

## **New Law against an Old State: Land Restitution as a Transition to Justice in Post-Apartheid South Africa?**

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### **ABSTRACT**

Based on a case study of the so-called 'Kafferskraal' land claim, this article scrutinizes the ongoing land restitution process in post-apartheid South Africa with regard to its capacity to provide a transition towards 'justice'. After sketching the legal and institutional set-up of land restitution, the justice of the actual restitution process is explored with reference to conflicting interpretations by various actors involved in this exemplary case. Here, a focus on divergent understandings of what historically constituted valid rights in land as well as forms of past compensation reveals continuing discrepancies regarding the legitimacy of various property regimes. These differences, leading to divergent evaluations of 'the justice' of this claim's final outcome, are shown to be ultimately rooted in incompatible logics of exceptionality and the ordinary, which conceive of land restitution in terms of either 'law making' or 'law preserving'. The article concludes with a discussion of the implications of such a configuration of land restitution as a measure of transitional justice.

### **INTRODUCTION**

One morning in October 2010, I was sitting in the living room of a farmhouse near the settlement of Stoffberg, northeast of Pretoria, South Africa. My hosts were the Botha family who had been party to the legal dispute regarding the

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so-called 'Kafferskraal' land claim.<sup>1</sup> At the time, I was collecting data for a research project about the ongoing South African land restitution process, through which the state compensates former victims of land dispossession on racial grounds. For this research, I selected a number of exemplary land claim cases, talked to representatives of all parties involved, checked court files and engaged in participant observation on the farms and in the Land Claims Court. Since the 'Kafferskraal' case was one of them, I had arranged to meet the Botha family on that day, and we discussed their experiences regarding this particular restitution case. Portion 3 of the 'Kafferskraal' farm had been owned by the Botha family since the late nineteenth century, as was proven when I was shown their historical title deed and cadastral map, dating back to 1893. As a matter of fact, the farm had already been in possession of the family since it was first granted in private ownership in 1872, as the Bothas were also matrilineally related to the first white<sup>2</sup> owner, Abraham Johannes Korf.

While the Bothas agreed that land which had been taken unlawfully in the past should now be restituted to the former owner, they questioned the validity of the 'Kafferskraal' land claim, since South African land restitution (as we will see below) only deals with dispossessions after 1913. So how could anybody have been dispossessed in terms of current restitution legislation, I was rhetorically asked, if their portion 3 had continuously been in the family's possession long before 1913? Therefore, the Botha family, together with the Prinsloo family owning portion 2 of 'Kafferskraal', had legally challenged the validity of the land claim in the Land Claims Court and, subsequently, in the Supreme Court of Appeal. However, on both occasions, they lost. By the time of our meeting, the state had already bought the respective portions from both families and handed them over to the claimant community. The Bothas stressed forcefully that they still felt the judgments neither to be just nor to follow what they regarded as 'the law'. Mr Botha Jnr expressed this strong sense of injustice by claiming that the state is 'creating a situation for me, in fifty years' time, to be the next land claimant, because I've been treated unfairly now. So in fifty years'

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1. The name of this farm has appeared on successive title deeds since 1872. The word *kaffer* is an offensive term for African people and *kraal* refers to an enclosure for cattle within an African homestead. As we will see below, however, this fact was recently used to positive effect by the claimants in court. Given that this name is consistently used in state proceedings such as court files and judgments, oscillating uncannily between being a seemingly neutral signifier and representing precisely the racial discrimination which lies at the heart of land restitution, I stick to it, placing it in quotation marks to highlight its problematic nature.

2. I use the conventions of African, Indian, coloured, black (as inclusive of the previous three categories) and white to describe the different social groups that were identified as 'distinct' under the apartheid system. At the same time, I acknowledge the dilemma the usage of these socially constructed terms entail, in that they might reinforce notions of their alleged 'reality' as being biologically predetermined.

time, whatever might happen, it's not impossible that I'll be the next land claimant! . . . You cannot fix a mistake with a mistake'.<sup>3</sup>

Based on a case study of the 'Kafferskraal' land claim, this article scrutinizes South African land restitution with regard to its capacity to provide a transition to justice in the post-apartheid era. I thereby consciously refrain from studying this process with reference to an analytical concept of 'justice' — be it in terms of utilitarianism, libertarianism, fairness, capabilities, participatory parity, etc.<sup>4</sup> Instead, my focus is exclusively on 'justice' as it is emically understood, and constructed, by the actors themselves. 'Justice' is thus interpreted in a broad sense as an evolving co-production involving various actors engaged in negotiating, and putting into practice, the concrete terms of South Africa's new beginning with regard to its moral rightness. The article is premised on the assumption that these discursive and practical negotiations of justice, as exemplified in land restitution, are strongly influenced by divergent evocations of logics of exceptionality and logics of the ordinary. Reference to logics of the exception seems inevitably to arouse associations with the recently somewhat popular Agambian paradigm of 'sovereignty' and its foundational 'state of exception' (Agamben, 1998, 2005), which builds on the earlier works of Carl Schmitt (1985) and Walter Benjamin (1996). Given the massive scope of social scientific engagements with Giorgio Agamben's state of exception, and the somewhat divergent focus on exceptionality in this text, I will refrain from discussing Agamben's critique of sovereignty as such.<sup>5</sup> For present purposes, it suffices to say that Agamben's exception seems to simultaneously offer too much and too little. It offers (and asks for) too much in that it ultimately proclaims the state of exception to be the paradigm of modern government, and the camp, populated by citizens reduced to 'bare life', to be the modern predicament. Thus downplaying, among others, the difference between liberal democracy and totalitarian dictatorship — once described by Adorno (2000: 155) as 'a total difference'<sup>6</sup> — Agamben's homogenizing and unitary exception also arguably offers too little. It lets the highly divergent logics of exceptionality pass unnoticed, which are only possibly and not necessarily centred on law and the state, and not exclusively evoked by 'the sovereign'.

By contrast, the notion of variable logics of exceptionality in this article propagates a more empirically open conception, accommodating a whole variety of modes, which, from the actor's point of view, insist on some profound break with normality, the familiar and the mundane — in short, the ordinary — that demands and justifies extraordinary measures in exceptional times. Correspondingly, proponents of logics of the ordinary insist

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3. Interview with members of the Botha family, 11 October 2010.

4. For an overview of different theories of justice, see Brighouse (2004) and Sandel (2010).

5. For an extensive enumeration of recent scholarship on Agambian sovereignty as well as a critical engagement with the genealogy, and consequences, of Agamben's approach, see Jennings (2011).

6. I am indebted to Heins (2005: 860) for this observation.

on some profound continuity with normality and the mundane which, in turn, allows reading, and motivating, behaviour in all too familiar terms — whatever such behaviour may say of itself (see Anders and Zenker, 2014, in the Introduction to this issue). Seen in this light, singular events may acquire a different selectivity and connectivity, that is, different pasts and potential futures (Luhmann, 1995: 215), depending on the peculiar logic(s) through which they are contextualized. In this way, South African land restitution can be interpreted as evolving through crisscrossing pathways of agency which — based on divergent logics of exceptionality and the ordinary — bring forth the peculiar nature of any potential transition to ‘justice’ in post-apartheid South Africa.

In order to approach the possible justice of South African land restitution in such terms, the article first sketches the concrete institutional set-up with reference to the Restitution of Land Rights Act (Act 22 of 1994) and the constitutional provision for both the protection of private property and the restitution of land rights. Against this backdrop, ‘the justice’ of the actual land restitution process is explored with regard to conflicting interpretations by various sets of actors involved in the ‘Kafferskraal’ land claim, using data generated in the course of an ongoing research project on South African land restitution (see Zenker, 2012a, 2012b, forthcoming-a, forthcoming-b, forthcoming-c). This article focuses on divergent understandings of what historically constituted valid rights in land and corresponding forms of compensation in the past. These understandings account for the continuing discrepancies regarding the legitimacy of various property regimes which, in turn, inform different evaluations of ‘the justice’ of the final outcome in this land claim. As is shown, these differences are ultimately rooted in incompatible logics of exceptionality and the ordinary, which conceive land restitution either in terms of ‘law-making’ or ‘law-preserving violence’ (Benjamin, 1996). The article concludes by discussing the implications of this overall configuration for land restitution as a measure of ‘transitional justice’.

## **THE RESTITUTION ACT WITHIN THE LEGAL RECONSTITUTION OF SOUTH AFRICA**

South African land restitution was mandated both by the Interim Constitution of the Republic of South Africa (Act 200 of 1993) and by the current Constitution of the Republic of South Africa (Act 108 of 1996) as an extraordinary measure, placing the state under a duty to redress land dispossessions as a result of past racially discriminatory laws or practices. The basic criteria and procedures for the restitution process were provided for by the Restitution of Land Rights Act (Act 22 of 1994). Section 2(1) of the act provides a set of criteria according to which claimants are entitled to restitution in the form of either restoration of a right in land or equitable redress. The claimant could be an individual (or a direct descendant) or a

community (or part of a community) whose rights in land were derived from shared rules determining access to land held in common by such a group. Claims of dispossession of land rights through racially discriminatory laws and practices could not pre-date 19 June 1913.<sup>7</sup> Finally, claimants may not have received just and equitable compensation (as stipulated in the constitution) for the dispossession at issue and had to lodge their claim before 31 December 1998.<sup>8</sup> Significantly, restitution was explicitly not limited to former freehold ownership of land. Instead, the right in land to be restituted was defined quite broadly in section 1 of the Restitution Act, including ‘any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question’. As we will see in the so-called ‘Kafferskraal’ case, this had profound consequences for the perceived justice of restitution outcomes.

The Restitution Act further established the Commission on Restitution of Land Rights, including the Chief Land Claims Commissioner and the Regional Land Claims Commissioners, as well as the Land Claims Court (LCC), as its key players. The subsequent examination by the Commission of lodged claims ultimately validated about 80,000 claims as legitimate and in need of resolution.<sup>9</sup> Since then, commission bureaucrats have mediated between claimants and usually white landowners in order to settle on a largely market-oriented agreement, where the state buys the land and, based on certain conditions, hands it over to the claimants. The minister and, by delegation, the land claims commissioners, have the power to facilitate and conclude settlements by agreement. Only claims that cannot be resolved this way take the judicial route through the LCC. This also entails the possibility of expropriation — an option that is also constitutionally enshrined (Hall, 2010: 21–32). Based on figures from 2011, about 5 per cent of restitution claims (that is, 3,673 cases) remain outstanding (Department of Rural Development and Land Reform, 2011: 40). These cases are typically quite complex and face numerous challenges for their resolution. Yet, not only the outstanding restitution claims, but also the officially ‘resolved’ cases continue to be haunted by many problems (see James, 2007; Walker, 2008; Walker et al., 2010; Zenker, 2012b, forthcoming-a).

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7. This was the date of the proclamation of the Natives Land Act (Act 27 of 1913), first legalizing massive dispossessions country-wide by introducing racial zones of possible landownership and by restricting black reserves to only 7 per cent of South African land (later to be extended to 13 per cent).

8. At the time of writing (February 2014), a Restitution of Land Rights Amendment Bill (B35 of 2013) is undergoing the legislative procedure, reopening the lodgement of land restitution claims until 31 December 2018.

9. See Zenker (2012a, forthcoming-b) for extensive discussions of the shifting figures within restitution statistics as well as their recent transformation into explicit performance indicators of South African land restitution.

The history of race-based land dispossession had always occupied an important position in the African National Congress's (ANC) understanding of the liberation struggle (Walker, 2008: 50–1). Political protests, legal battles and the meticulous documentation of the racially based land dispossessions and forced removals involving an estimated 3.5 million black people between 1960 and 1983 (Platzky and Walker, 1985: 10), had constituted key areas of land activism in and around the ANC for many decades. However, despite a political rhetoric highlighting the land question, towards the late 1980s rural issues occupied a rather low priority on the ANC's political agenda (Klug, 2000: 125). Given the ANC's general preoccupation with urban–industrial issues and the strong emphasis on property rights by the still ruling National Party (NP), especially concerning agricultural land, land reform became a matter of strategic compromise (Walker, 2008: 54). This resulted in a balanced constitutional protection of both property rights and the right to redress for race-based violations of past rights in land; first, in the Interim Constitution of 1993 (Chaskalson, 1994: 131–2), and then in the Constitution of the Republic of South Africa of 1996 (Klug, 2000: 124–36; Walker, 2008: 50–69). The institutional framework for land restitution needs to be seen within this context of the profound reconstitution of the overall South African legal order during the transitional negotiations (Zenker, 2012b).

As Ruth Hall points out, however, both the 1998 deadline for lodging claims and the 1913 cut-off date, categorically excluding all prior colonial dispossessions, have been hotly contested (Hall, 2010: 23). Yet until very recently, the government consistently opposed accepting new claims, not least because this would entail an explosion in costs (*ibid.*: 24). With regard to the 1913 cut-off date, the ANC government provided an ex-post rationalization in 1997: it pointed out that given the numerous conflicts between African groupings prior to 1913, as well as the massive growth and scattered distribution of the overall African population thereafter, there would be a high risk of endless inter-ethnic conflict among the dispossessed, were pre-1913 claims to be admitted (Department of Land Affairs, 1997: section 4.14.2); by contrast post-1913 dispossessions evidently favoured white supremacy. A further reason for the 1913 deadline can be found in the necessity for political compromise during the constitutional negotiations, as described above.<sup>10</sup>

While the 1913 cut-off date has indeed continued to categorically exclude claims to restitution for pre-1913 dispossessions, it is important to emphasize

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10. However, during the State of the Nation Address on 14 February 2013, President Jacob Zuma announced that the government would re-open the lodgement of land claims and allow limited exceptions to the 19 June 1913 cut-off date to accommodate claims by the descendants of the Khoi and San. On 23 May 2013, the government published the Restitution of Land Rights Amendment Bill (B35 of 2013) for public comment, extending the deadline for lodging new land claims until 31 December 2018. The Explanatory Memorandum annexed to the Bill declares it to be the government's intention to deal separately with pre-1913 land dispossessions as a result of state action.

that two factors have decisively broadened the scope for land restitution to actually include cases often assumed in both public debates and the academic literature to fall outside the jurisdiction of land restitution. First, according to the above-mentioned broad definition of ‘rights in land’, much more than merely a loss of freehold land ownership qualifies victims of post-1913 dispossessions for an entitlement of restitution. Second, the largely overlooked jurisprudential role of the courts (Mostert, 2010) has substantially broadened the scope of restitution through redefining ownership in such a way that many dispossessions are actually conceived as having, indeed, occurred post-1913. These two aspects constitute core elements underlying the divergent understandings of justice as instantiated by the ‘Kafferskraal’ land claim.

### **THE CASE OF THE SO-CALLED ‘KAFFERSKRAAL’ LAND CLAIM: A HISTORY OF REPOSSESSION**

The farm ‘Kafferskraal’ is situated on the edge of the highveld escarpment, approximately 200 km to the northeast of Pretoria and situated within the Greater Groblersdal Local Municipality, Mpumalanga Province.<sup>11</sup> The name of this farm, measuring about 4,200 hectares, has appeared on successive title deeds since 1 December 1872, when the Zuid-Afrikaansche Republiek (ZAR), also known as the ‘Transvaal Republic’, first granted the land in private ownership to the white farmer Abraham Johannes Korf. While the farm name is pejorative, as mentioned above, it signified a fact which was used in court to positive effect by the claimant community. They argued that the land had long been settled by black people and that this fact, and related land rights, survived the superimposition of white registered title.<sup>12</sup>

The settlement history of the farm and surrounding areas is both crucial for an understanding of this restitution case and highly contested. For this reason, I will restrict myself to those historical elements that were more or less taken for granted by all parties and hence formed the backdrop for the subsequent legal dispute. In this spirit, a history of this area can be summarized as follows. During the first half of the nineteenth century, intense competition characterized the region, as three powerful South African kingdoms — the Pedi, the Swazi and the Zulu — struggled for dominance. The interplay of colonial penetration, especially in the form of arriving Boer Voortrekkers in the 1840s, and the emergence of new African kingdoms, wars and migration

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11. This local municipality has been renamed and rezoned into the bordering Limpopo Province. However, as the farm was still situated in Mpumalanga at the time this claim was processed, I continue to refer to Mpumalanga Province.
  12. See the judgment of the Supreme Court of Appeal, reported as *Prinsloo & Another v. Ndebele-Ndzundza Community & Others* 2005 (6) SA 144 (SCA), section 1.

in the aftermath of the Difaqane<sup>13</sup> sent further shock waves throughout the region (Delius, 2007: 137). In 1852, Boer settlers established the ZAR in what later became known as the South African province of ‘Transvaal’, encompassing the area at issue as its eastern part. In the early decades, ‘the ZAR was weak and poor and as an administrative, judicial and executive body it was inefficient’ (Delius and Hay, 2009: 51). The Boers wanted to own and control the land and further distribute it to white settlers. They attempted to buy land from various kings and chiefs, occupied pockets of land that did not fall under the control of any particular chief and subordinated smaller African chiefdoms and communities. In this process, the ZAR issued title deeds for what it regarded as its land to the growing number of immigrating white *burghers* (citizens) (ibid.: 51–2).

Within this overall context, the Ndebele<sup>14</sup> was one local group among others. Much earlier in their history, they had divided into the two kingdoms of Manala and Ndzundza (Delius, 1989: 229). While both sections suffered heavily in the course of the Difaqane, the Ndzundza Ndebele recovered better, and by the 1840s had re-emerged as a significant kingdom under King Mabhoko, with various fortified mountain strongholds. The coexistence with the Boers proved conflictual, ‘with the Ndzundza refusing Boer demands for labour and denying their claims to ownership of the land’ (ibid.). Against a number of failed Boer attempts to subjugate the kingdom, Ndzundza power reached its heights in the late 1860s and 1870s. However, substantial changes were on the way:

The British annexation of the Transvaal in 1877 resulted in a restructuring and strengthening of the state, and in 1879 a British-led army (with Swazi and Ndzundza assistance) finally defeated the Pedi paramountcy (i.e. the most powerful African kingdom in the area). As the balance of power swung away from the African states in the region, landowners and speculators started to press claims to formerly unoccupied farms and to those which had been worked only on sufferance of the Ndzundza rulers. Shortly after retrocession (i.e. the restoration of ZAR independence from Britain in 1881), the Ndzundza and the restored Republican administration found themselves at loggerheads over competing land claims and over whether the chiefdom fell under the authority of the Zuid-Afrikaansche Republiek (ZAR). In 1882 the Pedi pretender Mampuru sought refuge amongst the Ndzundza after having murdered his brother Sekhukhune. Nyabela’s refusal to hand him over to the ZAR brought the wider conflicts to a head. (ibid.: 231)

The protracted Mapoch War that followed ended in 1883, when the Ndzundza were forced to capitulate. Their tribal leadership was disrupted with the imprisonment of King Nyabela and other members of the royal

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13. The Difaqane, also called Mfecane, refers to a period, caused by colonial conquest and tensions within and among indigenous groups, of warfare, migration and political change within African society during the first half of the nineteenth century (see Delius, 2007: 107–111).

14. The overall Ndebele have been classified into Northern and Southern sections, of which the Northern Ndebele subsequently came to be substantially influenced by Northern Sotho language and cultural forms. Thus, the name ‘Ndebele’ is often used as shorthand only for the Southern section, as is the case in this text (see Delius, 1989: 228–29).

family. The land around the royal stronghold, situated on the farm ‘Mapochsgronden’ — named after the above-mentioned Ndzundza King Mabhoko — was confiscated, subdivided and handed over to Boers who had fought in the war (van Vuuren, 2010: 10–11). The population of the kingdom was dispersed among the ZAR burghers — ‘in the interests of order, safety and humanity’, as the ZAR government decreed — and indentured for a period of five years (1883–88) (Delius, 1989: 232). This led to much arbitrary displacement of Ndzundza Ndebele within the ZAR territory and ensured that the Ndzundza, subsequently working mainly as labour tenants on white-owned farms, would never officially regain their pre-colonial territory (van Vuuren, 2010: 10). The incarceration of the royal family and the dispersal of the population constituted a severe blow to the Ndzundza Ndebele, but their imprisoned leadership managed to organize the escape of Nyabela’s brother. Matsitsi was sent to the farm ‘Kafferskraal’ to re-establish chiefly guidance and the male initiation ritual (*ingoma*), an important Ndebele institution even today (Delius, 1989: 241; van Vuuren, 2010: 11–12).

As mentioned above, the farm ‘Kafferskraal’ had been in white titled ownership since 1872 and subdivided into three separate portions with changing owners from at least 1902. White owners never actually lived on the farm, while generations of Ndzundza Ndebele resided and worked on ‘Kafferskraal’, including Matsitsi and his chiefly successors who regularly organized male initiation schools on the farm and exercised judicial functions there. At various points in the 1920s and 1930s, Ndzundza leaders also attempted to buy a portion of ‘Kafferskraal’ from willing white sellers but were prevented from doing so by various racially discriminatory laws (see below). Against this backdrop, and after some changes in white ownership of ‘Kafferskraal’, most members of the local Ndebele community were finally evicted by the late 1930s and removed to the north to the state-owned farm Goedgedacht and surrounding areas in the Nebo district (today Limpopo Province) which, as reserve land, later became part of the Lebowa homeland.

This final removal constituted the end point in a long process of cumulative dispossession that had started in the nineteenth century. At that time, divergent property regimes of arriving white settlers and competing African chiefdoms under their respective ‘customary laws’ had uneasily co-existed until the latter’s dispossession ‘by right of conquest’ (Bundy, 1972: 379). After the establishment of the Union of South Africa in 1910, the Natives Land Act (Act 27 of 1913) unified the somewhat divergent regulations for African reserves and landed property in the four provinces of the Union. It introduced racial zones of exclusive landownership and restricted black reserves to only 7 per cent of South African land. Furthermore, it reduced legal occupation by blacks on white farms to labour tenancy or wage labour, thereby effectively abolishing squatting and sharecropping as successful strategies for relatively independent African peasant farmers, thus ensuring the supply of cheap labour to white farmers (Bundy, 1972: 384). While the

implementation of the Natives Land Act was slow and uneven, allowing the Ndzundza Ndebele to continue living on 'Kafferskraal' into the 1930s, it still prevented them from buying a portion of 'Kafferskraal', as this farm fell outside the areas designated as African reserves.

The Native Trust and Land Act (Act 18 of 1936) released additional land for black reserves, expanding the total amount of land officially set aside for the majority African population to (still only) 13 per cent of South African land. The act also established the 'South African Native Trust' to control the administration and acquisition of land (with public funds). The trust became the registered owner of almost all the reserves, as a title was usually not vested in the people who lived there (Platzky and Walker, 1985: 89). It was in the wake of these acts that the Ndzundza Ndebele community on 'Kafferskraal' was eventually removed in the late 1930s to several trust farms in the Nebo district.

Meanwhile, a parallel system of administration for the African population had been established. The Native Administration Act (Act 38 of 1927) modified and consolidated the system of chiefly rule and 'customary law', placing all chiefs under the Governor-General as the white 'supreme chief'. While the powers of chiefs were thereby to some extent restricted, their authority in local African administration was also officially recognized, for instance, their continuous right to control land allocation in the reserves. Through this process, a dominant property regime in the reserves emerged under apartheid in which *de jure* trust-owned land *de facto* turned into the chief's 'property' through his control of access to the land. This laid the foundation for many post-apartheid conflicts with chiefs (as the case of the Ndzundza Ndebele shows below), who insist that they are the true owners of the land.

Within this overall framework, a proclamation was published in the government gazette on 2 August 1957 that defined the trust farms in Nebo, to which the Ndzundza Ndebele had been removed, as their 'tribal area' and established a 'Bantu Tribal Authority' for this Ndebele tribe under the then Chief Poni Mahlangu, called 'Ndebele Tribal Authority'. However, these trust farms in Nebo became the relocation site for successive waves of removals from the late 1930s, in which both Ndebele- and Pedi-speaking people, mainly ex-labour tenants, were relocated from nearby white farms. While the earlier arrivals, like the Ndzundza Ndebele who moved in at the beginning of this period, usually managed to establish some rights to land for ploughing, later arrivals, especially from the late 1960s onwards, were only able to acquire residential stands (James, 1988: 36). As in other reserves, the South African government also subjected the area to agricultural 'Betterment planning', that is, schemes introduced since the 1930s and 1940s in an attempt to control land usage and thus improve and rationalize reserve agriculture (Platzky and Walker, 1985: ix). However, the Betterment schemes in Nebo had the adverse effect of actually reducing the size and viability of these plots: 'In attempting to provide land for the waves of more

recent settlers, the planners took land away from earlier settlers, rendering them unable to produce more than a supplement to migrant wages' (James, 1988: 36).

The growing land shortage on the trust farms contributed to local impoverishment and increased the dependence on the wider South African system of labour migration, thus stabilizing the reproduction of cheap labour, upon which South African capitalism depended (Wolpe, 1995). At the same time, the continued expansion of both labour migration and forced removals into the homelands led to processes of political cross-fertilization and a growing interaction of township and rural youth from the 1970s onwards. This effected an increasing politicization also of rural areas, and youth involvement in rebellions such as the 1986 uprisings in Sekhukhuneland/Lebowa (Delius, 1996) and the revolt in 1986 against political independence in KwaNdebele (Phatlane, 2002).

With the demise of apartheid, different Ndzundza Ndebele groups and individuals lodged restitution claims for 'Kafferskraal'. After establishing *prima facie* validity, the proscribed notice concerning the restitution claim of the three portions of 'Kafferskraal' was published by the Regional Land Claims Commissioner in the government gazette on 2 January 1998. The validity of the claim was researched and the various valid claims — mostly by individuals or nuclear families from the Ndzundza Ndebele community under then Chief M.J. Mahlangu of the Ndebele Tribal Authority — were consolidated. For that purpose, a land claims committee called Sibuyela Ekhaya (We Return Home) was formed in cooperation with the chief and his council to represent the entire Ndzundza Ndebele community with a valid claim on 'Kafferskraal', on whose behalf Chief M.J. Mahlangu had also lodged a separate land claim on 18 September 1995 regarding 'Kafferskraal' and sixteen neighbouring farms along the Stoffberg-Groblersdal corridor (see also van Vuuren, 2010: 10). In the course of various stakeholder meetings, organized by commission officers with representatives of the claimant community and the three sets of white landowners, it became clear that while the owner of portion 1 agreed after initial opposition to sell his portion (as he subsequently did), the Prinsloo and Botha families, owning portions 2 and 3 respectively, continued to contest the validity of the claim. The Regional Land Claims Commissioner thus referred the case to the Land Claims Court (LCC) on 19 January 2000, since no agreement could be reached.

On the basis of extensive submissions and court hearings on 7–10 October, 1 November and 9 December 2002, the LCC gave a judgment on 23 December 2002 with regard to the validity of the claim by answering five questions: first, whether there had been a community on 'Kafferskraal' as contemplated in the restitution act; second, if so, whether the community had rights in land falling under the Restitution Act; third, whether, if such rights had existed, they had been dispossessed as a result of past discriminatory laws and practices; fourth, whether there had been substantial compliance

with the procedure prescribed for lodgement of claims; and fifth, whether the claim was not excluded on the basis of a just and equitable compensation in the past.<sup>15</sup>

In its judgment, the LCC answered all these questions in favour of the claimant community. First, it found that although the Ndzundza had been scattered over the area after the Mapoch War, they had retained their identity as a distinct group, lived on the farm under tribal conditions ruled by various chiefs, and maintained rights in land derived from shared rules determining access to land held in common. Furthermore, they left as a community in 1939 and letters from various government authorities over a prolonged period recognized the claimants as a community.<sup>16</sup> Second, given that the community had lived on the farm from at least 1883 until the late 1930s, cultivated the soil, kept livestock and shared the land as a community without any white owners occupying the farm or consistently exercising ownership rights (except for two decades of demanding an annual rent), the court found that the community had a restorable right in land in the form of beneficial occupation of no less than ten years prior to dispossession.<sup>17</sup> Third, the court decided that the community had been dispossessed by the cumulative effect of a number of racially discriminatory laws and practices, first turning them into labour tenants on their own land, then preventing them from purchasing the land and finally allowing for their eviction. Furthermore, the record shows the involvement of the government in the actual relocation.<sup>18</sup> Fourth, the court found that, on the whole, the claim had been lodged substantially in compliance with the legal requirements.<sup>19</sup> Last but not least, the court found that the relocation farm, Goedgedacht, could not have been intended as compensation at the time, since it was explicitly declared by the government as only a temporary solution. The court found additional merit in the argument by the claimants' advocate that 'in any case, Goedgedacht, having been provided as part of homeland consolidation, a discriminatory act in itself, cannot now be accepted as compensation for past discriminatory acts. . . . To accept as compensation, land given in furtherance of such policies would be tantamount to buttressing the very acts the Constitution and the Act are intended to undo'.<sup>20</sup> Correspondingly, the LCC found that the claimants were entitled to restitution and granted them leave to set the

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15. See the judgment of the LCC, sections 4–7, reported as *Ndebele-Ndzundza Community v. Farm Kafferskraal* NO 181 JS2003 (5) SA 375 (LCC).

16. *Ndebele-Ndzundza Community v. Farm Kafferskraal* NO 181 JS2003 (5) SA 375 (LCC), sections 17–18.

17. *Ndebele-Ndzundza Community v. Farm Kafferskraal* NO 181 JS 2003 (5) SA 375 (LCC), section 19.

18. *Ndebele-Ndzundza Community v. Farm Kafferskraal* NO 181 JS 2003 (5) SA 375 (LCC), sections 20–22.

19. *Ndebele-Ndzundza Community v. Farm Kafferskraal* NO 181 JS 2003 (5) SA 375 (LCC), sections 23–28.

20. *Ndebele-Ndzundza Community v. Farm Kafferskraal* NO 181 JS 2003 (5) SA 375 (LCC), section 29.

matter down for a hearing of the remaining issues that had been excluded pending the outcome of the trial.<sup>21</sup>

An application by the Prinsloo and Botha families for leave to appeal against the whole of the LCC judgment was granted on 17 February 2004 by the Supreme Court of Appeal (SCA). In its judgment on 31 May 2005, the SCA dealt with four issues: first, whether the claimants were a community as contemplated in the act; second, if so, whether the community had restorable rights in land; third, whether the community was dispossessed as contemplated in the act; and fourth, whether the claim was not excluded on the basis of a just and equitable compensation in the past.<sup>22</sup>

The SCA, again, principally confirmed the validity of the claim. First, it found that the claimants constituted a community as defined in the restitution act since these Ndzundza Ndebele continuously lived and worked on the farm for at least fifty years under tribal authority, held the land in common with each other, occupied the farm exclusively without immediate supervision or direct control of the white landowners, and did so under Ndzundza Ndebele traditions, as the telling fact shows that Matsitsi was explicitly sent back to 'Kafferskraal' in the 1880s in order to re-establish male initiation rites.<sup>23</sup> Second, the court emphasized that the restitution act put forward a broad definition of 'rights in land', going far beyond formal ownership and including customary law interests and rights of labour tenants and sharecroppers. Without further specifying the exact nature of their former land rights, the SCA found that the claimants had certainly exercised rights no less than those recognized in the act.<sup>24</sup> Third, the court confirmed that there had been a dispossession as contemplated in the act, emphasizing that the absence of a physically forced removal did not mean that there was no dispossession. The court stated that the community was not given a real choice, as people had to relocate and live and work under changed conditions there or stay on the farm as labour tenants under significantly changed conditions.<sup>25</sup>

However, regarding the fourth question, whether the claim was excluded due to just and equitable compensation in the past, the SCA found that the LCC had erred. The SCA noted that the LCC had argued that no just and equitable compensation had occurred, since the relocation farm had been intended only as a temporary measure (while *de facto* becoming permanent) and, since being part of the racially discriminatory practice of homeland consolidation, could not now be accepted as a legitimate compensation in

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21. Ndebele-Ndzundza Community v. Farm Kafferskraal NO 181 JS 2003 (5) SA 375 (LCC), section 36.

22. Prinsloo & Another v. Ndebele-Ndzundza Community & Others 2005 (6) SA 144 (SCA).

23. Prinsloo & Another v. Ndebele-Ndzundza Community & Others 2005 (6) SA 144 (SCA), sections 11–31.

24. Prinsloo & Another v. Ndebele-Ndzundza Community & Others 2005 (6) SA 144 (SCA), sections 32–40.

25. Prinsloo & Another v. Ndebele-Ndzundza Community & Others 2005 (6) SA 144 (SCA), sections 41–49.

the past. The SCA found that neither the Restitution Act nor the constitution provided any basis for excluding past compensation on such grounds. The SCA thus ordered that the issue of past compensation be remitted to the LCC for further consideration, when dealing with the remaining issues that had been excluded from the original LCC trial.<sup>26</sup>

In light of having lost their overall appeal, the Prinsloo and the Botha families decided not to pursue the case further to the level of the Constitutional Court. Instead, they reached a settlement with the claimants that was made an order by the LCC on 21 August 2006, in which all parties consented to the transfer of the two remaining ‘Kafferskraal’ portions on the following principal condition: ‘that the value of the rights in land that the community had in respect of the farm “Kafferskraal” 181 JS prior to dispossession, and the compensation, if any, that the community received as a result of the dispossession of such rights, shall be taken into account’<sup>27</sup> when the outstanding claims by the same community regarding the above-mentioned sixteen neighbouring farms (several portions of which are also owned by the two families) are adjudicated by the LCC. On this basis, the remaining two portions of ‘Kafferskraal’ were subsequently bought for the claimant community. However, when I last researched this case (February 2012) the outstanding sixteen claims were still being processed by the Regional Land Claims Commissioner and had not yet reached the LCC. It remains to be seen how the contested issue over just and equitable compensation in the past will be dealt with by the court.

## **THE CONTESTED JUSTICE OF THE ‘KAFFERSKRAAL’ LAND CLAIM**

When I talked to different members of the Sibuyela Ekhaya committee, they evidently felt that finally justice had been done in restoring their former right in land and upgrading it to full ownership in order to redress the injustice of their dispossession in the past. However, some procedural injustices remained. As claimants complained, despite the LCC order in 2006, the official transfer of the remaining two portions of ‘Kafferskraal’ was further delayed until 2010 by protracted negotiations between the former white owners and the state regarding the price for the acquisition of the land. And while the state finally bought the remaining two portions in 2010, the claimants still did not know (when I last spoke to them in February 2012), when they would receive the new title deeds. As Mr Shabangu, the committee chairman, explained to me, these delays unduly prolonged

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26. Prinsloo & Another v. Ndebele-Ndzundza Community & Others 2005 (6) SA 144 (SCA), sections 51–56.

27. See section 2.3 in the settlement agreement, attached as Annexure X to the unreported judgment of the LCC, in re Ndebele-Ndzundza Community regarding the farm Kafferskraal 181 JS, Case No. LCC 03/2000, 21 August 2006.

the claimants' insecure tenure and precarious situation, as they continued to be unable, for instance, to prove to banks or private investors that the land actually belonged to them. Mr Shabangu further complained about the insufficient post-settlement support, which the Department of Land Affairs is supposed to offer all restitution beneficiaries in order to enable them to turn their restored land into sustainable sources of income.

Major problems have also persisted with the royal council of the Ndzundza Ndebele Chief Poni II Mahlangu in Nebo, whose predecessor, the late M.J. Mahlangu, had lodged a separate claim for 'Kafferskraal' and sixteen neighbouring farms.<sup>28</sup> As I learnt in interviews and conversations with members of the Ndebele Tribal Authority, they felt that the Sibuyela Ekhaya committee had 'stolen' their claim on 'Kafferskraal' and the other sixteen farms within the restitution process. Against the backdrop of the above-mentioned dominant property regime in the reserves under apartheid — when the chief, as the state-backed allocator of reserve land, had acted as its *de facto* owner — members of the royal council further demanded, in conflict with current state law such as the Communal Property Associations Act (Act 28 of 1996), that the land should in any case be owned and managed directly by the chief, as he was 'the true owner' of the land under 'customary law'.<sup>29</sup> Therefore, intra-communal strife was much more prevalent in my encounters with the various claimants than the still rather abstract problem that the issue of past compensation might (at least partly) undermine *all* Ndzundza Ndebele claims on the other sixteen farms in the future.

By contrast, the former white owners — that is, members of the Prinsloo and Botha families — were rather bitter about what they saw as the injustice that the trial had done them. As illustrated by the introductory vignette, I learnt in various conversations that land restitution as such was seen as morally right, but only when landowners with title deed had been dispossessed, as was the case in the infamous 'black spot removals' of black titled landowners. All over the world, it was claimed, ownership existed only with proper title deed, yet in South African restitution, people could claim a right in land simply because they had lived on the land for longer than ten years. In the case of 'Kafferskraal', the outcome was perceived as profoundly unjust, as the farm had been in white titled ownership since 1872 and, in the case of the Botha family, even in direct family ownership long before the 1913 cut-off date. Generally speaking, it was argued, local African people had lost their rights in land long before the 1913 cut-off date during the nineteenth century wars of conquest. The white government had still compensated them subsequently by setting aside land in the reserves, and yet

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28. Interviews with various members of the Sibuyela Ekhaya committee on 7 September 2010, 5 November 2010, 25 August 2011, 2 September 2011, 13–14 February 2012.

29. Interviews with the royal council of the Ndebele Tribal Authority in Nebo, and its various members, on 30 August, 6 September, 25 October 2010, 24 August 2011, 31 January and 15 February 2012.

new farms were nevertheless claimed in recent years. Furthermore, as Mr Botha Snr explained:

When the claim was made, at the first meeting, we were told ‘the claim is not against you as a person, it is against the state’. But when it came to the case, I had to pay my own lawyers, while the state was on the side of the claimants. So I do not understand how it is not against us, if we have to pay our costs! I had to prove against the state that the portion of Kafferskraal is my property. I thought that this wasn’t fair. We had to prove out of our own pockets that it was our own land, for which we had title deeds and everything.<sup>30</sup>

This evidently showed, it was argued, that South African land restitution was neither a just process nor based on a just law; instead it was a political process and a political court, as it was not about giving land back to the rightful owners, who had been dispossessed, but exclusively about handing over land to Africans for political reasons. Only the fact that the SCA had ordered to take past compensation into account when adjudicating the claim on the remaining sixteen farms was seen as, at last, constituting some form of justice.<sup>31</sup>

This diametrical opposition in the evaluation of the in/justice of the outcome in the ‘Kafferskraal’ case can be traced back to a fundamental difference in opinion regarding the legitimacy of alternative property regimes. The former white landowners continued to propagate a narrow conception of exclusive, formal ownership that is unified, hegemonic and elevated above other less comprehensive rights, which has until recently largely been supported by South African property law (Mostert, 2010: 69–70). In this interpretation, earlier African ‘owners’ of ‘Kafferskraal’ had been dispossessed long before 1913, therefore the restitution claim fell well outside the scope of the Restitution Act. In keeping with their conception of ownership, these former white owners advocated a broader understanding of past compensations, in which Africans with no ownership rights were ‘compensated’ in the course of their removal with rights in land regarding the relocation farms.

By contrast, the claimant community put forward a broad conception of their right in land regarding ‘Kafferskraal’ — framed as ‘beneficial occupation’ (rather than ‘a customary law interest’) by their lawyers in terms of the restitution act — which they had retained despite the superimposition of both the white registered title and state-backed property regime in the reserves. Their ultimate dispossession therefore occurred after the 1913 cut-off date and was thus clearly within the ambit of the restitution process. It follows that to describe their removal to the trust farms as a form of compensation was at best cynical, and at worst an impertinence. In the claimants’ understanding of past compensation (informed by their conception of land

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30. Interview with members of the Botha family, 11 October 2010.

31. Interviews with members of the Prinsloo and Botha families, 2 February, 11 September and 11 October 2010.

rights), relocating them made final their dispossession as opposed to constituting compensation.

As discussed above, the LCC followed the claimants in their interpretation of their former rights in land and their subsequent dispossession, while also rejecting an interpretation of the relocation farms as a form of past compensation. The SCA overruled this judgment concerning past compensations, yet upheld the LCC's decision to interpret rights in land broadly. As Hanri Mostert shows with reference to recent case law, especially regarding the Richtersveld land claim,<sup>32</sup> but also 'Kafferskraal', decisions by the LCC, the SCA and the Constitutional Court have significantly transformed and broadened core concepts of land ownership, representing 'a major turn in South African jurisprudence on land rights' (Mostert, 2010: 62–4, 67, 76). This may be illustrated by two core statements in the SCA judgment on 'Kafferskraal', which declare that 'the fact that registered title exists neither necessarily extinguishes the rights in land that the statute [the restitution act] contemplates, nor prevents them from arising' and that '[t]he statute also recognises the significance of registered title. But it does not afford it unblemished primacy'.<sup>33</sup>

In view of the massive racially motivated land dispossessions of the past, these extraordinary transformations in the conception of South African landownership are seen as a restoration of justice by state officials in the commission and the courts, and land claimants alike. In other words, these actors invoke a logic of exceptionality that highlights a massive break with humane, desirable normality which demands and justifies the extraordinary measures of land restitution in exceptional times. Given that the former government is responsible for past dispossessions through its own laws, they cannot easily be redressed in terms of the former legal categories of 'property' and 'ownership', since these made dispossession possible in the first place. Thus sometimes referred to as 'transformation legislation' (Walker, 2008: 5), land restitution is seen as constituting a transformative legal counter-violence or 'law-making violence', to borrow Walter Benjamin's term, which establishes new property law that remains necessarily and intimately bound to violence under the title of state power (Benjamin, 1996: 248).

However, from the point of view of former white landowners, who insist on an earlier and unchanged conception of exclusive formal ownership, such legal transformations and the judicial outcomes they make possible seem illegitimate and deeply unjust. In other words, far from making restitution's law-making logic of exceptionality their own, these former owners believe

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32. See *Richtersveld Community and Others v. Alexkor (Pty) Ltd and Another* 2001 (3) SA 1293 (LCC); *Richtersveld Community and Others v. Alexkor (Pty) Ltd and Another* 2003 (2) All SA 27 (SCA); and *Alexkor (Pty) Ltd and Another v. Richtersveld Community and Others* 2004 (5) SA 460 (CC).

33. See *Prinsloo & Another v. Ndebele-Ndzundza Community & Others* 2005 (6) SA 144 (SCA), sections 36 and 38.

they have unmasked land restitution as actually following the perfectly ordinary logic of ‘victor’s justice’. For them, land restitution represents a redistribution of goods based on political considerations rather than a remedy based on the manifest victimhood of individual beneficiaries. On the one hand, these former owners thus advocate a logic of the ordinary with regard to the ‘true’ nature of land restitution, which implies a continuity of an alleged political bias of the former anti-apartheid movement against white farmers. On the other hand, this ‘unmasking’ is intimately linked to another logic of the ordinary, which insists on the rightfulness and hence legal continuation of the former conception of exclusive formal ownership that prevailed under apartheid. Taken together, these two logics of the ordinary combine in a ‘law-preserving violence’ (Benjamin, 1996) which is concerned with the protection of the legal principles, and the still skewed patterns of landownership made possible by them, underpinning the former state of landed property.

In short, the continuing discrepancies regarding the legitimacy of the various property regimes which inform the different evaluations of ‘the justice’ of this land claim are ultimately rooted in an incompatibility between the law-making logic of exceptionality that drives the restitution process and the law-preserving logics of the ordinary, as accentuated by former landowners. Hence, a transition to justice does not take place for all, because some actors involved cannot agree that land restitution should ultimately bring about a truly ‘new law against an old state’.

## **CONCLUSION: NEW LAW AGAINST AN OLD STATE**

South African land restitution conforms closely to Ruti Teitel’s definition of ‘transitional justice’, which is concerned with a ‘conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes’ (Teitel, 2003: 69). South Africa’s post-1994 land restitution process can thus be discussed as a form of transitional justice, even though research and public debate on the topic with regard to South Africa has focused almost exclusively on the Truth and Reconciliation Commission (TRC) (Zenker, 2011: 2–3).

Taking into account the result of this case, and rethinking South African land restitution in terms of transitional justice, it becomes possible to throw into sharper relief the potential and limitations of land restitution to facilitate a transition towards a more just South Africa. As shown, land restitution is based on a law-making logic of exceptionality which is invoked and enacted by the state. While being similar to Agamben’s state of exception declared by the sovereign, there are two important differences. First, as a transitional justice measure, land restitution consciously marks a threshold between two substantially different regimes, while explicitly addressing an old state of injustice (in both senses of the phrase) through developing *new law* within

an equally transformed framework of legality (such as a new constitution) rather than merely *suspending the law*. Land restitution thus differs from the paradigmatic ‘state of exception’, given that it is by necessity concerned with establishing ‘new law against an old state’.<sup>34</sup>

Second, in order to achieve the transitional justice goals of justice and reconciliation, land restitution’s law-making logic of exceptionality must succeed in winning over broad societal support for its project. However, a *de facto* sovereign, in its successful enforcement of the state of exception, is not truly dependent upon legitimacy. This highlights the importance of not only focusing on the inner logic of transitional justice. Instead, it is crucial to situate concrete transitional justice measures within wider local, that is, ‘place-based’ (Shaw et al., 2010), debates on various logics of exceptionality and the ordinary that are seen as being ‘really’ behind these measures (see Anders and Zenker, 2014). Put differently, given the multiple logics of exceptionality and the ordinary with which transitional justice measures locally co-exist and often conflict, the relative success of ‘transitional justice’ also crucially depends on its capacity, over time, to win over a broad majority of actors to share its definitions of ‘justice’ and ‘reconciliation’.

As the case study of the ‘Kafferskraal’ land claim showed, South African land restitution clearly succeeded with regard to the first point, developing a significantly transformed (property) law against an old state of landed injustice. However, regarding the second point of securing broad support for its law-making logic of exceptionality, land restitution, relatively speaking, failed — at least in this case. It did not succeed in bringing about a transition towards a situation that was widely interpreted as exhibiting more justice than before, since the former landowners stuck to their own law-preserving logics of the ordinary. While such broad-based support is admittedly always difficult to establish, I will end with a brief reflection upon one peculiar feature of South African land restitution that makes this support-building endeavour even more difficult, namely the absence of any explicit requirement for a face-to-face interaction and reconciliation between current owner and claimant.

This is not to say, of course, that the interested parties do not meet during the restitution process. Stakeholder meetings with all interested parties do take place, and also happened in the ‘Kafferskraal’ case. However, their purpose is to inform parties about the existence of a land claim and to attempt to settle the claim by agreement. Their aim is not to explain the law-making logic of exceptionality that informs land restitution. Much discontent regarding the in/justice of restitution outcomes possibly springs from the

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34. The most concise example of this principle can possibly be found in subsection (3)(b) of the equality clause (section 8) of the Interim Constitution of 1993: ‘Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) [of this equality clause prohibiting unfair discrimination] had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights . . . .’

fact that white landowners often expect restitution to operate as an ordinary process within an unchanged property system, whereas, in fact, it is driven by an exceptional process of a new transformative property regime. The likelihood of achieving a more congruent and widely shared understanding of this process would be considerably improved if restitution institutionalized a much more substantive engagement between current owner and claimant. In this way, a mutual sharing of histories of possession and dispossession could lead to greater understanding and more ‘common sense’ — that is, more consensual understandings of history and justice, and thus, ultimately, to more reconciliation.

There is no guarantee, of course, that such an approach would always succeed. The divergent sense of entitlement of African claimants and white owners might prove to be irreconcilable. African claimants may completely reject any sense of legitimate white ownership, thus possibly dismissing the latter’s constitutional right to just and equitable compensation when the state returns the land. Similarly, the families of current owners may have lived on or farmed the claimed lands for several generations and may have developed an equal sense of belonging and entitlement, which could make it difficult to transcend their earlier conception of exclusive formal ownership. Furthermore, given the judicialized nature of the restitution process, an open exchange about what the different parties regard as historical fact may be unlikely when parties are in actual dispute and little incentive exists to reveal such ‘evidence’ to their opponents.

Although it might be difficult to achieve ‘common sense’ between parties under such judicialized conditions, a process that incorporates a much stronger element of face-to-face interaction between the different parties, in which the existence and legitimacy of property regimes other than those formerly accepted by the colonial state are made explicit, would still stand a better chance of achieving reconciliation and more consensual understandings of justice than is currently the case. Such a shared understanding and support for a ‘new law against an old state’ — which ultimately summarizes the transitional justice project of restitution’s law-making logic of exceptionality — is crucial for South African land restitution in order to better achieve a transition to a state of more justice for all.

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