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ARTICLE

RATIONALES FOR RURAL LAND REDISTRIBUTION IN SOUTH AFRICA

*Lauren G. Robinson**

We, the people of South Africa, [r]ecognize the injustices of our past . . . and [b]elieve that South Africa belongs to all who live in it, united in our diversity.

We, therefore . . . adopt this Constitution . . . to [h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights . . . [and] [i]mprove the quality of life of all citizens and free the potential of each person.¹

I. INTRODUCTION

A critical mass, if not a preponderance of the Black majority, and those who were in the forefront of the struggle to end White minority rule in South Africa, believe that some land must be redistributed to the disenfranchised African majority as an element of true political and economic transformation in South Africa.² The deprivation of the property rights of Afri-

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1. S. AFR. CONST. preamble.

2. *See, e.g.*, AFRICAN NATIONAL CONGRESS, READY TO GOVERN, ANC POLICY GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA 26-30 (1992) [hereinafter ANC]; PAN AFRICANIST CONGRESS (PAC) OF AZANIA, THE DEPARTMENT OF LAND AND ENVIRONMENTAL AFFAIRS, THE LAND POLICY OF THE PAN AFRICANIST CONGRESS OF AZANIA 7-18 (1992) [hereinafter PAC]; ALBIE SACHS, PROTECTING HUMAN RIGHTS IN A NEW SOUTH AFRICA 105-15 (1990); ESSY M. LETSOALO, LAND REFORM IN SOUTH AFRICA, A BLACK PERSPECTIVE, preface (1987).

cans,³ the majority of the country's population, was the foundation on which apartheid was built. Under apartheid, Africans endured profound and extensive economic hardship. Many Africans still live in the rural homelands⁴ which are generally extremely impoverished. In the name of apartheid, approximately 3.5 million Africans were forcibly removed from their communities to the homelands between 1960-1983.⁵ Generally, the homelands lacked economic viability and were never designed to sustain the population placed on them.

Europeans dispossessed⁶ Africans of their land through a complex and lengthy process of conquest, the undermining of chiefdoms, the enactment of statutes, and the implementation of apartheid.⁷ These deliberate policies displaced Africans from

3. The writer uses the term "African" or "Black" to refer to people of African descent whose forebears were farmers who originally populated the eastern regions of South Africa and spoke any of the ethnic African languages. See LEONARD THOMPSON, *A HISTORY OF SOUTH AFRICA* 16 (1990). The writer uses the term "White" to refer to people of European descent. As explained in detail herein, a complex system of racial classifications was created by statute under apartheid. This article analyzes the land-based oppression of Africans under apartheid. Other racial groups, namely, Coloureds and Indians, also endured discrimination under apartheid. This article focuses on the oppression of Africans because they were the group most discriminated against under apartheid.

4. The homelands refer to the ten areas in South Africa designated by the White minority-ruled government during apartheid for the habitation of Africans. The areas were comprised of the reserves established in 1913 by statute and expanded in 1936 also by statute. These areas have been known at various times as the reserves, scheduled areas, released areas, and the homelands. The apartheid government began referring to the areas as the homelands asserting that these areas represented the original homelands of African ethnic groups. Africans derisively refer to the areas as "bantustans" implying their dissatisfaction with the apartheid government's exploitation of the tribal system. The homelands system was abolished under the Constitution of the Republic of South Africa. See S. AFR. CONST. ch. 2, § 21(3).

5. See LAURINE PLATZKY & CHERRYLL WALKER, *THE SURPLUS PEOPLE, FORCED REMOVALS IN SOUTH AFRICA* 9 (1985). This figure underestimates the total number of forced removals because the government continued the policy after 1983.

6. The writer uses the term 'dispossession' to denote the European settlers' and the White minority-ruled government's appropriation of land owned by Africans, the divestiture of full property rights to Africans by statute (e.g., the right to own land directly or sell property freely) and the forced removals of Africans. The writer considers the denial of full property rights dispossession because it divested Africans of the opportunity to purchase property without restriction and accrue the socioeconomic benefits that accompany property ownership. Although Africans had been driven off of some of the land by colonial conquest prior to the Natives Land Act of 1913 (1913 Act) and the Natives Land and Trust Act of 1936 (1936 Act), those Acts precluded Africans from reversing those trends and changing the status quo of land allocation. See discussion *infra* Part II.C.

7. Discriminatory laws such as the 1913 Act and the 1936 Act, "resulted in

the land and unleashed severe poverty on the majority of rural Africans.⁸ Landless, Africans were coerced into a system of cheap migrant labor that was needed to develop the mining and manufacturing industries emerging at the turn of the twentieth century.⁹ Africans were similarly exploited and paid subsistence wages by rural farmers who depended on their labor.¹⁰

Rural land should be redistributed to redress the harms created by the particularly egregious statutes and policies of the White minority-ruled government.¹¹ The White minority-ruled government enacted laws and acted through formal legal institutions to implement and perpetrate injustice and to lend segregation and apartheid an air of legitimacy that they lacked.¹² Segregation and apartheid formed the basis of the systematic denial of fundamental rights to the majority of South Africa's people through a political process in which the majority was denied participation.¹³

This article examines various rationales supporting rural land redistribution in South Africa. Land redistribution, as discussed in this article, embodies redistributing specific plots of land to individuals and communities who possess legitimate claims to that particular property; redistributing land as a form of reparations to individuals without specific claims to particular land but who have endured various harms emanating from land dispossession; and increasing the opportunities for Africans to obtain land.

The article argues that the post-apartheid government must redistribute rural land to Africans to redress the harms that Africans have endured under apartheid and to enable

the allocation of eighty-seven percent of . . . [South Africa's] best land to the whites who were less than eighteen percent of the country's population." Zola Skweyiya, *Towards a Solution to the Land Question in Post-Apartheid South Africa: Problems and Models*, 21 COLUM. HUM. RTS. L. REV. 211, 213 (1989). For further analysis of these acts see *infra* Part II.C.

8. See generally Skweyiya, *supra* note 7, at 213-15.

9. See THOMPSON, *supra* note 3, at 166-67.

10. See *id.* at 164-65.

11. The writer uses the term "White minority-ruled government" or "apartheid government" to refer to the government before the dismantling of apartheid. The writer uses the term "democratically elected government" or "post-apartheid government" to refer to the government elected following the dismantling of apartheid.

12. Cf. THOMPSON, *supra* note 3, at 190-91.

13. See generally *id.* at 189-91.

them to achieve economic and social self-sufficiency. It also explores the reasons why land is an appropriate remedy for the harms committed in the name of apartheid.

Part II discusses the history of European conquest, the evolution of apartheid, and the final stages of the transition to South Africa's current regime. Part III analyzes rationales supporting rural land redistribution. Part IV addresses various issues raised by the implementation of comprehensive rural land redistribution in South Africa. Part V examines the adjudication of individual claims to land. Finally, Part VI concludes this article by arguing that, although implementing a comprehensive land reform program presents some formidable challenges, land reform is essential to the creation of the just and unified South Africa envisioned by the country's Constitution.

II. A HISTORY OF DISPOSSESSION

The history of South Africa is marked by a series of incidents in which European settlers dispossessed indigenous South Africans of their land. The process of dispossession was neither immediate nor monolithic. Dutch settlers began this process in the mid-1600s when they invaded the Cape, the territory of the Khoikhoi and the San.¹⁴ Between the 1770s and the late 1800s, African chiefdoms and Afrikaner farmers and British colonists struggled over land and fought several wars as Europeans settled further inland.¹⁵ European settlers dispossessed Africans of much of their land by the twentieth century.¹⁶ Beginning in the early twentieth century, legislation segregated land ownership by race.¹⁷ This was succeeded by a more extensive series of statutes, which preceded the implementation of apartheid in the late 1940s.¹⁸

A. *The Indigenous People of the Western Cape and Initial European Contact*

The indigenous people of the Western Cape were the

14. See *id.* at 37-38; see also I THE OXFORD HISTORY OF SOUTH AFRICA 40-41 (Monica Wilson & Leonard Thompson eds. 1969) [hereinafter OXFORD HISTORY].

15. See generally THOMPSON, *supra* note 3, at 70-109.

16. See generally *id.*

17. See *id.* at 163.

18. See *id.* at 189-90.

Khoikhoi, a community of cattle-keepers, and the San, who were hunter-gatherers.¹⁹ In 1652, Jan van Riebeeck of the Dutch East India Company (the Company) settled the Cape of Good Hope on the western coast of South Africa.²⁰ He established a resting stop for Dutch ships en route from the Netherlands to southeast Asia.²¹ The Dutch settled further inward as they moved from crop farming to cattle farming and as slavery developed.²² In addition to enslaving the Khoikhoi, the Dutch held slaves from Madagascar, Indonesia, and India.²³ The Dutch were dependent on the slaves to make their economy work.²⁴ This economic relationship was to repeat itself in the late 1800s and throughout the twentieth century as politically empowered Whites relied on the labor of politically disempowered Africans.²⁵

The availability of land in the Cape attracted Dutch settlers who were granted "burgher's rights" by the Company.²⁶ These "burgher's rights" gave settlers large tracts of land to produce food for the Company at fixed prices.²⁷ The Company also gave rights to land, generally, six-thousand acre farms, to "trekboers" for a nominal fee.²⁸

In the 1670s, the Khoikhoi attempted to limit Dutch encroachment.²⁹ By the mid-1700s, the Dutch, possessing superior weapons, defeated the Khoikhoi after several wars.³⁰ A smallpox epidemic also decimated most of the Khoikhoi.³¹

The British captured the Cape from the Dutch in 1795.³² Although the Dutch regained the territory in 1803, it was lost to the British in 1806 who retained control through 1910.³³ The British government provided official support and easy

19. See OXFORD HISTORY, *supra* note 14, at 40-41.

20. See THOMPSON, *supra* note 3, at 32.

21. See *id.* at 32-33.

22. See *id.* at 33-37.

23. See *id.* at 36.

24. See *id.*

25. See generally *id.* at 118-19.

26. See *id.* at 35.

27. See *id.*

28. See *id.* at 46. Trekboers were semi-migrant farmers. See *id.*

29. See *id.* at 38.

30. See *id.* at 38-39.

31. See *id.*

32. See *id.* at 51.

33. See *id.* at 52, 154.

access to capital to its settlers who "began to pour into the area" and "gradually edged the remaining Khoikhoi people out of their landholdings."³⁴

B. The Invasion of African Chiefdoms and the Development of the Capitalist Industrial Sector

Between the late 1770s and the mid-1800s, White colonists settled into the eastern regions of South Africa where they first encountered groups of Africans who spoke different dialects of the Bantu language (Bantu-speakers).³⁵ Among the Bantu-speakers were the Nguni, Xhosa, Zulu, Sotho, and Pedi.³⁶ These indigenous Black South Africans, as distinguished from the Khoikhoi, were agriculturalists and cattle keepers who lived in large scale tribal societies known as chiefdoms.³⁷

Initially, some of the Bantu-speaker chiefs welcomed the settlers, believing that they would comply with the customs of the chiefdoms.³⁸ The chiefdoms began resisting invading Europeans when the settlers threatened their autonomy.³⁹ Differences between Europeans and African tribes also erupted because of distinct perceptions of land tenure.⁴⁰ For example, White settlers would claim that a chief had granted them land.⁴¹ Since African chiefs did not "own" land in the European sense, they could not convey it.⁴² The notion of exclusive rights by individuals over collectively owned land did not exist in African culture.⁴³ For example, the Xhosa believed that every man had the right to use land just as he had the right to breathe the air.⁴⁴

European settlers fought several wars against several African chiefdoms over a hundred year period. For example, the Xhosa and White settlers clashed several times in the

34. *Id.* at 62-63.

35. *See id.* at 10, 16, 70.

36. *See id.* at 16.

37. *See id.* at 10, 21-28.

38. *See id.* at 70-71.

39. *See id.* at 71.

40. *See OXFORD HISTORY, supra* note 14, at 268.

41. *See id.*

42. *See id.* at 268-69.

43. *See id.*

44. *Id.* at 268.

1800s and the Zulu fought the Dutch and the English in 1879.⁴⁵ The Europeans gained hegemony with their superior weapons despite being outnumbered by Africans.⁴⁶ Further, the Dutch and English united to defeat some African chiefdoms.⁴⁷ African chiefdoms, not having identified the concept of racialism, did not unite to defend themselves against invading Europeans.⁴⁸ By the end of the nineteenth century, African chiefdoms were subjected to White control.⁴⁹

The influx of White settlers into South Africa increased significantly with the discovery of diamonds and gold in the late 1800s.⁵⁰ The development of the diamond and gold mining industries strengthened White economic power and the demand for African labor.⁵¹ These discoveries triggered the process of absorbing Black labor into a White-dominated, capitalist structure.⁵²

British domination of South Africa, including the Afrikaner⁵³ republics, increased through 1910.⁵⁴ The British defeated the Afrikaners in the Anglo-Boer war (1899-1902) and annexed their territories, but granted self-government to the population on the basis of a primarily White franchise.⁵⁵ The Union of South Africa was formed in 1910, combining the British colonies in South Africa into a single state.⁵⁶

45. See *id.* at 252; see also THOMPSON, *supra* note 3, at 124.

46. See THOMPSON, *supra* note 3, at 123.

47. See *id.* at 122.

48. See generally *id.* at 122-32.

49. See *id.* at 122, 163.

50. See Bently J. Anderson, *The Restoration of the South African Citizenship Act: An Exercise in Statutory Obfuscation*, 9 CONN. J. INT'L L. 295, 296-97 (1994).

51. See *id.* at 296-99.

52. See *id.*

53. The term "Afrikaner" refers to the White settlers who arrived in South Africa under the sponsorship of the Dutch East India Company. See Ibrahim J. Gassama, *Reaffirming Faith in the Dignity of Each Human Being: the United Nations, NGOs, and Apartheid*, 19 FORDHAM INT'L L.J. 1464, 1467 n.7 (1996). These settlers are generally of Dutch, German, and French descent. See *id.*

54. See Frank Berman, *South Africa: A Study of Apartheid and Its Enforcement*, 2 TOURO J. TRANSNAT'L L. 1, 15 (1991).

55. See generally *id.* at 12-14.

56. See *id.* at 15.

C. *Laying the Foundation of the Apartheid State: Legislating Racially Discriminatory Land Policies*

In the early twentieth century, the White-ruled government began legislating policies that significantly restricted Africans' land rights and drove them further from their land.⁵⁷ The denial of property rights to Africans was the foundation on which apartheid and African political and economic subjugation was built.⁵⁸ Parliament enacted laws that created market and territorial segregation, dispossessed Blacks of property and property rights, and restricted Blacks' contractual rights.⁵⁹ Although Blacks had already been pushed off much of the land by the beginning of the twentieth century, the Natives Land Act of 1913⁶⁰ (1913 Act) and the Natives Land and Trust Act of 1936⁶¹ (1936 Act) prohibited Blacks from purchasing most of the country's land and did not provide sufficient land in the reserves for Blacks to sustain viable rural communities.⁶² Further, these statutes terminated the existence of a neutral marketplace in which Africans could fairly participate and created a cheap pool of African labor for the rural and urban sector.⁶³

1. 1913 Natives Land Act

The first major statute that set the stage for apartheid and territorial segregation of the races was the 1913 Act, which effectively denied the majority of the population fee simple and leasehold rights to the majority of the land.⁶⁴ The 1913 Act set aside seven percent of the surface area of South Africa as reserves or scheduled areas as territories where only Blacks, who comprised more than seventy-five percent of the population, could purchase property.⁶⁵ The statute also prohibited

57. See THOMPSON, *supra* note 3, at 163.

58. See *South Africa Grapples With Land Issue*, AFR. NEWS, Feb. 11, 1991, at 1-2.

59. See generally SACHS, *supra* note 2, at 106-07, 114.

60. Black Land Act 27 of 1913 (repealed 1991).

61. Development Trust and Land Act 18 of 1936 (repealed 1991).

62. See THOMPSON, *supra* note 3, at 163-64.

63. Cf. *id.* at 163-66.

64. See White Paper on Land Reform 14 (Mar. 1991) (on file with author) [hereinafter White Paper on Land Reform]; see also Skweyiya, *supra* note 7, at 213.

65. See Black Land Act 27 of 1913, § 1.(2) (repealed 1991); see also Skweyiya,

land transactions between "Black[s]" and "person[s] other than Blacks" in the areas outside of the reserves.⁶⁶ The prohibited transactions included sharecropping and squatting.⁶⁷ Under sharecropping or "farming-on-the-halves" arrangements, White farm owners would provide the seed to Africans, who would work and live on the farms.⁶⁸ The parties then divided the crop between themselves in various proportions.⁶⁹ These arrangements were eliminated under the 1913 Act largely because they gave Africans the opportunity to earn relatively high incomes.⁷⁰

The impact of the 1913 Act was devastating:

It is possible that no other legislation has so deeply affected the lives of black people in South Africa as the Natives' Land Act of 1913. It created overnight a floating landless proletariat whose labour could be used and manipulated at will, and ensured that ownership of the land had finally and securely passed into the hands of the ruling white race.⁷¹

Further, "[a]waking on Friday morning June 20, 1913, the South African native found himself, not actually a slave, but a pariah in the land of his birth."⁷²

The 1913 Act maintained the status quo by halting the existing allocation of land ownership between the races.⁷³ This devastated Africans by giving White farm owners tremendous bargaining power. Africans seeking to expand their lands, on the other hand, had little bargaining power when dealing with White farmers whose land was declared to be in the reserves because of the scarcity of available land after the 1913

supra note 7, at 213.

66. See Black Land Act 27 of 1913, § 1.(1) (repealed 1991).

67. See COLIN BUNDY, *THE RISE AND FALL OF THE SOUTH AFRICAN PEASANTRY* 213 (2d ed. 1988). White farmers, however, in parts of the Eastern Cape, the Orange Free State, and the Transvaal, continued to enter into these arrangements with Africans into the 1940s. See *id.* at 231; see also MERLE LIPTON, *CAPITALISM AND APARTHEID* 89 (1985).

68. See BUNDY, *supra* note 67, at 213.; Cf. TIM KEEGAN, *FACING THE STORM, PORTRAITS OF BLACK IN RURAL SOUTH AFRICA* 23 (1988).

69. Cf. KEEGAN, *supra* note 68, at 23.

70. See BUNDY, *supra* note 67, at 213, 230.

71. Bessie Head, *Foreward* to SOL. T. PLAATJE, *NATIVE LIFE IN SOUTH AFRICA* ix (1982).

72. PLAATJE, *supra* note 71, at 21.

73. See Black Land Act 21 of 1913, § 1.(1)-(2) (repealed 1991).

Act.⁷⁴ They had little choice but to accept the terms offered which were often egregious. Some Europeans who owned land along the riverfront or other prime land refused to sell land to Africans.⁷⁵

Africans, who generally did not have a great deal of money, were also forced to pay exorbitant prices for land because the 1913 Act significantly decreased the supply of land available to Africans for purchase.⁷⁶ This, in turn, artificially increased the price of land.⁷⁷ Africans who sold their land had limited opportunities to buy other land.

Finally, the 1913 Act played a decisive role in the emergence of a White-dominated capitalist agricultural sector at the expense of the Black peasantry.⁷⁸ It initiated a process that ultimately impoverished most Black farmers by changing the status of self-sufficient African farmer-landowners, rent-paying squatters, and sharecroppers to farm laborers forced to sell their labor to White-owned farms at low wages.⁷⁹ Africans who left the farms for slightly higher paying jobs in the urban areas were forced into the harsh system of migrant labor in the mining and manufacturing industries.⁸⁰

African labor was needed for South Africa to evolve as a capitalist society.⁸¹ Although Africans were an integral and necessary part of the growing urban industrial sector, they were unable to share in the wealth that their labor created.⁸² Africans were not paid a living wage, endured poor working conditions, and were precluded from certain jobs which were reserved for Whites.⁸³ The migrant labor system was particularly harsh because it separated families by forcing rural dwellers, primarily men, to live apart from their families and

74. See Howard Venable, "Native Land" Laws, Segregated Markets and the Economic Decline of African Landowning Communities, in the Western Transvaal, 1900-1940, at 77-78 (1993) (unpublished paper, on file with *Brooklyn Journal of International Law*).

75. See *id.* at 107.

76. See *id.* at 85-86.

77. See *id.*

78. See generally BUNDY, *supra* note 67, at 230.

79. See *id.* at 231.

80. See generally THOMPSON, *supra* note 3, at 165-69.

81. See generally BUNDY, *supra* note 67, at 213-15, 230-36.

82. See generally *id.*

83. See THOMPSON, *supra* note 3, at 165-68; see also LIPTON, *supra* note 67, at 18-20.

travel to distant cities to obtain work.⁸⁴

2. 1936 Native Land and Trust Act

Parliament amended the 1913 Act with the 1936 Act.⁸⁵ The 1936 Act slightly augmented the reserves with additional land (the "released areas").⁸⁶ This increased the land available for Black ownership to 13.6% of the country's surface area.⁸⁷ The 1936 Act, however, further dispossessed Africans by denying them direct ownership of land in the reserves.⁸⁸ The statute substituted individual land ownership with trust tenure by establishing the South African Development Trust,⁸⁹ a government body which purchased land in the released areas for "Black settlement."⁹⁰

During this period, Parliament also passed legislation that severely restricted the rights and movement of Blacks and created racially segregated sections in the urban areas.⁹¹ Among this legislation was the Blacks (Urban Areas) Consolidation Act of 1945⁹² (Urban Areas Act), which restricted the rights of Blacks to acquire land in urban areas and allowed the government to remove "redundant Blacks" from urban areas that were "in excess of the reasonable labor requirements in [those areas]."⁹³ This law, and others like it, essentially barred Africans from the urban areas, which became known as "White" South Africa,⁹⁴ when they were not working.⁹⁵ A group of statutes known as the pass laws, for example, con-

84. Cf. LIPTON, *supra* note 67, at 18.

85. See Development Trust and Land Act 18 of 1936, ch. I, § 1 (repealed 1991).

86. *Id.* sch. 1; see also White Paper on Land Reform, *supra* note 64, at 14.

87. See White Paper on Land Reform, *supra* note 64, at 15.

88. See Development Trust and Land Act 18 of 1936, ch. II, § 6 (repealed 1991); see also generally THOMPSON, *supra* note 3, at 163-64.

89. See *id.* ch. II, § 4.

90. See *id.* ch. III, § 10.(1).

91. See JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 166 (1978); see also Skweyiya, *supra* note 7, at 215.

92. Blacks (Urban Areas) Consolidation Act 25 of 1945 (repealed 1986).

93. *Id.* §§ 6, 28.

94. White South Africans began to refer to the urban areas as "white-only areas" as early as 1922 following a statement in a 1922 Transvaal Local Government Commission that the towns had been built by and for White people. P.D. Glavovic, *Traditional Rights to the Land and Wilderness in South Africa*, 23 CASE W. RES. J. INT'L. L. 281, n.1 (1991).

95. See generally THOMPSON, *supra* note 3, at 166.

trolled the labor flow and the number of Africans entering South Africa's urban areas.⁹⁶

D. Apartheid: 1948

In the aftermath of World War II and the fight for democracy and at a time when African and Asian nations were fighting against colonialism, South Africa's White minority-ruled government further institutionalized and formalized its political disenfranchisement of Black South Africans. In 1948, the National Party rose to power by espousing apartheid to lower income and middle class White South Africans.⁹⁷ Once in power, the National Party subsidized White farmers in exchange for their political loyalty.⁹⁸ This practice continued until the late 1980s when White farmers began defecting from the National Party to the right-wing Conservative Party.⁹⁹

Apartheid represented a culmination of South Africa's segregationist policies as opposed to a break in its history. It embodied the White minority-ruled government's initial articulation of a rationale for its segregationist policies. Apartheid, as distinct from *de facto* segregation, was unique because racial segregation was not simply socially condoned; it was legally mandated and it entrenched White privilege through the law.¹⁰⁰

In the 1940s, Hendrik Verwoerd, who would become Prime Minister between 1958 and 1966, systematized the policy of apartheid.¹⁰¹ He justified apartheid on the basis of an ideology of White supremacy and the alleged racial inferiority of Africans.¹⁰² Under apartheid, the White minority-ruled government defined South Africa's citizens according to an elaborate system of racial classifications.¹⁰³ Whites were all

96. See LIPTON, *supra* note 67, at 92; see also THOMPSON, *supra* note 3, at 166.

97. See generally THOMPSON, *supra* note 3, at 187-89.

98. See THOMPSON, *supra* note 3, at 188-89; see also LIPTON, *supra* note 67, at 86. These subsidies included providing White farmers with tax exemptions, price supports, and low interest rate loans. See SEBASTIAN MALLABY, *AFTER APARTHEID, THE FUTURE OF SOUTH AFRICA* 148 (1992).

99. See MALLABY, *supra* note 98, at 148.

100. See DUGARD, *supra* note 85, at 53.

101. See THOMPSON, *supra* note 3, at 189.

102. See DUGARD, *supra* note 91, at 22.

103. See THOMPSON, *supra* note 3, at 190.

placed in the same racial group, while Blacks were broken up into numerous sub-groups.¹⁰⁴ The four major racial groups, under the Population Registration Act of 1950¹⁰⁵ were White, Coloured, Indian, and Blacks, who were further classified into subgroups based on tribal affiliations.¹⁰⁶

At the high point of apartheid, the government regulated virtually all areas of life—social, culture, education, commerce, politics, and residence—through a complex series of statutes to maintain separation of the races.¹⁰⁷ By the 1960s, the apartheid government modified its rationale for apartheid by asserting that all races benefited by developing separately, because segregation preserved ethnic integrity.¹⁰⁸

E. Forced Removals and the Fallacy of the 'Independent Homelands'

Between 1960 and 1983, an estimated 3.5 million Africans were forcibly removed from non-Native areas by the government and White farm owners.¹⁰⁹ The apartheid government forcibly removed Africans to entrench apartheid and implement the policy of separate development.¹¹⁰ This policy was unconscionable as the reserves were inadequate to absorb the vast African population and, as a result, Africans were subjected to severe economic and social conditions.¹¹¹

Under the policy of separate development, the apartheid government transformed the reserves into the homelands to achieve total racial segregation.¹¹² Under separate development, Africans were banished to the homelands and the urban and industrial areas comprised "White" South Africa.¹¹³ The policy's ultimate goal was to deprive Africans of their South African citizenship by enabling them to opt for independence in

104. *See id.*

105. Population Registration Act 30 of 1950 (repealed 1991).

106. *See id.* §§ 1, 5; *see also* Randal S. Jeffrey, Note, *Social and Economic Rights in the South African Constitution: Legal Consequences and Practical Considerations*, 27 COLUM. J.L. & SOC. PROBS. 1, 1 n.2 (1993).

107. *See id.*

108. *See* LIPTON, *supra* note 67, at 30-31.

109. *See* PLATZKY & WALKER, *supra* note 5, at 9.

110. *See id.* at 16.

111. *See* THOMPSON, *supra* note 3, at 164.

112. *See generally id.* at 191-95.

113. *See* PLATZKY & WALKER, *supra* note 5, at 16.

the homelands.¹¹⁴ At a time when colonialism became unacceptable in the international community, separate development represented the White minority-ruled government's attempt to defend its racist policies by pretending it had granted "independence" to Black areas.¹¹⁵

The apartheid government installed the institutions for government within the homelands under the Black Authorities Act of 1951¹¹⁶ by which tribal chiefs were granted limited authority to govern within the homelands.¹¹⁷ Parliament supplemented this Act with the Promotion of Black Self-government Act of 1959.¹¹⁸ This statute identified eight tribal groups (North and South Sotho, Swazi, Tsonga, Venda, Xhosa, Zulu, and Tswana; Ndebele was added subsequently), each of which was forced to move into different designated homelands.¹¹⁹

The separate development policy was particularly offensive because it attempted to make Africans foreigners in their own country. Subsequent legislation was enacted that assigned all Africans citizenship to one of the homelands and granted the homelands the right to seek independence from South Africa.¹²⁰ Prior to the dismantling of apartheid, approximately eight million Africans were stripped of their South African citizenship as a result of various homelands opting for independence.¹²¹ The apartheid government defended this policy by analogizing the independence of the homelands to the decolonization occurring throughout Africa in the 1960s.¹²² The theory was that Parliament was liberating Blacks by enabling them to exercise political rights in the homelands.¹²³ The homelands did not, in fact, represent true political representa-

114. See THOMPSON, *supra* note 3, at 191; see also PLATZKY & WALKER, *supra* note 5, at 16.

115. See generally THOMPSON, *supra* note 3, at 222.

116. Black Authorities Act 68 of 1951.

117. See PLATZKY & WALKER, *supra* note 5, at 111.

118. Promotion of Black Self-government Act 46 of 1959. The name of this act was later changed to the Representation Between the Republic of South Africa and Self-governing Territories Act. See Constitutional Laws Amendment Act 32 of 1987, § 10.

119. See PLATZKY & WALKER, *supra* note 5, at 112-13. The homelands included Lebowa, KwaNdebele, Qwaqwa, KaNgwane, Gazankulu, and KwaZulu. See Promotion of Black Self Government Act 46 of 1959, § 2(a)-(f).

120. THOMPSON, *supra* note 3, at 191.

121. PLATZKY & WALKER, *supra* note 5, at 22.

122. See generally THOMPSON, *supra* note 3, at 191.

123. See PLATZKY & WALKER, *supra* note 5, at 23.

tion for Africans because the apartheid government installed the chiefs.¹²⁴ Further, Parliament co-opted the tribal system to advance its own purposes by conferring upon the chiefs more power than they possessed traditionally.¹²⁵ Finally, the homelands could not be independent when they were not economically self-sufficient and were economically dependent on "White" South Africa.¹²⁶

In connection with the implementation of separate development, the Surplus People's Project estimates that the apartheid government and White farmers removed over 3.5 million Africans from their homes between 1960 and 1983.¹²⁷ Approximately 614,000 Black landowners were removed from their real property in "white areas," commonly referred to as "black spots."¹²⁸ The removal of "black spots" was central to separate development because their existence undermined the apartheid government's assertion that the homelands were the true and traditional homelands of Africans and proper sites for Africans to exercise their political rights.¹²⁹ African landowners were dispossessed of their property and did not receive equivalent land.¹³⁰ African landowners were only entitled to agricultural land in the homeland to which they were relocated if they owned more than 20 morgen (40.4 acres) of land previously.¹³¹ Otherwise, African landowners were entitled to only a dwelling plot.¹³² During the same period, White farm owners evicted over one million Black tenants, thereby creating a floating, landless proletariat with limited viable means of fending for themselves.¹³³ These removals violated norms of due process because Africans were forced from their land without any sort of hearings where challenges could be brought.¹³⁴

124. *See id.* at 111.

125. *See id.*

126. *Cf. LETSOALO, supra* note 2, at 57.

127. *See THOMPSON, supra* note 3, at 194.

128. *See id.* 193-94; *see also* PLATZKY & WALKER, *supra* note 5, at 44. The apartheid government referred to Black owned land outside of the reserves as "black spots." *See DUGARD, supra* note 91, at 4.

129. *See* PLATZKY & WALKER, *supra* note 5, at 115.

130. *See id.* at 93; *see also* LETSOALO, *supra* note 2, at 48.

131. *See* LETSOALO, *supra* note 2, at 48.

132. *See id.*

133. *See id.* at 49.

134. *See id.* at 48. While the apartheid government was required to consult the tribal chiefs regarding removals, no notice was required to be given to the individ-

Forced removals destroyed entire African communities:

Before, there was always something that kept the community ticking over and operating correctly . . . there was the extended family, the granny and grandpa were at home, doing the household chores and looking after the kids. Now, the family is taken out of this environment where everything is safe and known. It is put in a matchbox in a strange place. All social norms have suddenly been abolished.¹³⁵

This community destruction was exacerbated by the apartheid government's categorizing Africans by ethnic group, regardless of whether they felt an affiliation to that group, and the subsequent assignment of the members of each group to their respective homelands.¹³⁶ This "divide and conquer" process entrenched minority control even further.¹³⁷

Forced removals unleashed severe economic and social harm on Africans. Some of the homelands were never much more than holding camps established to preclude Africans from entering "White" South Africa but to keep Blacks available to serve "White" South Africa's labor needs.¹³⁸ Because the homelands were not economically viable, Africans were coerced into the harsh migrant labor system for subsistence wages.¹³⁹ Africans who could not find employment, on the other hand, struggled to survive as farmers in the face of the land shortage that existed in the homelands.¹⁴⁰

The land allocated from the homelands was insufficient to support full-time farming for the population placed on the land.¹⁴¹ Landlessness has only increased as the population in

uals who were being moved, and, in any event, the tribal chiefs had no authority to reject or approve an approval order. *id.* 48-49.

135. Don Pinnock, *Breaking the Web: Economic Consequences of the Destruction of Extended Families By Group Areas Relocations in Cape Town* 14 (Apr. 13-19, 1984) (unpublished paper, on file with Tufts University Library). For other narratives of the devastation to families following forced removals see PLATZKY & WALKER, *supra* note 5, at 3-4.

136. *See generally* PLATZKY & WALKER, *supra* note 5, at 112-13.

137. *See id.* at 23.

138. *See* LETSOALO, *supra* note 2, at 57-58.

139. *See id.* at 57.

140. *See generally id.* at 57-58.

141. *See* FRANCIS WILSON & MAMPHELA RAMPHELE, *UPROOTING POVERTY* 43 (1989). As early as 1951, the apartheid government concluded that at least forty percent of the population in the homelands would have to be moved to leave sufficient land for those who wanted to farm full time. *See id.*

the homelands has nearly tripled from 1910 to 1990.¹⁴² The landless population ranges from between twenty percent and thirty percent in Transkei, to thirty-six percent in Venda, to as high fifty percent in Gazankulu.¹⁴³

As a result of landlessness and overcrowding, it has been estimated that eighty percent of the residents of the homelands live in poverty.¹⁴⁴ Despite South Africa's ability to feed itself, many South Africans endure hunger. The conditions Africans endure are striking in absolute and relative terms. The social and economic conditions Africans suffer contrasts sharply with those of South Africa's White community.¹⁴⁵ South Africa has one of the world's highest GINI coefficients, which measures the economic inequality among a country's population.¹⁴⁶ Africans endure higher and rising unemployment, lower wages, greater infant mortality, and shorter life expectancies than Whites.¹⁴⁷

F. The Transition from Apartheid: Repeal of the Land Acts and Ratification of a New Constitution

The transition from apartheid to a democratic society emanated from decades of political struggle, the deaths of thousands of people fighting for freedom and equality, and the damaging effects of economic sanctions imposed by the world community. On February 2, 1990, then President Frederik W. de Klerk announced that he would lift the ban against political organizations and release several political prisoners.¹⁴⁸ On February 11, 1990, Nelson Mandela, the near-mythic figure synonymous with the South African struggle for freedom, was

142. See PAC, *supra* note 2, at 7.

143. See WILSON & RAMPHELE, *supra* note 141, at 40.

144. See Daryl Glaser, *Regional Development in South Africa: Towards an Alternative?*, in AFTER APARTHEID, RENEWAL OF THE SOUTH AFRICAN ECONOMY 76, 80 (John Suckling & Landeg White eds., 1988). For an analysis of the conditions in the homelands, see PLATZKY AND WALKER, *supra* note 5, at 93; THOMPSON, *supra* note 3, at 202.

145. See THOMPSON, *supra* note 3, at 202; see also WILSON & RAMPHELE, *supra* note 141, at 17.

146. See WILSON & RAMPHELE, *supra* note 141, at 18.

147. See THOMPSON, *supra* note 3, at 202-03.

148. See ROBERT S. JASTER ET AL., CHANGING FORTUNES: WAR, DIPLOMACY, AND ECONOMICS IN SOUTHERN AFRICA 214 (1992); see also Howard Witt, *S. Africa Lifts Bans, Vows to Free Mandela*, CHI. TRIB., Feb. 3, 1990, available in 1990 WL 2938396.

released from prison after serving twenty-seven years of a life sentence.¹⁴⁹

In 1990, the apartheid government began repealing the statutes that buttressed apartheid, including the Separate Amenities Act, which segregated public facilities such as toilets by race.¹⁵⁰ The following year, Parliament went on to repeal the Group Areas Act, which segregated residential areas by race,¹⁵¹ and the Population Registration Act, which classified citizens by race.¹⁵² In June 1991, Parliament repealed the 1913 and 1936 Land Acts.¹⁵³

The formation of a multi-racial transitional government and the drafting of an Interim Constitution followed the unraveling of the statutory regime of apartheid.¹⁵⁴ In December 1991, delegates from nearly all of South Africa's leading political organizations attended the Convention for a Democratic South Africa (CODESA) to begin the formation of a multi-racial government and the drafting of an Interim Constitution.¹⁵⁵ On April 1, 1993, representatives from twenty-six political parties met to begin multi-party negotiations for a new multi-racial government.¹⁵⁶ As a result of these concrete steps toward full democracy, Mr. Mandela and Mr. de Klerk were awarded the Nobel Peace Prize in October 1993.¹⁵⁷ During the next month, the governing National Party and the African National Congress¹⁵⁸ (ANC) endorsed an Interim

149. See Witt, *supra* note 148; see also Allister Sparks, *South Africa Frees Mandela After 27 Years; Jubilant Crowds Dance, Shout in Black Townships*, WASH. POST, Feb. 12, 1990, available in 1990 WL 2149323.

150. See Discriminatory Legislation Regarding Public Amenities Repeal Act 100 of 1990, § 1; see also generally Reservation of Separate Amenities Act 49 of 1953 (repealed 1990).

151. See Abolition of Racially Based Land Measures Act 108 of 1991, ch. II, § 48(a); see also generally The Group Areas 36 of 1966 (Repealed 1991).

152. See Population Registration Act Repeal Act 114 of 1991, § 1(1); see also generally Population Registration Act 30 of 1950 (repealed 1991).

153. See Abolition of Racially Based Land Measures Act 108 of 1991, ch. I, §§ 1(a), 11(a).

154. See Makau wa Mutua, *Hope and Despair For a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 77-79 (1997).

155. See *id.* at 78-79; see also Michael Holman, *De Klerk Embarks on Uncertain Trek*, FIN. TIMES, May 10, 1996, at 4.

156. See Holman, *supra* note 155.

157. See *id.*

158. The African National Congress (ANC) is a political organization that has long opposed apartheid. See Mutua, *supra* note 154, at 64, 89. The ANC has been described as "South Africa's premier reformist organization during apartheid." *Id.*

Constitution.¹⁵⁹ Under the Interim Constitution, a transitional government was formed to govern South Africa until the country held democratic elections.¹⁶⁰

The people of South Africa elected the ANC by a clear majority in South Africa's first truly democratic election in 1994.¹⁶¹ Nelson Mandela was elected president by the ANC controlled Parliament shortly thereafter.¹⁶² Following Mr. Mandela's election, a "Government of National Unity" was formed by which the leading political parties—the ANC, the National Party and the Inkatha Freedom Party—shared cabinet posts in the new government in proportion to the number of seats they held in the National Assembly.¹⁶³ The Interim Constitution continued as South Africa's main governing document until the democratically elected representatives drafted a permanent document in 1996.¹⁶⁴

On May 8, 1996, the South African government adopted the final Constitution.¹⁶⁵ The new Constitution, whose provisions will be phased in over three years, establishes majority rule and a Bill of Rights guaranteeing individual liberties similar to the governing legal documents of the leading democracies of the world.¹⁶⁶ South Africa's Bill of Rights prohibits discrimination based on "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth."¹⁶⁷ The Constitutional Court, the highest court of South Africa, has final jurisdiction regarding the interpretation of the Constitution.¹⁶⁸ The Constitution divided the country into nine provinces, each of which has control over regional services.¹⁶⁹

at 89.

159. See Mutua, *supra* note 154, at 78-79.

160. See *id.* at 79.

161. See Laurinda Keys, 'Let Us Forget the Past' Mandela, at Election Eve Service Urges Reconciliation, BOSTON GLOBE, May 9, 1994, available in 1994 WL 5972670.

162. See Holman, *supra* note 155.

163. See S. AFR. CONST. (Interim Constitution Act 200 of 1993) ch. 4, §§ 40(1), 48(1); see also Mutua, *supra* note 154, at 79.

164. See Mutua, *supra* note 154, at 83-84.

165. See *id.*

166. See generally S. AFR. CONST. ch 2; see also Mutua, *supra* note 154, at 83-85.

167. S. AFR. CONST. ch 2, §9(3).

168. See *id.* ch 8, § 167.

169. These are the Eastern Cape, Free State, Gauteng, Kwazulu-Natal,

The political evolution of South Africa continues. On the day following the ratification of the Constitution, the National Party, led by Mr. de Klerk, opted out of the power sharing arrangement of the Government of National Unity and announced its withdrawal therefrom.¹⁷⁰ Mr. de Klerk expressed his belief that true multi-party democracy requires a strong opposition and stated that the National Party would fulfill that role.¹⁷¹ In May 1997, however, Mr. de Klerk resigned as the leader of the National Party.¹⁷² Depending on who is elected as his successor, the National Party may seek to rejoin the Government of National Unity.¹⁷³ How this ultimately will play out remains to be seen.

III. RATIONALES FOR RURAL LAND REDISTRIBUTION

A. *The Validity of Rural Land Redistribution in South Africa*

Land is an appropriate means of compensating Africans for the harms they suffered under apartheid and expanding Black economic self-sufficiency and political empowerment. Because the past cannot be undone and the injuries cannot be fully quantified, Africans will never be compensated fully for the hardship unleashed on them over generations by the White minority-ruled government. A return to their land, however, is among the best compensation they can hope to receive.

Land is appropriate compensation to Africans because, first and foremost, it is their country and their land. Land redistribution redresses current and historically recent harms. The dispossession following the enactment of the 1913 and 1936 Acts occurred in historically recent times. Many of the Africans who endured forced removals and related atrocities are alive and able to recount their experiences.¹⁷⁴

Africans should be compensated with land because their

Mpumalanga, Northern Cape, Northern Province, North West, and Western Cape. See S. AFR. CONST. ch. 6, § 103(1).

170. See Holman, *supra* note 155.

171. See *id.*

172. See Roger Matthews, *Successor to de Klerk May Rejoin Government*, FIN. TIMES, Aug. 28, 1997, available in 1997 WL 11050118.

173. See *id.*

174. See, e.g., MALLABY, *supra* note 98, at 142 (documenting the 1954 removal of the Nyambi family); see generally KEEGAN, *supra* note 68, at 3-109 (documenting the lives of several families following forced removals).

dispossession is the source of their oppression. Land redistribution begins to adjust for the historical inequities caused by the White minority-ruled government's dispossession of Africans' property and its manipulation of property rights, which barred Africans from accumulating wealth.

Monetary compensation is a limited means of redress. It is neither a place to build shelter nor a place to produce food. Monetary compensation only represents income while compensation with land represents wealth, equity, and a source of control and power. Redistributing rural land will empower Africans by giving them control over a source of capital and, therefore, more control over their lives. The unique value of property lies in its conceptual essence. As one scholar has noted, "the conceptual essence of property is the power given to a single individual or group (called the "owner") to control the allocation of some resource whose employment may affect the well-being of the larger community."¹⁷⁵

Property ownership also generates political clout. The National Party, for example, subsidized poor White farmers for decades in exchange for their political loyalty.¹⁷⁶ Although it is unlikely that African farmers in post-apartheid South Africa will wield the influence of White farmers under apartheid, African farmers can achieve a degree of political power as property owners with common interests. Further, property owners have political clout because they manage a "resource whose employment may affect the well-being of the larger community."¹⁷⁷

B. The Constitutional Authority for Rural Land Redistribution

The Constitution expressly manifests the moral, social, and economic bases for rural land redistribution by providing the legal authority empowering the government to redistribute land. The Constitution also articulates the mechanisms by which to implement land redistribution—government expropri-

175. Eben Moglen, *Takings and Redistribution: North American Fifth Amendment Theory in South African Circumstances* 2 (Sept. 26, 1989) (unpublished paper, on file with the *Brooklyn Journal of International Law*).

176. See MALLABY, *supra* note 98, at 148.

177. Moglen, *supra* note 175, at 2.

ation and legislative action.

The Constitution's Bill of Rights addresses property rights. The Constitution first states that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."¹⁷⁸ Notwithstanding this basic premise, the Constitution permits government expropriation of private property: "[p]roperty may be expropriated only in terms of law of general application . . . (a) for public purposes or in the public interest; and (b) subject to compensation, the amount, timing, and manner of payment, of which must be agreed, or decided or approved by a court."¹⁷⁹ The definition of public interest "includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources."¹⁸⁰ Regarding compensation, its "amount, timing, and manner of payment" must "be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected."¹⁸¹

178. S. AFR. CONST. ch. 2, § 25(1).

179. *Id.* ch. 2, § 25(2).

180. *Id.* ch 2, § 25(4)(a). Land reform is not unprecedented as being within the public interest for purposes of justifying government expropriation of property, at least under the constitutional jurisprudence of nations other than South Africa. In *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984), the United States Supreme Court held that a state government's exercise of its eminent domain powers to implement a fully-compensated land redistribution plan was constitutional because it was rationally related to a conceivable public purpose. An estimated 47% of the land in Hawaii was owned by only 72 landowners as a result of the historical concentration of land ownership by tribal chiefs and colonial owners. *See id.* at 232. Since 49% of the land in Hawaii was owned by the federal government, this meant that nearly all of the privately owned land in the state was concentrated in the hands of only a few individuals. *See id.* The state government, exercising its power of eminent domain, created a system where residential tracts of land were condemned and compensation was paid to the owners. *See id.* at 233. Once a tract of land was condemned, individuals who were leasing that land were given the opportunity to purchase it and could borrow up to 90% of the purchase price from the state in order to do so. *See id.* at 234. The Court upheld this system of land reform, stating that: "[t]he Hawaii legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii—a *legitimate public purpose*. Use of condemnation to achieve this purpose is not irrational." *Id.* at 245 (emphasis added). This holding could provide guidance for a South African court, which may consider foreign law when interpreting the Bill of Rights. S. AFR. CONST. ch. 2, § 39(1)(c).

181. S. AFR. CONST. ch. 2, § 25(3). A court applying this balancing test must consider "all relevant factors, including . . . (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the

The Constitution also provides for legislative action to implement land reform. Under Section 25(7), "[a] person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property, or to equitable redress."¹⁸² Section 25(6) supplements this principle by providing that "[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament, either to tenure which is legally secure, or to comparable redress."¹⁸³ These provisions explicitly recognize the social injustices Africans have endured under apartheid. The first provision acknowledges the land dispossession that occurred in the aftermath of the 1913 Act.¹⁸⁴ The second provision recognizes the insecurity of land tenure following the 1913 Act and forced removals.¹⁸⁵

By acknowledging the adverse social conditions caused by land dispossession, the Constitution not only authorizes legislative action, it manifests the expectation of the South African people that Parliament will take legislative action. This intent is further reflected in Section 25(5), which provides that "[t]he state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."¹⁸⁶ Furthermore, Section 25(8) states that "[n]o provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination."¹⁸⁷ These provisions unambiguously contemplate proactive steps by the legislature and other governmental bodies to implement land reform and address the harms that emanated from land dispossession.

property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation." *Id.*

182. *Id.* ch. 2, § 25(7).

183. *Id.* ch. 2, § 25(6).

184. *See id.* ch. 2, § 25(7).

185. *See id.* ch. 2, § 25(6).

186. *Id.* ch. 2, § 25(5).

187. *Id.* ch. 2, § 25(8).

The Bill of Rights also declares that "[e]veryone has the right to have access to adequate housing," and that "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."¹⁸⁸ Comprehensive rural land redistribution contemplates addressing the social and economic conditions of Africans. Housing is among those needs and the Constitution authorizes state action to address it.¹⁸⁹

Finally, the Constitution offers this guiding principle for interpreting the Bill of Rights: "[w]hen interpreting the Bill of Rights, a court, tribunal or forum . . . must promote the values that underlie an open and democratic society based on human dignity, equality and freedom."¹⁹⁰ This provision, in conjunction with the sections discussed above, makes clear that the post-apartheid government has the constitutional authority necessary to initiate and implement a comprehensive land redistribution program.

C. Specific Rationales Justifying Rural Land Redistribution

1. Africans Demand Land Redistribution

Among the most persuasive rationales for rural land redistribution is the simple fact that a critical mass of Africans demand and expect land redistribution. It is delusional to expect Africans, who have been systematically oppressed and denied fundamental civil rights under apartheid, not to seek land to which they have legitimate claims. This is particularly true of African property owners who were dispossessed of their land and the impoverished, militant Blacks who were in the forefront of the democratic struggle. For them, land redistribution is a political inevitability.

Africans demand land redistribution because they recognize that the present distribution of land is illegitimate. The present allocation of land emanated from conquest exacerbated by the repeated suppression of Africans' property rights through a process in which they could not participate. The inequities in land allocation have not been caused by purely economic forces but by deliberate political machinations. Ac-

188. *Id.* ch. 2, § 26(1)-(2).

189. *See id.*

190. *Id.* ch. 2, § 39(1)(a).

cordingly, Africans realize that the unfettered market cannot adequately address the current disparities in land allocation.

Africans perceive the nexus between the creation of apartheid and their dispossession of property and property rights. Although a great deal of land dispossession had already occurred by the turn of the twentieth century, the 1913 and 1936 Land Acts and the formal implementation of apartheid manipulated the distribution of property further by undermining the neutral marketplace. As a direct result, Africans were precluded from reversing the effects of colonial conquest, freely buying and selling land, and acquiring economic self-sufficiency. Land redistribution, therefore, does not destroy but vindicates property rights.

Africans also demand land based on their cultural claims to the land. For many Africans, access to land is considered to be a birthright.¹⁹¹ Land is the site of family, history, and gravesites; it is not simply a commercial asset. As one author notes, "[t]he land represents the link between the past and the future; ancestors lie buried there, children will be born there. Farming is more than just a productive activity, it is an act of culture, the centre of social existence, and the place where personal identity is forged."¹⁹² Moreover, unlike some dispossessed peoples who have been pushed off of their land entirely, many Africans remain connected to the land.¹⁹³ A considerable number of Africans have not lost their farming skills as most rural land is farmed by Africans.¹⁹⁴

In addition to the moral imperative to respond affirmatively to these claims, the democratically elected government may confront a political powderkeg and its inevitable explosion if it ignores these demands. Many Africans are bitter and angry:

[B]lack[s] are so good at hiding their own suffering that whites could easily forget it ever happened. At the start of South Africa's transition, whites declared that after apartheid there should be a fresh start for everyone, glibly discounting the past.

This was truer about land than about any other issue,

191. See SACHS, *supra* note 2, at 115; see also PAC, *supra* note 2, at 13.

192. SACHS, *supra* note 2, at 115.

193. See *id.* at 132.

194. See PAC, *supra* note 2, at 16.

partly because dispossession of black farmers was the biggest hardship inflicted by apartheid and partly because healing it seemed impossibly difficult.¹⁹⁵

As long as these feelings are pervasive, there will be Africans who will not tolerate the current allocation of land. The post-apartheid government may be compelled to redistribute land to avert civil unrest.¹⁹⁶ Land distribution may be a necessary showing of good faith in building a new and just South Africa.

2. Land Should Be Redistributed to Enable Blacks to Improve Their Economic and Social Condition

Land redistribution is necessary to create the just and united South Africa envisioned by the Constitution. How can the "divisions of the past" be healed and "a society based on democratic values" and "social justice" be built if the extreme social and economic inequities created by apartheid are not meaningfully addressed?¹⁹⁷ Land redistribution is a means of "improv[ing] the quality of life of all [South African] citizens and free[ing] the potential of each person" and allowing Black South Africans to realize the political rights they have recently obtained in a meaningful way.¹⁹⁸ The Constitution, which expressly recognizes the injustices of apartheid and embodies abstract political rights (*e.g.*, due process)¹⁹⁹ with concrete social rights (*e.g.*, housing),²⁰⁰ reflects the idea that a socially just democracy embodies more than the right to vote. It recognizes that basic social and economic needs must be met to enable the citizenry to exercise and benefit fully from political rights.

Redistributing land to Africans will also integrate Africans into the mainstream economy and give them a stake in South Africa's future:

[P]roperty and the legal institutions that protect it retain a

195. MALLABY, *supra* note 98, at 141.

196. Political violence has claimed over 14,000 lives between 1991 and 1994. See Mkhonto Mkhondo, *Serious Problems Await Post-Apartheid South Africa*, EMERGE, April 1994, at 19.

197. S. AFR. CONST. preamble.

198. *Id.*

199. *See id.* ch. 2, § 33.

200. *See id.* ch. 2, § 26.

valuable secondary function; they . . . creat[e] a basis on which future stability can be erected, conveying a stake in the outcome to those individuals who might otherwise abdicate political responsibility or abandon the fundamental premise of politics—the need to live with others, including dissident others, in a single community.²⁰¹

It is extremely difficult, if not impossible, to create a community where the degree of economic inequality is as great as it is in South Africa.²⁰² If the present extreme inequities remain, Africans will have little incentive to work for higher productivity.²⁰³ Redistributing land and putting Africans in a position where they can begin to be self-sufficient and bargain equally with Whites is a necessary condition for creating a unified South Africa and improving race relations. Although other forms of restitution may ease poverty, they would probably do little to change inequality between the races and the structure of power relations.²⁰⁴ Land redistribution is vital not solely from an economic standpoint but from a political and psychological perspective. Control over land will transform Africans and the manner in which they perceive themselves and others perceive them.

Some scholars believe that the development of comprehensive strategies to address poverty in South Africa is the country's fundamental challenge.²⁰⁵ Given the extreme poverty of rural Africans, land redistribution, combined with broader economic and agricultural reforms, can only improve their economic status.²⁰⁶ One reform that would supplement land redistribution and help to improve economic condition of Africans would be the integration of the rural economy into the

201. See MOGLEN, *supra* note 175, at 14.

202. See WILSON & RAMPHELE, *supra* note 141, at 4.

203. See RUSSELL KING, *LAND REFORM* 7 (1977).

204. See Terence Moll, *The Limits of the Possible: Macro-economic Policy and Income Redistribution in Latin America and South Africa*, in *AFTER APARTHEID*, *supra* note 144, at 19, 30.

205. See WILSON & RAMPHELE, *supra* note 141, at 4.

206. See KING, *supra* note 203, at 71-72 (noting that "[g]enerally the historical approach shows that land reform can make a vital contribution to, [even though it] is by no means an automatic condition of, economic development" and suggesting that obstacles related to—but beyond the scope of land reform "can be surmounted only by the diversification of the economy as a whole in the course of a programme of general economic development").

urban economy.²⁰⁷ To achieve this, the post-apartheid government will have to build infrastructure (water, sanitation, roads, electricity, telecommunications, housing) to connect urban and rural areas. Also it will have to facilitate the rural population's engagement in the commercial production of agriculture and help rural dwellers to compete with goods and services that are produced in the urban areas and sold in the rural communities.²⁰⁸

Land redistribution is more likely to succeed if sufficient institutional support and infrastructure are provided.²⁰⁹ For example, in Zimbabwe, the government raised corn prices after achieving independence in the 1980s, which encouraged farmers to increase production.²¹⁰ The government further supported African farmers by providing transportation and credit.²¹¹ These strategies significantly increased the production of Black farmers.²¹² In 1980, Black farmers produced seven percent of the country's marketed corn.²¹³ By 1985, their share of production rose to two-thirds of the market.²¹⁴

Comprehensive land reform, of which land redistribution is an element, must take into account the need to increase the long-term productive use of land²¹⁵ and advance social and economic goals in the country's national interests (e.g., reform should not disrupt the country's food exports). In the long run, such policies will stimulate capital investment in South Africa.

Redistributing rural land will give Africans opportunities beyond economic dependence on Whites.²¹⁶ Africans will be able to exercise economic self-determination by controlling

207. See WILSON & RAMPHELE, *supra* note 141, at 287.

208. See *id.* at 287-88.

209. See KING, *supra* note 203, at 71-72.

210. See MALLABY, *supra* note 98, at 154.

211. See *id.*

212. See *id.*

213. See *id.*

214. See *id.* It should be noted that although land policy in Zimbabwe has increased the output of Black farmers for certain crops, land policy has not resulted in political or economic power for Blacks. While Whites comprise only one percent of Zimbabwe's population, they dominate the country's farms and economy. See Bill Keller, *Zimbabwe Whites Find the Good Life is in Peril*, N.Y. TIMES, Aug. 30, 1993, at A8.

215. Erosion of agricultural areas is a significant problem here. The Development Bank of South Africa has reported that 25% of White farming areas suffer from erosion. See *South Africa Grapples With Land Issue*, *supra* note 58, at 2.

216. See Skweyiya, *supra* note 7, at 220.

capital if provided the necessary supports for commercial production. Under apartheid, Africans' role in the economy was that of a mere factor of production. Access to land will change their economic status to owners of capital. Redistributing land will reduce the degree of political and economic inequality between Whites and Africans. Success among Black farmers is possible because the desire and willingness to succeed is great.²¹⁷

Rural land redistribution and comprehensive economic and agricultural reforms will create jobs and self-employment opportunities in the rural areas.²¹⁸ This is of critical importance in South Africa because the urban economy cannot absorb all of the unemployment in the homelands.²¹⁹ Land redistribution can help to absorb the labor force in the homelands into agricultural jobs by dividing large farms into smaller ones. This strategy not only increases rural employment, it increases productivity as only limited economies of scale are achieved by farms larger than 300-400 hectares (750-1,000 acres).²²⁰ Small holdings generally are more productive than large ones because greater investments of household labor and the efficiency advantages of that labor over wage labor appear to more than compensate for potential economies of scale that in practice are usually unrealized.²²¹

Land redistribution will begin to address homelessness and hunger within the Black population. By some accounts, roughly seven million Africans are homeless.²²² Land that

217. See, e.g., Bill Keller, *A Farmer, but Not Exactly a Boer. You See . . .*, N.Y. TIMES, Aug. 11, 1993, at A4 (describing the aspirations of an African farmer recently in receipt of land).

218. See Helena Dolny & Heinz Klug, *Land Reform: Legal Support and Economic Regulation*, in SOUTH AFRICAN REVIEW 6, at 322 (Glenn Moss and Ingrid Obery eds., 1992).

219. See David Cooper, *Ownership and Control of Agriculture in South Africa*, in AFTER APARTHEID, *supra* note 144, at 47; see also generally C.M. Rogerson, *Late Apartheid and the Urban Informal Sector*, in AFTER APARTHEID, *supra* note 146, at 144, 132-45 (analyzing the weaknesses of the urban economy in South Africa).

220. See WILSON & RAMPHELE, *supra* note 141, at 311; see also John Bruce, *The Variety of Reform: A Review of Recent Experience with Land Reform and the Reform of Land Tenure, with Particular Reference to the African Experience* 3 (Sept. 1989) (unpublished paper, on file with the *Brooklyn Journal of International Law*); KING, *supra* note 203, at 58.

221. See Bruce, *supra* note 220, at 3.

222. See Daisy M. Jenkins, *From Apartheid to Majority Rule: A Glimpse Into South Africa's Journey Towards Democracy*, 13 ARIZ. J. INT'L & COMP. L. 463, 472

cannot be farmed can be redistributed to the homeless population and used for housing.²²³ Land redistribution also can address the hunger crisis by encouraging subsistence farming. Land should be redistributed such that beneficiaries receive no less than the minimum amount of land necessary to achieve self-sufficiency.²²⁴

Improving the economic conditions of Africans will improve the entire country's economy by increasing internal demand for goods and services. The economy needs increased demand from Africans because they comprise the majority of the population and the wealth of the remaining population is insufficient to expand economic growth. Economic demand from Africans is limited because of their poverty.²²⁵ If the per capita income of the poor rises even slightly, this can significantly improve internal demand.²²⁶ The extensive poverty of such a large proportion of the population causes the economy to have a structure that discourages the production of the goods that are needed most.²²⁷

Redistribution must be executed in a manner that also gives women access to direct control of land. If these safeguards are not implemented, redistribution could create a landless class of women. In Kenya, for example, the country converted the tenure of most farmland to private individual ownership following independence.²²⁸ However, private ownership was vested in men, which enabled them to sell their property out from under their families and leave women landless.²²⁹

The democratically elected government should also consider the capacity for persons who are being considered as potential beneficiaries of land redistribution in rural areas to be successful farmers.²³⁰ Africans with limited agricultural skills should receive less land and be encouraged to engage in coop-

(1996).

223. See S. AFR. CONST. ch. 2, § 26(1)-(2).

224. It has been suggested that 15 hectares (approximately 37.5 acres) per household is the minimum amount of land necessary to achieve self-sufficiency. See PAC, *supra* note 2, at 14.

225. See Glaser, *supra* note 144, at 80.

226. See KING, *supra* note 203, at 67.

227. See *id.* at 52.

228. See Bruce, *supra* note 220, at 18.

229. See *id.*

230. See PAC, *supra* note 2, at 17-18.

erative farming. Those with more skills should receive more land.

The standard to judge the wisdom of land redistribution should be whether Africans would be better off with no change. The fact that this cannot be answered affirmatively bolsters the wisdom of implementing reform. Africans must be absorbed into the economic system so that they can afford to exercise their newly acquired rights. The right to buy property and to live anywhere in South Africa is meaningless without the economic wherewithal to do so.

3. Land Should Be Redistributed to Redress Harms Caused by the 1913 and 1936 Land Acts and by the Forced Removals Instituted Under the Policy of Separate Development.

The 1913 and 1936 Land Acts, as explored earlier, devastated Africans.²³¹ To redress these harms, land should be redistributed to former Black landowners. Rural Blacks who endured the hardships of the migrant labor system and exploitation by White farmers should have reasonable opportunities to obtain land because these individuals are bound to demand, and are entitled to, such compensation as a matter of basic justice.

Under the same rationale, rural land should be redistributed to the African landowners who were dispossessed of their property by the government's policy of forced removals.²³² Non-property owners who endured the destruction of their communities and the profound disruptions in their lives from forced removals should be given access to land for similar reasons.²³³

IV. IMPLEMENTING COMPREHENSIVE RURAL LAND REDISTRIBUTION

The Constitution permits government expropriation of property "in the public interest" and "subject to compensation."²³⁴ Arguably, all of the rationales for rural land redistribution explored herein are within the public interest, either

231. See *supra* Part II.C.

232. See *supra* Part II.E.

233. See *supra* Part II.E.

234. S. AFR. CONST. ch. 2, § 25(2)(a)-(b).

explicitly or implicitly.

The Constitution gives South African courts broad discretion in determining compensation.²³⁵ Courts do not simply determine the amount of compensation; they also determine the timing and manner of payment.²³⁶ All three of these aspects of compensation must be "just and equitable, reflecting an equitable balance between the public interest and the interests of those affected."²³⁷ In balancing these interests, courts must consider the property's: (i) current use; (ii) history of acquisition and use; (iii) market value; (iv) the extent of direct state subsidy in the property; and (v) the purpose of the property's expropriation.²³⁸

The Constitution does not state in whose favor any particular factor should weigh. These factors, therefore, will be considered on a case-by-case basis and the party in whose favor a particular factor weighs will vary from one case to the next. Also the balance between the "public interest" and "the interests of those affected" is an equitable one, rather than an equal one, which gives the court additional flexibility in determining compensation.²³⁹ Accordingly, some factors will be given more weight than others, depending on the particular facts.

Given the broad discretion of courts to determine compensation, the government can expropriate property and satisfy the constitutional standard for just and equitable compensation by paying moderate, or even nominal, compensation and by making such payments over a lengthy period of time which would decrease the expense of large scale government expropriations. Such outcomes are likely in cases where the property has been acquired below market values following the 1913 Act and has had substantial direct government subsidy and where the purpose of the expropriation is to give restitution to victims of apartheid with claims to particular plots of land. Moderate or nominal compensation would manifest a reasonable compromise between those who believe property owners should receive no compensation and those who believe property owners should receive full market value.²⁴⁰ Limited compensation

235. *See id.* ch. 2, § 25(3).

236. *See id.*

237. *Id.*

238. *See id.* ch. 2, § 25(3)(a)-(e).

239. *Id.* ch. 2, § 25(3).

240. Scholars and organizations advocating for land reform have expressed

is more palatable to Africans who are seeking a return to the land and who believe property owners have already been enriched unjustly. White property owners will find a government expropriation of property less egregious if they receive some compensation.

With regard to comprehensive land reform under legislative or other governmental action, the proposals for land redistribution should be guided by a set of clearly defined goals that the policy is designed to achieve. In order to be successful, land reform must be tailored to South Africa's unique cultural heritage and economic and political conditions.²⁴¹ The goals, structure, and implementation of land redistribution should be identified and formulated through locally-based democratic structures.²⁴² Such procedures should be consistent, should be fair, and should comport with the values, rights, and interests that the South African people have articulated in their Constitution or elsewhere. It is undesirable for these reforms to be implemented in a manner that replicates the procedures of apartheid (e.g., government action under administrative decree). Proposals should be analyzed thoroughly to discern the proposed beneficiaries of those reforms and be subject to scrutiny by the people affected by them.²⁴³ The officials who implement land reform should be held accountable to the people.²⁴⁴

Although locally-based decision making is the ideal paradigm, such a process is impeded by the significant level of illiteracy and the lack of familiarity with democratic processes among the Black population. Despite these barriers, locally-based decision making should be pursued in the name of democracy and fairness. Encouraging Black participation in the political process will require outreach and education. Given the

differing views on the compensation issue. See, e.g., Dolny & Klug, *supra* note 218, at 329 (unrecovered investment or loss of future profits); ANC, *supra* note 2, at 29 (balance must be struck between necessity for compensation and the need to compensate historically disenfranchised Black South Africans); PAC, *supra* note 2, at 13 (compensation on the improvements only); KING, *supra* note 203, at 67 (stating generally that compensation can be in the form of government bonds to force property owners to invest in government-owned or sponsored industry or infrastructure).

241. Cf. KING, *supra* note 203, at 4.

242. See ANC, *supra* note 2, at 29; see also DOLNY & KLUG, *supra* note 218, at 322.

243. See WILSON & RAMPHELE, *supra* note 141, at 313.

244. See *id.* at 314.

highly technical nature of land use decision making, it is neither anticipated nor desired that the general population make land use decisions directly. Democracy, however, requires that the general population have an opportunity to elect local representatives who will make decisions on their behalf and be held accountable to them. In order to implement the goals of land redistribution, the post-apartheid government must identify the beneficiaries of reform.

Pursuant to comprehensive land reform, the post-apartheid government must establish forms of tenure. The democratically elected government confronts the tension between its desire to make direct access to land to a significant portion of the Black rural population a realizable goal and its desire to encourage investment and productive land use through private and secure forms of tenure. Decisionmakers should strive to advance both of these objectives and therefore embrace different systems of tenure. Furthermore, the forms of tenure chosen are consequential from a production standpoint. Although tenure is not the most pivotal factor in production, secure forms of tenure combined with assistance can enable farmers to generate greater productivity and welfare.²⁴⁵

There is controversy between those who endorse communal tenure and those who advocate individual ownership. Some believe that land should be held communally to prevent White farmers from buying Blacks' land, and leaving them landless, and to limit the widening of the economic gap between rural Blacks and Whites.²⁴⁶ The most tenable options appear to be private freehold tenure, limited communal tenure, and limited nationalization. Given the country's capitalist, private enterprise economy, tenure probably will evolve toward private individual ownership to comport with the economic system.²⁴⁷

In addition to traditional, private individual ownership, other tenure options include leaseholds from community land trusts (CLTs).²⁴⁸ Under a CLT, a private, non-profit corpora-

245. See generally John J. Carroll, *Agrarian Reform, Productivity and Equity: Two Studies*, in *SECOND VIEW FROM THE PADDY* 15, 16-17, 19 (Ledesma et al. eds. 1983).

246. See MALLABY, *supra* note 98, at 149-50 (discussing the concerns of Aninka Claasens and Zola Skweyiya, both of whom are members of the ANC).

247. See Bruce, *supra* note 220, at 17.

248. THE INSTITUTE FOR COMMUNITY ECONOMICS, *THE COMMUNITY LAND TRUST LEGAL MANUAL* 1-7 (1991) [hereinafter CLT MANUAL].

tion acquires and holds land for the benefit of a community and provides affordable access to land and housing for community residents.²⁴⁹ Generally, the CLT is managed by a board of directors comprising current and future lessees and community people, who live adjacent to, but not in, the CLT.²⁵⁰ By limiting the tenant's ability to benefit from the entire appreciated value of her plot or house when she sells, the CLT keeps the land affordable for subsequent tenants.²⁵¹ CLTs can meet the needs of communities unable to participate in the market through other channels. This form of tenure is a satisfactory medium between communal tenure and traditional private ownership. Like communal tenure, it increases the accessibility of poor people to the land and emphasizes the values of cooperation and mutual assistance. Unlike full-scale nationalization and cooperatives, it is voluntary, not coercive.

Communal tenure, where every citizen of a group has access to the land of that group as a birthright, is a less viable form of tenure.²⁵² First, unlike during pre-colonial periods, land is scarce.²⁵³ Second, communal tenure discourages conservation and improvement because farmers do not benefit from the increased value of the land.²⁵⁴ Third, financing production is difficult because banks generally are unwilling to extend credit on property on which they cannot obtain a lien. Fourth, communal tenure is vulnerable to nepotism.²⁵⁵ Finally, it is not clear that the majority of Africans want to return to communal tenure. They may feel similar to Tanzanians following independence in their country in the 1960s and may reject any form of cooperative farming.²⁵⁶ Following indepen-

249. *See id.* at 1-7, 1-10.

250. *See id.* at 1-7.

251. *See id.* at 1-9.

252. *See* MALLABY, *supra* note 98, at 137.

253. *See id.*

254. *See* KING, *supra* note 203, at 358-59. CLTs resemble traditional forms of communal tenure because they are a form of tenure that increases access to land to more people and land is managed for the benefit of a group. *Compare* CLT MANUAL, *supra* note 248, at 1-10, *with* KING, *supra* note 203, at 356-57. However, CLTs mitigate the risk of members using the land unproductively by permitting individuals to benefit from some of the increased value of the land. *See* CLT MANUAL, *supra* note 248, at 1-10.

255. *See* MALLABY, *supra* note 98, at 141; *see also* PAC, *supra* note 2, at 19.

256. *See* JOHN P. POWELSON & RICHARD STOCK, *THE PEASANT BETRAYED* 49-51, 58 (1987).

dence in 1961, Tanzania's President Nyerere effectively abolished private ownership and implemented *Ujamaa*, or African socialism, to prevent greater socioeconomic inequity among rural people.²⁵⁷ The government consolidated villages with land to be farmed collectively, which made it easier for the State to provide technical assistance and other services.²⁵⁸ The people rejected *Ujamaa* despite the underlying theory that it conformed to African values of cooperation and mutual assistance.²⁵⁹ By 1973, only fifteen percent of land had been collectivized, and much of this occurred by coercion.²⁶⁰ The results undermined the notion that African socialism inhered naturally in African peasants.

Tanzania's failed attempt at land reform should inform the approach taken by South Africa. The experiences in Tanzania specifically, and the detriments of communal tenure in general, suggest that communal tenure presents unique risks. These experiences and detriments do not, however, necessarily imply that communal tenure should be rejected out of hand. Communal tenure may be a reasonable option in communities such as Transkei where land currently is used in that manner.²⁶¹ At least one scholar has suggested that factors unique to Tanzania may account for the failures of *Ujamaa*.²⁶² These factors include the poor administration of the program, the poor returns to labor in the collective farms, the difficulties of organizing communal work among ethnically diverse people, and the lack of clear land tenure arrangements for land farmed individually and communally.²⁶³

A third option is the nationalization of some land. It has been argued that "[w]here beneficiaries of redistribution programs are provided with security of tenure, both freeholds and long-term leaseholds from the state can be viable options."²⁶⁴ Kenya, which has utilized freeholds, and Zambia, which has

257. See *id.* at 50, 52-53; see also JULIUS K. NYERERE, *FREEDOM AND SOCIALISM* 2 (1968).

258. See POWELSON & STOCK, *supra* note 256, at 54-55, 57.

259. See *id.* at 54, 58.

260. See *id.* at 54-55, 57.

261. Interview with Enoch M. Gqomo, Regional Treasurer, African National Congress, in New York, N.Y. (Sept. 15, 1993).

262. See Bruce, *supra* note 220, at 5.

263. See *id.*

264. *Id.* at 24.

opted for long-term leaseholds, have had satisfactory experiences with this approach in terms of production.²⁶⁵ If the state leases land to citizens, the security of tenure depends on the terms of the lease and the effectiveness of the land administration process.²⁶⁶ In Somalia, for example, land reform has been less successful than in Zambia.²⁶⁷ The leasehold system in Somalia was poorly structured and failed to protect lessees from a land-grabbing bureaucracy.²⁶⁸

Full scale nationalization and subsequent redistribution appear untenable as White farmers and local banks will vehemently oppose such a policy. The international community, a primary source of investment capital, will be similarly opposed. This tactic also would disrupt agricultural production for local and export use and discourage foreign investment.

Last, but certainly not least, the post-apartheid government must identify the land available for comprehensive land reform. The post-apartheid government could make available for land redistribution indebted farmland, underutilized or wastefully used land, land acquired through nepotism or corruption, and land held for speculation.²⁶⁹ To make additional land available for redistribution, the democratically elected government could limit land ownership by size and by number of holdings,²⁷⁰ and implement a progressive tax scheme to encourage large landowners to dispose some of their holdings.²⁷¹

Although virtually all farmland is indebted, the democratically elected government could define the criteria for determining when land is hopelessly indebted and take possession of those properties. In 1991, the Development Bank of Southern Africa, which studies land issues for the government, determined that 3,000 White farmers were hopelessly indebted.²⁷² These farms comprised approximately ten million acres.²⁷³ In addition the democratically elected government also may distribute the land that it holds in trust.

265. *See id.*

266. *See id.*

267. *See id.*

268. *See id.*

269. *See* ANC, *supra* note 2, at 27.

270. *See* PAC, *supra* note 2, at 12.

271. *See generally* ANC, *supra* note 2, at 27.

272. *See* MALLABY, *supra* note 98, at 148-49.

273. *See id.* at 149.

V. ADJUDICATING INDIVIDUAL CLAIMS TO LAND

There are several issues with respect to adjudicating individual claims to land. The first issue is the type of system that would be established to hear such claims. Numerous scholars and organizations have endorsed establishing a system of land claims courts.²⁷⁴ This suggestion took fruition, at least to some extent, with the swearing-in of South Africa's Land Claims Court on March 29, 1996.²⁷⁵ The Land Claims Court takes claims from the Commission on the Restitution of Land Rights, which mediates land claims arising from the forced removals after the enactment of the 1913 Act.²⁷⁶ If mediation fails, claims are referred to the Land Claims Court for adjudication.²⁷⁷ The Land Claims Court can order restitution to successful claimants in the form of land or other remedies, for which the state bears the burden of compensation.²⁷⁸ Both the Land Claims Court and the Commission on the Restitution of Land Rights were formed under the Restitution of Land Rights Act of 1994.²⁷⁹

As one commentator recently has noted, "[i]t is too early to gauge the success of [this] restitution scheme, although a handful of claims have been settled."²⁸⁰ It has been estimated, however, that the current Land Claims Court system will only affect approximately two percent of the land in South Africa.²⁸¹ With respect to the small percentage of claims that the Land Claims Court system does cover, a major difficulty that is likely to surface will be the inability of claimants to substantiate their claims. In most cases, South Africans will not have documentation to support claims that their land was dispossessed in the furtherance of a specific discriminatory law, either because they never had such records or because the

274. See, e.g., ANC, *supra* note 2, at 29; SACHS, *supra* note 2, at 130; Dolny & Klug, *supra* note 218, at 327. Other countries, such as Canada and Australia, have implemented land courts to address land reform issues.

275. See Mutua, *supra* note 154, at 94 n.187.

276. See *id.* at 94.

277. See *id.*

278. See *id.*

279. Restitution of Land Rights Act 22 of 1994. For a detailed discussion of this statute, see 1994 ANNUAL SURVEY OF SOUTH AFRICAN LAW 12-20 (1995) [hereinafter 1994 ANNUAL SURVEY].

280. *Id.*

281. See *id.*

records were destroyed along with other personal effects during forced removals.²⁸² Therefore, courts will have to rely on oral testimony.²⁸³ The Land Claims Court system is further limited by the requirement that claims must be brought within a period of approximately three years after the commencement of the Restitution of Land Rights Act of 1994.²⁸⁴ This is a relatively short period of time in light of the many years during which Black South Africans were dispossessed of their land by the White minority government.

Given the limited scope of the Land Claims Court, as well as the inherent difficulties in substantiating claims, South Africa's current land claims court system can only function as a supplement to a government program of comprehensive land reform. The beneficiaries of such a system would be a broader segment of the population, based on the other rationales expressed herein or on other more flexible criteria (*e.g.*, need).

VI. CONCLUSION

Redistributing rural land to Black South Africans is a valid form of reparations to redress the profound and extensive social and economic harm they have endured under apartheid. It is also a necessary element in the creation of the just and united South Africa envisioned by the Constitution and in the integration of Black South Africans in the political and economic mainstream of South Africa. The challenges to implementing comprehensive land reform are formidable—expense, time and White political opposition among them. However, these obstacles are not sufficiently great to forego comprehensive land reform entirely. This first democratically elected, post-apartheid government faces other significant challenges in addition to those relating to the land. Despite the daunting tasks which this new government faces, land issues must be addressed. Accordingly, it is expected that this government will

282. See 1994 ANNUAL SURVEY, *supra* note 279, at 13-14. The Land Claims Court system only permits restitution to persons who were dispossessed of their land in furtherance of a discriminatory law. See *id.* at 13.

283. While it should be noted that the Restitution of Land Rights Act of 1994 provides for flexible evidentiary rules to deal with this problem, the Land Claims Court ultimately decides how much weight such evidence is given. See *id.* at 16. This promises to be a difficult task at best.

284. See *id.* at 14.

not immediately address comprehensive land reform, but do so within a reasonable period of time. Given the progressive nature of this government, a Constitution which unambiguously authorizes comprehensive land reform and the afterglow of the emergence from the apartheid era, the ultimate barrier to comprehensive land reform will be the lack of political will. Hopefully, this government will embrace land reform and seize the opportunity to create a just and united South Africa and emerge as a model for the world.