NOW ANOTHER THING MUST HAPPEN: RICHTERSVELD AND THE DILEMNAS OF LAND REFORM IN POST-APARTHEID SOUTH AFRICA

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ABSTRACT

The Constitutional Court's decision in the Richtersveld case, recognising the Richtersveld community's right to restitution of the lands they had been dispossessed of in the 1920s, was hailed as a victory for the cause of justice in South Africa. Of legal interest is the South African court's consideration, for the first time, of the doctrine of aboriginal title. This article explores the theories of justice that underpin the decision, contending that the justice claims made by the parties are more complicated than they first appear. While the Richtersveld community's claim is predominately grounded in the politics of recognition, the government's defence can be understood with reference to the politics of redistribution. This article explores some of the complications raised by the competing theories of justice that underlie the positions of the parties. While redressing past injustices will usually further broader objectives of social justice generally, the Richtersveld decision illustrates that this is not necessarily the case. Tensions can arise between competing justice claims, and there is always a danger that righting one injustice may be perpetuating or even creating other injustices. The purpose of the article is not to suggest a solution to these tensions, but merely to explore the complications, and to suggest that there are many aspects of restitutionary claims that need further theorising.

1 INTRODUCTION

The land was up for grabs. You grabbed. That's history. Now another thing must happen.1

In October of 2003, the Constitutional Court rendered a decision in a landmark case, where it considered the doctrine of aboriginal title in South Africa for the first time.2 In the 1920s, the Richtersveld Community had been pushed off their land by a racist government anxious to access the diamonds that had been found there. In order to

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make a claim for restitution under the Restitution of Land Rights Act 22 of 1994 ('Restitution Act'), the Richtersveld Community had to establish that they had a right in the land at the time of the dispossession. The Court’s recognition of the Richtersveld Community’s right in land based in customary law was hailed as a resounding victory, not just for the people of Richtersveld, but for the cause of justice in South Africa. What the media seemed to overlook is that the diamond mine that was returned to the Richtersveld Community, at a net worth of R10 billion, was generating some R84 million in annual revenue for the post-apartheid South African government - badly needed revenue that could be used for the benefit of the people of South Africa as a whole.

The land question has always been critical in South Africa. Tensions over land began in the colonial era, particular as Boer Voortrekkers moved inland, displacing indigenous Africans as they went. Land became perhaps an even more central issue during the apartheid regime. As Olivia Zirker describes it:

In apartheid South Africa, land was the pillar of the apartheid structure. The apartheid government used land as a means of economically and socially suppressing the African majority. By depriving Africans of property rights the foundation was set for profound poverty and social instability. The deprivation of property rights set the stage for the profound adversity Africans endured under apartheid.

Return of the land was a rallying cry of the anti-apartheid resistance movement, and in the 1990s, as the transition was made to a racially open government, hopes were high that stolen lands would be returned. The post-apartheid government has engaged in an ambitious program of land redistribution and restitution. Unfortunately, resources are tight, the process is complicated, and it has become apparent that many landless

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4 The total cost to the government is actually a more complicated calculation. The Richtersveld Community may be owed some compensation for mineral assets taken from their land since the 1920s. At the same time, the government has made a considerable capital investment in the mine, for which it will likely be compensated. The community and the government have both expressed interest in negotiating the eventual settlement. For the sake of the argument in this paper, the R84 million annual revenue, and R10 billion present value figures will be used as stand-ins for the total cost to the government. There is also no way of knowing whether this R84 million would have gone towards social problems aimed at poor South Africans in general, or more specifically towards settling other restitutionary land claims, or land redistribution initiatives. It might have been used to finance tax cuts for the wealthy, or controversial military expenditures. But for the sake of this paper, it will be assumed that profits from the mine are an asset that could have and ought to have been used to ameliorate the plight of poor and landless black South Africans.

5 OI Zirker 'This Land is my Land: The Evolution of Property Rights in South Africa' (2003) 18 Corn J of Int L 621.
black South Africans are unlikely ever to see a benefit from the land reform programs.

The land claims process is on its face about righting past injustice, but lurking within are claims of culture. This is particularly true now that the doctrine of aboriginal title has been introduced into the mix. This article will not explore the legal issues raised in Richtersveld so much as examine the arguments that underlie the parties’ positions. The ultimate question is whether, in light of South Africa’s history and present context, Richtersveld is a just decision. This article will explore what justice means in the context of South African land reform. My contention is that the normative claims made by the parties to the Richtersveld decision are actually more complicated than they initially appear. While on its face Richtersveld is about restitutitional justice, there is much more going on: questions about de-colonisation, self-determination, cultural ties to land, and transitional justice are all raised. This article will concentrate on the relationship between the pulls of recognition and redistribution, borrowing from Nancy Fraser’s well-known essay. My concern is that the outcome of Richtersveld could be that redistribution has been sacrificed to recognition, and that in the context of South Africa in particular, this may exacerbate rather than relieve some of the post-apartheid injustices the country is trying to rectify.

Before reaching this analysis, I have devoted the initial sections of the article to providing some historical background about South Africa, the land claims process, and the Richtersveld Community. Since this article is an attempt to get at the normative issues raised by Richtersveld, this background is not meant to be exhaustive, and I have avoided delving into a detailed analysis of the politics and policies surrounding the land question. My intent is merely to provide some context for the more substantive analysis that occurs in sections VI through VIII, in which I explore the normative claims made by each side of the Richtersveld litigation. My hope is to show both the merits, and some critiques of each claim, in order to better expose the full complexity of the case.

II LAYING THE APARTHEID MAP

Most of the territory that is modern South Africa was first claimed for Holland by the Dutch East India Company in 1652. The first indigenous peoples encountered by the Dutch traders were the hunter-gatherer San and pastoral Khoi Khoi peoples of the Cape area. Local Khoi Khoi were almost immediately driven out of their traditional grazing land below Table Mountain. Only those prepared to work for the Company

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7 Alternate spellings of Khoi Khoi include Khoi, Khoikhoi, and Khoe Khoe. In the absence of anything that appears to be authoritative spelling, I have opted to use the same spelling used by the Land Claims Court in the Richtersveld decision.
were permitted to remain on their former grazing lands.8 The Boers brought slaves with them from the Dutch East Indies, and also enslaved local Khoi Khoi.9 Over the course of the eighteenth and nineteenth centuries the San and Khoi Khoi, and later the African chiefdoms to the north and east of the Cape, lost most of their land to the white settlers.10

In 1795 the Cape Colony was captured by the British, and cession from the Netherlands occurred in 1806. Tensions between the Boers and the British government, particularly with regard to race relations, prompted the ‘Great Trek’, an exodus of about 15 000 Boer settlers northward into the interior.11 The Trek, which lasted from 1836-38, led to bloody confrontations with the African peoples of the interior, who resisted the expansion. The movement of the trekkers into the interior was aided by the aftermath of the Mfecane, a period of major dislocation and warfare amongst the Bantu-speaking peoples, that occurred in the early nineteenth century. Eventually the Boers established the republics of Natal, Orange Free State and the Transvaal. Beginning in the 1870s, the British began an aggressive policy of expansion, and over the next two decades conquered Basutoland, Griqualand West, the South African Republic in the Transvaal, the Transkei and Bechuanaland, and brought the Zulu and Pedi lands under their control.12 Tensions between the British and Boers culminated in the South African War which broke out in 1899, and ended with British victory in 1902.

Despite the general animosity between the Boers and indigenous Africans, the Roman-Dutch legal system that they established did recognise indigenous customary law.13 When the Western Cape was ceded to Britain in 1806, the British recognised only Roman-Dutch law, and the land titles issued under it. Pre-colonial land holdings of the Khoi Khoi and San were ignored.14 In Natal, where British colonisers were in a relatively weak position compared to the Cape, traditional forms of government and customary law were recognised and supported.15 Customary land law amongst South Africa’s indigenous groups differed from group to group, but generally land was communally held, and all members of the community had rights both to access communal

10 Platzyk & Walker (note 8 above) 72. N Worden *The Making of Modern South Africa: Conquest, Segregation and Apartheid* (1994) ch1.2 provides a detailed account of this process.
11 Prior to the Great Trek, there had been several smaller treks of Boer settlers, but these were different both in scale and intent. Conflict over colonial policies was not the only reason for the Trek. Economic impoverishment also played an important role. Worden (ibid) 12.
12 Ibid 19.
14 TW Bennett & CH Powell ‘Aboriginal Title in South Africa Revisited’ (1999) 15 SAJHR 449, 481.
15 Platzyk & Walker (note 8 above) 76.
resources (such as water and firewood), and to individual parcels of land that were allocated on the basis of need.16

The British set up the first reserve in the eastern Cape in 1847.17 In Natal, Theophilus Shepton, the Secretary of State for Native Affairs in the 1850s, managed to confine the majority of Africans to eight reserves, despite the fact that they greatly outnumbered the white settlers.18 Shepton felt that the indigenous inhabitants would be harmed by contact with the Europeans, and sought to protect traditional ways of life.19 In contrast, Sir George Grey, Governor of the Cape Colony from 1854 to 1861, imposed a ‘native policy’ aimed at ‘civilising’ the indigenous Africans. This included promotion of individual tenure over the traditional system of communal tenure.20 In the Transvaal and Orange Free State, very little land was set aside for reserves. Until the discovery of gold in 1886, land was the only major resource in the Boer republics, and farmers felt reserves threatened both their access to land and the supply of cheap labour.21

In 1910 the Cape, Natal, Transvaal and Orange Free State came together to form the Union of South Africa. The new country’s constitution expanded the system of racial separation already in existence.22 The beginning of the twentieth century was marked by conflict over a uniform native policy. Differences inherited from the pre-Union policies in each province were exacerbated by new economic interests: while white farmers had tended to oppose the establishment of reserves, the increasingly powerful industrial sector – particularly the mining industry – favoured them.23

Although apartheid did not become official state policy until 1948, the 1913 Natives Land Act is considered to have laid the foundation for apartheid land policies.24 Under this act land was divided into ‘land for natives’ and ‘land for persons other than natives’. Each group was prevented from having an interest in land outside of their area, and most land was reserved for whites. Black Africans were confined to ‘Native Reserves’, which were established in areas removed from white-owned farms and key areas of commercial agriculture.25 The reserves were

19 Ibid.
20 Platzky & Walker (note 8 above) 75.
21 Ibid 72-3.
22 Coles (note 17 above) 710.
23 Platzky & Walker (note 8 above) 82-3.
24 Coles (note 17 above) 711.
25 Worden (note 10 above) 49.
basically the same as those that had been set up in the provinces prior to 1910, and were concentrated in the Cape and Natal. In 1936 the Native Trust and Land Act was passed, which increased the amount of land allocated to the reserves by the Natives Land Act to 13 per cent of the total area of the country. The following year, the Native Laws Amendment Act was enacted, which prevented blacks from buying land in urban areas. Apartheid became official state policy in 1948, with the election of the National Party. The 1950 Population Registration Act set up a system to classify all South Africans as either white, Indian, Coloured or black (Bantu). Another act of the same year, the Group Areas Act, designated land according to these racial classifications. The Blacks Resettlement Act of 1954 allowed the state to remove any blacks from the magisterial district of Johannesburg and adjacent areas. In the 1960s the first relocation camps were established, in an attempt to remove displaced labour tenants, unwanted farm workers and the urban unemployed. The Black Laws Amendment Act and Native Trust Act of 1964 facilitated the complete abolition of labour tenancy and squatting on farms.

It is estimated that more than three and a half million South Africans were forcibly removed and relocated between 1960 and 1983. In 1989, the population density in the homelands averaged 151 people per square kilometre, compared with 19 for the rest of the country. In 1995, the black population of South Africa was 35.3 million of a total population of 41 million, or 86 per cent. Apartheid policies had attempted to confine them to living on only 13 per cent of the land. The Report of Poverty and Inequality in South Africa indicates that in 1998, 61 per cent of black Africans and 38 per cent of coloureds were poor, compared with five per cent of Indians and one per cent of whites. The Report also indicates that rural areas accounted for about 72 per cent of South Africa’s poor.

26 Platze & Walker (note 8 above) 84.
27 Ibid 92.
28 Ibid 9. The authors indicate that the figure is incomplete, because it does not include the bulk of people affected by influx control to urban areas, nor people moved within the bantustans for betterment planning.
31 Platze & Walker (note 8 above) 16. Apartheid policies were never wholly successful, and there were always some blacks living in areas designated for whites, often as labourers working on white farms, or increasingly as residents in urban areas. W Beinart, Twentieth Century South Africa (1994) 188-211 provides demographic information for black South Africans during the apartheid era.
33 Ibid 27.
III  THE LAND CLAIMS PROCESS

The land shall be shared among those who work it' was one of the rallying cries of the African National Congress (ANC), articulated in the 1950 Freedom Charter. The ANC attempted to turn the sentiment into policy with their proposals for post-apartheid land reform, contained in a series of documents including the 1988 Constitutional Guidelines for a Democratic South Africa, the 1990 proposed Bill of Rights, and Discussing the Land Issue in 1991. The ANC was opposed to the constitutional protection of group rights, which it feared would perpetuate apartheid land distribution. Its main policy objectives were: the abolition of all racial restrictions on ownership and land use; the passage of land reform legislation that would enable the state to obtain and redistribute land; setting up a Land Claims Commission and a Land Claims Court to achieve redistribution of land and to adjudicate disputes; some manner of nationalisation of land; and legal support for diverse forms of tenure and production. The ANC was in favour of including the right to land and property in the Bill of Rights, free from any racial bias, and subject to the state's ability to expropriate land, with just compensation, for land redistribution purposes.

South Africa’s new constitution was born out of a complicated multi-stage process. The interim Constitution, which came into force 27 April 1994, was the result of negotiations between 26 parties. It provided that a final constitution would be negotiated, following South Africa’s first racially open elections in 1994. It also provided that the final Constitution would have to adhere to a set of thirty-four principles established by the negotiators of the interim Constitution. Adherence to these principles was to be determined by the Constitutional Court, which was empowered to certify the new constitution. As it happened, the Court refused to certify the first draft of the new constitution. A second round of negotiations led to the current constitution, which was certified by the Constitutional Court on 4 December 1996.

Both the ANC’s support for inclusion of the right to private property, and for mechanisms of land reform found their way into the 1996 Constitution. Sections 121-23 of the interim Constitution instructed the legislature to put in place laws to provide redress for victims of dispossession, which led to the enactment of the Restitution of Land Rights Act in 1994. The Restitution Act created legal mechanisms for

35 Coles (note 17 above) 739.
36 ibid 741.
37 ibid 740.
restitution of land or compensation to individuals or groups who had been dispossessed of those rights after 19 June 1913, as a result of past racially discriminatory laws or practices.\(^\text{40}\)

The Commission on Restitution of Land Rights (CRLR) and the Land Claims Court (LCC) were set up under the Restitution Act to oversee this process.\(^\text{41}\) The Act allows for three types of relief for claimants: restoration of the land under claim, granting of alternative land, or financial compensation. All restitutio

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nary claims are made against the state, not the current owners of the land. In 1997 the Restitution Act was amended to bring it in line with the 1996 Constitution. Claimants were allowed direct access to the LCC (rather than having to go through the CRLR) and the Minister of Land Affairs was given greater powers to settle claims through negotiation.\(^\text{42}\) Both the interim Constitution and the Restitution Act made it clear that restoration of land would not be ordered unless the state certified that it was feasible to do so.

The progress of land restitution was initially disappointingly slow. The cut off for applications for restitution under the Restitution Act was 31 December 1998. By that date, 63 455 claims had been lodged, and only 31 had been settled.\(^\text{43}\) In 2000 an administrative process was set up, which sped up the process considerably.\(^\text{44}\) As of March 2004, 48 825 claims had been settled, affecting some 662 307 beneficiaries.\(^\text{45}\)

The second principle of the ANC's land reform strategy, redistribution, has been fraught with its own problems. The program was built on a 'willing seller-willing buyer' model. Initially, redistribution involved the granting of a Settlement Land Acquisition Grant (SLAG) of R16 000 to qualifying households.\(^\text{46}\) The grant could be used as a down payment on a loan, put towards the outright purchase of land, or used for other expenses related to land acquisition. Actual upfront costs of acquiring land are considerably more than R16 000, meaning that only individuals already relatively well off could afford to take the risk and acquire land.\(^\text{47}\) The government planned to redistribute 30 per cent of the country's agricultural land in the first five years of the program; however, by the end of the fifth year just 650 000 hectares of land had been distributed, representing less than one per cent.\(^\text{48}\) The regime was criticised for being

40 Section 1 of the Restitution Act.
41 Sections 4, 22 of the Restitution Act.
42 Reilly (note 13 above) 30.
44 Reilly (note 13 above) 29.
46 Lahiff (note 43 above) 10-12.
48 Lahiff (note 43 above) 10.
highly bureaucratic, and for meeting the needs of neither sellers nor buyers.\footnote{Ibid 13.} The shortcomings in the redistribution program prompted the government to introduce policy change in February 2000. A new program, Land Reform for Agricultural Development (LRAD) was introduced, with a new target of distributing 30 per cent of farmland in 15 years. Unlike the SLAG program, which redistributed land for any purpose, LRAD is exclusively focused on agricultural land. Under LRAD, every adult member of an eligible household is entitled to a grant of between R 20 000 and R 100 000, depending on their own contributions. Although land reform is now occurring at a much quicker pace, it still appears doubtful that the 30 per cent in 15 years target will be met.\footnote{N Vink 'Patience Running Out' (2004) 60 World Today 23, 23.} Frustations over the pace of land reforms have led to fears that South Africa will run in to farm invasion problems, along the lines of what transpired in Zimbabwe.\footnote{Ibid 21-2.} Criticisms also remain that the new land reform policies still fail to meet the needs of poor farmers. The Surplus Peoples Project, for example, cautions that LRAD pays insufficient attention to the rural poor, and to groups defined by the DLA as marginalised: women, the disabled, youth and farm workers.\footnote{F Lawrence & D Mayson 'Can the DLA Achieve the Targets Set in its 2001-2002 Strategic Plan?' (2001) 14 available at <http://www.app.org.za/pblkations/default.htm>.}

IV THE RICHTERSVIELD COMMUNITY

... living in the margin of history on the edge of the country...\footnote{Richtersveld Community v Alexkor Ltd 2001 (3) SA 1293 (LCC) para 8.}

The Richtersveld is located on the eastern edge of the Northern Cape Province, just south of the border with Namibia. It forms part of a larger area known as Namaqualand. The original inhabitants of Richtersveld were mostly Khoi Khoi, although there were some San also occupying the territory. The name Namaqualand is taken from Nama, the Khoi Khoi language. After the colonisation of South Africa the Khoi Khoi and San populations of the Cape were largely decimated. Many migrated north of the Garib (Orange) river, to present day Namibia. Others lost their separate identities, and formed the group later formally identified as the 'Cape Coloureds'.\footnote{Glavovic (note 16 above) 288.} The Richtersveld community arose from remaining Khoi Khoi and San who merged with each other, and with others who came into Little Namaqualand, in particular the 'basters', (people of mixed decent, usually having white fathers and Khoi Khoi or San mothers). During the nineteenth century other people started settling in Little Namaqualand. These included some white trekboere, basters, and missionaries. In the mid-nineteenth century the Renisch Mission
Society was established at Kuboes. The mission came to play a central role in the lives of the community, including the promotion of land claims during the nineteenth century.55

At the time the Richtersveld people consisted of a number of family clans, each headed by a chief. The clans together formed a tribe, led by a headman and a Raad, comprising the chief's of each clan.56 The Richtersveld people remained under this system until 1957, when governance was transferred to a government appointed superintendent, assisted by an advisory council.57 The Richtersveld people had extensive rules regarding land, access to grazing land, the number of livestock community members could graze, and liability to contribute to repair work.58 The rules drew a distinction between the rights of citizens and non-citizens. Non-citizens required permission from the Raad to use communal lands, and were often charged rent.59 Non-citizens could join the Richtersveld community only if accepted. Many new members were accepted into the community over the years, so that its composition changed over time.60

On 23 December 1847 the British Crown extended the northern boundary of the Cape Colony up to the Garib River, and all of Little Namaqualand became subject to British rule. The colonial government considered the whole of Little Namaqualand to be terra nullius.61 On 30 June 1890 a surveyor's report was presented to Parliament 'in regards to land occupied by natives on certain Missionary Institutions and other places in Namaqualand'.62 This included the Richtersveld. The report describes the people of Richtersveld as comprising 47 families, totalling about 380 people. The surveyor states that 'most of them are very poor, and I fear they are in a retrogressive state'.63

After annexation, the Richtersveld was considered Crown land. The colonial government followed a practice of issuing 'Tickets of Occupation' which would allow indigenous people whose ownership claims were not recognised to remain on the land they had traditionally occupied (or a portion of it).64 Though some gestures were made indicating an intention to set aside some portion of Little Namaqualand as a reserve for the Richtersveld people, no recognition of ownership or Ticket of Occupation was ever issued to the Richtersveld people.65 Members of the

55 Richtersveld (note 53 above) para 24.
56 ibid para 68.
57 ibid para 69.
58 ibid para 71.
59 ibid.
60 ibid para 72.
61 ibid para 25.
62 ibid para 26.
63 ibid.
64 ibid para 28.
65 ibid para 29.
Richtersveld community considered themselves to be the owners of their lands, and with the assistance of the missionaries directed claims to the government.

In 1925 diamonds were discovered near Port Nolloth, and claims for diggings were awarded to the government in 1926. In 1927, there was a subsequent discovery of a particularly rich deposit at the mouth of the Garib River at Alexander Bay.66 After the initiation of mining operations in the 1920s, the Richtersveld community was progressively denied access to its lands.67 On 5 February 1930 the Minister of Lands issued a certificate of reservation, setting aside a portion of the community’s traditional lands as a reserve. The land included in the Richtersveld Reserve comprised approximately 44 per cent of the land that had been occupied by the Richtersveld community at the time of the 1890 survey.68 The land containing the diamond mining operations and an area of land known as the corridor farm were not part of the reserve.

In 1989 the Alexander Bay Development Corporation was established under the Alexander Bay Development Corporation Act. Ownership of the corridor farm was passed from the Government to the corporation. In 1992 the corporation converted to Alexkor Ltd. Title deeds were passed to Alexkor and registered in 1993 and 1994.69

V Richtersveld Community v Alexkor and the Government of South Africa

The Richtersveld Community originally filed two claims: in 1997 it filed at the Cape High Court, and one year later it lodged a restitutionary claim before the Land Claims Court (LCC).70 It eventually decided to give precedence to the claim at the LCC. The community originally argued that their right in land was either (a) ownership; (b) a right in land based on the common law doctrine of aboriginal title; or (c) a right in land acquired through its beneficial occupation of the land for a period of longer than 10 years prior to their eventual dispossession, as per s 1 of the Restitution Act.71 The main contention of Alexkor and the government was that any right in land that the community may have possessed had been extinguished prior to the 1913 cut-off date contained in the Restitution Act. More specifically, they contended that the Richtersveld

67 Ibid para 32.
68 Ibid paras 27, 32.
69 Ibid para 31.
70 The LCC was established under s 6 of the Restitution Act and has similar status to the High Court.
71 Section 1 of the Restitution Act defines a right in land as ‘any right in land 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 that 10 years prior to the dispossession in question’. 
community lost any title to the land when the area was annexed to the British Crown in 1847.

The case was heard over 27 days in September and October of 2000. Gildenhuys AJ held that the LCC lacked the jurisdiction to decide the issue of aboriginal title.\textsuperscript{72} Though he found that the community did hold a right to beneficial occupation based on occupation for a continuous period of 10 or more years, he held that the community was not entitled to restitution because it failed to show that it had been deprived of its land under a racially discriminatory law or practice.\textsuperscript{73} The decision was appealed to the Supreme Court of Appeal (SCA), which set aside the original order and granted relief to the Richtersveld community. The SCA held that the Richtersveld community held a customary law interest in the land, which was akin to common law ownership, at the time of annexation to the British Crown.\textsuperscript{74} These rights survived the annexation. The Court held that the State had ignored the community’s right to the land, and had dispossessed it through a series of steps.\textsuperscript{75} These practices were held to be discriminatory, because they were based on the implicit premise that because of the Richtersveld community’s race and presumed lack of civilisation, its rights to the land had been lost with annexation.\textsuperscript{76} Alexkor appealed this decision to the Constitutional Court. Initially Alexkor was the sole applicant to the Constitutional Court, but three weeks before hearing the government sought condonation for its failure to apply for leave. This was considered in conjunction with the merits of the appeal, and ultimately allowed. The Court’s unanimous decision was rendered on 14 October 2003. The Constitutional Court upheld the SCA’s decision, finding that the Richtersveld community had a right to the land, not by virtue of the common law, but by virtue of the Constitution.\textsuperscript{77} The Richtersveld community was found to have had title in the contested land, including mineral rights.\textsuperscript{78} This title was not extinguished at any point prior to 1913. The series of laws used to deprive them of their lands were held to be racially discriminatory.\textsuperscript{79}

The exact legal nature of the Richtersveld community’s right in land is not entirely clear from the Constitutional Court’s ruling. Since the Constitutional Court largely adopts the reasoning of the SCA, it is necessary to explore further that Court’s ruling. The SCA held that the definition of a right in land found in the Restitution Act included any right in land, be it a right under common law, statute, or customary law.

\textsuperscript{72} Note 53 above, para 53.
\textsuperscript{73} Ibid para 105.
\textsuperscript{74} Richtersveld Community v Alexkor Ltd 2003 (6) SA 104 (SCA) paras 29, 53; 66.
\textsuperscript{75} Ibid para 130.
\textsuperscript{76} Ibid para 8.
\textsuperscript{77} Note 2 above, para 51.
\textsuperscript{78} Ibid paras 59-60.
\textsuperscript{79} Ibid para 97.
It considered two possibilities: that the Richtersveld community held a right in land based on common law aboriginal title or under a statutorily recognised customary law interest. That the community held a customary law interest under their indigenous law at the time of annexation is considered a settled matter – the real question is the legal status of this interest post-annexation.\textsuperscript{80} Comparing the doctrine of aboriginal title as it has evolved in the United States, Canada and Australia with the customary law interest held by the Richtersveld community, Vivier ADP finds both to be the 'creature of traditional laws and customs'.\textsuperscript{81} Despite spending several paragraphs discussing the nature of aboriginal title as elaborated by the courts of these three countries, Vivier ADP ultimately goes on to hold that there is no need to settle whether the doctrine of aboriginal title forms part of the South African common law, since a customary law interest is sufficient to ground restitution under the Restitution Act.\textsuperscript{82} This customary law interest is held not to have been extinguished by the annexation of the Cape Colony in 1847.\textsuperscript{83} In coming to this conclusion, Vivier ADP considers and rejects the doctrine of recognition, which holds that the annexation of land by the British Crown results in the abolition of all pre-existing customary rights and interests, except for those explicitly recognised by the Crown. Vivier ADP prefers instead the continuity principle, which holds that rights and interests continue after annexation, unless the Crown explicitly extinguishes them. Since there had been no action by the Colonial government to extinguish the Richtersveld community’s interest in their land, this interest must be said to have continued, until at least some time after 1913.\textsuperscript{84}

The Constitutional Court upheld the SCA’s finding that the Richtersveld community held a customary law right in land prior to annexation.\textsuperscript{85} The only change the Constitutional Court made was the deletion of the SCA’s finding that the community’s customary law interest is ‘akin to that held under common law ownership’.\textsuperscript{86} The Constitutional Court thus affirmed the independent status of customary law under the South African Constitution:

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 . . . . \textsuperscript{[The Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms}}

\textsuperscript{80} Note 74 above, paras 26-9.
\textsuperscript{81} Ibid para 37.
\textsuperscript{82} Ibid para 61.
\textsuperscript{83} Ibid paras 67-83.
\textsuperscript{84} Ibid para 62.
\textsuperscript{85} Ibid para 102.
within the legal system . . . . [I]ndigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.\(^7\)

The meaning of aboriginal title, as it has been developed in other jurisdictions, namely Canada and Australia, is not always entirely clear.\(^8\)

In Canada, aboriginal title is said to be a sui generis interest in land; sui generis because it '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'.\(^9\) In Australia, on the other hand, native title is considered to have its origin and content in the traditional laws and customs of the aboriginal inhabitants of the territory, and is not considered an instrument of the common law.\(^10\) The finding of the SCA that the Richtersveld community held a customary law interest at the time of annexation is very much akin to accepting the doctrine of aboriginal or native title. Indeed, the Court walks through the steps that would be used to determine aboriginal title, even though some of these steps are unnecessary for the purposes of the Restitution Act. Given that there was neither constitutional nor statutory recognition of customary law in South Africa until after the dispossession of the Richtersveld community, the Court's recognition of the community's customary law interest is, arguably, an implicit application of the doctrine of aboriginal title.

In the end, it does not really matter how the Court gets to its results, because the result is the same. Either because of the doctrine of aboriginal title, or because of customary law, the indigenous inhabitants of South Africa now have stronger legal tools with which to reclaim their ancestral lands.

VI RECOGNITION OR REDISTRIBUTION?

The possibility of tension between the provision of reparations to all those affected and the achievement of economic growth and reconstruction is self-evident.\(^11\)

The 1996 Constitution protects property rights, and provides that land cannot be expropriated except 'for public purposes'.\(^12\) Compensation for property is assessed based on a number of factors, including the market

\(^7\) Ibid para 51.

\(^8\) For a discussion of some of the unresolved questions in Canadian jurisprudence prior to the Supreme Court of Canada's holding in Delgamuukw (below) see K McNeil "The Meaning of Aboriginal Title" in M Asch (ed) Aboriginal and Treaty Rights in Canada: Essays on Law, Equity and Respect for Difference (1997) 135. Though the Supreme Court's subsequent decision went some way to clearing up the questions McNeil raises, they remain not entirely resolved, and are at the root of some of the puzzling aspects of the Richtersveld decision.

\(^9\) Delgamuukw v British Columbia [1997] 3 SCR 1010, para 112 (per Lamer CJ).

\(^10\) Mabo v Queensland (No 2) (1992) 107 ALR (HCA) para 645 (per Brennan J).


\(^12\) Section 25(2) of the 1996 Constitution.
value of the land. These provisions effectively insulate white South Africans from any costs associated with restitution, and place the burden on South Africans as a whole. This is in keeping with the country’s philosophy underlying restitution, which is based on principles of restorative and not punitive justice.

However, the objection may be raised that land restitution, while remedying one injustice, creates a new injustice, to the extent that the innocent are asked to pay for the crimes of the guilty. The problem is sharpened by the fact that the vast majority of South Africans are themselves victims of apartheid, although a combination of history and current day institutional constraints have dictated that only some are in a position to bring forward restitutionary claims. In the case of the Richtersveld decision, the potential for injustice is heightened, given that the practical result is that the South African government has lost approximately R84 million in annual revenue generated by the Alexkor mine.

In ‘From Redistribution to Recognition? Dilemmas of Justice in a Postsocialist Age’, Nancy Fraser suggests a reframing of the supposed impasse between the ‘politics of distribution’ and the ‘politics of recognition’ by suggesting that the two claims can be seen as forming a spectrum, with most justice claims falling somewhere between the two poles. Fraser argues that most justice claims cannot be redressed by either paradigm standing alone, but instead require their integration. Her purpose is to show that the two types of claims are not only not necessarily in conflict, but that they are actually frequently intertwined in such a way that one cannot be addressed without attention to the other. As helpful as this is, the Richtersveld decision seems to be an instance where two claims, both of which draw on both kinds of politics, are clearly at odds with each other. So how do we wade our way through?

VII The Richtersveld Claim

The land represents the link between the past and the future; ancestors lie buried there, children will be born there. Farming is more than just a productive activity, it is an act of culture, the centre of social existence, and the place where personal identity is forged.

The Richtersveld claim relies on more than the need to right a past wrong. It is also based on cultural claims. The community argues that it is culturally distinct, that it deserves autonomy, and that it has historic ties to the land that deserve recognition. Such assertions are inherent in the

93 Section 25(3) of the 1996 Constitution.
94 Jenkins (note 91 above) 416-17.
invocation of the doctrine of aboriginal title, which, as discussed above, involves some recognition of legal pluralism.

In his influential essay 'The Politics of Recognition', Charles Taylor makes a compelling argument for the recognition of cultural difference. Non-recognition or mis-recognition, he argues, 'can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being'.96 He traces the demand for recognition back to the demise of feudalism in Europe, and argues that the demand for recognition is tied to the rise of democracy. As societies moved away from the recognition of status that was tied to rigidly defined social roles, the recognition of identity became important.97 Tied to this notion of individual identity is the notion of authenticity, of an individual, moral self that we all possess. Identity is not, however, a strictly individual phenomenon, because of the fundamentally dialogical character of human life.98 Our identities are formed in conversation with those around us.

As identity becomes important, so does recognition. 'What has come about with the modern age is not the need for recognition but the conditions in which the attempt to be recognised can fail'.99 One of the ways in which recognition can fail is through the pull of universalism. Modern notions of identity give rise to politics which pull in different directions: one towards equality and universalism, the other towards the recognition of difference.100 This conflict can be mediated (at least partially) by recognising that '[i]n the case of the politics of difference, we might also say that a universal potential is at its basis, namely, the potential for forming and defining one's own identity, as an individual, and also as a culture'.101

It is hard to think of a modern state that exemplifies this tension between the pulls of universalism and difference better than South Africa. After half a century under a brutal regime founded on the misrecognition of difference, the ANC was understandably compelled by the rhetoric of equality and universalism. One of the ironies of apartheid is that it allowed certain cultural groups – most notably the Zulus – the necessary autonomy to maintain a distinctive culture. This is also true of the people of Richtersveld. During constitutional negotiations the Inkatha Freedom Party, whose main support base was the Zulu population of KwaZulu-Natal, was a powerful voice arguing for the recognition of difference in the constitutional negotiations. The problem

97 Ibid 26.8.
98 Ibid 32.
99 Ibid 35.
100 Ibid 43.
101 Ibid 42.
faced by the ANC was that while some claims to autonomy were sympathetic, others were not. Certain Afrikaner groups also base their claims for cultural autonomy upon the politics of recognition. For example, there were the attempts to establish Afrikaner volkstaats, such as the towns of Morgenzon and Orania, in the 1980s and 1990s. Afrikaners are indeed a linguistic minority within South Africa, and to the extent that they may be considered a cultural group, they are also a cultural minority. Does their history as the oppressors render them now unworthy of any cultural protection? It surely seemed difficult to the ANC to recognise the claims of Zulus and other black African groups without recognising the claims of Afrikaners. What better way out of the mess than to affirm universalism and reject 'special treatment' for any particular group. As Albie Sachs put it, '[t]he Constitutional debate turned essentially upon whether or not South Africans were to be seen as a variegated people sharing equal citizenship in a united country, or as collections of ethnic or race groups coexisting uneasily under one flag.'

This tension made the issue of culture a particularly contentious one during the constitutional negotiations. Particular sticking points included the tension between a decentralised versus a centralised federation; the demand made by some Afrikaner groups for separate, self-governing states within the unitary state; the call for legislative, consultative and advisory powers for traditional leaders; a place within South Africa's legal order for customary law; and certain proposed exemptions from the Bill of Rights. While the interim Constitution entrenched the right to culture, and contained provisions for the creation of an Afrikaner Volksraad Council, the final Constitution manifests a swing back towards more universalist principles. The final compromise upholds the principles of equality and universalism, while also containing measures for the protection of cultural autonomy, for example by protecting customary law, and by constitutionalising the right to self-determination.

There are many who argue that protection of cultural difference within a liberal state is not the contradiction it initially appears to be. One of the most influential liberal thinkers on the politics of recognition is Will Kymlicka. Kymlicka argues that 'minority rights are not only consistent

105 ibid 678. The right to culture is contained in s 31 of the interim Constitution, and as 184A-B allow for the creation of a Volksraad Council.
106 The Bill of Rights includes the right to culture in s 31. Chapter 12 recognises the role of traditional leaders, and s 211(3) specifies that the courts must apply customary law, where appropriate. The right of all peoples to self-determination is recognised in s 235.
with individual freedom, but can actually promote it'. 107 One of the central features of individual freedom, in liberal theory, is the choice it grants people in terms of how they live their lives; the freedom to follow a particular conception of 'the good life'. A related freedom is the ability of an individual to re-assess her conception of the good life, and perhaps to choose another path. A culture, Kymlicka argues, not only provides options, but makes them meaningful: whether or not a course of action has any significance for us depends on 'whether, and how, our language renders vivid to us the point of that activity. And the way in which language renders vivid these activities is shaped by our history, our traditions and conventions. Understanding these cultural narratives is a precondition of making intelligent judgements on how we lead our lives'.

Cultures are deeply engraingd, something evidenced by the difficulty most people experience attempting to adapt to a new culture. Moreover, evidence shows that people have real attachments to their cultures. To explain this, Kymlicka turns to Margalit and Raz, who argue (along the lines of Taylor) that culture 'has a high social profile and affects how others perceive and respond to us, and hence shapes our self-identity'. 109 Culture becomes an anchor for the identity of its members. If the culture is de-valued, it is an assault on the dignity of the members of that culture. 110

While Kymlicka's arguments support the Richtersveld community's claim for cultural autonomy, they do not necessarily support land restitution. For the Richtersveld land claim to be viewed as a cultural claim, as opposed to general restitutionary claim, we need to explore how and why cultures are tied to the land. There seems to be plenty of empirical evidence that illustrates such a connection. For example, Bennett and Powell note that in other countries, an assertion of aboriginal title has tended to lead to assertions of broader cultural rights and even to the right of self-determination. 111 They point, for example, to the impact of the Calder decision on subsequent aboriginal rights litigation in Canada. 112 Alex Reilly argues for use of the doctrine of aboriginal title in South Africa precisely because one of the spin-off

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108 Ibid 83.
109 Ibid 89.
110 Ibid.
112 Bennett & Powell (note 14 above) 449.
benefits tends to be somewhat of a cultural renaissance for the group making the claim. 113

Kymlicka draws a distinction between what he calls ‘national minorities’ and ‘ethnic groups’. Only the former, he argues, can make valid claims to cultural autonomy. One of Kymlicka’s key arguments is that a ‘national minority’ has ties to land and therefore has a basis for its autonomy. In fact, he defines culture as ‘a historical community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and history’. 114 Though this is a restrictive definition of culture generally, it is one that the Richtersveld community can meet. It seems that for Kymlicka, a national minority needs a land base, because land is necessary to support the institutional frameworks a culture needs to remain intact.

Yet, none of the arguments explored so far explains why ties to specific land are important. The Richtersveld community still has a land base on its reserve lands, and enjoys a measure of cultural autonomy from the state. Why is a claim for restitution of their historic lands so compelling? In Taking Responsibility for the Past, Janna Thompson attempts to circumvent some of the conceptual problems associated with claims based on historical title by postulating an alternative justification for the restitution of land. 115 Part of the justification comes from framing restitutioconomic claims as the claims of nations, much in the way that Kymlicka does. A nation (or culture) needs a place to live its common life. Moreover, a nation is an intergenerational association, and we assume that members of one generation will leave an economic and cultural inheritance to the next. This inheritance is tied to the land:

People of a nation learn to structure their lives around the activities that their land makes possible. They alter it to suit their purposes; they construct dwellings and monuments; they bury their dead in its soil and establish institutions that take a physical form. They imbue the features of land with meaning; it features in their myths and becomes central to their traditions and spiritual life. The development of their culture is influenced by geography; the landscape plays an essential role in their stories and legends. They read off their history from landmarks and find their symbols in natural features. 116

The problem with this argument, Thompson points out, is that it applies most readily to groups who have been recently dispossessed from their

115 J Thompson Taking Responsibility for the Past: Reparation and Historic Injustice (2002) 54-69. There are two main arguments against historical title that Thompson is trying to avoid. The first is that, since historical title is premised on first possession, it is vulnerable to claims by other, prior, possessors. At some point, the attempt to reach the first and rightful possessor could take us so far back into history that it becomes absurd. The second major argument, made in separate fashions by both Jeremy Waldron and David Lyons, is that the morality of land rights always has to be weighed against present circumstances. In particular, this argument raises the concern of equitable distribution. This argument is explored in detail in the next section.
116 Ibid 61.
lands. Over time the common life of a nation changes. The group will develop ties to their new lands, and the argument that historic lands are tied to culture will weaken with the passage of time. Part of Thompson’s answer to this objection is that ancestral lands usually contain sacred sites, the importance of which does not diminish with time. But this, she points out, can be satisfied by providing people access to their historic lands; it does not necessitate restitution.

The most compelling reason for restitution, according to Thompson, lies in the wrongness of the original dispossession. A historical dispossession becomes tied to the way a people view their history. Members of nations whose forebears suffered wrong remember how their injuries occurred; they resent injustices done to their nation and regard themselves as being injured not just by being deprived of the land they love, but also the lack of respect for their nation shown by the perpetrators. Thompson’s argument brings us back full circle to Taylor and the politics of recognition: where the wrongful action is based on a cultural mis-recognition, the appropriate response is to right that wrong by giving the culture the recognition it is due.

In addition to the cultural arguments outlined above, the people of Richtersveld also have a powerful socio-economic claim. Colonialism and apartheid left the Richtersveld community desperately poor. Their claim is about more than culture; it is about ensuring that the community has the material resources it needs to survive. As Margalit and Raz point out, a culture can flourish while its individual members do not.

The restitution of the Alexkor mine would give the Richtersveld community the resources it needs to raise the standard of living of its members.

VIII The Government Claim

We are trying to redress the dispossession, but excessive amounts cannot be met by the fiscus. Land restitution competes with portfolios like health, education, transport and safety and security – all pressing needs in South Africa. We face volumes of claims – this is a gesture to try and heal the wounds of the past.

During the Richtersveld case, the government argued that assertion of British sovereignty extinguished aboriginal title, that the removal of the Richtersveld community from their land had not been racially motivated – extraordinary arguments coming from a revolutionary government. Given these arguments, it is difficult to suggest that there are compelling...
moral arguments in favour of the position of the government. Yet I am going to suggest that if we look beyond what was actually argued, and consider the entire context of the restitution issue in South Africa, Richtersveld does raise some troubling moral issues, and is perhaps not the resounding victory for all of South Africa that it has been hailed to be.

The beginning of the problem lies in the concessions made during constitutional negotiations. Since the 1996 Constitution both protects property rights and promises restitution of land taken under apartheid, the only way both of these objectives can be met is if the government shoulders the cost of restitution. Olivia Zirker describes this as a kind of ‘victor’s justice’: the white minority has not been forced to give up any land, and the land they now possess is constitutionally protected. The problem is that the majority of South Africans are not only not the perpetrators of the apartheid system, they are victims. A theory of restorative justice requires not only that the victim be compensated, but also that the wrongdoers be disgorged of their ill-gotten gains. The second element of the justice equation is not being met.

For the most part, the doctrine of aboriginal title has been developed in former British colonies that were settler societies, countries where aboriginal peoples today comprise a minority of the population. Title claims are made against governments that are still dominated by the descendants of the original settlers, governments that at least serve as a reasonable stand-in for the colonial government. A plausible claim can be made that benefits derived from the wrongful acquisition of land have passed on to these descendants. In the Richtersveld case, the current government was forced to play the part of proxy for the racist apartheid government. The government was put in the position of defending, or at least explaining away the conduct of the colonising powers and of the apartheid regime. This anomalous situation is the result of a legal structure that relegates the real issues behind the claims to the background.

The adoption of the doctrine of aboriginal title into South African law would undoubtedly form the basis of more land claims; however, as Bennett points out, the number is likely not high. The reality in South Africa is that most indigenous peoples have been so thoroughly displaced that they are unable to make the case for aboriginal title. Ties to the land have been lost, groups are dispersed, lines of ancestry are unknown. Basing land claims on the doctrine of aboriginal title raises interesting

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123 Note 5 above, 639.
124 This is at least true for the modern doctrine of aboriginal title. There were many important early cases from non-setter societies, notably in India and various parts of Africa. For a discussion of these, see B Slattery The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown’s Acquisition of their Territories (unpublished PhD dissertation, Oxford, 1979) 10-44.
125 Bennett (note 16 above) 130.
questions about exactly what it means to be aboriginal in South Africa: What exactly is aboriginality? Does it have anything to do with race? Is it cultural? Can a culture change without losing what makes it aboriginal?

Underneath aboriginal title claims lie two fundamental questions: what makes a group aboriginal, and who is entitled to decide. Ronald Niezen, in *The Origins of Indigeneity*, identifies three categories of definitions that have been used to answer these questions: legal/analytic, strategic self-definition and what he calls ‘the global in-group definition’.[126] Attempts at legal definitions prove frustrating, because of the immense diversity of groups claiming to be indigenous. However, various definitions seem to agree that indigenous peoples share

descent from original inhabitants of a region prior to the arrival of settlers who have since become the dominant population; maintenance of cultural differences, distinct from a dominant population; and political marginality resulting in poverty, limited access to services and absence of protections against unwanted ‘development’. [127]

But Niezen points out that even this attempt at synthesis does not seem to hold, at least not for South Africa and other places in the world where the settler population is no longer dominant. Moreover, there is tension between attempts to come up with comprehensive definitions of ‘indigenous’ and the claims of indigenous peoples themselves, who assert their right, as self-determining peoples, to say who they are.

Niezen’s final category of definition stems from the global indigenous movement, manifest in gatherings such as the UN working group of indigenous peoples. This definition is perhaps the loosest of all, but ‘seems to begin with a sense of regional solidarity with those who share similar ways of life and histories of colonial and state domination that then grows into the realisation that others around the world share the same experience’. [128]

The doctrine of aboriginal title, as it has evolved in other countries, has been criticised for manifesting an essentialist view of aboriginal cultures. James Clifford’s reflections on the *Mashpee* land claim in Massachusetts illustrate the central problem:

The plaintiffs could not admit that Indians in Mashpee had lost, even voluntarily abandoned, crucial aspects of their tradition while at the same time pointing to centuries of reinvented ‘Indianness’. They could not show tribal institutions as relational and political, coming and going in response to changing federal and state policies and the surrounding ideological climate. An identity could not die and come back to life. To recreate a culture that had been lost was, by definition of the court, inauthentic. [129]

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127 Ibid 21.
128 Ibid 22.
Clifford’s work stirred up a host of criticisms of the ‘essentialist’ and ‘reified’ notions of culture that had historically marked the discipline of anthropology, but also spilled over into other disciplines, including the law.\textsuperscript{130} Lila Abu-Lughod, for example, contends that the idea of culture is necessarily implicated in hierarchy, and advocates instead the writing of ‘ethnologies of the particular’, which focus on individual experience, and thus skirt the problems of generalisation, and allow an anthropologist to explore how ‘culture’ is a particular, mediated and contested experience.\textsuperscript{131}

This anthropological work has been influential on Seyla Benhabib’s writing on cultural difference. In her article ‘The Liberal Imagination and the Four Dogmas of Multiculturalism’, she critiques the essentialist notion of culture that is often propounded by advocates of a politics of cultural difference (although she notes that this is often a strategic, rather than a theoretical argument).\textsuperscript{132} She explores the problem in more detail in \textit{The Claims of Culture: Equality and Diversity in a Global Era}, where she devotes a chapter to critiquing the ideas about culture implicitly (or explicitly) at play in the work of both Taylor and Kymlicka.

The problem manifest in Benhabib’s work is that the ideas of postmodern anthropologists, when applied politically, ultimately negate any form of collective difference, and become a liberal argument about the individual’s freedom to self-define. Benhabib wants to argue for a politics of recognition that ‘accepts the fluidity, porousness, and essential contestability of all cultures’.\textsuperscript{133} The problem is that her attempt to reconcile individual freedom and cultural autonomy leads her to a result where is she is measuring cultures against a ‘liberal yardstick’ – something that would surely make most anthropologists shudder.\textsuperscript{134} James Clifford foreshadowed the problem when he wrote ‘however the culture concept is finally transcended, it should, I think, be replaced by some set of relations that preserves the concept’s differential and relativist functions and that avoids the positing of cosmopolitan essences and human common denominators’.\textsuperscript{135}

As soon as political goods are distributed on the basis of group membership, we are back to the question of boundaries – what makes a group aboriginal, and who is entitled to decide? In South Africa, the majority of the population, by at least some definitions, are aboriginal, as

\textsuperscript{130} See generally the work of anthropologists such as George Marcus, Paul Rabinow and Lila Abu-Lughod.

\textsuperscript{131} L. Abu-Lughod ‘Writing Against Culture’ in RG Fox (ed) \textit{Recapturing Anthropology: Working in the Present} (1991) 137, 143.

\textsuperscript{132} S Benhabib ‘The Liberal Imagination and the Four Dogmas of Multiculturalism’ (1999) 12 \textit{Yale J of Criticism} 401, 405-10.

\textsuperscript{133} S Benhabib \textit{The Claims of Culture: Equality and Diversity in the Global Era} (2002) 70.

\textsuperscript{134} See, for example, Benhabib’s discussion of Catalan independence. Ibid 64-5.

\textsuperscript{135} Clifford (note 129 above) 275.
black Africans. 136 Yet most no longer live what the doctrine of aboriginal title would construct as an ‘authentic’ aboriginal life. The South African Constitution is a similar boundary drawing device: it is set up in such a way that either one lives in the sort of community to which the provisions protecting customary law and the right of self-determination attach, or one does not. It is history, not choice, that allots people into one category or the other. When it is a question of recognising cultural distinctness, perhaps historical arbitrariness is not such a troubling issue. While it is sad that some groups have lost their cultural distinctiveness, what is done is done, and once a culture is lost, there is no distinctiveness to recognise. But when political goods, particularly access to land, are distributed on the basis of cultural distinctiveness, arbitrariness becomes troubling.

People unable to bring a restitution claim will have to rely on the redistribution branch of the government’s land reform policy, which is fraught with problems. The ‘willing seller, willing buyer’ model ensures that sellers receive market price for their land. Again, the government is shouldering the cost of redistributing lands that were unjustly acquired. The program is slow, cumbersome, and under-resourced. The reality for most South Africans is that their aspirations of land ownership, fed by the ANC’s cry that ‘the land shall be shared among those who work it’, will never be realised.

Jeremy Waldron and David Lyons have each made compelling arguments that land distribution ought to be based on equitable principles. This makes it possible that a past wrong may be superseded by present circumstances. Both authors suggest that a victim of wrongdoing may lose her moral claim against the perpetrator if circumstances should change in such a way that the present system of distribution – though arrived at wrongfully – has become just.

Waldron has written extensively on the nature of private property. One of his primary concerns is the implications of the institution on people who have little or no property: the homeless and the poor. Unlike many critics of property, he approaches the problem as a liberal. His concern is with the impact of the institution of private property on the freedom of those who are property-less. The problem with many critiques of property, he argues, is that they pit the individual property owner against the interests of society as a whole. The interests of property-less individuals are left out of the equation. 137 This is apparent in the media portrayals of the Richtersveld case. It is portrayed as a struggle of a disenfranchised community against the state. No one seems to be asking

136 Many in South Africa reject any assertion of the aboriginality of black South Africans, counting only the Khoisan people as aboriginal. In a recent paper, Karin Lehmann asserts that the concept of aboriginal rights is meant as a mechanism to support minority rights, making a claim of aboriginal rights by black South Africans nonsensical. K. Lehmann ‘Aboriginal Title, Indigenous Rights and the Right to Culture’ (2004) 20 SAIJR 86.
whether there are worthwhile individual interests that might be served by the government's claim.

Waldron's concern for the property-less, and commitment to an equitable distribution of land in general, led to his provocative article 'Superseding Historic Injustice', where he questions the moral justifications of aboriginal land claims.\(^9\) Waldron makes several arguments regarding land restitution, but the one that is most relevant to the Richtersveld case runs as follows:

> [T]he burden of justifying an exclusive entitlement depends (in part) on the impact on others' interests of being excluded from the resources in question and that that impact is likely to vary as circumstances change. Similarly an acquisition which is legitimate in one set of circumstances may not be legitimate in another set of circumstances ... [A]n initially legitimate acquisition may become illegitimate or have its legitimacy restricted (as the basis of ongoing entitlement) at a later time on account of a change of circumstances. By exactly similar reasoning, it seems possible that an act which counted as an injustice when it was committed in circumstances C\(_1\) may be transformed, so far as its ongoing effect is concerned, into a just situation if circumstances change in the meantime from C\(_1\) to C\(_2\). When this happens, I shall say that injustice has been superseded.\(^10\)

David Lyons comes to much the same conclusions as Waldron, based on the utilitarian tradition. In 1977, Lyons wrote an article prompted by Native land claims in the United States, including the Mashpee case.\(^11\) According to Lyons, the moral justification of Native land claims tends to be grounded in Nozick's theory of just acquisition and transfer. The problem with this, Lyons argues, is that it assumes 'that property rights, once legitimately acquired, are virtually unaffected by circumstances'.\(^12\) Lyons' grounds his argument in the Lockean proviso that goods can be justly appropriated from the state of nature only if 'enough and as good' is left for others. An equitable distribution of goods is important because concentrations of wealth and power lead to unfair, and therefore illegitimate social arrangements.\(^13\) In other words, when distribution is unequal, everyone suffers. When goods are scarce, at some point there will not be enough and as good left over. Nozick calls this 'the historical shadow' because it raises the objection that past acts of appropriation can be regarded as illicit in the present. Lyons wants to flip this conclusion, so that '[i]t is not that acquiring the land violated the Lockean proviso but that keeping it appears to do so'.\(^14\)

The map of land distribution left in the wake of apartheid is clearly unjust. There is no doubt that land was taken wrongfully from the people

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139 Waldron (note 138 above) 28.
140 D Lyons 'The New Indian Land Claims and Original Rights to Land' (1977) 4 Social Theory & Practice 249.
141 Ibid 254.
142 Ibid 258.
143 Ibid 261 (emphasis in original).
of Richtersveld, and that they have suffered greatly as a result. But millions of other South Africans are also living in extreme poverty. And they have no diamond mines to lay claim to. In order to simplify the equation, imagine that white South Africans may be temporarily erased from the picture. What if the situation were this: at time one, sometime in the sixteenth century, land in South Africa is distributed on a more equitable basis amongst a number of pastoral and hunter-gather societies. At time two, in the late twentieth century, most of those peoples are living in extreme poverty, due in large part to the lack of an adequate land base. If some sort of lucrative resource—say diamonds—were found within the meagre territory of one of these groups, would it be just that that group be entitled to all of the profits derived from the resource? By an equitable theory of distribution, the wealth would have to be shared amongst the country as a whole.

In real life, colonialism and apartheid cannot be left out of the equation. For the reasons discussed above, it is different to lose land as a result of racist practices than as a result of population growth, or due to some other natural cause. The problem with both Waldron and Lyons is they tend to neglect both the impact of colonialism and the importance of cultural and historical ties to land. They miss, as Martha Minow argues, ‘the sheer importance— for the victimised and for onlookers— of rectifying past wrongs, independent of people’s current needs’. But given a situation where not all people who wrongfully lost their lands will ever get their lands back, we are faced with a choice between completely satisfying some claims, while not satisfying others at all; or satisfying all claims to some degree, but none fully. If restitution of all lands lost due to apartheid were possible, and the result was a roughly equitable distribution of land, Waldron and Lyons would be satisfied. Even if only some individuals and groups are in a position to make restitutitory claims, but others can receive adequate land through redistribution, there is again no problem. But in the Richtersveld case, a restitutitory claim may be occurring at the expense of redistribution. This raises moral problems.

Consider the following example. In 2003, the South African government made a settlement offer for another restitutionary claim. Sophiatown was once a thriving black suburb of Johannesburg. In 1963, the residences were displaced, the suburb razed, and a new, all white suburb built in its place. This new suburb was offensively named ‘Triomf’, Afrikaans for triumph. The destruction of Sophiatown became one of the galvanising moments for the anti-apartheid movement. Survivors filed a claim under the Restitution Act, which resulted in a government settlement package. Individual survivors were offered R40 000

compensation for the homes they had lost. It is estimated that an empty lot in Sophiatown, by today’s prices, is worth between R50 000 and R60 000. A lot with a house is worth an average of R200 000. The government cannot afford to pay survivors the current value of the properties they lost.

The government’s final possible argument for not wanting to recognise the Richtersveld community’s claim has to do with the possible implications that recognising aboriginal title might have for aboriginal self-government. To be clear, the Richtersveld community has at no point argued for increased political independence from the South African state. But as many commentators have noted, one tends to flow from the other. Context is everything, and in light of South Africa’s history, the ANC is understandably wary of anything that may point to claims for increased political autonomy for cultural groups. As one government official put it during the Richtersveld case: ‘In South Africa, such a policy would be disastrous. The very ethnic tension which the land claims process hopes to resolve would simply have been exacerbated.’ While this may be an overstatement, the issue does merit real consideration.

The ANC’s philosophy during South Africa’s constitutional negotiation was that liberal equality was the only way to dismantle apartheid in South Africa. Such a philosophy allows room for restitutionary claims in general, but not for claims that are premised on aboriginal title or claims of cultural autonomy. The ANC’s argument runs like this: apartheid was based on a theory that cultural/racial groups are incompatible and need to be separated. This was used as a pretext for dominance and exploitation. To undo the damage apartheid has caused, a unitary system based on the equality of all citizens is necessary. Given South Africa’s past, a policy that emphasises equality at the expense of autonomy is not without merit. A fine balance between centralisation and regional autonomy was struck in the course of negotiating the South African Constitution. At the very least, there is a good argument that tampering with this balance is better done by political means, rather than as the result of a legal decision.

IX Conclusions?
The arguments raised in this article are not meant to undermine support for the doctrine of aboriginal title – in South Africa or anywhere else. It is my intention solely to begin to explore the moral justifications that underpin aboriginal title. But the situation in South Africa does beg the question of whether the return of lands that were wrongly taken is always

146 Quoted in Ellis ‘A Future Lined with Diamonds’ (note 3 above).
the right thing to do. Maybe Waldron is right, and historic injustices can be superseded. Or even if the injustice has not been superseded, it seems possible that righting one wrong may just be creating a new wrong. On the other hand, the desire to right a past wrong is not the only reason for restitution, and there are compelling arguments that Waldron and others who argue from the standpoint of equity might be missing.

There are no easy solutions to the land reform issue in South Africa. Dismantling some of the constitutional protections that insulate white property owners seems like a just solution. But the 1996 Constitution struck a delicate political balance, and disrupting this could produce more harm than good. More money for land redistribution is the easiest, and most unrealistic answer of all.

It has not been my intention in this article to come to any conclusions on the questions that I feel are raised by the Richtersveld case, but merely to begin an exploration of some of the complications that arise when one delves into the more complicated issues that lie underneath the legal questions. The Richtersveld case make it very clear that there are issues surrounding aboriginal title that need more theorising. In many ways, Richtersveld is a progressive case. It makes considerable strides forward in terms of its conceptualisation of indigenous peoples, and their ties to the land. Richtersveld recognises that cultures change over time, and that the nature of a group’s ties to its ancestral lands can also change. But it also begs difficult questions about the very nature of aboriginality. The answer to ‘who is aboriginal?’ has been taken for granted in other countries that have recognised aboriginal title, but application of the doctrine in a country like South Africa makes it obvious that the answer is not always clear. Finally, and perhaps most troubling of all, the case lays bare the fact that the aims of economic and cultural justice might not always take us in the same direction. They may in fact be directly opposed to each other.