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Land Restitution and Transitional Justice in Post-Apartheid South Africa[1]

Olaf Zenker[2]

Abstract

This paper scrutinises South African land restitution in terms of 'transitional justice', in which, based on a legal framework redressing past human rights violations of the old state, 'the justice' of the new beginning in South Africa is continuously contested and renegotiated. After sketching the legal and institutional set-up of land restitution, the 'justice' of the actual restitution process is explored with regard to conflicting interpretations by various actors involved in an exemplary land claim on the so-called "Kafferskraal" farm in Mpumalanga. Here, a focus on divergent understandings of what historically constituted valid rights in land as well as corresponding forms of past compensation reveals continuing discrepancies regarding the legitimacy of various property regimes. Given that the legal framework for land restitution does not encourage intensive engagements between opposed parties, possibly furthering mutual understanding and 'common-sense', this reductionist processing has thus contributed little to racial reconciliation and a sense of working together towards a new state of justice – a fact that is arguably both reflected and exacerbated by the telling absence of any significant discussion of South African land restitution in terms of 'transitional justice'.

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Introduction

The concept of 'transitional justice' has recently gained prominence as a crucial means to account for past human rights violations in order to enable reconciliation and a transition towards (more) justice in the future (Teitel 2000, 2003; Shaw et al. 2010). While war crime tribunals as well as truth and reconciliation commissions have taken centre stage, institutions providing reparations to victims for past rights violations are also increasingly seen and deliberately established as instruments of transitional justice. Nevertheless, until recently, the issue of property restitution has been largely absent in the transitional justice literature. This is exemplified by the fact that the International Center for Transitional Justice, one of the leading organisations in the field, published a first report on this issue only in 2007 (Williams 2007; see also García-Godos 2010).

This neglect of restitution issues as an independent strand of transitional justice is also prominently present within debates on transitional justice in South Africa. Here, the focus has tended to be exclusively on the Truth and Reconciliation Commission (TRC) and related matters such as prosecutions and nation-building (e.g. Asmal et al. 1996; Buur 2000; Wilson 2001; Ross 2003; Du Bois 2008). While there is sometimes reference to the fact that the TRC was not the only mechanism responsible for redressing Apartheid's injustices, there has hardly been any analysis of directly linked processes, such as land restitution, in terms of transitional justice interventions (Valji 2010: 2; Walker et al. 2010b: 4; Hall 2010: 33).[3] Thus, for instance, Andrea Lollini's (2011) recent book on *Constitutionalism and Transitional Justice in South Africa* still deals exclusively with the TRC and does not discuss land restitution at all. This point can be further illustrated by Mahmood Mamdani's (1996) early critique of the TRC, criticising it for failing to broadly focus on the day-to-day injustices of Apartheid, including mass forced removals, without, ironically, making any reference to the ongoing land restitution process himself. Thus, as Nahla Valji points out,

> "as much as the key TJ mechanism – the TRC – needed to engage with land issues from the perspective of public education and debate – there is an equal need for TJ practitioners to engage with the sites where this redress was occurring – i.e., the land restitution mechanisms which were also an integral TJ intervention." (Valji 2010: 4)

That the ongoing South African land restitution, in which the state compensates former victims of racial land dispossession, can be – and arguably should be – interpreted in terms of transitional justice is easily demonstrated: first of all, land restitution was mandated both by the *Interim Constitution of the Republic of South Africa* (Act 200 of 1993)[4] and by the current *Constitution of the Republic of South Africa* (Act 108 of 1996)[5] as an exceptional 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 to be provided for by an Act of Parliament: the *Restitution of Land Rights Act* (Act 22 of 1994). Second, the transitional character of land restitution was exemplified both by the fixed deadline of 31 December 1998 for lodging land claims with the state and by the expressly temporary existence of the newly created

[3] Among the few studies of South African land restitution, which at least at times also refer to it in terms of "transitional justice", are Du Bois (2008: 142), Roux (2008: 153), and Gibson (2009: 2, 4, 211, 216).
[4] In section 8 (on the right to equality) within the chapter on fundamental rights as well as in sections 121-123, setting the basic criteria and procedures for the restitution process to be provided for by a subsequent Act of Parliament.
[5] In subsection 7 of the property clause (section 25).

Commission on the Restitution of Land Rights and the new specialist Land Claims Court (LCC).[6] Finally, the intention of giving the restitution process a broad mandate was further elaborated in the *White Paper on South African Land Policy* (Department of Land Affairs 1997: section 4.13), where the goal of restitution was defined as restoring land "in such a way as to provide support to the vital process of reconciliation, reconstruction and development". Thus, like other transitional justice instruments, land restitution in South Africa has equally drawn, as I would argue, on 'a logic of exceptionality', justifying the extraordinary measure of vast land restitution within a broader land reform programme by reference to the exceptional condition of massive, racially motivated land dispossessions in the past.

According to Jemima García-Godos (2010: 141), conceiving land restitution in terms of transitional justice has the added value of situating these restorative processes within a larger framework of accountability for past human rights violations, in which foundational questions of societal reconciliation and justice play a crucial role. Following this lead, this paper scrutinises South African land restitution in terms of 'transitional justice', in which, based on a legal framework redressing the wrongs of the old state, 'the justice' of this new beginning in South Africa is continuously contested and renegotiated. In order to do so, the paper first sketches the concrete institutional set-up based on the *Restitution of Land Rights Act* (1994) and situates this legal arrangement within the new constitutional provision for both the protection of private property and the obligation for land restitution that emerged in the early 1990s. 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 an exemplary land claim on the so-called "Kafferskraal" farm in Mpumalanga Province. This case study uses data generated in the course of an ongoing research project on South African land restitution, based on extensive fieldwork with participant observation in the LCC and on selected farms, archival research, as well as extensive interviews with the various participants in exemplary cases (see Zenker 2011a, forthcoming). In this process, I had the chance to talk to representatives of all parties in the "Kafferskraal" claim, which provided me with an overview regarding the divergent evaluations of 'the justice' that was ultimately achieved in this case. A focus in this paper on divergent understandings of what historically constituted valid rights in land as well as corresponding forms of past compensation thereby reveals continuing discrepancies regarding the legitimacy of various property regimes that underlie different evaluations of 'the justice' of the ultimate outcome in this claim. Given that the legal framework for land restitution does not encourage intensive engagements between opposed parties, possibly furthering mutual understanding and 'common-sense', profound disagreements regarding 'the justice' of these new beginnings in land ownership have persisted. The reductionist legalistic processing of this transition has thus contributed little to racial reconciliation and a sense of working together towards a new state of justice.

[6] The LCC is not only concerned with temporary restitution matters, but with various other land-related issues that are going to stay. Nevertheless, it is possible, if not likely, that these matters might be transferred to any South African High Court after restitution's completion, given the government's overall preference to minimise costly specialist courts (personal communication in 2010 with various judges at the LCC).

The Restitution Act within the Legal Re-constitution of South Africa

The *Restitution of Land Rights Act* of 1994 provides in section 2(1) 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. The claimant had to be dispossessed of a right in land after 19 June 1913[7] because of racially discriminatory laws and practices. Finally, claimants should not have received just and equitable compensation as contemplated in the current constitution for the dispossession at issue and had to lodge their claim before 31 December 1998. 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 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.[8] Since then, commission bureaucrats have mediated between claimants and usually white landowners in order to settle on a largely market-oriented agreement, in which the state buys the land and, based on certain conditions, hands it over to the claimants. Originally, the LCC was established to grant restitution orders for each and every case and to determine the conditions that must be met before land rights can be restored. However, owing to the slow process in handling claims, amendments to the restitution act were made, shifting the approach from a judicial to an administrative one in 1999. Now, the minister, and by delegation the land claims commissioners, have the power to facilitate and conclude settlements by agreement, and 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 (Hellum and Derman 2009: 128–131). Based on figures from 2011, there are still about 5 per cent of restitution claims (i.e. 3,673 cases) that remain outstanding (Department of Rural Development and Land Reform 2011: 40). These cases are typically quite complex and constitute 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.[9]

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[7] This was the day of the promulgation of the *Natives Land Act* (Act 27 of 1913), first legalising 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] See Zenker 2011a for an extensive discussion of the shifting figures within restitution statistics as well as their recent transformation into explicit performance indicators of South African land restitution.

[9] See e.g. Robins 2001; James 2006, 2007a, 2007b, 2011; James et al. 2005; Walker 2002, 2008; Walker et al. 2010a; Hall 2009, 2010; Hellum and Derman 2009; and Zenker forthcoming.

As Cherryl Walker (2008: 50–51) observes, the history of race-based land dispossession had always occupied a prominent position in the African National Congress' (ANC) understanding of the liberation struggle. For decades, land activists in and around the ANC had politically protested, legally fought, as well as meticulously documented the racial dispossessions of land and forced removals, involving an estimate of 3.5 million black people[10] between the years 1960 and 1983 (Platzky and Walker 1985: 10; Abel 1995: 385–522). However, Klug – who was involved in the ANC's internal Land Commission at that time – recalls how low the priority for rural issues actually was on the mainly urban-based ANC political agenda during the late 1980s, despite the latter's general rhetoric highlighting the land question (Klug 2000: 125). While many ANC cadres at that time still assumed that a future land reform would entail a politically endorsed nationalisation of existing land holdings as a key priority, senior ANC policy makers were apparently already starting to look critically at such socialist approaches: according to Walker (2008: 51–52), an emergent scepticism towards state farms in other socialist countries, growing fears about a potential destruction of the commercial agricultural sector, mounting pressures by the international and South African business lobby favouring a market-led reform, as well as worries about an ensuing massive capital flight from the country all combined towards an approach that increasingly favoured enshrining land rights and the right to redress into the constitutional bill of rights. In addition, the actual process of negotiating the transition to democracy

> "led to further moderation of its [the ANC's] land reform proposals. This was consistent with the organisation's general shift to the political centre as it turned its attention from fighting a liberation struggle towards fashioning substantive economic policies that could "win consensual endorsement". Once back in South Africa, furthermore, key members of the ANC's land desk concluded that a radical programme of land nationalisation was unlikely to find much support among rural communities, who yearned for tenure security and harboured deep suspicions of "government" as an unaccountable, untrustworthy force." (Walker 2008: 53)

Against the backdrop of 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 developed into a matter of strategic compromise (Walker 2008: 54). Prolonged and intense debates around these issues were still to complicate the negotiations leading, first, to the Interim Constitution of 1993 (Chaskalson 1994: 131–132, 1995), and then to the current *Constitution of the Republic of South Africa* of 1996. Nevertheless, a balanced constitutional protection of both property rights and the right to redress for race-based violations of past property rights ultimately emerged as such a strategic compromise (Spitz and Chaskalson 2000: 313–329; Walker 2008: 50–69; Klug 2000: 124–136). It is within this context of a profound legal re-constitution of South Africa in the course of the negotiated revolution (Waldmeir 1997) that the described institutional set-up for land restitution needs to be seen.

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 energetically contested (Hall 2010: 23). Yet, the government has persistently opposed accepting new claims – partly, it seems, because the expected preference for financial compensation among new claimants, who

[10] 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, while acknowledging, of course, the dilemma that the inevitable usage of these socially constructed terms might reinforce their alleged 'reality' as biologically predetermined categories.

often do not want to farm, runs counter to the government's declared goal of correcting the skewed ownership landscape through actual land redistribution (Williams 2007: 32), and partly, as this would cause a further explosion in costs (Hall 2010: 24). With regard to the 1913 cut-off date, the ANC government provided an ex-post rationalisation in 1997, insisting on the risk of endless interethnic conflict among the dispossessed under conditions of a massive growth and scattered distribution of the population were pre-1913 claims to be admitted (Department of Land Affairs 1997: section 4.14.2), whereas post-1913 dispossessions evidently favoured white supremacy. A further reason for the 1913 deadline is to be found in the necessity for political compromise during the constitutional negotiations, as described above (see also Du Bois 2008: 129–133; Roux 2008: 155–156; Hall 2010: 20, 23).

While the 1913 cut-off date has indeed continued to categorically exclude claims to restitution for pre-1913 dispossessions, it is important to emphasise 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; see also Dodson 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 in the exemplary case of the so-called "Kafferskraal" land claim, to which I turn now.

The Case of the So-Called "Kafferskraal" Land Claim: a history of repossession

On the edge of the highveld escarpment sloping into the midveld, approximately 200 kilometres to the northeast of Pretoria and situated within the Greater Groblersdal Local Municipality, Mpumalanga Province,[11] lies the farm "Kafferskraal" (deed number 181 JS). The name of this farm, measuring about 4,200 hectares, has appeared on successive title deeds since 1 December 1872, when the then Zuid-Afrikaansche Republiek (ZAR), also known as the "Transvaal Republic", first granted the land in private ownership to a white farmer named Abraham Johannes Korf. While the farm name is pejorative, consisting of *kaffer* as an offensive term for African people and *kraal*, denoting a cattle enclosure within an African homestead or village, this fact was recently used in court to positive effect by the claimant community to argue 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.[12]

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 summarised as follows:

[11] The Greater Groblersdal Local Municipality was meanwhile renamed "Elias Motsoaledi Local Municipality", incorporated into the Sekhukhune District Municipality and rezoned into the bordering Limpopo Province. However, at the time when this claim was processed by the Commission on Restitution of Land Rights and heard in the LCC, it still belonged to Mpumalanga. Thus, for current purposes, I will continue to refer to it as belonging 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.

During the first half of the 19th century, intense contestation and competition characterised the region, as three powerful South African kingdoms – the Pedi, the Swazi, and the Zulu – jockeyed for predominance. The interplay of colonial penetration, especially in the form of arriving Boer Voortrekkers in the 1840s, the emergence of new African kingdoms, wars and migration in the aftermath of the Difaqane[13] 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", comprising the area at issue as its eastern part. Yet, 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) (Delius and Hay 2009: 51–52).

Within this overall context, the Ndebele[14] constituted one local group besides others. Much earlier in their history, they had divided into two kingdoms, namely the Manala and the Ndzundza (van Vuuren 1992). 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 co-existence with the Boers proved conflictual, "with the Ndzundza refusing Boer demands for labour and denying their claims to ownership of the land" (Delius 1989: 229). Against a number of failed Boer attempts to subdue 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." (Delius 1989: 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 family. The land around the royal stronghold, situated on the farm "Mapochsgronden" (500 JS) named after the above-mentioned Ndzundza King Mabhoko, was confiscated, subdivided, and handed over to Boers, who had fought during the war (van Vuuren 2010:10-11). The population of the kingdom was dispersed among the ZAR burghers – "in the

[13] The Difaqane, also called Mfecane, refers to a self-generated process of violence, migration, and political change within African society during the early 19th century (see e.g. Delius 2007: 107–111).

[14] The overall Transvaal 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: 228–229).

interests of order, safety and humanity", as the ZAR government decreed – and indentured for a period of five years (1883-1888) (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). However, as the incarceration of the royal family and the dispersal of the population constituted a severe blow to the Ndzundza Ndebele, their imprisoned leadership organised for the escape of Nyabela's brother Matsitsi, who was sent to the farm "Kafferskraal" to re-establish chiefly guidance and the male initiation ritual (*ingoma*), an important Ndebele institution until today (Delius 1989: 241; van Vuuren 2010: 11–12).

As mentioned before, the farm "Kafferskraal" had been in white titled ownership since 1872, with its subdivision into three separate portions being in existence with changing owners from at least 1902. While white owners never actually lived on the farm, generations of Ndzundza Ndebele resided and worked on "Kafferskraal" for decades, including Matsitsi and his chiefly successors, who regularly organised 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, being removed to the north to the state-owned farm "Goedgedacht" (also called "Goedehoop") and surrounding areas in the Nebo district (today Limpopo Province) that, as reserve land, later became part of the Lebowa homeland.

This final removal constituted the endpoint in a long process of cumulative dispossession, which had started back in the 19th 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 subjugation in the mentioned wars of conquest. It is important to emphasise, however, that the exact nature of pre-colonial 'customary law', and especially the relationship between chiefs and the land, has been highly contentious and the object of much debate and critique with regard to the codified versions of 'official customary law' during colonial times (Chanock 2001: 378–392) as well as concerning the ways, in which the post-Apartheid state nowadays tries to account for the 'living customary law' (Levin and Mkhabela 1997; Bennett 2008; Cousins 2008). What is clear, however, is that with its victory in 1883, ending the Mapoch War, the Transvaal Republic regarded all earlier rights in land by the Ndzundza Ndebele as extinguished through its own acquisition of the land 'by right of conquest', as it did in other wars at the time (Bundy 1972: 379; de Beer 2006: 32).

While, from the point of view of the Transvaal Republic, the land rights of Ndzundza Ndebele were thus gone once and for all, the state nevertheless started to introduce officially recognised mechanisms for African people to acquire rights in land. In earlier republican law, Africans had not been allowed to buy any land. But in 1881, in the Pretoria Convention which restored ZAR independence from Britain, "the British forced upon the Transvaal provision for Africans to buy land, but transfer of land was to be to the Superintendent of Natives who held it in trust." (Chanock 2001: 361). Besides these official regulations, Africans used ruses to avoid the ban on directly buying land, by using missionaries as 'dummy' buyers or contracting 'leases' that were de facto sales (Bundy 1972: 380), often buying land as tribal communities under chiefs. Furthermore, the Transvaal Supreme Court found in 1905 that the common policy of not allowing black people to

obtain individual title did not actually have the force of law and insisted that it was for the legislature to explicitly deal with the matter, if it was thought right to make special landed property provisions for Africans (Carey Miller and Pope 2000: 18; Chanock 2001: 361).

This is precisely what happened. After the establishment of the Union of South Africa in 1910, comprising the four previously separate colonies of the Cape, Natal, Transvaal and the Orange Free State, the *Natives Land Act* (Act 27 of 1913) unified the somewhat divergent regulations for African reserves and landed property in its four provinces. It introduced racial zones of exclusive landownership and restricted black reserves to only seven 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 and thus ensured the supply of cheap farm labour (Bundy 1972: 384; Bundy 1988). Within most reserves, the Natal practice of encouraging traditional forms of land tenure was adopted, while the Cape practice of individual garden plots was discouraged (Platzky and Walker 1985: 84). 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 scheduled as African reserves.

The trend towards communal tenure in reserves became even more pronounced with the promulgation of the *Native Trust and Land Act* (Act 18 of 1936). It released additional land for black reserves, expanding the total land officially set aside for the African majority population to (still only) 13 per cent of South African lands. The act also established the "South African Native Trust" (later the Bantu Trust, still later the Development Trust), controlling the acquisition of land (with public funds) and its administration. 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; Carey Miller and Pope 2000: 26). It was in the context of these acts that the Ndzundza Ndebele community on "Kafferskraal" was eventually removed in the late 1930s to several trust farms (including "Goedgedacht") in the Nebo district.

Meanwhile, a parallel system of administration for the African population was being established. The *Native Administration Act* (Act 38 of 1927) modified and consolidated the system of chiefly rule and 'customary law'. It placed all chiefs under the Governor-General as the '[white] supreme chief', who was empowered to rule by proclamation in all African affairs. This included the right to establish and modify tribes, delineate their areas, appoint and dismiss chiefs and headmen, remove tribes from one area to another, establish native commissioners' courts for criminal and civil matters, as well as to authorise chiefs to settle civil disputes according to 'customary law' (Platzky and Walker 1985: 88). While the powers of chiefs were thereby, to some extent, restricted, their authority in local African administration was also officially recognised, for instance regarding the continuous right to control land allocation in the reserves. With the advent of Apartheid, the powers of chieftaincy were further expanded through statutes such as the *Bantu Authorities Act* (Act 68 of 1951) (Levin and Mkhabela 1997: 156–157).

> "They [chiefs and headmen] became salaried officials with a vested interest in the apartheid system, local agents of control for the central government. Their cooperation with the government assured them of more than their salaries. It also gave them power over the allocation of such precious resources as land, welfare and pension system, and any development money that might filter down to their district." (Platzky and Walker 1985: 111)

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 in the case of the Ndzundza Ndebele – see 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". At that time, there had been no recognition by the South African government of the Ndebele as an independent ethnic group, to which land or political status would be allocated within the emerging homeland system. Thus, the Ndebele Tribal Authority became the first recognised Ndebele Bantu Tribal Authority within a wider area dominated by Northern Sotho speaking Pedi that ultimately became part of the latter's homeland Lebowa. In the 1970s, a separate homeland did come to be designated for the Ndebele further to the west, around the settlement of the Ndzundza Ndebele king on the meanwhile acquired farm Weltevreden (deed number 158 JR). This caused a split and subsequent antagonism between two sets of Ndebele leaders: those who opted for homeland status in the newly-established territory of KwaNdebele, and those of the Nebo Ndebele who "preferred to remain in Lebowa since they were adamant that they would never accept any Ndebele Homeland other than the original heartland, now known as Mapochsgronde[n]" (James 1990: 36), i.e. the royal stronghold mentioned above. This antagonism between the Ndzundza king and the Nebo Ndebele chief, who remains subordinate to the king according to Ndebele cultural logic, whilst having become relatively independent from the king within Lebowa in terms of Apartheid's tribal logic of homeland administration, has persisted and continues to play a role in the current conflict within the claimant community on "Kafferskraal" (see below).

The trust farms in Nebo became the relocation site for successive waves of removals since the late 1930s, in which both Ndebele- and Pedi-speaking people, mainly ex-labour tenants, were relocated from nearby white farms. While those, 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 since the late 1960s, were only able to acquire residential stands (James 1985: 159). As in other reserves, the South African government also subjected the area to agricultural "Betterment planning", i.e. schemes introduced since the 1930s and 1940s in the attempt to control land usage and thus improve and rationalise reserve agriculture (Platzky and Walker 1985: ix). While aiming to improve productivity for those with access to ploughing land, 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 somewhat stabilising 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-fertilisation and a growing interaction of township and rural youth from the 1970s onwards. This effected an increasing politicisation also of rural

areas, and their involvement in rebellions such as in 1958 and in 1986 in Sekhukhuneland/Lebowa (Delius 1996) as well as in the revolt in 1986 against political independence of KwaNdebele (McCaul 1987; Phatlane 2002). The anti-Apartheid struggle had reached the countryside of the Ndzundza Ndebele in Nebo, as it did in other parts of the eastern Transvaal (see e.g. Levin and Weiner 1997; Niehaus et al. 2001).

When Apartheid came to an end, different Ndzundza Ndebele groups and individuals lodged restitution claims for "Kafferskraal" throughout the 1990s. 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 variously valid claims, mostly individuals or nuclear families from the Ndzundza Ndebele community under their then Chief MJ Mahlangu, i.e. 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 MJ Mahlangu had also lodged a separate land claim on 18 September 1995 regarding "Kafferskraal" and 16 neighbouring farms along the Stoffberg-Groblersdal corridor (see also van Vuuren 2010: 10). In the course of various stakeholder meetings, organised 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 owners of portion 2 and 3 continued to contest the validity of the claims. The Regional Land Claims Commissioner thus referred the case to the 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: 1) whether there had been a community on "Kafferskraal" as contemplated in the restitution act; 2) if so, whether the community had rights in land falling under the restitution act; 3) whether, if such rights had existed, they had been dispossessed as a result of past discriminatory laws and practices; 4) whether there had been substantial compliance with the procedure prescribed for lodgement of claims; and 5) whether the claim was not excluded on the basis of a just and equitable compensation in the past.[15]

In its judgment, the LCC answered all these questions in favour of the claimant community. First, it found that although the Ndundza 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 various letters from various government authorities over a prolonged time recognised the claimants as a community.[16] 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 persistently 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

[15] See the judgment of the LCC, sections 4–7, reported as *Ndebele-Ndzundza Community v. Farm Kafferskraal NO 181 JS* 2003 (5) SA 375 (LCC).
[16] *Ndebele-Ndzundza Community v. Farm Kafferskraal NO 181 JS* 2003 (5) SA 375 (LCC), sections 17-18.

beneficial occupation of no less than 10 years prior to dispossession.[17] 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.[18] Fourth, the court ordered that, all in all, the claim had been lodged substantially in compliance with the legal requirements.[19] 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, since the area was admittedly too small for accommodating the relocated community. 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."[20]

Correspondingly, the LCC ordered that the claimants were entitled to restitution and granted them leave to set the matter down for a hearing of the remaining issues that had been excluded, pending the outcome of this trial.[21]

An application by the two opposing parties in this trial – the Prinsloo family owning portion 2 and the Botha family owning portion 3 – 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: 1) whether the claimants were a community as contemplated in the act; 2) if so, whether the community had restorable rights in land; 3) whether the community was dispossessed as contemplated in the act; and 4) whether the claim was not excluded on the basis of a just and equitable compensation in the past.[22]

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 50 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.[23] Second, the court emphasised 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 recognised in the act.[24] Third, the court confirmed that there had been a dispossession as contemplated in the act, emphasising that the absence of a physically forced removal did not mean

[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.
[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.

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.[25]

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 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.[26]

In light of having lost their overall appeal, the Prinsloo and the Botha families decided not to pursue the case any 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"[27] when the outstanding claims by the same community regarding the above-mentioned 16 neighbouring farms is being adjudicated by the LCC.[28] On this basis, the remaining two portions of "Kafferskraal" were subsequently bought for the claimant community. However, the outstanding 16 claims are still being processed by the Regional Land Claims Commissioner and have not yet reached the LCC. It remains to be seen, how the contested issue over just and equitable compensation in the past will then be dealt with by the court.

Is Ownership to Past Compensation as Rights in Land is to Dispossession? 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[29] 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

[25] *Prinsloo & Another v. Ndebele-Ndzundza Community & Others* 2005 (6) SA 144 (SCA), sections 41-49.
[26] *Prinsloo & Another v. Ndebele-Ndzundza Community & Others* 2005 (6) SA 144 (SCA), 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.
[28] Technically speaking, the white owners had to concede for the purpose of the settlement that the Kafferskraal claim had not been excluded due to just and equitable compensation in the past in order for this transfer to become a court order before the contested issue of the past compensation had actually been dealt with by the Land Claims Court, as ordered by the Supreme Court of Appeal. See section 1.10 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.
[29] It has been common for both the commission and the LCC to restitute lesser rights in land by upgrading them to legally secure titled ownership (see Hall 2010: 34; Mostert 2010: 70). While this upgrade is meant to reduce tenure insecurity after restoration of the land, such a 'closure' in property conflicts might be difficult to put into practice, when the state-backed new property regime continues to be locally contested by both former white land owners and the chief, as is the case in "Kafferskraal" (see below).

protracted negotiations between the former white owners and the state regarding the price for the acquisition of the land. Furthermore, although the state had bought the first portion in 2002, it was only in 2003 when the actual title deed was issued. And while the state finally bought the remaining two portions in 2010, the claimants still did not know in September 2011, when they would receive the new title deeds. As Mr Shabangu, the committee chairman, explained to me, these delays unduly prolonged 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 lands 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 MJ Mahlangu, had lodged a separate claim for "Kafferskraal" and 16 neighbouring farms (see above).[30] 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 16 farms within the restitution process. And 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 contradiction to 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". This conflict was further aggravated by the fact that the "Sibuyela Ekhaya" committee had the backing of the Ndzundza Ndebele king in former KwaNdebele, with whom the Ndebele Tribal Authority had for a long time entertained antagonistic relations.[31] 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 16 farms in the future.

By contrast, the former white owners – i.e. members of the Prinsloo and Botha families – were rather bitter about what they saw as the injustice that the trial had done them. Land restitution as such was morally right, I learnt, 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 10 years. In their own 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 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 19th century wars of conquest, the white government had still compensated them subsequently by setting aside land in the reserves, and yet new farms were nevertheless claimed in recent years. Furthermore, as one former owner angrily explained:

[30] See interviews with members of the "Sibuyela Ekhaya" committee on 7 September 2010 and 2 September 2011 and with Mr Shabangu on 5 November 2010 and 25 August 2011.
[31] See interviews with the royal council of the Ndebele Tribal Authority in Nebo, and its various members, on 30 August, 6 September, 25 October 2010, and 24 August 2011.

> "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."[32]

This all showed, it was argued, that South African land restitution was not a just process and not 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 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 16 farms (several portions of which are also owned by the two families) was seen as, at last, constituting some form of justice.[33]

This diametrical opposition in the evaluation of the in/justice of the outcome in the "Kafferskraal" case can be traced back to profound underlying differences with regard to 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 been mostly supported by South African property law (Mostert 2010: 69–70). In this interpretation, earlier African 'owners' of "Kafferskraal" had been dispossessed long before 1913 and the restitution claim thus fell well outside the scope of the restitution act. Correspondingly, these former white owners advocated a (following from their ownership conception) 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 "Kafferkraal" – 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 white registered title and the state-backed property regime in the reserves. Their ultimate dispossession thus occurred after the 1913 cut-off date and was thus clearly within the ambit of the restitution process. Correspondingly, 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 that (given their notion of land rights) was narrower, their relocation made final their dispossession rather than constituting the opposite: its compensation. It is in this sense that this section's headline summarises the relationship between these key property concepts in terms of a Lévi-Straussian structural inversion, in that (narrow) 'ownership' in its relationship to (broad) 'past compensation', is structurally inverted regarding (broad) 'rights in land' in their relationship to (narrow) 'dispossession'. In other words: the divergent understandings of former owners and claimants of both the entitlements that the latter had maintained regarding the land and of what they had received when being finally removed were ultimately rooted in inversely constructed and more or less incompatible property regimes.

As described above, the LCC followed the claimants in their interpretations 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

[32] See interview with members of the Botha family on 11 October 2010.
[33] See interviews with members of the Prinsloo and Botha families on 2 February, 11 September and 11 October 2010.

compensations, yet upheld the LCC's decision to interpret rights in land broadly. As Hanri Mostert more generally shows with reference to recent case law, especially regarding the Richtersveld land claim[34] and the one dealt with here on "Kafferskraal", decisions by the LCC, the SCA, and also the Constitutional Court have indeed significantly transformed and broadened core concepts of landownership, representing "a major turn in South African jurisprudence on land rights" (Mostert 2010: 62–64, 67, 76). This may be illustrated by two core statements in the SCA judgment on "Kafferskraal", declaring 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".[35]

These extraordinary transformations in the conception of South African landownership are appropriate and restore justice in the light of the exceptional condition of massive racially motivated land dispossessions in the past, which justifies the logic of exceptionality permeating the whole restitution process as, arguably, a transitional justice intervention. 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 appear illegitimate and unjust. In other words, far from making the restitution's logic of exceptionality their own, these former owners believe to have unmasked land restitution as actually following the perfectly mundane agenda of a victor's justice, namely as constituting "a redistribution of goods based on political considerations rather than a remedy based on the manifest victimhood of individual beneficiaries" (Williams 2007: 47).

Conclusion

Starting from the observation that South African land restitution is hardly ever discussed in terms of transitional justice, this paper has shown that this process can be, and actually should be, interpreted in such terms in order to both highlight and justify the underlying logic of exceptionality, which has recently led to a substantially transformed new regime of landed property in South Africa. Yet why is there this relative absence of discussing South African land restitution as a transitional justice process? To some extent, as noted in the introduction, this reflects a general trend within the transitional justice literature, which only recently started to really attend to property restitution as an important transitional justice measure in its own right (Williams 2007: 48).

At the same time, there are also specific reasons for this state of affairs in the South African context. One important reason consists in the largely independent ways, in which the restitution process and the TRC actually emerged during the constitutional negotiations in the early 1990s. Debates on land and property rights unfolded largely in isolation from negotiations about the more high-profile TRC on human rights violations, thus missing a chance for serious discussion about potential synergies between the two programmes (Walker 2008: 63). Although forced removals were readily understood as a prime example of the abuse of human rights in Apartheid South Africa, redress for this aspect was channelled into a separate state programme with its own set of

[34] 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).

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

institutional and operational requirements (Walker 2008: 20). Land restitution and the TRC process thus entered the text of the *Interim Constitution* of 1993 via very different paths (Du Bois 2008: 118).

Hence the *Interim Constitution* contained three clauses dedicated to restitution (sections 121–123) and further referred to it in the equality clause (section 8), while containing the amnesty, truth and reconciliation process in the epilogue. Subsequently, two separate statutes were enacted, namely the discussed restitution act and the *Promotion of National Unity and Reconciliation Act* (Act 34 of 1995). According to Theunis Roux

> "[t]he separation of the land restitution and TRC processes in this way had the unintended consequence that land restitution was conceived primarily as an exercise aimed at doing particular justice to victims of apartheid's forced removals. The contribution of land restitution to reconciliation between black and white South Africans was a desired side effect, rather than a central policy goal of the process. When coupled with the primacy given to the constitutional protection of property rights, this policy choice produced a scheme that made the achievement of land restitution independent of the need to repair the moral and psychological damage done by apartheid land law." (Roux 2008: 161)

A second reason why South African land restitution is rarely discussed in terms of transitional justice arguably lies in the concrete institutional arrangement of the restitution process, as enshrined in the restitution act and instantiated in the "Kafferskraal" case: this process precludes the explicit necessity for a face-to-face interaction and reconciliation between the current owner and the claimant, which, again, deemphasises societal reconciliation as a key element of land restitution as a transitional justice measure (see also Roux 2008: 158–159).

This is not to say, of course, that the interested parties do not meet during the restitution process. Stakeholder meetings with all interested parties organised by commission officials do take place, and also happened in the "Kafferskraal" case. However, their purpose is to inform parties about the existence of a land claim, mediate and settle potential disputes among claimants or with the current owner, and to attempt to settle the claim by agreement. However, their aim is not to principally explain the logic of exceptionality that justifies the (compared to landownership under Apartheid) substantially transformed landed property regime, on which the restitution process is actually based. Much of the dissent regarding the in/justice of restitution outcomes seem to spring from the 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 (see also Du Bois 2008: 119). The chances for achieving a more congruent and widely shared understanding of this process were thus considerably better, if restitution institutionalised a much more substantive interaction between current owner and claimant, in which a mutual sharing of histories of possession and dispossession might also lead to greater understanding, more 'common-sense', and, ultimately, (more) reconciliation.

There is no guarantee, of course, that such an approach would always succeed. Divergent senses of entitlement among African claimants and white owners might prove to be irreconcilable. African claimants might completely reject any sense of legitimate white ownership, thus possibly disliking the latter's constitutional right to just and equitable compensation when the state returns the land. By contrast, the families of current owners might have lived on or farmed the claimed lands for several generations – as is the case for the Prinsloo and the Botha families regarding "Kafferskraal" – and may have developed a sense of belonging and entitlement, also through working and

improving the land,[36] which can make it difficult to transcend their earlier conception of exclusive formal ownership. Furthermore, given the judicialised nature of the restitution process, an open exchange of experiences and of what is regarded by the different parties as historical facts may become unlikely, when parties in actual dispute have little incentives to reveal such potential evidence to their opponents. Hence, while the TRC process might have indeed produced "reconciliation without justice" (Mamdani 1996), judicialised measures of transitional justice such as South African land restitution run the risk of achieving 'justice without reconciliation'.

Although it might thus be difficult to achieve 'common-sense' between parties under such judicialised conditions, a process incorporating 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 consensual understandings of justice than is currently the case. As research on property restitution in other countries such as the Czech Republic, Bosnia, Guatemala, Romania, Canada, Australia, Brazil, Peru, Mexico, and the USA shows (see Williams 2007; Fay and James 2008), the emergence of such consensual understandings of justice seems crucial for the overall legitimacy of restitution as an appropriate transitional justice intervention.

Given the macro-political separation between the TRC and land restitution and the latter's reductionist legalistic procedure, however, South African land restitution is rarely publically discussed in terms of reconciliation or with regard to the forms of justice it generates.[37] Instead, public opinion largely focuses on land restitution in quantified terms of achievements (e.g. claims settled), costs, and failures (Hall 2010: 28; Zenker 2011a). When the contribution of land restitution towards racial reconciliation and towards a more consensual understanding of justice in South Africa is discussed, however, it tends to be described in terms of a relative failure (e.g. Roux 2008: 166–167; Hall 2010: 38).

Yet for a restitution programme to be effective within a transitional justice framework, movements towards reconciliation and consensual understandings of justice are crucial. This would ideally require all stakeholders to ultimately develop some common understanding that both the overall restitution programme and all actors involved indeed operate under the same logic of exceptionality that characterises this process as one of transitional justice: the need for extraordinary measures in exceptional times allowing to redress past human rights violations in order to make for a better future. In this paper, the case study on the "Kafferskraal" land claim showed that at least in this example such a consensual understanding of the overall justice of the restitution process, entailing some form of reconciliation, did not emerge. Instead, the transitional justice of land restitution, supported by claimants and the courts, was shown to have been profoundly challenged by frustrated former landowners, who, from their point of view, 'unmasked' its proclaimed logic of exceptionality as 'actually' constituting an ordinary form of victor's justice.

This development was facilitated by the institutional set-up with its reductionist legalistic procedure, which did not encourage intensive engagements between opposed parties, that might possibly have furthered mutual understanding and 'common-sense'. At least in the "Kafferskraal" case, the purely judicial solution thus certainly contributed little towards reconciliation and a sense of working together towards a new state of justice. Such relative failure to commonly engage in a

[36] See Zenker 2011b: 78; for a similar dynamic among white farmers in Zimbabwe, see Hughes 2006.
[37] This is, of course, not the case for the academic research on South African land restitution (see e.g. Walker et al. 2010a).

transition to justice is arguably both reflected and exacerbated by the telling absence of any significant discussion of South African land restitution in terms of ‘transitional justice’.

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