Spring 2019

Land In South Africa: Dispossession, Constitutionalism, Political Expediency

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Senior Project Submitted to

The Division of Social Studies

of Bard College

by

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Annandale-on-Hudson, New York

May 2019

Acknowledgments

I would like to thank my advisor Professor Rosenblum, for two semesters worth of support, feedback and discussions, which helped bring this project to fruition. Thanks too, to Professor Ewing, for being on my board and helping developing my source analysis and writing style over the past few years. I am grateful to Professor Gilhooley for his feedback on my boards, particularly relating to constitutionalism.

I am fortunate to have parents who never allowed me to use the word 'bored' growing up, nor to strive for anything other than my best. This project, I hope, fulfills both of those family rules. Finally, thanks to my sister for being a lifelong friend, and over the past year, a comrade in the thesis arena, as you complete your own.

Completing this project afforded me the opportunity to delve into the complexities of constitutionalism, public policy, and the political dynamics of my home country. In so doing, I learnt a tremendous amount, and enjoyed being in conversation with my grandfather's work and reflecting on past, late night discussions.

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Introduction

The Constitution that Ruther Bader Ginsburg holds as a model to the world is not that of the United States, the two-century-old document to which she swore an oath to "bear true faith and allegiance" as an Associate Justice of the Supreme Court, but that of South Africa, written less than three decades ago.[1] This young document was the legal instrument that built the foundation of a new political order, one whose success was marked when the two most prominent figures of the nation's transition to democracy, President Nelson Rolihlahla Mandela and his predecessor President Frederik Willem de Klerk, were awarded the Nobel Peace Prize in 1993: the Novel citation mentioned "their work for the peaceful termination of the Apartheid regime, and for laying the foundations for a new democratic South Africa."[2] Officially adopted in 1996 after centuries of systemic economic exploitation through imperialism, settler violence and nearly five decades of Apartheid, the animating theme of this document is not retribution. "South Africa belongs to all who live in it, united in our diversity," the preamble proclaims.[3] The culmination of several years of negotiation, drafting and a public participatory process, the document "recognise[s] the injustices of our past" while seeking to "improve the quality of life of all citizens and free the potential of each person."[4]

But the widespread admiration for the South African Constitution extends beyond its repudiation of past injustices; equally admired is its vision of a shared future based on equality. The new Constitution represented a new breed of constitutionalism because it enshrined

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[1] Tembeka Ngcukaitobi, *The Land Is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism* (Cape Town, South Africa: Penguin Random House, 2018), 1.
[2] Nobel Media AB, "The Nobel Peace Prize 1993," *The Nobel Prize*, last modified 1993, accessed April 25, 2019, https://www.nobelprize.org/prizes/peace/1993/summary/.
[3] "The Constitution of the Republic of South Africa, 1996," Department of Justice, last modified 1996, accessed December 9, 2018, http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf.
[4] "The Constitution," Department of Justice.

socio-economic rights, as opposed to simply enumerating negative liberties. The Constitution covers a number of such rights: Section 26 (1) stipulates "everyone has the right to have access to adequate housing;"[5] Section 27 (1) ensures "everyone has the right to have access to — (a) health care services, including reproductive health care; (b) sufficient food and water"[6] and Section 25 (5) mandates that "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."[7]

It is Section 25 which has become a source of contention in recent years and is under fire by left-wing political parties, who characterize it as an impediment to land reform. Therefore, it is this section of the Constitution that I will explore in this paper, since it represents the critical axis of a contemporary debate about the legitimacy of the negotiated transition to democracy. This investigation will comprise a comprehensive analysis of the dispossession of black land in the 20th Century; an analysis of the tensions in the Constitutional negotiations over the issue of land; an evaluation of the origins and implementation of land reform policy, and finally, a survey of the contemporary political debate over a constitutional amendment that would allow the expropriation of land without compensation, and an analysis of what the implications of this debate are for the constitutional framework in South Africa.

Land dispossession was an ugly hallmark of both colonialism and Apartheid and conversely, a rallying cry for the anti-apartheid movement. The issue of land has been omnipresent for more than three centuries; there is perhaps no other issue as closely intertwined

[5] "The Constitution of the Republic of South Africa, 1996," Department of Justice, last modified 1996, accessed December 9, 2018, http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf.
[6] "The Constitution," Department of Justice.
[7] "The Constitution," Department of Justice.

with the history of the country than that of land. My first chapter will investigate the issue of land dispossession, forced removals, and the codification of discriminatory laws relating to land in the twentieth century, as a means to contextualize contemporary policy and rhetoric. The scope of this historical survey, as with the remainder of this investigation, will start with the passage of the Native Land Act of 1913, which prevented black purchase and ownership of land. This date was chosen because this is the time period recognized in the 1996 Constitution for legitimate claims of land restitution. The chapter will parse out the intertwined nature of the anti-apartheid struggle and the issue of land dispossession. This will be achieved by showing the prominent role the issue of land has played in the African National Congress since the organization's inception in 1912 — a year before the passage of the Native Land Act. The Freedom Charter, adopted by the ANC in 1955, and subsequent responses to forced removals throughout the Apartheid era, help contextualize the ideas about property rights proposed by the ANC during the constitutional negotiations of the early 1990s. These took place at the Convention for a Democratic South Africa (CODESA) and will be analysed, with careful attention paid to the competing debates and ideologies relating to land. Finally, the Constitution itself — the culmination of CODESA — will be analysed, again with a specific focus on how a consensus on Section 25 was reached, as it sought to address the emotive issue of land. The analysis will demonstrate how the mechanisms included in the Constitution not only allow for land reform, but, in fact, requires the political and legislative branches to carry it out.

After operating for nearly a century as an opposition movement, and as the dream of a democracy came within reach, the ANC had to undergo a transition: from a liberation movement to a government-in-waiting. The transition to a multiracial democracy had been fought for and

dreamt of for generations; once changes were set in motion, the transition itself happened with jarring swiftness. This left the ANC scrambling to formulate concrete policy proposals — something that had not been a priority only a few years before. Hence, the second chapter will explore the ANC government's land reform policies after the first democratic elections in April 1994. This element of the investigation will emphasise the importance of the Reconstruction and Development Program (RDP), adopted by the ANC as an election platform in the run-up to the 1994 elections. In that chapter, I will analyse the origin of the specific policies in the RDP, particularly in relation to the release in 1993 of a World Bank report on options for land reform in a democratic South Africa. Such analysis will highlight a key problem: the contradictory technical advice given by International Financial Institutions (IFIs) to the newly-elected ANC government. In the eyes of the World Bank, the transformative ambitions of the RDP were deemed necessary to catalyse economic development while addressing historical injustices. By contrast, the International Monetary Fund (IMF) was advocating fiscal austerity, which would prevent the ANC from delivering on those transformative election promises of the RDP, on which they campaigned. Finally, the tensions between the RDP's overwhelming focus on land reform as a rural issue and the increasing demand for urban land reform will be examined. One conclusion seems clear: the rapid urbanization in South Africa as a result of Apartheid economic, social and labor policies, is not adequately addressed in the RDP's section on land reform.

The contemporary debate over the necessity of a constitutional amendment to allow for the expropriation of land without compensation is not only a political red herring, but also calls into question the legitimacy of the negotiated transition and the constitutional framework. The historical context that I will sketch in the first two chapters — the emotionally charged nature of

the issue of land in South Africa — demonstrates that land reform has become an effective lightning rod for those seeking to question the legitimacy of the constitutional framework. Thus, the third chapter will interrogate the motivations behind the recent calls for a constitutional amendment by the ANC, pushed in that direction by the rallying cries of the recently-formed Economic Freedom Fighters (EFF). Making use of arguments that have been advanced by legal scholars, I will demonstrate that the Constitution is not, in fact, a stumbling block to transformative land reform, but rather a key mechanism which demands such change take place. The very political establishment that seeks to portray the Constitution as an impediment to reform is, in fact, responsible for the glacial pace of change. That chapter will conclude by assessing the consequences of the recent populist rhetoric for the future of the democratic project in South Africa.

Chapter 1: A History of Dispossession and Constitutional Attempts at Redress

While the focus of this project is to trace the genealogy of the contemporary debate about land reform in South Africa, such an analysis would only be productive if it is informed by the historical legacies of colonialism and Apartheid, as well as the conditions of the country's democratic transition. The story of land in South Africa at all points in its history, from the most violent instances of land theft to democratic attempts at restitution, in many ways is the story of the country itself. Therefore, this chapter will conduct a historical survey of land in the twentieth century, which will provide insights into the nature of the transition to democracy. The conditions at the time of the transition are directly related to the contemporary political debates on the issue. While the history of black land dispossession dates back to the arrival of European settlers and colonizers in 1652, this chapter, like the Constitution of 1996, will primarily focus on the history of land in South Africa from the enactment of the Natives Land Act in 1913. A mere three years after the union of South Africa, the newly-sovereign Parliament passed a law which prohibited blacks from purchasing land which was not part of newly-designated 'reserve' areas. Such areas constituted a mere 10% of all land in South Africa.[8] The government's move came as it faced pressure from the white farming sector and the mining industry to provide more cheap labor.[9] By stripping the black population of the right to live where they wanted and on land they owned, the government helped provide the mining and agricultural sectors with the cheap labor they needed. Rendering the black population landless, the Act criminalized anyone living on white farms who were not actively working as servants, evicting others who, under the new law,

[8] Allister Sparks, *The Mind of South Africa* (New York, NY: Alfred A. Knopf, 1990), 136.
[9] Allister Sparks, *Beyond the Miracle: Inside the New South Africa* (Johannesburg, South Africa: Jonathan Ball Publishers, 2003), 48.

were "squatting."[10] Land inside the so-called 'reserves' was owned communally and power was vested in the chiefs rendering individual ownership impossible. The law also destroyed the small but growing black commercial farming sector, which had started to provide "the black population with a degree of economic independence for the first time since the defeat of their tribes by the colonial armies in the nineteenth century frontier wars."[11]

This law was the first of many, which would seek to socially and economically alienate the indigenous black population of South Africa in their own country. Conversely, it was also the beginning of resistance and outrage by those the law affected, who fought to live in equality with their white counterparts. This phenomena was encapsulated in *Native Life In South Africa* by Solomon Tshekisho Plaatje who declared that with the passage of the law, "South Africa has by law ceased to be the home of any of her native children whose skins are dyed with a pigment that does not conform with the regulation hue."[12] The consequences of the law, Plaatje observed, would prevent black South Africans "from investing their earnings in land whereon they could end their days in peace."[13] Plaatje's observation highlights the intrinsic relationship between ownership of land, security of tenure and the pursuit of prosperity, all of which was outlawed for the black population in 1913. Sol Plaatje, deeply concerned with the ramifications of the new law, traveled to Britain as part of a deputation, in an unsuccessful attempt to persuade the British government to act in defense of South Africa's indigenous populations. But Britain, like much of Europe, was preoccupied with concerns of an imminent war, and Plaatje failed to persuade them

[10] Allister Sparks, *The Mind of South Africa* (New York, NY: Alfred A. Knopf, 1990), 136.
[11] Allister Sparks, *Beyond the Miracle: Inside the New South Africa* (Johannesburg, South Africa: Jonathan Ball Publishers, 2003), 49.
[12] Solomon Tshekisho Plaatje, *Native Life in South Africa: Before and Since the European War and the Boer Rebellion*, 3rd ed. (London, United Kingdom: P. S. King & Son Ltd, 1917), 63.
[13] Plaatje, *Native Life*, 45.

to intervene. Consequently, he remained in England for the duration of the First World War to write, including *Native Life in South Africa*, which explained his convictions relating to the tragic consequences of the Act.

In his book, he highlights the racialized nature of the new policy correctly pointing out that in South Africa there can no be such thing as a 'white squatter.' "Although it is insistently affirmed that the law applies both to Europeans and Natives, the conclusion cannot be avoided that it is directed exclusively against the Native. This is the naked truth that turns all other explanations of the fact into mere shuffling and juggling."[14] Through this observation, Plaatje successfully picks apart the rhetoric of Louis Botha's government. The task of picking apart the government's rhetoric (which was frequently an attempt to create a veneer of respectability) would become an ongoing challenge for opposition movements and leaders throughout the 20th Century, as deception would become almost synonymous with informal, and later codified, Apartheid policy.

Plaatje's life and writings are valuable to the understanding of early twentieth century social and political history in South Africa. Plaatje was not just an observer. The legalization of racial segregation instituted by the Union government affected his own life, too. He would become a strong supporter of independent African journalism which elevated his national profile. An early member of the South African Native National Congress, he became Secretary-General of the party, which would evolve into the African National Congress (ANC).[15] Throughout his work and writings, he advocated for a unified and inclusive South African society, even while

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[14] Solomon Tshekisho Plaatje, *Native Life in South Africa: Before and Since the European War and the Boer Rebellion*, 3rd ed. (London, United Kingdom: P. S. King & Son Ltd, 1917), 46.
[15] Peter Rule, "Remembering Sol Plaatje as South Africa's Original Public Educator," The Conversation (Johannesburg, South Africa), October 5, 2016, accessed January 14, 2019, https://theconversation.com/remembering-sol-plaatje-as-south-africas-original-public-educator-65979.

policies seeking to srip people like him of rights and dignity based on skin color where being enacted. So while Plaatje is an important character in the story of opposing land dispossession in South Africa, he is also an important figure in the history of the African National Congress and its commitment to a non-racial South Africa.

An immediate consequence of the Natives Land Act was a problem of internally displaced people, whereby nearly a million newly-designated 'squatters' became homeless. This resulted in opportunities for white farmers to extort unreasonable demands on newly homeless blacks such as offering exploitative wages in return for the right to stay on their farm. "The [displaced black people] were forced to live in squalor and poverty or to seek employment on white farms, in the mines and urban areas."[16] These consequences were aligned with a decades long priority of the South African state to provide cheap black labour for the benefit of the white population.

Writing in support of the new policy in 1916, John Harris correctly understood that the name of the act was misleading; it was not simply a law pertaining to land ownership, but rather a key component required to achieve Prime Minister Louis Botha's grander aim of segregating the country along racial lines. "Its proposals will lead to a separation of the white and coloured interests throughout the Union territories, a final settlement of vexatious land questions, and the foundations for a solution of the franchise difficulty, acceptable both to the white and coloured races."[17] The 'franchise difficulty' Harris refers to is the issue of voting suffrage, which he, along with Prime Minister Botha — and many of his successors — saw as a crucial problem: how could the white minority population maintain domination over the black majority? By

[16] Nelson Mandela, *Conversations with Myself* (London, United Kingdom: Macmillan, 2010), 395.
[17] John H. Harris, "General Botha's Native Land Policy," Journal of the Royal African Society 16, no. 61 (October 1916): 8, https://www.jstor.org/stable/715974.

dispossessing black people of their land, and relegating them to 'black only' regions of the country, Botha's government began the project of disenfranchisement, and what would become the Homeland system under Apartheid — the project of stripping black South Africans of their citizenship and relegating them to undesirable land. Reflecting on the historical significance of the act, former President Nelson Mandela points to the gross inequality it produced, "a white minority of barely 15% of the country's population owned 87% of the land, while the black majority — Africans, Coloureds and Indians — occupied less than 13%."[18] These figures are staggering, and Mandela correctly notes that while whites owned land, blacks could only occupy it.

The far-reaching social, political and economic consequences of the Natives Land Act would only be hastened and exacerbated with the election of the National Party in 1948. The Act had laid the foundations for a more ambitious (and devastating) vision of racial segregation in South Africa — Apartheid. The whites-only election saw the National Party adopt Apartheid as its platform, inciting white fear by warning of the "*swart gevaar"* (black peril). At a time of increasing black urbanisation (ironically a direct consequence of the Natives Land Act) this tactic proved effective in defeating the incumbent United Party. While the United Party and its allies won 50.9% of the popular vote, the nuances of the electoral system heavily favored rural seats and saw the National Party winning 79 seats to the United Party's 71.[19] Electoral systems aside, it is worth noting the rural dispensation of National Party support. Marking the advent of Apartheid, DF Malan was elected Prime Minister on May 26th 1948. This event, Nelson

[18] Nelson Mandela, *Conversations with Myself* (London, United Kingdom: Macmillan, 2010), 395.
[19] James Hamill, "Remembering South Africa's catastrophe: the 1948 Poll that Heralded Apartheid," The Conversation (Johannesburg, South Africa), May 24, 2018, [Page #], accessed January 14, 2019, https://theconversation.com/remembering-south-africas-catastrophe-the-1948-poll-that-heralded-apartheid-96928.

Mandela notes, would result in "unbelievable cruelty" as the National Party "sought to rob blacks even of these meager rights to land they possessed."[20]

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The election of 1948 marked the start of more explicit, concerted and sweeping attempts to strip non-white populations of rights, opportunities and dignity by implementing the policy of Apartheid. At the same time Apartheid policy was being formalized in South Africa, the world was still reeling from the horrors of Nazi Germany and Hitler's programs of eugenics and extermination. As the rest of the world was moving away from policies of white supremacy, constructing global institutions to prevent history from repeating itself, South Africa moved defiantly in the opposite direction. One of the most consequential elements was the creation of the Bantustan system, which the National Party leaders saw as foundational to the project of Apartheid — the literal definition of the word meaning, 'separateness' or 'apartness.' Starting with Malan's government, over more than four brutal decades, successive National Party governments sought to make this a physical reality in South Africa. Key considerations in this crusade were the segregation of white and black living spaces; the extraction of cheap black labour for the benefit of the white population; and white security and posterity.

The solution, in the view of the Apartheid state, was to create dependent tribal 'homelands' as a formula to achieve the aforementioned goals. These were not unlike the 'reserves' created by the Native Land Act, but this system was to be implemented on a national scale in an attempt to create a system where South Africa truly became a whites-only state. The 'homelands' were to be *dependent* on South Africa for economic opportunities, but were to be

[20] Nelson Mandela, *Conversations with Myself* (London, United Kingdom: Macmillan, 2010), 395.

geographically and spatially *independent*, governed by Apartheid-sponsored leaders. This scheme was also supposed to finally present "a solution of the franchise difficulty."[21] By creating 'independent' states, the Apartheid regime thought it could create an increased veneer of respectability to its crude and impractical racist policies: black populations would have the right to vote for the leaders of the homelands, while whites would have suffrage to elect the leader of South Africa.

It was only after the election of Hendrik Verwoerd as prime minister in 1958, frequently cited as the architect of Apartheid, that the 'tribal homelands' or *Bantustans* came into fruition.[22] He was instrumental in formulating and promulgating the ideological justifications which would serve as the underpinnings of Apartheid. In doing so, he masked the cruelty of the system with an intellectual argument and an, albeit skewed, moral respectability. For example, once he became Prime Minister, Verwoerd stopped using the term 'Apartheid,' instead opting for substitutes such as 'separate development' or 'separate freedoms.' "It became a vision of justice in which the blacks were given their rightful share, their own homelands where they could develop their own nationhood just as the whites were doing. They were no longer regarded as inferior, only different."[23] Regardless of terminology, the system was undeniably separate, and certainly neither equal nor morally justifiable. The areas designated for Bantustans comprised of just 13% of South Africa's land, for 75% of its population.[24] The land allocated for said homelands (there were 10 in total) was fragmented and economically unviable to provide food

[21] John H. Harris, "General Botha's Native Land Policy," Journal of the Royal African Society 16, no. 61 (October 1916): 8, https://www.jstor.org/stable/715974.
[22] Sebastian Mallaby, *After Apartheid: The Future of South Africa*, 2nd ed. (New York, NY: Times Books, 1992), 122.
[23] Allister Sparks, *The Mind of South Africa* (New York, NY: Alfred A. Knopf, 1990), 197.
[24] Nelson Mandela, *Conversations with Myself* (London, United Kingdom: Macmillan, 2010), 395.

and job opportunities for the designated populations. All homelands skirted urban areas, or land of significant mineral or agricultural wealth. By dividing the Bantustans based on ethnicity and tribal calculations, the system was not only relegating the black population to rural and undesirable land, it was also diminishing any sort of perceived threat of an influential black collective. A not so subtle nod to policies employed by the British, another enemy previously deemed an existential threat to Afrikaner existence. So while Apartheid policy was building on the dispossession and displacement of earlier policy during the colonial period, as well as the Natives Land Act, ironically, the Bantustan system was an attempt to restore the previous status quo which had by and large existed prior to the Act of 1913; where the black population occupied far-flung and unproductive rural land, while the white population enjoyed the economic benefits of urban centers. But the Bantustan system went further than previous policy, as it sought to strip the black population not only of its land, but also of its South African citizenship; this was no longer necessary, the government argued, because black people would have full citizenship of the newly formed Bantustans.

These events and Verwoerd's policy also show us that the history of land in the 20th century was often a conflict between access and tenureship of urban versus rural land: after the great disruption of 1913, the status quo of black occupation of land being primarily confined to rural areas was disrupted. Black people displaced by the new policy sought new homes, land, jobs and tenureship in urban areas — until the Apartheid regime had decided this was neither desirable, nor conducive to the white population's prosperity and security. "Colonial and Apartheid governments undertook an ambitious experiment in racial segregation by the ordering

of space and political economy to benefit the minority white population."[25] As Ambassador Robert Gosende, who was working for the US Information Agency in South Africa, points out, historically, Apartheid legislation was a balderdash: by disallowing any person of color from having any tenure in a 'white area,' the government was departing from previous historical trends. "Blacks had owned property in Cape Town, coloreds had owned property in Cape Town, and Indians had owned property in Cape Town. All of that got wiped out by the apartheid legislation."[26]

So while the flagrant disregard for the well-being of the black population, in pursuit of white dominance was a common thread throughout the history of race relations, different leaders had different visions for this with respect to the issue of land. But the fundamental theme remained consistent: the more land and wealth ripped from the black population, the more prosperous and secure the white population would be. The grand vision of the Apartheid government was its self-declared goal, which it pursued through the paternalistic developmentalism, of creating separate territories which would allegedly deliver the cultural and political needs of the 'unique' ethnic groups in each Bantustan. "The policy of territorial homelands flows directly from that of white supremacy."[27] Aside from the moral shortcomings and fundamentally racist objectives of this vision, crucially, it was also an almost unattainable goal — practically, physically and economically. It would not be until the late 1980s, and the ultimate ascent of of FW de Klerk to the Presidency, for this realization to reach the upper

[25] Brian H. King, "Developing KaNgwane: Geographies of Segregation and Integration in the New South Africa," *The Geographical Journal* 173, no. 1 (March 2007): 13.
[26] Daniel Whitman, ed., *Outsmarting Apartheid: An Oral History of South Africa's Cultural and Educational Exchange with the United States, 1960-1999* (Albany, NY: State University of New York Press, 2014), 236.
[27] V. B. Khapoya, "Bantustans in South Africa: The Role of the Multinational Corporations," *Journal of Eastern African Research & Development* 10, no. 1 (1980): 28.

echelons of the Apartheid state. As Prime Minister Jan Smuts, leader of the United Party, had remarked of the National Party's proposed policies, during the 1948 election: "You might as well try to sweep the ocean back with a broom."[28]

Despite the best efforts of Verwoerd himself, as well as those of his predecessors and successors, Smuts's prediction was correct. The reserve areas and Bantustans which were allegedly supposed to be spaces which facilitated the restoration of traditional African life, in reality were overpopulated and the land itself unconducive to the subsistence farming which was supposed to form the bedrock of these new 'homelands.' Instead, these areas became populated with large "resettlement camps" where hundreds of thousands of people who had been uprooted, were left to fend for themselves.[29] Bonnie Brown, the spouse of a US diplomat working in South Africa in the early 1980s, recalled visiting the homeland of Qwa Qwa, where Israeli and Taiwanese firms had access to free and unregulated labor. "People had no recourse if they become sick or injured. There was no labor code, not even the most rudimentary one."[30]

The disruption and uncertainty surrounding the homeland system, and the so-called forced removals which transported black people from their urban homes to these spaces, frustrated both rural *and* urban development. Consequently, 'squatter camps' were erected on the outskirts of cities, occupied by several hundred thousand black South Africans, with few business centers (or opportunities) and served only to accommodate workers who provided labour and services to the urban white population. Another example of the policy's short sightedness and failure, was the fact that a 'homeland' had not been designated for people of

[28] Allister Sparks, *The Mind of South Africa* (New York, NY: Alfred A. Knopf, 1990), 200.
[29] Allister Sparks, *The Mind of South Africa* (New York, NY: Alfred A. Knopf, 1990), 200.
[30] Daniel Whitman, ed., *Outsmarting Apartheid: An Oral History of South Africa's Cultural and Educational Exchange with the United States, 1960-1999* (Albany, NY: State University of New York Press, 2014), 356.

mixed race (or 'coloureds', as the system referred to them). Hence, "Verwoerd declared the western half of the Cape Province to be a 'coloured preference area' where no black worker might be hired unless the employer could prove there was no suitable 'coloured' person to do the job; so no new black housing was built in the area after that."[31] Like most decisions taken by the Apartheid state, this had the unintended consequence of shantytowns appearing around Cape Town. Crossroads, perhaps the most well-known of such informal settlements, was repeatedly bulldozed as the government sought to relocate its black inhabitants to Bantustans. But after each demolition, shacks were rebuilt and people re-inhabited the area: exemplifying, if anything, the stubbornly persistent resistance to Apartheid policy which was, as has been demonstrated, devoid of any practical or moral substance. Another factor which frustrated the attainment of Verwoerd's vision of 'separate development,' was the economic growth of the 1960s – an industrial revolution of sorts – which saw an increased demand for previously unskilled labor to undergo training, which required permanency, proximity to urban areas, and education — all of which the system denied to non-white populations.[32] This became a perpetuating process: industry required more black labor in cities, whereby creating a growing market which only spurred the demand for black labor. This tension would only increase over time. Despite his best efforts, Verwoerd was unable to halt this process, as the economic forces of industry were hard to constrain. The result was private tension between the business community and the state, although the realities of their circumstances meant their interests were inextricably connect. Verwoerd famously remarked, "If South Africa has to choose between being poor and white or rich and multiracial, then it must rather choose to be white."[33]

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[31] Allister Sparks, *The Mind of South Africa* (New York, NY: Alfred A. Knopf, 1990), 200.
[32] Sparks, *The Mind*, 201.
[33] Sparks, *The Mind*, 201.

While the story of the physical dispossession of land and resulting displacement is important, what is harder to explain is the high cost of such dispossession. The toll was not simply economic. As Nelson Mandela explained, "Communities large and small, who had occupied areas from time immemorial, where their ancestors and beloved ones were buried, were mercilessly uprooted and thrown into the open veld, [left] there to fend for themselves."[34] Through forced removals and the outlawing of black land ownership, a population was being dispossessed not only of livestock, a physical home or land, but also of places of tremendous spiritual, ancestral and religious significance. This caveat will be crucial to understanding the complexities of reparations and redistribution later on in this project. No arithmetic will ever be able to accurately quantify the significance of emotional attachment, developed over generations, to land. While attempts at calculating these losses in the constitutional negotiations of the early 1990s, or in contemporary policy debates might fall short, it is clear that these concepts were never part Dr. Verwoerd and his henchman's policy discussions.

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No single factor or individual can be credited with the downfall of the Apartheid regime - the institutionalized segregation of races in South Africa, which formally lasted 46 years, but as discussed, similar policies had existed prior to the 1948 election. Some highlight the role of Nelson Mandela, leader of the African National Congress (ANC), who emerged from more than 27 years of imprisonment with a reconciliatory mindset; or President FW De Klerk, who released Mandela and his peers and unbanned political organizations, thereby initiating the dialogue that led to democratic elections in 1994.[35] Historians recognize factors including international

[34] Nelson Mandela, *Conversations with Myself* (London, United Kingdom: Macmillan, 2010), 395.
[35] Hermann Giliomee, *The Last Afrikaner Leaders: A Supreme Test of Power* (Charlottesville, VA: University of Virginia Press, 2012), 32.

sanctions, internal uprisings, pressure from trade unions, religious organizations, liberal journalism and a growing sense among the upper echelons of Afrikaner leadership that the goal of separate communities — Apartheid's grand vision — was unattainable and morally bankrupt. As previously discussed, with the example of Verwoerd's determination to implement the Bantustan system, there were numerous practical shortcomings which would ultimately frustrate the full implementation of 'separate development'. The ultimate pace and wide sweeping change which would result in Nelson Mandela being elected President on April 27th 1994 can certainly be attributed, at least in part, to the practical unworkability of Apartheid. While the aim of this project is not attempt to explain or pinpoint the exact factors or moment which precipitated the dismantling of nearly a century of racial segregation, it is worth noting the observation of US Assistant Secretary of State for African Affairs, Chester Crocker, when he suggests that, "there came together a constellation of factors fortuitously, which led to the end of Apartheid."[36]

The first free, fair and multiracial elections in South Africa were the culmination of eight years of negotiations — some secret, some public — between the National Party government, and the African National Congress and other opposition parties. Reflecting on the process, which ultimately resulted in negotiations for a new constitution, in 1997 FW De Klerk remarked, "[It] was rather like paddling a canoe into a long stretch of dangerous rapids. You may start the process and determine the initial direction. However, after that the canoe is seized by enormous and often uncontrollable forces…. It is a time for cool heads and firm, decisive action."[37]

On February 2nd 1990, at the opening of Parliament President de Klerk announced a plethora of reforms: unbanning all political parties, releasing political prisoners and announcing

[36] Allister Sparks, *Tomorrow is Another Country* (Chicago, IL: University of Chicago Press, 1995), 80.
[37] Hermann Giliomee, *The Last Afrikaner Leaders: A Supreme Test of Power* (Charlottesville, VA: University of Virginia Press, 2012), 313.

the gradual dismantling of the Apartheid system. Nelson Mandela would walk free a week later on February 11th. As negotiations between the ruling party and the ANC leadership had begun several years earlier in secret, many leaders of both parties had been forced to imagine what such a seismic shift in the political landscape would mean for their party's positions, as well as for the country.

One such example was Albie Sachs, who, at the time was a member of the ANC's legal and constitutional committee, and had long been involved in the struggle against Apartheid. He would later be appointed to the newly formed Constitutional Court by President Mandela. But in 1989, he was still a member of a banned political party in South Africa, and was involved in thinking about the intellectual and constitutional framework of a democratic South Africa. On the 4th of May, he delivered a speech in New York entitled *Post-Apartheid South Africa: A Constitutional Framework.* His speech indicates a shift in ANC policy at the time, driven by a desire to "envisage a kind of compact, a constitutional compact for a free and democratic South Africa."[38] The timing of this shift, which Sachs concedes could not have happened 5 or 10 years earlier, was motivated by a "sense that the issue is now coming on the agenda as something concrete, something real."[39] This anticipation of change had lead the ANC to believe that in order for any sort of transition to be smooth and peaceful, they had to begin to deliberate on positions and policy for the transition. They were correct: five years later the party would win democratic elections, after intense negotiations about the future of the country with the outgoing National Party. But Sachs's understanding of "the issue" as something which had to be dealt with as a "constitutional compact" is critical, because it acknowledges the ANC was acutely aware of

[38] Albie Sachs, "Post-Apartheid South Africa: A Constitutional Framework," *World Policy Journal* 6, no. 3 (Summer 1989): 592.
[39] Sachs, "Post-Apartheid South," 592.

the fact the Apartheid government was not going to be crippled or simply capitulate and let the parties and people it had fought so vehemently, decide the fate of the country. The result was a broad set of constitutional guidelines which the ANC had tried to base on the "history, the culture, the social psychology of our people, of our country."[40]

The content of the speech recognizes the practical challenges associated with such an ambitious project: "[a constitutional] project that is workable, that will function, that will inspire people, and that will operate for decades to come as a foundation for government."[41] Sachs's speech also indicates another shift in the ANC's position; the party was no longer attempting to end half a century of racial injustice with guerilla tactics, rather beginning to position themselves as a party ready to govern. The speech makes clear the ANC's legal and constitutional committee saw themselves not only as a group who would thrash out intricate legal concepts, but also to help "establish the reality of a post-Apartheid South Africa."[42] Furthermore, these principles that Sachs outlines would later become a key component of the party's election platform in the run-up to the elections of 1994. Sachs addresses this issue head on, by conceding that many people in the country believed a multiracial state built on equality and democracy was impossible. This was part of the job he and his colleagues had to tackle: to create a framework and imaginary for a new South African state which was rooted in equality, grounded by a strong Constitution based on human rights and universal suffrage.

During a Q&A session after his speech, Sachs was asked about how the ANC's constitutional framework would address the issue of land inequality. At the time, white South

[40] Albie Sachs, "Post-Apartheid South Africa: A Constitutional Framework," *World Policy Journal* 6, no. 3 (Summer 1989): 592.
[41] Sachs, "Post-Apartheid South," 592.
[42] Sachs, "Post-Apartheid South," 592.

Africans owned 87% of all land (and 98% of all productive property[43]): would there be some kind of redistribution program?[44] Sachs' response, based more on broad goals, espouses less-clarity in his answer to this question than in the rest of his speech:

> We want to create a new South African nation, a feeling that the land- in a broad sense - belongs to everybody…. So the land question is a very, very difficult one — there are no easy solutions. A lot depends on how the whole process of change takes place: if the whites hang on right to the end, if they fight right to the end, then they're just going to be driven off the land.[45]

But it was clear that after nearly a century of land dispossession, land reform would be necessary. Perhaps Sachs's lack of a clear answer was because the shift from liberation movement to government in waiting was happening quickly for the ANC, and such detailed policy proposals had not previously been the focus of the party. Professor Heinz Klug notes that despite "principled references to land distribution in the 1955 Freedom charter, an organized debate over land was only revived in the ANC in late 1989."[46] Throughout that period, the liberation movement had been preoccupied with strategy and had not had the luxury of producing policy. But his lack of a clear answer might also be because of how fraught and challenging the issue of land would be. In fact, referencing a 1991 conference convened by the ANC Constitutional Committee, Heinz Klug cites a particular incident in the debate over property rights: "Attempts at that conference to question whether there should be any constitutionally protected property rights at all, elicited a highly charged response from one

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[43] Hermann Giliomee, *The Last Afrikaner Leaders: A Supreme Test of Power* (Charlottesville, VA: University of Virginia Press, 2012), 313.
[44] Albie Sachs, "Post-Apartheid South Africa: A Constitutional Framework," *World Policy Journal* 6, no. 3 (Summer 1989): 602.
[45] Sachs, "Post-Apartheid South," 603.
[46] Heinz Klug, "Decolonization, Compensation and Constitutionalism: Land, Wealth and the Sustainability of Constitutionalism in post-Apartheid South Africa," *South African Journal on Human Rights*, no. 1451 (September 5, 2018): 8, accessed April 27, 2019, https://ssrn.com/abstract=3244000.

member of the Constitutional Committee who warned that the rejection of property rights would directly endanger the democratic transition."[47] Evidently, the issue of land and property rights was of extraordinary importance and had the potential to make or break the democratic transition. The final constitution would ultimately choose to frame issues of land reform from 1913 onwards. But land dispossession, theft and eviction had been happening in South Africa since the arrival of European settlers and colonizers. Simply choosing a timeframe for the Constitution to address claims of land dispossession was a fraught issue.

Although the National Party government had by this time started meeting with Mandela in secret, this was not widely known, and the extent, rate and process of change was still unknown. Despite Sachs's insistence the issue of Apartheid was on the cusp of change, there were still no guarantees — and there had been false alarms before. Without being too harsh on his response to the question of land, it is clear the future constitutional court judge grasped the importance of properly addressing the issue. Seizure of land and forced-removals of communities had been an instrument of violence and control exerted by the Apartheid regime: the seizure of land underpinned the institutionalized racial segregation. Beyond the high emotional and social toll of being evicted from communities where in many cases families had multigenerational ties, the issue of land was also economic. By segregating cities, neighborhoods and suburbs along racial lines — with the most desirable real estate reserved for the minority white population — the regime was also relegating the black population to less economically desirable areas, far from the economic and job opportunities of city centers. This created issues of access to job opportunities and created barriers to reaching areas where work could happen.

[47] Heinz Klug, "Decolonization, Compensation and Constitutionalism: Land, Wealth and the Sustainability of Constitutionalism in post-Apartheid South Africa," *South African Journal on Human Rights*, no. 1451 (September 5, 2018): 10, accessed April 27, 2019, https://ssrn.com/abstract=3244000.

The issue of land was a multifaceted and crucial element to excluding the black population. Forced removals violently disrupted generations of social bonds, if people's livelihoods were tied to their land it destroyed these too, and was fundamentally a policy of social and economic exclusion. By the advent of democracy, land reform was an imperative — not just for the economic benefits such a policy could deliver, but also as part of a reconciliatory process of nation-building.

Something which is critical to any attempt at understanding the content, procedure and outcome of the constitutional negotiations is the simple fact that the end of Apartheid was perhaps the only case in history where a government was negotiating itself *out* of power. While its authority was facing internal challenges of legitimacy and international condemnation, the Apartheid government still maintained a monopoly on state power and terror. Some have suggested the status quo might have remained, largely unchallenged from any credible threats to its existence, for another 10 years, when De Klerk began instituting sweeping reforms. It was, as Professor Heinz Klug wrote, this "military and strategic stalemate that heralded South Africa's democratic transition."[48] The reason this is crucial to the understanding of the negotiations, is because it speaks to the dynamic which played out throughout the negotiations: the ANC and other opposition parties had not won a military struggle, nor had they defeated the regime politically. (The converse, of course, was also true: the state had not been able to defeat or subjugate the majority population). The result was a negotiated settlement — a pact — which necessitated compromise and pragmatism from all sides. By the time constitutional negotiations had begun, the National Party had committed itself to a negotiated settlement and a managed

[48] Heinz Klug, "Decolonization, Compensation and Constitutionalism: Land, Wealth and the Sustainability of Constitutionalism in post-Apartheid South Africa," *South African Journal on Human Rights*, no. 1451 (September 5, 2018): 1, accessed April 27, 2019, https://ssrn.com/abstract=324400.

transition. At the time Johannes Rantete and Hermann Giliomee wrote in *African Affairs,* " South Africa faces the stiff task of engineering a transition from authoritarian rule to an inclusive democracy and to do so from a position of relative stalemate."[49]

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The story of the negotiated transition in South Africa began in the second half of the 1980s, with secret, bilateral talks between the National Party and the African National Congress. The 1980s had been, statistically speaking, the most violent decade of the Apartheid era, on both sides of the political spectrum.[50] A noticeable increase in internal tension, such as national school boycotts, international pressure through disinvestment and sports boycotts placed increasing pressure on the government. The climax of this decade was the nation-wide State of Emergency, declared in July 1985 by President PW Botha which would last until 1990, when the new President FW de Klerk lifted it. The collapse of the Soviet Union, a longtime political, military and financial supporter of the African National Congress also decisively reduced the threat of a communist takeover in South Africa, a concern which successive Apartheid leaders had extolled to further justify their rule. After narrowly winning the leadership election within the National Party in January 1989, FW de Klerk, a cabinet minister of devout National Party pedigree, announced: "Our goal is a new South Africa . . . free of domination and oppression in whatever form."[51] But at the time PW Botha was still President, and de Klerk's election speech to his party

[49] Hermann Giliomee and Johannes Rantete, "Transition to Democracy through Transaction?: Bilateral Negotiations between the ANC and NP in South Africa," *African Affairs* 19 (October 1992): 515, accessed January 19, 2019, https://www.jstor.org/stable/722988.
[50] Albie Sachs, *Advancing Human Rights in South Africa*, Contemporary South African Debates (Oxford, United Kingdom: University of Oxford Press, 1992), 7.
[51] Hermann Giliomee, *The Last Afrikaner Leaders: A Supreme Test of Power* (Charlottesville, VA: University of Virginia Press, 2012), 280.

might have been considered an attempt to unify the party behind him, as his opponent had championed himself as a reformer, in contrast to De Klerk's own image as a conservative.

After his election to the Presidency in September 1989, FW de Klerk released Walter Sisulu and other high profile political prisoners, save for Nelson Mandela. He would remain in prison until De Klerk's quantum leap on 2nd of February 1990, when he announced a list of sweeping reforms, including: the unbanning of all political parties, the release of anyone who had committed acts on behalf of these organizations, and made overtures to a negotiated settlement. In the same speech, Mandela's released was announced, and he walked out of Pollsmoor Prison nine days later.[52]

The government had been involved in secret talks with Mandela, starting in 1987, and while less clandestine in the early 1990s, until December 1991, all negotiations had been restricted to bilateral talks between the two parties; the NP and ANC. "Subsequently multi-party talks in the Convention for a Democratic South Africa (CODESA) forum captured the headlines, but there has never been much doubt that a settlement hinged on a bilateral agreement between the ANC and NP."[53] By 1993 a set of constitutional principles, which would serve as the basis for a final constitutional document, had been adopted.[54] Years of carefully orchestrated talks and hard-fought concessions were nearly derailed by the assassination, on April 10th 1993, of Chris Hani, the popular leader of the South African Communist Party. The convicted killer was a right-wing, anti-black and anti-communist Polish immigrant, who shot Hani in the driveway of

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[52] Sebastian Mallaby, *After Apartheid: The Future of South Africa*, 2nd ed. (New York, NY: Times Books, 1992), 11.

[53] Hermann Giliomee and Johannes Rantete, "Transition to Democracy through Transaction?: Bilateral Negotiations between the ANC and NP in South Africa," *African Affairs* 19 (October 1992): 516, accessed January 19, 2019, https://www.jstor.org/stable/722988.

[54] Hermann Giliomee, *The Last Afrikaner Leaders: A Supreme Test of Power* (Charlottesville, VA: University of Virginia Press, 2012), 393.

his home. This event was seen as increasing pressure on the negotiating parties to come to a settlement, as tensions were rising. The date for the first democratic elections was quickly set to April 27th 1994.

While the pace of change from PW Botha's state of emergency in 1985 to President Mandela's election in 1994 appears almost miraculous, many have also likened the level of violence throughout this period as akin to a civil war. As Stuart Kaufman, in his book *Nationalist Passions*, points out between 1985 and 1995, over twenty thousand people were killed — with the peak of the violence occurring while negotiations were ongoing.[55] Professor Mahmood Mamdani, highlighting the fraught political situation in the early 1990s, suggests that "if Rwanda was the genocide that happened, then South Africa was the genocide that didn't."[56] The technicalities of this period fall outside of the scope of this investigation, but what is pertinent to this investigation, is the intense violence and tensions which served as a backdrop to the constitutional negotiations. (Various actors used violence, sometimes quite callously, as a bargaining chip in negotiations). This is significant, because it highlights the challenges the negotiators, from all sides of the political spectrum, faced in reaching a consensus amongst themselves, while retaining the support of their constituents and helping to defuse the internal tensions which threatened to derail the whole transition project.

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The Convention for a Democratic South Africa (CODESA) held its first meetings on the 20th and 21st of December 1991. This was to be the forum for constitutional and political negotiations which would create the mechanisms for a peaceful transition and a blueprint for a

[55] Stuart J. Kaufman, *Nationalist Passions* (Ithaca, NY: University of Cornell Press, 2015), 176.
[56] Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton, NJ: Princeton University Press, 2001), 185.

democratic South Africa. While CODESA could lay the groundwork for a constitutional framework, it could not legally draft or adopt the constitution as it was not an elected representative body. The meetings were held at the World Trade Center in Kempton Park, Johannesburg and would continue, despite headwinds, until April 1993. All political parties were invited to participate, making it the first platform for multiracial deliberations on the future of the country. "Above all, the make-up of the participating delegations underscored the fact that blacks are no longer excluded from central decision-making."[57] Five working groups were created to address specific issues, with each group comprised of two delegates and two advisors from each of the 19 parties. Chairpersons were elected appointed on a rotational basis.[58]

At the first meeting, the parties signed a declaration of intent, which helped gain consensus of what principles would underpin any future constitution. The statement, signed by all parties, included commitments to a bill of rights, proportional representation, the separation of powers and an independent judiciary.[59] The statement also put in place the process by which the final constitution would be drafted, stating, "that CODESA will establish a mechanism whose task it will be, in cooperation with administrations and the South African Government, to draft the texts of all legislation required to give effect to the agreements reached in CODESA."[60] The multiracial and inclusive nature of the first plenary meeting was, in and of itself, a watershed moment in the country's history. The Inkatha Freedom Party was the only participating party

[57] Alexander Johnston, *Constitution-Making in the New South Africa*, ed. Alexander Johnston, Sipho Shezi, and Gavin Bradshaw (London, United Kingdom: Leicester University Press, 1993), 1.
[58] Johnston, *Constitution-Making in the New South*, 1.
[59] Johnston, *Constitution-Making in the New South*, 1.
[60] "CODESA Declaration of Intent," news release, December 1, 1991, accessed February 3, 2019, https://peacemaker.un.org/sites/peacemaker.un.org/files/ZA_911229_CodesaDeclarationIntent.pdf.

who refused to sign the declaration of intent, objecting "to the phrase 'an undivided South Africa'".[61]

While the negotiations at CODESA were inclusive of all political parties who wanted to participate, in early 1990, De Klerk was open about the fact that he believed his party was negotiating from a position of relative strength: "We did not wait until the position of power dominance turned against us before we decided to negotiate a peaceful settlement. The initiative is in our hands. We have the means to ensure that the process develops peacefully and in an orderly way."[62] In 1992, reflecting on the secret talks with the government, Mandela recalled his first interaction in 1987 with Kobie Coetzee, then Minister of Justice, "I said, oh no, I am not coming to you cap in hand but as the leader of an organisation. Consider us discussing the future of South Africa as equals."[63]

Between President FW De Klerk's speech on February 2nd 1990 and the first session of CODESA, many hurdles had been cleared to lay the ground for a successful transition. The abolition of key apartheid laws, including the release of political prisoners, the normalization of political activities, had helped facilitate "a vitally necessary atmosphere of mutual trust which guided the transition through its earliest stages."[64]

In March 1992 there was a whites-only referendum which won a two thirds majority supporting the constitutional negotiations at CODESA. This strong backing empowered FW de

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[61] Alexander Johnston, *Constitution-Making in the New South Africa*, ed. Alexander Johnston, Sipho Shezi, and Gavin Bradshaw (London, United Kingdon: Leicester University Press, 1993), 5.
[62] Hermann Giliomee and Johannes Rantete, "Transition to Democracy through Transaction?: Bilateral Negotiations between the ANC and NP in South Africa," *African Affairs* 19 (October 1992): 518, accessed January 19, 2019, https://www.jstor.org/stable/722988.
[63] Giliomee and Rantete, "Transition to Democracy," 518.
[64] Alexander Johnston, *Constitution-Making in the New South Africa*, ed. Alexander Johnston, Sipho Shezi, and Gavin Bradshaw (London, United Kingdon: Leicester University Press, 1993), 2.

Klerk against the right-wing of his party to continue negotiations for the transition. The second plenary meeting of CODESA, or what became known as "CODESA II" also began in March 1992, with the view to settle outstanding issues. But the meeting ended in deadlock with the main stumbling block being the lack of consensus of what an interim government would look like. This body would be responsible for the final ratification and adoption of the constitutional framework.

Several months later, in a bid to resolve the gridlock of CODESA II, the Multi-Party Negotiation Process (MPNP) was formed — aided by technical experts to aid the negotiation process. These talks continued through 1993. After the assassination of Chris Hani in April 1993, as the country lurched closer than ever towards a civil war, negotiations were accelerated, an election date for the following April was declared, and Nelson Mandela's ANC swept to power on April 27th 1994, in the interim government. Thabo Mbeki and FW De Klerk both served as his deputies under the interim arrangement.

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Officially adopted on May 8th 1996, after being upheld by the Constitutional Court, the 'Constitution of the Republic of South Africa' was the culmination of decades of struggle against racist white rule, and years of tense, fraught, but ultimately successful negotiations.[65] The first line of the preamble reads: "We, the people of South Africa, recognise the injustices of the past…. And believe that South Africa belongs to all who live in it, united in our diversity."[66]

Section 25 of the 1996 Constitution directly addresses the issue of land — or 'property' — in a democratic South Africa. Like all parts of the constitution it is the culmination of a broad

[65] Edwin Cameron, *Justice: A Personal Account* (Cape Town, South Africa: Tafelberg, 2014), 100.
[66] "The Constitution of the Republic of South Africa, 1996," Department of Justice, last modified 1996, accessed December 9, 2018, http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf.

consensus, which sought to appease the National Party who remained in power (politically, economically and socially) as well as opposition parties who would all but certainly ascend to power in democratic elections, and be tasked with economic and social redress. This pressure for consensus and pragmatism was heightened by the violent events taking place outside the World Trade Center in Kempton Park — Chris Hani's assassination was one example, but there were many other examples of violence through the transition period. A less cited tension is the one within political parties, who had to put forward a united front in negotiations. One such ideological example was when the ANC, South African Communist Party (SACP), and the Congress of South African Trade Unions (COSATU) "had made a huge concession when they agreed to abandon socialism and nationalism [during negotiations]."[67] While this decision must have been made under duress at the time, as we will see in the discussion of contemporary debates, particularly around land and property, they are far from resolved.

Section 25 (7) comes to the heart of the land issue in the democratic era, as well as the Constitution itself: "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."[68] Section 25 (7) also explains the decision in this thesis to restrict the scope of the historical analysis of black land dispossession in the twentieth century to the events which transpired after June 1913 — primarily because this is the same scope adopted by the Constitution. The imaginary of land in democratic South Africa, was, like the Constitution as a whole, non-racial in intent and content.

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[67] Hermann Giliomee, *The Last Afrikaner Leaders: A Supreme Test of Power* (Charlottesville, VA: University of Virginia Press, 2012), 392.

[68] "The Constitution of the Republic of South Africa, 1996," Department of Justice, last modified 1996, accessed December 9, 2018, http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf.

Chapter 2: **Power and Policy**

This chapter explores in detail the ANC's major policy formulation at the time of the transition to democracy, the Reconstruction and Development Plan (RDP). It explores both the content of the RDP as it relates to land reform and the context in which it was elaborated, including the direct role of the World Bank and the indirect role of the International Monetary Fund (IMF). As this chapter will show, despite weaknesses, the text of the RDP directly engaged the challenge of land reform and sought to deliver on the socioeconomic rights enshrined in the Constitution. However, even in the best of circumstances, the policy still faced problems, for example, with its strong emphasis on rural land reform, with sparse attention paid to urban communities. But the role of the World Bank and the IMF highlight the constraints on the ANC that rendered the aspirational RDP almost unattainable. In any event, the government quickly abandoned the policy and whatever clarity and vision it had started with soon dissipated. After only two years, it was replaced, at first, by earnest plans to cope with perceived economic constraints and later with rhetorically motivated plans to benefit a few black farmers quickly. After close analysis of the RDP, its origins and problems, this chapter seeks to explain the ambiguity that followed and how it laid the ground for a resurgence of rhetoric about land theft and reform later.

Albie Sachs, a member of the ANC's National Executive Committee (as well as it's constitutional committee), wrote in 1992 that: "In a country like South Africa where property ownership is based upon so much past legal injustice, there is no question that there will have to

be redistribution in relation to land rights."[69] It was obvious to him, as it was to others who had fought against Apartheid, that it was a question of *how*, not *whether*. The arguments were made on the grounds of historical fairness but, also, contemporary politics and economics. Land reform was an important vehicle to address the geographic inequities wrought by Apartheid: "Because of the way the Land Acts and the migrant labour system worked, certain zones of the country are extremely underdeveloped while others are relatively advanced."[70] Mostly, the distinction between developed and underdeveloped areas Sachs refers to, can be traced along the urban rural divide. As this chapter will explore, the focus of land reform in the RDP is disproportionately focused on *rural* land redistribution. While rural communities required land reform, the urbanization driven by Apartheid policies and the migrant labor system, meant more attention was needed on urban communities. By primarily focusing on rural land reform, the RDP leaves the spatial inequalities in urban areas largely unchanged. Similarly, it does little to address the distinctions between urban and rural areas, particularly relating to economic opportunities and basic services. Sachs continues by arguing for the importance of a "constitutionally directed policy of regional equalization" which would presumably encourage investment in previously ignored areas of South Africa.[71] Professor Tom Lodge of the University of Witwatersrand contends that a successful land reform programme can "reduce social inequality, alleviate poverty and promote growth."[72] Lodge argues these benefits are crucial to political stability, even

[69] Albie Sachs, *Advancing Human Rights in South Africa*, Contemporary South African Debates (Oxford, United Kingdom: University of Oxford Press, 1992), 70.
[70] Albie Sachs, *Advancing Human Rights in South Africa*, Contemporary South African Debates (Oxford, United Kingdom: University of Oxford Press, 1992), 14.
[71] Sachs, *Advancing Human*, 14.
[72] Tom Lodge, *Politics in South Africa: From Mandela to Mbeki* (Indianapolis, IN: Indiana University Press, 2002), 84.

if progress is "uneven in the aftermath of a racially oppressive political order."[73] For Sachs, land reform was crucial for the reasons outlined by Lodge, as well as addressing the question of historical injustice. But his argument goes further than Professor Lodge, asserting that land reform would be an essential component of nation-building in democratic South Africa: "Without healing our divided cities, without deracializing the terms of access to the land, without a national effort with strong participation on the ground to overcome the enormous inequalities created by Apartheid, a new nation can never emerge."[74] While Sachs was an influential voice within the ANC, the divergence between the views he espouses here and the RDP, demonstrates the competing views and commitments within the broad political tent of South Africa's liberation movement.

The ANC was not alone in advocating a comprehensive land reform programme in the early 1990s. Section 25 of the Constitution, itself the product of multiparty negotiations (including the National Party), calls for land reform, too. "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."[75] In 1993, the World Bank published a report, *Options for Land Reform and Rural Restructuring in South Africa*, which proposes "the principles and specifics related to a land reform program."[76] The ANC would draw heavily from this report in their articulation of the RDP. However, when the World Bank first announced it was conducting engagements for a report on land reform it was met with fierce opposition from the ANC. In fact,

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[73] Lodge, *Politics in South*, 84.
[74] Albie Sachs, *Advancing Human Rights in South Africa*, Contemporary South African Debates (Oxford, United Kingdom: University of Oxford Press, 1992), 39.
[75] "The Constitution of the Republic of South Africa, 1996," Department of Justice, last modified 1996, accessed December 9, 2018, http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf.
[76] *Options for land reform and rural restructuring in South Africa*, technical report no. 77991 (Washington DC: World Bank, 1993), 13.

"the ANC's Land Commission's immediate response was to ask who had invited them to South Africa" and rejected the notion of engagement.[77] As a result, initial seminars and engagements were held in Swaziland. Hans Binswanger, a senior World Bank advisor at the events in Swaziland, suggested "that by facilitating land reform the government would be providing an essential catalyst for sustained economic development."[78] Despite initial hestiance to World Bank involvement, the ANC ultimately deployed the argument proffered by the World Bank's findings to keep the issue of land reform on the political agenda. "With this aim, the ANC Land Commission encouraged Binswanger to persuade the de Klerk government that land reform was an essential part of South Africa's political transition."[79] And so, an unlikely alliance emerged between the ANC, an organization which 25 years earlier called for the nationalization of all land, and the World Bank, a champion of neoliberal economic policy.

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During the 1994 elections the ANC campaigned using the Reconstruction and Development Programme as their platform. The RDP was a policy framework, the first clause of which states the policy's goal: "The RDP is an integrated, coherent socio-economic policy framework. It seeks to mobilise all our people and country's resources toward the final eradication of Apartheid and the building of a democratic, non-racial and non-sexist future."[80] With allusions to the ANC's Freedom Charter of 1955, and formulated policies for the first democratically elected government, it was celebrated by former United Democratic Front

[77] Heinz Klug, "Decolonization, Compensation and Constitutionalism: Land, Wealth and the Sustainability of Constitutionalism in post-Apartheid South Africa," *South African Journal on Human Rights*, no. 1451 (September 5, 2018): 13, accessed April 27, 2019, https://ssrn.com/abstract=3244000.
[78] Klug, "Decolonization, Compensation," 13.
[79] Klug, "Decolonization, Compensation," 14.
[80] African National Congress, *A Policy Framework: The Reconstruction and Development Programme* (Pretoria, South Africa: ANC, 1994), 6.

activists and trade unionists. In the preface, Nelson Mandela notes the policies are the result of consultation with the African National Congress members, Alliance partners, and "other mass organizations in the wider civil society."[81] The way the RDP seeks to address racialized inequality, is by "dismantling apartheid structures and building more appropriate structures, with the aim of reducing inequality and improving living standards."[82] The document argues that to achieve a fairer society, a dual strategy of reconstruction and development had to happen simultaneously. The RDP, Tom Lodge argues, "emphasised two aims: the alleviation of poverty and the reconstruction of the economy. These two objectives were interrelated, the RDP's authors maintained."[83] Achieving economic growth and development, reducing poverty and inequality, all while achieving 'structural transformation' was a tall order. At the center of the plan was that "The government, the RDP insisted, should play a 'major enabling role' in integrating growth with economic reconstruction and social development."[84]

The themes in the RDP reference the ideals and policy positions espoused by the ANC since its inception in 1912. Perhaps most pertinent to land, are the echoes of the Freedom Charter, adopted in 1955, which served as a guiding document for the party throughout its opposition to apartheid. "The land shall be shared among those who work it!" the Charter declared. "Restrictions on land ownership on a racial basis shall be ended, and all the land re-divided among those who work it, to banish famine and land hunger. The state shall help the

[81] African National Congress, *A Policy Framework: The Reconstruction and Development Programme* (Pretoria, South Africa: ANC, 1994), 4.
[82] Tony Binns, "Geography and Development in the 'New' South Africa," *Geography* 83, no. 1 (January 1998): 9.
[83] Tom Lodge, *Politics in South Africa: From Mandela to Mbeki* (Indianapolis, IN: Indiana University Press, 2002), 54.
[84] Lodge, *Politics in South*, 54.

peasants with implements…"[85] While details differed, equitable and nonracial land ownership had been a central pillar of the African National Congress for decades. As former President Thabo Mbeki wrote in September 2018 of ANC land policy, "As we would expect, even as they made more detailed comments about 'the land question', these documents kept broadly within the parameters set by the Freedom Charter."[86]

Despite clear references in the RDP to the Freedom Charter of 1955, Professor Lungisile Ntsebeza highlights one key departure: "There was a fundamental reversal of the Freedom Charter's call for the nationalization of land."[87] This could be attributed to the ideological compromises made during the constitutional negotiations. As Hermann Giliomee notes in *The Last Afrikaner Leaders*, the ANC and its alliance partners "had made a huge concession when it agreed to abandon socialism and nationalization [during negotiations]."[88] This concession is demonstrated by the absence of calls for nationalization in the RDP and other election statements. While the RDP did contain redistributive elements, Ntsebeza draws attention to this ideological shift within the ANC, by reminding us the RDP committed the ANC "though cautiously, to a market-led land reform program."[89]

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[85]Freedom Charter," June 25, 1955, accessed April 21, 2019, http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AD1137/AD1137-Ea6-1-001-jpeg.pdf.
[86] Thabo Mbeki, "What Then About Land Expropriation without Compensation? The National Democratic Revolution Must Resolve the Intimately Inter-Connected Land and National Questions!," Thabo Mbeki Foundation, last modified September 2018, accessed December 9, 2018, https://www.mbeki.org/2018/09/25/the-unresolved-national-question-the-ndr-and-the-land-question/.
[87] Lungisile Ntsebeza, "The Land Question: Exploring Obstacles to Land Redistribution in South Africa," in *After Apartheid: Reinventing South Africa?*, ed. Ian Shapiro and Kahreen Tebeau (Charlottesville, VA: University of Virginia Press, 2011), 305.
[88] Hermann Giliomee, *The Last Afrikaner Leaders: A Supreme Test of Power* (Charlottesville, VA: University of Virginia Press, 2012), 392.
[89] Lungisile Ntsebeza, "The Land Question: Exploring Obstacles to Land Redistribution in South Africa," in *After Apartheid: Reinventing South Africa?*, ed. Ian Shapiro and Kahreen Tebeau (Charlottesville, VA: University of Virginia Press, 2011), 305.

Whatever its flaws, ultimately the RDP was popular with voters. The ANC won a majority of 62.5% in the first democratic elections in April 1994, just shy of a two thirds majority, which would have given the party the power to make amendments to the Constitution.[90] The strong electoral support gave the ANC two-hundred and fifty two seats in parliament, with the National Party only managing to garner eighty.[91] Once in power, President Mandela and his government were faced with the mammoth task that no other South African government had faced before them: addressing the needs of *all* of its citizens regardless of race. The RDP had been the party's answer to this task, by delivering on the socio economic rights entrenched in the Constitution. But while Apartheid era laws could be repealed, the same could not happen with the nation's debt and financial health.

In the RDP, land reform is addressed under in the chapter *Meeting Basic Needs*, which speaks to how it was prioritized in party rhetoric as a pressing issue. Other needs addressed are jobs, housing, water, electricity, transport, health and social welfare.[92] It is important to note the breadth of areas the ANC felt needed to be addressed: segregation and unequal access to all services and opportunities were pervasive in all aspects of society. The scale of challenges was immense and regardless of who was in power, this document was an ambitious and aspirational vision for addressing the basic needs of the country's citizens — regardless of race.

Section 2.4 of the RDP directly addressed land reform. Interestingly, the clause opens with a focus on access to land in *rural* areas ("Land is the most basic need for rural dwellers").[93]

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[90] Tom Lodge, "The South African General Election, April 1994: Results, Analysis and Implications," *African Affairs* 94, no. 399 (October 1995): 471.
[91] Lodge, "The South," 471.
[92] African National Congress, *A Policy Framework: The Reconstruction and Development Programme* (Pretoria, South Africa: ANC, 1994), 21.
[93] African National Congress, *A Policy Framework: The Reconstruction and Development Programme* (Pretoria, South Africa: ANC, 1994), 21.

Correctly, the clause summarizes the consequences of Apartheid policy: "[they] pushed millions of black South Africans into overcrowded and impoverished reserves, homelands and townships."[94] Looking to the future, the document mentions that simply repealing the Apartheid Land Acts would not sufficiently redress inequities in the distribution of land, since only a small minority of the black population would be able to afford land on the free market. This is important because, again, it demonstrates the necessity of a sweeping, creative program of redress. It was not simply a case of repealing Apartheid laws which had negative consequences for the black population with respect to land, but promulgating new laws which would increase black ownership and drive down inequities. Yet, at every point a tension existed between historical redress and economically viable reform. For example, the tenuous relationship between redressing historical injustices while maintaining food security in a country where 39% of rural income comes from the agricultural sector.[95] ("One of the central tensions in designing the desired land redistribution model is between the desire to address welfare and asset transfer objectives through the redistribution of land and the need to promote the productive use of agricultural land").[96]

It is noteworthy that the focus of the policy on land reform was geared towards the rural population. It was seen as a "central and driving force of a programme of rural development."[97] As will be discussed later, perhaps this was a misreading of the needs and desires of the population. It is true land was an issue in rural areas, but the challenges of urban dwellers who

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[94] African National Congress, *A Policy*, 21.
[95] Ruth Hall, "A Political Economy of Land Reform in South Africa," *Review of African Political Economy* 31 (June 2004): 221.
[96] *Options for land reform and rural restructuring in South Africa*, technical report no. 77991 (Washington DC: World Bank, 1993), iii.
[97] African National Congress, *A Policy Framework: The Reconstruction and Development Programme* (Pretoria, South Africa: ANC, 1994), 22.

had been relegated to townships on the outskirts of towns and cities also had to be addressed. Security of tenure is seen as a priority for any land reform program. It appears the ANC viewed economic growth as an instrument of land reform, citing the democratic government's ambitions to "build the economy by generating large-scale employment, increasing rural incomes and eliminating overcrowding."[98]

The foundations of the reform programme appeared to be a hybrid model of support from the government and a market-based system. "This programme must be demand-driven and must aim to supply residential and productive land to the poorest section of the rural population and aspirant farmers."[99] Land reform was seen as one component of a 'comprehensive rural development program' which sought to "raise incomes and productivity, and must encourage the use of land for agricultural, other productive, or residential purposes."[100] In other words, land reform was to be an opportunity for redress, but also for broader economic growth and development. The government was hoping not only to increase access to land, but also to spur the productivity of land.

Under the broader program of land reform, the policy document proposed a dual approach to addressing inequities of access to land: redistribution and restitution. The focus of the former was on "residential and productive land to those who need it but cannot afford it," and the focus of the latter on "those who lost land because of apartheid laws."[101] It is important to remember that in section 25 of the final Constitution, restitution was limited to loss of land which happened after the 1913 Land Act, and did not address prior dispossession. The distinction

[98] African National Congress, *A Policy*, 21.
[99] African National Congress, *A Policy*, 22.
[100] African National Congress, *A Policy*, 21.
[101] African National Congress, *A Policy Framework: The Reconstruction and Development Programme* (Pretoria, South Africa: ANC, 1994), 22.

between redistribution and restitution also highlights the ANC's focus on a hybrid model, which sought to operate as a free-market system, with some government intervention in order to facilitate and accelerate more opportunities for inclusive land ownership.

The party's stance on land redistribution was multifaceted while explicitly referencing the use of "market and non-market mechanisms"[102] to achieve its objectives. Similarly, the adoption of policies aimed at restitution and reform demonstrate a commitment to addressing historical injustices while creating opportunities for a more inclusive society in the new dispensation. Examples cited in the policy, include the strengthening and protection of property rights of communities already occupying land. An example of this might be communal land to which no specific individual had legal title deeds. The policy also references the redistribution of vacant land currently under government ownership. This appears to be a smart, cost-effective and timely strategy to accelerate land redistribution, as it does not require capital outlay from the state to acquire and redistribute land already in private hands. With the explicit goal of redress, the section calls for the recovery (after investigation) of land "acquired from the apartheid state through illegal means."[103] This is clearly a reference to illegal land seizures and theft which took place during forced removals and is overtly focused on addressing historical wrongs. Section 2.4.7 states: "The redistribution programme should use land already on sale and land acquired by corrupt means by the Apartheid state or mortgaged to state and parastatal bodies. Where applicable, it will expropriate land and pay compensation as the Constitution stipulates."[104] This section will be highlighted in the next chapter with regards to contemporary debates surrounding

[102] African National Congress, *A Policy*, 21.
[103] African National Congress, *A Policy*, 21.
[104] African National Congress, *A Policy Framework: The Reconstruction and Development Programme* (Pretoria, South Africa: ANC, 1994), 21.

land reform, but once implemented, would become known as the policy of "willing buyer, willing seller". The policy entailed the government negotiating with private landowners on a mutually agreeable price at which the state would purchase land from private owners for the explicit purpose of being redistributed to citizens who lacked the ability to buy land for themselves at market prices. This very policy is one which, approximately 20 years later, would be called into question by the very party — as well as others — who adopted it. In order to achieve these ambitions the document calls for the democratic government to "provide substantial funding for land redistribution." Since the negotiated settlement from Apartheid to democracy had been a mediated pact, legally, the democratically elected government would not be able to embark on land seizures as their predecessors had done. The call for 'substantial funding' acknowledges a successful land reform program within the legal parameters of the Constitution would be expensive. With regards to the financing of land reform the policy calls for progressive payments based on ability. "Beneficiaries must pay in accordance with their means."[105]

The policy also creates accomodations for other aspects to be addressed with regards to land reform which might not traditionally be thought of together. For example, infrastructure, training, support services — including water provision and basic health care are all included as priorities within the broader agenda of land reform. The policy also outlines an inclusive reading of land tenure rights, taking its lead from the Constitution, to "recognize the diverse forms of tenure existing in South Africa."[106] Some of these pre-dated Apartheid and others were a consequence of the challenges to traditional land tenure posed by Apartheid laws. Consequently,

[105] African National Congress, *A Policy*, 21.
[106] African National Congress, *A Policy Framework: The Reconstruction and Development Programme* (Pretoria, South Africa: ANC, 1994), 21.

the document proposes "new and innovative forms of tenure" with the proposition of Community Land Trusts and other variations of such, which might be most effective in addressing the nuances of traditional laws and practices unique to South Africa.[107]

The issue of gender discrimination was a problem which had to be addressed in the RDP, to address Apartheid discrimination and patriarchal customary traditions. Section 2.2.7 acknowledges that "women are the majority of the poor in South Africa," while Section 4.1.1 points out that "a disproportionate share of the burden of poverty and inequality has fallen on black women who have been subject to systematic gender oppression."[108] Consequently, "mechanisms to address the disempowerment of women and boost their role within the development process and economy must be implemented."[109] Of most relevance to this investigation is that the RDP pledges to "address existing gender inequalities as they affect access to jobs, land, housing etc."[110] It was also widely understood at the time that land in traditional ownership could be both exclusionary or discriminatory against women, particularly as it related to inheritance and security of tenure. Any straightforward approach to land restitution, might have excluded women from the process because traditional land laws had overwhelmingly favored men. But the ANC could not let this happen. To do so would have been to commit one injustice in an attempt to correct a different one. So, in keeping with the long-held egalitarian norms of the ANC and the Constitution, it attempted to address these issues in the RDP. But, the case of gender equality in the RDP is a good illustration of something the ANC was not prepared to deal with — reconciling competing principles and stakeholders, in an

[107] African National Congress, *A Policy*, 22.
[108] African National Congress, *A Policy*, 76.
[109] African National Congress, *A Policy*, 20.
[110] African National Congress, *A Policy*, 20.

attempt to please all constituencies. Thus, the case of the RDP and the issue of gender equality is exemplary of the tensions between a variety of stakeholders in the land debate. The RDP makes the case for the relationship between reconstruction and development, arguing that growth without development would "leave intact the severe regional, racial, gender and structural imbalances that characterise the present economy."[111] Hence, the ANC came to the conclusion that "reconstruction and development must be an integrated process."[112] But beyond the accurate diagnosis of gender inequality and frequent calls for 'integration' and vague rhetoric such as to "ensure that no one suffers discrimination in hiring, promotion or training on the basis of race or gender," the document offers few concrete strategies for addressing the problem. The RDP's calls for gender equality are in line with the provisions of the Constitution, a founding principle of which is a commitment to "non-racialism and non-sexism".[113] But the issue of gender is much more complex than well-intentioned calls for equality, and is evidence of unresolved tensions between competing constituencies: traditional communities protected by patriarchal customary law and the more urban-based human rights progressives. So, while the Constitution protects customary law traditions, these practices cannot violate any rights espoused in the Bill of Rights — Section 9.1 of which states, "everyone is equal before the law and has the right to equal protection and benefit of the law."[114] This can be viewed as an attempt at compromise between the competing interests of different communities (human rights activists and indigenous law advocates) and evidence of the perhaps practically impossible attempt of making everything

[111] African National Congress, *A Policy Framework: The Reconstruction and Development Programme* (Pretoria, South Africa: ANC, 1994), 84.
[112] African National Congress, *A Policy*, 84.
[113] "The Constitution of the Republic of South Africa, 1996," Department of Justice, last modified 1996, accessed December 9, 2018, http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf.
[114] "The Constitution of the Republic of South Africa, 1996," Department of Justice, last modified 1996, accessed December 9, 2018, http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf.

work for everybody. In 2002, Professor Tom Lodge lauded the "series of enlightened measures to promote gender equality" and the establishment of "a range of impressive official institutions to enhance women's rights."[115] While frequently deemed under-resourced, "the institutional framework of women's rights in South Africa is an expression of deeply held convictions."[116] But it is difficult to measure the success of the RDP by its own benchmarks, since the objectives relating to gender equality were so vague. Furthermore, the official institutions cited by Lodge have origins in the Constitutional framework, rather than in the RDP itself. The issue of gender equality as it relates to land, is one example of many, where the realities on the ground are yet to reflect the rights and ideals already enshrined in the Constitution.

The policy proposals for land redistribution in the RDP call for support services for beneficiaries of land reform "so that they can use their land as productively as possible."[117] This seems aimed at the use and productivity of rural and agricultural land, which would be viewed as not only improving tenure security for residential property, but also capitalizing on the economic opportunities that come with access to agricultural land. It is also safe to assume, that this provision is focused not only on the welfare of the individual beneficiary, but also on the agricultural and food security of the state as a whole. If previously productive and fertile land is redistributed, the party clearly believes the same — or higher — level of productivity must be maintained in order to benefit the country as a whole. Importantly, the call for support services references "local institution building, so that communities can devise equitable and effective

[115] Tom Lodge, *Politics in South Africa: From Mandela to Mbeki* (Indianapolis, IN: Indiana University Press, 2002), 173.
[116] Lodge, *Politics in South*, 174.
[117] African National Congress, *A Policy Framework: The Reconstruction and Development Programme* (Pretoria, South Africa: ANC, 1994), 22.

ways to allocate and administer land."[118] This seems crucial to the viability of any land reform program, although the policy does not propose any examples or specifics of what these 'local institutions' might look like. It also seems to be in contradiction with the fact that the main levers and capacity for land reform are with the national government, not local municipalities.

In order to fulfill the rights to land restitution guaranteed by the Constitution, the ANC's policy document proposes a land claims court to restore land disposed by discriminatory or unlawful legislation since 1913. According to the proposal, the court should be able to make speedy decisions and must remain accessible to "the poor and illiterate".[119] This is outlined in section 2.4.13 which acknowledges the "suffering caused by the policy of forced removals."[120] While this section seeks to facilitate restitution, the broad definition of "suffering" seems limited to the material losses incurred by loss of land, and does not appear to address the social, cultural and personal suffering inflicted by Apartheid policies.

The RDP's section on land reform concludes with a summary and timeframe for the framework's objectives. "The land reform programme, including costing, implementing mechanisms, and a training programme, must be in place within one year after the elections." Given the scale of the programme's objectives, a one year deadline to achieve everything outlined, seems either overly ambitious or misguided, particularly given the plethora of other policy goals the ANC aimed to implement once they were in power. The section also quantifies how much land an ANC government would aim to redistribute within the first five years in government — 30% of agricultural land. Furthermore, it hoped to have the adjudication process

[118] African National Congress, *A Policy Framework: The Reconstruction and Development Programme* (Pretoria, South Africa: ANC, 1994), 22.
[119] African National Congress, *A Policy*, 22.
[120] African National Congress, *A Policy*, 22.

of the land restitution programme completed within five years. All of these policies were bold, positive and projected an imaginary of a pluralistic, inclusive and democratic state which sought to use redress as a tool to unleash a positive economic outlook for the country.

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At the same time the ANC was formulating the RDP, however, it was already facing the constraints of international financial institutions. Five months before the ANC had been elected to government in April 1994, the party had signed a letter of intent with the IMF pledging, once in power, to implement fiscal austerity in return for a loan of $850 million for South Africa.[121] This happened at almost exactly the same time as the party was launching the RDP. But the incoherence between the ambitions promoted in the RDP and the pledge to the IMF were clear: the country could not have both. In this sense, Mark Gevisser argues, the RDP was more of a wish list of the ideological 'broad church' of the ANC, rather "than the workable policy of a new government coming to power with enormous expectations on one hand and crippling debt on the other."[122] However, it was understood by the public to be a blueprint for action. This incoherence of ANC policy would becoming a recurring theme.

But the ANC was not the only party guilty of incoherence: while the World Bank had deemed land reform to be both a necessity and a priority, the IMF was calling for austerity. It was clear that the country could not achieve the transformative goals of the RDP supported by the World Bank *and* the fiscal austerity advocated for by the IMF. This was ironic because while it may be easy to label ANC policy as incoherent, in many ways this policy dissonance was a manifestation of conflicting advice from two of the most powerful International Financial

[121] Mark Gevisser, *Legacy of Liberation: Thabo Mbeki and the Future of the South African Dream* (New York, NY: St Martin's Griffin, 2010), 250.
[122] Gevisser, *Legacy of Liberation*, 250.

Institutions (IFIs) — the World Bank and the IMF. Given that these two organizations play the role of gatekeepers and scorekeepers in the international financial order, it appears that, as so often, the ANC was damned if it did, damned if it did not.

The text of the RDP (as well as the Constitution) nevertheless displays important distinctions between the right to housing and land reform. In the document the ANC appears to treat the right to housing as an urban issue and land reform as a rural one. This distinction might have been drawn to distinguish the different challenges facing these two groups, as interpreted by policy makers. But it might also point to a misjudgment on the part of the ANC by over-emphasising land reform in rural areas despite significant changes in social geography since the inception of the party — notably, urbanization. The Native Land Act of 1913 had displaced black people living in rural areas and the subsequent Apartheid policies resulted in massive urbanization. The RDP aimed to create a thriving sector of black farmers in South Africa, but while little is known about the demand for land, a survey conducted in the mid-1990s — when the RDP was being adopted — provides some clarity. Ruth Hall cites Marcus, Eales and Wildschut (1996) which "found that 68% of poor black people living in rural areas wanted land, but of these most wanted very small parcels of land with half wanting one hectare or less."[123]

This emphasizes more basic priorities which might have been overlooked by the dual approach of 'reconstruction' and 'development:' the rural poor prioritize "a secure place to live and land for small-scale cultivation of food crops, largely but not exclusively for consumption, plus access to (additional) grazing land."[124] The factors driving this prioritization, as argued by Ruth Hall and supported by Andrew, Ainslie, and Shackleton's paper *Evaluating Land and*

[123] Ruth Hall, "A Political Economy of Land Reform in South Africa," *Review of African Political Economy* 31 (June 2004): 11.
[124] Hall, "A Political," 11.

Agrarian Reform in South Africa, are the inability of this section of the population "to sustain the risks involved with full-time commercial farming" without significant government support.[125] This suggests that while the RDP might be a robust strategy for members of the black population who already had capital, and are looking to enter the commercial farming industry, it does little to address the needs and priorities of rural poor black communities. In order to more effectively address the needs of these communities, the RDP had to be less focused on 'development' and more on 'reconstruction'. For example, if the plan had focused more on providing legal security of tenure, communities would have benefitted from the permanency that such tenure would provide, allowing them to perhaps make medium or long term investments in their dwellings. This is a crucial point because to provide security of tenure is to restore what the Apartheid state destroyed with the Native Land Act of 1913. "Avoiding permanency became the salient feature of the [Apartheid] government's black land policy."[126] To address the issue of permanency, is to begin to restore conditions (albeit improved) pre-Native Land Act of 1913, whereby black commercial farming "was beginning to take root and give a small but growing sector of the black population a degree of economic independence for the first time since the defeat of their tribes by the colonial armies in the nineteenth century frontier wars."[127] By 1990 there was an urban housing crisis backlog conservatively estimated at 1.3 million units, but including rural areas the figure rose to 3 million units.[128] With land, housing and many other issues of equitable access,

[125] Hall, "A Political," 11.
[126] Allister Sparks, *The Mind of South Africa* (New York, NY: Alfred A. Knopf, 1990), 199.
[127] Allister Sparks, *Beyond the Miracle: Inside the New South Africa* (Johannesburg, South Africa: Jonathan Ball Publishers, 2003), 48-49.
[128] African National Congress, *A Policy Framework: The Reconstruction and Development Programme* (Pretoria, South Africa: ANC, 1994), 21.

the first democratically elected government of the country would have a mammoth task on its hands.

While the RDP was an articulation of ANC policy, it drew heavily on a World Bank report published in November 1993 tited *Options for Land Reform and Rural Restructuring in South Africa.* "It is hoped that the mechanisms and options examined in this report will serve as the basis for negotiations and decisions by South Africans on the complex issues surrounding land reform and rural restructuring."[129] Although the report cites the limitations of a redistribution program, it advocates for the "implementation of a comprehensive rural restructuring program that includes — but is not limited to-policy reform, land reform, and the provision of essential support services to newly empowered land users."[130] While a policy of land reform might conjure ideas of Marxist overthrow for some (and certainly did for the ANC, during the struggle against Apartheid), it was not, in fact, controversial among mainstream, and sometimes more conservative, development institutions. Purely on economic grounds — independent of historic reasons, the World Bank itself argued that a program of land reform would "increase agricultural efficiency and ensure equal market access for the farmers who will participate."[131] Arguing that growth in the agricultural sector, which had previously been heavily subsidized to privilege the white population, would "serve as the foundation of growth for the whole economy by supplying employment and secure sources of inexpensive food."[132]

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[129] *Options for land reform and rural restructuring in South Africa*, technical report no. 77991 (Washington DC: World Bank, 1993), 2.
[130] *Options for land*, i.
[131] *Options for land reform and rural restructuring in South Africa*, technical report no. 77991 (Washington DC: World Bank, 1993), ii.
[132] *Options for land*, ii.

To contextualize the call for 'agricultural efficiency' referred to in the report, a notable aspect of Apartheid policy as it relates to land was the generous state-support for the white agricultural sector. "Until the 1980s the National Party had lavished money and attention on white farmers, who enjoyed so many subsidies and tax exemptions that they paid just 30% of their nominal dues."[133] Government support also came in the form of technical advice as agricultural research and extension services were designed, and provided for, exclusively white farmers.[134] Furthermore, under Apartheid white farmers benefited from subsidized credit, leading to increased borrowing: "between 1970 and 1990 white farm debt rose from 1.4 billion to 16 billion rand."[135] In addition to financial and technical support from the state, a close relationship between white farmer's organisations and the state, allow these organisations to influence agricultural policy, as well as programs put in place by parastatal institutions.[136] This is important because it demonstrates that the agricultural sector under Apartheid relied heavily on state support, and was not self-sufficient. With this loyal government support came the expectation of a mutually beneficial agreement where the agricultural sector would support the ruling National Party. And despite Afrikaner opposition to 'socialist,' 'Marxist' or 'communist' ideas proposed by the ANC and other parties during the transition, the Apartheid state had in effect been engaged in similar activities for decades. In his critique of the World Bank's proposals, Gavin Williams argues that simply removing state subsidies for white farmers would not level the playing field given the established market position of large-scale farmers in comparison to new

[133] Sebastian Mallaby, *After Apartheid: The Future of South Africa*, 2nd ed. (New York, NY: Times Books, 1992), 149.
[134] Mallaby, *After Apartheid*, 149.
[135] Mallaby, *After Apartheid*, 148.
[136] Gavin Williams, "Setting the Agenda: A Critique of the World Bank's Rural Restructuring Programme for South Africa," *Journal of Southern African Studies* 22, no. 1 (March 1996): 152, accessed March 20, 2019, https://www.jstor.org/stable/2637008.

black entrants to the market or smallholders. Citing the disadvantages of being far from major markets, transportation links, and other vital facilities, Williams argues that removing subsidies for white farmers will still mean "most black producers will continue to be relatively disadvantaged," while "well-situated farmers" would continue to benefit.[137]

The vision proposed in the World Bank's report was a competitive and vibrant agricultural sector which would "keep food prices low" and "support the employment-intensive economic growth path that is so critical to the future of South Africa."[138] Given the need for redress and reform demanded by the political transition, as well as what the World Bank deemed inefficiencies in state support for white farmers, the report addressed an array of issues the institution deemed crucial to a sustainable and inclusive agricultural sector.

Citing the limitations of land reform, the report reminds its audience, namely the new government, that "a redistribution program will not be able to provide land for everyone and the program will need to be complemented by a rural safety net and by programs for urban groups." [139] While the primary focus of the report, as well as the subsequent RDP section on land reform, focuses on rural areas, the World Bank report urges the government to support a "wide range of land use activities, including trading activities, and small-scale enterprises."[140] The report does not expand much on this statement, but evidently it is a reference to the use of land for non-agricultural purposes.

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[137] Gavin Williams, "Setting the Agenda: A Critique of the World Bank's Rural Restructuring Programme for South Africa," *Journal of Southern African Studies* 22, no. 1 (March 1996): 153, accessed March 20, 2019, https://www.jstor.org/stable/2637008.
[138] *Options for land reform and rural restructuring in South Africa*, technical report no. 77991 (Washington DC: World Bank, 1993), ii.
[139] *Options for land*, 32.
[140] *Options for land reform and rural restructuring in South Africa*, technical report no. 77991 (Washington DC: World Bank, 1993), 32.

The World Bank report was also significant because it represented an ideological consensus across a diverse range of organizations that land reform was necessary. The fact that this view was shared by more conservative institutions in Washington DC, as well as by the ANC, speaks to the urgency policy makers believed the issue of land reform demanded at the time. The first section of the RDP titled 'Why do we need an RDP,' justifies the policy as crucial to the viability of a democratic state. "No political democracy can survive and flourish if the mass of our people remain in poverty, without land, without tangible prospects for a better life. Attacking poverty and deprivation must therefore be the first priority of the democratic government."[141] The ANC articulates the RDP as not only an economic imperative, but also a moral policy in the advent of democracy. "Of all of the cases of unequal land distribution in the world, South Africa is easily one of the starkest examples of inequity relative to population."[142] A more alarmist perspective on the need for land reform states, "Because it represents a combination of problems, ranging from urban homelessness and squatting to restitution for historical land dispossession, the land question has been referred to as a 'political timebomb."[143]

The African National Congress's answer to the World Bank report, and other technical advice, was the Reconstruction and Development Plan which was a promise by the soon-to-be ruling party to protecting the rights enshrined in the constitution by delivering on the promises of a more prosperous and equitable future. "The ANC took up the World Bank's framework for

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[141] African National Congress, *A Policy Framework: The Reconstruction and Development Programme* (Pretoria, South Africa: ANC, 1994), 19.
[142] William G. Moseley and Brent McCusker, "Fighting Fire with a Broken Teacup: A Comparative Analysis of South Africa's Land Redistribution Program," *Geographical Review* 98, no. 3 (July 2008): 322, accessed March 18, 2019, https://www.jstor.org/stable/40377334.
[143] James L. Gibson, "Land Redistribution/Restitution in South Africa: A Model of Multiple Values, as the Past Meets the Present," *British Journal of Political Science* 40, no. 1 (January 2010): 135, accessed March 18, 2019, https://www.jstor.org/stable/40649427.

land and agricultural policies in its Reconstruction and Development Programme."[144] In fact, the Department of Land Affairs planned a land reform strategy and began pilot projects based on the World Bank's proposals.[145] Another example is the RDP's adoption of the World Bank's goal of redistributing 30% of agricultural land over 5 years. (While the World Bank report specified the creation of 600,000 smallholdings from the 24 million hectare goal, the ANC did not specify a target number of beneficiaries).[146] The World Bank's cost calculations, which were not based on data, but rather on indicative models, estimated this program would cost 17.5 billion rands (or R3.5 billion per year over 5 years). However, this sum alone exceeded the R2.5 billion the newly elected ANC government had allocated for the entire Reconstruction and Development Programme (including healthcare, infrastructure, education, basic services) for 1994-1995. And represents more than 40% of the R40 billion allocated for the first five years of the RDP.[147]

While seemingly well-intentioned, it is important to analyse some of the objectives and their clarity as outlined in the RDP. For example, as highlighted by Tom Lodge, the RDP adopts the World Bank's finding that within 5 years of democratic elections, 30% of the country's land should be redistributed.[148] However, the policy framework failed to propose a goal for the number of beneficiaries who should benefit from this radical approach. So while the World Bank report had recommended that this land benefit 600,000 smallholders the ANC did not stipulate how many people should benefit from such a transfer. Possible explanations might be that this

[144] Gavin Williams, "Setting the Agenda: A Critique of the World Bank's Rural Restructuring Programme for South Africa," *Journal of Southern African Studies* 22, no. 1 (March 1996): 166, accessed March 20, 2019, https://www.jstor.org/stable/2637008.
[145] Williams, "Setting the Agenda," 22.
[146] Gavin Williams and Colin Murray, "Land and Freedom in South Africa," *Review of African Political Economy* 21, no. 61 (September 1994): 322, accessed March 21, 2019, https://www.jstor.org/stable/4006143.
[147] Williams and Murray, "Land and Freedom," 21.
[148] Tom Lodge, *Politics in South Africa: From Mandela to Mbeki* (Indianapolis, IN: Indiana University Press, 2002), 74.

was an oversight, the party had not reached a consensus, or it might have been an acknowledgment that the R9.6 billion price tag for such an endeavor might not have been affordable or prioritized once in government. Interestingly, the World Bank report also mentions that this land should be cultivable, demonstrating a focus on agricultural and presumably rural land, as opposed to urban space. This seems to suggest the World Bank's focus on using land reform as a vehicle not only to create more equitable access to land, but also to stimulate economic growth on the micro-level, given the policy's focus on smallholders. The objective of redistributing land to a specific number of beneficiaries is important because in order for any land reform programme to be effective, it should not replicate structural inequalities, but rather break them down. In this case, if 30% of the country's land had been transferred from a small white elite to a small black elite, the existing problems of inequitable land distribution would persist. The only thing that would change would be the race of the small elite who held large holdings of land. The other pitfall of this vague objective is there is no clear goal, making it hard for voters or government officials to hold those responsible for carrying out the policy to account. This lack of specificity would also become a trend in land policy in successive democratically-elected governments which would frustrate effective and efficient land reform.

Interestingly, the ANC with its affinity to certain Marxist ideas places a focus on an almost Lockean idea of land, and with a focus on land not just for restitution and redistribution purposes, but also for economic development. In his *Second Treatise of Government* Locke wrote, "As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property."[149] Three centuries later and half a world away, the ANC adopted the

[149] John Locke, *Second Treatise of Government*, ed. C. B. MacPherson, 2nd ed. (Indianapolis, IN: Hackett Publishing Company, Inc., 1980), 21.

Freedom Charter in Kliptown which declared, "Land belongs to all who work it!"[150] While the ANC ultimately abandoned its position on the nationalization of land, the veneration for the value created through the exploitation of land has continued. Thus, the Constitution did *not* declare that the 'land belongs to all who work it,' but subsequent ANC policy documents have continued to romanticize land reform and agricultural cultivation as important to the nation both economically and emotionally. The RDP states, "in implementing the national land reform programme… the democratic government will build the economy by generating large-scale employment, increasing rural incomes and eliminating overcrowding."[151] Other sections urge for land reform to be used to "encourage the use of land for agricultural or other productive purposes" and for the programme to "include the provision of services to beneficiaries of land reform so that they can use their land as productively as possible."[152] Thus, for the ANC, land reform was not just an issue of addressing past injustices. It was also about stimulating economic growth and positive social change, which was a sentiment echoed in the World Bank's report, through its focus on land reform as a vehicle for poverty alleviation.

As previously highlighted, the RDP was a promise to the South African people to deliver on the much-lauded Constitution. Professor Eric Berger cited it as unique because it enshrined socio-economic rights, "rather than only 'negative liberties.'"[153] It is these characteristics which earned the document the praise cited at the start of this thesis, from Ruth Bader Ginsburg, among

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[150] Congress of the People, "The Freedom Charter," Historical Records, last modified June 25, 1955, accessed December 9, 2018, http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AD1137/AD1137-Ea6-1-001-jpeg.pdf.
[151] African National Congress, *A Policy Framework: The Reconstruction and Development Programme* (Pretoria, South Africa: ANC, 1994), 23.
[152] African National Congress, *A Policy*, 25.
[153] Eric Berger, "The Right to Education under the South African Constitution," *Columbia Law Review* 103, no. 3 (April 2003): 614, accessed April 25, 2019, https://www.jstor.org/stable/1123719.

others. As the analysis above shows, land reform was viewed by the ANC as a key aspect in the economic development vision for the new South African dispensation. With the benefit of hindsight it is clear some aspects of the ANC's initial land reform policy were misguided. Chief among them was the oversize focus on *rural* land and development. The rural and urban demographics of South Africa had shifted significantly and irreversibly since the ANC's inception at the start of the 20th Century, and it's subsequent adoption of the Freedom Charter in 1955. The economic and social demands of Apartheid had resulted in massive black urbanization; a process which would not easily be reversed. Consequently, the government needed to respond accordingly by creating policies which would allow land reform to happen efficiently in urban areas. Proximity to cities and towns equates to better economic prospects and access to basic services. The disproportionate focus on *rural* land reform ignore the massive shift to urban areas which had occurred from the 1960s onwards.

So while the RDP demonstrated to the South African electorate that the ANC was committed to redress and building a more inclusive and equitable South Africa, it failed to accurately gauge the needs of the population. This misguided policy decision at the outset of democracy is still being felt: as the ANC's ascent to power in Pretoria brought with it the promise of a new era for previously disadvantaged peoples, but the past 25 years of democracy have by and large failed to address that promise, and most importantly the legitimate needs of the population with respect to land.

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Whatever the limitations of the RDP, the grand vision of transformation that it embodied was quickly abandoned. In 1996, following a currency crash fuelled by speculation that Mandela was in ill-health as well as other factors in international markets, Trevor Manuel was appointed as finance minister at the start of the year. A protégé of Deputy President Thabo Mbeki, Manuel's solution to the turbulent economic outlook was an emergency plan called the Growth, Employment and Redistribution program (GEAR). The plan was formulated with World Bank consultants, academics and other policy makers. "GEAR called for precisely the kind of fiscal discipline and investment and investment-friendly tax incentives the international financial institutions believed in, but was in stark contrast to the redistributive RDP, which was soon to be rendered obsolete."[154] The ANC was driven to ditch the RDP after only two years since the 1994 election, for "fear it would land up pawning South Africa's independence by borrowing from the IMF and the World Bank to service its debt."[155] Thus, in constructing the program, policy makers and politicians had been driven by the goal of self-reliance, as opposed to turning to western institutions for assistance. Or, as Mark Gevisser puts it, "capitulation to old colonial masters."[156] The RDP was all but abandoned, having been dropped from cabinet status.[157] With the new program came new promises: perhaps the most notorious — and failed — was that the fiscal discipline would quickly result in 6% growth per year. High levels of growth were seen as the

[154] Mark Gevisser, *Legacy of Liberation: Thabo Mbeki and the Future of the South African Dream* (New York, NY: St Martin's Griffin, 2010), 252.
[155] Gevisser, *Legacy of Liberation*, 255.
[156] Gevisser, *Legacy of Liberation*, 255.
[157] Makau wa Mutua, "Hope and Despair for a New South Africa: The Limits of Rights Discourse," *Harvard Human Rights Journal* 63 (1997): 69.

solution to solving the unemployment crisis. However, the growth rate would never exceed 5%, and unemployment levels would only increase — to over 30%.[158]

GEAR diverged not only from the RDP, but also from the ideals and promise of the transition to democracy. Professor Gillian Hart of UC Berkeley observes that "GEAR sits uneasily astride the emancipatory promises of the liberation struggle, as well as the material hopes, aspirations, and rights of the large majority of South Africans."[159] In many ways the adoption of GEAR was a stark reminder that South Africa could not have it all: acceptance into the neoliberal economic community *and* the ability to deliver on the socioeconomic promises of the liberation struggle. While it was negotiation which brought the democratic state into being, this policy shift makes it clear that being in power would require careful negotiation and navigation of competing priorities. In his book *Legacy of Liberation*, Mark Gevisser argues that the contradictory ANC policy changes were driven by competing commitments. Coming to power with its expansionary RDP in 1994 as an election manifesto, only to change tact two years later by adopting GEAR. "It [the ANC] could put into place labor market regulations to rival the most socialist of economies, and at the same time, tariff reform in line with the most capitalist." [160] These shifts might be ascribed to competing ideological factions within the party, the realities of transforming from an opposition party to a governing one, and changing economic conditions. The nature of the negotiated transition also meant that the ANC had to please its constituents while appealing its political adversaries. But perhaps the specific cause of policy shifts is less

[158] Mark Gevisser, *Legacy of Liberation: Thabo Mbeki and the Future of the South African Dream* (New York, NY: St Martin's Griffin, 2010), 252.
[159] Gillian Hart, *Disabling Globalization: Places of Power in Post-Apartheid South Africa* (Oakland, CA: University of California Press, 2002), 7.
[160] Mark Gevisser, *Legacy of Liberation: Thabo Mbeki and the Future of the South African Dream* (New York, NY: St Martin's Griffin, 2010), 254.

important, and ANC policy, Mandela's rhetoric was all in pursuit of balancing reconciliation with reality. Of these shifts in economic policy, Gevisser observes, "the impossible goal of 'national reconciliation' was, precisely, to be all things to all people."[161] Unfortunately, the desire to appease, placate and compromise did not always deliver results for the population.

Meanwhile, land reform largely fell of the agenda. In *Politics in South Africa: From Mandela to Mbeki*, Professor Tom Lodge observed that by 2002 — eight years after the RDP was adopted and 6 years after the pivot to GEAR — land reform had failed to deliver tangible results. "Of all the efforts to address basic needs, those directed at alleviating land shortage have been the most desultory."[162] To support this claim, Lodge, a professor of political studies at the University of Witwatersrand, points to the fact that by 2002 less than 2% of "farmland had changed ownership as a consequence of government initiatives."[163] Lodge argues the consequence of the commitment to 'demand led' reform was that land reform policy in South Africa was significantly less ambitious than those in other African countries, such as Zimbabwe and Kenya, where policies involved more state-intervention. By the ANC government's own metrics, land reform had gotten off to a sluggish start: "By 1999, less than 1% of commercial farmland had been redistributed through SLAG [Settlement/Land Acquisition Grant]" — a far cry from the RDP's goal of 30%.[164] Following these results and the 1999 elections, a dramatic shift in leadership and policy took place at the Department of Land Affairs. By June 1999, the Settlement Land Acquisition Grant programme had been suspended. The newly appointed

[161] Gevisser, *Legacy of Liberation*, 254.
[162] Tom Lodge, *Politics in South Africa: From Mandela to Mbeki* (Indianapolis, IN: Indiana University Press, 2002), 70.
[163] Tom Lodge, *Politics in South Africa: From Mandela to Mbeki* (Indianapolis, IN: Indiana University Press, 2002), 70.
[164] Lodge, *Politics in South*, 78.

minister of Land Affairs, Thoko Didiza, announced a series of policy shifts on February 11th, 2000. The announcement marked a reorientation to the emergent farming sector, as opposed to the extension of land rights to the poor. "To adopt the World Bank's terminology, it was less 'welfarist' and more 'productionist' in orientation."[165] The new focus was less concerned with the welfare of the general production, and more on assistance to an emerging class of black farmers who would help contribute to the economy.

The main objective of Minister Didiza's policy, was to create a group of 70,000 commercial farmers in the span of 15 years.[166] Grants would be made available to applicants who the state viewed as having the potential 'to contribute to local economic development.'[167] In 1996, 18.8 million South Africans lived in rural areas, 14 million of whom lived in former ethnic homelands. Meaning, approximately a third of the country's population was concentrated in 13% of the country: "Most of this population was very poor… earning less than R237 *per household* every month."[168] Despite the flaws of the 'welfarist' approach advocated by the World Bank, it was certainly more oriented towards the types of households living in the conditions described by Lodge above. For individuals living in former homelands who might be earning R237 per month, demonstrating to the Department of Land Affairs, one's ability 'to contribute to local development' could be challenging given the specialized skills and financial capital required to enter the agricultural sector. For example, to receive the smallest of the three grants, an applicant would have to contribute R10,000 to receive R30,000.[169] It doesn't take much imagination to see

[165] Lodge, *Politics in South*, 79.
[166] Lodge, *Politics in South*, 79.
[167] Lodge, *Politics in South*, 80.
[168] Tom Lodge, *Politics in South Africa: From Mandela to Mbeki* (Indianapolis, IN: Indiana University Press, 2002), 70.
[169] Lodge, *Politics in South*, 80.

how such a high barrier to entry would exclude large sections of the population from benefiting from the government's land reform policy. While the policy still allocated a marginal number of smaller grants to lower-income earners to use land as a 'food safety net,' the new policy shifted the focus away from poorer segments of the population for land redistribution.

The driving force behind the policy shift was "official impatience with the slow pace of land transfer."[170] The thinking was that by assisting smaller numbers of farmers to purchase bigger chunks of land, the state would be expediting the deracialisation of commercial land. The new requirement of commercial viability for access to state grants had been formulated to prevent the disruption of agricultural productivity, and consequently food security — two elements which the ANC government had been concerned with since their ascent to power. Of course, these were reasonable concerns. By 2000, when the ANC had been in power for 6 years, levels of frustration with the white farming community was rising. Officials announced that the government might have to start acquiring land at 'equitable' rates, rather than market price. "In certain cases, departmental spokespeople warned, the government would use its legal right to expropriate land: 'Farmers are just going to have to come down in their prices.'"[171] Critics of Minister Didiza's leadership claimed the new policy would deploy scarce state resources dedicated to land reform, to benefit a small group of already well-off communities. Alarmingly, the changes were implemented "without any consultation with either parliament or civil society."[172]

[170] Lodge, *Politics in South*, 80.
[171] Tom Lodge, *Politics in South Africa: From Mandela to Mbeki* (Indianapolis, IN: Indiana University Press, 2002), 80.
[172] Lodge, *Politics in South*, 81.

The land restitution process initiated by the RDP had also made slow progress. As of March 1999 only 241 of the 63,455 claims had been settled, although it is important to note that 13, 584 households were involved in the successful claims, leading to 83,378 beneficiaries.[173] Interestingly, approximately 80% of claims related to urban land, high-profile examples being District Six in Cape Town and Sophiatown in Johannesburg — both of which were the site of violent Apartheid forced removals, highlighting the relationship between Apartheid dispossession and contemporary issues of land reform. In an effort to accelerate the process, the government began settling claims prior to the arbitration stage, resulting in claimants receiving financial compensation in lieu of land. Consequently, only 40% of the restitution budget was used by the Department of Land Affairs to buy land for claimants.[174] Curiously, part of the justification for the aforementioned shift in land policy in 2000 was the frustrated pace of the deracialisation of land. Ironically, as demonstrated by the government's tendency to settle restitution claims with financial settlements, the deracialisation of land would have been accelerated if their own restitution process had been more efficient. Or perhaps measuring the government's progress by the 30% metric was not an accurate reflection of change, given that some would have opted for financial compensation. The restitution process under Minister Didiza's predecessor, Derek Hanekom, had required claimants to produce "documentary proof of original land ownership strong enough to withstand legal contestation."[175] This burden of proof was cumbersome, because the restitution process allowed claims dating back to the 1913 passage of the Native Land Act, and Apartheid land dispossession had usually not required

[173] Lodge, *Politics in South*, 82.
[174] Lodge, *Politics in South*, 82.
[175] Tom Lodge, *Politics in South Africa: From Mandela to Mbeki* (Indianapolis, IN: Indiana University Press, 2002), 82.

compensation, which left little documentation for citizens to claim in the restitution process once democracy had arrived. The cumbersome process may have been designed to ensure thoroughness, but it did not result in speedy resolutions.

Only 20% of the claims during the restitution process were related to rural land. The implications of this are twofold. Firstly, that the ANC's Reconstruction and Development Program was misguided in its focus on *rural* land reform, as opposed to urban. Secondly, examples of unsuccessful claims demonstrated "the importance of social capital in enabling communities to benefit from restitution."[176] As previously mentioned, about two thirds of the country's population reside in urban areas, and a parallel might be drawn between proximity to cities and the social capital required to complete a successful land restitution case. By 2002, the 550,000 beneficiaries of land reform policies represent a small fraction of the rural poor.[177] In spite of policy flip-flopping, and at times misguided assumptions by successive ANC governments, the ruling party does appear committed to land reform. However, "politically, land reform has been assigned a low-priority status by successive governments."[178] This might account for the relatively low levels of public expenditure on land reform policies since 1994.

While highlighting the success and shortfalls of ANC land policy, this chapter will argue the government was hamstrung by external constraints. If the democratic state had been allowed to subsize, protect and support emerging farmers in democratic South Africa in the same way in which the Apartheid state slavishly assisted white agriculture, the state might have made more progress in deracializing land through reform.

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[176] Lodge, *Politics in South*, 83.
[177] Lodge, *Politics in South*, 84.
[178] Tom Lodge, *Politics in South Africa: From Mandela to Mbeki* (Indianapolis, IN: Indiana University Press, 2002), 84.

Chapter 3: Debunking the Mythology of South African Exceptionalism

This chapter will analyse the contemporary debate in South African politics about whether the Constitution should be amended to allow for the expropriation of land without compensation. It explores both the emergence of the Economic Freedom Fighters (EFF) on the political scene, as well as the ANC's consequent shift in land policy and rhetoric. As this chapter will show, this contemporary debate has resulted in the Constitution being faulted for the slow pace of land reform, when in fact, it has primarily been a consequence of lackluster governance by the ANC. As a result, this chapter will argue, the legitimacy of the negotiated transition and the subsequent social contract, have been called into question for political expedience.

During a late-night address, televised to the nation on July 31st 2018, South African President Cyril Ramaphosa announced that the ruling African National Congress (ANC) would support a motion in parliament to amend the Constitution. This amendment, he indicated, would "outline more clearly the conditions under which expropriation of land without compensation can be effected."[179] The announcement, which concluded a two-day conference of the ruling party's national executive committee (NEC), acknowledged that the Constitution's current property clause, Section 25, does not impede the government from expropriating land without compensation. This announcement was startling to many, and was the most decisive move by the ruling party after months of debate; but Ramaphosa argued: "It has become patently clear that

[179] Cyril Ramaphosa, "ANC President Statement on Land Issue," *News24* (Johannesburg, South Africa), July 31, 2018, accessed December 9, 2018, https://www.news24.com/Columnists/GuestColumn/read-president-cyril-ramaphosas-full-speech-here-20180731.

our people want the Constitution to be more explicit about expropriation of land without compensation, as demonstrated in the public hearings."[180]

The historical survey of the issue of land theft and dispossession in South Africa outlined in the first chapter, and the subsequent evaluation of land reform policies outlined in the second chapter, help to ground an attempt to understand the aforementioned address. This chapter will attempt to trace the genealogy of President Ramaphosa's announcement by arguing that the call for the expropriation of land without expropriation is the result of a number of factors. Firstly, the slow pace of change and sluggish efficacy with which the democratically-elected government has been able to achieve change over the past 25 years. Secondly, the nature of the pacted transition in the early 1990s and the restraints on the democratic state which limited the resources and policies which could be deployed. And finally, this chapter will argue that the call for a more radical approach to land reform is borne out of frustration and anger that the systems of exclusion and inequality codified under Apartheid, still linger in contemporary South African society. In this sense, land reform is a metaphor for righting a past wrong which is much broader than the single issue of land, and which it can be argued, the much-lauded Truth and Reconciliation Commission did not address.

As explained in the first chapter, the issue of land was particularly emotive and evocative given the violence of land theft and dispossession throughout both the colonial and Apartheid eras. President Ramaphosa went as far as describing land dispossession and the inequality it wrought as South Africa's "original sin" in a recent address to parliament.[181] This statement is

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[180] Cyril Ramaphosa, "ANC President Statement on Land Issue," *News24* (Johannesburg, South Africa), July 31, 2018, accessed December 9, 2018, https://www.news24.com/Columnists/GuestColumn/read-president-cyril-ramaphosas-full-speech-here-20180731.

[181] Marianne Merten, "Amending Section 25: When Election Rhetoric and Real Law-Making Collide," *Daily Maverick* (Johannesburg, South Africa), March 10, 2019, accessed April 9, 2019,

hard to disagree with and the previously mentioned complexity of both land dispossession and attempts at redress and reform make this issue perhaps more poignant than others of similar socioeconomic significance.

Given the emotionally charged nature of land in the country, this paper is particularly interested in the origins of the contemporary debate about whether the South African constitution needs to be amended in order to facilitate a more expeditious program of land reform, through the expropriation of land without compensation. Interestingly, President Ramaphosa and many within the ANC do not believe that a constitutional amendment is necessary, arguing the existing property clause (Section 25 of the constitution), "enables the state to effect expropriation of land with just and equitable compensation and also expropriation without compensation in the public interest."[182] Previously, President Ramaphosa had decried a constitutional amendment as unnecessary for the expropriation of land without compensation. This sentiment has been shared by many academics and legal scholars. Providing a sharp critique of successive ANC government's failures to implement meaningful land reform, Professor Penelope Andrews argues that the blame lies with the political establishment, and not the constitution: "It's not the constitution's failure to deliver 'radical economic' transformation, but a lacklustre government that has forgotten its promises – first adopted in the Freedom Charter and then again in the Constitution."[183]

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https://www.dailymaverick.co.za/article/2019-03-10-amending-section-25-when-election-rhetoric-and-real-law-making-collide/.

[182] John Campbell, "Despite Land Reform, South Africa Is not Becoming Zimbabwe or Venezuela," *Council on Foreign Relations*, last modified August 7, 2018, accessed April 9, 2019, https://www.cfr.org/blog/despite-land-reform-south-africa-not-becoming-zimbabwe-or-venezuela.

[183] Penelope Andrews, "South Africa's Problems Lie in Political Negligence, not its Constitution," *The Conversation*, last modified July 4, 2017, accessed April 9, 2019, https://theconversation.com/south-africas-problems-lie-in-political-negligence-not-its-constitution-80474.

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Following national elections in May 2014 the Economic Freedom Fighters (EFF) won 6.35% of the vote. A newcomer to the political scene, made up predominantly of young, disaffected ex-ANC members and led by 'firebrand' former ANC Youth League leader Julius Malema.[184] Only formed a year prior to the 2014 elections, the party's surprisingly good showing, saw the party send 25 MPs to Parliament, and the party's popularity rise to 8% in the 2016 local government elections.[185] While their theatrical tactics, including frequently disrupting parliamentary proceedings, would later become infamous, a rallying cry of the party from its inception has been the issue of land. Such tactics have helped the party harvest outsize media attention and increased interest in a Parliament which had often been devoid of much dynamism after years of ANC dominance. But Shameela Seedat and Richard Calland argue, that said tactics sometimes result in "proffering dangerously vacuous populist policy prescriptions."[186] One such prescription has been the recurring demand for land redistribution to black South Africans, through a constitutional amendment and calls for the nationalization of all land. In the EFF's Founding Manifesto (2013) the party calls for "Expropriation of South Africa's land without compensation for equal redistribution in use."[187] An item on the first page of the party's 2014

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[184] Shameela Seedat and Richard Calland, "Institutional Renaissance or Populist Fandango? The Impact of the Economic Freedom Fighter's on South Africa's Parliament," in *A German-South African Perspective*, ed. Henk Botha, Nils Schaks, and Dominik Steiger (Baden-Baden, Germany: Nomos Verlagsgesellschaft mbH, 2016), 219, accessed April 9, 2019, https://www.jstor.org/stable/j.ctv941vr3.14.

[185] John Campbell, "Despite Land Reform, South Africa Is not Becoming Zimbabwe or Venezuela," *Council on Foreign Relations*, last modified August 7, 2018, accessed April 9, 2019, https://www.cfr.org/blog/despite-land-reform-south-africa-not-becoming-zimbabwe-or-venezuela.

[186] Shameela Seedat and Richard Calland, "Institutional Renaissance or Populist Fandango? The Impact of the Economic Freedom Fighter's on South Africa's Parliament," in *A German-South African Perspective*, ed. Henk Botha, Nils Schaks, and Dominik Steiger (Baden-Baden, Germany: Nomos Verlagsgesellschaft mbH, 2016), 245, accessed April 9, 2019, https://www.jstor.org/stable/j.ctv941vr3.14.

[187] "Founding Manifesto of the Economic Freedom Fighters," PoliticsWeb, last modified July 25, 2013, accessed April 10, 2019, https://www.politicsweb.co.za/news-and-analysis/founding-manifesto-of-the-economic-freedom-fighter.

election manifesto reads: “20 years later, the black majority is still trapped in landlessness, homelessness and hopelessness!”[188] Most recently, the title of the EFF’s manifesto for the May 2019 elections reads, “OUR LAND AND JOBS NOW!”[189] By making land its defining rallying cry, the EFF immediately placed itself in opposition to the ANC, blaming the ruling party for not prioritizing land redistribution or reform after over two and a half decades in power.

Writing in mid-2018 Professor Lungisile Ntsebeza observed this intra-party rivalry: “Malema’s emergence as an opposition and his radical land policy put pressure on the ANC…” [190] The ANC’s own shift on the expropriation of land without compensation can be directly traced to the emergence of the EFF onto the political scene. The move by the ANC to call for expropriation without compensation, and a commensurate constitutional amendment was viewed as driven largely by anxieties of being outflanked by the EFF. Professor Ntsebeza also ventures to suggest that then (embattled) President Jacob Zuma “likely saw the question as an instrument to extend his life in the ANC.”[191] Beginning with his February State of the Nation address in 2017, Zuma began to echo the EFF’s call for expropriation of land without compensation. Although initially, like President Zuma himself, the issue proved to be divisive within the party, ultimately the concept was endorsed at the ANC’s 54th party conference in December 2017.[192] While initially opposed to the concept, and only Deputy President at the time, President Ramaphosa has since endorsed the policy.

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[188] "EFF Election Manifesto 2014," News24, last modified March 3, 2014, accessed April 10, 2019, https://www.news24.com/elections/manifesto-eff-20140311-2.
[189] "EFF 2019 Election Manifesto," Africa Check, last modified 2019, accessed April 10, 2019, https://africacheck.org/wp-content/uploads/2019/03/2019-EFF-manifesto.pdf.
[190] Lungisile Ntsebeza, "This Land Is Our Land," *Foreign Policy*, May 3, 2018, accessed April 10, 2019, https://foreignpolicy.com/2018/05/03/this-land-is-our-land/.
[191] Ntsebeza, "This Land”
[192] Ntsebeza, "This Land”

Since President Ramaphosa's ascent to the Presidency he has presented himself as a unifying figure for the ANC, endorsing expropriation without compensation, while cautioning that such policies should not impede economic growth or investor confidence. "This gives him a platform to water down the radical edge of the policy."[193] Instead, he has called for such a policy to foster the South African economy and growth in the agricultural sector; perhaps in some way returning to the rhetoric surrounding land reform in the RDP, where it was viewed as a policy to spur growth. Expropriation without compensation, Ramaphosa declares, will build on the "enormous potential of agriculture to promote industrialization, create employment, and transform our economy."[194] While their approaches have differed, both the ANC and EFF have stuck to similarly vague statements, usually devoid of details about how such a policy would be implemented and its implications.

Capitalizing on the ANC's shift towards their own policy, the EFF tabled a motion in Parliament calling for land expropriation without compensation. This, the two parties could agree on, and the motion passed in March 2018.[195] Lungisile Ntsebeza, the National Research Foundation chair in land reform and democracy, is amongst those who believe the constitution *should* be amended to dispel any ambiguity for land reform going forward. Section 25 is "inherently conflictual in that it protects existing property rights, which favors whites, while at the same time promising the dispossessed that their land will be returned to them."[196] However, he argues that it is not enough for the ANC and EFF to agree on rhetoric: the process thus far has

[193] Lungisile Ntsebeza, "This Land Is Our Land," *Foreign Policy*, May 3, 2018, accessed April 10, 2019, https://foreignpolicy.com/2018/05/03/this-land-is-our-land/.
[194] Ntsebeza, "This Land."
[195] Ntsebeza, "This Land."
[196] Ntsebeza, "This Land."

been "top-heavy and led primarily by political parties."[197] For the land question to be taken seriously, and the implementation of well-thought out policy, "it will take direct action and mobilization from below, with those directly affected by landlessness."[198] Without more grassroots involvement, Ntsebeza argues, "there is a danger that South Africa's land reform will be reduced to a token expropriation of land that benefits an elite connected with the ruling party, the EFF, and the chiefs, while bypassing the downtrodden and the poor."[199] This point is salient, particularly in light of the widespread corruption which became endemic during the Zuma era. However, despite the newfound prominence of land reform in political discourse, it is unclear if there is an increase in bottom-up mobilization on the issue.

For all of the recent political rhetoric surrounding the land issue — some of it virtuous and practical, other parts more radical and theoretical — the scapegoat throughout has been the Constitution: specifically section 25. Advocate Tembeka Ngcukaitobi recently told MPs that the main reason for the lack of swift and meaningful land reform over the past two decades, was government policy rather than the Constitution. "Parliament was fortunate not to be taken to court for this constitutional failure," he stated during parliamentary hearings.[200] Even Albie Sachs, frequently cited in this paper, cautions that a simple amendment to the Constitution would not result in radically different outcomes: "It's not simply a technical process… That would be inadequate. Parliament would have to set out a programme of what needs to be done."[201] Sach's

[197] Lungisile Ntsebeza, "This Land Is Our Land," *Foreign Policy*, May 3, 2018, accessed April 10, 2019, https://foreignpolicy.com/2018/05/03/this-land-is-our-land/.
[198] Ntsebeza, "This Land."
[199] Ntsebeza, "This Land."
[200] Marianne Merten, "Amending Section 25: When Election Rhetoric and Real Law-Making Collide," *Daily Maverick* (Johannesburg, South Africa), March 10, 2019, accessed April 9, 2019, https://www.dailymaverick.co.za/article/2019-03-10-amending-section-25-when-election-rhetoric-and-real-law-making-collide/.
[201] Merten, "Amending Section."

observation about his own party's rhetoric further calls into question the claim that a simple constitutional amendment is all that is preventing transformative progress on land reform.

Amidst the contemporary rhetoric about section 25 being the main impediment to land reform, it has frequently been argued that the conservative nature of the property clause was a result of the negotiated settlement in the early 1990s, as a strategy to appease the white population. However, at a parliamentary hearing on the constitutional amendment early in 2019, Mohammed Valli Moosa a former Cabinet minister (previously Minister of Provincial and Constitutional Affairs) and a member of the ANC's negotiating team during CODESA, dismisses this argument. "It was not true Section 25 was drafted in order to appease and protect land held illegitimately by white people. In the process of Constitution drafting it was important for African people to be owners, given the history of dispossession and forced removals."[202] Black land ownership would not have been facilitated by wholesale nationalization of land, as this would have made the state the sole land owner and ultimate landlord. Concluding, he said: "the lack of land reform is not because of Section 25. It is about other things. If I say any more I will end up attacking my party (the ANC)."[203] Critiques of the ANC's rhetoric from prominent members of the party are important in that they demonstrate skepticism even from the party's own ranks, of the direction popular discourse has taken. Both Moosa and Sachs agree, that not only is a constitutional amendment unnecessary to achieve what the ANC claims it wants to, but it would also not be accurate to believe that a simple amendment would bring about the desired change.

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[202] Marianne Merten, "Amending Section 25: When Election Rhetoric and Real Law-Making Collide," *Daily Maverick* (Johannesburg, South Africa), March 10, 2019, accessed April 9, 2019, https://www.dailymaverick.co.za/article/2019-03-10-amending-section-25-when-election-rhetoric-and-real-law-making-collide/.
[203] Merten, "Amending Section."

During the parliamentary hearings, Professor Ruth Hall from the University of the Western Cape's Institute for Poverty, Land and Agrarian Studies (Plaas) also argued that the Constitution was not the obstacle to land reform, but rather the opposite: "There has been a lot of Constitution-blaming, but Section 25 actually is the mechanism for land reform redistribution and restitution. It doesn't say anywhere compensation must be cash and immediate, or market-related."[204] Hall's argument paints a more complicated picture of the future of land reform. By arguing that Section 25 should be *enabling* rather than *inhibiting* reform, like Sachs and Moosa, she cautions that a simple constitutional amendment will do little to change the status quo. If an expropriation act is passed, then it must be accompanied by a redistribution and a land records bill. A clear policy on compensation policy has not been formulated, primarily because test cases have not been taken to the Constitutional Court, which means jurisprudence has not been properly established about what 'just and equitable' compensation means. Again, the absence of legal precedent is not a failure of the Constitution, but rather the lack of test cases lodged in the courts. To provide comparison to a similar issue, a number of cases have been taken to the Constitutional Court regarding housing, evictions and the rights of squatters; for example, *Government of South Africa v Grootboom.* The case clarified the government's responsibility "to facilitate access to temporary relief for people who had no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of

[204] Marianne Merten, "Amending Section 25: When Election Rhetoric and Real Law-Making Collide," *Daily Maverick* (Johannesburg, South Africa), March 10, 2019, accessed April 9, 2019, https://www.dailymaverick.co.za/article/2019-03-10-amending-section-25-when-election-rhetoric-and-real-law-making-collide/.

demolition."[205] Of the *Grootboom* case, and others relating to socio-economic rights, Constitutional Court judge Edwin Cameron writes, "Instead of laying down a minimum core content of each right that government is obliged to meet in all cases, unconditionally, the court has focused on developing its socio-economic rights jurisprudence on a case-by-case basis."[206] Cameron's reflection on the role of the Constitutional Court appears in line with the argument proposed by Professor Hall, that more cases need to be taken to the Constitutional Court in order for jurisprudence on Section 25 to be properly developed. Despite the rhetoric and blame game surrounding the issue, the Parliamentary hearings appear to be an attempt by the state to diffuse the emotionally charged nature of the issue and focus on practical solutions. The question is: if the process is being led by the state, will the state ever find itself guilty of negligence on the issue of land, or will the Constitution remain a convenient scapegoat in the short-term?

It is widely recognized that domestic political events in a country can have regional implications, while the reverse is also true, where events within the region can also influence political events and sentiment in another country. However, constitutional debates are treated as legal discussions which are therefore unique to a sovereign state's legal and political order. This applies to the case of South Africa's neighbor, Zimbabwe, often cited as an example of land reform gone awry. Zimbabwe achieved independence from Britain in 1980, following the Lancaster House Agreement of 1979, which laid the framework for the post-colonial state.[207] The terms of the agreement constrained the new state from the outset, prohibiting constitutional

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[205] Government of the Republic of South Africa v. Irene Grootboom and Others, Case CCT 11/00 Yacoob, J. 1, 47 (Constitutional Court Oct. 4, 2000). Accessed April 17, 2019. http://www.saflii.org/za/cases/ZACC/2000/19.pdf.
[206] Edwin Cameron, *Justice: A Personal Account* (Cape Town, South Africa: Tafelberg, 2014), 259.
[207] Heinz Klug, "Decolonization, Compensation and Constitutionalism: Land, Wealth and the Sustainability of Constitutionalism in post-Apartheid South Africa," *South African Journal on Human Rights*, no. 1451 (September 5, 2018): 18, accessed April 27, 2019, https://ssrn.com/abstract=3244000.

amendments for the first ten years of independence. Once the decade was out, the government swiftly amended limitations in the Constitution pertaining to land reform. Progress on reform was slow, but once "the ruling ZANU-PF party began to face a serious electoral challenge in the late 1990s, the slow pace of land redistribution became a focus of government rhetoric."[208] Consequently, the country lurched towards a more aggressive stance on land acquisition, which, after 2000, resulted in a "wave of farm invasions and a subsequent collapse of the economy."[209] While the spectre of the Zimbabwe case is an important influence in the land reform debate in South Africa, it should be noted that the two cases are markedly different. First, Zimbabwean independence in 1980 was negotiated with Britain, the former colonial power, and not, like South Africa, with a racial group, which, despite European origins, had settled in the country, and had a vested interest in the success of the transition. Secondly, by 2000, President Robert Mugabe had been in power for twenty years, demonstrating disregard for term limits set out in the Lancaster House Agreement, with a commitment to ruling indefinitely. Despite President Jacob Zuma's ruinous term in office, he did not serve longer than the legally mandated two-term limit (in fact, he did not even finish his second term). Thirdly, the principle of 'willing buyer, willing seller' was codified in the post-colonial Zimbabwean Constitution, whereas in South Africa it was an ANC policy choice.

The consequences of the ANC governments' shortcomings surrounding the issue of land, leave the country similarly vulnerable to some of the rhetoric seen in Zimbabwe in the late 1990s. In South Africa, the government's slow progress calls into question the validity of the

[208] Heinz Klug, "Decolonization, Compensation and Constitutionalism: Land, Wealth and the Sustainability of Constitutionalism in post-Apartheid South Africa," *South African Journal on Human Rights*, no. 1451 (September 5, 2018): 19, accessed April 27, 2019, https://ssrn.com/abstract=3244000.
[209] Klug, "Decolonization, Compensation," 19.

aspirations very social contract which was a hallmark of the transition to democracy. Writing in 1997 about the limits of the rights discourse in South Africa, Makau wa Mutua asserted that "the struggle against apartheid was not waged so that blacks could boast of abstract political rights. It was waged so that blacks could have equal access to economic resources."[210] While this observation was met with skepticism at a moment when the South African constitution was being applauded at home and abroad, 25 years into democracy, Mutua's point is important. And in many ways his reservations about the Constitution early on, have manifested as he predicted. As Sisonke Msimang sees it, "the women and men who wrote the Constitution wanted it to be the case that access to the powerful discourse of rights would be more important than access to the courts. In other words, they had hoped that knowing your rights and being able to articulate them would incolcate you."[211] Despite the best intentions of 'the women and men' who wrote the Constitution, it appears that, as the title of Mutua's article suggests, there *are* limits to the rights discourse in the new South Africa.

Sisonke Msimang argues the nature of the negotiated settlement resulted in "forgiveness [becoming] a national mantra, and reconciliation an official ideology."[212] These ideals informed the vision of what Archbishop Desmond Tutu called the 'Rainbow Nation.' It was these two characteristics of the transition which saw the exceptionalism of the South African transition lauded by human rights advocates, legal and political scholars, and liberal governments around the world. Indeed, as Advocate Tembeka Ngcukaitobi points out the South African constitution

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[210] Makau wa Mutua, "Hope and Despair for a New South Africa: The Limits of Rights Discourse," *Harvard Human Rights Journal* 63 (1997): 89.
[211] Sisonke Msimang, "A Story of Love in the Time of the Constitution," *Africa is a Country*, August 21, 2018, accessed April 14, 2019, https://africasacountry.com/2018/08/a-story-of-love-in-the-time-of-the-constitution.
[212] Sisonke Msimang, "All Is Not Forgiven: South Africa and the Scars of Apartheid," *Foreign Affairs*, January/February 2018, 32, accessed April 8, 2019, https://www.foreignaffairs.com/articles/south-africa/2017-12-12/all-not-forgiven.

and transition stand "as a monument to the world."[213] Monument or not, the project of South African constitutional democracy was sold by its authors and champions as the path to a 'better life for *all* South Africans.' (This phrase can still be found on ANC election posters). It was in pursuit of these grand ideals that different races were urged to unite behind the mantra of forgiveness and the ideology of reconciliation. Without either, the fabled better life would not be attained. The mythologizing of the transition *was* remarkable: the decision to negotiate a transition, rather than a full blown race war was a victory. The fundamental nature of the process which ended Apartheid and ushered in democracy was by its very nature a compromise and negotiation. The drafting of the constitution, the imaginary of a new state: all involved painstaking negotiations. It was compromise which allowed a relatively peaceful transition to democracy but conversely also left the new government with its hands tied in many ways. The new government was populated by individuals who themselves, had often been the victims of the *ancien regime*, and had been left to clean up the mess of their predecessors. This is of particular importance because the democratic dispensation would require that the needs and plight of *all* citizens be addressed; not simply those who belonged to the white minority population, as had been the case. So the new government, which was going to face a mammoth task even if it had every tool at its disposal, was constrained by the same factors which had allowed it to come into being.

Having a constitution which is viewed by the world as a monument did not rip down the systems of exclusion built by the Apartheid regime (which was just the most recent iteration of colonialism in the country). The Constitution did not house, clothe, educate or feed the citizens

[213] Tembeka Ngcukaitobi, *The Land Is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism* (Cape Town, South Africa: Penguin Random House, 2018), 1.

whose rights it enshrined. Msimang argues that a more robust Truth and Reconciliation Commission would have engaged with the socioeconomic consequences of Apartheid, not just individual cases of human rights abuses.[214] Perhaps it is this limitation of the transitional justice process, and scepticism driven by a new generation of South Africans, which has resulted in the ANC dramatically change course on its position on the issue of land. After all, it was widely accept at the time, that Apartheid was a crime against humanity, but to date, only one person — Eugene de Kock — faced jail time for it.

Lackluster governance has resulted in the unraveling of the mythology that Msimang refers to, which underpins the legitimacy of the democratic South African state. The founding contract of the new South Africa — between the state and all of the population — was that forgiveness and unity would lead to a more prosperous future for all. Twenty-five years into democracy, this promise has begun to ring hollow. The populism which now flows through the veins of contemporary political discourse is the first sign that the myth is cracking, and at the forefront of this new populism is the emotive issue of land.

As South Africa celebrates 25 years of democracy, it is clear that while many things have changed, many others have not. Despite the controversial issue of land and property in the constitutional negotiations of the early 1990s, ultimately pragmatism and compromise prevailed and the democratic transition was *not* derailed over the subject. But while the ANC Constitutional Committee feared in 1991 that the land issue could threaten negotiations, it appears that the same issue is threatening the framework born out of those negotiations. Therefore, it appears, that despite nearly three decades of democratic rule in a country where the

[214] Sisonke Msimang, "All Is Not Forgiven: South Africa and the Scars of Apartheid," *Foreign Affairs*, January/February 2018, accessed April 8, 2019, https://www.foreignaffairs.com/articles/south-africa/2017-12-12/all-not-forgiven.

Constitution enshrines socio-economic rights, the issue of land still elicits such a powerful response from the electorate. This suggests that the glacial pace of land reform is not acceptable to South Africans. The legitimacy of this frustration and anger is unquestionable. But is the Constitution really to blame?

The Constitution is not, in fact, an obstacle to land reform, but rather a mechanism and a document which demands that the political establishment undertake such reforms. Land reform, and indeed the expropriation of land without compensation, can happen without a constitutional amendment. Section 25 (2) states that "property may be expropriated only in terms of law of general application (a) for a public purpose or in the public interest."[215] The public interest, for the purposes of Section 25, "includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources."[216] Furthermore, land reform is protected from the rest of Section 25 in Section 25(8), which states, "no section of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1)."[217] Evidently, the Constitution is not an obstacle to sweeping state-led land reform. Even the previous policy of 'willing buyer, willing seller' was a simple ANC policy decision which could be reversed without a constitutional amendment. Speaking at an event in Cape Town, Advocate Tembeka Ngcukaitobi a member of the South African Law Review Commission and author, recently, of *The Land Is Ours*, stated: "There needs to be political will. There is no need

[215] "The Constitution of the Republic of South Africa, 1996," Department of Justice, last modified 1996, accessed December 9, 2018, http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf.
[216] "The Constitution," Department of Justice.
[217] "The Constitution," Department of Justice.

for constitutional amendments, and I have told MPs as much."[218] Ngcukaitobi is not alone in defending the Constitution from the contemporary political rhetoric. As previously mentioned, Advocate Ngcukaitobi — who is frequently an acting judge in the Land Claims Court — believes parliament was lucky not to be taken to court for constitutional failure's relating to land reform.[219] But instead, it seems as if the Constitution is on trial. As previously discussed, Professor Penelope Andrews argued in a 2017 op-ed that, "it's not the constitution's failure to deliver "radical economic" transformation, but a lacklustre government that has forgotten its promises – first adopted in the Freedom Charter and then again in the Constitution."[220] So if the Constitution is not to blame for the disappointing rate of land reform, then why is it being blamed? Advocate Ngcukaitobi argues "the ANC [is] using the Constitution as a scapegoat. To amend section 25 is constitutionally unnecessary."[221]

The ANC's shift from the leading opposition party involved in negotiating and drafting the Constitution with the National Party, to one which describes it as a stumbling block for economic transformation is significant. But by blaming the Constitution for the slow progress on economic issues of such consequence as land, the party is able to deflect the spotlight away from its own record. Perhaps the gravest threat to the 1996 Constitution came from the party which

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[218] Kamva Somdyala, "Land Claims Court's Mandate Has Been Diverted - Ngcukaitobi," *News24* (Johannesburg, South Africa), April 3, 2019, 1, accessed April 29, 2019, https://www.news24.com/SouthAfrica/News/land-claims-courts-mandate-has-been-diverted-ngcukaitobi-20190403.
[219] Marianne Merten, "Amending Section 25: When Election Rhetoric and Real Law-Making Collide," *Daily Maverick* (Johannesburg, South Africa), March 10, 2019, accessed April 9, 2019, https://www.dailymaverick.co.za/article/2019-03-10-amending-section-25-when-election-rhetoric-and-real-law-making-collide/.
[220] Penelope Andrews, "South Africa's Problems Lie in Political Negligence, not its Constitution," *The Conversation*, last modified July 4, 2017, accessed April 9, 2019, https://theconversation.com/south-africas-problems-lie-in-political-negligence-not-its-constitution-80474.
[221] Kamva Somdyala, "Land Claims Court's Mandate Has Been Diverted - Ngcukaitobi," *News24* (Johannesburg, South Africa), April 3, 2019, 1, accessed April 29, 2019, https://www.news24.com/SouthAfrica/News/land-claims-courts-mandate-has-been-diverted-ngcukaitobi-20190403.

helped draft it; after ousting his predecessor, President Jacob Zuma took office in 2009 under a cloud of suspicion, as 783 chargers of corruption, money laundering and racketeering had been thrown out of court on a technicality.[222] This was only the beginning, and by the time he left office in early 2018, Minister of Public Enterprises, Pravin Gordhan speculated "that R100bn (approximately $7bn) or more could have been lost"[223] due to corruption under Zuma. The economic costs were disastrous. A report compiled by the Bureau for Economic Research found the South African economy "could have been up to 30% larger and created 2,5-million more jobs" had the country kept pace with pre-Zuma growth.[224] Perhaps the most infamous incident of corruption under Zuma was when he appropriated $25 million in state funds to upgrade his personal home under the guise of 'security upgrades.'[225] While the economic losses were great, and may one day be properly calculated, the cost of destroyed trust and missed opportunities is incalculable.[226] A 2017 New York Times op-ed entitled "Jacob Zuma and the theft of South Africa," accurately described the damage wrought under Zuma's leadership: "A decade of President Jacob Zuma's leadership has seen Africa's oldest liberation movement become a

[222] Tanisha Heiberg, "South African Supreme Court Upholds Reinstating 783 Corruption Charges Against Zuma," *Reuters* (London, United Kingdom), October 13, 2017, 1, accessed April 30, 2019, https://www.reuters.com/article/us-safrica-politics-zuma/south-african-supreme-court-upholds-reinstating-783-corruption-charges-against-zuma-idUSKBN1CI1B7.
[223] Khulekani Magubane, "SA May Have Lost R100bn or More to State Capture - Gordhan," *News24* (Johannesburg, South Africa), May 15, 2018, accessed April 30, 2019, https://www.fin24.com/Economy/sa-may-have-lost-r100bn-or-more-to-state-capture-gordhan-20180515.
[224] Claire Bisseker, "R1-trillion: The Cost of the Zuma years," *Sunday Times* (Johannesburg, South Africa), October 12, 2018, accessed April 30, 2019, https://www.timeslive.co.za/politics/2018-10-12-r1-trillion-the-cost-of-the-zuma-years/.
[225] Karen Allen, "Nkandla: South Africa's Zuma Challenged in Top Court," *BBC* (London, United Kingdom), February 9, 2016, accessed April 30, 2019, https://www.bbc.com/news/av/world-africa-35530531/nkandla-south-africa-s-zuma-challenged-in-top-court.
[226] Chris Bateman, "True Cost of State Capture Incalculable – a Shocking Reprise," *Biz News* (Johannesburg, South Africa), March 1, 2019, accessed April 30, 2019, https://www.biznews.com/leadership/2019/03/01/true-cost-state-capture-incalculable.

caricature of corruption and factionalism."[227] Beyond reputational and economic damage, the Zuma era cost the ANC electoral support. In the 2016 municipal elections, the largest opposition party, the Democratic Alliance (DA) had its strongest showing ever: the ANC lost control of the country's economic powerhouse, Johannesburg, the capital city of Tshwane and the DA strengthened its control of Cape Town.[228] The rise of the DA, coupled with the previously explained emergence of the EFF saw the ANC with its back against the wall. The issue of land, with its delicate history, provided the low-hanging political fruit to be deployed as a scapegoat. So while Zuma's call for the expropriation of land without compensation in his February 2017 State of the Nation address coincided with the increasing relevance of the EFF, it was also 6 months after the municipal elections which saw a dramatic loss in ANC support. As Professor Lungisile Ntsebeza said, Zuma "likely saw the question [of land] as an instrument to extend his life in the ANC."[229] As the leader of the organization who had overseen the dramatic loss of electoral support, in the interest of political expediency, he needed to deflect attention to stay in office. This was not simply a power play. The protections afforded to him as President of the Republic, including access to state funds to ward off the numerous legal battles he faced relating to corruption and impropriety, fortified his will to cling to power. The authenticity of the motivations, then, for the ANC's dramatic shift in policy, are questionable at best.

As this investigation has demonstrated, the Constitution as it stands is not an impediment to land reform, but rather a vehicle for it. Therefore, a constitutional amendment is not necessary.

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[227] Ivor Chipkin, "Jacob Zuma and the Theft of South Africa," *New York Times* (New York, NY), December 12, 2017, 1, accessed April 30, 2019, https://www.nytimes.com/2017/12/12/opinion/jacob-zuma-gupta-corruption.html.
[228] Ivor Chipkin, "Jacob Zuma and the Theft of South Africa," *New York Times* (New York, NY), December 12, 2017, 1, accessed April 30, 2019, https://www.nytimes.com/2017/12/12/opinion/jacob-zuma-gupta-corruption.html.
[229] Lungisile Ntsebeza, "This Land Is Our Land," *Foreign Policy*, May 3, 2018, accessed April 10, 2019, https://foreignpolicy.com/2018/05/03/this-land-is-our-land/.

However, given that the ANC is likely to remain in power for the foreseeable future and they have pledged to deliver such an amendment, it appears unlikely that they will make an about turn anytime soon. Political expediency will win the day, and the Constitution is likely to be amended. Such a move would be a mere technicality, as Sachs, Moosa, Ngcukaitobi and Hall have all argued, if it is not accompanied by comprehensive and deliverable policy documents . If the debate about land expropriation is a symptom of the flaws of the status quo, the ANC needs to tackle the issues head on with robust plans to accelerate the pace of change. This, as Advocate Ngcukaitobi argues, can only be achieved with political will. And it will demand the ANC returns to the lofty egalitarian ideals on which the party was founded and upheld throughout the darkest days of Apartheid. Only if this is done, will the party be able to demonstrate that recent shifts in policy are not the shallow politicking of a once great liberation movement anxious at the prospect of losing power, but rather attempts to fulfill the promises made in Kliptown in 1955 and with the adoption of the Constitution in 1996.

Conclusion

The dispossession of black land through the colonial and Apartheid eras was used as an instrument of control and oppression, with ruinous economic, social and emotional consequences. For this reason, by the advent of democracy in the early 1990s, the issue of restitution and reform were high on the agenda. At the time, 87% of the country's land was in the hands of the minority white population, which was only 13% of the population. This is a stark illustration of a country whose distribution of wealth and resources has been denounced as the most unequal in the world. As the result of an unlikely alliance of the African National Congress, the World Bank, and, more reluctantly, the National Party, the economic and political success of the new political dispensation would be linked to a successful grappling with this issue.

During the period in which the ANC functioned as a successful liberation movement, operating for decades under intense pressure from the Apartheid regime, the organization was able to effectively keep the injustices being committed by the regime in the consciousness of the domestic and international audiences. Tactics varied, and at times included the principle of an armed struggle through guerilla strategies, but the objectives remained unchanged. But the restraints and demands of this pressure left little time for coherent and robust policy debates for much of the second half of the twentieth century. Indeed, at the time, it was near impossible for the ANC leadership to meet. Many were living in exile in various countries, while others, like Nelson Mandela and Walter Sisulu, were imprisoned in South Africa. Once change began, it came quickly, and the ANC was forced to make a rapid shift from being a politically powerless but morally powerful thorn in the Apartheid government's side to a government in waiting. Furthermore, this shift required personal reflection for a group of people, many who had been

involved in guerrilla tactics and saw themselves as revolutionaries, who were now suddenly thrust into power. This included becoming custodians of Africa's largest and most sophisticated economy, and attempting to address the injustices of the past within the constraints of their newfound political and economic power. In the foregoing, I have traced the myriad tensions and competing priorities which the organization was forced to reconcile with, as they sought to form a united front against the National Party in constitutional negotiations. As the policy prescriptions demonstrated, the result was a number of sometimes incoherent and dissonant policies which, twenty-five years after their adoption, have not delivered on the promises of the Constitution.

If, as has been suggested here, the controversy over land is a symbol of unresolved injustices, then its resurgence as a flashpoint in contemporary South African politics is an indictment of the first twenty-five years of democracy and a demonstration of the limits of the rights-based framework. While a lot of progress has been made in expanding access to housing, electricity, water, healthcare and education, the issue of land has stubbornly persisted. The dark and painful history of land in the country has allowed the issue to be exploited for political gains: both to deflect from the failures and missteps of the ANC government and to highlight that political liberation did not, by default, result in economic liberation. The concerns and frustrations underpinning these arguments are legitimate, but the contemporary debate has seen the Constitution and the legitimacy of the democratic transition called into question, with no honest accounting of the political establishment's track record. Only when this is addressed will

the country be able to create the effective diagnostics required to see the economic transformation it so desperately needs.

Given the excitement and enthusiasm that greeted the Constitution in the 1990s, it was inevitable some disappointment would follow. While the document and its promise took on an almost mythological glow — heralding a new era for human rights and constitutionalism — the challenges it, and the government it created, were to face, would be tremendous. The expectation that a skillfully drafted legal document would swiftly and efficiently reverse the socioeconomic legacies of centuries of colonialism and nearly five decades of Apartheid brutality may well have been, as Makau wa Mutua argued, misguided. Ironically, South Africa benefited from being a latecomer to the post-colonial sensibility; drafters could evaluate the mistakes and success of the post-independence Constitutions of both African neighbors and other nations around the world. But given that the stakes are so high — for issues of justice, dignity and equality are at stake — no expectation, I would argue, is too harsh. To make excuses for the failure of the rainbow nation to deliver on the promise of its founding would be to compromise the humanity that animated its new constitution — the quality that the nation strove so mightily — and against such colossal odds, to preserve.

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