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Property and Transitional Justice

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PROPERTY AND TRANSITIONAL JUSTICE

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Transitional justice is the study of the mechanisms employed by communities, states, and the international community to promote social reconstruction by addressing the legacy of systematic human rights abuses and authoritarianism. The transitional justice literature discussing how states can address past civil and political rights violations through truth commissions and international and domestic prosecutions is well-developed compared to the transitional justice literature concerning the redress of past property rights violations. Nevertheless, history is ripe with examples of states and private actors that have systematically and unjustly taken real property from one group and given it to another. The goal of this Article is to further an important conversation about how transitional states can address these past property rights violations to promote social reconstruction. I discuss the strengths and weaknesses of a state's three main options: (1) maintaining the present property status quo, (2) fully or partially returning to a prior property status quo, or (3) creating a new property status quo altogether. I argue that a state should decide which option to choose through an inclusive public dialogue in which participants are well-informed rather than through a process involving only elites, which, despite being less time-consuming and less costly, would be inadequate in the long run.

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INTRODUCTION

History is rife with examples of state and private actors systematically confiscating property from one group without consent and without paying just compensation and then transferring that property to another group. I call these actions property dispossession or property theft.¹ In some cases, dispossessed populations have made resounding cries for reparations during the transitions from the offending regimes to the new political orders.² During Communism, for example, several Eastern European governments took property from the aristocracy and Nazi sympathizers to distribute it to their peasant populations.³ After the fall of these governments, pre-Communist owners in the Czech Republic, Estonia, Germany, Hungary, Latvia, Lithuania, and Slovakia demanded reparations.⁴ To placate these constituencies, the transitional governments had to determine how to address the property dispossession that had occurred during Communism.⁵

1. It is a violation of human rights to confiscate property without consent and compensation. See Universal Declaration of Human Rights, G.A. Res. 217A, at 74, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (“No one shall be arbitrarily deprived of his property.”).

2. See *infra* notes 3–12 and accompanying text for several examples. See also Mark Everingham, *Agricultural Property Rights and Political Change in Nicaragua*, 43 *LATIN AM. POL. & SOC’Y* 61 (2001); George Meszaros, *Taking the Land Into Their Hands: The Landless Workers’ Movement and the Brazilian State*, 27 *J.L. & SOC’Y* 517 (2000) (describing how the Landless Workers’ Movement used direct action techniques to demand implementation of land reform policies in Brazil).

3. See Rainer Frank, *Privatization in Eastern Germany: A Comprehensive Study*, 27 *VAND. J. TRANSNAT’L L.* 809, 812–13 (1994) (noting that from 1945 to 1949, the Soviet Military Administration of Germany confiscated all property holdings that exceeded 250 acres and initiated land reform to benefit “the general good of the working class”); see also Richard W. Crowder, Comment, *Restitution in the Czech Republic: Problems and Prague-Nosis*, 5 *IND. INT’L. & COMP. L. REV.* 237, 238 (1994) (noting that from 1945 to 1948, the Czechoslovak government confiscated the land belonging to those “who had collaborated or sympathized with the Nazis during the Second World War”).

4. See Nicolás J. Gutiérrez, Jr., *Righting Old Wrongs: A Survey of Restitution Schemes for Possible Application to a Democratic Cuba*, 4 *U. MIAMI Y.B. INT’L L.* 111 (1995) (reviewing restitution programs in the Baltic Republics, Bulgaria, Czech Republic, East Germany, Hungary, Nicaragua, Poland, Romania, and Slovakia); Mariana Karadjova, *Property Restitution in Eastern Europe: Domestic and International Human Rights Law Responses*, 29 *REV. CENT. & E. EUR. L.* 325 (2004) (presenting an overview of Eastern European restitution programs).

5. Not all post-Communist countries opted to return to a prior property status quo. See Frances H. Foster, *Restitution of Expropriated Property: Post-Soviet Lessons for Cuba*, 34 *COLUM. J. TRANSNAT’L L.* 621, 625–26 (1996) (noting that Russian land reform laws have “prohibited the ‘return of land plots to former owners and their heirs’” and that Tajikistan has enacted similar laws).

Similarly, beginning in 1652, Europeans arrived in southern Africa, established economic and political dominance, and brutally took ownership of vast swaths of land from the African majority.⁶ In the 1980s and 1990s, Zimbabwe, South Africa, and Namibia transitioned from white minority rule to majority rule.⁷ One of the greatest challenges faced by these new African governments was how to help the African population reclaim their stolen land.⁸

Similar events have taken place in the Middle East. Saddam Hussein's rise to power culminated in 1979 when he was named president of Iraq. Over the course of his dictatorship, he subjected Kurds to severe discrimination—including unjust confiscation of their property.⁹ In 2003, American troops ousted Hussein, setting the groundwork for Iraq's tumultuous political transition in which the Kurds gained significant political power.¹⁰ For the Kurds, addressing past property dispossession was a political priority, but choosing the manner in which to proceed proved challenging.

Another example of property dispossession is the Rwandan genocide of 1994, in which significant amounts of property were stolen or unwillingly abandoned by citizens fleeing ethnic violence. In fact, one impetus behind the mass killings was the desire of many Hutus to confiscate Tutsi property.¹¹ When the

6. Alois Mlambo, *The Ambiguities of Independence, Zimbabwe 1980–1990*, in UNFINISHED BUSINESS: THE LAND CRISIS IN SOUTHERN AFRICA 57, 64 (Margaret C. Lee & Karen Colvard eds., 2003).

7. *Id.* at 57, 65; Justine Hunter, *Introduction to WHO SHOULD OWN THE LAND? ANALYSES AND VIEWS ON LAND REFORM AND THE LAND QUESTION IN NAMIBIA AND SOUTHERN AFRICA* 1–6 (Justine Hunter ed., 2004); Cheryl Walker, *The Limits to Land Reform: Rethinking "The Land Question"*, 31 J. S. AFR. STUD. 805, 805–24 (2005).

8. See Mlambo, *supra* note 6, at 87, 411.

9. See JOHN FAWCETT & VICTOR TANNER, THE BROOKINGS INSTITUTION—SAIS PROJECT ON INTERNAL DISPLACEMENT, THE INTERNALLY DISPLACED PEOPLE OF IRAQ 10 (2002), available at http://www.brookings.edu/~media/Files/rc/papers/2002/10iraq_fawcett/iraqreport.pdf (explaining that the *al-Anfal* operation, which began in 1988, was based on the message that “the regime and its soldiers had a nigh-religious right to take Kurdish property and lives”).

10. See QUIL LAWRENCE, INVISIBLE NATION: HOW THE KURDS' QUEST FOR STATEHOOD IS SHAPING IRAQ AND THE MIDDLE EAST 235–36 (2008); Edward Wong, *Back From Exile, Kurds Demand Political Power and Reparations for Seized Property*, N.Y. TIMES, Jan. 19, 2004, at A9 (noting that the Kurds, recently back from exile, strongly demanded political rights and reparations from the transitional government).

11. See MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA 193 (2001) (noting that a pattern emerged in which “[p]refects and burgomasters organized Hutu militants who identified and targeted Tutsi ‘collaborators,’ took over the land of those who were killed or fled, and redistributed it to militants”); GÉRARD PRUNIER, THE RWANDA CRISIS 1959–1994: HISTORY OF A GENOCIDE 248 (1995) (noting that while the desire to acquire Tutsi land was not the primary motivation behind the 1994 mass killings, there was “an element of material interest in the killings . . . Villagers also probably had a vague hope that if things settled down after the massacres they could obtain pieces of land belonging to the victims, a strong lure in such a land-starved country as Rwanda”); Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis*

genocidal killing abated, Paul Kagame seized the reins of power and began the political transition. President Kagame—like many other leaders in times of transition—was forced to ask the recurrent transitional justice question: What can our government do about past property dispossession?¹²

Transitional justice is the study of those mechanisms employed by communities, states, and the international community to promote social reconstruction by addressing the legacy of systematic human rights abuses and authoritarianism. There is a well-developed transitional justice literature discussing how states can deal with past violations of civil and political rights such as incarceration, murder, sexual abuse, and torture.¹³ There has also been healthy discussion about the value of truth commissions and international and domestic prosecutions concerning these violations.¹⁴ Despite the important experiences of nations in Eastern Europe and Southern Africa, Iraq, and Rwanda that I have discussed, the transitional justice literature on how to address past property rights violations is significantly less developed.¹⁵

in Rwanda, 75 N.Y.U. L. REV. 1221, 1249–250 (2000) (noting that some Hutu “pillaged, stole, ransacked, and appropriated property from homes in which Tutsi had been killed or from which they had fled”).

12. PRUNIER, *supra* note 11, at 332 (noting that post-genocide, the Rwandan government struggled with “property grabbing by the former refugees now coming back from Uganda and Burundi”).

13. See, e.g., 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995); Kuk Cho, *Transitional Justice in Korea: Legally Coping With Past Wrongs After Democratization*, 16 PAC. RIM L. & POL’Y J. 579 (2007); Omar Encarnación, *Reconciliation After Democratization: Coping With the Past in Spain*, 123 POL. SCI. Q. 435 (2008); Saira Mohamed, *A Neglected Option: The Contributions of State Responsibility for Genocide to Transitional Justice*, 80 U. COLO. L. REV. 329 (2009); Binaifer Nowrojee, *Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone’s Rape Victims*, 18 HARV. HUM. RTS. J. 85 (2005); Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT’L L. REV. 301 (2003).

14. See CHARLES VILLA-VICENCIO & WILHELM VERWOERD, *LOOKING BACK REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA* (2000); RICHARD A. WILSON, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* (2001); Daniel J. Hendy, *Is a Truth Commission the Solution to Restoring Peace in Post-Conflict Iraq?*, 20 OHIO ST. J. ON DISP. RESOL. 527 (2005); Richard John Galvin, *The Case for a Japanese Truth Commission Covering World War II Era Japanese War Crimes*, 11 TUL. J. INT’L & COMP. L. 59 (2003); Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 LAW & CONTEMP. PROBS. 81 (1996); Margaret Popkin, *The Salvadoran Truth Commission and the Search for Justice*, 15 CRIM. L.F. 105 (2004); Michael P. Scharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. COMP. & INT’L L. 375 (1997); Peter A. Schey, Dinah L. Shelton & Naomi Roht-Arriaza, *Addressing Human Rights Abuses: Truth Commissions and the Value of Amnesty*, 19 WHITTIER L. REV. 325 (1997); Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor*, 95 AM. J. INT’L L. 952 (2001).

15. For a few examples of transitional justice literature about past property rights violations, see RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS 3 (Scott Leckie ed., 2003); Bernadette Atuahene, *From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility*, 60 SMU L. REV. 1419 (2007) [hereinafter Atuahene, *From Reparation to Restoration*]; Bernadette Atuahene, *Property Rights and the Demands of Transformation*, 31 MICH. J. INT’L L. 765 (2010); Bernadette Atuahene, *Things*

In this Article, I explore the effects of past property theft on the current property status quo. The property status quo or property distribution is the existing distribution of property among various racial, ethnic, or religious groups in a society. This status quo is important because property ownership structures group relations. When one group owns a disproportionate amount of property, the resulting asymmetries in social status and economic power can leave weaker groups open to various forms of subordination, which can foster deep resentment that undermines social reconstruction.¹⁶

When transitional states have the political will to address past property theft and promote social reconstruction, the enduring question is: How can a transitional state accomplish these goals? The answer to the question is complex and highly contextual. Thus, in Part I, to isolate the key issues that many countries face, I discuss a hypothetical transitional state called Naiku with a historical record that accentuates the challenges at hand. In Part II, I discuss Naiku's three main options: (1) maintaining the present property status quo, (2) fully or partially returning to a prior property status quo, or (3) creating a new property status quo. In Part III, I argue that when a transitional state is determining the most advantageous option, its decisionmaking process is crucial. A state should decide which option to pursue through an inclusive public dialogue with well-informed participants rather than through a less time-consuming, less costly process involving only elites.

I. THE HYPOTHETICAL NATION OF NAIKU

I have created the hypothetical African state of Naiku to illustrate my argument regarding the redress of past property theft. Three events in Naiku's history radically transformed the country's property allocation, and each one led to a new property status quo. The country is now on the cusp of its fourth potentially transformative event.

Fall Apart: The Illegitimacy of Property Rights in the Context of Past Property Theft, 51 ARIZ. L. REV. 829 (2009) [hereinafter Atuahene, *Things Fall Apart*]; Scott Leckie, *Housing and Property Issues for Refugees and Internally Displaced Persons in the Context of Return: Key Considerations for UNHCR Policy and Practice*, REFUGEE SURV. Q., Iss. 3, 2000, at 5.

16. See Daron Acemoglu & James A. Robinson, *A Theory of Political Transitions*, 91 AM. ECON. REV. 938, 957 (2001) (finding that high levels of inequality between groups in society lead to political instability); Ruth Hall, *A Political Economy of Land Reform in South Africa*, 31 REV. AFR. POL. ECON. 213, 214 (2004) (noting the World Bank's contention that redistributing the land in South Africa was necessary to avert social and political instability); Jaime Crook, Comment, *Promoting Peace and Economic Security in Rwanda Through Fair and Equitable Land Rights*, 94 CAL. L. REV. 1487, 1490 (2006) (arguing that the Rwandan government must further promote equitable land access through land reform to promote peace and stability).

- I. Archeologists have confirmed that the people of the small kingdom of Alim were the first modern humans to occupy the region now known as the country of Naiku. The Alim were farmers who tilled the fertile land. No one owned land, but custom dictated that all had rights to use it according to their needs. Following a sudden boom in the population of the neighboring nation of Alieu, coupled with a severe drought, the people of Alieu ventured out of their occupied territory in 1810 and conquered the Naiku region, bringing the concept of communal land ownership with them. The Alieu murdered the Alim leadership but incorporated the Alim people into the Alieu nation as full citizens with equal rights. Under the Alieu property system, the chief formally owned and controlled all land and gave members of the nation use rights according to each family's needs. In the new Alieu nation, the people of Alim and Alieu lived side-by-side peacefully and intermarried often.
- II. One hundred years later in 1910, the British arrived, vanquished the nation of Alieu, declared Naiku a colony, and claimed sovereignty over Naiku's land. They immediately evicted the natives from 90 percent of the land, divided that land into deeded lots, transferred the lots to British settlers and several members of the Alieu nation who cooperated with the British government, and created a land registry to maintain a record of ownership.¹⁷ The British settlers were economically and politically dominant from this point on.
- III. In 1996, the warriors of Alieu united under the leadership of General Abdeena, ousted the British, and won independence for their people. Abdeena was initially highly respected and hailed as the country's redeemer, but quickly became unpopular because she ruled with a heavy hand and failed to redistribute land as promised. Instead, without paying just compensation and without consent, she expropriated all the deeded lots

17. This situation is similar to that in southern Africa. See Johan van Tooyen & Bongwiwe Njobe-Mbuli, *Access to Land: Selecting the Beneficiaries*, in *AGRICULTURAL LAND REFORM IN SOUTH AFRICA: POLICIES, MARKETS AND MECHANISMS* 461 (van Zyl et al. eds., 1996) ("Land distribution in South Africa is highly skewed. Approximately 87 percent of agricultural land is held by almost 67,000 white farmers and accommodates a total population of 5.3 million. The remaining 71 percent of the population, which is predominantly black, live on 13 percent of the land in high density areas—the former homelands."). The same is true in Namibia and was true in Zimbabwe prior to its tumultuous land reform program in 2002. See Uazuva Kaumbi, *Namibia: The Land is Ours!*, *NEW AFR.* Feb. 2004, at 28 ("[L]ess than 10% of the people own more than 80% of the commercial farmland as a result of colonial theft."); J.S. Juana, *A Quantitative Analysis of Zimbabwe's Land Reform Policy: An Application of Zimbabwe SAM Multipliers*, 45 *AGREKON* 294, 294 (2006) ("During the colonial era, land was distributed on racial lines, with approximately 4,660 large-scale predominantly white commercial farmers owning about 14.8 million hectares and about 6 million black smallholder farmers owning about 16.4 million hectares in mainly low agricultural potential areas.").

distributed by the British in years prior and transferred over 65 percent of these lots to herself, her family, and her political cronies.¹⁸

- IV. In 2009, Abdeena was deposed in a bloodless coup, and soon thereafter a new government took power in Naiku’s first democratic election. Layla was elected president, in large part, based on her promise to transform the property distribution. This political transition placed Naiku on the cusp of the fourth event with the potential to drastically transform its property status quo. Most citizens—both black and white—agreed that the present property distribution was unjust because General Abdeena’s corrupt allocations of property were patently unfair. But, the corrupt transfers of land made by the general were complicated by the fact that, by 2009, the owners had sold 20 percent of the deeded lots to innocent third parties at market prices.

CHRONOLOGY OF LAND OWNERSHIP

| T1 (pre-1810) | T2 (1810) | T3 (1910) | T4 (1996) | T5 (2009) |
|------------------|-----------------------------------|-----------------------------------|--|------------------------------------|
| Alim | Alim & Alieu | British settlers | Independence under General Abdeena | Democracy under Layla |
| | 1 st transformation | 2 nd transformation | 3 rd transformation | 4 th transformation? |

The vast majority of Naiku’s citizens agree that the state must do something about the multiple layers of land dispossession, so there is tremendous political will to transform present property arrangements. Today the population of Naiku is as follows: The Alim and Alieu (who are black) constitute about 80 percent of the population, while the offspring of British settlers (who are white) constitute about 10 percent. An additional 10 percent of the population falls under the category of “other” by either claiming both British and African ancestry or some other ancestry altogether. The economically dominant descendants of the British settlers, backed by the British government, are demanding a return to T3—the property distribution that was

18. General Abdeena’s controversial redistribution of property is similar to what happened in Zimbabwe as a result of its fast-track program. See CRAIG RICHARDSON, *THE COLLAPSE OF ZIMBABWE IN THE WAKE OF THE 2000–2003 LAND REFORMS* (2004); Neil H. Thomas, *Land Reform in Zimbabwe*, 24 *THIRD WORLD Q.* 691, 700–02 (2003); INTERNATIONAL MONETARY FUND COUNTRY REPORT NO. 05/359, *ZIMBABWE: SELECTED ISSUES AND STATISTICAL APPENDIX 13* (2005) (noting that the lack of transparency has made it difficult to determine who benefited from the land reform by presently residing on confiscated farms).

in place just before independence in 1996.¹⁹ Meanwhile, the people of Alim and Alieu—now politically powerful—are demanding a return to T2, the pre-colonial property distribution, or to start anew. A small faction, which traces its ancestry directly back to the Alim, is demanding a return to T1 when the Alim people were the sole inhabitants of Naiku. In the midst of these varied demands and stark uncertainty, one thing is definite: To consolidate the political transition, Layla's government must create an efficient yet fair resolution to the multiple layers of land dispossession that have occurred in Naiku.

T5 is a crossroads for Naiku because the nation has the opportunity to reconcile its past in order to secure its future. There are some constraints, however. A government's freedom to imagine alternatives is bound by the extant but unwritten rules that transitional states (especially resource-deprived transitional states) must follow to gain acceptance into the new globalized economy. If transitional states do not comply with these rules, they will likely experience a decrease in the bilateral, multilateral, and private sector funding necessary for economic development.²⁰ At least one nonnegotiable rule for acceptance in the globalized economy is the commitment to protecting private property rights and promoting free-market democracy. Naiku's newly elected government is aware of this requirement but remains determined to create a property distribution that the vast majority of its citizens view as legitimate.

There are, however, problems with each of Naiku's past property status quos. General Abdeena's 1996 land transfers to herself, her family, and her political cronies at T4 was unquestionably unjust; given the short span of time that has passed since then, this injustice still dominates the society's collective memory. The violent British acquisition of Naiku and the transfer of deeded plots to British settlers and their supporters at T3 were equally illegitimate. Although these events occurred a century ago, the resulting unequal, racially skewed property distribution lasted until 1996 and has been the source of much anger and outrage among the African majority. Consequently, the injustice is fresh in the nation's collective memory and has proven to be an explosive issue in current Naiku politics. The kingdom of Alim's defeat, the massacre of its leaders, and expropriation of its land at T2 were similarly unjust. As a result of the lapse of time between the present and T2 (about two hundred years),

19. See, e.g., Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1710, 1730 (1993) (arguing that in societies structured around principles of white superiority and racial subordination, white privilege can become a quintessential expectation of that society).

20. See Tony Killick, *Conditionality and IMF Flexibility*, in THE IMF, WORLD BANK AND POLICY REFORM 253 (Alberto Paloni & Maurizio Zanardi eds., 2006) (noting that the International Monetary Fund imposes conditions to ensure that member states use funds for policies that are consistent with the IMF's objectives).

these are the only events of dispossession that play a nominal role in the nation's collective memory and are not politically divisive. Given the complicated history of dispossession and its effects on the present state of affairs, Naiku must carefully decide its path at T5.

II. OPTIONS AVAILABLE TO THE NATION OF NAIKU

The state's role in determining ownership patterns is especially pronounced in nations like Naiku where there have been multiple layers of property dispossession that have created multiple potentially legitimate claims to the same plots of land. In transitional states, the government's decision to address or ignore past property theft determines who will be considered the legitimate owner of each plot. Naiku's government has three possible courses of action at T5: (1) maintaining the present property status quo, (2) fully or partially returning to a prior property status quo, or (3) creating a new property status quo altogether.

A. Option One: Maintaining the Present Property Status Quo

If Layla's government chooses to maintain the present property status quo, it will look forward and not address the multiple layers of past land dispossession in Naiku. Instead, her government will rely on the market to place resources in the hands of those who will use them most efficiently. From an efficiency standpoint, who initially owns the property is irrelevant because the properties will end up in the hands of those who value them most highly, if transaction costs are low.²¹ Thus, following the examples of Namibia, South Africa, and Zimbabwe in their transitions to democracy, Naiku can allow current trade and investment to continue unencumbered by giving current landowners clear title to their property despite how it was acquired.²²

Maintaining the present property status quo ensures that investment and trade are not attenuated by protecting existing investment-backed expectations, including the expectation that innocent third parties who bought property during T4 at market rates will retain rights to that property without fear of expropriation. This option also requires the least bureaucratic intervention, consequently making it the least vulnerable to government failure, which "arises when government has created inefficiencies because it should not have

21. See RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 6 (2001) ("The 'Coase Theorem' holds that where market transaction costs are zero, the law's initial assignment of rights is irrelevant to efficiency, since if the assignment is inefficient the parties will rectify it by a corrective transaction.").

22. A.J. Van Der Walt, *The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation*, in *PROPERTY AND THE CONSTITUTION* 109, 111–12 (Janet McLean ed., 1999).

intervened in the first place or when it could have solved a given problem or set of problems more efficiently.”²³

One central flaw is that maintaining the present status quo legally legitimizes a patently unfair land distribution. Before General Abdeena was deposed, she titled a vast amount of land to herself, her family, and her political cronies; consequently, the vast majority of citizens view present-day ownership patterns as illegitimate. Most importantly, this commonly held view of the current property distribution has engendered a great amount of societal resentment and anger. Layla’s government must ensure that this discontent is channeled in an orderly manner through existing social, legal, and political institutions; otherwise, the country risks economic-based political turmoil.²⁴ Even if maintaining the current status quo is the most economically efficient option, Layla’s government should choose a different option to avoid economic-based political turmoil.²⁵

B. Option Two: Fully or Partially Returning to a Prior Property Status Quo

The second option Naiku has at T5 is to fully or partially return to a prior property status quo by taking the present property distribution as a starting point and using its powers of eminent domain to make land available for return to past owners.²⁶ If significant time has passed, and the state can no longer identify the beneficiaries of past unjust transfers, then it must provide the funds to purchase property from its general coffers. If, however, the beneficiaries of past unjust transfers are readily identifiable, the state can require them to fully or partially finance the return of property.²⁷

23. CLIFFORD WINSTON, GOVERNMENT FAILURE VERSUS MARKET FAILURE: MICROECONOMICS POLICY RESEARCH AND GOVERNMENT PERFORMANCE 2–3 (2006).

24. For a detailed discussion of disobedience resulting from past property theft, see Atuahene, *Things Fall Apart*, *supra* note 15.

25. See Mark J. Roe, Essay, *Backlash*, 98 COLUM. L. REV. 217, 217 (1998) (“Voters may see market arrangements as unfair, leading them to lash back and disrupt otherwise efficient arrangements. To quell this backlash, inefficient legal structures may arise and survive, despite the fact that they could not withstand a normal efficiency critique. The prospect of backlash—or of strategically tempering otherwise efficient rules and institutions to finesse away a more destructive backlash—complicates a law and economics inquiry.”).

26. This is the decision that the South African transitional government made. See Matthew Chaskalson, *Stumbling Towards Section 28: Negotiations Over the Protection of Property Rights in the Interim Constitution*, 11 S. AFR. J. HUM. RTS. 222, 229–38 (1995) (providing an insider’s view of the pre-liberation negotiation that led to the constitutional property clause, which protected existing property rights).

27. This is what happened in the Netherlands after World War II. See Wouter Veraart, ‘Reasonableness’ or Strict Law? *The Postwar Restitution of Property Rights in the Netherlands and in France (1945–1952)*, in YAD VASHEM—THE INTERNATIONAL CONFERENCE ON CONFRONTING HISTORY: THE HISTORICAL COMMISSIONS OF INQUIRY (2002) (on file with UCLA Law Review) (noting that the strict restitution law in France made it easier for former owners of property to get their land

To implement this option, Naiku can use two types of redistributive programs: reparations or restoration. Reparations programs are designed to vindicate past property rights.²⁸ In a reparations program, if property was confiscated unjustly, then the dispossessed have a window of time to file claims. These claims are vetted through a judicial or administrative process to determine whether compensation is warranted. A defining feature of reparations programs is that the beneficiaries do not have a great deal of choice in what they receive; they usually receive either land restitution or money as compensation.

Restoration is also a specific type of redistributive program designed to vindicate a past property right.²⁹ As with reparations, the state determines the process for accepting, validating, and paying restoration claims, but restoration is distinct from reparations on two counts. The first point of distinction concerns who is eligible to become a beneficiary. In a restoration program, beneficiaries must be subject to property-induced invisibility in order to qualify. As I have previously argued,³⁰ in certain situations, dispossession involves more than the confiscation of property; it involves the removal of an individual or community from the social contract. I call this property-induced invisibility and use the work of John Locke, Carole Pateman, and Charles Mills to provide a clear definition.³¹

Property-induced invisibility is defined as:

the widespread or systematic confiscation or destruction of real property with no payment of just compensation executed such that dehumanization occurs; the act is perpetrated by the state or other prevailing power structure(s), and adversely affects powerless people or people made powerless by the act such that they are effectively left economically vulnerable and dependent on the state to satisfy their basic needs.³²

For example, if a colonial government impoverished my father by confiscating his property during T3 and subjected him to property-induced invisibility, he would qualify for compensation. But, if my father has passed away and my siblings and I have become well-off, then we would not qualify for compensation

back because the judge was obliged to acknowledge the nullity of any transaction of property performed after the original owner had lost his right to dispose of it, meaning that all the transactions performed by so-called administrators were null and void and had to be undone). Southern Africa does not have this luxury because the identity of wrongdoers is not as clear as it was in the Netherlands due to the passage of time between the wrongful act and rectification.

28. See generally Emma Coleman Jordan, *The Non-Monetary Value of Reparations Rhetoric*, 6 AFR.-AM. L. & POL'Y REP. 21 (2004) (discussing the importance of reparations for black Americans and potential challenges to reparations).

29. See Atuahene, *From Reparation to Restoration*, *supra* note 15.

30. *Id.*

31. *Id.*

32. *Id.*

from the state because we do not meet the last condition of restoration: We are not economically vulnerable and dependent on the state to meet our basic needs. In contrast, under the reparations paradigm, the current financial position of the dispossessed person or her descendants is irrelevant, so my siblings and I would qualify for compensation despite our elevated socioeconomic standing.

The second point of distinction between reparations and restoration programs is what the beneficiaries receive. When the confiscation of a community's or individual's property causes property-induced invisibility, the state's objective should not be simply to compensate them for the stolen property; the need is more profound. The state's objectives should be to bring them into the social contract, to restore their visibility, and to affirm their humanity. A state can accomplish these objectives by giving the dispossessed a choice.³³ It is important to allow those subject to property-induced invisibility to participate in determining their compensation in order to give them control over the terms of their reentry into the body politic and affirm their humanity. The choices may include: the return of the confiscated property; the grant of alternative property if the original property is no longer available; financial compensation; or a variety of in-kind benefits, such as subsidized credit, free higher education or vocational training for two generations, or urban housing rights.³⁴ In contrast, the focal point of a reparations program is not providing the victim with a choice.

Regardless of whether a state implements a reparations or a restoration program, to return to a prior property status quo, it must surmount six potential roadblocks. The first hurdle involves identification of program beneficiaries. When those who were originally dispossessed have died, it can be difficult to identify who should receive compensation in their stead. Some may argue that once the dispossessed person dies, his or her claims die as well. Others argue that a debt is not extinguished upon death. Instead, the debt is owed to the deceased's estate; and so should be the case with debts arising from dispossession. If individuals of Alim and Alieu descent successfully prove that their ancestors were dispossessed during T3, then the heirs of the dispossessed should receive compensation. But, identifying heirs can be extraordinarily difficult when a significant amount of time has passed between the event of

33. *Id.* at 1447–50 & n.102.

34. Unrestricted cash grants will not necessarily be the best form of compensation in the group context. See, e.g., Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 391 (1987) (noting that appropriate reparations might include “[m]oney for education, housing, medical care, food, job training, cultural preservation, recreation and other pressing needs of victim communities [that] will raise the standard of living of victim groups, promoting their survival and participation”).

dispossession and the moment of compensation. With each generation, the number of heirs increases exponentially, and the state will require complicated family trees to identify them.

If the Alim and Alieu community is intact, however, it can make a community claim for compensation.³⁵ This approach is more akin to a living victim making a claim because the community transcends the lives of its individual members and endures through time. The compensation would go to the collective for the betterment of all its members.³⁶ All people of African descent whose ancestors were born in Naiku are part of the Alieu nation that existed at T2. Due to frequent intermarriage, a return to T1 (when the Alim were the sole occupants of the land) would be almost impossible because the Alim are no longer a distinct community.

The second challenge to implementing a reparations or restoration program is obtaining verifiable proof of prior ownership or occupation. Producing a deed or other official written document would be the simplest way to prove ownership or occupation, but there were no deeds in Naiku until the advent of the Europeans at T3. Nevertheless, if the nation of Naiku desires to restore rights in existence prior to T3, it can accept diverse forms of evidence to prove that an individual or community had a right to a particular plot of land, as South Africa did in its land restitution program.³⁷ South Africa relied upon a variety of forms of evidence, including documents in the national archives, physical evidence such as graves or ruins that indicated occupation, and oral evidence such as testimony concerning ownership or occupation from the claimant verified against testimony from other occupants or their descendants who lived nearby.³⁸ But, despite a state's willingness to use diverse forms of evidence, the undeniable reality is that verifying who owned or occupied

35. Mark Everingham & Crystal Jannecke, *Land Restitution and Democratic Citizenship in South Africa*, 32 J. S. AFR. STUD. 545, 548 (2006) (describing the political role of claimant communities in South Africa); Lewis P. Hinchman & Sandra K. Hinchman, *Australia's Judicial Revolution: Aboriginal Land Rights and the Transformation of Liberalism*, 31 POLITY 23, 23–51 (1998) (describing the progressive acceptance of aboriginal land claims on behalf of a community). Adrien K. Wing, *Communitarianism v. Individualism: Constitutionalism in Namibia and South Africa*, 11 WIS. INT'L L.J. 295, 299 (1993) (emphasizing the importance of communitarianism in both South Africa and Namibia).

36. The extensive litigation involving the U.S. cigarette industry is a testament to the fact that uncertainty over the exact identity of victims and their heirs is not an insurmountable barrier. Courts used “[s]tatistical, pro rata distribution of damages” to cure “the problem of indeterminate defendants and indeterminate [victims].” Kaimipono David Wenger, *Causation and Attenuation in the Slavery Reparations Debate*, 40 U.S.F. L. REV. 279, 313 (2006).

37. Interview With Daniel Jacobs, Assistant Dir., Comm'n on the Restitution of Land Rights (Mar. 15, 2008).

38. *Id.*

land becomes more difficult as time passes because, for instance, people who can provide oral evidence to confirm ownership eventually die.

The third hurdle in fully or partially returning to a prior status quo is acknowledging people who never owned anything in the past. Before the state makes a decision to reinstitute a prior property status quo, there must be a national consensus that the previous arrangement was significantly more legitimate than the present one. This consensus will be informed by a nation's memory of the past as kept alive through historical texts, oral traditions, and popular culture. Nevertheless, even if there is a consensus, the prior status quo had various imperfections and those imperfections will be restored. Consequently, restoring a past property status quo can serve to resurrect a former aristocracy and to exclude those who never owned property in the past. Option three, which I discuss in the following Subpart, addresses this concern directly through a full-scale redistribution of wealth. In the alternative, to address the needs of people who are currently poor and have never owned property in the past, a state can implement a restoration or reparations program in concert with significant redistribution effected through the tax and transfer system, as demonstrated in South Africa.³⁹

The fourth challenge to returning to a prior property status quo is the uncertainty that results from using eminent domain. When returning property to prior owners, the state should use eminent domain and pay existing owners just compensation. The determination of just compensation should use the fair market value as the starting point but must also take into consideration factors such as the conditions of acquisition, acquisition price, and any state subsidies from which the owner benefited.⁴⁰ Using eminent domain to restructure

39. STEPHEN GELB, EDGE INST., *INEQUALITY IN SOUTH AFRICA: NATURE, CAUSES AND RESPONSES* 55 (2003), available at http://www.sarpn.org/documents/d0000671/P686-Gelb_Inequality_in_SA.pdf (describing South Africa's social service spending).

40. The fifth hurdle in fully or partially returning to a prior property status quo or creating a new property status quo altogether is this involves government-led redistributive efforts that are highly susceptible to government corruption, inefficiency and ineptitude. See *supra* note 23 and accompanying text. As it stands, transitional states characteristically have weak administrative institutions that are particularly susceptible to corruption, bureaucratic inefficiency, and lack of transparency. The South African Constitution provides that "the amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including: (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation." S. AFR. CONST. 1996 § 25; see also *Ex Parte Former Highland Residents; In Re Ash and Others v. Dep't of Land Affairs* 2000 (2) All SA 26 (LCC) (S. Afr.) (stating that for determining just and equitable compensation, equitable balance required by the constitution will in most cases be best achieved by first determining the market value of the property and then subtracting from or adding to the amount of the market value, as other relevant circumstances may require).

property rights promotes fairness to all groups, including nonindigenous people who immigrated to Naiku in the last one hundred years and at no point benefited from any unjust past land transfers. The downside of using eminent domain is that it can cause uncertainty and dampen investment. Jahangir Saleh notes that “[u]ncertainty of expropriation affects the uncertainty of returns and tends to discourage investment for risk-averse decision makers.”⁴¹ This uncertainty begins when the redistributive program is announced (or when the public believes that it has a high probability of being implemented) and ends when the new owners of the land are determined.⁴² Once the uncertainty ends, trade and investment are no longer affected unless the government does not make a credible promise that the transformation is a one-time ordeal.⁴³

The sixth and most formidable hurdle in returning to a prior property status quo is answering the question: How far back? That is, a reparations or restoration program rectifies property rights violations that occurred during a specific time period, and the state must determine the eligible time period. This is a daunting question for nations like Naiku that have experienced multiple layers of property dispossession. Should Naiku’s program compensate people for property rights violations that occurred from 1910 to 2009 (including only T3 and T4) or from 1996 to 2009 (including only T4)? Or should the state include all violations that have occurred since 1810 (the period encompassing T2, T3, and T4)?

Numerous countries have dealt with these hard questions. In 1994, after the fall of apartheid in South Africa, the new political dispensation contended with apartheid-era land theft by enacting the Land Restitution Act, which instructs the state to compensate individuals and communities for a “right in land or portion of land dispossessed after 19 June 1913 as a result of past

41. Jahangir Saleh, *Property Rights Institutions and Investment* 7 (World Bank Policy Research, Working Paper No. 3311, 2004); see also Stein Holden & Hailu Yohannes, *Land Redistribution, Tenure Insecurity, and Intensity of Production: A Study of Farm Households in Southern Ethiopia*, 78 LAND ECON. 573, 575 (2002) (finding an inverse relationship between the willingness of farmers to invest in long-term improvements on their land and the perception of insecurity based on land reform in flux in Ethiopia).

42. Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 785 (2004) (“If all claims are immediately recognized and announced to the world, then both losers and winners will know the extent of their existing property rights, and they will invest and trade accordingly.”).

43. *Id.* (“As this description suggests, the amount of uncertainty {in investment} is a decision variable. A state can reduce uncertainty by requiring that all claims be filed within six months, as Czechoslovakia did, and by using expedited procedures If all claims are immediately recognized and announced to the world, then both losers and winners will know the extent of their existing property rights, and they will invest and trade accordingly.”).

racially discriminatory laws or practices.”⁴⁴ Similarly, in the Balkans prior to the NATO bombing of the region in 1999, thousands of Kosovo Albanians were forced to flee their homes due to a Serbian-led ethnic-cleansing campaign.⁴⁵ The interim U.N.-led civilian administration (the United Nations Mission in Kosovo or UNMIK) enacted a reparations program that gave any person who was dispossessed of a property right as a result of discrimination between March 23, 1989, and March 24, 1999 a right to restitution in kind or compensation.⁴⁶ In Germany, the government enacted the Law on Settlement of Open Property Questions in September of 1990, which permits return of property that was expropriated by the East German government after 1949 as well as property expropriated by the Nazis between January 30, 1933, and May 8, 1945.⁴⁷

In 1991, the Hungarian government enacted the First Compensation Law for owners subject to Communist-era expropriations;⁴⁸ and in 1992, the government passed the Second Compensation Law, which mandates compensation for Jews dispossessed by Nazi Germany and ethnic Germans expelled from Hungary in the wake of the Nazi retreat.⁴⁹ Australia’s reparations program—instituted by the Aboriginal Land Rights (Northern Territory) Act of 1976—set aside a twenty-year period (1976–1996) during which the state allowed aboriginal people to make a collective property claim to crown land that had been stolen from them during conquest.⁵⁰

Like many countries before it, Naiku must also decide which property violations it will rectify. It can return to the property status quo that existed

44. Restitution of Land Rights Act 22 of 1994, *as amended by* Act 48 of 2003, § 2(1) (S. Afr.); *see also* S. AFR. CONST. 1996 § 25(7) (“A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.”).

45. NOAM CHOMSKY, *ROGUE STATES: THE RULE OF FORCE IN WORLD AFFAIRS* 34 (2000) (describing the situation in Kosovo prior to the NATO bombings).

46. On Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission, U.N. MIK Reg. No. 2000/60, § 2.2 (Oct. 31, 2000).

47. *See* Jessica Heslop & Joel Roberto, *Property Rights in the Unified Germany: A Constitutional, Comparative, and International Legal Analysis*, 11 B.U. INT’L. L.J. 243, 257 (1993).

48. *See generally* ISTVAN POGANY, *EUROPE AND CHANGE: RIGHTING WRONGS IN EASTERN EUROPE* 155–65 (1997) (describing property restitution and compensation schemes in Hungary).

49. *See* Gutiérrez, *supra* note 4, at 130–34.

50. If an aboriginal group was able to prove traditional ownership, it was entitled to receive an inalienable freehold title held by a corporate land trust. *See* Hinchman & Hinchman, *supra* note 35, at 23, 36–37 (stating how the Aboriginal Land Rights (Northern Territory) Act, 1976 (Austl.) was a radical departure from *Milirrpum v. Nabalco Pty. Ltd.* (1971), 17 F.L.R 141, which required an economic attachment to the land in order to make a property claim. Also, most claims were exceedingly difficult to establish, and by the end of the twenty-year period, aboriginal people possessed 43 percent of the northern territory (where 15 percent of the Australian aboriginal population lived)).

at T1, T2, or T3, each of which has its own specific virtues and vices, which I review below.

1. Return to T1 or T2

The most compelling argument for returning to T1 is the principle of first possession: first in time, first in right.⁵¹ The Alim are the first known human inhabitants of the land and are the only group in present-day Naiku to have an indisputable claim to just acquisition. But, an addendum to the first-in-time principle is Locke's labor theory, which posits that being first to occupy is not sufficient to constitute ownership because land ownership results only when labor is mixed with the land.⁵² Under Locke's labor theory, the Alim owned, and thus only have a potential claim to, lands that were under cultivation or being used in other productive ways. Similarly, the virtue of returning to T2 is that at T2, both the Alim and Alieu occupied the land on an equitable basis because the chief distributed land fairly according to each family's needs.

There are, however, specific obstacles to returning to T1. It has been about two hundred years since the Alim exclusively inhabited Naiku in T1 and just less than one hundred years since the Alieu nation ruled in T2. Due to consistent intermarriage, the two communities are no longer distinct, so returning to T1 is logistically impossible. But, since the Alieu community endures, a community claim is appropriate, and all present members would benefit from the compensation distributed by Layla's government. In contrast, with individual or family claims (or claims of an extinct community), the original claimants are deceased, so the beneficiaries are their heirs, who are potentially numerous and difficult to locate. Consequently, given the significant passage of time, a return to T2 is logistically possible only because the Alieu nation is a surviving, functional entity that can identify its members and distribute compensation for the betterment of all.

Even if a return to T1 were logistically possible, it is not clear whether it would be a morally appropriate solution. Jeremy Waldron's supersession thesis argues that circumstances change such that what was rightfully owned at one

51. See, e.g., JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 3 (5th ed. 2002) (discussing acquisition of property by first possession or "[f]irst come, first served."). See generally Lawrence Berger, *An Analysis of the Doctrine That "First in Time Is First in Right"*, 64 *NEB. L. REV.* 349 (1985) (discussing first possession as the dominant method of establishing property rights and its continued relevance, and examining cases in which first possession is the dominant rule).

52. See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 18 (C.B. Macpherson ed., Hackett Publishing 1980) (1690).

point may not be rightfully owned at a later time.⁵³ He reasons, for example, that if someone steals another person's car, this is a continuing injustice, so compensation provided for the car is not meant to rectify something that happened in the past, but rather to address a present ongoing injustice.⁵⁴

Waldron tempers his claim by acknowledging that various circumstances erode even continuing entitlements. Consider, for instance, two communities—M and O. Each community has its own water source; thus, M has a moral right to exclude O from using M's water source, and O has a moral right to exclude M from use of O's water source. But if a drought dries up M's water source, then O no longer has a moral right to exclude M because the exclusion could lead to mass suffering and death in the M community. Even if M invaded O's waterhole by force prior to the drought, once M's water source has dried up, M has a moral right to continue using O's well because it is immoral to deprive someone of something necessary for her survival. Consequently, the initial injustice perpetrated against O (that is, the invasion) is superseded by circumstance (the drought).⁵⁵ In the case of Naiku, the Alim owned land at T1, a time of plenty. At T2, drought and population explosion caused land scarcity—the impetus behind the Alieu nation's attack on the Alim in 1810. Thus, according to the supersession thesis, subsequent circumstances superseded and morally justified the Alieu's use of Alim lands. According to the supersession thesis, returning to the property status quo at T1 and making the Alim the exclusive beneficiaries of the reparations or restoration program would therefore be morally unjust.

Returning to T2 also has its problems, namely evolving land ownership systems. In Naiku, land was not owned individually in fee simple until T3 when the British arrived, divided the land, and deeded each plot. Under the Alieu nation at T2, the chief owned all the land and parceled it out to his subjects according to their needs. The system introduced by the British, however, persists today, so a return to T2 would be problematic because a

53. Jeremy Waldron, *Settlement, Return, and the Supersession Thesis*, 5 THEORETICAL INQUIRIES L. 237, 245 (2004) (“[I]n certain sequences of circumstances, dispossession may not continue to count as an injustice even though the events that led to it undoubtedly were an injustice. And if the dispossession does not continue to count as an injustice, then reversion cannot be conceived as an appropriate remedy.”).

54. See *id.* at 246 (“Justice may make reference to the past, through principles of desert and Lockean entitlement; but its primary focus is on the present—present-day people, present-day resources—and on the circumstances of the present inasmuch as they affect who should get what.”).

55. See Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 23 (1992) (“If, for example, P acquires an oasis in conditions of plenty, she acquires (i) a right to use it freely and exclude others from its use so long as water remains plentiful in the territory, and (ii) a duty to share it with others on some fair basis if ever water becomes scarce. The right that is (permanently) acquired. . . is thus circumstantially sensitive in the actions it licenses.”).

different land ownership structure existed then. One way to reconcile the different land ownership systems would be to treat occupancy rights at T2 as ownership rights in fee simple for purposes of the restoration or reparations program.⁵⁶ This is what the South African state did in its reparations efforts, for example.

2. Return to T3

A return to T3 is the most logistically feasible option if the state intends to compensate individuals rather than groups. When the British arrived in 1910, they introduced a property system based on written deeds and a land registry system. Therefore, determining who owned which parcel of land after T3 would not be nearly as challenging as returning to the period before British conquest. Also, since British settlers were dispossessed in 1996, concerns about identifying who should receive compensation are attenuated because most owners are still alive; if they are not, it will be simpler to track down their heirs than the heirs of those who passed away one hundred or more years ago.

The primary downside of returning to T3 is the unfairness of the extant property distribution. T3 marked the advent of colonialism, which forced Africans into economic and political subordination. Returning to T3 would ignore the injustices of colonialism, cement the consequent illegitimate economic gains accrued by whites, and likely erect a permanent color hierarchy in Naiku. Most importantly, the African majority could resist (if not violently rebel against) a return to T3 because that property status quo was unfair and illegitimate. Leonid Polishchuk argues that “if private property rights are not sufficiently broadly recognized in the society as legitimate and fair, it makes the property rights regime unstable. This instability precludes efficient relocation of assets, and as a result expected efficiency gains of private ownership fail to materialize.”⁵⁷ If Naiku wants its system of private property to thrive, the option of returning to T3 is not feasible.

56. See South Africa Extension of Security of Tenure Act 62 of 1997 (S. Afr.) (providing that the right in land “may have been established by occupation of the land for a substantial period. It is not limited to a right recognized by law. It is not limited to ownership rights, and it may include certain long-term tenancy rights and other occupational rights”); DEP’T OF LAND AFFAIRS, S. AFR., WHITE PAPER ON SOUTH AFRICAN LAND POLICY (1998).

57. Leonid Polishchuk, *Distribution of Assets and Credibility of Property Rights* (Mar. 2, 2009) (unpublished manuscript on file with author).

C. Option Three: Creating a New Property Status Quo

If implemented correctly, creating a new property status quo has the potential to level the playing field, to equalize wealth, and to promote stability.⁵⁸ The state can implement wealth redistribution through the tax and transfer system or by redistributing real property through land equalization, a concept that I develop in this Subpart.

1. Tax and Transfer

Louis Kaplow and Steven Shavell argue that “redistribution through legal rules offers no advantage over redistribution through the income tax system and typically is less efficient.”⁵⁹ Through the tax and transfer system, the government can broadly reallocate wealth from more financially astute citizens to those with greater financial vulnerability. Redistribution through taxation could include wealth in the form of real, personal, and intangible property, which would allow Naiku to move beyond the narrow problem of land dispossession and to address the larger problem of asset inequality. This is a particularly attractive remedy for nations that have moved from an agrarian-based economy, in which

58. There is a vast body of literature confirming that land reform can increase economic growth and decrease the potential for instability. See SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* (2006); RUSSELL KING, *LAND REFORM: A WORLD SURVEY* (1977); ROY L. PROSTERMAN & JEFFREY M. RIEDINGER, *LAND REFORM AND DEMOCRATIC DEVELOPMENT* (1987); Daron Acemoglu et al., *Reversal of Fortune: Geography and Institutions in the Making of the Modern World Income Distribution*, 117 Q.J. ECON. 1231 (2002); Daron Acemoglu et al., *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369 (2001); Timothy Besley & Robin Burgess, *Land Reform, Poverty Reduction, and Growth: Evidence From India*, 115 Q.J. ECON. 389 (2000); Klaus Deininger & Lyn Squire, *New Ways of Looking at Old Issues*, 57 J. DEV. ECON. 259, 287 (1998); Edmundo Flores, *Issues of Land Reform*, 78 J. POL. ECON. 890 (1970); Herschel I. Grossman, *Production, Appropriation, and Land Reform*, 84 AM. ECON. REV. 705 (1994); T. David Mason, “Take Two Acres and Call Me in the Morning”: Is Land Reform a Prescription for Peasant Unrest?, 60 J. POL. 199 (1998); Karl Ove Moene, *Poverty and Landownership*, 82 AM. ECON. REV. 52 (1992); Edward N. Muller et al., *Land Inequality and Political Violence*, 83 AM. POL. SCI. REV. 577 (1989); Bruce M. Russett, *Inequality and Instability: The Relation of Land Tenure to Politics*, 16 WORLD POL. 442, 453 (1964) (arguing that land reform and stability in underdeveloped countries is a necessary component, though not a guarantee, of political stability); Klaus Deininger & Pedro Olinto, *Asset Distribution, Inequality, and Growth* (World Bank Policy Research Working Paper No. 2375, 2000); Klaus Deininger & Songqing Jin, *Land Rental Markets as an Alternative to Government Reallocation?: Equity and Efficiency Considerations in the Chinese Land Tenure System* 22 (World Bank Policy Research Working Paper No. 2930, 2002); Klaus Deininger, Songqing Jin & Hari K. Nagarajan, *Land Reforms, Poverty Reduction, and Economic Growth: Evidence From India 1* (World Bank Policy Research Working Paper No. 4448, 2007).

59. Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667 (1994).

access to land is vital, to an industry- or services-based economy, in which access to land is less important.⁶⁰

Taxation is not a perfect solution, however. First, many transitional states have weak tax bureaucracies that are not effectively able to collect taxes and to transfer them to beneficiaries in the form of cash payments or social programs.⁶¹ Second, higher taxation gives the wealthy an incentive to transfer wealth outside of the country and can dampen the incentives to create wealth domestically.⁶² Third, while a reparations or restoration program mandates a one-time asset transfer to beneficiaries, tax and transfer programs redistribute wealth gradually, leaving beneficiaries vulnerable to changing political winds over time.⁶³ Layla's government has an incentive to announce a substantial tax and transfer program to quell present discontent concerning land inequality. But, while her political administration may be genuinely committed to correcting past wrongs using redistributive programs, future administrations may neglect such programs or cancel them altogether.⁶⁴

This is the problem of time inconsistency: A present promise of future performance will not necessarily be honored. Time inconsistency is more likely to be a problem when beneficiaries constitute a politically powerless group because they cannot use the political system to influence future administrations to continue tax and transfer programs. But, problems associated with time inconsistency can even affect politically powerful groups like the Alieu in certain instances. For example, in some countries, international economic organizations, such as the International Monetary Fund, pressure local politicians to drastically reduce government spending in order to balance the country's budgets and thereby increase their capacity to repay international loans.⁶⁵ This coercion reduces the amount of funds available for use in the state's redistributive programs.

60. W.W. ROSTOW, *THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO* (3d ed. 1990) (describing the five stages of economic development).

61. See Richard M. Bird & Eric M. Zolt, *Redistribution Via Taxation: The Limited Role of the Personal Income Tax in Developing Countries*, 52 *UCLA L. REV.* 1627 (2005).

62. *Id.* at 1669.

63. Robin Broadway, Nicolas Marceau & Maurice Marchand, *Investment in Education and the Time Inconsistency of Redistributive Tax Policy*, 63 *ECONOMICA* 171, 186–87 (1996) (describing the effects of time inconsistency in redistributive tax policy on education and wealth disparity).

64. See Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 *NYU ANN. SURV. AM. L.* 497, 554 (2003) (discussing the decline in support for affirmative action policies because, with the passage of time, these policies are no longer viewed as a form of reparations for slavery). For further discussion about why affirmative action policies have suffered from time inconsistency, see, for example, BARBARA R. BERGMANN, *IN DEFENSE OF AFFIRMATIVE ACTION* 8 (1996).

65. See James H. Weaver, *What Is Structural Adjustment?*, in *STRUCTURAL ADJUSTMENT: RETROSPECT AND PROSPECT* 8 (Daniel M. Schydlowsky ed., 1995) (“Virtually all IMF agreements have an expenditure reducing component.”).

A fourth problem with taxation is that tax and transfer programs will not be sufficient in certain states because the novel attributes of land make its actual transfer essential. In his empirical evaluation of public opinion related to land in South Africa, James Gibson found that “70% . . . of African respondents . . . agreed that ‘Land is special: Having land is more important than having money.’”⁶⁶ Land is special because it often has an unquantifiable cultural value that derives from the key role it plays in individual and group identity. Communities are often spiritually and emotionally tied to the land where their ancestors are buried.⁶⁷ As a result, although a group or individual may have been dispossessed long ago, dispossessed owners can still have a deep cultural connection to particular parcels of land that does not erode with the passage of time. Land is also unique because it is a highly visible sign of wealth; as a result, perceptions about inequality may not shift without the significant transfer of real property.⁶⁸ Additionally, land is special because it is the basis of sovereignty. If an oppressed indigenous majority does not reclaim land that was unjustly dispossessed by its colonizers, political independence can ring hollow.⁶⁹ Finally, in some societies, land is the most important means of production, making access to land the primary way to counteract poverty and marginalization.⁷⁰ Therefore, while some states can address inequality resulting from past land theft through tax and transfer programs, others require land redistribution.

2. Land Redistribution

At T5, the government of Naiku can choose not to pursue a reparations or restoration program and thus dispense with the work of identifying who owned or occupied particular land parcels and the work of locating their heirs. Naiku’s government can instead implement a program to redistribute real property that is not focused on vindicating past rights in land. The objective of land redistribution in Naiku would be to provide greater access to land based

66. See JAMES L. GIBSON, *OVERCOMING HISTORICAL INJUSTICES: LAND RECONCILIATION IN SOUTH AFRICA* 40 (2009).

67. Waldron, *supra* note 55, at 4, 19–20 (qualifying his theory that property rights may fade with time by noting that property rights may not fade when the dispossessed entity is a tribe or community and the land taken is important to that group’s sense of identity).

68. See generally Carol M. Rose, *Crystals and Mud in Property Law*, 40 *STAN. L. REV.* 577 (1988) (discussing the importance we place on property and clear property rules, given the significance of property ownership as a signal of our economic and social standing).

69. See Kaumbi, *supra* note 17, at 28.

70. Moene, *supra* note 58, at 52, 53, 61 (“The amount of land relative to the population and the demand for labor in urban areas are shown to influence strongly the economic and social impact of land redistribution.”).

on an individual's current socioeconomic status or membership in a previously disadvantaged group. For example, in the redistributive prong of South Africa's land reform strategy—the Land Redistribution for Agricultural Development (LRAD) program—a citizen can qualify for a state grant to purchase land if he or she is an adult from a previously disadvantaged group who intends to engage in full-time farming and can contribute a minimum of R5,000 (\$665) towards the acquisition.⁷¹ To secure land for redistribution, the state can either rely on willing sellers to whom the state pays a mutually agreed-upon price, or in the alternative, it can rely on eminent domain. In the latter case, the state determines the amount of just compensation given the circumstances, and the landowner has the right to appeal to the courts if she thinks the amount is inadequate.

Land equalization is a specialized type of land redistribution program that is best suited for societies in which land is a key economic commodity and in which historical injustice has led to multiple ownership claims to the vast majority of the nation's land parcels. It is a way for a society to wipe the land ownership slate clean and start over. Land equalization places individuals and corporations on equal footing without heeding the Marxist call to abolish all private property.

The difference between land equalization and taxation is that the former focuses on the redistribution of land rather than all wealth. In addition, land equalization mitigates time inconsistency concerns by delivering benefits to individuals and communities in a shorter timeframe. The most important difference between land equalization and land redistribution is their respective moral starting points. The starting point for land equalization is that everyone is entitled only to his or her fair share of land. Under land redistribution, the state assumes current owners are entitled to their current land holdings, so to acquire their land, the state must wait for current owners to willingly sell their land, or the state can invoke eminent domain and pay the current owners just compensation.

A system of land equalization in Naiku might look like this: Every citizen who reaches the age of eighteen by a certain date will be allocated a certain number of points, and each point is worth a certain amount of money. The primary caretakers for people under the age of eighteen will qualify for a set amount of additional points per dependent. The government and corporations

71. MINISTRY FOR AGRIC. & LAND AFFAIRS, S. AFR., LAND REDISTRIBUTION FOR AGRICULTURAL DEVELOPMENT: A SUB-PROGRAMME OF THE LAND REDISTRIBUTION PROGRAMME (2000), available at <http://www.sarpn.org.za/documents/e0000008/20010604SibandaAppendix.pdf>. The dollar figures were calculated using an exchange rate of 7.5 to 1.

will also receive predetermined amounts of points. Through a participatory process involving government, civil society, and international experts, Naiku will devise a system by which each parcel of land, both publicly and privately owned, will be assigned a certain number of points based on its value. This determination will account for factors such as the price paid, fair market value, existing improvements, circumstances of acquisition, and the strategic importance of the land. These factors will ensure that land acquired in good faith is treated differently than land that was transferred under dubious circumstances.

Imagine that Naiku decides to allocate 100 points to each citizen. If X presently owns land worth 150 points, then she has two choices. She can either pay for the 50 points that she holds in excess of her 100 point allocation or relinquish her title to land worth 50 points in order to bring her land worth down to 100. In either case, to increase accountability, the money or land would be deposited into an internationally monitored land redistribution account. A corporation should receive points based on its contribution to society (determined by the number of people it formally employs, the amount of money invested in society, etc.); unlike individuals, corporations could not receive money from the redistribution account but would be required to pay into it.⁷²

In contrast, if Y owns land worth 25 points, she can take a cash or an in-kind payment worth 75 points, acquire land worth 75 points, or receive some combination of both from the redistribution account in order to raise her point total to the allocated 100. In-kind payments are crucial to land equalization because the process of choosing from a wide array of viable options makes citizens active agents in the process of transformation.⁷³ All in-kind payment options would have predetermined point allocations and could include things like specialized vocational training, higher education for two generations, priority in an existing housing program, and access to subsidized credit.⁷⁴ The list of in-kind payments would have to be tailored to the abilities of the government and the needs of its people.⁷⁵

The land equalization process would unfold in two rounds. The purpose of the first round would be to build up the redistribution account. Private citizens who own property in excess of 100 points would decide whether to place land or money into the redistribution account, and the government and corporations would place land in excess of their predetermined allocation of points

72. The tradeoff is that this may reduce a corporation's ability to create jobs.

73. See Atuahene, *From Reparation to Restoration*, *supra* note 15, at 1447–50 (arguing that choice plays a large role in making people active agents and restoring their visibility).

74. *Id.* at 1448–49.

75. *Id.* at 1448–50.

into the account as well. In the second round of the process, the state would distribute land, money, and in-kind payments to those with less than 100 points. A national lottery would determine the order in which people spent their points. After the initial allocation of property rights through the point system, there would be no restraints on alienation, so people would then be free to trade at will.

Land equalization's main strength is its potential to reorder the property status quo and to level the playing field.⁷⁶ It is not designed to restore a prior status quo, so those who have never owned land are not excluded from the redistributive program as they are in restoration or reparations programs. A shortcoming shared by both land equalization and land redistribution programs is that wealth accumulated as a result of past land theft can be transferred to non-land-based investments such as securities, thereby achieving land ownership equity, but not asset equity.⁷⁷ Consequently, the state should implement tax and transfer programs alongside land equalization and redistribution programs.

III. THE PROCESS OF CHOOSING FROM THE AVAILABLE OPTIONS

I have discussed the options available to Naiku and other states that have the political will to address past property theft. In this Part, I will argue that the process a state uses to choose between the available options is vitally important. More specifically, I argue that when choosing between options, the state should use a highly participatory process involving a broad swath of the polity because this will increase the perceived and actual legitimacy of the resulting property status quo. As it stands now, groups of elites often decide how states address past theft.

For example, in South Africa's Land Restitution Program, both the decision to compensate only those who were dispossessed of a right in land after 1913, as well as the process the state would use to compensate citizens, were made primarily with the involvement of political parties and experts with limited direct consultation of average citizens.⁷⁸ Likewise, in Kosovo, the decision to provide restitution in-kind or compensation only to persons dispossessed

76. The strengths of land equalization are discussed in Part II.B, *supra*.

77. The downsides of land equalization are enumerated in Part II.B, *supra*.

78. See Restitution of Land Rights Act 22 of 1994, as amended by Act 48 of 2003, §§ 2(1)(b), 2(3), 4 (S. Afr.); Heinz Klug, *Participating in the Design: Constitution-Making in South Africa*, 3 REV. CONST. STUD. 18, 20 (1996).

between March 23, 1989, and March 24, 1999, was made by international actors, with limited involvement of average citizens.⁷⁹

States that limit the participation of average citizens in their decisionmaking processes fail to avail themselves of several advantages of broad participation. First, because one primary purpose of addressing past theft is to increase the legitimacy of the state and present property arrangements, curtailing public participation in the process can place the perceived legitimacy of the program at risk. The evidence shows that people are likely to believe that the outcome of a legal process is legitimate even if it is unfavorable to them, as long as the process involved fair procedures and was conducted by the appropriate authorities;⁸⁰ Tom Tyler and others have proven that “the opportunity to express one’s opinions and arguments, the chance to tell one’s own side of the story, is a potent factor in enhancing the experience of procedural justice, even when the opportunity for expression really accomplishes nothing outside the procedural relationship.”⁸¹

Second, true participation results in the devolution of power to average citizens and hence serves as a check on the power of traditional decisionmakers. For example, if the process is transparent and highly participatory, it is more difficult for program administrators to perform corrupt acts because people have been allowed behind the closed doors and are actively watching. Third, a public conversation can help to ground citizens’ expectations in reality. Some transitional states cannot afford to give everyone compensation, so the public conversation can provide people with information about exactly what resources are available and what programs the state can offer given its limited resources. Fourth, direct citizen participation introduces a unique perspective not available when the decisionmaking process is dominated by elites. A broadly representative group of people is better suited than elites to know the

79. See On Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission, U.N. MIK Reg. No. 2000/60, § 3 (Oct. 31, 2000).

80. See Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 115, 149, 162–64 (1992). See generally JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

81. *Id.*; see also Robert Folger, *Distributive and Procedural Justice: Combined Impact of “Voice” and Improvement on Experienced Inequality*, 35 *J. PERSONALITY & SOC. PSYCHOL.* 108 (1977) (describing an experiment involving distribution of monetary rewards by a manager and finding that, on a measure of procedural fairness, “voice workers” (workers who expressed opinions on fairness) expressed more satisfaction with the allocation process than “mute workers” (workers who gave no statements of their opinions)); Stephen LaTour, *Determinants of Participant and Observer Satisfaction With Adversary and Inquisitorial Modes of Adjudication*, 36 *J. PERSONALITY & SOC. PSYCHOL.* 1531 (1978) (finding that the satisfaction with an adjudicative procedure was impacted by procedural fairness and the opportunity for presentation of all relevant information to the decisionmaker).

population's preferences. Lastly, democracy is strengthened when people participate in deciding issues that directly affect them.⁸²

When states decide to address past theft through an inclusive, highly participatory process, they must be ready to navigate around several potential pitfalls. First, the process can become time-consuming given the number of people who should be involved and the challenges of synthesizing the information received. But, by investing time in participatory procedures on the front end, the state can receive the dividends in the form of increased legitimacy at the back end.⁸³ Second, meaningful public participation requires significant resources that many cash-strapped transitional states cannot provide. Thus, it is crucial for states to involve civil society and international organizations in managing the process, which can reduce state expenditures and increase transparency. A third potential drawback of a highly participatory process is the difficulty of facilitating a conversation that adequately balances participation and deliberation precisely because participation has the potential to undermine deliberation. A common solution to the deliberation-participation paradox is for the organizing entity to choose community representatives.⁸⁴ But, there is no guarantee that the people the entity chooses will be accountable to, or representative of, the larger public.

Fourth, a public conversation about past property theft could serve to inflame extant divisions and ethnic- or religious-based hatred lurking just below the surface. But, it is not necessarily bad that talking about past injustices has the potential to cause latent animosities to boil up to the surface, so long as the conversation leads to a solution that will assuage the ethnic rancor moving forward. Fifth, the very concern a public conversation is intended to address—a lack of legitimacy—may prevent people from participating in the decisionmaking process. If people are discontent because of an illegitimate property distribution, this could result in apathy and disengagement rather than a determination to find a solution. Lastly, and most problematically, even if a state manages to facilitate a meaningful public conversation, there is no guarantee that the output of the conversation will affect the ultimate decision. The entire process can devolve into a propaganda campaign designed to give the illusion of power sharing when in actuality the state is carrying on with

82. See CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 31 (1970).

83. *Id.* at 60–61 (citing the Port Townsend Terminal case and the time and money the government lost by only consulting organized groups and excluding others). For a discussion about participatory procedures, see Atuahene, *Things Fall Apart*, *supra* note 15, at 829, 859–65.

84. Bruce W. McClendon & J.A. Lewis, *Goals for Corpus Christi: Citizen Participation in Planning*, 74 NAT'L CIVIC REV. 72 (1985).

business as usual, and the decisions are being made by those in power with no regard for what average citizens desire.⁸⁵

While the importance of involving the public in the political decisionmaking process is largely undisputed in the literature,⁸⁶ the level of control the public should have in the decisionmaking process is a very controversial matter. At the very basic level of participation, power holders aim to educate the public about options, rights, and responsibilities, but information flows in one direction.⁸⁷ This is not true participation. A moderate participation level involves token participation from certain stakeholders who are informed or consulted, but the present power holders are not forced or inclined to truly integrate the knowledge and suggestions of these participants.⁸⁸ Alternatively, a few handpicked citizens who are not accountable to their communities may be invited to join a decisionmaking body. In both situations, the community has no true opportunity to decide. A high participation level is achieved when participants exercise a significant amount of control over both the process and outcome;⁸⁹ this is the type of public participation envisioned in this Article.

To achieve a high participation level, a state must use a bottom-up approach for defining the relevant public groups, which may include stakeholders such as political parties, bureaucrats, community organizations, average citizens, and experts.⁹⁰ To ensure significant buy-in, the state must include both organized groups and citizens not affiliated with particular groups.⁹¹ The end goal is to make the final decision about how to address past property violations in collaboration with a diverse, representative group of citizens.

85. Cheryl Simrell King, Kathryn M. Feltey & Bridget O'Neill Susel, *The Question of Participation: Toward Authentic Public Participation in Public Administration*, 58 PUBLIC ADMIN. REV. 317, 322 (1998) (using focus groups in northeast Ohio—comprised of administrators and citizens—to examine the perceived effectiveness of attempts to incorporate public participation in administrative decisionmaking).

86. See Ortwin Renn et al., *Public Participation in Decision Making: A Three-Step Procedure*, 26 POL'Y SCI. 189 (1993).

87. See Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. PLANNING ASS'N 216, 217–18 (1969).

88. *Id.* at 217, 219–20.

89. *Id.* at 217, 221–23.

90. See JOHN CLAYTON THOMAS, PUBLIC PARTICIPATION IN PUBLIC DECISIONS: NEW SKILLS AND STRATEGIES FOR PUBLIC MANAGERS 61–62 (1995) (noting how the state must not choose to engage only certain groups while excluding others with contrary views).

91. Before inviting organized groups, however, the state must explore how democratic each group is and whom each one represents. See Walter A. Rosenbaum, *The Paradoxes of Public Participation*, 8 ADMIN. & SOC'Y 355, 372 (1976) (“An almost universal finding in participation studies is that groups or individuals active in such programs (1) represent organized interests likely to have been previously active in agency affairs, (2) include a large component of spokesmen for other government agencies, (3) represent a rather limited range of potential publics affected by programs, and (4) tend toward the well-educated, affluent middle- to upper-class individuals.”).

CONCLUSION

One of the most important issues facing transitional states is what they should do about past property violations. There is, however, a paucity of scholarship that explores the options a transitional state has. I examined the potential courses of action for a hypothetical country called Naiku in order to highlight the challenges many transitional states confront. Countries like Naiku, with the political will to address past land theft, have three options: (1) maintaining the present property status quo, (2) fully or partially returning to a prior property status quo, or (3) creating a new property status quo altogether. The main conclusion of this Article is that no matter which option a transitional state chooses, its decisionmaking process is crucial. Ensuring legitimacy and lasting results requires a well-informed, inclusive public dialogue rather than a less time-consuming, less costly process involving only elites.

For example, a state may decide to maintain the current property status quo because it does not have the bureaucratic capacity to redistribute property. While this is an important decision, what is more important is the participatory nature of the decisionmaking process. If the property status quo has been sullied by asset-based inequalities resulting, in large part, from past land dispossession, then a top-down decision not to reorder property arrangements can result in widespread resentment and feelings of injustice. In contrast, if the decision is a result of a highly inclusive, public dialogue, studies show that the population will likely perceive it as just.⁹²

In sum, this Article aims to further the literature about how transitional states can deal with past property violations. While I created the nation of Naiku to streamline the discussion, the problems that Naiku faces are very real and deserve further intellectual inquiry.

92. Tyler & Lind, *supra* note 80, at 162–64.