

# THE ROLE OF APARTHEID LEGISLATION IN THE PROPERTY LAW OF SOUTH AFRICA

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## INTRODUCTION

The struggle for possession of land in South Africa began in the 17th century, first symbolized by Jan Van Riebeeck's famous hedge, planted to delineate the extent of his property ownership and to prevent encroachment by neighboring tribes.<sup>1</sup> During the succeeding centuries, Black/white confrontations developed with ever-increasing intensity: stand-offs led to massacres; land speculation led to restrictive legislation.<sup>2</sup>

Beginning in the late 18th century, white expansion occurred through a two-fold process.<sup>3</sup> First, white military superiority resulted in the capitulation of independent<sup>4</sup> Black tribes.<sup>5</sup> Second, upon capitulation, the Western notion of individual ownership was introduced to the defeated.<sup>6</sup> While South African policy initially favored giving freehold and quitrent rights to Black tribes, the recipient tribes' lack of familiarity with these concepts resulted in the unexpected disintegration of many chiefdoms.<sup>7</sup> Not realizing the significance of individual ownership, as opposed to the tribal traditions of communal rights, chiefdoms traded their property rights without fully appreciating the value and import of the exchange.<sup>8</sup> Thus, although freehold and quitrent title, as well as trusteeship and reserve allotment rights in land, were extended to the

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\*\*The basic tenet of the South African government's apartheid policy is that defined population groups should exist separately. It is virtually impossible to discuss South Africa without using the South African vocabulary based upon these racial distinctions; separate ministries and legislative acts control the different groups, and the application of apartheid itself differs depending upon the race involved. Thus, this article adopts the terms currently used by the South African government.

Depending on when a given Act was passed, the terms "African," "Black," or "native" are used to denote persons of entirely Black descent. The term "Coloured" refers *only* to persons of mixed descent. The "Asian" refers to persons of Indian or Far Eastern descent. A detailed description of the other groups and subgroups is beyond the scope of this article.

1. T. R. H. DAVENPORT, *THE RIGHT OF THE LAND* ii (1974). See generally T. R.H. DAVENPORT, *SOUTH AFRICA—A MODERN HISTORY* 97-119 (2d ed. 1978) (discussing the history of possession of land in South Africa).

2. See generally T. R. H. DAVENPORT, *SOUTH AFRICA—A MODERN HISTORY* 97-119 (2d ed. 1978) (enumerating the conflicts between white settlers and Black tribes, and these conflicts' resolutions).

3. *Id.*

4. *Id.* at 10-17. In fact, many defeated black communities were not tribes, but only the remains of once powerful chiefdoms, fractured as a result of the "Mfecane," the chaotic dispersal of tribes after the rise of the Zulu empire in the late 18th and early 19th centuries.

5. *Id.* at 97-119.

6. *Id.* at 117-119.

7. *Id.* at 100-116.

8. See *id.* at 103-104.

defeated Black peoples,<sup>9</sup> the white settler gained great advantage by virtue of "his theodolite, and his title deed, and his greater awareness of the market."<sup>10</sup> In response, much early legislation was directed toward protecting Black land rights.<sup>11</sup>

During this same era, each of the four colonies—the Cape, Natal, the Orange Free State and the Transvaal—developed policies and legislation that physically and economically isolated Blacks, although to differing degrees depending upon the goals of a particular colony.<sup>12</sup> The scope of isolating legislation was linked to the conflict which had arisen from the attempted balancing of interests in obtaining land for white expansion against interests in protecting the remaining land of Blacks.<sup>13</sup>

With the union of the colonies in 1910, legislation became more comprehensive. Only three years later the South Africa government first laid down the principle of territorial segregation. The 1913 Native Lands Act<sup>14</sup> was created specifically for the control of Black access to land. Retitled and amended many times since, it stands now as the Black Land Act and provides for the isolation of areas where Blacks may acquire land.<sup>15</sup> It reads, ". . . no African shall acquire land outside of a scheduled African area except from another African; nor shall a non-African acquire land from an African outside of the scheduled areas. Further, only Africans shall acquire land in a scheduled area."<sup>16</sup> The import of these words is that only Blacks may sell to and buy from other Blacks and, even then, only in prescribed areas.

Since the introduction of this Act, legislation has evolved, and, to some extent, involuted to the point that all the people of South Africa—not simply Blacks—are restricted in every sphere by policies premised on racial segregation. Thus, while apartheid as it is understood today was not articulated until 1948 with the coming to power of the Nationalist Party,<sup>17</sup> the 1913 Native Lands Act marked the turning point in South Africa's history of race separation. This Act was the first step in the alteration of South Africa's Roman-Dutch property law and provided the foundation for apartheid.

This article outlines the development of apartheid as rooted in property law and analyzes proposed reforms of apartheid in terms of property rights. Although commonly perceived as an issue of racism, apartheid is much more complex than a national attitude of racial preferences. Apartheid is a shorthand reference to a vast body of statutory law concerning the extent and regulation of property law. An understanding of these laws is the first step to be taken when approaching proposed legal resolutions of the current situation in South Africa; any proposed change must be measured by its effect on these laws.

This article first examines the structures, powers and interplays of the

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9. 4 SURPLUS PEOPLE PROJECT, FORCED REMOVALS IN SOUTH AFRICA 24-27 (1983) (discussing the history of black freehold in Natal).

10. DAVENPORT, *supra* note 2, at 97.

11. *Id.* at 97-119.

12. *Id.*

13. *Id.*

14. Black Land Act 27 of 1913.

15. *Id.* § 1.

16. *Id.*

17. DAVENPORT, *supra* note 2, at 251-254.

judiciary and Parliament. An understanding of the relationship of the judiciary to the legislature is necessary to provide a foundation for understanding the mechanism of apartheid. The analysis generally observes that South Africa has developed a body of legislation that supersedes its judicial, Roman-Dutch guarantees of individuals' equality regarding individuals' property rights.

In Part II, this article outlines the development of a unique common law and the role of the courts, which has resulted in protection of individuals' property rights being enforced only by appeal to common law principles. This situation is complicated by several factors. First, Roman-Dutch law's inherent rigidity limits courts in their ability to interpret and enforce property rights.<sup>18</sup> Second, being subject to South Africa's Westminster system and Constitution, the judiciary is limited to procedural review of legislation and is unable to review the substantive impact a given act might have upon common law principles.<sup>19</sup> Finally, the South African Constitution defines only the structure and interrelations of the various branches of government; no constitutional provision, nor Bill of Rights, exists to protect its citizenry<sup>20</sup> or any other individual. Due to these factors the common law is left as the sole source of protection of individuals' rights in South Africa.<sup>21</sup>

In Part III of this article, a chronology of the various acts relating to property rights demonstrates that judicially unreviewable legislation has foreclosed the areas of common law to which an appeal may be had for the protection of individuals' property rights. In particular, legislation which defines the nature and scope of apartheid will be examined.

Part IV of this article compares principles of property law with current reform proposals. Over the past two years South Africa has repealed laws regulating interracial relationships and the law requiring that Blacks carry passes to legitimate their presence in South Africa. The government has proposed further legislative changes that would grant Blacks the right to own real property in freehold. This article demonstrates that, although those repeals which have taken place will have little meaningful impact in terms of direct benefits to Blacks, the current proposals by the South African government regarding the granting of full property ownership rights to Blacks may indicate the imminence of significant changes regarding apartheid and racial inequality in South Africa.

Although the principal focus of this article is an analysis of specific acts and their effects, it indicates that the interplay between the judiciary and parliament of South Africa has been essential to the development of a system based on unequal treatment. In a brief conclusion, this article reflects upon the idea that, in assessing any change within the current system, the statutory property laws of South Africa merit special attention since apartheid is derived from these laws. An understanding of these laws is an understanding of

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18. See *infra* notes 82-272 and accompanying text.

19. *Id.*

20. In reference to the Black population of South Africa, the term "citizenry" does not apply directly, due to this group's lack of political, civil and social rights. Thus, this Note emphasizes the term "individual," rather than "citizen," to avoid confusion. See L. BOULLE, CONSTITUTIONAL REFORM AND APARTHEID, at 92-94 (1984) (distinguishing between "citizen" and "national").

21. See *infra* notes 80-84 and accompanying text.

the blueprint of apartheid; therefore, apartheid can not be dismantled without the concomitant repeal of these laws.

## II. THE COMMON LAW

The law of South Africa is the product of three bodies of legal thought: Roman-Dutch law, English common law, and the Customary law of South Africa's Bantu-speaking peoples.<sup>22</sup> Of these three, Roman-Dutch law is by far the predominant component of South African law today.<sup>23</sup>

Roman-Dutch law is the result of the melding of the unwritten customs of the people of the Netherlands prior to the 13th century, and the rules of law compiled by the Roman civilization beginning with the *Corpus Juris Civilis* in the early 6th century.<sup>24</sup> The authority of this early law remains significant in South Africa today, for only those modifications of Roman-Dutch law enacted by the Netherlands before 1652 are binding upon South Africa.<sup>25</sup> Legislative changes regarding Roman-Dutch law enacted by the Netherlands between 1652 and 1806, the years of Dutch rule over South Africa,<sup>26</sup> are considered merely "persuasive" by South African courts.<sup>27</sup> In 1806, when Great Britain took possession of the Cape,<sup>28</sup> although the existing Roman-Dutch system of law was retained, the relevance of Dutch modifications became even more tenuous.<sup>29</sup> Thus, South Africa remains in most respects a civil code system.

For the purposes of this article, English common law and Customary law need be mentioned briefly. During the years of British rule, Roman-Dutch law remained the common law and was interpreted and developed by the largely English judiciary.<sup>30</sup> The primary contributions that the British made to the South African legal system were procedural.<sup>31</sup> For instance, the bureaucracy of the judiciary was restructured to be more similar to the British court system and the English civil and criminal procedure, as well as English laws of evidence, were adopted.<sup>32</sup> Aside from these changes, the Roman-Dutch law was left relatively untouched.<sup>33</sup>

Customary law has come into contact with the South African system in a very specific and controlled sense.<sup>34</sup> South Africa maintains a separate legal system, administered by the Commissioners' Courts, for disputes arising be-

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22. See J. GIBSON, *WILLE'S PRINCIPLES OF SOUTH AFRICA LAW* 30-40 (7th ed. 1977). See also J.C. BECKER & J.J.J. COERTZE, *SEYMOUR'S CUSTOMARY LAW* 1-38 (4th ed. 1982) (detailing the history and procedure of Customary law in both the Commissioner's Courts and South African civil system).

23. H. HAHLO & E. KAHN, *THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND* 578 (1968).

24. For a more extensive discussion of the development of Roman-Dutch law see generally HAHLO & KAHN *supra* note 23 at 483-517.

25. *Id.* at 572.

26. For a general history, see generally DAVENPORT, *supra* note 2, at 18-33.

27. HAHLO & KAHN, *supra* note 24, at 27.

28. *Id.* at 575.

29. GIBSON, *supra* note 22, at 30-31.

30. HAHLO & KAHN, *supra* note 23, at 575.

31. *Id.* at 576.

32. *Id.*

33. *Id.* at 576-578

34. See generally J. BECKER & J. COERTZE, *SEYMOUR'S CUSTOMARY LAW*, 1-40 (4th ed. 1982) (detailing the history and procedure of Customary law in both the Commissioner's Courts and South African civil system).

tween Blacks.<sup>35</sup> Here, Customary law is administered in certain situations, notably those concerning: bridewealth (*lobolo*), family law, grazing rights and privileges, and succession.<sup>36</sup> When a dispute arises among Blacks and the case comes before the Commissioners' Courts, the Repugnancy Clause of the Black Administration Act states that Customary law shall be enforced, among Blacks, to the extent that it, "shall not be opposed to the principles of public policy or natural justice."<sup>37</sup> Furthermore, should a Customary law issue arise before the South African judiciary, the court is bound by the same repugnancy principles and limited to enforcing agreements "not repugnant to the principles of the law of the land."<sup>38</sup> Because of these historical and jurisprudential limits, South African courts are unable to avail themselves of any property right doctrines of English common or Customary law.

In contrast, Anglo-American common law is characterized by its flexible, dynamic aspects. Courts under these systems are able to employ concepts such as "equity" and "judicial discretion" to interpret the law to fit social needs and protect individuals from unfair treatment. Although bound by precedent, the ability to distinguish and overrule cases gives the Anglo-American common law the potential to change or evolve over time. By comparison, Roman-Dutch law is an index,<sup>39</sup> "virtually an arbitrator."<sup>40</sup> Under this type of civil system, reference is made only to the laws themselves, past decisions are irrelevant in that they were determined by the same, eternal and inflexible set of principles.<sup>41</sup> For example, the South African judiciary long thought Roman-Dutch law did not require a systematic body of case law to record court decisions. South Africa did not begin to modify this aspect of Roman-Dutch law until the turn of the century. However, the doctrine of *stare decisis* now binds a court and its subordinate courts.<sup>42</sup> Despite this trend toward the Anglo-American common law concept of "precedent" in the making of decisions, the law of South Africa retains its roots in that South African law recognizes "custom"<sup>43</sup> above judicial decisions in persuasiveness.<sup>44</sup>

In accordance with the South African Constitution, Acts of Parliament are controlling and unreviewable, leaving Custom second to these Acts.<sup>45</sup> The governmental structure of South Africa is modeled on the British Westminster system.<sup>46</sup> Under this system, Parliament is sovereign and not subject to sub-

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35. *Id.* at 22.

36. *See generally id.*, at 41-69 (discussing conflict of laws resolutions between South African common and Customary law).

37. Black Administration Act 38( 1927) § 11(1). *See generally* N.S. Peart, *Section 11(1) of the Black Administration Act 1927No 38: the Application of the Repugnancy Clause*, 1982 Acta Juridica 99 (examining the history of the application of the Repugnancy Clause).

38. BECKER & COERTZE, *supra* note 34, at 38.

39. HAHLO & KAHN, *supra* note 23, at 217.

40. *Id.*

41. *Id.* at 217-218.

42. *See generally id.* at 240-242 (noting that the creation of the Supreme Court of South Africa by the South Africa Act, 1909, effectively bound all courts by decisions of the Appellate Division, the country's highest court), 282 (noting that the combined series of South African Law Reports commenced in 1947, with all previous years' decisions recorded on a provincial basis).

43. GIBSON, *supra* note 22, at 9-11.

44. *Id.* at 38.

45. *Id.*

46. For an excellent account of the South African development of the Westminster system, *see* van der Vyver, *Depriving Westminster of its Moral Constraints: A Survey of Constitutional Development in South Africa*, 20 HARV. C.R.—C.L.L. REV. 291 (1985).

stantive judicial review.<sup>47</sup> Both the Constitution of the Union of South Africa in 1910,<sup>48</sup> and the Constitution of the Republic of South Africa in 1961,<sup>49</sup> implemented the Westminster system with modifications to the limitations on the judiciary. Parliament was supreme in relation to other branches of state authority. However, legislation on certain constitutionally enumerated matters had to comply with provisions regarding extraordinary procedures.<sup>50</sup> This legislation was subject to a constitutionally granted right of procedural review.<sup>51</sup> All other legislation was subject only to the Supreme Court's general right of procedural review.<sup>52</sup> In 1984, the current South African Constitution came into force.<sup>53</sup> This Constitution does not allow for any exceptional circumstance under which the judiciary would be empowered with a right of substantive review. The two provisions relevant to this Note state that, except to review whether the provisions of the constitution were followed as required, "no court of law shall be competent to inquire into or pronounce upon the validity of an Act of Parliament."<sup>54</sup> At this point in time, the extent of procedural judicial review has been untested. However, though the current constitution uses the same language as that used in previous constitutions concerning the judiciary's powers, and makes no reference to exceptional circumstances, the new constitution appears to continue the bar on substantive review and expands the limits on the power of procedural review by courts of law.<sup>55</sup>

The new South African Constitution, like those before it, is a document that serves the functional needs of the government in that it provides the framework of and relationships between the various branches of government.<sup>56</sup> It is unlike the United States' Constitution in that it makes no provision to protect the integrity of individuals' rights as enumerated in the Bill of Rights. Thus, in interpreting the nature and scope of any civil rights, property rights included, the judiciary must look to the common law.<sup>57</sup>

The hierarchy of Acts of Parliament above Custom above judicial decision, in the ranking of persuasiveness, underscores the nexus of conflict between the courts and the legislature in South Africa. In the realm of property law, Roman-Dutch law is grounded in three concepts, two of which specifically relate to property law and one which is an undercurrent of Roman-Dutch law in general.<sup>58</sup> First, regarding leasehold, the possessor is entitled to

47. P.J. DALTON & R. S. DEXTER, CONSTITUTIONAL LAW 43 (1976).

48. South Africa Act, 1909, 9 Edw. 7, ch. 9.

49. Republic of South Africa Constitution Act 32, 1961.

50. *Id.* §§ 59(2), 108, 118.

51. *Id.*

52. DALTON & DEXTER, *supra* note 47, at 189-190. See also van der Vyver, *supra* note 46, at 292 (noting the place of the judiciary within the South African version of the Westminster system.)

53. Republic of South Africa Act 110, (1983).

54. *Id.* §§ 18(2), 34(3).

55. *But see* van der Vyver, *supra* note 46, at 336 n. 175 (giving a possible broader reading to the relevant constitutional text).

56. BOULLE, *supra* note 20 at 195-196.

57. *Cf.* DALTON & DEXTER, *supra* note 47, at 211 (demonstrating that under the English Westminster system, where no Bill of Rights or similar constitutional protection exists, the courts utilize a common law presumption of individuals' liberties).

58. See generally GIBSON, *supra* note 22, at 163-194 (discussing the various forms real rights take under the Roman-Dutch system of law).

full protection against interference with, or loss of, his property rights.<sup>59</sup> Furthermore, the possessor is entitled to compensation if deprived of or injured in his property interests.<sup>60</sup> Second, regarding ownership, the rule of *plena in re potestas* controls, that is, the individual has the right to wield "the most extensive power of control and disposition over a thing compatible with a given social order."<sup>61</sup> Finally, Roman-Dutch law is based on the fundamental belief of equal treatment, that a "juridical norm to preserve egalitarian standards, to bind citizens equally, and to define the rights of subjects generally and not for individuals" must be perpetuated in the reading of the law.<sup>62</sup> In other words, unless specifically legislated to the contrary, the Roman-Dutch vision of the rights of the *bona fide* property occupier or owner is absolute.

Apartheid alters the relevant Roman-Dutch common law by preventing the occupier or owner from becoming "*bona fide*." Apartheid is premised on the belief that otherwise free individuals can be restricted in their rights to own property.<sup>63</sup> Thus, where legislation falls short of common law, the courts have been compelled to enforce the Roman-Dutch principles of equal treatment of individuals regarding property law. This thwarting of apartheid legislation by the common law is witnessed in the continuing race of legislation to fill holes through which the common law might enter. This situation was first and, perhaps, is best exemplified by the decision of the Transvaal Supreme Court in the *Tsewu* case, in 1905.<sup>64</sup> The decision proved to be a watershed in the Black-white history of South Africa. The court ruled that the Deeds Registry could not refuse to register a transfer in favor of a Black simply on the grounds that Blacks were incapable of acquiring real rights.<sup>65</sup> The court noted that such grounds could not be enforced legally without express statutory support.<sup>66</sup> In looking to basic, Roman-Dutch law, the court stated that "all inhabitants of [South Africa] enjoy equal civil rights under the law."<sup>67</sup> Thus, *Tsewu* both emphasized the courts' respect for the fundamental principles of Roman-Dutch law and foretold of the necessity of extensive legislation if unequal treatment were to become law. The *Rikhoto*<sup>68</sup> and *Ingwavuma*<sup>69</sup> cases are current examples of the courts' persistence in turning to common law concepts of equal treatment where they have not been superseded by legislative act.

The result of such confrontations has been the continual overriding of the

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59. *Id.* at 168-170. Note that two of the forms of *jura in re aliena*—possession and lease—overlap in their incidents. For the purposes of this Note, real rights have been broken into two large categories: occupancy and ownership. For the sake of simplicity, occupancy has been limited to leasehold rights; ownership has been limited to full possession. To cover real rights in any greater detail would be to shift the focus of this article. For a similar dichotomization of real rights, see, e.g., T.H. VAN REENEN, *LAND—ITS OWNERSHIP AND OCCUPATION IN SOUTH AFRICA* (1981).

60. A. OOSTUIZEN, *THE LAW OF PROPERTY* 22-25 (1981).

61. D. COWEN, *NEW PATTERNS LANDOWNERSHIP—THE TRANSFORMATION OF THE CONCEPT OF OWNERSHIP AS PLENA IN RE POTESTAS* 55 (1984) (unpublished manuscript).

62. van der Vyver, *supra* note 46, at 307.

63. See DAVENPORT, *supra* note 2, at 258 (noting that the new, Nationalist government of 1948 grounded its concept of apartheid in the segregation of residential and business areas).

64. *Tsewu v. Registrar of Deeds*, T.S. 130 (1905).

65. *Id.* at 135.

66. *Id.*

67. *Id.*

68. See *infra* notes 167-173 and accompanying text.

69. See *infra* notes 200-207 and accompanying text.

common law by statutory law. Thus, the Transvaal Supreme Court's allusion to the need for explicit statutory authority in *Tsewu* appears prophetic, for within a decade this need was answered in the 1913 Native Lands Act.

### III. THE LEGISLATION

The Verwoerdian view of apartheid<sup>70</sup>—separation of races in all areas: cultural, economic, political, residential and territorial—would be no more than a national attitude that could be eliminated, or at least mitigated, through the judiciary were it not for the fact that South African government has legitimized this policy through Acts of Parliament. Apartheid is more than historical racism, it is statutory law. To fully appreciate the extent and significance of apartheid, it is necessary to understand the specific legislation that sustains the ideology today.

#### A. *The Population Registration Act*

In order to have a system organized on the basis of race, races must be defined. The Population Registration Act<sup>71</sup> was created to provide a foundation for this type of classification. Originally the Act accounted for only three population groups,<sup>72</sup> now however, there are twelve. Every South African citizen must be assigned to one of these groups. The groups are: White, Cape Coloured, Coloured Person of South-West Africa, Malay, Griqua, Chinese, Indian, Other Asian, Other Coloured, Baster of Rehoboth, Nama of South-West Africa, and Black.<sup>73</sup> Every population group has a complex and lengthy definition.<sup>74</sup>

#### B. *The Black Act*

The Black (Abolition of Passes and Co-ordination of Documents) Act repealed as of July 1, 1986,<sup>75</sup> enforced a requirement that Blacks carry reference books with them at all times.<sup>76</sup> Although all South Africans still must be registered in terms of the Population Registration Act, Blacks no longer are required to carry "passes."<sup>77</sup> The requirement was premised on the notion that Blacks are not true South African citizens but, are only "temporary sojourners" destined to return to their own lands.<sup>78</sup> The Population Registration Act and the Pass laws together are the underpinnings of the system of alien regulation, or "influx control," utilized by the government in regulating the presence of Blacks in South Africa. The Population Registration Act defined the different population groups, while the Pass laws delineated one group

70. DAVENPORT, *supra* note 2, at 270 (quoting Prime Minister H.F. Verwoerd, 1954, as to the nature of apartheid).

71. Population Registration Act 30, (1950).

72. *Id.* § 5 (enumerating the three original categories of "Black," "coloured," and "white").

73. SEC. OF THE INTERIOR, POPULATION REGISTRATION AND IDENTIFICATION GUIDE (1983).

74. *See, e.g.*, Population Registration Act 30 of 1950, §§ 1, 5, 9, 19 (listing attributes and presumptions for determining race of individuals).

75. Black (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952 [hereinafter Pass Laws].

76. *Id.* § 5(2).

77. *A Relic of Apartheid Falls*, TIME, Oct. 14, 1985, at 35.

78. SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, SURVEY OF RACE RELATIONS IN SOUTH AFRICA 252 (1983).

as alien, and therefore in need of regulation. The Pass laws were justified by the absence of property rights for Blacks within South Africa, for once a group is defined as alien and denied the right to own property, government regulation of any member of this group within national borders seems appropriate.<sup>79</sup> Thus, implicit in the repeal of the Pass laws is the idea that Blacks are now something more to South Africa than “temporary sojourners.”

### C. *The Black Land Act (1913)*

By 1913, land distribution had culminated in a critical shrinkage of areas available for Black communal tenure.<sup>80</sup> This resulted in two developments. First, out of desperation, and a developing sense of the market and its mechanisms, Black communities had begun to form syndicates to purchase farms.<sup>81</sup> Furthermore, a body of successful, though small-scale, Black farmers had acquired over the years freehold and quitrent title to property, title originally intended to preserve tribal lands for tribes as whole entities.<sup>82</sup> Although the actual number of individuals involved was small, segments of the white population viewed them as posing a significant threat.<sup>83</sup> Second, as land available for communal tenure and individuals decreased, “squatting” increased.<sup>84</sup>

The Black Land Act<sup>85</sup> was passed to meet this situation. It set aside the existing African reserves as “scheduled areas,” areas reserved exclusively for Black ownership and occupation.<sup>86</sup> Furthermore, Blacks were prohibited from purchasing land outside of these areas.<sup>87</sup>

The Act proved to be insufficient in two respects. First, in terms of the government’s goals at the time of the Act’s passage, the Act failed by actually aggravating—not lessening—the squatter problem.<sup>88</sup> The net result of the Act was to cast adrift large numbers of Blacks who, unable to purchase land due to the limits of the Act, were forced to seek shelter on land owned by both Blacks and whites owned lands.<sup>89</sup> Second, the Act was unable to fulfill goals developed subsequent to its enactment. During the years after the Act, the government tended away from the earlier, and much debated, policy favoring individual purchase of land for Blacks (through offering freehold and quitrent title, and by allowing mission purchases made on behalf of Black constituencies).<sup>90</sup> Since the Black Land Act permitted these purchases within scheduled areas, further legislation was needed to enforce the developing policy of barring Black individual ownership of real property.

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79. See, e.g., the Aliens Act 1, (1939), and the Admission of Persons to and Departure from the Republic Regulation Act 38, (1969).

80. SURPLUS PEOPLE PROJECT, *supra* 6, at 24.

81. DAVENPORT, *supra* note 2, at 334.

82. See generally *id.*, at 97-119 (including histories of land transactions with tribes).

83. SURPLUS PEOPLE PROJECT, *supra* note 9, at 25.

84. DAVENPORT, *supra* note 2, at 334.

85. Black Land Act 27,(1913).

86. *Id.* § 1.

87. *Id.*

88. DAVENPORT, *supra* note 2, at 334-336.

89. SURPLUS PEOPLE PROJECT, *supra* note 9, at 25.

90. DAVENPORT, *supra* note 2, at 336.

D. *The Development Trust and Land Act and the South African Development Trust (1936)*

In 1936, the government attempted to solidify its concept of Black land tenure by passing the Development Trust and Land Act.<sup>91</sup> Although many legislative acts have altered significantly the status of South African Blacks, this Act is of special importance because it provides the basis for two particularly controversial aspects of apartheid: 1) the removal of Blacks to trust lands, and 2) the creation of Homelands from these trust lands.<sup>92</sup>

The Development Trust and Land Act modified the 1913 Black Land Act by substituting trust tenure for individual ownership. All previous reserve lands became trust lands.<sup>93</sup> The Act provided for the creation of the South African Development Trust which was to increase land available for Black occupation, and to control farming of all the land concerned.<sup>94</sup> As of 1982, 7.4 million hectares were held as trust lands.<sup>95</sup>

The Development and Trust Act expanded the Black Land Act by creating the concept of "released areas" to supplement that of scheduled areas.<sup>96</sup> Under the Black Land Act, scheduled land included Black reserves and townships, or "locations", and land privately owned by Blacks.<sup>97</sup> Thus, the Black Land Act allowed for the existence of Black-owned property in white areas (i.e., property purchased before the enactment of the 1913 Act). The Development and Trust Land Act determined such Black-held property to be "released."<sup>98</sup> This meant the relevant properties were released from the restrictions of the Black Land Act regarding purchases or sales by Blacks.<sup>99</sup> However, the release from these restrictions relates only to the South African Development Trust.<sup>100</sup> Thus, Blacks are allowed to sell to non-Blacks in the unique instance when the prospective purchaser is the South African Development trust.<sup>101</sup> The South African Development Trust, usually through the mechanism of expropriation, can purchase released areas, relocate the Black owners on comparable land and then sell the released properties to acceptable buyers. These relocated Blacks, as all other Blacks, can purchase land only through the Trust. Therefore, some sort of parity must be maintained between the acreage of trust lands available for Black purchases and the released areas made available to acceptable, non-Black purchases.<sup>102</sup> In short, if a released area is purchased by the Trust, to be sold to an acceptable buyer, land of equal

91. Development Trust and Land Act 18,(1936) (originally enacted as Native Trust and Land Bill 19,(1936)).

92. DAVENPORT, *supra* note 2, at 336-337.

93. Development Trust and Land Act 18 of 1936, § 4.

94. *Id.* § 6.

95. SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, *supra* note 74, at 323. The total area of the Republic of South Africa is approximately 122 million hectares, while the total area of the Homelands approximates 16 million hectares. These figures provide the oft-cited ratio of 13% of South Africa's land being available for Black utilization, while 87% is available for white utilization. See, e.g., Note, *The Constitutionality of State and Local Government' Response to Apartheid: Divestment Legislation*, 13 FORD. URB.L.J. 764 n. 5 (1984/1985).

96. Development Trust and Land Act 18,(1936) § 2.

97. Black Land Act 27,(1913) § 27.

98. Development Trust and Land Act 18 (1936) § 2.

99. See *id.*, § 11(1).

100. *Id.*, §§ 10(2), 11, 12.

101. *Id.* § 9.

102. *Id.* at § 2(2)(a).

quantity and quality—in theory—must be obtained by the Trust so that the Black seller has the alternative of purchasing substitute land available to him.

The Development Land and Trust Act further exceeded the Black Land Act by prohibiting white landowners from allowing Black tenants, employees, or squatters from congregating or residing on their property, except in specific and controlled circumstances (such as for domestic employees and visitors).<sup>103</sup> The relevant provisions provided for the removal of Blacks found outside urban areas and not within reserves. Thus, the Act limited itself to Blacks on rural, white properties.<sup>104</sup> These provisions have been much less successful than their counterparts in legislation regarding the removal of Blacks from urban areas.<sup>105</sup> This has been primarily due to the fact that, while the Act established a basis for the removal of Blacks, it did not provide adequately for the after effects of removal.<sup>106</sup> Thus, the intensifying pressure of population increases on the reserves, a pressure resulting from both the natural rate of increase within the reserves and political repatriation to the reserves, has caused trust land populations to seek white areas as alternative lands upon which to live.<sup>107</sup>

Finally, the Development Land and Trust Act allowed for the “transfer of certain rights and obligations to self-governing territories.”<sup>108</sup> From this declaration arose subsequent legislation creating the Homelands, which are self-governing, independent and non-independent, states.<sup>109</sup>

Although since 1936 the Development Trust and Land Act has been amended repeatedly, the provisions enumerated above have remained unchanged. Together, the Black Land Act and the Development Trust and Land Act provide the structure upon which apartheid is based in that they establish separation of races, through the vehicle of property ownership restrictions, as statutory law.

#### E. *The Black (Urban Areas) Consolidation Act*

A broad sweep of segregation policy necessitates the setting aside of special residential areas for a particular group within the territory of the other. In other words, when can either whites reside in Black areas or Blacks live in white areas.<sup>110</sup> Demographically, whites in Black areas have never constituted a problem in the balancing of desired ratios.<sup>111</sup> On the other hand, the numbers of Blacks moving to the peripheries of white urban areas has increased disproportionately over the past century, in terms of the balance desired by the government.<sup>112</sup> Thus, in the years following the Black Land Act, Black urban settlements became a matter for explicit legislation.<sup>113</sup> Prior to indepen-

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103. *Id.* at § 26.

104. *Id.*

105. *See e.g.* DAVENPORT, *supra* note 2, at 336-342.

106. *Id.* at 338-339.

107. *Id.*

108. Development Trust and Land Act 18, (1936) § 4bis.

109. *See*, Black (Urban Areas) Consolidation Act 25, (1945) (originally enacted as Native (Urban Areas) Act 21, (1923)) [hereinafter Urban Areas Act], *infra* notes 126 to 157 and accompanying text.

110. DAVENPORT, *supra* note 2, at 339.

111. *See generally* RACE DISCRIMINATION IN SOUTH AFRICA 91-92 (S. van Der Horst ed. 1981) (following the combined histories of Black migration to urban areas and influx control legislation).

112. *Id.* at 92.

113. *See generally* DAVENPORT, *supra* note 2, at 330-347 (detailing amendments).

dence in 1910, each of the provinces developed its own laws.<sup>114</sup> By 1923, outbreaks of disease, worsening slum conditions, and the strengthening idea that urban areas were created by the whites, had combined to convince the government of the need for a comprehensive, national package of legislation to regulate these urban areas.<sup>115</sup>

The 1923 Urban Areas Act was subject to extensive amendments between 1936 and 1945 to meet these problems.<sup>116</sup> It stands as one of the most complex pieces of legislation anywhere. The Act is a portmanteau of laws covering a great variety of issues. Until 1986 it provided for the residence of Blacks in urban areas and the control of entry of Blacks into these areas.<sup>117</sup> This Act was the key to the influx control system. In 1986 the South African government repealed several of the provisions of the Act.<sup>118</sup> Nevertheless, a discussion of these repealed provisions is necessary in that it provides the background of the current South African system regarding, in particular, the rights of Blacks within white South Africa and how these rights have been protected by the courts.

The Urban Areas Act establishes what property rights Blacks may hold in urban areas, and non-urban areas such as the rural areas, trust lands, and Homelands, which are controlled by the 1913 and 1936 Acts. In 1937, amendments brought urban policy in line with the Black Land Act regarding ownership rights.<sup>119</sup> The Urban Areas Act prohibited non-Blacks from dealing in any form of land transaction (aside from those with government) in urban areas.<sup>120</sup> Furthermore, property rights in leasehold—the only rights available to Blacks both at that time and up to 1985<sup>121</sup>—were extremely limited.<sup>122</sup>

Leasehold rights were limited to the rental properties owned and managed by the government.<sup>123</sup> Currently, these properties are handled by the Administration Board, to which a Black must apply if he wishes to obtain leasehold rights in urban areas. No Black may rent property in urban areas other than from the Administration Board. In addition, any Black who wishes to rent must satisfy various legislative requirements.<sup>124</sup>

The 1937 amendments to the Urban Areas Act also included prohibitions against Blacks who remained within urban areas without employment. The powers of removal held by the government regarding Blacks within areas were activated by the presence of an unemployed, or otherwise wrongfully present, Black in an urban area for 72 hours or more, and resulted in the government removing Blacks who transgressed this prohibition and either fining them, im-

114. *Id.*, at 340

115. *Id.*

116. LEGAL RESOURCES CENTRE (DURBAN), LEGAL RESOURCES TRUST, PARA-LEGAL MANUAL 309-318 (describing historical development of urban rights).

117. See e.g. N.Y. TIMES, Apr. 24, 1986, § 1 at 1, col. 6 (noting the repeal of various provision of the Urban Areas Act).

118. *Id.*

119. LEGAL RESOURCES CENTRE, *supra* note 116, at 312.

120. RACE DISCRIMINATION IN SOUTH AFRICA, *supra* note 111, at 92.

121. See generally *id.* at 94-96 (noting historical policy of viewing urban Black residence as temporary).

122. Urban Areas Act 25, *supra* note 109 § 6A.

123. *Id.*

124. See, e.g., *id.*, § 9(1), (2).

prisoning them, or sending them to the Homelands.<sup>125</sup>

Among the major goals of the 1923 Urban Areas Act and the 1937 amendments was the relocation of Blacks from mixed residential areas to Black townships.<sup>126</sup> Authorities, however, discovered that removing Blacks from one white or mixed area often resulted in their drifting to another.<sup>127</sup> Thus, the result of this legislation was, again, the aggravation and expansion of squatter crises, social unrest, and dislocation, the very conditions the government wanted to eliminate.

During World War II, the government retreated and legalized 30-year leases in an effort to promote stability.<sup>128</sup> By 1985, 99-year leases were available for the first time in the four major urban areas of Cape Town, Durban, Port Elizabeth and the Witwaterstrand.<sup>129</sup>

The actual availability of leasehold rights was predicated on a Black applicant's ability to satisfy the requirements of the Urban Areas Act.<sup>130</sup> Under section 6A, the Administration Board could only grant a 99-year lease to a "qualified person."<sup>131</sup> A qualified person was a person who had resided continuously since birth in an urban area, or worked continuously for one employer for 10 years, or continuously and lawfully resided for 15 years in an urban area.<sup>132</sup> These provisions, tedious in their particularity, are prerequisite to understanding the history behind the limited leasehold property rights of urban Blacks in South Africa.

Section 10 (1) set out the qualifications for being a permanent urban resident, a desirable status for Blacks since it allowed them to remain for more than 72 hours in an urban area without some form of employment.<sup>133</sup>

Section 12 further qualified Section 10 rights and stated that, subject to a few exemptions, employment and residential rights were not to be extended to any Black unless he was: (a) a South African citizen; or, (b) a former South African citizen who subsequently had been assigned citizenship in one of the Homelands.<sup>134</sup> Section 12 eliminated the possibility of any Black from another country, or born in the Homelands, acquiring some form of residential right in South Africa. This was, and continues to be, of concern to the government since the mines historically have recruited heavily throughout all southern Africa, not just South Africa itself.<sup>135</sup>

In light of this legislative history, South African courts recognized the Urban Areas Act as a foreclosure of common law property principles as related to Blacks. For example, in *Rex v. Siza*,<sup>136</sup> the court noted that the Act materially abridged Blacks' common law right to reside anywhere they

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125. *Id.* § 14.

126. See generally DAVENPORT, *supra* note 2, at 340-343 (detailing the policies behind clearing mixed residential areas).

127. *Id.*, at 340.

128. *Id.* at 342.

129. RACE DISCRIMINATION IN SOUTH AFRICA, *supra* note 111, at 94.

130. Urban Areas Act, *supra* note 109, § 6A.

131. *Id.* § 1 (defining "qualified person").

132. *Id.*, § 10(1)(a).

133. *Id.*

134. *Id.* § 12(1).

135. SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, *supra* note 78, at 136-137.

136. *Rex v. Siza*, E.D.L. 48, (1944).

wished.<sup>137</sup>

The perpetual conflict between the common law and the tenets of apartheid formed the basis of the judicially created concept of "section 10" rights. Two Appellate Division court decisions are of particular interest.<sup>138</sup>

In 1980, the Appellate Division decided in *Komani NO v. Bantu Affairs Administration Board, Peninsular Area*<sup>139</sup> that Section 10(1)(a) of the Urban Areas Act provided a right, and not a mere privilege, to remain in a prescribed area.<sup>140</sup> The case concerned a resident of the Black township of Guguletu in the Cape Peninsula.<sup>141</sup> Mr. Komani had worked continuously for one employer for the requisite ten years.<sup>142</sup> Komani went to court seeking an order which would declare his wife as qualified to remain with him in Guguletu.<sup>143</sup> He based his claim on Section 10, which allowed a Black woman who entered an urban area lawfully and thereupon ordinarily resided with her spouse to acquire Section 10 rights.<sup>144</sup>

Previous court decisions had interpreted "ordinarily reside" to connote "lawful residence."<sup>145</sup> Mrs. Komani's residence was unlawful, however, since, under Regulation 20(1) of the Act, lodger's permits (and, therefore, lawful status) could be acquired only by persons "in *bona fide* employment or carrying on some lawful trade in the area."<sup>146</sup> Being a housewife, Mrs. Komani was unable to get a lodger's permit and, thus, could not "ordinarily reside" in the area.<sup>147</sup> The court concluded that, since one of the Act's provisions, Section 10, conferred a right, the regulations that emasculated this right could not be enforced.<sup>148</sup> While the case can be seen as one merely exemplifying rules of statutory interpretation, that regulations cannot supersede an Act's provisions, it also can be viewed as an example of the court's attempting to read legislative law in conjunction with common law principles. The court could have found a legislative intent of the Urban Areas Act to be no more than a restriction on the entry of persons into urban areas. Instead the court found a legislative intent to create rights. Having found that the Act created a right, however, the court then had to enforce it as such. The result was the vesting in Mr. Komani of an enforceable right of *occupancy*. The court's holding was in accord with Roman-Dutch common law property principles regarding the right of possession in leasehold. In doing so, the court enforced and protected a right to occupancy without regard to the status of the individual in question. The court was limited only by the applicable legislation and the power of procedural review.

137. *Id.* at 52.

138. See generally LEGAL RESOURCES CENTRE (DURBAN), *supra* note 116, at 309-342 (detailing the judicial history of influx laws in South Africa).

139. *Komani NO v. Bantu Affairs Administration Board, Peninsular Area*, (4) S.A. 448 (A) (1980).

140. *Id.* at 471.

141. Dixon, *Black Residence Rights: the Appellate Division of Section 10(1)*, 98 S.A.L.J. 42, 43 (1981).

142. *Id.*

143. *Id.*

144. Urban Areas Act, *supra* note 109 § 10(1)(c).

145. *S v. Mapheele*, (2) S.A. 651 (A) (1963).

146. See Dixon, *supra* note 141, at 44.

147. Urban Areas Act, *supra* note 109 § 10(1)(c).

148. *Id.*, §§ 38(1), (3) (stating regulations may be made that are not inconsistent with the Act).

In 1981, *Oos-Randse Administrasieraad en 'n Ander v. Rikhoto*<sup>149</sup> successfully challenged the government's 1968 rule relating to migrant workers, who were obliged to renew their labor contracts every year<sup>150</sup>—a process necessitating a return to the Homeland of origin for contract renewal. The rule provided that such workers could not be said to work “continuously,” in terms of Sections 10.<sup>151</sup> Thus, the government asserted, these workers were ineligible for permanent urban residence rights.<sup>152</sup> The Transvaal Supreme Court, as upheld by the Appellate Division, ruled that continuity of service was not broken by temporary absence due to illness, injury, or occasional departure for some legitimate purpose unconnected with a change of work.<sup>153</sup> The *Rikhoto* decision, as *Komani*, viewed Section 10 as vesting a right.<sup>154</sup> Finding that a broad meaning of “continuously” applied, like ruling that the regulations in *Komani* were not in accord with intent of the Urban Areas Act, was an exercise in substantive law under the guise of a procedural review. The *Rikhoto* court was more limited by its powers of procedural review than was the *Komani* court, however, since the Act, and not the enforcing regulations, narrowed the scope of the occupancy right. Nevertheless, in both cases, the courts applied the Roman-Dutch standard of equal treatment of individuals where a right is concerned by giving the individuals in question the greatest protection possible, while remaining consistent with the relevant Act.

In 1986, the government repealed several provisions of the Urban Areas Act. First, section 10 was repealed in its entirety.<sup>155</sup> Second, due to the repeal of the Pass laws, the 72-hour limit on the presence of unemployed Blacks was repealed.<sup>156</sup> Finally, regarding Blacks settling in the national, self-governing, or independent states, who had gained section 10 rights, the South African government has announced its intention to extend dual citizenship to those who request it.<sup>157</sup>

F. *Black Authorities Act, Promotion of Black Self-Government Act, National States Citizenship Act, and the National States Constitution Act*

The power of a government to relocate individuals presupposes the existence of place to which a given population can be relocated.<sup>158</sup> The South African government created the Homelands for this purpose. Although territories and reserves—trust lands—have been available exclusively for Black use

149. *Oos-Randse Administrasieraad en 'n Ander v. Rikhoto*, (3) S.A. 595 (A) (1983)[hereinafter *Rikhoto*].

150. BLACK LABOUR REGULATIONS, R74 GOVERNMENT 202 (1968). See also LEGAL RESOURCES CENTRE (DURBAN), *supra* note 116, at 336-337.

151. Urban Areas Act, *supra* note 109 §§ 10(1)(a), (b).

152. *Rikhoto*, *supra* note 149 at 602.

153. *Id.* at 596.

154. *Id.* at 608.

155. See *infra* notes 273-324 and accompanying text.

156. *Id.*

157. *Id.*

158. Great Britain granted the countries of Swaziland and Lesotho independence before it did so for South Africa; thus, these two countries are separate from any Trust Land or Homeland policies of the South African government. See DAVENPORT, *supra* note 2, at 104-110, 189-190 (discussing the relationship between the High Commission Territories and the Union of South Africa).

since the 18th century, the Black Authorities Act of 1951<sup>159</sup> set the foundation for what ultimately was to become South Africa's policy of denationalization and repatriation of Blacks.<sup>160</sup>

The premise of the Black Authorities Act is two-fold. The first premise is that the South African government believes Blacks should be allowed to control their own destiny, within historical Black areas, in accordance with traditional methods of Black government.<sup>161</sup> The second premise of the act is that Blacks have no right to be in South Africa, therefore no need exists for a system of representation for them in the Black townships adjacent to white urban areas.<sup>162</sup> Obviously, recent legislative changes regarding the rights of Blacks in white South Africa tend to erode these premises.

Regarding the issue of voting rights and political representation, this Act abolished the limited control Blacks had within urban areas prior to 1951.<sup>163</sup> To balance this change, the South African government initiated a policy of extending Black control in the trust lands and Homelands.

#### The Promotion of Black Self Government Act.

The Promotion of Black Self-Government Act saw the expansion of this policy.<sup>164</sup> This Act gave recognition to eight national units: North Sotho, South Ndebele, South Sotho, Swazi, Tsonga, Venda, Xhosa, and Zulu.<sup>165</sup> This was an interim step to provide for development until South Africa considered self-government feasible.<sup>166</sup>

The National States Citizenship Act of 1971 solidified these goals.<sup>167</sup> It provided that every Black in South Africa was to be a citizen of one of these "bantustans," or homelands.<sup>168</sup> In theory, each of the homelands' populations are drawn from one of the eight national units.<sup>169</sup> Birth, language, family history and association with other Blacks are used to allocate citizenship where ancestral lineage is unclear.<sup>170</sup>

This Act, together with the National States Constitution Act,<sup>171</sup> also fulfilled the objectives of the Promotion of Black Self Government Act in that together they provided for legislative assemblies in the Homelands. To date, only four Homelands Boputhatswana, Ciskei, Transkei, and Venda,<sup>172</sup> have utilized the mechanism provided by these two Acts in making the final step of voting to accept independence. In each case, the independence-conferring statute has provided that no citizen of the country in question, residing in South Africa at independence, shall lose any existing rights, privileges or bene-

159. Black Authorities Act 68, (1951).

160. LEGAL RESOURCES CENTRE (DURBAN), *supra* note 116, at 215-216.

161. *Id.*

162. Black Authorities Act, *supra* note 155, § 12.

163. LEGAL RESOURCES CENTRE (DURBAN), *supra* note 116, at 216.

164. Promotion of Black Self-Government Act 46 of 1959.

165. *Id.* § 2.

166. LEGAL RESOURCES CENTRE (DURBAN), *supra* note 116, at 216.

167. National States Citizenship Act 26, (1970).

168. *Id.* § 2(2).

169. Promotion of Black Self-Government Act 46, (1959) § 2.

170. Black Development Act, (1984).

171. National States Constitution Act 21, (1971).

172. Status of Boputhatswana Act 89, (1977); Status of Ciskei Act 110 (1981); Traskei Constitution Act 48, (1963); and, Statuts of Venda Act 107, (1979).

fits accorded to them by their South African citizenship.<sup>173</sup> These provisions were intended to preserve the Section 10 rights of denationalized Blacks.<sup>174</sup> The repeal of section 10 of the Urban Areas Act leaves open a question as to what rights and privileges these people have, *vis a vis* Blacks whose Homeland chose *not* to accept independence.

The goal of eliminating, or at least limiting, a permanent Black population gave rise to many of the government's Homeland strategies. Among these strategies was the utilization of expropriation powers to remove land from non-independent homelands and redistribute ownership rights to different national units.<sup>175</sup> The recent case of *Republic of South Africa v. KwaZulu*<sup>176</sup> brought by the non-independent Homeland of KwaZulu against the South African government, proved to be an interesting example of both the South African government's policy of excising land from non-independent Homelands and the judicial response to such policies.

Ingwavuma is an area in Northern Natal that borders Swaziland, Mozambique and KwaZulu.<sup>177</sup> This area was ceded originally to the Zulu as part of their territory, KwaZulu. South Africa subsequently chose to redistribute this land by excising it from non-independent KwaZulu and re-ceding it to Swaziland. KwaZulu, not having been consulted before nor during the attempted expropriation, brought suit, going twice before the Natal Supreme Court and once before the Appellate Division.<sup>178</sup>

Being barred from any substantive judicial review, the Appellate Division was able to derive an equitable decision by virtue of its powers of procedural review.<sup>179</sup> The court held that in terms of the National States Constitution Act, sections 1(1), (2), 29, the State President had not complied with the procedural requirements of the Act.<sup>180</sup> Under the Act, the State President was required to consult with a Homeland's representative when expropriating land. A perfunctory notice would have satisfied the terms of the Act.<sup>181</sup> Thus, the Appellate Division was faced with the choice of either: a) finding that procedures essentially had been followed, and ignoring all considerations of basic property law regarding expropriations and the rights of individuals to protection and compensation or, b) following legislative procedural provisions literally and, therefore, by default, ensuring the integrity of the property rights of the 66,000 residents of Ingwavuma.<sup>182</sup>

In contrast to the *Rikhotso* case, where a broad meaning of "continuously" applied, the court in *Ingwavuma* utilized an extremely precise defini-

173. Dugard, *South Africa's "Independent" Homelands: An Exercise in Denationalization*, 10 DEN. J. INT'L L.POL'Y 19, 23-24 (1980). See also Status fo Ciskei Act 110, (1981), § 6(3).

174. Dugard, *South Africa's "Independent" Homelands: An Exercise in Denationalization*, *supra* note 173 at 28.

175. Black Administration Act 38, (1927), § 5.

176. Government of the Republic of South Africa and Another v. Government of KwaZulu and Another, (1) S.A. 164 (C), (1983), (4) S.A. 387 (D) (1982) [hereinafter *Ingwavuma*].

177. For a more thorough discussion, see Southern African Research Services, Development Studies Group, *THE LAND DISPUTE: INCORPORATING SWAZILAND?* (1982).

178. *Ingwavuma*, *supra* note 176.

179. *Id.* at 164.

180. *Id.* at 165.

181. National States Constitution Act 21, (1971), §§ 1(1), (2).

182. Cf. South African Institute of Race Relations, *SURVEY OF RACE RELATIONS IN SOUTH AFRICA* 377 (1982).

tion of "consult", given that the most minimal interaction between the South African government and the government of KwaZulu would have satisfied the Act. Issues of judicial activism aside, again a South African court's utilization of the strong protections afforded by Roman-Dutch common law property rights were applied where an Act of Parliament was found not to be binding, in that once the court held the Act was not satisfied, the "absolute ownership" of the land in issue prevented the exercise of executive prerogative by the state.

### G. *The Black Administration Act and the Republic of South Africa Constitution Act*

Read together, the Black Administration Act and the Republic of South Africa Constitution Act of 1961 created the bureaucracies necessary to implement apartheid. In particular, the Black Administration Act allows the government to revoke any grant of land, made on individual tenure, upon quitrent conditions.<sup>183</sup> Section 5 of this Act details the most controversial of the powers which the State President,<sup>184</sup> who has supreme authority over Black affairs, is entitled to wield. It states that the State President may,

" . . . a) define boundaries of the area of any tribe or of a location and may . . . alter the same and may divide any existing tribe into two or more parts . . .  
b) order that any tribe, portion of a tribe, African community or African shall withdraw from any place to any other place . . . within the Republic and shall not at any time . . . return."<sup>185</sup>

Wielding these powers, the government is able to expropriate any property it desires in its efforts to establish Homelands for each national unit. Thus, the legislation further provides for the denationalization of Blacks and, in so doing, strengthens the apartheid policy of separate property rights for Blacks and whites.

### H. *The Group Areas Act*

Apartheid can be seen as evolving in a bifurcated manner: legislation has either removed one segment of the population from the country, or separated the remaining segments within the country. Both developments are expressions of the South African government's desire for segregation. Thus, just as various legislative acts provide for a Black South Africa, in the form of trust lands and Homelands, a separate legislative structure regulates all the different population groups within white South Africa. This structure primarily consists of the Group Areas Act.<sup>186</sup>

The Group Areas Act stands in the forefront of controversial apartheid legislation. Consequently, it is perhaps the most well-known piece of South African legislation.<sup>187</sup> The actual significance of the act, however, is not so widely known. As South African Supreme Court Justice T.H. Van Reenen has noted, Blacks are not as directly affected by this Act as are the other population groups because, "as far as non-urban land is concerned, occupation

183. Black Administration Act 38, (1927), § 7.

184. Under the new Constitution, authority continues to be vested in the State President. *See, e.g.,* The Republic of South Africa Act 110 of 1983, § 6(4), 93.

185. Black Administration Act 38, (1927), §§ 5(a) (b).

186. Group Areas Act 36 of 1966.

187. T. VAN REENEN, *LAND—ITS OWNERSHIP AND OCCUPATION IN SOUTH AFRICA* 1 (1962).

and ownership of land by [Blacks is] dealt with under the provisions of the [Black Land Act of 1936], and land acquired and administered under that Act is expressly excluded from the provisions of the Group Areas Act."<sup>188</sup> Furthermore,

as far as urban land for Natives is concerned, it has been found easier and simpler to apply the provisions of the [Black] (Urban Areas) Consolidation Act . . . of 1945, rather than make use of the machinery of the Group Areas Act [which] affects most directly the Asian, coloured, and white population groups. Before examining the structure and workings of this Act, the history of Asian and coloured property rights must be understood, since the Group Areas Act . . . is . . . a logical conclusion to a long series of enactments which all embody a fundamental principle which has ever been a guiding policy of legislation in South Africa: racial segregation.<sup>189</sup>

The drafters of the first Constitution of the Transvaal stated the principle that there could be no equality between white and non-white.<sup>190</sup> The aims of that policy—a policy that was to evolve into apartheid—were expressed in four points, two of which are of special relevance to this article. First, no non-white person should obtain ownership rights to fixed property;<sup>191</sup> and, second, non-whites should not live in close proximity to whites.<sup>192</sup> Thus, regarding property rights, the issues of ownership and occupation became key areas of concern.<sup>193</sup> The fear of granting non-whites ownership rights to fixed property stemmed from the fact that non-whites outnumbered whites and, were they allowed to own land, they eventually could have controlled the country and, thus, the State, by virtue of the voting rights which were appendent to property ownership rights.<sup>194</sup> The fear of granting non-whites rights to lease property was less specific in origin and these rights were not, at first, controlled as rigidly as were ownership rights.<sup>195</sup>

Up to the late 1800's, South Africa had delineated property rights only between white and non-white.<sup>196</sup> However, the evolution of a coloured population and the immigration of Asians, who were increasingly competitive in trade areas, caused the whites to perceive them as distinct from the Black population, and ultimately as a threat.<sup>197</sup> Thus, Law #3 of 1885, as effected by the Transvaal government, presented the first attempt at differentiating between non-whites.<sup>198</sup>

Under the 1885 Act, Asians were denied the right to own fixed property.<sup>199</sup> At this time the law of South Africa contained no specific definition of

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188. *Id.* at 4.

189. *Id.*

190. Drie-en-dertig Artiekelen art. VI, XXIX (1849).

191. VAN REENEN, *supra* note 187, at 5.

192. *Id.*

193. *Id.* at 2.

194. *Cf.* DAVENPORT, *supra* note 2, at 77096 (detailing the Stallard Commission's concern that property ownership for non-white would inevitable lead to majority voting control in the hands of those groups). See also the judgement of Wessels, J. in *Dadoo Ltd. v. Krugersdorp Municipal Council*, A.D. 530 1920.

195. See generally VAN REENEN, *supra* note 221, at 6-23 (noting the early lack of serious concern regarding Asian competitiveness and, therefore, concurrent lack of concern over leasehold rights in trading areas).

196. *Id.* at 8.

197. See the London Convention art. XIV (1884).

198. VAN REENEN, *supra* note 187, at 9.

199. *Id.*

“fixed property”. However, courts had determined that everything from 10-year stand leases (concerning business stands in trade areas), renewable in perpetuity, to 99-year leasehold rights, constituted fixed property.<sup>200</sup>

Under this Act, however, the government could assign bazaars for Asian trade occupation.<sup>201</sup> This Act also provided for separate wards, or Asian “locations:” the progenitorial “group areas.”<sup>202</sup>

In response to restrictions on the ownership of fixed property, methods of circumvention developed. Asians obtained land both indirectly, by nominee-holding, or directly, by Asian-owned companies, entities that had no race classification under Roman-Dutch law.<sup>203</sup>

The development of such methods, and the increasing awareness of the economic potential of the Asian community, led the government in 1903 to issue notices of its intent to relocate Asians to their wards.<sup>204</sup> But, in 1904, *Habib Motan v. The Transvaal Government*<sup>205</sup> precluded such actions. In *Habib Motan* the Transvaal Supreme Court held that Law #3 did not provide sanctions to compel Asians to reside in these areas and, furthermore, no machinery was provided to force them to do so.<sup>206</sup> Thus, as early as 1904, courts were using their power of procedural review to protect common law property rights. Until 1932, the situation remained that Asians could freely occupy land and, with ingenuity, acquire ownership of some fixed property.<sup>207</sup>

The Transvaal Asiatic Land Tenure Act of 1932<sup>208</sup> marked the beginning of major changes regarding Asian acquisition of fixed property and these changes laid the groundwork for the Group Areas Act. This Act attempted to define, for the first time, “fixed property.”<sup>209</sup> This term was defined as: “(a) any real right in immovable property in the Transvaal except such property that fell in those areas demarcated by Law #3 of 1885 as being Asian locations; and, (b) any lease of immovable property for a period of 10 years or longer.”<sup>210</sup>

This Act also introduced the innovation that any property registered in favor of an Asian barred from holding property by virtue of Law #3 of 1885 became the property of the State.<sup>211</sup> Furthermore, the Act provided that a foreign company could not acquire fixed property, nor be capable of holding fixed property unless it had a place of business in South Africa that had been approved by the government.<sup>212</sup> This was intended to put an end to the legal circumventions by which Asians had been acquiring land.<sup>213</sup> Thus, while for the first time the right to own fixed property was extended to Asians (although

200. *Id.*

201. *Id.*

202. *Id.*

203. See generally VAN REENEN, *supra* note 187, at 23-29 (detailing routes of circumvention utilized by Asians and Asian companies).

204. *Id.* at 14-15.

205. *Habib Motan v. The Transvaal Government*, T.S. 404 (1904).

206. *Id.* at 411.

207. VAN REENEN, *supra* note 187, at 29.

208. Transvaal Asiatic Land Tenure Act 35, (1932).

209. *Id.* at §§ 7, 8.

210. *Id.*

211. *Id.* § 8.

212. VAN REENEN, *supra* note 187, at 32.

213. *Id.* at 34.

only in their assigned locations), harsher measures were proposed for Asians who managed to acquire property outside these areas.

Another major change introduced by the Transvaal Asiatic Land Tenure Act was that for the first time occupation of land was specifically prohibited.<sup>214</sup> Again, the relevant prohibitions were aimed at the land which had been acquired through nominee-holding and by foreign companies.<sup>215</sup> In enacting these provisions, the government enabled itself to remove Asians from white areas without having to expropriate land acquired prior to the Act which was an extreme legislative maneuver, even by South African standards.

The 1939 Asiatic (Transvaal Land and Trading) Act<sup>216</sup> introduced a new complication. Particular properties were to be assigned a racial character, determined at a specific date.<sup>217</sup> This concept was to be expanded by the Group Areas Act years later, when all areas, not merely Asian, would be assigned a color.<sup>218</sup>

The 1946 Asian Land Tenure and Indian Representation Act<sup>219</sup> provided the final plank in the structure that was to become the Group Areas Act: the Land Tenure Advisory Board. This was the first creation of an enforcement machinery to implement the government's policies regarding the segregation of Asians.<sup>220</sup> The Board was empowered to consider and investigate every request to occupy or own land.<sup>221</sup> Furthermore, the Act provided for a register showing all the land which could be owned or occupied by Asians, a register from which the Board was to assign properties.<sup>222</sup>

Prior to the Group Areas Act of 1950, all legislation concerning the occupation and ownership of property rights in white South Africa delineated property rights and privileges only as between whites and Asians. The Group Areas Act went farther than the previous statutes in that racial distinctions were now made between whites and all other population groups, not just Asians.

The Group Areas Act extended the idea of exclusive racial areas to provide for specifically white areas. Thus the Act marked the first instance of whites being bound by apartheid restrictions regarding the owning, occupying and alienating of real property.<sup>223</sup> It also provided a machinery for the removal of people where racial intermingling, in terms of the ownership and occupation of property, had occurred.<sup>224</sup> Finally, it created a machinery for self-government by non-white groups within their group area.<sup>225</sup>

The goal of the Group Areas Act is to provide separate residential and business areas throughout South Africa for each population group.<sup>226</sup> The Act itself specifically enumerates only three groups: Blacks, whites, and

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214. *Id.*

215. *Id.*

216. Asiatic (Transvaal Land and Trading) Act 28, (1939).

217. *Id.* § 3.

218. *See, e.g.*, Group Areas 36, (1966) § 12.

219. Asiatic Land Tenure and Indian Representation Act 28, (1946).

220. VAN REENEN, *supra* note 187, at 70-71.

221. Group Areas Act 36, (1966) § 2.

222. *See generally* VAN REENEN, *supra* note 187 at 78.

223. *Id.*

224. *Id.* § 2.

225. *Id.* § 9.

226. S. SHRAND, *REAL ESTATE IN SOUTH AFRICA* 174 (ed. ed. 1981).

coloureds. The Act provides its own definitions of these groups, rather than rely upon the definitions of the Population Registration Act.<sup>227</sup> In addition to these three categories, the State President may declare other racial groups.<sup>228</sup> Since the passing of the Act, the government has specified sub-categories of "coloured," including, Indian, Chinese, and Malay.<sup>229</sup> Thus, the old term "Asian" actually has been expanded by the Act into ethnic sub-units.<sup>230</sup>

All the land of South Africa is, according to the Group Areas Act, of two varieties: either non-controlled areas or controlled areas.<sup>231</sup> Non-controlled areas include scheduled Black areas, Black locations, Black villages, mission stations, any land vested in the South African National Trust, and "coloured persons settlements."<sup>232</sup> In other words, non-controlled areas are, with the exception of coloured persons settlements,<sup>233</sup> those areas administered through the 1913 and 1936 land acts and the Black Administration Act. Controlled areas consist of all the remaining land in South Africa.<sup>234</sup> The main characteristics of controlled areas are the restrictions imposed on the acquisition of fixed property and, the restrictions imposed on the occupation of land and the premises thereon.<sup>235</sup>

"Group areas" are the final result of the Group Areas Act. They are areas which have been assigned to a specific racial group.<sup>236</sup> Group areas can be established for occupation, ownership or both.<sup>237</sup> However under the Act no "disqualified person or company" may acquire ownership rights in immovable property within the controlled areas of South Africa.<sup>238</sup> A "disqualified person" is one who is not a member of the same racial group as the owner of the property in question.<sup>239</sup> A "disqualified company" is one in which the controlling interest is deemed, by the Group Areas Board, to be held by or in the interest of a disqualified person or persons.<sup>240</sup> "Immovable property" includes all real rights in immovable property and any lease or sublease.<sup>241</sup> No disqualified person can occupy any premises in a controlled area.<sup>242</sup> There are legislatively enumerated exceptions to the occupation restriction, such as testamentary rights,<sup>243</sup> but generally the rule is absolute. Thus, the Group Areas Act enacted into national law the goals of all previous legislation regarding Asian and coloured property rights that no non-white ownership, for either

227. Group Areas Act 36 of 1966, § 12.

228. *Id.* § 45.

229. *Id.* § 12(d).

230. *Id.*

231. SHRAND, *supra* note 226, at 179-183 (explaining the term "non-controlled areas").

232. *Id.* at 179-180.

233. For an implied definition of "coloured persons settlements," see the Group Areas Act 36 of 1966, s 23(6)(c)(iv).

234. The term "controlled areas" is not used by the Act; however, those areas 'controlled,' or under the jurisdiction of the Act are all areas of South Africa not encompassed by the Black land acts or other, special legislation. This article uses the term "controlled areas" as a shorthand reference to those areas under the Act.

235. See SHRAND, *supra* note 226, at 179-183.

236. Group Areas Act 36, (1966) § 23(1).

237. SHRAND, *supra* note 226, at 184.

238. Group Areas Act 36, (1966) § 13.

239. *Id.* § 1(1)(x).

240. *Id.* § 1(1)(ix).

241. *Id.* § 1(1)(xiii).

242. *Id.* § 17.

243. *Id.* § 27(2)(3).

trade or residential purposes, in white areas and that no manipulation of legal forms is allowed to acquire otherwise unobtainable property.

The evolution of apartheid, the development of race segregation from attitude to policy to legislative law, is contained by the Group Areas Act and the various acts pertaining to Black property rights. The Group Areas Act denominates all South African peoples as members of racial groups. Then, on the basis of that status, members of these groups are limited in their rights of occupancy and ownership of land to their respective group areas. The government is empowered to expropriate land held by disqualified persons and, by virtue of the Community Development Act,<sup>244</sup> to compensate these persons for their land. Blacks, on the other hand, by virtue of the statutory restrictions regarding their rights to own and/or occupy property, are labelled as a group, deemed alien as a group, denationalized on the basis of their alien status, denied rights to own or lease property because of their alien status, and are subject to being relocated and compensated without being able to turn to the courts for protection. In short, all South African peoples are restricted in their common law rights of occupancy and ownership of property.

#### IV. REFORM

Currently, two major political issues exist regarding South Africa. First, the international debate revolves around the manner in which countries should be involved with South Africa by trade, diplomacy, and other relations. Under this heading, depending upon the philosophy of a particular country, solutions range from employing economic sanctions to assisting revolution.<sup>245</sup> This area of concern is one of foreign policy and is not addressed directly by this article.

The second area of concern, the intranational debate of how South Africa is to handle apartheid in the immediate future, is more relevant to all South Africans and, yet, less interesting to the rest of the world. Again, the range of possible solutions is dependent upon the philosophy of the decision-makers. At one end of the spectrum lie those groups within South Africa that support apartheid as a viable system of government.<sup>246</sup> At the other end are groups that reject any system other than one based upon one-man one-vote.<sup>247</sup> The middle of the spectrum seems to be a position based upon the gradual dismantling of apartheid.<sup>248</sup>

This article does not endorse any particular philosophy, foreign policy, or any particular mode of reform. Rather, it proposes that an understanding of the property law of South Africa is necessary to gauge the significance of any proposed repeal, strengthening, or alteration of apartheid legislation. Obviously, the effect on property laws is one measure of the effectiveness of a foreign policy which predicates relations with South Africa upon positive changes in the apartheid system. Furthermore, the probable effect on prop-

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244. Community Development Act 3 of 1966, § 1(1)(i).

245. See, e.g., Ungar & Vale, *Why Constructive Engagement Failed*, FOREIGN AFF., Winter 1985-1986, at 234, 253-258 (enumerating various diplomatic actions the United States could take against South Africa to express dissatisfaction with the current situation).

246. South African Institute of Race Relations, *supra* note 86, at 22-29.

247. *Id.* at 29-61.

248. Merwe, *The National Party's Reform Program*, AFR. REP., Mar.-Apr. at 69, 71, 1986.

erty law as a criterion of analysis would assist in pinpointing within the morass of apartheid legislation those areas of immediate concern and in need of initial modification or eradication. Thus, while avoiding recommending a given policy or reform, this article does offer a method of analysis that provides a structural understanding of apartheid—both as a whole and in its component parts—and, therefore, an understanding of how to undo the structure.

Applying this method of analysis to recent legislative actions and proposals by the South African government reveals that many of those repeals which already have taken place (in particular, the repeal of the Immorality Act,<sup>249</sup> Mixed Marriages Act,<sup>250</sup> Pass laws,<sup>251</sup> and portions of the Urban Areas Act<sup>252</sup>) will have little material effect in terms of strengthening the civil rights of non-white South Africans. On the other hand, the same analysis indicates that proposed legislative changes, such as the extension of freehold rights,<sup>253</sup> do hold a chance of meaningful improvement in the lives of Black South Africans. Whether or not improvements actually will take place is not addressed by this article.

A recent legislative development which can easily be assessed in terms of its impact upon property rights is the 1985 repeal of the Immorality Act and the Mixed Marriages Act.<sup>254</sup> These acts were essentially anti-miscegenation measures prohibiting interracial marriages and cohabitation.<sup>255</sup> While the repeal of these acts may carry a symbolic or sentimental significance, it confers no material benefit upon interracial couples since skin color continues to determine the nature of property rights.<sup>256</sup>

Without dwelling on the procedural complications of interracial relationships in South Africa, the rules simply stated are: if a white and non-white are to wed or cohabit, the white "attracts" the non-white's color.<sup>257</sup> The color of this couple determines the group area, when one of the pair is neither Black nor white, or Black township, when one of the pair is Black, in which they shall live.<sup>258</sup> Children of such a union take the color of their mother, unless

249. Immorality Act 23, (1957).

250. Prohibition of Mixed Marriages Act 55, (1949).

251. See *supra* notes 75-79 and accompanying text (detailing significance of Pass laws).

252. See *supra* notes 109-157 and accompanying text (detailing significance of Urban Areas Act).

253. See, e.g., Merwe, *The National Party's Reform Program*, *supra* note 248, at 71 (noting that extension of freehold rights to Blacks is on the Nationalist Party's agenda for reform). NB: another example of meaningful change could be the current government's assertion that the forced relocations of Black tribes in white South Africa will cease (*id.*). Typically, these tribes have inherited—individually or as a unit—freehold rights. (See *supra* notes 91-104 and accompanying text (detailing history of Black freehold rights in white South Africa).) Thus, the forced expropriation of tribal lands and simultaneous relocation of whole tribes, or villages, in Homelands is a particularly controversial issue, both in South Africa and internationally. (See SUPPLUS PEOPLES PROJECT, 1 GENERAL OVERVIEW 1, 84-86, 1983 (giving a brief statement of the current legal situation of black freeholders).) However, given the paucity of details as to how, when, and to what extent the cessation of forced relocation is to occur, any discussion of its significance is too speculative at this time.

254. ENDING THE SHAME, RAND FINANCIAL MAIL, at 36 Apr. 19, 1985.

255. For the relevant provisions of the Immorality Act, *supra* note 249, see §§ 16-20A; for the relevant provisions of the Prohibition of Mixed Marriages Act, *supra* note 278, see §§ 1-2.

256. See generally SCHOOMBE, *Some Reflections on the History of Land Tenure in South Africa, Seen in the Light of Attempts by the State to Impose Political and Economic Control*, ACTA JURIDICA 53, 102-103 (1985) (giving a detailed analysis of how property rights of interracial couples and their progeny are determined).

257. *Id.* at 103.

258. *Id.*

she is white, in which case they are coloured.<sup>259</sup> Should the parents divorce, and the white parent resume white status, by living in white areas, the children would be required to live with the non-white parent, regardless of any desired or judicially-decreed custody arrangements.<sup>260</sup> Similar rules govern marriages between other racial groups with Blacks.<sup>261</sup> Thus, although these couples now may marry and/or cohabit, they continue to be limited as to where to live as a couple. The repeal of these two Acts is essentially meaningless in terms of benefitting interracial couples unless the government also repeals the Group Areas Act and Black Land Act. The South African government, however, has stated explicitly its intention to continue the laws on residential racial segregation: "the continued ordering of our communities at the social, educational and constitutional level will not be affected by the repeal of the [Immorality Act and Mixed Marriages Act]."<sup>262</sup> Therefore, it appears that the status of interracial couples' property rights remain unchanged.

A legislative development which is assessed less easily is the 1986 repeal of the Pass laws and certain provision of the Urbans Areas Act.<sup>263</sup> Blacks will no longer be arrested for failure to produce a pass legitimating their presence in urban areas.<sup>264</sup> Clearly, therefore, the repeal of the Black (Abolition of Passes and Coordination of Documents) Act will simplify the lives of the approximately 18 million Black South Africans who work and/or live in white South Africa today.<sup>265</sup> Furthermore, the repeal of this Act could diminish significantly the number of prisoners in South African jails since the vast majority of arrests of Blacks to date have been for pass-related offenses.<sup>266</sup> Furthermore, with the repeal of section 10 and the 72-hour limit provisions of the Urban Areas Act, unemployed Blacks no longer have to establish a right to be in white South Africa for longer than 72 hours.<sup>267</sup> Thus, the need for earning a right to be in South Africa by virtue of having worked a certain number of years, etc., has been eliminated as an obstacle to Black migration to and within South Africa.

The repeal of these Acts, however, vests no right in Blacks to be secure in South Africa. No civil right—property or otherwise—has been created or protected by the repeal of this Act. In fact, statutorily-created rights such as section 10 rights have been retracted. Thus, the repeal of the Pass laws may have a negative impact for Black South Africans in that it denies those persons who are citizens of independent Homelands preservation of their pre-independence, earned right to work in South Africa<sup>268</sup>, which was protected by other the relevant South African independence-conferring statutes and their own

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259. Population Registration Act, *supra* note 71, § 2(b).

260. SCHOOMBE, *supra* note 256, at 103.

261. *Id.* at 102.

262. *Id.*

263. *A Relic of Apartheid Falls*, *supra* note 77, at 35.

264. *Id.*

265. SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, *supra* note 78, at 99.

266. *See generally id.* at 522-523 (providing statistics on arrests for violent crimes, as well as Pass laws offenses). NB: in 1982, arrests based on Pass laws offenses averaged to 564 people a day (*id.* at 263). This figure is the basis for the oft-cited assertion that South Africa has the highest prison population in the world. *See, e.g., Note, The Constitutionality of State and Local Governments Response to Apartheid: Divestment Legislation*, 13 *FORDHAM L. REV.* 763, 766-767, fn. 15 (1984-1985).

267. *A Relic of Apartheid Falls*, *supra* note 77, at 35.

268. *See supra* notes 159-175 and accompanying text (detailing significance of acceptance of independence by a "Bantustan,"—a non-independent Homeland).

constitutions. Given that citizenship and independence were—more or less—foisted upon the people of the Homelands by the South African government, this creates a particularly unjust situation in that the South African government now could deny independent Homeland citizens permission to immigrate and/or work, in deference to a desire to protect jobs for Black nationals, despite the government's previous assurances of maintaining section 10 rights. Although the South African government has proposed a plan to offer dual citizenship to these persons,<sup>269</sup> the current situation creates potential for a new method of influx control.

Regardless of the outcome of the Homeland vs. South African citizenship issue, those Blacks able to migrate freely into and throughout white South Africa must still face the dilemma of where to reside.

The repeal of the Pass laws and Urban Areas Act has little real impact on the reality of daily life for Black South Africans. Underscoring this assertion are statistics on the lack of availability of housing for Black South Africans and recent government statements regarding the squatter crisis.

Due to the previously discussed situations of all Black housing in South Africa being in leasehold and government-managed, and all other non-white housing being distributed by the government, the housing market has been impeded severely in its development.<sup>270</sup> In particular, urban areas are characterized by the symbiotic phenomena, long suffered by South Africa, of insufficient housing and squatting.<sup>271</sup> For example, the 1983 estimate of the housing shortage projected for the period of 1982-1990 stood at 2.3 million units.<sup>272</sup> This figure would require an expenditure of R4.0 billion, 6% of the Gross Domestic Product (in 1982 figures) to provide the necessary housing.<sup>273</sup> Historically, however, the South African government has spent approximately 2.4% of the Gross Domestic Product on non-white housing.<sup>274</sup> This has resulted in an increasing amount of currently needed housing, due to the annual increases in population, with no diminution of the backlog itself.<sup>275</sup>

The severity of the housing situation is underscored by what is often referred to as the "squatter crisis."<sup>276</sup> While no government figures are issued regarding the numbers of non-white squatters in white South Africa, newspaper sources estimate squatter camps such as K.T.C., outside Cape Town, as containing as many as a half million people.<sup>277</sup> Furthermore, Pass laws and trespasser arrest figures have provided an indication of the numbers involved in that they represent the number of Blacks regarded as illegal aliens, and therefore relegated to squatter status (since illegal aliens are barred from acquiring any leasehold rights in Black townships). In 1982 the government processed approximately 600 persons per day for Pass laws and trespass arrests.<sup>278</sup> Whatever the exact figures may be regarding both squatters and the

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269. *A Relic of Apartheid Falls*, *supra* note 77, at 35.

270. RACE DISCRIMINATION IN SOUTH AFRICA, *supra* note 111, at 91-93.

271. *Id.*

272. SOUTH AFRICA INSTITUTE OF RACE RELATIONS, *supra* note 78, at 229.

273. *Id.*

274. *Id.*

275. *Id.*

276. *See, e.g.*, G. HOWE, SQUATTER CRISIS, 23 (March 1982) (occasional Paper).

277. *Id.* at 7.

278. *See supra* note 266 (discussing significance of Pass laws arrest figures).

homeless, Blacks are not going to find a security in, or protection of, their property rights simply on the basis of the repeal of Pass laws and selected portions of the Urban Areas Act. In terms of impact upon property rights, or in creation of property laws, these two Acts fail to provide any material improvement for Black South Africans, and therefore, fail to mitigate the apartheid laws.

What is needed is access to property in terms of substantive guarantees and it is in this area that the South African government recently has shown willingness to concede. One recent proposal by the South African government, which holds some promise of meaningful change for Blacks, is the extension of freehold rights.<sup>279</sup>

Since, historically, all Black-occupied property in white South Africa has been held in leasehold, there has been no development of an ownership equity base from which the government could draw taxes.<sup>280</sup> Thus, Black townships have been characterized by a lack of municipal services such as paved roads, electricity, police protection.<sup>281</sup> Through 1982, government-owned liquor outlets in Black townships provided 70% of the needed revenues for Black township improvements while charges for rent and services generated only 18% of these revenues.<sup>282</sup> In 1982, the government began selling all liquor outlets to private enterprises in an effort both to divest itself of financial responsibility for Black townships, and to lessen the rate of alcohol sales in Black townships.<sup>283</sup> The loss of 70% of municipal revenues has caused the issue of how conditions in these townships are to improve to become a matter of critical concern.<sup>284</sup>

In 1986, the South African government announced its intention to grant Blacks freehold rights in certain Black townships.<sup>285</sup> The plan calls for allowing Blacks to own property and develop an equity base in these townships, consequently the South African government would be extending a chance for material improvement in the lives of Black South Africans in several ways. First, real property ownership means investment in land and the development of equity in this land. If Blacks were to own land in significant amounts, a tax base would be generated providing revenues for the improvements of Black townships.<sup>286</sup> Obviously, the development of these improvements would be an extremely long-term proposition due to the small amounts Blacks have for this type of investment<sup>287</sup> and the large amount necessary for municipal improvements.<sup>288</sup> Nevertheless, the potential and incentive for improvement would exist where none existed before and the need for secondary, revenue-generating measure, such as alcohol sales, could be diminished significantly.

Second, the link between property ownership and political autonomy can-

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279. Merwe, *supra* note 248, at 71.

280. SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, *supra* note 78, 254.

281. RACE DISCRIMINATION IN SOUTH AFRICA, *supra* note 128, at 108.

282. SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, *supra* note 84, at 254.

283. *Id.* at 255.

284. N.Y.TIMES, Apr. 24, 1986, section 1, at 1, col. 6.

285. Merwe, *supra* note 248, at 71.

286. SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, *supra* note 78, at 255.

287. Whites in South Africa constitute 15% of the population and receive 63% of the income; non-whites constitute the remaining 85% of the population and receive the remaining 37% of the income. N.Y.TIMES, July 11, 1986, section 1, at 23, col. 1.

288. SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, *supra* note 78, at 229.

not be severed in a capitalist-based society.<sup>289</sup> Typically, municipal franchise—the basis of political power structure—arises in capitalist societies with the joining of forces by several property holders within a region.<sup>290</sup> For example, in the United States, the closeness of the relationship between land ownership and political autonomy was underscored by the efforts of several southern states' to make property ownership a prerequisite to voting during the Reconstruction Era.<sup>291</sup> As one author notes, "The denial of Black people of an equity base in land ownership has consistently been at the heart of Black economic impoverishment and political powerlessness in the United States."<sup>292</sup> In South Africa, as early as 1922, the government had given official cognizance to the view that "the man of property could hardly be denied the municipal vote."<sup>293</sup> Thus, the extension of freehold rights in certain Black townships affords the foundation for the development of Black political power structure in white South Africa. Again, this development is more one of potential than imminence and would occur only if the government took no restrictive measure to prevent its evolution.

Since currently it is unclear whether and, if so, in what amounts Blacks will be allowed to acquire freehold rights, the extent of a possible Black power base cannot be estimated.<sup>294</sup> Obviously, the international goal would be freehold rights throughout South Africa to be equally available to persons of all races. The intranational goal, however, as stated by government representatives, appears to be in opposite. "Blacks will still be prohibited from living in white areas, except in the case of approved domestic servants. All residential areas in South Africa will remain segregated on the basis of race . . ."<sup>295</sup> Prime Minister Botha has proposed, "a confederation of geographic and ethnic 'units,' with each racial group having responsibility for its own affairs, including education, social welfare and residential areas."<sup>296</sup>(emphasis added.)

Finally, with this granting of freehold rights to real property, the South African judiciary has gained a much stronger tool than section 10 rights ever provided for the protection of Black rights. In its rigid adherence to Roman-Dutch principles, in particular those regarding property law, and its recent decisions seeking to protect Black property interests, the South African judiciary shows an inclination to assist in the development of further Black autonomy. Thus, the judiciary could provide support for both the prevention of any future attempts to encroachment upon Blacks' full enjoyment of Roman-Dutch real rights, and the development of a Black political power base derivative of interests in real property.

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289. Copeland, *The Rise and Fall of Black Real Property Ownership*, 9 BLACK L. J. 51, at 52 (1986).

290. For an historical account of a capitalist government in its formative stages, see T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 117-119 (1982) (1st ed. London 1787).

291. Copeland, *supra* note 289, at 54.

292. *Id.* (quoting Nelson, *Black Political Power and the Decline of Black Land Ownership*, 8 THE REV. BLACK POL. ECON., 253 (Spring 1978)).

293. Davenport, *The Triumph of Col. Stallard*, 2 S.A.H.J. 77, 77-96 (1970).

294. N.Y. TIMES, July 6, 1986, section 1, at 11, col. 5. See also Merwe, *supra* note 281, at 71 (stating that while freehold property rights will be extended to Blacks, the issue of voting rights remains unresolved).

295. N.Y. TIMES *supra* note 312, Apr. 24, 1986, section 1, at 1, col. 6.

296. *Apartheid By Another Name*, TIME, Oct. 14, 1985, at 47.

## V. CONCLUSION

The importance of security in land tenure was recognized from the beginning in America's history of civil rights' protection.<sup>297</sup> The first Reconstruction Era legislation passed to fulfill the thirteenth amendment's objectives of abolishing slavery, nationalizing freedom, and making Congress an organ of enforcement for these goals was the Civil Rights Act of 1866.<sup>298</sup> Section 1982 of this Act was "to ensure that all citizens of the United States . . . have the same right . . . as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey" real property.<sup>299</sup>

In contrast, South African legislation has been aimed at abridging common law property rights. For every incident of property law enumerated as protected by section 1982 of the Civil Rights Act of 1866, a South African counterpart exists in the form of legislation limiting or eradicating this incident.

The South African Constitution does not provide for equity in the treatment of its citizens. Thus, the courts are limited by South Africa's Roman-Dutch guarantees of equal treatment for all individuals when property rights are at issue. Apartheid legislation attempts to circumvent the common law though its restriction of these property rights.

Once one accepts the idea of apartheid being rooted in property law, the importance of this understanding becomes apparent in several legal contexts. Otherwise inexplicable decisions by the largely Afrikaans judiciary are made sensible by juxtaposing the common law and statutory law. Putting aside issues of moral and political preferences leading to judicial activism, the judiciary is limited to the common law in its interpretation of the nature and scope of property rights where legislation falls short. Because in the realm of property rights the common law and apartheid legislation are antithetical, judicial decisions and statutory intent are often at odds. The *Komani*, *Rikhoto* and *Ingwavuma* cases exemplify this idea in that each case revealed a court, though limited to its powers of procedural review of legislation, using common law standards to assess the extent of substantive property rights. As elaborated in this article, the court decisions that thwart legislation often result in new legislation being passed. An analysis of current and future cases regarding issues such as freehold rights, the nature of Homelands' citizens' status in white South Africa, and Group Areas Act properties, in terms of the conflict between the common and statutory laws, should reveal areas where new legislative developments and/or judicial conflicts are likely to occur.

Furthermore, South African efforts to alter apartheid can be assessed by weighing proposals for change against the existing property legislation and its history. For example, were there no history of race segregation based on property restrictions, the repeal of the Mixed Marriages Act and the Immorality Act could be seen as a step towards lowering racial barriers. However, given the extensive legislation, the repeal of these laws may have limited positive effect. Conversely, the extension of freehold rights in property does con-

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297. Sughroue, *Civil Rights—Racial Discrimination and Property Rights—the Scope of 42 U.S.C. § 1982*, 29 WAYNE STATE L. REV. 203 (1982).

298. *Id.*

299. 42 U.S.C. § 1982 (1976).

stitute a meaningful attempt to return South Africa to a "rule of law" which applies equally to all persons.

Finally, were South Africa to fall, an understanding of apartheid would remain important in that it underscores the importance of property law in the protection of civil rights. The number and magnitude of apartheid laws reflect the strength of the common law property principles, principles common to all legal systems. These principles guarantee equal treatment regarding the protection of the rights of occupancy and ownership. In turn, these rights ensure that individuals can live unimpeded in their exercise of civil rights.<sup>300</sup>

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300. In a related context Justice Felix Frankfurter once noted,

"Yesterday the active areas in this field was concerned with 'property.' Today it is 'civil liberties.' Tomorrow it may again be 'property.' Who can say that in a society with a mixed economy . . . these two areas are sharply separated, and that certain freedoms in relation to property may not again be deemed, as they were in the past, aspects of individual freedom?" OF LAW AND MEN 19 (1956).