SOUTH AFRICA'S LAND REFORM POLICY AND INTERNATIONAL HUMAN RIGHTS LAW

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I. INTRODUCTION

Property rights rarely have been included as a human right in international law. Part of the reason for the exclusion is that property rights are difficult to classify because they include aspects of both civil and political rights as well as economic and social rights.[1] Individuals who hold title to land registered in accordance with a country's requirements for ownership have a civil right to the land. At the same time, individuals who depend on land for survival have an economic right to the land. Land reform efforts in South Africa are essential in moving away from an apartheid state, but are caught between protecting civil or economic rights. Just as exclusive land laws were at the heart of apartheid, land reform is at the heart of a post-apartheid South Africa. While land reform is needed, it must be consistent with international human rights law.

In order to answer the question of whether South Africa's land reform policy violates international human rights law, the historical and contemporary importance of property in South Africa must be evaluated. Next, international human rights documents are explored to the extent that they pertain to property. Then the history of South Africa's Constitutional property clause is examined in light of the difficulty in balancing the interests of different classes of claimants. Finally, South Africa's Constitution is evaluated for its compliance with international human rights law.

II. BRIEF HISTORY OF PROPERTY RIGHTS IN SOUTH AFRICA

Colonialism, capitalism, and apartheid all have had a tremendous impact on property ownership in South Africa. As with any country, property rights and reforms can be understood best in the context of the country's history.

Precolonial South Africans had no concept of individual land ownership; instead, land belonged to the community at large.[2] Community

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1 Miloon Kothari, *The United Nations Speaks Out on Forced Evictions*, DEVELOPMENT IN PRACTICE, Feb. 1995, at 65.

2 LEONARD THOMPSON, A HISTORY OF SOUTH AFRICA 23 (Rev. ed. 1995).

ownership of land enabled families to use the land in villages as building sites or for small gardens.[3] The emphasis on community cohesiveness existed within a very hierarchical and patriarchal social structure.[4] Even though implementation of these concepts varied between ethnic groups, all ethnic groups incorporated these tenants of land ownership and social structure.[5]

Dutch traders invaded South Africa in 1652, launching a period of European domination.[6] The Dutch East India Company established Cape Town as its trading center.[7] The Company rapidly increased the number of settlers, and those settlers developed Cape Town into a "complex, racially stratified society."[8] The Dutch importation of slaves started only six years later.[9] By the 1760s, the first racially discriminatory laws were passed.[10] These laws evolved to require blacks to carry passes and reduced the rights of free blacks who originally had the same rights as the white settlers.[11] During these years, high-ranking Dutch officials and prosperous businessmen purchased almost all of the agriculturally viable land and relied on the labor of slaves and native people to produce crops.[12] Eventually the British obtained control of Cape Town and the slaves officially were emancipated in 1833.[13] However, whites still owned nearly all of the productive land so emancipated slaves had no viable alternative but to continue to work for their former owners.[14]

The century between 1770-1870 was marked by increased tensions and wars between settlers and ethnic groups. As settlers moved east they came into contact with many more ethnic groups.[15] Tensions within communities also mounted as settlers who owned the land and depended on black labor increasingly excluded blacks from participation in the newly emerging social and political systems.[16]

British imperialism began in 1870.[17] As whites conquered previously independent African communities, British ownership of land increased in

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3 *Id.*
4 *Id.*
5 *Id.* at 24.
6 *Id.* at 33.
7 *Id.*
8 *Id.*
9 *Id.* at 36.
10 *Id.* at 37.
11 *Id.*
12 *Id.* at 45-50.
13 *Id.* at 58.
14 *Id.* at 60.
15 *Id.* at 70.
16 *Id.* at 109.
17 *Id.* at 110.

already settled areas and racist ideology intensified.[18] During these early years, particularly 1902-1904, the British colonial government appointed a land commission, creating a number of reserves for the Zulu. By creating the reserves, the British colonial government opened the rest of the country for white settlement.[19]

The Segregation Era started in 1910 when South Africa proclaimed partial independence and immediately implemented programs of ethnic segregation.[20] While the policies of segregation continued for many more years, the Segregation Era ended in the 1940s. During this period, ethnic tensions were particularly high between the two segments of the white population—the poor Afrikaners and the wealthy English-speakers.[21] Both white ethnic groups exploited black labor as racist ideology became widespread.[22] The Natives Land Act, passed in 1913, prohibited native blacks from acquiring non-agricultural land.[23] This foreclosed Africans from purchasing or leasing twenty-two million acres, encompassing ninety-three percent of South Africa.[24] The Natives Urban Land Act of 1923 prohibited blacks from residing in urban areas.[25] Then, in 1932, South Africa gained complete independence from Great Britain. The Native Trust Land Act of 1936 further limited the rights of blacks to reside in white rural areas.[26] The era's politics resulted in the separation of blacks from whites. In addition, the Acts reduced blacks to tenants and wage laborers for white farmers.[27] Meanwhile, socio-economic conditions separated Afrikaners from wealthy whites.[28] The Acts resulted in seventy-five percent of the population sharing 11.7 percent of the country's land.[29] The remaining eighty-seven percent of the land, encompassing the most productive land, was divided among the white population, which constituted only 8 percent of the population.[30]

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18 *Id.* at 111.
19 *Id.* at 125.
20 *Id.* at 154.
21 *Id.* at 155.
22 *Id.* at 155.
23 D.L. CAREY-MILLER & ANNE POPE, LAND TITLE IN SOUTH AFRICA 241 (Juta & Co. Ltd. 2000).
24 Myriam De Blois, Land and Housing Rights in South Africa and Their Compatibility With International Human Rights Norms 9 (1995) (unpublished L.L.M. thesis, McGill University (Institute of Comparative Law) (on file with UMI Dissertations Services).
25 CAREY-MILLER, *supra* note 23, at 241.
26 THOMPSON, *supra* note 2, at 180.
27 *Id.* at 163.
28 *Id.* at 155.
29 *Id.* at 163.
30 *Id.* at 171.

The Apartheid Era lasted from 1948-1993 and separation of the four racial groups marked this era.[31] During this time black unrest grew, largely due to a huge shortage of housing for blacks and a severe economic recession.[32] English-speaking whites increasingly shared power with Afrikaners in order to maintain political control.[33] Also during this time, the National Party enjoyed tremendous support from the white population.[34] The National Party divided the urban areas into racially exclusive zones and gathered reserves into ten territories named homelands.[35] By forcing the black population to work in low paying jobs and by consolidating the land on which blacks could live, white settlers benefited from large expanses of open land.[36]

Apartheid began to crumble because of domestic pressure from the black majority as well as international pressure from the United Nations (UN) and the United States (US), neither of which tolerated segregationist policies.[37] The South African government repealed the first minor segregation laws in 1978, but the government made no significant changes to laws regulating land ownership until 1990.

The true transition away from apartheid occurred on February 2, 1990 when President F.W. DeKlerk led the last Parliament of the former South Africa to pass the Abolition of Racially Based Land Measures Act, which included the repeal of the 1913 and 1936 land acts. The government passed several land reform acts in the following years that focused on either restitution, redistribution or tenure reform policies. Restitution policies facilitated the Restitution of Land Rights Act of 1994. Redistribution policies included the Provision of Land and Assistance Act of 1993 and the Development Facilitation Act of 1995. Tenure reform policies materialized through the Communal Property Association Act of 1996 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998. South Africa's complex land history illustrates the importance of land, but does not explain the reasons that land is so important.

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31 *Id.* at 187-88. The apartheid system separated the four racial groups, Whites, Colourds, Indians and Africans and entitled Whites to control the State because they were the civilized race.

32 *Id.* at 221.

33 *Id.* at 188.

34 *Id.* at 187-88.

35 *Id.* at 191.

36 *Id.* at 188-89.

37 *Id.* at 222.

III. THE IMPORTANCE OF LAND IN SOUTH AFRICA

The history of South Africa, like that of most nations, reveals that land has been the key national asset for survival and accumulation of wealth, as well as for access to food, shelter, and political power. The Dutch recognized that establishing a strong colonial government required the separation of native inhabitants from their land.[38] Apartheid supporters realized the value of maintaining this separation, so apartheid continued discriminatory land ownership laws.

Given that land ownership plays an important role in the socio-economic structure of South Africa, land reform is among the most important of all reforms.[39] Land reform supporters argue that reform is needed because of the visual and tangible nature of property, which serves as a continuous reminder of apartheid.[40] Conversely, other anti-apartheid reformers disagree with land reform, arguing instead that land rights should not be altered.[41] The debate over whether and how to institute land reform in South Africa must involve examining international law pertaining to property rights because South Africa's constitution incorporates international law into municipal law.

IV. PROPERTY RIGHTS IN INTERNATIONAL HUMAN RIGHTS LAW

International human rights norms did not recognize property rights until after World War II and the creation of the UN.[42] While many nations affirmed property ownership as a basic human right through UN Resolutions, the National Party came to power in South Africa and ended the movement toward "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race."[43] With the National Party in power, South Africa did not participate in the Universal Declaration of Human Rights. Later, South Africa refused to be a party to any human rights convention.[44] Therefore, international law regarding human rights was not binding on South Africa.[45] Before looking at South Africa's

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38 *Id.* at 31.

39 AJ VAN DER WALT, LAND REFORM AND THE FUTURE OF LANDOWNERSHIP IN SOUTH AFRICA 22 (Juta & Co., Ltd. 1991).

40 *Id.*

41 *Id.*

42 RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER 463 (David Van Wyk et al. eds. 1995).

43 U.N. CHARTER art. 55.

44 Van Wyk, *supra* note 42, at 463.

45 De Blois, *supra* note 24, at 16.

laws, however, it is important to establish the international framework for human rights law.

A. THE UNITED NATIONS CHARTER

The international community created the UN in response to the atrocities of World War II and to prevent future conflict through an effective international system designed to protect human rights. Articles in the UN Charter established the legal and conceptual foundation for the development of contemporary human rights law.

One purpose of the United Nations is "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[46] The UN's General Assembly is charged with initiating studies and making recommendations to promote international cooperation in "assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[47]

Even though the Charter was a significant step in human rights law, the Charter's vagueness, lack of enforcement power, failure to become a legally binding obligation on all states, and its own internal conflicts impeded the development of international human rights law.[48] The primary source of conflict arose from the tension between the states' agreement to promote international cooperation by assisting in the "realization of human rights and fundamental freedoms"[49] and prohibiting the UN from intervening "in matters which are essentially within the domestic jurisdiction of any state."[50] South Africa refused to participate in the U.N., asserting that these matters were within its domestic jurisdiction based on national sovereignty.

B. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Economic and Social Council of the UN established a Commission on Human Rights and assigned it the task of drafting an International Bill of Rights. The Commission's first step in the process was creating the Universal Declaration of Human Rights (Declaration), which

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[46] U.N. CHARTER art. 1, para. 3.
[47] U.N. CHARTER art. 13, para. 1.
[48] Van Wyk, *supra* note 42, at 463.
[49] U.N. CHARTER art. 13, para. 1.
[50] U.N. CHARTER art. 2, para. 7.

later included two covenants and protocols and identified property as a human right.

Strong ideological differences between the East and West made it impossible to obtain a single multilateral treaty pertaining to either human rights in general or property rights in particular that was binding on the signatory states. Instead, the Declaration was passed by resolution so it was not binding on the signatory states, even though it had a significant impact on international human rights law. The Declaration received notable attention because it was the first comprehensive human rights instrument adopted by an international body. Over the course of the next twenty years, the Declaration became customary international law.[51] In addition, the UN relied on the Declaration when applying the human rights provisions of the UN Charter. Such repeated reliance on the Declaration gave it the significance of customary international law.[52]

Several sections of the Declaration are relevant to property rights. The Declaration's preamble proclaimed:

> As a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by backing teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.[53]

The property provision, Article 17, added that "[e]veryone has the right to own property alone as well as in association with others" and that "[n]o one shall be arbitrarily deprived of his property."[54] Even though the Universal Declaration does not define the "right to own property" or what constitutes "arbitrary" deprivation thereof, the groundwork was laid for the inclusion of property as a fundamental human right.[55]

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[51] Applicability of Article VI, Section 22, of Convention on Privileges and Immunities of United Nations, 1989 I.C.J. 177.

[52] THEODORE MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 92-95 (1989).

[53] UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948), (Jan. 6, 2001) *available at* http://www.un.org./Overview/rights.html.

[54] *Id.* at art. 17(1) and (2).

[55] LOUIS HENKIN, ET AL., HUMAN RIGHTS : AN AGENDA FOR THE NEXT CENTURY 119 (1994).

C. THE INTERNATIONAL COVENANTS

The International Covenants proclaim two broad categories of rights. The Covenants arose from the Declaration rather than from a treaty because of the difficulty the East and West had in agreeing on any substantial issue during the Cold War years. Through the Covenants, the international community characterizes one group of rights as civil and political rights, which recognize the right to own property. The community characterizes the other group of rights as economics, social, and cultural rights, all of which include recognizing the importance of access to land.

The UN General Assembly adopted both Covenants in 1966, but they were not ratified by the required thirty-five states for another ten years. South Africa ratified both Covenants after democratic elections in 1994 and 1998.[56] With ratification, the Covenants became binding upon South Africa.

The International Covenant on Economic, Social, and Cultural Rights includes many more rights than the Declaration, yet it fails to grant any protection for property rights.[57] The International Covenant on Civil and Political Rights does not include a section on property either, despite the fact that it also includes many more rights than the Declaration.[58] The only mention of property rights in the Civil and Political Rights Covenant shows up in its Preamble. It acknowledges that individuals must "first be free of fear and want before they can enjoy their Civil and Political Rights."[59] In order for groups discriminated against during apartheid to be free of fear and want, at a minimum, land reform must foster the ability of these groups to own land.

D. OTHER HUMAN RIGHTS CONVENTIONS

Europe, the Americas, and Africa each have adopted regional human rights conventions. These regional human rights conventions are likely to experience more success than their universal counterparts because of their members' greater political, cultural, and judicial homogeneity; this establishes

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[56] Further information on which other countries ratified these Covenants is available at http://www.unhchr.ch/pdf/report.pdf.

[57] INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (1976), (Jan. 8, 2001) *available at* http://www.unhchr.ch/html/menu3/b/a_cescr.htm.

[58] INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1976), (Jan. 8, 2001) *available at* http://www.unhchr.ch/html/menu3/b/a/_ccpr.htm.

[59] *Id.*

a stronger basis for cooperation and effective implementation of the conventions.[60]

The African Charter on Human and Peoples' Rights was approved by the Organization of African Unity and became enforceable law in 1986.[61] Article 14 of the Charter guarantees the right to property. The guarantee may "only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."[62] The Charter also guarantees that "[i]n case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation."[63] By referring to "people," the Charter recognizes and protects communal property rights interest.[64] South Africa is not a signatory of the Charter.[65]

Additionally, the International Convention on the Elimination of All Forms of Racial Discrimination[66] (CEFRD) defines racial discrimination as

> Any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[67]

The CEFRD's primary objective is to bring about social justice, which means land reform for South Africa.

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60 Weston, Lukes & Hnatt, *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 Vanderbilt J. of Transactional Law 585 (1987).

61 AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (1986), (Jan. 29, 2001) *available at* http://unhcr.ch/refworld/legal/instrume/women/afr_e.htm.

62 *Id.* at art. 14.

63 *Id.* at art. 21.

64 Richard N. Kiwanuka, *The Meaning of People in the African Charter on Human and Peoples' Rights*, 82 AM J INT'L. L. 80 (1988).

65 AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS: EIGHTEENTH ASSEMBLY OF HEADS OF STATE AND GOVERNMENT, June 1981, Nairobi, Kenya, (Oct. 21, 1986), *available at* http://www.unhcr.ch/refworld/refworld/legal/instrume/women/afr_e.htm

66 International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res.2106 A (XX) of 21 December 1965. Entry into force on 4 January 1969.

67 INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1969), art. 1, (Jan. 8, 2001) *available at* http://www.unhchr.ch/html/menu3/b/d_icerd.htm

V. SOUTH AFRICA'S CONSTITUTIONAL PROPERTY PROVISION

The early 1990s saw the unprecedented negotiation of a new dispensation of land in South Africa, resulting in profound changes to the country's social, political and economic structures.[68] Many of these changes were codified in the Interim Constitution (IC), including the Bill of Rights, which became the supreme law of the land on April 27, 1994.[69] Another feature was the creation of a Constitutional Assembly charged with drafting the final Constitution between 1994 and 1996.[70] This Constitution was adopted at the end of 1996 and came into force on February 4, 1997.[71] This section first focuses on the role of international law in South Africa and the Property clause of the Interim Constitution. The second section focuses on the same elements in the 1996 Constitution.

Section 231(4) of the IC explicitly addresses the expanded role of international law by providing "[t]he rules of customary international law binding on the Republic shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic."[72] Thus, South African courts in their decisions must implement human rights standards that have become accepted rules of customary international law unless the custom is incompatible with the Constitution or an Act of Parliament. However, the Interim Constitution provided that until a treaty was incorporated into South African law by an Act of Parliament, it was not binding municipal law.[73] Furthermore, the signed agreement may not be inconsistent with the Constitution.[74] Therefore, Parliament had to approve any human rights agreement[75] to which South Africa was a party.[76]

The Property clause, section 28, of the IC, viewed property as a fundamental right:

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68 Jeremy Sarkin, *The Development of a Human Rights Culture in South Africa*, 20 HUM. RTS. Q. 628 (1998) (discussing the development of the two constitutions and the restructuring of the government infrastructure including the court and criminal justice system).

69 S. AFR. CONST. of 1993 (IC), ch. 3, § 25 (delimiting Property).

70 *Id.* at ch. 5, §§ 68-74.

71 S. AFR. CONST. of 1996, ch. 14, § 243.

72 S. AFR. CONST. of 1993 (IC), ch. 15, § 231(4).

73 *Id.* at ch. 15, § 231(2-3). Section 231(2) qualified the President's power under Section 82(1)(i). *Id.* at § 231(2). Section 231(3) stated: "Where Parliament agrees to the ratification of or accession to an international agreement under subsection (2), such international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with this Constitution."

74 *Id.*

75 Before 1993, South Africa was party only to the United Nations Charter. It was only at the beginning of 1994 that South African signed a number of conventions.

76 Dermott J. Devine, *The Relationship Between International Law and Municipal Law in Light of the Interim South African Constitution Act 1993*, 44 INT'L & COMP. L.Q. 1, 6-7 (1995).

(1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.

(2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.

(3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.[77]

In terms of interpretation of this clause, the Interim Constitution created the Constitutional Court, above the Appellate Division, to adjudicate only constitutional and human rights issues.[78] The Interim Constitution denied the Appellate Division the authority "to adjudicate any matter within the jurisdiction of the Constitutional Court."[79]

The final Constitution provides that international agreements are binding on the Republic only after approval by resolution in both houses of Parliament, the National Assembly and the National Council of Provinces.[80] In addition, an international agreement becomes law in South Africa only "when it is enacted into law by national legislation." [81] However, a self-executing provision of an agreement approved by Parliament was law unless inconsistent with the Constitution or an Act of Parliament.[82]

Likewise, customary international law is binding on South Africa unless inconsistent with the Constitution or an Act of Parliament.[83] The

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77 S. AFR. CONST. of 1993 (IC), ch. 3, § 28.
78 *Id.* at, ch. 7, § 98.
79 *Id.* at ch. 7, § 101.
80 S. AFR. CONST. of 1996, ch. 14, § 231(2).
81 *Id.* at ch. 14, § 231(4).
82 *Id.*
83 *Id.* at ch. 14, § 232.

Constitution requires the Court, when interpreting the Bill of Rights, to "consider international law,"[84] and states that they "may consider foreign law" in making decisions.[85] Since this provision's enactment, international law has been discussed in many cases. For example, in a decision regarding a school education bill, the majority examined the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, the Universal Declaration of Human Rights, the role of the League of Nations and the United Nations in promoting and protecting human and minority rights as well as decisions of the Permanent Court of International Justice.[86]

Section 25 of the final Constitution, in Chapter II, the Bill of Rights, provides that:

> (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
>
> (2) Property may be expropriated only in terms of law of general application
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> a. for a public purpose or in the public interest; and
> b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
>
> (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 all relevant circumstances, including
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> 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

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[84] *Id.* at ch. 2, § 39(1)(b).

[85] *Id.* at ch. 2 § 39(1)(c).

[86] *In re Gauteng Education Bill of 1995*, 1996 (4) BCLR 537 (CC) at 76-87. The court was investigating the applicability and relevance of international human rights law to minority rights in South Africa, in particular whether minorities have the right to state educational institutions based on a common culture, language, or religion.

e. the purpose of the expropriation.

(4) For the purposes of this section
   a. the 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; and
   b. property is not limited to land.

(5) The 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.

(6) 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.

(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.

(8) No 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, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6).

Property rights were one of the most contentious issues in writing the Constitution because so many interests were impacted that amendments could not be made easily. Additionally, the Constitution would clearly indicate just how far the new government had moved from apartheid.[87] The

[87] Professor Ge Devenish, *A Commentary on the South African Constitution*, 1998 BCLR 69.

section reflects an attempt to balance the conflicting individual and the public interests during the period of social transformation.[88]

The Constitutional Court upheld the negative formulation of property rights because it protected private property holdings.[89] The negative formulation is evident in the first two sections of the Constitution, which are the most important in understanding the intent of the provision. Section one clearly protects a property holder's rights, but makes deprivation permissible if it is according to law. Section two explains that an expropriation, or taking, of property is not a deprivation of rights so long as it is for the public purpose and subject to reasonable compensation.

Most importantly, the provision protects against customary interests in land. It protects those who have legally insecure title resulting from past racially discriminatory laws. The protection entitles them to either legally secure tenure, which means restitution of the property, or comparable redress, which is an equitable remedy.[90] While this provision does not call for a recognition of the urgent political and socio-economic need to redistribute land, it protects whites against the arbitrary confiscation of land.[91]

In the final Constitution, unlike in the IC, all the higher courts are given powers of constitutional review.[92] The power to strike down a parliamentary statute, however, resides only with the Constitutional Court, which must affirm the decision of the lower court before the lower court's decision has the force of law.[93]

VI. THE ROLE OF INTERNATIONAL LAW IN INTERPRETING THE CONSTITUTION AND BILL OF RIGHTS

South Africa's land reform and restitution policies are predominantly dictated by internal interpretations of the Constitution. However, South Africa's Constitution also provides that international law plays a substantial role in its domestic practices. This section analyzes two sections of the Constitution. Section 231, the more limited of the two sections, focuses on

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88 *Id.* at 71.

89 *In re Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC) par 72.

90 Ge Devenish, *supra* note 87, at 70-71.

91 *Id.* at 71.

92 *See* S. AFR. CONST. of 1996, ch. 8, §§ 168, 169.

93 *Id.* at ch. 8, § 167(5). Section 167(5) states, "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm to any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force." *Id.*

the relationship between international agreements, customary international law, and domestic law. Section 39 explains the role of international law in interpreting the Constitution.

The language of the Constitution makes it clear that international law plays a key role in interpreting the policies of the Constitution, particularly in the area of human rights, including property rights. Section 231, entitled "International Agreements," provides that:

> (1) The negotiating and signing of all international agreements is the responsibility of the national executive.[94]
>
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).[95]
>
> (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.[96]
>
> (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.[97]
>
> (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.[98]

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[94] S. AFR. CONST. of 1996; ch. 14, § 231(1).
[95] *Id.* at ch. 14, § 231(2).
[96] *Id.* at ch. 14, § 231(3).
[97] *Id.* at ch. 14, § 231(4).
[98] *Id.* at ch. 14, § 231(5).

Parliament must approve all international agreements and treaties.[99] The Constitution also provides that "[c]ustomary international law is the law of South Africa, unless inconsistent with the Constitution or an Act of Parliament."[100]

Under South Africa's Constitution, the National Executive has responsibility for "negotiating and signing…all international agreements."[101] However, "international agreement becomes law in the Republic when it is enacted into law by national legislation."[102] This means that South Africa may sign an international agreement, yet the resulting body of law does not impact its citizens unless the National Assembly and the Council both pass it. The potential impact of South Africa assenting to a treaty but Parliament not passing it is significant yet is not cause for great concern.[103] Experts anticipate few difficulties because "an endorsement of incorporation" could be attached at the ratification process.[104] If the endorsements of incorporation become the general rule, all human rights conventions ratified by Parliament immediately would become binding law.[105]

Concern still exists because Parliament may "require an additional and separate process for the incorporation of treaties ratified by Parliament for international purposes under 231(3), the Constitution will probably bring little change to the existing practice and few treaties will be incorporated into municipal law."[106] By incorporating few treaties into municipal law, South Africa has elected to minimize the protection afforded to its citizens.[107]

International law also is key in interpreting the Bill of Rights. Section 39 of Chapter 3, states:

> (1) When interpreting the Bill of Rights, a court, tribunal or forum
>
> a. Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> b. Must consider international law;
>
> c. May consider foreign law.

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[99] *Id.* at ch. 14, § 231(4).
[100] *Id.* at ch. 14, § 232.
[101] *Id.* at ch. 5, § 82(2)(a).
[102] *Id.* at ch. 4, § 44(1).
[103] Van Wyk, *supra* note 42, at 192.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] Britain and Australia are currently in this situation. Neither country has incorporated the European Convention on Human Rights or the International Covenant on Civil and Political Rights into domestic law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport, and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law, or legislation, to the extent that they are consistent with the Bill.

Section 39 is based largely on the language and structure of the International Covenants that deal with human rights.[108] Fortunately, the Constitution expressly supports incorporating international law into domestic law, giving more credence to the application of international legal principles in interpreting the Bill of Rights.[109] However, almost every provision in the Bill of Rights has a counterpart in an international human rights convention or is governed by general principles of international law, so the Bill of Rights implicitly incorporates international law.[110]

When considering a case, a South African court may look at the entire body of international law. The court is free to consider all applicable law in rendering decisions even though Parliament has not approved a treaty. Limiting the South African courts to considering only law to which South Africa is bound would undercut the Section's effectiveness because the vast majority of international jurisprudence on property comes from the European Commission and Court of Human Rights. Both of these systems operate under the European Covenant and are not binding on South Africa.

International law is not binding on South Africa's courts. By ratifying more treaties or joining an international human rights group, South Africa's judges will have more international law on which to base their decisions. Otherwise, human rights violations could occur in South Africa and the judiciary would be unwilling to act and the international community would be unable to intervene.[111] When these treaties are incorporated into

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[108] Van Wyk, *supra* note 42, at 193.

[109] International law is not mentioned in The Bill of Rights for Canada, Zimbabwe, and Namibia. Even so, those countries' courts consistently draw in international human rights treaties, customary law, and the decisions of the European Court of Human Rights for assistance in interpreting their own countries' Bill of Rights. This decision is justified by the countries' presumption, rather than adherence to, in favor of compliance with international law, the similarity of the country's provisions to the international law provisions, or the legislative history behind their own Bill of Rights.

[110] Van Wyk, *supra* note 42, at 193.

[111] *Id.*

municipal law under Section 231, the courts will be obliged to apply them as they would an ordinary statute.[112] If South Africa joins an international human rights group, violations of international human rights law could no longer be ignored by South African courts."[113]

The expanded role of international and comparative law has had a marked impact on the South African legal system. The particular context of South Africa's Bill of Rights will remain crucial and any initiative that fail to account for South Africa's unique situation are likely to fail.

VII. SOUTH AFRICA'S LAND REFORM POLICIES

Land reform in South Africa started in the 1991 White Paper of Land Reform which identified access to land as a basic human need. The Paper established three policy objectives. First, broadening access to land through the abolition of all racially-based restrictions on land rights and through the expansion of land rights.[114] Second, upgrading title security and quality by modernizing the land registration system, by recognizing tribal land tenure, and by protecting the status and integrity of title.[115] Third, promoting land utilization as a national asset by maintaining commercial agricultural production, promoting rural development, accelerating urbanization by ensuring sufficient land, and conserving land for future generations.[116]

After publication of the 1997 White Paper, land reform policies took three distinct forms: land restitution, land redistribution and land tenure. Restitution returns land rights to persons or communities who were dispossessed of land rights for the purpose of furthering any racially-based discriminatory law. Redistribution "provide[s] the poor with land for residential and productive purposes."[117] Tenure reform focuses on modifying the legal basis of landholding to conform to post-apartheid socio-economic needs, but it has not been used directly by South Africa. All three of these policies redress injustices of apartheid, foster national reconciliation and alleviate poverty through sustainable economic growth. Each policy is addressed in the following sections.

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[112] Van Wyk, *supra* note 42, at 195.
[113] *Id.*
[114] CAREY-MILLER, *supra* note 23, at 245.
[115] *Id.* at 245.
[116] *Id.* at 245.
[117] White Paper 1997, preliminary section (Apr. 24, 2001) *available at* http://land.pwv.gov.za/White%20Paper/whitetab.htm.

A. LAND RESTITUTION

A cornerstone of the land reform policies of the new South African government was land restitution. It was designed to restore land or compensate the people who were dispossessed of land rights as a result of racially discriminatory laws and practices after June 19, 1913, the date of the enactment of the first discriminatory land act, but without perpetrating further injustice to current owners.[118] The key piece of legislation furthering the objective of land reform was the Restitution of Land Rights Act of 1994 (Restitution Act).

The Restitution Act established five entitlement criteria. First, the claimants had to be dispossessed. The claimants must be able to trace their claim back to a deceased relative in order to stand in place of the dispossessed.[119] The Restitution Act treats a community as a deceased relative so an individual or group may claim land previously owned by a community to which they have direct ties.[120]

Second, the claimants must have had a right in the land. Rights in land include any claim to land, whether it was registered or not, and may include a tenant's or sharecropper's interests.[121] Commentary on "rights in land" asserts that the concept is broad, but a narrow interpretation virtually could destroy the intent of the Restitution Act by refusing to recognize forms of land ownership that were particular to the homelands.[122]

Third, the claimants had to be dispossessed after June 19, 1913. Even though discriminatory land ownership practices started decades before the 1913 Act, restitution claims were limited to those that occurred since 1913. Restitution claims were limited out of concern that aboriginal title claims would "create a number of problems and legal-political complexities that would be impossible to unravel."[123] The concern was that historical land claims based on ethnic politics could significantly complicate the push for national unity. In addition, unraveling could occur because there would be a significant number of overlapping land claims.[124]

Fourth, the disposition had to be the result of a racially discriminatory law. This criterion should not be a difficult one to comply with because "the many racist laws which affected rights to land are readily

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[118] *Id.* at 31.
[119] CAREY-MILLER, *supra* note 23, at 326-27.
[120] *Id.* at 328.
[121] Restitution Act, §1.
[122] CAREY-MILLER, *supra* note 23, at 330.
[123] *Id.* at 316-17 (citation omitted).
[124] *Id.* at 317.

identifiable as such."[125] While some racially discriminatory laws are explicit in requiring forced removals, laws that facilitated a gradual weakening of the legal position of target groups also are included in the category of racially discriminatory laws.[126]

Finally, the claimant could not have received just compensation. The Court evaluates whether compensation is necessary based on the time at which the dispossession took place.[127]

In order to fulfill the purpose of the Restitution Act, the Land Claims Court issued orders to resolve land claims between claimants and current landowners if the parties could not resolve their claims. If the parties reached an agreement through negotiation and mediation, the Land Claims Court issued an order consistent with the parties' agreement.[128] If an agreement was not reached between the parties, they submitted the claim to the Land Claims Court for adjudication.[129] The Land Claims Court takes many factors into account in resolving land disputes, including whether it is practical to restore the land to the original owner and whether there is any physical or inherent defect in the land which may cause it to be hazardous for human habitation.[130]

The Act originally provided that all claims must be made by May 1, 1998. However, there was such a demand for restitution that the closing date was extended to December 1998. At that time a total of 54,218 claims for restitution had been registered.[131]

B. LAND REDISTRIBUTION

Redistribution is a policy that provides land for residential and productive purposes to improve the income and quality of life for the poor. Land redistribution is intended to assist the urban and rural poor, farm workers, labor tenants, and women.[132] Redistribution is a social, rather than legal program whereby the state provides financial assistance to the poor so that they may acquire land on an equitable basis to help themselves overcome the discrimination they faced under apartheid.[133]

The Provision of Land and Assistance Act 126 of 1993 (Provision) and the Development Facilitation Act 67 of 1995 (Development Act)

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125 *Id.* at 331.
126 In *re Macleantown Residents Association 1996 (4)* SA 1272 (LLC) at 1277, cited in *id.* at 331.
127 CAREY-MILLER, *supra* note 23, 333.
128 Section 14(1)(c) read together with Section 14(3) of the Restitution Act.
129 Sections 14(1)(a), (b) and (c) of the Restitution Act.
130 Section 15(6) of the Restitution Act.
131 Van Wyk, *supra* note 42, at 177.
132 White Paper on South Africa Land Policy, April 1997, IX.
133 CAREY-MILLER, *supra* note 23, at 398.

furthered the objective of land redistribution. The Provision provides a procedure for communities and individuals to gain access to settlement grants. Again, the Provision mandates the funding to acquire otherwise available land and redistribute some land ownership to the poor. The Provision does not require owners to sell their land. Allocation of the funds is at the discretion of the Minister of Land Affairs.[134] The Development Act seeks to "integrate [the] various aspects of land development"[135] such as physical planning and policy implementation.[136]

C. TENURE REFORM

Tenure reform is a "reform of the legal basis of landholding, usually directed towards the implementation of social change."[137] While it can be a useful independent tool, some elements must be undertaken in conjunction with other land reform policies.[138] Tenure reform has not yet been implemented because it is a complex process with far-reaching consequences. Government officials want to ensure that "upgrading of rights happens in a way which does not lead to internal evictions which would undermine the principle of security of tenure."[139]

VIII. CONCLUSIONS ON SOUTH AFRICA'S LAND REFORM POLICIES AND INTERNATIONAL LAW

The Constitution itself binds the Court to international human rights law, unless those laws are contrary to municipal law. The South African Constitutional Court has fulfilled this requirement by considering international and foreign law precedents in virtually every decision.[140] This consideration has enabled South Africa to learn from other countries and the international community's comparable and contrasting experiences while reinforcing customary international law. For example, the court had to rule whether single-language schools that were funded by the State were

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[134] *Id.* at 406.
[135] *Id.* at 412 (citations omitted).
[136] *Id. at* 412.
[137] *Id.* at 456.
[138] *Id.* at 457.
[139] White Paper on South African Land Policy, April 1997, VI.
[140] *See, e.g., State v. Makwanyane and Another*, 1995 (3) SALR 391, 436-39 (CC) (considering numerous sources of foreign law when unanimously declaring the death penalty unconstitutional.); *In re Gauteng*, 1996 (4) BCLR 537 (CC); *Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa and Others*, 1996 (4) SALR 671 (CC)- (The Court unanimously upholding Section 20(7) of the Promotion of National Unity and Reconciliation Act that permitted amnesty from criminal prosecution and civil liability.).

consistent with education guarantees in the Bill of Rights.[141] The Court relied on the international legal principle that minority groups who have not been victims of past discrimination are not entitled to affirmative protection. Therefore, non-Afrikaners could not be excluded from traditionally Afrikaner schools. The Court carefully considered international law precedents to reach this conclusion since there was no precedent in South African law.

However, the Court has not blindly adhered to international principles; it has, at times, based decisions entirely on its own perception of South African justice. For example, the Court considered the constitutionality of the death penalty.[142] The Court declared the death penalty unlawful after carefully analyzing international and foreign law and concluding that a decision could be made either way without violating customary international law. Interestingly, the Court explicitly grounded its holding on Justice Brennan's dissent in *Furman v. Georgia*.[143] In *Furman*, Brennan asserted that death is an unconstitutional penalty because it treats "members of the human race as nonhumans, as objects to be toyed with and discarded."[144] The South African Court could have decided the case either way, or based its decision entirely on South Africa's unique history, but by following the reasoning of another jurisdiction, the Court implicitly affirmed its commitment to international and foreign human rights standards.

The South African Constitutional Court has not expressly adhered to international human rights laws, nor has the government bound itself to international human rights laws. However, international laws have had a significant impact on interpreting the constitution. This ability and willingness to base Constitutional interpretations on international and foreign law likely will extend to anticipated cases on the constitutionality of the property clause. Therefore, any challenge to South Africa's land reform will be examined for its compliance with international human rights laws. The Constitutional Court probably will rule that South African land reform is constitutional because it is consistent with international human rights law.

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[141] *In re Gauteng*, 1996 (4) BCLR 537 (CC).
[142] *State v. Makwanyane and Another*, 1995 (6) BCLR 665.
[143] Furman v. Georgia, 408 U.S. 238 (1972).
[144] *Id.* at 2743.