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## THE METHODOLOGY USED TO INTERPRET CUSTOMARY LAND TENURE

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### 1 Introduction

The South African legal system is based predominantly on a mixture of civil law (Roman-Dutch) and English Common Law<sup>1</sup> principles.<sup>2</sup> Not only South African common law principles established and applied by case law, but also legislation forms part of this mixture.<sup>3</sup> In academic writing Roman-Dutch, European civil law and English Common Law jurists are mainly cited as authority for South African common law principles, thus firmly establishing the South African legal system as a mixed jurisdiction. In this respect Zimmermann observed:<sup>4</sup>

At the same time, however, English law had started to infiltrate and a process was set in motion that ultimately transformed Roman-Dutch law in South Africa into a mixed legal system with its own identity: neither purely Roman-Dutch nor purely English but an anglicized, specifically South African *usus modernus* of Roman-Dutch law.

However, a third component of the mix, namely indigenous or customary law, does not always receive the same attention. In this regard the South African *Constitution* of 1996<sup>5</sup> explicitly states that "the Bill of Rights does not deny the existence of any

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1 When referring to the English Common Law, capital letters are used to distinguish the concept from South African common law, which is a mixture of civil (Roman-Dutch) and English Common Law principles.

2 Zimmermann and Visser "South African Law" 4-5, who refer to the doctrinal history of the South African private law with reference to publications by several South African writers (especially fn 19). For an exposition of the relationship between Roman-Dutch and English legal principles, see 3.2 below.

3 Examples of legislation predominantly based on Roman-Dutch legal principles are the *Deeds Registries Act* 47 of 1937; *Administration of Estates Act* 66 of 1965; *Prescription Act* 68 of 1969; *Expropriation Act* 63 of 1975; *Game Theft Act* 105 of 1991 and *Security by Means of Movable Property Act* 57 of 1993. Examples of legislation predominantly based on English Common Law principles are the *Insolvency Act* 24 of 1936; *Magistrates' Courts Act* 32 of 1944; *Companies Act* 61 of 1973 and 71 of 2008; *Land Survey Act* 8 of 1997; *Banks Act* 94 of 1990; *National Water Act* 36 of 1998 and *Mineral and Petroleum Resources Act* 28 of 2002.

4 Zimmermann "Double Cross" 5; also Zimmermann and Visser "South African Law" 10-12; Hahlo and Kahn *South African Legal System* 131-138.

5 *Constitution of the Republic of South Africa*, 1996 (hereafter referred to as the *Constitution*).

other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill".<sup>6</sup>

The same is true in the case of other jurisdictions where indigenous law and common law are recognised. Canada is also classified as a mixed jurisdiction because the Canadian common law is based on English Common Law, European civil law (predominantly applied in Quebec) and the customary law of the native Indian population, or First Nations.<sup>7</sup> Therefore, a comparative study of the development and application of South African and Canadian legal principles offers a fascinating insight into the mutual influence of the three different components of these jurisdictions.

One of the areas of the law where the interaction between the different components of the legal system is clearly illustrated is customary or indigenous land tenure. In Canadian and South African land tenure the mutual influence of common law (in the case of Canada English Common Law property principles and in the case of South Africa Roman-Dutch property law principles)<sup>8</sup> and customary law principles has already been the object of extended litigation.<sup>9</sup> The nature of the customary land tenure and the protection of right holders were authoritatively settled by the Canadian Supreme Court and the South African Constitutional Court and have been comprehensively discussed by academic writers.<sup>10</sup>

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6 Section 39(3) *Constitution*; see also *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 469 (CC) paras 51 and 56.

7 Slattery "Nature of Aboriginal Title" 11; Henderson, Benson and Findlay *Aboriginal Tenure* 9; Cairns-Way 2009 *Ottawa L Rev* 9-10.

8 In South Africa Roman-Dutch principles were mainly applied to private law topics and English Common Law principles to public law topics, but this was never a water-tight distinction and is no longer strictly applied. In this regard see Hahlo and Kahn *South African Legal System* 131-138; Zimmermann and Visser "South African Law" 4-6.

9 Cf the Canadian trilogy of cases *Delgamuukw v British Columbia* 1997 3 SCR 1010 (SCC), an appeal from a case heard in the first instance by the Supreme Court of British Columbia 1991 3 WWR 97 and thereafter heard by the British Columbia Court of Appeal 1993 5 WWR 97, with the South African trilogy of cases *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC), *Richtersveld Community v Alexkor Ltd* 2003 6 SA 104 (SCA) and *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 469 (CC).

10 For South Africa, see for instance Hoq 2002 *SAJHR* 421-443; Ülgen 2002 *Journal of African Law* 131-154; Mostert and Fitzpatrick 2004 *TSAR* 309-323, 498-510; Pienaar 2005 *THRHR* 533-545, 2006 1-13; for Canada, see for instance Ülgen 2000 *NILR* 146-180; Lippert (ed) *Beyond the Nass Valley*; Henderson, Benson and Findlay *Aboriginal Tenure*.

Therefore, the purpose of this paper is not to repeat a description of the nature, protection and application of customary land tenure, but to concentrate on the methodology used to interpret these rights. As the extent and application of these rights are not based on codified or statutory sources<sup>11</sup> but stem from customary traditions and norms, the normal rules of legal interpretation cannot be followed. This paper compares the way in which predominantly westernised courts in Canada and South Africa interpret the customary values of land use in order to determine the nature of the land tenure rights.

## 2 Main jurisprudential tendencies of legal analysis

The methodology used to interpret legal principles is based on legal analysis. In both the civil law and Common Law systems two main tendencies of theoretical thought were developed historically and jurisprudentially, namely legal positivism and natural law.<sup>12</sup> These two tendencies have influenced the basis of legal analysis in most western legal systems to some extent, and in this context also the application of indigenous law.

### 2.1 Legal positivism

The term 'positivism' has many meanings,<sup>13</sup> but in the sense of 'legal positivism' it is mainly used to denote the analysis of 'the law as it is', in contrast to 'the law as it ought to be' (natural law). Although the official beginning of the positivism movement is often stated as the start of the nineteenth century,<sup>14</sup> its roots are found in the early and medieval philosophical theories. The positivistic theories concentrated mainly on "overly strict adherence to authority, the intricate web of rules and constructions in which all intellectual activity was enmeshed and the exaggerated subtlety of the

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11 The existence of customary land tenure is recognised by legislation, though; cf s 35(1) *Canadian Constitution Act*, 1982, and ss 8(1), 39(3) and 211(3) *South African Constitution*.

12 There are also other theoretical and jurisprudential tendencies, namely historical and anthropological approaches, the economic approach, the sociological approach and modern realism. In this regard see Dias *Jurisprudence* 381-595; Legrand and Munday (eds) *Comparative Legal Studies* 125-128; Glenn *Legal Traditions of the World* 131-194.

13 Hart 1958 *Harv L Rev* 601 n 25.

14 Dias *Jurisprudence* 381.

trivial distinctions drawn by the schoolmen".<sup>15</sup> Legal positivists were (and still are) therefore more concerned with applying legal principles rigidly as they appeared and were received from the *Corpus Juris Civilis*, formal precedents, legislative measures and immemorial custom, than with looking into the moral implications of laws and legal customs and the discovery of principles of universal validity.<sup>16</sup> The founders of English positivism, Jeremy Bentham (1748-1832) and John Austin (1790-1859), were characterised by their intellectual love of order, precision and the classification of the law as it is. They distinguished between formal analysis, on the one hand, and historical and functional analysis on the other hand, both being the sources of the law 'as it is'.<sup>17</sup>

The historical school or Pandectists developed positivism further by concentrating mainly on the incorporation of principles from the *Corpus Juris Civilis* into the German legal system. The most famous proponents of this school were Friedrich Karl von Savigny (1779-1861) and Bernard Windscheid (1817-1892). They endeavoured to deduce a logical and watertight system of general principles from Justinian law as they interpreted it.<sup>18</sup> Legal positivism was received in South Africa mainly through the influence of the Pandectists, who are still regarded by many South African lawyers and legal scholars as the true proponents of the classical Roman law principles upon which the South African common law is based.<sup>19</sup>

The most important criticism against legal positivism is that it promotes formalistic and rigid legal concepts based on the strict paradigm of law as it is (or is perceived to be), without taking moral and social circumstances sufficiently into consideration. The way the positivist jurisprudence of Bentham and Austin influenced the Canadian

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15 Van der Merwe "Ramus, Mental Habits and Legal Science" 32.

16 Dias *Jurisprudence* 544-545; Fuller 1958 *Harv L Rev* 630-672.

17 Dias *Jurisprudence* 382-383; Du Plessis 1961 *SALJ* 458; Dugard 1971 *SALJ* 184-185.

18 Many Pandectist principles are not based on pure Justinian law, but on the integration of these principles with German historical customary law; see *Johannesburg Municipal Council v Rand Townships Registrar* 1910 TPD 1314 1319; Van der Walt *Ontwikkeling van Houerskap* 453-457; Van der Walt 1995 *SAJHR* 177-179.

19 See e.g. *Green v Fitzgerald* 1914 AD 88; *Conradie v Rossouw* 1919 AD 279; *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A). See also Van Blerk *Purists' in South African Legal Literature* 24-36; Dugard "'Purist' Legal Method" 36-37 who both refer to the positivism of supporters of the Pandectists and the 'purist' movement in respect of Roman-Dutch law.

case law, and the Pandectist positivism of Von Savigny and Windscheid influenced South African case law, will be pointed out in 3.1 and 3.2 below respectively.

## 2.2 *Natural law*

The main premise of natural law is that law is based not only on the positive law created by man, but on law as it ought to be, which is dictated by a natural and higher order. This means that moral and social considerations must be taken into account in the formulation and application of legal principles. The idea of natural law stemmed mainly from Greek and early Roman philosophy and jurisprudence, although a deeper or higher legal order was already part of the early Jewish tradition.<sup>20</sup> In the Greek philosophical tradition Aristotle (384-322 BC) distinguished between particular or positive law, and law which is common or natural, emphasising the need not only for formal laws but also for just laws moulded in reason.<sup>21</sup> During pre-classical Roman law (509-27 BC) this idea was further developed by Cicero, who was inspired by the dialectical method of Aristotle.<sup>22</sup> St Augustine (AD 354-430) was one of the first Christian philosophers to contribute to the idea of a divine law separate from positive law. The idea of divine law was further developed by the Spanish Moral Philosophers<sup>23</sup> and Roman-Catholic theologians like St Thomas Aquinas (1225-1274), but this was gradually replaced by later legal positivistic views which were enforced and practised by most of the universities during the Middle Ages.<sup>24</sup> In reaction to the mainly positivistic views propagated by most universities, Petrus Ramus (1515-1572) a (later) Protestant follower of Jean Calvin, developed the 'Ramus method'. His philosophy was characterised by a general and all-embracing reliance on method in accordance with preconceived rules based on reason as the most fundamental aspect of scientific behaviour.<sup>25</sup> This view in turn influenced Roman-Dutch jurists like Hugo Grotius, Simon van Leeuwen and Ulrich

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20 Dias *Jurisprudence* 555-558.

21 Dias *Jurisprudence* 561-563; Van der Merwe "Ramus, Mental Habits and Legal Science" 34-36.

22 Dias *Jurisprudence* 563; Van der Merwe "Ramus, Mental Habits and Legal Science" 35. In his *Topics* Aristotle distinguished between the demonstrative and dialectical methods of acquiring knowledge, with the latter being that branch of scientific theory which reasons from readily acceptable opinions and seeks conviction.

23 Van der Walt *Ontwikkeling van Houerskap* 258-269.

24 Van der Merwe "Ramus, Mental Habits and Legal Science" 35-36.

25 Van der Merwe "Ramus, Mental Habits and Legal Science" 49-56; Van der Walt 2006 *Fundamina* 23-24.

Huber to methodically rearrange the Justinian civil law in a system dominated by axiomatic, self-evident principles based on human reason. Derek van der Merwe<sup>26</sup> states in this regard that sixteenth-century legal humanism, with its incisive textual criticism and developed historical sense, had eroded the absolute authority of the Roman codes. The Ramist method emphasised a new adherence to natural reason, and rejected mere recourse to authority. It appealed to those legal scholars, such as Roman-Dutch jurists, who sought to develop a legal system which was based on, but not enmeshed within, the Roman tradition.

Natural law is therefore perceived as incorporating universally valid principles which are not dependant on human legislative intervention. It does not separate legal and moral issues and is a criterion against which any historical law, including Roman law, can be tested, although many Roman legal principles were also principles of natural law. Therefore, the main contributions of natural law are the emphasis on morality as part of a universal, higher legal order that has to be adhered to in a legal system, and natural reason without mere recourse to authority.

### **2.3 Indigenous law**

The indigenous law systems of South Africa and Canada are distinctive legal systems applied for generations before any colonists settled. These systems have since survived meaningful assimilation with the principles of English Common Law (Canada) and Roman-Dutch law (South Africa). In both jurisdictions these systems have typical characteristics.<sup>27</sup> They are unwritten customary law passed on orally from generation to generation and have strong ties with culture, tradition and tribal, community or family structures.<sup>28</sup> The laws are both young and old – the legitimacy of custom depends on its age, but the custom is never older than the memory of the oldest living person in the family or tribe. There is no distinction between law within a

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26 Van der Merwe "Ramus, Mental Habits and Legal Science" 58; see also Van der Walt 2006 *Fundamina* 25; Dugard 1983 *SALJ* 215 indicates that Grotius's emphasis on "the law of nature as a dictate of reason". Some modern supporters of Roman-Dutch law in South Africa, the so-called 'purists', emphasise the formalisation of Roman-Dutch principles to such an extent that they lose track of the moral and social implications embodied in natural law. See also fn 19.

27 Dias *Jurisprudence* 445-447; Du Plessis *Introduction to Law* 67-68; Bennett *Customary Law* 1-7; Ülgen 2000 *NILR* 156-158; Slattery "Nature of Aboriginal Title" 13-17.

28 Bennett *Customary Law* 2-4.

state structure and law applied between individuals, because there are normally no strong governmental and administrative structures of an indigenous nature. However, the customs and social practices are accepted as obligatory.<sup>29</sup> Typical indigenous law in small-scale societies is based mainly on family, communal or tribal ties. The rules are fluid according to the circumstances, cannot be classified, and may therefore overlap and contradict one another.

Social and moral standards form part of indigenous law in both Canada and South Africa.<sup>30</sup> Apart from religious customs observed by indigenous communities as part of indigenous law, social and moral standards are included into and applied as part of the indigenous legal system.<sup>31</sup> In most indigenous societies law and religion are intertwined. Many of the cultural customs form part of the religion of the family or tribe. For example, a society's religious ceremonies are often expressed as their spiritual connection with the land they occupy.<sup>32</sup> However, in most traditional societies there is a phenomenon that can be isolated from religious and other social observances for which the term 'law' would be convenient. Legal positivism, especially during the 19<sup>th</sup> and early 20<sup>th</sup> centuries, eroded this moral fibre of many indigenous communities by ignoring the social origins of indigenous law and concerning itself mainly with the inner workings of a westernised legal code.<sup>33</sup> Therefore lawyers firstly had to define a set of indigenous rules and then had to order them into a consistent system for use by the courts. In this process it was irrelevant how the rules were implemented in indigenous societies and whether they were morally or politically legitimate to indigenous communities. The application of positivism as a legal doctrine resulted in condemning indigenous law to the obscurity of a sub-legal order. Indigenous law was therefore often seen as a body of habits, conventions and moral standards which could be ignored by policy makers, lawyers

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29 Bennett *Customary Law* 1. Colonial governments developed legal systems to control indigenous populations and systems, but these systems were based not on indigenous law but on the constitutional and administrative law of the conquerors.

30 Bennett *Customary Law* 9.

31 Dias *Jurisprudence* 446; Bennett *Customary Law* 9. Regarding the spiritual connection with land, see Henderson *Constitutional Framework of Aboriginal Law* Tab 7 1 3-4 and 13; also 3.1(a) below.

32 Dias *Jurisprudence* 446.

33 See 3.1 and 3.2 below for examples of legal positivism and the non-recognition of indigenous law principles.



and government officials.<sup>34</sup> In 3 below the influence of legal positivism on case law in South Africa and Canada will be pointed out.

Indigenous law received constitutional recognition in Canada<sup>35</sup> and South Africa<sup>36</sup> and is applied subject to constitutional imperatives. Indigenous law in Canada forms part of the Canadian common law, consisting of English Common Law, civil law and indigenous law. In South Africa, indigenous law "feeds into, nourishes, fuses with and becomes part of the amalgam of South African law".<sup>37</sup>

### 3 Interpretation of factual evidence: two case studies

The integration and interpretation of legal principles from different sources are regarded as the most complicated aspects of any mixed legal system.<sup>38</sup> This is illustrated by the way Canadian and South African courts have analysed the evidence presented to them in cases regarding the nature and application of indigenous land tenure.

#### 3.1 *Aboriginal title in Canada*

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34 Bennett *Customary Law* 9; Lawrence 2001 *Canadian Journal of Women and the Law* 113; Cairns-Way 2009 *Ottawa L Rev* 9-10.

35 Section 35(1) *Constitution Act*, 1982.

36 Sections 39(3) and 211(2) *Constitution*, 1996: "A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs" and s 211(3): "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law".

37 *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC) para 51. See also para 56: "The dangers of looking at indigenous law through a common-law prism are obvious. The two systems of law developed in different situations, under different cultures and in response to different conditions". See also Lea *Property Rights* 95-119.

38 See Dainow (ed) *Role of Judicial Decisions*; Zimmermann and Visser "South African Law" 2-4; Henderson, Benson and Findlay *Aboriginal Tenure* 9 state: "[R]econciling Aboriginal tenure with Crown sovereignty means uncovering a complex history of layered understandings and multiple translations that constitute the written and unwritten record of the British common law. Rules of evidence alone are inadequate to interpret the history; knowledge of the broader cultural, political, economic, religious, and historical context is required".

In the Canadian case *Delgamuukw v British Columbia*<sup>39</sup> an area of 58 000 square kilometers of British Columbia was claimed by the Gitksan and Wet'suwet'en people, based on their ownership (an inalienable fee simple)<sup>40</sup> of the territory, which claim was subsequently transformed into a claim for aboriginal title over the land.<sup>41</sup> The Gitksan consist of approximately 4 000 to 5 000 persons, most of whom live in the territory claimed, while the Wet'suwet'en consist of approximately 1 500 to 2 000 persons living predominantly in the territory claimed. The appellants' initial claim was based on their historical use and 'ownership' (an inalienable fee simple)<sup>42</sup> of one or more of the territories. The trial judge held that these territories are marked by physical and tangible indicators of their association with the land, like totem poles and other distinctive regalia. In addition, the Gitksan Houses have an 'adark', which is a collection of sacred oral traditions about their ancestors, histories and territories, while the Wet'suwet'en Houses have a 'kanga', which is a collection of spiritual songs or dances which ties them to their land. Both of these indicators were presented as evidence on behalf of the appellants. The most significant evidence of the spiritual connection between the Houses and their territory is a feast hall where they tell and retell their stories and identify their territories to remind themselves of the sacred connection that they have with their lands.<sup>43</sup> British sovereignty over British Columbia was established by the Oregon Boundary Treaty of 1846. There was consensus among the parties that proof of historic occupation was required to establish aboriginal title. The appellants argued that aboriginal title could be proven by reference to the pattern of landholdings under aboriginal law, while the respondents were of the opinion that title can be proven by the reality of physical occupation of the land in question only.

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39 *Delgamuukw v British Columbia* 1997 3 SCR 1010 (SCC), an appeal from a case heard in first instance by the Supreme Court of British Columbia 1991 3 WWR 97 and an appeal heard by the British Columbia Court of Appeal 1993 5 WWR 97.

40 McNeil "Aboriginal Title" 57. See also Slattery "Nature of Aboriginal Title" 14: "A person who holds a fee simple on land is for all practical purposes the absolute owner of the land. ...In theory, under the English doctrine of tenures, all lands owned by private individuals are held of the Crown, which has the underlying and ultimate title to land. The main practical significance of the Crown's ultimate title is that the land reverts to the Crown if the owner dies without leaving an heir to the estate". See also 4 below.

41 *Delgamuukw v British Columbia* 1997 3 SCR 1010 (SCC) para 7.

42 McNeil "Aboriginal Title" 57.

43 *Delgamuukw v British Columbia* 1997 3 SCR 1010 (SCC) paras 93 and 94; Slattery "Nature of Aboriginal Title" 11. Regarding the spiritual connection with land, see Henderson *Constitutional Framework of Aboriginal Law* Tab 7 1 3-4 and 13.

The trial judge of the Supreme Court of British Columbia rejected the claims of the appellants because three aspects of the evidence presented by the appellants were not regarded as sufficient proof of their land tenure rights:

- (a) Although their ancestors communally possessed and used the fishing sites and adjacent lands for hunting and gathering purposes, the appellants did not prove that they had aboriginal title (ownership) over the territory in its entirety, because the judge was not persuaded that there was any system of governance or uniform custom relating to the land outside the villages. He refused to accept that the spiritual beliefs exercised within the territory were necessarily common to all of the people or universal practice.
- (b) The appellants' claim for jurisdiction over the territories (aboriginal sovereignty)<sup>44</sup> was rejected because of the sovereignty of the crown at common law, as well as the relative paucity of evidence regarding an established governance structure and a legal system which is 'a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves' (para 20).
- (c) The appellants' further claim for the exercise of aboriginal rights (e.g. hunting, fishing and trapping) in the disputed territories was also rejected. The judge was convinced that the aboriginal people in the disputed territories had continued to exercise these rights even after the establishment of British sovereignty, but that the aboriginal rights to land had been extinguished. The extinguishment arose out of certain colonial enactments that demonstrated an intention to manage crown lands in a way that was inconsistent with continuing aboriginal rights. Crown grantees who received land in colonial times were clearly intended to receive the land free from any aboriginal encumbrances. This intention to extinguish applied not only to land that had

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44 This would include the right to enforce existing aboriginal law, as well as to make and enforce new laws for the governance of the people and their land. Such a right would also supersede the laws of British Columbia if the two were in conflict – *Delgamuukw v British Columbia*[1997 3 SCR 1010 (SCC) para 20.

actually been granted to third parties, but rather to all crown land in British Columbia.<sup>45</sup>

The British Columbia Court of Appeal subsequently confirmed this judgment<sup>46</sup> and the appellants appealed to the Supreme Court of Canada. The Supreme Court referred the case back to the trial court for a retrial as a result of the trial court's rejection of evidence by the claimants in the form of oral histories and legends, and the trial court's inability to approach the rules of evidence and interpret the evidence

... with a consciousness of the special nature of aboriginal claims and the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law tort case.<sup>47</sup>

The trial judge held, with reference to *St Catherine's Milling and Lumber Co v The Queen* 1888 14 AC 46,<sup>48</sup> that aboriginal title is a personal and usufructuary right that cannot be defined in terms of Common Law fee simple. Therefore, it is clear that the trial court's methodology of interpreting the evidence was based on the requirements to prove Common Law rights and not aboriginal title as practised by the appellants. The legal positivist inclination of the Supreme Court of British Columbia and the Appeal Court of British Columbia is evident from these judgments. Both judges defined aboriginal rights and title in terms of English Common Law principles.<sup>49</sup> On appeal the Supreme Court of Canada found that subsequent jurisprudence had attempted to grapple with this definition, "... and has in the process demonstrated that the Privy Council's choice of terminology is not particularly helpful to explain the various dimensions of aboriginal title".<sup>50</sup> Aboriginal title is therefore defined by the

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45 *Delgamuukw v British Columbia* 1997 3 SCR 1010 (SCC) paras 23 and 24.

46 *Delgamuukw v British Columbia* 1993 5 WWR 97.

47 *Delgamuukw v British Columbia* 1997 3 SCR 1010 (SCC) para 80.

48 Apparently this personal and usufructuary right simply entailed a bundle of particular rights to engage in specific culture-based activities on the land; alternatively the right to exclusive use and occupation of the land in order to engage in specific activities. See also Slattery "Nature of Aboriginal Title" 14-15.

49 See 2.1 above.

50 *Delgamuukw v British Columbia* 1997 3 SCR 1010 (SCC) para 112. The Supreme Court rejected the notion that aboriginal title is a mere personal and usufructuary right, as well as the claim that it is an inalienable fee simple, and stressed the *sui generis* nature of aboriginal title as a property right. Regarding the *sui generis* nature of aboriginal title, see McNeil "Aboriginal Title" 58-59 and

Supreme Court as a *sui generis* interest in land, because it does not stem from aboriginal customary law, English Common Law or French civil law, but co-ordinates the interaction between these systems without forming part of it:

Aboriginal title has been described as *sui generis* in order to distinguish it from 'normal' proprietary interests, such as fee simple. However, as I will now develop, it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives.<sup>51</sup>

The Supreme Court clearly moved away from the positivistic approach of the two preceding courts by defining aboriginal title in accordance with indigenous land tenure principles, but subject to the underlying title of the crown.

### 3.2 *Indigenous land tenure in South Africa*

The Richtersveld saga<sup>52</sup> is based on a land claim which was first instituted in the Land Claims Court (LCC),<sup>53</sup> where the plaintiffs alleged that they have (i) a right to land based on ownership, alternatively (ii) a right based on aboriginal title allowing them the exclusive beneficial occupation and use of the land,<sup>54</sup> alternatively (iii) a right in land acquired through their beneficial occupation of the land for a period of longer than ten years prior to their eventual dispossession.<sup>55</sup> The LCC held that the Richtersveld community constituted a community for the purposes of the *Restitution of Land Rights Act 22 of 1994*, but rejected the land claim on the grounds that the

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Slattery "Nature of Aboriginal Title" 11-13. See also the authority cited by Slattery "Nature of Aboriginal Title" 27 n 1 and *Guerin v R* 1984 SCR 335 382.

51 *Delgamuukw v British Columbia* 1997 3 SCR 1010 (SCC) para 112. The Common Law doctrine that all Canadian land is subject to the underlying title of the crown is also applicable to aboriginal title.

52 The Richtersveld is a large area of land situated in the north-western region of the Northern Cape Province of South Africa bordering Namibia. It has for centuries been inhabited by the Richtersveld community. The land claim relates to a narrow strip of land on the western side parallel to the Atlantic Ocean (the subject land) which is at present owned by the first defendant, Alexkor Ltd, a public company whose sole shareholder is the Government of the Republic of South Africa and which has been mining on the subject land for diamonds since 1992. Diamonds were discovered in this area during the first half of the twentieth century.

53 *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC).

54 The specified purposes are habitation, cultural and religious practices, grazing, cultivation, hunting, fishing, water trekking and the harvesting and exploitation of natural resources.

55 Based on s 2 *Restitution of Land Rights Act 22 of 1994*.

plaintiffs were dispossessed during 1925 for the purpose of the exploration and mining of diamonds, and not because of racially discriminatory legislation or practices.<sup>56</sup> The Richtersveld community appealed to the Supreme Court of Appeal (SCA),<sup>57</sup> who reversed the judgment of the LCC and found that the Richtersveld community had a right akin to common law (Roman-Dutch) ownership which constitutes a customary law interest in land as defined in the Act,<sup>58</sup> of which they were dispossessed in 1925 when diamonds were discovered on the subject land.<sup>59</sup> This dispossession was based on racially discriminatory practices as defined in the Act. Thereafter Alexkor Ltd, the defendant, appealed to the Constitutional Court (CC)<sup>60</sup> and contended that any rights in the subject land which the Richtersveld community might have held prior to the annexation of that land by the British Crown in 1847 were terminated by reason of such annexation. They contended further that the dispossession of the subject land after 19 June 1913<sup>61</sup> was not the consequence of racially discriminatory laws or practices.<sup>62</sup>

The evidence presented by the Richtersveld people was that the British crown acquired the Richtersveld by proclamation on 17 December 1847. The annexation of the Richtersveld took place after a process of consultation between the colonial government and the recognised political leaders of Little Namaqualand, including the leaders of the Richtersveld people. The LCC held that the plaintiffs had no right to the claimed land based on ownership, as no indigenous land rights survived the annexation, and that the colonial government regarded the Richtersveld as *terra nullius* because the inhabitants were insufficiently civilised (para 37-41). This finding was rejected by the SCA (para 35). The SCA first attempted to determine if the doctrine of aboriginal title could be incorporated in the South African law by the

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56 *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC) para 114.

57 *Richtersveld Community v Alexkor Ltd* 2003 6 SA 104 (SCA).

58 In s 1 *Restitution of Land Rights Act* 22 of 1994 a right in land is defined as "any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than ten years prior to the dispossession in question".

59 *Richtersveld Community v Alexkor Ltd* 2003 6 SA 104 (SCA) para 90-110.

60 *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 469 (CC).

61 In terms of s 2(1)(d) and (e) *Restitution of Land Rights Act* 22 of 1994 only a dispossession of a right in land after 13 June 1913 (the date of promulgation of the *Black Land Act* 27 of 1913 - the first of the apartheid land acts) as a result of racially discriminatory laws or practices gives rise to a land claim and such a land claim had to be instituted before 31 December 1998.

62 *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 469 (CC) para 10.

development of the common law in the same way as that in which it was developed in other countries with a colonial history.<sup>63</sup> The SCA held that aboriginal title is rooted in and is the creature of traditional laws and customs (para 36-43). 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. However, the SCA indicated that there are several hazards associated with the recognition of aboriginal title in South African law.

The SCA also rejected the finding of the LCC that the claimed land was *terra nullius* at the time of annexation because the people were insufficiently civilised (para 41).<sup>64</sup> The SCA considered whether the Richtersveld community had a right to land at the date of annexation, and whether or not this right survived annexation by the British crown. The SCA decided on this aspect:<sup>65</sup>

During argument in this Court it was conceded on behalf of both respondents<sup>66</sup> that at the time of annexation the Richtersveld people had a customary law interest under their indigenous customary law entitling them to the exclusive occupation and use of the subject land and that this interest was *akin to the right of ownership held under common law*.<sup>67</sup> In my view, counsel were driven to this concession by the uncontested facts.

The legal positivistic inclination of these two courts is evident, as both courts hesitated to break with established common law (Roman-Dutch) principles. Although the SCA regarded it as unnecessary to consider the recognition of the doctrine of aboriginal title, or to consider the development of the common or customary law (as a customary law interest in land akin to common law ownership of land by the Richtersveld people was recognised), they deemed it necessary to discuss the effect of annexation on these rights.<sup>68</sup> It was conceded by the respondents that the Richtersveld people were sufficiently civilised to refute the notion that the

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63 Section 8(3) *Constitution of the Republic of South Africa*, 1996 states that a court may apply or develop the common law to give effect to any fundamental right protected in the Bill of Rights and s 39(2) stipulates that in the interpretation of any legislation, and when developing the common law and customary law, every court must promote the spirit, purport and objects of the Bill of Rights. S 211(3) *Constitution* has the same measure regarding customary law.

64 *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC) para 48; *Richtersveld Community v Alexkor Ltd* 2003 6 SA 104 (SCA) para 25.

65 *Richtersveld Community v Alexkor Ltd* 2003 6 SA 104 (SCA) para 26.

66 Alexkor Ltd and the South African Government.

67 My italics.

68 *Richtersveld Community v Alexkor Ltd* 2003 6 SA 104 (SCA) para 43-51.

Richtersveld, including the subject land, was *terra nullius*.<sup>69</sup> From the evidence it was also clear that the colonial government did not regard the Richtersveld as *terra nullius*, as the rights to land of the original inhabitants were recognised by the Dutch East India Company during the seventeenth and eighteenth centuries,<sup>70</sup> and the British crown during the nineteenth century. Therefore, the indigenous land rights of the Richtersveld people were recognised by the Articles of Capitulations when the British crown acquired sovereignty during 1806 and were further strengthened by Ordinance 50 of 1828.<sup>71</sup> The SCA held that the Richtersveld was not uninhabited and not amenable to acquisition by occupation or settlement and concluded that the existing customary law interest in the subject land held by the Richtersveld people survived British annexation.<sup>72</sup> But it was still held in the final instance that the right to occupy the claimed land is a right akin to the right of ownership held under common law.

On appeal the Constitutional Court (CC) confirmed the finding of the SCA that the Richtersveld community held a customary law interest in the subject land within the definition of 'a right in land' in the *Restitution Act*.<sup>73</sup> However, the CC did not agree with the description of the substantive content of the interest as "...a right to exclusive beneficial occupation and use, *akin to the right of ownership held under common law*".<sup>74</sup> The nature and content of the rights of the Richtersveld community to the claimed land must be determined by reference to indigenous law, and not the common law.<sup>75</sup> It was proven by the evidence that the Richtersveld people's right to the land survived annexation and therefore the nature and content of their right had to be determined according to their indigenous law and custom until the date of their dispossession. In this regard the CC cautioned:<sup>76</sup>

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69 *Richtersveld Community v Alexkor Ltd* 2003 6 SA 104 (SCA) para 46-47.

70 Bennet "African Land - A History of Dispossession" 66.

71 Section 3 *Ordinance* 50 of 1828.

72 *Richtersveld Community v Alexkor Ltd* 2003 6 SA 104 (SCA) para 61.

73 *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 469 (CC) para 48.

74 *Richtersveld Community v Alexkor Ltd* 2003 6 SA 104 (SCA) para 29.

75 With reference to the decision of the Privy Council in *Oyekan v Adele* 1957 2 All ER 785 (PC) at 788G-H, where it was held that a dispute between indigenous people as to the right to occupy a piece of land has to be determined according to indigenous law "without importing English conceptions of property law".

76 *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 469 (CC) para 51. See also para 56: "The dangers of looking at indigenous law through a common-law prism are obvious. The two systems



While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by s 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. ... It is clear, therefore, that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.

While the SCA's methodology to interpret the evidence was based on their endeavour to keep as close as possible to (Roman-Dutch) common law principles, the CC recognised the peculiar characteristics of indigenous law as part of the South African law, which is to be applied subject to constitutional principles and not common law principles.

#### **4 The methodology used to interpret evidence**

The methodology used to interpret evidence in respect of indigenous land tenure was prescribed by both the Canadian Supreme Court and the South African Constitutional Court. In the *Delgamuukw* case the Supreme Court laid down the following evidentiary principles in the light of the peculiar nature of aboriginal title:

- (a) Evidence in respect of aboriginal title differs from evidence in respect of aboriginal rights. Aboriginal rights are defined in terms of activities (e.g. hunting, trapping and fishing).<sup>77</sup> To be acknowledged as an aboriginal right such activity must be an element of the practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. However, aboriginal title, as a species of aboriginal rights, is a right to the land itself. Subject to the inherent limitations of aboriginal title, the land may be used for

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of law developed in different situations, under different cultures and in response to different conditions".

<sup>77</sup> *Delgamuukw v British Columbia* 1997 3 SCR 1010 (SCC) para 140; see also *R v Van der Peet* 1996 2 SCR 507 para 74.

a variety of activities, none of which need to be individually protected as aboriginal rights under section 35(1) of the Canadian *Constitution Act* (e.g. the exercise of mineral rights). Those activities are parasitic on the underlying aboriginal title.<sup>78</sup> The purpose of section 35(1) is to reconcile the prior presence of aboriginal peoples with the assertion of crown sovereignty. The requirement of prior presence can only be satisfied by proof of two aspects:

- (i) the occupation of the land; and
  - (ii) the prior social organisation and distinctive cultures of aboriginal peoples on that land.<sup>79</sup>
- (b) The onus to prove aboriginal title rests on the aboriginal group claiming such title. The Supreme Court has laid out the analytical framework for constitutional claims under section 35(1).<sup>80</sup> The court must determine:
- (i) whether the aboriginal claimant was acting pursuant to an aboriginal title (onus to prove rests on the aboriginal group);
  - (ii) whether that title has been extinguished (onus to prove rests on the crown);
  - (iii) if not extinguished, whether the title has been infringed (onus to prove rests on the aboriginal group);
  - (iv) whether the infringement is justified (onus to prove rests on the crown).

In order to establish aboriginal title ((b)(i) above), the following must be proven by the aboriginal group:

- (aa) *The land must be occupied prior to sovereignty.*

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78 *Delgamuukw v British Columbia* 1997 3 SCR 1010 (SCC) para 140; see also *R v Van der Peet* 1996 2 SCR 507 para 74.

79 *Delgamuukw v British Columbia* 1997 3 SCR 1010 (SCC) para 141; *R v Van der Peet* 1996 2 SCR 507 para 74. Prior to the *Delgamuukw* case the second aspect had been given more emphasis, as the types of cases which had come before the Supreme Court often concerned regulatory offences that proscribed discrete types of activity. See also Henderson *Constitutional Framework of Aboriginal Law* 3-4.

80 See *R v Bernard* 2003 4 CNLR para 19 for a complete list of authority in this regard.

While the requirement for the establishment of aboriginal rights in general is based on the activities exercised at the time of first contact with the settlers,<sup>81</sup> the requirement for the establishment of aboriginal title is the occupation of the disputed lands at the time the crown asserted sovereignty over the land.<sup>82</sup> Therefore the time period in the case of aboriginal title differs from aboriginal rights in general. This time period is important, as aboriginal title is based not only on prior occupation before sovereignty, but also on the relationship between the common law and pre-existing systems of aboriginal law. In terms of common law principles the crown owns all land from the time when it asserted sovereignty, but aboriginal title is a burden on the crown's underlying title.<sup>83</sup> Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title was established ('crystallised') at the time sovereignty was asserted.

Physical occupation may be established by the construction of dwellings, the cultivation and enclosure of fields, the regular use of tracts of land for hunting and fishing, or the exploitation of its resources. The group's size, way of life, material resources and technological abilities, as well as the character of the disputed lands, should also be taken into consideration. A claim to aboriginal title could also be made when a group could demonstrate that their connection with a piece of land was of central significance to their distinctive culture, although the judge was not prepared to explicitly include this element as one of the tests for aboriginal title, as "...it would seem clear that any land that was occupied pre-sovereignty, and which

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81 *R v Van der Peet* 1996 2 SCR 507 para 60: "(T)he time period that a court should consider in identifying whether the *right* claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact". [My emphasis] In the case of the proof of aboriginal rights the emphasis is mainly on the exercise of culture-specific activities prior to the arrival of Europeans. Practices, customs and traditions that arose solely as a response to European influences do not meet the standard for recognition as aboriginal rights – *Delgamuukw v British Columbia* 1997 3 SCR 1010 (SCC) para 144. See also Henderson *Constitutional Framework of Aboriginal Law* 4-7.

82 *Delgamuukw v British Columbia* 1997 3 SCR 1010 (SCC) paras 142 and 145.

83 *Delgamuukw v British Columbia* 1997 3 SCR 1010 (SCC) paras 145; see also Slattery "Nature of Aboriginal Title" 13. The crown after sovereignty gained ultimate title to lands held by aboriginal people, after which the aboriginal group held a communal title at common law that formed a burden on the crown's ultimate title. See also Slattery 1987 *Can Bar Rev* 742; McNeil *Common Law Aboriginal Title* 196.

the parties maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants".<sup>84</sup>

(bb) *There must be continuity between present and pre-sovereignty occupation.*

As conclusive evidence of pre-sovereignty occupation is often difficult to obtain, an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation. In addition to this, it is required that continuity between present and pre-sovereignty occupation exists, because the relevant time for the determination of aboriginal title is at the time before sovereignty. There is no need to establish an unbroken chain of continuity, because the occupation and use of lands may have been disrupted for a time, often as a result of the unwillingness of colonisers to recognise aboriginal title. To impose the requirement of continuity too strictly might undermine the very purpose of section 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hand of colonisers who failed to respect aboriginal rights to land.<sup>85</sup> Therefore the requirement should be a substantial maintenance of the connection between the people and the land. There is also a strong possibility that the precise nature of occupation will have changed between the time of sovereignty and the present. Normally such a change would not preclude a claim for aboriginal title, as long as a substantial connection between the people and the land has been maintained.<sup>86</sup> The only limit to this might be the internal limitation on the use of aboriginal land, which is inconsistent with the continued use by future generations of aboriginals.<sup>87</sup>

(cc) *Occupation must have been exclusive at sovereignty.*

This requirement flows from the definition of aboriginal title as the exclusive use and occupation of land.<sup>88</sup> The exclusivity vests in the aboriginal community which holds

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84 *Delgamuukw v British Columbia* 1997 3 SCR 1010 (SCC) para 149-151; see also *R v Adams* 1996]3 SCR 101 para 26.

85 *Delgamuukw v British Columbia* 1997 3 SCR 1010 (SCC) para 153; see also *R v Côté* 1996 3 SCR 139 para 53 and a reference to *Mabo v Queensland* 1992 107 ALR 1.

86 *Delgamuukw v British Columbia* 1997 3 SCR 1010 (SCC) para 154.

87 See in this regard 3 above.

88 *Delgamuukw v British Columbia* 1997 3 SCR 1010 (SCC) paras 118 and 155.

the ability to exclude others from the lands held pursuant to that title.<sup>89</sup> As in the case of the proof of occupation, the proof of exclusivity must place equal weight on the aboriginal perspective and the common law perspective. Common law relies heavily on the exclusivity derived from the notion of fee simple ownership as held by Europeans, and should be used in the concept of aboriginal title with caution. Therefore, the test required to establish exclusive occupation must take into account the context of the aboriginal society at the time of sovereignty. Exclusive occupation can be proven even if other aboriginal groups were present or frequented the disputed lands. Under those circumstances exclusivity would be demonstrated by the intention and capacity to retain exclusive control.<sup>90</sup> Thus an isolated act of trespass would not undermine the exclusivity of the occupation, if an aboriginal community intended to and attempted to enforce their exclusive occupation. Where outsiders were allowed access upon request, the fact that they asked for permission would be evidence of the community's exclusive control.

To the same extent trespass by other aboriginal groups or communities does not necessarily refute a claim for aboriginal title, as an aboriginal community may have trespass laws which are proof of their intention to maintain exclusive occupation, or their granting of permission to other groups or communities may be used as proof of their exclusive control.<sup>91</sup> In the event of a lack of proof of exclusive occupation, an aboriginal community or person who proves occupation together with other communities may establish an aboriginal right to use the land in question. This is an aboriginal right short of title. Such rights might be intimately tied to the land and might permit a number of site-specific activities, but they are not rights to the land itself, and can therefore not be acknowledged as aboriginal title.

In order to prove the indigenous land tenure of the Richtersveld people in the *Richtersveld* case, the SCA analysed the evidence of experts regarding the nature of their rights prior to annexation (para 13-22); at annexation (para 23-29) and after annexation (para 30-51). From the evidence, which was not contested in either the

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89 *Delgamuukw v British Columbia* 1997 3 SCR 1010 (SCC) para 155.

90 *Delgamuukw v British Columbia* 1997 3 SCR 1010 (SCC) para 156; see also McNeil *Common Law Aboriginal Title* 204.

91 *Delgamuukw v British Columbia* 1997 3 SCR 1010 (SCC) para 158.

LCC or the SCA, it was clear that before annexation the Richtersveld people shared the same culture, including the same language, religion, social and political structures, customs and lifestyle. One of the components of the culture of the Richtersveld people was the customary rules relating to their entitlement to and use and occupation of the land. The land belonged to all of the members of the Richtersveld community, who were entitled to the reasonable occupation and use of the land and its resources. All of the members of the community had a sense of legitimate access to the communal land to the exclusion of all other people. Non-members had to obtain permission to use the land, for which they sometimes had to pay. The Richtersveld community also had rules related to criminal and civil law such as the prohibition of adultery, assault and theft, the recognition of private property rights of movables, rules of inheritance and the obligation to pay compensation for damage to private property. The SCA came to the conclusion that at the time of annexation the Richtersveld community had for a long time enjoyed exclusive beneficial occupation of the whole of the Richtersveld (including the claimed land) in the course of their semi-nomadic existence. The rules and decisions of their political structure (*raad*) were recognised by both the indigenous inhabitants and others, like missionaries and traders. With reference to Canadian sources especially, the SCA held that occupation of the land has to be determined according to the following requirements (para 23-25):

- Uninterrupted presence on and use of the land at the time of annexation. This requirement need not amount to possession at common law.
- A nomadic lifestyle is not inconsistent with the exclusive and effective right of occupation of land by indigenous people. Although the Richtersveld people's use of the land may have been only seasonal, and may have been sparse and intermittent, that did not mean that they did not have exclusive beneficial occupation of the land, which other people respected.

Although the SCA regarded it unnecessary to consider the recognition of the doctrine of aboriginal title or to consider the development of the common or customary law, as a customary law interest in land akin to common law ownership of land by the

Richtersveld people was already recognised, they deemed it necessary to discuss the effect of annexation on these rights.<sup>92</sup> According to international law, the establishment of sovereignty over new territory could be effected by conquest or cession if the territory was inhabited, or by occupation if it was uninhabited.<sup>93</sup> Occupation of inhabited territory was based on the fiction that if a territory was inhabited by people regarded as insufficiently civilised, it could be acquired by occupation as if it were uninhabited and therefore *terra nullius*. It is clear from the uncontested evidence of the expert witnesses that the Richtersveld people had a social and political organisation, including a civil and criminal legal system based on traditional laws and customs, at the time of the annexation. It was also conceded by the respondents that the Richtersveld people were sufficiently civilised to refute the notion that the Richtersveld, including the claimed land, was *terra nullius*.<sup>94</sup> From the evidence it was also clear that the colonial government did not regard the Richtersveld as *terra nullius*, as the rights to land of the original inhabitants were recognised by the Dutch East India Company during the seventeenth and eighteenth centuries,<sup>95</sup> and the British crown during the nineteenth century. The indigenous land rights of the Richtersveld people were recognised by the Articles of Capitulation when the British crown acquired sovereignty during 1806. It was further strengthened by Ordinance 50 of 1828.<sup>96</sup> Therefore, the SCA found that the Richtersveld was not uninhabited and not amenable to acquisition by occupation or settlement. The indigenous inhabitants were also sufficiently civilised to refute the notion of occupation of *terra nullius* (para 52). Thus the territory was obtained by proclamation. The SCA compared the doctrine of recognition (which entails that annexation of the land by the British crown resulted in the abolition of all pre-existing customary rights and interests except those rights explicitly recognised by the crown) with the doctrine of continuity (that there is a presumption that a mere change in sovereignty does not extinguish the private and customary property rights of the inhabitants of the conquered territory, unless confiscated by an act of state).<sup>97</sup> After

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92 *Richtersveld Community v Alexkor Ltd* 2003 6 SA 104 (SCA) paras 43-51.

93 See text at n 70 above. See also Henderson, Benson and Findlay *Aboriginal Tenure* 284-300.

94 *Richtersveld Community v Alexkor Ltd* 2003 6 SA 104 (SCA) paras 46-47.

95 Bennett "African Land – A History of Dispossession" 66-67.

96 Section 3 *Ordinance* 50 of 1828.

97 Bennett & Powell 1999 *SAJHR* 480. See also *Mabo v The State of Queensland (No 2)* 1992 175 CLR 57: "The preferable rule, supported by the authorities cited, is that a mere change in sovereignty does not extinguish native title to land. (The term "native title" conveniently describes

analysing the international precedent on this matter, the SCA accepted the doctrine of continuance and concluded that the existing customary law interest in the subject land held by the Richtersveld people survived British annexation.<sup>98</sup>

The content of the customary law interest in land also encompasses a right to minerals and other natural resources.<sup>99</sup> The SCA especially relied on the evidence that the Richtersveld people had mined and used copper for the purpose of adornment long before annexation and that they appreciated the value of minerals. They had even granted mineral leases to outsiders as early as 1856. The evidence clearly established that the Richtersveld community believed that they had the right to minerals and that they had acted in a manner consistent with such a belief. The minerals had been exploited without requesting permission from anyone to do so, and strangers and non-inhabitants respected their rights by obtaining their permission to prospect for minerals, and even concluding mineral leases with them. Although there was no proof of mining activities by the Richtersveld community on the subject land itself, it was clear from the evidence that at the time of annexation the mining for and use of minerals was part of the distinctive culture of the Richtersveld people,<sup>100</sup> who appropriated for themselves the right to minerals and natural resources on the land, and that this custom had been continued from earlier days.

The CC confirmed the finding of the SCA that the Richtersveld community held a customary law interest in the subject land within the definition of 'a right in land' in the *Restitution of Land Rights Act*.<sup>101</sup> However, the CC did not agree with the description of the substantive content of the interest as "...a right to exclusive beneficial occupation and use, akin to that held under common-law ownership".<sup>102</sup> The nature and content of the rights of the Richtersveld community to the subject land was to be

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the interests and the rights of indigenous inhabitants in land, whether communal, group or individual, possessed under traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants). The preferable rule equates the indigenous inhabitants of a settled colony to the rights and interests recognised by the Privy Council in *In re Southern Rhodesia* as surviving to the benefit of the residents of a conquered colony".

98 *Richtersveld Community v Alexkor Ltd* 2003 6 SA 104 (SCA) para 61.

99 *Richtersveld Community v Alexkor Ltd* 2003 6 SA 104 (SCA) paras 85-89.

100 With reference to *R v Van der Peet* 1996 SCR 289 para 60.

101 *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 469 (CC) para 48.

102 *Richtersveld Community v Alexkor Ltd* 2003 6 SA 104 (SCA) para 29.



determined by reference to indigenous law, and not the common law.<sup>103</sup> It was proven by the evidence that the Richtersveld people's right to the claimed land survived annexation<sup>104</sup> and therefore the nature and content of their right had to be determined according to their indigenous law and custom up to the date of their dispossession.

## 5 Conclusion

Although the lower courts in Canada and South Africa clearly demonstrated their positivistic preference to adhere to the established land tenure structures of Anglo-American Common Law and Roman-Dutch law respectively, it is commendable that the Supreme Court of Canada and the Constitutional Court of South Africa have recognised the peculiar/special nature of indigenous land tenure in the form of aboriginal title and indigenous ownership. The fact that the moral and spiritual nature of indigenous land tenure is recognised constitutionally is an exciting development in both jurisdictions.

The fact that specific requirements have to be met to prove indigenous land tenure precludes the positivistic adherence to established common law principles. The characteristics of indigenous land tenure differ to such an extent from westernised legal concepts in respect of land tenure that indigenous land tenure cannot be described in terms of the established common law terminology as 'a right akin to Roman-Dutch ownership' or 'a personal and fiduciary right'. This necessitates that special evidence in concurrence with the characteristics of indigenous land tenure is needed to prove indigenous people's land tenure rights.

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103 With reference to the decision of the Privy Council in *Oyekan v Adele* 1957 2 All ER 785 (PC) at 788G-H, where it was held that a dispute between indigenous people as to the right to occupy a piece of land has to be determined according to indigenous law "without importing English conceptions of property law".

104 See 3.2 above.

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*Mineral and Petroleum Resources Act 28 of 2002*

*National Water Act 36 of 1998*

*Ordinance 50 of 1828*

*Prescription Act 68 of 1969*

*Restitution of Land Rights Act 22 of 1994*

*Security by Means of Movable Property Act 57 of 1993*

### **List of abbreviations**

Can Bar Rev	Canadian Bar Review
Harv L Rev	Harvard Law Review
NILR	Netherlands International Law Review
Ottawa L Rev	Ottawa Law Review
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg



## THE METHODOLOGY USED TO INTERPRET CUSTOMARY LAND TENURE

G Pienaar\*

### SUMMARY

Customary land tenure is normally not based on codified or statutory sources, but stems from customary traditions and norms. When westernised courts have to interpret and adjudicate these customary traditions and norms, the normal rules of statutory interpretation cannot be followed. The court has to rely on evidence of the traditional values of land use to determine the rules connected to land tenure.

Previously courts in many mixed jurisdictions relied on common or civil law legal principles to determine the nature of customary land tenure and lay down the principles to adjudicate customary land disputes among traditional communities, or between traditional and westernised communities in the same jurisdiction. Many examples of such westernised approach can be found in case law of Canada and South Africa. The interpretation of the nature of customary land tenure according to common law or civil law principles has been increasingly rejected by higher courts in South Africa and Canada, e.g. in *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 469 (CC) and *Delgamuukw v British Columbia* 1997 3 SCR 1010.

This paper explores the methodology the courts should follow to determine what the distinctive nature of customary land tenure is. As customary land tenure is not codified or based on legislation, the court has to rely, in addition to the evidence of indigenous peoples, on the expert evidence of anthropologists and sociologists in determining the nature of aboriginal title (in Canada) and indigenous land tenure (in South Africa). The court must approach the rules of evidence and interpret the evidence with a consciousness of the special nature of aboriginal claims and the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The court must not undervalue the evidence presented simply

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because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law tort case.

**KEYWORDS:** Aboriginal title; customary land tenure; natural law; legal positivism; mixed jurisdiction; indigenous law; interpretation (of customary law); evidence (of customary land tenure)