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"Living in the Margins of History on the Edge of the Country" – Legal Foundation and the Richtersveld Community's Title to Land[#]

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1 Remaining in the margins and on the edge?

The people of the Richtersveld, their land and their history could hardly be a more obvious symbol for a well-worn academic theme, the centrality of the margin. The Supreme Court of Appeal recognised this when acknowledging, as part of its contribution to resolving the land claim dispute between the Richtersveld people and the state-held diamond-mining company Alexkor,[1] that these people for centuries had lived "in the margins of history on the edge of the country."[2] This was a land and a people of almost no concern to an occidental settler civilization,[3] so-called, until a part of it became of intense if rather narrowly focused interest when diamonds were discovered there in the early twentieth century.

Even with the mining for diamonds, the Richtersveld remained something to be adjusted incidentally to the imperial scheme, remained "waste and vacant" to adapt the British colonial phrase, a desolation to the cluttered European soul. Its unsettling

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[1] See especially *Richtersveld Community and Others v Alexkor (Pty) Ltd and Another*, 2001 (3) SA 1293 LCC ("the LCC decision"), and *Richtersveld Community and Others v Alexkor and Another*, 2003 (2) All SA 27 SCA ("the SCA decision"). The decision handed down by the Constitutional Court on 14 October 2003, *Alexkor (Pty) Ltd and Government of the Republic of South Africa v Richtersveld Community and Others* ("the CC decision") has not yet been reported.

[2] SCA decision par 8. And cf A Anghie "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" 1999 (40) *Harvard International Law Journal* 74: "The non-European world, relegated to the geographical periphery, is also relegated to the margins of theory."

[3] Evidence lead at the Richtersveld hearings, as well as prior research suggest that the pre-colonial titles of indigenous groups were at first simply ignored by the British. Only later local systems of African customary law were "recognised" if they did not "offend colonial precepts of civilisation". See eg the consideration of such evidence in par 56-72, and particularly 106-109, 112-113 of the LCC decision and par 30-33 of the SCA decision, as well as Bennett and Powell 1999 *SAJHR* 481-482.

potential was already embedded in the attempt to contain it in a name. Only the most fragile possessiveness can be carried by the naming after an obscure German missionary who visited the area briefly in the early nineteenth century. Yet even that tenuous hold dissipates in the "veld," for even if the Dutch "field" suggests a snug containment, when filtered by way of Afrikaans "veld" becomes uncontained country. And here is the resonance of our interest in the Richtersveld dispute: the uncontainable quality of its communal element where issues of sovereignty confuse and obscure the relation between property and territory.

Our analysis of the three main instances of judicial involvement in the Richtersveld dispute juxtaposes the uncontainability of "community" and the contained arrogation of sovereignty. In doing so, we employ the Richtersveld decisions to illustrate the ease with which communality in a private property setting can be used to obscure the basic and original question of an enduring sovereignty over territory and we explore the challenge posed by the uncontainable community for the constituent completeness of sovereignty.

1.1 The people, the land and the diamonds

The people of the Richtersveld initially approached the Land Claims Court for an order restoring their ancestral lands under the Restitution of Land Rights Act.[4] The Richtersveld is part of a larger area called Namaqualand, situated south of the Garib (Orange) River, and comprising about 85 000 hectares. It is valuable in mineral resources. Today, most of the Richtersveld people are resident in four settlements: Kuboes, Sanddrift, Lekkersing and Eksteenfontein. Their ancestors stemmed from two indigenous groups of people, the (pastoralist) Khoi-Khoi and the (hunter-gatherer) San, who inhabited the area in nomadic fashion, long before even the Dutch colonisation of the Cape from 1652 onwards. By the 19th century, the two groups had merged into the so-called Nama tribe and incorporated others present in the area, mainly some white *"trekboere"* (itinerant farmers) and the so-called *basters* (i.e. people of mixed descent, chiefly from white fathers and San or Khoi mothers). They lived independently, under their own political management.

The harshness of the land inhabited by the Richtersveld people is mirrored by the severity of their treatment under colonial and apartheid rule. The whole of southern Namaqualand (also the Richtersveld) was placed under British rule through annexation in 1847. Initially, the British Colonial Government showed no interest in the presence of the Nama tribe on the land. Later (between 1925 and 1927) a rich deposit of diamonds was discovered. By that time the British Colonial Government had been succeeded by a South African government under the protection of the Crown. It started proclaiming alluvial diggings and awarding mining rights to various

[4] 22 of 1994. The facts of the dispute are summarised in par 23-32 of the LCC decision and par 2, 13-22, 30-33 of the SCA decision. A summary is also provided in an earlier contribution to this journal: Mostert "The Decision of the Land Claims Court in the Case of the Richtersveld Community: Promoting Reconciliation or Effecting Division?" *2002 (1) Tydskrif vir die Suid-Afrikaanse Reg* 160–167.

stakeholders, in the belief that the land was unalienated Crown land subsequent to the 1847 annexation. Since then, the Richtersveld people were progressively denied access to the land they previously occupied. The dispossession culminated in the creation of reserves for these people, and the establishment of the state-owned Alexander Bay Development Corporation. The latter held most of the prospecting and mining rights in the area. When it was eventually converted into a private stock company (Alexkor), the state remained its largest shareholder. Alexkor opposed the Richtersveld people's claim for restoration of their land.

1.2 Judicial view of the Richtersveld people's "place"

The legislative criteria for restitution, in particular the combination of the Restitution Act's requirements[5] that dispossession of land rights had to have been the result of racial discrimination and that it had to occur after 1913 in order to attract a restitution award eventually led the Land Claims Court[6] to find against the claim.[7] It based its finding on the state's (erroneous) reliance on the *terra nullius* principle[8] of 19th

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[5] In particular s 2(1) of the Restitution Act. A discussion of the requirements set by section 2 of the Restitution of Land Rights Act may be found in Mostert "Land Restitution in the Context of Social Justice and Development in South Africa" *2002 (2) South African Law Journal* 400–428 and Badenhorst, Pienaar & Mostert *Silberberg & Schoeman's Law of Property* (2003) 512-516. In brief section 121(2) of the Interim Constitution / s 25(7) of the Final Constitution; read with s 2(1)(a) of the Retitution Act requires that the claimant must be a "person" (or direct descendant of such a person) or a "community," who must have been "dispossessed" of a "right in land." Dispossession must have taken place after 19 June 1913 and had to have the purpose of furthering the object of a "racially discriminatory law or practice." Dispossession must have taken place "without payment of just and equitable compensation." Finally, the claim for restitution also had to be lodged on or before 31 December 1998.

[6] The Land Claims Court heard and considered various aspects of the dispute at three occasions. The most important of these three decisions, for our purposes, is the one handed down on 22 March 2001.

[7] See par 106, 109, 110 and 115 of the LCC decision, where the court pointed out that - in view of the cut-off date requirement - it did not consider itself to have jurisdiction to decide whether the 1847 annexation was a dispossession as contemplated by the Restitution Act, and that this particular act of discrimination was not covered by the Restitution Act. According to the court, the only relevance annexation had, is that it caused all subsequent governments in South Africa to view the land as unalienated Crown land, belonging to no private individual or community, and rightfully acquired by the British Colonial Government.

[8] The doctrine of *terra nullius*, imported by the common law of colonizing England in the nineteenth century, entailed that settlement was a valid ground for acquiring "uninhabited" countries. Under this doctrine, eventually, colonizers were permitted to regard land as uninhabited if the indigenous people upon it did not meet the requirement of "sufficient civilization". Civilization, according to this doctrine, depended on the degree to which the land to be inhabited was already cultivated, and the extent to which the indigenous people were politically and socially organized. Nevertheless, no clear standards existed according to which sufficient civilization could be determined. In any event, the formulation of this doctrine, and its application in practice was found to be arbitrary and racist by various courts around the world. E.g. *Mabo and Others v The State of Queensland* (No. 2) (1992) 175 CLR (HC of A). Bennett and Powell 1999 *SAJHR* 455 ff provide a detailed analysis of the content of the *terra nullius* doctrine at various stages in legal history. See also Fagan, "Roman-Dutch Law in its South African Historical Context" in Zimmerman & Visser (eds) *Southern Cross - Civil Law and Common Law in South Africa*, at 41, and the discussions in the LCC decision (par 37, 41, 93, 106) and the SCA

century international law.[9] The Supreme Court of Appeal reversed this decision, holding that the Richtersveld community held a "customary law interest" in the land, which survived annexation. The "customary law interest" was described as being "akin" to rights held under common law ownership.[10] It included rights to the precious stones and minerals on the land. The most intriguing aspect of the SCA's argument is its use of aboriginal-title reasoning to outline the requirements against which the existence of a "customary law interest" may be tested.[11] First, it held that even though the Richtersveld people's use of the land may have been seasonal, sparse and intermittent due to the exigencies of their survival, they still had "exclusive beneficial occupation" of the land, especially since the community had "a strong sense of legitimate entitlement to the land," which others respected. The sources upon which these considerations are based invariably involve considerations of the doctrine of aboriginal title.[12] The court further employed similar sources to describe the trait of "exclusivity" which is connected with beneficial occupation, where it supported the notion[13] that exclusivity would be demonstrated by "the intention and capacity to retain exclusive control," before finding that the Richtersveld people "had enjoyed undisturbed and exclusive occupation of the … land" at the time of annexation.[14]

The SCA linked the annexation of the Richtersveld to the progressive expulsion of the Richtersveld people from the land after 1913, thus bringing the claim of the Richtersveld people under the ambit of the Restitution Act. Further the SCA rejected[15] the *terra nullius* doctrine upon which the LCC based its decision, and reconsidered the applicability of aboriginal title in the South African context.[16] It is of

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decision (par 35, 44-46, 52, 60, 106, 109-110). For a discussion of the consideration of this standard in *Mabo v The State of Queensland* (No. 2) (1992) 175 C.L.R. 1, see Fitzpatrick " 'No Higher Duty': Mabo and the Failure of Legal Foundation" 2002 (13) *Law and Critique* 233 at 244 ff. See in general also the critique of the formulation of "civility" in nineteenth century international law by A Anghie "Finding the Peripheries: Sovereignty and Colonialsim in Nineteenth Century International Law" 1999 (40) *Harvard International Law Journal* 34 ff, and especially 22-26. Anghie in this regard exposes (76 ff) the rare dismissal of the doctrine of *terra nullius* as outmoded alongside denial of its operation.

[9] Cf par 106, 110 of the LCC decision.

[10] Cf par 8 of the SCA decision; also par 23-29 (where it is found that this right amounts to a "customary law interest" in the land, with the specific content of "beneficial use and occupation") - see especially par 26 and 29; and again 111(a).

[11] Par 23 of the SCA decision.

[12] See par 23-24 of the SCA decision, which quotes as authority: K McNeil *Common Law Aboriginal Title* (1989) 202-204; *Mabo and Others v The State of Queensland* (No. 2) (1992) 175 CLR (HC of A) 188-189; *Delgamuukw and Others v British Columbia and Others* (1997) 153 DLR (4th) 193 (SCC) par 151; Bennett and Powell 1999 *SAJHR* 449 at 465; and *Hamlet of Baker Lake v Minister of Indian Affairs and Others* (1979) 107 DLR (3d) 513 at 544.

[13] Quoting the statement of McNeil *Common Law Aboriginal Title* (1989) 204.

[14] Par 28 of the SCA decision.

[15] At par 35, 44-51 of the SCA decision. The SCA doubted the applicability of the *terra nullius* doctrine to the case of the Richtersveld, on account of the considerable measure of political and social organization which was evident from the facts before the court. In par 47 of the SCA decision it is indicated that the colonial government did not regard the Richtersveld as *terra nullius* upon annexation, with reliance upon a citation of Dugard *International Law - A South African Perspective* 2 ed, at 121.

[16] At par 36-43 and 52-62 of the SCA decision.

some significance that the SCA's argument against the *terra nullius* rule relied on proof of the attitude of the colonizing authority, in particular its not *considering* the annexed territory to be *terra nullius*. This places in question the assumptions of encompassing sovereignty underlying the debate, since one would expect that the attitude of the colonial government would make no difference to the applicability of the *terra nullius* rule if it indeed formed part of the law. It was argued that according to the doctrine of continuity which is established in colonial Anglo-American jurisprudence, the proprietary rights of the community remained intact until such time as it was affected by a subsequent act of state.[17]

The Constitutional Court was requested to set aside the order of the SCA, amidst fears aired in the media about the extent of the financial burden placed on the present South African government to compensate the Richtersveld community.[18] If at first it appeared doubtful whether the CC at all had jurisdiction to deal with the claims made by Alexkor (and the South African government)[19] in the constitutional appeal, its decision illustrated that the sovereignty to constitute what is "constitutional" lies squarely with the CC itself.[20] Save in one respect, the CC essentially endorsed the conclusions reached by the SCA.

The CC allowed Alexkor to revive the argument that the Richtersveld had no rights worthy of protection,[21] even though this issue was abandoned during the SCA hearing. The compelling ground behind this move was the CC's desire to provide the LCC with a proper characterization of the Richtersveld community's title in order to facilitate the process of determining the value of the claim.[22] This characterization was undertaken with reference to the indigenous law of the Richtersveld people.[23] It was found that the Richtersveld people had a right of ownership in the land under

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[17] Par 55-61 of the SCA decision.

[18] See e.g. P de Bruin *Bid to dodge R10bn bill* (03-09-2003) *News 24.com* online at http://www.news24.com [2003/09/08].

[19] The CC grudgingly condoned the government's special late application for leave to appeal, which was submitted only after it became clear that no settlement could be negotiated between the Richtersveld community and the government. (See par 11-17 of the CC decision.)

[20] The CC, explicitly mindful thereof that its jurisdiction, although extensive, should not be construed so as to 'render "illusory" the distinction … between [its own] jurisdiction … and that of the SCA' (par 26), set out the basis for its elevation of itself to the final court of appeal in the Richtersveld matter in par 19-32 of its decision. In essence, in interpreting and applying section 167(3) of the Constitution, which deals with the apparently extensive powers of jurisdiction of the Constitutional Court and the distinction in jurisdiction between this court and the SCA, the CC deduces it jurisdiction in the Richtersveld matter from its reading of section 2(1) of the Restitution Act as emanating from the provisions of s 121(2) of the Interim Constitution, and s 25(7) of its successor, the 1996 Constitution. S 2(1) of the Restitution Act correlates to a very large extent with the constitutional provisions, which supported the CC's view that s 2(1) is supposed to give content to the constitutional right to restitution espoused by s 25(7) of the Constitution. (See especially par 22-23 of the decision.) The court's jurisdictional powers extend, accordingly, to the legislative requirements of restitution, since these are related to the broader constitutional objective of restitution.

[21] Par 42-45 of the CC decision.

[22] Par 45 of the CC decision.

[23] Par 50 of the CC decision, in reliance upon the Privy Council decision of *Oyekan and Others v Adele* [1957] 2 All ER 785 at 788G-H.

indigenous law.[24] Annexation robbed the Richtersveld people of their sovereignty, but it did not extinguish their land rights.[25] The Court found that the "indigenous law ownership" of the Richtersveld community remained intact until well after the Restitution Act's cut-off date of 1913.[26] The position changed only once diamonds were discovered in the area, when the community's indigenous law ownership was extinguished through the variety of (physical and legislative) measures taken to bring the land under the control of the state-held diamond mining company. In this typification of the right as "indigenous law ownership" lies the original contribution of the CC. This pushed the restitution process into a second phase, in which the parties now will have either to rely on the Land Claims Court to determine a restitution package (which might include restoration of ownership and financial compensation) or negotiate a deal involving the award of alternative land or the commitment to manage the land in a joint venture between the community and the state.[27]

To a certain extent each of the Richtersveld decisions subconsciously supports assertions about the "place" of the Richtersveld people in South African history and upon South African soil. They also stake claims about the uniqueness of this community's struggle to regain what has belonged to them all along. Perceptions of the case as "unique"[28] underscore our main point of interest: the claim to an encompassing sovereignty, be it of a colonial nature, or of a more "modern", democratic kind, in the resolution of disputes of this kind.[29] This matter has arisen in various other settings and jurisdictions, where the acknowledgement of aboriginal title had been at stake. In the South African context it is complicated, although not really distinguished, by attempts to bring aspects related to the inquiry under the ambit of the Restitution Act.

In brief, our argument is that treatment of restitution claims as dealing with matters of property alone disregards the possibility of such claims escaping their containing reach and exposing the depressing acceptance of sovereign arrogation, be it of a colonial or modern democratic nature. In addition, Richtersveld illustrates that the

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[24] Par 62 of the CC decision.

[25] Par 66-69, 76 of the CC decision.

[26] Par 81 of the CC decision.

[27] The restitution hearing in the LCC is set for May 2004. See E Ellis & SAPA "A Future Lined with Diamonds" *Star* 15-10-2003 at 1; P Naidoo "Richtersveld on Verge of a Deal" *Financial Mail* 24-10-2003 at32; P de Bruin "Die 3 Opsies vir Tweede Fase van Richtersveld-proses" *Beeld* 15-10-2003 at 3; F Nxumalo "Next Trial for Richtersveld set for May" *Star* 07-01-2004 at 15.

[28] See eg J Boin & C Benjamin "Ruling on Richtersveld has property rights implications" *Business Day* 15-10-2003 at 13.

[29] Discussions of problems surrounding the dichotomy between the indigenous and the sovereign in the context of native land rights are provided by Fitzpatrick " 'No Higher Duty': Mabo and the Failure of Legal Foundation" 2002 (13) *Law and Critique* 233 ff; Fitzpatrick "Taking Place: 'Aboriginality' and the Failure of Legal Foundation" forthcoming. See also the broader discussion of sovereignty and its dependence on law in Fitzpatrick " 'Gods would be needed …': American Empire and the Rule of (International) Law" 2003 (16) *Leiden Journal of International Law* 1-38. See also Anghie "Finding the Peripheries" 1999 (40) *HVIJL* 77-78, where the continued effects of nineteenth century international law in the contemporary legal setting are exposed.

intuitive link drawn between a cohesive ethnicity and claims of proprietary restitution of indigenous communities eventually restricts possibilities of land restoration in a system in which indigenous land title remains marginal. We accordingly argue that continued subordination of indigenous land title to a law that originated from an initial act of violence, territorial assertion of sovereignty, simply sustains marginalisation.

2 "Community" and its Impact on Richtersveld

It is evident from all three Richtersveld decisions that the constitution of the "communal" played and important role in establishing the quality of rights held by the Richtersveld people and dispossessed by government. The Act's definition of "community" focuses on "shared rules determining access to land held in common" by the group claiming to be a community or part thereof. The definition is partial, of course, not staking any claims concerning the maintained identity or any essential attributes or characteristics of the members of such a community. It focuses merely on the manner in which land is used and controlled by the group. Yet, even though the existence of a “community” for purposes of the Restitution Act was not really in dispute in the Richtersveld case, the LCC and the SCA’s respective treatment of this element influenced their eventual decisions on the quality of the land rights held. The CC relied heavily on the "indigenous" aspect accompanying the concept of community to determine the quality of the land rights held by the Richtersveld people.

2.1 "Community" and the conception of indigenous land rights

The LCC supported the idea that "the community’s sense of legitimate access to the land"[30] would determine the very question of a communal element being present. Upon the evidence it was not difficult to establish this sense of access.[31] In addition, "community" for purposes of a restitution award would involve the existence of a "sufficiently cohesive group of persons,"[32] taking into account the possible impact of the original dispossession on the solidity of the community. At least "some element of commonality" had to survive the dispossession.[33] Yet, the LCC accepted that "every community will change over time"[34] and did not regard it necessary to explore

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[30] See par 62 of the LCC decision, and compare with *In re Kranspoort Community* 2000 (2) SA 124 (LCC) at par 63.

[31] See in this regard the discussion of the evidence in par 62 of the LCC decision.

[32] See the LCC's use (at par 67 of the LCC decision) of the dictum of *In re Kranspoort Community* 2000 (2) SA 124 (LCC).

[33] Per Dodson J in *In re Kranspoort Community* 2000 (2) SA 124 (LCC) at par 34.

[34] Par 67 of the LCC decision. See also par 63, in which it is indicated that most people living in the Richtersveld were absorbed into the Richtersveld community, regardless of their descent (Namas, Damara, "*Bosluis Basters*," "*Oorlam Basters*" and white "*trekboere*" are mentioned); and par 72, where the development of the community is reviewed.

genealogical evidence to prove enduring cohesion.[35] Much more attention was given the political organisation of the community,[36] especially in as far as this related to the community members' and outsiders' land use and control in the area.[37] The existence of shared rules determining access to the land was thus established.[38] This alone ensured a sufficient degree of communality. Significantly, exactly the same considerations were then used to find that the only interest the Richtersveld people had in the land at relevant times was "beneficial occupation." This refers to a non-precarious interest, which would – but for its protection under particular legislative provisions - be no more than the unprotected potential to mature into a right on the basis of acquisitive prescription. The finding that the community's relation to the land amounted to "beneficial occupation", did not really afford the claimants with broad entitlements upon restitution.

In considering the same requirements for restitution, the SCA found it necessary to highlight the "discrete" ethnicity of the Richtersveld community.[39] Focus was placed on the fact that the community had "maintained its identity as a people and the essential attributes and characteristics of their forebears and the society and culture of earlier times".[40] The SCA recognised that the Richtersveld community had in various ways accommodated a diversity of peoples and a diversity of uses of the land by others.[41] Yet the ultimate test the community had to meet was one of exclusivity and distinctiveness and enduring cohesion.

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[35] Par 73 of the LCC decision.

[36] See e.g. the exposition in par 68 of the LCC decision.

[37] It is mentioned (par 68), e.g. that originally the captain ("hoofkorporaal") and clan leaders ("Raad") were specifically assigned the responsibility of managing the community's grazing, and overseeing the implementation of the rules governing access to such grazing. In more recent times, these functions were taken over by a committee system (see par 70), on the basis of internal "house rules" and later regulations, which basically reflected the arrangements already made by the earliest members of the group, and which envisaged a distinction in the treatment of group members on the one hand, and outsiders on the other hand.

[38] See especially par 71 of the LCC decision.

[39] See par 15 of the SCA decision. The existence of a "community" as required by section 2(1) of the Restitution Act was no longer in dispute by the time the case reached the SCA. See par 5 of the SCA decision.

[40] See par 5 of the SCA decision.

[41] The SCA considered the anthropological and archeological evidence advanced in evaluating the traditional laws, customs and practices which form part of the Richtersveld people's "distinctive aboriginal culture" (par 12 of the SCA decision). It was then stressed that, even though people of mixed descent were assimilated into the group which was predominantly of Khoi-Nama ancestry, they "shared the same culture, including the same language, religion, social and political structures, customs and lifestyle derived from their Khoi-Nama forefathers" (par 17-18 of the SCA decision). See, *contra*, the argument in the earlier, exploratory contribution: Bennett "Redistribution of Land and the Doctrine of Aboriginal Title in South Africa" 1993 (9) *SAJHR* 443 at 468-469 which excluded the possibility of an aboriginal character assigned to the Nama people, because of notable extraneous cultural influences. The stance of the SCA in this regard indicates a deviation from an approach based in law pertaining to aboriginal title, where habitation of territory prior to arrival of immigrant colonists plays an important role in determining aboriginal character.

The apparent reason for relying on the cohesion of the community is, however, not so much to determine communality itself, but to find and develop the idea of the "customary law interest" as basis of the community's right to land. Particular emphasis, understandable given the nature of the case, was placed on the continuing relation to the land, to its effective occupation, to the precise terms on which others may have been allowed to use it, to the maintenance of customary rules governing access to and use of the land – to whether, in sum, "exclusive beneficial occupation" was asserted and maintained.[42] The "customary law interest" which the Richtersveld people had to establish in the land itself required proof of a custom which "must be certain, uniformly observed for a long period of time and reasonable" – the "right" to the land having to be "rooted in the traditional laws and custom of the Richtersveld people…inher[ing] in the people inhabiting the Richtersveld as their common property, passing from generation to generation."[43] Accordingly, the SCA's discussion, even though it did not challenge the LCC's finding on this issue, went beyond the mere assertion that shared rules existed which governed access to land held by the group. The SCA's approach represents a broader basis for community claims, although its further treatment of the issue of aboriginal title again suggests strict containment of the type of claims which may be brought on this basis.

Perhaps the link between the communal and the land, appearing most notably from the SCA decision, is a convenient endowment stemming from the court's use of foreign case law on aboriginal title.[44] As appears from the SCA decision, the vagueness of the concept "customary law interest" in land enables a finding that can incorporate basically any entitlements to which a specific community wants to lay claim, or which a court is prepared to grant such a community, if it can be established that the specific elements of land control were *customarily* present. Finding a link between the community and the land also achieves a distinction between the Richtersveld people and other communities, by building in an additional, constituent condition for restitution in the form of a discrete ethnicity.[45]

But even more notably, the link between the communal and the land, based as it is on aboriginality, places the Richtersveld people in a continued state of subordination. The SCA understands a "customary law interest" under the Restitution Act to denote: "[a]n interest in land held under a system of indigenous law … whether or not it was recognised by the civil law as a legal right."[46] The court found[47] this interest to be similar to common law ownership. It specifically involves "exclusive beneficial occupation of the entire area … for a long period of time,"[48] which can be

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[42] Par e.g. 21, 28, 29 of the SCA decision.

[43] Par 27-29 of the SCA decision. Par 18 of the SCA decision then provides an exposé of exactly what the land culture of the Richtersveld people entailed: communal land holding, which excluded access to the land for outsiders; along with reasonable use and occupation of the land and its resources. Non-members had to obtain (and sometimes pay for) permission to use the land.

[44] See par 1.2 above.

[45] See par 5 of the SCA decision.

[46] Par 9 of the SCA decision.

[47] Par 8 of the SCA decision, read with paras 23-29.

[48] Par 29 of the SCA decision.

consistently exercised even by a nomadic community. It also includes the right to exploit and determine the distribution of mineral and natural resources of the land.[49] This type of control is described by the SCA as "certain and reasonable," based on "traditional laws and custom."[50] Accordingly, the SCA discovered for the Richtersveld people an interest in land which is characteristically indigenous and community-based, but still somehow corresponds with South African "common law" ownership, which is characteristically individual.

The availability of "shared rules" governing access to the land in the Richtersveld induces the SCA to define the content of the right as "exclusive beneficial occupation and use". This is probably merely an unfortunate choice of words. The meaning afforded to this concept here most certainly differs from the usual understanding, exemplified in the LCC's reasoning, of "beneficial occupation" as the possession of land to which *no legal title* is held.[51] But even so, the link drawn between customary land interests and common law ownership remain problematic. Perhaps the SCA's use of the term "beneficial occupation," in determining the content of the Richtersveld people's "customary law interest," and its simultaneous description of the interest as being "akin" to ownership,[52] was an attempt to take "some shadow of the rights"[53] known under South African common law and mutate it into a property right which would snugly fit into the existing scheme of things. In fact, none of the Restitution Act's specified "rights in land" is strongly rooted in South African "common law." As a result, for instance, the notion of "customary law interest" was already understood outside the common law context in *Nchabeleng v Phasha.*[54] It was understood as indicating lawful occupation of the land, plus exclusive jurisdiction *in terms of the customary law* relating to the regulation of a community, rather than the regulation of land title.

By the time the dispute reached the CC, interpretation of the communal element of the land claim has mutated the originally nebulous "beneficial occupation" of the LCC and the eventual, somewhat confusing "customary law interest" of the SCA into "indigenous law ownership" of the land.[55] The latter is typified as essentially

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[49] Par 85-89 of the SCA decision.

[50] Par 28 of the SCA decision.

[51] The LCC rejected the claimants' contentions regarding the nature of their rights as being either full ownership under common law (see par 37-43 of the LCC decision) or aboriginal title (see par 44-53; 117 of the LCC decision). Instead, it held that the relevant interest in land for the Richtersveld people would be that of "beneficial occupation," as described in the Restitution Act. No definition of "beneficial occupation" is provided in the Restitution Act, save for reference to the fact (in the definition of "right in land") that beneficial occupation involves continuous control over land for a period of at least 10 years. The definition of "beneficial occupation" in s 1 of the Interim Protection of Informal Land Rights Act 31 of 1996 as "the occupation of land by a person, as if he or she is the owner, without force, openly and without the permission of the registered owner" suggests that land control in this regard is related to the control necessary for prescription: it must be exercised *nec vi, nec clam* and *nec precario*.

[52] Par 8, 26, 29, 111(a) of the SCA decision.

[53] See Lord Sumner's dictum *In re Southern Rhodesia* 1919 AC 211 (PC) at 233.

[54] *Nchabeleng v Pasha* 1998 3 SA 578 (LCC) par 27.

[55] Par 58-64 and 74 of the CC decision.

"communal"[56] and comprising of the right to exclusive occupation and use by community members. In particular it includes the right to use water, to use the land for grazing and hunting and exploiting its natural resources, above and beneath the surface.[57] It hence included the right to the minerals and precious stones.[58] Contrary to the SCA's description, the CC regards the right of the Richtersveld people as something distinct from common law ownership,[59] something which has its own values and norms,[60] something which was conceived in the history and uses of the community[61] and which was given room to evolve according to the needs of the community at least up until 1913.[62]

The CC did not pursue the "communal" aspect of the Richtersveld claim, the issue having been acknowledged as "common cause".[63] Yet, in determining the nature of the land rights available to the community, the conception of the community and their relation to the land as "indigenous" enjoyed particular attention. The CC's contribution stretches beyond that of the SCA in that it awards a "place" to indigenous law[64] in determining the content of the Richtersveld community's title to the land. In its further attempt to internalise law governing the land rights of the Richtersveld people into the "amalgam of South African law",[65] without paternalising it by regarding it "through the common law lens" the CC invoked the Constitution to determine the "ultimate force and validity" of the law applicable.[66] Referring to the difficulties of courts from other jurisdiction to deal *ex post facto* with injustices caused by dispossessions of land from indigenous peoples by colonial settlers[67] the court made an effort to distinguish the situation in South Africa from these jurisdictions. It did so on the basis of the constitutional provisions providing expressly for retroactive application to dispossession of land,[68] and acknowledging the "originality and distinctiveness of indigenous law as an independent source of norms *within the legal system*." The CC, oblivious of its own containment of the applicable

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[56] Par 58-59 and 62 of the CC decision, in reliance upon par 68 of the LCC judgment.

[57] Par 62 of the CC decision.

[58] Par 64 of the CC decision.

[59] Par 50 of the CC decision, in reliance upon the Privy Council decision of *Oyekan and Others v Adele* [1957] 2 All ER 785 at 788G-H. Interestingly, the CC's use of foreign precedent at this point seems to suggest that for purposes of "common law" there is no difference between English and Roman-Dutch conceptions of property law.

[60] Par 53 of the CC decision.

[61] Par 57 of the CC decision, in reliance upon *Amodu Tijani v The Secretary, Southern Nigeria* 2 AC [121] 399 (PC) 404.

[62] Par 55 of the CC decision.

[63] Par 20 of the CC decision.

[64] Par 48-50 of the CC decision.

[65] Par 51 of the decision.

[66] Par 51 of the CC decision.

[67] Par 34 of the CC decision.

[68] Par 36 of the CC decision. The court here specifically refers to section 121(3) of the Interim Constitution and section 25(7) of the 1996 Constitution which set the cut-off date of 19 June 1913 for purposes of restitution.

indigenous law, proceeded to require such law to be established by adducing evidence.[69] Despite taking pains to distinguish the South African situation from those of other jurisdictions, the court thus reverted to the same kind of requirements for invoking indigenous law as those applicable in, for instance, Australian or Canadian cases on aboriginal title, where indigenous law is required to be proved as a matter of "fact".[70]

The eventual result was that the indigenous law rights exercised by the Richtersveld community as they evolved until 1913 were viewed "not through the prism of the common law" or "legal conceptions … foreign to it".[71] Instead, the court turned to the communal aspect of the Richtersveld people for evidence as to the real character of indigenous title to land.[72] The evidence suggested communal ownership of the land, the "history and usages"[73] of the community implying the content of this right to be exclusive occupation and use of the land by the community members, in particular the use of water, land for grazing, hunting and exploitation of the natural resources above and beneath the surface.[74] Accordingly the CC found the community's conduct to be consistent with their ownership of the minerals upon the land.[75] If anything, the CC's treatment of the land rights of the Richtersveld community, pivots – like the SCA's decision – on matters of cohesion, exclusivity and distinctiveness.

This link between the "communal" and "indigenous" nature of the claim and the determination of the quality of dispossessed rights for purposes of restitution, which features at various points in the different decisions, causes a particular aspect of subordination remaining even after the restoration of the Richtersveld community's rights by the SCA and the CC. Their rights are subordinated to a legal system which does not effectively cater for them. As the following paragraphs show, this subordination occurs on a much more subtle level than that contemplated by the requirement of “racial discrimination” under the Restitution Act.

2.2 Subordination and Containment through "Community" and "Aboriginality"

The tenor of the SCA's decision concerning the notion of "community," is that land reform legislation in South Africa has not completely eliminated the idea of aboriginal rights. The CC's judgement differs ostensibly on this point. By the terms of the SCA judgment, "aboriginality" of communities continues to be a factor, albeit in a severely

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[69] Par 52 of the CC decision.

[70] For more detail on the Australian situation, see S Motha ″Mabo: Encountering the Epistemic Limit of the Recognition of "Difference" *Griffith Law Review* (1998) 7/1 79-96; and, for Canada, see *R v Van der Peet* (1996) 2 SCR 507 at paras 47 and 69, and *Delgamuukw v British Columbia* (1997) 3 SCR 1010 at para 90.

[71] Par 54-55 of the CC decision.

[72] Par 57-62 of the CC decision.

[73] Par 60 of the CC decision.

[74] Par 62 of the CC decision.

[75] Par 64 of the CC decision.

restricted sense. With the assumed affinity between the "common law" as Roman-Dutch and the English brand, the SCA relied heavily on precedent from Canada and Australia.[76] Such precedent, not only in the explicit reference to it but in its whole orientation, reinforced the enclosing and containing conception of community "found" among the people of the Richtersveld, their being rendered as "encapsulated societies:" supposedly static, custom-bound communities.[77] As Vattel[78] put it more purposively, such people were to be restricted "within narrower bounds."

The CC made a point of distinguishing the South African situation from issues requiring retroactive involvement in land dispossessions from indigenous people by later colonial settlers who claimed political and legal sovereignty over the land, invariably being racially discriminatory in method and conviction.[79] The argument advanced was that retroactive operation was expressly permitted by both the Interim and 1996 Constitutions to the limited extent of occurrences after 19 June 1913.[80] Hereby the CC suggests that restitution of ancestral lands is a matter solely dealt with by the terms of the Restitution Act in correspondence with the Constitution. But the CC limits its range of concerns to those related to the constitutional aspect of the dispute,[81] thereby avoiding the trouble of having to indicate whether the Restitution Act was meant to provide an exclusive means of dealing with issues of aboriginality and restitution. It was apparently not necessary in *Richtersveld* to be so concerned with the explicit subordination of alien matter, to be concerned that whatever is "recognised" does not, as it was put in *Delgamuukw*, "strain the … legal and constitutional structure".[82] The CC's "recognition" of rights remain, however, contained "within the legal system", subject to the constitutional values, regardless of how original and independent indigenous law as a source of norms may be.[83]

Hence one finds a tendency, in all three instances of judicial involvement with the Richtersveld dispute, strictly to contain the types of claims that could be made in a Richtersveld-like scenario. The judgements of both the SCA and the CC ensure some kind of justice for the Richtersveld people, without creating any expectations of a broad-based restitution policy for the many other (now) dispersed and incohesive groups, who might have been subjected to an even more disruptive and changeful

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[76] See note 44 above.

[77] Compare in general the seminal contribution of Bennett 1993 *SAJHR* 467ff and the reference there in note 159 to Crawford "The Aborigine in Comparative Law" 1987 (2) *Law & Anthropology* 5 ff. See also the stance of the government as set out in the White Paper on Land Policy (April 1997) set out in note 141 below.

[78] Vattel "Life on the Edge" in 1994 *New York Review of Books* (7 April) 3. See also LC Green, "Claims to Territory in Colonial America" in LC Green and Olive P Dickason *The Law of Nations and the New World* (1989) 74.

[79] Par 34 of the CC decision.

[80] Par 38 of the CC decision.

[81] Par 37 of the CC decision.

[82] *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 (SCC).

[83] See par 82 of the CC decision.

history, and who might have wanted to rely on the precedent set by the Richtersveld case.[84]

Chief Justice Lamer cautioned with emphasis in *Van der Peet*[85] that the rights given to indigenous peoples in the constitution "are *aboriginal*" and this "aboriginality" means that the "rights cannot…be defined on the basis of the philosophical precepts of the liberal enlightenment", on the basis of their being "general and universal". The resulting subordination and containment issues in precedent cases like these form an encompassing position given surpassing force in terms of sovereignty – an expedient less needed in *Richtersveld* since the case was based on a legislative assertion of the sovereign South African state. And yet, even in those instances where the Richtersveld people's claim to the land was acknowledged, the omnipresence of a sovereign arrogation and its grip on aboriginality cannot be denied. In the SCA's decision, issues of subordination and sovereignty might be less overt, because of the legislative assertion on which the case was based. The SCA judgment[86] implies that aboriginality as it is known in other jurisdictions remains confined to typically occidental views on communality: "aboriginal" groups are static and custom-bound communities, subordinated in some kind of tight communality and defined in terms always relative to a supposedly more dominant "non-aboriginal" or "national" group.[87] This view typically must result in a conclusion about the loss of communality as soon as tight ethnicity is broken. The consequence would be that Richtersveld-type claims would depend on the existence of tight cohesive groups – even if aboriginality is only significant in some restricted sense as propagated by the SCA. The peculiarity of the Richtersveld community is that years of subordination, first to the Dutch "incomers," and later to the British Crown and the South African government enhanced rather than impaired communality. Interestingly, the LCC judgment seems to recognise much more clearly than the SCA decision that the Richtersveld community is as aboriginal as it is not.

Of particular relevance in the SCA's consideration of the nature of aboriginal title[88] is the court's endorsement of the idea that aboriginal title gives rise to a right *sui generis*,

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[84] See eg mention being made of the possible restitution award of the diamond fields around Kimberley to the Griqua community that might arise from the precedent set by the Richtersveld decisions. "Hofuitspraak baan weg vir Griekwa-eis, sê DA" *Volksblad* 23-10-2003 at 5 and Anon "Griekwas gaan saak as Eerste Volk voor VN stel" *Volksblad* 25-07-1998 at 9.

[85] *R v Van der Peet* (1996) 137 DLR 4th 289 par 17-19

[86] The SCA equated aboriginal title with the "customary law interest" it has identified for the Richtersveld people, and which it based – less than ten paragraphs earlier in its judgment – upon reasoning from scholarship and case law about aboriginal title (see par 37 of the SCA decision). Oblivious to the fact that it is now employing the concept used to define the "customary law interest" as comparative agent, the SCA states that "[l]ike the customary law interest … held by the Richtersveld community, aboriginal title is rooted in and is the 'creature of traditional laws and customs'," and that the only requirement for the acquisition of aboriginal title is that "the indigenous community must have had exclusive occupation of the land at the time when the Crown acquired sovereignty." (The SCA here quotes *Members of the Yorta Yorta Aboriginal Community v Victoria* 2002 HCA 58 par 103 and *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145 (SCC) at 193-195.)

[87] See Bernasconi "On Deconstructing Nostalgia for Community within the West: The Debate between Nancy and Blanchot" 1993 (13) *Research in Phenomenology* 3-6.

[88] Par 38-41 of the SCA decision.

which originates in pre-colonial systems of indigenous law, and which does not conform to typical concepts of property known to South African common law.[89] Aboriginal title is described from within the Common Law:[90] Although it is enforceable in the ordinary courts, and may be invoked in order to protect pre-colonial land holding and control, aboriginal title may be extinguished by legislative act. It is not an individual proprietary right, but rather a communal right vesting in an indigenous group of people.[91] It is inalienable to anyone except the Crown or the state government.[92] The content of aboriginal title may vary from the acknowledgment of integrally indigenous practices, customs and traditions, through to recognition of site-specific rights to engage in particular activities on land, to acknowledgment of land title itself, in the narrow sense of ownership.[93] Such a description renders it less problematic to subject the "indigenous" to the operation of "the law of the land." Pre-colonial indigenous land control is first defined in terms of the law of the colonial entity exercising sovereignty over the land, and then diminished to some kind of entitlement which does not threaten sovereign power over the territory.[94] The colonial annexation of the land itself resonates in the annexation of the legal concept of native title by the colonial sovereign's law.

Essentially this situation results in a state action which is above the law: the first acquisition of a territory by a sovereign state and the imposition of the sovereign's law upon that territory renders it difficult for subsequent courts to challenge, control or interfere with the original acquisition, unless they are willing to move beyond the boundaries set for law by sovereign assertion. In this manner, the basis of colonial acquisition is confined to issues of property, rather than territory. This creates the setting in which the settler's law becomes the solid basis for exclusivity of land title or "proprietary interests" in land, whilst simultaneously the way is prepared for subordination of competing indigenous land title. The latter is reduced to fragile and diminutive occupation of the land under common law.

But even the CC decision, for all its laudable attempts to separate the "indigenous" and the "common" in law,[95] does not move beyond the margins of the occidental. Instead, it creates the impression of free movement outside the constraints of western thought, whilst placing the indigenous aspect even more securely within these margins, in a subordinated capacity. As such, the CC compellingly remains within the established positivistic framework in which it is then attempts to reverse the effects of

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[89] See par 38 of the SCA decision.

[90] The SCA bases its analysis on that of Bennett & Powell 1999 *SAJHR* 461-462.

[91] See Bennett & Powell 1999 *SAJHR* 461-462, relying on *Mabo and Others v The State of Queensland* (No. 2) (1992) 175 CLR (HCA) 59-62, 85, 100 and 179 and *Amodu Tijani v Secretary, Southern Nigeria* 1921 2 AC 399 (PC) 403.

[92] Bennett & Powell 1999 *SAJHR* 461-462, relying on *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 (SCC) par 113.

[93] See *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 (SCC) par 138 and the SCA's use thereof in par 39.

[94] In previous foreign decisions dealing with aboriginal title, this concept is often juxtaposed with the idea of "radical title". See note 109 above.

[95] Par 53-64 of the CC decision.

discriminatory nineteenth-century laws.[96] Even in avoiding the tendency to "view indigenous law through the prism of legal conceptions that are foreign to it"[97] the alternative is to study "the history of [the] community and its usages"[98] and to invoke the depressing and mystical power of "the British Crown"[99] to endorse a finding in favour of colonialism and the arrogation of sovereignty, albeit alongside the assertion of private property.[100] So indigenous rights and title to land can only be particular, subsisting factually and precariously in the community's continuing to occupy the land, in its sustained coherence as a traditional community, in its still observing its traditional customs and in its still acknowledging its traditional laws, all of which matter has to be established as "fact" if the "extinguishment"[101] of the rights or title is to be avoided. Otherwise, and as Brennan J stated in *Mabo*, if "the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared."[102] The laws of some people are ever contained and contingent, the laws of others ever expansionary and surpassing.

3 Richtersveld and the Law's Schizophrenia

The findings reflected in the various Richtersveld decisions reveal a range of ambivalent expectations as to the role of the law in acknowledging proprietary and territorial claims to land under a new land regime in South Africa. One could, for instance, assume that the SCA's decision is the result of an awareness of the way in which the Roman-Dutch oriented ownership concept, in the times of both external and internal colonization of South Africa, were superimposed on indigenous title to land,[103] contributing to the "untenable schizophrenic profile" [104] of the legal system. But the effect of the SCA's characterisation of the relevant interest would still be to maintain the existing subordination of indigenous land rights. The indigenous aspect of the customary law interest in land is still subjected to a process of filtering or qualification based on common law ownership. There seems to be an awareness that legislation pertaining to land restitution permits an openness or responsiveness towards "alternative" forms of title not falling within the narrow ambit of the common law.[105] The determinant or stable quality of common law is thus combined with a

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[96] See Anghie "Finding the Peripheries" 1999 (40) *HVIJL* 77.

[97] Par 54 of the CC decision.

[98] Par 57 of the CC decision.

[99] Par 66 of the CC decision.

[100] Par 69 of the CC decision.

[101] See par 70 of the CC decision.

[102] *Mabo and Others v The State of Queensland* (No. 2) (1992) 175 CLR (HC of A) 66.

[103] See eg Steytler "The Renaissance of Traditional Ownership of Land" *Butterworths Property Law Digest* (November 2000)**.**

[104] Pretorius' review of Bennett & Dean *Urban Black Law* 1985 *TRW* 288.

[105] See eg par 23 ff of the SCA decision and the synopsis provided in par **1.2** above.

more responsive understanding thereof.[106] But in the case of the Richtersveld, responsiveness is tripped by the continued reliance upon the difference between common law and aboriginal title. For the SCA, common law ownership remains the yardstick against which the "customary law interest" is measured. The result is continued subordination of the customary law interest to a scheme of law it was never intended to follow and into which it cannot easily be wedged.

The confusion is heightened by another aspect of the law's schizophrenia: the unwitting marriage by the SCA of principles of the Common Law (that is, Anglo-American oriented legal rules), particularly those pertaining to aboriginal title, with South African "common law" ownership (that is, that apparently "unassailable stronghold of civilian jurisprudence,"[107] which endorses a Roman-Dutch oriented definition of the ownership concept). The "customary law interest" is equated with common law ownership of the Roman-Dutch brand whilst relying on "the Common Law," without any explanation of the proposed link between it and Roman-Dutch ("common") Law in the South African milieu, and without any indication as to an awareness of or sensitivity towards the limitations posed by a comparison between Civil Law and Common Law land title. In view of earlier reservations about the import of principles pertaining to aboriginal title into South African law,[108] more detailed justification would have been appropriate.

The SCA's import of the Common Law principles is important in scrutinising the expectations placed on South African common law in the SCA's efforts to come to the aid of the Richtersveld community. It seems as if the consideration justifying reliance on Common Law was that radical title[109] and aboriginal title need to be taken into account as an integral part of British colonial law applicable in South Africa.[110] Yet,

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[106] See Reilly "The Australian Experience of Aboriginal Title: Lessons for South Africa" 2000 (16) *SAJHR* 512-534.

[107] Zimmermann & Visser "Introduction: South African Law as a Mixed Legal System" in Zimmermann & Visser (eds) *Southern Cross - Civil Law and Common Law in South Africa* (1996) 24-28.

[108] See eg Carey Miller *Land Title in South Africa* (2000) 316; Murphy "Restitution of Land after Apartheid: Constitutional and Legislative Framework" in Rwelamira & Werle *Confronting Past Injustices* (1996) 121.

[109] "Radical title" refers to the exercise of sovereign power over land and hence conveys the notion of territorial control, as opposed to proprietary control, which refers to land holding on an individual or communal level, rather than sovereign power over it. In *Mabo and Others v The State of Queensland* (No. 2) (1992) 175 CLR (HCA) Brennan J described "radical title" as follows: "Radical title is a postulate of the doctrine of tenure and a concomitant of sovereignty. … By attributing to the Crown a radical title to all land within a territory over which the Crown has assumed sovereignty, the common law enabled the Crown, in exercise of its sovereign power, to grant an interest in land to be held of the Crown or to acquire land … " (par 53).

[110] This would involve reliance on the rule in British law that when new territories were acquired "radical title" to land vested in the Crown. Aboriginal title to the land would automatically be acknowledged as a result, because it was a necessary ingredient of British sovereignty. The argument that aboriginal title formed part of British colonial law applicable in South Africa relies on the notion of "radical title" to the land vesting in the conqueror, who is compelled to acknowledge existing land titles in the conquered territory. See Bennett & Powell 1999 *SAJHR* 461-462 and the authorities quoted there. The apparent willingness to respect indigenous land rights stretched only as far as it did not interfere with the Crown's interest in the relevant land. See in this regard, the groundwork done in

the link between English, Indigenous and Roman-Dutch law made by such a contention is still tenuous. It does not propose any explanation for the import into the civilian notion of landownership, of the idea of territory as opposed to tenure, which underlies the English system of "radical" title. What really was necessary here, was a clearer stance on the diversification of land rights in the court's attempt to escape the stifling matrix within which Roman-Dutch landownership is understood.

As a result of its reasoning in Common Law, though, the SCA provided no proper basis upon which the applicability of the doctrines of recognition or continuity (as aspects of British colonial rule) were to be considered.[111] "Recognition" would presuppose that the vesting of British sovereignty *in itself* provided justification for the subordination of existing political and legal systems of a particular territory.[112] Hence recognition would immediately marginalise the rights acknowledged, rendering them vulnerable to subsequent limitation by statute.[113] "Continuity of title," on the other hand, at the Cape still presupposed continuity of title under the superimposed Roman-Dutch system of law. British influence in matters of state organization and legal practice in South Africa did become increasingly important since the time of the colonial power shift.[114] Still, it was the Cape's scheme of Roman-Dutch law as basic legal system that was transplanted by the British to new territories in Southern Africa.[115] Hence it remains difficult to accept application of the Crown's supposed "radical title" to the land in a system where English law at that point had only marginal importance.

As it stands, the SCA's judgment requires reliance on claims of continuity or recognition[116] emanating from postcolonial jurisprudence.[117] These claims remain

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Bennett "Redistribution of Land and the Doctrine of Aboriginal Title in South Africa" 1993 *SAJHR* 443 at 447, 453 and Bennett & Powell 1999 *SAJHR* 449 at 451ff.

[111] The SCA found, contrary to the LCC that the Richtersveld community's title to the land survived annexation. As reason, the doctrine of continuity, as opposed to the doctrine of recognition is advanced. See par 52 – 62 of the SCA decision. Apart from a passing reference to Dugard *International Law - A South African Perspective,* 2 ed, at 119 in par 44 of the SCA decision, which deals with the imperialistic and paternalistic nature of doctrine of *terra nullius*, no sufficient explanation is given as to the relation between terra nullius and the doctrine of recognition which also supported the idea of civilization of indigenous societies to some extent.

[112] The British sovereign's power to introduce new laws into a conquered territory was never used completely to abolish the Roman-Dutch Law, which had already been established at the Cape of Good Hope upon annexation in 1806. The Roman-Dutch Law was allowed to continue as the law of the land in terms of a rule enunciated in *Campbell v Hall* 1774 1 Comp 204 209, 98 ER 1045 per Mansfield, at 1047. See Erasmus "Thoughts on Private Law in a Future South Africa" 1994 *Stell LR* 109.

[113] See the argument of Anghie "Finding the Peripheries" 1999 (40) HVILJ 64-66 that the doctrine of recognition only serves to obscure the role and function of "society" by presenting it as a creation of sovereignty, thereby also obscuring society's operational role as a mechanism by which cultural assessments could be transformed into a legal status and supporting the doctrinal suppression in international law of the colonial past.

[114] See Du Plessis "The Promises and Pitfalls of Mixed Legal Systems: The South African and Scottish Experiences" 1998 *Stell LR* 340.

[115] See Bennett and Powell 1999 *SAJHR* 481.

[116] The doctrine of continuity entailed that aboriginal title be regarded as a fundamental right predating colonization and unaffected by it. The doctrine of recognition regarded aboriginal title as a right

extremely tenuous. The SCA supported the idea that the doctrine of recognition did not enjoy full-scale support, and on this point followed the approach of the *Mabo* decision which adhered to the idea that a mere change in sovereignty did not extinguish native title to land.[118] It therefore still presupposed that, apart from the existing Roman-Dutch individualistic notion of property, the English understanding of radical and feudal title was also superimposed on the existing indigenous land title, thereby inherently weakening any claims that might have existed. In addition, it is interesting that Australian case law has moved away from the original support of the doctrine of continuity endorsed by *Mabo v Queensland*. In more recent decisions the courts indicate more readily that indigenous title depends upon recognition by the common law.[119]

The SCA's finding that the customary law interest is "akin" to common law ownership suggests, at least, that this land right was perceived as much stronger than, for example, the "native title" dubiously endowed on indigenous peoples in Australia,[120] upon which the court places much reliance. It is therefore not clear why the court must resort to foreign law pertaining to aboriginal or indigenous title at all if it is prepared to acknowledge the Richtersveld community's interest in land held under a system of indigenous law as a "customary law interest" under the Restitution Act.[121] It implies that nineteenth-century concepts of legal positivism are still used as a framework in which indigenous communities struggle to assert their rights.[122] Perhaps the discrepancy here is simply a result of the adversarial court system under which the case was presented and heard, or of the trajectories from which the case came, in conjunction with the unwillingness of the LCC to find that it had jurisdiction to decide on the import of the doctrine of aboriginal title. But the SCA's reliance on foreign law pertaining to aboriginal title to define the Richtersveld community's "customary law interest" in land could also be an attempt strictly to contain the sorts of interests and the sorts of societies in South Africa which could make Richtersveld-type claims. This would explain the imputed condition of retention of identity and the essential attributes and characteristics of society and culture for the constitution of the "community."[123]

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contingent upon state recognition. See the enlightening discussion of Bennett 1993 *SAJHR* 454ff and the authorities and case law cited there. See also Bennet & Powell 1999 *SAJHR* 478-481.

[117] This implies that nineteenth-century concepts of legal positivism are still used as a framework in which indigenous communities struggle to assert their rights. See Anghie "Finding the Peripheries" 1999 (40) *HVILJ* 73-78.

[118] Par 60 of the SCA decision, in reliance on *Mabo v The State of Queensland* (No. 2) (1992) 175 C.L.R. 1, decision of Brennan J at 57.

[119] Most notably *Commonwealth of Australia v Yarmirr* (2001) 184 ALR 113.

[120] See eg *Mabo v The State of Queensland* (No. 2) (1992) 175 C.L.R. 1 (discussed in Fitzpatrick " 'No Higher Duty': Mabo and the Failure of Legal Foundation" 2002 (13) *Law and Critique* 233 at 247-250).

[121] See par 9 of the SCA decision.

[122] See Anghie "Finding the Peripheries" 1999 (40) *HVJIL* 73 ff.

[123] See par 5 of the SCA decision.

But whereas the SCA's decision at least appropriately suggested that any "development of the common law"[124] or even the simple contextual interpretation of the boundaries of the right to restitution should venture beyond the acknowledged categories and descriptions of rights known under South African law, the CC decision indicates that developing the common law is unnecessary in the present case, where the constitutional issue of retroactivity is under discussion.[125] Ironically, this particular issue was avoided by the LCC and referred for adjudication at a higher instance.[126] In response to the LCC's judgement, Hoq[127] convincingly indicated that the courts' stance on its own lacking jurisdiction to decide the issue of aboriginal title is flawed.[128] The manner in which the LCC thus avoided developing the common law essentially allowed the Court to evade its specialised role with respect to the interpretation of land rights.

The CC's argument, however, is that since the issue of development of the common law did not arise in the present case, it will be left open for future decision. The CC's motivation seems to be their conviction that there is no relevant common law to be developed here, since the Restitution Act provides comprehensively for the South African objective of land restitution. However, the CC does not explore the alternative contention that certain principles of South African common law indeed leave room for adoption of an alternative to restitution as envisaged by the legislature. Instead, the CC invokes indigenous law to determine the nature and content of the Richtersveld community's land rights,[129] advocating that indigenous law now is part and parcel of South African law without that it has to be seen "through a common law lens".[130] Although the court in this manner takes pains to distinguish "substantially" the South African situation from those elsewhere,[131] it nevertheless relies on Privy Council decisions[132] to hold that a dispute between indigenous people has to be determined according to indigenous law.

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[124] As predicated in s 8(3)(a) and 39(1)(a) of the 1996 Constitution.

[125] See par 38 of the CC decision.

[126] In the LLC decision, the issue of retroactivity was dealt with under the banner of incorporation of aboriginal title into the South African law on land restitution, and the court's powers of ancillary jurisdiction. See par 44-53 and 117 of the LLC decision. See also the discussions of this issue in Hoq 2002 (18) *SAJHR* 426 ff and Mostert 2002 *TSAR* 164-165.

[127] Hoq "Land Restitution and the Doctrine of Aboriginal Title: Richtersveld Community v Alexkor Ltd and Another" 2002 *SAJHR* 421 at 426.

[128] In essence, the argument here was that from early in the jurisprudence of the LCC, it was indicated that a purposive approach is to be followed in determining restitution claims. This meant that the scope and purpose of the Restitution Act must be heeded in determining the application thereof, requiring the court to go beyond the letter of the law.

[129] Par 50 of the CC decision.

[130] Par 51 of the CC decision.

[131] Par 35 of the CC decision.

[132] *Oyekan and Others v Adele* [1957] 2 All ER 785 at 788G-H at par 50 of the CC decision;

The CC goes further to state that since indigenous law ("unlike common law") is not written (!),[133] it needs to be evidenced by the history and usages of a particular community.[134] Thus, despite its attempts not to view the indigenous law "through the prism of legal conceptions that are foreign to it",[135] the court reverts to the same standard terms in which indigenous people are comprehensively contained and subordinated, within those other jurisdictions which are supposed to differ substantially from the South African situation. The reference[136] to the Law of Evidence Amendment Act which permitted judicial notice being taken of indigenous law established by evidence simply ensures that the colonial arrogation of sovereignty now wears a more modern, democratic cloak. So eventually the question of an enduring sovereignty remains, even in terms of an approach acknowledging the property rights of the Richtersveld people.

4 Property, territory and the Law

The LCC's unwillingness to venture beyond a consideration of racially discriminatory dispossessions prior to 1913 (even though it could have done so in terms of its ancillary powers of jurisdiction)[137] is a telling example of the caution with which attempts to overcome the injustices of a colonial past in South Africa are undertaken. Perhaps the reason for this must be sought in a preoccupation with the country's apartheid history as moral basis for the land restitution policy, and a concomitant disinterest in the injustices of the earlier periods of "external" colonialism.[138] The 1997 *White Paper on South African Land Policy* underscores such a stance, with its explicit restriction of the scope and time-span of the restitution process, and its recognition of the fact that some unfair dispossessions are not covered by the restitution process.[139] But the immensity of addressing the systematic monopolization of the country's surface which commenced with the arrival of the first European settlers probably contributes to the tendency to shy away from a restitution policy incorporating rectification of pre-colonial entitlement.[140] In this regard, arguments

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[133] The remark in par 53 of the CC decision that "unlike common law, indigenous law is not written" is particularly ironic, especially since the Roman-Dutch common law, like the English variant, is regarded as *lex non scripta.*

[134] Par 52, 55 of the CC decision.

[135] Par 54 of the CC decision.

[136] Par 52 of the CC decision.

[137] See the argument in the earlier case note, Mostert 2002 *TSAR* 165.

[138] This argument has been raised previously, see inter alia, Mostert 2002 *TSAR* 166; Visser & Roux "Giving back the Country" in Rwelamira & Werle (eds) *Confronting Past Injustices* (1996) 94; Murphy "The Restitution of Land after Apartheid: The Constitutional and Legislative Framework" in Rwelamira & Werle (eds) *Confronting Past Injustices* (1996) 113, 121.

[139] White Paper on South African Land Policy (April 1997), par 4.14.2.

[140] Visser & Roux "Giving back the Country" in Rwelamira & Werle (eds) *Confronting Past Injustices* (1996) 94. See also White Paper par 4.14.2. and Carey Miller *Land Title in South Africa* (2000) 316-317.

may be advanced to the effect that acknowledgement of pre-colonial entitlement may be politically divisive, or that it might give rise to legal complexities incapable of solution.[141] As with the characteristic of "aboriginality" in the context of the communal, however, these arguments are advanced from within a paradigm assuming that the interests of the larger, "non-aboriginal" sectors of South African society outweigh those of smaller, cohesive indigenous communities.

The SCA's reluctance to acknowledge the existence of a doctrine of aboriginal title in South African law may be based upon similar considerations. The LCC avoided deciding the issue on the basis of lacking jurisdiction.[142] The CC distanced itself from the issue altogether, based on the clear distinction it saw between the South African situation and other jurisdictions, in which the restitution objective apparently does not appear to be as comprehensively legislated.[143] The SCA deals with the question of import of aboriginal title more openly, but finds that the doctrine does not "fit comfortably"[144] into South African law.[145] This finding is based upon a consideration[146] of several authoritative works. Some indicate "the hazards associated with recognising aboriginal title in South Africa."[147] Others analyse the viability of aboriginal title as a workable part of South African law.[148] Notably, some authors take the very reason for the 1913 cut-off date in the Restitution Act as an attempt to eliminate claims of aboriginal title.[149] Others argued that recognition of aboriginal title would exacerbate ethnic tension, which would run contrary to the intentions of the Restitution Act.[150] Yet, other scholars acknowledge the positive prospects for

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[141] See Visser & Roux "Giving back the Country" in Rwelamira & Werle (eds) *Confronting Past Injustices* (1996) 94; Carey-Miller *Land Title* (2000) 316–317; Mostert 2002 *TSAR* 166. And see especially the reasoning in the White Paper, par 4.14.2. that "[m]ost deep historical claims are justified on the basis of membership of a tribal kingdom or chiefdom. The entertainment of such claims would serve to awaken and/or prolong destructive ethnic and racial politics".

[142] Par 44-52, 117 of the LCC decision.

[143] Par 35 of the CC decision. The CC does not consider, however, the fact that at least the Canadian Constitution also deals "expressly with this problem".

[144] Par 43 of the SCA decision.

[145] The SCA decision exposes the arbitrariness and divisiveness of the *terra nullius* doctrine, but simultaneously draws on the ambivalence of common law in colonized territories to protect other rights over and above aboriginal title. Again, this approach might be the result of an attempt to restrict the sorts of interests and the sorts of societies in South Africa which could make Richtersveld-type claims. But the approach also underscores an unwillingness to challenge the very principles upon which common law land holding and control rely. The court's extensive application of foreign law pertaining to aboriginal title, in its attempt to prove that the customary law interest survived annexation, introduces the debate about the future of indigenous pre-colonial land control in a legal system derived from a colonial sovereign. It also raises the issue as to the responsibility of post-colonial judiciaries to engage in a process of decolonization.

[146] See par 42 of the SCA decision.

[147] Hoq 2002 *SAJHR* 435; see also par 42 of the SCA decision.

[148] Bennett and Powell 1999 *SAJHR* 450-451.

[149] E.g. Roux "The Restitution of Land Rights Act" in Budlender, Latsky and Roux *Juta's New Land Law* (1998) 3A-16; and see O'Reilly 2000 *SAJHR* 534.

[150] E.g. Roux "The Restitution of Land Rights Act" in Budlender, Latsky and Roux *Juta's New Land Law* (1998) 3A-16; and the sources listed in note 141 above.

establishing aboriginal title, both as an additional common law cause of action and as part of the existing land restitution process;[151] and dispel fears that recognition of aboriginal title in terms of the Act will open the proverbial floodgates.[152] In this context, particularly, the claim is made that anyway only a few instances exist where indigenous land title in South Africa could have survived the assertion of sovereignty.[153]

Such claims imply that aboriginal title should not pose too much of a threat to the continued sovereignty of a democratically constituted state.[154] They accordingly are based on the same considerations which would lead to the argument that restitution is a mere symbolic redress of injustice, which must remain within the parameters of modern demands on the state to effect a more just land regime in an economically viable manner.[155] For that matter, the CC's treatment of the issue as one which does not necessitate a development of the common law,[156] nor permits retroactive consideration beyond the cut-off date of 1913,[157] nor justifies a consideration of indigenous law outside the confines of the new constitutional dispensation,[158] follows basically the same line of argument.

These arguments are oblivious to their own underlying, complicit political asseverations with sovereign assertion, whether unintentional or not. The Constitutional Court, in particular, attempts to "place" indigenous law within the "amalgam of South African Law" by indicating that it is simultaneously "independent" and "dependent on the legal system."[159] The court relies upon the primal efficacy of the Constitution, indicating that the Constitution "giv[es] force" to indigenous law. But in effect, the Constitution does nothing of the kind. The constitutional dispensation simply becomes a further excuse for containment and subordination of indigenous law in general and indigenous land title in particular. The CC's unquestioning acceptance of the colonial arrogation of sovereignty is obvious also from the manner in which the court phrases its assignment to determine whether the Richtersveld community "had … rights prior to the British Crown acquiring sovereignty over the … land."[160] It is underscored by the stance that "evidence" or "scholarship" may establish the continued existence of rights beyond the original act of annexation,[161] and the adoption of a transcendent sovereignty in the court's dictum that an "Act of State" overrides a treaty of cession, regardless of what the latter

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[151] Bennett and Powell 1999 *SAJHR* 450-451

[152] O'Reilly 2000 *SAJHR* 528 ff.

[153] See O'Reilly 2000 *SAJHR* 534.

[154] Cf the comments in N Dollie "The Long View" *Sunday Independent* 19-2-2003 at 2.

[155] See also Mostert 2002 *TSAR* 166-167.

[156] Par 38 of the CC decision.

[157] Par 40 of the CC decision.

[158] Par 51 of the CC decision.

[159] Par 51 of the CC decision.

[160] Par 32 of the CC decision.

[161] Par 41, 47 and 52 of the CC decision.

provides.[162] The colonial subordination of indigenous law is perpetuated in the modern context in that the rights are rendered as facts which can be negated by contrary "acts" or "events," ironically under a new Constitution which affords a supposedly elevated position for indigenous law.[163]

The tendency to assume that matters such as the recognition of indigenous rights, the development of the law or the delimitation of the restitution policy need to be dealt with from within the parameters set by the sovereign state, allows a particular state action to be placed above the law.[164] Such an approach excludes the possibility of judicial challenge to or control of the first territorial acquisition by a colonizing, sovereign state. Judicial reluctance to engage in juridical decolonization – to challenge the very principles upon which colonization rests – results in the sorry standard panoply of colonial encompassment, even in a post-colonial, democratic era.[165] Especially through continued support of the colonial principle of territorial occupation, the rights of the colonized are placed under continuous subordination and subjected to a filtering process,[166] which allows the colonial sovereign's law to become the solid basis for exclusivity of land title and subordination of competing indigenous land title. It also confines the issue of the putative basis of colonial acquisition to questions of property rather than territory, as both the LCC and CC decisions in the Richtersveld case so aptly illustrate.[167]

So even if indigenous rights are "recognized" under a new dispensation, reliance on sovereignty can no longer sustain its suppositions of solidity and enduring completeness. The initial constitution of the democratic polity cannot be considered to be enduringly closed and exclusive or excluding of others. Honest "recognition" of indigenous rights, unfettered by the constraints of a sovereign state, even of the modern democratic kind, would in fact challenge the very basis upon which the social and democratic polity is established, requiring "the origin to repeat itself originarily, to alter itself so as to have the value of origin".[168] A truly authentic democratic dispensation must not seek only to conserve and reproduce. It must employ also those "resources that lie outside the West's definition of itself, resources the West has

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[162] Par 66-68 of the CC decision.

[163] Par 51 with 66-68 of the CC decision.

[164] See the discussion of Fitzpatrick *Modernism and the Grounds of Law* (2001) at 79-80 and the reliance there on J-J Rousseau *The Social Contract* (1968), trans. Maurice Cranston 87.

[165] Cf Anghie "Finding the Peripheries" 1999 (40) *HVJIL* 75, and his reliance on J Gathii "International Law and Eurocentricity" 1998 (9) *European Journal of International Law* 184 ff.

[166] J Westlake "John Westlake on the Title to Sovereignty" in PD Curtin (ed) *Imperialism* 45 at 47, 50-51.

[167] Cf especially the treatment of the dispossessions after 1920 as "unfortunate" consequences of the erroneous supposition that the land at stake belonged to the British Crown after annexation, at par 43, 97-114 of the LCC decision. See also the affirmation in the CC decision of the sovereignty of the British Crown established in 1847 (at par 66); and the reliance on the Privy Council (at par 66 and 69) to underscore the finding that the community's rights were recognised after this instance of sovereign assertion.

[168] J Derrida, 'Force of Law: The "Mystical Foundations of Authority" ' (1992), trans. Mary Quaintance, in D Cornell *et al*. (eds) *Deconstruction and the Possibility of Justice* 3 at 43; Fitzpatrick *Modernism and the Grounds of Law* (2001) at 78.

ignored",[169] respecting the logic of that which it has inherited enough to realise when the inheritance must turn upon its own protective mechanisms, and to "give birth … to what had never seen the light of day".[170]

The oppressions of a claim to all-encompassing sovereignty bathe the decisions of the Richtersveld/Alexkor dispute in a different light. The LCC's rejection of the contention that the community had *ownership* of the land, becomes particularly insightful when compared with the *Mabo* decision's treatment of aboriginal title. *Mabo*'s case weakened pre-colonial entitlement precisely through recognition of aboriginal title. The LCC eliminated pre-colonial entitlement altogether by directly subjecting the case to an overarching claim of sovereignty[171] and then pointing out that the Restitution Act's cut-off date does not allow the annexation itself to be considered for purposes of restitution under the Act.[172] The court, opting against decolonization, did not utilise the opportunity it had here to reject the dubious application of the colonial sovereign's law or the results thereof for subsequent title.

The decisions of the CC and SCA at first glance seem to be more supportive of the Richtersveld community's claim. Nevertheless, the effects of underlying assumptions in these decisions about sovereignty and the law are even more disturbing than in the case of the LCC's judgment, in view of the eventual result. Even if one accepts the SCA's recognition of the link between territorial dispossession through annexation and subsequent proprietary dispossession, the SCA's failure to dispel the inherent failings of land claims based on indigenous uses and customs within a system relying on the continued exercise of sovereignty constituted in the terms of settlers' laws remains unexplained. Not enough attention was paid to the ambivalence of common law in colonized territories such as South Africa and the fragility of the relation between colonial and indigenous law.

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[169] Bernasconi "Politics beyond Humanism: Mandela and the Struggle against Apartheid" in Madison (ed) *Working through Derrida* (1993) 94 at 111.

[170] Derrida "The Laws of Reflection: Nelson Mandela, in Admiration" in Derrida & Tlili (eds) *For Nelson Mandela* (1987) 13 at 17, 25.

[171] The LCC applied International Law prevailing at the time of annexation, which apparently incorporated the *terra nullius* doctrine. Upon the basis of *terra nullius*, the British Colonial Government during the nineteenth century simply assumed sovereignty of, and full ownership over, the entire southern Namaqualand (including the Richtersveld). Despite the Richtersveld community's repeated attempts to have their title to the land acknowledged, and although considerable proof of political organisation was at hand, the British Colonial Government did not consider the Richtersveld people to have the sufficient degree of civilisation to warrant such recognition. See par 37, 39, 41, 93 of the LCC decision; par 35, 44, 46, 52, 60, 64, 106 of the SCA decision. According to the LCC, such territorial domination by the colonial sovereign power excluded the continuation of any pre-existing ownership claims.

[172] But still the LCC admits that annexation is relevant in that it caused all subsequent South African governments to view the land as belonging to no private individual or community, and as having been rightfully acquired by the British Colonial Government. Yet, the causal link between annexation and subsequent dispossessions is ignored, despite repeated acknowledgements that subsequent South African Governments might have been wrong in assuming that the Richtersveld was unalienated Crown land at the time of proclamation and issuing of the mining licences.

The SCA pointed out[173] the significance of the fact that the Richtersveld was never acquired by occupation or settlement. It speculated on the basis of the vesting of sovereignty over the area, equating the annexation of the Richtersveld to "an acquisition by conquest or cession with the same consequences as the acquisition of the Cape Colony into which it was incorporated." In the absence of indications that the Richtersveld was acquired by conquest, though, it is "deemed to have been acquired by cession," with the court casually remarking that "it is not necessary to decide whether it was the one or the other."[174] Given that the annexation of 1847 is the definitive moment in determining whether or not the Richtersveld people's rights endured into the twentieth century, the SCA's brushing aside of the distinction between conquest and cession as basis for the vesting of sovereignty over the area seems peculiar and unconsidered. This stance is, however, not surprising if, as in Anghie's analysis, it is accepted that sovereignty was never so much the result of mechanisms such as conquest or cession as it was simply an assumption of sovereignty subsequent to colonization.[175] Richtersveld underscores Anghie's argument: on the facts as set out in both the SCA and LCC decisions, there seems neither to have been any conquest; nor any treaty justifying acquisition through cession. The view that a treaty of cession could be concluded after the fact of cession itself, moreover, seems dubious, if not supportive of the point made by Anghie that in reality many "cessions" were fraudulent, not involving real consent at all.[176] Upon the facts it is apparent that the 1847 proclamation of annexation abrogated and annulled all existing treaties.[177]

The "fact" that neither conquest nor cession "took place" is an exemplary instance of the impossibility of sovereignty as a claim of right not reducible into contained singularity. No amount of "factual" claiming and declaiming sovereignty by way of discovery, conquest or the like can constitute sovereignty itself.[178] These exercises are always retrospective and a legitimating of what sovereignty "is" now.[179] Even though the "indigenous" character of the claim and the place of indigenous law in

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[173] Par 52 of the SCA decision.

[174] At par 52 of the SCA decision, on the basis of the statement in Halsbury's *Laws of England* 4 ed, vol 6, par 980 that "an annexation in the face of an organised society considered civilized was treated as a case of cession and not settlement even before or in the absence of cession by international formalities." The argument in Halsbury is based on two seminal and reactionary cases, *Campbell v Hall* (1774) 20 State Tr 239 and *Re Southern Rhodesia* [1919] AC 211.

[175] Anghie "Finding the Peripheries" 1999 (40) *HVILJ* 49 ff.

[176] See the example in Anghie "Finding the Peripheries" 1999 (40) *HVIJL* 42.

[177] See par 30 of the SCA decision.

[178] This issue has been explored in the analysis of the judgment of Marshall C.J. in the 'Indian cases' (in Fitzpatrick *Modernism and the Grounds of Law* (2001) 166-175) where he is constrained, eventually, to say that given the condition of Indian peoples and the way they are being treated we have to assume they were conquered even though conquest did not take place (or had not at that stage taken place).

[179] The most dramatic instance of this is perhaps the *Mabo* case where the 'original' grant of sovereign acquisition, *terra nullius*, is quite vacated as illegitimate but the acquisition, of course, remains, and a new legitimation, more consonant with 'contemporary' human rights and democracy, is put in its place. See the remarks in Fitzpatrick " 'No Higher Duty': Mabo and the Failure of Legal Foundation" 2002 (13) *Law and Critique* 233 at 244. Indeed, even the new ground remains rather elusive with astute commentators being divided upon whether the leading judgement rejects or adopts it.

determining such received more attention in the CC decision,[180] the cavalier manner in which both the SCA and the CC deal with the Crown's vesting of sovereign power over the Richtersveld suggests that this original and constitutive action of sovereignty still passes unquestioned, despite the obviously arbitrary basis thereof. Moreover, neither the SCA's description of the Richtersveld community's interest in the land as a "customary law interest" *akin to common law ownership,* nor the CC's ruling that their rights constituted ownership under indigenous law as part of the "amalgam" of South African law, does much to constitute indigenous people and their title to land in terms other than national sovereignty. National sovereignty, even when bearing 'democratic' rather than colonial credentials, still encompasses and precisely subordinates claims to land in terms of indigenous laws. The CC's acceptance of the colonial sovereign's intervention and the SCA's reliance upon aboriginal title precedent in foreign law to define the customary law interest in South African law even strengthens the idea that some kind of unquestionable, prerogative power of the state exists, against which exclusivity and effectiveness of holding territory must be assessed. For those outside or on the margins of the sovereign's law, this is a lost battle.

Remarkably then, the range of cases in various countries dealing with indigenous land title[181] end up delineating indigenous peoples and their claims to land in very similar terms. Like so many of the preceding cases, the Richtersveld case indicates a process of subordination and filtering of existing title, undertaken at the hand of the sovereign colonizer or its more modern, "democratic" successors. "Rights" may previously have been dependent on the benign hold, in "honour and good faith," of the colonizer, who recognized the "special bond" between the indigenous people and the land, and who protected it so as to avoid the destruction of the "unique" value of the land as part of the "traditional way of life" of an indigenous people, rendering "aboriginality" dependent on a "highly contextual" and factual finding by the courts of the colonizer.[182] In the democratic, post colonial context, those "rights" apparently stand or fall by acquisitive beliefs as to the vesting of sovereignty and territorial expansion. Or their lasting existence depends upon the "continuity"[183] of rights "fully respected"[184] by the sovereign, who understands the indigenous claims to be the "qualification of a burden on [its] radical … title,"[185] even if the burden is one lightly borne or easily disposed of.

It may still be argued, though, that the decisions of the Richtersveld dispute go beyond existing foreign case law on similar matters. For the SCA, the argument

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[180] See par 50-64 of the CC decision.

[181] Some of these have been mentioned already in Fitzpatrick "Taking Place: 'Aboriginality' and the Failure of Legal Foundation" forthcoming. These include: *R v Van der Peet* (1996) 137 DLR 4th 289 (Canada); *Johnson v M'Intosh* (1823) 21 US (8 Wheat) 543 (United States); *Worcester v Georgia* 31 US (6 Peters) 515 (1832) (United States); *Delgamuukw and Others v British Columbia and Others* (1997) 153 DLR (4th) 193 (SCC) (Canada).

[182] *Delgamuukw and Others v British Columbia and Others* (1997) 153 DLR (4th) 193 (SCC) par 128-129, 191, 194, 204.

[183] See par 55 of the SCA decision in the Richtersveld dispute.

[184] *Amodu Tijani v The Secretary, Southern Nigeria* 1921 2 AC 399 at 407.

[185] *Sobhuza II v Miller and Others* 1926 AC 518 (PC) at 525.

against importing the doctrine of aboriginal title into South African law is based upon the existence of "stronger" protection under the statutory law of a democratic state. This is endorsed by the CC's stance on the encompassing range of the Restitution Act. It is peculiar, then, that neither decision considers the description of a "customary law interest" as espoused in the earlier LCC decision of *Nchabeleng v Phasha*.[186] Here the court, less wary of mainstream legal culture and its reliance on encompassing sovereignty, deduced the existence of a customary law interest from (i) the lawful occupation of the land, together with (ii) the exercise of exclusive jurisdiction *in terms of customary law relating to the regulation of a community* (as opposed to the law regulating land title).[187] This approach does away with the patently positivist distinction between "territory" and "property" as concerns national sovereignty,[188] rendering possible the idea that even the at the most basic level of asserting power and authority (i.e. controlling property) sovereignty may be the means by which people could preserve and assert their distinctive culture.[189] Moreover, it "recognises" indigenous people in terms which do frequently characterise them: terms of openness, plurality and sharing; terms which are different to the constituently exclusive terms of national sovereignty. This approach, therefore, is inherently different from cases such as *Mabo* or, for that matter, *Richtersveld*. The manner in which aboriginal title is recognized as property in the *Mabo* decision[190] indicates that a more modern, even "sensitive" rendition of sovereignty still has the effect of subordinating and marginalizing precisely those intended to benefit from the decision.[191] The same goes for the Richtersveld people.

The imperative of being "recognised" is testament to the necessity of recognition for being, and it is recognition which, in its singularity *and* its commonality, actively makes community. Such community challenges the enclosed sufficiency, the completeness of the community of surpassing sovereignty. It would displace the primal positioning of the sovereign's determinate and desolate being. To counter this displacement, the attributes of that being – its constituent tying to the land, to territory, to a distinctive people – become attributes also projected onto indigenous community, thereby creating a similarity with such community and enabling a determinate and affective connecting to it. Yet the attributes of indigenous community

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[186] *Nchabeleng v Pasha* 1998 3 SA 578 (LCC).

[187] Hoq 2002 *SAJHR* 436.

[188] See the description in Anghie "Finding the Peripheries" 1999 (40) HVILJ 26 of the positivistic notion of sovereignty as definitive control over territory, and his illustrations from nineteenth-century writing.

[189] Cf Anghie "Finding the Peripheries" 1999 (40) *HVILJ* 70.

[190] *Mabo v The State of Queensland* (No. 2) (1992) 175 C.L.R. 1,

[191] In *Mabo*, it was held that the rights and privileges conferred by indigenous peoples' titles to land were unaffected by the exercise of sovereign power in acquiring colonial land. However, the vesting of colonial sovereignty exposed native title to extinguishment through subsequent statutory enactment, thus rendering it inherently fragile or precarious, apt only for an "appeal … to the sword and to Almighty justice, and not to courts of law or equity." (*Cherokee Nation v Georgia* (1831) 30 U.S. (5 Pet) 1 at 52). For more detail, see Fitzpatrick " 'No Higher Duty': Mabo and the Failure of Legal Foundation" 2002 (13) *Law and Critique* 233 at 246-247.

are also projected as different to, less than, and containable within a sovereign diapason. So, these attributes of indigenous community become things of evanescent fact, whereas sovereignty is a domain of transcendent right, a domain, as Chief Justice Lamer readily notes,[192] of the "general and universal", a domain from which "aboriginal rights" are excluded because they cannot "be determined on a general basis." Thence they become rights relegated to an age "so finished" that "it could be sold again, without insight, or understanding of the unfinished past, the unfinished present…" [193]

[192] In *R v Van der Peet* (1996) 137 DLR 4th 289 paras 19 and 69.

[193] W Harris *The Dark Jester* (2001) 100.