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Land Registration and Land Reform in South Africa, 29 J. Marshall L. Rev. 809 (1996)

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LAND REGISTRATION AND LAND REFORM IN SOUTH AFRICA

F.G.T. RADLOFF*

INTRODUCTION

South Africa is the only country in Africa that spans the continent from East to West, from the warm Indian ocean to the cold South Atlantic. It therefore has a natural variety that is staggering; incredibly rich flora and fauna (980 indigenous tree species and 900 bird species) with magnificent game parks and vast landscapes. In addition, the people who inhabit South Africa are as diverse as the country itself, ranging from stone age hunter-gatherers to BMW-driving yuppies. Therefore, South Africans take umbrage at scoffs such as the following by poet Roy Campbell who wrote: "South Africa renowned both far and wide for politics and little else besides."¹

South Africa is an old civilization. Some of the most primitive examples of humankind were found at Sterkfontein. On the other hand, in a recent essay, Gerd Behrens said the following about South Africa: "... many feel that Francis Fukuyama had South Africa in mind when he wrote his famous essay: the advent of a black led government fits the bill for 'the end of history,' and Nelson Mandela is perfectly cast as 'the last man'."²

I. THE INFLUENCE OF ROMAN DUTCH LAW ON SOUTH AFRICA

For much of its history, Khoisan nomads, such as the Hottentots and the Bushmen, inhabited South Africa. Migrating cattle ranching blacks from East Africa and white settlers from the South eventually forced the Khoisan nomads into the largely uninhabited desert regions of the North West. The nomads understandably had no fixed abode, while the black people subscribed to tribal systems in which the chiefs were the only "landowners." This custom would clash with European concepts of land holding

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1. Roy Campbell, *The Waygoose*, in OXFORD DICTIONARY OF MODERN QUOTATIONS 45 (Tony Augarde ed. 1991).

2. Gerd Behrens, *Roads to Damascus*, TIME (S. Afr.), July 24, 1995, at 60.

in due course.

In the seventeenth century, the Dutch created a self-governing secular Republican State which not only survived against all odds — the Spanish, the French and the English — but flourished beyond all expectations. As bold and daring merchants, the Dutch left few areas of the world untouched. They founded New Amsterdam on Manhattan Island in 1625 and established a settlement at the Cape of Good Hope in 1652. Peter Stuyvesant was obliged to hand New Amsterdam, which later became New York, over to the English in 1664. Jan van Riebeeck and his successors on the other hand, managed to hang on to the Cape of Good Hope until the early nineteenth century. The colony was only permanently ceded to the British in the Peace Settlement of Vienna in 1814.

The Dutch carried their law into their settlements. The phrase "Roman Dutch law" was invented by Simon Van Leeuwen. Roman Dutch law is derived from two sources, Germanic Custom and Roman Law. The growth of economic activity and trade during the Middle Ages inevitably led to a situation where medieval institutions proved inadequate to meet the needs of an ever more complex society. Northern Europeans resorted to Roman law as a logical, coherent and complete system. Scholars have described this momentous process as the "reception" of Roman law in Northern Europe.³

The Dutch Republic of the seventeenth century not only produced marvelous painters, scientists, authors, poets, admirals, explorers and inventors, but also remarkable jurists in the persons of Johannes Voet and Huig De Groot. The latter, better known as Grotius, the father of international law, is regarded by many as one of the greatest jurists Europe ever produced. Such is the common law that the Dutch introduced to the Cape.

When the British annexed the Cape in the early nineteenth century, no express stipulation was made for the retention of Roman Dutch law. The continued use of Roman Dutch law was the consequence of English law and policy that colonies acquired by cession or conquest, so far as it remained unrepealed.⁴ As the boundaries of Cape Colony enlarged, Roman Dutch law extended its sphere of influence by the same natural process of expansion without express enactment. Today, Roman Dutch law is the common law of all of South Africa. However, South Africa's common law has been influenced in almost every branch by English law. Although the influence of English law is substantial in certain branches, South African property law remains, in essence, Roman Dutch.

3. R.W. LEE, AN INTRODUCTION TO ROMAN-DUTCH LAW 2-7 (4th ed. 1946).

4. *Id.* at 9-11.

While the original Dutch settlers, followed by French, German and British settlers, occupied South Africa, Bantu-speaking peoples migrating from East Africa gradually occupied South Africa from the North and East. The Europeans and the Bantu peoples met one another in the momentous year of 1760 on the banks of the Great Fish River, which in actual fact is neither great nor abundant in fish. British authorities and, after the establishment of the Union of South Africa in 1910, South African authorities, acknowledged African customary law regarding land use and control in the tribal areas. One of the challenges facing the new South Africa is to marry traditional African land-holding concepts with Western concepts as embodied by Roman Dutch law.

II. THE FOUNDATION OF THE SOUTH AFRICAN LAND REGISTRATION SYSTEM

To give effect to South African property law, a formidable land registration system was based on two remarkable pieces of legislation, the Land Survey Act of 1927 (Act 9/1927) and the Deeds Registration Act of 1937 (Act 47/1937).⁵ It is interesting to note that these acts were passed long before the architects of grand apartheid, the Nationalist Party, came to power in 1948.

South Africa believes that an efficient system of title registration is impossible unless each registered unit of land is surveyed and represented on a diagram or general plan. Land survey is not the author's field. Therefore, the author takes the liberty of associating himself with Dr. Clarissa Fourie of the University of Natal, an acknowledged expert in the field of land surveying. South African land surveyors assure the author that South Africa's cadastre is the best in the world. South Africa has an accurately beacons boundary system. Boundaries are straight lines between physical marks creating what is known as "physical cadastre." A physical cadastre is evidenced on the ground and not held only as information in an office, as happens with a numerical cadastre.

In an accurately beacons boundary system, the beacon is the evidence that is used to indicate the position of a boundary. Coordinates and other evidence are only used to assist in re-establishing the boundary, which follows an imaginary line. This imaginary line often does not conform to any physical representation that can be seen by communities on the ground (besides the bea-

5. The Sectional Titles Act, 255 REPUBLIC OF S. AFR. GOVERNMENT GAZETTE, No. 10440, Act No. 93 (1986). This Act enables a person to obtain full freehold title in a portion or part of a building regardless of how the building is used. *Id.* This Act is based on the sound tenets of both the Deeds Registries Act of 1937 and the Land Survey Act of 1927. *Id.*

cons themselves). If the beacon cannot be found, coordinates and other evidence are used to relocate the beacons and they serve as additional evidence of a boundary. Fortunately, South Africa has an excellent system of national coordinates to which most parcels of land are tied.⁶

According to Dr. Fourie, there is a very good chance that general boundaries will be suggested as a way of making surveying cheaper. A general boundary is one where the boundaries are agreed boundaries between neighbors. The coordinates that are often linked to a general boundary are for land administration and planning purposes only. Although these coordinates are sometimes used to create a registry map, this is used for management purposes and not as a legal document. Most of the time, but not always, general boundaries have a physical representation. The physical representation on the ground is used as the legal evidence in the case of a dispute. An aerial photo or orthophoto of the area is used as additional evidence in some cases.

The cost difference between beacons and permanently marked general boundaries, if both are coordinated, is that accurately beacons are much more expensive. One reason is because of the time necessary to relocate the existing beacons rather than measuring a boundary. Another reason why beacons are more expensive is because there are strict accuracy requirements so that the legal evidence, the beacons, can be found and/or replaced. By comparison, the accuracy requirement for general boundaries is lower; coordinates used for administration and planning can be less accurate and still reliable. Finally, as the legislation stands, only certain categories of surveyors can place beacons making the survey system costly. In other countries, survey technicians, often working for a municipality, are used to survey the general boundaries making the coordination exercise possibly much cheaper.

However, a country must decide where the cost of security of tenure will lie: whether in the insuring of title (the United States), in the law courts (the United Kingdom or India), with government funds (Australia) or whether the cost must be born by the poor in terms of vigilante groups (South America), or in terms of speculators buying off coalitions (Ibadan-Nigeria) or in the system of accurately beacons boundaries and the conveyancing system as in South Africa.⁷

The vision which underlies Dr. Fourie's entire report is that the land distribution program *must* work and people *have* to be

6. DR. CLARISSA FOURIE, *OPTIONS FOR THE CADASTRE IN THE NEW SOUTH AFRICA: REPORT TO THE SOUTH AFRICAN COUNCIL FOR PROFESSIONAL AND TECHNICAL SURVEYORS* 13, 50 (Apr. 1984).

7. *Id.* at 14.

housed to have peace in South Africa. The survey industry is necessary to make these programs work. The present cadastre system needs to be adapted to serve the needs of a developing African country undertaking massive reconstruction and redistribution programs for a largely black and poor population. If the survey industry and the present cadastre do not serve these needs, progress will be increasingly sidelined. It is in the best interest of the population to accept the sound principles underlying South Africa's cadastre as embodied in the Land Survey Act of 1927.

The history of land registration in South Africa commenced in 1652. The history of colonization and expansion northward determined the underlying principles of South Africa's system of registration. The system basically had its origins in a placet of Charles V of Holland in 1529 which provided that every sale or hypothecation of land, houses or other immovable property must take place before a judge. An edict of 1560 provided that registers should be kept of such transactions. At the Cape two commissioners of the Court of Justice were appointed to execute deeds.

Sir John Cradock, Governor of the Cape from 1811 to 1814, is regarded as the father of the South African land registration system. He issued a proclamation in 1813 which endeavored, in his own words, "to place property upon that solid and secure foundation, without which fair adventure and speculation cannot arise, and even common industry and labor will lose much of its effect."⁸

Various ordinances, proclamations and enactments followed Sir John Cradock's initial proclamation resulting in South Africa's first Deeds Registry Act of 1918. The Act was subsequently replaced by the present remarkable Deeds Registries Act. This act, a veritable "tour de force" in common sense, embodies the best of South African common law, and to its credit the author must stress that it has always been, still is and always will be color-blind. The sound survey principles embodied in our Land Survey Act of 1927, coupled with the down to earth, no-nonsense approach of our Deeds Registries Act resulted in a land registration system that worked so well and still works so well that title insurance is unknown in South Africa simply because there is no need for it.

III. THE PROPERTY LAWYER (CONVEYANCER) AND THE REGISTRAR OF DEEDS

It is one thing to be blessed with sound legislation, but another matter to apply it properly. Two categories of people attend

8. R.J.M. JONES, COVENYANCING IN SOUTH AFRICA 3-5 (1985).

to land registration in South Africa: (1) specialized lawyers known as conveyancers representing the private sector; and (2) Registrars of Deeds assisted by examiners representing the public sector. There is a healthy interaction between the private and public sectors, mainly because their respective roles are clearly defined. Mutual respect is a given, mainly because both conveyancers and registrars (and their examiners) are well qualified.

A person cannot become a conveyancer in South Africa unless he or she is admitted as an attorney in the Supreme Court of South Africa.⁹ To be admitted as an attorney in the Supreme Court, one needs to have completed a law degree at a South African university and have practiced law for at least two years.¹⁰ The Court requires one to pass a tough entrance exam known in South Africa as the admission exam.¹¹ To qualify as a conveyancer, a further examination is required.¹² The conveyancing examination in South Africa is notorious and regarded as one of the most difficult exams in a lawyer's career. Deeds Office examiners are public servants and in order to get a promotion they must pass a number of strenuous exams that the South African Department of Justice administers at special law schools.

A registrar's primary duty is to ensure that transactions which come before him for registrations are in proper form and that their nature is such that they are capable of registration. If both of these requirements are met, the registrar is obliged to effect registration. If one of the requirements is not met, the relevant deeds are rejected and registration is refused until the defects are cured. In the exercise of his duties the registrar may require proof of any fact necessary to establish eligibility of registration. Such proof may be by affidavit or otherwise, for example, by a certificate from the conveyancer.¹³

The object of registration is to afford protection for registered rights, to give notice to the public of such protection and to provide an easily accessible record should disputes arise. Personal rights are rights which one person has against another, whereas real rights are those rights that a person has against the whole world in general. While personal rights are incapable of being registered, the transference of real rights in South Africa can only be achieved through registration.¹⁴

9. Attorneys Act § 18, Act No. 53, STAT. REPUBLIC OF S. AFR. (1979).

10. *Id.* § 2.

11. *Id.*

12. *Id.*

13. Deed Registries Act § 4(1)(a), Act No. 47, STAT. OF THE UNION OF S. AFR. (1937).

14. J.E. KNOLL, 8 BUTTERWORTH FORMS & PRECEDENTS: PROPERTY LAW CONVEYANCING 2 (1994).

The registrar must keep, through the use of a computer or other means, registers containing the information necessary for carrying out the provisions of the Deed Registries Act or any other law and maintaining an efficient system of registration calculated to afford title security and ready reference to registered deeds.¹⁵ It is important to note that registration of land is impermissible without an approved diagram. The registrar cannot accept any general plan or diagram unless the Surveyor General has approved it. The Surveyor-General is a public official appointed to check and approve diagrams and General Plans prepared by land surveyors.

As far as the conveyancer is concerned, it should be noted that a registrar shall not attest, execute or register a deed of transfer, mortgage bond, certificate of title or registration of any kind mentioned in the Deeds Registries Act unless it has been prepared by a conveyancer practicing in the province within which the registry is situated.¹⁶ A practicing conveyancer is one who the Supreme Court has duly admitted to practice law and is in private practice on his or her own, is with a firm or professional company of attorneys or is employed as a professional assistant by any category of practitioner. One exception to this is conveyancers who are employed in the office of the State Attorney. The rule that the deeds mentioned must be prepared by a conveyancer practicing in the province in which the registry is situated is inviolate unless provided for by a law other than the Deeds Registries Act. There are few such exceptions.¹⁷

A conveyancer who signs a prescribed certificate on a deed or document prepared for registration accepts the responsibility, to the extent regulations prescribe, for the accuracy of those facts mentioned in such deed or document, or which are relevant in connection with registration or filing.¹⁸ Furthermore, the registrar is required to accept that the facts contained in the document are conclusively proved for the purpose of examination. However, the registrar must still give effect to any court order or notification recorded in the Deeds Registry or any other legal provision affecting the registration or filing of the deed or document.¹⁹

The facts a conveyancer certifies are far reaching. A conveyancer certifies *inter alia* that to the best of his knowledge, and after due enquiry, the names, identity number or date of birth and marital status of any natural person who is a party to the deed or document, and in the case of any other person or trust, its

15. Deed Registries Act § 3(y).

16. *Id.* § 15.

17. KNOLL, *supra* note 14, at 42.

18. Deed Registries Act § 15(a).

19. KNOLL, *supra* note 14, at 45.

name and registered number, if any, are correctly reflected in the deed or document. The conveyancer also certifies that the necessary authority has been obtained for signing in a representative capacity on behalf of a company, church, association, society or other body of persons or an institution. Furthermore, the conveyancer certifies that the transaction as disclosed is authorized by, and in accordance with, the constitution, regulation or founding statement, as the case may be, of any church, association, close corporation, society or other body of persons of any institution other than a company.²⁰

These responsibilities (the examples above are far from exhaustive) can only be conferred on properly qualified persons. It not only alleviates the burden of examiners in the various Deeds Registries, but also creates a healthy balance between the functions, duties and responsibilities of private practitioners on the one hand and the State on the other hand.

Since November 1994, the Deeds Registries have become "user-pay" offices. The taxpayers' money no longer subsidizes Deeds Offices. Only people who use the Deeds Office, *i.e.*, property owners and mortgagors, are responsible for its running and maintenance and pay a prescribed fee which is very reasonable. It is also important to note that the poor are exempted from these charges. The "poor" are defined as those people buying properties worth less than R60,000,00 (approximately \$20,000).

In conclusion, it should be mentioned that some perceive the land registration system to be elitist and expensive. "Experts" have suggested that a system should be introduced whereby land, especially below a prescribed value, can be transferred as quickly, easily and cheaply as shares of stock and motor vehicles. These "experts" further maintain that there is no need for South Africa to have the world's most sophisticated land survey system and deeds registry system. In their view, technology can provide better protection than conveyancers and they suggest a system of computer registration should be introduced as soon as possible. According to this school of thought, there are two simple solutions to the problem of greater title insecurity that may arise as a result of abandoning compulsory deeds registration: (1) the State can guarantee title; or (2) property owners can obtain title insurance.²¹ This, in my view, is not a case of *experto crede* but rather the opposite, *nolli experto credere*.

20. Deeds Registry Regs., Reg. 44A (1983) (amended 1985 & 1995).

21. Free Market Foundation of Southern Africa, Submission to the Workshop on Land Rights and the Constitution (July 24, 1995).

IV. THE LEGACY OF APARTHEID

The legal profession and property industry in South Africa face a daunting challenge. Apartheid legislation excluded most South Africans from the land registration system. It is up to the legal profession and property industry to persuade the black majority that the system is sound. It was not the registration system per se that excluded blacks from owning property, but the apartheid legislation of the past. It is important to make this distinction.

Millions of South Africans are in need of proper housing. There is a wide-spread land hunger due to the fact that the old "black areas," the former "independent states,"²² as well as the former self-governing territories, Kwazulu, KwaNdebele, QwaQwa, Ka-Ngwane, Lebowa and Gazankulu, are over-populated and impoverished. This situation has caused a massive trek to urban centers resulting in rampant urbanization of South America and Central Africa. The challenge now is to fast-track land delivery on an organized and rational basis to avoid the creation of another Kinsasha, Lagos, Calcutta, Cairo, Mexico City or Bombay in South Africa.

South Africans are obsessed with a number of issues. South Africans are searching for a method to stimulate the economy to ensure economic growth on an ongoing basis. They also strive for a way to implement a real, viable and fair program of land reform. Furthermore, South Africans want to elevate the black majority's quality of life through improved job opportunities, education, health services and housing. Lastly, South Africans want the government to curb crime. These desires led to the government's new policy of reconstruction and development, the so-called RDP.

White South Africans gained control of all of South Africa with the formation of the Union of South Africa in 1910 after a century and a half of virtually continuous warfare, strife and bloodshed. "Land reform legislation" leading to the acknowledgment and establishment of tribal areas, in other words black areas, was passed in 1913 and again in 1936.²³ The general policy regarding black people was aimed at setting aside (or "reserving") certain areas of land for their exclusive (tribal) occupation, restricting their access to land not so set aside, controlling their

22. The old black areas include the former independent states or the so-called TBVC countries; the abbreviation for Transkei, Bophuthatswana, Venda and Ciskei.

23. Black Land Act, Act No. 27, STAT. OF THE UNION OF S. AFR. (1913); Development Trust & Land Act, Act. No. 18, STAT. OF THE UNION OF S. AFR. (1936).

freedom of movement and excluding them from political participation.

When General Jan Christiaan Smuts was defeated by the Nationalist Party in the elections of 1948, the so-called "apartheid regime" came to power. From 1948 to 1994, the government created a massive apartheid infrastructure and then proceeded, during the late 1980s, to dismantle it to their own and the world's amazement. Apartheid was a social experiment that failed dismally. Apartheid legislation affected virtually every sphere of human life and activity. For instance, mixed marriages were forbidden. As far as land and property were concerned, no piece of legislation did more damage than the Group Areas Act of 1966.²⁴ The repeal of this notorious act, which many regard as the bastion of apartheid philosophy, led to apartheid's final demise.

The Group Areas Act set aside occupational areas for racial groups; hence the name of the act. The government set aside areas for the White group, the Colored group, the Indian group, the Chinese group and the Malay group.²⁵ As far as Blacks were concerned, comprising roughly eighty percent of the country's population, some of the areas set aside for them became "independent," the so-called TBVC countries. Others became self-governing territories. The government also earmarked trust and tribal areas for eventual consolidation into either independent or self-governing territories. The essence of the legislation was that one group could not obtain ownership of land in the area of another group. Not only was the country divided into racial areas, but ethnic areas as well. In the twilight years of apartheid, the argument that people's ethnic, cultural and language differences were recognized and catered to was strongly canvassed in defense of separate development (the euphemism for "apartheid"). Neither South Africans, nor the world, could be convinced of the "merits" of apartheid.

The white minority eventually agreed through a referendum to turn the country over to the black majority. Armageddon was avoided. South Africans are rather intrigued with the world's fascination with this "miracle." The miracle can be ascribed to the simple fact that common sense prevailed. The white minority realized that apartheid failed because it refused to recognize the real needs of the people: their aspirations, their education, their hunger for land and property and their ambition for a better life. Everyone's overwhelming obsession to become part of the greater world of culture, trade and sport compelled the whites to relinquish power.

24. Group Areas Act, Act No. 36, STAT. REPUBLIC OF S. AFR. (1966).

25. *Id.*

The whites, at long last, embraced the inevitable truth regarding reform that J. Foster so beautifully expressed:

How dangerous to defer those momentous reformations which the conscience is solemnly preaching to the heart. If they are neglected, the difficulty and indisposition are increasing every month. The mind is receding, degree after degree, from the warm and hopeful zone till at last, it enters the arctic circle, and become fixed in relentless and eternal ice.²⁶

The abolition of apartheid legislation, and especially the Group Areas Act and influx control legislation, led to a massive movement of people from rural to urban areas. This caused great disruption and, in some cases, land invasions. South Africa is now faced with the situation that the present system of establishing new towns and cities to accommodate people rushing to the exploding urban centers is simply inadequate to cope with the situation.

V. THE REFORM PROCESS

South Africa has characteristics of both the first world and the third world. In the first world, the following procedure is followed for establishing new residential areas: (1) land is identified and (2) laborious investigations are then conducted to establish whether the land is suitable for residential development. For example, fifty year flood water lines are determined and geotechnical surveys are made to see whether the area is safe. Mineral rights are sorted out, a proper survey is conducted and water, electricity and sewage are installed. Roads are built and plots or lots are pegged and shown on a property surveyed general plan. A marketing plan is then launched, deeds of sale concluded and transfer of the various properties are given to the purchasers after due proclamation of the new town.

In the third world the exact opposite happens. Land is invaded and people simply squat, creating vast shanty towns with houses made of corrugated iron, cardboard, hardboard, plastic bags and the like. The need then arises to create order out of the chaos (from the Western perspective). Efforts are then made to provide some of the basics: to provide running water (a tap for about every 100 people), to identify lots and to find a mechanism to protect people's rights. The process is consequently the exact reverse of the first world or Western experience.

26. J. FOSTER, *THE NEW DICTIONARY OF THOUGHT: A CYCLOPEDIA OF QUOTATIONS* 551 (Tryon Edwards et al. eds., 1965).

A. *The Development Facilitation Bill*

The Development Facilitation Bill²⁷ (to become law once the regulations have been framed) is, in the author's view, a laudable effort to fast-track land delivery. The first world method of establishing a new town is too slow and cumbersome to cope with South Africa's present situation and the third world method is totally unacceptable. The Bill creates a mechanism to fast-track land delivery by shifting the onus for establishing whether raw land is suitable for residential development from the public to the private sector. A host of government departments will no longer be called upon to approve the proposals up front. This will become the duty and obligation of the professionals: engineers, land surveyors and conveyancers. They will be called upon to give certificates, all within their specific fields of knowledge, to the effect that the land is suitable for residential development. Provisional transfer will then be registered to enable people to obtain mortgage finance from financial institutions. The necessary governmental approvals will only be obtained *ex post facto*, and the township formally established, after the opening of the township register and proclamation. The provisional titles will then be upgraded to full freehold titles by way of endorsement.

S.B.O. Gutto, a black academic and an Associate Professor of Law at the University of Witwatersrand, argues:

Property and proprietary relations are changing and changeable whenever they are no longer able to meet the broad needs and interests of time. Real society is thus constituted of conservative and revolutionary seeds and forces that at times consolidate the existing forms of property, while at other times radically altering the prevailing property and proprietary relations and creating or recognizing new forms.²⁸

Gutto goes on to say:

Once the new capitalist-orientated and racially motivated property regimes were entrenched in the life of the colonies, it was a matter of time before the privileges enjoyed by the white private owners started appealing to the now de-throned indigenous peoples. The "title deed", the legal documentation of ownership of land or landed property, eventually acquired a mythical and imposing significance as it was conceived to be the main reason for the economic progress

27. Development Facilitation Act, 364 REPUBLIC OF S. AFR. GOV'T GAZETTE, No. 16730, Act No. 67 (1995).

28. S.B.O. GUTTO, PROPERTY AND LAND REFORM: CONSTITUTIONAL AND JURISPRUDENTIAL PERSPECTIVES 17 (1995). Gutto dedicated this book, *inter alia*, "for millions in the world who are dispossessed and marginalised, who struggle to regain their lost and denied humanity." *Id.*

of white. Little did the people appreciate the fact that in addition or in the absence of title deeds, a host of other productive resources such as finance, infrastructure and marketing facilities were preserved for the sole access and utilization of the white property owners.²⁹

Gutto stresses that "for most of Africa the free market mechanism that comprises the dominant ideology of today, was introduced via non-market processes, with imperial state and private sector combining their energy and resources to ensure the success of the imperialist mission."³⁰ It may well be correct to maintain that the apartheid regime of white South Africa did exactly the same, especially during the 1960s, 1970s and 1980s.

When discussing land reform in South Africa, one must accept that an element of social engineering is involved. The entire apartheid regime was a massive exercise in social engineering and it appears that further social engineering will be required to redress the imbalances. Many perceive that it would be inequitable to expect free market forces to resolve the issue. As a result of the apartheid philosophy, and the harsh implementation of that policy, the playing fields are simply not equal. In Gutto's words:

the concern with the role of the state in property is therefore not whether this is necessary or good or bad, because it is essentially inevitable at this historical juncture. The issue is how and in whose interest the state exercises its power of sovereignty over property and land rights.³¹

The original ANC Reconstruction and Development Program of 1994 was explicit about land reform. The Program recognized that mere repeal of discriminatory legislation was not sufficient. It mandated a "demand driven" fundamental land reform program promising greater land security and housing for all. Further, the Program distinguished between land restitution and land distribution.

B. Constitutional Protections

The protection of property rights was a hotly contested issue at the multiparty negotiations leading to the adoption of South Africa's interim Constitution. After consensus was reached on the rest of the interim Bill of Rights, the parties remained unable to agree on an interim property right. It was only in the last days before the deadline, and after the establishment of an ad-hoc technical committee to formulate proposals, that the negotiating

29. *Id.*

30. *Id.*

31. *Id.*

forum ratified § 28 of the interim Constitution. The section reads as follows:

- (1) Every person shall have the right to acquire and hold rights in property, and, to the extent that the nature of the rights permit, to dispose of such rights.
- (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.
- (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.³²

The property clause makes a clear distinction between a deprivation of a right and the expropriation of a right. In the case of deprivation, no compensation is payable, the only requirement being that the deprivation shall only be permitted "in accordance with a law."³³ Nevertheless, some submit that, in practice, the Constitutional Court would condone such an action only if no other remedy was available to the government. If the same result can be achieved without depriving the person of his or her right in property, the Constitutional Court will in all probability set the deprivation aside.³⁴

Furthermore, the property clause does not distinguish between immovable and movable property. The clause also appears broad enough to include intellectual property.

Many see the property clause as an entrenchment of the prevailing property regime. It is important to note that this "entrenchment" is directly qualified by the so-called equality clause, § 8 of the interim Constitution. The equality clause states that every person shall have the right to equality before the law and equal protection of the law.³⁵ Additionally, it states that no person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of the provision, on one or more of the following grounds: race, gender, sex, ethnic or social origin, color, sexual orientation, age disability, religion, conscience, belief, culture or language.³⁶ The important subsection,

32. S. AFR. CONST. § 28.

33. S. AFR. CONST. § 28(2).

34. *Id.*

35. S. AFR. CONST. § 8(1).

36. S. AFR. CONST. § 8(2).

however, is sub-section (3) which reads as follows:

(a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with sub-section (2) had that sub-section been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.³⁷

Sub-section (4) asserts that *prima facie* proof of discrimination on any of the grounds specified in sub-section (2) shall be presumed to be sufficient proof of unfair discrimination unless the contrary is established.³⁸

C. Restitution of Land Rights Act

Sections 121, 122 and 123 of the interim Constitution appear under the heading "Restitution of Land Rights" and envisage the creation of a Commission on Restitution of Land Rights as well as a Land Claims Court.³⁹ What the Constitution envisaged has come to fruition in the form of the Restitution of Land Rights Act of 1994.⁴⁰ The Act introduces some definitions which indicate gender sensitivity and expansive inclusions of those dispossessed through forced removals. For example, "direct descendants" who are entitled to claim include "the spouse or partner in a customary union of such person whether or not such customary union has been registered." "Right in land" is defined to mean "any right in land whether registered or unregistered and may include the interest of labor tenant and sharecropper, a customary law interest. . . ."⁴¹

Chapter II of the Act establishes the Commission on Restitution of Land Rights.⁴² On January 18, 1995, the Chief Land Claims Commissioner and four regional land claims commissioners were appointed by the Cabinet after open public nominations and interviews. Two women are among the four regional commissioners. The Commission has primary and extensive powers elaborated in the Act. The Commission has the powers to receive and record lodged claims and to assist claimants in preparing their

37. S. AFR. CONST. § 8(3).

38. S. AFR. CONST. § 8(4).

39. S. AFR. CONST. §§ 121-123.

40. Restitution of Land Rights Act, Act. No. 22, STAT. REPUBLIC OF S. AFR. (1994).

41. *Id.*

42. *Id.*

submissions. Moreover, the Commission can also define issues which are in dispute before submitting them to Court and settle successfully mediated claims.⁴³

D. The Land Claims Court

The Land Claims Court will hear claims for the restitution of land rights which people lost after 1913 as a result of racially discriminatory land laws.⁴⁴ The Court, which has a president and two additional judges, has the same status as the Supreme Court. Either the Constitutional Court or the Appellate Division of the Supreme Court hear appeals from the Land Claims Court. As required by the Constitution, the Act reiterates the remedies available to claimants: an order of restoration where feasible, determination of compensation for successful claims where restoration is not feasible, the granting of an appropriate right in available state or public land where feasible and any other appropriate remedies.⁴⁵

Fikile Bam, a Johannesburg attorney, has been appointed President of the court. In contrast to most of the judicial candidates for the Land Claims Court, he escaped unscathed during the Judicial Service Commission interviews held in Cape Town during July 1995. During these interviews, the Judicial Service Commission grilled candidates about their past, particularly links to the National Party Government or lack of opposition to apartheid. One of the candidates, Dr. Anthonie Gildenhuys, vice president of the Association of Law Societies, was questioned on his membership in Broederbond. The Commission asked Gildenhuys how the public would view his appointment to the court if it knew of his membership in a think tank which helped form policies such as forced removals — the effects of which the court was seeking to undo.⁴⁶ Dr. Gildenhuys quoted President Mandela to the effect that when an Afrikaner changed, he changed completely.⁴⁷

The president of the court, Fikile Bam, comes across as a warm and humorous person. The Minister of Justice, Dullah Omar, knew Mr. Bam as a student.⁴⁸ He recounted how, in their student days, Bam would start running whenever he saw a police officer.⁴⁹ When the police called him, he would produce his pass

43. *Id.*

44. *Id.*

45. *Id.*; see also GUTTO, *supra* note 28, at 62.

46. San Vivier, *Johannesburg Attorney to Preside Over Land Claims Court*, DE REBUS, Aug. 1995, at 463.

47. *Id.* Dr. Gildenhuys has since been appointed as a judge of the Land Claims Court.

48. *Id.*

49. *Id.*

before the police could say anything.⁵⁰ Mr. Bam lists under "national service" on his curriculum vitae his arrest during 1960 after the Sharpeville and Langa massacres and his conviction and ten year imprisonment on Robben Island for conspiracy to commit sabotage.⁵¹ Forced to practice in the Transkei because he could not obtain permission to get chambers in Johannesburg, Mr. Bam stated he learned a lot about litigation from two judges in Umtata who mostly told him "not to waste their time."⁵² Mr. Bam was asked during the interviews whether his background would lead him to be less than just to landholders as opposed to the landless.⁵³ He responded that he was a land owner himself (his family had obtained freehold title to land) and that he was sensitive to the concerns of landowners.⁵⁴

E. Rural Land Reform

Regarding land reform in our rural areas, cognizance must be taken of the warning words of Clem Sunter of the Anglo-American Corporation.⁵⁵ He makes the point that in the last century the majority of Americans were employed in agriculture.⁵⁶ That figure is now reduced to three percent not because of forcible removal from the land, but because the manufacturing and service sectors are more attractive alternatives for earning a living.⁵⁷ Similar though less dramatic declines in agricultural employment are evident in Europe and Japan. Farms have merged into ever larger agri-businesses to compete in world markets. Moreover, governments have strived to keep agriculture afloat with enormous farm subsidies (currently estimated to be between \$200 and \$300 billion annually in developed countries). South Africa has not escaped these trends.

The present level of farmer's debt bears witness to the rigors and uncertainties of a life dedicated to the land. However, what makes the farmers of South Africa the ultimate entrepreneurs is the environmental challenge. Consider these statistics. The total area of South Africa is 122 million hectares of which just under 101 million hectares are farmland.⁵⁸ Of this, only 17 million hec-

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Clem Sunter, *Article*, SUNDAY TRIB. (Nigeria), Dec. 18, 1994, at A1.

56. *Id.*

57. *Id.*; THE WORLD ALMANAC AND BOOK OF FACTS 134 (Robert Famighetti et al. eds. 1985). In 1990, 2.4% of the American population worked in agriculture and in 1991 and 1992 that number rose to 2.5%. *Id.*

58. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK 388 (1995). The total area of South Africa is 1,219,912 square kilometers which converts into

tares are considered arable because of adequate rainfall.⁵⁹ The remaining 84 million hectares of non-arable farmland are natural vegetation used primarily for grazing.⁶⁰ With ten percent of its land surface considered arable, South Africa is categorized as an arid country.⁶¹ About twenty seven percent of the country is drought stricken for more than fifty percent of the time.⁶² When floods do come, as they regularly do, they inflict heavy damage in terms of life, property and the vanishing of topsoil.

Notwithstanding these sobering realities, it should be noted that South Africa, while comprising only six percent of Africa, provides thirty five percent of all the marketable agricultural products produced in Africa.⁶³ The South African Agricultural Union alleges that this achievement is the result of a free enterprise system and the protection of property rights.⁶⁴

The author in no way implies that any of the foregoing difficulties should slow down the process of land restitution. However, it would be imprudent to ignore the fact that land itself is not an asset. It is an asset only because of productive and profitable use by the owner. The commercial sector produced about ninety five percent of the total agricultural output compared to approximately five percent by the subsistence sector.⁶⁵ This is primarily due to the commercial sector's dominant position in terms of land ownership, effective land utilization and a well-developed infrastructure with extensive financing, marketing and support structures.⁶⁶

Therefore, any restitution must be accompanied by training where necessary — not only in appropriate farming methods, but also in entrepreneurship and business administration. An awareness of exactly how much the local environment can sustain in crop or livestock production has to be instilled. Restitution, therefore, involves the transfer of both knowledge and land.

121,991,220 hectares. *Id.*

59. *Id.* In 1995, of an available 121,991,220 hectares, 10%, or 12,199,122 hectares, was considered arable. *Id.*

60. *Id.* The land use in South Africa is apportioned as follows: 10% arable land, 1% permanent crops, 65% meadows and pastures, 3% forest and woodland and 21% other. *Id.*

61. *Id.*

62. *See id.* at 388-89. The increased use of water has threatened to surpass the supply. *Id.* Water conservation is essential because of the lack of arterial lakes or rivers and the danger of prolonged droughts is present. *Id.*

63. *See generally* Memorandum from the Agricultural Union of South Africa to the Constitutional Assembly of South Africa (1995) (on file with author).

64. *Id.*

65. *See generally* Background notes on the apportionment of land in South Africa from N.J.J. Oliver to the Constitutional Assembly of South Africa (1995) (on file with author).

66. *Id.*

VI. THE PROPERTY CLAUSE DISPUTE

Regarding the property clause of the interim Constitution, a fierce dispute is raging as to whether the property clause should be retained in the proposed final Constitution. Dr. Antonie Gildenhuys prepared a comprehensive report on behalf of the Association of Law Societies to the Government of National Unity for the retention of § 28.⁶⁷ He suggested that § 28(3) should be reworded as follows:

No law shall provide for the expropriation of property or any rights in property unless, in terms of such law:

- (a) such expropriation is permissible for public purposes only
- (b) provision is made for the prompt payment of compensation which is just and equitable, taking into account all factors which such law may prescribe, including but not limited to:
 - (i) the market value of the property;
 - (ii) the history of the acquisition of the right in the property;
 - (iii) the amount invested in the acquisition of the right in property and in the property;
 - (iv) the use to which the property is being put; and
 - (v) the financial loss created by the expropriation
- (c) a right of access to a Court of Law is secured to any persons having an interest in or right over the property, for the determination of any amount of any compensation to which he or she is entitled, and the period within which such compensation must be paid.⁶⁸

Dr. Gildenhuys examined the legal position of nineteen countries world-wide regarding property expropriation. In the United States, property may be expropriated for public use. In Sierra Leone, property may be expropriated if "necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the utilization so as to promote the public benefit or the public welfare of citizens of Sierra Leone."⁶⁹

Dr. Gildenhuys also examined the compensation norms of twenty odd countries. In the United States, the norm is "just compensation."⁷⁰ The Germans require that "compensation shall be determined by establishing an equitable balance between the public interest and the interest of those affected."⁷¹

Regarding the property clause, there are basically two schools

67. See *supra* Part V(B) for a discussion of Section 28.

68. See Submission of Dr. Antonie Gildenhuys to the Government of National Unity (1995) (on file with author) (regarding the retention of Section 28 of the Constitution).

69. *Id.*

70. *Id.*

71. *Id.*

of thought. One school is convinced that it is imperative to retain the property rights provisions as currently formulated in the interim Constitution because of the vital need for certainty and confidence that no one will be deprived of their property without due process of law and fair compensation.⁷² The second school is equally convinced that the property clause will entrench the vastly unequal division of land created under colonialism and apartheid.⁷³

Aninka Claasens proposes as a possible compromise position that whatever property clause is adopted should be subject to the following proviso: "Property rights acquired in terms of, or under laws which were in contravention of universally accepted human rights standards, shall not enjoy this protection."⁷⁴ Another possible compromise position would be to insulate land reform relating to rural restructuring from constitutional challenge. The major attraction of this approach is that it attempts to provide for rural restructuring without threatening commercial and industrial investors.⁷⁵ Claasens suggests that an insulation clause could read as follows:

Notwithstanding anything contained in this Constitution, no law enacted within 5 years of the commencement of this Constitution with the purpose of reforming land tenure and access to land shall be held void on the grounds that it is inconsistent with or takes away or abridges any of the rights conferred by this Constitution.⁷⁶

The simple fact is that it is not possible to insulate land issues completely from property rights. According to Chaskalson, land and property rights are inextricably bound in South African law and the laws of most of the English speaking world.⁷⁷

Chaskalson maintains that § 28(1) of the interim Constitution providing that every person "shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permit, to dispose of such rights" should be scrapped in its entirety:

72. Memorandum of the South African Chamber of Business to the Constitutional Assembly Workshop on Land Rights and the Constitution, Cape Town, South Africa (Aug. 1-2, 1995) (on file with author).

73. Aninka Claasens, Head of Land Rights Project, Center for Applied Legal Studies, University of Witwatersrand, Paper Presented at the Constitutional Assembly Workshop on Land Rights and the Constitution, Cape Town, South Africa (Aug. 1-2, 1995) (on file with author).

74. *Id.*

75. M. Chaskalson, Center for Applied Studies, University of Witwatersrand, submission to the Constitutional Assembly Workshop on Land Rights and the Constitution, Cape Town, South Africa (July 30, 1995) (on file with author).

76. Claasens, *supra* note 73.

77. Chaskalson, *supra* note 75.

It is either a rhetorical flourish with no meaning or it is a statement of the constitutional sovereignty of absolute property rights. If it is the former, we lose nothing by deleting it. If it is the latter, it is incompatible with the realities of late twentieth century society and should not be contained in our Bill of Rights.⁷⁸

The author is fairly certain that the views expressed by the South African Property Owners Association will eventually prevail:

An argument is often invoked against the inclusion of a property guarantee in the South African constitution is that a similar clause created enormous strife and conflict in India during the 1960s, and eventually had to be removed from the constitution. However, the situation in India cannot be compared to the South African context. In India, there was a very pronounced political conflict between the courts and the parliament to begin with, and it was always clear that the courts were going to use the property guarantee to restrict the government in its reform efforts. The same cannot be assumed in South Africa, and consequently a similar development is improbable. Similar property clauses have not had the same results in the United States, or in Germany, or in neighboring countries such as Zimbabwe. Instead of being afraid of a repetition of the Indian experience, one can just as well argue that the property guarantee will provide the foundation of strong economic growth, as it did in Germany.

A number of countries that also drafted new constitutions recently, like Canada, decided to leave the property clause out of their constitution. This is also used as an argument against the inclusion of a property guarantee in the South African constitution. However, in the countries in question the economy and socio-economic standards were fairly high and stable, and they were not faced with huge socio-economic transformation like South Africa. Socio-economic transformation implies some form of redistribution of property (provision of housing, job creation and taxation), which is only possible and workable when property rights are guaranteed in the constitution. In a situation of transformation a properly drafted constitutional property guarantee provides a firm basis of security and confidence, against which economic and social changes can take place. The South African situation should, therefore, be compared with the situation in Zimbabwe rather than Canada as far as the inclusion of the property guarantee is concerned.

It is often said that the property guarantee will simply serve the existing needs of those who already have property, while the whole point of the transformation is to give those who do not have property greater access to property. However, the political, psychological and legal value of the constitutional property guarantee for those who still aspire to property rights should not be underestimated. For many disadvantaged people in South Africa one of the most

78. *Id.*

important things is not only to get property, but to have property rights which are politically secure, and not open to the kind of state intervention they were used to in the apartheid era. This guarantee is provided by the constitution, for them as much as for those who have property. To remove the property guarantee from the constitution amounts to telling those who have always been deprived of property that they might get greater access to property in the new system, but that their property rights are not important or strong enough to merit constitutional protection. On the other hand, including a property clause in the constitution amount[s] to constitutional recognition of the property rights to which people have always aspired.

The phrase "rights in property" in § 28(1) is a novel term not used in any other constitutional property clause. It is important to note that the right which is protected in § 28(1) is not property, nor is it rights in property: it is the right to acquire, hold and dispose of rights in property. It is this exact formulation which makes § 28(1) unique, and which makes it uniquely suitable to protect a wide range of property interests.

Section 28(1) provides a powerful tool for the provision, improvement and upliftment of property rights held by millions of disadvantaged people. Many of these people were unable to acquire property in the past, and the access to property and the security and the protection they get from § 28(1) are important parts of the land reform process. This is a powerful reason for retaining § 28 as it is.

If the security of existing rights falls away, there is also no security for new property rights, and consequently those who have been unable to acquire property rights before would have gained nothing.⁷⁹

Recent press reports seem to indicate that the Minister of Land Affairs, Derek Hanekom, is not in favor of retaining the property clause. He expressed his views on the matter crisply during a workshop of the Constitutional Assembly:

I can understand that as the prospect of a new government came closer, some people became very anxious and feared a policy of redistribution through confiscation. That was one of the reasons for the constitutional entrenchment of existing property rights. By now, it should be clear that those fears are groundless. Personally, I do not see the need for a property clause in the Constitution. I believe that adequate protection would be provided by the common law and by the constitutional prohibition of arbitrary, unfair or discriminatory government action. But if we are to have constitutional protection of property rights, it must be formulated in a way which does not constitutionally entrench the results of generations of

79. Memorandum of the South African Property Owners Association (in consultation with Prof. Andre J. Van Der Walt, Dept. of Private Law, University of South Africa) to Workshop on the Constitutional Assembly, Cape Town, South Africa (Aug. 1995) (on file with author) [hereinafter "South African Property Owners"].

apartheid and dispossession.

Government must be able to regulate the use of property. A simple and I hope uncontroversial example is environmental protection. If the protection of property is too broadly phrased, it can have the result that a property owner can not be prevented from using the property in a way which damages the environment, unless the government pays compensation. Nowhere in the modern world is ownership absolute and unrestricted.⁸⁰

The author is not overly concerned by this statement. It is reasonable and Minister Hanekom is an eminently reasonable person. If the legal fraternity submits sound arguments for the retention of the property clause, he will support it.

VII. LAND REFORM BILLS

The Minister of Land Affairs faces an impossibly difficult job as evidenced again recently with the introduction of a new piece of legislation known as the Land Reform (Labor Tenants) Bill. The Cabinet approved this bill in August 1995 and it should become law shortly. The bill empowers labor tenants on farms to apply for title to the portions of the farm occupied by them or their forbearers. A hot debate raged between the Government of National Unity and the South African Agricultural Union as to the meaning of "labor tenant" (as distinguished from mere farm laborer) and the meaning of "a right in land" as contemplated in the bill.

After a debate that was extensively reported in the press, the parties eventually, in the South African way, reached a compromise. The proposed Bill places the *de facto* situation on many South African farms on a proper *de jure* basis. The author predicts this bill will in fact lead to a greater harmony between farmers and their workers.

Late in June 1995, the Cabinet approved three further draft land reform bills: the Interim Protection of Informal Land Rights Bill,⁸¹ the Upgrading of Land Tenure Rights Bill⁸² and the Communal Property Associations Bill.⁸³ Minister Hanekom issued a press statement illustrating the whole philosophy and thinking of the Government of National Unity regarding land reform:

A democratic government must ensure secure tenure rights for all South Africans by adopting a tenure policy that recognizes the diverse forms of tenure existing in South Africa. It must support the

80. See Derek Hanekom, Speech at the Workshop on the Constitutional Assembly, Cape Town, South Africa (Aug. 1995) (on file with author) [hereinafter "Hanekom"] (regarding Land Rights and the Constitution).

81. Interim Protection of Informal Land Rights Bill (June 28, 1995).

82. Upgrading of Land Tenure Rights Amendment Bill (June 28, 1995).

83. Communal Property Associations Bill, approved by Cabinet, June 28, 1995.

development of new and innovative forms of tenure such as Community Land Trusts and other forms of group land holding.

It is the Government's stated policy that security of tenure should be legally protected under a variety of forms of tenure, and that the process should be demand driven. In pursuance of this policy, draft legislation was submitted to Cabinet for approval, prior to it being tabled in Parliament. The previous discriminatory tenure laws and a breakdown in land administration systems in the former Bantustans undermined the capacity of black people to own and occupy land in a legally secure manner. Thus millions of people, and in particular the rural poor and women, are in a vulnerable position. They find that the land on which they live is simply sold from under their feet or allocated to someone else. Because they do not have clear legal rights to the land and cannot challenge the authority of the person or institution selling the land, they are powerless to stop the process. Government is under an obligation to step in and protect these people. It is necessary to stabilize the situation on the ground in a way which does not pre-empt a longer-term tenure reform process.

The Interim Protection of Informal Land Rights Bill is a holding measure which will protect the existing rights and interests of people who have informal rights to land, subject to the results of a comprehensive investigation into tenure reform, which should be finalized by the end of 1996. The Bill would thus protect the status quo while the investigation is in process.

The Bill aims to provide effective protection for people who hold insecure tenure rights which exist on a *de facto*, rather than a clear legally recognized basis, against arbitrary dispossession. As such, the legislation will also serve as a brake on the privatization of tribal land, by preventing the selling off of portions of tribal land to strangers for personal gain, without the knowledge and consent of the occupants and members of the tribe.

The Community Property Associations Bill provides a legal mechanism to accommodate the expressed need of those people who wish to hold land collectively.

To many people, this is the system with which they are most familiar, and which provides them with important social and economic protection. There is currently no suitable legal institution for communities which want to acquire and hold land in this manner. As a result, such communities have been forced to make use of trusts, companies and voluntary associations to acquire and hold their land. In many cases, these institutions did not really fit the needs of the communities, nor did they give adequate rights and protection to the members of such communities.

The proposed communal property association is a new kind of land-holding institution which will hold property on behalf of its members, who will control it. The constitution of such an association will have to meet public standards of non-discrimination, fairness and democratic process in order to be eligible for registration. The Department of Land Affairs will set up an office to register such associations, to assist communities and to deal with complaints of abuse.

We urgently need a suitable legal institution to which community land can be transferred. Until we have it, the Land Claims Court will no be able to make effective orders for the restitution of land to all the members of a community. In addition, there is already a demand in our pilot land reform programs for land-holding on a communal basis.

I would like to stress that his new tenure option will not be forced on existing communities. It will be offered in those cases where the Land Claims Court orders it, where it is the condition of a new land grant, or where an existing community asks for it. The proposed amendments to the Upgrading of Land Tenure Rights Act, No. 112 of 1991 are intended to bring this Act in line with Government's policy on tenure security. The Upgrading of Land Tenure Rights Bill offers freedom of choice. We believe that all tenure systems should be protected and that people should be able to access and use the system they prefer, as opposed to the previous policy in which individual freehold was seen as the only viable option for secure tenure.

The amended bill will continue to facilitate the upgrading into individual ownership of land rights in townships and urban areas, while ensuring that upgrading in rural areas will not have the effect of destroying the tribal or communal landholding systems, or of pre-empting tenure reform. For example, in the case of arable or grazing land upgrading will not be approved unless the applicant has had the opportunity to consider alternative tenure options, taking into account whether the upgrading is appropriate for the area and whether the land, once upgraded, will be economically viable for the holder. If the application relates to land in which joint rights exist, the upgrading should not detrimentally affect the rights and interests of any other holders of rights in that property. The Bill would therefore protect tribal or communal landholding systems until people themselves want to change them.

We believe that these pieces of legislation are an essential part of the RDP and will significantly contribute towards strengthening the human rights and enhancing the quality of life of a large number of our people. This legislation does not prejudice any other person's human rights as safeguarded in the Constitution.⁸⁴

CONCLUSION

These new bills are further evidence of the recent South African success story in its endeavor to resolve differences between peoples of different backgrounds, cultures and even civilizations. South Africa is in many ways a microcosm of the world. If South Africa fails, the rest of the world may also fail. The author is optimistic that South Africa will successfully implement its Land Reform Program. It is not overambitious or unrealistic and

84. Derek Hanekom, Minister of Land Affairs, Press Statement (June 28, 1995).

has been introduced with enough circumspection so as not to offend or scare any group into retreating into its previously irreconcilable position.

Once social engineering has taken its course and the imbalances of the past have been redressed, market forces should gradually take over. The author firmly believes that the free market system will not only survive in South Africa, but flourish.

South Africa already affords wonderful investment opportunities and it is surprisingly easy for non-South Africans to obtain immovable property in the Republic. In a nutshell, the law prevents only aliens unlawfully in the Republic from acquiring immovable property. If you are domiciled in Chicago, you are free to acquire immovable property in South Africa.⁸⁵ Should you wish to inspect your newly acquired property to use, improve or enjoy it, you are welcome to do so as long as your visit to South Africa is a lawful one.

External companies may also acquire immovable property in South Africa. The only requirements are the establishment of a place of business in South Africa and the registration of its Memorandum of Association in the Companies Office.⁸⁶

Developers need to acquaint themselves with three important and very topical African concepts if they intend to get involved with the Reconstruction and Development Program: UBUNTU, to live and let live; INDABA, to consult, to confer; and MASAKHANE, to build together. These concepts embody the spirit prevailing in South Africa today.

South Africans accept that reformation is a work of time and that there are no neat solutions. The government cannot be all things to all people at once. However, South Africans have already come a long way in changing their perspectives because they realize they have exhausted all other alternatives.

South Africans also realize that "reform need not mean abandoning our fundamental principles, but is rather a re-examination of them to determine whether we are following the dead letter or living spirit which they embody."⁸⁷

85. Aliens Control Act § 32, Act No. 96, STAT. REPUBLIC OF S. AFR. (1991).

86. Companies Act, §§ 1(1), 322 & 324, Act. No. 61, STAT. REPUBLIC OF S. AFR. (1973).

87. ANNE MORROW LINDBERGH, *THE NEW DICTIONARY OF THOUGHTS: A CYCLOPEDIA OF QUOTATIONS* 551 (Tryon Edwards et al. eds., 1965).