PROPERTY'S ROLE IN THE FUNDAMENTAL POLITICAL STRUCTURE OF NATIONS: THE SOUTHERN AFRICAN EXPERIENCE

HEINZ KLUG*

INTRODUCTION

There is a dominant assumption that private property is a fundamental element in the protection of "all other rights" and serves as a bulwark against oppressive government.[1] Yet, we also recognize that historically there has been an intimate relationship between the power of the State and property, including private property. As the prominent legal realist, Felix S. Cohen, famously argued in his *Dialogues on Private Property*, private property may best be described by the statement:

> To the world:
> Keep off X unless you have my permission, which I may grant or withhold.
> Signed: Private citizen
> Endorsed: The State[2]

While this statement reflects a core element of the relationship between property and the State, its focus is on the relations between people over access to resources. It does not address how the relationship between the State and citizens might be complicated by the State's endorsement of any particular claims to property. This essay will reflect on the case of southern Africa—Botswana, South Africa, and Zimbabwe in particular—to consider the relationship between the State, property, and the fundamental political structure of nations.

Legitimacy—both democratic and constitutional—is a key resource for a State. If the relationship between king and subject was

* Evjue-Bascom Professor, University of Wisconsin Law School, and Honorary Senior Research Associate, University of the Witwatersrand Law School.

1. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (Kermit L. Hall ed., 3d ed. 1992).

2. Felix S. Cohen, *Dialogues on Private Property*, IX RUTGERS L. REV. 357, 374 (1954).

mediated by the recognition of independent rights to property from the Magna Carta onwards, the relationship between the State and different forms of tenure in the post-colonial context—including indigenous, communal, colonial, as well as private ownership and a range of new forms—becomes crucial. In his seminal book, *Citizen and Subject*, Mahmood Mamdani describes the link between land rights and governance in colonial Africa and how the distinction between different forms of property recognized by the State has perpetuated colonial forms of domination in the post-colonial era.[3] Mamdani argues that this distinction gives the colonial State a particular essence—one that lies in its institutional segregation, creating what he terms a "bifurcated state," reflecting the dynamics of direct and indirect rule.[4] In southern Africa this bifurcation was reflected initially in a distinction between private property and communal land and later as a justification, during the colonial period, for the exclusion of the African majority from political participation.[5] While racist ideology would later come to predominate as a rationale for political exclusion, it was the initial exclusion from political citizenship, based on the holding of private property, that served as a rationale for the bifurcated colonial State in the settler colonies of the Cape and Southern Rhodesia.

The relationship between political structure and property is thus embedded in the history of southern Africa. From the dawn of the colonial era, a process of violent dispossession began. It took over two hundred fifty years and culminated in South Africa with the adoption of the Natives Land Act of 1913.[6] That Act created a legal structure that sought both to legitimize the history of dispossession and to prevent the African majority's future access to land. While the pattern of colonial settlement and the creation of African reservations

3. *See* MAHMOOD MAMDANI, CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM (1996).

4. MAMDANI, *supra* note 3, at 16–18.

5. *See* SOL (SOLOMON TSHEKISHO) PLAATJE, NATIVE LIFE IN SOUTH AFRICA (Longman African Classics 1987) (1916); Sam Moyo, *The Land Question in Southern Africa: A Comparative Review, in* THE LAND QUESTION IN SOUTH AFRICA (Lungisile Ntsebeza & Ruth Hall eds., 2007); BETHUEL SETAI, THE MAKING OF POVERTY IN SOUTH AFRICA (1998).

6. Natives Land Act 27 of 1913 (S. Afr.). *See* William Beinart & Peter Delius, *The Native Land Act of 1913: A Template But Not a Turning Point*, *in* LAND DIVIDED, LAND RESTORED: LAND REFORM IN SOUTH AFRICA FOR THE 21ST CENTURY (Ben Cousins & Cherryl Walker eds., Jacana Press 2015).

(later called "bantustans" and "homelands" in apartheid South Africa) was repeated in Zimbabwe (formerly Southern Rhodesia), the relationship between land and people in Botswana followed a slightly different pattern because the former British Protectorate, Bechuanaland, was not a settler colony. As a result, most of the arable, rural land in Botswana remained under the control of traditional authorities until after its independence in 1966. At that time the new government began to introduce a series of tenure reforms that both changed the relationship between traditional authorities and land and expanded the area of land available for private ownership. While there are clear differences in these three cases, the fundamental distinction lies in the level of dispossession that distinguishes the settler colonies of South Africa and Rhodesia from the Bechuanaland Protectorate.

In order to explore the relationship between property and the structure of the State, this essay will first address the connection between land tenure, sovereignty, and legitimacy. This will be followed by a brief outline of the general history of land reform before focusing more directly on the relationship between land and the State in southern Africa. Finally, the essay will look at tenure diversity as a basis for restructuring the relationship between democratic legitimacy and the post-colonial State in southern Africa.

I. LAND TENURE—SOVEREIGNTY, LAND, AND LEGITIMACY

While property extends far beyond the idea of land ownership, and wealth is no longer based primarily on landholdings, the focus of this essay will be on property in land. This requires recognition of the fact that in southern Africa, at least, the manner in which property in land is held varies greatly from fee simple tenure (the notion of full, private ownership) to a range of other tenure forms including common ownership, leasehold, public ownership, and various indigenous forms of landholding and control. This diversity means that it is important to understand that when considering rights to land, we are really looking at a range of land tenure arrangements and not simply full private ownership of property. In addition to the variety of tenure forms, it is also necessary to recognize that many of these forms may be held by completely different social and legal entities including the state, legal entities such as corporations or

trusts, private individuals, or even communities. While these different forms of tenure are often determined by the history, location, and use of the relevant parcels of land, another broad and significant distinction is between rural and urban land. Although this is an artificial distinction, it maps the forms of tenure onto geographic and use distinctions that fundamentally impact the nature of tenure at various times and locations. Furthermore, the distinction between rural (or agricultural) land and urban (or housing) property is a distinction of fundamental importance to understanding the relationship between the State and property in southern Africa.

The particular histories of different countries in the region and the evolution of property relations within each State had significant consequences for the nature of each State during the colonial period. In the post-colonial era, it is the legacy of these histories—and how they have shaped relations between public authorities and the governed—that is of central concern to the future of democracy in the region. Democratic legitimacy is, in this sense, tied to the processes of land reform and restitution that have been undertaken in the post-colonial era. Where these processes have stalled, or failed, there remains a sense of betrayal and a belief that the country still is not fully decolonized or returned to the people. In other contexts the types of land reform or the transfer of property through illegitimate means has led to impoverishment and even international isolation. In this sense, it may be argued that the political structure of the post-colonial states of southern Africa have indeed been fundamentally shaped by the nature of property relations. This is especially so in the cases of Zimbabwe and South Africa, where the dispossession of land was a central grievance of the liberation struggles. However, it is also significant to the structure of post-colonial Botswana, where the relationship between communal land and public authority remained a key area of contestation in shaping local governments, particularly in the rural villages of the country.

Dispossession and forced removals were central to the colonial and apartheid projects. These processes were not only the basic means of colonization but continued late into the twentieth century, as the darkest face of apartheid policy,[7] justifying the international community's

7. *See* COSMAS DESMOND, THE DISCARDED PEOPLE: AN ACCOUNT OF AFRICAN RESETTLEMENT IN SOUTH AFRICA (1971).

designation of apartheid as a crime against humanity.[8] It is this legacy—in which millions were forced from their homes and declared pariahs in the land of their birth;[9] in which communities were dismantled brick by brick and their members scattered across the most barren wastelands of the country;[10] in which people clung to the land and refused to give up their claims[11]—that set the stage for the recognition and shaping of property rights in post-apartheid South Africa. In Zimbabwe, the liberation movement's struggle was premised on the demand for land, and the history of post-independence Zimbabwe has been shaped by shifting struggles between the government and white farmers that culminated, at the turn of the century, in fast-track land reform and the subsequent collapse of the economy. While dispossession of land was not a direct driver of the relationship between the colonial State and the communities in the Bechuanaland Protectorate, the different Tswana chiefdoms that made up the Protectorate all experienced conflict over land as a result of state formation and colonial expansion throughout the late eighteenth and early nineteenth centuries.

In South Africa, the history of land dispossession, primarily of rural land, now defines the relationship between the State and property. In addition to the legacy of dispossession, the framework of land law inherited by post-apartheid South Africa has been characterized by a number of elements which have undermined its legitimacy and have had profound consequences for the establishment of a functional system of land law. These elements include a hierarchy of land tenures in which freehold title was privileged; the fragmentation of land law in different parts of the country; the lack of an adequate system for recording all land rights; the prevalence of bureaucratic discretion over the land rights of many landholders (particularly in the former Bantustans); and the need to establish new laws and forms

8. *See generally* G.A. Res. 2202 (XXI), The Policies of Apartheid of the Government of the Republic of South Africa (Dec. 16, 1966); G.A. Res. 2396 (XXIII), The Policies of *Apartheid* of the Government of South Africa (Dec. 2, 1968); G.A. Res. 3068 (XXVIII), United Nations General Assembly resolution: International Convention on the Suppression and Punishment of the Crime of *Apartheid* (Nov. 30, 1973).

9. *See* PLAATJE, *supra* note 5, at 6.

10. *See* 1–5 SURPLUS PEOPLE PROJECT, FORCED REMOVALS IN SOUTH AFRICA: THE SURPLUS PEOPLE PROJECT REPORTS (1983).

11. *See* TRANSVAAL RURAL ACTION COMMITTEE, A TOEHOLD ON THE LAND: LABOUR TENANCY IN THE SOUTH EASTERN TRANSVAAL (1988).

of regulation to address this history.[12] In the period since 1994 there have been major efforts to address this legacy. Although the degradation and pain of the communities and individuals who had these policies of dispossession and forced removal thrust upon them can never be adequately documented, there is an intimate link between these struggles and the shaping of property rights in South Africa today.[13] As a result, the legacy of dispossession and forced removals has become as central to building justice in post-apartheid South Africa as these processes once were in perpetuating the original injustices of apartheid.

A. History of Land and Agrarian Reform

The history of agrarian reform in the twentieth century reveals a range of circumstances giving rise to a diverse pattern of rural struggles, government interventions, and legal reform. The most far-reaching processes of land redistribution take place at moments of extreme political change, whether in the context of violent revolutions or post-war contexts. Beginning with the Mexican revolution and continuing through the Russian and Chinese revolutions, agrarian reform was characterized by the appropriation of land and its transfer into different forms of collective land tenure, from village-based holdings to massive state-run collective farms. After the Second World War, agrarian reform played a major role in the reconstruction of Japan, Korea, and Taiwan; but in these cases the land was transferred to the existing individual land users with compensation paid to former landlords. Processes of wide-scale land reform in post-colonial settings, such as the million-acre campaign in Kenya[14] and the left-wing electoral victory in Chile,[15] were pursued in legal

12. *See* UNTITLED: SECURING LAND TENURE IN URBAN AND RURAL SOUTH AFRICA (Donna Hornby et al. eds., 2017) [hereinafter UNTITLED].

13. *See* DESMOND, *supra* note 7; LAURINE PLATZKY & CHERRYL WALKER, THE SURPLUS PEOPLE: FORCED REMOVALS IN SOUTH AFRICA (1985).

14. The million-acre campaign in Kenya involved the transfer of one million acres of land held by white settlers in the "white" highlands to twenty-five thousand Africans in a large land reform and resettlement scheme. *See* CHRISTOPHER LEO, LAND AND CLASS IN KENYA (1984); John W. Harbeson, *Land Reforms and Politics in Kenya, 1954–70*, 9(2) J. OF MOD. AFR. STUD., 231 (1971).

15. The election of Salvador Allende in Chile saw a dramatic expansion of the existing land reform program. *See* Joseph R. Thome, *Law, Conflict, and Change: Frei's Law and Allende's*

environments that dramatically limited the pace and depth of the reform process. One limiting factor was the process of resettlement in cases where land was obtained for purposes of redistribution, and communities or individuals were required to uproot and move to the newly acquired lands. Not only was this a costly and often conflicted process, but the beneficiaries of such reforms often lacked local knowledge of the land or the capacity to place it into production without major inputs of capital or government aid. Despite payment of compensation according to the agrarian-reform laws, the reaction of landed interests, often allied with conservative domestic and international forces, led to the reversal of agrarian reforms, or counter-reforms in which land was returned to the previous owners.[16]

Since the end of the Cold War, the impetus for agrarian reform has come less from demands for land redistribution than from demands for reparation or restitution for past injustices. In former state-socialist countries, there was pressure for the privatization of state-owned land as part of the market reform process.[17] At the same time, land hunger and social movements representing the rural landless in countries such as Brazil and South Africa have continued to raise questions of redistribution and tenure reform. In the United States, claims for restitution were first recognized by the Indian Claims Commission ("ICC"); however, the ICC, which attempted to resolve claims by Native American tribes against the United States government, could only grant monetary compensation.[18] Today, First Nation and Native American land claims represent both the demand for the recognition of past injustice and the demands for political recognition and the right to governmental authority over communities and natural resources. United Nations

---

Agrarian Reform, in SEARCHING FOR AGRARIAN REFORM IN LATIN AMERICA 188 (ed. William C. Thiesenhusen ed., 1989).

16. After both the military coup in Chile in 1973 and the defeat of the Sandinista government in Nicaragua in 1990, there were significant reversals of the prior land reforms. *See* Lovell S. Jarvis, *The Unraveling of Chile's Agrarian Reform, 1973–1986, in* SEARCHING FOR AGRARIAN REFORM IN LATIN AMERICA, *supra* note 15, at 240; LAURA J. ENRÍQUEZ, HARVESTING CHANGE: LABOR AND AGRARIAN REFORM IN NICARAGUA, 1979–1990 (1991).

17. *See* RENEE GEOVARELLI & DAVID BLEDSOE, U.N. FOOD & AGRICULTURE ORG., LAND REFORM IN EASTERN EUROPE, WESTERN CIS, TRANSCAUCUSES, BALKANS, AND EU ACCESSION COUNTRIES, U.N. Job No. AD878 (2001), ftp://ftp.fao.org/docrep/fao/007/AD878E/AD878E00.pdf.

18. U.S. INDIAN CLAIMS COMMISSION, FINAL REPORT (1979), http://www.narf.org/nill/documents/icc_final_report.pdf.

recognition of the rights of indigenous peoples has also raised questions about the territorial claims of indigenous communities around the world.[19] The South African land-claims process, initiated by the first post-apartheid constitution in 1994, explicitly recognized the need to return the land and—only in exceptional circumstances—to substitute monetary compensation to those who lost their land as a consequence of racially discriminatory laws between 1913 and the first democratic elections in 1994.[20] In contrast to the steady but constrained process of land reform in South Africa, the conflict over land and its fast-track land reform in neighboring Zimbabwe has highlighted the continued salience of agrarian reform in the twenty-first century.

B. The Role of the Law in the Protection of Property and Land Reform

Law is central to the definition and protection of property rights, but it is also a key element in the processes of agrarian reform. While all significant reforms have usually accompanied major shifts in political and social power, the role of law has been central to the justification and stabilization of changes in ownership and tenure relations. Land commissions and special land courts have enabled restitution processes and mediated conflicts between tenants and landlords from South Africa to Eastern Europe. However, courts have also played a major role in resisting land reform efforts in post-independence India[21] and, under the government of President Frei, in Chile.[22] Whether through statutory change or constitutional mandate, the law has, in some places, fundamentally altered the existing gendered relations to land access, particularly under indigenous or customary law as well as in circumstances where traditional authorities have retained or regained control over the allocation of

19. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007); *see also* U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, INDIGENOUS PEOPLES AND THE UNITED NATIONS HUMAN RIGHTS SYSTEM, at 6, Fact Sheet No. 9/Rev 2 (2013), http://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf.

20. *See* S. AFR. (INTERIM) CONST., 1993; Restitution of Land Rights Act 22 of 1994 (S. Afr.).

21. *See* John Murphy, *Insulating Land Reform from Constitutional Impugnment: An Indian Case Study,* 8 S. AFR. J. ON HUM. RTS. 362 (1992).

22. Thome, *supra* note 15.

land and the adjudication of disputes.[23] At the other end of the legal spectrum, law plays a central role in creating and securing a market in land rights as well as resolving conflicts between land owners. Another important role of law in agrarian reform has been in the regulation of agricultural markets, production, and financing, which are central to the reshaping of a rural economy as it responds to the needs and opportunities created by new tenure relations and participants on the agrarian landscape.

The State's power of eminent domain has historically been the most effective means of achieving agrarian reform. At the same time, the use of this power to expropriate private property, whether from landlords in India and Chile or large landowners in Nicaragua and Zimbabwe, has led to heightened social and legal conflict. It was only under the umbrella of military occupation or war—for example, in Japan,[24] South Korea,[25] and Taiwan[26]—that the transfer of large amounts of land from landlords to tillers and the mass redistribution of property rights, with government compensation used to stimulate industrial investment, was swiftly and effectively achieved. In other contexts, government use of expropriation has faced costly legal challenges, including constitutional challenges to the taking of property for the purpose of redistribution and endless litigation over the use of related legal mechanisms (such as ceilings on landholdings, effective use requirements, and other measures designed to force the owner to relinquish control over significant portions of their landholdings). Challenges to the amount and form of compensation

23. The tension between traditional authorities, "customary" law, and the recognition of gender equality in many new constitutions in Africa and across the developing world has produced ongoing debates and legal struggles over women's rights to land in these contexts. *See* Sindiso Mnisi Weeks, *Women Seeking Justice at the Intersection Between Vernacular and State Laws and Courts in Rural KwaZulu-Natal, South Africa*, *in* 2 THE NEW LEGAL REALISM: STUDYING LAW GLOBALLY 113 (Heinz Klug & Sally Engle Merry eds., 2016).

24. *See* RONALD DORE, LAND REFORM IN JAPAN (2013); Toshihiko Kawagoe, *Agricultural Land Reform in Postwar Japan: Experiences and Issues* (The World Bank Policy Research, Working Paper No. WPS2111, 1999).

25. *See* Inhan Kim, *Land Reform in South Korea Under the U.S. Military Occupation, 1945–1948*, 18(2) J. COLD WAR STUD. 97, 97–129 (2016); Yong-Ha Shin, *Land Reform in Korea, 1950*, 5 BULL. POPULATION AND DEV. STUD. CTR. 14 (1976), http://s-space.snu.ac.kr/bitstream/10371/84988/1/2.LAND_REFORM_IN_KOREA__1950%5dYong-Ha%20Shin.pdf.

26. *See* CHEN CHENG, LAND REFORM IN TAIWAN (1961); Li Duan, Land Reform, Its Effects on the Rice Sector, and Economic Development: Empirical Case Study in Taiwan (May 2015) (unpublished thesis, University of California-Berkeley), https://www.econ.berkeley.edu/sites/default/files/Li%20Duan%20%281%29.pdf.

offered by the government after expropriation have also tied up land reform programs. In the most recent wave of land reform, the emphasis—often encouraged by multilateral financial institutions—has shifted from expropriation to the privatization of state property, market-assisted land reform, and the principle of "willing-buyer-willing-seller."[27]

A central feature of these most recent processes of agrarian reform has been the reassertion of individual land titling as the goal of agrarian reform. Despite a long history of ineffective and ultimately failed land-titling processes, such as the million-acre program in Kenya just after independence, an enormous amount of resources have been poured into new titling regimes in Eastern Europe and Africa, particularly post-1989.[28] Once again, however, the question of using traditional forms of communal title, rooted in indigenous systems of landholding and governance, has raised questions about the sustainability of individual titling, particularly in Africa. At the same time, it has been recognized that even under "traditional" systems of land tenure, there exists a spectrum of rights and duties, for individuals and communities, that were not recognized in the colonial codification of "customary law." Demands for the recognition of different forms of land tenure have become most acute in debates over land restitution and the reform of land tenure arrangements imposed by colonial, post-colonial, and, in the case of South Africa, apartheid authorities. Both as a result of the recognition of legal pluralism and because of greater democratic participation, there has emerged a deeper understanding of different forms of land tenure and the need, even outside of systems of legal pluralism, to formally recognize a range of tenure forms and not just private property.

---

27. A willing buyer and a willing seller have traditionally been assumed to be the basis for a fair market transaction, which will produce a fair market value. In the southern-African context, this concept is presumed to be the basis of fair compensation according to South Africa's Expropriation Act 63 of 1975, and the concept also served as the basis for compensation in the 1979 Lancaster House Agreement and, through the implementation of this agreement, in Zimbabwe's first post-independence constitution.

28. *See* Solomon Bekure, 3 Benefits and Costs of Rural Land Titling: The International Experience, Documentation from the Event on Standardization of Rural Land Registration and Cadastral Surveying Methodologies: Experiences in Ethiopia, Addis Ababa, Ethiopia (March 20–24, 2006), https://www.researchgate.net/publication/265099679_3_Benefits_and_Costs_of_Rural_Land_Titling_The_International_Experience.

Struggles over land—whether over access to arable land in rural areas, between agrarian and pastoral communities, or over land use and the needs of people for housing in urban areas—have continued to play an important role in political conflicts, particularly in Latin America and Africa. Recognizing the need to address these issues, the World Bank has affirmed that future economic stability requires that land claims be settled and tenure security guaranteed.[29] Debate continues, however, over the impact of land reform in releasing rural capital for development and over the exact parameters of tenure security. Outside of their policy departments, the World Bank and the International Monetary Fund, in particular, continue to push for market-related strategies such as individual land titling and are less open to demands for recognition of diversity in land tenure systems, including communal and indigenous tenure forms.[30] This emphasis on the market fails to recognize that access to land in many developing countries serves a range of purposes: the formation and maintenance of identity for indigenous communities; providing a home of last resort for many rural/urban migrants; encouraging the diversification of economic opportunity and risk among rural families; and finally, and possibly most importantly, providing a form of social security in times of economic hardship and old age.

Market-led reform was the mantra of the World Bank in the 1990s, as it attempted to mediate between claims for restitution, demands for redistribution, and the need to resuscitate and stabilize markets in countries emerging from state socialism, authoritarian dictatorships, apartheid, and civil conflict.[31] However, these policies have faltered in countries, such as Zimbabwe, where the post-colonial settlement dictated a willing-buyer-willing-seller process yet failed to provide the resources required to address the vast and colonially derived inequalities in land ownership.[32] In South Africa, there has

29. *See* FRANK F. K. BYAMUGISHA, SECURING AFRICA'S LAND FOR SHARED PROSPERITY: A PROGRAM TO SCALE UP REFORMS AND INVESTMENTS (2013), http://documents.worldbank.org/curated/en/732661468191967924/pdf/780850PUB0EPI00LIC00pubdate05024013.pdf.

30. *See* Klaus Deininger & Hans Binswanger, *The Evolution of the World Bank's Land Policy: Principles, Experience, and Future Challenges*, 14(2) WORLD BANK RES. OBSERVER 247 (August 1999); *e.g.*, *IMF Recommends Land Reforms*, IRIN, Nov. 9, 2012, http://reliefweb.int/report/swaziland/imf-recommends-land-reforms.

31. *See* Elizabeth Fortin, *Reforming Land Rights: The World Bank and the Globalization of Agriculture*, 14(2) SOC. & LEGAL STUD. 147 (2005).

32. *See* HENRY V. MOYANA, THE POLITICAL ECONOMY OF LAND IN ZIMBABWE (1984); JOSEPH

thus far been less economic and political disruption, with the process of restitution providing some relief and promise of change. Yet the process remains extremely slow and the overall disparities continue to stimulate agrarian tension and, at times, violent disruption. In other circumstances the process of privatization and individual titling continues apace; however, there is little evidence that this has significantly stimulated agrarian economies and lives. Faced with persistent rural poverty, developing countries and international non-government organizations, such as Oxfam,[33] have pointed to the farm subsidies of developed countries and the unequal access to land and capital as causes for the continued marginalization of agrarian economies in developing countries.[34] As a result, the Doha Development Round (the most recent international trade negotiations of the World Trade Organization ("WTO")) has focused on the need to address these disparities in the context of the WTO.[35] Yet the WTO seems unable to achieve its goals because domestic interests in the developed world continue to resist changes to agricultural policies that would inevitably lead to significant changes and agrarian reforms in their own countries.[36]

1. Land Reform in Southern Africa

If, today, land reform in southern Africa is immediately equated with the economic travails of Zimbabwe, a more nuanced history

---

HANLON ET AL., ZIMBABWE TAKES BACK ITS LAND (2013), http://www.openbooks.tig.org.za/Mugabe/Zimbabwe_Takes_Back_its_Land_book_pages_1-11.pdf.

33. Oxfam is an international confederation of charitable organizations initially founded in 1942 by a group of Quakers, social activists, and Oxford University academics. *See Oxfam*, WIKIPEDIA, https://en.wikipedia.org/wiki/Oxfam (last visited Aug. 9, 2017).

34. *See* Patricia Amat et al., *Make Trade Fair for the Americas: Agriculture, Investment and Intellectual Property: Three Reasons to Say No to the FTAA* (Oxfam, Briefing Paper No. 37, 2003), https://www.oxfam.org/sites/www.oxfam.org/files/trade.pdf; *The Global Food Crisis and Fairtrade: Small Farmers, Big Solutions?* (Fairtrade Found. Report, 2009), http://www.fairtrade.org.za/uploads/files/Research/Research_papers/2009_Feb_The_global_Food_Crisis_and_FT.pdf.

35. World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002), https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

36. *See Goodbye Doha, Hello Bali*, ECONOMIST, Sept. 8, 2012, http://www.economist.com/node/21562196?zid=309&ah=80dcf288b8561b012f603b9fd9577f0e; *cf.*, World Trade Organization, Nairobi Ministerial Declaration of 19 December 2015, WTO Doc. WT/MIN(15) /DEC, https://www.wto.org/english/thewto_e/minist_e/mc10_e/mindecision_e.htm; World Trade Organization, Export Competition, Ministerial Decision of 19 December 2015, WTO Doc. WT/MIN(15)/45 (2015)—WT/L/980, https://www.wto.org/english/thewto_e/minist_e/mc10_e/l980_e.htm.

will recognize that the first experience of post-colonial land reform was undertaken by the Republic of Botswana after it gained independence in 1966.

a. Botswana

The first case of post-colonial land reform in southern Africa saw the reform of indigenous processes of land distribution and conflict resolution in Botswana. With nearly half of the land formally designated as tribal reserves and about eighty percent of the nation living on those lands, the Botswana government adopted the Tribal Land Act in 1968, fundamentally transforming the existing tenure relations. At independence, Botswana's land mass was divided into three forms of tenure: state lands (formerly crown lands), freehold lands, and tribal lands (native reserves). While freehold tenure was limited to a few areas of the former "white" settlements, comprising about six percent of the land, the colonial division between crown lands and native reserves was never as clear. Some estimated that up to seventy percent of the land area was under tribal authority rather than the forty-eight percent that was formally designated native reserves. It was in this context that land reform in Botswana proceeded: first, with the adoption of the Tribal Land Act in 1968; second, with the State Land Act of 1970; and finally, with both the Tribal Grazing Land Policy, introduced by President Sir Seretse Khama in 1975, and its counterpart, the Arable Lands Development Programme in 1980.[37]

This process of land reform in Botswana has had a profound impact on both access to land and the political structure of the country. Instead of traditional authorities having the power to allocate land, the Tribal Land Act placed all tribal land under the jurisdiction of twelve land boards, which began operation in 1970.[38] While initially the land boards continued to be dominated by local, traditional authorities, amendments to the Tribal Land Act in 1989 removed

37. *See* BOTSWANA, 1 NATIONAL POLICY ON TRIBAL GRAZING LAND, GOVERNMENT PAPER NO. 1 OF 1975 (Republic of Botswana 1975).

38. B. Machacha, *Botswana's Land Tenure: Institutional Reform and Policy Formulation*, *in* LAND POLICY AND AGRICULTURE IN EASTERN AND SOUTHERN AFRICA (J. W. Arntzen et al. eds., 1982), http://www.unu.edu/unupress/unupbooks/80604e/80604E00.htm.

both chiefs and councilors from membership, ensuring that broader interests gained greater influence on the boards—particularly the national government through appointments by the Minister of Local Government, Lands, and Housing, as well as the appointments of two ex-officio members by the Minister of Commerce and Industry and the Minister of Agriculture.[39] Five of the twelve members of the main land boards are still elected in the local *Kgotla*—the traditional court of the chief—while the remaining seven are appointed. The main roles of the boards continue to be the allocation of land, land use planning, and the adjudication of land disputes.[40] In larger districts, subordinate land boards were created to address applications for land use and to hear local disputes, although their decisions have remained subject to appeal to the main land boards under which they were created. The operational difficulties of the land boards have been well documented—including the continued influence of local traditional authorities as well as problems of self-allocations and pre-allocations, involving applicants who would justify their requests based on a claim that they had been granted the land prior to the creation of the land boards. Despite these difficulties, the system has continued to evolve and represents a unique feature of governance in Botswana.[41]

While resisting the formal expansion of freehold tenure, Botswana's land reform process has fundamentally transformed the traditional land tenure system. Through the implementation of both the Tribal Grazing Land Policy in 1975 and the Arable Lands Development Programme in 1980, the land boards have granted individualized rights based on the demarcation and fencing off of land. Introduced in response to the problem of overgrazing and in recognition of the fact that forty-five percent of Batswana owned no livestock at all, these policies have produced a diversity of tenure forms within the

39. B. M. Mathuba, Paper Presented at the DFID Workshop on Land Rights and Sustainable Development in Sub-Saharan Africa: Lessons and Way Forward in Land Tenure Policy: Land Boards and Customary Land Administration in Botswana (Feb. 16–19, 1999), *cited in* Boipuso Nkwae, *Botswana's Experience on Recognizing Traditional Land Rights on a Large Scale* (World Bank Paper), http://siteresources.worldbank.org/INTIE/Resources/475495-1202322503179/NKwae_Paper2008WB.doc_2_.pdf (last visited April 9, 2017).

40. *Id.*

41. JOHN L. COMAROFF, THE STRUCTURE OF AGRICULTURAL TRANSFORMATION IN BAROLONG: TOWARDS AN INTEGRATED DEVELOPMENT PLAN (1977).

former tribal lands.[42] Even as critics have described the grazing policies' creation of individual ranches as synonymous with the historic highlands enclosure and as inequality in access to land has continued to grow, the political impact of land reforms has been profound. If, before the Tribal Land Act, a "strong chief enjoyed . . . sole control over the distribution of fields, pasturage, and residential plots . . . and a monopoly over the creation of new political constituencies," the introduction of land boards diffused local power and gave more authority to the national post-colonial state institutions.[43] At the same time, the retention of tribal lands and the role of the *Kgotla* and traditional authorities within the political system have provided what Jean and John Comaroff describe as a "civic culture that specifie[s] the means of producing a certain kind of participatory politics, a politics grounded in an articulate popular ideology of good government."[44] In the case of Botswana, the retention of the forms of land tenure that are rooted in the historic forms of governance has had a profound impact on the nature of the post-colonial State and what the Camoroffs' identify as a form of "popular sovereignty and direct state accountability" in post-independence Botswana.[45]

b. Zimbabwe

In contrast to Botswana, the history of post-independence Zimbabwe has seen a chaotic process of land reform that is considered the direct cause of the country's economic collapse and subsequent erosion of democracy. Understanding the origins of this process provides another important lens with which to view the relationship between property rights and state formation in southern Africa. Unlike Botswana, Zimbabwe was a settler colony, and at independence, six thousand white farmers owned forty-two percent of the arable land while four and a half million black Zimbabweans lived in the overcrowded communal areas, the former "native reserves."[46]

42. Machacha, *supra* note 38.

43. JEAN COMAROFF & JOHN L. COMAROFF, THEORY FROM THE SOUTH: OR, HOW EURO-AMERICA IS EVOLVING TOWARD AFRICA 104 (2014).

44. *Id.* at 111.

45. *Id.* at 113.

46. Robin Palmer, *Land Reform in Zimbabwe, 1980–1990*, 89 AFR. AFF. 163 (1990).

It was in this context that the 1979 Lancaster House Agreement which ended the war and led to democratic elections in Zimbabwe in 1980 included, in summary form, the text of Zimbabwe's first post-independence constitution.[47] The summary of the constitution included a guarantee of a specific number of seats for white settlers in the new Parliament until 1987,[48] as well as a clause in the Declaration of Rights that protected existing property rights and specified that the new government could only expropriate land for specific purposes and under very stringent conditions.[49] It also provided that there could be no amendment to the Declaration of Rights, and hence the property clause, except by unanimous agreement for the first ten years of independence.[50] As a result, the Zimbabwe Constitution Act of 1979, which came into force as the Constitution of Zimbabwe at independence in April 1980, prevented the government from obtaining land for the purpose of land reform except under circumstances in which the land was obtained in conformity with the willing-buyer-willing-seller principle.[51] While this principle refers in the common law to the idea of market value, in this context it included a limitation on the ability of the new government to exercise its inherent power of eminent domain rather than merely defining the measure of compensation that would be due in the aftermath of expropriation. However, this settlement was effectively limited by the terms of the independence constitution to ten years.[52] After this time period, the Parliament, which remained sovereign in the tradition of parliamentary sovereignty inherited from Britain, would be free to amend the constitution.

However, when it came to land, the policies of the Zimbabwean government, freed from the Lancaster House constitutional limitations, were at first unexpected. While the Zimbabwean legislature moved fairly quickly in 1990 to remove the willing-buyer-willing-seller

47. SOUTHERN RHODESIA: REPORT OF THE CONSTITUTIONAL CONFERENCE (Sept.–Dec. 1979), http://www.rhodesia.nl/lanc1.html (presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs in January 1980).

48. *Id.*, annex C, § E, ¶ 29.

49. *Id.*, annex C, § C, ¶ V(1)–(3).

50. *Id.*, annex C, § E, ¶ 30.

51. Zimbabwe Act, U.K.-Zimb., ch. 60, Dec. 20, 1979, http://legislation.gov.uk/ukpga/1979/60/pdfs/ukpga_19790060_en.pdf.

52. ZIMB. CONST. art. 52(4) (1979).

limitations in the constitution,[53] the government in practice continued to promote economic stability and foreign investment by pursuing a policy of willing-buyer-willing-seller as it purchased land from white farmers for purposes of resettlement and related land reform efforts. It was only when the ruling ZANU–PF (Zimbabwe African National Union–Patriotic Front) party and President Robert Mugabe began to face a serious electoral challenge in the late 1990s that the slow pace of land redistribution became a focus of government rhetoric.[54] It was in this context that Zimbabwe adopted ever more aggressive policies of land acquisition, which after 2000 led to a wave of farm invasions and a subsequent collapse of the economy.[55] While the conditions that led to the economic collapse are multiple and complex, it was the adoption of constitutional changes that revoked the government's duty to pay compensation altogether—by tying it to the unfulfilled promises of the former colonial power to offer financial aid to cover the costs of compensation—that has been the focus of attention.[56] These provisions of the constitution remained a core element of contestation in the process of constitutional amendment, or constitution-making, that ultimately produced a new constitution in 2013 but failed to resolve the political crisis in Zimbabwe. As Muna Ndulo has argued, "[t]he Lancaster House Constitution itself failed to serve as a framework for local political and economic actors to negotiate the transformation from a colonial state with great economic disparities to a more equitable Zimbabwe," and thus it "failed to gain legitimacy or provide a framework for the democratic governance of Zimbabwe."[57]

c. South Africa

Not unlike Zimbabwe, the South African system of land ownership historically functioned effectively for only a very small percentage of

53. ZIMB. CONST. amend. 16, § 16A (1980) (inserted by Section 3 of Act 5 of 2000).

54. *See* HANLON ET AL., *supra* note 32.

55. *See* LAWRENCE HOBA, THE TREK AND OTHER STORIES (2009). *But cf.* IAN SCOONES ET AL., ZIMBABWE'S LAND REFORM: MYTHS & REALITIES (2011).

56. ZIMB. CONST. amend. 16, § 16A(1)(i)–(ii) (1980) (inserted by Act 5 of 2000).

57. Muna Ndula, *Zimbabwe's Unfulfilled Struggle for a Legitimate Constitutional Order*, *in* U.S. INST. OF PEACE, FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 182 (Laurel E. Miller ed., 2010).

the South African population. Primarily, this was the result of the racial division of land that predated formal apartheid and was legally enshrined in the Natives Land Act 27 of 1913 (Black Land Act) and the Native Trust and Land Act 18 of 1936 (Development Trust and Land Act). The 1913 Land Act denied the land rights of black South Africans and established the spatial distribution of land use that became the basis of the apartheid system, in which the human dignity of the majority of South Africans was denied. It has been "estimated that some 3.5 million black South Africans had been uprooted from their homes and relocated in furtherance . . . of the apartheid agenda between 1960 and 1982."[58] In addition to this often violent dispossession, the effects of the Land Acts were twofold: first, they created a land market from which nearly eighty percent of the population was excluded; and second, they privileged freehold tenure—denied to all but "white" South Africans—over other forms of tenure.[59] In time this distinction would not only determine the racialized socio-economic conditions of wealth and poverty but also the distribution of political rights, leading to a system of racial oppression under apartheid.

Unsurprisingly the issue of property was, and remains, a significant point of contention in South Africa. While the internationally endorsed process for the democratic transition from apartheid included a commitment to the rule of law and the inclusion of a justiciable bill of rights, there was no clarity on the contents of these commitments. Just prior to the beginning of substantive constitutional negotiations in early 1993, the two major participants,[60] the African National Congress ("ANC") and the apartheid government, presented dramatically different proposals for how they wished to see property addressed in a post-apartheid constitution. On the one

58. CHERRYL WALKER, LAND-MARKED: LAND CLAIMS AND LAND RESTITUTION IN SOUTH AFRICA 2 (2008).

59. *See* Cherryl Walker & Ben Cousins, *Land Divided, Land Restored: Introduction*, *in* LAND DIVIDED, LAND RESTORED: LAND REFORM IN SOUTH AFRICA FOR THE 21ST CENTURY, *supra* note 6; *see also* Andries Johannes Van der Walt, *Introduction*, *in* LAND REFORM AND THE FUTURE OF LANDOWNERSHIP IN SOUTH AFRICA (Andries Johannes Van der Walt ed., 1991).

60. At this time, the two major participants in the negotiations were the African National Congress, which was a liberation movement, and the government, which was controlled by the National Party. While the ANC would later contest elections and govern as a political party, the only political parties legally recognized before the 1993 Interim Constitution was adopted were those that worked within the apartheid system, including the "white" political parties, the "Indian" and "Coloured" parties recognized under the 1983 Tricameral Constitution, and the different political parties recognized in the various "bantustans," or black "homelands."

hand, the ANC was willing to protect the undisturbed enjoyment of personal possessions; however, all property entitlements were to be determined by legislation, and provision was to be made for the restoration of land to people dispossessed under apartheid. On the other hand, the apartheid government's proposals were aimed at protecting all existing property rights and would only allow expropriation for public purposes, subject to cash compensation determined by a court of law according to the market value of the property. In response, the ANC suggested that no property clause was necessary at all.[61]

As the negotiations progressed, the conflict over the property clause focused on specific issues. The apartheid government insisted that property rights be included in the constitution and that the measure of compensation include specific reference to the market value of the property. In contrast, the ANC insisted that the property clause should not frustrate efforts to address land claims and that the State must have the power to regulate property without obligation to pay compensation unless there was a clear expropriation of the property. The conflict soon focused on whether provisions for land restitution should be included within the property clause or whether they should be limited to the corrective action provisions of the equality clause. The 1993 Interim Constitution resolved these conflicts by providing a separate institutional basis for land restitution which was guaranteed in the corrective action provisions of the equality clause and by compromising on the question of compensation by including a range of factors the courts would have to consider in determining just and equitable compensation. Despite predictions that there would be very little change in the constitution during the second phase of the constitution-making process, particularly on such sensitive issues as the property clause and the Bill of Rights, in fact the property issue once again became one of the lightening-rod issues in the Constitutional Assembly.[62]

Although the committee charged with reviewing the Bill of Rights was at first reluctant to change the formulation of the 1993 compromise, challenges that centered on questions of land restitution and

61. HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION 125–138 (2000).

62. *Id.*; Matthew Chaskalson, *Stumbling Towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution*, 11 S. AFR. J. ON HUM. RTS. 222 (1995).

reform forced open the debate once more.[63] In this case the impetus came from the Workshop on Land Rights and the Constitution organized by one of the Constitutional Assembly's subcommittees, Theme Committee 6.3.[64] The subcommittee's task was to resolve issues related to specialized structures of government such as the Land Claims Commission and Land Court that had been created by the Interim Constitution. The focus on the land issue once again raised the problem of property rights in the constitution. While some participants asked whether there should be any property protection at all, the most significant change since the 1993 Interim Constitution was negotiated, was that the participants in this workshop, even those representing long established interests like the National Party and the South African Agricultural Union, now agreed on the need "to rectify past wrongs" and on the need for land reform.[65] Disagreement here was over the means. The South African Agricultural Union, for example, continued to assert that land reform "should be done in a way that did not jeopardize the protection of private ownership," while the National Party now embraced the World Bank's proposals, arguing that land reform should "be accomplished within the parameters of the market and should be demand-driven."[66]

The outcome of this workshop and the written submissions to Theme Committee 6.3 was a report to the Constitutional Assembly that both challenged the existing 1993 formulation of property rights and called for a specific land clause to provide a "constitutional framework and protection for all land reform measures."[67] While Theme Committee 4, which was responsible for the Bill of Rights, had simply adopted a property clause that incorporated the 1993 constitution's restitution provisions, the *Report on Land Rights* threw the proverbial cat among the pigeons. Some objected to Theme Committee 6.3's very discussion of property rights, while others sensed an opportunity to reopen the debate on property rights and to once again question their inclusion in the Bill of Rights. Thus, the draft Bill of Rights

63. THE MAKING OF THE CONSTITUTION: THE STORY OF SOUTH AFRICA'S CONSTITUTIONAL ASSEMBLY, MAY 1994 TO DECEMBER 1996 (Paul Bell ed., 1997).

64. Report from the Constitutional Assembly, Constitutional Subcommittee Theme Committee 6.3: *Report on Land Rights* (Oct. 9, 1995) (currently unavailable; copy on file with Heinz Klug) (S. Afr.).

65. *See id.*

66. *Id.*

67. *See id.*

published by the Constitutional Assembly on October 9, 1995 included an option that the "final" constitution contain "no property clause" at all.[68] It was in this context that an alternative option, a property clause including specific land rights as well as a subclause insulating land reform from constitutional attack, began to gain momentum. While a strategy to insulate land restitution and land reform from constitutional attack had been implicit from early on in the debate, it was the inclusion of a specific subclause—insulating state actions aimed at redressing past discrimination in the ownership and distribution of land rights—that enabled the negotiators to reach a compromise between those demanding the removal of the property clause and those, like the Democratic Party, who remained opposed to even the social democratic formulation that was modeled on the German Basic Law.[69] Still the debate raged on and the draft formulations of the property clause continued to evolve. Political agreement on the property clause was finally reached at midnight on April 18, 1996,[70] when Subsection 25(8)—the "affirmative action," or insulation subclause of the property clause[71]—was modified so as to make it subject to Section 36(1), the general limitations clause of the constitution.[72]

Despite final agreement in the Constitutional Assembly, a number of opposition parties and civil society groups argued that the property clause violated the constitutional principles contained in Schedule 4

68. *Special Edition*, CONST. TALK: OFFICIAL NEWSL. CONST. ASSEMBLY, WORKING DRAFT EDITION (S. Afr. Const. Assembly 1990–1999), at 7 (undated) (on file with author) (describing option one of the options suggested for then-section 24 of the Bill of Rights, *adopted as* S. AFR. CONST., 1996 ch. 2 § 25).

69. *See 2A Land Rights,* Constitutional Comm. Constitutional Assemb., 13–41 (Sept. 15, 1995) (S. Afr.). The ANC's conception of constitutional property was intellectually modeled on the property provision of the German Basic Law, which in conformity with a social-democratic vision recognizes that property ownership involves both rights as well as obligations to society—what is referred to as the social function of property. *See* KARL RENNER, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS (1976).

70. THE MAKING OF THE CONSTITUTION, *supra* note 63.

71. S. AFR. CONST., 1996 § 25(8).

72. THE MAKING OF THE CONSTITUTION, *supra* note 63. Concerns that the new "insulation" clause would completely exempt all land reform policies from constitutional review were answered by the inclusion of the phrase, "provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1)." This is the general limitations clause and provides that the "rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom," taking into account a range of designated factors. S. AFR. CONST., 1996 § 36(1).

of the negotiated 1993 'interim' Constitution. Since the newly established Constitutional Court was required by the constitution-making clauses of the Interim Constitution to certify that the Constitutional Assembly had abided by these principles, they argued that certification of the "final" constitution should be denied. Two major objections were raised: first, that unlike the Interim Constitution, the new clause did not expressly protect the right to acquire, hold, and dispose of property; second, that the provisions governing expropriation and the payment of compensation were inadequate.[73] The Constitutional Court rejected both of these arguments. First, the court noted that the test to be applied was whether the formulation of the right met the standard of a "universally accepted fundamental right" as required by Constitutional Principle II ("CPII"). Second, the court surveyed international and foreign sources and observed that "[i]f one looks to international conventions and foreign constitutions, one is immediately struck by the wide variety of formulations adopted to protect the right to property, as well as by the fact that significant conventions and constitutions contain no protection of property at all."[74] Furthermore, the court held that it could not "uphold the argument that, because the formulation adopted is expressed in a negative and not a positive form and because it does not contain an express recognition of the right to acquire and dispose of property, it fails to meet the prescription of CPII."[75] The second objection—the argument that the provisions for expropriation and compensation were inadequate—met the same fate, with the court concluding that an "examination of international conventions and foreign constitutions suggests that a wide range of criteria for expropriation and the payment of compensation exists," and thus the "approach taken in NT 25 [New Text Section 25] cannot be said to flout any universally accepted approach to the question."[76]

As a result the final property clause guarantees not only the restitution of land dispossessed after the adoption of the 1913 Land Act[77] and a right to legally secure tenure for those whose tenure

73. *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*, 1996 (4) SA 744 (CC) at para. 70.

74. *Id.* at para. 71.

75. *Id.* at para. 72.

76. *Id.* at para. 73.

77. S. AFR. CONST., 1996 § 25(7).

remains insecure as a result of racially discriminatory laws or practices,[78] but also obligates the State to promote citizens' access to land on an equitable basis.[79] Furthermore, the State is granted a limited exemption from the protective provisions of the property clause so as to empower it to take "legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination."[80] At the same time, it protects the rights of property holders, stating in Section 25(1) 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." While the clause does recognize the State's power to expropriate property "[for] a public purpose or in the public interest"[81] and "subject to compensation,"[82] there is a clear attempt to both protect land reform from constitutional challenge and to ensure that the payment of compensation is tied to a recognition of the history and use of the relevant property.[83]

This constitutional response to the legacy of apartheid land law led to the establishment of a land-claims process that in its first iteration saw sixty-four thousand claims based on the constitutional right of "a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices" to claim either "restitution of that property or . . . equitable redress."[84] The property clause also gave a right to secure tenure[85] and imposed a duty on the State to "take reasonable legislative and other measures within its available resources, to foster conditions which enable

78. *Id.* § 25(6).
79. *Id.* § 25(5).
80. *Id.* § 25(8).
81. *Id.* § 25(2)(a).
82. *Id.* § 25(2)(b).
83. *Id.* § 25(3). The amount of the compensation and the time and manner of payment must:
be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to the relevant circumstances, 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 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.
84. *Id.* § 25(7).
85. *Id.* § 25(6).

citizens to gain access to land on an equitable basis."[86] By the end of the first process of land restitution, nearly eighty thousand claims (mostly to urban land) were received by regional land claims commissions and adjudicated in some cases by a Land Claims Court, a system specifically designed to implement the constitutionally mandated process of restitution.[87] When combined with the additional processes of land redistribution and land tenure reform that were introduced by statute, the land reform process redistributed over 3.4 million hectares—although this remains far short of the redistribution target of thirty percent of 82 million hectares of white-owned farmland initially set by the new government in 1994.[88]

Another major challenge facing the post-apartheid land system was the effective incorporation of the existing nonfreehold rights into the legal system.[89] Despite the adoption of a number of laws to address this legacy as well as laws designed to reduce insecurity of tenure, the task of providing security of tenure through formal processes of survey, titling, and registration remains daunting. Even reducing the levels of accuracy required for traditional modes of land survey is unlikely to bring about reduced costs because, although the technology is readily available to surveyors, professional control of the process and a reluctance to abandon past practices prevents significant reductions in cost.[90] The new legal regime designed to increase tenure security includes: a provision for securing tenure rights to persons occupying land with the owner's permission in rural

86. *Id.* § 25(5).

87. Cherryl Walker, *Sketch Map to the Future: Restitution Unbound, in* LAND DIVIDED, LAND RESTORED: LAND REFORM IN SOUTH AFRICA FOR THE 21ST CENTURY, *supra* note 6, at 323.

88. *See* HJ Kloppers & GC Pienaar, *The Historical Context of Land Reform in South Africa and Early Policies*, 17(2) POTCHEFSTROOM ELECTRONIC L. J. 677 (2014), http://dx.doi.org/10.4314/pelj.v17i2.03.

89. This is particularly true regarding the rights in Schedule 2 of the Upgrading of Land Tenure Rights Act 113 of 1991 (S. Afr.), and the occupation and site permits referred to in the conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 (S.Afr.).

90. The average surveying fee in four Independent Development Trust–capital subsidy upgrading projects represents a mere 2.6% of the total costs of the projects. Section 7 of the Land Survey Act 71 of 1927 (S. Afr.), provides that regulations may be made prescribing the fees which a land surveyor shall charge for the survey of land. Regulation 67 of the Land Survey Regulations, GN R1814 (11 Feb. 1962) (S. Afr.), provides that the tariff for services shall be in accordance with the tariff prescribed in Annexure A to the Regulations. Provision is made for charges to be agreed upon at a higher rate. Although the contrary is not stated, it is understood that surveys are also undertaken at rates lower than the tariff.

and peri-urban areas;[91] legislation protecting and allowing labor tenants to gain permanent rights to the use of land held as tenants;[92] laws providing temporary protection to those who might gain land rights as a result of land and tenure reform;[93] and new legislation prohibiting unlawful evictions, which fundamentally changed the legal and practical relationship between occupiers and title holders.[94] Despite these attempts to protect existing occupiers, the future legitimation of all landholdings was understood to rest on the recognition of historic land claims and the creation of a restitution process for those who had already been denied possession of their lands.

Despite this focus on rural land, urban land and housing is today the most significant form of property for the majority of individual South Africans who live in a country that has seen massive urbanization since the collapse of the apartheid's internal pass system[95] in the mid-1980s. A separate constitutional provision states that "everyone has a right to have access to adequate housing"[96] and imposes the same duty on the State to ensure this right within its available resources.[97] This provision also guarantees that "no one may be evicted from their home, or have their home demolished, without an order of court."[98] Constitutional Court jurisprudence has subsequently interpreted the right to housing to include a tenant's right not to be evicted unless provided with alternative accommodation and only after "meaningful engagement" by the relevant governmental authority.[99] In its attempts to address the vast urban

91. Extension of Security of Tenure Act 62 of 1997 (S. Afr.).

92. Labour Reform (Labour Tenants) Act 3 of 1996 (S. Afr.).

93. Interim Protection of Informal Land Rights Act 31 of 1996 (S. Afr.).

94. Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (S. Afr.).

95. The pass laws provided for a system of "internal passports" used to control the movement of the African majority during the apartheid era, although pass laws have a long history in South Africa and were used to establish a migrant labor system, control urbanization, and generally to segregate the society. *See Pass Laws in South Africa 1800–1994*, SOUTH AFRICAN HISTORY ONLINE, http://www.sahistory.org.za/article/pass-laws-south-africa-1800-1994 (last updated Mar. 21, 2011).

96. S. AFR. CONST., 1996 § 26(1).

97. *Id.* § 26(2).

98. *Id.* § 26(3).

99. The requirement of meaningful engagement was introduced into South African jurisprudence in *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC). *See generally* Lucy A. Williams, *The Right to Housing in South Africa: An Evolving Jurisprudence*, 45 COLUM. HUM. RTS. L. REV. 816 (2014).

housing shortage created by apartheid and post-apartheid urbanization and immigration, the government first adopted a housing policy under its 1994 Reconstruction and Development Programme ("RDP"), which produced over 3.3 million low-cost housing units in the first twenty years of democracy.[100] Over the same period, the population grew by approximately 13 million (to over 53 million), and only about fifteen percent of the country's approximately 14.5 million households earned enough income to secure financing in the formal banking system. With changing economic policies, the government's housing policy shifted in the first decade of this century towards a bifurcated policy, which, on the one hand, promoted a rental-housing sector under a social-housing policy and law[101] and, on the other hand, sought to promote a more market-based housing policy, in which the granting of title would facilitate private investments and improvements in housing.[102]

Recent government policies focus heavily on helping the poor gain formal title to their property, largely because of the influence of Hernando de Soto's notion that granting title will unleash capital already held by the poor.[103] De Soto's claims rely on the notion of the housing ladder—that property values increase, enabling those who hold property to gain wealth through ownership, which they can use to work towards a better home in the future, until they sell their final home to fund their retirement and live somewhere smaller and simpler.[104] The Breaking New Ground housing policy started in 2004

---

100. *See* NAT'L DEP'T OF HOUS., WHITE PAPER: A NEW HOUSING POLICY AND STRATEGY FOR SOUTH AFRICA (1994) (S. Afr.), http://www.gov.za/sites/www.gov.za/files/16178_0.pdf; FIN. & FISCAL COMM'N, RP303/2013, EXPLORING ALTERNATIVE FINANCE AND POLICY OPTIONS FOR EFFECTIVE AND SUSTAINABLE DELIVERY OF HOUSING IN SOUTH AFRICA: STATEMENT BY THE FINANCIAL AND FISCAL COMMISSION, (Oct. 21, 2013) (S. Afr.), http://www.gov.za/exploring-alternative-finance-and-policy-options-effective-and-sustainable-delivery-housing-south.

101. Social Housing Act 16 of 2008 (S. Afr.).

102. DEP'T OF HUM. SETTLEMENTS, "BREAKING NEW GROUND": A COMPREHENSIVE PLAN FOR THE DEVELOPMENT OF SUSTAINABLE HUMAN SETTLEMENTS (2004) (S. Afr.), http://abahlali.org/files/Breaking%20new%20ground%20New_Housing_Plan_Cabinet_approved_version.pdf.

103. *See* Graduate School of Public and Development Management, University of the Witwatersrand, *Are Hernando de Soto's Views Appropriate to South Africa?* (University of the Witwatersrand, Occasional Paper Series No. 1, Oct. 2007) [hereinafter *Hernando de Soto's Views*], http://www.dbsa.org/EN/About-Us/Publications/Documents/De%20Soto%20Colloquium%20FINAL.pdf.

104. *See* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000); *see also*, ROSALIE KINGWILL ET AL., MYSTERIES AND MYTHS: DE SOTO, PROPERTY AND POVERTY IN SOUTH AFRICA (Int'l Inst. for Env't & Dev. Gatekeeper Ser. No. 124, 2006).

closely resonates with de Soto's ideas. Its primary goal is to deliver housing, with secondary goals that include realizing the value of assets and "reducing duality in the housing sector" by enhancing access to title.[105] Key policies for reducing the duality included supporting demands for subsidies for secondary market transactions, reducing the prohibition on the sale of government subsidized property from eight to five years, stimulating the transfers of free-standing public housing stock, and accelerating the registration of transfer for subsidized homes. However, the de Soto–thesis relies on four factors other than title deeds that are not present in South Africa: (1) a functioning secondary housing market, (2) sufficient affordable housing, (3) affordable mortgage finance, and (4) mortgage lenders willing to lend to low-income people. The case of Joe Slovo Park in Cape Town illustrates some of the problems with inserting formal title regimes into an area without regard for the cultural institutions there.[106] Individual ownership actually reduced tenure security for many, especially women.[107] Tenure rights and responsibilities that were formally linked to kinship were now registered in the name of one member of the household, usually male.[108] The process itself was slow, and there were allegations of bias, with some community leaders receiving more than one house.[109] Many of the sales were informal. Sometimes people who legally owned their houses were unable to use them because street committees decided who should be the owner, or the houses had been rented out by people who were not the owners.[110] The process upended well-established informal markets and tore apart social networks, which in the informal economy

105. Lauren Royston, *Snakes and Ladders: A Housing Perspective on de Soto and the First and Second Economy Debate in South Africa*, *in Hernando de Soto's Views*, *supra* note 103, at 35–36. The idea of "duality" in the housing sector refers to the existence on the one hand of a regular housing market in which properties are regularly bought and sold, and on the other hand of a separate "market" in which houses are traded informally or under the table so as to avoid either the legal restrictions on their transfer or the costs of transfer in the regular market. This duality is reflected, too, in the location of houses since properties in the former "white" areas generally make up the "regular" market, while those in the former "black" townships and in informal settlements make up the second "irregular" market.

106. Rosalie Kingwell et al., *Mysteries and Myths: De Soto, Property and Poverty in South Africa, in Hernando de Soto's Views*, *supra* note 103, at 58.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

were vital to doing business.[111] The houses were also too small for large families, a fact that many had relied on in order to make payments.[112] Informal sales have continued to be a significant element of South Africa's titling program with a study conducted for the Cape Metropolitan Council in 2000 finding a "significant incidence of buying and selling of subsidized residential properties" either "immediately as people acquire their houses . . . [or] more gradually as people run into difficulties in paying the municipal service charges."[113] The study concluded that "the urgent need for cash [was] forcing some subsidised homeowners to sell their houses illegally" and the in many cases prices were "almost 50% less than the replacement cost[s]."[114]

II. LAND REFORM AND THE STRUCTURE OF GOVERNANCE

Different patterns of land tenure and reform efforts have produced very different impacts on the structure of governance across these three southern African countries: Botswana, Zimbabwe, and South Africa. The outcome and continuing conflict are products of both the inherited pattern of colonial land relations as well as the choices made by the post-colonial State in these different circumstances. In Botswana the limited amount of freehold tenure and the political strength of traditional authorities at the time of independence saw land policies focus on the "Tribal Areas." It was the slow, evolving process of national intervention and the continued vitality of the political culture of the *Kgotla* that has produced a gradual transformation in land rights as well as a stable political regime. In this structure, the dominant political party—the Botswana Democratic Party—has relied on rural support to continue to win national elections, even as the major urban areas have seen local governments controlled by the political opposition. The net result has been the emergence of a particular form of democratic State where national and local politics are quite distinct. Even if there are questions about the exact form of local democracy, there is recognition that national elections are free and fair.

---

111. *Id.*

112. *Id.*

113. BRUCE BOADEN & ALY H. KARAM, THE INFORMAL HOUSING MARKET IN FOUR OF CAPE TOWN'S LOW-INCOME SETTLEMENTS 24 (2000).

114. *Id.* at 35.

This is in stark contrast to developments in Zimbabwe where the failure to engage in an ineffective land reform in the immediate post-independence era saw a perpetuation of inequality and land hunger reminiscent of the colonial era. This continuing inequality produced first a political crisis and then economic collapse when Robert Mugabe's government responded by adopting what became known as "fast track land resettlement" and land invasions from 2000 to 2003.[115] While there is increasing evidence that this process has seen black Zimbabweans gain more access to land, the government's failure to uphold the rule of law and their undermining of the courts has had a long-term impact on the structure of the State. After flawed elections and increasing authoritarianism, there has been an attempt to reconstitute the State through a process of constitutional renewal. The failure of both the democratic process and the many constitutional reforms has produced "a government which lacks both national and international legitimacy."[116] It is in this context that we might compare developments in South Africa and ask what effect the process of land reform might have on the future structure of the new South African constitutional State that emerged from apartheid in the mid-1990s.

After more than twenty years of democratic governance, the debate over South Africa's land reform program has become an argument over whether the glass is half full or half empty. The promise of the 1994 ANC election manifesto—to transfer thirty percent of the land—has clearly not been met. Even so, thousands of families and individuals from the most marginalized sections of society have been beneficiaries of the government's threefold land reform strategy—land restitution, land redistribution, and land tenure reform—as well as the country's massive subsidized housing program.[117] Despite these slow gains, it remains the fact that the clearest indicator of poverty in South Africa, even after twenty-three years of democracy,

115. *See* HANLON, ET AL., *supra* note 32.

116. Ndula, *supra* note 57, at 177.

117. *See* EDWARD LAHIFF, LAND REFORM IN SOUTH AFRICA: A STATUS REPORT 2008 (Programme for Land and Agrarian Stud., Res. Rep. No. 38, 2008), http://www.plaas.org.za/sites/default/files/publications-pdf/RR38_0.pdf; *see also* Report Presented at Istanbul+5, Reviewing and Appraising Progress Five Years After Habitat II: The South African Housing Policy: Operationalizing the Right to Adequate Housing (June 6–8, 2001), http://www.un.org/ga/Istanbul+5/1-southafrica.doc.

is being black, female, and a resident of a rural area. Unfortunately, after a change in land reform policy in the early 2000s when the government decided to target black commercial farmers instead of marginalized rural communities to be the beneficiaries of land reform, these indicators of poverty seem even less likely to change. These developments did not solve the underlying problem of unequal access to land, and issues of legitimacy and the slow pace of land reform soon resurfaced in the political realm.[118]

As the ANC moved towards its national conference at the end of 2012, there were repeated calls for greater government intervention in the distribution of property, particularly land. In the lead-up to the organization's mid-year policy conference, which produced a draft policy document for the national conference, there were repeated calls from various ANC constituencies, the ANC Youth League and trade unions in particular, for a constitutional amendment. These organizations wished to remove what they understood to be the constitutional requirement of willing-buyer-willing-seller that they blamed for the slow pace of economic transformation and land reform in particular. In response to these calls, the official opposition, the Democratic Alliance, issued a press statement warning that the ANC government was "contemplating dramatic changes to the Constitution . . . which threatens the very foundation of our constitutional state."[119] Responding to these demands and concerns, the Minister of Rural Development and Land Reform, Gugile Nkwinti, said the debate about changing the constitution might be irrelevant as "the ANC had come up with four proposals to transform land ownership in South Africa without changing the Constitution."[120] But at the same time the ANC Youth League called for "changing . . . the Constitution to do away with land expropriation with compensation."[121]

---

118. For a critical assessment of South Africa's land reforms and related programs see, BEN COUSINS, LAND REFORM IN SOUTH AFRICA IS SINKING. CAN IT BE SAVED? (2016) (A provocation commissioned by the Nelson Mandela Foundation.), https://www.nelsonmandela.org/uploads/files/Land__law_and_leadership_-_paper_2.pdf. *See also* FRED HENDRICKS ET AL., THE PROMISE: UNDOING A CENTURY OF DISPOSSESSION IN SOUTH AFRICA (2013).

119. Dene Smuts, Press Release, Democratic Alliance: Property a Basic Right, Not a Sunset Clause (Cape Town, Mar. 4, 2012).

120. Gillian Jones, *Changing Constitution Not the Answer*, IOL, June 11, 2012, http://www.iol.co.za/news/politics/changing-constitution-not-the-answer-1316513.

121. *Id.*

While the constitution may not include a willing-buyer-willing-seller standard, the apartheid-era Expropriation Act 63 of 1975 does in fact include this standard as a basis for determining the compensation to be paid in the event of expropriation.[122] Although the Constitution is supreme in South Africa and explicitly provides criteria for determining compensation in the event of expropriation, in application the State may only exercise its power of eminent domain within the terms granted by the legislature in the Expropriation Act. This explains in part why the willing-buyer-willing-seller standard has some resonance in the South African debate over expropriation. However, a broader view of the debate, including an understanding of the conflict over land in the southern African region more generally, provides a much clearer perspective on why this standard has such resonance in the political debates over land and in the possibility of constitutional change specifically. Only once the history of land struggles and the pattern of constitutional amendment and crisis in Zimbabwe are taken into account, does it become clear why the willing-buyer-willing-seller language has such power and relevance.

In an attempt to address the inconsistency between the statutory law and what is arguably a more permissive constitutional requirement, the South African government first introduced a bill to reform the Expropriation Act in April 2008. In its explanation for the bill the government argued that the new law would create a "framework to give effect to the Constitution" and in particular the State's "constitutional obligation to 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."[123] The new statute would also require the recognition of unregistered rights as well as provide new institutional mechanisms to regulate expropriations. Significantly, the draft law also revised the standards for compensation, including the range of factors that had been negotiated during the democratic transition. Reaction to the bill was vociferous, particularly from those who had fought so hard to protect their property interests during the transition from apartheid. In the face of these objections, the bill has been repeatedly withdrawn and

122. Expropriation Act 63 of 1975 § 12(1)(a)(i).

123. Publication of Explanatory Summary of the Expropriation Bill 2008, GN 440 of GG 30963 § 2, at 3 (11 Apr. 2008) (S. Afr.).

revised. It was eventually passed by the Parliament in 2016. However, it was returned by President Zuma, who is concerned that it might be unconstitutional, and it remains yet again in limbo.

CONCLUSION

This brief comparison between three post-colonial states in southern Africa provides a clear demonstration of the relationship between the particular history and nature of property rights and the fundamental political structures of these nations. In each case the structure of the post-colonial State has been or is still being formed around the history and nature of tenure relations—whether these relations are based on indigenous and colonial relations to the land or are being forged through claims of historical dispossession and restitution. In each of these cases it has been the history of land reform post-independence that has had a profound impact on the structure of democratic politics and legal institutions—whether at the local level in Botswana or at multiple levels in Zimbabwe and South Africa. Where land reform has failed or has been inadequate in addressing the legacies of colonialism, there have been profound political consequences. In Zimbabwe, these early failings have put the very structure of the State in jeopardy. In South Africa, the inability to address economic inequality has led politicians to increasingly point to land distribution and reassert the claim that the land must be returned to the people. While often serving as a proxy for a more general claim for wealth redistribution, it is the continuing inequality in access to land, both urban and rural, that enables these claimants to increasingly question the legitimacy of the post-apartheid constitutional order.

The distinction between marketable and nonmarketable land, as well as its racial character, was reflected in the relationship between the State and land in most southern African countries—including Botswana and Zimbabwe—prior to independence, although not to the same extent or with the same consequences as experienced during the apartheid period in South Africa. The continued vitality of this distinction, even outside of southern Africa, may be seen in the new plurinational constitutions of Ecuador and Bolivia; in the recognition of different forms of tenure for tribal and First

Nation sovereignties in North America; and in the multitude of tenure forms that exist across Africa, Asia, and other regions of the world. From this perspective, it is no longer possible to ignore the diversity of tenure forms or to impose a simple one-size-fits-all notion of property on the world. Recognizing these alternate realities and working out how these different forms may coexist means that we may begin to benefit from local recognition and legitimacy of governmental institutions that must interact and manage these different forms of property.[124] In fact, different forms of tenure—private ownership, different types of co-ownership and tenant arrangements, as well as condominiums and community land trusts—already exist and are acknowledged in most western legal systems. The task now is to improve the interactions of these different forms of tenure in rural and urban contexts in the developing world in order to secure the benefits for those holding property and to promote the legitimacy of those institutions of good governance that are so essential to ensuring an effective and legitimate political structure in these post-colonial nations.

124. *See* UNTITLED, *supra* note 12.