

Application of Section 30 of the Restitution of Land Rights Act in the Courts: Some Guidelines



E (WJ) du Plessis*

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Author

Elmien du Plessis

Affiliation

Faculty of Law NWU
Potchefstroom
South Africa

Email Elmien.duplessis.ac.za

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Abstract

In terms of section 30 of the *Restitution of Land Rights Act* 22 of 1994, the court is allowed to "admit *any* evidence, including oral evidence, which it considers relevant and cogent to the matter being heard by it, *whether or not such evidence would be admissible in any other court of law*". This means that the normal rules of evidence can be relaxed in the case of restitution claims. This articles analyses the way in which courts have dealt with the section, with a specific focus on oral histories. The paper also makes a few suggestions as to how courts can better grapple with the question in the future, to ensure that a strict adherence to the rules of evidence does not preclude justice in the context of land restitution claims.

Keywords

Evidence; restitution of land; oral history.

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1 Introduction

When Njabulo Ndebele was inaugurated as Chancellor of the University of Johannesburg, he recalled his childhood.¹ He recounts his years as a child in Christ the King Church in Sophiatown. He writes:

In my creative moments, I always imagine myself in his arms, or maybe his hands - which may have accommodated my entire size. ... That was a long time ago. My family moved to Nigel ... [b]ut we kept our links with Johannesburg closely and firmly, visiting family and friends. ... That is why I have vivid memories of going to church on Sundays at Christ the King. In our immaculate Sunday best, we crossed the tramline in both directions between Western Native Township and Sophiatown. My sister would have been in her white dress, white socks, white shoes, and a strange white hat that flared upwards. And to crown it all, a small white handbag hung from her wrist making her look like vintage Queen Elizabeth. What about me? I would be in a grey suit for boys, distinguished by short trousers and socks that went up to the calves. And black, polished shoes!

My next vivid memory is more recent. In 2001, upon an impulse, I decided to drive to Sophiatown and to find Christ the King Church. Consider that I last saw the church as a child in the nineteen fifties. What would it look like some forty years later? I was to be disappointed. Is this all? I exclaimed to myself, when I saw the church. When I was a child, Christ the King was a huge edifice with massive pillars. But many years later I stood there looking at this small church. What happened? Who changed? Was it I, or the church? Never could I have imagined that Einstein's theory of relativity that I once struggled with could hit me with such forceful clarity, and so unexpectedly. Did the church become smaller as I grew older, and away from it? Or did the church remain as it was, as I grew older, such that it has always been its size? But then, I do have the reality of two sizes of a church: a big one and a small one. Or one more question: could the size of Christ the King have remained the same had I lived close by and never left? Things do not seem to change when you are around them all the time. These questions, I found intriguing. Maybe the answer to all of them is 'yes', and that each one may be correct from its own perspective. If so, it does seem as if what is big can be small, and what is small can be big. You always have to describe the perspective from which you view it. Awareness of perspective makes you less inclined to venture a quick opinion. It imposes the responsibility to listen, weigh, and then decide. I think this is the way of the mind, spirit, and imagination.

Ever since that day, every time I pass the Trevor Huddleston centre or the Church I am reminded of his narrative. I often tried to imagine what it must have been like. The streets. Filled with jazz and journalists writing for the

* Elmien du Plessis. BA (International Relations), LLB, LLD (US). Associate professor, Faculty of Law, North-West University. E-mail: elmien.duplessis@nwu.ac.za. This work was supported in part by a grant from the National Research Foundation of South Africa, Unique Grant No 94148. Any opinion, finding and conclusion or recommendation expressed in this material is that of the author(s) and the NRF does not accept any liability in this regard.

¹ Ndebele 2012 <http://www.njabulondebele.co.za/work/mind-spirit-and-imagination-inaugural-address-as-chancellor-of-the-university-of-johannesburg/>.

Drum magazine. The violence of the eviction of a whole vibrant suburb to the outskirts of Johannesburg. The insult of building a white neighbourhood on the land of a vibrant, interracial space, and calling it Triomf (Triumph). These stories! This imagination! Then, of course, the academic in me awakens. How do I know these stories are real? How can I trust history? Whose history do I listen to anyway? And more recently, how do all the stories about memories of places and spaces hold up in a court of law, as I have read in restitution cases.

In restitution cases oral history and oral traditions are often employed to establish whether the community laying the claim is in fact a "community"² and whether the community had a "right in land".³ Oral history refers to the person recalling events that took place in the past, of which the person was part. The issue with oral history is often that it is not only the memory that is recalled, but that it is also coloured with the meaning that people attach to the events. Here I remind of you the church in Ndebele's story, in memory big, in reality now small. The incidents and the interpretation are thus blended, and this leads to verification problems.⁴ Since the oral history is not pinned down at a certain time but told later, often for a specific purpose, the memory may be distorted. It is for this reason that scholars that use this data are often extremely cautious.

Oral tradition, on the other hand, refers to people telling stories that were handed down by the previous generations. This can amount to hearsay, in court. The problem with oral tradition, more than oral history, is that the original story teller is not in court, under oath, and subject to cross examination. The authenticity of the evidence is therefore problematic. Added to this is the fact that the historian as an expert witness is trying to help the court to determine the facts that are relevant to a legal dispute.

This paper will look at section 30 of the *Restitution of Land Rights Act*⁵ (hereafter the Act) and how it has been interpreted in the courts so far. The discussion of the courts' interpretation will be followed by a theoretical

² *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC) listed three things that must be proven for it to be a "community" in para 34, namely 1) a group of persons 2) with rights in the subject land held in common by the group and 3) which rights are derived from shared rules determining access to the land.

³ See *Richtersveld Community v Alexkor Ltd* 2003 6 BCLR 583 (SCA) where the requirement for proving the occupation of land is an uninterrupted presence on the land. This includes the use of the land at the time of annexation and a nomadic lifestyle, if such a lifestyle still affords exclusive and effective right of occupation to the people.

⁴ Borrows 2001 *Osgoode Hall LJ* 5.

⁵ *Restitution of Land Rights Act* 22 of 1994 (hereinafter the Restitution Act).

inquiry into strategies to overcome the possible pitfalls inherent in hearsay evidence.

2 Section 30

The Restitution Act foresaw the problems that having to rely on oral and hearsay evidence might pose in restitution cases, and for that reason inserted section 30 into the Act. Section 30 of the Restitution Act allows for a deviation from the normal rules of evidence. The court is allowed to "admit *any* evidence, including oral evidence, which it considers relevant and cogent to the matter being heard by it, *whether or not such evidence would be admissible in any other court of law*".⁶ [own emphasis] Any party before the Court can present "hearsay evidence regarding the circumstances surrounding the dispossession of the land right or rights in question and the rules governing the allocation and occupation of land within the claimant community concerned at the time of such dispossession⁷ and expert evidence regarding the historical and anthropological facts relevant to any particular claim".⁸ It is then up to the court to give the evidence the weight it deems appropriate.⁹

3 Interpretation of section 30

To understand how section 30 changes the normal rules of evidence, it is important to discuss briefly the rules regarding hearsay evidence in South Africa. A discussion on how the courts dealt with section 30 specifically will follow thereafter. This will lay the basis for a theoretical discussion in the last paragraphs of possible approaches.

3.1 Hearsay rule

Hearsay evidence is evidence of what someone other than the witness has stated, and the witness thus testifies to what he *heard* (or read).¹⁰ Hearsay evidence is normally excluded as evidence because it is deemed unreliable and therefore may mislead the court. It is unreliable because the person who had the first-hand experience is not in court to tell the court what he observed, under oath, and is therefore not subject to cross examination.¹¹

⁶ Section 30(1) of the Restitution Act.

⁷ Section 30(2)(a) of the Restitution Act.

⁸ Section 30(2)(b) of the Restitution Act.

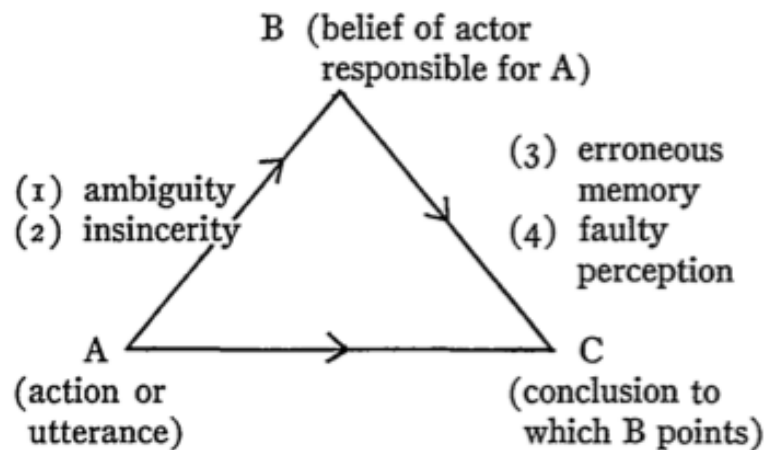
⁹ Section 30(3) of the Restitution Act.

¹⁰ Schmidt and Rademeyer *Law of Evidence* 18 1.

¹¹ Schmidt and Rademeyer *Law of Evidence* 18 1.

One of the problems with hearsay evidence is that it is difficult to piece together a reliable chain of inferences, from the event that actually took place to the person standing in court who is not connected to that event but is conveying what he knows about the event through hearsay. In a sense, the person conveying the message in court is trying to convey what the person who told the story was thinking when he observed the reality to which the evidence refers. An additional step requires an inquiry into the extent to which the assumptions of the first-hand observer coloured the conclusions drawn about the external reality. These links are usually what is tested in courts, and counsel can probe inaccuracies based on ambiguity, insincerity, faulty perception and erroneous memory.¹²

Tribe presents a testimonial triangle to illustrate the problem with hearsay evidence. The diagram is as follows:



In this diagram one starts at A. A is the person making the declaration of X's act or assertion. B is then X's belief in what the act or assertion suggests, and C is the external reality that X's belief suggests. The problem with hearsay arises when A, the act or utterance, is used to prove C, the conclusion, along the path of B. If hearsay is to be allowed, the obstacles of ambiguity, insincerity, erroneous memory or faulty perception need to be removed, unless one can show that there is a direct correlation between A and C.¹³ The triangle therefore allows for a quick construction of the mental journey that X makes arrive at C, and allows for the easy identification of

¹² Tribe 1974 *Harv L Rev* 958.

¹³ Tribe 1974 *Harv L Rev* 959.

the problem and how it can be addressed.¹⁴ Triangulation as a possible solution will be discussed later.¹⁵

In South Africa the hearsay rule is contained in section 3 of the *Law of Evidence Amendment Act* 45 of 1988, which states that in general hearsay evidence is inadmissible, but that there are exceptions to this general rule. Hearsay evidence can be admissible if both parties agree;¹⁶ if the person who is the witness himself testifies in court;¹⁷ if the court uses its discretion based on the nature of the proceedings,¹⁸ the nature of the evidence,¹⁹ the purpose of the evidence, the probative value of the evidence,²⁰ the reason why it is not first-hand evidence but hearsay evidence,²¹ and the prejudice to a party if such evidence is admitted;²² and if the court thinks it is in the interest of justice to do so.²³

This rule is slightly amended by section 30 of the Act,²⁴ in that the Act gives the court the discretion (the Court *may*) to admit evidence, including oral evidence, that might not be admissible in other courts of law.²⁵ The Act refers to the admissibility of hearsay evidence by stating that hearsay evidence is specifically admissible surrounding the dispossession of the land right or rights in question and the rules that govern the allocation and the occupation of the land within the claimant community at the time of such dispossession.²⁶

What follows is a discussion of the courts' interpretation of this section.

3.2 Courts' interpretation

3.2.1 Restitution of Land Rights Act 22 of 1994

It is necessary to place section 30 within the rest of the Act. This is so because in South Africa we follow a purposive approach to interpretation, and section 30 therefore needs to be understood in the context of the Act

¹⁴ Tribe 1974 *Harv L Rev* 962. This is rather technical and pertains to certain litigation skills, not all of which are relevant for the current paper.

¹⁵ See para 0.

¹⁶ Section 3(1)(a) of the *Law of Evidence Amendment Act* 45 of 1988.

¹⁷ Section 3(1)(b) of the *Law of Evidence Amendment Act* 45 of 1988.

¹⁸ Section 3(1)(c)(i) of the *Law of Evidence Amendment Act* 45 of 1988.

¹⁹ Section 3(1)(c)(ii) of the *Law of Evidence Amendment Act* 45 of 1988.

²⁰ Section 3(1)(c)(iii) of the *Law of Evidence Amendment Act* 45 of 1988.

²¹ Section 3(1)(c)(iv) of the *Law of Evidence Amendment Act* 45 of 1988.

²² Section 3(1)(c)(v) of the *Law of Evidence Amendment Act* 45 of 1988.

²³ Section 3(1)(c)(vi) of the *Law of Evidence Amendment Act* 45 of 1988.

²⁴ *Restitution of Land Rights Act* 22 of 1994.

²⁵ Section 30(1) of the Restitution Act.

²⁶ Section 30(2)(a) of the Restitution Act.

and the purpose that the Act sought to achieve. The primary purpose of the Act is to address the problems of spatial segregation as inherited from Apartheid, and more broadly to provide redress for individuals or communities who were dispossessed of their land due to the implementation of racially discriminatory policies.²⁷

Property rights were debated before the interim Constitution²⁸ was enacted.²⁹ The land restitution issue was included in the interim Constitution in sections 121 to 123 read with section 8(2)(b). It is section 121(1) that gave rise to the Restitution Act and is the predecessor of section 25(7) of the final Constitution, which provides that:³⁰

A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

In terms of the Restitution Act a party that wants to get equitable redress therefore has to show that it is a person or a community who was dispossessed, of a right in property after 19 June 1913, which dispossession happened as a result of racially discriminatory laws or practices.³¹

The Constitutional Court made it clear that the Act is to be interpreted purposively, and that the Act itself is linked to the empowering provision in the Constitution. When looking at individual sections in the Act, courts therefore have to scrutinise the purpose and seek to promote the spirit, purport and objects of the Bill of Rights. This requires placing a generous construction on the Act in order to afford people the fullest possible protection of their constitutional guarantees. Provisions cannot be regarded in isolation, but must be understood in the context of a grid of related provisions and the underlying values of the statute.³²

²⁷ *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) para 98.

²⁸ *Constitution of the Republic of South Africa* 200 of 1993. Hereinafter the "interim Constitution".

²⁹ *Minister of Land Affairs of the Republic of South Africa v Slamdien* 1999 ZALCC 6 (10 February 1999) 21.

³⁰ *Constitution of the Republic of South Africa*, 1996. Hereinafter "final Constitution" or "Constitution".

³¹ Pienaar *Land Reform* 536.

³² *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para 53.

3.2.2 *Richtersveld Community v Alexkor*³³

The Richtersveld case dealt with what is a claim of aboriginal title.³⁴ The claimants in this case argued that their indigenous rights in land survived annexation by the crown and that they had valid rights in property past the 1913 cut-off date. To prove indigenous rights, they had to show that they possessed shared rules of governing the occupation of land held in common by the community. For this purpose oral evidence was given to the effect that outsiders required permission to use the land, and that grazing fees were asked from outsiders for the use of the land.³⁵

The plaintiffs in the trial court called various witnesses, amongst them an anthropologist, an expert in social history, a historian and community members.³⁶ The documents that assisted the court in piecing together the story included archival records, articles, journals and writings from the 19th and early 20th century.³⁷

The first inclination of the Land Claims Court's (hereafter the LCC) when confronted with the issue of rights in land was to attempt to determine whether or not it could in fact recognise indigenous law rights, since the *Evidence Amendment Act* 45 of 1988 in section 1(1) permits a court to take judicial notice of such evidence only when it can be ascertained with sufficient certainty.³⁸ The issue that the court was confronted with was: Can these rights be ascertained with sufficient certainty? This, of course, points to the kind of evidence that is used to prove their existence. When trying to establish occupation, the LCC extensively referred to documents and the diary of Reverend Hein, as well as evidence given during a court case in 1917. This evidence was accepted by both parties.

When the social historian was called to testify about the oral histories, the defence used this opportunity to dispute the evidence "because the accepted methods for obtaining oral history were not followed".³⁹ It was suggested that the historian might be relying on hearsay. The allegation was that the four methods needed to address the hearsay problems were not being utilised. These four methods are that there must be a good translator,

³³ *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC).

³⁴ The court's definition of aboriginal title is "a right in land, one vesting in a community that occupied the land at the time of colonization" - *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC) para 44.

³⁵ *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC) para 65.

³⁶ *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC) para 18.

³⁷ *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC) para 21.

³⁸ Section 48 of the *Law of Evidence Amendment Act* 45 of 1988.

³⁹ *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC) 64.

there must be exactness of recording in the form of a tape recorder or written notes, enough people must be interviewed or enough time spent with them to and cross-check and verify histories that are presented with a particular slant, and the interviewer must have had sufficient background knowledge of the case.⁴⁰ The court did not agree with the defence and noted that in terms of section 30 it "may also admit evidence which would be inadmissible in any other court". Based on this, the court accepted the oral evidence given.⁴¹

Even though the social historian, as an expert witness, did not strictly comply with the requirements that the defence thought he should comply with, his evidence formed part of a body of evidence, part of a bigger narrative that also included documentary evidence in the form of reports, letters and diaries, as well as the evidence given by the anthropologist.⁴² As such, it was included.

Some of the remarks that the oral historian Dr Field made in his testimony in relation to the importance of oral histories are interesting. He focussed on the importance of oral traditions in pre-literature societies, and the importance of these stories in maintaining traditions and sustaining cultures.⁴³ He stressed that oral history has an important role to play in communal life, and that there are various techniques to deal with the problem of selective memory. For one, the interviewer can ask various questions to flesh out selective memories, the interviewer can engage in a series of interviews across the community and, importantly, oral histories can be related to other sources to test their accuracy.⁴⁴ Dr Field also did not regard the written sources of history as being less problematic, pointing out that writing is also always performed from a perspective and often tainted with preconceived ideas, despite the fact that the writer has the benefit of time to think and position himself with regard to the topic.⁴⁵ The need for internal consistency can be addressed by conducting in-depth interviews over several sessions and building up relationships with one's respondents.⁴⁶

⁴⁰ *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC) fn 154.

⁴¹ *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC) 65.

⁴² *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC) 69.

⁴³ Page 706 of the court records. Also see *Borrows* 2001 *Osgoode Hall LJ* 29, that speaks about the importance of understanding the testimonies in the cultural context from which they emanate.

⁴⁴ Page 707 of the court records.

⁴⁵ Page 708.

⁴⁶ Page 712.

Dr Field reflected on the fact that many people have been excluded from history because the history of their times was recorded and the documentation was performed by people in power. For that reason, "historians were interested in finding a way of documenting the voices that were excluded from the political process of South African life at the time".⁴⁷ In the context of the Act and what it attempts to achieve, this is an important consideration.

On the question on how oral history relates to written histories, Dr Field responded as follows:

I think it is imperative that we use as many sources of evidence, sources of information that we have at our disposal ... [H]istorians for example, are often – often look at a specific event to try and understand what happened and why did it happen. That if you look at a specific event, in most historical events, there are nearly always going to be multiple actors, playing different roles with different interests. You have got to understand why events unfold in a way they do or why they happen at all. I think it is vitally important we get as much information from the different actors that have constructed that event or led to that event happening. That is vital. I mean the only way you are going to do that is by drawing on written and oral sources. Only then can you start developing some sense of, or move closer to a historical truth about what shapes events and why they happen. ... I think you need these different sources of information to understand why those things happened ... [V]ery often the protagonists in a lot of historical events, are people that don't have access to the historical record. They rely primarily on oral history or oral traditions, and if we are going to understand why events took the shape they do, then we have to rely on oral history as well, and oral history has to be given an equal place together with written forms of historical evidence.⁴⁸

In the LCC the court relied extensively on the testimony of people, which the court then tested against documentary evidence. The court did so with remarkable ease and without delving much into the requirements for admitting such evidence.

3.2.3 *Kranspoort Community v Farm Kranspoort 48 LS 2000 JOL 5882 (LCC)*

In the Kranspoort community case the question was whether the claimants were entitled to the restoration of land in terms of the requirements of the Act. There were indigenous people living on the land when the Voortrekkers arrived in the area in 1830.⁴⁹ In the 1850s the Church decided to extend its missionary work in the area and acquired the farm Kranspoort to consolidate with the church's farm and to have access to water, and in 1906

⁴⁷ Page 705 of the court records.

⁴⁸ Pages 718-719.

⁴⁹ *Kranspoort Community Re: Farm Kranspoort 48 LS 1999 ZALCC 67* (10 December 1999) para 4.

a deed of grant was registered against the property in the name of Hofmeyr, the missionary at the time. Through a series of bequests it ended up in the family and in the name of the church.⁵⁰ For years following this, some of the land was used for church and missionary activities, and some of the land was used by the communities which resided on it. In this respect the church council governed certain areas of the land, with the civic affairs being governed by a "kgotla" or village council made up of residents.⁵¹

This dual system of governance later led to problems when a new missionary, Van der Merwe, introduced a stricter regime at the mission, which led to the community being split in two.⁵² This tension eventually led to the Church deciding, in an effort to curb the tension that only certain families (who were aligned with the church) were permitted to remain on the land. The evictions could be performed in terms of the *Group Areas Act* of 1950. The other families were ordered to vacate the farm due to their illegal presence. All of these families eventually left the farm under various circumstances, but none were compensated for the losses they suffered due to the removal.⁵³ A decade later all of the families would be removed, most without compensation.⁵⁴ To piece together the history in order to determine the validity of the claim, the court was faced with an array of evidence, amongst which was evidence that could be termed "hearsay" evidence.⁵⁵

The court relied on various sources of information. Of course, the Land Claims Commissioner's report was one of the documents, along with research-based documents that are based on other documents and interviews with various residents. The other documents include letters, minutes of meetings and similar documents from church archives and, as is often the case, aerial photographs of the area. All this information stood alongside the evidence of the witnesses who testified.⁵⁶ The documents, some of which might amount to hearsay, were admitted in terms of section

⁵⁰ *Kranspoort Community Re: Farm Kranspoort 48 LS 1999 ZALCC 67* (10 December 1999) paras 8-11.

⁵¹ *Kranspoort Community Re: Farm Kranspoort 48 LS 1999 ZALCC 67* (10 December 1999) para 15.

⁵² *Kranspoort Community Re: Farm Kranspoort 48 LS 1999 ZALCC 67* (10 December 1999) para 16.

⁵³ *Kranspoort Community Re: Farm Kranspoort 48 LS 1999 ZALCC 67* (10 December 1999) para 17.

⁵⁴ *Kranspoort Community Re: Farm Kranspoort 48 LS 1999 ZALCC 67* (10 December 1999) para 18.

⁵⁵ *Kranspoort Community Re: Farm Kranspoort 48 LS 1999 ZALCC 67* (10 December 1999) para 25.

⁵⁶ *Kranspoort Community Re: Farm Kranspoort 48 LS 1999 ZALCC 67* (10 December 1999) para 24.

30(1) and (2) of the Act, with the court having to give it the appropriate weight.⁵⁷

Despite this acknowledgement that it can deal with hearsay evidence in a more relaxed way, the court relied on the oral history only where it related to specific points in dispute. The court felt that the passage of time, coupled with the fact that the main role players in the specific period had not given evidence, meant that the documentary evidence was more reliable.⁵⁸ The case was nevertheless useful in showing how oral evidence and documentary evidence can be used in order to piece history together.

3.2.4 *Salem Community v Government of the Republic of South Africa*⁵⁹ *and Salem Party Club v Salem Community*⁶⁰

In the Salem case the claimant community alleged that they had lost their rights in ownership, residence, grazing and agricultural use of land in a property referred to as the Commonage.⁶¹ Their claim was opposed mainly by the current landowners on the grounds that the claimants were not a community; that the division of the Commonage was not as a result of racially discriminatory laws or practices; that they had no rights prior or after the 1913 cut-off date; and that the claimants were not dispossessed of rights in land as a result of racially discriminatory laws or practices.⁶²

The LCC heard extensive documentary, expert and oral evidence. Although the defence asked that the court disregard the oral evidence, the court found that it was sufficiently supported by documentary evidence.⁶³ The court regarded the

[n]ature of land claims [as] such that, in many cases those that suffered dispossession are no longer alive. In order to ensure that the Act is meaningful, the Legislature deemed it necessary to intervene on this point. There are no compelling grounds for this Court to reject the evidence of Mr N[...] merely because it is hearsay.

⁵⁷ *Kranspoort Community Re: Farm Kranspoort 48 LS 1999 ZALCC 67* (10 December 1999) para 25.

⁵⁸ *Kranspoort Community Re: Farm Kranspoort 48 LS 1999 ZALCC 67* (10 December 1999) para 28.

⁵⁹ *Salem Community v Government of the Republic of South Africa* 2015 2 All SA 58 (LCC).

⁶⁰ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA).

⁶¹ *Salem Community v Government of the Republic of South Africa* 2015 2 All SA 58 (LCC) paras 1-3.

⁶² *Salem Community v Government of the Republic of South Africa* 2015 2 All SA 58 (LCC) para 7.

⁶³ *Salem Community v Government of the Republic of South Africa* 2015 2 All SA 58 (LCC) para 132.

The court thus accepted some oral evidence to find that there were indeed people living on the land, that the people were a community, and that there were certain rules according to which this community lived.⁶⁴ Without consciously doing so, the court weaved the oral evidence into the documentary and historic evidence to gather an understanding of the history of the land.⁶⁵

On appeal to the Supreme Court of Appeal (hereafter the SCA), the issue of the acceptance of oral evidence became more problematic. The minority judgement (Cachalia J) strongly rejected the oral evidence of the claimant community in favour of the oral and other evidence of the landowners, while the majority accepted their testimony. The evidence that the Land Claims Commission relied on was that of Mr Paul (the investigating officer), Professor Legassick (a historian) and Mr Chandler (a land surveyor). The claimants called two witnesses, Mr Nondzube and Mr Ngqiyaza, who gave oral testimony of their memories of growing up in Salem. The landowners relied on Professor Giliomee (a historian) and six witnesses (many of whom are current landowners).⁶⁶

The minority was critical of the manner in which the LCC evaluated the evidence. It found that "[t]here is no reason to reject these elementary principles [of evidence] simply because this is a land restitution matter [and] the LCC's failure to do so is a misdirection that goes to the heart of the factual findings".⁶⁷ In the same critique the judge argued that while section

⁶⁴ *Salem Community v Government of the Republic of South Africa* 2015 2 All SA 58 (LCC) para 135.

⁶⁵ *Salem Community v Government of the Republic of South Africa* 2015 2 All SA 58 (LCC) para 146 is a good example of this.

⁶⁶ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) paras 15-18.

⁶⁷ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) para 295. The court here quotes extensively from the *Stellenbosch Farmers' Winery Group Ltd v Martell & Cie* SA 2002 ZASCA 98 (6 September 2002) case: "The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the

30(1) and (2) of the Act allows all evidence that may be relevant to be admitted, even if it is ordinarily not admissible, the court is not obliged to do so. It merely has a discretion. Giving a stern warning, the judge pointed to the dangers of the admission of hearsay evidence. On this matter section 30(3) asked the court to give weight to evidence as it deemed appropriate. This process of fact-finding, the judge said, "must be underpinned by clear legal reasoning".⁶⁸ The judge did make mention of the underlying principles and values of the Act, as the Constitutional Court did in the *Goedgelegen* case.⁶⁹

The judge also addressed the issue of the role of historians as expert witnesses, mostly because the two historians in this case differed greatly on the history of the land. In terms of section 30(2)(b) of the Act, the court can take into account the historical facts that are relevant to a claim. In this respect, historians seem to be the obvious expert witnesses. The court cautioned that as expert witnesses, historians should be treated like all expert witnesses in that their role is to assist the Court to come to a conclusion in matters in which the Court lacks knowledge.⁷⁰ But Courts should also approach these testimonies with caution, since facts can be utilised to advance theories, and facts can be used to draw conclusions to confirm theories.⁷¹ The Court must try to establish facts and be mindful of the possible partisan causes that might be served when statements are made as being factual.⁷² With this as background, the judge, in his minority judgement, evaluated the evidence. The judge thought that Mr Nondzube's evidence about whether or not there was an African community was amusing and bizarre, and inconsistent with contemporary written records about the expulsion of the Xhosa people from the Zuurveld.⁷³ Mr Nondzube's evidence with regard to the headman was also dismissed, because it did not correlate with the evidence of the Land Claims Commissioner, or any of the landowner's witnesses and "the objective

probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

⁶⁸ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) para 297.

⁶⁹ Compare para 0.

⁷⁰ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) para 300.

⁷¹ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) para 301.

⁷² *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) para 302.

⁷³ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) paras 304-306.

evidence of the land surveyors".⁷⁴ The minority found that there was, on the whole, no objective corroboratory evidence in the form of aerial photographs or otherwise for the existence of a headman.⁷⁵ The judge found his evidence to be completely unreliable and accorded it no weight whatsoever.⁷⁶

In contrast, the majority (Pillay and Dambuza JJA, with Seriti and Mbha JJA concurring) felt that some of Mr Nondzube's allegations had value and were borne out by documented history and confirmed by archaeologists, and accepted those.⁷⁷ This was because the majority judgment took a difference stance. They acknowledged that the Act was an extraordinary piece of legislation, *sui generis*, that required different processes and approaches to litigation and rules of practice. As such, special provisions that gave structure and effect to the land claims processes needed to be taken into account.⁷⁸ These included the normal rules of hearsay evidence, *inter alia*. When considering a disputed land claim the court should lean towards the realisation of the objectives of the Act. The philosophy underlying the purpose of the Act should be used to apply the provisions, and this led the majority to a conclusion different from that of the minority.⁷⁹

The difference in approach was also evident in the handling of Mr Ngqiyaza's testimony. The minority judgment rejected Mr Ngqiyaza as a reliable witness, stating that "[h]is evidence was sometimes difficult to follow, perhaps due to his lack of education and literacy".⁸⁰ His evidence was inconsistent with the evidence of Chandler, who testified for the landowners.⁸¹ Again, in contrast, the majority felt that Mr Ngqiyaza's evidence was sufficiently backed up by documentary evidence.⁸²

There was also a disagreement about the evidence of the Land Claims Commissioner and Prof Legassick. The minority judgement found the Land Claims Commissioner's investigation to be superficial and therefore attached no weight to it.⁸³ Professor Legassick's expert testimony was likewise disregarded because his opinions were regarded as questions of law and not facts. Professor Legassick's evidence did not correlate with the historical records about the possibility of the existence of an independent

⁷⁴ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) para 308.

⁷⁵ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) para 316.

⁷⁶ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) para 322.

⁷⁷ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) para 472.

⁷⁸ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) para 416.

⁷⁹ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) para 420.

⁸⁰ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) para 323.

⁸¹ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) para 326.

⁸² *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) para 474.

⁸³ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) para 330.

autonomous African community on the Commonage.⁸⁴ Some of the historical records included health reports issued by the government of the time.⁸⁵ On contrast, the minority judge found that the evidence of the landowners and Professor Giliomee correlated with the documentary evidence and was the only evidence to be taken into account.⁸⁶

The majority was of the opinion that the archival evidence supported the claim of occupation (and therefore the evidence of the Land Claims Commissioner). It accepted that the evidence of the claimants was not unproblematic but it found the evidence of the landowners lacking too. For the majority, the evidence of witnesses needed corroboration by the records.⁸⁷ The majority then carefully worked through the records in order to see if the records corroborated the witnesses' evidence,⁸⁸ and found that none of the evidence in the records refuted the assertion that the African population had lived on the commonage.⁸⁹ Likewise, the majority found that Professor Legassick's conclusion was possible, based on the records of the Cape Government.⁹⁰

What is striking is how the memories of the different witnesses were diametrically opposed, and how the court was forced to make sense of the evidence. Both judgements tested the oral testimony against other evidence. What is striking about the minority judgement is that the rights in land of the claimants were not tested in the cultural and normative framework of the indigenous people, but rather in the framework of the settlers. The minority also seemed to attach a fair amount of weight to documentary evidence as being more reliable, even though the rights in land of people like the claimants were very seldom formally recorded. If one regards the legal culture that the court seemed to cling to, especially the scepticism of hearsay evidence, and the lack of regard to the underlying values that the Act aims to adhere to, it is not surprising that the minority judge rejected the oral evidence in fairly strong language. The majority judgment was cognisant of the fact that the Act allows for a deviation from the rule of evidence in order to fulfil the purpose of the Act. This does not mean that there should be a blind pursuit of the purpose of the Act, but rather that the oral evidence should be understood and regarded within the

⁸⁴ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) para 333.

⁸⁵ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) para 365.

⁸⁶ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) para 391.

⁸⁷ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) para 435.

⁸⁸ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) paras 436-455.

⁸⁹ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) para 456.

⁹⁰ *Salem Party Club v Salem Community* 2017 1 All SA 712 (SCA) para 468.

bigger pool of evidence, and should be backed up by other forms of evidence; in this instance, by official documents.

It is unfortunate that the courts did not extensively explain or lay down rules on how the possible problems with hearsay evidence should be addressed. What follows is therefore a summary of the most pertinent problems, followed by a suggestion of possible approaches to the issue.

4 Problems

4.1 *The historian as expert witness*

The assessment of land claims has bred a new group of expert witnesses: the historians and the anthropologists (and related experts) that are called in to help lawyers prepare for cases.⁹¹ But historians and lawyers want to utilise the past for different purposes. Historians are looking for facts that make up history, and lawyers look for facts that can answer a legal question. For example, when a legal representative of a community in a case concerning customary fishing rights got excited about the stories her clients were telling her, she wanted them to articulate the stories in "rights language" in order to get the evidence needed to win the case. One of the older men looked at her and replied (the passage is translated):⁹²

You are using the wrong words. We didn't have a right to fish. Fishing was simply life. What you call rights, for us was simply a part of life. It is you who use this language of rights. We don't know that. We want our life, but if we can't have that, then maybe at a minimum we can have these rights to fish that you are talking about.

Sometimes the language of law and the language that the storyteller uses to tell the story just won't reconcile.

Likewise, lawyers often want details, while expert witnesses may be able to provide only tentative generalisations.⁹³ Historians do not necessarily aim to settle a dispute with finality. They are aware of the contestations of historical interpretations.⁹⁴ Take for instance the expert testimony of Dr Field in the Richtersveld case (and I quote):

[S]imilar to – in a way similar to Van Onselen's methodology using different sources both written and oral of different sources both written and oral of different participants to the event. ... And in the process there's a thread – I think a synthesis of a picture, a synthesis emerges of what happened there. ... It might be a quite contradictory picture, because different protagonists

⁹¹ Foster and Grove 1993 *U Brit Colum L Rev* 218.

⁹² Wicomb "Limits of the Law" 53.

⁹³ Foster and Grove 1993 *U Brit Colum L Rev* 220.

⁹⁴ Gover and Macaulay 1996 *Sask L Rev* 52.

have different interest and views. ... But I think it is possible in that process of synthesising multiple sources and multiple oral sources from different viewpoints you start to get a thread of truth emerging and that way offsetting the possibilities of one person maybe being slanted in one direction.

In contrast to this, oral histories are narrated to an audience, and the story is direct and interactive.⁹⁵ During a trial, however, once the court accepts evidence as being admissible, it becomes fixed and static.⁹⁶

4.2 Judging the story by different standards than the story is told

When indigenous communities tell their stories about land, for instance, they not only testify about their rights in the property concerned but they also explain the indigenous legal regimes that govern these relationships.⁹⁷ The courts are tasked with judging the community and their rights and not the way the community themselves view these rights. In other words, the legal standards of the community are often not employed to help make a judgement.⁹⁸ This is evident in the minority judgement in the Salem SCA case. This might be because recognising a separate legal system might challenge the constitutional structure of the state, and in the process, perhaps subconsciously, subordinates the oral histories to other methodologies.⁹⁹ This was evident in the Supreme Court of Appeal judgment in the *Richtersveld* case, where the court described the community's rights to land as being "akin to those held under common law ownership".¹⁰⁰ Measuring the rights that a community had by common law standards can have an influence on the importance attached to certain evidence. It might require a whole system overhaul for a court to accept oral history of this kind on an equal footing with first-hand evidence, since the legal institution does not have the same cultural and ideological orientation as that of indigenous communities.¹⁰¹ In today's speak, the decolonisation of court procedures is probably an apt description of what may need to occur.

⁹⁵ Errante 2000 *Educational Researcher* 17.

⁹⁶ Gover and Macaulay 1996 *Sask L Rev* 54.

⁹⁷ Borrows 2001 *Osgoode Hall LJ* 28.

⁹⁸ Gover and Macaulay 1996 *Sask L Rev* 51.

⁹⁹ Borrows 2001 *Osgoode Hall LJ* 28.

¹⁰⁰ *Richtersveld Community v Alexkor Ltd* 2003 6 *BCLR* 583 (SCA) para 8. Note that in *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) para 50 the court stated that the right had to be determined by reference to indigenous law and not the common law.

¹⁰¹ Borrows 2001 *Osgoode Hall LJ* 28.

4.3 *The hierarchy of evidence*

This is arguably the most problematic aspect of oral evidence. The appeal is often made to objectivity, but closer scrutiny may indicate that this is just a guise for an intellectual choice that views documentary evidence as more objective and therefore more reliable than oral evidence.¹⁰²

In *Department of Land Affairs v Goedgelegen*¹⁰³ the court made it clear that registered ownership of land does not enjoy primacy over indigenous title. The court also stated that the rights acquired under indigenous law must be determined with reference to indigenous law only, subject to the Constitution. There are instances where registered ownership (and thus documented ownership) will not be held to have extinguished rights in land as recognised by indigenous law. The court here aptly quotes a passage from *Prinsloo v Ndebele-Ndzundza Community*,¹⁰⁴ where Cameron JA correctly observes that "[t]he Act recognises complexities of this kind and attempts to create practical solutions for them in its pursuit of equitable redress".¹⁰⁵ Dealing with oral evidence in a way allowed by section 30 interpreted purposively would be one such practical solution.

5 Solutions

5.1 *Context of meaning*

In *Delgamuukw v British Columbia*¹⁰⁶ the Supreme Court of Canada forced a trial court to reconsider oral evidence in a case dealing with an aboriginal title in land.¹⁰⁷ Quoting from an earlier case, the court re-affirmed:¹⁰⁸

In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the

¹⁰² Foster and Grove 1993 *U Brit Colum L Rev* 221.

¹⁰³ *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC).

¹⁰⁴ *Prinsloo v Ndebele-Ndzundza Community* 2005 6 SA 144 (SCA).

¹⁰⁵ *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para 22.

¹⁰⁶ *Delgamuukw v British Columbia* 1997 3 SCR 1010 para 80.

¹⁰⁷ To prove aboriginal title, prior presence must be proven with regards to i) occupation of the land and ii) the prior social organisation and distinctive cultures of aboriginal peoples on that land. The onus to prove title rests on the aboriginal group claiming the title. The court must determine i) whether the aboriginal claimant acted pursuant to an aboriginal title, (onus on the group) ii) whether that title has been extinguished (onus of the crown), iii) if not extinguished, whether the title has been infringed (onus on the group) and iv) whether the infringement is justified (onus on the crown). Pienaar *Land Reform* 169.

¹⁰⁸ *R v Van der Peet* 1996 2 SCR 507 para 68.

rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of 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 courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.

The court made it clear that due weight should be placed on the perspective of aboriginal people.¹⁰⁹ If the oral histories were not given independent weight that would place an impossible burden of proof on the aboriginal people who need to prove their rights.¹¹⁰

The problem in this context, and perhaps a problem that is best illustrated in the *Salem SCA* case, is the fact that the evidence must be evaluated within a structure and institution that most often has a very different ideological and cultural orientation from that of indigenous people.¹¹¹ There is a risk that when people present facts for judicial interpretation, that may be misinterpreted.¹¹² On a reading of the minority judgement in *Salem SCA*, it is clear that the claimants' testimony about the different types of rights in land, that might not have been formally recognised rights, is simply not accepted by the minority court because it did not fit the cultural and ideological orientation of the court.

To counter this effect, judges should be mindful of the potential cultural and other differences they have to navigate if they want to draw inferences and conclusions from the facts presented by oral histories. In this sense, "the context of meaning" in oral evidence is important.¹¹³ Judges should also remember that in many cultures, the way in which history is remembered it is through the oral tradition.

5.2 Triangulation

Triangulation, or mixed methods, regards qualitative and quantitative methods as complementary rather than in opposition.¹¹⁴ A definition of "triangulation" is "the combination of methodologies in the study of the same phenomenon".¹¹⁵ Triangulation is derived from the practice of navigation, where multiple reference points are used to locate an object's exact position. The multiple viewpoints allow for greater accuracy. In terms of methodology,

¹⁰⁹ *Delgamuukw v British Columbia* 1997 3 SCR 1010 para 82.

¹¹⁰ Borrows 2001 *Osgoode Hall LJ* 24.

¹¹¹ Borrows 2001 *Osgoode Hall LJ* 28.

¹¹² Borrows 2001 *Osgoode Hall LJ* 29.

¹¹³ Borrows 2001 *Osgoode Hall LJ* 30.

¹¹⁴ Jick 1979 *Admin Sci Q* 602.

¹¹⁵ Denzin *Research Act*; Denzin 2012 *J Mix Methods Res* 291.

judgments can be more accurate when different kinds of data on the same theme are collected,¹¹⁶ as the court did in the *Richtersveld LCC* and the *Salem SCA* majority. Triangulation is thus a method of cross validation.

While oral history might not be hearsay as much as oral tradition might be, the triangulation method does help to conceptualise how the courts can currently accept it as evidence. What needs to happen, and this is perhaps a daunting task for lawyers representing such communities, is that this oral evidence must be triangulated with other evidence, perhaps with expert evidence from anthropologists or historians, or with archival evidence. The *Richtersveld LCC* case¹¹⁷ serves as a good example here.

6 Conclusion

Decolonisation is on the agenda. It requires us to move away from the Eurocentric canon, as Mbembe calls it, the tradition where "the knowing subject is enclosed in itself and peeks out at the world of objects and produces supposedly objective knowledge of those objects", where knowledge is independent of context. It requires us to allow for things to happen outside that hegemonic frame. It requires us to think of alternatives. Allowing story tellers to tell their stories can be seen as part of this project. It requires a purposive interpretation of section 30 – where the purpose is to get as clear a picture as possible of the past in restitution cases.

This paper advocates that oral histories and oral traditions should have a place in the court when we deal with restitution claims. They should have a place in the court even when the court falls back on the argument that what is being testified to is purely a "legal question" and not a "factual question". Whose laws anyway? There is a way of ensuring that the evidence is tested – namely triangulation. *Richtersveld LCC* laid down some rules as a guideline that can be followed.

To lawyers working on land claims, with oral histories now allowed in evidence to a limited extent, the new terrain offers possibilities. Lawyers for communities would like to shape the discourse on the admissibility of this evidence with the rights of the poor and the vulnerable in mind. We have a duty to ensure that people's constitutional right to restitution is afforded the maximum protection, like the other rights in the bill of rights.

To get back to Njabulo Ndebele image, which I sketched in the introduction: one may return to a place one remembers only to find it different. Is it the

¹¹⁶ Jick 1979 *Admin Sci Q* 603.

¹¹⁷ *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC).

person or the place that has changed? There are often two realities: that of the time when the event took place, seen in the context of the present, and that of the time we look back on, tainted by experience. But also, once we know a certain version of history that impacts on a case, does it require us to view the court and court proceedings in such an instant differently – as a limited space where hard evidence that tells only one part of the story is accepted, even if it goes against our concept of justice? Or does the Constitution and the legislation that is umbilically linked with it require us to do otherwise?

Perhaps it is all summed up best in the words of Nedelsky.¹¹⁸ If we critically examine our own perspectives of things when contemplating oral testimony about indigenous land rights, such critical self-examination is

the path out of the blindness of our subjective private. The more views we are able to take into account, the less likely we are to be locked into one perspective... It is th[is] capacity for the "enlargement of mind" that makes autonomous, impartial judgement possible.

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LIST OF ABBREVIATIONS

| | |
|--------------------|---|
| Admin Sci Q | Administrative Science Quarterly |
| Harv L Rev | Harvard Law Review |
| J Mix Methods Res | Journal of Mixed Methods Research |
| LCC | Land Claims Court |
| Osgoode Hall LJ | Osgoode Hall Law Journal |
| Sask L Rev | Saskatchewan Law Review |
| SCA | Supreme Court of Appeal |
| U Brit Colum L Rev | University of British Columbia Law Review |