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The Politics of Land Rights in the Transition to Democratic South Africa:  
The Rise and Fall of the Constitutional Property Clause

An Honors Paper for the Department of History

By Anna Louisa Roosevelt Lennon

Bowdoin College, 2019  
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## **Abbreviations**

ANC	African National Congress
CA	Constitutional Assembly
CODESA	Convention for a Democratic South Africa
COSATU	Congress of South African Trade Unions
CRLR	Commission on Restitution of Land Rights
DLA	Department of Land Affairs
EFF	Economic Freedom Fighters
LCC	Land Claims Court
MPNP	Multi Party Negotiating Process
NP	National Party
SACP	South African Communist Party
SADT	South African Development Trust
SANNC	South African Native National Congress
SCA	Supreme Court of Appeals
TRC	Truth and Reconciliation Commission

## Introduction

“The land shall be shared among those who work it!” – The Freedom Charter<sup>1</sup>

“Property may be expropriated only ... for a public purpose or in the public interest ... subject to compensation” – Section 25 of the Constitution of South Africa<sup>2</sup>

“Section 25 of the Constitution must be amended to make explicit that which is implicit in the Constitution with regards to expropriation of land without compensation as a legitimate option for land reform”- Economic Freedom Fighters Deputy Leader Floyd Shivambu<sup>3</sup>

In 1913, the Natives Land Act delegated black South Africans, who represented 67 percent of the population, to seven percent of the country’s arable land. In 2017, black South Africans accounted for 81 percent of the population and still owned only four percent of the land.<sup>4</sup> Land rights and distribution remain one of the most contentious political issues in South Africa not only because of continued disparity but also because of the implications that the land question has had as an indication of the ANC’s ability to deliver restitutive justice. The Constitutional Property Clause (known as Section 25), crafted by compromise between the ANC and the apartheid government during the transition to democracy in the early 1990s, protected both apartheid-era property rights and at the same time allowed the newly elected ANC government to expropriate land in order to redress past discriminatory injustice. In 2019, the ANC sought to stabilize their political hegemony and quell criticisms of ineffective land reform

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<sup>1</sup> Congress of the People, “The Freedom Charter,” Klipton, South Africa, June 1955, <https://www.sahistory.org.za/archive/freedom-charter>.

<sup>2</sup> Constitution of the Republic of South Africa, 1996, Section 25.

<sup>3</sup> Jan Gerber, “Land Expropriation: EFF Brings ANC’s Recommendation to Constitutional Review Committee,” *News 24*, November 15, 2018, <https://www.news24.com/SouthAfrica/News/land-expropriation-eff-brings-ancs-recommendation-to-constitutional-review-committee-20181115>.

<sup>4</sup> Department of Rural Development and Land Reform, *Land Audit Report*, November 2017, [https://www.sapeople.com/wp-content/uploads/2018/02/land\\_audit\\_report\\_05jan2018\\_final.pdf](https://www.sapeople.com/wp-content/uploads/2018/02/land_audit_report_05jan2018_final.pdf). Statistics South Africa, *Mid-Year Population Estimates*, July 31, 2017, <http://www.statssa.gov.za/publications/P0302/P03022017.pdf>.

through promises to amend Section 25 and expand the government's right to expropriate. In spite of this, the historical analysis developed in this paper demonstrates that the problem with land reform in South Africa is not the content of Section 25. The history of politics, policy and land reform laws from the 1980s to 2019, demonstrates that the land question remains not because of an ineffective clause but because of the ANC's political inability to implement policy that delivers on the symbolic promise of restitutive justice to its landless and land poor constituents.

The Natives Land Act of 1913 institutionalized a process of European conquest and dispossession of land that had occurred throughout the 19<sup>th</sup> century. It restricted land ownership in South Africa based on race. Under legal apartheid, beginning with the election of the National Party in 1948, the government used the racially divided land system to restrict black people's access to urban centers, deflect political responsibility to ethnic traditional leaders, and relocate the black population to ethnic homelands. Only during negotiations to reform and ultimately end apartheid in the 1980s did the apartheid government begin to change this system of racialized dispossession. During early land reform efforts in the post-apartheid era, the Acts' passage in 1913 served as the starting date from which applicants could make land restitution claims to the state.<sup>5</sup> Due to the statutory and political significance of this date, the history of land policy in this paper begins in 1913, even so, it is necessary to acknowledge that land restrictions due to race began earlier.

In 1910, the British colonies and former Boer republics joined to form the Union of South Africa. At the time of the Union, land reserves existed to varying degrees. These reserves acted as the basis for the later ethnic homelands. The desires of the white farmers and miners, the

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<sup>5</sup> Ruth Hall, "Land Restitution in South Africa: Rights, Development, and the Restrained State," *Canadian Journal of African Studies* 38 no. 3 (2004): 655.

history of military and amicable interaction with chiefs and the population distribution between rural and town land influenced the formation of reserves within the states. For the government, the object of the 1913 Act was to standardize and make rigid the disparate policies across the four states. The first government of the Union relied on the support of white agricultural and mining interests, referred to by historian Stanley Trapido as the union of “maize and gold.”<sup>6</sup> These groups favored the expansion of a racialized land reserves system not only because it gave agricultural land to white farmers but also because it provided white mining interests with a stable and cheap labor pool of men.<sup>7</sup> For the mining industries, the reserve system tied African workers to a permanent home and exempted white mine owners from paying wages to support the workers’ families as the families were subsistence farmers on the reserve.

In response to the 1913 Act, middle-class, educated Africans formed the South African Native National Congress (SANNC), a precursor to the African National Congress (ANC). Evidently, the roots of the ANC as a liberation movement lay in early recognition among black South Africans that losing rights to land preceded losing a range of political and human rights. Through the first half of the twentieth century, the ANC’s constituency swelled as it re-oriented itself as an anti-apartheid movement instead of an elite organization. Yet as the transition to democracy loomed in the 1990s, the ANC leadership lost its early sense of the centrality of land and it failed to develop policy that corresponded with the ideals of its broad support base. The

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<sup>6</sup> Stanley Trapido, “Landlord and Tenant in a Colonial Economy: The Transvaal 1880-1910,” *Journal of Southern African Studies* 5 no. 1 (October 1978): 52-53; Robert Morrell, “The Disintegration of the Gold and Maize Alliance in South Africa in the 1920s,” *The International Journal of African Historical Studies* 21 no. 4 (1988): 619.

<sup>7</sup> Laurine Platzky and Cherryl Walker, *The Surplus People: Forced Removals in South Africa* (Braamfontein: Ravan Press, 2017): 84; Anthony Christopher, “A South African Domesday Book: the First Union Census of 1911,” *South African Geographical Journal* 92 no. 1 (2010): 83.



ANC's failure to meet their constituents' expectations occurred through three stages: pre-transition policy development, mid-transition constitution writing, and post-transition policy implementation. Accordingly, the following three chapters depict the interplay of politics, policy, and law that led to unmet expectations in each of these stages.

### *Literature on Land Reform*

The vast majority of scholarly literature on land reform in South Africa seeks to diagnose a failure of delivery. The objective of these studies is to locate where, in the history of dispossession, the roots of current inequity lie and to prescribe a form of redress from this identification. Three common themes run through the literature: ethnographic critiques of local land reform infrastructure; institutional critiques of the judiciary's role in land reform; and political critiques of the ANC's priorities and leadership.

The purpose of this thesis is to explain the ANC's ineffective land reform through a history of law and politics. I divide this history into three key eras and trace how in each, political actions responded to developments in law and developments in law in turn reflected political priorities. Through this approach I touch on structural, judicial, and political elements. Ultimately, I build upon the literature that highlights failure at each of these levels to argue that the proposed amendment of Section 25 is ineffective because historically, political tension within the ANC and between the ANC and NP produced land laws and policies that perpetuated continued political inaction.

In her multiple works on the land reform issue in South Africa, sociologist Cherryl Walker combines ethnography with analysis to argue that poor organization and lack of resources limited the effect of land restitution agencies. Walker worked as a Regional Land

Claims Commissioner on the Commission on Restitution of Land Rights (CRLR) between 1995 and 2000. The CRLR was part of the tripartite system established by the ANC to manage land restitution claims. This system consisted of the CRLR, the Department of Land Affairs (DLA), and the Land Claims Court (LCC). The CRLR and the DLA were interdependent agencies of the state responsible for drawing up land claims settlements. The LCC was the court charged, initially, with authorizing each of these claims even if there was no dispute. The guaranteed judicial review and system of checks and balances was meant to allay National Party fears that the new government would freely expropriate land from white owners. However, Walker argues, it was unclear which specific responsibilities were assigned to each agency, and this interfered with the proper resolution of claims for restitution of land allocation.<sup>8</sup> Walker also argues that the limited scope, in terms of time and resources, of the programs precluded any option but failure.

Institutional critiques of the judiciary's role in land reform recognize that both the nature of the South African judiciary and the extent of the task of land reform also assured a failure of delivery. These criticisms often focus on the victims of forced removals and argue the Land Claims Court (LCC) was ill-equipped to deliver restorative justice. The LCC furthered an adversarial, market-based relationship between the dispossessed and the land owner or, frequently, between the dispossessed and the state. This context did not offer the same potential for healing or restitutive justice as the Truth and Reconciliation Commission (TRC). Historian Elmien Du Plessis argues land should have been included in the TRC to give the dispossessed a voice.<sup>9</sup> The LCC's operation in solely the realm of physical value and compensation failed to

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<sup>8</sup> Cherryl Walker, "Finite Land: Challenges Institutionalising Land Restitution in South Africa, 1995-2000," *Journal of Southern African Studies* 38, no. 4 (December 2012): 809–26.

<sup>9</sup> Elmien Du Plessis, "Property in Transitional Times: The Glaring Absence of Property at the TRC," in *The Limits of Transition: The South African Truth and Reconciliation Commission 20 Years On*, ed. Mia Swart and Karin van Marle (Leiden: Brill Nijhoff, 2007): 94-121.

rectify lasting senses of moral violation. Historian Bernadette Atuahene describes the dispossessions under apartheid as “dignity takings.”<sup>10</sup> The state confiscated land and expelled people because they conceived of them as less than human. Restitution of the physical land does not restore this denied humanity.

In one of her numerous pieces on South African land reform, historian Ruth Hall argues that the judiciary’s extensive role in land reform allowed the executive to avoid the necessary task of restructuring the agrarian system in order to overhaul distribution.<sup>11</sup> Theunis Roux explains that the formal nature of judicial culture in South Africa often meant LCC judges did not view the court as an aid to an activist project of restoring justice. With the new constitution, the court system transitioned from prioritizing the policy preferences of legislators over the constitution to enforcing the constitution over legislators. Judicial culture was thereby characterized by formalism: an ingrained tendency among judges to refer primarily and extensively to doctrine in their decision making as opposed to actively pursuing certain principles like restitutive justice.<sup>12</sup> When unclear, the court referred to common law or statute instead of prioritizing the interests of the poorer black applicants.<sup>13</sup> While this did not prove to be true at the level of the Constitutional Court, which had a clear mandate to operate with a purview of rectifying the wrongs of apartheid, lasting judicial formalism became a restraining influence

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<sup>10</sup> Bernadette Atuahene, *We Want What’s Ours* (Oxford: Oxford University Press: 2014): 3.

<sup>11</sup> Ruth Hall, “Land Restitution in South Africa: Rights, Development, and the Restrained State,” *Canadian Journal of African Studies* 38, no 3 (2004): 654-671.

<sup>12</sup> Theunis Roux, “Pro-Poor Court, Anti-Poor Outcomes: Explaining the Performance of the South African Land Claims Court,” *South African Journal on Human Rights* 20 no. 4 (2004): 511-43.

<sup>13</sup> Roux, “Pro-Poor Court”; Ben Cousins “Land Reform in South Africa is Sinking: Can it be saved?” *Nelson Mandela Foundation*.

within the lower courts, such as the LCC, limiting their efficacy as a tool of social transformation.

Lastly, and evident not only in scholarship but in political discourse in South Africa at least since the inauguration of President Jacob Zuma in 2009, are political critiques of the African National Congress (ANC). Political critiques of the ANC rest on the nature and extent of concessions made to the NP, the ANC's focus on urban issues at the neglect of the rural poor, and acceptance of neo-liberal models for market redistribution. Marinda Weideman argues the ANC adopted a neo-liberal land reform policy which maintained the existing power of elites and failed to reallocate land to poor blacks. This adoption was due to pressure from the NP, commercial agriculture lobbies, and institutions like the IMF and World Bank. The ANC was susceptible to external pressure in part because of its failure to establish a specific position on land reform beyond a vague call for increased state control.<sup>14</sup> Michael Aliber argues that critiques of the practical inefficacy and immorality of the ANC's Willing Buyer, Willing Seller land policy ought to be reframed as critiques of the ANC as a political party.<sup>15</sup> During the transition, Richard Spitz and Matthew Chaskalson explain, the ANC, anticipating democratic elections, sought to build legitimacy. Ironically, during this transition, the ANC moved further away from reflecting the ambitions of its followers.<sup>16</sup> Chaskalson echoes this critique in a separate piece where he specifically decries the lack of organization and transparency in the

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<sup>14</sup> Marinda Weideman, "Who Shaped South Africa's Land Reform Policy?" *Politikon* 31 no. 2 (November 2004): 235.

<sup>15</sup> Michael Aliber, "Unravelling the 'Willing Buyer, Willing Seller' Question," in *Land Divided, Land Restored: Land Reform in South Africa for the 21<sup>st</sup> Century*, ed. Ben Cousins and Cheryl Walker (Auckland Park: Jacana, 2015): 145-160.

<sup>16</sup> Richard Spitz and Matthew Chaskalson, *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (Johannesburg: Witwatersrand University Press Publications, 2000).

ANC during the negotiations.<sup>17</sup> The ANC's lack of organization had lasting ramifications for its constituents. The ANC leadership's attention centered on the debates with the NP and the coming democratic elections instead of on ensuring protections for its marginalized constituents.<sup>18</sup> In a piece from 2015, Hall criticizes the ANC's prioritization of farming as a continuation of the NP's creation of ethnic homelands. The focus on relatively elite black farmers perpetuated a labor pool of landless black people.<sup>19</sup> Historically, Hall argues, the ANC's ineffective land reform has been due to its tendency to divide the land question into separate issues of justice and development. Throughout the negotiations and into its tenure as the ruling party, the ANC's policies prioritized development while forsaking delivering restitutive justice instead of seeking strategies that addressed the multiple layers of land rights.

### ***Methodology, Sources, and Description***

This paper would not have been possible without the extensive online databases of South African History Online, O'Malley Archives, South African Legal Information Institute, the Constitutional Court, and the Justice Department.<sup>20</sup> These websites contained nearly all of the

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<sup>17</sup> Matthew Chaskalson, "Stumbling Towards Section 28: Negotiations Over the Protection of Property Rights in the Interim Constitution," *South African Journal on Human Rights* 11, no. 2 (1995): 222-240.

<sup>18</sup> Hassen Ebrahim and Laurel Miller, "Creating the Birth Certificate of a New South Africa: Constitution Making after Apartheid," in *Framing the State in Times of Transition: Case Studies in Constitution Making* ed. Laurel Miller (Washington, D.C: United States Institute of Peace Press, 2010):111-157.

<sup>19</sup> Ruth Hall, "Who, What, Where, How, Why? The Many Disagreements About Land Redistribution in South Africa," in *Land Divided, Land Restored: Land Reform in South Africa for the 21<sup>st</sup> Century*, ed. Ben Cousins and Cheryl Walker (Auckland Park: Jacana, 2015): 127-144.

<sup>20</sup> <https://www.sahistory.org.za/>;  
<https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv00000.htm>;  
<http://www.saflii.org/>; <https://collections.concourt.org.za/handle/20.500.12144/1>;  
<http://www.justice.gov.za/lcc/judgments.html>.

legal opinions, statutes, and draft bills used in this project. The multiple drafts of early ANC land policy documents and property clauses during the negotiations process proved essential to tracing the timelines of developing policy. To contextualize the evolution from one draft to the next, I relied on published writings and interviews with key negotiators.<sup>21</sup> These memoirs and interviews illuminate the influence of personal relationships among negotiators as well as pressures from external bodies, particularly the World Bank. Each chapter combines formal documents with personal accounts to explain how political strategy and published policy and law influenced each other.

The first chapter traces the development of ANC land policy before formal negotiations with a focus on the political response of the liberation movement to the implementation and later repeal of apartheid land laws. Opposition to the passage of early racial land laws spurred the development of the movement and allowed the ANC to gain broad support for their sweeping rejections of racist land dispossession. From the 1920s to the 1950s, ANC land policy developed first under the influence of African nationalism and then communism. The NP's repeal of apartheid land laws in the 1980s and the impending negotiations surrounding the transition led the ANC leadership to focus their politics on achieving democracy in a unitary South Africa along with their electoral victory. Due to this focus as well as disparate political ideologies within the ANC leadership, and unquestionable political support from the majority of South Africans, the ANC was not politically motivated to develop a cohesive land policy that corresponded with earlier revolutionary promises to its constituents. The ANC entered formal constitutional negotiations with an ambiguous and ambivalent land policy.

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<sup>21</sup> See Meyer 2001; Ramaphosa 2001; Du Plessis 1994; Coles 1993; Hall 2010.

The second chapter follows the formal negotiation process to the passage of the Restitution of Land Rights Act. The chapter shows the multiple levels on which the negotiations process allowed the ANC to continue to delay developing land policy that would have been both implementable and satisfactory to its constituents. The ANC's political prioritization of economic stability and preventing violence led it to agree to enshrine a protection of property rights in the Constitution—an outcome it had previously rejected. First, the ANC agreed to a stability-ensuring process in which an un-elected and non-proportionally representative body instituted constraints, through an Interim Bill of Rights, on the later Constitutional Assembly's ability to construct a final constitution. Due to this, the NP retained a disproportionate impact on the work of the Constitutional Assembly and was able to negotiate a property clause that reflected its constituents' interest, namely the protection of property rights for white South Africans in the Interim Constitution. The result was a constitutional property clause containing the opposing objectives of protecting existing land rights and redistributing land equitably. Unable to institute an acceptable balance between these two in the constitution, the ANC instead created a court system to balance the two constitutionally protected interests on a case-by-case basis—the Land Claims Court (LCC). Ironically, once in power, the ANC did not exploit the potential for possible expropriation it had negotiated.

The third chapter compares the ANC's market-based land reform policy following the transition with Constitutional Court interpretations of Section 25 to show that the negotiated clause allowed a wide range of policies to be constitutionally implemented. Dispossessed people found success only through bringing claims to the Constitutional Court that had failed in the lower levels of the ANC's land reform system. The ANC's political choice to rely on market transactions limited a program of state involvement and made individuals responsible for

pushing their cases all the way to the Constitutional Court. Constitutional Court decisions criticized the LCC's limited interpretation of the clause and the Restitution Act. This chapter explores the various constraints in implementing land reform: the WBO, commercial agriculture, institutional constraints, and goal of ensuring stability. Only after twenty years of ineffective policy, in 2019, threats to the ANC's political hegemony drove the leadership towards promises to amend Section 25.

Together, the three chapters point to the conclusion that stalled land reform in South Africa is not because of an ineffective clause but because of the political tensions within the ANC, between the ANC and NP, and between the ANC leadership and its constituents. This history of the politics and laws of land rights in South Africa shows that only local activism and political will, not a new clause, will drive reform.



## **Chapter One**

### **Retreat from Nationalization: The Development of ANC Land Policy Before Formal Negotiations**

The lack of effective land distribution after the end of apartheid is notable given the founding principles of the African National Congress (ANC)—the precursor to the ANC party formed largely in response to early National Party (NP) racially discriminatory land policies. In the early 20<sup>th</sup> century, the ANC leadership recognized that restricting land rights would lead to restricted political and human rights. This proved true as the NP based its escalating project of racial segregation and oppression in the mid 20<sup>th</sup> century on denying black South Africans ownership of land and deporting them to designated reserves. In response, the ANC amassed popular support as a liberation movement calling for revolutionary redistribution of land. In this chapter, I trace how, despite these core commitments to land rights, the ANC leadership's focus on land rights became diluted as formal negotiations approached in the early 1990s and the ANC's central priority became a stable transition to democracy.

As formal negotiations loomed, due to internal divergences, the ANC failed to develop a cohesive strategy for land reform that matched their constituents' expectations of restitutive justice. At the same time, the NP developed and implemented a reform agenda in an attempt to appease ANC and international criticism while protecting white property owners' rights. The ANC rejected the NP's proposals, but the ANC leadership struggled to agree on an alternative. By the 1990s, the economic and political experts in the ANC did not see earlier promises of state-led broad redistribution, specifically the communist-influenced 1955 Freedom Charter, as feasible. Therefore, entering formal negotiations, no coherent vision existed not only between the land reform strategies of the NP and the ANC but also among various members of the ANC and

between the ANC leadership and its constituents. These multiple levels of disconnect later weakened the ANC's negotiating power in developing Section 25.

### ***The Land Laws of Apartheid***

Laws governing land rights and access underpinned the apartheid era and allowed the minority white population to remain in control of the majority black population. The implementation of racially based segregation preceded the start of formal apartheid rule in 1948. The apartheid government built upon earlier laws which forced black people onto small, unproductive plots of land. These areas were then used as labor pools as black farmers and laborers could not support themselves on the land they occupied. Instead, they had to seek outside employment.

Precedents to apartheid included the Natives Land Act of 1913 which restricted black South Africans, who at the time composed 67 percent of the population, to seven percent of arable land.<sup>1</sup> Under the Natives Land Act, black people were no longer allowed to buy land outside the proclaimed boundaries of the reserves. Black people who did not live on the reserves lost any previous economic freedom as cash tenants or sharecroppers and were forced to become labor tenants or wage workers on white owned land.

From the Natives Land Act of 1913 to the beginning of legal apartheid in 1948, through various acts, commissions, and studies, the government promised to expand the amount of land allotted to the reserves. These promises of expansion were ultimately political tools to quiet

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<sup>1</sup> Laurine Platzky and Cherryl Walker, *The Surplus People: Forced Removals in South Africa* (Braamfontein: Ravan Press, 2017): 84; Anthony Christopher, "A South African Domesday Book: the First Union Census of 1911," *South African Geographical Journal* 92 no. 1 (2010): 25.

resistance while continuing the subjugation of black people through land deprivation. The Development Trust and Land Act of 1936 purported to increase land for the reserves, but in implementation the additional land was already included in the reserves designation and it nullified the voting rights of black residents in the reserves.<sup>2</sup> The Development Trust and Land Act also created the South African Development Trust (SADT). The SADT controlled all state-owned land and oversaw all land transactions involving black South Africans. The effect of this was to bar black South Africans from participation in private land markets.

Under formal apartheid, the government created racial groups of white, colored, Indian, and African people.<sup>3</sup> With these classifications established, the government further divided access to land by race. The 1950 Group Areas Act made it mandatory for people to live only in areas assigned to their race group. Those not of the assigned race group were removed. The government passed the Prevention of Illegal Squatting Act in 1951, the Reservation of Separate Amenities Act in 1953, and the Trespass Act in 1959. All of these facilitated the removal of black South Africans to designated land reserves and restricted them from moving freely in non-designated areas.<sup>4</sup>

Ultimately, the apartheid government sought a system in which black people lost citizenship to white South Africa and instead became citizens of self-governing black ‘homelands.’ The first Bantu Authorities Act of 1951 laid the groundwork for the increased authority of traditional structures of power within the existing reserves. The subsequent Bantu Self-Government Act of 1959 and Bantu Homelands Citizenship Act of 1970 created the ethnic-

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<sup>2</sup> See also: Beaumont Commission, Natives Administration Act of 1927, Platzky and Walker, *Surplus People*, 86-90.

<sup>3</sup> David Gordon, *Apartheid in South Africa* (Boston: Bedford/ St. Martin’s, 2017): 8.

<sup>4</sup> Catherine Coles, “Land Reform from Post-Apartheid South Africa,” *Boston College Environmental Affairs Law Review* 20 no.4 (August 1993): 714.

based ‘homelands’ and mandated that black South Africans live in their assigned area by revoking land ownership rights in white areas. Once black people were in the assigned areas, the government revoked their South African citizenship. The aim of the acts was to make black people citizens of the designated ‘homelands.’ To fulfill its commitment to ‘separate development,’ a euphemism for apartheid, the NP embarked on a project of forced removals and reserve consolidation. Black people were required to carry identification passes in white areas. The pass requirements also forced black people to stay with their white employers or face deportation or imprisonment.

To justify the deportations of 3.5 million people between 1960 and 1982, the NP framed the Bantustans as a return to true homelands and traditional leadership as well as a chance for development.<sup>5</sup> The Bantu Homelands Citizenship Act of 1971 provided for the creation of legislative assemblies within the reserves. Like the Bantu acts before it, the grants of political self-control came in tandem with increased dispossession. The Citizenship Act required that black residents obtain special permission to continue living in their own family homes in urban areas.<sup>6</sup> The NP government ultimately envisioned the Bantustans as small, self-governing states. In reality, black people were forced off their ancestral lands to overcrowded reserves where they were governed by chiefs whose position often depended on their collaboration with the NP.<sup>7</sup>

In 1979, facing increasing global condemnation and economic sanctions, P.W. Botha, the leader of the NP Government, told his followers the apartheid regime must “adapt or die.”<sup>8</sup>

Under President Botha, in the mid 1980s the National Party began to reform apartheid

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<sup>5</sup> Gordon, *Apartheid*, 18.

<sup>6</sup> Platzky and Walker, *Surplus People*, 125.

<sup>7</sup> Gordon, *Apartheid*, 10-11.

<sup>8</sup> PW Botha, “Address by State President,” Natal Congress Durban August 15, 1985.

legislation. Reform was also driven by a split within the NP. By the early 1980s, the party membership was divided between elite business men and working-class Afrikaners. The elite group favored an end to strict segregation due to their own business interest in using black labor. Some elites became ideologically disillusioned with the apartheid project as well.<sup>9</sup> Botha represented the elite group within the party and his election in 1978 demonstrated the dominance of elite interests in the NP agenda. In 1982 Botha's government announced their plans for a new constitution and government which included political representation for Colored and Indian people in a tri-cameral parliament system. The new constitution triggered a split within the NP and 23 parliament members left the party to establish the new, far right Conservative Party.<sup>10</sup>

### ***The National Party's Land Reform***

Throughout the mid 1980s, the NP government repealed many of the laws that dispossessed black land owners and restricted their movement and territories. However, the repeals did not redress the effects of forced removals nor did they redistribute land. The reforms proposed by the NP did not go so far as to threaten the property rights of their white constituents; rather, they sought to enshrine those rights. In that way, the NP tried to prevent any real revolutionary redistribution under any future post-apartheid government.

The first significant round of repeals of discriminatory policies occurred during the 1986-1989 government-ordered state of emergency. During this period violence and protest increased in predominantly black areas. In 1986, the government passed the Restoration of South African

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<sup>9</sup> Hermann Giliomee, *The Afrikaners: Biography of a People* (Charlottesville: University of Virginia Press, 2003): 607.

<sup>10</sup> Craig Charney, "Class Conflict and the National Party Split," *Journal of Southern African Studies* 10 no. 2 (April 1984): 273.

Citizenship Act with the intention to bring those living in the Bantustans back into the South African state. In implementation, this act mainly affected those living in urban areas or in areas where black people lived illegally, called ‘black spots.’<sup>11</sup> By 1990, frustration with the illegitimacy of the Bantustan leadership and desire for reincorporation into South Africa drove widespread violence within the Bantustans.<sup>12</sup>

ANC members and their supporters contended that the NP’s reform project was meant to suppress the growing power of the anti-apartheid movement. ANC supporters protested the continued exclusion of black people from political representation in the 1983 constitution. ANC member Zola Skweyiya argued that members of the NP accomplished their goal of suppressing black voter participation because they used the new Constitution to deprive black citizens of equitable land:

in order for the new constitution to function, there must be laws and institutions which fragment the land areas of South Africa into racially determined residential areas, such as the Group Areas Act, and the ‘homelands’ which define the African majority as non-citizens of SA. Without the homelands, the exclusion of the Africans from the constitutional process has no justification or foundations.”<sup>13</sup>

Anti-apartheid activists also fundamentally denied legitimacy to any constitution or government based on the racial division and oppression of South Africans. The Bantustans were a clear symbol of continuing inequity despite nominal political reform.

The mid-1980s repeals were haphazard and meant to quell violence. In 1989, after a stroke, Botha resigned the presidency to F.W. de Klerk. By 1991, under de Klerk, the NP put forth a White Paper on their new position on land rights; they also put forth five repeal bills. In the 1991 White Paper, the NP government claimed that land was “a basic common resource to

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<sup>11</sup> Coles, “Land Reform,” 719.

<sup>12</sup> Coles, “Land Reform,” 719.

<sup>13</sup> Zola Skweyiya quoted in Coles, “Land Reform,” 715.

all the people of this country” and that “every person has certain basic needs with regard to land, access to it and the use of it.”<sup>14</sup> Nevertheless, these acknowledgements did not lead the government to consider or implement programs of redistribution or reform. Instead, the stated objective of the government’s reform plan was “ensuring that existing security and existing patterns of community order will be maintained” and “offer[ing] equal opportunities for the acquisition, use and enjoyment of land to all the people within the social and economic realities of the country” through a system of “private enterprise and private ownership.”<sup>15</sup> While the acknowledgement of land as a basic and shared resource among the people of South Africa was a radical idea for the NP, their ensuing policies focused on bringing the Bantustans back under the control of the central government and the repeal of explicitly racist legislation.<sup>16</sup> In the White Paper, the NP specifically opposed expropriating land to return it to previous black owners. Instead, the government planned to promote accessibility for all races to purchase publicly and privately held land.<sup>17</sup>

Along with the White Paper, the NP tabled five bills. The bills repealed the majority of apartheid land laws. These bills were the Abolition of Racially Based Land Measures Bill, the Upgrading of Land Tenure Rights Bill, the Residential Environment Bill, the Less Formal Township Establishment Bill, and the Rural Development Bill. Following debate, the parliament rescinded the Residential Environment and Rural Development bills.<sup>18</sup> The Abolition of Racially Based Land Measures bill repealed key apartheid legislation including the Natives Land Act of

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<sup>14</sup> Republic of South Africa, *White Paper on Land Reform* (Pretoria: Government Printer, 1991), 1.

<sup>15</sup> Republic of South Africa, *White Paper on Land Reform*, 1.

<sup>16</sup> Juanita Pienaar, *Land Reform* (Cape Town: Juta and Company Ltd, 2014): 154.

<sup>17</sup> Coles, “Land Reform,” 726.

<sup>18</sup> Pienaar, *Land Reform*, 155.

1913, the Development Trust and Land Act of 1936, the Black Communities Development Act of 1984, and the Group Areas Act of 1966. The Abolition Act also established the Advisory Commission on Land Allocation. This commission advised the President on land suitable for agricultural development and for providing access to the landless.<sup>19</sup> These bills formed the reform agenda of the NP. The NP passed new land rights laws without proposing measures to rectify the unequal distribution of land that their now repealed policies had created.

Despite the repeal of apartheid legislation, the ANC still rejected the reform agenda in the White Paper. The ANC argued the reforms were a minimal effort to equalize land access and a mask for the NP's true purpose of protecting white land rights. Furthermore, equal access to land could not redress the damage of systematic dispossession. The proposals in the White Paper failed to demonstrate government or individual accountability or apology for apartheid policies. The policies also failed to propose methods of actively equalizing disparate distribution. The land identified by the Commission remained under government control and was primarily land the state already owned. In the system proposed in the White Paper, government ministers could select undesirable land for black people; however, black people could not claim the land that was deprived of them by apartheid laws. The NP had no intention of expropriating land and did not intend to interfere with land markets. The NP, characterizing its own program as one of development, granted government officials wide powers to subsidize certain "productive" land use.<sup>20</sup> Under the new NP land policy, development replaced explicit racism as the government's

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<sup>19</sup> Pienaar, *Land Reform*, 156.

<sup>20</sup> Ruth Hall, "The Politics of Land Reform in Post-Apartheid South Africa, 1990 to 2004: A Shifting Terrain of Power, Actors and Discourses" (PhD diss., University of Oxford, 2010), 139.



justification for its policies. Despite the new justification, the policies still created unequal land allocation by race.<sup>21</sup>

The ANC was clear in its rejection of the White Paper proposals, but it struggled to develop its own cohesive and actionable land policy. As the NP made reforms and proposals in an attempt to protect its interests during the transition, the ANC tried to resolve internal disagreement about the possibility and potential of the expropriation and nationalization of land.

### *SANNC and Early ANC Land Policy*

Early in the 20<sup>th</sup> century, the South African Native National Congress (SANNC), the precursor to the ANC, formulated cohesive policy largely in response to early land dispossession laws. Over the course of the century, the ANC transformed from a party of middle-class professionals seeking equal access to land to a liberation movement influenced by African nationalism and communism.

In 1914, the SANNC sent a delegation to meet with the British Secretary of the Colonies in London. The delegation did not challenge British rule over South Africa, but it issued a petition to the King arguing that the Natives Land Act of 1913 was a first step towards disenfranchisement for Africans. The SANNC accepted the concept of racial division of land yet demanded distribution be made on equal terms in proportion to the number of blacks and whites in the population.<sup>22</sup> In 1916, the SANNC again protested the Natives Land Act and published a document of resolutions describing it as a means of subjugating African laborers:

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<sup>21</sup> Coles, "Land Reform," 728.

<sup>22</sup> South African Native National Congress, "Petition to King George V," July 1914. <https://www.sahistory.org.za/archive/petition-king-george-v-south-african-native-national-congress-july-20-1914>.

To deprive the Natives as a people of their freedom to acquire more land in their own right: To restrict or limit their right to bargain mutually on even terms for the occupation of or settlement on land: To reduce by gradual process and by artificial means the Bantu people as a race to a status of permanent labourers or subordinates for all purposes and for all times with little or no freedom to sell their labour by bargaining on even terms with employers in the open markets of labour either in the agricultural or industrial centres. To limit all opportunities for their economic improvement and independence: To lessen their chances as a people of competing freely and fairly in all commercial enterprises.<sup>23</sup>

The SANNC rejected the Act and argued “there should be no interference with the existing conditions and vested rights of the Natives, and there should be no removal or ejection of them from their ancestral lands or from lands they have occupied for generations past: but they should have unrestricted liberty in every Province to acquire land wherever and whenever opportunity permits.”<sup>24</sup> At this stage, the SANNC focused on the protection of black land owners’ existing rights rather than on redistribution. Later, as apartheid ramped up, the ANC became a mass liberation movement rather than a group of black elites seeking to protect their land holdings. The resolutions demonstrate an early understanding of the long term aims and effects of apartheid land legislation; they encapsulated the SAANC’s view that protecting political and economic rights began with protecting land rights.

In May 1923, the SANNC, influenced by growing African nationalist ideas, stated “the declaration by Parliament that the Black man, the man of African descent and origin has no right to ownership of land in this, an African, land, and that only the man of European origin has

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<sup>23</sup> South African Native National Congress, “Resolution Against the Natives Land Act 1913 and the Report of the Natives Land Commission,” October 1916.

<https://www.sahistory.org.za/archive/resolution-against-natives-land-act-1913-and-report-natives-land-commission>

<sup>24</sup> South African Native National Congress, “Resolution Against the Natives Land Act.”

landed rights in this, a non-European country, is injustice of the grossest magnitude.”<sup>25</sup> The SANNK changed its name to the African National Congress (ANC) and declared, as part of a proposed Bill of Rights: “(I) That the Bantu inhabitants of the Union have, as human beings, the indisputable right to a place of abode in this land of their fathers. (2) That all Africans have, as the sons of this soil, the God-given right to unrestricted ownership of land in this, the land of their birth.”<sup>26</sup> Along with African nationalism, in this era, the communist-influenced view of collective land-rights gained influence within the ANC.

The South African Communist Party (SACP) officially formed in July 1921.<sup>27</sup> From its inception, the party recognized the centrality of land distribution in motivating a proletariat revolution. A few years later, the Communist International (Comintern) reflected on the primacy of land issues to the development of the SACP:

South Africa is a black country, the majority of its population is black and so is the majority of the workers and peasants. The bulk of the South African population is the black peasantry, whose land has been expropriated by the white minority. Seven eighths of the land is owned by whites. Hence the national question in South Africa, which is based upon the agrarian question lies at the foundation of the revolution in South Africa.<sup>28</sup>

The SACP identified the root of working-class oppression as the racial dispossession of land.

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<sup>25</sup> African National Congress, “Resolutions of the Annual Conference of the African National Congress,” May 1923. <https://www.sahistory.org.za/archive/resolutions-annual-conference-african-national-congress-may-28-29-1923>.

<sup>26</sup> African National Congress, “Resolutions.”

<sup>27</sup> South African Communist Party, “Manifesto of the Communist Party of South Africa,” July 1921. <https://www.sahistory.org.za/sites/default/files/Manifesto%20of%20the%20communist%20Party%20of%20South%20Africa%201921.pdf>.

<sup>28</sup> Executive Committee of the Communist International, “Resolution on ‘the South African question,’” 1928. <https://omalley.nelsonmandela.org/omalley/index.php/site/q/031v01538/041v01600/051v01603/061v01605.htm>

By 1943, the ANC surpassed the SANNC's early commitment to protecting existing black land rights and committed to redistribution. In an updated proposed Bill of Rights, the ANC reiterated its rejection of the Natives Land Act and called for change:

1. That the present allocation of 12½% of the surface area to 7,000,000 Africans as against 87¼% to about 2,000,000 Europeans is unjust and contrary to the interest of South Africa, and therefore demand a fair redistribution of the land as a prerequisite for a just settlement of the land problem.
2. That the right to own, buy, hire or lease and occupy land individually or collectively, both in rural and in urban areas is a fundamental right of citizenship, and therefore demand the repeal of the Native Land Act, the Native Trust and Land Act, the Natives Laws Amendment Act, and the Natives (Urban Areas) Act in so far as these laws abrogate that right.<sup>29</sup>

At this point, the ANC's definition of 'just' land reform was becoming grounded in tangible redistribution of land. The ANC expanded upon the idea of redistribution in the 1955 Freedom Charter.

The ANC published the Freedom Charter in June 1955 at the Congress of the People. The document represented the views not only of the ANC but also of the SACP and three other organizations.<sup>30</sup> The document was edited and compiled by SACP member Rusty Bernstein. The purpose of the Congress of the People was to unite and articulate the opinions of the politically unrepresented as well as to connect the ANC with a wider base of supporters. Delegates came from all over South Africa. Leading up to the Congress, regional committees formed and communicated with local working-class people about their demands by going to trade union

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<sup>29</sup>African National Congress, "Africans' Claims in South Africa," 1943. In Gwendolyn M. Carter and Thomas Karis, *From Protest to Challenge: A Documentary History of African Politics in South Africa 1882-1964. Volume 2 Hope and Challenge 1935-1952* (Stanford, CA: Hoover Institute Press, 1973): 209-223.

<sup>30</sup> Coles, "Land Reform," 739. The three other organizations were the South African Indian Congress, the South African Coloured People's Organization, and the Congress of Democrats.

meetings, churches, and even door to door.<sup>31</sup> The nearly 3,000 delegates reflected the racial and socioeconomic demographics of the country. The Congress took place in the face of often hostile government control. Apartheid government police officers watched and frequently questioned participants. On the second day of the Congress, police surrounded, held at gun-point, and forced participants to reveal their names and addresses.<sup>32</sup> The ANC President at the time, A.J. Lutuli commented on the significance of the event:

Why will this assembly be significant and unique? Its size, I hope, will make it unique. But above all its multi-racial nature and its noble objectives will make it unique, because it will be the first time in the history of our multi-racial nation that its people from all walks of life will meet as equals, irrespective of race, colour and creed, to formulate a freedom charter for all people in the country.<sup>33</sup>

The Freedom Charter, the document adopted by the Congress, laid out concrete demands for equality in South Africa. The Congress and process through which the Charter was created generated widespread publicity and attention. The document found a wide readership, and the position on land articulated in the Freedom Charter remained the ANC's position in the mind of their constituents even as the ANC leadership would ultimately adopt different policies.

On the subject of land, the Freedom Charter called for redistribution without delineating an actionable plan for how this ought to take place. "The land shall be shared among those who work it!" the charter declared. "Restrictions of land ownership on a racial basis shall be ended, and all the land re-divided amongst those who work it to banish famine and land hunger."<sup>34</sup> The

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<sup>31</sup> Frances Baard and Barbie Schreiner, *My Spirit is not Banned* (Zimbabwe: Zimbabwe Publishing House, 1986), <https://www.sahistory.org.za/archive/congress-people>.

<sup>32</sup> "Congress of the People," June 1980, <https://www.sahistory.org.za/archive/congress-people-i-was-there>.

<sup>33</sup> R.P. Ngcobo, "Twenty Years of the Freedom Charter," *The African Communist* no. 63 (Fourth Quarter 1975), 22, <https://www.sahistory.org.za/archive/twenty-years-freedom-charter-r-p-ngcobo-african-communist-1975>.

<sup>34</sup> Congress of the People, "The Freedom Charter," Klipton, South Africa, June 1955, <https://www.sahistory.org.za/archive/freedom-charter>.

association between land redistribution and general equitable redistribution among the working class in this statement reflected the communist influence on the ANC's land policy at the time.<sup>35</sup> The monumental nature of the Congress of the People and the ensuing political response solidified the fame of the Freedom Charter.

After the Congress of the People, police seized delegates and imprisoned them on charges of treason. The government argued the Charter called for a violent overthrow of the government. The trial proceedings continued until 1961, when the court found the delegates were not planning to violently overthrow the government and freed them. Then, in April 1960, the government passed the Unlawful Organizations Act which allowed the government to label and ban unlawful organizations.<sup>36</sup> A day after the passage of this Act, the government banned the ANC. From the 1955 passage of the Freedom Charter to the ANC's unbanning in 1990, land policy development as well as general party activities occurred underground or in exile. In exile, a disconnect developed as ANC supporters adhered to the Freedom Charter vision while the ANC leadership's plans evolved.

### ***The ANC Develops Land Policy in Exile***

Following the apartheid government's 1960 ban of the party, ANC president Oliver Tambo sought to intensify the ANC's attack on the NP government from exile. As a part of this effort, Tambo called for more radical land policies than those expressed in the Freedom Charter. However, by the mid-1980s, as prospects of a democratic transition became real, the ANC

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<sup>35</sup> Another example of the influence of the Communist focus on economic inequality over racial inequality on the ANC was the ANC's acceptance of white members beginning in 1955.

<sup>36</sup> Union of South Africa, "Unlawful Organisations Act, Act No 35 of 1960," April 1960, <https://www.sahistory.org.za/archive/unlawful-organizations-act%2C-act-no-34-of-1960>.

focused less on land policy in general and retreated from explicit plans for nationalization. The unbanning of the ANC in 1990, the NP's move towards meeting for talks about transition, combined with the fall of the Berlin Wall and sidelining of communist influences within the ANC, contributed to the its moderated stance on nationalization. By the start of Convention for a Democratic South Africa (CODESA) talks in November 1991, ANC leaders stated they did not support nationalization of land.

The ANC's First National Consultative Conference occurred in Morogoro, Tanzania in April 1969.<sup>37</sup> There, Tambo strategized for the overthrow of the apartheid government. His critique of the apartheid government was tied to anti-capitalist and anti-imperialist critiques. He also reflected on the tenets of the Freedom Charter and expanded upon each clause:<sup>38</sup>

The bulk of the land in our country is in the hands of land barons, absentee landlords, big companies and state capitalist enterprises. The land must be taken away from exclusively European control and from these groupings and divided among the small farmers, peasants and landless of all races who do not exploit the labour of others. Farmers will be prevented from holding land in excess of a given area, fixed in accordance with the concrete situation in each locality. Lands held in communal ownership will be increased so that they can afford a decent livelihood to the people and their ownership shall be guaranteed. Land obtained from land barons and the monopolies shall be distributed to the landless and the land-poor peasants. State land shall be used for the benefit of all the people. Restrictions of land ownership on a racial basis shall be ended and all land shall be open to ownership and use to all people, irrespective of race.<sup>39</sup>

Tambo laid out a more detailed approach to redistributing land based on the general call in the Freedom Charter for dividing it among those who work it. Tambo called for taking land from current property holders, implementing land holding ceilings, and ending the racial distribution

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<sup>37</sup> Hall, "The Politics of Land Reform," 128.

<sup>38</sup> Oliver Tambo, "Intensify the Revolution," Morogoro Tanzania, April 1969, <https://www.sahistory.org.za/archive/intensify-revolution-o-r-tambo-morogoro-conference-morogoro-tanzania-25-april-1-may-1969>.

<sup>39</sup> Tambo, "Intensify the Revolution."

of land. This reflected the most detailed of the ANC's plans for nationalization as well as the peak of communist influence.

From the Morogoro conference until the inception of informal talks between ANC leadership and NP government officials, Tambo's Freedom Charter-based version of nationalization remained the ANC's official and assumed position on land redistribution. But, some sections of the leadership had different ideas about how his vision would be realized. Communist members of the ANC planned for state ownership and control of the land, while other ANC officials devised plans within, what historian Ruth Hall describes as, the ANC's characteristically ambiguous "notion of a society in transition from monopoly capitalism to socialism," and faith in "a historical trajectory of change towards a more equitable and just society."<sup>40</sup> There was little consensus on details. In 1985, pro-communist thinkers, such as the ANC publication, *Sechaba*, writer Mzala, envisioned "collective farms... side by side with state farms to banish famine and land hunger."<sup>41</sup> A year later in April 1986, the ANC's official stance presented to the National Union of South African Students was that "the ANC would advocate the nationalization and redistribution of farms owned by monopoly businesses, the land bank, and farming absentee landlords... [and that] nationalization would not be forced on the people but would have to be decided democratically by all South Africans."<sup>42</sup>

The ANC's deflection of the question of nationalization to a later, democratic decision, demonstrated a major shift occurring during the mid-1980s. The ANC moved from policy based in land reform to policy based in political inclusion. International and economic pressure pushed

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<sup>40</sup> Hall, "The Politics of Land Reform," 130.

<sup>41</sup> Mzala, "The Freedom Charter and its Relevance Today" in ANC ed. *Sechaba*, March 1985 quoted in Hall, "The Politics of Land Reform," 129.

<sup>42</sup> Tom Lodge, "Perceptions of Agrarian Issues in Black Politics," *Development Southern Africa* no. 7 (October 1990), 490, <https://doi.org/10.1080/03768359008439558>.



the faltering NP to begin informal talks and pushed the ANC towards market-based neo-liberalism as opposed to socialism. As the possibility of a democratic transition emerged, the ANC's primary focus became democratic elections. As I will explain further in Chapter 2, this prioritization limited the ANC in later, formal talks. At this point, however, it allowed specific land policy to drop from a central focus and made the ANC's official position on nationalization ambiguous both within the leadership and to outside analysts and constituents.

In February 1989, in Harare, Zimbabwe, members of the ANC discussed the Constitutional Guidelines for a Democratic South Africa. These guidelines would be presented to the NP as part of the process of negotiating an end to apartheid. The ANC's guidelines did not reflect the more radical opinions held by some ANC members about land redistribution and moved the ANC's official policy towards protection of the existing system of distribution.<sup>43</sup> The tepid land section of the guidelines reads:

The state shall devise and implement a Land Reform Programme that will include and address the following issues:

- (i) Abolition of all racial restrictions on ownership and use of land.
- (ii) Implementation of land reforms in conformity with the principle of Affirmative Action, taking into account the status of victims of forced removals.<sup>44</sup>

The guidelines described an economy that contained a public sector, a private sector, a co-operative sector, and a small-scale family sector – a divergence from communist visions for the future South Africa. The ANC still critiqued “constitutional protection for group rights [that] would perpetuate the status quo and would mean that the mass of the people would continue to be constitutionally trapped in poverty and remain as outsiders in the land of their birth.”<sup>45</sup> In

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<sup>43</sup> Hall, “The Politics of Land Reform,” 131.

<sup>44</sup> African National Congress, “Constitutional Guidelines for a Democratic South Africa,” *South African Journal on Human Rights* 5 no. 129 (1989), 132, <https://heinonline.org/HOL/P?h=hein.journals/soafjhr5&i=141>.

<sup>45</sup> African National Congress, “Constitutional Guidelines,” 130.

spite of this, the ANC now conceded that “[p]roperty for personal use and consumption shall be constitutionally protected.”<sup>46</sup>

The removal of land policy from center focus was not universal among ANC leaders. In the late 1980s, ANC exiles Bongiwe Njobe, Helena Dolny, and Heinz Klug established a group in Lusaka, Zambia, to follow and discuss land removals in South Africa as well as land policy options.<sup>47</sup> Njobe later became the Director General of the national Department of Agriculture. Dolny went on to become an advisor to the Minister of Land Affairs. Klug joined the World Bank as a consultant. In 2005, Dolny said “up to the 1980s, I don’t think anyone had applied their minds to land issues in the ANC, at all.”<sup>48</sup> The group sought to bring land issues back to the forefront of ANC policy discussions. In 1989, the group organized an ANC workshop on ‘The Land Question’ in Lusaka and invited ANC members from London, Zimbabwe, Amsterdam, and other exile locations.<sup>49</sup> The group members, despite lamenting the lack of attention paid to land issues, believed the ambiguous calls for nationalization in the Freedom Charter remained the policy of the ANC.

After the publication and discussion of the ANC’s Constitutional Guidelines, the workshop organized by the Lusaka group of exiles convened in February 1990. On February 2<sup>nd</sup>, during this workshop, President De Klerk announced the unbanning of the ANC and other outlawed political parties in South Africa and the release of political prisoners. As a result, the workshop concluded with an agreement to form an ANC Land Commission in order to elevate the issue of land within the ANC as it entered formal negotiations.<sup>50</sup> The ANC Land Commission

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<sup>46</sup> African National Congress, “Constitutional Guidelines,” 132.

<sup>47</sup> Hall, “The Politics of Land Reform,” 132.

<sup>48</sup> Hall, “The Politics of Land Reform,” 135.

<sup>49</sup> Hall, “The Politics of Land Reform,” 135.

<sup>50</sup> Hall, “The Politics of Land Reform,” 135.

consisted of the original Lusaka members— Njobe, Klug, and Dolny as well as Derek Hanekom who went on to be Mandela’s Minister of Agriculture and Land Affairs.

Once the ANC was unbanned, its first meeting concerning land policy was in March 1990. The majority of the attendees were white academics and economists who were involved in NGO discussions concerning land policy in a future democratic South Africa. The only black person at the event was ANC representative Essy Letsoalo. The discussions there did not entertain nationalization as a realistic possibility. Instead, the favored policy was one of transfer from white commercial ownership to small, private black land owners.<sup>51</sup> The lack of debate about nationalization was significant as it signaled that regardless of the ANC’s position on nationalization from outside of South Africa, experts within did not anticipate nationalization to be realistic even under ANC rule in a new democratic nation. These experts’ vision diverged even more significantly from the popular and revolutionary hopes of ANC followers for redistribution, as articulated in the Freedom Charter.

In October 1990, the ANC Land Commission hosted a land workshop and invited a diverse group of NGOs, ANC representatives, and local academics. The ANC Land Commissioners, based on their own studies of the land distribution situation in South Africa, did not support nationalization. Instead, Dolny advocated for the regulation of land markets and Njobe sought a policy that prioritized transfer to black farmers.<sup>52</sup> This stance became significant as the commissioners went on to occupy influential positions in shaping ANC land policy and in working with the World Bank on issues of land policy during and immediately following the transition to democracy.

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<sup>51</sup> Hall, “The Politics of Land Reform,” 135.

<sup>52</sup> Hall, “The Politics of Land Reform,” 136.

On February 1, 1991, President De Klerk unexpectedly announced the 1913 Land Act would be repealed. By June, the NP repealed the majority of their discriminatory land policies. Also in June of 1991, the ANC held a national conference. On land issues, the ANC remained in an ambiguous space between two policy poles. Officially, it rejected the constitutional protection of property rights. The leader of the ANC's Constitutional Committee, Zola Skweyiya, also rejected nationalization. He compared nationalization policies of "forced removals and confiscation" to the land distribution policies of the NP.<sup>53</sup>

The split between ANC experts' policies and those tenets of the Freedom Charter, which the party's followers still espoused, would lead to a crisis of unmet expectations for the ANC. By November 1991, when the ANC and the NP began formal negotiations about a new democratic government, the Land Commission was engaged in devising a way to raise money to fund a system in which land owners were paid for expropriated land.<sup>54</sup> ANC and NP policies on this issue were converging.

### *Conclusions*

The beginnings of an overlap in ANC and NP land policy did not represent the start of an effective, united land reform program. The two parties came together around a shared desire for economic stability and a peaceful transition, but the ANC's policy diverged from the hopes of their constituents. Furthermore, disagreements amongst the ANC leadership in terms of preferred land policy would lead to a divided and weakened stance on the land question during the formal negotiation process. The only true point of agreement between the ANC and its constituents was

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<sup>53</sup> Hall, "The Politics of Land Reform," 145.

<sup>54</sup> Hall, "The Politics of Land Reform," 145.

that the current distribution was unjust and the NP's reform proposals were inadequate. The only true point of agreement amongst the ANC leadership was that the land issue, along with many other issues, could be best resolved under a democratically-elected ANC government. While this may have been true, the ANC over-estimated their own power, or even the political will of a future ANC government, to effect land reform even in the new democracy.

In the rest of this paper, I show how the ANC's agreement to a constitutional protection of existing land rights and its market-based reform policies led to wide-spread distrust in the party in the 2000s. This distrust, and the ANC's consequent precarious political position, originated in the disconnect between the ANC leaders' increasingly neo-liberal plans for land reform and their constituents hopes for revolutionary land redistribution.

## **Chapter Two**

### **Creating a Compromised Clause: The Multi-Step Negotiation Process**

Following years of secret conversations between Nelson Mandela and President De Klerk beginning in the late 1980s, party leadership, primarily from the existing apartheid National Party (NP) government and the African National Congress (ANC), negotiated the terms of a transition to inclusive, democratic government in South Africa. In this process, both parties sacrificed some of their ideals to achieve a new government without full blown civil war or economic collapse. Key to preventing these outcomes was the inclusion of minority parties in constructing the new Constitution and government. The multi-step, stability-ensuring process of Constitution writing produced a compromised clause regarding land reform and redistribution.

The negotiations occurred in three formal forums: the Convention for a Democratic South Africa (CODESA) in 1991-92, the Multi Party Negotiating Process (MPNP) in 1993-94, and the democratically elected Constitutional Assembly (CA) in 1994-96. However, throughout the process, secret, bilateral discussions between individual ANC and NP representatives, and between Mandela and De Klerk themselves, resolved many contentious issues.

The series of constitutional negotiations set the parameters for land reform. The ANC agreed to a process in which an un-elected and non-proportionally representative body instituted constraints, through an Interim Bill of Rights, on the later Constitutional Assembly's ability to construct a final constitution. Due to this, the NP retained a disproportionate impact on the work of the Constitutional Assembly and was able to negotiate a property clause that reflected their constituents' interest, namely the protection of property rights for white South Africans in the Interim Constitution. Consequently, in the drafting of the final constitution, the ANC was limited in its goal of ensuring equitable redistribution of land by the already enshrined protection of

existing property rights. Despite their majority, the ANC could not prioritize its agenda over that of the NP. The result was a compromised constitutional property clause with the contradictory objectives of protecting existing land rights and redistributing land equitably. Unable to codify a balance between these two in the constitution, the ANC instead created a court system to weigh the two constitutionally protected interests on a case-by-case basis.

### ***Convention for a Democratic South Africa and the Record of Understanding***

The initial Convention for a Democratic South Africa (CODESA) debates were unsuccessful because ANC and NP representatives were unable to align their fundamental disagreements about the constitution-writing process and the scope of rights to be protected. The NP sought to enshrine expansive protections while the ANC desired only an outline of basic principles. The ANC viewed this stage as illegitimate because the participants were not elected and the negotiators' power was not proportional to their support from the general population. Still, the ANC, led by Mandela, was committed to a new, united nation and recognized the necessity of compromise in constructing a constitutional democracy. In CODESA, the parties learned each other's stances and realized fundamental sources of disagreement. From CODESA's failure, negotiators garnered knowledge of the most contentious issues and experience in processes of deadlock-breaking and compromise. The history of the CODESA talks is important in explaining later agreements on the process of constitution writing and the final property clause.

In December 1991, 400 representatives of 19 parties met to begin the CODESA talks. As articulated in the Declaration of Intent, the parties broadly committed to a free, nonracial, multi-

party constitutional democracy with regular elections.<sup>1</sup> They sought to establish a procedure for writing the constitution and the terms for governance during the transitional period. Topic-based working groups were to produce agreements to be debated upon and approved in a plenary session. While the groups did invite public comment, they lacked an effective system for distributing information to the public.<sup>2</sup> The working groups distributed written position papers to the media before the final stage of debate and agreement, but this often served to entrench their different positions.<sup>3</sup> This ineffective interaction with the public, as well as the absence of technical law and policy experts in the process, were among the lessons for the parties when they planned for subsequent stages of the constitutional negotiations.

The working groups' mandates were: the creation of a climate for free and fair elections; the creation of constitutional principles and instructions for a constitution-making body; advice on the structure of a transitional government; a plan for inclusion of Bantustan states; and the determination of time frames.<sup>4</sup> Each group produced a report on agreements, with the exception of Working Group 2, which focused on constitutional principles. The constitutional principles group's task was fraught from the beginning because different parties had vastly different expectations of its outcome. The ANC sought general agreements about basic principles at this stage but hoped to leave the majority of details about constitutional provisions to an elected committee. On the other hand, the NP and existing government sought to enshrine as many protections as possible at this non-representative stage so the ANC could not dominate the terms

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<sup>1</sup> Convention for a Democratic South Africa, "Declaration of Intent," December 21, 1991.

<sup>2</sup> Hassen Ebrahim and Laurel E. Miller, "Creating the Birth Certificate of a New South Africa: Constitution Making after Apartheid," in *Framing the State in Times of Transition: Case Studies in Constitution Making*, ed. Laurel E. Miller (Washington, D.C: United States Institute of Peace Press, 2010), 118.

<sup>3</sup> Ebrahim and Miller, "Creating the Birth Certificate," 118.

<sup>4</sup>Convention for a Democratic South Africa, "The Composition of CODESA."



of the agreements based on its majority support. This central impasse prevented Working Group 2 from submitting a report.

While debates stalled, activists, specifically the Congress of South African Trade Unions (COSATU), pushed for a campaign of action and mass strikes to demonstrate the ANC's power and therefore bolster its negotiating ability.<sup>5</sup> COSATU played an integral role in persuading ANC negotiators to temporarily abandon the talks. On June 16, 1992 COSATU organized a mass strike. Yet it was a violent attack with suspected police aid against ANC supporters the following day that finally pushed CODESA's disintegration.<sup>6</sup> Mandela publicly suspended the talks and presented fourteen terms that the De Klerk government had to agree with in order to resume negotiations. These included a government of national unity, the termination of covert operations, suspension and prosecution of violent security force personnel and police officers, release of all political prisoners, and the repeal of repressive legislation.<sup>7</sup> Despite the public suspension, Roelf Meyer, at the time the Minister of Defense for the government and a leading negotiator in CODESA, recalled that minutes after Mandela's announcement, Cyril Ramaphosa, a leading ANC negotiator (who became President of South Africa in 2018) called him to schedule continuing private talks.<sup>8</sup>

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<sup>5</sup> Congress of South African Trade Unions, "Declaration of Support for Campaign of Rolling Action," May 1992.

<sup>6</sup> Richard Spitz and Matthew Chaskalson, *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement*, (Johannesburg: Witwatersrand University Press Publications, 2000): 28.

<sup>7</sup> Hassen Ebrahim, *The Soul of a Nation: Constitution-Making in South Africa*, (Cape Town: Oxford University Press, 1998): 532-44.

<sup>8</sup> Roelf Meyer, "From Parliamentary Sovereignty to Constitutionality: The Democratisation of South Africa, 1990 to 1994," in *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, ed. Penelope Andrews and Stephen Ellmann (Johannesburg: Witwatersrand University Press Publications, 2001): 56.

As violence had pushed the disintegration of CODESA, it also pushed the return to communications. On September 7, 1992, a violent outbreak at an ANC march left 28 dead.<sup>9</sup> The pressure to prevent further violence, along with Ramphosa and Meyer's continuing bilateral communication, led Mandela and De Klerk to sign the Record of Understanding on September 26, 1992. In his retrospective account, Meyer called the period between the dissolution of CODESA and the Record of Understanding crucial in establishing trusting interpersonal relationships among ANC and NP negotiators and allowing the NP to solidify its position that the transitional constitution ought to be a full constitution protecting individual rights, such as property rights.<sup>10</sup> The Record of Understanding laid out, in broad terms, the steps to a democratic election and final constitution.<sup>11</sup> The constitution-making body would be democratically elected and sit as a single chamber to draft the new document. It would be bound by a fixed time frame and equipped with deadlock-breaking mechanisms. Most importantly it would be bound by agreed-upon constitutional principles. The two parties agreed on the necessity of "constitutional continuity" and that an interim government would rule under a "constitutional framework/ transitional constitution" while it created the final constitution.<sup>12</sup>

In the fall of 1992, Joe Slovo, a leader of the South African Communist Party published an article asserting the necessity for compromise, because the ANC was not dealing with a "defeated enemy."<sup>13</sup> He argued that the ANC negotiators ought to be willing to make quantitative compromises on issues like timelines but not to make certain base line qualitative

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<sup>9</sup> Spitz and Chaskalson, *The Politics of Transition*, 29.

<sup>10</sup> Meyer, "From Parliamentary Sovereignty to Constitutionality," 58.

<sup>11</sup> Record of Understanding in Ebrahim, *The Soul of a Nation*, 589.

<sup>12</sup> Record of Understanding in Ebrahim, *The Soul of a Nation*, 589.

<sup>13</sup> Joe Slovo, "Negotiations: What Room for Compromise?" [\*African Communist Journal No. 130 \(Third Quarter 1992\)\*](#).

compromises. Slovo framed the negotiations as a step, not an ending, and argued that qualitative compromises would inhibit the future creation of non-racial democratic rule. Slovo also offered support for a “sunset” clause in the constitution that would allow for power-sharing for a set period of time following the adoption of a constitution.<sup>14</sup> Slovo’s paper demonstrated that even radical members of the ANC were willing to make significant concessions in order to facilitate a transition to democracy.

In February 1993, the ANC and NP agreed to an elected constitutional council, which would serve as the interim government— all parties that received a certain threshold of votes would be represented. Called the Government of National Unity, it was to serve for five years from the time of election.<sup>15</sup> In their retrospective accounts, both Roelf Meyer and Cyril Ramaphosa highlight the agreement regarding a Government of National Unity as groundbreaking in the ANC and NP bilateral negotiations.<sup>16</sup> This agreement, in February 1993, was crucial in bringing the two parties back to formal talks. Ramaphosa called the sunset clauses “among the key concessions made by the ANC in negotiations, and arguably paved the way for a settlement and the peaceful transition.” The clauses “required the ANC to consider the kind of broad strategic concessions it was prepared to make, and needed to make, to achieve a resolution which could lead to a democratic South Africa.”<sup>17</sup>

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<sup>14</sup> Slovo, “Negotiations.”

<sup>15</sup> Meyer, “From Parliamentary Sovereignty to Constitutionality,” 60-61.

<sup>16</sup> Meyer, “From Parliamentary Sovereignty to Constitutionality,” 60; Cyril Ramaphosa, “Negotiating a New Nation: Reflections on the Development of South Africa’s Constitution,” in *The Post-Apartheid Constitutions: Perspectives on South Africa’s Basic Law*, ed. Penelope Andrews and Stephen Ellmann (Johannesburg: Witwatersrand University Press Publications, 2001): 78.

<sup>17</sup> Ramaphosa, “Negotiating a New Nation,” 78.

Before the election for the Government of National Unity, a Multi-Party Negotiating Process would create an Interim Constitution. This two-step process, lauded as a solution to the problems of instability and illegitimacy, affected the opportunity for land reform because the Interim Constitution would be written before the election and it would be binding on the later constitutional writing process. The ANC's acceptance of continuity allowed guidelines created by a body that was not representative of the majority to set the terms for construction of the final constitution. The two-step process set forth in the Record of Understanding was paramount in preventing violence and establishing a political climate of constitutional respect. On the other hand, the Interim Constitution restricted the ANC's power in later negotiations over the constitutional property clause. The Record of Understanding created a system in which a non-elected coalition, in which the NP had a bargaining power disproportionate to the power it would have after the election, established key constitutional limits for property reform.

CODESA broke down because of a fundamental disagreement over the constitution-writing process. The ANC wanted constitutional provisions concerning land reform to be written after the election, and the NP sought to preserve a constitutional right to property before the ANC won a majority in the election. Nevertheless, the threat of violence and desire to move the transition along led the ANC to compromise. Because of the goal of stability, the Record of Understanding and the Multi-Party Negotiating Process gave the NP disproportionate power, and the resulting Interim Constitution created boundaries for the later democratically elected Constitutional Assembly. This restriction happened primarily through the inclusion, against the ANC's wishes, of an extensive Bill of Rights in the Interim Constitution.

### ***The Multi-Party Negotiating Process and the Interim Constitution***

The Multi-Party Negotiating Process (MPNP) employed non-partisan technical committees to facilitate political agreement in constructing an Interim Constitution. The concept of non-political advice demonstrated a strong commitment towards reaching compromise. In its commitment to compromise in order to progress towards democratic elections, the ANC ultimately accepted the technical committee's recommendation of including binding constitutional principles and a Bill of Rights in the Interim Constitution. This, like the acceptance of the two-step process of negotiating an Interim Constitution before writing the final Constitution, set the parameters for the content of the final property clause. The result of the MPNP was that agreements about constitutional property protection and redistribution were negotiated in a forum in which the NP had disproportionate power.

In March 1993, formal talks resumed in the new MPNP format. The MPNP was the first step in the two- step transition to democracy laid out in the Record of Understanding. This time, the negotiation structure, adapted from the failures of CODESA, consisted of technical committees instead of working groups. The technical committees were composed of five to six technical experts whose role was to be non-partisan.<sup>18</sup> There were seven technical committees in total. These committees were meant to identify areas of agreement and dissent between submissions from the different parties as well as from the CODESA reports and therefore facilitate negotiations towards an interim constitution. Unlike in CODESA, where the sub-groups encouraged political debate on this issue, in the MPNP, the technical committees sought primarily to identify areas of agreement and prevent deadlock.

The technical committee on fundamental rights was given the mandate to prepare a Bill of Rights that would guide and rule during the interim period. The group was tasked with

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<sup>18</sup> Ebrahim and Miller, "Creating the Birth Certificate," 119.

creating a compromise between the two main parties' positions that would be tabled for approval by the entire MPNP. The committee was not to discuss particular constitutional principles but rather to provide documents to facilitate MPNP discussion by identifying areas of agreement and dissent from the parties' submitted proposals. Yet, unsurprisingly due to the deadlock in the CODESA working group over this question, the two main parties did not agree on whether an Interim Constitution should include an extensive protection and definition of rights like the right to property.

The technical committee on fundamental rights addressed the point of dissent between the ANC and non-majority parties: the ANC refused a constitution created by an unelected party while the minority parties feared that a constitution drawn up by an elected party would reflect only the interests of the majority and would not include protections for minorities. The technical committee decided that the key to moving forward was the creation, at this stage, of constitutional principles that would guide the later elected body.<sup>19</sup> These principles had three criteria: "The principles should provide a clear framework for the drafting and adoption of a future Constitution. The principles should not have the character of constitutional provisions as such, but they should establish clear parameters within which a future Constitution must be drafted. The principles must be formulated in clear language which is capable of effective judicial interpretation and adjudication."<sup>20</sup>

The MPNP was part of the process outlined in the Record of Understanding. The purpose of the MPNP was to create an interim constitution containing the constitutional principles that

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<sup>19</sup> Technical Committee on Constitutional Issues, "Second Report of the Technical Committee on Constitutional Issues to the Negotiating Council," May 19, 1993: Section 1.5.

<sup>20</sup> Technical Committee on Constitutional Issues, "Second Report of the Technical Committee on Constitutional Issues to the Negotiating Council," May 19, 1993: Section 2.1.

would guide the later elected Constitutional Assembly in writing the Constitution. Then the Constitutional Court, established by the Interim Constitution, would certify the final document to ensure its adherence to the principles. In total, the Interim Constitution contained thirty-four constitutional principles.<sup>21</sup> The principles mandated that “everyone shall enjoy all universally accepted fundamental rights... provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.”<sup>22</sup> The ANC therefore was unable to delay a comprehensive definition and protection of constitutional rights until after democratic elections.

Roelf Meyer argues that, in this arrangement, the NP got “even more than they had hoped for, namely a two-phased process in which, firstly, an Interim constitution would be written and approved by the MPNP and, secondly, the negotiators could decide beforehand on the Constitutional Principles to which the new Constitution had to conform.”<sup>23</sup> The agreements reached in the MPNP necessitated that the ANC cooperate with the NP over the content of the property clause in a forum where the NP had strength disproportionate to its percentage of the electorate.

### ***The Property Clause in the Interim Constitution***

With the decision that the interim constitution would include a full Bill of Rights and would bind the final constitution, that the ANC and NP were forced to reconcile their conceptions of a property clause. The NP’s proposal read:

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<sup>21</sup> Constitutional Principles from Interim Act 200 of 1993 in Ebrahim, *The Soul of a Nation*, 619.

<sup>22</sup> Constitutional Principles from Interim Act 200 of 1993 in Ebrahim, *The Soul of a Nation*, 619.

<sup>23</sup> Meyer, “From Parliamentary Sovereignty to Constitutionality,” 65.

18(1) Every person shall have the right, individually or with others, to acquire, possess, enjoy, use and dispose of, including disposal by way of testamentary disposition or intestate succession, any form of movable and immovable property.

(2) Subject to the provisions of subsection (3) no person shall be deprived of his property otherwise than under a judgment or order of a court of law.

(3) Property may be expropriated for public purposes, subject to the payment within a reasonable time of an agreed compensation or, failing such an agreed compensation, of compensation in cash determined by a court of law according to the market value of the property.

(4) Every person shall have the right not to be subjected to taxes on property which will have a confiscatory effect or will make unreasonable inroads upon the enjoyment, use or value of such property.<sup>24</sup>

This expansive protection of property rights prohibited any deprivation of property without a court order, required that any expropriation be compensated for at market value, and barred “unreasonable” property taxes. This proposal offered no path to land redistribution or redress for apartheid land inequalities.

In sharp contrast, the ANC’s conception of the property clause echoed some aspects of the goals of nationalization and redistribution first expressed in the Freedom Charter, described in Chapter 1.

13 (4) The taking of property shall only be permissible according to law and in the public interest, which shall include the achievement of the objectives of the Constitution.

(5) Any such taking shall be subject to just compensation which shall be determined by establishing an equitable balance between the public interest and the interest of those affected.

(6) In the case of a dispute regarding compensation, provision shall be made for recourse to a special independent tribunal, with an appeal to the Courts.

(7) Legislation on economic matters shall be guided by the principle of encouraging collaboration between the public, private, co-operative, communal and small-scale family sectors with a view to reducing inequality, promoting growth and providing goods and services for the whole population.

(12) Rights to Land

(3) South Africa belongs to all who live in it.

(4) Access to land or other living space is the birthright of all South Africans.

(5) No-one shall be removed from his or her home except by order of a Court, which shall take into account the existence of reasonable alternative accommodation.

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<sup>24</sup> Republic of South Africa, “Government’s Proposals on a Charter of Fundamental Rights,” February 2, 1993, in Matthew Chaskalson, “Stumbling Towards Section 28: Negotiations Over the Protection of Property rights in the Interim Constitution,” *South African Journal on Human Rights* 11, no. 2 (1995): 224.



(6) Legislation shall provide that the system of administration, ownership, occupation, use and transfer of land is equitable, directed at the provision of adequate housing for the whole population, promotes productive use of land and provides for stable and secure tenure.<sup>25</sup>

The ANC sought the property clause to serve as legislation that would if not enable, at the very least not preclude, the option for state intervention in land reform and redistribution. The ANC property clause reflected an underlying understanding of the need for reform and redistribution.

The ANC focused on reform for the good of the majority of the population rather than emphasizing the protection of existing ownership. The proposal further detailed a plan for establishing a tribunal to facilitate land reform.

(7) Legislation shall provide for the establishment of a tribunal for land claims which shall have the power to adjudicate upon land claims made on legal or equitable grounds, and in particular shall have:

(a) the power to order the restoration of land to people dispossessed by forced removals, or where appropriate to direct that compensation be paid, or other suitable acknowledgement be made, for injury done to them;

(b) the power to award particular portions of land, or rights to land, to such claimants where there are special circumstances arising out of use, occupation or other similar grounds, which make it equitable for such an award to be made.

(8) Legislation shall also make provision for access to affordable land to be given as far as possible, and with due regard to financial and other resources available to the state, to those historically deprived of land and land rights, or deprived of access to land by past statutory discrimination...<sup>26</sup>

The ANC aimed to create a body that could both restore land and determine a form of compensation besides market value for expropriated land. The ANC's ideal that compensation for expropriated land would reflect historical wrongdoing and a commitment to restorative justice was absent from the NP's objectives.

Unable to align the proposals of the two parties through technical committees, the MPNP formed an Ad Hoc Committee on Fundamental Rights, which met first in August 1993 to

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<sup>25</sup> African National Congress, "A Bill of Rights for a New South Africa," May 1992.

<sup>26</sup> African National Congress, "A Bill of Rights for a New South Africa," February 1993.

negotiate those rights unresolved in the negotiating council.<sup>27</sup> At this time, the most recent clause draft was:

- (1) Every person shall have the right to acquire, hold and dispose of rights in property.
- (2) Expropriation of property by the State shall be permissible in the public interest and shall be subject either to agreed compensation or, failing agreement, to compensation to be determined by a court of law as just and equitable, taking into account all relevant factors, including the use to which the property is being put, the history of its acquisition, its market value, the value of the owner's investment in it and the interests of those affected.
- (3) Nothing in this section shall preclude measures aimed at restoring rights in land to or compensating persons who have been dispossessed of rights in land as a consequence of any racially discriminatory policy, where such restoration or compensation is feasible.

Instead of resolving the dispute at the heart of the ANC and NP's different proposals, this clause included both protection of property rights and expropriation for the public interest. It included sections of both parties' proposed clauses, yet, as their visions for the goal of land reform stood diametrically opposed, it remained unsatisfactory to both.

The key concession at this stage was the NP's acknowledgement that factors other than market price could be considered in determining the compensation due. These other factors were "the use to which the property is being put, the history of its acquisition," "the value of the owner's investment in it and the interests of those affected." The NP's Minister of Justice refused to accept a property clause that did not include mention of market price as a factor in determining compensation, yet he did not object to market price as one in a list of factors. Representatives, including those ranging from the National Party to the South African Communist Party and the Chief Justice of the Judiciary criticized the use of this list of subjective and quantitative factors for determining "just" price as unspecific and likely to cause uneven

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<sup>27</sup> Technical Committee on Constitutional Issues, "First Report of the Technical Committee on Constitutional Issues to the Negotiating Council," May 13, 1993.

application. Despite these critiques, the negotiators included the list as it presented a compromise and resolved a major discrepancy between the two parties' initial clause proposals.<sup>28</sup>

Property was not the only remaining unsolved fundamental right. Moreover, the five members of the Ad Hoc committee representing the South African Communist Party, ANC, Congress of Traditional Leaders of South Africa, NP, and the Democratic Party were not selected for particular experience in property law or land issues.<sup>29</sup> Due to this, their debates and ultimate acceptance of the final clause did not meaningfully rectify the fundamental disagreements between the two parties about the degree to which the clause was supposed to encourage land reform or protect the existing distribution.<sup>30</sup>

The MPNP agreed to the Interim Constitution on January 25, 1994. The property clause was solidified after a bilateral agreement between the ANC and NP outside of the ongoing negotiations in the Ad Hoc committee. On October 25-26 1993, the two parties met to resolve final issues over a policing clause and the term "rights in property." The ANC wanted the clause to read rights *in* property not just to property in an attempt to protect communal land holdings. The NP initially feared this would have the effect of creating a broad understanding of ownership and protecting squatters' rights. The ANC refused to make concessions on this term. Subsections 2 and 3 were adjusted to ensure that with this new phrase, the government would not later be forced to compensate individuals who could claim they lost a broader right in property due to legislation.<sup>31</sup> Subsection 3 thus created a distinction between deprivation and

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<sup>28</sup> Chaskalson, "Stumbling Towards Section 28," 230.

<sup>29</sup> Chaskalson, "Stumbling Towards Section 28," 230.

<sup>30</sup> Chaskalson, "Stumbling Towards Section 28," 231.

<sup>31</sup> Chaskalson, "Stumbling Towards Section 28," 235-236.

expropriation with only the latter qualifying for compensation. The final interim constitution property clause read:

Section 28: (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.<sup>32</sup>

While closing the option for radical state redistribution as outlined in the initial ANC proposal for a property clause, the final interim property clause did, in broad terms, allow a system of state rectification of dispossession. Cyril Ramaphosa wrote that the imperfections in the Interim Constitution were due, in part, to “an effort to accommodate those forces whose cooperation was necessary to ensure a smooth transition.”<sup>33</sup> He called the NP’s agenda for property rights part of a “desire to maintain through the Constitution some of the privileges and inequalities that had characterized apartheid.” Ramaphosa viewed the final Interim clause as a compromise with the NP that did not guarantee the right to property but “limited the circumstances under which property could be expropriated.”<sup>34</sup>

Importantly, the MPNP never reached an agreement on the substantive process for expropriation. Therefore, the ANC was later limited to the terms of the Interim Constitution without a political agreement on how to determine and facilitate feasible compensation and restitution. In this way, the MPNP and the two-stage process limited the content of the property

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<sup>32</sup> Constitution of the Republic of South Africa, Act 200 of 1993, April 27, 1994.

<sup>33</sup> Ramaphosa, “Negotiating a New Nation,” 80.

<sup>34</sup> Ramaphosa, “Negotiating a New Nation,” 82-83.

clause and the process of land reform. The concession of extensive definition and protection of rights in the Interim Constitution meant the ANC could not later redefine property rights in a way that represented the majority of citizens' interests.

Three central disagreements in the MPNP debates remained unresolved in the Interim Constitution: how to determine property ownership and protect communal property rights, the circumstances under which expropriation was appropriate, and the just compensation for expropriation. Because the final constitution was limited by the agreements in the Interim Constitution, these questions remained largely unanswered in the final constitutional clause as well. Instead, the clause balanced the opposing interests of the ANC and NP by listing factors the court ought to consider in deciding these issues. The ambiguity of this list allowed both sides to accept the clause but created a system in which the court had the difficult task of applying a balancing test between two opposing objectives to determine just solutions on a case-by-case basis.

### ***The Constitutional Assembly and the Final Constitution***

The second phase of the two-stage constitution writing process was the democratically elected Constitutional Assembly (CA) drafting a final constitution. The elections occurred in April 1994, and, despite violence leading up to the elections, an independent electoral commission found them to be free and fair. Four hundred representatives were elected to the national assembly by proportional representation. Ninety senators were elected to the senate, with ten from each of the nine provinces. The joint sitting of these two parliamentary bodies constituted the CA, which was run by President Nelson Mandela.<sup>35</sup>

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<sup>35</sup> Ebrahim and Miller, "Creating the Birth Certificate," 126.

Within the CA, 44 members, proportionally representing the parties, were chosen for a constitutional committee. Cyril Ramaphosa of the ANC and Leon Wessels of the NP served as chairman and deputy chairman, respectively, of both the constitutional committee and its twenty-member subcommittee. Six other sub-committees were established based on themes and each assigned a portion of the thirty-four constitutional principles.<sup>36</sup> The CA was limited not only in content by the Interim Constitution but also in structure. The Interim mandated an independent panel of constitutional experts and lawyers to serve as an initial deadlock-breaking mechanism, with a referendum on constitutional issues serving as another and more threatening option. The Interim Constitution also mandated complete adoption of a document within two years of the first sitting of the national assembly and two thirds majority for adoption of the text essentially ensuring that the ANC could not pass a final constitution unilaterally.<sup>37</sup>

The CA drafting process involved extensive public information and evaluation campaigns. Millions of copies of drafts were circulated and a public newsletter and television program, called Constitutional Talk, charted developments in the debates. An independent survey conducted in April 1996 found that the campaign reached 73% of all adult South Africans or 18.5 million people. The CA received over two million submissions from the public.<sup>38</sup> While this stage demonstrated a fervent desire for transparency and public comment, many of the critical negotiations took place in one-on-one discussions.<sup>39</sup> Due to time constraints and the vast number of responses, public input fostered a culture of constitutional respect and legitimacy for

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<sup>36</sup> Ebrahim and Miller, "Creating the Birth Certificate," 127.

<sup>37</sup> Constitution of the Republic of South Africa, Act 200 of 1993, April 27, 1994.

<sup>38</sup> Christina Murray, "Negotiating Beyond Deadlock: From the Constitutional Assembly to the Court," in *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, ed. Penelope Andrews and Stephen Ellmann (Johannesburg: Witwatersrand University Press Publications, 2001): 107.

<sup>39</sup> Ebrahim and Miller, "Creating the Birth Certificate," 130.

the new government more than it impacted the content of individual clauses.<sup>40</sup> Ramaphosa acknowledged that while the final constitution did not reflect every submission, the campaign allowed South Africans to directly engage with the constitution writing process.<sup>41</sup>

In the CA debates, even where ANC negotiators were not particularly constrained by the constitutional principles, they were influenced by the Interim Constitution. ANC negotiators were hesitant to overhaul institutions that worked in the interim period or where consensus between the major parties existed due to a fear of deadlock, breaking a working system, or angering the negotiators in other parties.<sup>42</sup> In the final debates over the property clause, the NP's Sheila Camerer pointed to the consensus reached on the property clause for the interim constitution, highlighting that land reform should be addressed while protecting existing property rights.<sup>43</sup> While the ANC maintained its preference for a property clause that advanced reform rather than protected existing property rights, negotiators recognized pursuing this position would disrupt the already established consensus. The ANC argued against privileging existing property rights because members of its constituency had been barred from ownership, yet Camerer maintained that a constitutional property right would protect those constituents once they attained property through land reform measures.<sup>44</sup>

On the final day of CA negotiations, the ANC and NP agreed that the current proposal reflected a fair agreement between protection for property owners and a need for land reform. While conceding that the current racialized land distribution was not sustainable, the conservative Democratic Party maintained that the property clause should not allow the

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<sup>40</sup> Ebrahim and Miller, "Creating the Birth Certificate," 138.

<sup>41</sup> Ramaphosa, "Negotiating a New Nation," 81.

<sup>42</sup> Spitz and Chaskalson, *The Politics of Transition*, 425.

<sup>43</sup> Ebrahim, *The Soul of a Nation*, 209.

<sup>44</sup> Ebrahim, *The Soul of a Nation*, 210.

government to pursue reform but rather protect access to property equally for all.<sup>45</sup> The Pan Africanist Congress viewed the final constitution property clause, specifically subsection 8, as an improvement to the interim constitution clause but maintained that the issue of property rights should be decided through a democratic process rather than through negotiations.<sup>46</sup>

The final constitution was adopted May 8, 1996. It was then sent to the constitutional court for certification. Certifying that the constitution fit with the thirty-four principles proved difficult because the principles were the result of political bargaining and therefore written broadly in order to please disparate interests. Furthermore, the court sought to establish its own legitimacy and risked its reputation with either an acceptance or rejection of the constitution.<sup>47</sup> The hearings occurred from July 1<sup>st</sup> to July 11<sup>th</sup>. Two months later, the court ruled that the May 8<sup>th</sup> text did not comply with the principles in eight instances. Nevertheless, they did not reject the document and advised that through revision it could fit with the principles. In response to an objection that the property clause as proposed did not protect a fundamental human right to property, the court found that in comparison to international human rights doctrines, where a right to property was not consistently protected, the draft constitution amply protected such a right.<sup>48</sup>

On October 11, the CA approved new amendments in compliance with the court's advice, and, finally, on December 4, 1996 the court certified the final constitution.<sup>49</sup> The property clause from the final constitution, which would become known as Section 25, reads:

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<sup>45</sup> Ebrahim, *The Soul of a Nation*, 219.

<sup>46</sup> Ebrahim, *The Soul of a Nation*, 220.

<sup>47</sup> Ebrahim and Miller, "Creating the Birth Certificate," 140.

<sup>48</sup> P. I. Meakin, "Fundamental Rights to Property," Submission to the Constitutional Assembly July 1995; The Constitutional Court of South Africa, "Certification of the National Constitution," June 4, 1996.

<sup>49</sup> Ebrahim and Miller, "Creating the Birth Certificate," 142.



25. (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— (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— (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.
- (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 Chapter 2: Bill of Rights 11 of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).<sup>50</sup>

The language of the property clause of the final constitution, like that of the Interim, attempted to balance a protection of property rights with an intention to reform land distribution. It did so in listing various factors the courts must consider in deciding when property may be expropriated and the just compensation for expropriated land. The court became the solution to the ANC and NP's inability to politically agree on one standard approach to land restitution. The clause created a balance between the ANC and NP's objectives for land distribution, allowing the courts to decide when property rights trumped redistribution and when they did not. The

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<sup>50</sup> The Constitution of South Africa, 1996, Section 25. Section 36 provides that laws may limit the Bill of Rights only when the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.

constitutional enshrinement of this fundamental disagreement was the product of a constitution-writing process in which the ANC gave minority interests a disproportionate weight in setting the parameters of the final text in order to reach a compromise and proceed towards inclusive democracy.

### ***Restitution Land Claims Act***

As mandated by Section 25, once in power, the ANC had to take legislative measures to “foster conditions which enable citizens to gain access to land on an equitable basis.”<sup>51</sup> The Restitution of Land Rights Act 22 of 1994 was the first law passed by the interim government to address land reform. The law aimed to assist the courts in their constitutionally mandated task of determining substantive land reform. The law defined the groups that may make land claims as well as the conditions under which land restitution could be granted. It also created the Commission on Restitution of Land Rights and the Land Claims Court (LCC) to facilitate and adjudicate land claims proceedings. With the creation of this system, the government delegated determinations of fair and just redress for land dispossession and inequality to the LCC. This assignment asked judges to balance equitable reform and property rights in individual cases as political negotiators had been unable to resolve this in the constitution.

The Act first defined criteria for making restitution claims. The claimant must have been dispossessed after June 19, 1913, the day the Natives Land Act became law.<sup>52</sup> The claimant also must have been dispossessed as a result of past racially discriminatory laws or practices.<sup>53</sup> The

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<sup>51</sup> The Constitution of South Africa, 1996, S 25(5).

<sup>52</sup> Natives Land Act restricted land ownership in South Africa based on race. Black South Africans, who at the time made up 67% percent of the population of South Africa, were allocated only seven percent of arable land.

<sup>53</sup> Restitution of Land Rights Act 22 of 1994, Preamble.

act defined restitution as “restoration of a right in land or equitable redress,” where equitable redress meant “the granting of an appropriate right in alternative state-owned land or the payment of compensation.”<sup>54</sup> Restitution could not be granted if, at the time of dispossession, the claimant was paid just and equitable compensation or granted “any other consideration which is just and equitable” at the time of dispossession.<sup>55</sup>

The Act then outlined the responsibilities of the Commission on Restitution of Land Rights. The commission’s purpose was to assist claimants throughout the restitution process. The commissioners advised claimants and acted as a mediator between the claimants and the court – outlining any outstanding issues in the restitution process for the court to decide. The Commission was also responsible for transparency both to the claimant about court proceedings and to the general public about how to engage in the restitutions process and about the overall progress of the court.<sup>56</sup> Regional commissioners referred cases to the LCC when they could not settle disputes through mediation or negotiation or when the commissioner decided the case was ready for hearing by the court.<sup>57</sup>

The Restitution of Land Rights Act gave the LCC power to “determine a right to restitution;” “determine or approve compensation payable in respect of land owned by or in the possession of a private person upon expropriation;” “determine the person entitled to title to land;” “grant declaratory order on a question of law relating to Section 25 of the constitution;” “determine whether compensation or any other consideration received by any person at the time of any dispossession of a right in land was just and equitable;” and to determine enforcement and

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<sup>54</sup> Restitution of Land Rights Act 22 of 1994, Definitions.

<sup>55</sup> Restitution of Land Rights Act 22 of 1994, (2)(2)b.

<sup>56</sup> Restitution of Land Rights Act 22 of 1994, (6)(1).

<sup>57</sup> Restitution of Land Rights Act 22 of 1994, (14).

implementation of restitution agreements.<sup>58</sup> Furthermore, the act defined the factors to be taken into account by the court in making restitution and compensation decisions:

- (a) The desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices;
- (b) the desirability of remedying past violations of human rights;
- (c) the requirements of equity and justice;
- (cA) if restoration of a right in land is claimed, the feasibility of such restoration;
- (d) the desirability of avoiding major social disruption;
- (e) any provision which already exists, in respect of the land in question in any matter, for that land to be dealt with in a manner which is designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination in order to promote the achievement of equality and redress the results of past racial discrimination;
- (eA) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;
- (eB) the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land;
- (eC) in the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money;
- (f) any other factor which the Court may consider relevant and consistent with the spirit and objects of the Constitution

In these criteria, as in earlier internal ANC policy shifts and constitutional negotiations, the government struggled to decide the relative weights of a right to restitution and a right to property. The Act required the court to consider opposing factors such as the history of dispossession and the desirability of avoiding major social disruption to satisfy the requirements of equity and justice. If the court were to prioritize the history of dispossession in their decision making, vast social disruption may result with the redistribution of land in an equitable manner. Further, by recognizing both the desirability of remedying past violations of human rights and changes over time in the value of property, the Act required the court to deal with restitution as both an issue of human rights and of economics. The Act recognized the simultaneous economic and human rights injustices in land dispossession in the past, yet lacked a meaningful distinction

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<sup>58</sup> Restitution of Land Rights Act 22 of 1994, (22)a, b, c, c(A), c(B), c(E).

or prioritization of land reform as either an economic project or a human rights one. The Act laid out the requirement of equity and justice without defining criteria for what the achievement of equity and justice in the project of land restitution would be. These contradictions and broad expectations in the court's mandate meant that rather than creating an effective system for adjudicating claims, the Act effectively delegated the undecided questions of land reform from the constitutional negotiations to the LCC judges. The ANC government then did not itself devise a system of land redistribution for its constituents, but laid the basis for a neoliberal system in which the onus was on individuals to file claims or purchase land.

### *Conclusions*

In the focus on establishing an inclusive democracy without civil war or economic collapse, the ANC agreed to a constitution-making process that prioritized continuity and stability from the apartheid government to an interim body and finally to the democratically elected government. The process allowed disproportionate minority influence in the interest of inclusivity and representation. This was in the ANC's interest for many reasons: it wanted a peaceful, timely, and legitimate transition to democracy. Furthermore, as explained in Chapter 1, the ANC leadership itself did not share a unified land reform policy, this weakened their negotiating position. It is not surprising that the final property clause then entrenched two opposing political agendas: the interest of those dispossessed by apartheid who favored redistribution for the public and the interest of those privileged by apartheid who favored protection for individuals. This compromise, among others, allowed the transition to democracy in South Africa to happen. Yet in this process, the distance between the ANC leadership and its constituents grew. The ANC leadership planned land reform through deals with the leadership of

the NP more so than through listening to their followers and adhering to their earlier principles.

The agreed upon system left the Land Claims Court judges to balance opposing values in making judgements about specific land claim cases. In the following chapter, I will examine the consequences of this system on overall land reform.

## Chapter Three

### **‘Willing Buyer, Willing Seller’ Land Reform: The ANC’s Implementation of the Negotiated Clause**

During the decade following the creation of the Constitution, tension developed between the Constitutional Court’s interpretation of state responsibility to affect land reform and the government’s own assessment of their role. As described in Chapter Two, in a stability ensuring, multi-step negotiating process, the African National Congress (ANC) created a constitutional property clause, Section 25, that protected both existing property rights and the government’s right to expropriate land.<sup>1</sup> This system left a Land Claims Court (LCC) to decide which right prevailed on a case-by-case basis. This chapter shows that another result of this compromised clause was that it allowed the ANC to enact a wide range of policies. Section 25 did not so much prohibit expropriation as allow for the ANC to withdraw from an active role in land reform. Only in recent years, when new leftist parties threatened the ANC’s political supremacy, did it return to promises of expropriation. In 2019, the government aimed to enact policies of expropriation through amending Section 25. It is not, however, the clause that prevented the ANC from pursuing an active role in land reform, but its own political priorities.

In this chapter, I juxtapose the Constitutional Court’s interpretation of Section 25 and the Restitution of Land Rights Act (Restitution Act) with the ANC’s policies. According to the Constitution, Land Claims Court (LCC) cases could be appealed to the Supreme Court of Appeals (SCA) and then to the Constitutional Court. The Constitutional Court provided the final decision in cases involving constitutional issues. When tasked with assessing the results of Land Claims Court cases, the Constitutional Court delivered an opinion on the responsibility of the

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<sup>1</sup> The Constitution of South Africa. Section 25 (1); (2). See Chapter 2, pg. 17.

government to affect land reform. The broad range of policies possible under the property clause is evident in the difference between the Constitutional Court's interpretation of government responsibility and the ANC government's actual policies.

I examine the tension between the Constitutional Court and the government through, first, an assessment of the Constitutional Court's analysis in three cases: *Alexkor Ltd v. Richtersveld Community*, *Department of Land Affairs v. Goedgelegen Tropical Fruits (PTY) Ltd*, and *Florence v. Government of the Republic of South Africa*. Next, I compare the Constitutional Court's reading of the broad state responsibility to provide redress under the Restitution Act with the ANC's Willing Buyer, Willing Seller policy. The state withdrew from land redistribution instead of employing the protected state power they had negotiated into the property clause. This was due to external pressure as well as the government's own commitment to ensuring stability. By 2019, the continued mismatch between the promise of restitutive justice through land redistribution and the ANC government's withdrawal from an active process of land redistribution had led to a widespread rejection of the ANC in favor of parties promising expropriation as well as a movement to amend Section 25.

### ***Constitutional Court Cases***

The Constitutional Court's decisions show how the government's approach to land reform operated in contrast to a broader constitutional commitment to redress and restitutive justice. Three cases in particular exemplify this dynamic. These are three of nearly a dozen instances in which the Constitutional Court heard appeals from the Supreme Court of Appeals



about constitutional matters in Land Claims Court proceedings.<sup>2</sup> This limited number meant that appeal to the Constitutional Court was not a viable option for all claimants frustrated by the outcome of their LCC cases. However, the number of and consistency in opinions, as shown below, made the Constitutional Court's criticism clear.

With the inception of a constitutional democracy in South Africa, judges had to transition from a practice of respecting the word of the legislature as supreme to judging the legislature's actions against the principles of the Constitution.<sup>3</sup> This shift further complicated the ANC's request that the judges weigh opposing constitutional principles in deciding land claims. Due to their specific mandate, the judges of the Constitutional Court were more clearly committed to activist applications of the law for restitutive justice. The Constitutional Court's rebuke of the lower court decisions was one of many cues to the government that its land policy was not working, yet the ANC continued to forsake expropriation for market-based policies.

The decisions below offer an alternative for potential state action under the property clause and Restitution Act. At worst, the Constitutional Court's decisions can be read as direct chastisements of the ANC government for not fulfilling its constitutional duties. At best, they present hope for the potential of land reform under the Restitution Act and the Constitution as it stands – a hope largely absent from contemporary South African politics.

*Alexkor Ltd v. Richtersveld Community* concerned a community with claims to an area of land in the Northern Cape Province. The claimants, the Richtersveld Community, traced habitation of the area of land to before British colonization. In 1847, the British Crown assumed

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<sup>2</sup> Land Claims Court appeals Constitutional Court of South Africa.

[https://collections.concourt.org.za/handle/20.500.12144/1/discover?rpp=10&page=1&query=%22land+claims+court%22&group\\_by=none&etal=0](https://collections.concourt.org.za/handle/20.500.12144/1/discover?rpp=10&page=1&query=%22land+claims+court%22&group_by=none&etal=0).

<sup>3</sup> Theunis Roux, "Pro-Poor Court, Anti-Poor Outcomes: Explaining the Performance of the South African Land Claims Court," *South African Journal on Human Rights* 20 no. 4 (2004): 533-34.

control of the area. In the early twentieth century, under South African rule as a British protectorate, diamond mines were discovered in the area. The government sold land to miners as they believed the property belonged to the British Crown, not the inhabitants.<sup>4</sup> As mining companies' desire to control the area grew, so too did government action to dispossess the Richtersveld Community. Ultimately, the government created a reserve for the people of the Richtersveld Community and a state-owned mining company, which became the private company, Alexkor, to control the mining rights for the area.<sup>5</sup> Both the LCC and the Supreme Court of Appeals (SCA) heard the case. The Constitutional Court overturned the decision of the LCC based on its narrow application of the Restitution Act.

Under a broader reading of the Restitution Act, the Constitutional Court unanimously decided to reconstitute the Richtersveld Community's rights to the land. The Constitutional Court acknowledged that the government allowed registered deed land holders to continue to access the land once under the control of the mining company while it forcibly removed land holders whose claim to the land was through indigenous law property rights. Some black inhabitants were able to obtain deed ownership. Yet as indigenous claims were the traditional method by which black people owned land, the Constitutional Court found that the government's denial of these rights constituted a racially motivated action.<sup>6</sup>

The Constitutional Court differed from the LCC in its application of the Restitution Act's timeframe for dispossession and criteria for racially motivated actions. First, Alexkor and the

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<sup>4</sup> Hanri Mostert, "The Case of the Richtersveld Community: Promoting Reconciliation or Effecting Division," *Journal of South African Law* 160 (2002): 161.

<sup>5</sup> Mostert, "The Case of the Richtersveld Community," 162.

<sup>6</sup> *Alexkor Ltd v. Richtersveld Community* 2004 (5) SA 460 (CC) [94], para. 96.

[https://collections.concourt.org.za/bitstream/handle/20.500.12144/2176/Full%20judgment%20\(445%20Kb\)-17491.pdf?sequence=1&isAllowed=y](https://collections.concourt.org.za/bitstream/handle/20.500.12144/2176/Full%20judgment%20(445%20Kb)-17491.pdf?sequence=1&isAllowed=y).

government, which remained the largest shareholder in the company, argued that the dispossession occurred under direct governance by the British crown, before the constitutional cut-off date of 1913.<sup>7</sup> The LCC accepted this claim. Based on this limited timeframe, the LCC determined the dispossession was motivated by concerns related to the diamond mining, not racial concerns.<sup>8</sup>

The LCC declined to take a holistic view and consider the relation of the government's refusal to acknowledge property rights post-1913 to earlier racially motivated dispossession. The LCC judgement read: "the brushing aside of claims which persons of colour might have had in respect of land because they were considered insufficiently civilized, could well be a wrong for which the Restitution Act provides no remedy. A remedy for such a wrong, if it exists, will have to be sought elsewhere."<sup>9</sup> This was in line with a 1999 decision by the LCC in *Minister of Land Affairs v. Slamdien*, there, they held that racially discriminatory laws were "those that sought specifically to achieve the (then) ideal of spatial apartheid, with each racial and ethnic group being confined to its particular racial zone."<sup>10</sup> In *Alexkor*, The Constitutional Court agreed with the SCA that this standard for racially discriminatory laws was "unduly restrictive." the Constitutional Court offered its own, and final, interpretation of the purpose of the Restitution Act: "its purpose is to provide redress to those individuals and communities who were dispossessed of their land rights by the government because of the government's racially

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<sup>7</sup> Restitution of Land Rights Act 22 of 1994, Preamble. Constitutional cut-off date set to June 19, 1913 as this day marked the passage of the Natives Land Act while dispossession occurred previous to this date, the Act formally restricted land ownership on the basis of race.

<sup>8</sup> Mostert, "The Case of the Richsterveld Community," 165.

<sup>9</sup> *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1293 (LCC) para 120. <http://www.saflii.org/za/cases/ZALCC/2001/10.pdf>.

<sup>10</sup> *Minister of Land Affairs and Another v Slamdien and Others* 1999 (4) BCLR 413 (LCC) para 26. <http://www.saflii.org/za/cases/ZALCC/1999/6.pdf>.

discriminatory policies in respect of those very land rights.”<sup>11</sup> The Constitutional Court further held that laws with the impact of racial dispossession qualified even if not directly advancing spatial apartheid.<sup>12</sup>

Here, significantly, the Constitutional Court read the Act’s purpose as broad redress instead of restitution under only spatial apartheid laws. The justices rejected the LCC’s narrow reading and fully acknowledged indigenous law and the racial impact of governmental rejection of indigenous land rights. The laws qualifying as racially motivated, argued the Constitutional Court, could not be narrowly read as those which directly forced inhabitants off land but were instead those which had an impact on dispossession. Furthermore, the Constitutional Court chose to look outside the set cut-off dates— a seemingly procedural step that contributed to the LCC rejection— based on its activist reading of the overall impact. The LCC did not share the Constitutional Court’s willingness to decide individual cases within a larger purpose of redress.

In 2007, in *Department of Land Affairs v. Goedgelegen Tropical Fruits (Pty) Ltd*, the Department of Land Affairs represented a community of labor tenants on the Boomplaats farm in the Limpopo province that could trace undisturbed indigenous rights to the land back to the 19<sup>th</sup> century.<sup>13</sup> White settlers moved into the land and claimed ownership, filing deeds, and instituting a system of labor tenancy where previous inhabitants could live, build homes, and raise cattle on the land so long as they worked for the white owners two days a week.<sup>14</sup> The first

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<sup>11</sup> *Alexkor Ltd v. Richtersveld Community*, para. 98.

<sup>12</sup> *Alexkor Ltd v. Richtersveld Community*, para. 99.

<sup>13</sup> *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (10) BCLR 1027 (CC) [7].

[https://collections.concourt.org.za/bitstream/handle/20.500.12144/2682/Full%20judgment%20Of%20ficial%20version%20\(268%20Kb\)-10293.pdf?sequence=13&isAllowed=y](https://collections.concourt.org.za/bitstream/handle/20.500.12144/2682/Full%20judgment%20Of%20ficial%20version%20(268%20Kb)-10293.pdf?sequence=13&isAllowed=y).

<sup>14</sup> *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*, para. 15.

white owner's deed was from 1889.<sup>15</sup> The land passed through multiple white owners while the previous black owners continued farming until 1969 when the owner forced the labor tenants off the land and sold the farm to the Goedgelgen fruit company. The owner claimed he terminated labor tenancy because it did not work efficiently for his own business needs and he was not at the time aware of apartheid legislation.<sup>16</sup> In this case, the applicants acknowledged the dispossession took place before 1913; however, they sought return of the limited areas around the homesteads they lost in 1969.

The LCC and SCA rejected the claim for lack of a causal relationship between the dispossession and racist policy, prompting the Constitutional Court to write an upgraded standard for determining the impact of policy on dispossession. The two courts disagreed about the phrase in both the Property Clause and Section Two of the Act that says eligible claimants were dispossessed as “*a result of past racially discriminatory laws or practices.*”<sup>17</sup> The LCC acted upon a narrow, causal reading of ‘a result of.’ The Constitutional Court instead advocated for a broad understanding that included acknowledgement of the full context of apartheid South Africa as well as the interlocking racially targeted legislation tailored to degrade black property holders’ rights.

The LCC found no evidence that the claimants did not voluntarily accept the labor tenancy position, therefore the dispossession was not racially motivated.<sup>18</sup> The SCA found that even if the seller knew of the racial policies degrading labor tenancy for black inhabitants at the time, knowledge alone did not constitute definite proof of causal connection between racially

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<sup>15</sup> *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*, para. 7.

<sup>16</sup> *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*, para. 19.

<sup>17</sup> *Department of Land Affairs v Goedgelegen Tropical Fruits*, para. 49; Restitution of Land Rights Act 22 of 1994, Preamble.

<sup>18</sup> *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*, para. 26.

motivated law or practice and dispossession.<sup>19</sup> The Constitutional Court rejected the lower courts' reading of 'a result of' to refer only to a causal connection.<sup>20</sup>

The Constitutional Court also rejected the SCA and LCC's "but for" test. The "but for" test made the lower courts decide culpability based on asking "but for" the discriminatory laws and practices, would the owners have terminated the claimants' labor tenancies? If they concluded that the owner would have, the lower court invalidated the claim. In contrast, the Constitutional Court advocated for a purposive reading of the Restitution Act that took into account the broad framework of legislation relevant to dispossession:

It is by now trite that not only the empowering provision of the Constitution but also of the Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution. Therefore, in construing "as a result of past racially discriminatory laws or practices" in its setting of section 2(1) of the Restitution Act, we are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole including its underlying values.<sup>21</sup>

I conclude that the term "as a result of" in the context of the Restitution Act is intended to be less restrictive and should be interpreted to mean no more than "as a consequence of" and not "solely as a consequence of".<sup>22</sup>

In its opinion, the Constitutional Court stated the seller's knowledge of apartheid legislation did not matter. Instead, the lower courts must take into account the context created by apartheid legislation. According to the Constitutional Court, the Restitution Act mandated that

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<sup>19</sup> *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*, para. 26.

<sup>20</sup> *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*, para. 50.

<sup>21</sup> *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*, para. 53.

<sup>22</sup> *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*, para. 69.

the LCC provide restitution based not on a transactional legalistic level but, within a broad, purposeful understanding of the injustice of land dispossession during apartheid. The Constitutional Court relied heavily on precedent from *Richtersveld* in their decision. They quoted *Richtersveld* about the necessity of including pre-1913 legislation in the interpretation of the facts when the “purpose is to throw light on the nature of a dispossession that took place thereafter or to show that when it so took place it was the result of racially discriminatory laws or practices that were still operative at the time of the dispossession.”<sup>23</sup> One law cannot be viewed in isolation, but as contributing to a context of dispossession without an option for black land owners to contest. Like in *Richtersveld*, the Constitutional Court rejected the lower courts’ narrow application of the Act in favor of a historically based interpretation seeking justice and redress.

In 2014, in *Florence v. Government of South Africa*, Florence’s husband could not move into the home he purchased in 1970 because it was in a designated white area in Cape Town.<sup>24</sup> In 1995, he filed a restitution claim for the property. Due to the development on the property, the LCC rejected his claim for restitution although it allowed him to pursue equitable redress of financial compensation and a memorial on the site.<sup>25</sup> The lower court calculated the monetary compensation as the amount he paid converted to present day value using the Consumer Price Index.<sup>26</sup> The LCC calculated and paid this as well as R10,000 for the construction of a

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<sup>23</sup> *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*, para. 24; *Alexkor Ltd v. Richtersveld Community*, para. 40.

<sup>24</sup> *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC), para. 8. [https://collections.concourt.org.za/bitstream/handle/20.500.12144/3742/Full%20judgment%20Official%20version%20\(535%20Kb\)-22275.pdf?sequence=9&isAllowed=y](https://collections.concourt.org.za/bitstream/handle/20.500.12144/3742/Full%20judgment%20Official%20version%20(535%20Kb)-22275.pdf?sequence=9&isAllowed=y).

<sup>25</sup> *Florence v Government of the Republic of South Africa*, para. 9.

<sup>26</sup> Consumer Price Index is calculated based on consumption. It measures the changes in the price for a market basket of consumer goods. This is inherently different from investment in property.

memorial.<sup>27</sup> Unsatisfied, Florence appealed the amount given for the memorial as well as the use of the CPI in determining the amount of monetary compensation.<sup>28</sup>

The Government argued that a private agreement between Florence and the present-day owner of the property as well the inclusion of Florence's family in a museum, constituted a memorial and the state did not need to pay for a plaque.<sup>29</sup> In response, Florence argued that the cost of the plaque fell under the government's wide remedial powers promised in the Restitution Act.<sup>30</sup> The Constitutional Court held that the private agreement did not remove state responsibility in this situation.<sup>31</sup> The opinion included "restitution is not only directed at righting the wrongs of spatial apartheid, but also at carrying out 'important symbolic work by acknowledging histories of injustice and their impacts on individuals, families, and communities.'"<sup>32</sup> Again, like in the decisions referenced earlier, the Constitutional Court chastised the lower courts for their narrow reading. Ultimately, the majority opinion required the government to pay for the plaque.

Florence further argued that the CPI was an inadequate determination of monetary compensation because it neither rectified the dispossession nor placed the claimant in the same position as if they received restoration—the Constitutional Court upheld this assessment.<sup>33</sup> The CPI failed to consider the benefits of an investment in property long term and therefore did not

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<sup>27</sup> *Florence v Government of the Republic of South Africa*, para. 17.

<sup>28</sup> *Florence v Government of the Republic of South Africa*, para. 18.

<sup>29</sup> *Florence v Government of the Republic of South Africa*, para. 27.

<sup>30</sup> Restitution of Land Rights Act 22 of 1994, 35(1).

<sup>31</sup> *Florence v Government of the Republic of South Africa*, para. 29.

<sup>32</sup> *Florence v Government of the Republic of South Africa*, para. 35; Quote used in opinion originally from Ruth Hall "Reconciling the Past, Present and Future" in Walker et al (eds) *Land, Memory, Reconstruction and Justice: Perspectives on Land Claims in South Africa* (Ohio University Press, Athens 2010): 17.

<sup>33</sup> *Florence v Government of the Republic of South Africa*, para. 46.



put the claimant in a position similar to as if they were never dispossessed.<sup>34</sup> The CPI money Florence received would not enable her to buy a property in the present day similar to the one stolen from her family. The failure to deliver equivalent restitution to claimants resulted in compounded injustice for those who did not receive restoration.<sup>35</sup> Through endorsing Florence's stance, the Constitutional Court established their definition of monetary compensation: "the purpose of equitable redress is to place the dispossessed owner in the position that she would have been in if the land had not been taken."<sup>36</sup> The Constitutional Court then qualified that no action they could require would put the claimant in a position similar to that before dispossession. The emotive opinion read, restoration could not "knit together the bones of history. The brutality of apartheid irreparably smashed them."<sup>37</sup> The Constitutional Court rejected the use of the CPI and advocated for the use of the current value of the property in conjunction with the LCC's wide discretionary power to consider other factors. The Constitutional Court argued applying current value, a practice included explicitly in the Constitution and used in some instances by the LCC, was more fitting with a purposeful reading of the Act and the goal of parity between those who received restoration and those who received monetary restitution.<sup>38</sup>

In the *Florence* opinion, the Constitutional Court read the Restitution Act as not just requiring direct rectification of wrong—paying the claimant the amount they should have been paid at the time of the sale in present day value—but seeking to redress systematic injustice—the

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<sup>34</sup> *Florence v Government of the Republic of South Africa*, para. 55.

<sup>35</sup> *Florence v Government of the Republic of South Africa*, para. 50.

<sup>36</sup> *Florence v Government of the Republic of South Africa*, para. 39.

<sup>37</sup> *Florence v Government of the Republic of South Africa*, para. 41.

<sup>38</sup> *Florence v Government of the Republic of South Africa*, para. 75, 77.

long term effect of oppressive legislation.<sup>39</sup> In the opinion, the Constitutional Court compared the Restitution Act to the Promotion of National Unity and Reconciliation Act as two instances of legislation intended to deal with the consequences of apartheid.<sup>40</sup> The Promotion of National Unity and Reconciliation Act created the Truth and Reconciliation Commission and had an explicit goal of acknowledging and addressing human rights violations under apartheid in order to rehabilitate victims and facilitate the development of a united nation.<sup>41</sup> This comparison, early in the opinion, signaled the Constitutional Court's general interpretation of the Restitution Act was in line with their interpretation in the two cases described above; one of intention to redress and rectify not simply to settle monetary or property disputes between land owner and claimant.

Throughout these three cases, the Constitutional Court repeatedly held the LCC's interpretation of the Restitution Act to be too narrow. The Constitutional Court advocated for a more activist interpretation with a clear intent of redress. These opinions demonstrate the broad scope of constitutional state action under the property clause and Restitution Act. The LCC's limited application of state power to deliver redress was not unique to that court but characteristic of the ANC's land reform program overall.

In the above cases, the Constitutional Court repeatedly demanded that the LCC adopt a broader and more purposeful reading of the Restitution Act. The disparity in the two interpretations was not just between the LCC and the Constitutional Court, but also between the Constitutional Court and the ANC government. The Constitutional Court's interpretation reflected the ANC's earlier intentions for land redistribution under the clause. Ironically, the ANC did not adopt policies that reflected the Constitutional Court's interpretation. The ANC

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<sup>39</sup> *Florence v Government of the Republic of South Africa*, para. 49.

<sup>40</sup> *Florence v Government of the Republic of South Africa*, para. 2.

<sup>41</sup> Promotion of National Unity and Reconciliation Act 34 of 1995.

relied on neoliberal redistribution policies instead of making use of the state expropriative powers protected by the clause. Repeatedly, ANC and South African presidents implemented ineffective, market-based land policies. Each development in land reform policy reflected specific priorities of the president of the time. Overall, state withdrawal characterized the ANC's land reform policy.

### ***Poverty Reduction and National Reconciliation: Section 25 During the Mandela Presidency***

Under President Nelson Mandela in 1995, the ANC government began to enact land reform through the 'Willing Buyer, Willing Seller' model, a drastically different model from its earlier calls for expropriation and redistribution. The program fit with the ANC's need to placate both their support base and big business interests as the new leadership of the united South Africa.<sup>42</sup> Mandela appointed Derek Hanekom, a white male, fluent in Afrikaans and a long-time member of the ANC, to be minister of the Department of Land Affairs. This selection was indicative of the government's commitment to stability and pleasing and uniting as many groups as possible.<sup>43</sup> The Willing Buyer, Willing Seller program allowed the government to fulfill promises of redistribution to their supporters without actively breaking up large commercial agriculture land holdings, and thus catering to the interests of big business.

The ANC began programs of land reform and restitution in 1995 but it formalized its approach in the Department of Land Affairs' 1997 White Paper on South African Land Policy. The stated goals of the program were to redress the injustices of apartheid, foster national

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<sup>42</sup> Colin Bundy, *Short Changed? South Africa Since Apartheid* (Athens: Ohio University Press, 2014), 60.

<sup>43</sup> Marinda Weideman, "Who Shaped South Africa's Land Reform Policy?" *Politikon* 31, no. 2 (November 2004): 231.

reconciliation and stability, underpin economic growth, and improve household welfare and alleviate poverty.<sup>44</sup> The goals were to be achieved through government assisted market transactions: “Rather than become directly involved in land purchase for the land redistribution program, government will provide grants and services to assist with the purchase of land.”<sup>45</sup> These grants and services were part of a three-pronged approach: restitution, redistribution, and tenure reform. Tenure reform referred to efforts to upgrade the land rights of tenant laborers. In this chapter, I will focus primarily on restitution and redistribution as they relate most closely to the negotiations over Section 25 and Restitution Act described in chapter two and in the court cases above.

The Willing Buyer, Willing Seller model applied to both restitution and redistribution. For restitution, dispossessed individuals and communities worked with the Commission on Restitution of Land Rights and the Land Claims Court to demonstrate previous ownership of a plot of land, dispossession after 1913, and dispossession by racially motivated laws or policies. Because of their constitutional commitment to protect existing property rights, the ANC intended the pure restitution aspect to be a limited part of land reform. To enable redistribution, the ANC instituted a series of grants, elaborated below, meant to facilitate black buyer’s entrance into the agricultural market.

In practice, Willing Buyer, Willing Seller involved an extended negotiations period which de-incentivized both buyer and seller from participating in the system. First, the potential buyer discovered the desired plot of land. Sellers were at liberty to decide which land to put on the market, often choosing undesirable plots. Next, the buyer and seller had to come to a formal

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<sup>44</sup> Department of Land Affairs, *White Paper of South African Land Policy* (Pretoria: DLA, 1997), 7.

<sup>45</sup> Department of Land Affairs, *White Paper of South African Land Policy*, 9.

agreement about the value of the property which an independent valuer confirmed. This process could take up to two years. Then, the seller had to wait for the state to evaluate and accept the claim. The state could refuse funds for the sale based on a problem with the application or with the DLA's own lack of funds.<sup>46</sup> If the government offered a lower price, the seller had the power to refuse and abandon the deal. No standard for determining compensation existed, so claimants did not have the necessary information to judge whether restitution or compensation would be personally more beneficial.<sup>47</sup> This extended process proved stressful and complex on both ends, yet as the seller ultimately possessed the land regardless of the outcome, they maintained the upper hand in negotiations and often in the outcome.

The DLA was technically and economically handicapped. Between 1994 and 2004, it received R 7.3 billion, less than half of the World Bank Organization's recommendation of how much they should receive in five years.<sup>48</sup> This made up .3% of the state's budget and was divided among the DLA and the Commission on Restitution of Land Rights.<sup>49</sup> This division was unclear in terms of responsibilities and payment. Untrained staff and a lack of efficient technology to track and assess claims and to measure progress further handicapped the DLA. Originally, they set a three-year period for the lodgment of claims beginning May 1, 1995, a five-year period for the commission and the court to finalize all claims, and a ten-year period for the implementation of court orders. They sought to transfer 30% of the country's land to the poor and landless within

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<sup>46</sup> Juanita Pienaar, *Land Reform* (Cape Town: Juta, 2014), 343.

<sup>47</sup> Kemraj Ramballi and Reij Maharaj, "Land Reform and Restitution in South Africa: A Critical Review," in *Transforming Rural and Urban Spaces in South Africa During the 1990s: Reform, Restitution, Restructuring*, ed. Ronnie Donaldson and Lochner Marais (Pretoria: Africa Institute of South Africa, 2002), 40.

<sup>48</sup> Cherryl Walker, *Landmarked: Land Claims & Land Restitution in South Africa* (Johannesburg: Jacana, 2008), 200.

<sup>49</sup> Ramballi, "Land Reform and Restitution in South Africa," 33.

five years.<sup>50</sup> Given the Department's institutional weakness and low budget, this target was impossible.

The policies in the 1997 White Paper created a hierarchy with sellers at the apex, followed by claimants with education and means. At the bottom, were rural, uneducated and poor dispossessed people.<sup>51</sup> Through restitution, claimants stood to receive their land back, alternative land, or monetary compensation. Through redistribution they could receive a grant to purchase land from willing sellers. However, the claimant's own resources greatly affected their ability to navigate bureaucracy and exert pressure to push their claim forward in the court system. Furthermore, the grants evolved to require claimants to supply labor or capital in order to receive land. Those without these advantages had a lower chance of receiving meaningful redress. The neo-liberal system of deregulation and state withdrawal lacked built-in measures to check this inequality.<sup>52</sup>

The first redistribution policy, as implemented in the 1997 White Paper was the Settlement/ Land Acquisition Grant. This grant specifically targeted poor households as only those earning less than R1500 per month could apply for the R16000 grant.<sup>53</sup> Often groups of poor households formed to apply as a unit.<sup>54</sup> Still, the grant sum was not enough for investment in the land or building homes after the transfer so these groups were left sharing a small and unproductive plot unable to use it to accumulate wealth.<sup>55</sup>

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<sup>50</sup> Ramballi, "Land Reform and Restitution in South Africa," 46.

<sup>51</sup> Pienaar, *Land Reform*, 224.

<sup>52</sup> Pienaar, *Land Reform*, 224.

<sup>53</sup> Department of Land Affairs, *White Paper of South African Land Policy*, 91.

<sup>54</sup> Pienaar, *Land Reform*, 217.

<sup>55</sup> Ramballi, "Land Reform and Restitution in South Africa," 32.

The World Bank Organization's suggestions in 1993-94 directly inspired The Settlement/Land Acquisition Grant policy.<sup>56</sup> In their proposal, the WBO advised agricultural liberalization and a program of grants to allow more individuals to enter the land market and purchase small plots. The WBO advised against government-led expropriation or direct purchase of white owned land. Instead it advocated for a market-dependent strategy with a court system to resolve disputed settlements.<sup>57</sup>

### ***Black Entrepreneurship: Section 25 During the Mbeki Presidency***

In June 1999, newly elected President Mbeki appointed a new minister of the Department of Land Affairs, Thoko Didiza. Under Didiza, following criticism from the WBO, the government shifted the focus of the grants from the poor to wealthier farmers. In 2000, the WBO returned to South Africa to criticize the development of large group-owned land plots that were not agriculturally productive.<sup>58</sup> These unproductive plots, ironically, were a product of their previous recommendations. Instead, the WBO advocated for a policy that enabled those with some resources to invest them into agriculture. The new Land Redistribution and Agricultural Development policy launched in August 2001. This policy contained grants ranging from R 20,000 to R 100,000 to applicants who could prove through labor or means contribution their dedication to farming.<sup>59</sup> The criteria shifted from earning below a certain income threshold to demonstrating, through means contribution, preparedness to farm. Therefore, the redistribution

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<sup>56</sup> World Bank Organization, *Proposals for Rural Restructuring*, November 1993.

<sup>57</sup> World Bank Organization, *Proposals for Rural Restructuring*, ii-iii.

<sup>58</sup> Ruth Hall, "Who, What, Where, How, Why? The Many Disagreements About Land Redistribution in South Africa," in *Land Divided, Land Restored: Land Reform in South Africa for the 21<sup>st</sup> Century*, ed. Ben Cousins and Cheryl Walker (Auckland Park: Jacana, 2015), 136.

<sup>59</sup> Departments of Agriculture and Land Affairs, *Land Redistribution for Agricultural Development*, June 2001.

system shifted to focus on rewarding productive farmers rather than providing land for the impoverished. The ANC also limited the number in a group application to ten.<sup>60</sup> This too made it more difficult for the poor to benefit from the system. This new policy still relied completely on a market based, Willing Buyer, Willing Seller approach. Even in the government's limited role in affecting land reform, they chose not to assist the poor and most vulnerable.

By 2005, widespread criticism of the ineffectiveness and bias inherent in the Willing Buyer, Willing Seller model compounded by criticism from the Constitutional Court and fear of land seizures like those occurring in neighboring Zimbabwe drove the government to further address land reform policy.<sup>61</sup> In the first ten years since the launch of their program in 1995, only 4% of land had been redistributed. This amount was far from the government's original goal of 30% transfer.<sup>62</sup> The government hosted the National Land Summit in July 2005. There, they announced "today we have buried Willing Buyer, Willing Seller."<sup>63</sup> The government recognized the ineffectiveness of Willing Buyer, Willing Seller, heard suggestions from representatives involved in the restitution and redistribution processes as well as from the South African Communist Party and international NGOs. Still the summit did not produce consensus on the details of a new approach.

From 2006 to 2011, the government continued Willing Buyer, Willing Seller but increasingly acted as the willing buyer. The new grant system called Proactive Land Acquisition

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<sup>60</sup> Departments of Agriculture and Land Affairs, *Land Redistribution for Agricultural Development*, June 2001.

<sup>61</sup> Zimbabwe Influence: Edward Lahiff and Ben Cousins, "The Land Crisis in Zimbabwe Viewed From South of the Limpopo," *Journal of Agrarian Change* 1, no. 4 (2001): 652-666.

<sup>62</sup> African National Congress, *Reconstruction and Development Programme* (Johannesburg, 1994), 22.

<sup>63</sup> Ruth Hall, "The Shifting Terrain of Land Reform in South Africa: The National Land Summit, July 2005" *Review of African Political Economy* 32 no. 106 (December 2005): 621.



Strategy sought to speed up the rate of land redistribution and bolster black farmers in commercial agricultural. In this program, the DLA purchased land and then leased it to black farmers for a period of time in which they could prove their ability to farm the land. Proactive Land Acquisition Strategy did not expand access to land for non-agricultural or poor land holders and it rarely actually transferred land to black owners as the government frequently remained the land holder. Furthermore, if claimants could not demonstrate their ability to farm through capital or skills they were evicted and landless again. Most of all, though, in their new position as the willing buyer, the government experienced the realities of their own system; they were not able to afford to pay the sellers the market-based prices for the land.

### ***State Intervention: Section 25 During the Zuma Presidency***

In 2009, after his election, President Zuma, riding a wave of support from workers and landless people, restructured the Department of Land Affairs into the Department of Rural Development and Land Reform.<sup>64</sup> In 2010, the new Department committed to reviewing all current land reform policy and published their own framework of policy in 2012.<sup>65</sup> The Department sought to address the slow pace of redistribution and the high prices the government paid for acquiring land. To do this, they established the Office of the Valuer General. The Valuer General position aided the government in navigating the land market and determined the just and equitable compensation for the government to pay sellers. In 2013, President Zuma described the approach by saying “the government will now pursue the ‘just and equitable’ principle for

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<sup>64</sup> Pienaar, *Land Reform*, 232.

<sup>65</sup> Department of Rural Development and Land Reform, *A Policy Framework for Land Acquisition and Land Valuation in a Land Reform Context and for the Establishment of the Office of the Valuer-General*, October 2012.

compensation, as set out in the Constitution instead of the ‘Willing Buyer, Willing Seller’ principle which forces the state to pay more for the land than the actual value.”<sup>66</sup> The phrase ‘just and equitable’ came from the wording of Section 25 where it alluded to a balance between “the public interest and the interests of those affected.”<sup>67</sup>

Officially, the government acknowledged reliance on market value impeded reform. Nonetheless, it still shied from a commitment to expropriation. With the creation of the Valuer General, the ANC, again, enshrined a balance between competing objectives instead of implementing an actionable plan for redistribution. In order for the government to pay the just and equitable compensation as decided by the Valuer General, they would have to expropriate land.<sup>68</sup> Otherwise, the seller could seek a higher bidder.

The ANC government’s continued refusal to incorporate expropriation meaningfully into its land reform policies spurred mass political pushback. In the 2010s, parties with platforms centered around expropriation, specifically the Economic Freedom Fighters (EFF), began to threaten the ANC’s dominance amongst landless voters. This threat pushed the ANC to demonstrate its commitment to land reform. The EFF party is a pro-black pro-worker political party founded in 2013. Central to their agenda is ensuring that Section 25 of the Constitution is amended to allow for expropriation without compensation.<sup>69</sup> In the 2014 national elections, the

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<sup>66</sup> Jacob Zuma, ‘State of the Nation Address by His Excellency Jacob G. Zuma, President of the Republic of South Africa on the Occasion of the Joint Sitting of Parliament’ (Cape Town, February 2013).

<sup>67</sup> Constitution of the Republic of South Africa, 25(3).

<sup>68</sup> Michael Aliber, “Unravelling the ‘Willing Buyer, Willing Seller’ Question,” in *Land Divided, Land Restored: Land Reform in South Africa for the 21<sup>st</sup> Century*, ed. Ben Cousins and Cheryl Walker (Auckland Park: Jacana, 2015), 151.

<sup>69</sup> Economic Freedom Fighters, *Economic Freedom Fighters Founding Manifesto: Radical Movement Towards Economic Freedom in our Lifetime*, July 2013.

EFF received 6.35% of the popular vote, enough to become the third largest opposition party.<sup>70</sup> In July 2018, President Cyril Ramaphosa, the successor to Zuma, announced his ANC government would approve an amendment to Section 25 that specified a plan for expropriation without compensation.<sup>71</sup> In December 2018, the Parliament approved amendment to Section 25. At the time of writing, the amendment process is underway. Presumably, the amendment's content will promote expropriation without compensation.<sup>72</sup>

### *Conclusions*

The move to amend Section 25 suggests that the clause inherently limits the potential for land reform. Yet, the problem, as shown in the Constitutional Court's decisions is not that Section 25 precludes active state involvement in land reform but that, as a negotiated balance between two agendas, one based on the right to property and another on the right to compensation and restitutive justice, it allows for a wide range of policy implementation. Indeed, in the twenty-year tenure of the ANC, Mandela, Mbeki, and Zuma oversaw the adoption of at least three different interpretations of Section 25. Amending the clause to explicitly dictate a program of expropriation without compensation is necessary not because the original clause is prohibitive but because it does not strictly bind governmental action. Instead, it allows the

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<sup>70</sup> Amil Umraw, "What the Numbers Tell Us About EFF Support," *Huffington Post*, March 22, 2018. [https://www.huffingtonpost.co.za/2018/03/21/is-the-eff-2019s-dark-horse-lets-look-at-the-numbers\\_a\\_23391412/](https://www.huffingtonpost.co.za/2018/03/21/is-the-eff-2019s-dark-horse-lets-look-at-the-numbers_a_23391412/).

<sup>71</sup> George Devinish, "Proposed Amendment of Section 25 of Constitution is Intriguing," *Independent Online*, August 19, 2018. <https://www.iol.co.za/sundayindependent/analysis/proposed-amendment-of-section-25-of-constitution-is-intriguing-16635155>.

<sup>72</sup> Government of the Republic of South Africa, "Parliament Approves Recommendation to Amend Section 25 of Constitution," December 5, 2018. <https://www.gov.za/speeches/ncop-approves-recommendation-amend-section-25-constitution-5-dec-2018-0000>.

government freedom to implement a policy that suits interests that are susceptible to manipulation from powerful external pressures. The ANC leaderships' early commitments to expropriation were far from the stability-ensuring, WBO-pleasing policies they implemented once in power. Only when the EFF threatened the ANC's supremacy did it return to a commitment to expropriation. The problem of land reform in South Africa today appears more directly a problem of political will than it is of the existing constitutional property clause.

## Conclusion and Epilogue

In 1993, when South African Communist Party leader Joe Slovo forfeited his combative stance to call for negotiations with the National Party, a fellow SACP member accused him of advocating for a scenario in which “the masses are absent and, instead, the issue becomes primarily that of tradeoffs between negotiators, constrained by the logic of the negotiations process.”<sup>1</sup> This accusation presents an oft-repeated critique of the African National Congress’ handling of the land question. During the pre-CODESA stage, the ANC reoriented itself from a champion of the oppressed and impoverished masses to a willing compromiser with the NP in order to obtain power under a new democratic government. Undoubtedly, prioritizing inclusive democracy was a worthy goal for the ANC leadership. Yet, the relatively peaceful and stable transition to democracy came at the cost of land overhaul.

Despite the ANC’s initial formation in 1912 to oppose discriminatory land legislation, by the time of CODESA, the leadership’s preferred policy was a neoliberal one of deferred state action and reliance on individual actors in the market. This caused a mismatch in expectations as the ANC’s constituents largely still hoped for state-led redistribution of land among the land poor. Earlier nationalist and communist-influenced visions for reform were superseded by the ANC leadership’s desire to speed along the transition to a united democracy.

During formal negotiations, the ANC continued to prioritize the transition to democracy without developing effective land reform laws and policies. ANC negotiators were not equipped with a specific land reform plan. Through a series of compromises, negotiators agreed to constitutionally protect both property rights and a state right to expropriate. The ANC then

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<sup>1</sup> Hein Marais, *South Africa: Limits to Change* (London: Zed Books Ltd, 1998), 87; see page 26.

assigned the responsibility of weighing these opposing constitutional mandates on the local level to the courts.

Section 25's protection of property rights limited the ANC's options for revolutionary land redistribution. Still, the ANC negotiators had succeeded in maintaining a constitutionally acceptable option for expropriation. Since 1996, it has not been Section 25 that prevented the ANC from using state expropriative power. Instead, successive ANC presidents implemented policies that relied primarily on individual claimants and the markets to effect restitution. Only in 2019, when the ANC faced threats to its political hegemony did the leadership promise expropriation through amending Section 25.

The ANC's plan to amend Section 25 is a misplaced effort to address ineffective land reform. The amendment effort is a political strategy meant to appeal to land poor constituents through broad promises that are detached from the leadership's actual policy plans. The move to amend Section 25 to orient more explicitly towards expropriation is primarily driven by a response to the growing popularity of ANC opposition parties.

In May 2019, South African voters will vote to elect a new parliament and president. In March 2019, the ANC committee working on amending Section 25 declared it will not be complete with its recommendations before the new parliament takes office.<sup>2</sup> Due to this, on the subject of land reform, voters must choose between the ANC's unfinished plan to amend the Constitution and the EFF's explicit promises to take all land under state control.<sup>3</sup> The ANC has shown that even with the constitutional ability to enact state led reform, it prefers to designate

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<sup>2</sup> Parliament of the Republic of South Africa, *Ad Hoc Committee Adopts Reform on Amending Constitution*, March 13, 2019. <https://www.parliament.gov.za/press-releases/ad-hoc-committee-adopts-report-amending-constitution>.

<sup>3</sup> A third main party, the Democratic Alliance, wants to protect land rights and leave the Constitution as is. Their land reform program seeks to increase access to land ownership.

redistribution to market, judiciary, and individual forces. Because of this history, it is unclear how and if amending the constitution to make more explicit a state right already in the clause will lead to dramatic land redistribution. The ANC has not presented how the economic, social, and global political forces preventing it from pursuing state-led redistribution in negotiations have shifted to allow such a program. In fact, ANC president Ramaphosa, one of the initial negotiators of this form of limited land reform, has promised to protect foreign investments in the country from expropriation; the ANC under Ramaphosa has promised that expropriation will not threaten food security nor economic development.<sup>4</sup> These promises, especially of protecting development from state efforts to redistribute land are reminiscent not only of earlier ineffective ANC land policy but also of NP land reform policy.<sup>5</sup>

The EFF promises to assume state ownership of all land to facilitate redistribution. This idealistic claim carries populist appeal, but the EFF's ability to institute this remains untested. If elected, the party will face many of the same economic and social challenges that led ANC leadership to retreat from their own early idealistic revolutionary promises. Missing from South African voter's options are creative policies that recognize land as a symbol for larger, lasting forms of economic inequality.

The starkly unequal distribution of land on racial lines, the role of land inequality as a basis for apartheid and resistance to apartheid, and the reality of land as a stand in for other forms of economic inequality make land reform an emotional and controversial political issue.

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<sup>4</sup> Carin Smith, "Ramaphosa: SA Will Not Expropriate Foreign Investments," *Fin 24*, March 7, 2019. <https://www.fin24.com/Economy/ramaphosa-sa-will-not-expropriate-foreign-investments-20190307>; Amogelang Mbatha, "What SA's Main Political Parties are Promising Voters," *Fin 24*, March 2, 2019. <https://www.fin24.com/Economy/what-sas-main-political-parties-are-promising-voters-20190302>.

<sup>5</sup> See pg. 8; pg. 63.

Therefore, political leaders owe the landless, land poor and all South Africans a serious reckoning with whether physical return of land remains the true solution to the land problem in 2019 and beyond. Given the realities of the dominance of commercial farming, environmental change, and growing populations, situating the return of farm plots as the ultimate goal of land reform is an unpromising solution. Political leadership ought to consider if restitutive justice could be better delivered through forms of reparations, affirmative action, or addressing the striking levels of economic inequality that have only grown since the end of apartheid. It is necessary for the ANC to recognize that not only is amending Section 25 an ineffective solution, but simply returning certain percentages of land may be as well. To solve the land question, the ANC should address economic inequality and other lasting consequences of apartheid that land symbolizes.



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