THE USE OF LAND RESTITUTION AS A MEANS OF PROTECTING INDIGENOUS KNOWLEDGE SYSTEMS FOR THE PURPOSE OF REALISING FOOD SOVEREIGNTY

BY

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DECLARATION REGARDING ORIGINALITY

I, Deborah Raduba declare that:

A. The research reported in this dissertation, except where otherwise indicated, is my original research.

B. This dissertation has not been submitted for any degree or examination at any other university.

C. This dissertation does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.

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ABSTRACT

This mini-dissertation will explore the Indigenous Knowledge Systems and food sovereignty in light of South Africa's stance on land restitution. It will critically discuss Indigenous Knowledge Systems as they relate to food which will include farming and preservation methods, and the sustainable use of land. It will expand on the rights in question, such as the right to food in relation to Indigenous Knowledge Systems and food sovereignty. Furthermore, it will analyse the necessity of food sovereignty for indigenous communities; draw the links between preservation of Indigenous Knowledge Systems and the realisation of food sovereignty; and carefully consider whether land restitution is a suitable tool for protecting Indigenous Knowledge Systems. The mini-dissertation will do this by considering foreign jurisdictions and relevant legislation such as the Constitution of the Republic of South Africa, 1996, the Restitution of Land Rights Act 22 of 1994, the Communal Land Rights Act 11 of 2004, and the Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill of 2004. It will conclude by recommending ways in which indigenous knowledge systems can be protected by access to land.

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1. CHAPTER ONE- INTRODUCTION

INTRODUCTION

South Africa is known as the rainbow nation because of its diversity. What contributes to South Africa's diversity is not only the people but the history, values, traditions and the culture that the peoples share. Amongst its diverse population, there exist indigenous people - people that have a specific right based on their entrenched historical and cultural ties to a geographical area[1] and who still uphold indigenous practices. Throughout history these people have practiced their way of life on land in relation to the homes they lived in, subsistence farming (ploughing and grazing fields) and accessing natural resources(water, soil, timber and mined minerals).[2] The western world was developing with technology which allowed travel and voyage across the continents. The manifestation of these developments led to forcing western ideologies on indigenous people in the form of colonialism.[3] Colonialism and later the apartheid regime in South Africa institutionalized discriminatory and grossly oppressive practices that had an innumerable impact on the lives of indigenous people. As a result of the past racially discriminatory practices, many indigenous peoples' way of life (knowledge systems and practices) was critically disrupted and ideologies that served the dominant race were imposed on these people. Despite these disruptions, many traditional cultures have managed to retain their way of life by passing them on to the next generation orally. The world we live in now focuses on materialism and individualism. Given the global issues that we are faced with it is evident that these concepts are not without fault and only benefit a select few. South Africa has moved closer towards concepts of the west but could it be that that which has been abandoned is where there is the most to learn.

Land is central to any civilization.[4] Indigenous people were dispossessed of their ancestral land due to past racially discriminatory practices. This research study will

[1] 'Indigenous Peoples Literature' available at http://www.indigenouspeople.net/ ,accessed 24 June 2019.
[2] E Green 'Productions systems in Pre-colonial Africa' in Frankema, E *The History of African Development* (2015) 8.
[3] Ibid.
[4] T Shultz 'On the Economic Importance of Land: Reply" (1967) Journal of Farm Economics 735.

explore the meaning of land to an African, specifically Africans that observe Indigenous Knowledge Systems ("IKS"). IKS is defined by Grenier as being: "… the unique, traditional knowledge existing within and developed around specific conditions of women and men indigenous to a particular geographic area".[5]

It is therefore important to look at land-use in South Africa in pre-colonial context, colonial/apartheid context and post-apartheid context. There was no concept of ownership before colonialism, the land vested in the group as a whole.[6] Ownership did not operate as it does in the South African common law system and the land was not bought or sold.[7] In pre-colonial times the indigenous peoples of South Africa had vast land, their main economic activities being farming and herding.[8] The indigenous communities occupied the land and used it for agricultural purposes.[9] The weather conditions and the availability of water were contributing factors in determining where and how the indigenous people lived.[10] Subsistence farming was dominant as there were no trade routes or market places. The value of livestock, especially cattle had social and ritual importance rather than economic.[11] People had access to land to live on and use by virtue of being part of the community, and this was done mostly under traditional authority or chief.[12]

These relations that the indigenous people had with each other and their land changed significantly from 1913[13] under colonialism which created reserves to contain resistance to dispossession.[14] Some use rights survived the colonial dispossession of ownership after the cut-off date.[15] However, the rights that still existed suffered dispossession again due to apartheid.[16] Subsequently the apartheid system through a

[5] L Grenier Working *with indigenous knowledge: A guide for researchers* (1998).
[6] B Cousins "Characterising 'Communal' Tenure: Nested Systems and Flexible Boundaries" (eds) *Land, Power and Custom* (2008).
[7] Ibid.
[8] W Du Plessis 'African Indigenous Land Rights in a Private Ownership Paradigm' (2011) 14 *P.E.R* (2011) 48.
[9] Mclachlan, JN The History Of The Occupation Of Land In The Cape Colony And Its Effect On Land Law And Constitutionally Mandated Land Reform (LLD Thesis, University of Pretoria, 2018) 27.
[10] Du Plessis op cit note 8.
[11] Ibid.
[12] Cousins op cit note 6.
[13] This date is significant for the purpose of this study because s25 (7) of the Constitution makes reference to that date although dispossession did occur prior to that. This will be discussed in more depth in chapter three.
[14] Ibid.
[15] Dube, P Reconsidering Historically Based Land Claims (LLM Thesis, University of Stellenbosch, 2009) 30.
[16] Ibid

series of racist laws[17] set aside a small portion of South Africa's land for black people and prescribed the conditions under which indigenous people could use the land.[18]

Currently, in the post-apartheid period, indigenous people observe indigenous practices that are governed by customary law (including customary land law) a source of law recognised by the Constitution of the Republic of South Africa ("the Constitution").[19] In South Africa the territories of land subject to customary land law are, in most cases, registered under state ownership, according to The Interim Protection of Informal Land Rights Act (IPLRA).[20] The state owns such property subject to 'communal' or 'indigenous' title.[21] As mentioned above, in such systems, rather than individual ownership of land, land use and occupation is communally-held.[22] The difficulty since 1994 has been how to merge these forms of land law with other forms in a way that does not result in inferior rights for people living on communally-held land where customary law is applied. Sachs states that the approach is not to establish a hierarchy of who should be afforded the rights but rather consider all the relevant factors to find a balance. [23]

Land ownership in South Africa is a controversial issue that must be addressed with sensitivity and scrutiny. The protection of people who already had property rights, as opposed to those who were to receive restitution to adjust the imbalance of ownership caused by the apartheid regime, was discussed during the drafting of the Constitution.[24] The compromise between the two is evident in the final Constitution[25] which has provisions which give Parliament the task of developing legislation to address and remedy the land dispossession[26] that occurred in the past and compensate occupants for the expropriation. [27]

[17] Relevant discriminatory laws is discussed in chapter three.
[18] Ibid.
[19] Constitution of the Republic of South Africa, 1996 s 211(3).
[20] S 1(iii)(a)(ii) Act 31 of 1996.
[21] Ibid.
[22] Interim Protection of Informal Land Rights Act 31 of 1996.
[23] Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC) para 23.
[24] A Chaskalson "Stumbling towards section 28: negotiations over the protection of property rights in the interim Constitution" (1995) *SAJHR* 225.
[25] Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) 43.
[26] Chaskalson op cit at note 23.
[27] Ibid.

This research will assess whether the various legislative measures that were promulgated post-1994 had been effective (specifically the Restitution of Land Rights Act),[28] by looking into the actual content of the legislation and by analysing its execution. The study will do so from the perspective of indigenous people by looking into what the land means to them. The focus is primarily on restitution rather than redistribution because the land that is in question for these individuals is land that is regarded as sacred because it has belonged to their ancestors for many generations.[29] Land can have many uses, especially in the industrialized and technological world that we live in today. The research intends to focus on land for a basic use which is to grow food and to highlight its importance in contrast to the other needs of land in South Africa, given the issue of food security in the country. This is where the concept of food sovereignty plays a role because land is what is needed for indigenous practices to continue, including a means by which indigenous people will have access to food (which is a right in the Constitution)[30] in a manner that they find fit according to their traditions.

The definition of food sovereignty is as follows:

> "*Food sovereignty is the right of peoples, communities, and countries to define their own agricultural, labour, fishing, food and land policies, which are ecologically, socially, economically and culturally appropriate to their unique circumstances. It includes the true right to food and to produce food, which means that all people have the right to safe, nutritious and cultural appropriate food and to food-producing resources and the ability to sustain themselves and their societies.*"[31]

It is evident from this definition that there is an inextricable link between land and the right to food.

The research will show why IKS is intellectual property and should be protected as such. It will show that for the knowledge that IKS holders have (farming and preservation methods) to be well imparted and to be a continued practice land is a

[28] Act 22 of 1994 Act and the Amendment Act 15 of 2014.
[29] AK Barume Land Rights of Indigenous Peoples in Africa (2010) 52.
[30] Constitution of the Republic of South Africa, 1996 s 27(b).
[31] M Winffuhr 'Food Sovereignty: Towards democracy in localized food systems' 2005.

central and necessary component. Essentially indigenous people need the resources to continue their practice and preserve it.

This dissertation intends to shed light on the role that access to land related rights plays in food sovereignty. It will address elements of food sovereignty which include access to land and the right to food. It will then demonstrate how IKS can be protected by access to land use. The dissertation will then examine the reasons behind the current state of land restitution and the effect that this has on people who observe IKS (as mentioned above, this will be done through analysing Acts of parliament and court decisions that govern this area of law).

The study is significant because it seeks to draw attention to the role of IKS in the present day and in so doing, highlight the position of people who were dispossessed by previous racially discriminatory practices, not just dispossessed in terms of land, but also in terms of their way of life. Thus, it intends to engage in the nationwide conversation about land reform, but from a legal perspective rather than economical.

RESEARCH QUESTIONS

Research questions are as follows:

1. Why is food sovereignty necessary for indigenous communities?

2. How does the preservation of IKS help to realise food sovereignty?

3. To what extent has land restitution been used as a suitable vehicle for protecting IKS and how it can be used as a means to protect IKS?

4. Through a consideration of experiences in some foreign jurisdictions (Australia, Canada, the United States of America("USA") and New Zealand)[32] facing similar historical marginalization of indigenous people, how can land restitution be used more effectively as a means for protecting IKS for the purpose of realising food sovereignty?

5. What is the practical use of IKS for agricultural purposes across the globe?

RESEARCH METHODOLOGY

[32] The reason as to why these jurisdictions were chosen is discussed in chapter three.

The research design is quantitative (desktop) research which is done to quantify variation. The purpose of the study is to research existing structures that are meant to safeguard IKS and then assess the reasons for the shortcomings. By using this method, this study will critically analyse existing approaches against the values of the Constitution and find a resolution that is just and equitable. The dissertation is a response to a legal question and the response will be found by looking at various legal authorities. Case law that has dealt with land reform and/or indigenous peoples will be discussed, as well as legislation. In addition, foreign law (Australia, Canada, New Zealand and the USA because of the similarities of the historical context), international law (to look at whether the measures South Africa has taking is consistent with international standard)[33] and literary works that have contributed to the study of IKS will also be considered. The practical use of IKS will be discussed to show how traditional practices can be developed with the intervention of the state.

LIMITATIONS OF THE STUDY

Although there is an ongoing conversation in South Africa about land ownership,[34] there has been little focus on food security or IKS. The dissertation thus intends bringing together these two themes. This dissertation is limited to the importance of land with reference to the themes mentioned above, despite there being a number of other uses for land in South Africa.

The African Research Institute has an article titled *Five Things to Remember when Researching Africa*[35]. The author states that the five important things to remember when researching Africa is that Africa does not exist in a bubble (historical and international impact), a multi-disciplinary approach is essential (think expansively beyond the research focus), never stop developing relationships, conduct yourself with integrity (be impartial) and step outside the academic bubble. The limitations to the study are

[33] Relevant international instruments are discussed in the literature review and throughout the research.
[34] Makombe, G. "Land Reform in South Africa: The Conversation That Never Took Place" (2018) The Qualitative Report, 23(6), 1401.
[35] 'Five Things to Remember When Researching Africa' available at https://www.africaresearchinstitute.org/newsite/blog/5-things-to-remember-when-researching-africa (accessed on 29 October 2018).

that the issues faced with indigenous peoples are complex and have not all been addressed. The research is limited to indigenous people's rights surrounding land use for the realisation of food sovereignty.

A more important limitation is that this dissertation is written and researched from a western paradigm and constructs because a study such as this stems from western academic systems. Although the nature of the research has been approached with the suggestions by the research institutions that deal with indigenous cultures, because of the history of colonialism and colonial systems, a western influence is inevitable.

LITERATURE REVIEW

This literature review provides an overview of literature on themes that are in the dissertation. It is important to note that throughout the search for sources, there was no source that incorporated every component of the dissertation. The research topic for the dissertation is a necessary perspective because of this. The aim of the literature review is to ascertain key information for the quantitative research that will contribute to the aim of the study. The literature discussed below gives a general background to the current arguments around the themes of the dissertation topic.

The Constitution and Legislation:

- Constitution of the Republic of South Africa, 1996:

  The Constitution is important for the research because rights relating to Land Reform are found there. The provisions in the constitution are the basis from which the rights around land arise. S 25 deals with constitutional property rights. The sections that concern this research are the reforming clauses. S 25(5) to 25(9) give a Constitutional claim for those who were dispossessed because of racially discriminatory laws, specifically s 25(7). These sections allow for programmes to be developed according to the standards of equality and fairness of the Constitution.

  S 25(4) (a) makes it clear that the purposes of reform are in the public interest.

  S 25(5) places a duty on the state to take measures "to foster conditions which enable citizens to gain access to land on an equitable basis".

S 25(6) deals with communities whose tenure of land is insecure as a result of past discriminatory practices.

S 25(7) provides for restitution of specific land to people who were deprived of that land after 1913 as a result of racially discriminatory laws or practices.

There are also various provisions in the Constitution that deal with customary law and practices.[36] Those provisions are relevant to show the place that IKS has in South African law.

The Act of Parliament passed to give effect to the provisions that are relevant for this study is the Restitution of Land Rights Act[37] (Restitution Act) and Communal Land Rights Act.[38] The Restitution Act was passed as a result of the Interim Constitution[39] (s121-123) and was in effect by the time the Final Constitution was adopted.

S 27(1) (b)[40] states that everyone has a right to have access to sufficient food and water. S 27 therefore requires that the state must not hinder access to food and that it must take reasonable legislative and other measures to advance access to food and water.[41] It is from this section of the Constitution that I will draw the basis of my argument for food sovereignty.

- Restitution of Land Rights Act 22 of 1994:

  Land restitution is governed by this Act. It is for those individuals or communities who were dispossessed of a right in land as a result of past racially discriminatory laws or practices. The Act sets conditions which allow them to claim back the land of which they were dispossessed, or alternative land, or receive equitable compensation. This Act is important for this research because it is the source of law which engages with adjusting the imbalance that was caused by the colonial and apartheid regimes. An analysis of this Act and its

[36] These rights are discussed in chapter two.
[37] Act 22 of 1994.
[38] Act 11 of 2004. The Act was declared unconstitutional by the Constitutional Court in 2010 in the case of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* and has not been replaced.
[39] Constitution of the Republic of South Africa Act 200 of 1993.
[40] Constitution of the Republic of South Africa, 1996.
[41] D Brand 'Food' in Woolman, S (2ed) Constitutional Law of South Africa (2013) 56C-1.

application will determine whether its purpose has been achieved and why shortcomings exist. Furthermore it will discuss the 2014 amendment which was interdicted. The discussion will take place through looking at the two judgments on the amendment act (*Land Access Movement of South Africa v Chairperson of the National Council of Provinces and Others*[42] and *Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others.*[43]*)* The aim of analysing this statute will be to determine whether the legislation has addressed land restitution and how the latest developments have affected the process.

- The Protection, Promotion, Development and Management of Indigenous Knowledge System Bill of 2014.

  The above Bill, if enacted, will set protections for IKS. Its relevance for this study is that it emphasizes that IKS is in need of protection measures to ensure its existence and confirms why it has a *sui generis* status under intellectual property law. However in order for this Bill to have its envisaged protection and development, access to land is necessary first.

International Instruments:

- The International Covenant on Economic, Social and Cultural Rights, 1966 ("ICESCR")

  South Africa signed the CESCR in 1994 but it was only ratified on 18 January 2015 and came into force on 12 April 2015.[44] The specific articles in the treaty lays the foundation for signatory countries to adopt policies to protect all individuals, including in this instance, indigenous peoples. South Africa has not enacted any legislation as a result of the Covenant yet.

  Article 15 1(a) says that the state parties to the present Covenant recognize the right of everyone to take part in cultural life. In Article 15(4) it expands on this by saying that the state parties to the Covenant recognize the benefits to be

[42] 2016 (40) SA 635 (CC).
[43] 2019 (4) SA 619 (CC).
[44] 'The Government of South Africa Ratifies the ICESCR' available at https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr accessed on 16 January 2019).

derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

- The United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") of 2007

  The UNDRIP was adopted by the General Assembly in September 2007 and South Africa is a signatory to this declaration. Declarations do not have the same legal binding effect as conventions. The UNDRIP was drafted because existing international law instruments did not encompass the full spectrum of rights surrounding indigenous peoples, such as self-determination and sovereignty. The UNDRIP fully addresses these rights.

Case Law:

The right to food has not been litigated on exclusively. The right to food is a socio-economic right and the case law that will be examined include decisions that have dealt with socio-economic rights in general. This is relevant because it will indicate how the courts approach socio-economic rights.

There have been several land claims cases that have been litigated in court based on customary land law which revolve around ideas of communal use rather than private individual ownership. For the purposes of the literature review, an analysis will be conducted on how the principles of the cases can contribute to the study.

- *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC):[45]

  The Richtersveld community is a community living at the north-western border of South Africa. Historically, it occupied a large piece of land south of the Gariep River but it was removed from that land in the 1920s by the Union Government after diamonds were discovered on the land.

  One of the disputes in the case was whether the group had an indigenous title and claim to the land despite the fact that they were dispossessed before the cut-

[45] Case will be dealt with in more depth in chapter three.

off date of June 1913. It was argued that the customary rights were not recognized by the colonialists and therefore did not exist. However, the Constitutional Court allowed for their claim (collective right to ancestral land).

The case is important because of how the courts defined indigenous law and its status in South Africa. The case is a breakthrough for indigenous people and I believe that through the judgment that was given, a door was opened for indigenous rights to land to be further developed, in particular in respect of indigenous peoples' needs and practices. This can be seen in the quote below:

"*In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written... It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution*."[46]

- *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC):

  This case was based on the right of access to housing in terms of s 26 of the Constitution. The importance of this judgment for this research is how the courts dealt for the first time with the enforcement of socio-economic rights and the obligations of the state. The courts established a reasonableness test which is now the standard test for socio-economic rights.

- *Mazibuko and Others v City of Johannesburg and Others* 2009 SA 28 (CC) :

  The right to food is listed alongside the right to water in s 27(1). As mentioned above, the right to food has never been litigated on but the right to water was brought before the court in this case. The case also deals with the reasonableness test that was developed in *Grootboom*. Socio-economic rights litigation enables citizens to hold the government accountable for the manner in which it chooses to achieve these rights. The jurisprudence developed by this case assists in how, going forward, the right of food can be enforced.

[46] *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 53.

- *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (8) 741 (CC):

  IPILRA[47] was enacted to govern when customary law was applicable as recognized by s211(3) of the Constitution. It was unsatisfactory because it was not detailed enough and the Communal Land Rights Act[48] ("CLARA") was created to replace it. However, it was opposed by people living under customary law and struck down by the Constitutional Court in this case, one of the reasons being that the government did not consult with affected communities (public involvement).

  The importance of this case for the dissertation is that it emphasizes that the law being developed should correlate with the peoples' demands and should protect their rights, first as individuals and then as collectives. Although the unconstitutionality finding was on procedural grounds, the judgment dealt comprehensively with customary land rights.

Books:

- Bennet, T *Customary Law*: Juta and Company (2004)

  TW Bennet is a renowned author and has made many academic contributions to the field of customary law. The importance of this book in particular, for this research dissertation, is that it focuses on the core values that indigenous people hold to and how they resonate in our current constitutional dispensation. It defines concepts such as dignity, *Ubuntu* and communal concepts. Customary law is the field of law in which indigenous rights are accommodated. The book expands on how indigenous concepts are in line with the Constitution as some of the key concepts correlate with the principles and values of the Constitution. This perspective is significant because indigenous customs are often disregarded yet this author states not only how they are still relevant but also how the principles contain possible solutions to the problems that our society is faced with.

- Cohen, R *Satisfying Africa's Food Needs*: Lynne Rienner Publishers, (1988).

[47] Act 31 of 1996.
[48] Act 11 0f 2004.

This book was written in the 1980s and it raised issues with agriculture in Africa that still exist today. The book discourages the notion of going towards greater industrialisation as a means to address the food security issue in Africa. Instead the book promotes the idea of using methods that were used in Africa in pre-colonial times and expanding these methods so that individuals can make a means for themselves that does not involve industrialized methods that have proven unbeneficial to those who live in rural areas. The author's suggestion of how to deal with Africa's food needs adds value to the research because he goes into great detail on how indigenous methods will contribute to the food security issue in Africa. The belief that more industrialisation is the solution to poverty and food security is simply expanding the crisis, the author foresaw the greater crisis that we are faced with today.

- Cousins B "Characterising 'Communal' Tenure: Nested Systems and Flexible Boundaries" in Claassens A and Cousins B (eds) Land, Power and Custom (2008):

  One of the substantive issues in the case of *Tangaone* was how communities that observe indigenous practices together can live in harmony without their land rights being determined by a traditional authority. Ben Cousins goes in depth in suggesting a possible solution could be for communal rights in a customary law paradigm. He states that people living under communal customary arrangements should perhaps be provided with individual title to areas of occupation and/or use, even if shared (co-ownership) i.e. and not through the group as a whole as mediated by the chief. He further argues for the entrenchment of democratic forms of governance.

  The piece of writing is important in describing communal life amongst indigenous people. The contribution will assist in finding a suitable balance between the conventional legal framework and customary law.

- Currie, I; De Waal, J *The Bill of Rights Handbook South Africa*: Juta and Company, (2016):

Various provisions of the Bill of Rights are relied on for this research. The book expands on these rights with case law and academic writings. This served as a guide to the rights that are relevant for food sovereignty, IKS and land restitution.

- Eide, A *Economic, Social and Cultural Rights*: South Africa, (1995):

  This book has chapters that were contributed by various authors. The chapters discuss economic, social rights, cultural rights, and human right. The book discusses these rights based on international law. This book is important because once South Africa has ratified a treaty, it has international obligations. The treaties discussed in this book are ones South Africa has signed and ratified, most importantly for this research is CESCR. This treaty includes rights such as the right to self-determination, the right to food and rights of indigenous people. The book expands on the rights and what obligations are placed on the state.

- Hoppers, C *Indigenous knowledge and the Integration of Knowledge Systems* South Africa: New Africa Books, (2002):

  The value of this book is immense for the sake of this research. The reality is that we are living in an age that is obsessed with innovation and technology and to suggest that we abandon that and embrace indigenous knowledge systems in isolation would not be realistic. The book suggests methods of integrating the two; it suggests how we can incorporate IKS and the value that the system will have in the age that we are living in.

- Mukuka, *G Reap what you have not sown* South Africa: Pretoria University Law Press (2010):

  Overall, the book is about IKS and intellectual property. The book assists in providing various aspects relevant to IKS. The book goes further by giving historical and theoretical contexts.[49] It also highlights the importance of geography and IKS. Although the book does mention how application of indigenous knowledge can alleviate poverty through traditional food and how

[49] Mukuka, G *Reap What You Have Not Sown* (2010) iii.

IKS helps in the production and preservation of agriculture, it does not expand on this.

It advocates for the concept of traditional economy through IKS being developed through a legislative framework that upholds IKS values.

- Pienaar, JM *Land Reform* South Africa: Juta and Company (2014):

  The book comprehensively covers the legal developments of land reform in South Africa. The book sets out the laws that contributed to the state of land reform presently, it does so by exploring the past racially discriminatory legislation that led to land dispossession. The book is relevant for the study because it gives a historical context of land dispossession in South Africa. In order to understand the need for land restitution, there needs to be an understanding of what legal arrangements were used to execute dispossession – the book is relevant for this purpose. As stated above, the Constitution provides for redress for land dispossession as a result of past racially discriminatory practices, the book accounts for measures that have the state has taken since, this includes relevant legislation and major court cases.

- Woolman, S; Bishop, M *Constitutional Law of South Africa* 2 ed Cape Town: Juta (2013):

  This is a compilation of comprehensive writings on the study of constitutional law in South Africa. It is written by various legal academics, each contributing their expert opinion on sections that make up the Constitution of South Africa. The textbook is probably the most crucial source in this dissertation because it offers an in-depth constitutional analysis on the main components of the dissertation which are: land; the right to food; and community rights.

  The section on the right to food is extremely beneficial to this study because there are limited legal writings available on this area of law.[50]

Articles:

[50] Constitution of the Republic of South Africa, 1996 s 27(1)(b).

- Guye, P 'The Gap Between Indigenous Peoples' Demands And WIPO's Framework On Traditional Knowledge' (2007) CIEL:

  The World Intellectual Property Organization has played a crucial role in creating a global awareness of the rights of indigenous people. Its publications set guidelines for protecting indigenous people around the world. Furthermore, it reconciled intellectual property rights in human rights development.

  This piece of writing expands on ICESCR alluded to above. It sets the premise in terms of which indigenous peoples' rights should be acknowledged in policy. It highlights the value of the role that indigenous people play in society and how their knowledge contributes to sustainable use of resources and preservation of biodiversity on a global scale. It describes people as individuals who should be consulted in the development processes to protect their rights.

  The article assisted in indicating that the issue around IKS is a global one and it requires sensitivity and a different line of thinking when being addressed.

- Ndhlovu, F 'Land Reform and Indigenous Knowledge: A Missing Link in the Fast Track Land Reform Programme in Zimbabwe' Indilinga African Journal of Indigenous Knowledge Systems, Volume 3, Issue 2, (2004) p. 147 – 156

  The land reform movement in Zimbabwe was quite drastic and resulted in unfortunate economic consequences for the country. This is due to the fact that the land that was expropriated was land that provided agricultural resources for the country at large. The author acknowledges the fault in the process because the people to whom the land was given had no knowledge of the running of a commercial farm. In light of this, the author highlights that indigenous knowledge was the missing link in the land reform movement and had it been included, perhaps the repercussions would not have been as fatal. Zimbabwe is South Africa's neighbouring country and also has a history of colonial rule. Much can be learned from the procedure that was undertaken for land reform and South Africa can address the issue with caution.

- Ntlama, N 'The Application of Section 8(3) of the Constitution in the Development of Customary Law Values in South Africa's New Constitutional Dispensation' Potchefstroom Electronic Law Journal (2012):

This article speaks of the position of customary law in our legal system. The article discusses how s 8(3) can be relied on to apply customary law in our courts. This article is relevant to the research because in it the author speaks of the application of customary law in a practical and relevant way. IKS fall under customary law. It is important for the sake of this research that it takes into account the court and how it deals with indigenous peoples' rights.

- Pienaar, G 'The methodology used to interpret customary land tenure' Potchefstroom Electronic Law Journal (2012):

  This paper gives insight on the methodology the courts should follow to determine what the distinctive nature of customary land tenure is. Customary land law is not codified or based on legislation, the article suggests that the courts must rely on oral evidence given by the indigenous people as well as anthropological and sociological reports. The value of this writing for this research is that it addresses customary law in its complexities and gives recommendations on how to approach indigenous land rights.

- Pope, A 'Indigenous-law land rights: Constitutional imperatives and proprietary paradoxes' Pluralism and Development: studies in access to property in Africa (2011):

  The article draws from the Constitution and states that insecure land tenure must be made more secure via s 25(6) as well as customary law protection in s 39(3).

  The article engages in-depth with how the application of law in South Africa undermines indigenous land rights and does so in light of the cases mentioned above.

  The importance of the article is that it points out the problem in the law and mentions how policy development should be used as a means to resolve this. The article however does not necessarily provide solutions, it mostly draws attention to the problems and what the courts have said through case law.

- Moyo K and Mireku O "This Land is Mine": an analysis of the decision of the Land Claims Court in the case of the *Salem Community v Government of the Republic of South Africa and Others":*

In this article, the writers are analysing a restitution case that went before the Land Claims Court. The value of this article to the dissertation is the discussion of why land is significant to a community beyond its commercial value. The article goes further into discussing the historical context of land dispossession and its current effects in the country.

- Winffuhr M 'Food Sovereignty: Towards democracy in localized food systems' ITDG Publishing (2005):

  The article is important for making the link between food sovereignty and the right to food. Furthermore, it speaks about food sovereignty being a way to alleviate poverty, hunger and malnutrition. Embracing this concept would also assist in rural development and providing for sustainable livelihood. The article goes on to address access to land for smallholder farmers, however, it does not expand on this. The article addresses the role of government in ensuring food security and that it should be government's desire to create efficient policy by saying the following: "Food Sovereignty is the new policy framework being proposed by social movements all over the world for the governance of food and agriculture, because it addresses the core problems of hunger and poverty in a new and innovative way."

  Most importantly for the purpose of this dissertation, it suggests a special land policy for those who have been marginalized and how essential policy is and how essential land is as a productive resource.

CHAPTER OUTLINES

Chapter One will be the introduction which will set out the overview of the dissertation and will include the research methodology and the literature review.

Chapter Two will discuss food sovereignty, IKS and the right to food. The chapter will engage with how the preservation of IKS is necessary to achieve food sovereignty. Chapter Two will discuss in detail the value of IKS in the historical and present day context. The chapter will look at developments of the law in light of IKS in South Africa against the backdrop of international frameworks. Chapter Two will further discuss the right to food and its position in South African law as a socio-economic right.

Chapter Three will discuss land restitution and legislation relating to those previously dispossessed. The chapter will analyse the legislation that has governed indigenous people since the colonial and apartheid era. The chapter will discuss relevant case law for land restitution.

Chapter Four will analyse case studies of the practical application of IKS in agriculture in select indigenous communities across the globe. The chapter will highlight key features that contribute to the successful use of IKS.

Chapter Five will summarize all the chapters and will bring out the key components. It will further give recommendations in light of the research conducted.

2. CHAPTER TWO - FOOD SOVEREIGNTY AND INDIGENOUS KNOWLEDGE SYSTEMS

INTRODUCTION

IKS in South Africa has existed since before colonialism. We cannot deny its crucial place in society. This dissertation is limited to discussing the knowledge with regard to food, which includes farming, and preservation methods and sustainable use of land. This chapter will begin by setting out the core elements of food sovereignty which include rights that are set out in the Constitution[51] and that are relevant to the topic of the dissertation. Significant constitutional rights include firstly that everyone has the right to participate in the cultural life of their choice[52] and that persons belonging to a cultural community may not be denied the right to enjoy their culture,[53] and secondly, the right to food as set out in s 27(1)(a).[54] The reason this chapter deals with themes that are not ordinarily linked is because the definition of food sovereignty encompasses them all. The themes overlap, one is necessary for the other to be achieved. Land restitution is also part of the concept of food sovereignty, however as there is much to be discussed around it, it will be discussed specifically in Chapter Three.

The aim of this chapter is to answer the first two research questions:

- Why is food sovereignty necessary for indigenous communities?
- How does the preservation of IKS help realise food sovereignty?

This chapter is divided into four sections: The first section of the chapter deals with food sovereignty- how it came about as a concept and its relation to IKS. The second section looks at IKS and its origins. This second section outlines the history of IKS

[51] Constitution of the Republic of South Africa, 1996 s 30.
[52] Ibid.
[53] Ibid s 31(1)(a).
[54] Constitution of the Republic of South Africa, 1996.

and the current position it holds in South Africa. The third section will deal with the right to food as laid out in the Constitution as well as the measures that the state has taken to realise this right with specific regard to indigenous peoples. The fourth section will conclude this chapter by highlighting the correlation between the sections and how food sovereignty can be realised through IKS.

THE CONCEPT OF FOOD SOVEREIGNTY

There has been growing concern over rising food shortage in Africa, for many reasons, especially due to the growing populations, droughts, crop shortfalls, the increase of food importing costs combined with foreign exchange problems and debt crises.[55] It is accepted that the major reason for Africa's declining per capita food production is colonial and post-colonial encounters which emphasised urban development over rural development, often at the expense of rural development. [56] This was evident in apartheid South Africa and the migrant labour system [57] and its present day remnants. In theory, by looking at the resources that Africa has, farmers should be able to grow enough food to fend for themselves; however, this is not the case.[58] Colonialism brought about a different way of life that disrupted indigenous African systems which had been sustainable for decades prior; it is highly possible that the current failure may also be due to the great faith in western methods and technologies[59] and the abandonment of IKS.[60]

According to the book titled *Food Sovereignty*,[61] there has been global concern over the food price increase which inevitably exacerbated the conditions the rural poor were enduring. The food crisis, currently still underway, indicates that modern day agricultural development has not been successful at doing away with poverty or world hunger.[62]

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[55] R Cohen *Satisfying Africa's Food Needs* (1988) 1 and A Sasson 'Food security for Africa: an urgent global challenge' 2012 Agriculture and Food Security 1.
[56] ibid.
[57] 'The Migrant Labour System' available at http://www.sahistory.org.za/archive/the-migrant-labour-system accessed on 16 December 2017. People seeking employment would travel outside homelands/rural areas to find work in the urban areas.
[58] AK Barume Land Rights of Indigenous Peoples in Africa (2010) 52.
[59] Cohen op cit note 51.
[60] Due to the forced socio-economic and political systems of colonialism and apartheid over the centuries that held African customs with disdain.
[61] H Wittman et al *Food Sovereignty* (2010).
[62] Cohen op cit note 51.

There is a high rate of food and nutrition insecurity in urban and rural South Africa, a large number of people are without reliable access to sufficient food.[63] Statistics reveal that 26% of households are food insecure while 28.3% are at risk of hunger.[64] The African racial group experiences the highest rate of food insecurity which is 30.3%.[65] It is clear that accessing food constitutes a major crisis in South Africa.[66] Many of the people experiencing food and nutrition insecurity are indigenous people living in rural areas.[67]

The concept of food sovereignty came about as a reaction against the global industrialisation of agriculture which has often left people destitute. According to Wittman, "Food sovereignty is broadly defined as the rights of nations and people to control their own food systems, including their own markets, production modes, food cultures and environments."[68] This definition has emerged against the dominant neoliberal model for agriculture and trade.[69] The definition suggests that if people are given the proper means, they will be able to fend for themselves.

The past plays a crucial role in the current state of South African society. The colonisation period and apartheid regime in South Africa lasted several hundred years. [70]Amongst other racially entrenched laws the migrant labour system created huge socio-economic damage, ruined communities and families and left rural areas destitute due to the productive economic benefits of the labour only benefitting urban areas.[71] Apartheid played a huge rule in the neglect and stagnancy of development in rural area. Concepts such as food sovereignty seek to heal some of this damage by giving people the platform to choose a way of life that benefits them not only in nutritional value but culturally as well. It aims to empower people and give them the tools to pursue their

[63] Shisana O et al 'South African National Health and Nutrition Examination Survey' 2013 at 46 and The South African Human Rights Commission, 'The Right to Access Nutritious Food in South Africa' 2016-2017.
[64]Ibid.
[65] Ibid.
[66] The South African Human Rights Commission, 'The Right to Access Nutritious Food in South Africa' 2016-2017.
[67] Ibid.
[68] Wittman op cit note 57 at 2.
[69] The book by H Wittman discusses how the concept of food sovereignty came about and how through various discussions and engagements over the years, a core definition emerged which is widely accepted as the model for food sovereignty.
[70] J Pienaar *Land Reform* (2014) 54.
[71] Ibid 64.

own means of food consumption. It also gives government a framework of how such policy can be adapted to suit people's needs.

There is a conflict between the neoliberal models which advocate for governments to intervene with modern methods in the market instead of a model which would promote food sovereignty.[72]

The global movement towards realising food sovereignty was developed in 1996 by a movement called *La Via Compesina*[73] which catered for peasants, small-scale farmers, farm workers and indigenous communities. They argued that the economic and environmental crises relating to food were due to decades of globalisation and capitalist-based models of agriculture. They campaigned for food sovereignty around the globe. The Landless People's Movement[74] is the division of the movement in South Africa which advocates for the same thing.

Since its inception in 1996, a policy and framework[75] for food sovereignty have been developed, with the definition of food sovereignty containing the following elements:

- priority of local agricultural production to feed people locally;
- access of smallholder farmers, pastoralists, fisher folk and landless people to land, water, seeds and livestock breeds and credit (hence the need for land restitution);
- the right to food;
- the right of smallholder farmers to produce food;
- the right of consumers to decide what they consume, and how and by whom it is produced;
- the right of countries to protect themselves from under-priced agricultural and food imports;
- the need for agricultural prices to be linked to production costs and to stop all forms of dumping;
- the populations' participation in agricultural policy decision-making;

[72] Wittman op cit note 64.
[73] 'Food Sovereignty' available at https://viacampesina.org/en/food-sovereignty/ accessed on 19 December 2018.
[74] 'Landless Peoples Movement' https://viacampesina.org/en/landless-peoples-movement-lpm/ accessed on 19 December 2018
[75] Wittman op cit note 57 at 13.

- the recognition of the rights of women farmers; and
- sustainable livelihoods, living landscapes and environmental integrity[76]

The Food Sovereignty policy framework contains set principles that serve as a guideline for countries to adopt in their agricultural and food policies which favour indigenous peoples.[77] Indigenous peoples are often smallholders and landless farmers and who are in most cases hungry and malnourished.[78] The right to produce food and the right to food are therefore mutually linked.

Food sovereignty aims to end violations of the right to adequate food by reducing and ultimately eliminating hunger and malnutrition.[79] The right to adequate food is the basic right of each person to have access to safe, nutritious and culturally acceptable food.[80] The full enjoyment of the right to food is that all people need to have physical and economic access to sufficient quantities of safe, nutritious, and culturally appropriate food and food-producing resources, including access to land, water, and seeds.[81]

Access to resources that allows for production is a crucial element of food sovereignty. Indigenous peoples need access to use of their land, waters, genetic and other natural resources used for food and agricultural production. A policy is necessary to give indigenous people ownership and control of the land they work and returns in their territories.

Food Sovereignty and Food Security

The most dominant element to the right to food is the concept of food security.[82] The concept of food sovereignty is a broad one and is a more recent concept than food security. According to the Food and Agriculture Organisation of the United Nations ("FAO") food security is: "the physical and economic access to sufficient, safe and nutritious food by all people at all times to meet their dietary and food preferences for

[76] Ibid.
[77] Ibid.
[78] Wittman op cit note 57 at 12.
[79] The two overlap because the right to food is part of food sovereignty. Food sovereignty contains the right to food in its definition. The right to food is not expansive as food sovereignty. The distinction and similarities will be discussed below.
[80] Wittman op cit note 57 at 14.
[81] Ibid.
[82] Food security in its definition encompasses the right to food.

an active and healthy life."[83] Food sovereignty goes further than food security and even the right to food. Food security is more of a goal. The right to food focuses on the obligations of the state and allows for people negatively affected to have remedies in place (as will be discussed below). States have a large margin of discretion when approaching this concept).[84] Food sovereignty contains both these concepts which contributes to the broader definition which seeks to encompass all these concepts in order to address the need for food in all its variables. It has policy recommendations that not only include variations of vulnerable peoples but also aims to empower them. It was developed from a rural perspective, where most of the intractable poverty exists. All three terms are not mutually exclusive, they all play a role in addressing hunger and malnutrition.

Food Sovereignty is a concept that has been developed to improve the governance of food and agriculture and to fight the core problems of hunger and poverty in ways that do not force people to conform to mass industrialisation of agriculture.[85] It is a more liberal approach that allows for people to choose for themselves how they want to access food.[86]

INDIGENOUS KNOWLEDGE SYSTEMS IN SOUTH AFRICA

Defining Indigenous Knowledge Systems

According to the definition provided in the United Nations Environment Programme, there is no set definition for indigenous people. What is usually considered as indigenous peoples is cultural groups or their descendants that have historically occupied a specific region; their occupation of the region may have been disrupted by colonisation but despite this, they have managed to retain their distinctive cultural identity.[87] In most countries indigenous communities are the minority and thus laws are in place to protect them from being neglected.[88] In South Africa, the indigenous people are the majority of the population (this includes Sotho, Tswana, Pedi, Zulu,

[83] 'Food Security and Nutrition Around the World' available at http://www.fao.org/state-of-food-security-nutrition/en/ accessed on 11 November 2019.
[84] Wittman op cit note 57 at 23.
[85] Wittman op cit note 57 at 47.
[86] Ibid.
[87] 'Indigenous Peoples and Their Communities' available at https://www.unenvironment.org/civil-society-engagement/major-groups-facilitating-committee-and-regional-representatives-0 accessed on 5 January 2019.
[88] The United Nations Declaration on the Rights of Indigenous People, 2007.

Xhosa, Swati, Ndebele, Tsonga, Venda and the Khoi San). Although the indigenous people of South Africa are the majority, they were subjected to racial oppression due to colonialism and the oligarchic apartheid regime. These regimes left a legacy of low regard towards indigenous customs and as a result, indigenous customs are vulnerable to exploitation and even diminishment.

IKS is difficult to define from a western approach. Invariably it would confine it to a narrow and forceful definition which would result in elements of IKS being excluded. Defining IKS would need a more flexible approach, with each indigenous community choosing which one suits them best.[89] The most general and widely accepted element of IKS is the use value system approach.[90] This approach values knowledge as a way of life to commemorate, celebrate and teach. This is opposed to western and modern approaches where value is determined according to its commercial use.[91]

Despite the fact that past racially discriminatory practices have diminished the role and recognition of IKS, it still plays a significant role in the lives of indigenous people in South Africa especially those who live in rural areas and local communities.[92]

The South African democratic era seeks to address past wrongdoings as per the preamble in the Constitution. Indigenous peoples want to be respected, acknowledged and be given the opportunity to practice their beliefs and customs and to live out the community based knowledge systems such as skills, innovations, beliefs, experience and insight about their respective environments. Many of these people still rely on this knowledge to survive and that is exactly what they are doing at this stage, simply surviving whereas the right tools will empower not only themselves, but will also address the global issue of food security. IKS can play a role in society to educate the nation if given the right platform.

Throughout the world indigenous peoples and local communities have developed a wealth of traditional knowledge. Indigenous people have the right to maintain, control,

[89] This should be done with guidelines that are provided by the Centre in Indigenous Knowledge Systems. More information is available at http://aiks.ukzn.ac.za/about-dst-nrf-ciks
[90] World Intellectual Property Organization '*Protect and Promote Your Culture: A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities'* 2017.
[91] Ibid.
[92] Ibid.

protect and develop their cultural heritage, traditional knowledge,[93] science, technologies, knowledge of farming methods and attainment of genetic resources and seeds.[94] The state has taken some measures to recognise and promote this right, this will be discussed in more detail below.

Indigenous Knowledge Systems and International Law

International instruments become binding once South Africa has completed the process of ratification.[95] IKS is mentioned in CESCR, and the UNDRIP. From certain provisions in the covenants and declarations, it is confirmed that IKS is a human right and the international covenants and declarations serve to protect and promote it. The Covenants supports the definitions that encompass IKS.

Article 11 of the Covenant states:

> *1. The States Parties to the present Covenant recognize the right of everyone to an **adequate standard of living** for himself and his family, including **adequate food**, clothing and housing, and to the continuous **improvement of living conditions**. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*
>
> *2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be **free from hunger**, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:*
>
> *(a) To **improve methods of production**, conservation and distribution of food by making full use of **technical and scientific knowledge**, by disseminating knowledge of the principles of nutrition and by **developing or reforming agrarian systems** in such a way as to achieve the **most efficient development and utilization of natural resources;***
>
> *(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.*

[93] There is more to IKS and its practice but for the sake of this study, the focus will be on the knowledge of framing methods.
[94] World Intellectual Property Organization op cit note 86.
[95] Constitution of the Republic of South Africa, 1996 s 231.

This provision demonstrates that the state should commit towards the realisation of the right to adequate food by creating opportunities through policy. The realisation of IKS to address food security is a way for the state to execute its international obligations.

However, there has still been a neglect of economic, social and cultural rights and a slow process in clarifying the content of these rights and obligations on states.[96] The UNDRIP breaks down the obligations of the state towards indigenous peoples. The following provisions are important:

> *Article 8*
>
> *2. States shall provide effective mechanisms for prevention of and* ***redress*** *for: (a)* ***any action*** *which has the aim or effect of* ***depriving them*** *of their integrity as distinct peoples, or of their* ***cultural values*** *or* ***ethnic identities****;*
>
> *Article 11*
>
> *1. Indigenous peoples have* ***the right to practise and revitalize their cultural traditions and customs****. This includes the* ***right to maintain, protect and develop the past, present and future manifestations of their cultures****, such as archaeological and historical sites, artefacts, designs, ceremonies****, technologies*** *and visual and performing arts and literature.*
>
> *2.* ***States shall provide redress through effective mechanisms****, which may include* ***restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property*** *taken without their free, prior and informed consent or in violation of their laws, traditions and customs.*
>
> *Article 31*
>
> *1. Indigenous peoples have the* ***right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora****, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the* ***right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge****, and traditional cultural expressions.*

[96] See generally J Symonides "Cultural Rights: A Neglected Category of Rights" (1998) International Social Science Journal Vol.50.

The UNDRIP increases awareness to promulgate legislation and implements mechanisms to safeguard the indigenous ways.

Within these covenants and declaration, the recurring theme is the right to self-determination. The right to self-determination is the first Article of the CESCR. It states:

> *1. All peoples have the **right of self-determination**. By virtue of that right they freely determine their political status and **freely pursue their economic, social and cultural development.***
>
> *2. All peoples may, for their own ends, **freely dispose of their natural wealth and resources without prejudice** to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.*
>
> *3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.*

The article refers to more than the political status of peoples but also to their economic, social and cultural development and the right to freely dispose of their natural wealth and resources and their right not to be deprived of their own means of subsistence. [97] This means the right for people to pursue their economic, social and cultural development without interference and Government policies should enable this.

The African Charter provides in Article 17 that a state shall promote and protect the morals and traditional values recognised by a community. Article 27 of the Universal Declaration of Human Rights recognises the right to freely participate in the cultural life of the community.

The right to self-determination is *jus cogens* principle in international law. The principle is that all people have the right to determine and pursue their own political status and states have the duty to respect this right.[98] The right to self-determination has two aspects, namely external and internal.[99] The external aspect allows for state

[97] A Eide *Economic, Social and Cultural Rights* (1995) 83.
[98] J Dugard *International law* (2011) 31.
[99] Ibid.

sovereignty and independence; it is the right of people to be free from outside interference. After World War Two self-determination was a popular concept in the decolonisation process.[100] The internal aspect which is more relevant for the sake of IKS provides that people can decide their economic, social and cultural development; it gives people the right to choose for themselves what form of association they will have.[101] For self-determination to be realised, it is important that it is free from discrimination and the people are able to maintain their own social institutions.[102] The state has a duty to protect this right and advance it.[103]

Similar to Article 27 of the International Covenant on Civil and Political Rights ("ICCPR"),[104] the right to self-determination is individual based but it cannot be separated from the community as this right is practiced within a community and cannot meaningfully be practiced alone.[105]

Historical Developments for Indigenous Knowledge Systems in South Africa

Cultural and linguistic ties are a critical source of meaning for the majority of South Africans. There have been historical developments in South Africa for IKS.

S 30 of the Constitution states as follows:

> *30.* ***Everyone has the right to use the language and to participate in the cultural life of their choice****, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.*

This section deals with ethnic and religious beliefs which are a defining characteristic of political life in South Africa since colonial settlement.[106] S 31 of the Constitution further states:

> *31. (1) Persons belonging to a* ***cultural, religious or linguistic community*** *may not be denied the right, with other members of that community—*
> *(a) to* ***enjoy their culture, practise their religion and use their language****; and*
> *(b) to* ***form, join and maintain cultural, religious and linguistic associations*** *and other organs of civil society.*

[100] Eide op cit 93 at note 79.
[101] TW Bennet *Human Rights and African Customary Law* (1997) 13.
[102] Ibid.
[103] Constitution of the Republic of South Africa, 1996 s 235.
[104] Article 27, International Covenant on Civil and Political Rights 999 UNTS 171, concluded on 16 December 1966 and entered into force on 23 March 1976.
[105] TW Bennet op cit note 55 at 27.
[106] I Currie et al. *The Bill of Rights Handbook South Africa* (2016) 625.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

S 31 protects the interests of the community and s 30 ensures that individuals retain the right to participate within the cultural and the linguistic communities to which they belong.[107] Collective recognition is of significant importance.

Indigenous communities' interests lie in preserving their identity. Their interest lies in particular qualities of a relationship held together by something they share in common. The Constitution aims to protect cultural pluralism in South Africa. This is further indicated in s 235 of the Constitution which states the following on self-determination:

The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the ***right of self-determination of any community sharing a common cultural and language heritage****, within a territorial entity in the Republic or in any other way, determined by national legislation.*

John Locke's Letter on Toleration suggests that we could end civil uprisings by the state not dictating that its citizens conform to a certain behaviour deemed to be an ideal life and by ensuring that the state allows for religious, cultural and linguistic groups autonomy to pursue their own preferred way of life.[108]

In a pluralistic society that is South Africa, mutual respect is of great importance in order for the secular and the sacred to coexist. The role of the courts is not to force one sphere on the other but to recognise where each belongs and apply the law accordingly. In an open and democratic society, the law must acknowledge the diversity provided that no fundamental rights of a person or group are infringed.[109] The recognition of customary law in the Constitution allows for individuals and communities to engage in their traditional practices so long as they do not infringe other fundamental rights.[110] The customary law practices must be in line with the provisions of the Constitution.[111]

[107] Woolman, S 'Community Rights, Language, Culture and Religion' in Woolman, S (2ed) *Constitutional Law of South Africa* (2013) 58-49.
[108] J Locke *A Letter Concerning Toleration* (1632).
[109] Minister of Home Affairs v Fourie 2006 (1) SA 524 (CC), at paras 90–98.
[110] Bhe And Others V Magistrate, Khayelitsha And Others 2005 (1) SA 580 (CC) at para 41.
[111] Woolman op cit note 102.

African IKS has been perceived as primitive, savage like, barbaric and an inferior system that has no place in a 'civilised world'.[112] The notion was enforced that IKS was inferior when compared to the knowledge systems from Europe.[113] The effects of this have been long lasting. African customs were merely tolerated to the extent that they suited the greater colonial and apartheid agenda.[114] As a result, the development of customary law became stagnant and subservient to other systems of law. IKS has then and since been exploited by capitalists with higher bargaining powers.

Recent Developments Indigenous Knowledge Systems in South Africa

There have been developments aimed to redress the damage suffered by IKS due to past racially discriminatory practices. In 2004, parliament approved the adoption of a policy on indigenous knowledge systems, known as the IKS Policy. The Department of Trade and Industry formulated a policy document on the protection and commercialisation of indigenous knowledge.[115] The policy seeks to recognise and protect indigenous knowledge as a form of intellectual property and to enable and promote the commercial exploitation of such material for the benefit of the indigenous communities from which the material originated.[116] The Protection, Promotion, Development and Management of Indigenous Knowledge System Bill[117] aims to give IKS a *sui generis* status within the Intellectual Property ("IP") field. The Act is in line with international obligations from WIPO and UNDRIP. IP generally aims to monopolise an idea and make money out of it.[118] Development is defined by the standard of mirroring western lifestyle and infrastructure. However, what IKS seeks to do is to redefine development according to each IKS holding community's standards that are not pressurised by the western standards of modernity.

Mukuka, an expert in IKS captures the significance of IKS in the text below:

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[112] Barume op cit 54 note 21.
[113] 'Decolonising the Mind: The Misunderstanding of Traditional African Beliefs' available at https://historymatters.co.za/content/decolonising-mind-misunderstanding-traditional-african-beliefs-cosmic-yoruba accessed on 16 December 2018.
[114] Barume op cit 107.
[115] The Department of Trade and Industry, The Protection of Indigenous Knowledge through the Intellectual Property System A Policy Framework. (2013).
[116] 'Threat to Traditional Works' https://historymatters.co.za/content/opinion-threat-traditional-works-owen-dean-cape-times-20-august-2013 accessed on 16 December 2018.
[117] Bill of 2016.
[118] Ibid.

> *"Indigenous knowledge systems represent both a national heritage and a national resource, which should be promoted, developed and, where appropriate, exploited for the economic benefit of the majority. It covers all aspects of life and provides a rich resource for development – a crucial aspect for a country like South Africa, which has a large under-developed sector. Apart from indigenous knowledge adding to the repertoire of development options, understanding it can help determine the appropriateness of interventions and form the basis for encouraging local people to foster their own locally-driven development. Indigenous knowledge adds to the self-esteem and empowerment of local people, thus providing a basis for self-determination and sustainability."*[119]

We are living in an age called knowledge economy, an economy is driven by the knowledge that people possess.[120] If the economy is driven by knowledge then IKS has value in the global economy. WTO and WIPO regulate the way knowledge is used. There is no value to this if the communities to which the knowledge belongs can no longer practice their knowledge system. It therefore cannot be used void of its ties to the sacredness of their beliefs, it has no dignity.

The development of IKS needs to be done within the context of equality, the advancement of human rights and freedoms and the furtherance of social justice. Preserving, protecting and practicing IKS is a way to approach the subordination, stereotyping, structural and intersecting disadvantage that indigenous persons face on a daily basis. The importance of IKS is that it is a value system that once it is protected and applied, could play a crucial role in addressing food security in South Africa.

THE RIGHT TO FOOD IN SOUTH AFRICA

Wittman states in *Food Sovereignty*, that the absence of food is an excruciating form of human suffering because it is a key necessity for all human life.[121] It is clear that adequate food and nutrition are essential for other basic human rights to be realised.

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[119] G Mukuka *Reap what you have not sown* (2010).
[120] 'Knowledge Economy' available at https://www.investopedia.com/terms/k/knowledge-economy.asp accessed on 29 December 2018.
[121] Wittman op cit note 57 at 1.

To a large extent, legislation and policy in the colonial and apartheid eras can be blamed for prevailing socio-economic ills in society. However, the law can now be an important tool to address these ills. The final constitution entrenches a right to everyone to have access to sufficient food.[122] Food and nutrition insecurity exist around the world and in South Africa. The courts have made it clear it can and will assess the reasonableness of laws. [123]

The right to food is entrenched in International law in article 11 of ICESR, it states that everyone has the right to adequate food and freedom from hunger. Article 2 (1) of ICESCR says that the state has the duty to take steps to progressively realise this right to the maximum of its available resources. Article 25(1) of the UDHR further states:

> *"Everyone has the right to a standard of living for adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."*

International covenants serve as instruments to assure that basic rights are protected and that signatories abide by their duties and obligations. It caters for vulnerable groups of persons who are in circumstances that are less than the basic standard of living.[124] According to the UN committee on Economic, Social and Cultural Rights, vulnerable or disadvantaged groups include landless peasants, marginalised peasants, rural workers, the rural unemployed and indigenous peoples.[125]

The general comments of food and cultural rights by CESCR states:

"Right to food is inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international

[122] Constitution of the Republic of South Africa, 1996 s27.
[123] CESCR General Comment No. 12: The Right to Adequate Food (Art. 11), 1999.
[124] Eide op cit note 93 at 53.
[125] Eide op cit note 93 at 53.

levels, oriented to the eradication of poverty and the fulfilment of all human rights for all."[126]

The ICESCR provides every state with a margin of discretion in choosing its own approach to realise the right to food, nutrition and water. According to international instruments, South Africa has a duty to adopt policies that address hunger and malnutrition. The state should adopt programmes that will address elements of food sovereignty – the creation and maintenance of sufficient food supply and culturally acceptable food.

Food Policy in South Africa

In 2002 the Department of Agriculture published the Integrated Food Security Strategy[127] ("IFFS") for South Africa to meet the states obligations set out in Constitution and international obligations set out by FAO for member states to promulgate policy for the right to access to food. The framework in South Africa to deal with food security was first introduced in 1994 through the Reconstruction Development Programme ("RDP"),[128] to address poverty and food insecurity which was a result of the socio-economic and political setup of apartheid. South Africa committed to support the World Food Summit Plan of Action in the 1996 Rome Declaration on World Food Security.[129] The Declaration aims to promote the allocation of natural resources to achieve global security. Other policies were developed in later years to address food security.[130] These policies dealt with various aspects of food security. They were all consolidated into the Integrated Food IFSS which aimed to address the multiple factors surrounding food security.

There has been a lot of discussions by the state to address food security in South Africa, however, there has not been any notable developments other than publications of research and strategy. The FAO indicates that a state can address food security by constitutional inclusion, a food security framework and/or inclusion in legislation.[131] South Africa has no legislation that directly deals with food security. The policies

[126] CESCR op cit note 118.
[127] The Department of Agriculture, *The Integrated Food Security Strategy for South Africa*, (2002).
[128] Ibid.
[129] Ibid.
[130] Ibid
[131] Food And Agriculture Organization Of The United Nations, *Voluntary Guidelines To Support The Progressive Realization Of The Right To Adequate Food In The Context Of National Food Security*, (2004) 3.

surrounding food security involve a range of government departments and requires them to work together to attain food security.[132]

The 2014 National Policy on Food and Nutrition Security for the Republic of South Africa was published in the government gazette.[133] The Department of Agriculture, Forestry's and Fisheries ("DAFF") and the Department of Social Development were tasked with implementing by partnering with experts in the private sector and civil society. On 22 March 2017 DAFF presented to the Portfolio Committee its implementation plan for 2017-2022.[134] However, there is a lack of communication between the relevant departments and this has led to stagnation.[135] The plans exist to address food security but there is no execution.

The South African Human Rights Commission ("SAHRC") role includes monitoring and assessing government departments on human rights related issues.[136] The SAHRC compiled a report on the Right to Access to Nutritious Food in South Africa.[137] The SAHRC interviewed the relevant department heads on the current state of food security in South Africa.[138] It was found that there are approximately 14 million food-insecure people in South Africa, in most circumstances it was due to unemployment and poverty.[139] It was found that people cannot afford to buy food and lack the means to produce their own food.[140] The SAHRC found that the state's approach to the right to food was fragmented and lacked composure.[141]

It is evident that the lack of legislation to strengthen the right to food is one of the reasons for the state's delay to act. Legislation holds the state accountable, as it stands, the policy and poor administration of the current policy has failed to meet the needs of the people.

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[132] A Gildenhuys, Food Law in South Africa: *Towards a South African Food Security Framework Act,* (2016).
[133] Gazette No. 37915 of 22 August 2020.
[134] 'South Africa needs a national food security council to fend off starvation' by By Nic JJ Olivier and Sheryl L Hendriks available at https://www.dailymaverick.co.za/article/2020-05-11-south-africa-needs-a-national-food-security-council-to-fend-off-starvation/#gsc.tab=0 (Accessed 30 June 2020).
[135] Ibid.
[136] Constitution of the Republic of South Africa, 1996 s 184(3).
[137] The South African Human Rights Commission, The Right to Access Nutritious Food in South Africa SAHRC (2016-2017)
[138] Ibid 11.
[139] Ibid 15.
[140] Ibid 23.
[141] Ibid.

The Right to Food and the Constitution

The right to food is found the Bill of Rights ("BOR") and is protected the same way as other socio-economic rights in the Constitution.[142]

Socio-economic rights are known as second generation rights, in that they are traditionally thought to impose duties on the state to act positively to realise these rights. They are therefore considered to be positive rights.[143] The BOR attempts, by including socio-economic rights, to ensure that all members of society have the capacity to enjoy and participate in the traditional civil and political rights granted to them.

Rights in the BOR are justiciable, meaning the courts have the power to direct the way in which government distributes the state's resources. A justiciable BOR permits decisions affecting basic rights and liberties to be reviewed by an institution outside the political sphere, being the judiciary. In South Africa socio-economic rights are guaranteed and judicially enforceable. However, despite the lack of food security in the country, the right to food has not been litigated on.

As alluded to above, the right to food is explicit in South African and is provided for in the Constitution, in s27:

> *(1) Everyone has the right to have access to—*
>
> > *(a) health care services, including reproductive health care;*
> > ***(b) sufficient food and water;*** *and*
> > *(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.*
>
> ***(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.***

S 27 is a qualified right consisting of (1) a duty to take reasonable legislative and other measures, (2) to achieve progressive realisation of the right (3) within the state's available resources. The courts have made it clear it can and will assess the reasonableness of laws and policies.[144] Reasonableness has been dealt with in the

[142] Constitution of the Republic of South Africa, 1996 s 27(1)(b).
[143] D Brand 'Food' in Woolman, S (2ed) *Constitutional Law of South Africa* (2013) 56C-1
[144] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

Constitutional Court (CC) in cases that deal with other s 27 rights. For example, a relevant policy will not be reasonable if it excludes those most in need[145] or where life-saving benefits are withheld while the government works at gathering information and perfecting its policy.[146]

This right is subject to the limitation clause in s 36 and the proportionality test. The qualification has been interpreted by the CC in the context of other socio-economic rights as stated above. The state must show that it is taking steps to improve and any regression is fully justified and if not, their inability to realise the right must be justified in terms of s 36.

Justiciability of Socio-economic Rights

Because socio-economic rights are justiciable, the courts have to determine whether a state is in breach of its obligations. The right to access to water was dealt with in the case of *Mazibuko v The City of Johannesburg ("Mazibuko")*[147]

> The City of Johannesburg sought to reduce the water loss in certain areas. One of the areas was Phiri, a poor area in Soweto. The City gave the residents an option of installing a yard pipe or the installation of prepaid meters which would both dispense 6 kilolitres of water, after which the residents would have to buy credit in order to reinstate the water supply. This figure was calculated on the average household water needs.
>
> The legal issue was whether the City's water policy to supply 6 kilolitres free was in conflict with s 27(1)(b) which provides that everyone has the right to access to sufficient water.
>
> The court cited previous findings in relation to socio-economic rights in *Grootboom* and *TAC*. The court held that the Constitution requires the state to take reasonable legislative and other measures to progressively achieve the right of access to sufficient water within available resources. The courts applied the reasonableness test and held that s 27(1)(b) must be read with s 27(2) to delineate the scope of the positive obligation to provide sufficient water by the state. That obligation requires the state to take reasonable legislative and other measures to progressively achieve the right of access to sufficient water within available resources. It does not confer a right to claim sufficient water upon demand. What the right requires will vary over time and context. Fixing a quantified content might, in a rigid and counterproductive manner, prevent an analysis of context.

[145] Ibid.
[146] *Minister of Health v Treatment Action Campaign* (2002) 5 SA 721 (CC) (TAC).
[147] 2010 (3) 239 (CC).

> The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable.[148]

Socio-economic rights enable citizens to hold the government accountable for the manner in which it seeks to pursue the achievement of these rights. Litigation is a way that holds government accountable through separation of powers and democratic processes. When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government. Not only must government show that the policy it has selected is reasonable, it must show that the policy is being reconsidered consistent with the obligation to "progressively realise" social and economic rights. A policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights consistent with the obligations imposed by the social and economic rights in our Constitution.

S 7(2) of the Constitution says that "*the state must respect, protect, promote and fulfil the rights of the Bill of Rights*." According to D Brand in *Constitutional Law of South Africa,*[149] respect means the state must refrain from impairing existing access to adequate food and not place undue obstacles in the way of people gaining access to food.[150] The duty to protect includes protecting existing access to foods and to protect from interference.[151] To promote and fulfil is enhancing channels that allow access to food, create access where none exists and create opportunities that allow for people to be self-sufficient.[152] This provision creates a duty on the state. It forces the state to take reasonable steps towards progressively realising the right to food within its available resources otherwise it will be in violation of its constitutional duties.[153] A failure on

[148] Ibid.
[149] Brand op cit 138.
[150] Ibid.
[151] Ibid.
[152] Ibid.
[153] S Liebenberg *Socio-economic rights* (2010).

the state to perform these duties can only be justified against the reasonableness test that was established in *Grootboom*.

The duties to protect, promote and fulfil speak towards the state's duty to progressively realise these rights; therefore, these rights cannot be enforced immediately.

The state has a duty to develop and implement an effective strategy to fulfil the right to access to food, which has be reasonable according to the tests established in *Grootboom, Khosa*[154]*, TAC and Mazibuko*. While many policies have existed since 1994 across government departments, none have properly addressed hunger and malnutrition.[155] The state is yet to implement effective programmes that are well coordinated and yield results.

In South Africa, agricultural institutions prioritise conventional practices and ignore indigenous knowledge as one of the areas to enhance household food production and rural economies.[156]

Article 11 of the ICESCR provides that every state has a margin of discretion in choosing its own approaches. This in turn means that South Africa can adopt policies that realise food sovereignty to meet South African needs. The state can put measures in place that will lead to food availability and accessibility; including programmes that will address elements of food sovereignty- creation, maintenance of sufficient food supply (agriculture) and cultural acceptability of food.

Food accessibility refers to individual household security which requires that people acquire food that is available or make use of opportunities to produce food for own use.[157] It further refers to people having a sense of entitlement over food or means of production. This requires assistance from the state which should provide a manner in which the people can exercise legal control over means of food production (e.g. land) so they can produce food for their own consumption. Food Accessibility applies to any pattern or entitlement through which people procure their food and is a measure of the

[154] *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC).
[155] Shisana op cit note 59 at 36.
[156] See abovementioned discussion at food policy in South Africa.
[157] Brand op cit note 138 at 56C-3.

extent to which it is satisfactory for the enjoyment of the right to adequate food. Food security may be enhanced in communities engaging in subsistence agriculture.

In the case of *Mazibuko*, it was held that a policy also needs to be reviewed regularly in order to meet the constitutional requirements.[158] Current policy is not efficient hence there is still food insecurity in South Africa.

S 10 of the Constitution states:

> *Everyone has inherent dignity and the right to have their dignity respected and protected*

According to s 1 of the Constitution, the Republic of South Africa is founded on the values of human dignity. Human dignity as a right is contained in international instruments, for example the UDHR.[159] After World War Two, the concept of dignity became widespread in the international community. It was accepted that it contains three core elements by virtue of an individual being a human being. The first element is human beings have equal inherent dignity which cannot be waived or diminished; the second is human dignity must be recognised.[160] The third element entails that the state has a positive obligation to progressively realise the human dignity by using socio-economic rights as a means to achieve this end. Other rights contained in the BoR are an elaboration of the right to dignity, they are inextricably linked to the right to dignity.[161] The right to food is a socio-economic right and hunger is a condition that critically affects one's inherent dignity. Dignity as a right should always be factored in when balancing other rights contained in the BOR. The state has a duty to create mechanisms to realise the right to food which will duly achieve the right to dignity.[162]O'Reagan emphasizes that the provision for dignity in the Constitution is to assert rights that were not afforded to black people before.[163]

As explained, the right to food is inextricably linked to other rights. *In Re Kraansport Community*[164] considered the community's loss of grazing and cultivation rights which

[158] *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) 239 (CC).
[159] Currie op cit note 591 at 251.
[160] R Steinmann R 'The Core Meaning of Human Dignity' 2016(19) *PER* 2016 3.
[161] Ibid.
[162] Ibid.
[163] *Dawood and Another v Minister of Home Affairs and Others* 2000 8 SA 936 (CC) para 35.
[164] *In Re Kranspoort Community* 2000 (2) SA 124 (LCC).

in turn affected their right to food. The case is relevant to the dispossession of land used for subsistence farming. It was argued that the land was used to exercise the constitutional right to food and such a loss should be weighed in order to assess whether the compensation the community received was just and equitable.

IKS should be integrated into agricultural policies for development of smallholders in current modern food production systems. Indigenous farming system's practices or technologies are a viable option in smallholder household food production and food security.

For the right to access food to be realised, accessibility must be sustainable for future generations, embodying sustainable methods that will empower people. IKS in relation to food production methods has been practiced for generations and can continue to do so if it is preserved, protected and promoted. The right to food should be promoted through a lens of food sovereignty and IKS.

People facing hunger and malnutrition (food insecurity) are mostly smallholders, landless workers, pastoralists or fisher folk- indigenous people who are often situated in marginal and vulnerable ecological environments.[165] Additionally, they are frequently neglected. Without proper support they cannot compete with increasingly subsidised industrialised agriculture.[166] The situation often results in smallholders moving to more marginal areas or migrating to the slums around cities.[167] Without addressing the structural causes of poverty, hunger and malnutrition, a meaningful discussion about how to reduce hunger and malnutrition cannot be commenced. For the majority of the rural poor, changes are needed in order to increase the ability of countries and communities to define their own agricultural, pastoral, fisheries, and food polices which are ecologically, socially, economically and culturally appropriate to their circumstances. A policy reform and therefore corresponding legislation reform is needed to attain this.

CONCLUSION

[165] Wittman op cit note 57 at 10.
[166] Ibid.
[167] Ibid.

This chapter has established that realisation of food sovereignty is a possibility through IKS. This chapter has further established that the existing policies in South Africa do not adequately recognise and protect some aspects of food sovereignty and indigenous knowledge systems. As has been shown, there is currently legislation underway that is intended to protect IKS as intellectual property. It has been established that mere protection is not sufficient, there has to be availability of resources for indigenous people to impart and practice their knowledge and the main resource is land. There needs to be laws available and implementation methods that will give effect to the full enjoyment of the rights that are mentioned above. The interdependence of these rights is explained well by Liebenberg, she says it implies that the right to equality must be interpreted in such a way that promotes equal access to socio-economic rights.[168] These are rights that are often neglected by both national and international agreements because they are perceived to not attract economic benefits according to western practices.

[168] Liebenberg op cit 148 note 52.

3. CHAPTER THREE- LAND RESTITUTION AND CUSTOMARY LAW

INTRODUCTION

Customary law rights have a different set of social norms compared to common law. The interpretation of customary land rights is difficult because of the widely accepted and dominant common law concept of ownership.[169] Ownership under common law is the authority to exclude others and exercise control over the use of property.[170] Instead of a system fixated in private individual ownership title where control is the determining factor, customary land law is centred on the idea of use, and usually communal use.[171]

People had access to land by being a member of their community. The access to the land was to a certain extent administered by a traditional authority or chief. If there was a concept of 'ownership', this was vested in a community as a whole and did not operate as ownership operates in the common law system; land was not bought or sold.[172] The term *ubuntu* is best to describe the relations between communities. It entails communal living, shared belonging, responsibility, accountability, reciprocity, collective efforts, group solidarity and generosity. These relations that indigenous communities had with one another changed under colonialism which sought to confine the relations to suit the scheme of dispossessions and creating reserves for indigenous peoples.[173]

Some 22% of the hungry and malnourished across the globe are families and communities without access to productive resources, including largely indigenous

[169] TW Bennet *Customary law* (2004)374.
[170] P Dhlawayo 'Reflecting on Landowners' Right to Exclude and Non-Owners' Access to Quasi-Public Property: Victoria and Alfred Waterfront v Police Commissioner, Western Cape' 2018 *Speculum Juris Vol 32* 68.
[171] J Pienaar *Land Reform* (2014) 5.
[172] W Du Plessis 'African Indigenous Land Rights in Private Ownership Paradigm' 2011 *PER* 48.
[173] Pienaar op cite 167 note 76.

people and rural labourers.[174] South Africa is not an exception. The food sovereignty framework highlights that one of barriers to the realisation of food sovereignty is the lack of access to land, water and other productive resources.[175] Land is sacred to indigenous people and their methods of tilling the land is sustainable. The environment in South Africa became largely affected by industrialisation that began on a mass scale during the gold rush in the 1800s.[176] If indigenous people had access to land, they could use their knowledge systems to fend for themselves by subsistence farming, assisting in the movement towards sustainable development and partaking in the economy by either selling their produce or having a patent registered in relation to their knowledge system as mentioned in Chapter Two.[177]

This chapter aims to answer the last two research questions:

- To what extent has land restitution be used as a suitable vehicle for protecting IKS and how it can be used as a means to protect IKS?
- Through a consideration of experiences in some foreign jurisdictions (Australia, Canada, USA and New Zealand) facing similar historical marginalization of indigenous people, how land restitution be used more effectively as a means to protect IKS for the purpose of realising food sovereignty.

Chapter Two discussed the land use in relation to the right to food and its value to indigenous people; this chapter will discuss the laws and practices that led to dispossession and the consequences thereof. This chapter will further discuss current legislation, such as restitution, and its role in addressing the past discriminatory practices that resulted in mass dispossession and the disruptions of indigenous practices. The chapter will then engage with case law that has dealt with customary law land claims. Lastly the chapter will briefly discuss other countries' processes in dealing with indigenous land claims.

HISTORICAL OVERVIEW OF LAND DISPOSSESSION

The need for land restitution in South Africa arose from the dispossession that took place during colonial and apartheid rule. Over the 19th century explorers entered and

[174] Food and Agriculture Organization of the United Nations The State of Food Security and Nutrition in the World, (2019) 15.
[175] H Wittman et al Food Sovereignty (2010) 24.
[176] G Austin 'African Economic Development and Colonial Legacies' 2010 *International Development Policy | Revue internationale de politique de développement* 11.
[177] This will be considered in more detail in Chapter Four.

occupied spaces in Africa. There was of course a collision between western and indigenous values.[178] The knowledge that the indigenous people possessed was deemed to be inferior and was merely for fascination.[179] With the absence of any 'valid' claim or ownership by indigenous people, it was viewed that the land was empty of inhabitants and available for conquest.[180] Dispossession took place before 1913 through violent clashes, forced settlements and at times negotiations.[181] However, systematic territorial racial segregation took place in the early 20th century in the form of promulgated legislation.[182] Indigenous land rights were severely curtailed.

Past racial discriminatory policies and practices that resulted in dispossession

Native Land Act 27 of 1913[183]

This Act marked division of land by means of national legislation. This Act set aside 7.3% of the land in South Africa as reserve areas (rural areas known as homelands) for the *native*[184] population (indigenous people).[185] It set the conditions for the natives to buy/own land in the reserves and restricted them from buying and/or owning land outside the reserve areas.[186] The Act ensured territorial segregation of the races. Not only did this Act seclude indigenous people to limited spaces, it also ensured that they could never purchase or have claim to land outside the designated areas (including white-owned land).[187] Land vested in the trust for the use of natives could be acquired by black people under various forms of tenures[188] but full ownership title was not possible.[189]

Native Trust and Land Act 18 of 1936[190]

[178] D Kennedy *The Last Blanks Spaces: Exploring Africa and Australia* (2013)6.
[179] Ibid
[180] Ibid at 10.
[181] Pienaar op cite 167 note 67.
[182] Ibid.
[183] Subsequently renamed Bantu Land Act, 1913 and Black Land Act.
[184] This was the terminology used in that period of time.
[185] Natives Land act 13 of 1913, s1.
[186] Ibid.
[187] Pienaar op cite 167 note 80.
[188] Ibid.
[189] I Currie et al *The Bill of Rights Handbook South* Africa (2016) 559.
[190] Amended by the Native Trust and Land Act in 1936. Renamed the Development Trust and Land Act.

In this Act, the land initially set aside for natives was expanded from 7.3% to approximately 13%.[191] The Act expressly stated that natives were not allowed to own, rent and/or purchase land outside reserve areas.[192] During the late 1930s, the government implemented a Betterment Planning policy which set conditions on communities in reserve areas such as restrictions on ploughing and the culling of livestock.[193] The application of the policy transformed formerly self-sufficient indigenous populations to people dependent on the migratory labour system. The Native Reserves were overseen by Native Commissioners and Agricultural Officers.

Promotion of Bantu Self-Government Act 46 of 1959[194]

This Act set up 'Bantu Homelands'. Transkei, Bophuthatswana, Ciskei and Venda were national states. Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa and QwaQwa were self-governing territories. Homelands were set out of the existing reserves areas; each had a form of self-governance.[195] The purpose was to transition into granting independence to the homelands with the greater goal of depriving the indigenous population of South African citizenship which was to be only granted to the white population.[196] The Bantu Homelands were governed by chiefs and traditional authorities in the designated areas but still subjected to be controlled by the apartheid government. Each homeland had its constitution with its own electoral processes, assemblies.[197] The aim was to establish administration in the homelands run by the tribal authority of the designated region. Chiefs became trustees of the land and as a result community and individual land rights diminished.

In an attempt to constitute these independent Bantu Homelands, the Native Affairs Department conducted more forced removals and allocations. Indigenous people were considered citizens of their ethnically-based designated homelands and only visitors in

[191] Native Trust and Land Act 18 of 1936.
[192] Pienaar op cit note 167.
[193] 'Native Land Trust' available at https://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01646/05lv01784.htm accessed on 3 January 2019.
[194] Promotion of Bantu Self-Government Act 46 of 1959.
[195] Ibid.
[196] 'Bantu Homelands Development Corporations Act' available at https://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01919.htm (accessed on 3 January 2019). Replace with act
[197] 'The Homelands' available at https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv03370/05lv03413.htm (accessed on 3 January 2019) and Pienaar op cite 167 note 114.

the Republic; they were treated as aliens in their ancestral land. By the late 1970s to 1990s, approximately 8 million indigenous peoples were forcibly removed and relocated to Bantu Homelands.

The racially based laws that displaced indigenous people were repealed in 1991,[198] but South African indigenous people are still living in the aftermath of social engineering that the colonial and apartheid regime brought about.

The codification of customary land law by the apartheid government in 1959 entrenched traditional authority and did away with communal authority. In addition to colonialism and apartheid distorting customary, the codification froze customary law and did not allow indigenous laws to develop. Customary law was codified to suit the marginalization scheme of apartheid. By 1994 the patriarchal system that existed before colonialism and apartheid was still prevalent in the Bantu Homelands, mostly due to the fact that the colonial and apartheid regime used traditional authorities to enforce their policies and regulate land use and allocation. In addition to losing the land to dispossession, indigenous people had no secure legal claim to the 'homelands' allocated to them[199] and lost their self-sufficiency within their IKS.

REDRESS SINCE DEMOCRACY

There are currently three approaches that deal with land reform:

1. Land tenure reform which is dealt with in s25(6) of the Constitution, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE),[200] the Extension of Security of Tenure Act (ESTA),[201] and IPILRA. The aim is to improve tenure-related rights of those whose tenure of land is legally insecure due to past discriminatory laws and practices.

2. Redistribution which is dealt with in s 25(5).[202] The aim is to broaden access to land for citizens only. In 1994 the white population owned 87% of the land. Since 1994

[198] Repealed by the Abolition of Racially Based Land Measures Act 108 of 1991.
[199] Currie op cit note 101 at 559.
[200] Act 19 of 1998.
[201] Act 62 of 1997.
[202] Constitution of the Republic of South Africa, 1996.

only 8% has been redistributed (This does not include government owned land-even those possessed in trusts).[203]

3. Restitution is aimed at restoring land or giving just and equitable redress to previously dispossessed people. This is the relevant part of land reform for this research and is dealt with in the Restitution of Land Rights Act[204] and s25(7): *"a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress."*

Customary land law

Customary law norms are adhered to by the black majority of South Africans.[205] The land that was previously demarcated as homelands for the indigenous people is subject to customary land law and the state is custodian of this land. According to customary land law, as recognised in IPILRA, the state is the custodian such property subject to "communal" or "indigenous" title.[206] In such systems, rather than individual control and ownership of land, land use and occupation by communities is the form of tenure in these areas. The common law description of ownership is where ownership is defined as the most complete real right that a legal subject can have regarding property.[207] The challenge has been to align these forms of land law with other forms in a way that would not result in 'lesser' rights for people living on communally-held land where customary law is in operation. The main focus is on more secure tenure.

The application of customary law and traditional forms of authority are recognised and is highlighted in s 211 (3) of the Constitution: *"The courts must apply customary law when it is applicable, subject to the Constitution and any legislation that specifically deals with customary law".* As to when customary law is applicable, this is currently governed by a supposedly short-term post-1994 piece of legislation, the IPILRA.[208] Under s 1(a) (i), customary law rights are extended to wherever land is used, occupied

[203] Institute for Poverty, Land and Agrarian Studies University of the Western Cape Diagnostic Report on Land Reform in South Africa (2016) 3.
[204] Act 22 of 1994.
[205] G Mukuka *Reap what you have not sown* (2010).
[206] Interim Protection of Informal Land Rights Act 31 of 1996.
[207] AJ Van der Walt et all *Introduction to the Law of Property* (2016) pg 46.
[208] According to s 5(2) IPILRA was meant to lapse on 31 December 1997 but it has been extended every year since.

or accessed in terms of *"any tribal, customary or indigenous law or practice of a tribe"*. IPILRA isn't very specific and it has been left to the courts to narrow down the meaning.

There is still no holistic individual ownership under customary land law. Instead, land is held and used according to the practices established by the community and overseen by a traditional authority in the broader interests of the community. [209]

IPILRA was initially intended to be a temporary measure only to try to bridge two legal worlds at the time of the democratic transition. There is another Act that was drafted to replace it, the Communal Land Rights Act 11 of 2004 ("CLARA"). It was widely opposed by people living under customary law and was struck down by the CC in the case of ***Tongoane and Others v Minister for Agriculture and Land Affairs and Others***[210]

> The challenge to CLARA was brought by four affected communities. The challenge involved three questions:
>
> 1) Whether the correct procedure had been followed to enact CLARA (was it correctly tagged)?
>
> 2) Did Parliament comply with its constitutional obligation to facilitate public involvement in the process?
>
> 3) Did CLARA instead of securing tenure for people living in customary land law arrangements actually undermine it? (The communities were concerned about the land being placed under the control of traditional councils, which they did not consider capable of administering the land for their benefit).[211]
>
> Although at the last minute the government informed the CC that CLARA would be repealed due to opposition, the CC continued to hear the case on its merits, but focused only on the first question: whether or not CLARA had been correctly tagged.
>
> As such, the CC found CLARA unconstitutional as it had not gone through the correct process (for not following the correct procedure including not consulting affected communities). The CC found it was not necessary to examine any of the other questions. So there is still ambiguity with regards to CLARA's other provisions.

[209] Bennet op cit 165.
[210] 2010 (6) SA 214 (CC).
[211] *Tongoane and Others v Minister for Agriculture and Land Affairs and Others 2010* (6) SA 214 (CC) para 33.

> CLARA sought to transform the communal land system applicable to all former homelands and independent self-governing territories. It sought to introduce a system of community ownership in substitution for state ownership. [212]

CLARA was unpopular with communities because they were concerned that it would further entrench chiefly control under arbitrary traditional rule and make them even more insecure.[213]

Ben Cousins describes how communal land tenure operates.[214] He argues that it is rather a "nested" or federalised system of land administration. He suggests that customary land law can only really be understood as a series of layers, with decisions about land use being taken at different levels of authority within a community. Decisions about how to use residential land (either to live on or for subsistence farming) are taken primarily at the household level, while decisions about how to allocate land and use resources belonging to the community (waterways, mineral resources etc.), are taken at a higher level of authority, or a broader communal level.[215]

Perhaps the solution to addressing the communal land ownership lies within Ben Cousin's writing where he suggests the better approach would be providing people living under communal customary arrangements individual title to areas of occupation and/or use. Even if the space is shared through co-ownership, this is a better alternative to group ownership mediated by the chief. This approach prefers democratic processes and does away with the established system of traditional authorities. A democratic form of governance which involves meaningful engagement as a way to address the complexities of communal land rights.

Claiming Land Restitution

The requirements for a successful land claim are set out in the Restitution of Land Rights Act[216] and are as follows as set out in s2:

- Definitions:

[212] Currie op cit note 101 at 560.
[213] *Tangoane* op cit 207.
[214] B Cousins, "Characterising 'communal' tenure: nested systems and flexible boundaries" in Claassens et al (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) 123-126.
[215] Ibid.
[216] Act 22 of 1994 (as amended on 1 July 2014)

- Community: any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group.[217]
- Right in land: means any right in land whether registered or unregistered and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.[218]
- Racially discriminatory practices: acts or omissions, direct or indirect, by the state or any other functionary performing a public power.
- Restitution of a right in land: this means either the restoration of the right in land, or equitable redress.
- Equitable redress: Beyond restitution of land, 'equitable redress' is considered as either the granting of appropriate right in alternative state-owned land, or the payment of compensation

- S 2(1)(a) and (d): *a person or community dispossessed after 19 June 1913 as a result of past racial discriminatory practices*
- S 2(1)(e) As long as the claim is lodged by 31 December 1998[219]
- S 2(2): No person is entitled to restitution if they have received just and equitable compensation as contemplated by S 25(3) of the Constitution.
- Factors taken into account when determining a land restitution claim (s 33) include:
  - Desirability of providing for restitution in land;
  - Desirability of remedying past violation of human rights;
  - Requirements of equity and justice;
  - Feasibility of restoration;
  - Desirability of avoiding major social disruption;
  - Amount of compensation paid at the time of dispossession;
  - History of the dispossession, the hardship caused, the current use of the land, the history of the acquisition and use of the land.

The question of what customary land law is and when it applies was answered in the case of *Alexkor Ltd and Another v Richtersveld Community and Others.*[220]

[217] In Re Kranspoort supra.
[218] Ibid.
[219] 2014 amendment will be discussed below.
[220] 2004 (5) SA 460 (CC).

After the enactment of the Restitution of Land Rights Act, the Richtersveld community brought a land claim to be restored of the land. One of the main issues was whether the community had held rights in land at the time of their ejectment.[221]

The land was owned by Alexkor, the state-owned diamond mining company. Alexkor argued that the community's land rights were extinguished long before they were ejected from the land by the annexation of the area by the British in 1847. As a result, whatever land rights the community had, were destroyed before 1913 (the cut-off date for land claims).

The community argued that they had 'indigenous' or 'customary' rights that, although not recognized by the British, ought to be accepted by virtue of the doctrine of aboriginal title. This is a *sui generis* title that recognises that indigenous customs, practices and laws survive colonial annexation and if a community has evidence that they occupied a piece of land before colonisation, their rights were not extinguished merely by the act of annexation.[222] In short, simply because colonial powers do not recognise land rights, does not mean they cease to exist.

The LCC sided with Alexkor and rejected the community's claim. It held that the community's ancestors were nomadic and the British would not have recognised their land rights because they would have been deemed to be uncivilised and therefore the people who continued to live on the land until they were ejected in the 1920s were living there without any land rights because they could not prove that dispossession occurred because of a racially discriminatory law or practice. The community successfully appealed to the SCA but Alexkor appealed to the CC.

The Constitutional Court dismissed Alexkor's appeal. It also set out important principles for the recognition of customary land law:

"...annexation must be determined by ***reference to indigenous law***. ***That is the law which governed its land rights***. ***Those rights cannot be determined by reference to common law***.."[223]

"... Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by s 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights."[224]

[221] In other words: were they a community that had a right in land that was lost/dispossessed as a result of racially discriminatory laws or practices after 19 June 1913.
[222] Bennet op cit note 165 at 423.
[223] Alexkor supra note 33 at para 50.
[224] Ibid para 51.

> The Court went on to hold that determining the content of indigenous land rights involves the study of the history of a particular community and its usages. The Court held that the community had indigenous land rights before annexation and these were not extinguished by the annexation. The Court held that the Community was in fact dispossessed of the land as a result of racially discriminatory laws or practice.

This case is important because the court set out an approach on how to deal with indigenous land rights, in particular that indigenous rights must be approached and interpreted in line with indigenous law and not common law. This case was successful in acting on the provision of the Constitution that does not view customary law as subordinate but equal to common law. Based on this case it is evident that the courts gave effect to customary law and indigenous people's land rights contained in the Constitution.

Shortcomings of the Land Restitution Programme

Statistics reveal that the state has conferred less than 10% of the land to black people through the restitution process.[225]

One of the reasons for the stagnancy is that from 1994 to 1996 the LCC had to first ratify the decisions that the Commission came to.[226] This created a back log because 80 000 claims were lodged and only a small fraction had been settled. As a result, the section was amended and the court's approval was no longer needed. This created another issue which is the role of the Commission where on one hand they would act like a prosecutor, defending the interest of the state and on the other the judge by deciding whether the claim is successful or not.[227]

As discussed above, there is a backlog that dates back to 1998 of land claims that have not been processed. ***Land Access Movement of South Africa v Chairperson of the National Council of Provinces and Others***[228] deals with the Restitution of Land Rights Amendment Act[229] which proposed to re-open the restitution process by permitting new claims to be lodged until 30 June 2019.

[225] B Atuahene B *We Want What's Ours: Learning From South Africa's Land Restitution Process* (2014).
[226] Restitution of Land Act 22 of 1994 (as amended on 1 July 2014).
[227] Atuahene op cit note 128.
[228] 2016 (40) SA 635 (CC).
[229] 15 off 2014.

The first legislation which dealt with land restitution was enacted in 1994 and by December 1998 about 80 000 claims had been filed, by 2014 over 20 0000 claims had not been finalised.[230] The purpose of the Amendment Act was to re-open claims, however, the backlog and capacity constrains had not been addressed.[231] The Bill was passed on 5 February 2014. The constitutionality of the Act was challenged by the Land Access Movement of South Africa ("LAMOSA") on the grounds that Parliament failed to facilitate public involvement in accordance to s 72 (1)(a)[232] and failed to fulfil their obligations in terms of s167(4)(e) and s 172(2)(a) of the Constitution.[233] Additional problems were raised about old claims not being 'ring fenced', insufficient public consultation, corruption and maladministration by the Commission..[234] The judgment discussed the public consultation process in the different provinces and whether parliament had sufficiently conducted the process. The importance of the right to restitution was highlighted because restitution equals restoration of dignity and it was held that restoration affords recipients a wholesome environment.[235] The court then emphasised the importance of the re-opening of land claims process and how it is in the public interest, however, the backlog needed to first be addressed.[236] The court concluded that the actions of the National Commissioner of Provinces ("NCOP") were unreasonable and unconstitutional and that it was a failure of parliament. As a result, the Amendment Act was struck down and claims made under the Amendment Act were interdicted. Parliament was given a period of two years to address the shortcomings.

***Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others*[237]**

This case dealt with an application by parliament for extension of the period to redress the issues raised in the LAMOSA judgment and promulgate legislation accordingly. The Applicant was the Speaker of the National Assembly and the chairperson of the NCOP. LAMOSA opposed the application and brought a counter-application requesting the court to give an appropriate order.[238] The case firstly discussed the salient

[230] Ibid para 8.
[231] Ibid para 10.
[232] Ibid.
[233] Ibid para 6.
[234] Ibid para 13.
[235] Ibid para 63.
[236] Ibid para 64.
[237] 2019 (40) SA 619 (CC).
[238] Ibid para 5.

issues of the LAMOSA judgment and the court order. In the counter application LAMOSA proposed that old claims should be prioritised over interdicted claims (substantively and procedurally).[239] The legal question the court had to deal with was whether the court could grant an order to extend the time period prescribed to address the issues raised in LAMOSA. Moreover, if it would be just and equitable to do so.[240] The court goes one to discuss the measures parliament took since the judgment in 2016 and the reasons as to why parliament wanted a further extension. Several communities (seventh to tenth respondents) were in support of the extension, they claimed the extension would be in the interest of justice and no prejudice would be caused.[241] In addition, they submitted that if no new amendment was enacted then the interdict on the 2014 to 2016 claims should be lifted.[242] LAMOSA opposed the application based on the principle of finality of judgments and because parliament had failed to enact new legislation within the stipulated period, the fate of interdicted claims shifted from parliament to the Constitutional Court.[243] The court discussed the test as set out in the *Teddy Bear Clinic*[244] case to find whether the delay was due to exceptional circumstances.[245] The court then found that parliament's delay fell short of the test set out in the case. It added that even if given the extension, the bill would still not be ready given the lack of efficient time usage by parliament and the lack of public engagement which was the reason why its constitutionality was challenged in the first place.[246] On those grounds the court found it would not be just and equitable to grant the extension. The court then discussed the counter-application presented by LAMOSA in terms of the previous judgment.[247] The court concluded by highlighting the link between land, dignity and other constitutional rights and how the restitution process aims to achieve this. The court then stated that any more delay will hinder constitutional rights and that the continued delay in processing of land claims crippled the land reform process. [248]The court ended off by stating that the judgment aimed to give effect to social justice,

[239] Ibid para 13.
[240] Ibid para 14.
[241] Ibid para 18.
[242] Ibid.
[243] Ibid para 21.
[244] 2014 (1) SACR 327 (CC).
[245] Ibid para 38.
[246] Ibid.
[247] Ibid para 42.
[248] Ibid para 65.

identity, stimulation of economic activity, gender equality and rural development.[249] In conclusion, the court ordered that the application for extension be dismissed, the counter application by first to sixth respondent be upheld to the extent that the Commission could not process any claims from 2014 to 2016 before having dealt with claims lodged on or before 31 December 1998. The court order then set the conditions on which the commission must approach land claims and that they must report to the Land Claims Court on a regular basis.

It is unclear from this judgment whether there will be an opening for new land claims. The judgment makes it clear that unprocessed land claims are a priority beginning with claims from 1998 and thereafter claims made under the amendment act.

A report prepared for the government speaks on the challenges they have faced when it comes to land restitution.[250] It states that many people have not lodged claims due to being illiterate and not having required documentation to support their claim (maps, title deeds, death certificate, family trees etc.).[251] It further states that claimants lack the capacity to support sustainable development in the rural areas and to fulfil the different needs that each community requires.[252] It further mentions how there is a lack of support from the local municipalities and that the demands surrounding land restitution are often not prioritized.[253]

The colonial and apartheid governments have kept records of the various activities surrounding land in South Africa,[254] given the vulnerability of these communities, the state should make investigations into these communities, approach them, inform them of their rights and hear from them how they would like to proceed. This should be done in addition to the provisions of the Restitution Act.

Another contentious issue is that of the starting date of 19 June 1913. There are the arguments in favour of an earlier date. However, how an earlier cut-off date is to be identified, as well as its operation, is unclear. [255]

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[249] Ibid para 66.
[250] Advisory Panal on Land Reform and Agriculture *Final Report Of The Presidential Advisory Panel on Land Reform And Agriculture* (2019) 18.
[251] Commission on the Restitution of Land Rights. 2003. 'Restitution Update: Annual Report to 31 March 2003 and Progress to Date'. Presentation to the Portfolio Committee on Agriculture and Land Affairs. http://www.pmg.org.za/docs/2003/appendices/030812land.ppt (accessed on 16 January 2019).
[252] Ibid.
[253] Ibid.
[254] The legislation and documentation is discussed under briefly under historical overview of dispossession.
[255] Dube, P Reconsidering Historically Based Land Claims (LLM Thesis, University of Stellenbosch, 2009) 14.

INDIGENOUS LAND RIGHTS IN FOREIGN JURISDICTIONS

Articles 26, 27 and 28 from UNDRIP[256] are relevant for land possession of indigenous peoples. The declaration was drafted to specifically address the needs of indigenous people around the globe. It is evident from the articles mentioned above that it is intended for indigenous people to have their lands restored to them and to freely pursue their way of life. Four countries voted against the declaration. Those four countries are Canada, USA, Australia and New Zealand.[257] All four of these countries share similar histories of acquiring the land which was occupied by indigenous people through colonialism and conquest. The colonial government in these countries did not recognise indigenous people's occupation of the land as ownership. These four countries refused to sign a declaration that would give indigenous people rights more suited to their needs as a community because of the responsibility it demanded on the state. Only in 2010 did these four countries sign the declaration.

Indigenous rights over the years have become part of the legal frameworks of the western settler countries, including USA, Australia, Canada, and New Zealand.[258] These countries, like South Africa were settled by the English, with legal systems influenced by English common law.[259] These countries have adapted processes for land claims for indigenous people to redress the past injustices that the indigenous people suffered in relation to land dispossession. The processes that they have adapted intend to protect the heritage of indigenous people and restore their rights to property and self-determination. These countries have referred to each other to inform their approach to indigenous land rights. South Africa has similarities to these countries and so their approach is worth considering when dealing with the rights of indigenous communities in western settler states. Furthermore, the use of foreign law is sanctioned in the Constitution.[260]

In Australia, to claim indigenous land (referred to as native title), the claimant must find its source in law and customs observed by their ancestors before colonisation.[261] The validity

[256] Discussed in chapter two.
[257] 'UN Declaration on the Rights of Indigenous People by Hansen E' available at https://indigenousfoundations.arts.ubc.ca/un_declaration_on_the_rights_of_indigenous_peoples/ accessed 17 January 2019.
[258] J Benjamin et al Indigenous Peoples and the Law (2009).
[259] Ibid.
[260] Ibid.
[261] 'Native Title Facts by the National Native Tribunal' available at http://www.nntt.gov.au/publications-and-research/publications/documents/fact sheets/fact sheet what's the difference between native title and land rights September 2007.pdf (accessed 17 January 2019).

of the claim is determined by the judiciary. What is taken into consideration is whether the indigenous claim still exists i.e. if the law recognises it alongside with the rights of other people in the area. The rights of the people occupying the area and the indigenous people must be able to co-exist. The court then decides what sort of indigenous rights the claimant has and if their interests exist in an area.[262]

In Canada, to claim indigenous land (referred to as aboriginal title) three things must be proven: occupation, continuity and exclusivity of the occupation.[263] The courts in Canada take more consideration of the current occupation of the land and overall public interest. They do not give exclusive rights to indigenous people to occupy the land and require assurance of proper administration of the land.[264]

In the USA, the courts demand indisputable evidence when Native Americans are making land claims, as a result it is difficult for indigenous people to recover their lands.[265] It is often ruled in their courts that land recovery for the natives would not be feasible as it would disrupt non- indigenous peoples who are currently occupying the land.[266]

Although these countries are now signatories of the UNDRIP, the implementation of it has not been effective. It seems that across the globe, indigenous peoples' rights are accommodated to the extent that they do not affect the state or private ownership.[267] South Africa is a signatory to the UNDRIP, however it is important to note that South Africa has not ratified the Indigenous and Tribal Peoples Convention. [268] The convention together with UNDRIP address various rights surrounding indigenous peoples, the difference is however that the convention has a stronger binding effect on the state than the UNDRIP because it is a declaration.

CONCLUSION

[262] Ibid.
[263] Rights of Indigenous People in Canada by Henderson W. https://www.thecanadianencyclopedia.ca/en/article/aboriginal-rights (accessed on 17 January 2019).
[264] Ibid
[265] Indigenous Peoples Rights in the United States by the Advocates for Human Rights. https://www.theadvocatesforhumanrights.org/uploads/indigenous_rights_fact_sheet_2013_2.pdf (accessed on 17 January 2019).
[266] Ibid.
[267] Centre for International Governance Innovation *UNDRIP Implementation More Reflections on the Braiding of International, Domestic and Indigenous Laws* (2018) 133.
[268] Indigenous and Tribal Peoples Convention, 1989 (No. 169).

This chapter has looked at land restitution from a historical, current and international point of view. A common factor considered in the land restitution process is the current use of the claimed land and what the use will be once it is restored. Concerns to the restitution process is whether the restoration of land will result in the land in question being used for production in a sustainable manner. IKS and its practice is the solution. Indigenous people know the land and have taken care of the land for generations before colonisation. Indigenous people do not own the land, they belong to it and that is why they know how to take what they need from the land without destroying it.[269]

J Pienaar describes land as not only being a factor in production but also a symbolism of identity and belonging.[270] The land dispossession that took place was not just deprivation of land but also of dignity. South Africa's land restitution programme attempts to ameliorate the wrongdoings of the past with its intentions to restore land that was previously dispossessed. The restitution process is slow and as far as overall distribution of land is concerned, it is still grossly unequal.

The poverty of rural areas and the demise of IKS can be attributed inter alia, to the lack of access to ancestral land. Merely restoring ancestral land is not enough as indigenous people have faced generations of marginalization. In addition to access to land, indigenous people require programmes adjusted to their specific needs as a community.

[269] AK Barume Land Rights of Indigenous Peoples in Africa (2010) 52.
[270] Pienaar op cit note 2 at 573.

4. CHAPTER FOUR: PRACTICAL EXAMPLES OF THE APPLICATION OF INDIGENOUS KNOWLEDGE SYSTEMS IN AGRICULTURE ACROSS THE GLOBE

INTRODUCTION

Indigenous people residing in previous Bantustans still remain dependent on migrant labour.[271] This is due to the lack of a sustainable system in the rural areas. There has, however been notable undertakings around the globe of indigenous people using their indigenous farming methods to sustain themselves and also use their knowledge and skill to participate in the agricultural market.[272]

China has a history of foreign occupation in the 19th and 20th Century, by the British and the Japanese.[273] Although they were not colonised the same as African countries, they did suffer infringements of rights under foreign rule.[274] In the 1950s, after the end of the civil war, the communist Chinese government implemented the Agrarian Reform Law of 1950, a land reform programme in the regions that were either occupied by the Japanese or belonged to wealthy landlords.[275] The aim of the programmes was to level the ground in the feudal system between landlords and peasants in the rural areas by redistributing the land.[276] The history of China is relevant for this study because the Chinese government since the 1950s has had programmes to develop agriculture for small-scale farmers.[277] The continued assistance by the government resulted in specific IKS methods being used on a wide-scale.

Since India's independence in 1947 from British rule, land reform has been part of the government's policy to date.[278] The aim of the land reform programme in India is to regulate ownership of land and ensure there is distribution of land to the rural poor.[279] There is a minimum of land allocated to people for them to firstly produce food for

[271] AK Barume *Land Rights of Indigenous Peoples in Africa* (2010) 69.
[272] Ibid.
[273] C Ding 'Land Policy Reform in China: Assessment and Propspects' 2003 Land Use Policy 110.
[274] Ibid.
[275] Ibid 110.
[276] Ibid.
[277] Ibid 115.
[278] K Basu 'Land Reform in India' 2012 The Oxford Companion to Economics in India Oxford University Press 1.
[279] Ibid 2.

themselves and then partake in the market.[280] The desired outcome of the programme is to increase productivity and promote equality for the rural population.[281]

Both these Asian countries were subjected to foreign rule which resulted in gross inequalities for the rural population. The governments implemented land reform programmes to address inequality and poverty by creating opportunities to the rural population to become self-sufficient and partake in the agricultural market.[282] The practical examples discussed below will show how legislative and policy efforts were successful factors for the rural people to effectively use their IKS.

This chapter contains a brief analysis of case studies which deal with the practical use of IKS. It will firstly look at an IKS practice in the rural areas of China that turned into a major commercialised method. Secondly the chapter will discuss how IKS in India has features that contribute to organic sustainability. This chapter will then look into two other African countries and what has contributed to their successful IKS practices. Lastly it will look in at the use of IKS in South Africa. The specific countries have been chosen because of the cultural ties that the specific food production method has and how it has been enhanced through assistance by the state. Each case study has its own as well as overlapping salient features which have contributed to the success of the IKS practice in that region.

INDIGENOUS KNOWLEDGE SYSTEMS IN ASIA

Rice-fish Culture in China

Rice-fish culture is a farming technique that has been used for over 1,200 years in south China and has recently been accredited as a "globally-important agricultural heritage system," by the UN Food and Agriculture Organization.[283] The practice is based on the mutual beneficial system where the fish serve as a pesticide and the rice moderates the

[280] Ibid 4.
[281] The World Bank Land *Policies and Land Reforms in India: Progress and Implications for the Future* (2007) 2.
[282] The World Bank *Land Policies for Growth and Poverty Reduction* (2003) 1.
[283] Ibid.

fish environment.[284]It is important to note that China had land reform programmes in the 1950s to redress the Japanese occupation of their lands.[285]

A study was conducted by the Chinese Academy of Agricultural Sciences, the Chinese Aqua Cultural Research Institute and the International Development Research Centre.[286]The method is the fish and rice growing in the same environment -rice provides the fish with a shelter reduces water temperature, which creates a mutually beneficial environment.[287] The aim of the study was to combine the IKS used by Chinese farmers to not only improve rice and fish farming but to also increase food production.[288]

In the rural regions of China, farmers practice rice–fish culture to raise fish for their own consumption. The rice-fishing method has gained attention due to its organic and mutually beneficial method. The techniques of rice–fish farming improved with additional skill, experience and research.[289]

In 1984 the Ministry of Agriculture in China partnered with the municipalities of 17 provinces. The goal was to develop and implement the improved techniques in these areas.[290] After three years the new technique was adopted throughout the nation because of its ecological, economic and social benefits.[291]

Rice–fish farming is no longer limited to subsistence consumption. It has improved productivity of rice and fish and is now part of agricultural improvement and environmental protection.[292]

Sustainable Organic Farming in India

A study was conducted in Uttarakhand state in India to investigate the IKS practices by the indigenous farmers in agriculture with the greater goal of assessing whether this

[284] 'Following tradition: Top examples of indigenous knowledge preserving biodiversity, ecosystem service' available at https://phys.org/news/2013-12-tradition-examples-indigenous-knowledge-biodiversity.html accessed on 31 May 2019.
[285] R Clough *The Peoples Republic* (1991) p. 83
[286] K Mackay *Rice-fish Culture in China* (1995) vii.
[287] Ibid.
[288] Ibid.
[289] Ibid at 15.
[290] Ibid.
[291] Ibid.
[292] Ibid.

knowledge can be integrated as a sustainable farming method for the agricultural industry in Uttarakhand.[293] This was an initiative by the Government of India to promote organic agriculture. Uttarakhand was the first state where the initiative began. The study was conducted by the Uttarakhand Organic Commodity Board with the goal of finding resource management which is sustainable and organic.

Eighteen villages were visited and 180 farmers were interviewed and their farming practices were observed. That research found that 80% of the rural households earn a third of their income from agricultural practices, specifically with livestock. The farmers in this area hold indigenous knowledge of organic soil techniques and livestock management by using sustainable and renewable farm resources as opposed to depending largely on purchased product.[294] The IKS practices by the rural farmers were the maintenance of diversity through crop rotation (allows for the soil to be replenished) and farming two to three types of livestock. These practices contribute to biodiversity as they allow for a nutrient cycle to take place as well as for sustainability. Further research showed that the diversification approach in farming is beneficial to the ecosystem, improves self-sufficiency and financial security. The IKS practices in this area meet the requirement of an organic practice because the livestock are kept as part of the farming system meaning their feed is naturally produced on the farms where they are kept.[295]

It was concluded that IKS practices in livestock production can integrate and make a significant contribution into the organic livestock production. IKS can further assist as a cost-effective and sustainable means to alleviate poverty. The organic initiative has created a new sector consisting of various stakeholders which includes farmers, policy makers, IKS holders and researchers. The value of the IKS was highlighted as worthy of exchanging to the rest of the world to contribute to organic sustainable agriculture. It was further emphasized that IKS around the globe should be documented and exchanged to provide better quality food which has less adverse effects on the environment.[296]

[293] M Chander et al. 'Integrating Indigenous Knowledge of Farmers for Sustainable Organic Farming: An Assessment in Uttarakhand State of India' (2012) 12(2) Indian Journal of Traditional Knowledge 259.
[294] Ibid.
[295] Chander op cit not 280 at 261.
[296] Chander op cit note 280 at 263.

INDIGENOUS KNOWLEDGE SYSTEMS IN OTHER AFRICAN COUNTRIES

Afroforestry by Mobisquads in Ghana

Mobisquad is a name of a movement given to communities in Ghana that were taking the initiative towards development using their surrounding natural resources. [297] One of the most successful mobisquads was a community in the region of Goviefe-Agodome, Volta.

Ghana was colonised by the British and attained independence in 1957. Agriculture in Ghana was negatively affected by government misadministration and severe drought seasons in the 1980s. At that time about 70% of the country lived in rural areas and they depended largely on small-scale farming for food and income.[298] The participation of the community combined with the involvement of the government is what created a sustainable development system. The government sponsored local groups and traditional communities to create their own sustainable agricultural development scheme throughout Ghana. The communities used their indigenous knowledge and were able to improve their socioeconomic situation as well as maintain natural resources.[299] Mobisquads participants' mandate was to fight bushfires, replant cocoa, re-establish food crops, plant trees in degraded forests and manage natural resources. Part of the mandate was to empower rural communities to till the land native to them and boost food production. The people involved were community residents and local leaders.

The mobisquad in Goviefe-Agodome was successful after the four years of operation. The profits were shared amongst the community and used to construct infrastructure in their area[300] In addition to achieving their goals, the community managed to turn land that was infertile into to arable land through use of their IKS.

A study was done in the Goviefe-Agodome area to establish the elements that contributed to the success of the self-help development process. The people in the area

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[297] 'Community Institutions in Resource Management: Agroforestry by Mobisquads in Goviefe-Agodome' available at http://www.unesco.org/new/en/natural-sciences/priority-areas/links/biodiversity/projects/indigenous-knowledge-within-the-framework-of-ipbes/tokyo-workshop/case-studies/case-study-5/ accessed on 24 May 2019.
[298] CD Adzobu et al. *Community Institutions in Resource Management: Agroforestry by Mobisquads in* Ghana (1991) 3.
[299] Ibid 4.
[300] Ibid 12.

are referred to as Govie people who belong to the Ewe indigenous group.[301] Land use in the area is primarily for agricultural purposes. There are crops used for subsistence, like maize. People in the area have access to land; there is land that is privately owned by customary title (this usually where the houses are) and other land (land that is set aside for farming) that is for communal use and is held in a trust by the village chieftaincy.[302]

Research found that the initiative was successful for the following reasons: the support of local leaders and institutions, planning and implementation by local forums accepted by the community, the initiative was directly beneficial to members and their households and lastly resource management was sustainable and included practices and techniques known to the community (IKS).[303]

Agriculture in Zimbabwe's North and South Rural Areas

This study focused on crop farming in the Binga District in the North Province and livestock farming in the Plumtree District in the South Province. The study focused on investigating the farming knowledge that indigenous people possessed, specifically for the climate and physical conditions of the specific regions with the greater goal of assessing the value and limitation of IKS in agriculture in the regions.[304] The data was collected through field research which included personal interviews with IKS holders, site visits and group discussions.[305]

In the Binga District, the chief, with the consultation of village elders, governs the allocation of land for farming purposes. The other resources (livestock, water, vegetation) are managed by a committee which was setup by the government.[306] In the Plumtree District farming activity is mostly subsistence farming and animal husbandry. Timber is also largely available in the area. The residents only use their resources for personal use although it is possible that they have enough resources to generate business ventures and compete in the market. The IKS in these regions are sustaining the people

[301] Ibid 8.
[302] Ibid 9.
[303] Ibid 32.
[304] 'Sustainable Indigenous Knowledge Systems in Agriculture in Zimbabwe's Rural Areas of Matabelel and North and South Provinces' (1998) 2 IK Notes 1.
[305] Ibid.
[306] Ibid.

with farming.[307] The IKS includes land preparation, grain selection, planting, harvesting, and crop preservation methods and livestock management.[308] The IKS value is its acquired knowledge passed down from generation on the soil conditions, climatic patterns and when to plant specific crops. Secondly the IKS contributes to the continuous supply of resources resulting in a sustainable life for the people. IKS determines food production and labour division amongst the indigenous people.[309]

It is suggested that western knowledge should be used to complement IKS and that it should not be a competition. The combination of the two systems can potentially result in establishing sustainable agricultural practices (through IKS) which once developed, can participate in the global market.[310] Once it is at a commercialized scale, communities can benefit from the profit and still retain ownership of the IKS as envisaged in the Protection, Promotion, Development and Management of Indigenous Knowledge Act.

INDIGENOUS KNOWLEDGE SYSTEMS IN SOUTH AFRICA

Communal Stock Farming in Namaqualand

Land tenure reform is relevant to parts of South Africa that were previously reserves proclaimed for natives in the relevant area and administered by the Rural Areas Act[311] resulting in land being held in trust by the state. The case study was done in such an area, Namaqualand.

In this area there are communal and commercial stock farmers. The commercial farms function with the purpose of providing livestock for mass consumption while the communal livestock farmers have several objectives.[312] Communal livestock is used primarily for household food security (milk and meat) as well as capital storage (selling the livestock in exchange for cash whenever a need for money arises). Livestock also contributes as social capital to the indigenous communities in the area. Some of them often combine livestock to form herds while others make arrangements for their

[307] Ibid.
[308] Ibid 2.
[309] Ibid.
[310] Ibid.
[311] Of 1987. The 1987 Act was replaced by the Transformation of Certain Rural Areas Act 94 of 1998.
[312] T Benjaminsen et al. *Contested Resources: Challenges to the Governance of Natural Resources in Southern Africa* (2000) 256.

livestock to be taken care of while they stay elsewhere. This contributes to the ties that the communities have with one another. Communal farmers depend on their livestock for income; however, there is a shortage of land which prevents them from expanding their herds. In most instances, the communal farmers end up working on the commercial farms or mines in the area because of the lack of opportunities in communal farming. The households that are better off are the ones that have multiple streams of income by owning their own livestock while being employed elsewhere.

Communal areas in Namaqualand are home to the descendants of the Nama-speaking Khoekhoen, the first herders in the region, who arrived here with their sheep around 2,000 years ago. Leliefontein and Paulshoek are such areas which comprise of sparse villages and are surrounded by communal grazing land.[313]

The indigenous community uses the system of kraaling to attend to their livestock. The method entails the livestock being allowed to roam around in the communal grazing land and at night, the livestock being placed into a stockade where they are able to monitor and protect them. The method allows for the livestock to interact with the environment in an unrestricted manner and prevents overgrazing.[314]

The Namaqualand region is a conservation site due to its ecological makeup.[315] Conservation South Africa has an interest in the region and supports communities with sustainable endeavours so they sustain the area's ecological value. The communities are empowered through a stewardship programme to protect the environment that they rely on for fodder for their livestock and traditional medicine. The initiative focuses on sustainable development and creates opportunities.[316]

Namaqualand has distinct features compared to other previous homelands in South Africa. In the past two centuries, the reserves have predominantly been occupied by the rural coloured population with ancestry of hunting and pastoral indigenous communities.[317] The hunting and pastoral practices were interrupted by legislation[318] in

[313] Ibid 196.
[314] Ibid.
[315] M Hoffman et al 'One Hundred Years of Separation: the Historical Ecology of a South African 'Coloured Reserve'' 2008 *Africa vol 78* 190.
[316] 'Equiping Farming Communities for Environmental Stewardship' available at https://www.bizcommunity.com/Article/196/358/174748.html accessed 20 May 2019.
[317] M Hoffman et al 'One Hundred Years of Separation: the Historical Ecology of a South African 'Coloured Reserve'' 2008 *Africa Vol 78* 190.
[318] The Mission Stations and Communal Reserves Act 29 of 1909.

the 20th century which placed the indigenous communities in reserves.[319] The communities were restricted to practicing their IKS within the allocated reserves which did not allow for stock forming to be exercised holistically.[320]

The regions occupied by the indigenous people are now governed by the Transformation of Certain Rural Areas,[321] which was enacted to meet the requirements specific to each area, taking into consideration the unique circumstances and historical context of coloured rural areas. [322] The Act allows for land initially held in trust by the state to be held by municipality in that area or any other legal entity that the indigenous communities may prefer such as communal property associations in order to facilitate communal tenure reform.[323]

The Dikgale Community in Limpopo Province

The research examined indigenous communities' use of subsistence farming under unfavourable environmental conditions in the area. The study was conducted by a researcher from the University of Limpopo.

Interviews were conducted with 250 participants to assess how community members sustain farming through their indigenous knowledge. The participants were asked questions about the indigenous knowledge used to endure subsistence farming.[324] Communities in Dikgale perform subsistence farming in their gardens and ploughing fields through indigenous farming practices and rainfall prediction. The practices involve improvement of soil fertility, maintenance of crops, seed selection and storage.

The Dikgale people have a trust, Dikgolo Trust. The people acquired the land through the Settlement and Land Acquisition Grant of the Department of Land Affairs.[325] The

[319] NH Mclachlan 'History Of The Dispossession Of The Rights In Land Of Pastoral Indigenous Communities In The Cape Colony From 1652 To 1910' 2019 *Fundamina Volume* 25 109.
[320] Ibid.
[321] Act 94 of 1998.
[322] J Pienaar Land Reform (2014) 326.
[323] Ibid 330.
[324] S Rankoana 'The Use of Indigenous Knowledge in Subsistence Farming: Implications for Sustainable Agricultural Production in Dikgale Community in Limpopo Province, South Africa' 2017 *MDPI* 65.
[325] Aliber, M et all "The role of "black capital" in revitalising land reform in Limpopo, South Africa" 2010 Law, Democracy & Development / Vol 14 11.

community settled in this area as a result of forced removals from the surrounding farms during apartheid.[326]

Indigenous subsistence farming provides rural communities with food resources.[327] These IKS are produced by local people based on their lived experiences. The Food and Agricultural Organisation recognises that local farmers and indigenous communities have indigenous knowledge, expertise, skills, and practices related to sustainable agricultural production.[328]

The results of the study found that IKS is highly valued and depended upon by the community. The community knows the area and can predict rainfall patterns and have coping strategies when the rainfall declines. The crop management materials are locally produced and easily accessible. The IKS is self-developed and meets the subsistence needs of the community which contributes towards food security at a household level. The knowledge has the potential if used accordingly to contribute towards sustainable developmental policies to assist rural communities faced with similar circumstances. [329]

These indigenous practices could be helpful in the achievement of the United Nations' Sustainable Development Goal on food security, which requires a nutritionally adequate and safe food supply at household levels

CONCLUSION

IKS is an integral part of the strategy to address rural poverty. Within communities, it is the basis for decision-making in food security, human and animal health, education and natural resource management.[330] The link between community capital (communities being actively involved in their own development) and rural development is illustrated under the community capitals framework, which is an expansion of the systems approach to poverty reduction, effective natural resources management and social equity.[331]

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[326] Ibid.
[327] Rankona op cit 303 at note 63.
[328] Ibid 66.
[329] Ibid 69.
[330] L Maunganidze et al *A moral compass that slipped: Indigenous knowledge systems and rural development in Zimbabwe* (2016).
[331] Ibid.

On the outset it is important to note that relations between indigenous people and land is influenced by various factors such as history, socio-economic and environmental considerations and location. The contexts of these factors vary depending on the human activities.[332]

This chapter has referred to practical examples of the application of IKS in different regions. The purpose was to first show that IKS can be practically applied to address food security and to empower IKS practicing communities. The second purpose is to highlight the notable components that contributed to the success of the communities mentioned above in order to extract features that can contribute to agricultural development and the study of IKS.

Taking into consideration the case studies mentioned above, what contributed to sustaining and even the improvement of IKS and application is government intervention, availability of resources, research, fieldworkers, establishment of programmes (that are inclusive and empowering), community involvement from grass root levels, proper records, rural development programmes and assistance from other forums. Development agencies should investigate IKS and improve the technology without exploiting but with working together with communities. De Villiers and van den Berg identify strategic partnerships as being one of the main contributions to a number of successful restitution projects.[333]

This chapter recommends that IKS be taken seriously in policy development and implementation with a focus on subsistence farming. It further recommends that there be increased advocacy to promote knowledge and awareness on the importance of IKS in agriculture. Existing agricultural projects which involve IKS should furthermore be supported as the best practices.[334]

Lastly the chapter recommends that land restitution and IKS be considered in policy development and implementation. Decision makers in government should develop policies and programmes aimed to improve local-level resource management, specifically with IKS in mind.

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[332] Benjaminsen op cit note 299 at 98.
[333] B De Villiers.. et all *Land reform: Trailblazers; Seven Successful Case Studies Johannesburg*: (2006).
[334] H Tirivangasi 'Indigenous Knowledge Systems and Food Security in South Africa'47(3) 2017 Journal of Human Ecology 2017 120.

5. CHAPTER FIVE – CONCLUSION

Chapter One introduced three themes: food sovereignty, IKS and land restitution. Chapter Two explained the link between food sovereignty and IKS as well as elaborating on the rights that surround these two concepts. Chapter Three dealt with land restitution and indigenous rights. Chapter Four dealt with practical examples of how IKS has been applied. The dissertation relied primarily on the rights as set out in the Constitution, court decisions, policies adapted by the state and international obligations that South Africa has entered into (treaties, conventions and declarations). Other research materials included books, articles, reports and commentaries.

Frantz Fanon, a philosopher in the 20th century wrote:

"For a colonised people the most essential value, because the most concrete, is first and foremost the land: the land which will bring them bread and, above all, dignity"[335]

Indigenous communities cannot go back to a way of life before colonialism nor can they go forward with the way things currently are. Indigenous people are not moving towards better lifestyles because 'development' is defined according to western standards and they fall short of that standard. 'Progress' should not be defined by normalising successful assimilation into western systems. A better lifestyle is one where past injustices are addressed, self-determination and sovereignty is permitted and all fundamental rights surrounding indigenous people are protected, fulfilled, promoted and respected.[336]

The Constitution and legislative efforts towards land restitution indicate that South Africa's intentions are *bona fide*. However, there needs to be better legislative and policy efforts to implement reparations that are more robust. This research has shown that current policies and framework do not sufficiently address the rights surrounding indigenous people because there has been no execution (the right to food, IKS, land rights). The problem is the assertion of western systems to solve indigenous problems which should be allowed to be governed by customary law in practice. When dealing with the various rights that affect indigenous people, one must be willing to truly listen to the needs of that specific community and how they want their rights to be addressed and what would be equitable redress. We have become so engrossed in telling people what a good life is without being willing to unlearn this habit and listen.[337] An important and laudable feature of the Department of Science and Technology National Research Foundation Centre in Indigenous Knowledge Systems is how they engage with communities. Often policy is promulgated by the law makers who have in mind only what they think would best suit indigenous communities and that is perhaps where the biggest problems lie as highlighted in the *Tangaone* case.[338] There needs to first of all exist policy which allows for the realisation of food sovereignty to promote and allow practice of IKS by also giving indigenous peoples the relevant resources (the main one

[335] F Fanon. *The Wretched of the Earth* (1963) 108.
[336] Mazzocchi, F 'Western science and traditional knowledge. Despite their variations, different forms of knowledge can learn from each other' 2006 *EMBO Report* 465.
[337] J Van Niekerk 'Indigenous Law And Narrative' (1999) 32(2) *Comparative and International Law Journal of Southern Africa* 208 – 227.
[338] Discussed in chapter three.

being land) and support. The government then needs to have a task team to engage with various communities and receive a mandate from them of how they would like to use their indigenous knowledge to achieve food sovereignty and how the government can assist.

Communities themselves are able to provide detailed information of their indigenous identity which includes:[339]Characteristics of their indigenous heritage, specific needs and priorities in area, specific problems and marginalization, women and nature of gender relation, types of external shocks and seasonal variability affecting livelihoods, households and individual coping strategies, perceptions of government, NGO support programmes and aspects of peoples' lives which lack support and make them most vulnerable.

Rural livelihood is not attractive as it is associated with poverty. Rural development fails due to lack of government commitment (not enough funding or follow through even though they have made commitments), lack of appropriate technology (need project specific research components instead of relying on information provided by the previous regime which should also include IKS), lack of beneficiary participation (beneficiaries are not given authority for decision-making or programme execution, there is no meaningful engagement) and the complexity or co-ordination problem (implementing urban standards in rural development).

The development discourse should be shifted from an exclusive focus on the urban areas and rural development should not be dealt with under the same threshold as urban development. Agriculture policies must acknowledge indigenous knowledge practices in development programmes and have policies that specifically focus on enhancing socio-economic factors such and assist in improving farm practices through IKS.

The principle of community participation, of benefiting from the resources and knowledge of local communities in the environment management process, are some of the fundamental elements of sustainable livelihood thinking.[340] The best level of government equipped to deal with the needs of indigenous communities across the nation is the local government, the municipality. To build community participation, it is necessary for municipalities to understand what participation is and what it involves.

[339] J Plummer *Municipalities & Community Participation: A Sourcebook for Capacity Building* (2000) 31.
[340] Ndhlovu op cite note 1 at 147.

In building capacity, all aspects of contextual frameworks should be properly explored with the view of identifying constraints and opportunities for community participation. Municipalities should develop more detailed understanding of the livelihoods of the communities, the characteristics of the needs and how the community perceives themselves.[341] Community participation increases the effectiveness and efficiency of investment. It strengthens civil society and democracy. Objectives should be to provide infrastructure which is relevant to indigenous peoples' needs and priorities; ensure infrastructure meets needs; use local knowledge and human resources; increase peoples' ownership of services.[342] Participation allows for communities to lobby government and increase accountability. The approach will allow for participants to be empowered to learn about their basic rights, develop skills, mobilise community resources and network with other deprived groups. Municipalities need to build an institutional and personal understanding of the scope of poverty in the area.

It is therefore recommended that the land restitution programme aimed at improving livelihoods and tenure of land for indigenous people has to be driven by the state at a parliamentary level.[343] It is evident that farming is fundamental in a rural economy. Land and agriculture policies need to correlate with specific regions, taking into account the ecology, culture and history of the area because IKS is unique to specific communities. Sustainable development programmes need to support people with land claims. A programme needs to exist specifically to address indigenous people that practice IKS.

Legislation for the right to food must be enacted and food policies must align with all aspects of food sovereignty. Parliament should take all these factors to inform policy and initiate a thorough review of policies relating to food.

Parliament must enact legislation that will continue the restitution process. There must be an investigation of how indigenous communities would like to proceed with their land rights. Given the vulnerability of these communities, government should take initiative and approach the communities rather expecting them to approach the LCC. Courts should take IKS into consideration when dealing with customary law and

[341] J Plummer op cit note 2 at 25.
[342] Ibid 27.
[343] Ibid.

customary land claims. Food sovereignty must be considered in the land restitution process. There must be an additional policy to align with land restitution programme.

Nurturing and developing existing IKS and skills can have a widespread and long term effect achieving food sovereignty, reducing poverty and potentially leading to income generating opportunities.[344] Parliament should continue to pursue procedural reforms in broader multi-cultural poverty reduction which integrate other socio-economic rights.[345]

It will be effective for the various government departments to collaborate in supporting indigenous communities. There needs to be a coalition of spheres of government to tackle the various aspects of realising food sovereignty – this would include the Department of Agriculture, Forestry's and Fisheries and the Department of Social Development, The Department of Rural Development and Land Reform and Department of Science and Technology. A coalition would be beneficial as the multi-faceted rights of indigenous rights discussed in this study cannot be effected by one department. We need partnerships with local level institutions. The state must strengthen efforts and increase capacity to monitor through local governance (municipalities). There must be meaningful engagement between all stakeholders mentioned in the research. It is important for the indigenous people to be at the center of the process rather than being used as a means to achieve an end.[346] Partnerships must be formed in order to collect information to make assessments of indigenous needs in their community, such as group discussions, social mapping, individual and household discussions. This should be done with the aim to meet needs on a real level and not based on perception.

Co-management where the decision-making powers, responsibility and authority for resource management is shared from grass root level.[347] Co-management will address lack of accountability, limited enforcement capacity of community based institutions and lack of understanding of local conditions. Co-management can potentially provide incentives which result in sustainable resource use, power sharing for natural resource

[344] Ibid 27.
[345] Ibid.
[346] ibid
[347] Benjaminsen.. et al. *Contested Resources: Challenges to the Governance of Natural Resources in Southern Africa* (2000) 39.

management and conservation, participation of local peoples, legitimacy and opportunity to introduce enterprise based partnerships within the private sector.

Community based natural resource management and governance of natural resources involves the structures and processes of power and authority. There must be co-operation that governs decision making and dispute resolution concerning resource allocation and use so communities can have a sense of ownership and vision of what it desires and what the partners desire. Major decisions can be shared by state and local groups representatives. The state must find mechanisms to work collaboratively with indigenous communities effectively. The state must conduct public information campaigns.

The study has explored the extent to which IKS can contribute to the achievement of food sovereignty and how land is an important component. In conclusion, improved indigenous land rights allow indigenous peoples to freely practice their IKS and attain food sovereignty; it also preserves their cultural heritage and identity. Restoring land will not only address past injustices, but it will also mark a new beginning that upholds the spirit of democracy and liberty.

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UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

30 June 2017

Ms Deborah Raduba (217077877)
School of Law
Howard College Campus

Dear Ms Raduba,

Protocol reference number: HSS/0941/017M
Project title: The use of Land Restitution as a means of protecting Indigenous Knowledge Systems for the purpose of realising Food Sovereignty

Approval Notification – No Risk / Exempt Application
In response to your application received on 27 June 2017, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL.**

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

Naidoo
.....
Dr Shamila Naidoo (Deputy Chair)

/ms

Cc Supervisor: Mrs Judy Parker and Mrs Angela Crocker
Cc Academic Leader Research: Dr Shannon Bosch
Cc School Administrator: Mr Pradeep Ramsewak