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Catherine M. Coles

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LAND REFORM FOR POST-APARTHEID SOUTH AFRICA

*Catherine M. Coles**

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I. INTRODUCTION

In 1991, the South African government embarked upon a course of negotiations with representatives of the nonwhite majority in South Africa to end the apartheid system of racial segregation by which the National Party had maintained control of nonwhites for decades.¹ Although disagreements between the parties caused negotiations to cease during the second half of 1992, the talks resumed again early in 1993 with the goal of developing a new constitution and political system that would permit more equitable participation in social and political life and access to resources for all South Africans.² Because land issues were central to the entire apartheid system and the policies underlying it, land reform is a key element in

¹ On February 1, 1991, President F. W. de Klerk explicitly acknowledged the dismantling of apartheid, announcing the repeal of the Population Registration Act and the future elimination of several other major statutes on which apartheid rested. See *South Africa Country Report*, ECONOMIST PUBLICATIONS, LTD., Business International, Mar. 1, 1991, available in LEXIS, MDEAFR Library.

² See generally Nicholas Haysom, *Democracy, Constitutionalism, and the ANC's Bill of Rights for a New South Africa*, SOC. JUST. Vol. 18, Nos. 1-2, Issue 43-44, Spring-Summer 1991, at 40; Albie Sachs, *The Constitutional Position of White South Africans in a Democratic South Africa*, SOC. JUST. Vol. 18, Nos. 1-2, Issue 43-44, Spring-Summer 1991, at 1.

the dismantling of apartheid.³ Even more importantly, to the degree that a new land program alienates or satisfies the demands of various interest groups with respect to land, correspondingly weakening or strengthening their commitment to a future in South Africa, land reform will impact the ability of the next regime to govern effectively. Furthermore, as it contributes to or impedes economic development, land reform will be a central determinant of the long-term economic and political viability of the South African state.⁴

Land policies associated with apartheid shaped the most basic areas of life for *all* South Africans, and resulted most significantly in widespread dispossession of land for nonwhites.⁵ The foundation of apartheid was a system of racial zoning that reserved eighty-seven percent of the land for ownership and occupation by whites, who comprised approximately thirteen percent of the population.⁶ Over three million people, ninety-eight percent of whom were black, have been evicted from their homes under apartheid property laws over the last thirty years.⁷ Apartheid statutes required all deeds for the lawful transfer of land to include an affirmation that both seller and buyer belonged to the particular racial group allowed to own that land.⁸ The implementation of apartheid legislation and policies

³ See generally D. M. Davis, *Remaking the South African Legal Order*, SOC. JUST. Vol. 18, Nos. 1-2, Issue 43-44, Spring-Summer 1991, at 65; Haysom, *supra* note 2, at 40; Sachs, *supra* note 2, at 1.

⁴ See generally Zola Skweyiya, *Towards A Solution to the Land Question in Post-Apartheid South Africa: Problems and Models*, 21 COLUM. HUM. RTS. L. REV. 211 (Fall, 1989), reprinted in 1990 S. AFR. J. ON HUM. RTS. 195.

⁵ See generally LAURINE PLATZKY & CHERRYL WALKER, *THE SURPLUS PEOPLE: FORCED REMOVALS IN SOUTH AFRICA* (Johannesburg, 1985).

⁶ As Budlender and Latsky state,
Race zoning is the spatial dimension of apartheid.

Over the better part of a century . . . and through layers of statutory interventions into the common law of property, a legislative map of South Africa has been drawn which divides the entire country into race zones. Inside these race zones people of different races have been assigned mutually exclusive and sometimes quite different rights to land. . . .

Geoff Budlender & Johan Latsky, *Unravelling Rights to Land and to Agricultural Activity in Rural Race Zones*, 1990 S. AFR. J. ON HUM. RTS. 155, 155.

The total population estimate as of 1990 for South Africa, including the ten homelands, was 37,532,000: approximately 75.3% were African, 8.6% were colored, 2.6% were Asian, and 13.5% were white. See H. A. Steenkamp, *Demographic segmentation of the population of the RSA and TBVC countries, 1970-2000*, Bureau of Market Research of the University of South Africa (1989), reprinted in 1989/90 RACE REL. SURV. at 35.

⁷ Albie Sachs, *A Bill of Rights for South Africa: Areas of Agreement and Disagreement*, 21 COLUM. HUM. RTS. L. REV. 15, 33 (1989).

⁸ *Id.*

over many decades produced wide disparities among racial groups in access to land that will not disappear merely with statutory repeal. Even though President F. W. de Klerk has repealed virtually all apartheid land provisions, most parties agree that such measures fall far short of providing those reforms necessary to reverse the inequality that persists.⁹

Two problems in particular stand out as the various parties in South Africa attempt to agree upon a plan for land reform: first, how to redress the inequalities of past racial land allocation systems; and second, how best to achieve the first goal without disrupting and endangering the land-based economy of South Africa in the future.¹⁰ This Comment assesses prospects for land reform in post-apartheid South Africa in light of these two concerns, specifically with regard to the distribution of and access to land, and land ownership rights. Section II reviews briefly the relationships of indigenous communities in South Africa with the land and examines changes that ensued upon contact with and eventual conquest by Europeans. Section III examines the major pieces of legislation leading to the development and institutionalization of the apartheid land program, and its operation in the 1980s before significant moves toward repeal had begun. Section IV discusses the National Party's efforts at land reform to date and program for the post-apartheid era, focussing in particular on the government's *White Paper on Land Reform and Accompanying Statutes* of March 1991. Section IV also considers responses to the *White Paper* from scholars and groups involved in the negotiation process, especially the African National Congress. Section V considers African National Congress proposals for land reform, as well as perspectives on particular land-related issues offered by other groups and individuals. Finally, Section VI examines key areas of agreement and disagreement in the current debate over a land reform program, and weighs prospects for negotiated settlement.

⁹ See African National Congress, *Constitutional Guidelines for a Democratic South Africa* (Lusaka, Zambia), reprinted in 21 COLUM. HUM. RTS. L. REV. 235, 238 (Fall, 1989); Geoff Budlender et al., *Statement on the White Paper on Land Reform and the Accompanying Bills*, 1991 S. AFR. J. ON HUM. RTS., 159, 159 [hereinafter *Statement on White Paper*]; Bongwiwe Njobe and ANC Land Commission, *Repeal of Land Acts: Land Reform?* 1 (24 Jan. 1991) (unpublished document available from ANC); Republic of South Africa, *White Paper on Land Reform 1* (Government Printer, Pretoria, March 1991) [hereinafter *White Paper*].

¹⁰ Michael Robertson, *Land Reform: South African Options*, 21 COLUM. HUM. RTS. L. REV. 193, 201 (1989).

II. LAND SYSTEMS IN COLLISION: PRECOLONIAL AND COLONIAL LAND SYSTEMS IN SOUTH AFRICA

A. *An Overview of Precolonial Land Systems*

The nature of indigenous South African land systems is significant to plans for post-apartheid land reform in three respects. First, environmental advocates argue that particular aspects of precolonial African land systems should be retained for their inherent resource management value.¹¹ Second, many South Africans propose that indigenous African cultural values are inherently worth protecting and accommodating within a changing legal system.¹² Third, even though European incursions and settlement fundamentally transformed the relationships of indigenous South African peoples with the land, certain characteristics of precolonial systems persist, particularly in the homelands. The most significant aspect of indigenous South African land systems is the communal nature of land holding, in which a chief or headman owns or holds the land and has rights to disperse it to individuals and groups.¹³ The continuing presence of this element of land tenure adds a significant dimension to proposed land reform, specifically to a determination of the form or forms that access and rights to land will take in post-apartheid South Africa.¹⁴

The basic forms of land tenure in precolonial South Africa corresponded roughly to three types of subsistence or economic systems of the indigenous peoples: gathering and hunting, pastoralism, and a mixed agricultural/pastoral economy.¹⁵ Dutch settlers in the Cape first encountered gathering and hunting, and pastoral peoples, the San, and Khoikhoi, respectively.¹⁶ Only after 125 years, when Europeans moved inland to the east and north, did they confront large numbers of African agriculturalists.¹⁷

¹¹ P. D. Glavovic, *Traditional Rights to the Land and Wilderness in South Africa*, 23 CASE W. RES. J. INT'L L. 281, 316 (1991).

¹² *Id.* at 317.

¹³ *Id.* at 283.

¹⁴ See *infra* Section VI.

¹⁵ Within these subsistence types, land tenure systems were not uniform in detail. See generally DONALD DENOON & BALAM NYEKO, *SOUTHERN AFRICA SINCE 1800*, at 1-12 (1984).

¹⁶ Because the two groups are physically related, and have interacted closely, they are referred to today as the Khoisan peoples. See T.R.H. DAVENPORT, *SOUTH AFRICA: A MODERN HISTORY* 6-8 (4th ed. 1990); J. D. OMER-COOPER, *HISTORY OF SOUTHERN AFRICA* 5 (1987). See also *infra* note 18.

¹⁷ While agriculturalists provided the most effective and threatening resistance to European

The San, descendants of Late Stone Age peoples who had lived in southern Africa for thousands of years, were organized in small groups, or bands, that subsisted through gathering and hunting.¹⁸ Access to land for these purposes depended upon one's membership in a band. Each band had a nominal head, either male or female, who "owned" the resources within the band's territory. Every member of the band, however, shared in the common use of waterholes, game, and resources available for gathering. Strangers moving through a band's territory asked permission of the band head to make use of resources in the area.

The Khoikhoi, closely related to the San and also known as Hot-tentots, were pastoralists organized into chiefdoms substantially larger than the San bands.¹⁹ They kept sheep and cattle, the latter used not only for subsistence, but also for riding and warfare. The Khoikhoi also practised hunting and gathering, and engaged in trade with African agriculturalists and later with Dutch settlers.²⁰ Like the San, the Khoikhoi had a communal land tenure system, where clan members held land for grazing in common. The Khoikhoi lived side by side with the San, interacting frequently with them. San occasionally became clients of or were absorbed by Khoikhoi; Khoikhoi whose herds were decimated might adopt a San way of life, even joining a band. Both San and Khoikhoi groups also at times joined or worked for agricultural Bantu-speaking groups, and some Bantu-speaking communities came under Khoi rule.²¹ Intermarriage was not uncommon among all three groups.²²

expansion and settlement in southern Africa, all peoples, including the San and Khoikhoi, resisted. See BERNARD MAKHOSEZWE MAGUBANE, *THE POLITICAL ECONOMY OF RACE AND CLASS IN SOUTHERN AFRICA* 27–28 (1990); OMER-COOPER, *supra* note 16, at 26–28.

¹⁸ For the material presented in this paragraph, see MARJORIE SHOSTAK, *NISA THE LIFE AND WORDS OF A !KUNG WOMAN* 8–9 (1981). Most knowledge of the San peoples comes from studies of contemporary peoples. For accounts of the San, see generally THE BUSHMEN (P. Tobias, ed., 1978); KALAHARI HUNTER-GATHERERS (Richard B. Lee & Irven DeVore, eds., 1976); RICHARD B. LEE, *THE !KUNG SAN* (1979); *MAN THE HUNTER* (Richard B. Lee & Irven DeVore, eds., 1968); SHOSTAK, *supra*.

¹⁹ See OMER-COOPER, *supra* note 16, at 5.

²⁰ *Id.* at 7; see also DAVENPORT, *supra* note 16, at 8.

²¹ See OMER-COOPER, *supra* note 16, at 5–7, 16, 26–28; see generally Gerrit Harinck, *Interaction Between Xhosa and Khoi: Emphasis on the Period 1620–1750*, in *AFRICAN SOCIETIES IN SOUTHERN AFRICA* 145, 145–169 (Leonard Thompson, ed., 1969). Over time the Khoikhoi became the nucleus of a group known today as the Cape Coloureds. See Glavovic, *supra* note 11, at 288.

The Bantu are a major language family whose speakers extend throughout much of the African continent. See generally JOSEPH GREENBERG, *THE LANGUAGES OF AFRICA* (3d ed., Indiana University Research Center, 1970).

²² See OMER-COOPER, *supra* note 16, at 16.

Communities or chiefdoms representing two basic sub-groups of indigenous, agriculturalist Bantu-speakers also flourished in 'pre-European' South Africa.²³ The Nguni peoples, including the Xhosa, Zulu, Thembu, Mpondo, Ngoni, Swazi, and others, lived along the coast between the Indian Ocean and Drakensberg, to the east and northeast of Cape Town.²⁴ The Sotho-Tswana peoples lived inland in what is now Botswana, the Transvaal, the Orange Free State, Lesotho, and Bechuanaland districts of the Cape.²⁵ Nearly all these peoples combined agriculture and pastoralism, along with some hunting and craft production. Among Nguni groups pastoralism played a decidedly more central role. Settlement patterns also differed for the two groups of peoples. Most Nguni peoples lived in dispersed settlements and homesteads, while Sotho-Tswana were concentrated in villages or larger towns often at some distance from grazing and farming lands.²⁶ Both groups had extensive clan and lineage organizations that were territorially based: members of a lineage, or a group of families, used land in common for stock-raising and cultivating. In addition to chiefdoms, some Nguni and Sotho-Tswana also developed hierarchical states.²⁷

Under indigenous systems of land tenure in South Africa, then, membership in the community provided an individual with the right to share in that community's lands, and resources such as firewood, vegetation, water, and game for hunting. A chief, or band, lineage, or ward head held the land and dispersed it to community members, usually through the household head.²⁸ Household heads generally received sufficient land for their families to subsist and, apart from

²³ These sub-groups include peoples related both linguistically and culturally. See GREENBERG, *supra* note 21.

²⁴ See DAVENPORT, *supra* note 16, at 55-61; PAUL MAYLAM, A HISTORY OF THE AFRICAN PEOPLE OF SOUTH AFRICA: FROM THE EARLY IRON AGE TO THE 1970S, at 20-41 (1986); OMER-COOPER, *supra* note 16, at 8. Maylam also notes that both Nguni and Sotho labels are of recent origin, and not self-ascribed by those within these groups. *Id.* at 20-21. Thus the terms should be used carefully, and in recognition of their primary designation being language groupings, with some cultural affinities following. See also Martin Legassick, *The Sotho-Tswana Peoples before 1800*, in AFRICAN SOCIETIES IN SOUTHERN AFRICA, *supra* note 21, at 86, 94-95.

²⁵ See DAVENPORT, *supra* note 16, at 51-54; OMER-COOPER, *supra* note 16, at 9-10.

²⁶ See generally sources cited, *supra* notes 24 and 25.

²⁷ These states resisted European attempts to seize their land with extensive military organizations. See, e.g., John Omer-Cooper, *Aspects of Political Change in the Nineteenth Century Mfecane*, in AFRICAN SOCIETIES IN SOUTHERN AFRICA, *supra* note 21, at 207, 207-29.

²⁸ See B. M. JONES, LAND TENURE IN SOUTH AFRICA—PAST, PRESENT & FUTURE 33 (University of Natal Press, 1965).

chiefs or heads of state, did not accumulate more. In some societies individual rights attached to water from a well, or fruit from trees.²⁹ Both individual and communal rights tended to be flexible. For example, arable lands assigned to individuals or families for cultivation might be used after harvesting for more general grazing or gathering by others in the community.³⁰ Shifting cultivation practices also required exhausted lands to be left fallow until they regained sufficient fertility. When all the land easily accessible to a homestead was exhausted, the group moved to a new location. Although other members of the community might later use the fallow lands, claims brought by the original cultivators would usually prevail. So long as land was plentiful, drawing exact land boundaries was unnecessary; where land was scarce and population pressures grew, however, people recognized definite boundaries.³¹

In sum, land tenure systems in indigenous South African societies accorded to all members of the community rights of access to a reasonable share of the land, and to those natural resources available to and claimed by that community. An individual maintained rights in land through active membership in the community. European incursions, a growing European presence, and eventual conquest of South African peoples challenged all of these principles and gradually replaced indigenous land tenure forms with a system of freehold rights to land with access based upon racial categories.

B. Changing Rights to Land for Indigenous South African Peoples Under European Rule

From 1652 when the Dutch East India Company asserted sovereignty over the Cape area of what is today South Africa, Europeans began to disrupt and seriously challenge the viability of the land tenure systems of the San, the Khoikhoi, and the agricultural Bantu-speaking peoples.³² Indigenous southern Africans first welcomed the Europeans. As their livelihood and land were increasingly threatened, however, Africans fiercely resisted European settlement and expansion. Eventually Europeans claimed and occupied much of the land of the southern African peoples.³³

²⁹ *Id.* at 33-35.

³⁰ *Id.* at 35.

³¹ *Id.*

³² See MAGUBANE, *supra* note 17, at 20-36.

³³ See *id.* at 47-54.

The first European settlers in what is today South Africa were representatives of the Dutch East India Company, sent early in the seventeenth century to the Cape to establish a station for trading ships to replenish their stock en route to the Indies.³⁴ During the second half of the century independent settlers—Dutch, German, and French and Belgian Huguenots—arrived to take up farming and stock-raising.³⁵ The settlers adopted Dutch as their primary language and the Dutch Reformed Church, with its rigidly puritanical doctrines, as the official church in the colony. These European settlers, eventually known as Boers, used slaves from the Dutch East Indies and local Khoi as laborers on their ranches and farms. A white laboring class never developed; instead, the Europeans increasingly accepted the view that only nonwhites were fit for menial labor. Thus class distinctions paralleled racial divisions from early on.³⁶

Ranching and farming activities soon led to white expansion into the interior, and to confrontations with local African peoples. Although San and Khoikhoi attempted to oppose European incursions peacefully and later with force, neither group was a match for European settlers.³⁷ Members of the two indigenous groups were eventually displaced, hunted and killed, or assimilated. African agriculturalists, however, offered a much greater challenge to European settlement in southern Africa than did the San and Khoikhoi.³⁸ Late in the seventeenth and into the eighteenth century Europeans moved east and north out of the Cape, seeking further land for stock-raising and cultivation. Pushing through Khoi settlement areas, they encountered the agricultural Xhosa during the last quarter of the eighteenth century, and eventually waged a series of wars to push the Xhosa beyond the Fish River.³⁹ The Xhosa and other agricultural peoples were also expanding at this time in search of cattle, land,

³⁴ See *id.* at 25–26.

³⁵ See DAVENPORT, *supra* note 16, at 19–20; OMER-COOPER, *supra* note 16, at 20.

³⁶ DAVENPORT, *supra* note 16, at 22, 29–31; DENOON & NYEKO, *supra* note 15, at 19–22.

³⁷ Many San fled north into the Kalahari Desert region where they now occupy only a small portion of their former land. See OMER-COOPER, *supra* note 16, at 28. Large numbers of Khoikhoi were lost to smallpox epidemics when the Dutch arrived. Others moved inland, or intermarried with the Dutch, with African and Asian slaves, and with other African populations. In processes similar to those that Native American groups experienced, the Khoikhoi negotiated “treaties” with Europeans that deprived them of their rights to land. See DENOON & NYEKO, *supra* note 15, at 18–19.

³⁸ See DENOON & NYEKO, *supra* note 15, at 22–24, and see generally *id.* at chs. 3–4.

³⁹ The Fish River conflict was part of the European settlement of Cape Colony, and expansion toward an eastern frontier. Although Europeans ultimately failed to drive the Xhosa permanently beyond the River, the areas to the east eventually developed into more densely populated African reserves. See OMER-COOPER, *supra* note 16, at 34.

and resources. The conflict between Europeans and indigenous southern Africans at the Fish River in 1780 signaled the beginning of massive dislocations of indigenous agricultural peoples and appropriation of their land.

In 1806, during the French Revolution and Napoleonic Wars, European claims of sovereignty over Cape Colony were transferred from the Dutch East India Company to the British.⁴⁰ Many new ideas entering the Cape from Europe early in the century threatened the system of racial privilege that the settlers had developed there.⁴¹ Slave imports ended in 1807 with the abolition of the slave trade in Britain.⁴² In 1828, the British government passed Ordinance 50, setting aside earlier restrictions on movement for the Khoi in Cape Colony, and granting them full legal equality with whites. This equality both offended Boer views of the appropriate status of nonwhites, and threatened their labor supply.⁴³

The emancipation of the slaves in 1834, continuing conflicts with Xhosa in the eastern Cape, lack of support for their interests from the British, and the British government's attitude toward race relations in the Colony convinced the Boer settlers to undertake the Great Trek northward into the interior in 1836–1838.⁴⁴ The Trek took Boer frontiersmen, also known as Afrikaners, across the Orange River, and into Transorangia, Natal, and the Transvaal—where widespread fighting among African agriculturalists as part of the Mfecane had devastated the countryside.⁴⁵ The Boers mounted military expeditions against many African agricultural peoples who resisted their expansion, and the British were drawn into some of these confrontations. Boer efforts led eventually to the establishment of the republics of Natal, Orange Free State, and the Transvaal.⁴⁶

⁴⁰ *Id.* at 42.

⁴¹ These new ideas grew out of the Enlightenment and were associated with revolutionary events in France and the American colonies/United States during the last quarter of the eighteenth century. See DAVENPORT, *supra* note 16, at 32.

⁴² *Id.* at 41.

⁴³ The Boers, or Afrikaners, were an amalgam of groups, primarily French Huguenots, Germans, and Dutch, who settled in South Africa, and adopted the Dutch language and the religion of the Reformed Church. *Id.* at 20; see also *supra* notes 35–36 and accompanying text.

⁴⁴ DAVENPORT, *supra* note 16, at 68.

⁴⁵ *Id.* at 44; see also OMER-COOPER, *supra* note 16, at 71. The Mfecane refers to violent upheavals among Bantu-speaking peoples in South, Central and East Africa during the eighteenth century that led to the development of several militarized kingdoms and new types of states, such as in Zululand under the great warrior king, Shaka. See generally OMER-COOPER, *supra* note 27, at 207–29.

⁴⁶ OMER-COOPER, *supra* note 16, at 84. During this time British policies in South Africa

The discovery of diamonds in West Griqualand in the Cape in 1867, followed by gold in the Transvaal in 1886, initiated far-reaching economic changes in South Africa. Development of the mines spurred the building of a new transportation system across the different republics and the growth of industry, and drew a substantial migrant labor force to the mines. Yet Europeans strictly controlled African labor and residential areas, preventing black workers from leaving their workplaces or living quarters near the mines and from bringing family members to live with them.⁴⁷ Conflicts between the Boer controlled republics—Transvaal and the Orange Free State—and the British finally culminated in the South African Boer Wars, from 1899 to 1902, from which the British emerged victorious.⁴⁸

By the end of the Boer Wars, a system of freehold land tenure existed throughout the Transvaal, the Cape, and Natal under which there were no general restrictions on the acquisition of rights to land by nonwhites; in the Orange Free State black South Africans could purchase land in only one ward.⁴⁹ At the same time, however, a pattern of land rights for African Bantu peoples throughout the provinces emerged in the form of a reserve system that designated land specifically for indigenous peoples, many of whom had been forced off their own land. In 1847 the British introduced the first reserve in the eastern Cape, for Fingo refugees from Zulu army wars, allocating them individual land holdings.⁵⁰ The reserve system was subsequently extended to other areas of the republics that would make up South Africa. Colonial administrations controlled allocation of land within the reserves, sometimes indirectly through tribal authorities, at other times directly, through government officers.⁵¹ Indigenous land tenure systems persisted, however, in most reserves.⁵²

In 1910, the four South African colonies, Cape, Natal, Transvaal, and Orange Free State, came together to form the Union of South

fluctuated between an assumption of moral responsibility for protecting indigenous people from losing their lands, thus requiring the extension of direct British control over areas that the trekkers occupied, and wishing to avoid the costs associated with administration and defense of large areas that would not benefit the British, leading to an abandonment of any attempts to control the trekkers. Eventually the first course was taken. *Id.*

⁴⁷ See *id.* at 123 for a description of these changes and the controls Europeans developed over Africans; see also DENOON & NYEKO, *supra* note 15, at 105–07.

⁴⁸ See DAVENPORT, *supra* note 16, at 191–200.

⁴⁹ JONES, *supra* note 28, at 12.

⁵⁰ See DENOON & NYEKO, *supra* note 15, at 70.

⁵¹ In Natal, however, land designated for use by African blacks was held by various trusts and could only be alienated with government sanction. Natal's reserves were considered Crown Land. JONES, *supra* note 28, at 12.

⁵² *Id.* at 37.

Africa (the Union).⁵³ At this time the British directly controlled several other areas in southern Africa with predominantly nonwhite populations, yet refused to permit their incorporation into the Union.⁵⁴ For example, Britain had annexed Basutoland in 1868, directly establishing white administration over African communities on the land, as opposed to seizing African land and granting it to white settlers; subsequently Britain annexed Swaziland and Bechuanaland. The British administered all three as High Commission Territories, retaining direct control of them after 1910.⁵⁵

Although union followed the military defeat of the Boer Republics in the Anglo-Boer wars, and the British refused to release the three High Commission Territories to South Africa, Britain conceded much to Boer leaders in the new Union. While Britain would control foreign policy, two Transvaal generals, Afrikaners Jan Smuts and Louis Botha, would lead the new government.⁵⁶ Furthermore, the 1910 South African Constitution, and those political institutions in place at the time of union, expanded and further entrenched the system of racial separation and inequality already in existence in the former Boer Republics. Only approximately seven percent of the total area of the Union was set aside as reserves for nonwhite Africans.⁵⁷ Instead of the more liberal Cape electoral provisions for nonwhites spreading to other provinces, these voting rights for a limited elite of Africans and Coloureds were eventually eliminated: in the Union Parliament, the lower and more powerful House of Assembly would seat only those of European descent; only white adult males could vote for delegates, except in the Cape.⁵⁸ Rural

⁵³ See DENOON AND NYEKO, *supra* note 15, at 135.

⁵⁴ JONES, *supra* note 28, at 11. Union leaders assumed that eventually they would be incorporated. See DENOON & NYEKO, *supra* note 15, at 135-37.

⁵⁵ See OMER-COOPER, *supra* note 16, at 157. Bechuanaland later became Botswana, and Basutoland, Lesotho. Britain eventually granted independence to the three Territories as Lesotho, Swaziland, and Botswana in the 1960s, although they continued to provide migrant labor for South African industries.

⁵⁶ *Id.* Racial land policies did not reflect Afrikaner interests alone, however, but British as well. See SAUL DUBOW, *RACIAL SEGREGATION AND THE ORIGINS OF APARTHEID IN SOUTH AFRICA, 1919-1936*, at 22 (1989). In 1903, in anticipation of federation following the Anglo-Boer War, the British Governor of Transvaal and Orange Free State appointed a Native Affairs Commission to develop a uniform policy to be applied to nonwhite Africans throughout the colonies. JONES, *supra* note 28, at 11. Both the report issued in 1905, and the implementation of the Commission's proposals in 1913 and 1923, laid the groundwork for permanent, mandatory territorial separation of blacks and whites in South Africa. See DAVENPORT, *supra* note 16, at 207-08.

⁵⁷ MAYLAM, *supra* note 24, at 144.

⁵⁸ See GWENDOLEN CARTER, *THE POLITICS OF INEQUALITY* 119 (2d ed., 1977); JOHN DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* 28-29 (1978). The "en-

constituencies were permitted to be fifteen percent smaller than average, urban constituencies fifteen percent larger, thereby giving electoral advantage to white farming groups.⁵⁹ A growing black migrant population of mineworkers had no representation and no opportunity to organize politically. Furthermore, new legislation in 1913 denied rural black farmers access to land and forced them to undertake wage labor to survive.⁶⁰ From this point on, racial policies denying black South Africans access to most of the country's land and resources increased in intensity and effect.

III. THE INSTITUTIONALIZATION OF RACIAL INEQUALITY AND APARTHEID THROUGH A LAND PROGRAM

Although apartheid did not become the official policy of the South African government until after the National Party was elected to a majority in the South African Parliament in 1948, the roots of apartheid land law were planted long before. In 1913, soon after union, the first Native Land Act initiated a program of separate development based upon racial distinctions; a series of legislative acts followed as apartheid land law developed fully.⁶¹ From the time of union Britain did not seriously oppose the development of South Africa's racial land policy.⁶² In 1931 the British Parliament gave South Africa full freedom of legislation with the Statute of Westminster.⁶³ Following the *Ndlwana* judgment in 1937, which held that Parliament could adopt any procedure not specifically precluded by the Constitution, the South African Parliament felt free to act as a sovereign body, unhindered by the entrenchment clauses included in the Act of Union that had offered some protection to nonwhite interests.⁶⁴ By the late 1980s the combined effect of the South Af-

trenched clause" of the South African Act of Union specified that existing voting rights of Cape Africans and Coloureds were protected unless changed by a two-thirds majority of both houses of Parliament sitting together. Yet in the former Boer states, the Orange Free State and the Transvaal, non-Europeans were not permitted to vote; Natal's practices were highly restrictive for non-whites.

⁵⁹ DENOON & NYEKO, *supra* note 15, at 164-65, 171-72.

⁶⁰ *Id.* at 165.

⁶¹ See generally, MAGUBANE, *supra* note 17, at 71-90; M. K. Robertson, *Black Land Tenure: Disabilities and Some Rights*, in RACE AND THE LAW IN SOUTH AFRICA 119 (A. J. Rycroft et al. eds., Juta & Co., Ltd., 1987).

⁶² See generally, MAGUBANE, *supra* note 17, at 130-38.

⁶³ Statute of Westminster, 1931, 22 & 23 Geo. 5, c. 4 (Eng.). See CARTER, *supra* note 58, at 121.

⁶⁴ *Ndlwana v. Hofmeyr*, N.O., 1937 A.D. 229 (S. Afr.). This was an Appeal Court decision; the case itself concerned the African franchise and Parliamentary attempts to eliminate it. See CARTER, *supra* note 58, at 119-21; DUGARD, *supra* note 58, at 28-29.

rican government's apartheid land laws severely limited access to land, and rights in land, for black South Africans.

A. Legislative Development of the Apartheid Land Program

Several significant pieces of legislation underlay the delineation by race of residential and economic zones and access to land that constituted apartheid in South Africa. Foremost was the Natives' Land Act 27 of 1913 (1913 Act), the legal foundation of South Africa's racially organized society and the law that has had the greatest impact on the lives of nonwhite South Africans.⁶⁵ This Act followed the creation of the reserve system as the next major step in the development of the South African government's land policy for nonwhites.⁶⁶ The 1913 Act made illegal the purchase or lease of land by nonwhites from Europeans outside the reserves.⁶⁷ Prior to the Act some black Africans owned land outside reserves, while many others were sharecroppers or tenant farmers on white-owned agricultural land or Crown Land.⁶⁸ With the Act's passage white farmers were able to turn black sharecroppers off the land, or force them into disadvantageous tenancies. Even more significantly, however, the Act established the Beaumont Commission and charged it with dividing the country permanently into white and nonwhite areas.⁶⁹

Following the Beaumont Commission's recommendations, made in 1916, the Development Land and Trust Act 18 of 1936 (1936 Act) increased the size of black reserve areas from seven percent to about thirteen percent of South African land.⁷⁰ Also known as scheduled areas, these reserves later were referred to, successively, as bantustans, homelands, and national states.⁷¹ Under the 1936 Act, the South African Development Trust (SADT) controlled all state-owned land set aside for black South Africans, including both scheduled or

⁶⁵ See LEONARD THOMPSON, *A HISTORY OF SOUTH AFRICA 163-65* (1990); Budlender & Latsky, *supra* note 6, at 156; Robertson, *supra* note 61, at 120.

⁶⁶ See *supra* notes 49-50 and accompanying text.

⁶⁷ See JONES, *supra* note 28, at 12; OMER-COOPER, *supra* note 16, at 163.

⁶⁸ OMER-COOPER, *supra* note 16, at 163.

⁶⁹ See JONES, *supra* note 28, at 12. The Commission proposed that African reserves would need to be enlarged, a recommendation so unpopular with white farmers that it was not until 1936, with passage of the Native Trust and Land Act, that the recommendations formed the basis for further legislation.

⁷⁰ See Robertson, *supra* note 61, at 123. After much resistance from white farmers, the government obtained this additional land by expropriating the holdings of these farmers at high cost.

⁷¹ See generally DENOON & NYEKO, *supra* note 15, at 197-220; PLATZKY & WALKER, *supra* note 5, at 109-14.

reserve areas, and released areas that lay outside the reserves but designated to be added to them.⁷² The Trust could dispose of its land only to blacks; allocation to non-blacks required Parliamentary approval. Thus non-black persons were largely unable to acquire scheduled land.⁷³ Outside the reserves, the Act prohibited blacks from land transactions or holding any rights to land except in released areas, or with permission of the Minister.⁷⁴ To provide for the administration of black areas in South Africa and implementation of the 1913 Act, the South African Parliament in 1927 passed the Native Administration Act 38. This act awarded legislative power to the executive, giving him far-reaching powers to remove blacks from rural white land and relocate them on reserves.⁷⁵

Following the two Land Acts of 1913 and 1936 and their descendants, the Group Areas Act 41 of 1950 (1950 Act), later consolidated by Group Areas Act 36 of 1966, had the greatest impact on residential segregation by race in South Africa.⁷⁶ The 1950 Act provided for the State President to set out specific rural and urban areas exclusively for ownership and occupation by members of particular racial groups: whites, coloureds, and Indians. There were no areas designated specifically for black South Africans, however, who were prohibited also from occupying or owning land in areas designated for

⁷² See Robertson, *supra* note 61, at 127. Released areas were outside the provisions of the Natives' Land Act of 1913. Blacks were permitted to acquire land in released areas, but in 1936 the released areas were designated to be added to the reserves. See PLATZKY & WALKER, *supra* note 5, at 89. See also *supra* notes 50–52 and accompanying text, on the reserves.

The legal character of the South African Development Trust was not clear. Budlender and Latsky describe it as different from most trusts under common law, where a trustee holds property for the benefit of beneficiaries. Instead, the SADT was similar to a trustee under laws of sovereignty, with the state acting as owner of the land. See Budlender & Latsky, *supra* note 6, at 164.

⁷³ JONES, *supra* note 28, at 11–13; Budlender & Latsky, *supra* note 6, at 157–58.

⁷⁴ Budlender & Latsky, *supra* note 6, at 158. No one except the Trust or a black could acquire land in a released area from a black except with the approval of the Minister of Education and Development Aid. *Id.* This particular restriction was later superseded by the Group Areas Act 41 of 1950. See generally MELVILLE FESTENSTEIN & CLAIRE PICKARD-CAMBRIDGE, *LAND AND RACE SOUTH AFRICA'S GROUP AREAS AND LAND ACTS* (South African Institute of Race Relations, 1987). The South African government gradually reduced the number of blacks holding land outside the scheduled areas, that is reserves, using several means, including forced removals. See Budlender & Latsky, *supra* note 6, at 147.

⁷⁵ See G.E. Devenish, *The Development of Administrative and Political Control of Rural Blacks, in RACE AND THE LAW IN SOUTH AFRICA*, *supra* note 61, at 26, 27; Robertson, *supra* note 61, at 122. This allocation of significant power to the executive set a precedent for many future such mandates.

⁷⁶ See generally FESTENSTEIN & PICKARD-CAMBRIDGE, *supra* note 74; MURIEL HORRELL, *RACE RELATIONS AS REGULATED BY LAW IN SOUTH AFRICA 1948–1979*, at 39 (South African Institute of Race Relations, 1982).

the other groups.⁷⁷ Although not specifically land acts, the Prevention of Illegal Squatting Act 52 of 1951, the Reservation of Separate Amenities Act 49 of 1953, and the Trespass Act 6 of 1959, facilitated the operation of the land acts by empowering the state to control, exclude, or evict nonwhites from areas in which they infringed white ownership rights.⁷⁸

Twenty years of movement toward the development of separate territories for black South Africans culminated in the Black Homelands Citizenship Act 26 of 1970 and the Black Homelands Constitution Act 21 of 1971.⁷⁹ The Citizenship Act provided that *all blacks* in the Republic of South Africa were to have citizenship in one of several territorial authority areas, or homelands, even those blacks who had never lived in any homeland and had no relatives or contact with anyone there.⁸⁰ The Constitution Act empowered the South African government to grant self-government to these homelands: following the Act's passage several bantustans began to move toward self-government.⁸¹

Although white South Africans have always depended upon black urban labor, the government continuously sought through its apartheid land legislation to preclude the development of a permanent black urban workforce. The Natives (Urban Areas) Act 21 of 1923 and Natives (Urban Areas) Consolidation Act 25 of 1945 authorized the establishment of formal black townships and men's hostels in white-designated urban areas; however, conditions were controlled so as not to encourage permanent residence by black Africans.⁸² A

⁷⁷ See FESTENSTEIN & PICKARD-CAMBRIDGE *supra* note 74, at 1. This Act did not apply in black reserves or released areas set aside under the 1913 and 1936 Land Acts. See Michael Robertson, *Dividing the Land: An Introduction to Apartheid Land Law*, in NO PLACE TO REST 122, 125-26 (Christina Murray & Catherine O'Regan, eds., 1990).

The Group Areas Development Act of 1955 and Community Development Act of 1966 subsequently provided for the actual establishment of new group areas and relocation to them of disqualified persons who had been displaced from Group Areas in which they had been living. FESTENSTEIN & PICKARD-CAMBRIDGE, *supra* note 74, at 15.

⁷⁸ See Robertson, *supra* note 61, at 125. This Comment does not address specifically the removal laws that the South African government applied to uproot millions of people, along with the implementation of apartheid land laws themselves. See generally NO PLACE TO REST, *supra* note 77; PLATZKY & WALKER, *supra* note 5. See also Raylene Keightley, *The Trespass Act*, in NO PLACE TO REST, *supra* note 77, at 180, 180; Catherine O'Regan, *The Prevention of Illegal Squatting Act*, in NO PLACE TO REST, *supra* note 77, at 163, 163.

⁷⁹ The Black Authorities Act 69 of 1951 began this process by setting up a hierarchy of local tribal authorities on the pattern of indirect rule practiced in colonial Africa by the British. The first territorial authority created was Transkei, which was eventually followed by the other homelands. See Devenish, *supra* note 75, at 28-36.

⁸⁰ *Id.* at 36-37.

⁸¹ *Id.* at 37.

⁸² See Robertson, *supra* note 77, at 131.

later descendant, the Black Communities Development Act 4 of 1984, operated as a group areas act for black Africans outside the black homelands, providing for the controlled development of new African townships upon land otherwise governed by the Group Areas Act and designated for nonblacks.⁸³ This act and subsequent amendments represented a change in government policy toward recognizing the permanent nature of black residence in the townships that had begun in the 1970s.⁸⁴

By the late 1980s the government began to make concessions to the land acts themselves. The ruling National Party introduced exceptions to the racial restrictions of the Group Areas Acts in the form of free trading areas, to be designated by the State President in central business districts of urban centers nationwide, and residential free settlement areas, to be set up upon request from the public by a board designed for this purpose under the Free Settlement Areas Act 102 of 1988.⁸⁵ The courts added to this trend with the *Govender* judgment, requiring a prosecutor attempting to enforce the Group Areas Act to provide evidence as to "the personal hardship which such an order may cause and the availability of alternative accommodation" for the court to consider in its deliberations over whether nonwhites should be evicted.⁸⁶ Nevertheless, the apartheid land program remained fundamentally intact. Furthermore, as Zola Skweyiya, Director of the Legal and Constitutional Department of the African National Congress explained, the laws were integral to the operation of the country's governing Constitution, set forth in the Republic of South Africa Constitution Act 110 of 1983: without South Africa's apartheid legislation, the Constitution itself was meaningless.⁸⁷

⁸³ *Id.*

⁸⁴ *Id.*; see also Michael Sutcliffe et al., *Managing the Cities: An Examination of State Urbanization Policies Since 1986*, in *NO PLACE TO REST*, *supra* note 77, at 86, 87.

⁸⁵ See *DAVENPORT*, *supra* note 16, at 541; *Robertson*, *supra* note 77, at 126.

⁸⁶ *S v Govender* 1986 (3) SA 969, 971 (T). The judgment was not reported until 1986, when it resulted in the suspension of evictions by the authorities. See *FESTENSTEIN & PICKARD-CAMBRIDGE*, *supra* note 74, at 77. The government subsequently withdrew the Group Areas Amendment Bill 124/88 (GA), which sought to tighten enforcement of the Group Areas Act, after significant resistance to the Amendment Bill arose. See *Robertson*, *supra* note 77, at 125-26.

⁸⁷ Skweyiya, *supra* note 4, at 214-15. In Skweyiya's words:

In order for the constitution to function, there must be laws and institutions which fragment the land areas of South Africa into racially determined residential areas, such as the Group Areas Act, and the "homelands," which define the African majority as non-citizens of South Africa. Without the "homelands," the exclusion of the Africans from the constitutional process has no justification or foundation. The Group Areas Act forms the legal basis for the "own affairs" as provided for in the Consti-

B. The Apartheid System of Racial Zoning in Practice: Limiting the Land Rights of Black South Africans

By the 1980s, the legislative acts discussed above had geographically separated white and nonwhite South Africans, and effected a large-scale dispossession of land by blacks. The legislation accomplished this separation and dispossession through the group areas system, dividing blacks and whites in both urban and rural locations.⁸⁸ The acts also created several types of areas reserved solely for black South Africans. Three such areas were rural: the independent homelands of Transkei, Bophuthatswana, Ciskei, and Venda; the self-governing although not yet independent homelands, or national states, of KaNdebele, Lebowa, KaNgwane, KwaZulu, Gazankulu, Qwaqwa;⁸⁹ and a group consisting of black reserves or scheduled areas, and black-owned released areas or Trust-owned areas outside the homelands.⁹⁰ In urban centers, two formal types of residential areas for blacks included: established black townships associated with white cities and towns;⁹¹ and new black townships outside the homelands.⁹² In addition, informal black settlements grew up in both urban and rural areas, some legalized, others not.⁹³

1. Homelands and National States: Limiting Black Access to Land by Restricting Citizenship

The basic notion underlying the creation of national states from the former South African reserves was that black South Africans could be denied equality within South Africa proper if they were citizens of their own ethnically defined states rather than the Republic of South Africa.⁹⁴ The government planned that as the home-

tution of 1983—i.e., the power for the Indian and Coloured racially segregated parliaments to legislate for local administration of their racially segregated residential areas respectively.

Id.

⁸⁸ See Group Areas Act 36 of 1966; Free Settlement Areas Act 102 of 1988.

⁸⁹ See National States Constitution Act 21 of 1971.

⁹⁰ See Natives' Land Act 27 of 1913, Native Administration Act 38 of 1927, Development Land and Trust Act 18 of 1936.

⁹¹ See Natives (Urban Areas) Act 21 of 1923; Natives (Urban Areas) Consolidation Act 25 of 1945.

⁹² See Black Communities Development Act 4 of 1984.

⁹³ See Prevention of Illegal Squatting Act 52 of 1951, which permitted recognition of informal settlements under section 6A; and Michael Robertson, *supra* note 10, at 195.

⁹⁴ See A.J. Rycroft, *Citizenship and Rights*, in RACE AND THE LAW IN SOUTH AFRICA, *supra* note 61, at 209, 212–14, 217–20. The government also had two other objectives in promoting the Bantustan strategy: to divide the black population into smaller, more easily

lands acquired full independence and sovereignty, their citizens would assume homeland citizenship and concurrently lose South African citizenship, in spite of the fact that many thousands still lived and worked within the Republic. South Africa itself could then become a country with a white majority.⁹⁵

The South African government took the first steps toward explicitly developing a homelands policy with the Promotion of (Bantu) Self-Government Act 46 of 1959, which provided for the granting of self-government and eventual independence to specific black African groups, defined tribally or ethnically, based upon their attachment to particular rural reserves.⁹⁶ This legislation ushered in a new phase in apartheid policy—separate development—in which the races were not only to remain physically separate from one another, but to be citizens of distinct and different countries.⁹⁷ The government further developed this policy of separate development in the Bantu Homelands Citizenship Act 26 of 1970, by which all black Africans in the Republic were to become individual citizens of one of the homelands, even if they had never lived outside white areas.⁹⁸ Finally the Bantu Homelands Constitution Act 21 of 1971 empowered the State President to grant self-government to any of the reserves by proclamation, following the example of Transkei, which had become self-governing in 1963.⁹⁹

Implementing the legislation of separate development, the government granted independence to the homelands of Transkei in 1976, Bophutatswana in 1977, Venda in 1979, and Ciskei in 1981,¹⁰⁰ and awarded self-government in varying degrees to KaNdebele, Lebowa, KaNgwane, KwaZulu, Gazankulu, Qwaqwa.¹⁰¹ By the mid-1980s, however, the homelands policy was in a state of disarray and collapse. The homelands themselves lacked economic viability and

controlled units that would preclude the development of black unity; and to gain a modicum of international support by casting the policy as one of internal decolonization. See DENOON & NYEKO, *supra* note 15, at 208.

⁹⁵ See DAVENPORT, *supra* note 16, at 413–14.

⁹⁶ See DENOON & NYEKO, *supra* note 15, at 198–99.

⁹⁷ The architect of separate development was Dr. H.F. Verwoerd, an Afrikaner and Minister for Native Affairs under the Malan government from 1950. The programs he developed were accepted by the National Party and in 1958 he became Prime Minister. *Id.*

⁹⁸ See DAVENPORT, *supra* note 16, at 374.

⁹⁹ *Id.* at 362, 374.

¹⁰⁰ These four homelands accepted independence on terms that the South African government presented, so that homeland citizens lost South African citizenship and the Republic of South Africa determined homeland territorial boundaries. In addition, the homelands were not recognized internationally as sovereign states. DAVENPORT, *supra* note 16, at 413–14.

¹⁰¹ See generally Robertson, *supra* note 77, at 127–30.

were in fiscal crisis, while in all of South Africa momentous political changes were underway.¹⁰² The scheme of separate development and creation of a fictive, separate citizenship for nonwhites in the homelands could not change the reality that South Africa itself was still the home of millions of black South Africans.¹⁰³

Conditions in the homelands were problematic from the beginning. The government set aside approximately thirteen percent of South Africa for the ten homelands, yet many were geographically fragmented and lacked basic services such as piped water and electricity.¹⁰⁴ By 1980, government removal policies and agricultural mechanization in white areas had increased African homeland residence to 52.7 percent of black South Africans, leading to extensive overcrowding; today population densities in the homelands far exceed those in the Republic. In some homeland areas densities reach 329 persons per square kilometer, compared with seventeen per square kilometer in white South Africa, and twenty-four per square kilometer on average in South Africa as a whole.¹⁰⁵ High population densities in combination with uneconomically small farming plots and poor farming methods have produced severe soil erosion. Furthermore, black farmers have not had access to sufficient farm subsidies, transportation systems enabling them to reach markets, education, or water resources and storage facilities, so that productivity on the homelands remains low.¹⁰⁶

Landlessness is one of the most severe problems in the homelands.¹⁰⁷ The South African government awarded self-governing territories title to the land in their jurisdictions, and granted them full legislative authority over land affairs, in 1986.¹⁰⁸ Yet only about one

¹⁰² See generally DAVENPORT, *supra* note 16, at 413–14; Eliphaz G. Mukonoweshuro, *Between Verwoerd and the ANC: Profiles of Contemporary Repression, Deprivation, and Poverty in South Africa's "Bantustans"*, SOC. JUST. Vol. 18, Nos. 1–2, Issue 43–44, Spring–Summer 1991, at 171, 171.

¹⁰³ According to Donald Denoon and Balam Nyeko, "For all the cleverness of the Bantustan concept, it was only a paper solution to substantive problems, lacking the capacity to change reality." DENOON & NYEKO, *supra* note 15, at 209.

¹⁰⁴ See Robertson, *supra* note 77, at 128.

¹⁰⁵ Mukonoweshuro, *supra* note 102, at 175, 178–83.

¹⁰⁶ *Id.* at 177.

¹⁰⁷ *Id.*

¹⁰⁸ See Robertson, *supra* note 77, at 129. The government extended the Bantu Homelands Constitution Act 21 of 1971, and through proclamations for each homeland transferred all land to the homeland governments that had formerly been vested in the South African government, a provincial administration, or the Trust. Procs R228, R229, R230, R231, R232, R233 of 24 December 1986, GG 10560. The TBVC (Transkei, Bophuthatswana, Venda, Ciskei) countries also received power to legislate over land matters, and ownership rights over land, at various points along their paths to independence. See Robertson, *supra* note 77, at 130.

percent of residents have freehold title to land.¹⁰⁹ Homeland governments hold most land in trust, with tribal chiefs allocating plots to residents.¹¹⁰ Although most black farming is carried out for subsistence, few families actually grow enough food to feed themselves, and total food production on the homelands is sufficient to support only about thirty percent of the population.¹¹¹ The South African government has provided significant incentives, aid, and protection for white farmers; in contrast, black farmers in rural areas suffer from a lack of available credit and corresponding low income levels, making it difficult for them to purchase new seeds or fertilizers recommended by agricultural outreach programs. They also have insufficient water resources and an inadequate transportation system, hindering their access to markets.¹¹² Commercial agricultural production in the homelands has raised overall agricultural production, but has done nothing to assist most subsistence farmers.¹¹³ Furthermore, a high percentage of the labor force engages in migrant labor, working in mines, in industry, and on white farms outside the homelands.¹¹⁴

Recognizing the failure of the homelands program the South African government passed the Restoration of South African Citizenship Act 73 of 1986. Act 73 did not actually restore citizenship to most black South Africans; rather the statute affected mainly urban blacks who could claim permanent residence in the Republic.¹¹⁵ By 1990 the situation in the bantustans was so unstable and disastrous that all the independent homelands had experienced military coups; and all except Bophutatswana demanded reincorporation into South Africa.¹¹⁶

¹⁰⁹ See Mukonoweshuro, *supra* note 102, at 177.

¹¹⁰ *Id.*; see generally ESSAY M. LETSOALO, LAND REFORM IN SOUTH AFRICA 63-73 (1987).

¹¹¹ ANTHONY LEMON, APARTHEID IN TRANSITION 128 (1987). The majority of homeland residents have arable plots of only one to two hectares, and yields are low compared with those of white farms; at the same time, "much arable land is actually left uncultivated—as much as 20 per cent to 30 per cent in KwaZulu, for instance." *Id.*

¹¹² *Id.* at 130.

¹¹³ *Id.* at 133-35.

¹¹⁴ See Mukonoweshuro, *supra* note 102, at 175. But see LEMON, *supra* note 111, at 131, who claims that since the 1960s with the growth of large-scale monopoly capitalism, the demand for unskilled workers has been reduced so that it is the black urban labor force that now supplies workers for mining and manufacturing, and Skweyiya, *supra* note 4, at 217, who notes that cheap, abundant African labor from the bantustans has discouraged greater mechanization in agriculture even though some technological progress has occurred, leading to increased unemployment in the homelands.

¹¹⁵ See Rycroft, *Citizenship and Rights*, *supra* note 94, at 220-21.

¹¹⁶ See Mukonoweshuro, *supra* note 102, at 172.

2. Restricting Black Land Rights in Rural Areas Outside the Homelands through State Control

After setting up the ten homelands and granting independence or self-government to them, the South African government retained direct control of about 2.57 million hectares of land that were originally black African reserve areas, giving the SADT the power to grant, sell, lease, and dispose of these lands to blacks.¹¹⁷ Thus most black South Africans residing in rural areas outside the homelands live on land that the government controls directly, or else in settlements that have resisted forced removal.¹¹⁸

The Black Areas Land Regulations of 1969 governed land tenure in the government-controlled areas, defining two types of tenure: quitrent, and permission to occupy. In both types of tenure the Trust retained ultimate control over the land.¹¹⁹ Quitrent tenure applied to surveyed land; whereas permission to occupy titles applied to land not surveyed, and were more common because many black areas have not been formally surveyed.¹²⁰ Both forms of tenure carried a permanent right to occupy land, and other rights associated with ownership. Yet numerous restrictions applied so that all rights of ownership under common law were not present. For example, the right to alienate land was lacking: the Chief Commissioner's consent was required to transfer, mortgage, or let land to a black individual, and the Minister's consent was required for transfer, mortgage, or letting of land to a nonblack. Furthermore, the title could be cancelled if the holder did not comply with regulations, failed to pay appropriate charges, no longer used or required the land for its original purpose, or was convicted more than once of theft or a drug-related offense.¹²¹

In addition to those black South Africans living on rural state-owned land, others resided in settlements known as "Black spots," which successfully resisted government attempts to remove them from white areas.¹²² In some Black spots, communities or tribes have registered freehold title to land that they acquired before the 1913

¹¹⁷ See *supra* note 72 and accompanying text on the SADT; Robertson, *supra* note 77, at 126; Robertson, *supra* note 61, at 127.

¹¹⁸ See, e.g., Geoff Budlender, *Urban Land Issues in the 1980s: The View From Weiler's Farm*, in NO PLACE TO REST, *supra* note 78, at 66, 66 (on a community resisting resettlement).

¹¹⁹ See Proc R188 of 1969; Robertson, *supra* note 61, at 128-29.

¹²⁰ See Budlender & Latsky, *supra* note 6, at 166.

¹²¹ *Id.* at 167.

¹²² See *id.* at 165.

Land Act.¹²³ In other cases the land is registered in the name of the Minister of Native Affairs, who holds it in trust for a group of black Africans and their successors, and is obliged "to exercise his powers for the benefit of the beneficiaries, who have enforceable rights to the land."¹²⁴ In both these types of settlements the 1969 Regulations should theoretically have applied, yet in practice they did not; instead, individual landowners exercised common-law rights of ownership, and tribally held land was allocated and administered in accord with customary practices.¹²⁵

Prior to 1986, although the Development Trust and Land Act prohibited and made unlawful black African labor tenancy in white rural agricultural areas, black tenancy continued to exist.¹²⁶ This form of tenancy gave no right in the land itself to the black tenant: the tenancy was to end with the white owner's sale of land. Yet the employer had to give reasonable notice of the impending sale, sufficient at least for a tenant to harvest his crops. Under the Abolition of Influx Control Act 68 of 1986, labor tenancy became legal, although evictions still occur under other legislation.¹²⁷

3. Restricting Black Access to Urban Land

Despite the government's attempts to prevent permanent black residence in South Africa's urban centers, large numbers of blacks have always lived in the country's cities because of the need for black labor.¹²⁸ During much of this century the South African government permitted some black residence in white urban areas, and the existence of black urban townships outside the reserves or homelands. Yet the government carefully controlled the entry and residence of blacks, and maintained the townships under such conditions that black South Africans would not want to remain in them permanently.¹²⁹ Government policies from the 1920s onward, particularly after the National Party's assumption of power in 1948, represented

¹²³ *Id.* Examples are Driefontein and Daggakraal in Eastern Transvaal, and Mathopestad in Western Transvaal.

¹²⁴ *Id.* For example, KwaNgema in Eastern Transvaal.

¹²⁵ *Id.* at 169.

¹²⁶ See Budlender & Latsky, *supra* note 6, at 171.

¹²⁷ See Moray Hathorn & Dale Hutchison, *Labour Tenants and the Law, in NO PLACE TO REST*, *supra* note 77, at 194, 197.

¹²⁸ See LEMON, *supra* note 111, at 213; MAGUBANE, *supra* note 17, at 123; Robertson, *supra* note 61, at 129.

¹²⁹ For example, black domestic servants living on their white employers' premises could not be joined by their family members; neither could men living in hostels. See LEMON, *supra* note 111, at 225.

the views of the Stallard Report, published in 1922: "the African was required in the urban industrial areas 'to minister to the needs of the white man and should depart therefrom when he had ceased so to minister'."¹³⁰ The Stallard commission of inquiry into local government had proposed strict influx controls over the entry of blacks into urban areas: these controls were realized explicitly in the Prevention of Illegal Squatting Act 52 of 1951 (1951 Act) and the imposition of pass laws and influx controls.¹³¹ The 1951 Act gave magistrates powers to order those blacks living illegally in towns to leave, and the demolition of their houses. The Pass Laws Act 67 of 1952 made it compulsory for Africans over the age of sixteen to carry passes at all times, while the 1952 amendments to the Urban Areas Act 25 of 1945 set out conditions for residence in particular urban areas by blacks.¹³² Only those who were born and continuously resident in a specific area, or who had worked continuously for ten years or lived in that area for fifteen years, or certain immediate family members, could legally be present. Without permission to be in an urban center, as evidenced by proper documentation in one's pass book, no black could stay longer than seventy-two hours in that urban location.¹³³

From the 1960s to the 1980s, the government's urban policy concentrated primarily upon removing black Africans to the bantustans.¹³⁴ The Black Labour Act 67 of 1964 went so far as to propose doing away with permanent residence rights for Africans in urban areas, who had not been born or resident there for at least fifteen years, or had not worked for the same employer for ten years, in an attempt to entrench the migrant labor system.¹³⁵ Nevertheless, black urbanization continued at a rapidly increasing pace. As the bantustan populations grew, so, too, did the size and number of urban settlements located within the homelands adjacent to white metropolitan and urban areas. At the same time, black African settlements around urban centers within white areas continued to increase.¹³⁶ By 1980,

¹³⁰ ALF STADLER, *THE POLITICAL ECONOMY OF SOUTH AFRICA* 88 (1987).

¹³¹ The Godley Committee, an interdepartmental government committee whose mission was to inquire into pass laws, set out an alternative approach to that of Stallardism in its report. The Committee recommended free mobility for black African laborers in towns, subject only to the carrying of individual registration certificates, or passes. The United Party of South Africa, a rival to the National Party, generally followed this approach, although it also implemented influx controls, up to 1948. *Id.* at 88-90.

¹³² See PLATZKY & WALKER, *supra* note 5, at 103-05.

¹³³ *Id.*

¹³⁴ See Sutcliffe et al., *supra* note 84, at 87.

¹³⁵ See MAGUBANE, *supra* note 17, at 143.

¹³⁶ See Robertson, *supra* note 77, at 131; Sutcliffe et al, *supra* note 84, at 87.

approximately fifty percent of black South Africans lived in various types of urban centers: there were approximately seven million non-homeland urban blacks, compared with approximately four million urban whites; by 1985, the numbers had grown to about eight million blacks in urban settlements.¹³⁷

Up to the mid-1980s, several types of black settlements existed outside the homelands in South African cities under apartheid: established black townships and institutions such as men's hostels in white-controlled cities; new black urban townships; townships in Trust-controlled areas outside the homelands but associated with particular bantustans; and informal, temporary, or unplanned settlements of various sorts.¹³⁸ In all of these areas, severe housing shortages, lack of services, and deprivation of access to land for black South Africans prevailed.¹³⁹

Access to land and land tenure rights varied with each type of settlement. In urban centers and townships within the bantustans, different regulations applied, depending upon whether the land belonged to the SADT, or had been designated for a specific ethnic group or entity.¹⁴⁰ For the most part the 1968 Regulations governed tenure in black urban townships outside the homelands.¹⁴¹ Because the state considered blacks temporary residents, land tenure conditions were precarious for them, limited to site permits for erecting private dwellings, and residential and ownership certificates for renting or buying houses that the provincial administration had built. Each form of tenure carried with it restrictions requiring proof of lawful presence, residence, and use of property: revocation of permits was possible for infractions such as permitting persons other than a holder's dependants to live or sleep on the premises, or not occupying an existing dwelling.¹⁴²

Just as the bantustan policy of the South African government failed,¹⁴³ however, so also did the government's urbanization policies for black South Africans. The government signalled its acknowl-

¹³⁷ LEMON, *supra* note 111, at 224.

¹³⁸ See Robertson, *supra* note 77, at 131-32.

¹³⁹ LEMON, *supra* note 111, at 226, notes: "The black housing shortage in 'white' South Africa was officially estimated at 168,000 units at the end of 1983, although other sources put it considerably higher. In addition, there was an estimated shortage of 142,000 units in the six self-governing homelands, more than half of which was in KwaZulu." From 1968 to 1976, virtually no family housing was built for blacks in these white areas. Since then the slow rate of construction has not meet the need caused by population growth and rural-urban migration.

¹⁴⁰ See Robertson, *supra* note 61, at 133.

¹⁴¹ Proc R1036 of 1968.

¹⁴² See Robertson, *supra* note 61, at 132.

¹⁴³ See *supra* notes 94-116, and accompanying text.

edgement of this fact in 1986 with the release of the *White Paper on Urbanization*, which proposed significant policy changes that would affect virtually all types of black urban settlements.¹⁴⁴ For the first time, the South African government appeared to recognize that African urbanization was both inevitable and in some senses desirable. The government sought to replace the prior policy of containment through mandatory influx control measures with one of planned, "orderly urbanization."¹⁴⁵ With the Abolition of Influx Control Act 68 of 1986, the government formally eliminated influx controls, and through amendments to the Black Communities Development Act 4 of 1984 granted conversions of minimal existing rights to 99-year leasehold and ownership right for residents of new black townships.¹⁴⁶ In 1988, the Conversion of Certain Rights to Leasehold Act 81 similarly permitted the conversion of black land rights in townships in white-controlled urban areas into rights of leasehold for 99 years, with possibility for future conversion to full, common-law ownership.¹⁴⁷

"Orderly urbanization" policies shifted the government's focus away from preventing black movement into towns, toward greater control of people within urban centers. Yet these legislative initiatives did not eliminate the development and maintenance of discrete African urban and semi-urban enclaves, nor geographical and residential apartheid generally.¹⁴⁸

IV. DISMANTLING APARTHEID: THE NATIONAL PARTY'S PLAN FOR LAND REFORM

A. Initiatives to End Apartheid During the 1980s

During the 1980s, the South African government faced international condemnation and sanctions from abroad, along with increasingly well-organized and effective resistance by nonwhite South Africans at home and in exile.¹⁴⁹ In particular, the townships presented growing problems. Angry over their exclusion from the newly constituted Parliament under the 1983 Constitution, black residents

¹⁴⁴ See Government of South Africa, *White Paper on Urbanization* (Pretoria, 1986).

¹⁴⁵ Sutcliffe et al., *supra* note 84, at 86.

¹⁴⁶ See Budlender, *supra* note 118, at 69; Robertson, *supra* note 77, at 131.

¹⁴⁷ See Robertson, *supra* note 77, at 131.

¹⁴⁸ See *id.* at 132; Sutcliffe et al., *supra* note 84, at 103.

¹⁴⁹ See generally DAVENPORT, *supra* note 16, at 422-28; COLIN LEGUM, *THE BATTLEFRONTS OF SOUTHERN AFRICA* 374-446 (1988).

protested the Black Local Authorities Act, forced the resignation of councillors in the townships, and engaged in rent boycotts.¹⁵⁰ The government declared a state of emergency from 1986 to 1989, during which time township structures collapsed in many locations and violence increased.¹⁵¹ In some townships residents set up local administrative committees to govern.¹⁵²

During this time the government began the selective and piecemeal repeal of statutes and regulations under which the apartheid land system had operated.¹⁵³ The government also undertook constitutional reforms, for example, abolishing white-controlled provincial councils and replacing them with multiracial (including black South African) provincial executives directly responsible to the State President.¹⁵⁴ In addition, the South African Law Commission, at the government's request, produced Working Paper 25, Project 58: Group and Human Rights, which included "A Proposed Bill of Rights."¹⁵⁵ This document proposed that all individuals in the Republic should have rights to privacy that prevented a place of residence from being entered or property seized arbitrarily,¹⁵⁶ rights to move freely within the country,¹⁵⁷ to acquire property and the "means of production,"¹⁵⁸ and to receive compensation in the event of expropriation of private property in the public interest.¹⁵⁹ Yet it was not until the publication of the *White Paper on Land Reform*, in 1991, that the government, in anticipation of the end of apartheid, made its first comprehensive attempt to address land issues.¹⁶⁰

¹⁵⁰ Act 102 of 1982. See DAVENPORT, *supra* note 16, at 440; Sutcliffe et al., *supra* note 84, at 88-90. See generally LEMON, *supra* note 111, at 338-43.

¹⁵¹ See DAVENPORT, *supra* note 16, at 440; THOMPSON, *supra* note 65, at 235.

¹⁵² See DAVENPORT, *supra* note 16, at 440.

¹⁵³ See *supra* notes 115, 127, 144-47, and accompanying text.

¹⁵⁴ See DAVENPORT, *supra* note 16, at 436. In addition, from 1987 the government gradually introduced multiracial Regional Services Councils, to administer the provision of water, power, sewage, land use planning, and other provincial services. *Id.*

¹⁵⁵ South African Law Commission, Working Paper 25, Project 58: Group and Human Rights (1989) [hereinafter Working Paper 25]. The Minister of Justice, Mr. H. J. Coetsee, in 1986, requested the Commission to make recommendations as to the "definition and protection of group rights in the context of the South African constitutional set-up and the possible extension of the existing protection of individual rights. . . ." *Id.* at 1. The Commission's final report urged that a bill of rights be adopted to protect minority groups, that discriminatory laws be repealed before its adoption, and that affirmative action be implemented "to grant temporary, non-mandatory privileges to disadvantaged groups. . . ." DAVENPORT, *supra* note 16, at 436.

¹⁵⁶ Working Paper 25, *supra* note 155, at 472, Art. 6.

¹⁵⁷ *Id.* at 473, Art. 12.

¹⁵⁸ *Id.*, Art. 14.

¹⁵⁹ *Id.*, Art. 15.

¹⁶⁰ *White Paper*, *supra* note 9. This document is available in the Yale University Library African Collection.

*B. The Government White Paper on Land Reform, and
Accompanying Bills*

With its release of the *White Paper on Land Reform*, on March 12, 1991, the South African government set forth the National Party's general approach to land reform in South Africa, including specific policies and legislation to implement them. As starting points the *White Paper* acknowledged access to land as a basic human right, and proposed that access be achieved through operation of a market economy in which free enterprise and private land ownership would prevail.¹⁶¹ The *White Paper* provoked considerable discussion, criticism, and eventual concessions by the government. The *White Paper* remains, however, the most comprehensive and definitive statement of the South African government's approach to land reform.¹⁶²

1. *The White Paper*

The *White Paper* set out specific proposals in three designated areas: Accessibility of Rights in Land; Quality and Integrity of the Title in Land; and Effective Utilisation of Land.¹⁶³ In addressing land rights, the government proposed abolishing all racially based restrictions on land acquisition and ownership in both urban and rural areas.¹⁶⁴ It thereby sought to eliminate the legal status of most areas, except the self-governing territories.¹⁶⁵ Although the government stated that it would promote measures in both the private and public sectors to extend the accessibility of land to all, the *White Paper* rejected explicitly the restoration of land to those who had been dispossessed forcibly through past policies or historical events.¹⁶⁶

¹⁶¹ *Id.* at 1.

¹⁶² See *infra* Sections IV.C., IV.D.

¹⁶³ See *White Paper*, *supra* note 9, at 2.

¹⁶⁴ *Id.* Provisions were to apply to the homelands as well. See *id.* at 5.

¹⁶⁵ *Id.* at 2-3. The current local government system in all areas was *not* repealed. See *id.* at 3-4.

¹⁶⁶ The government measures included "land-focused assistance programmes in a rural and urban context, of which financial and other assistance with respect to settlement, housing, agriculture, commerce and industry, and the provision of infrastructure are examples." *Id.* at 6. In addition, Sec. A2.11(f) stated:

Apart from the vast potential for conflict inherent in such a programme, overlapping and contradictory claims to such land, as well as other practical problems, would make its implementation extremely difficult, if not impossible. The government believes that it is in the interest of peace and progress that the present position should be accepted and that the opportunities afforded by the new land policy should be exploited to bring about a more equitable dispensation. An attempt to return to the

In addressing quality and integrity of title in land, the *White Paper* expressed the government's commitment to a policy of upgrading lower order, racially based land tenure rights, and registration, to full ownership or better rights of leasehold.¹⁶⁷ While the *White Paper* stated that tribal systems of land tenure should be permitted to continue alongside individual land tenure systems, the proposed policy opposed expansion of traditional "communal" systems.¹⁶⁸ The government would transfer to tribal communities, with full rights of ownership, however, any land that it or the SADT held in trust for these communities.¹⁶⁹ To protect individual and group interests in land and preserve the integrity of title in land, the government proposed strong measures to control illegal squatting, while improving the availability of housing.¹⁷⁰ The *White Paper* also emphasized a devolution of power from the central government and corresponding growth in local community autonomy. Localities would assume increasing responsibility for management of their domestic affairs, including setting minimum requirements for new building and the provision of services, and maintaining local "norms and standards."¹⁷¹

previous order will only disrupt the country's pace of development to the detriment of all.

Id.

¹⁶⁷ *Id.* at 7.

¹⁶⁸ *See id.* at 8:

B3.2 . . . After due consideration the Government has decided not to interfere with this traditional land tenure system. The traditional system of land tenure underpins a delicately balanced subsistence economy system which, if replaced injudiciously, could lead to the collapse of the communities to which it affords a livelihood. The Government is, however, not in favour of the expansion of this system.

B3.3 The Government believes that tribal communities should seriously consider the advantages of individual tenure. Although tribal communities will not be pressurised into converting the traditional rights to their land into individual rights of tenure, the *Upgrading of Land Tenure Rights Bill* provides for such a contingency. It is stressed, however, that the tribes themselves must initiate the reform of the tribal land systems

¹⁶⁹ The proposed *Upgrading of Land Tenure Act* prohibited tribes from selling this land to anyone outside the tribe for the first ten years, however, unless a court order was obtained to authorize such sale. *Id.* at 9.

¹⁷⁰ *Id.* at 10.

¹⁷¹ *See id.*:

B4.4.4 The impending repeal of the *Group Areas Act*, 1966, has given rise to the fear among certain communities that established community life will be endangered. Against the background of the prevailing housing shortage, increasing urbanisation and the heterogeneous population, it is understandable that there should be strong reservations in this regard.

B4.4.5 The Government believes that if these fears are to be allayed, steps must be taken to ensure that the norms and standards a local community sets itself are maintained. The key to this lies in the following: easing the housing shortage to a

Where disputes arose within local communities the Government would provide a mediation and settlement mechanism.¹⁷²

The third focus in the *White Paper* was the utilization of land.¹⁷³ Government policy in this area concentrated on both rural and urban land use, and espoused the efficient use of land for the benefit of the entire population. Regional development needs, opportunities and conditions were to replace race as the key to spatial ordering in South Africa.¹⁷⁴ Specifically, the government sought to protect the current production capacity of commercial agricultural land in rural areas, further developing this system of production within a market economy and in accord with market forces, through increasing access to private ownership.¹⁷⁵ The policy included plans to target rural areas for development, providing wider access to marketing, finance, training, extension services and other such benefits, and proposed the creation of a national corporation to organize development while phasing out the SADT.¹⁷⁶

Addressing urban development, government policy recognized serious concerns that the massive influx of people from rural to urban centers in the country posed.¹⁷⁷ The *White Paper* provided interim measures for creating settlements and townships through less formal legal means than normally would be permitted.¹⁷⁸ It also pledged assistance for increasing housing availability in cities and towns by providing government loans for erecting dwellings, funds for acquiring land, and financing of better community facilities and services.

significant degree; providing would-be squatters with suitable informal settlement opportunities on an orderly basis; taking steps to protect the established urban environment against disruptive influences; giving local communities a greater say in matters that affect their community life; and providing mechanisms for dealing with grievances concerning the disregard of community values at local and neighbourhood level.

¹⁷² *Id.* at 11, 20–21.

¹⁷³ *See id.* Utilization was described in Sec.C1.1:

The utilisation of land in South Africa is characterised by large concentrations of people in and around the metropolitan areas and an uneven distribution of people in the rural areas. The western parts of the country are sparsely populated owing to a lack of natural resources, while there are larger concentrations of people in those Black areas where a subsistence economy prevails. By far the greater part of the country is used for commercial agricultural production by predominantly White farmers.

Id. at 11.

¹⁷⁴ *Id.* at 12.

¹⁷⁵ *Id.* at 13.

¹⁷⁶ *Id.* at 14.

¹⁷⁷ *Id.* at 15. The *White Paper* referred to the *White Paper on Urbanisation*, and the accompanying *Physical Planning Bill*, as evidence of the importance of this problem. *Id.*

¹⁷⁸ *Id.* at 16.

These measures were aimed at major metropolitan areas as well as rural towns.¹⁷⁹

2. The Accompanying Bills

The *White Paper* incorporated five accompanying bills to implement government proposals for land reform.¹⁸⁰ These bills, introduced as a single legislative package to the South African Parliament, were intended to repeal 189 pieces of existing legislation, and to nullify thousands of discriminatory regulations.¹⁸¹ The following Sections discuss these five proposed bills.

a. *The Abolition of Racially Based Land Measures Bill*

This bill would repeal the Land Acts of 1913 and 1936, the Group Areas Act of 1966, and the Black Communities Development Act of 1984, thus removing all statutory race restrictions on land tenure.¹⁸² The bill would empower the State President to make necessary legal adjustments by proclamation, and set up an Advisory Committee on Nonracial Measures under the Minister of Justice.¹⁸³ The bill proposed phasing out the SADT, with the Trust's responsibilities to be exercised instead directly through government administration.¹⁸⁴ This bill was to be applicable to the self-governing territories as well as all other areas in South Africa.¹⁸⁵

b. *The Upgrading of Land Tenure Rights Bill*

The Upgrading of Land Tenure Rights Bill would have converted immediately about 300,000 black-held leases in formal townships to full ownership, and established procedures for upgrading leases not yet registered.¹⁸⁶ In "informal" townships and settlements where there had been no previous surveying or registration of land, the government proposed to establish a process for planning, surveying, and eventual granting of ownership rights to those occupying the

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 17.

¹⁸¹ *South Africa*, WORLD NEWS DIG., Facts on File, Mar. 21, 1991, available in LEXIS, MDEAFR Library.

¹⁸² *White Paper*, *supra* note 9, at 17.

¹⁸³ *Id.* at 17. The President's power of proclamation for these purposes was to lapse on 31 December 1994.

¹⁸⁴ *Id.* at 17-18.

¹⁸⁵ *Id.* at 18.

¹⁸⁶ *Id.* at 18-19. Currently blacks can obtain leaseholds for up to 99 years. The upgrading or granting of ownership would be free of cost. *Id.*

land.¹⁸⁷ The bill would transfer ownership of tribal land to blacks who occupied the land, even though it was registered in the name of the SADT, the State President, the Minister of Development Aid, or the government of a self-governing territory.¹⁸⁸

c. The Residential Environment Bill

This bill sought to establish an Urban Environment Board to oversee the development of urban environments free from physical deterioration. In addition, the bill would permit local authorities to make by-laws to maintain "norms and standards" for the upkeep of their communities.¹⁸⁹ Such by-laws could not legally differentiate on the basis of race or color.¹⁹⁰ In anticipation of disputes likely to arise with the repeal of the Group Areas Act of 1966, the government mandated the designation of officials to investigate complaints and justices of the peace to settle disputes.¹⁹¹

d. The Less Formal Township Establishment Bill

The Less Formal Township Establishment Bill addressed the current shortage of housing in South Africa by establishing interim measures to expedite the creation and approval of squatter camps and shantytowns with minimum facilities.¹⁹² These procedures would allow for bypassing lengthy, formal restrictions for the creation of residential settlements by giving administrators the power to designate state or any other land for informal settlement where there was serious and pressing need.¹⁹³ The government declared that such

¹⁸⁷ *Id.* at 19.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 20.

¹⁹⁰ *See id.* The by-laws could address:

- combating over-occupation of residential premises;
- the use for residential purposes of premises unsuitable for such use;
- the effective implementation of restrictions on the use of premises;
- maintaining premises in a tidy and hygienic condition;
- promoting sound relations in the neighbourhood and combating behaviour on premises that could disturb such relations; and
- the orderly and civilised use of public facilities.

The government later attached this provision to the Abolition of Racially Based Measures Bill. *See infra* note 222 and accompanying text.

¹⁹¹ *See id.* at 21. These justices of the peace would act under the terms of the *Justices of the Peace and Commissioners of Oaths Act, 1963*.

¹⁹² *Id.* at 21.

¹⁹³ *Id.* Section D4.2.1 stated

Land is not designated in this way unless the Administrator is convinced that there is a pressing need in the area in question for informal settlement opportunities and

townships could further be established anywhere, so long as the land was suitable for the purpose.¹⁹⁴

e. The Rural Development Bill

The Rural Development Bill provided for a National Rural Development Corporation to oversee a coordinated national strategy for rural development, and would set aside nearly 1.2 million acres (490,000 hectares) of state-owned land for an undetermined number of small-scale commercial farmers who would be given financial and technical assistance.¹⁹⁵ Race was to play no part in the allocation of farming units in these agricultural settlements. Those who received farms were to have the opportunity to purchase their land following a period of leasehold.¹⁹⁶ Tribes would be able to purchase land for residential and agricultural use, but strict requirements would apply for communal use so that conversion to a system of individual ownership could occur at a later time.¹⁹⁷ The bill was not to affect current tribal lands.¹⁹⁸

the land in question is suitable for this form of settlement. Land thus designated must be surveyed and developed for settlement by the Administrator if it is State land or, if it is not State land, under his supervision. The Bill specifies that the provisions relating to formal township development are not applicable to the development of such an area.

Id.

¹⁹⁴ Thus the Act assumed the repeal of the Group Areas Act 36, 1966. *See id.* at 22.

¹⁹⁵ *Id.* at 23. The government could also acquire additional land for these purposes.

¹⁹⁶ *Id.*

¹⁹⁷ *See id.* at 24. Sec. D5.5.3 stated:

Whereas tribes will be free to purchase land, laws such as those in respect of the subdivision of agricultural land and township development will stand in their way if they wish to turn such land to communal use. The Bill therefore provides that tribes are entitled to use such land as they may purchase, for the purposes of communal agricultural settlement, provided certain requirements are complied with. It is proposed that the responsible Minister be empowered to determine whether specific land which the tribe wishes to acquire or has acquired, is suitable for the purpose of communal agricultural settlement. The question of whether land is suitable for communal use, must be decided on the basis of criteria specified in the Bill, for example the economic carrying capacity of the land. If the Minister approves the use of the land in question for that purpose, the *Subdivision of Agricultural Land Act, 1970*, and the laws on township development will not be applicable, thus opening the way to communal usage. However, in order to ensure productive use of the land and make it possible to convert to individual ownership of land at a later state, the tribe will be obliged by law to lay out a duly surveyed settlement on the land and to allocate farming units to members of the tribe only in accordance with the lay-out plan. The size of the units must be determined with a view to their viability. The layout and development of the scheme must be conducted under the supervision of the Minister.

¹⁹⁸ *Id.*

C. Critiques of the National Party's Land Reform Proposals

Immediately upon the government's release of the *White Paper*, many individuals and groups, ranging from independent scholars, to the African National Congress (ANC), and the right-wing Conservative Party, responded with praise as well as substantive criticisms.¹⁹⁹ Representatives of the National Party, the Labour Party, the Democratic Party, the United Democratic Party, and the National People's Party generally welcomed the tabling of the *White Paper* in Parliament, and described it as a significant step toward a non-racial South Africa. Similarly, Dr. Mangosuthu Buthelezi, Chief Minister of KwaZulu and President of the Inkatha Party, praised the government's intention to eliminate apartheid.²⁰⁰ While business appeared to favor the potential economic opportunities that could result from implementation of the *White Paper*, white agricultural unions reacted much more cautiously, stressing the need for continued protection of the rights of owners of agricultural land.²⁰¹ On the other hand, the leaders of the Conservative Party, the Herstigte Nasionale Party (Reformed National Party), and the Afrikaner Weerstand Beweging (AWB or Afrikaner Resistance Movement) claimed, in the words of Conservative Party leader Dr. Andries Treurnicht, that whites were "being robbed of their right to self-determination over their own land."²⁰² Critiques of the *White Paper*

¹⁹⁹ Founded in 1912, the African National Congress is the pre-eminent anti-apartheid party in South Africa. The South African Government banned the ANC in 1960 after the ANC led nationwide protests against apartheid; subsequently, many ANC leaders went into exile. The party became multi-racial in 1985. In February, 1990, the government legalized the ANC and released ANC President Nelson Mandela, who had been imprisoned since 1964. See *South Africa*, KCWD/KALEIDOSCOPE, 1991 ABC-CLIO, INC., December 24, 1991, available in LEXIS, MDEAFR Library; see generally THOMPSON, *supra* note 65, at 156, 207-10, 215-16, 228-42.

²⁰⁰ See *More Reaction to Government White Paper on Land Reform*, BRIT. BROADCASTING CORP., Mar. 15, 1991, excerpts from Rep. ME/1020/B/3, Page ME/1021/B/1, available in LEXIS, MDEAFR Library. For a brief description of some of the political parties mentioned in this section, see *South Africa*, KCWD/KALEIDOSCOPE, *supra* note 199. For a more detailed treatment see generally DAVENPORT, *SOUTH AFRICA*, *supra* note 16; DONALD L. HOROWITZ, *A DEMOCRATIC SOUTH AFRICA?* at 42 (1991); THOMPSON, *supra* note 65; Shula Marks & Stanley Trapido, *South Africa since 1976: An Historical Perspective*, in *SOUTH AFRICA: NO TURNING BACK* at 1 (Shaun Johnson, ed., 1989). On Inkatha see generally MANGOSUTHU G. BUTHELEZI, *SOUTH AFRICA MY VISION OF THE FUTURE*, (1990); John Brewer, *From Ancient Rome to Kwazulu: Inkatha in South African Politics*, in *SOUTH AFRICA: NO TURNING BACK*, *supra*, at 353.

²⁰¹ *More Reaction to Government White Paper on Land Reform*, *supra* note 200.

²⁰² *Id.* The Conservative Party eventually withdrew from the parliamentary committee on land reform. See *South Africa in Brief; Conservative Party Withdraws from Committee on Land Reform*, BRIT. BROADCASTING CORP., Apr. 27, 1991, Page ME/1057/B/1, available in LEXIS, MDEAFR Library.

from parties favoring land reform focussed primarily on five issues, set out in the following sections.

1. The Lack of Provision for Distribution and Restoration of Land to Black South Africans

The major anti-apartheid party, the ANC, strongly criticized the *White Paper* for an approach that absolved the white population of all responsibility for dispossessing blacks of their land, and thus for the inequality in current land distribution. The ANC further argued that no land reform proposals could be seen as legitimate by black South Africans until the government publicly committed itself to addressing the misdeeds of the past.²⁰³ The ANC found intolerable the government's refusal to propose a redistribution system to restore land to communities that had been forcibly dispossessed.²⁰⁴ The ANC proposed the creation of a land claims court to settle disputes and conflicting claims over land, thus to facilitate a redistribution.²⁰⁵ A statement by several scholars published soon after the *White Paper's* release echoed this view, noting that the land to be made available for agricultural settlement schemes for black farmers, comprised of SADT land, was already part of the meager thirteen percent of the country reserved for black Africans.²⁰⁶ Further, these scholars disputed the view that restoration of land was too complex to be undertaken, and instead suggested several factors that could be taken into consideration in a restoration process: present status of the land; and the manner in which removal occurred; the date and

²⁰³ ANC Press Statement on the Government White Paper on Land Reform, 12/3/1991. Issued by the Department of Information and Publicity, P.O. Box 61884, Marshalltown 2307; available from African National Congress, P. O. Box 15575, Washington, D.C. 20003 [hereinafter *ANC Statement*].

²⁰⁴ See Rich Mkhondo, *Anti-Government Groups Reject Proposals to Scrap Land Apartheid*, REUTERS, Mar. 12, 1991, Tuesday, AM Cycle, available in LEXIS, MDEAFR Library. Similarly, the Pan African Congress, an anti-apartheid party that opposes any white role in a post-apartheid government, said "Our people were dispossessed by force of arms. It is illogical and insensitive to expect us to buy back the land we were dispossessed of." *Id.*

²⁰⁵ See *South Africa in Brief; ANC Calls for "Meaningful Land Reform Process,"* BRIT. BROADCASTING CORP., June 28, 1991, Page ME/1110/B/1, available in LEXIS, MDEAFR Library.

²⁰⁶ Budlender et al., *Statement on White Paper*, *supra* note 9, at 160. This statement was drafted by Geoff Budlender (Legal Resources Centre); Aninka Claassens, Dennis Davis and Gilbert Marcus (Centre for Applied Legal Studies, University of the Witwatersrand); Mosheen Moosa (BellDewar & Hall); Michael Robertson (Centre for Socio-Legal Studies, University of Natal); and Joanne Yawitch (National Land Commission). On the SADT, see *supra* note 72 and accompanying text.

purpose of removal.²⁰⁷ They joined the ANC in suggesting that a land claims court should assess and decide upon claims for land restoration.²⁰⁸ Critics also found fault with the government's tacit sanctioning of continued residential segregation based upon race through permitting white neighborhoods to maintain "norms and standards" that could be used to exclude black South Africans.²⁰⁹

2. Reform Based upon Administrative Rule Rather than Legal Procedures Arising Out of Fundamental Land Rights

Repeal of the Land Acts and associated regulations swept away the legal basis for the rights of black South Africans occupying former SADT land.²¹⁰ In their place, the Abolition of Racially Based Land Measures Bill proposed that the State President be authorized to decide who should own land.²¹¹ Similarly, under the Rural Development Bill, a tribe could only use land for agriculture in accord with traditional, communal tenure if the Minister gave permission. The Minister also would decide who should receive farming units in rural settlement schemes, and whether compensation would be paid for improvements to land.²¹² Under the Less Formal Township Establishment Bill, an owner of land desiring to establish a "less formal township" through new, abbreviated procedures, would have to obtain permission from the Administrator.²¹³

These and other provisions of the *White Paper* and accompanying statutes represented, according to critics, the dangerous subjection of black South African land rights to administrative decision.²¹⁴ The ANC claimed that these provisions would perpetuate racist practices, by maintaining one set of standards for whites and another for

²⁰⁷ See *Statement on White Paper*, *supra* note 9, at 160–61.

²⁰⁸ *Id.*

²⁰⁹ See Brendan Boyle, *South African Parliament Votes to End Land Apartheid*, REUTERS, June 5, 1991, available in LEXIS, MDEAFR Library; *ANC Statement*, *supra* note 203.

²¹⁰ See *supra* notes 115, 127, 144–47, and 153, and accompanying text.

²¹¹ See *White Paper*, *supra* note 9, Part D.1; *Statement on White Paper*, *supra* note 9, at 162.

²¹² See *White Paper*, *supra* note 9, Part D.5; *Statement on White Paper*, *supra* note 9, at 163.

²¹³ See *White Paper*, *supra* note 9, Part D.4; *Statement on White Paper*, *supra* note 9, at 163.

²¹⁴ ANC Land Commission member Aninka Claassens described the *White Paper* as essentially a "return to classic 1950s apartheid," because the bills implementing *White Paper* policy increased legal protections for whites, but put significant arbitrary powers over black South Africans in the hands of white politicians. See *Urban Foundation Urges Government to Drop Land "Reform" Bills*, AGENCE FRANCE PRESSE, May 15, 1991, available in LEXIS, MDEAFR Library.

nonwhites. Administrative decisions would control black ownership rights and claims to land, in sharp distinction from the existing ownership rights of whites.²¹⁵ Scholars also called this reliance on administrative control an undesirable outcome, for instead of beginning with the existing rights and claims of individuals and creating a process to consider future rights, the *White Paper* provided for an administrative procedure that could operate arbitrarily.²¹⁶

3. Problems Associated with the Upgrading of Rights

Critics of the Upgrading of Land Tenure Rights provisions suggested two major improvements to the government's proposals. First, they called for upgrading the existing rights not only of those with "quasi-ownership" rights—leasehold, deeds of grant, and land held but not owned by tribes—but also the rights of those who simply occupied land, particularly in urban tenancies, under mere residential permits or with other similar rights. This upgrading of occupation rights to ownership rights was especially important because of prior legislation that removed occupational rights and substituted mere administrative discretion to protect the rights.²¹⁷ Second, critics proposed that formal procedures for upgrading rights replace administrative decisionmaking, to include a means of dispute resolution, preferably through a land claims court.²¹⁸

4. Failure to Restructure the Commercial Agricultural Sector

The ANC argued strongly after the release of the *White Paper* that the government had failed to address the need for restructuring the entire commercial agricultural sector, especially in light of factors

²¹⁵ See *ANC Statement*, *supra* note 203, at 2.

²¹⁶ See *Statement on White Paper*, *supra* note 9, at 164:

. . . this administrative discretion is clearly unnecessary and inappropriate to deal with the rights of the affected people. It is possible to start from the rights and claims which exist, and determine future rights according to a procedure which is legitimate and non-arbitrary. There is a need to create a body which, in contrast to administrative process, will operate according to publicly stated criteria, and which will create an open process which is subject to appeal. In this context we support the proposal for a specially constituted Land Claims Court. This proposal has been made by, *inter alia*, the African National Congress, the Urban Foundation, NAFCO, and the Development Bank of Southern Africa.

²¹⁷ *Id.* at 165. Budlender and his fellow scholars, the authors of this statement, suggest that removal of certain occupational rights occurred under the Conversion of Certain Rights to Leasehold Act 81 of 1988, and claim that upgrading should be clearly established in legislation. *Id.*

²¹⁸ *Id.*

that the Development Bank of Southern Africa had recognized: indebtedness, and environmental damage due to monocropping and excessive use of fertilizers, pesticides, and mechanized farming.²¹⁹ Furthermore, even though legislation provided the theoretical possibility for black South Africans to buy land anywhere, very few would actually be able to afford market prices for agricultural land.²²⁰

5. Pressure to Reject Communal Land Tenure Forms In Favor of Individual Tenure

The ANC was also highly critical of the government's treatment of traditional remnants of communal land tenure, which would permit communal land holding but would have exerted significant pressure on black communities to move away from communal tenure in favor of individual tenure, and actually constrained communal tenure through administrative intervention. The ANC drew attention to the fact that the government proposed no analogous regulation of white farmers.²²¹

D. Current Government Policy on Land Reform

Following its issuance of the *White Paper on Land Reform*, and public responses to it, the South African government continued to move ahead with eliminating the apartheid land program. In June, 1991, Parliament voted to repeal the major land acts, the Group Areas Act and the Land Acts of 1913 and 1936, through passage of the Abolition of Racially Based Land Measures Bill.²²² Because of significant opposition to its proposed land bills, particularly by the ANC, the government postponed introduction of complete legislation to reform land and property rights.²²³ Instead, the government announced that it would reconsider the redistribution of land to black South Africans. The government agreed to restore some land to

²¹⁹ See ANC Statement, *supra* note 203, at 3.

²²⁰ *Id.*; see also Anton Ferreira, *Soil Erosion A Major Issue on South Africa's Political Agenda*, REUTERS, July 4, 1991, available in LEXIS, MDEAFR Library.

²²¹ ANC Statement, *supra* note 203, at 2.

²²² See Boyle, *supra* note 209.

²²³ The South African Parliament passed only the first of the five proposed bills amended to the *White Paper on Land Reform*; the government withdrew the other four bills for further consideration. See *South Africa: No Change on Land Reform*, REUTERS, June 1, 1991, available in LEXIS, MDEAFR Library. Chapter Seven of the Abolition Bill incorporated the "norms and standards" provision of the former Residential Environment Bill, to enable whites in residential areas to draft and enforce particular standards for their neighborhoods, and in so doing to exclude blacks. See Boyle, *supra* note 209.

nonwhites who had been removed forcibly from their land under apartheid, while making clear that it could not afford compensation for all those who had been dispossessed.²²⁴ The government also proposed setting up a commission made up of all the political parties in South Africa to settle disputes over land claims.²²⁵ It further agreed to provide an opportunity for reincorporation into South Africa to the "independent" homelands of Transkei, Bophuthatswana, Venda, and Ciskei.²²⁶

All these actions in concert, however, eliminated neither the cumulative effects of race as the fundamental basis for differential access to land in the present, nor other avenues by which it would persist in the foreseeable future. The government retained the population register listing people's races, and the 1983 Constitution, that provided for racially based government. Residential segregation would persist with neighborhoods permitted to set their own "norms and standards," and with the lack of redistribution of land among South Africans, including those 3.5 million blacks forcibly removed from their property.²²⁷ Only with a new constitution giving political representation to black South Africans could the government achieve meaningful land reform.²²⁸

During early 1992, negotiations proceeded between the South African government and representatives of anti-apartheid parties.²²⁹

²²⁴ See David Beresford, *Government Defers New Property Laws*, THE GUARDIAN, REUTER TEXTLINE, Apr. 24, 1991; *South Africa*, WORLD NEWS DIG., Facts on File, May 23, 1991; Patti Waldmeir, *South Africa Reverses Land Claim Decision*, THE FINANCIAL TIMES, Sec. I at 6, May 21, 1991; all available in LEXIS, MDEAFR Library.

²²⁵ See Beresford, *supra* note 224; Waldmeir, *supra* note 224.

²²⁶ See *South Africa Country Profile*, BUS. INT'L, May 31, 1991, available in LEXIS, MDEAFR Library.

²²⁷ See Gregory Shank, *South Africa in Transition*, SOC. JUST. Vol. 18, Nos. 1-2, Issue 43-44, Spring-Summer 1991, at i, vii.

²²⁸ See generally Sachs, *supra* note 2.

²²⁹ Late 1991 and early 1992 produced several significant events in progress toward negotiations between the government and anti-apartheid parties. On September 15, 1991, President de Klerk, Nelson Mandela, and other political leaders signed a peace accord pledging the end of civil violence. See *South Africa Business Finance and Tourism Survey: The Road to Reform*, THE DAILY TELEGRAPH, Dec. 8, 1991, at 40, available in LEXIS, MDEAFR Library. On January 20, 1992, the Convention for a Democratic South Africa (CODESA), comprised of nineteen political parties and groups, formally began meeting to negotiate a new constitution to extend political rights to all racial groups. See Christopher Wren, *Negotiators Begin Talks on South Africa's Future*, N.Y. TIMES, International, Jan. 21, 1992. On February 20, 1992, after the National Party lost an off-year Parliamentary constituency election in Transvaal to the Conservative Party, which favored apartheid, President de Klerk called for a referendum of whites to seek a mandate for his policies of change, and on March 17, 1992, 68.7 percent of the white voters endorsed the referendum proposition of support for the reform process and

These talks broke down in May 1992, however, following further outbreaks of violence in the townships. The talks resumed in 1993 with an announcement by the ANC that it had agreed to a five-year power-sharing arrangement with the government, to include broad-based elections in which blacks would participate in April 1994, and the election of a 400-seat assembly to act as an interim parliament for five years and write a new constitution.²³⁰

V. ALTERNATIVE PROPOSALS AND MODELS FOR LAND REFORM

Although it operated from exile for thirty years until 1990, the ANC nevertheless assumed a leading role among those parties that opposed the South African government and its policies of apartheid during this time.²³¹ The ANC constitutes today the most visible and effective opposition group to the South African government, and the latter's primary adversary in negotiations toward a new constitution and transition to democratic rule.²³² ANC land reform proposals serve as the most widely discussed alternatives to those of the government.²³³ This Section focusses primarily upon the ANC land program, a product incorporating the proposals of many other groups and individuals. The discussion refers to perspectives of other parties insofar as they offer unique or more comprehensive views on particular land reform issues

A. *The African National Congress Land Reform Proposals*

Among South African anti-apartheid political parties, the ANC consistently has taken the lead in providing a set of principles, albeit not an entire program, for post-apartheid land reform.²³⁴ By 1991, when the ANC and the South African Government entered into formal negotiations to develop a new constitution and a new form of

for continued negotiations. See Christopher Wren, *South African Whites Ratify De Klerk Effort to Negotiate a Move Toward Majority Rule*, N.Y. TIMES, Mar. 19, 1992, at 1, 14.

²³⁰ See Bill Keller, *Mandela's Group Accepts 5 Years of Power-Sharing*, N.Y. TIMES, Feb. 19, 1993, at A1.

²³¹ This is not to suggest that other political parties and groups, such as trade unions, have not also actively worked to end apartheid and the domination of the National Party in South Africa. Furthermore, white, coloured (mixed race), Indian, and black South Africans have all played a part in this resistance. See sources cited *supra* note 200; see generally DAVENPORT, *supra* note 16, at 349-51, 356-60, 362-67, 437-45; LEMON, *supra* note 111, at 330-38, 351-55; MAGUBANE, *supra* note 17, at 331-59; *South Africa*, KCWD/KALEIDOSCOPE, *supra* note 16.

²³² Christopher Wren, *South African Foes Narrow Differences*, N.Y. TIMES, Mar. 31, 1992, at A3.

²³³ See *infra* notes 236, 242, 245, and accompanying text.

²³⁴ See sources cited, *supra* notes 231-33 and accompanying text.

government to follow the elimination of the apartheid system, the ANC had already established a set of core principles that would guide its approach toward land reform. In formulating these principles the ANC drew widely upon the advice of scholars and practitioners in various fields.²³⁵

The ANC first stated its approach toward the land question in concert with the South African Indian Congress, the South African Coloured Peoples' Organization, and the Congress of Democrats, through their joint issuance of the 1955 *Freedom Charter of South Africa*.²³⁶ The *Freedom Charter* made several distinct claims relative to land issues: that white South Africans had robbed non-whites of their "birthright to land;" that mineral wealth should be owned by the people as a whole; and that those who worked the land should own it, and not be restricted in acquiring land, occupying land, or moving about.²³⁷ The *Charter* also called for ending racial restrictions on land ownership, and redistributing land among those who worked it, with the state providing outreach assistance to farmers in the form of seeds, equipment, machinery, and the building of dams.²³⁸

Following publication of the *Freedom Charter*, the ANC subsequently developed and elaborated its land-related policies in several other documents. In the *Constitutional Guidelines for a Democratic South Africa (1988 Guidelines)* the ANC explicitly opposed the constitutional protection of group rights that would perpetuate white South Africans' control of eighty-seven percent of the land and virtually *all* of the country's production.²³⁹ Instead, the ANC proposed that the state create a land reform program that would abolish all racial restrictions on the ownership and use of land, and implement an affirmative action program specifically aimed at assisting those who had been removed forcibly from land, or who had lost their land, to acquire land. According to the document, the state should

²³⁵ See, e.g., LETSOALO, *supra* note 110; Budlender & Latsky, *supra* note 6; Robertson, *supra* note 10; Robertson, *supra* note 61; see also sources cited, *infra* note 256.

²³⁶ Delegates from the four groups met together in Kliptown, near Johannesburg, in June 1955, and adopted the *Freedom Charter* as their manifesto. See *The Freedom Charter of South Africa* at 2, United Nations Centre against Apartheid, reprinted 40572, July 1987 (1979) [hereinafter *Freedom Charter*]. The later *Constitutional Guidelines for a Democratic South Africa* called the *Freedom Charter* "the first systematic statement in the history of our country of the political and constitutional vision of a free, democratic and non-racial South Africa." See African National Congress, *Constitutional Guidelines for a Democratic South Africa* at 1 (Lusaka, Zambia) [hereinafter *1988 Guidelines*].

²³⁷ *Freedom Charter*, *supra* note 236, at 3-4.

²³⁸ *Id.* at 4.

²³⁹ *1988 Guidelines*, *supra* note 236, at 1.

support flexible forms of land ownership, including "co-operative forms of economic enterprise, village industries and small-scale family activities."²⁴⁰ Finally, the ANC supported a mixed economy, with public, private, co-operative, and small-scale family sectors.²⁴¹

Moving further along the lines set out in the *Freedom Charter* and the *1988 Guidelines*, in October 1990 the ANC Legal and Constitutional Committee published for discussion the draft *Bill of Rights for A New South Africa (Bill of Rights)*.²⁴² Article 11 of the *Bill of Rights* addressed specifically rights to land and property, proposing that the rights to acquire, own or dispose of property, free of any racial basis, should be guaranteed by a new constitution.²⁴³ Article 11 further affirmed the right of the state to take legislative action directed at redressing prior statutory discrimination, but only pursuant to a law that established just compensation while maintaining a balance between the public interest and the private interests of those directly involved either as landowners or as previously dispossessed.²⁴⁴

In February 1991, shortly before the government issued its *White Paper on Land Reform*, the ANC Land Commission released a discussion paper, *Discussing the Land Issue*, specifically addressing land reform.²⁴⁵ As a basic premise, the document affirmed ANC support for a new constitution and bill of rights that would protect property rights and provide the state with authority to take action regarding the land market and rights in real property.²⁴⁶ The Land Commission stated its principal objectives in constructing a land program as effecting *real* land redistribution by returning land to black producers and workers and reorganizing the ways in which land was owned and used, while at the same time stimulating economic development.²⁴⁷ Most of the document's provisions essentially

²⁴⁰ *Id.* at 3.

²⁴¹ *Id.*

²⁴² The ANC National Executive Committee did not formally endorse the document. See ANC Constitutional Committee, *A Bill of Rights for a New South Africa* (1990) [hereinafter *Bill of Rights*], reprinted in SOC. JUST. Vol. 18, Nos. 1-2 (1991), at 49, 49-64.

²⁴³ *Id.* at 59.

²⁴⁴ *Id.* Nicholas Haysom notes that the proposals are based upon the post-1945 model in West Germany, seeking to reconcile "interests of individual owners and the larger community." Haysom, *supra* note 2, at 44.

²⁴⁵ ANC Land Commission, *Discussing the Land Issue; A Discussion Document for ANC Land Commissions and Branches* (Feb. 28, 1991).

²⁴⁶ *Id.* at 14.

²⁴⁷ *Id.* at 6-7, 9-10.

restated and further developed positions the ANC had taken previously, calling for: the abolition of all racial restrictions on ownership and use of land;²⁴⁸ the passage of a Comprehensive Land Reform Act to enable the state to obtain and redistribute land through affirmative action, taking into account the status of victims of forced removals and the need for land by those too poor to buy it;²⁴⁹ setting up a Land Claims Commission and Court to achieve redistribution of land and adjudicate disputes;²⁵⁰ some manner of nationalization of land, with compensation to be paid over time;²⁵¹ and finally, establishing flexible forms of tenure and diverse systems of production within a mixed economy.²⁵² The discussion paper put forth no specific program or timetable for reaching the goals it set out; instead, the Land Commission committed itself to a gradual process of reform that would take place over a period of several years.²⁵³

By the time the South African government released its *White Paper on Land Reform* in March, 1991, the ANC had clearly set forth the fundamental principles that guided its own land reform proposals. In its response to the *White Paper*, the *ANC Press Statement on the Government White Paper on Land Reform*, the ANC presented no new land proposals; rather, it offered substantive criticism of the government's program, and in so doing clarified the differences between the government's position on land reform and its own.²⁵⁴ The South African government responded to criticisms from the ANC and other parties by reconsidering its entire proposed legislative land package and its position on several key issues, such as redistribution of land to black South Africans and establishment of a land claims commission.²⁵⁵ At the time of this writing neither the government nor the ANC has presented any further substantive land reform proposals.

²⁴⁸ *Id.* at 1.

²⁴⁹ *Id.* at 14.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 10–12. The document proposed a limited compensation program where the state would compensate owners for land it took for redistribution purposes. The compensation could occur over a period of up to ten years. The document also called for consideration of a proposal to give compensation through a mixture of cash, bonds to be cashed in ten years, and bonds to be invested in local industries. The document flatly ruled out payment of compensation with foreign exchange. *Id.* at 12.

²⁵² *Id.* at 13.

²⁵³ *Id.*

²⁵⁴ See *supra* note 203 and accompanying text.

²⁵⁵ See *supra* notes 223–25 and accompanying text.

*B. Specific Aspects of Land Reform: Contributions to the Debate
by Scholars and Institutions*

During the past decade many individual scholars, groups, and institutions, whose work reflects experience with economic development processes or comparative legal systems, have joined in the debate over post-apartheid land reform in South Africa by presenting detailed analytical studies.²⁵⁶ In formulating its own policies, the ANC has considered many of the proposals for land reform included in these studies.²⁵⁷ Three proposals prominent in recent analytical studies addressing future land reform issues are important with respect to any redistribution of land, and to the reformulation of land ownership rights, in South Africa.

1. Lessons on Land Reform from other Post-Colonial African Experiences

Although the transition from colonial to black majority rule is occurring considerably later than in most sub-Saharan African countries, South Africa follows in the path of others that have already faced the need to construct coherent land reform programs and policies. In particular, Zimbabwe, Mozambique, and Namibia are southern African countries from whose histories South Africa might gain valuable insight into the land reform process, given similarities in precolonial land tenure systems and in colonial experiences that culminated in wars of liberation waged by blacks seeking majority rule.²⁵⁸ A common economic pattern also developed in these countries as Europeans settled in significant numbers, monopolized the most fertile agrarian areas, and forced black Africans into overpopulated, less productive areas and into the position of having to sell their labor cheaply to white farmers and industries.²⁵⁹ Whites eventually dominated the commercial agricultural sector, while black Africans were predominantly subsistence farmers faced with serious difficul-

²⁵⁶ See generally, e.g., JONES, *supra* note 28; Budlender & Latsky, *supra* note 6; Tessa Marcus, *Land Reform: Considering National, Class and Gender Issues*, 1990 S. AFR. J. ON HUM. RTS. 178; Robertson, *supra* note 10; Robertson, *supra* note 61. Among those institutions contributing research and analyses are the Southern African Development Bank and the Urban Foundation. See *Mandela Calls for a Mixed Economy*, *infra* note 303; *South Africa Grapples with Land Issue*, *infra* note 301; *Urban Foundation Urges Government to Drop Land "Reform" Bills*, *supra* note 214.

²⁵⁷ See generally *Discussing the Land Issue*, *supra* note 245, which the ANC released seeking discussion and responses; Skweyiya, *supra* note 4.

²⁵⁸ Skweyiya, *supra* note 4, at 204.

²⁵⁹ *Id.*

ties in acquiring land, access to agricultural outreach services, and use of infrastructural facilities.²⁶⁰

Land reform programs and political arrangements following independence differed somewhat in the three countries. Under Portuguese colonialism, Mozambique's economy was integrated with that of South Africa, with thousands of laborers migrating to work in South African mines.²⁶¹ Mozambique became independent in 1975, after more than a decade of guerilla warfare and the collapse of the Portuguese dictatorship.²⁶² At independence, 200,000 Portuguese left en masse, destroying much capital equipment and taking critical skills from the country. Recovering from a war and building a new infrastructure under these circumstances proved difficult for the Frente de Libertacao de Mocambique (FRELIMO), the new governing party.²⁶³ Nevertheless, FRELIMO attempted to develop a socialist economy, creating communal villages in rural areas and worker control of industry.²⁶⁴

During the early 1980s the South African-supported Mozambican National Resistance Movement (RENAMO) regularly attacked Mozambique, severely disrupting economic production and distribution.²⁶⁵ Mozambique also experienced severe drought. With state farms and communal villages largely failing and the economy in a shambles,²⁶⁶ Mozambique signed the Nkomati Accord in March 1984, seeking, in desperation, a peace with South Africa that ultimately would not be fully realized.²⁶⁷ After the suspicious death of Mozam-

²⁶⁰ *Id.*

²⁶¹ See Ngyuru H. I. Lipumba, *The State of the Economies of Front Line States and the Liberation Struggle in Southern Africa, in CONFRONTATION AND LIBERATION IN SOUTHERN AFRICA* 71, 78 (Ibrahim S. R. Msabaha & Timothy M. Shaw eds., 1987).

²⁶² See generally, THOMAS H. HENRIKSEN, *REVOLUTION AND COUNTERREVOLUTION; MOZAMBIQUE'S WAR OF INDEPENDENCE, 1964-74* (1983); BARRY MUNSLOW, *MOZAMBIQUE: THE REVOLUTION AND ITS ORIGINS* (1983).

²⁶³ See Lipumba, *supra* note 261, at 76.

²⁶⁴ See MUNSLOW, *supra* note 262, at 161-66.

²⁶⁵ See Lipumba, *supra* note 261, at 77. By 1982, production levels for the major export crop, cashewnuts, had declined by nearly seventy percent, and sugar production by half. *Id.* at 76.

²⁶⁶ See Allen F. Isaacman, *Conflict in Southern Africa: The Case of Mozambique, in APARTHEID UNRAVELS* 182, 189-90 (R. Hunt Davis, Jr., ed., 1991). Isaacman states that the state farms and communal villages failed dismally. There was no incentive for engaging in collective labor, and the family sector, by 1982, still provided nearly three-fourths of the total agricultural output, despite the government's efforts at "socialization of the countryside." *Id.* at 190.

²⁶⁷ See *Appendix I Nkomati Accord, Signed Between Mozambique and South Africa, March 1984, in CONFRONTATION AND LIBERATION IN SOUTHERN AFRICA, supra* note 261, at 279, 279-83. The South African-supported RENAMO military and political movement continued its violent disruption of Mozambican life and development throughout the 1980s. See Douglas

bique's President Samora Machel, new President Joaquim Chissano implemented the International Monetary Fund-World Bank structural readjustment program that included reducing state control of the economy and expansion of the private sector.²⁶⁸ Only modest gains have occurred since then, in spite of austerity programs and an influx of foreign aid.²⁶⁹

Zimbabwe also experienced a white-dominated settler economy, with the white government staunchly resisting a move to majority black rule and declaring unilateral independence (UDI) from Great Britain in 1965.²⁷⁰ After a period of United Nations sanctions and a civil war against the illegal white regime, black Zimbabweans achieved independence under the leadership of Robert Mugabe in 1980.²⁷¹ Before independence, the colonial government distributed over a third of all farmland, including the most fertile lands, to white settlers.²⁷² The 1980 constitution continued to favor these white settlers, providing that for a minimum period of ten years land could only be bought and sold on a "willing buyer, willing seller" basis, at market rates, and for foreign currency: resettlement was planned for black Zimbabwean peasants, but at a slow, carefully planned pace.²⁷³

Zimbabwe has found the redistribution of land to peasant farmers particularly difficult to achieve: in ten years the government has been able to relocate fewer than 60,000 farmers, in spite of earlier promises to resettle 162,000 by 1985.²⁷⁴ Following passage of the Land Acquisition Act in March 1992, the country's commercial farmers face compulsory acquisition of their land by the government, including those farms located in lucrative tobacco growing areas. Although the government will pay compensation, farmers will be unable to appeal established compensation levels.²⁷⁵

G. Anglin, *SADCC in the Aftermath of the Nkomati Accord*, in CONFRONTATION AND LIBERATION IN SOUTHERN AFRICA, *supra* note 261, at 173, 173-74; Colin Legum, *The Nkomati Accord and Its Implications for the Front Line States and South Africa*, in CONFRONTATION AND LIBERATION IN SOUTHERN AFRICA, *supra* note 261, at 89, 90.

²⁶⁸ Isaacman, *supra* note 266, at 201.

²⁶⁹ *Id.* at 202-03.

²⁷⁰ See generally, DAVID MARTIN & PHYLLIS JOHNSON, THE STRUGGLE FOR ZIMBABWE 300, 300-34 (1981).

²⁷¹ *Id.* at 330.

²⁷² *Id.* at 53.

²⁷³ See *Zimbabwe Poised for Huge Land Reform*, CHRISTIAN SCI. MONITOR at 12, Nov. 12, 1992, available in LEXIS, MDEAFR Library.

²⁷⁴ Tony Hawkins, *Harare Rules Out Land Appeals to High Court*, FIN. TIMES, Jan. 20, 1992.

²⁷⁵ *Id.*; see also, *Zimbabwe Poised for Huge Land Reform*, *supra* note 273.

The most recent southern African neighbor of South Africa to assume independence is Namibia. While Germany formerly ruled Namibia, South Africa took control of the country in 1915 and subsequently treated Namibia as its own province.²⁷⁶ The colonial experience resulted in approximately four thousand white commercial farmers owning forty-four percent of the arable land, while about one million nonwhite subsistence farmers farmed approximately forty-one percent of the land, in reserves or homelands.²⁷⁷ Only the northern fifth of the country provides abundant water for agriculture; however, the remainder of Namibia supports grazing, and mineral deposits as well as the port of Walvis Bay are also important to the economy.²⁷⁸

Namibia achieved its independence under the supervision of the United Nations in 1990, with the South West Africa People's Organization (SWAPO) winning the first elections in 1989.²⁷⁹ The independence constitution guaranteed the right of all persons to own and dispose of property; the state, however, reserved the right to expropriate property in the public interest with payment of just compensation, and in accord with legislative procedures that the Parliament had established.²⁸⁰ The constitution further provided for a mixed economy and state ownership of natural resources above and below the land surface, on the continental shelf, and in the country's territorial waters.²⁸¹ By independence, foreign investment in Namibia was growing rapidly, few white farms had been put up for sale indicating at least a temporary commitment of white owners to remain in the country, and commercial farmers in the Namibian Agricultural Union had affirmatively pledged their cooperation with the government toward increasing and diversifying output.²⁸²

In July 1991, Prime Minister Hage Geingob convened a consultative land reform conference to help formulate a national policy. The

²⁷⁶ See generally, I. GOLDBLATT, *HISTORY OF SOUTH WEST AFRICA FROM THE BEGINNING OF THE NINETEENTH CENTURY* (Juta, 1971).

²⁷⁷ *Namibia Conference on Land Reform Issues Resolutions*, BRIT. BROADCASTING CORP., ME/1114/B/1, July 3, 1991, available in LEXIS, MDEAFR Library.

²⁷⁸ Robert Rotberg, *Political and Economic Realities in a Time of Settlement*, in *NAMIBIA: POLITICAL AND ECONOMIC PROSPECTS* 29, 30 (Robert I. Rotberg, ed., 1983).

²⁷⁹ *Namibia: 1991 Human Rights Report*, U.S. Dept. of State, Feb. 1992, available in LEXIS, MDEAFR Library.

²⁸⁰ Michael Robertson, *Land and Human Rights in South Africa: (A Reply to Marcus and Skweyiyi)*, 1990 S. AFR. J. ON HUM. RTS. 215, 220.

²⁸¹ *Namibia: Pragmatic Approach May Reap Benefits*, AFRICAN ECONOMIC DIGEST, REUTERS TEXTLINE, Mar. 5, 1990, available in LEXIS, MDEAFR Library.

²⁸² *Id.*

conference drew up a consensus document calling for the redistribution of land in accord with an affirmative action program giving priority to Namibians, precluding foreigners from owning farm land but permitting them to use it on a leasehold basis, and according special protection to communal areas and the land rights of communities living in them.²⁸³ Clearly the document reflected the strong desires of indigenous farmers for greater access to land and stronger redistribution measures.²⁸⁴ Since then SWAPO has publically committed itself to implementing expropriation of farms without compensation, at least from absentee-landlords, in order to settle landless people and increase production.²⁸⁵

Whether Namibia will follow the course set by Zimbabwe—of divesting white commercial farmers of their land—remains to be determined.²⁸⁶ The experiences of these two countries attest, however, to the difficult problems involved in attempting genuine redistribution of land to meet the political and economic demands of African peasants, while avoiding the erosion of commercial agricultural production.²⁸⁷ Namibia's experience suggests that protecting rights to land in a constitution or bill of rights may be effective in encouraging the commitment of commercial farmers to, and new investment in, the new state. Namibia also presents "an encouraging sign for human rights lawyers in South Africa."²⁸⁸

Post-independence land reform programs in former settler colonies, such as Zimbabwe, Mozambique, and Namibia, provided for a mixture of commercial farming and private systems.²⁸⁹ Commercial farming took several forms: large mechanized state farms established on former estates or large commercial farms where rural peasants worked as wage laborers;²⁹⁰ villages made up of traditional groups of families farming communally;²⁹¹ and cooperatives set up among individual families to farm together, including common purchasing

²⁸³ *Namibia Conference on Land Reform Issues Resolutions*, *supra* note 277.

²⁸⁴ *See id.*

²⁸⁵ Godfrey Karoro, *Namibia: Ruling Party Decides to Expropriate Land without Paying*, INTER PRESS SERVICE, Apr. 3, 1992, available in LEXIS, MDEAFR Library.

²⁸⁶ Prime Minister Hage Geingob has set up a commission to investigate claims by indigenous communities, but has also urged caution in the face of an "impossible task." *Namibia: Softly, Softly on Land Reform*, AFRICAN ECONOMIC DIGEST, REUTER TEXTLINE, July 15, 1991, available in LEXIS, MDEAFR Library.

²⁸⁷ *See Skweyiya*, *supra* note 4, at 208–11.

²⁸⁸ *See Namibia: Pragmatic Approach May Reap Benefits*, *supra* note 281; Robertson, *supra* note 280, at 220.

²⁸⁹ Skweyiya, *supra* note 4, at 204.

²⁹⁰ *Id.* This system existed in Mozambique.

²⁹¹ *Id.* This system operated in Mozambique and Zimbabwe.

and marketing of products.²⁹² Private systems included large farms sold or given to individual farmers with proven records;²⁹³ settlement schemes with individual allocations of land yet some degree of cooperative activities among individuals, such as grazing;²⁹⁴ and out-grower systems in which individual families were settled on plots near larger farms and could make use of facilities or industries located there.²⁹⁵

These different land/farming systems have met with varying degrees of success economically; furthermore, the implementation of communal forms, however traditional, has not led to more effective or successful outcomes measured in productivity.²⁹⁶ No reform program appears to have avoided difficulties with land redistribution. In Mozambique the continuing war has interfered generally with implementation of reform;²⁹⁷ in Zimbabwe severe social and economic stratification persist,²⁹⁸ and for Namibia, peasant cries for land are strong and loud.²⁹⁹ Regardless of the specific land reform policies implemented in the years following the end of colonial rule, however, the government in each of these three countries has accepted a significant role for the state in directing land reform and economic development, as have virtually all African countries.³⁰⁰

2. Prospects for Land Redistribution: Expropriation, Nationalization, and Compensation

Land redistribution will undoubtedly form the core of whatever land reform program is implemented in post-apartheid South Africa, and the next South African government certainly will play a significant role in redistributing land to dispossessed black South Africans.³⁰¹ Yet the prospect of government expropriation and/or nation-

²⁹² *Id.* This system existed in Mozambique.

²⁹³ *Id.* This system operated in Zimbabwe.

²⁹⁴ *Id.* at 205. This system existed in Zimbabwe, and Mozambique.

²⁹⁵ *Id.*

²⁹⁶ See, e.g., Isaacman, *supra* note 266, at 189-90, on Mozambique.

²⁹⁷ *Id.* See generally LEGUM, *supra* note 149, at 354-65, 395-400; Nguyuru H.I. Lipumba, *supra* note 261, at 76-78 (1987); E.N. Maganya, *The Nkomati Agreement and the Future of the Second Phase of the National Liberation Struggles in Southern Africa*, in CONFRONTATION AND LIBERATION IN SOUTHERN AFRICA, *supra* note 261, at 99, 99-109.

²⁹⁸ See *supra* notes 273-74, and accompanying text.

²⁹⁹ See Karoro, *supra* note 285; *Namibia: Softly, Softly on Land Reform*, *supra* note 286; *Namibia Conference on Land Reform Issues Resolution*, *supra* note 277.

³⁰⁰ See *supra* notes 263-69 (on Mozambique), 273-75 (on Zimbabwe), 279-85 (on Namibia), and accompanying text.

³⁰¹ See *South Africa Grapples with Land Issue*, AFR. NEWS SERVICE, INC., Feb. 11, 1991,

alization of land as a fundamental component of a land reform program, with or without compensation, continues to evoke heated debate.³⁰²

In a speech given late in 1991 to mark the establishment of the Macroeconomic Research Group (MERG), an interim body set up to study and develop an economic policy and program for the transition to a democratic South Africa, Nelson Mandela articulated the reasons for the necessity of state involvement and leadership in redistribution.³⁰³ Mandela cited the fact that state intervention was a frequently-used development strategy, particularly by the South African government in recent years to advance the interests of whites. Mandela contended that various forms of state intervention were possible, with nationalization being only one, and that the new state that would come into existence following apartheid would require the freedom to use any means available—including nationalization—to bring about growth and redistribute resources in order to rectify past injustices. In making this speech, Mandela was responding to the fear and concern voiced in South Africa over the future.

Arguments against the redistribution of land in South Africa most frequently articulate two concerns: first, expropriation or nationalization might occur without adequate compensation so that some white farmers face the prospect of losing their land and livelihood

available in LEXIS, MDEAFR Library; ANC Land Commission, *Discussing the Land Issue*, *supra* note 245, at 14.

³⁰² See, e.g., *South Africa: COSATU Still Calling for Nationalisation*, AFRICAN ECONOMIC DIGEST, REUTER TEXTLINE, Apr. 6, 1992; sources cited *supra* notes 188–93.

³⁰³ See *Mandela Calls for a Mixed Economy; Expenditure Redistribution*, THE BRIT. BROADCASTING CORP., Part 4B. AFRICA, ME/1238/B/1, Nov. 25, 1991, available in LEXIS, MDEAFR Library. Some of Mandela's words were:

History provides us with many examples of state intervention being used as a means of promoting growth and redistribution. The experience closest to us is the use of the state by the nationalist government to promote the interest of whites in general and poor whites in particular. . . .

. . . We must reserve the right to use any economic instrument to stimulate growth and effect

redistribution to redress historical economic imbalances and injustices. . . .

. . . [Nationalisation] is in fact one among many economic instruments that may be used to achieve growth through redistribution. It is therefore imperative that a major task of our research effort will have to examine the degree and form of state intervention necessary to redress the historical socio-economic injustices. It is quite clear that by politicising the issue of nationalisation, big business and the minority government are trying to instill an element of fear into the small business community, the professionals, the informal sector and organised labour.

Id. The remainder of this paragraph in the Comment text characterizes the speech that is reproduced in full in the citation.

without recourse or relief; second, black African farming is underdeveloped and inefficient, so that redistribution of land, particularly commercial agricultural farms, would lead to severe disruption of the economy and current commercial production.³⁰⁴ Compensation for expropriated land, particularly at or near current market value, does indeed represent a grave problem, perhaps nearly insurmountable, for a government planning to undertake substantial land redistribution. Recognizing this fact, the ANC has suggested the possibility of gradual compensation over a ten year period, through a mixture of cash and bonds.³⁰⁵ Others suggest that a new government might also consider using affirmative action programs that allow for flexibility in payments and mortgages, and cooperative, communal, and part-ownership programs, as alternatives or supplements to straight compensation.³⁰⁶

With regard to economic development and potentially negative effects of redistribution on commercial production, those in favor of redistribution suggest careful planning and deliberate implementation.³⁰⁷ Among those who argue for redistribution, some propose that nationalization itself is both necessary and feasible. The basis of their argument is, of course, *fairness*: because racially-based removals of black Africans from land dominated the development of the apartheid system of agricultural landholding in South Africa, proponents of nationalization argue that fairness demands action by the state to return land to those dispossessed.³⁰⁸ These proponents contend as well that specific redistribution processes could be implemented in a manner and at a moderate pace designed to prevent dislocation of agricultural production, while gradually opening up black access to land. For example, Southern African Development Bank economists propose that the state be empowered to return to dispossessed blacks land held by the government, including trust lands, and similarly to repossess indebted farms and negotiate for the use of church land in order to make further land available.³⁰⁹

³⁰⁴ See, e.g., *More Reaction to Government White Paper on Land Reform*, *supra* note 200. But see *South Africa Grapples With Land Issue*, *supra* note 301.

³⁰⁵ See *supra* note 251; ANC, *Discussing the Land Issue*, *supra* note 245, at 11-12.

³⁰⁶ See Sachs, *supra* note 7, at 34. See also Charles Villa-Vicencio, *Whither South Africa? Constitutionalism and Law-Making*, 40 EMORY L.J. 141, 160 (1991), quoting an anonymous black South African political leader: "To make redistribution dependent on compensation at market value would mean the end of the revolution."

³⁰⁷ See *infra* notes 309-12, and accompanying text.

³⁰⁸ See, e.g., Budlender et al., *supra* note 206, at 159-61; Marcus, *supra* note 256, at 188; Skweyiya, *supra* note 4, at 203.

³⁰⁹ See *South Africa Grapples With Land Issue*, *supra* note 301.

Others suggest that absentee-owned farms be transferred early on in the redistribution process, and that the actual transfer of land should proceed only as rapidly as people are able to lay claim to particular parcels and show an ability to work any land received.³¹⁰ Some scholars contend, in addition, that *land* could be nationalized while ownership of large commercial agricultural "enterprises" remained with private individuals or companies.³¹¹ Land nationalization would be separated, then, from nationalization of farming enterprises: the state would be a landlord charging rent for the use of all land, with rents funneled into services or programs of benefit to all.³¹²

Informed debate clearly illustrates that processes of nationalization and redistribution could take a number of different forms, each of which might be more or less appropriate and effective in achieving the goals of a particular land reform policy. The ANC, other working groups, and scholars are currently directing their collaborative research and planning efforts toward investigating these different forms.³¹³

3. Gender Issues in Land Reform

Gender concerns are important to a land reform program in South Africa because women bear much of the responsibility for supporting families, and for peasant and simple commodity production on the land, particularly on the bantustans where males are away as migrant laborers.³¹⁴ In spite of their important role in farming, however, women's access to land is frequently dependent upon their relationships with men.³¹⁵ A land reform policy that fails to recognize women's roles as agricultural producers and to address realistic problems associated with their access to and use of land will not

³¹⁰ *Id.*

³¹¹ Marcus, *supra* note 256, at 189.

³¹² *Id.* But see Robertson, *supra* note 280, at 224.

³¹³ See, e.g., Mandela Calls for a Mixed Economy, *supra* note 303; Sachs, *supra* note 7, at 23–26, 33–36; Villa-Vincencio, *supra* note 306, at 160.

³¹⁴ Marcus, *supra* note 256, at 180; see also Jane I. Guyer, *Women in the Rural Economy: Contemporary Variations*, in AFRICAN WOMEN SOUTH OF THE SAHARA 19, 28 (Margaret Jean Hay and Sharon Stichter, eds., 1984); Ann Seidman, *Women and the Development of "Underdevelopment": The African Experience*, in WOMEN AND TECHNOLOGICAL CHANGE IN DEVELOPING COUNTRIES 109, 115–16 (Roslyn Dauber and Melinda L. Cain, eds., 1981) [hereinafter WOMEN AND TECHNOLOGICAL CHANGE].

³¹⁵ Marcus, *supra* note 256, at 180; see also Elizabeth A. Eldredge, *Women in Production: The Economic Role of Women in Nineteenth-Century Lesotho*, 16 SIGNS 707 (No. 4, 1991).

achieve true agrarian or democratic reform.³¹⁶ Increasing the availability of land to black South African males without considering the social, cultural, and economic constraints upon women's access could leave women in a severely disadvantaged position.³¹⁷ The ANC's land reform policies acknowledge the importance of including women's concerns in land reform planning, without developing detailed goals.³¹⁸

VI. ASSESSING PROSPECTS FOR LAND REFORM

In the current dialogue over land reform the major parties involved have approached relative consensus in a few significant areas, leaving many key issues as yet unresolved. This section identifies four concerns that must be addressed in the construction of a land reform program, offering a brief prediction for resolution and an assessment of the degree of consensus that exists for each concern. Needless to say many other significant land-related issues not addressed here remain the subject of considerable debate and uncertain resolution.

A. *The Constitutional Treatment of Rights to Land*

A new constitution and bill of rights in South Africa should recognize and guarantee rights to land as fundamental human rights. Land reform should then be implemented in accord with established legal procedures designed to uphold and protect these rights. The designation of a right to land as a fundamental human right, guaranteed and protected in a bill of rights and constitution, will aid in establishing a genuinely nonracial post-apartheid society in South Africa. For nonwhites, as well as whites, legal procedures that govern land reform will provide an assurance that no future South African government will arbitrarily deprive anyone of his or her land or land rights, regardless of whether that government tends toward

³¹⁶ See generally Louise Fortmann, *The Plight of the Invisible Farmer: The Effect of National Agricultural Policy on Women in Africa*, in *WOMEN AND TECHNOLOGICAL CHANGE*, *supra* note 314, at 205; Hanna Papanek, *The Differential Impact of Programs and Policies on Women in Development*, in *WOMEN AND TECHNOLOGICAL CHANGE*, *supra* note 314, at 215. Zola Skweyiya, Director of the Legal and Constitutional Department of the ANC, has acknowledged the need to consider the interests of women and to integrate their demands into economic and social programs. Skweyiya, *supra* note 4, at 212-13.

³¹⁷ See generally Fortmann, *supra* note 314; Papanek, *supra* note 314.

³¹⁸ 1988 *Guidelines*, *supra* note 236, at 4; *Bill of Rights*, *supra* note 242, at Article 7.

capitalism and greater privatization, or toward socialism and more centralized planning.³¹⁹

The current South African government did not take this position in its *White Paper*; instead, the *White Paper* approached access to land not as a right, but as a basic need of all people.³²⁰ Similarly, the 1989 Report of the South African Law Commission on Group and Human Rights proposed simply that access to and ownership of property, and the means of production, should not be subject to any discriminatory prohibitions.³²¹ Although they saw little reason to do so under apartheid, today some white South Africans, anxious about losing their property under a new government, advocate constitutional protection for racial group rights as an alternative to the constitutional protection of land rights vested in individuals.³²² Proponents of racial group rights lobby for constitutional measures to prevent the domination of one group by another, and to allow whites to maintain "minimum standards" within local communities, thereby precluding black residence in these areas.³²³ Yet according constitutional protection for group rights to land, especially the minority rights of white South Africans, could serve to perpetuate current inequalities in land ownership and access to land.³²⁴ Furthermore, a group rights approach raises the ghost of race classifications that underlay apartheid land legislation and the personal status of the individual that it defined.³²⁵ A bill of rights, combined with established legal procedures guaranteeing an orderly transition to a democratic government, will actually provide greater security than racially based measures that continue to raise racial consciousness and affiliations.³²⁶

A guarantee that land reform would be carried out only in accord with established legal procedures, protecting the fundamental rights of individuals to land, could provide a strong incentive for those white South Africans with critical skills and expertise, who are potentially valuable to a new government, to remain in the country

³¹⁹ See Sachs, *supra* note 7, at 34.

³²⁰ *White Paper*, *supra* note 9, at 1.

³²¹ Working Paper 25, *supra* note 155; see also *supra* notes 156-59 and accompanying text.

³²² See Sachs, *supra* note 2, at 2-8.

³²³ See *id.*; see also sources cited *supra* note 223.

³²⁴ See generally Sachs, *supra* note 2, at 3-19, 25. Sachs argues as well that in the long run, white South Africans will benefit more from constitutional protection of their fundamental, individual land rights. This is a discussion that extends beyond a consideration of land rights to most fundamental rights. See *id.* at 19-20.

³²⁵ See DUGARD, *supra* note 58, at 59.

³²⁶ See Sachs, *supra* note 7, at 19.

and commit themselves to a future in South Africa. Yet why should *nonwhite* South Africans favor enshrining land rights in a constitution and bill of rights, and following established legal procedures to protect these rights, when the government has ignored any such rights for decades? The answer is that to do otherwise would be to build upon the legacy of apartheid, to follow a path of lawlessness and disrespect for due process.³²⁷ The lessons of the past are striking: governmental administrative decision-making in South Africa under apartheid led to the operation of a grossly unequal system with regard to nonwhite and white rights and claims to land.³²⁸ The government used administrative fiat as a vehicle particularly for dispossessing blacks of land, largely eliminating their recourse to the courts or a body that could hear appeals, while protecting and enhancing the rights and access of whites to land.³²⁹ The ANC and numerous scholars have raised appropriate objections to the government's proposals in the *White Paper on Land Reform* both to proceed largely by administrative action, and to characterize land rights on the basis of subjectively discernable *need* rather than fundamental *rights*.³³⁰ Instead, the ANC has joined numerous scholars in advocating the protection of the fundamental land rights of *all* South Africans in a new constitution and bill of rights, and the establishment of legal procedures designed specifically to protect these rights.³³¹

The specific treatment of land rights in a bill of rights and constitution could take one of several forms, ranging from silence as to whether existing property rights could be violated in the public interest; to permissive expropriation in the public interest with prompt and adequate compensation and in accord with affirmative action principles; to authorizing outright takings without compensation, or nationalization.³³² Zimbabwean and Namibian models fall in the middle of this spectrum, although there is some evidence that both governments are moving toward outright takings.³³³ As in Zim-

³²⁷ Robertson, *supra* note 280, at 221, states that even though new South African rulers might view current property rights with hatred, it would be a serious mistake for them to ignore due process protections, for in doing so they would perpetuate the legacy of lawlessness remaining from apartheid, and would take a disastrous first step under the new constitutional system. *Id.*

³²⁸ See generally notes 88–148, and accompanying text.

³²⁹ See, e.g., notes 124, 132, 213, and accompanying text.

³³⁰ See sources cited *supra* notes 210–16, and accompanying text.

³³¹ See *Bill of Rights*, *supra* note 242, at 59; *1988 Guidelines*, *supra* note 236, at 14; Robertson, *supra* note 280, at 221; Sachs, *supra* note 2, at 3.

³³² See Sachs, *supra* note 7, at 34.

³³³ See Robertson, *supra* note 280, at 220 (on the Namibian constitution's private property

babwe and Namibia, the constitutional recognition and protection of individual rights to land in South Africa should not be an absolute impediment to the government taking land in the public interest, for such action may eventually prove to be the final and ultimate remedy for effecting real redistribution of land to those previously dispossessed.³³⁴ Both Zimbabwean and Namibian experiences illustrate the strong political pressures that landless peasants will continue to place on the government, especially in the face of careful, paced efforts at redistribution.³³⁵

Current proposals for legal procedures, about which there is substantial agreement between the ANC and the government, involve the creation of a land claims commission to set up fair procedures and criteria for settling land disputes, and a land claims court to resolve conflicting claims.³³⁶ These proposals would provide for only a small part of the total program of legal procedures and institutions that will be required to safeguard fundamental land rights of individuals, particularly against arbitrary government action as the state moves into a leadership role in land reform and land redistribution.

B. The State's Role in Land Reform

Few disagree with the proposal that the post-apartheid South African state must and will play a major role in directing future economic development and land reform. Even the current South African government, while advocating a free market approach to land reform, affirmed in its *White Paper* and in subsequent concessions that it expected a future government to be actively involved in the land reform process.³³⁷ Significant government leadership in land reform and economic development is consistent with the experiences of most African nations.³³⁸ Government direction has occurred where countries have opted for a mixed economy, in which the free market principle operates alongside some central direction,

clause); *see also supra* notes 274–75 (on Zimbabwe), and 283–85 (on Namibia), and accompanying text.

³³⁴ *See, e.g.*, Marcus, *supra* note 256, at 188; Robertson, *supra* note 280, at 219; Sachs, *supra* note 2, at 27.

³³⁵ *See supra* notes 274–75, 283–85, and accompanying text.

³³⁶ *See supra* notes 205, 208, 225, 249–51, and accompanying text.

³³⁷ *See generally White Paper, supra* note 9. The *White Paper* refers to proposed government involvement in the land reform process throughout the document.

³³⁸ *See Mandela Calls for a Mixed Economy; Expenditure Redistribution*, and the text of Mandela's speech, *supra* note 303; Skweiyi, *supra* note 4, at 204; *see also* sources cited *supra* note 256; *see, e.g.*, notes 263–69 (Mozambique), 273–75 (Zimbabwe), 280–85 (Namibia), and accompanying text, specifically on these countries.

as well as in those nations developing along socialist lines that place greater emphasis upon communitarian structures and cooperative farming and industrial enterprises.³³⁹

In South Africa, the government will no doubt play an active role regardless of the form of the economy. Furthermore, carrying out land reform will require government leadership and direction in a number of areas. The government will no doubt be involved in overseeing legal procedures and institutions of the type discussed in the previous Section for settling disputes over land claims.³⁴⁰ The ANC also supports the establishment of an affirmative action program to address the imbalance between white and black rights and access to land that the apartheid land system created, while the government in its *White Paper*, committed itself instead to providing measures for assisting people to meet their "reasonable needs" for acquiring, exercising and enjoying their rights in land.³⁴¹ The future government is certain to play an active role in monitoring if not actually directing such a program.

The government is also destined to be a key actor in the mixed economy that will likely be necessary to accommodate economic development in the country.³⁴² Although white South Africans who fear losing their land argue for inserting into the constitution elaborate protections for private property, privatization, and inviolable free-market principles, and the *White Paper* endorsed a free-market economy as a context for land reform,³⁴³ realistically the operation of a free market economy in the absence of government intervention is not likely to be sufficient to achieve a restoration of rights and access to land for black South Africans.³⁴⁴ Even with the repeal of racially discriminatory land legislation, the legacy of apartheid persists: white South Africans still control most land and hold a dominant position in the market, while nonwhites have neither land nor the economic resources necessary to obtain real property.³⁴⁵ One of

³³⁹ See *supra* notes 289–300, and accompanying text.

³⁴⁰ See *supra* notes 205, 208, 225, 249–51, 338, and accompanying text.

³⁴¹ The ANC has explicitly stated that it supports an extensive affirmative action program, under the passage of a Comprehensive Land Reform Act, that would enable the state to redistribute land to victims of forced removals and those too poor to buy it. See ANC Land Commission, *Discussing the Land Issue*, *supra* note 245, at 14. The South African government's position is not as clear. See *White Paper*, *supra* note 9, at 1, 14; sources cited, *supra* note 206, and accompanying text.

³⁴² See Sachs, *supra* note 7, at 34.

³⁴³ See *White Paper*, *supra* note 9, at 1.

³⁴⁴ See *supra* note 220, and accompanying text.

³⁴⁵ See *supra* notes 227–28, and accompanying text.

the next government's major tasks will be directing the redistribution of land.

C. Redistribution and/or Nationalization of Land

Redistribution of land must occur in South Africa in order to make land available to those who have been dispossessed. Political and economic justifications are strong for redistribution: agitation by landless peasants, unable to feed their families, or by activists protesting their previous dispossession and continued lack of access to land, could topple a new regime, or at the very least make governing difficult.³⁴⁶ The ongoing preoccupation with redistribution in Zimbabwe and Namibia illustrates the pressure that the new South African government should expect to feel.³⁴⁷ The question that dominates discussion in this area is how to design a redistribution program that will satisfy the political aspirations and subsistence needs of nonwhite South Africans, while also promoting long term economic development and avoiding severe dislocation in the commercial agricultural sector.³⁴⁸

The most likely resolution of issues surrounding land redistribution will be a program of limited nationalization and compensation, coupled with a strong affirmative action program to assist black South Africans both in acquiring land and using it productively. The ANC has proposed gradual compensation over a ten-year period for land the government would take, involving payments in cash and bonds.³⁴⁹ For poor South Africans seeking to acquire land, the ANC suggests affirmative action measures emphasizing flexible payments and mortgages and cooperative ownership forms.³⁵⁰ These measures provide alternatives both to taking without compensation, and to immediate and straight compensation, and represent a first step toward developing a limited compensation program. By offering something of value to each of the major negotiating parties, such a resolution could present a workable political compromise: combining limited compensation, a moderately costly option, with moderately paced nationalization and affirmative action, perhaps less costly options, is more feasible economically than more extreme measures

³⁴⁶ See Budlender et al., *supra* note 206, at 159-61; Marcus, *supra* note 256, at 188; Skweyiya, *supra* note 4, at 203.

³⁴⁷ See *supra* notes 273-74, 277, 286, 298-99, and accompanying text.

³⁴⁸ See *supra* note 304, and accompanying text.

³⁴⁹ See *supra* note 305, and accompanying text.

³⁵⁰ See *supra* note 306, and accompanying text.

such as rapid and mass nationalization, unlimited compensation, or complete lack of compensation.³⁵¹

While the next South African government must have sufficient power and flexibility to take whatever measures are required to effectuate land redistribution, an essential element in any plan for redistribution is the incorporation of procedures that will accord due process protections where the government takes land from individuals in the public interest.³⁵² The legacy of experiences in Zimbabwe and Namibia shows how difficult this balance may be to achieve.³⁵³ Without such due process safeguards, however, any fundamental land rights guaranteed by a new constitution and bill of rights will be meaningless.³⁵⁴

D. The Future of Indigenous South African Land Systems

The economic and social changes that have occurred in South Africa since Europeans first entered the area have altered fundamentally the relationships of indigenous African peoples to their land, including systems of land tenure and use.³⁵⁵ Such changes have been detrimental to the interests of most South African peasants, particularly women and their dependents.³⁵⁶ The apartheid system produced systematic and extreme land deprivation for indigenous peoples in South Africa.³⁵⁷ The dilemma that a new government will face in developing policies and programs to encourage or protect remnants of traditional land systems in South Africa, however, is similar to that faced by other African governments.

Those other African countries that, under the guise of socialist economic programs, have attempted to create communal economic institutions such as cooperative villages or mechanized state farms, have not enjoyed great success.³⁵⁸ The South African government should not assume that communal farming in particular will contribute significantly to commercial agricultural production, in part be-

³⁵¹ See also *supra* notes 307-13, and accompanying text.

³⁵² See Sachs, *supra* note 2, at 3; Sachs, *supra* note 7, at 35.

³⁵³ See *supra* notes 174-75, 283-87, and accompanying text.

³⁵⁴ See *supra* notes 330, 335, and accompanying text.

³⁵⁵ See generally, Glavovic, *supra* note 11; *supra* notes 18-60 and accompanying text, for a discussion of the effects of European incursions and settlement on indigenous peoples in South Africa. Compare *supra* notes 88-148 and accompanying text, discussing the relationships of nonwhite South Africans to land under apartheid and white rule.

³⁵⁶ See generally, Fortmann, *supra* note 316; Seidman, *supra* note 314, both discussing women's experiences in economic development.

³⁵⁷ See Skweyiya, *supra* note 4, at 213. See generally, *supra*, note 355.

³⁵⁸ See, for example, Isaacman, *supra* note 266, at 189-90, on Mozambique.

cause of the inadequate infrastructural base present in many of the bantustans where they are located, and the need for improvement in production methods.³⁵⁹ Proponents of programs and policies to protect indigenous land systems, however, argue that these systems have inherent ecological and cultural value, apart from purely economic interests.³⁶⁰ Because some communal landholding systems persist in South Africa—primarily within the homelands—as do cultural values associated with such communal systems, the government must address cultural as well as economic issues related to indigenous land systems in its policy deliberations.³⁶¹

If communal landholding as it presently exists is to be protected under future law and government policy in order to preserve the cultural preferences and values of nonwhite South Africans, the government should ascertain that the system in fact provides peasants, including women, with sufficient access to land for subsistence purposes. Furthermore, any future government policy should protect flexibility and freedom of choice for the communities and individuals involved. The *White Paper's* suggestion of providing opportunity for communally based communities to convert to individual rights of tenure at a later time, through self-initiated reform, is appropriate.³⁶² The *White Paper* proposal that traditional land tenure systems not be permitted to expand, however, unduly restricts the land rights of nonwhite South Africans.³⁶³ The problems associated with adapting and preserving indigenous cultural values associated with land, within a new land system, are equal in importance and degree of difficulty to the economic and political challenges inherent in land reform.

VII. CONCLUSION

Early in 1993, the ANC announced that it would agree to proposals for temporary joint rule with the white minority, and the South African government proposed multi-racial elections to be held early in 1994.³⁶⁴ The long cessation of negotiations between the government and the ANC appears to have caused the parties to re-examine

³⁵⁹ See Skweyiya, *supra* note 4, at 216 (documenting conditions in the bantustans).

³⁶⁰ See Glavovic, *supra* note 11, at 316.

³⁶¹ See *supra* notes 11–14 and accompanying text. This discussion does not address ecological environmental arguments for preserving indigenous land systems. See Glavovic, *supra* note 11, at 316.

³⁶² See *supra* notes 167–69 and accompanying text.

³⁶³ See *supra* note 168.

³⁶⁴ See Bill Keller, *supra* note 230, at A1.

their positions soberly, and to consider conciliatory actions aimed at resuming formal deliberations. Land reform issues remain at the core of negotiations, and of disagreements between the government and the ANC.

The compromise over land issues suggested here includes constitutional guarantees of individual land rights, provisions for the government to take land in the public interest in accord with due process, and a land reform program that encompasses significant land redistribution and affirmative action measures, along with limited nationalization and compensation. These elements probably lean more toward current ANC thinking than that of the government; yet they also offer protections for the rights of white South Africans as citizens in a post-apartheid state. The proposals place a large burden on the good faith and abilities of both black and white South Africans, a burden to accept a compromise in which neither party can achieve all its goals, nor can every detail of land reform be resolved. Such a compromise would constitute a viable starting point in the process of South African land reform.