

Thesis

OWNERSHIP, RIGHTS AND ACCESS TO MINERALS IN NAMIBIA: A CONTEMPORARY
LEGAL PERSPECTIVE

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To my dear husband, thank you so much for believing in me more than I believe in myself. May God bless you abundantly!

Declaration

I, Liina Kalili, hereby declare that the work contained in this thesis for the purpose of obtaining my Master of Laws is my own original work and that I have not used any other sources than those listed in the bibliography and quoted in the references.

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SUPERVISOR'S CERTIFICATE

I, Dr. Tapiwa V. Warikandwa, hereby certify that the research and writing of this thesis was carried out under my supervision.

Supervisor's signature: _____

Date : _____

DEDICATION

This work is dedicated to my late father who passed away on the 23rd of January 2018. He loved and valued education so much, thus he taught me that education is the key to my future. His hard work and commitment towards the family made me the person I am today. May the soul of my lovely father continue to rest in peace. This work is further dedicated to my mother for giving birth to me and raising me up. Growing up, my mother was not privileged to get education like I did, but she understood the importance of sending me to school. Her contribution is highly valued. May the Lord continue to bless and strengthen my mother.

Abstract

Namibia has a rich mineral heritage, but the larger proportion of these minerals is mined by foreign owned companies. The majority of the Namibian people do not have access to these mineral resources. Thus, the distribution of natural resources in Namibia has been blamed for the high inequality within the Namibian society as foreign investors arguably benefit more from the mining proceeds than locals. Therefore, the unequal distribution and ownership of natural resources can equally impact on the distribution of other forms of wealth in the Namibian society. In a bid to reverse the current status quo, the contemporary legal perspective to the right of ownership, access and distribution of mineral resources in Namibia was developed to support equitable distribution of mineral resources. However, it is evident that, many factors still need to be considered in order to achieve the objective of equitable access, ownership and distribution of mineral resources in Namibia. Thus, emphasizing the need to look at the current challenges Namibia is facing and how to overcome them in the quest for equitable distribution of natural resources.

The lack of access, ownership and distribution of mineral resources is not only the result of inadequate technical skills, technology and capacity but also fear of economic downgrades, corruption and absence of a supporting legal framework. As a way of addressing this problem, some countries such as Zimbabwe has learned from South Africa to implement measures to control business fronting, increased their focus on corporate social responsibility and invested in infrastructure development and technology transfer. This study therefore suggests that Namibia allow citizens to take ownership of the country's mineral resources by advocating more on creating and expanding local skills and expertise, which may positively contribute to local economic growth. Local empowerment as the engine of growth will also minimize inequality and foreign domination of Namibia's mineral wealth.

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1. International Market Prices in a global economy

LIST OF ABBREVIATIONS

AMV	:	African Mining Vision
CERDS	:	Charter of Economic Rights and Duties of States
CSR	:	Corporate Social Responsibility
EPL	:	Exclusive Prospecting Licenses
FDIs	:	Foreign Direct Investments
GA	:	General Assembly
GATT	:	General Agreement on Tariffs and Trade
GDP	:	Gross Domestic Product
HC	:	High Court
IEEA	:	Zimbabwe Indigenization and Economic Empowerment Act
MPRDA	:	Mineral and Petroleum Resources Development Act
NDP5	:	Namibia's 5th National Development Plan
NDTC	:	Namibia Diamond Trading Company
NEEEB	:	National Equitable Economic Empowerment Framework Bill
NEEEF	:	National Equitable Economic Empowerment Framework
NIPA	:	Namibia Investment Promotion Act
PTY	:	Proprietary Limited
SADC	:	Southern African Development Community
SWA	:	South West Africa
UK	:	United Kingdom
UN	:	United Nations
UNECA-SA	:	United Nations Economic Commission for Africa Southern Africa Office
USD	:	U.S. Dollar

WTO : World Trade Organization

CHAPTER ONE

INTRODUCTION

1.1 Introduction

A natural resource is defined as the materials or substances occurring in nature which can be exploited for economic gain.¹ In reference to the polarized nature of the control and exploitation of natural resources in Africa, some scholars consider that the capital intensive industry can only be controlled by wealthy multinational corporations whereas others consider it imperative that African countries must now revise the manner in which their resources are exploited by adopting an indigenous approach to mining. According to section 1(1)(b) of the Namibia Minerals (Prospecting and Mining) Act (herein after the Minerals Act),² minerals are defined as any substance, whether in solid, liquid or gaseous form, occurring naturally in or under any land and having been formed by, or subjected to, a geological process. It is submitted that mineral resources have positive benefits not only in Namibia but globally, as they can be used to develop the economies of the countries. For example, in Namibia, mineral resources are contributors to GDP and export earnings. The mining sector grew by 12.2% in 2017 and contributed 12.2% to GDP compared to a reduction of 5.8% and GDP contribution of 12% in 2016.³ Further, mining has supported the development of necessary infrastructure such as schools and

¹ The American Heritage® Science Dictionary 2018. Published by Houghton Mifflin Harcourt Publishing Company, Available at www.dictionary.com/browse/natural-resource; last accessed on 29 March 2016.

² No. 33 of 1992.

³ Chamber of Mines, 2018. “Mining Industry Performance in 2017”. Available at www.chamberofmines.org.na/index.php/home-menu/mining-industry-performance-2015/; last accessed on 22 October 2018.

clinics, in towns at Oranjemund, Uis, Kombat, Rosh Pinah, and Arandis.⁴ Globally, minerals resources are regarded by many countries as assets belonging to the public.⁵ Thus it is expected to be accessed and owned by the majority of the citizens. It is further maintained that these assets are important in terms of sustainable and economic development around the world. In some mining countries, up to 25 or 30 percent of fiscal revenues depends on the mining sector.⁶ Countries such as Australia, Canada, Sweden and the United States of America are good examples of countries where mining still remains a significant contributor to economic development.⁷

The definition of minerals in Namibia does not specify who should gain economically; therefore, one would presume it does not only apply to Namibians.⁸ It is submitted that economic benefit, from mining, extends to both Namibians and foreign investors. As a result foreign investors are invited to invest in various industries in Namibia including the mining sector; a privilege that is pronounced in the Namibian Constitution.⁹ Furthermore, the economic order of Namibia is based on the principles of a mixed economy with the objective of securing economic growth based on, a) public (b) private (c) joint public-private (d) co-operative (e) co-ownership and (f) small-scale family.¹⁰ Therefore, it is appropriate to conclude that the scope and context of the phrase “economic gain” extends to foreign investors. However, this research focuses on natural resources from the mining sector in Namibia.

⁴ Lange, G.M. & Motinga, D.J. 1997. “The contribution of resource rents from minerals and fisheries to sustainable economic development in Namibia” (No. 19). Directorate of Environmental Affairs, Ministry of Environment and Tourism, p. 1.

⁵ Global Mining, “Treasure or trouble? Mining in developing countries”. Available at www.siteresources.worldbank.org/INTOGMC/Resources/treasureortrouble.pdf; last accessed on 24 July 2018, p.2.

⁶ (*Ibid.*:2).

⁷ (*Ibid.*:3).

⁸ No. 33 of 1992.

⁹ No. 1 of 1990 as amended.

¹⁰ (*Ibid.*, Article 98 (1) & (2)).

Furthermore, Namibia is part of the international community that respects international principles. Consequently, the general rules of public international law and international agreements form part of the law of Namibia.¹¹ Namibia has incorporated features of international law that deal with natural resources and its ownership into domestic laws, including rights to own properties.¹² According to the Constitution of the Republic of Namibia,¹³ Article 100 provides that:

“Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned”.

Therefore, it is submitted that Article 100 of the Namibian Constitution, as stated above, regards the State as the owner of minerals in Namibia unless otherwise owned. For that reason, ownership of properties including mineral resources is protected by the Namibian Constitution and is not subjected to expropriation without compensation.

It is agreed in principle and in practice that the international community recognizes the importance of natural resources. In the case of *De Sanchez v Banco Central de Nicaragua*¹⁴ it was emphasised that taking of property without compensation violates American public policy regardless of the nationality of the property owner. The taking of property without compensation is deemed to violate international law only where the property owner is an alien. And in the case of *AMCO v Indonesia (AMCO v Republic of Indonesia (Merits))*,¹⁵ the Tribunal found that Indonesia had failed to protect PT Amco against the takeover of the Hotel, which constituted a breach of international law obligation to protect

¹¹ (*Ibid.*, article 144).

¹² (*Ibid.*, article 16).

¹³ No. 1 of 1990 as amended.

¹⁴ *De Sanchez v Banco Central de Nicaragua (De Sanchez v Banco Central de Nicaragua 770 F.2d 1385 US Court of Appeals 5th Cir September 19 1985 at paragraph 17.*

¹⁵ *AMCO v Indonesia (AMCO v Republic of Indonesia (Merits)) 1992 89 ILR 368 at paragraphs 405 and 466.*

aliens against unlawful acts of its citizens. The Tribunal referred to Indonesian law and international law principle *pacta sunt servanda* and the doctrine of respect for acquired rights to rule that Indonesia was liable to compensate the claimants for the revocation of the investment license.¹⁶ As a result, the United Nations has recognized and adopted the International Principle of Permanent Sovereignty over natural resources¹⁷ on 14 December 1962 GAR 1803 XVII.¹⁸ This international principle is about the protection of national wealth as it requires States and international organizations to strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter of the United Nations. The principle is linked to the Draft Namibian Policy¹⁹ on mineral resources and the Southern African Development Community (SADC) protocol.²⁰ This is because the principle of Permanent Sovereign over natural resources and wealth of States is the foundation principle of the economic self-determination of independent states in Africa, Asia and the Pacific.²¹ In addition, it is opined that legislations such as the International Principle of Permanent Sovereignty over natural resources²², Southern African Development Community (SADC) protocol, the Constitution of the Republic of Namibia,²³ and the Namibia Minerals (Prospecting and Mining) Act,²⁴ have one objective in common, which is to boost and create an environment for exploitation of mineral resources. The International Principle of Permanent Sovereignty over natural resources²⁵, Southern African Development Community (SADC) protocol, the Constitution of the Republic of

¹⁶ (*Ibid.*).

¹⁷ International Covenant on Human Right of 1966, Article 1.

¹⁸ Visser, F. 1988. "The principle of permanent sovereignty over natural resources and the nationalization of foreign interests." *Comparative and International Law Journal of Southern Africa*, Volume 21 (1): 77.

¹⁹ 2002 Minerals Policy of Namibia.

²⁰ SADC Protocol on Mining of 1997.

²¹ *De Sanchez v Banco Central de Nicaragua* 770 F 2d 1385 US Court of Appeals 5th Circuit (19 September 1985).

²² International Covenant on Human Right of 1966, Article 1.

²³ No. 1 of 1990.

²⁴ No. 33 of 1992.

²⁵ International Covenant on Human Right of 1966, Article 1.

Namibia,²⁶ and the Namibia Minerals (Prospecting and Mining) Act legislations as stated earlier focuses on national interest and the determination to increase foreign investments for national development.

It is further submitted that the right to permanent sovereignty over natural resources must be exercised in the best interest of national development and of the well-being of the people of the state concerned.²⁷ At the same time, despite the need to use natural resources for national interest, one needs to appreciate investment into the economy. It must be appreciated that foreign direct investment is also required to achieve economic liberation and growth. That is why it is important for countries to retain foreign direct investment (FDIs) as a business principle in their road to economic emancipation for the best interest of the Namibian nation. This explains why FDIs have been relied upon to support African economies. However, their benefits to the African indigenes have been questioned. To that end, there is a need to focus on home grown solutions to African problems, key amongst them, is the process of localizing mining activities. The General Assembly (GA) Resolution 626 (VII) provides that, “the right of peoples to use and exploit their natural wealth and resources is inherent in their sovereignty”.²⁸ Therefore, it is acknowledged that international law desires those natural resources to be utilised for the benefit of the citizens.²⁹ Nonetheless, it has been observed that mineral resources have not been distributed equally to the masses in Namibia, with only a few individuals benefiting from the national mineral resources. In support of the previous idea that mineral resources have not been utilised effectively by the citizens, the contemporary studies conducted by the African Mining Vision (AMV), introduced by the African Union, found that Africa is the world’s top producer of numerous mineral

²⁶ No. 1 of 1990.

²⁷ (*Ibid.*:78).

²⁸ *Natural Resource Sovereignty as a Basis for Sustainable Development*. Available at www.rug.nl/research/portal/files/3265513/h11.pdf; last accessed on 19 February 2018, p. 352.

²⁹ Bilder, R.B. 1980. “International law and natural resources policies”. *Natural Resources Journal*, Volume 20 (3):452-453.

commodities and has the world's greatest resources, but most of Africa still lacks systematic geological mapping which could bring to light a much greater resource base and use.³⁰ As a result of mineral resources are inherent in their sovereignty and people have right to use and exploit their national wealth, the SADC member states saw it fit that they ensure that their citizens have an understanding of exploitation of mineral resources.

The SADC member states such as Angola, Botswana, the Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe, recognize the importance of mining within the SADC region.³¹ As a result, in September 1995, the SADC Mining Sector coordinating Unit invited a wide range of stakeholders such as academia, economists, governments from all the SADC member States to participate in the development of the regional Mining Sector, as part of the effort to strengthen the relationship between the SADC member states. It is commented that the composition of the stakeholders was ideal to drive the African indigenous agenda. This work was done in partnership with the United Nations Economic Commission for Africa Southern Africa Office (UNECA-SA), for the harmonization of mining policies, standards, legislative and regulatory framework in Southern Africa.³² As a result, the SADC Protocol on Mining³³ was established with the objective of recognising a thriving mining sector that can contribute to economic development, alleviate poverty and improve the standard and quality of life throughout the SADC region.³⁴ The member states of SADC, through the Protocol on Mining, agreed

³⁰ "Africa Mining Vision 2009". Available at www.au.int/sites/default/files/documents/30984-doc-africa_mining_vision_english.pdf; last accessed on 24 July 2018, p.2.

³¹ Mzumara, D.W. 2004. "Harmonization of Mining Policies, Standards, Legislative and Regulatory Frameworks in Southern Africa". Available at www.sadc.int/files/8813/5825/8305/Mining-Harmonisation_Study.pdf; last accessed on 20 February 2018, p.1.

³² "Southern African Development Community towards a common future". Available at www.sadc.int/themes/economic-development/industry/mining/; last accessed on 24 July 2018.

³³ SADC Protocol on Mining of 1997, Article 2.

³⁴ "SADC Mining Sector Community Building Workshop, Record", Pretoria, South Africa, 11-15 September, 1995.

to adopt internationally accepted regional standards within the mining sector³⁵ which include mineral policy stability, making allowance for adjustments from time to time, consistency and transparency, stakeholder dialogue in policy formulation, management of stakeholder expectations, tradability of mineral rights, and integrated land use and development plans such as social development plans.³⁶ The regional standards and principles as mentioned above originated from the common standards established to encourage development of internationally acceptable national and regional standards. The common standards include adopting common nomenclature, common symbols and common colors for all published data as well as coordinating efforts in developing and adopting common certification standards for the region to promote the interchange of engineering, geological codes and other technical data that facilitate the application of common standards.³⁷ These standards are set to ensure uniformity of policies for harmonisation³⁸ and conformity with an African oriented regulation for control of the African mining sector. Additionally, SADC member states also agreed to share information on exploitable mineral resources in the region³⁹ to enhance the technological capacity of the sector as well as promote policies that will encourage and assist small scale mining in the region.⁴⁰ It is submitted that SADC member states initiative to support the mining industry is highly recommended for strengthening the relationships and working towards enhancing the quality of lives of the member states through mining.⁴¹

³⁵ Protocol on mining in the Southern African Development Community, Article 2.

³⁶ Mzumara, D.W. 2004. "Harmonization of Mining Policies, Standards, Legislative and Regulatory Frameworks in Southern Africa". Available at www.sadc.int/files/8813/5825/8305/Mining-Harmonisation_Study.pdf; last accessed on 24 July 2018, p.14.

³⁷ Protocol on mining in the Southern African Development Community, Article 5.

³⁸ Mzumara, D.W. 2004. "Harmonization of Mining Policies, Standards, Legislative and Regulatory Frameworks in Southern Africa". Available at www.sadc.int/files/8813/5825/8305/Mining-Harmonisation_Study.pdf; last accessed on 24 July 2018, p.x.

³⁹ (*Ibid.*, Article 6).

⁴⁰ (*Ibid.*, Article 7).

⁴¹ "Southern African Development Community towards a common future". Available at www.sadc.int/themes/economic-development/industry/mining/; last accessed on 24 July 2018.

Namibia, being part of SADC, also participated in the effort to strengthen the relationship between the SADC member states and in support of the mining sector in the region.⁴² Namibia has adopted legislation such as the SADC Protocol on Mining of 1997, the Namibian Constitution and International Principle of Permanent Sovereignty over natural resources of 14 December 1962 GAR 1803 XVII that prescribe the handling of the country's mineral resources. The Draft Mineral Policy of Namibia⁴³ that was formulated to contribute to the creation of an environment that attracts both foreign and local investment in mining,⁴⁴ is aimed to amend the Minerals Act of 1992 to end the uncertainty about strategic minerals. Further, the Mining Policy sought to contribute to the development of opportunities for the Namibian people to benefit from their country's mineral resources in line with the Government's policy on socio-economic upliftment.⁴⁵ It is submitted that synergies between the draft mineral policy of 2002, the SADC Protocol on mining as well as the Namibian Constitution support a thriving mining sector, economic development, poverty alleviation and equitable distribution of mineral wealth. Therefore, in order to have a thriving mining sector and equitable distribution of wealth, there is a need to campaign and promote for home grown solutions to African problems such as the localisation of mining activities. However, it is important to note that localisation of mining activities do not mean abolishing the need for foreign participation in the local economy. Thus, the SADC member states' initiative to participate in the development of regional mining has taken note that responding to international trade and international market theories on trade means that countries

⁴² Mzumara, D.W. 2004. "Harmonization of Mining Policies, Standards, Legislative and Regulatory Frameworks in Southern Africa". Available at www.sadc.int/files/8813/5825/8305/Mining-Harmonisation_Study.pdf; last accessed on 24 July 2018, p.1.

⁴³ The Draft Mineral Policy of Namibia of 2002.

⁴⁴ (*Ibid.*).

⁴⁵ (*Ibid.*). The Government's policy on socio-economic entails the upliftment of the lives of the Namibian people and promote the creation of opportunities that are meant for socio-economic development. Thus the Draft Mineral policy of 2002 is based on that foundation, with the vision to achieve a high level of responsible development of national resources in which Namibia becomes a significant producer of mineral products while ensuring maximum sustainable contribution to the socio-economic development of the country. To further attract investment and enable the private sector to take the lead in exploration, mining, mineral beneficiation and marketing. The Draft mineral Policy is read in conjunction with the Minerals Act of 1992 because the Draft Mineral Policy is still a draft.

need one another when it comes to trading their resources, including the mining sector. The Classical trade theory maintains that countries gain if they offer resources to produce goods and services in which they have an advantage.⁴⁶ Therefore, states can trade with others where they will benefit,⁴⁷ there is no need to trade with another for no reason or benefit. The Classical trade theory is not the only theory available, there are other theories, namely Mercantilism, Absolute Advantage and Comparative Advantage theory, which fall under classical theories of international trade. Mercantilism theory is based on the premise that a country must export more than it imports in order to promote local industry.⁴⁸ While the Absolute Advantage theory is based on the fact that export is profitable if a country can import goods that could satisfy better the necessities of consumers instead of producing them on the internal market.⁴⁹ The Comparative Advantage (David Ricardo) theory postulates that countries can gain from trade even if one of them is less productive than another.⁵⁰ Therefore, the aspect of trade is linked to access and ownership of mineral resources, because trade provide an efficient mechanism for ensuring access to natural resources. It is submitted that mineral resources can be distributed via trade through import and export. The comparative advantage theory allows for a more efficient allocation of resources, which in turn leads to an increase in global social welfare – the “gains from trade”.⁵¹ It is submitted that trade may provide an efficient mechanism for ensuring access to natural resources through skills and technology transfer. Nevertheless, it is doubtful whether gains from trade benefit the masses. On the one hand, there are specific problems related to “open access” to mineral resources which may lead to a situation where ownership of, and access to, a natural resource

⁴⁶ Myint, H. 1958. “The” classical theory” of international trade and the underdeveloped countries”. *The Economic Journal*, Volume 68 (270):317-337.

⁴⁷ (*Ibid.*).

⁴⁸ “Classical theories of international trade”. Available at www.cis01.central.ucv.ro/iba/files/int_ec2.pdf, p.1-4; last accessed 11 May 2018.

⁴⁹ (*Ibid.*:1-4).

⁵⁰ (*Ibid.*).

⁵¹ The World Trade Report 2010, “Trade theory and natural resources”. Available at www.wto.org/english/res_e/booksp_e/anrep_e/wtr10-2c_e.pdf; last accessed on 25 July 2018, p.74.

can lead to its overexploitation and eventual exhaustion.⁵² Therefore, even though the exploitation of mineral resources by international companies or individuals is good for international trade, measures must be put in place to avoid overexploitation, abuse and exhaustion of mineral resources.

It is commendable that the Namibian government has embraced aspects of trade and what international law entails on trade. To ensure access and equitable distribution of mineral resources, research shows that the Namibian parliament tabled the National Equitable Economic Empowerment Framework Bill (NEEEB).⁵³ The main objective of NEEEB is to implement the National Equitable Economic Empowerment Framework (NEEEF).⁵⁴ The framework seeks to create an equitable and socially just society in terms of distribution of resources.⁵⁵ It consists of six (6) pillars of empowerment, the first being economic ownership.⁵⁶ This pillar promotes equitable and balanced ownership of businesses in Namibia and provides certainty and investor confidence.⁵⁷ The second pillar is management control and employment equity,⁵⁸ which ensures that the management structures and workforces of businesses in Namibia accurately reflect the demographics of the Namibian population.⁵⁹ The third pillar, human resources and skills development,⁶⁰ encourages training and skills development as the key to empowerment and transformation in the business sector.⁶¹ The fourth pillar, entrepreneurial development and marketing,⁶² seeks to enhance entrepreneurship among previously disadvantaged Namibians.⁶³ Corporate social responsibility is the fifth pillar⁶⁴ and it emphasises the significance of

⁵² (*Ibid.*:81).

⁵³ Bill of 2015.

⁵⁴ (*Ibid.*, section 2).

⁵⁵ The New Equitable Economic Empowerment Framework, p.5.

⁵⁶ New Equitable Economic Empowerment Bill of 2015, section 3.

⁵⁷ New Equitable Economic Empowerment Framework, p.9.

⁵⁸ (*Ibid.*:5).

⁵⁹ (*Ibid.*:12).

⁶⁰ (*Ibid.*:5).

⁶¹ (*Ibid.*:13).

⁶² (*Ibid.*:5).

⁶³ (*Ibid.*:14).

⁶⁴ (*Ibid.*:5).

corporate social responsibility in the modern business environment.⁶⁵ The sixth pillar is value addition,⁶⁶ technology and investment and financing of transformation,⁶⁷ to support economic transformation and empowerment of the citizens.”⁶⁸ The Namibian parliament is appreciated in the effort and determination to ensure that the Namibian people have access to national wealth harmonising it with foreign participation in the local economy.

As a result, the NEEEB was tabled before parliament to support the Draft mineral policy of 2002 in terms of distribution and access to mineral resources in Namibia and to address inequalities within the Namibian economy, including unequal distribution of mineral resources. Further, NEEEB was also tabled for the following objectives such as by ensuring the sharing of Namibian resources in an equitable and sustainable basis by the people of Namibia, creating a socially just society; implementation of measurable policies of redress and redistribution; creating vehicles for empowerment; removing barriers of socio-economic advancement in order to enable previously disadvantaged persons to access productive assets and opportunities for empowerment; actively guarding against the repugnant tendencies of window-dressing, favoritism, nepotism and self-enrichment; providing measurement of empowerment targets; ensuring that an empowering act is meant to launch individuals to empower themselves in the future using the basis of their initial empowerment; economic empowerment may be organised in the following forms of ownership: public, private, joint public-private, cooperative, co-ownership, and small-scale family owned and to address the shortcomings of the current policies and legislative regime by addressing disparities

⁶⁵ (*Ibid.*:15).

⁶⁶ (*Ibid.*:5).

⁶⁷ National Equitable Economic Empowerment Bill of 2015, section 2.

⁶⁸ (*Ibid.*).

occasioned by class, gender and generational relationship in order to find a solution to shortcomings as stated above.⁶⁹

It is agreed that there is a lack of fair and equal distribution of natural resources in Namibia. There is a concern that a small percentage of well-connected people have benefited unduly since independence.⁷⁰

It is further submitted that these people continue to benefit instead of the masses. However, change may come because NEEEF requires businesses to be at least 25% owned by previously disadvantaged persons (black people) while 50% of top management must be previously disadvantaged persons.⁷¹ It is important to have policies aimed at addressing inconsistencies in wealth participation; thus NEEEF may be a good starting point to address the challenge of inequitable distribution, lack of access and ownership of mineral resources in Namibia.

Despite the efforts to address the issue of inequitable distribution of the national wealth through NEEEF, it is recognised that NEEEF may also have some flaws because after it was tabled before Parliament, FITCH, an international outlook rating agency, gave Namibia a negative economic outlook.⁷² This negative outlook may affect the implementation of NEEEF. It is argued that the negative outlook rating could have been a result of several factors including NEEEF. NEEEF was not clearly defined, causing panic among international business communities. It is further acknowledged that it is not clear how NEEEF will be applied, particularly the 25% share to the previously disadvantaged people. Therefore, one cannot ignore this international outlook on the Namibian economy. At the same time, once it has been explained how the 25% share will be applied, the

⁶⁹ Mining Journal. A publication of the Namibian, April 2016, p.37.

⁷⁰ (*Ibid.*:38).

⁷¹ (*Ibid.*).

NEEEB will be able to compliment the Mineral Policy of 2002 in terms of access and equitable distribution of mineral resources.

1.1.1 Beneficiation and nationalisation in the context of the Namibian mining sector

Beneficiation is defined as the transformation of a primary material produced by mining and extraction process to a finished product, which has higher sale value for export.⁷³ The term is used interchangeably with value-addition.⁷⁴ There is a perception that Namibia is exporting its mineral wealth, only to repurchase it after it has been processed at a premium.⁷⁵ It is submitted that this practice may affect development of the mining industry in Namibia. It is further argued that Namibia needs to adopt a new approach of handling mineral wealth by processing natural resources locally, in order to gain monetary value added to resources and gain nominal effect on the economy. This raises questions on availability of capital, equipment and technical skills to achieve this objective. One would hope that, as a country that got its independence 28 years ago, Namibia must have sufficient resources to process natural resources. It is assumed that it may be due to the lack of skills and expertise that alternatives are sought to fill the gap in the mining industry in Namibia.

Simultaneously, the Namibian Chamber of Mines advocates for an alternative wherein the government is able to attract individuals that have necessary expertise to create beneficiation.⁷⁶ It is admitted that skills and expertise are vital to the mining industry. As such, the development of local skills and

⁷² Nhemachena. A & Warikandwa, T.V. (eds) 2017. *Mining Africa: Law, Environment, Society and Politics in Historical Multidisciplinary perspective*. Langaa Research & Publishing CIG Mankon, Bamenda p.267.

⁷³ McGregor,V., Emvula, C., & Brown, R. 2017. "Beneficiation in Namibia: Impacts, constraints and options", Institute for Public Policy Research Paper, p.15.

⁷⁴ "A beneficiation strategy for the minerals industry of South Africa". June 2011, p.ii.

⁷⁵ (*Ibid.*).

⁷⁶ (*Ibid.*).

expertise should become a priority,⁷⁷ in order to achieve the objectives of NEEEF. However, the Namibian chamber of Stakeholders in the Mining industry do not believe that NEEEF is the solution to poverty eradication and equality, as the new policy framework and the bill focuses on empowerment of few individuals instead of the majority of the population.⁷⁸ It is argued that it is also important to be cautious of the negative impact of radical economic policies that may discourage foreign investors.

The concept of “resource nationalism” is defined as a sovereign claim on resource assets by citizens of a mineral-rich country, in which this claim must deliver maximum benefits to them”.⁷⁹ On December 14, 1962, the General Assembly adopted Resolution No. 1803 (XVII) which provided that nationalisation measures could only be implemented for public purposes, security or national interest, subject to the investor whose property is expropriated⁸⁰ receiving appropriate compensation in accordance to domestic and international law and in good faith.⁸¹ What it means is that international law requires that expropriation of properties should be done in a just and equitable way. Therefore, resource nationalisation is subjected to the law to avoid unjust treatment and to ensure that previously disadvantaged Namibians when becoming owners of mineral resources should not emanate from previously advantaged Namibians parting with their properties without reward.

⁷⁷ Namibia’s 5th National Development Plan (NDP5), one of the game changer that will move Namibia from a reactive, input-based economy towards a proactive, high performing economy is to invest in quality technical skills development. Vision 2030, 2002 Draft Minerals Policy and the Harambee Prosperity Plan.

⁷⁸ Mining Journal, “A publication of the Namibian 2017”, p.13.

⁷⁹ Antin, D. 2015. “The South African Mining Sector: An Industry at a Crossroads”. Available at www.shivau.com/images/South%20African%20Mining%20Industry.pdf; last accessed on 24 April 2018, p.10.

⁸⁰ Vielleville, D.E., & Vasani, B.S. 2008. “Transnational Dispute Management”. *Sovereignty Over Natural Resources Versus Rights Under Investment Contracts: Which One Prevails?*, Volume 5 (2):11.

⁸¹ (*Ibid.*:4).

According to the Mining Journal,⁸² previously advantaged Namibians dominated the mining industry before independence. Therefore, it is submitted that when the Namibian Government aspires to nationalise the mining industry, the process must be done within the ambit of the law, such as the Namibian Constitution.⁸³ It means if the government wants to expropriate properties, which involves the taking of private property for the benefit of the public should involve suitable compensation by the government to the parties involved.⁸⁴ Despite the nationalisation of the mining industry, the neoliberal economic order embraces the fusion of free market policies and the radical economic transformation agenda, thus foreign investment may be still necessary while advocating for adopting an indigenous approach to mining.

1.1.2 Indigenisation

Namibia produces a wide range of minerals and metals such as Diamonds, Uranium, Base Metals, Precious Metals, Industrial Minerals, Gemstones and Dimension Stone.⁸⁵ These mineral resources are held in trust for the benefit of the Namibian people according to the draft mineral policy of 2002,⁸⁶ and the Constitution of Namibia. It however, remains debatable whether state control, over resources, guarantees equitable distribution of mineral wealth. This is so because, the objective of state control over mineral resources has not supported successful equitable distribution of wealth in Namibia. For example, in the case of the *Namibia Grape Growers and Exporters Association and Others v Ministry of Mines and Energy and Others*,⁸⁷ the parties were *ad idem* that Article 100 of the Constitution vested mineral rights, so far as they were not privately owned, in the State. The fact that the objective of the

⁸² Mining Journal, “A publication of the Namibian 2017”, p.8.

⁸³ Vielleville, D.E., & Vasani, B.S. 2008. “Transnational Dispute Management”. *Sovereignty Over Natural Resources Versus Rights Under Investment Contracts: Which One Prevails?*, Volume 5, (2):9-11.

⁸⁴ 16 of the Namibian Constitution Act 1 of 1990 as amended.

⁸⁵ Minerals policy of Namibia of 2002.

⁸⁶ (*Ibid.*).

⁸⁷ *Namibia Grape Growers and Exporters Association and Others v Ministry of Mines and Energy and Others* SA14/02 (2004) NASC 6.

state control over mineral resources has not supported successful equitable distribution of wealth in Namibia has resulted, resulted in challenges of high exports of raw mineral resources

Despite the state control over natural resources, there are challenges that were highlighted by the Minister of Mines and Energy, Honorable Obeth Kandjoze, in his keynote address at the minister's engagement session with the diamond industry on the 27th of March 2017.⁸⁸ The minister expressed disappointment to the effect that a significant proportion of rough diamonds sold by Namibia Diamond Trading Company (NDTC) to its customers in 2016 had been typically exported instead of being cut and polished in Namibia.⁸⁹ The Minister further stated that, "...the current trend of high exports of rough diamonds, meant for beneficiation purposes, is viewed to be against the spirit of beneficiation and is of grave concern to the Ministry of Mines and Energy and the Namibian Government."⁹⁰ He emphasised that, "...the continued mass exports of rough diamonds is not only a loss to Namibia but totally undermines the concerted efforts Government is making to eradicate poverty, unemployment and improve the lives of ordinary Namibian citizens."⁹¹ Therefore, Namibia should add value to its mineral output before export in order to capture as much rent from the sector as possible for national growth.⁹²

That leads to a need to further clarification regarding the question whether indigenisation is coterminous with value addition, meaning having boundaries or extent in space, time or meaning. It is notable that the two concepts are different. The concept of indigenisation deals with the process of

⁸⁸ Kandjoze, O.M. 2017. "Keynote address at minister's engagement session with the diamond industry". Hilton Hotel, March 27, 2017, p. 9-15.

⁸⁹ Kandjoze, O.M. 2017. "Keynote address at minister's engagement session with the diamond industry". Hilton Hotel, March 27, 2017, p. 9-11.

⁹⁰ (*Ibid.*).

⁹¹ (*Ibid.*).

⁹² Mzumara, D.W. 2004. "Harmonization of Mining Policies, Standards, Legislative and Regulatory Frameworks in Southern Africa". Available at www.sadc.int/files/8813/5825/8305/Mining-Harmonisation_Study.pdf; last accessed on 20 February 2018, p.33.

bringing something under the control, dominance, or influence of the people native to a certain area that gives people a chance to partake in the national economy while value addition with local processing of goods or raw material into finished products.

Indigenisation may involve enacting of Indigenisation Policy that will enhance the value addition strategy to ensure that the country fully benefits from its resources. It is emphasized that the two concepts work hand in hand and have boundaries in terms of economic development and adequate access and ownership of mineral resources. For that reason, government's involvement will be required to promote local production through research and gathering of essential information that can affect the performance of local citizens or industries. It is obvious that, value addition creates wealth for nations for economic growth,⁹³ however, raw materials are extracted and exported from Africa to Europe and Asia in their raw state and at very low prices.⁹⁴ Consequently, the value addition or processing is done outside the countries of origin and the finished goods or processed materials imported back as finished products that attract more money.⁹⁵ The importation at high prices opens the gap between poverty and wealthy nations.⁹⁶

1.2 Problem Statement

Namibia has rich mineral heritage such as diamonds, lead, gold, cement, metal ores, copper, uranium, zinc and salt.⁹⁷ However, it is worthwhile to note that a significant proportion of these minerals are mined by foreign owned companies as illustrated later in this study.

The market price in a global economy is as follows:

⁹³ Shangahaidonhi, T. & Gundani, B. 2014. "The feasibility of value addition in the mining sector in the wake of the indigenization policy in Zimbabwe". *Journal of Emerging Trends in Economics and Management Sciences*, Volume 5(2): pp.128-137.

⁹⁴ (*Ibid.*).

⁹⁵ (*Ibid.*).

⁹⁶ (*Ibid.*).

⁹⁷ The Chamber of Mines of Namibia, "Annual review 2015", p.13.

Table 1: International Market Prices in a global economy

Time	Mineral	Price US\$
27 Feb 2018 10:9 AM (EST)	Diamond: Round, 0.33, F, S11	P/C\$1364 ⁹⁸
27 Feb 2018 06:9:57 AM EST	Copper	4.50 ⁹⁹
19 February 2018	Uranium	21.75 ¹⁰⁰
26 February 2018	Zinc	3587.00 (Bid) 3588.00 (Offer) ¹⁰¹
26 February 2018	Lead	2597.50 (Bid) 2598.50 (Offer) ¹⁰²
31 Dec 2017	Metal ores	71.40 ¹⁰³

Source: Online index

Despite the value of minerals in Namibia, thousands of the country's populace continues to wallow in abject poverty while only a few have access to natural resources.¹⁰⁴ In particular, the unequal

⁹⁸ Index, 2018. *Diamond Price*. Available at www.idexonline.com; last accessed on 27 February 2018.

⁹⁹ Business Insider, 2018. *Copper Price Commodity*. Available at www.markets.businessinsider.com/commodities/copper-price; accessed 27 February 2018.

¹⁰⁰ Business Insider, (2018). *Uranium Price*, available at www.cameco.com/invest/markets/uranium-price; last accessed 27 February 2018.

¹⁰¹ Business Insider, 2018. *LME zinc official prices, US\$ per tonne*. Available at www.lme.com/Metals/Non-ferrous/Zinc#tabIndex=0; last accessed 27 February 2018.

¹⁰² Business Insider 2018. *LME lead official prices, US\$ Per Tonne*. Available at www.lme.com/Metals/Non-ferrous/Lead#tabIndex=0; last accessed 27 February 2018.

¹⁰³ Business Insider, 2018. *Iron Ore Prices and Iron Ore Price Charts*. Available at www.infomine.com/investment/metal-prices/iron-ore/; last accessed 27 February 2018.

distribution of natural resources has been blamed for the high inequality within the Namibian society and this is coupled by the fact that most mining rights are in the hands of foreign nationals, who arguably receive a larger share of proceeds than locals.¹⁰⁵ It is submitted that the reason why foreign nationals are getting a large share of proceeds than locals may be due to financial challenge on the part of the locals. This financial challenge is associated with lack of funding or inability to obtain credit from the financial institution to run the mines. However, given that the law does not preclude Namibians from acquiring mining rights, one can argue that limited financial capacity, on the part of locals, limits their ability to acquire such mining rights. Another challenge may be at the administrative level. This is so because knowledge and information remain mostly with the wealthy and is inaccessible to many, contributing to income inequality.¹⁰⁶ The question is, if mining wealth remains with the few, does it really serve to benefit all of society? Previously disadvantaged Namibians have had trouble accessing mineral resources.¹⁰⁷ Therefore, if Namibia emphasises more on creating and expanding local skills and expertise, inequality and foreign domination of Namibia's mineral wealth may be minimized.

In 2015, some mining companies provided bursaries in the field of mining such as Langer Heinrich Uranium Pty Ltd, B2 Gold, Navachab Gold Mine for the beneficiaries to further their education and skills.¹⁰⁸ Namdeb Diamond Corporation (Pty) Ltd provided job attachments and internships.¹⁰⁹ It is

¹⁰⁴ Thorium, R. 2016. "Profiling Namibia's mineral resources". *The patriot newspaper*. Available at www.thepatriot.com.na/index.php/2016/10/30/profiling-namibias-mineral-resources/; last accessed 25 November 2016.

¹⁰⁵ (*Ibid.*).

¹⁰⁶ (*Ibid.*).

¹⁰⁷ Nyaungwa, F. N & Abankwah, C. 2014. "Oil and Mining Boom: Where do Namibians fit in?" *Windhoek Observer newspaper*. Available at www.observer.com.na/index.php/8-latest-news/3514-oil-and-mining-boom-where-do-namibians-fit-in; last accessed 25 November 2016.

¹⁰⁸ The Chamber of Mines of Namibia, "Annual Review 2015", pp.26-51.

¹⁰⁹ (*Ibid.*).

acknowledged that the initiative of awarding financial assistance to study mining is necessary for sustainable development of the mining industry but is not adequate.

Despite the financial assistance and the efforts to develop skills, Namibia still faces many challenges related to widespread poverty (29% of the population is classified as poor or severely poor) and severe income inequality (Gini 0.58).¹¹⁰ It is recorded that Namibia scored 58% Gini co-efficient; a measure that looks at statistical dispersion intended to represent the income distribution of a nation's residents.¹¹¹ This has consistently placed Namibia, over the years, in the top five countries in the world, in terms of income inequality.¹¹² It is asserted that the challenge of widespread inequality, despite the abundance of mineral resources, may be attributed to high operational costs of running mines compared to low market prices of commodities. This is largely due to irrevocable regulations such as expiry of mining lease or permit and institutional arrangements such as investment in labor (high costs of hiring, training, and firing employees).¹¹³

Therefore, this study is going to focus on the contemporary legal perspective to the right of ownership, access and distribution of mineral resources in Namibia. To investigate factors that need to be considered in order to achieve the objective of equitable access, ownership and distribution of mineral resources in Namibia, as it appears that there is a problem of unbalanced distribution of natural resources in Namibia. Nevertheless, as a way of addressing this problem, a comparison of other jurisdictions will help Namibia to learn from, to implement measures to control business fronting,

¹¹⁰ NIP Namibia, Available at www.ec.europa.eu/europeaid/sites/devco/files/nip-namibia-edf-11-2015_en.pdf; last accessed 30 March 2017.

¹¹¹ Hamilton, A. 2015. "Namibia has world's worst income inequality". *Windhoek Observer newspaper*. Available at www.observer.com.na/national/5556-namibia-has-world-s-worst-income-inequality; last accessed 30 March 2017.

¹¹² (*Ibid.*).

¹¹³ Zhang, K., Nieto, A. & Kleit, A.N. 2015. "The real option value of mining operations using mean-reverting commodity prices". *Mineral Economics*, Volume 28 (1-2):11-22.

focus on corporate social responsibility and invested in infrastructure development and technology transfer.

This study will further investigate the effect of citizens ownership of the country's mineral resources by advocating on creating and expanding local skills and expertise and whether citizens ownership of country's mineral resources may positively contribute to local economic growth.

Therefore, this study will focus on the

1.3 Research questions

- a) Who is the custodian of mineral resources in Namibia?
- b) Who holds mineral rights in Namibia?
- c) Can indigenisation laws and policies be relied upon to address challenges related to beneficiation and value addition in Namibia's mining sector?

1.4 Hypothesis

Mineral resources as defined by section 1(1) (b) of the Mineral Act,¹¹⁴ are supposed to generate revenue through taxes and royalties.¹¹⁵ Further, mineral resources are supposed to realize corporate social responsibility, skills transfer and human capital investment.¹¹⁶ Thus, it is submitted that mineral resources achieve revenue generation through corporate social responsibility if mining companies are involved. Mining companies are supposed to be involved when they use their profits to benefit society. As a result, the prior stated positive benefit of revenue generation through taxes and royalties from the mining sector will then realize poverty eradication and reduction of the inequality gap in Namibia.¹¹⁷

¹¹⁴ No. 33 of 1992.

¹¹⁵ Mining Journal, A publication of the Namibian 2017, p.38.

¹¹⁶ Mining Journal, A publication of the Namibian, April 2016, p.41.

¹¹⁷ (*Ibid*).

1.5 Literature Review

In virtually all countries around the world, the owner of the surface land, be it a house or farmland, has absolutely no rights with regards to mineral ownership.¹¹⁸ But in Roman-Dutch law, there is the principle *cuius est solum eius est usque ad coelum et ad inferos* which confirms the landowner's rights and entitlements to the subsurface.¹¹⁹ This principle basically states that property holders have rights to the land itself including the air above and the ground below.

It has been stated earlier that mining industries in Namibia have been dominated by previously advantaged persons, mostly foreign nationals.¹²⁰ However, Warikandwa and Nhemachena contend that the situation can change if Africa, including Namibia, realizes their capability to run mining industries on their own without relying on the West and Asia.¹²¹ Africa must leverage the increase of competition for its natural resources and maximize on such opportunities to realise development.¹²² However it is submitted that this can only be achieved by investing in skills development, training and regulations.¹²³ It is further claimed that there is lack of confidence and positive perception in the capabilities of locals to run the mining industry successfully, mainly due to a lack of capital and skills.

While Warikandwa and Nhemachena believes the situation in Africa can change if dependence on foreign countries is decreased and allow citizen participation in the national wealth and distribution

¹¹⁸ Legislation & policy: mineral ownership. Available at www.bgs.ac.uk/mineralsUK/planning/legislation/mineralOwnership.html; last accessed 2 March 2018.

¹¹⁹ Mostert, H. & van den Berg, H.M. 2013. *Roman-Dutch Law, Custodianship, and the African Subsurface: The South African and Namibian Experiences*, Oxford University Press, pp.2-3.

¹²⁰ Mining Journal, "A publication of the Namibian 2017", p.8.

¹²¹ Nhemachena. A & Warikandwa, T.V. (eds) 2017. *Mining Africa: Law, Environment, Society and Politics in Historical Multidisciplinary perspective*, Langaa Research & Publishing CIG Mankon, Bamenda, p.38.

¹²² (*Ibid.*).

¹²³ Namibia's 5th National Development Plan (NDP5), Vision 2030, 2002 Draft Minerals Policy and the Harambee Prosperity Plan.

thereof. While citizen participation is being advocated for, the distribution of wealth properly coordinated may prompt efficient and effective access of natural resources. However, Shackleton, Campbell, Wollenberg and Edmunds highlight that income distribution shares are generally decided at the central level, making promises to the public, but later governments often fail to deliver on their promised share of incomes, or returns were far less than anticipated and inadequate to maintain local enthusiasm.¹²⁴ Therefore it is conferred that lack of capital may limit access to and ownership of mineral resources. Furthermore, corruption that has become chronic in many African states such as Nigeria, South Africa, Zimbabwe, Angola, Cameroon and Equatorial Guinea hinders development and progress of the mining industry for the benefit of the people¹²⁵. Therefore, it is worth noting, from the onset, that the existence of corruption makes it challenging for States to act in the best interest(s) of the masses.

Despite the intention of States to distribute natural resources equitably to the people, Fernando and Pablo argue that the abundance of natural resources may fail to improve living standards.¹²⁶ They further state that the abundance of natural resources may even hinder economic performance, especially in the presence of bad institutions; leading to conflict and undermining of democracy.¹²⁷ Furthermore, the above mentioned challenges are at the heart of the inability to transform natural wealth into better standards of living.¹²⁸ But failure to develop African countries should not be blamed on the abundance of natural resources because other continents, such as Europe, are developed as a result of exploiting Africa's natural resources. The same resources have sustained development in

¹²⁴ Shackleton, S., Campbell, B., Wollenberg, E. & Edmunds, D. 2002. "Devolution and community-based natural resource management: Creating space for local people to participate and benefit". *Natural resource perspectives*, Volume 76 (1):1-6.

¹²⁵ Nhemachena, A & Warikandwa, T.V. (eds). 2017. *Mining Africa: Law, Environment, Society and Politics in Historical Multidisciplinary perspective*. Langaa Research & Publishing CIG Mankon, Bamenda p.269.

¹²⁶ Fernando, A. M. & Juan Pablo, R. 2013. "Natural Resources and Local Communities: Evidence from a Peruvian Gold Mine". *American Economic Journal: Economic Policy*, Volume 5 (2):1-25 at 2-5.

¹²⁷ (*Ibid.*: 2-5).

¹²⁸ (*Ibid.*:52).

Europe, thus can sustain development in Africa. It is further admitted that countries that are rich in natural resources may fail to improve living conditions of its citizens due to corruption, legislations that are not responsive to the needs of the people,¹²⁹ as well as neoliberal economic policies, lack of technology, skills, and even poor governance. As a consequence, conflicts may arise as seen in some African countries that are rich in mineral resources such as Liberia, Sierra Leone, the Democratic Republic of Congo, and Angola.¹³⁰

It is further opined that if there is no equal distribution of resources, inequality in terms of income will prevail, and as a consequence, the mining industry would remain in the hands of previously advantaged people. This has been established by Thorvaldur and Gylfi who contend that, income inequality has a negative effect on economic growth across countries.¹³¹ Therefore, in support of Thorvaldur and Gylfi, unequal distribution of mineral resources leads to inequality in terms of income and this may hurt growth in many different ways and delay economic freedom. The other argument that negates unequal distribution of wealth is that, excessive inequality may be socially divisive and wasteful because it may motivate the poor to engage in illegal activities and riots, or to divert resources from productive uses, both the resources of the poor and those of the state.¹³²

The social evil that leads to social division has been underlined by Le Billon that, natural resources have played a conspicuous role in the history of armed conflicts.¹³³ The question is why? The main focus should be on how best these resources can be distributed to benefit the masses. It is further

¹²⁹ Frankel, J. A. 2010. "The Natural Resource Curse: A Survey". HKS Faculty Research Working Paper Series, John F. Kennedy School of Government, Harvard University, pp.13-14.

¹³⁰ Ross, M.L. 2004. "How Do Natural Resources Influence Civil War? Evidence from Thirteen Cases." *International Organization*, Volume 58 (1):35-67 at 43.

¹³¹ Thorvaldur, G. & Gylfi, Z. 2002. "Inequality and Economic Growth: Do Natural Resources Matter"? CESifo Working Paper, Number 712. Available at www.hdl.handle.net/10419/75958; last accessed on 5 April 2017, p.1.

¹³² (*Ibid.*:2).

¹³³ Le Billon, P. 2001. *The political ecology of war: natural resources and armed conflicts*. School of Geography, Mansfield Road, Oxford OX1 3TB, UK, pp.561-584.

opined that natural resources are supposed to maintain peace and eradicate poverty and should not be related to conflicts or any form of tension. Nevertheless, Havro and Santiso stressed that, while natural resource revenues ought to enable development, past experiences have shown that mineral and oil wealth often represents a curse rather than a blessing, inducing slower growth and higher levels of poverty.¹³⁴ It is submitted that, mineral resources should be regarded a blessing than a curse. For that reason, it is not the availability of mineral resources that is attributed to this social evil of conflicts in many nations but the regulations in place and the implementation thereof.¹³⁵

If mineral resources are regarded as a blessing, why is it that some countries with abundant mineral resources are cursed with social evils such as corruption, inequality and conflicts? According to Sarraf and Jiwanji, the standard economic theory asserts that one can never be made worse off by a positive wealth effect.¹³⁶ It is submitted that mineral wealth has a positive effect in every economy but it depends on how one manages the resources therefore natural resources curse is not necessarily the fate of resource rich countries.¹³⁷ It is submitted that properly managed resources will benefit all citizens. Further, sound economic policies and good management lead to sustained economic growth and poverty eradication.¹³⁸ Natural resources curse should not be interpreted as an iron law but rather a strong recurrent tendency.¹³⁹ According to Lange,¹⁴⁰ mineral wealth can provide countries with a tremendous opportunity for economic development by providing funding for investment and growth.

¹³⁴ Havro, G. and Santiso, J. 2011. "Benefiting the Resource Rich: How Can International Development Policy Help Tame the Resource Curse"? IDS Working Papers, 2011: 01–54. doi:10.1111/j.2040-0209.2011.00355_2.x, p.1.

¹³⁵ Fernando, A. M. & Juan Pablo, R. 2013. "Natural Resources and Local Communities: Evidence from a Peruvian Gold Mine". *American Economic Journal: Economic Policy*, Volume 5 (2): 1-25 at 2-5.

¹³⁶ Sarraf, M. & Jiwanji, M. 2001. "Beating the Resource Curse: The Case of Botswana. Forward environmentally & socially sustainable development". *Environmental economics series*, Volume 8:1.

¹³⁷ (*Ibid.*).

¹³⁸ (*Ibid.*).

¹³⁹ (*Ibid.*:3).

¹⁴⁰ Lange, G. 2003. "The contribution of minerals to sustainable economic development: Mineral resource accounts in Namibia". Research Discussion Paper, Number 54, Directorate of Environmental Affairs, Ministry of Environmental and Tourism, p.20.

However, many countries have not fully benefitted from their natural resources due to corruption and end up in worse situations than countries without an abundance of natural capital.

According to Lee,¹⁴¹ people have capability and power to transform their surroundings in a positive way. If the capability is used wisely, it may bring positive benefits of development to the people and the opportunity to enhance their quality of life.¹⁴² If human capability and power is wrongly or recklessly applied, they can do infinite harm to human beings and the human environment.¹⁴³ It is submitted that governance or leadership approach may be the reason why some states have adequate mineral resources yet have limited access and unequal distribution to the masses. The advocates of the scarce resource wars theory are of the view that people will fight each other to secure access to the resources necessary for their survival.¹⁴⁴ In agreement with the advocates of the scarce resources theory, the issue of unequal distribution of resources is not a legislative issue but an implementation one; therefore the focus should be on the implementation of legislation that enable sharing and distribution of mineral resources to the masses.

On the issue of contribution of the mining sector to the economy, Pegg opines that the idea that mining can positively contribute to economic development and poverty reduction makes sense.¹⁴⁵ It can positively contribute to poverty reduction if essential legislations are in place.¹⁴⁶ It is opined that if

¹⁴¹ Lee, L. (n.d). "Environmental laws and their enforcement". *Sovereignty, ownership of, and access to natural Resources*. Volume ii. Available at www.eolss.net/Sample-Chapters/C04/E4-21-05.pdf; last accessed 30 March 2017.

¹⁴² (*Ibid.*).

¹⁴³ (*Ibid.*).

¹⁴⁴ Le Billon, P. 2001. *The political ecology of war: natural resources and armed conflicts*. School of Geography, Mansfield Road, Oxford OX1 3TB, United Kingdom, pp. 561-584.

¹⁴⁵ Pegg, S. 2006. "Mining and poverty reduction: Transforming rhetoric into reality". *Journal of cleaner production*, Volume 14 (3-4): 376.

¹⁴⁶ (*Ibid.*:385).

legislation is not properly implemented, the community will continue to live in poverty despite the abundance of wealth available in the country.

With regards to rent from the mining sector, Ross is of the opinion that, mineral industries often generate substantial rents for governments or investors but employ relatively few local workers at decision making level. This may be due to lack of skills and expertise.¹⁴⁷ It is submitted that despite large shares generated by foreign investors, foreign investment is recommended for every country. According to Marwa and Warioba, people should be educated on various laws and regulations governing mining activities, as it is this lack of knowledge which the source of limited participation and most misunderstandings with the investors is.¹⁴⁸ Therefore, it is submitted that this state of affairs answers the question of who owns and controls mineral resources. Further it is noted that the rent generated from the mining sector is mostly for the government and the investors.

The consequences of the level of income distribution may also be associated with the reduction in a country's export performance as a result of an appreciation of the exchange rate after a mineral resource has been discovered.¹⁴⁹ This is referred to as Dutch disease.¹⁵⁰ Dutch disease involves foreign exchange gifts that decrease the size of the traded sector, as a result, productivity and investment will decline.¹⁵¹ It is submitted that one must not rule out the Dutch disease. According to Gylfason, those

¹⁴⁷ Ross, M. 2003. "How does mineral wealth affect the poor"? Available at www.researchgate.net/profile/Michael_Ross1; last accessed 02 April 2017, p.6.

¹⁴⁸ Marwa, C.W. & Warioba, I. 2015. "Challenges Posed on The New Mining Act and Its Regulations in Tanzania". *Journal of Politics and Law*; Volume. 8 (4) :185 at 190.

¹⁴⁹ Barder, O.M. 2006. "A policymakers' guide to Dutch disease" Available at www.cgdev.org/sites/default/files/8709_file_WP91.pdf, last accessed on 14 April 2018, p.4.

¹⁵⁰ The term Dutch disease normally refers to the adverse effects on the traded sector of natural resource discoveries such as oil, gas or minerals, or of foreign aid. As many authors have pointed out, the term '&disease' might seem misplaced. After all, foreign exchange gifts are normally thought of as advantageous. If they were not, one could leave them untouched. Since the term seems to have survived among economists despite all the criticism, it is used here.

¹⁵¹ Torvik, R. 2001. 'Learning by doing and the Dutch disease'. *European economic review*, Volume 45 (2):285-306 at 286.

who do not think it is a disease seem to view it as matter of one sector benefiting partly at the expense of others, without seeing any macroeconomic or social damage being done.¹⁵² However, those who view the Dutch disease as an ailment, are concerned about the potentially harmful consequences of the induced reallocation of resources between sectors.

The relevant existing literature as mentioned above is linked to this study as it will contribute to filling gaps in knowledge, not only in Namibia but across the world. It is evident that mineral resources have a positive contribution towards the economic development of the country. Therefore, the situation in Namibia of inadequate mineral resources ownership can change if dependence on foreign countries is minimized by allowing local citizens involvement as indicated in literature. Currently, local citizens involvement in mineral resources in Namibia is minimal and people are not utilising the opportunity to access mineral resources. This study will then discuss the reason why.

This paper will also confirm or rejects whether there is any effect of investors' contribution to corporate social responsibility and skills transfer in Namibia. Why and how to tackle the potential challenges to redistribution of wealth in the country. With reference to the literature, this paper will also explain why access and benefits from the country's mineral resources should be promoted and encouraged. This paper will also examine what the advocates of the scarce resource wars theory have to say on possible conducts of those that need to access to the resources necessary for their survival.¹⁵³

¹⁵² Gylfason, T. 1984. "Lessons from the Dutch disease: causes, treatment, and cures". *Oxford Economic Papers*, Volume 36 : 359-380.

¹⁵³ Le Billon, P. 2001. *The political ecology of war: natural resources and armed conflicts*. School of Geography, Mansfield Road, Oxford OX1 3TB, UK, p. 564.

This paper will discuss the results of laws aimed at advancing the lives of previously disadvantaged people in Africa, the subsurface issues including the ability to give access to the subsurface. It will further discuss whether the concept foreign investment is valued in the selected jurisdictions to generate wealth under the total or partial control of the owner of the assets. Finally, how Namibia can learn from the selected jurisdictions in terms of ownership, rights and access to minerals from a legal perspective.

1.6 Theoretical framework

Article 100 of the Namibian Constitution¹⁵⁴ states that, land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State, if they are not otherwise lawfully owned. This research is based on the theory of distributive justice. Further, the research focuses on the issue of adequate distribution of mineral resources.¹⁵⁵ The theory of distributive justice asserts that those who have must give to those who have not. Distributive justice is also known as social justice because the duty to bring about a just distribution is thought to be a social obligation.¹⁵⁶ If one wants to determine whether people are being fairly treated by the society, it is necessary to study or examine people's access to primary social goods and burdens; all persons should share the benefits and burdens in society equally.¹⁵⁷ If access and distribution of natural resources is inadequate then there is no justice. The nature of justice is difficult to define but "Justice" has concepts associated with its

¹⁵⁴ No. 1 of 1990 as amended.

¹⁵⁵ Robeyns, I. 2003. "Is Nancy Fraser's Critique of Theories of Distributive Justice Justified"? *Constellations*, Volume 10 (4) :538-554 at 4.

¹⁵⁶ Warikandwa, T.V & Osode, P.C. 2014 "Legal Theoretical Perspectives and their Potential Ramifications for Proposals to Incorporate a Social Clause into the Legal Framework of the World Trade Organisation" *Speculum Juris*, Volume 28 (2): 44.

¹⁵⁷ www.philosophyfaculty.ucsd.edu/faculty/rarneson/Rawlschaps1and2.pdf; last accessed 30 March 2017.

definition such as fairness, equality and rights.¹⁵⁸ The distribution theory describes the situation where everyone is given an equal share of resources by taking from those who have and giving to those who have not.¹⁵⁹ The assumptions of this theory underpin the argument of this study. However, it is opined that the contemporary global economic order may not accommodate the distributive justice theory due to the World Bank ease of doing business that ranks and evaluate the conduciveness of the business environment based on the legislations available. Nonetheless, there is a proposal to amend GATT Article XX, which contains general exceptions allowing World Trade Organization (WTO) Member States to restrict trade in order to protect “public morals.”¹⁶⁰

1.7 Research Methodology

The proposed research method is a desktop study. The desktop study will allow for a review or reading of law articles and journals as well as international reports available in the library and on the internet. This approach will enable a comparative analysis of legal systems in Africa and beyond when it comes to access, ownership and equal distribution of natural resources.

1.8 Justification of the Study

The main interest of this study is to provide reasons why equitable distribution and exploitation of mineral resources in Namibia should benefit the masses and support the notion to benefit the previously disadvantaged citizen and advocate for their access, ownership of mineral resources. Further, to suggest the end of disadvantaged citizens of the country.

¹⁵⁸ Colorado University. (n.d). *Distributive Justice*. Available at <http://rintintin.colorado.edu/~vancecd/phl306/justice.pdf>; last accessed 30 March 2017.

¹⁵⁹ Hoffman, E. & Spitzer, M.L. 1985. “Entitlements, Rights, and Fairness: An Experimental Examination of Subjects' Concepts of Distributive”. *The Journal of Legal Studies*, Volume 14 (2):259-297.

¹⁶⁰ Warikandwa, T.V & Osode, P.C. 2014 “Legal Theoretical Perspectives and their Potential Ramifications for Proposals to Incorporate a Social Clause into the Legal Framework of the World Trade Organization” *Speculum Juris*, Volume 28 (2):41.

1.9 Limitations of the study

The limitation of the study to conduct the research, is the availability of literature and the time constraint.

1.10 Organization of the study

The dissertation will be organised into chapters as follows:

Chapter one provides an introduction of what mineral rights ownership is and the background to the study. The chapter discusses the problem statement, justification of the study and the limitations of the study. The main argument, put forward in this chapter is that, despite Namibia's rich mineral heritage, thousands of the country's populace have limited access to the country's natural resources.¹⁶¹ The chapter concludes by stating that unequal distribution of resources has been blamed for the high inequality within the Namibian society.¹⁶²

In chapter two, a historical background on the regulation of mineral rights in Namibia is provided. In this chapter, it is argued that the mineral sector seems to enrich certain individuals in Namibia than the masses. Further, the chapter discusses whether the Draft mineral policy of 2002 has changed the status of mineral ownership and distribution in the contemporary discourse in Namibia. The conclusion is that mineral resources are supposed to generate revenue through taxes and royalties. Further, companies should invest more on corporate social responsibility, skills transfer and human capital investment in order to realize poverty eradication and reduction of the inequality gap in Namibia.

¹⁶¹ Thorium, R. 2016. "Profiling Namibia's mineral resources". *The patriot newspaper*. Available at <http://www.thepatriot.com.na/index.php/2016/10/30/profiling-namibias-mineral-resources/>; last accessed 25 November 2016.

¹⁶² *Ibid.*

In chapter three, the discussion of ownership, distribution and community participation and access to mineral resources in Namibia, based on the theory of distributive justice is provided.¹⁶³ The theory maintains that those who have must give to the have not and in order to decide whether people are treated fairly by society, one must examine their access to primary social goods.¹⁶⁴ The main discussion is on, who owns mineral resources in Namibia. The discussion is considering the current status quo of mass exports of rough diamonds sold for the purposes of beneficiation. This mass exports of rough diamonds are not only a loss to Namibia but also undermines the concerted efforts Government is making to eradicate poverty, unemployment and improve the lives of ordinary Namibian citizens. The conclusion is that, in order to survive an international competitive environment in mining, companies with the best management and resources survives regardless of whether the owner is a state or private investor.¹⁶⁵

Chapter four deals with a comparative analysis of mineral ownership between Namibia and other selected jurisdictions such as United Kingdom, Zimbabwe, Nigeria, and South Africa. It explains these differences and or similarities found in selected jurisdictions in terms of mineral resources and the lessons that could be learnt from other jurisdictions and concludes that the implementation of the ambition to develop the previously disadvantaged people failed to yield positive results in Zimbabwe and South Africa. Still, it is pre-mature to establish whether the outcome will be the same in Namibia or not.

¹⁶³ Robeyns, I. 2003. "Is Nancy Fraser's Critique of Theories of Distributive Justice Justified"? *Constellations*, Volume 10 (4), 2003 : 538-554 at 4.

¹⁶⁴ www.philosophyfaculty.ucsd.edu/faculty/rarneson/Rawlschaps1and2.pdf; last accessed 30 March 2017.

¹⁶⁵ Kojima, M., Matthews, W. and Sexsmith, F. 2010. "Extractive Industries for Development Series. Petroleum Market in Sub-Saharan Africa", ESMAP, World Bank, p.35.

Chapter five provides summary of findings, conclusion and recommendations of the study. The main argument presented is that, people should be educated on various laws and regulations governing mining activities in Namibia. It is the lack of knowledge that contributes to most misunderstandings with investors.¹⁶⁶ The conclusion is that natural resource curse should not be interpreted as a rule that resource-rich countries are doomed to failure.¹⁶⁷

1.11 Ethical consideration

This work is purely a desk top research in which sources used are referenced. As such no individual or group interviews/questionnaires were used as an instrument of research, with the objective of holding discussions concerning any topics or issues that might be sensitive, embarrassing or upsetting. No criminal or other disclosures requiring legal action and having potential adverse effects, risk or hazards for research participants were made in respect of the study. Therefore, there was no need for arrangements to be made in respect of insurance and /or indemnity to meet the potential legal liability of the University of Namibia for harm to participants arising from the conduct of the research.

1.12 Conclusion

There is no doubt that equitable distribution of mineral resources from the mining sector in Namibia is important. It is also not a secret that the majority of the Namibian people have limited access to the country's natural resources.¹⁶⁸ Unfortunately, this may be due to lack of courage amongst the local population to run the mining industry. The unequal distribution of resources has been blamed for the high inequality within the Namibian society.¹⁶⁹ Further, it is explained that as the Dutch disease may

¹⁶⁶ Marwa, C.W. & Isabela Warioba, I. 2015. "Challenges Posed on The New Mining Act and Its Regulations in Tanzania." *Journal of Politics and Law*; Volume 8, (4) : 185 at 190.

¹⁶⁷ (*Ibid.*).

¹⁶⁸ Thorium, R. 2016. "Profiling Namibia's mineral resources". *The patriot newspaper*. Available at <http://www.thepatriot.com.na/index.php/2016/10/30/profiling-namibias-mineral-resources/>; last accessed 25 November 2016.

¹⁶⁹ (*Ibid.*).

decrease the size of the traded sector, it was also reduce productivity and investment in that specific sector.¹⁷⁰ The same may contribute to the level of inequality in terms of mineral resources distribution. It is maintained that mineral resources have a positive contribution towards the economic development of the country. Therefore, the scope and context of the phrase “economic gain” does not only apply to Namibia but it extends to foreign investors as the Namibian Constitution recognises and encourages foreign investments.¹⁷¹

It is further emphasised that each country has the right to permanent sovereignty over natural resources that must be exercised in the interest of national development and of the well-being of the people of the state concerned.¹⁷² Therefore, Namibia being part of the international community that respects international principles must make mineral resources more accessible to many. Thus, effort has been made to make mineral resources accessible to many, a thriving mining sector and to promote trade amongst other countries

The SADC Protocol on mining¹⁷³ is established with the objective of recognising a thriving mining sector in the SADC region so as to contribute to economic development, alleviation of poverty and an improved standard and quality of life throughout the region.¹⁷⁴ However, there are still notable limitations of continued mass exports of rough diamonds sold for the purposes of beneficiation.¹⁷⁵ Therefore, the unequal distribution of mineral resources may be reduced if majority of Namibians fully participate in the mining sector. In order to achieve that objective, the distribution theory prevails

¹⁷⁰ Torvik, R. 2001. “Learning by doing and the Dutch disease”. *European economic review*, Volume 45 (2) : 285-306 at 286.

¹⁷¹ No. 1 of 1990 as amended, Article 99.

¹⁷² Visser, F. 1988. “The principle of permanent sovereignty over natural resources and the nationalization of foreign interests”. *Comparative and International Law Journal of Southern Africa*, Volume 21, (1):76-91 at 78.

¹⁷³ SADC Protocol on Mining of 1997, article 2.

¹⁷⁴ SADC Mining Sector Community Building Workshop, Record, Pretoria, South Africa, 11-15 September, 1995.

¹⁷⁵ (*Ibid.*).

instead of self-indulgence.¹⁷⁶ However, it is argued that it is important to be cautious of the negative impact of neo-liberal economic policies such as NEEEF that may discourage foreign investors. Further, one also needs to appreciate the supposed positive impact of foreign direct investment in Namibia's mining sector. Again, international trade requires countries to trade with each other because countries gain if each offers resources to the production of goods and services in which they have an advantage.¹⁷⁷

¹⁷⁶ Hoffman, E. & Spitzer, M.L. 1985. "Entitlements, Rights, and Fairness: An Experimental Examination of Subjects Concepts of Distributive". *The Journal of Legal Studies*, Volume 14 (2): 259-297.

¹⁷⁷ Myint, H. (1958). "The" classical theory" of international trade and the underdeveloped countries". *The Economic Journal*, Volume 68 (270) :317-337.

CHAPTER TWO

HISTORICAL BACKGROUND ON THE REGULATION OF MINERAL RIGHTS IN NAMIBIA

2.1 Introduction

In this chapter, the historical background on the regulation of mineral rights and ownership in Namibia is outlined. The mining industry in Southern Africa commenced long before European colonisation. Therefore, the origin of the Namibian mining law is traced back to the period that commenced approximately around the mid-nineteenth century.¹⁷⁸ The mining industry has been plagued with controversies in the past; and the debates are still ongoing about the industry today.

It is reported that in an attempt to control mineral resources in South West Africa in 1911, regulations were enacted declaring some mineral resources areas such as the diamond area as a *Sperrgebiet* (forbidden territory).¹⁷⁹ Access in and out of the *Sperrgebiet* was restricted and remains so until today.¹⁸⁰ The restriction to the area is for security reasons to protect Namibia's most valuable mineral commodity, the diamond.¹⁸¹ However, in 2004, the Cabinet of the Republic of Namibia decided to declare the *Sperrgebiet* a national park.¹⁸² There is a lot of pressure from the mining industry to look for commodities other than diamonds, since the mineral potential is high in the area.¹⁸³ It is clear from the previous assertions that discriminatory practices are still present in the contemporary democratic

¹⁷⁸ Littlewood, D. 2014. "Cursed communities? Corporate Social Responsibility (CSR), company towns and the mining industry in Namibia". *Journal of Business Ethics*, Volume 120 (1):39-63 at 7.

¹⁷⁹ (*Ibid.*).

¹⁸⁰ (*Ibid.*:7-8).

¹⁸¹ Schneider, G.I.C. & Walmsley, B. 2004. "The Sperrgebiet Land Use Plan – An example of integrated Management of Natural Resources". *Communs geological. Survey of Namibia*, Volume 13 (2004): 23.

¹⁸² Werner, W. 2009. "A historical review of land and water use in the Orange-Fish River Basin, Namibia". Report produced for the Ephemeral River Basins in Southern Africa (ERB) Project, Desert Research Foundation of Namibia (DRFN): Windhoek, p.34.

¹⁸³ (*Ibid.*: 23).

society as far as access and ownership of mineral resources in Namibia is concerned, despite the provisions of Article 23 of the Namibian Constitution.¹⁸⁴ However, positive discrimination, in the form of Affirmative Action,¹⁸⁵ is allowed and is in favor of previously disadvantaged Namibians. With reference to the *Sperrgebiet*, it is admitted that, the entry restrictions to the forbidden territory is not a new phenomenon and can also be viewed in a positive light as an exceptional idea to control and restrict access to the diamond area. It is opined that restriction to the *Sperrgebiet* may be viewed as a form of positive discrimination that seeks to control, maintain order and ensure that mineral resources are not abused but preserved for exploitation in future and in the nation's interest.

2.2 Historical background

The South West Africa's (now Namibia) minerals were not being utilized effectively for the benefit of the citizens and this was known by the international community. Consequently, following the growing international concern about the effect of South Africa's imposition of its Apartheid policy on South-West Africa,¹⁸⁶ and the depletion of South-West Africa's natural resources to the sole benefit of South Africa, a ruling was handed down by the Council for Namibia established by the United Nations for Namibia to achieve independence.¹⁸⁷ It is submitted that, Namibia's mineral resources were owned by

¹⁸⁴ No. 1 of 1990 as amended, Article 23.

¹⁸⁵ Coate, S. & Loury, G.C. 1993. "Will affirmative-action policies eliminate negative stereotypes"? *The American Economic Review*, Volume 83 (5):1220-1221. Defines Affirmative action as an important and controversial policy used to combat differences between groups in different areas such as earnings, employment or treatment. However, critics say that affirmative action forces employers to lower standards, with the consequence of poor performance by preferred workers will only reinforce negative prejudices. Article 23 of the Namibian Constitution Act 1 of 1990 as amended, gives power to Parliament to enact legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices. As a result The Affirmative Action (Employment) Act, 1998 (Act 29 of 1998) was passed by the Namibian Parliament to redress imbalances at the workplace, arising from the discriminatory socio-economic dispensation which had previously existed in Namibia.

¹⁸⁶ Mostert, H. & Van den Berg, H.M. 2013. "Roman-Dutch Law, Custodianship, and the African Subsurface: The South African and Namibian Experiences". In Donald, N. Zillman, Aileen McHarg, Adrian Bradbrook, & Lila Barrera-Hernandez, (Eds). 2013. *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage*, The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage, Oxford University Press, p.7-12.

¹⁸⁷ (*Ibid.*).

South Africa and at the same time exploited for the development and benefit of the minority South Africans at the expense of the Namibians.

The historical background of mining in Namibia began during its colonial occupation by the German colonial Government that was present in South West Africa (SWA).¹⁸⁸ It is opined that the occupation of the German colonial Government in SWA was caused by the existence of mineral wealth. This is because, Germany first discovered the semi-precious stones and gold deposits before 1880.¹⁸⁹ After the discovery of the minerals, the mining ordinances called *Deutsche Kolonialgesellschaft für Südwest-Afrika* was promulgated to control, manage and concentrate on mineral rights and mining exploration.¹⁹⁰ This ordinance in turn allocated rights to smaller companies.¹⁹¹ In light of the above-mentioned mining ordinance, it appears that all mining rights in the then South West Africa were held and supervised by the German Empire for the benefit of the minority.

At the end of World War One, South West Africa was placed under the mandate of South African Government in 1919.¹⁹² It is submitted that this was done to take possession of Namibia and to be in control of South West Africa. It is further narrated that the control of the South African Government

¹⁸⁸ History World, (n.d.). *History of Namibia*. Available at www.historyworld.net/wrldhis/PlainTextHistories.asp?historyid=ad32; last accessed 24 February 2018.

¹⁸⁹ Mostert, H. & Van den Berg, H.M. 2013. "Roman-Dutch Law, Custodianship, and the African Subsurface: The South African and Namibian Experiences". In Donald, N. Zillman, Aileen McHarg, Adrian Bradbrook, & Lila Barrera-Hernandez, (Eds). 2013. *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage*, Oxford University Press, p.6.

¹⁹⁰ Werner, W. 2009. "A historical review of land and water use in the Orange-Fish River Basin, Namibia". Report produced for the Ephemeral River Basins in Southern Africa (ERB) Project, Desert Research Foundation of Namibia, p.4.

¹⁹¹ (*Ibid.*:33).

¹⁹² Mostert, H. & Van den Berg, H.M. 2013. "Roman-Dutch Law, Custodianship, and the African Subsurface: The South African and Namibian Experiences". In Donald, N. Zillman, Aileen McHarg, Adrian Bradbrook, & Lila Barrera-Hernandez, (Eds). 2013. *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage*, Oxford University Press, p.6

over South West Africa was extended to the mineral and mining industry.¹⁹³ The situation continued until the end of World War Two, when the newly formed United Nations (UN) sought to replace this mandate with a trusteeship agreement requiring closer international monitoring of the territory's administration.¹⁹⁴ The control over South West African continued until when Namibia became an independent state on 1 March 1990.¹⁹⁵ It is submitted that the change in control of South West Africa gave birth to independent Namibia and it impacted on the control of mineral and ownership in Namibia. The control of Namibia's rich endowment of mineral resources is now under the custodianship of the Ministry of Mines and Energy.¹⁹⁶ Subsequently, the change also resulted in the establishment of new mining companies, in 1994, such as Namdeb Diamond Corporation (Pty) Ltd. This company was formed and is owned in equal shares by De Beers and the Government of the Republic of Namibia.¹⁹⁷ It is further established that the change in the control of South West Africa gave birth to enactment of legislations meant for improvement of lives of the previously disadvantaged Namibians. However, it is debatable whether those legislations have achieved expected results to date.

When the Imperial German Government assumed direct military and administrative control of South-West Africa after 1890, it acquired the right to grant concessions.¹⁹⁸ This effectively created a dual system, wherein land or mining rights, in some areas, were granted by indigenous leaders, and in other areas concessions were granted by the German Colonial Government.¹⁹⁹ It is argued that there were

¹⁹³ (*Ibid.*:6).

¹⁹⁴ Littlewood, D. 2014. "Cursed'communities? Corporate Social Responsibility (CSR), company towns and the mining industry in Namibia". *Journal of Business Ethics*, Volume 120 (1): 39-63 at 7.

¹⁹⁵ History World, (n.d). *History of Namibia*. Available at www.historyworld.net/wrldhis/PlainTextHistories.asp?historyid=ad32; last accessed 24 February 2018.

¹⁹⁶ Ministry of Mines and Energy, 2013. *Annual Report FY2012/13*. Available at www.mme.gov.na/files/publications/MMEAnnualReport.pdf; last accessed 24 February 2018, p.3.

¹⁹⁷ Werner, W. 2009. "A historical review of land and water use in the Orange-Fish River Basin, Namibia". Report produced for the Ephemeral River Basins in Southern Africa (ERB) Project, Desert Research Foundation of Namibia, p.33.

¹⁹⁸ Littlewood, D. 2014. "Cursed'communities? Corporate Social Responsibility (CSR), company towns and the mining industry in Namibia". *Journal of Business Ethics*, Volume 120 (1):39-63 at 7.

¹⁹⁹ (*Ibid.*:7).

different guidelines and procedures regarding acquisition of mineral rights, depending on geographical site or traditional set-ups.

The ordinance of 1905²⁰⁰ was formed on the General Prussian Mining Act of 1865 which established the principle of mining freedom.²⁰¹ The ordinance of 1905²⁰² states:

“Provided that the Administrator may from time to time by notice in the Gazette, remit or reduce for such period or periods as he may determine the yearly claim tax for alluvial deposits of precious minerals with or without the said minimum of thirty shillings per annum.”

The strength of the above-mentioned ordinance is that anyone was entitled to explore and to extract “precious” and “common” minerals subject to the provisions of the ordinance.²⁰³ However, the weakness was that, blacks and “other colored people” were not permitted to extract any mineral without obtaining the special consent from the colonial Governor.²⁰⁴ It is submitted that it is evident that the term “anyone” entitled to explore minerals excluded blacks and colored people. In other words, they had no right to own and access mineral resources except when permitted by the Governor. It has been averred that the law that was in place was discriminating because it granted unlimited access and ownership of mineral resources to white people only. Even though the title to minerals was vested in the Imperial Government outside concession areas, not everyone could prospect for precious

²⁰⁰ Imperial Mining Ordinance for German South-West Africa, 8 August 1905.

²⁰¹ Mostert, H. & Van den Berg, H.M. 2013. “Roman-Dutch Law, Custodianship, and the African Subsurface: The South African and Namibian Experiences”. In Donald, N. Zillman, Aileen McHarg, Adrian Bradbrook, & Lila Barrera-Hernandez, (Eds). 2013. *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage, The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage*, Oxford University Press, p.7.

²⁰² Imperial Mining Ordinance for German South-West Africa of 8 August 1905 as amended, section 63.

²⁰³ Kawana, A.B. 1988. “The political economy of mining laws and regulations in Namibia from 1884 to 1986”, Available at www.go.warwick.ac.uk/wrap/34710; last accessed 14 February 2018, p.63.

²⁰⁴ (*Ibid.*:63).

and base metals anywhere in the country.²⁰⁵ It is therefore submitted that lack of access and distribution of resources to blacks and colored people had an impact on their right to benefit from wealth and minerals of their own country. The discrimination in terms of access and exploitation of mineral resources has come to an end on the eve of Namibia's independence.

The colonial Governor is no longer in control of Namibia's mineral resources. At the moment the law pertaining to mineral ownership, access and distribution in Namibia is based on the Namibian Constitution as supreme law.²⁰⁶ As a result, there is no longer distribution and access to mineral resources that is influenced by geographical location or ethnic groupings. Nevertheless, now that the minerals of Namibia are in the hands of the Government, continuous review of policies is paramount in the contemporary discourse to ensure fair distribution of mineral wealth.

Despite the fact that mineral resources that are not otherwise owned are now in hands of the Namibian Government, some elements of English law are still relevant in Namibian law today. For example, in the English case of *Chartiers Block Coal Co. v. Mellon*,²⁰⁷ "the surface of the land may be separated from the different strata beneath it, and there may be as many different owners as there are strata..." It is interesting to note that the owner of the surface might have no ownership interests in the oil, gas, or other minerals beneath the surface.²⁰⁸ It is maintained that mineral resources on the land may be owned by a third party. However, in the case of *Agri SA v Minister for Minerals and Energy and Others*,²⁰⁹ compensation of mineral rights from the surface rights enable third parties to become

²⁰⁵ Mostert, H. & Van den Berg, H.M. 2013. "Roman-Dutch Law, Custodianship, and the African Subsurface: The South African and Namibian Experiences". In Donald, N. Zillman, Aileen McHarg, Adrian Bradbrook, & Lila Barrera-Hernandez, (Eds). 2013. *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage, The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage*, Oxford University Press, p.7.

²⁰⁶ No. 1 of 1990 as amended, Article 1 (6).

²⁰⁷ *Chartiers Block Coal Co. v. Mellon* 25 A 597 (1893).

²⁰⁸ (*Ibid.*).

²⁰⁹ *Agri SA v Minister for Minerals and Energy and Others* CCT 51/12 2013 (ZACC), 9.

holders of the mineral rights, the state is merely a custodian of the rights. It is clear from the above stated case that the third party may acquire ownership of mineral resources located on someone's property once compensation is done. In the United Kingdom, the Queen, in theory owns all the rights to extract minerals from all lands in the country, including those lands located offshore.²¹⁰ Although minerals not yet extracted from land vests in the state,²¹¹ common law dictates that the landowner is the owner of the minerals in the land.²¹²

2.3 International Legislations

(a) Principle of permanent sovereignty over natural resources

The International Principle of Permanent Sovereignty over natural resources²¹³ has underlined that the right to permanent sovereignty over natural resources must be exercised in the interest of national development and of the well-being of the people of the state concerned.²¹⁴ It is submitted that every nation has to take due care of its mineral resources in order to comply with the principle of international law. It is further submitted that the international principle is concerned with the well-being of the people that is why the burden is placed on States to ensure that their citizens benefit from wealth of their countries.

(b) Charter of Economic Rights and Duties of States (CERDS)

²¹⁰ *Minerals*, available at www.ieneurope.com/pdf/Mineral.pdf; last accessed 13 March 2017.

²¹¹ Mostert, H. & Pope, A. (Eds). 2010. *The principles of the law of property in South Africa*. Oxford University Press Southern Africa, p.270.

²¹² (*Ibid.*:270).

²¹³ Visser, F. 1988. "The principle of permanent sovereignty over natural resources and the nationalisation of foreign interests". *Comparative and International Law Journal of Southern Africa*, Volume 21 (1): 76-91 at 77.

²¹⁴ (*Ibid.*:78).

The development of the principle of permanent sovereignty over natural resources led to the establishment of the Charter of Economic Rights and Duties of States (CERDS).²¹⁵ Article 2 (1)²¹⁶ prescribes that every State must be free to exercise full permanent sovereignty over all its natural wealth and economic activities. It is evident that the States have full discretion over its mineral resources and should exercise such rights for the benefit of its citizens. It is further submitted that, it is therefore the duty of the States to make laws regarding their mineral resources that are in line with international law provisions. The CERDS indicates that foreign investment may at least be accorded a subsidiary value, however, the majority of countries in the United Nations General Assembly viewed the role of foreign investment as increasingly negative.²¹⁷ It is clear that the CERDS requires foreign investments to be secondary to local investors. However, it has to be noted, in this instance, that Namibia needs to gain confidence in value that local investors can add.

2.4 Namibian Legislations applicable to the mining industry

Namibia gained independence on the 1st of March 1990 and in that period the Constitution became the supreme law of the land.²¹⁸ The Roman-Dutch common law and other laws in force, before independence, continue to exist in Namibia as long as they remain consistent with the Constitution,²¹⁹ or unless declared unconstitutional by a Competent Court or repealed by an Act of Parliament.²²⁰ Article 140 (1)²²¹ states that:

²¹⁵ General Assembly Resolution 3281 (XXIX) of 12 December 1974.

²¹⁶ Charter of Economic Rights and Duties of States.

²¹⁷ Visser, F. 1988. "The principle of permanent sovereignty over natural resources and the nationalisation of foreign interests". *Comparative and International Law Journal of Southern Africa*, Volume 21 (1):76-91.

²¹⁸ No. 1 of 1990 as amended, Article 1 (6)

²¹⁹ (*Ibid.*, Article 1(6) & Article 66).

²²⁰ (*Ibid.*, article 25 (1) (b)).

²²¹ No. 1 of 1990 as amended.

“Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by an Act of Parliament or until they are declared unconstitutional by a competent Court.”

It is presumed from the above constitutional provision that Namibia has adopted pre-independence legislations including those related to the mining industry, if such laws find validity from the Constitution. Therefore, ownership of natural resources is now constitutionally entrenched,²²² and all rights in respect of minerals resources are now vested in the state.²²³ Consequently, all persons have the right, in any part of Namibia, to acquire, own, and dispose of properties.²²⁴ In this regard, the Constitution prescribes economic freedom that is applicable to everyone. However, economic freedom is attainable when the country is no longer dependent on other countries for mineral processing and imports.

The issue of foreign dependent was addressed shortly after independence by Minister of Mines Toivo ya Toivo who voiced government's desire to reduce the mining industry's dependence upon South Africa, especially for processing.²²⁵ However it is doubtful whether there has been progress made to date in terms of reducing dependence on foreign countries. It is obvious from the speech of the Minister of Mines and Energy, made in 2017, that significant proportion of the rough diamonds sold by Namibia Diamond Trading Company (NDTC) is being exported instead of being cut and polished in Namibia.²²⁶ This is clear evidence that Namibia's mining sector still depends on foreign countries

²²² (*Ibid.*, Article 100).

²²³ No. 33 of 1992, section 2.

²²⁴ No. 1 of 1990 as amended, Article 16 (1).

²²⁵ Du Pisani, A. 1991. “Rumours of rain: Namibia's post-independence experience”. *Africa Insight*, Volume 21 (3) :174.

²²⁶ Kandjoze, O.M. 2017. “Keynote address at minister's engagement session with the diamond industry.” Hilton Hotel, March 27, 2017, p. 9-11.

for processing and one may say there is little progress, to date, if any when it comes to processing of mineral resources locally.

Apart from pre-independence legislations including those related to the mining industry, the Constitution is the supreme law of the land.²²⁷ There are also other several legislations²²⁸ that are governing mining in Namibia, including the national policy on mining. There are also other statutes such as the Minerals (Prospecting and Mining) Act²²⁹ that regulate mining law in Namibia, as amended by Minerals (Prospecting and Mining) Amendment Act.²³⁰ The purpose of the Act is to provide for the reconnaissance, prospecting and mining for, and disposal of, and the exercise of control over, minerals in Namibia; and to provide for matters incidental thereto.

According to section 1 of the Act:²³¹

“mineral” means any substance, whether in solid, liquid or gaseous form, occurring naturally in, on or under any land and having been formed by, or subjected to, a geological process, excluding:

- (a) water, not being water taken from land or from the sea for the extraction there from of a mineral or a group of minerals;
- (b) petroleum, as defined in section 1 of the Petroleum (Exploration and Production Act), 1991 (Act 2 of 1991); or

²²⁷ No.1 of 1990 as amended, Article 1 (6).

²²⁸ Mineral policy of 2002, Minerals (Prospecting and Mining) Act No. 33 of 1992, Minerals (Prospecting and Mining) Amendment Act No. 8 of 2008, Environmental Management Act No. 7 of 2007, Soil Conservation Act No. 76 of 1969, Hazardous Substance Ordinance No.14 of 1974, Prevention and Combating of Pollution of the Sea by Oil Act No. 6 of 1981, Forest Act 12 of 2001, Atomic Energy and Radiation Protection Act No. 5 of 2005, Affirmative Action Act No. 29 of 1998, Water Act No.54 of 1956, Foreign Investment Act No.27 of 1990, Income Tax No. 24 of 1981.

²²⁹ No. 33 of 1992.

²³⁰ No. 8 of 2008.

²³¹ No. 33 of 1992.

- (c) subject to the provisions of subsection (2), soil, sand, clay, gravel or stone (other than rock material specified in Part 2 of Schedule I) if they are *bona fide* required for purposes of (i) agriculture, building works, fencing or road making;(ii) the manufacture of bricks and tiles;(iii) the construction of sports fields, airfields, railways, bridges, dams, reservoirs, weirs, canals or other irrigation works; or
- (iv) any other purpose defined by the Minister by notice in the *Gazette*;"

Section 17 of the Minerals (Prospecting and Mining) Act,²³² made it possible for Namibians from the age of 18 years and above as well as Namibian juristic persons to apply for mineral rights. The same Act also grants discretionary power to the Commissioner²³³ to grant or refuse access to mineral resources through various instruments.²³⁴ It is clear from the sections of the Minerals Act that it is possible for all Namibians to have access to mineral resources after independence. However, it is further submitted that Namibia has to work hard to ensure access and ownership of minerals by the masses. Conversely, Namibian government has never advocated the nationalisation of mines and would probably not do so in the foreseeable future.²³⁵ This may be because of the negative perception that capital requirements to develop and operate mines are huge.²³⁶ It is urged that Namibia may require moving away from this negative perception and adopting a positive approach advocating for the nationalisation of the mining industry.

²³² (*Ibid.*).

²³³ (*Ibid.*, section 20).

²³⁴ (*Ibid.*, section 21).

²³⁵ Mining Journal 2017, A publication of the Namibian, Free Press of Namibia (Pty) Ltd; p.8.

²³⁶ (*Ibid.*).

The mining sector must also comply with the Affirmative Action (Employment) Act²³⁷ of which its purpose is to achieve equal opportunity in employment in accordance with Article 10 and Article 23 of the Namibian Constitution. Article 10 of the Namibian Constitution²³⁸ deals with equality and freedom from discrimination, it states that:

“1. All persons shall be equal before the law.

2. No persons may be discriminated against on the grounds of sex, race, color, ethnic origin, religion, creed or social or economic status.”

Therefore, nobody should be subjected to any form of discrimination and all people must be treated equally. In regard to article 23,²³⁹ it deals with apartheid and affirmative action, and it gives Parliament the power to enact legislation that benefits or advance previously socially, economically or educationally disadvantaged persons within Namibia. It appears that like any other sector, the mining sector is not an exception, as it is prohibited from conducting its operations and employment based on past discriminatory laws and practices. Further the mining sector is also required to comply with the set standards and principles of the affirmative action practises.

The Affirmative Action Act²⁴⁰ also prescribes restrictions on certain contracts, guarantees, loans, licences, permits, grants, or concessions that:

“No

(a) contract shall be entered into by or on behalf of the State and any relevant employer; or

²³⁷ No. 29 of 1998.

²³⁸ No. 1 of 1990 as amended.

²³⁹ (*Ibid.*).

²⁴⁰ No. 29 of 1998, Section 42 (1).

(b) guarantee, loan, licence, permit, grant, or concession, including the right to the reconnaissance or prospecting for, or to mine, any mineral, shall be given, made, issued, granted or awarded to any relevant employer by or on behalf of the State, unless the relevant employer concerned is in possession of a valid affirmative action compliance certificate.”

The law also requires the mining sectors to comply with the Income Tax Act,²⁴¹ which prescribes tax to be paid to the government of Namibia. It is maintained that the source basis of Income Tax of the mining sector is based on the tax principle that requires normal tax to be levied on taxable income of companies, trusts and individuals from sources within or deemed to be within Namibia.²⁴² It is illustrated further that the tax rates for 2017/2018 are as follows: company tax rates for 2017/2018 are 32% for corporate tax, 55% for diamond mining company, 37.5% for mining Companies (other than diamond mining companies), 35% for Petroleum Companies (exploration , development or production operations).²⁴³ This illustrate that the mining sector is contribute to government tax such as capital gains taxes from the sale of mining and petroleum licenses are included in the gross income for tax purposes. Similarly, the sale of shares, in a company for a license or right to mine minerals in Namibia, also form part of the company’s gross income and is taxed accordingly.²⁴⁴ It is affirmed that the mining royalties are levied in terms of the Prospecting and Mining Act²⁴⁵ as a percentage of the market value of the minerals extracted by license holders in the course of finding or mining of any mineral or group of minerals.²⁴⁶ It is further attested that the rates for 2017/2018 are 3% for precious

²⁴¹ No. 24 of 1981.

²⁴² KPMG Namibia 2017. *Namibia tax reference and rate card 2017*, Available at www.pwc.com/na/en/assets/pdf/namibia-tax-reference-and-rate-card-2017.pdf; last accessed 06 June 2017.

²⁴³ (*Ibid.*).

²⁴⁴ (*Ibid.*).

²⁴⁵ No. 33 of 1992.

²⁴⁶ KPMG Namibia 2017. *Namibia tax reference and rate card 2017*. Available at www.pwc.com/na/en/assets/pdf/namibia-tax-reference-and-rate-card-2017.pdf; last accessed 06 June 2017.

metals/ Base and rare metals and 2% for Semi-precious stones/Industrial metals/Non-Nuclear fuel minerals.²⁴⁷

Another law that is applicable to the mining industry is the Foreign Investment Act²⁴⁸ that makes provision for the promotion of foreign investments in Namibia. According to the Act, a foreign national may invest and engage in any business activity in Namibia, which any person (Namibian) may undertake.²⁴⁹ It is evident that the Foreign Investment Act does not discriminate against foreign nationals. The Foreign Investment Act further states that, any law relating to natural resources or any license or other authorization granted under such a law conferring rights for the exploitation of such resources may provide for the granting or enjoyment of such rights to or by Namibians on terms more favorable than those applicable to foreign nationals.²⁵⁰ Therefore, it is further submitted that the Foreign Investment Act²⁵¹ requires favorable conditions for Namibians in terms of ownership, granting or enjoying of mineral rights. It can be submitted that the law is promoting access and equitable distribution of mineral resource, possibly what is lacking is the implementation thereof.

2.5 The State of Mining in Namibia after Independence

In order to regulate the mining industry, the Namibian Government came up with the Draft Minerals Policy, whose rationale is to ensure the continued development of the mining industry.²⁵² It is acknowledged that the rationale is excellent for the development of the mining industry and for the benefit of the Namibian people. However, the question still remains whether the above stated Draft Mineral Policy has actually changed the status of mineral ownership and distribution in the

²⁴⁷ *(Ibid.)*.

²⁴⁸ No. 27 of 1990.

²⁴⁹ *(Ibid., section 3)*.

²⁵⁰ *(Ibid., section 13 (5))*.

²⁵¹ No. 27 of 1990.

²⁵² The Draft Mineral Policy of 2002.

contemporary discourse. The answer to this question may be negative. What can be learned is that the custodian or curator of the property does not hold property for themselves but on behalf of beneficiaries.²⁵³ Therefore, it is argued that the beneficiaries should hold the mineral resources but to what extent this determination would be the task of the government. Similarly, the custodian of minerals in Namibia cannot act in own best interest but in the best interest of the beneficiaries. Therefore, it is satisfactory to say that the Draft Mineral Policy has changed the status of mineral ownership in Namibia, however there is still a long way to go as far as the equitable distribution of mineral resources is concerned.

Furthermore, the formulation of the Draft Minerals Policy is also at the center of contributing to the creation of advantageous environment for the beneficiaries and attracts both foreign and local investment in mining.²⁵⁴ It is obvious that Namibia wants to maintain a balanced position between local and foreign investment to sustain the mining industry. However, emphasis must be placed more on self-determination of the industry. It is acknowledged that the Draft Minerals policy²⁵⁵ contributes to the development of opportunities for the Namibian people to benefit from their country's mineral resources in line with the Government's policy on socio-economic upliftment.²⁵⁶ Therefore, it is notable that both foreign and local investors are important because they contribute to the economy of the country, create employment and alleviate poverty. However, adequate distribution of mineral resources to the local masses should be the main focus.

²⁵³ Mostert, H. & Pope, A. eds., 2010. *The principles of the law of property in South Africa*. Oxford University Press Southern Africa, p.270.

²⁵⁴ *Minerals*, available at www.ieneurope.com/pdf/Mineral.pdf, last accessed 13 March 2017.

²⁵⁵ The Draft Minerals policy of Namibia of 2002.

²⁵⁶ *Minerals*, available at www.ieneurope.com/pdf/Mineral.pdf, last accessed 13 March 2017.

Irrespective of the Draft mineral policy at hand, the question still remains whether mineral resources are benefiting all Namibians or whether foreigners have more access? Regardless of the answer to the question, the Namibian mining laws do not exclude foreigners. Because, section 46 of the Minerals (prospecting and mining) Act²⁵⁷ states that foreign investors can also apply for Exclusive Prospecting Licenses (EPL).²⁵⁸ This is no doubt good for the economy growth, but foreigners should not get more shares of the mineral resources than the local masses. It is further argued that there should be a balance in participation in regard to ownership and distribution of mineral resources in Namibia. It is admitted that non-discrimination in foreign investment is a necessary goal of public policy and good for development and growth.²⁵⁹ However, it is maintained that it may have a negative impact on the confidence of the country to run the mining industry independently. Further, it may also lead to neglecting of local skills development and capacity to manage own resources.

Since the law permits foreign investments, the following is an indication of how mineral resources are controlled by foreign owned companies in Namibia:

“The Navachab Mine near Karibib is solely owned by a foreign company, AngloGold Ashanti Pty, which has operations in the Democratic Republic of Congo, Ghana, Guinea, Mali and Tanzania. Block 2914A and B2914B offshore Namibia in the Orange Basin, was 75% owned by Signet Petroleum and 15% Cricket Investment, both foreign companies, with Namcor obtaining a 10% share. Signet Petroleum and Cricket Investment’s shares have now been taken over by Shell oil. Skorpion zinc mine in southern Namibia is 100%-owned by Skorpion and

²⁵⁷ No. 33 of 1992.

²⁵⁸ Lineekela, H. 2014. “Namibian minerals in foreign hands”. *The Villager newspaper*, Available at thevillager.com.na/articles/6156/Geingob--Angula--Namibian-minerals-in-foreign-hands/; last accessed 16 March 2017.

²⁵⁹ Von Moltke, K. 2002. “Discrimination and Non-Discrimination in Foreign Direct Investment Britain: A guide”, 2nd edition. DTI Minerals Programme, Publication No. 1, pp. 31-32.

Vedanta Zinc International and it is the eighth largest zinc producer in the world. Namibia De Beers (NAMDEB) is a 50:50 partnership between Government and De Beers, also a foreign player. Rosh Pinah states that zinc mine in southern Namibia is 80%-owned by London-listed Glencore, with 20% ownership by Namibian participant, PE Minerals. Glencore's shares previously belonged to South African's Exxaro. Rossing Uranium mine is dominantly owned by British-Australian Company, Rio Tinto Group, which holds 69% share, with 15% owned by the Iranian government, 10% by IDC of South Africa, three percent by the Namibian government and three percent by individual shareholders.”²⁶⁰

It is further highlighted that the information provided above clearly gives an indication that majority of mines in Namibia are owned by foreign nationals, which gives an answer to the question of who owns mineral resources in Namibia.

In 2011, Cabinet took a decision to give the state-owned mining company, Epangelo Mining Limited, the exclusive right to strategically exploit minerals such as uranium, gold, copper, coal, diamonds, and rare earth metals.²⁶¹ It is an instrument of public policy that increases equitable Namibian participation and ownership; however the revenue generated is for the State.²⁶² It is not clear whether this has still impacted on the issue of equitable distribution of mineral resources.

2.6 Marikana massacre incident

It is submitted that the issue of inequitable distribution of wealth in Namibia may lead to frustration and as a result lead to actions that results in tragedy like what happed in Marikana in South Africa.

²⁶⁰ Lineekela, H. 2014. “Namibian minerals in foreign hands”. *The Villager newspaper*, Available at www.thevillager.com.na/articles/6156/Geingob--Angula--Namibian-minerals-in-foreign-hands/; last accessed 16 March 2017.

²⁶¹ (*Ibid.*,:9).

²⁶² Hawala, E. 2014. “Epangelo Mining Company “Investing on Solid Ground”, Mining Expo 2014, p.8.

Marikana is a mining town in the North West province of South Africa.²⁶³ The Marikana massacre took place on the 16th of August 2012. 34 striking mineworkers were killed and 78 were injured when members of the South African Police Service (SAPS) opened fire on them.²⁶⁴ The massacre took place in the context of a strike over pay at a mine owned by British multinational mining company Lonmin PLC.²⁶⁵ Their key demand was for a salary increase of R12 500 (USD1, 211) while Lonmin maintained that this demand was unreasonable and would impact negatively on the company's viability.²⁶⁶ It is reasoned that what happened in South Africa, at Marikana, is a clear indication of the consequences of inequitable distribution of resources and led to the call for nationalization of mines in South Africa. It is further claimed that such a gap may lead to tension, and conflicts as far as inequitable distribution and exploitation of mineral resources is concerned.

2.7 Law reform

There have been many changes of laws in Namibia after Namibia gained independence. These changes are related to the past discriminatory conducts of allowing access to mineral resources based on color in South West Africa.²⁶⁷ It is highlighted that such practices did not represent the ethos and aspiration of the Namibian people. Therefore, in order to maintain the dignity of the Namibian people, Article 10 (2) of the Namibian Constitution²⁶⁸ states that:

“No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status”.

²⁶³ Duncan, J. 2014. “South African journalism and the Marikana massacre: A case study of an editorial failure”. *The Political Economy of Communication*, Volume 1 (2) :9-12.

²⁶⁴ (*Ibid.*).

²⁶⁵ (*Ibid.*).

²⁶⁶ (*Ibid.*).

²⁶⁷ Kawana, A.B. 1988. “The political economy of mining laws and regulations in Namibia from 1884 to 1986”, Available at www.go.warwick.ac.uk/wrap/34710; last accessed 14 February 2018, p.63.

²⁶⁸ No. 1 of 1990 as amended.

The Namibian Government saw it necessary to prohibit discrimination and for law reform to reflect the aspirations contained in the preamble of the Constitution,²⁶⁹ the aspiration and values of the Namibian people. Therefore Article 23 (2)²⁷⁰ states that:

“Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programs aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service.”

It is submitted that the above-mentioned provision of the Constitution gave power to the Parliament of Namibia to enact laws for the advancement of people within Namibia. As a result, the Draft Minerals Policy²⁷¹ was formulated in an attempt to reform mining law in Namibia. Despite the fact that mineral resources belong to the state,²⁷² the said policy does not refer to the State as the owner of mineral resources in Namibia.²⁷³ Instead it advocates that the Ministry of Mines and Energy be the custodian of Namibia’s mineral resources which are held in trust for the benefit of the Namibian people.²⁷⁴ It is maintained that the Draft Minerals Policy regards the Namibian people as the beneficiaries of these resources. It is further stressed that the custodian does not use the property for own use. In the contrary, it is evident that the Constitution regards the State as the owner of the mineral resources. It is

²⁶⁹ *(Ibid.)*.

²⁷⁰ *(Ibid.)*.

²⁷¹ Draft Minerals Policy of 2002.

²⁷² No. 1 of 1990 as amended, Article 100.

²⁷³ Draft Minerals Policy of 2002.

²⁷⁴ *(Ibid.)*.

further argued that it appears there is a contradiction between the Constitution of Namibia²⁷⁵ and the Draft Minerals Policy of Namibia,²⁷⁶ in terms of ownership of mineral resources in the country.

Therefore, in order to address the contradiction between the two legislations, one needs to look at the supremacy of the two laws. It is submitted that the Constitution is the supreme law of the land²⁷⁷ and it prescribes that the State owns mineral resources in the country.²⁷⁸ In addition, considering the fact that the Draft Minerals Policy of Namibia is only a draft policy, the supreme law prevails. The same Constitution²⁷⁹ prescribes that the Constitution must be upheld by all including the Executive, Legislature and Judiciary, all organs of the Government and its agencies and by all natural and legal persons in Namibia.²⁸⁰

Still on the Mineral Policy of 2002, the Ministry of Mines and Energy is the custodian of the minerals, facilitates and regulates the exploitation of them for the benefit of all Namibians.²⁸¹ It is submitted that the Ministry of Mines and Energy is also required to uphold the Namibian Constitution. However, it is implied, according to the draft Mineral Policy, that Namibian people including natural and juristic persons are the owners of the mineral resources. It is further implied that they have the rights to access and own these resources.

²⁷⁵ No. 1 of 1990 as amended.

²⁷⁶ Draft Mineral Policy of Namibia.

²⁷⁷ No. 1 of 1990 as amended, Article 1 (6).

²⁷⁸ (*Ibid.*, Article 100).

²⁷⁹ No. 1 of 1990 as amended.

²⁸⁰ (*Ibid.*, Article 5).

²⁸¹ Mostert, H. & Van den Berg, H.M. 2013. "Roman-Dutch Law, Custodianship, and the African Subsurface: The South African and Namibian Experiences". In Donald, N. Zillman, Aileen McHarg, Adrian Bradbrook, & Lila Barrera-Hernandez, (Eds). 2013. *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage*, Oxford University Press, p.9.

2.8 Challenges

The challenges that are facing the mining industry in Namibia have to do with laws and policies that could attract and streamline investments, local participation and value addition.²⁸² However it is submitted that the challenges have to do with implementation of legislations that encourage local skills development and independence from foreign domination in the mining industry.

2.9 Conclusion

After Namibia gained independence, the status of Namibia's mineral resources also changed. The changes to Namibia's status of mineral resources came after it has been realised that the depletion of South-West Africa's natural resources to the sole benefit of South Africa was unlawful.²⁸³ The misuse of Namibia's resources was because Namibia's mineral resources were owned and exploited by South Africa for the development and benefits of the minority South Africans at the expense of the Namibian.²⁸⁴ Another change that was brought by Namibia's independence is the rights of all people including blacks and colored people that were excluded from access and distribution of resources. This exclusion had impacted on their right to benefit from wealth and minerals of their own country.

Now that Namibia is independent, mineral resources are no longer owned by South Africa and no longer being exploited for the development and benefits of the minority South Africans at the expense of the Namibian.²⁸⁵ The changes to the Constitution of Namibia resulted in Namibian people, irrespective of their skin color or race to have rights to exploit mineral resources. Despite the rights of people to access mineral resources, people are not utilising the opportunity to access mineral resources

²⁸² Mining Journal 2017, p.7.

²⁸³ Mostert, H. & Van den Berg, H.M. 2013. "Roman-Dutch Law, Custodianship, and the African Subsurface: The South African and Namibian Experiences". In Donald, N. Zillman, Aileen McHarg, Adrian Bradbrook, & Lila Barrera-Hernandez, (Eds). 2013. *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage*, The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage, Oxford University Press, p.7-12.

²⁸⁴ (*Ibid.*).

²⁸⁵ (*Ibid.*).

due to lack of funds and skills. As a result, few individuals continue to be the ones getting more shares of the mineral resources than ordinary Namibians.

The control of Namibia's rich endowment of mineral resources that is under the custodianship of the Ministry of Mines and Energy,²⁸⁶ provides rights to access mineral resources as per Section 17 of the Minerals (Prospecting and Mining) Act.²⁸⁷ The Minerals (Prospecting and Mining) Act made it possible for Namibians from the age of 18 years and above as well as Namibian juristic persons to apply for mineral rights. It is emphasised that it is satisfactory to say that the Draft Mineral Policy has changed the status of mineral ownership in Namibia; however, there is still a long way to go as far as the equitable distribution of mineral resources is concerned. It is further submitted that, there should be a balance with regards to ownership and distribution of mineral resources in Namibia. It is evident that non-discrimination in foreign investment is a necessary goal of public policy and good for development and growth.²⁸⁸ It appears that mineral resources are controlled by foreign owned companies in Namibia as foreign nationals and few individuals appear to be the ones getting more shares of the mineral resources than ordinary Namibians.

The Constitution of the Republic of Namibia regards the State as the owner of the mineral resources²⁸⁹ while the Draft Minerals Policy²⁹⁰ prescribes the Ministry of Mines and Energy as the custodian of Namibia's mineral resources held in trust for the benefit of the Namibian people.²⁹¹ It is further opined that it appears that there is a contradiction between the Constitution²⁹² and the Draft Mineral Policy of

²⁸⁶ Ministry of Mines and Energy, 2013. *Annual Report FY2012/13*. Available at www.mme.gov.na/files/publications/MMEAnnualReport.pdf; last accessed 24 February 2018.

²⁸⁷ No. 33 of 1992.

²⁸⁸ Duncan, J. 2014. "South African journalism and the Marikana massacre: A case study of an editorial failure". *The Political Economy of Communication*, Volume 1 (2): 5.

²⁸⁹ No. 1 of 1990 as amended, Article 100.

²⁹⁰ Draft Minerals Policy of 2002.

²⁹¹ (*Ibid.*).

²⁹² No. 1 of 1990 as amended, Article 100.

Namibia²⁹³ in terms of ownership of mineral resources in the country. To address the contradiction between the Policy instrument and legislation, one needs to look at the supremacy of the two laws. It is submitted that the Constitution is the supreme law of the land²⁹⁴ and it prescribes that the State owns mineral resources in the country.²⁹⁵ Therefore on that basis the supreme law prevails.

²⁹³ Draft Minerals Policy of 2002.

²⁹⁴ (*Ibid.*, Article 1 (6)).

²⁹⁵ (*Ibid.*, Article 100).

CHAPTER THREE

OWNERSHIP, DISTRIBUTION AND ACCESS TO MINERAL RESOURCES IN NAMIBIA

3.1 Introduction

This chapter deals with ownership, distribution and community participation and access to mineral resources in Namibia. It is premised on the distributive justice theory that focuses on inequalities,¹ in terms of mineral resources. It is submitted that, in general, there are people who are more privileged because they have adequate access to national resources than others. Some people may lack opportunities and become disadvantaged due to large societal conditions, which must be attended to.² This perception requires examination; thus, the theory of distributive justice is of essence to the analysis advanced in this chapter. The theory of distributive justice means that those who have must give to those who have not, in order to realize a fair society.³ It is possible to decide whether people are treated fairly in the society by examining their access to primary social goods.⁴ The main question is who owns mineral resources in Namibia? The question will be answered based on available legislations and bearing in mind the current status quo of mass exports of rough diamonds and other mineral resources sold for the purposes of beneficiation. It is further submitted that the mass export of rough diamonds is not only a loss to Namibia but also undermines the concerted efforts Government is making to eradicate poverty, unemployment and improve the lives of ordinary Namibian citizens. The conclusion is that in order to survive an international competitive environment in mining, companies

¹ Robeyns, I. 2003. "Is Nancy Fraser's Critique of Theories of Distributive Justice Justified?" *Constellations*, Volume 10 (4) 2003: 538-554 at 4.

² Goodman, D.J. 2000. "Motivating people from privileged groups to support social justice". *Teachers College Record*, Volume 102 (6):1067.

³ Arneson, D. 2008. "John Rawls's theory of justice notes for theories of justice". Available at philosophyfaculty.ucsd.edu/faculty/rarneson/Rawlschaps1and2.pdf; last accessed 30 March 2017, p.1.

⁴ (*Ibid.*).

with the best management and resources survive regardless of whether the owner is a state or private investor.⁵

Mining is a critical sector of the Namibian economy and mineral assets form a major source of national wealth.⁶ As a result, the mining sector, in Namibia, is the key sector and it contributes 16% to the Gross Domestic Product (GDP). In addition, Namibia and Botswana have diamonds as part of their natural resources;⁷ therefore, the development of natural resources is regarded as a prerequisite for the economic growth of many countries.⁸ This means that, the ongoing development of a mining sector is not only crucial in Namibia but also crucial in other countries.⁹ Countries such as the United Kingdom, South Africa, Nigeria and Zimbabwe are some of the countries where a comparative analysis was done to find out how access and distribution of mineral resources are done in those jurisdictions and the lesson to be learned if any. The results are found in subsequent chapters of this study. Nevertheless, the sharing of benefits is a controversial issue because people may not get what they deserve in terms of their countries' mineral resources.¹⁰ This is regardless of the fact that the mineral resources are for the nationals of the states concerned. States are frequently under considerable pressure to spend mineral revenues on current consumption rather than to invest revenues.¹¹ It is argued that citizens are not - getting enough shares of their national resources. As a result, some foreign diamond companies

⁵ Kojima, M., Matthews, W. and Sexsmith, F. 2010. "Extractive Industries for Development Series. Petroleum Market In Sub-Saharan Africa", ESMAP, World Bank, p.35.

⁶ Lange, G.M. 2003. "The contribution of minerals to sustainable economic development: Mineral resource accounts in Namibia", No. 54. Directorate of Environmental Affairs, Ministry of Environment and Tourism, p.3.

⁷ Kojima, M., Matthews, W. and Sexsmith, F. 2010. "Extractive Industries for Development Series. Petroleum Market In Sub-Saharan Africa", ESMAP, World Bank, p.33.

⁸ Warden-Fernandez, J. 2001. "Indigenous communities and mineral development". *Mining, Minerals, and Sustainable Development*, Volume 59 (4): 1-30 at 4.

⁹ (*Ibid.*).

¹⁰ Littlewood, D. 2014. "Cursed Communities? Corporate Social Responsibility (CSR), Company Towns and the Mining Industry in Namibia". *Journal of Business Ethics (forthcoming)*, Volume 120 (1) :39-63 at 7.

¹¹ Lange, G.M. 2003. "The contribution of minerals to sustainable economic development: Mineral resource accounts in Namibia", No. 54. Directorate of Environmental Affairs, Ministry of Environment and Tourism, p.4.

may have discovered loopholes in the national regulatory system and used them to their advantage. For that reason, they are taking a large share of rent than the locals.¹²

While the diamond companies have discovered the loophole in the national regulatory system, it is also known that some diamond companies have been undermining the beneficiation efforts of the Namibian Government by processing only 20% of locally produced diamonds while the rest of the rough diamonds are exported.¹³ This move is frowned upon by the nation as it defeats the governments' determinations for beneficiation. One may therefore question whether Namibians own minerals from the mining sector if such large chunks of rough diamonds are exported, leaving little in the country.¹⁴ It is doubtful if mineral resources extracted from mining are genuinely held in trust for Namibian people. The concern is prompted by the current status quo of mass exports of rough diamonds, which is not only a loss to Namibia but also undermines the Government efforts to improve the lives of ordinary Namibian citizens.

To confirm that mass exports of rough diamonds is high, the Bank of Namibia report that, the total merchandise exports in 2004 were valued at about \$1.83 billion, of which diamond accounted for \$824 million (45% of total exports); manufactured products, which included processed zinc, \$431 million (24% of total exports); and other mineral commodities, such as copper, gold, uranium, and unprocessed zinc, about \$228 million (12% of total exports).¹⁵ The above stated percentage of exports appears small in 2004 but the amount has increased since then. In 2016, sixty percent (60%) of the

¹² Thorium, R. 2016. "Profiling Namibia's mineral resources". *The patriot newspaper*. Available at www.thepatriot.com.na/index.php/2016/10/30/profiling-namibias-mineral-resources/; last accessed 25 November 2016.

¹³ Kisting, D. 2017. "Kandjoze lays into diamond industry". *The Namibian Newspaper*. Thursday 30 March 2017, p.18.

¹⁴ Kandjoze, O.M. 2017. "Keynote address at minister's engagement session with the diamond industry." Hilton Hotel, March 27, 2017, p. 9-15.

¹⁵ Mobbs, P.M. 2004. *The Mineral Industry of Namibia*. Available at <https://minerals.usgs.gov/minerals/pubs/country/2004/wamyb04.pdf>; last accessed 10 April 2018, p31.1.

rough diamonds sold by Namibia Diamond Trading Company (NDTC) to its customers have been exported instead of being cut and polished in Namibia.¹⁶ It is therefore opined that the percentage of export of diamonds outside the country shows Namibia's dependency on export than local processing.

Apart from Namibia's dependency on export, a lot has been said on the issue of access and distribution of mineral resources from the mining sector by the locals. It is a fact that mining can positively contribute to economic development and poverty reduction.¹⁷ However, there are opposing ideas on the matter such as the recent empirical record that demonstrates that mining is more likely to lead to poverty exacerbation than it is to poverty reduction. Mining can positively contribute to poverty reduction if managed properly and if certain essential preconditions are in place.¹⁸ These preconditions relate to technology transfer, building a strong technological system to exploit minerals, indigenously, which may be the best way to facilitate the expansion of a national innovative capacity.¹⁹ Another precondition is the creation of downstream industries where the profits from mineral resource extraction would be re-invested in industries that would process and add value to the minerals before they are exported.²⁰ Infrastructure development is necessary for mining projects to take place.²¹ For example, when a road is upgraded to allow heavy equipment to travel from a mine to a port, the benefits of such an initiative extends to other sectors. Farmers, for example, may use the upgraded road to get their crops to the market quicker and that contributes towards increased trade between

¹⁶ Kandjoze, O.M. 2017. "Keynote address at minister's engagement session with the diamond industry". Hilton Hotel, March 27, 2017, p. 9-11.

¹⁷ Pegg, S. 2003. Mining and poverty reduction: Transforming rhetoric into reality. Department of Political Science, Indiana University Purdue University Indianapolis, 425 University Boulevard, Indianapolis, IN 46202-5140, USA, p.376.

¹⁸ (*Ibid.*: 385).

¹⁹ Pegg, S. 2006. Mining and poverty reduction: Transforming rhetoric into reality. *Journal of Cleaner Production*, Volume 14 (3-4): 380-381.

²⁰ (*Ibid.*:381).

²¹ (*Ibid.*).

previously unconnected villages.²² It is submitted that the essential preconditions referred to relate to the implementation that transform economic independence into reality. It is further concurred that, the increase in value addition creates more jobs and boosts the economy. Thus, a properly managed mining sector will not lead to poverty exacerbation, instead it will contribute towards eradicating poverty. Further, a comprehensive analysis is required that will focus on the investigation and determination of how mineral resources, from the mining sector, would be owned, distributed and accessed by the Namibian people.

3.2 Ownership of mineral resources in Namibia

Ownership is an absolute right which the holder can exercise against the whole world.²³ Ownership is the most complete real right in the sense that the holder of such a right, in principle, has the widest powers in respect of something but it must be borne in mind that ownership may sometimes be limited by another (limited) real right, such as usufruct held by a person who is not the owner of the thing.²⁴

However, it is unquestionable that Namibia has rich mineral heritage, although thousands of the country's populace continues to wallow in abject poverty while only a few appears to have access to the country's natural resources.²⁵ The unequal distribution of natural resources has been blamed for the high inequality within the Namibian society. Natural resources, including mining rights, seem to be in the hands of foreign nationals who are getting the large share of proceeds than locals.²⁶

²² (*Ibid.*).

²³ Amoo, S.K. 2014. *Property Law in Namibia*. Pretoria University Press, p.179.

²⁴ (*Ibid.*:42).

²⁵ Thorium, R. 2016. "Profiling Namibia's mineral resources". *The patriot newspaper*. Available at www.thepatriot.com.na/index.php/2016/10/30/profiling-namibias-mineral-resources/; last accessed 25 November 2016.

²⁶ (*Ibid.*).

As such, if mining wealth remains with the few, it does not really serve to benefit all of society.²⁷ Does it mean the few that have access to mineral wealth represent the whole nation? The answer may be negative. Some experts are of the opinion that previously disadvantaged Namibians have had no trouble owning and accessing mineral resources, but it is the work commitments, access to funding, skills and technology that limit them.²⁸ It is doubtful if the lack of ownership can be blamed on the work commitments, access to funding, skills and technology. Rather, it is submitted that, if access to funding, skills and technology are the contributing factors, then the country may look at intervention programs such as mineral resources awareness, financial assistance, like in the United Kingdom (UK),²⁹ in form of community development for successful access and mineral resources ownership by the locals. It is submitted that financial assistance and skills development has achieved plausible results in the United Kingdom, and the United Kingdom has been viewed as a center of excellence in the mining industry, with firms that have a wealth of exploration and mining due to diligence and expertise in the mining industry.³⁰

Even though Article 100 of the Namibian Constitution prescribes who owns mineral resources in Namibia, it does not define what constitutes ownership.³¹ Nonetheless, the content, and nature of ownership is defined by the society in which ownership functions and as society dictates or demands.³² Therefore, it may be correct to say that what constitutes ownership is also defined by the society to a

²⁷ (*Ibid.*).

²⁸ Nyaungwa, F. N & Abankwah, C. 2014. "Oil and Mining Boom: Where do Namibians fit in?" *Windhoek Observer newspaper*. Available at www.observer.com.na/index.php/8-latest-news/3514-oil-and-mining-boom-where-do-namibians-fit-in; last accessed 25 November 2016.

²⁹ Colman, T. 2011. "The last 50 years of mineral exploration in Britain". *Mercian Geologist 2011*, Volume 17 (4) :262.

³⁰ UK *Delivering Global Mining Solutions*. Available at www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/295099/UK_Delivering_Global_Mining_Solutions.pdf; last accessed on 4 August 2018, p.4-11.

³¹ No. 1 of 1990 as amended.

³² Mostert, H. & Pope, A. (Eds). 2010. *The principles of the law of property in South Africa*. Oxford University Press Southern Africa, p.91.

certain extent.³³ However, according to common law, ownership focuses on the theoretical completeness of the right by describing it as the most complete right a legal subject can have in relation to an object; therefore only owners have the most complete and absolute entitlements to such property.³⁴

Strydom ACJ in the case of *Namibia Grape Growers and Exporters Associations and Others v Ministry of Mines and Energy and others*,³⁵ confirmed that Article 100 of the Namibian Constitution³⁶ vests mineral rights in the state, in so far as they are not privately owned. Currently, Namibia's mineral ownership is prescribed in the Mineral (Prospecting and Mining) Act³⁷ but these mineral resources have been vested in the state ever since colonial times.³⁸ Further, the right to exploit mineral resources in Namibia is treated as separate from land ownership and has been reserved for the State. It is translated to say that the owner of the land does not own mineral resources found on it but the State does. It means that the owner of the land owns the land only but not minerals on that specific land. On the other hand, does it mean there is a contradiction between mineral resources held in trust for the Namibian people in the Minerals Policy of 2002 and the Court's decision in the case of *Namibia Grape Growers and Exporters Associations and Others v Ministry of Mines and Energy and others* of the state owning the mineral resources? There is not, because the mineral resources that are in trust for the benefit of the people are the ones that are not privately owned. On the other hand, one may argue that minerals that are held in trust for the benefit of the Namibian people do not belong to the people *per se* but held in trust for the State. On the contrary, one may argue that the state is the people,

³³ (*Ibid.*:p.91).

³⁴ (*Ibid.*).

³⁵ *Namibia Grape Growers and Exporters Associations and Others v Ministry of Mines and Energy and others* 2004 NR 194 (SC), at 209.

³⁶ No. 1 of 1990 as amended.

³⁷ No. 33 of 1992.

³⁸ Imperial Mining Ordinance of German South West Africa, 8 August 1905, Proclamation 21 of 1919, Proclamation of 1940, Ordinance 26 of 1964, Ordinance 20 of 1968.

therefore what belongs to the state belongs to the people. However, it is doubtful whether the latter is realistically true.

Nevertheless, in the case of *Rostock CC and Another v Van Biljon*,³⁹ the applicant instituted action for eviction against the respondent, who continued to mine on the property, despite the fact that the applicant allegedly cancelled the surface agreement in terms of which the respondent originally obtained the right to mine on the property.⁴⁰ After pleadings closed, the applicant brought the interlocutory or incidental application to procure the land pending the outcome of the action.⁴¹ Pending the final determination of the action in the High Court of Namibia in case no I 844/2010 (“the main action”), the Respondent was interdicted from removing any stone of whatsoever nature from the farm Rostock North 393, registration division K, district of Windhoek, north of the C26 road and east of the C14 road, personally or through employees or any person on his behalf.⁴²

The state does not own natural resources in a private-law sense.⁴³ Although Article 100 of the Namibian Constitution prescribes that natural resources belong to the state, it must be read in conjunction with the rest of the Constitution,⁴⁴ in particular Article 1(2).⁴⁵ Article 1(2) provides that all power shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State.

The Namibian Government has made it possible for the Namibia people to access mineral resources. Thus, the Ministry of Mines and Energy has been tasked to control the mineral resources sector, hence it has full custodianship of all mineral resources in Namibia unless otherwise lawfully owned on

³⁹ *Rostock CC and Another v Van Biljon* 2011 (2) 751 (HC).

⁴⁰ (*Ibid.*).

⁴¹ (*Ibid.*).

⁴² (*Ibid.*).

⁴³ (*Ibid.*).

⁴⁴ (*Ibid.*, paragraph 8-10).

⁴⁵ No. 1 of 1990 as amended.

behalf of its citizens.⁴⁶ However, it is doubtful if this is the case. The Ministry has an obligation to promote and regulate the minerals and mining sector for transformation, growth and development as well as to ensure that all Namibians derive sustainable benefits from the country's mineral wealth.⁴⁷ Yet, this approach has been fraught with challenges that were highlighted by the former Minister of Mines and Energy, Honorable Obeth Kandjoze, when he expressed disappointment to the effect that a significant proportion of the rough diamonds, sold by Namibia Diamond Trading Company (NDTC) to its customers in 2016, have been exported instead of being cut and polished in Namibia.⁴⁸ To add to that, the current trend of high rough export diamonds, meant for beneficiation purposes, is viewed to be against the spirit of beneficiation and is of grave concern to the Ministry of Mines and Energy and the Namibian Government.⁴⁹ The continued mass exports of rough diamonds sold for the purposes of beneficiation is not only a loss to Namibia but also undermines the concerted efforts Government is making to eradicate poverty, unemployment and improve the lives of ordinary Namibian citizens.⁵⁰ It is acknowledged that there must be transformation at a regulatory level to benefit ordinary Namibians.

3.3 Surface and Sub-surface rights

Sub-surface rights holders possess the ownership of minerals, while surface holders own the rights to the surface of the land.⁵¹ Consequently, it is established that it is possible for different persons to own

⁴⁶ The Draft Mineral Policy of 2002.

⁴⁷ Thorium, R. 2016. "Profiling Namibia's mineral resources". *The patriot newspaper*. Available at www.thepatriot.com.na/index.php/2016/10/30/profiling-namibias-mineral-resources/; last accessed 25 November 2016.

⁴⁸ Kandjoze, O.M. 2017. "Keynote address at minister's engagement session with the diamond industry." Hilton Hotel, March 27, 2017, p. 9-11.

⁴⁹ (*Ibid.*).

⁵⁰ (*Ibid.*).

⁵¹ "African Mining and Mineral Policy Guide: A Resource for nongovernmental organizations, activists, communities, governments and academics 2016". Available at www.profundo.nl/download/ianra160, p.8.

the subsurface and the surface. Therefore, the holder of surface rights is not usually entitled to claim any right of ownership whatsoever over the deposits of minerals.⁵²

During the colonial era in Namibia, German law allowed the State to control access to the subsurface whereas in South Africa the ability to give access to the subsurface was in the hands of private parties, landowners and/or mineral right holders.⁵³ Namibia adopts the Roman-Dutch law principle *cuius est solum eius est usque ad coelum et ad inferos*⁵⁴ which means whose is the soil, his it is up to the sky,⁵⁵ or in more simple terms: “he who possesses the land possesses also that which is above it”.⁵⁶ Other explanations maintain that “he who owns the soil owns everything above and below from heaven to hell,”⁵⁷ and he who owns the land owns up to the sky.⁵⁸ The above principle confirms the landowner’s rights and entitlements to the subsurface,⁵⁹ however it is recognized that this right is not absolute.

The State in Namibia has total control of all subsurface mineral rights.⁶⁰ The Roman-Dutch law conception of landownership did not allow horizontal layering of property, meaning one person could not have ownership of the surface, while another had ownership of the subsurface.⁶¹ The State has always claimed and exercised territorial sovereignty in space above their surface; as a result there is a

⁵² (Ibid.:8).

⁵³ Mostert, H. & Van den Berg, H.M. 2013. “Roman-Dutch Law, Custodianship, and the African Subsurface: The South African and Namibian Experiences”. In Donald, N. Zillman, Aileen McHarg, Adrian Bradbrook, & Lila Barrera-Hernandez, (Eds). 2013. *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage*, Oxford University Press, p.21.

⁵⁴ Viljoen, H.P. & Bosman, P.H. 1979. *A Guide to Mining Rights in South Africa*, Lexi Patria Publisher, Johannesburg, p.7.

⁵⁵ Abramovitch, A. 1961. “The maxim “*cujus est solum ejus usque ad coelum*” as applied in aviation”, *McGILL Law Journal*, Volume 8: 247-8.

⁵⁶ Henry Campbell Black M. A. 1968. *Black’s Law Dictionary*, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern, 4th Ed., p. 453.

⁵⁷ Abramovitch, A. 1961. “The maxim “*cujus est solum ejus usque ad coelum*” as applied in aviation”, *McGILL Law Journal*, Volume 8: 247-8.

⁵⁸ (Ibid.:247-248).

⁵⁹ Wessels, J.W. 1908. *The History of the Roman-Dutch Law*. Read Book Ltd, p.486.

⁶⁰ Corry, S. 2003. *News reactions and interactions*. Available at www.unl.edu/rhames/courses/current/readings/corry-suzman.pdf, last accessed 10 April 2018, p.6.

⁶¹ Hahlo, H. R. & Kahn, E. 1960. *The Union of South Africa*. Available at www.scielo.org.za/pdf/funda/v19n1/06.pdf, pp.761–2.

view that the landowner has no rights, at all, in the air column above his land.⁶² This view is based on the idea that the air is free to all, and that it is incapable of being possessed and owned.⁶³ It is impossible to have own air, so air is a free gift to all.

Nevertheless, Article 100 of the Namibian Constitution⁶⁴ stipulates that land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State, if they are not otherwise lawfully owned. Therefore, it is evident from the above constitutional provision that the subsurface right belongs to the State.

3.4 Access

Access is defined as the ability to derive benefits from things, broadening from property's classical definition as "the right to benefit from things."⁶⁵ Therefore, when someone has access to something, such a person must be able to gain significant positive impact from that thing. However, it must be clearly understood that access is different from ownership.⁶⁶ It is submitted that it does not mean that having access to something is equivalent to owning it. Access is about all possible means by which a person is able to benefit from things and rights-holders enjoy a certain kind and degree of social power.⁶⁷ By focusing on ability, rather than rights as in property theory, this formulation brings attention to a wider range of social relationships that can constrain or enable people to benefit from resources without focusing on property relations alone.⁶⁸ Access retains an empirical focus on the issues of who does (and who does not) get to use what, in what ways, and when (that is, in what

⁶² Abramovitch, A. 1961. "The maxim "*cujus est solum ejus usque ad coelum*" as applied in aviation", *McGILL Law Journal*, Volume 8 (248).

⁶³ (*Ibid.*:p.248).

⁶⁴ No. 1 of 1990 as amended.

⁶⁵ Ribot, J.C.& Peluso, N.L. 2003. "A theory of access". *Rural sociology*, Volume 68 (2):153-181 at 153.

⁶⁶ (*Ibid.*:153).

⁶⁷ (*Ibid.*:156).

⁶⁸ (*Ibid.*:154).

circumstances) as some people or institutions benefit from resources, whether or not they have rights to them.⁶⁹ Therefore, if the Namibian people do not have power over mineral resources, it is unrealistic to claim having access to these resources and it will be difficult to achieve nation's progress and economic development.

It is not a secret that every state has the right to freely dispose, exploit and use their natural resources.⁷⁰ This is done to preserve and regulate the economy, hence it does not matter how states run their affairs in terms of their natural resources from the mining sector.⁷¹ However, this shall only occur to further their national development and benefit the well-being of their people.⁷² Therefore it is stressed that access and benefits from the country's mineral resources be promoted and encouraged significantly. Further, the duty for each state to use its natural resources to improve the nation's progress and economic development serves as justification for many of the extensive rights connected to the principle under the duty of a state to exercise permanent sovereignty over natural resources in the interest of national development and the well-being of the people. The States must also ensure that foreign companies do not plunder the territory's mineral resources to the extent that the continent remain poor despite the wealth.

It has been concluded that the mining legislation in Namibia has enabled foreign private mining companies to plunder the territory's mineral resources while the African population remains one of the poorest in Africa.⁷³ In Namibia, foreign companies are permitted by Section 17 of the Minerals

⁶⁹ (*Ibid.*:156).

⁷⁰ Hofbauer, J.A. 2009. The Principle of Permanent Sovereignty over Natural Resources and Its Modern Implications (Doctoral dissertation). Available at www.skemman.is/bitstream/1946/4602/1/Jane_Hofbauer.pdf; accessed on 15 August 2018, p.29.

⁷¹ (*Ibid.*).

⁷² (*Ibid.*).

⁷³ Kawana, A.B. 1988. "The political economy of mining laws and regulations in Namibia from 1884 to 1986" Available at www.go.warwick.ac.uk/wrap/34710; last access 4 March 2017, p. (xvi).

(Prospecting and Mining) Act,⁷⁴ that prescribes that any person may apply for a non-exclusive prospecting license, to exploit mineral resources. It is evident that this section does not exclude foreign companies from prospecting the country's mineral resources but allow any person to apply provided that a principal place of business of such company in Namibia is provided.⁷⁵

The investment of foreign companies in Namibia's mining industry is also encouraged by the Namibian Constitution⁷⁶ subject to the provisions of an Investment Code adopted by Parliament. As a result, the Investment protection Act⁷⁷ has been enacted with the aim to:

“Provide for the promotion of sustainable economic development and growth through the mobilization and attraction of foreign and domestic investment to enhance economic development, reduce unemployment, accelerate growth and diversify the economy; to provide for reservation of certain economic sectors and business activities to certain categories of investors.”

Therefore, it is submitted that foreign investments are suitable for substantial economic development and growth; further a country may not survive economically without foreign investment. It is further opined that lack of foreign investment may impact development of any country. For that reason, the Namibian Government's ability to attract investment to develop natural resources will strongly influence future economic growth and development.⁷⁸

⁷⁴ No. 33 of 1992.

⁷⁵ (*Ibid.*, section 18 (2) (a) (ii)).

⁷⁶ No. 1 of 1990 as amended, Article 99.

⁷⁷ No. 9 of 2016.

⁷⁸ Mobbs, P.M. 2004. “The Mineral Industry of Namibia”. Available at www.minerals.usgs.gov/minerals/pubs/country/2004/wamyb04.pdf; last accessed 10 April 2018, p.31.3.

Some examples of foreign investors in Namibia include Bafex Exploration (Pty) Ltd. of Namibia which held eight exclusive prospecting licenses in northwestern Namibia.⁷⁹ However, in 2004, Bafex was acquired by Helio Capital Corporation of Canada, which was renamed Helio Resources Corporation.⁸⁰ Bafex initiated exploration on the Leicester and the Zebra licenses. Boulder Mining Corporation of Canada, which was earning 100% interest in the copper-gold Teverede prospect from Bafex, continued exploration at Teverede.⁸¹

AngloGold (Pty) Ltd. of Namibia (a subsidiary of AngloGold Ashanti Limited of South Africa) held a 100% interest in the Navachab open pit gold mine near Karibib. The mine accounted for more than 90% of national gold output.⁸²

Rosh Pinah Zinc Corp. (Pty) Ltd. (a joint venture of Kumba Resources Ltd. of South Africa, 89.5% interest, and PE Minerals Namibia (Pty) Ltd., 10.5%) operated the Rosh Pinah underground zinc mine.⁸³ In 2004, Rosh Pinah increased production of zinc concentrates by 15% to about 124,000 tones and Zinc concentrates were shipped through Walvis Bay to Kumba's Zincor refinery in South Africa for treatment.⁸⁴

3.5 Existing Mineral rights

Section 2 of the Minerals (Prospecting and Mining) Act⁸⁵ prescribes the rights in relation to minerals in Namibia. It maintains that any right in relation to the exploration or prospecting of mining activities, including the exercise of control thereof notwithstanding any right of ownership of any person, vests

⁷⁹ (*Ibid.*:31.2.).

⁸⁰ (*Ibid.*).

⁸¹ (*Ibid.*).

⁸² (*Ibid.*).

⁸³ (*Ibid.*).

⁸⁴ (*Ibid.*).

⁸⁵ No. 33 of 1992.

in the State. Further, the Minerals (Prospecting and Mining) Act⁸⁶ prohibits the carrying on of certain operations without license, and transfer of certain licenses or grant, cession or assignment of interests in such licenses, and joinder of persons as joint holders of such licenses or interests.

However, The Ministry of Mines and Energy has the responsibility of accessing mineral rights applications and granting minerals licenses as prescribed by the law. Any person may apply for a non-exclusive Prospecting license,⁸⁷ provided, in the case of a natural person; such person has reached the age of 18 years. There are also mining claims that are available to Namibian citizens only for the development of small-scale mining.⁸⁸ These mining claims are valid for 3 years and 2-year extension periods are possible provided that the claim is being developed and up to a maximum of ten claims can be held at any one time.⁸⁹

The other license is the Reconnaissance License⁹⁰ that is designed for regional exploitation, mainly remotely sensing exploration, to facilitate the identification of exploration targets and is valid for six months on a non-renewable basis.⁹¹ There is also an Exclusive Prospecting Licenses⁹² which is a 3-year license that allows systematic prospecting in areas of up to 1,000 km.⁹³ Further, it gives exclusive exploration rights to the land and may be extended twice for two-year periods, if demonstrable progress is shown. Renewals beyond seven years require special approval from the Minister.⁹⁴

⁸⁶ (*Ibid.*, section 3 (1) (a) & (b)).

⁸⁷ (*Ibid.*, section 18 (1)).

⁸⁸ (*Ibid.*, section 33 (1)).

⁸⁹ Ministry of Mines and Energy, 2018. *Mineral Rights & Resources Development*. Available at www.mme.gov.na/mines/mrrd/; last accessed 11 April 2018.

⁹⁰ No. 33 of 1992, section 60.

⁹¹ Ministry of Mines and Energy, 2018. *Mineral Rights & Resources Development*. Available at www.mme.gov.na/mines/mrrd/; last accessed 11 April 2018.

⁹² No. 33 of 1992, sections 68 & 72.

⁹³ Ministry of Mines and Energy, 2018. *Mineral Rights & Resources Development*. Available at www.mme.gov.na/mines/mrrd/; last accessed 11 April 2018.

⁹⁴ (*Ibid.*).

The ministry of Mines and Energy also gives the Mineral Deposit Retention License⁹⁵ that allows an exploration company, in certain circumstances, to retain tenure on a prospecting license, mining license or mining claim without mining obligations.⁹⁶ This license is valid for five years, with two-year renewal periods. However, the license holder must meet work and expenditure obligations and submit regular project reviews.⁹⁷

There is also a Mining License⁹⁸ that gives the holder the exclusive mining right in the license area for a period of 25 years or the life of the mine, with renewals valid for 15-year periods.⁹⁹ The holder is required to demonstrate the financial and technical ability to develop and operate a mine.¹⁰⁰

These are some of the existing mineral rights that exists in Namibia at the moment and are granted in terms of the available legislations as stated above.

3.6 The private sector's involvement in mining

The Member States of SADC, through the Protocol on Mining, agreed to adopt internationally accepted regional standards within the mining sector.¹⁰¹ Through the SADC Protocol, member states agree to share information on exploitable mineral resources in the region,¹⁰² as well as promote policies that will encourage and assist small scale farming.¹⁰³ It is indicated that the SADC Protocol on mining requires the member states to permit the private sectors involvement in mining in their respective countries. Despite the SADC Protocol expectation on member states, it is opined that the

⁹⁵ No. 33 of 1992, section 79.

⁹⁶ Ministry of Mines and Energy, 2018. *Mineral Rights & Resources Development*. Available at www.mme.gov.na/mines/mrrd/; last accessed 11 April 2018.

⁹⁷ (*Ibid.*).

⁹⁸ No. 33 of 1992, section 91.

⁹⁹ Ministry of Mines and Energy, 2018. *Mineral Rights & Resources Development*. Available at www.mme.gov.na/mines/mrrd/; last accessed 11 April 2018.

¹⁰⁰ (*Ibid.*).

¹⁰¹ Protocol on mining in the Southern African Development Community, Article 2.

¹⁰² (*Ibid.*, Article 6).

¹⁰³ (*Ibid.*, Article 7).

Namibian mining law system may still be a replicate of the colonial era system, as it does not appreciate distribution and equity. It is opined that Namibia needs to close the gap between rich and poor to reach the objective of the New Equitable Economic Empowerment Framework (NEEEF).

3.7 New Equitable Economic Empowerment Framework (NEEEF) analyzed

It has been circulated that under NEEEF, businesses are required to be at least 25% owned by previously disadvantaged persons (black people) while 50% of top management must be previously disadvantaged persons.¹⁰⁴ It is submitted that NEEEF is not accommodative in the neo-liberal dimension to a certain extent. Critics have said the black-economic empowerment laws, in general, have failed to redress inequality but instead benefited a small number of wealthy individuals.¹⁰⁵ Equally, it is observed that the NEEEF has also received many criticisms, as it is admitted that it is not the 25% clause requirement of NEEEF that is a problem but the modality around it. Further, it is worrisome that the 25% clause, for previously disadvantaged Namibians, is vague and it is not clear how the 25% will be applied in different sectors. Despite the constitutional provisions regarding the rights to properties, it is not clear whether the 25% requirement of NEEEF, meant for previously disadvantaged people, will be applied on expropriation basis through fair and just compensation, or expropriation basis without compensation or by way of willing buyer willing seller basis. Therefore, since the Constitution of Namibia guides on parting with own properties. It is suggested that NEEEF should be reviewed to define clear guidelines and procedures for effective implementation that is in line with provisions of the Namibian Constitution that is dealing with property rights and expropriation of properties.

¹⁰⁴ National Equitable Economic Empowerment Bill of 2015, section 2.

¹⁰⁵ Nyaungwa, F. N & Abankwah, C. 2014. "Oil and Mining Boom: Where do Namibians fit in"? *Windhoek Observer newspaper*. Available at www.observer.com.na/index.php/8-latest-news/3514-oil-and-mining-boom-where-do-namibians-fit-in; last accessed 25 November 2016.

The Namibian Constitution in Article 16(2)¹⁰⁶ provides that Parliament makes laws that would allow the state or a lawfully established body or organ to expropriate property in the public interest, on condition that the state pays “just compensation” to affected parties. This is called “expropriation” where the state is required to pay what is termed “just compensation”, in this context, a “fair price”.¹⁰⁷ Article 16 (1) of the Namibian Constitution¹⁰⁸ covers the principle of willing seller/willing buyer, which states that all persons have a right to “acquire, own and dispose” of all forms of property. However, Article 16(2) of the same Constitution¹⁰⁹ limits the right to own property in Namibia. It is submitted that the right to own the property including mineral resources from the mining sector is not absolute. Thus, the state has the power to expropriate the property in accordance with the procedures laid down by law, and therefore has the right to interfere with an individual’s right to own property.¹¹⁰

3.8 Measuring inequality

Inequality can be measured in different ways. The Gini index, for example, measures the extent to which income or, in some cases, consumption among individuals or households within an economy deviates from a perfectly equal distribution.¹¹¹ It means that a Gini index of zero represents perfect equality, while a Gini index of 100 means perfect inequality.¹¹²

¹⁰⁶ No. 1 of 1990 as amended.

¹⁰⁷ Narib, G.(n.d). “Is there an absolute right to private ownership of commercial land in Namibia”? Land, Environment and Development Project Legal Assistance Centre Windhoek, Namibia. Available at www.lac.org.na/projects/lead/Pdf/privateownership.pdf; last accessed 11 April 2018, p.2.

¹⁰⁸ No. 1 of 1990 as amended.

¹⁰⁹ (*Ibid.*).

¹¹⁰ Narib, G. (n.d). “Is there an absolute right to private ownership of commercial land in Namibia”? Land, Environment and Development Project Legal Assistance Centre Windhoek, Namibia. Available at www.lac.org.na/projects/lead/Pdf/privateownership.pdf; last accessed 11 April 2018, pp.2-3

¹¹¹ Gylfason, T. and Zoega, G. 2002. “Inequality and economic growth: Do natural resources matter”? CESifo Working Paper No. 712 (5), p.13.

¹¹² (*Ibid.*:13).

Namibia is rich in minerals,¹¹³ however it faces many challenges related to widespread poverty (29% of the population is classified as poor or severely poor) and severe income inequality (Gini 0.58),¹¹⁴ which over the years has placed Namibia in the top five, in the world, in terms of income inequality.¹¹⁵ This state of affairs prevails while foreign investors continue to make obscene profits at the expense of ordinary Namibians. The perceived unhealthy state of affairs calls for a radical change in approach in so far as the implementation of legislations and regulations of the mining sector in Namibia is concerned. It is observed that because of confidentiality requirements, information about reserves for individual minerals is not published.¹¹⁶

3.9 Distribution and community participation

Distribution is the process of giving things out to people or spreading or supplying something.¹¹⁷ However distribution of Namibian's mineral resources should not be interpreted to be equal to free distribution, there may be costs involved. It is considered that, if the distribution of ownership of natural resources is more unequal than the distribution of other forms of wealth, the inequality of the distribution of income, education or land is directly related to the share of natural resources in national income.¹¹⁸

¹¹³ Kojima, M., Matthews, W. and Sexsmith, F. 2010. "Extractive Industries for Development Series. Petroleum Market In Sub-Saharan Africa", ESMAP, World Bank, p.33.

¹¹⁴ European Union, 2015. *International Cooperation and Development, Building partnerships for change in developing countries*. Available at www.ec.europa.eu/europeaid/sites/devco/files/nip-namibia-edf-11-2015_en.pdf; last accessed 30 March 2017.

¹¹⁵ Hamilton, A. 2015. "Namibia has world's worst income inequality". *Windhoek Observer newspaper*. Available at www.observer.com.na/national/5556-namibia-has-world-s-worst-income-inequality; last accessed 30 March 2017.

¹¹⁶ Lange, G.M. 2003. "The contribution of minerals to sustainable economic development: Mineral resource accounts in Namibia", No. 54. Directorate of Environmental Affairs, Ministry of Environment and Tourism, p.9.

¹¹⁷ *Cambridge English dictionary*. Available at www.dictionary.cambridge.org/dictionary/english/distribution.

¹¹⁸ Gylfason, T. and Zoega, G. 2002. "Inequality and economic growth: Do natural resources matter"? CESifo Working Paper No. 712 (5), p.32.

There must be contributing factors to uneven distribution of mineral resources and lack of community participation in national resources. One of the factors may be corruption, which is described briefly,¹¹⁹ as a situation where politicians and officials exercise power without accountability. Corruption affects economic development by rewarding the most dishonest rather than the most competent. The fear of competition is the major justification for paying bribes as one may feel that their competitors may be more qualified than they are. Therefore, Governments needs to step in to protect mining revenue from being misappropriated, improve mineral resources access and distribution among the unequal society by allowing public involvement.

To protect the national resources, government should prioritize local inputs for policy development and management of the sector that has been the prerogative of the government without any input from local communities.¹²⁰ Thus, sub-Saharan African communities have called for mining revenues to stay in the countries where they are mined; for raw materials to be processed in the countries where they are mined, thereby adding value; and for governments to act to protect people affected by mining rather than protecting the profit margins of corporations exploiting them.¹²¹ With a Gini coefficient of 0.59719,¹²² Namibia's income distribution is still among the most unequal in the world, despite improvements since independence.¹²³

¹¹⁹ Bray, J. 1999. "Corruption in Africa". *Business in Africa*, Volume 7 (3): 15-17.

¹²⁰ Lebert, T. 2016. *The scale of the UK's involvement in Africa's resources is staggering. So too is its disregard for the rights of those affected*. Available at www.africanarguments.org/2016/09/13/the-scale-of-the-uks-involvement-in-africas-resources-is-staggering-so-too-is-its-disregard-for-the-rights-of-those-affected/; last accessed 2 March 2018.

¹²¹ (*Ibid.*).

¹²² Namibia Statistics Agency 2012. "Namibia Household Income & Expenditure Survey 2009/2010". Available at www.microdata.worldbank.org/index.php/catalog/1548/study-description.pdf; last accessed 15 May 2018.

¹²³ European Union 2014. "Republic of Namibia National Indicative Programme 2014 – 2020". Available at www.eeas.europa.eu/delegations/iceland/5964/2014-2020-national-indicative-programme-namibia_en; last accessed on 15 October 2018, p.18.

3.10 Potential challenges to redistribution of wealth

The eradication of poverty and development progression in Namibia requires a purposeful and coherent approach to policy making across sectors and stakeholders, dedicated resources and accountability.¹²⁴ It is submitted that the above can be realised through equitable distribution of mineral resources. However, it is also opined that the capital or neo-liberal economic policies, such as the World Banks' ease of doing business that compares economies, may impact negatively on the redistribution of wealth. On the other hand, the Government has the role to protect the rights of the people, including the right to engage in voluntary exchange or redistribution of wealth from rich to the poor.¹²⁵ However, it is submitted that the potential challenges to redistribution of wealth may be caused by various factors such as corruption, bad policies, fear of economic downgrade and lack of essential legislations aimed at wealth redistribution.

As a result, many African countries do not have a strong track record of properly managing mineral wealth due to corruption, bad policies. However, there are a few exceptions of countries with decent policies of distributing a proportion of mining rents to local authorities and traditional leaders in mining affected communities.¹²⁶ It is acknowledged that Ghana and Sierra Leone are some of the few countries in Africa to have developed and upheld policies for redistributing a proportion of its mining wealth directly to communities.¹²⁷ In Ghana, royalty being the main sources of revenue derived from the mining sector are provided directly to the government quarterly.¹²⁸ It is established that in order to tackle the potential challenges to redistribution of wealth, lawmakers need to come up with policies of

¹²⁴ Kameeta, Z. 2016. "Blue print on wealth redistribution and poverty eradication". Available at www.info.undp.org/docs/pdc/Documents/NAM/Blue%20Print%20on%20Wealth%20Redistribution%20and%20Poverty%20Eradication%20%20PDF.pdf; last accessed 10 April 2018, p.5.

¹²⁵ Posner, R.A. (1985). Wealth maximization revisited. *Notre Dame Journal of Law Ethics & Public Policy*, Volume 2: 85 at 99.

¹²⁶ Standing, A. & Hilson, G. 2013. "Distributing mining wealth to communities in Ghana, Addressing problems of elite capture and political corruption". *U4 Issue*, Volume 2013 (5): p.vi.

¹²⁷ (*Ibid.*; p.2).

¹²⁸ (*Ibid.*).

distributing wealth. Such policies must target both local and foreign investors to ensure that all citizens share in wealth benefits derived from the mining sector.

Countries such as Mongolia and Iran have what is called “citizen resource dividend” and the essence of a citizen resource dividend is that all or some proportion of resource revenues are transferred in the form of direct cash benefits.¹²⁹ This is normally paid on a monthly basis, to every person in the country, irrespective of their wealth or employment status.¹³⁰ The implication is that governments will reduce, or entirely forego, dependency on resource royalty payments for funding the state’s budget, and instead rely more on direct taxation as their source of government income.¹³¹ It is acknowledged that this may be one of the alternatives to be considered by the Namibian lawmakers. However, there is resistance to such alternatives of cash transfer based on the presumption that giving people cash will induce dependency and laziness, thereby reducing labor supply. Distributing cash will have an inflationary effect.¹³² It is further opined that no country would want to produce lazy citizens.

3.11 Beneficiation strategy

The beneficiation strategy provides a framework that seeks to translate the country’s complete comparative advantage inherited from mineral resources endowment to a national competitive advantage.¹³³ The strategy is aligned to a national industrialization programme, which seeks to enhance the quantity and quality of exports, promote creation of decent employment and diversification of the economy, including promotion of the green economy.¹³⁴ If the mineral resources

¹²⁹ (*Ibid.*:17).

¹³⁰ (*Ibid.*:17).

¹³¹ (*Ibid.*:17).

¹³² (*Ibid.*:17).

¹³³ Department of Mineral Resources of South Africa, 2011. “A beneficiation strategy for the minerals industry of South Africa”. Available at [www.gov.za/sites/www.gov.za/files/Beneficiation%20Strategy%20June%202011%20final%20\(3\)_0.pdf](http://www.gov.za/sites/www.gov.za/files/Beneficiation%20Strategy%20June%202011%20final%20(3)_0.pdf); last accessed 30 March 2017, piii.

¹³⁴ (*Ibid.*).

are held in custody for the benefit of all Namibians, evidence should be there, and if not, people will get frustrated and at the end Namibia will become part of the cursed nations due to natural resources.

3.12 Corporate Social Responsibility

This responsibility, framed in terms of corporate social responsibility (CSR) or corporate citizenship entails maximizing the positive and minimizing the negative social and environmental impacts of mining, while maintaining profits.¹³⁵ It is submitted that this responsibility is meant to give back to the society. Further, it is submitted that since Namibia welcome investors, they are required to contribute to sustainable development of Namibia. The CSR calls for a company to respond not only to its shareholders, but also to other stakeholders, including employees, customers, affected communities and the general public, on issues such as human rights, employee welfare and climate change.¹³⁶ It is opined that Government should regulate CSR so that if investors comply with the corporate citizenship principles to ensure that the Namibian people benefit ultimately from the mineral resources of the country while proper solution is being sought for citizen's development and to allow their access, participation and to nationalize mines. It means that, in order to provide maximum development benefit, CSR must be integrated into the core activities and decision making of a company and be regarded as a key concern by top management.¹³⁷ It is therefore recommended that mining companies should be more responsible and take up more interactive role in social transformation and sustainable development. Ignoring CSR may risk losing their license to operate and their international competitiveness.¹³⁸

¹³⁵ Hamann, R. 2003. "Mining companies' role in sustainable development: the 'why' and 'how' of corporate social responsibility from a business perspective". *Development Southern Africa* Volume 20, (2):237-254 at 238.

¹³⁶ (*Ibid.*).

¹³⁷ (*Ibid.*:239).

¹³⁸ (*Ibid.*:251).

3.13 Theory of distributive justice

The theory of distributive justice depicts how a society allocates its scarce resources to individual or groups with competing interest or claims.¹³⁹ In this regard, it focuses exclusively on inequalities.¹⁴⁰ This concept requires those who have to give to those who have not. A society where injustice does not exist is regarded as a society guided by the principles of distributive justice.

In order to know whether people are being fairly treated by society, an examination on their access to primary social goods is required and¹⁴¹ this is done through the distribution justice theory. The nature of justice is difficult to define but “Justice” has concepts associated with the definition of justice such as fairness, equality, and rights.¹⁴²

These elements are explained in more details as follows:

“Fairness: Similar cases must be treated in the same way. For instance, it would be unfair not to refuse one fish to one person and then respond to another person by giving him hundred boxes of fish. In other words, similar situations must be treated in similar ways.

Equality: The treatment of people ought to reflect the fact that all are morally equal. There are no morally relevant differences between human beings which make it permissible to treat them differently. For instance, there is not one race or gender that is “better” than the others. To act otherwise is to engage in immoral discrimination.

¹³⁹ Roemer, J.E. 1996. *Theories of Distributive Justice*. Harvard University Press. Cambridge Massachusetts, p.1.
¹⁴⁰ Robeyns, I. 2003. “Is Nancy Fraser’s Critique of Theories of Distributive Justice Justified?”. *Constellations*, Volume 10 (4) 2003: 538-554 at 4.
¹⁴¹ Arneson, D. 2008. “John Rawls’s theory of justice notes for theories of justice”. Available at www.philosophyfaculty.ucsd.edu/faculty/rarneson/Rawlschaps1and2.pdf; last accessed 30 March 2017, pp.1-9.
¹⁴² Colorado University, *Distributive Justice*. Available at www.rintintin.colorado.edu/~vancecd/phl306/justice.pdf; last accessed 30 March 2017, p. 2.

Rights: There are certain moral claims that everyone ought to be able to exercise against others”.¹⁴³

It is submitted that this theory is important as natural resources ought to be distributed and accessed equally and fairly. Further, according to Namibian law, the state owns natural resources;¹⁴⁴ including mineral resources from the mining sectors. Article 144 of the Namibian Constitution¹⁴⁵ also provides that:

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

Consequently, international law and international agreements that Namibia has acceded to is part of Namibian law. On that basis, the principle of international law that prescribes people, amongst others, as criteria that determine statehood,¹⁴⁶ requires fairness and just treatment of the nationals complemented by rights and enjoyment of national wealth. The reason why State should concentrate on the well-being of the people is because it is made up of people and no state can exist without the people. That is the reason why the Ministry of Mines and Energy holds mineral resources in trust for the benefit of the Namibian people.¹⁴⁷ However, it must be understood that the freedom to have any particular thing can be significantly distinguished from actually having that thing; what an individual is free to have and not just what he actually has is relevant.¹⁴⁸ In other words, the person’s right to

¹⁴³ (*Ibid.*:2).

¹⁴⁴ No. 1 of 1990 as amended, Article 100.

¹⁴⁵ No. 1 of 1990 as amended.

¹⁴⁶ Crawford, J. 1977. “The Criteria for Statehood in International Law”, *British Yearbook of International Law*, Volume 48 (1) : 93–182.

¹⁴⁷ Namibian Government’s Minerals Policy of 2002.

¹⁴⁸ Sen, A. 2005. “Human Rights and Capabilities”. *Journal of Human Development*, Volume 6 (2) : 151-166 at 155.

have something is not equal to actually having it. There should be a difference between doing something, having something and being free to do that thing.

Despite what the theory of distributive justice depicts, it is assumed that the current economic order may not accommodate the distributive justice theory considering the World Banks' ease of doing business. The ease of doing business ranking compares economies with one another; benchmarking economies according to regulatory best practice and the regulatory environment.¹⁴⁹ Further, the ease of doing business looks at whether the regulatory environment is conducive to business operations and the protections of property rights. Therefore, it is doubtful whether the concept of taking from those who have to give to the have not will survive the World Banks' ease of doing business test, without the country gaining low ranking for the economy. It is further opined that the theory of distributive justice may affect the economy of the country negatively because the regulatory environment may not be conducive to business operations. Further the theory will also be required to pass the protection of property rights test that is viewed to be at risk in the case of redistribution of wealth.

3.14 Objective of State control of minerals

The reason why minerals are mostly under state control is to capture rent and to safeguard national inheritance, which in this instance, consists of resources that have been passed down from previous generations to the current generations. This is a result of the perception that international mining companies or foreign investors obtained most of the rent, leaving very little for the host country.¹⁵⁰ Most state-owned mining companies have over the years, and in particular in developing countries, not

¹⁴⁹ World Bank, "Doing Business Annual report 2018". Available at www.doingbusiness.org/~media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB18_Chapters/DB18-DTF-and-DBRankings.pdf; last accessed 10 April 2018.

¹⁵⁰ Kojima, M., Matthews, W. & Sexsmith, F. 2010. "Extractive industries for development series". Petroleum market in Sub-Saharan Africa, ESMAP, World Bank. p.31.

been able to operate successfully, leading to privatization.¹⁵¹ The success of a state-owned mining company is determined by the governance framework/structure, assets, and capital base. It is maintained that the mining sector ought to be governed by experienced personnel in mining and finance as board of directors. If such capacity is not available locally, it should be sourced internationally and the day to day administration be trusted in experienced professional managers who understand both the mining industry and the country specific conditions.¹⁵²

It is warned that sustainable mining demands re-investment in exploration and development to maintain current reserves and to provide for future production. This includes developing at least five to ten (5–10) years of ore reserves,¹⁵³ as mining companies cannot only be utilized as a revenue generator by the government to cover budgetary deficits or other demands for money, skills or capital elsewhere in the national economy.¹⁵⁴

3.15 Understanding international nature of mining

It should be understood that it takes ten to fifteen (10–15) years to develop a mine and that the industry is a high-risk sector. However, not only the mining sector should be understood, but the stability and continuity provided by the mining sector as compared to other sectors should also be recognized and understood.¹⁵⁵ The most important aspect of survival of mining is to have adequate skills and expertise and to invest in succession planning and development. In order to survive an international competitive environment in mining, companies need best management practices and resources regardless of whether the owner is a state or private investor.¹⁵⁶

¹⁵¹ (*Ibid.*:33).

¹⁵² (*Ibid.*:34).

¹⁵³ (*Ibid.*).

¹⁵⁴ (*Ibid.*).

¹⁵⁵ (*Ibid.*).

¹⁵⁶ (*Ibid.*:35).

3.16 Conclusion

Article 100 in the Namibian Constitution has given the assurance of who owns mineral resources in Namibia that are not lawfully privately owned.¹⁵⁷ As a result the Ministry of Mines and Energy has been given full custody and been tasked to control the mineral resources on behalf of its citizens.¹⁵⁸ It is suggested that citizens will have access and ownership of mineral resources if state-owned enterprises create a mixed capital type of mining company with a set timetable for gradual transfer of ownership from the state to private national entities and investors on a jointly agreed timetable.¹⁵⁹ It would be more beneficial to the nation provided that national entities occupy large share of rent. However, transfer of ownership from the state to private national should be done strategically. That is when skills are developed and adequate technology acquired as it is evident that to survive an international competitive environment in mining, companies need best management practices and resources regardless of whether the owner is a state or private investor.¹⁶⁰

It is concluded that, mining is a critical sector of the Namibian economy and mineral assets form major source of national wealth.¹⁶¹ The Mining sector in Namibia contributes 25% to the Gross Domestic Product (GDP) but nationals are not really getting enough shares of their national resources as it was supposed to be due to governance style and the laws that are in place.¹⁶² It is unfortunate that

¹⁵⁷ *Rostock CC and Another v Van Biljon* 2011 (2) 751 (HC).

¹⁵⁸ The Draft Mineral Policy of 2002.

¹⁵⁹ Kojima, M., Matthews, W. and Sexsmith, F. 2010. "Extractive industries for development series". Petroleum Market In Sub-Saharan Africa, ESMAP, World Bank, p.35.

¹⁶⁰ (*Ibid.*:35).

¹⁶¹ Lange, G.M. 2003. "The contribution of minerals to sustainable economic development: Mineral resource accounts in Namibia", No. 54. Directorate of Environmental Affairs, Ministry of Environment and Tourism, p.3.

¹⁶² (*Ibid.*:4).

some diamond companies have been undermining the beneficiation efforts of the Namibian Government by exporting most of the raw natural resources.¹⁶³

Thus, it is required that necessary skills are developed, people have access to natural resources of the country and that the distribution of these resources is done fairly and equitably. It would be more beneficial to the nation provided that national entities occupy large share of rent because what is required is skills, funds and technology to survive in the mining industry. Considering the fact that, in order to survive an international competitive environment in mining, companies need best management practices and resources regardless of whether the owner is a state or private investor.¹⁶⁴ It is assumed that previously disadvantaged Namibians have had trouble owning and accessing mineral resources, due to work commitments, access to funding, skills and technology.¹⁶⁵ If lack of skills is still an issue up to today, Namibia needs to move away from the perception of not having enough local skills and capacity to access and run the mining sector successfully.

Despite the plea for the local access to mineral resources, it does not mean a call to abolish foreign investors that are provided for in the Namibian Constitution. According to the Namibian Constitution, investment by foreign companies in Namibia's mining industry is good for the economy.¹⁶⁶ Therefore the Namibian Government's ability to attract investment to develop natural resources will strongly influence future economic growth and development.¹⁶⁷ As Namibia welcomes investors to contribute to sustainable development of the country, investors are expected to respond to their corporate social

¹⁶³ Kisting, D. 2017. "Kandjoze lays into diamond industry". *The Namibian Newspaper*, Thursday 30 March 2017, p.18.

¹⁶⁴ (*Ibid.*:35).

¹⁶⁵ Nyaungwa, F. N & Abankwah, C. 2014. "Oil and Mining Boom: Where do Namibians fit in?" *Windhoek Observer newspaper*. Available at www.observer.com.na/index.php/8-latest-news/3514-oil-and-mining-boom-where-do-namibians-fit-in; last accessed 25 November 2016.

¹⁶⁶ No. 1 of 1990 as amended, Article 99.

¹⁶⁷ Mobbs, P.M. 2004. "The Mineral Industry of Namibia". Available at www.minerals.usgs.gov/minerals/pubs/country/2004/wamyb04.pdf; last accessed 10 April 2018, p.31.

responsibility. The corporate social responsibility calls for companies to respond not only to their shareholders, but also to other stakeholders, including employees, customers, affected communities and the general public.¹⁶⁸

While there is a call for companies to implement corporate social responsibility seriously, the Ministry of Mines and Energy should also take full responsibility not only of accessing mineral rights applications and granting minerals licenses but also to partake in awareness campaign for local participation education. This is because, the Namibian mining law system still replicates colonial system as it does not appreciate distribution and equity. Even though, Government has the role to protect the rights of the people, including the right to engage in voluntary exchange or redistribution of wealth from rich to the poor.¹⁶⁹ However, capital or neo-liberal economic policies may impact negatively on the redistribution of wealth. It is established that in order to tackle the potential challenges to redistribution of wealth lawmakers need to come up with policies of distributing of wealth targeting local and foreign investors. The purpose of the policies of distributing of wealth is to ensure that citizens share in wealth benefits derived from the mining sectors, to safeguard the national inheritance and to avoid foreign investors obtaining most of the resources, leaving very little for the host country.¹⁷⁰

There are countries such as Mongolia and Iran that have systems of wealth redistribution what is called “citizen resource dividend”, by transferring all or some proportion of resource revenues in the

¹⁶⁸ Hamann, R. 2003. “Mining companies’ role in sustainable development: the ‘why’ and ‘how’ of corporate social responsibility from a business perspective”. *Development Southern Africa* Volume 20, (2) :237-254 at 238.

¹⁶⁹ Posner, R.A. (1985). Wealth maximization revisited. *Notre Dame Journal of Law Ethics & Public Policy*, Volume 2: 85 at 99.

¹⁷⁰ Kojima, M., Matthews, W. and Sexsmith, F. 2010. “Extractive industries for development series”. Petroleum market in Sub-Saharan Africa, ESMAP, *World Bank* : 31.

form of direct cash benefits.¹⁷¹ Although this may be one of the alternatives to be considered by the Namibian lawmakers, there may be resistance to such alternative of cash transfer based on the presumption that giving people cash will induce dependency and laziness.¹⁷²

The Namibian's score of 58% Gini co-efficient demonstrates an unhealthy state of affairs that calls for a radical change in approach in so far as the regulation of the mining sector in Namibia is concerned.¹⁷³ If the distribution of ownership of natural resources is unequal than the distribution of other forms of wealth, such as the distribution of income, education or land will be unequal.¹⁷⁴ Besides that, corruption is also regarded as one of the contributing factors to uneven distribution of mineral resources and lack of community participation in national resources,¹⁷⁵ as it rewards undeserving individuals.

However, with the implementation of NEEEF, the situation of unequal distribution of resources may change, but it is submitted that NEEEF may not be accommodative in the neo-liberal dimension to a certain extent due to what World Bank ease of doing business expects. Critics have said the black-economic empowerment laws in general have failed to redress inequality but instead benefited a small number of wealthy individuals.¹⁷⁶ Therefore, access and benefits from the country's mineral resources

¹⁷¹ Standing, A. & Hilson, G. 2013. "Distributing mining wealth to communities in Ghana, Addressing problems of elite capture and political corruption". *U4 Issue*, Volume 2013 (5): 17.

¹⁷² (*Ibid.*: 2).

¹⁷³ European Union, 2015. *International Cooperation and Development. Building partnerships for change in developing countries*. Available at www.ec.europa.eu/europeaid/sites/devco/files/nip-namibia-edf-11-2015_en.pdf; last accessed 30 March 2017.

¹⁷⁴ Gylfason, T. and Zoega, G. 2003. "Inequality and economic growth: Do natural resources matter"? *Inequality and Growth: Theory and Policy Implications*, Volume 1 :255 at 32.

¹⁷⁵ Bray, J. 1999. "Corruption in Africa". *Business in Africa*, Volume 7 (3): 15-17.

¹⁷⁶ Kaira, C. 2018. "Government to remove 25 percent NEEEF clause". *Windhoek Observer newspaper*. Available at www.observer.com.na/index.php/national/item/9477-govt-to-remove-25-percent-neeef-clause; last accessed on 12 April 2018.

should be promoted and encouraged because each state has a duty to use its natural resources to improve the nation's progress and economic development.

While the Government is encouraged to promote access and ownership of mineral resources in the country, what the theory of distributive justice portrays may not be accommodated by the current economic order considering the World Bank ease of doing business, because distributive justice may seem to portray uneasiness on the side of the foreign investors. Nevertheless, the use of the theory of distributive justice does not imply the call to abolish foreign investors because investment of foreign companies in Namibia's mining industry is encouraged by the Namibian Constitution.¹⁷⁷ However, it is advised that investors should respond to their corporate social responsibility. The state can impose the corporate social responsibility because it has total control of all subsurface mineral rights.¹⁷⁸ That is found in the Roman-Dutch law principle that means "he who possesses the land possesses also that which is above it".¹⁷⁹ This view is based on the idea that the air is free to all, and that it is incapable of being possessed and owned.¹⁸⁰

¹⁷⁷ No. 1 of 1990 as amended, Article 99.

¹⁷⁸ Corry, S. 2003. *News reactions and interactions*. Available at www.unl.edu/rhames/courses/current/readings/corry-suzman.pdf, last accessed 10 April 2018, p.6.

¹⁷⁹ Henry Campbell Black M. A. 1968. *Black's Law Dictionary*, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern, 4th Ed., p. 453.

¹⁸⁰ Abramovitch, A. 1961. The maxim "*cujus est solum ejus usque ad coelum*" as applied in aviation, *McGILL Law Journal*, Volume 8 : 248.

CHAPTER FOUR

COMPARATIVE ANALYSIS BETWEEN NAMIBIA AND OTHER SELECTED JURISDICTIONS

4.1 Introduction

In this chapter, the discussion regarding mineral ownership in Namibia in comparison with selected jurisdictions is provided. A comparison is made with selected countries such as: The United Kingdom, Zimbabwe, Nigeria and South Africa. South Africa is selected because of the legal systems that are similar to Namibia's legal system. Similar to South Africa, Zimbabwe and Nigeria are also selected as similar jurisdictions to Namibia, whose experiences and pitfalls in so far as resource sharing is concerned, could appropriately guide Namibia on the appropriate course of action to take. They also serve as classic examples of the pitfalls of miscalculated resource sharing policies adopted by some African countries. The United Kingdom (UK) is selected as a developed country for purposes of establishing best practices in so far as equitable sharing of resources is concerned and in so far as UK has been regarded as the centre of excellence and innovation in sustainable development.¹ It would be important to learn how mineral resources are distributed, accessed or owned in the UK. Zimbabwe is selected in order to find out what it looks like when the President has total control of the country's mineral resources.

This chapter also highlights the laws applicable in the selected jurisdictions and the foreign investment concept. Investment is regarded as the transfer of tangible or intangible assets from one country into

¹ *UK Delivering Global Mining Solutions.* Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/295099/UK_Delivering_Global_Mining_Solutions.pdf; last accessed on 4 August 2018, p.11.

another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets.²

Namibia is part of Southern African countries, and many of the Southern African countries have vested mineral resources in the State or President for the benefit of its citizens.³ For example in Namibia, Article 100 of the Namibian Constitution as well as the Draft Mineral policy of 2002, vest minerals resources in the State unless otherwise owned. In South Africa, section 2(a) of the Mineral and Petroleum Resources Development⁴ prescribes the State as the custodian of mineral resources.⁵ While in Zimbabwe mineral resources are governed by the Mines and Mineral Act⁶ which vests them in the President.⁷ In Zambia, all rights of ownership in, searching for, mining and disposing of, minerals located in the Republic vest in the President on behalf of the Republic according to the Mines and Minerals Development Act.⁸ However, it is doubtful whether the masses really have access and whether there is equitable distribution of these mineral as anticipated. It is further submitted that in many cases local communities have restricted access to minerals resources except for what custom demands, for example construction materials for their houses.

This chapter therefore explains these differences and or similarities found in selected jurisdictions in terms of mineral resources and the lessons that could be learnt from other jurisdictions, and the laws aimed at improving the lives of the previously disadvantaged people if any.

² Amarasinha, S.D. & Kokott, J. 2008. "Multilateral Investment Rules Revisited" In Muchlinski *et al*, *The Oxford Handbook of International Investment Law*, Oxford University Press, p. 120.

³ Levin, G. & Hanley, J.R.F. 1993. "Mineral Rights Revolution in Southern Africa: A Comprehensive Historical Review". Kaplan and Stewart Incorporation, p. 37.

⁴ No. 28 of 2002.

⁵ Van Der Schyff, E. 2012. "South African mineral law: a historical overview of the state's regulatory power regarding the exploitation of minerals", p.131.

⁶ No. 38 of 1961, section 2.

⁷ Nhemachena. A & Warikandwa, T.V., (eds). 2017. *Mining Africa: Law, Environment, Society and Politics in Historical Multidisciplinary perspective*. Langaa Research & Publishing CIG Mankon, Bamenda, p.261.

⁸ No. 11 of 2015 of Zambia, section 3.

4.2 United Kingdom

The United Kingdom is one of the developed countries in the world, hence its selection for the comparative analysis in terms of mineral resources. Despite the fact that the United Kingdom has been regarded as the centre of excellence and innovation in sustainable development,⁹ the mining industry has also been faced with particular risks such as those found in Africa, specifically fraud and corruption, as identified by international transparency organizations.¹⁰ The risks as mentioned above exist although there are laws applicable to the mining industry in the United Kingdom (UK),¹¹ of which some of them will be highlighted herein. Mineral resources in the UK are in categories such as gold, silver, coal, oil and gas and belong to her Majesty while other forms of minerals belong to the land owner.¹² Yet again there is no register of mineral rights in place.¹³ It is further stated that the mineral rights that belong to the land owner are privately owned, however consent must be obtained from a mineral planning authority for their extraction.¹⁴ It is challenged that if consent is required to extract privately owned minerals then such minerals are not privately owned. It is further questioned whether it is possible to obtain permission to use or exploit one's own property. The answer may be negative as it is expected that if the property is privately owned, the owner is also expected to have rights to use such property freely. Therefore, one can easily conclude that these mineral resources are not privately owned as claimed, if permission is required from a mineral planning authority to extract

⁹ *UK Delivering Global Mining Solutions.* Available at www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/295099/UK_Delivering_Global_Mining_Solutions.pdf; last accessed on 4 August 2018, p.11.

¹⁰ (*Ibid.*).

¹¹ Coal Industry Act of 1994; Health and Safety at Work Act of 1974; Management of Health and Safety at Work Regulations of 1999; Mines Regulations of 2014 and Quarries Regulations of 1999; Mines (Working Facilities and Support) Act of 1966; The Coal Mines Act of 1930.

¹² Brown, M. (2018). *Mining law 2018/ United Kingdom*. Available at www.iclg.com/practice-areas/mining-laws-and-regulations/united-kingdom; last accessed 2 March 2018.

¹³ Colman, T. 2011. "The last 50 years of mineral exploration in Britain". *Mercian Geologist 2011* Volume 17 (4.): 262.

¹⁴ *UK Legislation & policy: mineral ownership.* Available at <https://www.bgs.ac.uk/mineralsUK/planning/legislation/mineralOwnership.html>; last accessed 2 March 2018.

them from a private property. The applicable legislation in The United Kingdom contain definitions of mineral resources just like any other legislation around the globe.

The Coal Industry Act 1994¹⁵ defines oil and gas as:

“ (a) any mineral oil or any relative hydrocarbon which, in its natural state, is not a solid; or (b) methane or any other natural gas.”

The definition as given by the Coal Industry Act clearly outline what constitute oil and gas that is not solid, methane or any other natural gas, for the purpose of ownership. It is admitted that, the ownership of petroleum (oil and gas) within the land of Great Britain is vested in her Majesty as per Petroleum (Production) Act.¹⁶ However, it is submitted that the Petroleum (Production) Act¹⁷ is silent whether these resources are held in trust for the benefit of the people or not. Therefore one would assume that mineral resources are held in trust by her Majesty. On the other hand, Section 2 (1) of the Petroleum Act¹⁸ gives rights to the Board of Trade, on behalf of her Majesty to grant to such persons as they deem fit licenses to search and bore for and get petroleum. It is clear from the provision of the Petroleum (Production) Act that the Board of Trade uses its own discretionary power to decide whether to issue rights or not. It is also clear that her Majesty is the owner of the mineral resources in the United Kingdom. Apart from oil and gas, the ownership of coal resides with the Coal Authority who grants licenses for coal exploration and extraction.¹⁹ While the Crown holds the rights to gold and silver.²⁰

¹⁵ Act of 1994, section 9 (6).

¹⁶ Act of 1934, section 1.

¹⁷ (*Ibid.*).

¹⁸ (*Ibid.*, section 1).

¹⁹ Act of 1994, section 26.

²⁰ UK Legislations & policy mineral ownership. Available at <http://www.bgs.ac.uk/mineralsUK/planning/legislation/mineralOwnership.html>; last accessed 2 March 2018.

Another legislation that deals with mineral resources in the United Kingdom is the Continental Shelf Act,²¹ which prescribes that any rights exercisable by the United Kingdom outside exploration territorial waters, with respect to the sea bed and subsoil and their natural resources, except so far as they are exercisable in exploitation relation to coal is vested in Her Majesty. It is evident that mineral resources that can be exercised are for Her Majesty wherever they are found be it on the sea bed or subsoil. It is further submitted that these mineral resources are protected by the law to avoid exploiting or mining activities without permission.

As a result, Her Majesty protects the natural resources through the Coal Industry Act,²² which prohibits:

“(a) Any interference with the carrying on of any underground operations carried on otherwise than for purposes connected with any coal-mining operations; (b) The withdrawal of support from any land or any interference with the surface of any land.”

It is obvious from the above clause that all rights in relation to minerals on the seabed and subsoil is vested in her Majesty. Further, there is prohibition of interference or conducting activities within the surface of any land in relation to underground land without permission. It is stressed that the right of ownership of mineral resources in United Kingdom is not automatic, owning the land does not equate to owing mineral resources found underneath.

Another legislation applicable in United Kingdom is the Land Registration Act,²³ which prescribes that mines and minerals represent those that are held with the surface or not. Thus, when one is talking about the registration of the land, such registration does not include mines and minerals held apart

²¹ Act of 1964, section 1 (1).

²² Act of 1994, section 51 (5).

²³ Act of 2002, section 132 (1).

from the surface.²⁴ As a result, mineral rights title cannot be registered or interfered with.²⁵ It means that a person can register the land but not the minerals whether or not held with the surface. Interestingly, in many parts of England and Wales, someone will own the surface of the land, while someone else owns the land below the surface.²⁶ As a result, rights and ownership may differ, in some cases minerals can be removed whether the owner of the surface agrees or not.²⁷ Therefore it is recognised that there is no absolute ownership if the owner of the surface is not always required to grant permission for extraction of minerals located in their surface. However, that does not give the extractor of minerals the right to access the surface liberally but to negotiate the access with the surface right owner.²⁸

On the issue of laws aimed at improving the lives of the previously disadvantaged people in UK, it appears that there is no such legislation available. However there are exceptional laws in place such as the Mineral Exploration and Investment Grants Act of Britain.²⁹ The aim is to authorize the giving of financial assistance in connection with mineral exploration, and to clarify certain exceptions from the abolition of investment grants.³⁰ It is submitted that if financial assistance is granted in terms of mineral exploration, it will allow more access to mineral resources. It is the Government that initiated funding programmes to support mineral exploration by providing assistance to the mineral exploration industry,³¹ Due to this support; UK firms have a wealth of exploration and mining expertise.³² It is

²⁴ (*Ibid.*, section 9).

²⁵ (*Ibid.*, section 4).

²⁶ Tighe, C. 2013. *Mining rights in UK can be a barrier to exploration*. Available at <https://www.ft.com/content/dd8c96e2-278d-11e3-8feb-00144feab7de>; last accessed 16 April 2018.

²⁷ (*Ibid.*).

²⁸ Colman, T.B., Cooper, D.C. 2000. "Exploration for metalliferous and related minerals in Britain: A guide", 2nd edition. DTI Minerals Programme, Publication No. 1, p.31-32.

²⁹ Act of 1972.

³⁰ (*Ibid.*).

³¹ Colman, T. 2011. "The last 50 years of mineral exploration in Britain". *Mercian Geologist* 2011, Volume 17 (4):262.

further submitted that Government is, in principle, obliged to approve the application for financial assistance provided that the requirements for allocation are met. Further, funding programmes are initiated to mitigate the negative effects of the lack of any sensible mineral rights legislation.³³ It is acknowledged that the idea to provide financial assistance to the mineral exploration industry is an outstanding idea to facilitate adequate access to mineral resources in the country. The United Kingdom supports mining finance, providing liquidity for all sizes of projects and operations, supporting access to capital by supporting world class capabilities to global mining sector.³⁴

4.3 Zimbabwe

Zimbabwe is rich in mineral resources and these resources are governed by the Mines and Minerals Act³⁵ which vests them in the President.³⁶ Consequently, any revenue in form of mining royalties that is derived from mineral exploitation belongs to the state.³⁷ Therefore, one would ask whether there are land rights by individuals and communities and to what extent these rights extend to include mineral rights over the land.³⁸ However, South Africa defines land rights as inclusive of rights over minerals but it is the opposite in the case of Zimbabwe.³⁹ It is submitted that the landowner has no right whatsoever in terms of mineral resources found on the land. The acquisition of mining rights in

³² UK Delivering Global Mining Solutions. Available at www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/295099/UK_Delivering_Global_Mining_Solutions.pdf; last accessed on 4 August 2018, p.4-11.

³³ (*Ibid.*:262).

³⁴ UK Delivering Global Mining Solutions. Available at www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/295099/UK_Delivering_Global_Mining_Solutions.pdf; last accessed on 4 August 2018, p.4.

³⁵ No. 38 of 1961, section 2.

³⁶ Nhemachena, A & Warikandwa, T.V., (eds). 2017. *Mining Africa: Law, Environment, Society and Politics in Historical Multidisciplinary perspective*. Langaa Research & Publishing CIG Mankon, Bamenda, p.261.

³⁷ Marongwe, N. 2004. "Land and resource rights in southern Africa. Securing land and resource rights in Africa: Pan-African perspectives". Programme for Land and Agrarian Studies (PLAAS): School of Government, University of the Western Cape, p.23.

³⁸ (*Ibid.*:23).

³⁹ (*Ibid.*)

Zimbabwe can be acquired for all minerals, mineral oils and natural gases,⁴⁰ by any person who is 18 years old or older,⁴¹ and a permanent resident of Zimbabwe or any duly appointed agent of such person paying an appropriate fee prescribed.⁴² It is evident that the law made it possible for the people of Zimbabwe to acquire mineral resources. The Mines and Minerals Act⁴³ provides considerable discretion for the licensing authorities to issue licenses to the people of Zimbabwe. However, national ownership of mineral rights has resulted in the enrichment of political elites in the country.⁴⁴

The country is rich in top selling platinum, diamonds, gold and other minerals, but Zimbabwe's enduring economic problems is yet to be alleviated by the sustainable exploitation of these rich mineral resources.⁴⁵ It is opined that since the country is rich in mineral resources, the living standard of the people ought to be improved. On the other hand, despite the closure and downsizing of a number of mining companies, mineral resources continue to be extracted and exported and the mining industry continues to survive in Zimbabwe.⁴⁶ Therefore, it is assumed that the survival of the mining sector in Zimbabwe is impressive despite the challenges of economic decline. It is further submitted that the survival of the mining sector may improve the avenue to empower the people and enhance the standard of living of the people of Zimbabwe.

Better standard of living of the people is important for every nation and it is acknowledged that the government recognizes the importance of uplifting the standard of living of the people. As a result,

⁴⁰ No.38 of 1961, section 3.

⁴¹ (*Ibid.*, section 24).

⁴² (*Ibid.*, section 20 (1)).

⁴³ No. 38 of 1961.

⁴⁴ Dobra, J.L & Newman, D. 2014. "The Case for Private Ownership of Mineral Rights". Available at www.miningfacts.org/Blog/Mining-News/The-Case-for-Private-Ownership-of-Mineral-Rights/; last accessed 19 April 2018.

⁴⁵ Murombo, T. (2010). "Law and the indigenization of mineral resources in Zimbabwe: any equity for local communities?". *Southern African Public Law*, Volume 25(2) : 568-589.

⁴⁶ (*Ibid.*:568-589).

Section 14 of the Constitution of Zimbabwe⁴⁷ requires institutions and agencies of government to take measures to empower the people of Zimbabwe, through appropriate, transparent, fair and just affirmative action. Further, it is important to ensure that youth are afforded opportunities for employment and other avenues to economic empowerment.⁴⁸ The above-mentioned provisions grant power to the law makers to draft policies that are meant for the advancement of the lives of the people of Zimbabwe. It is further commendable that the Government of Zimbabwe enacted legislations, as a starting point, to enable adequate distribution of mineral resources and enhance the standard of living of the people of Zimbabwe. One of such legislation is the Zimbabwe Indigenization and Economic Empowerment Act⁴⁹ (IEEA). Zimbabwe has opted for indigenization through compulsory local equity ownership in mining and certain sectors.⁵⁰ The IEEA requires 51% of every public company and any other business to be owned by indigenous Zimbabweans.⁵¹ There are significant changes to the shareholding of most of the large scale mining companies due to the introduction and implementation of the Indigenization and Economic Empowerment Act.⁵² However it is doubtful if the indigenization ideology worked in Zimbabwe because of the tension in government over indigenization policies and lack of transparency.⁵³ Therefore one cannot really confirm the ideology of indigenization in Zimbabwe as the 51% shareholding has been reduced to just above 40%. Nevertheless, the Government of Zimbabwe has demonstrated their willingness to change and uplift lives of citizen of Zimbabwe through legislations.

⁴⁷ No. 20 of 2013 as amended.

⁴⁸ (*Ibid.*, section 20 (1) (c)).

⁴⁹ No. 14 of 2007.

⁵⁰ Murombo, T. 2013. "Regulating mining in South Africa and Zimbabwe: Communities, the environment and perpetual exploitation". *Law Environmental & Development Journal*, Volume 9 : 31.

⁵¹ No. 14 of 2007, section 3 (1) (a).

⁵² Makore, G. & Zane, V. 2012. "Mining within Zimbabwe's Great Dyke: Extent, Impacts & Opportunities", p.11.

⁵³ Raftopoulos, B. 1996. "Fighting for control: The indigenization debate in Zimbabwe". *South African Report*, Volume 11 (4) : pp.3-7, at 30.

The Government of Zimbabwe clearly defined who should benefit from IEEA, thus section 2 (1) of the IEEA has been amended for inclusiveness, previously it defined “indigenous Zimbabweans” as:

“any person who, before the 18th April 1980, was disadvantaged by unfair discrimination on the grounds of his or her race, and any descendant of such person, and includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of the members or hold the controlling interest.”

However, the IEEA has been amended by the Indigenization and Economic Empowerment amendment Act and Regulations⁵⁴ replacing the term “indigenous Zimbabweans” with “citizen of Zimbabwe”. The new definition⁵⁵ entails:

"appropriate designated entity" means any of the following entities (and such other entities as may be designated by the line Minister by notice in the *Gazette*)-

(a) the Zimbabwe mining Development Corporation established in terms of the Zimbabwe Mining Development Corporation [Chapter 21 :081, and any company or other entity incorporated by the Zimbabwe Mining Development Corporation or by the Republic of Zimbabwe for the purposes of section 3(2h); or

(b) the Zimbabwe Consolidated Diamond Company, being a wholly Government owned private limited company involved predominant) or exclusively in the extraction for profit of diamonds, that was incorporated on the 11th May 2015; or (c) the National Indigenization and Economic Empowerment Fund.”

⁵⁴ Regulations of 2018.

⁵⁵ 14 March 2018 Amendments of Zimbabwe’s Indigenization and Economic Empowerment Act (1) (ii) 42 Amendment of Cap. 14:33.

The Zimbabwe government amended the IEEA⁵⁶ to also limit its application to designated diamond and platinum extraction businesses.⁵⁷ It is opined that the definition that was given by the IEEA was not inclusive enough as it did not cater for all citizens but those regarded as “native Zimbabweans”. Nonetheless it is doubtful whether all citizens are catered for and the question still remains whether the amendments made achieved the purpose of the legislation.

In contrast, it is alleged that the IEEA laws have been drafted to benefit the elites more than previously disadvantaged Zimbabweans.⁵⁸ It is further indicated that, passing the IEEA law saw Zimbabwe dumping its own Zimbabwean currency and replaced it with United States Dollars.⁵⁹ Therefore it may not be accurate to say the IEEA law empowered the people of Zimbabwe, if the law that was meant to improve the living standards of the people of Zimbabwe resulted in the downfall of the economy. Further, it is supposed that the legislation allows the Government of Zimbabwe to be in total control of the mineral resources in the country.

Hence, the Indigenization and Economic Empowerment (General) (Amendment) Regulations,⁶⁰ inserted the following subsection after subsection (3):

“(4) Any investor who, after the date of commencement of the Indigenisation and Economic Empowerment (Amendment) Regulations, 2011 (No. 3)⁶¹, makes an investment in a business belonging to any of the sectors prescribed under the Third Schedule which results in the investor owning or having a controlling interest in that business shall, unless he or she has

⁵⁶ (*Ibid.*).

⁵⁷ Zimbabwe government officially amends indigenization law, available at http://www.xinhuanet.com/english/2018-03/19/c_137050661.htm; last accessed 16 April 2017.

⁵⁸ Nhemachena. A & Warikandwa, T.V., (eds). 2017. *Mining Africa: Law, Environment, Society and Politics in Historical Multidisciplinary perspective*. Langaa Research & Publishing CIG Mankon, Bamenda, p.262.

⁵⁹ (*Ibid.*: 261).

⁶⁰ Regulations 3 of 2011, section 5 (b).

⁶¹ i.e. 25th March 2011. *Note by Veritas*.

obtained for the investment the prior written approval of the Minister and the Minister responsible for the administration of the Zimbabwe Investment Authority Act [*Chapter 14:30*], be guilty of an offence and liable to a fine not exceeding level twelve or imprisonment for a period not exceeding five years or to both such fine and such imprisonment.”

It is clear that the above-mentioned provision prohibits any investor to make any kind of investment in a business, in any sector, where such an investor would become a majority shareholder in that business. It is also clear that such investor is only permitted with prior written investment approval from the Minister. Further it is opined that the above-mentioned clause gives power to the Minister to control investment in any sector in the country as an effort to support local participation and access to mineral resources.

In 1990s, several measures were taken by the Government of Zimbabwe to decentralize the control of mining and support local community.⁶² These measures were promoted as attempts to create a win-win situation, by training miners in how to secure access to prospecting and mining licenses as well as mining technologies and micro financing.⁶³ It is acknowledged that this government effort is blameless; however it is doubtful if the measures introduced yielded expected results because illegal miners, causing harm to infrastructures and the environment, increased.

4.4 Nigeria

Nigeria has an abundance of mineral resources, which have contributed enormously to the national wealth with associated socio-economic benefits.⁶⁴ Mines and Minerals are currently on the Exclusive

⁶² Spiegel, S.J. 2015. “Shifting formalization policies and recentralizing power: The case of Zimbabwe's artisanal gold mining sector”. *Society & Natural Resources*, Volume 28(5) : 543-558 at 546.

⁶³ (*Ibid.*).

⁶⁴ Aigbedion, I. & Iyayi, S.E. 2007. “Environmental effect of mineral exploitation in Nigeria”. *International Journal of Physical Sciences*, Volume 2(2): 33-38 at 33.

Legislative List⁶⁵ of the Constitution of the Federal Republic of Nigeria.⁶⁶ This means that the powers in relation to the minerals are exclusively reserved for the Federal Government.

The government has specific interest in gold, iron ore, coal, tin, copper, barites, talc and bitumen; as such it holds about five per cent of exploration licences.⁶⁷ The remaining 95 per cent is owned by private individuals and corporate entities, out of which foreign companies make up less than five per cent.⁶⁸ It is clear from the previous statement that the masses in Nigeria have access to mineral resources because foreign ownership is represented by a small percentage. It is submitted that, the right to acquire mineral resources originates from Section 43 of the Constitution⁶⁹ that prescribes rights to acquire property anywhere in Nigeria. Despite such rights, Section 44⁷⁰ prohibits compulsory acquisition of property. It means that acquisition of property must be done within the ambit of the law, not by the whims and the caprices of the rulers.

Section 44(3) of the Constitution⁷¹ states that:

“Notwithstanding the foregoing provision of this Section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon territorial waters and the Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.”

⁶⁵ Item 39, Exclusive Legislative List, Part I, Second Schedule to the 1999 Constitution of the Federal Republic of Nigeria as amended.

⁶⁶ Act of 1999 as amended.

⁶⁷ Chindo, M. 2011. “An extensive analysis of mining in Nigeria using a GIS”. *Journal of Geography and Geology*, Volume 3 (1):3 at 5.

⁶⁸ (*Ibid.*: 5).

⁶⁹ Act of 1999 as amended.

⁷⁰ (*Ibid.*).

⁷¹ (*Ibid.*).

Therefore, it is evident from the above provision of the Constitution that mineral resources in Nigeria belong to the State and should be managed and controlled according to the law. There are several legislations apart from the Constitution of Nigeria that prescribes the ownership of mineral resources such as Section 1 of the Nigerian Minerals and Mining Act,⁷² states that:

“The entire property in and control of all mineral resources in, under or upon any land in Nigeria, its contiguous continental shelf and all rivers, streams and watercourses throughout Nigeria, any area covered by its territorial waters or constituency and the Exclusive Economic Zones is and shall be vested in the Government of the Federation for and on behalf of the people of Nigeria.”

In addition to that, Section 1(1) of the Petroleum Act⁷³ also prescribes that the entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the State on behalf of the people of Nigeria. Therefore, it is clear as to whom ownership is vested in Nigeria.

Despite the fact that the Federal Republic of Nigeria has ownership of mineral resources, it is submitted that what people have is the right to acquire these resources. However, there is no doubt that the ownership and control of minerals under or upon any land vests in the Federal Government. Hence, it is lawful for the Governor to revoke a right of occupancy for overriding public interest.⁷⁴ It is evident that any land previously owned by a citizen may be revoked in cases where minerals are discovered upon the land. It is further submitted that the State has absolute ownership of mineral resources in Nigeria. Just like in Namibia, the Federal Government as the owner of these resources,

⁷² No. 20 Act of 2007.

⁷³ No. 51 of 1969.

⁷⁴ No. 6 of 1978, section 28.

grants permit, licenses and leases for reconnaissance, prospecting and extraction to interested persons/organizations.⁷⁵

Case laws have also agreed to the fact that ownership and control of mineral resources is vested in the Federal Government. In the case of *Attorney General of the Federation v. Attorney General Abia State*,⁷⁶ the court decided that the mere fact that oil rigs bear the names of indigenous communities on the coastline adjacent to such offshore area does not prove ownership of such offshore areas. This means that the ownership vests in the Federal Government for and on behalf of the people of Nigeria and the Government takes full ownership and control of the mineral resources in the mining industry.

In order to regulate the mining industry in Nigeria, the Nigerian Minerals and Mining Regulations 2011⁷⁷ were also issued for the purpose of setting out the rules, procedures and processes. Furthermore, the regulation sought to control the acquisition of mineral titles, granting licenses to investors (both local and foreign) and to give effect to the Minerals and Mining Act No. 20 of 2007.⁷⁸ It is opined that these regulations are in line with the Central Government's goal to harness and distribute the national resources to the masses based on Article 16 (2)⁷⁹ of the Constitution that states:

“(b) that the material resources of the nation are harnessed and distributed as best as possible to serve the common good;

⁷⁵ No. 20 of 2007, section 5 (a); No. 14 of 1990, Section 1(1).

⁷⁶ *Attorney General of the Federation v. Attorney General Abia State* (2002) 4 NSCC 51 (Nigeria)

⁷⁷ “The former Minister of Mines and Steel Development, Musa Mohammed Sada announced the commencement of the Regulations on 24 May 2011, when he delivered a presentation of Nigeria’s Minerals and Mining Regulations to investors, stakeholders and members of the public in Abuja. The May 2011 event marked the completion of Nigerian Mining programme geared towards the provision of the required regulatory framework for mining in Nigeria. The Minister stated that the Regulations were aimed at meeting the yearnings and aspirations of all stakeholders, prospective indigenous and foreign investors since their inputs were taken into consideration in the formulation of the document.”

⁷⁸ Nigerian Mining Sector: Legal & Regulatory Overview, available at <http://www.ajumogobiaokeke.com/assets/media/74b9d440d3feec1f8bd9c361113a9b40.pdf>; last accessed on 7 March 2018, p.7.

⁷⁹ Constitution of the Federal Republic of Nigeria 1999 as amended.

(c) that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group.”

Nevertheless, Section 2 of the Nigerian Minerals and Mining Act⁸⁰ prohibits exploration or exploitation of Minerals without authority from the Mining Cadastre Office.⁸¹ It is submitted that, the right to explore and to acquire wealth through mineral resources in Nigeria should be done in accordance with the law to avoid abuse of resources at the expense of the masses. Further, Article 17 (2)⁸² of the Constitution states that:

“d) Exploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented.”

Therefore, the law requires mineral resources to be exploited for the benefit of the community not the contrary. Still, the vast majority of mineral resources are either under-explored or not exploited at all.⁸³ It is opined that if majority of mineral resources are either under-explored or not exploited at all, it may indicate that the majority of the population do not have access to these resources or they do not have means to explore and exploit them. It is supposed that, the fact that mineral resources should be exploited for the benefit of the community does not exclude participation of foreign investors into the country.

Foreign investors are encouraged to participate and invest in the Nigerian economy as per the Nigerian Investment Promotion Commission Act.⁸⁴ However, the Company and Allied Matters Act of the

⁸⁰ No. 20 of 2007.

⁸¹ Chindo, M. 2011. “An extensive analysis of mining in Nigeria using a GIS”. *Journal of Geography and Geology*, Volume 3 (1) : 3 at 4.

⁸² Constitution of the Federal Republic of Nigeria 1999 as amended.

⁸³ Chindo, M. 2011. “An extensive analysis of mining in Nigeria using a GIS”. *Journal of Geography and Geology*, Volume 3 (1) : 3 at 4.

⁸⁴ No. 15 of 1995, section 1.

Federation of Nigeria 2004 prescribes that no foreign company may carry on business in Nigeria unless it incorporates a local subsidiary in the country.⁸⁵ It is argued that the provision of the above mentioned Act is meant to prevent total control of mineral resources by foreign companies and encourage local participation in the resources.

4.5 South Africa

South African mineral law has always been based on the Roman and Roman- Dutch law principle that the landowner is also the owner of the minerals embedded in and under the soil of the land he owned.⁸⁶ However, the State is the custodian of mineral resources with the responsibility to grant, issue, control, administer and manage all rights in minerals.⁸⁷ The right in mineral resources is founded in the provision of the Constitution of South Africa that prescribes that everyone has the right to use natural resources.⁸⁸ These natural resources include mineral resources from the mining sector and the ownership of all minerals is vested in the State on behalf of the people; hence the users of mineral rights (mining companies) must pay rent to the State (the agent of the people).⁸⁹

Section 5(1)⁹⁰ of the Minerals Act recognized the common law rights of landowners in relation to mining. The Minerals Act⁹¹ recognized that the holders of mineral rights who were the landowners unless the mineral rights were detached from land ownership had the prerogative to decide if, and by

⁸⁵ (*Ibid.*, section 54 (1)).

⁸⁶ *Trojan Exploration Co v Rustenburg Platinum Mines Ltd*, 1996, (4), SA 499 (A), at 537C

⁸⁷ Van Der Schyff, E. 2012. "South African mineral law: a historical overview of the state's regulatory power regarding the exploitation of minerals", p.131.

⁸⁸ No. 108 of 1996 as amended, Article 24 (iii).

⁸⁹ Cawood, F.T. 2004. "The Mineral and Petroleum Resources Development Act of 2002: a paradigm shift in mineral policy in South Africa." *Journal of the Southern African Institute of Mining and Metallurgy*, Volume 104(1) : 53-64 at 54.

⁹⁰ No. 50 of 1991.

⁹¹ (*Ibid.*).

whom, prospecting and mining activities could take place on their land.⁹² It appears from the above mentioned provision of the Minerals Act, 50 of 1991 that the law of South Africa did not guarantee unrestricted right of mineral resources for the State but recognize the right of the landowner where mineral is found. However, the current status of the Minerals Act, 50 of 1991 is that it has been repealed by the Mineral and Petroleum Resources Development Act 28 of 2002.

Apart from the Minerals Act, 50 of 1991, Mineral and Petroleum Resources Development Act⁹³ (MPRDA) was also enacted with objectives to promote mineral development including urban renewal, rural development and economic empowerment in South Africa.⁹⁴ It is acknowledged that this kind of development is like development made to the Namibian's mining industry after independence. In the same way, the South African Minister is given broad discretionary powers in granting or refusing an application for prospecting or mining rights.⁹⁵ Under the old order regime, the holder of mineral rights was under no obligation to exploit their rights and could keep the right indefinitely and sell it at a profit.⁹⁶ It appears that, the mineral rights holders were previously advantaged people that were enjoying these kinds of benefits before independence in Namibia and South Africa. Therefore, it is further advanced that these developments in the mining policies and regulations is considered a stepping stone in the right direction as far as distribution and ownership of mineral resources is concerned.

⁹² Van Der Schyff, E. 2012. "South African mineral law: a historical overview of the state's regulatory power regarding the exploitation of mineral", p.151.

⁹³ No. 28 of 2002.

⁹⁴ Nhemachena. A & Warikandwa, T.V., (eds). 2017. *Mining Africa: Law, Environment, Society and Politics in Historical Multidisciplinary perspective*. Langaa Research & Publishing CIG Mankon, Bamenda, p.262.

⁹⁵ No. 28 of 2002, sections 23(3) & 26.

⁹⁶ Van der Vyver, J.D. 2012. "Nationalisation of mineral rights in South Africa". *De Jure*, Volume 45(1), :125-142 at 135.

The MPRDA ousted the Roman-Dutch common law notion of landowners owning minerals embedded in their land that formed the basis of the South African mineral law privilege in the preceding era.⁹⁷ The enactment of MPRDA witnessed the abolition of landowners rights over minerals entrenched in and under the soil of their land.⁹⁸ It is obvious that there are similarities between South Africa and Namibia regarding legislations dealing with mineral resources, its ownership and distribution.

The above was confirmed in the case of *Holcim (South Africa, Pty) Ltd v Prudent Investors (Pty) Ltd and Others*,⁹⁹ where the State has taken on itself the common law privileges of landowners to decide where, when and by whom the country's mineral riches can be mined. This means that the landowner has no right to decide who should enter their property and when. It is purported that, despite the mineral rights available for South African people, the Government is still concerned about distribution and ownership of resources which led to enactment of regulations aimed at enhancing lives of the people.

The Broad-Based Economic Empowerment Act¹⁰⁰ was enacted to establish a legislative framework for the promotion of black economic empowerment. It is maintained that the enactment of the above-mentioned legislation was also meant to address unbalanced wealth distribution such as distribution of mineral resources. However, the interpretation of the above-mentioned Act should be done in line with the Constitution of the Republic of South Africa,¹⁰¹ as it is in Namibia. Section 1 of the Broad-Based

⁹⁷ Van der Schyff, E. 2012. "South African mineral law: a historical overview of the state's regulatory power regarding the exploitation of minerals", p.132.

⁹⁸ *Ibid.*, p.131-132.

⁹⁹ *Holcim (South Africa, Pty) Ltd v Prudent Investors (Pty) Ltd and Others* (641/09), 2010, ZASCA 109; 2011, 1 All SA 364 (SCA), 17 September 2010

¹⁰⁰ No. 53 of 2003.

¹⁰¹ (*Ibid.*, section 3).

Economic Empowerment Act¹⁰² defines the terms “black people” and “broad-based black economic empowerment as follows:

“Black people” is a generic term which means Africans, Coloureds and Indians;

“broad-based black economic empowerment” means the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies that include but are not limited to:

- (a) Increasing the number of black people that manage, own and control enterprises and productive assets;
- (b) Facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises; human resource and skills development;
- (c) Achieving equitable representation in all occupational categories and levels in the workforce;
- (d) Preferential procurement; and
- (e) Investment in enterprises that are owned or managed by black people.”

It is further submitted that; black people were previously disadvantaged in terms of resources distribution therefore legislations of this nature are vital to achieve the true spirit of economic independence for the people. It is noted that South Africa ‘s legal system is almost similar to the Namibian system.

¹⁰² No. 53 of 2003.

Nonetheless, in the Amendments¹⁰³ of Section 3 of Broad-Based Economic Empowerment Act 53 of 2003, Section 2¹⁰⁴ states that in case there is a conflict between any other law and the Broad-Based Economic Empowerment Act, this Act¹⁰⁵ prevails especially if the conflict relates to matters dealt within the Act. It is opined that, it appears that there is no difference between South Africa and Namibia requirements as the Constitutions is supreme in in Namibia and in South Africa. It means that in Namibia the Constitution of the Republic of Namibia prevails in all matters just like in South Africa. However, in Zimbabwe, the issue of economic development for previously disadvantaged South Africans has been slow,¹⁰⁶ and only well connected Africans benefited from the Economic Development Program.¹⁰⁷ Another legislation that is read with the Broad-Based Economic Empowerment Act¹⁰⁸ is the Preferential Procurement Policy Framework Act,¹⁰⁹ which prescribes for implementation of preferential procurement policy as contained in section 2 (d) that allows:

“(i) Contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability.”

Still, it is not certain whether the enactment of previously disadvantaged legislations in South Africa will soon achieve envisioned objectives to promote access, ownership and equitable distribution of wealth or it is just an addition to the number of legislations available in the country. Similar to Namibia, it is assumed that, the motion of local access and ownership of resources by the local community does not amount to exclusion of foreign investment.

¹⁰³ No. 46 of 2013.

¹⁰⁴ (*Ibid.*).

¹⁰⁵ No. 53 of 2003.

¹⁰⁶ Nhemachena. A & Warikandwa, T.V., (eds). 2017. *Mining Africa: Law, Environment, Society and Politics in Historical Multidisciplinary perspective*. Langaa Research & Publishing CIG Mankon, Bamenda, p.262.

¹⁰⁷ (*Ibid.*).

¹⁰⁸ No. 53 of 2003.

¹⁰⁹ No. 5 of 2000.

It is supposed that investment is key in every economy, so South Africa is no exception. The Government of South Africa saw it necessary to enact laws meant for securing foreign investment such as the Protection of Investment Act¹¹⁰ that is enacted to provide for the protection of investors and their investments; to achieve a balance of rights and obligations that apply to all investors in South Africa. Investors have the right to property in terms of section 25 of the Constitution,¹¹¹ and rights or concessions conferred by law or under contract, including licenses to cultivate, extract or exploit natural resources.¹¹² Similar to Namibia, encouragement of foreign investments is constitutionally entrenched.¹¹³ Therefore, it is evident that both Namibia and South Africa acknowledge the importance of foreign investment in their Constitutions. It is further submitted that even though Namibia and South Africa share comparable legal system including rights in terms of access and ownership, there are some differences worth noting concerning subsurface regulation.

The concept of constitutional supremacy in Namibia¹¹⁴ and South Africa has influenced current status in subsurface regulation as it relates to minerals resources. Although the two jurisdictions share the same principles of common law, their positions deviate quite significantly as regarding private versus state control of the subsurface.¹¹⁵ It is submitted that the issue of subsurface and the minerals therein is slightly different in the two jurisdictions. In South Africa, the ability to give access to the subsurface vests in the hands of private parties, landowners and/or mineral right holders.¹¹⁶ While in Namibia, the State owns the subsurface¹¹⁷ and controls access thereto¹¹⁸ due to the influence of German law that

¹¹⁰ No. 22 of 2015.

¹¹¹ (*Ibid.*, section 10).

¹¹² (*Ibid.*, section 2 (h)).

¹¹³ No.1 of 1990 as amended, Article 99 reads “Foreign investments shall be encouraged within Namibia subject to the provisions of an Investment Code to be adopted by Parliament”.

¹¹⁴ (*Ibid.*, Article 100).

¹¹⁵ *Trojan Exploration Co v Rustenburg Platinum Mines Ltd*, 1996, (4), SA 499 (A).

¹¹⁶ *Holcim (South Africa) Pty Ltd v Prudent Investors (Pty) Ltd and Others* (641/09), 2010, ZASCA 109; 2011, 1 All SA 364 (SCA), 17 September 2010.

¹¹⁷ No. 1 of 1990 as amended, Article 100.

still remains in place even after independence; unless declared unconstitutional by an Act of Parliament.¹¹⁹ It is therefore submitted that mineral resources in South Africa and Namibia do not adequately benefit the masses but the minority made up of well-connected elites and foreign nationals.

4.6 Namibia

The Constitution of the Republic of Namibia is the supreme law of the land.¹²⁰ Article 100 of the Constitution provides that:

“Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned”.

Therefore, the State is the owner of minerals in Namibia, since the supreme law of the land prescribes it.¹²¹ Nevertheless, the Draft Minerals Policy¹²² prescribes that the Ministry of Mines and Energy is the custodian of Namibia’s mineral resources which are held in trust for the benefit of the Namibian people.¹²³ The rights to exploit mineral and petroleum resources in Namibia are treated as separate from land ownership and have been reserved for the State.¹²⁴ This means that, the owner of the land owns the land only but not minerals on that specific land. In other words, the State has total control of all subsurface mineral rights.¹²⁵ Just like in other jurisdictions, the Namibian Government is concerned about equitable distribution of resources, local access and ownership.

¹¹⁸ No. 33 of 1992.

¹¹⁹ No. 1 of 1990 as amended, Article 144.

¹²⁰ No. 1 of 1990 as amended, Article 1 (6).

¹²¹ (*Ibid.*, Article 100).

¹²² The Draft Minerals Policy of 2002.

¹²³ (*Ibid.*).

¹²⁴ *Namibia Grape Growers and Exporters Associations and Others v Ministry of Mines and Energy and others* 2004 NR 194 (SC) at 209

¹²⁵ Corry, S. 2003. *News reactions and interactions*. Available at <https://www.unl.edu/rhames/courses/current/readings/corry-suzman.pdf>, last accessed 10 April 2018.

To promote local participation in national wealth, the Namibian parliament tabled the National Equitable Economic Empowerment Framework Bill,¹²⁶ aimed to address the inequalities occasioned by class, gender and generational relationship.¹²⁷ It is commonly known that Namibia produces a wide range of minerals and metals such as Diamonds, Uranium, Base Metals, Precious Metals, Industrial Minerals, Gemstones and Dimension Stone.¹²⁸ However the majority of ordinary Namibians have no access to these mineral resources despite the fact that they are required to benefit the people. NEEEF requires that at least 25% of businesses must be owned by previously disadvantaged persons (black people) while 50% of top management must be previously disadvantaged persons.¹²⁹ However, there is a concern that NEEEF will benefit a small percentage of well-connected people.¹³⁰ It is observed that laws meant to advance previously disadvantaged people did not work for Zimbabwe and no satisfactory results were recorded in South Africa. It is also assumed that after NEEEF was tabled before Parliament, it earned Namibia a negative economic outlook.¹³¹ Further it is observed with great concern and uncertainty how NEEEF will be implemented on the issue of the 25% clause, aimed for previously disadvantaged people. It is opined that the Government will not accomplish desired results by enacting more previously disadvantaged legislations without awareness and campaigns about people's rights to ownership of the country's mineral resources. There are so many legislations that make it possible for people to participate in the national wealth.

Apart from NEEEF, there are several legislations that makes it possible for the Namibian people to own and access mineral resources. These legislations include Section 17 of the Minerals (Prospecting

¹²⁶ Bill of 2015, p.6.

¹²⁷ Mining Journal. A publication of the Namibian, April 2016, p.37.

¹²⁸ Minerals policy of Namibia of 2002.

¹²⁹ (*Ibid.*).

¹³⁰ Mining Journal. A publication of the Namibian, April 2016, p.37.

¹³¹ Nhemachena. A & Warikandwa, T.V., (eds). 2017. *Mining Africa: Law, Environment, Society and Politics in Historical Multidisciplinary perspective*. Langaa Research & Publishing CIG Mankon, Bamenda, p.267.

and Mining) Act,¹³² that made it possible for Namibians from the age of 18 years and above as well as Namibian juristic persons to apply for mineral rights. The same Act also grants discretionary power to the Commissioner¹³³ to grant or refuse access to mineral resources through various instruments.¹³⁴ However, the exploitation of Namibia's mineral resources is not restricted to Namibian nationals only. The context of utilizing resources in Namibia for economic gain include foreign investors as per section 1 (1) (b) of the Mineral Act.¹³⁵ Section 46 of the Minerals (prospecting and mining) Act¹³⁶ enables foreign investors to apply for EPLs.¹³⁷

The Namibian lawmakers also recognized the importance of foreign investment with the enactment of the Namibia Investment Promotion Act (NIPA),¹³⁸ which is aimed at attracting foreign investments and accelerate growth amongst other objectives. The Namibia Investment Promotion Act¹³⁹ defined foreign investor as:

“(a) a natural person who is not a Namibian that has made or is seeking to make an investment into Namibia; or (b) a company incorporated, registered or constituted in accordance with the laws of (i) Namibia; or (ii) any country other than Namibia, that is not directly or indirectly owned or controlled by a Namibian and that has made or is seeking to make an investment into Namibia in terms of this Act.”

¹³² No. 33 of 1992.

¹³³ (*Ibid.*, section 20).

¹³⁴ (*Ibid.*, section 21).

¹³⁵ No. 33 of 1992.

¹³⁶ (*Ibid.*).

¹³⁷ Lineekela, H. 2014. “The Namibian minerals in foreign hands”. *The Villager newspaper*. Available at <http://www.thevillager.com.na/articles/6156/Geingob--Angula--Namibian-minerals-in-foreign-hands/>; last accessed 16 March 2017.

¹³⁸ No. 9 of 2016.

¹³⁹ (*Ibid.*, section 1).

Therefore, it is evident that the law makers have recognized the importance of regulating certain economic sectors and business activities in Namibia by providing reservation of certain sectors to certain categories of investors.¹⁴⁰ This could have been prompted by the escalation of foreign investment in the country taking up the large share of rent than the locals. Since the law permits foreign investments, majority of shareholding in mineral resources are controlled by foreign owned companies in Namibia:¹⁴¹ This may have been contributed by the gaps in the Namibian mining system.¹⁴²

Nevertheless, the Namibia Investment Promotion Act (NIPA),¹⁴³ raised discontent and concerns from private sectors such as Section 4 that grants discretionary powers to the Minister to approve or disapprove investors.¹⁴⁴ It is criticized as it is contrary to NIPA's objectives of promoting Namibia as an attractive investment destination.¹⁴⁵ The Minister has comprehensive discretion to approve investors after being satisfied that the conditions are met for the investor to invest in a certain economic sector.¹⁴⁶ It is criticised that giving discretionary power to the Minister to decide which investor should invest in which type of sector, may open room for potential corruption and manipulation.¹⁴⁷ Therefore it is submitted that, the objectives of NIPA may be compromised and the idea of adequate distribution of mineral resources may not be accomplished. It is a concern that the

¹⁴⁰ No. 9 of 2016.

¹⁴¹ Lineekela, H. 2014. "The Namibian minerals in foreign hands". *The Villager newspaper*. Available at <http://www.thevillager.com.na/articles/6156/Geingob--Angula--Namibian-minerals-in-foreign-hands/>; last accessed 16 March 2017.

¹⁴² Kisting, D. (2017). "Kandjoze lays into diamond industry". *The Namibian Newspaper*, Thursday 30 March 2017, p.18.

¹⁴³ No. 9 of 2016.

¹⁴⁴ (*Ibid.*, section 4 (1) (b)).

¹⁴⁵ The Chamber of Mines of Namibia, 2017 Annual review, p. 13.

¹⁴⁶ No. 9 of 2016, section 4 (1) & (2).

¹⁴⁷ Wohlers, W. 2017. *The Namibia Investment Promotion Act, 2016: hindering or promoting foreign investment?* Available at <https://www.ensafrica.com/news/The-Namibia-Investment-Promotion-Act-2016-hindering-or-promoting-foreign-invest?Id=2707&STitle=ENSafrica%20ENSight>, last accessed on 3 May 2018.

Namibia Investment Promotion Act (NIPA)¹⁴⁸ does not make provisions for the checks and balance of the decision of the minister, therefore this may create loopholes in the system. Further the discretionary power of the minister to decide on which investor should invest where may create a system where the approach of an investment may depend on personal agenda, whims and caprices of the Minister.¹⁴⁹ Nevertheless, the mining industry is expected to comply with legislations encouraging fair and just treatment of all.

The Namibian mining sector is required to comply with the Affirmative Action (Employment) Act¹⁵⁰ and prohibited from any form of discrimination.¹⁵¹ It is submitted that the anti-discriminatory laws and the Draft Mineral Policy¹⁵² have changed the status of mineral ownership in Namibia even though not entirely. However, the Government will not accomplish desired results by enacting more previously disadvantaged legislations without awareness and campaigns of what these legislations entail in details and what benefits they produce.

4.7 Detailed Similarities and differences

It is acknowledged that there are similarities in the mining laws of Namibia and South Africa. According to the Constitution of the Republic of Namibia,¹⁵³ Article 100 provides that mineral resources of Namibia belong to the State. However, the Draft Mineral Policy of Namibia¹⁵⁴ vested the custodianship of mineral resources from the mining industry in the hands of the Ministry of Mines and

¹⁴⁸ No. 9 of 2016.

¹⁴⁹ Wohlers, W. 2017. *The Namibia Investment Promotion Act, 2016: hindering or promoting foreign investment?* Available at <https://www.ensafrica.com/news/The-Namibia-Investment-Promotion-Act-2016-hindering-or-promoting-foreign-invest?Id=2707&STitle=ENSafrica%20ENSight>, last accessed on 3 May 2018.

¹⁵⁰ No. 29 of 1998.

¹⁵¹ No. 1 of 1990 as amended, Article 10.

¹⁵² The Draft Mineral Policy of 2002.

¹⁵³ No. 1 of 1990 as amended.

¹⁵⁴ The Draft Mineral Policy of Namibia of 2002.

Energy, to administer them on behalf of the Namibian people.¹⁵⁵ According to the court, natural resources including those from the mining sector belong to the people of Namibia and are administered by the state on their behalf.¹⁵⁶ Similarly, the State is the custodian of mineral resources with the responsibility to grant, issue, control, administer and manage all rights in minerals in South Africa.¹⁵⁷ While in Zimbabwe, mineral resources are governed by the Mines and Minerals Act¹⁵⁸ which vests them in the President.¹⁵⁹ In Nigeria, control of the minerals resources is vested in the Central Government as per Section 44(3) of the Constitution,¹⁶⁰ and the owner of these resources grants permits, licenses and leases for reconnaissance, prospecting and extraction to interested parties.¹⁶¹ It is acknowledged that there are provisions made to people that qualify for mineral resources access and ownership in all jurisdictions under review.

Section 17 of the Minerals Act,¹⁶² allows Namibians from the age of 18 years and above to apply for mineral rights. It is clear that there is legislation in place that makes it possible for Namibians to access mineral resources. In the United Kingdom, the Petroleum (Production) Act¹⁶³ prescribes that the ownership of petroleum within the territory of Great Britain is vested in Her Majesty. Further, Section 2 (1) of the same Act¹⁶⁴ gives rights to the Board of Trade, on behalf of her Majesty to grant licenses to search and bore for and get petroleum to such persons as they deem fit. The difference in approach between Namibia and the UK is that minerals are administered on behalf of the Namibian people

¹⁵⁵ (*Ibid.*).

¹⁵⁶ *Rostock CC and Another v Van Biljon* 2011 (2) 751 (HC).

¹⁵⁷ Van Der Schyff, E. 2012. "South African mineral law: a historical overview of the state's regulatory power regarding the exploitation of minerals", p.131.

¹⁵⁸ Section 2 of the Mines and Minerals Act no. 38 of 1961.

¹⁵⁹ Nhemachena, A & Warikandwa, T.V., (eds). 2017. *Mining Africa: Law, Environment, Society and Politics in Historical Multidisciplinary perspective*. Langa Research & Publishing CIG Mankon, Bamenda, p.261.

¹⁶⁰ Constitution of the Federal Republic of Nigeria 1999 as amended.

¹⁶¹ No. 20 of 2007, section 5 (a); No 14 of 1990, section 1(1).

¹⁶² No. 33 of 1992.

¹⁶³ Of 1934, section 1.

¹⁶⁴ (*Ibid.*, section 2 (1)).

while in United Kingdom minerals are administered on behalf of her Majesty. However, the most important part is that the law makes provision for ownership and exploitation, but the challenge may be the inability to use available legislations due to unequal and socially unjust society caused by lack of knowledge.

To transform the standard of the current unjust society, the Namibian Parliament formulated the Affirmative Action Act¹⁶⁵ to achieve equal opportunity in employment and the National Equitable Economic Empowerment Framework Bill;¹⁶⁶ for the implementation of the National Equitable Economic Empowerment Framework,¹⁶⁷ aimed to achieve equality in terms of mineral resources access and distribution. Furthermore, it is also meant to create an equitable and socially just society in terms of distribution of resources for the Namibian people.¹⁶⁸ Correspondingly, in South Africa, the Preferential Procurement Policy Framework Act,¹⁶⁹ and the Broad-Based Economic Empowerment Act¹⁷⁰ were enacted to establish a legislative framework for the promotion of black economic empowerment. It is opined that there is minimal difference between Namibian law and South African law.

Similar to South Africa and Zimbabwe, Namibia also formulated NEEEF to address the differences caused by race, class, gender and generational relationship.¹⁷¹ Under NEEEF, businesses are required to be at least 25% owned by previously disadvantaged persons while 50% of top management is required to be previously disadvantaged people.¹⁷² However, it was indicated that legislation such as the IEEA law, which aimed to help previously disadvantaged people did not work out well for

¹⁶⁵ No. 29 of 1998.

¹⁶⁶ Bill of 2015.

¹⁶⁷ (*Ibid.*, section 2).

¹⁶⁸ The New Equitable Economic Empowerment Framework, p.5.

¹⁶⁹ No. 5 of 2000.

¹⁷⁰ No. 53 of 2003.

¹⁷¹ Mining Journal. A publication of the Namibian, April 2016, p.37.

¹⁷² (*Ibid.*).

Zimbabwe and the same effort did not produce satisfactory results in South Africa.¹⁷³ It is doubtful whether the situation will be different for Namibia or whether the experience of Zimbabwe and South Africa will be repeated in Namibia. Further, it is opined that NEEF may be one of the contributing factors to the downgrading of Namibia's economic outlook by FITCH, an international economic outlook rating agency.¹⁷⁴ It is further observed that no legislation could be found for United Kingdom and Nigeria that are aimed at addressing an equitable and socially just society in terms of distribution of mineral resources for the previously disadvantaged citizens. It is further observed that, unavailability of previously disadvantaged legislations in United Kingdom may be attributed to the fact, that communities of Africa descent living in United Kingdom are also subjected to the legal system of that nation without considering their historical backgrounds.

In Africa, African customary law is also part of both legal systems in the selected jurisdictions except United Kingdom. However there are differences in African customary law systems but the general principles are comparable.¹⁷⁵ Communities in Africa often do not own the land but have the rights to use the land.¹⁷⁶ Therefore it is submitted that since the communities in Africa do not own the land, as indicated earlier, it is unlikely for them to own mineral resources found on the land. Customary rights are often group rights grounded in common property rights and communal use regimes.¹⁷⁷ Therefore, it is clear that these rights are not absolute as they may be restricted in certain circumstances, for example when there is servitude.¹⁷⁸

¹⁷³ Nhemachena, A & Warikandwa, T.V., (eds). 2017. *Mining Africa: Law, Environment, Society and Politics in Historical Multidisciplinary perspective*. Langaa Research & Publishing CIG Mankon, Bamenda", p.261-262.

¹⁷⁴ (*Ibid.*:267).

¹⁷⁵ Murombo, T. 2013. "Regulating mining in South Africa and Zimbabwe: Communities, the environment and perpetual exploitation". *Law Environmental & Development. Journal*, Volume 9 :31.

¹⁷⁶ (*Ibid.*:31).

¹⁷⁷ (*Ibid.*).

¹⁷⁸ No. 4 of 2012, section 10 (3).

On the issue of foreign investments, Namibia also makes provision for foreign investments as per Foreign Investment Act¹⁷⁹ to allow foreign nationals to invest and engage in any business activity in Namibia.¹⁸⁰ It is further prescribed that foreign nationals have right to own properties in Namibia as per Article 16 of the Namibian Constitution.¹⁸¹ Similarly, investors are protected in South Africa in terms of the Protection of Investment Act¹⁸² to achieve a balance of rights and obligations that apply to all investors. Foreign nationals also have the right to own property in terms of section 25 of the Constitution,¹⁸³ and rights or concessions conferred by law or under contract, including licenses to cultivate, extract or exploit natural resources.¹⁸⁴ It is apparent that when advocating for adequate distribution of mineral resources, it is not possible to totally disregard foreign investment as it is at the heart of economic growth and development.

4.8 How the legislative regimes prevailing in the selected jurisdictions inform the issue of access to resources.

To advance the debate on the linkages between legislative regimes and the issue of access to mineral resources, one needs to consider legislative provisions especially those supporting the welfare of the people. Thus, the exploitation of natural resources should be discussed in line with what the law prescribes. In Namibia, Article 10 of the Constitution¹⁸⁵ deals with the right to equality.¹⁸⁶ The

¹⁷⁹ No. 27 of 1990.

¹⁸⁰ (*Ibid.*, section 3).

¹⁸¹ No. 1 of 1990 as amended, Article 16 (1) states that “All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.”

¹⁸² No. 22 of 2015.

¹⁸³ No. 22 of 2015, section 10.

¹⁸⁴ (*Ibid.*, section 2 (h)).

¹⁸⁵ No. 1 of 1990 as amended.

¹⁸⁶ (*Ibid.*, Article 10 (1)).

constitution also provides for the right to equality and freedom from discrimination,¹⁸⁷ including the full and equal enjoyment of rights and freedoms to fully enjoy and participate freely in any lawful activity. It is submitted that these rights and freedoms include right to access and ownership of properties¹⁸⁸ including natural resources. Article 10 of the Constitution¹⁸⁹ prescribes similar rights and enjoyment as those prescribed by Section 9(2) of the Constitution of South Africa. It is these provisions of the Constitution that give birth to legislation such as the Draft Mineral Policy of 2002 in Namibia and the Minerals Act 50 of 1991 of South Africa that inform access to mineral resources. Despite the good legislations aimed at informing the issue of access to resources, it appears that citizens do not make use of these legislation to exploit the natural resources for their own benefit. It is also important to mention that since the Namibian Investment Promotion Act (NIPA)¹⁹⁰ does not make provisions for the checks and balances of the decision of the minister to decide on the investments in Namibian industries, this may open loopholes in the system. It is submitted that the loophole in the system may contribute to unequitable distribution of wealth. The discretionary power of the minister to decide on which investor should invest in what industry may create a regime where investment may depend on personal agenda, whims and caprices of those in power such as the Minister.¹⁹¹ It is recommended that checks and balances in the system are important to ensure that the exercise certain powers that they can be checked by the powers given to the other two branches of the Government.

In Zimbabwe, the legislative regime gives the President ownership and all rights to control the country's mineral resources. It is submitted that it is risky to place ownership of the country's mineral

¹⁸⁷ (*Ibid.*, 10 (2)).

¹⁸⁸ (*Ibid.*, Article 16).

¹⁸⁹ No. 1 of 1990 as amended.

¹⁹⁰ No. 9 of 2016.

¹⁹¹ Wohlers, W. 2017. *The Namibia Investment Promotion Act, 2016: hindering or promoting foreign investment?* Available at <https://www.ensafrica.com/news/The-Namibia-Investment-Promotion-Act-2016-hindering-or-promoting-foreign-invest?Id=2707&STitle=ENSafrica%20ENSight>, last accessed on 3 May 2018.

into the hands of the President because the President may use his own discretion on how to use the mineral resources without being held accountable for any bad decision. It is apparent that the IEEA law, established to help previously disadvantaged people did not work out well for Zimbabwe.¹⁹² Despite such good laws, illegal miners increased in Zimbabwe. It is an indication that there is no adequate distribution of wealth to the masses and the access to mineral resources is limited. This is why people engage in illegal mining activities that causes harm and damage to infrastructure and the environment in Zimbabwe.

In Nigeria, before the passage of the Minerals and Mining Act of 2007 and the Minerals and Mining regulations of 2011, the sector was neglected and unregulated.¹⁹³ It is evident that the masses in Nigeria have access to mineral resources,¹⁹⁴ as the law requires mineral resources to be exploited for the benefit of the community.¹⁹⁵ People's access to mineral resource in Nigeria is a good indicator that the people of Nigeria are making use of the legislation in place to access and own mineral resources in the country, even though it is also apparent that there is large amount of mineral resources that remain undeveloped or unexploited. It is acknowledged that the idea to provide financial assistance to the mineral exploration industry encourages access to mineral resources in the country.

The United Kingdom is the only country where comparative analysis was conducted and showed different legislations on rights and ownership applicable in one country. In some cases, minerals can be removed whether the owner of the surface agrees or not, due to different laws applicable in

¹⁹² Nhemachena, A & Warikandwa, T.V., (eds). 2017. *Mining Africa: Law, Environment, Society and Politics in Historical Multidisciplinary perspective*, Langaa Research & Publiship CIG Mankon, p.261-262.

¹⁹³ Alokolaro, O. 2015. *The legal and regulatory framework for mining in Nigeria: A catalyst for investment*. Available at <http://www.advocaat-law.com/assets/resources/8710b3ba667382c9b1520ca803827f02.pdf>, last accessed on 1 August 2018.

¹⁹⁴ (*Ibid.*:50).

¹⁹⁵ Chindo, M. 2011. "An extensive analysis of mining in Nigeria using a GIS". *Journal of Geography and Geology*, Volume 3(1):3 at 4.

different regions in the United Kingdom such as Wales. Similar to Namibia, there is no absolute right to ownership because the owner of the surface is not always required to grant permission for extraction of minerals located in their surface. There is good legislation such as the Mineral Exploration and Investment Grants Act,¹⁹⁶ which authorises the giving of financial assistance in connection with mineral exploration.¹⁹⁷ Although, the United Kingdom has been regarded as the centre of excellence and innovation in sustainable development,¹⁹⁸ the mining industry is also faced with challenges such as corruption.¹⁹⁹

4.9 Conclusion

It has been observed that Namibia, South Africa and Nigeria have similar legal systems that have been faced with similar challenges of corruption and administrative setbacks. It is also noted that there is no evidence that laws aimed at advancing the lives of previously disadvantaged people in Africa produced positive results. As a result, mineral resources in Zimbabwe, South Africa and Namibia continue to benefit the minority made up of well-connected local elites and foreigners. It is admitted that legislation aimed at uplifting lives of previously disadvantaged people are exceptional but may amount to nothing if people are not using them. Nigeria is one of the countries analyzed where people are using legislation available to access mineral resources. The fact that people have access to mineral resources is viewed as a good indication that the people of Nigeria are making use of the legislation in place to their benefit. Despite the similar legal system found in Africa, United Kingdom appears to be different from Africa. One of the differences found in the ownership of mineral in United Kingdom is the different legislation on rights and ownership applicable in one country applicable to different

¹⁹⁶ Mineral Exploration and Investment Grants Act of 1972 of Britain.

¹⁹⁷ (*Ibid.*).

¹⁹⁸ *UK Delivering Global Mining Solutions.* Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/295099/UK_Delivering_Global_Mining_Solutions.pdf; last accessed on 4 August 2018.

¹⁹⁹ (*Ibid.*).

regions, which is not available in Africa. United Kingdom is also having an excellent idea of providing financial assistance to the mineral exploration industry as it facilitates adequate access to mineral resources in the country.²⁰⁰ The idea of financial assistance backed up with right skills, capacity and technology may be one of the good idea Namibia has to learn from United Kingdom.

In Namibia, the Constitution regards the State as the owner of the mineral resources²⁰¹ while the Draft Minerals Policy²⁰² prescribes that the Ministry of Mines and Energy is the custodian of Namibia's mineral resources in trust for the benefit of the Namibian people.²⁰³ Conversely, the natural resources include mineral resources from the mining sector and the ownership of all minerals is vested in the State on behalf of the people in South Africa.²⁰⁴ However, the ownership of petroleum within the land of Great Britain is vested in His Majesty,²⁰⁵ while in Zimbabwe mineral resources are governed by the Mines and Mineral Act which vests them in the President.²⁰⁶ Lastly in Nigeria, Section 1(1)²⁰⁷ prescribes that the entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the State on behalf of the people of Nigeria.

In both Namibia and South Africa, the colonial approaches to the regulation of minerals had a noticeable impact on the way common law was applied and adapted in relation to subsurface issues.²⁰⁸ It is submitted that although the two jurisdictions have a similar legal system, there are slight differences on the issue of subsurface and mineral resources. Example: in Namibia, the State control

²⁰⁰ Mineral Exploration and Investment Grants Act of 1972 of Britain.

²⁰¹ No.1 of 1990 as amended, Article 100.

²⁰² Draft Minerals Policy of 2002.

²⁰³ (*Ibid*).

²⁰⁴ Cawood, F.T. 2004. "The Mineral and Petroleum Resources Development Act of 2002: a paradigm shift in mineral policy in South Africa". *Journal of the Southern African Institute of Mining and Metallurgy*, Volume 104 (1) : 54.

²⁰⁵ Petroleum (Production) Act of 1934, section 1.

²⁰⁶ Nhemachena. A & Warikandwa, T.V. (eds). (2017). *Mining Africa: Law, Environment, Society and Politics in Historical Multidisciplinary perspective*. Langaa Research & Publishing CIG Mankon, Bamenda, p.261.

²⁰⁷ No. 51 of 1969 of Nigeria.

²⁰⁸ Mostert, H. & Van den Berg, M. (2013.). *Roman-Dutch Law, Custodianship, and the African Subsurface: The South African and Namibian Experiences*. Oxford University Press, p.21.

access to the subsurface unlike in South Africa where the ability to give access to the subsurface is in the hands of private parties, landowners and/or mineral right holders.²⁰⁹ It is further submitted that mineral resources in South Africa and Namibia do not adequately benefit the masses but the minority made up of well-connected elites and foreigners. It has been learned that Namibia, South Africa and Zimbabwe have tried to elevate the economic status of their people through legislation.

These laws that aimed at elevating the economic status of previously disadvantaged people found in Namibia, South Africa and Zimbabwe are also meant to abolish the colonial economic approach to mineral resources ownership. However no positive results could be traced yet in Zimbabwe due to such laws. It is further discovered that the implementation of the ambition to develop the previously disadvantaged people has been slow in South Africa. Nevertheless, it is pre-mature to establish whether the outcome will be the same in Namibia or not.

On African customary law, Communities in Africa often do not own the land but have the rights to use the land.²¹⁰ Therefore it is submitted that since the communities do not own the land, it is unlikely for them to own mineral resources found on the land. Under Roman-Dutch law a landowner owned the mineral resources beneath her land.²¹¹ Despite the endeavor to avail mineral resources to the locals, the concept foreign investment is also valued in the selected jurisdictions to generate wealth under the total or partial control of the owner of the assets.²¹²

²⁰⁹ (*Ibid.*).

²¹⁰ Murombo, T. 2013. "Regulating mining in South Africa and Zimbabwe: Communities, the environment and perpetual exploitation". *Law Environmentt & Development. Journal*, Volume 9 : 31.

²¹¹ (*Ibid.*:310).

²¹² Amarasinha, S.D. & Kokott, J. 2008."Multilateral Investment Rules Revisited" in *The Oxford Handbook of International Investment Law*, P. Muchlinski *et al.* eds., Oxford *et al.*, p. 120.

CHAPTER FIVE

FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

This chapter discusses the findings, conclusion and the recommendations of this study. The Constitution of the Republic of Namibia is the supreme law of the land.¹ Therefore all laws must obtain their validity from the Constitution. Section 1(1) (b) of the Mineral Act,² defines what constitutes minerals. Therefore, this research focused on mineral resources in Namibia with respect to access and equitable distribution of the mineral resources. It outlined the historical background of regulation of mineral rights and ownership in Namibia. Further, the chapter discussed ownership, distribution, including community participation, and access to mineral resources in Namibia. The study was premised on the distributive justice theory that focuses on inequalities,³ in terms of mineral resources. A comparative analysis of jurisdictions such as Nigeria, United Kingdom, South Africa and Zimbabwe was also included.

While natural resource revenues ought to enable development, past experiences have shown that mineral wealth often represents a curse rather than a blessing, inducing slower growth and higher levels of poverty.⁴ Therefore, advocates of the scarce resource wars theory have argued that people

¹ No. 1 of 1990 as amended, Article 1(6).

² No. 33 of 1992.

³ Robeyns, I. 2003. "Is Nancy Fraser's Critique of Theories of Distributive Justice Justified?" *Constellations*, Volume 10 (4) Blackwell Publishing: 538-554 at 4.

⁴ Havro, G. & Santiso, J. 2011. "Benefiting the Resource Rich: How Can International Development Policy Help Tame the Resource Curse?". IDS Working Papers, 2011: 01-54. doi:10.1111/j.2040-0209.2011.00355_2.x, p.1.

fight each other to secure access to the resources necessary for their survival.⁵ It means that, those without access to resources want to have access in order to survive, as a result conflicts may erupt. Thus, it is necessary to address the issue of beneficiation of minerals and equitable distribution of these mineral resources. There is unequal distribution of natural resources within the mining sector in Namibia. It is submitted that the law of Namibia does not limit mineral rights to a particular grouping of people, but it is difficult for the people to make use of available legislation. This difficulty may be attributed to lack of skills and in some instances, people do not know their rights. As a result, only those with necessary resources and capacity have access to mineral resources. It is further submitted that the skewed distribution of mineral resources is taking place due to lack of funds, technology, skills and capacity. This predisposition has been blamed on the high inequality within the Namibian society. This is compounded by the fact that most mining rights are in the hands of foreign investors who have the large share of proceeds than locals.⁶ It is therefore the responsibility of the owner of mineral resources to ensure that adequate distribution and ownership is extended to the local citizens.

Article 100 of the Constitution of the Republic of Namibia,⁷ prescribes the State as the owner of minerals in Namibia that are not already lawfully owned. The above-mentioned legislation is the supreme law of Namibia. International law has also acknowledged the importance of natural resources of each country. As a result, Namibia recognized and adopted the International Principle of Permanent Sovereignty over natural resources,⁸ which requires every State to exploit their resources freely for the benefit of their citizens.⁹ The above mentioned principle is linked to the Draft Namibian Policy on

⁵ Le Billon, P. 2001. *The political ecology of war: natural resources and armed conflicts*. School of Geography, Mansfield Road, Oxford OX1 3TB, UK, p. 564.

⁶ Thorium, R. 2016. "Profiling Namibia's mineral resources". *The patriot newspaper*. Available at <http://www.thepatriot.com.na/index.php/2016/10/30/profiling-namibias-mineral-resources/>; last accessed 25 November 2016.

⁷ No. 1 of 1990 as amended.

⁸ International Covenant on Human Right of 1966, Article 1.

⁹ Charter of Economic Rights and Duties of States, Article 2.

mineral resources and Article 2 (1) of the SADC protocol,¹⁰ which recognizes a thriving mining sector in the SADC region with six (6) pillars of empowerment.¹¹ Despite the legislations such as the Constitution of Namibia, International Principle of Permanent Sovereignty over natural resources, Draft Namibian Policy on mineral resources, and Article 2 (1) of the SADC protocol, there has been unequal access to and distribution of mineral resources in Namibia. The inequality within the Namibian system has led to the enactment of laws meant to uplift previously disadvantaged people such as NEEEF,¹² Affirmative Action Act¹³ and prohibition of discrimination by Article 10 of the Namibian Constitution.¹⁴ It has been established that mining industries in Namibia have been dominated by previously advantaged persons, mostly foreign nationals.¹⁵ However, the situation can be changed if Africa, including Namibia, realises their capability to run mining industries on their own without relying on the West and Asia.¹⁶

The conclusion drawn, regarding aspects of ownership, acquisition of mineral rights and distribution of access to minerals and wealth in Namibia, is that it may be risky to put all control of the country's mineral resources into the hands of the President because of possible abuse of power. The President's own discretion towards distribution of mineral resources may be abused. Further, Namibia has adequate legislation that prescribe free exploitation of resources by citizens for their own benefit. However, not many Namibians have ownership and access to these mineral resources. This problem cannot be solely attributed to a lack of legislation but to lack of funding, skills and capacity to run mining industries. As a result, mining industries in Namibia have been dominated by previously

¹⁰ SADC Protocol on Mining of 1997.

¹¹ Bill of 2015, section 3.

¹² New Equitable Economic Empowerment Framework, p.9.

¹³ No. 29 of 1998.

¹⁴ No. 1 of 1990 as amended.

¹⁵ Mining Journal: A publication of the Namibian 2017, p.8.

¹⁶ Nhemachena. A & Warikandwa, T.V. (eds). 2017. *Mining Africa: Law, Environment, Society and Politics in Historical Multidisciplinary perspective*. Langaa Research & Publishing CIG Mankon, Bamenda, p.38.

advantaged persons and foreign nationals who have enough funds and capacity to run the mining industry. Therefore, even though legislation prescribe that mineral resources are held in trust for the benefit of the people, it is the people who need to use these available legislation¹⁷ to acquire ownership of mineral resources. However, the right given to people by the Constitution is not absolute. The same Constitution of Namibia that provides rights to people to benefit from the national resources also placed limitations to their rights.¹⁸

Despite the limitations on people's rights and freedom, the Namibian government owns mineral resources and there is considerable amount of pressure to spend mineral revenues, using their own discretion, on current consumption rather than to invest revenues.¹⁹ As a result, citizens may end up not benefiting from the proceeds of their national resources. Considering the aforementioned, one can argue that mineral resources are for the State unless otherwise owned. It is further concluded that mineral resources in Namibia do not sufficiently benefit the masses but the minority consisting of well-connected elites and foreign nationals. This state of affairs, of having minerals in the hands of few a people, has also been observed in some African countries such as Zimbabwe where ownership is vested in the President and consequently has control of mineral resources.²⁰ Therefore, it appears pointless to have good legislation that are aimed at addressing an inequitable and socially unjust society, in terms of distribution of mineral resources for the previously disadvantaged people, if citizens are not making use of such legislation.

¹⁷ No. 1 of 1990 as amended, Article 16 (1).

¹⁸ (Ibid., Article 22).

¹⁹ Lange, G.M. 2003. "The contribution of minerals to sustainable economic development: Mineral resource accounts in Namibia" (No. 54). Directorate of Environmental Affairs, Ministry of Environment and Tourism, p.4.

²⁰ Nhemachena, A & Warikandwa, T.V., (eds). 2017. *Mining Africa: Law, Environment, Society and Politics in Historical Multidisciplinary perspective*. Langaa Research & Publishing CIG Mankon, Bamenda p.261.

It is further concluded that enacting more legislation aimed at uplifting lives of previously disadvantaged people may not be a solution if people lack skills, funds, technology and capacity to successfully run the mining industries in Namibia. There is a need for working towards the objectives set out in Namibia's 5th National Development Plan (NDP5), Vision 2030 and the Harambee Prosperity Plan. The objectives include among others, skills and infrastructure development, technology transfer and the creation of downstream industries to transform economic independence into reality.

It is also concluded that people may lack opportunities due to existing societal conditions that lead to social inequalities.²¹ Thus the problem of societal inequalities can also be addressed through corporate social responsibility activities such as funding education or training in the mining sector. Companies have responded to the call of corporate social responsibility, but more is still to be done in this regard.

Another conclusion drawn is that there is a need to employ the theory of distributive justice that allows those who have to give to those who have not, in order to realise a fair society.²² It has been observed that people are not treated fairly in society because those who have continue to gain and those who do not have remain in the same position. However, the distributive justice theory may disadvantage a country, if not properly handled, as it was seen in Zimbabwe. The Zimbabwean economy collapsed and led to the abandonment of the country's currencies after the forceful takeover of whites owned farms, without compensation, by black people.²³ Nonetheless, advocating for adequate distribution of

²¹ Goodman, D.J. 2000. "Motivating people from privileged groups to support social justice". *Teachers College Record*, Volume 10 (6):1067.

²² Arneson, D. 2008. "John Rawls's theory of justice notes for theories of justice", p.1, Available at <http://philosophyfaculty.ucsd.edu/faculty/rarneson/Rawlschaps1and2.pdf>; last accessed 30 March 2017.

²³ Nhemachena, A & Warikandwa, T.V., (eds). 2017. *Mining Africa: Law, Environment, Society and Politics in Historical Multidisciplinary perspective*, Langaa Research & Publishing CIG Mankon, Bamenda, p.262.

mineral resources, does not ignore foreign investment given its major role in the economic growth and development of the country.

5.2. Findings

Mineral resources in Namibia are supposed to generate revenue through taxes and royalties.²⁴ Further, mining is expected to promote corporate social responsibility, skills transfer and human capital investment.²⁵ The prior stated positive benefits from the mining sector are envisaged to contribute towards poverty eradication and reduction of the inequality gap in Namibia.²⁶ However, it has been observed that there is unequal distribution and ownership of the national wealth within the mining sector.

The current status quo of a few local individuals and foreign nationals owning majority shares in Namibia's mineral resources needs to be reconsidered and addressed.²⁷ Namibia needs to encourage more corporate social responsibility to develop more skills and focus on infrastructure development and technology transfer in order to achieve successful nationalisation and beneficiation of the mining industry. Even though Namibia has good laws that promote fair distribution and access to mineral resources, it is submitted that many Namibians are not using these laws to their advantage to exploit, own and access the national resources. If mineral resources are held in custody by the Ministry of Mines and Energy for the benefit of all Namibians, they must be available to all in terms of ownership and people must be educated about the good things the independent of Namibia brought such as their rights to benefit and own mineral resources.

²⁴ Mining Journal: A publication of the Namibian 2017, p.38.

²⁵ Mining Journal. A publication of the Namibian, April 2016, p.41.

²⁶ (*Ibid*).

²⁷ Thorium, R. 2016. "Profiling Namibia's mineral resources". *The patriot newspaper*. Available at <http://www.thepatriot.com.na/index.php/2016/10/30/profiling-namibias-mineral-resources/>; last accessed 25 November 2016.

It is submitted that; Namibia's mineral resources were owned by South Africa before independence and were exploited for the development and benefit of the minority South Africans at the expense of the Namibians.²⁸ There were discriminatory laws such as the Ordinance of 1905 that granted unlimited access and ownership of mineral resources to white people only. As a result, blacks and colored people were excluded. The lack of access and distribution of resources to blacks and colored people impacted on their right to benefit from wealth and minerals of their own country. Laws, such as the Ordinance of 1905, form part of the discriminatory laws addressed by the Constitution of the Republic of Namibia to provide for equality before the law and prohibition of discrimination of any form.²⁹ The discriminatory law such the Ordinance of 1905 was used during the occupation of South Africa in South West Africa. Nevertheless, the change in control of South West Africa gave birth to independent Namibia and it influenced the control of minerals and ownership in Namibia. The control of mineral resources and ownership in Namibia is no longer influenced by racial ethnic and geographical discrimination but by the law and is now under the custodianship of the Ministry of Mines and Energy.³⁰ However, it is opined that the Namibian mining law system may be viewed to replicate the colonial error system, if the system does not address equitable distribution of mineral resources. As a result, it may prompt a perception that the system does not appreciate fair distribution and equity. This is evidenced by Namibia's Gini coefficient of 0.59719,³¹ in terms of income distribution. The Gini coefficient is used to measure inequality and the percentage given is an

²⁸ Hanri, M. & Van den Berg, H.M. 2013. *Roman-Dutch Law, Custodianship, and the African Subsurface: The South African and Namibian Experiences* (December 3, 2013). The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage, Ed. Donald N. Z., Aileen McHarg, A., Adrian Bradbrook, A. & Lila Barrera-Hernandez, L. Oxford University press Southern Africa, p.7-12.

²⁹ No. 1 of 1990 as amended, Article 10. (1) All persons shall be equal before the law. (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status of the Namibian Constitution Act 1 of 1990 as amended.

³⁰ Ministry of Mines and Energy. 2013. *Annual Report FY2012/13*. Available at www.mme.gov.na/files/publications/MMEAnnualReport.pdf; last accessed 24 February 2018.

³¹ Namibia Household Income & Expenditure Survey 2009/2010.

indication that Namibia is still among the most unequal societies in the world, notwithstanding the commitments to adhere to international laws and improvements at legislation level since independence.³²

The international law on natural resources concerns itself with the well-being of the people and as such it places emphasis on States to ensure that citizens benefit from the wealth of their countries. In response to the demands of the International law, ownership of natural resources in Namibia is now constitutionally entrenched.³³ According to the Minerals (Prospecting and Mining) Act³⁴ all rights in respect of minerals resources are now vested in the state, for the benefit of the citizens. As a result, there are no longer laws that prescribe distribution and access to mineral resources based on geographical location, racial or ethnic groupings such as the Ordinance of 1905. However, despite the available laws that are aimed at improving the living standards of Namibian people, there are still gaps in the Namibian law system in terms of access, ownership and distribution of wealth within the mining sector.

It is maintained that the Draft Minerals Policy regards the Namibian people as the beneficiaries of the resources and this is in support of the dictates of the Constitution of the Republic of Namibia³⁵ and the SADC Protocol on Mining, which advocates for the exploitation of minerals including the private sector. The Ministry of Mines and Energy is the custodian of the resources however, the custodian does not use the property for own use. Therefore, the Constitution of Namibia considers the State as the owner of mineral resources if such minerals are not lawfully owned as it is stated in the case of

³² European Union 2014. “Republic of Namibia National Indicative Programme 2014 – 2020”. Available at www.eeas.europa.eu/delegations/iceland/5964/2014-2020-national-indicative-programme-namibia_en; last accessed on 15 October 2018, p.18.

³³ No. 1 of 1990 as amended, Article 100.

³⁴ Of 1992, section 2.

³⁵ No. 1 of 1990 as amended.

Namibia Cape Grower.³⁶ The Constitution thus³⁷ seeks to address colonial by induced injustice and as the supreme law³⁸ it takes precedence in all matters. The fact that the supreme law prevails, mineral resources in Namibia belong to the State to the extent to which they are not lawfully owned. Further, in Namibia, the State has total control of all subsurface mineral rights.³⁹

The Ministry of Mines and Energy of Namibia has the responsibility of accessing mineral rights applications and granting minerals licenses as prescribed by the law. Therefore, Namibians aged 18 years and above, as well as Namibian juristic persons can apply for mineral rights by virtue of Section 17 of the Minerals (Prospecting and Mining) Act.⁴⁰ It is evident that the law makes it possible for mineral rights to be accessed at an early age but is unfortunate that not every 18 year old may have skills and financial capacity to prospect for mineral resources. Further, it has been observed that discrimination against foreign investment is prohibited in Namibia as Section 46 of the Minerals (prospecting and mining) Act⁴¹ allows foreign investors also to apply for EPLs. This has resulted in majority of foreign owned companies controlling the mining of mineral resources in Namibia.⁴² However, foreign investment is recommended in Namibia as it is necessary for the development of any given country.

It has also been established that the Namibian law encourages and promotes access to and equitable distribution of mineral resources, but what is lacking is the implementation thereof. Namibian people

³⁶ *Namibia Grape Growers and Exporters Associations and Others v Ministry of Mines and Energy and others* 2004 NR 194 (SC) at 209.

³⁷ No. 1 of 1990 as amended.

³⁸ No. 1 of 1990 as amended, Article 1 (6).

³⁹ Corry, S. 2003. *News reactions and interactions*. Available at <https://www.unl.edu/rhames/courses/current/readings/corry-suzman.pdf>, last accessed 10 April 2018.

⁴⁰ No. 33 of 1992.

⁴¹ (*Ibid.*).

⁴² Lineekela, H. 2014. "Namibian minerals in foreign hands". *The Villager newspaper*. Available at <http://www.thevillager.com.na/articles/6156/Geingob--Angula--Namibian-minerals-in-foreign-hands/>; last accessed 16 March 2017.

may also be the one to blame due to lack of access of mineral resources because the law made it possible for them to participate in exploitation of the national wealth.⁴³ It is submitted that one of the reasons why there is no adequate access to mineral resources, is likely that most Namibians are not aware they have such rights. On the other hand, it is part of common law that ignorance of the law is not an excuse. One cannot claim that they did not know. All the same time, in order to solve the problem of lack of knowledge, government needs to conduct awareness and campaigns to inform citizens about the right they have to access mineral resources. It should not be taken for granted that legislation is in place therefore people know about them. Lack of awareness is possible because Section 17 of the Minerals (Prospecting and Mining) Act⁴⁴ did not address inequalities in terms of distribution of wealth within the mining sector, thus lack of access and ownership can also be attributed to a lack of information regarding access to mineral resources and the negative perception of huge capital investments required to develop and operate mines. It is argued that, despite the provisions of the SADC Protocol on mining, the Namibian mining law system still replicates the colonial era system as it does not fully appreciate equity and adequate distribution of wealth.

Efforts geared towards increasing local access to mineral resources in Namibia must not be perceived as attempts to abolish foreign investments but must be seen as efforts seeking a balanced approach in so far as the pursuit of indigenization and foreign direct Investments is concerned. It is a fact that Governments and today's neoliberal ideology shape institutions whose policies account for contemporary international economic law.⁴⁵ The question is, does the neoliberal economic order accommodate distributive justice? The neoliberal economic order may be accommodative towards the

⁴³ No. 33 of 1992.

⁴⁴ (*Ibid.*).

⁴⁵ IEEA as amended, section 2 (1); Warikandwa T.V, & Osode, P.C “Legal Theoretical Perspectives and their Potential Ramifications for Proposals to Incorporate a Social Clause into the Legal Framework of the World Trade Organization” *Speculum Juris*, Volume 28 (2) :2014 41.

distributive justice, yet it may be a significant threat to investment security.⁴⁶ This is since investment of foreign companies in Namibia's mining industry is encouraged by the Namibian Constitution,⁴⁷ and it is the Namibian Constitution that grants rights to invest in the country. Therefore, it is opined that there must be a noticeable balance between foreign investments and local investments. The Namibian Government's ability to attract investment to develop natural resources will strongly influence future economic growth and development,⁴⁸ therefore balancing foreign investment with national awareness of rights to mineral resources will encourage national participation of citizens to prospect and exploit the mineral resources in the country.

In order to attract and maintain Foreign Investments, Namibia has enacted the Namibia Investment Promotion Act (NIPA).⁴⁹ However, the Act has been criticized for granting the Minister full discretion to approve investors in a certain economic sector.⁵⁰ Granting discretionary powers to the Minister to decide which investor should invest in which type of sector, may open room for potential corruption and manipulation.⁵¹ The loopholes may occur due to lack of checks and balances on the decisions made by the Minister such that a system may be created where investment will depend on personal motives, leadership style, whims and caprices of the Minister.⁵² Nevertheless, it is submitted that the Minister can exercise comprehensive discretion to approve investors to invest in Namibia as long as there is a balanced approach between the local development and foreign investment development. Further, checks and balances, on the decisions made by the Minister, may be required to avoid

⁴⁶ (*Ibid.*).

⁴⁷ No. 1 of 1990 as amended, Article 99.

⁴⁸ Mobbs, P.M. 2004. *The Mineral Industry of Namibia*. Available at <https://minerals.usgs.gov/minerals/pubs/country/2004/wamyb04.pdf>; last accessed 10 April 2018.

⁴⁹ No. 9 of 2016.

⁵⁰ No. 9 of 2016, section 4 (1) & (2).

⁵¹ Wohlers, W. 2017. *The Namibia Investment Promotion Act, 2016: hindering or promoting foreign investment?* Available at <https://www.ensafrica.com/news/The-Namibia-Investment-Promotion-Act-2016-hindering-or-promoting-foreign-invest?Id=2707&STitle=ENSafrica%20ENSight>, last accessed on 3 May 2018.

⁵² (*Ibid.*).

possible personal motives and decisions based on leadership style of the ruler, whims and caprices of the rulers that may compromise just distribution of wealth.

This thesis is premised on the concept of distributive justice theory that requires those who have to give to those who have not.⁵³ It is argued that Namibian citizens are not getting enough shares from their national resources as it is supposed to be. This may be attributed to the governance style and the laws that are in place or to a lack of proper understanding of the mining sector. However, it is submitted that the application of the distributive justice theory may affect the economy of the country negatively, if not properly executed. A case in point is the Zimbabwean forceful takeover of commercial properties owned by white farmers by previously disadvantaged black people of Zimbabwe.⁵⁴ If the concept of distributive justice is not properly executed, the regulatory environment may not be conducive to business operations. Further the theory of distributive justice will be required to pass the protections of property rights test that is viewed to be at risk in the case of redistribution of wealth

To avoid the Zimbabwean case, South African law makers identified formidable threats to the success of the indigenization programme such as business fronting.⁵⁵ As a result, the *Broad-Based Black Economic Empowerment Amendment Act* (Amendment Act)⁵⁶ was enacted to combat business fronting practices and also regulating business fronting.⁵⁷ Namibia may adopt a similar stance towards

⁵³ Robeyns, I. 2003. "Is Nancy Fraser's Critique of Theories of Distributive Justice Justified?". *Constellations*, Volume 10 (4): 538-554 at 4.

⁵⁴ Warikandwa T.V, & Osode, P.C "Legal Theoretical Perspectives and their Potential Ramifications for Proposals to Incorporate a Social Clause into the Legal Framework of the World Trade Organization" *Speculum Juris*, Volume 28, (2): 2014 41.

⁵⁵ (*Ibid.*).

⁵⁶ No.46 of 2013.

⁵⁷ Warikandwa T.V, & Osode, P.C "Legal Theoretical Perspectives and their Potential Ramifications for Proposals to Incorporate a Social Clause into the Legal Framework of the World Trade Organization" *Speculum Juris*, volume 28(2): 2014 - 41 defines "fronting practice as "a transaction, arrangement or other act or conduct that

practices, such as business fronting that can significantly prevent the success of the country's indigenization programme. The law makers can ensure the success of the indigenisation programme by facilitating benefits diversion, eliminating opportunistic beneficiaries and thereby limiting the trickle-down effects as well as the overall impact of the related instruments and initiatives.⁵⁸

As it is the case in Namibia, the State is the custodian of mineral resources in South Africa,⁵⁹ and the ability to give access to the subsurface is in the hands of private parties.⁶⁰ It is also acknowledged that there are similarities in the mining laws of Namibia and South Africa, specifically legislation dealing with mineral resources, ownership and distribution. In South Africa, the Minister is given broad discretionary powers in granting or refusing an application for prospecting or mining rights,⁶¹ but by giving too much power to the minister may be risky for administrative justice. The minister may not be fair in making a decision to give prospective or mining rights. Another similarity between South Africa and Namibia is that Namibia also allows foreign investments as per its Foreign Investment Act⁶² to invest and engage in any business activity in Namibia.⁶³ It is further prescribed that foreign nationals have the right to own properties in Namibia as per Article 16 of the Namibian Constitution.⁶⁴ Similarly, investors in South Africa are protected in terms of the Protection of Investment Act.⁶⁵ They

directly or indirectly undermines or frustrates the achievement of the objectives of the Act or the implementation of any of the provisions of the Act.

⁵⁸ (*Ibid.*).

⁵⁹ Van Der Schyff, E. 2012. "South African mineral law: a historical overview of the state's regulatory power regarding the exploitation of minerals", p.131.

⁶⁰ Mostert, H. & Van den Berg, M. 2013. *Roman-Dutch Law, Custodianship, and the African Subsurface: The South African and Namibian Experiences*. Oxford University Press Southern Africa, p.21.

⁶¹ No. 28 of 2002, section 23(3) & 26.

⁶² No. 27 of 1990.

⁶³ (*Ibid.*, section 3).

⁶⁴ No. 1 of 1990 as amended, Article 16 (1) states that "All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens."

⁶⁵ No. 22 of 2015.

also have the right to property in terms of section 25 of the Constitution,⁶⁶ and rights or concessions conferred by law or under contract, including licenses to cultivate, extract or exploit natural resources.⁶⁷

Unlike in Namibia and South Africa, in the United Kingdom, some minerals belong to her Majesty such as gold, silver, coal, oil and gas while other forms of minerals belong to the land owner.⁶⁸ At the same time, the Coal Industry Act⁶⁹ of United Kingdom, maintains that all rights, in relation to minerals on the seabed and subsoil, are vested in her Majesty. Therefore, the registration of land does not include minerals found therein.⁷⁰

However, like United Kingdom, mineral resources are in the custody of the President in Zimbabwe.⁷¹ At the same time, any person who is 18 years old or older may acquire rights to exploit mineral resources like in Namibia and South Africa. However, despite the right of people to acquire mineral resources in Zimbabwe at the age of 18, national ownership of mineral rights has resulted in the enrichment of certain people in the country.⁷² This has resulted in the majority living in poverty. The IEEA, as amended, requires 51% of every public company and any other business to be owned by designated extractive business, by an appropriate designated entity, provided that some part of the 51% referred to may be held by a community share ownership scheme or employee share ownership

⁶⁶ (*Ibid.*, section 10).

⁶⁷ (*Ibid.*, section 2 (h)).

⁶⁸ Brown, M. 2018. *Mining law 2018/ United Kingdom*. Available at www.iclg.com/practice-areas/mining-laws-and-regulations/united-kingdom; last accessed 2 March 2018.

⁶⁹ Coal Industry Act of 1994, section 51 (5).

⁷⁰ Land Registration Act of 2002, section 9.

⁷¹ Nhemachena, A. & Warikandwa, T.V. (eds). 2017. *Mining Africa: Law, Environment, Society and Politics in Historical Multidisciplinary perspective*. Langaa Research & Publishing CIG Mankon, Bamenda, p.261.

⁷² Dobra, J.L & David Newman, D. 2014. "The Case for Private Ownership of Mineral Rights". Available at www.miningfacts.org/Blog/Mining-News/The-Case-for-Private-Ownership-of-Mineral-Rights/; last accessed 19 April 2018.

scheme or trust, or both.⁷³ However it is opined that the IEEA did not yield positive results for Zimbabwe, instead it led to the weakening of the economy and subsequently abandoning of the local currency.⁷⁴

In Nigeria, minerals are exclusively in the custody of the Federal Government.⁷⁵ The mineral resources belong to the State as per Section 44(3) of the Constitution.⁷⁶ As is the case in Namibia, the Federal Government of Nigeria grants permits, licenses and leases for reconnaissance, prospecting and extraction to interested persons/organizations of mineral resources.⁷⁷ However, most of the mineral resources are either under-explored or not exploited at all,⁷⁸ and this may indicate that the majority in society do not have access to these resources or they do not have means to explore and exploit them. Therefore, the Federal Government must be involved in preventing total control of mineral resources by foreign companies and encourage local participation in mining mineral resources.⁷⁹ It is lawful for the Governor to revoke a right of occupancy on grounds of public interest.⁸⁰ Any land previously owned by a citizen may be revoked in cases where minerals are discovered upon the land. Nigeria does not appear to have legislations aimed to uplift lives of previously disadvantaged people like South Africa, Nigeria and Namibia but seems to have other legislations that prescribes exploitation of the national resources.

⁷³ Amendments of Zimbabwe's Indigenization and Economic Empowerment Act, 14 March 2018, section 3 (2) (c).

⁷⁴ Nhemachena, A. & Warikandwa, T.V., (eds). 2017. *Mining Africa: Law, Environment, Society and Politics in Historical Multidisciplinary perspective*. Langaa Research & Publishing CIG Mankon, Bamenda, p.261.

⁷⁵ Constitution of the Federal Republic of Nigeria of 1999 as amended.

⁷⁶ (*Ibid.*).

⁷⁷ No. 20 of 2007, section 5 (a) & No. 14 of 1990, section 1(1).

⁷⁸ Chindo, M. 2011. "An extensive analysis of mining in Nigeria using a GIS". *Journal of Geography and Geology*, Volume 3, (1):3.

⁷⁹ Company and Allied Matters Act of the Federation of Nigeria 2004, section 54 (1).

⁸⁰ No. 6 of 1978, section 28.

It is evident that the IEEA law sought to help previously disadvantaged people but did not yield the expected results for Zimbabweans and the same effort did not produce satisfactory results in South Africa.⁸¹ It is unknown whether NEEEF will produce different results in Namibia when compared to Zimbabwe and South Africa. Therefore, indigenisation laws and policies may not be fully relied upon to address challenges related to beneficiation and value addition in Namibia's mining sector. This is due to the likelihood of failure as experienced in other countries. It is also not clear whether the 25% requirement of NEEEF meant for previously disadvantaged people will be applied on expropriation basis through fair and just compensation, or expropriation basis without compensation and/or by way of willing buyer willing seller basis. However, no law aimed at improving the lives of the previously disadvantaged people in the UK could be found except for the Mineral Exploration and Investment Grants Act;⁸² which authorizes the giving of financial assistance in connection with mineral exploration in the UK. Therefore, it is clear that legislations aimed to elevate lives of previously disadvantaged people may not be the absolute solution to unequal distribution, lack of access and lack of ownership of mineral resources.

It is recognized that the cause of unequal distribution of wealth, particularly mineral resources may be attributed to a lack of skills, capacity and technology.⁸³ That could be true, but Namibia is now independent for long to continue being behind due to lack of skills. Therefore, Namibia needs to move away from such perspectives in order to survive an international competitive environment in mining.⁸⁴ The lack of education and knowledge regarding - laws and regulations governing mining activities, has

⁸¹ Nhemachena, A. & Warikandwa, T.V. (eds) 2017. *Mining Africa: Law, Environment, Society and Politics in Historical Multidisciplinary perspective*. Langaa Research & Publishing CIG Mankon, Bamenda, pp.261-262.

⁸² Of 1972 of Britain.

⁸³ Nyaungwa, F. N & Abankwah, C. 2014. "Oil and Mining Boom: Where do Namibians fit in?" *The Windhoek Observer newspaper*. Available at www.observer.com.na/index.php/8-latest-news/3514-oil-and-mining-boom-where-do-namibians-fit-in; last accessed 25 November 2016.

⁸⁴ Kojima, M., Matthews, W. and Sexsmith, F. 2010. "Extractive Industries for Development Series. Petroleum Market in Sub-Saharan Africa", ESMAP, World Bank, p.35.

arguably contributed to the problem of unequal distribution of natural resources.⁸⁵ Countries such as Mongolia and Iran have a system of “citizen resource dividends”.⁸⁶ This may be one of the alternatives Namibian lawmakers can consider to ensure equitable distribution of natural resources. However, there is a criticism that giving people cash will induce dependency, laziness and reducing labor supply, while distributing cash is not recommended.⁸⁷ For that reason, no country would want to produce lazy citizens.

5.3 Recommendations

It is recommended that:

- 5.3.1 Namibia should consider exporting less of its mineral wealth in raw or unprocessed form to avoid repurchasing the finished products which have been processed at a premium in other countries.
- 5.3.2 Namibia should add value to its mineral output before export in order to capture as much rent from the sector as possible for national growth.⁸⁸
- 5.3.4 More awareness, by legal scholars in conjunction with the Ministry of Mines and energy, is required on mineral rights participation, as knowledge remains mostly with the wealthy and is inaccessible to many.
- 5.3.5 Namibia must move away from the negative perception of capital constraints to develop and operate mines. Furthermore, Namibia must adopt a positive stance towards the nationalization of the mining industry.

⁸⁵ Marwa, C.W. & Warioba, I. 2015. “Challenges Posed on The New Mining Act and Its Regulations in Tanzania”. *Journal of Politics and Law*; Volume 8 (4) 2015 :185 at 190.

⁸⁶ Standing, A. & Hilson, G. 2013. “Distributing mining wealth to communities in Ghana, Addressing problems of elite capture and political corruption”. *U4 Issue*, Volume 2013 (5) :17.

⁸⁷ (*Ibid.*:p.17).

⁸⁸ Mzumara, D.W. 2004. Harmonization of Mining Policies, Standards, Legislative and Regulatory Frameworks in Southern Africa. Available at www.sadc.int/files/8813/5825/8305/Mining-Harmonisation_Study.pdf; last accessed on 20 February 2018, p.33.

- 5.3.7 Namibia must tackle the challenges that are facing the mining industry that have to do with laws and policies that could attract streamline investments, local participation and value addition.
- 5.3.8 There must be transformation at a regulatory level that will benefit ordinary Namibians.
- 5.3.9 Corporate Social Responsibility must be integrated into the core activities and decision making of every company and be regarded as a key concern by top management.⁸⁹
- 5.3.10 Financial assistance, in connection with mineral exploration, must be considered as in the case of the United Kingdom in order to facilitate adequate access to mineral resources in the country.
- 5.3.11 A comprehensive study must be carried out to investigate and determine how mineral resources from the mining sector would be owned, distributed and accessed by the majority of the Namibian people.
- 5.3.12. It should be noted that, corruption and manipulation of the system is of great concern. There may be a lack of enforcement of the fiscal law of Namibia and possibly lack of political will and commitment in so far as the enforcement is concerned.

5.4. Conclusion

It is evident that Namibia has good legislation such as the Namibian Constitution,⁹⁰ and the Draft Mineral policy of 2002. Article 100 of the Namibian Constitution regards the State as the owner of minerals, unless otherwise owned. The same Constitution has placed the custodian of mineral resources in the Ministry of Mines and Energy for the benefit of the Namibian people. It has been concluded that the State has total control of all subsurface mineral rights in Namibia. The Namibian

⁸⁹ Hamann, R. 2003. "Mining companies' role in sustainable development: the 'why' and 'how' of corporate social responsibility from a business perspective". *Development Southern Africa*, Volume 20 (2):.237-254 at 238.

⁹⁰ No. 1 of 1990 as amended.

law prescribes ownership of mineral resources⁹¹ but it is also a fact that there is no absolute right in Namibia,⁹² thus the right to ownership and access is also not absolute. This is why the owner of land cannot own the space or air above the land as the constitutional reality grants subsurface right to the State. Further, the State has power to expropriate the property in accordance with the procedures laid down by law and has the right to interfere with an individual's right to own property.⁹³

It is submitted that having access to something is not equivalent to owning it. Access is about a person's ability to benefit from resources and access to certain rights provides a degree of social power.⁹⁴ It should be noted that there is a difference between access and ownership. Access does not equal to ownership. Having access to something does not mean owning it; people may have access without ownership. Hence, if one understands the difference between access and ownership, they can equally determine whether the people of Namibia own mineral resources. The freedom to have any particular item can be distinguished from actually having that thing; what an individual is free to have is not the same as what the person actually has.⁹⁵ Therefore, the unequal distribution and ownership of natural resources has the potential to impact on the distribution of other forms of wealth such as income, education or land,⁹⁶ because they are directly related to the share of natural resources in national income.⁹⁷

⁹¹ No. 1 of 1990 as amended, Article 100 and 16 (1).

⁹² (*Ibid.*, Article 22). Deals with the Limitation upon Fundamental Rights and Freedoms.

⁹³ Narib, G.(nd). "Is there an absolute right to private ownership of commercial land in Namibia"? Land, Environment and Development Project Legal Assistance Centre Windhoek, Namibia. Available at www.lac.org.na/projects/lead/Pdf/privateownership.pdf; last accessed 11 April 2018, p.2.

⁹⁴ Ribot, J.C. & Peluso, N.L. 2003. "A theory of access". *Rural sociology*, Volume 68 (2):153-181 at 153.

⁹⁵ Sen, A. 2005. "Human Rights and Capabilities". *Journal of Human Development*, Volume 6 (2): 151-166 at 155.

⁹⁶ Gylfason, T. & Zoega, G. 2002. "Inequality and economic growth: Do natural resources matter"? *Inequality and Growth: Theory and Policy Implications*, Volume 1: 255 at 32.

⁹⁷ (*Ibid.*:32).

It is argued that every state has the right to freely dispose, exploit and use their natural resources,⁹⁸ and Namibia is no exception. The legislation that is making it possible for Namibian people to access mineral resources are in place, but it becomes difficult to exploit them for their own benefit. The difficulty may be attributed to lack of skills, capacity and funding. The conclusion drawn is that mineral resources in Namibia are mostly in the hands of foreign nationals and the few elite individuals⁹⁹ despite the fact that the Namibian law makes it possible for its citizens to access mineral rights as per Section 2 of the Minerals (Prospecting and Mining) Act.¹⁰⁰ If one looks at the requirements to be met to obtain mineral rights in Namibia, there is an indication that these rights are available to Namibians from a very tender age of 18 years.¹⁰¹ Therefore it is suggested that awareness campaigns will help Namibians to own and access mineral resources.

Nonetheless, it is submitted that the lack of access, ownership and unequal distribution of wealth in Namibia may be attributed to the natural resources curse. However, the natural resources curse should not be interpreted as an iron law but rather a strong recurrent tendency¹⁰² which can be avoided. The potential challenges to redistribution of wealth emanate from various factors such as corruption, the fear of economic downgrade and lack of essential legislation aimed at wealth redistribution. It has been observed that after the NEEEB was tabled before Parliament, there was a change in Namibia's economy resulting in a negative rating outlook. Therefore, the fear of economic downgrades may impact on the implementation of legislation that are aimed at uplifting lives of the previously disadvantaged people. Further, indigenisation laws and policies may not be relied upon fully to

⁹⁸ Hofbauer, J.A. 2009. "The Principle of Permanent Sovereignty over Natural Resources and Its Modern Implications" (Doctoral dissertation), p.29.

⁹⁹ Mobbs, P.M. 2004. "The Mineral Industry of Namibia", p.31.3, Available at minerals.usgs.gov/minerals/pubs/country/2004/wamyb04.pdf; last accessed 10 April 2018.

¹⁰⁰ No. 33 of 1992.

¹⁰¹ No. 33 of 1992, section 18 (1).

¹⁰² (*Ibid.*:3).

address challenges related to beneficiation and value addition in Namibia's mining sector given the challenges observed in other African countries such as Zimbabwe.

In order to achieve the objective of increasing ownership of mineral resources by the locals, businesses are encouraged to invest more on Corporate Social Responsibility. It is important to note that there is a difference between ownership and access, having access does not mean having ownership of something. It is argued that enough is not being done, in terms of corporate social responsibility, to support the NDP5 and Vision 2030 in enhancing technology transfer and skills development. It is therefore necessary that the Government regulates CSR to ensure investor compliance with the corporate citizenship principles in order to benefit citizens.

The Mining sector in Namibia contributed 12.2% to the Gross Domestic Product (GDP) in 2017, increasing from 12% in 2016.¹⁰³ However, Namibian citizens are not fully benefiting from the proceeds of mining. This may be attributed to the governance style and the laws that are in place.¹⁰⁴ Some mining companies have been undermining the beneficiation efforts of the Namibian Government by exporting the large quantities of raw natural resources.¹⁰⁵ This approach does not support the intended vision of nationalisation of mineral resources.

The concept of equitable distribution of the country's mineral resources may be achieved through the distributive justice system. The distributive justice philosophy requires proper implementation of legal frameworks that do not negatively affect the economy of the country. The regulatory frameworks may not be conducive for business operations, if not properly implemented. As an example, NEEEF does

¹⁰³ Chamber of mining, 2018. *Mining Industry Performance in 2017*. Available at www.chamberofmines.org.na/index.php/home-menu/mining-industry-performance-2015/; last accessed on 22 October 2018.

¹⁰⁴ Lange, G.M. 2003. "The contribution of minerals to sustainable economic development: *Mineral resource accounts in Namibia*" (No. 54). Directorate of Environmental Affairs, Ministry of Environment and Tourism, p.4.

¹⁰⁵ Kisting, D. 2017. "Kandjoze lays into diamond industry." *The Namibian Newspaper*, Thursday 30 March 2017, p.18.

not give clear indications on how it will be implemented in terms of the 25% meant for the previously disadvantaged group of people. Thus, it is important to re-evaluate the framework widely to ensure successful implementation once it becomes operational. Nevertheless, the introduction of NEEEB in 2017 resulted in a negative rating on the economy by FITCH. It is therefore submitted that such ratings, from monetary bodies, may render it difficult to implement NEEEF for fear of further downgrades of the country's economy.

It is further concluded that challenges to redistribution of wealth may be caused by the inability to successfully implement legislation such as NEEEF that are aimed at wealth redistribution like those available in Ghana and Sierra Leone where a proportion of its mining wealth is directly redistributed to the communities.¹⁰⁶ Further, it is recommended that the Government of Namibia must regulate CSR to ensure compliance with corporate citizenship principles. This must be done to ensure that Namibian citizens benefit directly from the country's mineral resources.¹⁰⁷

¹⁰⁶ Standing, A. & Hilson, G. 2013. "Distributing mining wealth to communities in Ghana, Addressing problems of elite capture and political corruption". *U4 Issue*, Volume 2013 (5) :vi.

¹⁰⁷ Hamann, R. 2003. "Mining companies' role in sustainable development: the 'why' and 'how' of corporate social responsibility from a business perspective". *Development Southern Africa* Volume 20, (2):.237-254 at 238.

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