by the relief sought. The OAU Charter negates colonialism and racial domination and seeks to defend the Member States' sovereignty, their territorial integrity and independence.[86] On the one hand, the UDHR enshrines the rights and freedoms of all human beings.

143. I further submit that if the relief is granted, the order will destroy the standing of South Africa on international plane. South Africa's position and international status in BRICS, G20, UN, AU, WHO and many other international organizations will simply fall away. South Africa was admitted in these international bodies on the basis that the Republic is independent and sovereign State.

GROUNDS OF OPPOSITION

144. Before proceeding to deal with the applicant' founding affidavit *ad seritium*, I wish to set out the bases on which the second respondent opposes the relief sought by the applicant.

145. First, the applicant in its founding affidavit tends to distort the history of land ownership in South Africa in order to reverse the Boer colonialism and its concomitant racial domination. The application is mainly fraught with

[86] Article II (c) and (d) of the OAU Charter.

distortions, biases and exaggerations of historical account of land rights in South Africa.

146. Second, the applicant, misrepresents the issues relating to the role of government in combating the spread of corona virus (Covid-19), government's stance on vaccine intended to provide immunity against COVID-19, the role of WHO in combating Covid 19 and participation of South Africa on international plane. The applicant has blown all these issues out of proportion and context.

147. Third, the applicant' application is an attempt to dismantle the new constitutional order. The effect of this application is to change the borders of the Republic and the democratically elected government. The applicant's reliance on biblical verses, covenants, religion and prophesies to claim sovereignty of the former Boer Republics are not justified.

148. Fifth, the application seeks to de-legitimise the existing constitutional order and further the interests of its members as a dominant grouping and seeks to normalize oppression and domination of mostly black majority. The relief sought by the applicant marks a radical departure from the principles of constitutional democracy and international law.

149. Sixth, this application (if relief sought is granted) has the potential to strip millions of South Africans of their citizenship. This was the hallmark of the

former Boer Republics and apartheid regimes, which left many black people as "foreigners in the land of their birth." Additionally, the rights of the South Africans to sovereignty, residence, property and freedom of movement will be trampled upon.

150. Seventh, the application seeks to disintegrate and dismantle the national unity and the national existence of South Africa envisaged in the Constitution and the objectives of the Truth and Reconciliation Act. It is in this context that the application militates against the spirit of a united, sovereign democratic South Africa based on human dignity, rule of law and constitutional supremacy.

151. Eighth, the present case is a conundrum on its own. On the one hand, the applicant accepts and acknowledges the existence of the Constitution and on the other, it seeks an order that goes against the values and fundamental principles of the Constitution.

152. Ninth, the applicant relies directly on the Constitution and Bill of Rights for the protection of the constitutional rights of its members such as the rights to freedom of religion, belief and culture as the basis of its claim for restoration of the former Boer Republics. The applicant does not place reliance on legislation or common law. Therefore, the application militates against the principle of subsidiarity.[87]

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87 **My Vote Counts NPC v Speaker of the National Assembly and Others**, (CCT121/14) [2015] ZACC 31

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153. Tenth, if this court may grant the relief sought, the possible result is that the applicant and its members will establish their own government, adopt the Constitution and pass laws. That will be the reversal of the old Boer Republics. In turn, this will dismantle the current constitutional existence of the Republic. This is likely to cause the political unrest and instability that were experienced by the South Africans in the 60s, 70s, 80s and the early 90s.

154. In the premises, I submit that the applicant' claim as it stands offends the spirit of the principles of transformative constitutionalism and the norms of international law.

155. I am advised that this court is the ultimate guardian of the Constitution. Therefore, it has the right to intervene in order to prevent violation of the Constitution and the norms of international law which may arise as a result of the applicant's claim.

156. In sum, I respectfully submit that:

156.1 the Republic is a democratic State based on sovereignty of its people (black and white) and on respect for

(30 September 2015) para 50.

fundamental rights and liberties. The sovereignty of the Republic is vested in the citizens who exercise it through freely elected representatives. The Republic is within its borders an independent, sovereign, united and indivisible democratic State based on the rule of law; freedom, human dignity and constitutional supremacy;

156.2 no political organization, group, individuals and voluntary associations (including the applicant) may usurp the sovereignty of the Republic from its citizens nor establish government against the freely expressed will of the people;

156.3 no person or organization including the applicant and its members has the legal right to alienate any territory or sovereign rights which the Republic and the people exercise over South Africa. Neither section 25 (7) the Constitution nor the Restitution of Land Rights Act[88] authorize the applicant and its members to claim the restitution of the ownership right in the land of the former Boer Republics;

88 **Restitution of Land Rights Act** 22 of 1994.

156.4 the authority and legitimacy of the South African government (the respondents) comes from the people through the Constitution and regular elections. The people speak through the free and direct elections and their freely elected representatives. Therefore, the applicant' claim of part of South Africa undermines not only the sovereignty of the Republic but also the will of the people of South Africa;

156.5 the applicant's claim for the restoration of the former Boer Republics is an attempt to change the democratically elected government and undermine the territorial integrity of the Republic; and

156.6 the applicant's claim undermines the political independence of the people of South Africa and it is a serious interference in the legitimate and constitutional order of the Republic.

SECOND RESPONDENT'S RESPONSE TO PARTICULAR PARAGRAPHS IN THE FOUNDING AFFIDAVIT

157. I now turn to deal in an *ad seriatim* fashion with the individual averments in the founding affidavits filed by the applicant. I shall deal only with those averments

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that call for a response. My failure to respond to any averment should not be construed as an acceptance thereof but should on the contrary be understood to be a denial of the averment.

158. **Ad paragraphs 1, 1.1 to 1.5**

I note that the applicant is a voluntary association as it appears in its Constitution marked Annexure "**A**" to the applicant's founding affidavit. I also note the inauguration resolution of the applicant marked Annexure "**B**" attached to the founding affixed. However, I take a particular issue with the obvious fact that the names, identities and addresses of the applicant's individual members and affiliated organizations and groups are not known to me and the second respondent.

For the reasons set out in this answering affidavit, I deny that much of what the applicant has stated is true and correct.

159. **Ad paragraphs 2 and 2.1**

For the reasons stated elsewhere in this answering affidavit, and as it will be argued at the hearing of this application in due course, the applicant has not made out a case for the restoration of the ownership

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right in the former Boer Republics. The history of land ownership in South Africa does not support the applicant's claim of the ownership right, title and sovereignty in the land of the former Boer Republics.

To the extent to which the applicant alleges that history is a basis of its claim, I restate my submissions made in this answering affidavit. I therefore submit that the applicant's submissions premised on history, religion, belief and culture as the bases of the claim for the former Boer Republics are without merit. I deny that the applicant and its members were in a peaceful and undisturbed possession of the land known as the Boer Republics prior to 18 March 2020. The contents of this paragraph are totally irrelevant. In the event, this court would find otherwise, I respectfully submit that such peaceful and undisturbed possession became extinguished by the Peace Treaty of 1902 and subsequent Constitutions of South Africa.

160. **Ad paragraphs 2.1.1 to 2.1.12**

Save to state that the government has announced its proposed policy of expropriation of land without compensation, I deny that the proposed policy constitutes a threat to the applicant and its members. I submit that the averments raised in these paragraphs introduce matters that are irrelevant to these proceedings. The announcement of the outbreak of Covid 19, the allegations of Covid-19 vaccination, the announcement of

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Disaster Management Regulations and the role of WHO in combating and reducing the spread of Covid 19 have nothing to do with the respondent's claim and therefore irrelevant and without merit. I deny that I and government co-respondents' actions constitute high treason. These allegations are frightening, abusive, grossly defamatory and irrelevant. I have filed an application to this court to strike out these paragraphs because they constitute inadmissible evidence.

I further deny that the murder penalty may be imposed when the provisions of Disaster Management Regulations are contravened. I submit that on 6 June 1995 a historic judgment which abolished death penalty was made by the CC in **S v Makwanyane and Another** (cited above). The court ruled that capital punishment, as provided for under the Criminal Procedure Act 51 of 1977 was opposed to the Constitution. I do not know on what basis the deponent can make these unfounded allegations. No justification is provided for this assertion.

I further deny that I and government co-respondents are corrupt and had admitted the misappropriation of funds. I submit that these allegations are "troubling, defamatory, alarming and discomforting". In the result, I respectfully submit that the perception created by the applicant in these paragraphs is totally disturbing.

161. **Ad paragraphs 2.1.13 to 2.1.13.6**

Save to state that the Global Preparedness Monitoring Board is an independent group of global leaders helping make the world safer from health crisis while the WHO's work includes combating emergencies, such as the pandemic of a new coronavirus disease, I state that the allegations contained in these paragraphs do not apply to the matter in hand and do not contribute one way or the other to the present matter. The applicant misconstrues the mandate and role of WHO and the GPMB on global health issues. It is surprising that the deponent has adopted a negative attitude towards WHO and its programmes. I therefore submit that these allegations are irrelevant, baseless and without merit.

162. **Ad paragraphs 2.2, 2.2.1 to 2.2.6**

I have dealt with the historical background relating to the establishment of the Boer Republics extensively above. I however, reiterate that the applicant's claim is not supported and confirmed by history of land ownership in South Africa. I further submit that the applicant distorted the history of land ownership in South Africa. I have demonstrated at length that the history of the Great Trek and Battle of Blood River laid the foundation of the land dispossession in this country. I find it difficult to understand how the covenants of Battle of Blood River and Paardekraal could confer the ownership right to the ancestors of the applicant's members. In the premises, I therefore submit that the

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allegations contained in these paragraphs are baseless and without merit.

163. **Ad paragraphs 2.3, 2.3.1 to 2.3.11**

I deny that the biblical verses contained in these paragraphs support the applicant's claim of ownership right in the land of the former Boer Republics. Moreso, the allegations are irrelevant and have no connection with relief sought in the applicant's notice of motion. In the premises, I do not understand why the applicant places reliance on biblical verses.

164. **Ad paragraphs 2.4 to 2.5**

I deny that the applicants and its members are deprived undisturbed possession of their land. I further submit that the reliance of the applicant on history, religion, belief, opinion and culture has no basis whatsoever. I have already dealt with these allegations above and demonstrated that they are without merit.

165. **Ad paragraphs 3,3.1 to 3.11**

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Save to state that the contents of these paragraphs which deal with Constitution of the applicant are noted, I have already demonstrated above that the applicant's claim is without merit.

166. **Ad paragraphs 3.12 to 3.16**

The contents of these paragraphs are admitted.

167. **Ad paragraphs 4 to 4.1**

I have dealt at length with the contents of these paragraphs above. I have also dealt with the legality of the government's proposed policy of expropriation of land without compensation in this answering affidavit. I have shown that the issue of nil compensation is the business of court and not the State. In any event, expropriation of land without compensation seeks to address the historical injustices of land dispossession. The intended policy would eradicate the economic inequalities and made land accessible to all.

168. **Ad paragraphs 4.2 to 4.4.8**

I submit that the allegations contained in these paragraphs are baseless and totally irrelevant. I have launched an interlocutory application in this

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court to strike out these allegations as scandalous, vexatious and irrelevant. I however, strongly deny that I and the government co-respondents secured assets of the Republic of South Africa as a condition of loan from China.

169. **Ad paragraphs 5.1, 5.1.1 to 5.1.10**

I deny all the claims of prophesies, covenants, religion, history and biblical verses raised by the applicant in these paragraphs which purport to assert and justify the ownership right in the land of the former Boer Republics. In particular, reliance on biblical verses cannot be a justification for the ownership of land in the former Boer Republics. I further state that the allegation that the applicant's ancestors were given land in question by God is a pure myth.

170. **Ad paragraph 5.1.11**

Save to admit that the Republic of South Africa came into existence in 1961 and the Constitution guarantees various rights, I deny that the applicant's members are deprived these rights and peaceful and undisturbed possession of their land. I have already demonstrated above that the applicant's constitutional rights to freedom of religion, belief and culture interfere with the rights of others and militate against

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public interest. For this reason, I reiterate that the applicant's rights may be limited by law of general application and the Constitution itself.

CONCLUSION

171. Having regard to all of the above, the second respondent is justified in opposing the applicant' application, and I respectfully pray that the application be dismissed with costs including the costs of counsel.

DEPONENT

SIGNED AND SWORN BEFORE ME AT RUSTENBURG ON THIS THE 22nd DAY OF NOVEMBER 2021 BY THE DEPONENT WHO HAS ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT; THAT HE HAS NO OBJECTION TO TAKING THE PRESCRIBED OATH AND THAT HE CONSIDERS THE PRESCRIBED OATH TO BE BINDING ON HIS CONSCIENCE.

COMMISSIONER OF OATH

NAME: _____

CAPACITY: _____

ADDRESS: _____

GILBERT PHETHEDI NGOEPE
Commissioner Of Oaths
Practising Attorney
8th Floor Die Meent Building
Cnr Pretorius and Andries Streets
Pretoria
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N.T.

AREA: _____

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South Africa's Land Restitution Challenge: Mining Alternatives from Evolving Mineral Taxation Policies

Sasha Fannie Belinkie†

Introduction

South Africa is blessed with a wealth of land and natural resources.[1]

† B.A., George Washington University, 2010; J.D., Cornell Law School, 2015; Articles Editor, *Cornell Law Review*; Bench Editor, Cornell Moot Court Board. I would like to thank Professor Muna B. Ndulo for his mentorship, teaching me the importance and potential of a constitution, and for his guidance during the drafting of this piece. Thank you to Sue Pado and the members of the *Cornell International Law Journal* whose hard work and thoughtful suggestions have benefited this Note. I would also like to honor my grandfather, Alfred R. Belinkie, whose excellence as an attorney inspired my legal career. Finally, thank you to my dad, my mom, my sisters, and Damien Rose for their love and support; everything I have accomplished so far has been the result of your encouragement.

1. *See Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at 2 para. 1 *available at* http://www.saflii.org/za/cases/ZACC/2013/9.html ("South Africa is

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However, as a result of South Africa's previous apartheid government, approximately 13% of the population controls 87% of the country's land and minerals.[2] Despite this present-day inequality, the rise of democracy in 1994 engendered a new South Africa.[3] This rebirth led to the creation of a new constitution aimed at rectifying South Africa's history of land-grabbing and race-based politics through the redistribution of the country's land to its rightful owners.[4]

The new South African Constitution specifically promotes "an open and democratic society" with the economic goals of "improv[ing] the quality of life of each person and free[ing] the potential of each person."[5] The South African Constitutional Committee determined that improving each individual's quality of life was directly tied to providing equal access to land, natural resources, land reform, and adequate housing.[6] Therefore those rights, among others, are expressly granted in the South African Constitution.[7]

Nevertheless, tension arises from the realities of land ownership in post-apartheid South Africa.[8] Economic power from land ownership is

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not only a beauty to behold but also a geographically sizeable country and very rich in minerals").

2. The Land and Agrarian Reform Project (LARP), The Concept Document 6 (Feb. 2008) *available at* http://www.nda.agric.za/doaDev/topMenu/DoAProgrammes/LARP_25Feb08.pdf (hereinafter LARP) (identifying land distribution as a priority in light of "the new democratic Government of South Africa inherit[ing] a socially highly skewed land distribution: whites owned 87 and blacks 13 percent of agricultural land."). *See also Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at 2 para. 1 ("the architecture of the apartheid system placed about 87 percent of the land and the mineral resources that lie in its belly in the hands of 13 percent of the population"); Edward Lahiff, *Documentaries with a point of view: Promised Land, Q&A: Land Reform in South Africa*, PBS (July 6, 2010) *available at* http://www.pbs.org/pov/promisedland/land_reform.php ("In 1994, at the end of apartheid, almost 90 percent of the land in South Africa was owned by white South Africans, who make up less than 10 percent of the population. . . . [l]ess than 7 percent of land has been redistributed to date").

3. *See Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at 2 para. 1 ("To address th[ese] gross economic inequality[ies], legislative measures were taken to facilitate equitable access to opportunities in the mining industry").

4. *See* Bernadette Atuahene, *South Africa's Land Reform Crisis: Eliminating the Legacy of Apartheid*, Foreign Affairs (July/Aug. 2011) *available at* http://www.foreignaffairs.com/articles/67985/bernadette-atuahene/south-africas-land-reform-crisis (identifying the African National Congress's (ANC) goal of "redistributing 30 percent of the land from whites to blacks in the first five years of the new democracy" after Mandela took power in 1994).

5. S. Afr. Const., Preamble (1996).

6. *See* S. Afr. Const. (1996), §§ 25, 26, 27, 29.

7. *See id.* The constitution provides additional rights including, access to health care, sufficient food and water, social security, and education.

8. *See* Palash Ghosh, *South Africa's White Farmers: An Endangered Species?*, International Business Times (Dec. 3, 2012, 1:08 PM) *available at* http://www.ibtimes.com/south-africas-white-farmers-endangered-species-915345 (discussing the hundreds of murders and attacks on white South African farmers and the lack of response their farming associations are likely to receive from the government); *see also* Frans Cronje, *How much of SA's land is really in black hands?*, Politics Web (Feb. 27, 2012) *available at* http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619/page71639

divided almost cleanly along racial lines, creating racial tension between black and white South Africans due to the economic inequalities. These economic inequalities derive from the apartheid government's systematic transfer of land from black South Africans to white South Africans over the course of a century.[9] Today, despite innovative land reform programs, the current government has had limited success returning or redistributing land.[10] As a result, land ownership continues to be an emotional and highly charged issue with whites maintaining ownership over the vast majority of the country's land. Professor Atuahene cites James Gibson's survey of South African public opinion and argues,

> South Africa's failure to rectify its land inequality is like a sea of oil waiting for a match. In one of the most impressive public opinion studies ever conducted in the country, in 2009 the political scientist James Gibson surveyed 3,700 South Africans and found that 85 percent of black respondents believed that 'most land in South Africa was taken unfairly by white settlers, and they therefore have no right to the land today.' Only eight percent of white respondents held the same view. Gibson's most alarming finding was that two of every three of these blacks agreed that 'land must be returned to blacks in South Africa, no matter what the consequences are for the current owners and for political stability in the country'; 91 percent of the whites surveyed disagreed.[11]

While the land-restitution programs initially experienced success, the government's progress has plateaued.[12] Scholars and critics have predicted that if the situation is not improved, South Africa might end up in a violent revolt similar to the one experienced in neighboring Zimbabwe.[13]

?oid=282525&sn=Detail&pid=71639 ("Any discussion on land ownership in South Africa risks generating more heat than light").

9. *See* The Centre for Development and Enterprise, Policy in the Making: Land Reform in South Africa: A 21st Century Perspective 5–7 (June 2003). During the apartheid era, the Native Land Act of 1913, the 1936 Natives Trust and Land Act, and the Group Areas Act of 1950 continued to transfer land ownership from black to white South Africans. Today, whites own over 80% of the land in South Africa, with the majority of the remaining 20% set aside by the government for tribal homelands.

10. *See* Atuahene, *supra* note 4. Only 8% of South African land has been redistributed since the fall of apartheid, despite extensive government initiatives designed to accomplish that objective.

11. *See* Atuahene, *supra* note 4.

12. *See id.* The land restitution process experienced more success in urban settings, where victims could be paid damages with money rather than land, than rural settings. *See also* LARP, *supra* note 2 (identifying the previous land reform policies as slow and of questionable success, in the context of a government document).

13. *See* Alanna Chang, *South Africa: The Up Down, An Application of A Downstream Model to Enforce Positive Socio-Economic Rights*, 21 Emory Int'l L. Rev. 621, 637 (2007) ("In *Grootboom*, the Constitutional Court prefaced its decision by alluding to South Africa's potential for a Zimbabwe-like land grab"). *See* e.g. Pumza Fihlani, *Can South Africa avoid doing a Zimbabwe on land?*, BBC News (June 24, 2013, 11:25) *available at* http://www.bbc.com/news/world-africa-22967906 ("In the face of the lack of progress, some activists are calling for a more drastic approach, including taking land from white farmers without compensation . . . But many look at Zimbabwe's economic meltdown after it seized most of the country's white-owned commercial farms and caution against this approach"); Robin Palmer, Land Policy Adviser, *The World Bank, Civil Society, and Land Reform*, OXFAM GB (Aug. 2000) *available at* www.mokoro.co.uk/files/13/file/lria/

The apartheid regime caused similar tensions in South Africa's mining industry, through polices that resulted in race-based dispossession of mineral rights.[14] While transferring land rights, white colonists simultaneously took ownership over the country's mineral rights through legislation designed to create colonial wealth.[15] Until the 1990s, whites maintained almost complete title to the country's mineral and mining rights with minimal limits on the way those rights could be exercised.[16] Through post-apartheid government regulation and industry-wide reforms, the past twenty years have seen the mining industry evolve in positive ways. The main change has come from partial nationalization of the mining industry and a revocation of the colonial mining legislation. This has enabled the government to implement a system that meets the goals of efficiency, mineral conservation, and equal access to mineral resources.[17]

South Africa's successful reform of the mineral ownership program serves as a model to other African countries that are struggling with foreign possession of domestic resources.[18] Given Africa's history of colonization, many countries currently find themselves struggling with foreign

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wb_civil_society_land_reform.pdf ("As for the "new" and much-hyped model of "market-assisted" land reforms, which involve governments taking a more hands-off approach, they have conspicuously failed to address either political realities or power relations on the ground. In Brazil they have done nothing to break the power of the large landlords, while in post-apartheid South Africa their scope for securing sustainable rural livelihoods for poor people has proved to be extremely limited").

14. *See* Laissez-Fair, *Mining in South Africa and Private Enterprise*, 3 S. Afr. J. on Hum. Rts. 167, 172 (1987). Franz Wild and Mike Cohen, *Mandela's Wealth-Sharing Dream Fades in South Africa*, Bloomberg (July 23, 2013) *available at* http://www.bloomberg.com/news/print/2013-07-22/mandela-s-wealth-sharing-dream-fades-in-south-africa.html (explaining a conflict between villagers in Modikwa and African Rainbow Minerals Ltd. (ARI) mining company over the Modikwa platinum mine in Limpopo province. The founders of the mine promised to develop schools, hospitals, and homes, in return for a lucrative mining operation. Today 80,000 villagers have seen no benefit from the mine while ARI remains highly lucrative).

15. *See* F.T. Cawood and R.C.A. Minnitt, *A historical perspective on the economics of the ownership of mineral rights ownership*, The Journal of The South African Institute of Mining and Metallurgy 369, 370 (1998) (referring to the Native Land Act 27 of 1913). Today whites occupy 73% of the top business management positions. *See* Commission for Employment Equity Annual Report 2012-13, Department of Labour of the Republic of South Africa (Apr. 2013) *available at* http://www.labour.gov.za/DOL/downloads/documents/annual-reports/employment-equity/commission-for-employment-equity-annual-report-2012-2013/ceel3report.pdf/view.

16. *See* Department of Minerals and Energy, A Minerals and Mining Policy for South Africa, 1.3.1.2 Ownership of Mineral Rights (Oct. 1998) *available at* http://www.polity.org.za/polity/govdocs/white_papers/minerals98.html (explaining that South Africa's mineral rights used to be 1/3 state-owned and 2/3s privately owned, while "[a] distinguishing feature of the South African mining industry at present is that almost all privately-owned mineral rights are in white hands").

17. *See* ANC Policy Institute, Maximising the developmental impact of the people's mineral assets: State Intervention in the Minerals Sector 1, 2 (Feb. 2012) *available at* www.anc.org.za/docs/reps/2012/simsreport.pdf (discussing the nationalization of South Africa's mines as a pathway toward "effectively maximis[ing] the growth, development and employment potential embedded in such national [mineral] assets, and not purely for profit maximization").

18. *See* Cawood & Minnitt, *supra* note 15, at 370.

control of their oil and mineral wealth.[19] In the past twenty years, South Africa and a few other African countries[20] have corrected this inequality by implementing land and mineral licensing programs.[21] These programs have allowed mining companies to continue business operations while giving the African governments control over the quantity of minerals extracted, the duration of mining licenses, the parties participating in mining processes, and the benefits local communities receive from the operations.[22]

The purpose of this Note is to propose a method for South Africa to mirror its domestic mineral reform success in its land reform programs. South Africa is opportunely situated to accomplish this objective because it has the most liberal constitution in the world.[23] This constitution creates a legal framework for progressive land and resource redistribution.[24] If South Africa creates a successful land distribution scheme, this system could serve as an example for numerous other African countries experiencing similar struggles. Even in the absence of a rights-based constitution, other African countries could adapt South Africa's model of progressive taxation as a solution to land reform.

Part I of this Note introduces background on the issue and examines South Africa's history and present legal framework, which has paved the way for progressive land reform. Part II analyzes the success and future potential of South Africa's current land restitution policies. Part III examines the history of South Africa's mining policies, describes how the current progressive taxation system successfully accomplishes the country's mining goals, and addresses the interests of all parties involved. Part IV describes how South Africa can utilize its mining regulatory framework to meet its land distribution goals. This Note concludes that the advances South Africa has made in its mining policy can successfully be applied to its land distribution program. The improved land distribution program

19. *See* S. Afr. Trade and Indus. Minister Rob Davies, New Approach Needed on Investment Treaties, Presentation at United Nations Conference on Trade and Development, Geneva, (Sept. 24, 2012) *available at* http://www.igd.org.za/archives/latest-stories/1597-south-african-minister-new-approach-needed-on-investment-treaties (recognizing "that while [foreign direct investment] can make a positive contribution to sustainable development, the benefits to host countries are not automatic").

20. *See* ANC Policy Institute, *supra* note 17, at 2.

21. *See id.*; *see also* Mike Cohen, *South Africa Wants Black Ownership of Mines Maintained at 26%*, Bloomberg (July 15, 2014, 12:16 PM) *available at* http://www.bloomberg.com/news/2014-07-15/south-africa-wants-black-ownership-of-mines-maintained-at-26-.html (citing comments of South Africa's Mineral Resources Minister Ngoako Ramathlodi stating that "mining companies should maintain 26 percent black ownership of their assets in the country or risk losing their operating licenses").

22. *See Towards the transfer of Mineral wealth to the ownership of the people as a whole: A Perspective on Nationalisation of Mines*, ANC Youth League (Aug. 2010) *available at* http://www.ancyl.org.za/show.php?id=5502 (discussing the foreseeable benefits of South Africa's mineral nationalization policy); *see also* David van Wyk, *Debate on Nationalising the Mines in South Africa*, In Defence of Marxism (Feb. 6, 2010) *available at* http://www.marxist.com/south-africa-mines-nationalisation-debate.htm.

23. *See Agri South Africa v Minister for Minerals and Energy*, 1 (4) SA 1 (CC) (2013).

24. *See id.*

will not only provide an efficient, market-driven redistribution of property but will also set a model for other African countries to follow.[25]

I. Background

A. South Africa's History and Present Legal Framework

1. *Statutory Framework from Colonialism and Apartheid*

The African continent has an extensive history of colonization. During the colonial period, invading countries often stripped native Africans of land and maintained ownership of this land by force.[26] South Africa, however, is a poignant example because its history of "property dispossession has greatly contributed to present-day inequality and has become a politically explosive issue that can cause backlash."[27]

Pre-colonial South Africans utilized collective systems of land rights, which prioritized communal land uses and community interests.[28] Individuals, who pledged allegiance to the community, were allowed to maintain individual land allotments to foster land that they inhabited or cultivated.[29] Those individual allotments, based on usage, were inheritable in perpetuity.[30] The head of the family regulated land usage, and tribal chiefs consulted both elders and those individuals living and using the land before making any decisions that could affect property rights.[31] Under this communal system, land was distributed based on need, land use, and individual status.[32]

The arrival of Dutch colonists in 1652 marked the formation of a new land ownership system.[33] The new system required formal registration of property, did not acknowledge communal land systems, and effectively excluded blacks from property ownership.[34] This trend of land dispossession (outside of those blacks who were "grandfathered" into ownership) continued until The Native Land Act of 1913 (the "Native Land Act"). The Native Land Act officially deprived black South Africans of the ability to

25. *See* Section IV.C *infra*.

26. *See* Bernadette Atuahene, *Property Rights & the Demands of Transformation*, 31 MICH. J. INT'L L. 765, 767 (2010); *see also* NIGEL WORDEN, THE MAKING OF MODERN SOUTH AFRICA: CONQUEST, APARTHEID, DEMOCRACY 6–37 (3d ed. 2000) (discussing the history of land dispossession in South Africa).

27. *Id. See also* Bernadette Atuahene, *Things Fall Apart: The Illegitimacy of Property Rights in the Context of Past Property Theft*, 51 ARIZ. L. REV. 829, 849 & n. 87 (2009) (discussing how opposing views of property ownership can be detrimental to future political progress in post-colonial societies).

28. *See e.g.*, Chang, *supra* note 13.

29. *See* Durkje Gilfillan, Poverty Alleviation, Economic Advancement and the need for Tenure Reform in Rural Areas, 1–2, Address at the SAPRN Conference on Land Reform and Poverty Alleviation in Southern Africa, Pretoria (June 4, 2001), *available at* http://www.sarpn.org.za/EventPapers/Land/20010605Gilfillan.pdf.

30. *See id.* at 1.

31. *See id.* at 2.

32. *See* Atuahene, *supra* note 27, at 779–83.

33. *See id.*

34. *See id.* at 784.

own land.[35] Blacks who were previous landowners became tenants, and the land ownership of tribal officials became uncertain.[36]

In 1936, the Native Trust and Land Act dramatically increased segregation by officially designating certain areas of land as available only to whites.[37] Simultaneously, the Native Trust and Land Act impeded the sustainability of black communities by re-designating black homelands to remote rural areas with few natural resources.[38] The Group Areas Act of 1950 exacerbated these problems by limiting the access of black individuals to specific urban areas.[39] The practical effect of the Group Areas Act was to prevent blacks from living or working in cities and urban areas in South Africa.[40] Blacks were restricted to various "homelands," rural locations without white South Africans, which were established throughout the country.[41]

At the height of these regulations came the Prevention of Illegal Squatters Act of 1951, which forced the relocation of blacks who were squatting on white public or private property.[42] The Illegal Squatters Act also applied to black individuals who were renting land on white property, even allowing white property owners to demolish the renters' homes.[43] These black renters were then required to move into squatter villages.[44] Lastly, legislators passed Section 10 of the Native Laws Amendment Act of 1952 to limit the movement of blacks into urban areas.[45] Section 10 codified restrictive pre-apartheid practices by limiting the number of blacks allowed to live in urban areas only to those who were one of the following: (1) born in an urban area, (2) employed in an urban area for over 15 years, or (3)

35. See e.g., T.R.H. Davenport & Christopher Saunders, South Africa: A Modern History 271, 390 (2000). See also Robert C. Cottrell, South Africa: A State of Apartheid (Arbitrary Borders) 83 (2005) (noting that blacks made up over 70% of the population but lived on only 7% of the land).

36. See Anton D. Lowenberg & William H. Kaempfer, The Origins and Demise of South African Apartheid: A Public Choice Analysis 34 (1998); see also Bertus de Villiers, Land Reform: Issues and Challenges: A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia 46 (2003); Gilfillan, *supra* note 29, at 2 ("Racial discrimination restricted the extent of land Blacks were allowed to own. . . . As a result chiefs and traditional authorities gained title in land to which they had no legitimate claim, neither at common law nor at customary law").

37. See e.g., Chang, *supra* note 13, at 627 (explaining the development of "homelands").

38. *Id.*

39. *Id.* See also Thsmá Ka Plaatjie, *Taking Matters Into Their Own Hands: The Indigenous African Response to the Land Crisis in South Africa*, in Unfinished Business: The Land Crisis in Southern Africa 287, 291-92 (Margaret C. Lee & Karen Colvard eds., 2003).

40. The Group Areas Act deprived blacks of adequate opportunities for housing and forced many to commute long distances for work. See Helen Suzman, *Key Legislation in the Formation of Apartheid* (March 16, 2009) *available at* http://www.cortland.edu/cgis/suzman/apartheid.html.

41. *Id.*

42. Chang, *supra* note 13, at 629.

43. See Davenport & Saunders, *supra* note 35, at 390.

44. See *id.*

45. See Chang, *supra* note 13, at 629; see also Davenport & Saunders, *supra* note 355, at 390.

employed by the same urban employer for at least 10 years.[46] The Native Laws Amendment Act severely restricted the ability of black South Africans to find employment.

Today, approximately 32% of South Africans still live in the homelands.[47] In addition to living in re-designated homelands, problems with land invasion, squatting, urbanization, and severe black unemployment can also be traced back to these apartheid-era statutes.[48]

2. *South Africa's Democratic Constitution*

In the early 1990s, South Africa faced pressure from the United Nations to end apartheid.[49] An international, multi-racial movement began toward a united South Africa. The first legislative progress was the Abolition of Racially Based Land Measures Act of 1991, which repealed the 1913 and 1936 Land Acts, thus reinstating in Blacks the right to own land.[50] In 1994, Nelson Mandela became President of the new democracy and the South African Interim Constitution was drafted and put into effect.[51] Scholars have since characterized South Africa's Constitution as "the most admirable constitution in the history of the world."[52]

The Constitutional framework was designed to reinstate the fundamental rights of black South Africans.[53] One of the most significant aspects of the new Constitution is the granting of property rights and housing rights to all citizens.[54] Specifically, Sections 25 and 26 of the Constitution create a right to adequate housing and declare that the government must use reasonable means to foster equitable access to land.[55] The statute's language, however, limits the government's responsibility to provide land and housing with the term "available resources."[56] This language provides South African citizens with a justiciable right without imposing expansive duties on the government.[57] This language also allows the legislature and government to work toward achieving these rights over an unde-

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46. Chang, *supra* note 13, at 629.
47. *Id.*
48. *See* Chang, *supra* note 13, at 629 (citing *Republic of South Africa v. Grootboom* (2001) (1) SA 46 (CC) at 54 (S. Afr.)).
49. *See* Pienaar, *supra* note 39, at 291–92.
50. *See* Villiers, *supra* note 36, at 47.
51. S. Afr. (Interim) Const. 1993.
52. *See* Chang, *supra* note 13, at 621. South Africa finalized its current constitution in 1996.
53. *See generally* S. Afr. (Interim) Const. 1993 (including provisions designed to protect formal democratic equality, as well as substantive rights that would ensure equal freedoms among the people of South Africa.
54. *See* S. Afr. Const. 1996, §§ 25–27 (explaining South Africa's approach to human rights in the shadow of an apartheid government).
55. S. Afr. Const. 1996, §§ 25–26; *see also* Chang, *supra* note 13, at 623.
56. *See* S. Afr. Const. 1996, §26(2) (determining that South Africa would be able to achieve progressive realization by taking reasonable measures within its available resources); *see also* Paul Nolette, *Lessons Learned from the South African Constitutional Court: Towards a Third Way of Judicial Enforcement of Socio-Economic Rights*, 12 Mich. St. J. Int'l L. 91, 99–100 (2003).
57. *See* Chang, *supra* note 13, at 661 (citing S. Afr. Const. 1996, §25).

fined period of time, while still granting the rights that allow South African citizens to legally challenge abuses.[58]

B. *Government of the Republic of South Africa v. Grootboom*

South Africa's Constitutional Court addressed the scope of the government's responsibility to ensure constitutional rights and to provide housing in *Republic of South Africa v. Grootboom*.[59] In a class action suit, the government charged Irene Grootbloom and 900 other citizens ("Respondents") with illegally occupying private government land.[60] The Respondents had relocated there from another squatter settlement, which lacked water, sewage, and electricity.[61] Some of the Respondents had been on housing wait lists for over seven years.[62] Upon moving to the government property, the group built shelters and called the new settlement "New Rust."[63] Within a few months, the municipality evicted the squatters and bulldozed their homes.[64] The Respondents then found refuge at a sports complex, where they built makeshift shelters but were still exposed to the elements.[65]

While determining that the municipality did not take adequate measures to provide the Respondents with access to housing, the Constitutional Court established a reasonableness standard for assessing government-housing responsibilities.[66] Under that standard, the State is obliged "to take reasonable legislative and other measures to ensure the progressive realization of this right within its available resources."[67] Using the standard, the Constitutional Court concluded that although there was a "massive shortage in available housing and an extremely constrained budget[,]" the State failed to provide adequate housing and was prevented from using that failure as an excuse to eliminate shelters which were actively being used.[68] Even considering the financial constraints on the municipality, the Court found that the State action in *Grootbloom* failed the reasonableness test.[69]

The Constitutional Court required that the reasonableness test be universally applicable and respond to an array of housing needs.[70] This

58. Chang, *supra* note 13, at 661.
59. *See Government of the Republic of South Africa v. Grootboom* 2000 (1) SA 46 (CC) at 53 (S. Afr.).
60. *Id.* at 53. The other respondents consisted of 510 children and 390 adults. Furthermore, the land illegally occupied was ironically earmarked for low-income housing.
61. *See id.*
62. *See id.*
63. *See id.*
64. *See id.* at 55.
65. *See Government of the Republic of South Africa v. Grootboom* 2000 (1) SA 46 (CC) at 9–10 (S. Afr.).
66. *See id.* at 11.
67. *Id.*
68. *Id.* This avoided hindering government action with burdensome housing funding requirements.
69. *See id.* at 25–26.
70. *See id.* at 68.

meant a government program could not preclude segments of the population, and the program must respond to the short-term, intermediate, and long-term housing needs of the populations at issue.[71] In *Grootboom*, the municipality at issue was making an effort to construct long-term housing but its actions were found unconstitutional because the program violated the respondents' short-term housing needs.[72]

The Court rejected the government's argument that requiring a balance of needs would result in the diversion of resources ordinarily used for long-term housing to short-term housing, which would make constructing housing developments impossible.[73] The Court also rejected the argument that if the government could not remove squatters, the government would lose the ability to develop designated properties, and the Court reiterated the State's duty to provide shelter.[74] The Court limited the government's responsibility to provide shelter, to constraining government action that destroys housing for which there is an immediate need.[75]

In the context of land reform, the *Grootboom* decision means that the government has a responsibility to strive to meet the rights threshold set by the Constitution. Although this requirement does not burden the government with providing more housing than is needed, the government is prevented from making decisions that will neglect immediate housing needs in favor of a long-term strategy.

C. *President of South Africa v. Modderklip Boerdery, Ltd.*

Implementation of the Constitution faces further issues because not all of the rights guaranteed under the Constitution comport with the ideals of all South Africans.[76] White South Africans have argued that many of the individual liberties guaranteed by the Constitution have been implemented

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71. *See Government of the Republic of South Africa v. Grootboom* 2000 (1) SA 46 (CC) at 68 (S. Afr.).

72. *See id.* at 53.

73. *See id.* at 36–37 (emphasizing the balance between goals and means). Government measures must be effective and timely, but the availability of resources is an important consideration.

74. *See id.*; *see also* Marie Huchzermeyer, *Housing Rights in South Africa: Invasions, Evictions, the Media, and the Courts in the Cases of Grootboom, Alexandra, and Bredell*, 14 URB. F. 80, 87–88 (2003).

75. *See* Marius Olivier, *Constitutional Perspectives on the Enforcement of Socio-Economic Rights: Recent South African Experiences*, 33 VICT. UNIV. OF WELLINGTON L. REV. 117, 137 (2003) ("In *Grootboom* the Constitutional Court remarked, within the context of the right to access to adequate housing, that there is, at the very least, a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing"). This limitation curtails the government's obligation to provide housing, but it also lessens the constitutional rights. For example, *Grootboom* was handed down October 4, 2000 and the municipality did not create new housing plans until 2002. Eventually Grootboom had to find housing elsewhere.

76. Section Nine of the South African Constitution states that "[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken." This clause has caused racial strife between South Africans who support the government's use of affirmative action to remedy past violations, and those who do not.

purely for the benefit of the black population, at the expense of the white South Africans.[77] This tension is best exemplified at the state level, where adequate financial commitment to provide services is often lacking.[78]

Modderklip demonstrates the difficulties of forcing municipalities to obey court orders, regardless of the Constitution.[79] In *Modderklip*, a municipality evicted 400 homeless black individuals from an informal settlement.[80] That group then illegally occupied land held by Modderklip Boerdery, Ltd.[81] The municipality notified Modderklip of the illegal occupation and ordered the company to evict the squatters.[82] Modderklip refused to evict the squatters because it believed the eviction was the city's responsibility.[83] Instead, Modderklip brought trespass charges against the squatters; however, the police requested the company refrain from filing criminal charges due to inadequate prison capacity.[84] Modderklip then offered to sell the property to the city for 10,000 rand, but the city rejected the offer.[85] As a result of the delay, 18,000 squatters occupied the property in October 2000, growing to almost 40,000 by April 2001.[86]

The Constitutional Court held for Modderklip and affirmed damages for both the lost use of the property and the state's gain in avoiding the need to provide the squatters alternative land.[87] Importantly, the Court acknowledged that damages were not an optimal form of relief.[88] The Court explained that the State should have expropriated the property for the squatter's use, especially since Modderklip offered to sell the property.[89] This would have allowed the inhabitation to be legal, and the State would have avoided the problem of having to find a substitute property for the squatters.[90] The Court, however, acknowledged its inability to force expropriation without violating the separation of powers.[91]

In *Modderklip*, the need for the judicial branch to avoid determining how the State would meet its constitutional responsibilities outweighed

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S. Afr. Const. 1996, §9. *See also supra* note 11 (commenting on the racial divide in opinions regarding land restitution policies).

77. *See* Atuahene, *supra* note 4 (referring to the affirmative action provisions in the constitution, which were designed to benefit black South Africans in order to remedy the effects of the apartheid regime).

78. *See* Chang, *supra* note 13, at 622–23.

79. *See President of S. Afr. v. Modderklip Boerdery, Ltd.* 2005 (5) SA 3 (CC) at 9 (S. Afr.).

80. *Id.* at 3–4.

81. *See id.*

82. *See id.* at 4–5. This order complied with § 6(4) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

83. *See id.* at 5–6.

84. *See id.* at 4.

85. *See President of S. Afr. v. Modderklip Boerdery, Ltd.* 2005 (5) SA 3 (CC) at 10–11 (S. Afr.).

86. *See id.* at 5–6.

87. *See id.*

88. *See id.* at 13–14.

89. *See id.* at 28–29.

90. *See President of S. Afr. v. Modderklip Boerdery, Ltd.* 2005 (5) SA 3 (CC) at 28–29 (S. Afr.).

91. *See id.* at 33–35.

efficient distribution.[92] The Court also discussed the State's responsibility in ensuring the maintenance of law and order.[93] While the municipalities at issue in this situation failed to purchase the land for the squatters, the Court cautioned against making the same decision in the future. Without State enforcement of individual rights, citizens could be pushed into taking the law into their own hands.[94] Local governments must thus implement socio-economic rights and land reform programs in order to avoid a Zimbabwe-like situation.[95]

II. South Africa's Land Reform Policies

Many politicians and activists call for land reform as the mechanism to rectify the inequality still prevalent in South Africa.[96] Implicit in popular land reform is a push to redistribute land predominantly owned by white farmers in a manner that would facilitate the creation of a large, black farming class.[97] Many argue that South Africa's long-term economic security depends on both continuous agricultural development and sustainable economic activity for the native populations.[98] The reality today, however, is that most South Africans live or are migrating to urban areas of the country.[99] This creates a more pressing need for urban employment and housing opportunities, as opposed to plots of land to farm.[100] While the government struggles with securing sufficient funds to finance both the redistribution of land and development of urban infrastructure for migration,[101] the country continues to face massive problems of homelessness, landlessness, and inadequate resources for the poorest South Africans.[102]

92. *See id.* at 28–30.
93. *See id.* at 9–11.
94. *See id.* at 26.
95. *See id.* ("Otherwise the purpose of the rule of law would be subverted by the very execution process that ought to uphold it").
96. *See e.g.*, Amahene, *supra* note 4 ("According to South African President Jacob Zuma, land reform ranks at the top of the ANC's agenda").
97. *See Policy in the Making*, *supra* note 9, at 10.
98. *See Land and Power: The growing scandal surrounding the new wave of investments in land*, Reliefweb (Sept. 22, 2011) *available at* http://reliefweb.int/report/world/land-and-power-growing-scandal-surrounding-new-wave-investments-land. The World Bank has recognized the importance of land tenure in the context of Africa's agricultural development.
99. *See Policy in the Making*, *supra* note 9, at 10.
100. *See e.g.*, *Land Reform in South Africa: Getting back on track*, Centre for Development and Enterprise, Research no 16, Executive Summary 3 (May 2008) *available at* www.urbanlandmark.org.za/downloads/LandReform_South_Africa.pdf [hereinafter CDE] (explaining South Africa's urbanization and "land reform programmes must include the identification and release of urban and peri-urban land for settlement, housing and job creation, as well as reform of ownership and use of land suitable for farming").
101. *See* Amahene, *supra* note 4 (noting that South Africa's Land Restitution Commission, the agency responsible for the land reform efforts, placed a moratorium on land restitution in 2010. This was a result of underfunding from the government, which caused the agency to back out of numerous land-purchase agreements).
102. *See* Chang, *supra* note 13, at 667 (concluding that the transfer of land has the potential to "raise the standard of living for much of the population" but the government

Hence, land redistribution efforts, which are dependent on adequate funding, have stagnated.[103]

Land reform is critical to South Africa's stability, economic development, and recovery post-apartheid.[104] In 1994, the government established a land reform program geared toward accomplishing these goals by implementing the Constitution's open-ended property clause.[105] Three different program components address post-apartheid land inequities—land restitution, land tenure reform, and land redistribution. Land restitution restores land to blacks whose property was taken under apartheid legislation.[106] Land tenure reform coveys ownership rights to blacks, who have worked and lived on farms for years without secured rights.[107] Land redistribution involves tailoring policy to create more black landowners.[108]

A. Land Restitution

Since the Native Land Act of 1913, black South Africans have been deprived of legitimate land ownership in a variety of ways.[109] Under the land restitution initiative, blacks are given back the property that was taken away from them under apartheid legislation, with the goal of righting previous wrongs and promoting equality and land ownership between the races.[110] Restitution applies to both rural and urban land claims.[111] The Restitution Act created a committee to investigate land claims and a court to settle claims between parties.[112]

Restitution has by far been the most successful of the three reform methods.[113] In 2006, the Land Claims Commission declared that 89% of

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still needs to focus on "urbanization, public transportation, and high unemployment rates").

103. *See e.g.*, Amy Ochoa Carson, *East Timor's Land Tenure Problems: A Consideration of Land Reform Programs in South Africa and Zimbabwe*, 17 IND. INT'L & COMP. L. REV. 395, 414 (2007) (explaining South Africa's "The land tenure program did not prove to be as successful as the government had hoped; a mere forty-one out of 63,000 claims were settled [by 2005]").

104. *See* Anuabene, *supra* note 4 ("South Africa's failure to rectify its land inequality is like a sea of oil waiting for a match").

105. *See* S. AFR. CONST. 1996, §§ 25, 26 (granting all individuals the right to own property); *see e.g.*, Hasani Claxton, *Land and Liberation: Lessons for the Creation of Effective Land Reform Policy in South Africa*, 8 MICH. J. RACE & L. 529, 546 (2003) ("The South African Department of Land Affairs (DLA), headed by Derek Hanekon, was created in 1994 to deal with land distribution issues").

106. *See* Claxton, *supra* note 108, at 546.

107. *See id.*

108. *See id.* at 547.

109. *See* Bernadette Anuabene, *From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility*, 60 SMU L. REV. 1419, 1457 (2007) (noting that dispossession of black land began before 1913 however "the 1913 law was the first major piece of legislation that allowed the newly formed South African state to legally dispossess Blacks of their land").

110. *See id.* The land restitution initiative was implemented in 1994 with the Restitution of Land Rights Act, no. 22.

111. *See* Chang, *supra* note 13, at 633.

112. *See id.*

113. *See id.*

the claims it received had been settled.[114] Land restitution involves the adjudication of claims, with the party entitled to damages having the option of either land or monetary compensation.[115] The South African government would acquire white-owned land based on market rates and then redistribute the land based on the Land Claim Court decisions.[116] After determining the "willing buyer, willing seller" model was taking too long and proving to be ineffective,[117] the government shortened the legal negotiation period to six months and reserved the right to expropriate the land if negotiations proved to be unsuccessful.[118]

Despite the program's initial success and future potential, the program never fulfilled the goal it was set to accomplish. While 89% of claims were settled, those claims were settled via payouts as opposed to land. Blacks who would have preferred to receive land instead of monetary compensation were out of luck because white landowners were reluctant to actually sell their land.[119] Alternatively, white landowners would selectively identify parcels to sell and then receive market rate for the worst sections of the land they owned.[120] In the context of a shortage of farmable land to distribute, urban land reform proved dramatically more successful.[121] The

114. *See id.*; *see also* *See* KwaZulu-Natal, *Land claims settlements near 90%, says Gwanya Edward West*, Bus. Day (July 5, 2006, 2:00) *available at* http://www.eprop.co.za/commercial-property-news/item/7119-Land-claims-settlements-near-90-says-Gwanya-Edward-West.html ("The Land Claims Commission says it has settled 89% of the claims lodged with it, while the remaining 11% are expected to be completed by 2008").

115. Ruth Hall, *A Comparative Analysis of Land Reform in South Africa and Zimbabwe*, in Unfinished Business: The Land Crisis in Southern Africa, 264 (2003) (Margaret C. Lee & Karen Colvard eds., 2003).

116. *See id.*

117. *See* Review on Land Acquisition and Willing Buyer Willing Seller Principle: briefing by Department of Rural Development and Land Reform; Committee Report on joint oversight visits to the Northern Cape, Limpopo, Free State and Mpumalanga (May 23, 2012) *available at* http://www.pmg.org.za/print/report/20120523-department-rural-development-and-land-reform-findings-study-commissio (quoting Mr. S. Ntapane, a leader of the United Democratic Movement (the ANC's opposition party), stating that "[t]he pace of land redistribution was slow and ineffective. The figure quoted in the report for redistributed land already allocated was too little, why? The Department had been using the willing-buyer willing-seller approach, it had to be agreed that this was not working. Nation building and social cohesion could not be a talking point when the majority of the people in this country were landless. There was a need for commitment and flexibility from all the stakeholders").

118. *See Farmers spooked by 'expropriation' threat*, 6 World Trade Rev. (Sept. 2006), *available at* http://worldtradereview.com/news.asp?pType=N&iType=A&iID=139&xID=22&nID=29192 ("Organizations representing farmers called on Agriculture and Land Affairs Minister Lulu Xingwana to clarify remarks that farmers had six months to agree on a selling price before their farms would be seized"); *see also* Justin Arenstein & Thandee N'wa Mhangwana, *Scam sparked land reform review*, BuaNews (Mar. 3, 2006), *available at* http://www.lawlibrary.co.za/notice/wordsanddeeds/2006/2006_03_06.htm#press_scamsparked ("Expropriation 'will only be used very selectively in a very small number of cases where negotiations have effectively stalled without any prospect of resolution,' said Dr Edward Lahiff, a researcher at the University of the Western Cape's programme for land and agrarian studies.").

119. *See* Hall, *supra* note 115, at 262.

120. *See id.*

121. *See* CDE, *supra* note 100, at 4 (noting that "[t]he restitution process has successfully settled almost all urban claims").

increased success can be partly attributed to urban claimants being significantly more likely to consent to receiving monetary compensation, as opposed to actual land.[122] Today, the vast majority of unsettled claims involve rural land, where an individual claim can cover hundreds of families and huge amounts of land.[123]

B. Land Tenure Reform

The government designed land tenure reform to provide ownership possibilities for black farmers who had worked or had other historical claims to white-owned farmland.[124] Individuals seeking tenure had claims to the property based on years, sometimes going back generations, of working on commercial farms, or based on living and working on communal homelands (both of which created no formal ownership rights).[125]

For individuals working on commercial farms, the Land Reform Act of 1996 and the Extension of Security of Tenure Act of 1997 created ownership interests in the farms where they worked.[126] The acts legally secured land tenure and "allowed second-generation labor tenants to acquire the titles to land they had used for cultivation and grazing in lieu of remuneration in cash."[127] However, in reality, these programs were most effective for developing a formal process for labor tenants to bring legal land-related claims and demand formal eviction procedures.[128] When evictions occurred, the government provided alternative land or housing for those tenants.[129]

For individuals inhabiting communal homelands, the Communal Property Association Act 28 of 1996 protected the collective right to land, which had not been acknowledged under the common law land system.[130]

122. *See* Chang, *supra* note 13, at 633.
123. *See* Hall, *supra* note 115, at 262.
124. *See* Chang, *supra* note 13, at 634.
125. The hierarchy prioritizes ownership in this order: ownership itself, limited real rights that restrict rights of owners, and personal rights in property. *See* Chang, *supra* note 13, at 634. Farming commercial farms or communal homelands did not reach the personal rights in real property level of ownership. *Id.*
126. *See* Department of Rural Development & Land Reform of the Republic of South Africa, Strengthening the Relative Rights of People Working the Land: Policy Proposals (July 30, 2013) [hereinafter RDLR] *available at* www.plaas.org.za/. . .landpdf/Strengthening%20the%20Relative%20Right. These pieces of legislation were designed to protect the rights of commercial farmers. In 2004, an estimated six million black farmers were evicted or displaced from commercial farms in South Africa.
127. Hall, *supra* note 115, at 264.
128. *See* Gilfillan, *supra* note 29, at 7 ("In reality [] the legislation has provided for little else but a statutory framework for 'fair eviction procedures'"); *see also* RDLR, *supra* note 125, at 17 ("The highly unequal relationship between farm owners and farm workers/dwellers, in which the latter are completely dependent on the former for sustaining livelihoods, makes it almost impossible for these vulnerable groups to fight for their rights").
129. Hall, *supra* note 115, at 264.
130. *Id.* ("The white system under apartheid didn't recognize communal land, because it was a form of customary law. However, the Communal Property Act created a formal framework that gave communal property rights to a legal entity called a Communal Property Association, which then registered the property").

This right was strengthened by the 1996 Interim Protection of Informal Land Rights Act, which protected individuals with communal land interests (as opposed to the community).[131] Under that system, individuals with communal land claims could not be deprived of their land rights without consent.[132]

C. Land Redistribution

The goal of the land redistribution program was to provide black South Africans with access to agricultural land.[133] Redistribution was one of the initial goals of the land reform program because it was seen as being maximally able to promote socioeconomic justice and economic development for the black community.[134] Unlike the land tenure and land restitution programs, blacks benefiting from redistribution had no former claim to land and had to qualify for state grants to purchase land.[135] This program would help most in the long term by resolving land, housing, and poverty problems, as well as by creating equality.[136]

Similar to what it did with land restitution, however, the government decided to adopt a "willing-buyer, willing-seller" approach, which allowed whites to inflate prices and slowed down the process because the State was the only purchaser.[137] In an attempt to fix this issue, the government announced a plan of expropriation of prices if price settlements became stagnant after six-months.[138] These complications have led to widespread disappointment at the slow pace of the redistribution process.[139] As of 2005, the government had transferred less than 4% of white-owned farmland back to black ownership.[140]

South Africa's current goal of increasing redistribution in rural lands is primarily to avoid a domestic uprising and land-grabbing situation com-

131. *See* Interim Protection of Informal Land Rights Act 31 of 1996 (S. Afr.), *available at* http://www.lawsofsouthafrica.up.ac.za/index.php/browse/land/interim-protection-of-informal-land-rights-act-31-of-1996/act/31-of-1996-interim-protection-of-informal-land-rights-act-26-june-1996-27-september-1998-pdf/download.

132. *See id.*

133. *See* RDLR, *supra* note 125, at 23.

134. *See* Chang, *supra* note 13, at 636.

135. *See id.*

136. *See id.* (describing other comparable initiatives to promote similar goals).

137. *See* Department of Land Affairs, Toward the Framework for the Reviewing of the Willing Buyer Willing Seller Principle 15–17 (Sept. 17, 2006), *available at* http://www.caxtonmags.co.za/data/files/doc/file_151f2d1898758ed8b68157174c3c1d80.DOC (commenting "it is clear that the prices of land in the open market have been escalating and continue to do so because Government cannot walk away from the negotiations").

138. *See Fair price for land reform*, Brand South Africa (Dec. 8, 2004), *available at* http://www.southafrica.info/doing_business/economy/fiscal_policies/landreform-policy.htm; *see also Farmers spooked by 'expropriation' threat*, *supra* note 118.

139. *See e.g.*, Pierre De Vos, *Willing buyer, willing seller worksFalse if you have a lifetime to wait*, Constitutionally Speaking (June 13, 2013), *available at* http://constitutionallyspeaking.co.za/willing-buyer-willing-seller-works-if-you-have-a-lifetime-to-wait/.

140. *See* Chang, *supra* note 13, at 637.

parable to that of Zimbabwe.[141] However, this is a risky move for South Africa. South Africa has 43,000 black and white rural farmers, and if the country meets the goal of a 30% white-to-black redistribution, thousands of white commercial farmers will likely be out of business.[142] In light of the situation in Zimbabwe, this could be catastrophic for both the white farmers and the country's agricultural industry.[143]

D. Zimbabwe: Lessons Learned

The government's struggle to strike a balance between rectifying the effects of apartheid and maintaining the goodwill of South Africa's white population has resulted in a stagnant and overly complex reform effort.[144] Many South Africans fear that, in the absence of speedy, effective progress, the country will follow Zimbabwe's example of violent land reform.[145]

In 2000, Zimbabwe implemented a "land reform program" to institute a government-sponsored land restitution program.[146] This land restitution program was designed to return white-owned farmland to poor, black Zimbabweans. President Robert Mugabe instituted the program in response to cultural tensions focused solely on Zimbabwe's absence of prior land reform or redistribution.[147] A privileged political class executed the program, which ended up becoming a violent fiasco when the politically elite and unskilled workers repossessed most of the commercial farms.[148] The result was a dramatic decline in the country's agricultural

141. *See id.*

142. *See Farmers spooked by 'expropriation' threat*, *supra* note 118.

143. Today, Zimbabwe is no longer able to produce sufficient food supplies to feed its country, much less to use farming as a profitable export. *See generally* Ward Anseeuw, Tinashe Kapuya & Davies Saruchera, *Zimbabwe's agricultural reconstruction: Present state, ongoing projects and prospects for reinvestment* 9 (Development Bank of Southern Africa, Working Paper Series No. 32, 2012).

144. Zimbabwe has a similar experience with colonialism to that of South Africa. Zimbabwe has a history of white rule, similar to the start of apartheid. Ian Smith, a white colonist, took over Zimbabwe in a brutal fashion that ensured his control, but also ensured gross resentment among the subjugated black communities. Black Zimbabweans who were not working on designated farms or in urban areas were forced to live on reserves. *See* Claxton, *supra* note 106, at 341.

145. *See* Anseeuw, Kapuya & Saruchera, *supra* note 143, at 9 (describing the Fast Track Land Reform Programme as "a process marked by considerable coercion, violence and illegal activity, [where] thousands of party-sponsored settlers and veterans of the Liberation War invaded commercial farms . . .").

146. *See* Ryan Dale Groves, Fast-Track Land Reform and the Decline of Zimbabwe's Political and Economic Stability 67–68 (2009) (unpublished M.A. Thesis, University of Central Florida in Orlando, Fl.), *available at* purl.fcla.edu/fcla/etd/CFE0002801. President Mugabe stated that he would adopt a "fast-track" land reform process in Zimbabwe where a national committee, the National Land Identification Committee, would identify tracks of land for redistribution. *See also* Simon Coldham, *The Land Acquisition Act, 1992 of Zimbabwe*, JOURNAL OF AFRICAN LAW 82 (Spring 1993), *available at* http://www.jstor.org/stable/745590 (discussing the previous legislation which was supposed to speed up the land reform process through Land Designation and Compulsory Acquisition).

147. *See* Groves, *supra* note 146, at 67–68.

148. Some citizens of Zimbabwe fully supported Mugabe's efforts and have praised his intervention. *See, e.g.*, Godfrey Marawanyika, *Thank you, Mr Mugabe: Zimbabwe's*

production, leading to food shortages and the destruction of numerous previously profitable commercial farms.[149]

Zimbabwe then passed the Land Acquisition Act in 1992, which allowed the government (specifically President Mugabe) to create a Land Reform program that would facilitate the government's ability to redistribute and expropriate land.[150] Mugabe then tried to pass a referendum that would allow government expropriation without compensation, but the referendum failed.[151] After his referendum failed, Mugabe permitted a group of war veterans to attack and overtake white farms.[152] Today, Zimbabwe's Land Acquisition Act serves as the primary example of what not to do in land reform.[153] Furthermore, the act also demonstrates the inadequacy of a market-based land reform program in societies that require a massive restructuring of a country's land and wealth distribution.[154]

III. South Africa's Mining Paradigm

South Africa is home to some of the richest mineral resources on the African continent.[155] However, apartheid policies led to the inequitable distribution of those resources.[156] Prior to 1992, the South African government promoted an individual land-ownership policy under the guise that "successive [South African] governments ha[d] 'since 1910 pursued economic policies based on the principles of free enterprise and the market system.'"[157] In reality, under apartheid only white South Africans had the rights to own land, which effectively limited access to the mineral market to less than 10% of the total population."[158] The country experienced a

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forced land redistribution led to huge controversy - but it has transformed the lives of thousands of small farmers, THE INDEPENDENT (Nov. 5, 2013), *available at* http://www.independent.co.uk/news/world/africa/thank-you-mr-mugabe-zimbabwes-forced-land-redistribution-led-to-huge-controversy—but-it-has-transformed-the-lives-of-thousands-of-small-farmers-8923229.html.

149. *See* Groves, *supra* note 146, at 69 ("Damage caused to Zimbabwe's infrastructure and economy was incalculable. Underutilization of farms, unqualified personnel, mass unemployment, shortages of foreign currency, and severe food shortages compounded the international isolation, drought, and political upheaval that had defined the past five years").

150. *See id.*

151. *See id.*

152. *See id.*

153. *See id.*

154. *See* Heather Boyle, *The Land Problem: What Does the Future Hold for South Africa's Land Reform Program?* 11 IND. INT'L & COMP. L. REV. 665, 687 (2001).

155. South Africa hosts the world's largest reserves of gold, platinum group metals, chrome and manganese ores, and the second-largest reserves of zirconium, vanadium, and titanium. *Pocket Guide to South Africa 2012/13: MINERAL RESOURCES*, *available at* http://www.gcis.gov.za/sites/www.gcis.gov.za/files/docs/resourcecentre/pocketguide/2012/15%20Mineral%20Resources.pdf.

156. *See* LARP, *supra* note 2, at 7.

157. Laissez-Faire, *supra* note 14, at 167 (quoting White Paper on the Mineral Policy of the Republic of South Africa: Para 1.8). On 1 January 1992, the 1991 Minerals Act came into effect and South Africa was regulated by a combination of common law and legislation. *See id.*

158. *See* DEPARTMENT OF MINERALS AND ENERGY, *supra* note 16.

dramatic shift in 2004 when the Mineral and Petroleum Resources Development Act of 2002 came into effect and essentially nationalized the mining process.[159]

A. History of South Africa's Mining Rights

Three common forms of mineral ownership exist in government-coordinated mining systems.[160] The first model is state ownership where the government holds property rights to all mineral resources "on behalf of the people[.]"[161] The second method is the "lease or 'regalien' system" which most countries currently utilize.[162] Under that system, the state holds all permanent mineral rights and miners both apply to and pay the state for tenured rights to mine specific minerals.[163] The third method grants the owner of the land surface corresponding rights "to hold, extract, or dispose of the [underlying] minerals."[164] Under that system, prospectors have the right to obtain private mineral rights by discovering minerals and registering a claim.[165]

For the majority of the apartheid era, South African common law followed the third model, where landowners also owned any minerals that existed below the surface.[166] Mineral rights holders could exploit the minerals on the land in addition to assigning or transferring their mineral rights for value.[167] However, The Group Areas Act of 1950, which limited black access to urban areas, applied to all land ownership and effectively

159. *See* Peter Leon, *Creeping Expropriation of Mining Investments: an African Perspective*, 27 JERL 597, 2 (Nov. 2009). Subsequent legislation has continued to ensure mining regulation operates to facilitate the discovery and development of South Africa's mineral resources, while ensuring that the government conducts the investigation into future mineral resources in a sustainable and economically beneficial manner. Tumai Murombo, *'Regulating Mining in South Africa and Zimbabwe: Communities, the Environment and Perpetual Exploitation'* [hereinafter *Regulating Mining in South Africa*], 9/1 L. Envir. & Dev. J. 31, 43 (2013) *available at* http://www.lead-journal.org/content/13031.pdf (citing Mineral and Petroleum Resources Development Act 28 of 2002).

160. *See* Muna Ndulo, *Mining Legislation and Mineral Development in Zambia*, 19 Cornell Int'l L.J. 1, 13–15 (1986).

161. *Id.* at 13 (citing Mines and Minerals Act, ch. 329 of the Laws of Zambia (as amended by No. 32 of 1976) Section 3(1) (Zambia is one of the countries following the State-ownership model, with its President holding the property right to all minerals within its boundaries.).

162. *Id.* at 14.

163. *See id.* "The miner's tenure is seldom equivalent to a fee title, but is rather a bundle of rights and obligations, the composition of which varies greatly from country to country."

164. *Id.*

165. *See id.* at 15.

166. *See* Laissez-Pair, *supra* note 14, at 16 ("This 'mineral right holding,' in terms of the various mining laws and common law, gave the landowner special rights either to mine or, where statutorily required, to obtain the necessary mining title" (citing Rien Lloyd Stuart Franklin & Morris Kaplan, *The Mining and Minerals Laws of South Africa* 7 (1982) and Mining Rights Act 20 of 1967 Section 7(2)(a), 25(2))).

167. Landowners could be the holders of the mineral rights, or, where rights were severed, an individual could hold title specifically to the mineral rights. *See Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at 26.

precluded blacks both from acquiring land or mineral rights.[168]

In South Africa's apartheid-era mineral program, the government issued claims and mining leases to interested prospectors.[169] These prospectors were white individuals who had made mineral discoveries or could trace legitimate ownership.[170] The government granted mining leases for the excavation of deep-level mines to any applicant perceived as being able to promote the government's goals.[171] Blacks were excluded from that opportunity by Section 7 of the Group Areas Act as well as Section 25(3) of the Mining Rights Act, which stated that "no lease shall be granted unless the Minister is satisfied that there are reasonable grounds for believing that precious metals occur in workable quantities."[172] Since the Mining Rights Act prevented blacks from owning land and holding prospecting licenses, whites exclusively held these mining leases.[173] The effect of the mining laws was to effectively prevent non-whites from "acquiring and exploiting any significant mineral deposits of any nature in South Africa," and "has limited their participation in the mining industry to that of labourers."[174]

The effects of the restrictive mining regime were very similar to the effects of the restrictive land ownership laws.[175] Under apartheid, the government forced blacks to accept the transfer of land and mineral rights to white prospectors.[176] However, once the demise of apartheid led to changes in the laws that lifted the restrictions, black South Africans supported the redistribution of those mineral rights and the accompanying wealth.[177] Empowered by the newly drafted constitution, lobbying move-

168. *See id.* at 25. While the government could grant an exception if there was a compelling reason to grant a black individual ownership rights, this occurrence was extremely rare. This legislation effectively precluded blacks from benefitting from South Africa's extensive mineral wealth.

169. *See* Badenhorst, P.J., *Exodus of 'mineral rights' from the South African Mineral Law*, 22 J. ENERGY & NAT. RESOURCES L. 218, 222 (2004).

170. *See Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at 38. "The Act provides that a claim license may be obtained by 'any natural person of the age of eighteen years or upwards . . .' but goes on to state that no claim license shall be issued 'to a coloured person, except in respect of state land situated in the Province of Cape of Good Hope or land which the ownership vests in a coloured person or an association of coloured persons or a corporate body or company in which coloured persons hold a controlling interest; to a black, except in respect of land which the South African Development Trust or a black is the owner or which is held in trust for a black. Group Areas Act Section 49(2)(b) (1950).

171. *See Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at 38.

172. *Id.* at 11.

173. *See id.* at 70.

174. *Id.* at 3.

175. *See* Yazini April, *An Analysis of the Mineral and Petroleum Resources Development Act 28 of 2002, and the Nationalisation of Minerals Debate in South Africa*, 42 AFRICA INSIGHT 115, 117 (2012) ("The structure of mineral law in South Africa has always been complicated, and heavily influenced by the racial injustices of apartheid.").

176. *See id.* at 118 ("Many black-owned communities who lived on mineral-rich land did not even have the basic claim to minerals since they could not be owners of the land under apartheid, which can be evidenced through the Land Act 27 of 1913 and the Trust and Land Act 18 of 1936, which deprived blacks of land wealth").

177. *See* ANC POLICY INSTITUTE, *supra* note 17, at 115. *See also* Cohen, *supra* note 21.

ments emerged to ensure that a united South Africa would benefit from the country's mineral wealth.[178]

B. South Africa's Current Mining System

Until 2004, holders of mineral rights had the right to use their minerals as they wished.[179] These rights included exploiting the minerals on their land and assigning or transferring the mineral rights for value under the Minerals Act of 1991.[180] Following the third model of mineral ownership (where landowners also owned any minerals that existed below the surface), the mineral rights were tangible rights of indefinite duration. These rights did not require the holder to exercise the rights via mining in order to maintain them.[181] The government only got involved if the rights holders needed authorization to prospect or mine under the Minerals Act.[182] Depending on the minerals in question, officials would issue the necessary authorization and then there was no further mechanism for government control.[183] Specifically, "common law rights to minerals were not subject to termination by a public authority for non-compliance with the Minerals Act or on any other grounds."[184]

The mining system changed in 2002 when Parliament passed the Mineral and Petroleum Resources Development Act ("MPRDA").[185] The MPRDA effectively:

> [Froze] the ability to sell, lease or cede unused old order rights until they were converted into prospecting or mining rights with the written consent of the Minister for Minerals and Energy (Minister). It also had the deliberate and immediate effect of abolishing the entitlement to sterili[z]e mineral rights, otherwise known as the entitlement not to sell or exploit minerals.[186]

Mineral rights holders were furious because the legislation removed their ability to sell, lease, cede, and prospect minerals, thus dramatically altering

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178. *See* Erik Els, *Anglo-American lobbying flops as clamour intensifies for nationalization of South Africa's mines*, MINING.COM (June, 19, 2011), *available at* http://www.mining.com/anglo-american-lobbying-flops-as-clamour-intensifies-for-nationalization-of-south-africas-mines/ (commenting on "growing calls in South Africa for majority government ownership of key industries and a push for a greater role for the state in the economy").

179. Holders of mineral rights could be either the owner of the surface (where the mineral rights had not been severed from the land) or a successor in title to the surface owner.

180. *See Trojan Exploration Co (Pty) Ltd v Rustenberg Platinum Mines Ltd* 1996 (4) SA 499 (A) at 509 and 528I–529B.

181. *See Ex parte Marchini* 1964 (1) SA 147 (T) at 150–51.

182. *See Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at 35 ("[T]he control by the state under [the Minerals Act] was a system whereby the exercise of mineral rights was controlled through permits, authorizations, licenses and permissions which created a framework within which common-law mineral rights as elements or derivatives of ownership of land, could be exercised").

183. *See* Minerals Act, §§ 9(3), 9(5), and 39.

184. Leon, *supra* note 159, at 11.

185. Mineral and Petroleum Resources Development Act 28 of 2002.

186. *See Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at 39.

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the rights that they had previously held.[187] The government effectively removed the previous owners' abilities to use minerals or the rights without more explicit authorization. This restriction was designed to prevent the exploitation of minerals by eliminating an owner's mineral rights to determine the amount and pace of their mining.[188]

While many of the mineral rights holders lobbied against this legislation and filed expropriation suits, the government stood its ground.[189] The government defended this change because the MPRDA gives effect to Section 25(4)(a) of the South African Constitution.[190] Section 25 "requires that reform measures be implemented to bring about equitable access to all South Africa's natural resources."[191] The democratic South African government introduced this mineral rights policy in order to enable equitable, race-blind access to South Africa's mineral wealth by implementing "a system of state custodianship of mineral resources 'for the benefit of all.'"[192] Under the Mineral and Petroleum Resources Development Act 28 of 2002, Section 3(2) states that:

> "As the custodian of the nation's mineral and petroleum resources, the state, acting through the Minister, may -
>
> (a) grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right; and
>
> (b) in consultation with the Minister of Finance, determine and levy, any fee or consideration payable in terms of any relevant Act of Parliament.[193]

The implementation of the MPRDA changed the mechanism of resource ownership and created a one-year term for exchanging mineral rights, at the end of which any remaining "old order rights" would expire.[194] With the State as custodian, mineral resource owners were deprived of the basic right of control that they previously enjoyed.[195] Legal critics have complained that "[t]he Act essentially replaced the principles of private law, based on rights of ownership, with principles of administrative law based on conditional state licenses."[196] Regardless of the conflicting views, the implementation of the MPRDA has correlated with diminishing

187. *See id.* at 50.

188. *See id.* at 50.

189. *See* April, *supra* 178, at 119 ("The Act essentially replaced the principles of private law, based on rights of ownership with principles of administrative law based on conditional state licenses. In this regard, the MPRDA provided the initial impetus for the encroachment on the ownership rights of mining investors.").

190. *See* S. Afr. Const., § 25(4)(a) of 1996.

191. Leon, *supra* note 159, at 12.

192. *See* Department of Minerals and Energy, *supra* note 16, at para. 1.3.1.2.

193. *Id.*

194. Mineral and Petroleum Resources Development Act 28 of 2002, 94-95.

195. *See* Peter Leon, *A Fork in the Investor-State Road: South Africa's New Mineral Regulatory Regime Four Years On*, 42(4) J. of World Trade 671, 679 (2008).

196. Leon, *supra* note 159, at 12.

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values of mineral rights in South Africa.[197]

Despite the depreciation in the value of mineral rights, the MPRDA serves a valuable function.[198] Today the government monitors all mineral claims.[199] Private companies and individuals still have the ability to mine resources, but the government taxes companies separately for prospecting, mining, and removing minerals from the land.[200] This multiple taxation system accomplished many objectives.[201] First, the taxes significantly increased the government's profit from domestic mining operations.[202] Second, the government was able to intentionally regulate mineral extraction and mining across the country.[203] Third, this regulation enabled the government to preserve mineral deposits and prevent mining monopolies.[204]

IV. Implementing a Mining Framework on Land Ownership

A. The Rationale

Apartheid created tensions in South Africa's mining industry that were similar to the tensions that the farming industries currently face.[205] Until the 1990s, whites held almost complete title to the country's mineral and mining rights with nearly no restrictions on the way those rights could be exercised.[206] The development of South Africa since apartheid has led to industry-wide reforms that have partially nationalized the mining industry and enabled the government to implement a system that meets the goals of efficiency, mineral conservation, and equal access to mineral

197. *See id.*

198. *See* April, *supra* 175, at 125 ("According to the South African parliament report, key activities of this regulation programme would include monitoring and enforcing compliance, inspections of social and labour plans, mining and prospecting work programmes, and environmental management plans").

199. *See id.* at 120.

200. *See* Leon, *supra* note 159, at 12, 23.

201. *See* Elmarie van der Schyff, *South African mineral law: A historical overview of the State's regulatory power regarding the exploitation of minerals*, 64 New Contree 131, 131 (July 2012) ("In 2009 mining contributed 8.8% directly and 10% indirectly to the country's gross domestic product (GDP), sustained approximately one million jobs and created roughly R10.5 billion in corporate tax receipts").

202. *See generally* Graham Glenday, *South African Tax Performance: Some Perspectives and International Comparisons*, Tax Symposium 2008, National Treasury of South Africa (Mar. 26, 2008), *available at* https://ids.duke.edu/db/attachment/826.

203. *See generally* Avril Cole, *Mine regulations changing in South Africa*, The International Resource Journal (Jan. 11, 2014) *available at* http://www.internationalresourcejournal.com/features/january11_features/mine_regulations_changing_in_south_africa.html.

204. *See* Department of Mineral Resources of the Republic of South Africa, Mineral Regulation (2011) *available at* http://www.dmr.gov.za/mineral-regulation.html (describing a function of the Mineral Regulation Branch as "[a]ddress[ing] past legacies with regard to derelict and ownerless mines and enforce legislation regarding mine rehabilitation by means of regulated environmental management plans").

205. *See* Laissez-Fair, *supra* note 14, at 172.

206. *See* The Presidency of the Republic of South Africa, Twenty Year Review: South Africa 1994 - 2014 87 (2014), *available at* www.20yearsoffreedom.org.za/20Year Review.pdf.

resources.[207]

Today, South Africa's mining reforms serve as an example to other mining countries of what is possible.[208] South Africa has the advantage of its constitution, its strong government, and its judicial infrastructure that allow it to enforce a decision.[209] The country has been able to demonstrate the possibilities of success for a nationally regulated mining system.[210] This presents numerous possibilities for other countries struggling with foreign control over a majority of domestic natural resources.[211] Given Africa's history of colonization, most countries suffer from foreign mineral ownership in some regard.[212]

More importantly, South Africa's success in mineral reform is directly applicable to the government's struggle with land distribution.[213] Given the many interests involved in land reform—from critics interested in providing small farms to poor blacks to those interested in funding urban migration—the reality is that South Africa's poor black population has a plethora of pressing needs.[214] Any land reform policy geared solely toward increasing available rural land will run the risk of ignoring the issues that are truly important in the urban and most volatile areas of South Africa, Johannesburg and Cape Town.[215]

B. The Framework

Similar to the apartheid government's land ownership regulations, mining regulations prior to the 1990s systematically excluded non-white South Africans from the opportunity to own or be involved in the country's mineral wealth except in the capacity of menial laborers.[216] Once the democratically elected government began implementing the new Constitution

207. *See id.* at 3.

208. *See* Franklyn Lisk, Hany Besada & Philip Martin, *Regulating Extraction in the Global South: Towards a Framework For Accountability* 30 (High Level Panel on the Post-2015 Development Agenda, Background Research Paper, May 2012) ("At the policy level, a coordinated and integrated global value chain approach to mineral resource development is necessary [for sustainable mineral reform]").

209. *See supra* notes 5-7 (describing South Africa's rights-based constitution).

210. *See* Thomas Walde, *Mining Law Reform in South Africa*, 17(4) MINERALS & ENERGY 10, 17 (2002). There is great risk involved in South Africa's mining efforts, including "the risk that a well-functioning industry might be destroyed and go down the same path as many other African countries (except Botswana). There is also a benefit, namely that the South African minim industry will no longer be seen to symbolize economic apartheid, but will be an engine of prosperity for all South Africans.").

211. *See id.* at 11.

212. *See generally* Ganesh Austin, *African Economic Development and Colonial Legacies*, THE GRADUATE INSTITUTE OF GENEVA INTERNATIONAL DEVELOPMENT POLICY (2010), *available at* http://poldev.revues.org/78 (discussing how colonial rule and African actions during the colonial period affected the resources and institutional settings for subsequent economic development south of the Sahara).

213. The struggle and debate between entrenched mineral right holders are comparable to those of the farmers and white landowners who currently hold states as a result of the apartheid regime.

214. See Laissez-Fair, *supra* note 14, at 172.

215. *See id.*

216. See Leon, *supra* note 195, at 579.

in 1994, the government justly re-defined the mineral-ownership paradigm in order to expand access to South Africa's non-white majority.[217] This process did not involve taking property from the white owners and giving it to the black citizens.[218] Instead, the government nationalized the rights and created a taxation structure to facilitate services, which benefited the whole country and the communities impacted by mining.[219] Although the owners of old-order mining rights have brought suits based on expropriation, the country has benefited as a whole from the departure of its previous private-ownership model.[220] Furthermore, the previous rights holders are not forbidden from mining and further capitalizing on their rights.[221] Rather, the nature of their ownership has changed.[222]

The South African government must take a similar course of action in the realm of land ownership. The country's three-tiered effort to remedy unequal land distribution experienced great success initially; however, that success has plateaued and is no longer addressing the needs of South African citizens.[223] This is largely due to the fact that beliefs about the country's political history influence political conversations around land reform and complicate changes that would further the country's economic and political well-being.[224] Furthermore, the romanticized image of impoverished South Africans receiving farms and rural land as a method of extricating themselves from poverty should not be the government's primary concern.[225] In reality, there are a much more pressing issues towards which South Africa should concentrate its resources, namely creating employment and housing opportunities for black South Africans in urban areas.

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217. *See* Leon, *supra* note 195, at 679.

218. *See* Gavin Capps, *A bourgeois reform with social justice? The contradictions of the Minerals Development Bill and black economic empowerment in the South African platinum mining industry*, Review of African Political Economy 315, 316 (2012). Statements of the ANC leadership made it clear that expropriation of the mines was "off the political agenda . . . Rather, the state's influence within the mining industry would be 'confined to orderly regulation and the encouragement of equal opportunities for all citizens in mineral development").

219. *See* Department of Minerals and Energy, *supra* note 16, at para. 1.3.1.2; *see also* Mineral and Petroleum Resources Development Act 28 of 2002, Section 3.

220. *See* Department of Minerals and Energy, *supra* note 16, at para. 1.3.1.2; *see also* Mineral and Petroleum Resources Development Act 28 of 2002, Section 3.

221. *See* Capps, *supra* note 218, at 316. While "older order" rights were abolished in favor of new "universal rights," it would be expected that mining companies would continue mining operations. The purpose of the act was to disseminate those rights in a manner that was centralized, eliminating entrenchment in the mining industry. This was designed to open the door to black miners.

222. *See id.*

223. *See* Atuahene, *supra* note 4.

224. *See id.*

225. *See* Keith Bryer, *Most land claimants do not want to be farmers*, Business Report (Aug. 20, 2014, 8:00 A.M.), *available at* http://www.iol.co.za/business/opinion/columnists/most-land-claimants-do-not-want-to-be-farmers-1.1737902#.VFs5b_mAGGQ ("Today, most South Africans live in cities. Most of us, black and white, do not wish to farm. Above all, none of us relish the harsh life that 'peasant farming' inflicts").

Under a land-taxation regime (which mirrors South Africa's mineral-taxation regime), the South African government would implement a progressive taxation program. This program would impact all landowners, regardless of race, wealth, or socioeconomic background. The taxation scheme would depend on land size and land use. Certain types of land use—commercial farmlands, tribal farmlands, grazing land, barren land, etc.—would merit different initial tax brackets. Depending on the bracket, there would be a threshold hectareage[226] under which land would not be taxed.[227] Any land above that amount would be taxed annually based on quantity of surface area owned.

Suppose a landowner has 50 hectares and they surpass the initial tax bracket threshold. If there is a 1.75% land tax for parcels less than 50 hectares but a 5% land tax for parcels between 50 and 100 hectares, the land owner would then be taxed at 5%. The government would set the specific tax brackets according to the type of land ownership the government is interested in promoting. For example, 100 hectares might be the most profitable size for a profitable commercial farm, whereas 25 hectares might be the most efficient size for a private grazing parcel. The land owner would then have the option to adjust their ownership to minimize their tax burden, or, alternatively, they would be able to maintain their current ownership but pay taxes in a way that adds to the operational efficiency of the country.

This system will allow current landowners a finite period of time (ideally the one-year time frame allocated for mineral rights) during which they could register the titles and use of their land. The government could then continue adjusting the various importance levels of different land uses and apply taxes accordingly. For example, tribal lands or land being utilized by rural villages could be exempt from any taxation. Low-income farms might also be exempt or put into a very low tax bracket. On the other hand, commercial farms and game reserves could be put into graduated tax systems depending on the size of the area and on the services for which the land is being utilized. The country would be able to provide additional resources and put more funds into purchasing land for land restitution programs if the government implemented a registration scheme similar to the model used for land rights.[228] If any type of land use became more important to the country, the taxation scheme could be adjusted.[229]

C. The Benefits

The effect of this tax scheme will be to tailor land use to the government's needs. The country will be able to provide additional resources and

226. Land in South Africa is measured according to hectares, as opposed to acres.

227. For example, land would not be taxed if the minimum hectarage for commercial farming were ten hectares.

228. *See* Atuahene, *supra* note 4 (commenting that South Africa's Land Restitution Commission lacked adequate funding to complete its land distribution goals).

229. This mirrors South Africa's ability to adjust its mineral taxation depending on which mines are more lucrative and in higher demand.

put more funds into purchasing land for land restitution programs.[230] Additionally, implementing a registration scheme that is similar to the model used for mineral rights will allow citizens and the government to track land reform progress more closely.[231] At the same time, white landowners who hold tens of thousands of hectares of land, could choose to keep that land at a burdensome tax rate to maintain the registration on their lands. This will meet multiple government objectives.

First, this taxation system will allow the government to obtain land needed for the restitution program. A scheme that was incrementally increased should incentivize landowners to choose to own a specific amount of land right below one of the tax thresholds. Any forfeited land could then be used to settle more of the land claims that are still in flux.

Second, this taxation system will provide the government with an influx of income. Land is a unique commodity that owners tend to be reluctant to sell, even when it makes financial sense. For that reason, even a burdensome tax scheme will be unlikely to impact all landowners in the same manner. The funds paid from the tax could be used toward pressing urban concerns, the creation of more housing developments, or the provision of government job opportunities and public services. The funds could then be used to purchase land to further help with the restitution and tenure prongs of the current land program.

Third, a graduated tax rate will affect all landowners and will therefore be deemed race neutral. Although the majority of South Africa's land and mineral rights are currently held by white South Africans due to the Native Land Act of 1913, the 1936 Native Trust and Land Act, and the Group Areas Act of 1950, today there is a possibility of emerging black landownership.[232] Under this proposed land taxation scheme all substantial farms will be equally impacted, providing the South African government with greater legitimacy and increasing the likelihood of black land ownership.

Conclusion

Today, South Africa is a thriving democratic nation with the potential to be a model of a successful transition from colonized country to independent democracy. In order for the country to meet those goals, the government must continue to address the material racial inequalities that still plague South Africa. This requires South Africa to develop a land distribu-

230. *See* Glenday, *supra* note 202, at 6 ("South Africa charges a number of taxes on property—estate duty and donations tax, transfer duty and marketable securities tax—which in combination collect about 0.6% of GDP or just over 2% of revenues"). Adding a graduated taxation scheme to the existing taxation scheme would ensure increased revenues.

231. *See generally* Southern African Institute of Mining and Metallurgy, The Rise of Resource Nationalism: A Resurgence of State Control in an Era of Free Markets Or the Legitimate Search for a New Equilibrium? (2012). Given South Africa's relatively low sovereign debt and credible fiscal and monetary track record, increased nationalization will lead to a shift in company investment, monitoring, and the speed and intensity of government feedback on corporate behavior.

232. *See supra* Part I.A.1.

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tion system that continues the progress that the country has been able to make in rectifying the land grabbing that occurred under the apartheid regime. This proposed land taxation system should provide South Africans from the homesteads with the ability to migrate to urban areas. The alternative is to risk a potential internal conflict similar to what occurred in Zimbabwe.

In order to achieve the successful transition from a colonial land ownership model to a system that provides the possibility of land ownership to black South Africans, the South African government should follow the successful model set by its mining industry. The industry was able to avoid racial tension and drama stemming from South Africa's history by creating a mineral reform system that avoided racial distinctions.[233]

Implementing the mining industry model would allow the government to take an active role in land management, while incentivizing current land owners to either own smaller plots or choose to pay an increased tax burden depending on their land use. These changes would strengthen South Africa's long-term economic security by giving the government greater land and tax resources. Furthermore, this course of action would provide the government with the resources necessary to increase efforts to provide housing and jobs for urban migration—the real needs of South Africa's poorest populations.

233. *See* DEPARTMENT OF MINERALS AND ENERGY, *supra* note 16, at para. 1.3.1.2; *see also* Mineral and Petroleum Resources Development Act 28 of 2002, Section 3.

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MANIFESTO OF THE EMIGRANT FARMERS.

A document has been handed to us, with a request to give it publicity, purporting to be the causes of the emigration of the colonial farmers—of which the following is a literal translation:—

Numerous reports having been circulated throughout the colony, evidently with the intention of exciting in the minds of our countrymen a feeling of prejudice against those who have resolved to emigrate from a colony where they have experienced for so many years past a series of the most vexatious and severe losses; and as we desire to stand high in the estimation of our brethren, and are anxious that they and the world at large should believe us incapable of severing that sacred tie which binds a christian to his native soil, without the most sufficient reasons, we are induced to record the following summary of our motives for taking so important a step; and also our intentions respecting our proceedings towards the Native Tribes which we may meet with beyond the boundary.

1. We despair of saving the colony from those evils which threaten it by the turbulent and dishonest conduct of vagrants, who are allowed to infest the country in every part; nor do we see any prospect of peace or happiness for our children in a country thus distracted by internal commotions.

2. We complain of the severe losses which we have been forced to sustain by the emancipation of our slaves, and the vexatious laws which have been enacted respecting them.

3. We complain of the continual system of plunder which we have ever endured from the Kafirs and other colored classes, and particularly by the last invasion of the colony, which has desolated the frontier districts, and ruined most of the inhabitants.

4. We complain of the unjustifiable odium which has been cast upon us by interested and dishonest persons, under the cloak of religion, whose testimony is believed in England to the exclusion of all evidence in our favour; and we can foresee as the result of this prejudice, nothing but the total ruin of the country.

5. We are resolved, wherever we go, that we will uphold the just principles of liberty; but whilst we will take care that no one shall be held in a state of slavery, it is our determination to maintain such regulations as may suppress crime and preserve proper relations between master and servant.

6. We solemnly declare that we quit this colony with a desire to lead a more quiet life than we have heretofore done. We will not molest any people, nor deprive them of the smallest property; but, if attacked, we shall consider ourselves fully justified in defending our persons and effects, to the utmost of our ability, against every enemy.

7. We make known, that when we shall have framed a code of laws for our future guidance, copies shall be forwarded to the colony for general information; but we take this opportunity of stating, that it is our firm resolve to make provision for the summary punishment of any traitors who may be found amongst us.

8. We purpose, in the course of our journey, and on arriving at the country in which we shall permanently reside, to make known to the native tribes our intentions, and our desire to live in peace and friendly intercourse with them.

9. We quit this colony under the full assurance that the English government has nothing more to require of us, and will allow us to govern ourselves without its interference in future.

10. We are now quitting the fruitful land of our birth, in which we have suffered enormous losses and continual vexation, and are entering a wild and dangerous territory; but we go with a firm reliance on an all-seeing, just, and merciful Being, whom it will be our endeavour to fear and humbly to obey.

By authority of the farmers who have quitted the Colony,

(Signed) P. RETIEF.

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DESEGREGATING HISTORY IN SOUTH AFRICA: THE CASE OF THE COVENANT AND THE BATTLE OF BLOOD/NCOME RIVER

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INTRODUCTION

The theme of "Desegregating History" implies a desire for an integrated history and in an even broader sense an ultimate grand or master narrative. In the case of South Africa with its divided past this is a much needed but very daunting ideal to achieve. A desegregated South African history is an ideal that can be achieved in more than one way. In this paper I want to suggest that one of the paths (processes) that can contribute to such a history is through the demythologising/deconstruction of Afrikaner history and historical consciousness as it was practised and perceived during the 20th century.

Within Afrikaner ranks the above-mentioned process was started by Afrikaner historians in the late 1970s and led to intense debate on Afrikaner political mythology in the 1980s. This debate was not just limited to academic circles, but also spilt over to the broader public and received extensive coverage in the Afrikaans press. This was especially true with regard to the attempts by Afrikaner historians to demythologise the Covenant and the Battle of Blood River/Ncome (16 December 1838) as the central myth in the history of Afrikaner nationalism. This paper is an attempt to indicate how Afrikaner historians demythologised the Covenant and the Battle of Blood River by referring to the myths, their origin, development and application in the service of Afrikaner nationalism as well as the reinterpretations of these events by historians. Official attempts by the state since 1994 to facilitate a reinterpretation of the historically one-sided views on the Covenant and the Battle of Blood River/Ncome and the way they were remembered in the past will also be examined. Lastly, reference will be made to the current debate on and use of 16 December in South Africa to determine the degree to which the Covenant and the Battle of Blood River have become integrated South African history.

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DEFINING POLITICAL MYTH AND POLITICAL MYTHOLOGY

Various attempts have been made to define political myth. Leonard Thompson defines a political myth as "a tale told about the past to legitimize or discredit a regime" and political mythology he describes as "a cluster of such myths that reinforce one another and jointly constitute the historical element of the regime or its rival".[1] Henry Tudor suggests that a myth "is an interpretation of what the myth-maker (rightly or wrongly) takes to be hard fact. It is a device men adopt in order to come to grips with reality; and we can tell that a given account is a myth, not by the amount of truth it contains, but by the fact that it is believed to be true and, above all, by the dramatic form into which it is cast".[2] According to Tudor a myth is a political myth if its subject matter deals with politics. Lastly, there is the definition by Ewan Morris that defines myth "as a story which, through repetition by members of a particular group, has acquired a conventional form and content, is generally believed by members of the group to be true, and is told by members of the group in order to convey a message".[3]To these definitions one can add the view of PH Kapp to whom the central characteristic of myth lies in the fact that it cannot be proved either true or false.[4] Measured against these definitions the Covenant and Battle of BloodRiver/Ncome are prime examples of political mythology.

HISTORICAL BACKGROUND OF THE COVENANT AND THE BATTLE OF BLOOD RIVER/NCOME

The history of the Covenant and the Battle of Blood River/Ncome forms part of a period of Afrikaner history referred to as the Great Trek. The Great Trek phase spans the period of more or less 1836-1854 during which approximately 15 000 people (Afrikaner farmers and their families referred to as Voortrekkers) left the eastern districts of the Cape Colony and settled in the interior regions of what is today known as South Africa.[5] Although a wide spectrum of reasons (traditionally divided into material and spiritual reasons by

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[1] L M Thompson: **The Political Mythology of Apartheid**, p. 1.
[2] H Tudor: **Political Myth**, p. 17.
[3] E Morris: 'It Seems History is to Blame': Historical Myth in Ireland, p. 2 (Paper delivered at the Australian Historical Association Conference, 5-9 July 2000).
[4] Personal interview with Prof. PH Kapp.
[5] HJ van Aswegen: **Geskiedenis van Suid-Afrika tot 1854**, p. 261.

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historians)[6] for the emigration were cited by the Voortrekkers what they amounted to was a widespread dissatisfaction with the British colonial regime and a conclusion "that the government was failing to provide for their security and was threatening their way of life".[7]

Between 1835-1838 Voortrekkers left the Cape Colony in large groups organised by various Trekker leaders. In 1835 groups under the leadership of Hans van Rensburg, Louis Tregardt and Andries Hendrik Potgieter left the Colony followed by Gert Maritz (1836), Piet Retief and Piet Uys (1837), and Andries Pretorius (1838). After crossing the Orange River the various groups spread in different directions to settle in the region of their preference.[8]

Van Rensburg and Tregardt moved into the area north of the Vaal River, while Potgieter eventually also settled north of the Vaal River and founded Potchefstroom. The majority followed Retief across the Drakensberg into Natal with the hope of obtaining land from the Zulu king, Dingane. During a visit by Retief to Dingane's kraal, Mgungundlovu, in November 1837 the Zulu King declared himself willing to discuss the granting of land to the Voortrekkers, but not before Retief returned the Zulu cattle raided by the Tlokwa. Retief fulfilled this precondition, but during his second visit to Dingane in February 1838 he and his expedition of 70 whites and 30 blacks were killed by the Zulus[9] after they signed an agreement with Dingane in which he granted the land between the Thukela and Umzimvubu Rivers to the Voortrekkers.[10] In further attacks by the Zulus 300 Voortrekker men, women and children as well as 250 blacks employed by the Voortrekkers were killed and a punitive expedition under the leadership of Potgieter and Uys was defeated at Italeni.[11] Afrikaner historians' demonisation of Dingane was based mainly on these actions which the Voortrekkers considered to be treacherous. From a

[6] CFJ Muller: **Die Britse Owerheid en die Groot Trek**, p. 72.
[7] LM Thompson: **The Political Mythology of Apartheid**, pp. 146-147.
[8] HJ van Aswegen: **Geskiedenis van Suid-Afrika tot 1854**, p. 261.
[9] Ibid., p. 277.
[10] FA van Jaarsveld: **Honderd basiese dokumente by die studie van die Suid-Afrikaanse geskiedenis 1648-1961**, p. 61.
[11] HJ van Aswegen: **Geskiedenis van Suid-Afrika tot 1854**, p. 277.

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Zulu perspective these actions were seen as necessary by Dingane to save his kingdom from destruction.[12]

Against this background Andries Pretorius arrived in Natal in November 1838 and immediately organised another punitive expedition against Dingane. In the days before the military encounter Pretorius, the leader of the Voortrekker expedition, initiated the idea of a covenant with God. After discussing the idea with Sarel Cilliers (the spiritual leader of the Voortrekkers in Natal) and other leaders in the expedition and obtaining the general consent of the expedition members, a covenant was made with God on 9 December 1838 at a place called Wasbank. In the covenant, which took the form of a prayer by Cilliers, the Voortrekkers asked God to grant them a victory over the Zulus. In return they would build a church in memory of His name and they and their children and the generations coming after them would consecrate it to the Lord and celebrate the day with thanksgiving[13].

The military encounter between the Voortrekker expedition and the Zulu army took place on 16 December 1838. The 14 000 strong Zulu army came up against a strategically well-planned laager defended by 470 Voortrekkers under Pretorius and 60 black allies led by Alexander Biggar. The defeated Zulu army lost 3 000 men, with no loss of life on the side of the Voortrekkers[14].

[12] Report of the Panel of Historians appointed by the South African Department of Arts, Culture, Science and Technology: The Battle of Blood River/Ncome, pp. 4, 6.
[13] FA van Jaarsveld: Die Afrikaners se Groot Trek na die stede en ander opstelle, pp. 300-301.
[14] C Venter: Die Groot Trek, pp. 49, 52.

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THE HISTORY OF THE COMMEMORATION OF THE COVENANT AND THE BATTLE OF BLOOD RIVER/NCOME

Although a church was erected in Pietermaritzburg (the capital of the newly founded Voortrekker Republic of Natalia in Natal) in 1841, there is no surviving record to indicate whether it was explicitly built by the Voortrekkers as a fulfilment of their vow. As far as the commemoration of the Battle of Blood River/Ncome in thanksgiving to God is concerned, the Natal Voortrekkers failed dismally. In the first quarter of a century after the battle only a handful of individuals like Sarel Cilliers celebrated the day and it is known that even the initiator of the idea of the Covenant, Andries Pretorius, did not uphold the promise of celebrating the day as a sacred day. The Volksraad of the Republic of Natalia also did nothing to commemorate the vow[15].

After the British annexation of Natal in 1843 most of the Natal Voortrekkers crossed the Drakensberg again and settled in either the Orange Free State or Transvaal. In 1864 the Dutch Reformed Church in Natal decided that "the 16th of December should be celebrated religiously as a day of thanks".[16] In 1865 the Transvaal government proclaimed December 16 a public holiday, "to commemorate that by God's grace the immigrants were freed from the yoke of Dingane".[17] According to the Afrikaner historian, FA van Jaarsveld, the development of Afrikaner nationalism in the Transvaal, which was generated by the attempts to regain their independence after the British annexation of the Transvaal in 1877, was decisive for the establishment of December 16 as a historical festive day. In 1880 the Transvaal revolted against Britain in an attempt to regain its independence. Before the start of hostilities the Transvaal burgers gathered at Paardekraal in December 1880 where, according to Van Jaarsveld, "the covenant was 'renewed'...by piling a cairn of stones, symbolizing both past and future: the past because the covenant had freed them from Black domination, and the future because they saw it as a sign that they would continue fighting until they regained their independence

[15] LM Thompson: **The Political Mythology of Apartheid**, pp. 154-156.
[16] **Ibid.**, p. 166.
[17] **Ibid.**, p. 168.

from the British imperialists".[18] After a successful military campaign Transvaal regained its independence from Britain in 1881. In that year and every fifth year thereafter the Transvaal government organised a state festival on December 16 (Dingaan's Day) to celebrate the Transvaal's victory over Britain as well as the Voortrekker victory at Blood River. [19]

In 1894 the government of the Republic of the Orange Free State declared December 16 (Dingaan's Day) a public holiday. After the Anglo-Boer War (1899-1902) the British authorities reinstated December 16 as a public holiday in Transvaal and the Free State. In 1910 the Union government proclaimed Dingaan's Day a public holiday for the whole of South Africa. In 1952 the National Party government changed the name from Dingaan's Day to the Day of the Vow in an attempt to make the day less offensive to South African blacks. The government also elevated the Day of the Vow to a "sabbath" by legally attaching the sabbath restrictions (no organised public sport, closed theatres and places of public entertainment, etc.) to the holiday. The sabbath status attached incorrectly to the day was done on the basis of the version of the Covenant given by Cilliers in his Memoirs as recounted by his biographer, Gerdener.[20]

THE EVOLUTION OF THE COVENANT AND BATTLE OF BLOOD RIVER/NCOME MYTHOLOGY IN ARIKANER NATIONALISM IN THE 20TH CENTURY

According to Van Jaarsveld, the celebration of the Battle of Blood River/Ncome served as a reliable barometer of the historical, national and political thought of the Afrikaner. He described the Day of the Vow as an example of a type of civil religion. The significance of Blood River becomes clear from Day of the Vow celebrations in which religion and history were united. An example in this regard is the 16 December 1881 state festival, where the Battle of Blood River/Ncome and the regaining of Transvaal's independence were celebrated. Speaking at this occasion Paul Kruger, President of the

[18] LM Thompson: The Political Mythology of Apartheid,p. 169; FA van Jaarsveld: Die evolusie van apartheid en ander geskiedkundige opstelle, p. 49.
[19] Ibid.

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Transvaal Republic, declared that the "volksleiers" (leaders of the people) were used by God to regain Transvaal's independence and that He gave them the victories at Blood River and Majuba (place of the final defeat of the British during the Transvaal's war of independence). God gave them their freedom and their country because they were "Gods volk" (God's people). In 1891 Kruger warned that Dingaan's Day should be celebrated as a religious and not a worldly festival. Kruger was also of the opinion that the loss of the Transvaal's indepedence in 1877 and the war that followed in 1880 was a punishment by God because the promises made by the Voortrekkers in the Covenant of 1838 were not kept. There was a heavy reliance on history to strengthen the historical consciousness of the Transvaal Afrikaners, while the idea that they were God's people and that God treated them as he did the Israelites of the Old Testament was widely propagated.[21]

During the course of the 20th century the Covenant and the Battle of Blood River/Ncome were used by Afrikaner political, religious and community leaders (nationalist culturalists, as referred to by Grundlingh and Sapire[22]) to explain the political, social and economic circumstances of Afrikaners and in the process fed the fire of Afrikaner nationalism.

After the Transvaal and Orange Free State lost their independence in 1902, the Battle of Blood River/Ncome and the commemoration of Dingaan's Day were used to inspire Afrikaners to overcome the political and economic losses they suffered by reminding them of the determination of the Voortrekkers who fought Dingaan and that they (the Voortrekkers) did not waver in their belief in the future of their "volk" (people). The comparison between the Afrikaners and the Israelites was made repeatedly and the sorry state that Afrikaners found themselves in after the Anglo-Boer War was, according to some commentators, attributed to the fact that the volk neglected the Dingaan's Day Covenant.[23]

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[20] FA van Jaarsveld: Die evolusie van apartheid en ander geskiedkundige opstelle, pp. 48-49.
[21] Ibid., pp. 65-67.
[22] A Grundlingh and H Sapire: From Feverish Festival to Repetitive Ritual? The Changing Fortunes of Great Trek Mythology in an Industrializing South Africa, 1938 –1988 (South African Historical Journal 21, 1989, p. 26).
[23] FA van Jaarsveld: Die evolusie van apartheid en ander geskiedkundige opstelle, pp. 68-69.

After 1912 Dingaan's Day celebrations were increasingly used as a political platform for making nationalistic speeches directed at the "volk". A popular theme that Dingaan's Day was related to was the "native question". In 1910 ex-president MT Steyn of the Free State referred to the events around the Battle of Blood River/Ncome as follows: "It can be that it (the "native question) will lead to a blood bath... Maybe the growth in civilization will bring a solution that nobody has dreamt of up till now. When Pretorius broke the back of the barbarians God placed the natives...under the guardianship of the white man ... That is a burden the white man must carry. The Afrikaners will have to keep their blood 'pure', and work to stay on top. Under God's management we are heirs of centuries of civilization. The native is only now touching the fringes of civilization".[24]

In 1929 Hertzog discussed the meaning of the Battle of Blood River/Ncome at a Dingaan's Day celebration. He was of the opinion that "Dingaan's Day 1838 was decisive for the existence (Volksbestaan) of the European race from the Cape to Nyassa". It was more than just a military victory: "It was the birth of a new European nation (volksiel) on African soil ". He also saw it as the victory of civilization over barbarism: "the power of the assegaai" was replaced by the authority of the "law", the authority of "a new-born Afrikaner nation". He was also of the opinion that the Afrikaner wanted to keep South Africa what Dingaan's Day 1838 made of it, namely "a white man's country under the white man's authority".[25]

During the 1938 centenary celebrations of the Great Trek the Battle of Blood River/Ncome and the Covenant were a central reference point in what Grundlingh and Sapire describe as "an important populist phase" in the development of Afrikaner nationalism with "all the rhetoric of populist movements: 'struggle', 'survival' and 'salvation'".[26] In a speech at the Battle of Blood River/Ncome site in December 1938 Dr DF Malan, leader of the National Party, referred to the difficulties of keeping South

[24] Ibid., p. 69.
[25] Ibid., pp. 69-70.

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Africa a "white man's country": "At the Blood River battleground you stand on sacred soil. It is here that the future of South Africa as a civilized Christian country and the continued existence of the responsible authority of the white race was decided... You stand today in your own white laager at your own Blood River, seeing the dark masses gathering around your isolated white race." According to Malan, the site of the "new Blood River" was the city, where black and white confront each other in the labour field. "If there is no salvation", Malan declared, "the downfall of South Africa as a white man's country" would be sealed. This can only be prevented through forceful intervention without which the victory of faith at Blood River would be transformed into one of despair and ruin.[27]

In 1938 the Reverend JD Vorster declared: "In answer to prayer and covenant God Alighty confirmed on 16 December 1838 that it is his will that the Afrikaner volk shall live...And on December 16 the Almighty gave his approval to the volk's direction and our fathers bound us with a holy, unimpeachable covenant never to be untrue to the Volk and God. For the Afrikaner Dingaan's Day is therefore a holy day of covenant".[28] On 22 September 1938 Dirk Mostert declared at Pearston: "We are a chosen nation. We did not choose ourselves. God chose us. We were given a commission".[29]

Van Jaarsveld describes the massive and enthusiastic participation of Afrikaners in the centenary celebrations of the Great Trek and the symbolic ox-wagon procession from Cape Town to Pretoria as a peak in emotional Afrikaner nationalism. He explains the Afrikaner response to the celebrations as a reaction to the coalition and fusion of the South African Party and National Party in 1933-1934, while the celebrations themselves were an attempt to stimulate Afrikaner nationalism, republicanism and volk's unity. The

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[26] A Grundlingh and H Sapire: From Feverish Festival to Repetitive Ritual? The Changing Fortunes of Great Trek Mythology in an Industrializing South Africa, 1938-1988 (South African Historical Journal 21,1989, p.27).
[27] FA van Jaarsveld: Die evolusie van apartheid en ander geskiedkundige opstelle, p.71.
[28] Ibid.
[29] Ibid., p. 72.

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Afrikaner viewed himself in the mirror of his past and drew from it inspiration for his present and future.[30]

In contrast to Van Jaarsveld's approach, Grundlingh and Sapire explained the changing role of Great Trek mythology by placing it in its material context, emphasising class and material motivations, factors and changes. By referring to Afrikaner poverty and the effects of urbanisation they came to the conclusion that the "bruises" caused by these material conditions were "soothed by the balm of 'traditional' culture". They concluded that "Although the formalization of emotions was undoubtedly important in its own right, at bedrock were still the material realities of proletarian and rural poverty and the often frustrated position of the petty bourgeoisie that ultimately underlay responses to the celebrations".[31]

This pattern of use by Afrikaner politicians and community leaders (nationalist culturalists) of the Battle of Blood River/Ncome and the Covenant continued in the decades after 1938, although the symbolism attached changed with the changing perspectives as dictated by the needs of the day. With the inauguration of the Voortrekker monument in December 1949 Dingaan's Day was used as a celebration of the victory of Afrikaner nationalism and volk's unity, as demonstrated by the election victory of the National Party in 1948. By the late 1960s and early 1970s the focus shifted to South Africa's isolation and the battle against decolonisation. In 1966 Prof. MCE van Schoor compared the Afrikaners' position to that of the Voortrekkers at the time of the Battle of Blood River/Ncome. A small minority of whites fighting against a vast majority of hostile black people of Africa to secure the values of civilisation in South Africa. In 1972 Prof. AN Pelzer commented in a paper on the significance of Blood River as follows: "We are being isolated, besieged, devoured, forced into a laager - just like 133 years ago; another Blood River in our existence is not impossible...The battle that awaits us...will

[30] Ibid., p. 71.
[31] A Grundlingh and H Sapire: From Feverish Festival to Repetitive Ritual? The Changing Fortunes of Great Trek Mythology in an Industrializing South Africa, 1938- 1988 (South African Historical Journal 21, 1989, pp. 25, 26).

be merciless, relentless and final. It is a battle for life and death".[32] Van Jaarsveld described December 16 used in this way as providing an anchor to answer questions annually about Afrikaner identity and which often served the purpose of unifying Afrikaners politically against either the English or the blacks. In this sense it served as a "power-station" where nationalistic electricity was generated every year.[33]

The content of this nationalistic electricity changed profoundly in the 1970s and 1980s as meanings were attached to Great Trek mythology in general "that would have a greater resonance with an increasingly sophisticated and self-confident urban Afrikanerdom".[34] The economic and political crises of the late 1970s and early 1980s led to moves towards reforming the apartheid system. A move that needed wider support than just from Afrikaners. Because English and moderate black support were necessary, the ethnic exclusivity and divine mission of Afrikaners, two dominating themes in the Battle of Blood River/Ncome and the Covenant mythology, had to be played down. According to Grundlingh and Saphire, it was against this background "of Afrikaner doubt about the apartheid system in the 1980s that the call went out from the press, the pulpits, and cultural organizations for a reconsideration of the way in which the Great Trek was to be commemorated in the yearly Blood River celebrations. Thus, for example, Afrikaner intellectuals appealed for the inclusion of non-Afrikaner groups in the Day of the Covenant celebrations and for the depoliticization of the day, while Afrikaner historians began to depict the Great Trek in a secular light and to subject the event to re-examination."[35] It is to this re-examination and deconstruction by historians that I now want to turn.

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[32] FA van Jaarsveld: Die evolusie van apartheid en ander geskiedkundige opstelle, pp. 72-74.
[33] FA van Jaarsveld: Die Afrikaners se Groot Trek na die stede en ander opstelle, p. 311.
[34] A Grundlingh and H Sapire: From Feverish Festival to Repetitive Ritual? The Changing Fortunes of Great Trek Mythology in an Industrializing South Africa, 1938-1988 (South African Historical Journal 21, 1989).
[35] Ibid., pp. 30, 31.

THE DECONSTRUCTION / DEMYTHOLOGIZING OF THE BATTLE OF BLOOD RIVER AND THE COVENANT BY AFRIKANER HISTORIANS

The mythology that developed around the Covenant and the Battle of Blood River/Ncome since the last quarter of the 19th century and formed the traditional interpretation of these events consisted of the following:

- **Myths on the significance of Blood River**

1. Blood River saved the Great Trek

2. Blood River was the birthplace of the Afrikaner people

3. Blood River was a symbol of the victory of Christianity over heathendom and barbarism

- **The myth on the binding of the Covenant**

1. All Afrikaners are irrevocably bound by the vow for all time

- **The myth on the miracle of Blood River**

1. The victory at the Battle of Blood River/Ncome was a miracle in the sense that divine intervention gave the Voortrekkers the victory

2. God's intervention at Blood River to save the Voortrekkers proved that He was on the side of the Afrikaner people and would not abandon the Afrikaner nation

3. The Blood River victory was also interpreted as proof that God had commissioned the Afrikaner people to keep South Africa white or that God desires white supremacy in South Africa.[36]

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The process of the deconstruction of these traditional interpretations of the Battle of Blood River and the Covenant by Afrikaner historians was facilitated by the completion in 1975 and publication in 1977 of the doctoral study by BJ Liebenberg entitled **Andries Pretorius in Natal**. Liebenberg corrected the subjective and biased picture of Pretorius painted by Gustav Preller in his biography of Pretorius and in the process also rectified many factual mistakes with regard to the Covenant and the Battle of Blood River/Ncome.[37] In December 1977 Prof Liebenberg wrote an article in *Die Huisgenoot (The Housemate)*, a popular Afrikaans periodical, in which he gave a rational explanation, according to the findings of his doctoral dissertation, of the reasons for the Voortrekker victory at Blood River without ascribing it to the divine intervention of God. Liebenberg's explanation and his viewpoint that it was not the task of the historian to indicate the hand of God in history were greeted with letters full of reproachful and shocked reactions from readers.[38]

The academic debate on the Covenant and the Battle of Blood River/Ncome was given further momentum when Prof. FA van Jaarsveld, the foremost Afrikaner historian of his time, became involved. In 1978 he wrote an essay on *"The Covenant in the Bounds of Time"* (*Die Gelofte in die Ban van die Tyd*) in which he indicated that the Sabbath stipulation was not applicable to the Day of the Vow.[39] He followed up the essay with a paper entitled *"Historical mirror of Blood River"* (Historiese spieël van Bloedrivier), which he delivered at the 1979 Unisa Conference on the *Problems in the Interpretation of History with Possible Reference to Examples from South African History such as the Battle of Blood River*.[40] In his paper he questioned and rejected the reliability of Sarel Cilliers's account of the Covenant with reference to both its content and form, and also indicated that the addition of the Sabbath stipulation to the Day of the Vow in 1952 was

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[36] BJ Liebenberg: Mites Rondom Bloedrivier en die Gelofte (South African Historical Journal 20, November 1988).
[37] BJ Liebenberg: Andries Pretorius in Natal, pp. 7-8.
[38] FA van Jaarsveld: Die evolusie van apartheid en ander geskiedkundige opstelle, pp. 54-55.
[39] BJ Liebenberg: Mites Rondom Bloedrivier en die Gelofte (South African Historical Journal 20, November 1988, p. 18).
[40] A Grundlingh and H Sapire: From Feverish Festival to Repetitive Ritual? The Changing Fortunes of Great Trek Mythology in an Industrializing South Africa, 1938-1988 (South African Historical Journal 21, 1989, p.31).

done on the strength of Cilliers's unreliable account.[41] The strength of emotion among certain Afrikaner groups on the issues he addressed was demonstrated by the fact that his presentation was interrupted when AWB (Afrikaner Weerstand Beweging /Afrikaner Resistance Movement) members under the leadership of Eugene Terreblanche stormed into the conference hall and tarred and feathered Prof. Van Jaarsveld for attacking the holy symbols of the volk.[42] In a third essay published in 1982 under the title "*The demythologizing of Afrikaner historical consciousness*" (Die ontmitologisering van die Afrikaner se geskiedbeeld) Van Jaarsveld reconfirmed his view on the Sabbath stipulation with regard to the Day of the Vow and also described as a myth the viewpoint that all Afrikaners are irrevocably bound by the vow for all time.

In an article in the *South African Historical Journal* of November 1980 entitled "*Blood River and God's Hand*" (Bloedrivier en Gods Hand) Prof. Liebenberg expanded on his arguments with regard to the miracle of the Voortrekker victory at Blood River as outlined in his 1977 article in *Die Huisgenoot*. Addressing the issue on an academic level he summarised his findings as follows: "The assertion that the victory of the Voortrekkers at the Battle of Blood River was a miracle which must be ascribed to the intervention of God has been made by various historians. After an analysis of the argument advanced in this connection, the author concludes that nothing incomprehensible, miraculous or supernatural occurred at Blood River. It was an ordinary battle and there are more mundane reasons for the Voortrekker victory. As to whether a historian can discern the hand of God in history, the author's answer is that this lies outside his province. It is the task of the historian to explain the thoughts, motives and actions of men - the thoughts, motives and actions of God are beyond his ken. The author finally provides three reasons why some people are anxious to attribute the Voortrekker victory at Blood River to God's intervention. One is that it is much easier to describe the victory of so few Voortrekkers over so many Zulus as a miracle than it is to explain it rationally. Another is that the Covenant made before the battle has inserted an element of mysticism into subsequent events. Finally, the Battle of Blood River has been

[41] BJ Liebenberg: Mites Rondom Bloedrivier en die Gelofte (South African Historical Journal 20, November 1988, p. 18).
[42] Rapport, 1.4.1979: Geteer...en veer, p. 5.

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interpreted in the light of an overall assumption that God is on the side of the Afrikaner nation".[43]

The academic and public debate on the issues surrounding the Covenant and the Battle of Blood River/Ncome continued intermittently through the 1980s, surfacing periodically in national Sunday newspapers like *Rapport*[44] and fed by new publications like Thompson's *The Political Mythology of Apartheid* (1985) and De Jongh's *Sarel Cilliers* (1987). The last two publications broadly confirming the Covenant and Blood River mythology exposed in the earlier publications. In 1988, the year of the 150th anniversary of the Great Trek, the Historical Society of South Africa organised a conference to stimulate debate on the Great Trek as historical event. In a paper entitled *"Myths on Blood River and the Covenant"*(Mites Rondom Bloedrivier en die Gelofte) Liebenberg took stock of Blood River and Covenant mythology, in the process also indicating less known and less prominent myths surrounding the events and coming to the conclusion that they were all myths "which have the common purpose of supporting Afrikaner Nationalism".[45] The conference confirmed that in Afrikaner academic circles the new perspectives on the Covenant and the Battle of Blood River that emerged in the preceding decade were generally accepted.[46] Further confirmation of this acceptance was the inclusion of the new perspectives in an Afrikaans textbook on South African history published in 1989 and intended for first-year university students studying South African history.[47]

The new perspectives amounted to a recognition of the following:

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[43] BJ Liebenberg: Bloedrivier en Gods Hand (South African Historical Journal 12, November 1980, p. 1).
[44] H van Aswegen: Geloftedag-Mites Ander sal ook onthul word in Afrikaner se geskiedenis (Rapport, 20.12.1981, p. 14); B J Liebenberg: Onjuisthede oor die Gelofte (Rapport, 21.2.1982, p. 34).
[45] BJ Liebenberg: Mites Rondom Bloedrivier en die Gelofte (South African Historical Journal 20 November 1988, p. 17).
[46] Historia (Groot Trek –Gedenkuitgawe) 33, November 1988, No 2.
[47] HJ van Aswegen: Geskiedenis van Suid-Afrika tot 1854, pp. 7, 278.

- **On the significance of Blood River**

1. Blood River did not save the Great Trek, since only a small group of Voortrekkers was involved, while many Voortrekkers outside Natal were not threatened by the Zulus.

2. Blood River was not the birthplace of the Afrikaner people, since the Afrikaner nation began emerging long before 1836 and many Cape Afrikaners were not touched by Blood River.

3. Blood River was not a victory of Christianity over paganism / heathendom and/or barbarism, as had been claimed by many Afrikaners, since it is an open question whether any military victory can occur in the name of Christianity, and furthermore, after the battle the Voortrekkers did little to spread the Christian message among black people.

- **On the binding force of the Covenant**

1. The vow was binding only on those who actually participated in making it. Nobody can make a binding vow on behalf of somebody else without the latter even being aware of it.

- **On the miracle of Blood River**

1. Blood River was not a miracle. In other battles fewer Voortrekkers overcame similar massive attacks. The favourable climatic conditions during the battle can be ascribed to natural circumstances.

2. God cannot be claimed to be on the side of the Afrikaners because of the Voortrekker victory at Blood River. God is not exclusive but universal. The God of Blood River is also the God of Italeni and Perdeberg. The God of the Afrikaners is also the God of the English, the Germans and the Zulu.

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3. The interpretation that the Voortrekker victory at Blood River is an indication that God is against equality between black and white people, and desires white supremacy in South Africa, is an example of the subjective viewpoints and desires of people being ascribed to God and projected as His will. As such, this interpretation was rejected.[48]

FROM DINGAAN'S DAY TO THE DAY OF RECONCILIATION: SOME PUBLIC AND OFFICIAL REACTIONS TO THE NOTION OF A DESEGREGATED COVENANT AND BLOOD RIVER

It has already been mentioned that the National Party government changed the official name of December 16 as public holiday from Dingaan's Day to the Day of the Vow in 1952 in an attempt to make the day less offensive to South African blacks.[49] This name change was, however, not accompanied by an attitudinal change in the way Afrikaners in general celebrated the day. The public debate on the character of the celebration of the Day of the Vow only started in earnest in the mid-1970s and coincided with the academic debate on the demythologising of the Covenant and the Battle of Blood River/Ncome. In the sustained debate that raged throughout the 1970s and 1980s three broad approaches towards December 16 as a national public holiday crystallised. The more conservative elements within Afrikaner ranks called for the preservation of the Day of the Vow as an exclusive festival of Christian Afrikaners. For them the Day of the Vow was as exclusive to Afrikaners as the Passion Play was to Oberammergau. The second approach was that of Afrikaners and other South Africans who wanted to make the day more inclusive by incorporating English-speaking and black South Africans and changing the character of the day from that of confrontation to one of reconciliation between the peoples of South Africa. The third group, which included people like John Mavuzo of Inkatha and David Curry of the (Coloured) Labour Party, called for the abolition of December 16 as a public

[48] BJ Liebenberg: Bloedrivier en Gods Hand (South African Historical Journal 12, 1980, p.7); BJ Liebenberg: Mites Rondom Bloedrivier en die Gelofte (South African Historical Journal 20, November 1988, pp. 19-32; HJ van Aswegen: Geskiedenis van Suid-Afrika tot 1854, p.278; JEH Grobler: Afrikaner perspectives on Blood River: A never-ending debate?, pp. 2-3 (Paper delivered at one-day seminar on the Battle of Blood River/Ncome at University of Zululand, November 1998).

holiday on the grounds of its exclusivity.[50] Despite the lively debate December 16 remained on the South African calendar in the form that it was given in 1952.

With the introduction of the new political dispensation in 1994 December 16 was retained as a national public holiday, but the name was changed to the Day of Reconciliation to symbolise the spirit in which the government expected the day to be celebrated in future. The changing attitude of the majority of Afrikaners towards December 16 was best demonstrated by the acceptance in 1997 of a motion during the annual congress of the ATKV (Afrikaanse Taal en Kultuur Vereniging / Afrikaans Language and Cultural Association), a traditionally more conservative Afrikaner cultural organisation, namely that the Day of the Vow should in future be celebrated as a day of thanksgiving similar to the American example. It should no longer be a day used to remind Afrikaners of Blood River and the Covenant. Expressing himself in favour of the proposal, one of the delegates was of the opinion that "Whether we want to admit it or not, the Day of the Vow was for many years just a public holiday to people" with only one percent of Afrikaans speakers actively commemorating the day. The aim of the proposal was "to give meaning to a day which normally does not have great significance to people". According to the proposal ATKV branches were requested to organise public meetings in co-operation with like-minded organisations on December 16. On these occasions special attention was to be given to "thanksgiving to God for his mercy and goodness in the past, present and future". One of the delegates described the proposal as an attempt to create a culture of thanksgiving among all people in South Africa. He added that the day should be characterised by large meetings and street processions, as in the USA. The diversity of colours of the national flag could be displayed at these occasions. He saw this as a way of unifying people and of giving sense and meaning to the intention behind the Day of Reconciliation.[51]

Official involvement in desegregating the historiography and the commemoration of the Battle of Blood River/Ncome took a tangible form when the Department of Arts, Culture,

[49] FA van Jaarsveld: Die Afrikaners se Groot Trek na die stede en ander opstelle, p. 311.
[50] FA van Jaarsveld: Die evolusie van apartheid en ander geskiedkundige opstelle, pp. 74-80.
[51] M Waldner: Geloftedag kan soos 'n 'dankdag' word (Rapport, 24.8.1997, p. 2)

Science and Technology identified the re-interpretation of the Battle of Blood River/Ncome as a Legacy Project under its co-ordination for delivery in 1998. According to the Department, the project involved "a re-interpretation of some of the historically one-sided views of the 1838 Zulu-Boer war, and the erection of an appropriate memorial at the site of the Battle. Also, built around the project is the idea of building and effecting a spirit of reconciliation among the descendants of those involved in the Battle". After the Department briefed Cabinet early in 1998, it undertook consultations with all affected role players. The Minister also appointed a panel of academics to work on the conceptual framework for the re-interpretation. In October 1998 the Department hosted a one-day seminar at the University of Zululand with the aim of "allowing the many academic views that still exist about this Battle to be synthesized and aligned with the conceptual framework" produced by the panel of academics appointed by the Minister.[52]

The panel of academics appointed by the Minister of Arts, Culture, Science and Technology and consisting of *inter alia* Professors JS Maphalala, M Kunene, J Laband, CA Hamilton and Dr JEH Grobler produced the following conceptual framework for their report:

> "On 16 December 1838 the marshalled forces of the Zulu army engaged a laagered Voortrekker commando on the banks of a small river in what is today northern KwaZulu-Natal. In the encounter that followed, known variously as iMpi yase Ncome, die Geveg van Bloedrivier and the Battle of Blood River, the numerically tiny Voortrekker force (of about 600) inflicted heavy losses on the Zulu army of some 14000 men.
>
> The Voortrekkers attributed their victory to divine intervention in response to a covenant made with God some days before the battle. This covenant became a cornerstone of Afrikaner nationalism resulting in its annual commemoration on a declared public holiday, known initially as Dingaan's Day, later as the Day of the Vow and currently as the Day of Reconciliation. Two monuments, both

[52] Invitation Prof. MK Xulu-Prof. PH Kapp, 9.10.1998 and annexure entitled: Legacy project: Re-interpreting the Battle of Ncome/Blood River.

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representing wagons, have been erected by the Afrikaner community at the site of the battle.

While for some the covenant became a cornerstone of Afrikaner nationalism, for others the monument became a symbol of Afrikaner domination that chimed closely with the biased textbooks and other historical materials produced under apartheid which celebrated the hardy, pioneering spirit of the Afrikaners and denigrated the black inhabitants of the region as savage barbarians.

Any attempt to refigure the commemoration of this battle must both challenge these stereotypes and accord full recognition to the hitherto neglected Zulu side of the battle. In the body of this report, we provide background material that both contextualises the rise of the stereotypes and provides material on how the Zulu participants understood the battle. In the conclusion, we go on to assess the significance of the battle and its commemoration in post-apartheid South Africa."[53]

In the body of the report the various issues were then treated under the following headings: The Covenant, Afrikaner Nationalism and the Mythification of the Voortrekker victory at *Bloedrivier*; Zulu interpretations of *iMpi yase Ncome*; The Origins of the Battle; The Battle Itself; and The Battle: A Military Analysis. With regard to the significance of the battle and its commemoration in post-apartheid South Africa, the panel came to the following conclusion:

"On the one hand it is important because it resulted in the first time that a Zulu king's capital was completely destroyed by invading whites. On the other hand, although the Voortrekkers crushed Dingane's armed force, they did not break the spirit of the Zulu, who rose from defeat to constitute a major South African force again by the 1870s. Symbolically the battle came to mark the beginning of Afrikaner dominance. It is notorious for the role it played in establishing

[53] Report of the Panel of Historians appointed by the South African Department of Arts, Culture, Science and Technology: The Battle of Blood/Ncome River, 1.9.1998, pp.1-2.

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historical stereotypes about Zulu barbarism and treachery and about the Afrikaners as God's chosen people in South Africa.

The panel unanimously feels that the government should openly support a movement away from one-sided and stereotypical representations of events in South African history, such as this battle. Instead the government should support and stimulate the viewpoint that conflicting interpretations are the life-blood of historical debate, and should neither be suppressed nor disregarded in the practice of history. From this point of view it is clearly imperative that a major effort be undertaken to ensure that far greater attention is given to Zulu interpretations of the battle. At the battle-site itself there is a need for such materials to be provided.

The descendants of the original protagonists in the Battle of Blood River/Ncome, namely the Zulu and the Afrikaners of today, are no longer enemies. From a view some 160 years after the confrontation, the main lessons to be learned from it are no longer about the courage and the suffering of the participants, but rather an imperative not to prolong the conflicts of the past. That leads the panel to propose that a further monument should be erected at the site that carries out a message of reconciliation for everybody. The name *eKukhumeleni umlotha* (Place of Reconciliation) should be considered for this monument.

After a war it is often necessary for the protagonists to reconcile with each other and also within themselves with what had taken place – the taking of human lives, the destruction, horror and tragedy which they helped to cause. By jointly participating in erecting a monument that would make noble the loss of Zulu life and extol Zulu bravery as much as the present monuments at the site do for the Voortrekkers; by moving beyond a mere valorisation of war; and by creating a spirit of reconciliation, the descendants of the original protagonists can play an immense part in the building of a united South Africa."[54]

[54] Report of the Panel of Historians appointed by the South African Department of Arts, Culture, Science and Technology: The Battle of Blood River/Ncome, 1.9.1998, pp. 9-10.

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The idea of a monument to give recognition to the role of the Zulu warriors in the Battle of Blood River/Ncome as proposed by the panel was taken up by the government. The inauguration and unveiling of the new monument at the Blood River battle site a kilometre away from the existing monument commemorating the Voortrekker victory took place on 16 December 1998, on the 160th commemoration of the battle. At the inauguration ceremony attended by "thousands of people"[55] were also present Deputy President Thabo Mbeki, Minister of Home Affairs and Inkatha Freedom Party leader Chief Mangosuthu Buthelezi, Minister of Arts, Culture Science and Technology Mr Lionel Mtshali, Freedom Front leader General Constand Viljoen and executive director of the Federasie van Afrikaanse Kultuurverenigings (Federation of Afrikaans Cultural Societies) Hennie de Wet. Speakers like Mbeki and Buthelezi stressed the conciliatory character and potential of the occasion and the monument. Buthelezi even aired the idea of a new covenant: "Let us consider this the day of a new covenant that binds us to the shared commitment of building a new country through a shared struggle against poverty, inequality, corruption, crime and lack of discipline at all levels".[56] Mtshali was of the opinion that: "Two monuments at the site of the battle, commemorating the participation of both sides will complete the symbolism. They will unite the protagonists of 160 years ago. In so doing, they will hopefully help reconcile conflicting historical interpretations. Today's event marks freedom from the yoke of many years of the divisive symbolism and dangerous stereotyping."[57] The speakers at the ceremony, however, also lamented the fact that the occasion's potential for reconciliation was not fully realised because of the sparse Afrikaner attendance and the existence of a separate ceremony by Afrikaners at the Voortrekker laager monument a kilometre away.[58]

The *Cape Argus* described the Afrikaner ceremony as "a small group of apartheid flag-waving Afrikaners conducting a prayer at the wagon site". [59]The *Sowetan* reported as

[55] Cape Argus 17.12.1998: Afrikaner stay-away from Blood River ceremony, p.4.
[56] Sowetan 17.12.1998: Peace on battlefield, p. 1.
[57] Cape Argus 17.12.1998: Afrikaner stay-away from Blood River ceremony, p. 4.
[58] Ibid.; Sowetan 17.12.1998: Peace on battlefield, p. 1; Cape Argus 19/20.12.1998: No reconciliation at Blood River, p. 24.
[59] Cape Argus 19/20.12.1998: No reconciliation at Blood River, p. 24.

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