



The Inclusivity of Communal Land Tenure: A Redefinition of Ownership in Canada and South Africa?

Gerrit Pienaar*

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1. Introduction and Scope

The nature of land tenure rights is defined in many different ways in different jurisdictions. One of the basic differences lies in the extent of exclusivity or inclusivity of land tenure, or what is called a “discourse of exclusion”.¹ Another lies in the distinction between the “idea of property”, premised by individualism, and the “institution of property”, preoccupied with compromise, relationality and the tension between individual and community.²

Roman-Dutch ownership, which is to a large extent in concurrence with the European civil law concept, is defined in South Africa with emphasis on the exclusivity of ownership:

Ownership is the most complete real right a person can have with regard to a thing. The point of departure is that a person, as far as an immovable is concerned, can do on and with his property as he likes. However, this apparently unlimited freedom is only partially true. The absolute entitlements of an owner exist within the boundaries of the law.³ [Own translation]

* B Jur et Com; LLB; LLD; Professor of Private Law, Northwest University (Potchefstroom campus), South Africa. The research for this article is based upon work supported by the National Research Foundation. Any opinion, findings, and conclusions or recommendations expressed in this article are those of the author and therefore the NRF does not accept any liability in regard thereto. This paper is appearing in the Stellenbosch Law Review (Stell. L.R., ISSN 1016-4359) and is published in the EJCL with the permission of the Stell. L.R. Editorial Committee.

¹ Gutto *Property and land reform: constitutional and jurisprudential perspectives* (1995) 4-9; Grear “A tale of the land, the insider, the outsider, and human rights” 2003 *Legal Studies* 33-65; Fitzpatrick “Evolution and chaos in property rights systems: the third world tragedy of contested access” 2006 *Yale Law Journal* 996 1001.

² Underkuffler *The idea of property* (2003) 5.

³ *Gien v Gien* 1979 2 SA 1113 (T). In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services* 2002 4 SA 768 (CC) par 51 it was held that private ownership is constitutionally protected, but also limited in the public interest; also *President of the RSA v Modderklip Boerdery (Pty) Ltd* 200505 SA 3 (CC). See also Van der Walt “Striving for the better interpretation – a critical reflection on the Constitutional Court’s *Harksen* and *FNB* decisions on the property clause” 2004 *SALJ* 854 866.

In Canada land tenure is defined according to common law principles and is regarded less absolute and more flexible than the Roman-Dutch concept in South Africa. The crown's ultimate or underlying title (or radical ownership) of all immovable property in the realm is acknowledged, and land tenure rights are held of the crown by tenants in the form of tenures, estates and interests. This indicates that different land tenure rights can be exercised by several people in respect of the same property.⁴ However, the crown's ultimate title has been described by some commentators as a legal fiction and fee simple ownership (freehold ownership) in Canada is often regarded as "...absolute ownership of the land, or at least as close to being absolute owner as English common law permits".⁵ Thus land tenure rights in Canada also seem to a large extent exclusive in nature, indicating the use and possession of land with exclusion of other persons.

In both Canada and South Africa there is an additional system of land tenure rights in operation. Communal land rights have been and still are exercised by indigenous communities. Communal land tenure is defined in terms of its inclusive nature and displays the following features:⁶

- Land rights are embedded in a range of social relationships, including household and kinship networks, and various forms of community membership, often multiple and overlapping in character.
- Land rights are inclusive rather than exclusive in character, being shared and relative, but generally secure.⁷ In a specific community rights may be individualised (dwelling); communal (grazing, hunting, fishing and trapping) or mixed (seasonal cropping combined with grazing and other activities).
- Access to land is guaranteed by norms and values embodied in the community's land ethic. This implies that access through defined social rights is distinct from control of land by systems of authority and administration.
- The rights are derived from accepted membership of a social unit and can be acquired by birth, affiliation, allegiance or transactions.
- Social, political and resource use boundaries are usually clear, but often flexible and negotiable, and sometimes the source of tension and conflict.
- The balance of power between gender, competing communities, right-holders, land administration authorities and traditional authorities is flexible.
- The inherent flexibility and negotiability of land tenure rights mean that they are adaptable to changing conditions, but susceptible to capture by powerful external forces (like the state) or processes (like capital investments).

⁴ Slattery "The nature of aboriginal title" in Lippert (ed) *Beyond the Nass Valley* (2000) 11 13; Agbosu *Land law in Ghana: contradiction between Anglo-American and customary conceptions of tenure and practices* (2000) 3-8; Fox "Relativity of title at law and in equity" 2006 *Cambridge Law Journal* 330-365.

⁵ Slattery (2000) 14; see also Agbosu (2000) 8; Henderson, Benson & Findlay *Aboriginal title in the Constitution of Canada* (2000) 5-6; Grear 2003 44.

⁶ Gutto (1995) 13-17; Agbosu (2000) 14-16; Ülgen "Aboriginal title in Canada: recognition and reconciliation" 2000 *Netherlands International Law Review* 146 156-158; Slattery (2000) 16-22; Cousins "'Embeddedness' versus titling: African land tenure systems and the potential impacts of the Communal Land Rights Act 11 of 2002" 2005 *Stellenbosch Law Review* 488 500-501; Fitzpatrick 2006 *Yale Law Journal* 1011-1012.

⁷ Van der Walt "Property rights and the hierarchies of power: a critical evaluation of land-reform policy in South Africa" 1999 *Koers* 259 267-268.

The purpose of this article is to compare the way Canada and South Africa incorporated communal land tenure in their property systems of predominantly common law and civil law respectively. A remarkable similarity is that in both jurisdictions it required three different decisions by three different courts before the matter was finally settled, namely the *Delgamuukw* decisions in Canada and the *Richtersveld* cases in South Africa.⁸

2. The Judicial Process

2.1 *Delgamuukw*

The basic common law principle in Canada is that the crown owns all land after it asserted sovereignty, but that aboriginal title is a burden on the crown's underlying title. Aboriginal title was established (crystallised) at the time sovereignty was asserted.⁹ In *Delgamuukw* the hereditary chiefs of the Gitksan and Wet'suwet'en people, both in their individual capacity and on behalf of several houses,¹⁰ claimed separate portions of 58 000 square kilometres in British Columbia. The claim in *Delgamuukw* was initially for ownership (an inalienable fee simple)¹¹ of the territory and jurisdiction over it, implying exclusive use and control of the area and formulated in (exclusive) common law terminology. It was subsequently transformed into a claim for aboriginal title over the land in question, based on long-term (inclusive) communal land tenure.¹² There are also other aboriginal people living in the claimed area, some with unsettled land claims overlapping with the territory claimed, as well as approximately 30 000 non-aboriginal persons.¹³

The present social organisation of the appellants, which is necessary to prove in order to establish long-term communal tenure rather than personal use and possession of the land, is that the Gitksan and Wet'suwet'en peoples are both divided into clans and houses with hereditary membership to houses and clans.¹⁴ Each house has one or more hereditary chief as its titular head, selected by the elders of the house as well as the head chief of the other houses of the clan. There is no head chief for the clans, but there is a ranking order of precedence

⁸ In Canada *Delgamuukw v British Columbia* Supreme Court of British Columbia [1991] 3 WWR 187; British Columbia Court of Appeal [1993] 5 WWR 97 and Supreme Court of Canada [1997] 3 SCR 1010; in the case of South Africa *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). For a comprehensive exposition of the facts and decisions of the different courts, see Mostert & Fitzpatrick "Living in the margins of history on the edge of the country" 2004 *JSAL* 309-323 and 498-510; Pienaar "From *Delgamuukw* to *Richtersveld*: are land claims in Canada and South Africa comparable?" 2005 *Stellenbosch Law Review* 446-465.

⁹ Slattery (2000) 11-13;

¹⁰ Regarding the nature of first nations, tribes, houses and bands, see Woodward *Native Law* (1994) 1.1-1.4; Lester "Do treaty Indians have a corporate personality?" 1990 *Canadian Native Law Reporter* 1-6; McNeil "Aboriginal title as a constitutionally protected property right" in Lippert (ed) *Beyond the Nass Valley* (2000) 55 70 n 43. For a description of "bands", see also s 18 Indian Act of 1985.

¹¹ McNeil (2000) 57; Slattery (2000) 11 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."

¹² *Delgamuukw v British Columbia* Supreme Court of Canada [1997] 3 SCR par 7. All references to *Delgamuukw* are to the Supreme Court of Canada case, unless otherwise indicated.

¹³ *Delgamuukw* par 8 and 9.

¹⁴ Woodward (1994) 6-10. See also Slattery (2000) 16.

within the communities or villages, where one house or clan may be more prominent than others.

The appellants' initial claim was based on their historical use and "ownership" (an inalienable fee simple)¹⁵ 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 *adaawk*, which is a collection of sacred oral tradition about their ancestors, histories and territories, while the Wet'suwet'en have a *kungax*, which is a spiritual song or dance which ties them to their land.¹⁶

The claims of the appellants were rejected by the Supreme Court of British Columbia because of three aspects that were not proven sufficiently or at all:

- (i) 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.
- (ii) The appellants' claim for jurisdiction over the territories (*aboriginal sovereignty*)¹⁷ was rejected, because 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".
- (iii) The appellants' further claim for the exercise of *aboriginal rights* (eg hunting, fishing and trapping) in the disputed territories was also rejected. The judge was convinced that the aboriginal people in the disputed territories have 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. This intention to extinguish did not only apply to land that had actually been granted to third parties, but rather to all crown land in British Columbia.¹⁸

This judgment was confirmed by the British Columbia Court of Appeal¹⁹ and an appeal to the Supreme Court of Canada was lodged. The Supreme Court of Canada referred the case back to the Supreme Court of British Columbia for a retrial as a result of the trial court's rejection

¹⁵ See fn 11.

¹⁶ *Delgamuukw* par 93 and 94; Slattery (2000) 11. Regarding the spiritual connection with land, see Henderson, Benson & Findlay *Aboriginal title in the Constitution of Canada* (2000) 406-418; Henderson "The constitutional framework of aboriginal law" 2001 *Aboriginal Law Seminar, National Judicial Institute* Saskatoon May 2001 Tab 7 1 3-4 and 13; Cassidy "The stolen generation: Canadian and Australian approaches to fiduciary duties" 2002/2003 *Ottawa LR* 177-238.

¹⁷ This includes 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 right will also supersede laws of British Columbia if the two were in conflict – *Delgamuukw* par 20.

¹⁸ *Delgamuukw* par 23 and 24.

¹⁹ *Delgamuukw v British Columbia* [1993] 5 WWR 97.

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.²⁰

Aboriginal land tenure was defined by the Supreme Court of Canada with specific emphasis on its inclusive nature, as will be discussed in more detail in 3.1 below.

2.2 Richtersveld

The Richtersveld, a large area of land situated in Namaqualand, a region in the north-western part of South Africa bordering Namibia, has for centuries been inhabited by the Richtersveld people. The original inhabitants of Namaqualand were overwhelmingly Khoi Khoi, but included some San people. During the nineteenth century other people, including some white farmers and missionaries, settled in the area. In 1847 the British crown annexed the Richtersveld.²¹ In South Africa the principle is that the property dispensation of the inhabitants at the time of British sovereignty was upheld, unless it was explicitly changed. This resulted in the retention of the Roman-Dutch property dispensation based on exclusivity, as well as inclusive indigenous ownership in areas where Roman-Dutch ownership was not previously applied.²² The annexed Richtersveld land was at all relevant times considered by the Cape Colonial government to be crown land.²³ During 1925 diamonds were discovered in the area and in 1926 alluvial diggings were proclaimed in a part of the Richtersveld. During 1930 the Richtersveld Reserve was created east of the proclaimed area and the Richtersveld people were restricted to the use and occupation of the Richtersveld Reserve. They were denied any access to the proclaimed area. In 1989 the land was transferred to a statutory government corporation, the Alexander Bay Development Corporation, and in 1992 the Corporation was converted into a public company Alexkor Ltd, of which the government is the sole shareholder.²⁴

The land claim of the Richtersveld community (and several individuals in the community) 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. The land claim was first instituted in the Land Claims Court,²⁵ where the plaintiffs alleged that they have (i) a right to the subject land based on ownership (exclusivity), alternatively (ii) a right based on aboriginal title allowing them the beneficial occupation and use of the subject land (inclusivity),²⁶

²⁰ *Delgamuukw* par 80.

²¹ *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC) (hereafter referred to as LCC) par 23-25.

²² Ülgen "Developing the doctrine of aboriginal title in South Africa – source and conduct" 2002 *Journal on African Law* 133-138; Hoq "Land restitution and the doctrine of aboriginal title" 2002 *SAJHR* 421 434-438.

²³ LCC par 75.

²⁴ LCC par 28-31.

²⁵ *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC).

²⁶ The specified purposes are habitation, cultural and religious practices, grazing, cultivation, hunting, fishing, water trekking and the harvesting and exploitation of natural resources.

alternatively (iii) a right in land acquired through their beneficial occupation of the subject land for a period of longer than ten years prior to their eventual dispossession (inclusivity).²⁷

The Land Claims Court 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 plaintiffs were dispossessed during 1925 for the purpose of the exploration and mining of diamonds, and not because of racially discriminatory legislation or practices.²⁸ Thereafter the Richtersveld community appealed to the Supreme Court of Appeal,²⁹ who reversed the judgment of the Land Claims Court and found that the Richtersveld community had a right to the use and possession of the subject land akin to Roman-Dutch law ownership, which constitutes a customary law interest in land as defined in the Restitution of Land Rights Act,³⁰ of which they were dispossessed in 1925 when diamonds were discovered on the subject land.³¹ This dispossession was based on racially discriminatory practices as defined in the Act. Thereafter Alexkor Ltd, the defendant, appealed to the Constitutional Court³² 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 further contended that the dispossession of the subject land after 19 June 1913³³ was not the consequence of racially discriminatory laws or practices.³⁴ This appeal was rejected by the Constitutional Court, as will be discussed in more detail in 3.2 below.

3. The Nature of the Interest in Land

3.1 *Delgamuukw* – aboriginal title

The appellants initially based their claim on aboriginal “ownership” (an inalienable form of fee simple) over the disputed territories proved by their exercise of aboriginal rights. Aboriginal rights are protected by section 35 of the Constitution Act of 1982. The trial judge of the Supreme Court of British Columbia held with reference to *St Catherine’s Milling and Lumber Co v The Queen*,³⁵ that aboriginal title is a personal and usufructuary right. The

²⁷ Based on s 1 of the Restitution of Land Rights Act 22 of 1994; see also fn 30 and 33 below.

²⁸ LCC par 114. According to s 2(1) of the Restitution Act a claimant has to establish: (a) that it is a community as defined in the Act; (b) that the community possessed ‘a right in land’ as defined in the Act (see fn 30); (c) that they were dispossessed of such right after 19 June 1913 (see also fn 33); (d) that the dispossession occurred as a result of racially discriminatory laws or practices; and (e) that the claim was not lodged after 31 December 1998.

²⁹ *Richtersveld Community v Alexkor Ltd* 2003 6 SA 104 (SCA) (hereafter referred to as SCA).

³⁰ In s 1 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.”

³¹ SCA par 90-110.

³² *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 469 (CC) (hereafter referred to as CC).

³³ In terms of s 2(1)(d) and (e) of the Restitution of Land Rights Act 22 of 1994 only a dispossession of a right in land after 19 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 land claim had to be instituted before 31 December 1998. The dispossession date of 19 June 1913 is also constitutionally entrenched in s 25(7) of the Constitution of the Republic of South Africa of 1996.

³⁴ CC par 10.

³⁵ (1888) 14 AC 46. 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 Henderson, Benson & Findlay (2000) 212-226; Slattery (2000) 14-15.

nature of the right was therefore described in common law terminology with emphasis on exclusivity. This definition was upheld by the British Columbia Court of Appeal.

For the purposes of a retrial, the Supreme Court of Canada found it necessary to define aboriginal title comprehensively, and to give an exposition of the content of aboriginal title and the way in which it has to be proven. It is impossible to explore all the issues of the judgment of the Supreme Court, but the discussion will be limited to the nature of aboriginal land tenure. The court found that the subsequent jurisprudence attempted to grapple with the definition of aboriginal title in *St Catherine's Milling and Lumber Co v The Queen*³⁶ as a personal and usufructuary right, "...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".³⁷ Therefore aboriginal title is defined by the Supreme Court as a *sui generis* interest in land:

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 to be reference to both common law and aboriginal perspectives.³⁸

Although this definition refers to principles of both exclusive common law and inclusive aboriginal land tenure, the communal and inclusive nature of aboriginal title is further emphasised by the following:

Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may themselves be aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need to be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title. This inherent limit, to be explained more fully below, flows from the definition of aboriginal title as a *sui generis* interest in land, and is one way in which aboriginal title is distinct from fee simple.³⁹

³⁶ (1888) 14 AC 46.

³⁷ *Delgamuukw* par 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 common law property right. Regarding the *sui generis* nature of aboriginal title, see Henderson, Benson & Findlay (2000) 401-418; McNeil (2000) 58-59 and Slattery (2000) 11-13. 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. See the authority cited by Slattery (2000) 27 n 1 and also *Guerin v R* [1984] SCR 335 at 382.

³⁸ *Ibid.*

³⁹ *Delgamuukw* par 111; Henderson, Benson & Findlay (2000) 227-231.

Aboriginal title is a Canadian common law right⁴⁰ to land protected by section 35(1) of the Constitution Act of 1982.⁴¹ Section 35(1) did not create aboriginal rights, but accorded constitutional status to the rights existing in 1982, including aboriginal title.⁴² The recognition of aboriginal rights as constitutionally protected rights raises the question of the relationship between aboriginal rights and aboriginal title. There is a difference between aboriginal *rights* to engage in particular activities (*eg* hunting, fishing and trapping) and aboriginal *title*. Though they are related concepts with broad similarities, they should be distinguished from each other. Aboriginal title is the aspect of aboriginal rights related specifically to aboriginal claims to land; it is the way in which the Canadian common law recognises aboriginal land rights.⁴³ It is therefore more than a right to engage in specific activities which may themselves be aboriginal rights. Therefore, if a claim of an aboriginal right relates to an activity which is land-based, it is not necessarily a claim for aboriginal title.

Although aboriginal title is one of the aboriginal rights recognised by section 35(1), it is distinct from other aboriginal rights because it arises where the connection of the group with a piece of land *was of central significance to their distinctive culture*.⁴⁴ Aboriginal rights which are recognised and affirmed by section 35(1) fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the occupation and use of the land where the activity is taking place is not sufficient to support a claim of title to the land. Although these activities receive constitutional protection, they cannot be defined as aboriginal title. In the middle there are activities which, out of necessity, take place on land and might be intimately related to a piece of land. In such a case the aboriginal rights may be site specific, for example the exercise of hunting rights on a specific tract of land, but it does not form part of their “occupation and use of the land as central significance to their distinctive culture”. It is therefore defined as aboriginal rights which may be exercised on a specific tract of land, but do not confer aboriginal title to the group.⁴⁵ At the other end of the spectrum is aboriginal title itself. It confers more than the right to engage in site-specific activities – it is a right to the land itself which is of central significance to their distinctive culture.⁴⁶

Aboriginal title encompasses the right to exclusive⁴⁷ use and occupation by the community of the land held pursuant to that title for a variety of purposes. The term “exclusive” may be misleading. The exclusivity is always related to the rights exercised by the community and not to individualised rights. As it is a *sui generis* concept, those purposes need not be aspects of the original practices, customs and traditions which are integral to distinctive aboriginal cultures.⁴⁸ Relying on Canadian jurisprudence, section 18 of the Indian Act⁴⁹ and the Indian

⁴⁰ By contrast, the South African Supreme Court of Appeal and Constitutional Court found it unnecessary to recognise aboriginal title, but described it as a customary law interest in land (SCA) and indigenous ownership or title (CC) – see 3.2 below.

⁴¹ S 35(1): “(T)he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” See also Henderson, Benson & Findlay (2000) 350-363; Henderson (2001) 1-32.

⁴² *R v Van der Peet* [1996] 2 SCR 507 par 28-29. See also Slattery (2000) 23-25 and McNeil (2000) 61.

⁴³ Regarding aboriginal rights, see *R v Van der Peet* [1996] 2 SCR 507 par 33 and 74; *R v Bernard* [2003] 4 CNLR par 33 and 34; Henderson, Benson & Findlay (2000) 240-241.

⁴⁴ *Delgamuukw* par 137 and 138; also *R v Adams* [1996] 3 SCR 101.

⁴⁵ An example of these rights is the exercise of hunting rights by a nomadic group on a specific tract of land.

⁴⁶ *Delgamuukw* par 138.

⁴⁷ With regard to the exclusivity of aboriginal title, see *Delgamuukw* par 118; Slattery (2000) 17-18; McNeil (2000) 58-59.

⁴⁸ *Delgamuukw* par 118-124.

Oil and Gas Act,⁵⁰ the Supreme Court found that the content of aboriginal title is not restricted to those traditional uses, practices and customs of the aboriginal group claiming the right.⁵¹ A community may for instance exercise mineral rights on land held by virtue of aboriginal title, although the exercise of mineral rights was not part of their customs, practice and traditions. But it must form part of their inclusive communal activities.

On the other hand, there is an inherent limitation in that land held pursuant to aboriginal title cannot be used in a manner irreconcilable with the nature of the aboriginal people's attachment to the land.⁵² This is a manifestation of the principle that the interest in land is *sui generis* and distinct from "normal" proprietary interests. The use of land must be consistent with the nature of the occupation and the relationship that the specific community has with the land that has given rise to aboriginal title in the first instance. This inherent limitation is linked to the need to maintain the continuity of an aboriginal community's special relationship with their land.⁵³ For example, land used for hunting ground may not be used for strip mining, as it destroys its value for the original purpose on which the aboriginal title is based. It is for this reason that land held by virtue of aboriginal title may not be alienated without the consent of the specific community.

In *Delgamuukw* it was stated that aboriginal title is not absolute, but may be infringed by government only if justifiable.⁵⁴ The test of justification, the so-called *Sparrow* test,⁵⁵ has two prerequisites, namely:

(i) The infringement of aboriginal title must be in the furtherance of a legislative objective that is compelling and substantial. This objective may often be the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the crown. As a result of the existence of distinctive aboriginal societies within the broader social political and economic community over which the crown is sovereign, there are circumstances where the rights of an aboriginal community must be infringed or limited as part of the reconciliation with the broader political community of which it is part. This is especially the case where such infringements are of sufficient importance to the broader community as a whole, *eg* the conservation of fisheries, which acknowledges that fishing is integral to many aboriginal cultures, and also seeks to reconcile aboriginal societies with the broader community by ensuring that there are enough fish for all.⁵⁶

(ii) The infringement must be consistent with the special fiduciary relationship between the crown and aboriginal peoples. Although there is case law to the effect that the special fiduciary duty of the crown requires that aboriginal interests be placed first,⁵⁷ it must be contextualised in that the specific circumstances of these cases necessitated priority to aboriginal interests. Other circumstances may require that the fiduciary duty be applied in

⁴⁹ Amended in 1985.

⁵⁰ Amended in 1985

⁵¹ See, though, the critical comment of justice La Forest in *Delgamuukw* par 192.

⁵² *Delgamuukw* par 125-132.

⁵³ Regarding the spiritual connection of aboriginal people with their land, see Henderson (2001) 3.4 and 13.

⁵⁴ *Delgamuukw* par 160; this is a consequence of the constitutional protection of aboriginal rights by s 35(1). See also Henderson et al *Aboriginal title* 364-371; McNeil *Aboriginal title* 62.

⁵⁵ With reference to *R v Sparrow* [1990] 1 SCR 1075.

⁵⁶ *Delgamuukw* par 161; *R v Sparrow* [1990] 1 SCR 1075 par 75.

⁵⁷ *R v Sparrow* [1990] 1 SCR 1114-1115; Cassidy "The stolen generation: Canadian and Australian approaches to fiduciary duties" 2002/2003 *Ottawa LR* 177-238.

other ways, for instance by limitation of the interest of aboriginal people, taking into consideration the extent of infringement in order to effect the desired result, the availability of fair compensation and whether the aboriginal group in question has been consulted with respect to the measures being implemented.⁵⁸ The test is whether the government has taken the aboriginal rights into account and has allocated a resource “in a manner respectful of that priority”.⁵⁹

The inclusive nature of aboriginal title is indicated by the following characteristics:⁶⁰

- (i) It is a *sui generis* Canadian common law right to land distinct from English fee simple, French civil law or aboriginal land rights. It entails the exclusive use and occupation of land by a community.⁶¹ The exclusivity must be contextualised as communal land tenure, and not individualised land rights.
- (ii) It is constitutionally protected by section 35(1) of the Constitution Act of 1982, which protects aboriginal rights.⁶²
- (iii) Although it is an aboriginal right, it is qualified by the fact that the connection of a group with a piece of land is of central significance to their distinctive culture.⁶³
- (iv) The land is inalienable, except to the crown.
- (v) The land is communally held. All decisions pertaining to the land must be made by the community.
- (vi) The source of aboriginal title was not its recognition by the Royal Proclamation of 1763, but the prior occupation of Canada by aboriginal peoples. Aboriginal title is also *sui generis* in the sense that it arose from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arose afterwards.⁶⁴
- (vii) Aboriginal title is not absolute. It may be infringed by both the federal and provincial governments, but only when justified.⁶⁵

3.2 Richtersveld – a customary law interest in land; indigenous ownership

The British crown acquired the Richtersveld by proclamation on 17 December 1847 after consultation with and consent by the leaders of the Richtersveld people.⁶⁶ The Land Claims Court held that the plaintiffs had no right to the subject land based on ownership, as no indigenous land rights survived the annexation. The colonial government regarded the Richtersveld as *terra nullius* because the inhabitants were insufficiently civilised.⁶⁷ This finding was rejected by the Supreme Court of Appeal.⁶⁸

⁵⁸ *Delgamuukw* par 162; Cassidy 2002/2003 *Ottawa LR* 177-238; McNeil “Extinguishment of aboriginal title in Canada: treaties, legislation, and judicial discretion” 2001/2002 *Ottawa LR* 301-346.

⁵⁹ *R v Gladstone* [1996] 2 SCR 723 par 62.

⁶⁰ *Delgamuukw* par 112-115. See also Slattery (2000) 13-17 and Henderson, Benson & Findlay (2000) 351-363.

⁶¹ With regard to the exclusivity of use and occupation, see *Delgamuukw* par 118; Slattery (2000) 13-17 and fn 47 above.

⁶² Also McNeil (2000) 61-65. Slattery (2000) 22 describes it as “...a true property right that may be maintained against the whole world, including the Crown.”

⁶³ See 2 above.

⁶⁴ See in this regard also McNeil “The meaning of aboriginal title” in Asch (ed) *Aboriginal and treaty rights in Canada* (1997) 135 144; Henderson (2001) 10-11.

⁶⁵ *Delgamuukw* par 160-169. On infringements by provincial legislation, see also Slattery (2000) 22-26.

⁶⁶ Ülgen 2002 *JAL* 133-138.

⁶⁷ LCC par 37-41. See, though, Bennett & Powell “Aboriginal title in South Africa revisited” 1999 *SAJHR* 449 459 and the discussion of the contemporary rejection of the decision by the Privy Council in *Re Southern Rhodesia* [1919] AC 211 (PC) on the *terra nullius* principle.

⁶⁸ SCA par 35, with reference to Bennett & Powell 1999 *SAJHR* 459.

Furthermore the Land Claims Court held that the Richtersveld people might have the right of possession and use of the subject land based on aboriginal title as applied in the United States, Canada, Australia and New Zealand.⁶⁹ However, it found that the recognition of the existence of aboriginal title in South African law falls outside the jurisdiction of the Land Claims Court, which is bound to the stipulations of the Restitution of Land Rights Act 22 of 1994. The Act explicitly limits land claims to dispossessions after 19 June 1913.⁷⁰ The function to develop the Roman-Dutch law and customary law is constitutionally allocated to the Supreme Court and the Constitutional Court. Therefore it was the contention that the Land Claims Court was restricted to the application of the Restitution of Land Rights Act.⁷¹

The Supreme Court of Appeal first examined whether the doctrine of aboriginal title could be incorporated in the South African law by developing the Roman-Dutch law in the same way it was developed in other countries with a colonial history.⁷² It was held that aboriginal title is rooted in and is the creature of traditional laws and customs.⁷³ 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.⁷⁴ Aboriginal title does not conform to the typical Roman-Dutch concepts of ownership and is *sui generis* in nature. However, with reference to comments on the Land Claims Court decision,⁷⁵ the Supreme Court of Appeal indicated that there are several hazards associated with the recognition of aboriginal title in South African law. Some commentators indicated that this was the reason for the 1913 cut-off date for land claims in the Constitution and the Restitution of Land Rights Act, and the fact that the date of dispossession was not applied with retroactive effect to the time of colonial annexation. Referring to other commentators⁷⁶ who expressed the opinion that aboriginal title can be a legitimate and workable part of South African law, it was held:⁷⁷

⁶⁹ The Land Claims Court referred *inter alia* to *Mabo v The State of Queensland (No 2)* (1992) 175 CLR 1; *Delgamuukw v British Columbia* [1997] 3 SCR 1010 and Bennett and Powells's articles in 1999 *SAJHR* 449 and "The state as trustee of land" 2000 *SAJHR* 601.

⁷⁰ See fn 33 above.

⁷¹ LCC par 49-53. See in this regard the SCA par 43, who left the matter open. See also the Constitution of the Republic of South Africa of 1996 ss 8(3), 39(2) and 173; Hoq 2002 *SAJHR* 426-431 and the authority cited in fn 78 below regarding Roman-Dutch law as part of South African common law.

⁷² S 8(3) of the Constitution of the Republic of South Africa of 1996 provides 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) of the Constitution provides for the same measure regarding customary law. See also De Waal Currie & Erasmus *The Bill of Rights Handbook* (2000) 69-70 and the authority cited there.

⁷³ SCA par 36-43.

⁷⁴ Ülgen 2002 *JAL* 133-138; see also Steytler "The renaissance of traditional ownership of land" 2000 *Butterworths Property Law Digest* 3 9-10.

⁷⁵ Roux "The Restitution of Land Rights Act" in Budlender, Latsky & Roux (eds) *Juta's New Land Law* (1998) 3A 16; Hoq 2002 *SAJHR* 435.

⁷⁶ Bennett & Powell 1999 *SAJHR* 450-451; Reilly "The Australian experience of aboriginal title: lessons for South Africa" 2000 *SAJHR* 512 528.

⁷⁷ SCA par 43.

All aspects of the doctrine (of aboriginal title) do not fit comfortably into our common (Roman-Dutch) law.⁷⁸ For instance, the idea that the State or Crown possesses radical title to all land may have its origin in English feudal law and may be foreign to our law. In view of my conclusion that a customary law interest, for which the Act expressly provides, has been established in the present case, it is not necessary to pursue the matter any further and it becomes unnecessary to decide whether the doctrine forms part of our common law or whether our common law should be developed to recognise aboriginal rights. This conclusion also obviates any resolution of the question whether the LCC is entitled to ‘develop’ the common law, an issue dealt with at some length in its judgment (at paras [49] – [53]).

This conclusion of the Supreme Court of Appeal is unsatisfactory. It is true that the English doctrine of radical title by the state does not form part of South African common law, but in Canada the main practical significance of the crown’s ultimate title in the case of fee simple is that the land reverts to the crown if the owner dies without leaving an heir to the estate.⁷⁹ Except for the theoretical differences between Roman-Dutch ownership and Canadian common law fee simple, both are predominantly based on exclusivity. Consequently, not too much should be made of this distinction with regard to the inclusive nature of indigenous law. The Supreme Court of Appeal furthermore acknowledged that aboriginal title is *sui generis* and does not conform to the typical common-law concepts of property, but rejected the doctrine because “...all aspects of the doctrine do not fit comfortably into our common (Roman-Dutch) law”.⁸⁰ It is clear that the Supreme Court of Appeal tried to keep as far as possible with Roman-Dutch concepts in their description of the exclusive nature of the interest in land instead of recognising the inclusive communal aspect thereof.⁸¹ Therefore the nature of the customary law interest in land is described with reference to Roman-Dutch ownership:

...[A]t 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*.⁸² In my view, counsel were driven to this concession by the uncontested facts.⁸³

The Supreme Court of Appeal clearly confused the “exclusive” use and occupation of the land by the Richtersveld people (as a community) with the exclusivity of the Roman-Dutch concept of ownership.

The Constitutional Court confirmed the finding of the Supreme Court of Appeal 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.⁸⁴ However, the

⁷⁸ The South African common law is comprised of a mixture of Roman-Dutch law and English law – see Zimmermann & Visser (eds) *Southern Cross – Civil and common law in South Africa* (1996) 1-30. Regarding the redefining of ownership and the influence of common law developments on pure Roman-Dutch property principles, see Milton *Southern Cross* 697-699 and the authority cited there.

⁷⁹ See especially McNeil (2000) 57 and Slattery (2000) 14.

⁸⁰ SCA par 43.

⁸¹ SCA par 26; see also Steytler 2000 *BPLD* 4-5.

⁸² My emphasis.

⁸³ Of both respondents Alexkor Ltd and the South African Government.

⁸⁴ CC par 48.

Constitutional Court 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 Roman-Dutch ownership".⁸⁵ The nature and content of the right of the Richtersveld community to the subject land must be determined by reference to indigenous law, and not common (Roman-Dutch) law.⁸⁶ It was proven by the evidence that the Richtersveld people's right to the subject land survived annexation⁸⁷ and therefore the nature and content of their right have to be determined according to their indigenous law and custom up to the date of their dispossession. In this regard the Constitutional Court cautioned:⁸⁸

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.

Although the Constitutional Court refrained from recognising aboriginal title explicitly, the inclusive nature of the customary law ownership (indigenous title) to land is described with reference to the requirements for the recognition of aboriginal title in other legal systems. It is therefore questionable whether indigenous title in South Africa is a fundamentally different concept from aboriginal title elsewhere. The main difference is that customary law ownership in South Africa is for the purpose of land claims not retroactively recognised from the date of annexation, but restricted to the statutory cut-off date of 19 June 1913.

The content of the customary law interest in land also encompasses a right to minerals and other natural resources.⁸⁹ The Supreme Court of Appeal used 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 even granted mineral leases to outsiders as early as 1856. The evidence clearly establishes that the Richtersveld community believed that the right to minerals belonged to them and that they acted in a manner consistent with such a belief. The minerals were 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

⁸⁵ SCA par 29.

⁸⁶ 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".

⁸⁷ CC par 65-69; see also Ülgen 2002 *JAL* 144-147.

⁸⁸ CC par 51. See also par 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."

⁸⁹ SCA par 85-89.

them. Although there is no proof of mining activities by the Richtersveld community on the subject land itself, it is 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 people⁹⁰ to appropriate for themselves the right to minerals and natural resources on the land and that this custom had been continued from earlier days.

Therefore, the Constitutional Court concluded that the nature of the customary law interest in land (also referred to as “indigenous title to land”)⁹¹ is “...a right of communal ownership under indigenous law”, including communal ownership of the minerals and precious stones.⁹² The inclusiveness of indigenous title is indicated by the following characteristics:

- (i) communality;
- (ii) inalienability;
- (iii) exclusive use and occupation by the community;
- (iv) the right to exploit natural sources above and below the surface, including the minerals.⁹³

Therefore, it is a true property right with economic implications.

By contrast with Canadian law, the state’s fiduciary duty towards vulnerable rural people and communities after land restitution has not been clearly stated in South Africa, even after the acceptance of the 1996 Constitution.⁹⁴ Although some private law trust principles are applied, the South African courts have not developed any doctrine to circumscribe the state’s duty and powers to act in the interest of vulnerable rural communities. This is an aspect of indigenous ownership that is to some extent addressed by the Communal Land Rights Act 11 of 2004, but it has to be developed further by formulating a suitable rural land policy. There are still too many incidences of rural communities and communal property associations which do not receive any advice or assistance after the restoration of land, resulting in failure of farming or business enterprises and escalation of poverty.⁹⁵

4. A Redefinition of Property?

Several legal aspects have emerged from the decisions of the Supreme Court of Canada and the Constitutional Court of South Africa.

4.1 The *sui generis* nature of aboriginal title and indigenous ownership

This aspect is applied in different ways in Canada and South Africa. In Canada the *sui generis* nature implies an inclusive and autonomous system of land tenure that bridges the gulf between aboriginal land systems, English common law and French civil law. It was nourished by, but is distinct from these systems.⁹⁶ Its *sui generis* character implies that the principle of

⁹⁰ With reference to *R v Van der Peet* [1996] SCR 289 par 60.

⁹¹ CC par 57 and 62.

⁹² CC par 64.

⁹³ CC par 62-64.

⁹⁴ See in this regard Bennett & Powell “The state as trustee of land” 2000 *SAJHR* 601-622.

⁹⁵ Nonyana “Communal property associations and their impact on the formation of small business in the rural sector” 2000 *Butterworths Property Law Digest* 2-7; De Villiers *Land reform – issues and challenges* (2003) 69-70; Pienaar “Security of communal land tenure” 2004 *JSAL* 244 246-247.

⁹⁶ Slattery (2000) 11; McNeil (2000) 58-59.

inclusivity of aboriginal land tenure has been combined with the exclusivity of common and civil law principles. An example of this cross-pollination is that a right to land communally held as aboriginal title may be converted into private property (fee simple).⁹⁷ A prerequisite for such conversion is that the decision to modify or surrender aboriginal title must be made by the collective decision of the community as a whole in accordance with aboriginal law.⁹⁸ In this sense Canadian property law has been enriched and developed by the recognition of aboriginal title.

In South Africa the *sui generis* nature of indigenous ownership as an inclusive and communal right is emphasised.⁹⁹ The content of the right should not be described with reference to the exclusivity of Roman-Dutch principles, but in terms of the inclusivity of indigenous law as an independent source of norms within the South African legal system. Although indigenous ownership is a customary law concept, it depends for its ultimate force and validity on the Constitution.¹⁰⁰ The courts are obliged to apply customary law when applicable, subject to the Constitution and any legislation that deals with customary law. In this regard indigenous ownership in South Africa is described according to customary law principles within the amalgam of South African property law.¹⁰¹ The redefinition of property took place with the advent of the new constitutional dispensation in South Africa in 1994, recognising the inclusivity of indigenous ownership alongside the exclusivity of the Roman-Dutch ownership.

4.2 Self-determination

As aboriginal title is a right to land communally held, it gives rise in Canada to the question of self-determination.¹⁰² In negotiations a process of mutual recognition is to be followed: the crown has to recognise aboriginal title and the jurisdiction of first nations over traditional territories, and the first nations have to recognise the crown's underlying title and federal jurisdiction, which is limited to infringements which are justified and have to be compensated.¹⁰³ The effect of this is that a protective sphere has been created in which customary law may develop and flourish.¹⁰⁴

In South Africa the question of self-determination is central to indigenous ownership. The Supreme Court of Appeal (par 18) and the Constitutional Court (par 58) clearly indicated that the land should be used, occupied and managed according to indigenous law concepts, which included communality, inalienability, cultural uses and historical entitlements, such as the use of minerals. However, these entitlements only concerned the use of the land and local self-determination and are recognised within the broader spectrum of the spirit, purport and objects of the Bill of Rights. For the recognition of self-determination on provincial and national level, special national legislation has to be promulgated in accordance with section

⁹⁷ Woodward "Converting the communal aboriginal interest into private property" in Lippert (ed) (2000) 93-102.

⁹⁸ With regard to the *sui generis* nature of aboriginal law, see Henderson (2001) 1-32.

⁹⁹ CC par 51, 57 and 102.

¹⁰⁰ S 211(3) of the Constitution.

¹⁰¹ See the authority cited in fn 3 above; also s 39(2) of the Constitution, which prescribes that the spirit, purport and objects of the Bill of Rights should be promoted when applying or developing customary law.

¹⁰² *Delgamuukw* par 115: "Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community." See also par 170-171; Macklem "Distributing sovereignty: Indian nations and equality of peoples" 1993 *Stanford LR* 1311-1342; Slattery (2000) 16; McNeil (2000) 59-60; Henderson (2001) 28.

¹⁰³ Robertson (2000) 136-137; McNeil "Extinguishment of aboriginal title in Canada: treaties, legislation, and judicial discretion" 2001/2002 *Ottawa LR* 301-346.

¹⁰⁴ Slattery (2000) 16; Henderson (2001) 10-12.

235 of the Constitution.¹⁰⁵ Although this possibility is slim, it is not altogether ruled out by the Constitution.

4.3 The fiduciary duty of the state

Canadian law, like South African law, acknowledges that aboriginal title is not absolute, but there are well-developed measures in Canada to recognise the spiritual attachment of aboriginal people to their land. This is manifested in the *Sparrow* test for the justification of infringements. The fiduciary duty of the crown towards aboriginal people and their land rights is emphasised throughout this process. Such a fiduciary duty has not been clearly stated in South Africa, even after the acceptance of the 1996 Constitution.¹⁰⁶ Although some private law trust principles are applied, the South African courts have not developed any doctrine to circumscribe the state's duty and powers to act in the interest of vulnerable groups. This is an aspect of indigenous ownership that has to be developed further, especially in the formulation of a suitable rural land policy.

4.4 Evidentiary requirements

In both jurisdictions evidence of use and occupation must be interpreted with a consciousness of the special nature of aboriginal title and indigenous ownership respectively. Exclusive use and occupation in this context do not indicate exclusive ownership (as was found by the Supreme Court of British Columbia and the Supreme Court of Appeal of South Africa). It must be interpreted as inclusive and communal within the framework of aboriginal title in Canada and indigenous ownership in South Africa as communal land tenure rights. Evidence in the form of oral histories and legends must be allowed, and courts have to 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."¹⁰⁷ The courts must not undervalue the evidence presented by claimants simply because that evidence does not conform precisely to the evidentiary standards that would be applied in other private law matters.

Property law is never static. The process in Canada to recognise aboriginal title as part of the Canadian common law, but consisting of aspects of common law, civil law and aboriginal land tenure, and in South Africa to describe indigenous law ownership as part of the amalgam of constitutionally protected property, distinct from Roman-Dutch law, is an indication of the virility of property law. Anna Grear calls this the "identifiable cross-currents between exclusive and inclusive impulses in our relationship with land",¹⁰⁸ Nicholas Blomley writes about "rethinking the social and personal entanglements of property"¹⁰⁹ and Doug Moodie refers to this phenomena as "thinking outside the 20th century box".¹¹⁰

¹⁰⁵ S 235: "The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation." See also Ülgen 2000 *NILR* 146-147 and the authority cited there.

¹⁰⁶ See in this regard Bennett & Powell "The state as trustee of land" 2000 *SAJHR* 601-622.

¹⁰⁷ *Delgamuukw*

¹⁰⁸ Grear (2003) 35.

¹⁰⁹ Blomley "Who owns the land? Restitution and the geographies of property" 13-15 September 2006 *Land, Memory, Reconstruction and Justice Conference*, Houwhoek, South Africa 1-18 12.

¹¹⁰ Moodie "Thinking outside the 20th century box: some comments on the politics of judicial law-making in the context of aboriginal self-government" 2003/2004 *Ottawa Law Review* 3-41.

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