

THE METHODOLOGY USED TO INTERPRET CUSTOMARY LAND TENURE

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SUMMARY

Customary land tenure is normally not based on codified or statutory sources, but stems from customary traditions and norms. When westernised courts have to interpret and adjudicate these customary traditions and norms, the normal rules of statutory interpretation cannot be followed. The court has to rely on evidence of the traditional values of land use to determine the rules connected to land tenure.

Previously courts in many mixed jurisdictions relied on common or civil law legal principles to determine the nature of customary land tenure and lay down the principles to adjudicate customary land disputes among traditional communities, or between traditional and westernised communities in the same jurisdiction. Many examples of such westernised approach can be found in case law of Canada and South Africa. The interpretation of the nature of customary land tenure according to common law or civil law principles has been increasingly rejected by higher courts in South Africa and Canada, e.g. in *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 469 (CC) and *Delgamuukw v British Columbia* 1997 3 SCR 1010.

This paper explores the methodology the courts should follow to determine what the distinctive nature of customary land tenure is. As customary land tenure is not codified or based on legislation, the court has to rely, in addition to the evidence of indigenous peoples, on the expert evidence of anthropologists and sociologists in determining the nature of aboriginal title (in Canada) and indigenous land tenure (in South Africa). The court must approach the rules of evidence and interpret the evidence with a consciousness of the special nature of aboriginal claims and the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The court must not undervalue the evidence presented simply because that evidence does not

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conform precisely with the evidentiary standards that would be applied in, for example, a private law tort case.

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