

Chapter 2

Eternal Land Rights? Interaction of Land Rights in the SADC

2.1. Introduction

The question what, if any, was the nature of title to real property in the SADC prior to colonial experience of States parties is a compound question because in order to answer it fully, we may need also to answer several other questions that it triggers off. They include the following:

- 1) How were pre-colonial land rights determined and to what effect?
- 2) What was the legal effect upon their interaction with new rights introduced under colonial rule?
- 3) Is there such a thing under international law as a perpetual, claim to land? If there is, what is its basis and does it deserve and should it be privileged above every other claim?

Yet to gain as full an appreciation of the land issue, and in order to discover a model for resolving this and similar issues that are rooted in colonial or some such other similar experience of States, we must ask the former compound question. The thorny issue in the SADC land issue is whether there is among the competing claims to title to land one that could, and should be honoured ahead of the others. Even if such a title could be determined, perhaps the question is no longer one of honouring it ahead of its rivals, but one of extinguishing the policy of unequal access to land and land redistribution. Restoration of land to the one with the best title is a separate issue with an entirely different set of dynamics, goals and outcome from that of land redistribution. The former is about competition and battle among holders of different titles to the same land. They must do combat in the forum determined by policy makers, in order to prove that theirs is the unassailable claim. The outcome is either victory or loss with the winner taking all. Those beaten to the prize face social humiliation and even economic ruin, depending on their personal circumstances. The latter

merely accepts that at a particular point in time, the status quo, for whatever reason is no longer sustainable. The status quo itself becomes a threat to national peace, security and stability. Such a realisation may have been inspired by economic, social or political realities of the State. It resembles more or less Rawls' point of genesis where a community gathers together to write the (new) rules that shall regulate property rights henceforth. Its dynamics are more favourable than those of the former paradigm in that theoretically there are no losers because everyone ends up with an equal opportunity and the possibility of an equal share as anyone else. The outcome favours unity and progress compared to the former.

A finding that pre-colonial SADC communities adhered to a system of land rights of any description would raise two further questions. The first, is what occurred to those rights in the period between colonization and the emergence of the land issue in affected SADC States? Did they suddenly disappear? If so by what process? Or did they undergo some metamorphic change? If so, to become what? What holds the consequent order of that metamorphic change together? Why has it failed to prevent or even cope with the land issue? Does that metamorphic process hold the key to the solution to the land issue? If there indeed was a metamorphic change, are the current land disputes an inevitable equal and opposite reaction for the restoration of some balance? The second, refers to validation of the transformation of native Africans' land rights after their conquest by empire nations of Europe. What validated that process? Ultimately sovereign States are accountable to no other authority than that of international law. If international law acquiesced with alienation of natives from their land by the settler communities, is it still possible to imagine that it (international law) should have the final say on the land issue in affected SADC States given its appalling record on the matter? Where does that leave the corpus of domestic law within affected SADC States that was used forcibly to expropriate natives of their land?

2.2. Legitimacy deficit in individual titles to commercial farmland in the SADC

The question whether a legitimacy deficit resides in claims of various parties to title to what is now called commercial farmland in troubled SADC States raises complex historical, legal and theoretical matters. Nonetheless, it should be raised because of its potential to inform the scope of the land issue in SADC States.

Common Law jurisdictions favour the view that pre-existing property rights persist even after conquest. In *The Case of Tanistry (1608)*¹ it was held that the British Crown did not take actual possession of land by reason of conquest. The Privy Council in *In re Southern Rhodesia*² held that upon asserting sovereignty, the British Crown accepted the existing property rights of the natives. Lord Sumner stated that it must be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected pre-existing native rights and forbore to diminish or modify them. Lord Denning re-affirmed the same principle in *Oyekan v Adele*.³ He stated that in inquiring “what rights are recognised, there is one guiding principle. It is this: The Courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected”. In *Mabo and Others v. State of Queensland*⁴ The High Court of Australia declared the following: “Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted”.

Nonetheless, Classical International Law recognizes five modes by which a State legitimately could acquire sovereignty over territory, namely, cession, occupation, accretion, subjugation and prescription.⁵ Oppenheim writes that, subjugation, also called title by conquest, is the acquisition of territory by conquest followed by annexation. This mode of acquiring title:

... had to be accepted into the scheme ... in the period when making of war was recognized as a sovereign right, and war was not illegal. Simple title by subjugation has always been relatively rare, because victors more usually enforced a treaty of cession. In any event, war waged for the purpose of the acquisition of territory has probably been unlawful since Article 10 of the League of Nations Covenant.⁶

Two treaties between Chief Lobengula and representatives of the British Government, conferring privileges and rights to the British Government over Matebeleland and Mashonaland, and developments thereafter favour

¹ Davis 28, 80 E.R. 516.

² [1919] A.C. 211 at 233.

³ [1957] 2 All E.R. 785 at 788.

⁴ See *Mabo and Others v. State of Queensland*, Australian Law Reports, 107 (1992), p.1. Per Brennan J.

⁵ Brownlie, I. (5th ed 1998) Principles of Public International Law, Oxford University Press, Oxford, p. 130.

⁶ Oppenheim's International Law, (Watts, A. and Jennings, R., eds. 9th ed. 1992), Longman, London/New York, pp.698-699.

the view that the colonization of Southern Rhodesia occurred through cession rather than conquest. First, on 11 February 1888, and to prevent the Boers and the Portuguese from frustrating British hopes in Matabeleland and Mashonaland, Moffat and Chief Lobengula signed a treaty whereby Lobengula undertook that, "... he would have no dealings with any foreign power without the previous knowledge and sanction of the (British) High Commissioner (for South Africa – Sir Hercules Robinson)".⁷ Second, on 30 October 1888 Lobengula put his signature to the Rudd Concession.

By its terms, he gave Rudd and Rudd's associates "complete and exclusive charge" over all minerals located within his dominions, "together with full power to do all that they may deem necessary to win and procure the same" – a vague phrase which might refer to such things as the making of a road and the importation of mining machinery, but which might possibly be stretched to cover the enforcement of public order within the area operations. In return, he was to receive a payment of £100 each lunar month (£1,300 a year), and was to be supplied with 1,000 Martini-Henry breech-loading rifles – not ordinary cheap muzzle-loading trade guns – together with 100,000 rounds of cartridges to fit them.⁸

Cession of State territory is the transfer of sovereignty over State territory by the owner-State to another State.⁹ Effective cession depends on whether:

- 1) It was intended that *sovereignty* will pass. Acquisition of governmental powers, even exclusive, without an intention to cede territorial sovereignty, will not suffice.¹⁰
- 2) An agreement was reached, normally in the form of a treaty between the ceding and the acquiring State; or indeed between several States including the ceding and the cessionary States.¹¹ and whether:
- 3) the treaty of cession passes the test set in Article 52 of the Vienna Convention on the Law of Treaties which makes void all treaties procured by the threat or use of force in violation of principles of international law

⁷ Hanna, A. J. (1960) *The Story of the Rhodesias and Nyasaland*, Faber and Faber Ltd., London, pp.78-9.

⁸ *Ibid.* pp. 81-2.

⁹ Oppenheim's *International Law*, (Watts, A. and Jennings, R., eds. 9th ed. 1992), Longman, London/New York, p679.

¹⁰ *Ibid.* p.680

¹¹ *Ibid.*

embodied in the Charter of the United Nations.¹² Earlier treaties being subject to the principle of inter-temporal law.¹³

The question of intention is always one of inference because while human behaviour is vulnerable to human observation, thinking is not. For this reason, inference is always a risky business. It is not surprising that there is no unity among historians, whether by the terms of the Rudd Concession, Lobengula intended to pass sovereignty to the British.¹⁴

Factual misunderstandings between the settler authorities and the native leaders oppose the land titles that resulted. For instance, the British Government's dealings with Chief Lobengula whom they wrongly believed to be in control of Mashonaland¹⁵ facilitated the grant to the British South Africa Company on 29 October 1889, a Royal Charter to administer Southern Rhodesia. Clause III of the charter authorized the Company to "... exercise such powers of jurisdiction and government as it might "from time to time" in future acquire "by any concession, agreement, grant or treaty"¹⁶. Even more, it emboldened the Company's resolve to occupy Mashonaland, even without Lobengula's authority as the royal charter required. In September, 1890, the British South Africa Company, after journeying north-east to avoid clashes with Lobengula's army, stopped just south of Mount Hampden, hoisted the Union jack, and built a fort which they named in honour of Lord Salisbury, the Prime Minister of Britain.

¹² Ibid.

¹³ For discussion of inter-temporal law see Elias, T.O. (1980) "The Doctrine of Inter-temporal Law", *American Journal of International Law*, vol. 74 p.285; Shaw, M. N. (4th ed. 1997) *International Law*, Cambridge University Press, Cambridge, pp.346-7.

¹⁴ See Gann, L.H. (1965) *A History of Southern Rhodesia: Early days to 1934*, 1965, Chatto and Windus, London, pp.78-9; 86-7.

¹⁵ After the conclusion of the treaty of 11 February 1888 with Lobengula, British Foreign secretary and Prime Minister Lord Salisbury stated: "... Her Majesty's Government have satisfied themselves that Lo Bengula, with whom they have concluded a treaty, is the undisputed ruler over Matabeleland and Mashonaland".Ibid. p.79. But Hanna writes that: "Lobengula did not govern the Mashona, did not trouble to intervene in their internal disputes, did not protect them in the enjoyment of any rights whatever. If a village was left unmolested for a time, it was 'only being kept to fatten, much as a pig is kept, before it may be thought time to raid. To regard marauding as equivalent to jurisdiction may have been diplomatically convenient, but it was morally reprehensible". Hanna, A. J. (1960) *The Story of the Rhodesias and Nyasaland*", Faber and Faber Ltd., London, pp.78-9.

¹⁶ Ibid. p.83.

“Thus began the capital of Mashonaland, and afterwards of Southern Rhodesia.”¹⁷

1890 Southern Rhodesia was not *terra nullius*, neither was British occupation characterized with subjugation. In a poignant metaphor Lobengula himself describes to Rev. C. D. Helm the process by which Southern Rhodesia came under British rule.

Did you ever see a chameleon catch a fly? The chameleon gets behind the fly and remains motionless for some time, then he advances very slowly and gently, first putting forward one leg and another. At last, when well within reach, he darts his tongue and the fly disappears. England is the chameleon and I am that fly.¹⁸

Oppenheim writes that the classical scheme of separate modes of acquisition of territory is falling into disuse, except where situations belonging to former times come into question.¹⁹ This view is consistent with the inter-temporal rule.²⁰ The celebrated 1928 Award of Judge Huber in the *Island of Palmas case*²¹ is commonly credited with inspiring the new doctrine of acquisition of territory.²² The Southern Rhodesia case invokes a *critical date* of September 1890. It appears therefore, that the classical doctrine of acquisition of territory, and not the new doctrine applies. Nonetheless, even if the new doctrine were applied, consideration would still need to be given to “... proof of the exercise of sovereignty at the *critical date or dates*, and in doing so will not apply the orthodox analysis to describe its process of decisions”.²³ Oppenheim concludes that,

... The issue depends, therefore, upon the weight to be attached at a critical date or period, itself a matter to be decided in relation to each particular case, to a variety of possible factors and considerations. These include continued and effective occupation and administration, acquiescence and/or protest, the relative strength or weakness of any rival claim, the effects of the inter-temporal law, the principle of stability in

¹⁷ Ibid. p.87.

¹⁸ Ibid. p.81.

¹⁹ Oppenheim's International Law, (Watts, A. and Jennings, R., eds. 9th ed. 1992), Longman, London/New York, p. 708.

²⁰ See Brownlie, I. (5th ed. 1998) Principles of Public International Law, (5th ed. 1998), Oxford University Press, pp.126-8.

²¹ *Island of Palmas Case, (Netherlands v. U.S. (1928), Permanent Court of Arbitration. Sole Arbitrator: Huber. 2 R.I.A.A.829.*

²² See Harris, J. (5th ed. 1998) Cases and Materials on International Law, Sweet and Maxwell, London, pp. 190-263.

²³ Brownlie, I. *Supra.* note 20. p.129. (Emphasis added)

territorial title and boundaries, regional principles such as *uti-posidetis*, geographical and historical factors, the attitudes of the international community, and the possible requirements of self-determination, *and also indeed the possibly unlawful origin of the original taking of possession, and that subjugation is no longer per se a recognizable title. The weight to be given to these factors and considerations, in the assessment of the total result in terms of a consolidated title, will vary with particular cases.*²⁴

Where the question arises as does in the present case, whether the situation at a particular time is decisive in determining title to property, the “critical date” doctrine applies. The *Minquiers and Ecrehos case*²⁵ has helpfully clarified the meaning and application of the doctrine. Sir Gerald Fitzmaurice stated that the doctrine of the critical date enforces today whatever was the position on the date identified as the critical date.

... Whatever were the rights of the Parties then, those are still the rights of the Parties now. If one of them still had sovereignty, it has it now, or is deemed to have it. If neither had it, then neither has it now... the whole point, the whole *raison d'être*, of the critical date rule is, in effect, that time is deemed to stop at that date. Nothing that happens afterwards can operate to change the situation as it then existed. Whatever the situation was, it is deemed in law still to exist; and the rights of the Parties are governed by it.²⁶

Mabo considered the question whether, and to what extent natives retained land rights after British colonization of Australia. *Mabo* argued that his title to his traditional gardening lands on Murray Island had not been superceded by British colonization of Australia. The Court ruled that:

- 1) the critical date of settlement was 1788, and at that time, Australia and its surrounding islands were not *terra nullius* or practically unoccupied,²⁷
- 2) because the mode of British colonization of Australia was not conquest, and no treaty had been entered that assigned natives' property rights to the Crown, native title to land continued unaffected until it was extinguished by a valid act of the Crown that was inconsistent with the continued right of enjoyment of native title,²⁸ and

²⁴ Oppenheim's International Law, (Watts, A. and Jennings, R., eds. 9th ed. 1992), Longman, London/New York, p.716. Emphasis added.

²⁵ International Court of Justice Reports, 1953, p.47.

²⁶ Ibid. p. 64.

²⁷ Ibid. p.408.

²⁸ Ibid.

- 3) where the colonizer through legislation protects or reserves traditional land rights, these reservations are an acknowledgment and re-enforcement of continuing native common law land rights or native title.²⁹

Where territory is *terra nullius*, the occupying forces have no other rights to take notice of because no one else has rights over the land. But where a people have been conquered, the international convention of “conquest and continuity” applies. The institutions, laws and rights of the conquered people subsist until an act of the conqueror changes that position. The conqueror can always extinguish the option of discontinuing previous institutions and laws of his new subjects by recognizing them as valid.³⁰

If the critical date for Zimbabwe is taken to be 1890 as has always been asserted,³¹ the question: what became of native rights to land they held and controlled prior to British colonization cannot be avoided. Native peoples’ rights have different status, origin and force depending on how the colonizing state acquired sovereignty over them.³² Where there is no full-scale conquest as the term is traditionally understood, and cession is the mode of colonization, the native people of the occupied territory, through their leaders cede sovereign competence in exchange for other rights, usually by way of treaty.³³ *Mabo* asserts that in the absence of unequivocal cession of territory, all pre-existing native land rights continue. “This is an instance of the Court affirming the doctrine of consent: *quod omnes tagit*”³⁴ meaning: “that which touches all must be agreed to by all” – *humwe*. This gives the view that, native rights to territories that became commercial farming zones in Zimbabwe may have persisted throughout colonization to the present. Tully writes that where natives and international law both refute that conquest was the means by which the colonial administrators gained control, native rights persist through institutions that established those rights.³⁵ To hold otherwise would serve to dispossess native peoples “... of their property rights, forms of government, and authoritative

²⁹ Ibid.

³⁰ See Dodds, S. (1998) “Justice and Indigenous Land Rights”, *Inquiry*, 41 No.2 p.187, at p.191.

³¹ See Ranger, T. O. (1967) *Revolt in Southern Rhodesia 1896-7: A Study in African Resistance*, Heineman, London, pp.1-16; Martin, D. and Johnson, P. (1981) *The Struggle for Zimbabwe*, Zimbabwe Publishing House, Harare, pp.vii;

³² See *Mabo and Others v. State of Queensland*, *Australian Law Reports*, 107 (1992), p.1. See also Oppenheim’s *International Law*, (Watts, A. and Jennings, R., eds. 9th ed. 1992), Longman, London/New York, pp.709-712.

³³ Dodds, S. *supra*. note 30 at p.189.

³⁴ *Mabo and Others v. State of Queensland*, *Australian Law Reports*, 107 (1992), p.1.

traditions without so much as an argument³⁶. If this is correct, then Southern Rhodesia and Rhodesia's ostracised other - *humwe*, may still have a role to play in the resolution of Zimbabwe's land crisis. However, *humwe* bestows inferior title compared to private property arrangements introduced under colonial rule. Holders of title under *humwe* have a limited title in two senses. First, their title to land is understood as a general right to use land. That right does not incorporate the right to deprive others of access to it, except by prior and continuing use. Individuals do not have property rights with their standard attributes of exclusivity and free transferability, but merely trust authority to use the land as long as another is not using it.³⁷ Second, and not without controversy, *Mabo* suggests that *humwe* title is extinguished once the colonial government declares new rights over land which are opposable to native notions of land rights.³⁸ The passing of legislation creating private property titles for commercial farmland appears to do exactly that. But the Court also stated that, where the colonizer through legislation protects or reserves traditional land rights, as did the 1895 joint declaration of the British Government and the British South Africa Company that 2.2 million acres of land should be reserved for native occupation according to their tribal custom, and the Southern Rhodesia Government's Land Apportionment Act (1930) which reserved 30 percent of agricultural land for the 1.1 million Africans; such legislation serves to acknowledge and to re-enforce continuation of native common law land rights, or native title. The latter argument of the Court is reconcilable to the former argument only if it is accepted also that native rights to land subsist only in the newly designated communal lands, but not in the land that natives held prior to colonization. That way, the colonizers' new law supplants pre-colonial land rights of natives. This appears to be the view that the High Court of Zimbabwe took recently in *The Commercial Farmers Union v. Comrade Border Gezi and others*.³⁹ But overall, this would conflict with the *Minquiers and Ecrehos case*⁴⁰ critical date theory,

³⁵ Tully, J. (1994) "Aboriginal Property and Western Theory: Recovering a Middle Ground", *Social Philosophy and Policy*, 11 No.2 p.153 at 156.

³⁶ *Ibid.*

³⁷ In *Mabo*, the Court observed that native title holders could not sell or lease their interest in land, though it accepted that as a community, holders could pass the title from generation to generation. In other words power to inherit native title resides in belonging to that particular community.

³⁸ *Supra.* n.68 pp. 21-2.

³⁹ Case No. H.C. 3544/2000 HE. See <http://www.samara.co.zw/cfu/courtorder.htm>.

A fuller consideration of this case occurs at Section 3(e), *infra.* pp.25-7; and at Appendix I, *infra.* pp.32-6.

⁴⁰ International Court of Justice Reports, 1953, p.47.

previously stated in the *Island of Palmas case*.⁴¹ It would conflict also with the inter-temporal principle which holds that in 1890, international law placed different obligations on colonizers to natives of the colonized territories depending on the mode of colonization. Therefore, the question no longer is whether individual land titles created during the era of forcible dispossession of natives subsist beyond independence, but what justice as fairness requires as an equitable and egalitarian way forward. Attempts to address this question are made difficult by an unstable context. To begin with, once a legal title has been created, it assumes a life of its own in the market place. Through market exchanges, it can be broken down into several separate “smaller” interests. It can be enjoined also to other interests. Therefore, it is possible that in many cases, people are no longer dealing with original titles. But even where titles have not altered, they may have changed hands not only through Inheritance law, but also through Sale of Property law, up to and including the last twenty years of Zimbabwe’s independence from Britain. In the era of globalization, where States are in competition with one another for investment and are constantly prostituting themselves to potential foreign investors, Zimbabwe is not the holy nun that turns away opportunity for foreign investment. Several farmers migrated to Zimbabwe after independence from Britain in 1980 and bought farms and set about farming. They have dealt with no other Zimbabwean government apart from President Mugabe’s own post independence government, paying taxes and duties to that government and that government alone. These farmers are not beneficiaries of colonization. On the contrary they are proactive facilitators of Zimbabwe’s post-independence development program. Therefore, to say that they should forfeit to the State 50 percent of the land they hold title to without any compensation for the land itself, except for structural value that they may have added onto the farms⁴² is comparable only to the initial injustice during colonization of forcibly moving natives from agro-ecological regions I and II and crowding them and their livestock in the low rainfall, infertile drought prone regions of the country.⁴³ If no one else deserves protection from President Mugabe’s “land grab” policy, this category of farmers who purchased land in good faith after Zimbabwe’s independence in 1980 ought not to have their titles diminished without prompt adequate efficient compensation whatsoever.

⁴¹ *Island of Palmas Case, (Netherlands v. U.S. (1928), Permanent Court of Arbitration. Sole Arbitrator: Huber. 2 R.I.A.A.829.*

⁴² Professor Jonathan Moyo, Spokesman for President Mugabe, BBC News 24, Live Interview, 3 May 2000, 20:00hrs.

⁴³ See Tables 1, 2 and 3, *infra*.

2.3. Relationship of natives to land before colonization

The relationship of natives to their environment was summed up in the philosophy of common heritage – *humwe*,⁴⁴ by which every member of the tribal group was presumed to have an inherent right not only to earn a living off the land, but also to be supported by his kinsmen in his effort to live off the land. Thus, even those that were too poor to afford ploughing oxen and ploughing implements would prepare also for the rain season with the confidence that their neighbours would set aside a day in their calendar, when they would all converge on their field, to do all the ploughing necessary for the season, without charge - *humwe*. The same applied if for a good reason a family needed assistance with weeding, harvesting, or transfer of their grain from the fields to the granaries. This communal spirit extended to ownership, maintenance and exploitation of marine life, and other wildlife. Hunting of particular species of animals was prohibited during their mating season. Certain species of animals were preserved,⁴⁵ and if anyone caught them by mistake, they had to report to their chief and surrender the catch to them. While individual exploits were not uncommon, and individuals were encouraged to develop individual expertise at something, the majority of exploits worth talking about were collectively orchestrated.⁴⁶ Thus, hunting parties were organized and executed collectively. When a tribe was threatened with famine, a party of warriors was sent to a friendly neighbouring clan to secure enough food for all until the next harvest - *humwe*. Alternatively, an army of men was sent to go and plunder the resources of another clan, hence the attempt by some to portray colonialism as a virtue that often put an end to tribal wars. But those tribal wars confirmed also the property rights of one group in relation to other groups. For instance, Ndebele raids into Mashonaland were targeted at seizing food stocks, beautiful young women, and livestock but not at territorial conquests. The Ndebeles always retreated to their territory in the west. Those tribal wars also confirmed property rights in that alliances were formed between tribal groups, to fend off threats of aggressive and hostile tribes.

⁴⁴ Literally translates to “us all”.

⁴⁵ The pangolin is one example.

⁴⁶ The *Shona* proverb *Rume rimwe harikombi churu* – “One man cannot single handedly surround an anthill” is core to the mindset of the Shona people of Zimbabwe. The *Ndebele* equivalent is *Indhlovu kaibulawa ngomuntu oyedwa* – “You cannot kill an elephant on your own”.

The common heritage view of land – *humwe*, persists among Southern Africans to this day. *Humwe* is in direct opposition to selfishness - a vice long frowned upon and opposed by all cultures of African tradition. Lester writes that European Romantics first posited the Xhosa and later on the Khoisan tribes of South Africa as “possessors of ideal traits that Europeans lacked – savage dignity, humility and *communal selflessness*”.⁴⁷ Landless peasants have never accepted, and will not, particularly after achievement of political independence, accept that land from which they were forcibly alienated can be owned in excess by a handful of people while millions go without. It not only would be unnatural for them, but also make a mockery of their well-documented political struggles to end colonial injustices on their territories. To do so would be to legitimate the injustice of colonial annexation of their land. Ultimately, it would legitimate their own dehumanisation. According to Lester, European conceptions of African tribes were not fixed. “Later accounts describe the Khoisan, by now dispossessed, as governed by caprice, *products of nature just like the other flora and fauna being described*, catalogued and dominated by the increasingly imperial European eye.”⁴⁸ Lester observes that accounts that described geography and identified flora and fauna structures are examples of “... asocial narratives in which the human presence is absolutely marginal, and as embodied in the naturalist suited Europeans that wanted to justify their authority”⁴⁹ and to place their legitimacy beyond contest by claiming that land they now possess was *terra nullius* when they settled themselves on it. Beinart⁵⁰ writes that in pre-colonial South Africa, the Bantu speaking African people that had for centuries made up the bulk of the country’s population did not penetrate the Cape Peninsula – one better-watered pocket of the west. Non-use at the material time of one’s own resources does not justify another’s presumption of authority over them. “Use” is also as subjective an idea as one can think of. With regard to intergenerational capital such as land which one generation truly holds only in trust for the next generation, that trusteeship requires each generation not to abuse, squander or waste all of it so that future generations are left with remnants of what they could have had. Therefore, what appears to be land not in use at any time might be land being preserved for future generations’ use. What has precipitated the

⁴⁷ Lester, A. (1996) *From Colonization to Democracy: A new historical geography of South Africa*, Tauris Publishers, London/New York, p.22. (Emphasis added)

⁴⁸ *Ibid.* (Emphasis added)

⁴⁹ *Ibid.*

⁵⁰ Beinart, W. (2001) *Twentieth Century South Africa*, Oxford University Press, p.10.

land issue in affected SADC States is the fact that land allocation and distribution today shows that one minority racial group legally holds land sufficient for the present generation and enough reserve for several future generations of their kindred to be bequeathed with virgin land while the present generation of the majority black community has no land to live off. For example, South Africa has a population of approximately 41 million people. Sixty thousand whites own eighty-five percent of South Africa's prime commercial agricultural farmland. This amounts to approximately one hundred and twenty-three million hectares of which only ten million is under cultivation or other use. In one sense landless peasants' effort to wrestle "idle land" from commercial farmers who hold it in excess is an attempt at kicking away the indignity that comes with forcible dispossession and to restore their dignity as owners and holders of land. Beinart writes that private land titles were imposed also over areas that were still occupied by African communities and held for speculative purposes.⁵¹ In another sense it is an effort to humanise through *humwe* the commercial farmers who appear to be shackled by the chains of selfishness in that they hold most of South Africa's prime agricultural production land, some of which is not used at all, while their fellow citizens go without. Beinart⁵² writes that South Africa is divided by the 20 inch or 500 mm rainfall line which runs from Port Elizabeth in the Eastern Cape through the middle of the Free State into the Western Transvaal. Over half of the country, most of it to the West of this line receives so little rainfall that it is difficult to grow crops. Prior to colonization the bulk of the population lived to the east of that line. However, with colonization, they were squeezed beyond it. Some tribes retained only 20 per cent of their original land. After over a century of repressing it, this philosophical and cultural clash of notions of property is now set to play itself out in spite of what colonial laws suggest should be the case. Law's power lies in its legitimacy, by which is meant its ability to pull its addressees towards compliance. That the majority of inhabitants of Zimbabwe, Namibia and South Africa are strongly against the pattern of land distribution on racial lines suggests perhaps that reformulation of property rights is overdue in the SADC.

Besides instituting a system of inequitable land distribution, conversion from oral to recorded governance, ushered in also the concept of private ownership of land that firmly opposes the philosophy that has characterized land use in pre-colonial SADC States - *humwe*. *Humwe* requires that those holding land beyond their need/use should accept also

⁵¹ Ibid. p.11.

⁵² Ibid. p.10.

that the poverty of land of their fellow countrymen in the midst of their excess of it dehumanizes themselves. In such a situation, *humwe* requires them to relieve their countrymen's poverty of land by sharing with them the fertile, high rainfall land beyond their use but still held by them as their personal farmland.⁵³ But the question must still be asked whether *humwe* conferred property rights at law before colonization, and if so, what was the effect if any, of colonization on those rights?

Franck defines legitimacy as a rule's pull of its addressees towards compliance.⁵⁴ By treating as his own land, that which another regards as their private property, the violator of assumed private rights to land asserts either that, the legal title presumed by that other does not exist at all, or that the violator holds a more superior title to the same property than anyone else. People that have become known as "*squatters*" in affected SADC States appear to be asserting that the legal standard that separates communally held land from privately owned commercial land has lost its legitimacy precisely because the squatters themselves no longer regard themselves as excluded from the land by some binding rule of law. Instead, they regard themselves either as co-holders of title to those commercial farmlands, or as holders of a superior title to those farmlands than anyone else. Often, rules lose legitimacy when they are perceived by their addressees as being unjust. Rawls writes that justice is evidenced by practice of principles which,

... free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further

⁵³ Studies on land utilisation on large-scale commercial farms have shown that 5 million hectares of land can be transferred from that sector to the squatters, without compromising national agricultural production. But even more important, the studies have shown that there is considerable under-utilization of arable land in the large-scale commercial farming sector. This has prompted the Government of Zimbabwe to inquire into allowable farm size variable scale. No clear policy on this has been reached yet though the figure of 1,500 hectares is being floated as the maximum allowable size for a commercial farm in Natural Regions I and II. See Moyo, S. (1998) "The Political Economy of Land Redistribution in the 1990s", Paper presented at the Centre of African Studies, University of London, SOAS and Britain Zimbabwe Society Seminar on Land Reform in Zimbabwe: The Way Forward, 11 March, p.10.

⁵⁴ Franck, T. M. (1988) "Legitimacy in The International System", *American Journal of International Law*, 82 p.705; Franck, T. M. (1990) *The Power of Legitimacy Among Nations*, 1990, Oxford University Press, New York/Oxford.

agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established.⁵⁵

The theory of justice as fairness which is premised on a hypothetical genesis of social ordering where from a position of equality, every member of the community disinterestedly participates in the process of creating rules for regulation of all future transactions of the community is consistent also with the theory of justice as mutual advantage according to which justice results from a social agreement that enhances the position of all the participants.⁵⁶ Both theories are premised on communal agreement as the basis and point of departure regarding ordering of both private and public arrangements. The original hypothetical communal agreement to ensure that if “*p*” occurs, then “*x*” must follow sets up agents of the community to expect particular outcomes all the time. Therefore, a major product of the hypothetical agreement is the expectation among agents that if “*p*” then “*x*”. That expectation obliges agents of the community to order their conduct in a socially desirable fashion, that desire having been stated directly or implicitly in the hypothetical agreement. Circumstances where “*x*” does not follow “*p*” betray the hypothetical agreement and injustice appears to prevail over justice. Rawls writes that a veil of ignorance⁵⁷ from which the community creates its rules results in legal principles that confer on all members of the community basic rights and duties.⁵⁸ By these principles,

... men decide in advance how they are to regulate their claims against one another and what is to be the foundation charter of their society. Just as each person must decide by rational reflection what constitutes his good, that is, the system of ends which it is rational for him to pursue, so a group of persons must decide once and for all what is to count among them as just and unjust. The choice which rational men would make in this hypothetical situation of equal liberty, assuming for the present that this choice problem has a solution, determines the principles of justice.⁵⁹

Impartial justice theorists regard “advantage” as application by men of foresight for their own preservation, and a more contented life thereby, or a

⁵⁵ Rawls, J. (1994) “The Main idea of the Theory of Justice”, in Singer, P., *Ethics*, Oxford University Press, Oxford, p.362.

⁵⁶ See Cross, G. (2001) “A Theory of Impartial Justice”, *Oxford Journal of Legal Studies*, vol 21 No.1 pp.129-44.

⁵⁷ Rawls, J. *supra*. n.55 at p.363.

⁵⁸ *Ibid*. p.362.

⁵⁹ *Ibid*.

fuller idea of self-advancement incorporating the individual's more complete achievement of their conception of the good. Cross⁶⁰ writes that "... justice as mutual advantage digs itself in on the terms of an agreement whereby everybody can achieve it more fully than they otherwise could". These attributes of equality and mutual advantage contemplated in both the theory of impartial justice and justice as fairness are wholly lacking in the processes that converted oral governance of pre-colonial SADC States to recorded governance during colonial rule. Nozick⁶¹ argues that justice in holdings can only be the result of just acquisition and just transfers of holdings, or rectification for unjust expropriations. Therefore, we ought to be able to trace the justiceability of title all the way back to original acquisition. Besides, where laws that define man's relationship to his environment privilege the concerns of the community's minority group over those of the majority the risk is created always that those laws will lose their humanistic appeal,⁶² and become tools of violence and oppression. It appears that existing private holdings in land in affected SADC States cannot be justified on the basis of any liberal theory of justice. Therefore, there is no reason why they could not be re-examined. Dodds⁶³ perceives the problem as one of misplaced confidence by contemporary liberals in the foundations of state institutions presented as examples of Western liberal democracy. She writes:

Contemporary liberals frequently start from the assumption that the institutions of Western liberal democracy are well grounded. Liberalism is concerned to defend liberal institutions or to improve those parts of specific liberal institutions which are unjust or biased against some members of the State. In debate about justice towards indigenous peoples, however, there is need to question whether States with colonial histories are built upon unjust foundations which cannot be addressed within existing institutions of the State. ...justice towards the demands of indigenous groups requires substantial acknowledgment and recognition

⁶⁰ Cross, G. *supra*. n. 56.

⁶¹ See Dodds, S. n.30 at p.195.

⁶² On law's humanistic appeal see Dyzenhaus, D. (1998) *Judging the Judges, Judging Ourselves, Truth, Reconciliation and the Apartheid Legal Order*, 1998, Hart Publishing, Oxford, p.vii.

⁶³ For instance, Waldron presents the issue as an epistemical one that glorifies the injustice and its perpetuation because but for it (the injustice complained of), another people other than the British might have colonized Southern Rhodesia and created worse injustice than that complained of. Further, he argues that such injustices can be superseded over time. See Dodds, S. *supra*. n.30 at p.195.

of the values and institutions of the relevant indigenous group, which may not fall readily within the framework of existing institutions.⁶⁴

For Kingsbury,⁶⁵ land disputes represent political negotiations about normative matters. However, "... the question of which concept is applicable is often set up as the key threshold issue – its resolution is seen as a key to channelling argument, determining which structure of analysis and legitimation will then prevail, and thus influencing outcomes."⁶⁶ It appears to me that in any negotiation process resides a power dynamic between participants that affects outcomes and is resolved only at the end of the negotiation process. That dynamic is as important to the outcome of the negotiations as the subject of the negotiation itself. It is like the railway line (the medium) on which a tilting train will or will not run and if it runs, at what speed. In this sense it determines whether the train gets there or not, if it ever leaves at all. Therefore, discussion of land issues should devote equal attention to both the dynamic between stakeholders or participants and the content they are addressing particularly because of the medium's potential to affect outcomes. Kingsbury's study of discourse and jurisprudence of national courts and of quasi judicial organs of the United Nations on native peoples' claims to land held by others suggests that there are five different conceptual structures employed by claimants. These are⁶⁷:

- 1) human rights and non discrimination claims
- 2) minority claims
- 3) self-determination claims
- 4) historic sovereignty claims
- 5) native peoples, including claims based on treaties or other agreements between native peoples and States

This range suggests a recognition under international law of the overwhelming significance of native claims to title to land under others' control. Jurisprudence⁶⁸ shows that it represents also a huge dilemma about

⁶⁴ Ibid. p.187.

⁶⁵ Kingsbury, B. (1999) "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law", in Alston, P. ed. *Peoples' Rights*, Oxford University Press, pp.69-110.

⁶⁶ Ibid. at 70.

⁶⁷ Ibid at 169.

⁶⁸ Discussing the *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*, 167/1984 (26 March 1990) UN Doc. Supp. No. 40 (A/45/40); *Apirana Mahuika et al. v New Zealand*, 547/1993 (10 December 1992), UN Doc. CCPR/C/70/D/547/1993; *J.E. Lämsman et al. v Finland* 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994); *Lovelace Case* (24/1977), see Chapter 4.

how to channel claims because each of these channels may make a difference to legal outcomes. What is important appears not to be declaration of this range but perhaps the “political discourse and social patterns in some societies”⁶⁹ because ultimately it is that which dictates the channel through which claims are channelled. The Zimbabwe situation shows that land claims are regarded perhaps as beyond negotiation or even adjudication. Initially, commercial farmers regarded their dispute with peasants as a legal one, governed by property laws of Zimbabwe. However, as peasants ignored consecutive High Court rulings against their leaders, the Government and the Police Commissioner, and as judges that had handed those decisions down were forced into exile, it became clear that native claims to land were not negotiable. However, it is arguable that the human rights culture has emerged in the last half century as the dominant culture against which all action can be judged. Baxi⁷⁰ writes that:

Although not radically ameliorative of here-and-now suffering, international human rights standards and norms empower peoples’ movements and conscientious policy makers everywhere to question political practices. That, to my mind, is an inestimable potential of human rights languages, not readily available in the previous centuries. Human rights languages are all that we have to interrogate the barbarism of power.

The structures of land law prevailing in most SADC States herald largely from the colonial era. In Zimbabwe for instance, The Land Apportionment Act (1930) reserved 30 percent of agricultural land for the 1.1 million Africans, and 51 percent for the 50,000 whites. The Land Husbandry Act (1951) enforced private ownership of land while the Land Tenure Act (1969) reinforced land classification into African and European areas. By these acts, Africans, who were not equally represented in the legislative process were forcibly removed from their traditional lands, without compensation. By 1976, a total of 4.5 million Africans were crowded in the infertile, low rainfall TTLs.⁷¹ In South Africa, four pieces of legislation

Discussing *Mabo and Others v. State of Queensland*, Australian Law Reports, 107 (1992), p.1; *Minquiers and Ecrehos cas*, International Court of Justice Reports, 1953, p.47 and the *Starrett case*, Harris, D. J. (5th ed. 1998) Cases and Materials on International Law, Sweet and Maxwell, London, p.555, see infra.

⁶⁹ Kingsley, B. (1999) “Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International and Comparative Law”, in Alston, P. ed. Peoples’ Rights, Oxford University Press, pp.69-110.

⁷⁰ Baxi, U. (2002), The Future of Human Rights, Oxford University Press, p.2.

⁷¹ “The Zimbabwe Land Question in Perspective”, Zimbabwe High Commission, Summary of Commissioner’s discussion with Tim Sebastian of BBC News 24 ,

appeared effectively to formalise ownership and possession of land according to race. The first is the 1913 Natives Land Act, which had the effect of entrenching the unequal distribution of land between the races, and made the segregation of races an ideal to be pursued by future governments. The next two pieces of legislation came from the PACT government following its election in 1924. The 1926 Masters and Servants Law (Transvaal and Natal) Amendment Act and the 1932 Native Service Contracts had the common effect of pooling all Africans outside of the reserves into the agricultural economy, while extending existing controls over labour tenancy. The fourth is the 1936 Native Trust Land Act which formalised African reserve areas and the eviction of black tenants from farms for the next fifty years. This resulted in whites securing for themselves approximately 87 per cent of land and blacks approximately 13 per cent.⁷² There is an ancient African proverb which says that “The one dishing out food does not allocate himself a small portion”. Continued existence of the effect of these pieces of legislation, which were vigorously pursued by successive colonial and racist governments, is what has precipitated in Zimbabwe the backlash against commercial farmers by the landless peasants, albeit with governmental encouragement purely for political gain. Similar trouble looms over South Africa unless the problem is constructively deconstructed.

Anthropology shows that, for a long time different cultures have held different notions of land rights. Upon colonization, land formed the fulcrum of an unpredictable political control because of its double signification to the disjointed community that resulted. Europeans perceived land commercially as detachable property because it started legally to be registered as such, while natives tended to regard it as undetachable property, and also as the medium in which ancestor and descendant interpenetrate. Accordingly, settler Governments had to walk the tightrope between the legal acquisition of registered land and the legal protection of symbolic bodily land.⁷³ Abramson⁷⁴ writes that:

... the ancestral body of land to which any given patriclan belongs physically colonises all of the potentially separate bodies of the descent group ... Fijians observe, that the economic separation of land and

April 2000, p.1.

⁷² The precise figures are a matter of dispute. See Beinart, W (2001) *Twentieth Century South Africa*, Oxford University Press, p.10.

⁷³ See Abramson, A. (1999) “Dialectics of Localization: The Political Articulation of Land Rites and Land Rights and Land Rights in the Interior of Eastern Fiji (1874 –c. 1990)”, *History and Anthropology*, 11 No.4 p.437 at p.439.

⁷⁴ *Ibid.* p.447.

51 Land Reform Policy: The Challenge of Human Rights Law

patriclan in a market environment, where ritual assimilation to some chiefly body-politic is lacking, disembodies land and tears the ancestrally collectivised body of the patriclan apart. Land in this threatened state, is said to have lost its “soul” or *yalo*. Typically, Fijians speaking English say that, when land passes onto the market, they lose their “identity”. ... In the relevant medical economy of land, human illness is perceived to be an automatic consequence of land alienation. Subsequently, only a certain *kava* drinking ritual is capable of refurbishing life-giving links with the ancestral *vu*. And, even then, an appeasement of the now-malevolent ancestor is not guaranteed. ... Illnesses that are linked to the sale of land, and that are put down to the calamitous alienation of descendants from their ancestral origin, are termed *mate ni vanua*, “sickness of the land”.

Therefore, legal title to property insisted upon by Western notions of official records is not the only way by which societies determined land rights. Moreover, when the British colonized Fiji, attempts were made to determine pre-established native territories and not to interfere with them, and to declare government land all those territories not claimed by the *mataliqi*.⁷⁵ This contrasts sharply with their approach in Southern Rhodesia where people were forcibly driven away from land targeted for commercial farming production regardless of the fact that land was communally owned, and its use supervised by the chieftainships of different kingdoms through their headmen. In fact, 1890 Zimbabwe comprised several kingdoms, including the Ndebele kingdom located in the south-west, the Manyika located in the east of Zimbabwe, the Karanga located in the South and the Zezuru located in central and northern Zimbabwe. Rural Zimbabwe manifests this demographic distribution to this day.

2.4. Land distribution in SADC States at the turn of the 21st Century

At Zimbabwe’s independence from Britain in 1980, 6,000 commercial farmers owned 46.5 percent of all arable land, more than half of it in the high rainfall agro-ecological regions where potential for agricultural production is greatest. 8,500 black farmers held 5 percent of the agricultural land situated mostly in the drier agro-ecological regions. 4.3 million people occupied 49.3 per cent of the agricultural land, 75 percent of which is located in the drier agro-ecological regions where the soils are

⁷⁵ Ibid. pp.440-442.

poorest.⁷⁶ Between 1980 and 1990, the Zimbabwe Government acquired 3,5 million hectares on a willing-buyer/willing-seller basis as required by the negotiated Lancaster House Agreement of 1979 which ended the 16 year civil war for independence of Rhodesia, and resettled 71,000 households. Apart from the British Government, which provided £44 million, no other donors have funded land acquisition. However, in 1990, aid to Zimbabwe for purposes of resettling landless black Zimbabweans stopped completely.⁷⁷ Britain is now channeling all its aid through the private sector and non-governmental organizations and has promised £5 million over three to five years to help the rural poor.⁷⁸ In 1992, the Government of Zimbabwe passed the Land Acquisition Act to make way for compulsory acquisition of land. Legal challenges of its applicability to specific situations mean that its impact is yet to be fully realized. The current position is that 4,000 large-scale commercial farmers (predominantly white) own 11,2 million hectares. More than 1 million communal area families occupy 16,3 million hectares, mainly in drier and less fertile agro-ecological regions. 10,000 small-scale commercial farmers occupy 1,2 million hectares. 70,000 families have been resettled on 2 million hectares. State owned farms amount to 0,5 million hectares. The Zimbabwe Government seeks to resettle a further 150,000 families on at least 5 million hectares which only the large-scale commercial farming community can provide - *humwe*. In its publications, the commercial farmers union⁷⁹ states that it fully supports the land reform programme in Zimbabwe⁸⁰ and actively participates nationally and internationally in conferences on the issue.

⁷⁶ “The Zimbabwe Land Question in Perspective”, Zimbabwe High Commission, Summary of Commissioner’s discussion with Tim Sebastian of BBC News 24 , April 2000, p.2.

⁷⁷ See “How Mugabe abused Backing from Britain”, The Times, 19th April, 2000, p.5.

⁷⁸ Ibid.

⁷⁹ Established in 1942, this voluntary union describes its principal objective as the representation, protection and advancement of the interests of its members and the furtherance of the development of an economically viable and sustainable agricultural industry.

See <http://www.samara.co.zw/cfu/about.html>. (visited 03/03/01)

⁸⁰ See Statement by Mr. T. K. Henwood, President of the Commercial Farmers’ Union, <http://www.samara.co.zw/cfu/FARMINVASIONS.htm#29march>. (visited 3/3/00)

2.5. Humwe, Colonization, Land Rights: National Courts Step in

In *The Commercial Farmers Union v. Comrade Border Gezi and others*⁸¹ the High Court of Zimbabwe appeared to reject international law's notion of enduring native rights to property. The Court's ratio precluded inquiry into the legality of the dispossession of natives of their land by their colonisers and their dumping in agriculturally sterile zones of the country.⁸² This raises the question whether what a robber plunders and keeps long enough permanently becomes his, so that when the owner is able to claim it back, the robber can turn to the Courts to deny his victim of what is correctly his. The High Court of Zimbabwe ordered that:

- 1) Every occupation of any property listed in the Schedule hereto or of any other commercial farm or ranch in Zimbabwe that has been occupied since February 16 2000 in pursuit of any claim to a right to occupy that property as part of the demonstrations instigated, promoted or encouraged by any person, is hereby declared unlawful.
- 2) All persons who have taken up occupation of any commercial farm or ranch in Zimbabwe since February 16 2000 in pursuit of any claim to a right to occupy that property as part of the recent demonstrations instigated, promoted or encouraged by any person shall vacate such land within 24 hours of the making of this Order.
- 3) The first three Respondents should not encourage, allow or otherwise participate in any demonstration in protest against the holding of commercial farming or ranching land in Zimbabwe according to the race of the present owners or occupiers....

In one sense, this approach of the Court fuels the argument that where native claims to land now under other people's control is concerned, justice cannot be achieved without adopting a formula that substantially acknowledges and embraces the values and institutions of the native population. Yet these values and institutions may not readily fall under the framework of existing state structures. Therefore, "... attempts to redress injustice towards indigenous groups which do not question the justice of existing state institutions will therefore prove to be inadequate responses to indigenous people's demands for substantive justice."⁸³ In another sense, this decision casts the Court as a mature legal institution, fully aware of its juristic function. The Court is constrained by the principle of non-

⁸¹ Case No. H.C. 3544/2000 HE. See <http://www.samara.co.zw/cfu/courtorder.htm>. (visited 3/4/01)

⁸² *Supra.* tables 2 and 3.

⁸³ Dodds, S. n. 30 p.187.

retroactivity from applying norms of law created after the breach at issue occurred. In this case it was alleged that the “squatters” had breached the law of trespass by setting up camps on private farms without invitation or authorization of the landowners. In this sense, the Court could be congratulated on its decision to consider only the legal issue (trespass) under the laws of trespass in force at the time that offence was committed. The decision also helps to define a way forward in that it rejects violent conquests relied upon by colonizers of the late 19th Century to expropriate natives of their property as unacceptable to the modern humanistic climate desired by the international community’s fervent push for a culture of human rights. International law insists that upon appropriation by a State of private property, prompt adequate and efficient compensation must follow. In the *Iran-US Claims Tribunal*⁸⁴ the tribunal granted an interlocutory award upon the determination that there had been a “taking of the claimant’s property,” and appointed experts to calculate the loss. The *Starrett case*⁸⁵ has helpfully defined “property” and “taking of property.” A taking may be effected by transfer of title by law, as in the typical case of nationalisation or of the expropriation of land. The physical seizure of property may suffice, as may its transfer under duress or by confiscatory taxation.⁸⁶ Harris writes that, “constructive expropriation” occurs when “events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.”⁸⁷ In *Tippetts v. TAMS-ATTA*⁸⁸ the Tribunal insisted on an objective theory of State responsibility so that, it was not the intention of the government, or the form of the measures of control or interferences that mattered, but the effects of the measures on the owner and the reality of their impact that mattered.⁸⁹ Property is defined as: “all movable and immovable property, whether tangible or intangible, including industrial, literary, and artistic property, as well as rights and interests in any property”.⁹⁰

In *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement v Others*⁹¹ the applicant, an incorporated voluntary

⁸⁴ 23 International Legal Materials (1984), p.1090.

⁸⁵ See Harris, D. J. (1998) Cases and Materials on International Law, Sweet and Maxwell, London, p.555.

⁸⁶ Ibid.

⁸⁷ Ibid. p.556.

⁸⁸ 6 Iran-USCTR (1985), p.219 at 225.

⁸⁹ See also Explanatory note to the 1961 Harvard Draft Convention, Article 10 in American Journal of International Law, 55 (1961), p.558.

⁹⁰ See Harris, D. J. (1998) Cases and Materials on International Law, Sweet and Maxwell, London, p.557.

⁹¹ SC/132/2000

association that represents the interests of commercial farmers operating within Zimbabwe sought an order declaring *inter alia* that the exercise of acquiring land by the Land Task Force was not proceeding in accordance with the Declaration of Rights under Chapter 3 of the Zimbabwe Constitution. Section 16, which provides that:

1) Subject to section sixteen A, no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that—

(a) requires—

- (i) in the case of land or any interest or right therein, that the acquisition is reasonably necessary for the utilisation of that or any other land—
 - A. for settlement for agricultural or other purposes; or
 - B. for purposes of land reorganization, forestry, environmental conservation or the utilisation of wild life or other natural resources; or
 - C. for the relocation of persons dispossessed in consequence of the utilisation of land for a purpose referred to in subparagraph A or B;

or

- (ii) in the case of any property, including land, or any interest or right therein, that the acquisition is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilisation of that or any other property for a purpose beneficial to the public generally or to any section of the public;

Further, Section 16A, which deals with “Agricultural Land Acquired for Resettlement” provides that:

1) In regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with a programme of land reform, the following factors shall be regarded as of ultimate and overriding importance—

(a) under colonial domination the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation;

(b) the people consequently took up arms in order to regain their land and political sovereignty, and this ultimately resulted in the Independence of Zimbabwe in 1980;

(c) the people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land;

and accordingly—

(i) the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and (ii) if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.

(2) In view of the overriding considerations set out in subsection (1), where agricultural land is acquired compulsorily for the resettlement of people in accordance with a programme of land reform, the following factors shall be taken into account in the assessment of any compensation that may be payable^{3/4}

- (a) the history of the ownership, use and occupation of the land;
- (b) the price paid for the land when it was last acquired;
- (c) the cost or value of improvements on the land;
- (d) the current use to which the land and any improvements on it are being put;
- (e) any investment which the State or the acquiring authority may have made which improved or enhanced the value of the land and any improvements on it;
- (f) the resources available to the acquiring authority in implementing the programme of land reform;
- (g) any financial constraints that necessitate the payment of compensation in instalments over a period of time; and
- (h) any other relevant factor that may be specified in an Act of Parliament.

Sitting in its capacity as the Constitutional Court of Zimbabwe, the Supreme Court held that the compulsory acquisition of agricultural land for resettlement was a programme of land reform. Such a plan would have to be in conformity with the law.

Apart from those farms whose owners had agreed to the takeover of their properties, the settling of people on farms had been entirely haphazard and unlawful: a network of organizations, operating with complete disregard for the law, had been allowed to take over from the government. War veterans, villagers and unemployed townspeople had simply moved onto farms, encouraged, supported, transported and financed by party officials, public servants, the Central Intelligence Organization and the Army. Such settlement had not been done in terms of a programme of land reform or in terms of the Land Acquisition Act⁹² ... as to the respondents' contention that the matter was a political one and not a legal matter, that, while it was fundamentally true that the land issue was a political question and that the political method of resolving that question was by enacting laws, the Government had enacted and amended the Land Acquisition Act and then failed to obey its own law by flouting the procedures laid down in that Act. The Courts were doing no more than to insist that the State comply with the law.⁹³

The Court's insistence on the rule of law is justifiable. The need to separate the functions of the legislator, judiciary, and the executive is recognized in the doctrine of separation of powers. Acknowledgment justifications for this doctrine are offered by Locke⁹⁴ who writes that:

It may be too great a temptation to humane frailty, apt to grasp at power, for the same persons who have the power of making law, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law both in its making and execution, to their own private advantage.

Therefore, application of the doctrine is an attempt at institutionalizing conscience in order to ensure accountability that promotes democratic governance. Montesquieu⁹⁵ who argues that if the judiciary is not

⁹² At 940B/C-D.

⁹³ At 940I-941A.

⁹⁴ Locke, J. (1980) *The Second Treatise of Civil Government*, Hackett Publishing, Indianapolis Ch XII, Para 143

⁹⁵ Montesquieu, "*De l'Esprit des Lois*" Book XI, Chapter 6 cited in Bradley, A.W. & Ewing, K.D. (12th edn 1997) *Constitutional and Administrative Law*, Longman, London, p.92.

independent of the legislature and the executive, the law cannot be employed as a means of ensuring liberty advances human rights justifications for the doctrine. The law could not in those circumstances empower the citizen to challenge the lawfulness of legislative or executive orders that impede his rights. He writes that:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty ... Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to the arbitrary control; for the judge would then be the legislator. Were it joined to the executive however, the judge might behave with violence and oppression. There would be an end to everything were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

Without a separation of powers, collusion of functions with respect to clearly delineated purposes of the organs of government is possible. That possibility threatens wherever it exists to undermine objectivity in the conduct of government.

Application of the doctrine is a matter of course in democratic States, suggesting firm acceptance of the virtues of the doctrine. The United Kingdom Bill of Rights (1869) and the Act of Settlement (1700) are credited with establishing the doctrine in the modern British Constitution.⁹⁶ The United States Constitution of 1787 carefully delineates the functions of the executive, judiciary and legislature, providing for a system of checks and balances to that facilitates a measure of accountability. South Africa's constitution of 1996 provides for a Constitutional Court that acts as final guarantor of protection of individuals from State power. Japan's Constitution of 1946 shows similar adherence to the doctrine. However, in practice States have struggled to maintain a clear separation between the functions of these organs. The office of the Lord Chancellor has caused difficulty in the application of the doctrine for the United Kingdom. The incumbent is part of the legislature, executive and judiciary. The Lord Chancellor sits as a member of the judiciary in the House of Lords but sits also with the Prime Minister as a full member of his cabinet. Arguing for the abolition of the office of Lord Chancellor, Woodhouse⁹⁷ writes that it

⁹⁶ See McEldowney, J.F. (2nd edn 1998) *Public Law*, Sweet & Maxwell, London, p.8.

⁹⁷ Woodhouse, D. (1997) *In Pursuit of Good Administration – Ministers, Civil Servants and Judges*, Clarendon Press, Oxford p.120

taints the British Constitution by perpetuating a culture of “managerialism and market politics.” The dual roles of the Lord Chancellor as Law Lord and Cabinet Officer results in a strong possibility that justice could be undermined by pursuit of political ends.

However, what is difficult to justify in *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement v Others*⁹⁸ is the Court’s complete blindness to the realities of social evolution. Where legal procedures preferred by the State are overtaken by popular revolt of the people, the *grundnorm*, or an aspect of it, is replaced not in the orderly manner previously contemplated by the collapsing order, but by force. Except that there has not been such a fundamental change in Zimbabwe. Without such a change the Courts could and should continue to hold the Government to account particularly because the Government has the power to legislate and to effect its own laws to achieve its political ends. Assuming that the contemplated political ends are justifiable, the government’s ineptitude becomes the problem. The government becomes the legitimate target of the people’s frustration and not officers of the Courts. Had the government managed efficiently to create the laws it needed for land redistribution, perhaps the war veterans, villagers and jobless townspersons would not have resorted to violent, self-help measures. But the language of the Courts in these cases surprisingly shows the judges and justices wanting to convince us that their task is merely to apply the law regardless the reality of the context in which they operate. This casts suspicion on the objectivity of the Court because judges are not mere automatons, blindly pushing the buttons of the law. On the contrary they can and perhaps should seek to realise the objective and purpose of particular national laws rather than seek to demonstrate that Parliament or Government has been inept when the laws in question were debated in their full glare. In *Pepper (Inspector of Taxes) v Hart and related appeals*,⁹⁹ the House of Lords considered at length whether judges may use Parliamentary Hansard as an aid to Parliamentary construction, contrary to the general rule which forbade reference to such material in construing statutory provisions. The Court stated that “Statute law consisted of the words that Parliament had enacted. It was for the Courts to construe those words and it was the Court’s duty in so doing to give effect to the intention of Parliament in using those words”. Therefore the proper allocation of work is that Parliament legislates and the courts construe the meaning of the words finally enacted. The Court held that:

⁹⁸ SC/132/2000

⁹⁹ [1993] AC593.

In many cases references to Parliamentary materials would not throw any light on the matter. But in a few cases it might emerge that the very question was considered by Parliament in passing the legislation. In such cases the Courts should not blind themselves by strictly adhering to the rule excluding references to Parliamentary material as a guide to the construction of the words used in the Statute. Thus, subject to any question of Parliamentary privilege, the exclusionary rule would be relaxed so as to permit reference to parliamentary materials where (a) legislation was ambiguous or obscure, or led to absurdity; (b) the material relied on consisted of one or more statements by a Minister or other promoter of the Bill together if necessary with such other parliamentary material as was necessary to understand such statements and their effects; and (c) the statements relied on were clear.

Thus judges are more than mere automatons pushing the buttons of the law. They are co-creators of the law. Cooray¹⁰⁰ writes that interpretation of the law provides some basis for modification and judges in one of three ways can effect fundamental change in the law. First, judges can express disagreement with pre-existing law for whatever reasons, and substitute a new rule or a new set of rules, in effect over ruling the cases, which declared the pre-existing law. Second, judges can ignore precedent and prior decisions and make a statement of new law. Third, “judges could pretend that they were following existing law and manipulate previous decisions to obtain the desired results. Courts in Australia, and other common law countries have done this for generations”.¹⁰¹ Thus, decisions like *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement v Others* where the judges appear to fold their hands in matters of constitutional importance and mock the Government instead of giving effect to its intentions cast doubt on the willingness of the judiciary concerned to give effect to Governmental intentions, notwithstanding the desired practice of separating judicial powers of government, namely the executive, the legislature and the judiciary.

The forcible expropriation of land adopted by President Mugabe is contrary to the South African model, which privileges the rule of law in the resolution of a similar problem. In recognition of the past and continuing social injustice of inequitable distribution of land according to race, the first majority rule government of South Africa established in 1996 a Land Claims Court, which hears disputes arising from laws which underpin South Africa’s land reform initiative. These are the Restitution of Land

¹⁰⁰ Cooray, M. “Mabo Amends State Constitutions”, at <http://www.ourcivilisation.com/cooray/mabo/indexa.htm> (visited 04/05/03)

¹⁰¹ Ibid.

Rights Act 22 of 1994, the Land Reform (Labour Tenants) Act 3 of 1996 and the Extension of Security of Tenure Act 62 of 1997. The Land Claims Court is an independent court. It enjoys the same status as the High Court of South Africa. Appeals lie to the Supreme Court of Appeal and in appropriate cases, to the Constitutional Court. South Africa's interim Constitution (1993) provided for the right to claim restitution against the State on persons that could prove that they had been dispossessed of their land under racist legislation. It mandated the creation of a Commission on the Restitution of Land Rights and a Land Claims Court to give effect to this process. In 1994 the Restitution of Land Rights Act was passed. The Act provided for a constitutional framework of the said constitutional right. That framework evidences earlier procedures of the European Court of Human Rights, which had a Commission, which filtered frivolous cases from deserving ones. Current procedure is that individuals (or their descendants) and communities who were dispossessed of their rights in land in terms of racially discriminatory laws or practices have the right to claim restitution against the State. All claims must first be submitted to the Commission on the Restitution of Land Rights, whose role is to investigate the merits of claims and attempt to settle them through mediation. Where a claim cannot be settled through mediation, the Commission prepares a comprehensive report, and refers the claim to the Land Claims Court for final determination. Successful settlements must also be referred to the Court in order for the Court to scrutinise them and give them the status of court orders. In this way, the Land Claims Court validates all restitution claims. The task of the Land Claims Court is to decide the nature and appropriateness of restitution in each case. In some cases, restitution involves the return of the original piece of land that was taken – restoration. If this requires expropriation then the current owner is entitled to fair compensation. In some cases, restitution involves resettling the claimant on alternative state owned land or monetary compensation. Where compensation is due, either to a claimant or to a current owner who is being expropriated, the Court must decide on the amount of compensation.

The Restitution of Land Rights Act was amended by the Land Restitution and Reform Laws Amendment Act (1997), which incorporated a new Chapter. Chapter IIIA allows claimants to approach the Land Claims Court directly without first going to the Commission. However, this option requires claimants themselves to undertake all the necessary investigative and preparatory work before submitting the claim to the Court. To date, the Court has had a very busy docket. This reflects both the magnitude of the problem of inequitable access and distribution of land under apartheid and confidence of those most dependent on its work.

*Ndebele-Ndzundza Community concerning the farm Kafferskraal No 181JS*¹⁰² raised several questions. The first was whether there existed a community in accordance with the Act in relation to the said property after 19 June 1913, and if there existed a community, what its identity was. The second related to the rights the community had held in respect of the farm. The fourth was whether such a community had lost any rights it might have had in relation to the said property as a result of past racially discriminatory laws or practices. The fifth was whether the claim for restitution had been lodged in compliance with the Act. The sixth was whether the claim was not excluded in terms of section 2(2) of the Act. The Court found that:

there was a community as contemplated in the Act on the farm after 19 June 1913, and that its identity was that of the Ndebele-Ndzundza community. The community had had rights of beneficial occupation for not less than ten years prior to dispossession. The Court found that the community had been dispossessed of these rights as a result of past discriminatory laws and practices, and that the claim for restitution had been lodged in compliance with the Act. The Court found that, since the resettlement of the community in about 1939 was seen as a temporary measure by the government, the land the community was moved to was not compensation as contemplated in section 2(2) of the Act. In addition, the Court found that a relocation in furtherance of homeland policy could not be accepted as compensation in terms of the Act, since such a relocation was an act of the type that the Act and the Constitution were intended to undo.¹⁰³

The effect of the Land Reform (Labour Tenants) Act (1996) is to shield labour tenants from arbitrary eviction. Nonetheless, they may be evicted in accordance with certain procedures. They cannot be dismissed without a court order issued by the Land Claims Court. Under the Act, labour tenants may apply for ownership of that portion of the farm over which they have historically had use rights. The function of the Land Claims Court is to decide whether such ownership rights should indeed be granted, or whether the granting of lesser rights or compensation would be more appropriate. Where ownership is granted to labour tenants, farm owners are entitled to fair compensation.

Combrinck v Nhlapo is a case that was transferred from the Magistrates Court Carolina pursuant to section 13(1A) of the Land Reform

¹⁰² LCC3/00, Judgment of 23 December 2002, at http://wwwserver.law.wits.ac.za/lcc/summary.php?case_id=2543 (visited 02/05/03)

¹⁰³ *ibid.*

(Labour Tenants) Act (1996) to the Land Claims Court when the defendant raised the defence that he was an associate of a labour tenant in terms of the Labour Tenants Act. In the alternate, the defendant claimed that the status of an occupier as provided for under the Extension of Security of Tenure Act (1997). The defendant was not himself a labour tenant. The Court ruled that because the defendant had not been nominated yet by the labour tenant as his successor, he could not be regarded as an associate of the labour tenant. Nonetheless, the Court held that he could not be evicted because he was an occupier whose right of residence had not been terminated.

The Extension of Security of Tenure Act (1997) protects rural occupiers of land, other than labour tenants, against arbitrary eviction except in certain circumstances. Under the Act parties can seize the Magistrate's Court, High Court or the Land Claims Court. Of the three courts, the Land Claims Court is the final arbiter. The Act subjects all eviction orders granted by Magistrates' Courts to automatic review of the Land Claims Court for a period of two years. Automatic review under s19(3) of the Act has exercised the Court's docket considerably.¹⁰⁴ The Act constrains the High Court from actual interpretation of the Act, requiring it in all cases to halt proceedings and refer them to the Land Claims Court. It does not however, take away the right to appeal decisions of the Land Claims Court to the Supreme Court of Appeal, and in appropriate cases, to the Constitutional Court.

In *Nhlabathi and others v Fick (2003)*¹⁰⁵ The petitioners applied for an order in terms of section 6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997 (ESTA) allowing for the burial of a family member on a farm owned by the respondents. The respondents' principal argument was that the applicants were not occupiers as defined in ESTA, and that section 6(2)(dA) was not constitutionally valid because it provided for burial rights. This brought it into the realm of exclusive provincial legislative competence. Secondly, that section infringed the constitutional protection of property.

The Court ruled that the constitutional right to property is subject to limitations that are "... reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".¹⁰⁶

¹⁰⁴ For example *Biffen v Sithole and another*, LCC07R/02, judgment of 29 January 2003; *Hanekom v Hendriks en andere*, LCC13R/03, Judgment of 24 February 2003; *Van Den Berg v Skosana* LCC10R/03 Judgment of 18 February 2003 at http://wwwserver.law.wits.ac.za/lcc/cases.php?browse_judgmentyear=2003&submit_quickbrowse=Browse (visited 02/05/03)

¹⁰⁵ Land Claims Court - LCC42/02, Judgment of 8 April 2003

¹⁰⁶ *Ibid.* at http://wwwserver.law.wits.ac.za/lcc/summary.php?case_id=12140 (visited 02/05/03)

Article 6(2)(dA) contained sufficient safeguards, including the requirement that the right to bury a family member should be balanced with the right of the owner, and that a burial may only take place if there is already an established practice of burials on that land. The Court did not rule out the possibility that the owner could legitimately refuse burial on his land of deceased occupiers because in all cases, the Court must balance the rights of the owner against those of the occupier.¹⁰⁷ It held that in this case there was no factor that would tip the balance in favour of the owner because the deceased had been resident on the farm at the time of his death. “The existence of two other family graves on the farm led to the conclusion that there was an established practice of permitting burials on the farm.”¹⁰⁸ Therefore, the requirements of section 6(2)(dA) of ESTA were fulfilled. The Court granted an order that the first applicant was entitled to bury the body of his late father on the farm. The judgment makes good law in that for most far workers in the SADC, their personal landlessness forced them to work on the farms. Subsequently, the farms became their places of work, but also the only places they could call home. But the dispute demonstrates also the need for judicial mechanisms and procedures for resolving such issues. Even more, it reveals the extent to which respect for the dignity of persons as fellow human beings has sunk in some places. It may be alright to labour at a farm, in the rain, dust, cold and wind for all your life but once you drop dead, you are not good enough even to be stored in the bowels of mother earth at the same place that you worked.

The practice of establishing or strengthening work of land claims courts is growing. The Maori Land Court (*Te Kooti Whenua Maori*) is the New Zealand court that hears matters relating to Maori land. The Court is the only Maori court. Its operational procedures are contained in section 2(2) of *Te Ture Whenua Maori Act 1993*. On 15 December 1989 the Supreme Court of the State of Hawaii promulgated rules of the Land Court. The Scottish Land Court Act 1993 (c. 45) consolidates certain enactments relating to the constitution and proceedings of the Scottish Land Court and repeals provisions of the Crofters Holdings (Scotland) Act 1886 relating to the Scottish Land Court.

The work of the Land Court of South Africa is commendable. It will placate the heat from South Africa’s land issue only to the extent that the landless peasants that need land actually rely on it to legitimise their claims. But to the extent that *locus standi* before the Court depends on demonstration of existence of a previously held title to land that was

¹⁰⁷ The Court granted orders of eviction sought by the owner in *Gay NO v Sibiya and others*, LCC120/00, Judgment of 4 April 2002. *ibid*.

¹⁰⁸ *Ibid*.

expropriated through racially motivated laws under apartheid, there are many that will not be able to bring claims *qua* individuals because they may never have had the opportunity to hold land. The practice of expropriating land from natives spanned more than a century in South Africa. In that period many never even got their foot onto the property ladder either as communities or individuals. Further, apartheid was skilful at scattering and dividing black communities, so that where a claim of restitution could be brought only as a community, “what you get is competing claims for the same piece of land from groups”¹⁰⁹ In such cases the competing claims must be resolved among the groups themselves before the merits of a claim can be considered by the Court. Therefore, the legislature might have created too finely meshed a filter mechanism by requiring demonstration of previous ownership of land for a claim to be brought to the Land Court. This may alienate many landless people who through no fault of their own are not in position to demonstrate that, even though their situation shows that they need land to work for a living. One interpretation may be that the Court is not a forum for land distribution. The Court serves only to restore and enforce certain rights in land. If that is correct, then South Africa may still need to develop mechanisms for land redistribution. While some people will be able to demonstrate group rights over particular lands, many will not because of fragmentation of communities that has happened in South Africa, aided by the efficient anti black family laws of apartheid South Africa. These are satirised in Alan Paton’s “Cry the Beloved Country.” Moreover, not every SADC State enjoys South Africa’s privileged position of being able either to purchase land or to compensate successful claimants under the Restitution of Land Rights Act (1994). But land restoration that achieves nothing more than recreation of early twentieth century communal existence without conferring opportunities that empower the peasants to exploit that land in a manner that facilitates realisation of SADC economic aspirations may not suffice. The quality of the title to land enjoyed just before restoration must be maintained by creation of individual titles that beneficiaries can use in the market place to secure developmental loans with banks, lease for a period for a fee or even sell if they wish. These are the qualities that make land more than just a dwelling place.

Non-Governmental organizations interested in land rights of the landless are commonplace in South Africa. They are the mouthpieces of many whose situations do not quite fit into the scheme contemplated under the Restitution of Land Rights Act (1994). The Land Access Movement of South Africa (LAMOSA) - a community-based movement of rural

¹⁰⁹ Discussion with the Judge President of South Africa’s Land Court, 05/05/03.

communities from Gauteng, North-West, Mpumalanga, and Limpopo puts South Africa's landless rural people at nineteen million. Most of these may not fit into the Restitution of Land Rights Act (1994) particularly because they may not have *locus standi* before the Land Court. In *Baphiring Community v Uys and others* (2002)¹¹⁰ the Land Court considered whether a plaintiff (the *Baphiring* Community) who constituted only part of the full community (the full community being the *Baphiring* tribe), had *locus standi* under the Restitution of Land Rights Act (1994). The plaintiff did not show that the majority of the tribe members supported the claim. The Court held that the *Baphiring* Community, as a part of the *Baphiring* tribe, was entitled to claim restitution of a right in land dispossessed from the full community. Nonetheless, the *Baphiring* Community did not have the right to act on behalf of the *Baphiring* tribe because it was not representative of the majority of the tribe members. This underlines the community based approach to standing to petition the Court for restoration as opposed to individual claims. The situation is exacerbated that even where a community is established, it has to be the total community and not only part of it, an honourous requirement in modern day South Africa following the thorough scattering of people by the employment and social regimes of apartheid. However, in *Mahlangu v The Minister of Land Affairs and others* (2003)¹¹¹ the Land Court stated that the right to claim restitution of a right in land is protected in the Bill of Rights. Therefore, such a right must be interpreted generously. Clearly the question of standing before the Land Court may shut out many landless peasants from applying for restitution. It makes clear that the Land Court is perhaps not about resettlement in general, but restoration of particular land rights. If that is correct, then South Africa still has to address that other problem: resettlement of millions of landless native persons. On 21 March 2003 LAMOSA boycotted Human Rights Day celebrations to protest what it called:

..day for the privileged few of our country to celebrate the rights which are not enjoyed by the majority of our people, while millions continue to suffer from landlessness, poverty and human rights abuses. Almost nine years have now passed since the end of apartheid, and less than 2% of the country's land has been restored or redistributed from white to black, leaving 60,000 white farmers still controlling about 85% of our country, while the black majority is forced to eke out a living on the remaining

¹¹⁰ LCC64/98, Judgment of 29 January 2002, at http://wwwserver.law.wits.ac.za/lcc/cases.php?browse_judgmentyear=2002&submit_quickbrowse=Browse

¹¹¹ LCC116/99, judgment of 6 February 2003, at <http://www.concourt.gov.za:9999/law/lcc.aln> (visited 03/05/03)

15% of land or toil under slave-like working conditions on the farms that belong to their ancestors, but which are still the "property" of white farmers.¹¹²

2.6. Legitimacy of Law's intervention in re-ordering of titles to land

Given that international law actually legitimated colonization and that colonial governments relied on law to impose their political agendas on an unwilling and uncooperative native population, it is not a misnomer to ask the question whether the law could even be regarded as a relevant candidate to the resolution of the problem. The universal culture of Human Rights that now casts law as the dominant or even probable candidate for resolution of the land issue and other continuing social injustices whose roots are firmly anchored in the injustices of colonial occupation of SADC States is arguably inapplicable for three reasons. First, it was established post facto the issue in question. The element of time is a worry for lawyers in relation to the temporal sphere of validity of the legal norm.¹¹³ To apply it might violate the legal principle of non-retroactivity. This problem has plagued debate about the legality of the Tokyo and Nuremberg tribunals. The need to avoid similar criticism appeared to be uppermost in the United Nations when it was next called upon to respond to crimes against humanity, war crimes and other international offences committed in the former Yugoslavia and Rwanda respectively. Secondly, even if that law now applied to the present situation rather than to its history, its application would allow for enormous margins of appreciation that might even be said to be irreconcilable. For instance, it could not uphold settler commercial farming titles and insist on the compensation of white farmers at the point that the new government assumed authority to resettle landless peasants, without also justifying titles that were illegal under *Mabo*. *Mabo* held that native claims to title to land subsisted, endured and persisted beyond colonization, making any other title superimposed over them illegal. Thirdly, the legitimacy of International Human Rights law might be tainted forever in the perception of blacks for whom international law initially legitimated slavery, colonization and discrimination. It would undermine International Law's continuing process of redemption in the eyes of those for whom abolition first of slavery, and later of colonial and racist

¹¹² See "Human Rights Day celebrations a mirage for the landless", at <http://www.nlc.co.za/pubs2003/press-mar-18-hr-day.htm> (visited 03/05/03)

¹¹³ See Tur, R.H.S. (2002) "Time and Law", *Oxford Journal of Legal Studies*, Vol.22 No.3 p.463; Kelsen, H. (1945) *General Theory of Law and State*, Russel and Russel, New York, p.45.

domination were the initial steps. A disparity in the allocation of international energy and resources between similar African and Western issues is often used as a measure of international law's attitude towards Africa. For instance, some argue that but for the creation in 1993 of the International Criminal Tribunal for the former Yugoslavia (ICTY), the Security Council might never have established the International Criminal Tribunal for Rwanda (ICTR). It is widely acknowledged that the Rwanda Genocide that led to the creation of the ICTR is the most efficient human catastrophe experienced since the Second World War. Therefore, it probably was more grotesque than others that occurred around that time. Yet financial and other resources allocated to the tribunals suggests that international law has not quite shaken away its earlier Western centricism. While this criticism appears to be justified, it disregards the fact that no legal system is perfect, and that imperfections do not mean that we should stop working to improve our institutions. On the contrary, we should persist in the effort to create substantive rules and procedures necessary to make those institutions more efficient, legitimate and fairer. History serves us best when we discover from it and apply today what we should have in the past, however long ago that may have been. To persist as if legal science had not profited from two hundred years of practice is akin to dying today of an ailment that penicillin would cure in a day or two. International Human Rights law which started to gain momentum after the Second World War is relevant to our quest for strategies for resolving problems anchored in a time well before the firmament of the Universal Culture of Human Rights began to take effect.

2.7. Native Claim to Land: Is it Eternal?

It is estimated that indigenous peoples in the world today number between 250 and 300 million, or upwards to 600 million if the distinct peoples of Africa are included, making up between 5% and 10% of the world's population.¹¹⁴ In China and India, indigenous peoples make up 7% of the population, that is, 80 and 65 million respectively. In Latin America, the largest numbers are found in Peru 8.6 million and Mexico 8 million. In Africa they number over 25 million, in North America 2.5 million, and over 160,000 members of the Inuit and Saami groups populate the Arctic and northern Europe. The survival of these groups is threatened in several

¹¹⁴ Washington, J.L. (1998) "United Nations Human Rights Apparatus for the Protection of Indigenous Peoples", *The Mediterranean Journal of Human Rights*, vol.2 No.2

parts of the world sometimes by natural conditions, sometimes by health conditions which continue to be the most appalling in the world, and sometimes by the pressure of surrounding populations and government institutions. As an example, nearly 125,000 Tuareg nomads in the Sahara starved to death during the droughts of the 1970s.¹¹⁵ Increasingly, the combination of Government and multinational corporations' interest in the mineral resources of the Kalahari Desert of Botswana is threatening the Bushmen's way of life with efforts being made forcibly to make them urban dwellers. In the effort to draw attention to cultural and proprietary injustices, there is a tendency to categorise and statisticise the either or, or both the victim(s) and the aggressor(s) as I have just done with indigenous people. Yet, if ever we needed reminding of the difficulty, and sometimes futility of categorisation, we need not look further than the divided conceptual framework of the human rights regime. Attempts to cast rights as civil and political on the one hand, and economic, social and cultural on the other have significantly weakened the potential of the movement for now, to promote, protect and ensure the sanctity of the inherent dignity of man precisely because any real enjoyment of civil and political rights impliedly presumes or assumes fulfilment of certain economic and social and cultural rights. Tell a homeless man freezing on a New York sub-way that he has the right to freedom of speech (Article 19 ICCPR 1966); or a man starving to death under a savannah tree that he has the right to participate in the governing of his country by participating in periodic free and fair elections (Article 25 ICCPR 1966). Determination of "a people" *viz* the right to self-determination,¹¹⁶ and "indigenous" in the context of exploitation of natural resources¹¹⁷ demonstrate that we indulge in the exercise of categorisation at the risk of unhelpful reductionism. Yet we cannot do without it because particularly when we speak of rights, we raise inevitably the question of limits because first, resources are not unlimited, and second, some rights target specific needs of particular sections of communities. Since the second half of the last century, international law began to acknowledge that indigenous peoples have claim rights under the

¹¹⁵ See "A Commitment to Pluralism: Indigenous Peoples", at http://kvc.minbuza.nl/uk/archive/report/chapter2_6.html (visited 18 April 2003)

¹¹⁶ Acknowledging this difficulty, but insisting that the principle appears to have a core of reasonable certainty, see Brownlie, I. (1988) "The Rights of Peoples in Modern International Law", in Crawford, J. (ed) *The Rights of Peoples*, Clarendon Press, Oxford, p.1 at 5.

¹¹⁷ Arguing that most Africans do not fit into the category of indigenous people, see Date-Bah, S.K. (1998) "Rights of Indigenous People in Relation to Natural Resources Development: An African's Perspective", *Journal of Energy and Natural Resources Law*, vol.16 No.4 pp.389 – 412.

international legal system, thus recognising groups as subjects of international law both as peoples and as an indigenous entity. This two-pronged evolution of local people's rights hastened juridical recognition of their rights. Convention No.107 of the International Labour Organization (ILO) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations (1957) appears to have set off juridical normative recognition of claim rights of indigenous people. Revision in 1989 of Convention No. 107 with Convention No. 169 (1989) showed the growing importance of the subject. Between the adoption of Convention No. 107 and Convention No. 169 Commissions, Sub Commissions and Working Groups were established that researched and presented reports on indigenous people's status and rights.¹¹⁸ Moreover, the ICCPR had declared in Article 27 group rights of persons belonging to ethnic, religious or linguistic minorities. In 1992, two developments cemented juridical recognition of indigenous peoples' rights. One was establishment at the Earth Summit in Rio of Agenda 21 which was adopted as a strategy for the implementation of principles and policies agreed upon by the negotiating conference. Agenda 21 specifically required that the lands of indigenous peoples and their communities should be protected from activities that are environmentally unsound or that the indigenous people consider to be socially and culturally inappropriate. The other, was adoption by the UN General Assembly of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities which in Article 1 enjoins States to:

- 1) protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity, and
- 2) adopt appropriate legislative and other measures to achieve those measures.

However, juridically, indigenous and minority groups are not necessarily one and the same thing. Washington¹¹⁹ writes that protection of indigenous

¹¹⁸ For a discussion of some of these see Nettheim, G. (1988) "Peoples' and Populations – Indigenous Peoples and the Rights of Peoples" in Crawford, J. (ed) *The Rights of Peoples*, Clarendon Press, Oxford, pp.107- 26; Brownlie, I. (1988) "The Rights of Peoples in Modern International Law", in Crawford, J. (ed) *The Rights of Peoples*, Clarendon Press, Oxford, p.1 at 4.

¹¹⁹ Washington, J.L. (1998) "United Nations Human Rights Apparatus for the Protection of Indigenous Peoples", *The Mediterranean Journal of Human Rights*, vol.2 No.2

peoples in international law is relatively recent while attempts at safeguarding the rights of minority populations date back to the predecessor of the UN – the League of Nations. The working definition adopted by the UN Special Rapporteur on Minorities suggests that a minority is “a group numerically smaller than the rest of the population of the State to which it belongs and possessing cultural, physical or historical characteristics, a religion or a language different from those of the rest of the population”.¹²⁰ Similarities are few between the two groups. The most common one is that both exist as a numerical minority on the territories that they are located. Their aspirations could not be more dissimilar. Whereas minorities aspire to either “assimilate into the dominant population with adequate safeguards to protect their unique characteristics and mores, or to gain equal standing within a nation-State structure, if not a State”,¹²¹ indigenous people are keen “to maintain, preserve or regain their separate and distinct attributes and existence in mutually exclusive communities. [They] ... seldom consider themselves as voluntarily being members of any State and generally wish to continue their own indigenous structures rather than aspire to Statehood”.¹²² Unlike minorities, indigenous people have inhabited their land from time immemorial. International law recognises the right of indigenous populations to pursue the right to self-determination while the same cannot be said of minorities¹²³ who are not necessarily indigenous. It is clear from the discussion so far that peasants of the SADC that are said to be the subject of land reform policy in the SADC are neither a minority in the juridical sense nor indigenous people. For the sake of clarity, discussion of their case should desist from labelling them as such. But the juridical conception that has emerged of indigenous people has “... much to do with the West’s perception of non-Western peoples and the reaction of those non-Western peoples, particularly in States where they constitute a minority”.¹²⁴ This has skewed the juridical conception of indigenous peoples to exclude from them potential harvests of belonging to the category of indigenous population, the peasants of the SADC because they are neither a minority nor an indigenous population in the juridical sense.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Date-Bah, S.K. (1998) “Rights of Indigenous People in Relation to Natural Resources Development: An African’s Perspective”, *Journal of Energy and Natural Resources Law*, vol.16 No.4 pp.389 at 390.

Today, the term indigenous refers broadly to living descendants of pre-invasion inhabitants of lands now dominated by others. Indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest. The diverse surviving Indian communities and nations of the Western Hemisphere, the Inuit and Aleut of the Arctic, the Aborigines of Australia, the Maori of New Zealand, the tribal peoples of Asia, and such other groups among those generally regarded as indigenous.¹²⁵

But why? There are probably several reasons for this but two are to my mind salient ones. Firstly, while the post-colonial States of the SADC that have emerged from the collapse of the European empires may have within their jurisdiction indigenous peoples, it is perhaps correct to say that only a few of these people continue to identify themselves as indigenous peoples in the sense taken by human rights discourse. The majority do not perceive themselves as such nor do they expect anyone else to regard themselves as such. To borrow from Date-Bah,¹²⁶ they have mainstreamed themselves in the political and economic life of their post-colonial State to the extent that the core essentials of the juridical definition of indigenous peoples no longer apply to them. A 1981 UN commissioned Study on the Problem of Discrimination against Indigenous Populations¹²⁷ and led by Special Rapporteur José R. Martínez Cobo defined indigenous people as:

Those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence with their own cultural patterns, social institutions and legal systems.

This understanding of “indigenous people” suggests that landless peasants’ claim of an equal share of the land held by commercial farmers in the SADC should not be posited as indigenous claims because the core elements of this definition clearly do not fit with the SADC situation. They include:

¹²⁵ Ibid. at 391.

¹²⁶ Ibid. at 390.

¹²⁷ The first report was submitted in 1981 (EC/CN.4/Sub.2/476). The study was completed in 1986 (E/CN.4/Sub.2/1986/7 and Add.1-4).

73 *Land Reform Policy: The Challenge of Human Rights Law*

- 1) Longstanding ties to a particular land area by a group that shares a conscious sense of its distinctness from the surrounding majority population.
- 2) A shared culture, language, ethnicity and social patterns that the group desires to identify themselves by, and pass on to future generations as a mark of distinction from the surrounding majority.
- 3) A context of numerical minority of the claimant group.

The SADC land issue is characterised by organised people of varying backgrounds and aspirations that are incensed by the injustice of unequal access to land and the widespread poverty that that has resulted in. Article 1 of the ILO Convention No. 169 (1989) defines indigenous peoples as:

- a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- b) peoples in independent countries who are regarded as indigenous (by whom?) on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of the present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

In its guide to the interpretation of this Convention, the ILO is absolutely clear that references in the Convention to indigenous and tribal peoples refer "... to those who, while retaining totally or partially their traditional languages, institutions, and lifestyles which distinguish them from the dominant society, occupied a particular area before other population groups arrived"¹²⁸ and not to people that have integrated themselves into the mainstream roles of their national life. Nonetheless, if we turn to the purpose for which the notion of indigenous peoples or even that of minority groups it would be odd if international law sought to guarantee the land rights of indigenous groups and minority groups but not those of majority native populations that were dispossessed after colonial occupation of Europe's empire nations. Rights of minorities that have been recognised under international law serve to both preserve and protect the group by restoring any land and cultural rights that may previously have been lost, or are actively under threat from their dominant majorities. Given that in Africa, Africans who are also among the world's most dispossessed exist

¹²⁸ Date-Bah, S.K. (1998) "Rights of Indigenous People in Relation to Natural Resources Development: An African's Perspective", *Journal of Energy and Natural Resources Law*, vol.16 No.4 pp.389 at 392.

only as dominant numerical majorities, is it international law's intention to deny them what rights it recognises for minorities on their territories even if the minorities are not native to those territories? Were that international law's objective, few would find reason to believe in it. Because no other group right has been formulated that targets their particular situation, which it might be said is equally grave and urgent, interpretation of group rights under international law should reflect their situation too. From the outset the human rights movement has sought to restore dignity that persons had either lost or were threatened with losing. The human rights movement targets equity in the enjoyment by any population of its basic natural resources and opportunities. If this is correct, then juridically, groups, including Africans that are neither indigenous nor minority groups in their own countries have historical land rights that ought to be accounted for. Brownlie¹²⁹ writes that these rights manifest three special aspects. The first is that they "... do not cope with claims to positive action to maintain the cultural and linguistic identity of communities especially when the members of the community concerned are to some extent territorially scattered". The *Belgian Linguistics Case* suggests that they impose no positive duty on States to provide subsidies and other material underpinning to the rights protected.¹³⁰ The second aspect is that they make exclusive claims in respect of specific areas.¹³¹ According to Brownlie, "This sets the land rights issue and the traditional ownership of a group, apart from the usual prescription of human rights on the basis of individual protection".¹³² The third is that group rights are often based on the political and legal principle of self-determination.¹³³ This study is concerned mainly with the second aspect though the third one is implicit in the land issue because ultimately, struggles for independence in the SADC relied on restoration of land rights to recruit cadres to arms.

2.8. Zimbabwe's trials and tribulations over the land issue

¹²⁹ Brownlie, I. (1988) "The Rights of Peoples in Modern International Law", in Crawford, J. (ed) *The Rights of Peoples*, Clarendon Press, Oxford, p.1 at 3.

¹³⁰ *Belgian Linguistics Case*, European Court of Human Rights, Ser A No. 6 (1968)

¹³¹ Brownlie, I. (1988) "The Rights of Peoples in Modern International Law", in Crawford, J. (ed) *The Rights of Peoples*, Clarendon Press, Oxford, p.1 at 4.

¹³² *Ibid.*

¹³³ Discussing the range of political models possible, see Cassese, A. (1995) *Self-Determination of Peoples: A Legal Appraisal*, Cambridge University Press.

The murders in the name of re-acquisition of native title to land of David Stevens, Talent Mabika and Tichaona Chiminya on 15 April,¹³⁴ Martin Olds on 18 April,¹³⁵ Alan Dunn on 8 May¹³⁶ and the commission of murders, torture, kidnapping and intimidation of opposition party supporters every so often thereafter,¹³⁷ and contempt of the rule of law,¹³⁸ and the siege of commercial farmers by “war veterans”¹³⁹ raises the question whether there is a genuine connection between the breakdown of law and order on the one hand, and the land issue that all Zimbabweans and the international community that supported Zimbabwe’s struggle to end Rhodesia’s white minority rule, and later to rebuild Zimbabwe acknowledge needs to be resolved. A series of events suggests there is not.¹⁴⁰ Rather, an issue, of paramount concern to all Zimbabweans appears to have been put to the service of political electioneering.¹⁴¹ But after all the murders, torture, rapes and abuse of the electorate have ceased, the issue will still be unresolved because title to land is a legal concept which confers standards of exclusivity which the current chaos can not conceive. The difficulty with Zimbabwe’s land crisis is not only one of expropriation of natives of their land during colonization but also of legal management of different concepts of titles to property created during colonization because the underlying philosophies of those titles appear to conflict with one another. The distinction between private title on the one hand and communal title on the other is one that legally has to be attended so that acquisition and disposal of land occurs through a common process. This

¹³⁴ See “Farmer’s fate was sealed by car sticker”, *The Times*, 18th April 2000, p.1; CFU Report on the murder of David Stevens, <http://www.samara.co.zw/cfu/farmininforbul.htm> and “This is not racism, it’s Politics”, <http://www.mg.co.za/mg/news/2000apr/20apr-zim2.html>

¹³⁵ See “They wanted him out and wanted him dead”, *The Times*, 19th April 2000, p.5;

¹³⁶ See “Zimbabwe Farmer beaten to death”, <http://www.mg.co.za/mg/news/2000may1/8may-zim1.html>

¹³⁷ See “Five more Opposition Members Killed”, <http://www.mg.co.za/mg/news/2000may1/1may-zim2.html>.

¹³⁸ See “Blood on the Land”, *Times*, 18 April 2000, p.23.

¹³⁹ See “Army set up Farm Occupations, says insider”, <http://www.mg.co.za/mg/news/2000may1/5may-zim.html>

¹⁴⁰ See Appendix 1: Chronology of events leading to Zimbabwe’s crisis of 2000, *infra*.

¹⁴¹ It is an open secret that “Were he (President Mugabe) to neutralise the land issue, the election would have to be fought on corruption, unemployment and economic disaster. On those issues, no amount of gerrymandering could save ZANU-PF from humiliation”. *The Times*, “Blood on the land”, 18 April, 2000, p.23.

book concerns itself with the latter difficulty. Legally attending and resolving this distinction is a necessary part of the resolution strategy of this problem. However, current developments are hard pressed for evidence that demonstrates clear policy aimed at achieving this. Instead developments unfolding in Zimbabwe show that when communal title falls short of peasant expectation, forcible collapse of private title follows immediately, whatever the cause of that collapse. Communal title presupposes that every Zimbabwean is destined in the 21st century to be a peasant farmer unless he/she can secure full time employment outside his peasant community. However, that is hardly the case. If “war veterans” and the *squatters* take over commercial farming land, what title do they obtain? With a population of 12 million, and a population growth rate of 3.1, how will land be allocated to the young adults ten years from now, and what sort of title will they obtain?

In the determination and allocation of title to land, *humwe* is limited in that it suffices only where there is surplus land, and those in need of it are guaranteed to find some. Group membership is the basis of social rights that include access to land as a means of ensuring one’s subsistence. However, when there is no more surplus, which Zimbabwe’s growing population threatens to make a reality soon, another land crisis will hit Zimbabwe because in the current crisis land issues are being played out as an electioneering strategy.¹⁴² Often it is the scarcity of a good that determines its value. Land would not have its enhanced qualities of utility if everyone had hectares of it to spare.

2.9. Conclusion

This chapter considered the nature of title to real property before colonization of SADC communities. It established that pre-colonial SADC communities’ relationship to their physical environment: land, rivers, wildlife, etc – was summed up in the philosophy of common heritage – *humwe*, according to which every member of the tribal group and larger community was presumed to hold an inherent right not only to earn a living off, but also to be supported in that effort by his kinsmen. This common heritage view of the physical environment *humwe* persists among Southern Africans to this day. Having been rejected by the foundationalist approach of successive colonial administrations in the region, who favoured private individual ownership of what was essentially communal property, *humwe*

¹⁴² See appendix I below, p.30.

as the oppressed other¹⁴³ appears to be bouncing back with similar force and brutality. In one sense the land issue in Zimbabwe and South Africa has become the stage on which resolution is to be addressed of foundationalist violence of enthroning “x” and rejecting “y” without justification. Clearly our understanding of “x” depends so much on the existence of “y” to the extent that the former would not make sense without the latter. It is that interdependence of both “x” and “y” that requires in any social ordering practice, application of critical foundationalism and not violent foundationalism typified in many of the social injustices that are rooted in colonial or some such other similar historical experience of developing countries. Critical foundationalism requires reconciliation of “x” and “y” and not outright rejection of either. In social ordering practices, such reconciliation is an on-going process, sometimes culminating in the firming over time of one of the two opposites and the disappearance of the other. This is certainly to be preferred over violent foundationalist tendencies that only nurture violence.

This chapter observed that the land issue in affected SADC States appears to be an equal and opposite reaction to the legal violence that alienated native people from their land and forced them into wage earners from the new landlords and to be “squatters” in the land of their forefathers. Private title to commercial farmland, which also has the most agricultural potential, appears corrupt because of the violence inherent in its creation. Racism, coercion and dehumanisation of the native population are at the core of the corruption of the titles to commercial farmland. Thus, the native people’s impatient and even violent agitation for re-allocation of land without regard to race, and without stigmatising the other as inferior appears noble. This is summed up in the slogan:

Landlessness = Racism

International law’s role in the resolution of this issue is made difficult in that it also sanctioned colonialism because then, the community of States that made the rules was the same that pursued the practice. Nonetheless, it would be a big leap to say that because it sanctioned colonialism it sanctioned also human rights abuse unless it can be shown that human rights abuse was synonymous with colonization of other territories. By sanctioning slavery, did international law sanction also the rape of black

¹⁴³ Discussing deconstructionist normative theory, see Chigara, B. (2001) *Legitimacy Deficit in Custom: A deconstructionist Critique*, Ashgate, Aldershot, pp.18-1666.

women by their masters? Again unless it can be shown that raping by a master of a slave was the same as slavery it may be difficult to impute to international law all the evils associated with that which it legitimated in the past. To its credit, international law, which is dependent to a great extent on State practice, later prohibited both slavery and colonization of other territories. The human rights movement behind the sanctification of international law continues to grow in both stature and strength. It is to its strength that nationals of all jurisdictions now look to both under their national laws, regional laws, and international laws. Therefore, even in addressing the land issue, human rights issues appear best suited to head the list of considerations that should be had. While international law has clearly ruled that native people's pre-colonial experience titles to land subsisted through colonization and endured it except in a few special cases, restoration of those titles should still be informed by human rights of those whose titles appear inferior and must make way for those with title superior to theirs.