

A CRITICAL EVALUATION OF THE EFFICACY OF THE WILLING-SELLER,
WILLING-BUYER CONCEPT IN THE NAMIBIA'S LAND REFORM POLICY
AND LEGAL FRAMEWORK

A THESIS SUBMITTED IN FULFILMENT

OF THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

OF THE UNIVERSITY OF NAMIBIA

BY

REBEKA HAIMBILI

201404083

APRIL 2024

SUPERVISOR: DR KENNETH FERDIE MUNDIA (UNIVERSITY OF NAMIBIA)

ABSTRACT

Namibia inherited a skewed land redistribution system in favour of a white minority, which necessitated the newly elected government to enact measures to redress this injustice. This study investigated the effectiveness of the willing seller, willing buyer principle and redistribution policies that were enacted to implement the land reform programme. The willing-seller, willing-buyer (WSWB) approach, together with the enacted legislative framework on land have failed dismally in ensuring the equitable distribution of land and in realising the transformative aims of the Constitution. The study analysed the legislative framework to deduce reasons why Namibia has failed to properly address the issue of landlessness 32 years after it attained independence. It also criticises the path of national reconciliation that the government adopted shortly after independence in that it deprived the country of an opportunity to holistically address the inequitable distribution of land. The study found that the major constraints to meaningful land reform are contained in the legislative framework on land, as well as the mixed economy order which undermine the government's efforts to redistribute land. The study also found that Namibia's land reform programme does not comply with widely accepted requirements of a successful land reform programme, such as rapidness in implementation, and consensus on the political legitimacy and appropriateness of the mode of land acquisition, which in this case, is the willing-seller, willing-buyer policy. Drawing on the experiences of land reforms in South Africa and Zimbabwe this study also found that there is a need to rethink land reform in Namibia, by infusing restorative justice in the land debate, by combining it with other policies that can enhance productivity in agriculture, as well as by easing the burden on the state as the only party responsible for managing and implementing the process of land reform.

Keywords: Land reform, national reconciliation, willing-seller, willing buyer policy, transformation, land redistribution

List of publication(s)/conference(s) proceedings

**The Intricacies of Land Reform in Namibia: An Overview of the Land Question
in Namibia 33 years after Independence**

TABLE OF CONTENTS

LIST OF ABBREVIATIONS AND/OR ACRONYMS	vii
ACKNOWLEDGEMENTS	viii
Dedication	ix
DECLARATION	x
CHAPTER ONE	1
NAMIBIA’S LAND REFORM POLICY AND LEGISLATIVE FRAMEWORK: A CRITICAL EVALUATION	1
1.1. Background	1
1.2. Statement of the problem	2
1.3. Research objectives	4
1.4. Hypothesis/Basic assumptions	5
1.5. Significance of the study	5
1.6. Organisation of the study	6
1.7. Research methodology	8
CHAPTER TWO	9
LAND REFORM POLICY AND LEGAL FRAMEWORK IN NAMIBIA: THE BASIC CONCEPTS AND POLICIES UNDERLYING LAND REFORM IN NAMIBIA	9
2.1. Introduction	9
2.1.1. The impetus behind land reform	10
2.1.2. The 1982 Constitutional Principles	11
2.2. The basic concepts and policies underlying land reform in Namibia	13
2.2.1. Introduction	13
2.2.2. The Constitution	15
2.2.3. The first National Conference on Land and the land question	24
2.3. The Land Reform Programme	26
2.3.1. Redistributive land reform	26
2.3.2. Objectives of the Agricultural Commercial Land Reform Act (ACLRA)	30
2.3.3. To whom should the land be distributed?	30
2.3.4. The preferent right of the state to purchase Agricultural land	32
2.3.5. Land expropriation in the public’s interest	34
2.3.6. Restriction on acquisition of agricultural land by foreign nationals	35
2.4. The Resettlement Policy and the Resettlement Programme	36
2.4.1. Tenure rights in respect of redistributed land	37
2.4.2. The Affirmative Action Loan Scheme (AALS)	38
2.4.3. The National Land Policy of Namibia (1998)	41
2.5. The Communal Land Reform Act	42
2.5.1. What is the importance of the Communal Land Reform Act?	43

2.6. The Second National Conference on Land (2018)	45
2.7. Conclusion	54
CHAPTER THREE	55
THE THEORY AND PRACTICE OF THE WILLING SELLER WILLING BUYER POLICY	55
3.1 Introduction	55
3.2. Definition and global overview of the concept “land reform”.....	55
3.3. Theoretical framework.....	64
3.4. Literature review	65
3.4.1. The genesis of the willing-seller, willing-buyer (WSWB) approach	65
3.4.2. Opponent views of the WSWB approach	68
3.4.3. Proponent views of the policy	70
3.4.4. The willing-seller willing-buyer approach in Namibia	75
3.5. Conclusion	80
CHAPTER FOUR	81
LAND REFORM IN SOUTH AFRICA AND ZIMBABWE: A COMPARATIVE EVALUATION OF POLICIES AND LEGISLATIVE FRAMEWORKS	81
4.1. Introduction	81
PART A: LAND REFORM IN SOUTH AFRICA	82
4.2. A brief historical background of the land question.....	82
4.2.1. Motivations for land reform at independence.....	85
4.2.2. The negotiated terms of freedom: The compromise to protect property rights 87	87
4.3. The legal framework for land reform.....	88
4.4. Components of the Land Reform Programme in South Africa	90
4.4.1. Redistribution	90
(i) The Reconstruction and Development Programme (RDP)	90
4.4.2. Tenure Reform.....	92
4.4.3. Restitution	95
4.4.4. The White Paper on Land Policy, 1997	97
4.5. Approach to redistribution	98
4.5.1. The rationale for the market-based approach	99
4.5.2. What went wrong?.....	103
4.4.3. What should be done?	105
PART B: LAND REFORM IN ZIMBABWE	107
4.6. Introduction	107
4.6.1. The historical basis of land reform: Tracing the roots of colonial dispossession	

4.7. The first phase of land reform in Zimbabwe: 1980-1990.....	108
4.7.1. Redistribution	113
4.7.2. Schemes of resettlement	114
4.8. Land reform from 1990 to 2000: A shift in the land reform programme	115
4.9. Land reform after 2000: The Fast Track Land Reform Programme	119
4.9.1. The genesis of the fast-track land reform process	120
4.10. Land reform from 2014 onwards	124
4.11. Conclusion	126
CHAPTER FIVE	129
DISCUSSION AND ANALYSIS	129
5. Introduction	129
SECTION A: PART ONE	129
5.1. Evaluation of land reform in Zimbabwe, South Africa, and Namibia	129
5.1.1. Components of the programmes	131
5.1.2. The WSWB Approach.....	133
5.1.3. Preferent right for the state to acquire commercial agricultural land	136
5.1.4. Role of the state in the land reform programme	137
5.1.5. Foreign ownership of agricultural land	138
5.1.6. Compensation.....	139
5.1.7. Conclusion	141
SECTION B.....	142
5.2. To what extent does the legislative framework and policies contribute to the slow pace of land reform?.....	142
5.2.1. What are the characteristics of a successful land reform program?	143
5.2.2. Challenges of land reform in capitalistic countries	144
5.3. Transformative goals in the constitution	148
5.3.1. What makes a land policy transformative?	152
5.3.2. Is transformation possible in the Namibian context?.....	157
5.4. Conclusion	158
CHAPTER SIX	161
CONCLUSIONS AND RECOMMENDATIONS	161
6.1. Introduction	161
6.2. Summary of chapters	161
6.3. Conclusions.....	162
6.3. Relevance of study	165
6.4. Recommendations.....	165
6.5. Conclusion	169
BIBLIOGRAPHY	170

LIST OF ABBREVIATIONS AND/OR ACRONYMS

ACLRA	-	Agricultural Commercial Land Reform Act
AALS	-	Affirmative Action Loan Scheme
CLRA	-	Communal Land Reform Act
DLA	-	Department of Land Affairs
NRP	-	National Resettlement Policy
PTO	-	Permission to Occupy
FTLRP	-	Fast Track Land Reform Programme
RDP	-	Reconstruction and Development Program
WSWB	-	Willing seller, willing buyer
CP	-	Constitutional Principles

ACKNOWLEDGEMENTS

I would like to thank the Lord God for granting me the grace to pursue this degree. I would also like to express my gratitude to my supervisor, Dr Kenneth Ferdie Mundia, who rendered invaluable insights and direction during this study. His persistence in excellence helped shape this study, thereby helping me to write on a topic I am passionate about.

Many thanks to my sister Dr Emilia Inman and her husband, Paul Inman, for their consistent moral support throughout my studies.

I would also like to express my heartfelt gratitude to my mother, Petrina Shuumbwa for instilling in me the importance of education and for being proud of all my achievements.

Dedication

I dedicate this to all my loved ones who have supported my decision to embark on this journey and to my late father who ascended to the terrestrial jurisdiction too early.

DECLARATION

I, Rebeka Haimbili, hereby declare that this study is my own work and is a true reflection of my research, and that this work, or any part thereof has not been submitted for a degree at any other institution.

No part of this thesis may be reproduced, stored in any retrieval system, or transmitted in any form, or by means (e.g., electronic, mechanical, photocopying, recording or otherwise) without the prior permission of the author, or the University of Namibia in that behalf.

I, Rebeka Haimbili, grant the University of Namibia the right to reproduce this thesis in whole or in part, in any manner or format, which the University may deem fit.

Name of Student

Signature

Date

CHAPTER ONE

NAMIBIA'S LAND REFORM POLICY AND LEGISLATIVE FRAMEWORK: A CRITICAL EVALUATION

1.1. Background

At independence, Namibia inherited a skewed land distribution system.¹ This status quo placed a constitutional duty and mandate on the newly elected government to address the inequitable distribution of land.² As such, the government organised a National Land Conference in 1991 where it adopted the policy of national reconciliation. This policy is premised on the view that resurrecting the past would not serve any constructive purpose for the newly independent state, and as such, seizing land from the whites who acquired land under both German and South African rule as a way of rectifying specific historical wrongs was not to be attempted.³ Instead, the conference recommended a policy aimed at 'redressing Namibia's historical iniquitous land ownership through national reconciliation in accordance with the provisions of Article 16 of the Namibian Constitution.'⁴ Whereas the policy is commended for enabling the newly independent state to achieve considerable political stability and a

¹Ancestral Land Rights Commission, 'Report of the Commission of Inquiry into Claims of Ancestral Land Rights and Restitution' (LAC 2020) 96. See also John Nakuta, 'Ancestral Land Claims: Why Bygones Cannot be Bygones' in Willem Odendaal and Wolfgang Werner (eds) *Neither Here nor There: Indignity, Marginalization and Land Rights in Post-independence Namibia* (LAC 2020) 146.

² Samuel Kwesi Amoo, 'Land Reform in Namibia: Beyond 2018' in Willem Odendaal and Wolfgang Werner (eds) *Neither Here nor There: Indignity, Marginalization and Land Rights in Post-independence Namibia* (LAC 2020) 13.

³ Lauren Dobell, 'Silence in Context: Truth and or Reconciliation in Namibia (Review Article)' 1997 23(2) *Journal of Southern African Studies* 373; *Kambazembi Guest Farm CC T/A Waterberg Wilderness v The Minister of Land Reform and 5 Others* (A197/2015) [2016] NAHCMD 366 (17 November 2016).

⁴Chris Alden and Ward Anseeuw, 'The Gathering Storm? Namibia and the Land Question' (2nd International Conference on Wars and Violent Conflicts in Africa, 8 July 2016) 2. <<https://repositorio.iscte-iul.pt/bitstream/10071/11693/1/Gathering%20Storm.pdf>> accessed 16 September 2021. See also Report of the Commission of Inquiry into Claims of Ancestral Land Rights and Restitution (n 1) 96.

peaceful democracy, scholars criticise it for depriving the newly elected government of an opportunity to holistically address the land issue.⁵ Most importantly, the willing seller, willing buyer approach adopted to spearhead the redistribution of land in line with the policy of national reconciliation has brought about a slow pace of land redistribution in Namibia and it has failed to significantly alter the patterns of land ownership.⁶ To this end, white Namibians continue to enjoy one of the world's highest standards of living while most Namibians remain in abject poverty.⁷ This has made Namibia one of the most unequal societies in the world⁸ and this inequality is deeply rooted in land ownership.⁹

1.2. Statement of the problem

The effect of the government's adoption of the national reconciliation policy is that it legitimated the inequitable access to land inherited at independence, to the effect that the white privileged groups 'retained most of their former economic and social spoils'.¹⁰ The black majority, on the other hand, has remained landless, and their

5 Guillermo Delgado, 'A Short Socio-Spatial History of Namibia' (Working Paper No. (10)) (Integrated Land Management Institute Namibia University of Science and Technology 2018) 13.

6 Ben Fuller and George Eiseb, 'The Commercial Farm Market in Namibia: Evidence from the First Eleven Years' (2002) Briefing Paper No. 15 (IPPR) 1.

7 Annalena Oppel, 'Exploring economic support networks amidst racial inequality in Namibia' (2021) WIDER Working Paper 2021/102 (UNU-WIDER, Helsinki) 2; Bianca Braganza, 'The Illusion of Redress and Redistribution: South Africa, Namibia and Black Economic Empowerment' 2020 8(1) *McGill* 18.

8 Luregn Lenggenhager and Romie Vonkie Nghitevelekwa, 'Why Namibians Want Fresh Impetus Behind Land Reform' (2018) Quartz Africa. <[Why Namibians want fresh impetus behind land reform \(theconversation.com\)](#)> accessed 20 September 2021; Namibia Statistics Agency, Namibia Population and Housing Census Main Report 2016 (Windhoek: Namibia Statistics Agency, 2017); Bianca Braganza, 'The Illusion of Redress and Redistribution: South Africa, Namibia and Black Economic Empowerment' 2020 8(1) *McGill* 8.

9 Bernard Swartbooi, 'On the land Question' in Judith Hackmack and Karina Theurer (eds) *Colonial Repercussions: Namibia 115 Years after the Genocide of the Ovaherero and Nama* (European Center for Constitutional and Human Rights 2019) 15.

Kambazembi Guest Farm CC T/A Waterberg Wilderness v The Minister of Land Reform and 5 Others (A197/2015) [2016] NAHCMD 366 (17 November 2016).

¹⁰ Phaniel Kaapama, Lesley Blaauw, Bernie Zaaruka and Esau Kaukunga, *Consolidating Democratic Governance in Southern Africa: Namibia* (EISA 2007) 4.

economic status did not immediately change as most expected would happen after independence.¹¹ Arguably, this pattern of national reconciliation is embedded in the prevailing capitalist order which is a stark departure from the socialist movements that led to the independence of most African countries, including Namibia. It is further endorsed in the mixed economy order which Namibia has adopted in terms of Article 98 of the Constitution. This has had a direct impact on the transformative aims of the constitution, which is to create a society based on equality and dignity for all. This state of affairs prompted the government to adopt policies and enact legislation to address the land issue.¹² For example, the Agricultural Commercial Land Reform Act 6 of 1995 (ACLRA) was enacted, through which the government could acquire commercial agricultural land through the ‘willing seller, willing buyer’ (WSWB) approach.¹³ The National Land Policy, the National Resettlement Policy, and the Communal Land Reform Act were also enacted to spearhead the land reform process. A second national land conference was convened in 2018 to review and deliberate on land related matters, to adopt measures to accelerate land reform, and to propose contemporary reforms in numerous areas of land reform.¹⁴ The Second National Land

¹¹Henning Melber, ‘The Battles over Land in Namibia’ (19 December 2018) <[The battles over land in Namibia \(africasacountry.com\)](https://www.africasacountry.com)> accessed 16 May 2022. Casey K Kelso, ‘National Reconciliation and the Land Question in Namibia’ (1992) *Institute of Current World Affairs* 11. This state of affairs is contrary to what SWAPO promised during the election campaigns, i.e., the nationalisation of land and a state that will direct massive changes in the economy

¹²Amoo, ‘Land Reform in Namibia: Beyond 2018’ (n 2) 13.

¹³Section 14 states: the Minister may, out of moneys appropriated by Parliament for the purpose, acquire, in accordance with the provisions of this Act, agricultural land in order to make such land available for agricultural purposes to Namibian citizens who do not own or otherwise have the use of agricultural land or adequate agricultural land, and foremost to those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices. Section (20) “... where the Minister, after consultation with the Commission, decides to acquire any property for the purposes of section 14(1) and - (a) the Minister and the owner of such property are unable to negotiate the sale of such property by mutual agreement; or (b) the whereabouts of the owner of such property cannot be ascertained after diligent inquiry, the Minister may, subject to the payment of compensation in accordance with the provisions of this Act, expropriate such property for such purpose.”

¹⁴ The objectives of the Conference was to deliberate on inter alia, Ancestral land claims for restitution, The willing seller -willing buyer principle for agricultural land acquisition, National Resettlement Programme and Resettlement criteria, Expropriation of agricultural land in the public interest with just compensation, Urban land reform programmes, Illegal fencing of communal, Dual grazing, The

Conference was necessitated by the need to find realistic solutions to the challenges of land reform and to adopt measures that shall enhance land reform programme in Namibia for the benefit of its citizens.¹⁵

However, 33 years after independence, the land reform programme approach has failed to deliver as intended and the land issue persists.¹⁶ The failure of the land reform programme can be attributed to a number of factors which hamper land reform, such as the general difficulty in implementing a programme of compulsory expropriation of land without compensation in a capitalistic country, the inherent constraints in the legislative framework, and inter alia, budgetary constraints. The government's failure to effectively carry out land reform three decades after independence warrants an evaluation and analysis of the effectiveness of Namibia's land policies and the legislative framework on land as well as factors that may be considered to undermine land reform. It also raises the question as to whether the government is expected to retain a land reform programme that is not bringing about any significant improvement in the socioeconomic status of its citizens. To this end, there is a need to rethink land reform in Namibia.

1.3. Research objectives

The main objectives of this study are to:

removal of the veterinary cordon fence. See in this regard Government of the Republic of Namibia, 'Concept Paper: Second National Land Conference' (GRN 2018) 6.

¹⁵ *ibid.*

¹⁶ Henning Melber 'How the First Redistribution Attempt Failed' (05 August 2020) Development Cooperation E-Paper No. 8. 2020, 08/2020 <[The policy proposed by Namibia's first National Land Reform Conference in the early 1990s never took off | D+C - Development + Cooperation \(dandc.eu\)](#)> accessed 15 September 2021.

- a. evaluate the effectiveness of the land reform policies and legislative framework on land; and
- b. Investigate the extent to which the WSWB approach is to blame for the slow pace of land reform.

1.4.Hypothesis/Basic assumptions

Namibia's land policies and legislative framework on land are ineffective and inadequate to realise the equitable distribution of land and thus contribute to the transformative aims of the Constitution. The willing-seller willing-buyer policy, together with Namibia's legislative framework on land, has failed dismally in ensuring the equitable distribution of land. The land reform policy does not fully recognise the specificities and / or peculiarities of the dispossession of land among the various communities. To this end, there is a need to rethink land reform in Namibia and to confront factors hampering its progress.

1.5.Significance of the study

This study is significant in that it evaluated the effectiveness of the land policies and attendant legislative framework on land, and investigated the extent to which the WSWB approach is to blame for the slow pace of land reform. The study identified the promises envisaged in the Preamble of the Namibian Constitution as the guiding light to assess the effectiveness of policies adopted by the government to address past injustices, particularly the skewed distribution of land. This study is beneficial to policymakers as it identified underlying issues in our policies, that when addressed, can improve the land reform programme.

1.6.Organisation of the study

The study consists of six chapters.

Chapter one: The Introductory Chapter

In this chapter, I introduce the study, its objectives, and its significance. I also identify the problem justifying the study and outline the study's main assumptions. The crux of this chapter is to vividly paint the picture of the background of the land question in Namibia, as inherited at independence, and to sketch the policies implemented to address the inequitable distribution of land.

Chapter two: Land reform policy and legal framework in Namibia: The basic concepts and policies underlying land reform in Namibia

In this chapter, I evaluate Namibia's land reform policies and the legislative framework. To this end, I concentrate on the land reform programme with its components and accompanying legislative framework, to wit, the National Land Policy, the Agricultural Commercial Land Reform Act, the Communal Land Reform Act, and the Resolutions from the two National Land Conferences.

Chapter three: The theory and practice of the Willing Seller, Willing Buyer Approach

This chapter presents an overview of the World Bank-inspired market-led approach to land redistribution, i.e., the willing-seller, willing-buyer. In this regard, I review legal and historical literature to evaluate the plausibility of this market-led approach as an instrument for redressing the skewed distribution of land.

Chapter four: Land reform in South Africa and Zimbabwe: a comparative evaluation of policies and legislative frameworks

In this chapter, I provide a comparative analysis of land reform in South Africa and Zimbabwe. This is because both Zimbabwe and South Africa share comparably similar colonial histories with Namibia, and in both countries similar land reform measures have been adopted to address the land issue. The purpose of the comparative exercise is to investigate how the land issue has been approached in those two jurisdictions, in contrast with Namibia and to extract lessons which Namibia can emulate, as well as pitfalls to avoid.

Chapter five: Discussion and analysis

In this chapter, I discuss and analyse the land reform programmes in South Africa and Zimbabwe against the Namibian land reform programme. I also discuss and analyse findings from the preceding chapters, answering questions such as whether successful land reform is possible; whether land reform can be utilised to realise the transformative aims of the constitution, how factors undermining land reform can be addressed and what lessons Namibia can learn from the jurisdictions discussed.

Chapter six: Conclusion and recommendations

This chapter concludes the study and provides recommendations to policymakers concerning the laws that need reforming and the further steps that must be considered for the government to succeed in its land reform programme. This is important as this will serve as the author's contribution to the jurisprudence on land reform in Namibia.

1.7. Research methodology

Doctrinal research method involves the search of unknown facts by reviewing legal materials to conclude on matters connected to legal systems, policies, laws, and pronouncements by the courts without necessarily relying on primary study from the field.¹⁷ The study adopted a doctrinal research strategy, by conducting a critical, qualitative analysis of various legal materials to answer the question of whether the legislative framework on land is to blame for the slow pace of land reform. It begins with a ‘doctrinal’ or ‘black letter law’ methodology, to inquire about what the law is on land reform. This means that most of the research is based on the analysis of primary and secondary sources, being the legislative framework and policies on land, and tools or approaches of land redistribution such as the WSWB approach to meet the research objectives. The study also adopted a comparative analysis of land reform measures in three other countries, namely, South Africa, Zimbabwe, due to the similar history and colonial experiences these countries share, the similar legal foundations of property law, as well as the similarities in the land reform programmes embarked on in these countries. The purpose of this comparative exercise is to highlight the cultural and social character of law on land in those countries and how it acts in different settings. Once I have set a clear and comprehensive system for assessment in place, which include similarities in the Bill of Rights, colonial experiences, and the manner in which land reform measures were implemented, I provide recommendations based on the findings. In essence, then, the thesis is firmly doctrinal in its methodology as it entails a critical and qualitative analysis of legal materials that support the hypothesis.

¹⁷Sanne Taekema and Wibren van der Burg, ‘Legal Philosophy as an Enrichment of Doctrinal Research – Part II: The Purposes of Including Legal Philosophy’ 2022 *Law and Method* 2; Gareth Davies, ‘The Relationship between Empirical Legal Studies and Doctrinal Legal Research’ (2020) (2) *Erasmus Law Review* 9; Khushal Vibhute and Filipos Aynalem, *Legal Research Methods: Teaching Material* (Justice and Legal System Research Institute 2009) 71.

CHAPTER TWO

LAND REFORM POLICY AND LEGAL FRAMEWORK IN NAMIBIA: THE BASIC CONCEPTS AND POLICIES UNDERLYING LAND REFORM IN NAMIBIA

2.1. Introduction

In chapter one I provided a brief background of this study, including the reason why the land question remains a significant issue more than 33 years after independence. To this end, I provided the hypothesis justifying this study and an outline of the main arguments of this study. This chapter addresses the legislative framework adopted to regulate the land issue in Namibia. I argue in this chapter that land reform goes beyond legislation and policies and for as long as we as a country does not address the underlying roots giving rise to the problem, we cannot resolve the land dilemma. I conclude by submitting that Namibia is where she is today because of the compromise accepted shortly before independence by acceding to the 1982 Constitutional Principles as well as the decision to follow the one-sided path of reconciliation which is in line with her economic order.

As already alluded to, Namibia inherited a skewed land tenure system which necessitated the government to take appropriate steps to redress this injustice. The government then embarked on a legal regime and land reform policies premised upon underpinnings such as the concepts of sovereignty and the right to property which emanate from international law.¹⁸ This theoretical basis is discussed below. The

¹⁸ Samuel Kwesi Amoo, 'Land Reform in Namibia: Beyond 2018' in Willem Odendaal and Wolfgang Werner (eds) *Neither Here nor There: Indignity, Marginalization and Land Rights in Post-independence Namibia* (LAC Windhoek 2020) 13.

protection of property rights then, as found in the Namibian constitution, has its basis in international law, which guarantees the protection of the right to own property. To this end, the need, and purposes of land reform in Namibia are clear: to redress past injustices regarding the right to own land, that is, to redress the skewed distribution of land to promote inclusive agriculture for economic growth and to promote land inequality and transitional justice.¹⁹

2.1.1. The impetus behind land reform

Amoo argues that land reform features among the most onerous processes allowed by the law.²⁰ The reason for this is that it needs a radical transformation of property rights in poverty-stricken and agrarian societies, under which Namibia falls under, via peaceful, legal means.²¹ In other words, land reform is a difficult process to carry out because it requires a balancing exercise between the need to redress past injustices and the need to adhere to the internationally recognised right to own private property. Most people who were dispossessed of their land cannot understand why the law does not allow for the swift restitution of lost lands, particularly because one of the main motivations of the liberation struggle was to get access to land.²² They see the law as protecting the interests of the white minority, who acquired the land through illegal means (i.e. forced removal of the native people, illegal contracts; and discriminatory laws and practices adopted by the colonial governments). However, as a democratic

¹⁹ Selma Lendelvo, Martin Shapi and Clever Mapaure, ‘The Economic Viability of Emerging Commercial Farmers under the Resettlement Programme’ in Willem Odendaal and Wolfgang Werner (eds), *Neither Here nor There: Indigeneity, Marginalization and Land Rights in Post-Independent Namibia* (Legal Assistance Centre 2020) 36.

²⁰ Amoo (n 18) 13.

²¹ *ibid* 13.

²² Nico J Horn, ‘The Forerunners of the Namibian Constitution’ in Anton Bösl, Nico Horn and André du Pisani (eds) *Constitutional Democracy in Namibia: A Critical Analysis After Two Decades* (Macmillan Education Namibia 2010) 63.

state, Namibia must pay due regard to democratic principles such as the ones enunciated in the 1982 Constitutional principles instead of taking a radical approach to the land issue. And this is what triumphs in the land reform process.

It is also important to realise that the equitable distribution of land does not automatically bring about socio and economic transformation. Whereas the distribution of land constitute an important part of land reform, it is not in itself enough to change the socio-economic status of beneficiaries. Other factors, such as the provision of services and support programmes, are also necessary to complement the redistribution of land and to achieve the objectives of land reform.

It is argued that one of the main aims of land reform is to transform ‘the institutional structure of the relations between humans and land by intervening in the dominant ownership, control and use of land.’²³ Is the law then able to change the skewed land tenure system inherited at independence without derogating from international standards that protect the right to own property? Is the Namibian legislative framework able to bring about change in the status quo inherited at independence?

2.1.2. The 1982 Constitutional Principles

The skewed land distribution in Namibia is a direct result of colonialism and apartheid, which result was confirmed in the government’s acceptance of the 1982 Constitutional Principles (CP) drafted by the Western Contact Group (WCG) comprising Canada,

²³ Hossein Azadi and Eric Vanhaute, ‘Mutual Effects of Land Distribution and Economic Development: Evidence from Asia, Africa, and Latin America’ (2019) 8(96) *Land Journal* 1.

France, West Germany, the United Kingdom, and the United States of America (USA). These principles represent an attempt by the WCG to ease the fears of the white minority as well as internal parties, who were afraid that they would be deprived of property they have come to regard as theirs for years.²⁴ Horn argues that these constitutional principles highly and decisively influenced the content of the Namibian constitution, including the right to own private property.²⁵ SWAPO initially rejected these CPs, not only because it was sceptical of the Western powers, but also because SWAPO did not appreciate former colonial powers playing such a crucial role in the future of Namibia.²⁶ However, the CP's were eventually accepted, and it became the basis upon which the constitution was built.²⁷

Critics of the property clause accuse SWAPO of over-compromising by accepting the CP, which has essentially prevented the government to repossess that which was stolen through colonialism. However, Frans Kapofi, the Minister of Defence, dismissed such claims and maintained that compromising is a necessary aspect of negotiations, as long as it is not treacherous. Moreover, he maintained that it was necessary to bring an end to the war, which was not benefiting any Namibians.²⁸

The 1982 CP contained a clause which guaranteed the protection of private property, which once accepted and adopted as part of the Namibian Constitution, left a lot of

²⁴ Horn, 'Forerunners of the Namibian Constitution' (n 22) 63.

²⁵ *ibid* 65.

²⁶ *ibid*.

²⁷ *ibid*.

²⁸ Edward Mumbuu, 'Kapofi Brushes Off 'Sell-out' Tag' *New Era* (Windhoek, 28 September 2022) <<https://neweralive.na/posts/kapofi-brushes-off-sell-out-tag>> accessed 28 September 2022.

Namibians feeling betrayed by the new government²⁹. This is because the need to restore land that was seized by the colonial authorities was one of the main motivations behind the liberation struggle, apart from attaining political sovereignty. As Horn argues, the government has often maintained that the liberation struggle was about land. For this reason, Horn argues that ‘actual reconciliation can only take place if it goes hand in hand with an aggressive land reform programme that will assist the government programme of poverty alleviation.’³⁰

Whilst the black Namibians were disappointed in the protection of private property by adapting the CP the white farmers were ecstatic. Horn argues in this respect that white farmers regard the CP as the eventual settlement between SWAPO and South Africa that private property will be protected. As such, they consider the entrenchment of property rights in Article 16 of the Namibian Constitution as a settlement agreement between themselves and the new SWAPO government at independence.³¹

2.2. The basic concepts and policies underlying land reform in Namibia

2.2.1. Introduction

According to Watson, the reason why land reform has remained such a challenging issue in Namibia for a long time in Namibia is due to:³²

sometimes complex competing reasons and other interests that continually re-emerge in the literature and law as “land reform’ take place under the not-so-

²⁹

³⁰ Horn (n 22) 67.

³¹ *ibid.*

³² Peter Watson, *The Seditious State: How to Shake the Poor from the Communal Land Safety Net* (Land, Environment & Development Project, Legal Assistance 2021) 2.

always-watchful eye of the constitutional rule of law, where transitional justice struggles in an uneven playing field pitted with the stars of a repeating history replete with elitist interests often dominating the playing rules in the age-old game of powers and patronage, where the fractured state is a vehicle for personal interests.

Watson argues that it is difficult for anybody today to argue that prior colonial state conduct was justifiable, either from a human rights perspective or from a natural justice perspective.³³ This is one reason why land reform was needed. To this end, shortly after independence, the government has, through the Ministry of Land Reform, facilitated the development and implementation of land policies and legislation to guide the implementation of the Land Reform Programmes.³⁴

The first National Land Conference in 1991 was the first step in the execution of the country's vision for land reform. This vision was to redress past historical injustices perpetrated by the successive colonial governments in a manner which fosters unity, stability and nation building. This was followed by the first legislation on Land, the Agricultural Commercial Land Reform Act, No.6 of 1995, the White paper on Resettlement of 1997; the National Land Policy of 1998; the Communal Land Reform Act No. 5 of 2002; and lastly, and recently, the Second National Land Conference in 2018. Accordingly, this section discusses the land reform programme and its

³³ *ibid.*

³⁴ Government of Namibia, 'Concept Paper: Second National Land Conference' (2018) <http://dna.nust.na/landconference/submissions_2018/concept_paper_second_national_land_conference_2018.pdf> accessed 15 March 2021

components, including the legislative framework and policies outlined above, which have been enacted to address the land issue to date.

2.2.2. The Constitution

Article 16 of the Namibian Constitution provides for the protection of property rights.

Article 16 reads as follows:

(1) 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.

(2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.

Article 16(1) of the Namibia Constitution entitles all persons the right to acquire, own and dispose of all forms of property in any part of Namibia.³⁵ According to Parker AJ

³⁵ See *Günther Kessl v Ministry of Lands and Resettlement and 2 others*: Case no. 27/2006 and 266/2006 at [36] where an analysis of the essence of Article 16 was outlined as follows: “The format of Article 16 is not unique. It consists of a combination of a positive guarantee and a negative guarantee, and resembles the property clause in the **German Basic Law 1949** and in the interim South African Constitution of 1993. The second part of the clause is a more or less traditional, negative guarantee that ensues that expropriations only takes place in the public interest and against compensation, and as such it does not create any new or unique problems. However, the first part of the clause is formulated positively, and that does create certain interpretation problems.

The first part of the clause establishes a positive guarantee of the right to acquire, own and dispose of property. It includes the following elements: (a) The guarantee is provided for the benefit of all persons, individually or in association with others, provided that Parliament may regulate or prohibit the right to

in the case of *Town Council of Rundu v Dinyando*³⁶ rights enunciated in Article 16 of the Namibian constitution:

... includes the applicant's entitlement to possess and keep the land, (b) use, and benefit from the land, (c) encumber the land in favour of another person, e.g. by way of a lease, (d) dispose of the land in favour of another person through sale, for example, and (e) vindicate the land, that is, claim the land from another person who occupies the land unlawfully.

However, foreign nationals cannot acquire agricultural land in Namibia. This in accordance with the Agricultural Commercial Land Reform Act (ACLRA).³⁷ This

acquire property by noncitizens.(b) The guarantee includes all forms of property, movable and immovable. (c) The guarantee explicitly includes the right to acquire, own and dispose of property and to bequeath it to heirs or legatees, subject to certain parliamentary powers to regulate the acquisition of property by non-citizens. In *Cultura 2000 and Another v Government of the Republic of Namibia and Others* the Namibia High Court confirmed that a guarantee in article 16 (1) applies to all persons, including both natural and juristic persons, such as companies; and also that the guarantee refers to both tangible and intangible property.

The first part of the guarantee in article 16 (1) must probably, given the positive phraseology and content, be seen as a constitutional duty placed upon the state to uphold the institutional framework within which it is possible for people to acquire, own and dispose of property as meant in the article – in other words, what is referred to in German law as an institutional guarantee. Briefly, such an institutional guarantee means that the state is not obliged to provide property, but to uphold (not to abolish) the institutional conditions that enable citizens to exercise this right as set out in the provision. ...On the contrary, the state can expropriate and regulate the use of property, provided the general framework within which the rights can be exercised is not abrogated.”

³⁶ *Town Council of Rundu v Dinyando* (A 417-2013) [2015] NAHCMD 237 (8 October 2015).

³⁷ See section 58(1) of the Agricultural Commercial Land Reform Act which reads as follows: (1) Notwithstanding anything to the contrary in any other law contained, but subject to subsection (2) and section 62, no foreign national shall, after the date of commencement of this Part, without the prior written consent of the Minister, be competent(a) to acquire agricultural land through the registration of transfer of ownership in the deeds registry; or (b) to enter into an agreement with any other person whereby any right to the occupation or possession of agricultural land or a portion of such land is conferred upon the foreign national (i) for a period exceeding 10 years; or (ii) for an indefinite period or for a fixed period of less than 10 years, but which is renewable from time to time, and without it being a condition of such agreement that the right of occupation or possession of the land concerned shall not exceed a period of 10 years in total.

See also *Wohlfart v Bergh* (HC-MD-CIV-MOT-GEN-2019/00004 [2019] NAHCMD 264 (28 May 2021) where the court stated that ‘Section 58(1)(a) in turn prohibits a foreign national from acquiring agricultural land in Namibia, without the prior written consent of the Minister of Lands, Resettlement and Rehabilitation.’

means that the phrase ‘all persons’ does not literally mean ‘everyone’ as not everyone can acquire agricultural land in Namibia.

The theoretical basis of Article 16 is based on the state’s sovereign concept of eminent domain and police powers.³⁸ According to Seervai,³⁹ police power is defined as “the inherent power of a government to exercise reasonable control over person and property within its jurisdiction in the interest of general security, health, safety, morals and welfare except where legally prohibited (as by constitutional provision)”, whereas eminent domain relates to ‘the power of the sovereign to take property for public use without the owner’s consent upon making just compensation’.⁴⁰

Article 16(1) (which entails the willing seller, willing buyer approach), confirm the concept of police powers, while Article 16(2) confirms the principle of eminent domain.⁴¹ The view that Article 16 is inspired by the state’s police powers and its

³⁸ *Namibia Grape Growers and Exporters Association and Others v Ministry of Mines and Energy and Others* (SA 14 of 2002) [2004] NASC 6 (25 November 2004).

³⁹ Hormasji M Seervai *Constitutional Law of India: A Critical Commentary* 3rd ed Vol II paras 14.24 as cited in *Namibia Grape Growers and Exporters Association and Others v Ministry of Mines and Energy and Others* (SA 14 of 2002) [2004] NASC 6 (25 November 2004) 28.

⁴⁰ Seervai *Constitutional Law of India: A Critical Commentary* 3rd ed Vol II paras 14.24 as cited in *Namibia Grape Growers and Exporters Association and Others v Ministry of Mines and Energy and Others* 28. See also Usha Ramanathan, ‘A Word on Eminent Domain’ in Lyla Mehta (ed) *Displaced by Development – Confronting Marginalisation and Gender Injustice* (New Delhi: Sage, 2009) 133; Ratheesh Kumar, ‘Land Acquisition and Eminent Domain’ (2018) 7(11) *International Journal of Science and Research (IJSR)* 57.

⁴¹ Article 16(2) empowers the parliament to enact laws that would authorise the state to expropriate property in the public interest, subject to payment of just compensation. This right of the state to compulsorily acquire private property in the public interest is enunciated in the ACLRA under section 20. In essence, then, Article 16(2) places restriction on the right to own private property rights in Namibia. See also *Katima Mulilo Town Council v Maswahu* (I 575/2014) [2017] NAHCMD 188 (14 July 2017) and *Kashela v Katima Mulilo Town Council & 7 others* (I 1157/2012) [2017] NAHCMD 49 (01 March 2017). In the case of *Katima Mulilo Town Council v Maswahu* the court reiterated that Article 16(2) safeguards ownership rights. To this end, Bassingthwaighe AJ stated that ‘the protection afforded in article 16(2) is against expropriation without just compensation. Expropriation takes place when someone is deprived of ownership of his property.’ Compensation is claimed against the state, and this includes compensation in respect of the expropriation of communal land.

power of eminent domain was confirmed in *Namibia Grape Growers and Exporters Association and Others v Ministry of Mines and Energy and Others* where the court stated:

It seems to me that in so far as a comparison can be drawn this distinction between the State's police power and its power of eminent domain is to a certain extent inspirational for Art. 16 of our Constitution and that Art. 16(1) can be compared to the State's police powers and Art. 16(2) its powers of eminent domain.

This view was further confirmed in the matter of *Günther Kessl v Ministry of Lands and Resettlement and 2 Others* where the court stated that: 'The approach to be followed in interpreting provisions of the Namibian Constitution providing for the infringement of fundamental property rights embodied in Article 16 (1) by the State according to its right of *eminent domain* to expropriate property.'⁴²

There are divergent views of Article 16, one of which is that, the founding fathers never intended to change the property regime in Namibia.⁴³ According to *Namibia Grape Growers and Exporters Association and Others v Ministry of Mines and Energy and Others*,⁴⁴ 'the purpose of Article 16 was to protect the right of individuals and body corporates to acquire and possess property and did not intend this to change on

⁴² *Günther Kessl v Ministry of Lands and Resettlement and 2 others*: Case no. 27/2006 and 266/2006 2.

⁴³ Samuel Kwesi Amoo and Sidney Haring, 'Intellectual Property under the Namibian Constitution' in Anton Bösl, Nico Horn and Du Pisani (eds) *Constitutional Democracy in Namibia: A Critical Analysis after two decades* (Macmillan Education Windhoek 2010) 301 where they argue that Article 16 did not take sufficient consideration of the property rights of black majority because that was not its political object.

⁴⁴ *Namibia Grape Growers and Exporters Association and Others v Ministry of Mines and Energy and Others* SA 14 of 2002) [2004] NASC 6 (25 November 2004).

the advent of Independence.’ This view supports Melber’s⁴⁵ argument that SWAPO failed to negotiate the land issue as vigorously as it should have done, instead of simply conceding to the property clause. This view is also shared by critics of the SWAPO government who maintain that SWAPO over-compromised by conceding to the property clause.⁴⁶ The view that Article 16 was a compromise to appease the white farmers and international parties is shared among scholars, including Horn.⁴⁷ Similarly, Amoo and Harring submit that:⁴⁸

Once the war for independence had been won, it was the incorporation of Article 16 property rights that gave legitimacy to the existing, racially structured, property regime in Namibia. Thus, the political expediency of ending the war at the expense of recognising white property rights was a political compromise. This cannot be judged backwards against the flow of history: it is what occurred and it is now embodied in the Constitution.

It is therefore not surprising that there are therefore two opposing views on Article 16. The blacks see it as a legitimisation of the colonial appropriation of land; while the white settlers regard it as the sacred heart of the Constitution.⁴⁹ The former view finds support with Horn, who argues that Article 16 of the constitution guarantees the

⁴⁵ Melber 2018 <https://africasacountry.com/2018/12/the-battles-over-land-in-namibia>.

⁴⁶ Edward Mumbuu, ‘Kapofi Brushes Off ‘Sell-out’ Tag’ *New Era* (Windhoek, 28 September 2022) 3 <<https://neweralive.na/posts/kapofi-brushes-off-sell-out-tag>> accessed 28 September 2022.

⁴⁷ Nico Horn, ‘The Western Sahara Case: Kand Reform and Pre-colonial Land Rights in Namibia’ *SADC Law Journal* 96. See also Henning Melber, ‘Namibia’s Long-standing Land Issue Remains Unresolved’ *The Conversation* (31 October 2018) <[Namibia's long-standing land issue remains unresolved \(theconversaton.com\)](https://theconversation.com/namibia-s-long-standing-land-issue-remains-unresolved)> accessed 20 May 2023.

⁴⁸ Amoo and Harring (n 42) 301.

⁴⁹ Horn, ‘The Western Sahara Case: Land Reform and Pre-colonial Land rights in Namibia’ (n 46) 96. See also Justine Hunter, ‘Who should own the Land: An Introduction’ in Justine Hunter (ed) *Who Should Own the Land? Analyses and Views on Land Reform and the Land Question in Namibia and Southern Africa* (Konrad-Adanauer-Foundation 2004) 2.

property rights of property owners at the time of independence.⁵⁰ However, it does not refer to the long pre-independence practice of disowning indigenous people, a practice which began shortly after the Germans settled in Namibia in 1884, and which exacerbated with the Herero/Nama genocide during the German/Herero war in 1904.⁵¹ This is a grave injustice, in that it fails to consider the circumstances necessitating land reform in the first place. Had it not been for the unjust and mass dispossession of land by the indigenous people carried out by the colonial powers, the motivation for land reform would have been different. The latter view finds support in the concept of the rule of law. As is the norm in any democratic state which abides by the rule of law, the government of Namibia vowed to abide by the Constitution in its land reform programme.⁵² This means that it was not possible for the government to advocate for a land reform program that is at variance with the constitution and the rule of law. From a pragmatic point of view, government's vow to follow the rule of law is commendable, however, it has resulted in grave injustice to the indigenous people who were victims of mass dispossession by both the Germans and the South Africans.⁵³

Most importantly, the land reform program primarily based on the WSWB approach is not only supported by Article 16 of the Namibian constitution, other constitutional provisions also support the view that government could not have advocated for a land reform program which is at variance with the rule of law. In this regard, Article 98, 99 and 100 of the Namibian constitution suffice.

⁵⁰ Horn, 'The Western Sahara Case: Land Reform and Pre-colonial Land rights in Namibia' (n 47) 96.

⁵¹ *ibid.*

⁵² *ibid* 97.

⁵³ *ibid.*

While it is true that Article 16 entrenched property rights and the reliance on the WBWS approach, the economic order to which the constitution ascribes to in terms of Article 98 also creates an enabling environment for the slow pace of land reform and even justify the use of the WSWB approach. Article 98 ultimately confirms the right to own private property. It reads as follows:

The economic order of Namibia shall be based on the principles of a mixed economy with the objective of securing economic growth, prosperity and a life of human dignity for all Namibians. (2) The Namibian economy shall be based, inter alia, on the following forms of ownership: (a) public; (b) private; (c) joint public-private; (d) co-operative; (e) co-ownership; (f) small-scale family.

The economic order envisaged by Article 98 does not accommodate a model whereby the state can distribute resources, including land, in a way which may affect existing property rights. This is because private ownership is recognised as part of the economic order. This fact is exacerbated by Article 100 which provides that the state only owns land which is not otherwise lawfully owned. This means that the state had to recognise as legitimate, the ownership of all land acquired during the colonial era and as such, it could not interfere with such rights after independence. Article 100 reads as follows:

Article 100 Sovereign Ownership of Natural Resources

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.

Additionally, Article 99 also promotes an environment where the right to property is recognised and protected. Article 99 states that ‘foreign investments shall be encouraged within Namibia subject to the provisions of an Investment Code to be adopted by Parliament.’ If the right to private property was not protected as part of the economic order, foreign investors would be reluctant to invest in Namibia.

The legislative framework then, as envisaged in these constitutional provisions support the WSWB approach and fosters an environment where market principles take precedence over the land issue and where government is excluded from playing an active role in the economy in favour of the private sector. This fact stifles the constitutional objectives centering on equal access to property and the redistribution of resources. I argue in chapter 5 of this study that the constitutional provisions make it impossible for government to enforce a radical land reform program.

There is however, another view of Article 16 which considers the property clause completely adequate for the purpose it was intended to serve. This is the view advanced by both Amoo and Haring.⁵⁴ Accordingly, Amoo and Haring advance an argument that:

This adequacy also reflects the intention of those who drafted Article 16: that it serve this foundational political and legal purpose – and not to purport to be any kind of a model property clause for world constitutions. Future interpretation could be left to a

⁵⁴ Amoo and Haring (n 43) 299.

strong legal system, completely competent for that purpose, and able to interpret the property provision as new problems developed.

Despite Article 16 being a costly compromise which the country is still paying 33 years after attaining independence, I believe that it still remains a powerful tool in addressing the inequitable distribution of land if the Courts can adopt a broad, purposive and liberal interpretation thereof. In this regard, I believe that transformative constitutionalism is one of the ways in which the property clause can be interpreted to bypass its apparent limitations and to bring into reality the transformative aims of the constitution. Accordingly, the Supreme Court in *Namibia Grape Growers and Exporters Association and Others v Ministry of Mines and Energy and Others*⁵⁵ stated that Article 16:

... 'being part of Chapter III of the Constitution, must be interpreted in a purposive and liberal way so as to accord to subjects the full measure of the rights inherent in ownership of property.'

This purposive interpretation of the property clause should be motivated by the concept of affirmative action as envisaged in Article 23(2)⁵⁶ which allows government to adopt measures aimed at redressing the economic imbalances arising out of past

⁵⁵ *Namibia Grape Growers and Exporters Association and Others v Ministry of Mines and Energy and Others* (SA 14 of 2002) [2004] NASC 6 (25 November 2004).

⁵⁶ Article 23(2) reads as follows: 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 programmes 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 defence force, the police force, and the correctional service.

discriminatory practices and laws; and the right to equality for all as envisaged in Article 10. There is therefore noting preventing government to adopt policies which will give effect to the transformative aims of the constitution outlined in the constitution, and especially in Article 23(2) to expropriate land on the basis of Article 16(2) and section 20(1) of the ACLRA.

2.2.3. The first National Conference on Land and the land question

Shortly after independence, in June 1991, the first National Conference on Land was convened to address the skewed land distribution inherited at independence. The ultimate aim of the 1st National Conference on Land was to resolve land problems in the spirit of reconciliation.⁵⁷ To this end, the government opted to follow a route of national reconciliation, unity and nation building instead of going back into history to and reclaiming land which was appropriated by successive colonial governments.⁵⁸ At the Conference, 24 resolutions were made to provide a bedrock for land policies and subsequent legislation.⁵⁹ These resolutions were later translated into law, mostly in the provisions of the *Agricultural Land Reform Act*.

According to Melber, promises made at the first National Conference have not materialised.⁶⁰ This includes the expectation that restitution of ancestral land claims could be made at least partially, based on the understanding that restitution in full is

⁵⁷ Office of the Prime Minister, 'Consensus on the National Conference on Land and the Land Question (OPM July 1991) 9.

⁵⁸ Pempelani Mufune, 'Land Reform Management in Namibia, South Africa, and Zimbabwe: A Comparative Perspective' (2020) 6(1) *International Journal of Rural Management* 19.

⁵⁹Erika von Wietersheim, *This Land is my Land! Motions and Emotions around Land Reform in Namibia* (Friedrich Ebert Stiftung 2021) 33. See also Henning Melber, 'The Battles over Land in Namibia' (19 December 2018) <[The battles over land in Namibia \(africasacountry.com\)](https://www.africasacountry.com)> accessed 16 May 2022. The redistribution of commercial farmland on the basis of the WSWB approach, the preferential right of government to acquire agricultural land for resettlement purposes, and the fact that there would be no restitution of ancestral lands were some of the Resolutions made at the Conference.

⁶⁰ Henning Melber, 'Colonialism, Land, Ethnicity & Class: Namibia after the 2nd National Land Conference' (2019) 54(1) *Sage Journals* 73.

impossible. This stems from an acknowledgment that it is simply impossible to overturn the past. However, no restitution was implemented.⁶¹ This is unlike the situation in South Africa, where restitution of ancestral rights is a component of the land reform programme.⁶² In incorporating restitution in the land reform programme, the South African legislative framework has in a way considered the emotions of the victims of dispossession.⁶³ This is despite the fact that restitution in South Africa is limited due to the cut-off date of 19 June 1913, which means that ancestral lands are not really restored as much of the ancestral has already been disposed at that stage.

Notably, the restitution of ancestral land has not actually resulted in more land being redistributed in South Africa. This is because claimants opted for monetary compensation rather than getting back the land.⁶⁴ Most importantly, money for claims were generally pursued in urban areas as opposed to rural areas, which urban areas usually do not comprise ancestral lands. According to Lahiff, claimants opting for cash compensation instead of the restoration of their original land ‘reflects the wishes of a rapidly urbanising population as well as obstacles thrown in their path by state agencies’.⁶⁵

I do not believe that the lack of clear records on land ownership warrants the dismissal of restitution in its entirety. Partial restitution would have been in order. Ethnic considerations would have guided this approach. I say so because the ethnic groups

⁶¹ *ibid.*

⁶² Wietersheim (n 59) 32.

⁶³ *ibid.*

⁶⁴ *ibid* 33.

⁶⁵ Edward Lahiff, ‘Stalled Land Reform in South Africa’ (2016) 115(781) *Current History* 182.

which lost most of their land to the Germans are the Nama/Herero people. Government could have prioritised these ethnic groups under the land reform program by allocating them land in the same areas where the dispossession took place. Also, while I believe partial restitution would not have satisfied a lot of people, it might have assisted in healing the wounds of the past.

2.3. The Land Reform Programme

The Land Reform Programme commenced in 1990, and it has four main components, namely, Redistributive land reform; Tenure reform; Development of unutilised communal land; and the Affirmative Action Loan Scheme (AALS).⁶⁶ These four components are discussed below in conjunction with the relevant policies and legislative framework guiding the Land Reform Programme. Redistributive land reform is executed in accordance with the provisions of the ACLRA. For purposes of this study, only certain provisions of the ACLRA are discussed.

2.3.1. Redistributive land reform

The redistribution of freehold agricultural land for farming to previously disadvantaged Namibians is presently the most significant part of the land reform programme. This component comprises two sub-components, namely the Affirmative Action Loan Scheme (AALS) and the National Resettlement Programme (NRP).⁶⁷ The NRP's purpose is to redistribute agricultural land to previously disadvantaged and

⁶⁶ Wolfgang Werner, 'Land Reform in Namibia: Motor or Obstacle of Democratic Development?' (Land Reform in Southern Africa, Berlin, 28 May 2003) 6.

⁶⁷ Wolfgang Werner and Willem Odendaal, 'Livelihoods after Land Reform. Policy Brief no. 1 - Resettlement: How Viable is the Small-scale Farming Model?' (Legal Assistance Centre 2020) 1 <[Livelihoods after Land Reform \(lac.org.na\)](https://lac.org.na)> accessed 18 March 2021.

landless Namibians. In this regard, applicants apply to the Ministry of Land Reform to be allocated land. The government then acquires land in terms of section 14 of the ACLRA and redistributes it to the successful applicants.⁶⁸ However, the beneficiaries do not become legal owners of the redistributed land. Instead, beneficiaries lease the land from the state for a period of 99-years, after which period the land will revert back to the state.⁶⁹ As such, beneficiaries of land reform do not enjoy security of tenure.

However, it has been argued that the NRP has failed to improve the livelihoods of the resettled people. Wietersheim submits that it is difficult to determine the extent to which access to land has improved the livelihood of the beneficiaries.⁷⁰ Moreover, beneficiaries are faced with many challenges, which include cash-flow problems, which prevent them from investing in the farms. Accordingly, the inability of beneficiaries to obtain credit for land-based economic activities due to the absence of formalised tenure rights makes the situation more difficult for land reform beneficiaries.⁷¹ This is because beneficiaries only obtain the right to lease the land from the state and it is the leasehold which is registered at the Deeds Registry. Beneficiaries are also unable to use the land as collateral due to the absence of a land rental market.⁷² Land can only be used as collateral if it can be sold by financial institutions in order to recover outstanding debts. The law does not permit this and as such, commercial institutions do not accept as collateral land that is leased from the

⁶⁸ Laina H Shigwedha, 'A Study of the National Resettlement Policy in Namibia: A Critical Review of Policy Application and Impact' (Masters Thesis, University of Namibia 2015) ii.

⁶⁹ Wietersheim (n 59) 50

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² *ibid.*

state.⁷³ Additionally, beneficiaries do not receive adequate government support to attain self-sufficiency.⁷⁴

Many of the beneficiaries have been unable to successfully create new operations or to preserve already established operations on the allocated farms.⁷⁵ This could be attributed to a lack of skills when it comes to farming, as well as the lack of capital to invest in productive farming. As a result, many resettled farmers have not been able to sustain themselves on the farm after the period during which government offered support expired.⁷⁶ This means that the distribution of land alone through the WSWB approach without essential support services does not automatically guarantee an improved life for the resettled people. And this is one of the flaws of the WSWB approach: it focuses more on redistribution of land, without necessarily considering how the resettled people will be able to use the allocated land in order to sustain themselves.

The perfect example of how beneficiaries have been unable to sustain themselves and operationalise previously productive farms is resettlement on the following farms:

- i. Farm Ongombo West which used to produce flowers for the European market, and which was expropriated after a tedious legal battle and subsequently handed over to the farmworkers for farming purposes. Production immediately collapsed because the beneficiaries did not have

⁷³ Wietersheim (n 59) 51.

⁷⁴ *ibid.*

⁷⁵ Laina Alexander, 'The Expropriation of Farms doesn't necessarily achieve the aims of Land Reform' *The Namibian* (Windhoek 07 October 2022) 10.

⁷⁶ *ibid.*

the requisite skills to operate a flower farm, and the infrastructure deteriorated as well. Occupants are unable to make a living.⁷⁷

- ii. The second farms that were purchased by government for purposes of resettlement in 2010 are Farm Neue Haribes and Baumgartsbrunn, which were the country's biggest private units breeding karakul sheep. By 2012, the resettled beneficiaries were dependent on food aid and were unable to utilise the land to become self-sufficient farmers and as a result, the state's resources have gone to waste.⁷⁸
- iii. The third farm purchased by the government for purposes of resettlement is Farm Hartebeesteich-sud, a once productive farm where a total of 6000 olive trees were being cultivated. This farm was handed over to the National Central Intelligence Services (NCIS), which never used it. As a result, all the trees died.⁷⁹

If the farm was given to farmworkers and graduates from agricultural training institutions as recommended by Rothauge, the results would have been different.⁸⁰

Rothauge's views here are in line with the criticisms advanced against the manner in which beneficiaries of land reform are described under the ACLRA in that, almost

⁷⁷Melber, 'Colonialism, Land, Ethnicity, and Class: Namibia after the Second National Land Conference' (n 60) 73. See also Kuzeeko Tjitemisa and Albertina Nakale, 'Farmworkers who failed as farm owners' *New Era* (Windhoek 11 October 2018) <<https://kundana.com.na/posts/ongombo-west-farmworkers-who-failed-as-farmers>> accessed 29 May 2023; Loide Jason, 'Resettled Farmers Beg for Handouts' *New Era* (Windhoek, 23 February 2021) <<https://neweralive.na/posts/resettled-farmers-beg-for-handouts>> accessed 29 May 2023.

⁷⁸ Melber, 'Colonialism, Land, Ethnicity, and Class: Namibia after the Second National Land Conference' (n 60) 73.

⁷⁹ *ibid.*

⁸⁰ Alex Rothauge, 'Overcoming Barriers to the Productive Resettlement of Namibians' 2007 *Agricola* 28.

every black Namibian qualifies as a beneficiary of land reform. This includes those without the necessary skills to farm and this lack of specificity in identification of beneficiaries means that government does not have the benefit of allocating land to those who can productively utilise it.

2.3.2. Objectives of the Agricultural Commercial Land Reform Act (ACLRA)

The ACLRA, enacted to guide the land reform programme, has several objectives, including inter alia: to acquire agricultural land for purposes of land reform and allocation of land for agricultural purposes to the previously disadvantaged landless Namibians; to grant the state the preferent right to agricultural land; to expropriate agricultural land in the interest of the public; and to regulate the right of foreigners to acquire agricultural land in Namibia.⁸¹ These objectives have not been met.

2.3.3. To whom should the land be distributed?

The Act defines beneficiaries of land reform as: “Namibian citizens who do not own or otherwise have the use of agricultural land or adequate agricultural land, and foremost to those Namibians who have been socially, economically, or educationally been disadvantaged by past discriminatory practices.”⁸² This definition is criticised for its lack of specificity in that it makes almost all black Namibians eligible to benefit under the redistributive component of the land reform programme. Although almost every black Namibian qualifies as a beneficiary of land reform, which means that

⁸¹ *Agricultural Commercial Land Reform Act*, No. 6 of 1995 (ACLRA) 1.

⁸² *ibid* 1.

technically no one is left out, it appears that certain groups want to be prioritised over all other people in the distribution of land.

Accordingly, there is a perception that land reform is not actually benefiting those whom it should benefit.⁸³ This is the view shared by many Herero/Nama speaking Namibians, who feel left out of the land reform programme. This is despite the fact that they are not excluded from applying for land like everyone else. Given that they were the primary victims of dispossession, they do not feel comfortable that other ethnic groups are also benefiting from the programme and getting land in areas where they do not have ancestral roots.⁸⁴

As argued before the liberal manner in which beneficiaries are described in the ACLRA has led to black elites, mostly politicians, being awarded land as ‘previously disadvantaged people’, despite their changed socio-economic status.⁸⁵ Although they might have fit into that category before, they are no longer disadvantaged. Furthermore, there is a lack of transparency in land allocation, which is attributed to the ‘absence of credible records of land availability and transactions, and lack of board dissemination of information on land rights and policies.’⁸⁶

⁸³ Wietersheim (n 59) 80-81.

⁸⁴ *ibid*; Melber, ‘Colonialism, Land, Ethnicity, and Class: Namibia after the Second National Land Conference’ (n 60) 73.

⁸⁵ *ibid*.

⁸⁶ Petronella Sibeene, ‘Lack of Transparency taints Land Reform- Truth for its own sake’ *New Era* (Windhoek, 29 May 2008) <<https://neweralive.na/posts/lack-of-transparency-taints-land-reform>> accessed 29 September 2022. According to Sibeena, those are the ‘main vehicles that easily ferment corruption and malpractice in land allocation and management.’

It is imperative that beneficiaries of redistributive land reform be outlined precisely to avoid the practices of corruption and to benefit those who are truly entitled to land.⁸⁷ To this end, it is argued that having a blanket application of beneficiaries will have an effect of excluding the real beneficiaries of land reform the legislature had in mind when the Act was enacted. This applies in respect of the Herero>Nama speaking Namibians who were the initial victims of dispossession of land as compared to other ethnic groups in Namibia. To this end, having a priority list might assist the government in the redistribution of land, having regard to the truly dispossessed people.

2.3.4. The preferent right of the state to purchase Agricultural land

Section 17(1) of the Act gives the state a preferent right to acquire any agricultural land offered up for sale by an owner of such privately owned land, who has an intention of alienating such land.⁸⁸ In this regard, the person or entity offering to sell agricultural land to the state must make such an offer in writing to the Minister through the Permanent Secretary and such offer must contain the following: the price which the owner is prepared to accept for the land; such particulars as may be prescribed; as well as a true copy of the Title Deed under which such land is held by the owner making the offer.⁸⁹ The Minister has a discretion to accept or reject such offer, in which case a certificate of waiver will be issued to the owner in the event that the Minister rejects the offer of sale.⁹⁰

⁸⁷ This demonstrates that the failure of the land reform programme in Namibia is complex and cannot simply be attributed to the WSWB approach

⁸⁸ ACLRA s 17(1) states as follows: Subject to subsection (3), the State shall have a preferent right to purchase agricultural land whenever any owner of such land intends to alienate such land. See also *Wohlfart v Bergh* (HC-MD-CIV-MOT-GEN-2019/00004 [2019] NAHCMD 264 (28 May 2021) at [69].

⁸⁹ s 17(4) of the ACLRA.

⁹⁰ s 17(6A) c of the ACLRA. See also *Wietersheim* (n 59) 49-50.

The preferent right of the state to acquire agricultural land emanates from the United Nations (UN) General Assembly Resolution 1803(xvii) adopted on December 14, 1962, which recognises a State's sovereign power over all its natural resources.⁹¹ Accordingly, the State can freely possess, utilise and dispose of any surface and subsurface natural resources in its territory. This sovereign right over resources applies to the state's prerogative to adopt an economic system of choice, and to decide whether to nationalise or expropriate property belonging to both nationals and foreigners. Most importantly, the state has an inherent and inalienable right to exercise its sovereignty in the interest of national development and of the wellbeing of its people.⁹² The preferent right to acquire land is therefore exercised in terms of the state's sovereign right to its resources, which exercise is done in the interest of Namibians.

Countries like South Africa and Zimbabwe do not enjoy the same right. In South Africa, the lack of a preferent right has led to criticism against the minimal intervention by the state in negotiating land prices.⁹³ This means that individuals must engage the players in the market themselves, and not the state. In Zimbabwe, the government also does not enjoy the preferential right because all land is vested in the president.

⁹¹ See United Nations 'Permanent Sovereignty over Natural Resources' (14 December 1962) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/general-assembly-resolution-1803-xvii-14-december-1962-permanent>> accessed 20 June 2023.

⁹² *ibid.*

⁹³ University of Witwatersrand, 'The Reshaping of South African Land Policy' Johannesburg 143 <http://wiredspace.wits.ac.za/bitstream/handle/10539/275/17_chapter5.pdf?sequence=17> accessed 29 May 2023.

2.3.5. Land expropriation in the public's interest

Section 20(1) of the Act authorises the Minister to acquire any property, including agricultural land in the public's interest subject to just compensation.⁹⁴ However, the Act does not define what public interest is. In the *Kessl* case, the court stated as follows concerning public interest:⁹⁵

Expropriation of land will certainly not be in the public interest in the context of Article 16(2) if that land is not suitable for the purpose of expropriation. In order to expropriate land, it must be done in compliance with the provisions of the Act, which involves a double-barrel process, namely, that provided for in sections 14 and 20 of the Act. Although it is not peremptory that the section 20 process should necessarily follow the section 14(1) one, it is equally clear that the section 20 process (expropriation) cannot take place if there was no section 14 process.

Whereas in Namibia the state can only acquire property in the public interest, in South Africa the state is empowered to acquire property for 'public purpose' and in the public interest in accordance with section 25(2) of the Constitution. This means that the state cannot acquire property for private use, it must be for a public purpose (such as constructing a public road etc.) or in the public interest, which specifically includes land reform purposes. Additionally, the recently proposed Expropriation Bill allows the state to acquire property in limited circumstances without paying any compensation.⁹⁶ Notably, the point of departure is still the payment of just and

⁹⁴ ACLRA s 25(1).

⁹⁵ *Kessl* (n 42) at [56].

⁹⁶ Marianne Mernet, 'Controversial Expropriation Bill is finally Approved after Navigating a 14-year Rocky Road' *Daily Maverick* (Cape Town, 29 September 2022) <<https://www.dailymaverick.co.za/article/2022-09-29-controversial-expropriation-bill-is-finally-approved-after-navigating-a-14-year-rocky-road/>> accessed 29 September 2022.

equitable compensation, only in very limited instances may the compensation be determined to be nil, depending of the specific facts and circumstances.

The government has been reluctant to expropriate commercial land on a large scale, despite section 20(1) of the ACLRA empowering the state to expropriate land in the interest of the public. To date, only a few farms have been expropriated.⁹⁷ It is submitted that financial constraints as well as legal battles play a role in the government's reluctance to utilise section 20 of the ACLRA more effectively.

However, section 20 has the potential to acquire more land for redistribution when compared to the WSWB approach. This is because expropriation in terms of section 20(1) does not require the landowners consent. This means that there is a compelling element in section 20 which authorises the Minister to expropriate land which is earmarked for redistribution, despite the lack of consent from the landowner. Although the Minister is required to engage the landowner whose land is targeted for expropriation, the purpose of such engagement only relates to the purchase price and if the parties do not mutually agree on the purchase price, the Minister still has a discretion to expropriate such land.⁹⁸ Government should consider the viability of this method of land acquisition instead of focusing entirely on the WSWB approach.

2.3.6. Restriction on acquisition of agricultural land by foreign nationals

Under section 58(1), foreign nationals are prohibited from owning or acquiring agricultural land in Namibia without the prior written consent of the Minister. I believe

⁹⁷ Wietersheim (n 59) 49.

⁹⁸ See s 20 of the ACLRA.

that the intention of the legislature in including such a provision in the Act was to prevent further exploitation by foreigners in the acquisition of commercial agricultural land, which has been in the hands of the foreigners for a long time. It was, therefore, necessary to give Namibians a fair chance to acquire agricultural land, which they could not acquire due to the oppressive apartheid regime and colonialism. However, it is argued that this restriction may act as a hindrance in the Africa's agenda for a common market which the African Continental Free Trade Area seeks to realise.

To sum up, the ACLRA provides for two principal ways of land acquisition by the state; namely through the WSWB option, and land expropriation in the public's interest. The first option has been prioritised by the government as the preferred mode of acquisition of land, while the second option has been rarely utilised.⁹⁹

2.4. The Resettlement Policy and the Resettlement Programme

The resettlement programme run by the Ministry of Agriculture, Water and Land Reforms aims at resettling poor and landless Namibians on state-acquired commercial farmland. It is the first land reform programme that the government embarked upon in order to redress the inequitable distribution in respect of commercial land.¹⁰⁰ The resettlement programme goes hand in hand with the Resettlement Policy.

The purpose of the National Resettlement Policy is to improve the standards of living of previously disadvantaged people by metamorphosing the large-scale commercial farming sector into small-scale units. This is done by sub-dividing large-scale

⁹⁹ Government of Namibia, 'Concept Paper: Second National Land Conference' (GRN 2018) 4. <http://dna.nust.na/landconference/submissions_2018/concept_paper_second_national_land_conference_2018.pdf> accessed 18 April 2021.

¹⁰⁰ Wietersheim (n 59) 34.

commercial farms into portions ranging between 1500 ha in the central and northern regions, and 3000 ha in the southern part of the country.¹⁰¹ This is meant to increase productivity for the resettled people, who in most cases are in a better position to run these small-scale units than large scale commercial farming.¹⁰²

The National Resettlement Policy has failed to meet its key objectives. So far, only a few resettled people have managed to attain some level of self-sufficiency and generate employment;¹⁰³ and smallholder farmers are still struggling to get integrated into the mainstream market and often have no market to sell their produce.¹⁰⁴ The expectation that after five years of government support the resettled people would be able to support themselves has been confronted with a sobering reality as most resettled people have not been able to make a living on the allocated land due to factors such as the lack of skills and capital.¹⁰⁵ As such, the goal to alleviate poverty and to make the resettled people self-sufficient is far from being reached.

2.4.1. Tenure rights in respect of redistributed land

Werner argues that the government's position regarding tenure rights in respect of redistributed land appears ambiguous.¹⁰⁶ The ACLRA provides for the 99-year period leasehold rights in respect of allocated farming and their subsequent registration in the

¹⁰¹ *ibid* 46. The sub-division is done in order to resettle as many people on the land as possible.

¹⁰² Werner (n 66) 7.

¹⁰³ See Wietersheim (n 59) 33. Wietersheim recounts a success story of the NRP at farm Sonderwater, where a resettled family has managed to turn the land allocated to them into a successful farming operation.

¹⁰⁴ Nuusita Ashipala, 'Presidency Supports Small-scale Farmers' *New Era* (Windhoek, 15 September 2021) <<https://neweralive.na/posts/presidency-supports-small-scale-farmers>> accessed 15 September 2022.

¹⁰⁵ Government of Namibia (n 99) 8.

¹⁰⁶ Werner (n 66) 7.

Deeds Office.¹⁰⁷ The registration is done in the lessee's name, which lessee is responsible for the payment of any fees and costs pertaining to the registration of the lease. This 99-year lease period demotivates beneficiaries from investing fully in the development of the land.¹⁰⁸ This means that there is still no security of tenure for beneficiaries of resettlement, and this impedes their right to productively utilise the land allocated.

2.4.2. The Affirmative Action Loan Scheme (AALS)

The second measure implemented under the redistributive component of the land reform programme is the Affirmative Action Loan Scheme (AALS), which was birthed from a Cabinet decision in 1992.¹⁰⁹ Implemented by AgriBank (then the Land and Agricultural Bank), the AALS is a five-year scheme intended to assist full-time black farmers with access to subsidised loans of between N\$400 000.00 and N\$500 000.00, which can be repaid over 25 years with a three-year grace period and the interest rate ranging from 2% in year four to 16% from year 10.¹¹⁰ Adams compares the AALS with the previous subsidies offered to South African farmers in Namibia by the South African government, and states that the schemes are very similar.¹¹¹

¹⁰⁷ S 42 of the ACLRA states as follows: (1) The term of any lease granted in respect of a farming unit under the provisions of this Part shall be ninety-nine years. (2) The Minister shall cause any lease referred to in subsection (1) to be registered in accordance with the provisions of the Deeds Registries Act, 1937 (Act 47 of 1937) or the Registration of Deeds in Rehoboth Act, 1976 (Act 93 of 1976), whichever is applicable.) The lessee shall be liable for the payment of any fees and costs pertaining to the registration of the lease.

¹⁰⁸ Wietersheim (n 59) 40.

¹⁰⁹ Cabinet Resolution, CAB 92.

¹¹⁰ Martin Adams, 'Land Reform in Namibia' (2000) 7 <[land reform in Namibia: past, present and prospects \(mokoro.co.uk\)](https://landreform.co.uk)> accessed 18 April 2022. The repayment period has now been extended to 30 years. See Mathew Dlamini, 'Agribank takes loan repayment to 30 years' *The Namibian* (Windhoek, 17 May 2022 <https://namibian.com.na/agribank-takes-loan-repayment-to-30-years/> accessed 29 May 2023.

¹¹¹ *ibid*; Willem Odendaal, 'Confiscation or compensation? An Analysis of the Namibian Commercial Land Reform Process' (2005) Legal Assistance Centre 6.

Through the AALS scheme, well-off black farmers buy land from white farmers on the open market, with the backing of government-guaranteed loans at a subsidised interest rate.¹¹² However, the AALS has the following conditions: (a) loan applicants must have at least 150 head of cattle or a corresponding number of small stock; and (b) an operating capital in the amount of N\$ 150 000.00. When a farmer meets those requirements, Agribank loans the farmer 85% of the farm's purchase price, and government guarantees 35% of the loan.¹¹³ The buyers become owners of the farms and as such, they enjoy security of tenure as opposed to those resettled under the Resettlement Program.

The scheme is especially favoured by emerging black farmers in that it allows them to sell their stock north of the veterinary cordon fence (Red Line) and to acquire equivalent stock to the south of the fence. I believe that this scheme is necessary to allow well-off black farmers into the agricultural sector. This is contrary to the status quo which existed prior to independence, and which was enforced with and by the veterinary fence, to exclude black farmers from participating in large-scale commercial farming, despite the desire and capacity to do so. This explains why many well-off black farmers have taken advantage of this scheme and acquired agricultural land. This is because these well-off black farmers meet the general requirements of the AALS, have operating capital, and can, in most cases, afford to pay back the loan on low interest for over 30 years.

¹¹² Wietersheim (n 59) 35.

¹¹³ *ibid.*

Despite its popularity, it has not been without its controversies.¹¹⁴ According to Odendaal, the under-utilisation of the farms by owners keeping fewer stock than what the farms can carry, results in farmers not being able to pay back their loans. This is because full-scale production is a crucial factor in being able to pay back Affirmative Action Loans.¹¹⁵ Another shortcoming of this scheme is that the scheme is demand-driven, which makes it difficult to measure it against a target.¹¹⁶ In addition, these farmers like most farmers, have to deal with *inter alia*, climate change, droughts, lack of skills as well as falling producer prices, which undermine the beef industry.¹¹⁷ .

Notwithstanding its shortcomings, the scheme has been commended for being remarkably more successful than the resettlement programme for the following reasons: it has prompted the emergence of African entrepreneurs who can now participate in the commercial agricultural sector; it has relatively cost the government less than the resettlement programme; it entails a farming system which is well understood and appreciated by the beneficiaries, and which has a low risk; and it has also reduced undue dependency on the government for the provision of services.¹¹⁸ I also commend the AALS scheme for being able to bridge the gap between white and black farmers and in a way, putting them on the same pedestal. Through this scheme, black farmers who undertake large-scale farming are able to cooperate with white farmers and work together to contribute to the economy of the country. The fact that from 1992 to 2018 about 648 farms were acquired through the AALS shows that there

¹¹⁴ *ibid* 8.

¹¹⁵ Odendaal (n 111) 7.

¹¹⁶ Wietersheim (n 59) 45.

¹¹⁷ Adams (n 110) 7.

¹¹⁸ *ibid*.

has been some movement in the right direction, although some shortcomings still remain, and the skewed distribution of land still persists.¹¹⁹

2.4.3. The National Land Policy of Namibia (1998)

The National Land Policy was enacted to guide the legislature and policy makers in implementing the most progressive land reform package, which include the cardinal principles and guidelines on which land legislation for both commercial and subsistence sectors should be developed.¹²⁰

The ideology supporting the National Land Policy was ‘to redress, in the spirit of national reconciliation constitutionality and nation building, the problem of dispossession, discrimination, and inequitable distribution of land that characterised the pre-independence era.’¹²¹ However, the concept of reconciliation has been misunderstood and utilised to attack government’s efforts in addressing the land issue. I believe that the concept goes beyond the need to give a tooth for a tooth and that it is a constitutional imperative adopted as a result of the mixed-economy system.¹²² . A climate of reconciliation is needed to foster political and economic stability. So far, the spirit of reconciliation, especially in respect to the issue of land, has resulted in the government taking an active role in redistributing land in a non-violent manner, without illegal land grabs and without compromising the agricultural sector.¹²³ It has ensured that social peace and stability are maintained, as it was envisioned at

¹¹⁹ Wietersheim (n 59) 48.

¹²⁰ Ministry of Lands, Resettlement and Rehabilitation (MLRR), ‘National Resettlement Policy’ (MLRR 2001).

¹²¹ *ibid* iii.

¹²² See in this regard Articles 98, 99 and 100 of the Namibian Constitution.

¹²³ Wietersheim (n 59) 45.

independence.¹²⁴ Reconciliation was therefore necessary if Namibia was going to prosper and attain its goals envisaged in the Preamble to the Constitution.¹²⁵

2.5. The Communal Land Reform Act

The *Communal Land Reform Act 5 of 2002 (CLRA)* was enacted with a view of dealing with access to land in communal areas. It governs the allocation of land rights and the establishment of communal land boards in all communal areas of the country.¹²⁶ Communal lands refers to all land in the communal areas.¹²⁷ The CLRA defines ‘communal area’ in relation to a traditional community to mean the area comprising the communal land inhabited by the members of that community.¹²⁸ The purpose of the Communal Land Reform Act was enunciated in the case of *Joseph v Joseph and Joseph v Joseph* where the court stated that:¹²⁹

The Act intends to regulate the allocation of land in communal areas occupied by traditional communities so as to recognise the customs and to protect the traditional lifestyles which consist mostly of humble abodes and thus substantial improvements which adhere to the land is not encouraged.

¹²⁴ *ibid.*

¹²⁵ There is however a looming fear that radical groups will continue to blame the government for adopting the concept of national reconciliation and possibly interfere destabilise the current state of affairs from a governmental perspective.

¹²⁶ Johann Malan, ‘Guide to the Communal Land Reform Act’ (2003) Legal Assistance Centre (LEAD) iii.

¹²⁷ The following areas are communal areas in terms of the Act: Kaokoland (Area 1 and 2); Damaraland (Area 1-6); Ovamboland; Kavango (Area 1 and 2); Caprivi; Bushmanland; Hereroland West (Area 1 and 2); Hereroland East (Area 1-3); and Namaland (Area 1-5).

¹²⁸ The Communal Land Reform Act 5 of 2002 (2002) 5.

¹²⁹ *Joseph v Joseph and Joseph v Joseph* [2020] NASC 22 (30 July 2020).

The Act lays down two broad categories of land rights allocations, that is, customary land rights and rights of leasehold.¹³⁰ The Communal Land Reform Act is tailored in accordance with the objectives of the National Land Policy of 1998. For instance, the unitary land system proposed in the National land Policy is manifested in the CLRA, which has recognised communal forms of land tenure and afforded them the protection of the law, as well as a uniform system of administration.¹³¹

2.5.1. What is the importance of the Communal Land Reform Act?

Prior to the introduction of the CLRA, traditional leaders in communal areas primarily played an informal role in land management.¹³² The CLRA came to challenge the authority of the traditional chiefs, which they had prior to independence to allocate and administer communal land, by not only vesting the ownership of communal land in the government, but by also creating a body to which traditional chiefs will be accountable to. The introduction of the ACLRA then, has significantly changed the power structures among state institutions and traditional leaders.¹³³ Further, the introduction of the ACLRA is an endeavour to tackle long-existing land problems such as ownership or conflicts over land rights; the illegal fencing off of communal land for private use;¹³⁴ the capriciousness of decisions by traditional leaders; and the sale of communal land by the traditional leader.¹³⁵

¹³⁰ *ibid.*

¹³¹ Republic of Namibia, 'The National Land Policy' (GRN 1998) 2.

¹³² Daniela Behr, Roos Haer and Daniela Kromrey, 'What is a Chief without land? Impact of Land Reforms on Power Structures in Namibia' (2015) 25(5) *Regional and Federal Studies* 456.

¹³³ *ibid* 462.

¹³⁴ Which jeopardises the lives of other farmers in the areas, especially in respect to grazing land.

¹³⁵ Behr, Haer and Kromrey (n 132) 456. Own emphasis added.

Despite the existence of the Act, there are still challenges pertaining to communal land rights. Some of these challenges were discussed during the 2nd National Land conference, and those include the need for government to remove the colonial cordon fence and allow northern farmers to sell their produce through a procurement system, the need for government to coordinate closely activities related to mining and allow traditional authorities to benefit from mining activities in communal areas, and the need to consider the future development of communal land areas by fast-tracking the registration of communal and rights.¹³⁶ This would ensure some security of tenure, which is currently lacking in communal areas. Access to the agricultural market south of the cordon fence remains a reminder of the colonial past, which prejudices communal farmers north of the red line. It is clear that communal land does not receive the same attention as commercial land in the debate of land reform, although many Namibians still reside in communal areas.

The National Land Policy, from which the CLRA emanates, has brought about considerable improvements to women in communal areas who were for decades subject to the discriminatory patriarchal practices which denied them the right to acquire communal land rights or to inherit it upon the death of their spouses.¹³⁷ This means that women had no security of tenure over the land they cultivated, and they could be chased off the land once their spouses passed on. However, in terms of the CLRA any person, including women, can now obtain a right over customary land in

¹³⁶ Government of the Republic of Namibia, 'Concept Paper: Second National Land Conference' (GRN 2018) 6.

¹³⁷ See the Fundamental Principles of the National Land Policy (1998) 1, where it is stated that: In accordance with Article 95 (a) of the Constitution, women will be accorded the same status as men with regard to all forms of land rights, either as individuals or as members of family land ownership Trusts (see below). Every widow (or widower) will be entitled to maintain the land rights she (or he) enjoyed during the spouse's lifetime.

their own names and they can make a living off the allocated land without the fear of losing the land upon the death of their spouse.¹³⁸ It is important to note however, that although the Act does not actually make reference to ‘women’, women now have access to customary land rights. To this end then, the Act can be applauded for its role in the implementation of the National Land Policy and for the manifest changes it has brought about when it comes to women.

I believe that communal land reform is one part of the land reform programme that has been underutilised. Despite the potential that this programme has in improving the socio-economic status of the Namibian people, in that the government could invest in agricultural production, which could have serious economic benefits and contribute to food security, the economic viability of communal land has not been explored yet. In this regard, I refer to communal areas with the highest rainfall in the country, such as the Zambezi and Kavango regions, which can be epicentres to grow food and reduce the dependency on imports from other countries. This would go a long way in realising the objectives of land reform, which is, inter alia, to improve the socio-economic status of the people.

2.6. The Second National Conference on Land (2018)

The Second National Conference on land was convened in 2018, 27 years after the first conference on land. The unsolved land issue which persisted for 27 years led to the Second National Conference. This means that even after 27 years of independence,

¹³⁸ See *Joseph v Joseph and Joseph v Joseph* [2020] NASC 22 (30 July 2020) where it was stated that ‘On the death of the rights holder the land reverts to the Chief or Traditional Authority for re-allocation. This re-allocation is however circumscribed so that, e.g., the surviving spouse will be entitled to such allocation if so desired.’

there were still considerable challenges regarding land reform and its implementation and many people remained landless. A total of 167 Resolutions were made at the 2nd National Conference on land, however, my discussion is restricted to only those resolutions which have a bearing on my study.

a. Ancestral land claims for restitution

The first Conference on Land resolved that restitution of ancestral rights was too complex and impossible to fully implement. Restitution was not implemented, not even partially. As a result, cries for restitution of ancestral and rights have surfaced again, which proves that the issue of land dispossession is far from being settled in the hearts of most Namibians. For this reason, and shortly after the conference, the Lands Tribunal Commission was established, and in July 2020, the Commission submitted its report to the Presidency, with several recommendations to be considered by the Ministry of Land Reform.

The key findings of the Report are summarised by Wietersheim as follows:¹³⁹

- a. There is need to enact legislation to provide for ancestral land claims for restitution, including a body to ascertain land claims and assist claimants to lodge their claims;
- b. It is trite that restitution in whole is near to impossible, as it was conveyed at the first National Land Conference in 1991;
- c. The land reform programme and its policies has failed to meet its target and goals over the last three decades;

¹³⁹ Wietersheim (n 59) 56.

- d. The skewed distribution of land based on colonial injustices still hurts many communities, which still struggle to access land.

The government has been criticised for sitting on these recommendations without taking any steps in implementing them.¹⁴⁰ This demonstrates that people are still interested in having their ancestral lands restored to them, even partially so.

b. The willing seller-willing buyer principle for agricultural land acquisition

The WSWB principle has been subjected to several criticisms over the years.¹⁴¹ For this reason, participants at the conference resolved that there is a need to either abolish the entire approach, which has failed to deliver satisfactory results or to complement it with section 20 of the ACLRA.¹⁴² It is important to note that whereas the WSWB approach might have been a plausible option so soon after independence for South Africa, Zimbabwe and Namibia, and probably most African countries, it is no longer plausible. The principle of willing seller-willing buyer as the basis for land reform has long been overwhelmingly rejected in Africa. This is because market-based land acquisitions entail reliance on the existing land market system which is characterised by a number of distortions and imperfections, such as restrictions on land subdivisions, the absence of an effective land tax, unequal access to capital markets and information, as well contradictory requirements in respect of municipal zoning regulations. The open market mechanism is also open to abuse through price inflation which makes it

¹⁴⁰ Sakeus Iikela, 'Govt Denies Slacking on Land Summit Resolutions' *The Namibian* (Windhoek, 10 February 2022) <<https://www.namibian.com.na/6217843/archive-read/Govt-denies-slacking-on-land-summit-resolutions>> accessed 20 March 2022.

¹⁴¹ *ibid.*

¹⁴² Government of the Republic of Namibia, 'Concept Paper: Second National Land Conference' (GRN 2018) 5. Notably, it is already possible to acquire agricultural land in terms of Section 20 of the ACLRA.

difficult for the government to buy back land through expropriation which is based on the WSWB.

The only realistic option then becomes expropriation without compensation which also poses a threat to the ease of doing business index in Namibia, and which would be at variance with both Article 16(2) and Article 98 of the Constitution. However, the agenda of land reform is driven by the philosophy that there is need to break the capitalist agenda and the dominant models of land use and agricultural production. This includes advocating for large-scale commercial farming as the ideal or viable means of agricultural production and focusing on small-scale farming which is at the centre of traditional African farming system.

However, abolishing the WSWB approach will go against the spirit of Article 16 which is meant to ensure that the state does not arbitrary interfere with the right to own property.¹⁴³ Whereas the resolution to abolish the WSWB approach may have appealed many black people, it is not sound under the current legislative framework.

c. The National Resettlement Programme and the Resettlement Criteria

Delegates at the conference considered that there is a need to review the resettlement models which focus mainly on livestock farming to accommodate other land uses, such as commercial and semi-commercial.¹⁴⁴ This is because the main focus has always

¹⁴³ Tjatindi Charles, 'Govt Stuck with Willing Seller-Willing Buyer...Move to Scrap System Unconstitutional' *New Era* (Windhoek, 19 January 2021).

¹⁴⁴ Government of the Republic of Namibia, 'Concept Paper: Second National Land Conference' (GRN 2018) 5.

been on the use of the allocated land for agricultural purposes. However, if other land uses are accommodated, government will be in better position to subdivide land knowing fully well what the beneficiaries intend to do on the land allocated. This is especially significant to enable the government to exercise its right of first refusal, and to make an informed decision in respect of the subdivision of land prior to redistribution to beneficiaries.

d. The expropriation of agricultural land

There have been calls, for the government to make use of section 20 to speed up land reform.¹⁴⁵ Section 20 has potential to acquire more land for redistribution than the WSWB approach and this potential is found in the compelling nature of this section.¹⁴⁶ Section 20 gives the Minister power to expropriate any land earmarked for purposes of land reform after firstly, negotiating the sale of such property with the owner and failing to reach a mutual agreement, and secondly, if the owner of the land cannot be located after a diligent search. This means that expropriation does not require the consent of the landowner and as such, whether the landowner agree or not, the minister may expropriate such land. The only purpose of the engagement then, between the Minister and the owner relates to compensation and not on the decision to expropriate. The only requirement that the minister must follow is due process, as stipulated in the *Kessl* case.¹⁴⁷ The reluctance of government to capitalise on this

¹⁴⁵ *ibid* 8.

¹⁴⁶ Section 20(1) reads as follows: 20. (1) Where the Minister decides to acquire any property for the purposes of section 14(1) and the Minister, acting on the recommendation of the Commission, and the owner of such property are unable to negotiate the sale of such property by mutual agreement, or the whereabouts of the owner of such property cannot be ascertained after diligent inquiry, the Minister may, subject to the payment of compensation in accordance with the provisions of this Act, expropriate such property for such purpose.

¹⁴⁷ *Kessl* (n 42).

option of land acquisition is therefore not understood. Simply put, there is no reason to even continue acquiring land through the expensive WSWB approach.

e. Land valuation and pricing

It has been argued that the WSWB approach has failed due to the exorbitant prices demanded for land offered to the government, which resulted in the government waiving about 5.2 million hectares of land offered for sale between 1992 and 2018.¹⁴⁸ These high prices can be attributed to the fact that there are no Valuation Standards in the country. For this reason, the Special Cabinet Committee on Land and Related Matters has formulated Valuation Standards for Namibia.¹⁴⁹ The Property Valuers Profession Act on commercial land was also enacted for this purpose and to improve the monitoring of land markets in the commercial sector.¹⁵⁰ The purpose of the Act is to ensure that only registered qualified valuers shall be entitled to carry out valuation activities in the country.¹⁵¹ This will curb the practice of landowners inflating land prices.

f. Pre- and post- resettlement support for resettled farmers

A post-settlement support scheme by the Agricultural Bank (AgriBank) in collaboration with the Ministry of Land Reform was introduced with a revolving fund and to which they each contribute N\$ 30 million annually.¹⁵² This was done to cater

¹⁴⁸ Wietersheim (59) 50.

¹⁴⁹ Government of the Republic of Namibia (n 143) 8.

¹⁵⁰ Act No.7 of 2012.

¹⁵¹ Government of the Republic of Namibia (n 143) 9.

¹⁵² *ibid* 9.

for resettled people who often struggle to operationalise their land after resettlement. How this would play out in practice is yet to be determined.

g. Affirmative Action Schemes and Programmes

The Affirmative Action Loan Scheme under AgriBank has been the most famous scheme utilised by emerging middle-class commercial farmers. However, despite its popularity, most farmers have struggled to repay their loans. The need to increase the loan amount to farmers is a necessity recognised by both the Bank and the Ministry.¹⁵³ This it will make it even harder for farmers to repay the loan amounts. Notably, the repayment period has since been extended to 30 years.¹⁵⁴

h. Accessibility to land by women and the youth

Access to land for both women and the youth have been the centre of the first National Conference on Land, the National Land Policy and the *Communal Land Reform Act*. The fact that the issue was still being discussed in 2018 means that there is still much to be done to realise the rights of these two groups. It was resolved that there was a need to amend existing legislation over land to cater for co-habiting partners and to protect single mothers who in most cases are in vulnerable positions when their male partners die.¹⁵⁵

¹⁵³ *ibid.*

¹⁵⁴ Mathew Dlamini, 'Agribank takes loan repayment to 30 years' *The Namibian* (Windhoek, 17 May 2022 <https://namibian.com.na/agribank-takes-loan-repayment-to-30-years/> accessed 29 May 2023).

¹⁵⁵ *ibid.*

i. Bankability of communal land

Holders of communal land rights¹⁵⁶ are unable to use their rights as collateral due to the lack of security of tenure. This is because all communal land vests in the state in accordance with Article 100 of the Constitution and as such, holders of communal land rights do not have tenure rights which financial institutions can attach as collateral for any loans borrowed. Financial institutions are not willing to extend credit to these communal residents, which limits the economic viability of communal land. It was argued that extending credit and financial assistance has the potential to unlock the barrier to economic development in the communal areas.¹⁵⁷

j. Land productivity and employment creation

Low agricultural production is a feature of most resettled farms under the National Resettlement programme. This can be attributed to, amongst other, a lack of sufficient farming infrastructure and lack of training programmes that can boost production. This is because in many cases people who are resettled know nothing about commercial farming. To this end, the need to train and mentor resettled people is imperative.

The government has been accused of slacking on implementing most of the resolutions of the conference, an accusation which it strongly denies.¹⁵⁸ This is despite the fact that the government has not made any progress in implementing the following

¹⁵⁶ Communal land is vested in the state. Holders only obtain a right to use such land for a period of 99 years, after which the land reverts back to the state.

¹⁵⁷ *ibid.*

¹⁵⁸ Sakeus Iikela, 'Namibia: Govt Denies Slacking on Land Summit Resolutions' *The Namibian* (Windhoek, 10 February 2022) <[Namibia: Govt Denies Slacking on Land Summit Resolutions – allAfrica.com](#)> accessed 10 May 2022.

resolutions: the removal of the cordon fence, the abolishment of the WSWB policy, the enactment of a Land Bill, and the expropriation of foreign owned land, underutilised land, as well as land belonging to absentee landlords.¹⁵⁹ It has been reported that so far, only 29 resolutions of the conference have been successfully implemented.¹⁶⁰ This is out of the 167 total resolutions that were taken to address the country's land issue.

The Minister of Agriculture, Water and Forestry has stated that there are certain major resolutions that the government cannot implement due to 'unspecified legal impediments.'¹⁶¹ There is for instance the resolution calling for the abolishment of the WSWB policy, which is entrenched in Article 16, and which cannot be abolished without amending article 16 itself, as well as the resolution of 'one-Namibia, one-farm' which was taken to curb multiple ownership of farms. Such a resolution is also at variance with Article 16 of the constitution.

What the second National Conference on Land managed to do was to expose unresolved issues in the land reform project. Many of the unresolved issues boiled ver from the Resolutions taken at the first National Conference on land. It showed us, as a country, that there is a lot more that needs to be done before the land issue is satisfactorily addressed. The conference exposed weaknesses in our legislative framework and the lack of implementation which are hampering the land reform programme, which weaknesses I deal with in the discussion chapter.

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.*

2.7. Conclusion

This chapter deliberated upon the legislative framework and policies underpinning land reform in Namibia. In this regard, several legislative enactments and policies informing the land reform programme were discussed, beginning with the 1982 Constitutional Principles. I have argued that the 1982 CP are partly to blame for the unresolved land question that the country is still struggling with 32 years post-independence. I have also argued that land reform is not just a political matter, but an emotive matter which needs to be addressed if there is any chance of healing the wounds of the past. The legislative framework on land is in line with the policy of national reconciliation, and as such, it does not make room for radical land reform measures of expropriating land without compensation (such as the one adapted in Zimbabwe in 2000). The preferred mode of land acquisition remains the World Bank-supported WSWB approach, entrenched in section 14 of the ACLRA and Article 16 of the Constitution. The failures of the land reform programme were exposed at the 2nd National Land Conference, and as such, have provided the government with pointers of what needs to be done to improve the land reform process.

The next chapter discusses the efficacy of the WSWB approach to land reform in order to determine whether it remains a viable tool to alter the skewed patterns of land distribution in Namibia.

CHAPTER THREE

THE THEORY AND PRACTICE OF THE WILLING SELLER

WILLING BUYER POLICY

3.1 Introduction

In this chapter, I present a synopsis of the World Bank inspired market-based approach to land distribution (the willing-seller, willing-buyer policy) which was adopted in countries such as Namibia, South Africa, and Zimbabwe. I review historical and legal literature to evaluate the efficacy of this approach as an instrument for redressing the inequitable distribution of land inherited by those countries, particularly, Namibia. The specific objectives of this chapter are: (i) to draw a distinction between agrarian and land reform; and (ii) to evaluate the plausibility of the willing-seller, willing-buyer approach. My main argument in this chapter is that the redistribution of land through the willing seller, willing buyer approach is insufficient to meet the demands for land and that the redistribution of land alone is not enough to bring about socio-economic transformation. An in-depth analysis of the WSWB approach in South Africa and Zimbabwe follows in chapter four.

3.2. Definition and global overview of the concept “land reform”

3.2.1. What is land reform?

The concept of ‘Land Reform’ does not admit to one definition, as it has meant different things over the last century. However, its principal focus has been to redistribute farmland to eliminate landlessness and tenancy in feudal economies.¹⁶²

¹⁶² Liz Alden, ‘Land Reform in Africa: A Reappraisal- Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa’ (2012). Brief #3 of 5 < [RightsToResourcesInCrisis.Briefs1thru5.pdf \(oicrf.org\)](https://www.oicrf.org/~/media/Files/Briefs/Brief3/Brief3.pdf)> accessed 10 September 2021.

According to Adams, it is difficult to define land reform because of the differences in land types, the methods of farming, the history of land acquisitions, political objectives, as well as general social and economic conditions. However, Adams finds it necessary to define land reform “because some supposed land reform policies are not intended to change the distribution of land ownership and rural power”.¹⁶³

Simply defined then, land reform relates to the reshaping of tenure rights and the redistribution of land. This remodelling is done in directions which are in line with the political imperatives cardinal to the reform. As such, decisions on whether to go ahead with land reform are fundamentally political in nature.¹⁶⁴ Those in favour of revolutionary change commend a planned and drastic public intervention to redistribute land.¹⁶⁵ However, Adams cautions against drastic attempts of land redistribution in that, ‘they distract from more feasible evolutionary policies aimed at improving access and security of tenure for small farmers under alternative forms of individual and communal tenure, which do not involve expropriation and compensation’.¹⁶⁶

It is common for the words ‘land reform and agrarian reform’ to be used interchangeably. The words are often used to denote the same thing, that is, to bring

¹⁶³ Martin Adams, ‘Land Reform: New Seeds on Old Ground’ (1995) *Overseas Development Institute* 1.

¹⁶⁴ Edward Lahiff, ‘Willing-Buyer, Willing-Seller: South Africa’s Failed Experiment in Market-Led Agrarian Reform’ (2007) 28(8) *Third World Quarterly* 1577.

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid.*

about reform in an existing agrarian structure.¹⁶⁷ However, Elvinia argues that the two concepts may have different meanings. Elvinia argues in this regard that even though the distribution of land constitutes the most contentious aspect of agrarian reform, agrarian reform is much broader than mere land reform.¹⁶⁸ Whereas land reform concerns the reform of the dissemination of landed property rights, agrarian reform goes beyond land reforms and covers complementary socio-economic and political reforms.¹⁶⁹ In this regard then, land reform forms a central part of agrarian reform, and the other measures taken in agrarian reform are usually of a supportive nature, which solidifies the implementation of the land reform aspect.¹⁷⁰

These concepts are, according to Elvinia, actually inseparable and as such, they are complementary to each other.¹⁷¹ Lanzona agrees with Elvinia and submits that agrarian reform is a much wider concept which does not only refer to land distribution, but also to the provision of infrastructure, services, and agricultural development.¹⁷² Contrasted to land reform, the objectives of agrarian reform are much broader, and often affect the entire country.¹⁷³

¹⁶⁷ Sartunino M Borras, 'The Underlying Assumptions, Theory, and Practice of Neoliberal Land Policies' (2006) *Economics Political Science* 99 <[BORRAS-Neoliberal-land-policies.pdf](#)> accessed 02 June 2022.

¹⁶⁸ Jose Elvinia J, 'Is Land Reform a Failure in the Philippines? An Assessment on CARP' in Hirotsne Kimura, Suharko, Aser B Javier and Ake Tangsupvattana (Eds), *Limits of Good Governance in Developing Countries* (Gadjah Mada University Press (UGM) 2011) 337.

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.*

¹⁷¹ *ibid.*

¹⁷² Leonardo A. Lanzona, 'Agrarian Reform and Democracy: Lessons from the Philippine Experience' (2019) 10 *Millennial Asia* 274.

¹⁷³ *ibid.*

It is then argued that, in the broad and populist sense, land reform refers to a redistributive policy instrument of government aimed at property rights in agricultural land and is usually undertaken and driven for political reasons. A definition that appeases market imperatives considers land reform as the effort to re-arrange, re-configure, or re-define existing tenure relationships to allow land to become a marketable means of production.¹⁷⁴ Land reform then or the reordering of relationships pertaining to land and property rights is part and parcel of the bigger policy mix of agrarian reform that any country can pursue.¹⁷⁵ Land reform is an inherently conflictive process, for it challenges established economic and political structures and dominant cultural identities. Although peaceful land reform is always the objective of public policy, such policy must be informed by a realistic assessment of the sources of conflict and the implications of different models of land reform.¹⁷⁶

Manjengwa views land reform as a process whose purpose is to enhance agricultural production.¹⁷⁷ Manjengwa cites Moyo, who identifies two main land reform experiences, namely, the radical-cum-socialist redistributive land reforms, such as in Mozambique and Angola; and the liberal approaches that were a result of negotiated settlements that left the land questions relatively unsolved, as in Zimbabwe, South

¹⁷⁴ Anon, 'Land Reform Approaches: An International Perspective' ch 4 129 <<https://repository.up.ac.za/bitstream/handle/2263/25955/03chapter4.pdf?sequence=4>> accessed 20 April 2022.

¹⁷⁵ *ibid.*

¹⁷⁶ Sam Moyo, 'Designing and Implementing Redistributive Land Reform: The Southern African Experience' in Hans P. Binswanger-Mkhize, Bourguignon Camille, Roger Van den Brink (eds) *Agricultural Land Redistribution: Towards Greater Consensus* (The World Bank 2009) 338-339.

¹⁷⁷ Jeanette Manjengwa, 'Natural Resource Management and Land Reform in Southern Africa' (2006) Commons Southern Africa Occasional Paper No. 15, 1.

Africa, and Namibia.¹⁷⁸ The present study focuses on the liberal approaches of land reform as adopted in Namibia, South Africa, Zimbabwe, and the Philippines.

3.2.2. Market-based land reform v state-assisted land reform

According to Moyo, there are three overall models of land reform, namely, the ‘state’, ‘market’ and ‘popular’ models, all of which contain these 5 basic elements: (1) the selection of land, (2) the method of acquiring land, (3) the selection of beneficiaries, (4) the method of transferring land to the beneficiaries, and (5) support to beneficiaries.¹⁷⁹ I draw a distinction between the first two below.

The State Model

Under this model, the state plays a prominent role in the land reform process. In this regard, the state may compulsorily acquire land or it may acquire land based on the WSWB basis. In the first instance, the acquisition is regarded as radical, in that the state identifies the land, confiscates it without any compensation and transfers it to beneficiaries of choice.¹⁸⁰ In the second instance, the state acquires land which is offered by a landowner by paying the market-value for it, and then transfers the land to selected beneficiaries.¹⁸¹

The Market model

Under this model, the involvement of the state in land reform is limited, while the prominent role is played by the communities which select themselves, and enter

¹⁷⁸ *ibid* 1.

¹⁷⁹ Moyo (n 175) 343.

¹⁸⁰ *ibid*.

¹⁸¹ *ibid*.

into negotiations with the landowners concerning the price and location of the land. The community then pays the purchase price and receive the title deed.¹⁸²

In this study, reference to state-led reform is understood as the radical acquisition of land, whereas the market-led approach is understood as the acquisition of land on the basis of the WSWB approach.

3.2.3. Purposes of land reform

Land or agrarian reform is carried out to achieve specific objectives, such as: the shifting of power in terms of ownership of resources from land owners to those who are landless; to increase the popularity of the government among the poor who in most cases happen to be in the majority, by reducing the power of the few over many; (like in Zimbabwe and the Philippines); the achievement of more equity and social justice in respect of ownership of the production resources (like in Namibia, South Africa, Zimbabwe and the Philippines); the augmentation of the livelihood of and security for those who work the land but do not have property rights thereof; and to bring about a more productive agricultural sector/ or to increase agricultural productivity.¹⁸³

Moyo identifies the objectives of land reform which are peculiar to southern Africa.¹⁸⁴

Those objectives bring together various elements of the wider social, economic, and

¹⁸² *ibid.*

¹⁸³ See Clemence Rusenga, 'Rethinking Land Reform and Its Contribution to Livelihoods in South Africa' (2022) 14(2) *Africa Review* 127; Rob Davies, Katrina Kosec, Ephraim Nkonya, and Jie Song, 'Global land reform experiences: A review for South Africa' (SA-TIED Working Paper #98 March 2020); Anon, 'Land Reform Approaches: An International Perspective' ch 4 129, <<https://repository.up.ac.za/bitstream/handle/2263/25955/03chapter4.pdf?sequence=4>> accessed 20 April 2022. More and better sources needed

¹⁸⁴ Moyo (n 175) 340.

political objectives of land reform, which focus on stabilising the postcolonial nations and mitigating the historical injustices and accommodating land needs.¹⁸⁵

Accordingly, the objectives of land reform in southern Africa are as follows:

- (1) to decongest and reorganize overpopulated communal areas;
- (2) to increase the base of productive agriculture;
- (3) to reduce poverty;
- (4) to rehabilitate people displaced by war;
- (5) to resettle squatters, the destitute, and the landless;
- (6) to promote equitable distribution of agricultural land;
- (7) to correct the racial imbalance of land ownership;
- (8) to empower and benefit members of the new black elite;
- (9) to provide land to war veterans;
- (10) to provide land to “competent farmers” and indigenous capitalists;
- (11) to promote environmentally sustainable land use; and
- (12) To create political stability and peace.

The above are the most cited reasons for undertaking land reform in southern Africa. In Namibia, land reform has been and is aimed at ameliorating the lives of displaced or dispossessed previously disadvantaged Namibians and changing their socio-economic status.¹⁸⁶ This is necessitated by the fact that the dispossession of the natives’

¹⁸⁵ *ibid.*

¹⁸⁶ Republic of Namibia, ‘The National Land Policy’ (GRN 1998) 3.

land had an economic impact on the natives in that it deprived them of their livelihood and their source of sustenance, namely, the land and their livestock.

2.3.Redistributive land reform

The kind of land reform that was pursued in most southern African countries which experienced land dispossession at the hands of the colonisers is usually redistributive. For this reason, and to achieve the various objectives identified for land reform, governments have adopted redistributive land policies. McKay defines redistributive land policies as a type of land reform which endeavours to directly transfer land from the rich to the landless and land poor to attenuate poverty and inequality while at the same time appeasing the likelihood of political threats or revolts among the rural poor and the peasantry.¹⁸⁷

Redistributive land policies which depend mainly on the functioning of the market assume that ‘rational individuals will enable land markets to work efficiently and thus facilitate a voluntarist willing-seller, willing-buyer competitive market environment, lowering land prices and transaction costs through quick and non-contentious land transactions.’¹⁸⁸ However, as argued by McKay, in many settings, what these market-led policies have done is intensify and or aggravate land-based inequalities. This is because those that have no access to capital, credit, technical assistance, authority,

¹⁸⁷ Ben M McKay, ‘Redistributive Land Policies for Inclusive Growth and Poverty Eradication’ (2017) *International Institute of Social Studies (ISS) of Economics University 2*.

¹⁸⁸ *ibid* 6.

legal aid, inter alia, are often excluded, subjugated and are not able to prosper in a competitive land market and often are forced to sell and become indebted.¹⁸⁹

As argued earlier, land reform is concerned with redistributing land from large private owners to small peasant farmers and landless agricultural workers. For land reform to be truly redistributive, it needs to meet certain requirements, namely:¹⁹⁰

- i. It must bring about a change in ownership on a pre-existing agrarian structure and or control over land resources ‘wherein such change flows strictly from the landed to the landless and land-poor classes or from rich landlords to peasants.’¹⁹¹
- ii. Landlords must not be paid the full price of the market value of the land if land reform is to be truly redistributive.¹⁹²
- iii. Post-settlement or post-transfer support for the resettled people is essential to ensure that the ideals of food security, poverty alleviation, redistribution of income and sustainable production are achieved. The government must therefore make provision for this.¹⁹³

¹⁸⁹ *ibid.*

¹⁹⁰ Anon, ‘Land Reform Approaches: An International Perspective’ ch 4 129 <<https://repository.up.ac.za/bitstream/handle/2263/25955/03chapter4.pdf?sequence=4>> accessed 20 April 2022.

¹⁹¹ *ibid.*

¹⁹² *ibid.* This is primarily because in most cases struggle to pay exorbitant prices demanded by landowners, and as such, it is under those circumstances unable to financially fund the acquisition of land. Most importantly, paying the market value to landowners for land which was in most cases acquired through dubious means or simply appropriated from the indigenous people at no price is not fair.

¹⁹³ *ibid* 132.

To a certain extent, land reform in Namibia, South Africa, and Zimbabwe, has had a redistributive component. The motivation has always been to distribute land from the land rich to the land poor. However, all these countries have grappled with the issue of compensation, whereby landowners demand market-related compensation as consideration for their land, a practice which the landless indigenous people regard as unfair, given that most of the land has been appropriated from the indigenous people. In Zimbabwe, the stance taken by the late President Robert Mugabe after the year 2000 was that no compensation was to be paid to the white farmers for the land, except for improvements made on the land. This was after Britain renegeged on its promise to compensate white farmers in accordance with the Lancaster Agreement concluded in 1979, and in terms of which Britain would bear the financial burden of the proposed land reform.

3.3. Theoretical framework

During the colonial period in southern Africa, land laws and policies were enacted to dispossess the indigenous people of their land, and to reserve the appropriated land for the whites.¹⁹⁴ As a result, at the attainment of independence, new policies and laws had to be enacted that would bring about land reform. To this end, several redistributive policies were adopted, including state-led reform policies and market-led land reform policies, such as the WSWB approach. The WSWB approach attracted a lot of support from the landowners, who were mostly whites, mostly because it was advocated for by the World Bank and the International Monetary Fund (IMF), institutions which intended to not only find a market-appropriate solution to the land

¹⁹⁴ Manjengwa (n 176) 1.

issue but also to protect the interests of the white settlers/farmers.¹⁹⁵ This section focuses on the divergent views regarding market-based and state-led reform measures put in place by governments undertaking land reform.

3.4.Literature review

3.4.1. The genesis of the willing-seller, willing-buyer (WSWB) approach

The willing-seller, willing-buyer principle/approach is also known as ‘market-based land reform’, market-led agrarian reform’, ‘negotiated land reform’ or ‘market-friendly redistribution’.¹⁹⁶ This market-based approach to the redistribution of land emanates from the World Bank.¹⁹⁷ The World Bank seized the idea of the WSWB as it was in line with its general embrace of market liberalism.¹⁹⁸ This WSWB approach or market-led agrarian reform has been influenced by the World Bank.¹⁹⁹ This can be seen in countries such as Brazil and the Philippines, where market-led agrarian reform was first started.²⁰⁰

According to Moyo,²⁰¹ the WSWB approach means a ‘completely voluntary transaction between a buyer and a seller. In this regard the principle accurately denotes

¹⁹⁵ Veronika Penciakova, ‘Market-Led Agrarian Reform: A Beneficiary Perspective of Cedula Da Terra’ (Working Paper Series No. 10-11, Semantic Scholar 2010) <[\[PDF\] Market-Led Agrarian Reform: A Beneficiary Perspective of Cédula da Terra | Semantic Scholar](#)> accessed on 30 September 2021.

¹⁹⁶ Michael Aliber and Reuben Mokoena, ‘The Interaction between the Land Redistribution Programme and the Land Market in South Africa: A Perspective on the Willing-Buyer/Willing Seller Approach’ (Occasional Paper-no.2, Programme for Land and Agrarian Studies 2002) 1.

¹⁹⁷ Penciakova (n 194).

¹⁹⁸ *ibid.*

¹⁹⁹ Elmien (WJ) du Plessis, ‘Silence Is Golden: The Lack of Direction on Compensation for Expropriation in the 2011 Green Paper on Land Reform’ 2014 (17)(1) *PER/PELJ* 801; Zander Navarro, ‘Expropriating Land in Brazil’ in Hans P. Binswanger-Mkhize, Bourguignon Camille., Roger Van den Brink (eds) *Agricultural Land Redistribution: Towards Greater Consensus* (The World Bank 2009) 279 ; Lahiff (n 163) 1557.

²⁰⁰ Lahiff (163) 1577. In Africa the policy was first adopted in Kenya in line with the Swynerton Plan adopted in 1954. See Nicholas E Makana, ‘Peasant’s Response to Agricultural Innovations: Land Consolidation, Agrarian Diversification & Technical Change. The Case of Bunguna District in Western Kenya, 1954-1960’ (2009) 35(1) *A Journal of African Studies*.

²⁰¹ Simbarashe Moyo, ‘A Failed Land Reform Strategy in Zimbabwe. The Willing Buyer Willing Seller’ (2014) (2) (1) *Public Policy and Administration Review* 68-69. See also du Plessis (n 198) 797.

the lack of compulsion on landowners.²⁰² The main assumption of the WSWB approach is that there are willing sellers and willing buyers who participate in the transaction process in the market, on an equal pedestal.²⁰³ However, in reality, the parties are not on an equal standing, and the willing buyers are both landless and resource less.²⁰⁴

In Zimbabwe, the WSWB approach was contained in the famous Lancaster House Agreement, and it sought to preserve the status quo of the skewed patterns of land distribution along racial lines and to park the land issue on a shelf for at least the first 10 years after independence.²⁰⁵ South Africa and Namibia followed suit in due course. This they did despite the animated debate in South Africa concerning the justiciability of what was referred to as the ‘prosperity clause’ during the drafting of the interim and the new constitutions.²⁰⁶ As such, the property clause in South Africa is regarded to

²⁰² See also Edward Lahiff, ‘State, Market or the Worst of Both? Experimenting With Market-based Land Reform in South Africa’ *Occasional Paper Series NO. 30* (School of Government, University of the Western Cape 2007) ii.

²⁰³ Moyo, ‘A Failed Land Reform Strategy in Zimbabwe. The Willing Buyer Willing Seller’ (n 200) 68-69.

²⁰⁴ *ibid.*

²⁰⁵Section V: Freedom from Deprivation of Property of the Lancaster House Agreement (21 December 1979) <https://sas-space.sas.ac.uk/5847/5/1979_Lancaster_House_Agreement.pdf> accessed 29 April 2022. See also Moyo, ‘A Failed Land Reform Strategy in Zimbabwe. The Willing Buyer Willing Seller’ (n 200) 69. It is important to also emphasise that the WSWB has had mixed results in Zimbabwe and South Africa. Post-1980, it was effective in Zimbabwe for purposes of land redistribution to indigenous people. However, it was subject to an audit which allowed the British Government to pay for the programme for the first five years after independence. However, the abuse of the land and farm implements by indigenous people led to the British government renegeing on their Lancaster House commitments. The end result was the forcible land grab exercise in the 2000s.

²⁰⁶ Aliber and Mokoena (n 195) 3. It is important in this regard to note that the WSWB has had mixed results in South Africa as well. In South Africa, the approach has worked in the wine farms and in the Bloemfontein area. However, the process is slow which has prompted the expropriation without compensation agenda. The fact that the WSWB is driven by the Bretton Woods institutions makes it neoliberal or capitalist in tenor. It is market driven and therefore is unlikely to benefit the masses because it is not redistributive in nature

have been a gesture to promote investor confidence and not necessarily to serve the interests of the dispossessed section of the population.²⁰⁷

The WSWB approach in Namibia can be traced back to the 1st National Land Conference that was convened in 1999 where the National Reconciliation Policy was adopted to guide the process of land reform.²⁰⁸ The essence of the National Reconciliation Policy is based on the precept of forgiveness and burying the wounds of the past as well as an understanding that delving into the injustices of the past would only instigate a desire for vengeance which would distract the nation from the cardinal task of reconstruction and development.²⁰⁹ As such, the government opted not to seize land from those who acquired it under both German and South African rule and to forego restitution based on past claims (to ancestral land).²¹⁰ To this end, the government adopted a market-based solution to land reform in the spirit of national reconciliation. This was essential to maintain political stability and to adhere to the rule of law in accordance with the provisions of Article 16 of the Namibian Constitution.²¹¹ To this end, and although there were other modes of acquisition,²¹² the

²⁰⁷ *ibid.*

²⁰⁸ Chris Alden and Ward Anseeuw, 'The Gathering Storm? Namibia and the Land Question' (2nd International Conference on Wars and Violent Conflicts in Africa, 8 July 2016) 2 <<https://repositorio.iscte-iul.pt/bitstream/10071/11693/1/Gathering%20Storm.pdf>> accessed 16 September 2021.

²⁰⁹ Lauren Dobell, 'Silence in Context: Truth and or Reconciliation in Namibia (Review Article)' (1997) 23(2) *Journal of Southern African Studies* 373.

²¹⁰ Henning Melber, 'The Battles over Land in Namibia' (19 December 2018) <[The battles over land in Namibia \(africasacountry.com\)](https://www.africasacountry.com)> accessed 16 May 2022. See also Erika von Wietersheim, *This Land is my Land! Motions and Emotions around Land Reform in Namibia* (Friedrich Ebert Stiftung 2021) 33, where Wietersheim submits that restitution was considered not plausible because there 'was no fixed point in history (such as the Land Tenure Act of 1913 of South Africa) which could or would be used to restore ancestral land rights.' The clear, documentation of land in South Africa made it possible for restitution to take place. The same could not be said about Namibia. See also Justine Hunter, 'Who should own the Land? An Introduction' in Justine Hunter J (ed) *Who should own the land? Analyses and views on Land Reform and the Land Question in Namibia and Southern Africa* (Konrad-Adenauer-Foundation 2004) 2.

²¹¹ Article 16 provides that just compensation for any private land which is expropriated will be given.

²¹² Moyo (n 175) 343.

government adopted the WSWB approach as the preferred mode of land acquisition to meet the public demand for land redistribution.²¹³

3.4.2. Opponent views of the WSWB approach

The desirability and efficacy of the WSWB approach to land redistribution have been a subject of debate for many years in southern Africa, and the debate still rages on.²¹⁴

Palmer submits six reasons why the WSWB approach is not ideal, and they are as follows:²¹⁵

- i. It will redistribute little land and benefit few landless families;
- ii. A market-based approach to land reform is likely to be unaffordable to the would-be beneficiaries because the ‘market’ value of the land exceeds the agronomic value of the land;²¹⁶
- iii. If implemented, large-scale market-based agrarian reform will drive up land prices, effectively excluding poor farmers from the benefits of reform;
- iv. Would-be beneficiaries of market-based agrarian reform lack access to affordable private credit markets to finance their share of the land cost;

²¹³ Sipiwe RA Dlamini, ‘Taking Land Reform Seriously: From Willing Seller-Willing Buyer to Expropriation’ (Master Thesis, University of Cape Town 2014) 39 <<https://open.uct.ac.za/handle/11427/4691>> accessed 7 August 2021.

²¹⁴ Aliber and Mokoena (n 195) 1.

²¹⁵ Robin Palmer, ‘Report on International Conference on Agrarian Reform and Rural Development (ICARRD)’ (ICARRD, Tagaytay City, 5-8 December 2000) <http://mokoro.co.uk/wp-content/uploads/report_icarrd.pdf> accessed 02 October 2021. See also Lahiff, ‘State, Market or the Worst of Both? Experimenting With Market-based Land Reform in South Africa’ (n 201) ii; Ministry of Agriculture and Land Affairs, ‘Land Summit: [A Partnership to Fast Track Land Reform: A New Trajectory Towards 2014](#)’ (Johannesburg 27 – 30 July 2005); Land and Environment Select Committee, ‘Draft Land Summit Conference Recommendations on the Willing Seller, Willing Buyer’ (Johannesburg, 13 September 2005) where the principle of the willing seller, willing buyer was overwhelmingly rejected, and where it was submitted that ‘Market-based land acquisitions entail reliance on the existing land market system which is characterised by a number of distortions and imperfections, such as restrictions on land subdivisions, the absence of an effective land tax, unequal access to capital markets and information, contradictory requirements in respect of municipal zoning regulations.’

²¹⁶ This is true especially if beneficiaries are expected to enter the open market by themselves and to negotiate by themselves land prices with landowners, and without assistance from the government.

- v. The empirical record of market-based reforms offers little evidence that this approach will result in a rapid or significant redistribution of land; and
- vi. Uncertainty in the agricultural sector can best be addressed by a clear commitment to the rapid completion of conventional-compulsory acquisition-based-agrarian reform.

In addition to the above criticisms against the policy, the WSWB approach has been blamed for its failure to deliver on the objectives of land reform.²¹⁷ Additionally, the constitutions of both South Africa and Namibia have been blamed for protecting the property rights of landowners who have acquired the land through colonial injustice.²¹⁸ This protection of private property as articulated in Article 16 of the Namibian Constitution and section 25 of the South African Constitutions has been regarded as the main reason why land reform can never be satisfactorily addressed.²¹⁹ It is acknowledged globally that expropriation should be accompanied by compensation. As such, expropriation of land (previously owned by the indigenous people) without compensation is considered radical and in conflict with international standards regulating the right to own property.²²⁰

The slow pace of land reform in Namibia is attributed to resistance by landowners who are reluctant to relinquish their rights to property.²²¹ The WSWB is also slow due to

²¹⁷ Aliber and Mokoena (n 195) 1.

²¹⁸ *ibid.*

²¹⁹ *ibid* 5.

²²⁰ See Walter Block, 'The Economics and Ethics of Land Reform: A Critique of the Pontifical Council for Justice and Peace's "Toward a Better Pontifical Council for Justice and Peace's "Toward a Better Distribution of Land: The Challenge of Agrarian Reform" Distribution of Land: The Challenge of Agrarian Reform"' (1999) 15(1) *Journal of Natural Resources and Environmental Law* 38.

²²¹ Lahiff (n 163) 1581; Casey K Kelso, 'National Reconciliation and the Land Question in Namibia' (1992) *Institute of Current World Affairs* 8.

the unavailability of land, collusion by owners not to sell, and the inferior land which beneficiaries end up getting.²²² Odendaal and Werner also blame the WSWB approach for constraining the government's ability to acquire fertile and more productive commercial farms.²²³

De Vos has attributed the slow pace of land reform in South Africa to the government's WSWB approach and contends that the policy has so far allowed the blockage of redistribution efforts by property owners, 'as it allows property owners to refuse to have their property expropriated and allows them to hold the government to ransom by demanding that the state pays exorbitant prices for property intended for expropriation.'²²⁴ But any land can still be expropriated.

3.4.3. Proponent views of the policy

Supporters of the WSWB approach including the World Bank and IMF attack state-led redistribution methods because they go against individual rights to own property.²²⁵ This attack is based on Nozick's interpretation of the right to own property which denotes that the right to own property is inviolable and that the state has no business interfering with this sacred right by requiring landowners to give up their land for the sake of the landless.²²⁶ Aliber and Mokoena also support the WSWB approach

²²²Aliber and Mokoena (n 52) 5.

²²³Willem Odendaal and Wolfgang Werner (Eds). 2020. *Neither Here nor There: Indigeneity, Marginalisation and Land Rights in Post-Independence Namibia* (Legal Assistance Centre, 2020) 16.

²²⁴ Pierre de Vos, 'Willing Buyer- Willing Seller Works... If you have a Lifetime to Wait' *Daily Maverick* (Cape Town, 13 June 2013) <<https://www.dailymaverick.co.za/opinionista/2013-06-13-willing-buyer-willing-seller-works-if-you-have-a-lifetime-to-wait/>> accessed 15 April 2021.

²²⁵ Block (n 219) 37.

²²⁶ David Johnson, Steve Pete and Max Du Plessis, *Jurisprudence: A South African Perspective* (Butterworths 2001) 100; Nigel E Simmonds, *Central Issues in Jurisprudence: Justice, Laws, and Rights* (Sweet & Maxwell 1986) 56.

and argue that despite what is commonly claimed, the WSWB approach is not a fundamentally ill-suited mechanism to effect state-supported land redistribution.²²⁷ However, both Aliber and Mokoena suggest that the way the approach is being applied is to blame for the slow pace of redistribution and it reflects a lack of vision and ambition among policymakers.²²⁸ Prime Minister Saara Kuugongelwa shares the same sentiment as she argues that the WSWB approach has not failed in Namibia, however, it is the overpricing of the land that has made it nearly impossible for the state to acquire land for redistribution purposes.²²⁹

Support for a market-based approach to land reform is largely advanced by the World Bank.²³⁰ Proponents of this approach argue against state-led land reform, claiming that state-led reform is too expensive, that it requires the establishment of a large public sector and that it involves complex planning and implementation in a bureaucracy that is already cumbersome.²³¹ State-led land reform is also accused of fostering corruption, thereby leading to officials benefiting people who do not qualify.²³² In addition, some people will be included as beneficiaries of land reform due to their political affiliation, which means that the land intended for the needy will end up being given to those who do not deserve benefits under the programme.²³³ This is also the case in Namibia, where the political elites are accused of hijacking resettlement

²²⁷ Aliber and Mokoena (n 195) 5.

²²⁸ *ibid.*

²²⁹ Edward Mumbuu, 'WBWS Policy has not Failed' *The Namibian* (Windhoek, 28 September 2018) 5.

²³⁰ University of Witwatersrand, 'The Reshaping of South African Land Policy' Johannesburg 143 <http://wiredspace.wits.ac.za/bitstream/handle/10539/275/17_chapter5.pdf?sequence=17> accessed 29 September 2022.

²³¹ Saturnino M Borrás, 'The Underlying Assumptions, Theory, and Practice of Neoliberal Land Policies' (2006) *Economics Political Science* <[BORRAS-Neoliberal-land-policies.pdf](#)> accessed 02 June 2022.

²³² *ibid.*

²³³ *ibid.*

farms,²³⁴ where the lack of transparency in land allocation is accused of tainting land reform,²³⁵ and where politicians are accused of using their positions to influence decisions about the allocation of land.²³⁶ In my view, these claims are not without merits, however, almost every black person qualifies as a beneficiary under the ACLRA. This does not exclude members of the cabinet who can no longer be classified as economically disadvantaged

Lahiff et al submit that ‘state-led programmes introduce a range of distortions to land and agricultural markets through restrictive measures which fail to achieve the desired results of a more equitable distribution of land.’²³⁷ State-led reforms are further criticised for being overly reliant upon the state as the ultimate responsibility bearer for both the funding and implementation of the land reform programmes. This has led to state-led land reforms being ineffective and inefficient.²³⁸

State-led programmes have been ridiculed for their inability to realise any meaningful distribution of land. In this regard, it is argued that state-led reforms result in two undesirable outcomes, namely, the acquisition of lands that are not suitable for

²³⁴ Timo Shihepo and Shinovene Immanuel, ‘Political Elite Hijacked Resettlement Farms’ ... Swapo Think Tank says Corruption has Sponsored Upg’ *The Namibian* (Windhoek, 07 July 2022) <<https://www.namibian.com.na/6221900/archive-read/Political-elite-hijacked-resettlement-farms--Swapo-think-tank-says-corruption-has-sponsored-upg>> accessed 20 July 2022.

²³⁵ Petronella Sibeene, ‘Lack of Transparency Taints Land Reform’ *New Era* (Windhoek, 29 May 2008) <<https://neweralive.na/posts/lack-of-transparency-taints-land-reform>> accessed 29 September 2022. This is due to an absence of credible records of land availability and transactions.

²³⁶ Carmel Rickard, ‘Court Finds Award of Two Namibian Farms, Aimed At Land Reform, Tainted By Corruption And Irregularities’ *African Legal Information Institute* (Windhoek, 24 February 2021) <<https://africanlii.org/article/20210224/court-finds-award-two-namibian-farms-aimed-land-reform-tainted-corruption-and>> accessed 29 September 2022.

²³⁷ Edward Lahiff, Saturnino M Borras and Cristobal Kay, ‘Market-led Agrarian Reform: Policies, Performance and Prospects (2007) 28(8) *Third World Quarterly* 1421-1422.

²³⁸ *ibid* 1422.

resettlement and the inclusion of households that are not 'qualified to become land reform beneficiaries.'²³⁹ However, this criticism does not solely apply to state-led reforms. Market-related approaches such as the WSWB are plagued with similar shortcomings. State-led programmes are further accused of bringing about efficiency losses in agriculture due to the subdivision of prime agricultural land into smaller and unproductive units which are then allocated to selected beneficiaries.²⁴⁰

Furthermore, state-led reforms are regarded as coercive in nature due to the fact that the state is empowered to expropriate land and legally force landowners to relinquish their rights to the property. This has a tendency of attracting resistance from the landowners, evasion, as well as tedious legal battles and this ultimately leads to investors being uncertain about investments.²⁴¹ Arguably, landowners are reluctant to relinquish their rights to property due to the protection afforded by the constitution.²⁴²

State-led programmes are also blamed for the lack of post-settlement support.²⁴³ However, the lack of adequate post-settlement support is not peculiar to state-led reforms. Market-led reforms also suffer from a similar predicament. Additionally, State-led programmes are known to be expensive and they breed large and

²³⁹ *ibid.*

²⁴⁰ *ibid.* While sub-division of agricultural land is allowed in Namibia, such is not the case in South Africa.

²⁴¹ Lahiff et al (n 236) 1421; Francis J Murray Jr, 'Land Reform in the Philippines: An Overview' (1972) 20(1/2) *Philippine Sociological Society* 160.

²⁴² Shelleygan Petersen, 'German Settlers Never Stole any Land' *The Namibian* (Windhoek, 11 February 2022) <<https://www.namibian.com.na/6217859/archive-read/German-settlers-never-stole-any-land>> accessed 10 October 2022.

²⁴³ Lahiff et al (n 236)1423.

unaccountable bureaucracies which consume inordinate quantities of the available land-reform budget.²⁴⁴

In contrast, supporters of the WSWB have argued that market-led reform encourages a collaborative atmosphere.²⁴⁵ Penciakova contend that market-led reform stimulates rather than undermines land market. In contrast to the state-led land reform, it has been held that the market-based approach is more expedient, costs less and that it leads to fewer conflicts and increased agricultural productivity.²⁴⁶ This is contrary to Palmer's view that market-led reform is not an ideal tool to utilise in the redistribution of land.²⁴⁷ According to Lahiff et al., market-led approaches such as the WSWB are faster in acquiring land due to the minimised involvement of the state in the acquisition process and due to the fact that compensation is paid in cash.²⁴⁸ However, this view has been refuted by Palmer.²⁴⁹

The market-led approach is not without disadvantages. Penciakova argues that although this approach has led to increased rural income, often, it is only a few families who benefit and the land that is distributed is usually unproductive. This approach resonates well with landowners and because it strengthens their power within the existing property regime, it represents a victory for them.²⁵⁰ Given that there is no real threat of expropriation, landowners can simply decide not to make any land available

²⁴⁴ *ibid.*

²⁴⁵ The same cannot be said in reality, as landowners usually do not want to give up their land or if they do, they demand excessive prices.

²⁴⁶ Penciakova (n 194) 5.

²⁴⁷ Palmer (n 214).

²⁴⁸ Lahiff et al (n 236) 1421.

²⁴⁹ Palmer (n 194).

²⁵⁰ Penciakova (n 194) 5.

for redistribution purposes. As a result, the pace of land reform is very slow. This is the dilemma facing countries carrying out land reform. Lahiff et al. argue in this regard that it is highly unlikely that market-led agrarian reform has the capacity to bring about a radical restructuring of landholding to provide enough land and to meet the demand from the rural poor and the landless.²⁵¹ Arguably, this is the dilemma faced by countries like Namibia.²⁵²

3.4.4. The willing-seller willing-buyer approach in Namibia

In Namibia, the approach can be traced back to the first National Land Conference that was convened in 1991 where instead of focusing on land restitution based on past claims (to ancestral land), the government opted for a market-based solution. This market-based solution aligns with the mixed economy system adopted in Namibia in terms of Article 98 of the Namibian constitution. Article 98 of the Constitution confirms the protection of property rights in the Namibian economy, and as such it provide a fertile ground for a market-based approach to land.²⁵³ Most importantly, a mixed economy model creates a basis for the market-based approach to thrive.

At this conference, the consensus was reached that there will be no recognition of land claims by black Namibians who had lost the land during colonialism and apartheid.²⁵⁴

²⁵¹ Lahiff et al (n 236) 1431.

²⁵² Donna Pankhurst, *A Resolvable Conflict? The Politics of Land in Namibia* (University of Bradford 1996)111.

²⁵³ Article 98 of the Namibian Constitution reads as follows: Principles of Economic Order (1)The economic order of Namibia shall be based on the principles of a mixed economy with the objective of securing economic growth, prosperity and a life of human dignity for all Namibians. (2) The Namibian economy shall be based, inter alia, on the following forms of ownership: (a) public; (b) private; c) joint public-private; (d) co-operative; (e) co-ownership; (f) small-scale family.

²⁵⁴Wietersheim (n 209) 33.

This view was based on the perception that the issue of restitution is too complex, and that restitution in full is close to impossible.²⁵⁵ According to Wietersheim, restitution was not considered as plausible because there was no ‘fixed point in history (such as the Land Tenure Act of 1913 of South Africa’ which could or would be used to restore ancestral land rights.’²⁵⁶ Because of the government’s decision to forego restitution, it was impossible to implement any type of restitution.²⁵⁷ I argue further on that restitution, even partially, should have been considered by government.

A policy based on reconciliation, rather than on righting the wrongs of the past was therefore acceded to. To cement this policy, the Agricultural (Commercial) Land Reform Act 6 of 1995 was promulgated five years later, which created a legal framework for the state to acquire lands for resettlement purposes, in pursuit of the WSWB policy. It is argued concerning Namibia that:²⁵⁸

A land reform requiring strong state intervention in land and providing markets, let alone one that included the historic recompense from the country’s white communities, would have been anathema to the free market ideology on which the pre-dominant continent-wide policy framework of structural adjustments rests.

Naturally then, and to avoid restitution based on ancestral land claims in respect of land that was taken from the indigenous people as a direct result of colonial injustices,

²⁵⁵ *ibid.*

²⁵⁶ *ibid.* See also Hunter (n 209) 2.

²⁵⁷ Henning Melber, ‘The Battles over Land in Namibia’ (19 December 2018) <[The battles over land in Namibia \(africasacountry.com\)](https://www.africasacountry.com)> accessed 16 May 2022.

²⁵⁸ Pankhurst (n 251)111.

the World Bank's view on land reform, the WSWB approach appeared as the ultimate solution to the land issue for the newly independent Namibia.

Lahiff argues that the 'negotiated transition to democracy in South Africa (1990-1994) left much of the power and wealth of the white minority, including land ownership, intact.'²⁵⁹ The same holds true for Namibia. Namibia's acceptance of the Constitutional Principles laid the foundation for the inequitable distribution of land in the country to continue. To address this skewed distribution of land, the government adopted the WSWB policy.²⁶⁰ However, just like in South Africa, the WSWB in Namibia has proven to be a slow and drawn-out process.²⁶¹

There are contradictory views as to why the WSWB approach was embarked upon in Namibia, some of which are political in nature. For instance, Dlamini attributes the slow pace of land reform to the fact that 'the political balance of forces is stacked against the landless and dispossessed in particular' and this is related to how land dispossession impacted different indigenous communities.²⁶² Alden and Anseeuw agree with this political view, claiming that the motivation for adopting the WSWB approach is that SWAPO's support base was largely drawn from Ovambo people who themselves have not been dispossessed of their land.²⁶³ Hunter concedes with this view, and argues that a transparent land reform process does not seem to be a priority to most Namibians because not all people were affected directly by colonial land

²⁵⁹ Lahiff (n 163) 1578. See also Moyo (n 175) 345.

²⁶⁰ Alden and Anseeuw (n 207) 9.

²⁶¹ *ibid.*

²⁶² Dlamini (n 212) 41.

²⁶³ Alden and Anseeuw (n 207) 11.

grabbing.²⁶⁴ For Melber, the program's failure can be attributed to the sheer lack of political will and incompetence of the government agencies, coupled with greed and corruption among the elites.²⁶⁵

Another reason why the WSWB has failed to deliver as expected is that from the onset, it was insufficient to meet the demands of land reform. It was already argued in 1996 that the land reform programme did not have the capacity to adequately address the land issue and that no amount of land reform would successfully change the patterns of land ownership in Namibia.²⁶⁶ Pankhurst argues thus, "Land reform alone could not resolve the problematic colonial legacies of settler states, even if there is enough land of sufficiently good quality to parcel out portions to all the population in need."²⁶⁷ To this end then, it appears that the WSWB remains an insufficient tool to effect colonial redress.

The slow pace and inefficiency of the WSWB approach to deliver results necessitated the amendment of the Agricultural (Commercial) Land Reform Act in 2001, to give the state power to expropriate agricultural land in the public's interest.²⁶⁸ Section 20(1) of the ACLRA reads:

²⁶⁴ Hunter (n 209) 2.

²⁶⁵ Henning Melber 'How the first Redistribution Attempt Failed' (05 August 2020) No. 8 2020 Development Cooperation E-Paper <[The policy proposed by Namibia's first National Land Reform Conference in the early 1990s never took off | D+C - Development + Cooperation \(dandc.eu\)](#)> accessed 19 September 2021.

²⁶⁶ Pankhurst (n 251) 1.

²⁶⁷ *ibid.*

²⁶⁸ s 20 of the ACLRA. No. 6 of 1995.

The Minister may, subject to the payment of compensation in accordance with the provisions of this Act, expropriate such property for such purpose.

Section 20 can therefore be seen as government's attempt to move away from the WSWB approach as the preferred mode of land acquisition. However, this section has rarely been made use of as a mechanism of land reform. So far, only a few farms have been expropriated in terms of section 20(1) of the Act.²⁶⁹ Arguably, financial constraints as well as legal battles play a role in the government's reluctance to utilise section 20 of the ACLRA. The government is thus reluctant to interfere with the constitutionally protected right to own private property despite legislation authorising expropriation in the public interest. This could be attributed to the policy of national reconciliation which was economically crucial to obviate the flight of much needed capital.²⁷⁰ However, it is doubtful whether this argument is still viable more than three decades later. Most notably, this reluctance begs the question of whether expropriation of land in the public interest should only be utilised after the WSWB is exhausted or whether there are no adequate situations that would qualify as public interest.

In light of the above, there is sufficient reasons for government to reconsider the market-led approach to land reform. I, therefore, concede with Claxton's view that there is a need to shift from market-led land reform to a need-based reform model to bring about land redistribution on a scale that is large enough to have an impact on

²⁶⁹ Wietersheim (n 209) 49. According to Wietersheim, by 2006, only 5 farms comprising of 24451 hectares were acquired in terms of section 20 of the ACLRA.

²⁷⁰ Phanel Kaapama, Lesley Blaauw, Bernie Zaaruka and Esau Kaukunga, *Consolidating Democratic Governance in Southern Africa: Namibia* (EISA 2007) 16.

poverty experienced by black people and landlessness. For Claxton, this means that the government must reassess the land needs of the poor, not only for farming and grazing but also for building homes. The government should also take steps to fulfil those needs.²⁷¹

3.5. Conclusion

The market-led approach to land reform, and specifically the WSWB approach is characterised by many shortcomings. The shortcomings notwithstanding, it has been the preferred mode of land acquisition in countries such as Namibia, South Africa, and Zimbabwe. Assuredly, there are succinct reasons as to why Namibia continues to rely on the WSWB policy, including the fact that its mixed economy provides a fertile ground for the approach to thrive, and consequently, because property rights are constitutionally guaranteed and protected. The next chapter focuses on the land reform measures in South Africa and Zimbabwe. Given that these two jurisdictions share identical colonial histories with Namibia, the comparative exercise is deemed necessary to assess how the WSWB approach has contributed to redressing colonial dispossession.

²⁷¹ Hasani Claxton, 'Land and Liberation: Lessons for the Creation of Effective Land Reform Policy in South Africa' (2003) 8 *Michigan Journal of Race and Law* 529-552.

CHAPTER FOUR

LAND REFORM IN SOUTH AFRICA AND ZIMBABWE: A COMPARATIVE EVALUATION OF POLICIES AND LEGISLATIVE FRAMEWORKS

4.1.Introduction

The dispossession and appropriation of land by the colonial governments is not peculiar to Namibia. Neighbouring countries such as South Africa and Zimbabwe were also victims of colonial dispossession. These two countries also share similar property and land systems, both adopted Bills of rights protecting the right to own property, and in both countries, their land reform programmes implemented the WSWB approach. In this chapter, I discuss land reform in both South Africa and Zimbabwe. Part one focuses on land reform in South Africa. My objectives under this part are the following: (i) to demonstrate how the law was used in the pre-colonial era to perpetrate inequality in land ownership that South Africa is still facing today; (ii) to explore the motivations for implementing a land reform programme which speaks to the needs of the people; (iii) to identify shortcomings in the implementation of the land reform projects; and finally, (iv) to extract possible lessons which Namibia can emulate.

Part two focuses on land reform projects in Zimbabwe. Under this part I aim to: (i) demonstrate how the colonial dispossession of land framed the land issue in Zimbabwe; and (ii) discuss the impetus behind land reform; as well as the various phases of land reform which have been implemented in the country, including the controversial Fast-Track Land Reform Program (FTLRP). My main argument in this section is that while some Western governments condemned the late Robert Mugabe

for implementing a land reform programme that is at odds with their understanding of property rights, these Western Governments equally played a role in undermining the land reform programme. In conclusion, I submit that there are valuable lessons and features of the WSWB approach as implemented in Zimbabwe that other countries can learn from.

PART A: LAND REFORM IN SOUTH AFRICA

4.2. A brief historical background of the land question

The early 1900s in South Africa were characterized by deep poverty among most of the population; a highly divided society, profound levels of inequality, social pandemonium; ubiquitous violence and grave political tensions.²⁷² Those largely emanate from the legacies of previous state policies going as far back as the 17th century and spreading into the 20th century policies of partition and apartheid.²⁷³ These were purposely devised to embed a system of racial privilege, and to bolster regimes of capital accumulation.²⁷⁴ As such, the legacy left behind can be seen in the massively unequal distribution of land that the country inherited at independence which has laid a foundation for economic inequality and contemporary poverty.²⁷⁵

Thwala traces the dispossession (and segregation) of land in South Africa to as early as 1658, when the whites directed the Khoi people that the Khoi people could no longer

²⁷² Institute for Poverty, Land and Agrarian Studies, 'Diagnostic Report on Land Reform in South Africa: Commissioned Report for High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an Initiative of the Parliament of South Africa' (University of the Western Cape, September 2016) 3.

²⁷³ *ibid.*

²⁷⁴ *ibid.*

²⁷⁵ *ibid.*

reside to the west of the Salt and Liebeck rivers.²⁷⁶ This dispossession of the black people continued until the establishment of the first reserves by the British and the Boer governments in the 1800s.²⁷⁷ Beginning in the 1650s, European settlement started in the Cape of Good Hope and persisted northward and eastward for a duration of three centuries.²⁷⁸ By the 1900s, most of the arable agricultural land was reserved for the white minority, while the vast part of the black population was confined to the Native Reserves.²⁷⁹

This necessitated the passing of the *Native Land Act* of 1913,²⁸⁰ the purpose of which was to prohibit the ownership of land by black people outside the designated reserves; to guarantee that white people own as much land as possible, specifically in the Orange Free State and the Transvaal, as well as to safeguard them from competition of successful African farmers.²⁸¹ Mathekga argues in this regard that the appropriation of the land by the whites is a ‘rock on which the particularly unequal system of racial exploitation was built and maintained until 1970s.’²⁸² He considers the *Native Land Act* an obstacle for economic independence of many Africans.²⁸³

²⁷⁶ Wellington D Thwala, ‘Land and Agrarian Reform in South Africa’ (National Land Committee, Johannesburg 2022) 1 <[\(PDF\) LAND AND AGRARIAN REFORM IN SOUTH AFRICA \(researchgate.net\)](#)> accessed 10 April 2022.

²⁷⁷ *ibid.*

²⁷⁸ Edward Lahiff, ‘Land Redistribution in South Africa’ in Hans P. Binswanger-Mkhize, Bourguignon Camille., Roger Van den Brink (Eds.) *Agricultural Land Redistribution: Towards Greater Consensus* (The World Bank 2009) 169.

²⁷⁹ *Ibid.*

²⁸⁰ *Native Land Act* No. 27 of 1913.

²⁸¹ Mmanoko J Mathekga, ‘Land Defended: the Land Reform Policy in South Africa’ (20 May 2013) 1 <[\(99+\) Land defended: the land reform policy in South Africa | Mmanoko Jerry - Academia.edu](#)> accessed 19 April 2022.

²⁸² *ibid.* 2.

²⁸³ *ibid.*

As discussed above, the main instrument of dispossession and segregation of the black people was the legislative framework. This can be seen in a plethora of legislation (known as the Land Acts) enacted between 1913 and 1991. To this end, the *Development Trust and Land Act*²⁸⁴ was enacted in 1936 to allocate land that was already promised to the reserves, and to make squatting illegal.²⁸⁵ Shortly thereafter, and in 1937, the *Natives Laws Amendment Act*²⁸⁶ was promulgated to proscribe Africans from purchasing land in urban areas.²⁸⁷ In 1950, the *Group Areas Act*²⁸⁸ was enacted to partition areas with respect to residence and business and to control interracial property actions. The *Bantu Authorities Act* was another attempt to guarantee separate and unequal development between the whites and the blacks.²⁸⁹ In 1951, the *Prevention of Illegal Squatting Act*²⁹⁰ was passed to ensure full illegality of squatting and to allow the government to create resettlement camps for excess people put out from white farms.²⁹¹

But the white government was not done yet. In 1954, it passed the *Blacks Resettlement Act* to authorize the state to remove Africans from any area falling within the magisterial district of Johannesburg and adjacent areas.²⁹² The effect of this was to establish whites-only areas. In 1959, the *Bantu Self-Government Act* was enacted to create Bantustans, and to make the reserves the political homelands of the Africans.²⁹³

²⁸⁴ *Development Trust and Land Act* No 18 of 1936.

²⁸⁵ Thwala (n 275) 2.

²⁸⁶ *Natives Laws Amendment Act* of 1937.

²⁸⁷ Thwala (n 275) 2.

²⁸⁸ *Group Areas Act* No. 41 of 1950.

²⁸⁹ *Bantu Authorities Act* No. 68 of 1951.

²⁹⁰ *Prevention of Illegal Squatting Act* No. 52 of 1951.

²⁹¹ Thwala (n 275) 2.

²⁹² *Blacks Resettlement Act* No. 19 of 1954.

²⁹³ *Bantu Self-Government Act* No. 46 of 1959.

The effect of the Land Acts and ancillary laws of the white government was to forcibly take away land rights from the blacks and to hand it over to the whites. This led to overcrowding in the reserves, which were characterized by little or no development, poverty and unemployment rates as well as malnutrition and a lack of basic services.²⁹⁴ In essence then, the driving force behind the dispossession of the black South African population was to minimize competition to white farmers and to establish a system of cheap labour tenancy on the farms and mines.²⁹⁵ The pattern of land ownership and control established through the legislative framework radically structured the social system of control over black employees and the remaining part of the population to the needs of the capitalist economy.²⁹⁶ To this end, Lahiff argues that the degree to which the indigenous people of South Africa were dispossessed by European colonists, primarily Dutch and British settlers, which persisted for a considerably long time, cannot be compared to any other country in Africa.²⁹⁷

4.2.1. Motivations for land reform at independence

In 1991, the White Paper on Land Reform was tabled in parliament.²⁹⁸ It recognised access to land as a basic human need, and that this basic human need can be appropriately filled through a system of private ownership.²⁹⁹ As a result of the objectives of the White Paper³⁰⁰ five Bills were introduced, including the Abolition of

²⁹⁴ Thwala (n 275) 4.

²⁹⁵ *ibid.*

²⁹⁶ *ibid* 4.

²⁹⁷ Lahiff (n 277) 169.

²⁹⁸ Department of Land Affairs, 'White Paper on South African Land Policy' (Pretoria 1997) B-91.

²⁹⁹ PJ Badenhorst, Juanita M Pienaar, Hanri Mostert, '*Silberberg and Schoeman's: The Law of Property* 5th Ed (Durban, LexisNexis Butterworths 2006) 586.

³⁰⁰ The objectives of the White Paper was to broaden access to land to the whole population and to

Racially Based Measures Act, which repealed the majority of the racially discriminatory Land Acts promulgated throughout the colonial era.³⁰¹ However, due to the fact that many of the Regulations to the abolished Acts were not repealed at the same time with the Acts, existing rights remained in force.³⁰²

As such, when apartheid ended in 1993, a small sector of the population, the white minority of about 60 000 people controlled 82% of all farmlands in South Africa, which equates to 68% of the total surface area.³⁰³ This contrasts with more than 13 million blacks who were confined to the overcrowded former homelands, characterised by abject poverty, unclear and contested land rights, and extremely low incomes, high rates of infant mortality, malnutrition, and illiteracy.³⁰⁴ There were also millions of black people on white farms with no security of tenure and or basic facilities.³⁰⁵ As a result, South Africa has one of the most unequal distributions of income in the world, ‘with income and quality of life being correlated strongly with race, location and gender’.³⁰⁶ Land reform was therefore necessary.³⁰⁷

Accordingly, the purposes of land reform is fourfold: (i) to redress the injustices of apartheid; (ii) to foster national reconciliation and stability; (iii) to underpin economic growth; and finally, (iv) to improve household welfare and to alleviate poverty.³⁰⁸

³⁰¹ Badenhorst, Pienaar, Mostert (n 298) 588.

³⁰² *ibid.*

³⁰³ Lahiff (n 277) 170.

³⁰⁴ *ibid* 170.

³⁰⁵ *ibid.*

³⁰⁶ *ibid* 169.

³⁰⁷ Ndaba M Kagisho, ‘Land Reform and Restitution in South Africa’ (2019) 2 <[https://www.academia.edu/39874253/Land Reform and Restitution in South Africa](https://www.academia.edu/39874253/Land_Reform_and_Restitution_in_South_Africa)> accessed 20 April 2022.

³⁰⁸ Department of Land Affairs, ‘White Paper on South African Land Policy’ (Pretoria 1997) 7. See also Badenhorst et al (n 298) 593.

4.2.2. The negotiated terms of freedom: The compromise to protect property rights

Both Pienaar and Lahiff argue that the transition to democracy in South Africa materialized through a negotiation settlement instead of an all-out war on liberation.³⁰⁹

The presence of balanced forces during the negotiations ensured that the constitution which materialised from the multiparty talks embodied a number of ‘exacting state commitments to the country’s landless.’³¹⁰ As a result, property rights were entrenched into the constitution, on the one side protecting the rights of existing owners, and on the other side granting specific rights of redress to victims of past dispossession.³¹¹ To this end, ‘broadening access to land and effecting redistribution were linked to the market-based approach, founded on the WSWB principle.’³¹² But also redistribution, tenure reform and restitution.

There are three clauses in the South African Bill of Rights which address land reform. Those are namely:³¹³

- a. Section 25(5) which states that: *the State must take reasonable legislative and other measures within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.*

³⁰⁹Juanita M Pienaar, ‘Reflections on the South African Land Reform Programme: Dichotomies and Disconnects’ (Property Law Teachers Conference on 31 October – 1 November 2013, University of the Free State, Bloemfontein) 429; Lahiff, (n 227) 170.

³¹⁰ Pienaar (n 308) 428; Thwala (n 275). See also Lungisile Ntsebeza, ‘Land Redistribution in South Africa: The Property Clause revisited’ in Lungisile Ntsebeza and Ruth Hall *The land Question in South Africa: The Challenge of Transformation and Redistribution* (HSRC Press Cape Town 2007) 112-114.

³¹¹ Pienaar (n 308) 429.

³¹² *ibid* 429.

³¹³ The South African Constitution 1996 s 25(5), 25(6), 25(7). See also Thwala (n 275) 4.

- b. Section 25(6) which states that: *A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided for by an Act of Parliament, either to tenure which is legally secure or to comparable redress; and*
- c. Section 25(7) which states that: *A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.*

In this regard then, the legal basis for land reform is set out in the South African Constitution, in its Bill of Rights, in the property clause specifically.³¹⁴ The constitution places a clear obligation on the state to undertake land and connected reforms. It also grants specific rights to previously disadvantaged persons or victims of past discrimination.³¹⁵

4.3. The legal framework for land reform

Immediately after liberation, the newly elected government set out to redress the injustices of the past by introducing and implementing a land reform programme, with the aim of securing land rights of previously disadvantaged people. The legal basis for redressing racial imbalance in landholding emanates from the Constitution, under

³¹⁴ Section 25(1), (2) and (3) of the South African Constitution.

³¹⁵ Lahiff (n 277) 171; Edward Lahiff, 'Stalled Land Reform in South Africa' (2016) 115 *Current History* 183.

section 25(5); 25(6); and 25(7).³¹⁶ Those are restitution of land rights to the victims of all forms of racially-based dispossessions (section 25(7)); redistribution of land to the disadvantaged section 25(5)); and tenure reform aimed at promoting security of tenure for all (section 25 (6) read with section 25(9)).³¹⁷

The aims of those three components of land reform were to ‘achieve equity in land access and ownership as well as efficiency through improved land use, and in the process, help alleviate poverty and boost national economic growth.’³¹⁸ However, only few, if any, of the aims have been achieved so far. According to Lahiff, the lack of tangible success brings the entire question of transforming property rights into doubt.³¹⁹ This is a similar situation in Namibia, where land reform was intended to contribute to economic growth and to improve the socio-economic status of the people. Such objectives have not been achieved, apart from a few isolated success stories of the AALS and the redistributive programme.³²⁰

In addition to the constitutional imperative for land reform enunciated above, a comprehensive legislative framework, comprising of several legislative measures has been enacted to guide the land reform process.³²¹

³¹⁶ South African Constitution s 25(5) (6) and (7).

³¹⁷ Johanna F Kirsten and Johan Van Zyl, ‘Approaches and Progress with Land Reform in South Africa’ (1999) 38 *Agrekon* 329.

³¹⁸ Lahiff, ‘Stalled Land Reform in South Africa’ (n 314) 183.

³¹⁹ *ibid.*

³²⁰ Erika von Wietersheim, *This Land is my Land! Motions and Emotions around Land Reform in Namibia* (Friedrich Ebert Stiftung 2021) 34-44.

³²¹ Kirsten and Van Zyl (n 316) 330. Some of the imperative legislation in this regard include Restitution of Land Rights Act, No. 22 of 1994; Land Administration Act, No. 2 of 1995; Land Reform (Labour Tenants) Act, No. 3 of 1996; Upgrading of Land Tenure Rights Act, 1991, as amended by Act No. 34 of 1996; Interim Protection of Informal Land Rights Act, No. 31 of 1996; Communal Property Associations Act, No. 28 of 1996.

4.4. Components of the Land Reform Programme in South Africa

4.4.1. Redistribution

The first component of land reform is redistribution of land. In contrast to the last two components of land reform discussed, which are rights-based, redistribution is not rights-based.³²² As such, it is a discretionary programme aimed at redressing the racial imbalance in landholding on a considerably larger scale.³²³ The purpose of the redistribution programme is to avail land for residential or productive purposes to those without land (or poor) in order to improve their livelihoods.³²⁴ The redistribution programme is also aimed at strengthening property rights of communities already in occupation of land and the provision of access to land for those who in the past were deprived of the right to own land.³²⁵ The redistribution policy has undergone a series of shifts since its inception in 1994. Its focus is to provide grants to aid applicants who are qualified to purchase or lease land in rural areas, primarily for agricultural purposes and for residential purposes.³²⁶

(i) The Reconstruction and Development Programme (RDP)

The Reconstruction and Development Programme (RDP) was the first programme introduced by the ANC in 1994 to address the issue of land in a country characterised by high levels of inequality in land ownership, unacceptable levels of income

³²² Ben Cousins, 'Land Reform in South Africa is Sinking. Can it be Saved?' (2016) *University of the Western Cape, PLAAS 2* <https://www.nelsonmandela.org/uploads/files/Land_law_and_leadership_-_paper_2.pdf> accessed 20 September 2022.

³²³ *ibid.*

³²⁴ Badenhorst et al (n 298) 593.

³²⁵ Henk J Kloppers and Gerrit J Pienaar, 'The Historical Context of Land Reform in South Africa and Early Policies' (2014) 17(2) *PER/PERJ* 690. See also Kagisho (n 306) 2 where Kagisho argues that, redistribution responds to a variety of needs and aspirations of 'people for land, in both rural and urban areas, in a way that is both equitable and affordable, without derogating from the objective of alleviating poverty and national growth.

³²⁶ Lahiff (n 277) 175.

inequality, abject poverty and a dilapidating problem of unemployment.³²⁷ So the RDP introduced a consolidated policy framework whose aim was the obliteration of the legacies of the past by redressing the inequalities and creating a vibrant and democratic South Africa.³²⁸ To this end, the programme identified poverty as one of the worst burdens on the country which affected millions of people, as well as the need to provide land and housing, amongst others.³²⁹

As envisaged in the RDP, the purpose of the land reform programme was to encourage the utilisation of land for agricultural purposes and to provide productive land in order to increase income and productivity.³³⁰ Both Kloppers and Pienaar applaud the RDP as a very significant first step in post-apartheid South Africa to acknowledge that in order to alleviate poverty, it was imperative to address the needs of those who had been disadvantaged by apartheid policies and laws through the land reform programmes and land redistribution.³³¹ However, the RDP has been characterised by corruption and dishonesty in land allocation, a situation which has led to officials appropriating for themselves subsidies made for the beneficiaries.³³²

³²⁷ Kloppers and Pienaar (n 324) 688; ANC, 'The Reconstruction and Development Program: A Policy Framework' (1994) <https://www.sahistory.org.za/sites/default/files/the_reconstruction_and_development_programm_1994.pdf> accessed 18 October 2022.

³²⁸ Kloppers and Pienaar (n 324) 688.

³²⁹ *ibid.*

³³⁰ *ibid* 690.

³³¹ *ibid.*

³³² *ibid.*

4.4.2. Tenure Reform

The Constitution provides for security of tenure to persons or community whose tenure to land is legally insecure as a consequence of past racially discriminatory laws or practices.³³³ But what is tenure reform? Tenure reform is intended to provide security to all South Africans under various forms of appropriate tenure. Included in tenure reform is an initiative to provide legal recognition and to formalise communal land rights in rural areas; and a newly legislated programme aimed at strengthening the rights of tenants who mainly reside on white-owned farms.³³⁴ Tenure reform focuses on mostly communal land or land in rural areas in the former homelands, areas heavily characterised by overcrowding and various unresolved disputes concerning overlapping land rights.³³⁵

a) Communal land

To address the administration of land rights in communal areas, the *Communal Land Rights Act* No. 11 of 2004 was promulgated. Its aim was to strengthen the land tenure rights of people living in communal areas and to give their land tenure rights full protection of the law.³³⁶ However, the Act was struck down by the Constitutional Court in 2010 on procedural grounds.³³⁷

³³³The South African Constitution s 25(6). See also Badenhorst et al (n 298) 607.

³³⁴ Thwala (n 275) 14. See also Lahiff (n 277) 173.

³³⁵ Lahiff (n 277) 173.

³³⁶ *ibid.*

³³⁷ Tanja Winkler, 'Exploring some of the complexities of planning on 'communal land' in the former Transkei' (2019) (75) *Town and Regional Planning* 9. See also Lahiff, 'Stalled Land Reform in South Africa' (n 314) 183.

This was done in the case of *Tongoane and Others v Minister of Agriculture and Land Affairs and Others*³³⁸ where several communities lodged a constitutional challenge against specific provisions of the Act, and challenged its validity on inter alia the following grounds:³³⁹ that the provisions of the Act undermine the communities' security of tenure; that it undermines the customary law-based systems of land administration, and that it fails to adequately secure women's land rights.

The court held that certain provisions of the Act, particularly those setting out the transfer and registration of communal land, the ascertainment of rights by the Minister and the creation and composition of land administration committees, are unconstitutional and therefore, invalid *ab initio*.³⁴⁰ Arguably, the Act was struck because it gave traditional authorities too much power including control over the administration and occupation or use of land. This should not have been so in a democratic society. The communities thus felt aggrieved that the legislature was giving a new life lease to apartheid-created tribal authorities, at their demise.³⁴¹ In this case then, the court correctly upheld the democratic principles of equality and citizenship rights in rural areas. The Act being struck essentially left its objectives in limbo.

³³⁸ *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* (2010). Constitutional Court of South Africa. Case CCT 100/09, 11 May.

³³⁹ Thembisa Pepeteka, 'Judgement on Communal Land Rights Act, 2004 (Act No.11 of 2004) and its Implications' (8 July 2010) <https://pmg.org.za/files/docs/100908peneteka_0.doc> accessed 09 October 2022.

³⁴⁰ *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* (2010). Constitutional Court of South Africa. Case CCT 100/09, 11 May.

³⁴¹ The Law, Race and Gender Unit, 'Press Statement on the Constitutional Court Judgment on the Communal Land Rights Act' (11 May 2010) University of Cape Town <https://open.uct.ac.za/bitstream/item/2219/CLS_Press_Release_CLRA_11052010.pdf?sequence=1> accessed 09 October 2022.

The implication of the court's judgment is that there is now no legislation which provides people in rural areas with secure land tenure.³⁴² Accordingly, it is argued that the legislature must urgently enact legislation in order to provide people living in communal areas with security of tenure.³⁴³ Any delay in promulgating the necessary legislation will ensure that the chaotic land administration in rural areas will continue and this will delay economic development in communal areas.³⁴⁴

b) Tenure Reform for farm dwellers

The Extension of Security of Tenure Act 62 of 1997 (ESTA) was enacted to secure tenure rights of farmworkers. The Act was promulgated to promote the achievement of long-term security of tenure for occupiers of land; to protect these persons from unfair evictions and to set out the basic rights, duties and legitimate interests of both occupiers and owners.³⁴⁵

However, it has not been successful in curbing evictions on commercial farms and illegal evictions remain rampant.³⁴⁶

c) Tenure reform for labour tenants

Labour tenants is used to refer to black tenants on white-owned farms who offer payment for the utilisation of agricultural land by providing labour instead of cash.

³⁴² However, there is an interim measures dealing with communal land, that is, the Interim Protection of Informal Land Rights Act 31 of 1996.

³⁴³ Pepeteka (n 338).

³⁴⁴ *ibid.*

³⁴⁵ Badenhorst et al (n 298) 608.

³⁴⁶ Lahiff (n 277) 173. Lahiff submits that a total of 2 million farm dwellers were evicted and or displaced between 1994 and 2004, a figure which is more than all the people who have benefited under all components of the land reform programme since it commenced

Labour tenants are protected under the *Land Reform (Labour Tenants) Act* 31 of 1996, which safeguards them from eviction and accords them the right to acquire ownership of the land that they reside on or utilise.³⁴⁷ The purpose of the Act was therefore to broaden access to land, and to provide sufficient protection against similar (discriminatory) practices from being repeated in the future.³⁴⁸ The Act is however ineffective due to budgetary constraints for tenure reform as well as the absence of enforcement of the law by the police, prosecutors and the courts.³⁴⁹ This is not to say that there has been no success at all in this regard, because a total of 126 519 hectares of land has been made available to people under the tenure reform programme since 1994³⁵⁰. The beneficiaries have mostly been farm-dwellers and labour tenants evicted from commercial farms.³⁵¹

4.4.3. Restitution

Restitution is a key objective of the land reform programme derived from the Constitution, in section 25(7). It is this element of restitution which sets South Africa apart from Namibia, and Zimbabwe. It is based on the recognition that what the colonists did was morally wrong and where possible, land must be given back to its rightful owners, but within limits. The restitution programme is not only aimed at restoring land but also to providing other restitutionary remedies to the victims of dispossession through racially discriminatory legislation and practices.³⁵²

³⁴⁷ Lahiff, (n 277) 175.

³⁴⁸ Badenhorst et al (n 298) 595.

³⁴⁹ Lahiff (n 277) 175.

³⁵⁰ *ibid.*

³⁵¹ *ibid.*

³⁵² Badenhorst et al (n 298) 629.

The restitution claims are made against the state, the democratic government, rather than the colonial authorities or the current land owner, and a claimant can choose between three broad categories of relief, namely, restoration of specific land under claim; grant of alternative land; or financial compensation.³⁵³ According to Lahiff, most of the claims related to urban land, in respect of which claimants opted to receive monetary compensation.³⁵⁴ This means that relatively little land changed hands as a result of the restitution program.³⁵⁵ This view is correct in as far as urban areas are concerned, however, the results of restitution are different in terms of agricultural land.³⁵⁶ To this end, it is important to have regard to the fact that from the 12.8 million hectares of land acquired for purposes of land reform from 1994 to 2018, 3.6 million hectares have been acquired through the restitution programme.³⁵⁷

Restitution has been relatively more successful than the other components of land reform, and the achievements of the right to recompense for historical wrongs in South Africa has exceeded those of any comparable process globally.³⁵⁸ Considering the fact that in countries such as Namibia no level of restitution has taken place since independence, the South African restitution programme is commendable and it demonstrates that restitution, even partially, is always possible. This is despite the fact

³⁵³ Lahiff (n 277) 172.

³⁵⁴ *ibid*; Lahiff, 'Stalled Land Reform in South Africa' (n 314)183.

³⁵⁵ *ibid*.

³⁵⁶Badenhorst et al (n 298) 651. According to Badenhorst et al, the largest percentage of restitution claims settled has taken place in the Eastern Cape, with Mpumalanga and the Free State having the least percentage of the settled claims.

³⁵⁷ Legal Assistance Centre, 'Probono on Ancestral Land Rights and the Restitution Bill' <<https://www.lac.org.za/index.php/2021/07/14/probono-on-ancestral-land-rights-and-the-restitution-bill/>> accessed 30 June 2023.

³⁵⁸ *ibid*. See also Rob Davies, Katrina Kosec, Ephraim Nkonya, and Jie Song, 'Global land reform experiences: A review for South Africa' (SA-TIED Working Paper #98 March 2020) 2.

that it has progressed at a slow pace due to budgetary constraints, capacity problems and insufficient funds for post settlement support.³⁵⁹

4.4.4. The White Paper on Land Policy, 1997

To further address the issue of land reform, the White Paper on Land Policy was published.³⁶⁰ Kloppers and Pienaar submit that the White Paper represents the entire land reform policy as it addressed among other things, the ‘injustices brought about by racially based land dispossessions, unequal land ownership, and the need for the sustainable utilisation of land.’³⁶¹ It acknowledged the enormous suffering and hardships in South Africa which were caused by forced removals in line with racial segregation. It further acknowledged the fact that it is impossible to settle the land issues without addressing such historical injustices.³⁶²

Premised on such a stoic reality, the objective of the White Paper was to provide an overall manifesto for land reform comprising of three main elements: restitution, redistribution, and tenure reform- which are essentially the same components identified in the RDP and the Constitution.³⁶³

As regards the redistribution pillar, the commitment of the government was that it would refrain from intervening in the land market. Instead of directly entangling itself

³⁵⁹ Cousins (n 321) 3.

³⁶⁰ Badenhorst et al (n 298) 588. See also Kloppers and Pienaar (n 324) 692.

³⁶¹ Kloppers and Pienaar (n 324) 692.

³⁶² Department of Land Affairs, ‘White Paper on South African Land Policy’ (Pretoria 1997) 4, 6.

³⁶³ Department of Land Affairs, ‘White Paper on South African Land Policy’ (Pretoria 1997) 4. Badenhorst et al (n 298) 593.

in the purchase of land for purposes of redistribution, the government opted to adhere to the principle of the WSWB wherein the government would avail resources to fund market-led redistribution transactions without the need for the government to become the owner of the land.³⁶⁴ However, the WSWB approach has been criticised as being the number one impediment against redistribution. As such, there has been calls to abolish the principle and to migrate to a considerably hostile approach of expropriation.³⁶⁵

4.5. Approach to redistribution

Before South Africa got her freedom, the World Bank cautioned that failure to undertake ‘a major restructuring of the rural economy centred on significant land transfers and smaller scale agricultural production units will most likely result in rural violence, and perhaps even a civil war.’³⁶⁶ Kloppers and Pienaar state in this regard that:³⁶⁷

It was against this background- and amid growing concerns about the need to inspire the confidence of foreign investors in a rapidly globalising world economy- that South Africa’s multi-party constitutional negotiators approached the thorny question of whether and how to reverse the centuries old racial maladministration of the country’s 122 million hectares of land.

³⁶⁴ Department of Land Affairs, ‘White Paper on South African Land Policy’ (Pretoria 1997) 9.

³⁶⁵ Kloppers and Pienaar (n 324) 688.

³⁶⁶ *ibid.*

³⁶⁷ *ibid.*

The South African government therefore adopted a market-based approach to redistribute land, but with some state assistance.³⁶⁸

4.5.1. The rationale for the market-based approach

Apart from constitutional provision for expropriation with compensation,³⁶⁹ the government also opted to adapt a market-led approach to land reform. The justification for this approach is efficiency, that is, to maintain efficiency in the agricultural sector, to maintain and revamp the present production level in the country, and to guarantee food self-sufficiency.³⁷⁰ This is to prevent a crisis such as the one in Zimbabwe where commercial farms were expropriated without compensation during the fast-track land reform programme, an event which negatively affected the agricultural sector, and which invited sanctions from the international community against the economy of Zimbabwe. The sanctions ultimately crippled the Zimbabwean economy.

The WSWB approach works this way: the government, just like all other ordinary buyers, must find sources and go to the open market and purchase the land when it is available for sale.³⁷¹ For Mathekga, the WSWB approach has led to a laissez-faire attitude to land reform on the side of the government.³⁷² In essence then, the government has the prerogative and the means to enter the land market on behalf of

³⁶⁸ Thwala (n 275) 12-3.

³⁶⁹ The Constitution of the Republic of South Africa, section 25(2).

³⁷⁰ *ibid.*

³⁷¹ *ibid.*

³⁷² Mathekga (n 280) 4.

the poor, but it has opted not to do so until the pro-active land acquisition strategy (PLAS) was introduced in 2006.³⁷³

Mathekga criticises the WSWB approach for deliberately safeguarding the interests of the existing landowners, in that, it does not compel landowners to sell their land. Would-be beneficiaries, who depend on the government's approval of their applications and the willingness of the sellers to transact with them are not given any guarantees. This is because landowners enjoy the freedom of deciding whether to sell their land property, to whom they will sell; and to determine the price at which they want to sell.³⁷⁴ The downside to this wide discretion given to landowners under the WSWB approach is that the policy has no authority to compel the landowners to give up their land. If the landowners decide not to relinquish their rights in respect of land, there is absolutely nothing that the policy can do to change the situation. This wide discretion gives landowners the right to select their own buyers and to determine their prices, and this makes them a determining factor in the land redistribution program.³⁷⁵ However, this situation is ameliorated somewhat by the Property Valuation Act of 2014, which provides for the Property Valuer General to value property identified for purposes of land reform in order to determine their market value.³⁷⁶ In essence then, the Property Valuation Act is a significant step in regulating market-prices for land and curbing exorbitant prices demanded by landowners.

³⁷³ DRDLR, *Implementation Evaluation of Proactive Land Acquisition Strategy (PLAS)* (Pretoria: DRDLR Directorate of Evaluation and Research Pretoria 2015) 2. Because the state also entered into the market and bought property, it was deemed to be too expensive and ultimately unsustainable, on the basis of market value.

³⁷⁴ Mathekga (n 280) 4.

³⁷⁵ *ibid.* The availability of the land hinges on the willingness of the landowners to release land into the open market.

³⁷⁶ The *Property Valuation Act* 17 of 2014, section 12.

The laissez-faire approach to redistribution came to the end in 2006 with the introduction of the Pro-Active Land Acquisition Strategy of 2006, which effectively replaced the land redistribution programmes implemented from 1996 to 2006 and enabled the government to play a direct role in the acquisition of land from white farmers and to redistribute it to black farmers.³⁷⁷ To this end then, land was proactively purchased (mostly for agricultural purposes) by government without the need to first identify beneficiaries, because the PLAS provides for a simultaneous process of identifying beneficiaries.³⁷⁸ It is important to note however, that beneficiaries of redistribution under the PLAS did not automatically become owners of the allocated land. Beneficiaries were required to sign a lease-agreement with the option to purchase before government could hand over the plot to them.³⁷⁹ Ownership was only granted after government has satisfied itself that the beneficiaries were both willing and able to farm successfully.³⁸⁰ This is not the case in Namibia where ownership of redistributed land under the Resettlement Policy remains in the government, although beneficiaries receive a leasehold of 99 years over the allocated land which is registered in their names.

³⁷⁷ DRDLR, *Implementation Evaluation of Proactive Land Acquisition Strategy (PLAS)* (Pretoria: DRDLR Directorate of Evaluation and Research Pretoria 2015) 2. The objectives of PLAS were to achieve the following: Fast-track land redistribution, especially in nodal areas and agricultural corridors; to improve identification, screening and selection of land reform beneficiaries in order to ensure maximum productive use of land acquired; to hedge against escalating land prices through proactive acquisition; to acquire land for agricultural production and not for residential purposes; to lease acquired land to an emerging black farmer for a three-year period at a fixed rate of 6% of the value of the arable land, after which period the land could be sold to the same beneficiary.

³⁷⁸ Ronald Nkwain Ngam, 'Government-driven Land and Agrarian Reform Programmes in Post-Apartheid South Africa – A Brief History (1994-2021)' (2021) 25(1) *African Sociological Review* 138. See also Johann Kirsten, Aart-Jan Verschoor and Collecto Gandidzanwa, 'The South African government has been buying farmland for black farmers. It's not gone well' *The Conversation* (Cape Town, 09 January 2023) <<https://theconversation.com/the-south-african-government-has-been-buying-farmland-for-black-farmers-its-not-gone-well-197201>> accessed 29 May 2023.

³⁷⁹ Ngam (n 377) 138.

³⁸⁰ *ibid.*

Since 1994, the ANC led government has endeavoured to transfer land through the WSWB policy, but this has been considerably slow, just as in Namibia. This goes to show that the WSWB approach has enjoyed little to no success in these countries, and it is not an ideal policy for land redistribution. However, it is important to realise that the actual tempo is difficult to determine, due to a number of reasons, including the issue of race. The fact that race is not included in land titles any more, makes it difficult to see what the actual transfer of land is to black beneficiaries. However, the targets set for redistribution can be utilised as a guide to substantiate the argument above. The target set by the South African government for redistribution of land was 30% for the first 20 years after independence to the effect that the black people of the population will own 43% of the land. At independence, they only owned 13% of land. However, as of 2013, only 5% of the land was transferred to black people.³⁸¹ Mathekga argues that if the government proceeds with the policy and pace of 5% distribution every 20 years, only 25% of land would be transferred in a century.³⁸²

This means that the country's racially based inequality in terms of land ownership will remain high and the economic exclusion of the blacks as well as the patterns of land ownership will be preserved.³⁸³ According to Wietersheim, Namibia has fared considerably better than South Africa in transferring land from white hands into black hands.³⁸⁴

³⁸¹ Mathekga (n 280) 4.

³⁸² *ibid.*

³⁸³ *ibid.*

³⁸⁴ Wietersheim (n 319) 45.

4.5.2. What went wrong?

The South African Land Reform Programme established as an essential part of a broad-based programme of economic remodelling and this is commended for ‘its strong political acceptability and legitimacy’.³⁸⁵ However, it has several flaws.³⁸⁶

- a. Firstly, the slow speed of implementation due to mixture of superfluous bureaucracy and over-centralisation of the process renders the programme ineffective.
- b. Secondly, there has been a failure to adequately address the economic viability of farm models, this is evidenced in the fact that there is inadequate land size and quality for resettled individuals to provide at the minimum, the target income.
- c. Thirdly, the role that the public sector can play, if any, is not defined. What should be left to the non-governmental sector is also not outlined.
- d. Considerably little attention has been paid to the need for additional services, markets, infrastructure, incentives and health, which consideration are imperative to maintain ‘higher productivity subsequent to reform’ as well as to include those who may not be direct beneficiaries of land reform.

In 2017, after years of a slow pace of land reform, a Panel was appointed to ‘examine the extent to which current laws and policies uphold and fulfil rights to equitable access, tenure security and restitution, and to identify possible proactive interventions to address any shortcomings identified’.³⁸⁷ This investigation was critical in order to

³⁸⁵ *ibid.*

³⁸⁶ Kirsten and Van Zyl (n 316) 338-339.

³⁸⁷ Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (November 2017) 202.

understand why the process of land reform has not met its objectives. Two main issues undermining land reform were revealed, namely:³⁸⁸

- a. Both the restitution and redistribution programmes of land reform have failed to deliver;
- b. People have been denied their land rights and in some cases, dispossession has taken place. This has directly affected security of tenure for many people

Similarly, it was found that despite a plethora of legislation on land reform, the state has been struggling to implement the policies. In analysing the key constraints to an effective land reform programme, the WSWB approach was identified as one of the factors hampering land reform. Other factors include state capacity in implementing the land reform programme, (despite a very comprehensive legislative framework); as well as the determination of land price valuations without taking into account the requisite constitutional provisions.³⁸⁹ Failure of the program was also attributed to the Land Reform Budget and post-settlement investment by key departments, which budget has been below 1% of the total budget. The Panel also identified other constraints such as poor infrastructure investment and alignment which are undermining land reform.³⁹⁰ It is clear then that land reform is a complex matter and its failure cannot only be attributed to the legislative framework.

However, and most importantly, the Panel recognised the failure of the State to utilise section 25(5) of the Constitution to enact laws and or policies that would foster

³⁸⁸ *ibid.*

³⁸⁹ Expert Advisory Panel on Land Reform and Agriculture, 'Final Report of the Presidential Advisory Panel on Land Reform and Agriculture' (Republic of South Africa, 04 May 2019) 33.

³⁹⁰ *ibid* 33.

conditions that would enable citizens to gain access to land on an equitable basis. In this regard then, and according to the High Level Panel: ³⁹¹

- (a) Legislation has failed to meet the goals and objectives enunciated in the constitution and in policy documents;
- (b) only 5.6% of agricultural land has been transferred thus far, making redistribution a slow exercise;
- (c) redistribution has neglected urban needs and rapid urbanisation, having focused mainly on agriculture;
- (d) the pace of redistribution has declined since 2008
- (e) there has been shifting policy positions;
- (f) land redistribution has been captured by the elites and there are no monitoring mechanisms to prevent this;
- (g) there is still a lack of clarity about tenure rights; and women still constitute a small percentage of beneficiaries;

The inefficiencies above have brought about an action plan to make land reform a priority again, and Namibia would do well to adopt a similar approach.

4.4.3. What should be done?

The ruling party has honestly and frankly acknowledged that land reform has progressed at a painfully slow pace since independence.³⁹² This realisation has led to calls of an accelerated land reform programme and Parliament has responded accordingly by embarking on a process of fast-track land reform, which includes deliberating with the issue of amending legislation and or the constitution in order to allow the expropriation of land without compensation.³⁹³

In order to solve the complex issue of land reform, the Panel Report proposed the introduction of a clear policy framework with clear strategies and transformation

³⁹¹ *ibid.*

³⁹² *ibid* 42.

³⁹³ *ibid.*

outcome. A number of recommendations which directly impact land reform were made, however, I only discuss three which are relevant for purposes of this study:³⁹⁴

1. Allocation of already acquired land: this entails fast tracking the conclusion of restitution cases and transfer of legally secure and legally registrable tenure to communities with settlement packages; the conferment of tenure rights in land allocated through the land reform program as envisaged in sections 25(6) and 25(9) of the Constitution; and reviewing and re-allocation of dysfunctional farms from previous land reform schemes;³⁹⁵
2. Development of a proactive targeted land acquisition and allocation programme: this proposed Proactive Target land Acquisition Programme is a shift from the WSWB approach in that it is open to various forms of land acquisition in line with section 25 of the Constitution, and will have room for amendments (expropriation without compensation) should such amendments materialise. In this regard, various acquisition methods can be utilised.³⁹⁶
3. Land expropriation: The Panel acknowledged that the call to expropriate land for purposes of land reform is a constitutional imperative. To this end, it proposed that the Expropriation Act 63 of 1975 should be replaced with a new Act which would allow the expropriation of the following types of land at nil compensation, i.e. abandoned land, hopelessly indebted land; land held purely for speculative purposes; unutilised land held by state entities; land already occupied and used by labour tenants and former labour tenants; land obtained

³⁹⁴ *ibid* 77.

³⁹⁵ *ibid* 77.

³⁹⁶ *ibid* 79.

through criminal activity; informal settlement areas; inner city buildings with absentee landlords; land donations; and farm equity schemes.³⁹⁷

I commend the South African government for reflecting on the slow pace of land reform and coming up with lucrative proposals to address the challenges associated with the land reform programme. It is hoped that those recommendations will be eventually implemented and when they do, the results will encourage other jurisdictions, especially Namibia on how best the land question can be resolved.

PART B: LAND REFORM IN ZIMBABWE

4.6. Introduction

As stated before, land dispossession is not peculiar to Namibia. Both South Africa and Zimbabwe have experienced decades of land dispossession by the colonial governments. South Africa, which was under colonial rule for 350 years, arguably suffered more when compared to Zimbabwe and Namibia. These countries, therefore, share similar historical experiences of land dispossession as a result of colonialism, all these countries share similar ownership and property systems, and all of them implemented the market-led approach to land reform. They have equally implemented land reform programmes to redress the injustices of the past pertaining to land ownership. However, Zimbabwe is special in that it is the only country in southern Africa which has implemented a radical land reform project. I focus on the Zimbabwe experience below.

³⁹⁷ibid 80.

4.6.1. The historical basis of land reform: Tracing the roots of colonial dispossession

In Zimbabwe, the land reform programme was introduced in 1980 with two main objectives, namely, to redress the historical disparity in land ownership; and to allow the black part of the population to participate in the agricultural production of the country.³⁹⁸ The need to redress this grave injustice was evident. However, the expectation of undertaking a radical approach to land reform were thwarted by the Lancaster House negotiations of 1979 which paved the way for Zimbabwe's independence.³⁹⁹

4.7. The first phase of land reform in Zimbabwe: 1980-1990

At independence, most Zimbabweans expected to see a radical transformation in land ownership patterns. They had been deprived of their land, and now, land hungry and desirous of the restoration of land that was promised by the liberation rhetoric, they expected their legitimate grievances over land to be addressed.⁴⁰⁰ However, that radical re-structuring did not occur at independence. As a matter of fact, the colonial pattern of land holding stayed intact for the next twenty years after independence.⁴⁰¹

Mlambo attributes this to a number of reasons, such as:⁴⁰²

³⁹⁸ Francis T Gonese, Nelson Marongwe, Charles Mukora and Bill Kinsey, 'Land Reform And Resettlement Implementation In Zimbabwe: An Overview of the Programme against Selected International Experiences' (2002) *Political Science* i <[Land reform and resettlement implementation in Zimbabwe : an overview of the programme against selected international experiences | Semantic Scholar](#)> accessed 11 May 2022.

³⁹⁹ Sam Moyo and Walter Chambati (eds.), *Land and Agrarian Reform in Zimbabwe: Beyond White-Settler Capitalism* (African Institute for Agrarian Studies 2013) 2.

⁴⁰⁰ Alois M Mlambo, 'Land Grab' or 'Taking Back Stolen Land': The Fast-track Land Reform Process in Zimbabwe in Historical Perspective' (2005) 3 *History Compass* 8.

⁴⁰¹ *ibid* 2.

⁴⁰² *ibid* 8.

- i. the limitations ‘placed on the incoming independence government’ by the Lancaster House Constitution of 1979, which assisted in Zimbabwe’s independence;
- ii. the half-hearted way in which the Zimbabwe government addressed the land reform issue; and
- iii. ‘Arguably, the myopic and intransigent attitude of the country’s white farmers who, instead of being pro-active in finding ways of sharing the land they held, were generally obstructionist and antagonistic to efforts to redistribute the land, even though they were aware that the land issue had always been at the root of African grievances in the colonial era’.

To protect the interests of its settlers, the British government proposed the Lancaster House Constitution of 1979 as the legislation to usher Zimbabwe into independence.⁴⁰³ This is similar to the 1982 Constitutional Principles introduced by the Western Contact Group to usher Namibia to independence.⁴⁰⁴ The Lancaster House Constitution/Agreement dictated a framework for land redistribution and resettlement in Zimbabwe. Furthermore, it provided guidelines for land ownership.⁴⁰⁵ Its preferred mode of land acquisition through the willing seller, willing buyer policy ensured that there were no obstacles to prevent white farmers from continuing their farming activities.⁴⁰⁶

⁴⁰³ Luise White, ‘The “Lancaster House was Redundant”’: Constitutions, Citizens, and the Frontline Presidents’ in *Unpopular Sovereignty: Rhodesian Independence and African Decolonization* (University of Chicago Press 2021) 255.

⁴⁰⁴ See the 1982 Constitutional Principles; Marinus Wiechers, ‘Namibia: The 1982 Constitutional Principles and their Legal Significance’ (1989) 15 *A Yearbook of International Law* 1-21.

⁴⁰⁵ Kudzayi S Tarisayi, ‘Divergent Perspectives on the Land Reform in Zimbabwe’ (2019) 44(1) *Journal for Contemporary History* 92.

⁴⁰⁶ *ibid.* See also Robin Palmer, ‘Land Reform in Zimbabwe, 1980-1990’ (1990) 89 *African Affairs* 166; Moyo and Chambati (n 398) 2.

The effect of the Lancaster House Constitution (interchangeably referred to as the “Lancaster Agreement) for Zimbabwe is that, for the first ten years after independence, the newly elected government could not acquire land from the colonial owners, except through the WSWB approach , at market prices and in foreign currency.⁴⁰⁷ The ramifications for this are that the expectations for radical land reform that would have rectified the inequalities of the past and fulfilled the motivation behind the liberation struggle could not be implemented immediately after independence.⁴⁰⁸ This provided the basis for deep resentment by the Zimbabwean population and a perception that the liberation struggle for land was in vain.⁴⁰⁹ As such, Tarisayi argues that the Lancaster Agreement served as an obstacle to land reform throughout the first ten years after independence.⁴¹⁰ In essence then, the Lancaster Constitution tied the hands of government as far as radical land reform is concerned.⁴¹¹

The progress of land reform under the limitations of the Lancaster Constitution was considerably slow, due to the unwillingness of the white settlers to offer adequate land for the government to purchase, and their tendency to offer government marginal, infertile land in low rainfall areas to buy.⁴¹² The fact that the settlers could choose to be paid in foreign currency meant that land reform was an extremely expensive affair

⁴⁰⁷ Mlambo (n 399) 8; Pempelani Mufune, ‘Land Reform Management in Namibia, South Africa, and Zimbabwe: A Comparative Perspective’ (2020) 6(1) *International Journal of Rural Management* 4.

⁴⁰⁸ Mlambo (n 399) 9. It is accepted that there is a strong moral case for radical redistribution of land in Zimbabwe, as a result of colonialism. See Neil H Thomas, ‘Land Reform in Zimbabwe’ (2003) 24(4) *Third World Quarterly* 692.

⁴⁰⁹ Tarisayi (n 404) 92.

⁴¹⁰ *ibid.*

⁴¹¹ Mlambo (n 399) 9.

⁴¹² *ibid.* Only 52 000 households out of a target of 162 000 were settled from congested communal lands by 1989. See also Tavonga Njaya and Nelson Mazuru, ‘Land Reform Process and Property Rights in Zimbabwe: Constraints and Future Prospects (1980-2002)’ (2010) 12(4) *Journal of Sustainable Development in Africa* 164.

for the government.⁴¹³ The little progress of land reform could also be attributed to Britain's failure to provide adequate funding.⁴¹⁴ Without adequate funding, it was impossible for the government to acquire as much land as was in demand and therefore, the British is partly to blame for the slow pace of land reform in Zimbabwe. Essentially, Britain failed to honour her commitments to land reform.⁴¹⁵

The pledge that was given by the British and American governments at the Lancaster House Agreement to contribute to the costs of land acquisition from the white settlers for redistribution to the black people was short-lived.⁴¹⁶ The £44 million that was released by the British government was nowhere close to 'the massive international assistance that the nationalists had been promised at the Lancaster House and therefore Mugabe reiterated that the British Government has reneged on its promises.'⁴¹⁷ This fact has been acknowledged by some British commentators, who also maintain that Britain is to blame for the failure of the land reform in Zimbabwe:⁴¹⁸

The 1979 Lancaster House Agreement... ensured that the Zimbabwean government could not use local currency only to buy land from farmers who were willing to sell. If it were to expropriate their property, it would have to compensate them with scarce and precious foreign exchange. The Agreement bound the country to a programme of land whose implementation would have cost billions. Having hinted that we (the British) would pay for it, our government handed over only a fraction of the money required - £44 million-

⁴¹³ *ibid.* See also Neil H Thomas, 'Land Reform in Zimbabwe' (2003) 24(4) *Third World Quarterly* 697.

⁴¹⁴ Njaya and Mazuru (n 411) 164.

⁴¹⁵ Mlambo (n 399) 9. See also Thomas (n 407) 697 and Njaya and Mazuru (n 411) 164.

⁴¹⁶ Thomas (n 407) 697.

⁴¹⁷ Mlambo (n 399) 9.

⁴¹⁸ George Moinbot, 'We Share the Blame on Zimbabwe' *Guardian Unlimited (UK)* (London, 20 April 2002) <<https://www.theguardian.com/world/2000/apr/20/zimbabwe.comment>> accessed 17 May 2022.

to make it happen. Had a sterner settlement been struck, or had Britain been more generous, there might have been a land distribution problem. Our meanness, compounded perhaps by an unwillingness to undermine white economic hegemony, perpetuated Zimbabwe's racial segregation.

Mlambo also blames the Zimbabwean government for its contribution to the failure of land reform.⁴¹⁹ In this regard, Mlambo accuses the Zimbabwean government of failing to prioritise land reform and for failing to distribute the land acquired in terms of the WSWB basis as vigorously as it should have done.⁴²⁰ This is not to take away from the fact that the British government funded the process of land reform half-heartedly.

The view that the Zimbabwean government was slacking on land reform is also perpetuated by the fact that it did considerably little to ensure that the liberation rhetoric was translated into reality. This can partly be attributed to a 'lack of a comprehensive and effective plan on land redistribution as well as a lack of transparency in the way the land that was acquired was redistributed'.⁴²¹ Corruption, lack of post-settlement support and government's ineptitude are also some reasons why the programme was not successful. By 1988, the British government became dissatisfied with the (corrupt) way land was being allocated to the elites of the ruling party rather than the landless rural people.⁴²²

⁴¹⁹ Mlambo (n 399) 10. See also Njaya and Mazuru (n 411) 164 on views of what made the land reform programme of Zimbabwe to fail.

⁴²⁰ Mlambo (n 399) 10.

⁴²¹ *ibid* 11.

⁴²² *ibid* 6; Mufune (n 406) 9.

4.7.1. Redistribution

Under the constraints of the Lancaster House Constitution, redistribution was slow. As such, land reform during this period was mostly confined to the resettlement of black families or cooperatives onto land that was willingly availed by the whites.⁴²³ These justifications for resettlement were not only based on the need to attain social justice, but also on ecological balance in resettlement.⁴²⁴ There was, therefore, a need for the government to act fast.

The support for resettlement advanced by Britain under the Lancaster Agreement was supposed to be utilised in two ways: (i) the purchasing of land from white farmers; and (ii) the development of the requisite infrastructure to assist the new settlers in establishing themselves.⁴²⁵ Britain agreed to meet the Zimbabwean government halfway, in funding the programme of land reform, on condition that the government of Zimbabwe will contribute to half the price of land reform in the British currency.⁴²⁶ This was an arguably difficult position for the newly elected government to fulfil, as it had to struggle with the exorbitant prices of land set by the white farmers, in the currency of their choice. There were four models of resettlement which the government adopted under the confines of the Lancaster Agreement.⁴²⁷

⁴²³ Palmer (n 405) 167.

⁴²⁴ *ibid* 168.

⁴²⁵ *ibid*. Palmer argues in this regard that the conditions laid down by Britain in respect of the development of infrastructure were too strict and were difficult to meet in that there were insufficient surveyors to meet Britain's requirements.

⁴²⁶ *ibid*.

⁴²⁷ Francis Chitsike, 'A Critical Analysis of the Land Reform Programme in Zimbabwe' (2nd FIG Regional Conference, Marrakech, Morocco 2-3 December 2003) 5.

4.7.2. Schemes of resettlement

Four resettlement schemes or models were introduced under the land reform programme. Although there were initially just two, two additional models were subsequently added.

- a. Model A - under this model, individual households are allocated 5-6 hectares of arable land for farming, plus access to common grazing land between 20-200 hectares according to the region. This model is intended for family farming. Additionally, under this scheme, people had access to roads connecting the villages to a rural service centre where basic services such as health, education etc. were provided by government.⁴²⁸
- b. Model B - under this scheme, collective production cooperatives were formed to manage the acquired farms. Under this model, land is owned by the state, but it is held and managed communally.⁴²⁹
- c. Model C - this model comprised of individual family farming holdings affixed to a cooperative or state farm. These schemes were initiated to integrate small farmers directly into more intricate and technically challenging farm enterprises such as dairy production and tobacco.⁴³⁰

⁴²⁸ Palmer (n 405) 4; Chitsike (n 426) 4-5.

⁴²⁹ Mufune (n 406) 4; Chitsike (n 426) 4-5.

⁴³⁰ *ibid.*

- d. Model D - This model was made for low rainfall regions, where ranches were assimilated as protracted grazing areas. This was done to lessen pressure on grazing land in communal areas.⁴³¹

Most of the people who were resettled in the 1980s preferred the first model. It is arguably the most ideal model of resettlement due to the level of support services the resettled people had access to.

4.8. Land reform from 1990 to 2000: A shift in the land reform programme

In 1989, and shortly before the elections, the issue of land resurfaced again into the mainstream. By this time, many politically connected individuals, about 500, had become owners of large areas of land.⁴³² The public was disgruntled by the government's nonchalant attitude towards the redistribution of land, and some held the view that this is because for some members of government, land distribution was about securing land for themselves rather than giving it to the peasants.⁴³³

Land then became a political tool for the government to use in its election campaign.⁴³⁴ As such, a campaign was launched to persuade white farmers to part with their underutilised land and avail it to government for resettlement. The government maintained that it would only resort to other means of acquiring the land should negotiations fail.⁴³⁵ The white farmers did not respond to the call to avail land for

⁴³¹ *ibid.*

⁴³² Palmer (n 405) 174.

⁴³³ *ibid* 175.

⁴³⁴ *ibid.*

⁴³⁵ *ibid.*

redistribution, rather, they maintained that “extreme caution should be taken because of the sensitivity of the issue” and advised that land should not be expropriated from white owners without compensation at the expiry date of the Lancaster Agreement.⁴³⁶ However, Zimbabwe maintained that the situation inherited at independence had been ‘morally unacceptable, economically unjustifiable, and politically untenable.’⁴³⁷

The two nations entered negotiations concerning the future of land reform after the expiry of the Lancaster Agreement.⁴³⁸ Britain was fixed on perpetuating the Lancaster Agreement beyond 1990, while Zimbabwe was adamant that the life of the Agreement will not be extended.⁴³⁹ It is clear then that by 1989, the British were afraid of losing control over the process of land reform. For this reason, they maintained the rhetoric that should the Zimbabwean government go ahead with a radical programme of land reform, it would undermine white confidence, cripple the economy, and discourage foreign investors, and it would also prompt Britain to turn off both its bilateral and multilateral aid taps.⁴⁴⁰ The financial/economic ramifications for any proposal of a radical land reform program in Zimbabwe were therefore not concealed. To this end, Britain maintained that it had no ‘special responsibility to fund the land reform in Zimbabwe because it has a new government and has no links with former colonial interests.’⁴⁴¹ Any other funding that Britain was prepared to give was channelled through civic organisations, instead of the Zimbabwe government which angered the

⁴³⁶ *ibid* 176.

⁴³⁷ *ibid.* see also Thomas (n 407) 692.

⁴³⁸ Palmer (n 405) 177.

⁴³⁹ *ibid* 178-179.

⁴⁴⁰ *ibid* 178.

⁴⁴¹ Mlambo (n 399) 14.

already struggling government further. This prompted the people of Zimbabwe to act.⁴⁴²

To this end, in 1990, the government reviewed the objectives of the National Land Policy and amended the Constitution.⁴⁴³ In addition, government enacted the *Land Acquisition Act* in 1992, which abolished the WSWB approach and authorised the government to compulsorily obtain land for redistribution subject to fair compensation.⁴⁴⁴ The new *Land Acquisition Act*, together with the newly amended Constitution provided for the following: that compensation for purchased land should be in the local currency alone; that the government should have the right to compulsorily acquire land that is not being fully utilised; that fair compensation should be subject to guidelines outlined by the Minister in the acquisition of designated land; that the evaluation of compensation will be done by a ‘Compensation Committee’; and that the Administrative Court of Arbitration will be established as a body of appeal to deal with disputes concerning compensation.⁴⁴⁵

The government’s new approach to land reform was met with vigorous opposition from white farmers, who claimed that the Act is a gross infringement of property rights which will undermine the country’s agriculture and investor confidence.⁴⁴⁶ The international community also opposed the government’s attempt to compulsorily acquire land from the white farmers.⁴⁴⁷ In doing so, they had forgotten that the white

⁴⁴² Palmer (n 405) 165.

⁴⁴³ Chitsike (n 426) 4.

⁴⁴⁴ Mlambo (n 399) 11.

⁴⁴⁵ *ibid* 8-9.

⁴⁴⁶ *ibid*.

⁴⁴⁷ *ibid*.

settlers have not paid any compensation for the land they forcefully acquired from the indigenous people. As such, it can be argued that Britain's renegeing on its promise to fund the land reform programme in terms of the Lancaster Agreement was one of the main motivations which prompted the Zimbabwean government to finally do something about the skewed distribution of land.

The opposition from the international community encouraged the white settlers to resist any meaningful land reform in Zimbabwe. Their resistance proved their desire to hold on to land that they acquired on a racially discriminatory basis for as long as possible. Rather than being forthcoming with proposals to assist the government in the land reform process, the white farmers dug in their heels and insisted that the government should pay market prices for their land, despite the fact that the government could not afford to purchase land for redistribution at a pace that would keep the time bomb that was the land question from exploding.⁴⁴⁸ Equally, the 1992 *Land Acquisition Act* that would enable government to acquire excess land for redistribution to the landless was strongly opposed by the white settlers.⁴⁴⁹ The refusal by the white farmers to participate in the land reform programme and/or to become integrated in the new post-independence dispensation by maintaining their societal and racial enclaves did not help to appease the indigenous people. This is mostly because of the resentment felt by many black people towards the fact that even after independence most of the arable land remained under the control of the whites.⁴⁵⁰

⁴⁴⁸ *ibid* 12.

⁴⁴⁹ *ibid*.

⁴⁵⁰ *ibid*.

4.9. Land reform after 2000: The Fast Track Land Reform Programme

Some scholars attribute Zimbabwe's economic downfall to the forceful eviction of white farmers during the period of the fast-track land reform process. In this regard, they regard it as the genesis of the fall of the economy, in that just a decade earlier, agriculture was the cornerstone of Zimbabwe's economy, providing employment to more than 300 000 farmworkers as well as a livelihood for close to two million people.⁴⁵¹ However, after the year 2000, agriculture sank and there has been a collapse of the rule of law and the unnecessary loss of human life.⁴⁵²

The move by the Zimbabwe government to undertake a fast-track land reform process has had grave repercussions for the country to this day. The process left the country dependant on food aid programmes to feed its people, and today, Zimbabwe's fast-track land reform used as an example of what countries undertaking land reform should not do.⁴⁵³ Arguably, for the Zimbabwe Human Rights NGO Forum, it was the complete ignorance of the rule of law and the failure to protect and uphold property rights, which are intimately linked with economic growth, which led to the collapse of the Zimbabwean economy.⁴⁵⁴ However, it was sanctions imposed by the West which also led to the collapse of the country's economy.⁴⁵⁵

The fast-track land reform process has incited serious criticisms and a worldwide public outcry and condemnation for the gross violations of human rights which

⁴⁵¹Zimbabwe Human Rights NGO Forum, 'Land Reform and Property Rights in Zimbabwe' (2010) 1 <[Zim Human Rights NGO SPECIAL REPORT FINAL.cdr \(kubatana.net\)](#)> accessed 5 May 2022.

⁴⁵² *ibid.*

⁴⁵³ *ibid.*

⁴⁵⁴ *ibid.*

⁴⁵⁵ Thomas (n 407) 701-702.

accompanied the process, and Mugabe has gone down in history as an autocrat/despot who condoned the violation of human rights. However, and as much as the fast-track land reform is condemned, little attention is paid to the reasons why the Zimbabwean government had to act and why it is significant.

4.9.1. The genesis of the fast-track land reform process

Many Zimbabweans agree that there was a need to redress the injustices of the past evidenced in the inequitable and skewed distribution of land inherited at independence in 1980. However, there are mixed feelings regarding the way the fast-track land reform process was implemented. This is because of the gross violations of human rights and the utter disregard for the rule of law.⁴⁵⁶

It is trite that by 2000, many Zimbabweans were frustrated with the land reform programme, especially the war veterans who believed that the purpose of the liberation struggle was to restore the land to its rightful owners. This frustration culminated in the third phase of land reform, that is, the Fast Track Land Reform Process (FTLRP) which was launched in July 2000. This was the era of expropriation without compensation where the war veterans took it upon themselves to forcefully acquire commercial land by invading white farms in a fit of violence.⁴⁵⁷ This move was more political than it appears *ex facie*, and it was aimed at destabilising the opposition which had the support of the West and many farm workers.⁴⁵⁸

⁴⁵⁶ *ibid*; Mufune (n 406) 7.

⁴⁵⁷ Dominique E Uwizeyimana and Alouis Chilunjika, 'Shifts in the Zimbabwean Land Reform Discourse from 1980 to the Present' (2015) 8(3) *African Journal of Public Affairs* 140.

⁴⁵⁸ Alexander C Laurie, *The Land Reform Deception Political Opportunism in Zimbabwe's land Seizure Era* (Oxford University Press 2017) 2-3.

The legal basis for this FTLRP is derived from an amendment of the rejected draft constitution relating to land acquisition which the government eventually pushed through Parliament in April 2000. This new provision added a new section to section 16B of the Zimbabwean Constitution. Part C of the property clause now reads:⁴⁵⁹

The people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land and accordingly -

- i. The former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and*
- ii. If the former colonial power fails to pay compensation through such a fund, the government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement*

This Constitutional amendment made room for more grounds upon which the state could compulsorily acquire land, absolving it from the obligation to provide compensation to owners whose land was expropriated. The provision also made it the responsibility of the colonial powers to avail compensation to the white owners.⁴⁶⁰ Several legislative amendments followed, including an amendment to the *Land Acquisition Act* No. 21 of 1985 in May 2000 and again in November 2000, with the objective of prescribing new compensation rules in line with the Constitution.⁴⁶¹ Chitsike argues that the main reasons for the amendment of both the Constitution and

⁴⁵⁹ *ibid* 4.

⁴⁶⁰ *ibid*. See also Chitsike (n 426) 9.

⁴⁶¹ Chitsike (n 426) 9.

the Land Acquisition Act was to attempt to avail more land for resettlement. This is because Britain revoked their support.⁴⁶²

Armed with the newly amended constitution authorising expropriation of land without compensation, the war veterans invaded the white farms in early 2001. The government impliedly supported the invasion, in that it literally ignored court orders to stop the invasions.⁴⁶³ The need to act came as a result of Britain having refused to provide funding for land reform in early 2000.⁴⁶⁴ Accordingly, many Zimbabweans shared this sentiment:⁴⁶⁵

Having realised that donors and some stakeholders such as the CFU were not genuinely interested in assisting government undertake a successful land reform and resettlement programme ... government is determined to go it alone using its own, limited resources to settle people.

The whites were told to co-exist with the new settlers, and eventually this invasion spread across the whole country. Soon thereafter, government moved to enact legislation to safeguard the new settlers, maintaining that the new settlers would only be removed when new land has been identified to resettle them. Subsequently, more white farms were acquired and partitioned into small, medium and large-scale self-contained units.⁴⁶⁶

⁴⁶² *ibid.*

⁴⁶³ Kagisho (n 306) 8. See also Chitsike (n 426) 9.

⁴⁶⁴ Thomas (n 407) 701.

⁴⁶⁵ *ibid.*

⁴⁶⁶ Chitsike (n 426) 9.

The amended *Land Acquisition Act* afforded the previous owners a limited time frame within which to vacate their land. At the same time, black individuals were invited to apply and make submissions of proposals of projects they wanted to undertake on the land.⁴⁶⁷ The FTLRP led to a disruption in large-scale commercial farming, an increase in sanctions, and withdrawal of foreign investors.⁴⁶⁸ However, the move earned Zimbabwe admiration from the marginalised communities of the world, especially in countries which had also experienced land appropriation by the colonial governments.⁴⁶⁹

It is important to note that the view that the economy of Zimbabwe crumbled as a result of the collapse of commercial farming is refuted by academics, including Thomas, who argues that the notion that whites are efficient in farming as compared to blacks is misplaced.⁴⁷⁰ In this regard, he argues that evidence shows that when support was given to communal farmers for the first time after independence, the share of marketed grains and cotton in the communal areas increased from less than 10% before Independence to about 50% in 1985/6.⁴⁷¹ Thomas further debunks the view that the dispossession of white farmers have negative effects on productivity.⁴⁷² To this end, Thomas asserts that the redistribution of land in Zimbabwe has been good for productivity. He submits thus:⁴⁷³

Resettlement greatly increased the marketing of agricultural products: by 1997 the value of crop and livestock sales of resettled households was seven and three times,

⁴⁶⁷ *ibid.*

⁴⁶⁸ Thomas (n 407) 702. See also Kagisho (n 306) 8.

⁴⁶⁹ Chitsike (n 426) 10.

⁴⁷⁰ Thomas (n 407) 702.

⁴⁷¹ *ibid.*

⁴⁷² *ibid.*

⁴⁷³ *ibid.*

respectively, as high as in the CAs from where they came. Although only comprising 5% of the peasant farmer population the 70 000 resettled households now produce 15%–20% of the country’s marketed maize and cotton.

4.10. Land reform from 2014 onwards

The fourth and final phase is what followed 2014 to date. According to Uwizeyimana and Chilunjika, this era is referred to as the era of partnerships between indigenous black holders and white commercial farmers which allows the once-ejected white commercial farmers to enter into partnerships which are beneficial to both parties in relation to farming.⁴⁷⁴

Regardless of the criticism advanced against the FTLRP, its necessity cannot be ignored. So far, it is the only land reform programme in southern Africa that has directly transferred ownership of 90% of agricultural land previously annexed by the white settlers back to the indigenous people, although ownership of such land is now vested in the state.⁴⁷⁵ To this end, between 2000 and 2002, about 11 million hectares of land were expropriated from 4000 white farmers and transferred to 160 000 black families. In this regard then, it can be said that the FTLRP has succeeded in redressing the land grievance among most black Zimbabweans, although it did not necessarily redress poverty or improve livelihoods.⁴⁷⁶

⁴⁷⁴ Uwizeyimana and Chilunjika, (n 456) 140.

⁴⁷⁵ Phineas G. Kadenge and Charles Chavunduka, ‘Land Governance in Zimbabwe’ Paper prepared for presentation at the “*2019 Land Governance in Southern Africa Symposium*” (The NUST-NELGA Hub - Windhoek, Namibia, 3-4 September, 2019).

⁴⁷⁶ Tarisayi (n 404) 94.

However, access to land does not guarantee improvement in the quality of life.⁴⁷⁷ As such, the change in ownership of land has not necessarily improved the socio-economic status of the Zimbabweans. Many people are still poor and this can be attributed to the fact that many resettled people do not have the necessary skills to farm and as a result, they are unable to make the farms as productive as they were in white hands. When the whites migrated, they also took with them their knowledge and skills on farming. This is indicative of the fact that redistribution of land alone does not guarantee that the socio-economic status of the people will be improved, or that they will become self-sufficient. Land reform is but one measure through which the government can bring about socio-economic transformation.

The fact that 90% of the land in Zimbabwe is now in the hands of the black indigenous farmers and that the ejected white farmers are now entering into partnerships with the black farmers in order to utilise the land is commendable. According to Uwizeyimana and Chilunjika, these partnerships are meant to revive the agricultural sector and to enhance the general productivity of the nation.⁴⁷⁸ Notwithstanding, the authors are of the view that there is more to be done to make those arrangements a success, that is, the political buy-in and support by the state which could be reflected in the form of a robust legislative framework to regulate those partnerships and contractual arrangements in the country's agricultural sector.⁴⁷⁹

⁴⁷⁷ Hossein Azadi and Eric Vanhoute, 'Mutual effects of Land Distribution and Economic Development: Evidence from Asia, Africa, and Latin America' (2019) 8 (96) *Land Review* 2.

⁴⁷⁸ Uwizeyimana and Chilunjika (n 456) 140.

⁴⁷⁹ *ibid.*

4.11. Conclusion

The underlying assumption of the WSWB is that there are willing buyers and willing sellers who are involved in transaction process in the market place on an equal basis. However, upon a critical examination and analysis of this principle, it is clear that the willing buyers are those who need land. They are landless as well as resource less. And in the context of the African setup, the willing buyer is dependent on the state to enter the market place through the Government's grant system to purchase the land in order to fulfil his various needs for socio-economic development. The social and economic profiles of the willing buyers make them dependent also on the co-operation of the acquisition of land as exhibited in Namibia, South Africa and Zimbabwe. Therefore, the willing seller, willing buyer principle was arrived at, by controversial and continuous discuss at the Lancaster house in Britain, it was the promise given by the government of the UK, with the support of the US government, to set up a fund for financing the purchase of land from the white settlers, which made it possible for Lancaster House Conference to succeed. As it were, the thesis of this essay is to discuss the reasons behind the failure of the willing seller, willing buyer principle.

In the case of Zimbabwe, lack of justice at the Lancaster house land resolution precipitated the failure of the willing seller, willing buyer principle. The Lancaster House Constitution contained a clause (section 16), that created a strong and robust framework for property rights. It ensured, in effect, that for the first ten years of independence, land redistribution would be based on the willing buyer, willing seller principle. Section 16 was one of the entrenched provisions of the new constitution which meant that it could not be amended for a period of ten years. The view of the Zanu Patriotic Front in 1979 was that: The Lancaster House conference produced a

constitution which secured for the whites unhinged citizenship rights, a bill of rights which precluded the expropriation of private property. The Lancaster House constitution paid little, if any attention, to the plight of the victims of the colonial systems, leaving the wounds to fester and very unpleasantly burst twenty years later. It protected those who owned property but did not address the concerns and interests of those who were disposed by the unjust colonial systems. Land grievances and claims were therefore unresolved, left instead to the operation of market forces through the willing buyer, willing seller principle. Under the Lancaster house constitutional provisions, no meaningful land reform programme could take place. The constitution obligated government to acquire land on a willing seller-willing buyer basis during the first ten years of independence. Where land was offered to government in most cases it was expensive, marginal and occurred in pockets around the country, making it difficult to affect a systematic and managed land reform. Moreover, land supply failed to match the demand for land resettlement. The principle served no justice to the African majority who were poor as a result of colonial masters and as it were for them to purchase land it was more of a burden than relief as they want to present it. This can be further substantiated by (Julius Nyerere, 1979) the then president of Tanzania expressed his view on the land question saying, that to tax Zimbabweans in order to compensate people who took it away from them through the gun. Really the British cannot have it both ways.

It is quite clear that the willing buyer principle failed as means to solve the land question in Zimbabwe as shown in the above thesis. In light of the above outlined issues one is not blind to see the unfair ruling of the colonial government at the Lancaster house conference which precipitated to complications in dealing with the

land issue later. As shown above, there was nowhere the WSWB could have been an end by itself due to the following reasons that limited it thus; lack of justice at the Lancaster house conference, the white farmers conduct to land reform, Britain and the US stopped funding the land reform as per agreement, socio-economic conditions of the blacks in the communal area to mention just a few. With these factors the government of Zimbabwe was left without choice but embark on the fast track land reform. This may be the route Namibia will be forced to follow.

CHAPTER FIVE

DISCUSSION AND ANALYSIS

5. Introduction

The previous chapter discussed the land reform experiences of South Africa and Zimbabwe, and where possible, reference was made to the similarities those jurisdictions share with Namibia. In this chapter, I draw a comparison between the land reform programmes as carried out in South Africa and Zimbabwe against the Namibian land reform programme. My first point of departure is a comparison between the three southern African countries. The aim is to extract lessons that Namibia can emulate and implement in its land reform programme and the pitfalls to be avoided. The second part of this chapter is aimed at answering the main research question posed by this study in the objectives and the hypothesis. The aim is to ascertain whether there is anything that Namibia can do to satisfactorily address the land issue. My main argument in this chapter is that the redistribution of land, while crucial, does not automatically guarantee socio-economic transformation and therefore, land reform must be complemented by factors such as support services and job creation.

SECTION A: PART ONE

5.1. Evaluation of land reform in Zimbabwe, South Africa, and Namibia

The atrocities committed by the colonial governments during the colonial era which led to countries such as Namibia, South Africa and Zimbabwe inheriting skewed land distribution patterns are well documented in history. It is unnecessary to reiterate those at this juncture. Needless to say, all three countries suffered dispossession of vast areas

of land at the hands of the colonial governments.⁴⁸⁰ The appropriation of land was enabled by pro-white legislation and policies implemented by the colonial governments.⁴⁸¹

Zimbabwe was the first country amongst the three to gain independence in 1980. It was also the first one to implement the World Bank's market-led approach of land redistribution, the WSWB policy.⁴⁸² Similar to Namibia, the acceptance of the WSWB approach as the model for land redistribution was a compromise precedent upon the attainment of independence.⁴⁸³ In Zimbabwe, it had the effect of parking the land issue on the shelf for a whole decade after independence.⁴⁸⁴ In my view, this was done to enable the white farmers to retain the prime agricultural land in the country.

Both Namibia and South Africa followed suit by consenting to the compromise which bred their respective land problems until today.⁴⁸⁵ This is not to take away from the fact that there are various reasons for the prevailing land problems which are not

⁴⁸⁰ Lazarus Hangula, 'Land Reform in Namibia' (2000) *Population–Development–Environment in Namibia* 78; Institute for Poverty, Land and Agrarian Studies, 'Diagnostic Report on Land Reform In South Africa: Commissioned Report for High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, An Initiative of the Parliament of South Africa' (University of the Western Cape, September 2016); Alois M Mlambo, 'Land Grab' or 'Taking Back Stolen Land': The Fast-track Land Reform Process in Zimbabwe in Historical Perspective' (2005) 3 *History Compass* 4.

⁴⁸¹ Francis Chitsike, 'A Critical Analysis of the Land Reform Programme in Zimbabwe' (2nd FIG Regional Conference, Marrakech, Morocco 2-3 December 2003) 2.

⁴⁸² Veronika Penciakova, 'Market-Led Agrarian Reform: A Beneficiary Perspective of Cedula Da Terra' (2010) Working Paper Series No. 10-11 <[PDF | Market-Led Agrarian Reform: A Beneficiary Perspective of Cédula da Terra | Semantic Scholar](#)> accessed on 30 September 2021.

⁴⁸³ Chris Alden and Ward Anseeuw, 'The Gathering Storm? Namibia and the Land Question' (2nd International Conference on Wars and Violent Conflicts in Africa, 8 July 2016) 2. <<https://repositorio.iscte-iul.pt/bitstream/10071/11693/1/Gathering%20Storm.pdf>> accessed 16 September 2021.

⁴⁸⁴ Kudzayi S Tarisayi, 'Divergent Perspectives on the Land Reform in Zimbabwe' (2019) 44(1) *Journal for Contemporary History* 92; Sam Moyo and Walter Chambati (eds), *Land and Agrarian Reform in Zimbabwe: Beyond White-Settler Capitalism* (African Institute for Agrarian Studies 2013) 2.

⁴⁸⁵ Nico J Horn, 'The Forerunners of the Namibian Constitution' in Anton Bösl, Nico Horn and André du Pisani (Eds) *Constitutional Democracy in Namibia: A Critical Analysis After Two Decades* (Macmillan Education Namibia, 2010) 63.

necessarily associated with the starting point of the programme. The above notwithstanding, Namibia compromised on her land question by accepting the 1982 Constitutional Principles, by adapting of the National Resettlement Policy, and subsequently, Article 16 of the Constitution. For South Africa, the compromise was in the intervention by the WB in the policy formulation process and the subsequent recommendations which were included in the constitution and the land policies such as the RDP.⁴⁸⁶

5.1.1. Components of the programmes

In all the three countries, the redistribution of agricultural land to the landless and other categories of people, especially the previously disadvantaged, is a major component of the programmes.⁴⁸⁷ Redistribution has failed to achieve its target in all the three countries, and this can be attributed to a plethora of complex reasons, including the social and political land market, land reform laws, financial support and institutional framework that executed the program, and also challenges with implementation.⁴⁸⁸

⁴⁸⁶ University of Witwatersrand, 'The Reshaping of South African Land Policy' Johannesburg 143 <http://wiredspace.wits.ac.za/bitstream/handle/10539/275/17_chapter5.pdf?sequence=17> accessed 29 September 2022. See also Michael Aliber and Reuben Mokoena, 'The Interaction between the Land Redistribution Programme and the Land Market in South Africa: A Perspective on the Willing-Buyer/Willing Seller Approach' (Occasional Paper-no.2, Programme for Land and Agrarian Studies 2002) 1.

⁴⁸⁷ Ministry of Lands, Resettlement and Rehabilitation (MLRR), 'National Resettlement Policy' (MLRR 2001); The South African Constitution s 25(5); Edward Lahiff, 'Land Redistribution in South Africa' in Hans P. Binswanger-Mkhize, Bourguignon Camille and Roger Van den Brink (Eds.) *Agricultural Land Redistribution: Towards Greater Consensus* (The World Bank 2009) 169.

⁴⁸⁸ Tavonga Njaya and Nelson Mazuru, 'Land Reform Process and Property Rights in Zimbabwe: Constraints and Future Prospects (1980-2002)' (2010) 12(4) *Journal of Sustainable Development in Africa* 178. See also Anon, 'Willing Buyer, Willing Seller Principle to Go' *News24* (Cape Town 14 February 2017) <<https://www.news24.com/fin24/willing-buyer-seller-principle-to-go-20130214>> accessed 16 June 2022. Likewise in Namibia, the government has been unable to meet its redistribution targets.

Tenure reform is also a common feature of the land reform projects in these countries. It is argued that the South African legislative framework provides more secure tenure rights to beneficiaries of land redistribution as opposed to both Namibia and Zimbabwe. To this end, beneficiaries under PLAS are granted ownership of the land after satisfying the state that they are indeed capable and willing to farm. In both Namibia and Zimbabwe, beneficiaries only have the right to use the allocated land for a number of many years, however, ownership never passes to the beneficiaries and after the leasehold expires, the land reverts back to the state. This lack of security of tenure discourages beneficiaries from fully investing in the allocated land.

Both Namibia and Zimbabwe then, rejected the idea of legal restitution of specific private or community land rights that have been appropriated during colonial rule, as in the restitution programme of South Africa.⁴⁸⁹ As such only South Africa provides for restitution of ancestral land rights to those who were dispossessed up until 19 June 1913. Restitution does not apply to those who were dispossessed before 19 June 1913. However, the fact that most ancestral land had already been dispossessed by 19 June 1913 makes the restitution programme a closed limited programme.⁴⁹⁰

The restitution component of land reform in South Africa is seen as an acknowledgment of the wrongfulness of the land dispossession that Africans were subjected to. As such, it gives some sort of closure to the dispossessed people, and this

⁴⁸⁹ Sam Moyo, 'Designing and Implementing Redistributive Land Reform: The Southern African Experience' in Hans P. Binswanger-Mkhize, Bourguignon Camille, Roger Van den Brink (eds) *Agricultural Land Redistribution: Towards Greater Consensus* (The World Bank 2009) 346.

⁴⁹⁰ Department of Land Affairs, 'White Paper on Land Policy' (Pretoria, DLA 1997) para 4.13.

is the type of closure that Namibians are yet to receive. This recognition is essentially lacking in the programme of land reform in Namibia, and it has left many Namibians with unhealed wounds from the past. Despite the fact that the recognition of past injustices is a crucial component of social and economic transformation, restitution has completely been left out of the land reform programme. I believe that this has robbed the country of an opportunity to lay to rest the ghosts of the past.

However, as already argued, restitution of ancestral land rights does not necessarily result in more land being restored to the black people, as claimants have often opted for cash compensation rather than the actual land. It remains unclear whether claimants would have opted to be paid in cash or whether they would have opted for the actual restoration of land if restitution was introduced in the Namibian context. One can only speculate.

5.1.2. The WSWB Approach

In both Namibia and Zimbabwe, the respective governments chose to implement state-centred models of land redistribution through the market-led approach, whereby the state acquired land through the market and distributed it to the landless.⁴⁹¹ This approach is due to resource, constitutional and legal constraints.⁴⁹² However, in South Africa, the market-led approach was a policy of choice, as it not embodied in the constitution nor in the various legislative framework.

⁴⁹¹ Moyo (n 488) 346.

⁴⁹² *ibid.*

All three countries then, have implemented the WSWB approach as a tool for redistribution, starting with Zimbabwe in 1980.⁴⁹³ In Zimbabwe, the policy was implemented through the Lancaster Agreement. In South Africa it was a policy of choice, and Namibia, it was implemented through the respective legislative frameworks. In all the three countries, the WSWB approach has been criticised and blamed for the slow pace of land reform.⁴⁹⁴ The policy has also been blamed for constraining the government's ability to acquire fertile and more productive commercial farms.⁴⁹⁵ To this end, there have been cries in both Namibia and South Africa to abolish the WSWB policy, mainly due the inability of the programme to bring about meaningful reform that will in essence rectify the injustices of the past.⁴⁹⁶ In Zimbabwe, the policy has also been criticised for failing to bring about a significant change in land ownership patterns and as such, the policy was not renewed at the expiry of the Lancaster Agreement.

⁴⁹³ The Lancaster House Agreement of 1979 section V.

⁴⁹⁴ Edward Lahiff, 'Willing-Buyer, Willing-Seller: South Africa's Failed Experiment in Market-Led Agrarian Reform' (2007) 28(8) *Third World Quarterly* 1581; Samuel Kwesi Amoo, 'Land Reform in Namibia: Beyond 2018' in Willem Odendaal and Wolfgang Werner (eds) *Neither Here nor There: Indignity, Marginalization and Land Rights in Post-independence Namibia* (LAC 2020) 13; Sidney L Haring and Willem Odendaal, *Kessl: A New Jurisprudence for Land Reform in Namibia?* (LAC 2008) 12.

⁴⁹⁵ Amoo (n 493) 16.

⁴⁹⁶ Martina Schwikowski, 'Namibia: Who Owns the Land' *Deutsche Welle* (Windhoek, 03 October 2018) <<https://www.dw.com/en/namibia-who-owns-the-land/a-45740852>> accessed 01 June 2022; Government of the Republic of Namibia (GRN), 'Concept Paper: Second National Land Conference' 5 <http://dna.nust.na/landconference/submissions_2018/concept_paper_second_national_land_conference_2018.pdf> accessed 20 June 2022; Elmiën du Plessis, 'Silence is Golden: The Lack of Direction on Compensation for Expropriation in the 2011 Green Paper on Land Reform' (2014) 17(1) *PER/PERJ* 799; Pierre de Vos, 'Willing Buyer- Willing Seller Works... If you have a Lifetime to Wait' *Daily Maverick* (Cape Town, 13 June 2013) <<https://www.dailymaverick.co.za/opinionista/2013-06-13-willing-buyer-willing-seller-works-if-you-have-a-lifetime-to-wait/>> accessed 15 April 2021.

Notably, all three countries recognise expropriation with compensation as one of the measures through which the state can acquire land for land reform purposes.⁴⁹⁷ Grounds upon which expropriation may be carried out include that the acquisition must be carried out in the public's interest.⁴⁹⁸ In Zimbabwe, the grounds on which expropriation could take place under the Lancaster House Agreement were succinctly outlined as opposed to both Namibia and South Africa.⁴⁹⁹ To this end, all three countries recognise expropriation a key component of land reform.

South Africa has made progress regarding enacting legislation which empowers the state to expropriate property at nil compensation through the proposed Expropriation Bill. This came after previous efforts to amend section 25 of the constitution failed.⁵⁰⁰ The newly proposed Expropriation Bill empowers the state expropriate inter alia, underutilised land and state land without paying any compensation or with nil compensation.⁵⁰¹ In Zimbabwe expropriation without compensation is associated with the fast-track land reform programme.

⁴⁹⁷ Article 16(2) of the Namibian Constitution, Section 25(2) and (4) of the South African Constitution, and Section V of the Lancaster House Agreement 19.

⁴⁹⁸ *ibid.*

⁴⁹⁹ See Section V of the Lancaster House Agreement which reads as follows:

V. Freedom from Deprivation of Property

1. Every person will be protected from having his property compulsorily acquired except when the acquisition is in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development or utilisation of that or other property in such a manner as to promote the public benefit or, in the case of under- utilised land, settlement of land for agricultural purposes. When property is wanted for one of these purposes, its acquisition will be lawful only on condition that the law provides for the prompt payment of adequate compensation and, where the acquisition is contested, that a court order is obtained. A person whose property is so acquired will be guaranteed the right of access to the High Court to determine the amount of compensation.

⁵⁰⁰ Johan Coetzee and Jacques Marous, Expropriation without compensation- it is not the end of the road and is still on the table' *Fasken Martineu DuMoulin* (Johannesburg, 15 December 2021) <<https://www.fasken.com/en/knowledge/2021/12/15-expropriation-without-compensation>> accessed 10 October 2022.

⁵⁰¹ *ibid.*

In Namibia, one of the resolutions made at the 2nd National Land Conference in 2018 was to abolish the WSWB approach. Government has however reported that the WSWB approach will not be discontinued, despite calls to abolish it. According to the Prime Minister Saara Kuugongelwa, ‘the express deletion of the principle from the Agricultural (Commercial) Land Reform Act of 1995 would be a futile exercise as the right to buy and sell remains entrenched in Article 16.’⁵⁰² Effectively, Namibia is stuck with the WSWB approach. The situation is different in Zimbabwe, where the implementation of the FTLRP effectively brought the WSWB approach to an abrupt end, effectively making expropriation without compensation the only means through which government could acquire land for redistribution up until the FTLRP was completed. As a result, 95% of the land in Zimbabwe is in the control of the black people, which means that Zimbabwe has effectively overcome the inherited skewed distribution of land.

5.1.3. Preferent right for the state to acquire commercial agricultural land

In Namibia, section 17 of the ACLRA provides for the preferent right of the state to acquire agricultural land before it is placed on the market and before any other party can acquire it.⁵⁰³ The South African legislation does not provide for such a right, nor does the Zimbabwe legislation. It has been argued that the lack of a preferent right for the state to purchase land each time land goes onto the market is one of the many reasons why the South African government has failed to meet its target of

⁵⁰²Sakeus Iikela, ‘Willing buyer-willing seller to stay’ *The Namibian* (Windhoek, 20 January 2021) <<https://www.namibian.com.na/207976/archive-read/Willing-buyer-willing-seller-to-stay>> accessed 25 September 2022.

⁵⁰³ ACLRA s 17.

redistributing 30% of the agricultural land in a period of five years.⁵⁰⁴ However, having a first option to acquire land does not automatically guarantee that land will be bought. In Namibia, the government has a preferential right to acquire land before it goes in the market, and still, this has not resulted in the purchase of more land for purposes of redistribution. This is because sometimes the quality of the land offered is not appropriate for resettlement, and sometimes there are no adequate funds to acquire the land. I submit, therefore, that a preferent right to acquire land does not automatically guarantee that the land would be acquired.

In Zimbabwe, the issue of a preferent right of the state does not apply because the WSWB approach has lapsed.

5.1.4. Role of the state in the land reform programme

In Namibia, even though the preferred mode of land acquisition is the WSWB policy, the state plays an active role in the process. This is very much alike to the South African's Pro-active Land Acquisition Strategy, which repealed redistribution policies enacted prior to 2006, through which the government adopted a laissez-faire attitude to the acquisition of land from the open market.⁵⁰⁵ The PLAS made it possible for the government to enter into the land market and to acquire land for redistribution on behalf of beneficiaries.⁵⁰⁶ In both jurisdictions then, the state deals directly with the

⁵⁰⁴ University of Witwatersrand, 'The Reshaping of South African Land Policy' Johannesburg 143 <http://wiredspace.wits.ac.za/bitstream/handle/10539/275/17_chapter5.pdf?sequence=17>accessed 29 September 2022.

⁵⁰⁵ Mmanoko J Mathekga, 'Land Defended: the Land Reform Policy in South Africa' (20 May 2013) <(99+) [Land defended: the land reform policy in South Africa | Mmanoko Jerry - Academia.edu](http://www.academia.edu/10539/275/17_chapter5.pdf?sequence=17)> accessed 19 April 2022.

⁵⁰⁶ Ronald Nkwain Ngam, 'Government-driven Land and Agrarian Reform Programmes in Post-Apartheid South Africa – A Brief History (1994-2021)' (2021) (25) (1) *African Sociological Review* 138. See also Johann Kirsten, Aart-Jan Verschoor and Collecto Gandidzanwa, 'The South African government has been buying farmland for black farmers. It's not gone well' *The Conversation* (Cape

willing sellers and beneficiaries are not involved in the negotiations for the price of land. In South Africa, a Valuer General is appointed in terms of the Property Valuation Act to determine the value of land offered in the open market. This in essence curbs the exorbitant prices of land demanded by landowners.⁵⁰⁷

In Zimbabwe as well, the state has been actively involved in the land reform programme, by designing policy for land redistribution, identifying the land for purposes of land reform and to acquiring it, as well as to develop and distribute it to the appropriate beneficiaries.⁵⁰⁸

5.1.5. Foreign ownership of agricultural land

In Namibia, foreigners are prohibited from owning commercial agricultural land by section 58 of the ACLRA. This prohibition is necessary to allow Namibians who were dispossessed of their land during the colonial era to have access to land without competing with foreigners. Although foreigners can form corporations that can own land, they are proscribed from having a controlling interest in such corporations or companies. The same principle does not apply in South Africa and Zimbabwe, which do not prohibit foreigners from acquiring commercial agricultural land. These two countries are more flexible and investor friendly than Namibia in respect of land.

Town, 09 January 2023) <<https://theconversation.com/the-south-african-government-has-been-buying-farmland-for-black-farmers-its-not-gone-well-197201>> accessed 29 May 2023.

⁵⁰⁷ The *Property Valuation Act* 17 of 2014, section 12.

⁵⁰⁸ Francis T Gonese, Nelson Marongwe, Charles Mukora and Bill Kinsey, 'Land Reform and Resettlement Implementation in Zimbabwe: An Overview of the Programme against Selected International Experiences' (2002) *Political Science* (i). <[Land reform and resettlement implementation in Zimbabwe: an overview of the programme against selected international experiences | Semantic Scholar](#)> accessed 10 May 2022.

5.1.6. Compensation

In both Namibia and South Africa, the legislature empowers the state to expropriate property in the public interest and for public purposes.⁵⁰⁹ International law recognises expropriation which is done for reasons of ‘public utility, security, or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign.’⁵¹⁰ What constitutes public interest has been a subject of contention in Namibia, where the concept is not defined. In contrast, the South African constitution in section 25(4)(a) defines public interest as follows: ‘the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources’.

Accordingly, expropriation is allowed for public purposes or interests, which would include expropriation by the state for purposes of land reform and to allow it to carry out its administrative duties such as erecting infrastructure such as roads, hospitals etc.⁵¹¹ Property and land can thus be expropriated for land reform purposes. If, however, the purpose of expropriating the land is to carry out the state’s private or commercial activities or for the benefit of a private individual, such expropriation would not pass the public interest test.⁵¹² The test then, is whether such expropriation will be for the benefit of the public or for private individuals. However, the newly approved Expropriation Bill allows for the state to expropriate specific types of land without paying any compensation.⁵¹³

⁵⁰⁹ Article 16(2) of the Namibian Constitution and section 20 of the ACLRA; Section 25(2) of the South African Constitution.

⁵¹⁰ The 1962 United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources (GA Res. 1962) para 4.

⁵¹¹ See section 25(4) (a) of the South African Constitution.

⁵¹² Christina Treeger, *Legal Analysis of Farmland Expropriation in Namibia* (Konrad Adanauer Stiftung, 2004) 2.

⁵¹³ Coetzee and Marous (n 499).

In Namibia, the state can compulsorily acquire agricultural land in limited circumstances. Section 20 of the ACLRA authorises the minister to acquire any property for purposes of land reform only in two instances: (i) if the minister and the owner of such property are unable to mutually negotiate the sale of such property; and (ii) if such property belongs to someone whose whereabouts cannot be ascertained. This means that even if the owner of the property does not consent to his property being sold to government, the Minister is empowered to acquire such. This is the compelling element, which is absent in the WSWB approach.

In Zimbabwe, although landowners were powerless to challenge the acquisition of land, each seller was free to negotiate the compensation price they sought for the land they sold.⁵¹⁴ This was during the second phase of land reform in Zimbabwe, when the government was moving away from the WSWB approach as per the Lancaster Agreement to expropriation with full market compensation. The beginning of the third phase of land reform, that is, the FTLRP marked the end of the payment of compensation at the market value for expropriated farms and it was superseded by compensation for improvements only. The issue of compensation has therefore ceased to exist after the FTLRP when the state compulsorily acquired commercial land without paying any compensation. The fourth phase of land reform that subsists in Zimbabwe now, and which entails partnership agreements between black indigenous

⁵¹⁴ Michelina Andreucci, 'A History of Land, Agriculture and ...Close Look at 'Willing-Buyer Willing-Seller' *The Patriot* (Harare, 28 February 2019) <https://www.thepatriot.co.zw/old_posts/a-history-of-land-agriculture-and-close-look-at-willing-buyer-willing-seller/> accessed 29 May 2022.

farmers and the once-ejected white farmers also does not contain an element of compensation.

It is important to note that in all the three countries, compensation has often been based on the market-value of the land and its improvements.⁵¹⁵ However, in Zimbabwe, attempts to acquire land based on its market value in 1992, 1995 and 1997 failed due to failed negotiations and litigation.⁵¹⁶

5.1.7. Conclusion

Whereas the three countries share similarities in respect of how they have approached the issue of land reform, there are stark differences between them, and it is those differences which provide Namibia with examples to emulate. For instance, some of the farming schemes which were introduced in Zimbabwe during the Lancaster Agreement period, such as Model A, was a highly organised model which incorporated the necessary fiscal services, and which enabled beneficiaries of land reform to become self-sufficient.⁵¹⁷ These models were perfect for family farming and are better suited for small-scale farming instead of large-scale commercial farming which is often promoted in land reform. Adapting this Model in Namibia would make small-scale farmers productive and self-sufficient.

⁵¹⁵ Moyo (n 488) 348.

⁵¹⁶ *ibid.*

⁵¹⁷ Pempelani Mufune, 'Land Reform Management in Namibia, South Africa, and Zimbabwe: A Comparative Perspective' (2020) 6(1) *International Journal of Rural Management* 4; Chitsike, (n 480) 4-5.

From South Africa, the restitution component of its land reform programme is a commendable element. In Namibia, it would solve tensions among the former victims of dispossession, being the Herero and Nama speaking Namibians. It would not only appease them, it will also heal the wounds inflicted by the Germans and which refuse to heal under the current land reform programme. In this regard, having a land reform program that is specific and which considers the injustices of the past committed against specific groups will go a long way in addressing the land issue. This is not to say that only those who were dispossessed during the Herero/Nama war should be beneficiaries of land reform. Doing so would be contrary to the principle of equality and the commitments as well as aspirations of the Namibian people enunciated in the Preamble. However, it is an issue which can be considered as being in the public interest and with which the state can invoke section 20 of the ACLRA. It is apposite that the injustices of the past cannot be reversed. However, it is not justifiable for government to simply do nothing about restitution. This can be a starting point for the Ministry to consider.

SECTION B

5.2. To what extent does the legislative framework and policies contribute to the slow pace of land reform?

Through the last five chapters I have discussed the effectiveness of the land reform policies and legislative frameworks in four respective jurisdictions. I did that to answer the main question which this study posed: to what extent can we blame the Namibian legislative framework for the slow pace of land reform? This is what I wish to address at this juncture. However, before I venture into answering this question, I will first

discuss the characteristics of a successful land reform programme. This is necessary if one is to clearly articulate the shortcomings of the legislative framework on land in Namibia.

5.2.1. What are the characteristics of a successful land reform program?

According to Davies et al⁵¹⁸, measuring the success of a land reform programme requires asking the following questions:⁵¹⁹ (a) whether the reforms achieved the targets they set out to achieve;⁵²⁰ (b) whether the lives of land recipients were improved as a result of the programme;⁵²¹ (c) Did the benefits to the targeted group spill over into benefits for others?⁵²² (d) What were the costs of the reform programme?⁵²³ (e) Who bore those costs?⁵²⁴

⁵¹⁸ Rob Davies, Katrina Kosec, Ephraim Nkonya, and Jie Song, 'Global land reform experiences: A review for South Africa' (SA-TIED Working Paper #98 March 2020) 3. See also Johanna F Kirsten and Johan Van Zyl, 'Approaches and Progress with Land Reform in South Africa' (1999) 38 *Agrekon* 327 who argue that the following are some of the salient facts to consider in determining whether a land reform was successful or not: The speed at which the programme is implemented or executed; Economic viability of the farm models; The programme's political acceptability and legitimacy; There needs to be a clear definition of the role that all parties involved in land reform are expected to play, that is, the public, NGOs etc.; and Land reform is just one component of a comprehensive programme of economic reconstruction, and while it is necessary to redistribute land, land redistribution does not guarantee the effectiveness of a development programme.

⁵¹⁹ See Davies et al (n 517) where Davies et al argue that the success of a land reform programme is usually affected by many things, such as the place where the program is being implemented, and as such, 'land reform programmes do not easily translocate lock, stock, and barrel from where they were successful to a new country. Some of the important lessons are negative, suggesting factors that contributed to failure elsewhere.'

⁵²⁰ It is argued that in the three southern African countries discussed in this study, the land reform programmes have failed to meet the set targets.

⁵²¹ It has been submitted that the redistribution of land has not necessarily improved the lives of the resettled people. See Erika von Wietersheim, *This Land is my Land! Motions and Emotions around Land Reform in Namibia* (Friedrich Ebert Stiftung 2021) 33.

⁵²² This has not happened under the Namibian land reform programme.

⁵²³ In all the three countries discussed, the land reform programmes have been very costly to the governments.

⁵²⁴ In the countries discussed, the cost of the land reform programme has been borne by government.

As far as the above characteristics are concerned, Namibia falls short for the following reasons, which may explain why land reform has been a failure: the period of implementation of the programme has not been adhered to; the government has not considered the economic viability of the farm models, if any; there has not been consensus with respect to the legitimacy and acceptance of the WSWB approach; the entire programme depends upon the state and there is minimal, if any role that the public sector plays in the programme.

The above notwithstanding, I am of the view that one of the greatest reasons why land reform in Namibia has failed is because of the capitalistic economy order underpinning the protection of private property, and which allows the WSWB approach to thrive.

5.2.2. Challenges of land reform in capitalistic countries

Takigawa argues that it is challenging to enforce land reform in the radical sense in a capitalistic society, because doing so is at variance with the right to own private property.⁵²⁵ Enforcing land reform in a radical sense would entail expropriation without compensation as it occurred during the fast track land reform programme of Zimbabwe. This is a challenge for Namibia as well, where private property is protected in the constitution, like in many countries at a global level. To compulsorily acquire all agricultural land through expropriation without compensation will be inconsistent with Article 16, and at variance with the essence of capitalism.

⁵²⁵Tsutomu Takigawa, 'Landownership and Land Reform Problems of the Philippines' (1964) 2(1) *The Developing Economies* 72.

It is trite that the economic order in Namibia is that of a mixed economy, which is based on the following forms of ownership: (a) public; (b) private; (c) joint public-private; (d) co-operative; (e) co-ownership; (f) small-scale family.⁵²⁶ As such, private ownership of property as enunciated under Article 16 is directly complemented by Article 98. Given that the right to own property is recognised as part of the economic order, it is thus not possible to implement radical land reform in Namibia as doing so would be at variance not only with the economic order, but also with the internationally recognised right to property. Similarly, Article 99 promotes foreign investments, which can only be safely done in an environment where property rights are protected. Most importantly, in terms of Article 100, the state only owns land which is otherwise not lawfully owned. It will therefore be impossible for the state to enforce radical measures such as expropriation without compensation when there are recognised existing rights.

Mufune identifies three dilemmas that Namibia faces when it comes to land, namely, legal dilemma, economic dilemma, and political dilemma.⁵²⁷ Arguably, the legal dilemma is found in the legislative framework supporting the WBWS approach to redistribution, and which has failed dismally in meeting the targets of distribution. The economic dilemma resonates with the economic order of a mixed economy, which supplements Article 16(1) and protects property rights, effectively dispelling any fears of expropriation without compensation. The political dilemma that Namibia faces as

⁵²⁶ See Article 98 of the Namibian Constitution which reads as follows: Article 98 Principles of Economic Order (1) The economic order of Namibia shall be based on the principles of a mixed economy with the objective of securing economic growth, prosperity and a life of human dignity for all Namibians. (2) The Namibian economy shall be based, inter alia, on the following forms of ownership: (a) public; (b) private; joint public-private; (d) co-operative; (e) co-ownership; (f) small-scale family.

⁵²⁷ Mufune (n 516) 23.

far as the land question is concerned relate to the effect that the decision to undertake land reform is always political in nature. This is why the land question always feature in political campaigns.

Mufune asserts that the government's manner of addressing the land question is in line with the aspirations and promises enunciated in the preamble of the constitution, which is committed to addressing rights that Namibians were denied due to apartheid, racism and colonialism.⁵²⁸ Mufune submits further that the constitution provides both opportunities and constraints to land redistribution.⁵²⁹ Opportunities for land redistribution are found in two respective Articles, that is, Article 10(2) which prohibits discrimination against persons on the basis of sex, colour, ethnic origin, religion, creed or socio or economic status and Article 23(2) which empowers parliament to, firstly, enact laws for the advancement of persons who have been previously disadvantaged either socially, economically or educationally by past discriminatory practices; and secondly, to implement policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory practices.⁵³⁰

Accordingly, the government can employ the legislative framework to enact policies that will ensure the fulfilment of both the above Articles, and especially Article 23(2). This exercise involves a purposive and liberal interpretation of the property clause. However, the state has not always utilised the legislative framework to realise the

⁵²⁸ *ibid* 23.

⁵²⁹ *ibid*.

⁵³⁰ *ibid*; Article 10(2) and Article 23(2) of the Namibian Constitution.

transformative aims of the Constitution as enunciated in the Preamble. An example is the Communal Land Reform Act (inspired by the National Land Policy of 1998, and which calls for the equal treatment of both men and women in accessing land) which failed to provide for specific rights pertaining to women, despite the clear need to do so in a highly patriarchal society. The CLRA would have been a perfect starting point to realise Article 23(2) of the Constitution.

The constraints to land redistribution are found in the wording of Article 16, which entitles all persons to acquire, own and dispose of all forms of immovable and movable property. This means that the state cannot arbitrarily interfere with a persons' right to own property. As such, the effect of Article 16 is that the acquisition of land will be based on the WSWB policy.⁵³¹ This means that the provisions of Article 16 already implied that the state would not have unregulated powers to deprive individuals from owning land, notwithstanding the manner of original acquisition. Because of the regulated powers of the state to compulsorily acquire land and redistribute such land in line with any scheme of land reform, Harring⁵³² submits that there is in actual fact no constitutional obstacle to land reform in Namibia. This is mainly because the state has a prerogative to compulsorily acquire all farms in the country and redistribute them in line with any scheme of land reform. However, one should note that although the state has powers to expropriate land, not all land is suitable for resettlement purposes.

⁵³¹ Mufune (n 516) 24.

⁵³² Sidney Harring, 'The Stolen Lands Under the Constitution of Namibia: Land Reform under the Law' Presented at (AASA Conference, UNAM, July 2000).

5.3. Transformative goals in the constitution

The call to transform is a constitutional imperative. And this call to transformation is aimed at establishing a truly equal society whereby the socio-economic rights are accessible to everyone. However, despite attaining independence and political sovereignty 33 years ago, Namibia remains divided along racial and economic lines drawn by, inter alia, access to land and resources. And even though several measures have been put in place to address the inequitable distribution of resources, especially land, the question remains: can the land reform programme be regarded as transformative in nature? Does it assist in establishing a truly equal society? To answer this question, I am motivated to discuss the issue of transformation in the context of land reform.

The preamble of the Constitution identifies several transformative goals. It paints a picture of a future state governed by the rule of law and democratic principles, a future characterised by human rights and equality for all. It is the benchmark upon which the question of whether independence has brought about any transformative results should be measured against, and it is premised upon the National Reconciliation Policy. It reads as follows:⁵³³

...Whereas these rights have for so long been denied to the people of Namibia by colonialism, racism and apartheid;

Whereas we the people of Namibia

- have finally emerged victorious in our struggle against colonialism, racism and apartheid;*

⁵³³ The Preamble to the Namibian Constitution, Act No.1 of 1990.

- *are determined to adopt a Constitution which expresses for ourselves and our children our resolve to cherish and to protect the gains of our long struggle;*
 - *desire to promote amongst all of us the dignity of the individual and the unity and integrity of the Namibian nation among and in association with the nations of the world;*
 - *will strive to achieve national reconciliation and to foster peace, unity and a common loyalty to a single state;*
 - *committed to these principles, have resolved to constitute the Republic of Namibia as a sovereign, secular, democratic and unitary State securing to all our citizens justice, liberty, equality and fraternity,*
- Now therefore, we the people of Namibia accept and adopt this Constitution as the fundamental law of our Sovereign and Independent Republic.*

The specific transformative goals enshrined in the preamble which speak to the land question include the determination to adopt a constitution which expresses for all Namibians including future generations, the resolve to cherish and to protect the gains of the long struggle. What the gains of the long struggle are, include political sovereignty, freedom and liberty. However, the question remains as to whether the country also gained economic freedom at independence.⁵³⁴

Another transformative goal enunciated in the Preamble is the promotion of the dignity of all persons. The protection and promotion of the dignity of persons as enshrined in Article 8 of the Constitution has been construed as the bedrock upon which a

⁵³⁴Chris Tapscott, 'National Reconciliation, Social Equity and Class Formation in Independent Namibia' (1993) 19(1) *Journal of Southern African Studies* 33. Tapscott argues that SWAPO does not control the economy, which continues to be dominated by other forces. It only controls the political arena.

democratic society is based. Justice Mahomed described it as such in the case of *Ex Parte Attorney-General: In Re Corporal Punishment by Organs of State*.⁵³⁵

The government also committed itself to strive to attain national reconciliation.⁵³⁶ The concept of reconciliation has been criticised as being a one-sided process that is more beneficial to the white settler community than to the poor majority.⁵³⁷ Tapscott argues in this regard that while the policy of national reconciliation has been commended internationally as a sign of political maturity for Namibia, and for its role in conquering the immediate political, racial and ethnic tensions of the past, for many Namibians, the policy is viewed as embedding the status quo. This is because, the policy is seen as safeguarding the pre-colonial gains of the minority, (mainly the unlawful acquisition of land) and as endorsing patterns of social polarity that had existed during the colonial period.⁵³⁸ Hangula concedes with Tapscott's view and states:⁵³⁹

Namibia's land reform, like any other socio-economic reform in the country, is subject to the imperatives of the policy of national reconciliation that is enshrined in the Constitution (Preamble) through which former enemies, or adversaries, are encouraged to live together and work for the building of a new, prosperous and peaceful nation. However, this noble intention of the national reconciliation policy cannot dispel the difficulties and hurdles inherent in the

⁵³⁵ 1991 NR 178 (SC) at 178.

⁵³⁶ Phaniel Kaapama, Lesley Blaauw, Bernie Zaaruka and Esau Kaukunga, *Consolidating Democratic Governance in Southern Africa: Namibia* (EISA 2007) xix.

⁵³⁷ Tapscott (n 533) 35; Lauren Dobell, 'Silence in Context: Truth and or Reconciliation in Namibia (Review Article)' (1997) 23(2) *Journal of Southern African Studies* 373.

⁵³⁸ *ibid* 29 'own emphasis.'

⁵³⁹ Hangula (n 479) 87.

social, economic and political reform Namibia has to go through to build a new society based on equal opportunity (Article 95).

Furthermore, there are some socio-economic variables, such as the landed property rights of the formerly advantaged, that the fathers and mothers of the Namibian constitution deemed necessary to be maintained, probably for the sake of national reconciliation as well as the country's political and economic stability. Thus, the policy of national reconciliation and the constitutional right to property (Article 16) seem to have been conceived as practical measures to create confidence in a polarised post-war society.

Notwithstanding, the above criticisms, I hold the view that reconciliation was a necessary compromise, and that although it led to some unwanted results, the concept of national reconciliation is a necessary element of nation building. I believe that Namibia would not have continued enjoying peace and political stability if it adopted a hostile attitude towards the colonial powers and insisted, for instance, on the compulsory expropriation of private land without compensation from the date of independence. This would have crippled the economy and compromised the peace and freedom fought for during the liberation struggle.

It is apposite to realise that in the face of the mixed economic order giving rise to the constitution of Namibia, the transformative goals enunciated in the preamble may be challenging to realise. This applies for instance in respect of achieving equality for all, (including in land allocation) which government may find challenging to realise in the face of Article 16(1) and Article 98. To this end, attaining equality in land allocation may not necessarily be realistic.

5.3.1. What makes a land policy transformative?

It is argued that in order for a land reform programme to be transformative, a consideration of factors need to be taken into account, such as who the programme is intended to benefit, the goals of the programme, the mechanisms being employed to acquire and redistribute land, the type of support services to be provided to beneficiaries of the programme, as well as the need to identify what structural transformation of the agrarian economy would be required to alleviate poverty and inequality plus the policies to be enacted to bring about the expected transformation is necessary.⁵⁴⁰

An application of these requirements in the Namibian context demonstrate that land reform cannot conclusively be regarded as being transformative. I say so for the reasons advanced below. Firstly, in Namibia, land reform is intended landless Namibians, specifically the previously disadvantaged who suffered injustice as a result of colonialism. As such, beneficiaries of land reform are defined broadly, rather than narrowly, which means that essentially all black Namibians qualify as beneficiaries of land reform. This liberal way of defining beneficiaries robs the true victims of land dispossession from enjoying a preferent right to access to land. As a result, the truly victims of land dispossession now have to compete with people who were never dispossessed of their land. In this context then, transformation remains nominal.

⁵⁴⁰ Ruth Hall and Lungisile Ntsebeza, *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (HSRC Press 2007) 2.

Secondly, the goals of the land reform programme are to solve the issue of landlessness inherited at independence, and to disallow foreigners to own land at the expense of landless Namibians. The pace of land reform has been slow, and the issue of the skewed distribution of land remains unsolved.

Thirdly, there are currently two main methods of land acquisition being utilised by government, that is, the WSWB policy, and expropriation of land in the public interest. The WSWB approach has failed dismally in bringing about the equitable distribution of land. As such, it is difficult to argue that this policy has led to transformation and establishing a truly equal society.

Fourthly, although beneficiaries of land reform receive support services, those support services are not adequate to make them self-reliant. Beneficiaries remain reliant on government, and are in most cases struggling to utilise the land productively as many lack the necessary skillset to productive farming. As such, resettlement does not automatically translate to transformation.

Lastly, the programme still needs to identify what structural transformation would be needed to assuage poverty and inequality, and there is a need to rely more on the purposive approach when interpreting statutes in order to bring about the expected transformation and economic development. This is because there is already a plethora of legislation and policies enacted to address the inequitable distribution of land. Without a doubt, land remains a powerful tool in the debate of transformation.

To be truly effective, Lund and Sjaastad argue that market-assisted redistribution might need to be augmented by astutely used expropriation tools as well as improvement in respect of support services such as ‘extension, infrastructure, marketing, input provision, insurance, and credit’.⁵⁴¹ However, the question remains, what is the connection between land reform and economic development?

It has been argued that land reform is an indispensable condition of the economic development of underdeveloped countries.⁵⁴² This means that land reform is *sine qua non* for economic development in developing countries. The significance with which marginalised/poor people attach to land cannot be underplayed.⁵⁴³ Land is an increasingly crucial asset for livelihood for increasing urbanisation. And a lot of people attach more importance to land than to other sources.⁵⁴⁴ Melber concedes with Von Wietersheim’s view above and argues that land is not just an economic affair.⁵⁴⁵ It is also a matter of identity to both who own it and those who believe should own it. In the minds of many people, there can never be a separation between colonialism and land dispossession. As such, the present skewed distribution of land in favour of a white minority serves as a constant reminder that colonialism has not actually come to an end with independence. To Melber, these sentiments will continue unless and until

⁵⁴¹ Christian Lund, ‘Land Rights and Land Conflicts in Africa: A Review of Issues and Experiences’ (2006) Report commissioned by the Danish Ministry of Foreign Affairs 17 <http://www.diiis.dk/graphics/Publications/Andet2007/rod_landrights_SOA.doc.pdf> accessed 16 May 2022.

⁵⁴² Takigawa (n 524) 72.

⁵⁴³ Erika von Wietersheim, *This Land is my Land! Motions and Emotions around Land Reform in Namibia* (Friedrich Ebert Stiftung 2021) 73.

⁵⁴⁴ *ibid* 73.

⁵⁴⁵ Henning Melber, ‘The Battles over Land in Namibia’ (19 December 2018) <[The battles over land in Namibia \(africasacountry.com\)](http://ThebattlesoverlandinNamibia(africasacountry.com))> accessed 16 May 2022.

restorative justice is infused into the debate on land.⁵⁴⁶ This would entail the colonial governments acknowledging their wrongfulness in the appropriation of land, and apologising accordingly, as well as considering the need to contribute financially to enable victims of dispossession to be compensated for their loss.

Despite the imperativeness of land reform, it is solely not enough to bring about transformation or an improvement in the lives of those resettled. In this regard, it is argued that if land reform is ‘not combined with other adequate policies, such as increasing the productivity in agriculture and raising perpetually the income of the formerly landless farmers’, it cannot be successful.⁵⁴⁷ In the same line, Walker submits that changing landownership racial patterns is not sufficient to ensure the success of land reform.⁵⁴⁸ Land reform then, in its narrow sense (which is confined to the mere redistribution of land), is not sufficient to bring about a change in livelihoods, social equality or rural stability.⁵⁴⁹ This begs the question, what is needed to make land reform effective?

Hangula argues that in order to be effective, land reform needs to be carried out within the confines of the law.⁵⁵⁰ However, it has been argued that the law itself places a hindrance on land redistribution, particularly in Article 16(2) of the Constitution. Currently, land reform stands on three significant but shaky pillars; namely: (i) the availability of land on the market; (ii) the availability of funds for government to

⁵⁴⁶ *ibid.*

⁵⁴⁷ Takigawa (n 524) 72.

⁵⁴⁸ Cheryl Walker, ‘The Land Question in South Africa: The Challenges of Transformation and Redistribution’ (Harold Wolpe Memorial Trust Conference, Cape Town, 25-7 March 2004) 2.

⁵⁴⁹ *ibid.*

⁵⁵⁰ Hangula (n 479) 87.

acquire such land; and (iii) the quality and quantity of the land offered.⁵⁵¹ The government's assent to the WSWB approach means that 'land reform becomes a reactive exercise, submissive to the drives of the market principles'.⁵⁵² This fact puts the landowners in a position where they are effectively in control of the land reform process, unless government exercises its power of expropriation in terms of Article 16(2) and section 20 of the ACLRA.

It is argued that unless the factors slowing down land reform are addressed, the land reform programme will continue being a slow, ineffective, and costly exercise.⁵⁵³ The government needs to capitalise on section 20 of the ACLRA and acquire more land for purposes of land reform. In this regard, a pro-active strategy is required. This would entail identifying viable parcels of land by the Ministry and allocating such viable parcels to applicants who have knowledge of farming, especially agricultural graduates who will be able to utilise the allocated land in a profitable manner. The land reform programme also needs to include restitution as a means of rectification for the land lost by the respective tribes through dispossession. The starting point in respect of restitution is to understand that history cannot be reversed fully, and that the wounds of the past may never be fully healed, nor can the marks left by the violent dispossession of land by the colonial powers be erased.⁵⁵⁴ However, certain things may be done to soothe these wounds, such as addressing the emotions surrounding the dispossession of land by infusing restorative justice in the land reform program. In this

⁵⁵¹ *ibid.*

⁵⁵² *ibid.*

⁵⁵³ Chris Alden and Ward Anseeuw, 'The Gathering Storm? Namibia and the Land Question' (2nd International Conference on Wars and Violent Conflicts in Africa, 8 July 2016) 9. <<https://repositorio.iscte-iul.pt/bitstream/10071/11693/1/Gathering%20Storm.pdf>> accessed 16 September 2021.

⁵⁵⁴ Lund (n 540) 17.

regard, Melber argues that acting on Resolution 38 of the second National Conference on land, which requires the government to undertake ‘measures to restore social justice and ensure economic empowerment of the affected communities’ is crucial.⁵⁵⁵ This involves clear attempts to redistribute land to the landless.⁵⁵⁶

Land reform in communal areas has not been given as much attention as the reform of commercial land. However, given that many Namibians live in communal areas, the need to reform land in communal areas could not simply be ignored. The types of land rights provided for by the Act do not allow beneficiaries to derive economic gains from the land, in that they cannot use the land as collateral to obtain financial assistance from lending institutions, nor can they sell such land. This hindrance is detrimental to leaseholders who acquire communal land with a purpose of utilising it as a means of income.

5.3.2. Is transformation possible in the Namibian context?

It is argued that real transformation in the current legislative framework on land remains a challenge due to the constraints embedded in it. This is primarily due to the mixed economic order which Namibia follows, and which promotes private ownership of property. However, given that ownership is not absolute, the state can still employ the right of affirmative action enunciated in Article 23 of the Constitution to implement laws which would endeavour to fulfil the transformative aims of the constitution, including attaining equality and justice for all. This is necessary in light of the fact

⁵⁵⁵ Melber (n 544).

⁵⁵⁶ *ibid.*

that the dispossessed are not experiencing justice when it comes to land. There is also no equality in land allocation, nor is the land reform programme able to bring about equity. The lack of discrimination in the identification of beneficiaries of land reform is an injustice that prejudices the true victims of land dispossession. This does not only pertain to commercial land, but there has also been dispossession of land in communal areas through illegal fencing off the land.

I argue that the constitution contains certain imperial elements that make it impossible for real transformation to occur, and which hamper the realisation of the aspirations enunciated in the Preamble. Despite the land reform programmes, people are still living in abject poverty. This means that issues that are hampering transformation are infused in the structure of our laws.

5.4. Conclusion

The fact that transformation is still lacking in the Namibian society is echoed in the words spoken by Hamutenya:⁵⁵⁷

One challenge to the Constitution is the need to develop the economy, to provide jobs and to improve the incomes of the broad majority of this society. And, if they are not addressed, you will have a continuous trend of young generations being unemployed and you don't know when they are going to get tired of sitting on street corners. And they might start to significantly undermine the Constitution. So we may celebrate and rejoice that we do not

⁵⁵⁷ Naita Hishoono, Graham Hopwood, Justine Hunter, Frederico Links and Masoma Sherazind, *The Constitution in the 21st Century: Perspectives on the Context and Future of Namibia's Supreme Law* (NID and IPPR 2011) 10.

have violence yet but how long are you going to ensure that that's the case?

That's a constitutional issue. The well-being of the people, taking care of the development of the people has implications for peace and stability in the country.

There is a need to rethink land reform in its totality if transformation is to be achieved. So far, the current legislative framework is incapable of bringing about transformation as envisaged in the preamble to the Namibian Constitution. A wider approach to land reform needs to be adopted, which includes the provision of land for other purposes apart from farming or resettlement. There is a need to rely more on the right to expropriate in terms of section 20 of the ACLRA and compel landowners to give up their land. It is trite that the land issue is a highly political issue, which, if not addressed at this stage will give birth to unwanted outcomes and disruption to the stability of the country.

Parties need to join hands and fight against the evil of landlessness in a country so sparsely populated. The land reform programme needs to include other features, including infrastructure, the proper provision of services, providing proper training to beneficiaries of land reform to allow them to farm productively, to amend the CLRA so that communal land becomes marketable and can be used as collateral to get access to credit etc. The resolutions of the Second National Land Conference reflect outstanding issues on the land question and should be carefully and properly implemented and not simply packed on the shelf until the subject emerges again into the public domain.

There is a need to set realisable goals which comply with the elements of a successful land reform program. While the route taken by Zimbabwe is not recommended, there are valuable lessons that can be noted from the Zimbabwe experience; firstly, the land reform programme must not be based on the willingness of foreign powers to contribute; secondly, land reform needs a coercive element; thirdly, land reform is a political issue which will always be opposed by those who stand to lose their land and/or property fourthly, seldom will landowners agree to restitution; and finally, sometimes radicalism is required to implement changes for the good of many. Restitution of ancestral land remains an imperative component in redressing the injustices of the past that Namibia should consider.

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

6.1. Introduction

The previous chapters discussed land reform frameworks, policies and legislation in four respective countries, outlining the challenges that each of those countries has faced since the colonial era and more particularly after embarking on land reform programmes. This chapter concludes the study by reiterating the main arguments presented in the study, the relevance of the study, as well as some recommendations for future studies on the subject.

It is trite that there is no perfect way of dealing with the challenges these countries inherited from their colonial masters. The fight to redress the injustices of the past is made more complicated by the very essence of democracy and the rule of law which governs nations in the world today. International law does not allow for atrocities to be recommitted, including righting the wrongs of the past in the form of complete restoration of land restitution as doing so would be at variance with individual rights and freedoms.

6.2. Summary of chapters

In chapter 1 I provided the background of the study and set out specific objectives I wished to achieve by undertaking this study. This chapter has demonstrated that land reform is a complex issue which is faced with challenges at various levels. As such,

the approach to solving these challenges should be multi-dimensional as opposed to a singular approach.

In chapter 2, I discussed the efficacy of the WSWB approach in the Namibian context. In this regard, I discussed the various legislative frameworks informing the land question in Namibia. To this end, I identified reasons why the WSWB has failed to meet redistribution targets in Namibia.

In chapter 4, I undertook a comparative exercise of the land issue in two southern African countries, namely South Africa and Zimbabwe, due to the similarities in colonial dispossession, efforts embarked upon by government to address the land issue, as well as challenges encountered in the implementation of land reform.

In chapter 5, I discussed and analysed the legislative framework on land in order to answer the research question. A comparative analysis was needed in order to extract possible lessons that Namibia can adopt in her land reform programme.

6.3. Conclusions

I have argued throughout this thesis that the Namibian legislative framework is ineffective and incapable in bringing about effective land reform. To this end, I have identified the main obstacles embedded in our constitutional framework which hampers the process of land reform. In this regard, I have argued that the WSWB is incapable of bringing about large-scale distribution of land because it has no

compelling element and is solely dependent on the willingness of landowners to offer their land for sale. To this end, I have demonstrated how challenging it is for one to enforce a large-scale redistribution programme in a capitalist society without infringing on the rights of individuals and without violating the rule of law. I have also argued that the policy of National Reconciliation adopted at independence has deprived Namibia of an opportunity to comprehensively deal with the land issue, despite the fact that it was a critical step for reconciliation and nation building. It has further allowed land to remain in the hands of a select few, a fact which has economic significance and has played a role in the level of poverty many Namibians experience. I have further argued that the lack of discrimination in identifying land reform beneficiaries under the redistribution programme has resulted in some groups of the population (who were directly dispossessed of their land by the Germans) feeling betrayed. I have clearly demonstrated that section 20 of the ACLRA has the potential of transforming the land reform process in Namibia if applied in accordance with the Constitution. However, it has only been utilised a few times, mostly due to both political and economic reasons.

It has further been argued throughout this study that whereas no country has implemented a perfect land reform programme, there are valuable lessons that Namibia can take from its neighbours, Zimbabwe, and South Africa. Considering the fact that these countries do not necessarily amount to success stories, the most important lesson drawn from this comparison is how not to undertake a land reform programme and why the WSWB will not work as part of the land reform agenda. Other lessons include adapting economically viable settlement schemes and considering the concept of some level of restitution. Mandating the Agricultural Bank to provide valuations of

commercial land, an example adopted in South Africa through the PLAS, will assist in curbing land prices, and eliminate undue influence by landowners willing to sell their land.

In my comparative analysis, I identified similar problems that all the three countries experienced or are experiencing in the process of land reform.

1. The reluctance of farm/landowners to reconcile and or participate meaningfully in land reform, which culminates in landowners exerting their influence on corrupt government officials to slow down the process of land reform;
2. Corruption among government officials who are tasked with allocating land; who then end up reserving land for their cronies instead of availing it to the appropriate beneficiaries;
3. The valuation of land is biased most of the times and does not reflect the true value of the land but rather, it reflects exorbitant prices that government cannot afford, and in this way, the landowners retain the land. This is a mechanism they use to frustrate land reform.

Furthermore, I have argued that there is a need to rethink land reform by making it a priority again and improving it to comply with the widely accepted requirements of an effective land reform programme, which include widespread consensus concerning the political legitimacy and appropriateness of the mechanisms of land acquisition. By relying on the failures of the WSWB approach and the calls for its abolishment, I have

demonstrated that in Namibia, the WSWB does not enjoy widespread support as a preferred mode of acquisition of land for purposes of land reform.

6.3. Relevance of study

This study is relevant in that it succinctly identified some deep-rooted elements embedded in the Namibian Constitution and the legislative framework on land which have caused the land reform programme to fail. It is those inherent flaws that have made government's attempts in respect of land reform futile. It identified the shortcomings which render the transformative goals of the Constitution, such as equality and dignity for all, impossible. This study challenged the conventional views about the efficacy of the land reform programme and identified the root cause giving rise to the ineffectiveness of the programme. In so doing, the study revealed shortcomings in the programme, which when addressed will lead to improved results for the programme.

6.4. Recommendations

It is trite that land reform under the WSWB in Namibia has failed, just like it has failed in Zimbabwe and South Africa. State-led reforms have also failed to bring about the expected results in land ownership. There is a need to rethink the whole process of land reform. To this end, I submit the following recommendations.

6.4.1. Recommendations on the WSWB approach

1. Instead of only using one mode of land acquisition through the WSWB approach, the state should explore other options such as contractual agreements

between landowners (with excess or underutilised land) and farmers who can utilise portions of the underutilised land for making a living. The government should give an incentive (which may include adding a certain percentage to the purchase price) to the landowners to prompt them to avail underutilised lands for use to those who can use it at a price. Government should therefore increase the use of land expropriation.

6.4.2. Recommendation relating to setting realistic deadlines

2. A land reform programme must set specific milestones and deadlines in the process of land reform a due date and a starting date. If it is allowed to drag on, the state will lose sight of the objectives of the programme. No urgency equals to lack of political will in respect of implementation.

6.4.3. Recommendation in respect of restorative justice

3. Restorative justice needs to be infused in the debate for land. There is a need to understand that while the injustices of the past cannot be reversed, an element of restoration in the land programme will go a long way in healing the wounds of the past, especially among the Herero and Nama people. This would include a public acknowledgment of the land appropriated, some sort of compensation for the disposed groups, as well as prioritising these groups in the process of redistribution.

6.4.4. Recommendation in respect of redistributive land reform

4. Redistributive land reform is not enough. There is a need to combine it with other adequate policies, for instance, enhancing the productivity in agriculture and improving the income of the previously landless farmers via land reform. As such, land reform should be supplemented by other measures to ensure self-sustenance for the resettled people.

6.4.5. Recommendation in respect of capacity building

5. Capacity building is needed to prepare the resettled people for engaging in commercial farming. Appropriate training should be rendered to assist the new farmers to be mentally prepared and to brace for the challenges associated with venturing in commercial farming.

6.4.6. Recommendation in respect of sustainability of resettled beneficiaries

6. The government should endeavour not to create and / or retain a culture of dependency by resettling people who have no idea or intention to farm. In this regard, the selection criteria for identifying beneficiaries should be revised.

6.4.7. Recommendation with respect to valuating land prices

7. The valuation of commercial land offered for sale into the market should be done by an objective valuation body and not by individual valuers or the Bank who can be influenced by landowners to produce exorbitant prices.

6.4.8. Recommendation with respect to compensation

8. The government should offer below-market compensation when land is acquired in terms of section 20 of the ACLRA

6.4.9. Recommendation with respect to adopting economically viable settlement models

9. Economically viable settlement schemes like A1 models adopted in Zimbabwe during the Lancaster Agreement should be explored. These models must be clearly set out, with support programmes to ensure beneficiaries become self-sufficient.

6.4.10. Recommendation in respect of commercialising communal land

10. Land in communal areas should, to a certain extent, be commercialised to allow owners to make the requisite investments. This would entail allowing communal rights holders to use communal land as collateral in order to get financial assistance from financial institutions.

6.4.11. Recommendation on ownership by absentee landlords and imposing land taxes

11. Government should consider expropriating land belonging to absentee landlords and redistribute it to the landless, in the absence of which the policy on absentee landlords should be scrapped. Additionally land taxes should be imposed, especially with absentee landlords.

6.4.12. Recommendation on speeding up Land Reform

12. In order to improve the pace of land reform, government should focus on concentrated land purchasing, removing sub—divisions of Agricultural land, and promoting a proactive land acquisition agenda in Namibia

6.5. Conclusion

The call to transform is a constitutional imperative. And this call to transformation is aimed at establishing a truly equal society whereby socio-economic rights are accessible to everyone. As a nation characterised by acute inequalities, the pursuit of substantive equality should be spearheaded by government and desired by all. This entails that government should initiate and constantly facilitate a serious conversation on the need to transform between Namibians of European descent who own land and black Namibians who do not have land. A belligerent and hostile posture between those who own land and those without should be discouraged. This can be done by utilising the media to spread a dialogue of tolerance between the two groups. Without doubt, all land reform projects can contribute towards the realisation of substantive transformation if managed properly, through the correction of inequalities created by historical dispossession. This would entail for instance some sort of compensation to the victims of dispossession. Essentially then, the pursuit of political and economic objectives of transferring land to those who were previously dispossessed should be done in a manner that acknowledges that the quest for transformation should benefit all Namibians. While acknowledging the emotions associated with the historical dispossession of land, a divisive government rhetoric language that pits Namibian land owners of European descent against black Namibians should be discouraged as it does not foster national reconciliation and will ultimately frustrate the land reform efforts.

BIBLIOGRAPHY

Secondary sources: Books, Articles

Adams ME, 'Land Reform: New Seeds on Old Ground' (1995) *Overseas Development Institute*

Alexander L, 'The Expropriation of Farms doesn't necessarily achieve the Aims of Land Reform' *The Namibian* (Windhoek 07 October 2022)

Aliber M and Mokoena R, 'The Interaction between the Land Redistribution Programme and the Land Market in South Africa: A Perspective on the Willing-Buyer/Willing Seller Approach' (Occasional Paper-no.2, Programme for Land and Agrarian Studies 2002)

Amoo SK, 'Land Reform in Namibia: Beyond 2018' in Odendaal W and Werner W (Eds) *Neither Here nor There: Indignity, Marginalization and Land Rights in Post-independence Namibia* (LAC 2020)

Ancestral Land Rights Commission, 'Report of the Commission of Inquiry into Claims of Ancestral Land Rights and Restitution' (LAC 2020)

Andreucci M, 'A History of Land, Agriculture and ...Close Look at 'Willing-Buyer Willing-Seller' *The Patriot* (Harare, 28 February 2019)

Azadi H and Vanhaute E, 'Mutual Effects of Land Distribution and Economic Development: Evidence from Asia, Africa, and Latin America' (2019) 8(96) *Land Journal*

Badenhorst PJ, Pienaar JM, Mostert H, '*Silberberg and Schoeman's: The Law of Property* 5th Ed (Durban, LexisNexis Butterworths 2006)

Ballesteros MM and dela Cruz A, 'Land reform and Changes in Land Ownership Concentration: Evidence from Rice Growing Villages in the Philippines' (Discussion Paper Series No. 2006-21, Philippine Institute for Development Studies 2006)

Behr D, Haer R and Kromrey D, 'What is a Chief without land? Impact of Land Reforms on Power Structures in Namibia' (2015) 25(5) *Regional and Federal Studies*

Block W, 'The Economics and Ethics of Land Reform: A Critique of the Pontifical Council for Justice and Peace's "Toward a Better Pontifical Council for Justice and Peace's "Toward a Better Distribution of Land: The Challenge of Agrarian Reform" Distribution of Land: The Challenge of Agrarian Reform"' (1999) 15(1) *Journal of Natural Resources and Environmental Law*

Borras SM, 'Questioning Market-led Agrarian Reform: Experiences from Brazil, Colombia and South Africa' (2003) 3(3) *Journal of Agrarian Change*

Braganza B, 'The Illusion of Redress and Redistribution: South Africa, Namibia and Black Economic Empowerment' (2020) 8(1) *McGill*

Chitsike F, 'A Critical Analysis of the Land Reform Programme in Zimbabwe' (2nd FIG Regional Conference, Marrakech, Morocco 2-3 December 2003)

Claxton H, 'Land and Liberation: Lessons for the Creation of Effective Land Reform Policy in South Africa' (2003) 8 *Michigan Journal of Race and Law*

Davies R, Kosec K, Nkonya E, and Song J, 'Global land reform experiences: A review for South Africa' (SA-TIED Working Paper #98 March 2020)

Delgado G, 'A Short Socio-Spatial History of Namibia' (Working Paper No. (10)) (Integrated Land Management Institute Namibia University of Science and Technology 2018)

Department of Land Affairs, 'White Paper on Land Policy' (Pretoria, DLA 1997)

Dobell L, 'Silence in Context: Truth and or Reconciliation in Namibia (Review Article)' 1997 23(2) *Journal of Southern African Studies*

DRDLR, *Implementation Evaluation of Proactive Land Acquisition Strategy (PLAS)* (Pretoria: DRDLR Directorate of Evaluation and Research Pretoria 2015)

Du Plessis E, 'Silence is Golden: The Lack of Direction on Compensation for Expropriation in the 2011 Green Paper on Land Reform' (2014) 17(1) *PER/PERJ*

Edward Mumbuu, 'WSWB Policy has not Failed' *The Namibian* (Windhoek, 28 September 2018)

Elvinia J, 'Is Land Reform a Failure in the Philippines? An Assessment on CARP' in Kimura H, Suharko, Javier AS and Tangsupvattana A (Eds), *Limits of Good Governance in Developing Countries* (Gadjah Mada University Press (UGM) 2011)

Fuller B and Eiseb G, 'The Commercial Farm Market in Namibia: Evidence from the First Eleven Years' (2002) Briefing Paper No. 15 (IPPR Windhoek)

Davies G, 'The Relationship between Empirical Legal Studies and Doctrinal Legal Research' (2020) 2 *Erasmus Law Review*

Government of the Republic of Namibia, 'Concept Paper: Second National Land Conference' (GRN 2018)

Hall R and Ntsebeza L, *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (HSRC Press 2007)

Hangula L, 'Land Reform in Namibia' (2000) *Population–Development–Environment in Namibia*

Harring SL and Odendaal W, *Kessl: A New Jurisprudence for Land Reform in Namibia?* (LAC 2008)

Harring SL, 'The Stolen Lands Under the Constitution of Namibia: Land Reform under the Law' Presented at (AASA Conference, UNAM, July 2000)

Hishoono N, Hopwood G, Hunter J, Links F and Sherazi M, *The Constitution in the 21st century: Perspectives on the Context and Future of Namibia's Supreme Law* (NID & IPPR 2011)

Horn NJ, 'The Forerunners of the Namibian Constitution' in Anton Bösl, Nico Horn and André du Pisani (Eds) *Constitutional Democracy in Namibia: A Critical Analysis after Two Decades* (Macmillan Education Namibia, 2010)

Horn NJ, 'The Western Sahara Case: Land Reform and Pre-colonial Land rights in Namibia' (2015) 4(1) *SADC Law Journal*

Hunter J, 'Who should own the Land: An Introduction' in Hunter J (ed) *Who Should Own the Land? Analyses and Views on Land Reform and the Land Question in Namibia and Southern Africa* (Konrad-Adanauer-Foundation 2004)

Institute for Poverty, Land and Agrarian Studies, 'Diagnostic Report on Land Reform in South Africa: Commissioned Report for High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, An Initiative of The Parliament of South Africa' (University of the Western Cape, September 2016)

Johnson D, Pete S and Du Plessis M, *Jurisprudence: A South African Perspective* (Butterworths 2001)

Juanitha M Pienaar, 'Reflections on the South African Land Reform Programme: Dichotomies and Disconnects' (Property Law Teachers Conference on 31 October – 1 November 2013, University of the Free State, Bloemfontein)

Kaapama P, Blaauw L, Zaaruka B and Kaukunga E, *Consolidating Democratic Governance in Southern Africa: Namibia* (EISA 2007)

Kelso CK, 'National Reconciliation and the Land Question in Namibia' (1992) *Institute of Current World Affairs*

Khushal Vibhute and Filipos Aynalem, *Legal Research Methods: Teaching Material* (Justice and Legal System Research Institute 2009)

Kirsten JF and Van Zyl J, 'Approaches and Progress with Land Reform in South Africa' (1999) 38 *Agrekon*

Kloppers HJ and Pienaar GJ, 'The Historical Context of Land Reform in South Africa and Early Policies' (2014) 17(2) *PER/PERJ*

Kumar R, 'Land Acquisition and Eminent Domain' (2018) 7(11) *International Journal of Science and Research (IJSR)*

Lahiff E, 'Land Redistribution in South Africa' in Binswanger-Mkhize HP, Camille B and Roger Van den Brink R (Eds.) *Agricultural Land Redistribution: Towards Greater Consensus* (The World Bank 2009)

Lahiff E, 'Stalled Land Reform in South Africa' (2016) 115(781) *Current History*

Lahiff E, 'Willing-Buyer, Willing-Seller: South Africa's Failed Experiment in Market-Led Agrarian Reform' (2007) 28(8) *Third World Quarterly*

Lahiff E, Borras SM and Kay C, 'Market-led Agrarian Reform: Policies, Performance and Prospects (2007) 28(8) *Third World Quarterly*

Lanzona AL, 'Agrarian Reform and Democracy: Lessons from the Philippine Experience' (2019) 10 *Millennial Asia*

Laurie AC, *The land Reform Deception Political Opportunism in Zimbabwe's land Seizure Era* (Oxford University Press 2017)

Lendelvo S, Shapi M and Mapaire C, 'The Economic Viability of Emerging Commercial Farmers under The Resettlement Programme' in Odendaal W and Werner W, (Eds) *Neither Here nor There: Indigeneity, Marginalization and Land Rights In Post-Independent Namibia* (Legal Assistance Centre 2020)

Lenggenhager L and Vonkie Nghitevelekwa RV, 'Why Namibians Want Fresh Impetus Behind Land Reform' (2018) Quartz Africa. <[Why Namibians want fresh impetus behind land reform \(theconversation.com\)](https://www.theconversation.com/why-namibians-want-fresh-impetus-behind-land-reform)> accessed 20 September 2021

Luise White L, 'The "Lancaster House was redundant": Constitutions, Citizens, and the Frontline Presidents' in *Unpopular Sovereignty: Rhodesian Independence and African Decolonization* (University of Chicago Press 2021)

Makana NE, 'Peasant's Response to Agricultural Innovations: Land Consolidation, Agrarian Diversification & Technical Change. The Case of Bunguna District in Western Kenya, 1954-1960' (2009) 35(1) *A Journal of African Studies*

Malan J, 'Guide to the Communal Land Reform Act' (2003) Legal Assistance Centre (LEAD)

Manjengwa J, 'Natural Resource Management and Land Reform in Southern Africa' (2006) Commons Southern Africa Occasional Paper No. 15

Mashwama Nokulunga, Thwala Didi and Aigbavboa Clinton, 'Challenges of Reconstruction and Development Program (RDP) Houses in South Africa' (International Conference on Industrial Engineering and Operations Management Washington DC, USA, September 27-29, 2018)

McKay BM, 'Redistributive Land Policies for Inclusive Growth and Poverty Eradication' (2017) *International Institute of Social Studies (ISS) of Economics University*

Melber H, 'Colonialism, Land, Ethnicity & Class: Namibia after the 2nd National Land Conference' (2019) 54(1) *Sage Journals*

Ministry of Land Reform, 'Resolutions of the 2nd National Land Conference' (Office of the Permanent Secretary, 05 October 2020)

Ministry of Lands, Resettlement and Rehabilitation (MLRR), 'National Resettlement Policy' (MLRR 2001)

Mlambo AM, 'Land Grab' or 'Taking Back Stolen Land': The Fast-track Land Reform Process in Zimbabwe in Historical Perspective' (2005) 3 *History Compass*

Moffat C, 'Lancaster House Agreement' (Lancaster House Agreement: Southern Rhodesia Constitutional Conference, Lancaster House, London September-December 1979)

Moyo S and Chambati W (Eds.) *Land and Agrarian Reform in Zimbabwe: Beyond White-Settler Capitalism* (African Institute for Agrarian Studies 2013)

Mufune P, 'Land Reform Management in Namibia, South Africa, and Zimbabwe: A Comparative Perspective' (2020) 6(1) *International Journal of Rural Management*

Nakuta J, 'Ancestral Land Claims: Why Bygones Cannot be Bygones' in Odendaal W and Werner W (Eds) *Neither Here nor There: Indignity, Marginalization and Land Rights in Post-independence Namibia* (LAC 2020)

Nakuta J, 'The Justiciability of Social, Economic and Cultural Rights in Namibia and the Role of the Non-governmental Organisations' in Horn N and Bösl A (Eds) *Human Rights and the Rule of Law in Namibia* (2nd edition, Konrad-Adenauer-Stiftung 2009)

Namibia Agricultural Union (NAU), 'Proposals Towards Establishing Principles and Procedures for Agricultural Land Expropriation for Resettlement Purposes in Namibia' (2004) Namibia Agricultural Union

Namibia Statistics Agency, *Namibia Population and Housing Census Main Report 2016* (Windhoek: Namibia Statistics Agency, 2017)

Navarro Z, 'Expropriating Land in Brazil' in Hans P. Binswanger-Mkhize, Bourguignon Camille., Roger Van den Brink (eds) *Agricultural Land Redistribution: Towards Greater Consensus* (The World Bank 2009)

Nkwain Ngam RN, 'Government-driven Land and Agrarian Reform Programmes in Post-Apartheid South Africa – A Brief History (1994-2021)' (2021) 25(1) *African Sociological Review*

Ntsebeza L, 'Land Redistribution in South Africa: The Property Clause revisited' in Ntsebeza L and Hall R *The land Question in South Africa: The Challenge of Transformation and Redistribution* (HSRC Press Cape Town 2007)

Odendaal W and Werner W (Eds) *Neither Here Nor There: Indigeneity, Marginalisation and Land Rights In Post-Independence Namibia* (Legal Assistance Centre 2020)

Odendaal W, 'Confiscation or compensation? An Analysis of the Namibian Commercial Land Reform Process' (2005) Legal Assistance Centre

Office of the Prime Minister, 'Consensus on the National Conference on Land and the Land Question (OPM July 1991)

Oppel A, 'Exploring economic support networks amidst racial inequality in Namibia' (2021) WIDER Working Paper 2021/102 (UNU-WIDER, Helsinki)

Palmer R, 'Land Reform in Zimbabwe, 1980-1990' (1990) 89 *African Affairs*

Pankhurst D, *A Resolvable Conflict? The Politics of Land in Namibia* (University of Bradford 1996)

Ramanathan U, 'A Word on Eminent Domain' in Lyla Mehta (ed) *Displaced by Development – Confronting Marginalisation and Gender Injustice* (New Delhi: Sage, 2009)

Ronald Nkwain Ngam, 'Government-driven Land and Agrarian Reform Programmes in Post-Apartheid South Africa – A Brief History (1994-2021)' (2021) 25(1) *African Sociological Review*

Rothauge A, 'Overcoming Barriers to the Productive Resettlement of Namibians' (2007) *Agricola* 28

Rusenga C, 'Rethinking Land Reform and Its Contribution to Livelihoods in South Africa' (2022) 14(2) *Africa Review*

Sam Moyo, 'Designing and Implementing Redistributive Land Reform: The Southern African Experience' in Hans P. Binswanger-Mkhize, Bourguignon Camille, Roger Van den Brink (eds) *Agricultural Land Redistribution: Towards Greater Consensus* (The World Bank 2009)

Sanne Taekema and Wibren van der Burg, 'Legal Philosophy as an Enrichment of Doctrinal Research – Part II: The Purposes of Including Legal Philosophy' (2022) *Law and Method*

Shigwedha LH, 'A Study of the National Resettlement Policy in Namibia: A Critical Review of Policy Application and Impact' (Masters Thesis, University of Namibia 2015)

Simmonds NE, *Central Issues in Jurisprudence: Justice, Laws, and Rights* (Sweet & Maxwell 1986)

Swartbooi B, 'On the land Question' in Judith Hackmack and Karina Theurer (eds) *Colonial Repercussions: Namibia 115 Years after the Genocide of the Ovaherero and Nama* (European Center for Constitutional and Human Rights 2019)

Takigawa T, 'Landownership and Land Reform Problems of the Philippines' (1964) 2(1) *The Developing Economies*

Tanja Winkler, 'Exploring some of the complexities of planning on 'communal land' in the former Transkei' (2019) 75 *Town and Regional Planning*

Tapscott C, 'Land Reform Agrarian Transformation and Rural Poverty in Namibia: Some Policy Issue' in MLRR, *Land as Factor in Poverty Alleviation in Namibia* (1993) Windhoek

Tapscott C, 'National Reconciliation, Social Equity and Class Formation in Independent Namibia' (1993) 19(1) *Journal of Southern African Studies*

Tarisayi KS, 'Divergent Perspectives on the Land Reform in Zimbabwe' (2019) 44(1) *Journal for Contemporary History*

Tavonga Njaya and Nelson Mazuru, 'Land Reform Process and Property Rights in Zimbabwe: Constraints and Future Prospects (1980-2002)' (2010) 12(4) *Journal of Sustainable Development in Africa*

Thomas NH, 'Land Reform in Zimbabwe' (2003) 24(4) *Third World Quarterly*

Treeger C, 'Legal Analysis of Farmland Expropriation in Namibia' (Konrad Adanauer Stiftung 2004)

Walker C, 'The Land Question in South Africa: The Challenges of Transformation and Redistribution' (Harold Wolpe Memorial Trust Conference, Cape Town, 25-7 March 2004)

Watson P, *The Seditious State: How to Shake the Poor from the Communal Land Safety Net* (Land, Environment & Development Project, Legal Assistance 2021)

Werner W, 'Land Reform in Namibia: Motor or Obstacle of Democratic Development?' (Land Reform in Southern Africa, Berlin, 28 May 2003)

Wiechers W, 'Namibia: The 1982 Constitutional Principles and their Legal Significance' (1989) 15 *A Yearbook of International Law*

Wietersheim E, *This Land is my Land! Motions and Emotions around Land Reform in Namibia* (Friedrich Ebert Stiftung 2021)

Uwizeyimana DE and Chilunjika A, 'Shifts in the Zimbabwean Land Reform Discourse from 1980 to the Present' (2015) 8(3) *African Journal of Public Affairs*

Internet Sources

Adams M, 'Land Reform in Namibia' (2000) 7 [land reform in Namibia: past, present and prospects \(mokoro.co.uk\)](http://landreform.co.uk)> accessed 18 April 2022

Alden C and Anseeuw W, 'The Gathering Storm? Namibia and the Land Question' (2nd International Conference on Wars and Violent Conflicts in Africa, 8 July 2016) 2. <<https://repositorio.iscte-iul.pt/bitstream/10071/11693/1/Gathering%20Storm.pdf>> accessed 16 September 2021

Alden L, 'Land Reform in Africa: A Reappraisal- Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa' (2012) Brief #3 of 5 <[RightsToResourcesInCrisis.Briefs1thru5.pdf \(oicrf.org\)](#)> accessed 10 September 2021

Anderson EA, 'The Encomienda in Early Philippine Colonial History' (1976) Asian Studies <[anderson-encomienda-philippine-history.pdf \(upd.edu.ph\)](#)> accessed 15 April 2022

Anderson R, 'Can Foreigners Own Land in the Philippines?' <[can Foreigners Own Land in the Philippines? - Retiring to the Philippines](#)> accessed 20 June 2022

Anon, 'Willing Buyer, Willing Seller Principle to Go' *News24* (Cape Town 14 February 2017) <<https://www.news24.com/fin24/willing-buyer-seller-principle-to-go-20130214>> accessed 16 June 2022

Ashipala N, 'Presidency Supports Small-scale Farmers' *New Era* (Windhoek, 15 September 2021) <<https://neweralive.na/posts/presidency-supports-small-scale-farmers>> accessed 15 September 2022

Borras SM, 'The Underlying Assumptions, Theory, and Practice of Neoliberal Land Policies' (2006) Economics Political Science <[BORRAS-Neoliberal-land-policies.pdf](#)> accessed 02 June 2022

Chikukwa N, 'The Land Dispute in Namibia and Redistributive Justice' (07 April 2017) <[The Land dispute in Namibia and Redistributive justice \(ngonichiks.blogspot.com\)](http://ngonichiks.blogspot.com)> accessed 20 May 2022

Coetzee J and Marous J, 'Expropriation Without Compensation- it is not the end of the road and is still on the table' *Fasken Martineu DuMoulin* (Johannesburg, 15 December 2021) <<https://www.fasken.com/en/knowledge/2021/12/15-expropriation-without-compensation>> accessed 10 October 2022

Cousins B, 'Land Reform in South Africa is Sinking. Can it be Saved?' (2016) University of the Western Cape, PLAAS 3 <https://www.nelsonmandela.org/uploads/files/Land_law_and_leadership_-_paper_2.pdf> accessed 20 September 2022

De Vos P, 'Willing Buyer- Willing Seller Works... If you have a Lifetime to Wait' *Daily Maverick* (Cape Town, 13 June 2013) <<https://www.dailymaverick.co.za/opinionista/2013-06-13-willing-buyer-willing-seller-works-if-you-have-a-lifetime-to-wait/>> accessed 15 April 2021

Department of Housing, Eastern Cape Provincial Government, 'Failed Reconstruction and Development Programme (RDP) housing projects are under housing rectification programme' (30 July 2009) <<http://www.echousing.ecprov.gov.za/index.php>> accessed 18 October 2022

Department of Land Affairs, 'Implementation Plan for the Proactive Land Acquisition Strategy (PLAS)' (2006) <https://www.gov.za/sites/default/files/gcis_document/201409/impllandacquisition0.pdf> accessed on 13 March 2022

Dlamini SRA, 'Taking Land Reform Seriously: From Willing Seller-Willing Buyer to Expropriation' (Master Thesis, University of Cape Town 2014) 39 <<https://open.uct.ac.za/handle/11427/4691>> accessed 7 August 2021

Gonese FT, Marongwe N, Mukora C and Kinsey B, 'Land Reform And Resettlement Implementation In Zimbabwe: An Overview of the Programme against Selected International Experiences' (2002) Political Science <[Land reform and resettlement implementation in Zimbabwe : an overview of the programme against selected international experiences | Semantic Scholar](#)> accessed 11 May 2022

Government of Namibia, 'Concept Paper: Second National Land Conference' (2018) <http://dna.nust.na/landconference/submissions_2018/concept_paper_second_national_land_conference_2018.pdf> accessed 15 March 2021

Ikela S, 'Namibia: Govt Denies Slacking on Land Summit Resolutions' *The Namibian* (Windhoek, 10 February 2022) <[Namibia: Govt Denies Slacking on Land Summit Resolutions – allAfrica.com](#)> accessed 10 May 2022

Ikela S, 'Willing buyer-willing seller to stay' *The Namibian* (Windhoek, 20 January 2021) < <https://www.namibian.com.na/207976/archive-read/Willing-buyer-willing-seller-to-stay>> accessed 25 September 2022

Jason L, 'Resettled Farmers Beg for Handouts' *New Era* (Windhoek, 23 February 2021) < <https://neweralive.na/posts/resettled-farmers-beg-for-handouts>> accessed 29 May 2023

Johan Coetzee and Jacques Marous, 'Expropriation without compensation- it is not the end of the road and is still on the table' *Fasken Martineu DuMoulin* (Johannesburg, 15 December 2021) <<https://www.fasken.com/en/knowledge/2021/12/15-expropriation-without-compensation>> accessed 10 October 2022

Johann Kirsten, Aart-Jan Verschoor and Collecto Gandidzanwa, 'The South African government has been buying farmland for black farmers. It's not gone well' *The Conversation* (Cape Town, 09 January 2023) <<https://theconversation.com/the-south-african-government-has-been-buying-farmland-for-black-farmers-its-not-gone-well-197201>> accessed 29 May 2023

Kagisho NM, 'Land Reform and Restitution in South Africa' (2019) 2 <[https://www.academia.edu/39874253/Land Reform and Restitution in South Africa](https://www.academia.edu/39874253/Land_Reform_and_Restitution_in_South_Africa)> accessed 20 April 2022

Kirsten J, Verschoor A and Gandidzanwa C, 'The South African government has been buying farmland for black farmers. It's not gone well' *The Conversation* (Cape Town, 09 January 2023) <<https://theconversation.com/the-south-african-government-has-been-buying-farmland-for-black-farmers-its-not-gone-well-197201>> accessed 29 May 2023

Lenggenhager L and Nghitevelekwa RV, 'Why Namibians Want Fresh Impetus Behind Land Reform' (2018) *Quartz Africa* <[Why Namibians want fresh impetus behind land reform \(theconversation.com\)](https://theconversation.com/why-namibians-want-fresh-impetus-behind-land-reform)> accessed 20 September 2021

Lund C, 'Land Rights and Land Conflicts in Africa: A Review of Issues and Experiences' (2006) Report commissioned by the Danish Ministry of Foreign Affairs 17 <http://www.diis.dk/graphics/Publications/Andet2007/rod_landrights_SOA.doc.pdf> accessed 16 May 2022

Martina Schwikowski, 'Namibia: Who Owns the Land' *Deutsche Welle* (Windhoek, 03 October 2018) <<https://www.dw.com/en/namibia-who-owns-the-land/a-45740852>> accessed 01 June 2022

Mathekga MJ, 'Land Defended: the Land Reform Policy in South Africa' (20 May 2013) <(99+) [Land defended: the land reform policy in South Africa | Mmanoko Jerry - Academia.edu](#)> accessed 19 April 2022

Mavhenga D, 'South Africa's Constitutional Court Protects Land Rights: Landmark Rulings Protect Women and Communities Affected by Mining Companies' Human Rights Watch (South Africa, 06 November 2018) <https://www.hrw.org/news/2018/11/06/south-africas-constitutional-court-protects-land-rights> accessed 09 October 2022

Melber H 'How the First Redistribution Attempt Failed' (2020) Development Cooperation E-Paper No. 8. 2020, 08/2020 <[the policy proposed by Namibia's first National Land Reform Conference in the early 1990s never took off | D+C - Development + Cooperation \(dandc.eu\)](#)> accessed 15 September 2021

Melber H, 'Namibia's Long-standing Land Issue Remains Unresolved' *The Conversation* (31 October 2018) <[Namibia's long-standing land issue remains unresolved \(theconversaton.com\)](#)> accessed 20 May 2023

Melber H, 'The Battles over Land in Namibia' (19 December 2018) <[The battles over land in Namibia \(africasacountry.com\)](#)> accessed 16 May 2022

Mernet M, 'Controversial Expropriation Bill is finally Approved after Navigating a 14-year Rocky Road' *Daily Maverick* (Cape Town, 29 September 2022) <<https://www.dailymaverick.co.za/article/2022-09-29-controversial-expropriation-bill-is-finally-approved-after-navigating-a-14-year-rocky-road/>> accessed 29 September 2022

Moinbot G, 'We Share the Blame on Zimbabwe' *Guardian Unlimited (UK)* (London, 20 April 2002) <

<https://www.theguardian.com/world/2000/apr/20/zimbabwe.comment>> accessed 17 May 2022

Mumbuu E, 'Kapofi Brushes Off 'Sell-out' Tag' *New Era* (Windhoek, 28 September 2022) <<https://neweralive.na/posts/kapofi-brushes-off-sell-out-tag>> accessed 28 September 2022

Narib G, 'Is there an Absolute Right to Private Ownership of Commercial Land in Namibia?' (2008) Land, Environment and Development Project 1 <[is there an absolute right to private ownership of commerc... \(lac.org.na\)](#)> accessed 10 May 2022

Palmer R, 'Report on International Conference on Agrarian Reform and Rural Development (ICARRD)' (ICARRD, Tagaytay City, 5-8 December 2000) <http://mokoro.co.uk/wp-content/uploads/report_icarrd.pdf> Accessed 02 October 2021

Penciakova V, 'Market-Led Agrarian Reform: A Beneficiary Perspective of Cedula Da Terra' (2010) Working Paper Series No. 10-11 < [\[PDF\] Market-Led Agrarian Reform: A Beneficiary Perspective of Cédula da Terra | Semantic Scholar](#)> accessed on 30 September 2021

Pepeteka T, 'Judgement on Communal Land Rights Act, 2004 (Act No.11 Of 2004) And its Implications' (8 July 2010) <https://pmg.org.za/files/docs/100908peneteka_0.doc> accessed 09 October 2022

Petersen S, 'German Settlers Never Stole any Land' *The Namibian* (Windhoek, 11 February 2022) <<https://www.namibian.com.na/6217859/archive-read/German-settlers-never-stole-any-land>> accessed 10 October 2022

Rickard C, 'Court Finds Award of Two Namibian Farms, Aimed At Land Reform, Tainted By Corruption And Irregularities' *African Legal Information Institute* (Windhoek, 24 February 2021) <<https://africanlii.org/article/20210224/court-finds-award-two-namibian-farms-aimed-land-reform-tainted-corruption-and> > accessed 29 September 2022

Sakeus Iikela, 'Namibia: Govt Denies Slacking on Land Summit Resolutions' *The Namibian* (Windhoek, 10 February 2022) <[Namibia: Govt Denies Slacking on Land Summit Resolutions – allAfrica.com](#)> accessed 10 May 2022

Sakeus Iikela, 'Only 29 Land Summit Resolutions Implemented' *The Namibian* (Windhoek, 07 February 2022) <<https://www.namibian.com.na/6217754/archive-read/Only-29-land-summit-resolutions-implemented>> accessed 02 October 2022

Schwikowski M, 'Namibia: Who Owns the Land' *Deutsche Welle* (Windhoek, 03 October 2018) <<https://www.dw.com/en/namibia-who-owns-the-land/a-45740852>> accessed 01 June 2022

Shihepo T and Immanuel S, 'Political Elite Hijacked Resettlement Farms' ... Swapo Think Tank says Corruption has Sponsored Upg' *The Namibian* (Windhoek, 07 July 2022) <<https://www.namibian.com.na/6221900/archive-read/Political-elite-hijacked-resettlement-farms--Swapo-think-tank-says-corruption-has-sponsored-upg>> accessed 20 July 2022

Sibeene P, 'Lack of Transparency Taints Land Reform' *New Era* (Windhoek, 29 May 2008) <<https://neweralive.na/posts/lack-of-transparency-taints-land-reform>> accessed 29 September 2022

The Law, Race and Gender Unit, 'Press Statement on the Constitutional Court Judgment on the Communal Land Rights Act' (11 May 2010) University of Cape Town

<https://open.uct.ac.za/bitstream/item/2219/CLS_Press_Release_CLRA_11052010.pdf?sequence=1> accessed 09 October 2022

The Law, Race and Gender Unit, 'Press Statement on the Constitutional Court Judgment on the Communal Land Rights Act' (11 May 2010) University of Cape Town

<https://open.uct.ac.za/bitstream/item/2219/CLS_Press_Release_CLRA_11052010.pdf?sequence=1> accessed 09 October 2022

Pepeteka T, 'Judgement on Communal Land Rights Act, 2004 (Act No.11 of 2004) And its Implications' (8 July 2010)

<https://pmg.org.za/files/docs/100908peneteka_0.doc> accessed 09 October 2022.

Thwala WD, 'Land and Agrarian Reform in South Africa' (National Land Committee, Johannesburg 2022) 1 <[\(pdf\) land and agrarian reform in south africa \(researchgate.net\)](#)> accessed 10 April 2022

Tjatindi C, 'Govt Stuck with Willing Seller-Willing Buyer...Move to Scrap System Unconstitutional' *New Era* (Windhoek, 19 January 2021)

Tjiriange N. 'Willing Seller, Willing Buyer Policy – Is it effective?' *New ERA* (Windhoek, 20 March 2014) <[Namibia: Willing Seller, Willing Buyer Policy - Is It Effective? - allAfrica.com](#)> accessed 15 September 2022

Tjitemisa K and Nakale A, 'Farmworkes who failed as farmowners' *New Era* (Windhoek 11 October 2018) <https://kundana.com.na/posts/ongombo-west-farmworkers-who-failed-as-farmers> accessed 29 May 2023

United Nations 'Permanent Sovereignty over Natural Resources' (14 December 1962) < <https://www.ohchr.org/en/instruments-mechanisms/instruments/general-assembly-resolution-1803-xvii-14-december-1962-permanent>> accessed 20 June 2023

University of Witwatersrand, 'The Reshaping of South African Land Policy'
Johannesburg 165

<http://wiredspace.wits.ac.za/bitstream/handle/10539/275/17_chapter5.pdf?sequence=17> accessed 29 September 2022

Veronika Penciakova, 'Market-Led Agrarian Reform: A Beneficiary Perspective of Cedula Da Terra' (Working Paper Series No. 10-11, Semantic Scholar 2010) <[\[PDF\] Market-Led Agrarian Reform: A Beneficiary Perspective of Cédula da Terra | Semantic Scholar](#)> accessed on 30 September 2021

Zimbabwe Human Rights NGO Forum, 'Land Reform and Property Rights in Zimbabwe' (2010) 1 <[Zim Human Rights NGO SPECIAL REPORT FINAL.cdr \(kubatana.net\)](#)> accessed 5 May 2022

Legislation and Policies

Agricultural Commercial Land Reform Act No. 6 of 1995 (ACLRA)

Bantu Authorities Act No. 68 of 1951

Bantu Self-Government Act No. 46 of 1959

Blacks Resettlement Act No. 19 of 1954

Cabinet Resolution, CAB 9

Department of Land Affairs, 'White Paper on South African Land Policy' (Pretoria 1997)

Development Trust and Land Act No 18 of 1936

Group Areas Act No. 41 of 1950

Land Apportionment Act of 1930

Land Tenure Act No. 54 of 1969

Land Tenure Act of 1969

Native Land Act No. 27 of 1913

Natives Law Amendment Act of 1937

Natives Laws Amendment Act of 1937

Prevention of Illegal Squatting Act No. 52 of 1951

Prevention of Illegal Squatting Act No. 52 of 1951

Republic of Namibia, 'The National Land Policy' (GRN 1998)

The 1962 United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources (GA Res. 1962)

The Constitution of the Republic of Namibia

The Constitution of the Republic of South Africa

The Constitution of the Republic of Zimbabwe

The Lancaster House Agreement of 1979

The Property Valuation Act 17 of 2014

Case Law

Günther Kessl v Ministry of Lands and Resettlement and 2 Others Case No 27/2006
and 266/2006

Joseph v Joseph and Joseph v Joseph [2020] NASC 22 (30 July 2020)

Kambazembi Guest Farm CC T/A Waterberg Wilderness v The Minister of Land Reform and 5 Others (A197/2015) [2016] NAHCMD 366 (17 November 2016)

Kashela v Katima Mulilo Town Council & 7 others (I 1157/2012) [2017] NAHCMD 49 (01 March 2017)

Katima Mulilo Town Council v Maswahu (I 575/2014) [2017] NAHCMD 188 (14 July 2017)

Tongoane and Others v Minister of Agriculture and Land Affairs and Others (2010) Constitutional Court of South Africa CCT 100/09

Town Council of Rundu v Dinyando (A 417-2013) [2015] NAHCMD 237 (8 October 2015)

Wohlfart v Bergh (HC-MD-CIV-MOT-GEN-2019/00004 [2019] NAHCMD 264 (28 May 2021)