

Chicago-Kent College of Law

From the Selected Works of Bernadette Atuahene

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**“PROPERTY RIGHTS AND THE
DEMANDS OF TRANSFORMATION”**



Bernadette Atuahene

Bernadette Atuahene is a member of the faculty of Chicago-Kent College of Law, and has been a Faculty Fellow at the American Bar Foundation since 2007. She holds a J.D. from Yale Law School, and a Master's in Public Administration from the John F. Kennedy School of Government at Harvard University. After receiving her law degree, Atuahene was awarded a Fulbright Scholarship to work and study in South Africa, where she served as a judicial clerk at the Constitutional Court of South Africa, working for Justices Madala and Ngcobo.

At Chicago-Kent, Professor Atuahene teaches Law, Policy and International Development; Property; and International Business Transactions. Professor Atuahene has published widely on the topic of the confiscation and restitution of property, with a particular focus on South Africa. In 2008 she was awarded the Council on International Affairs Fellowship, and worked with the South African Director General of Land Affairs and his staff. She is currently writing a book about the Land Restitution Program, which is based upon 150 interviews she conducted with the program's beneficiaries. Atuahene is also producing and directing a documentary film on the struggles of one South African family to reclaim their land. Professor Atuahene has been named Fellow for the 2011-12 academic year in the Program in Law and Public Affairs at Princeton University.

Property Rights & the Demands of Transformation

In 1994 South Africa held its first free democratic elections, with victory going to the African National Congress, the party that had struggled for decades for African liberation from the Apartheid system.

Under the leadership of Nelson Mandela, the new government faced many pressing social and political issues stemming from the Apartheid past, among them the inequitable distribution of land among the nation's population. As a direct result of racist government policies and practices of the past—most notably the forcible and systematic displacement and dispossession of black landowners—the vast majority of the nation's land mass was owned by the white minority. After its election, the new government spent two years negotiating the terms of a new constitution that specifically called for land reform to address this

legacy. Yet, reform has proceeded at a glacial pace, leading to such levels of disillusionment and frustration among the black majority today that, some commentators suggest, the stability of the state may be threatened.

In a new article, “Property Rights and the Demands of Transformation,” ABF Faculty Fellow Bernadette Atuahene addresses this situation and the questions it provokes. In particular, she analyzes the basis for the current system of property law in South Africa — the “classical conception” — and asks “for states where past property dispossession has the serious potential to cause backlash and destabilize the current state, is the classical conception appropriate or do these states require an alternative conception of property?” Atuahene argues that the defining principles of the classical conception of property, especially the almost total control of property it grants to owners, are the very features that impede fair, orderly, and timely land reform in South Africa. Alternately, in this paper, Atuahene develops “a transformative conception of real property that facilitates property redistribution, which bolsters fairness and stability.” This new conception may be justified in situations where the long-term frustrations of the unjustly dispossessed majority threaten state stability, Atuahene argues. In such situations a time-limited application of property law informed by the transformative conception may

create optimal conditions for just and timely land reform.

THE LEGACY OF PAST PROPERTY THEFT AND THE PROMISE OF LAND REFORM

The history of South Africa is marked by systematic thefts of native lands by white colonial powers.

“Under the Natives Lands Act, black land ownership was restricted to certain areas of the country, which totaled only seven percent of the landmass.”

The British and Dutch violently dispossessed natives of their land both as a means of distributing it to white settlers and as a way to destroy African self-sufficiency and “to create a surplus of cheap labor to work on white-owned farms and mines,” Atuahene states. The system of land confiscation continued after the Second Boer War, when in 1913 the

newly formed Union of South Africa passed the Native Lands Act. Under the Natives Lands Act, black land ownership was restricted to certain areas of the country, which totaled only seven percent of the landmass; consequently, more blacks were forcibly removed from their land. Apartheid became official government policy in 1948, and displacements and dispossessions continued through the 1980s. As Atuahene explains, as a consequence of this history, “today upwards of eighty percent of commercial farmland in the region is owned by whites, who constitute less than ten percent of the population.”

The Apartheid system began to break down in the late 1980s and early 90s as the government undertook negotiations with the opposition African National Congress (ANC) under the leadership of Nelson Mandela. In 1994, “in exchange for political independence, the African liberation parties agreed to allow present owners to keep their property and maintain their jobs despite past injustices,” Atuahene explains. This “liberation bargain” also included the promise of future land reform, with the proviso that any future reform would respect current property rights. As Atuahene notes, “in this bargain, the white minority secured valid legal title to substantial assets while dispossessed African communities received a promise of land reform.”

The promise of land reform is enshrined in Chapter 2 of the Constitution of the Republic of South Africa (1996) in the following Sections:

- **25.5:** The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- **25.6:** A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- **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.
- **25.9:** Parliament must enact the legislation referred to in subsection (6).

But land reform has not happened in a timely fashion. More than fifteen years after the end of Apartheid less than seven percent of land has been redistributed and

few dispossessed blacks have been compensated in any way.

PROPERTY-RELATED BACKLASH : THE CASE OF ZIMBABWE

The slow pace of land reform may result in very serious consequences for South Africa, Atuahene warns.

“Today upwards of eighty percent of commercial farmland in the region is owned by whites, who constitute less than ten percent of the population.”

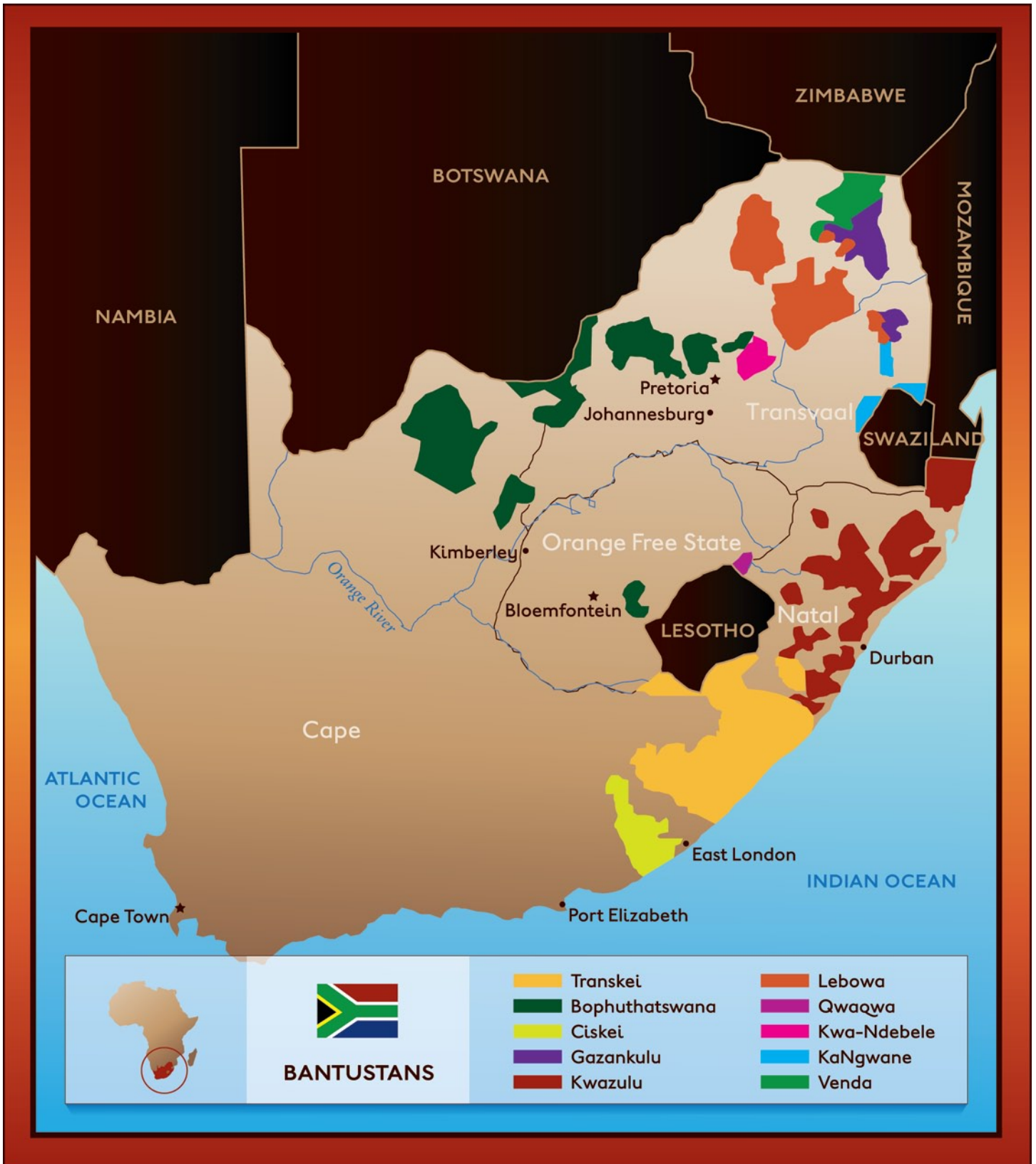
With a history of past property theft and no compensation, she explains, the majority of the population “is likely to perceive the existing property distribution as illegitimate and this perception can serve as the basis for property disobedience and backlash,” and consequent instability of the state. In South Africa, Atuahene comments, “if past property theft is not addressed in a timely fashion, the

possibility of severe backlash is high. The world has already witnessed this possibility realized in Zimbabwe.”

In post-colonial Zimbabwe, land reform did not follow the rule of law. The colonial system in Zimbabwe resulted in whites owning more than eighty percent of the country’s fertile agricultural land at the time of independence. After independence and the election of president Robert Mugabe, several unsuccessful attempts were made to redistribute property, resulting in great frustration amongst the landless black population. Finally, as Atuahene reports, “in a desperate attempt to rapidly deliver on the promise of land reform and to retain power, Mugabe’s government supported a hasty and violent land reform program in 2000.” The chaotic, corrupt, and sometimes bloody process came at an enormous cost to Zimbabwe’s once prosperous economy: by 2005 agricultural output had declined by thirty percent; the average annual GDP growth from 2000 to 2006 was negative 5.6% and inflation became rampant.

RISING FRUSTRATION AND THREATS TO STATE STABILITY— A MOMENT OF INTEREST CONVERGENCE

Atuahene cites the work of political scientist James Gibson to bolster her argument that landless black South Africans are becoming



The Republic of South Africa, showing the distribution of land until 1994. Colored areas represent bantustans (homelands) to which the black population was confined under the Natives Lands Act. Today the property distribution has changed little, despite more than 15 years of land reform.

increasingly outraged at the slow pace of land reform. Gibson conducted a public opinion survey, published in 2009 that found that, of the 3,700 South Africans surveyed, eighty-five percent of black respondents believe that “most land in South Africa was taken unfairly by white settlers, and they therefore have no right to the land today. By contrast, only eight percent of whites held the same view.” Gibson also found that two out of three blacks agreed “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.” Ninety-one percent of whites disagreed with this statement. Gibson concludes: “land issues have all of the characteristics required to become volatile and destabilizing, should effective political leadership emerge to mobilize the discontented.”

Atuahene argues that the social and economic costs of maintaining the status quo are so high, and the threat of destabilization so great, that the current situation creates a “unique moment of interest convergence, where opponents and supporters of redistribution are most likely to work together to pursue a common goal—stability.” Though reparations should be enacted on moral grounds, Atuahene comments, in practice this often does not occur. However, as a practical measure, opposing parties may come together to enact a time-

ly and transparent reform when the stability of the state is at risk.

“More than fifteen years after the end of Apartheid less than seven percent of land has been redistributed and few dispossessed blacks have been compensated in any way.”

THE CLASSICAL CONCEPTION OF PROPERTY AND ITS IMPACT ON LAND REFORM

In the years since liberation, “although only one side of the liberation bargain has been upheld” the government of South Africa has “honored the bargain and thereby ensured its legitimacy.” How then, to resolve a situation where current landowners have valid title, the government is committed to upholding landowners’ rights, but the need for land reform is urgent? Atuahene argues that the prevailing conception of property in South Africa that undergirds current law—the “classical conception”—creates legal obstacles that impede just,

efficient, and effective land reform. With land reform imperative not only for fulfilling the demands of the Constitution, but also for state stability, Atuahene proposes the time-limited adoption of a new “transformative” conception of real property. She develops the transformative conception after first analyzing the components of the classical conception of property and their impact on land reform.

Under the classical conception owner control of property is very highly valued. Atuahene further explains the classical conception by listing four of its principles. Under the classical conception, she states, an owner must:

- 1) acquire valid legal title through individual efforts to become the sole owner with consolidated rights;
- 2) possess near absolute control over the use and transfer of her property so long as it does not cause significant harm to anyone else;
- 3) rely upon the state to defend her rights against third parties who attempt to infringe upon this control while deemphasizing her duties to third parties; and,
- 4) expect that the state or other third parties will bear the burden of justifying any actions that attenuate her control of the property.

Atuahene first analyzes the underpinnings of the state's land restitution program. As she states, "South Africa's implementation of its constitution's land restitution provision is a prime example of the classical conception at work."

“How then, to resolve a situation where current landowners have valid title, the government is committed to upholding landowners' rights, but the need for land reform is urgent?”

Land restitution, one of three prongs in South Africa's land reform policy (the others are land tenure reform and land redistribution), "compensates individuals and communities whose land was expropriated by past governments." Restitution specifically addresses Chapter 2, Section 25.7 of the South African Constitution, mentioned above. As Atuahene points out, however, there

are problems with the government's enactment of restitution programs. For example, when compensation has been paid, the compensation has been symbolic and "did not reflect the market value of the property at the time of confiscation or the present." The government has cited budget constraints as the reason for small payments to claimants; however when the government has purchased land from whites through eminent domain for the purpose of redistribution or restitution, it has paid owners fair market value, despite budget constraints, Atuahene notes.

Atuahene argues that white owners in these eminent domain cases are given fair market value for their property while dispossessed blacks receive smaller symbolic payments because:

the government is giving existing owners' rights more value than the rights of dispossessed individuals and communities. This is because the state is working within a conceptual framework that assumes current owners acquired valid legal title through their individual efforts to become the exclusive, deserving owners...The framework dismisses the possibility that current owners acquired their property unjustly; and it also ignores the rights of owners unjustly dispossessed. Most importantly, the framework

overlooks the duties present owners may have to dispossessed populations with valid ownership claims. Thus, despite the transformative potential of Section 25.7, the classical conception is the framework that has informed the government's decisions and determined the outcomes.

In most cases, however, the South African government has avoided using eminent domain, engaging instead in negotiated land reform, which is based on the willing-seller/willing buyer principle. But, again, negotiated land reform also is shaped by the classical conception of property, where "owners have near absolute power to decide to whom, at what price, and on what terms they will sell their land." This, despite the fact, Atuahene argues, "that expeditious land reform is necessary to address past injustice and avert backlash."

Atuahene explains that while the black majority who favors increased use of eminent domain has significant electoral power, "those lobbying for negotiated land reform have immense economic power." South Africa is dependent upon foreign assistance and investment to finance its land reform program. World Bank economists advise against eminent domain and for negotiated land reform, and their example sets the tone "for what other foreign donors and inves-

tors view as acceptable land reform policies,” according to Atuahene. Because of these circumstances, “the ANC has made a strategic choice to pacify those with economic power and continue with negotiated land reform against the wishes of the majority,” Atuahene states.

Atuahene summarizes the weaknesses of the classical conception of property in the context of South Africa in four points:

- 1) Relying upon willing sellers often undermines the state’s planning capacity because the government cannot condemn and acquire contiguous parcels of land in a specific area.
- 2) Negotiated land reform gives landowners the upper hand in land negotiations.
- 3) The quality of the land available through negotiated land reform is more likely to be substandard.
- 4) A pervasive and potentially fatal problem with negotiated land reform is that it is too slow.

Further, Atuahene argues that in the context of South Africa the classical conception of property is not justified, because the legitimacy of property rights is in question. The classical conception, developed by John Locke, and by later natural law

theorists such as Robert Nozick, is based on the labor theory of ownership. That is, these theorists assume that “property rights are acquired through individual effort and free and fair market exchanges.” Thus, Atuahene argues, the classical conception was never intended to

“A pervasive and potentially fatal problem with negotiated land reform is that it is too slow.”

“apply in contexts where past property theft was never rectified.” Further, as Atuahene explains, Locke argued “private ownership is legitimate so long as there is some property left over for others.” In South Africa in 1994 “eighty-seven percent of the land was owned by whites who constituted less than ten percent of the population,” Atuahene reminds us.

Given the urgency of fair, orderly land reform in South Africa as well as the weaknesses of the classical conception of property outlined above, Atuahene proposes “it is now time to re-imagine the possibilities. It is time to explore a transformative conception of real property.”

THE TRANSFORMATIVE CONCEPTION OF PROPERTY : THE RECIPROCAL RELATIONSHIP BETWEEN RIGHTS AND DUTIES

The transformative conception of property is based on four defining principles:

- 1) All property is not alike, and thus one uniform standard of protection is inappropriate.
- 2) The transformative conception requires the state to vindicate the rights of both present title holders and past owners who were unjustly dispossessed.
- 3) While the classical conception focuses solely on unidirectional demands titleholders can make on society, the transformative conception requires the state to focus on the duties of titleholders and not just their rights.
- 4) The transformative conception does not automatically place the burden of proof on third parties. It requires the owner to bear the burden of proving that certain modifications intended to facilitate the reallocation and relegitimization of property rights are not justified.

While the transformative conception represents a radical departure from the classical conception, Atuahene suggests that it is justified in “the extreme case, which is when inequality emanating from past property theft has the potential to cause backlash and destabilize the state.”

rentals to redistribute land.

As Atuahene explains, each of these policies is “incompatible with the classical conception, but exemplary of the transformative conception.”

According to Atuahene, an automatic Right of First Refusal (ROFR)

with the transformative conception of property. Eminent domain counteracts “the undue power of intransigent owners to obstruct or make the state’s acquisition of land for a valuable public purpose prohibitively expensive.” Under the classical conception eminent domain is considered a

“With a history of past property theft and no compensation, the majority of the population “is likely to perceive the existing property distribution as illegitimate and this perception can serve as the basis for property disobedience and backlash.”

In such cases, Atuahene calls for a time-limited application of the transformative conception of property until such time as “there is a generalized belief that present owners have acquired their property fairly,” at which time “the society may move to the point where the vast majority of citizens believe that it is in their self-interest to adopt a conception of property that prioritizes protecting owners rather than facilitating land reform.”

Atuahene suggests three ways a state can actualize the transformative conception of property through redistributive policies such as: 1) automatic right of first refusal; 2) eminent domain; and 3) mandatory land

for the state on predetermined lands is one method through which the state can begin redistributing property more equitably. In such a system, the state would be required to exercise the ROFR within a reasonable period of time, after which its rights would extinguish automatically. The owner, on the other hand, would bear the burden of proof that the ROFR was not justified. Atuahene addresses the concern that such a ROFR would reduce competition and add unnecessary inefficiencies to the market by suggesting that the state can subsidize potential buyers costs and be limited to the set period of time to exercise the ROFR, as mentioned above.

Eminent domain is also consistent

serious infringement on owner rights, and is thus used sparingly. Under the transformative conception land reform itself is considered a valid public purpose. Indeed, the South African constitution specifies, “the public interest includes the nation’s commitment to land reform.” (2.25.4a)

Atuahene argues that in eminent domain proceedings in South Africa where systematic past property theft has shaped the current property distribution, “it is not appropriate to assume that compensation should be automatically equivalent to the fair market value (FMV), because property was sometimes not acquired on fair market terms.” The transformative conception of property does not

automatically offer owners FMV in cases of eminent domain because it “takes into account the reality of how an owner actually acquired the land.” Under the transformative conception the owner has the burden of proving that only the FMV should apply. Atuahene admits that this approach to eminent domain may

ate productive and unproductive land and subject unproductive land to long to medium term leases with the state.” While land rentals do not transfer the wealth attached to land, they do produce economic benefits for tenants, who can labor, build wealth and perhaps eventually become owners. “In order to provide current owners with

jural correlatives—one cannot exist without the other.” “This reinforcing relationship between rights and duties,” she adds, “is deeply embedded in the transformative conception.” Thus, “as a result of the political negotiations that led to African liberation in South Africa, titleholders have a right to their land, but they also have

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The transformative conception of property does not automatically offer owners fair market value in cases of eminent domain because it “takes into account the reality of how an owner actually acquired the land.”

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discourage long-term investment in and improvements to property. To counter this effect she proposes that “all improvements created or fully paid for by [owners] are entitled to FMV upon expropriation.” But compensation for the underlying land should be “subject to the contextual understanding of just compensation.”

Mandatory land rentals comprise the final method of land distribution under the transformative conception that Atuahene discusses. As Atuahene notes, “one consequence of extreme inequality is that there are a few owners who often have more high quality land than they can use productively.” When states lack the funds to purchase land, they can “differenti-

adequate notice, the state should create a comprehensive list of uses that it is likely to classify as unproductive,” Atuahene states. “Once the state classifies land as unproductive, the burden is on the owner to prove that the classification is unjustified.”

The emphasis on the *duties* of property holders and not just their rights is a distinguishing characteristic of the transformative conception. While under the classical conception of property an owner can let his or her fertile land lie fallow, under the transformative conception, “owners have a duty to facilitate redistribution,” Atuahene states. Citing Wesley N. Hohfeld’s famous argument, Atuahene states, “rights and duties are


a duty to facilitate redistribution.” At the same time, those dispossessed of land under the prior regime have a duty to respect the rights of current titleholders, but they also have a right “to the vindication of their land rights,” Atuahene summarizes.

THE NOVEL ATTRIBUTES OF LAND AND THE TRANSFORMATIVE CONCEPTION OF PROPERTY

Atuahene acknowledges that the transformative conception is open to criticism, and she addresses some potential criticisms in her article. For example, it can be argued that the transformative conception is

unnecessary “because tax and transfer programs more efficiently redistribute assets,” Atuahene states. To this criticism Atuahene counters that in certain states such as South Africa “the novel attributes of land make its actual transfer essential.” First, land has cultural value, Atuahene asserts, “because it plays a key role in individual and group identity.” Though groups may have been dispossessed of land in the distant past, present day members may still have a strong cultural connection to the land. Second, “since land is a highly visible sign of wealth, perceptions about inequality may not shift without the significant transfer of real property.” Citizens’s perceptions of inequality are important as they are one “primary source of backlash,” and potential state instability, Atuahene argues. Third, Atuahene states, “land is the basis of sovereignty,” and “if an indigenous majority does not reclaim land that was unjustly dispossessed by an ethnically distinct market-dominant minority, then political independence can ring hollow.” Finally, in some societies “land is the most important means of production” so that access to it is one means out of poverty. As Atuahene concludes, “therefore, while some states can address inequality resulting from past theft through tax and transfer programs, others require a new conception of property that facilitates prompt land transfer.”

Atuahene counters several other critiques of the transformative conception of property with strong arguments. She also emphasizes that the transformative conception is not appropriate in all contexts, and its adoption should be time-limited. It is most fitting and useful “during the period in which society is changing from one set of values based on exclusion and oppression to another based on inclusion and fairness,” Atuahene states. But however apt, it is a “limited technical legal solution,” which represents just one piece of a larger puzzle. For effective and meaningful land reform to occur states must find the political will to develop a transparent, efficient bureaucracy, decide who will benefit from land reform programs, make sure that the courts protect the rights of current owners, and create effective agrarian reform policies, Atuahene notes. Yet, “every puzzle is solved one piece at a time,” Atuahene concludes, and in certain cases the transformative conception is a piece worth adopting.

Bernadette Atuahene’s research on land reform in South Africa appears in several recent publications, including “Property Rights and the Demands of Transformation,” 31 *Michigan Journal of International Law* 765 (2010). 

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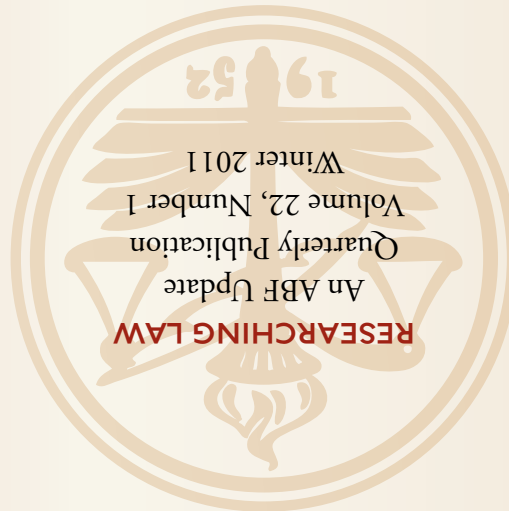
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