

**A Legal Analysis of Expropriation of Land without Compensation in
South Africa**

by

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Declaration by student

I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

.....
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2019

Dedications

This work is dedicated to the landless people of South Africa who were evicted and expropriated their land by the brutal colonial and apartheid enterprise. The efforts made in this work is to ensure that government as a legal leader of the state expropriate land without compensation for the benefit of the South African citizens.

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Abstract

For decades, land reform and land redistribution have been tensely contested issues across the entire African continent. It is particularly worse in countries that experienced the wrath of colonisation, and imperialism, and apartheid in the case of South Africa. This is because the historical dispossessions of land resulted in major displacements, disenfranchisements, underdevelopment, socio-economic vulnerabilities, and thus, poverty in the end. To a large extent, such abysmal experiences of land dispossessions are responsible for the present pervasive social and economic inequalities besieging majority of proletariat masses. Worth noting is the fact that even after the passing of the Universal Declaration of Human Rights Convention of 1948, human rights violations against the native people of South Africa continued unabated. Against this backdrop, this mini-dissertation set out to conduct a critical analysis on whether expropriation of land without compensation is practicable, at least constitutionally speaking, especially within the context of rights-based approaches to property law, juxtaposed with the post 1994 truth and reconciliation initiatives, and the Constitution's so-called transformative agenda. It is appreciated that section 25 of the Constitution, 1996 in its present does not prohibit expropriation of land. However, it is asserted that to enhance necessary impetus to the law, the decision of the National Assembly (legislature) to embark on a process of amending section 25 is justified. This is because there is a need to expressly insert a clause or sub-clause which shall, with absolute certainty, enable expropriation of land without compensation in order that the post-1994 dispensation does not get caught on the wrong side of constitutional supremacy system of governance. The fact that the legislature embarked on a process that seeks to conform to the rule of law is commendable, because it confirms a widespread commitment of transforming the country's social, legal and political realities, within the confines of the Constitution.

Chapter 1: Introductory

1.1 Introduction and background

It has been twenty-four (24) years since South Africa transitioned from the repressive apartheid system of governance into a democratic dispensation under which the Constitution¹ would reign as the supreme law of the Republic.² This transition has been lauded by many as an epitome of hope given that the past oppressive regime of apartheid was notorious for its pervasive social and economic injustices, perpetrated across all walks of life. It was hoped that the post-1994 dispensation would help the country realise social, political and economic transformation with ease, with much reliance being put on the Constitution to facilitate such changes which included addressing the skewed land ownership patterns. With regards to this land question, it was well appreciated that land ownership has for many decades been a thorny subject, especially because of historic disenfranchisement, forced removals and land dispossessions that resulted from colonialization times, and ran into the apartheid race-based discriminatory laws and policies. Therefore, the post-1994 dispensation inherited a natural obligation to alter material disadvantages of the past, which included, helping to redress the imbalances of the past on the land question. But this would require some strategic and legally sound approaches in order to successfully implement.

At its 54th National Conference,³ the governing party of the Republic of South Africa, the African National Congress (*hereinafter, the ANC*), adopted a resolution which resonated the view that it was high time to confront the land question and get it resolved. As a consequence, the 54th National Conference resolved that the land shall be expropriated without compensation, and the fundamental objective being to redress the imbalances of the past and to restore justice in the main. This resolution culminated in debates in the National Assembly which centered largely on whether land may be expropriated without compensation or not, and how this may be implemented within a constitutionally accepted framework that protects the interests of both individuals and society at large.

On or about the 27th of February 2018, a motion to expropriate land without compensation was moved in the National Assembly by the Economic Freedom Fighters

¹ Constitution of the Republic of South Africa, 1996 (*hereinafter, the Constitution, 1996*).

² *Ibid*, s2.

³ African National Congress. ANC 54th National Conference, Nasrec 16-20 December 2017.

(EFF). The motion was adopted and supported by majority of the parties in the National Assembly. The original motion was called for the establishment of an ad hoc committee to review and amend section 25 of the Constitution to make it possible for the state to expropriate land in the public interest, without compensation. The ANC proposed an amendment to the motion, which was adopted, that the Constitutional Review Committee undertake a process of consultation to determine the modalities of the governing party resolution.⁴

When the ANC came into power in 1994, its key policy '*Ready to Govern*'⁵ identified land as an immediate and key priority for the people of South Africa. It explains in detail how the legacy of historical land expropriations had to be dealt with and address any intended policy on land in South Africa. The ideological base for the policy was on the understanding that the land is the economy and the economy is the land which affects the socio-economic conditions of the people of South Africa.

Therefore, this research dissects issues that predates both history and struggles for liberation, while it on the other hand analyses legal frameworks that came with the post-1994 dispensation on the understanding that these tools offer workable solutions to developmental challenges in society.

1.2 Problem Statement

The problem of skewed land ownership patterns started with the introduction of the Native Land Act of 1913, which was promulgated mainly to undermine, dispossess and remove majority of the native people from their fertile land, and created inequalities in patterns of land ownership. This legacy lasted until the last years of apartheid in the early nineteen-nineties. In other words, the apartheid system inherited the 1913 Land Act and entrenched its injustices until early nineties when apartheid became untenable. Today, South Africa is categorised as one of the developing countries that are faced with triple challenges of unemployment, poverty and inequalities. The colonial-apartheid regime contributed to the racially skewed land ownership patterns which entrenched landlessness among the native African masses, a reality which remain widespread even

⁴ Parliament of the Republic of South Africa: 2018, *Debate on Motion of expropriation of Land without compensation*. 27 February 2018.

⁵ *ANC Policy Guidelines for a Democratic South Africa*. Adopted at the National Conference in Johannesburg in May (28-31) 1992, at p. 26.

today. Since 1994, South Africa's process of land redistribution has been slow and disappointing, such that it has been labelled unsuccessful. In 2004, the then General Secretary of Cosatu, Zwelinzima Vavi⁶ also said that in 2017, South Africa shall have had over 20 years into democracy, and if land is not meaningfully distributed by then, we will find ourselves in a Zimbabwean situation. This demonstrates that the issue of land is fundamental to address the triple challenges facing the people of South Africa.

The former Minister of Environmental Affairs and Tourism, Martinus Van Schalkwyk, remarked at the land reform conference in his opening statement that the Zimbabwean situation is the kind of the situation that we would like to avert in South Africa by finding practical, innovative and constructive solutions to the challenges facing South Africa. On the 1st March 2010,⁷ the then Minister of Land Affairs Gugile Nkwinti said the land situation in South Africa might explode or implode like the Zimbabwean situation. His ideas were complemented by Jakes Moloï who argued that South Africa is left with few years before the people take the law in their own hands. The Chief Land Claim Commissioner in South Africa Wallace Mqogi⁸ also said that 'We do not want to see what happened in Zimbabwe and we will ensure that our land reform program remains socially, economically and politically sound'. The problem of the study begins with the constitution of the Republic of South Africa, 1996 which creates condition for land expropriation with compensation, while it was historically taken by force without compensation. Since 1994, the government has been implementing various measures intended to redress past injustices, and this include returning land to the rightful owners. But this process has proved to be a daunting one, especially because of the compensation requirement, which in real terms appear to have potential to inhibit progressive and effective land redistribution. Against this backdrop, the research seeks to address the problem that expropriation of land is indispensable because the past injustices remain pervasive, while also focusing attention on the constitutional elements

⁶ Greenberg, S. 2006. 'The Landless People's Movement and the Failure of Post-Apartheid Land Reform'. In Ballard R. (et al) (Eds) *Voices of Protest: Social Movements in South Africa*. Scottsville: University of KwaZulu-Natal Press, 2006.

⁷ Nkanyiso Sibanda. *Where Zimbabwe got it wrong for South Africa: A comparative analysis of the politics of land reform in Zimbabwe and South Africa*. Master of Art (University of Stellenbosch) available at http://www.issafrica.org/land/templates/tmpl_html.php?node_id=2889&slink_id=5 (Accessed on 03/04/2018).

⁸ Mqogi, W quoted by Moloï, J. 2007. 'Speeding Up the South African Land Reform Process is Critical' online at http://www.issafrica.org/static/templates/tmpl_html.php?node_id=2899&slink_id=5 (Accessed on 03/04/2018).

that seek to impede the very foundational value of transforming society and building a united nation in diversity. Section 25 of the Constitution deals with property and is often called the property clause. In its current form, it states that "no law may permit arbitrary deprivation of property" and that "[property] may be expropriated only in terms of law of general application (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court". Section 25 also says 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".

1.3 Research Question

In South Africa, the land question has been treated as a complex and sensitive matter. It is for this reason that it remained unresolved for over twenty-four years to the extent that Parliament conceded to holding a debate on an item of land expropriation without compensation. This followed some extensive discussions and some acknowledgment by the National Assembly that land reform project has successfully failed to meet its targeted objectives. As a result, this research is centered on appreciating that things are changing, especially because of the recent motion passed by the National Assembly, which effectively sought to amend section 25 of the Constitution, and thus effect land expropriation without compensation.

The main research question is centered on establishing the constitutionality of such a project, and the extent to which it may impact on social, political and economic transformation. That is, does the law permit land expropriation without compensation? And if yes, how can it be achieved? Further, how can its effect be carried in such a way that it assists government to achieve its ideals of redressing the imbalances of the past and overcoming the inherited ever-present problems of poverty, unemployment and inequalities? The research will inadvertently address questions that seek to understand why land reform has been slow and how that can be improved.

1.4 Aim and Objectives of the Study

The central aim of the study is to understand and explain the dynamics surrounding land reform in South Africa. The study investigates and analyses the constitutionality of land expropriation without compensation in South Africa. It examines notable legislative and constitutional provisions pertaining to land reform. The research envisions to illuminate on workable mechanisms of land reform. On completion of the research, it should be demystified on whether land expropriation without compensation is constitutionally protected, or whether the Constitution proffers such legislative strategies or leverages that permits for laws that expropriate land without compensation.

1.5 Literature Review

In South Africa, the land question is a highly sensitive matter. But as matter of fact, the historical problems associate with dispossessions, forced removals, discriminations and oppression are unavoidably significant. It is acknowledged that precautionary measures must be had to strike a balance between the need for land reform and equitable access to land, and the recognition and protection of the existing land rights. Already, tensions exist because there is a public perception that the land reform under the current legal and constitutional jurisprudence never yielded targeted results.

In South Africa, the legal and policy framework on land was set out in the interim constitution⁹ and the final Constitution, 1996 as well as the 1997 White Paper on South African Land Policy¹⁰ which provides for land acquisition in terms of the '*willing buyer-willing seller*' methods of land acquisition. The White Paper set out the direction of and implementation strategy for South African land policy. This policy necessitates reconciliation and stability for just and equitable distribution of the land.¹¹ However, it argues that where land cannot be acquired in terms of the proposed methods, the government can expropriate land in the public interest as the constitution guarantee such expropriation.

⁹ Constitution of the Republic of South Africa Act 200 of 1993.

¹⁰ The *White Paper on Land Policy received contribution from the Department of Land Affairs Framework Document on Land Policy*, May 1995.

¹¹ The *White Paper on Land Policy*, 1997. Pretoria. Department of Land Affairs.

The interim constitution provided for the right to acquire and dispose land and made it illegal for anyone to deprive another or expropriate another's proprietary rights except in terms of section 28 of the Constitution. This provision is entrenched in the Constitution, 1996 through what would become known as property clause in section 25 which provides the legal and constitutional framework for effective land reform. The White Paper¹² seeks to balance the protection of property rights and on the other hands, it constitutionally guarantees the land reform and these constitutional provisions gave birth to the land restitution Act.¹³

Section 25 identified the need for land reform to redress past injustices. Most of the scholars and land right activist like Mqogi and Nkwinti¹⁴ raised the question on the failure to implement the land reform program as a critical gap in South African which also undermine the developmental potential of land reform. This was informed by inconsistent coordination of government support and the denial of land owners to sell the land. The Constitution mandated the Department of Land Affairs through section 25, to conduct land reforms programs based on the following three pillars restitution,¹⁵ redistribution¹⁶ and tenure reform.¹⁷The Land Restitution Programme aimed at providing the vulnerable with access to land for residential and productive reasons. It responds to the needs and aspirations of the poor people for land in both rural and urban areas, in an equitable and affordable manner while at the same time contribute to poverty alleviation and national economic growth. It also restores land and provide comparable redress for the right to land which was dispossessed after the 1913 Land Act.

The Restitution program demand that people who were illogically dispossessed of their land, must be given back their land (Cousin, 2009).¹⁸ The restitution program in simplicity is based on the restoration of land or cash compensation to the victim of forced removal. Cousin has identified a challenge that if there is a piece of land claimed, the claim will be validated before the government enter in to negotiation on the price and thereby allow beneficiaries to develop a business plan outlining how they will use the

¹² See White Paper, 1997: at p.16

¹³ The *Restitution of Land Right Act* 22 of 1994

¹⁴ Sibanda, N. 2010. Where Zimbabwe got it wrong lesson for South Africa: A comparative analysis of the policies of land reform in Zimbabwe, at p. 4

¹⁵ The *Restitution of Land Rights Act*, No 22 of 1994.

¹⁶ The *Provision of Land Assistance Act*, No 126 of 1993.

¹⁷ The *Security of Tenure Act*, No 62 of 1997.

¹⁸ Cousins, B. (2009). *Land Reform in Post-Apartheid South Africa – A disappointing Harvest*, at p.4.

land when it is restored to them. The problem with this method is that in South Africa, majority of our people are poor and illiterate in that their interest is to occupy land which they want to use it for residential purposes.

The Land Reform is a vehicle that seeks to redress the injustices of the past and to simultaneously promote sustainable growth and development in South Africa (DLA, 1997)¹⁹ by providing historically marginalized people with tenure and thus a secure base for economic empowerment. In 1994, the South African government committed itself to the Reconstruction and Development Programme (RDP)²⁰, a policy framework which promote a fundamental transformation of the social, economic and moral foundation of South African Society (African National Congress, 1994). The Reconstruction and Development Programme (RDP) identified land reform as a key component of its programme of meeting the basic needs and building the economy.

The market-based method of willing buyer-willing seller approach moved in a snail pace for the land reform in South Africa because the owners of the land or property had to inflate prices and make it impossible for the land to be acquired. This unaffordable behavior on land simple demonstrated that the seller or owners of land are not willing to sell the land. Aliber (et al)²¹ brought an argument that ‘the willing buyer-willing seller approach is not as fundamentally ill-suited a mechanism to effect state supported land redistribution as is commonly claimed’. He went further to claim that it is in fact the manner through which the method is applied that is slowing down land reform. Interestingly, the then Minister of Land Reform, Gugile Nkwinti conceded that the ‘willing buyer-willing-seller method of land acquisition was not working and because of such facts, the government must investigate an alternative land reform paradigm.’²²

There is a general acknowledgement that the land reform projects moved in a snail pace and as a result it never yielded targeted results. Moyo²³ argues that the land question in Southern Africa has seen little progress. He contends that the reason why the land question is still unresolved is the gradualistic approach by government and the

¹⁹ Department of Land Affairs: 1997: *Whitepaper on the South African Land Policy*, Department of Land Affairs, Pretoria.

²⁰ African National Congress:1994. *The Reconstruction and Development Programme: A Policy Framework*. Umanyano: Johannesburg.

²¹ Aliber, M (et al), 2005. *Trends and Policy Challenges in the Rural Economy: Four Provincial Case Studies*. Cape Town: HSRC Press.

²² The Times, 01 March 2010, http://www.issafrica.org/static/templates/tmpl_html.php?node_id=2899&slink_id=5329&slink_type=12&slink_id=4056 (Accessed 04.04.2018).

²³ Moyo, S. 2007. ‘*The land question in Southern Africa*’, at p.60.

underestimation of the peasant question by official policy as well as the denial by intellectuals and civil society.²⁴ In support of the above-mentioned connotation Hall²⁵ argues that there are good reasons why land reform has been slow in South Africa, it is undeniable that the process has indeed not happened as quickly as it had been expected to.

According to Walker²⁶ the ANC has itself to distribute 30% of agricultural land, approximately 25 million hectares within five years since 1994. However, the target has been met through the Reconstruction and Development Program (RDP). Between 2007 and 2008, only 340 000 hectares of land were distributed, and this was less than 14% of the 2.5 million which has been targeted. Only 4% of land or four million has been transferred to black South Africans²⁷ In February 2008, the Department of Land Affairs (DLA) signaled the fact that 2014 is the deadline for of land reform project, however such was unrealistic, and the possibilities of South Africa failed to reach the targeted results after 20 years of democracy are enormous.

The people of South Africa are landless in that they neither own the land nor they have legally secured access to the land. In some cases, they live on the land that does not belong to them but someone else. The demand of land has been adequately neglected by the South African market-based land reform policies. Halls²⁸ stated that 'land redistribution in South Africa is a market led but the unfortunate part is that the market lead in its own direction. This is the reason for conflict relating to land expropriation without compensation championed by the marginalized and blocked poor groups, as well as the middle class fighting against white minority class.

Walker²⁹ states that since the advent of democracy, 'the symbolic importance that is attached to land reform political debate has not been matched by its status as a program of government. She goes on to claim that in fact, by the time the first democratic election took place in South Africa, 'land reform had ceased to be the fundamental demand for except in an occasional rhetorical flourish'. This is a cause for concern given the racially skewed land ownership patterns which is still in existence in South Africa.

²⁴ Moyo, S. 2007. The land occupation movement and democratization in Zimbabwe: contradictions of neo-liberalism in Millennium, at p.61.

²⁵ Hall, R. 2003. *A Comparative Analysis of Land Reform in South Africa and Zimbabwe*, at p.266.

²⁶ Walker, C. 2008. *Landmarked – Land Claims and Land Restitution in South Africa*. Jacana/Johannesburg: Ohio University Press/Athens, at p. 198.

²⁷ Sokomani, A. 2009. *Rural Poor Bear the Brunt of Dysfunctional Land Reform*.

²⁸ Hall, R. 2003. *A Comparative Analysis of Land Reform in South Africa and Zimbabwe*, at p.274.

²⁹ Walker, C. 2008. *Landmarked – Land Claims and Land Restitution in South Africa*. Jacana/Johannesburg: Ohio University Press/Athens.

One of the scholar called Walker³⁰ further wrote that the failure of land reform to meet both developmental and redistributive targets has led to a growing erosion of confidence across the political spectrum in the ability of the state to manage a significant land reform programs.

The Expropriation Act³¹ provides detail clarity on how land should be expropriated with compensation for the willing buyer-willing seller market valued system. The Act also provided strategy and the method within which the land should be expropriated for the benefit of the South African Citizens. According to Mngxitama³² ‘the historical land dispossessions created a situation of accumulated privileges of being white.’ The white settlers not only forced blacks off their land but also compelled them to work for them, going to the extent of creating legislation legitimizing such a situation. In fact, he writes further that the South African social, political and economic realities of today are founded on the long colonial conquest.

1.6 Research Methodology

This research shall adopt a legal doctrinal analysis method. This method is best suited for the topic because it focuses on reading, interpreting and analysing the nature and content of legislation and what its impact is to real life situations. This methodology will incorporate a theory-based analysis which shall use the concept of constitutionalism and constitutional supremacy as tools that guide the analysis process and the reading of the law in the Constitution and other conforming legislation. Some comparative analysis will also be undertaken to determine how the land expropriation without compensation was carried in a specific jurisdiction.

1.7 Outline of the Chapters

This study is organized into five chapters. **Chapter one** is introductory in nature. it introduces the issues, provide some background, and aim and objectives. It explains the main research question and the method adopted to try to respond to it. **Chapter Two** provides a theoretical framework. It unpacks concepts such as constitutionalism and the constitutional supremacy in an attempt to develop a framework of analysis

³⁰ See Walker, C. 2008 at p. 222.

³¹ 63 of 1975.

³² Mngxitama, A. 2005. *A Critical Insider's Perspective. In Problematizing Resistance*, at p. 43

which will be used to explain the constitutionality of expropriation of land without compensation. **Chapter Three** deals with the legal framework on land reform. It will give some insights on the existing legal and constitutional provisions regarding land reform. **Chapter Four** shall conduct a comparative study, using a Zimbabwe case. It will reflect on how the Zimbabwean government undertook their land reform in order to establish the role assigned to law in that regard. **Chapter Five** concludes the study. It also provides recommendations

Chapter 2: Theoretical Framework

2.1 Introduction

For the past twenty-five years, South Africa has been premised under constitutional democracy under the Constitution reign supreme. The Constitution serves as a guiding instrument to advance transformation in society and it is based on safeguarding fundamental values of human dignity, equality and freedom. The Constitution is a product of notable commitment to transform the legal culture, economic, social and political aspect of this country.³³ Therefore, the state and other strategic institutions must develop a legal framework within which its citizens will observe, adhere and respect the rule of law for effective and efficient administration.

Therefore, this chapter reflects on the context of constitutionalism from a socio-political and legal viewpoint, with the purpose of establishing the background within which the constitutionalism was grounded. It will give specific focus on the significance and importance of constitutionalism in South Africa for the purpose of promoting transformation. The purpose of this chapter is also to note constitutional changes which are required to establish constitutional transformation, which in South Africa, is captured through Transformative Constitutionalism. The chapter establishes a framework within which to analyse the constitutionality and justiciability of expropriation of land without compensation. Thus, the chapter will also reflect on the aspect constitutional development on land reform in terms of the rule of law, democracy and accountability in order to conform with the theory of constitutionalism.

2.3 Constitutionalism in Perspective

2.3.1 The Political Context

South Africa, like many other African countries, has a rich history characterised by political instability, dictatorship, corruption, massive violation of human rights and social misery. The people who were colonised had the hope and believed that one day they will have freedom and democracy. The formation of the Republic of South Africa in 1961 marked the end to British Crown but did not yield fruitful result rather continuation and

³³ Langa, P. (2006). *Transformative Constitutionalism*. "Stellenbosch Law Review" p. 352.

perfection of misery under the apartheid regime.³⁴ These include racial segregation, discrimination, dispossession, disenfranchisement, political exclusion, and general socio-economic under-development. That is the reason why South Africa share similar experience with the rest of African countries.

However, the South African transition may not be regarded as the same when compared with the rest of African countries but a process of liberation with similar plight. This transition may be equated to the liberation of the rest of African countries from colonial slavery but with the view of popular and multi-racial election process. This transition shaped the country's destiny that power and governance should be in the hands of popular-elected government of the black majority that had suffered from marginalisation of apartheid regime.³⁵

The country has attracted attention of international countries regarding development of fundamental human rights. This attention has impacted all spectrum of life, particularly in the international law, development policies, economics and domestic constitutional law.³⁶ This is obviously informed by the fact that developmental rights to own land or property has been compromised since CODESA negotiation in 1991. However, due to transitional and democratic interventions progress was registered to realize these rights. The development of neo-liberal economic policies had influence in ensuring that banks collude and connive to threaten the existing operations of the economy in the policy adjustment, deregulation of corporate activities and privatisation of goods and services. This resulted in a situation where majority of citizens continued to be marginalised from participating in major economic activities. It is important to understand and note that these developmental rights need to be embedded within a transformed conception of law and its relation to social change.

2.3.2 Constitutionalism

James Madison wrote the following: "If men were angels, no government would be necessary".³⁷ If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered

³⁴ Dugard, J. (1990). 'A bill of rights for South Africa?', *Cornell International Law Journal* 442-443.

³⁵ Ibid.

³⁶ UNDP-Human rights-based approach to development

³⁷ Madison, J. ([1788] n.d., 337) *The Federalist* No. 51.

by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself".³⁸ This is a pure explanation of the definition of constitutionalism.

However, there are many theories about constitutionalism. Generally, constitutionalism refers to a system of government based on a Constitution, a government which demonstrates adherence to the principles of the constitution. Within the concept of constitutionalism is the idea of limited, open, transparent and accountable government which must truly represent the will of the people and not simply smoke-screen the will of the people. Constitutionalism ensures that governmental powers are limited beyond theory, and in practice whilst the promotion of fundamental rights and adherence of the law in order to curbing the abuse of power.³⁹ Constitutionalism means that the practice and acceptance of government by means of constitution. However, this is beyond the mere adoption of a document or fundamental principles as the guiding rules by which a given country is governed, but a widespread willingness and readiness on the part of those who govern and those who are governed to abide by both the letter and the spirit of fundamental laws.

Constitutionalism therefore describes both a political and reality of government limited by law, a psychological and social disposition on the part of individual citizens to be limited and bound by law. Constitutionalism can therefore be said to be the foundation of democracy and good governance, which are basically the tangible results of the working of a constitution and the respect for the constitution and law."⁴⁰

The purpose constitutionalism is to see constitutions being realised and not merely be treated as decorative documents which could easily be manipulated by politicians. The understanding of constitutionalism is a positive step and a mechanism that seeks to limit the abuse of power, without addressing the enforcement of these limitations on the government. Constitutionalism is a constitutional system that mandate state to perform its function in accordance with the rules within the constitutional confinement.⁴¹ It then mean that the state derives its authority from the constitution and its functionaries must conform with the constitution when exercising public

³⁸ Ibid

³⁹ Fombad, C. (2005). The separation of powers and constitutionalism in Africa: the case of Botswana' 25 *Boston College Third World Law Journal*, p. 301

⁴⁰ Ibid.

⁴¹ Currie, I & De Waal, J. (2005). The Bill of Rights Handbook, "Juta & Co.Ltd.: Cape Town", p. 8.

functionaries.⁴² Thus, constitutionalism refers to a doctrine that governs the legitimacy of government action.⁴³ This effectively meant that state must be able to substantively defend its decision in accordance to the law or constitution.

2.3.3 Transformative Constitutionalism

The post-1994 dispensation is characterized by a notable constitutional transformation, which Karl Klare relied upon when formulating Transformative Constitutionalism, a concept that has since been described by many as an agenda which describes South Africa's commitment of transforming society through the Constitution.⁴⁴ It is an agenda which is founded grounded values and fundamental human rights which must be respected and promoted. Transformative Constitutionalism derives its ideological existence from the womb of the Constitution because it has been granted motivation to transform society and bury the wounds of the past injustices and build a non-racial, non-sexist, democratic, free and prosperous society.

Transformative Constitutionalism entails that the country is under constitutional democracy, whose fundamental objectives have been and remain; to build a country that espouses social justice and substantive justice in social, economic and political realities. It is an embodiment of freedom and the rule of law, fulfilment of substantive equality, national unity and reconciliation, the promotion of human dignity.⁴⁵ Its fundamental aim to guide the nation in to the better future.⁴⁶ Therefore the agenda is a project driven by a commitment to transform the country's social, political, economic and legal culture.⁴⁷

South Africa subscribes to constitutionalism and the notion of 'Transformative Constitutionalism' is informed by the pursued of constitutional agenda of transformation. Karl Klare formulated the meaning of transformative constitutionalism to clarify the

⁴² Rapatsa, M. (2015). South Africa's transformative Constitution: from civil and political rights doctrines to socio-economic rights promises: *Juridical Tribune*, Volume 5, p.212.

⁴³ Burns, Y. (2003). *Administrative Law under the 1996 Constitution*, "LexisNexis: Butterworths, Durban", p. 34.

⁴⁴ Rapatsa M. (2014). *Transformative Constitutionalism in South Africa: 20 Years of Democracy*. Vol 5 No 27. p887.

⁴⁵ Moseneke, D., (2007). *The Internationalisation of Constitutional Law*. World Congress of the International Association of Constitutional Law, Athens, Greece 11 – 15 June 2007.

⁴⁶ Langa, P., (2006). *The challenges facing transformative constitutionalism in South Africa*. Prestige Lecture delivered at Stellenbosch University on 9 October.

⁴⁷ Rapatsa M. 2014. *Transformative Constitutionalism in South Africa: 20 Years of Democracy*. Vol 5 No 27. p887.

nature and character of the 1996 constitution. He clarified it as “a long-term project of constitutional enactment, interpretation and enforcement committed to transforming a country’s political, legal and social institutions and power relations in a democratic, participatory and egalitarian direction”.⁴⁸ He argued that the constitution dictates for serious social changes through non-violent political process grounded by law.⁴⁹ Klare’s idea was confirmed by Karin Van Marle when he perceived transformative constitutionalism as “a theory which encompasses an approach to the constitution and law in general that is committed to transforming political, social, socio-economic and legal practice in a manner that it will radically alter existing assumption about law, politics, economics and society in general”⁵⁰ Karin Van Marle’s understanding of transformative constitutionalism was that it has capacity to reach out to other discipline of philosophy, political theory and sociology because it does not traditionally account to the rule of law.⁵¹

In changing the social and political landscape, the constitution entrenched the fundamental human rights and create institutions that will protect and enforce them. This is what Klare in his writing argued that the “the constitution is a process of a legally-focused social and political change”.⁵² Transformative Constitutionalism is the perfect architect for entrenching a legal culture with which to safeguard the principles of constitutional democracy.⁵³ It is aimed to achieve legal and social change in broader terms, which can only be achieved if the courts were to consider circumstances in each case to give effect to the transformative ideals.⁵⁴ Hence, the adjudication process ought to explicitly adapt to activist transformative approach because it is rooted in the epilogue of the Interim Constitution, aimed at providing a historic bridge between the past and present.⁵⁵ Transformative Constitutionalism will be a project which went wrong if it fails to give meaningfully effect to change with regards to addressing these aspects. The meaningful change regarding transformation is that institutions of democracy must

⁴⁸ Klare, K. (1998). Legal Culture and Transformative Constitutionalism. “*South African Journal on Human Rights*” (1998) p.146.

⁴⁹ Ibid. p. 150

⁵⁰ van Marle, K. (2009). Transformative Constitutionalism As/And Critique. “*Stellenbosch Law Review*” p. 288.

⁵¹ Ibid

⁵² See Klare, 1998

⁵³ Rapatsa M. 2014. Transformative Constitutionalism in South Africa: 20 Years of Democracy. Vol 5 No 27. p.889.

⁵⁴ Ibid, p.889.

⁵⁵ Langa, P., (2006). *The challenges facing transformative constitutionalism in South Africa*. Prestige Lecture delivered at Stellenbosch University on 9 October.

understand the entrenchment of legal culture of justification in the Constitution. The institutions of democracy must promote transformative agenda because they are established to support constitutional democracy.⁵⁶ This is crucial because the cases of South Africa are entrenched fundamental rights in the Bill of Rights, and courts are prepared to experiment their authority to advance national transformation and ensure adherence to upholding constitutional values and the rule of law.⁵⁷

The South African Constitution is prominently and consistently described as a 'transformative Constitution'.⁵⁸ This concept implies that the Constitution and its normative character and its commitments to human rights and democracy should facilitate a process of social change aimed at ensuring the effective realization of all rights and freedoms. Karl Klare argued that "transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law".⁵⁹ This is obviously informed by the fact that the constitution is a cornerstone for freedom and democracy which recognizes the injustices of the past and honor those who suffered for justice and freedom in their land.⁶⁰ According to Klare, the Constitution endeavours to create a society which is totally different from the vexatious draconian regime in terms law and its relation to the people and institutions.

The late Chief Justice Pius Langa, in his socio-political and legal perspectives "the transformative constitutionalism project is a constitutional commitment to heal wounds of the past and guide to a better future".⁶¹ He argued that "this project encompass transformation process which is a continuous ideal and a way of looking the world that create space for dialogue and contestation, where new mechanism are constantly explored and created, accepted and rejected, and in which change is unpredictable but the idea of change is constant". Rapatsa also argued that "transformative nature of the constitution is based on its capacity to alter social, legal and political landscapes in a manner that is considered legitimate by its citizens. Langa further said that the Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one

⁵⁶ Christiansen, E., (2010). Transformative Constitutionalism in South Africa: *Journal of Gender, Race & Justice*, 13, 575 - 614.

⁵⁷ Rapatsa M, 2014.p 889

⁵⁸ Langa, P. (2006). 'Transformative constitutionalism'. 3 *Stellenbosch Law Review* 351 – 360. See also the judgments of the court: *S v Makwanyane* 1995 3 SA 391 (CC).

⁵⁹ van der Walt, A. (2001). Tentative urgency: sensitivity for the paradoxes of stability and change in the social transformation decisions of the Constitutional Court, 16 *SA Public Law* 1 – 27.

⁶⁰ Preamble of the Constitution of the Republic of South Africa, 1996.

⁶¹ Langa, P. (2006). *Transformative Constitutionalism*. "Stellenbosch Law Review" (2006) p. 352.

which respects the dignity of all citizens and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves, and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole".⁶² Therefore a legal work has to be undertaken if the constitution is to achieve its transformative purpose and this legal work has to start with questioning the origins, underlying premises and purpose of the status quo law.⁶³

The everlasting goal of constitutional-makers is to seek justice from structures and systems of government to ensure that the rights of the people are respected, promoted and protected. The quest for this justice is more challenging if our country aspires to actualise substantive justice because justice in its dimension require formal, legal equality and the exclusive protection of negative liberties. This would literal mean that people will be free from government interference. Since the end of apartheid in the early 1990s, the Republic of South Africa has attempted an intentional process of remaking itself as a human rights state.⁶⁴ Indeed, South Africa is the most frequently discussed example of transformative constitutionalism. This is a conscious attempt to create a nation that would espouse and accomplish substantive justice in its political and economic facets.

2.3 Constitutionalism in South Africa

From the talks about talks about talk in 1989 to the effective date of the current constitution in 1997, the process of bringing constitutional democracy to South Africa was resolved through a negotiation process dominated by the generally opposed concerns of the ruling, white-minority National Party and the African National Congress.⁶⁵ Despite imperfections in the drafting process and in the resulting document, the negotiations achieved a goal considered impossible for decades: a relatively peaceful shift from racial autocracy to a non-racial democracy, by means of a negotiated

⁶² Director, Land and Accountability Research Centre, Faculty of Law, University of Cape Town.

⁶³ Klare, K. (1998). Legal Culture and Transformative Constitutionalism. 14 *South African Journal on Human Rights*, at p.146.

⁶⁴ Christiansen, E. (2010). Transformative Constitutionalism in South Africa: *The Journal of Gender, Race & Justice*. at p.575.

⁶⁵ Sparks, A. (1995). Tomorrow is Another Country: The Inside story of South Africa's Road to Change.

transition, the progressive implementation of democracy, and respect for fundamental human rights.⁶⁶

The fundamental compromise that permitted agreement between the previously combative parties was a temporary governing arrangement to facilitate democratic elections and end apartheid.⁶⁷ This agreement is called the *Interim Constitution*, which also contained a set of thirty-four mandatory that the negotiating parties agreed would govern the terms of the final Constitution to be drafted by a newly elected Constitutional Assembly.⁶⁸ The Constitutional Court was created by the Interim Constitution and was assigned the task of certifying that the final Constitution conformed to the negotiated agreement memorialized in the transitional document.⁶⁹

The Thirty-four Principles established the fundamental guidelines, the prescribed boundaries, according to which and within which the Constitutional Assembly was obliged to perform its drafting function.⁷⁰ The final Constitution was not certified and hence not valid until the elected Constitutional Assembly could secure a Constitutional Court ruling to that effect.⁷¹ In fact, the first proposed draft was rejected on several grounds and had to be amended by the Constitutional Assembly in line with the Court's opinion.⁷² The amended text of the Constitution was approved by the Constitutional Court on December 4, 1996, and formally took effect on February 4, 1997.⁷³ Hence, the Court played a decisive role in assuring the success of the negotiated transition to democracy, and it significantly influenced the final text of the Constitution.

The exceptional role played by the Court in the drafting process was not the only novel thing about the South African Constitutional Court. The Interim Constitution ended the era of parliamentary supremacy in South Africa and it has invested broad judicial review authority in the courts of South Africa including the power to review proposed legislation, national and provincial statutes, provincial constitutions, acts of the

⁶⁶ Waldmeir, P. (1997). *Anatomy of a Miracle: The end of apartheid and the birth of the new South Africa*.

⁶⁷ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*. 1996 (4) SA 744 (CC) at ch. 1, para. 10–13 (S. Afr.) [hereinafter *in re Certification of the Constitution*].

⁶⁸ S. AFR. (Interim) CONST. 1993, sched. 4.

⁶⁹ *Ibid.*

⁷⁰ *In re Certification of the Constitution*, *supra* note 10, at ch. 2, para. 32.

⁷¹ See S. AFR. (Interim) CONST. 1993, ch. 5,

⁷² *In re Certification of the Amended Text of the Constitution of the Republic of South Africa 1996, 1997* (2) SA 97 (CC) at para. 31.

⁷³ *Ibid.*

executive branch and administrative bodies, and decisions of lower courts on all matters related to the Constitution.⁷⁴

The inauguration of judicial review in 1993 was a significant change for South Africa. Apartheid in South Africa had been a parliamentary sovereignty system, vesting ultimate governmental authority in the national Parliament and not subjecting its laws to invalidation by the courts. Moreover, the onset of judicial review was not merely an experiment with a new constitutional model; judicial review played an essential role in facilitating the transformation from apartheid oppression to constitutional democracy.

South Africa is enjoying the ongoing benefits of an established legal system without sacrificing its transformative goals of equality, dignity, and justice. At the conclusion of the constitutional transition, the South African Constitutional Court was the branch of government that was undeniably the first among equals. The Court was uniquely empowered by its role to ensure the initial democratic transition and as the ultimate interpreter of the new Constitution through judicial review due to its placement at the pinnacle of a court system newly empowered by a transformational value set.

Section 1 of the Constitution provides that the Republic of South Africa is one, sovereign, democratic state founded on supremacy of the constitution and rule of law. Constitutional supremacy dictates that the rules and principles of the constitution are binding on all branches of the state and have priority over any other rules made by the executive, the legislatures or the courts. Any law or conduct that is not in accordance with the constitution, either for procedural or substantive reasons, will therefore not have the force of law.

The idea or essence of constitutionalism and the rule of law overlaps, and so closely linked that they are often used interchangeably. Constitutionalism, as pointed out, is defined as the idea that government should derive its authority from a written constitution and that its powers should be limited to, and therefore cannot exceed those set out in the constitution. The main reason for the emergence of the notion of a government limited by substantive and procedural restraint seems to emanate in human being's painful experience of mankind's lack of compassion toward his fellow human being. This capacity of being inhuman, is directly related to the authority of man whether an individual ruler or parliament over others. The normative premise upon which

⁷⁴ The Constitution, 1996.

constitutionalism emanate is therefore seen as a triumphant confirmation of the powerless, the oppressed, persecuted minorities and individuals.

2.5 Fundamentals of Constitutionalism

The Constitution of the Republic of South Africa founded a new dispensation and society premised on democratic values, social justice and fundamental human rights.⁷⁵ This is contextualised on the basis that the constitution seeks to improve the quality of life of all citizens and free the potential of each person from the past discrimination. The country has attempted to transform itself through a constitution that zealously protects traditional civil and political rights and addresses the fundamental elements of justice.

Section 2 of the Constitution gives expression to the principles of constitutional supremacy. It states that the constitution is the supreme law of the republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.⁷⁶ Section 8 further provides that the Bill of Rights has supremacy over all forms of law and that the Bill of Rights binds all branches of the state in addition to private individuals. For a supreme constitution to be effective, the judiciary should have the power to enforce it. Section 172 of the Constitution provides that, a court must declare any law or conduct that is inconsistent with the constitution invalid to the extent of its inconsistency. The court orders must be obeyed by the other branches of the state. According to section 165(5), an order or decision issued by a court binds all persons to whom and organs of state to which it applies. When the court uses its powers of judicial review to strike down an Act of Parliament, it is thought that in so doing it thwarts the will of the people.

Klare also argued that “transformative constitutionalism can encounter a restraining force like section 25 of the constitution which is the current static legal culture resisting transformation”.⁷⁷ The pre-constitutional legal culture was static the same way with the current legal culture and representative of ‘a set of intellectual habits’ that uncritically accepts legal practices of legal reform on land expropriation without compensation. This also stifles progress of the Constitution’s transformative aspirations and slows down the rate of transformation because expropriation of land will be just an

⁷⁵ The Constitution. 1996 (*discussing the goals of the Constitution in the preamble*).

⁷⁶ Ibid

⁷⁷ Klare, K. (1998). (*supra*), at p.153

academic exercise.⁷⁸ For us to adhere to transformative constitutionalism, South Africa will be better placed in strengthening the projects of constitutional enactment, interpretation and enforcement.⁷⁹ This will invariably strengthen the commitment towards the reconstruction and transformation of the current legal and socio-economic cultures, which arguably safeguard the remnants of apartheid land law within a new constitutional democracy.⁸⁰

Upon our examination of South Africa's constitutional democracy, one becomes aware that the current legal culture of land reform has influenced the interpretation, application and enforcement of section 25. The current legal culture has also influenced how section 25 and its underlying values and principles, influence the advancement of socio-economic development in the area of land reform. The current legal culture appears to differ from the ideals of transformative constitutionalism in that the desire for legal formalism and conservatism often obstructs the transformation, and development of a legal culture primarily concerned with the Constitution's transformative aspirations. This reality is relevant in the context of the need to showcase how a post constitutional legal culture ought to influence the interpretation, application and enforcement of section 25, and how the values and principles underlying section 25 ought to drive the process of transformation and land redistribution.

Despite the tendency of the current legal culture to revert to a conservative and formalistic approach towards the constitutional interpretation, enactment and enforcement of s 25 the Constitution establishes the necessary normative institutional framework through which the ideals of large scale, and egalitarian socio-economic transformation are capable of being infused into the current legal culture. The commitment towards achieving substantive justice, represents a shift in the roles of institutions responsible for promoting and supporting a system of transformative constitutionalism that creates an egalitarian society of justice-oriented ideology. This ideology can safeguard the interests of the previously disadvantaged black majority, in relation to access and ownership of land. These institutions include the judiciary.

The commitment to the progressive transformation of South Africa's land holding and ownership regime relies on the support that is given to these projects.⁸¹ This means

⁷⁸ van der Walt, AJ. (2006). Legal History, Legal Culture and Transformation in a Constitutional Democracy. (12) *Fundima* at p.18.

⁷⁹ Klare (*supra*) at p.150.

⁸⁰ *Ibid.*

⁸¹ Klare (note 3) at p.150.

that 'transformative constitutionalism' rely on the adoption and development of a new legal method, analysis and reasoning consistent with the Constitution's transformative goals.⁸² The implications is that section 25 of the constitution and land reform is progressive, in that section 25 and the underlying transformative values is harnessed by change of the status quo ante and the level of which the economy is playing in the field between white settlers and the majority of the historically disadvantaged and dispossessed groups.

For us to realise this methods and process is that we need to adopt a critical method of expropriation of land without compensation by clearly reflecting on the analysis, legal method and reasoning of property law in a manner that is consistent with the Constitution's transformative goals. The implications of this process or method is that section 25 can be utilised as a mechanism to facilitate transformation of the existing property law in relation to the land question to facilitate the right to access and own land through state expropriation and land redistribution.⁸³ We are fortunate that parliament through representative democracy our leaders have sparked debate on transformation, particularly the amendment of section 25 of the Constitution. This was done to create a favourable condition to allow expropriation of land without compensation either.

2.5.1 Constitutionality

Constitutionality is the state of conforming to a given constitution. It refers to something relating to or controlled by the constitution. All laws of a country must draw their validity from the constitution if they are to be constitutional. Similarly, all governmental action, executive, legislative or judicial, must draw their validity from the constitution, otherwise they will be unconstitutional and declared invalid. The supremacy of the constitution entails that all governmental action must remain within the confines of the constitution and no government should act outside the constitution or set itself above the constitution, otherwise it will be acting unconstitutionally.

The Constitution must be interpreted as a whole and no part of it must ever be interpreted so as to abrogate another part.⁸⁴ Rather, every provision of the constitution

⁸² Ibid at p.156.

⁸³ van der Walt, AJ. (2005). "Constitutional Property Law" at p.402.

⁸⁴ Chaskalson, A. (2000). Human Dignity as A Foundational Value of Constitutional Order. "South African Journal on Human Rights", 16(2).

must be interpreted in such a way that it complements and support the other provisions. For these reasons, I seriously doubt if any provision the constitution can ever be said to be unconstitutional, vis-à-vis the same constitution. The idea of constitutionality is viewed as a way of checking the validity of the law or governmental action in accordance with expropriating the land without compensation. Thus, the emphasis in constitutionality is on formal validity.

2.5.2 The Constitution

It is a document containing the fundamental principles of government organisation. It is a visible symbol or epitaph of the values of the people. It reflects the ideas of the rule of law. It is that type of the rule of law that requires that all political actions and even legislations be confined and brought under law to pressure the rule of law the country. Section 1 of the Constitution provides that the Republic of South Africa is one, sovereign, democratic state founded on supremacy of the constitution and rule of law.⁸⁵ Constitutional supremacy dictates that the rules and principles of the constitution are binding on all branches of the state and have priority over any other rules made by the executive, the legislatures or the courts.⁸⁶ Any law or conduct that is not in accordance with the constitution, either for procedural or substantive reasons, will therefore not have the force of law.

2.5.3 The Rule of Law

The concept of “*Rule of Law*” refers to a state in which people are governed according to laws that are just and fair, and which apply to all people equally and not a government decree disguised as law.⁸⁷ The rule of law is not a western idea, nor is it linked up with any economic or social system.... As soon as you accept that man is governed by law and not whims of men, it is the rule of law.⁸⁸

The term therefore means that State must act in terms of the law and be limited by law. In other words, the law is both the instrument whereby the State and its

⁸⁵ Section 1 of the Constitution.

⁸⁶ Botha, H., (2009). Equality, Plurality and Structural Power. South African Journal on Human Rights, 25, 1-37.

⁸⁷ English, K and Stapleton, A (1997) *The Human Rights Handbook*.14

⁸⁸ Ibid, p.15

institutions are established, and the instrument with which a court limits and controls the exercise of power by the state. “The rule of law” principle therefore elevates law above party political interests, and Judges are independent and impartial arbiters, protecting citizens’ rights and guarding against tyranny and arbitrariness in government. Consequently, the Judiciary should assume a watchdog function by enforce the law.

The rule of law envisages that everyone is subject to the discipline and sanctity of the law.⁸⁹ No one shall set himself above the law no matter what position they occupy in society. Actions of all and sundry must conform to the law. The society is required to observe the rule of law if it is to be orderly. Those that are ruling, or institutions of democracy always have a greater obligation to observe the rule of law in order to reinforce the rule of law and eliminate the possibility of the emergence of the rule of men.⁹⁰ The rule of law is predictable. The rule of men is unpredictable. The mechanism of judicial review ensures that the rule of law is adhered to by all those performing public functions.⁹¹ Executive decisions and legislative enactments which fall outside the framework of the rule of law must be declared invalid if the executive and the legislature do not observe the rule of law. This will ensure enjoyment of developmental and fundamental human rights guaranteed by the constitution. The constitution of the country is firmly founded on the rule of law. The constitution binds everyone in the country, including the ruling elite. The rule of law is meant to be a cornerstone of well-functioning democracy.

2.6 Conclusion

This chapter has revealed that there are ostensible relations between the concepts of constitutionalism, the Constitution and Klare’s Transformative Constitutionalism. The chapter has also demonstrated that fundamental ideals grounded in constitutionalism are necessary in navigating transitions from repressive regimes to democracy, which South Africa did indeed subscribe the country’s new culture of justification to. Therefore, it is significant to ascertain the relationship between constitutionalism and the Constitution, especially with regards to how they impact on the land ownership and

⁸⁹ Moseneke, D., (2007). The Internationalisation of Constitutional Law. VIIIth World Congress of the International Association of Constitutional Law, Athens, Greece 11 – 15 June 2007.

⁹⁰ Rapatsa, M. (2015). The Right to Equality under South Africa’s Transformative Constitutionalism: A Myth or Reality? *“Acta Universitatis Danubius.Juridica”* (2015) 11(2).

⁹¹ Ibid.

redistribution and development initiatives of the country. This view emanates from the fact that there is an ongoing debate and contestation regarding section 25 of the Constitution, which impacts on land ownership patterns and statistics, against the Constitution's agenda advancing socio-economic, political and legal transformation. Overall, this chapter has established a wider theoretical framework within which the Constitution is built, and how constitutionalism and its fundamental principles of constitutional law theory affect land reform. Thus, the next chapter shall focus on South Africa's legislative framework on land reform.

Chapter 3: Land Reform and the Law

3.2 Introduction

This chapter focuses on land reform and the legislative instruments that impact on land reform in South Africa. It reflects on the role of the Constitution when it comes to social and economic transformation and development. The chapter shall provide a detailed historical overview of legislative and other policy frameworks which defined land reform and its general developments. Most importantly, it attempts to provide clarity on which land should be expropriated and why land should be expropriated without compensation, and how the law should respond in this regard, especially given injustices of the past and the need for reconstruction, social reconciliation and development. In this regard, expropriation of land without compensation is explained with reference to the law, mainly to explain what it means and how the law must react towards such a process.

3.3 The Constitution, 1996, Constitutional Supremacy and the Rights Narrative

The Constitution is the fundamental legal instrument providing legal guidance, even on matters related to land reform. This Constitution has been described as a transformative tool because it was designed to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights, and to improve the quality of life of all citizens and free the potential of each person.⁹² It is the cornerstone of democracy found on values of human dignity, equality and freedom. Section 1 of the Constitution provides that the Republic of South Africa is one, sovereign, democratic state founded on supremacy of the constitution and rule of law. In terms of section 2 embedding constitutional supremacy, the rules and principles of the Constitution are binding on all branches of the state and have priority over any other rules made by the executive, the legislatures or the courts. Thus, any law or conduct that is not in accordance with the constitution, either for procedural or substantive reasons, will therefore not have the force of law.

⁹² Preamble to the Constitution of the Republic of South Africa, 1996.

The South African Bill of Rights epitomise a post liberal constitutional democracy founded on the values of human dignity, the advancement of human rights and freedoms within a democratic state.⁹³ What is unique about the South African Bill of Rights is that it was drafted in such a way so as to render the rights enshrined in the constitution capable of being given concrete effect, through judicial enforcement.⁹⁴ The Bill of rights is unique in the sense that it includes economic and social rights by imposing an obligations on the state and its functionaries, to establish effective measures which will give effect to progressive realisation of such rights.

The commitment to transformation of society and social justice in the new constitutional democracy, were ideals that are embedded in the Constitution once they were guaranteed in a cluster of provisions in the Bill of Rights. In *Soobramoney*,⁹⁵ the Constitutional Court expressed its sentiment that ‘transformation’ and ‘social justice’, were commitments for which the Constitution aspired to achieve in transforming our society into one which human dignity, freedom and equality were realised. This commitment was construed in *Grootboom*,⁹⁶ that the state is obliged to achieve the intended result of the constitutional directive in section 26. The legislative measures will invariably have to be supported by appropriate, well directed policies and programmes that must be reasonable in both their conception and their implementation. The formulation of a programme is only the first stage in meeting the state’s obligation. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state’s obligations.

It is important to note that the country must rectify its failures to address inequalities concerning the land question, because failure to rectify these inequalities by returning and distributing the land is like a sea of oil waiting for a match or a taboo to the people of South Africa. The South African Constitutional framework was designed to reinstate the developmental and fundamental rights of the people of South Africa. One of the most important and significant aspects of the new Constitution is the granting of property rights to the people of these country, especially section 25 of the constitution.

⁹³ Van der Walt, A. 2005. Constitutional Property Law, at p.402

⁹⁴ *Ibid.*

⁹⁵ *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC) at 770I-771A.

⁹⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

It has created a conducive environment for the government or state to take reasonable and other legislative measures to foster conditions for expropriation of land equitably.

3.3 The Constitution, and Social and Economic Development

The rise of democracy and freedom followed the fall of apartheid, which was planned by liberation movements and the apartheid regime. The post-1994 dispensation inherited the many laws and problems created under apartheid. It is understood that compromises were made because the collective negotiations between liberation groups and the old apartheid regime sought to reform the old property regime in order to institutionalise a constitutional order predicated on the ethos of transformative constitutionalism. The motivation behind this was to ensure that they transform all the laws that exclude and prevent the black majority from participating in the mainstream of the economy. regime.

The new South African Constitution specifically promotes “an open and democratic society” with the economic goals of “improving the quality of life of each person and free them as potential of each person”.⁹⁷ The South African Constitutional Committee determined that improving each individual’s quality of life was directly tied to providing equal access to land, natural resources, land reform, and adequate housing.⁹⁸ Therefore those rights are amongst others which are expressly granted in the South African Constitution.

The tension arising from the realities of land ownership in post-apartheid South Africa is that the economic power and the land are still in the hands of a few, and still in accordance with the racial divisions of the past. These economic inequalities between black majority and white minority derive their existence from the apartheid government which did systematic transfer of land from black South Africans to white South Africans over the course of a century. Today, despite innovative land reform programs, the current government had limited success of returning and redistributing land. Consequently, the land ownership in South Africa continues to be a highly emotional and contested issue with whites maintaining huge ownership of land. The Constitutional negotiations sought to establish a more just political, social and legal

⁹⁷ Preamble of the Constitution

⁹⁸ Sasha, F.B. (2015). South Africa’s Land Restitution Challenge: Mining Alternatives from Evolving Mineral Taxation Policies. *Cornell International Law Journal*, 48, p.220

system which reformed land and property distributions in order to facilitate for greater access to land, through the implementation of land reform policies such as expropriation. The negotiations further sought to arrange the new constitutional property regime in such a way as to provide the state with enough institutional mechanisms to alleviate poverty, by reversing the effects of the unjust system of land distribution and land ownership rights.

The initial stage of negotiation was to draft the Interim Constitution,⁹⁹ which was followed by the final Constitution¹⁰⁰ which was drafted by the democratically constituted Constitutional Assembly. Part of the intentions was to deal with property rights in relation to the question of land and the commitment to transformative constitutionalism. The ANC presented draft land and property clause in order to address the triple challenges facing the democratic government, but multiparty negotiating members sought a different vision on property laws by formulating the property clause in the interim constitution questioning the economic feasibility of expropriation land reform.

3.7 The Constitution and Land Expropriation

According to Judge Yacoob, the rights to expropriate land without compensation must be understood from their historical and social origin.¹⁰¹ This was informed by the fact that there is no way in which one can give clarity on land expropriation without compensation without providing an extensive historic political background of the previous discriminatory laws and practices of land. The Constitution also plays a leading and significant role in the transformation process of land reform. The reasons are based on section 25(1) of the Constitution which state unambiguously that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.¹⁰² This was the beginning of the problem of land reform project in South Africa and the reason why the land must be fast tracked for the benefit of the majority and to balance the economy. Therefore, to respond to the critical question of land expropriation without compensation in South Africa is to get a better understanding on why the land was expropriated from the native community, why the

⁹⁹ Act 200 of 1993.

¹⁰⁰ Constitution, 1996.

¹⁰¹ See *Grootboom*, 2001.

¹⁰² Section 25 (1) of the Constitution, 1996.

land should be expropriated without compensation and which land should be expropriated without compensation?

3.7.1 Why Land was Expropriated from Native Community?

South Africa has an extensive history of colonisation. During the colonial period, the colonialists invaded the country and often stripped the rightful owners of land and maintained ownership of the land through force.¹⁰³ In 1652, upon the arrival of the Dutch colonists, the formation of a new land ownership system which required formal registration of property and systems was formed and did not acknowledge communal land systems, and effectively excluded blacks from property ownership. This is a clear evident of land dispossessions which caused abhorrent inequalities. However, one need to know that South Africans used a collective system to prioritise communal land use and community interests which was foreign to colonial masters. Individuals native who had interest were allocated land depending on conditions (cultivation or inhabited) stated for the use of land and they were inheritable in perpetuity. Our communal system was transparent of the basis that land could only be distributed on the need and use or even status. The consultation and usages of and were determined by traditional authorities. The political genocide of land dispossession continued until 1913.¹⁰⁴

In 1913, the Native Land Act was introduced to officially deprive black South Africans of land ownership.¹⁰⁵ Indigenous black people who owned land became tenants and ownership of land in tribal arrangement became uncertain.¹⁰⁶ The dramatic and structural patterns which colonial masters created was to redesign black homelands to remote areas with few natural resources. This is the fundamental reason why the native community were expropriated land without compensation, and in the extreme, in a criminal way. When the Group Areas Act of 1950 was established, the colonial government limited the rights of black majority to access urban land areas. They practically, systematically and deliberately prevented blacks from living or even working in urban areas. At the height of these injustices came the Prevention of Illegal Squatters Act of 1951, which also forced the relocation of blacks who were squatting on white

¹⁰³ See Bernadette Atuahene, *Property Rights & the Demands of Transformation*, 31.

¹⁰⁴ The Native Land Act of 1913.

¹⁰⁵ Ibid.

¹⁰⁶ See Anton D. Lowenburg & William H. Kaempter, (1998). *The Origins and Demise of South African Apartheid: A Public Choice Analysis* 34.

public or private property. The Illegal Squatters Act also applied to those that were renting land from white property, even allowing white property owners to demolish their renters' homes. Those black renters were then required to move into squatter villages. The last political genocide for economic opportunity was passing of section 10 of the Native Laws Amendment Act of 1952 by the legislator to limit the movement of blacks into urban areas.¹⁰⁷ These act literally restricted majority of blacks to live in urban areas and even to find employment.¹⁰⁸

The legacy of colonial conquest and apartheid worked effectively to restructure ownership and control of resources in South Africa.¹⁰⁹ That restructuring was to enact legislative measures which will restrict black majority access, control and ownership of the country's land.¹¹⁰ Only thirteen (13) per cent (%) of the land out of eighty (80) per cent (%) of the black South African population are entitled to access, control and own.¹¹¹ These legislative measures were entrenched in deep disparities between the minority white population who owned and controlled the land by acquiring and sustaining wealth at the expense of the black majority.¹¹² Our people whom majority are blacks were subjected to large scale poverty due to landlessness.¹¹³ The project of acquisition of land from the black majority advanced by the colonial regime, systematically institutionalised an informal system of spatial separation based on race.¹¹⁴ The purpose of settlers' program was to swiftly acquire land in order to develop a land regime which will secure economic domination over the land. These acquisitions of land were made possible by the promulgation of a long line of racially motivated land laws.¹¹⁵ The respective land laws reinforced by the colonialists to access and control of land as a resource, in order to institutionalise their vexatious draconian rules in terms of property law.¹¹⁶

3.8 The Constitutional provisions on Land Reform

¹⁰⁷ Native Laws Amendment Act of 1952.

¹⁰⁸ Ibid.

¹⁰⁹ Mostert, H. (2002). Land restitution, social justice and development in South Africa. *South African Law Journal* at 403.

¹¹⁰ Ibid.

¹¹¹ Bennett, T.W., (1996). 'African land -A history of dispossession' in Reinhard Zimmermann & Daniel Visser (eds) Southern Cross: Civil Law and Common Law in South Africa at p.65.

¹¹² Ibid.

¹¹³ Mostert, H. (supra) at 401.

¹¹⁴ Ibid.

¹¹⁵ The Black Land Act 27 of 1913.

¹¹⁶ Van der Walt, A.J. (supra) at 261-263.

The constitutional provisions are important practical steps setting out the nature and scope of the state's duty to promote and fulfil the underlying transformative ethos embedded in section 25, through the implementation of land reform policies and programmes. When the Constitution came into effect, it made provisions for a 'property and land rights clause' against improper state interference, but also made explicit provision for land reform, including provision for regulatory deprivation and for the expropriation of property for the sake of land reform.

Section 25 reads as follows:

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*
- (2) Property may be expropriated only in terms of law of general application-*
 - (a) For a public purpose or in the public interest; and*
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.*
- (2) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including-*
 - (a) The current use of the property;*
 - (b) The history of the acquisition and use of the property;*
 - (c) The market value of the property;*
 - (d) The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*
 - (e) The purpose of the expropriation.*
- (4) For the purposes of this section-*
 - (a) The public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to land on all South Africa's natural resources: and*
 - (b) Property is not limited to land.*
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.*
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.*

(7) A person or community dispossessed of property after 19 June 19213 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.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1). (9) Parliament must enact the legislation referred to in subsection (6).

Section 7(2) of the Constitution also plays a crucial role in which the interpretation and enforcement of the underlying transformative values and principles embedded in section 25 can be utilised to ascertain whether the state has truly acted in accordance with the Constitution's transformative agenda of transforming the prevailing land process. The constitutional basis for the land restitution programme is found in section 25(7) of the Constitution, 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'.

Similarly, section 25(5) of the Constitution introduced the land redistribution programme, in terms of which the state is under the constitutional duty to 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". Section 25(6) addresses security of tenure by stating 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 by an Act of Parliament, either to tenure which is legally secure or to comparable redress'.

However, section 25(4), section 25(5) and section 25(8) make provision to impose positive duties on the state to provide for equitable access to and ownership of land through the implementation of policies centred on the expropriation and redistribution of land.¹¹⁷

Section 7(2) of the Constitution sets out the state's primary role of creating an environment through which persons are capable of not only accessing a right, as entrenched in the constitution, but advancing the realisation of that right in order to give effect to the meaningful transformative ethos of the Constitution. This commitment

¹¹⁷ Section 25(5)-(8) of the Constitution of the Republic of South Africa, 1996.

endeavour to ensure that the state remains committed to the long-term project of the constitutional enactment of legislation and policies which not only establish a more just social order, but progressively 'shift the South African land regime from the past injustices to conform with transformative constitutionalism ethos.'¹¹⁸

This section gives practical meaning and purpose because it indicates the scope and nature of the entitlements of section 25 (4) to 25(8) as well as outlining when and how the right can be used to advance a claim.¹¹⁹ The practical implications of this is that the constitutional long-term projects of constitutional interpretation and enforcement are enhanced and strengthened by the judiciary. The judiciary must determine whether the state has acted in accordance with Section 7(2) which impose positive duty on the state to conform with Constitution's transformative ethos. This section applies to all organs of state, that is the executive and the legislature within the national, provincial and local spheres of government, and these organs are required by the Constitution to engage fully in their positive duties to fulfil the right as representative of the Constitution's underlying transformative ethos. The branches, as components of the state, must 'adopt appropriate legislation, executive policy, and other measures' in order to ensure that those who are currently unable to enjoy access to equitable land are able to do so, as a result of the implementation of effective land reform policies and programmes.¹²⁰

As a result of this constitutional obligation, it is imperative to reflect on the legislative and policy frameworks on the land reform in South Africa.

3.9 The Legislative and Policy Framework on Land Reform

It is significant to provide an extensive historical background to the discriminatory laws and practices related to land which gave rise to the need for land reform. A very brief overview will be provided of the main legislative framework for the policies formulated by the post-1994 government to address the issue of land reform. It was and still the believe of the downtrodden masses of our people to believe that the land shall be distributed equally amongst those who lives in it as enshrined in the freedom charter.¹²¹

¹¹⁸ Mostert, H. (2002). "Land restitution, social justice and development in South Africa. *South African Law Journal* at p.402.

¹¹⁹ Brand, D. & Heyns, C. (1998). Introduction to socio economic rights in the South African Constitution. *Law, Democracy and Development* 153 at p.9.

¹²⁰ Ibid at p.10.

¹²¹ The *Freedom Charter*, 1955. Kliptown, 26 June.

3.9.1 The Freedom Charter

During Colonial era, political activist mobilised the people of South Africa to nourish the idea of freedom and democracy and to fight colonial and apartheid project. They gathered and formulate the '*Freedom Charter*' in Kliptown, near Soweto on the 25th and 26th June 1955. This Charter entails the developmental and fundamental rights of the people of South Africa and continues to be an inspirational and guiding principles for the people of this country. It clearly contains principles which are relevant and subject matter for expropriation of land without compensation. The principles are as follows: -

- The people shall govern.
- All National Groups Shall have equal rights.
- The Land shall be shared amongst those who work it.
- All Shall be equal before the Law.
- All Shall enjoy human rights.

This are the principles that guides the people of South Africa about the kind of democracy they were dreaming for the past centuries. However, there were specific legislative process that were undertaken by the colonial and apartheid government to undermine the people of South Africa and exclude them from the economic activities which include the land.

3.9.2 The Abolition of Racially Based Land Measures Act 108 of 1991

The unbanning of political structures and the release of political prisoners had great impact on the measures to end apartheid project and its laws. Over the centuries, the Land act was preceded by the Abolition of Racially Based Land Measures Act¹²² which was promulgated to bring an end to the Land Acts and it came into operation on 30 June 1991.¹²³ Accordingly the long title of the Act, it was promulgated to 'repeal or amend certain laws so as to abolish certain restrictions based on race or membership of a specific population group on the acquisition and utilization of rights to land; to

¹²² Act 108 of 1991.

¹²³ Du Plessis and Pienaar, 1991 *SA Public Law* 115-125.

provide for the rationalization or phasing out of certain racially based institutions and statutory and regulatory systems repealed the majority of discriminatory land laws ...'

In terms of this Act, all apartheid laws and their amendments were abolished with immediate effect to enabling all South Africans, regardless of race, to occupy and own land in any part of the country without fear of prosecution. It was for the first time in almost 80 years that blacks were no longer precluded from owning land. This signalled an end to an unfortunate chapter of Colonial-apartheid enterprise in South Africa's history.

3.9.3 The Reconstruction and Development Programme (RDP)

Immediately after the strategic defeat of the colonial and apartheid enterprise in 1994, the first democratically elected government led by the ANC inherited serious and worse triple challenges created by the apartheid projects. These challenges are characterised by extreme levels of poverty, a worsening high unemployment rate problem and unacceptable and undesirable inequalities in levels of income.¹²⁴

In 1995 the Reconstruction and Development Programme (RDP)¹²⁵ introduced an integrated socio-economic policy framework¹²⁶ aimed at eradicating the legacies of the past through the redress of inequalities and building a vibrant and democratic South Africa. Turok¹²⁷ characterised the RDP as “the centrepiece of the government's efforts to promote socio-economic reform and restructuring and a bold umbrella-plan that aims to bring about all-round socio-economic improvement that is focused to make the process thorough and participatory with an intention to mobilizing the resources of civil society for support”.

The reasons for the introduction of the RDP was the fact that South Africa was identified as a country with one of the highest income distribution inequalities and consequently an extremely high incidence of poverty.¹²⁸ The RDP recognised the fact that poverty was the single worst burden on the country and it affect millions of our

¹²⁴ Aliber *Poverty-eradication* 17.

¹²⁵ African National Congress. *The Reconstruction and Development Programme: a Policy Framework* Umanyano Publications (1994)

¹²⁶ Turok 1995 *Int J Urban Reg Res* p.305

¹²⁷ Ibid. Turok. 1995.

¹²⁸ *White Paper on Reconstruction and Development* in Gen N 1954 in GG 16085 of 23 November 1994 (hereinafter referred to as the *RDP White Paper*).

people, especially those living in rural areas.¹²⁹ In order to address poverty and extreme deprivation, the programme identified various aspects that need to be addressed especially the provision of land and housing, as well as access to safe water and sanitation.¹³⁰ This program recognises the fact that the basic needs of people had to be met and that human resource development should take place in order to eradicate poverty and ensure that the basic needs of the poor are met.

This program acknowledges that land represent the most basic need for the rural population which resulted from the discriminatory practices of the past regime. To effectively address the issues of inequality, poverty and landlessness caused by the "injustices of forced removals and the historical denial of access to land"¹³¹ the programme identified the need for the establishment of a comprehensive national land reform programme.¹³² The RDP envisaged:¹³³ 'a dramatic land reform programme to transfer land from the inefficient, debt-ridden, ecologically-damaging and white-dominated large farm sector to all those who wish to produce incomes through farming in a more sustainable agricultural system'.

The RDP of the soul expostulates that the land reform program aimed at encouraging the use of land for agricultural purposes and providing productive land to raise income and productivity. The reform programme is based on the redistribution of land to those who need and cannot afford the land. It also provides clarity on the restitution for those who were deprived of their land due to the system of apartheid.¹³⁴ In the light of these inequalities, the RDP identified the main elements of land reform: land redistribution, restitution, and tenure reform.¹³⁵

The aim of the land redistribution programme was to strengthen the property rights of communities already occupying the land and to provide access to land for those previously deprived of the right to be the owners of land. In the context of redistribution, the RDP set the ambitious target of transferring 30% of all white-owned agricultural land to black South Africans by 2001.¹³⁶ The aim of land restitution was to restore land to South Africans dispossessed by discriminatory legislation and practices

¹²⁹ ANC *Basic Guide* para 2.2.1.

¹³⁰ *RDP White Paper*.

¹³¹ ANC *Basic Guide* para 2.4.2.

¹³² Boyle 2001 *II&CLR* 677.

¹³³ ANC *Basic Guide* para 4.3.8.

¹³⁴ ANC *Basic Guide* para 2.4.5.

¹³⁵ Aliber and Mokoena "Land Question" 330.

¹³⁶ ANC *Basic Guide* para 2.4.14.

since 1913.¹³⁷ In order to achieve these aims the government needed to provide substantial funding and to create an infrastructure that supported land development.¹³⁸ As a result of the discriminatory practices of the past, the majority of South Africans had been dispossessed of their land and in instances forcibly removed and relocated.¹³⁹ The RDP recognises the need to restore land to the dispossessed through implementing a system of land restitution.

The central objective of the entire RDP was to provide opportunities for people to develop themselves in order not only to improve the quality of their own lives, but also to contribute to the upliftment of their communities. The programme acknowledged the fact that although the ultimate responsibility for ensuring human resource development lay with government, civil society (by implication, the private sector) should be encouraged to actively take part in the provision of learning opportunities. It is in this context that the fight against poverty is central to the development of human resources.

The RDP represent a very important first step in post-apartheid South Africa transition to initiate change and to address the injustices of the past. The programme identified the eradication of poverty as its most important challenge. To eradicate poverty, the basic needs of those disadvantaged by apartheid needed to be addressed. These needs were to be addressed inter alia through programmes of land reform and land redistribution, as well as the development of human resources.

The South African government has embarked on an ambitious land reform program which was aimed at redistributing 30% of white-owned commercial agricultural land by 2014 to black South Africans and settling all claims for redistribution by 2005. To date, all land claims have still not been settled and less than 10% of the land redistribution target has been achieved by the state. However, this figure does not take into consideration the land bought or acquired by means of private transactions. The RDP was also facilitated by the interim constitution¹⁴⁰ which gave birth to the 1996 Constitution.

¹³⁷ Hall 2004 *Canadian Journal of African Studies* 656.

¹³⁸ Ibid

¹³⁹ Forced removals were to a large extent carried out in terms of the *Prevention of Illegal Squatting Act* 52 of 1951. The Act was aimed at preventing illegal squatting and made provision for the removal of persons who transgressed the Act and certain instances the demolition of structures erected in contravention of the Act.

¹⁴⁰ *Constitution of the Republic of South Africa*, Act 200 of 1993.

3.9.4 The White Paper on Land Policy, 1997

The White Paper was responsible for establishing the overall land reform policy and it addressed *inter alia* the injustices caused by racially-based land dispossessions, unequal land ownership, and the need for the sustainable use of land.¹⁴¹ In this regard the White Paper¹⁴² acknowledged that forced removals in support of racial segregation have caused enormous suffering and hardship in South Africa and no settlement of land issues can be reached without addressing such historical injustices.

Based on this reality, the aim of the White Paper was meant to provide an overall platform for land reform consisting of three principal components: restitution, redistribution and tenure reform - the same three pillars as identified in the RDP.¹⁴³ Government committed itself to a land reform programme where, with specific reference to redistribution, it would not intervene in the land market. Rather than getting directly involved in the purchase of land for redistribution, the government undertook to adhere to the principle of "willing buyer, willing seller", where government would provide resources to finance market-led redistribution transactions without government becoming the owner of the land.¹⁴⁴ However, recently and even before 2017 the "willing buyer, willing seller" system is identified as one of the principal obstacles against redistribution because it did not yield positive results and the people are still landless. This is the reason why the constitution must be amended to allow expropriation without compensation informed by the history of land and policies developed to address this developmental human rights challenge. The most interesting part of the White Paper is that acknowledges that the state has limited capacity in terms of fiscal resources to finance the land reform programme because the budget conflict with other socio-economic priorities.¹⁴⁵

Informed by the above factual issues, the White Paper confirmed the three pillars of the land reform programme. With reference to redistribution, the White Paper stated that "the purpose of the land redistribution programme is to provide the poor with access to land for residential and productive uses, in order to improve their income

¹⁴¹ Department of Land Affairs *White Paper* para 2.1.

¹⁴² Department of Land Affairs *White Paper* para 3.17.

¹⁴³ See Mostert, Pienaar and Van Wyk "Land" 117.

¹⁴⁴ Lahiff. 2007. *Third World Quarterly* 1577.

¹⁴⁵ Department of Land Affairs *White Paper* para 3.2.

and quality of life”.¹⁴⁶ The fundamental goal of the restitution programme, on the other hand, is described as “to restore land and provide other restitutionary remedies to people dispossessed by racially discriminatory legislation and price, in such a way as to provide support to the vital process of reconciliation, reconstruction and development”.¹⁴⁷ The White Paper reaffirms the fact that the policy and procedure for land claims are based on the provisions of section 25(4) of the Constitution and the Restitution of Land Act¹⁴⁸ and details four of its elements: qualification criteria,¹⁴⁹ forms of restitution,¹⁵⁰ compensation,¹⁵¹ and urban claims.¹⁵² However, the land reform aims to contribute to economic development by providing beneficiaries with the opportunity to engage in productive land use and by increasing employment opportunities through encouraging greater investment.

This White Paper¹⁵³ acknowledges that without a programme of state support and targeted interventions, the land reform will not be possible and that “it is a long-term success and sustainability of the land reform programme is to a large extent dependent on the ability of potential beneficiaries to be able to access the programme easily, and to have a clear understanding of what assistance they can get from government”. Accordingly, the White Paper on South African Land Policy of April 1997 the aim of the South African Government ‘s land reform policy is four-fold; To redress the injustices of apartheid; to foster national reconciliation and stability; to underpin economic growth; and to improve household welfare and alleviate poverty.¹⁵⁴

The government of South Africa has demonstrated its commitment to address the challenges of racial inequalities and injustices of the past historic discriminations by initiating a comprehensive land reform program with strong constitutional basis. However, it must be noted that the land reform program is based on the three pillars namely: Land restitution, Land redistribution, Land tenure security and other policies developed are government policy programs which moves on a snail pace even to date.

¹⁴⁶ Ibid at p3.3

¹⁴⁷ Ibid

¹⁴⁸ *Restitution of Land Rights Act 22 of 1994*. For further reference to this Act, see para 2.4.1.

¹⁴⁹ Department of Land Affairs *White Paper* para 4.14.2.

¹⁵⁰ Ibid at para 4.14.4.

¹⁵¹ Ibid at para 4.14.5. The *White Paper* addresses the payment of compensation to claimants and compensation to land owners.

¹⁵² Ibid at para 4.14.6.

¹⁵³ Ibid at para 6.7.

¹⁵⁴ Department of Land Affairs *White Paper on South African Land Policy* Government Printer (1997).

3.9.5 Land Reform and Land Restitution

The Parliament passed the Restitution of Land Rights Act, No 22 of 1994, to restore or compensate people for land rights they lost because of racially discriminatory laws passed since 19 June 1913. The Commission on Restitution of Land Rights established in terms of the Restitution of Land Rights Act, 1994 (Act 22 of 1994), will continue to provide redress to victims of land rights dispossessions as a result of discriminatory laws and practices since June 1913. Restitution is rights-based, and it can mean restoring the land itself or providing alternative land or financial compensation or other relief.

3.9.6 Land Redistribution

The purpose of the Land Redistribution Programme is to provide the poor with access to land for residential and productive use to improve their livelihoods. Land Redistribution is not rights-based and people who need land must apply for government grants. These are used to acquire farms offered for sale on the market.

3.6.7 Land and Agrarian Reform Project (LARP)

The Land and Agrarian Reform Project (LARP) provides a new Framework for delivery and collaboration on land reform and agricultural support to accelerate the rate and sustainability of transformation through aligned and joint action by all involved stakeholders. It creates a delivery paradigm for agricultural and other support services based on the concept of 'One-Stop Shop' service centres located close to farming and rural beneficiaries.

3.6.11 Settlement and Implementation Support (SIS) Strategy

Settlement and Implementation Support (SIS) Strategy presents a comprehensive strategy for settlement and implementation support for land and agrarian reform in South Africa.

3.6.9 The Proactive Land Acquisition Strategy (PLAS)

The Proactive Land Acquisition Strategy (PLAS) was adopted as official policy in 2006, and saw the state becoming the 'willing buyer' of land for redistribution, by actively using market opportunities where they arise and, in some instances, approaching landowners to sell.

PLAS is therefore a State driven programme where the State pro-actively targets land and matches this with the demand or need for land. PLAS follows an integrated approach and targets land in nodal areas and in identified agricultural corridors and other areas of high agricultural potential. The group (beneficiaries) targeted by PLAS for redistribution purposes is individual emergent or commercial farmers. PLAS does currently not target communities or groups of people (Implementation Plan for the Proactive Land Acquisition Strategy, May 2006).

3.6.10 Land Tenure Reform

Land Tenure Reform refers to the protection of people who live on rural or peri-urban land with the permission of the owner or person in charge of that land. This is achieved through the Extension of Security of Tenure Act, No 62 Of 1997. This Act gives them a secure legal right to live on and use the land.

3.7 Conclusion

This chapter has demonstrated that section 25 of the Constitution has entrenched the right to ownership of property, and that land reform in all its meanings finds expression from this provision. Therefore, the Constitution does not only secure existing property holdings against improper state interference but also make explicit provision for land reform including provision for regulating deprivation and for expropriation for the sake of land reform. Section 25 of the Constitution further creates a sufficient framework in which government is capable of invoking its powers of expropriation to promote and facilitate effective land reform, for the purposes of advancing land redistribution. However, it is observed that the current state of land reform and the debate surrounding the lack of transformation in South Africa prompt us to believe that the state's failure to progressively address the land reform programme is solely as a result

of varied interpretations of section 25, which is hinders the prospects of realising the objectives of numerous policies and legislative initiatives on land reform. It is clear that section 25 does not prohibit expropriation of land. The state inability to fully utilise section 25 obscures the constitutional mandate for equitable distribution of land. Although not necessary, the Constitution may be amended to create the necessary conditions for expropriation without compensation and broader socio-economic development for it serves the public good.

Chapter 4: A Comparative study

4.1 Introduction

For decades, the issue of land reform has been part and parcel of critical debates and intense scrutiny, and indeed it has been at the center of many liberation struggles across many African states. It has also been a subject of thorough debates across the whole region of Southern African Development Community (SADC) and beyond. Therefore, the purpose of this chapter is to compare the Zimbabwean perspective of land reform with that of South Africa, with the fundamental purpose of understanding how the two countries devised legislative and policy initiatives to deal with the issue of land reform. In the main, the chapter explains how the land reform program was carried out in Zimbabwe, and how that perspectives could influence the present processes in South Africa, in an attempt to see how best to respond to notable challenges facing the country today. It endeavours to explain the logic behind the land reform by ascertaining the legality of expropriation without compensation. It also notes the similarities that are existing between the two countries and the systems they used to advance the land reform.

4.2 Background and historical context land reform in Zimbabwe

Zimbabwe's Land Reform programme has been at the center of discussions for the better part the country's post-independence developments. Whereas the Zimbabwean government has been lauded for taking a bold stance to expropriate land without compensation, it has also been a subject of serious condemnation by various international organisations and states. It is worth appreciating that the dynamics of land reform in Zimbabwe are rooted and shaped by historical realities and it is for that reason that there is a need to understand the context of Zimbabwe's land struggles as compared to South Africa.

It has been said that King Lobengula was bribed to signed the Lippert concession in 1891, which the white settler to dispossess land from Native Zimbabweans.¹⁵⁵ Cecil Rhodes later bought the concession which was signed by the King.¹⁵⁶ The concession

¹⁵⁵ Rifkind, M. 1968. "The Politics of Land in Rhodesia", p.18

¹⁵⁶ Ibid

was used for appropriation of land. Some years later, the British government evoked an order by recommending Native Reserves for Native Zimbabweans.¹⁵⁷ That Native Reserves was established in dry and remote areas which later became communal land. The Zimbabweans in their majority lives in rural areas and it is not surprising why the land became a contested issue because farming was dominated by white settlers who plays a key and leading role in the national economy.¹⁵⁸ This is what prompted indigenous people to fight for their land against white settlers because they believed that the land belongs to them. Cecil Rhodes captured Zimbabwe by identifying potential land for agriculture and illegally evict indigenous occupants in favour of his victorious soldiers. Those soldiers benefited large tracts over the black majority. The struggle for land was for the purpose of rewarding the military, production and productivity, and to reduce poverty and create jobs.¹⁵⁹

The then Prime Minister of Southern Rhodesia, Godfrey Huggins said ‘the ultimate possessor of land will be the people who can make the best use of it.’¹⁶⁰ This means that only those who had advantage and knowledge of commercial farming will be granted the land for economic reasons. Such a responsible economic statement has disadvantaged our people who use to feed their family in terms of agricultural land. He cemented on the establishment of Apportionment of Land Act of 1930 which explicitly defined European and Native land areas which was a definite political and historic milestone in the history of southern Rhodesia.¹⁶¹

Over the past hundred years, when the British government came to the Southern Africa known as Zimbabwe, it was an era which the indigenous people of Zimbabwe took an unconscious decision by giving white settlers their right to access and own land. Despite several concessions which led to the land grab by white settlers, and over time, they urged majority of black people to reside at the Native Land. This marked the beginning of division of the African Land because the Colonial Conquest through land grab and livestock seizure brought serious resistance from the indigenous people because that necessitate a war against white settlers. This explosion of the land question by black people called “*The First Chimurenga*” happened around 1893 and it was bloodily suppressed by leaders and instigators who advocated for it. Within a short

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

period of time the land became largely and vastly disproportionate in 1914.¹⁶² It was approximately twenty-five (25) white settlers, who constituted three (3%) percent of population, controlling seventy-five percent (75%), and twenty-three (23%) percent of land designed for almost one million people of Rhodesians who were restricted.¹⁶³

In 1960, various pieces of legislation were introduced and passed to protect and strengthen a huge privately-owned farm of settlers which were largely situated in high rainfall areas. The black population grown and were relocated to poor soils in the communal areas. Black people also became dissatisfied and liberation movement were challenged because of the then status quo of colonial subjugations. This was the “*Second Chimurenga*” which was an armed struggle because people redirected the battles from townships to villages and communal areas involving rural masses in the National Uprising. The Second Chimurenga culminated in the death of Rhodesia and the birth of the Republic of Zimbabwe in 1980. This was after a protracted negotiation between the conservatives and the liberation movements in Lancaster House Agreement in 1979 which was finally reached.

4.2.1 The Lancaster House Conference

When Zimbabwe achieved independence in 1980, it also inherited highly skewed patterns of land ownership and distribution, because most people farmed in lower rainfall and less fertile areas, whereas the small minority of white people owned large scale of commercial farms in fertile areas. This necessitated concerted effort to complete the whole liberation struggle. The dual structure of land ownership was a result of various piece of legislation which were introduced during colonial era and which resulted to mass expropriation of prime agricultural land created by colonial settlers and subsequently led to the marginalisation of black people into reserves knows as communal land. A conference on land was convened at Lancaster, and resulted in the Lancaster House Agreement, which paved the way for compromises because the clauses of acquisition of land would be based on market value approach on a willing buyer-willing seller basis. The British government, which was the colonial power at the time, was given an obligation to fund half of the cost of land reform. This pact or

¹⁶² Sadomba, Z. W. 2011. War Veterans in Zimbabwe’s Revolution, p.47.

¹⁶³ Ibid.

agreement was too restrictive in that it sought to preserve ownership of the land to colonial masters. However, there were constitutional guarantees that white land ownership continues for a period of (10) ten years or (100) hundred years. Observantly, these constitutional provisions slowed down the land reform programme, especially in the first ten years of independence, which compromised the character of the new Zimbabwean dispensation. This is informed by the fact that the Constitution was designed to maintain the previous structure of commercial.

The land reform process in Zimbabwe was divided into three phases or periods. The first phase or period was between 1980 and 1992. The second phase or period was between 1992 and 1999 and the last period was 2000 and 2002.¹⁶⁴

4.2.2 Phases of Zimbabwe's Land Reform and Redistribution

Immediately after gaining independence, the government of Zimbabwe set out to acquire huge land for resettlement programme as one of its land reform programs. However, due to lack of planning it failed to acquire the land huge as planned because its redistribution programme was based on willing buyer-willing seller principles which was a market mechanism of voluntary sales by owners and voluntary purchase by government.¹⁶⁵ This principle gave advantage to white settlers who will only sell land of poor quality and which has been abandoned during the liberation struggle and thereby refusing the natives an opportunity to establish a successful economic interest.¹⁶⁶

What differentiates this phase of distribution from others is that the level of land distribution was peaceful and orderly in character. The process was transparent, and the resettlement was carried out under a serious and intense political program with a limited scope of planning and wide range of infrastructure and supportive systems that will support the community. Communities were assigned to arable and residential lands on random basis utilising the primary areas made available from amalgamation of former commercial farms.¹⁶⁷ The government failed to put in place systems that will distribute the land in the first decade of its independence because the land reform

¹⁶⁴ Moyo, S. and Yeros, P. 2005. Land Occupations and Land Reform in Zimbabwe: Towards the National Democratic Revolution' in Moyo and Yeros (eds) *Reclaiming the Land: The resurgence of rural movements in Africa, Asia and Latin America*, at p.182.

¹⁶⁵ Thomas, H. 2003. Land reform in Zimbabwe. *Third World Quarterly*, 691,712.

¹⁶⁶ Ibid.

¹⁶⁷ Moyo and Yeros, (supra) at p.17.

program was market driven and incapable of addressing the land question. The slow and incremental process of land reform imposed serious fiscal demands of the government of Zimbabwe and has created bitter diplomatic conflict between the Zimbabwean government and the United Kingdom.¹⁶⁸

The Second Phase of land redistribution was characterised by the beginning of an official challenge to the market method and the beginning of a real threat of compulsory acquisition. Towards the end of the first decade, the ZANU-PF leadership and black elite who were connected took advantage of unclear guidelines related to the land reform for distribution. Due to this trouble signs, the United Kingdom suspended disbursement of the first phase of land reform programme because they describe it as a lost decade of Zimbabwean program. The reason for slowdown of land reform was that the land was acquired through 'willing seller-willing buyer' approach which has been too much expensive for the government to purchase.¹⁶⁹

Immediately after the Lancaster Housing agreement, the government has amended its constitution to allow compulsory acquisition of land with "little compensation and limited right of appeal to the courts".¹⁷⁰ The amendment did not implement such acquisition or replace the market method but pressured to ensure that the willing seller conditions persisted to facilitate purchase of farms. This was a dynamical phase of land reform programme in Zimbabwe because prices of were escalating and distribution of little land occurred. The government was lessened after assuring military war veterans that resettlement would be speeded up to ensure a successful land reform project. However, immediately after the drafting of the constitution in February 2000 a compulsory acquisition clause was included to reject the national referendum which angered the war veterans.

The Third or Last Phase of land redistribution, was a period of radical transformation or compulsory acquisition because the market methods were completely and resolutely abandoned. In May 2000, the government changed the law for confiscation of the land so that it fast-tracks its land reform program. The main aim of the fast track program was to take land from the rich white commercial farmers and distribute it to the poor and middle-income landless black Zimbabweans.¹⁷¹ The process

¹⁶⁸ Ibid

¹⁶⁹ Moyo and Yeros (note 117 above).

¹⁷⁰ Thomas (note 118 above) at 699.

¹⁷¹ 'Fast track land reform in Zimbabwe', available at <http://www.hrw.org/reports/2002/zimbabwe/ZimLand0302.htm> (accessed on 22/12/2018).

of allocating plots to those who want the land has dramatically discriminated against those who are believed to have joined or support the oppositions or opposing political organisation. to poor and middle-income landless black Zimbabweans. The application process of land redistribution requires a demonstration that citizens are patriotic to the ruling party.

In this period, the process of fast-tracking the land for resettlement was carried out even when people allocated plots on commercial farms were given the land despite their little security of tenure. They were vulnerable to future partisan political processes or eviction on political grounds and further impoverished. It is a fact that the fast track program violated the rights to equal protection of the law, non-discrimination and due necessary process. The violence on land resettlement has created fear and insecurity on the part of white-owned commercial farms in black communal land and threatened to destabilise the entire country.

4.3 Zimbabwe's Constitutional Approaches

The Zimbabwean government was bound by "sunset clauses" in the Lancaster House Agreement that gave special protections to white Zimbabweans for the first ten years of independence. These included provisions that the new government would not engage in any compulsory land acquisition and that when land was acquired the government would "pay promptly adequate compensation" for the property. Land distribution would take place in terms of "willing buyer, willing seller" principle in that every vendor of land was required to obtain from government a "certificate of no present interest in the acquisition of land concerned before going ahead with the sale. The government of Zimbabwe had to amend the provisions of the constitution concerning property rights arising from the constraints of the Lancaster House Agreement in 1990.

The Constitutional provisions relevant to land reform are the results of government actions to deal with unequal and racially skewed distribution of land and wealth which existed over the past 40 years. Despite achieving democracy, the Constitution gave no hope for an immediate ratification of the past legacies since its independence in 1980. The people of Zimbabwe acknowledges colonial injustices and honours the sacrifices of the men and women who fought to overcome the injustices.¹⁷²

¹⁷² Preamble of the Zimbabwean Constitution

Consistent with the democratic principles and the rule of law, the constitution encourages all people who lives in Zimbabwe to look in to the future with a resolve to live in hard work, respect for and enjoyment of the fundamental human rights and freedoms, unity, our natural resources and attain prosperity for all citizens.¹⁷³

Zimbabwe is founded on the grounding values and principles which are unitary, democratic and sovereign republic.¹⁷⁴ The Constitution is its supreme law and any law, practice custom or conduct inconsistent with the Constitution is invalid.¹⁷⁵ The Constitution binds everyone, including juristic persons, the State, all executive, legislative and judicial institutions and all agencies of government.¹⁷⁶ Supremacy of the Constitution, the rule of law, human rights, the nation's religious and cultural diversity, the inherent dignity of every person, equality of all; gender equality, and respect for the liberation struggle.¹⁷⁷ With the lapse of Section 52 of the Constitution in 1990, the Government passed the Constitutional Amendment Act (No. 11), Act No 30 of 1990 and the Constitution Amendment Act (No.12) Act No.4 of 1993 so that the acquiring authority would henceforth be obliged only to give "reasonable notice" of an acquisition, pay "fair compensation within a reasonable time" and apply for an order of confirmation of acquisition within 30 days if such acquisition were contested.¹⁷⁸

Section 16A, which provided, inter alia, that where agricultural land is compulsorily acquired for "the resettlement of people in accordance with a programme of land reform", the obligation to pay compensation for land lay with the United Kingdom as the former colonial power, and the obligation of the Government of Zimbabwe was limited to the payment of compensation only for improvements. According to the amendment, no appeal was possible on the basis that the compensation was not fair.¹⁷⁹ The amendment of Section 16 of the Zimbabwean Constitution¹⁸⁰ and the subsequent Land Acquisition Act of 1992 paved the way for the expropriation of white owned rural land.¹⁸¹ Following the enactment of the new Section 16A of the Constitution, the

¹⁷³ Ibid

¹⁷⁴ Section 1 of the Zimbabwean Constitution

¹⁷⁵ Ibid

¹⁷⁶ Ibid

¹⁷⁷ Ibid

¹⁷⁸ Ruswa, G. 2014. Thesis on "A study on the impact of governance on land reform in Zimbabwe" p.29

¹⁷⁹ Land Reform and Resettlement Programme Phase II, A Policy Framework and Project Document, Harare

¹⁸⁰ Act No 15 of 2000

¹⁸¹ Land Reform and Resettlement Programme Phase II, A Policy Framework and Project Document, Harare

President, acting pursuant to the Presidential Powers (Temporary Measures) Act, issued Statutory Instrument No 148A of 2000, which changed the Land Acquisition Act significantly in a number of ways. It extended the duration of the preliminary notice of acquisition indefinitely. In 2000, the Land Acquisition (Amendment) Act reproduced the Statutory Instrument. In a separate development, Britain started to renege on its commitment to fund land reform. In a communication to the Zimbabwean.

The constitution provides that “every person has a right to acquire, use and dispose of all forms of property but different provisions apply to agricultural land:¹⁸²

- a. Except in respect of agricultural land, every person has a right not to be deprived of their property compulsorily unless;¹⁸³
- b. the deprivation is in terms of a law of general application;¹⁸⁴
- c. the deprivation is necessary in the interests, public defence, public safety and public order, etc;¹⁸⁵
- d. the law requires the acquiring authority to give reasonable notice to acquire the property and to pay fair and adequate compensation;¹⁸⁶
- e. the law entitles the person whose property is acquired to apply to court if the acquisition is contested or for the determination of their interest in the property, the legality of the acquisition and the amount of compensation. ¹⁸⁷
- f. Every person is entitled to property, including land”.¹⁸⁸

The state may acquire agricultural land for settlement and land reorganisation. It will take responsibility of relocating people and no compensation will be payable in respect of the acquisition except for improvements. It also provide that where agricultural land is acquired from an indigenous Zimbabwean, or land protected by bi-lateral agreements, full compensation is paid and no person may contest the acquisition in a court except for compensation for improvements or the acquisition may not be challenged on the ground that it was discriminatory.¹⁸⁹ The Agricultural land that was compulsorily acquired during the land reform programme or was identified for such

¹⁸² Constitution of Zimbabwe

¹⁸³ Ibid.

¹⁸⁴ Ibid

¹⁸⁵ Ibid

¹⁸⁶ Ibid

¹⁸⁷ Ibid

¹⁸⁸ Ibid

¹⁸⁹ Ibid

purpose before the commencement of this Constitution continues to be vested in the State and no compensation, is payable in respect of its acquisition except for improvements effected on it before its acquisition and in these regard compulsory acquisition of agricultural land for resettlement of people the following factors are of ultimate and overriding importance, namely, that the people of Zimbabwe were unjustifiably dispossessed of their land during colonialism. The people of Zimbabwe took up arms in order to regain their land and must be enabled to re-assert their rights and regain ownership of their land.

The former colonial power, not the government of Zimbabwe, has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement of people.

4.4 Zimbabwe's Legislative Framework

The Zimbabwean land question has been critical both pre- and post- independence because of vast disparities between blacks and whites in terms of land ownership. The legal framework is defined by the Constitution as well as number of statutes. The Land Reform process in Zimbabwe was guided by the Land Acquisitions Act,¹⁹⁰ which provides for compulsory acquisition of land by the President for various purposes. The process of land acquisition is elaborated in the government document entitled "Land Reform and Resettlement programme Phase II."¹⁹¹

The legislative framework on Agricultural Land dictates that all citizens must regardless of race, have a right to hold, occupy, use or dispose of agricultural land. the allocation of land must be fair and equitable having regard to the fact that it is a finite resource and part of the common heritage.¹⁹² The allocation of land must be gender balance and diverse community interests. It must also be used must to promote food security and employment subject to conservation for future generations. The right to use and occupy it may not be arbitrarily taken by any person. The current rights of the people of Zimbabwe in relation to agriculture is that the ownership of land by the State to acquire land must be based on compensation and be protected by government.¹⁹³

¹⁹⁰ Land Acquisition Act, Revised Edition 1996 and Amendments of 2000, 2001 and 2002.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Growth with Equity: An Economic Policy Statement. Harare, Zimbabwe: Government Printer, 1981.

The role of land occupation in the land reform process was again exposed because commercial farmers protested the land reform process. The government was given a moratorium to come up with a land reform programme and stop the violent occupations. At the expiry of the moratorium, the government argued that it had enacted a law to protect the occupiers meaning that it had legalised the land reform process. The government thus implicitly acknowledged that the occupations were in fact part of its land reform programme. The institutions for policy formulation were weak, poorly coordinated and did not have staff with appropriate skills to ensure the implementation of numerous multi-sectoral land reform functions. Too many ministries were involved without clear roles and mandates and this led to institutional failure. The fragmentation created problems of synchronisation. It was also observed that in some instances the legitimate institutions were by-passed by powerful politicians resulting in double allocations and general confusion.

The institutions for policy formulation were weak, poorly coordinated and did not have staff with appropriate skills to ensure the implementation of numerous multi-sectoral land reform functions. Too many ministries were involved without clear roles and mandates and this led to institutional failure. The fragmentation created problems of synchronisation. It was also observed that in some instances the legitimate institutions were by-passed by powerful politicians resulting in double allocations and general confusion. Apart from this, the role of war veterans was not clear. War veterans assumed “position of authority” at many occupied farms; base commanders at occupied farms took leading roles in registering occupiers and allocating land part from this, the role of war veterans was not clear. War veterans assumed “position of authority” at many occupied farms; base commanders at occupied farms took leading roles in registering occupiers and allocating land.

4.5 Comparative Analysis

It is discernible from above discussions that South Africa and Zimbabwe does indeed share vast common characteristics when it comes to the history of land dispossession. While Zimbabwe’s independence was a result of bilateral agreement between Britain and Zimbabwe, South Africa’s democracy was on the other hand attained through negotiations, with the land issue being on top of the agenda. The two countries have remarkable similarities but with different style of acquisition on the land issue. This

notable similarity had a significant impact that led to establishment of different norms and institutional arrangement. The dissent model of radical land reform in Southern Africa was a mixed feeling because in South Africa, the land reform program was pursued in line with the experience and lessons from Zimbabwe.¹⁹⁴ This is precisely because when violent and militant farm invasion began in Zimbabwe and championed by war veterans, people were wondering if it would not happen in South Africa.¹⁹⁵

4.5.1 Similarities

e. Colonial Legislation and inheritance

In both countries, the colonial government deliberately and systematically promulgated legislation that aimed at protecting interest of minority groups and monopoly capital. The land was taken away from black people through colonial conquest by consolidating and maintaining ownership of land. The land that had potential to grow the economy were only reserved for white inhabitants for control and ownership. The colonial government also passed discriminatory laws which have similar characteristics but not identical to both countries, including ownership of land in all agroecological areas of inhabitants. These laws required blacks to vacate arable land and settle in an infertile land. It was a criminal offence for any black person to be seen in areas designated for white minority, except and unless they were seen to be promoting the interest of the colonial masters. The white minority settlers could legally acquire and settle on huge and fertile land whilst most black people were forced to occupy small and infertile land. Consequently, when the two countries collapsed the colonial and apartheid rules, the ownership and control of land was much skewed in favour of white minority. It is therefore not an accident that ownership and control of land, particularly in South Africa, is been viewed as a legacy of colonialism.

f. Political Settlement

Both countries have achieved their independence through political processes and settlement which involved concessions on the scope of law that would govern the land

¹⁹⁴ Moyo, 2007, (supra), p.79.

¹⁹⁵ Walker, 2008, (supra) p. 222.

reform.¹⁹⁶ These countries engaged in a process that ended colonial rules and at the centre of such engagement was the land question. The outgoing governments of both countries managed to find guarantees which compels both governments to be silent on compulsory acquisitions. The legacy of racially unequal land control was maintained and guaranteed both in Lancaster and 1996 constitution which was aimed at protecting the property rights. This compromise led to a market valued approach of willing-buyer and willing-seller principles of land redistribution.¹⁹⁷

The Constitution of both countries made it possible to inhibit both countries to immediately embark on large scale of land redistribution. The two countries failed to realise their dreams because the constitution reign supreme and their plans were placed at a limited position despite their ambitious programs to transform rural economy through land reform projects.¹⁹⁸ These countries inherited ideologies and practices which were entrenched in the white ownership of land.¹⁹⁹ The Constitution of Zimbabwe was framed in a way that it would protect the existing property rights and allow the land reform to be processed on market basis. In terms of the initial stage of transition of independence, the Constitution demanded difficult compromises which permits for the protection of land ownership by white people. The country was able to deal with the land question only through a framework of acquiring land on market basis.

In South Africa, a similar and analogous occurrence took place were the protections of property right in the interim constitution was negotiated through the Convention for Democratic South Africa (CODESA). This was confirmed in the final Constitution that property rights must be balanced against constitutional obligations to enact the land reform. The final constitution consists of property clause in terms of section 25 which explicitly provides provisions that must conform with the constitutional mandate of expropriation. What happened in Zimbabwe, happened in South Africa because the constitution was made to protect property of the land owners against arbitrary deprivations.

¹⁹⁶ Halls, 2003. at p.255.

¹⁹⁷ Moyo, 2007. at p.62.

¹⁹⁸ Halls, 2003. at p.255.

¹⁹⁹ Ibid.

g. Willing Buyer-Willing Seller Principles

In 1994 and 1980, both countries saw the end of white minority rule respectively. However, they have adopted a market base land reform influenced by international market forces. The unfortunate part of this market-based method of land acquisition was that it solely depends on completely voluntary system between a person willing to buy land and the one willing to sell the land. this resulted in a slow pace of land reform between the two countries.

h. Illegal and Militant Invasions

Zimbabwe has experienced militancy of landless people before the fast-track of the land reform program. In Zimbabwe, numerous attempts were made by the so called “Squatters” for land redistribution through systematic land occupation.²⁰⁰ Likewise in the present case of South Africa, many people who tried to occupy land through squatting were forcefully removed by the government as illegal settlers from the white farms.²⁰¹ The land invasion was seriously motivated by political reason of land hunger and the government did not even tolerate such action because it removed them from the onset as illegal occupiers of land. all illegal occupiers had to sing the song composed by the government of day or face the law. The land battles became common, intensified and violent in both countries between 1980s and 1990s. In Zimbabwe, the War Veterans forcefully invaded and occupied white owned commercial farms which were still in the hands of white minorities. They led the landless people of Zimbabwe to pressure government for land and compensation for the role they played in struggle for liberation. They continued to forcefully occupy the white farmland even when government officially sanctioned and allowed the fast track of the land reform. Their momentum to occupy the land violently was enhanced because of their boldness and determination.

In south Africa, there was and still have illegal occupations of land in some areas in the country. They slow pace of land reform have exacerbated the problems which led to urban land invasion and subsequently evictions by tribal, local and provincial authorities. Some of the land belongs to the state were invaded because there was no

²⁰⁰ Moyo, 1995, at p.12.

²⁰¹ Ibid.

proper control or supervision and communities were involved with planning of land and development of housing to reduce or halts land invasions²⁰² the land question is not uncommon in south Africa because the land grabs has taken place in many parts of the country, especially the ones that were not used. However, the South African government demonstrated their ability to handle such illegal situation by evicting illegal land occupier, unlike in Zimbabwe, because the processes even if it is slow it is handled orderly and constitutionally.

4.5.2 Constitutional Supremacy v Parliamentary Supremacy

Immediately after the attainment of democracy and freedom, the South African legislation were premised on the Constitution which reign supreme above all laws of land, whereas, the Zimbabwean Constitution allow its parliament to be supreme. The Parliament is sovereign and has the country's legislative authorities. The South African legislative authority is vested in Parliament but in Zimbabwe the executive is much stronger than Parliament and could even act against parliament's wishes. The executive can pass or repeal any law or act for as long as the correct procedure is followed. This system disregard what the constitution regulates for as long as or on conditions that the decisions or law is supported by majority of members in parliament and voted for. If the majority voted for such law, it will be enacted because is Parliamentary democracy that supersede Constitutional democracy. This kind of democracy resulted in numerous oppressive and repressive acts by government before the opposition rise to the occasions.

The Zimbabwean government at some stage passed the Presidential Power Act which allows the President to assume legislative power on behalf of Parliament. This is what caused the then President Mugabe infringe the doctrine of separation of power and thwart the judiciary. Because of his super power, he passed controversial bills in to law and other numerous unlawful declarations. The system of Zimbabwe is dictatorship or authoritarian state, whilst the South African system is democratic one which is found on the grounding values of freedom, human dignity and equality.

²⁰² See White Paper, 1997, at p.12.

4.5.3 The Property Clause, Section 25

The South African Constitution provides clarity on the property clause which gives the constitutional framework for effective land reform. It seeks to achieve the balance between land reform as constitutional guarantee and on the other hands protects the property rights of the land holders.²⁰³ The Constitution provides clear authority for land reform and together with the equality clause which protects the land holders from arbitrary deprivation like those happened in Zimbabwe. This clause compels the state to take reasonable and other legislative measures to pay 'just and equitable compensation' if the land was to be acquired through land reforms.

The land expropriation that happened in Zimbabwe was uniquely peculiar because no one can make unilateral decision to encourage people to grab the land in South Africa. However, in Zimbabwe land invasion was encouraged by the President through Presidential Power Act (PPA) and it seems to have worked as the best action or decision to solve the land problems of Zimbabwe. In South Africa's system of democracy, it will be unconstitutional and legislatively immoral.

4.5.4 Land Claims Court and Land Commission

The difference with Zimbabwe is that South Africa has a Land Claim Court which was established in 1996 under the Land Restitution Act in 1996, as well as the Land Claims Commission. Apparently, the government has passed the Restitution Land Right Act which set up the Commission on Restitution of Land Rights and the land Claim Court to look at people's land claims. The Land Claims Commission and the Land Claim court can investigate, mediate and settle land claims. The Land Commission is an independent body that is only accountable to the constitution and Parliament.

If the land Claims Commission cannot resolve dispute, such disputes must be referred to the Land Claims Court. The Land Claim Court is on the same level with the High court, but it is independent from the High Court. It only specialised on matters arises from the land reform when parties are unable to reach agreement through mediation or negotiation process.

²⁰³ White Paper, 1997, at p.16

4.6 Conclusion

This chapter has illustrated that South Africa and Zimbabwe share a lot in common, at least from a historical and contemporary point of views as far as the land question is concerned. The two countries have had to deal with almost similar constitutional and socio-political opportunities and challenges. It is clear that the question relating to the legality of expropriation of land without compensation is a complex emotive issue, mainly because there are social and political implications in every case when such process is to be invoked. However, it is should be acknowledged that there are many lessons to draw from the Zimbabwean perspective. is a country where we should learn why the land reform program was carried out and how was carried out so that we don't repeat the mistake of endangering the people's life and promote the economy.

In both countries, there is a salient historical connotation suggesting that land is viewed as an important source of life and basic source of livelihood, and thus playing fundamental role in the development of the economy. Further, the past injustices which were experienced happened in similar patterns. The most distinctive feature about South Africa is that the post-1994 dispensation dedicated specific institutions and departments to deal specifically with the process of land reform, something which was not well orchestrated in the Zimbabwean case.

Chapter 5: Conclusions and Recommendations

5.1. Conclusions

When this mini-dissertation was conceptualised, South Africa was experiencing a new abrupt wave of change, in which the National Assembly was to consider amending section 25 of the Constitution in order to give full meaning to expropriation of land without compensation. Such developments culminated in robust debates and widespread consultations across the country, in an effort to establish the preferences of the populace at large. At the centre of attention, this mini-dissertation focused on establishing the constitutionality of such a project of expropriation of land without compensation, and the extent to which it may impact on social, political and economic transformation. Further, this research work had to ascertain the need to amend the Constitution and explain why it is important to ensure that such expropriation happens within the confines of the law, and takes into account the interests of justice and public good.

It is clear that the land expropriation without compensation project is a necessary project which will also help South Africans find each other in terms of advancing fundamental ideals of the post-1994 transformative constitutional dispensation. For instance, it is crucial for social, and political stability and economic growth and social development. When properly implemented, progressive and inclusive land reform has potential to contribute towards ending the unacceptable levels of inequalities, poverty and unemployment. Therefore, this mini-dissertation considers the project of expropriation of land as a that should be viewed positively as a developmental measure. Hence, the National Assembly has been tasked with the duty to consider all just and fair mechanics of implementing the wishes of the people in manner that resonate the transformative ideals of the Constitution. The widespread consultations were intended to safeguard the interests of justice in a constitutional context, and for the sustenance of democracy. It is appreciated however that because the National Assembly has already taken a position that the Constitution should be amended to foster conditions which land must be expropriated without compensation, such a process will be carried out with

meticulous deserved meticulous care, and for the benefit of all South Africans. There various lessons that can be drawn from the Zimbabwean perspective, but the most outstanding one that land reform must not be carried with anger and in a ferocious manner, because that often happen at the expense of justice and rationale decision making. The expropriation of land without compensation is a fundamental mechanism for land redistribution, whose aim is of increasing agricultural production and food security. Following on the National Assembly initiating the process of amending the Constitution, it instructed the Joint Constitutional Committee (CRC) to engage on a process of public participation or hearing on land reform. The Committee engaged on a process of public participation on the need for constitutional amendment, outcomes of which are presently being considered for implementation.

It has been shown that section 25 of the Constitution was constructed in such a manner that it appears to be frustrating the land reform program because it secures the protection of the existing property holder against improper state interference. It explicitly makes provisions for land reform and create the necessary conditions for land expropriation with or without compensation in the public interest. However, the land reform programme has been slow, thus, failing to meet the initial target in 2005 because of willing-buyer and willing-seller principle and methods of compensation. The South African land reform programme is critical for social and political stability, economic development and recovery or redress of the past injustices.

This mini-dissertation concludes that whereas there is an urgent need to hasten progressive land reform which transfers ownership of the land to the natives, it is crucial to note that the rule of law remains an important cardinal pillar of our constitutional democracy, which should be respected to advance the land reform programme which is just, fair and considerate of all surrounding circumstances in an open and free democratic society. In other words, the Constitution must be protected to safeguard the interest of all citizens against any form of violence or arbitrary deprivation of property. But, as a matter of fact, the land which was taken by force, in which people lost lives,

disenfranchised and displaced, must be returned to the rightful native owners without an apology.

5.3 Recommendations

This mini-dissertation commends the efforts of the National Assembly (legislature) for adopting a constitutionally correct process of amending the Constitution in a fair, just and open democratic society in order to enable expropriation of land without compensation, particularly section 25 of the Constitution. However, such amendment should be construed as encouraging arbitrary seizure of land. Thus, such expropriation must happen in a manner that is free, fair and just in an open and democratic society. However, land should be transferred to the ownership and custodianship of the state in a similar way that all mineral and petroleum resources were transferred to the ownership and custodianship of the state through the Minerals and Petroleum Resources Development Act (MPRDA) of 2002. This will assist ensuring that no loss of land will be experienced again, either due to monetary exchanges or for whatever considerations. Once the state is in control and custodianship of all land, those who will be using the land or intend use the land must apply for land-use licences, which must only be there is a purpose of land use.

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