CASES / VONNISSE

THE CONCEPT OF "INDIGENOUS LAND TENURE" SURFACES IN NAMIBIA: A COMPARATIVE OVERVIEW

***Agnes Kahimbi Kashela v Katima Mulilo Town Council* (SA 15/2017) [2018] NASC 409 (16 November 2018)**

1 Introduction

The facts in this case, which fell to be decided by the Supreme Court of Namibia in November 2018, can be succinctly put: in 1985, Ms Kashela's late father was allocated a piece of land as part of communal land by the Mafwe Traditional Authority (MTA) in the Caprivi region of the then-South West Africa (now Namibia). In 1985, the Caprivi region fell under the then-South West Africa Administration. Following the independence of Namibia on 21 March 1990, all communal lands became property of the state of Namibia by virtue of section 124 of the Constitution of Namibia Act 1 of 1990, read with Schedule 5 of the Constitution. (For an exposition of the Constitution of Namibia, see Naldi *Constitutional Rights in Namibia* (1993); Carpenter "The Namibian Constitution: *Ex Africa Aliquid Novi* After All?*"* 1989/90 15 *SAYIL* 22.) Paragraph (3) of Schedule 5 of the Constitution states that the afore-mentioned communal lands became property of the state "subject to any existing *right*, charge, *obligation* or *trust* existing on or over such property" (author's own emphasis).

2 Facts

At the time of Namibian independence (1990), Ms Kashela's father was still alive and continued to live, without interference, on the piece of communal land allocated to him by the MTA (the land in dispute) with his family, including Ms Kashela. Ms Kashela's father died in 2001 with Ms Kashela as his only surviving heir. She continued to live on the land in dispute – land that had been initially allocated to her deceased father by the MTA in 1985. In terms of Mafwe customary law, Ms Kashela was the heir to the land in dispute.

In 1995, the government of Namibia – as owner of all communal lands by virtue of section 124 of the Namibian Constitution, subject to Schedule 5

paragraph (3) – transferred a portion of communal land (including the land in dispute) to the Katima Mulilo Town Council (KTC) in terms of the Local Authorities Act 23 of 1992 (LAA). KTC, as the new registered title holder of the communal land, rented out certain portions (including the land in dispute) and subsequently offered to sell those rented portions for varying amounts.

3 The dispute in the High Court

Ms Kashela issued summons in the High Court, claiming that KTC had unlawfully rented out the land in dispute. She claimed that KTC was subsequently unjustly enriched to her prejudice and also that KTC had unlawfully expropriated her land without just compensation as determined by section 16(1) and (2) of the Constitution and section 16(2) of the Communal Land Reform Act 5 of 2002.

In the High Court, KTC submitted that Ms Kashela was not entitled to the relief sought because, at the independence of Namibia and also upon transfer of the land to KTC, the land in dispute had ceased to be communal land. Consequently, Ms Kashela could not claim communal land tenure as KTC had become absolute owner of the disputed land without any encumbrance thereon.

The High Court agreed with KTC, holding that the land in dispute ceased to be communal land upon Namibian independence and that no communal land right as claimed by Ms Kashela could exist therein. Ms Kashela appealed to the Supreme Court.

4 The appeal before the Supreme Court

The pertinent issues to be decided by the Supreme Court were: (a) whether Ms Kashela had validly acquired customary land rights over the land in dispute; and (b) whether she continued to hold such customary land rights after the independence of Namibia in 1990.

Ms Kashela submitted to the Supreme Court that her right to occupy and use the land in dispute (acquired under communal land tenure prior to Namibian independence) was a property right protected by section 16(1) of the Constitution. (S 16(1) guarantees the right to property and provides everyone with the right to acquire, own and dispose of property and to bequeath such property.) She submitted further that such a right was capable of being inherited by a child of a person in whom it vested and could be passed on in perpetuity from one family member to another. That such a right could not be extinguished by the State declaring the land in dispute as part of a local authority's land and upon such a declaration, the local authority acquiring ownership of such land with no encumbrances.

She submitted that paragraph (3) of Schedule 5 of the Namibian Constitution was clear in stating that communal lands upon independence became property of the State subject to any existing "right", "obligation" and "trust" on or over such communal land. Ms Kashela submitted that her right

to occupy and use the land in dispute was such a "right" or "obligation" and that it attached to the land in dispute upon the land being transferred to KTC.

She further submitted that section 16 and paragraph (3) of Schedule 5 of the Constitution must be purposively interpreted so as to give a value to customary land tenure rights that is equivalent to other real property rights under common law. The import of this argument was that the right of "ownership" of communal land should be accorded the same protection under the Constitution as those accorded to rights of freehold that are recognised under Roman-Dutch law.

In the Supreme Court, KTC (and seven other respondents, including the government of Namibia) presented an uncomplicated argument. It was submitted on their behalf that, after the communal lands had become state land upon independence and thereafter been transferred to KTC, it became KTC town land; whatever customary rights of use and occupation may have existed at the time of such transfer ceased to exist and could thus not have extended to Ms Kashela as a surviving heir of her late father; the land in dispute ceased to be communal land even while Ms Kashela's father was still alive as it lost its status as communal land when it became state land under section 124 of the Constitution and it was thereafter transferred to KTC as town land. They submitted that Ms Kashela's right to occupy the land was thus a precarious personal right that was not enforceable without registration under the Deeds Registries Act 47 of 1937.

5 Judgment of the Supreme Court

As seen in the Supreme Court's judgment, the appeal confronted it with three questions: (a) whether or not Ms Kashela had acquired a valid customary law tenure right in the land in dispute; (b) whether she still held such a right; and (c) if so, whether any liability or obligation attached to KTC arising from its interference with that right (par 41). This discussion focuses only on the issue of whether Ms Kashela had acquired and continued to hold a customary law tenure right in the land in dispute when her father died in 2001.

To put the dispute into proper context, the Supreme Court set out the legislative framework underlying the dispute before it (par 46–56). (For a detailed exposition of property law in Namibia, see Amoo *Property Law in Namibia* (2014)). This legislative framework can be summarised as follows: section 4 of the South West Africa Native Administration Act 56 of 1954 (Act 56 of 1954) made the South African Development Trust the owner of communal land in South West Africa (SWA). Since SWA then being a Mandate under South African administration, Act 56 of 1954 gave the Governor-General (GG) of South Africa the power by proclamation to set apart any land or area in SWA for the sole use and occupation of indigenous peoples of SWA. Section 6(2) of Act 56 of 1954 required the GG in that event to set apart land of pastoral or agricultural value for the "sole use and occupation" of an ethnic group. Such rescinded land then became unalienated state property. The Development of Self-Government for Native Nations in SWA Act 54 of 1968 transformed such tracts of land set aside for

the sole use and occupation of indigenous peoples in SWA into "homelands". This was followed by Proclamation AG 8 of 1980, section 3 of which empowered the Administrator-General (AG) of SWA to create representative authorities for the various ethnic groups. A myriad of proclamations then followed, introducing the concept of "communal land", which was placed under the jurisdiction of various representative authorities. Proclamation AG 29 of 1980 established a Representative Authority for Caprivians, which included the Mafwe Traditional Authority. Section 33 of Proclamation AG 29 of 1980 set out the circumstances under which land would cease to be communal land. Proclamation AG 29 of 1980 was repealed by Proclamation AG 8 of 1989 and all powers then vesting in the representative authorities were vested in the AG of SWA, who subsequently exercised jurisdiction over all communal land until the date of Namibian independence in 1990. Post independence, section 17(1) and (2) of the Communal Land Reform Act 5 of 2002 provided that all communal land areas vest in the State in trust for the benefit of the traditional communities residing in those areas. Furthermore, it provided that no right conferring freehold ownership is capable of being granted or acquired by any person in respect of any portion of communal land.

Against this backdrop, which on the face of it illustrates an absence of a coherent system of laws to protect the people living on communal land, the Supreme Court had to assess KTC's submission as opposed to Ms Kashela's submission. Had Ms Kashela lost whatever rights she might have had in communal land when such land became state land upon independence and, subsequently, municipal or town land? Or did paragraph (3) of Schedule 5 of the Constitution create a *sui generis* right in favour of Ms Kashela over the land in dispute, and did such right continue to exist even when transferred to a local authority such as KTC?

In answering the question whether Ms Kashela's deceased father (Andreas Kashela) retained or acquired any rights over the land in dispute upon its proclamation as town land, and whether those rights survived his death and passed on to his heir (Ms Kashela), the court had to interpret Schedule 5 of the Constitution. As seen by the court, Proclamation AG 8 of 1980 determined that the representative authorities held lands in trust for respective tribal communities over whom they had jurisdiction. By virtue of section 124 of the Constitution, these communal lands became property of the State upon independence. Paragraph (3) of Schedule 5 of the Constitution, however, determined that communal lands that became property of the State in this manner were subject to any "right", "obligation" and "trust" existing on or over such communal lands. The representative authorities of the various tribal communities were required to allocate land to members of their tribal communities for habitation or use. These rights of habitation or use, the court held (par 63), although not real rights as understood at common law, entitled the holders to live on and work the land, and sustain themselves from it. This right of habitation or use, the court held (par 65), could not be taken away relying merely on section 124 of the Constitution, because section 124 of the Constitution must be read with Schedule 5 of the Constitution, which states clearly that communal lands

that became property of the State upon independence were subject to any "right", "obligation" and "trust" existing on or over the communal lands.

This interpretation of section 124 and Schedule 5 of the Constitution, the court held (par 65), represents rationality and fairness as predicated by the substantive structures and ethos of the Constitution, which (as supreme law) enjoys primacy over all law subordinate and subject to it. This ethos, the court held, must permeate the judicial interpretation of the Constitution. This specific interpretational approach of the Constitution was previously accentuated by the Supreme Court of Namibia per Mahomed AJA in *S v Wyk* (1993 NR 426 (SC) 456G–H), where the court supported a benevolent interpretation of Schedule 5 so as to restore the dignity of pre-independence traditional communities. The court held further:

> "It cannot be correct that the State's succession to communal land areas at independence extinguished the communal land tenure that subsisted in the land … It could not have been the intention of the framers of the Constitution to grant a right which was unenforceable by the courts." (par 72)

As seen by the court (par 72), when the government of Namibia at independence took ownership of communal land areas as successor-in-title, it assumed an obligation under paragraph (3) of Schedule 5 to look after the interests of the people who lived on it. It never stopped holding that land in trust for the affected communities. Paragraph (1) of Schedule 5 employs language aimed at recognising that, in such communal land, there are interests that are short of rights in the black-letter law sense. As successor-in-title to communal land areas, the government of Namibia assumed the obligations of paragraph (3) of Schedule 5 that attached to such communal land. This obligation involved recognition and respect for the *rights* of the members of the community to live on the land, work it and sustain themselves. These rights were not of the kind that require registration under the Deeds Registries Act 1937 to have force of law.

Schedule 5 of the Constitution, the court held (par 76), must not be interpreted in a way that has the effect of perpetuating injustices of the past, which the Constitution has attempted to remove. By implication, the court here referred to over a century of methodical and systematic dispossession of indigenous communities of their lands by successive colonial administrations, which included the South African administration of South West Africa as a Mandate. (This history is graphically illustrated by Werner "A Brief History of Dispossession in Namibia" 1993 19 *Journal of Southern African Studies* 1. For a comprehensive exposition of the relationship between South Africa and South West Africa and South African policy in that territory, see Dugard *The South West Africa/Namibia Dispute* (1973)).

The court consequently held (par 77–78) that Ms Kashela acquired the exclusive customary law rights that her late father held in the land in dispute upon his passing. It held further that the fact that land ceased to be communal land upon Namibian independence did not necessarily result in the occupier of such land losing the protection given by paragraph (3) of Schedule 5, which states that communal land transferred to the government upon independence was "subject to any existing right, … obligation or trust on or over such property". Such a "right", the court held (par 78) "is a *sui*

generis right given under the Constitution (with a corresponding obligation on the successor to the land) and must take primacy". KTC thus, as a local authority and successor to the communal land, received the land in dispute for free but subject to any existing right or obligation over the property.

The court in conclusion held:

> "I come to the conclusion that Ms Kashela acquired a right of *exclusive use and occupation* of the land in dispute upon the passing of her father and that the right survived and attached to the land even after its proclamation as town land. That right is enforceable by the courts of law." (par 81, emphasis added by author)

Ms Kashela's claim that KTC was unjustly enriched to her prejudice and that her land was expropriated without just compensation was remitted to the High Court for further adjudication.

6 A comparative overview

This innovative judgment is to be welcomed. The Supreme Court could, however, have added much substance to its conclusion by seeking wider jurisprudential support. Such jurisprudential support in the African context is to be found in South Africa, Botswana and the African Commission on Human and People's Rights. Further afield, similar support can be found in jurisdictions such as Australia, Canada, Malaysia, Belize and in decisions of the Inter-American Court of Human Rights (IACHR).

With regard to South Africa, reference could have been made to the Richtersveld saga. The Richtersveld saga encompassed decisions by the Land Claims Court in *Richtersveld Community Alexkor Ltd* (2001 (1) SA 337 (LCC)), by the Supreme Court of Appeal in *Richtersveld Community v Alexkor Ltd* (2003 (6) SA 104 (SCA)) and by the Constitutional Court in *Alexkor Ltd v The Richtersveld Community* (2004 (5) SA 460 (CC)). The Richtersveld saga concerned the Richtersveld community, who historically lived in a large area of Namaqualand. This community (often referred to as the Khoisan or Nama) lived on their traditional lands long before 1847, when Namaqualand was placed under British rule through annexation by proclamation and their lands were then considered Crown land. In 1910, the British colonial government of the Cape Colony (which included Namaqualand) was replaced by the government of the Union of South Africa. In 1925, a rich deposit of diamonds was discovered in the area where the Richtersveld community had lived from time immemorial. The South African government considered this land to be "unalienated Crown" land owing to its annexation by Britain in 1847. Hence the land was proclaimed as alluvial diggings under the Precious Stones Act 44 of 1927, and mining rights were awarded to various stakeholders. The Richtersveld community was removed from this proclaimed land and denied access to the land by the erection of a fence and the creation of buffer farms. The community was eventually removed to a reserve. The prospecting and mining rights were allocated to a private stock company (Alexkor) with the State as the largest stakeholder.

In 1994, the Restitution of Land Rights Act 22 of 1994 came into being. Section 2(*d*) states that a community or part of a community shall be entitled to restitution of a "right in land*"* if it had been dispossessed of a "right in land*"* after June 1913 as a result of past "racially discriminatory*"* laws or practices.

The Richtersveld community approached the Land Claims Court (LCC) arguing that they were a "community" who had been "dispossessed" of a "right in land" as a result of past "racially discriminatory" practices. They claimed restitution and compensation. The community was unsuccessful in the Land Claims Court (LCC) but successful in the Supreme Court of Appeal (SCA) and the Constitutional Court (CC).

The SCA held (par 29) that the customary practices of the community disclosed a "right in land". The nature of this right in land, the SCA held, was that it was a customary law interest that had been present at the time of the British annexation and had continued until the dispossession in 1925. The substantive content of this interest, the SCA held (par 29), "was a right to exclusive beneficial *occupation* and *use*, akin to that held under common-law ownership". The CC concurred (par 62) with the SCA and saw the content of the right of the Richtersveld community under indigenous law as a "right to *exclusive occupation and use* of the … land by members of the Community … [T]he Community had a right to ownership in the land under indigenous law" (emphasis added by author).

The conclusions in the *Kashela* case (par 81) (that Ms Kashela had acquired a right of "exclusive use and occupation" of the land in dispute upon the passing of her father, that that right survived and attached to the land even after its proclamation as town land, and that that right is enforceable by the courts) resonate very strongly with the South African SCA and CC *Richtersveld* decisions. In both these decisions, it was held that a customary interest in land results in exclusive beneficial occupation and use of that land, akin to that held under common law ownership. This was pertinently held in paragraph 29 of the SCA decision and concurred with in paragraph 48 of the CC decision.

The CC *Richtersveld* decision (par 34) took cognisance of the Australian High Court case of *Mabo (No2) v Queensland* ((1992) 175 CLR) and the Canadian cases of *R v Van der Peet* ((1996) 137 DLR (4th) 289 (SCC)) (referred to *infra*) and *Delgamuukw v British Columbia* ((1997) 153 DLR (4th) 193 (SCC)) (referred to *infra*). *Mabo (No 2)* is unarguably universally accepted as the foundational case relating to so-called aboriginal or native or indigenous title. (In what follows, the terms "aboriginal" or "indigenous" or "native" are used as synonyms and interchangeably. These terms, broadly speaking, designate descendants of original inhabitants of territories colonised by foreigners, and whose culture, language, ancestry and land occupation have been continuous. Their cultures are distinct from the dominant society and they show a strong sense of identity.) In *Mabo (No2)*, it was held (par 60) that the Meriam Islands aboriginal people (despite the Australian continent having been colonised by Britain) had legal rights to their traditional lands. It was also held that Australian common law recognised the pre-existing land rights of the indigenous people, and that these rights (whether classified by the common law as proprietary,

usufructuary or otherwise) are ascertained according to the laws and customs of the aboriginal peoples, who by their laws and customs have a connection with the land. (*Mabo (No2)* is discussed by Barrie "Aboriginal Rights in Australia Remain an Unruly Horse" 2009 *TSAR* 155; see also Webber "The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo"* 1995 17 *Sydney Law Review* 5.)

It is submitted that exactly the same principles that applied to the Richtersveld community applied to Ms Kashela as an individual in the sense that Ms Kashela was part of an indigenous community who had a continuous connection with the land in dispute. A reference to the *Richtersveld* SCA and CC decisions would decidedly have enhanced the conclusions reached by the Namibian Supreme Court in the *Kashela* case. (For a comprehensive discussion of the Richtersveld saga, see Barrie "Land Claims by Indigenous People: Litigation Versus Settlement" 2018 *TSAR* 344.)

In Botswana, support is to be found in *Sesana v Attorney-General* (*Botswana*) ([2006] BWHC 1). This case concerned the Baswara, a group of San hunter-gatherers who protested against their relocation by the Botswana government in 2002 out of the Kgalagadi Game Reserve, which had been proclaimed as a game reserve in 1961. (Prior to independence, Botswana had been a British Protectorate known as Bechuanaland.) The Baswara sought to retain the right to remain on their traditional territory, which was inside the proclaimed game reserve. The court found (par 79) that the Baswara were, by operation of the customary law in the area, in lawful occupation of the land prior to: (i) the creation of the Bechuanaland Protectorate; (ii) the independence of Botswana; and (iii) consequently, the creation of the game reserve in 1961. It found further (par 76) that the presumption of the legal continuity of the customary land rights of the Baswara had not been displaced. The court in effect held that the doctrine of "aboriginal title" that had been acknowledged in Australia in *Mabo (No2)* was applicable to Botswana. Phumapi J found *Mabo (No2)* to be "quite persuasive" (par 92).

The court's decision in *Sesana* is arguably applicable to similarly situated indigenous peoples on the African continent. The court in *Sesana* clearly acknowledged the application of the customary law of indigenous peoples in giving recognition and protection to their lands, as did the South African SCA and CC in the *Richtersveld* cases. (The *Sesana* case is discussed by Saugested "The Impact of International Mechanisms on Indigenous Rights in Botswana" 2011 15 *The International Journal of Human Rights* 187.) The intransigence of the Botswana government in implementing the *Sesana* decision was criticised by the United Nations Human Rights Council in 2010 (*The Situation of Indigenous Peoples of Botswana: UN Special Rapporteur Addendum Report* in Doc A/HRC/15/37/Add.2, 2 June 2010, par 73).

In Kenya, a former British colony, the history relating to land has been one of dispossession, exclusion and government pressure on use and access to land. *William Yatich Sitetalia, William Arap Ngasia v Baringo Country Council* HCKe (Civil Case No 188, 2000, Judgment of 19 April 2002) concerned the removal of the pastoralist Endorois Community from the environs of Lake Bogoria (their traditional territory) by the Kenya Wildlife

Service to create a game reserve. The Endorois community submitted that they had communal indigenous title to their traditional lands where they had lived for centuries, had cultivated the land and had enjoyed unchallenged rights to pasture. They submitted further that they consequently had an indigenous form of land tenure. They relied *inter alia* on *Mabo (No2)* and the South African SCA and CC decisions in the Richtersveld saga. The Endorois were unsuccessful in the Kenyan High Court, which held that the gazetting of the game reserve and the fact that compensation had been paid was conclusive against any claim. The case eventually gravitated to the African Commission on Human and Peoples' Rights in *Centre of Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication (No 276/2003, 46th Ordinary Session, Banjul, The Gambia, 11–25 November 2009). (This case is discussed extensively in Barrie "The Quest for Indigenous Land Rights Intensifies" 2011 26 *SAPL* 497 and Beukes "The Recognition of 'Indigenous Peoples' and their Rights as a 'People': An African First" 2010 35 *SAYIL* 216.) Here, the Endorois, besides relying on their above-stated submissions to the Kenyan High Court, alleged a violation of Article 14 of the African Charter on Human and Peoples' Rights (1982 21 *ILM* 58). Article 14 of this Charter states that the "right of property" shall be guaranteed and may only be encroached upon in the general interest of the community, in the interest of public need and in accordance with the appropriate laws. The Endorois submitted that the "right to property" includes indigenous property rights. The African Commission agreed (par 196) with the Endorois, relying (par 94) *inter alia* on *Mabo (No2)* and the South African CC *Richtersveld* decisions. It held that the first step in the protection of traditional African communities is acknowledging that the rights, interest and benefits of such communities in their traditional lands constitute "property" under the African Charter. The African Commission recommended that Kenya recognise the rights of ownership of the Endorois and restitute their ancestral land. The African Commission concurred with various decisions of the IACHR – such as *Yakye Axa Indigenous Community* 15 IHRR 926, 2008, where it held (par 82) that indigenous communities who have exercised historical rights to their traditional lands are entitled to the recognition of such rights. The African Commission also concurred with the IACHR decision *Mayagna Awas Tingni v Nicaragua* (10 IHRR 758, 2003), which was the first major recognition of aboriginal land rights by an international adjudicative tribunal (see Anaya and Grossman "The Case of the *Awas Tingni v Nicaragua*: A New Step in the International Law of Indigenous People" 2007 19 *Arizona Journal of International and Comparative Law* 1). The African Commission further concurred (par 94) with the South African CC *Richtersveld* decision and the Australian High Court *Mabo (No2)* decision. The African Commission also concurred (par 56) with the Canadian decision of *R v Van der Peet* ([1996] 2 SCR 507) and *Delgamuukw v British Columbia* ([1997] 3 SCR 1010). In *Van der Peet*, the court accepted (par 30) that when Europeans arrived in North America the aboriginal people were already there, living on their traditional land in communities, and this led to their acquiring aboriginal rights. In *Delgamuukw*, it was held (par 140) that aboriginal title, which the court accepted as part of Canadian common law, conferred the right to use the

land for a variety of purposes based on the aboriginal peoples' "historic" occupation and relationship to their traditional lands.

Mabo (No2) was also accepted by the Malaysian Federal Court in *Superintendent of Lands v Madeli Bin Saleh, Superintendent of Lands and Surveys Miri Division v Madeli bin Saleh (suing as the administrator of the estate of the deceased, Saleh bin Kilonu* 2007 6 CLJ 509; 2008 2 MLJ 677). This case concerned the customary land rights of the indigenous Orang Asli. The court endorsed (par 19) the doctrine of customary aboriginal property rights as enunciated in *Mabo (No2)*, upholding the aboriginal land rights of the Orang Asli in Sarawak. The court held that *Mabo (No2)* reflected the legal position relating to aboriginal title throughout the British Commonwealth.

Mabo (No2), the *Richtersveld* SCA and CC decisions and *Madeli bin Saleh* all played an important role in the Supreme Court of Belize (former British Honduras) in *Mayan Leaders Alliance and the Toledo Alcades Association (on behalf of the Mayan Villages of Toledo District) v Attorney-General Belize* (Claim No 366 of 2008, Supreme Court Belize, 28 June 2010). The case concerned the rights of the Mayan indigenous people to their lands in southern Belize, based on historical use and occupancy. Relying on *Mabo (No2),* the South African *Richtersveld* cases and *Maleli bin Saleh*, the court held that the doctrine of aboriginal title applied and that there was an underlying presumption of legal continuity and cognisability of indigenous tribal property rights.

The IACHR has played a decisive role in recognising the customary rights to land of indigenous peoples. As stated above, *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (*supra*) was the first decision by an international adjucative tribunal to evolve a version of indigenous or aboriginal title to land based on customary land tenure. The court held:

> "Indigenous groups, by the very facts of their existence, have the right to live freely in their territory; the close ties of indigenous people with the land must be recognised." (par 149)

These sentiments were echoed in the *Case of the Kichwa Indigenous People of Sarayaku (Ecuador)* (2012 IACHR (Ser C) No 245 231) and the *Case of the Kalina and Lokono Peoples (Suriname)* (2015 IACHR (Ser C) No 196 161). In the latter case, the court interpreted (par 121) article 21 of the American Convention on Human Rights – the right to property – in light of the International Convention on Civil and Political Rights (1967 6 *ILM* 368) and the International Convention on Economic, Social and Cultural Rights (1967 6 *ILM* 360), and traced the collective rights, of indigenous people to property, to traditional occupation and use in keeping with their community-based traditions. This approach is similar to that of the Namibian Supreme Court, which as indicated above (par 81) held that Ms Kashela "acquired a right of *exclusive* use and occupation of the land in dispute upon the passing of her father and that the right survived and attached to the land even after its proclamation as town land" (emphasis added by author).

The Namibian Supreme Court could also have made reference to the United Nations Declaration of the Rights of Indigenous People 2007 (GA

Res 61/295 of 2007-08-13) (UNDRIP), which makes extensive provision for land rights of indigenous people. Section 26 of UNDRIP states that indigenous peoples have the "rights to the lands which they have traditionally owned, occupied or otherwise used". It provides further that states shall give legal recognition to such lands with due respect to the customs and land tenure systems of the indigenous peoples concerned. (For an exposition of UNDRIP, see Barrie "The United Nations Declaration on the Rights of Indigenous People" 2013 *TSAR* 292; Hartley, Joffe and Preston *Realising the UN Declaration on the Rights of Indigenous People* (2010); Barelli "The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous People" 2009 58 *ICLQ* 957.)

7 Conclusion

The cases discussed in this article all emanate from previously colonised states. South Africa, Australia, Canada, Botswana, Kenya, Belize and Malaysia were British colonies and consequently share similar colonial histories emanating from a particular Anglo constitutional-legal culture. The IACHR cases concerned previous Spanish colonies. Namibia itself has a German colonial history and was administered as a South African Mandate. This common colonial history was used to justify colonial control of the indigenous peoples themselves and their traditional lands. This has had an enduring impact that continues in modern times. As a result of the above innovative decisions of the courts, the judicial branches of the relevant countries are inexorably nudging the political powers to adapt their constitutional policies to accommodate the relatively recent judicial phenomenon of customary indigenous land tenure, which encompasses exclusive use and occupation.

In the African context, the *Kashela* decision is of great significance. By concluding (par 81) that Ms Kashela had acquired an enforceable "right of exclusive use and occupation" to the piece of communal land allocated to her deceased father, the Namibian Supreme Court echoed the conclusions reached in the African *Richtersveld, Sesana* and *Endorois* cases. It also came to a conclusion similar to those in the Australian, Canadian, Malaysian and IACHR cases referred to above.

George Barrie
University of Johannesburg