

**RIGHTS FOR THE LANDLESS:
COMPARING APPROACHES TO HISTORICAL
INJUSTICE IN BRAZIL AND SOUTH AFRICA**

Taylor Reeves Dalton*

I. INTRODUCTION	172
II. SOCIAL OBLIGATION THEORY OF PROPERTY AND THE ENTRENCHMENT OF RIGHTS	175
A. Social Obligation Theory of Property as a Remedy to Historical Injustice	175
B. Entrenched Rights Versus Unentrenched Rights in the Context of Historical Injustice.....	176
III. REFORM IN BRAZIL.....	178
A. A Brief History of Property Rights in Brazil	178
B. Social Function Doctrine and Its Development	180
C. Brazilian Constitutional Provisions and Procedure.....	182
D. Squatter Movements in Brazil	183
IV. SOUTH AFRICA	185
A. Historical Background of Injustice.....	185
B. Key Constitutional Provisions Regarding Property	186
C. South Africa’s “Housing Crisis” and Land Invasions.....	189
V. COMPARISON OF PROGRESSIVE PROPERTY RIGHTS REFORM IN BRAZIL AND SOUTH AFRICA.....	192
A. Why Compare the Two?: Similarities.....	192
B. Some Key Constitutional Differences.....	194
C. Approaches to the Landless Problem and the Benefits of Land Invasions.....	195
VI. CONCLUSION	198

* J.D., Cornell Law School, 2010; LL.M., International and Comparative Law, Cornell Law School, 2010; B.A., Philosophy and Political Science, University of Southern California, 2006. I am grateful to Professor Gregory Alexander for introducing me to new and equitable ways of thinking about property law and to my wife for her continuing support and encouragement. Of course I am extremely grateful to the editors of the Columbia Human Rights Law Review for their patience and valuable work on this piece.

I. INTRODUCTION

Early one February morning, seventy-three year old Sister Dorothy Stang walked to a community meeting in the city of Anapu, nestled in the Amazon basin, to give a talk on the land rights of the rural poor in the Amazon.¹ As she walked on her way to the meeting, two armed men stopped her alongside the dirt road.² Wielding her Bible, she read a passage from the Beatitudes and continued down the road.³ One of the armed men called after her and, when she turned, fired a round into her stomach.⁴ She fell face down on the ground, and one of the men fired a round into her back and four rounds into her head.⁵ The nun was lying in the mud, left for dead.⁶ The hit men were allegedly hired by wealthy landowners as retribution for Stang's activism in the region.⁷ The prosecution of Sister Stang's death has been surrounded by violence and is an on-going legal saga in the justice system in Brazil.⁸

Four thousand miles away and three years later, on another February morning, police and private security forces moved into the dusty town of Delft, South Africa to evict roughly 1,600 squatters off a construction site to make way for a pilot housing project called the N2

1. See *The Expanded Story of Sister Dorothy Stang*, Sisters of Notre Dame de Namur, <http://www.sndohio.org/sister-dorothy/Expanded-Story.cfm> (last visited Oct. 25, 2012) [hereinafter *Expanded Story*]; Larry Rohter, *Brazil Promises Crackdown After Nun's Shooting Death*, N.Y. Times, Feb. 14, 2005, at A3.

2. See *Expanded Story*, *supra* note 1; Rohter, *supra* note 1; Roseanne Murphy, *Martyr of the Amazon* 142 (2007).

3. See *Expanded Story*, *supra* note 1; Editorial, *Sister Dorothy's Killers*, N.Y. Times, Mar. 2, 2005, at A18.

4. See Murphy, *supra* note 2, at 142; *First Arrest Made in Nun's Slaying in Amazon*, N.Y. Times, Feb. 21, 2005, at A9.

5. See Murphy, *supra* note 2, at 142.

6. See *id.* at 142-43.

7. See *Brazil Farmer Held in Killing of Nun*, N.Y. Times, Mar. 27, 2005, at A8.

8. The prosecution has been particularly bloody not only because of the nature of the crime, but because witnesses have been shot just before giving testimony. *Brazil Nun Case Witness is Shot and Wounded*, BBC News (Nov. 29, 2009, 11:43 AM), <http://news.bbc.co.uk/2/hi/8384974.stm>. One of the landowners suspected of ordering the murder was rearrested on February 7, 2010. *Amparado por sua advogada, "Bida" se apresenta à Polícia [Bolstered by his lawyer, "Bida" presented himself to the Police]*, Folha do Progresso (Feb. 8, 2010, 7:40:50 AM), <http://www.folhadoprogresso.com.br/folha3br2/modules/news/article.php?storyid=840> (Braz.).

Gateway.⁹ Armed with dogs and rubber bullets, the force went door-to-door removing families and their belongings.¹⁰ Violence erupted when, without warning, police and security forces opened fire on the crowd, pelting individuals with rubber bullets.¹¹ As people ran for cover, the police chased them and continued to fire the painful rounds into the crowd.¹² They kicked and punched the fleeing crowd members, and twenty people—including a young child—were ultimately hospitalized for their injuries.¹³ Ironically, the housing project where the evictions took place was meant to be new housing for poor squatters living in shantytowns near Cape Town.¹⁴

Land reform can be dangerous and difficult. Both stories above illustrate how violent coming up against the inertia of deep-rooted traditions can become. According to the Catholic Church's Land Pastoral, over a thousand settlers, union members, and priests have been killed in the state of Para, Brazil as a result of land disputes in the last thirty years.¹⁵ Sister Stang's advocacy for the poor in this region provoked the hatred of powerful landowners. Her story brought much-needed attention to the violence in Brazil over land disputes between landowners and landless individuals, who are largely indigenous people and descendants of black slaves. The story of the "Angel of the Amazon," as Sister Dorothy Stang was sometimes called, has even been made into a recent documentary film.¹⁶ In South Africa, protests and clashes between the landless and landowners often erupt into violence. These problems are the direct result of inequality in land ownership in the two countries over centuries.

In Brazil, approximately one percent of the population owns forty-six percent of the land.¹⁷ As a country, Brazil has the greatest disparity in income distribution in the world, followed by South

9. Kerry Chance, *Housing and Evictions at the N2 Gateway Project in Delft*, Abahlali baseMjondolo (May 8, 2008), <http://www.abahlali.org/node/3581>.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. Times Topics, *Sister Dorothy Stang*, N.Y. Times (updated Apr. 8, 2009), available at http://topics.nytimes.com/topics/reference/timestopics/people/s/sister_dorothy_stang/index.html.

16. *They Killed Sister Dorothy* (Just Media 2008).

17. Thomas T. Ankerson & Thomas Ruppert, *Tierra Y Libertad: The Social Function Doctrine and Land Reform in Latin America*, 19 Tul. Envtl. L.J. 69, 102 (2006).

Africa.¹⁸ Because of the great disparity in property ownership in both countries, they have faced a substantial problem with squatters invading private land, pushing the boundaries of property rights to the fringe. Historically, both Brazil and South Africa were colonies of European powers, and both are still struggling to break from their colonial pasts. It appears that both countries are taking a similar approach to remedying historical injustice through land and ownership reform. They have done so by incorporating a social obligation norm into their property law. The social obligation norm is essentially the principle that private property rights can only be enforced or vindicated to the extent that they promote human flourishing in the community at large. Since the adoption of Brazil's constitution in 1988, Brazil has re-incorporated a "social function" requirement into land use, which is similar to the social obligation norm present in the South African constitution. Incorporation of a social obligation norm into the countries' property theory and laws can lead to dramatic social transformation.¹⁹

The need for constitutional reform of property rights arises out of the long historical injustices present in both countries. For example, oppression resulting from colonial traditions and racism was enshrined in South Africa's laws—essentially shielding the rights of the oppressors from those of the oppressed.²⁰ With such entrenched oppression and injustice, wide and systematic change in the form of constitutional reform was desperately needed. Constitutional reform was the only way to rout out injustice and remove the shield protecting the rights of the oppressors and quashing those of the oppressed.

This Article seeks to compare the two approaches to property reform as a solution to historical injustice. Brazil and South Africa prove to be prime examples of how incorporating and entrenching socioeconomic rights into a constitution is an effectual method of remedying historical injustice. Using a social obligation theory of property rights as a guide, this Article will seek to show that property reform is essential to remedying historical injustice. In particular,

18. John C. Mubangizi, *Protecting Human Rights Amidst Poverty and Inequality: The South African Post-Apartheid Experience on the Right of Access to Housing*, 2 Afr. J. Legal Stud. 130, 132 (2008).

19. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 Cornell L. Rev. 745, 782 (2009).

20. See Albie Sachs, *Majority Rule and Minority Rights*, 19 Recht en kritiek 228, 229 (1993), published as *Human Rights and Property: A Bill of Rights in a Constitution for a New South Africa* (Roel de Lange et al. eds., 2003).

this Article will focus on the constitutional provisions created to protect property and socioeconomic rights in both countries. As mentioned earlier, providing for the stability and security of these rights is a powerful method of social transformation that corrects historical injustice. In Part II, this Article will present the social obligation theory of property and describe the benefits of entrenching rights to property and socioeconomic rights in a country's constitution. In Part III, this Article will introduce the Brazilian scheme for land reform by first summarizing its development, the constitutional provisions, and then the current state of the "landless" problem. In Part IV, this Article will give a brief description of the historical background of injustices in South Africa, present the relevant South African constitutional provisions, and then discuss the country's current landless problem. In Part V, the Article will compare the two schemes and evaluate their relative successes in achieving their land reform goals. The future of reform in both countries is uncertain, but the land reforms already established provide the landless movements with the support to propel their societies to a more just future.

II. SOCIAL OBLIGATION THEORY OF PROPERTY AND THE ENTRENCHMENT OF RIGHTS

A. Social Obligation Theory of Property as a Remedy to Historical Injustice

A social obligation theory of property rights provides a firm philosophical foundation by which assignment of property rights can further social transformation and rectify historical injustice. Wherever colonial powers found new space, they usually displaced the indigenous population and stripped away that group's rights to property and resources. That denial of property rights is at the core of historical injustice in most instances around the globe. From Africa to the Americas, colonial powers dispossessed the conquered, whose inability to acquire the physical means to succeed has led to their impoverishment and inequality in those regions. Therefore, restoring property rights to these disadvantaged groups is the key method by which to remedy historical injustices and allow for the improvement of the situation of the disadvantaged. The social obligation norm provides a useful conceptual framework to explain the need for property rights reform.

A social obligation theory of property essentially posits that private property ownership has inherent limits, and these inherent

limits derive from the very concept that makes property ownership a social good. The theory finds its foundation in the claim that access to certain physical resources is necessary to human survival and “flourishing.”²¹ Endowing an individual with property rights allows that individual to acquire the necessary resources for her own flourishing.²² Therefore, property rights are a social good, and the community should protect those rights to allow the holder of those rights use of certain resources for her own flourishing.²³ The community protects those rights by vindicating the property owner’s claims to certain resources.²⁴ Under this theory, if the community, acting through the state, refuses to vindicate a purported owner’s claim because it is inconsistent with human flourishing within the community, then the community has not in fact diminished the rights of the individual. As an absolute limit, the individual only has rights that are consistent with human flourishing and community, and thus any claim contrary to that limit on property is invalid.²⁵ Stated in the positive, the community should only vindicate those rights that are consistent with human flourishing. This inherent limit upon private ownership is called the social obligation norm, and it expresses how and why the law justifies the institution of private property.²⁶ Simply put, the underlying principle that makes private property a social good, is the same principle that provides for its inherent limits.²⁷

B. Entrenched Rights Versus Unentrenched Rights in the Context of Historical Injustice

Property rights can be “entrenched” in a constitution, fortifying the rights against attack. The strongest form of entrenchment is making a right absolute; thereafter, the right cannot be abridged even by amending the constitution containing the right. This form of entrenchment is likely only reserved for *jus cogens* or peremptory norms, which are norms accepted by every nation without any allowance for deviation. In a domestic system, entrenchment is generally not absolute from a legal perspective, although it may be from a political perspective, as no democratically-accountable politician would dare question any such fundamental right.

21. Alexander, *supra* note 19, at 749.

22. *Id.*

23. *Id.* at 749–50.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

Domestically, constitutions serve as the most fundamental and secure place to entrench rights because of their stringent requirements for amendment—the right is “entrenched” because it is beyond the reach of ordinary law-making and law-modifying power. In contrast, if a right existed in the law of a particular country but was not entrenched, then the right could be expanded, limited, modified, or abolished through the normal course of law-making.²⁸ For example, the United States Congress can amend or abrogate a statute by a simple majority, because the right is within the jurisdiction of the country’s law-making body and so can be controlled by it. If a right is entrenched, then it likely exists in an instrument, like a constitution, outside the normal jurisdiction of the law-making body. Where this is the case, it would require legislative “supermajorities” to change or repeal the right, which for rights that are deeply connected to the fabric of society or strongly adhered to by the population is unlikely. Therefore, entrenching rights provides those rights with a heightened level of protection and makes them more resistant to modification.

In countries where historical injustice has found a home in the legal system, entrenching rights of the have-nots within a constitution is key to ensuring that the politically powerful cannot legally abridge the rights of the disadvantaged. Article 5 of the 1988 Brazilian constitution and Chapter 2 of the constitution of South Africa serve as entrenched bills of rights for each respective country.²⁹ As will be discussed below, these entrenched rights can be used by the landless in court to force social transformation and coerce their governments to accept change with more assurance that the rights cannot be abrogated by a simple majority of the powerful.

28. Most of Australia’s rights are statutory and are not entrenched. The Common Law is the source of many of the rights Australians hold dear, such as the right of access to courts and procedural fairness, right of immunity from government takings without compensation, right against self-incrimination, right to freedom of speech and movement, among others. *See* R.S. French, Chief Justice, High Court of Australia, Address at Anglo Australian Lawyers Society: The Common Law and the Protection of Human Rights para. 7 (Sept. 4, 2009), available at <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj4sep09.pdf>.

29. *See* Constituição Federal [C.F.] [Constitution] art. 5 (Braz.); S. Afr. Const., 1996, ch. 2.

III. REFORM IN BRAZIL

A. A Brief History of Property Rights in Brazil

The Portuguese sea captain Pedro Álvarez Cabral landed on the pristine Brazilian coast in 1500, ushering in an era of colonization in the region.³⁰ To facilitate settlement in the young colony, the Portuguese Crown offered large grants of land, called *sesmarias*, free of encumbrances except the requirement that the land be used beneficially—an important condition that will be discussed further in the next section.³¹ Because of the abundance of land in the country, the *sesmaria* system of property distribution remained the principal method of transferring land until Brazilian independence in 1822.³² After independence, the new government did away with the *sesmaria* system, and for the next few decades private land was obtained through occupation, known as the right of *posse*.³³ *Posse* by occupation here is similar to homesteading or claims by original appropriation. Existing landowners used their power and capital to expand their *latifundias*, large land holdings with their roots in colonial grants, through *posse*.³⁴ Land laws remained relatively the same until coffee production and export began to boom in the mid-nineteenth century.³⁵ With the boom in coffee production, land values increased and the new demand created incentives for landowners to push for reform.³⁶ In 1850, the government passed the Land Law.³⁷ The Land Law legalized *posses* and revalidated all *sesmarias* obtained before that point; however, it forbade land acquisitions by squatting and all land could only be acquired by purchase.³⁸ By the 1940s, the presence of large unproductive *latifundias* coexisting alongside large populations of landless peasants refocused the land policy debate on equitable redistribution.³⁹

During the period of military dictatorship over Brazil, the government realized the need for aggressive land reform policies and

30. See Lee J. Alston et al., *Titles, Conflict, and Land Use: The Development of Property Rights and Land Reform in the Brazilian Amazon Frontier* 33 (1999). See also Robert M. Levine, *The History of Brazil* 31 (1999).

31. Alston, *supra* note 30, at 33–34.

32. *Id.* at 34.

33. *Id.*

34. *Id.* at 34–35.

35. *Id.* at 35.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 38.

passed the Land Statute in 1964.⁴⁰ The Land Statute authorized the government to expropriate *latifundias*.⁴¹ The statute required three elements to be satisfied for lawful expropriation: (1) the land must be unproductive; (2) the expropriation must be in the public interest; and (3) the expropriation must be for compensation.⁴² After the fall of the military dictatorship in 1985, the new civilian government included land reform as a large part of its political platform.⁴³ These land reform efforts had been slow to materialize in years following the regime change. Lack of political capital and the persistence of old property regulations kept government land reform from being effective.⁴⁴

The 1988 constitution continued the tradition of government expropriations. Article 184 states, "It is within the power of the Union to expropriate on account of social interest . . . rural property which is not performing its social function."⁴⁵ One major issue that exacerbated the ineffectiveness of reform was the lack of any definition of "productive use" used in Article 184. The Brazilian courts failed to give the term any meaning, and eventually it was broadly defined by statute so as to require eighty percent of the property to be put to productive use that varied according to land types.⁴⁶

A further wrinkle on modern property rights in Brazil is the continued existence and use of the Brazilian Civil Code. The Civil Code, which has remained unchanged since 1916, guarantees property rights and treats any infringement on property rights as a compensable taking of property.⁴⁷ The duty of defining property rights has been substantially entrusted to the Brazilian courts, which have been conservative in implementing the new constitutional mandates.⁴⁸ Generally, the courts have interpreted "fair compensation" in the constitution as fair market value⁴⁹ and

40. John C. Martin, *Bringing Dead Capital to Life: International Mandates for Land Titling in Brazil*, 31 B.C. Int'l & Comp. L. Rev. 121, 125 (2008).

41. *Id.*

42. *Id.*

43. Kristen Mitchell, *Market-Assisted Land Reform in Brazil: A New Approach to Address an Old Problem*, 22 N.Y.L. Sch. J. Int'l & Comp. L. 557, 568 (2003).

44. *Id.* at 568–74.

45. C.F., art. 184.

46. Mitchell, *supra* note 43, at 569.

47. Martin, *supra* note 40, at 126.

48. Mitchell, *supra* note 43, at 569.

49. *Id.*

have therefore mandated that expropriation of private property be compensated for by fair market value.⁵⁰ Given the combination of high land values and the government's unwillingness to pay high prices for land, there is a disincentive for the government to use its expropriation power to redistribute property rights. This expensive expropriation renders the constitutional mandate for reform essentially toothless.

B. Social Function Doctrine and Its Development

As mentioned above, during the European colonization of the Americas, the Portuguese Crown doled out largely unencumbered land grants called *sesmarias*, which included a reversionary clause in the event that the property was not put to a "beneficial use."⁵¹ Although reversions did not occur and land concentration proliferated, this "beneficial use" requirement foreshadowed the themes of much of the country's land policy into the present.⁵² Throughout history, the disparity between the landed and the landless has been particularly great in South America, and Brazil especially. Many revolutionary leaders called for expropriation and redistribution of the large land grants when the South American colonies were breaking their ties with Europe, setting the stage for future discussions of land reform.⁵³

The term "social function" first appeared in Brazilian law in the 1946 constitution.⁵⁴ The term was largely ignored until it was subsequently adopted in the 1988 constitution,⁵⁵ which explicitly references "social function" several times.⁵⁶ The social function doctrine in Brazil imposes an affirmative duty on landowners to use their property to serve the social interest and an affirmative duty on the state to expropriate property that is not performing its social function.⁵⁷ Article 184 of the 1988 constitution allows the government to expropriate rural land that is not serving its "social function."⁵⁸ Brazilian law considers rural land to have met its social function where "80% of the surface is completely and effectively utilized;

50. *Id.*
51. Ankerson & Ruppert, *supra* note 17, at 84.
52. *Id.* at 84–85.
53. *Id.* at 88.
54. *Id.* at 102.
55. *Id.*
56. *Id.*
57. *Id.* at 98–99.
58. *Id.*

where appropriate use is made of the natural resources, ecological and labor standards are respected, and the use is considered to be of common benefit to land owners and workers.”⁵⁹ The 1988 constitution also requires that urbanized land conform to its social function in Article 182.⁶⁰ Article 182 states, “The urban development policy carried out by the municipal government . . . is aimed at ordaining the full development of the social functions of the city and ensuring the well-being of its inhabitants.”⁶¹ The government is authorized to expropriate urban land that is not used in conformance with the constitutionally-mandated master plans of metropolitan areas.⁶² The new constitution and the use of the “social function” doctrine in Brazilian property law coincided with the emergence of organized squatter movements.⁶³

Further, Brazil is among many Latin American nations to use and redefine the social function doctrine to accommodate the “ecological function” of property by accounting for the consequences of development on the agricultural frontier and deforestation.⁶⁴ Simply promoting activities like industrial development that increase profits or produce more goods fails to take into consideration negative externalities that harm the environment and society. For example, a landowner of a heavily forested tract of land who is solely incentivized to maximize profit may want to cut down all the trees for timber and use the cleared land for heavy farming that can pollute nearby environments. Although this makes economic sense—i.e. maximizes profits—to the landowner, the negative externalities are not considered in a traditional model. The social function doctrine, though, would balance these widely-felt costs against the private benefits to the landowner. Brazil similarly uses the doctrine to promote respect and dignity for rural workers.⁶⁵ Some commentators note that this stance explicitly rejects the notion that economically beneficial activities undermine the social function doctrine, further developing property rights in broader terms than pure economics.⁶⁶

59. *Id.*

60. C.F., art. 182.

61. *Id.*

62. Ankerson & Ruppert, *supra* note 17, at 102.

63. *Id.* See *infra* Part II.D for further discussion of squatter movements.

64. Ankerson & Ruppert, *supra* note 17, at 111.

65. *Id.* at 112.

66. *Id.*

C. Brazilian Constitutional Provisions and Procedure

The right to property is entrenched within the 1988 Brazilian constitution. Article 5 provides: “All persons are equal before the law . . . being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: . . . (22) the right to property is guaranteed; (23) property shall observe its social function.”⁶⁷ This provision establishes the right to property for all people—not just Brazilians, but also foreigners. The provision incorporates the caveat that property must fulfill its social function, which shapes the contours of permissive uses and is evidence of a social obligation norm in the state’s definition of property.

Both state and federal courts in Brazil have been at the center of the land reform process, although their willingness to effect change is often lacking.⁶⁸ They have been forced to define many of the vague pieces of land reform legislation.⁶⁹ Local courts issue eviction warrants, federal courts review contested expropriations, and both adjudicate criminal actions regarding conflicts over land.⁷⁰

Only the National Institute for Colonization and Agrarian Reform, *Instituto Nacional de Colonização e Reforma Agrária* (INCRA), has the power to expropriate; that power is beyond the courts’ jurisdiction.⁷¹ The courts are only involved with expropriations when landowners contest expropriation by INCRA.⁷² It is estimated that approximately ninety-five percent of expropriations are contested.⁷³ Landowners can make either of two arguments to contest expropriation by the government: (1) the landowner can argue that the land fulfills its social function and thus cannot be legally expropriated, or (2) the landowner can argue that the price offered by INCRA is too low.⁷⁴ There are also due process claims available, which allow the landowner to claim that the INCRA inspection of the land was performed improperly or that the landowner was not handed notice of expropriation directly, which invalidates the whole process.⁷⁵ Courts commonly uphold the state’s expropriation but often

67. C.F., art. 5.

68. Alston, *supra* note 30, at 71.

69. *Id.*

70. *Id.*

71. *Id.* at 72–73.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

reset the amount of compensation.⁷⁶ Nevertheless, INCRA can appeal a valuation set by a lower court to higher courts.⁷⁷

D. Squatter Movements in Brazil

During the 1980s, invasion and expropriations around the country developed in fits and starts.⁷⁸ Uncoordinated groups invaded farms throughout the country with varying degrees of success.⁷⁹ As these invasions and expropriations became increasingly successful in the 1990s, landless peasants began organizing.⁸⁰ Landowners did not ignore these land invasions and would choose to remove the squatters either through expensive court proceedings or with self-help.⁸¹ In 1993, laws explaining the federal government's interpretive powers under the 1988 constitution were passed, and in the wake of these laws, land invasions and conflicts skyrocketed.⁸²

Many grassroots organizations in Brazil have resorted to drastic measures to enforce the constitution's law reform mandate. The *Movimento Sem Terra* (MST), or Landless Worker's Movement,⁸³ is the most radical and active group pushing for land reform.⁸⁴ Other grassroots groups pushing for land reform include the Federation of Rural Workers (CONTAG) and the Pastoral Land Commission (CPT), which is associated with the Catholic Church.⁸⁵ The MST works to pressure the government into acting through demonstrations and land occupations during what have come to be called "red months."⁸⁶ Its stated goals are to obtain land for landless rural workers, to achieve agrarian reform by altering landownership in order to guarantee land to all who desire to work, and to create a more just

76. *Id.*

77. *Id.*

78. Lee J. Alston et al., *A Model of Rural Conflict: Violence and Land Reform Policy in Brazil*, 4 *Env't & Dev. Econ.* 135, 136 (1999) (analyzing determinants of rural land conflicts).

79. *Id.*

80. *Id.*

81. Mitchell, *supra* note 43, at 570.

82. *Id.* at 571.

83. See generally MST: Movimento dos Trabalhadores Rurais Sem Terra, <http://www.mstbrazil.org/> (last visited Sept. 28, 2012).

84. Mitchell, *supra* note 43, at 571.

85. *Id.* Sister Dorothy Stang was a member of this group.

86. *Brazil's Landless Farm Workers Launch 'Red April' Offensive*, Channel News Asia (Apr. 15, 2008), http://www.channelnewsasia.com/stories/afp_world/view/341516/1/.html.

society.⁸⁷ In response to land invasions by groups like MST, INCRA often expropriates land and transfers it to those squatters.⁸⁸ These INCRA expropriations encourage conflicts and violence between the landowners and the squatters.⁸⁹ There have been many cases of violent clashes between the land reform activists and landowners in the form of assassinations and police brutality.⁹⁰ Sister Dorothy Stang's death was just one of many assassinations related to land reform.⁹¹ The 1988 Brazilian constitution has also incorporated key components of the "right to city" movement. Those key components are: the social function of property, the social function of the city, and the ability for urban squatters to obtain title to land they occupy.⁹² The social function of the city and property explicitly create obligations to the greater community. Article 183 is a favorable adverse possession law in urban settings requiring only a five-year occupation period before title is transferred.⁹³ The City Statute "allows for ownership rights in the *favela* to shift after brief periods of squatting."⁹⁴ *Favelas* are shantytowns primarily made up of black Brazilians who were displaced.⁹⁵

In addition to self-help methods, landowners can also use the courts to enforce their rights. Landowners whose land is occupied by squatters must go to court to obtain a *reintegração de posse*, "reintegration of possession," which is a warrant to protect title—not

87. John L. Hammond, *Law and Disorder: The Brazilian Landless Farmworkers' Movement*, 18 Bull. Latin Am. Res. 469, 473 (2005).

88. *Id.*

89. See Lee J. Alston et al., *Land Reform Policies, The Sources of Violent Conflict and Implications for Deforestation in the Brazilian Amazon*, 39 J. Envtl. Econ. Mgmt. 162, 163 (2000) (discussing the correlation between INCRA intervention and violence escalation).

90. See Mark S. Langevin & Peter Rosset, *Land Reform from Below: The Landless Workers Movement in Brazil*, SEDOS Rome (Dec. 24, 1997), http://www.sedosmission.org/site/index.php?option=com_docman&task=doc_view&gid=1446&Itemid=55&lang=en.

91. Rohter, *supra* note 1.

92. Ngai Pindell, *The Right to the City*, 24 Harv. BlackLetter L.J. 69, 70–71 (2008).

93. C.F., art. 183. The provision states that an individual may acquire domain of a piece of urban land of up to two hundred and fifty square meters, provided that he possesses it for at least five years without interruption or opposition, uses it as his or his family's home, and does not own any other property.

94. Martin, *supra* note 40, at 126.

95. The New Oxford American Dictionary 614 (Erin McKean ed., 2d ed. 2005).

just of land—under the Brazil Civil Code.⁹⁶ The purpose of the instrument is to protect private property rights and to prevent damages that may be difficult to recover if the judicial process takes a long time.⁹⁷ It is similar to an injunction in the United States. The instrument is expensive: the landowner must pay a fee and hire a lawyer to obtain the *reintegração de posse*.⁹⁸ Therefore, landowners will only take action if the occupied land is valuable enough. Once the instrument is obtained, the local police execute the warrant and evict the squatters. When a judge receives a request for *reintegração de posse*, she follows the procedure in the Civil Code.⁹⁹ Traditionally, the only question addressed is whether another is taking the individual's property.¹⁰⁰ The courts generally do not consider this to be an issue of land reform or social justice, so the judge does not take into account the social function requirement of the land.¹⁰¹ Generally, a farmer's land is not productive if it is invaded, and the 1988 constitution only guarantees property rights to land that is used so as to fulfill its social function. Unfortunately, this issue is beyond the jurisdiction of the lower courts and is omitted from their analyses.¹⁰² This practice again demonstrates how the courts have not been proactively involved in the land reform discussion, but simply working on the fringe.

IV. SOUTH AFRICA

The system of apartheid—which split the country into poor and rich, black and white, landless and landed—forms the context in which South Africa's new constitution was created. Land reform and equality are key features of the property provisions included in the constitution and set the stage for reform in the country.

A. Historical Background of Injustice

In the mid-seventeenth century, the Dutch East India Company set up shop in South Africa. Their contact with indigenous peoples was the origin of the tense relationship between whites and

96. Alston, *supra* note 30, at 72.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

blacks in the region that persists to this day.¹⁰³ By 1910, whites dominated the indigenous peoples, and the British Parliament had created the Union of South Africa through the passage of the 1909 South Africa Act.¹⁰⁴ The Native's Land Act of 1913 was the first key piece of segregation legislation passed by the Union Parliament, and remained a cornerstone of apartheid until the 1990s, when it was replaced by land reform policies.¹⁰⁵ The Act severely restricted land ownership by blacks to merely seven percent of the total land area of the Union, creating severe disadvantages to their socioeconomic well-being.¹⁰⁶ Other segregationist legislation included the Natives (Urban Areas) Act of 1923, which allowed the government to force blacks into urban locations.¹⁰⁷ By the 1930s, Afrikaner intellectuals began to use the term "apartheid," meaning "apartness," to refer to these policies of segregation.¹⁰⁸

The official regime of apartheid in South Africa began in 1948, even though de facto apartheid had existed for many decades before.¹⁰⁹ Constitutional reform was needed to rectify the "unjustified protection of privileged status."¹¹⁰ The modern South African constitution has been lauded for its progressive aspirations and protection of socioeconomic rights.¹¹¹ Historically, the law was used to oppress; now it would serve as an instrument to empower.

B. Key Constitutional Provisions Regarding Property

The South African constitution is designed to be one of the primary instruments of social change in modern South Africa.¹¹² The preamble to the constitution recognizes historical injustices and pledges to heal the inequities of the past.¹¹³ By its own terms, the Bill of Rights "affirms the democratic values of human dignity, equality and freedom"¹¹⁴; it "applies to all law, and binds the legislature, the

103. See Leonard Thompson, *A History of South Africa* 33 (3d ed. 2000).

104. See *id.* at 150–53.

105. See *id.* at 163.

106. See *id.*

107. See *id.* at 169–70.

108. *Id.* at 186.

109. Alexander, *supra* note 19, at 784.

110. Sachs, *supra* note 20, at 229.

111. Cyrus E. Dugger, *Rights Waiting for Change: Socio-Economic Rights in the New South Africa*, 19 Fla. J. Int'l L. 195, 198–99 (2007) (discussing the general state of socioeconomic rights in South Africa).

112. Alexander, *supra* note 19, at 784.

113. S. Afr. Const., 1996, pmb.

114. *Id.* § 7(1).

executive, the judiciary and all organs of state.”¹¹⁵ The state has a duty to “respect, protect, promote and fulfil the rights in the Bill of Rights.”¹¹⁶ The rights entrenched in the Bill of Rights can only be *reasonably* limited in terms of general application.¹¹⁷

The provisions of the 1996 South African constitution that detail the general property scheme are Sections 25 and 26, located in the Bill of Rights of the constitution. Section 25 generally addresses the right to property. Subsection 1 provides the basic protection to property rights: “no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”¹¹⁸ Subsection 2 authorizes the government to expropriate property under certain circumstances:

Property may be expropriated only in terms of law of general application

- (a) for a public purpose or in the public interest; and
- (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.¹¹⁹

Subsection 4 explicitly states that, as it pertains to property, “the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources.”¹²⁰ It also goes on to emphasize that “property is not limited to land,”¹²¹ expanding the application of the transformative aspirations of the law.

Subsections 5 through 8 of Section 25 also illustrate the transformative purpose of the new constitution. Section 25(5) mandates that the “state must take reasonable legislative and other measures . . . to foster conditions which enable citizens to gain access to land on an equitable basis.”¹²² Subsections 6, 7, and 8 explicitly acknowledge past racial discrimination and the inequitable position of black South Africans.¹²³ Discussing who the reforms are meant to benefit, the provisions state the people and communities entitled

115. *Id.* § 8(1).
 116. *Id.* § 7(2).
 117. *Id.* § 36.
 118. *Id.* § 25(1).
 119. *Id.* § 25(2).
 120. *Id.* § 25(4)(a).
 121. *Id.* § 25(4)(b).
 122. *Id.* § 25(5).
 123. *Id.* § 25(6)–(8).

to redress are those “whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices,”¹²⁴ or who were “dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices.”¹²⁵ Subsection 9 requires parliament to enact land reform redressing past racial discrimination.¹²⁶

It is important to note that Section 25(1) protects the right to property for all people, even though it is expressed in the negative.¹²⁷ Subsections 1 and 2 seem to contemplate expropriation and may be in tension with the land-reform provisions in Subsections 4 through 9.¹²⁸ Fundamentally, the property clause explicitly includes a commitment to land reform and social justice.¹²⁹

Section 26 is the main provision regarding housing and operates alongside Section 25’s socioeconomic property rights. Complementing Section 25, Section 26 states:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.¹³⁰

Section 26(1) establishes the right to adequate housing for everyone. Section 26(2) requires the state to promulgate legislation to achieve “the progressive realisation” of the right to adequate housing for all. Section 26(3) places restrictions on evictions and bans legislation that permits arbitrary eviction. The interplay of sections 25 and 26 became prominent in the context of South Africa’s “housing crisis.”

124. *Id.* § 25(6).

125. *Id.* § 25(7).

126. *Id.* § 25(9).

127. AJ van der Walt, *Constitutional Property Clauses: A Comparative Analysis* 323–24 (1999). However, it is also suggested that something less than property is guaranteed in section 25. *Id.* at 327–28.

128. *Id.* at 327–28.

129. See Gregory Alexander, *The Global Debate over Constitutional Property* 149 (2006).

130. S. Afr. Const., 1996, § 26.

C. South Africa's "Housing Crisis" and Land Invasions

Naturally, housing segregation was a key component of apartheid in South Africa. In the past, the black population, which makes up a majority of the country's population, was evicted from its land and sent to reserves, opening up urban land for white settlers who were in the minority.¹³¹ As economic development increased, poor black South Africans began to re-enter the urban areas in search of opportunities.¹³² Many of them squatted on public and private land to survive.¹³³ These migrations established a pattern of land invasions that resulted in large housing settlements popping up on unused land.¹³⁴ These settlements, or shantytowns, had no basic services and the populations lived in squalor.¹³⁵ During apartheid, the government was harsh towards squatters and enacted legislation that made evictions relatively easy: a landowner had only to show that a squatter's possession was unlawful—all other factors were irrelevant.¹³⁶

After the end of apartheid in 1993, the state and local governments enacted legislation to fulfill the mandates of Sections 25 and 26.¹³⁷ However, because of the massive demand for low-cost housing by the landless black population, most of the housing programs failed.¹³⁸

Section 26 seems to place both negative and positive duties on the state and private parties. The state and private parties have a negative duty not to impede anyone's right to adequate housing. The court in *Government of the Republic of South Africa v. Grootboom*¹³⁹ located these negative duties in Section 26(1) and (3). However, that court rejected the notion that Section 26 created a positive duty, a "minimum core obligation," and adopted a "reasonableness" approach.¹⁴⁰ This approach interpreted Section 26 to only require the state to adopt a reasonable housing program. This stripped away the ability of claimants to demand specific goods or services from the state.

131. Alexander, *supra* note 129, at 173.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 173–74.

137. *Id.* at 174.

138. *Id.*

139. 2001 (1) SA 46 (CC).

140. *Id.*

In *Grootboom*, unlawful occupiers of private land were evicted.¹⁴¹ The landless filed suit, claiming that the government was required to provide them with temporary shelter and housing until they could obtain permanent accommodation.¹⁴² In deciding the case, the court raised its standard of review of state actions relating to duties under the housing provision from a rationality review to a “reasonable national plan” standard.¹⁴³ Under this higher standard for government action, the national housing program failed to fulfill its obligations laid out in Section 26.¹⁴⁴ The program did not make provisions for the landless, who were in the most need.¹⁴⁵

In response to Section 26(3)’s restrictions on eviction practices, the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act of 1996 (PIE) was enacted to regulate evictions resulting from practices like land invasion.¹⁴⁶ The Act essentially flipped the old notions and prejudices, decriminalizing squatting and favoring public law over private.¹⁴⁷ The Act also changed the ability of landowners to evict these squatters. Instead of simply showing that the squatter had no legal right to possession, the landowner must now show that the eviction would be “just and equitable.”¹⁴⁸ All relevant factors have to be taken into account. The courts can consider facts beyond unlawful possession of land when deciding whether to grant a request for an eviction.¹⁴⁹ The court must now balance the interests of the landowners and the landless squatters.

The interplay between Sections 25 and 26 was also addressed in *Modderfontein Squatters v. Modderklip Boerdery (Pty) Ltd.*¹⁵⁰ In this case, a large group of landless people in a Johannesburg suburb moved onto adjacent land that they thought was city land.¹⁵¹ The land in fact was a private farm owned by Modderklip Boerdery Ltd.¹⁵² Within months, the land had been invaded by thousands of

141. *Id.* at 53.

142. *Id.*

143. *Id.* at 69.

144. *Id.*

145. *Id.*

146. Alexander, *supra* note 129, at 177–78.

147. *Id.*

148. *Id.*

149. *Id.*

150. 2004 (6) SA 40 (SCA).

151. *Id.* at 47.

152. *Id.*

individuals, many living in shacks.¹⁵³ Frustrated by the invasion, the owner sought to evict the squatters using PIE.¹⁵⁴ The owner succeeded in the lower court and the court issued an execution order, which the sheriff was to carry out.¹⁵⁵ However, because of the size of the squatter population and the costs it would take to remove the population, all of the owner's efforts to evict the squatters were unsuccessful.¹⁵⁶ After eviction efforts failed, the owner went to court seeking an enforcement order to compel the relevant government officials to evict the unlawful occupants.¹⁵⁷ The owner won the action for enforcement and the Supreme Court of Appeal considered an application by the state appealing this enforcement order, alongside an application for leave to appeal by the original defendants.¹⁵⁸ The court saw a conflict between the state's constitutional duty to protect property rights under Section 25 and its duty to provide adequate housing under Section 26.¹⁵⁹ The court pointed to Section 7(2) of the constitution, which requires "the State to 'respect, protect, promote and fulfil the rights' in the Bill of Rights."¹⁶⁰ The court thought that the state had failed its mandate under Section 7(2) because it had failed to protect the owner's property rights under Section 25 by not providing adequate alternative housing to the unlawful occupants under Section 26.¹⁶¹

On appeal, the Constitutional Court held that the eviction order was valid, but the unlawful occupiers could not be evicted unless alternative land was provided.¹⁶² Therefore, the Court ordered the state to comply with all of its constitutional obligations. The Court carefully balanced the obligations of the state and property owner, and entitlements of the property owner and the unlawful occupiers.¹⁶³

The situation of the landless in modern South Africa is still dire and commentators continue to claim that "landlessness

153. *Id.*

154. *Id.*

155. *Id.* at 48.

156. *Id.*

157. *Id.* at 49.

158. *Id.* at 47.

159. *Id.* at 53–54.

160. *Id.* at 55.

161. *Id.* at 55–56.

162. *President of the Republic of South Africa v. Modderklip Boerdery (Pty) Ltd.* 2005 (5) SA 3 (CC) at 23.

163. Alexander, *supra* note 19, at 791.

and homelessness are nearly ubiquitous among non-whites.”¹⁶⁴ Other factors that will need to be addressed to substantially improve the conditions of the landless would include improvements in economic development, increases in education, and serious commitment from the South African government.¹⁶⁵

V. COMPARISON OF PROGRESSIVE PROPERTY RIGHTS REFORM IN BRAZIL AND SOUTH AFRICA

A. Why Compare the Two?: Similarities

Both Brazil and South Africa are similar in how they have constructed their property rights to foster social change. Both countries have a history of injustice in property ownership and are trying to rectify this by instituting land reform policies that give the landless an opportunity to acquire basic property rights. The progressive aim of both constitutions is made explicit by the terms of each, and, in both cases, the state takes affirmative action to further these goals.

Human rights can generally be classified into three “generations” of rights.¹⁶⁶ First generation rights are civil and political rights, generally including the fundamental rights to life, liberty, equality, and property. These rights were expounded upon by Enlightenment philosophers and politicians and found their way into many of the early republican constitutions, like the American and French constitutions. First generation rights also include other freedoms—mostly in the negative sense¹⁶⁷—of expression, religion, assembly, and movement, to name a few. These rights are promoted in the negative sense in that the government is prevented from encroaching on the rights, as opposed to a positive sense, where the government proactively promotes the rights. Most of these rights are found entrenched in constitutions in liberal, democratic countries.

164. *Id.* at 784.

165. *Id.* at 786.

166. Karel Vasak, *Human Rights: A Thirty-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, UNESCO Courier, Nov. 1977, at 29, 29.

167. See generally Isaiah Berlin, *Two Concepts of Liberty*, in *Liberty* 166 (Henry Hardy ed., 2002) (discussing the role of positive and negative conceptions of freedom in the context of philosophy’s relationship with politics); Cass R. Sunstein, *The Second Bill of Rights 197–207* (2004) (using positive and negative conceptions of liberty to compare the Bill of Rights with a proposal for a bill of economic rights).

Second generation rights are rights to social and economic features of life. These rights include access to food, water, housing, healthcare, education and social security.¹⁶⁸ Second generation rights began to be generally recognized in the mid-twentieth century and are not generally found entrenched in first world, democratic constitutions. Third generation rights are the newest class of rights, which are concerned with the environment, development, resources, language and culture. These rights have most prominently been featured in aspirational “soft law” instruments and their development is ongoing.¹⁶⁹ In both Brazil and South Africa, the institution of the “second generation” rights empowered the landless and the disadvantaged in society to invade land with some confidence.

168. Second generation rights can be found in the Universal Declaration of Human Rights and Article 11 of the International Covenant on Economic, Social and Cultural Rights. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3. The African Charter on Human and Peoples' Rights, also known as the Banjul Charter, is an international human rights instrument designed to promote and protect human rights on the African continent. South Africa signed and ratified the Charter on September 7, 1996. In addition to civil and political rights, the Charter also recognizes economic, social and political rights, which have included the right to housing. See African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, 21 I.L.M. 59 (1982); See also *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Afr. Court on Human & Peoples Rights, Communication 155/96 (2002), available at http://www.achpr.org/files/activity-reports/15/achpr30and31_actrep15_20012002_eng.pdf (reading the right to housing into the African Charter because destruction of shelter or housing necessarily harms property, health, and family life, which the Charter names as explicit rights). President Franklin D. Roosevelt proposed political implementation of second generation rights in the United States in 1944 during his State of the Union Address to Congress. Franklin D. Roosevelt, U.S. President, State of the Union Message to Congress (Jan. 11, 1944), available at http://www.fdrlibrary.marist.edu/archives/address_text.html.

169. See United Nations Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14 (declaring that all people have a fundamental right to an environment that promotes “a life of dignity and well-being” and have a “solemn responsibility to protect and improve the environment for present and future generations”); United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992) (reaffirming that although states have the right to development, they should strive to do so using sustainable and environmentally conscious methods).

Both constitutions balance the rights of individuals against the requirement that property be used in a way that fulfills its social function. Essentially, these requirements evince a social obligation theory of property. Article 5 of the Brazilian constitution and Section 25(1) of the South African constitution are structurally similar and ensure the right to property. Article 5(24) of the Brazilian constitution provides that the state may only expropriate property under the procedure established by law and for the “social interest.”¹⁷⁰ That provision provides for fair pecuniary compensation. In South Africa, Section 25(2) has essentially the same provisions and protections.¹⁷¹ Thus, in both systems, property is a protected right within the bounds of a social obligation to use the property in a way that benefits the community.

Both systems have included provisions which the landless can use to acquire some rights to property. In Brazil, Article 191 establishes a five-year limitations period by which a landless individual can acquire title to rural or urban land that does not exceed fifty hectares and which she makes productive.¹⁷² This provision incentivizes the landless to improve the land with the hope of acquiring title. The South African constitution is touted as a triumph for second generation rights.¹⁷³ Through it, the landless are afforded the right to adequate housing. Although they cannot demand specific redistribution, they can use the guarantee as a tool to hold the state accountable to provide reasonable accommodations.

B. Some Key Constitutional Differences

Both constitutions provide some level of guarantee of basic property rights for all. The South African constitution is more explicit in specifying the beneficiaries of property reform. For example, Section 25(6), (7), and (8) specifically mention racial discrimination as the impetus of the reform.¹⁷⁴ There is no similar amount of specificity in Brazil. This is most likely because in Brazil, the land disparity was not primarily based on any immutable characteristic of the landowner, but as a result of the large land grants given to colonists.

170. C.F., art. 5(24).

171. S. Afr. Const., 1996, § 25(2).

172. C.F., art. 191. Notably, the land must be held “without opposition.”

173. *The Bill of Rights—An Overview and the Text*, Constitutional Court of S. Afr., <http://www.constitutionalcourt.org.za/text/rights/bill.html> (last visited Sept. 21, 2012) (discussing South Africa’s incorporation of second generation rights into its constitution on its official website).

174. S. Afr. Const., 1996, § 25.

However, a majority of blacks and indigenous peoples in Brazil in fact make up the landless class, making this a de facto similarity.

The social obligation of landowners is interpreted slightly differently in each country. In South Africa, there is a heavy emphasis on providing rights to the underprivileged. Brazil identifies a similar interest in the definition of the social function by including a provision that incorporates the rights of laborers into the landowner's obligations. However, it seems that the Brazilian provisions focus on using land in a productive way. That constitution provides that "the law shall guarantee special treatment for the productive property," which further illustrates the Brazilian constitution's emphasis on productivity.¹⁷⁵ This makes sense given Brazil's abundant resources. Essentially the constitution incentivizes landowners to cultivate the land, not explicitly to provide housing.

C. Approaches to the Landless Problem and the Benefits of Land Invasions

Invaders of land are generally considered bad actors and labeled transgressors. However, property theorists have recently posited that property lawbreakers are a crucial part of the evolution of property law.¹⁷⁶ Squatter invasions in both Brazil and South Africa have been the impetus for government action in land reform. The landless have used their numbers to effect change by forcing the contours of the law to change. Property theorists proposing that property lawbreakers add to the dynamic development of the law, claim that law breakers fall into two types: expressive and acquisitive.¹⁷⁷ Expressive lawbreaking aims at changing an overarching legal principle.¹⁷⁸ A lawbreaker practicing civil disobedience would fall into the expressive type of property lawbreaker.¹⁷⁹ Acquisitive lawbreaking aims at obtaining immediate benefits, such as an individual adverse possessor squatting for the

175. C.F., art. 185 ("The law shall guarantee special treatment for the productive property and shall establish rules for the fulfilment of the requirements regarding its social function.").

176. See Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. Pa. L. Rev. 1095, 1098–99, 1102–03 (2007).

177. *Id.* at 1102.

178. *Id.* at 1158–62.

179. See *id.* at 1114–22 (using the lunch counter sit-in movement in the 1960s as an example of expressive property lawbreaking).

sole purpose of acquiring that specific piece of property.¹⁸⁰ A hybrid category of lawbreakers, called “intersectional” lawbreakers, combines the attributes of the two types of outlaws. The acceptability of the property lawbreaker to the community and government is higher if her motive is more acquisitive, and lower if expressive.¹⁸¹

Squatters in both Brazil and South Africa seem to fit in the category of intersectional lawbreakers. The land invasions in both countries not only seek immediate benefits, but also seek to prompt broad change. However, each movement seems to lean to one end of the spectrum of intersectional lawbreaking. In Brazil, the organized squatter movements invade land as a method of prompting government action. These invaders are usually laborers and are usually much more organized than their South African counterparts. In South Africa, the landless seem to have no choice and move onto land out of necessity, not necessarily in an organized movement to coerce state action. Because the courts have no jurisdiction to expropriate land in Brazil, the only way for the landless to prompt action is petitioning INCRA and to make enough noise in the media. These large land invasions more or less coerce the government to expropriate land in an effort to quell the unrest and to prevent conflict. Therefore, land invasions in Brazil seem to fall closer to the expressive end on the spectrum of intersectional lawbreakers. In South Africa, the land invasions generally occur out of dire need and thus fall closer to the acquisitive type of lawbreaker on the spectrum of intersectional lawbreakers.

The courts in either country are involved in land reform to different extents. The courts in Brazil do not have jurisdiction to expropriate land; that power is exclusively vested in INCRA. When a landowner brings an action for *reintegração de posse* against squatters, the courts do not take into account the social function of the property or the land use. Thus their determinations in these squatter suits are only based on title and there is no room for equitable consideration of the squatters’ rights. However, in South Africa the courts do weigh the social obligation factors when ruling on

180. *Id.* at 1145–58. The authors use urban squatters in the United States during the 1970s and 1980s as an example of intersectional property “outlaws.” *Id.* at 1122–28.

181. *Id.* at 1064 (“[T]he more the motive of the acquisitive behavior moves away from satisfying immediate needs . . . and the more it moves towards the expressive end of the spectrum, the less likely it is that the ‘speaker’ will be entitled to avoid . . . (or be interested in avoiding) some criminal sanctions for her conduct.”).

claims for eviction. The PIE in South Africa requires the owner to show that the eviction would be “just and equitable,” and the court to take into account all factors. Similar legislation was proposed in Brazil in 1996, but it was not voted on.¹⁸² Some claim that this deficiency is somewhat responsible for the violent confrontations between the squatters and the landowners.¹⁸³

However, it looks as if something has changed in how courts analyze these petitions for eviction in Brazil. A 2003 case coming out of a state court in the State of Rio de Janeiro rejected a farm owner’s petition to have squatters evicted from the land based on considerations that could be characterized as equity and justice.¹⁸⁴ The court not only took into account the social function obligation required by the constitution, but also looked to the International Covenant on Economic, Social and Cultural Rights when it considered to grant the reintegration of possession.¹⁸⁵ In that case, the court wrote: “Land ownership without fulfillment of social function is not property to be safeguarded by law, when in confrontation with other values.”¹⁸⁶ The court also discusses the squalor in which the squatters are living in its considerations.¹⁸⁷ It is unclear whether this is purely a judicial change in approach to the problem, or whether it was mandated by another governmental branch.

In neither country is the story complete. The redress of past inequities between the landed and the landless will continue for years. However, with these legal reforms comes hope that true change is possible with the blessing of the law. The stories of Brazil and South Africa illustrate the transformative power of the law to address injustice and to give legitimate power to popular movements to effect change.

182. Alston, *supra* note 30, at 73.

183. *Id.*

184. Vara Única Estadual do Município de Italva, No. 5018/03, 25.08.2003 (Braz.) (cited in Samir Namur, *Posse e Propriedade na Contemporaneidade*, 1 EOS – Revista Jurídica da Faculdade de Direito 221, 224–25 (2009), available at http://www.estig.ipbeja.pt/~ac_direito/SNamur.pdf).

185. See Namur, *supra* note 185, at 224.

186. *Id.* (“A propriedade da terra sem o cumprimento de função social não é propriedade a ser tutelada pelo Direito, quando em confronto com outros valores.” (quoting Vara Única Estadual do Município de Italva, No. 5018/03, 25.08.2003 (Braz.))).

187. See Namur, *supra* note 185, at 224–25.

VI. CONCLUSION

Constitutional reform entrenching property rights and socioeconomic rights is an effective means of remedying historical injustice. Both Brazil and South Africa have instituted reforms that seek to address past inequities that existed between the landed and the landless. However, the quest for a more equitable system is not without struggle. In Brazil, the process is slow, expensive, and has resulted in much collateral damage in the form of violence. In South Africa, the process has also been expensive and the courts have been slow to embrace the full extent of the constitutional provisions—still unable to grant the landless the ability to demand specific rights. Although both systems have had to overcome institutional impediments, it seems that as these progressive provisions become more accepted by the governments—and most importantly by the people—greater progress will be made. In both countries, the landless now have leverage to force the government to act and to carry out the mandates enshrined in each constitution. Incorporating a social obligation norm into both constitutions has helped to define property rights in a way that allows the underprivileged to flourish by providing access to the benefits those rights entail and gave teeth to landless movements. These movements will likely continue for years to come, but over time the respective courts and governments will become more willing to use their power to proactively address the landless problems in either country. The landless movements in each country serve to sensitize the powers that be to the problem, and over time they will be more accepting of change. The waves of popular movements can erode the rocky beach of inequity down to the soft sands of a more just society.