Reconsidering Historically Based Land Claims

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Declaration

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

Signature: .....

Date: .....

Summary

The 1996 Constitution provides in s 25(7) that individuals and communities who had been dispossessed of rights in land after 19 June 1913, as a result of past discriminatory laws, may claim restitution or equitable redress. The Restitution of Land Rights Act 22 of 1994 reiterates the 1913 cut-off date for restitution claims. The cut-off date appears to preclude pre-1913 land dispossessions. Various reasons are cited for this date, the most obvious being that it reflects the date on which the Black Land Act came into effect. The *Richtersveld* and *Popela* decisions of the lower courts appear to confirm the view that historically based land claims for dispossessions that occurred prior to 1913 are excluded from the restitution process.

In Australia and Canada restitution orders have been made possible by the judicially crafted doctrine of aboriginal land rights. However, historical restitution claims based on this doctrine are constrained by the assumption that the Crown, in establishing title during colonisation, extinguished all existing titles to land. This would have meant that the indigenous proprietary systems would have been lost irrevocably through colonisation. In seeking to overcome the sovereignty issue, Australian and Canadian courts have distinguished between the loss of sovereignty and the loss of title to land. In this way, the sovereignty of the Crown is left intact while restitution orders are rendered possible.

South African courts do not have to grapple with the sovereignty issue since post-apartheid legislation authorises the land restitution process. The appeal decisions in *Richtersveld* and *Popela* recognised that some use rights survived the colonial dispossession of ownership. This surviving right was later the subject of a second dispossession under apartheid. By using this construction, which is not unlike the logic of the doctrine of aboriginal title in fragmenting proprietary interests, the second dispossession could then be said to meet the 1913 cut-off date, so that all historically based land claims are not necessarily excluded by the 1913 cut-off date. However, it is still possible that some pre-1913 dispossessions

could not be brought under the umbrella of the *Richtersveld* and *Popela* construction, and the question whether historically based restitution claims are possible despite the 1913 cut-off date will resurface, especially if the claimants are not accommodated in the government's land redistribution programme.

Opsomming

Die 1996 Grondwet bepaal in a 25(7) dat individue en gemeenskappe wat na 19 Junie 1913 van ‘n reg in grond ontneem is, as gevolg van rasgebaseerde wetgewing en praktyke, geregtig is om herstel van sodanige regte of gelykwaardige vergoeding te eis. Die Wet op Herstel van Grondregte 22 van 1994herhaal die 1913-afsnydatum vir grondeise. Dit lyk dus asof die afsnydatum die ontneming van grond voor 1913 uitsluit. Verskeie redes word vir hierdie datum aangevoer, waarvan die bekendste is dat dit die datum is waarop die Swart Grond Wet in werking getree het. Dit beslissing van die laer howe in beide die *Richtersveld*- en die *Popela*-beslissings bevestig blykbaar dat ontneming van grond of regte in grond voor 1913 van die restitusie-proses uitgesluit word.

In Australië en Kanada is restitusiebevele moontlik gemaak deur die leerstuk van inheemse grondregte. Historiese restitusie-eise in hierdie jurisdiksies word egter aan bande gelê deur die veronderstelling dat die Kroon, deur die vestiging van titel gedurende kolonialisering, alle vorige titels op die grond uitgewis het. Dit sou beteken dat die inheemsregtelike grondregsisteme onherroeplik verlore geraak het deur kolonialisering. Ten einde die soewereiniteitsprobleem te oorkom het die Australiese en Kanadese howe onderskei tussen die verlies van soewereiniteit en die verlies van titel tot die grond. Op hierdie wyse word die soewereiniteit van die Kroon onaangeraak gelaat terwyl restitusiebevele steeds ‘n moontlikheid is.

Suid-Afrikaanse howe het nie nodig gehad om die soewereiniteitskwessie aan te spreek nie omdat post-apartheid wetgewing die herstel van grondregte magtig. Die appélbeslissings in *Richtersveld* en *Popela* erken dat sekere gebruiksregte die koloniale ontneming van eiendom oorleef het. Die oorblywende gebruiksregte is later ‘n tweede keer ontneem as gevolg van apartheid. Deur gebruikmaking van hierdie konstruksie, wat dieselfde logika volg as die leerstuk van inheemsregtelike regte en berus op fragmentasie van eiendomsaansprake, kan gesê word dat die tweede ontneming van grond wel binne die 1913-afsnydatum

val. Gevolglik sal alle historiese restitusie-eise nie noodwendig deur die 1913-afsnydatum uitgesluit word nie. Dit is steeds moontlik dat sommige pre-1913 ontnemings nooit onder die vaandel van die *Richtersveld*- en *Popela*-beslissings gebring sal kan word nie, en die vraag of histories gebaseerde eise moontlik is ongeag die 1913-afsnydatum sal daarom weer opduik, veral indien die grondeisers nie geakkommodeer word in die grondherverdelingsprogram van die staat nie.

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Table of Contents

1

Introduction

1.1 Background

Given South Africa's history of both colonial and apartheid land dispossessions, land reform understandably became a major transformation and development objective of the African National Congress (ANC) government soon after coming into power in 1994. The *White Paper on the Reconstruction and Development Programme* (RDP),[1] which was adopted in September 1994, set out the principles guiding the land reform policy and programme. These guiding principles culminated with the Department of Land Affairs issuing the 1997 *White Paper on South African Land Policy* (*White Paper*),[2] which recognised land redistribution, land restitution and land tenure reform as being the three elements of the land reform programme. Whereas tenure reform was aimed at reinforcing weak land rights and redistribution focused on providing wider and more equitable access to land in general, the restitution process was specifically designed for a limited purpose, namely to restore land (or give other equitable redress) to people from whom it had been taken away as part of apartheid racially-based legislation or policies.

[1] Republic of South Africa, Government of National Unity *White Paper on Reconstruction and Development Programme* (1994) at 2.4.1 http://www.anc.org.za/ancdocs/policy/rdpwhite.html [accessed 12 August 2009].

[2] Republic of South Africa, Department of Land Affairs *White Paper on South African Land Policy* (1997) at 2.3.

After much debate, a property clause was eventually included in the post-apartheid Constitution.[3] Both the 1993 and the 1996 Constitution made provision for land reform, which included restitution, although this provision was only included within the property clause in the 1996 Constitution.[4] The purpose of land restitution, according to the *White Paper on South African Land Policy*, is to restore land and to provide further restitution remedies to people dispossessed by racially discriminatory laws and practices. One of the most significant characteristics of the restitution process, for present purposes, is that the Constitution and the Restitution of Land Rights Act[5] authorised and regulates the process of restitution subject to a historical cut-off date, with the effect that restitution claims are possible only for land dispossessions that occurred after that date. The preamble to the Restitution of Land Rights Act provides that the Act is intended to "[p]romote the protection and advancement of persons, groups or categories of persons disadvantaged by unfair discrimination, in order to promote their full and equal enjoyment of rights in land." In terms of the Act, a community or individual dispossessed of a right in land after 19 June 1913 as a result of racially discriminatory laws or practices may lodge a claim for restitution. The form of redress is wide ranging and it includes either compensation or restitution of the dispossessed right or other equitable redress. The Act defines

[3] Budlender G "The Constitutional Protection of Property Rights: An Overview" in Budlender G, Latsky J & Roux T (eds) *Juta's New Land Law* (1998) at 1-5.

[4] S 25(7). In the 1993 Constitution land restitution was provided for in the land reform provisions in ss 121-123, which did not form part of the Bill of Rights.

[5] 22 of 1994.

the rights and interests that had been dispossessed and that can be restored widely, recognising both registered and unregistered rights.

The policy framework document adopted by the new government, the *White Paper on South African Land Policy*, first set the cut-off date for restitution claims at 1913. The Interim Constitution of 1993 made provision for land restitution for individuals and communities dispossessed of land. In addition, the Constitution provided that an enabling Act of Parliament was to be promulgated to govern the restitution of land rights.[6] This was the basis for the adoption of the Restitution of Land Rights Act 22 of 1994. This Act stipulates that a person (or a direct descendant of such a person) who was dispossessed of a right in land after 19 June 1913, under an abolished racially discriminatory law or practice, may qualify as a claimant for the restitution of rights in land.[7] The property clause[8] in the Final Constitution of 1996 contains a similar provision that maintains the cut-off date for unfair dispossession of land rights as 19 June 1913. In addition, the land claim must have been lodged by 31 December 1998. The restitution process is therefore restricted by a cut-off date that excludes dispossessions that took place before 19 June 1913, as well as by a sunset clause that excludes claims that have not been lodged by 31 December 1998.

It is generally accepted that the cut-off date is a feature that reflects the

[6] Ss 121-123 of the 1993 Constitution.

[7] S 2(3).

[8] S 25.

compromise nature of the Constitution.[9] It is an attempt at finding the balance between the rights of those dispossessed and the rights of the current occupiers. Although the Act recognises the legitimacy of restitution claims for unjust land dispossessions that took place prior to the democratic turnaround of 1994, it is acknowledged that certain historical dispossessions and injustices cannot be restored by means of this process. In view of the *White Paper*, the Constitution and the Act, the cut-off date of 1913 was identified as the historical point that signifies the break between historical injustices that have to be restored and those that cannot be restored through the restitution process, although those affected by them could be accommodated in other land reform programmes, such as the land redistribution programmes.

In summing up the reactions to the cut-off date, essentially, the Minister of Land Affairs and some authors view the cut-off date's exclusion of further claims for pre-1913 dispossessions as fair, pragmatic and logical. The majority of political and academic commentators seem to accept that it is the result of a pragmatic decision that allows the major apartheid dispossessions to be rectified, albeit at the cost of other, equally racially determined, pre-apartheid dispossessions. Political opinion seems to have been shaped by pragmatic considerations emerging from the deals that were struck during the multi-party negotiations. However, some commentators see the cut-off date as unfair and think that obvious pre-1913 dispossessions should be restored, despite the cut-off date.

[9] Republic of South Africa, Department of Land Affairs *Green Paper on South African Land Policy* (1996) 2.12.

Others venture that the doctrine of aboriginal title can be used for that purpose, given that the Constitution and the Restitution of Land Rights Act appear to preclude pre-1913 land claims. Academic opinion remained largely unclear as to whether the effect of the 1913 cut-off date is absolute or whether the courts should consider claims based on dispossessions that occurred prior to the cut-off date anyway, although the majority of commentators seemed to favour the view that the seemingly unambiguous language of the Act precluded the possibility of allowing historical land claims to restore land to people who had been dispossessed of it prior to the cut-off date. This was the position that the courts found themselves in when the first restitution claims surfaced.

A preliminary point that deserves mention here is the fact that, essentially, all restitution claims are historical, in the sense that they entail a claim for restitution based on a dispossession that took place in the past and that should, in terms of new policy, now be overturned. In this perspective, the restitution claims for post-1913 dispossessions that are allowed under the Act are also historically based claims. However, for purposes of brevity the phrase 'historical land claims' is used here to refer to claims that are apparently excluded from the restitution process under the Act because they are based on pre-1913 dispossessions.

Hence, having stated the problem – namely that the 1913 cut-off date appears to exclude historically based land claims – the question to be asked is: just how far can the courts go in interpreting the cut-off date in order to include historically

based land claims? Is it possible that dispossessions that took place prior to 1913 could nevertheless be adjudicated within the framework of the Restitution of Land Rights Acts, or is it possible that historical land claims could be considered outside of the Act? In seeking answers to this question, resort will be had to two sources. The first source is comparative law, namely the jurisprudence arising out of aboriginal land rights decisions in Australia and Canada. The leading cases on land restitution from these jurisdictions will be analysed so as to establish whether the methodology by which historically based land claims were decided in these jurisdictions could also be brought to bear within or outside of the framework of the South African Restitution of Land Rights Act, notwithstanding the cut-off date. The second source to be considered is South African case law on the restitution process, to determine whether historical land claims could (and should) be considered within or outside of the framework established by the Restitution of Land Rights Acts.

The question to be answered in analysing both these sources is whether it is possible, in South African law, and particularly given the framework established by the Restitution of Land Rights Acts and the 1913 cut-off date, to consider restitution claims that are based on land dispossessions that took place prior to the statutory cut-off date of 1913, or whether claims of this nature are excluded automatically by the cut-off date. Secondly, if it is possible to consider such claims, the further question is to establish what the optimal theoretical or doctrinal foundation for adjudication of these claims is.

1.2. Research Question, Hypothesis and Methodology

The main question to be asked is whether the cut-off date excludes all claims that originate in land dispossessions that took place before 1913. As previously mentioned, most colonial dispossessions of land took place before 1913. In fact, it has been said that by 1913, the larger dispossessions under colonialism (compared to apartheid) had already been carried out, hence creating the importance of including pre-1913 dispossessions. When first faced with land claims where the original dispossession of the full ownership right had taken place before 1913, the courts dismissed the land claims out of hand on the basis that they failed to fulfil the requirements of the Restitution of Land Rights Act. This failure to satisfy the requirements in the Act is either ascribed to the fact that the dispossession took place prior to the cut-off date, or it results from the fact that a use right that survived the pre-1913 dispossession was scaled down or hollowed out to an extent where it, having been subjected to a second, post-1913 dispossession under apartheid laws, no longer satisfies the requirements of the Act. Since the courts appeared to disregard historically based land claims in terms of the Restitution of Land Rights Act, the question is asked whether it is possible to have a historically based land claim succeed on the basis of aboriginal title, or whether it is possible to adjudicate these claims in terms of a different interpretation of the Act.

The hypothesis upon which this thesis proceeds is that South African law does

not need the doctrine of aboriginal title, to the extent that the formulation of restitution claims in the *Richtersveld*[10] and *Popela*[11] decisions, which is not unlike the logic of the Canadian and Australian *Delgamuukw* and *Mabo* cases*,* applies. The underlying assumption is that the 1913 cut-off does not, as it may seem to do, exclude historically based land claims absolutely, provided that a limited use right survived the initial colonial dispossession and was again subjected to a second, post-1913 dispossession under the apartheid laws. A further assumption is that the constitutionally mandated Restitution of Land Rights Act 22 of 1994 should be given a wide or purposive interpretation to enable the courts to provide redress for individuals and groups that have been the victims of both colonial and apartheid land dispossessions. If the Act is interpreted purposively, it should be possible to apply the processes foreseen in the Act in a way that would include, rather than exclude, at least some dispossessions that started prior to the 1913 cut-off date but that continued to affect the position of the occupiers long after the cut-off date. In this logic, the initial, colonial dispossession would not destroy original land rights completely but leaves a limited use right in the hands of the original owners or occupiers. If they were subjected to a second dispossession under apartheid laws, the focus of the restitution claim could, for purposes of the cut-off date, fall on the second, apartheid dispossession, but the restitution order could take into account the whole history of dispossession from colonial times.

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

[11] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC).

The formulation in the successful appeal decisions of *Richtersveld* and *Popela* succeeded in formulating such a purposive approach by following a specific logic. First of all, the courts identified a weaker remaining right of use or of occupation that survived the original, colonial dispossession of full ownership. This weaker interest is then described as the subject of a second dispossession that took place under apartheid, after the cut-off date. By concentrating on the weaker surviving right, the courts able to consider a restitution claim under the Act; by concentrating on the colonial as well as the apartheid dispossessions the courts can craft a restitution order that might grant a right of full ownership over the subject land, which in effect restores to the claimants the same ownership previously dispossessed under colonialism.

The Restitution of Land Rights Act stipulates that there must be an interest or a surviving right in land as on 19 June 1913, which interest is dispossessed under a racially discriminatory law or practice. The appeal decisions of *Richtersveld* and *Popela* considered that both communities had been dispossessed, prior to 1913, of the original right of ownership and that lesser rights in the land remained. For the Richtersveld people, the lesser right was in the form of use rights since the community was permitted, after the Crown annexed their land in 1847, to continue residing on the land. The use rights included habitation, hunting and drawing water. The community was only made to leave the subject land in 1925, after the discovery of diamonds on the subject land. The court found that the community's use right, which the Constitutional Court characterised as a

customary law interest, survived the 1913 cut-off date and therefore the claim succeeded. The restitution award was full ownership of the subject land, which is a stronger right than the actual use right that was dispossessed under apartheid, but reflected the right that the community enjoyed prior to the first, colonial dispossession. The Popela community was also dispossessed of their original ownership in 1889 and thereafter forced to become labour tenants in order to remain on the land. In 1969, their remaining labour tenancy rights were revoked and replaced by wage labour. They therefore lodged a restitution claim. The Constitutional Court found that the surviving right of labour tenancy was dispossessed after 1913 as a result of racially discriminatory laws. Here too, the court took into account the lesser surviving right to satisfy the 1913 cut-off date, but awarded a stronger right of full ownership, such as the community previously enjoyed.

The formulation of the Australian *Mabo*[12] and Canadian *Delgamuukw*[13] cases on aboriginal title distinguishes loss of sovereignty from loss of title to land. Aboriginal title is said to continue existing, after colonisation, as a burden on the Crown's underlying radical title. Using this formulation, full ownership to the land was restored to the community on the basis of the doctrine of aboriginal title. In *Mabo*, the Mer people from the Murray Islands challenged the actions of the federal government when the government attempted to place heavy restrictions on their land use. Eventually, after protracted litigation, the Australian High Court

[12] *Mabo and Others v State of Queensland (No 2)* (1992) 175 CLR 1.

[13] *Delgamuukw v British Columbia* (1997) DLR (4th) 193,

ruled in favour of the Merriam people and restored rights of full ownership based on the doctrine of aboriginal title. In *Delgamuukw,* although not deciding on the land claim, the Supreme Court of Canada gave a detailed discussion on the nature, source and content of the doctrine of aboriginal title. In order to by-pass the issue of sovereignty, Australian and Canadian courts have developed the doctrine of aboriginal title in order to allow them to restore land that was dispossessed at the time that the British Crown established territorial sovereignty. Broadly framed, the doctrine of aboriginal title maintains that indigenous communities retained an indigenous law title in their respective lands when their sovereignty was lost as a result of colonisation, which title then acts as a burden on the underlying Crown's radical title to the newly acquired territories.

This distinction between loss of sovereignty and loss of title is not unlike the distinction between loss of title as a result of colonisation and loss of surviving rights as a result of apartheid in the appeal decisions of the *Richtersveld* and *Popela* land claims cases. Using this formulation allowed the Australian and Canadian courts to consider restitution claims in the absence of legislation; within the South African context it allowed the courts to conclude that historically based land claims are not necessarily automatically excluded by the 1913 cut-off date.

Reliance will be placed on several methodologies to cover the issues set out above. The first method is an analysis of the Act in order to consider its

requirements for a successful land claim, and particularly the cut-off date. South African case law will be analysed to discover how the South African courts dealt with the cut-off date and with the requirements for a restitution claim. The comparative case law is analysed to find out how the doctrine of aboriginal title was construed by the Australian and Canadian courts and whether it can be applied in South Africa. Finally, doctrinal analysis will be used to show the nature and effect of the *Richtersveld* and *Popela* cases on the consideration of the dispossessions and on the restitution orders.

1.3 Overview of Chapters

Chapter 2 discusses the 1913 cut-off date, noting that it is a compromise feature in the aftermath of the negotiations leading to the birth of the democratic state by South African political parties. The cut-off date parallels the date on which the Black Land Act 1913 was promulgated. The 1913 Act is said to have been the precursor to further racially based legislation that eventually saw the black South African population occupying just 13% percent of the land even though they constituted 80% of the population.

Chapter 2 also shows how the new democratic government developed and implemented the land reform programme to redress the injustices of apartheid land dispossessions. Land restitution, as governed by the constitutionally mandated Restitution of Land Rights Act 22 of 1994, is the key tool for the restoration of previously dispossessed rights in land. It provides restitution of land

or other equitable redress where the dispossession took place after 19 June 1913 in the furtherance of a racially discriminatory law or practice. Opinion is divided as to the justification and desirability of the cut-off date. Chapter 2 further discusses the reaction of political and academic commentators on the justification of the cut-off date and the reaction of the lower courts when adjudicating claims where the original dispossession took place before the cut-off date. The decisions seemed to imply that historically based land claims are precluded from the restitution process.

Chapter 3 then follows up on the implication that historically based land claims are left out of the restitution process and considers the doctrine of aboriginal title in Australia and Canada as a possible means of getting around the 1913 cut-off date. The chapter notes how, in these jurisdictions, the land reform process has been chiefly driven by the courts rather than by political will, in the sense that there is no comprehensive legislative basis for restitution claims. As such, their land claims process, not being governed by legislation, does not have a cut-off date.

Chapter 3 further shows how, in fashioning a remedy for colonial land dispossessions, Canadian and Australian courts were constrained by the problem of the Crown's sovereignty. The underlying assumption is that the Crown, in establishing title during colonisation, extinguished all prior existing titles to land. Since the Crown established both sovereignty and title over the land

upon colonisation, the courts were confronted with the problem that they could not reverse the effects of colonisation without interfering with sovereignty. Relying on the groundbreaking *Mabo* and *Delgamuukw* decisions, which distinguished between loss of sovereignty and loss of title to land, the Australian and Canadian courts were able to craft the doctrine of aboriginal title as a remedy which allows for restitution claims by identifying a surviving and thus restorable aboriginal land right that acts as a burden on the underlying Crown title. This formulation is not unlike that used by *Richtersvld* and *Popela* in the appeal decisions.

Chapter 4 then discusses the *Richtersveld* and *Popela* decisions in the Supreme Court of Appeal and the Constitutional Court. It will be shown that the decisions reflect a formulation which identifies a right – either in the form of a use right or a right of occupancy – that survived the original dispossession. The surviving weaker right was then dispossessed again, under apartheid laws. The courts were able, on the basis of the surviving right, to grant restitution of the full ownership dispossessed before the 1913 cut of date. This logic, like the *Mabo and Delgamuukw* cases, identifies a weaker surviving right, and on that basis awards restitution of full ownership. Chapter 4 will also discuss alternative approaches to the *Richtersveld* and *Popela* formulation of historical dispossessions, including the question whether the doctrine of aboriginal title should or can be applied in South African law at all. The chapter, mindful of the temporal nature of the Restitution of Land Rights Act, will also offer opinion as to

whether historically based land claims outside of the Restitution of Land Rights Act are plausible.

The concluding chapter 5 summarises the above conclusions and answers the question as to just how the courts can interpret the cut-off date to include historically based land claims.

2

The 1913 Cut-Off Date and its Implications

2.1 Introduction

2.1.1 Background to Land Dispossessions in South Africa

This chapter discusses the land restitution programme in South Africa, noting that there is a cut-off date for land restitution claims. The Constitution[14] limits land restitution to dispossessions that occurred after 19 June 1913 and as a result of racially discriminatory laws or practices. The Restitution of Land Rights Act[15] is the principal legislative tool governing the land restitution process and it carries the same stipulation. Hence it appears that the Restitution of Land Rights Act precludes pre-1913 land dispossessions. Various reasons are cited for this date, the most obvious being that the cut-off date reflects the date on which the infamous Native Land Act[16] came into effect.

On the other hand, Canada and Australia, both of which have also in recent times restored land seized under colonialism to their indigenous populations, do not have a statutory limit on the date of dispossession. In fact, neither of these

[14] S 25(7) states that "[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."

[15] 22 of 1994.

[16] 27 of 1913.

countries has promulgated comprehensive restitution legislation. Instead, their courts have formulated the doctrine of aboriginal title as a means to restore colonial land dispossessions.

Arguably, the doctrine of aboriginal title is rendered unnecessary in South Africa by the Restitution of Land Rights Act, at least to the extent that the Act makes it unnecessary for the courts to invent a legal basis for restitution claims. Nonetheless, the fact that the Act imposes a limit in the form of a cut-off date, at face value, precludes some historically based land claims in South Africa. Thus this formal limit must be considered in light of the deliberate democratic processes from which it arose.

South African history is long steeped in land dispossessions.[17] The San and KhoiKhoi were the first people to be dispossessed of their traditional land and thereafter numerous wars were fought over land control. The arrival of European settlers saw the continuance of land-based conflicts.[18] Colonial powers declared land traditionally occupied and controlled by various indigenous groups as "Crown" land and later as "state" land. In so doing, pre-existing traditional forms of land ownership were either not recognised or destroyed within the new settlers' legal system.[19] Segregation based on race became entrenched in South

[17] Bundy C "Land, Law and Power: Forced Removals in Historical Context" in Murray C & O'Regan C (eds) *No Place to Rest: Forced Removals and the Law in South Africa* (1990) 3-11 at 4.

[18] Terreblanche S *A History of Inequality in South Africa,* 1652-*2002* (2002) at 9-10.

[19] Terreblanche S *A History of Inequality in South Africa, 1652-2002* (2002) at 9-10.

Africa long before the National Party (NP) took power in 1948. This segregation had a direct link to the manner in which occupation of, access to and rights on land were regulated.

Land legislation was the primary tool used to achieve territorial segregation. Prior to 1913 many land laws had been enacted in the British colonies and the Boer Republics to control squatting and to regulate tenancies, complete with penalties and punishments for contraventions.[20] The Black Land Act[21] that came into effect on 19 June 1913 carried similar provisions but was more severe. It provided for scheduled areas where only black persons could reside on specific land. Also, they were precluded from residing on land outside the scheduled areas. As many as three million black people had to leave their ancestral lands to settle in low quality land in the scheduled areas.[22] Apart from being restricted to the scheduled areas, black people also lost the right to purchase land in these areas, with the result that they acquired inferior and weak land rights even in the areas they were restricted to. The Act was what Bundy[23] describes as an effort to destroy independent forms of tenure and to create and sustain a perpetual state of dependent tenancy.

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[20] Bundy C "Land, Law and Power: Forced Removals in Historical Context" in Murray C & O'Regan C (eds) *No Place to Rest: Forced Removals and the Law in South Africa* (1990) 3-11 at 5.

[21] 27 of 1913.

[22] Terreblanche S *A History of Inequality in South Africa, 1652-2002* (2002) at 260-263.

[23] Bundy C "Land, Law and Power: Forced Removals in Historical Context" in Murray C & O'Regan C (eds) *No Place to Rest: Forced Removals and the Law in South Africa* (1990) 3-11 at 4.

After that, the South African Development and Trust Land Act[24] was promulgated, in terms of which released areas were created exclusively for black occupation. Black people lost the right to own, rent or share-crop land outside the designated areas. This Act eventually saw the allocation of a mere 13% of the country to black people, even though they comprised 80% of the population.

These land acts were followed by other developments, which included the Group Areas Act[25] and later the Promotion of Bantu Self Government Act,[26] which made provision for four independent national states[27] and six self-governing territories.[28] The Group Areas Act created different residential and business areas based on racial grouping within urban areas. Non-whites were excluded from living in the most developed areas and were forcibly removed after being deemed to be resident in the wrong area. The Promotion of Bantu Self Governing Act divided black South Africans into distinct ethnic groups and sought to transform reserves into independent homelands. It further banned parliamentary representation for black South Africans.

2.1.2 Land Reform

Under intense international political pressure and a weakening economy, the

[24] 18 of 1936.

[25] 41 of 1950.

[26] 46 of 1959.

[27] The erstwhile so-called homelands: Transkei, Ciskei, Venda and Boputhatswana.

[28] Kwa-Ndebele, Qwa-Qwa, ka-Ngwane, Kwa-Zulu, Gazankulu and Lebowa.

National Party adopted the White Paper on Land Reform in 1991.[29] It aimed to increase access to land rights to the entire population, upgrade the quality and security of title in land as well as to utilise land as a resource available to all. Three key pieces of legislation were passed in order to fulfil the latter objectives.[30] The Abolition of Racially Based Land Measures Act[31] was intended to deracialise the land control system. It repealed various pieces of primary legislation on which the policy of spatial separation of different racial groupings in South Africa was based. It either wholly or partially repealed the racially based land laws. Positive action by the state in the form of a robust programme to fully engage the inequality in respect of landholding and access to land, insecure tenure, and land restitution was sorely needed. The Upgrading of Land Tenure Rights Act[32] was intended to elevate informal land rights and permits to occupy into full ownership. The Less Formal Township Establishment Act[33] envisaged the creation of townships by black South Africans, for their exclusive use in terms of a communal system. Equally important was the fact that the Act made it possible for tribal authorities to establish a township and to dispose of land after permission was granted by the provincial authorities.

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[29] Republic of South Africa, Department of Land Affairs *White Paper on Land Reform WPB-91* (1991) http://land.pwv.gov.za/White%20Paper/white4.htm [accessed 12 August 2009]. In general, for detailed background on the negotiations that took place during the transition period, see Terreblance S *A History of Inequality in South Africa, 1652-2002* (2002), particularly at 306-311.

[30] The Abolition of Racially Based Land Measures Act 108 of 1991, Upgrading of Land Tenure Rights Act 112 of 1991 and the Less Formal Township Establishment Act 113 of 1991.

[31] 108 of 1991.

[32] 112 of 1991.

[33] 113 of 1991.

It is no surprise, therefore, that land reform was a major objective of the African National Congress (ANC) government soon after coming into power in 1994. The *White Paper on the Reconstruction and Development Programme* (RDP),[34] adopted in September 1994, set out the principles guiding the land reform policy and programme. These guiding principles culminated with the Department of Land Affairs issuing the 1997 *White Paper on South African Land Policy* (*White Paper*),[35] which recognised land redistribution, land restitution and land tenure reform as being the three elements of the land reform programme. The advent of the new constitutional dispensation ultimately saw the inclusion, after much debate, of a property clause in the national constitution.[36] Both the 1993 and the 1996 Constitutions included provision for land reform, and particularly restitution,

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[34] Republic of South Africa, Government of National Unity *White Paper on Reconstruction and Development Programme* (1994) at 2.4.1 http://www.anc.org.za/ancdocs/policy/rdpwhite.html [accessed 12 August 2009].

[35] Republic of South Africa, Department of Land Affairs *White Paper on South African Land Policy* (1997) at 2.3.

[36] The constitutional protection of property was controversial from the onset and was one of the last issues to be resolved in the negotiations for a constitution to found the new democratic dispensation. It was argued that the entrenching of the property clause would legitimise the consequences of apartheid and land dispossessions. In fact, some authors remain unconvinced as to its constitutionally protected status. See for example Hendricks F "Does the South African Constitution Legitimise Colonial Land Alienation?" (2004) (Paper presented to the Sociology Department seminar series, Rand Afrikaans University) available at http://general.rau.ac.za/sociology/Hendricks.pdf [accessed 30 October 2008]. He asks whether the South African Constitution *justifies* colonial land theft. For a general discussion on the debate over the constitutional entrenchment of property rights, see Budlender G "The Constitutional Protection of Property Rights: An Overview" in Budlender G, Latsky J & Roux T (eds) *Juta's New Land Law* (1998) at 1-5.

albeit that this provision was only included in the property clause in the 1996 Constitution.[37]

The policy framework document adopted by the new government first set the cut-off date for restitution claims as 1913.[38] The purpose of land restitution, according to the *White Paper on South African Land Policy*, is to restore land and to provide further restitution remedies to people dispossessed by racially discriminatory laws and practices. The restoration of land provides support to the overarching national process of reconstruction, reconciliation and development. Walker describes the master narrative underpinning the South African land reform process as being composed of two themes, namely "[t]he trauma of deep dislocating loss of land in the past and the promise of restorative justice through the return of that land in the future."[39] The 1913 cut-off date reflects the above considerations, as the discussion below details.

2.2 The 19 June 1913 Cut-Off Date

The Interim Constitution of 1993 made provision for land restitution for individuals and communities dispossessed of land. In addition, an enabling Act of Parliament

[37] S 25(7). In the 1993 Constitution land restitution was provided for in the land reform provisions in ss 121-123, which did not form part of the Bill of Rights.

[38] The Reconstruction and Devolvement Programme (1994) states that land restitution is "[t]o redress the suffering caused by the policy of forced removals, the democratic government must, through the mechanism of a land claims court, restore land to South Africa's dispossessed by discriminatory legislation since 1913."

[39] Walker C *Land Marked: Land Claims and Restitution in South Africa* (2008) at 34.

was to govern the restitution of land rights.[40] This was the basis for the Restitution of Land Rights Act 22 of 1994. This Act stipulates that a person (or a direct descendant of such a person) who was dispossessed of a right in land after 19 June 1913, under an abolished racially discriminatory law, may qualify as a claimant for the restitution of rights in land.[41] The property clause[42] in the Final Constitution of 1996 contains a similar provision that maintains the cut-off date for unfair dispossession of land rights as 19 June 1913.

It is generally accepted that the cut-off date is a feature that reflects the compromise nature of the Constitution.[43] It is an attempt at finding the balance between the rights of those dispossessed and the rights of the current occupiers.[44] The *Green Paper* acknowledges that certain restitution claims will fall outside of the Restitution of Land Rights Act because of the cut-off date's limitation to dispossessions that occurred after 19 June 1913.[45] In such cases, a commitment is made to provide alternative forms of relief, although these alternatives are not explained. The *Green Paper* states that the restitution

[40] Ss 121-123 of the 1993 Constitution.

[41] S 2(3).

[42] S 25.

[43] Republic of South Africa, Department of Land Affairs *Green Paper on South African Land Policy* (1996) 2.12.

[44] Van der Walt AJ "Land Reform in South Africa Since 1990 – An Overview" (1995) 10 *SAPL* 1-30 at 4. Van der Walt states that this balance should be seen against the background of the "[s]uffering, injustice and poverty created by an enormous and ill-advised programme of social engineering carried out by white nationalist governments over a period of forty years."

[45] Republic of South Africa, Department of Land Affairs *Green Paper on South African Land Policy* (1996) 2.12.

process as set out in the Constitution would be unworkable if it applied to all historic land claims, concluding that in South Africa ancestral land claims would be problematic since the legal and political complexities associated with such claims would be too difficult to solve.[46] The *White Paper* justifies the exclusion of pre-1913 land claims on the basis that most historic claims are by their nature based on tribal affiliation, and that such claims would "serve to awaken and/or prolong destructive ethnic and racial politics."[47] Moreover, the demographics of ethnically defined communities have changed over the years with populations growing to more than eight times that of the past. There would also be a risk of overlapping claims in instances where land was occupied in succession by various ethnic groups.[48]

In public hearings[49] before the Portfolio Committee on Agricultural and Land Affairs, aimed at amending certain provisions of the Restitution of Land Rights Act, the Chief Land Claims Commissioner stated that pre-1913 land dispossessions were fuelled by colonial and tribal wars, implying that such claims are not the result of racially discriminatory laws or practices as envisaged by the Restitution of Land Rights Act. Furthermore, he stated that such claims would

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[46] Republic of South Africa, Department of Land Affairs *Green Paper on South African Land Policy* (1996) 2.12.

[47] Republic of South Africa, Department of Land Affairs *White Paper on South African Land Policy* (1997) 3.17.3.

[48]Republic of South Africa, Department of Land Affairs *White Paper on South African Land Policy* (1997) 3.17.3.

[49] www.pmg.org.za/docs/2005/comreports/050308pcagricreport.htm [accessed on 11 October 2008).

lead to inter-tribal wars, and that the largest claims would be only for restitution of land originally occupied by the KhoiSan population.

The 2005 Land Summit[50] mooted the possibility of revisiting the cut-off date to either 1652 or 1820, when the Dutch and English settlers respectively arrived. This was dismissed by the then Minister of Agriculture and Land Affairs, Thoko Didiza, on the grounds that this would open up a Pandora's Box of "counter plans over counter plans". She added that all issues pertaining to land needs were addressed by the land redistribution programme as well as land tenure legislation.

Carey Miller and Pope[51] have described the limitation of restitution claims to post-1913 dispossession as a critical aspect of the restitution process. They sum up the reasoning of the *White Paper's* insistence on the cut-off date as follows: firstly, aboriginal title should not be included in the South African restitutionary process as South Africa differs demographically from the countries in which it has been applied successfully.[52] Secondly, aboriginal title is unsuitable in land claims as there has been a shift in the ownership paradigm from that of long ago and also, some land settled on by European settlers was *terra nullius.*[53] Finally, due

[50] www.land.pwv.gov.za/Land_Summit/ [accessed on 11 October 2008).

[51] Carey Miller DL & Pope A *Land Title in South Africa* (2000) 315.

[52] Namely Australia, Canada, New Zealand and the United States of America.

[53] On this point, Yanou scathingly comments that "[i]t reflects the tendency to devise exculpatory reminiscences by those who having unjustly enriched themselves with African lands seek to frustrate its restoration": Yanou MA "The 1913 Cut-Off Date for Restitution of Dispossessed Land

to the ethnic nature of aboriginal title, it was felt that this may influence ethnic conflicts over land. Carey Miller and Pope regard the cut-off date as valuable in the land restitution process because it ensures that potential claimants can be identified with sufficient certainty. They add that it is essential to balance prime concerns such as restitution with maintaining public confidence in the land market. Since forced removals are a phenomenon of the twentieth century, the twentieth century cut-off date is consistent with that limitation. They suggest that this limitation could have a positive influence on the economy. This would be in line with the stated objectives of the *White Paper*.[54] Their conclusion is that, ultimately, the 1913 cut-off date makes the scope of restitution clear.

Patterson[55] describes the cut-off date as a realistic compromise, adding that the Land Claims Court cannot be reasonably expected to deal with 350 years of land dispossessions. Walker[56] describes the cut-off date as "pragmatic" yet "not unprincipled" and adds that the history of pre-1913 dispossessions is too dense to fall in line with community-level redress as envisaged in the post- 1994 land restitution programme. Walker further opines that the poverty and

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in South Africa: A Critical Appraisal" (2006) 41 *Africa Development* 177-188 at 179.

[54] Republic of South Africa, Department of Land Affairs *White Paper on South African Land Policy* (1997) 2.2.5. The *White Paper* states that one of the indicators of the land reform programme is achieving land restitution whilst maintaining public confidence in the land market.

[55] Patterson S "Land Restitution and the Prospects of Aboriginal Title in South Africa" (2003) 34 *Australian Indigenous Law Reporter* 13-28 at 15.

[56] Walker C "Redistributive Land Reform; For What and for Whom?" in Nstebeza L & Hall R (eds) *The Land Question in South Africa – The Challenge of Transformation and Redistribution* (2007) 132-151 at 136.

underdevelopment brought about by colonial land dispossessions can be alleviated through alternative development strategies, although she does not describe the alternative strategies in any detail.

Visser and Roux[57] note that the 1913 cut-off date is a compromise feature of the land reform programme. They state that this compromise is due to the realisation that the foundations of apartheid were laid long before the National Party came into power in 1948. This in effect precludes the inclusion of pre- 1913 colonial era dispossessions in the restitution programme. They argue that pre-1913 claims would be too complicated to solve, given the massive population migrations involved, the absence of written records and the passage of time. Also, the ANC was particularly concerned that pre-1913 claims would be used by the Inkatha Freedom Party (IFP) to lay a claim, based on ethnicity, to the entire province of KwaZulu-Natal.[58]

Roux[59] states that even though land dispossessions took place before 1913, the bulk of the country's usable land had been occupied by European settlers during the course of the 19th century. The cut-off date is testimony to the delicate balance of power at the Convention for a Democratic South Africa (CODESA)

[57] Visser D & Roux T "Giving Back the Country: South Africa's Restitution of Land Rights Act 1994 in Context" in Rwelamira MR & Werle G (eds) *Confronting Past Injustices: Approaches to Amnesty, Punishment, Reparation and Restitution in South African and Germany* (1996) 89-111 at 94.

[58] Carey Miller DL & Pope A *Land Title in South Africa* (2000) at 315.

[59] Roux T "The Restitution of Land Rights Act" in Budlender G, Latsky J & Roux T (eds) *Juta's New Land Law* (1998) at 3A-4.

talks.[60] Roux acknowledges the arbitrariness of the cut-off date, but suggests that it would be theoretically possible for communities dispossessed of land before 1913 to claim restitution on the basis of the doctrine of aboriginal title; he even suggests that there may be some tactical advantage in using this doctrine in support of a general claim for state assistance.[61]

Budlender[62] notes the compromise reached by political parties in the drafting of the property clause in the interim Constitution. As an indicator of the significance of land, he notes that of all the wrongs caused by apartheid and racial discrimination, it is only the dispossession of land rights which the interim Constitution specifically directed the legislature to rectify. Bennett and Powell[63] point out that the Restitution of Land Rights Act is of limited effect in that the restitution mechanism is primarily aimed at redressing the wrongs of apartheid, of which land deprivation is the most immediate injustice.

The apparently broad consensus[64] about the wisdom of the 1913 cut-off date

[60]The series of multi-party negotiations to end apartheid in South Africa. They took place between 1990 and 1993 and resulted in South Africa's first multiracial election in 1994.

[61]Roux T "The Restitution of Land Rights Act" in Budlender G, Latsky J & Roux T (eds) *Juta's New Land Law* (1998) at 3A-4.

[62] Budlender G "The Constitutional Protection of Property Rights: Overview and Commentary" in Budlender G, Latsky J & Roux T (eds) *Juta's New Land Law* (1998) at 1-3.

[63] Bennett TW & Powell CH "Aboriginal Title in South Africa Revisited" (2005) 19 *SAJHR* 449-485 at 450.

[64] Van der Walt AJ *Constitutional Property Law* (2005) at 293-294 states that a clear result of the 1913 cut-off date is that historically based land claims against colonial dispossessions are, somewhat controversially, left out of the restitution process.

does not completely exclude the relevance of the doctrine of aboriginal title from the scope of the South African restitution process. Bennett and Powell[65] submit that some aboriginal title restitution claims can be legitimate in South African law. Reilly[66] similarly opines that international law jurisprudence provides enough reason for South African law to recognise the applicability of aboriginal title claims. Yanou[67] describes the cut-off date as unreasonable in light of the corrective justice theory that underpins the land restitution process. He submits that where land dispossessions that occurred before 1913 are clearly identifiable, then it is "[t]heoretically unsound to foreclose it by an arbitrary limitation of time provision."

In summing up the reactions to the cut-off date, essentially, the Minister of Land Affairs and some authors view the cut-off date's exclusion of further claims for pre-1913 dispossessions as fair, pragmatic and logical. Some see it as unfair and think that obvious pre-1913 dispossessions should be restored, despite the cut-off date. Others venture that the doctrine of aboriginal title can be used for that purpose.

2.3 Judicial Reactions to the Cut-Off Date

[65] Bennett TW & Powell CH "Aboriginal Title in South Africa Revisited" (2005) 19 *SAJHR* 449-485 481.

[66] Reilley A "The Australian Experience of Aboriginal Title: Lessons for South Africa" (2000) 16 *SAJHR* 512-534 at 528.

[67] Yanou MA "The 1913 Cut-Off Date for Restitution of Dispossessed Land in South Africa: A Critical Appraisal" (2006) 41 *Africa Development* 177-188 at 180.

2.3.1 Introduction

The Constitution and the Restitution of Land Rights Act appear to preclude pre-1913 land claims. Academic opinion, as discussed above, remained largely unclear as to whether the effect of the 1913 cut-off date is absolute or whether the courts should consider claims based on dispossessions that occurred prior to the cut-off date anyway. This was the position that the courts found themselves in. Their approach to the problem is discussed below.

2.3.2 The Richtersveld Land Claim[68]

The subject land had been inhabited by the San and the Khoi Khoi since time immemorial. In this time, they had treated the subject land as theirs, with outsiders having to obtain permission to either graze or use the land and its minerals. This right in the land was said to be rooted in the traditional laws and customs of the inhabitants.[69]

Upon annexation by the British Crown in 1847, the Cape Colonial government considered the subject land to be Crown land.[70] However, the inhabitants were

[68]The discussion of the case in this section is limited to the decision of the Land Claims Court. The decision was appealed before the Supreme Court of Appeal and again before the Constitutional Court. Chapter 4 at 4.2 details the decisions of both the Supreme Court of Appeal and the Constitutional Court. See *Richtersveld Community and Others v Alexcor Ltd and Another* 2003 (6) SA 104 (SCA)*, Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC).

[69] *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA) para 28.

[70] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1993 (LCC) para

permitted to remain on the land, exercising the same rights as they had done in the past. When diamonds were discovered in 1925, the Richtersveld people were over time denied access to the subject land. The Precious Stones Act[71] did not recognise the rights of the community to the land, as the land (and therefore their right to use it) was not registered.[72] They were then forced off the land and into reserves. The community's occupation and use of, as well as trade on the land, was criminalised.[73] Consequently, the community lost its rights in the land and was treated as though it had had no rights to begin with.[74] By 1989, all rights to the state land had passed to Alexkor Ltd and were registered in favour of Alexkor Ltd, a public company of which the government is the sole shareholder.[75]

In 1998, the Richtersveld community approached the Land Claims Court, claiming the subject land on the basis that they had been dispossessed of their customary law ownership rights in the subject land by racially discriminatory legislative and other action, after 19 June 1913, as a result of past discriminatory actions.[76] The community's case was that they held title to the subject land and

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[71] Act 44 of 1927. It permitted alluvial diggings over the subject land in terms of various Proclamations which also deemed the Richtersveld land to be "unalienated Crown land".

[72] *Richtersveld Community and Others v Alexkor Ltd and Another* 2004 (5) SA 460 (CC) para 85.

[73] *Richtersveld Community and Others v Alexkor Ltd and Another* 2004 (5) SA 460 (CC) para 89.

[74] *Richtersveld Community and Others v Alexkor Ltd and Another* 2004 (5) SA 460 (CC) para 91.

[75] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1993 (LCC) para 31.

[76] In terms of the Restitution of Land Rights Act 22 of 1994 s 2(1), which provides that where a claim for restitution of a right in land is made, the restitution must be made to a community

that the title had survived the 19 June 1913 cut-off date. Further, they submitted that the title fell within the definition of a "right in land"[77] as stipulated by the Restitution of Land Rights Act.[78] The right in land was that of customary law ownership and in the alternative a right founded on aboriginal title. The alternative claimed based on aboriginal title, they contended, allowed the community exclusive beneficial occupation and use of the subject land. Aboriginal title also gave the community the right to use the subject land for certain specific purposes such as habitation, cultural and religious practices, grazing, cultivation, hunting, fishing, drawing water as well as the harvesting and exploitation of natural resources. Another alternative claim was for a right in land over the subject land that was obtained through their beneficial occupation of the subject land for ten years prior to their eventual dispossession.

In considering whether the community had rights in the subject land based on customary law ownership, the Land Claims Court began by analysing the law of the Cape Colony at the time of annexation. The community claimed that they had acquired ownership of the subject land by *occupatio* or *res nullius* land at the

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dispossessed of a right in land after 19 June 1913 and as a result of past racially discriminatory laws and practices.

[77] S 1 of the Restitution of Land Rights Act 22 of 1994 defines "right in land" as "[a]ny 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."

[78] 22 of 1994.

time of annexation.[79] However, the court held that the community did not have rights of ownership in the subject land after the 1847 annexation by the British Crown.[80] The court made use of the laws in force in the Cape Colony at the time, which regarded the Richtersveld people as lacking in civilisation. Due to this perceived lack of civilisation, their occupation was disregarded and their land was considered unoccupied territory.[81] Although Gildenhuys J cautioned that this line of thinking had since undergone change, the changed thinking did not affect land title obtained in accordance with the laws of that time.[82]

The court then considered the community's alternative claim on the basis of rights in land based on aboriginal title. They claimed rights of possession and use of the subject land. However, the court was unconvinced of the argument, stating instead that the rights claimed by the community were uncertain as there was a lack of clarity as to whether the doctrine of aboriginal title formed a part of South African law. According to the Land Claims Court, even if aboriginal title was a part of South African law, its scope and content remained unknown.[83] The court also added that it lacked the jurisdiction to develop the common law to allow the

[79] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1993 (LCC) para 37.

[80] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1993 (LCC) para 43.

[81] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1993 (LCC) para 37.

[82] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1993 (LCC) para 41.

[83] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1993 (LCC) para 53.

claim based on aboriginal title to succeed.[84] However, the court stated that what the community referred to as indigenous title may be a customary law interest as is entailed in the definition of "right in land" in the Restitution of Land Rights Act.[85] On this point the court reiterated that it lacked the powers to develop the common law so as to include a right to indigenous title as a customary interest.

The court then considered the third alternative claim of the community having rights in the land based on beneficial occupation. The community relied on rights in land that came about as a result of their being in beneficial occupation of the subject land for a continuous period of more than ten years before being dispossessed.[86] Essentially, the land must have been occupied with the occupiers intending to benefit from the occupation. The community needed to have derived a certain value from the occupation. The court took into consideration the evidence submitted by the community that they had regarded the subject land as their own and that outsiders needed to obtain permission before they could use the subject land.[87] The court found that the Richtersveld community had beneficial occupation of the subject land prior to the

[84] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1993 (LCC) para 52.

[85] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1993 (LCC) para 51.

[86] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1993 (LCC) para 54.

[87] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1993 (LCC) para 59.

dispossession.[88]

On the question whether the community had been dispossessed of the right in land by past racially discriminatory laws or practices, the court began by stating that dispossession is the actual loss of a right in land which occurs at a particular point in time. Thereafter, the court considered what constitutes a racially discriminatory law or practice and concluded that the "[p]recepts of equality must be transgressed for racist reasons".[89] In order to determine the kind of dispossession that is envisaged by the Restitution of Land Rights Act, the court held that the dispossession had to have occurred as a result of a law or a practice that was designed to bring about spatial apartheid.[90]

With the above in mind, the court then considered whether the community's dispossession had been as a result of past racially discriminatory laws or practices. In doing so, the court considered the legislation and executive actions and omissions that the community alleged were the factual and legal causes of the dispossession. In particular, the community cited various proclamations[91]

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[88] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1993 (LCC) para 65.

[89] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1993 (LCC) para 81.

[90] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1993 (LCC) para 92.

[91] Proclamation 58 of 8 March 1928, which declared a part of the subject land as state digging site in terms of s 26 of the Precious Stones Act 44 of 1927; Proclamation 1 of 3 January 1929; Proclamation 250 of 17 July 1931 and Proclamation 158 of 7 June 1963; all of which expanded

issued under two pieces of Precious Stones legislation.[92] The court did not find any of the proclamations or practices racially discriminatory. The community stated that as owners of the subject land, they had not received the benefits[93] that a private owner would have been entitled to in terms of the mentioned precious stones legislation. Nonetheless, the court held the withholding of the benefits was not caused by a racially discriminatory law or practice. The court instead held that the withholding of the benefits of ownership was caused by the Government's non-recognition of the community's ownership of the subject land.[94]

Ultimately, the Land Claims Court concluded, the community was dispossessed of the original ownership right over the subject land in 1847, in other words prior to the statutory cut-off date of 1913. However, the Land Claims Court did not consider the original dispossession. Instead, the court focused on the remaining weaker right of beneficial occupation, which survived after the 1913 cut-off date and could therefore have founded a restitution claim under the Restitution of Land Rights Act in 1994. However, the court held that beneficial occupation was a right in land newly created by legislation and as such could not have been subject to dispossession in 1927. The restitution claim was rejected on the basis

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state alluvial diggings until they covered the subject land in its entirety.

[92] Act 44 of 1927 and Act 23 of 1964.

[93] Such as the prerogative of owners and surface owners in terms of s 19(1)(a) to choose four hundred claims free of charge; the owners' entitlement to license moneys in accordance with s 22 and the protection of the owner's homesteads and water rights under s 23.

[94] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1993 (LCC) para 105.

that the 1927 dispossession was not the result of a discriminatory law or practice meant to bring about spatial apartheid.[95] The main ground for the failure of the restitution claim was that the Richtersveld community had failed to show how the dispossession had occurred as a result of past racially discriminatory laws or practices.[96] Accordingly, although the court identified a land right that survived the 1913 cut-off date, this was held not to have been a right that could have been or were shown to have been dispossessed after the cut-off date in terms of racially based legislation.

2.3.2 The Popela Land Claim[97]

The Popela community[98] had held exclusive customary law ownership of the subject land since the nineteenth century.[99] They had enjoyed undisturbed indigenous land rights to the land and they had also exercised all the rights that

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[95] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1993 (LCC) para 106.

[96] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1993 (LCC) para 106.

[97] *Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2005 (2*)* SA 618 (LCC), *Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (2) SA 21 (SCA), and *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC). The decision of the Constitutional Court is discussed in chapter 4.

[98] The claimants were only described as such in the Constitutional Court decision. It is only for ease of reference that they are referred to as a community in the discussion of their land claim before the Land Claims Court and the Supreme Court of Appeal. See also 4.3 of Thesis for the Constitutional Court decision.

[99] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 6.

went with such possession of the land. In 1889, in what has been termed the "[h]allmark of forcible dispossession of indigenous ownership of land", the Zuid-Afrikaanse Republiek granted the subject land to white owners.[100]

This resulted in the loss of the customary law ownership right over the land that the community had previously held.[101] The white settlers then required the community to provide labour for specified periods annually, changing their status to labour tenants. The land owner would give the members of the community land on which they could plough their own crops. The land owner would determine the number and type of animal each individual member of the community was permitted to keep. The labour tenants were permitted to build homes for themselves and their families on the subject land. The community continued to reside on the land. The surviving right that they exercised over the land after the initial dispossession of their ownership right in 1889 was mere labour tenancy.[102]

This remained the status quo until 1969, when the then owners of the land decided to terminate the labour tenancies. The community did not receive compensation for the loss of the rights to the subject land. They had to cease

[100] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 6.

[101] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 15.

[102] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 15.

ploughing on the subject land and were required to get rid of their livestock and to enter into wage labour. They then became full time wage earners on the subject land. Members of the community who did not agree with the changed circumstances left the subject land. They were therefore dispossessed of the cropping and grazing rights which they had held under the labour tenancy agreements.[103]

In 2000, the community lodged a claim for the subject land before the Land Claims Court[104] on the basis that they had been dispossessed of their labour tenancy rights in 1969 because of past racially discriminatory practices.[105] As redress, they sought restitution of the land where they had previously enjoyed cropping and grazing rights as well as where their homesteads had been situated.[106] The claim was lodged by the claimants as a community and, in the alternative, as individuals.

The Land Claims Court took cognisance of the fact that the community had been dispossessed of sovereignty over the subject land in 1889. However, since the dispossession of rights in land in the form of customary law ownership occurred

[103] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) paras 16-19.

[104] *Popela Community and Others v Goedgelegen Tropical Fruits (Pty*) *Ltd* 2005 (2) SA 618 (LCC).

[105] *Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2005 (2) SA 618 (LCC) para 62.

[106] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 25.

before 1913, the court emphasised that this initial dispossession in terms of the Restitution of Land Rights Act was not justiciable.[107] Instead, the Land Claims Court accepted that the remaining rights in the land that the community held were in the form of labour tenancies, of which the community was again dispossessed in the course of 1969. A restitution claim might therefore be possible with regard to these lesser, remaining land rights. However, the court found that the evidence that the community could be deemed a community for purposes of the Restitution of Land Rights Act was insufficient.[108]

Thereafter the court considered whether the individual community members had been dispossessed of the labour tenancy rights by racially discriminatory laws or practices. The community relied on the Bantu Laws Amendment Act,[109] which in section 22 enabled the inclusion of section 27*bis* in the Native Trust Land Act,[110] which terminated labour tenancy contracts nationally.[111] The community contended that the provisions of these laws were racially discriminatory and the

[107] *Popela Community & Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2005 (2) SA 618 (LCC) para 61.

[108] *Popela Community & Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2005 (2) SA 618 (LCC) para 55.

[109] 42 of 1964.

[110] 18 of 1936.

[111] More specifically, it provided that: "Whenever a Minister considers it in the public interest to do so, he may be notice in the *Gazette* declare that as from a fixed date in such notice –

a) no further labour tenants contracts shall be entered into and no further labour tenants shall be registered in respect of land in the area refereed to in such notice; or

b) no labour tenants shall be employed on land referred to in such notice."

court agreed with this contention.[112] However, the community was dispossessed of their labour tenancy rights in 1969, a year before the racially discriminatory laws were published and as such, the court concluded, the community could not have been dispossessed as a result of the racially discriminatory laws.[113]

In addition, the court stated that even though the community members were dispossessed of their original ownership over the land in 1889, this was a dispossession that fell outside of the ambit of the Restitution of Land Rights Act, as it preceded the 19 June 1913 cut-off date. The Land Claims Court ruled that the community was not entitled to restitution as there was no link between the racially discriminatory laws and their being dispossessed of their individual labour tenancy rights. Again, the rights that survived the 1913 cut-off date were not the kind of rights that could have been or were shown to have been dispossessed after the cut-off date in terms of racially based legislation.

In 2006 the community appealed to the Supreme Court of Appeal against the decision of the Land Claims Court.[114] The community claimed the subject land on the basis that they had been dispossessed of their rights in the land as a result of the termination of their labour tenancy relationship between themselves and the

[112] *Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2005 (2) SA 618 (LCC) para 64.

[113] *Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2005 (2) SA 618 (LCC) para 66.

[114] *Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (2) SA 21 (SCA) para 3.

registered owners of the land.

The Supreme Court of Appeal, like the court *a quo*, focused on the dispossession of the labour tenancy rights rather than the initial dispossession of the customary law ownership originally held by the community over the subject land.[115] The Supreme Court of Appeal agreed with the finding of the Land Claims Court that individual community members had been dispossessed of their cropping and grazing rights as labour tenants. The Supreme Court of Appeal also agreed with the finding that the original ownership right that was dispossessed in 1889 fell outside of the reach of the Restitution of Land Rights Act. On the other hand, the second dispossession in 1969 of the labour tenancy right fell within the scope of the Act. Despite finding that the community had a right that was dispossessed in 1969, however, the Supreme Court of Appeal also considered the real question to be whether the dispossession had occurred as a result of past racially discriminatory laws or practices.[116]

The court made reference to an amendment to the Native Trust and Land Act.[117] The amendment was in accordance with the Bantu Laws Amendment Act.[118] The amendment to the Native Trust and Land Act gave the Minister discretion to

[115] *Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (2) SA 21 (SCA) paras 4-6.

[116] *Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (2) SA 21 (SCA) para 7.

[117] 18 of 1936

[118] 42 of 1964.

terminate labour tenancies in instances where the Minister found it in the public interest to do so.[119] It was only on 31 July 1970 that the Minister published a notice in the *Government Gazette*, effective from that date, which prohibited the creation of further labour tenancy contracts. The Supreme Court of Appeal's conclusion was that, even though the amendment to the Native Trust and Land Act was racially discriminatory, there was no evidence to suggest that the landowners, in terminating the labour tenancies, had acted with that knowledge.[120] This was due to the fact that the claimants' labour tenancies were terminated in 1969, a year before the laws came into effect. The community had attempted to show that the landowners had been aware of the intention of the government to phase out labour tenancy and that the landowners had acted with knowledge of this policy.[121] However, the Supreme Court of Appeal found no evidence to suggest that the landowners had been influenced by knowledge of this policy. The landowner's reasons for ending the labour tenancy were that it was outdated and inefficient and that neighbours who had done the same were benefiting from the change.[122] The court found the latter to be sufficient reason for terminating the labour tenancies.[123] Hence, the court found that there was an

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[119] Refer to n 93 above.

[120] *Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (2) SA 21 (SCA) para 15.

[121] *Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (2) SA 21 (SCA) para 15.

[122] *Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (2) SA 21 (SCA) para 11.

[123] *Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (2) SA 21 (SCA) para 12.

insufficient connection between the racially motivated law or practice and the dispossession of the labour tenancy rights. In this instance, the court did not find the causal connection that section 2(1) of the Restitution of Land Rights Act calls for.[124]

The claimants also argued that they were a community or part of a community on the subject land.[125] The landowners responded to this by stating that the farm residents did not belong to a group organised enough to be termed a community in terms of the Restitution of Land Rights Act.[126] The Supreme Court of Appeal chose to agree with the ruling of the Land Claims Court, which had found that the evidence submitted to establish the existence of a community was inconclusive.[127]

Thus, for the above reasons, underpinned by the finding that the original dispossession of ownership was in 1889, with a second dispossession of the surviving weaker right in 1969, the land claim failed because the dispossession of the surviving right could not satisfy the requirements for a restitution claim

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[124] *Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (2) SA 21 (SCA) para 15.

[125] *Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (2) SA 21 (SCA) para 17.

[126] S 1 of the Restitution of Land Rights Act 22 of 1994 defines a community as "[a]ny group of persons whose rights are derived from shared rules determining access to land held in common by such group and includes part of any such group."

[127] *Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (2) SA 21 (SCA) para 17.

under the Act.

2.4 Conclusion

The above discussion of South African restitution cases implies that there can be no restitution for pre-1913 land dispossessions. These decisions imply that the 1913 cut-off date can have no other interpretation except that all land dispossessions that occurred prior to the cut-off date cannot be restored under the Restitution of Land Rights Act. With this line of reasoning, historically based land claims that occurred prior to the cut-off date would therefore be left out of the restitution process.

Furthermore, although the courts in both cases established that the claimants had land rights that survived the 1913 cut-off date, these rights were described in such a way that the second, post-1913 dispossession that clearly took place did not satisfy the requirements for a restitution claim in terms of the Act, because either the right itself or the way in which it was exercised (the community requirement) or the dispossession of that right (the racial discrimination requirement) was inadequate. In both cases, it is arguable that the first dispossession would have qualified, if it were not for the cut-off date, and that the second dispossession would also have qualified if the surviving right had not been scaled down by the first dispossession. In this way it appears that the lack of success in these cases was directly or indirectly caused by the cut-off date.

On further appeal, however, both these cases succeeded.[128] Chapter 4 of the thesis will discuss the appeal decisions in order to reveal a formulation that allows for restitution orders within the ambit of the cut-off date in order to include historically based land claims that seem to be grounded in pre-1913 dispossessions, in the restitution process of the Restitution of Land Rights Acts. Briefly, in granting the claims for restitution, the appeal courts focused on a weaker (mostly use) right that was held to have survived the initial dispossession of the stronger right of ownership and that could satisfy the requirements of the Act.[129] Since the surviving right was dispossessed after 1913, the claims met the requirements of the Restitution of Land Rights Act. By identifying and then focusing on weaker use rights that are said to have survived the original (mostly colonial) dispossession of ownership or sweeping indigenous land rights, the courts opened the possibility of considering restitution claims in cases that might otherwise seem to be excluded from the ambit of the Restitution Act.

However, the above formulation is only applicable where potential claimants can prove the existence of a land right that survived the initial dispossession. As such, the question remains whether historical land dispossessions are impossible if claimants are unable to prove a surviving right that was again dispossessed after the cut-off date.

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[128] See *Alexkor Ltd and Another* 2004 *v Richtersveld Community and Others* 2004 (5) SA 460 (CC) and *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC).

[129] Van der Walt AJ *Property in the Margins* (2009) at 205-206.

Australia and Canada, unlike South Africa, do not have a cut-off date for land restitution claims, because the restitution process in those countries is driven by judicial invention and not by legislation. In those countries, the major problem with establishing a legitimate foundation for land restitution claims is the aspect of sovereignty. Indeed, aspects of the *Mabo* and the *Delgamuukw* decisions reflect this quandary.[130] In order to by-pass the issue of sovereignty, Australian and Canadian courts have developed the doctrine of aboriginal title in order to allow them to restore land dispossessed at the time that the British Crown established territorial sovereignty. Broadly framed, the doctrine of aboriginal title maintains that indigenous communities retained an indigenous law title in their respective lands, which title acted as a burden on the underlying Crown's radical title to the newly acquired territories. Chapter 3 accordingly discusses, by way of case law, the doctrine of aboriginal title in Australia and Canada to determine the similarities and differences between the judicial and statutory processes of restitution.

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[130] See Lamer CJ's quote in *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 1124 that "[u]ltimately it is through negotiated settlements with good faith and give or take on all sides, reinforced by the judgments of this court, that we will achieve what I stated … to be the basic purpose of s 35 (1) [of the *Constitution Act* 1982 of Canada, which protects aboriginal and treaty rights] – the reconciliation of aboriginal societies with the sovereignty of the Crown. Lets face it, we are all here to stay." See also Brennan J's remark that "[a]lthough the question whether a territory has been acquired by the Crown is not justiciable before municipal courts, those courts have jurisdiction to determine the consequences of an acquisition under municipal law": *Mabo and Others v State of Queensland* (*No 2)* (1992) 175 CLR 1 para 32.

3

The Doctrine of Aboriginal Title Explored

3.1 Introduction

Having established the legislative framework governing the South African restitution process and noting how the 1913 cut-off date appears to exclude historically based land claims, the question remains whether there is any way in which pre-1913 dispossessions could be restored. An alternative approach to the problem could be found in Australian and Canadian jurisprudence. In these jurisdictions, the land reform process has been chiefly driven by the courts rather than political will, in the sense that there is no comprehensive legislative basis for restitution claims. As such, their land claims process, not being governed by legislation, does not have a cut-off date.

In fashioning a remedy for colonial land dispossessions, both Canada and Australia found themselves constrained by the problem of the Crown's sovereignty.[131] The underlying assumption is that the Crown, in establishing title

[131] Van der Walt AJ in *Property in the Margins* (2009) at 38 notes how the decisions in *Mabo and Others v State of Queensland (No 2)* (1992) 175 CLR 1 and *Delgamuukw v British Columbia* [1997] 3 SCR 1010 are crafted in such a manner that state sovereignty is left uncompromised. In the context of the post-colonial debate, post-colonial governments, according to Van der Walt,

during colonisation, extinguished all prior existing titles to land. Given the fact that the Crown established both sovereignty and title over the land upon colonisation, the courts were confronted with the problem that they could not reverse the effects of sovereignty without creating all kinds of problems. With this line of reasoning, it would have meant that the indigenous proprietary systems prior to sovereignty would have been lost through colonisation and not recoverable through judicial restitution orders.

South African courts, on the other hand, did not have to grapple with the sovereignty issue since the post-apartheid democratic process resulted in a constitutional foundation and legislation to govern the land restitution process.

In seeking to overcome the sovereignty issue, Australian and Canadian courts have developed the doctrine of aboriginal title in order to redress colonial land dispossessions. The core of the doctrine of aboriginal title is that the loss of

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should be able to distance themselves from the bigoted sentiments of colonial actions since colonisation owes its origin to the assumption that the indigenous populations were inferior to the European colonisers. See also Brennan J's *obiter* that to raise questions of sovereignty could "[f]racture the skeleton of legal principle which gives the body of our law its shape and internal consistency" *Mabo and Others v State of Queensland (No 2)* (1992) 175 CLR 1 para 19. See also for example *R v der Peet* [1996] 2 SCR 507 para 46, where it was said that the reason for the clause on aboriginal title in the Canadian Constitution Act 1982 is to provide "[t]he means by which prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory." This means that since aboriginal rights provide a means to reconcile aboriginal occupation with sovereignty, it cannot be used as a tool to challenge sovereignty: Asch M "From *Terra Nullius* to Affirmation: Reconciling Aboriginal Title with the Constitutional Court" (2002) 17 *Canadian Journal of Law and Society* 23-39 at 29.

sovereignty is distinct from the loss of title to land. This means that indigenous communities who lose their sovereignty to the Crown at colonisation, could possibly retain a weaker interest in the land which is less than full ownership. Using aspects such as communality, indigineity and continuity, which are said to lie at the heart of the doctrine of aboriginal title, the courts were then able to grant restitution of full title to land without interfering with state sovereignty.

This chapter will begin by stating the reasons for the comparative studies and thereafter discuss the leading Canadian and Australian cases in this regard, with a view to showing how the formulation detailed above has been crafted. The chapter also discusses the legislation passed, policies implemented, and supporting institutions developed as a direct result of the courts' development of the doctrine of aboriginal title. By way of conclusion, the chapter asks whether the doctrine of aboriginal title can be used in South Africa as a means of overcoming the remaining implications of the 1913 cut-off date.

3.2 Comparative Studies

3.2.1 Basis for Comparison

On the issue of historically based land claims, Canada and Australia have relatively developed jurisprudence. Both countries, like South Africa, have histories that are characterised by unfair, racially biased land dispossessions. Moreover, in all these countries there was a land use system prior to the acquisition of sovereignty by the British Crown. These countries are what De

Villiers refers to as “non-treaty dispensations” in that the colonising power did not enter into treaties with the local indigenous people.[132] They also share a common law system as introduced by the colonising powers.[133] Ultimately, all three countries have in recent times embarked on some kind of land reform, albeit that the South African restitution process is the only one that is explicitly authorised by the Constitution and governed by legislation. For these reasons, there is a sufficient basis upon which to undertake a comparative study.

However, there are also notable differences due to the differing circumstances influencing the respective jurisdictions. Canada and Australia are relatively developed first world powers, whereas South Africa is a developing nation with millions of people and communities with insecure land rights.[134] Importantly, neither the Australian[135] nor the Canadian[136] constitutions make provision for

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[132] In Canada this is only true of British Columbia. See De Villiers B *Land Reform: Issues and Challenges: A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia* (2003) 141.

[133] Pienaar G “From *Delgamuukw* to *Richtersveld* – Are Land Claims in Canadian and South African Law Comparable?” (2005) 16 *Stell LR* 446- 465 at 446 points out that that Canadian and Australian land laws are based on the common law, whereas South African land law is predominantly based on principles of civil law.

[134] Pienaar G “From *Delgamuukw* to *Richtersveld* – Are Land Claims in Canadian and South African Law Comparable?” (2005) 16 *Stell LR* 446-465 at 447.

[135] Van der Walt AJ *Constitutional Property Clauses: A Comparative Perspective* (1999) at 39 states that the Australian *Commonwealth Constitution 1900* does not have a bill of rights – the property guarantee is contained in s 51(xxxi), which deals primarily with the functional division of powers of the federal and state governments.

[136] Van der Walt AJ *Constitutional Property Clauses: A Comparative Perspective* (1999) at 86-87 states that the Canadian Constitution Act of 1982 does not have a property guarantee clause. Aboriginal title is protected by s 35(1).

land restitution. This is in contrast to sections 121-123 of the 1993 South African Constitution and section 25(7) of the 1996 Constitution, which authorise (and require) the promulgation of special restitution legislation. By contrast, historically based land claims in Australia and Canada are dealt with purely in terms of judicial interpretation and development of the common law.

Another important difference highlighted in the discussion below is that the Australian and Canadian recognition of aboriginal title came about through litigation which was opposed by the respective governments. Meaningful land reforms later followed the initial recognition of restitution claims by the courts.

3.2.2 Australia

3.2.2.1 The *Mabo*[137] Land Claim

The Merriam people were in occupation of the Murray Islands in the Torres Strait, in North Queensland for many generations before the first European contact. Their subsistence was mainly through fishing and hunting. The rights over the land were passed from generation to generation through family relationships. They viewed the Murray Island as theirs, recognising both individual and small group ownership of the land.

In 1788, the British Crown established sovereignty over Australia,[138] and in 1879,

[137] *Mabo and Others v State of Queensland (No 2)* (1992) 175 CLR 1.

[138] Banner S "Why *Terra Nullius*? Anthropology and Property Law in Early Australia" (2005) 23 *Law and History Review* 95–130 at 99-101.

the Murray Islands were annexed to the State of Queensland.[139] This was despite the occupation and ownership of the Murray Islands by aboriginal groups. The Merriam people were then subjected to British sovereignty, although they continued to reside on the subject land, conducting their lives as they had done for centuries prior to Crown sovereignty.[140]

In 1982, the Queensland government enacted the Queensland Amendment Act of 1982, which established a system of land grants in trust for the aboriginal people residing on Murray Island.[141] The Merriam people refused to accept the Act and approached the Australian High Court, seeking declarations to the effect that they were entitled to Murray Islands as owners, as possessors or as persons entitled to use and enjoy the Islands. They claimed a possessory title, which they claimed came into being by virtue of their long possession of the Islands. The case was sent back to the Queensland Supreme Court for a finding on the facts,

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[139] Keon-Cohen BA "The *Mabo* Litigation: A Personal and Procedural Account" (2000) 24 *Melbourne University Law Review* 893–955 at 909.

[140] Manwaring M "A Small Step or a Giant Leap? The Implications of Australia's First Judicial Recognition of Indigenous Land Rights: *Mabo and Others v. State of Queensland*" (1993) 34 *Harvard International Law Journal* 177-191 at 183.

[141] Keon-Cohen BA "The *Mabo* Litigation: A Personal and Procedural Account" (2000) 24 *Melbourne University Law Review* 893–955 at 904. The Murray Islands, together with other islands in the Torres Strait, had in 1912 been set aside as permanent reserves intended for inhabitants of the Queensland State. The Queensland Amendment Act sought to repeal the enabling legislation and in its place grant 50 year leases to the Island communities. The reserves would be revoked and replaced with Deeds of Grants in Trust. In terms of the Deeds of Grants in Trust, trustees could then lease Murray Island and the Merriam people could be prevented from staying on the lands for a period exceeding one month without the express permission of the Minister for Lands.

and a decade later (in 1992) returned to the Australian High Court for determination. In the meantime, in an attempt to terminate the proceedings, the state of Queensland enacted the Queensland Coast Islands Declaratory Act of 1985,[142] in terms of which the effect of the 1879 annexation was that title to the island was vested in the state of Queensland "[f]reed from all other rights, interests and claims whatsoever".[143]

In the High Court of Australia, Brennan J, writing for the majority, identified two key issues in the case. The first issue was whether the 1879 annexation of the Murray Islands had vested in the Crown absolute beneficial ownership of the island, including sovereignty, or whether the annexation had only vested sovereignty in the Crown.[144] The second issue was whether aboriginal title, if ever it had existed, had been extinguished by official acts immediately after annexation.[145] On this point, the Court stressed that ownership of the Island was in question, and not sovereignty, since sovereignty could not be challenged in municipal courts.[146]

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[142] The Queensland Coast Islands Declaratory Act of 1985 purported to extinguish any title to land or entitlement that the Murray Islanders may have held over the Island prior to its enactment.

[143] Manwaring M "A Small Step or a Giant Leap? The Implications of Australia's First Judicial Recognition of Indigenous Land Rights: *Mabo and Others v. State of Queensland*" (1993) 34 *Harvard International Law Journal* 177-191 at 183.

[144] *Mabo and Others v State of Queensland (No 2)* (1992) 175 CLR 1 para 29.

[145] *Mabo and Others v State of Queensland (No 2)* (1992) 175 CLR 1 para 30.

[146] *Mabo and Others v State of Queensland (No 2)* (1992) 175 CLR 1 para 32. This aspect of the decision is criticised by Mostert H & Fitzpatrick P "Living in the Margins of History on the Edge of the Country – Legal Foundation and The Richtersveld Community's Title to Land" (2004) *TSAR* 498–510 at 506–510. See also Fitzpatrick P "'No Higher Duty': Mabo and the Failure of Legal

The case of the Queensland government was based upon the notion that upon annexation in 1879, the British Crown acquired not only sovereignty but also absolute beneficial ownership over the territory, since no-one else had title over the land.[147] This was a viewpoint based on the extended notion of *terra nullius*. Under customary international law at the time that the British Crown established sovereignty over Australia, sovereignty was acquired by conquest, cession, and occupation of *terra nullius*.[148] Sovereignty over land is distinguished from ownership of land. Sovereignty can only be acquired by a sovereign power and is essentially the political power to govern territory. Ownership, on the other hand, can belong to anyone and is the private title to a piece of property, namely the right to possess, occupy, use, and enjoy that property.[149] Regardless of this distinction, acquisition of sovereignty through the occupation of *terra nullius* came to be equated with acquisition of absolute beneficial ownership by the sovereign when there was "no other proprietor of such lands."[150] This was a logical deduction under the original conception of *terra nullius*, which contemplated unoccupied waste land. The then property doctrine was founded on possession.

Foundation" (2002) 13 *Law and Critique* 233-252 at 248-249.

[147] *Mabo and Others v State of Queensland (No 2)* (1992) 175 CLR 1 paras 33–34.

[148] Manwaring M "A Small Step or a Giant Leap? The Implications of Australia's First Judicial Recognition of Indigenous Land Rights: *Mabo and Others v. State of Queensland*" (1993) 34 *Harvard International Law Journal* 177-191 at 179–182.

[149] Manwaring M "A Small Step or a Giant Leap? The Implications of Australia's First Judicial Recognition of Indigenous Land Rights: *Mabo and Others v. State of Queensland*" (1993) 34 *Harvard International Law Journal* 177-191 at 179-182.

[150] *Mabo and Others v State of Queensland (No 2)* (1992) 175 CLR 1 para 29.

This meant that if no other persons were present to assert possession of land, then the Crown could assert both sovereignty and ownership through occupation.[151] Customary international law expanded the *terra nullius*[152] doctrine to include, in addition to the acquisition of sovereignty, the exercise of ownership over land that was inhabited. This kind of acquisition was considered justifiable if the indigenous inhabitants were so "[l]ow in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society."[153] The court rejected this notion and declared is as "[f]alse in fact and unacceptable in society."[154] As such, the Crown did not automatically acquire universal and absolute ownership of land upon colonisation, even though it did establish sovereignty. Whether the Crown also acquired ownership through establishment of sovereignty depended upon the question whether there were prior rights in indigenous law.

Brennan J then turned to the question whether aboriginal title, if it existed to begin with, had been extinguished by sovereign acts after annexation. He began by stating that aboriginal title has its origins in and that its content flows from the traditional laws and traditional customs practiced by the indigenous inhabitants of a territory.[155] However, the precise nature of the aboriginal title is dependent

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[151] Wonnacott M *Possession of Land* (2006) at 35.

[152] See n 150-151 and accompanying text.

[153] Lord Sumner, speaking for the Privy Council in *In re Southern Rhodesia* 463 App Cas 211 233-234 (PC 1919).

[154] *Mabo and Others v State of Queensland (No 2)* (1992) 175 CLR 1 para 29.

[155] *Mabo and Others v State of Queensland (No 2)* (1992) 175 CLR 1 para 42.

upon the indigenous community, although there are common characteristics. Furthermore, although the colonising power could extinguish existing indigenous law through legislation, a law that merely regulates the exercise of aboriginal title does not extinguish aboriginal title.[156]

Applying the above principles to the Merriam people, the court held that the land in the Murray Islands is not Crown land and that the Merriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the island of Mer, a right enforceable against the whole world.

The court's view ultimately was that a change in sovereignty did not automatically extinguish aboriginal title to land.[157] The court's strategy was to find incidents of ownership that survived the establishment of crown sovereignty. These incidents then acted as a burden on the crown's radical title.[158] The *Mabo* decision distinguished acts of sovereignty from ownership of land title.[159] For the Merriam people, this meant that the loss of sovereignty could not be equated with the loss of proprietary ownership.

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[156] *Mabo and Others v State of Queensland (No 2)* (1992) 175 CLR 1 para 42. Brennan CJ cited little Australian authority for his account of the nature and scope of aboriginal title, although he drew references from Canadian, American and New Zealand authorities. His account in any event begins with the preface that "[s]ome general propositions about native title can be stated without reference to evidence."

[157] *Mabo and Others v State of Queensland (No 2)* (1992) 175 CLR 1 para 45.

[158] *Mabo and Others v State of Queensland (No 2)* (1992) 175 CLR 1 para 45.

[159] *Mabo and Others v State of Queensland (No 2)* (1992) 175 CLR 1 para 45.

In other words, aboriginal title "crystallised"[160] at annexation, whereas the content of aboriginal title existed before the Crown established sovereignty. Aboriginal title is a stronger right than its content as it is a complete right of ownership. The contents of the aboriginal title, which included but were not limited to, the existence of an identifiable group or community with a traditional connection to the subject land, traditional laws and customs as well as a measure of continuity, survived the annexation.

The Queensland Amendment Act[161] and the Queensland Coast Islands Declaratory Act[162] sought to curtail the surviving incidents of the successful claimants' original ownership over the Murray Islands. Hence, the Islanders sought to regain the title to land that they had previously enjoyed. The court held that both pieces of legislation were invalid and that certain incidents of aboriginal title had survived the annexation. As a result of this, the court returned full rights in land to the Merriam people. In granting the order for the restitution of the land, the Australian High Court focused on one aspect of the content of aboriginal title which survived the original dispossession of full ownership. This content, in the form of occupancy of the subject land, was categorised as proprietary "[i]n order that it survive a change in sovereignty".[163] In this regard the court focused on the community's exclusive possession of the land. The court considered that the Merriam people saw themselves as the sole occupiers of the Murray Islands and

[160] A term coined by Lamer CJ in *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 143.

[161] Of 1982.

[162] Of 1985.

[163] *Mabo and Others v State of Queensland (No 2)* (1992) 175 CLR 1 para 53.

concluded that this was an interest in the land which "[m]ust be proprietary in nature".[164] As such, the full ownership of the Murray Islands was restored to the Merriam people.

3.2.2.2 The *Mabo* Aftermath

Following the *Mabo* decision, the Native Title Act of 1993 was enacted in order to provide a means by which aboriginal title, as recognised by the common law, could be claimed in a restitution action and also to balance its relationship with other interests in land. The Native Title Act defines aboriginal title as the group, individual or communal rights and interests of aboriginal people and Torres Strait Islanders, held under traditionally acknowledged laws and traditionally observed customs.[165] The laws and customs of the aboriginal people must have a connection to the land and the water. The rights and interests must be recognised by Australian common law.

The Preamble of the Native Title Act provides that the Act represents the intention of Australian people to correct the consequences of prior injustices and to guarantee that aboriginal people receive "[t]he full recognition and status within the Australian nation to which history, prior rights and interests and their rich and diverse culture, fully entitle them to aspire."[166] Its main objectives are to ensure the recognition and protection of native title and to create a means by which

[164] *Mabo and Others v State of Queensland (No 2)* (1992) 175 CLR 1 para 53.

[165] S 225 of the Native Title Act.

[166] Preamble of the Native Title Act.

aboriginal title may be dealt with. It also establishes mechanisms and procedures to be followed in the verification of aboriginal title claims.

The Native Title Act[167] describes aboriginal title as a co-existing right to land, distinct from leasehold and freehold title. This right to land in terms of the Native Title Act does not offer the same range of management and control capabilities that arise from either leasehold or freehold title. In fact, De Villiers views aboriginal title as being the least important land right and subject to extinguishment or limitation by the rights of others.[168]

In terms of the Native Title Act, there are four main institutions that facilitate land claims in Australia, namely the Federal Court, the National Native Title Tribunal, Representative Bodies and Prescribed Bodies Corporate.[169] The Federal Court is not a specialised land court like the South African Land Claims Court. By contrast, the Land Claims Court is part of the machinery designed to promote the transformative goals of the South African Constitution and its specialised focus forms a part of the new post-1994 transformative agenda. On the other hand, the National Native Tribunal established by the Australian Native Title Act has a host of objectives which include the registration of native title claims as well as the

[167] Of 1995.

[168] De Villiers B *Land Reform: Issues and Challenges: A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia* (2003) 137.

[169] Government of Australia *Indigenous Land Reform in Australia* (2007) (Report submitted to the United Nations Economic and Social Council) http://www.un.org/esa/socdev/unpfii/documents/6_session_australia.pdf [accessed 27 October 2008].

mediation and arbitration of land claims based on native claims. The Native Title Act further establishes representative bodies known as land councils, whose functions resemble those of the Land Claims Commission in South Africa.[170] These bodies assist claimants in native title claims and other related matters. They mostly carry out research, prepare claims and also assist in the mediation and resolution of disagreements.

The final institution tasked with native title claims in Australia comprises various Prescribed Bodies Corporate (PBC). The PBC can hold native title either as a trustee or on behalf of the community. The PBC is to ensure that the group members can be identified with sufficient certainty. It normally has a vast range of functions, which include the holding of native title on behalf of a group and the development of whatever policies the group adopts. There are, however, very few PBCs owing to the fact that their capacity to fulfil their obligations under the Native Title Act is severely constrained due to uncertain funding and because there is no scheme with which to facilitate their running.[171]

3.2.3 Canada

3.2.3.1. Before *Delgamuukw*

The decision in *Delgamuukw v British Columbia*[172] was the first definitive

[170] S 4 of the Restitution of Land Rights Act 22 of 1994.

[171] De Villiers B *Land Reform: Issues and Challenges: A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia* (2003) at 137.

[172] [1997] 3 SCR 1010.

Canadian ruling on the content of aboriginal title in Canada. The decision also states the scope of protection that is afforded to aboriginal title in terms of section 35(1) of the Constitution Act.[173] In addition, the decision outlines how aboriginal title may be proved as well as the instances in which it may be justifiably infringed upon.

Canada does not have an explicit restitution policy, let alone restitution legislation. The Royal Proclamation of 1763 first gave recognition, albeit limited, of aboriginal rights to land. The Indian Act of 1876 followed, influenced by the legislative foundation laid by the Royal Proclamation of 1763. It set guidelines which determined the day to day existence of First Nations Canadians. It was only in 1951 that a provision expressly barring aboriginal Canadian communities from engaging the services of an attorney to institute a land claims was repealed. From then on until 1969, land claims were dealt with on a case by case basis without a general policy to resolve land claims.

In 1969 the federal government published the *White Paper on Indian Policy*.[174] Its intention was to completely assimilate First Nations people into the prevailing Euro-Canadian society by granting the First Nations people the status of "equal citizens".[175] This policy underscored the notion that aboriginal title had ceased to

[173] Of 1982.

[174] Canadian Government *White Paper on Indian Policy* (1969).

[175] Barber L "Indian Claims Mechanisms" (1997) 38 *Sask LR* 11-15 at 13.

exist due to its being extinguished by various legislation and treaties.[176] The resulting objections from aboriginal groups persuaded the federal government to shelve the proposals. The same *White Paper* saw the establishment of the Indian Claims Commission, but this Commission was disbanded in 1977.[177]

Before the *Delgamuukw* decision, Canadian courts had tried to define the nature of the interest in land held by aboriginal peoples. *Calder v The Attorney General of British Columbia*[178] held that "Indian title" was a legal right, that was arising out of aboriginal peoples' historic "occupation, possession and use" of traditional territories.[179] From this definition, aboriginal title first came into existence at the time of colonisation even if the colonisers did not recognise the title. In *Guerin v The Queen*[180] it was said to be as a unique interest in land that was "best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered." In *Canadian Pacific Ltd. v Paul*,[181] the Court held that aboriginal title was a *sui generis* interest in land, adding that "[i]t is more than the right to enjoyment and occupancy, although … it is difficult to describe what more in

[176] Barber L "Indian Claims Mechanisms" (1997) 38 *Sask LR* 11-15 at 13.

[177] Economic and Social Department, Food and Agricultural Organisation *Canadian Land Reform: An Overview of Aboriginal Rights and Claim Settlements* (2003) www.fao.org/DOCREP/003/Y0434T/Y043t08.htm [accessed 24 October 2008].

[178] [1973] SCR 313.

[179] *Calder v The Attorney General of British Columbia* [1973] SCR 313 para 139.

[180] [1984] 2 SCR 335.

[181] [1988] 2 SCR 654.

traditional property law terminology."[182]

In 1982, Canada adopted a new Constitution which in subsection 35(1) recognised and affirmed existing aboriginal rights, provided they had not been the subject of prior extinguishment.[183] Prior to *Delgamuukw,* aboriginal rights cases mainly pertained to aboriginal fishing rights.[184] *Sparrow v R*[185] set out general principles which included a statement that subsection 35(1) was purposed to recognise the prior occupation of North America by aboriginal people and that the prior occupancy should be reconciled with the Crown's assertion of sovereignty.[186] "Existing rights" as referred to in subsection 35(1) meant rights that as of 1982 had not been extinguished. The aboriginal rights in subsection 35(1) could limit both federal and provincial laws pertaining to aboriginal people, but this did not provide immunity from general government regulation.[187] In any legislation that infringed upon aboriginal rights, the Crown had to justify such action.[188] On the definition of aboriginal rights, they were said to be as a result of the traditions and norms of the aboriginal peoples prior to European contact.[189] The aboriginal rights, in order to be recognised as such must have been a

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[182] *Canadian Pacific Ltd v Paul* [1988] 2 SCR 654 para 117.

[183] In general see Macklem P *Indigenous Difference and the Canadian Constitution* (2002).

[184] *R v Van der Peet* [1996] 2 SCR 507; *R v NTC Smokehouse Ltd* [1996] 2 SCR 672; *R v Gladstone* [1996] 2 SCR 723; *R v Côté* [1996] 3 SCR 139; *R. v Adams* [1996] 3 SCR 101.

[185] [1990] 1 SCR 1075.

[186] *Sparrow v R* [1990] 1 SCR 1075 paras 204 -207.

[187] *Sparrow v R* [1990] 1 SCR 1075 para 104.

[188] *Sparrow v R* [1990] 1 SCR 1075 para 106.

[189] *Sparrow v R* [1990] 1 SCR 1075 para 267.

definitive feature of the aboriginal culture.[190] The recognition of subsection 35(1) aboriginal rights was not dependent upon aboriginal title or recognition by colonial powers. Aboriginal title was a discrete species of aboriginal rights.[191] Ultimately, when courts were adjudicating aboriginal rights matters, the courts had to be aware of the special nature of aboriginal claims hence rules of evidence and interpretation had to be approached with caution.[192]

From the discussion above, *Delgamuukw* then had to adapt the principles set out in *Sparrow*, particularly with regard to the notion that aboriginal title is a discrete species of the constitutional aboriginal right.

3.2.3.2 The *Delgamuukw* Land Claim and Analysis

In 1984, Chiefs from the Gitxsan and Wet'suwet'en houses instituted proceedings against the Province of British Columbia. Their claim was both individually and on behalf of their respective houses. They claimed ownership over portions of British Columbia. In setting out the claim, they recognised the Crown's underlying title to the lands, but they asserted a view that their claims were a burden on the Crown's title. They also sought compensation for lost lands and resources. The British Columbia province contended that the aboriginal peoples had neither a right nor an interest in the land, and that their claim for compensation had to be directed at the federal government instead.

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[190] *Sparrow v R* [1990] 1 SCR 1075 para 264.

[191] *Sparrow v R* [1990] 1 SCR 1075 para 265.

[192] *Sparrow v R* [1990] 1 SCR 1075 paras 268-274.

In March 1991, McEachern CJ of the Supreme Court of British Columbia dismissed the aboriginal people's claims to aboriginal title, self-government and aboriginal rights.[193] At the essence of the judgment was that aboriginal title and aboriginal rights were synonymous and that aboriginal rights held prior to 1982 Constitution existed at the pleasure of the Crown and provided the intention to do so was clear, could be extinguished.[194] McEachern CJ held that aboriginal rights and therefore title had been extinguished over the subject land.[195] In addition, the decision found that title vested in the Crown when the Crown established sovereignty over British Columbia. Furthermore, the British Columbia Province had title to the province alongside the right to dispose of unburdened Crown land and in addition to the right to govern the province within the terms of section 92 of the 1867 Constitution.[196] However, he held that the Crown had a fiduciary obligation to allow the plaintiffs to use unoccupied Crown lands for subsistence purposes.[197]

With this reasoning, the aboriginal title and aboriginal right of self-government claimed by the plaintiffs had been extinguished and therefore fell out of the subsection 35(1) definition of "existing rights" under the 1982 Constitution. The ruling was met with much criticism for both its conservatism as well as an

[193] *Delgamuukw v British Columbia* [1991] 79 DLR (4th) 185.

[194] *Delgamuukw v British Columbia* [1991] 79 DLR (4th) 185 para 363.

[195] *Delgamuukw v British Columbia* [1991] 79 DLR (4th) 185 para 292.

[196] *Delgamuukw v British Columbia* [1991] 79 DLR. (4th) 185 para 214-216.

[197] *Delgamuukw v British Columbia* [1991] 79 DLR (4th) 185 para 304.

underlying bias in its approach.[198]

On appeal before the British Columbia Court of Appeal,[199] the broad extinguishment of the claimants' aboriginal rights was rejected. The British Columbia Court of Appeal, by a 3-2 majority of the Court of Appeal allowed the appeal, declaring that the Gitxsan and Wet'suwet'en "[have unextinguished non-exclusive aboriginal rights, other than a right of ownership or a property right."[200] These aboriginal rights were protected by the common law and, since 1982, by subsection 35(1) of the Constitution.[201] These rights were found in the subject land. However, the exact scope, content and results of these use rights and occupation were not defined. The issues were referred back to the trial judge for determination. In addition, the litigating parties were urged to rather resolve their differences through consultation and negotiation.[202]

In March 1994, the Gitxsan and Wet'suwet'en and the Province of British Columbia were granted leave to appeal and cross-appeal the decision of the British Columbia Court of Appeal to the Supreme Court of Canada.

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[198] Borrows J "Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*" (1999) 37 *Osgoode Hall Law Journal* 538-596 at 545.

[199] [1993] 104 DLR (4th) 470.

[200] *Delgamuukw v British Columbia* [1993] 104 DLR (4th) 470 para 455.

[201] *Delgamuukw v British Columbia* [1993] 104 DLR (4th) 470 para 498.

[202] *Delgamuukw v British Columbia* [1993] 104 DLR (4th) 470 para 340.

In 1997 the Supreme Court of Canada issued its decision.[203] For procedural reasons, the Supreme Court of Canada could not delve into the merits of the Gitxsan and Wet'suwet'en claims and the matter was referred back to the trial court with the directive that the trial court should take into account the oral evidence tradition of the aboriginal claimants.

Lamer CJ stated that the *sui generis* nature of aboriginal title functions as the principle that underlies its varying facets.[204] As such, aboriginal title is inalienable and can only be transferred or surrendered to the Crown.[205] This, however, does not detract from it being a proprietary interest. The source of aboriginal title is firstly from occupation of Canada by aboriginal people prior to the Royal Proclamation.[206] Secondly, under common law principles, occupation amounts to possession in law and finally, the relationship between common law and pre-existing systems of aboriginal law are what gave rise to aboriginal title in law.[207] Finally, Lamer CJ stated that aboriginal nature is communal in nature and is a group right to land which all members of an aboriginal nation can hold.[208] It is for these reasons that the features of aboriginal title cannot be explained under the rules of common law or indeed under rules of the aboriginal systems.

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[203] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 155.

[204] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 112.

[205] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 114.

[206] Of 1763, see *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 113.

[207] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 115.

[208] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 115.

Detailing the contents of aboriginal title, Lamer CJ stated that aboriginal title was not restricted to activities that were distinct to the aboriginal group claiming the aboriginal title.[209] Essentially, lands held under aboriginal title are not precluded from non-traditional forms of exploitation.[210]

Lamer CJ stated that there were, however, limits to the content of aboriginal title that came about as a result of its *sui generis* nature. Since prior occupation is the source of aboriginal title, the law then provides legal protection to the prior occupancy, albeit in present times.[211] Hence there has to be continuity in the relationship between the aboriginal community and the land. This means that aboriginal title is lost once the aboriginal land use becomes "[i[rreconliable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place".[212] This viewpoint also applied to the inalienability of lands held by aboriginal title, since alienation would terminate not just the entitlement to occupy the land but also any special relationship with the land.[213]

Importantly, Lamer CJ placed emphasis on the fact that the limitation placed on the use of lands held by aboriginal title did not necessarily translate into a proviso

[209] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 116.
[210] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 120.
[211] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 122.
[212] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 124.
[213] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 128.

that lands held by aboriginal title could only be used for traditional activities.[214] Such an approach would amount to an unfair restriction to those that have "[l]egitimate legal claim to the land."[215]

Delgamuukw confirmed that common law aboriginal title, previously recognised as a common law aboriginal right before 1982, was constitutionalised.[216] In addition, aboriginal title was more than the right to engage in activities which are characteristic of the aboriginal cultures.[217] Aboriginal title is a right to the land itself.[218]

Lamer CJ then set out tests to be followed in proving aboriginal title. The starting point for such tests is the notion of aboriginal title acts as a burden on the Crown's underlying title.[219] This means that aboriginal title only came to be at the Crown's assertion of sovereignty. Their aboriginal title "crystallised" at that time.[220] In terms of English common law, occupation or possession grounds aboriginal title even without proof that the land was integral to aboriginal society prior to contact with European settlers.[221]

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[214] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 130.
[215] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 132.
[216] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 135.
[217] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 138.
[218] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 139.
[219] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 paras 140-142.
[220] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 143.
[221] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 145.

Lamer CJ stated that both the common law and the aboriginal view of land were essential in order to establish occupancy.[222] With common law, the fact of physical occupation proves legal possession of the land, which in turn gives title to the land.[223] This occupation can be established in a variety of ways such as construction or resource extraction.[224] In gauging whether a sufficient degree of occupation has been established in order to ground title, aspects such as the size and lifestyle of the group claiming aboriginal title are to be taken into consideration.[225]

Recognising that there may be a lack of conclusive evidence to establish occupation prior to Crown sovereignty, a group claiming aboriginal title may prove such occupation through presenting evidence of present occupation.[226] The present occupation should be complemented by evidence of continuity in the form of "[s]ubstantial maintenance of connection" with the subject land.[227]

Exclusive occupation must have been present when sovereignty was established.[228] This requirement is proved using both common law and aboriginal perspectives. Thus, notwithstanding the English common law principle of exclusivity associated with fee simple ownership, the test for exclusive

[222] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 146.
[223] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 147.
[224] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 149.
[225] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 148.
[226] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 152.
[227] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 153.
[228] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 155.

occupation in aboriginal title claims takes into consideration the nature aboriginal society in question at sovereignty.[229] In this way, exclusive occupation can be shown if there were other aboriginal groups present or frequenting the subject land.[230] Additionally, the exclusivity requirement does not rule out the prospect of title shared between two or more aboriginal nations.[231]

Once an indigenous group has sufficiently proven exclusive occupation at the time of colonisation, it is presumed that occupation has continued to the present day. It is therefore incumbent upon the defendant to rebut the presumption by showing that the title was lost. Should the title be lost, aboriginal title is said to have been extinguished. Since extinguishment works in relation to the principle that aboriginal title is inalienable to all but the Crown, the defendant must show that aboriginal title was lost through transfer to the Crown.[232]

The Crown can declare itself owner of the land and, in doing so, extinguish aboriginal title. There must, however, be a plain and clear intention to extinguish aboriginal title and any legislation purporting to abolish aboriginal title must be applicable to specific land.[233] The aboriginal community need not be specifically mentioned in the legislation abolishing aboriginal title.

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[229] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 157.

[230] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 158.

[231] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 159.

[232] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 156.

[233] *Ward v Western Australia* [1998] 159 ALR 483 paras 552-553 states that in the absence of appropriate legislative empowerment, a government cannot extinguish title by granting land to persons other than the original holder.

There is a presumption that the colonial power did not intend to abolish aboriginal title upon acquiring sovereignty. The effect of this presumption is that aboriginal communities are given the benefit of the doubt where legislation purporting to extinguish aboriginal title is ambiguous.[234]

When an aboriginal group has successfully shown that its title has not been extinguished, the Crown may infringe upon the existing right of aboriginal title. Lamer CJ enumerated the instances in which aboriginal title may be infringed upon.[235] To begin with, the infringement must be in the furtherance of a compelling legislative purpose since "[a]boriginal societies are part of a broader community over which the Crown is sovereign, [hence] limitations on Aboriginal rights will sometimes be justified in the pursuit of objectives of importance to the community as a whole, and are a necessary part of the reconciliation of aboriginal societies with the broader community."[236]

In addition, infringement must also be in line with the Crown's fiduciary duty towards aboriginal peoples.[237] This is, however, dependent upon the impact of infringement on the aboriginal right at issue. Thus the Crown is under a duty to

[234] *Western Australia v Commonwealth* [1995] 128 ALR 1 para 12. See also the Privy Council decision in *Re Southern Rhodesia* [1919] AC 211 (PC) paras 233–234, where it was held that property rights are presumed to be have survived conquest in the absence of any express confiscation.

[235] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 160.

[236] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 161.

[237] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 162.

provide compensation if need be, where a right has been infringed upon.[238]

Lamer CJ rejected British Columbia's contention that it had held the power to extinguish aboriginal rights, which included aboriginal title prior to the constitutionalisation of aboriginal rights.[239] Referring the matter back to the court *a quo* for deliberation on the land claim, Lamer CJ in addition encouraged the parties to negotiate rather than litigate advising that negotiated settlements "[w]ith good faith and give and take on all sides would achieve the reconciliation purpose of subsection 35(1)."[240]

The Supreme Court of Canada's *Delgamuukw* decision, although not ruling on the merits of the Gitxsan and Wet'suwet'en aboriginal title claim, affirms the existence of aboriginal title in Canada. The decision also underscores that aboriginal title has a constitutionally protected status within the Canadian legal system. The *Delgamuukw* directives offer aboriginal claimants and the lower courts a wide-ranging set of guidelines for future settlement or litigation other comprehensive land claims. The *Delgamuukw* decision provides a theoretical framework that acts as a platform for developing the law of aboriginal title in Canada.

Importantly, the Delgamuukw decision placed emphasis on aspects such as

[238] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 163.

[239] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 paras 172-183.

[240] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 186.

communality, group continuity, as well as traditional laws and customs in order to ground the content of the aboriginal right. Since the latter concepts survived Crown sovereignty, they formed the bases of aboriginal title which in itself is a complete ownership right, albeit placed as a burden on the underlying Crown title. This formulation for Canada means that the sovereignty aspect is left intact whilst simultaneously restoring full ownership over land dispossessed through the imposition of Crown sovereignty.

3.3 Conclusion

From the discussion above it appears that Australia and Canada did not have a cut-off date for their judicially conceived land claims processes. Their position was unlike the South African situation, which has to take cognisance of the cut-off date of 19 June 1913 because the land restitution process is authorised by the Constitution and regulated by special legislation, both of which impose this cut-off date on the restitution process. A potential stumbling block for both Australia and Canada is the fact that the courts, in crafting remedies for the restoration of colonial land dispossessions, may not question the sovereignty of the Crown. This is because, in the words of Brennan J "[t]he question whether a territory has been acquired by the Crown is not justiciable before municipal courts, those courts [only] have jurisdiction to determine the consequences of an acquisition under municipal law".[241]

[241] *Mabo and Others v State of Queensland (No 2)* (1992) 175 CLR 1 para 45.

Hence, using the English common law doctrine of tenure, in terms of which the Crown held radical title over all land, the doctrine of aboriginal title was then said to act as a burden on the underlying Crown's title. Importantly, as was clearly stated in *Mabo,* a change in sovereignty did not extinguish prior titles to land. In recognising the surviving interests after the loss of sovereignty, the *Mabo* decision assigned a proprietary nature to such surviving interest. Having done this, the court's conclusion was that the aboriginal title had survived the original dispossession that took place when the Crown established sovereignty. Using this formulation, a right of full ownership was restored in the restitution process.

Hence the question to be asked is whether the doctrine of aboriginal title could be a solution to the problem of the exclusion of historically based land claims in South Africa, where the restitution process is regulated by legislation. Although the restitution claims were eventually successful in the *Richtersveld*[242] and *Popela*[243] decisions, after initial indications that these claims might be excluded on the basis of the cut-off date, the appeal courts did not use the doctrine of aboriginal title in allowing the claims. However, in deciding that these claims should succeed the courts followed a formulation which is not unlike that described in the Australian and Canadian cases above. Above all, the logic by which the South African courts distinguished between an initial colonial dispossession (prior to the cut-off date) and a right that survived the initial

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

[243] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC).

dispossession bears more than a passing resemblance to the distinction between sovereignty and title in the Australian and Canadian cases. These similarities and the detail of the South African decisions are discussed in Chapter 4.

In Chapter 4 it will be argued that there is no need for the doctrine of aboriginal title within the South African context since the distinction between original dispossession and surviving rights, which may or may not have been inspired by the decisions in *Delgamuukw* and *Mabo*, could be used to successfully restore previously dispossessed full rights of ownership within the ambit of the Restitution of Land Rights Act.[244] Chapter 4 expands on this discussion.

[244] 22 of 1994.

4

Reconsidering Historically Based Land Claims in South Africa

4.1. Introduction

The Australian and Canadian land claims processes, as discussed in Chapter 3, not being governed by legislation, do not have a cut-off date. In crafting a remedy for colonial land dispossessions, the Australian and Canadian courts had to construct a remedy that would not compromise the sovereignty of the Crown since the Crown acquired not just sovereignty through colonisation, but also title to land. Since the sovereignty of the Crown cannot be challenged by municipal courts, it would have meant that indigenous populations dispossessed of land at the establishment of sovereignty would have had no recourse. Accordingly, the doctrine of aboriginal title is premised upon the idea that there is a distinction between the loss of sovereignty and the loss of title. The surviving incidents of aboriginal title are said to be a burden on the underlying Crown's radical title. In this formulation, the sovereignty of the Crown is left intact, while restitution claims become possible.

South Africa, on the other hand, does not have to grapple with the sovereignty question since there is constitutional authority and a legislative framework for the restitution of previously dispossessed land. However, the 1913 cut-off date for restitution claims, as detailed in Chapter 2, appears to intentionally exclude

historically based land claims. It then would appear as if aboriginal title might be a solution to the apparent exclusion of pre-1913 land dispossessions. However, two recent decisions suggest that historically based land claims are not, after all, necessarily excluded from the restitution process. Importantly, these decisions followed an approach that recognised the existence of a weaker right which, having survived the original dispossession under colonial dispossession, was then the subject of a second dispossession under apartheid, which in turn opened up the possibility to restore full ownership rights through a restitution process. Equally important is the fact that all this took place within the framework of the Restitution of Land Rights Act 22 of 1994. The formulation, which can be said to be a fragmentation of proprietary interests, is not unlike the *Mabo*[245] and *Delgamuukw*[246] logic as recounted in Chapter 3.

This chapter details the appeal decisions in *Richtersveld*[247] and *Popela*.[248] The chapter discusses how the formulation of the decisions can be used to include cases that, at face value, are excluded by the cut-off date. The chapter also discusses whether and how the doctrine of aboriginal title could still be applicable in South Africa, given the logic of *Mabo* and *Delgamuukw.* A lingering question is whether there could still be cases that cannot be resolved in spite of the above

[245] *Mabo and Others v State of Queensland* (*No 2)* (1992) 175 CLR 1.

[246] *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

[247] *Richtersveld Community and Others v Alexkor Ltd and Another* 2004 (5) SA 460 (CC) and *Richtersveld Community and Others v Alexcor Ltd and Another* 2003 (6) SA 104 (SCA).

[248] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC).

formulation.

4.2 *The Richtersveld* Land Claim

As previously discussed, the, the Land Claims Court concluded that the Richtersveld community had been dispossessed of the original ownership right over the subject land in 1847, prior to the statutory cut-off date of 1913. However, the Land Claims Court did not consider only the original dispossession, electing instead to focus on the remaining weaker right of beneficial occupation, which survived after the 1913 cut-off date and could therefore have founded a restitution claim under the Restitution of land Rights Act.[249] Eventually the court held that beneficial occupation was a right in land newly created by legislation[250] and as such could not have been subject to dispossession in 1927. The restitution claim was rejected on the basis that the 1927 dispossession was not the result of a discriminatory law or practice meant to bring about spatial apartheid.[251] The main ground for the failure of the restitution claim, underpinned by the disregard for the pre-1913 dispossession, was that the Richtersveld community had failed to show how the second dispossession had occurred as a

[249] 22 of 1994.

[250] Namely the Restitution of Land Rights Act 22 of 1994 s 1(xi), which states that "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."

[251] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1993 (LCC) para 106.

result of past racially discriminatory laws or practices.[252] Although the case initially failed because of the racially discrimination requirement and not the cut-off date, it is arguable that the cut-off date was ultimately at the basis of the decision, since it would have been more difficult to uphold the court's argument if the original right had not been scaled down by the initial dispossession.

The Richtersveld community then appealed the decision of the Land Claims Court before the Supreme Court of Appeal.[253] They contended that in addition to the right to beneficial occupation for ten years as was found by the Land Claims Court,[254] they possessed further rights in the subject land that survived the cut-off date of 19 June 1913. These rights were ownership as well as the right to use the subject land for certain specified purposes, such as "[h]abitation, cultural and religious practices, grazing, cultivation, hunting, fishing, 'water-trekking' and the harvesting and exploitation of natural resources."[255] The community contended that they held these rights on two bases. The first was in terms of their indigenous law and the second under colonial law, which allowed the continued protection of existing land rights of inhabitants at the time of annexation in 1847.[256] An alternative contention was that the rights the community had held in

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[252] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1993 (LCC) para 106.

[253] *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA).

[254] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1993 (LCC) para 65.

[255] *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA) para10.

[256] *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA) para

the subject land in terms of their own indigenous law constituted a customary law interest and therefore met the "right in land"[257] requirement as stipulated by the Restitution of Land Rights Act.

The court began by considering the community's customary law interest. The court stated that in respect of an indigenous law right of occupation, uninterrupted presence on the land did not necessarily translate into possession at common law.[258] Furthermore, a nomadic lifestyle did not interfere with the exclusive and effective right of occupation of land by indigenous people. Therefore, even if the community's use of the subject land was seasonal, it did not cancel their exclusive beneficial occupation of the land.

Concerning the ruling of the Land Claims Court, the Supreme Court of Appeal held that the court *a quo* had erred in finding that the community only had a right to beneficial occupation for a continuous period of ten years during the twentieth century. The Land Claims Court had also erred in finding no customary law interest in land within the definition of "right in land" in the Restitution of Land Rights Act had been proved.[259] The court *a quo*, according to the Supreme Court of Appeal, had been mistaken in considering whether at the time of annexation

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[257] S 1 of the Restitution of Land Rights Act 22 of 1994.

[258] *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA) para 23.

[259] *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA) para 26.

"[t]here existed a custom which had become applicable law, in terms of which the State was obliged to recognise rights of the first plaintiff over the subject land".[260] The Supreme Court of Appeal found that at the time of annexation, the Richtersveld community had a customary law interest in terms of their indigenous customary laws that also permitted exclusive occupation and use of the subject land.[261] Furthermore, this customary law interest was synonymous with the right of ownership held under common law."[262] At the time of annexation, the community had enjoyed exclusive occupation of the subject land. This right to exclusive occupation was the result of the traditional laws and customs of the Richtersveld people. Ultimately, the Supreme Court of Appeal found that the customary law interest fell within the definition of the "right in land"[263] as is required by the Restitution of Land Rights Act. The basic content of the interest was a right to exclusive beneficial occupation and use of the subject land. In addition, the Supreme Court of Appeal, although not finding evidence to suggest that the community had engaged in mining activities on the subject land itself, accepted evidence that at the time of annexation, the culture of the Richtersveld community had been to acquire rights to minerals and natural resources on the

[260] *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA) para 28.

[261] *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA) para 29.

[262] *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA) para 29.

[263] *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA) para 29.

land.[264]

The tacit State policy was that the subject land was made Crown territory upon annexation because the Richtersvelders were insufficiently civilised – this view was premised upon the race of the Richtersveld community and hence the racially discriminatory element was patently clear for the Supreme Court of Appeal. The appeal succeeded and the community was found to be entitled to the right to exclusive beneficial occupation and use similar to that held under common law ownership[265] of the subject land, which included its minerals as well as its precious stones.

Alexkor then appealed to the Constitutional Court on the basis that any rights in the subject land in which the Richtersveld Community might have held were terminated by the 1847 annexation.[266] Furthermore, according to Alexkor, the dispossession was not the result of past racially discriminatory laws or practices.[267]

Regarding the land rights held by the community at the time of annexation, the Constitutional Court accepted evidence that showed that the community had a

[264] *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA) paras 87-88.

[265] *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA) para 29.

[266] *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 10.

[267] *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 10.

history of prospecting in minerals, even though the community had never used the subject land for that purpose, and that this was in line with the viewpoint that the community was the owner of the minerals.[268] The Constitutional Courts' conclusion on this score was that the nature of the title that the community held in the subject land was a right of communal ownership under indigenous law.[269] The content of the right included occupation and use of the subject land by community members. Thus, for the Constitutional Court, prior to annexation the Richtersveld community had a right of ownership in the subject land and this right of ownership was held under indigenous law.[270]

Alexkor contended that, upon annexation in 1847, the subject land had become Crown property. Following this line of reasoning, Alexkor's further contention was that the community had then lost all title to the subject land and since this occurred before the cut-off date, therefore the community's claim had to fail.[271] However, the Constitutional Court endorsed the ruling of the Supreme Court of Appeal that indigenous rights to private property in a conquered territory were both recognised and protected after the Crown acquired sovereignty. The Richtersvelders were, in terms of the Proclamation,[272] establishing Crown sovereignty in "[b]ona fide and beneficial occupation of the land without title

[268] *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 60.
[269] *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 62.
[270] *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) paras 62-63.
[271] *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 65.
[272] Royal Proclamation of 1847.

deed".[273] That then remained the position of the Richtersveld Community until 1926, when diamonds were discovered on the subject land.

The effect of the Precious Stones Act was that it made the continued occupation of the subject land by the Richtersveld Community unlawful.[274] The community was then dispossessed of whatever rights in the land they had that survived the annexation. The dispossession of their rights was as a direct consequence of the Precious Stones Act as well as the Proclamations issued in accordance with the Act. Thereafter, the state had assumed ownership of the subject land and forced the community off the land.

The Constitutional Court subsequently considered whether the dispossession was the result of racially discriminatory laws or practices. The court emphasised that the Precious Stones Act and the Proclamations issued under it did not recognise indigenous law ownership and thus prohibited the community from the subject land and barred them from exploiting the mineral wealth on the subject land.[275] On the other hand, registered ownership was both recognised and protected. Registered land owners were mostly white.[276] Since black communities in South Africa have, since time immemorial, held land in terms of

[273] S 12 of the Crown Lands Disposal Act of 1887.

[274] S 103(5) and 103(6) made it a criminal offence for members of the community to occupy, trade on or use any portion of the proclaimed land outside of tacit authority from the State. In terms of s 103(6) it was also illegal to for any individual to utilise water within the proclaimed land.

[275] *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) paras 89-90.

[276] *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 95.

indigenous law ownership, the Precious Stones Act's failure to recognise indigenous land ownership was discriminatory towards black indigenous land owners.[277] The Constitutional Court's conclusion therefore was that the Richtersveld Community was dispossessed of the subject land on grounds of race.[278]

The Constitutional Court ultimately found that the Richtersveld Community was entitled, in terms of section 2(1) of the Restitution of Land Rights Act, to restitution of the right to ownership[279] of the subject land, including its minerals

[277] *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 95.

[278] *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) paras 98-99.

[279] The precise terms of the agreement, which was subsequently made into an order of court were as follows:(a) Transferral and restoration of portions of land by the State and Alexkor to the Richtersveld Community. (b) The transfer of Alexkor's land mining rights to the Richtersveld Community, and the setting up of a Pooling and Sharing Joint Venture The State would capitalise Alexkor to contribute R200 million to the Pooling and Sharing Joint Venture to set up a sustainable mining venture. (c) The transfer of Alexkor's mariculture and agricultural assets to the Richtersveld Community. (d) A sum of R190 million to be paid as reparation to the Richtersveld Community's Investment Holding Company over three years. (e) A R50 million development grant to be paid as a lump sum development grant to the Richtersveld Community's Investment Holding Company for agriculture and mariculture Parliamentary Monitoring Group *Richtersveld Land Claim Settlement & Alexander Bay Township Establishment: Department of Public Enterprises Briefing* (2008). (f) R45 million to be paid to the Richtersveld Community's Property Holding Company as compensation for Alexkor's occupation on transferred residential properties for ten years. (g) The establishment of a township at Alexander Bay. (h) Environmental rehabilitation. See http://www.pmg.org.za/report/20080624-richtersveld-land-claim-settlement-alexander-bay-township-establishment (accessed 23-07-2009).

and precious stones.[280]

In summing up the *Richtersveld* decision, the Supreme Court of Appeal and the Constitutional Court placed emphasis on the use rights of the *Richtersveld* community. These use rights were said to be "[h]abitation, cultural and religious practices, grazing, cultivation, hunting, fishing, 'water-trekking' and the harvesting and exploitation of natural resources."[281] These use rights were less comprehensive than the Roman-Dutch law concept of ownership.[282] The Supreme Court of Appeal then characterised the use rights as a customary law interest "[a]kin to that held under common law ownership." The Constitutional Court recharacterised the use right as an indigenous law ownership right. The restitution claimed succeeded and the community had their full rights of

[280] *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 101.

[281] *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA) para10.

[282] Du Bois F *et al Wille's Principles of South African Law* (9th ed 2007) at 470 describes ownership as including but not limited to, the power to use, enjoy the fruits, destroy, possess, alienate, vindicate, and to exclude. See also Van der Walt AJ *Property in the Margins* (2009) 188-190. See also the meaning proffered in *Gien v Gien* 1979 2 SA 1113 (T) 1120C-E that "[o]wnership is the most complete real right a person can have with regard to a thing. The point of departure is that a person, as far as an immovable is concerned, can do on and with his property as he likes. However, this apparently unlimited freedom is only partially true. The absolute entitlements of an owner exist within the boundaries of the law." Translated from Afrikaans and quoted with approval by Pienaar G "The Inclusivity of Communal Land Tenure: A Redefinition of Ownership in Canada and South Africa?" (2008) 19 *Stell LR* 259-277 at 260. Contrast with Dagan H *Exclusion and Inclusion in Property* (2007) http://law.bepress.com/cgi/viewcontent.cgi?article=1116&context=taulwps [accessed 30 August 2009].

ownership restored.

From the above it appears that the claim succeeded on appeal because the court was willing to not only recognise the existence of a use right that survived the cut-off date for restitution claims, but also to understand the nature of that right in a way that would enable a restitution claim under the requirements of the Act, instead of allowing historical prejudice to paint the right in a way that would make it impossible to satisfy the restitution requirements even if the right survived colonisation.

4.3 The Popela Land Claim

As discussed in Chapter 2, the Popela community's land claim had failed as the Land Claims Court ruled that the community was not entitled to restitution since there was no link between the racially discriminatory laws and their being dispossessed of their weaker, surviving individual labour tenancy rights in 1969. Despite acknowledging the community's original ownership over the subject land, both the Land Claims Court and the Supreme Court of Appeal stressed that the 1889 original dispossession fell outside of the ambit of the Restitution of Land Rights Act.

In 2007, the Constitutional Court heard the claimants' appeal against the judgment of the Supreme Court of Appeal.[283] The court began with a discussion

[283] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA

of the community's history, emphasising that community had previously held undisturbed customary law ownership of the land until 1889 when the Zuid-Afrikaanse Republiek granted the land to white owners.[284] The community was then compelled to become labour tenants in order to remain on the land.

The subject land saw a succession of registered owners, with the community continuing to live on the land as labour tenants. The community had to work for the registered owner of the land so as to be allowed to continue living there. By 1969, the court stated, the status of the community had been reduced to a hapless labour tenancy on land that they had once held as their own.[285]

The court then focused on the community's claim. The court stated that the community had on occasion had made reference to the dispossession of their customary law ownership over the subject land. However, since the loss of the customary law ownership occurred in 1889, this type of dispossession, according to both the Restitution of Land Rights Act and the Constitution, had no redress.[286] Nonetheless, the Constitutional Court stated that regard should still be had to the

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199 (CC).

[284] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) paras 6-11.

[285] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) paras 17-18.

[286] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 21, where the court refers to its judgment in *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 81, where its stated that the customary law ownership held by the Richtersveld Community over the subject land had not been effectively extinguished prior to 19 June 1913 and hence survived the constitutional cut-off date.

history of land dispossessions before the cut-off date of 19 June 1913 in order to give the correct approach to the historical context before the cut-off date.[287] As will appear from the discussion below, this approach is central to the success of the *Popela* land claim, since it implies that the court not only recognises the existence of a right that survived the original colonisation, but interprets that right in a way that makes it possible to formulate a restitution claim under the Act with regard to the second dispossession, which followed after the cut-off date.

The court resolved that the claimants were a community at the time when they were dispossessed of their customary law ownership of the subject land in 1889, and that they were still a community when, in 1969, they were once again dispossessed of the remaining right in the land, which was in the form of labour tenancy.[288]

Beginning with the notion that the Restitution of Land Rights Act 22 of 1994 should be "understood purposively because it is remedial legislation that is linked umbilically to the Constitution",[289] the Constitutional Court approached the appeal from a holistic perspective. It held that the tenuous land rights that the community retained in the form of labour tenancy was the result of a "grid of integrated

[287] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 24.

[288] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) paras 33-44.

[289] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 53.

repressive laws that were aimed at furthering the government's policy of racial discrimination."[290] The court took cognisance of the fact that the very existence of the system of labour tenancies, to begin with, was the result of racist laws and practices which had deprived black communities of land that they had previously owned. The Constitutional Court overturned the finding of the Supreme Court of Appeal that the 1969 dispossession of the labour tenancy right had not been the result of racially discriminatory laws and practices.[291] The reasoning of the Constitutional Court was that the apartheid state advanced the rights of white landowners at the expense of black citizens. As such, even though the community's 1969 labour tenancy dispossession had been by white landowners rather than a forced removal by the state, the dispossession was "tainted by the context that allowed and encouraged it to occur".[292] From this discussion, the Constitutional Court concluded that the second dispossession of the individual community members met all the requirements of both the Constitution and the Restitution of Land Rights Act, more so since the second dispossession of the labour tenancy right in 1969 fell within the cut-off date.[293]

The Constitutional Court upheld the Popela community's appeal against the

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[290] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 70.

[291] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 81.

[292] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 72.

[293] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 81.

decision of the Supreme Court of Appeal. The Constitutional Court issued a declaratory order to the effect that the individual community members were entitled to restitution for being dispossessed of their labour tenancy right in 1969.[294] The community claimed the land where their homesteads had stood as well as the land immediately around their homesteads. In addition, they claimed the entire land which they had used collectively for ploughing and for grazing.[295] The Constitutional Court on this basis granted a right of full ownership to the Popela community over the subject land.

The *Popela* decision acknowledged the original dispossession of the full ownership in 1889, but focused on the weaker surviving right of the individual labour tenancies. The surviving weaker right was found to have survived the 1913 cut-off date and was again the subject of a second dispossession under apartheid in 1969. Taking a purposive approach to interpretation, the Constitutional Court found that the individual community members, at the termination of the labour tenancies in 1969, had been effectively dispossessed of a right in land, after the cut-off date, and as a result of racially discriminatory laws or practices. Using this formulation, which regards loss of title and loss of sovereignty as distinct, the court was able to restore to the community the right of

[294] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 85.

[295] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 83.

full ownership.[296]

4.4 Implications of the Decisions

Arguably, the South African courts' methodologies in the restitution of rights in land in the above cases draw upon the manner in which the *Mabo* and *Delgamuukw* decisions formulated a remedy for colonial land dispossessions in the form of the doctrine of aboriginal title. The position in Australia and Canada differed doctrinally from that in South Africa in that the Australian and Canadian courts had to invent a doctrinal foundation for restitution, subject to the restriction that they could not compromise the Crown's sovereignty, whereas South African courts are constitutionally authorised and statutorily empowered to grant restitution orders, albeit subject to the cut-off date. Paradoxically, it is this same doctrinal difference which in the end created an avenue for the restoration of full rights in land for the Richtersveld and Popela communities. The implication of the *Richtersveld* and *Popela* decisions discussed above is that land claims can succeed within the Restitution of Land Rights Act framework, even in instances where the original colonial dispossession occurred prior to the 1913 cut-off date. This is with the added proviso that, in order to succeed with claims of this nature, the communities should have retained a form of use or occupation right which

[296] Not everyone is impressed with this formulation. See Lewis J "The Constitutional Court of South Africa" (2009) 125 *Law Quarterly Review* 440-467 at 452, who accuses the court of overreaching its functions and encroaching on the functions of the legislature. He does not see the causal link between the dispossession of the labour tenancy right and the racially discriminatory laws, stating that the court "rewrote" the enabling legislation for its own purposes.

survived the 1913 cut-off date but was later subject to a second dispossession under apartheid. Despite the differences, this kind of restitution remedy functions in a similar manner to the remedy for restitution in both Australia and Canada. Aboriginal title distinguishes between the loss of sovereignty and whatever rights and interests survived annexation. In this way, the Australian and Canadian courts are able to restore previously dispossessed lands, using the doctrine of aboriginal title. This approach is not unlike the South African distinction between the loss of the original ownership through colonisation and the surviving weaker right that is again dispossessed under apartheid. For South African courts, this formulation essentially strengthens the weaker right by turning it into a right that can be restored, even in the form of full ownership, within the Roman-Dutch law context of ownership. Although the full ownership right is based on Roman-Dutch law with its strong emphasis on the hierarchal structure of land ownership,[297] the courts' strategy also represents a fragmentation of proprietary interests, which is in essence a break from the hierarchal construct and serves to strengthen weaker rights.[298]

In both *Popela* and *Richtersveld*, the communities were dispossessed of sovereignty and original ownership over their territories by colonising powers in the nineteenth century. This would have left their claims for restitution outside of the 1913 cut-off date, as the decisions in the courts *a quo* have proved. However, the courts elected to focus on the remaining incidents of ownership of which

[297] Van der Walt AJ *Property in the Margins* (2009) at 29-30.

[298] Van der Walt AJ *Property in the Margins* (2009) at 29-40.

communities were again dispossessed later. This strategy employed by the South African courts is not unlike the one used by the Australian High Court in *Mabo* which, instead of focusing on the dispossession of original ownership during annexation, focused on the effects of 1982 and 1985 legislation which would have dispossessed the Merriam people of their few remaining incidents of aboriginal title after the loss of sovereignty.

In considering the surviving rights after loss of sovereignty, the *Mabo* decision referred to the sociological aspects of the aboriginal group such as their shared rules on how the land was used and managed. The South African courts in both *Popela* and *Richtersveld* employed a similar formulation. The two thousand strong members of the Richtersveld community were able to prove a lasting coherence and an accepted communality dating centuries before contact with the colonising powers. This aspect of communality, coupled with a shared right of usage of the subject land, influenced the respective courts into characterising the community's interest in the land as firstly beneficial occupation, then a customary law interest and finally an indigenous law interest in the land. It can also be interpreted to be the court's attempt at strengthening the right by moulding it from a lesser beneficial occupation to a customary law interest which is so strong that it is "[a]kin to ownership at common law"[299] and finally an indigenous law interest which is a full right of ownership without the crutch of the common law.

[299] *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA) para 29.

By interpreting the surviving use right contextually, the South African courts avoided the danger of recognising a right that survived colonisation but could not satisfy the restitution requirements in the Act. In discussing whether the Popela claimants could be deemed a community, the Constitutional Court stated that over time, the composition and cohesiveness of dispossessed communities would be eroded. Hence requirements such as an accepted tribal identity or life under the authority of a chief would only serve to hinder the purpose of the Restitution of Land Rights Act.[300] For the Constitutional Court, the proof of community was by way of a "[s]ufficiently cohesive group of persons to show that there is a community or a part of a community, regard being had to the nature and likely impact of the original dispossession on the group; and that some element of commonality between the claiming community and the community as it was at the point of dispossession."[301]

In the *Richtersveld* decision the aspect of community was not in dispute, although the Constitutional Court relied on the indigenous aspect of the community as a means of asserting the nature of the interest in the land that the Richtersveld people held.

For the Popela community, the Constitutional Court had to consider historical evidence in order to finally find that the nine individuals were indeed a

[300] Being to provide restitution and equitable redress to as many victims of racial dispossession of land rights after 1913 as possible.

[301] *Department of Land Affairs and Others v Goedegelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 70.

community. In this regard, existing literature mostly focuses on the implications of the doctrine of aboriginal title as a means of land restitution in South Africa.[302] As yet, no literature exists that examines the manner in which the South African courts were influenced by the *Mabo* approach by fragmenting proprietary interests in order to make an award for restitution of rights in land previously dispossessed. However, the similarities are striking.

The methods for proving traditional laws and customs in the South African cases are also similar to those used to establish aboriginal title. Both the *Richtersveld* and *Popela* decisions used language that is used to prove the elements of a land claim based on aboriginal title. Aboriginal title demands that there be use or occupation rights that survived the Crown sovereignty and resultant loss of title. In the *Richtersveld* and *Popela* decisions discussed in this chapter, the courts focussed on the manner in which both communities carried out their day to day

[302] See for example Barry M "Now Another Thing Must Happen: *Richtersveld* and the Dilemmas of Land Reform in Post-Apartheid South Africa" (2004) 20 *SAJHR* 355-382; Bennett TW & Powell CH "Aboriginal Title in South Africa Revisited" (1999) 15 *SAJHR* 449-485 at 464; Bennett TW "Redistribution of Land and the Doctrine of Aboriginal Title in South Africa" (1993) 9 *SAJHR* 443-476; Brink S "Legal Pluralism in South Africa in View of the Richtersveld Case" (2005) 16 *Stell LR* 175-19; Hoq LA "Land Restitution and the Doctrine of Aboriginal Title" (2002) 18 *SAJHR* 421-443; Mostert H "The Decision of the Land Claims Court in the Case of the *Richtersveld* Community: Promoting Reconciliation or Effecting Division?" (2002) 65 *THRHR* 160-167; Patterson S "Land Restitution and the Prospects of Aboriginal Title in South Africa" (2003) 34 *Australian Indigenous Law Reporter* 13-28; Pienaar G "From *Delgamuukw* to *Richtersveld* - Are Land Claims in Canadian and South African Law Comparable?" (2005) 16 *Stell LR* 446–465; Pienaar G "Aboriginal Title or Indigenous Title – What's in a Name?" (2006) 68 *THRHR* 1-13; Ülgen O "Developing the Doctrine of Aboriginal Title in South Africa: Source and Content" (2002) 46 *Journal of African Law* 131-154.

activities. They were found to have had a distinct social and political structure which included laws governing the land. For the Richtersveld community this relationship to the land translated into a customary law interest, whereas for the Popela community it was an occupation right based on labour tenancy. Using this formulation both communities therefore had a right that survived the 1913 cut-off date. As such, their land claims were made possible in terms of the Restitution of Land Rights Act.

It has been pointed out above that there are important differences between the South African context and the context within which the doctrine of aboriginal title was developed in Australian and Canadian case law, but that there are nevertheless striking similarities in the logic and language employed by the courts in all three cases. The most significant difference is of course the fact that the Australian and Canadian courts had to formulate the doctrine of aboriginal title simply to make restitution of historical dispossessions at all possible, while the South African courts employed the distinction between the colonial dispossession of title and the subsequent apartheid dispossession of use rights as a way of getting around the obstacle of the 1913 cut-off date. The most important similarity is the fact that all three sets of courts relied on a fragmentation of property title in the sense of distinguishing between different aspects of title that were dispossessed and retained at various points, as well as the historically sensitive and purposive interpretation of the surviving use rights, in view of the nature and scope of the pre-colonial indigenous rights, through

analysis of the elements of indigeneity, community and custom. In Australia and Canada, this strategy allowed restitution claims without any constitutional or statutory foundation; in South Africa, it allowed courts to go behind the apparently forbidding 1913 cut-off date and consider restitution claims for dispossessions that started during colonisation but continued after the cut-off date through their systemic and dogmatic effects.

4.5 Alternative Approaches to Richtersveld and Popela?

Arguably, a large number of historically based land claims can be brought within the framework of the Restitution of Land Rights Act by using the logic of *Richtersveld* and *Popela*. Needless to say, there must be an interest surviving the original dispossession for this strategy to work at all. Should there be no surviving interest, then this formulation would not be of assistance as the cut-off date cannot be done away with. Indeed, the Constitutional Court in *Richtersveld* stated in no uncertain terms that the limit of the retroactivity of the Restitution of Land Rights Act was set at 19 June 1913. The implication of this is that the Constitutional Court intends that all claims for land restitution should be dealt with under the Restitution of Land Rights Act.

However, in terms of the notion of a reversionary right, although a private law concept, one could argue that ownership has not been extinguished and therefore survived the cut-off date to be again dispossessed under apartheid, even when the original owners did not retain any use or occupation rights with

regard to the land. Within this formulation, the reversionary right could have been dispossessed under apartheid and can still be restored using the Restitution of Land Rights Act. Cowen[303] describes the reversionary right as the "elasticity of ownership" since, regardless of the limitations placed on ownership and the number of subtractions from the dominium, the owner will still maintain the reversionary right. It is a vested right which reverts to the owner once the various subtractions end. Arguably, this approach is better suited in the private law arena than for large scale land reform,[304] but it is worth while considering it as the basis of a restitution claim under the Act, where the original owners were dispossessed prior to the cut-off date with a remaining entitlement.

Some authors have stated that the doctrine of aboriginal title can be used in South Africa, outside of the Restitution of Land Rights Act, to allow historical land claims that were lost in dispossessions that took place prior to the cut-off date. For communities dispossessed of their original right in land without any surviving use rights, particularly where the dispossession occurred just before the cut-off date, it may be necessary to discuss whether and how the doctrine of aboriginal title can function within the South African context. As yet, the South African judiciary has not expressed a decisive opinion as to whether a land claim based on aboriginal title can succeed, although the Constitutional Court has indicated

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[303] Cowen DV *New Patterns of Landownership. The Transformation of the Concept of Landownership as Plena in Re Potestas* (1984) at 76.

[304] Pottage P "Restitution and Enjoyment of Land" (1998) *Conveyancer and Property Lawyer* 333-338 at 335-336.

quite strongly in *Richtersveld* that this might not be possible.

Academics such as Bennett and Powell[305] and Hoq[306] favour the application of the doctrine of aboriginal title regardless of whether or not it forms part of the common law. Others, such as Mostert and Fitzpatrick[307] and Lehmann,[308] are of the view that the Restitution of Land Rights Act does not provide redress for colonial land dispossessions prior to the cut-off date. Nonetheless, Bennett and Powell assert the viewpoint that by virtue of aboriginal title being part of customary international law it naturally is a part of South African law.[309] This view seems to suggest that the cut off date which precludes aboriginal title contravenes international law. It may be said that the promulgation of the Restitution of Land Rights Act probably complied with South Africa's obligations in that regard. The cut-off date does not imply a contravention unless it is imposed arbitrarily or works unfairly. The discussion on the case reflects that it is not the case. In Australia, aboriginal title post the *Mabo* ruling has become a

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[305] Bennett TW & Powell CH "Aboriginal Title in South Africa Revisited" (1999) 15 *SAJHR* 449-485 at 464.

[306] Hoq LA "Land Restitution and the Doctrine of Aboriginal Title" (2002) 18 *SAJHR* 421-443 at 433.

[307] Mostert H & Fitzpatrick P "Living in The Margins of History on the Edge of the Country- Legal foundation and the Richtersveld Community's Title to Land" (2004) *TSAR* 310-510 at 503-510.

[308] Lehmann, K "Aboriginal Title, Indigenous Rights and the Right to Culture" (2004) 20 *SARHJ* 86-118 at 110.

[309] Bennett TW & Powell CH "Aboriginal Title in South Africa Revisited" (1999) 15 *SAJHR* 449-485 at 464. This argument may further be bolstered by the fact that South Africa in 1996, signed the International Convention on Economic and Cultural Rights, which protects cultural and linguistic minorities.

limited right with the advent of the Native Title Act.[310] Furthermore, very few cases on aboriginal title have been decided by the courts, with most claims being settled by way of negotiation between the aboriginal communities and the federal governments.[311] This is attributed to the lack of political will on the part of the government to fully recognise aboriginal title. Despite the legal and administrative processes established by the Native Title Act, very little land has been claimed successfully.[312]

In the *Richtersveld*[313] Supreme Court of Appeal and Constitutional Court decisions, the courts followed some principles which are said to be key in grounding a claim for aboriginal title. The decisions reflect that South African law recognises rights to land which have their source in the traditional laws and customs of indigenous people. In addition, these decisions established, for South African law, the principle that a mere change in sovereignty does not unsettle pre-existing rights in land. This aspect of the *Richtersveld* decisions suggests, for

[310] According to Reilly A "The Australian Experience of Aboriginal Title: Lessons for South Africa" (2000) *SAJHR* 512-534 at 533.

[311] Reilly A "The Australian Experience of Aboriginal Title: Lessons for South Africa" (2000) *SAJHR* 512-534 at 533.

[312] See Van der Walt AJ *Property in the Margins* (2009) at 205, 207, who notes that *Mabo,* in holding that aboriginal title is recognised and protected by the common law means that aboriginal title is not extinguished by colonisation. There is however a proviso that the Crown does not protect aboriginal title since aboriginal title is not derived from the Crown. It can therefore be dispossessed by the state without a concomitant duty to compensate. He uses *Griffiths v Minister of Lands, Planing and Environment* [2008] HCA 20 as an example where the expropriation of lands under aboriginal title was permitted.

[313] *Alexkor Ltd and Another Richtersveld Community and Others* 2004 (5) SA 460 (CC) and *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA).

Patterson,[314] that South African courts may have begun to recognise aboriginal as a part of South African law. Moreover, in finding that at the time of annexation, the Richtersveld people had a communal customary law interest whose source lay in "the traditional laws and customs of the Richtersveld people", the Supreme Court of Appeal[315] noted the similarity between this customary law interest and an aboriginal title right, saying;

> "Like the customary law interest that I have found was held by the Richtersveld community, aboriginal title is rooted in and is the 'creature of traditional laws and customs."[316]

The Supreme Court of Appeal in *Richtersveld* made reference to the *Mabo* decision where Brennan J rejected the time honoured view in *In re Southern Rhodesia*[317] that some indigenous people are insufficiently civilised to have recognisable property rights. Like *Mabo,* the Constitutional Court adopted Brennan J's viewpoint and found that the Richtersveld community's customary law rights in the subject land were recognised as such and that they had survived annexation. Finally, the Supreme Court of Appeal held that the government's failure to recognise the Richtersveld community's rights in land, based as it were

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[314] Patterson S "Land Restitution and the Prospects of Aboriginal Title in South Africa" (2003) *Australian Indigenous Law Reporter* 34 (8) 13-28 at 25.

[315] *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA) para 37.

[316] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 para 103.

[317] *In Re Southern Rhodesia* 1919 AC 211 (PC).

on the ground of 'insufficient civilisation' after diamonds were discovered was racially discriminatory. The Richtersveld community was entitled, under the Restitution Act, to restitution of their rights in land.

Pienaar compares the *Delgamuukw* decision to the *Richtersveld* decision and notes the similarities between aboriginal title and indigenous law. His conclusion in the comparison is to ask "is it the same concept with a different name?"[318] This implies, like Bennett and Powell suggest,[319] that aboriginal title is a part of South African law.

In contrast to Canada and Australia, the South African government has proved its commitment to land reform.[320] The Restitution of Land Rights Act is far better placed to assist communities to obtain a more secure title than the judicially created and somewhat insecure doctrine of aboriginal title. In fact, in the *Popela* decision, the government was a litigant, alongside the Popela community, in the community's quest for restitution. With the full ownership remedy for previously dispossessed lands, communities are able to form new relationships with land – for example communities that form joint investment ventures with the landowner after a successful restitution award. This is not unlike the Richtersveld community becoming major shareholders in South Africa's largest mining corporation as part

[318] Pienaar G "From *Delgamuukw* to *Richtersveld* - Are Land Claims in Canadian and South African Law Comparable?" (2005) 16 *Stell LR* 446-465 at 463.

[319] See n 65 above.

[320] See Chapter 3 of thesis.

of the settlement. Aboriginal title, on the other hand, demands that communities use the land in a manner that is compatible with their title. Once land use patterns change, then the title is said to revert back to the state.

Therefore, from the discussion above it is apparent that the courts used the doctrine of aboriginal title in order to formulate a unique logic which would ensure the inclusion of historically based land claims within the restitution process. However, to conclude, as some academics have, that the doctrine has come to be applicable in South Africa is maybe premature. In any event, as has been discussed, the doctrine of aboriginal title, because of its sovereignty handicap, arguably does not have the same wide ranging reach that, ironically, its logic suggests. South African courts, without the sovereignty handicap, have made use of the logic in order to craft a remedy for historically based land claims. In any event – notwithstanding the perceived difficulties of the doctrine of aboriginal title, the doctrine, within the South African context, is unnecessary. The crux of this chapter is that the *Richtersveld* and *Popela* formulation functions as the preferable tool with which to bring historically based land claims into the legislative framework.

In concluding the discussion on possible alternatives to the *Richtersveld* and *Popela* formulation, the 1913 cut-off date reflects a balance between correcting historic injustices on the one hand and maintaining public confidence in the markets on the other hand. In saying so, the cut-off date which acts as a

limitation on the rights to land restitution bears testament to the view that not all land dispossessions can be restored without some form of disruption to the social order. The formulation of the *Richtersveld* and *Popela* decisions can be said to reflect a nuanced understanding of the former. Fragmenting a proprietary interest to find a lesser interest which survived the cut-off date and was later subject to a second dispossession under apartheid arguably widens the scope of the restitution process by including claims which would otherwise have been excluded on the basis of the pre-1913 dispossession. The formulation is in line with the Restitution of Land Rights Act's constitutional transformative essence.

4.6 Conclusion

As the case discussion above reflects, there are marked similarities in the manner in which the South African courts and the Australian courts have adjudicated their historical land claims. The one obvious difference is that in South Africa, land claims are dealt with in terms of constitutionally mandated legislation with a cut-off date. The cut-off date appears to intentionally exclude historically based land claims. It then would appear as if aboriginal title might be a solution to the apparent exclusion of pre-1913 land dispossessions. As such, this chapter has discussed literature with a view to see whether aboriginal title can be applied in South Africa. In this regard, the conclusion, based on Australian and Canadian experiences, suggests that it is a limited right and therefore falling short of the wider transformative aspirations of the land reform programme in South Africa. That being said, a remaining question is whether

there are still historic land dispossessions which cannot be remedied using the *Richtersveld* and *Popela* formulation discussed in sections 4.2 to 4.4 of the Chapter. A reversionary right was discussed as a possible solution to such instances, but because it is primarily a private law function, it may not be suitable within the land reform programme. In this regard, the conclusion is that there may well be instances where restitution for a historical land dispossession is not possible. Such an instance would arise when original ownership right has been stripped of all its incidents without any surviving rights. Recourse may then be in the form of either land redistribution or a secure form of tenure, which are the other two trajectories of the land reform programme.

However, the thrust of this thesis is that there is no need to resort to the doctrine of aboriginal title in redressing pre-1913 land dispossessions. This is because 1913 cut-off date does not preclude historically based land claims. The fragmentation of proprietary interests by the Constitutional Court in both the *Richtersveld* and *Popela* decisions, in a manner with some resemblance to the *Mabo* and *Delgamuukw* decisions, offers a more flexible approach to historically based land claims, albeit within the 1913 cut-off date.

Bearing in mind the temporal nature of the Restitution of Land Rights Act, there could arguably be instances in which applicants cannot bring their land claims within the *Richtersveld* and *Popela* framework. As the claims have now been closed under the Act, new claims are not possible. The *Richtersveld* and *Popela*

framework largely affects as yet undecided claims. The original date by which land claims had to be lodged was 30 April 1998 but was later extended to 31 December 1998 due to the low volumes of lodged claims. It may just well be that the common law can be developed to include the doctrine of aboriginal title as previously suggested by some academics, since aboriginal title is accepted as practice of customary international law.

It appears as if the rationale for the sunset clause in the Restitution of Land Rights Act is that existing landowners require certainty as to their title to land. The Chief Land Claims Commissioner in public hearings on the Restitution Amendment Bill, before the Portfolio Committee on Agricultural Land Affairs, expressed the view that the 31 December 1998 cut-off date had to be maintained in order to balance the property market so as to ensure economic stability.[321]

Therefore, the implications of the above decisions call for a revised understanding of the 1913 cut-off date and its impact on historically based land claims. Pre-1913 land dispossessions are not necessarily excluded from the restitution process. Chapter 5, by way of concluding the thesis will summarise the findings in the previous chapters and will also answer the question as to how far the courts can interpret the 1913 cu-off date in order to include historically based land claims.

[321] T Gwanya " Restitution Amendemnt Bill: Proposal Cut-Off Dates" (2007) http://www.pmg.org.za/docs/2007/070529gwanya.pdf [accessed 1 September 2009].

5

Conclusion

5.1 Introduction

This thesis set out to find out whether it is possible, in South African law, and particularly given the framework established by the Restitution of Land Rights Act[322] and the 1913 cut-off date, to consider restitution claims that are based on land dispossessions that took place prior to the statutory cut-off date of 1913, or whether claims of this nature are excluded by the cut-off date. This thesis also set to out to establish what the best theoretical foundation for adjudication of these claims is, should it be found that it is possible to include them in the restitution framework.

The *Richtersveld*[323] and *Popela*[324] decisions of the lower courts appear to dismiss the land claims due to the pre-1913 dispossession of the original ownership right. On appeal, these land claims succeed. In granting the claims the courts followed a formulation which is not unlike that of the Canadian *Delgamuukw*[325] and the Australian *Mabo*[326] decisions. Based on this logic, it was shown that the 1913 cut-off date does not, as it may appear, exclude historically based land claims absolutely. An attempt has been made to show that the

[322] Act 22 of 1994.

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

[324] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC).

[325] *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

[326] *Mabo and Others v State of Queensland* (*No 2)* (1992) 175 CLR 1.

constitutionally mandated Restitution of Land Rights Act[327] should be given a wide or purposive interpretation to enable the courts to provide redress for individuals and groups that have been the victims of both colonial and apartheid land dispossessions. If the Act is interpreted purposively, it should be possible to apply the processes foreseen in the Act in a way that would include, rather than exclude, at least some dispossessions that started prior to the 1913 cut-off date but that continued to affect the position of the occupiers long after the cut-off date through the weakening effect that the colonial dispossession had on the occupiers' land rights.

This aim of this chapter is to summarise the most important findings and conclusions made in previous chapters in order to answer the question on just how far the courts can go in interpreting the cut-off date so as to include pre-1913 restitution claims in the land restitution process.

5.2 The 1913 Cut-Off Date and its Implications

The thesis commenced with a discussion on the history of land dispossessions in South Africa, noting how the major colonial land dispossessions took place prior to 19 June 1913.[328] The chapter also discussed the various legislative tools that were used in order to effect a second wave of land dispossessions during the apartheid era. These legislative tools included the Black Land Act of 1913, whose date of commencement the cut-off date is modelled after. The reasoning behind

[327] 22 of 1994.

[328] Paragraph 2.1.1.

the cut-off date is that the Black Land Act[329] is said to be the first key legislative tool that saw the country's surface area divided according to racial grouping, and that restitution should therefore take the date upon which this Act became operative as its point of departure. In the end, the black population of South Africa was settled on just 13% of the surface area even though they constituted 80% of the total population.

The chapter then noted how the post-1994 democratic dispensation made land reform a focal point for transformation and development. The chapter also discussed how the policy framework document adopted by the new government, the *White Paper on South African Land Policy*, first set the cut-off date for restitution claims as 1913. The chapter also discussed the manner in which the cut-off date has been included in the 1996 Constitution[330] and the constitutionally mandated Restitution of Land Rights Act. Various opinions were cited on the desirability of a cut-off date and it was indicated that the majority of commentators agreed that historically based land claims were left out of the restitution process for pragmatic reasons.[331] The chapter also discussed how the courts dealt with the question of historically based land claims for the first time. The claims relating to dispossessions that took prior to 1913 were initially dismissed, which then raised the question whether aboriginal title could be the avenue for historically based land claims in South Africa.

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[329] 27 of 1913.

[330] S 25(7).

[331] Paragraph 2.4.

5.3 The Doctrine of Aboriginal Title Explored

It was noted that Australia and Canada did not have a cut-off date for their judicially conceived land claims processes. Their position was unlike the South African situation, which has to take cognisance of the cut-off date of 19 June 1913 because the land restitution process is authorised by the Constitution and regulated by special legislation, both of which impose this cut-off date on the restitution process. A potential stumbling block for both Australia and Canada was the fact that the courts, in crafting remedies for the restoration of colonial land dispossessions, may not question the sovereignty of the Crown.[332] Therefore, Australian and Canadian courts used the English common law doctrine of tenure, in terms of which the Crown held radical title over all land, to distinguish between the effect that colonisation had on sovereignty and on title to land respectively. In terms of the doctrine of aboriginal title the original occupiers' surviving title in the land was then said to act as a burden on the underlying Crown title. The chapter identified as the most important aspect of this formulation of the problem the view that a change in sovereignty did not extinguish prior titles to land. Hence, by giving due recognition to the surviving interests after the loss of sovereignty, the *Mabo* decision assigned a proprietary nature to such surviving interest and a restitution claim became possible. On this basis, it was said that the aboriginal title had survived the original dispossession

[332] Paragraph 3.1.

that took place when the Crown established sovereignty.[333] Using this formulation, a right of full ownership was restored in the restitution process. Thus, having discussed the doctrine of aboriginal title in Australia and Canada, the thesis then considered the question whether the doctrine of aboriginal title had a place in South Africa.

5.4 Aboriginal Title in South Africa?

Chapter 4 argued that there is no need for the doctrine of aboriginal title within the South African context, since the distinction between original dispossession and surviving rights, which may have been inspired by the decisions in *Delgamuukw* and *Mabo*, could be used to successfully restore previously dispossessed full rights of ownership within the ambit of the Restitution of Land Rights Act. The chapter noted the doctrinal differences between the South African land restitution process and that of Australia and Canada.[334] The latter land claims processes, not being governed by legislation, do not have a cut-off date and in crafting a remedy for colonial land dispossessions, the courts had to construct a remedy that would not compromise the sovereignty of the Crown, since the Crown acquired not just sovereignty, but also title to land when it colonised the territory. Since the sovereignty of the Crown cannot be challenged by municipal courts, it would have meant that indigenous populations dispossessed of land at the establishment of sovereignty would have had no restitution claim. Accordingly, the doctrine of aboriginal title is premised upon the

[333] Paragraph 3.2.2.1.

[334] Paragraph 4.1.

idea that there is a distinction between the loss of sovereignty and the loss of title. The surviving incidents of aboriginal title are said to be a burden on the underlying Crown's radical title. In this formulation, the sovereignty of the Crown is left intact while restitution becomes possible.[335]

Regarding South Africa, it was noted that the courts, unlike those of Australia and Canada, do not have to deal with the sovereignty question, since there is legislative framework for the restitution of previously dispossessed land.[336] It was noted that the 1913 cut-off date for restitution claims appears to intentionally exclude historically based land claims. It would then appear as if aboriginal title can be a solution to the apparent exclusion of pre-1913 land dispossessions. Literature in which it was suggested that the doctrine of aboriginal title could or should be used to bring pre-1913 restitution claims into the restitution process was discussed to see whether aboriginal title can be applied in South African law. In response to this suggestion, the chapter points out that the *Richtersveld* and *Popela* appeal decisions suggest that historically based land claims are not, after all, excluded from the restitution process automatically.[337] Importantly, these decisions followed an approach that recognised a weaker right which, having survived the original dispossession under colonial dispossession was then the subject of a second dispossession under apartheid. In the restitution process the courts can focus upon the second dispossession to bring the claim within the cut-

[335] Paragraph 3.3.

[336] Paragraph 4.1.

[337] Paragraph 4.2, 4.3.

off date, while focusing on the whole dispossession process, including the original colonial dispossession, in order to restore full ownership rights. Equally important is the fact that all this took place within the framework of the Restitution of Land Rights Act. The formulation, which can be said to rely on a fragmentation of proprietary interests, is not unlike the *Mabo* and *Delgamuukw* logic previously discussed.

In granting the claims for restitution, the appeal courts focused on a weaker (mostly use) right that was held to have survived the initial dispossession of the stronger right of ownership and that could satisfy the requirements of the Act.[338] Since the surviving right was again dispossessed after 1913, the claims met the requirements of the Restitution of Land Rights Act. By identifying and then focusing on weaker use rights that are said to have survived the original (mostly colonial) dispossession of ownership or sweeping indigenous land rights, the courts opened the possibility of considering restitution claims in cases that might otherwise seem to be excluded from the ambit of the Restitution Act.

A further question was whether there are still historic land dispossessions which cannot be remedied using the *Richtersveld* and *Popela* formulation. The notion of a reversionary right of ownership was raised as a possible solution for such instances.[339] In addition, there may be instances where restitution for a historical land dispossession is simply not possible within the framework of the Act. Such

[338] Van der Walt AJ *Property in the Margins* (2009) at 205-206.

[339] Paragraph 4.5.

an instance would arise when the original ownership right has been stripped of all its incidents without any surviving rights. Recourse may then be in the form of either land redistribution or a secure form of tenure, which are the other two trajectories of the land reform programme.

However, the thrust of this thesis has been that there is no need to resort to the doctrine of aboriginal title in redressing pre-1913 land dispossessions. This is because, firstly, the 1913 cut-off date does not absolutely preclude historically based land claims. The fragmentation of proprietary interests by the Constitutional Court in both the *Richtersveld* and *Popela* decisions, with some resemblance to the *Mabo* and *Delgamuukw* decisions, offers a more flexible approach to historically based land claims, albeit within the 1913 cut-off date. Secondly, it is argued that remaining claims might be better solved within the redistribution programmes.

Therefore, the implications of the *Richtersveld* and *Popela* decisions call for a revised understanding of the 1913 cut-off date and its impact on historically based land claims. Pre-1913 land dispossessions are not necessarily excluded from the restitution process.[340]

[340] Paragraph 4.5.

5.5 Conclusion

The thesis has attempted to answer the question as to just how far the courts can go in interpreting the cut-off date to include historically based land claims. When an incident of the original full ownership right survived the original colonial dispossession, and is then dispossessed again after 1913 in terms of racially discriminatory laws, this second dispossession can form the basis of a restitution claim within the restitution process. Arguably, it does not matter when the original dispossession took place, since the formulation of the restitution claim is dependent on fact that the weaker right survived the cut-off date. The formulation of the *Richtersveld* and *Popela* land claims widens the scope of the Restitution of Land Rights Act, which in light of its being constitutionally mandated legislation must arguably play a transformative role. In this regard, there is no need for the doctrine of aboriginal title in South African law, since the logic of drawing a distinction between the loss of sovereignty and the loss of rights in land functions within the legislative framework. In so far as the Restitution of Land Rights Act, due to practical economic considerations such as the desire for certainty of ownership, is of a temporal nature and new claims are no longer permitted, the South African common law might perhaps be developed in order to permit the land the doctrine of aboriginal title. It is perhaps the only instance in which a claim for restitution might be brought outside the framework of the Restitution of Land Rights Act.

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