positioned in terms of the legislation's objectives. Amendment Act 49 of 2008, together with the NEMA Amendment Act 62 of 2008 have also repositioned evaluation of the environmental impacts of prospecting and mining under the jurisdiction of the NEMA.

6.1.3 Interaction between natural resource extraction laws, the environment and human rights legislation

One of the stated objectives of the **MPRDA** is to give effect to section 24 of the **Constitution**, which holds that everyone has the right to an environment not harmful to their health or wellbeing, and to have the environment protected for present and future generations through reasonable legislative measures that promote conservation, prevent pollution, and promote ecologically sustainable development. The MPRDA states that the nation's mineral and petroleum resources must be developed in an "orderly and ecologically sustainable manner while

promoting justifiable social and economic development.”

Prior to amendments to the MPRDA (Amendment Act 49 of 2008) the NEMA (Amendment Act 62 of 2008; Amendment Act 25 of 2014); the National Water Act (Amendment Act 27 of 2014) and the **National Waste Act** (no. 59 of 2008) (Amendment Act 25 of 2014), the environmental impacts of mining were chiefly governed by the MPRDA (although for a long time there was uncertainty regarding the simultaneous application of the environmental assessment provisions in the NEMA). Under the MPRDA applicants for prospecting or mining rights had to compile and submit an **environmental management programme (EMP)** that incorporated a prior assessment of mining impacts on:

- The environment (primarily biophysical surroundings);
- The socio-economic conditions of any person who might be directly affected by the prospecting or mining operation; and
- Any heritage object that falls within the meaning of the “national estate” in terms of the National Heritage Resources Act 25 of 1999. This includes places to which oral traditions are attached or which are associated with “living heritage”, landscapes, and natural features of cultural significance, and graves and burial grounds.

Consistent with the general approach to impact assessment, the EMP had to identify mitigatory and remedial measures to prevent pollution and ecological degradation.

There were a host of reasons for believing that EMPs were a poor governance instrument for managing the range of detrimental environmental impacts associated with prospecting and mining. They ranged from EMPs conveying only site-level impacts that did not set out a true picture of regional and cumulative impacts, to the limited time period for undertaking the impact assessment (30 days in the case of a prospecting right, 180 days for a mining right), to the integrity of the scientific information contained in the reports (see further Centre for Environmental Rights 2011).

The new system that will shortly replace the environmental assessment regime under the MPRDA is described in the next part.

6.1.4 Natural resource extraction laws and other legislation

There is a perception that for much of the more than 100-year history of mining in South Africa, the regulation of mining took place in terms of mining-specific laws. When the first set of activities requiring environmental impact assessments were promulgated in 1997, for instance, prospecting and mining activities were excluded. In subsequent lists, prospecting and mining activities were included, but the law specifically pertaining to these activities was never brought into effect. Whether the environmental impacts of mining were required to be evaluated in terms of the MPRDA or in terms of the generic framework for environmental management under the **National Environmental Management Act** 107 of 1998 (NEMA) has been a bone of contention between the Department of Mineral Resources and the national and provincial departments responsible for the environment for more than fifteen years.

The opinion of the Minister and Department of Mineral Resources was that the

MPRDA “trumped” all other legislation potentially applicable to mining, including environmental and municipal planning legislation. This issue came before the courts in the case of *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC). In this case the Western Cape High Court decided that the MPRDA did *not* trump the NEMA and the applicable municipal planning legislation. The aspect of the decision pertaining to the NEMA was subsequently set aside on a technicality, but both the Supreme Court of Appeal and the Constitutional Court affirmed that the MPRDA is not “trumping” legislation and cannot override, or indeed even take upon, the function of municipal planning as carried out by the local sphere of government.

In the past, coordination between the MPRDA and environmental legislation, and the respective administrative agents for minerals and the environment, has been poor. From 2008, however, the Department of Mineral Resources began co-operating with the Department of Environmental Affairs (and later also the Department of Water Affairs) to develop a single system for assessing the environmental impacts of mining. This co-operation has manifested in a number of inter-departmental agreements, amendment of primary legislation, and development of new regulations. From 8 December 2014, the system in place is therefore as follows:

- Anyone undertaking prospecting or mining is required to obtain an environmental authorization, as regulated by the NEMA. The issuing authority is the minister for mineral resources. The applicant, or any interested or affected person, may appeal against the granting or refusal of an environmental authorization to the minister for environmental affairs. The lodging of an appeal suspends the authorization. Appeals must be lodged timeously or risk going unheard as there are strict rules mitigating against acceptance of late appeals.
- The time frame for lodgement and consideration of an environmental authorization must be coordinated with the time frames for the granting of a water use licence and articulated with applications for a prospecting or mining right. It is likely that the time frames will be reduced all around. The issuing authority for the water use licence is the minister for water affairs.
- Mining waste has been brought under the jurisdiction of the Waste Act, and the issuing authority for waste management licences will be the minister for mineral resources.

6.1.5 The impact of natural resource extraction on other natural resources

The impacts of prospecting and mining on a range of natural media are well known, including impacts on air quality, the available quantity and quality of water, biodiversity, and land use availability, which impacts vary with the different phases of the mining cycle (Watson et al. forthcoming). In South Africa, impacts on water are probably the most serious, given the shortage of water in many areas of the country and the multitude of pressures on water resources. Although mining uses far less water than commercial agriculture, the potential for much more serious forms of pollution is greater, as illustrated by the case of mining in the Inkomati and the pollution of the drinking water in the town of Carolina (see Box 6.1).

Air quality impacts are also significant in many areas. In South Africa a unique air quality impact is associated with the processing/re-mining of mine residue deposits, leftover from the previous gold rush on the Witwatersrand. Such processing is taking place in the absence of prescribed dust control standards and mechanisms of enforcement. Although the **Air Quality Act** 39 of 2004 allows the Minister of Environment to prescribe general and specific measures for dust control, the regulations in this regard have not been finalised.



Photo 6.1: Acid mine drainage in Witswatersrand (2012). Source: Stephanie Booker

By precluding other land uses, even if only for a short period of time, prospecting and mining also have serious impacts on the livelihood strategies of traditional and rural communities. In many areas, the advent of prospecting or mining has occupied areas formerly used as communal grazing. Additionally, community members are paid compensation to stop planting crops, but this is usually a once-off amount that does not compensate for withholding from crop planting for many years, or the loss of skills and experience associated with this cessation.

6.1.6 Natural resource extraction laws: Relationship to the rights of Indigenous peoples and local communities

The relationship between natural resource extraction laws and rights of local communities can be considered along at least three dimensions:

- 1) Rights to the minerals in or on the land;
- 2) Land-associated rights (use, occupation, access) conferred in terms of customary law; and
- 3) Statutory entitlements to use water.

In all cases, the relationship is one of the *de jure* or *de facto* precedence of natural extraction over the rights of local communities.

The effect of the MPRDA's *de facto* nationalisation of mineral rights (*de jure* this is couched as State "custodianship", as mentioned above) means that **communities have no right to the minerals in or on communal lands**. To explore and extract these minerals in a manner that would support their own developmental vision, communities would need to apply for a prospecting or mining right in terms of the MPRDA, in competition with other mining entrepreneurs. The MPRDA does make a small concession in favour of communities by allowing them to apply for a "preferent" prospecting or mining right in terms of section 104 of the MPRDA. Essentially, this provision requires the Minister of Mineral Resources to grant a community a prospecting or mining right if it meets the specified criteria. However a preferent right cannot be granted if a prospecting or mining right has already been granted to another person. A negative effect of this provision is that it forces communities to rush to submit their applications for prospecting or mining rights before long standing conflicts over land and tribal authority are resolved. The Bengwenyama-ya-Maswazi case (Box 7) shows how difficult it is for a community to gain prospecting rights through this particular statutory mechanism.

Because mineral rights are distinguished from rights to land, prospecting and mining can take place on land *without the landholders' consent*, irrespective of whether such land is formally owned through title, or communally owned in terms of customary law. However, consultation with landowners, occupiers, and interested and affected parties is required as part of the process of obtaining a prospecting or mining right.

Flowing from the *de jure* precedence of prospecting and mining over other livelihood activities, there is a *de facto* precedence over the use of water, to the detriment of communities. Although mining companies are required by law to obtain a form of water-use authorisation, the administration and enforcement of the law is extremely weak. The result is that the use of water for prospecting and mining affects both the quantity and quality of water available for community livelihoods. This problem arises not only during the operational period of the extractive industry but, even more importantly, upon cessation of activities and so-called closure (see Box 5).



Photo 6.2: Poster by Treasure the Karoo Action Group (2013). Fracking in the Karoo is proposed, likely to impact communities, including those of the Khoi and San. Source: Stephanie Booker

Box 6.1: *De facto* precedence of the use of water by the mining industry

In South African law no one owns water and no one has a preferential right to water. The practical impact of the weak enforcement of the MPRDA and the NWA however affords *de facto* precedence to the mining industry, which in some cases has even impacted upon drinking water. Two cases illustrate this point:

- In the Sand River Catchment of the Inkomati Basin, a sand-mining operation is located at the river headwaters. The mine is located almost immediately adjacent to a dam that is used by communities downstream for watering vegetable crops (the crops are in turn grown for subsistence and small-scale trading). The mine is no longer operational, but a failure to rehabilitate the site is causing the dam to slowly silt up, dramatically reducing the amount of water available for use by the downstream communities.
- In 2011 the drinking water of small town of Carolina was rendered unfit to drink as a result of mines leaching acid mine drainage into a tributary that fed the town's waterworks. More than 17,000 people were impacted, most from poor local communities. Four mines were subsequently issued pre-directives over non-compliance with the NWA.

6.1.7 Natural resource exploration and extraction impacts on Indigenous peoples and local communities

The effects of natural resources exploration and exploitation on traditional and local communities are bound up with the effects on natural resources. This section focuses on social effects of exploration and extraction on traditional communities.

Traditional communities that are empowered to participate in the benefits of natural resource exploration and exploitation may experience substantial political and economic benefits. Paradoxically, success breeds its own problems, as modern forms of economic participation combine with traditional forms of undemocratic and patriarchal authority. In general, the possibility of benefitting from mineral exploitation tends to heighten tension and conflict within and between communities. Such conflicts may take the form of challenges to the legitimacy of a traditional authority, the form of its decision-making, and the substance of decisions relating to how benefits should be used and who should be able to benefit. The experience of the Royal Bafokeng, a Setswana-speaking community settled in South Africa's North West Province, is indicative of these tensions (see Box 6.2 below).

Where traditional and local communities are not positioned to benefit from mining operations in terms of ownership or royalties, they may be able to benefit in terms of a social and labour plan drawn up by the project proponent. Social and labour plans must promote employment and advance the socio-economic welfare of all South Africans, contribute to the transformation of the mining industry, and ensure that holders of mining rights contribute to the socio-economic development of the areas in which they are operating. These objectives should be achieved through both a human resources development programme and a local economic development programme for the area in which operations occur, as well as labour-sending areas. Financial flows to communities under such plans are considerable. In terms of the MPRDA, one of the criteria the Minister of Mineral Resources must consider when

deciding to grant a mining right is whether the applicant has provided financially and otherwise for the prescribed social and labour plan. These plans, however, say nothing about protecting or respecting the traditional culture, practices, and livelihoods of traditional communities and the manner in which these are connected to particular natural resources.

Box 6.2: The paradoxes of being the “richest tribe in Africa”

The Bafokeng’s success has little to do with an enabling legal environment, and is essentially based on the fact that by the late 19th century they were able to establish themselves as a corporate landholder. Owners of land on which substantial deposits of platinum occur, the Bafokeng initially benefited from royalties paid by Impala in terms of mining leases concluded during the 1960s (Manson & Mbenga 2003). After a protracted legal battle with Impala, by the late 1990s the Bafokeng had improved their royalty position substantially, acquired shares in Impala Platinum Holdings, and won the right to nominate one person to sit on the board of Impala Platinum (*ibid*). They had also entered into various joint venture agreements with Anglo American Platinum (Amplats). In 2006 they established the Royal Bafokeng Holdings (RBH) to manage the community’s overall investment strategy and portfolio (Cook 2011). RBH strives to be the world’s leading community-based investment company, and as of December 2012 the pro forma value of the investments under their management was approximately R39.6 billion (RBH 2013), earning the Bafokeng the title of “richest tribe in Africa” and establishing them as a model for other traditional communities to emulate.

The proceeds from RBH’s investments are channelled into an aggressive social development programme in 29 rural villages. As a result of the decisions taken by the tribal leader and his royal council, however, to date the benefits to the community itself have been communal and infrastructural, rather than individual and financial. There are electrified homes with clean water, better schools and clinics, more paved roads and community halls, and so on, but unemployment is conservatively estimated at 40%, and the average Bafokeng household subsists on US\$100 per month (Cook 2011). The sharing of the benefits of natural resources exploitation is thus based on decisions taken by a traditional authority that operates in terms of the discourses of communalism, paternalism, and kinship-based favouritism, a model that conflicts with notions of democratic, equitable participation as enshrined in the South African Constitution. As a result, there is increasing internal frustration and conflict within the Bafokeng nation, as well as conflicts around ethnic inclusion and exclusion. These include conflicts over the manner in which foreign labourers, recruited to work on the mines, are treated (*ibid*). Social mobilization around such conflict has manifested in the form of the Bafokeng Landbuyers Association, a federation of representatives from a number of dissatisfied communities within the Bafokeng (see <http://bafokeng-communities.blogspot.com/>). The influx of outsiders is also contributing to class stratification within the community, as some community members rent out their properties to provide outsiders with living quarters.

6.1.8 Conflicts with domestic property laws governing land formally owned

(i) *Community rights to land use and resources*

In the MPRDA, communities are currently defined as “a group of historically disadvantaged persons with interest or rights in a particular area of land on which members have or exercise communal rights in terms of an agreement...”.

The **Interim Protection of Informal Land Rights Act** (Act 31 of 1996) (IPILRA) was enacted in 1996 to provide some form of protection of such interests and rights until such time as a statute dealing with communal land under tribal authority could be formulated. The IPILRA indicates that interests or rights in land extend to use, occupation, and access in terms of any tribal, customary, or indigenous law, or practice of the tribe. One of the most important protections IPILRA establishes is that subject to laws dealing with expropriation, no holder of any informal right to land may be deprived of that right without his or her *consent* (section 2(a), IPILRA). Where land is held communally, the IPILRA goes on to state that a person may be deprived of such land or a right in land “in accordance with the custom and usage of the community” (section 2(b), IPILRA). However, statutorily infusing the custom and usage of a community with democratic principles, IPILRA requires that any decision to dispose of any informal right may only be taken: (a) by a majority of the holders of such rights; (b) present or represented at a meeting convened for the purpose of considering such disposal; and (c) of which they have been given sufficient notice, and (d) in which they have had a reasonable opportunity to participate.

The IPILRA is not permanent legislation, and the Minister for Rural Development and Land Reform extends its force from year to year. The latest extension was only valid until 31 December 2013. The IPILRA would have become permanent upon the entry into force of the **Communal Land Rights Act** 11 of 2004 (CLARA), which was declared unconstitutional, as discussed above. As no communal land rights legislation is yet on the statute books, the IPILRA remains in effect.

The land rights of local communities are rendered even more tenuous by the fact that many were dispossessed of land by racially discriminatory laws during the colonial and apartheid eras. If such communities meet the criteria specified in the **Restitution of Land Rights Act** 22 of 1994, they are entitled to restitution of rights in land. These claims are dealt with by the regional offices of the Commission on Restitution of Land Rights and the Land Claims Court. Many communities are still waiting for their land claims to be finalised, a process coupled with contestations over tribal authority.

(ii) *Community rights to water use and resources*

Communities also have rights to water on communal land administered in terms of customary law. In addition to any protections afforded by customary law itself, the **National Water Act** 36 of 1998 (NWA) defines certain uses of water as permissible without the need for any form of authorisation. These include the use of water, taken from land owned or occupied by a person, for reasonable domestic use in a person’s household, for small gardening, and for the watering of animals that graze on the land. These statutory entitlements to water support rural agrarian livelihoods.

6.1.9 Free, prior and informed consent, consultations, customary decision-making, and the fair and equitable sharing of costs and benefits arising from resource extraction

The MPRDA does require consultation prior to the award of prospecting and mining rights, however this falls far short of the standard of free, prior, and informed consent. Obligations rest on both the state (in respect of “interested and affected persons”) and the project proponent (in respect of landowners, lawful occupiers, and interested and affected persons) to ensure that there is notification and consultation in relation to a proposed prospecting or mining project.

These provisions are firstly problematic for failing to require, expressly, consultation with communities (even though the term, as mentioned above, is defined in the legislation). This allows mining companies to exploit the ambiguity of the term “interested and affected parties” (which remains undefined), as recently occurred in the Mokopane case. Here the proponent company allegedly maintained that it was only required to consult the state as the landowner, and the local municipality, but not the local Kgobudi community.

Flowing from the failure to expressly require consultations with communities, the legislation provides no guidance on who should be consulted; whether, for instance, it is acceptable to consult simply with the leader and/or traditional council, or what forms of democratic participation from community members is required. This allows for the co-option of traditional leaders through promises of individual benefit and entitlement, and the possible corruption of traditional governance structures. Similarly, the legislation provides no guidance on what course project proponents should follow in the event of conflicts over traditional authority and their entitlements to land.

The MPRDA makes no specific reference to regulatory frameworks that have been established to resolve these conflicts, such as the **Traditional Leadership and Governance Framework Act** 41 of 2003 and the **Restitution of Land Rights Act** 22 of 1994. Moreover, in the case of a prospecting right, it requires the project proponent to complete consultation within the ridiculously short period of 30 days, and in 180 days in the case of a mining right. This is an insufficient time to undertake consultation in the best of circumstances, let alone in contexts where there are deep-seated and unresolved conflicts.

In addition to failing to identify who should be consulted, the MPRDA does not adequately outline the modalities of the consultation process; in particular, requiring that measures are taken to address the difficulties of notification and consultation in far-flung rural areas where modern communication technologies often are non-existent. For example, the MPRDA regulations require that a notice of the proposed application be placed on the notice board of the Regional or District Magistrates Courts with jurisdiction over the land on which the prospecting and mining is to take place. However, these are situated in small urban centres many kilometres removed from the affected rural communities.

Finally, the MPRDA provides no guidance on the standard of consultation required. The perfunctory manner in which many project proponents conduct consultation

came to the fore in the Bengwenyama case (see Box 6.3).

Box 6.3: The Bengwenyama case: Faultlines of consultation under the MPRDA

In 2006 a black empowerment firm approached the traditional leader of the Bengwenyama to undertake the prescribed consultation in respect of prospecting on land occupied by the community and to which the community had also lodged a land claim. After meeting the traditional leader, the representative of the firm left a prescribed consultation form. The form simply provided blocks to be ticked yes or no to indicate whether there were any objections to the firm lodging a prospecting application in respect of the land. If “yes”, a further five lines were provided for the consultee to articulate the “full particulars” of their objection. Significantly, the form was never signed by anyone on behalf of the community. The black empowerment firm, however, was granted the prospecting right. The Bengwenyama Tribal Council challenged the granting of the right all the way to the Constitutional Court on, amongst other grounds, failure to properly undertake the consultation process. In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC), the Constitutional Court affirmed that the consultation process in the MPRDA had not been properly complied with, and indicated that a “good faith” standard applied. While the MPRDA did not “impose agreement” as the standard, the consultation requirements of the Act – in light of the invasive nature of prospecting rights – were indicative of a “serious concern” for the rights and interests of landowners and lawful occupiers. According to the court the project proponent had to engage in good faith in order to attempt an accommodation of those rights and interests. Further, landowners and occupiers had to be provided with all “necessary information” on the operations to be conducted. While these statements do go a little way to making the standard more lucid, the Constitutional Court did not go far enough in articulating the kinds of practices this standard requires. Their wholly uncritical stance on the lack of free, prior, and informed consent is also worrying.

6.1.10 State agencies mandated to develop, implement and monitor laws and policies

The minister for mineral resources, supported by the Director-General for mineral resources, and officials in the national and regional offices of the Department of Mineral Resources are the chief agents responsible for implementing MPRDA legislation. Since the recent amendments to NEMA and the MPRDA, the minister and DDG will act in terms of the NEMA insofar as regulating the environmental impacts of mining is concerned.

6.2 Large-scale infrastructure/development projects

6.2.1 Large-scale infrastructure and development projects and impacts on communities

South Africa has chosen a path of “counter-cyclical spending” driven by “catalytic infrastructure development” as outlined in the 2012 National Infrastructure Plan (NIP). Cabinet mandated the Presidential Infrastructure Coordinating Commission (PICC) to develop the NIP and coordinate its implementation. The NIP integrates and

phases investment plans across 18 Strategic Infrastructure Projects (SIPs), which in turn pivot on the five core functions of: unlocking opportunity; transforming the economic landscape; creating new jobs; strengthening the delivery of basic services; and supporting the integration of African economies. The SIPs include the following clusters of infrastructure investment:

- Opening up the northern mineral belt in the Waterberg (SIP 1). This includes the construction of rail, water pipelines, and energy generation and transmission infrastructure in the rural areas of the Limpopo Province.
- South-eastern node and corridor development (SIP 3). The development of this corridor is proposed to include a new dam on the Mzimvubu River, construction of the N2 Wild Coast Highway, and the construction of a manganese smelter and refinery.
- Unlocking economic opportunities in the North West Province (SIP 4). Accelerated investments in road, rail, bulk water, water treatment, and transmission infrastructure are proposed to facilitate development of mining, agricultural, and tourism opportunities.
- Agri-logistics and rural infrastructure (SIP 11). This SIP aims to improve investment in agriculture and rural infrastructure that support expansion of production and employment, small-scale farming, and rural development.

This public investment seeks a “balanced” approach, claiming for instance that it also aims at “greening” the economy. In this regard SIP 8 aims to support sustainable green energy initiatives through a diverse range of clean energy options, in addition to supporting bio-fuel production activities. Other projects are aimed at improving public health, education, and water sanitation and treatment facilities.

The infrastructure investments contemplated in the NIP are potentially a double-edged sword for traditional and local communities. On the one hand, they promise to bring much-needed public services to formerly remote and rural areas. On the other hand, they will potentially disrupt and dislocate rural economies and livelihoods and heighten social conflict. In some instances, for example, the Nandoni dam project in Thohoyandou, Vhembe district, Limpopo, community members had to be relocated and lost their residential and agricultural land in the process. There were running battles between the community and Department of Water Affairs officials from 1998. In a report presented by the Public Protector, after a two-year investigation initiated in 2006, it was found: (i) that monetary compensation for the loss of land was not fair and equitable and some complainants did not receive any compensation at all for the loss of land or for the loss of their agricultural equipment; (ii) new houses which were built for the affected beneficiaries were of poor quality; (iii) cultural requirements were not followed when graves were relocated; there was insufficient consultation during the relocation process; the dam was not fenced off and some homesteads were left just a few metres from the dam water, posing a serious safety risk; and here was no water or electricity supply in the new locations. These issues are typical of the types of problems indigenous and local communities face as a result of big infrastructure projects.

The manner in which a toll roll has split the amaMpondo community is further illustrative of this capacity of large infrastructure projects to sow division in a

community (see Box 6.4).

Box 6.4: amaMpondo divided over construction of a toll road

Under the late King Mpondombini Justice Sigau, the amaMpondo people had long been apparently opposed to the construction of the N2 Wild Coast Highway, a toll road linking East London and Durban. Tribal king since 1978, Mpondombini's status was stripped in 2010 following the Nhlapo Commission on Traditional Leadership Dispute and Claims's finding that his nephew, Zanozuko Sigau, was rightful king. Mpondombini launched a Constitutional Court challenge into the issue, but died of a stroke in March 2013 before the matter had been resolved. Two months later, Gugile Nkwinti, the Minister of Rural Development (who also heads the PICC Management Committee) met with King Zanozuko regarding the amaMpondo's long stand-off with the government regarding the construction of the highway. The King apparently gave his blessing for the project to go ahead, triggering an angry response from the community still loyal to Mpondombini, who accused Zanozuko of creating anarchy in the amaMpondo nation. A spokesperson for Mpondombini loyalists accused the government of dividing the amaMpondo over the issue of the highway. "They are creating a lot of confusion and people on the ground are becoming very impatient. This is a very delicate situation and has caused a lot of unprecedented tension," the spokesperson said (Ngcukana 2013).

6.2.2 State agencies mandated to develop, implement and monitor laws and policies

The coordinating agency for the NIP is the PICC, which was mandated by Cabinet to fast-track infrastructure development for purposes of spring-boarding economic growth. The governance structure of the PICC includes the Council, the Management Committee, a Secretariat and a Technical Task Team. The PICC Council is chaired by the President, and includes Cabinet Ministers (though it is difficult to determine which portfolios are represented), Provincial Premiers, and executive mayors. The PICC Management Committee (Manco), headed by Minister of Rural Development Gugile Nkwinti, comprises a number of "key" ministries, and is focused on "unblocking" challenges, monitoring the development plan, and "ensuring" regulatory approvals (PICC 2013). The PICC Secretariat, based in the Ministry of Economic Development, is comprised of the Ministers and Deputy Ministers who oversee the day-to-day work of the technical team, while the Technical Task Team comprises "skills and competence" drawn from public agencies and the government (PICC 2013).

Important therefore to note is that neither traditional leaders nor representatives of civil society are represented on the PICC. The coordinating agency is functioning under the leadership and with the support of the highest political office. The language used to describe the mandate of the PICC Management Committee in particular ("unblocking" challenges and "ensuring" regulatory approvals) conveys the impression that challenges to the NIP will not be tolerated, let alone accommodated.

6.2.3 Laws and policies with respect to the generation of infrastructure and/or development projects

The impression that challenges to the NIP will not be tolerated, let alone accommodated, is reinforced by the laws drafted to support the work of the PICC. The **Infrastructure Development Act** (no. 23 of 2014) and the **Special Economic Zones Act** (no. 16 of 2014) were enacted by the South African Parliament in 2014. The Infrastructure Development Act provides a formal legal basis for the PICC and its coordinating structures (including multidisciplinary steering committees for each SIP) with a statutory basis and legal mandate, articulates requirements for SIPs, outlines processes related to the implementation of SIPs, and includes brief provisions on reporting. The Special Economic Zones Act allows for the establishment of special economic zones as economic development tools aimed at promoting national economic growth and export by using a range of support measures to attract target foreign and domestic investments and technology.

6.2.4 Infrastructure laws and the extent to which they take into account environment and/or human rights and the rights of Indigenous peoples and local communities

The draft Infrastructure Development Bill in particular appears to disregard decades of national policy development regarding environmental management. It contains no reference whatsoever to the principle of sustainable development, which imports the notion of integration of environmental concerns with economic development as well as the principle of broad-based public participation in developmental decision-making. The Bill provides that environmental impact assessment procedures must still be followed when listed activities are triggered, but additionally requires that the time frames for assessment set out in Schedule 3 must not be exceeded. This contradicts the time frames defined for scoping, EIA, public participation, and appeal set out in the EIA regulations under the NEMA.

The steering committee for each SIP must determine the approvals, authorisations, licences, permissions, and exemptions applicable to the implementation of the SIP, and then monitors the processing of these applications. Two additional extensions of the steering committees functions appear to contradict the principle of the allocation of powers amongst independent national, provincial, and local spheres of government. Firstly, if an approval, authorisation, licence, permission, or exemption is *not* granted, the relevant authority must provide reasons to the steering committee, and the matter is then “reported” to the PICC Secretariat. Of even greater concern, the Secretariat is then mandated to “enter into negotiations” with the relevant authority, with a view to obtaining the necessary approval, etc. These “big brother” provisions would undoubtedly place officials in all spheres of government under intense pressure to comply with the NIP and the wishes of the PICC.

Finally, although the draft Bill recognises the PICC and its structures, the membership of the Council and the Management Committee remains opaque and there is no statutory guarantee that either the minister responsible for environmental matters or the minister responsible for traditional government will be

represented. Civil society and traditional leadership are not represented on any of the PICC's structures.

Ostensibly the developing regulatory frame for national infrastructure development respects existing laws on environmental impacts assessment and other environmental matters, all of which in turn respect the principle of prior public consultation (though not free, prior, and informed consent). Reading between the lines, however, it appears as if the legislation legitimises a railroading of both internal (government) and external (civil society and traditional authorities) dissent as to the substance and timing of planned large-scale infrastructure development.

6.3 Large-scale agriculture

6.3.1 Large-scale agriculture in South Africa

South Africa's agricultural sector includes field crop production, horticulture, and livestock farming. Only 12% of South Africa's total land area can be used for crop production, and a significant proportion of this is under irrigation. Maize is the largest locally produced field crop. An estimated 8,000 commercial farmers and thousands of small-scale farmers have produced an average of 9.7 million tonnes a year over the last ten years. Other field crops include wheat (planted in the Western and Eastern Cape, with an annual crop of 1.5 million tonnes); and sunflower seeds and soya beans (each producing about a half million tonnes per annum). In 2010, sugar cane plantations produced 16.8 million tonnes. There is also significant cultivation of vegetables, potatoes, citrus, and deciduous fruit (South African Government Information 2013). About 69% of South Africa's surface area is suitable for livestock production, making it the largest contributor to agricultural output (Ramaila et al. 2011). The demand for meat and eggs has increased significantly in recent years, resulting in a less efficient use of South Africa's grain products (Department of Agriculture, Forestry and Fisheries 2006).

The total area of farmland (including livestock farming, field crop production, and horticulture) rose to a high of 91.8 million hectares during the 1960s, and declined to 82.2 million hectares by 1996. Between 2000 and 2007, the area of farmland has remained within the range of 83.7 million hectares. A long-term decline in the number of farms (from 76,622 in 1910 to 44,575 in 2007) and an increase in farm size (from an average of 1,006 hectares in 1910 to 1,400 hectares in 2007) is apparent (Ramaila et al. 2011). There is an increase in the intensity of agricultural production in the form of increased irrigation, fuel, fertilizer, mechanisation and genetically modified seed inputs (Goldblatt n.d.).

In 2011, the gross farming income earned by the commercial farming sector was R131,541 million, reflecting increases in the sale of animal products and horticulture. The total indebtedness of the commercial farming sector was estimated at R80,513 million in 2011, an increase of 23% from 2010. The capital expenditure of the commercial farming sector in 2011 is reflective of an increase in intensive farming, with the highest increases recorded for plantations, computers and IT equipment, motor vehicles, plant, machinery, tractors, and other transport (Statistics South Africa 2012).

(i) *Biofuels*

Biofuels are currently not being produced in South Africa (Van der Westhuizen 2013). According to the Department of Energy's *Biofuels Industrial Strategy for South Africa* (2007), crops considered for the production of biodiesel include canola, sunflower, and soya, with sugarcane and sugar beet for ethanol. The strategy aims to develop the biofuels industry to achieve a 2% market penetration of road transport liquid fuels, which would contribute 30% to the nation's renewable energy target for 2013. In August 2012, the South African government announced that fuel producers would be required to blend a minimum of 5% biodiesel in diesel, and between 2 and 10% of bioethanol in petrol. In September 2013, the Minister of Energy announced 1 October 2015 as the date from which fuel producers would be legally obliged to comply with these blending requirements (Reuters 2013).

(ii) *Genetically Modified Crops*

In contrast to biofuel production, South Africa has forged ahead with cultivating genetically modified (GM) crops. Currently 2.6 million hectares of GM crops are under cultivation, comprising 78% GM maize, 17.7% GM soybean, and 4.3% GM cotton. While GM maize and GM soybean are mainly grown by commercial farmers throughout South Africa, GM cotton is grown by small-scale farmers in northern KwaZulu-Natal. The approved GM crops either have resistance to insect pests or tolerance to a broad range of chemical herbicides or both (Biosafety South Africa 2012). Multinational biotechnology companies are at the forefront of research on GM crops in South Africa, and have submitted a number of further applications to the South African government for the commercialisation of GM crops. In this regard the African Centre for Biosafety (a vociferous critic of the South African government's policy on GMOs), is currently opposing the Dow Chemical Company's application to commercialise three additional GM crops resistant to the chemicals 2,4-D, glufosinate ammonium, and glyphosate.

6.3.2 Impacts of large-scale agriculture on other natural resources

The commercial farming sector uses up to 60% of South Africa's available freshwater and future expansion of the sector is severely constrained by the lack of availability of this critical resource.

6.3.3 Laws and policies with respect to large-scale agriculture

Commercial agriculture in South Africa is governed by a number of laws, of which the most important are the **Conservation of Agricultural Resources Act** 43 of 1983 (CARA); the **Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act** 36 of 1947; the **Plant Breeders' Rights Act** 15 of 1976; and the **Plant Improvement Act** 53 of 1976. Agriculture is also not excluded from the application of the **National Environmental Management Act** 107 of 1998, as environmental management framework legislation. Important recent agricultural policies and discussion documents include the *White Paper on Agriculture* (1995); a discussion document on *Agricultural Policy in South Africa* (1998); a *Policy on Agriculture in Sustainable Development* (2002); and a *Broad-Based Black Economic Empowerment Framework for Agriculture* (2004). The primary state agency in respect of the governance of agriculture is the **Department of Agriculture, Forestry and Fisheries**.

The main policy instrument for biofuels is the **Biofuels Industrial Strategy**. Regulations regarding the mandatory blending of biofuels with petrol and diesel were promulgated in terms of the **Petroleum Products Act** 120 of 1977 in 2012, and in September 2013 the Minister of Energy determined 1 October 2015 as the date upon which they enter into effect.

The primary statute regulating GMOs is the **Genetically Modified Organisms Act** 15 of 1997 (GMO Act) and attendant Regulations, which are administered by the Department of Agriculture and the Executive Council of Genetically Modified Organisms; the **Biodiversity Act** 10 of 2004, regulated by the Department of Water and Environmental Affairs; the **Foodstuffs, Cosmetics and Disinfectants Act** 54 of 1972, administered by the Department of Health; and the **Consumer Protection Act** 68 of 2008, administered by the Department of Trade and Industry.

6.3.4 Large-scale agriculture laws and policies, the environment and human rights

(i) Human rights

The legislation governing agriculture passed prior to 1994 was not conceptualised in terms of a human rights frame, including any recognition of indigenous rights.

(ii) Environmental rights

Although the **CARA** is regarded as outdated and in need of reform, its initial formulation had a clear environmental objective to conserve the natural agricultural resources of the Republic by maintaining the production potential of land; combating and preventing erosion and the weakening or destruction of water resources; and combating weed and invader plants.

The CARA legislation allows for subsidies to be paid to farmers for certain measures, but also requires “land users” to maintain soil conservation works at their own expense to ensure continued efficiency. The category of “land user” potentially includes indigenous people and local communities, as it is defined to include “any person who has a personal or real right in respect of any land in his or her capacity as... servitude holder, possessor, lessee, or occupier (irrespective of whether he or she resides thereon), and any person who has the right to cut trees or wood on land, or to remove any other organic material from the ground”. Non-compliance with the requirement to maintain soil conservation works may result in criminal prosecution.

Since its enactment a number of “control measures” have been prescribed in terms of the CARA, including measures relating to the utilisation and protection of *vleis*, marshes, water sponges, and water courses; the utilisation and protection of the *veld*; the number of animals that may be kept on *veld*; and the restoration and reclamation of eroded, disturbed, or denuded land (Verster et al. 2009).

(iii) Biofuels

Although the *Biofuels Industrial Strategy*, administered by the Department of Energy in close co-operation with the Department of Science and Technology, articulates and responds to the impact of biofuel cropping on water resources as the most important area of environmental concern, it is not framed in terms of the discourse of human rights. In fact neither the word “right” nor “rights” feature even once in the document. The *Strategy* acknowledges that dryland crops such as soya, maize, and sugarcane can reduce stream flows and thus impact on other uses, and that

increased fertilizer and pesticide runoff from biofuel crops could impact on water quality. The *Strategy* itself deals quite vaguely and unsatisfactorily with these impacts, noting simply that irrigated cropping for biofuels would need to find water from existing allocations, or compete for scarce new water; and that “best practice management” would need to be adopted for both dryland and irrigated biofuel crops.

(iv) *Genetically Modified Crops*

That the governance of GMOs has been so controversial in South Africa may in part be ascribed to the rights-based arguments that support both sides of the debate. Proponents of GMOs maintain that they are integral in the fight against food insecurity, thus supporting the constitutional right of access to sufficient food. Opponents however argue that the manner in which GMOs have been regulated in South Africa infringes upon the right to environment and important procedural rights such as the right of access to information.

The lack of transparency surrounding GMO applications submitted to the Executive Council of Genetically Modified Organisms established in terms of the GMO Act (comprising ten officials representing different state departments, including the Department of Environmental Affairs), was challenged in the case of *Trustees, Biowatch Trust v Registrar: Genetic Resources, and others* 2005 (4) SA 111 (T). The veil of secrecy that appears to surround GM applications derives from a number of factors, including the protection of intellectual property rights. A section on confidentiality in the Act effectively allows the Executive Council, in consultation with the applicant, to withhold information concerning the application if it is necessary to protect their rights – even the summary of the scientifically-based risk assessment of the impact of the GMO on the environment and human and animal health.

The Executive Council is supported by an Advisory Committee of ten persons, eight of whom should be knowledgeable persons in the field of science applicable to the development and release of GMOs, one of whom should have knowledge of ecological matters and GMOs, whilst the last member must have knowledge of the potential impact of GMOs on human and animal health. It is not difficult to see immediately that the Advisory Committee is heavily biased in favour of the uptake of GM crops.

6.3.5 Interaction of laws and policies with other legislation, such as environmental and human rights laws

Although the CARA applies to rural areas throughout the national territory, soil conservation was historically split between the Department of Agriculture – responsible for soil conservation in the white areas – and the Department of Native Affairs – responsible for soil conservation in the “native” areas (Dodsen 2004). In practice this division severely limited the attainment of CARA’s conservation objectives in the former homeland areas. The 2002 *Policy on Agriculture in Sustainable Development* recognised the “crucial” role agriculture plays in achieving sustainable development, and acknowledged the many challenges to sustainable agriculture, including limited water resources, soil degradation, and destruction of biodiversity. A *Draft Sustainable Use of Agricultural Resources* was developed in

2003 and revised in 2007 to address some of these challenges, but has yet to be introduced in Parliament.

Since 1994, the identification of a number of agricultural activities as listed activities requiring prior environmental impact assessment in terms of the **NEMA** has strengthened the linkages between agriculture and the environment. For example, the “physical alteration of virgin soil to agriculture... for commercial... production of 100 hectares or more” requires submitting a scoping report and an environmental impact assessment report to the environmental authorities for approval. Other linkages to the NEMA include the relevance of a number of the environmental management principles set out in section 2 of this Act (for instance, that the development and exploitation of renewable resources and the ecosystems of which they are part must not exceed the level beyond which their integrity would be jeopardized), and the duty of care provision in section 28, which allows provincial and national government officials to order any person to take “reasonable measures” to prevent pollution or degradation of the environment from occurring, continuing, or recurring.

(i) Biofuels

The environmental impact assessment regulations in terms of the NEMA do not specifically require a prior environmental impact assessment before the planting of biofuel crops. Although the development of the *Biofuels Industrial Strategy* appears to have involved a consultative process, no other form of free, prior, or informed consent is required before planting biofuel crops. The need for biofuel entrepreneurs to obtain a water-use licence for their operations could involve some level of public participation and consultation, though this would lie at the discretion of the Department of Water Affairs or the relevant catchment management agency. In general, as stated above, however, development of the biofuels industry is regarded as a potential panacea for the alleviation of rural poverty.

(ii) Genetically Modified Crops

Although a notice and comment procedure is required for every application in terms of the GMO Regulations, and takes place in conjunction with a “scientifically-based risk assessment” (which may include an assessment of socio-economic impact), the procedure is distinct from the environmental impact assessment process under the NEMA. There is thus no independent assessment of the environmental and socio-economic impacts of proposed new GM crops, unless the Executive Council exercises its discretion to require that an environmental impact assessment under the NEMA should be followed.

The exponential rate at which GM crops have been adopted in South Africa, especially for the staple crop maize, have led some activists to maintain that the fundamental principle of democracy has been breached, since it is now almost impossible not to consume GM maize. Section 24(6) of the **Consumer Protection Act** does however require that producers, suppliers, importers and packagers of prescribed goods disclose the presence of GMOs in their products. In terms of current labelling regulations passed in terms of this Act, if a product contains GMO material of more than 5% it must be labelled as containing GMOs.

6.3.6 Effects of large-scale agriculture on Indigenous peoples and local communities

The impact of large-scale agriculture on indigenous people and local communities commenced as far back as the 19th century. Many African pastoralist farmers were stripped of their land, but some retained access. Three different forms of tenancy arose: Outright cash tenants, peasants who farmed as share croppers, and labour tenants, who farmed their portion of a white farm in paid rent in the form of a specified amount of labour (Bundy 2013). The **Native's Land Act**, 1913 disrupted all these relationships and precipitated the eviction of hundreds of black families from farms.

Subsequently, the **Native and Trust Land Act**, 1936 defined the spatial contours of the Reserves, which were to become the main source of migrant labour to white South Africa. Comprising 13% of the total land area of South Africa, the Reserves included about half the land with enough rainfall to be regarded as arable (ibid). Outside of the Reserves, the 1913 **Land Act** did little to alter social relations in the rural areas, and by the 1940s the number of Africans on white-owned farms had actually increased. Share-cropping and labour tenancy persisted.

The real blow to independent African agriculture occurred in the 1950s and 60s, when state subsidies enabled white farmers to mechanise production. As Bundy notes, “(t)he tractor proved to be the key weapon in class struggle in the countryside” (ibid). Between 1947 and 1961 the number of tractors rose from 12,000 to 122,000; by 1980 to 300,000. Because farmers were no longer reliant on the labour black African farmers could provide, hundreds of thousands of labour tenants were evicted. This increased the proportion of the African population living in the Reserves, placing increasing strain on the resources in these areas (ibid).

Underutilised land in the former homelands is being targeted for the growth of biofuel crops (*Biofuels Industrial Strategy*, 14). Development of a “modest” biofuels sector is in fact viewed as a chance to decrease poverty in rural areas, although apart from sugar cane, state subsidies for the production of biofuel crops are not envisaged (ibid: 13–14). In order to address concerns relating to food security, the *Biofuels Industrial Strategy* proposes that maize will not be used for ethanol production *in the initial phases of the strategy implementation* (ibid: 14). It is envisaged that bio-ethanol production from maize could commence at a later stage once the productive capacity of underutilised land in the homelands is established, and measures are put in place to guard against industry linked food inflation (ibid). No indication is given, however, of the measures that could be put into place.

One of the well-known arguments regarding GM crops is that they take the control of production out of the hands of indigenous peoples and local communities and place it in the hands of powerful transnational companies. The effect of Bt-Cotton on smallholder production in the Makhatini Flats is one of the most closely observed case studies of this phenomenon in South Africa. Although some studies have found that the adoption of Bt-Cotton increased the efficiency of farming cotton in this region (Beyers & Thirtle 2003), others have highlighted how the adoption of this technology increased irrigation in the area as well as the power of the sole cotton buyer in the region, the Makhatini Cotton Company, relative to individual farmers

(African Centre for Biosafety 2013).

7 NON-LEGAL RECOGNITION AND SUPPORT

7.1 Non-legal government support

Through a range of its provisions dealing with minority rights, equality and non-discrimination, and the interpretive role of the Constitutional Court, that the 1996 Constitution offers a legal basis for the recognition of the indigenous peoples is not disputed. However, the non-legal recognition by governmental agencies through non-legal means of indigenous peoples and local communities, particularly in relation to the governance and/or management of indigenous peoples and local communities' conserved territories, areas, and natural resources can at best be inferred.

The inclusion of **Indigenous and Community Conserved Areas (ICCA)** into National Biodiversity Strategy and Action Plans in South Africa has been a key aspect of the global call for non-legal recognition of the governance and/or management of indigenous peoples and local communities' conserved territories, areas, and national resources. The commitment of South Africa's government to this was stressed before the ICCA Consortium at the 11th Conference of the Parties to the Convention on Biological Diversity (Neumann et al. 2012). There is, however, evidence showing that support for this recognition already exists in key legislation that offer platforms and create mandates for agencies in relation to the protection of biodiversity in South Africa. Notable among this legislation are the **National Environmental Management: Biodiversity Act** 10 of 2004 (NEMBA) and the **National Environmental Management Protected Areas Act**, 2003 (NEMPAA). The NEMBA is the normative platform for the **South African National Biodiversity Institute (SANBI)**, which was established on 1 September 2004. Among other things, SANBI monitors and reports on the state of biodiversity, provides knowledge and information, and pilots best-practice management models in partnership with stakeholders in South Africa.

In particular, section 11 (c) of NEMBA offers a normative platform for community members to contribute to the activities of SANBI in the protection of biodiversity. The section states that SANBI is required to "act as an advisory and consultative body on matters relating to biodiversity to organs of state and other biodiversity stakeholders". In engaging with this mandate SANBI embarks on projects, for instance, the **Cape Flats Nature Project**, which reportedly employs a people-centred approach to conservation by incorporating community members and organisations in developing a strategy to create awareness about biodiversity conservation and cleaning up polluted areas (SANBI Annual Report 2010/11). In collaboration with the **Department of Environmental Affairs** and **Department of Rural Development and Land Reform**, SANBI also hosts the **Land Reform and Biodiversity Stewardship Programme**; this programme not only involves community groups across the country to share lessons on how land should be managed sustainably for the benefit of communities and the environment, but also establishes a network of learning concerning land reform, communal lands, and biodiversity stewardship (SANBI Annual Report 2010/11).

The **NEMPAA** also provides a basis for the activities of governmental agencies and SANBI to recognise and support, through non-legal means, the governance and/or management of indigenous peoples and local communities' conserved territories, areas, and natural resources. This is easily discernible in the objectives of the instrument, which embody community participation as a core element. Also, in defining local communities as "any community of people living or having rights or interests in a distinct geographical area", the NEMPAA set the standard for community engagement in its mandated activities.

While section 2(a) generally establishes that NEMPAA's objective is – within the framework of national legislation (including the **National Environmental Management Act**) – to provide for the declaration and management of protected areas, there are specific provisions of the instrument which accommodate non-legal means of supporting indigenous peoples and local communities' conserved territories, areas, and natural resources, such as **networking** and **social recognition**. In particular, section 2 (d), (e), and (f) respectively provide for the building of a representative network of protected areas on state land, private land, and communal land; sustainable utilisation of protected areas for the benefit of people without compromising the ecological character of such areas; and the promotion of participation of local communities in the management of protected areas, where appropriate.

In declaring a land as a protected area, section 35 of the NEMPAA provides that, among other things, the proposal can be initiated by the owners of that land acting individually or collectively. According to article 34(1)(b), in respect of a land which is held in trust by the State or an organ of state for a community or other beneficiary, the Minister may declare such area as protected only with the concurrence of the trustee and the community involved. As part of the management strategy, section 42 allows for a co-management agreement involving a local community or individual or for the regulation of human activities that affects the area. A co-management arrangement may confer management functions on the local communities and provide for: the apportionment of income generated from management; sharing of benefits; use of biological resources; access to the area; occupation of the area or portion of it by parties; development of economic opportunities within and adjacent to the protected areas; development of local capacities and knowledge and financial and other support to ensure effective administration. However, there are provisions that can serve as "clawback" to the overarching objectives of the NEMPAA. These include the provision in section 80(1), which empowers the Minister, in agreement with Cabinet member, to acquire land or any right in or to land, which has been or is proposed to be declared as or included in a national protected area. This can be achieved by purchasing the land or right; exchanging the land or right for other land or rights; or expropriating the land or right in accordance with the **Expropriation Act**, 1975 (Act No. 63 of 1975), and subject to section 25 of the Constitution, if no agreement is reached with the owner of the land or the holder of the right in or to the land.

Notwithstanding these "clawback provisions", the operation of statutory independent organisations such as the South African National Parks (SANParks) and SANBI shows, to some extent, that these instruments are capable of aiding non-legal

recognition and support for indigenous peoples and local communities' conserved territories, areas, and natural resources. For instance, in the Kgalagadi Transfrontier Park (KTP) located in the Kgalagadi area of the Northern Cape Province, there is evidence of SANParks' granting recognition to the Khoi-San, who self-identify as indigenous in the area. According to SANParks' policy on resource use, the organisation is "... fully committed to supporting the preservation of the Khomani San culture, through cultural activities including sustainable resource use, in the San Symbolic and Cultural Zone. Therefore, under mutually agreed conditions and in line with the co-management plan, according to Reid et al. (2004), the Khomani San, as an indigenous community, are entitled to use natural resources for cultural, historical, and ceremonial purposes in accordance with indigenous traditions. It is recognised that such sustainable resource use could include traditional bow hunting for cultural and ceremonial purposes" (Khomani San 2007).

The above signifies a form of administrative/developmental assistance aimed at encouraging and recognising the interests and rights of the Khomani San and the Mier, who are indigenous in that area. This inference is further confirmed by recent events inside the Contract Park, as documented by Thondhlana et al. (2011). According to the authors, the government decided to build a community lodge (!Xaus Lodge), an encouraging demonstration of positive and encouraging effort towards the welfare of the community. This is in addition to encouraging ecotourism, which supports creation of jobs and income generating opportunities, such as craft sales, for these communities. In particular, the lodge is understood as a means of earning rent from the concessionaire, providing jobs to community members, and teaching traditional skills to both San youths and tourists (Thondhlana et al. 2011).

Evidence of financial assistance as a form of non-legal support of indigenous peoples' initiatives and related efforts is discernible in the operation of the Kgalagadi Park. For instance, the National Lottery Trust Distribution Fund made available R4.8 million (US\$686,000) in support of the communities to pursue livelihood opportunities and cultural regeneration through sustainable use of their land (*ibid*). Also, in conjunction with the indigenous communities, sustainable resource use protocols for the Contract Park have been developed (Khomani San 2007), and the development of a monitoring and evaluation system (using cyber trackers) for sustainable resource use is being undertaken by the San technical advisors. However, while the Contract Park provides a window of opportunity for the local communities, ecotourism initiatives have been criticised for not improving livelihood security, and especially for a tendency to create temporary employment, and largely benefitting external players instead of local communities (Laudati 2010).

The completion of a Development and Management Plan (DMP) for Erin, a 5,000 hectare farm outside the park, for management as a fenced game farm, offers another model of recognition and enterprise for the Khoi-San community in that it incorporates an employment plan and opportunity for the Khoi-San a reconnection to the "wild". Additional positive enterprises involving the Khoi-San under the DMP include cultural protection and enhancement programmes, such as the Imbiwe, Bobbenjanskop, and Tierwyfie field schools in the park, and the Bushmen camps outside the park (Thondhlana et al. 2011).

SANParks has also demonstrated other means of facilitating the networking of indigenous peoples and local communities with civil society in relation to protected areas, as seen in its relationship with the communities around Kruger National Park (KNP). According to Statistics South Africa, the KNP is surrounded by three million people within 181 communities (villages), seven District Municipalities, and 68 Tribal Authorities. Pursuant to NEMPAA, a **Park Forum** was established to represent the various surrounding communities regarding co-management on matters and issues including regular review of management plans, proposed development plans, sustainable use of natural resources, and all park-related issues (SANParks 2011). These forums meet with KNP officials every month on a voluntary group basis. Interaction includes attention to community economic empowerment, ancestral claims, and cultural/spiritual claims. In various ways the forums benefit financially from the existence of the KNP; for example, through curio stalls at Numbi, Kruger, Phalaborwa, and Punda Maria entrance gates, where community members can sell local crafts directly to the public (SANParks 2011).

7.2 Non-legal non-governmental support

Non-governmental organisations have been involved actively in the non-legal recognition and support through non-legal means of the governance and/or management of indigenous peoples and local communities' conserved territories, areas, and natural resources. They contribute mainly in the form of advocacy, administrative and developmental help, financial assistance, and legal assistance, particularly demonstrated in the negotiation of claims relating to land and indigenous knowledge.

In relation to claims regarding the land belonging to the indigenous peoples, organisations that have played a critical role include: the **Working Group of Indigenous Minorities in Southern Africa** (WIMSA); the **San networking and advocacy organisation**, established in 1996 at the request of San groups to lobby for San rights; the **South African San Council**, a voluntary association established as part of WIMSA by the three San communities of South Africa in November 2001; and the Cape Town-based **South African San Institute** (SASI), a San service NGO which facilitates access of San-based organisations to funding and expertise (Chennels 2001). The South African San Institute is especially dedicated to providing San organisations with specialised legal and social services required for the ultimate success of land claims and other related challenges to the existing order. WIMSA was instrumental in establishing links with other groups internationally, and providing the necessary institutional framework for the successful land claim of the Khomani San (Chennels 2001).

Closely associated with NGO activities is the issue of indigenous peoples' knowledge in relation to certain plants found on their lands. For instance, the above NGOs were involved in the negotiation of the intellectual interests of indigenous peoples in relation to *Hoodia gordonii* plant. In June 2001 the UK *Observer* newspaper printed an article citing **Biowatch**, a South African NGO specialising in issues of environmental biodiversity, asserting that San traditional knowledge relating to the *Hoodia* formed an essential component of a Council for Scientific and Industrial Research (CSIR) patent that had been licensed to Pfizer for an appetite suppressant drug (Chennels 2007). At that time the San had already begun to advocate for their

rights to land and culture, and were thus institutionally prepared to challenge what they perceived as a clear breach of their intellectual rights. The Hoodia plant (also known as *Ghaap* or *!Khoba*) was but one of hundreds of plants used traditionally and currently by San communities for medicinal, appetite suppressing, and other properties. WIMSA assisted the South African San leaders to register a San Council to negotiate with the CSIR, the holders of the patent, on behalf of all San (Chennels 2007).

With the assistance of **Natural Justice**, on 19 August 2013, the indigenous San and Khoikhoi groups represented by the National Khoi-San Council (NKC) signed a historic benefit-sharing agreement with Cape Kingdom Nutraceuticals Pty under South Africa's Biodiversity Act 10 of 2004 (Natural Justice 2013). Cape Kingdom Nutraceuticals is a pharmaceutical company that processes buchu, a small shrub endemic to the Western Cape. Used for its essential oils, buchu's medicinal qualities are associated with the traditional knowledge (TK) of the Khoikhoi and San peoples. The agreement acknowledges that the Khoikhoi and San's medicinal plant knowledge predates that of subsequent South African inhabitants, and that the Khoikhoi and San are "legally entitled to a fair and equitable share of the benefits that result from the commercial development of the buchu plant" (Natural Justice 2013).

7.3 Key issues

Despite good intentions, the worldview of indigenous peoples/local populations may not be effectively reflected in the voice of key non-governmental organisations formed to articulate their concerns, in part because the institutional structure of some of these organisations may be too technical. For instance, WIMSA's institutional leadership and decision-making style may not reflect the San culture, where no one person would speak for others. Scholarship has described the cultural tensions that arise when outsiders appoint certain persons into positions of power (Chennels 2007; Schapera 1938; Suzman 2001), an action that can undermine indigenous peoples' own sense of leadership and hence cooperation. As such, there is need for more support in "indigenizing" these organisations' leadership structures to truly represent San aspirations.

The San still suffer from non-recognition of their language rights, a core aspect in the realisation of their cultural rights in conservancy. This is the result of a long-held assumption that the N/u language (the language of the San) was no longer in use anywhere (Crawhall 1999). While the provision of article of the constitution and recent political commitments to reviving the San language (Citypress 2012) offer reasons to be optimistic, recognition of their language rights is yet to be well concretised in political action.

The recognition of land rights, particularly in the case of the Khoi-San, remains a challenge. This is largely a result of the constitutional cut-off date of 1913, which technically barred the Khoi-San from applying for land restitution, due to the fact that their claims largely predated that period. The need to review this date in light of this fact was well-captured by the South African Rural Development and Land Reform Minister, Gugile Nkwinti, who, while speaking at the New Age Business

briefing in Cape Town, highlighted that the Khoi and San people were the first defenders of the land when the country was invaded by colonists. In his words:

“The Khoi and San were left out of the process even though they were the first to be dispossessed of their ancestral land before the notorious 1913 Native Land Act was passed, so now is time for us to go back and go beyond the cut-off date of 1913”

(SA News 2013; also see SAGI 2013).

Other outstanding issues exist around the social impact of protected areas on indigenous peoples. These include: restraints on the use of and access to natural resources; reduced influence of customary law; disorganisation of settlement patterns; disruption of informal social networks; undermining of livelihoods; loss of property; lack of compensation; poverty; disruption of customary systems of environment management; forced resettlement; weakening of cultural identity; broken ties with the environment; and intensified pressure on natural resources outside protected areas (Colchester2004).

8 JUDGMENTS

8.1 Case law and judgments that support or hinder indigenous peoples and local communities’ rights

Since its inception, the Constitutional Court in South Africa has decided a number of important cases relating to customary law. Not all of these have related to indigenous peoples or local communities’ rights of self-determination over land, territory, and natural resources.

The cases of *Bhe v Magistrate Khayelitsha* (Commission for Gender Equality as Amicus Curiae) 2005 (1) SA 580 (CC), *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC), and *MM v MN* 2013 (4) SA 415 (CC) dealt with issues of customary succession, marriage, and matrimonial property. One of the trends to emerge from this set of cases is the need to develop customary law so as to promote the interests of women. For example in *Bhe*, the customary principle of inheritance by the eldest son was declared foul of the Constitution, while in *MM v MN*, the majority of the court found that in allowing for a non-consensual second marriage, Xitsonga customary law fell short of the requirements of equality and dignity in the Constitution.

In these cases the court has consistently stressed the importance of recognising customary law as an original, distinctive, and independent source of norms within the South African legal system. They have also highlighted its flexible and evolutionary character, and have noted that caution, patience, and respect are required when determining its content. Nevertheless, they have also determined that customary law derives its force from – and does not supersede – the Constitution, as the afore-mentioned cases demonstrate.

For purposes of this report, the most significant judgments are *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC), *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC), *Tongoane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC), *Pilane*

v Pilane (unreported, (2013) ZACC 3, 28 February 2013), and *Sigcau v President of the Republic of South Africa* (unreported, (2013) ZACC 18, 13 June 2013). Three of these cases (*Shilubana*, *Pilane* and *Sigcau*) relate to the functioning of traditional authority, while the *Richtersveld* and *Tongoane* cases relate to indigenous rights of ownership over natural resources.

In the earliest case dealing with traditional authority, the Constitutional Court held in *Shilubana* (a case concerned with the development of the customary law by an indigenous group in order to recognise a female chief) that traditional authorities themselves have authority to develop customary law in line with the Constitution. Any attempt on the part of traditional authorities to bring their norms and values in line with the Constitution would in fact be welcomed.

In *Sigcau*, the court once again had an opportunity to consider a traditional leadership dispute, in this instance relating to the succession to the kingship of the amaMpondo community (see Box 6.4 above). The court refrained from deciding upon the difficult issues of customary law raised in the case (which related to whether the “right-hand house” of the amaMpondo could ever succeed, and whether an issue born of *iqadi* at the level of kingship took precedence over the right-hand house), instead deciding the case on a fairly narrow procedural ground; i.e. that the President had issued a notice deposing of the applicant’s kingship, and recognising the respondent in terms of the wrong statute.

In contrast, in the case of *Pilane*, the court had to decide whether to uphold interdicts granted by the High Court in favour of the *Kgosi* and traditional council of the Bakgatla-Ba-Kgafela, restraining members of a village unhappy with the traditional leadership from meeting as (or purporting to hold themselves out as) a traditional authority of the Bakgatla or Mothlabe village. In a split decision, the majority of the court held that the interdict was flawed, in that it infringed on the constitutional rights of freedom of expression, association, and assembly. The court held that the lawful exercise of these rights would ensure accountability in all forms of leadership and good governance. The minority decision of Mogoeng Mogoeng CJ and Nkabinde J, however, held that failure to uphold at least part of the interdict would erode the rule of law.

Regarding current disputes over natural resources, the need to balance respect for a traditional authority’s governance with respect for lawful dissent is clear. In the Bakgatla case, for instance, the dispute appears to be long-standing and linked to allegations of maladministration in the spending of natural resource revenues. The Constitutional Court’s majority decision allowing for dissent and debate within the tribe would appear to be a welcome intervention. In the Bengwenyama case, however, the traditional authority’s attempt to secure a mining right to community land was thwarted by a dissenting group that sided with a rival tribe and an outside black empowerment firm. In this case, the Constitutional Court’s minority decision, in requiring respect for the authority structures of the traditional authority, would appear to be more in support of the community’s overall welfare.

As regards indigenous and local communities’ rights over natural resources, in the *Richtersveld* case, the Constitutional Court was concerned with whether the Richtersveld community’s claim for restitution in terms of the **Restitution of Land**

Rights Act 22 of 1994 was valid. The community had effectively been dispossessed of their indigenous rights to the diamondiferous land in question prior to 1913, when the British Crown had annexed the land. During the 1920s, State alluvial diggings were established on the land in terms of the Precious Stones Act 44 of 1927, and registration of the land in the name of Alexkor, a state-owned company, subsequently took place. The Land Claims Court had rejected the community's claim for land restitution on the basis that the annexation and dispossession of the land after 1913 had not taken place in terms of racially discriminatory laws. The Constitutional Court rejected this position, holding that the nature and content of the rights that the Richtersveld community held in the land prior to annexation had to be determined with reference to indigenous law, and could not be determined by the Roman-Dutch based and English-influenced common law. The court found that the racial discrimination in this instance lay in the failure to recognise and afford protection to indigenous ownership, while at the same time protecting registered title. In this way, the Richtersveld community had been deprived of its indigenous land rights in a racially discriminatory fashion. The court also held that the dispossession in this instance extended to the rights to minerals and precious stones.

In contrast to the strongly affirmative effect of the *Richtersveld* decision on indigenous and local communities' rights to natural resources, the effect of the *Tongaone* matter has been mixed. This case was concerned with the constitutionality of the **Communal Land Rights Act 11** of 2004 (CLARA). This Act responded to a long-standing constitutional obligation on the part of Parliament to enact legislation to provide legally secure tenure or comparable redress to people or communities whose tenure of land was legally insecure as a result of apartheid policies. At issue was the "tagging" of the Act as a Bill in Parliament, an act that determined whether the Bill had to be heard and passed by both the National Assembly and the National Council of Provinces, or only by the former. Finding that the Bill did indeed impinge upon the rights of provinces, the Act was declared unconstitutional in its entirety. While this was welcome from the perspective of those who had argued that the Act was in any event deeply flawed, it has also meant that the regulatory vacuum relating to communal land rights has been perpetuated. A considerable degree of uncertainty and ambiguity regarding communal land rights thus remains, which is ordinarily not in the interest of the less powerful members of those societies.

In a recent case decided by the magistrates' court, *S v Gongqose & others* (Willowvale Magistrate's Court E382/10), the question of indigenous rights to fish in a marine protected area was considered. The accused had been criminally charged in terms of both the **Marine Living Resources Act 18** of 1998 and the **Environmental Conservation Decree No. 9** of 1992. The court adopted a position that affirmed customary fishing rights, dismissing most of the charges against the accused. The case is discussed more fully in Part 4 above. In South African law, however, the decisions of magistrates' courts do not set a precedent.

9. IMPLEMENTATION

Laws that potentially support the governance and/or management of indigenous peoples and local communities' conserved territories, areas, and natural resources, include the **Restitution of Land Rights Act**, 1994; **Communal Land Rights Act**, 2004; The **National Environmental Management: Protected Areas Act**, no. 57, 2003; and **National Environmental Management: Biodiversity Act** 10, 2004. These laws have successfully been used in claims made by indigenous peoples/local communities.

In terms of land restitution, the **Restitution of Land Rights Act** was passed within seven months of the establishment of the new democratic government in 1994, thus supporting section 25(7) of the 1996 **Constitution** that provides for restitution of rights in land to persons or communities who were dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices. The **Restitution Act** established the Commission on Restitution of Land Rights (Land Claims Commission) to investigate and process all land claims lodged by 31 December 1998. Khoi-San communities that have benefited from the land restitution programme include the Riemvasmaak Community, the Mier Community, the Kleinfonteintjie Community in Schmidtsdrift, as well as the Khomani San Community of the Southern Kalahari (Working Group Report 2005). The Act also was useful to the Makuleke community in the claim they successfully made against the government for the legal transfer of their land.

However, several specific issues undermine the implementation of laws and policies around land restitution. First, there is the central problem of the fixed cut off-date, particularly in connection with land claims by indigenous peoples. As mentioned earlier, this constitutional requirement discriminates against some indigenous peoples' claims. Second, the process of making land claims is often complex or too technical for indigenous peoples and local communities. Indeed, the high number of land claims still unsettled in the post-apartheid era remains a stumbling block for the implementation of ICCAs in South Africa. Third, certain claims deal with land in places that have already been proclaimed protected areas or used for other state purposes. For instance, only recently, a Khoi-San group invaded 19 housing units in District Six, Cape Town, claiming that the land is ancestral land belonging to the Khoi-San. The group of about 60 is refusing to leave the units despite a court-ordered eviction against them (SA News 2013).

In terms of management, the **National Environmental Management: Protected Areas Act** has allowed communities whose lands have been declared protected areas by the government to be involved in the management of the natural resources in those protected areas. The Act at least theoretically recognises the ICCAs, and paves the way for their implementation. Hence, in theory, this menu of legislation potentially offers communities a number of opportunities, including: the development of local management capacity, support to administration, implementation of co-management agreements, creation of protected areas and consultation with communities, delegation of powers to local community, income division and benefit sharing, use of natural resources, and economic opportunities (Holden et al. 2008).

However, effective implementation of the co-management described above is undermined by what could be called a fundamental unwillingness to truly decentralise. As Nelson (2010) notes, it is not clear from the law and policies that the so-called strategy of “co-management” is intended to equal decentralisation. Rather, there is still a demonstrable unwillingness at the centre to relinquish control over valuable resources provided “free” by nature. Illustrating this further, Whande (2010) cites the case of the Madimbo Corridor in the Great Limpopo Transfrontier Conservation Area, demonstrating how the trans frontier conservation and development model (“Peace Parks”) does not lend itself well to genuine devolution through Community Based Natural Resources Management (CBNRM). This is because it also occasioned forced removal of local people. Further, policy windows whereby communities might co-manage the protected area are constantly being closed, owing to the greater power of outside forces in biodiversity conservation, national security, and sovereignty. External drivers like global commerce and foreign investments still threaten conservation efforts. The evidence that the co-management concept can be misunderstood is also demonstrated in the debate around the draft protocol for sustainable resource use, against which the San have consistently maintained that they cannot be bushmen without hunting. In their view “the hunt, the dance, the healing and the connection to the land are all integral to their cultural identity, and when one component falls away, all falls away” (Holden 2007).

Finally, regarding the consultation of indigenous peoples/local communities in management and governance issues, there are also concerns around how laws/policies are implemented. For instance, the approach to the consultation of indigenous peoples/ local communities is questionable. The law does not make it clear who is to set the agenda of the consultation process, how consent of indigenous peoples is sought, and at what stage the government decides that obtaining consent is not necessary. Given these uncertainties, it is possible that decisions on governance are already predetermined in political arenas that indigenous peoples and local populations do not have access to (Nelson 2010). Even though indigenous populations and local communities may resist government decisions, their options may be limited by internal social divisions (Nelson 2010).

Finally, regulations with respect to natural resource use in protected areas and regulations dealing with protection of community rights in the case of the formation of new or extension of existing protected areas require substantial input from the communities. Similar observation has been made regarding the regulation relating to Community Contractual National Parks. A rule that stood out was a SANParks demand that a park staff member accompany the Khoi-San into the park. For the Khoi-San this implied that they were not trusted or that they did not have the knowledge or ability to navigate the park safely on their own (Hughes 2010).

10. RESISTANCE AND ENGAGEMENT

10.1 Indigenous peoples and local communities' engagement with or resistance of laws and policies

The history of conservation is filled with examples of exclusion and resistance (Jacoby 2001; Neumann 1998). In South Africa, resistance has taken different forms, including continuation of proscribed activities, refusal to compromise a cultural worldview, and other acts explicitly and implicitly expressing resistance and conflict.

When the conservation of the Mkuze Wetland on the coastal plain of KwaZulu-Natal made activities such as collection of firewood and medicinal plants, setting fires, fishing, and hunting illegal, local people perceived these restrictions as unjust, owing to negative consequences on local food security. Hunting was the most contentious issue, with custom and need both clashing with official views on poaching. As Dahlberg and Burlando (2009) reported, local hunters entered the protected area at night while game guards patrolled the area in search of poachers, and men on both sides were injured and even killed.

The unwillingness to compromise a cultural worldview can be seen as a form of resistance. In conservation, the notion that people should take responsibility for the protection of nature dominates. Some indigenous peoples and local communities hold different views about the protection of nature. Reporting on the conflicts and synergies between local Tsonga people and conservation authorities in and around the boundaries of Kruger National Park (KNP) in Limpopo Province, Anthony et al. (2011) demonstrate how a clash in worldview can create friction. The authors explain that the Tsonga hold it as irrational to think that the protection of the forest and wild animals is man's responsibility, believing instead that ultimately it is God's (*Xikwembu*) responsibility to ensure the sustainability of resources.

Policymakers also sometimes encounter clashes of worldview in negotiation. For instance in the Hoodia negotiation, the agreements required that the indigenous people form a "legal structure" in a corporate form that can be sued, open bank accounts, etc., and be represented by a spokesperson. This concept is quite foreign to the San, in whose culture social hierarchies were virtually unknown, and leadership a shifting notion depending upon the issue (Laird & Wynberg 2008).

10.2 Types of disputes that have emerged

At the heart of conservation efforts, land is often the object of competing claims between the state and indigenous peoples/local communities, with the latter historically struggling to repossess it. The Makuleke's land claim is testament to this fierce contestation. Central to their contestation was the restoration of full land rights to their community, with the intention of resettling at old Makuleke (Pafuri), inside the KNP (Ramutsindela & Shabangu 2013). The area has since been returned back to them through the Restitution of Land Rights Act, No 22 of 1994 with the conditions that they form the Makuleke Community Property Association ("CPA") in terms of the Community Property Association Act 28 of 1996, to take transfer of it, preserve its ecological integrity, and use it only for purposes consistent with the preservation of its ecological integrity (Maluleke 2012).

Earlier, in 1995, the Khoi- San made similar claims in respect of the Kgalagadi Transfrontier Park, which lay between Botswana and South Africa, and encompassed a part of their ancestral lands. Having successfully made their claim pursuant to South Africa's land restitution programme, the Khoi-San community was awarded land inside and outside the Kgalagadi Transfrontier Park in May 2002, together with the adjacent Mier community (Reid et al. 2004).

Other disputes between indigenous peoples and the state are over resource rights associated with conserved areas and territories. This was apparent in the Makuleke claim, where conservation groups favouring a policy limiting mining in the area were in conflict with the Department of Minerals and Energy (DME), which had issued prospecting rights for alluvial diamonds in and around the Kruger National Park (Carruthers 1995). For its part, the Department of Environmental Affairs and Tourism was opposed to mining, considering it a threat to the conservation status of the KNP (Ramutsindela & Shabangu 2013). The indigenous populations showed an interest in the mining option on this land in the hope to realise economic benefits through exploitation of their commercial rights in the same area (Steenkamp & Uhr 2000).

Also, while some land claims have been made successfully, there remains great doubt as to whether SANParks has actually realised its full potential in terms of so-called "co-management" partnerships with communities. The inadequate flow of anticipated benefits from joint management of parks, including the Richtersveld National Park, where the Nama landowners contracted their land into the park, is a reason for other contractual parks, especially those arising out of successful land claims, to doubt and resist co-management or similar arrangements.

10.3 Broad social movements or trends

To some extent indigenous peoples/local communities have constituted themselves into a movement that has helped secure their identity and reinforce their culture. WIMSA has been able to forge a sense of solidarity amongst the different San groups, who recognised their essential San kinship, despite linguistic, cultural, national, and other differences. At its General Assembly in 1998, WIMSA secured a significant early achievement in gaining a unanimous decision – subsequently confirmed on many occasions – that the San culture and heritage is a collective asset, owned and to be shared by all San across all boundaries. Heritage was understood to encompass all tangible and intangible aspects of culture, traditional knowledge, rock art, myths, and music. This important policy decision was of importance when the San came to negotiate their rights under the Hoodia case some years later (Laird & Wynberg 2008).

The involvement of NGOs in securing indigenous peoples/local communities rights in conservation constitutes an interesting trend in social mobilisation. For instance in the Makuleke case, there was serious backing from organisations including the Friends of Makuleke, which consisted of "highly qualified and articulate white South African professionals in community development and planning... (whose) arguments matched the esoteric language of the officials of SANParks" (Magome & Murombedzi 2003). Formally constituted in 1997 (a year after the land claim was gazetted), this NGO provided the Makuleke with technical support throughout the land claim (Spiereburg et al. 2011), while Moray Harthorn of the Legal Resource

Centre in Johannesburg coordinated the legal backing of the claim (Ramutsindela & Shabangu 2013).

10.4 Response of Indigenous peoples and local communities to laws and policies that affect them

The San have succeeded in generating vast quantities of information relevant to their land through a cultural resource mapping process involving outside research, recording of oral histories, and mapping work of their traditional lands (Chennels 2003). The lodging of land claims as evident in the cases of the Khoi-San over the Kgalagadi Transfrontier Park and the Makuleke over the old Makuleke (Pafuri) show that indigenous peoples and local populations are aware of the laws and actively responding to policies which affect them. However, such awareness is often reactive, that is, manifesting more in the exercise of redress than as information to prevent encroachment on their interests. Also, while co-management arrangement, as seen from the Makuleke region of KNP, offers an opportunity or platform for the participation of indigenous populations, doubt remains that this end is being fully achieved. A certain amount of mistrust among different stakeholders, particularly between the communities and conservation agencies seems embedded in the co-management arrangement, and there appears a lack of true appreciation for the opportunity presenting itself in terms of information-sharing and learning (Steenkamp & Uhr 2000, Holden 2007).

11. LEGAL AND POLICY REFORM

There is still room for institutional, legal, and/or policy reform in South Africa to safeguard the rights of indigenous peoples and local communities in conservation areas. Required reforms include:

- Putting an end to all forms of racial discrimination: Despite political promises, the language right of some of the indigenous peoples remains unrecognised. The San's language is still not one of the official languages in South Africa. Additionally, respecting the culture of indigenous peoples, recognising their land rights, relating to them as people, and regarding their rights as human rights are all imperative.
- Developing human resources across all employment categories: The capacity of indigenous peoples and local communities, as well as that of government officials, to fully involve indigenous peoples/local communities' claims needs development. Indigenous peoples require understanding of modern legal negotiation. Government needs to understand and respect how the indigenous peoples/local communities' customs function, and to add indigenous peoples' customs and traditions into mainstream view in the official negotiation process.
- Eliminating all discriminatory and exploitative labour practices: While it has been acknowledged that past inequalities and abuses of power have led to the exploitation of local cultures and community groups (The Development and Promotion of Tourism in South Africa 1996), this recognition is yet to be fully reflected in the protected areas where indigenous peoples still serve as rangers and labourers.

- Formulation and implementation of new policy on partnerships and co-management arrangements: Decentralisation of power to indigenous peoples should become central in co-management arrangements, which also need to respect the rights of indigenous peoples/local communities in the protected areas.
- Education on sustainable management of land resources: All stakeholders need to understand sustainable management practices in order to promote a holistic understanding linking conservation of both natural and cultural resources to development. This is important as environmental issues, like the customs of the indigenous peoples, are dynamic.
- Improved relations with indigenous peoples/local communities on benefit sharing: This is crucial as the concept of benefit sharing and its terms, particularly in relation to the operation of the parks, are often not clearly articulated in any official document. The government arguably retains a wide discretion on the matter.

In addition to specific reforms proposed above:

11.1 Institutional, legal and/or policy reforms required

To enable indigenous peoples and local communities to govern their lands, territories, and natural resources, it is important that their rights should be mainstreamed into the management of the protected areas. Parks officials should not be allowed to dominate the co-management process. Indigenous peoples and local communities should have an authoritative voice in decision-making relating to conservation arrangements on their lands. In fact, indigenous peoples and local populations should be encouraged and empowered to set up their own management system in accordance with protected areas law.

Along similar lines, provisions in existing laws that are incompatible with indigenous peoples/local communities' aspirations should be removed. For instance, the provision in the Constitution that stipulates the cut-off date for land claims should be amended. Also, the bar stating that the Land Claims Commission only has the responsibility to investigate and process all land claims lodged by 31 December 1998 should be removed. Both of the above can be affected through legislative amendment. Alternatively, the Constitutional Court can be invited to rule on the constitutionality of the time frame in the light of other provisions of the Constitution dealing with access to justice and discrimination. While amendment to the Constitution can be initiated by way of an Executive Bill, in exploring the latter option, non-governmental organisations can litigate the constitutionality of the provision, particularly if political will is found wanting to initiate a process for constitutional amendment.

12. CASE STUDIES

Two case studies are provided in this section. The case studies are adapted from literature on some of the communities discussed in this report. They have been subject of academic discussion in a number of papers.

Case Study 1: Mkuze Wetlands and Conservation Experiences

Adapted from: Dahlberg, A.C., and Burlando, C. 2009. **Addressing Trade-offs: Experiences from Conservation and Development Initiatives in the Mkuze Wetlands South Africa.** *Ecology and Society* 14(2): 37

Mkuze wetland is under the tribal authority of Mngqobokazi. People have lived in the area for several hundred years, and according to available census data, the community has about 8,000 people. The community is divided into wards, each administered by a headman, *Induna*, who reports to the tribal chief, *Inkosi*. Since 1994, power and responsibilities have been shared between the traditional leadership and an elected councillor. The area has recently seen some improvements in infrastructure, such as a local clinic, but overall the level of development is low, as is the educational standard, and the incidence rate of HIV and malaria is extremely high. Few people have formal employment, and reliance on pensions and child grants has become increasingly important. Many households have access to land in the fertile delta of the Mkuze River for subsistence and small-scale commercial agriculture. Cattle are grazed on communal land and in the protected areas, with the latter being especially important in drought years. People rely heavily on resources from the wetland, such as poles, firewood, reeds used for roofs and mats, ilala palm (*Hyphaene coriacea*) for baskets and beer, fish, and small game (Dahlberg & Burlando 2009). These resources are mainly used within the household or sold locally, although reeds, palm leaves, and crafts are also sold to middlemen or at tourist markets. Those sales have become an important source of income, especially for poor, female-headed households, which are growing in number as a result of the migration of men in search of work and the effects of HIV.

The coastal plain of KwaZulu-Natal is dominated by sandy soils, and the scattered wetlands provide pockets of productive soil important to local agriculture. The Mkuze wetland includes the floodplain of the Mkuze River, streams, pans, and swamps. The climate is moist-subtropical, and rainfall, averaging between 600 and 1,000mm, is highly variable and droughts as well as flood events are common. The area constitutes a mosaic of different habitats and vegetation types, where abiotic, biotic, and human influences have contributed to a high plant and animal diversity. The demarcation of state land and commercial farms for white farmers during the 20th century reduced the area available to the local black communities. As in South Africa generally, land is divided among different tenure regimes, categorised as communal, private, or state land. Today, Mngqobokazi is surrounded by protected areas on three sides: the Mkuze Game Reserve, established in 1912, the Phinda Reserve, a commercial wildlife reserve developed in the 1980s, and the iSimangaliso Wetland Park which dates back to 1895. These protected areas were formerly accessed by the Mngqobokazi community for settlements, fields, grazing, and hunting.

The Wetland Park, covering more than 300,000 hectares along the coast of KwaZulu-Natal, was proclaimed a World Natural Heritage Site in 1999. The area was later declared conservation land, and resource use was further restricted. Cattle grazing and the collection of reeds were allowed, but the collection of firewood and medicinal plants, setting fires, fishing, and hunting became illegal. This had negative consequences for local food security and was perceived as unjust by local people.

Hunting was the most contentious issue, where custom and need clashed with official views on poaching. Local hunters entered the protected area at night while game guards patrolled the area in search of poachers, and men on both sides were injured and even killed. Conservation field staff faced an impossible task, with orders to enforce regulations while simultaneously maintaining good relations with local communities. In 2007, Mnqobokazi gained land title to about 5,000 hectares inside Phinda Reserve, but here also the land would continue to be managed for conservation.

Case study 2: The case of Kgalagadi Transfrontier Park

Adapted from: Thonhlana, G. 2011. **Dryland Conservation Areas, Indigenous Peoples, Livelihoods and Natural Resource Values in South Africa: The case of Kgaladi Transfrontier Park, A Thesis Submitted in fulfilment of the requirements of a PHD in Science Department of Environmental Science.** Faculty of Science, Rhodes University.

The Kgalagadi Transfrontier Park (KTP) is situated in the Kalahari Desert in the Northern Cape Province of South Africa and Botswana. The South African part of the KTP was the San people's hunting and gathering territory before European settlement. Attached to the Cape Colony in the late 19th century, the land was subdivided by the government for white farms from 1897. The settlers were slow to take the newly surveyed farms, however, and the Cape Government decided to give them to "coloured" farmers instead. The coloured farmers struggled to make a comfortable living from their farms in the harsh Kalahari environment, however, and gradually joined the biltong (dried/cured meat) hunters on game hunting sprees. To protect the ecosystem from wanton degradation by the farmers and biltong hunters, the then-Minister of Lands, Piet Grobler, proclaimed the area a National Park in 1931.

By 1970, most San were totally dispossessed of their traditional land in the Kalahari, and spread all over South Africa in small groups or clans. In June 1992, representatives from the South African National Parks Board and the Department of Wildlife and National Parks of Botswana set up a joint management committee to manage the Kalahari area as a single ecological unit. Subsequent to the 1994 emergence of the democratic government in South Africa, the Khoi-San and Mier indigenous groups launched a 1995 land claim for return of their ancestral land rights in the park (overlapping with that of the San, the Mier land claim included areas within the Park, from which they were also displaced when it was established in 1931).

By March 1999, Former Deputy President Thabo Mbeki signed an historic land restitution settlement with the Khoi-San and Mier tribes of Kalahari Bushmen. In March 1999, the first phase of the land claim was completed as the government returned 40,000 hectares inside the park, and 42,000 hectares of farmland outside the park to the Khoi-San and Mier respectively. In accordance to the terms of the final 2002 agreement, the South African Government further transferred the ownership of about 30,000 hectares of Park land, called the Mier Heritage Land, to the Mier community (Bosch 2005). It is reported that the Mier, in the face of a

desperate land need themselves, freely gave 7,000 hectares of their land to the San as a remarkable gesture of reconciliation, since they had displaced the San in the Kalahari in the 19th century.

The restitution of communal land rights procedure in South Africa involves an observance of the **Communal Property Associations Act 28 of 1996**, which enables communities to form Communal Property Associations (CPAs) for the purposes of acquiring, holding, and managing property on a basis agreed to by members of a community. As such, the transferred land was to be used for the benefit and development of the Khoi-San members of the overall Communal Property Association (CPA); that is, registered co-owners of this land.

The land within the KTP that was transferred to the San and Mier communities functions as a jointly owned Contract Park (a combination of San and Mier heritage land) known as the !Ae!Hai Kalahari Heritage Park. The aim of the Contract Park is to enable ecotourism opportunities, including hunting, camping trails, walking trails, and a tourism lodge, for the benefit of the communities. Presently a commercial partner is operating! Xaus Lodge (owned by the communities) while ensuring that the interests of and benefits to the partner (theoretically at least) do not supersede those of the owners. SANParks (the national conservation authority) and the two communities co-manage the Contract Park through a Joint Management Board (JMB). Other actors such as NGOs, Department of Land Affairs, San Technical Advisors, and the San Traditional Council are involved in advisory roles.

The benefits from the Contract Park so far are only in the form of job opportunities (employment and crafts selling), and the generated income does not directly accrue to either San or Mier households. The income is reportedly used for maintenance of !Xaus (the community lodge), and general development of the San and Mier area (housing, water, etc.). Apart from ecotourism ventures, the co-management agreement in theory allows the San to carry out cultural practices, hunt (in a traditional manner), and collect culturally important wild foods and medicines. However, traditional use of wild natural resources in the Contract Park is still curtailed and hunting has not yet happened.

13. ADDITIONAL COMMENTS

Legal and non-legal recognition and support for indigenous peoples and local communities' conserved territories, areas, and natural resources are mutually reinforcing. Unless there is adequate legal recognition, non-legal recognition and support cannot be effectively conceived or implemented. Similarly, unless there is effective non-legal recognition and support through non-legal means, including social recognition, advocacy, developmental help, financial assistance, networking, and legal assistance, legal recognition is hollow.

It is difficult to imagine that external threats, namely systemic pressures on the environment and biodiversity worldwide, the direct pressures on indigenous peoples and local communities and their territories and resources, and inadequacy of legal recognition, will be resolved without a clear legal text on the terms, roles, and responsibilities to achieve this end. Having said that, it is misconceived to expect that

law and policy on their own are enough. The soft platform provided by non-legal means can, at the very least, help in actualising the provisions and commitments under law and policies. This is particularly the case in South Africa, where some laws such as the **Restitution of Land Rights Act**, 1994; **Communal Land Rights Act**, 2004; the **National Environmental Management: Protected Areas Act**, N° 57, 2003; the **National Environmental Management: Biodiversity Act** 10, 2004 and the Communal Property Associations Act 28 of 1996 allow for institutions and initiatives that can be engaged with for the recognition, and support of indigenous peoples and local communities' conserved territories, areas and natural resources.

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