A CRITICAL ANAYLSIS OF HOW SUCCESSFUL THE LAND REFORM PROCEDURES HAVE BEEN IN NAMIBIA

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Declaration

"I the undersigned, hereby declare that the work contained in this dissertation for the purpose of obtaining my degree of LL.B is my own original work and I have not used any other sources than those listed in the bibliography and quoted in the references."

Signature: _____ _____

R Hengari Date

Supervisor's Certificate

I, MR S.K Amoo hereby certify that the research and writing of this dissertation was carried out under my supervision.

_____ _____

Supervisor's signature **Date**

Dedication

This paper is dedicated to My Mom and my one and only Amigo.

Acknowledgements

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Abbreviations

ACLRA – Agricultural Commercial Land Reform Act
AALS – Affirmative Action Loan Scheme
LRAC - Land Reform Advisory Commission
MAWRD – Ministry of Agriculture, Water and Rural Development
MET - Ministry of Environment and Tourism
MLRR –Ministry of Lands Resettlement and rehabilitation
MRLGH – Ministry of Regional Local Government and Housing
NAU – Namibian Agricultural Union
NGO – Non Governmental Organizations
NANGOF - Namibian Non-governmental Forum
UNIN – United Nations Institute for Namibia

Abstract

The land question is among the most difficult issues facing independent Namibia and many other Southern African countries throughout Africa, there has been no agreed method of Land reform and each country chooses a different formula.

In Namibia the land reform procedures are provided for under the Agricultural (Commercial) Land Reform Act 6 of 1995 (ACLRA).It specifically provides for methods of reform, one of the methods is land reform by expropriation. The government's land reform policy is shaped by two key pieces of legislation: the Agricultural (Commercial) Land Reform Act 6 of 1995 and the Communal Land Reform Act 5 of 2002. Although the Government remains committed to a "willing seller, willing buyer" approach to land reform and to providing just compensation as directed by the Namibian constitution, there are still major loopholes in terms of the legal process when it comes to the process of land reform. The aim of this paper is to analyze the legal issues that exist with the land reform procedures, to look at what measures have been taken to try and address these issues and to recommend the further steps that can be taken to address the issues.

Statement of the Problem

The aim of this paper is to look at the issues that have occurred with the policies that were put in place to address the land reform in Namibia. There are a number of procedures that were put in place to address land reform, amongst them is Expropriation. Expropriation of agricultural land is both a popular and controversial route to achieving the land reform needed. The Agricultural (Commercial) Land Reform Act 6 of 1995 (ACLRA) is the primary legal mechanism for securing land reform. Although expropriation has been legal under this Act since 1995, the Government of Namibia has been committed to a "willing buyer / willing seller" process mainly for political reasons, until announcing in 2004, after much public criticism over "the slow pace of land reform", that it would proceed with land expropriation. However it would seem that there has been a number of disadvantages and disappointments in terms of this method of reform because in July 2007, three High Court cases were filed by German farmers who are challenging the entire land expropriation process on several grounds, including constitutional.

Another method reform was the resettlement programme. Under this programme all land acquired under the Agricultural (Commercial) Land Reform Act 6 of 1995 (ACLRA) will effectively be state land. Land acquired for resettlement purposes will be provided to beneficiaries on leasehold of 99 years. This gives the state control over the land after the initial administration. While the 99-year lease is a legal and substantial form of land

tenure, it is not a freehold title. This means that no person holding such land in a resettlement programme can be certain as to what rights their leasehold will bring them. There are many unanswered questions such as are these leases renewable? Will the families of leaseholders be able to inherit the property or will transfer of leases be controlled and regulated in the future? Could a leaseholder have their lease taken away at any time? There are many uncertainties in regards to the resettlement programmes..The question that now arises how legal is this problem?

Many issues have been raised with regard to land resettlement in Namibia; amongst them is the privatization of communal land and the issue as to how land reform will benefit the country economically? Although it will be seen as a social problem it is also of great importance. Another notable issue was the fact that even though the act[1] provided procedures to be used for land reform, it did have a loophole such as were commercial farmers tried to escape the process by transferring the land from one person to a corporation for example and thereby avoiding the waiver procedure[2]. Another

1 Agricultural commercial land reform act no 6 of 1995

2 "In the first instance, and subject to certain limitations contained in section 17(3) of the Agricultural Land Reform Act, the state is given the right of first refusal to purchase agricultural land. This means that any owner of agricultural land who wishes to sell it must first offer it to the state, and only if the state declines to purchase it, can it be offered for sale to any other person who is permitted by law to buy such land. When the state declines to purchase the agricultural land concerned, it will issue the prospective seller with a "certificate of waiver' in respect of the specific land on offer, and only then can that seller enter into a valid contract of sale with another person who wants to purchase such land. Should this procedure not be followed, and the seller enters into a contract with a third party, without first having offered the land to the state, such contract is invalid and the transfer of such land may not be registered by

problem when it comes to the resettlement programe, is the fact that these leaseholders cannot use these land as collateral, when wanting to take out loans to upgrade the land This indicates that there are still major loopholes in terms of the legal process when it comes to the process of land reform.

Research Methodology

The method of research used in the collection of information for this research paper was largely library research, by referring to different scholarly articles and books, which have dealt with the topic of Land reform in Namibia. There is a host of information from the Internet which deals with Namibia's land reform process and the difficulties that exist with this process. Therefore, a lot of the information was gathered also from online publications from the internet. Due to time constraints Empirical research is yet to be conducted. However some interviews that have been previously conducted with some prominent partakers in the land reform were also used as a source and have been accordingly referenced.

This paper is divided into five chapters. Chapter one will be an introduction. In this chapter gives the research proposal; namely: introduction, contextual issues, research questions, related research/literature review, objectives of study, research methodology, and explanation of land reform as a process and goes further to look at the past experiences of the land reform process in Namibia. It shall include experiences before independence and after independence. The second Chapter identifies the various

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the Registrar of Deeds".

methods used for the land reform process and the grey areas that exist within the law when it comes to each method. These methods include; expropriation of land, resettlement programmes, the affirmative action loan scheme just to mention a few. The third chapter will give mechanisms or recommendations and policies that have been put in place to try and redress these grey areas (if any).The fourth chapter of the paper will give a comparison of the land reform procedures used in Namibia and two other countries, this will help in identifying the different forms of land reform that have been used successfully in other countries which could help the land reform process in Namibia. The countries will consist of an African Country and Latin American Country. Fifth and final chapter will give a personal opinion and make recommendations that can be used to try and redress these loopholes.

Chapter 1

Introduction

1.1 Historical overview of the land issue in Namibia

In order to understand the why Namibia has embarked on a land reform programme, it is imperative to undergo a historical journey that will bring this discussion to the present. Namibia, as most African countries experienced colonization, first by the Germans and later on by apartheid South Africa.

1.1.1 Land reform under German Colonial Rule

The Germans came to Namibia in 1883 and signed treaties with the indigenous tribes. Many of these agreements were speculative, made in the hope that the gold and diamond rush of the 1880s in South Africa would be replicated in Namibia. During this period, many European settlers in Namibia bought or leased land for commercial farming purposes, thereby formally defining the areas occupied by indigenous communities. "By 1902, freehold farmland accounted for 6% of Namibia's total land service area while 30% was formally recognized as communal land"[3]. After the 1904-1907 war between Germany and forces of the Herero and Nama, large tracts of land were mainly confiscated from the Herero and Nama by proclamation and, the reason for this is because by the 20th century, the German troops have enough equipment to fight the mighty northern kingdoms. "By 1911, some 21% of the total land surface area had been allocated as freehold (commercial) farmland while the recognized communal land

3 Willem Odendaal, Our Land We Farm, An Analysis of the Namibian commercial Agricultural Land reform process,2005,

area had shrunk to just 9%"[4].Early on, the Germans had established a survey department and had given out massive tracts of land, expropriated mainly from the Herero population, to white settlers in the centre and south of the country. This then resulted in the central and Southern parts of the country being divided proclaimed as police zones[5], and thus dividing the country into two parts, the north and the south. The mainly Oshivambo-speaking people in the north living in the basins of the Kunene and Zambezi rivers were colonized in the way that is familiar further north: treaty making and subordinating indigenous authorities to colonial overrule. The northern part became a native reserve, and land ownership remained in the control of indigenous authorities that administered individual ownership with strong residual communal rights.

1.1.2 Land Reform under South African colonial rule

After WWI in 1915 the Germans lost authority over the territory and it was given in trust to South Africa by the League of Nations. South West Africa became a Protectorate of Great Britain, with the British King's mandate held by South Africa in terms of the

4 John Mendelssohn et al., *Atlas of Namibia: A Portrait of the Land and its People*, David Philips Publishers (imprint of New Africa Books), Cape Town, 2003, at 134-137.

5 Nowadays it is called the veterinary cordon fence that keeps cattle from the communal areas of the north out of the commercial farming area. Its official rationale is the control of veterinary diseases.

Treaty of Versailles signed in 1919. "Under the Treaty and the South West Africa Act 49 of 1919, land held by the German colonial administration effectively became Crown (or State) land of South West Africa. The Governor-General of the Union of South Africa had the power to legislate on all matters, including land allocation. During the intervening period of military rule from 1915 to 1920, no legislation existed under which land settlement could be carried out. When martial law came to an end in 1920, land settlement laws in force in the Union of South Africa were applied to South West Africa" [6]. As a result, South Africa's homeland policies and other discriminatory policies were extended to Namibia.

During the 1920s, South Africa followed a policy of settling poor South African whites in South West Africa, who were supported by the South West African Administration financially and logistically despite the drought conditions, lack of markets and financial depression prevailing at the time. The then South West African Administration had gone further and made land available for white settlement, by introducing the Native Administration Proclamation 11 of 1922. This law provided that natives should not employed by land owners or lessees were not permitted to squat on land without a magistrate's permission. It also authorized the Administrator to set aside areas as "native reserves" for the sole use and occupation of natives generally or for any race or tribe in particular. However, the Native Reserve Proclamation did not affect

6 Fiona Adams & Wolfgang Werner with contributions from Peter Vale, *The Land Issue in Namibia: An Inquiry*, Namibia Institute for Social and Economic Research, University of Namibia, Windhoek, 1990, at 94.

Owamboland, Okavango and a few other areas in the north located outside the white farming areas and under the administration of government-appointed Commissioners. The South African Administration did not change some aspects of the German colonial policy and still maintained using the term "Police Zone" to distinguish between two areas in the country, and thereby continued with the German policy restricting movement between the two areas.

The system as it had evolved of course fitted the apartheid ideology that came to dominate South African politics. The apartheid system was formally implemented in South West Africa by the Odendaal commission in 1962 and it affected the centre and south of the country especially. White farmers moved out of black areas and 'tribal' groups were concentrated in homelands. The administration of land tenure in the homelands was given to 'traditional authorities' who administered again on the principle of individual ownership with strong residual communal rights. Ultimately, the land belongs to the descent group of the farmer. This meant that the assemblies would have the authority to release land for the alienation to individual 'citizens' of the various homelands, subject to permission from the South African Prime Minister. Alienation to a 'non-citizen' was allowed only with the permission of both the Legislative Assembly and the Prime Minister.

The Odendaal Commission's directive in 1964 led to the establishment of 10 reserves (homelands) for black people of South West Africa, as proclaimed in the Development of Self- Government for Native Nations in South West Africa Act 54 of 1968. This Act recognized Owamboland, Hereroland, and Kaokoland, Okavango land, Damara land

and Eastern Caprivi as “native nations”. The Act was purportedly introduced in South West Africa to assist native nations in the territory to develop in an orderly manner towards attaining self-governance and independence. In some ways the Odendaal Plan merely extended and rationalized an administrative system created in the 1920s by the Native Reserve Commission. Although the Odendaal Plan increased land available to black Namibians by nearly 50%, the agricultural potential of the newly ‘received’ land was very limited.

The Odendaal commission did not, however, create merely a white commercial sector and a black traditional sector. For those defined as black, it also opened the way for European style individual ownership on fenced and surveyed land. This gained government support towards the end of the colonial period. Government then bought white-owned land in order to turn this into settlement schemes for Africans on individual title (Harring and Odendaal, 2002:26/7). During the period of colonialism by both Germans and the apartheid South Africa, land was expropriated from the Namibian people. Thus by the time of Independence, the new Namibian government was faced with the problem of a dual and unequal land tenure that favored commercial farmers and not communal farmers. This situation led the government to embark on land redistribution and land reform programme.

1.1.3 Land reform developments in exile

Systematic deliberations on the land question started in the latter half of the 1970s. This was not only a matter of concern to the liberation movement SWAPO. Political parties and institutions inside the country also addressed the issue and developed a land reform programme. At Independence, therefore, the need for redistributive land reform was no longer an issue – everybody agreed on its necessity. Instead, the objectives and nature of redistribution had to be agreed upon. It was inevitable that all the stakeholders argued from positions that had been developed before Independence and under conditions that were different to the post-Independence period.

In the mid-1970s the United Nations established the United Nations Institute for Namibia in Lusaka, Zambia. Its broad mandate was to prepare Namibians in exile for Independence. It was composed of several Divisions, each with teaching and research obligations[7]. The Agricultural and Land Resources Division was responsible, inter alia, to undertake research in

- Land reclamation and its possible development;
- Conversion of white owned ranches and 'native reserves';
- Existing livestock and future possibilities; and
- Existing and future tillage possibilities (UNIN 1979: v).

7 Land Reform and Poverty Alleviation: Experiences from Namibia Wolfgang Werner August 2001

In terms of the approach to land reform elaborated by the United Nations Institute in Lusaka Namibia was to play a powerful and central role in matters of land redistribution and tenure. In view of the dualistic nature of land ownership in Namibia – freehold vs. non-freehold – the study argued that the state would have a cardinal role to play in correcting this inequality by repossessing and redistributing land held under freehold tenure. More specifically, the state needed to be invested with sufficient powers to be able to control, regulate, allocate and marshal all resources, especially land and water, so as to correct the prevailing imbalances. To summarize, land redistribution and tenure reform in UNIN's deliberations, were based on socialist transformation, with the state playing a central role in planning and controlling production and tenure[8].

1.1.4 Land Reform at Independence

One year after Namibia gained Independence, the SWAPO government supported by the opposition parties, started its land reform programme by announcing its intention of transferring land to 'the landless majority' and agreed to a constitution in which the property of citizens could not be taken without just compensation. With the support of the opposition parties, it conducted a national consultation on the land question which led to a National conference on Land Reform and the land question. The conference was held in Windhoek from the 25th June to 1st July 1991[9]. The objectives of the Land Conference were undoubtedly shaped by Namibia's policy of national reconciliation and

8 It should be noted that this style of land reform is the style which was followed by some African countries like the democratic republic of Congo and Tanzania.

the provisions of the Namibian Constitution. The main objectives of the conference were to achieve a consensus on the major issues and to make recommendations to government on a policy of land reform and a programme of action for the implementation of the necessary changes. The conference made the following resolutions:

· Foreigners should not be allowed to farmland

· Underutilized freehold land should be reallocated

· Land of the absentee landlords should be expropriated

· Very large farms, and/or ownership of 'several farms' should not be allowed

· That land tax be imposed on commercial farm land

Although the intentions of the conference were bona fide it would seem that in some instance the result has not been completely good. An example of this would be the policy development process. While the National Conference on Land Reform and the Land Question established a process of consultation on the land question, this process was not continued during the following five years, as the Agricultural *(Commercial) Land Reform Bill* was tabled in the National Assembly without offering stakeholders such as non-governmental organizations, trade unions, churches and traditional authorities an opportunity to consider the draft legislation[10]. "In response, the Namibian Non-

9 It is of great importance that one should be aware of the fact that the Land Conference was of a consultative nature and had no powers to take binding decisions on land redistribution or land reform.

10 Its should however be noted that the Technical Committee on Commercial Farmland (TCCF) did invite submissions from the public on this issue, however the bill was passes

governmental Forum (NANGOF), an umbrella organization of NGOs, organized a conference in 1994 to discuss the land question and put forward recommendations to government on land policy and legislation. Invitations by the NGO Working Committee on Land Reform to the Chairman of the Cabinet Committee on Land Policy, as well as to the Minister of Lands, Resettlement and Rehabilitation, his Deputy Minister and the Ministry's Permanent Secretary to attend and address the conference were declined. As if adding insult to injury, the Minister of Lands, Resettlement and Rehabilitation tabled the *Agricultural (Commercial) Land Reform Bill* in the National Assembly while NGOs were discussing the land question"[11].

Other resolutions that were discussed at the conference related to the need to improve the conditions of farm workers. Policies that were also developed at the conference was the, policy of market-led land reform, the willing buyer/willing seller - was agreed upon. However, more importantly, it was decided that historical claims would not be

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without consideration as to whether the public had forwarded any such submissions.

11 Land reform in Namibia the first seven years Wolfgang Werner August 1997

entertained[12]. The recommendations and resolutions made at the conference acted as a guideline for the land legislation framework within which Namibia took.

Chapter 2

2.1 The various methods used for land reform Process in Namibia

When one takes a closer look at the land reform process in Namibia one, would see that the Land reform process in Namibia comprises four main components: (i) redistributive land reform; (ii) tenure reform; and (iii) the development of unused land in non-freehold and communal areas and (vi) the Affirmative Action Loan Scheme

12 Wolfgang Werner states that "the issue of ancestral land claims represented one of the most sensitive aspects of the land question in Namibia. Demands to redistribute commercial farm land even if it would entail expropriation derive their moral and legal justification from the fact that many indigenous communities were deprived of their land by German and later South African colonialists. It would seem to be logical that an independent government in Namibia would seek to redress the issue by restoring ancestral land rights. However, since the vast majority of small-scale farmers, and particularly those in the mixed farming areas of northern and north-eastern Namibia were not subjected to land dispossession in the same way as pastoralists in southern Namibia, a land policy based on restoring ancestral land rights could be perceived as not benefiting the vast majority of small-scale communal farmers. Politically, therefore, the principle of restoring ancestral land rights had to be abandoned in order to develop a land distribution policy which would benefit all previously disadvantaged farmers, and not only those who were dispossessed. This was achieved at the Land Conference. It is clear that the allocation of land to former exiles enjoyed a higher political priority than restoring land rights to those who had lost these as a result of colonial dispossession".

(AALS).These components are complemented, or better yet enforced by the Agricultural (Commercial) Land Reform Act 6 of 1995 and the Communal Land Reform Act 5 of 2002 which are the key pieces of legislation of the government's land reform policy. The main purpose of this paper is to look at the legal issues that exist that within the land reform process that are contributing to the slow pace of land reform in Namibia. In order to do this one would have to take an in depth look at the various methods of land reform that are used in Namibia, whereby one would then be able to determine the legal issues that exist within each process.

2.1.1 Redistributive land Reform

The first major piece of legislation on land reform, the Agricultural (Commercial) Land Reform Act, was not passed until 1995. The Agricultural (Commercial) Land Reform Act 6 of 1995 provides for the acquisition of agricultural land by government for the purposes of land reform and redistribution to Namibian citizens. The land reform and redistribution process is focused on those "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"[13].Therefore it can be inferred that that one of the main and most important aims of the land reform process in Namibia is to provide landless previously disadvantaged Namibians with land. This Act[14] contains a number of

13 Preamble of the Agricultural (Commercial) Land Reform Act 6 of 1995

14 The Agricultural (Commercial) Land Reform Act

provisions to ensure that the market would perform as expected. These provisions include:

- A requirement that any commercial farm offered for sale is offered to the Government first for the purposes of resettlement[15].
- A provision against ownership of multiple land holdings by a single individual.
- A provision against ownership of commercial farmland by non-Namibians.
- Creation of a Land Reform Advisory Commission to advise the Government on the suitability of farms it wants to purchase and to resolve disputes arising from other parts of the Act.

2.1.1.2 The willing seller willing buyer land reform process

The government has been buying land from white farmers on a willing-seller, willing-buyer basis, to resettle poor and landless Namibians. Part III of the Act, beginning at section 16, gives the state a preferential right of the State to purchase agricultural land. This basically means that a willing seller of any farm must first offer the land to the State. If the State decides not to purchase the farm, it issues a "certificate of waiver" enabling the owner to sell the land on the open market. This right has been in operation since 1995 and the government has been able to purchase about 209 farms for land reform at a cost N$215 million, and has issued 785 "certificates of waive[16]. However the

15 This is also known as the willing seller, willing buyer process, which the Namibian Government has stuck to due to political reasons.

16 See note 1 supra

process has been slow and expensive, as prices of land have tended to go up and not enough white farmers are willing to sell their farms to the government at reasonable rates.

A number of problems have occurred in terms of the willing-seller, willing buyer process in Namibia and amongst these is the fact that that the best farms in the country were not being offered to the Government under the scheme because they were in the hands of stable families passing profitable land down from generation to generation[17]. Also there have been rumors of schemes to evade the Act, most specifically of creating close corporations to own the farms, and then selling shares rather than selling the land [18].For example, there was an increase of over 250% in the number of corporate registrations between 1994 and 1995 – the year when reporting of sales of commercial farms became mandatory. It has been suggested that the majority of post-1995 transfers

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17 **John Grobler, Namibia hopes to avoid Zimbabwe-style trouble with new land reform law, Associated Press, May, 2000. "President Nujoma has called on white farmers to be "bold and sincere" in how they offer their land for sale."It will not contribute to the success of equitable land redistribution if farmers and other land owners are only prepared to offer land that is less economical, or when prices for the farms or the improvements made to the land are inflated beyond their real cost." Such actions, he said, are hindering the government's efforts to acquire land, and thus hinder the government's policy of national reconciliation"**

18 Sidney L Harring, Willem Odendaal, No Resettlement: An assessment of the expropriation principle and its impact on land reform in Namibia,2007.

categorized as donations have been structured so as to avoid provisions of the 1995 Act[19]. This meant that no sale between persons occurred and the seller therefore did not have any obligation to first give the government the preferential right of buying the farm in order to obtain a waiver certificate. Another effect that this had that should be taken note of is the fact that the commercial land was then removed from the process of redistribution at the crucial point when ownership was being transferred. In the long run this practice in a way also defeated the provision in the act which was against ownership of multiple holdings and ownership of land by non-Namibians.

The Government then tried to address this issue by amending the act in 2002[20].The Amendment Act of 2002 introduced to eliminate some of the loopholes in the 1995 Act. Currently the Amendment Act specifically provides that the passing of commercial agricultural land to another person in terms of the controlling interest in a company or close corporation owning agricultural land be deemed as void, unless a certificate of waiver is first obtained from the Minister of Lands and Resettlement[21].

Furthermore Sidney L Harring(2007:14) states that " although the economics of land acquisition is a difficult issue, the Government may not have enough money to buy as

19 See note 1 Supra

20 Agricultural Commercial Land Reform Amendment Act 13 of 2002.

21 See note 1 Supra

many farms as it would have liked. In 2003, the annual budget for land acquisition was increased from N$20 million to N$50 million. A land tax introduced in 2005 has yielded N$60 million for land acquisition. Farms were being acquired at an average price of just over N$1 million, so with the budget available, the Government should be able to buy a large number of farms. But farm prices have increased, the land acquisition infrastructure is expensive, and little money has been made available for technical support for new farmers, so it is not obvious how far this money will go in support of an effective land reform programe". From this it is clear to identify that one of the main issues with the willing seller; willing buyer form of process is the fact that it relies on the chance opportunity that a particular farms might be available. This means that if no farms are up for sale then there is nothing that it can do, and thereby limiting the Government. This in a sense does not contribute positively to the land reform process and it can in fact be argued that it is contributing to the slow pace of land reform. Another notable issue with the willing seller willing buyer method is the fact that did not make quality land available for land reform, in that only underutilized land is available for reform purposes. A question that one should then ask is why is the land underutilized? Could it be that the land is not of good enough quality? However it would be narrow minded not to take note of the fact that Government's limited capacity to utilize the farms offered for sale for resettlement purposes has also contributed to the slow pace of land reform.

2.1.1.3 Expropriation

Expropriation of agricultural land is both a popular and controversial route to achieving the land reform needed. The reason that land expropriation was given constitutional status is the fact that the racist and colonial character of Namibian land law had created a grossly unequal society based on land. At independence in 1990, white farmers controlled almost half of the land, in the heart of the country, while almost one million black farmers lived in overcrowded conditions on less than half of the land. The very legitimacy of the new State required redressing that highly visible imbalance, and doing so quickly. Expropriation was enshrined in the Constitution to ensure that this happened. The ACLRA was a popular measure designed to implement this constitutional provision.

The Agricultural (Commercial) Land Reform Act 6 of 1995 (ACLRA) is the primary legal mechanism for securing land reform in Namibia. Although expropriation has been legal under this Act since 1995, the Government of Namibia held to a "willing buyer / willing seller" process for political reasons and, In terms of the legal framework of the Agricultural (Commercial) Land Reform Act 6 of 1995, it was intended that land expropriation runs concurrently with the 'willing buyer willing seller' approach as a means to acquire land for the government's resettlement programe. However in February 2004 the Namibian government announced that the expropriation of agricultural land is to be implemented in order to speed up the land reform process. The government argued that the "willing buyer willing seller" approach was to blame for inflating market related land prices, which consequently led to the unavailability of productive agricultural land. The ACLR was amended in 2003 which gave the Minister of Lands and Resettlement the power to decide after consultation with the Land Reform

Advisory Commission (LRAC) to expropriate *any* farm it identifies as suitable for the resettlement of the landless and poor.

In terms of the act the Expropriation procedures would be as follows:
"The Act, as amended in 2003, prescribes that the Minister of Lands and Resettlement after consultation with the Land Reform Advisory Commission (LRAC) to expropriate *any* farm it identifies as suitable for the resettlement , the Minister must serve the owner with an expropriation notice which has to include a full and clear description of the property, the date of expropriation and the date on which the State intends to take possession of the property – no longer than six months from the date of the notice, On receipt of the notice, the owner has to prepare compensation claim for submission to the MLR as the acquiring authority.

Once the owner states his/her price, the MLR has to send in a team to inspect and value the property before making a counter offer. An owner who has received an expropriation notice may submit a statement to the Minister communicating whether or not he/she has accepted the offer and the amount offered as compensation. This process has to be completed within 60 days of the date of delivery of the expropriation notice. If the owner does not accept the Minister's offer, the Minister has to inform the owner that he/she has 90 days from the date of notice to make an application to the Lands Tribunal for the determination of compensation"[22].

22 Willem Odendaal, The SADC Land and Agrarian Reform Initiative, The case of Namibia, December 2006.

As can be seen from this process one would then conclude that the law is clear and therefore no loophole exists within the law when it comes to expropriation. However should one take a closer look at the legal problems with land reform, one would realize that one cannot just be turn a blind eye on it. Amongst these issues is the fact that although the ACLRA not only set out the legal process for expropriation, but also used the language of the Constitution in doing so, which is part of the problem with the Act, because the while a Constitution is a broad statement of legal policy, a statute must have much narrower and more precise legal definitions. This means that legislation and the ACLRA in this case should put the flesh on the skeletons of the land reform process, which clearly the Act does not do, thereby contributing to the already existent uncertainties which exist when it comes to Expropriation as a land reform method[23].

Furthermore that in July 2007, three High Court cases were filed by German farmers who are challenging the entire land expropriation process on several grounds, including constitutional. Amongst the grounds brought forward was the "in the public interest"

23 The uncertainties that we are talking about is the ambiguity of defining in the public interest and the procedures that must be followed in this instance.

issue[24].This issues was highlighted and argued upon in the famous Kessel[25] case in the High Court. The appellants in this case took note of and recognized to reports[26] on land reform (which were also recognized and used by the defendants the Ministry) which basically reported on the land reform process in Namibia and also highlighted that the administration of the land reform process by the Ministry had failed. Both reports take the land reform process seriously, support it and spell out the complexity of the situation that the Ministry faces. The appellants looked at the constitutional requirement that land expropriation should be done "in the public interest", and argued that since the entire land reform process was a failure, then it could not possibly, by this logic, be in the public interest.It should however be noted that in the kessel case it was

24 The public interest is a condition which is brought forward in the act when expropriating. This basically means that before the government decides to expropriate a farm, the expropriation of such a farm should be in the interest of public. This further means that should the expropriation of a farm not be in the interest of the public, then the Government does not have the power or the right to continue with such expropriation.

25 Gunther Kessel v Ministry of Lands and resetellement,2006.

26The first, "The Commercial Farm Market in Namibia: Evidence from the First Eleven Years", is a 16-page report by Dr Ben Fuller and George Eiseb prepared for the Institute for Public Policy Research in 2002The second report, *"One Day We Will All Be Equal": A Socio-Legal Perspective on the Namibian Land Reform and Resettlement Process*, is a 115-page report by Sidney Harring and Willem Odendaal, published by the Legal Assistance Centre in 2002.

also stated that article 18 of the of the Namibian constitution, which states that all administrative acts of government officials should not only be procedurally, but also substantively fair. Furthermore a clear loophole exists as nowhere in the act or in the Kessel case has there been an attempt to define what is meant by "in the public interest". Although it seems easy to define, the phrase "in the public interest" may be open to different interpretations. For example, land expropriation for land reform purposes could be interpreted as being in the public interest, but disputes may arise as to whether the expropriation of a particular piece of land is in the public interest.

Willem Odendaal[27] (2008:13) further argues that that the "public interest" Requirement of Article 16(2) was violated if the Ministry took functioning farms and turned them over to black farmers who could not make a living on the same lands, rendering the farms literally "unsuitable" for agricultural purposes. Thus there is a careful duplicity at the core of the NAU strategy: while continuously stating its support for a land reform process, at the same time it insists that this process is entirely consistent with a rigorous set of legal requirements which in fact is extremely difficult for the Ministry". He goes further and states that "The more serious legal argument under Article 16(2) is the constitutional requirement that land expropriation be in the "public interest". While this doctrine generally has been tested around the world and held to be some version of a valid public interest, the NAU has put forth a far more restrictive argument, inquiring into the substance of the public interest and testing its effectiveness. This is almost

27 Sidney L Harring and Willem Odendaal, New Jurisprudence for Land Reform In Namibia,2008, Legal Assistance Centre.

never done, but rather, the courts defer to the Legislature's determination of public policy, a determination more appropriate for the political arena". Therefore it can be said that the main legal problem when it comes to expropriation is the vagueness of the words "in the public interest" contained in article 16 of the constitution.

2.1.1.4 Resettlement

One method of the land reform was the resettlement programe. The *Agricultural (Commercial) Land Reform Act, 1995* provides for the acquisition by the State of very large, under-utilized and foreign-owned freehold farms for resettlement .The act also provides for the granting of 99 year leasehold rights to allocated farming units and subsequent registration of such lease agreements in the Deeds Office[28]. Under this programme all land acquired under the Agricultural (Commercial) Land Reform Act 6 of 1995 (ACLRA) will effectively be state land. Land acquired for resettlement purposes will be provided to beneficiaries on leasehold of 99 years. This gives the state control over the land after the initial administration.

Up to now an average of approximately 610 persons have been resettled per year on commercial agricultural land over the last 16 years. If the total purchase cost of 142

28 Not a single lease agreement has been registered in the Deeds Office to date, although some beneficiaries have signed them. The problem is that the MLRR has to survey subdivided portions of freehold farms and attach survey diagrams to lease agreements. Capacity to carry out the surveys seems to be lacking.

farms is divided by the total number of people resettled since independence, then the average cost to resettle one person is about N$14 000. This amount excludes food rations, housing and technical services that the MLR provides to resettlement beneficiaries. A number of these resettlement projects are dependent on Government drought aid. The National Resettlement Policy provides that the MLR must analyze applications for resettlement and judge applicants on the basis of their economic status. Government has classified the categories of settlers as follows:

a) People who have no land, no income and no livestock.

b) People who have no land or income, but who have some livestock.

c) People who have no land but do have income or livestock, and who need land on which to resettle with their families and graze their stock.

Through the MLR the government has to prioritize the groups of beneficiaries in the resettlement programme. The primary target groups are members of the San community, ex-soldiers, returnees (people who lived in exile when Namibia was under South African rule), displaced people, people with disabilities and people living in overcrowded communal areas.

Tenure rights to land redistributed to beneficiaries remain contested among politicians due to the fact that, while the 99-year lease is a legal and substantial form of land tenure, it is not a freehold title. Leasehold agreements for resettlement beneficiaries drafted by the Land Reform Advisory Commission (LRAC) has been approved by the Minister of Lands and Resettlement, but it is not clear when the beneficiaries will actually receive them. Presently those resettled have no legal status on their land. This

means that that no person holding such land in a resettlement programme can be certain as to what rights their leasehold will bring them.

This problem has been caused due to the fact that before any land is registered with the Registrar of Deeds, the Office of the Surveyor-General should survey it. Secondly, the Office of the Valuer-General should value the surveyed land to render the leasehold agreement valid. To date 40 resettlement farms have been surveyed but none can be registered as valuation has not taken place. One possible reason for the delay in the registration process is that provisions for statements made under oath and for other information to be submitted to the Registrar of Deeds increase the costs and prolong the process as is currently the experience with the registration of resettlement beneficiary allotments[29].

There are many unanswered questions such as whether the beneficiaries of the resettlement programme can use their land as collateral when taking out farming loans? In other words, beneficiaries should be able to use their leasehold agreements as collateral to obtain loans from Agribank or any commercial bank .However this is not the case as Agribank is currently cautious in granting loans to resettlement beneficiaries because the beneficiaries have no legal ownership interest in the resettlement land. Agribank is not clear on what procedures to follow where a resettlement farmer has default in repaying a mortgage bond. Repossessing land in the event of default would

29 Willem Odendaal,The Land we Farm, September 2005

surely defeat the aims of resettlement. At the same time, it is important to note that denying resettlement farmers commercial credit may undermine their ability to farm successfully and thereby not meeting the objective to redress the imbalances of the past in the distribution of economic resources, particularly land and secure tenure; and to offer citizens an opportunity to reintegrate themselves into society after many years of displacement by colonialism, the war of liberation and other adverse circumstances.

Other issues that have appeared in terms this form of land reform is the question as to whether these leases are renewable? Another question is whether the transfer of these leases will be controlled and regulated in the future? Another main issue which is clearly visible with this process of land reform is the fact that although the act provides a 99 year leasehold rights and other rights such as rights to assign, sublet, mortgage or in any way encumber a farming unit allocated by the MLRR is in terms of the act these rights are still subject to the written approval of the Minister. This then indicates that these rights are not absolute private rights and therefore the families of these leaseholders will not be able to inherit the property.

Even though the Office of the Attorney-General tried to ease these fact by expressing a legal opinion which stated that a mortgage could be registered on any lease agreement registered in the Deeds Office, the draft *Land Tenure Policy* continues to state that the rights of settlers will be subject to a number of limitations which include the right of the Minister to change the agreement with settlers and the power to revoke a lease if the holder is in breach of the terms and conditions relating to the productive use of the land, financial viability etc. Even the erection of buildings on a holding will be prohibited

unless consent from the Minister has been obtained. How then can this process be viewed as giving the land back to the people if so many restrictions and conditions with regard to the use of the land exist?

2.1.2 The Tenure Form of Land Reform

Communal lands account for just under half of Namibia's land area, slightly less than the commercial farms. However with a few exceptions, this land has always been occupied by blacks and was organized into black "homelands" in the apartheid era. More than half of Namibia's population still lives in these communal areas. The Government has always held that it holds title to these communal lands, in trust, for the people of Namibia. From this, the Government takes the position that it is much cheaper to use "under-utilized" communal areas for resettlement purposes without paying compensation[30]. An advantage of this system is the fact that since most of the communal areas are disproportionately in the north and north-east, where there is more rain in that area than in any other part of Namibia, the argument is that these lands are more suited to resettlement than the white commercial farms. Thus, as resettlement here is far cheaper, it is an attractive alternative for the Ministry, but one that does not come without problems.

The main and most important issue that the government was faced with in terms of communal land reform was the fact that land redistribution also involves the communal

30 It should be noted that this is the fourth form of land reform procedure. One of the main reasons why the Ministry followed this form of land reform is because it is much cheaper to develop communal land for small scale commercial farming than to buy developed land on the open market. For that reason, government is pursuing this option.

lands, which are under the control of chiefs who traditionally allocate land to their subjects. However before the government stopped the practice, well-off individuals were fencing off large chunks of land without any authorization by the state, thereby excluding other users. It was reported that government ministers were also amongst these well to do individuals[31].This privatization of the land has had a negative impact on the in some communal areas[32]

To eradicate some of these problem and to manage customary rights to land and natural resources of rural people the government then enacted the Communal Land Reform Act No 5 of 2002.The Act was inspired by Botswana's Tribal Lands Act, and was finally passed in August 2002, after being sent back to the National Assembly by the Upper Chamber. The National Council pointed out that the Act did not actively combat the problem of illegal fencing-off of communal lands, and was in fact condoning this activity. This caused a considerable delay in the application of the Act, which was finally implemented in late 2002.

The main purpose of the act is to provide for the registration of all land rights held in communal areas, it goes further and distinguishes between two different kinds of rights to be recognized namely: (i) customary land rights; and (ii) rights of leasehold. With regard to customary land tenure, the *Act* recognizes and confirms the powers of traditional leaders to allocate and revoke rights in land. However, *Communal Land*

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31 ~~Sam Moyo~~, **The Politics of Land Distribution and Race Relations in Southern Africa,** ***Africa Recovery, Vol.12#3 (December 1998), page 12.***

32 Wolfgang Werner and Willem Odendaal, Livelihoods after Land Reform, Namibia Country Report,2010.

Boards will control customary allocations and revocations of land rights customary land administration have been formalized. This means that all new allocations of land have to be addressed to the Traditional Authority .The Traditional Authorities are then given the power to grant or refuse to allocate such land with consultation with the Communal land board. This was viewed as legally protecting the customary land rights of the people because the Communal land board first had to make sure that a particular allocation does not infringe on the land rights held by another person, does not exceed the maximum area prescribed and does not fall into an area reserved for common usage, before granting such allocation and issuing a certificate of registration.

As has been seen from the above it is clear that amongst the main aims of the *Communal Land Reform Act* is to make unused communal land available to individuals[33] under leasehold with a view to promote agricultural development. One of the problems with this is that it will effectively reduce the areas of jurisdiction of traditional leaders by bringing customary land under the control of the state. This in itself can be seen as a loophole in the act, the reason for this argument being that the main aim of land reform is to provide land to the landless and previously disadvantaged Namibians, how then is the state giving the land back to the people if it is still under the control of the state. It can also be further argued that this implies a lack of faith and trust in the people to manage the land on their own.

33 However it should be noted that this, that communal land is made available under leasehold depending on the size of the land.

Furthermore Namibia is signatory to the General Assembly Resolution 61/295 of the United Nations Declaration on the Rights of Indigenous People. Most importantly, Article 25 emphasizes a distinctive spiritual relationship with their land, and Article 26, reaffirms their right to the lands, territories and resources which they have traditionally owned, used or acquired; and their right to own, use, develop and control the lands, territories and resources that they possessed by reason of traditional ownership or traditional occupation. A question comes to mind how does the Communal land reform act meet the requirements of this resolution. It can therefore be said that since the state is still in control of the communal lands, it does not because the Traditional authorities are not given right to own, use, develop and control the lands, territories and resources. From this one can conclude that there is a major loophole in the law because it does not protect or redress the injustice brought about by the colonial authorities and in fact just continues with the same practices that were established by the colonial authorities.

After having spoken to some officials in the Ministry of Lands and Resettlement, they informed me that amongst the problems they experienced when it comes to the Act was the fact that there was no harmonization of the laws, between the different laws namely: the Communal land reform act, the Environmental Management act and the Traditional authorities act[34].One other issue that must be taken cognisance of, which was raised by

34 The problem with these act is the fact that they all give some kind of powers and authority to Traditional authorities in terms of communal land, the problem comes when each act requires some type action or fund from them in terms of one issue, the traditional authorities then become confused as to which act to follow, since they pay for one item, for instance 3 three times.

the Ministry Official is the fact that the act does not provide enforcement agencies. This is mainly a problem especially with the issue of illegal fencing, from which one can infer that basically all these rules and procedures have been provided but there is no one to enforce them, no one to ensure that they are adhered to[35]. Also one should look at the question of how a customary land rights policy can be implemented while some newly instituted chiefs do not yet know his areas of jurisdiction. This the case with some of the chiefs in the Caprivi area[36].To add on to that chiefs in the Kavango Region have adamantly refused to sign the customary land rights policy arguing that it practically ends their chieftainship, and that they have never experienced problems with the current traditional land allocation methods even to fellow Namibians who want to reside in Kavango. The chiefs have a problem with the demarcation of land into portions that could be registered in people's names as their property, which for them means

35 Although one could argue that the police could enforce this, they rarely do, because they maintain that the act does not give them the mandate to do so, so they don't.

36 Written by Sinala Simukwenga ,Setting the war agenda Communal land reform will erode chiefs' powers, Informante,22 July 2010."This is the case with chief Mayuni and Chief Sifu in the Caprivi Region. Jurisdiction is not yet discussed with Chief Mamili the owner of land where the chieftainships were established by Government. Government can't simply ignore chiefs' boundaries as some of Chief Muraliswani's subjects are legally or illegally residing in chief Mamili's land and its being alleged that Salambala Conservancy is registered under Masubuya chief while it falls in Chief Mamili in Sikanjabuka area".

privatization of their land and the erosion of their powers to control their people subsequently. This makes sense because these are the value they lost during colonialism and that is why they initiated the war of liberation to return these values and they feel they can't lose them so soon[37].Therefore is issue can contribute to the slow pace of land reform.

2.1.4 Affirmative Action Loan Scheme (AALS)

The other side of Namibia's land reform process is the Affirmative Action (AALS) Loan scheme administered by the Agricultural Bank of Namibia (Agribank) which was introduced in 1992.The Agricultural Bank Amendment Act 27 of 1991 and the Agricultural Bank Matters Amendment Act 15 of 1992 introduced the AALS, among other things, with the main aim of resettling well-established and strong communal farmers on commercial farmland so as to minimize the pressure on grazing in communal areas. The scheme provides targeted subsidized credit to formerly racially disadvantaged groups to assist in buying farms from Namibians of European descent. It has been said that the scheme is more emancipator in design, but not particularly redistributive[38]. Applicants need to have a track record of farming in communal areas; evidenced by ownership of at least 150 head of cattle or 800 small livestock, or a combination of the two that is equivalent. Many urban Africans of managerial rank can make that claim. AALS is in practice an elite-elite transfer.

37 See Note 31 Supra.

38 Jan Kees Van Donge, **Land reform in Namibia: issues of equity and poverty,2005,pg 9.**

The scheme functions primarily as an instrument of black empowerment. AALS is a prime example of market-led land reform based on the principle of willing buyer/willing seller. While the Resettlement Programme is aimed at the poorest of the poor, the AALS is aimed at the emerging black middle class. The policy underpinning the AALS has three fundamental rationales:

- To promote ownership of Namibian farmland by formerly disadvantaged Namibians.
- To encourage communal farmers with large livestock herds to move to commercial farmland to free space for smaller upcoming communal farmers.
- To encourage formerly disadvantaged farmers to become strong and well-established

The policy is very much a market-based mechanism in much the same way as a bank loan, associated as it is with clear property rights and incentives to perform unlike the above mentioned resettlement programme. However it is important to note that since the AALS's inception in 1992, the Government has been subsidizing the purchase of commercial farmland by formerly disadvantaged farmers. Even though Agribank has been administering the loans, and as perfect and flawless as this form of reform might seem, it can be said that it also just like the methods of reform has had some problems. Amongst these issues is the fact that the there is also evidence that the AALS on its own is not an adequate mechanism to ensure the transfer of white-owned land to black Namibians. Emerging black farmers report that by year eight they have consumed the capital they accumulated during the grace period and are unable to repay their loans.

For many emerging farmers, if not most, the reality is that unless their loan is matched by some type of capital subsidy, their farm will fail. This would cause the AALS to be an economic drain rather than a creator of wealth[39].

The major problem with AALS, when it comes to the law is the fact that the AALS has had a negative impact on the resettlement form of land Reform. The main reason for this is because farm land for sale is purchased at a much faster rate by the AALS beneficiaries, than the government can purchase for land reform. From this one can further infer that the land reform policies namely the AALS programme and the Resettlement programme are in conflict with one another. How then will both these policies succeed at achieving their aims if they are in conflict with one another? Furthermore the government is not able to purchase a lot of land under the willing sell, willing buyer scheme due to the fact that there are quite a number of AALS buyers which means that land prices are high because they are in demand[40].

39 See note 28 Supra

40 Sanette Elenor Vermuelen, A comparative assessment of the land reform programme in South Africa and Namibia, March, 2009, Stellenbosch University, Cape Town.

Chapter 3

3.1 Mechanisms or policies that have been put in place to try and redress the loopholes within the law.

In 2006, the Ministry of Lands and Resettlement developed and adopted an initiative to bring the administration of all land under one consolidated legal framework, after realizing the complexity of effectively fulfilling its mandate due to legal and policy impediments. By consolidation it hoped to bringing the Agricultural Commercial Land Reform Act, Act 6 of 1995 and the Communal Reform Act, Act No.5 of 2002 into one Act that will provide an opportunity for process and improvement in the administration of all land in Namibia with the exception of urban land and national parks.

Question that then comes to mind is how different from the other two land reform laws is the new land reform bill and how has it improved on the grey areas which exist in the other laws? From the face of the bill , the objectives of the Land Bill do not differ in substance from the combined objectives of the Commercial (Agricultural) Land Reform Act of 1995 and the Communal Land Reform Act of 2002, as amended. “on the contrary, the arrangements of sections in the Bill correspond largely to those of the two laws it seeks to replace. On the look of it therefore, the Bill appears to simply combine both Acts in a single piece of legislation, with few changes,"[41]

41 Irene Hoaës interviewed Wolfgang Werner, Focus on the Proposed Land Bill, New Era, 16 July 2010.

What are the new changes that were brought about by the new land Bill, well the new Bill now specifies a procedure for inheriting village land. This can e said to be identical to inheriting land under individual customary tenure in so far as the land rights of a deceased land rights holder in a registered village revert to the village head, Furthermore the Bill, does not state that such land reverts to the village head for reallocation, as it does for traditional authorities. A welcome feature of the Land Bill, according to Werner is hat community-based organizations such as conservancies, women's and farmers' groups, as well as community development trusts may now be granted head leases to communal land .This means that, they will be legally entitled to sub-lease land to an investor, which is addressing a loophole in the law in terms of giving rights (free-hold rights) to the people. This also means that the people can use their land for collateral when taking out bank loans.

However, it is important to take cognizance of the fact the expropriation of agricultural land remains a controversial issue, although the administration of the expropriation process had violated Namibian law on several grounds, the principle of expropriation is legal. When it comes to expropriation, the expropriation of agricultural land remains the same as in the Agricultural Commercial Land Reform Act (ACLRA), the only changes that were brought about by the act is the omission of the Land Reform Advisory Commission (LRAC) from the process of expropriation, in contrast to the ACLRA, which requires the commission to make recommendations to the minister. The minister therefore takes all decisions about expropriation on his/her own, without the recommendation of any commission or other institution.

Firstly it should be noted that previous expropriation judgments ruled that a body like the LRAC was very important in the expropriation cases, as they were no mere

formality. The reason for this is not quite clear, however Werner speculates that it might have been that the LRAC was done away with to reduce the risk of falling foul of procedural errors in expropriating land, one of the reasons for this, he states is due to the fact that the ministry was in the past criticized for not having carried out proper investigations into the suitability of the farms for resettlement and hence expropriation. The Bill seems to address the criticism, in that the minister has to inspect land for purposes of expropriation, but this is not obligatory. Furthermore in terms of expropriation the bill tried to redress the vagueness of 'in the public interest by adding that expropriation will be carried out in the public interest for expropriation purposes. Another surprise change, Werner points out, is the fact that interests of people employed and lawfully residing on the land and their families need not be taken into account when expropriating farms. However, the ACLRA made it obligatory for the LRAC to consider the interests of such persons, namely farm workers. "Instead of providing more protection for farm workers, the Land Bill makes them more vulnerable," Werner said. One can say that this another loophole in the bill and will in no way be fair to the farm workers and can in fact make matters worse rather than better. Another change brought about by the bill in terms of legal procedures, is that the Land Bill appears to have exonerated the minister from acting within specific time frames, to "a reasonable period"[42].Another grey area which the bill addresses is the issue of the Environmental impact assessment, where in the past the applicant had to indicate any environmental issues related to the intended use of the project. This was now changed by the bill in terms of section 31(7) the board may now request for the

42 How progressive this will be remains to be seen.

environmental impact assessment ,this addresses the issue which I mentioned beforehand that there is no harmonization of the laws when it comes to the procedures that are applied when a person is applying for a communal land right of leasehold.

After having looked at the bill it would seem that although it is an attempt to try and address the loopholes within the law when it comes to the land reform procedures, there is in fact not much of a difference with the new land reform bill and the current land reform laws. It does address some of the loopholes, but in some instances it just makes matters worse rather than better. For instance the fact that it does not provide any form of protection for farm workers who work on the farms that are to be expropriated. Secondly another loophole which was identified in terms of the communal land reform act is the fact that they don't have enforcement agencies, especially when it comes to illegal fencing, and the act does not address this issue. It can be said that the bill as much as it aims to address the loopholes ,it is safe to say that it doesn't because it does not address most of the above mentioned loopholes within the law.

Chapter 4

4.1 Land Reform in Tanzania

Land tenure in Tanzania is in the form of a right of occupancy and leasehold. There is no freehold system. Matters of land reform first began in 1989-90 with the

establishment of a Technical Committee in the Ministry of Lands, Housing and Urban Development to draft new Urban Land Policy. By the recommendations of the minister a Presidential Commission of Inquiry into Land Matters was then established[43]. This began in January 1991 and presented its final report in January 1993. To achieve its objective, the 12-man Commission travelled widely in the country, holding 277 meetings attended by 80,000 people. The most important recommendation of the Commission is to vest root title of most of the country in respective village communities, and to remove control over tenure administration from the executive into an autonomous Land Commission. However the commission was not supported on this ground by the government and the and the lengthy report they had prepared remained unpublished. In 1993 a position paper and draft National Land Policy which nonetheless relied heavily upon most other aspects of the Commission's recommendations was drawn up. This was presented to Cabinet in December 1994 and the subject of a public workshop in January 1995. The National Land Policy was approved by Parliament in August 1995, however it is important to take cognizance of the fact that no public consultation was held[44].

A final Draft Bill for the Land Act was presented by the working group in November 1996, and remained uncirculated in any form until late 1998. At that point, the

43 One could say they in a way this Commission is similar or its job title was similar to the Odendaal commission that was formed in Namibia during the 1960.

44 Marjorie Mbilinyi and Gloria Shechambo, Struggles Over Land Reform in Tanzania: Experiences of Tanzania Gender Networking Programme and Feminist Activist Coalition

extremely lengthy draft was gazetted as two proposed laws, a Land Bill and a Village Land Bill. A limited amount of public discussion ensued immediately before its debate in Parliament in February 1999, where the two laws received full support[45]. The primary legislation governing land ownership is the Land Act, No. 4 of 1999 as well as Village Act, No. 5 of 1999. Under the Land Act, there are several categories of land but the most relevant is general land. This is the land that a right of occupancy or leasehold may be granted by the Commissioner for Lands upon application and fulfillment of certain conditions. On the other hand, Village Land is administered at grass root level for which a Certificate of Title can be granted to the holder. The Land Act and Village Land Act designate Councils as Land Managers, responsible for guiding community decisions as to the distribution of land within the village into household, clan, community or other lands, and their adjudication, registration [Village Land Register] and titling [to be effected by the Commissioner's offices in accordance with the decisions of the village].

The advantages of this form of reform is that it is important t and crucial that , accurate and comprehensive guidance to villagers will thus be clear. Justification for the extremely detailed, procedural and prescriptive nature of the Tanzanian laws is also suggested. In theory at least, this extent of 'democratization' of control over property relations should simplify implementation of the reform, increase accountability in local

45 Liz Alden Wily with Sue Mbaya, *A Study of Land, People and Forests. The Impact of Property Relations on Community Involvement in Forest Management* (forthcoming IUCN, 2000).

land matters, and cost a great deal less than is anticipated in the concurrent reform process in neighboring countries such as Uganda.

Plans for a national publicity campaign have been made but remain un-funded. Government is seeking donor support for this and the drafting the regulations through which tenure administration and control will be exercised. Liz Alden Wily states that there is a "need and role to conduct a thorough and comprehensive information and education programme on the law is especially critical in Tanzania; this is because the centre-piece (and main innovation) of the new tenure laws is the devolution of a great deal of authority and administration over land to the grassroots, in what is arguably a unique form of tenure democratization ".She further argues that unlike Uganda, Tanzania has chosen to use the existing and well-established village governance machinery for tenure administration and local dispute resolution, rather than depositing these functions in district level agencies. Each Village Council is the democratically elected government of the community [Village Assembly] and subject to its direction. Village Land encompasses the vast majority of lands in the country.

Whilst the Tanzanian laws were subject to insignificant public consultation in their formulation, they have received abundant academic critique. On the other hand there has been a widely expressed disappointment in terms of the failure of the Government to release its ultimate ownership and control over land, at the same time there is as widespread approval for its handling of customary rights in land, the devolution of administration as noted above, and the express support in principle and procedure given to the security of women, urban 'squatters', and pastoralists. Significant

innovations have been made to retain and develop the capacity of groups to securely hold land in common into the 21st century. The only question with which they were faced with was whether the extent to which political will and central Government willingness to release powers as suggested in the new laws, will be realized.

4.2 Land reform in Chile

LAND TENURE IN rural Chile has gone through two major changes in thirty years, emerging as largely a modern commercial farming structure noted for an exceptional growth rate based in part on high-quality counter-seasonal fruit exports to the Northern Hemisphere. For a century, ending in the early 1960s, Chilean agriculture was characterized by a mixture of large haciendas owned and managed by traditional families, and a large number of small production units (under five ha.) farmed by persons who also served as day laborers for the nearby haciendas.

In 1963, under a conservative businessman, President Alessandri, the government sold off several huge state-owned farms to extension agents and other professionals, in parcels of 50 to 150 ha. Previously, the state farms were leased for five years at a time to well-connected oligarchs in the capital city, who hired managers but invested little or no capital in improvements. This even was characterized as a breakthrough that showed that land tenure could be changed, with positive results. A t the same time, a forward-looking bishop authorized young Christian Democrat technocrats to experiment with transferring church-owned farms to their workers. The results of these experiments fed into the design of a massive land reform under Christian Democrat President Eduardo Frei Montalvo (1964-1970). Basically, owners were allowed to retain up to 80 ha. (200 acres) of irrigated Maipo River Valley land or the agronomic equivalent in other lands,

but holdings in excess of that could be expropriated, with compensation in the form of long-term bonds with indexing to compensate at least in part for Chile's inflation[46].

Frei's reform affected about half of the farms large enough to be eligible, involving perhaps 20 percent of all the agricultural land. Before and after studies, by the University of Chile and the University of Wisconsin Land Tenure Center, showed that the reformers had followed Frei's instructions to seize first the most underutilized farms but not touch the best-managed farms in each valley. A sample survey found that on average, from 1965 to 1970, output rose well over benchmark levels on both the land that was expropriated and transferred, and on the land that was not expropriated. This result merely confirmed that on average the functionaries had followed orders to seize first the land which produced the least under former management, while leaving the best farm operators alone.

In 1970, Senator Salvador Allende, backed by an uneasy coalition of five groups with a greater or lesser degree of leftist orientation, was elected president by a plurality of the voters, narrowly defeating Former President Alessandri. The Allende administration favored large-scale farms under cooperatives and state-farm management over private ownership of agricultural land and therefore the government attempted to expropriate most of the remaining large farms, but this failed as his cabinet also tried to nationalize wholesale trade, freezing prices to favor consumers. Farmers and land reform beneficiaries alike sold their output in a thriving black market. In 1973, General Augusto

46 ~~American Journal of Economics and Sociology, The~~, ~~Dec, 2000~~ by Strasma, http://findarticles.com/p/search/?qa=John Strasma

Pinochet led a military coup in which President Allende died. Pinochet governed as an authoritarian ruler for the next 15 years before agreeing to a plebiscite. Voters chose to return to democracy, and Chile is now into its third post-Pinochet presidential term, under a center-left coalition government.

Under Pinochet, the government began using Cora to end agrarian reform by distributing land to establish family farms with individual ownership. In a period of three years, 109,000 farmers and 67,000 descendants of the Mapuche had been assigned property rights to small farms. About 28 percent of the expropriated land was returned to previous owners who had not accepted compensation and the rest was auctioned off. Where the legal formalities were completed and compensation paid, many land reform beneficiaries were allowed to keep the land they had received. However, most beneficiaries and traditional landowners alike were soon forced into bankruptcy by a combination of tight money, high interest rates, and low demand for farm products because of a deep recession caused by Pinochet's conservative economic policies. Three key legal issues were then clarified by decree law in 1978. Government authority to expropriate land was repealed, the ceilings on landholdings were removed, and the ban on corporate ownership of land was eliminated. At the end of 1978, all farmland owned publicly had been distributed, and Cora was legally closed.

The buyers at foreclosure auctions were mostly urban businessmen, who eagerly embraced market incentives, and especially the potential market for counter-seasonal fruits to be sold in the US and other Northern Hemisphere markets. The result of Chile's tumultuous land policy experiments is thus the product of a mild land reform followed by a radical land reform, followed by a market-induced shakeout, tending to produce a

rural sector now dominated by modern entrepreneurs. Typical farms are now more likely to be 40 ha. (100 acres) than 400 ha. (1000 acres), and they are likely to be well-managed, but relying still on a lot of seasonal laborers who live nearby.

4.3 How can the Namibian System learn from the Tanzanian and Chile Land reform procedures?

4.3.1 Tanzania

What can Namibia learn from the approach taken by Tanzania, well firstly it should be noted that Namibia in its new Land reform bill did adopt similar approaches as that taken by Tanzania in terms of the of the Village act. More specifically similarly to Tanzania the new act provides for the recognition of villages. In section 21 of the new bill it provides for a right to cluster residential units, which may be registered under the head of the cluster. It also further gives the clustered villages the rights to farming, residential and other units.

However the issue still remains that most of the laws in Tanzania are more advanced in terms of Government giving away more rights, ownership, control over land and their powers[47] in terms of the land. Namibia can learn or be greatly influenced by the Tanzanian laws with this regard, as not only will it create moral amongst the people, the people will also have more faith and respect in the Government.

47 In terms of this statement one would have to look at the fact that although beneficiaries of land reform are given lease hold titles of 99 years, for those who do not have the means to develop the land there is not much they can do with land if they do not have the means to maintain themselves and the land.

4.3.2 Chile

Chile has gone through two major land reform procedures , the first state-led reform was based on expropriation. These were selective in the sense that they first targeted unproductive land. After Chile abolished expropriation in favor of measures like progressive taxation on land and agricultural potential to induce more land into the market this meant that land was used to target specific land for specific purposes. One of the biggest problems with the willing seller willing buyer principle as found in the Chilean land reform procedure was that it did not make quality land available for land reform. Due to the above reasons Chile and most other Latin American countries have now opted to move away from a "state-led agrarian reform programme to market-oriented land policies, which also means a move away from expropriation to progressive land tax, land settlement and financing mechanisms, land markets, registration, titling and secure property rights"[48].Namibian could learn a lot from the approach that Chile and most of the Latin American countries have opted to take especially in terms of giving the beneficiaries more property rights, and adopting measures that will ensure that more and better quality land will be available for land reform.

48 U G O Okafor, Computer-Assisted Analysis of Namibian Land reform Policy,2006,University of Stellenboch.

Chapter 5

Conclusion

With all the laws that have been passed in Namibia with regard to Land Reform, this issue has not yet been properly addressed. Land reform has been on the global agenda for decades now. Governments all over the world have given a lot of attention to the initiatives and procedures of land reform, due to the fact that they consider them an essential ingredient of economic and political development. Furthermore the skewed distribution of agricultural land arising from historical dispossession and the apartheid legacy. Income inequality is high and poses a serious danger to political stability[49].This means that there is a need for land reform that is implemented fairly. In conclusion I recommend the following:

- That the Namibian government start moving away from state-led agrarian approach and move more towards progressive land tax, land settlement and

49 See Note 45 Supra

financing mechanisms, land markets, registration, titling and secure property rights and adopt more or some of the procedures that were adopted in some of the Latin American Countries, which

- Namibia should move away from procedures like expropriation because even though, expropriation is legal, there are a lot of problems in terms of the procedures which in the end is costing the government more money at the end of the day.
- Namibian should adopt or enact laws that will give the beneficiaries more rights in terms of the land they receive for resettlement.
- Namibian should government to adopt some of the Latin American procedures such as providing support services such as credit, infrastructure, agricultural extension and marketing and strengthening of the farmers associations and institutions[50], this is highly important because in order to have a successful land reform process, one has to have that adequate support services and capacity building. The government can use the funds that they receive from the land Tax which was recently introduced to fund this support services.
- Namibia should slowly but surely start moving away from procedures like expropriation because as has been evident from past experience even though expropriation is legal, there are a lot of problems in terms of the procedures which in the end is costing the government more money at the end of the day.

50 See Note 45 Supra

- However in the meantime Namibia, should try to redress the issue of public interest in terms of expropriation, and give a less ambiguous meaning to "in the public interest.
- Another recommendation is that the new Land bill should include as one of its aims to, the harmonizing the current laws that in any way relate to land and land reform

Namibia is still a young country and has more to lessons to learn in terms of land reform.

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