

5-1-2015

## Native Title in Australia and South Africa: A Search for Something That Lasts

Justin Hunter

Follow this and additional works at: <https://repository.law.miami.edu/umiclr>



Part of the [Comparative and Foreign Law Commons](#), [Law and Race Commons](#), and the [Law and Society Commons](#)

---

### Recommended Citation

Justin Hunter, *Native Title in Australia and South Africa: A Search for Something That Lasts*, 22 U. Miami Int'l & Comp. L. Rev. 233 (2015)

Available at: <https://repository.law.miami.edu/umiclr/vol22/iss2/6>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami International and Comparative Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

**NATIVE TITLE IN AUSTRALIA AND SOUTH AFRICA:  
A SEARCH FOR SOMETHING THAT LASTS**

*Justin Hunter\**

I.	INTRODUCTION.....	233
A.	AUSTRALIA.....	234
B.	SOUTH AFRICA.....	235
II.	PART I: THE HISTORY AND STATUS OF INDIGENOUS LAND RIGHTS IN AUSTRALIA AND SOUTH AFRICA .....	236
A.	AUSTRALIA.....	236
B.	SOUTH AFRICA.....	244
i.	COLONIAL AND APARTHEID PERIODS.....	244
ii.	POST-APARTHEID PERIOD.....	247
III.	PART II: THE NEXT STEPS FOR AUSTRALIA AND SOUTH AFRICA TO PROVIDE BETTER RESTITUTION FOR NATIVES.....	252
A.	AUSTRALIA.....	252
B.	SOUTH AFRICA.....	255
IV.	PART III: THE COUNTRY PROVIDING THE BEST DIRECTION FOR NATIVES .....	257

I. INTRODUCTION

“Why, land is the only thing in the world worth workin’ for, worth fightin’ for, worth dyin’ for, because it's the only thing that lasts.”<sup>1</sup> There are so many assets that depreciate or wither away, yet for millennia humans have treasured land as a source of strength, interconnection, and independence. From the ancient migrants journey over the Bering Strait to the Jewish quest for a home in Canaan, there has always been a calling to land because of its ability

---

\* J.D./LL.M. Candidate, 2016, University of Miami School of Law; B.S.M., 2012, Tulane University. I would like to thank Professor David Abraham for his excellent insight and direction with this note. I would also like to thank the University of Miami International and Comparative Law Review for their assistance and review. Most importantly, I would like to thank my parents and grandparents for their love and endless support. I could not be a prouder son and grandson.

<sup>1</sup> GONE WITH THE WIND (Warner Bros. 1939).

to be passed from generation to generation. However, for the past two hundred years, the white population in Australia and South Africa has stripped natives of their lands through a variety of means with the purposes of marginalization and exploitation. Recently, both countries have attempted different measures to remedy the prior dramatic shift in land ownership but mostly to poor results.

#### A. Australia

In 1993, the Australians passed the *Native Title Act*, a law designed to encourage the Aboriginal population to make claims on land that was taken from them in previous generations.<sup>2</sup> Since that year, nearly 200 claims have been made against 1.3 million square kilometers of land – approximately 18% of the Australian continent.<sup>3</sup> In Western Australia alone, Aborigines now control approximately 15% of the land.<sup>4</sup> However, that land is subject to government ministerial and executive control, an issue discussed below, on the grounds that the aborigines are unable to sell their land.

Unfortunately, numerous claimants using the *Native Title Act* as the means to acquire land have complained about the process.<sup>5</sup> Voluminous red tape and perpetual delays have slowed the system leaving the poor economic conditions of the indigenous population unchanged.<sup>6</sup> For example, in Western Australia from 1993 to 2005, only eleven native title determinations had been made.<sup>7</sup> The state government cited four reasons for the slow responses to the claims: (1) a lack of efficient governance capacity in the indigenous communities to develop and manage the land; (2) long-standing natural resource mismanagement of the transferred land; (3) much of the land lacks infrastructure, or existing infrastructure is degraded;

---

<sup>2</sup> Ian L. Neubauer, *Australia's Aborigines Launch a Bold Push for Independence*, TIME (May 30, 2013), <http://world.time.com/2013/05/30/australias-aborigines-launch-a-bold-legal-push-for-independence/?iid=gs-main-lead>.

<sup>3</sup> *Id.*

<sup>4</sup> *Overcoming Indigenous Disadvantage*, STATE OF WESTERN AUSTRALIA 227 (2005), [available at http://www.daa.wa.gov.au/Documents/ReportsPublications/OvercomingIndigenousDisadvantage/pg226-253PartBChapter8.pdf](http://www.daa.wa.gov.au/Documents/ReportsPublications/OvercomingIndigenousDisadvantage/pg226-253PartBChapter8.pdf).

<sup>5</sup> Neubauer, *supra* note 2.

<sup>6</sup> *Id.*

<sup>7</sup> *Overcoming Indigenous Disadvantage*, *supra* note 4, at 231.

and (4) many of these landholdings have low commercial value, which makes it difficult for Aboriginal communities to use their lands to raise capital.<sup>8</sup> These problems continue to plague the Australian land redistribution process.

## B. South Africa

After the Apartheid ended in 1994, South Africa created a new constitution that severely limited the government's ability to expropriate land.<sup>9</sup> This led to the numerous laws passed by the white minority to take land without compensation during the Apartheid.<sup>10</sup> However, the new constitution arguably brought about "victor's justice."<sup>11</sup> When Nelson Mandela became president in 1994, whites owned 87% of the land despite representing less than 10% of the population.<sup>12</sup> In 2003, eight years after the reform process began, whites owned 70% of the land, but less than half of the claims had been settled.<sup>13</sup> However, by 2010, the white population again owned 79% of the land.<sup>14</sup> This unfortunate regression occurred because of failed policies that began in the 1990s.

The Reconstruction and Development Programme (RDP), the African National Congress's blueprint for reform, created broad plans for eliminating many of the inequalities—specifically, racial and gender—fostered under the Apartheid.<sup>15</sup> Unfortunately, the program never identified any distinct strategies to fully combat the serious land distribution crisis in South Africa.<sup>16</sup> The program created a "willing-buyer-willing-seller" principle "without direct government involvement except as a facilitator to provide financial

---

<sup>8</sup> *Id.* at 228.

<sup>9</sup> Olivia L. Zirker, Comment, *This Land Is My Land: The Evolution of Property Rights and Land Reform In South Africa*, 18 CONN. J. INT'L L. 621, 632 (2003).

<sup>10</sup> *Id.* at 639.

<sup>11</sup> *Id.*

<sup>12</sup> Bernadette Atuahene, *South Africa's Land Reform Crisis: Eliminating the Legacy of Apartheid*, 90 FOREIGN AFF. 121, 121 (2011).

<sup>13</sup> Zirker, *supra* note 9, at 639.

<sup>14</sup> Atuahene, *supra* note 12, at 121.

<sup>15</sup> Makua wa Matua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 69 (1997).

<sup>16</sup> *Id.*

assistance.”<sup>17</sup> The plan also did not contemplate expropriation, instead choosing to regard it as a last resort when the voluntary market had not met the land demand.<sup>18</sup> As a result, South Africa remains woefully behind its goal of redistributing 30% of the land *in the first five years* after the fall of the Apartheid.<sup>19</sup>

There are questions that need to be answered: How did we get to this slow-moving system? What needs to be done to improve it? Who is moving in the best direction? This Article will examine these questions more clearly. Part I explores the history and status of indigenous land rights in these countries. Part II analyzes how these countries might move forward considering the current issues that have arisen from their past policies. Finally, Part III concludes which country is providing the best direction for solving the problems natives face when attempting to acquire land.

## II. PART I: THE HISTORY AND STATUS OF INDIGENOUS LAND RIGHTS IN AUSTRALIA AND SOUTH AFRICA

### A. Australia

Aboriginals retained land and water rights across Australia when the British were aggressively acquiring property in the 18th and 19th centuries.<sup>20</sup> However, since Australia developed property rights under Section 51(xxxi) of the Constitution in 1901, the concept of “native title” has been in flux.<sup>21</sup> A series of cases and statutory law has attempted to clarify the matter.

The struggle for native title rights in the 20th century began with *Milirrpum v. Nabalco Pty Ltd.*<sup>22</sup> In 1968, the Yolngu people, an aboriginal tribe living in northeastern corner of the Northern Territory known as Gove Peninsula, filed suit against the Commonwealth and Nabalco, a mining company, claiming that they

---

<sup>17</sup> *Id.* at 93.

<sup>18</sup> *Id.*

<sup>19</sup> Atuahene, *supra* note 12, at 121.

<sup>20</sup> Sean Brennan, *Native Title and the ‘Acquisition of Property’ under the Australian Constitution*, 18 MELB. U. L. REV. 28, 29 (2004).

<sup>21</sup> *See id.* at 43.

<sup>22</sup> *Milirrpum v. Nabalco Pty. Ltd.* (“Gove Land Rights Case”), (1971) 17 FLR 141 (SCNT).

were the rightful owners of the land.<sup>23</sup> Nabalco and the Commonwealth had entered into an agreement whereby the Commonwealth granted Nabalco rights to mine bauxite in the Gove Peninsula under the *Mining (Gove Peninsula Nabalco Agreement) Ordinance of 1968*.<sup>24</sup> The aboriginals possessed no written evidence of links between any clans and any areas of land.<sup>25</sup> They believed that their "great ancestral spirits arrived at particular places, allotted sites and areas" to the clans, and gradually established mythological eternal links to the land.<sup>26</sup>

Unfortunately for the aboriginals, a series of unclear expert testimonies and a lack of established law clouded whether the natives possessed communal title, and, therefore, common law rights on the land.<sup>27</sup> As a result of the confusion, the court searched for answers on the topic in countries such as Canada, New Zealand, Southern Rhodesia,<sup>28</sup> and the United States,<sup>29</sup> as well as extensively examining the legislative and executive history of Australian law. After a thorough analysis of Commonwealth and Australian native title history, Judge Blackburn found the following for the Supreme Court of the Northern Territory:

I have examined carefully the laws of various jurisdictions which have been put before me in considerable detail by counsel in this case, and, as I have already shown, in my opinion *no doctrine of communal native title has any place in any of them, except under express statutory provisions*. I must inevitably therefore come to the conclusion that the doctrine does not form, and never has formed, part of the law of any part of Australia.<sup>30</sup>

---

<sup>23</sup> *Id.* at 146.

<sup>24</sup> *Id.* at 149.

<sup>25</sup> *Id.* at 176.

<sup>26</sup> *Id.* at 183.

<sup>27</sup> *See generally id.* at 184-97.

<sup>28</sup> Southern Rhodesia, now called Zimbabwe, was a conquered colony, which distinguished it from Australia, a settled colony. *Milirrpum*, 17 FLR at 253.

<sup>29</sup> Of course, the United States is not part of the British Commonwealth due to its split with England caused by the American Revolution. However, Judge Blackburn looked extensively at its case law involving Native American land rights.

<sup>30</sup> *Milirrpum* 17 FLR at 244-45 (emphasis added).

Not only did Judge Blackburn rule that aboriginals did not possess native title under the circumstances in this case *but also* that native title never existed *at all*.<sup>31</sup> Therefore, aboriginals could only receive native title if the legislature, federal or state, decided to grant that right to them.

Interestingly, to reach his conclusion Judge Blackburn distinguished settled colonies from conquered colonies.<sup>32</sup> While a conquered colony would have already possessed settled law and property rights,<sup>33</sup> the judge stated that Australia was unsettled before the English arrived.<sup>34</sup> He further found that settled colonies were desert and uncultivated and had “always been taken to include territory” where uncivilized inhabitants in a primitive state of society lived.<sup>35</sup>

Judge Blackburn’s opinion was marginalization through words. While he attempted to mollify his decision by expressing his sympathies for the aboriginals<sup>36</sup> and his contempt for their treatment

---

<sup>31</sup> *Id.* at 252.

<sup>32</sup> *See id.* at 201.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 242. Judge Blackburn ruled that a case called *Cooper v. Stuart* from New South Wales was binding authority upon him. *Id.* The court in *Cooper* found that “[t]here was no land law or tenure existing in the [Australian] colony at the time of its annexation to the Crown; and, in that condition of matters, the conclusion appears to [the Court] to be inevitable that, as soon as colonial land becomes the subject of settlement and commerce, all transactions in relation to it were governed by English law, in so far as that law could be justly and conveniently applied to them.” *Id.* at 243 (citing to *Cooper v. Stuart* (1889) 14 AC 286, 291 (JCPC)).

<sup>35</sup> *Id.* at 201. Judge Blackburn’s opinion was consistent with the Commonwealth’s view of native title. In Canada, the leading case involving native title at the time of Judge Blackburn’s opinion was *St. Catherine’s Milling & Lumber Co. v. The Queen*, [1889] 14 AC 46 (JCPC). In *St. Catherine’s Milling*, the Judicial Committee of the Privy Council (“JCPC”) in England affirmed a Canadian Supreme Court decision when it held that only the Crown could grant aboriginal title, and that the Crown could remove aboriginal title at any time it desired. *Id.* at 55. In New Zealand, the Supreme Court had nullified a treaty granting the Māori people title to their land. *Wi Parata v. Bishop of Wellington*, (1877) 3 NZ Jur (NS) 72, 78. Instead, the court decided that the treaty had been signed by “primitive barbarians” and that the Crown was not legally bound to acknowledge the natives because they had no form of law or civil government. *Id.* at 77.

<sup>36</sup> *Milirrpum*, 17 FLR at 293.

by the white race,<sup>37</sup> he gently insulted the natives by stating that he did not put “too much reliance on cross examination of aboriginal witnesses in which the questions are expressed in terms of anything less than the most extreme precision.”<sup>38</sup> He found that their “simplicity” caused them to be “easily ‘led’ by a leading question.”<sup>39</sup>

Most importantly, he believed that the aboriginals *did* think of the subject land in this case as possessing boundaries, but he discounted that as not the precise “boundaries understood in *our* law.”<sup>40</sup> Instead he referred to them as “uncivilized inhabitants”<sup>41</sup> who lived in a primitive state and dismissed their oral history as a lack of direct evidence that their ancestors had lived on the subject land prior to the Europeans settling in Australia.<sup>42</sup> When he ignored the aboriginal culture and applied English law to land not yet possessed by the white race, Judge Blackburn had marginalized the native population. He had stripped the aboriginals of their right to live within their culture because they did not associate with the land in the same way as the English. This opened a door for the white race to take land where aboriginals lived and gave the aboriginals no recourse.

After the controversial *Gove Land Rights Case* decision, the Australian Parliament attempted to remedy the aboriginal plight. In 1976, the Australian Parliament enacted the *Aboriginal Land Rights Act* (“ALRA”), which allowed aboriginal people in the Northern Territory to claim rights to land based upon traditional occupation.<sup>43</sup> The law gave Aborigines “a nearly irrefutable veto power on all requests for mine development” and allowed the successful transfer of “nearly fifty percent of the Northern Territory to Aborigines as inalienable freeholds. . . .”<sup>44</sup> However, while the ALRA was seen as a high point for Australian indigenous legislation, it merely followed *Gove* in that it statutorily granted rights but did not establish that the

---

<sup>37</sup> *Id.* at 256.

<sup>38</sup> *Id.* at 179.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (emphasis added).

<sup>41</sup> *Id.* at 201.

<sup>42</sup> *Milirrpum*, 17 FLR at 183.

<sup>43</sup> See Geoffrey R. Schiveley, *Negotiation and Native Title: Why Common Law Courts Are Not Proper Fora for Determining Native Land Title Issues*, 33 VAND. J. TRANSNAT’L L. 427, 435-36 (2000).

<sup>44</sup> *Id.* at 436.



rights had existed before the English arrived. It would require a court holding to reverse this issue.

In 1982, Eddie Mabo, a Torres Strait Islander, challenged the authority of Queensland, the northeastern state in Australia, when he filed suit for native title to the Torres Strait Islands, specifically the Murray Islands.<sup>45</sup> Mabo and his community's ancestors lived on these islands for generations before European contact.<sup>46</sup> When the Murray Islands were annexed to Queensland in 1879, Mabo's community and other communities peacefully accepted a large measure of control from Queensland authorities,<sup>47</sup> but that was likely because they knew nothing about the annexation or did not understand the legal ramifications of it.<sup>48</sup>

Mabo and others in his community possessed very little foreign ancestry compared to most communities in the Torres Strait.<sup>49</sup> There had been relatively few contacts between Mabo's ancestors and the Europeans prior to annexation,<sup>50</sup> and because of this, Mabo's community retained "a strong sense of affiliation with . . . the society and culture of earlier times."<sup>51</sup> The community was regulated more by custom than by law,<sup>52</sup> and if there were land disputes, then these issues were settled by consensus after consideration of a variety of factors.<sup>53</sup> Strict legal rules, such as those applied in English law, could have been seen as disruptive towards community life.<sup>54</sup>

The High Court of Australia immediately answered the question of whether it would find its answer strictly in common law. While the "peace and order of Australian society" was built on a sound legal system,<sup>55</sup> the Court stated the following regarding its understanding of English common law rulings:

Australian law is not only the historical successor of,  
but is an *organic development* from, the law of

---

<sup>45</sup> *Id.*; Mabo v. Queensland (No 2), (1992) 175 CLR 1, 16 (plurality opinion).

<sup>46</sup> *Mabo*, 175 CLR at 17.

<sup>47</sup> *Id.* at 24.

<sup>48</sup> *Id.* at 25.

<sup>49</sup> *Id.* at 17.

<sup>50</sup> *Id.* at 18.

<sup>51</sup> *Id.* at 17.

<sup>52</sup> *Mabo*, 175 CLR at 18.

<sup>53</sup> *Id.* at 24.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 30.

England. Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies.<sup>56</sup>

Essentially, when Australian law did not meet “contemporary notions of justice and human rights,”<sup>57</sup> the Court could change it to meet those standards because Australian law *evolves from* English law but it is *not* directly attached to it.

This approach to English law allowed the High Court to make one of its most noteworthy decisions of the twentieth century. The Court had to decide whether to apply existing authorities such as the *Gove Land Rights Case* and “proceed to inquire whether [Mabo’s community was] higher ‘in the scale of social organization’ than the Australian Aborigines,” or overrule those existing authorities that found *terra nullius* (non-existence of native title).<sup>58</sup> The Court, in a plurality decision, chose the latter when it stated the following regarding current international human rights standards for native communities:

Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind *can no longer be accepted*. The expectations of the international community accord in this respect with the contemporary values of the Australian people.<sup>59</sup>

The Court used international law as an influence in the development of common law.<sup>60</sup> Even if common law had established that

---

<sup>56</sup> *Id.* at 29 (emphasis added).

<sup>57</sup> *Id.* at 30.

<sup>58</sup> *Mabo*, 175 CLR at 40.

<sup>59</sup> *Id.* at 42 (emphasis added).

<sup>60</sup> *Id.* By the time that the Supreme Court of Australia made this decision, many Commonwealth nations either had found or were in the process of finding aboriginal title. In Canada, *Calder v. British Columbia* had overturned *St. Catherine’s Milling*. *Calder v. British Columbia* (Attorney General), [1973] S.C.R. 313, 328. The court in *Calder* decided that aboriginal title existed when the natives were “organized in societies and occupying the land as their forefathers had done for centuries.” *Id.* New

discrimination was allowed because native peoples lacked proper political and legal organization,<sup>61</sup> a doctrine “founded on unjust discrimination” had no place in today’s society.<sup>62</sup>

Following the High Court’s opinion, the Australian Parliament codified the decision in the *Native Title Act of 1993* (“NTA”) and recognized common law rights of indigenous title.<sup>63</sup> The law was designed to regulate the “determination, protection, and extinguishment of native title” when an application was filed under the NTA with the Australian government.<sup>64</sup> Section 223 of the NTA defined native title as “the communal, group or individual rights and interests of Aboriginal peoples . . . in relation to land or waters . . .”<sup>65</sup> To establish these rights, traditional laws and customs must have

---

Zealand recognized aboriginal title in *Te Runanganui o Te Ika Whenua Inc Society v. Attorney General*. *Te Runanganui o Te Ika Whenua Inc Society v. Attorney General*, [1994] 2 NZLR 20, 23 (NZCA). The New Zealand Court of Appeal held that aboriginal title was a concise expression to cover the rights over land and water enjoyed by the established inhabitants of a territory prior to annexation. *Id.* As a result, the Crown’s title over the land was subject to native rights. *Id.* at 24. In Tanzania, aboriginal title was firmly established in *Attorney General v. Lohay Aknonaay* when the court examined an agreement between the United Nations and the British Government that stated that the British must respect the rights and interests of the native population. *Attorney General v. Lohay Aknonaay*, [1995] T.L.R. 80, 89 (T.Z.C.A.). The British were not allowed to grant real rights over native land in favor of non-natives unless they received consent from the native population. P.G. MCHUGH, *ABORIGINAL TITLE: THE MODERN JURISPRUDENCE OF TRIBAL LAND RIGHTS* 195 n.17 (2011).

<sup>61</sup> *Mabo*, 175 CLR at 41. The Court rejected the definitive Commonwealth case on indigenous land rights, *In re Southern Rhodesia*, a decision from 1919. *Id.* at 42. In *In re Southern Rhodesia*, a charter had been issued which incorporated the British South Africa Company and gave the company power over Southern Rhodesia. *In re Southern Rhodesia*, [1919] AC 211, 213 (JCPC). A sovereign ruler named Lobengula was defeated by the English and fled, but the natives challenged the charter. *See generally id.* at 220-30. The Privy Council rejected aboriginal title because “[s]ome tribes [were] so low in the scale of social organization that their usages and conceptions of rights and duties [were] not to be reconciled with the institutions or the legal ideas of civilized society.” *Id.* at 233-34.

<sup>62</sup> *Mabo*, 175 CLR at 42.

<sup>63</sup> Native Title Act (Act No. 110/1993) (Austl.).

<sup>64</sup> Lisa Strelein, *From Mabo to Yorta Yorta: Native Title Law In Australia*, 19 WASH. U. J.L. & POL’Y 225, 251 (2005).

<sup>65</sup> Native Title Act, *supra* note 63, at §223(1).

been acknowledged and observed,<sup>66</sup> and the natives were required to have had a connection with the land or waters that they claimed belonged to them.<sup>67</sup>

The High Court interpreted Section 223 in several different lawsuits. First, the Court found that the section requires two elements: (1) the native group must identify the traditional laws and customs that the group observes and translate those laws and customs into protectable rights and interests; and (2) the evidence must exhibit the connection to the land or water claimed through those laws and customs.<sup>68</sup> Second, the Court construed the NTA to mean that establishing laws and customs required more than merely “observable patterns of behaviour.”<sup>69</sup> Third, the Court determined that, although the term “tradition” means the passing of a group’s culture, including laws and customs, from generation to generation by word of mouth or common practice, the NTA expected more.<sup>70</sup> Namely, the court dictated that under the NTA the native group’s laws and customs had to have existed prior to annexation, and that they have continuously existed since sovereignty.<sup>71</sup>

These rulings are concerning because they have strengthened the test applied for aboriginal title under the NTA. The first element of the NTA requires that laws and customs have to be *observed*; yet the High Court in *Ward* decided to add the condition that these laws and customs must be *translated* into protectable rights and interests.<sup>72</sup> This addition appears to imply that laws and customs in a centuries-

---

<sup>66</sup> *Id.* at §223(1)(a).

<sup>67</sup> *Id.* at §223(1)(b).

<sup>68</sup> *W. Austl. v. Ward*, (2002) 191 ALR 1, 17. Canada also established a test to determine aboriginal title: “(i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.” *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1097. From the test established in *Delgamuukw*, the Canadian Supreme Court seemed far more concerned with the native group’s *occupation* of the land than with its physical or emotional connection to it. This divergence between Australian and Canadian indigenous land rights law demonstrates that there is a lack of congruence in the Commonwealth.

<sup>69</sup> *Yorta Yorta Cmty. v. Victoria*, (2002) 194 ALR 538, 551 (Austl.).

<sup>70</sup> *Id.* at 552-53.

<sup>71</sup> *Id.* at 553.

<sup>72</sup> *Ward*, 191 ALR at 551.

old community will not qualify for protection unless they meet rights and interests *readily understandable* by the Court. This change weakens the NTA because it allows the court to apply its own understanding of property law, which is invariably more like English property law. As the *Gove Land Rights Case* confirmed, when a judge does not understand how a different group of people views land, he rejects it. This “translation” opens the door to that possibility.

Furthermore, requiring aboriginals to establish that laws and customs existed through greater means than “observable patterns of behaviour”<sup>73</sup> contradicts their culture. Aboriginal traditions passed from generation to generation through storytelling and dance.<sup>74</sup> Therefore, their behavior would clarify that they possessed the laws and customs required under the NTA. However, the High Court implied that it wanted physical evidence instead of oral testimony when aboriginals kept no written records of custom or land possession.<sup>75</sup> Yet again, the Court appears to conflate English law with Aboriginal culture when the two are completely unrelated. These interpretations of the NTA, along with the lack of infrastructure and efficient governance, continue to burden the aboriginal community in the Australian land redistribution process.

## B. South Africa

### *i. Colonial and Apartheid Periods*

Unlike Australia, South Africa does not draw its origins strictly from English common law. In fact, the English were not even the first to arrive on the South African shore. In 1652, the Dutch East India Company (“The Company”) established a trading post at the Cape of Good Hope and began development of a “racially stratified society.”<sup>76</sup> When the Dutch completed the construction of the town’s infrastructure, the Company began transporting settlers from the

---

<sup>73</sup> *Yorta Yorta Cmty.*, 194 ALR at 551.

<sup>74</sup> Helen McKay, *Australian Aboriginal Storytelling*, AUSTRALIAN STORYTELLING, <http://www.australianstorytelling.org.au/storytelling-articles/a-d/australian-aboriginal-storytelling-helen-mckay> (last visited Dec. 21, 2014).

<sup>75</sup> *Milirrump*, 17 FLR at 176.

<sup>76</sup> Zirker, *supra* note 9, at 624 (citing to LEONARD THOMPSON, A HISTORY OF SOUTH AFRICA 33 (1990)).

Netherlands.<sup>77</sup> These settlers possessed land grants to the “fertile valley” in the outskirts of the Cape, an area of the countryside held by natives.<sup>78</sup> The Company gave employees more land grants as an enticement to stay after their service was completed.<sup>79</sup> Through the land grant process, the Dutch began economically repressing the Africans.<sup>80</sup> As the Africans had their land stripped away from them, they became subservient to the Dutch, culminating “in the shape of discriminatory laws based on race.”<sup>81</sup>

The Dutch preferred a system of written codes as opposed to a system of judicially created laws,<sup>82</sup> such that the original discriminatory practices in South Africa became statutes.<sup>83</sup> In the 1760s, the first discriminatory laws were passed to govern “free blacks” whom had been emancipated from slavery.<sup>84</sup> By the 1790s, these laws required the free blacks to carry passes if they chose to leave town.<sup>85</sup> Effectively, through written codes, Dutch colonists exploited the native people and free blacks into working on the lands of the white population and creating infrastructure for the Company. By subjecting the natives and free blacks into the same work as the imported slaves, the whites had divested the minorities of their earning and bargaining power.

In 1795, the British invaded and captured the Cape from the Dutch but kept in place the economic and social structure that hindered the Africans.<sup>86</sup> For the next eighty years, the British settlers moved inland gradually conquering chiefdoms, usually through cooperation rather than by force.<sup>87</sup> However, the largest influx of colonists occurred in 1870 when the British discovered gold and diamonds.<sup>88</sup> With the need for African labor on the newly

---

<sup>77</sup> *Id.* (citing to THOMPSON, *supra* note 76, at 35).

<sup>78</sup> *Id.* (citing to THOMPSON, *supra* note 76, at 35).

<sup>79</sup> *Id.* (citing to THOMPSON, *supra* note 76, at 35).

<sup>80</sup> *Id.* at 625.

<sup>81</sup> *Id.*

<sup>82</sup> Gerrit Meijer & Sjoerd Meijer, *The Influence of the Code Civil In the Netherlands*, 14 EUR. J. L. & ECON. 227, 228 (2002).

<sup>83</sup> See Zirker, *supra* note 9, at 625.

<sup>84</sup> *Id.* (citing to THOMPSON, *supra* note 76, at 37).

<sup>85</sup> *Id.* (citing to THOMPSON, *supra* note 76, at 37).

<sup>86</sup> *Id.* (citing to THOMPSON, *supra* note 76, at 51).

<sup>87</sup> *Id.* at 626 (citing to THOMPSON, *supra* note 76, at 122-23).

<sup>88</sup> *Id.* (citing to THOMPSON, *supra* note 76, at 110).

constructed mining sites, the white settlers "became more determined to exclude the Africans from participation in social and political systems."<sup>89</sup>

In 1910, the Union of South Africa was formed under the dominion of the British Empire, yet even the flag displayed the fusion of English and Dutch law.<sup>90</sup> As a result, the white settlers who were now primarily British decided to continue using civil code as a form of discrimination.<sup>91</sup> In 1913, the Union passed the *Natives Land Act*, a law designed to restrict natives from possessing "leasehold or fee simple rights to a majority of the land."<sup>92</sup> In fact, the Africans had already been deprived of almost all their land anyway.<sup>93</sup> This law restricted their ability to *acquire* land in almost any fashion. Even if land was purchasable, Africans could not afford the high prices and they were forced to work on farms to support the white agricultural industry.<sup>94</sup>

Farming land was not the only property that Africans were restricted from acquiring. In 1945, the Union passed legislation that segregated urban areas as well.<sup>95</sup> Titled the *Blacks (Urban Areas) Consolidation Act*, this law removed Africans from the urban areas that the government deemed to have excess labor.<sup>96</sup> Urban areas, particularly areas where white people dwelled, were considered off limits to the black population unless they possessed a pass.<sup>97</sup> A pass would only guarantee protection from arrest during working hours.<sup>98</sup> As a result, Africans who worked in the city were forced to live on the outskirts in townships. These areas were poverty-stricken suburbs.

---

<sup>89</sup> Zirker, *supra* note 9, at 625. (citing to THOMPSON, *supra* note 76, at 109).

<sup>90</sup> *Id.* (citing to THOMPSON, *supra* note 76, at 149-54). The Union of South Africa's flag contained three large, orange, white, and blue horizontal stripes with the flags of English and Dutch in the middle.

<sup>91</sup> *See generally id.* at 626-27.

<sup>92</sup> *Id.* at 627.

<sup>93</sup> *Id.* (citing to THOMPSON, *supra* note 76, at 163).

<sup>94</sup> *Id.* at 628 (citing to COLIN BUNDY, *THE RISE AND FALL OF THE SOUTH AFRICAN PEASANTRY* 230 (1979)).

<sup>95</sup> Zirker, *supra* note 9, at 629 (*see also* JOHN DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* 73 (1979)).

<sup>96</sup> *Id.* (citing to DUGARD, *supra* note 95, at 475).

<sup>97</sup> *See id.*

<sup>98</sup> *See id.*

However, perhaps no land redistribution law exemplified the Apartheid more than the *Group Areas Act of 1966*.<sup>99</sup> The Act forcibly removed Africans from their property and sent them to reserve lands in an effort to implement the Apartheid's core ideology: apartness, both physically and emotionally.<sup>100</sup> The government then reconstructed these reserve lands into "homelands" so the regime could claim that the Africans were now on their traditional lands.<sup>101</sup> Also, according to the government, Africans now had the ability to "exercise their political rights in the homeland system" because they could opt for independence.<sup>102</sup> Sadly, the real purpose of this law was to strip the Africans of their property rights and their South African citizenship.<sup>103</sup>

In light of the previous Dutch control and the discriminatory system already in place, the white population had complete power over the Africans. Unlike Australia, the government did not need a judicial decision to solidify their inequitable practices because the Dutch code previously established discrimination.<sup>104</sup> The Union's laws were merely additions to the original codes.

## ii. *Post-Apartheid Period*

After the fall of the Apartheid in 1994, South Africa created the Interim Constitution ("IC") as means to establish order and prevent a full-scale collapse of the government.<sup>105</sup> Although many of the discriminatory land redistribution laws had already been repealed, the new leadership sought to protect the rights of future

---

<sup>99</sup> *See id.*

<sup>100</sup> *Id.* (citing to LAURINE PLATZKY & CHERRYL WALKER, *THE SURPLUS PEOPLE: FORCED REMOVALS IN SOUTH AFRICA* 16 (1985)).

<sup>101</sup> Zirker, *supra* note 9, at 630 (citing to THOMPSON, *supra* note 76, at 191-95).

<sup>102</sup> *Id.* (citing to THOMPSON, *supra* note 76, at 191-95). An estimated 614,000 Africans were forced to relocate from their property so that White suburbs could be created, and so the government could continue to maintain that Africans were being moved to their true "homeland." *Id.*

<sup>103</sup> *Id.* (citing to THOMPSON, *supra* note 76, at 191-95).

<sup>104</sup> South Africa was a conquered colony, which meant that the British had to follow Dutch property rights. This circumstance favored the British because they could write discriminatory laws without challenge from the natives.

<sup>105</sup> *See id.*



South Africans.<sup>106</sup> As a result, Section 28 of the IC acknowledged property as a fundamental right, a right that could only be extinguished if the government was to use the property for a public purpose.<sup>107</sup> Moreover, the private party either had to agree to a set compensation or a court would determine the fair price for the property.<sup>108</sup> The government had no power to take the land without negotiating with the private owner.<sup>109</sup>

Following the ratification of the IC, the new government passed the *Restitution of Land Rights Act 1994*. This Act's purpose, still in effect, is twofold:

- (1) To provide restitution of rights in land to persons or communities dispossessed of such rights after June 19, 1913, a result of past racially discriminatory laws or practices; and
- (2) To establish a Commission on Restitution of Land Rights and a Land Claims Court.<sup>110</sup>

The Act grants a person the right to make a demand with the Commission, which "investigate[s] the merits of claims" and "mediate[s] and settle[s] disputes arising from such claims."<sup>111</sup> Most importantly, Section 38B of the Act gives any person representing his community *direct* access to the courts.<sup>112</sup> This allows a petitioner to have input in a public forum, building more trust in the system, as compared to an administrative body that makes binding decisions outside of the public eye.<sup>113</sup> Of course, it is the court system that has provided the best insight into the effect of the law on black Africans.

---

<sup>106</sup> See *id.*

<sup>107</sup> S. AFR. CONST. (IC), ch. 3, §28 (1993).

<sup>108</sup> *Id.* § 28(3).

<sup>109</sup> See *id.*

<sup>110</sup> Restitution of Land Rights Act 22 of 1994 (S. Afr.).

<sup>111</sup> *Id.* § 6(1)(c)(A-B).

<sup>112</sup> *Id.* § 38B(1).

<sup>113</sup> See *id.* § 38.

In 2003, the *Restitution of Land Rights Act* (“RLRA”) became the focal point for an important decision involving indigenous title.<sup>114</sup> In *Alexkor v. Richtersveld Community*, members of the Richtersveld Community (“the Community”) filed an application with the South African government for the return of “a narrow strip land” along the Gareip River in Richtersveld.<sup>115</sup> For centuries, the Community had inhabited the area, but Alexkor, a mining organization, possessed rights to the land.<sup>116</sup> The Community claimed that it had been stripped of its land in the 1920s when diamonds were discovered.<sup>117</sup> At issue was whether the natives had their rights extinguished at the time of annexation, and if not, whether the dispossession of the land was a “consequence of racially discriminatory laws or practices.”<sup>118</sup> If the government had discriminatorily confiscated the land after the passing of the *Native Lands Act of 1913*, the Community would be entitled to restitution.

In its decision, the Constitutional Court held that South Africa’s Constitution validated the existence of indigenous law.<sup>119</sup> This holding allowed the current court and future courts to apply indigenous law when faced with claims involving the discriminatory displacement of Africans. Interestingly, the court acknowledged the history of examining indigenous law through an English lens when it stated the following:

Caution must be exercised when dealing with textbooks and old authorities because of the tendency to

---

<sup>114</sup> *Alexkor & Another v. Richtersveld Cmty. & Others*, 2004 (5) SA 460 (CC). The decision was filed in 2003 but was not published until 2004.

<sup>115</sup> *Id.* at 466.

<sup>116</sup> *Id.* Alexkor is a wholly owned government entity and was established through the Alexkor Limited Act 116 of 1992 (S. Afr.). The company specializes in mining for diamonds on land, along rivers and beaches. *Our History*, ALEXKOR, <http://www.alexkor.co.za/our-history.html> (last visited Dec. 28, 2014).

<sup>117</sup> *Alexkor & Another*, 2004 (5) SA at 467-68.

<sup>118</sup> *Id.* at 468.

<sup>119</sup> *Id.* at 478. The South African Constitution states that it will not “deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill [of Rights].” S. AFR. CONST., 1996. South Africa promulgated its Constitution in 1996, replacing the Interim Constitution.

view indigenous law through the prism of legal conceptions that are foreign to it.<sup>120</sup>

The dangers of looking at indigenous law through a common law prism are obvious. The two systems of law developed in different situations, under different cultures and in response to different conditions.<sup>121</sup>

The Court paid particular heed to the formation of indigenous law. Like Australian aboriginal law, indigenous law in South Africa was not written.<sup>122</sup> Instead, it passed from generation to generation through practice, always evolving to meet the needs of the community.<sup>123</sup> As long as the traditions by the natives were constitutional, the court held that future decisions had to follow indigenous law.<sup>124</sup>

Following the evidentiary procedure established earlier in the decision, the court found that the Community's history and usage of the land was sufficient to determine ownership.<sup>125</sup> Witnesses testified that the Community "had mined and used copper for purposes of adornment" long before the land was annexed to the Crown.<sup>126</sup> Copper was also smelted and mixed with molten metal to make rings, beads, and ornaments.<sup>127</sup> Most importantly, outsiders were not

---

<sup>120</sup> *Alexkor & Another*, 2004 (5) SA at 480.

<sup>121</sup> *Id.* at 480-81. The Constitutional Court cited *Amodu Tijani v. The Secretary, Southern Nigeria*, a Privy Council decision from 1921, which stated that "[t]here was a tendency, operating at times unconsciously, to render that title conceptually in terms which [were] appropriate only to systems which have grown up under English law." *Amodu Tijani v. The Secretary, Southern Nigeria*, 2 AC [1921] 399, 402 (JCPC). This decision established throughout the Commonwealth that title may exist through the *community*, and that the *history and usage* of the land will determine if a community has title. *Id.* at 402-04.

<sup>122</sup> *Alexkor & Another*, 2004 (5) SA at 480.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 478.

<sup>125</sup> *Id.* at 482.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

allowed to prospect for or mine minerals on the Community's land, which demonstrated exclusivity.<sup>128</sup> The Court *for the first time* acknowledged that natives had property rights when they had exclusive occupation and use of the land.<sup>129</sup>

Finally, the Court held that the Community's land rights were not extinguished at the time of annexation,<sup>130</sup> and that the land was wrongfully taken from them by the government after 1913.<sup>131</sup> The Court was particularly concerned with the treatment of the indigenous people after the discovery of diamonds in 1926.<sup>132</sup> The following year, the government passed the *Precious Stones Act of 1927* ("PSA"), a law that would not acknowledge landowners unless those owners were registered.<sup>133</sup> When land was not registered to an owner, that land was deemed by the Act as "unalienated Crown land."<sup>134</sup> Indigenous owners, likely unaware of the registration requirement, were treated differently from registered owners, who were primarily white.<sup>135</sup> While not facially discriminatory like so many other laws during that time period, the court concluded that the PSA was disparately impacting the indigenous people because black communities rarely registered their land.<sup>136</sup>

The Constitutional Court's ruling in *Alexkor v. Richtersveld Community* provided a signature victory for natives across the country. While the *Restitution of Land Rights Act* provided written relief, this decision solidified what the indigenous people were hoping for—namely, a definitive victory in a public forum, which is exactly what the RLRA intended. Most importantly, the decision recognized what many other Commonwealth nations had already acknowledged: native title.

However, concerns remain involving South Africa's future. Most natives have not regained any interest in their land, mainly because the RLRA relief only to those who were stripped of their

---

<sup>128</sup> *Alexkor & Another*, 2004 (5) SA at 482.

<sup>129</sup> *See id.*

<sup>130</sup> *Id.* at 483.

<sup>131</sup> *Id.* at 491.

<sup>132</sup> *Id.* at 488.

<sup>133</sup> *Id.* at 490.

<sup>134</sup> *Id.* (citing to the Precious Stones Act 44 of 1927 (S. Afr.)).

<sup>135</sup> *See id.* at 491.

<sup>136</sup> *Id.* at 491.

land *after* the ratification of the *Native Lands Act* in 1913.<sup>137</sup> Sadly, most of the natives lost their land before 1913 when Dutch and British settlers were spreading outside of the Cape of Good Hope.<sup>138</sup> This issue, along with many others, continues to cause roadblocks in South Africa's restitution program.

### III. PART II: THE NEXT STEPS FOR AUSTRALIA AND SOUTH AFRICA TO PROVIDE BETTER RESTITUTION FOR NATIVES

Australia and South Africa have taken incredible strides in an attempt to rectify the harm caused to indigenous communities. Both countries have adopted laws that encourage natives to request that the government reallocate land to displaced people. Australia went so far as to apologize to Aborigines for the centuries of misdeeds that damaged generations of natives.<sup>139</sup> However, a serious question remains: is there a way to resolve wrongs committed for many years prior to the twenty-first century?

#### A. Australia

Unlike South Africa, Australia's discriminatory policies toward aboriginals were not as prevalent in the last half-decade of the 20th century. The last major discriminatory policy, the removal of aboriginal children from their families to "bleed out the color," ended in the 1970s.<sup>140</sup> Since that time period, Australian courts have made efforts to remedy landless aboriginals culminating in the *Mabo* decision in 1992.<sup>141</sup> Furthermore, state governments such as Western Australia have created land redistribution and restitution programs for the aboriginal community.<sup>142</sup>

Unfortunately, state programs have faced numerous delays, and aboriginals who have been granted land frequently are unable to use it for their benefit. For example, in Western Australia, the Native

---

<sup>137</sup> Zirker, *supra* note 9, at 634; *see also* Atuahene, *supra* note 12, at 124.

<sup>138</sup> *See* Zirker, *supra* note 9, at 627 (citing to THOMPSON, *supra* note 76, at 163).

<sup>139</sup> Tim Johnston, *Australia Says 'Sorry' to Aborigines for Mistreatment*, N.Y. TIMES (Feb. 13, 2008), <http://www.nytimes.com/2008/02/13/world/asia/13aborigine.html>.

<sup>140</sup> *Id.* The kidnapped children became known as the Stolen Generation. *Id.*

<sup>141</sup> *Mabo*, 175 CLR at 42.

<sup>142</sup> *Overcoming Indigenous Disadvantage*, *supra* note 4, at 227.

Welfare Development state agency holds former Aboriginal reserves in the Aboriginal Land Trust ("ALT").<sup>143</sup> The ALT holds approximately "12% of Western Australia's land area" so aboriginal tribes can make claims on the land that they deem to have been theirs prior to their displacement.<sup>144</sup> However, the land is not given; it is *leased*, usually for 99 years "to incorporated Indigenous organizations."<sup>145</sup> These freehold properties carry with them a unique requirement: they can only be acquired and managed for "*the use and benefit of the Indigenous people*."<sup>146</sup> This restriction might seem beneficial to the aboriginal communities, but, in fact, it has restricted their ability to acquire capital—specifically, subleasing part of the land to corporate developers such as mining companies.<sup>147</sup> Obviously, most corporations that want to use the land for economic purposes are not attempting to benefit the aboriginal people. Thus, without the ability to acquire capital, the indigenous people have very limited ways to develop their communities.

This paternalistic treatment, while protecting the natives from exploitation, harms the overall growth of the aboriginal community. Without the freedom to make their own choices, the Aborigines cannot learn from their mistakes, and thus, break away from the "simplicity"<sup>148</sup> term that other parties use to describe them. In order to rectify this matter, the Australian government must determine a method that will prepare natives negotiations with more sophisticated buyers.

There are two possible solutions to this issue. The first is to remove the condition from the leasehold. Currently, state governments, especially Western Australia and the Northern Territory, are developing "[i]nnovative policy or land tenure arrangements" for aboriginals.<sup>149</sup> These plans are supposed to attract private investments, while preventing the loss of aboriginal land.<sup>150</sup>

---

<sup>143</sup> *Id.* The ALT was formed under *Aboriginal Affairs Planning Authority Act 1972*, which means that by the early 1970s, Western Australia was already attempting to provide land to displaced Aborigines. *See id.*

<sup>144</sup> *See id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 228 (emphasis added).

<sup>147</sup> *Id.* at 235.

<sup>148</sup> *Milirrpum*, 17 FLR at 179.

<sup>149</sup> *Overcoming Indigenous Disadvantage*, *supra* note 4, at 235.

<sup>150</sup> *Id.*

However, while on their face these ideas seem productive, they are also discriminatory. The Australian government appears concerned that the indigenous people will lose their land if a restrictive condition is not placed on the property; in reality the government is not allowing aboriginals to negotiate for themselves. This restriction inhibits the natives from conducting business with corporations and other individuals.<sup>151</sup> Removing the conditional use clause from the distributed land will create economic growth and strengthen indigenous communication with non-aboriginal parties.

The second possible solution is more radical. Instead of only removing the conditional use clause, the ALT could distribute land *permanently* to the aboriginal community. When *Mabo* recognized native title, it recognized that aboriginals not only possessed the land, but also *owned* the land prior to the arrival of the British.<sup>152</sup> If the High Court can recognize fee simple ownership in indigenous society, then state agencies should *give* the land to the natives when a claim is properly filed and authorized. Ownership rights will not only give aboriginals the power to use and dispose of their land, but they may also strengthen the trust in the indigenous community that their land will not be stripped away again. After all, leases expire, and the future is unpredictable. Without fee simple rights, the aboriginals are still dependent on the government and are still missing *lasting* title to the land.

Either solution would provide relief to the struggling indigenous people. Considerable parts of aboriginal land, although desert, are "well placed to develop economic opportunities."<sup>153</sup> Mining companies, particularly in Western Australia, have zoned areas that possess high mineral content.<sup>154</sup> Many of those areas overlay allotted aboriginal lands.<sup>155</sup> With the freedom to negotiate with these firms, communities will "receive economic benefit from rent, royalties, and dividends as well as significant social benefits from meaningful training, employment or contractual opportunities."<sup>156</sup> Overall, the ability to receive capital and develop

---

<sup>151</sup> *Id.*; cf. Neubauer, *supra* note 2.

<sup>152</sup> See *Mabo*, 175 CLR at 42.

<sup>153</sup> *Overcoming Indigenous Disadvantage*, *supra* note 4, at 233.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

infrastructure will strengthen the aboriginal people living on these lands.

## B. South Africa

When South Africa welcomed new leadership in 1993, the government strengthened the protection of land under the Constitution.<sup>157</sup> The administration also created a land redistribution program called the Reconstruction and Development Programme (“RDP”), with the goal to reallocate land to the black populace.<sup>158</sup> They only owned 13% of the acreage, a tiny projection considering they were over 90% of the population.<sup>159</sup>

Unfortunately, the redistribution program has been anything but effective. Even though natives dominate the government, whites still own over 75% of South Africa’s land, particularly farming property.<sup>160</sup> Similar to Australia, much of South Africa is so arid that farming is simply not possible.<sup>161</sup> As a result, natives want access to the more fertile land currently owned by white farmers.<sup>162</sup> In fact, the failure to successfully reallocate farming property to the black populace has stirred demands for nationalization of *all* land.<sup>163</sup> While not considered an actual option,<sup>164</sup> this demand signals growing impatience with the government’s lack of progress in redistributing the wealth.

The main reason for the lack of progress is the willing-buyer-willing-seller principle.<sup>165</sup> In an ideal world, real estate transactions

---

<sup>157</sup> S. AFR. CONST., 1993; *see also* S. AFR. CONST., 1996.

<sup>158</sup> Matua, *supra* note 15, at 69.

<sup>159</sup> *See* Atuahene, *supra* note 12, at 121 (“When Nelson Mandela took power in South Africa in 1994, 87 percent of the country’s land was owned *by* whites, even though they represented less than ten percent of the population.”)(emphasis added).

<sup>160</sup> Atuahene, *supra* note 12, at 121; *see also* *Nationalisation not an option, says land minister*, MAIL & GUARDIAN (Apr. 1, 2010), available at <http://mg.co.za/article/2010-04-01-nationalisation-not-an-option-says-land-minister> [hereinafter *Nationalisation*].

<sup>161</sup> JOHN CROUMBIE BROWN, HYDROLOGY OF SOUTH AFRICA 216 (1875).

<sup>162</sup> *See* *Nationalisation*, *supra* note 160.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Matua, *supra* note 15, at 93; *see also* Sebastien Berger, *Congo hands land to South African farmers*, THE TELEGRAPH (Oct. 21, 2009),



between whites and blacks without government interference would not only strengthen the economy, but also improve race relations. However, because whites own the majority of the farmland, they would have *to want to sell* the property.<sup>166</sup> In reality, whites have clung onto the land and blacks either remain landless or have accepted farmland from the Democratic Republic of the Congo and have moved there.<sup>167</sup>

There is a possible solution to this problem, but it does not involve forcefully stripping land from the white population.<sup>168</sup> In order to establish better racial relations, parties have to contractually agree without government force behind the transaction.<sup>169</sup> The government should continue with its current program but with one significant change.

The problem with the willing-buyer-willing-seller concept is not the idea itself but rather the payment offered. The government issues grants to black individuals who propose projects where they intend to use farmland owned by white persons. Grant amounts vary depending on the size of the project, and the amounts are usually insufficient.<sup>170</sup> Although most black persons living on white-owned farmland desire only small amounts of land,<sup>171</sup> they are going to need more capital because current owners will not part with their land so easily. Rather, present landowners will likely want a cash payment that equals the present value of all future value in the land *plus* a

---

<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/congo/6398253/Congo-hands-land-to-South-African-farmers.html>.

<sup>166</sup> See Matua, *supra* note 15, at 93.

<sup>167</sup> Berger, *supra* note 165.

<sup>168</sup> But see Atuahene, *supra* note 12, at 127.

<sup>169</sup> Compromise between contracting parties also prevents drastic measures like those taken in Zimbabwe, which spiraled into a deep recession because 4,000 white farmers were evicted from their land. SA 'to learn from' land seizures, BBC News <http://news.bbc.co.uk/2/hi/africa/4140990.stm> (last updated Aug. 11, 2005).

<sup>170</sup> M. Mercedes Stickler, *Focus On Land: Land Redistribution in South Africa* 2-3 (2012). Originally, the government gave landless poor the equivalent of \$2,000 to purchase land from the white farmers. Provision of Land and Assistance Act 126 of 1993 (S. Afr.), amended by Provision of Certain Land for Settlement Act 26 of 1998 (S. Afr.). This also proved inefficient, as evidenced by the change in policy.

<sup>171</sup> Tessa Marcus et al., *Down to Earth: Land Demand in the New South Africa* 241 (1996).

premium because of their significant bargaining advantage.<sup>172</sup> The most probable way of meeting that sort of demand would require limiting grants to certain projects.

The government should choose to support smaller projects such as farm development on minimal acreage, and those projects should be funded in full. Without an efficient way to attain capital such as mortgaging property, the landless black population does not possess the means to make up the difference between the land price and the grant. For that reason, the government must supply the entire amount, but due to limited resources, it must choose who receives the grants. Since the small projects require less funding and more individuals can be helped in the process, the government should take this approach.

#### IV. PART III: THE COUNTRY PROVIDING THE BEST DIRECTION FOR NATIVES

Despite numerous changes in policy in both countries, Australia and South Africa have only shown disappointing results in land reform. Both judicial systems have made significant decisions recognizing native title. Both legislative bodies have passed important statutes that provide guidelines for land redistribution. However, the failure to enforce these new laws has left many natives in both countries without land to call their own. Indeed, for the past 20 years, despite continued glaring land inequity, both Australia and South Africa have failed to rectify their procedures.

Notwithstanding this major general concern, it is South Africa that continues to display the most extreme situation. Apartheid ended in the early 1990s, yet even with drastic changes to laws many of its core consequences have remained—namely, land distribution. How can a country where almost eight in ten people are black,<sup>173</sup> still

---

<sup>172</sup> The South African government has shown little interest in using Section 25(3) of the Constitution, which allows for the Land Restitution Commission to acquire land at fair market value from whites and distribute that land to blacks. Atuahene, *supra* note 12, at 125. Instead, the administration chooses to continue following the willing-buyer-willing-seller approach. As a result, current landowners have a bargaining advantage.

<sup>173</sup> STATISTICS SOUTH AFRICA, CENSUS 2011: CENSUS IN BRIEF 21 (2011).

have whites own 79% of the land?<sup>174</sup> Perhaps the best answer lies in race relations: the fear that stripping land from the white population will devastate already harmed relations with black people. For example, white landowners might violently reject the land redistribution process and ignite a racial war. Or perhaps the more cynical view is corruption: whites are paying off politicians to stall the reforms. That would explain the reason why the Land Restitution Commission only received about \$270 million when it asked for around \$750 million in 2010.<sup>175</sup> The Commission, in any case, was forced to place a moratorium on all land purchases due to depleted funds.<sup>176</sup> This administrative failure is inexcusable, especially when the government knows that its plan is not working, and it only answers broadly that there will be proper reform in the future.<sup>177</sup>

Australia, on the other hand, has made some strides in identifying problems and has analyzed different approaches to correct them. Specifically, there has been recognition that many of the original reforms were only bureaucratic and did not directly benefit the indigenous people.<sup>178</sup> After all, paternalism protects the natives from losing their land to more sophisticated parties but denies them the right to make their own choices and learn from their mistakes. Essentially, the laws are facially pleasing but fail in action because the government has not given the natives enough freedom to make their own choices.<sup>179</sup> In fact, since 2006, the Northern Territory Land Council has stated that the best method to empower the natives would be to increase their control in decision-making.<sup>180</sup> Numerous accounts, including an annual report from the Australian Human Rights Commission, detail different problems and possible solutions to native title issues. These accounts are all filed with parliament for review. Despite the slow progress, Australia has demonstrated some

---

<sup>174</sup> Atuahene, *supra* note 12, at 121.

<sup>175</sup> *Id.* at 123-24.

<sup>176</sup> *Id.* at 123.

<sup>177</sup> *Nationalisation*, *supra* note 160.

<sup>178</sup> Leon Terrill, *Indigenous land reform: what is real aim of reforms?*, AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES 6 (Sept. 7, 2010), <http://www.aiatsis.gov.au/ntru/nativetitleconference/conf2010/papers/Terrill.pdf>.

<sup>179</sup> AUSTRALIAN HUMAN RIGHTS COMM'N, NATIVE TITLE REPORT 2009 137 (2009).

<sup>180</sup> *Id.*

motivation in correcting some of the early mistakes of its indigenous land reform plan.

Nevertheless, the fight for natives in both countries for “something that lasts” continues. Many black Africans and Australian aboriginals have not experienced the feeling of owning land since white settlers arrived on the coast over a century ago. Instead, they live on property that is leased either from the government or white landowners. Infrastructure development remains mostly absent from indigenous land, and subleasing is extremely limited or restricted. What began as hope for a right to own land has sunk into a vicious cycle of cynicism: the more things change, the more they stay the same. And that cycle seems to be the only thing that lasts.