THE LEGALITY OF LAND EXPROPRIATION WITHOUT COMPENSATION IN SOUTH AFRICA: A COMPARATIVE INTERNATIONAL LEGAL APPROACH

by

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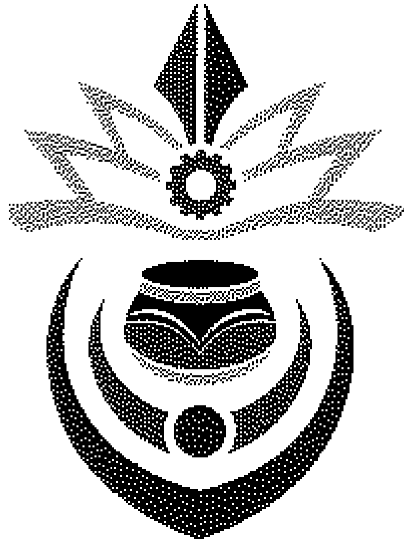

Theses submitted in fulfilment of the requirements for the degree of

MASTER OF LAWS

SCHOOL OF LAW

University of Venda

SOUTH AFRICA

Supervisor: Prof John-Mark Iyi

Co-Supervisor Mrs Zamokhule Mopai

2019

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Contents

Decleration v

Dedication vi

Acknowledgement vii

Abstract viii

Abbreviations ix

CHAPTER ONE 1

INTRODUCTION TO THE STUDY 1

1.1 Introduction 1

1.2 Research Problem 9

1.3 Aims and Objectives of the Study 11

1.3.1 Aim 11

1.3.2 Objectives 11

1.4 Research questions 11

1.5 Hypothesis 12

1.7 Methodology 13

1.8 Literatures Review 16

1.9 Definition of Key Concepts 24

1.9.1 Constitution 24

1.9.2 Constitutional Amendment 24

1.9.3 Expropriations 25

1.9.4 Land Reform 25

1.9.5 Public Purpose/ Public interest 26

1.9.6 Compensation 27

1.10 Delimitation of the Study 28

1.11 Limitation of the Study 29

1.12 Overview of Chapters 30

CHAPTER TWO 31

2.1 Introduction 31

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2.2 Pre-Colonial land ownership epoch 31
2.3 Colonial land ownership period 38
2.3.1 Colonial Laws on Land ownership 42
2.3.1.1 Article 13 of the Pretoria Convention 1881 42
2.3.1.2 Natives Land Act 27 of 1913 43
2.3.1.3 Native Administration Act, 38 of 1927 45
2.3.1.4 The Development Trust and Land Act, 1936 45
2.3.1.5 The Black (Urban Areas) Consolidation Act 46
2.4 Apartheid land ownership epoch 48
2.5 Post-Apartheid land ownership epoch 56
CHAPTER THREE 65
3.1 Introduction 65
3.2 International Level 66
3.2.1 Universal Declaration of Human Rights (UDHR) 66
3.2.2 Other International Human Rights Instruments 69
3.2.2 Customary International Law 71
3.3 Regional Level 71
3.3.1 African Charter on Human and Peoples Rights (ACHPR) 72
3.3.2 European Convention on Human Rights and Fundamental Freedoms (ECHR) 76
3.3.3 The American Convention on Human Rights (ACHR) 79
3.4 Southern African Development Community Treaty (SADC) 81
3.5 Roman-Dutch Law 86
3.6 African Customary law 87
CHAPTER FOUR 90
4.1 Introduction 90
4.2 Zimbabwe 90
4.2.1 Historical Background of Zimbabwe's Policy of Land Expropriation without Compensation 91
4.2.2 The Colonial epoch 92
4.2.3 The Lancaster House Constitution and the willing buyer, willing seller epoch 96
4.2.4 The Period of Expropriation with Fair Compensation 98

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4.2.5 The Advent of Land Expropriation without compensation 100

4.3 The Post 2013 Zimbabwe Constitution Period 102

4.3.1 Section 71 of the Constitution of 2013 103

4.3.2 Section 72 of the Constitution 104

4.4 China 106

4.4.1 China's Land Tenure System 106

4.4.2 Land Expropriation in China 108

4.4.2.1 Expropriation of Farmland 111

4.4.2.2 Urban/Metropolitan land expropriations in China 113

4.4.3 Predicaments associated with the Chinese compensation regime in land expropriations 117

CHAPTER FIVE 122

5.1 Introduction 122

5.2 South Africa's Land History 124

5.3 Land and Politics in South Africa 125

5.4 Expropriation laws in South Africa 126

5.4.1 Expropriation Act 63 of 1975 127

5.4.1.1 Authority to expropriate property 128

5.4.1.2 Public Purpose 129

5.4.1.3 Fair Procedure 130

5.4.1.4 Compensation 131

5.4.2 Interim Constitution 133

5.4.3 Restitution of Land Rights Act 22 of 1994 134

5.4.4 Constitution of the Republic of South Africa Act 108 of 1996 136

5.4.4.1 Deprivation 139

5.4.4.2 Expropriation 141

5.4.5 Land Reform (Labour Tenants) Act 3 of 1996 151

5.4.6 The Draft Expropriation Bill of 2019 153

CHAPTER SIX 156

6.1 Introduction 156

6.2 A Brief Summary of the Main Arguments 156

6.3 Recommendations 159

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6.3.1 Amendment of Section 25 of the Constitution 159

a) Seperating the general property clause and the land reform clause 159

b) Introducing Legislation regulating expropriation 160

c) Capacity to Use the Land 160

6.3.2 Departure from Market Value Compensation 162

6.3.3 Land compensation 164

6.3.4 Expropriating Power to be given to a particular Ministry 165

Bibliography 166

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Decleration

I **Mawere Joshua**, declare that the thesis submitted therein for the Master of Laws degree is my personal, original work, except to the degree explicitly otherwise specified, and that I have not before submitted it for attaining any qualification at the University of Venda or any other Institution.

Signed (Student): ……………………………………………..Date………………………

Signed Supervisor:…………………………………………….Date……………………..

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Dedication

This work is dedicated to my mother, Patricia Mawere for her support during my entire education.

For my wife Nyasha Terry Dolly, for her support and contribution towards my master of laws degree.

For my siblings Rangarirai Kamukwedze, Blessing Mawere, and my sister Ratidzai Kamukwedze for their contribution towards my education career.

Finally, to all my friends and loved ones who through their encouragement and financial support, I managed to complete my master of laws degree in record time.

You are all special to me and may God bless.

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Acknowledgement

I express gratitude to God Almighty for His wisdom, direction and divine favour during the entire duration of my study.

- Prof John-Mark Iyi, my supervisor merits singular thanks and recognition for his valued time, direction, guiding, and recommendations. Special regards to Mrs Zamokhule Mopai the co-supervisor for her substantial advice.
- Also to Lecturer Dr Stewart Lee Kugara for his continued advice and Graduate Makonese a student of University of Venda, who willingly devoted his time in helping me register for this course.
- In addition, I would like to express gratitude to Terry Nyasha Dolly, my wife and partner for being a helper, my mother Patricia Mawere, for establishing the foundation of my education, Dominic and Peace Maminingu for their financial support and encouragement.
- A huge thank you to the University of Venda, for giving me the opportunity to pursue my LLM degree.

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Abstract

The focal problem anchoring this study, is that there is no consensus on the legality of expropriating land without compensation in South Africa in light of international and regional laws. Therefore, the study examines the legality of expropriating land without compensation in South Africa. This study aims to find out whether expropriating land in South Africa without compensation is legal, taking in to account the international, regional and sub-regional standards on compensation. It further seeks to find out whether the proposed methodology of expropriating land without compensation is in tandem with sub regional, regional and international laws. In addition, the study seeks to find out whether it is legal and necessary to amend the property clause to permit the expropriating of land without compensation in South Africa.

The study gave an appraisal of the historical background igniting the volatile issue of expropriation of land without compensation. The study also analysed international and regional instruments governing issues concerning expropriation of property and compensations. Lastly, the study undertook a comparative international legal exposition between South Africa, China and Zimbabwe on the issue of land expropriation without compensation. This was simply done to establish the acceptable compensation regime at both the domestic and international level.

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Abbreviations

ACHR American Convention on Human Rights

ACHPR African Charter on Human and Peoples' Rights

CEDAW Convention on the Elimination of All Forms of Discrimination against Women

CRPD Convention on the Rights of Persons with Disabilities

ECHR European Convention on Human Rights and Fundamental Freedoms

FAO Food and Agriculture Organisation

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic Social and Cultural Rights

ICERD International Convention on the Elimination of all forms of Racial Discrimination

ICSIDC International Centre for Settlement of Investment Dispute Convention

OAU Organisation of African Unity

UDHR Universal Declaration of Human Rights

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CHAPTER ONE

INTRODUCTION TO THE STUDY

1.1 Introduction

The land issue in South Africa is a vehemently debated issue. The black majority South Africans share the sentiments that colonial and apartheid laws diminished the rights of blacks to land to an extent that they became more than just apprehensive.[1] Therefore, the government must expropriate land without compensation to expedite land reform in order to recompense the historical wrongs. On the contrary, the opposing view is premised on the pretext that the land occupied by the European travelers was virgin land and the blacks who confronted and challenged the settlers occupation were intruders from the north.[2] Europeans merely acted in self-defense against the African 'intruders'.[3] Following this argument will entail how the current landowners regard themselves as the legitimate holders of the land they occupy.

The African National Congress engulfed by the spirit of redressing the historical land inequalities in South Africa at its December 2017 Congress, adopted and passed a resolution for expropriation of land without compensation.[4] The Parliament of South Africa backed this resolution and passed a motion seeking to amend the Constitution to allow for this paradigm and radical shift.[5] The Parliament instructed the Committee to have an appraisal of the Constitution and give a report back by 30 August 2018. This study shall therefore examine the legality of expropriating land without compensation in South Africa.

In order to comprehend the current land debate and the doctrines of pre-constitutional law on expropriation in South Africa, the history of land ownership and expropriation law is crucial. Hence, it is of paramount importance to revisit property law prior to the advent of the 1996 Constitution.[6] It suffices to say that history is a contested terrain,

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[1] M Chaskalson 'Stumbling Towards sec 28: Negotiations over the Protection of Property Rights in the Interim Constitution' (1995) *SAJHR* 222-232.
[2] G McCall Theal *History of South Africa under the Administration of the Dutch East India Company, 1652-1795* (1965) 92.
[3] McCall Theal (note 2 above).
[4] L Ntsebeza Expropriation without compensation: implications of ANC policy 25 April aidc.org.za/expropriation-without compensation-compensation-implications-anc-policy (accessed 25 July 2018).
[5] N Goba National Assembly adopts EFF Motion on land expropriation 27 February https://www.timeslive.co.za/politics/2018-02-27-on-land-expropriation/ (accessed 25 July 2018)
[6] Constitution of The Republic of South Africa, Act 108 of 1996

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especially in South Africa, as there is practically no documented evidence of how Africans used to conduct themselves before the epoch of transcribed records. Patrick Harries opines that history pays petite consideration to the period prior to the coming of whites during the mid-fifteenth and seventeenth century as it generally focuses on the coming of the Dutch in the 1480s and the establishment of the Portuguese settlement in the 1650s at the Cape.[7] Daphna Golan opines that lineages of black and white literature in South African writings have at all times been distinct.[8] The general argument stems from the notion that sources of history produced by European writers are inescapably contaminated; therefore, authentic African sources must be preferred as opposed to the European ones.[9] The brief discussion shows that history in South Africa, in particular the pre-colonial era is contested. However, inference suggests that the epoch before colonisation ended between mid-1600s and 1890s.

During the pre-colonial era, the concept of ownership was foreign. African indigenous law was fixated on individual’s obligations to one another regards property contrary to the rights of people in property. Everyone had an equal right to the same thing and everything was held in common with nothing belonging to anybody.[10] Therefore, different interest in property could bestow in different holders.[11] Property was entrenched in social relationships as opposed to person’s exclusive right over property.[12] Cousins shares the same sentiments and explains pre-colonial land tenure as both “communal” and individual in that it was a system of complimentary interest held simultaneously.[13]

This corroborates the idea that during the pre-colonial period, the relationship among individuals was of significant value as opposed to an individual’s aptitude to proclaim his claim or right in property against the universe. Bennet states that a ‘right to property was more in the form of obligations deriving from clan relationships, than excluding

[7] P Harries *Butterflies and Barbarians: Swiss Missionaries and Systems of Knowledge In South-East Africa* (2007).
[8] D Golan *Inventing Shaka: Using History in the Construction of Zulu Nationalism* in Boulder, C, and CO: Lynne Lienner 1994.
[9] J Cobbing A tainted well: The Objectives, Historical Fantasies, and Working Methods of James Stuart, with Counter-Argument (1988) 11 Journal of Natal and Zulu History 115-154.
[10] TW Bennet *Customary Law in South Africa* (2004) 374.
[11] AN Allot Towards a definition of absolute ownership (1961) 99 Journal of African Law 100.
[12] B Cousins The Politics of Communal Tenure Reform: A South African Case Study in Anseeuw, W & Alden, C (eds) *The Struggle over Land in Africa* (2010) 60.
[13] B Cousins Characterizing communal tenure in Claasens, A & Cousins, B (eds) *Land, Power & Custom* (2008) 110.

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people from the use of certain property.' [14] Land therefore, was common to all people and communities collectively made decisions with regard to the use and access of the land.[15] Bennet explains the word 'communal' to mean that 'groups of people, who are meticulously woven together by common values and interest share land for the purpose of subsistence.' [16] Concisely, as illustrated in this brief exposition, during the pre-colonial period, land was collectively owned and the community at large made communal resolutions concerning the use and access to land. After the pre-colonial era came the colonial epoch. Different schools of thought cloud this period.

George McCall Theal states that the land which the European settlers occupied and established their farms was virgin land and that the black people who challenged the Europeans occupation where intruders from the north.[17] This reasoning cements the idea that during the colonial era Africans where not dispossessed of any land, as Europeans found the land unoccupied and not owned. However, the argument by Mc Theal in my view is misdirected. The Australian Court in the case of *Mabo v Queensland*, on 3 June 1992 held that the lands of this continent were not *terra nullius* or 'land belonging to no-one' when European settlement occurred.[18] Further, a thorough synthesis of literature as shall be discussed demonstrates that during the colonial era, legal instruments through statute, decrees and orders where enforced by the government to preserve spatial race-segregation.[19] Africans customarily owned the land before colonial invasions and dispossessions.[20] The white minority government introduced laws that ensured black land dispossessions.

An example of such statutes, *inter alia*, includes Article 13 of the Pretoria Convention of 1881, which stated that Natives were permitted to procure land. Nonetheless, land in all cases was to be granted to and registered in the name of the Commission in trust

[14] Bennet (note 10 above).
[15] HWO Oketh-Ogendo The nature of Land Rights under Indigenous Law in Africa in Claasens, A & Cousins, B (eds) *Land, Power & Custom* (2008) 99.
[16] Bennet (note 10 above) 379.
[17] G McCall Theal *History of South Africa under the Administration of the Dutch East India Company, 1652-1795* (1965)92.
[18] *Mabo v Queensland* (1992) AustLII
[19] W Beimart & S Dubow (1995); Chaskalson M & Lewis C *'Property' in M Chaskalson et al (eds) Constitutional Law of South Africa* (1996) 31-2.
[20] See *Ritchtersveld Community & Others v Alexkor Ltd and Another* 2001(3) SA 1293 (LCC), the title possessed by the Ritchtersveld community in the land was a right of communal ownership under indigenous law. However, these rights were ignored by the British government, the community was dispossessed and rights of full ownership were granted to Alexkor.

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for the Natives.[21] Another example is the 1910 Constitution of South Africa which no doubt guaranteed South Africa to be a white man's polity[22]; the 1913 Natives Land Act, which proscribed purchase of land by Africans with the exception of land purchase in black reserves[23]; and the Native Trust and Land Act of 1936, which elabourated further on the 1913 Act.[24] It suffices to say that the 1913 Act stripped black people every single right to possess land, and the National Party and its skewed dexterity of apartheid reinforced this policy decades later.[25]The law favoured the white minority, denoted that blacks were inferior, and could not own fertile commercial agrarian land.

Events of the colonial era are hence expository that the colonial government dispossessed black Africans of their land in South Africa during the colonial era. Ownership transformed from indigenous law land tenure to private property ownership in light of the European laws. However, dispossession was a continuous process. It continued through the apartheid era. The promulgation of new legislation by the apartheid government manipulated the existing black land rights.[26] These laws downgraded the rights of blacks in land to rights that are nothing more than just apprehensive.[27] The Bantu Self-government Act[28] and the Black Homelands Citizenship Act[29], assigned black indigenous South Africans into homelands. These involuntary removals of Africans from the land they occupied to reserves occasioned the dispossession of land in the majority of the African people. Africans had lost all claims to land in 'white' South Africa.

Beimart states that segregation in South Africa incorporated many diverse social relationships.[30] He further contends that segregation was a sequence of statutory Acts

[21] Art 13 of the Pretoria Convention of 1881 stated that "natives will be allowed to acquire land, but the grant of transfer of such land will in every case be made to and registered in the name of the Native Location Commission … in trust for such natives". See also *Tongoane v Minister of Agricultural and Land Affairs* 2010 6 SA 214 (CC), 2010 8 BCLR 741 (CC), par 10.
[22] The Union of South Africa Act, 1909.
[23] J van Wyk *Planning Law* 2 ed (2012) 43. See also *Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC), 2010 8 BCLR 741 (CC),
par 11.
[24] *Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC), 2010 8 BCLR 741 (CC), par 12-15.
[25] WJ DuPlessis African Indigenous Land Rights in A Private Ownership Paradigm (2011) 14 (7) *PELJ* 45.
[26] Chaskalson (note 1 above).
[27] J Murphy *'Property Rights in the New Constitution' (1993) 56 An Analytical Framework for Constitutional Review* 623-644.
[28] The Bantu Self-government Act, 46 of 1959.
[29] The Black Homelands Citizenship Act, 26 of 1970.
[30] Beimart (note 18 above) 3

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which detached and delimited the rights of 'non-whites' in every conceivable domain. Coetzee et al opines that all Acts pertaining to land had but one goal, which is to reduce black South Africans to proletarians.[31] According to Du Plessis, 'by the time of the advent of the new South Africa, about 17000 statutory measures had been issued to segregate and control land division, with 14 different control systems in South Africa.'[32]

The government subsequently promulgated the Expropriation Act.[33] The Act guaranteed property rights and permitted interference by the state subject to recompense at market value and actual financial loss.[34] It is therefore apparent that after acquiring property (land) through unjust, discriminatory and segregating laws, the white minority government then enacted legislation to preserve the unjustly acquired treasures.

Apartheid laws no doubt achieved their goal of dispossessing Africans of their land. These dispossessions compromised the interrelation and structure of the African communities by relocating them from the land they occupied. Africans were forced to either reside in the reserves or toil on white owned farms for survival. Allen Cook uses the term 'prison labour' to demonstrate the horrendous conditions that blacks endured on white owned farms during the apartheid period.[35] This historical injustice is the foundation of the land ownership contestation in South Africa today.

The prevalence of inequalities in access to land in South Africa resulted in politicians and activists advocating for land reform as machinery to remedy such inequalities.[36] The rationale is to redistribute land largely possessed by whites in order to broaden the class of black farmers.[37] The advent of the Final Constitution after the end of the

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[31] JK Coetzee et al *Development: Theory, Policy and Practice* (2002).
[32] DuPlessis (note 24 above).
[33] Expropriation Act ,63 of 1975; The Expropriation Act is used for the purpose of this study to demonstrate the effect of laws on land ownership. However, this was not the first law to be enacted to achieve this objective. Before the Expropriation Act of 1975 the European settlers introduced other laws like the Group Areas Act of 1950 which was amended and re-enacted in the Consolidation Acts of 1957 and 1966 among others. These laws carried the same objective of segregating and dispossessing black South Africans of their land.
[34] Expropriation Act, 63 of 1975 sec 12
[35] A Cook Akin to slavery: prison labour in South Africa: International Defence Aid Fund (1982).
[36] B Atuahene South Africa's Land Reform Crisis: Eliminating the Legacy of Apartheid, Foreign Affairs (July/ August 2011) available at http://www.foreignaffairs.com/articles/67905/bernadette-atuahene/southafrica-land-reform-crisis (accessed 8 October 2018).
[37] The Centre for Development and Enterprise, Politics in the Making: Land Reform in South Africa: A 21st Century Perspective (2005).

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minority apartheid government introduced a paradigm shift to the land issue.[38] It introduced the land reform program. The African National Congress in the 1994 election, as one of its policies, included the need to provide land for residential and production purposes to the underprivileged sector of the bucolic people and aspiring commercial black farmers.[39] The legislature enacted the property clause. The property clause centred on affirmative action underlined the necessity to redress the continuing legacy of racial segregation in the past, to be exact, the uneven distribution of land.[40] However, the property clause is a product of compromise. The African National Congress spurred by the spirit of redressing apartheid spatial effects, were of the view that a constitutionalized property right must not thwart land reform.[41] On the contrary, the National Party was skeptical that the existing land rights of white landowners if not guaranteed by the Constitution may be compromised.[42]

In order to reach a settlement both parties agreed to a compromise, as a result the property clause on the one hand legalised land reform, and on the other hand, it guaranteed the right not to be dispossessed of property under certain circumstances.[43] The land reform program includes three components that aimed at addressing apartheid land inequalities. These include restitution, land tenure and redistribution. Land restitution fixates on giving blacks back property that was taken away through apartheid laws. The aim is to rectify previous wrongs and create equity regards ownership of land between races.[44] Restitution applies to both urban claims and rural claims.[45] Restitution provides the claimant with both an option of financial compensation or land compensation.[46] The government's responsibility is to acquire land from whites based on market value rates and subsequently redistribute such land as per the Land Claims Court order.[47] However, the 'willing buyer, willing seller'

[38] McCall Theal (note 2 above).
[39] African National Congress. The Reconstruction and Development Program: A policy framework Johannesburg: Umanyano Publications, 1994 at par 2.4.3
[40] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Services and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).
[41] LM Du Plessis & H Corder *'Understanding South Africa's Transitional Bill of Rights'* (1994) 182-3.
[42]As above
[43] The Constitution of the Republic of South Africa, Act 108 1996 sec 25.
[44] A Chang, South Africa: The Up Down, An Application of A Downstream Model to Enforce Positive Socio-Economic Rights, (2007) 21 *EMORY INT'L L. REV* 621, 637.
[45] As above.
[46] R Hall *A Comparative Analysis of Land Reform in South Africa and Zimbabwe in Unfinished Business: The Land Crisis in Southern Africa* (2003) 264.
[47] See Khumalo and Others v Potgieter and Others 2000 2 All SA 456 (LCC) par 22; DuToit v Minister of Transport 2006 (1) SA 297 (CC) par 21; City of Cape Town v Holderberg Park Development (Pty)

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approach stalled progress and thus proved to be extremely ineffective.[48] The 'willing buyer, willing seller' approach relates to a situation were property would change hands between a willing buyer and a willing seller, at a price agreeable to both parties with neither being under any coercion to buy or to sell and both having judicious knowledge of relevant facts.[49]

The land tenure reform was designed to provide prospects of proprietorship to black agrarians who either had historical claims to or worked on land owned by whites.[50] In other words the land tenure reform as enshrined in the Constitution is intended to strengthen previously insecure land rights of the previously marginalized. In order to claim, the claimant should institute the claim based on years of working on the communal land or working or living on the communal native land.[51] The Land Reform Act of 1996 coupled with the Extension of Security of Tenure Act of 1997 created proprietary interest for persons employed on commercial farms, in the farms that they worked.[52] These statutes legitimately assured land tenure. They made it conceivable for labour tenants to obtain title to land used by them for cultivation and grazing in lieu of cash remuneration.[53]

The program effectively established a formal process for labour tenants to institute claims for land and demand evictions.[54] The government would provide alternative

Ltd 2007 (1) SA 1 (SCA) par 19. Despite the fact that section 25 provides for a list of factors to be considered in calculating compensation, courts in South Africa have generally gone with market value compensation as demonstrated in these cases cited herein.

[48] Review on Land & Willing Buyer Willing Seller Principle: Briefing by Development & Land Reform; Committee Report on Joint oversight visits to the Northern Cape, Limpopo, Free State and Mpumalanga (23 May 2012) available at http://www.ping.org.za/print/report/20120523-department-rural-development-and-land-reform-findings-study-commissio (accessed 8 October 2018), Mr S Ntapane the leader of the United Democratic Movement

[49] Section 25 of the Constitution provides a list of factors to be considered when calculating compensation and market value is one of them. However, a careful synthesis of case law as illustrated above clearly demonstrates that courts in South Africa in interpreting section 25 have generally adopted the market value factor. Hence it is arguably concluded that the government adopted the market value factor as the determining factor. See also (note 46 above).

[50] Chang (note 42 above).

[51] Chang (note 42 above).

[52] Department of Rural Development and Land Reform of the Republic of South Africa, Strengthening the Relative Rights of People Working the Land: Policy Proposals (30 July 2013) available at www.plaas.org.za/...landpdf/strengthening%20the%20Relative%20Right (accessed 8 October 2018).

[53] Hall (note 44 above).

[54] D Gilfillan Poverty Alleviation, Economic Advancement and the need for Tenure Reform in Rural Areas, 1– 2, Address at the SAPRN Conference on Land Reform and Poverty Alleviation in Southern Africa, Pretoria (4 June 2001) available at http://www.sarpn.org.za/EventPapers/Land/20010605Gilfillan.pdf (accessed 10 October 2018).

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land for the evicted tenants.[55] The Communal Property Association Act 28 of 1996 protected the collective right to own land. Common law did not recognise this right.[56] The Interim Protection of Informal Land Rights Act 31 of 1996 reinforced the right. It safeguarded individual's communal interest in land. Without consent, it was not permissible to deprive any person of his land rights.

Just like the land tenure reform, the main aim of redistributing land was to provide blacks with access to land for farming purposes.[57] However, the redistribution program was distinct from land tenure and restitution. Claimants had no claim to land. For them to qualify for procuring land, they had to be eligible for state grants.[58] Government adopted the 'willing buyer, willing seller' approach for redistributing land. However, the approach equipped the white property-owners with the occasion to inflate values thereby slowing down the process of redistribution, taking into cognizance the fact that the state is the sole buyer.[59] This consequently resulted in a sporadic redistribution, hence causing extensive distress.[60] By the year 2005, less than four percent of land owned by whites had been transferred back to blacks.[61]

Courts in South Africa in interpreting section 25[62] have generally adopted market value as the determining factor as to what establishes an equitable and just compensation.[63] The current constitutional and legal prescript has been criticised for hindering any

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[55] Hall (note 44 above).
[56] Hall (note 44 above).
[57] Chang (note 42 above).
[58] Chang (note 42 above).
[59] Department of Land Affairs, Towards the Framework For the Reviewing of the Willing Buyer Willing Seller Principle (17 September 2006) available at http://www.caxtonmags.co.za/data/files/doc/file_f51f2d1898758ed8b68157174c3c1d80.DOC (accessed 10 October 2018).
[60] Pierre De Vos, Willing,buyer,willing seller works False if you have a life-time to wait, Constitutionally Speaking (13 June 2013) available at http://constitutionallyspeaking.co.za/willing-buyer-willing-seller-works-if-you-have-a-lifetime-to-wait/. (accessed 10 October 2018).
[61] Chang (note 42 above).
[62] The Constitution of the Republic of South Africa, Act 108 of 1996 sec 25 (3) reads: 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.
[63] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) par 25-28

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meaningful land reform. Land reform has been sporadic. On 25 May 2018, the Land Audit financed by Agri SA stated that blacks now own 27% of all farmland an increase from 14% during the apartheid era and that whites own 75% of farmland from 85% in 1994.[64] This has resulted in the public and political muscle advocating for an amendment to the Constitution to permit expropriation without compensation. The sentiment is that there is a need for restorative justice in land cases.

The general feeling stems from the idea that the gap between landless blacks and property owning whites widened during the almost half century that the white rule lasted.[65] As such, there is a need to expropriate land without compensation for land reform in order to ensure an equitable distribution of natural resources. In this dissertation I will analyse the legality of expropriation of land without compensation in South Africa. The aim is to critically interrogate, if expropriating land for land reform in South Africa without compensation is legal, taking into account the international, regional and sub-regional standards on compensation.

1.2 Research Problem

The right to property and compensation is a hotly debated issue. It is an extremely controversial issue at international law.[66] There exists a notable difference between First World and Third World or socialist countries as to which approach to compensation is appropriate.[67] Customary international law generally advocates for compensation that is 'just' and 'fair' but leaves the determination and interpretation of 'just' and 'fair' to national laws.[68]

At regional level there appears to be no consensus and certainty on the proper approach to compensation. Various forms of compensation are evident at regional level. The conventions, treaties or laws provide for adequate, just, fair and appropriate compensation.[69] There is no uniformity and certainty as to which form of compensation

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[64] Submission On Expropriation Without Compensation available at file:///C:/Users/tafmawere/Downloads/Agri%20SA%20Submission%20EWC%2025%20May%202018.pdf (accessed 25 May 2018)

[65] I Changuion & B Steenkamp '*Disputed Land the Historical Development of the South African Land Issue', Pretoria* (2012) 94-96.

[66] C Krause The Right to Property in Eide, A, Krause, C and Rosas, C (eds) *Economic, Social and Cultural Rights: A Textbook (2nd revised edition)* 2001 191-210 at 192.

[67] As above.

[68] J Dugard *International Law: A South African Perspective* (2005) 314;

[69] See European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, entered into Force on 3 September 1953; First Protocol to the

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is acceptable. Countries like China[70] and Zimbabwe[71] provide that compensation must be specifically for the improvements on the land only, not the land itself.

At sub-regional level, the approach to compensation is a conundrum. The Southern African Development Community Tribunal criticised the Zimbabwean approach of compensating only for the improvements and not the land as unlawful and against the SADC treaty.[72] However, Zimbabwe exposed the grave weakness of the Tribunal, when it refused to comply with the SADC Tribunal directive. Zimbabwe was not punished for non compliance. As such, the issue at sub regional level remains a conundrum.

In South Africa, there exist divergent opinions whether compensation ought to be a requirement in the event of expropriation for land reform commitments and if so how compensation ought to be calculated.[73] The compensation issue in the land reform context has been hotly debated and contested. The material issue under deliberation is whether the state may take away land without paying compensation. The argument is that expropriation of land without compensation is legal and vital in remedying land inequalities created by colonialism and apartheid. Steinberg discourses that

> If whites have forgotten that their forbears acquired their land by force, you will soon see that there isn't a single black person in Sarahdale district who does not have memories of dispossession geared on his consciousness.[74]

Blacks are advocating for expropriation without compensation in order to rectify these alleged wrongs and heal the wounds created by apartheid and colonial laws. The

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European Convention for the Protection of Human and Fundamental Freedoms signed in Paris on 20 March 1952 (213 UNTS 222, ETS 5). Guideline 7 (A) of The African Commission, State Party; Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and People`s Rights adopted (24 October 2011).

[70] N Chan 'Land-Use Rights in Mainland China: Problems and Recommendations for Improvements' (!999) *Vol 7 Journal of Real Estate literature* 53-63

[71] Constitution of the Republic of Zimbabwe, Amendment Act 20 of 2013 section 295 (3).

[72]. *Mike Campbell (Pvt) Ltd & Others v The Government of the Republic of Zimbabwe* SADC (T) Case No 2/2007.

[73] See article titled "Expropriation Act Must be amended, says DG" at www.sabinetlaw.co.za/land-reform articles (accessed 30 June 2018). The Director General of Rural Development and Land Reform, Shabane Mdu, suggested that the Expropriation Act of 1975 must be amended to enable an effective land reform program. The African National Congress, at its December 2017 congress, adopted and passed a resolution for expropriation of land without compensation. The Parliament of South Africa backed this resolution and passed a motion seeking to amend the constitution to allow for this paradigm and radical shift.

[74] J Steinberg, *Midlands (Johannesburg and Cape Town: Jonathan Ball Publishers* (2002).

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opposing argument is that if the state expropriates land without compensation, such conduct would infringe the property right protected in the Constitution and international law. Such would disrespect the right to property and will kill investor confidence and economic stability. The consequences will be dire for the poor and would create food shortages to the detriment of the poor, as the rich will simply leave the country.

The problem, consequently, is that there is no consensus on the legality of expropriation of land without compensation in South Africa in light of international and regional laws. It is therefore crucial to inquire into the proposed methodology of expropriating land without compensation in order to make a determination on whether it is in tandem with sub regional, regional and international laws on the issue.

1.3 Aims and Objectives of the Study

1.3.1 Aim

The aim of the study is to examine the legality of expropriation of land without compensation in South Africa.

1.3.2 Objectives

The objectives of this study are as follows:

1. To give an appraisal of the historical background sparking the volatile issue of expropriation of land without compensation

2. To assess the international and regional instruments governing issues concerning expropriation of property and compensations.

3. To undertake a comparative international legal exposition between South Africa, China and Zimbabwe on the issue of land expropriation without compensation.

1.4 Research questions

1. To what extent did the South African land acquisition history during the colonial and apartheid era, create the current land problem?

2. What legal approach to compensation is admissible and acceptable at international law in expropriation of land?

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3. What is South Africa's current legal and constitutional approach to land expropriation and what lessons can she learn from other jurisdictions such as China and Zimbabwe?

1.5 Hypothesis

A hypothesis is a discerning or astute supposition that predicts how the research will turn out; it explains observed facts and guides further investigation.[75] In simple terms, a hypothesis is a statement of prediction, based on research and explains in concrete terms the expected outcome of the research.

This study is predicted on the supposition that if expropriation for land reform commitments is allowed in South Africa without compensation, it will be legal.

1.6 Justification of the Study

Land reform is an emotional issue in South Africa. It requires a cautious and well-informed approach. South Africa is currently overwhelmed with the hotly contested land issue. There exist divergent schools of thought. The African National Congress government is advocating for expropriation of land without compensation. On the contrary the Democratic Alliance party and landowners are opposed to this motion. They argue that such a move will erode property rights and has the potential to scare away investors thereby threatening food security.

The study is therefore justified by the concerns expressed in South Africa on land acquisitions without compensation. The central aim of this study is to critically interrogate the legality of expropriation of land, for land reform without compensation in light of regional and international approaches. This will be important in defining the magnitude to which expropriations devoid of compensation are in harmony with regional and international criteria on compensation. The research will recommend law reform, if any, to guarantee the right to property, food security, agriculture, investor confidence, and economic stability. The study will be relevant for expediting land reform and guaranteeing effective local remedies for aggrieved parties.

More so, the study is equally relevant to national governments, policy makers, and international organizations, academics, researchers, politicians and students. This is

[75] G LoBiondo-Wood & JD Haber *Nursing Research: Methods and Critical Appraisal for Evidence-based Practice* (2014) 35.

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because it provides the reader with South Africa's land issue history and the regional and international law guiding principles and standards in expropriations of property and compensation.

1.7 Methodology

The study will employ the doctrinal research methodology also known as the black letter law research .Hutchinson states that the 'doctrinal research method assists in giving a critical conceptual analysis of all the relevant legislation and case law to explain the law.'[76] Pearce et al defines black letter law research as 'a research that provides a systematic exposition of rules governing a particular legal field explains an area of difficulty and in most instances predicts future developments.'[77] Gestel propounds that in respect of doctrinal research, opinions or arguments emanate from authoritative sources, for example rules, principles, precedents, scholarly publications etcetera.[78] Langdell opines that

> The library in legal research is parallel to what a labouratory is to the chemist and to what a museum is to a naturalist, thus the law ought to be studied from its own concrete phenomena that is case law and legislation.[79]

This study therefore will synthesize literature on the notion of expropriation of land and compensation. The research is solely qualitative and non-empirical. Legal texts, case law, textbooks, internet sources, legislation on land acquisition and compensation shall be critically analysed at global, regional and domestic levels.

The study will also undertake a comparative international legal approach in the research. Roberts defines comparative international law to mean a 'comparative assessment of national court decisions … as a means of identifying and interpreting international law.'[80] Roberts further regards comparative international law as a 'phenomenon … which loosely fuses international law substance with comparative law

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[76]T Hutchinson 'Vale Bummy Watson? *Law Librarians, Law Libraries and Legal research in the Post-Internet Era'* (2014) 106 (4) Law Library Journal 579, at 584.
[77] D Pearce, E Campbell & D Harding *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987) 6.
[78] RV Gestel & H-. W. Micklitz *'Revitalizing Doctrinal Legal Research in Europe: What about Methodology?' (2011) 5 European University Institute Working Papers Law* 26.
[79] CC Langdell *Annual Report 1873-74 from B Kimbali, The Inception of Modern Professional Education* (2009) 67
[80] A Roberts Comparative International Law? The Role of National Courts in Creating and Enforcing International Law (2011) 60 *INT'L & COMPIQ* 57,73-92.

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methodologies.'[81] The International Law Commission defines comparative international law as 'a cross-national comparisons of how different legal systems interpret and apply substantive international norms in diverse ways.'[82] This method is vital in assessing whether or not the manner in which states approach international law is similar. The view held by International Law Commission is that comparative International law 'operates as a conduit between international law and domestic laws… perceiving commonalities and forming intercultural bridges enabling agreements across borders.'[83] Mathias Forteau weighs in and opines that comparisons between state practices are essential in order to identify and form customary international rules.[84] However, it is important to note that the meaning of comparative international law can vary subject to the nature of the organisation or persons involved in the comparative law exercise.[85]

Roberts et al states that 'comparative international law at first blush might sound like an oxymoron.'[86] The rationale for this reasoning is premised on the fact that 'rules which are avowedly universal in character do not lend themselves to comparison.'[87] However, the dissection between comparative law and international law is progressively coming under immense pressure. Scholars are advocating for the creation or revival of the field of 'comparative international law' despite the conundrum that its delineations, outlines and methods linger undefined.[88] The field is still developing, thus its contours are contingent and fluid. In light of this difficulty, the study will employ the definition by Anthea Roberts et al, which reads, 'comparative international law entails identifying, analyzing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply and approach international law.'[89] Comparative international law gives us the opportunity

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[81] As above.
[82] Rep. of the Int'l Law Comm'n, 58th Sess., May 1-June 9, July 3-Aug, 11, (2006) UN Doc.A/61/10; GAOR, 61st Sess., Supp.No. 10 (see par 8 of Draft Article 14 commentary).
[83] B Grossfeld *Core Questions of Comparative Law* (2005) 12.
[84] M Forteau *Comparative International Law Within, Not Against, International Law: Lessons from the International Law Commission* (2014) 499.
[85] As above.
[86] A Roberts et al *Comparative International Law: Framing the Field* (2014) 467.
[87] As above.
[88] A Anghie & B.S Chimni Third World Approaches to International Law and Individual Responsibility in Internal Conflicts (2003) 2 *J. INT'L* 77.
[89] Roberts (note 75 above).

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to access the work of diverse scholars on different continents thus, helps in the interpretation, application and understanding of international law in depth.

In relying on comparative international law approach, the study will draw on established theories and methodologies from other disciplines. These will among others, include comparative law. The study will first identify what establishes international law and then proceed to explain and analyse the similarities and differences in the application and interpretation of international law on expropriation of land and compensation by Zimbabwe and China. The comparison is vital in that it will augment our appreciation of how international law operates with respect to the subject. China[90] and Zimbabwe[91] have both implemented land reforms.

These legal systems identify with the proposed idea in South Africa of expropriating land without compensation. These two jurisdictions are pivotal in giving insight on the legality of expropriations devoid of compensation. They also shed light on the legal challenges faced by both jurisdictions in employing such a methodology. South Africa can learn from these two jurisdictions and safeguard against making detrimental policies. Reference to these two jurisdictions is significant in making recommendations on the amendments to the current property clause. The rational is to ascertain the legality of expropriating land for land reform without compensation in South Africa.

I chose Zimbabwe because it shares a similar history of land inequalities with South Africa. Zimbabwe went through a similar land reform program and adopted the approach of expropriating land without compensation.[92] It is important to analyse how Zimbabwe interprets, applies and approaches international law on expropriation and compensation. I also chose China because it allows for compensation only for improvements and not the land itself.[93] A comparative international approach on how China and Zimbabwe interpret, apply and approach international law on expropriation and compensation will then be undertaken. The rationale is to deduce whether expropriation without compensation is lawful at international law. The study will also give an exposition of international and regional laws on expropriation and

[90] N Chan 'Land-Use Rights in Mainland China: Problems and Recommendations for Improvements' (1999) Vol 7 *Journal of Real Estate Literature* 53-63.
[91] Constitution of Zimbabwe Amendment 17 Act 5 of 2005 sec 295(3).
[92] Constitutional Amendment 16 of 2000.
[93] Constitution of the People's Republic of China 1982 (amended 2004). Available at http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm (accessed 10 October. 2018).

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compensation as explained above. The rationale is to give a general base or exposition of what constitutes international law in order to juxtapose such with the approaches in the chosen jurisdictions of China and Zimbabwe.

The research will also look at the history of land ownership in South Africa dating back to the pre-colonial period, colonial period, apartheid period and the post-apartheid period in order to ascertain the origins of the current land issue. This will be relevant in identifying a solution to the current prolonged land issue in South Africa. The study will proceed to analyse International, regional and sub-regional instruments in order to ascertain whether expropriating land without compensation is legally justified in South Africa.

1.8 Literatures Review

Literature review relates 'to a methodical way for identifying, evaluating and synthesizing the existing body of completed work produced by researchers, scholars and practitioners.'[94] A plethora of scholars, researchers, practitioners and judicial officers have written about *eminent domain*, affirmative action, substantive and formal equality and compensation in expropriations of property. In order to render justice to this study, it will be imperative to have a literature overview of the above-mentioned aspects.

George McCall Theal justifies colonial invasions. He argues that 'the land upon which whites established their farms was uninhabited and that the black Africans who challenged the Europeans for ownership of the land were invaders from the north.'[95] He describes the Europeans as 'harassed farmers' who only acted in their defense against the acrimonious hostility of the African neighbors of a very low type. Afriforum representative Ernst Roets corroborates this reasoning when he stated that

> The argument that whites stole the land is a single biggest fallacy. They are three ways in which whites acquired land, namely resettlement on empty land, the purchase of land through treaties, cooperation and agreements and through conquest.[96]

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[94] N Shunda What is a Literature Review? 21 February 2007 https://web2.uconn.edu/com/Shunda/LitRev,pdf (accessed 26 July 2018).
[95] McCall Theal (note 2 above) 92.
[96] E Roets Heated debate on land expropriation without compensation between Afriforums Ernst Roets & ANC + EFF available at https://www.youtube.com/watch?v=xdu1Bf_OQe0&t=2562s (accessed 9 October 2018).

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He further propounds that indeed the injustices of the past must be dealt with but they must be dealt with specifically and not used to construct grand false narratives or to advance new racist policies. He expressed that Afriforum, an organisation representing the interest of white landowners holds the view that expropriation of land without compensation is an assault to property rights and amounts to discrimination. To substantiate this assertion, he said:

> Unfortunately, the President has already done so when he used the words 'our people' to refer to black people. The Deputy President did so when he threatened with a violent takeover if white people did not voluntarily hand over their land to black people. The Minister for Cooperative Governance and Traditional Affairs Zweli Mkize did so when he said no property of any black person or black group will be expropriated.[97]

Afriforum argues that expropriation is irrelevant as the major barrier to land reform is the government's inefficiency and corruption. Furthermore, the quest for agricultural land is all a myth. Of all the land claims to date, fifty-nine percent claims were filed in urban areas. Of all the land grabs in recent years were in urban areas. Ninety three percent of the people indicated that they would rather have money than land.[98]The general contention is that an assault to property amounts to investment uncertainty and economic decline.[99] Lastly, Afriforum argued that if ownership of land by whites is illegitimate because Africa is the black people's continent, then the argument by fascist in Europe who argues that Europe is a white people's continent, with no place, for black people should be ratified.[100] In essence, white landowners are against expropriation of land without compensation. They regard it as a total disrespect to the right to property and unnecessary.

On the contrary, William Macmillan argues that African land dispossessions led to impoverishment and exploitation of the black majority.[101] Hanekom discourses that black South Africans were chased away from the land they occupied by potency of arms and in some cases they were relegated to the position of labour residents on white held farms. [102] This brief discussion above shows that in South Africa there are

[97] As above.
[98] Roets (note 91 above).
[99] Roets (note 91 above)
[100] Roets (note 91 above).
[101] W M Macmillan *The South African Agrarian Problem and Its Historical Development 1919, Pretoria: The State Library* 1974.
[102] D Hanekom Cabinet Paper on Agricultural Sector: Opportunities and Challenges,1998.

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different schools of thought regarding the land issue and ownership. The current landowners maintain that they are the legitimate proprietors of the land that they dwell on. On the contrary, the majority black South Africans argue that the Europeans dispossessed them of their land by force which rendered them poor, hence it is peremptory for the state to expropriate land for land reform without recompense in order to rectify the historical wrongs. Therefore, this study will examine the legality of expropriating land without compensation for land reform purposes.

Keith opines that *eminent domain,* expropriation, compulsory acquisition, takings or a compulsory purchase 'is the power of government to acquire private rights to property (land) for a public purpose, without the willing consent of its owner or occupant.'[103] Gosh defines *eminent domain* as the inherent right of the state to acquire private property compulsorily for a public purpose.[104] Azuela and Herrera define expropriation as that supremacy which permits governments to obtain property against the will of its owner in order to realize some purpose of general interest. [105] This power emanates from the states' territorial sovereignty.[106] The reasoning by scholars above, categorically and specifically exhibit that expropriations though being a severe interference with property rights, they are *prima facie* lawful. The power of *eminent domain* is a vital development apparatus for governments and ensures that land whenever needed is available for public purpose or interest. Kalbro opines that compulsory purchase legislation; prevents an individual landowner from acquiring the power to veto or frustrate land acquisition for community benefit.[107] He further states that the landowner is not prepared to go to the extent of refusing to sell on any account.

However, expropriations despite being necessary for development and other positive attributes, on the other hand they cause so much distress, agony and anguish for the people threatened with dispossession.[108] In order to curtail the government's sovereign power, legislatures generally constrain or encumber the power by imposing

[103] S Keith et al Compulsory acquisition of land and compensation (FAO land Tenure Series, 2008).
[104] A Gosh *The Land Acquisition Act 1894- Law of Compulsory Acquisition and Compensation* (1973)
[105] A Azuela & C Herrera 'Taking land around the World: International trends in the expropriation for Urban and Infrastructure projects' in Lall, SV et al (eds) *Urban Land Markets: Improving Land management for successful urbanization* (2009).
[106] R Dolzer & C Shreuer *Principles of International Law* (2008)
[107] T Kalbro *Private Compulsory Acquisition and the Public Interest Requirement* (2007).
[108] FAO Land Tenure Studies 10: Compulsory acquisition of land and compensation (2008).

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an obligation that such expropriation must be specifically for public purpose or interest and that it must be subject to the payment of compensation.[109]

In South Africa, the constitution guarantees private ownership of land. Just like in other jurisdictions globally, the right is not absolute as state enjoys *eminent domain*. Section 25 of the Constitution permits expropriations for land reform.[110] Nonetheless, it subjects that interference to payment of just and equitable compensation.[111] The law in South Africa therefore bestows the power of *eminent domain* upon the state for land reform. It nevertheless, encumbers the power by imposing an obligation that such interference must be for public interest, in this context land reform, and subject to imbursement of equitable and just compensation.

The abovementioned scholarly views are relevant in indicating the justification and legality of compulsory acquisitions in general. However, the current research will be restricted to analyzing whether compulsory land acquisitions deprived of recompense for land reform are legal. This will enable the study to give a detailed analysis on land reform, compulsory acquisition of land and compensation.

The Constitution in section 25 (1) provides for deprivation of property and subsection (2) provides for expropriation of property. It is paramount for the purpose of this study to distinguish between expropriations and other deprivations of property. The Court in *Harksen v Lane NO and Others*[112] stated that:

> the distinction between expropriation, which involves acquisition of rights in property by a public authority for a public purpose, and the deprivation of rights in property, which falls short of compulsory acquisition, have long been recognized in our law.

This reasoning depicts that not all deprivations amount to expropriations. In *Phoebus Apollo Aviation CC v Minister of Safety and Security*,[113] the court held 'that expropriation is the compulsory taking over of property by the state to obtain public benefit at private expense', while on the contrary deprivation demands restrictions on

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[109] As above p 5
[110] The Constitution of the Republic of South Africa, Act 108 of 1996 sec 25 (4) (a) reads, "For the purpose of this section- the public interest includes the nation's commitment to land reform and to reforms to bring about an equitable access to all South Africa's natural resources".
[111] The Centre for Development and Enterprise, Politics in the Making: Land Reform in South Africa: A 21st Century Perspective (2005).
[112] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at 315G-316C.
[113] *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC) at para 4.

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the use and enjoyment of property in the public interest, for example nuisance laws and fire regulations. In this case, it is apparent that expropriation refers to the complete taking of the property whereas deprivation relates to the limitation in use and enjoyment.

This idea is also illustrated in the Zimbabwean case of *Davis and Others v Minister of Lands, Agriculture and Water Development*[114], where Gubbay CJ (as he then was) held that 'compulsory deprivation was more of an attenuation or negative restriction of some right that come with private ownership. To the contrary, compulsory acquisition involves the transfer of property rights from the owner to the state without the previous owner's consent.'

The court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a v Minister of Finance*[115] postulate that 'expropriation is a smaller category that falls within the larger category of deprivation.' Agreeing to this viewpoint expropriation constitutes a subclass of deprivation. This means all expropriations are also deprivations. Nevertheless, not all deprivations amount to expropriations.

Van der Walt opines that 'deprivations constitutes regularly uncompensated, duly sanctioned and forced restrictions on the use, enjoyment or discarding of property for public benefit.'[116] Expropriation on the contrary, refers to the government's muscle to terminate *intra vires* the constitution all entitlements that come with property rights for public interest.[117]

The distinction shows that for the taking to qualify to be an expropriation, the state should have transferred property rights from owner to the state. This distinction is relevant for this study, considering that this study shall enquire only on expropriations and not deprivations. Expropriation of land is justified on the principle of equality and affirmative action. Langa DP in *City Council of Pretoria v Walker* held that 'equality

[114] *Davis and Others v Minister of Lands, Agriculture and Water Development* 1996 (1) ZLR 681 (S).
[115] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a v Minister of Finance* 2013 4 SA 768 (CC) par 46.
[116] AJ Van der Walt *Constitutional Property law* (2005)
[117] AJ Van der Walt *The limits of Constitutional Property* (1997)

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might require states to adopt specific affirmative steps to eradicate and dismantle structures perpetuating patterns of disadvantage.'[118] Sachs J in *Walker* held that:

> Differential treatment that happens to coincide with race in the way that poverty and civic marginalization coincide with race, should not be regarded as presumptively unfair discrimination when it relates to measures taken to overcome such poverty and marginalization.[119]

Iain Currie and Johan De Waal state 'affirmative action means preferential treatment towards a disadvantaged group of people.' Affirmative action is about achieving equality in its substantive form, where people who were previously excluded are now included.[120] Hence, affirmative action as illustrated is in tandem with international law requirements of compulsory property acquisitions, as it does not violate international law principles.

From the above scholarly perspective, in theory land reform serves development objectives. Therefore, in South Africa land reform is a policy of development. It centers on meeting the primary prerequisites of the previously marginalized underdeveloped people. Adams views Africa as 'a model of land reform where the key concern is to right the inequality of agricultural land as Africa has history of subsistence farming.'[121] Jacoby is of the view that land reform is a term recurrently used to mean any program whose aim is to reorganize the established background of farming in order to enable social and socio-economic progress for the community concerned.[122] According to Prosterman, land reform relates to 'a speedy process of transfer of land rights to dispossessed individuals and communities.'[123] The above scholarly views are in tandem with affirmative action in that they view land reform to be in context with the development of the previously marginalized. Land reform guarantees land ownership and land ownership provides people with a sense of empowerment. It creates within such people a general feeling that their socio-economic status is improving.

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[118] See Langa DP for the majority in *City Council of Pretoria v Walker* 1998 2 SA 363 (CC) par 33.
[119] City Council of Pretoria v Walker 1998 2 SA 363 (CC) par 118.
[120] I Currie & J De Waal *The New Constitution and Administrative Law* (2001)
[121] M Adams 'Land Reform: New seeds on old ground? Overseas Development Institute' (1995) http://www.odi.org.uk (accessed 29 March 2006).
[122] EH Jacoby *Man and Land: The fundamental issue in development* (1971).
[123] RL Prosterman *Agrarian Reform and Grassroots Development* (1990)

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The compensation issue is a hotly debated and contested issue both nationally and globally. The general notion according to Food and Agriculture Organisation of the United Nations is that compensation aims to repay affected persons for losses suffered pursuant to the process of compulsory acquisitions.[124] Ibagere argues that compensation refers to recompense for loss, deprivation or injury suffered. [125] Joe Thoeuwes opines that 'when compensation follows a taking by the state, expropriation amount to forced sales, on the other hand, if there is no compensation paid for expropriation, the taking amounts to confiscation.' [126] Schreur opines that the subsequent requirements namely, (i) public purpose, (ii) not discriminatory, (iii) state must pay compensation, must be complied with, for expropriation to be legal.[127] The expropriation must conform to all these requirements cumulatively for the expropriation to be in tandem with international law standards.[128] Umezuruike defines compensation 'as placing in the hands of the owner expropriated, the full money equivalent of the thing which he has been deprived of.'[129] Balachew states that 'compensation is to repay the affected people for the loss suffered, and it should be based on the principles of equity and equivalence.'[130] While most writers generally concur with the view that compensation should follow compulsory acquisitions, some are of the view that there is no consensus on this issue.

For example, Krause states that there exist divergent views whether deprivation requires payment of compensation, if so, what is the proper approach to compensation.[131] Louis interestingly states also that there is no universally accepted model defining adequate compensation.[132] This study will thus, critically analyse whether expropriations for land reform without payment of compensation are legal.

[124] Food and Agriculture Organisation of the United Nations (2008).
[125] OP Ibagere *Compulsory Acquisitions of Land and Compensation and Valuation of Special Interest in Nigeria* (2010).
[126] J Thoeuwes *Law and Economics* (2008).
[127] C Schreur *Principles of International Law* (2008).
[128] DP Zongwe 'The Contribution of Campbell v Zimbabwe to the Foreign Investment law on Expropriation' (2009) Vol 5 CLPE Research Paper Series 3.
[129] N Umezuruike *A Critical Analysis of the Land Use Act of 1978* (1998).
[130] YA Balachew *'Expropriation, Valuation, and Compensation in Ethiopia'* Doctoral Thesis in Real Estate Planning. Department of Real Estate and Construction Management School of Agriculture and the Built Environment, Royal Institute of Technology, 2013.
[131] C Krause The Right to Property in Eide, A et al (ed) *Economic, Social and Cultural Rights: A Textbook* (2nd revised edition 2001) 200.
[132] KO Louis *An assessment of the level of the Adequacy of the Paid Compensation and Lost Livelihood in Mining Communities* M.Sc. dissertation, University of Science and Technology, 2010

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This study will also depart from the general expropriation of property but will zero in on analysing expropriations done specifically for land reform in South Africa.

The compensation issue in South Africa to be specific is far from settled. Court decisions vary and lack consistency regarding, the interpretation of section 25 when determining just and equitable compensation. There exist divergent views regarding the proper approach to compensation. The court in the case of *Du Toit v Minister of Transport* first calculated the market value of the property before applying factors listed in section 25 (3) of the Constitution.[133] In applying the factors, the court reasoned that 'the public purpose requirement would be frustrated if the full market value of the gravel were to be paid to the owner.' This approach identifies itself with the reasoning in *Khumalo v Potgieter* where the court stated that in order to calculate compensation in terms of the constitution one should start at market value, since it is quantifiable.[134] To the contrary, the court in *Mhlanganisweni Community v Minister of Rural Development and Land Reform* held that there is no justification why an expropriate for land reform should receive compensation which is less to that of an expropriate for a more mundane purpose, such as the construction of a dam, school or hospital.[135] The court reasoned that land reform is not superior to any other legitimate purpose. Therefore, it deserves no special treatment from any other expropriation.

In both cases expropriations were performed for a public purpose, compensation was also determined. However, the reasoning was different. The latter reasoning is that market value compensation is justifiable in land reform expropriations. The initial court's reasoning is that while market value is the determining factor, compensation below market value is justifiable for public purpose. Gildenhuys deduces that 'compensation in excess of market value is plausible, because the Constitution merely sets the minimum standards that must be adhered to.'[136] Claasens however holds a different opinion. She states that entrenching compensation at market value would make land reform expensive or rather unaffordable.[137] This would defeat equitable distribution and access to land. The approach has the effect of safeguarding land

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[133] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC).
[134] *Khumalo v Potgieter* 1999 ZALCC 59.
[135] *Mhlanganisweni Community v Minister of Rural Development and Land Reform* 2012 ZALCC 7 par 73.
[136] A Gildenhuys *Onteiengsreg* (2001) 164-5.
[137] A Claasens 'Compensation for Expropriation: The Political and Economic Parameters of Market Value Compensation' (1993) 9 *SAJHR* 422.

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rights of the whites to the detriment of the fragile land rights of blacks, with the overall consequence of fueling tension. This study seeks to bridge this gap by critically synthesising which approach to compensation for land reform should be pursued in South Africa. The study will also critically analyse whether a uniform approach to ordinary property acquisitions and acquisitions for land reform is justifiable or whether there must be a distinction at law when determining compensation for land reform as opposed to property in general.

1.9 Definition of Key Concepts

1.9.1 Constitution

The Oxford Advanced Learner's dictionary defines a constitution 'as the system of laws and basic principles that a state, a country or an organization is governed by.'[138] According to the Black's law dictionary, a constitution is defined as 'the fundamental and organic law of a nation or state that establishes the institutions and apparatus of government.' It further opines that the constitution defines 'the scope of governmental powers and guarantees individual civil liberties and rights'.[139] A constitution according to Duhaime's Constitutional, Human Rights and Administrative Law Dictionary, is 'the fundamental state law, which sets out how that particular state will be organized, and the powers and authorities of government between different political units and citizens'.[140]

Constitutions come in two types, namely written and unwritten. There is however, no universal and overt meaning of a constitution. It is therefore, normally conventional that whichever definition adopted, must include a certain set of essential legal-political rules.

1.9.2 Constitutional Amendment

A constitution is amended in order to respond to changing times or as a way of ensuring that it remains relevant. The Free Dictionary defines an amendment as the 'modification of materials by the addition of supplemental information, the deletion of unnecessary, undesirable or outdated information, or the correction of errors existing

[138] AS Hornby Oxford Advanced Learners Dictionary of Current English 2005.
[139] HC Black Black's Law Dictionary (online) Available at http://www.thelawdictionary.org/constitution(accessed 21 June 2018.
[140] L Duhaime (ed) Duhaime's Constitutional Human Rights and Administrative Law Dictionary (online) Available at http://www.duhaine.org/Legal Dictionary/c/Constitution.aspx (accessed 21 June 2018).

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in the text'.[141] The Oxford Advanced Learner's Dictionary defines an amendment as 'a small change or improvement that is made to a law or document or the process of changing a law or document to introduce, propose or table an amendment'.[142] According to section 74 (2) of the Constitution, for an amendment to ensue, a majority vote of two thirds of the National Assembly is required, coupled with at least six provinces out of nine voting in favor of the amendment in the National Council of Provinces.

1.9.3 Expropriations

As previously stated earlier, Keith suggests that 'expropriation is the power of government to acquire private rights to property (land) for a public purpose, without the willing consent of its owner or occupant.'[143] Gosh defines expropriation as the 'inherent right of the state to acquire private property compulsorily for public purpose.'[144] Azuela and Herrera define expropriation as that 'supremacy which permits governments to obtain property against the will of its owner in order to realize some purpose of general interest.'[145] This power emanates from the states territorial sovereignty.

1.9.4 Land Reform

Moyo defines land reform as 'a change in the legal or customary institution of property rights and duties, which define the rights of those who own or use agricultural land.'[146] Baines states that according to the United Nations definition, land reform includes an incorporated program of procedures intended to eradicate economic and societal development hindrances rising out of imperfections in the agricultural edifice, considering that masses of indigenous African agriculturalists were involuntary compelled to horde onto trifling tracts of land not conducive even for subsistence farming.[147]

Adams views Africa as a model of land reform where the key concern is to right the inequality of agrarian or farming land since Africa has a rich history of subsistence

[141] Farlex The Free Dictionary (online) Available at https;//legals-dictionary.thefreedictionary.com/amendment (accessed 20 June 2018).
[142] Hornby (note 133 above).
[143] Keith (note 98 above).
[144] Gosh (note 99 above).
[145] Azuela (note 100 above).
[146] S Moyo *The land question in Zimbabwe Harare: SAPES* (1995).
[147] T Baines The realities of Land Reform, Health and Environment http://www.e-venthorizon.net (accessed 21 June 2008).

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agriculture.[148] Jacoby is of the view that land reform is a term recurrently used to mean any program whose aim is to reorganize the established background of agriculture in order to enable social and socio-economic progress for the community concerned.[149] According to Prosterman, land reform relates to a speedy process of transfer of land rights to dispossessed individuals and communities.[150] Land reform in South Africa, deals with the necessity for an evenhanded dissemination of land proprietorship, tenure and the necessity for land reform to diminish poverty and historical dispossessions.[151] Deininger asserts that in South Africa, 'land reform is focused on restitution, land tenure and land redistribution.'[152]

1.9.5 Public Purpose/ Public interest

Keith provides that the terms public uses, public purpose, and public interest have distinctive if overlapping connotations; however, in some instances these differences are blurry or non-existent.[153] He further gives a list of factors that he stated fit within the meaning of public purpose and these include among others:

- 'Transportation uses including roads, canals, highways, bridges or;
- Public buildings including schools, hospitals and public housing or;
- Public utilities for water, sewage and electricity or,
- Defense purposes or,
- Public parks, sports facilities, cemeteries.'[154]

In its self-efficacy form, the term 'public purpose' implies that the expropriation must profit the public or the whole community, not only an individual or single person.[155] The term 'public purpose' has been used both in the narrow and in broad sense in South African law. In the broad sense, it is a purpose that benefits the whole public contrary to a private purpose affecting only one single person.[156] Hence, whatever upsets the

[148] Adams (note 116 above).
[149] Jacoby (note 117 above).
[150] Prosterman (note 118 above).
[151] D Hanekom *Cabinet Paper and Agricultural Sector: Opportunities and Challenges* (1998).
[152] K Deininger *Making Negotiated Land Reform Work: Initial Experience from Colombia, Brazil and South Africa* (1999) 27 (4) World Development 651-672ss
[153] Keith (note 98 above).
[154] Keith (note 98 above).
[155] J Murphy *Interpreting the Property Clause in the Constitution Act of 1993* (1995) 10 SAPR/PL107 125.
[156] A good example is the case of *Rocks Farm (Pty) Ltd v Minister of Community Development* 1984 (3) SA 785 (N) 794, where the acquisition of land was done to institute a mountain catchment area in order to preserve the countries water sources.

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country as a whole is included. However, in the narrow sense public purpose is constrained to government purposes.[157] Section 1 of the Expropriation Act defines public purpose broadly enough to include 'any purpose connected with the administration of any law by an organ of state.'[158] On the contrary the court in *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society*, defines public purpose more narrowly and in contradistinction to private purpose, thus expropriation for the benefit of a third party cannot conceivable be for a public purpose.[159]

The court in the *Administrator, Transvaal & Another v J van Streepan (Kempton Park)* case, distinguished public purpose from public interest.[160] The court held that 'expropriation or acquisition of land for the benefit of a third party cannot be for a public purpose, but it might be possible in certain circumstances that it is in the public interest.' It therefore, follows from this reasoning of the court that public interest is broader in category than public purpose.

Section 25 (4) of the Constitution provides that 'public interest includes the nations commitment to land reform and to reforms that bring about an equitable access to all South Africa's natural resources.'[161] Therefore, the inclusion of both public purpose and public interest by the legislature as depicted ensures that land reform is not constrained by the constricted interpretation of the term public purpose.

1.9.6 Compensation

The general notion according to the Food and Agriculture Organisation of the United Nations (2009) is that compensation aims to repay affected persons for losses suffered pursuant to the process of compulsory acquisitions. Ibagere argues that compensation refers to recompense for loss, deprivation or injury suffered.[162] Umezuruike defines compensation as 'placing in the hands of the owner expropriated the full money equivalent of the thing which, he has been deprived.'[163] Balachew states that 'compensation is to repay the affected people for the loss suffered, based on the

[157] *Slabbert v Minister van Lande* 1963 (3) SA 620 (T) 621.
[158] Expropriation Act 63 of 1975 sec 1.
[159] *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society* 1911 AD 271 at 283.
[160] Administrator, Transvaal & Another v J van Streepan (Kempton park) 1990 (4) SA 644 (A) 601.
[161] The Constitution of the Republic of South Africa, Act 1996 sec 25(4).
[162] Ibagere (note 120 above).
[163] Umezuruike (note 124 above).

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principles of equity and equivalence.'[164] The Oxford Advanced Learners dictionary defines compensation as 'something especially monetary, that someone gives you because they have hurt you or damaged something that you own, things that make a bad situation better.'[165] Oladape and Ige opine that compensation is a just imbursement by the government for property acquired for land acquisition in order to ensure that the owner after the acquisition is not -worse off.[166] Adequate compensation in land, according to Usilappan, is always referred to as market value of the land expropriated.[167] Louis propounds that there is no universally accepted model of defining adequate compensation.[168]

The rationale of compensation as illustrated from the definitions above, is to safeguard against rendering the landowner insolvent or worse-off post the expropriation. However, the issue of compensation is treated differently in different national context. There are various approaches to compensation and these include *inter alia*, commercial value, fair price value; fiscal value, compensation for improvements and land compensation.

1.10 Delimitation of the Study

The topic on expropriation of property and compensation is very wide and extensive in scope and nature. The study therefore, will focus or will be limited to an investigation, scrutiny and assessment of pertinent literatures on expropriation and compensation journal articles, legislation, case law, internet, international instruments, textbooks and so on. The study will not employ the socio-legal research method due to time and financial constraints. Furthermore, due to the political nature of the area under study, accessing information may be difficult and time-consuming taking into account the sensitivity surrounding the land issue in South Africa at the moment. No doubt, a socio-legal research approach would have assisted in yielding more results. The researcher however, will compensate for this by undertaking a comprehensive analysis of the literature available on the topic under study.

[164] Balachew (note 125 above).
[165] Hornby (note 133 above).
[166] RA Oladape & V Ige Assessment of Claimants' satisfaction to variation in Compensation paid for compulsory land acquisition in Ondo State (2014) 16-21.
[167] M Usilappan Land Acquisition Act 1960: the 1997 amendments, the surveyors, 2nd quarterly (1997)
[168] Louis (note 127 above).

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Regardless the fact that the study is within the expansive context of property law, it will not deal with property rights in general. The study will not deal with theories or measures that justify why property rights must be safeguarded, the rationale behind the enactment of the property clause that provides for both public purpose and public interest terms, adequacy of compensation in terms of the constitution etcetera. A comprehensive and thorough research on the aforementioned is abundant; hence, any further research will be unnecessary.

The study therefore, will focus on land expropriation for land reform and compensation in order to determine whether it will be legal to expropriate land for land reform without compensation in South Africa judging from an international law approach. This will enable the researcher to focus on the problem statement, thus guaranteeing a well-researched and informed study. Attention is given to international law and the respective jurisdictions of China and Zimbabwe on compensation for land reform. China and Zimbabwe both provide for expropriation of land without compensation, hence, they are relevant in providing legal insights to South Africa. South Africa is bound to consider international law when interpreting the bill of rights in terms of section 231 of the Constitution, hence, comparative international law approach will enrich the study.

As mentioned above, the research will only limit itself to the issue of expropriation for land reform and compensation, thus, the study is not fixated on property rights in general. The research will focus on the right to property in section 25 of the Constitution and international law that concerns expropriation for the purposes of land reform and the research will be strictly limited to expropriation of land for land reform and compensation.

1.11 Limitation of the Study

The study is politically sensitive; as such acquiring information can be difficult. In order to cure the limitations, the study will mainly rely on literature available. The other limitation of the study is access to material, considering that reference is given to countries like China that have some of their sources written in the Chinese language and not English. Moreover, access to libraries with Chinese sources requires the researcher to travel to different places. This requires funding. However, this limitation is cured by the research fund and the use of language interpretation software. The

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study is also limited to an analysis of only three countries when embarking on the comparative international approach due to time and financial constraints.

1.12 Overview of Chapters

In realising the aims and objectives, the study is set into six chapters:

1.12.1 Chapter 1 introduces the study, a brief background on the study, problem statement, aims and objectives, research questions, hypothesis, justification of the study, research methodology, literature review, definition of key words, ethical considerations, scope of the study, and limitation of the study.

1.12.2 Chapter 2 will give an appraisal of the historical background igniting the issue of expropriation of land without compensation. This chapter will focus on the pre-colonial, colonial, apartheid and post-colonial era.

1.12.3 Chapter 3 will critically analyze the international and regional instruments governing issues concerning expropriations of property and compensations. The rational is to depict which approach to compensation is available at sub regional, regional and international level**.**

1.12.4 Chapter 4 will give a legal comparative exposition on the issue of expropriation and land compensation. The study shall rely upon Zimbabwe and China mainly as the yardstick.

1.12.5 Chapter 5 will give an exposition of the current national legal framework governing the land issue and compensation in South Africa. It will further compare South Africa, China and Zimbabwean approaches to compensation in expropriation of land.

1.12.6 Chapter 6 will conclude and give recommendations on the obstinate issue of expropriation of land without compensation.

In the next chapter, I will examine the historical background to land ownership and expropriation in South Africa from the pre-colonial period to the post-apartheid epoch. This critical historical appraisal is essential in that it helps to portray the root cause of the land issue in South Africa.

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CHAPTER TWO

'At the core of South Africa's social history lies the transition of a majority of her people from their pre-colonial existence as pastoralist-cultivators to their contemporary status: that of subsistence rural dwellers, unable to support themselves by agriculture and dependent for survival upon wages earned in white farms.'

- Colin Bundy[169]

A HISTORICAL BACKGROUND TO LAND OWNERSHIP AND EXPROPRIATION IN SOUTH AFRICA FROM THE PRE-COLONIAL PERIOD TO THE POST-APARTHEID EPOCH

2.1 Introduction

The land question in South Africa is best understood against a historical background of previous land ownership and expropriation. This chapter provides a comprehensive review of the history and background of land ownership and expropriation in South Africa. The chapter focuses on the pre-colonial, colonial, apartheid and post-apartheid epochs. This critical historical appraisal is essential in that it helps to trace the root cause of the land issue in South Africa. The historical appraisal to the current land issue is vital in determining the appropriate recommendations towards the land question.

2.2 Pre-Colonial land ownership epoch

History is a contested terrain. It is extremely problematic to state with exact certainty, the period that the pre-colonial period commenced and ended, considering that there is practically no written evidence of how indigenous black people used to conduct their affairs until the era of written records. Patrick Harries opines that:

> History pays little attention to the era prior the coming of white settlers in the mid seventeenth century as it generally focuses on the coming of the Portuguese navigators in the 1480s and in more detail the establishment of the Dutch settlement at the Cape in the 1650s.[170]

[169] C Bundy *The Rise and fall of the South African Peasantry* (1979).
[170] Harries (note 7 above)

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Creating Future Leaders

Daphna Golan argues that 'lineages of black writing and white writing in South African literature have always been distinct.' [171] The argument stems from the opinion that sources of the past produced by European authors are manifestly polluted; hence, reliable African sources should be preferred as opposed to European sources.[172] The brief discussion shows that history in South Africa, in particular the pre-colonial era is contested. However, inference proves that the period before colonisation ended between the periods ranging from the mid-1600s to the 1890s.[173] For the purpose of this study, the pre-colonial period shall range between the 1600s to the 1890s. Brookes validates this reasoning when he opines that 'the settlement of whites apart from the presence of an insignificant number of English traders at Port Natal did not commence until 1837 when the first Voortrekkers arrived in the area.'[174]

Colin Bundy contends that Africans during the pre-colonial epoch existed as pastoralist-cultivators.[175] Land was plentiful, with farming and the herding of cattle being the pre-dominant pecuniary activities.[176] The basic forms of land tenure during this era included gathering and hunting, pastoralism and a mixed agricultural pastoral economy.[177] Ecological issues like rainfall, soil fertility and water dictated the economy of black South Africans during this era; hence, this resulted in the decentralisation of structures of political authority with all units having access to abundant resources, which allowed for self-reliant existence.[178] This reasoning corroborates Cousins' argument that 'pre-colonial land tenure was both collective and individual, in that it was a system of complimentary interest held simultaneously.'[179] The indigenous black people of South Africa used communal systems of land rights, which prioritised collective land uses and community interest.[180] Individuals, who belonged to the

[171] Golan (note 8 above).
[172] Cobbling (note 9 above).
[173] T N Huffman *Handbook to the Iron Age: The Archaeology of Pre-Colonial Farmers in Southern Africa* Scottsville: University of KwaZulu-Natal press (2007).
[174] E Brrokes & Webb C *A history of Natal* (1965) 29.
[175] Bundy (note 163 above) p 1.
[176] Bennet (note 10 above).
[177] D Denoon & B Nyeko *Southern Africa Since 1800* (1984) 1-12.
[178] Bennet (note 10 above).
[179] Cousins (note 13 above).
[180] A Chang South Africa: The Up Down, An Application of A Downstream Model to Enforce Positive Socio-Economic Rights (2007) 21 *Emory Int'l L. Rev* 621.

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community, were permitted to maintain individual allotments to land for habitation or cultivation.[181] These individual land rights were heritable through infinity.[182]

Ownership during this period was tremendously limited. Customary law was mainly concerned with the obligations the African natives had to each other as far as property was concerned and not the rights of people in property.[183] Rather, ownership was communal and not restricted to private ownership. Following this reasoning, it is apparent that during this period an individual's right to declare his interest in property against everyone else was less important than the relationship between people. Bennet argues that 'a claim to property was more in the form of obligations originating from family relations, than excluding people from the use of certain people.'[184] Therefore, property was embedded in communal affiliations as opposed to an individual person's claim over property.[185] The San, who had lived in Southern Africa for thousands of years, survived through gathering and hunting.[186] Access to land for the above-mentioned purposes hinged upon one's affiliation to the group.[187] Each group had a nominal leader who owned the resources within the groups' territory.[188] Every member, however, shared in the common use of the resources available.

The Khoikhoi had close ties to the San. They were pastoralists organised into chiefdoms considerably larger than San groups.[189] The Khoikhoi kept sheep and cattle for subsistence, practiced hunting and gathering and traded with African agriculturists.[190] Similar to the San, the Khoikhoi had a collective or communal land tenure system, where members of the clan communally held land for grazing.[191] The Nguni people combined farming and pastoralism together with hunting and artisanship production.[192] During the itinerant epoch, the rural area was densely populated, land

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[181] D Gilfillan Poverty Alleviation, Economic Advancement and the need for Tenure Reform in Rural Areas 4 June 2001 http://www.sarpn.org.za/EventPapers/Land/20010605Gilfillan.pdf (accessed 2 August 2018).
[182] As above.
[183] Bennet (note 10 above).
[184] Bennet (note 10 above).
[185] Cousins (note 13 above).
[186] R B Lee & I DeVore *Hunter-Gatherers* (1976).
[187] C M Coles Land Reform from Post-Apartheid South Africa 8 January1993 http://lawdigitalcommons.bc.edu/ealr/vol20/iss4/4 (accessed 30 July 2018).
[188] S F Khunou *Traditional leadership and independent Bantustans of South Africa: some milestones of transformative constitutionalism beyond Apartheid* (2009).
[189] T R H Davenport *South Africa: A Modern History* (1990) 6-8.
[190] J D Omer-Cooper *History of Southern Africa* (1987) 7.
[191] Coles (note 181 above) p705.
[192] Coles (note 181 above)

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was plentiful and climatic conditions coupled with poor land quality compelled frequent movements, thus, delineation or identification of agrarian or domiciliary land was irrelevant.[193] In the nineteenth century, the Nguni people depended more on farming for subsistence.[194] The Nguni people had broad ancestry and clan organisations. Members of a lineage used land in common for grazing and agriculture.[195] The indigenous land tenure system provided an individual member in the community with the right to share in that community's lands and resources. A chief held land in trust on behalf of the community and distributed it to members of the community, mostly through the family head.[196] Chiefs had outright power over land occupied by a tribe. They had the influence to mandate a tribal move and subsequently allocate land to his headman, from whom kraal heads would attain acquiescence to occupy a site.[197] The chief as the leader or ruler 'owned'[198] the land as 'trustee' and was in control of all the distribution of unappropriated land, and the exercising of expropriation powers.[199] However, the tribal chiefs consulted the elders and individuals using and living on the land prior to making any decisions affecting property rights.[200] Land was distributed based on necessity, use and individual rank.[201]

Land tenure was collective regards grazing land and individual concerning residential and arable land. Both the individual and communal rights to land during this era tended to be flexible.[202] Other members of the community could use land assigned to an individual or a family for cultivation, for grazing and cultivation after harvest.[203] Land was not a source of wealth.[204] For example, the individual right to land could be expropriated or forfeited in the public interest. No one paid for his or her allotment,

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[193] P D Glavovic Traditional Rights to the Land and Wilderness in South Africa 1991 http://scholarlycommons.law.case.edu/jil/vol23/iss2/4 (accessed 31 July 2018).
[194] As above
[195] J Omer-Cooper Aspects of Political Change in the Nineteenth Century Mfecane, in L Thompson (ed) *African Societies in Southern Africa* 1969 20.
[196] B M Jones *Land Tenure in South Africa-Past, Present & Future* (1965) 3.
[197] Glavovic (note 187 above) 283.
[198] Ownership in this context is different from 'ownership' in European property law. The word aims to demonstrate the power that the Chief possessed. Though technically the chiefs held the land in trust on behalf of the clan members, their powers were beyond such a duty as they could order removals and allocate same to someone else, hence they had power to control and distribute the land.
[199] A Kerr *Native Common Law of Immovable Property in South Africa* (1993)1-33.
[200] Gilfillan (note 175 above) 2.
[201] B Atuahene Things Fall Apart: The Illegitimacy of Property Rights in the Context of Past Property Theft (2009) 51 *Ariz. L. Rev* 829, 849.
[202] Glavovic (note 187 above) 283.
[203] Jones (note 190 above) 35.
[204] J Baten *A History of the Global Economy: From 1500 to the Present Cambridge University Press* (2016).

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thus, no one could sell or let it. Land could be alienated gratuitously to relatives or friends among the community members but outsiders had to receive their allotment from the chief.[205]

The above discussion clearly expounds that ownership of property and in this context, land was foreign to African natives. Everything was held in conjoint with everyone having equal rights to the same thing and nothing belonged to anybody. African indigenous people communally or collectively owned the land. The word communal as defined by Bennet submits that 'groups of people, who are closely bound together by common values and interest, share land for the purpose of subsistence.'[206] 'Okoth-Ogendo opines that 'indigenous land rights systems are communal in nature, in that ownership is collective and the community as an entity makes collective decisions about access and use of land.'[207] Bennet validates this fact when he argues that during the pre-colonial period prior the ownership stage, only rights of use were protected.[208] Protection therefore, was temporarily required to exclude other people during the period of use only.

Indigenous land tenure then was like an 'inverted pyramid' where the apex was the family, the tribe ancestry being the mid and the community the base.[209] The belief was that land belonged to a gigantic family of which numerous are dead, few are living and countless members are still to be born.[210] Land belonged to the family as a whole, not to any individual person. A good example to depict this reasoning is the case of *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* ,where the Maake ancestors originally settled on the Boomplats farm in the 1800s before the white settlers came to settle on the land.[211] The research report by the Regional Land Claims commissioner indicated that these ancestors enjoyed undisturbed indigenous rights to the land and exercised all rights that came with it.[212] These rights among

[205] R Fisher Land and Land Tenure in M Fuggie & M Rabie (ed) *Environmental Concerns in South Africa* 1983 442.
[206] Bennet (note 10 above) 379.
[207] Okoth-Ogendo (note 15 above).
[208] TW Bennet Customary law in South Africa (2004) 374.
[209] HWO Okoth-Ogendo '*The tragic African Commons: A century of expropriating, suppression and subversion'* An address delivered at a workshop on Public Interest Law and Community based Property Rights, PLAAS, 1-4 August 2005 [available at http://www.plaas.org.za/pubs/op/occasional-paper-series/OP%2024.pdf/]2.
[210] Fisher (note 199 above) 442.
[211] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* CCT 69/06.
[212] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* CCT 69/06.

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others included living on the land as families, bringing up their children on the land, tendering the elderly, paying spiritual tribute to their ancestors, burying the dead on the land, cultivating the land and using the land for livestock. They collectively owned the land as a family and preserved it for passing on to next generations since the 1800s.

Another example to substantiate the argument that land during the pre-colonial era was owned collectively by the community is the case of *Alexkor Limited v The Government of the Republic of South Africa and Another.*[213] The facts of the case suggest that the Richtersveld Community exclusively possessed the whole of the Richtersveld land prior its annexation by the British crown in 1847. The title possessed by the Community in the land, was the right of communal ownership under indigenous law.[214] This included exclusive occupation and use of the land by the members of the Community. The Community had the exclusive rights to its water, grazing land and hunting to exploit its natural resources.

It was customary under indigenous law during the pre-colonial epoch that land rights were preserved for the family, and were capable of passing on to direct descendants. It was the responsibility of the ancestors as per the Africans belief to transmit these rights to succeeding generations. The common conviction was that, the ancestors are akin to the land; therefore, access to land was determined by group standing.[215] Land in terms of indigenous law cannot and thus could not be alienated to external groups; therefore, the culture is and no doubt was that those in control of the land held trans-generational obligations to preserve the land for future generations.[216]

Pre-colonial indigenous land tenure as clearly demonstrated entrenched land ownership and land use rights to the whole community. The family or clan as discussed earlier, decided collectively on issues pertaining to access and use of land. However, premised on the belief that traditional leaders were held as a direct communicating conduit with the ancestors, they had power to make decisions regarding land and this

[213] *Alexkor Limited v The Government of the Republic of South Africa and Another* CCT 19/03 14, *Richtersveld Community & Others v Alexkor Ltd and Another* 2001 (3) SA 1293 (LCC).
[214] Fisher (note 199 above).
[215] Okoth-Ogendo (note 203 above)
[216] HWO Okoth-Ogendo Some issues of theory in the study of tenure relations in African agriculture (1989) Africa, Journal of the International African Institute 611.

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power is still in existence in the present age under indigenous laws and customs.[217] The traditional leaders possessed the power to make decisions on how and when the clan members could use the land. The land system was communal in nature, in that the chief or headman "held" the land and had rights to allocate it to individuals and groups.[218]

African indigenous law as indicated was not sophisticated and codified. With the coming of the European settlers as shall be discussed in subsequent chapters, resulted in Africans being dispossessed of the land they occupied. The European settlers in the nineteenth century dismantled the African setup and the chiefly power held by traditional leaders.[219] Europeans refused to recognise indigenous laws and replaced the chiefs by appointing magistrates but the Africans recognised and continue to recognise their indigenous laws regardless of what the Europeans thought.[220]

Black South Africans vehemently resisted land dispossessions by the minority European settlers. In order to demonstrate their disapproval, they employed several tactics *inter alia*, arson, destroying barriers or fences and confining cattle.[221] However, the European settlers kept accumulating in numbers, thus black Africans independence and freedom progressively dwindled.[222] Blacks eventually succumbed and consequently began toiling at white owned farms.[223] Africans, regardless of their defeat, which resulted in dispossessions, never entirely quit resisting total domination by the white settlers, thus they kept fighting to defend themselves from full incorporation into a colonial capitalist society.[224]

In sum, pre-colonial indigenous land tenure system in South Africa afforded to all members of the community rights of access to the land and natural resources available to the community. However, an individual could only claim through membership in the

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[217] Bennet (note 8 above) 382.
[218] P D Glavovic *Traditional Rights to the Land and Wilderness in South Africa* (1991) 283.
[219] P Delius Contested terrain: Land rights and Chiefly power in historical perspective in Claasens, A & Cousins, B (eds) *Land, Power & Custom* (2008) 221.
[220] As above.
[221] S Plaatje Native Life in South Africa 1916 Hallow Longman (1987).
[222] As above.
[223] Plaatjie (note 215 above).
[224] W Beinart & S Dubow Introduction: The Historiography of Segregation and Apartheid in Segregation and Apartheid in Twentieth-Century South Africa (ed) Beinart, W & Dubow, S London: Routledge (1999)21.

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community. When land was exhausted, the group could move to a new location and this was possible as land was plentiful. Those people who would move to a new location would then use the unused land in the new areas but in instances were disputes pertaining to the use and occupation of such land arises the original cultivators of such land would in most cases prevail in obtaining the right to use and occupy the land. [225]

2.3 Colonial land ownership period

Burger explains colonialism to mean 'monopolization of resource utilization by companies, creation of cheap wage labour to support these enterprises and creation of laws to suit colonisers.'[226] Colonialism wrecked indigenous land tenure and squeezed out traditional African agriculture systems.[227] The colonised African majority was dismantled into various ethnicised minorities, and consequently there were no majorities in the African colonies.[228] Mahmood Mamdani argues that colonialism 'unified the minority as rights-bearing citizens and fragmented the majority as so many custom-driven ethnicities.'[229] According to Mamdani, colonialism ensured that the minority settlers rule over the black majority.[230] African independence was a threat or endangered cheap labour for the colonial enterprises as Africans would have been able to earn a living without having to resort to offering wage labour.[231] The government through various laws and violence as shall be discussed later forced Africans to become labour tenants.[232] Around 1820, the British pilgrims in the Eastern Cape advocated for the expatriate authorities to bring Africans from the north under their domination, if need be by ferocity or potency of arms in order to grab their land and coerce them to offer cut-rate or free labour at their farms.[233]

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[225] Coles (note 181 above) 706.
[226] J Burger *Progress on Programme Governance for Responsive and Entrepreneurial Societal Solutions* (2010) 5.
[227] M Mamdani, Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism (Princeton: Princeton University Press, 1996).
[228] M Mamdani Political Identity, Citizenship and Ethnicity in Post-Colonial Africa Columbia University (2005).
[229] Mamdani (note 221 above).
[230] Mamdani (note 221 above).
[231] J L Gibson *Land Redistribution/Restitution in South Africa: A Model of Multiple Values, as the Past Meets the Present* Cambridge University Press (2009).
[232] See Natives Land Act No. 27 of 1913. The basis for referring to this statute is because the Restitution of Land Rights Act 22 of 1994 limited its jurisdiction to racially motivated land dispossessions taking place after the passage of the Natives Land Act of 1913.
[233] Leggassick M & Ross Robert From Slave Economy to Settler Capitalism: The Cape Colony and its Extensions in Mbenga, H & Rose, R (ed) *Cambridge History of South Africa* Vol 1 253-318.

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Hanekom also corroborates this assertion when he propounds that;

> Africans where driven off the land they occupied by force of arms and in some instances the colonial masters would introduce the imposition of taxes as an indirect way of forcing Africans off the land.[234]

For that reason, it suffices to state that indigenous African structures were destroyed by a series of wars.[235] These wars dispossessed black Africans of their land and livestock, which constituted the basis of their existence or way of life.[236] Harsch opines that 'the dispossession process was first under the British colonies and then thereafter, with the Union of South Africa, which was established in the year 1910.'[237] Bundy argues that 'indigenous black South Africans where pushed off the land they occupied into designated native reserves and some became labour tenants in the newly established diamond and gold mines.'[238] Onselan further argues that the relationship between the new self-appointed European proprietors: and the African tenants; was characterised by violence. [239] African independence drastically diminished as white settler accumulation evolved.

The land issue in South Africa began with the coming of the early European settlers. The arrival of the Dutch colonists in 1652 brought with it a new ownership land system.[240] The inauguration of the colonial era brought with it subjugation, discrimination and numerous systems of exploitation in South Africa.[241] The arrival disturbed and extremely defied the sustainability of the land tenure system of the KhoiKhoi, the San and Bantu peoples.[242] The Europeans first entry into South Africa fundamentally altered the relationships of African indigenous people to their land,

[234] Hanekom (note 145 above).
[235] E Harsch *South Africa: From Settlement to Union. New York: Grove Press* (1987).
[236] As above.
[237] Harsch (note 229 above).
[238] Bundy (note 163 above) 14; See Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd CCT 69/06, where the Popela community was dispossessed of their land by the white settlers. The white settlers required them to render services for a certain period every year in order to live there. The Africans were reduced to nothing more than labour tenants. The registration of the farm in the deeds registry whittled down their indigenous land rights to vulnerable labour tenants in relation to their ancestral land.
[239] CV Onselen Paternalism and Violence on the Maize Farms of the Southwestern Transvaal, 1900-1950 in Jeeves, AH and Crush, J (ed) *Portsmouth White Farms, Black Labour: The State and Agrarian Change in Southern Africa, 1910-1950* (1979) 192.
[240] Atuahene (note 195 above) 779-83.
[241] A Waldo *Apartheid the Facts* (1991) 18.
[242] B M Magubane *The Political Economy of Race and Class in Southern Africa* (1990) 27-28.

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including the systems of land tenure and use.[243] The new land tenure system introduced by the European settlers required formal registration of property; did not recognise communal land tenure systems and comprehensively excluded indigenous black people from owning property.[244]

Black South Africans became tenants and land ownership of tribal officials became unclear.[245] The livelihood and land of black South Africans were continuously threatened; as such, black South Africans fiercely resisted European settlement and expansion. However, despite such resistance by the San, the KhoiKhoi and Bantu agriculturist against European incursions, they all were not a match for the settlers.[246] Europeans eventually succeeded in claiming occupation of the land belonging to Africans.[247] The indigenous peoples were displaced, hunted, killed, and in some instances assimilated.[248] The Europeans in the late seventeenth and eighteenth century moved into the interior of South Africa in search of grazing and cultivating land. They waged a series of wars against the Africans.[249] These wars, in particular the 1780 war at Fish River, resulted in the dislocations of the agricultural indigenous people and appropriation of their land.[250]

In 1806, the British took over sovereignty over the Cape Colony from the Dutch East India Company.[251] The British reversed the system of racial privileges implemented by the Dutch.[252] They enacted Ordinance 50, which granted the Africans full legal equality with whites. A system of freehold land tenure was in existence post-Boer Wars throughout the Transvaal, the Cape and Natal.[253] The system permitted the acquisition of rights to land by nonwhites.[254]

Land was reserved and designated to indigenous people, especially those moved off their land. In 1847, the British introduced a reserve for migrants from Zulu army wars

[243] P D Glavovic *Traditional Rights to the Land and Wilderness in South Africa* (1991) 281,316.
[244] Atuahene (note 195 above) 784.
[245] A D Lowenberg & W H Kaempter *The Origins and Demise of South African Apartheid: A Public Choice Analysis* (1998) 38.
[246] Cooper (note 189 above) 28.
[247] Magubane (note 236 above) 47-54.
[248] Coles (note 181 above) 707.
[249] D Denoon & B Nyeko *Southern Africa since 1800* (1984) 22-24.
[250] Coles (note 181above) 708.
[251] Davenport (note 183 above) 68.
[252] Davenport (note 183 above).
[253] Jones (note 190 above) 12.
[254] Jones (note 190 above) 12.

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and allocated them individual land holdings.[255] The reserves were subsequently extended to other areas making up South Africa. This shows that blacks, who had been earlier dispossessed of their land, now had an opportunity to own land and attain full legal equality with whites.

The union of South Africa in 1910 followed the defeat of the Boer Republics in the Anglo Boer war.[256] However, Jan Smuts and Louis Botha, Transvaal Afrikaner Generals led the new government.[257] The 1910 Constitution under this government expanded and further entrenched racial separation and inequality that existed in the former Boer Republics. It reserved a mere seven percent (7%) of the total land in South Africa for nonwhite Africans reserves.[258] Subsequent laws further entrenched these racial segregating and discriminatory laws.

The colonial settlers enacted laws to enable African land dispossession. Coetzee et al state that ‘all the Acts relating to land had only one goal, that is to reduce black South Africans to proletarians.’[259] Africans relied on the use and access to land for their survival; hence, dispossessions nullified their independence and rendered them subjects to the white minority. Sachs argues that ‘the control of land is not merely control over an industrious resource but rather a control over people’s lives.’[260]

However, other scholars like George McCall Theal offer a contrasting thought regards the land history in South Africa. He argues that ‘the land upon which European settlers established their farms was unoccupied and that the black Africans who challenged the settlers for title of the land were actually invaders from the north.’[261] He justifies his claim by arguing that much of the interior South Africa around the 1820s due to a series of wars, was depopulated, which then explains that when the whites first arrived the land was uninhabited.[262] He reasons that ‘the white settler farmers whom he terms

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[255] Denoon (note 243 above) 70.
[256] The Union of South Africa came into being on 31 May 1910 with the unification of four previously separate British colonies: The Cape, Natal, Transvaal and Orange River colonies. It included the territories formerly part of the "Boer republics" annexed in 1902, the South African Republic and the Orange Free State.
[257] S Dubow *Racial Segregation and the Origins of Apartheid in South Africa, 1910-1936* (1989) 22.
[258] P Maylam *A History of the African People of South Africa: From the Early Iron age to the 1970s* (1986) 20-41.
[259] Coetzee (note 30 above).
[260] A Sachs *Rights to the Land: A fresh look at the property question* (1990) 3.
[261] GM Theal *History of the Boers in South Africa 1887* (1969).
[262] Roets (note 91 above).

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"harassed farmers" only acted in defense against the vicious hostility and enmity of their African neighbors whom he describes as the "savages of a very low class".'[263] Ernst Roets corroborates this reasoning when he stated that

> The argument that whites stole the land is a single biggest fallacy. There are three ways in which whites acquired land, namely resettlement on empty land, the purchase of land through treaties, cooperation and agreements and through conquest.[264]

Contrasting schools of thought exist on how the current white landowners acquired the land. They hold the view that they legally and justifiably acquired the land as described above. However, the majority black people hold the view that whites unjustly acquired the land through discriminatory and segregatory laws. In order to do justice to the study it is prudent to examine the laws that were enacted by the colonial settlers on land ownership.

2.3.1 Colonial Laws on Land ownership

2.3.1.1 Article 13 of the Pretoria Convention 1881

This convention provided that natives would be permitted to acquire land, however the grant or transfer of the acquired land, in every case, was to be made and registered in the name of the Native Location Commission in trust for such activities.[265] The term 'Native' according to the definition provided in the Natives Land Act, refers to African people.[266] A critical analysis of this convention clearly confirms that the colonial laws aimed in all cases to limit black ownership and dealing in land. Hence, it was an effective way of controlling Africans, as they would be subject to white formal laws, which laws undermined indigenous land tenure laws. Indigenous laws became inferior to white settler formal laws, hence, dispossessions became easy and justifiable by law.[267]

In the case of *Richtersveld Community & Others v Alexkor Ltd and Another*, it was not in dispute that the Ricthtersveld community possessed the whole of Richtersveld prior to its annexation by the British Crown in 1847.[268] In the year 1920, the British colonial

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[263] Theal (note 2 above).
[264] Roets (note 91 above).
[265] The Pretoria Convention 1881, Article XXII.
[266] Native Trust and Land Act, 27 of 1956, which became the Bantu Land Act 27 of 1913 and later the Black Land Act 27 of 1913.
[267] *Richtersveld Community & Others v Alexkor Ltd and Another* 2001 (2) SA 1293 (LCC).
[268] *Richtersveld Community & Others v Alexkor Ltd and Another* 2001 (2) SA 1293 (LCC).

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government ignored the indigenous land rights of the community. The state dispossessed the black indigenous community of these rights and subsequently granted those rights in full ownership to Alexkor. This case corroborates the argument that the colonial laws supplanted indigenous land tenure laws.

2.3.1.2 Natives Land Act 27 of 1913

The court *Tsewu v Registrar of Deeds*, held that the Black Land Act and the Native Trust and Land Act[269] (now the Development Trust and Land Act) were the crucial laws that determined where black South Africans could live.[270] The Act denied black South Africans the capacity to own land.[271] These laws paved the way for segregation and no doubt rendered South Africa a white man's polity. By 1913, areas available for black communal tenure had diminished because of the fact that blacks had developed a sense of the market and its mechanisms.[272] Blacks had begun to acquire farms.[273] Additionally, a group of prosperous small-scale black farmers had acquired freehold and quitrent title to property over the years.[274] The white settlers began to view such developments as a threat.[275] The Act was therefore, enacted to address these emerging concerns or threats.

Section 2 of the above-mentioned Act proscribed transaction in land between Africans and European settlers outside the scheduled areas.[276] People were regulated based on the racial group to which they were assigned.[277] The court in the case *of Tongoane & Others v Minister of Agriculture and Land Affairs & Others*[278] held that 'the effect of the legislation was to preclude African people from purchasing land in most of South Africa.' Black; land rights were infringed and made inferior to these formal laws.[279]

An example, to demonstrate the effect of this law can be deduced in the case of *Baphalane Ba Ramakoka Community v Mphela Family & Others Inre Mphela family &*

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270 *Tsewu v Registrar of Deeds* 1905 TS 130 at 135.

271 TRH Davenport & C Saunders *South Africa: A Modern History* (2000) 271,390.

272 Davenport (note 183 above) 24.

273 Davenport (note 183 above) 334.

274 Davenport (note 183 above) 97-119

275 4 Surplus People Project, Forced Removals in South Africa 24-27 (1983)

276 Natives Land Act 27 of 1913, sec 2.

277 Waldo (note 235 above) 18.

278 *Tongoane & Others v Minister of Agriculture and Land Affairs and Others* (2010) ZACC 10 CCT 100/09.

279 Civil law created rights in property for the nonnatives and such were safeguarded against infringement but on the contrary the Africans were regarded unsophisticated to possess any right in property.

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others v Haakdoombult Boodery & Others.[280] In *casu,* the Mphela family acquired Haakdoonbult farm in August 1918. They carried farming activities on the land until they were compelled forcefully to dispose of the land. The authorities then, relied on the Black Land Act 27 of 1913 and the Development Trust and Land Act 18 of 1936, to conclude that the farm was located at an unacceptable 'black spot'. Therefore, under duress the family sold the farm in 1959. The family regardless of the forced sale, refused to vacate the land and the government through the police raided them at night in order to vacate them forcefully. Despite the fact that the evacuation materialised during the apartheid era, the laws that paved way for such discrimination came into effect during the colonial era.

Waldo opines that the Native Land Act of 1913 and the Native Trust and Land Act of 1936 designated only thirteen point seven percent (13, 7%) of the land to the black South Africans.[281] This was despite the stubborn fact that the black South Africans constituted the majority of the populace as opposed to the white minority. Hence, blacks were confined to overcrowded unfertile reserves. Blacks became poorer and could not own fertile agrarian land. The 1913 Act stripped black South African people of every single right to possess land, and the National Party in its dexterity of apartheid reinforced these policy decades later.

The 1913 Act was an effective tool to guarantee that all Africans were denied the prospect to attain a self-sustenance status. When Africans were dispossessed of their land, some of them resorted to sharecropping, as opposed to wage labour. Sharecropping allowed them to retain access to at least some of the land for their own use.[282] These peasant farmers became successful and began to thrive, they accrued profits, which they used to purchase more land and as a result, the state was alarmed as this posed serious threats to white land monopoly.[283] The government then answered by enacting the 1913 Natives Land Act, which then proscribed Africans from purchasing or owning land except in the unfertile overcrowded reserves allocated to them.

[280] *Baphalane Ba Ramakoka Community v Mphela Family & Others Inre Mphela family & others v Haakdoombult Boodery & Others* [2011] ZACC 15 CCT 75/10.
[281] Waldo (note 235) 18.
[282] Bundy (note163 above)14.
[283] Bundy (note163 above)14.

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2.3.1.3 Native Administration Act, 38 of 1927

The Native Administration Act[284] now referred to as the Black Administration Act stated that Africans could procure land subject to the state President's consent. Nevertheless, they could not register title to the land in their own respective names. The Minister of Native Affairs held the land in trust on behalf of the Africans. The legislation placed restrictions on native's power to purchase and control land. A reading of the Act shows that without the state Presidents approval; an African could not buy land. Furthermore, even after purchasing the land, full ownership rights could not pass to such purchaser. The Minister of Native Affairs was to hold the land in trust on behalf of the African purchaser. This entails that Africans held the same status at law with that of minors, which means that Africans had no legal capacity to own land.

2.3.1.4 The Development Trust and Land Act, 1936

Thwala opines that 'the Development Trust and Land Act condemned Africans to unfertile overcrowded reserves.'[285] He further argues that 'the Act endorsed a framework for South Africa's crooked and segregating pattern of land ownership.[286]' The Act made black South Africans to become destitute in their own land of origin. It removed blacks to Trust lands and created homelands from these Trust lands.[287] Section 6 of the Act provided that all land kept for Native occupation and all land within the Native reserves vested in the Trust. Hence, the Act gave force to the colonial objective to deny Africans power to possess full land ownership rights.

The Act went further to place a limit on the amount of land the Trust acquired. Consequently, this automatically placed a limit on the land that Africans could occupy. Section 14 (1) of the Act placed a limit on the land to be acquired for Africans not to exceed seven and one-quarter million mergen in extent. The consequence was that the majority black South Africans were restricted to only thirteen percent (13%) of South Africa, while on the contrary, the minority white settlers comfortably occupied the remaining eighty-seven percent (87%) of South Africa's land. No doubt, the Act made South Africa a white man's polity.

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[284] The Native Administration Act, 38 of 1927
[285] D Thwala Backgrounder-Land and Agrarian Reform in South Africa. National Land Committee. (2003) available at http://www.nlc.co.za,n.d., accessed 08 September 2019)
[286] Thwala (note 279 above).
[287] Davenport (note183 above) 336-337.

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The dispossessions, as time passed by, compromised the existence, interconnection and structure of African communities by removing and estranging them from their homes or land to reserves.[288] The removals took away their sentimental attachment to the land. The Act introduced the concept of 'released areas'.[289] This consequently meant that blacks were released from the restrictions of the Black Land Act,[290] regarding the sale and purchase of properties by blacks.[291] However, the release was only restricted to the South African Development Trust.[292] This meant that blacks could sell to non-blacks only if the purchaser was the Trust. The Trust could re-sell the purchased land to acceptable buyers in the context of non-blacks.[293] The Trust in return, would after expropriating such land; relocate the Black owners on comparable land. As such, some elements of parity were maintained between the acreage of Trust lands available for Black procurements and the released areas.

Black tenants, squatters or employees were prohibited by the Act from residing on property owned by the white settlers unless such stay was well defined or specified in the statutory provision.[294] Hence, the statute focused on indigenous black people who resided outside urban areas and not within reserves. This explains that the Act focused itself on blacks on rural, white properties.[295] Thus, in this context, the Act emphasised segregation and creation of reserves as advocated in the 1913 Act.

It will be sufficient to state that blacks at some point willingly sold their land to the Trust or government. Compensation was given to the seller upon appropriation of land. However, the couching of the law, as deduced from its wording no doubt, aimed at dispossessing blacks from the white areas. This explains why only acceptable buyers (whites only) purchased the appropriated land from the Trust.

2.3.1.5 The Black (Urban Areas) Consolidation Act

This Act specifically set aside special residential areas for each particular group or race within the territory of the other.[296] The Act aimed to control the huge number of

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[288] Bundy (note 163 above).
[289] Development Trust and Land Act 18 of 1936 sec 2.
[290] Black Land Act 27 of 1913
[291] Development Trust and Land Act 18 of 1936, sec 11(1).
[292] Development Trust and Land Act 18 of 1936, sec 10 (2), 11(1) and 12.
[293] Development Trust and Land Act 18 of 1936, sec2(2)(a)
[294] Development Trust and Land Act 18 of 1936, sec 26
[295] As above.
[296] Davenport (note 183 above) 339.

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Blacks moving to the peripheries of white urban areas.[297] The Urban Areas Act determined what property rights indigenous black South Africans held in urban areas as well as other non-urban areas such as the rural areas, trust lands and Homelands under the control of the 1913 and 1936 Acts. Non-blacks were prohibited from dealing in any land transactions except from those with government in urban areas.[298] In addition, the leasehold property rights, which were the only rights accessible to blacks, were exceedingly limited.[299] The 1937 amendment proscribed blacks from remaining within urban areas without employment, for any period in excess of 72 hours. Those who defaulted were fined, imprisoned, or sent to Homelands.[300] The primary aim of the Urban Areas Act and the 1937 amendment was to relocate blacks from motley residential areas to townships.[301] Section six A granted a 99-year lease to a qualified person. However, a qualified person entailed 'a person who had continuously resided in an urban area since birth, or had continuously worked for one employer for 10 years or the person should have continuously resided in an urban area for 15 years.'[302] This consequently deprived black people an opportunity to own property in urban areas. The provision explains the reason why there are limited leasehold property rights of urban blacks in South Africa.

To conclude, it is apparent that indigenous black South Africans to some extent were ignorant. They did not understand the formal registration system introduced by the Europeans. It is not clear if they understood individual property ownership taking into account the fact that they practiced communal land tenure prior the arrival of European settlers. Africans on some occasions discussed above, participated in land transactions with the whites. They relinquished their title to the land, regardless of the fact that there exists a possibility that they did not understand the consequences of the said transactions. It is unclear as to whether they were appraised as to whether they were relinquishing their ownership in the land or they were convinced they were only relinquishing use rights in the land and not ownership. Another controversial issue is whether Africans transacting in the land understood the complex European laws and the language. Conversely, the view possibly held by the current landowners is

[297] S van Der Horst Race Discrimination in South Africa 91-92 (1981)
[298] As above.
[299] Urban Areas Act 25 of 1923 sec 6 A
[300] Davenport (note 183 above) 340-343
[301] Davenport (note 183 above) 340-343.
[302] Urban Areas Act 25 of 1923 sec 10 (1)(a).

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that ignorance of the law is not an excuse. They purchased the land; hence, they are legally entitled to the land. The current landowners further argue that the land occupied by their farms as argued by George McCall Theal was unoccupied and redundant due to a series of wars as discussed above. As a result, indigenous black Africans cannot legally claim ownership of the land, which in turn ratifies the current landowners as the legal owners of the land.

This is contrary to the fact that the above-mentioned argument was resolved in the *Mabo* case as discussed earlier when the court held that land in this continent was not *terra nullius*.[303] The Africans view as demonstrated above argue that the European settlers unlawfully dispossessed indigenous South Africans of their land. Europeans introduced a series of laws as discussed above to enable such dispossessions. In addition, they took advantage of the indigenous people's ignorance of European system of laws. It defeats reason as to why Europeans would enact a series of laws when the land was unoccupied and unclaimed. The colonial dispossessions paved the way for apartheid, in particular the 1913 Act, thus significantly promoting unequal distribution of land and natural resources still evident in contemporary South Africa.

2.4 Apartheid land ownership epoch

Sunstein opines that 'the advent of the apartheid era in the year 1948 was aimed at finding a permanent lasting solution to the native predicament.'[304] It suffices to state that though apartheid did not become the official policy in South Africa until the time the National Party massed majority votes in parliament, the roots of apartheid existed long before 1948. The drafters of the Transvaal first constitution introduced and stated the principle that equality between whites and non-whites was impossible.[305] The objective of this policy, a policy which was to progress into apartheid entailed that no non-white person should own individual fixed property rights; and secondly, that non-whites could not live in proximity to whites.[306] Therefore, the issue of ownership and occupation became a key area of concern and continued to be in existence throughout the apartheid epoch.[307] The 1913 Act during the colonial period introduced racial stratification, and a series of legislations subsequently followed, thereby creating a

[303] Mabo v Queensland (1992) AustLII
[304] C R Sunstein *Social and Economic Rights? Lessons from South* Africa (2001) 11 (4) 123.
[305] Drie-en-dertig Artiekelen art. V1, XX1X (1849).
[306] T Van Reenen *Land-Its Ownership and Occupation in South Africa* 1 (1962).
[307] As above.

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strong foundation for apartheid.[308] Another example is the Black Administration Act[309] as read together with the Republic of South Africa Act of 1961. These statutes created the necessary bureaucracy to implement the apartheid system.

The Black Administration Act endowed the State President with the superlative authority to define and change borders of any tribe or location, divide the existing tribe into two or more, and direct the removal or withdrawal of a tribe, African or African community from whichever place to the other and never to return.[310] Thus, the Act afforded the government power to expropriate any land desired, thereby perpetuating denationalisation of blacks. This kind of power strengthened and paved the way for apartheid policies of separate property rights for blacks and whites. The apartheid government in its dexterity reinforced colonial laws and enhanced them in a bid to further dispossess Africans of land in favor of the white minority. The laws implemented promoted segregated ownership and use of land. Thus, it entailed forced evictions and relocation of large numbers of African people.

MacMillan opines that 'these forced evictions or dispossessions led to severe impoverishment and exploitation of the black majority South Africans.'[311] Kieweit weighs in to corroborate the view that white settlers immensely contributed in condemning the black Africans to poverty, because of these land dispossessions.[312] The land dispossessions resulted in some black South Africans resorting to labour tenancy on white owned farms for survival. However, these African labour tenants were subjected to inhuman and degrading treatment. Cook metaphorically equates the appalling living conditions of Africans on the farms with prison labour.[313] Onselen argues that 'violence was an essential part of the European proprietors and African tenants.'[314]

Apartheid was entrenched on racial segregation and limited access to land for blacks in South Africa. Apartheid had a negative impact on the lives of nonwhites.[315] It paved

[308] M K *Robertson Black Land Tenure: Disabilities and Some Rights, in Race and The Law In South Africa* (1987) 119.
[309] Black Administration Act 38 of 1927
[310] Black Administration Act 38 of 1927, sec 5 (a)-(b).
[311] MacMillan (note 96 above).
[312] C. W. deKiewiet, A History of South Africa: Social and Economic (Oxford, 1957 [1941]), 205–6.
[313] A Cook Akin to Slavery: Prison Labour in South Africa: London: International Aid and Defense Fund 1982
[314] Onselen (note 233 above).
[315] L Thompson *A History of South Africa* (1990) 163-5

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the way for the creation of reserves for nonwhites.[316] The apartheid system rendered the purchase or lease of land by nonwhites from Europeans outside the reserves illegal.[317] The Group Areas Act 41 of 1950, later merged by the Group Areas Act 36 of 1966 had a huge impact on racial segregation in South Africa.[318] Unlike other Acts that focused on creating a Black South Africa in the context of trust lands and homelands, the Group Areas Act regulated all the different population groups within white South Africa.

The Group Areas Act no doubt stands at the apex of controversial apartheid laws. The Act is perhaps the most known apartheid law In South Africa.[319] T.H Van Reenen the Justice of the Supreme Court of South Africa opines that 'the actual significance and effect of the act is not well known.' He holds the view that blacks were the least affected by this Act. The rationale behind this view is founded on the argument that the Black Land Act of 1956, regulated non-urban land occupation and ownership of land by blacks, thus such land was excluded from the provisions of the Group Areas Act. In my view, the argument by Van Reenen is misdirecting because the evictions of black people from their land in the period ranging between 1960 to 1970 is tantamount to expropriations and disposseesions.

The Act placed all land in South Africa under two varieties, that is controlled and non-controlled areas.[320] The non-controlled areas constituted of black locations, black areas, villages and all land vested in the South African National Trust.[321] Non-controlled areas relate to all areas regulated by the Black Administration Act as well as the 1913 and 1936 Act. The controlled areas relate to all the land that was not under the administration of the Black Administration Act, the 1913 and 1936 Act. In other words, this means all the area designated to white urban areas.[322] Nonetheless, the Act indirectly played a significant role in land dispossessions in South Africa,

[316] As above
[317] Jones (note 190 above) 12.
[318] G E Devenish The Development of Administrative and Political Control of Rural Blacks in Robertson, MK (ed) *Race and The Law in South Africa* (1987).
[319] T Van Reenen Land-Its Ownership and Occupation In South Africa 1 (1962).
[320] S Shrand Real *Estate in South Africa* (1981) 179.
[321] As above.
[322] The Group Areas Act does not use the term "controlled areas". The term is used for the purpose of this study to refer to all the areas in South Africa that were under the provisions of the Act and not areas regulated by any of the Black Land Acts or any other legislation regulating land in homelands, reserves, townships etcetera.

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through racial segregation, thus its discussion for the purposes of this study remains relevant. The Act placed all people in South Africa as members of racial groups. The status of the racial groups then determined the ownership and occupancy rights in land possessed by members of such a group.

The 1950 Act empowered the President to set up urban and rural areas exclusively for ownership and occupation by members of a particular race, for example whites, coloureds or Indians. Nevertheless, the act did not designate any area specifically for indigenous black South Africans. In addition, blacks where prohibited from owning or occupying areas designated to the other groups.[323] The Act achieved the separation and dispossession through the group areas system that divided blacks and whites in rural and urban areas.[324] The Act restricted the access of black persons to particular urban areas.[325] For that reason, blacks were restricted to homelands and rural locations without white South Africans.[326] The apartheid laws, around the 1980s, succeeded in geographically separating white and nonwhite South Africans, and guaranteed a huge scale of black land dispossessions. The rural homelands included the Bophuthatswana, Transkei, Ciskei and Venda while in urban areas there were two prescribed types of residential areas for blacks, that is, recognised black townships concomitant with white towns and black townships outside the homelands.[327] Thus, blacks were required to reside in these areas in order to guarantee against infringements on white ownership rights in white designated areas.

The Prevention of Illegal Squatting Act 52 of 1951, the Reservation of Separate Amenities Act 49 of 1953 and the Trespass Act 6 of 1959, though not enacted to regulate land dispossessions, endowed the state with power to exclude, govern or evict nonwhites in designated White areas.[328] Apartheid laws focused on creating separate territories for black South Africans. Hence, the above Acts assisted the

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[323] M Robertson Dividing the Land: An Introduction to Apartheid Land Law in Murray, C & O'Regan, C (ed) *No Place to Rest* (1990).
[324] Group Areas Act 36 of 1966.
[325] A Chang South Africa: The Up Down, An Application of A Downstream Model to Enforce Positive Socio-Economic Rights (2007) 21 *EMORY INT'L L.REV* 621,627.
[326] The Group Areas Act denied Blacks housing opportunities, thus, compelled most of them to commute for long distances to work. Furthermore, the Act deprived Blacks the opportunity to own land in the white South Africa. See H Suzman Key Legislation in the Formation of Apartheid 16 March 2009 http://www.cortland.edu/cgis/suzman/apartheid.html (accessed 18 August 2018).
[327] See Natives (Urban Areas) Act 21 of 1913; Natives (Urban Areas) Consolidation Act 25 of 1945; Black Communities Development Act 4 of 1984.
[328] R Keightley The Trespass Act in (ed) Murray, C & O'Regan, C (ed) No Place to Rest (1990).

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government in indirectly achieving the objective of racism and segregation, which culminated in unequal distribution of all resources, as blacks were condemned to overcrowded and unfertile homelands and reserves. The 1956 statute criminalised black African occupancy on white owned land.[329] In 1960, at least six hundred and fourteen thousand black people were removed from the land they occupied for the exclusive use of white people.[330] From the period extending between 1960 up to 1974 approximately, one and a half million tenants and their respective families were evicted from agricultural land owned by whites and transferred to reserves or Bantustans.[331] In my view these evictions amounted to expropriation.

The Black Homelands Citizenship Act stipulated that all blacks in South Africa ought to have citizenship in one of the territorial authority areas or homelands.[332]This was inclusive of the black indigenous people who had certainly not lived in any homeland, had no relatives or connection with anybody in the homelands.[333] The Black Homelands constitution subsequently authorised the government to endow the homelands with power to self-govern.[334] The idea embedded in apartheid was to create a white South Africa, without blacks infringing white ownership rights.[335] Hence, blacks where confined to homelands, allowed self-governance, while the rest of South Africa was reserved for the white minority group. Regardless, the fact that white South Africans relied on black labour, the South African government continuously sought to preclude permanent black urban workforce. By 1980, the apartheid government through its segregation laws had dispossessed about three million five hundred black people and relocated them to black townships and homelands.[336]

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[329] Waldo (note 235 above) 19.
[330] Waldo (note 235 above) 19.
[331] Thwala (note 279 above).
[332] Black Homelands Citizenship Act 26 of 1970
[333] Devenish (note 311 above) 28-36.
[334] Devenish (note 311 above) 37.
[335] International law declared these homelands or "independent states" or any aspect associated or embedded in apartheid illegal. See the Convention on the Elimination of Discrimination Against Women (1979), 1249 UNTS 13, entered into force 3 Sept. 1981, an instrument which prescribed how to eradicate apartheid ; Convention on the Suppression and Punishment of the Crime of Apartheid (1973), 1015 UNTS 243, entered into force 18 July 1976; the International Convention on the Elimination of All Forms of Racial Discrimination (1965), 660 UNTS 195, entered into force 4 Jan. 1969, the first instrument of international law which expressly proscribed apartheid in particular Article 3.
[336] Human Awareness Programme 1989.

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The fundamental idea of creating states by the ruling National Party was to deny black South Africans equal treatment within South Africa, as they would be citizens of their defined tribal states rather than the Republic of South Africa.[337] The rationale was that if homelands became sovereign and independent, their citizens would take homeland citizenship, thus automatically loosing South African citizenship, regardless of the fact that a majority of the blacks still worked and dwelt within South Africa. The idea was to make South Africa a white man's polity.[338] The government in perpetuating this idea enacted the Promotion of (Bantu) Self-Government Act.[339] The Act gave specific black African groups according to their tribe and attachment, rural reserves "independence" and the power to self-govern.[340]

The Act succeeded in physically separating people according to race and ensured that races were citizens of different countries. The government in implementing the separation, granted independence to the homelands of Transkei in the year 1976, Bophuthatswana in the year 1977, Venda in 1979 and Ciskei lastly in the year 1981. The effects of this Act were strikingly similar to those of the National States Citizenship Act.[341] It provided that all blacks in South Africa had to be citizens of one of the 'Bantustans' or homelands.[342] An individual's birth, dialectal, family, history and association was pertinent to allocate citizenship in cases where such individual's ancestral lineage was unclear.[343]

However, it is pertinent to note that the Black Authorities Act[344]set the foundation for the above-mentioned denationalisation and repatriation of blacks.[345] The Act was premised on the reasoning that blacks should be allowed to regulate their own destiny, within areas designated for them, in terms of their traditional methods of government.[346] Secondly, the Act was premised on the reasoning that blacks had no right to be in South Africa, consequently, there was no need to put in place a system

[337] A J Rycroft, *Citizenship and Rights in Race and the Law in South Africa* (1987) 209.
[338] Davenport (note 183 above) 413-14.
[339] Promotion of (Bantu) Self-Government Act 46 of 1951
[340] Denoon (note 188 above) 198-99.
[341] National States Citizenship Act 26 of 1970
[342] National States Citizenship Act 26 of 1970, sec 2(2).
[343] Black Development Act 1984.
[344] Black Authorities Act, 68 of 1951.
[345] Legal Resources Centre (Durban), Legal Resources Trust, Para-Legal Manual 215-216.
[346] As Above.

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to represent them in the black townships contiguous to white urban areas.[347] Europeans feared granting non-whites ownership rights to fixed property.[348] The rationale was that non-whites outnumbered whites; hence, if they owned land, they would consequently control the country by virtue of voting rights, which rights attached to property ownership rights.[349]

The Act identifies with the view held by the Minister of Bantu Administration and Development in 1971, when he said:

> … Land ownership outside the towns is communal…To abolish the system of communal tenants would drastically affect the Bantu tribal traditions and systems of government… Their tribal system of government is based on the concept of land tenure. It is a very important matter.[350]

Communal land tenure was very important to the indigenous people. However, the distribution of the land was unfair and unequal. The blacks constituted the majority, but the land allocated for communal land tenure and self-governance of blacks was uneven as compared to land reserved for the white minority. It is ostensible that regardless the disguise advanced by the European government in pretending to uphold and preserve the African tribal system of government, the main objective of the above-mentioned Act was to establish a system of indirectly ruling the blacks.[351] Davenport argues that the Act

> was an attempt to restructure the government of the reserves on more traditional lines, but in practice came to mean the establishment of a system of indirect rule through the medium of subservient and sometimes well-rewarded chiefs, chosen for their preparedness to enforce government policy at the expense of their own popularity.[352]

This Act had dire consequences for indigenous black South Africans. It perpetuated racial segregation, discrimination and an extensive gross unequal distribution of land to the prejudice of black people. It paved the way for the above-discussed statutes that subsequently came into effect. The Act, though portraying the need to preserve traditional land tenure, aimed at dispersing Africans from white South Africa to

[347] Black Authorities Act 68, of 1951 sec 12.
[348] Dadoo Ltd v Krugersdorp Municipal Council A.D 530 1920.
[349] *Dadoo Ltd v Krugersdorp Municipal Council* A.D 530 1920.
[350] T Davenport & K Hunt *The right to the land 7* (1974).
[351] T R H Davenport *South Africa: A Modern History* (1987).
[352] As above

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reserves and homelands. This substantiates the argument echoed by black majority South Africans that apartheid and colonial laws were the mechanism used to dispossess blacks of their land, hence the need to redistribute land in order to redress the past gross unequal distribution of land.

The government introduced the Black Communities Development Act 4 of 1984, which possessed the same effect as the Group Areas Act. It regulated indigenous Africans outside the homelands and controlled townships and areas designated for nonblack.[353] However, this Act paved way for a change in government policy towards blacks. The government introduced free trading areas and free residential settlement areas.[354] An example of the shift in policy is the *Govender* case.[355] The prosecution endeavored to enforce the Group Areas Act. The court requested the prosecutor to provide evidence on 'the personal hardship which such an order may cause and the availability of alternative accommodation' before the court could make a determination as to whether nonwhites should be evicted as requested in the application.[356] However, this did not eradicate apartheid. Apartheid remained intact and embedded in the Republic of South Africa Constitution.[357]

In the early 1990s, South Africa was under immense pressure from the United Nations to end apartheid.[358] Consequently, the government embarked on repealing racial laws. The first legislative progress was the Abolition of Racially Based Land Measures Act of 1991. The Act repealed the 1913 and 1936 Land Acts and reinstated Blacks with the right to own land.[359] In 1994, a new government came into power, and subsequently the South African Interim Constitution came into effect.[360] In spite of the attempts by the apartheid government to repeal apartheid laws, the effects of apartheid still exist. In the year 1994, about thirteen million people of South Africa's forty million population were resident in the anterior homelands and approximately

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[353] Robertson (note 301 above) 131.
[354] Davenport (note 183 above) 541.
[355] S v Govender 1986 (3) SA 969, 971 (T).
[356] *S v Govender* 1986 (3) SA 969, 971 (T).
[357] Republic of South Africa Constitution Act, 110 of 1983.
[358] T K Plaatjie Taking Matters into Their Own Hands: The Indigenous African Response to the Land Crisis in South Africa in Lee, M C & Colvard K (ed) *Unfinished Business: The Land Crisis in Southern Africa* (2003) 287, 291-92.
[359] B de Villiers *Land Reform: Issues and Challenges: A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia* (2003) 46.
[360] South Africa (Interim) Constitution, 1993.

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eighty percent of the bucolic populace was deeply impoverished.[361] As a result, the land issue remains a hotly debated issue post the apartheid epoch.

2.5 Post-Apartheid land ownership epoch

Colonial and apartheid laws and policies as demonstrated earlier, were the root cause of the current land issue. These laws were characterised by racial segregation and discrimination and had the consequence of not only barring people from residing in certain areas but also affected their property rights.[362] The 1913 Act as explained provided that all natives could only purchase land in scheduled areas, which areas constituted reserves, homelands and townships.[363] The apartheid government in 1948 reinforced this position in order to find a permanent solution to the native problem.[364] The government in order to implement and maintain spatial race-segregation promulgated apartheid land laws.[365] These laws manipulated the existing land rights and downgraded black land rights to rights that are more than merely insecure.[366] The land rights system during apartheid entrenched racial segregation and this brought about severe social imbalances and exclusions.[367] This prompted the subsequent drafting of the South African Final Constitution—a Constitution with a commitment to undo or overcome apartheid legacies.[368]

The end of the minority apartheid government and the subsequent birth of the final Constitution of South Africa introduced a paradigm shift to the land issue.[369] The new democratic government enacted a series of new laws to effect transformation through land reform in order to redress the gross unequal distribution of land in the past.[370]

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[361] S Turner & H Ibsen 'Land and agrarian reform in South Africa: Programme for land and Agrarian Studies' A status report. Unpublished report, University of Western Cape, 2000.
[362] See the Black Land Act 27 of 1913, which restricted certain areas for sole occupation of the Black people only; See also Natives (Urban Areas) Act 21 of 1923, which specifically regulated segregation in urban areas.
[363] CR Sunstein 'Social and Economic Rights? Lessons from South Africa' (2001) 11 (4) Constitution for 123 5.
[364] As above.
[365] M Chaskalson & C Lewis Property in Chaskalson, M et al (ed) *Constitutional Law of South Africa* (1996) 31-2.
[366] Murphy (note 26 above).
[367] AJ van der Walt *Towards the Development of Post-Apartheid Land Law: An Explanatory Survey* (1990) 23 De Jure 12.
[368] Sunstein (note 356 above).
[369] McCall Theal (note 2 above).
[370] See the Provision of Land and Assistance Act 123 of 1993; Land Reform (Land Tenants) Act 3 of 1996; Extension of Security of Tenure Act 62 of 1997; Interim Protection of Informal Lands Rights Act 31 of 1996; Communal Properties Association Act 28 of 1996; Transformation of Certain Rural Areas Act 94 of 1998 and Communal Land Rights Act 11 of 2004, all enacted by the government post-apartheid in order to give effect to the land reform program.

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The African National Congress since 1994, as one of its policies, included the need to provide 'residential and productive land to the poorest section of the rural people and aspiring commercial black farmers.'[371] The ensuing White Paper on the South African Land Policy corroborated the position by the African National Congress to ensure land distribution as a means to alleviate poverty.[372] Attention was focused on implementing this policy, thus, the government provided the people with Settlement Land Acquisition Grants of fifteen thousand rands (R15000). The grants later increased to sixteen thousand rands (R16000). However, the grants were only available to people falling below the threshold income of fifteen thousand rands per month.

The appointment of a new Minister of Agriculture and Land Affairs in June 2000 resulted in a change to the land policy.[373] The objective of the new policy was to assist the historically underprivileged people to become marketable farmers. Therefore, a sliding-scale system of grants from twenty thousand to one hundred thousand rands came into effect. The conundrum is that the budget of land reform remained the same. Consequently, resources were diverted away from funding grants to the poor rural people in favor of funding the relatively well-off. On this basis, the National Land Committee condemned the policy.[374] It is apparent from the discussion that the land policy, though embedded in the need to redistribute land to the previously marginalised, suffered due to the unavailability of resources. This is because the land redistribution policy in South Africa is subject to a justiciable economic right as provided for by the Constitution.[375]

Section 25 was enacted to regulate property rights. Section 25 has a dual purpose. It aims to protect the property rights of landowners and it simultaneously endeavor to safeguard the interest of the people in general.[376] The tenacity of the property clause is to strike a proportional balance between the fortification of private property rights

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[371] African National Congress. The Reconstruction and Development Program: A policy framework Johannesburg: Umanyano Publications (1994) at par 2,3,4.
[372] Department of Land Affairs (April 1972).
[373] Ministry of Agriculture and Land Affairs (June 2000).
[374] National Land Committee "Workshop Briefing Paper" delivered at the Civil Society forum on Land and Agrarian Reform Johannesburg (2000) 11.
[375] See The Constitution of the Republic of South Africa Act 108 of 1996, sec 25 (5) which reads "…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".
[376] M B Pienaar et al *The Principles of the Law of Property in South Africa* (2010) 126.

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and public interest.[377] Van der Walt argues that section 25 serves both a protecting and reformative purpose.[378] The property clause in the Constitution premised on affirmative action accentuated the necessity of rectifying the continuing heritage of past racial discrimination, namely the unequal distribution of land.[379] However, the property clause is a product of compromise. It contains a deleterious property guarantee in that it safeguards individual property rights and at the same time permits state interference with the same right.[380] The African National Congress driven by the spirit of redressing apartheid spatial effects, were of the view that a constitutionalised property right must not thwart land reform.[381] On the other hand, the National Party was skeptical that the existing land rights of white landowners if not guaranteed by the Constitution maybe compromised.[382]

It was the National Party's principal objective that the landowner's rights in property must be secured by affirming in the Constitution that expropriation cannot take place unless sanctioned by a court order, for a public purpose subject to payment of compensation at market value.[383] The National Party later conceded that compensation upon expropriation could not be rigidly tied to market value.[384] The concession found favor with the African National Congress; hence, they welcomed it because it would have impeded land reform if compensation was paid only at market value. In order to reach a settlement both parties agreed to a compromise, as a result the property clause on the one hand legalised land reform, and on the other hand, it guaranteed property rights.[385] Compensation was agreed to be 'just and equitable', taking into account several factors listed in the property clause, of which market value is one.[386]

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[377] First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Services and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC); T Roux Property in Woolman, S & Bishop, M (ed) *Constitutional Law of South Africa Vol 3* (2003) 1-37.
[378] AJ Van der Walt *Constitutional property law* (2011) 13.
[379] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Services and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).
[380] Van der Walt *Introduction to the Law of Property* (2009) 307.s
[381] LM Du Plessis (note 39 above).
[382] LM Du Plessis (note 39 above).
[383] LM Du Plessis (note 39 above)
[384] M Chaskalson 'Stumbling Towards section 28: Negotiations over the Protection of Property Rights in the Interim Constitution' (1995) SAJHR 222-232.
[385] The Constitution of the Republic of South Africa, Act 108 1996 sec 25.
[386] M Chaskalson (note 377 above).

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The Constitution, in particular the property clause, sanctions expropriation of property from the owner for a public interest and subject to payment of compensation.[387] The aim is to redress the unequal land distribution brought about by past racial discriminations.[388] Hence, the property clause placed compensation at the center of expropriation. Zimmerman opines that 'the calculation of compensation either break or make the expropriation driven program of land reform.'[389] Pursuant to the enactment of the property clause the government of South Africa, subsequently adopted the 'willing buyer willing seller' principle in a bid to calculate the appropriate compensation.[390] However, this approach has been criticised for the sporadic rate of land redistribution; thus, copious appeals have been made for an amendment to the Constitution and the Expropriation Act of 1975.[391]

Those affected can agree to compensation in terms of the Constitution, or it can be decided upon by the court.[392] Section 25 provides the court with factors to consider when determining compensation.[393] Courts when interpreting section 25, have in general adopted market value as the determining factor. In *City of Cape Town v Holderberg Park Development (Pty) Ltd,* the court relied on market value in determining compensation.[394] The rationale was that market value was the only quantifiable value among all other factors.[395] Market value hence, remains pivotal. The

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[387] The Constitution of the Republic of South Africa, Act 108 of 1996 sec 25 (2) which provides 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."
[388] The Constitution of the Republic of South Africa Act 108 of 1996 sec 25 (4) (a) reads: "…public interest includes the nations commitment to land reform, and to reforms to bring about equitable access to South Africa's natural resources."
[389] Zimmerman 'Property on the line: Is an expropriation-centered land reform constitutionally permissible' (2005) *SALJ* 378.
[390] L Edward 'Willing Buyer, Willing Seller': South Africa's Failed Experiment in Market-Led Agrarian Reform (2007) Vol 28 (8) Third World Quarterly 1577-1597.
[391] See article titled "Expropriation Act Must be amended, says DG" at www.sabinetlaw.co.za/land-reform articles (accessed 30 June 2018). The Director General of Rural Development and Land Reform, Shabane Mdu, suggested that the Expropriation Act of 1975 must be amended to enable an effective land reform program. The African National Congress, at its December 2017 congress, adopted and passed a resolution for expropriation of land without compensation. The Parliament of South Africa backed this resolution and passed a motion seeking to amend the constitution to allow for this paradigm and radical shift.
[392]A J van der Walt *Constitutional Property Law* (2005) 272.
[393] The Constitution of the Republic of South Africa Act 108 of 1996, sec 25 (2) (b).
[394] *City of Cape Town v Holderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA) par 19.
[395] As above.

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court in *DuToit v Minister of Transport* held that 'compensation may not exceed market value but rather must be simply just and equitable.'[396] In *Khumalo and Others, v Potgieter and Others*, the court stated that 'compensation is paid to ensure that the dispossessed landowner is justly and equitably compensated for his loss.'[397] Gildenhuys opines that 'compensation surplus of market value is plausible; due to the fact the Constitution only sets the minimum standards that must be adhered to.'[398] Chaskalson states that the balancing approach in the property clause allows for compensation in excess of market value in circumstances where the property has more than market value to the owner.[399]

Generally, in order to realise the balance the deprived property owner might require the state to pay more than market value.[400] In the *Nhlabathi v Fick* case, the court held that 'in instances where the infraction is minimal to the owners' rights, it is needless to pay market value compensation.'[401] Therefore, it is apparent that courts have adopted market value as the apex factor to determine compensation because it is quantifiable. Claassens opines that 'embedding a property clause that provides for compensation at market value fuels tension as it protects white land rights at the expense of fragile black land rights.'[402] She further states that the minority white race, which attained and possessed land inexpensively from the black people or state during the apartheid epoch would rely on market value compensation in order to make land expensive and unaffordable, thus, defeating any equitable distribution and access to land.[403]

The Minister of Public Works in 2008 introduced the Expropriation Bill of 2008. The rationale of the Bill was to replace the Expropriation Act of 1975, an Act that provides for compensation at market value.[404] The aim of introducing the Bill was to expedite land reform.[405] The Bill provided for compensation not solely based on market value. The Bill however, drew the wrath of landowners in South Africa and resulted in the

[396] *DuToit v Minister of Transport* 2006 (1) SA 297 (CC) par 21.
[397] *Khumalo and* Others *v Potgieter and Others* 2000 2 All SA 456 (LCC) par 22.
[398] Gildenhuys (note 131 above).
[399] Chaskalson M & Lewis C 'Property' in M Chaskalson et al (eds) *Constitutional Law of South Africa* (1996) 31-2.
[400] I Curiie & J de Waal *The Bill of Rights Handbook* (2003) 556.
[401] *Nhlabathi v Fick* 2003 (7) BCLR 806 (LCC) par 29.
[402] Claasens (note 132 above).
[403] Claasens (note 132 above).
[404] W Hartley 'Controversial Expropriation Bill is shelved' *Business Day* 28 August 2008 1.
[405] As above

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predominantly white newspapers labeling the bill as the “Land grab act”.[406] The white farmers and the real estate community criticised the bill and were of the view that compensation below market value inhibits or deters investment.[407] The whites were of the view that the land issue could be resolved through upgrading black urban rights and distributing state owned land, hence, it is unnecessary to expropriate private owned land.[408] The African National Congress gave in to the immense pressure and subsequently admitted that expropriation might result in the emigration of white people whose skills are of paramount importance in various sectors.[409]

The capitulation by the African National Congress was contrary to the reasoning of the Congress of South African Trade Unions. The Congress of the South African Trade Unions were of the view that the bill was a necessary cause to abolish the market value approach, which enabled landowners to hold out land for the highest price, thereby defeating land reform.[410] The consensus was that there was need for an expropriation legislation that rectifies historical injustices. The withdrawal of the bill much to the relief of landowners ratified market value as the determining factor upon expropriation. On the other hand, it left the majority landless black people landless and condemned to the slow pace of land reform.

Consequently, land reform continues to be slow in South Africa. Little progress has been made as far as land reform is concerned. The majority of the country’s population still own a small percentage of the agricultural land.[411] The Land Audit financed by Agri SA stated that blacks now own only 27% of all farmland up from 14% during the apartheid era and that whites own 75% of farmland from 85% in 1994.[412] The Department of Rural Development and Land Reform’s Land Audit Report in November 2017 stated that white South African’s (eight percent of the population) own over 72 percent of farms while Black Africans (eighty percent of the population) own a measly

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[406] Hartley (note 397 above).
[407] Hartley (note 397 above).
[408] F Rabkin ‘Seeking a New Tool for Land Reform’ *The Weekender* 30 August 2008 5.
[409] A Musgrave ‘Market Forces are the Best Way to Obtain Land’ *The Weekender* 30 August 2008 3; C Kgosana ‘Land Reform v Investment’ *City Press* 3 August 2008 2 / questions whether the fear of offending foreign investors should override the public interest.
[410] Rabkin (note 401 above).
[411] M Mgibisa ‘Bill Addresses Land Parity Erosion’ *City Press* 23 March 2008 2.
[412] K Crowley Whites Own 73% of South Africa’s Farming Land, City Press Says 29 October 2017 https://www.bloomberg.com/news/articles/2017-10-29/whites-own-73-of-south-africa-s-farming-land-city-press-says (accessed 11 December 2018).

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four percent. The current constitutional and legal prescript has been criticised for hindering any meaningful land reform. This has led to the public and political muscle backing an amendment to the Constitution to allow for expropriation of land without compensation.[413] The aim is to rectify the injustices of the past emanating from racial proletarianisation, political conquest and past black land dispossessions. The sentiment is that there is a need for restorative justice in land cases. This feeling stems from the idea that the gap between landless blacks and property owning whites widened during the almost half century that the white rule lasted.[414] As a result some commentators argue (rightly so in my opinion) that there is a need to expropriate land without compensation for land reform in order to ensure an equitable distribution of natural resources, thereby addressing the issue of inequality between ethnicities with regard to land ownership.

Du Plessis and Olivier interestingly state that section 25 (3) of the Constitution provides that in land expropriations the history of acquisition of such property among other factors influences the amount of compensation to be paid.[415] They further argue that 'it is justifiable to conclude with certainty that the state expropriated property (land) during the apartheid era and sold it well below market value to the white people.'[416] The state in most of these cases made available land to white farmers below market value.[417] As a result, it will be unfair and unjust to offer market value to such a landowner upon expropriation for land reform, because such owner would benefit twice from apartheid.[418] This reasoning corroborates the current call in South Africa to expropriate land without compensation in order to redress apartheid injustices and ensure equality among citizens.

It suffices to state that people are living on some of the land that is subject to the proposed expropriation. Such people have occupied this land for a succession of generations and have built their lives around the production of the land, mostly as commercial farmers. For that reason, the contrary view to the proposed methodology

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[413] L Ntsebeza The land question in South Africa: The Challenge of Transformation and redistribution (2007).
[414] Changuion (note 61 above).
[415] A J van der Walt Constitutional Property Law (2005) 276; W Du Plessis & N Olivier The old and the New Property Clause (1997) 3 *BPLD* 11
[416] Du Plessis (note 39 above).
[417] G Budlender The Constitutional Protection of Property Rights in Budlender, G et al (ed) *Juta's New Land law original service* (1998).
[418] As above.

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is that, to employ a 'draconian' -the general view held by white current landowners (my emphasis) approach of eviction, devoid of compensation would constitute a gross violation of the right to property, housing, food and lastly social security. George McCall Theal even states that 'the land which the European settlers occupied and established their farms was virgin land and that the black people who challenged the Europeans occupation where intruders from the north.'[419] Following this argument, the inference to be drawn is that black Africans were not dispossessed of land; hence, land expropriation devoid of compensation is not justified. Afriforum holds the view that expropriation of land without compensation is an assault on property rights and amounts to discrimination.

The government is faced with a paradox to expedite land reform on the one hand and to adopt policies that guarantee property rights, food security and investor confidence on the other hand.[420] It is apparent that the white landowners benefited from the injustices of apartheid; hence, compensation fixated on market value would result in benefiting twice from the injustices of apartheid. Expropriation rooted in market value has proved to be an obstacle to a successful land reform. This is in tandem with the sentiments expressed by Claasens when she states 'that entrenching compensation at market value would make land reform expensive or rather unaffordable.'[421]

The post-apartheid government has failed to redistribute land to the landless. It is common knowledge that despite numerous government efforts to realise land reform since 1994, the white minority continues to own a disproportionate amount of land. The slow and sporadic land reform is blamed on section 25 of the Constitution, which is perceived to be an obstacle to land reform. The submission by 'Black First Land First' to the 'Portfolio Committee on Public Works' public hearings on the Expropriation Bill on 4 August 2015 spells out that 'Section 25 legalises land theft and legitimises colonialism'. They argued in their submissions that 'Section 25 in its entirety is a yoke around the necks and shackles in the feet and hands of our people; it makes us slaves

[419] Theal (note 2 above)
[420] The 2013 land audit conducted by the Department of Rural Development and Land Reform http://www.ruraldevelopment.gov.za/phocadownload/Cadastral-Surveymanagement/Booklet/land%20audit%20booklet.pdf (accessed 12 December 2018) indicated that 79 percent of land (including agricultural, mining and urban land) may still be privately owned by the white minority.
[421] Claasens (note 132 above).

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in our own land.'[422] Magobe Bernard Ramose argues that section 25 is a fatal obstacle to the objective of achieving justice for indigenous black South Africans. Consequently, there is a call to amend the property clause. The Azanian People's Organisation (AZAPO) is advocating for the amendment of section 25 and the nationalisation of land to (re)establish 'black power'.[423] This call is consistent with the view held by the African National Congress and the general black population at large.[424] There is a need to ensure equality among the citizens of South Africa through substantive equality and affirmative action. It is arguable that this is a view held by the majority of Black South Africans. However, in doing so, the government still has an obligation to protect individual property rights, food security and investor confidence. In the next chapter, I will examine how international law deals with the issue of expropriation and compensation to see if South Africa could learn any lessons therefrom.

[422] Black First Land First (4 August 2015) 'Return the stolen land – that's the only real solution! Sankara policy and political school submission to the Portfolio Committee of Public Works on Public Hearing on the Expropriation Bill [2015]': https://black1stland1st.wordpress.com/2015/08/04/return-the-stolen-landthats-the-only-real-solution-sankarapolicy-and-political-school-submission-to-the-portfolio-committee of publicunlicublic-works-on-public-hearing-on-theexpropriation-bill (accessed 12 December 2018.

[423] Input by AZAPO representative, Lepeto Nkubela, at UNISA debate on expropriation without compensation, Pretoria 30 April 2018: https://www.enca.com/south-africa/catch-it-live-unisas-landexpropriation-debate (accessed 12 December 2018).

[424] The African National Congress adopted and passed a resolution for expropriation of land without compensation at its December 2017 Congress.

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CHAPTER THREE

"International law is an effective guide in interpretation of certain rights"

-Kaunda v President of the Republic of South Africa [425]

A CRITICAL ANALYSIS OF INTERNATIONAL AND REGIONAL INSTRUMENTS GOVERNING ISSUES CONCERNING EXPROPRIATION OF PROPERTY AND COMPENSATION

3.1 Introduction

Liebenberg opines that section 39 (1) (b) of the Constitution indicates the openness and receptivity to the norms and values of the international community.[426] Section 39 (1) (b) of the Constitution places an obligation on courts, forums and tribunals to cogitate international law when interpreting the Bill of Rights. [427] Section 231 of the Constitution makes international law agreements binding on South Africa upon approval by the National Assembly and the National Council of Provinces.[428] The Constitution further states that no approval is required from the National Assembly and the National Council of Provinces for international agreements of a technical, administrative or executive nature to become binding on South African law.[429] Section 232 goes further to provide that customary international law if not in conflict with the Constitution or an Act of Parliament forms part of South African law. South Africa follows a monistic approach in which if the state ratifies a treaty at international level, it automatically becomes binding at the domestic level without any need to domesticate it inorder to give effect to it.[430]

The Court in *S v Makwanyane* held that 'binding and non-binding international law, together with customary international law; construct the framework within which the bill of rights must be understood.'[431] In *Kaunda v President of the Republic of South Africa,* the court held that 'international instruments enshrine the fundamental human

[425] *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) par 158.
[426] S Liebenberg *Socio-Economic Rights; Adjudication under a Transformative Constitution* 2010.
[427] The Constitution of the Republic of South Africa Act 108 of 1996, sec 39(1)(b).
[428] N Botha 'Treaty-making in South Africa: A Reassessment' (2000) 25 *SAYIL* 71-96.
[429] The Constitution of the Republic of South Africa Act 108 of 1996, sec 231 (3).
[430] J Dugard *International Law: A South African Perspective* (2005) 55.
[431] *S v Makwanyane* 1995 (3) SA 391 (CC) par 35.

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rights that are commonly found in our Constitution.'[432] Therefore, section 25 of the Constitution forms part of the bill of rights, thus, ought to be interpreted with the aid of relevant international law. The section provides for the right to property. The right to property and in this case agricultural land, is a strategic essential human right, which in quintessence safeguards other rights.[433] It is an inherent human right and it is intrinsic in, and an essential constituent of human dignity.[434] It is thus, apparent that the right to property is a renowned issue in international and regional human rights discourse and there are international and regional law instruments that make detailed mention of the right to property. This chapter, therefore, seeks to analyse the right to property, *eminent domain* and compensation at international and regional level. This is relevant in order to identify how the issue of compensation is addressed at the international, regional and sub-regional levels. The said compensation regimes will be used as a benchmark or gauge in making a determination on the legality of expropriating land without compensation in South Africa.

3.2 International Level

Not all treaties, covenants or conventions at international level recognise and guarantee the right to property. Some of the international instruments are silent regarding the right to property. Hence, the interrogation of international human rights instruments in this study will be limited to the Universal Declaration of Human Rights (UDHR) and some International treaties, conventions or covenants; and Customary International Law.

3.2.1 Universal Declaration of Human Rights (UDHR)

The international bill of rights safeguards the individual's human rights in instances where the state fails to protect such rights.[435] However, the right to property being a

[432] *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) par 158.
[433] R E Howard-Hassmann 'Reconsidering the Right to Own Property'(2013) 12 *Journal of Human Rights* 180-197
[434] Howard-Hassmann (note 426 above); Property in particular land, forms the basis of life for most of South Africans rely on land for a living. For the majority life begins and ends with land because land is the essential base of all social and commercial interaction. Land is more than just property ownership in South Africa as it creates a sense of justices and redemption.
[435] The Universal Declaration of Human Rights (hereafter UDHR) adopted by the General Assembly of the United Nations Resolution 217 (III) of 10 December 1948, UN doc 17/810; International Covenant on Economic Social and Cultural Rights (hereafter) ICESCR, adopted and opened for signature, ratification and accession by General Assembly Resolution 22000A (XXI) of 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3; International Covenant on Civil and

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contentious issue in international law was omitted from the International Covenant on Economic Social and Cultural Rights (hereafter ICESCR) and the International Covenant on Civil and Political Rights (hereafter ICCPR) , covenants that give binding effect to the rights contained in the UDHR. The court in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* stated the following regards the right to property:

> … if one looks to international conventions [and foreign constitutions] one is immediately struck by the wide variety of formulations adopted to protect the right to property, as well as the fact that significant conventions and constitutions contain no protection of property at all…, neither the ICESCR nor the ICCPR contains any general protection of property.[436]

Therefore, the exclusion implies that the right to property in international law is non-binding upon states. This attracted a lot of criticism on international conventions. Such a conundrum leaves the UDHR as the main source that provides for the right to property.[437]

The UDHR is the foundation of contemporary international human rights law and the main key international instrument that provides for the fortification of the right to property.[438] Article 17 of the UDHR provides that 'Everyone has the right to own property' and that 'no one shall be arbitrarily deprived of property'. Therefore, it guarantees the institution of private property and ensures protection of such against arbitrary deprivation.[439] It limits the ability of the state in arbitrarily interfering with the enjoyment of the right.[440] It therefore, plays a vital role in imposing restrictions on the manner in which states can deal with property rights upon expropriation.

Political Rights (hereafter ICCPR), adopted and opened for signature, ratification and accession by General Assembly Resolution 22000A (XXI) of 16 December 1966 entered into force on 23 March 1976, UNTS 171 constitutes the international law bill of rights.

[436] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* (4) SA 744 (CC).

[437] Although the UDHR is not a treaty, it arguably forms part of customary international law now.

[438] M. G Nyarko 'The Right to Property and Compulsory Land Acquisition in Ghana: An Analysis of the laws and Policies towards Greater Protection' unpublished MA Dissertation, Makerere University (2014).

[439] C Krause The right to property in Eide, A, Krause, C & Rosas, A (eds) *Economic, Social and Cultural Rights* (2001) 191-209.

[440] Nyarko (note 431 above).

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However, the UDHR has received a lot of criticism. Firstly, the drafting of article 17 of the UDHR, which encompasses the right to property, was contentious regarding the contents and limitations of the right to property.[441] Western countries, with United States of America at the vanguard backed the robust protection of the right to property, on the contrary the Third World and socialist countries, sought stronger recognition of the societal function of property advocating for an easier interferance with the right to property in the public interest.[442] These disagreements resulted in the right to property being ommitted in the ICESCR and the ICCPR. The disagreements also contributed to article 17 being vague in content.[443] The preliminary draft as projected by the drafting committee contained article 19, which required public interest justification for deprivation or expropriation of property and payment of just compensation.[444]

Pursuant to the disagreements, the requirements for public interest and just compensation were omitted and replaced with prohibition of arbitrary deprivation of property.[445] As a result, the adoption of article 17 was a compromise, which explains why it is vague.[446] By virtue of being vague, the UDHR drastically fails to address the comprehensive scope of the right and neither does it define what constitutes arbitrary deprivation.[447] The UDHR does not expressly mention anything pertaining to the public interest requirement and compensation. These fundamental aspects guarantee a valid and legitimate expropriation. Therefore, the UDHR fails to provide guidelines on expropriation of property and compensation. Nevertheless, the arbitrariness standard has, in general been construed to subtly require a public interest justification, payment of compensation, non-discrimination and procedural fairness for compulsory acquisition.[448]

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[441] C Krause & Alfredsson G 'Article 17' in Alfredsson, G & Eide, A (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 359-378 at 359.
[442] Krause (note 432 above).
[443] J Morsink *'The Universal Declaration of Human Rights, Origin, Drafting and Intent'* (1999).
[444] T R G Van Banning The Human Right to Property (2002) Vol 14 School of Human Rights Research series 76.
[445] C Krause & G Alfredson *'The Right to Property, in the Universal Declaration of Human, a Common Standard of Achievement*' (1999) Kluwer Law International 359-378.
[446] Van Banning (n 437 above)
[447] I A Shearer "*Starke`s International Law* (1994).
[448] L. Cortula 'Property Rights, Negotiating Power and Foreign Investment: An International and Comparative law study of Africa' Unpublished, PHD Thesis, University of Edinburgh (2009) 87.

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Secondly, the UDHR is critcised because the declarations are normally not binding under international law and consequently are not legally binding on states.[449] Dugard opines that the UDHR is merely a recommendatory resolution of the United Nations General Assembly and nothing more; hence, it is not legally binding on states.[450] For that reason, it means that no treaty body is able to monitor states compliance with the obligation imposed by the right. Nonetheless; the UDHR by virtue of being regarded as an authoritative statement of the international community, has attained the status of international customary law.[451] Dugard describes customary international law as 'the common law of the international community.'[452]

To conclude, though being vague, the term 'arbitrary' in the UDHR suggests that the state may not take property without paying compensation.[453] Tladi opines that 'expropriation without compensation is in breach of international law principles.'[454] The UDHR is silent on which regime of compensation is acceptable and how the compensation is calculated. Furthermore, it is unclear under which circumstances is compensation peremptory. The issue of compensation remained a hotly debated and contested issue and it was for this reason that the right to property was excluded in the international covenants of 1966.[455]

3.2.2 Other International Human Rights Instruments

As demonstrated earlier, the contents of the UDHR were included in two binding human rights treaties, that is, the ICCPR and the ICESCR. Still, the right to property was not included in either of the two as a broadly framed right and neither was it included in any protocol or covenant.[456] The omission momentously and significantly weakened the protection of the right to property under human rights law. Apart from prohibiting discrimination on property grounds, the covenants make no mention of the

[449] C Golay & I Cismas *'Legal Opinion: The Right to Property from a Human Rights Perspective'* (2010).
[450] J Dugard International Law: A South African Perspective (2005) 314.
[451] As above.
[452] J Dugard (note 443 above)
[453] C Krause (note 432 above).
[454] D Tladi The Right to Diplomatic Protection, the Van Abo Decision, and one Big Can of Worms: Eroding the Clarity of Kaunda (2009) 20 *Stell LR* 14-30 at 24.
[455] C Krause (note 432 above).
[456] Nyarko (note 431 above).

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requirements of a lawful expropriation, the compensation to be paid and public interest requirement upon expropriation of property.[457] The omission was due to the disagreements that surrounded the drafting of the right to property in the UDHR.[458] The Western countries, with United States of America at the vanguard backed the robust protection of the right to property. On the contrary the Third World and socialist countries, sought stronger recognition of the societal function of property advocating for an easier interferance with the right to property in the public interest.[459]

However, the right to property is included in the Convention on the Elimination of all forms of Discrimination against Women (hereafter CEDAW),[460] International Convention on the Elimination of all forms of Racial Discrimination (hereafter ICERD)[461] as well as the Convention on the Rights of Persons with Disabilities (CRPD).[462]Regardless of the inclusion of the right to property in the above-mentioned treaties, the treaties are silent on the protection of the right to property in the event of expropriation. The International Convention on the Rights of All Migrant Workers and Members of their Family is the only treaty that addresses expropriation of land.[463] The Convention in addition to recognising the property rights of migrant workers, further guarantees them protection from arbitrary deprivation or expropriation. The Convention requires payment of fair and adequate compensation in the event of expropriation or deprivation.[464]

The International Centre for Settlement of Investment Dispute Convention (hereafter ICSIDC) is insightful and germane in issues relating to expropriation and compensation. The treaty calls for the payment of just compensation that reflects the candid value of the investments in land expropriations.[465] The International Centre for

[457] Article 2 (2) of International Covenant on Economic Social and Cultural Rights.
[458] W A Schabas *'The Omission of the Right to Property in the International Covenants'* (1991) 4 Hague Yearbook of International Law 135-170.
[459] Krause (note 432 above).
[460] Article 16 of Convention on the Elimination of all forms of Discrimination against Women.
[461] Article 5 (v) of International Convention on the Elimination of all forms of Racial Discrimination.
[462] Article 12) of Convention on the Rights of Persons with Disabilities.
[463] Article 15 of International Convention on the Rights of All Migrant Workers and Members of their Family.
[464] As above.
[465] Article 6 (c) of the International Centre for Settlement of Investment Dispute Convention; Even though South Africa is not a member of ICSID, the fact that South Africa concluded forty-nine Bilateral Investment Treaties, these permit other state parties to institute claims against South Africa including at ICSID. Hence, the ICSID is relevant to this discussion.

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Settlement of Investment Dispute tribunal in *Bernardus Henricus Funnekotter and others vs. Republic of Zimbabwe* held that '…genuine value must be determined on the basis of the market value of the whole farm at the time of expropriation.'[466] The tribunal further stated that investors have the right to compensation that corresponds to the value of their investments both under international law and under the treaty. The above discussion illustrates that under conventional international law, the issue of compensation remains unsettled.

3.2.2 Customary International Law

Dugard defines Customary International Law as the 'common law of the international community.'[467] States practices are common with regards to the property right.[468] It suffices to state that most countries globally recognise the right to property in their domestic laws.[469] This aspect has afforded the property right with the status of customary international law. Customary international law recommends principles that must be conformed to, in the event the right to property is interfered with for expropriation to be lawful in international law. The expropriation must be for a public purpose, must not be discriminatorily unfair, and must be subject to the payment of compensation. Therefore, a cumulative compliance of the requirements is peremptory. If one of the requirements is infringed, it amounts to a violation of customary international law.[470] Customary international law is of great significance to this study because it is deemed to be part of South Africa's common law even prior the coming into effect of the 1996 Constitution.[471]

3.3 Regional Level

Shaw opines that 'International law may also be regional, whereby a group of states linked geologically or in ideology may recognise extraordinary rules applicable only unto them.'[472]The right to property in regional law recompenses for the insufficiency of

[466] *Bernardus Henricus Funnekotter and others vs. Republic of Zimbabwe* ICSID Case NO Arb/05/6, 22 April 2009.
[467] Dugard (note 443 above).
[468] J G Sprnkling '*International Property Law*' (2014).
[469] As Above.
[470] D P Zongwe The Contribution of Campbell v Zimbabwe to the foreign Investment law on Expropriation (2009) Vol 5 CLPE Research Paper Series 3.
[471] *Ex Parte Schuman* 1940 NPD 251 at 254: See also *Nduli v Minister of Justice* 1978 (1) SA 893 (C) 906B, where the court held that '…it is obvious that international law is part of our law'.
[472] MN Shaw *International Law* (2003) 2.

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any protection of the right at international level.[473] Many regional human rights systems recognise the right to property as a vital and fundamental human right. This was possible because reaching consensus on binding provisions proved easier at the regional level.[474] This study will focus on the African Charter on Human and Peoples Rights (hereafter ACHPR),[475] American Convention on Human Rights (hereafter ACHR) and the European Convention on Human Rights (hereafter ECHR) and its first Protocol.

3.3.1 African Charter on Human and Peoples Rights (ACHPR)

The ACHPR is relevant for the purposes of this study as it is binding upon South Africa in terms of section 231 of the Constitution. This Charter is famous as a treaty that defends the three 'generations' of human rights, namely 'civil and political rights; economic, social, and cultural rights; and group and peoples' rights', in one instrument.

The Organisation of African Unity (OAU) the treaty in Nairobi in 1981. The OAU was thereafter, replaced by the African Union in 2002.[476] South Africa is part of the fifty-four member states constituting the African Union. Eleven sovereign African states who collectively, form the African Commission on Human and People's Rights (African Commission) are entrusted with the monitoring of the rights in the ACHPR.[477] However, the African Commission is criticised because its decisions lack any binding legal effect and state parties may neglect compliance with its recommendations.[478] In order to cure this defect the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, was adopted by the OAU in Burkina Faso on the 10th of June 1998.[479] One of the aims was to solve the problem caused by the non-binding effect of the African Commission's

[473] L Cotula *International Law and Negotiating Power in Foreign Investment Projects: Comparing Property Rights Protection under Human Rights Investment Law in Africa* (2008) 33 SAYL 62-112 at 66-67.
[474] I Ingunn 'Securing Women's Homes: The Dynamics of Women's Human Rights at the International level and in Tanzania' Unpublished Faculty of Law, University of Oslo (2009) 37-55.
[475] African Charter on Human and Peoples Rights adopted by the 18th Assembly of Heads of State and Government of the Organisation of African Unity on 27 June 1981, entered into force on 21 October 1986.OAU doc CAB/LEG/67/3 rev.5; 1520 UNTS 217,21 ILM 58 (1982).
[476] G J Naldi The African Union and the Regional Human Rights System in Evans, M & Murray, R (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (2008) 24-48 at 20.
[477] As above.
[478] A Motala The African Court on Human and People's Rights: Origins and Prospects in Akokpari, J Ndinga-Muvumba, A & Murithi, T (eds) *The African Union and its Institutions* (2008) 271-290 at 293.
[479] S Liebenberg *Socio-Economic Rights: Adjudication under Transformation Constitution* (2010) 111.

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recommendations.[480] However, despite South Africa ratifying the Protocol the African Court on Human and People's Rights is still inoperative.[481]

Article 14 of the Charter guarantees the right to property. It reads

> The right to property shall be guaranteed. It may only be encroached upon in the interest of public needs or in the general interest of the community and in accordance with the provision of appropriate laws.

The Article guarantees private property rights and restrains states from arbitrarily interfering with such right.[482] It tolerates infringement of the property right of natural or legal persons and justifies it based on lawful, public or general interest.[483] Therefore, the article entails that *eminent domain* overides the right to property in the interest of the community, thereby striking a balance in the relationship between ownership of property and *eminent domain*.[484] The article despite recognising a state's right of *eminent domain*, is silent on the aspect of compensation in cases were the state exercises the right. In respect of compensation, the African Charter provides no such protection; it leaves the enquiry of payment of compensation to each individual state by subordinating it to national laws.[485]

Cotula opines that 'the absence of the compensation requirement wanes the protection of the property right especially if compared to the protection the right is afforded in European and American Regional international law.'[486] Although the African Charter protects the right to property, it does so in broad nebulous terms. Article 14 does not define the content of the right and its benefactors. In addition, the permitted limitations, namely 'public need' or 'general interest of the community', are framed broadly. Manisuli Ssenyonjo argues that 'there is no explicit mention of 'prompt,

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[480] As above.
[481] African Court on Human and Peoples Rights available at http://www.african-court.org/en/index.php/12-homepage1/1-welcome-to-the-african-court (accessed 11 January 2019).
[482] K Olaniyan Civil and Political Rights in the African Charter: Article 8-14 in Evans, M & Murray, R (eds) *The African Charter on Human and People's Rights: The system in Practice* 1986-2006 (2008) 213-243 at 238.
[483] F Ouguerounz *'The African Charter on Human and People`s Rights: A Comprehensive Agenda for Human Dignity and sustainable Democracy in Africa'* (2003).
[484] R Gittleman, 'The African Charter on Human and People`s rights; A Legal Analysis' (1982) 4 *Virginia Journal of International law* 667-714.
[485] As above.
[486] L Cotula *International Law and Negotiating Power in Foreign Investment Projects: Comparing Property Rights Protection under Human Rights and Investment Law in Africa* (2008) 33 SAYIL 62-112 at 70.

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effective and adequate compensation' prior to the compulsory deprivation of property.'[487]

Nevertheless, the African Commission on Human and People`s Rights has in numerous non-binding documents and communications provided clarity on the issue of compensation upon expropriation of property.[488] The African Commission adopted the Draft Principle and Guidelines on Economic, Social and Cultural Rights in Africa in the year 2011. The Draft as adopted provides that 'the right to property may only be interfered with by states for legitimate public interest in a non-arbitrary manner, in accordance with the law and the principle of proportionality.' It compels the payment of compensation that is realistically interrelated to the market value of the property.[489] The terms 'non-arbitrary manner' are suggestive of the idea that all states must follow due process and guarantee payment of fair and comparative compensation when expropriating property in order to guarantee against unlawful takings. Furthermore, the expropriation must be strictly limited to 'legitimate public interest' purposes only.

The African Commission echoed the same sentiments in the State Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter adopted in the year 2011. The Guidelines stated that 'compulsory acquisition of property must be piloted in a transparent manner, harmonizing the public interest requirement with the right to private property or subject to the payment of fair compensation.'[490] This strengthens the reasoning that property expropriations according to the African Commission should be subject to the payment of just compensation in order to strike a balance between the public interest requirement and the need to preserve the integrity of the right to property.

The African Commission in its communications suggested as depicted in the *Malawi African Association and others v Mauritania Communication* case that 'the arbitrary expropriation of land belonging to black Mauritanians without adequate compensation

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[487] M Ssenyonjo Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter (2011) 29 (3) Netherlands Quarterly of Human Rights 358–397.
[488] See the following examples, Communication 428/12 – Dawit Isaak v Republic of Eritrea; 349/07. Simon Weldehaimanot v. Eritrea; 250/02. Liesbeth Zegveld and Mussie Ephrem / Eritrea; Communication 431/12 – Thomas Kwoyelo v. Uganda.
[489] Principle 51-55 of The African Commission, Draft Principle and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and People`s Rights (24 October 2011).
[490] Guideline 7 (A) of The African Commission, State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and People`s Rights adopted (24 October 2011).

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amounted to a violation of the right to property.'[491] In this sense, according to the Commission the expropriation was prima facie lawful but became unlawful because it was devoid of the payment of adequate compensation. Similarly, the Commission in the *Centre for Minority Rights Development and others v Kenya* (referred to as the Endorois case), stipulated that 'fair or adequate compensation is an essential component of Article 14 of the ACHPR.'[492] This explains that for an expropriation to be termed lawful, the state is obliged to pay fair compensation.

The African Commission also adopted the same reasoning in the case *Serac v Nigeria, Communication*, when it held that the right to property for the Ogoniland people was destroyed, thus appealed with the government of Nigeria to pay adequate compensation towards the affected victims.[493] In the case of *John K Modise v, Botswana,* the complainant had been deported at least four times from Botswana.[494] He claimed that the deportation infringed his right to property in terms of article 14 of the Charter as he had suffered financial losses due to the confiscation of his goods by the Botswana government during the deportation.[495] The Commission held that the action by the Botswana government was an 'encroachment of the complainant's right to property guaranteed under Article 14 of the Charter'. However, the Commission did not endeavor to spell out the content of the right to property. The Commission's omission to spell out the content of the right to property, does not in any way disregard the reasoning deduced from this case that any encroachment by the state without due process and payment of recompense violates the right to property.

These non-binding communications and documents coupled with article 21 of the Charter remedy the deficiency of article 14. Olaniyan propounds that 'if article 14 of the Charter, is read with article 21, the predicament emanating from the exclusion of the compensation requirement is rectified.'[496] 'Article 21 guarantees the right to freely dispose of natural resources and in the event of spoliation the deprived people shall

[491] *Malawi African Association and others v Mauritania Communication* 54/91, 61/91, 98/93, 164/97, 196/97, 210/98.
[492] *Centre for Minority Rights Development and others v Kenya* 2009 AHRLR 75 (ACHPR 2009).
[493] *Serac v Nigeria, Communication No* 155/96 (2001).
[494] *John K Modise v Botswana* Communication No. 97/93 (2000).
[495] As above.
[496] Olaniyan (note 475 above).

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have the right to the legal reclamation of their property as well as to adequate property.'[497] It reads;

> 1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
>
> 2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

In this context, the phrase 'spoliation' could be interpreted broadly to include expropriation. The article makes it mandatory for adequate compensation to be paid in order to reimburse the dispossessed people as a safeguard of the right to property. The term 'lawful recovery' is suggestive of the fact that everyone with an interest in such property has a right to challenge the taking in a court of law.

The African Commission post 2001 concluded that the right to property incorporates two principles.[498] The first principle relates to 'ownership and peaceful enjoyment of property'.[499] This places an obligation on the states to protect the right against infringement. The second principle allows for deprivation and the conditions attached to such in the event of deprivation taking place.[500] Article 14 permits states to interfere with the right to property in accordance with the 'public or general interest', by putting into effect laws necessary for such purpose. Therefore, encroachment in tandem with these requirements is lawful and not a violation of the right to property. The general thread that is apparent from the ACHPR, soft law instruments of the AU and cases by the Commission and so on, is that states cannot arbitrarily infringe the right to property and payment of compensation that is fair is peremptory in the event of deprivation or expropriation.

3.3.2 European Convention on Human Rights and Fundamental Freedoms (ECHR)

The European Convention was signed in Rome on November 4, 1950 and entered into force on September 3, 1953.[501] The European Convention, as of 2006, had fourteen Protocols. One of these Protocols deals with the right to property, education,

[497] Olaniyan (note 475 above).
[498] *Interights, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l'Homme v Islamic Republic of Mauritania,* (2010) *Communication* 373/2009 para. 44.
[499] As above.
[500] As above.
[501] European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, entered into Force on 3 September 1953.

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and the right to regular and fair elections.[502] It is important to note that the European Convention as well as the jurisprudence of the European Court of Human Rights has no binding effect on South Africa. They may however, provide guidance to South African law when interpreting the right to property. The court in *S v Makwanyane* stated that 'the decisions of the European Court of Human Rights may provide guidance as to the correct interpretation of particular provisions.'[503] Hence, the discussion of such is imperative as it helps to demonstrate the internationally accepted standards of compensation upon expropriation of property by states at international level.

The drafting of the property right in the European Convention was overwhelmed with a lot of controversy just like what transpired in the drafting of article 17 of the Universal Declaration of Human Rights.[504] The states parties failed to reach consensus regard the formulation of the right to property in the Convention.[505] The European Union Committee of Ministers concluded that the omission of political, education and property rights from the European Convention was justified.[506] The rationale for the omission was based on the understanding that such rights will be later included in a separate Protocol upon the parties reaching a consensus with regard to the different thoughts.[507] This explains why the right to property is not provided for in the European Convention for Human and Peoples Rights.

The state parties subsequently reached a consensus. The right to property was included in the Protocol to the European Convention. The Protocol guarantees and safeguards the right to property for both legal and natural persons to enjoy peaceful undisturbed possession of such property and only allows for encroachment in exceptional circumstances subject to public interest requirements. Therefore, the Protocol only permits lawful expropriations. An expropriation is lawful if it is in the public interest subject to payment of compensation. The First Protocol to the European Convention provided that:

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[502] First Protocol to the European Convention for the Protection of Human and Fundamental Freedoms signed in Paris on 20 March 1952 (213 UNTS 222, ETS 5).
[503] S v Makwanyane 1995 (3) SA 391 (CC) para 35.
[504] T Allan *Human Rights in Perspective: Property and Human Rights Act 1998* (2003) 17-28.
[505] As above.
[506] As above.
[507] Allan (note 497 above).

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> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest subject to conditions provided for by the law and general principles of International law.

The preceding provision does not, however, prejudice the right of the state to adopt and administer laws it deems fit to regulate the use of property in accordance with the general interest. Neither did the provision preclude the state to secure tax payments, contributions or any other penalties.[508] The provision no doubt protects the right to property against arbitrary deprivation. It requires that any expropriation or encroachment must be subject to international law principles or guidelines. It limits the scope of interference with the right by the state unless such interference is in the public interest. The wording 'subject to conditions provided for by the law and general principles of International law' suggests that the encroachment on the right to property requires payment of compensation in order for it to be lawful. The European Court of Human Rights in *Mercky v Belgium* stated that 'the right to the peaceful enjoyment of possession in substance guarantees a right to property.'[509] Cotula holds the view that article 1 of the Protocol is applicable to all rights in property, which in context includes the right to attain and dispose of property.[510]

It is clear from the discussion above that the Protocol does not expressly require payment of compensation for expropriation of property. This implies that the right to receive compensation for expropriated property is not explicitly part of the Protocol. The European Court jurisprudence has however, given clarity on this aspect and suggests that the compensation requirement upon expropriation is inherent from Article 1 of the Protocol.

The court in *James and others v the United Kingdom* left the determination of compensation to national laws and jurisdiction.[511] It permitted the national margin of appreciation regards payment of compensation and made it subservient to national law. However, the court in other instances has departed from subordinating the issue of payment of compensation to national laws. Instead, the court has made

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[508] Allan (note 497 above).
[509] *Mercky v Belgium* 1979 ECHR Series Vol 31 para 63.
[510] L Cotula *International law and Negotiating Power in Foreign Investment Projects: Comparing Property Rights Protection under Human Rights and Investment Law in Africa'* (2008) 33 SAYIL 62-112 at 70.
[511] *James and others v the United Kingdom* (1986) 8 EHRR 123

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proclamations for compensation that is equitable to the property acquired.[512] The court in *Jahm v Germany* held that, 'the taking of property without payment of an amount reasonably related to the value will normally constitute a disproportionate interference.'[513] The court further held that 'the reference to international law does not apply to the taking by state of the property of its nationals.'[514] The judicial reading of this decision illustrates that in accordance with general principles of international law; adequate, prompt and effective compensation is not applicable to property of nationals taken by the state but is intended for aliens.

The Protocol does not provide for adequate and rapid compensation according to international law principles. Furthermore, it is not applicable to state expropriation of property of its nationals as it is applicable to aliens only. The Protocol does not in all circumstances warranty full compensation. This is because the exception of 'public interest' includes other aspects like erection of roads or dams, which aim at achieving greater social good, thus, may call for 'less than full compensation'.[515] To conclude, the European Convention implicitly recognises the right to compensation in land expropriation cases. Landowners or property owners have a right to contest expropriation considering that the compensation right is justiciable. Inference from the jurisprudence of the court demonstrates that compensation is peremptory though the determination of compensation may depend on the national laws, in some instances; compensation maybe reasonably related to the value of the property and it may be less than full compensation.

3.3.3 The American Convention on Human Rights (ACHR)

The American Convention on Human Rights was adopted in San Jose, Costa Rica, in 1969.[516] The inter-governmental conference convened by the Organisation of American States adopted the Convention.[517] The Convention was afterward, ratified and came into force on July 18, 1978. The American Convention on Human Rights, just like the European Convention on Human Rights and Fundamental Freedoms is

[512] *Lithgrow and others v United Kingdom* (1986) 8 EHRR 329 para 109 – 120.
[513] *Jahm v Germany* App no.46720/99, 72203/01 & 72552/01.
[514] *Lithgrow, European Court of Human Rights,* Series A No 102; 75 ILR p 438; See *M Shaw 'International Law'* (2014).
[515] G J Naldi "Land Reform in Zimbabwe: some legal Aspects" (1993) 31 *The Journal of Modern African Studies* 1.
[516] Dugard (note 443 above) 334.
[517] Dugard (note 443 above) 334.

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not binding on South Africa. Nonetheless, the Constitutional Court in *State v Makwanyane* held that 'the jurisprudence of the Inter-American Commission on Human Rights is among the sources that provide guidance as to the correct interpretation of the bill of rights.'[518] This implies that, though the Convention is not binding upon South African law, it remains relevant when interpreting the bill of rights, which includes the right to property. Hence, a discussion of the Convention is relevant; in order to ascertain the scope of the right and deduce which form of compensation, if any is acceptable upon expropriation or encroachment on the right to property.

Article 21 of the American Convention on Human Rights states that:

> Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of the society. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

The Convention recognises and protects the right to property. However, it subjects it to *eminent domain*. The state is allowed to expropriate privately owned property privately. However, in exercising that right, the expropriation or taking by the state must be in the 'public interest'. The court in *Mayagna (Sumo) Community of AwasTingni v Nicaragua, Inter-American Court of Human Rights*, established that the state can 'limit or restrict the right to property through expropriation process where it is; (a) previously established by law; (b) necessary; (c) proportional, and (d) with the aim of achieving a legitimate objective in a democratic society.'[519]

The right to property is not absolute and is subject to limitation in exchange for just compensation. The Convention apparently permits challenging the taking by the state if the taking is *ultra-vires* the established law and if the reasons of the taking do not aim to achieve the social interest or public utility. Employing a judicial interpretation of this Convention shows that expropriation is restricted to only two fundamental aspects, namely: the interest of society justification for such expropriation to begin with and secondly the calculation of just compensation. It follows that once dispossessed, the inquiry of just compensation arises.

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[518] *State v Makwanyane* 1995 (3) SA 391 (CC) para 35.
[519] *Mayagna (Sumo) Community of AwasTingni v Nicaragua, Inter-American Court of Human* (31 August 2001)

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The Inter-American Commission as well as the Court broadly interprets Article 21 regarding the expropriation of land belonging to tribal or indigenous peoples.[520] The Inter-American Commission together with the Court held that 'the acquisition of land for indigenous people requires informed consent and must be subject to the payment of compensation that is fair.'[521] Ordinarily, the market value standard is acceptable as fair standard for making a determination of what constitutes a just or fair compensation. The right to compensation hence, is a justiciable right thus, owners of land have the right to contest expropriation. In conclusion, the Convention bestows owners of land with the right to access the court as well as with the right to a fair hearing before any right or interest is deprived.[522]

3.4 Southern African Development Community Treaty (SADC

It is imperative to state from the outset that the SADC treaty does not guarantee the right to property. The treaty does not provide for the states *eminent domain* and neither does it provide for compensation. Nevertheless, the Southern African Development Community Tribunal established by Article 9 of the Southern African Development Community Treaty in 1992, dealt with a pertinent case, which elabourated extensively on expropriation and compensation of agrarian or agricultural land.[523]

It is prudent to give a brief exposition of the facts of the case, which the SADC Tribunal dealt with. Zimbabwe adopted the 'willing buyer, willing seller' method in an attempt to embark on a land reform programme. The basis of this approach was clause 16 of the Lancaster House Constitution.[524] The 'willing buyer, willing seller' approach delayed any meaningful land redistribution in Zimbabwe and thus resulted in a sporadic land reform.[525] Consequently, the government introduced a surfeit of legal and policy

[520] *Maya Indigenous Communities and their members* (Case 12.054(Belize)), Report No 40/04, Inter American Commission on Human Rights (12 October 2004).
[521] Mayagna (Sumo) Community of Awas Tingni v Nicaragua, Inter-American Court of Human Rights (31 August 2001).
[522] Article 27(2) of the American Convention on Human Rights.
[523] Southern African Development Community Treaty, http://www.sadc.int. (accessed 23 October 2018).
[524] Section 16 of the Lancaster House Constitution placed an obligation on the government to pay 'promptly adequate compensation'.
[525] The argument is premised on the reasoning that the British government had offered at the Lancaster meeting to assist in compensating dispossessed commercial farmers, hence the compensation paid was the equivalent of market value compensation. When the British government

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interpositions after 1990.[526] Section 16 of the Lancaster House Constitution was amended in 1991.[527] The amendment precisely watered down the government's onus to pay compensation for land acquired. The amendment stated that 'fair compensation' was to be paid 'within a reasonable time'. A further amendment was introduced to bar any judicial contests questioning the fairness of compensation as decided by the compensation committee established in terms of the Land Acquisition Act.[528]

Violence and force characterised the legal processes from 2000 onwards. Land invasions surfaced, though they were condemned internationally. The Zimbabwean government effected another amendment which sought to give legitimacy to the invasions and at the same time expedite land reform.[529] The amendment absolved the government of Zimbabwe from paying 'fair or adequate compensation' Amendment No. 17 was passed and its effect was to oust the Zimbabwean court's jurisdiction to adjudicate land acquisition cases. This gave birth to the Campbell case that went before the SADC Tribunal challenging these amendments.

Mike Campbell (Pvt) Limited and William Michael Campbell filed an application in October 2007 with the SADC Tribunal in Windhoek, Namibia. The application challenged the acquisition of agricultural land owned by the Campbells by the government of Zimbabwe. A separate application in terms of Article 28 of the Protocol on Tribunal read with Rule 61 (2)-5 of the Rules of Procedure of the SADC Tribunal accompanied the main application. It aimed at estopping the Zimbabwean government from evicting applicants on the farm pending finalisation of the matter.[530]

The Tribunal, in the *Mike Campbell (Pvt) Ltd and Others v The Government of the Republic of Zimbabwe* case, dismissed the assertion by the government of Zimbabwe that Britain had an obligation to pay compensation to the landowners for the land

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refused to honour its promise the Zimbabwean government struggled to pay such compensation for the whole first 10 years of independence.

[526] This period in principle marked the end of the 'willing buyer, willing seller' barrier to land reform.

[527] The Constitution created an impervious and robust framework for the protection of property rights in the first ten years of independence. It mandated the government to pay 'prompt and adequate compensation. Section 6 of the Constitution of Zimbabwe Amendment 11, Act 30 of 1990 amended this provision to require 'fair compensation to be paid within a reasonable time'.

[528] S Coldham The Land Acquisition Act, 1992 of Zimbabwe (1993) 37 *Journal of African Law* 82-88; See also section 16 (2) of the Amendment which reads 'No such law [authorizing acquisition of land] shall be called into question by any court on the ground that the compensation provided is not fair'.

[529] Constitutional Amendment 16 of 2000.

[530] *Mike Campbell (Pvt) Ltd and Others v. The Government of the Republic of Zimbabwe* SADC (T) Case No. 2/2007 para 1 at 4.

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expropriated.[531] The Tribunal held that the Zimbabwean government was obliged to pay the compensation for the expropriated land. The Tribunal stated the following regard expropriation of agricultural land and compensation;

> It is difficult for us to understand the rationale behind excluding compensation for such land, given the clear legal position in international law. It is the right of farmers under international law to be paid, and the correlative duty of the government to pay fair compensation. Moreover, the respondent cannot rely on its national law, its constitution, to avoid an international law obligation to pay compensation. The government cannot rely on Amendment 17 to avoid payment of compensation to the applicant for their expropriated farms.

This judgment is extremely progressive. However, the events that transpired after the ruling by the Tribunal remonstrate against the landmark judgment. To begin with, the government of Zimbabwe refused to comply with the judgment. They described the judgment as 'nonsense and of no consequence' and argued that the Tribunal was ultra-vires its jurisdiction.[532] The Zimbabwean government on several occasions reiterated that it would not reverse the land reform program.[533] The SADC Summit did not take any apposite action against Zimbabwe for non-compliance regardless the fact that the same matter had been on two occasions brought to it in 2009[534] and 2010[535] respectively for appropriate action to be taken against Zimbabwe.[536] The SADC Summit, in May 2011, at an extra ordinary meeting disbanded the SADC Tribunal. The Summit stopped the Tribunal from presiding on any impending or new cases.[537] By doing so, it ended the Tribunal's jurisdiction to hear individual cases. Thus, the jurisdiction of the Tribunal was restricted or limited to resolving disputes between member states only.

As illustrated above, the decision by the SADC Tribunal was not enforced. Hence, it is significant now to discuss the enforcement of the SADC Tribunal decisions. The

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[531] As above.
[532] F Conwell The Death of the SADC Tribunal's Human Rights Jurisdiction (2013) 13 *Human Rights Law Review* 153-165.
[533] 'No Land Reform Changes: Government' The Herald 1 December 2008.
[534] *William Campbell and Another v Republic of Zimbabwe* SADC (T) 03/2009.
[535] *Fick and Another v Republic of Zimbabwe* SADC (T) 01/2010.
[536] In terms of
Article 32(5) of the Protocol, the Summit is the ultimate body to decide on the course of action to be taken in cases where a member disregards a ruling by the Tribunal. Article 33 of the Treaty provides that sanctions may be imposed against any member that, without good reason, persistently fails to fulfi l its Treaty obligations or implements policies that undermine the trade bloc's principles and objectives.
[537]Paragraph 24 of the Final Communique of the 32nd Summit of SADC Head of State and Government, Maputo, Mozambique, 18 August 2012.

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decisions of the Tribunal are final and binding as provided for by Article 16 (5) of the Treaty. It is the responsibility of the member states to enforce and execute the rulings made by the Tribunal.[538] It is apparent as exposed by the Campbell case that when it comes to enforcement of its judgments the Tribunal is found wanting.

According to Article 32 of the Protocol, a member's civil rule of procedure concerning enforcement of foreign rulings in whose territory the ruling is to be enforced, govern such enforcement. The respondent's failure to comply with the decision of the Tribunal, prompted the applicants to file an urgent application in terms of Article 32 (4) of the Protocol.[539] They sought an order to the effect that Zimbabwe was in contempt of the Tribunal's rulings.[540] The Tribunal ruled in favour of the applicants. It proceeded in terms of Article 32 (5) of the Protocol. Article 32 (5) provides that

> If non-compliance by a member with a decision has been shown to exist, the Tribunal is obliged to report the same to the Summit in order for the latter to take "appropriate action".

However, the conundrum is that the term 'appropriate action' is not defined thereby rendering the article ambiguous and inadequate. This contributes to the weaknesses of the Tribunal as far as enforcement is concerned. There is need for a clear rule that deals with non-complying states in order to prevent member states from escaping their international legal obligations.[541]

Zimbabwe continued to disregard the Tribunal's decisions in the main matter. The Government of Zimbabwe issued a statement to the effect that the rulings were invalid thus not binding on it.[542] It would seem the preeminence of politics and issues of national sovereignty largely determined the fate of Zimbabwe over and above the rule of law. Nevertheless, the conduct by Zimbabwe was in contrast with the sovereignty principle, which provides that states must subject themselves to the rule of law.

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[538] OC Ruppel & FX Bangamwabo The SADC Tribunal: A legal analysis of its mandate and role in regional integration in Bösl, A, Breytenbach, W Hartzenberg, T McCarthy, C & Schade, K (ed) Monitoring Regional Integration in Southern Africa Yearbook. Stellenbosch: Trade Law Centre for Southern Africa (2008) 21.
[539] Article 32(4) allows any party concerned to report a member's non-compliance with a Tribunal ruling.
[540] *Campbell v Republic of Zimbabwe SADC (T)* 11/2008
[541] Coleman, G & G Erasmus. 2008. "Regional dispute resolution: The SADC's first test". Available at http://www.tralac.org/unique/tralac/pdf/20080205_hotseat.pdf; (accessed 10 January 2018). .
[542] 'Zimbabwe not bound by regional court ruling: Justice Minister'. Available at http://jurist.org/paperchase/2010/07/zimbabwe-is-not-bound-by-sadc-rulings-justiceministerhp, (accessed 10 December 2018).

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Not all member states supported Zimbabwe in disregarding the Tribunals decisions. South Africa being a member provided a platform for some of the applicants to obtain a remedy. The applicants after failing to obtain a relief in Zimbabwe proceeded to make an application to register and enforce the Tribunals ruling to the High Court of South Africa. The application succeeded and property belonging to Zimbabwe situated in South Africa was attached. However, some of the property was immune to attachment by virtue of being diplomatic property.[543]

The discussion above clearly sheds light on the position regarding enforcement of the Tribunal's rulings. The current position no doubt is an impediment to the Tribunals mandate. Therefore, it is useless to bestow upon the Tribunal the obligation of safeguarding respect for the rule of law such as protection of property rights, if it is not at the same time vested with the power to ensure compliance with its decisions.[544] As it stands, the decisions of the Tribunal remain unenforceable unless if member states observe their treaty obligations in good faith.[545] This explains why Zimbabwe reaffirmed and solidified its land reform stance in 2013 despite the ruling by the Tribunal discrediting it.[546] Furthermore, consensus from members is required in order for the Summit to reach a binding decision.[547] This implies that even the member against whom the Summit is contemplating to punish with sanctions must also agree to such an action. It is absurd to believe that such a member would willingly support imposition of sanctions on itself.

To conclude, despite the shortcomings surrounding the enforcement of the Tribunal rulings, the judgment by the SADC Tribunal is highly progressive in explaining the accepted international principles of expropriation and compensation. It shows that in expropriation of land cases, payment of fair compensation is peremptory. The Tribunal interpreted SADC instruments and aligned them to international instruments thereby

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[543] The Republic of Zimbabwe v Sheriff Wynberg North & Others 2009/34015 [2010] ZAGP JHC 118. The available at http://www.saflii.org/za/cases/ZAGPJHC/2010/118.html (accessed 26 November 2018); South Africa'sForeign States Immunities Act, 1981 (No. 87 of 1981) precludes the attachment of foreign states' movable or immovable property in order to enforce a judgment without the written consent of the foreign state. However, this does not apply to property that is used or intended for use for commercial purposes.
[544] P N Ndlovu*Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal (2011) vol 1 SADC Law Journal
[545] As above.
[546] Constitution of the Republic of Zimbabwe of 2013 sec 72.
[547] Article 10(8) of the Treaty stipulates that "unless otherwise provided for in this Treaty, the decisions of the Summit shall be by consensus and shall be binding".

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setting a well-enriched jurisprudence within accepted international law standards on compensation and expropriation. However, this position was not enforced and neither was the Zimbabwean land policy disregarded considering the enforcement challenges facing the Summit. Pertaining to the suspension of the Tribunal, it is hoped that a speedy solution is reached lest the Tribunal becomes redundant.

3.5 Roman-Dutch Law

Roman law was denied the privilege of a general law regulating expropriation. However, it permitted state expropriation for particular needs. It is significant to note that expropriation law was not required considering that large tracts of land, were held in reserve, in the form of *ager publicus*, for public works.[548] Nevertheless, Roman law chronicled the requirement of compensation in expropriation cases. Frontinus states that 'the material expropriated from private land for public works had to be paid'.[549] The price to be paid was gazetted to be '*viri boni arbitratu aesti-mata*'[550]

In Constantinople, private properties were acquired for erecting schools in return for a *competens pretium*. Likewise, it was possible to acquire land for constructing public buildings. This was subject to payment of compensation in form of awarding the dispossessed the right to build on the new building or over the new building.[551] In instances where land was expropriated for example building a tower, the landowner would be compensated with the right to dwell in the new built tower.[552] Tax pardons was also another form of compensation to landowners whose property were taken.

The *pretium* requisite is ambiguous and confusing as it can mean cost, value, or price, which makes it analogous to the word 'value' which we use now.[553] An exploration of Roman law would portray that the term *quanti venire potest* (what it can be sold for) or *quanti vendere potest* (what the owner can sell it for) is exactly the same with market value *vis-à-vis verum pretium*, that is conceivably the actual price.[554] Gierke detailed that the state must not exercise its expropriation powers in an arbitrary manner, but

[548] N Davies *A Comparative Study of the History and Principles of South African Expropriation Law with the Law of Eminent Domain of the United States of America* (1987) 6.
[549] N Mathews *The Valuation of Property in the Roman Law* 1920-1921) 34 Harv LR 229.
[550] As above.
[551] Mathews (note 542 above).
[552] Mathews (note 542 above) 229.
[553] Mathews (note 542 above) 229 232.
[554] Mathews (note 542 above) 229 232.

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should only do so *justa causa*.[555] Public need was viewed as *justa causa*, considering the public ought to profit when compensation is paid at public expense.[556] Therefore, for expropriation to be legal, it was supposed to meet the following requirements: - (i) based on *justa causa* (ii) subject to compensation (iii) a fair procedure to be followed.

Where the state expropriates property, the first obligation is public utility and compensation must be paid to the person expropriated.[557] The state's power to expropriate private property without the owner's consent for a public purpose was referred to as *dominium eminens,* the first mention of the word *eminent domain*.[558]

The principle of *eminent domain* traces its origins to Roman-Dutch law. Hugo Grotius in 1625 detailed that

> The property of subjects is under eminent domain, so that the state or those who act for it may use or even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over property of others but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. However, it is to be added that when this is done the state is bound to make good the loss to those who lose their property.[559]

Therefore, the state could expropriate property for public use subject to payment of just compensation.[560] The court in *Estate Marks v Pretoria City Council*,[561] clearly demonstrates that Roman-Dutch law defined compensation as the market value of the land expropriated. Hence, under Roman-Dutch law, the state could expropriate private property only for a public use and subject to payment of compensation at market value.

3.6 African Customary law

It is imperative to outline the African land tenure system under this chapter in order to illustrate the land tenure laws of the region of Africa. Joireman contends that 'before colonisation, Africa was a vast differentiated and governed area'.[562] Kingdoms spread athwart the land in the best inhabitable areas. Customary law was in use by then.

[555] Mathews (note 542 above) 229 232.
[556] Mathews (note 542 above) 229 232.
[557] F Mann *Outlines of a History of Expropriation* (1959) 75 LQR 188.
[558] As above.
[559] J E Nowak & R D Rotunda Constitutional Law (2004).
[560] F Mann 'Outline of a History of Expropriation' (1959' 75 LQR 188; W J Du Plessis 'Compensation for Expropriation under the Constitution' LLD Thesis, Stellenbosch University 2009.
[561] *Estate Marks v Pretoria City Council* 1969 3 SA 227 at 244.
[562] S. F Joireman *'Entrapment or Freedom: Enforcing Customary Property Rights Regimes in Common-law Africa'* (2011).

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Customary law is however, sundry, principally unrecorded, informal and not easily ascertainable.[563] Nevertheless, land was held under customary law, under the preceding rights, (i) allodial title, which was held by the community, (ii) the ancillary law right comprising of 'customary law freehold or usufruct' held by either an individual or group of people who form part of the community holding the allodial title.[564]

Therefore, customary law acknowledged a degree of individual control of land in the form of the right to use and occupy land. Conversely, the allodial title was observed as conferred above society and whatsoever rights any individual person possessed in land were submissive or inferior to the rights of the community.[565]

During the pre-colonial epoch, Africans believed that land was god-given and that the ancestors had a connection to the land.[566] For this reason, it was not possible to appropriate or alienate land through sale.[567] The community collectively owned the land and it passed from generation to generation.[568] However, outright title to land bestowed in the traditional leaders under whose management the land vested.[569] Traditional authorities possessed certain powers over land.

Among other powers, they could allot, take or confiscate land in certain situations.[570] It is nonetheless, not known whether the public interest requirement as well as payment of compensation were prerequisite for expropriation. It is apparent that under customary law there was communal proprietorship of land contrary to the European dogma of personalised land ownership.[571] Private land ownership and the concept of *eminent domain*, is foreign and unfamiliar to African indigenous customary law.

However, land under customary tenure, in the modern world, is treated as government land. The land vests in the state or in the Presidents name in trust for the people. Due

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[563] L. Juma *Putting Wine in a New Wine Skin, The Customary Code of Lerotholi and Justice Administration in Lesotho, in the Future of African Customary law* (2011)
[564] G R *Woodman Customary land law in the Ghanaian Courts* (1996); K Bensh-Enchill *Ghana land law* (1964).
[565] K. M Maini *Land law in east Africa* (1967).
[566] H W O Okoth-Ogendo *The Tragic African Commons; A Century of Expropriation, Suppression and Subversion* (2005).
[567] W J du Plessis & G Frantz *African Customary Land Rights in a private Ownership Paradigm* (2013).
[568] Alexcor Ltd v The Richtersveld Community 2004 (5) SA 469 CC par 58
[569] G R Woodman *Customary Land Law in the Gananian Courts* (1986).
[570] T W Bennet *Customary law in South Africa* (2004).
[571] W J du Plessis & G Frantz African Customary land Rights in a Private Ownership Paradigm (2013) http://ssrn.com/abstract (accessed 12 November 2018).

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to this nationalisation of customary land, the official view is that land has no value.[572] Accordingly, the only form of compensation that is payable for expropriated land under customary tenure is that of the developments on the land but not for the land itself.[573]

An analysis of the discussion *supra*, clearly elabourates that the issue of compensation remains a conundrum at international law. There exists no settled and acceptable form of compensation. Compensation can either be above market value, at market value, below market value or compensation for developments only and not the land itself. However, the common aspect that is apparent is that international law requires payment of compensation is peremptory in expropriation cases. In the next chapter, I will examine how Zimbabwe and China deals with the issue of expropriation and compensation to see if South Africa could learn any lessons therefrom.

[572] S Keith Compulsory acquisition of land and compensation http://www.fao.org/nr/lten/lten-en.htm (accessed 12 November 2018).
[573] Keith (note 565 above).

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CHAPTER FOUR

'In acquisitions of agricultural land required for resettlement purposes, compensation shall only be payable for improvements on the land.'[574]

A COMPARATIVE LEGAL EXPOSITION OF LAND EXPROPRIATION AND COMPENSATION IN ZIMBABWE AND CHINA

4.1 Introduction

Chapter 4 will embark on a legal exposition on the issue of land expropriation and compensation. It is now apparent from the previous chapters that expropriation of property is a necessary requirment in democratic modern societies.[575] It consequently, follows as discussed in the preceding chapters that the right to compensation in expropriation cases is a basic property right.[576] Various compensation regimes as demonstrated in the previous chapter exist at international and regional levels. South Africa is proposing an approach that allows for expropriation of land without compensation. The current chapter embarks on a comparative study drawing on how China and Zimbabwe treat the legal principles of "expropriation" and "compensation" in practice to see whether South Africa can learn from it. The rationale for choosing these two countries is founded on the fact that both countries have implemented policies that allow for expropriation of land without compensation. Hence, an assessment of these two jurisdictions, which have already adopted the same policy, is crucial in shedding more light as to whether such a position is legally acceptable, if so what the pros and cons are and whether it is prudent for South Africa to adopt it. The study will first look at Zimbabwe then proceeds to look at China. The aim is to look at the compensation regimes in these two jurisdictions for making recommendations to South Africa on the issue of expropriation without compensation.

4.2 Zimbabwe

The land problem was dominant and at the core in Zimbabwe during the colonial struggle and afterwards. The land struggle began with expansionism in 1890 when the British South Africa Company directed by Cecil John Rhodes acquired land between

[574] Land Acquisition Act (Chapter 20;30).
[575] *Director of Buildings and Lands v Shun Fung Ironworks Ltd* (1995) ZAC 111, 125.
[576] *Waters and others v Welsh Development Agency* 2004 UKHL 19.

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the Limpopo and Zambezi Rivers.[577] From that period onwards, land was and continues to be at the center of acrimony between indigenous Africans and the white settlers. The land dispute resulted in the government invoking its expropriation powers in order to redress the injustices of the past. Expropriation is a necessary mechanism in democratic countries, Zimbabwe included.[578] However, expropriation works hand-in-hand with the duty to pay compensation.[579]

As such it follows that the right to receive compensation for expropriated land is a fundamental property right.[580] In chapter 3, the study gave a comprehensive explanation of the compensation regimes acceptable at international and regional level in general. The study seeks to examine whether expropriation without compensation is legally permissible and if whether it is in tandem with international and regional law. In order to achieve that objective, after having identified the acceptable compensation regimes, the study proceeds to look at Zimbabwe and China. The aim is to examine the policies in these countries and if such are in tandem with the compensation principles discussed in chapter 3. The rationale for choosing Zimbabwe and China is premised on the reasoning that both jurisdictions have already allowed for expropriation without compensation in their respective jurisdictions. The aim, hence, is to analyse how these policies are being mplemented and enforced, the pros and cons and whether or not they subscribe to international and regional standards in order to make recommendations to South Africa on the same issue.

4.2.1 Historical Background of Zimbabwe's Policy of Land Expropriation without Compensation

The land issue remains overriding and at the core in Zimbabwe since the colonial struggle. The land struggle arose with interventionism in 1890 when the British South Africa Company directed by Cecil John Rhodes acquired land between the Limpopo and Zambezi rivers.[581] Those in authority tainted the colonial period with land expropriations. Zimbabwe consequently, endured four stages namely the colonial epoch, the willing buyer-willing seller epoch, expropriation with fair recompense epoch

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[577] A T Magaisa The Land Question and Transitional Justice in Zimbabwe:Law, Force and History's Multiple Victims at http://www.csls.ox.ac.uk/documents/magaisaLandinZimbabweRevised290610.pdf (accessed 15 November 2018).
[578] *Director of Buildings and Lands v Shun Fung Ironworks Ltd* (1995) ZAC 111.
[579] As above.
[580] *Waters &Others v Welsh Development Agency* 2004 UKHL 19.
[581] Magaisa (note 570 above).

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and lastly the expropriation without recompense epoch, which I would describe as the "rush, invade and grab" period.[582] It is therefore, prudent to examine these four stages to give a clear exposition on the land starting from the colonial period to the present day. The discussion will clearly shed light on the history of the compensation methodology in Zimbabwe pertaining to the land issue.

4.2.2 The Colonial epoch

The general view is that the land struggle began with colonisation in the year 1890 through the British South Africa Company.[583] The British South Africa Company received a Royal Charter of Incorporation in 1889 from Queen Victoria of Britain. The company then gave birth to Southern Rhodesia now known as Zimbabwe. The Charter equipped the company with the power to expropriate and dole out land.[584] The colonial government enacted several statutory provisions including the 1898 Southern Rhodesia Order in Council, the 1930 Land Apportionment Act and the Land Tenure Act of 1969, which had the effect of grouping land holdings into racial classes.[585] The period between the year 1894 and 1895 saw 'Native Reserves' being fashioned in order to seperate Africans from their European counterparts.[586] These statutes and the implementation of native reserves laws marked the commencement of segregation and compelled the removals of Africans from their familial land. The indigenous peoples were relocated from fertile lands to infertile reserves that included places like Gwaai, Shangaani and Gokwe.[587] The indigenous Africans in Zimbabwe staged uprisings in an attempt to resist such invasions and dispossessions of their ancestral land; however, they were ruthlessly conquered and subdued in both the 1893 Matebele revolt and the 1896-7 first Chimurenga war.[588]

The indigenous people were not permitted to purchase, let or occupy land in areas designated for Europeans, as doing that would attract criminal prosecution.[589] These statutes sanctioned forced displacements of the indigenous peoples. All the various

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[582] L Madhuku *Law, Politics and the Land Reform Process in Zimbabwe* (2004) Friedrich Ebert Stiftung and Institute of Development Studies, University of Zimbabwe, Harare 124-146..
[583] A T Magaisa The Land Question and Transitional Justice in Zimbabwe: Law, Force and History"s Multiple Victims (2010) http://kar.kent.ac.uk/id/e (accessed 20 November 2018).
[584] R Palmer *Land and Racial Domination in Rhodesia* (1977).
[585] As above.
[586] Magaisa (note 570 above).
[587] S Moyo The Land Question in Zimbabwe (1995).
[588] L Tshuma *A matter of Injustice-Law, State and the Agrarian Question in Zimbabwe SAPES Books, Harare* (1997) 5-15. Chimurenga is a phrase that means an uprising or rebellion.
[589] Land Apportionment Act, 30 of 1930 sec 42.

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legal instruments that came into force during the colonial epoch provided the European settlers with legal control over land.[590] The legislations sanctioned camouflaged dispossessions. The objective was to target for transfer all land under the holding of indigenous Africans in favour of European settlers, without payment of any compensation. Expropriations by the authorities were justified on the basis that all unalienated land belonged to the Crown. The court in *In re Southern Rhodesia*[591] held that it was unimaginable for Africans to have established any distinguishable rights over property (land), thus all land expropriated or taken from blacks was perceived *terra nullius* (not owned by any person) and all unoccupied land therefore, belonged to the Crown.[592] The judgment exposed the role of the judiciary in interpreting and applying land expropriation rights. It sanctioned land expropriation devoid of compensation. The colonial settlers relied on legal instruments as well as the help of the judiciary in achieving their objective of forcibly taking land from Africans. Law was continuously used for a prolonged period by the authorities to encroach on the indigenous peoples' right to own land. Examples of such laws include the Land Apportionment Act[593] and the Land Tenure Act.[594]

Palmer describes the Land Apportionment Act *as* a '*Magna Carta'* to whites, which assured their way of life and insulated it from the encroachment of the indigenous people who regarded the statute as unashamedly biased and profoundly unjust.[595] In essence, the colonial land policies guaranteed the white race that was in the minority with a greater portion of land in quality and magnitude.[596] They reserved for themselves lands with fertile soil and high rains.[597] On the other hand, the Africans lost their portions of land through comprehensive evictions and compelled abstractions to native inhospitable areas ridden with tsetse flies such as the Gwaai and Shangaani

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[590] The International Commission of jurists (ICJ) Report of 1976 11-12 stated that the aim of the legislation was to guarantee and cement white control over fertile and thriftily important land thereby condemning indigenous people as the labouring class.
[591] *In re Southern Rhodesia* (1919) AC 210.
[592] As above.
[593] Palmer (note 532 above) 186 explains that when the Land Apportionment Act came into force, the European settlers who constituted the minority were given on average 1000 acres per head while the Africans who were the majority had only 29 acres per head.
[594] Land Tenure Act of 1939.
[595] Palmer (note 586 above) 134.
[596] This situation is identical to that of South Africa. See for example the Native Land Act of 1913. The Native Act dispossessed African Indigenous people of South Africa their land and made South Africa to become a white men's polity.
[597] Palmer (note 586 above).

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with pitiable sterile soils.[598] As a result, the indigenous peoples were comprehensively dispossessed of their land through expropriation devoid of any compensation.[599] To add salt to the already existing wounds, the proceeds amassed from land dispossessions went to the United Kingdom.[600] Consequently, the indigenous peoples received nothing in return.[601]

No doubt, the colonial epoch inflicted many wounds within the indigenous peoples and land dispossessions were at heights.[602] These grievances gave birth to the 'Second Chimurenga', that is the war of independence between 1965 and 1979. The war ended in 1979-80 thereby paving way for the Lancaster House Constitution. This piece of statute has and is criticised as seriously flawed and the cause of the land problem in Zimbabwe. The document contrary to the objectives of the Patriotic Front[603], which focused on a speedy land reform, sought to postpone the land issue.[604] Consequently, the Lancaster House Constitution deferred the land problem in the Republic of Zimbabwe for at least thirty years.[605] The Constitution strongly protected the Europeans rights in property within the first ten years of independence. As a result, the government failed to embark on any progressive land reform, since the program was rooted in the 'willing buyer, willing seller' principle. Moyo states that land reform during the first 10 years of independence was disappointing for the reason that the 'land supply side of the distribution effort [was at the time] the least transparent and the most contentious issue around which future conflicts revolve'.[606]

On the contrary, white landholders hold the view that the land they occupied was *terra nullias.*[607] They argued that it was unimaginable for Africans to have established any distinguishable rights over property, thus all land unoccupied belonged to the

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[598] Be de Villiers *Land Reform: Issues and Challenges- A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia* (2003) Konrad-Adenauer Stiftung 1-170.
[599] *Alistair Davies v Minister of Lands, Agriculture and Water Development* HH-185-94.
[600] Magaisa (note 570 above).
[601] Magaisa (note 570 above).
[602] W Chinamora The Land Question in Zimbabwe: Can Indian Jurisprudence Provide the Answer? (1999) Vol 16 *Zimbabwe Law Review* 30-44.
[603] The Patriotic Front was composed of primarily two independence protagonist namely Zanu PF led by Robert Mugabe and PF Zapu led by Joshua Nkomo.
[604] S Moyo *The Land Question in Zimbabwe SAPES Books, Harare* (1995) 1.
[605] Africa All Party Parliamentary Group of the UK Parliament report on 'Land in Zimbabwe: Past Mistakes, Future Prospects' (2009) 26.
[606] Moyo (note 597 above).
[607] *In re Southern Rhodesia* (1919) AC 210. The *terra nullias* English concept was resolved in the *Mabo v Queensdale* (1992), case. The Court held that the land in this continent was not *terra nullius* when settlers entered the land.

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Crown.[608] Europeans contend that land in Zimbabwe was for the taking and since the African ocupiers of the land then, had no concrete laws regulating land, they had no say in the acquired land.[609] Kelvin Sieff further emphasises on the belief that white commercial farmers are the legitimate owners of the farmland when he contends that 'Mugabe's policy of land reform amounted to theft'.[610] Micheal Carter argues that the land reform policy benefited the supporters of Zanu PF and discriminated against the European landholders and their African employees.[611] Carter opined that the land reform law enacted by Robert Mugabe mimicked the colonial law, which discriminated against blacks.[612] He further stated that

> Can a white person not be indigenous? In our constitution, citizens are separated from indigenous people on racial basis, which is unconstitutional and will eventually be challenged. This principle is based on the same principle as applied by the Smith government against black people. Do two wrongs make a right?[613]

This reasoning by Carter emphasises the fact that white landholders regard themselves as indigenous people of Zimbabwe, thus they have a legal right to own private property just like any other person. Any form of discrimination based on race is unconstitutional and unlawful. John Robertson describes the land reform system as 'unjust and politically driven'.[614] Peter Steyl corroborates this reasoning when he opined that 'land reform was used as a tool of political patronage'.[615]

It is apparent that white landholders in Zimbabwe hold the view that they legally acquired land during the colonial epoch as the land was *terra nullius*. Furthermore, no law regulated land then, thus Blacks had no say in land. On the contrary, Blacks hold the view that Africans received no compensation for land unlawfully taken from them by the Europeans. Hence, there is no justification why Europeans must recieve compensation for land taken from them. Dr Tetteh Osabu-Kle contends that:

> There is talk about compensation. The question is who should pay the compensation-the robber or robbed? Certainly, the principle of natural justice demands that the robber, when

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[608] *In re Southern Rhodesia* (1919) AC 210.
[609] J Herbst The Dilemmas of Land Policy in Zimbabwe in Baynham, S (ed): Zimbabwe in Transition. Stockholm: Almqvist & Wiksell International (1992)
[610] 'Zimbabwe's white farmers find their services in demand again' The Gurdian 25 September 2015.
[611] M Carter 'Racist' land policies: At least 1000 white farmers 'poverty-stricken' in Zimbabwe available at https://m.news24.com (accessed 26 February 2019).
[612] As above.
[613] Carter (note 604 above)
[614] 'Zimbabwe's white farmers find their services in demand again' The Gurdian 25 September 2015;
[615] As above.

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> caught, should pay the compensation… For some few white Africans to own 80% of arable land and millions of black Africans to have nothing is very unAfrican and unacceptable.[616]

Former Zimbabwean President Robert Mugabe opined that 'if white settlers just took the land from us without paying for it, we can, in a similar way, just take it from them without paying for it'.[617] These varying views and wounds created by the colonial land dispossessions led to the liberation laws and the Lancaster House Agreement.

4.2.3 The Lancaster House Constitution and the willing buyer, willing seller epoch

The passing of the Lancaster House Constitution, following the Lancaster House Agreement of 1979 gave birth to land reform in Zimbabwe. It focused on correcting the colonial land inequalities and injustices. The Lancaster House Constitution engrained and assured the right to property.[618] It read that 'No property of any description or interest or right there in shall be compulsorily acquired except under authority of law'.[619] Consequently, the provision outlawed any form of expropriation unless if permitted at law. The government could expropriate property except and only if, (i) it is in the interest of defense (ii) public order (iii) public health and lastly (iv) if it is for town planning subject to payment of adequate and prompt compensation in foreign currency towards the dispossessed persons.[620]

The Lancaster House Constitution extremely limited the latitude of expropriation by the state particularly in resettlement cases.[621] Land expropriation for resettlement drives was restricted only to underutilsed land.[622] However, it was peremptory that upon such expropriation the government was required to pay prompt and adequate compensation in foreign currency to these respective landowners.[623] It is imperative to note that the phrase 'adequate compensation' is not amorphous. However, the courts interestingly construed it to mean nothing less than market value.[624] As a result,

[616] T Osabu – Kle The Fundamental Problem in Zimbabwe" in Ankomah, B. (ed) New African issue no. 400. London: IC Publications, (2001) p 47.
[617] Zimbabwe's white farmers find their services in demand again' The Gurdian 25 September 2015
[618] The Lancaster House Constitution of 1980, sec 16.
[619] As above.
[620] The Lancaster House Constitution of 1980, sec 16 (1) (a)-(c).
[621] Madhuku (note 575 above).
[622] The Lancaster House Constitution of 1980
[623] As above.
[624] *May & others v Reserve Bank of Zimbabwe* 1985 (2) ZLR 358 SC.

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the notion of ‘adequate and prompt compensation’ is the equivalent of compensation based on the ‘willing seller, willing buyer’ principle.[625]

The consequence of the phrase ‘underutilised land’ had the implications of excluding all productive farms. This is because productive farms were outside the scope of underutilised land. The Constitution, in particular the property clause coupled with the market value perception, forced the government to espouse and implement the willing buyer willing seller approach in expropriating and distributing land. Therefore, it follows that it was possible for the state to procure productive land or farms subject to the ‘willing buyer -willing seller principle’ at market value and in foreign currency.[626] The effects of the willing seller-willing buyer principle were that the government would only buy land voluntarily offered for the purposes of resettlement, thus, the state could not compulsorily purchase land.[627] The outcome, consequently, was that the government received a preferential offer to buy the land first, and if not interested, the government would issue a certificate of no present interest permitting alternative sales.[628]

It is trite to indicate that the Land Acquisition Act of 1985 was legislated to give effect to the Lancaster House provision on land expropriation.[629] The Act corroborated the principles provided in the Lancaster House Constitution on land expropriation. According to the Act, the government could only expropriate underutilised and deserted land for agricultural and resettlement purposes or the land was to be sold on a willing buyer-willing seller basis.[630] Just like with the Lancaster House Constitution, the Act dictated that the government enjoyed first preference to purchase all land before placing it on the open market.[631]

It is apparent that the government enjoyed first preference to acquire land either through expropriation at market value or by purchasing land offered for sale by a willing

[625] Madhuku (note 575 above).
[626] Lancaster House Constitution, sec 16
[627] A Chilunjila & D E Uwizeyimana ‘Shifts in the Zimbabwean Land Reform Discourse from 1990 to the Present’ (2015) 8 African Journal of Public Affairs 130-144; See also B deVilliers ‘Land Reform: Issues and Challenges- A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia (2003) Adenauer Stiftung 1-170.
[628] Land Acquisition Act of 1985, sec 5-7.
[629] Madhuku (note 575 above).
[630] Lancaster House Constitution of 1985, sec 3(1)(a)(iii).
[631] Land Acquisition Act of 1985

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seller at market value.[632] Therefore, the Lancaster House Constitution provided for land expropriation based on the willing seller-willing buyer principle, which is the market value of the land. This principle was a thorn in the flesh for the government and gave birth to a plethora of policy and legal interventions.[633] As shall be discussed later, the changes shifted the responsibility for land redistribution and compensation from the government of Zimbabwe to the United Kingdom.[634] From that period thenceforth, the Zimbabwean government used law, force and violence in repossessing the land. Technically, roles had reversed; the settlers swapped places with their black counterparts who had endured the effect of the unjust laws in the 1930s and 1960s.[635]

4.2.4 The Period of Expropriation with Fair Compensation

As discussed above, the Lancaster House Constitution was an obstacle to land redistribution; hence, a series of legal and policy intermediations came into effect to reverse its effect.[636] Consequently, 18 April 1990 paved way for a new constitutional dispensation as well as the advent of the new land policy.[637] The change in the land policy emanated firstly from the fact that the landowners (white commercial farmers then) were not willing to relinquish their ownership over the huge tracts of land under their control.[638] Secondly, the government was financially incapacitated to compensate the white landowners and finally yet importantly Britain had reneged on its promise of assisting the government of Zimbabwe in compensating the white landowners for all land expropriated.[639] In order to bring into effect the new land policy, the government amended section 16 of the Lancaster House Constitution and promulgated the Land Acquisition Act of 1985, an Act later repealed and substituted by the 1992 Act.[640]

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[632] K Moyo *Justiciable Property Rights and Post-Colonial Land Reform: A Case Study of Zimbabwe* (2015).
[633] The principle derailed any meaningful land reform and technically marked the beginning of the 'willing seller-willing buyer; impediment to land reform.
[634] Payment of compensation based on a 'willing seller-willing buyer' principle delayed land reform as the government was required to pay compensation at market value. By shifting responsibility to the United Kingdom the government aimed at expediting land reform.
[635] Magaisa (note 570 above).
[636] This marked the commencement of the end of the 'willing buyer, willing seller' obstacle to land redistribution.
[637] B deVilliers (note 596 above); R Palmer 'Land Reform in Zimbabwe 1980-1990' (1990) Vol 89 African Journal of Public Affairs 163-181.
[638] Chilunjila (note 620 above).
[639] Chilunjila (note 620 above).
[640] Land Acquisition Act 3 of 1992.

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The new land policy allowed the state to expropriate land for resettlement purposes. The interesting development is that the state was authorised to expropriate agricultural land namely; underutilised, unutilised and commercial land for resettlement purposes subject to payment of fair compensation within a reasonable time after the acquisition.[641] The amendment precisely directed its attention to the provisions concerning the government's duty to pay compensation for land acquired. The shift absolved the government from paying 'prompt and adequate compensation' as dictated by section 16 of the Lancaster House Constitution. [642] The amendment required the state to pay 'fair compensation within a reasonable time'. The new term 'fair compensation' although not well defined, was in general regarded a more supple yardstick, thus favorable to land reform.[643] The general interpretation afforded to 'fair compensation' meant something less than market value.[644]

Another significant change brought about by the new legal order unlike during the epoch of the Lancaster House Constitution, was that the state could expropriate any land either utilised or not and the compensation paid for such land acquired was to be in the local currency. Additionally, the paradigm shift was parallel to the market value principle as the new Act favored calculation of compensation based on non-market value principles.[645] The new Act provided for the establishment of a compensation Committee.[646] The Committee's responsibility was to determine the value for expropriated land.[647] In my opinion, the primary consequence of the amendment was to move away from the copious open market policy to a more controlled framework, which bestowed the government with extensive power over private land rights. Dispossessed landowners were denied the chance to approach the courts for determination on issues relating to compensation and neither could they appeal to the Supreme Court.[648] The Administrative Court could only review the decision of the

[641] Land Acquisition Act 3 of 1992, sec 16.
[642] The crux of the new land policy was to do away with Lancaster House Constitution, an instrument used to stop any meaningful reform for nearly 10 years since Independence.
[643] G Naldi 'Land Reform in Zimbabwe: Some legal Aspects' vol 31 The Journal of Modern African Studies 1.
[644] P Nherere 'The Legal Framework for Land Acquisition' (2001) Faculty of Law, University of Zimbabwe pg 1-13.
[645] First Schedule of the Land Acquisition Act 3 of 1992, sec 19; S Coldham 'The Land Acquisition Act, 1992 of Zimbabwe' (1993) 37 Journal of African Law p 82-88.
[646] Land Acquisition Act 3 of 1992, sec 17.
[647] Chilunjila (note 620 above).
[648] Land Acquisition Act 3 of 1992, sec 16 (2) as amended by Constitution of Zimbabwe Amendment Act 17 of 2005, sec 3.

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Committee on the basis that the Committee fails to comply with every principle set out in the Act.[649]

As expected, these drastic changes implemented by the government were met with resistance from commercial farmers (white landowners), whose land and properties had been taken by the state. In the *locus classicus* case of *Davies and Others v Minister of Lands, Agriculture and Water Development*[650] a challenge was instituted against the constitutionality of designating land under the 1992 Act.[651] The government however, won the case in both the High and Supreme Courts. It was obvious that the legal itinerary was not achieving the anticipated outcomes. The fundamental issue in contention was the question of who was responsible for compensating farmers whose properties the government had expropriated. As illustrated in the preceding discussion, the Zimbabwean government placed the duty to pay compensation on the British Government, which had for years, funded land reform since independence in line with the unwritten agreement purportedly agreed upon at the Lancaster House discussions.[652] The new labour government led by Tony Blair in 1997, explicitly pointed out that the British government had no responsibility to foot the compensation bill.[653] The repudiation enraged the then President Robert Gabriel Mugabe, thus activated the events that resulted in the farm raids and invasions from 2000 to date.[654]

4.2.5 The Advent of Land Expropriation without compensation

Pursuant to the repudiation discussed above, the Zimbabwean government embraced a drastic and unique stance towards the land reform program. The government amended the Land Acquisition Act[655] and the Lancaster House Constitution.[656] The

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[649] Land Acquisition Act 3 of 1992, sec 23(4).
[650] *Davies and Others v Minister of Lands, Agriculture and Water Development* 1994 (2) ZLR 294 (H).
[651] The Minister would pronounce selected farms or lands in the Gazette as elected by the government for land redistribution. This act of 'selecting' was termed 'designating land for resettlement'.
[652] M Dube & R Midgely 'Land Reform in Zimbabwe: Context, Process, Legal and Constitutional Issues and Implications for the SADC Region' (2008) *Monitoring Regional Integrations in Southern Africa Yearbook* p 9-18.
[653] The communication indicating the repudiation came in the form of a letter addressed to the then Minister of Lands, Agriculture and Rural Development in Zimbabwe, MP Kumbirai Kangai. The full text of the communication is available at http://www.swams.com/library/art9/ankomah5.html (accessed 21 December 2018).
[654] Dube (note 645 above).
[655] Land Acquisition Act 3 of 1992
[656] Constitution of Zimbabwe Amendment 16 Act 5 of 2000.

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amendments validated, legalised and empowered the government to expropriate agricultural land without compensation, save for the improvements on the land only.[657] The amendment liberated the government of Zimbabwe of the obligation to compensate dispossessed farmers by shifting such responsibility to the former colonial power, Britain.[658] There was no longer any obligation on the government to pay fair or adequate compensation. The British government was expected and required to establish a fund for the purposes of compensating the white landowners and compensation was payable only if the fund was established.[659] Madhuku argues that compensation was spontaneous in terms of section 16 (1) (e) of the Constitution once, the fund is established.[660] The implication of this change meant that in the dearth of the fund, compensation was payable for the improvements on the land only and not the land and any compensation claim for land expropriated was to be directed to Britain.[661] It is prudent to emphasis that the payment of compensation for improvements was applicable to agrarian land expropriated for resettlement purposes only.

In the absence of any constitutional or statutory guidelines to determine or calculate compensation, the new legal system created a vacuum as to what constituted the correct compensation regime. The new legal system neither assured nor guaranteed payment of fair or adequate compensation nor did it compel payment of market value compensation for the improvements on the land.[662] Consequently, the Zimbabwean government's obligation to pay compensation was relaxed, considering that compensation had changed from being peremptory to payment of compensation at

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[657] S Coldhamn 'Land Acquisition Act 1992 of Zimbabwe' (2001) Vol 45 Journal of African Law p227-229.
[658] See the Lancaster House Constitution, sec 16 A (1) (c) which reads-
the people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land; and accordingly—
(i) the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and
(ii) if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.
[659] Lancaster House Constitution, sec 16 A
[659] Madhuku (note 575 above); Section 16 (i) (2).
[660] Madhuku (note 575 above); Section 16 (i) (e) reads- Subject to section sixteen A, no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that— enables any person whose property has been acquired to apply to the High Court or some other court for the prompt return of the property if the court does not confirm the acquisition, and to appeal to the Supreme Court
[661] Chilunjila (note 620 above).
[662] Chilunjila (note 620 above).

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the government's discretion. Some commentators, for example, Madhuku opine that 'the measure of compensation appears to be fair compensation within a reasonable time and not prompt and adequate compensation'.[663] The Supreme Court in the case of *Mike Campbell (Pvt) Ltd and Another v Minister of National Security Responsible for Land, Land Reform and Resettlement* corroborated this reasoning when it held that '…the second procedure under section 16 B (2) (b) relates to the right to payment of fair compensation' within a reasonable time.[664] The fact that the compensation Committee in line with the guiding principles determined compensation payable also cements this reasoning.[665] The amendment smothered any objections towards land expropriations. All the landowners could do was to challenge the issue through the courts of the amount payable for improvements on the land (farms).[666]

4.3 The Post 2013 Zimbabwe Constitution Period

The government of Zimbabwe proceeded to legalise its policy of expropriating white-owned farms for resettlement purposes. In order to appreciate same, it is vital to discuss the property clause in the 2013 Constitution. The Constitution separates the general property clause from the land rights clause.[667] Section 71 deals with property rights in general and section 72 deals with agrarian land for resettlement purposes. The land Acquisition Act implements the principles outlined in the Constitution regarding expropriation.[668] It sets out procedures for expropriation of agricultural land

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[663] Madhuku (note 575 above)
[664] Mike Campbell (Pvt) Ltd and Another v Minister of National Security Responsible for Land, Land Reform and Resettlement 2008 (1) ZLR 17 (SC)
[665] Land Acquisition Act, sec 21 & 29 C.
[666] Lancaster House Constitution, sec 16 B (3) (a)-(b) which reads- The provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, and the provisions of section 18(1) and (9), shall not apply in relation to land referred to in subsection (2)(a) except for the purpose of determining any question related to the payment of compensation referred to in subsection (2)(b), that is to say, a person having any right or interest in the land
(a) shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge;
(b) may, in accordance with the provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, challenge the amount of compensation payable for any improvements effected on the land before it was acquired.
[667] See the Constitution of Zimbabwe Amendment 20 Act 1 of 2013, sec 71 & 72.
[668] See the Land Acquisition Act, 3 of 1992 [Chap 20:10] AN ACT implemented to empower the President and other authorities to acquire land and other immovable property compulsorily in certain circumstances; to make special provision for the compensation payable for agricultural land required for resettlement purposes; to provide for the establishment of the Derelict Land Board; to provide for the declaration and acquisition of derelict land; and to provide for matters connected with or incidental to the foregoing

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as well as non-agricultural land.[669] I now proceed to give a brief exposition of section 71 and 72 of the Constitution.

4.3.1 Section 71 of the Constitution of 2013

Section 71 embodies the general property clause and expressly guarantees private property rights.[670] The provision interestingly 'uses the terms deprivation and acquisition interchangeably'.[671] The use of both terms creates controversy on whether the provision solely provides for compulsory acquisition (expropriation for the purposes of this study) or whether it also provides for compulsory acquisition and deprivation. The provision is parallel to the Lancaster House Constitution in that the latter exclusively provided for expropriation.[672] Nevertheless, it is apparent that the provision provides for both deprivation and expropriation, thus, demonstrating the legislature's intent to provide for both terms. In order to substantiate this reasoning, the legislature used the term "acquisition" only under section 72, a clear demonstration that the legislature appreciates the difference between the two terms, which makes the double use under section 71 deliberate.

Another interesting observation to note, in my view, is that the legislatures in enacting section 71 of the Constitution copied word-for- word section 16 of the Lancaster House Constitution. In my view, a strict interpretation of section 71, concluding that it solely applies to compulsory deprivations undermines the government's right to *eminent domain*. The apparent effect of such interpretation is that all property falling outside the ambit of agrarian land is immune to expropriation. For that reason, from

[669] Land Acquisition Act, sec 5 (1).
[670] Section 71 (3) reads- Subject to this section and to section 72, no person may be compulsorily deprived of their property except where the following conditions are satisfied—
(a) the deprivation is in terms of a law of general application;
(b) the deprivation is necessary for any of the following reasons—
(i) in the interests of defence, public safety, public order, public morality, public health or town and country planning; or
(ii) in order to develop or use that or any other property for a purpose beneficial to the community;
(c) the law requires the acquiring authority—
(i) to give reasonable notice of the intention to acquire the property to everyone whose interest or right in the property would be affected by the acquisition;
(ii) to pay fair and adequate compensation for the acquisition before acquiring the property or within a reasonable time after the acquisition; and
(iii) if the acquisition is contested, to apply to a competent court before acquiring the property, or not later than thirty days after the acquisition, for an order confirming the acquisition;
(d) the law entitles any person whose property has been acquired to apply to a competent court for the prompt return of the property if the court does not confirm the acquisition.
[671] J Tsabora 'Reflection on the Constitutional Regulations of Property and Land Rights under Zimbabwean Constitution' (2016) Journal of African Law p 1-17.
[672] Lancaster House Constitution, sec 16.

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abovementioned, section 71 recognises and safeguards private property rights in general but at the same time confirms the government's power to expropriate private property for public purposes.[673] Conversely, payment of fair and adequate compensation follows the expropriation.[674]

The Constitution is silent on how to determine fair and adequate compensation. However, the general reasoning dictates market value to constitute adequate and fair compensation.[675] The court in *May & Ors v Reserve Bank of Zimbabwe* defined market value as 'the price that a willing purchaser would pay to the willing seller for the property or the best price which can reasonably be obtained on the open market'.[676] In essence, the Constitution guarantees remedies in cases of unlawful expropriations and the aggrieved property owner has a remedy to challenge any unlawful taking through the courts.[677] Property owners can also compel payment of prompt compensation.[678]

4.3.2 Section 72 of the Constitution

Section 72 deals with the right to agricultural land and expropriation. This section is relevant in illustrating the Zimbabwean position regards expropriating land without compensation.[679] The section identifies with the provisions of section 16 A and 16 B of the Lancaster House Constitution, though there exist some amendments. In essence, this provision echoes the position stated in the 1980 Constitution regarding expropriation of agrarian land and compensation.

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[673] Constitution of Zimbabwe Amendment 20 Act 1 of 2013, sec 71 (3) (b) (i) & (ii) reads- the deprivation is necessary for any of the following reasons—
(i) in the interests of defence, public safety, public order, public morality, public health or town and country planning; or
(ii) in order to develop or use that or any other property for a purpose beneficial to the community.
[674] Constitution of Zimbabwe Amendment 20 Act 1 of 2013, sec 71 (3) (c) (ii) reads- the law requires the acquiring authority— to pay fair and adequate compensation for the acquisition before acquiring the property or within a reasonable time after the acquisition.
[675] *May & Ors v Reserve Bank of Zimbabwe* 1985 (2) ZLR 358 SC
[676] As above.
[677] Tsabora (note 664 above).
[678] Tsabora (note 664 above).
[679] See Constitution of Zimbabwe Amendment 20 Act 1 of 2013, sec 72 (3) which reads- Where agricultural land, or any right or interest in such land, is compulsorily acquired for a purpose referred to in subsection (2)—
(a) subject to section 295(1) and (2), no compensation is payable in respect of its acquisition, except for improvements effected on it before its acquisition;

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This clause provides for no compensation to previous landowners for land except for improvements.[680] Section 72 (3) of the Constitution provides that:

> Where agricultural land, or any right or interest in such land, is compulsorily acquired for a purpose referred to in subsection (2)—
>
> (a) subject to section 295(1) and (2), no compensation is payable in respect of its acquisition, except for improvements effected on it before its acquisition

The duty to pay compensation for land expropriated falls on the British government, which had the responsibility to found an adequate fund for that purpose.[681] In the absence of such fund, the government has no obligation to pay compensation to affected landholders.[682] This is consistent with section 29 C (i) of the Land Acquisition Act that reads:

> In respect of the acquisition of agricultural land required for resettlement purposes compensation shall only be payable for improvements on the land. Provided that compensation shall be payable for the land or any interest or right therein where an adequate fund for that purpose is established…

The above discussion explains that as soon as the fund is established, payment of compensation is peremptory and automatic. Section 72 as read with section 295 (1) and (2) of the Constitution dictates that the compensation principle is restricted to land owned by white commercial farmers only, thus, excluding land owned by indigenous people of Zimbabwe and land protected under the Bilateral Investment Promotion and Protection Agreement.[683]

Section 72 is silent on the measure of compensation to be paid. However, the Land Acquisition Act resolves the gap and states that 'the acquiring authority shall pay fair compensation within reasonable time'.[684] Therefore, the acquiring authority has an obligation to pay fair compensation. On the contrary, full compensation is guaranteed

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[680] Constitution of Zimbabwe Amendment 20 Act 1 of 2013, sec 72 (2) (a) ARW 72(3) (a).
[681] See the Constitution of Zimbabwe Amendment 20 Act 1 of 2013, sec 72 (7) (c) (i) & (ii) which reads- the people of Zimbabwe must be enabled to re-assert their rights and regain ownership of their land; and accordingly—
(i) the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and
(ii) if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement
[682] As above.
[683] Constitution of Zimbabwe Amendment 20 Act 1 of 2013.
[684] Land Acquisition Act, sec 16 (b).

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for indigenous Zimbabweans and landholders with land falling under the protection of the Bilateral Investment Promotion and Protection Agreement.

To conclude, landholders post the establishment of the fund are entitled to receive compensation for improvements on the land only and not for loss suffered or costs incurred due to the taking of the land itself.[685]

4.4 China

The discussion will focus on the land tenure system in China as well as the compensation regime applicable ensuing land expropriation by the state. In addition, the discussion will also note the pros and cons accompanying the compensation regime in land expropriations. The crux of the discussion is to outline the Chinese land laws and compensation in order to see what lessons South Africa can learn from the Chinees experience of expropriating land without compensation. The discussion will focus on the Chinese land tenure system, land expropriation in China, compensation in land expropriation cases and the problems associated with the current compensation regime.

4.4.1 China's Land Tenure System

Prior 1978, China's land tenure system was not well defined. Individuals privately owned land post the establishment of new China in 1949.[686] However, private land ownership ceased to exist in 1966 due to successive changes that took place.[687] Individuals in China do not privately own land; hence, private land ownership is foreign in China.[688] The state owns urban land while rural land is subject to villages' collective ownership.[689] In essence rural land falls under the governance of village communities and the Village's Communist Party.[690] Farmers possess continuing lease rights to the

[685] Land Acquisition Act, sec 29 C (5).
[686] N Chan International Real Estate Review (2003) Vol. 6 (1): p. 136 – 152, CC Chow Development of a More Market Oriented Economy in China (1987) Vol 235, Issue 4786
[687] B D Bi China Real Estate Market Study, Renmin University Press (1994).
[688] Constitution of the People's Republic of China, Article 10 of 1978 as amended in 1993.
[689]. 'China.' Freedom in the World 2015 Freedom House 28 January 2015 https://freedomhouse.org/report/freedom-world/2015/china (Accessed 27 December 2018); Europe China Research and Advice Network (ECRAN). July 2012. Staphany Wong. Short Term Policy Brief 60:
Land Acquisition in China
http://eeas.europa.eu/china/docs/division_ecran/ecran_is66_policy_brief_60_land_acquisition_in_china_s_taphany_wrong_en.pdf (Accessed 27 December 2018); People Republic of China Land Administration Law of 1986 (PRCLAL), amended in 1998,Article 47
[690] As above

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land they farm, however, they cannot dispose, develop or sell the land.[691] The US Law Library report states that according to the Constitution and land laws of China 'Chinese individuals cannot privately own land and natural resources, but that citizens are entitled to privately own real estate, including residential houses and apartments (i.e. buildings and structures on the land)'. [692]

China in 1978 implemented a land use right freehold system akin to the leasehold tenure system in western nations.[693] The system entails that land and improvements on the land for example buildings are two separate entities.[694] As discussed above the state owns all metropolitan land while farmers collectively own rural land.[695] The consequence of the land use rights system means land users can only use and own the buildings and improvements with the state and farmer collectives being the sovereign owners of the urban and rural land respectively. The right to use and own buildings and improvements is termed 'Land Use Rights' (LURs).[696]

The People's Republic of China Assignment and Transfer of Use Rights of State Owned Land in Urban Areas Temporary Regulations, 1990 (PRCLUR), regulates the 'land use rights'. Regulation 3 of the PRCLUR states that organisations, domestic or foreign firms *inter alia*, obtain land use rights from the state. However, regulation 8 requires payment of an assigned premium for the rights obtained. Regulation 13 provides that 'land use rights' should be obtained by way of auction, tender or

[691] Freedom House (note 689 above).
[692] March 2015. Law Library of Congress. China: Real Property Law. http://www.loc.gov/law/help/realproperty-law/china-real-property-law.pdf (Accessed 27 December 2018)
[693] N Chan Land Use Rights in Mainland China: Problems and Recommendations for improvements (1999) Vol 7 Journal of Real Estate literature 53-63; See also *SHA Mingbao et al. v. The People's Government of Huashan District, Ma'anshan Municipality* Case No 91 (EGC91) where the Plaintiff's believed that the People's Government of Huashan District, Ma'anshan Municipality, illegally demolished their house and infringed upon their legal property rights. Therefore, they brought suit, requesting that the people's court order the People's Government of Huashan District, Ma'anshan Municipality, to pay [them] a total of RMB 2,827,680 as compensation for the loss of the house, the decorations, and the rent, as well as to pay [them] a total of RMB 100,000 as compensation for the loss of the items inside the house
[694] N Chan Land Acquisition Compensation in China: Problems and Answers (2003) Vol 6 International Real Estate Review 136-153.
[695] See People's Republic of China Land Administration Law, sec 8 of 1986 as amended in 1998, Articles 45 through 63 of the Property Law which delineate, or more properly restate, principles found in the PRC Constitution, the PRC Land Law and other PRC laws and regulations, the scope of state ownership and collective ownership of land and other property and certain procedures relative to the exercise of such ownership.
[696] The right is formally transcribed into the People's Republic of China Assignment and Transfer of Use Rights of State Owned Land in Urban Areas Temporary Regulations, 1990 (PRCLUR).

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agreement. As regards government agencies, they obtain land from the government at no costs through administrative allocation.[697]

The People's Republic of China Land Administration Law prohibits the granting of rural or collectively owned land for purposes other than agriculture.[698] The state must first requisition the land, convert it into state-owned land and pay compensation to the collective owners in order for such land to be eligible for uses other than agriculture.[699] With regard to state-owned land, 'land use rights would be formed either by way of allocation or compensated grant.[700] It is prudent to state that land use rights obtained through compensated grant are transferable and maybe owned by either an individual or an entity. However, allocated land use rights are not transferable and are most likely limited to military, public educational and health and other government and social uses.[701] The duration of the granted use rights depends on the purpose of the land.[702] To conclude, the characteristics of the Chinese land tenure system entail that private land ownership is prohibited in China. In simple terms, it does not exist in China. Hence, in expropriation cases, the state expropriates land use rights only.

4.4.2 Land Expropriation in China

The Constitution of China safeguards the right to own private property.[703] Article 13 of the Constitution provides that:

> [t]he state protects by law the right of citizens to own private property and the right to inherit private property. … The state protects according to law the right of citizens to inherit private property.

[697] See Regulation 43 of the People's Republic of China Assignment and Transfer of Use Rights of State Owned Land in Urban Areas Temporary Regulations, 1990 (PRCLUR).
[698] See the People's Republic of China Land Administration Law in general for an in-depth overview on this aspect.
[699] As above.
[700] People's Republic of China Land Administration Law, Article 2; Land use rights include the right to possess, use and benefit from the use of the land in question, including the right to erect buildings, structures and ancillary facilities thereon.
[701] The Property Law of the People's Republic of China, adopted at the Fifth Session of the Tenth National People's Congress on March 16, 2007, promulgated by Order No. 62 by the President of the People's Republic of China on March 16, 2007 and effective as of October 1, 2007, Article 137.
[702] Article 12 of the and Use Rights Transfer Regulations provides a maximum term of 70 years for land used for residential purposes; 50 years for land used for industrial purposes; 50 years for land used for educational, scientific, cultural, public health and physical education purposes; 40 years for land used for commercial, tourist and recreational purposes; and 50 years for land used for mixed use or other purposes.
[703] Constitution of the People's Republic of China, Article 13 of 1978 as amended in 1993 provides that-The lawful private property of citizens shall be inviolable. The country shall protect in accordance with law citizens' private property rights and inheritance rights.

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The constitutional provisions appear to provide the foundation for the safeguard of private property. The Chinese property law describes and explains the scope and nature of the types of property proprietorship recognised in China, namely private, state and collective ownership.[704] Regards private ownership, in terms of article 13 of the property law, individuals may own both moveable and immovable property, for example houses, raw materials, production tools etcetera.[705]

In essence, the law protects all lawful property of individual persons.[706] Several statutory provisions emphasise the protection of private ownership, thus enhances certainty with regard to the protection and recognition of private property rights.[707] However, in respect of land, private ownership does not exist. As discussed earlier, all land in China, is owned; either by the state or by rural collectives.[708] Accordingly, land users are restricted to using the land, developing it and owning buildings while the state or collectives remain the sovereign owners. Consequently, the state may expropriate the land use rights only.

It is apparent that countries that permit private land ownership usually enjoy the sovereign right to expropriate private property for public use. As explained earlier, land expropriation is the 'right and action of the government to take property not owned by it for public use.'[709] However, different jurisdictions have different terminologies for expropriation. Eaton opines that the right of the government to take private property is known as '*eminent domain',* and the action is known as 'condemnation'.[710] Boyce contends that the right and action in Canada is known as 'expropriation'.[711] Denyer also argues that the right is known as 'compulsory acquisition or resumption'.[712] China is unique and distinct. In China, land expropriation is termed land resumption, whereby

[704] Property law of the People's Republic of China (note 696 above).
[705] Property law of the People's Republic of China (note 696 above)
[706] The Property Law of the People's Republic of China, Article 64.
[707] See Article 64, 65, 66 and 67 of The Property Law of the People's Republic of China, adopted at the Fifth Session of the Tenth National People's Congress on March 16, 2007, promulgated by Order No. 62 by the President of the People's Republic of China on March 16, 2007 and effective as of October 1, 2007,
[708] Law Library of Congress (note 661 above).
[709] J D *Eaton Real Estate Valuation in Litigation, 2nd edition, Appraisal Institute* (1995).
[710] As above.
[711] B N Boyce *Real Estate Appraisal Terminology, revised edition, Society of Real Estate Appraisers* (1984).
[712] B Denyer-Green *Compulsory Purchase and Compensation, 4th edition, Estates Gazette* (1994).

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the state or authorities take land use rights, buildings or improvements on the land.[713] Strictly speaking, there is a difference between 'land resumption' and 'expropriation'. Chan clearly distinguishes between the two when he says:

> Compulsory 'land acquisition' refers to the case in which the government does not have ownership of the land. For example, the land occupant has the freehold interest in the land, and the government needs to acquire ownership of the land through a compulsory acquisition process. This kind of 'land acquisition' is also known as a 'compulsory purchase. Compulsory 'land resumption' refers to the case in which the government, not the land occupants, has the ownership of the land.[714]

Expropriation in China is termed 'zhengdi'.[715] As pointed out above, land users do not own any land; for that reason, all land expropriations in China are 'compulsory land resumptions', whereby only land use rights, buildings or improvements on the land are taken by the government.[716] The Constitution of China guarantees the government's sovereign power to land resumption.[717] The Supreme Peoples Court in the case of *SHA Mingbao et al. v. The People's Government of Huashan District, Ma'anshan Municipality*[718] confirmed this position when it held that

> a department in charge of land administration shall order the party subject to expropriation to hand over land within a time limit, and if the party refuses to do so, the department shall apply to a people's court for compulsory enforcement

There are two different forms of expropriation in China, namely expropriation of farmland [719] and urban land.[720]

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[713] Chan (note 688 above); see also *Wong Wan Leung, Wong et al v The Secretary of Transport* Lands Tribunal Application No. LDMR 33 of 1998. In *casu* applicant was leased land in 1905 by the Government. Upon land resumption applicant instituted a compensation claim against the government.

[714] Chan (note 687 above).

[715] Zhengdi was authorized by the Constitution of the People's Republic of China in 1978, and was amended in 1993. Article 10 of the Chinese Constitution states that "[the] state may, in the public interest, requisition land for its use in accordance with the law."

[716] Constitution of the People's Republic of China in 1978 as amended in 1993, Article 10

[717] This form of expropriation is governed by People Republic of China Land Administration Law of 1986 (PRCLAL).

[718] *SHA Mingbao et al. v. The People's Government of Huashan District, Ma'anshan Municipality* Case No 91 (EGC91)

[719] The Urban Buildings Demolition Relocation Administration Regulations of 2001 govern this form of expropriation.

[720] People Republic of China Land Administration Law of 1986, Section 43

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4.4.2.1 Expropriation of Farmland

Section 43 of the People's Republic of China Land Administration Law of 1986, as amended in 1998 allows for the expropriation of farmland for construction purposes.[721] However, approval must be sought first before converting farmland to construction purposes. In addition, converting farmland to other non-agricultural purposes requires prior authorisation in terms of section 45 of the People Republic of China Land Administration Law of 1986. The following categories of land require the approval of the State Council before expropriation:

(i) Basic farmland
(ii) Arable land apart from basic farmland which is in excess of 35 ha
(iii) All other land in excess of 70ha

4.4.2.1. (i) Compensation for expropriation of Farmland

China land laws require the payment of compensation subsequent any expropriation or land resumption. The People Republic of China Land Administration Law of 1986 clearly outlines the principles and standards in farmland expropriations.[722] However, this statutory provision only gives broad principles of compensation. It is the duty of the governments of province, autonomous region and the respective municipality under the Central government to offer specific details for implementation.[723] China by virtue of being a socialist country has a unique system of compensation in farmland expropriations. The People Republic of China Land Administration Law of 1986 provides that the acquiring unit may not be the same with the land use unit, thus compensation must be for the dispossessed land unit. Section 47 of the same law provides for the principle that payment is made according to the original use of the land acquired. So, the principle in general prescribes that compensation should be paid based on the original use of the land.[724]

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[721] See *SHA Mingbao et al. v. The People's Government of Huashan District, Ma'anshan* Municipality Case No 91 (EGC91), where the court dealt with a case in which the People's Government of Anhui Province issued the Wan Zheng De, approving the expropriation of 10.04 hectares of construction land collectively [owned by] peasants [and located] within the area of Huoli Street, Huashan District, Ma'anshan Municipality, to use for urban construction
[722] X Zhang & H Lu Compensation for Compulsory Land Acquisition in China: To Rebuild Expropriated Farmer's long-term livelihoods (2011) Vol 3 IRLE 1-39.
[723] Chan (note 687 above).
[724] The Tribunal in *Chun Investment Company Limited v The Director of Lands* In the Lands Tribunal of the Hong Kong Special Administrative Region Lands Resumption Application NO. 3 OF 2000 case,

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The following constitute the compensation standards:

a) *Compensation for land*

Section 47 of the People Republic of China Land Administration Law of 1986 provides that the compensation payable for arable land must be 6-10 times its average production value in the three years preceding the expropriation. Regards other land, with the exclusion of arable land, the amount of compensation payable or the compensation standards must be determined by people's governments of province, autonomous region, and municipality respectively.[725]

b) *Settlement subsidy disbursements*

In respect of arable land, the dispossessed person's number determines the 'settlement subsidy payment'. The amount of compensation payable is calculated by dividing the land acquired by the arable land per individual in the dispossessed land unit.[726] Concerning individuals who prefer resettlement, the standard of payment used is 4-6 times the average production value of the expropriated land at least three years preceding the taking.[727] Nonetheless, the maximum payment for each hectare of expropriated land cannot exceed fifteen times the average production value in the three years preceding the taking.[728] The people's governments of province, autonomous region, and municipality directly under the Central Government must determine the payment of all other land.[729] In cases were compensation paid for the land or the settlement subsidy payments are inadequate to uphold the standard and quality of life the dispossessed farmers are accustomed to, the responsible authorities may authorise an increase in the settlement subsidy to be paid.[730] However, the amount payable must not be in excess of thirty times the average production value of the expropriated land in the three years preceding the taking.[731]

relied on the potential use of the lots for erecting medium residential houses in order to determine compensation based on the open market value

[725] People Republic of China Land Administration Law of 1986, Section 47

[726] Chan (note 687 above).

[727] Chan (note 687 above).

[728] Chan (note 687 above).

[729] PRCLAL (note 691 above).

[730] Chan (note 687 above).

[731] PRCLAL (note 696 above).

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c) Compensation for crops and improvements

Respective people's governments of province, autonomous region and municipality directly under the Central Government should determine the standards of compensation payable for both improvements and crops on the land.[732] The State Council has the duty to determine the compensation standards for conservancy and hydroelectric power projects.[733] The compensation payable for the expropriated farmland must be 3-4 times the annual average production in the three years preceding the expropriation.[734] However, the standard of compensation in respect of individuals who prefer relocation is calculated based on 2-3 times the average production value of the land expropriated in the previous three years preceding the expropriation.[735]

The discussion of compensation standards applicable in farmland expropriations demonstrates the compensation regimes available pursuant expropriation of agricultural land in China. It is apparent that the compensation laws on farmland expropriations neither make mention of just compensation nor value to the owner principle.[736] Consequently, the principle disrespects the value of the farmland and fails to address the question of just compensation, considering that attention is fixated on the type of resources the land yields (land production) as opposed to the market value of the land.[737] As a result, the compensation payable for farmland expropriated is very small.[738] Furthermore, it is also apparent that farmland expropriations in China are not for land reform or resettlement purposes but rather for construction purposes. However, the analysis remains relevant in illustrating the compensation regimes available in agricultural land expropriations.

4.4.2.2 Urban/Metropolitan land expropriations in China

The Urban Buildings Demolition Relocation Administration Regulations of 2001 (UBDRAR) regulates the expropriation of buildings situated on land covered by a city

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[732] PRCLAL (note 696 above); Medium and Large Scale Water Conservancy and Hydroelectric Power Projects Land Acquisition Compensation and Migrants Resettlement Regulations in 1991, regulation 5 par 1.
[733] Compensation regulations (note 727 above)
[734] Compensation regulations (note 727 above)
[735] Compensation regulations (note 727 above)
[736] Chan (note 687 above).
[737] Zhang (note 715 above).
[738] Zhang (note 715 above)

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plan for development purposes. It is statutorily peremptory that all destructions and removals of structures must conform to the relevant city plan and must be of benefit towards urban revitalisation, improving the ecological setting, and ensuring fortification of cultural remnants.[739] However, it is mandatory that the acquiring authority must first obtain a permit from the relevant administrative department before conducting any demolition and relocation.[740] Regulation 4 of the above-mentioned law defines the unit that obtains the permit authorising the demolition and relocation as the 'demolition and relocation person (DRP)' and the dispossessed persons as 'persons subject to demolition and relocation (PSDRs)'.[741] Therefore, the demolition and relocation person and persons subject to demolition and relocation are of similar status to the acquiring authority and dispossessed persons in international, regional and state compensation laws in general.

4.4.2.2. (i) Compensation for expropriation of Metropolitan/Urban land in China

The Urban Buildings Demolition Relocation Administration Regulations of 2001 (UBDRAR) governs the compensation regime in China for all demolitions and relocations of buildings within the areas covered by the city plan.[742] It requires the acquiring authority (demolition and relocation person) to compensate the dispossessed persons (persons subject to demolition and relocation).[743] The regulations make no provision for compensating for temporary structures exceeding the permitted period and illegal structures.[744] Compensation can either be monetary or through the exchanging of property titles as per the claimant's discretion.[745] However, it is obligatory that the claimant must have the legal capacity to act. Only an owner of former owner can claim compensation following land resumption. The

[739] Urban Buildings Demolition Relocation Administration Regulations of 2001 (UBDRAR), Regulation 3.
[740] UBDRAR (note 732 above) Regulation 6.
[741] UBDRAR (note 732 above) Regulation 4.
[742] UBDRAR (note 732 above) Regulation 2 & 39.
[743] UBDRAR (note 732 above) Regulation 22.
[744] Chan (note 687 above); See also *Nam Chun Investment Company Limited v The Director of Lands in* the Lands Tribunal of the Hong Kong Special Administrative Region Lands Resumption Application NO. 3 OF 2000, where H. H. Judge Chow held that no compensation shall be given in respect of any use of the land which is not in accordance with the terms of the Government lease under which the land is held.
[745] UBDRAR (note 732 above) Regulation 23 par 2.

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Tribunal in *Wong Wan Leung v The Secretary of Transport*[746] defined the terms as follows:

> …'former owner' means, in relation to land resumed by the government, the person who was the owner of the land immediately before the land reverted to the Government. 'owner' means the person registered or entitled to be registered in the Land Registry in respect of any land sought to be resumed, or if such person is absent from Hong Kong, or cannot be found, or is bankrupt or dead, his agent or representative in Hong Kong.

As regards monetary compensation, the amount payable is determined by real estate market value assessment.[747] In making the assessment, the following factors may be taken into account, (i) location, (ii) uses, (iii) gross floor area etcetera.[748] The relevant people's governments of province, autonomous city, and municipality directly under the Central Government must determine the assessment method details.[749]

In respect of the exchange of property title, the 'persons subject to demolition and relocation' gives away his property title in exchange for the replacement property title provided by the 'demolition and relocation person'.[750] There is need for adjustments concerning the variances between the expropriated property and the replacement property. As indicated earlier the prices are determined according to the properties market value assessment in terms of regulation 24. Regulation 25 provides that this method of compensation is not applicable to attached structures or non-public welfare undertakings. The acquiring authority is obliged to replace the properties expropriated according to the applicable town planning requirements and laws or alternatively give a monetary compensation.[751] The compensation regime in urban land expropriations no doubt allows for market value compensation.

a) Additional Compensation methods

The following methods are also available for compensating the dispossessed persons:

(i) Removal costs

[746] *Wong Wan Leung v The Secretary of Transport* Lands Tribunal Application No. LDMR 33 of 1998
[747] UBDRAR (note 732 above) Regulation 22 par 1.
[748] Chan (note 655 above).
[749] UBDRAR (note 732 above) Regulation 24.
[750] UBDRAR (note 732 above) Regulation 25.
[751] UBDRAR (note 732 above) Regulation 26.

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It is a prerequisite that the expropriating authority must settle tenants and persons with unclear titles to property in building structures that conform to the safety standards prescribed by the nation-state in terms of regulations 27, 28 and 29 of the Urban Buildings Demolition Relocation Administration Regulations of 2001. The expropriating authority must pay removal costs to the dispossessed persons and tenants.[752] Regulation 31 requires that in cases were the dispossessed persons and tenants organise for their own places of dwelling in the course of the relocations the demolition and relocation person must pay the persons subject to demolition and relocation a temporary settlement subsidy. However, such payment is not available if the expropriating authority provides the affected people with accommodation during the relocation period. Just like other standards of compensation, the standards for removal costs fall under the discretion of the relevant people's governments of province, autonomous city, and municipality directly controlled by the Central Government. In instances where the buildings expropriated are not for residential purposes, the expropriating authority is required to compensate appropriately, losses for either the stopping of operations or the shutting of business.[753]

b) Land Use Rights Compensation

As demonstrated in the earlier discussions, the People Republic of China Land Administration Law of 1986 established land use rights. It is prudent to indicate that the compensation standards discussed above do not precisely relate to land use rights. The government possesses the sovereign right to resume land use rights subject to payment of compensation based on the following: (i) unexpired term of years (ii) actual development (iii) uses on site.[754] The government may also resume land use rights for either public interest or urban rejuvenation programs.[755] However, the land laws fail to provide particulars about the compensation. It only gives reference to the fact that land use rights holders must be suitably compensated. The law nonetheless does not define the term 'suitable compensation' and there is no guidance on how to assess 'suitable compensation'.

[752] UBDRAR (note 732 above) Regulation 31 par 1.
[753] Chan (note 687 above).
[754] People Republic of China Land Administration Law of 1986, section 42.
[755] G N Cruden *Land Compensation and Valuation Law in Hong Kong, Butterworths Singapore* (1986); People Republic of China Land Administration Law of 1986, section 58.

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4.4.3 Predicaments associated with the Chinese compensation regime in land expropriations

The compensation principles and standards in China are very much inadequate. The following challenges depict the shortcomings associated with the compensation principles:

i) Absence of the just term compensation principle

The court in the case of *Horn v Sunderland Corporation*[756] held that

> a dispossessed person is entitled to compensation and to be put, as far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains the right to receive a monetary payment not less than the loss imposed on him in the public interest, but, on the other [hand], no greater.

The decision of Scot LJ in the above-mentioned case demonstrates the 'just term' compensation principle. This principle is universally applicable and acceptable in most Commonwealth nations as well as in countries like the United States of America. In other countries, the principle is known as 'just compensation'.[757] The principle requires that the compensation payable must be adequate and fiscal. The term however, carries different meanings and interpretations in different countries. For example, Eaton opines that 'the market value of the subject property is generally held as just compensation for the dispossessed landowners'.[758] According to Denyer-Green, just compensation is based on 'the principle of value to owner'.[759] This principle submits that the value to the owner principle relates to market value plus loss suffered by claimant.[760]

China land laws do not define the meaning of 'just term compensation' nor do they make mention of value to the owner principle.[761] Even though the Urban Buildings Demolition Relocation Administration Regulations of 2001 makes provision for market value compensation, it only applies to urban land dispossessions. Rural or farmland in China does not recognise private land ownership; hence, it is impossible

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[756] *Horn v Sunderland Corporation* (1941). The cited case though not a Chineese case is relevant to define the just term compensation principle. The intended purpose is to use the definition as a yardstick in evaluating the compensation system offered in China on rural land expropriations.
[757] Eaton (note 702 above).
[758] Eaton (note 702 above).
[759] Denyer-Green (note 705 above).
[760] Denyer-Green (note 705 above).
[761] Chan (note 687 above).

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to ascertain the value for the land. The system of compensation based on land production denies claimants from claiming the best use value for their land. Consequently, the compensation in farmland expropriations falls short of the compensation awarded in terms of the 'just term compensation' principle.[762] No momentous pecuniary losses that do not fall within the mentioned standards, for example relocation costs or settlement subsidy are payable. The overall effect is that the compensation systems in China do not overtly afford the affected persons the right to claim compensation.[763]

ii) A limited scope of Consequential loss reimbursements

The Chinese expropriation laws provide a narrow scope of consequential loss payments. Section 47 of the People Republic of China Land Administration Law of 1986 as well as regulation 31 of the Urban Buildings Demolition Relocation Administration Regulations of 2001 only makes provision for settlement subsidy payments and relocation costs. The laws do not provide for other significant consequential losses like cost of securing alternative accommodation, additional costs associated with living in a new area etcetera.

In respect of non-residential occupants, the Chinese land laws merely provides for suitable compensation towards losses suffered because of ceased production or business closure.[764] However, the laws are silent on the meaning of 'suitable compensation'. Consequently, it is uncertain how 'suitable compensation' must be determined. Furthermore, it remains a conundrum whether or not compensation must be a reasonable amount.[765] As briefly highlighted above, the laws are shy of any specific provision that provides for economic loss compensation arising from ceased productions or shutting of businesses.[766] As a result, several costs associated with the removals, for example, all costs incurred by such businesses in notifying clients of the intended removals and the prospective place of business or the businesses losing their goodwill go uncompensated.

[762] Chan (note 687 above).
[763] Chan (note 687 above).
[764] Urban Buildings Demolition Relocation Administration Regulations of 2001, regulation 33.
[765] Chan (note 687 above).
[766] Chan (note 687 above).

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iii) No right to claim compensation

A careful analysis of Chinese land laws clearly reveals that the right to claim compensation is not available in China. The law, in particular the Urban Buildings Demolition Relocation Administration Regulations of 2001 obliges the expropriating authority to compensate the affected people and to agree with the affected people on such. However, the law has shortcomings because, the affected people may not agree to the amount of compensation offered, but there is no provision that gives them the right to claim compensation.[767] As a result, they have to take whatever is on offer, considering that they do not have the legal right to initiate and claim compensation.[768] In my view the situation is even dire for people who do not form part of the agreement though affected by the expropriation. Such a people do not have a right whatsoever to claim compensation, regardless of the effects suffered.

In addition, the law is silent regards partial takings or expropriations (generally known as deprivations in other countries). The lack of such provision, affects persons who possess a valid title in property.[769] The law appears silent on the form of compensation payable in partial land expropriations. Juxtaposing this aspect with the fact that Chinese land laws do not provide for any right to claim compensation, it remains a conundrum if occupiers of the affected land are eligible to receive compensation in this regard.

iv) Market Value Calculation

The Chinese laws allow for market value compensation in particular in urban land expropriations.[770] Nonetheless, the laws fail to define 'market value'. The land provisions bestow upon the relevant people's government the power to determine the approaches of calculating market value. The provision no doubt provides the authorities with unrestrained powers and this frequently leads to serious injustice. The following incident may give an example of how this system is flawed. In 2001, a group of dispossessed families remonstrated in Nanjing City against the compensation

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[767] Land Acquisition System Reform Is Mandatory: Ministry of Land and Resources P.R.C (TMLR), (2001), http://www.mlr.gov.cn/information/info/querying/gettingInfoRecod.asp (accessed 4 January 2019.
[768] Chan (note 687 above).
[769] Chan (note 687 above).
[770] UBDRAR (note 732 above).

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offered by the expropriating authority.[771] They contended that the expropriating authority had ignored that the buildings are located in the central business district thus the compensation offered was too little.[772] The absence of a legal definition may also on the other hand work against the expropriating authority in that it may end up paying more than is necessary to compensate the dispossessed persons.[773]

v) Inconsistent land laws

China land laws, in particular, the Urban Buildings Demolition Relocation Administration Regulations of 2001 and the People Republic of China Land Administration Law of 1986 only provide for general compensation principles. The fine compensation details fall under the discretion of the respective people's governments of province, autonomous region, and municipality directly under the Central Government.[774] In my view, this has resulted in a wide disparity of standards considering that each authority formulates its standards based on its own objectives and concerns. The compensation standards are not consistent with each other. For example, dispossessions under the People Republic of China Land Administration Law of 1986 attract more compensation than dispossessions of farmland under the Medium and Large Scale Water Conservancy and Hydroelectric Power Projects Land Acquisition Compensation and Migrants Resettlement Regulation of 1991.

In conclusion, China allows for private property ownership.[775] However, there exist different provisions between property rights in general and land rights. Private land ownership does not exist in China. The farmers own all rural farmland collectively and urban land falls under state ownership.[776] The land occupiers only enjoy land use rights and also own and control the developments, buildings and improvements on the land.[777] Like most nations, the Chinese government has the sovereign right to

[771] 'Thousand of Dispossessed Households in Nanjing Protest with Roadblock' The Sun News Publisher Ltd 24 April 2001 http://www.thesun.com.hk/channels/news/20010423/20010423020157_0001.html (accessed 4 January 2018).
[772] As above.
[773] The compensation payable is determined by the standards of the authorities which may pause a risk of them adopting standards that may costs them more than the just compensation ought to have been paid had a proper definition and procedures been put in place.
[774] Land Acquisition Compensation in China 147.
[775] Constitution (note 696 above).
[776] Constitution (note 696 above).
[777] Freedom House (note 689 above).

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expropriate land subject to payment of compensation. However, compensation payable is not for the land but for the improvements and buildings on the land only. This form of expropriation in China is known as 'land resumption', considering that the land belongs to the state and not dispossessed persons.[778] Similarly, in Zimbabwe, the Constitution separated property rights in general and land rights. In Zimbabwe, the government has the right at law to expropriate agricultural land for resettlement purposes subject to payment of compensation for the improvements on the land and not for the land itself.[779]

This analysis is vital in that South Africa is currently contemplating amending its Constitution to enable expropriation of land without compensation. Hence, the analysis of both China and Zimbabwe demonstrate the pros and cons of such a position, thereby giving insight to South Africa on which route to adopt if the legislatures are to pursue the proposed compensation methodology. In the next chapter, I will examine how South Africa is currently dealing with the issue of expropriation and compensation. The aim is to ascertain whether it is legal and necessary to amend the Constitution to allow for expropriation of land without compensation.

[778] Chan (note 688 above)
[779] Coldham (note 650 above).

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CHAPTER FIVE

'The colonial and post independent history of SADC States shows that unequal access to agricultural land has resulted in a situation where a handful of families own and farm vast acreages of the most agriculturally productive land, while the vast majority farm very small plots in the least agriculturally favourable zones. There is evidence of both unused and underused land under the ownership of commercial farmers and land scarcity and growing landlessness among the peasant who often live on the outskirts of white commercial farmland' [780]

AN EXAMININATION OF THE CURRENT NATIONAL LEGAL FRAMEWORK GOVERNING THE LAND ISSUE IN SOUTH AFRICA

5.1 Introduction

Land is very important and its primary qualities are unquestionable. Humankind, has not yet been able to master the divine art of creating land thus, it remains out of production. This unique attribute of land distinguishes it from all other perishable forms of property. Lord Browne acknowledged this fact in the case *of Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1994]* where he stated that, '… in the case of real property there is a defined and limited supply of the commodity'.[781] Gray and Gray state that 'life begins and ends with land because land is the essential base of all social and commercial interaction.'[782] In Southern Africa like in most parts of Africa, land is very important as the majority of the population directly rely on land for their livelihood. Therefore, the importance of land in the affairs of men is incalculable. Regardless its importance as demonstrated, Adu-Asare has this to say concerning land in Africa:

> Landlessness, land scarcity, and overpopulation directly affect the majority of the rural African population who remain poor while the European rural population is the major contributor to commercial agricultural production and is rich in comparison.[783]

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[780] Access to land in affected Southern African Development Community States………………
[781] *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 107D.y (SADC).
[782] K Gray & S F G Gray *Elements of Land Law, Butterworths, London/Edinburgh/Dublin*, (2001)1.
[783] R Y Adu-Asare Pre-Independence Economic, Political Realities of Zimbabwe's Race-based Land Tenure Debacle (2000), http://www.africanewscast.com/Regional%20News/Zimbabwe%20PreColonial%20land%20problem.htm (accessed 12 January 2018).

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South Africa is no exception to the land question. The land issue in South Africa has been a hotly debated issue since the advent of democracy. The land question in South Africa arises from the devastating reality of racialised socio-economic inequalities.[784] The general call by the majority is advocating for the redistribution of land acquired through colonial and apartheid land dispossessions. The land issue has been and continues to be tense. Some of the people in South Africa are suggesting an adoption of the Zimbabwean rush-and-grab method in order to expedite land reform. For example the Land Movement of South Africa (LAMOSA) in 2002 suggested that the land reform policies popularly known as the 'rush-and-grab' adopted by Zimbabwe was a perfect way to expedite land reform in South Africa.[785]

The African National Congress (ANC) at its 54th congress in December 2017 tabled the land issue as one of the leading topics for discussion. The ANC-led government adopted a radical paradigm shift in order to speed up land redistribution without compensation.[786] The ANC made their position regarding the land issue clear when they pledged in the statement of 8 January 2018 in favour of 'expropriation of land without compensation'.[787] The Parliament subsequently adopted a motion to assign the Constitutional Review Committee to look into the possibility of amending the Constitution to permit expropriating land without compensation.[788] The brief discussion clearly demonstrates that the land issue in South Africa remains a hotly debated issue, which if not dealt with properly, portends danger. Therefore, this

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[784] Despite the frantic efforts to eradicate racial inequalities,South Africa remains one of the most unequal countries in the world See for example: https://www.theguardian.com/inequality/datablog/2017/apr/26/inequality-index-where-are-the-worldsmostunequal-countries; and https://mg.co.za/article/2015-09-30-is-south-africa-the-most-unequal-society-in-theworld

[785] The SA government and WSSD need a wake-up call about land, available at http://www.nlc.co.za/wssd/press0220maylamosawakeup.htm. ; In Zimbabwe war veterans and other opportunist groups used violence to grab and dispossess white commercial farmers of their land and infrastructure. No compensation was payable and the majority of the commercial farmers lost their personal private property.

[786] L Omarjee 'ANC reaches resolution on land reform': (20 December 2017) (available at) https://www.fin24.com/Economy/anc-reaches-resolution-on-land-reform-20171220 (accessed 11 January 2018); ; See also Ma Merten (21 December 2017) '#ANCdecides2017: Land expropriation without compensation makes grand entrance':((available at) https://www.dailymaverick.co.za/article/2017-12-21-ancdecides2017-land-expropriation-without-compensationmakes-grand-entrance/#.WubX7C-B2i4 (accessed 11 Janauary 2018).

[787] http://www.politicsweb.co.za/documents/the-ancs-january-8th-statement-2018--cyril-ramapho (accessed 15 February 2018).

[788] See https://www.parliament.gov.za/press-releases/national-assembly-gives-constitution-review-committeemandate-review-section-25-constitution (accessed 11 January 2019).

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chapter will examine the current national legal framework governing the land issue in South Africa. The aim is to assess the adequacy of such laws and if there is need to amend the existing laws.

5.2 South Africa's Land History

In chapter 2, i dealt with the land history in South Africa. The land history lays down the basis of the current criticism of section 25 of the Constitution. The colonial and apartheid governments managed to secure the exclusive usage of most of the valued and fertile land for whites in the twentieth century.[789] This was possible through the passing of segregatory laws like the 1913 Natives Land Act, a law that stripped Black Africans of their land, restricted areas where Blacks could live and effectively limited ownership of land by Blacks. Blacks were condemned to 'homelands' and 'native reserves'. A series of laws of this nature came into force and all aimed at creating a white South Africa.[790] The European government even went to the extent of eliminating all land owned by blacks that was surrounded by land owned by Europeans.[791] De Villiers argues that approximately 470 000 Blacks were moved as a measure to clean and eradicate 'black spots'.[792] The Black people moved, where placed into 'homelands' or 'native reserves'.[793]

According to the Surplus People Project (1983) approximately 1.29 million Black people from the year 1960 to 1983 had been evicted from farms and at least 614 000 had been victims of the abolishing of black spots.[794] Vicencio corroborates this reasoning when he claimed that at least 3, 5 million Blacks between the year 1963

[789] S Turner & H Ibsen, Land and Agrarian Reform in South Africa: A Status Report (Cape Town: Programme for Land and Agrarian Studies, School of Government, University of the Western Cape, and Centre for International Environment and Development Studies, Agricultural University of Norway, 2000); see also R Hall & L Ntsebeza, 'Introduction'; 'Transforming Rural South Africa? Taking Stock of Land Reform', in Ntsebeza, L & Hall, R (eds), The Land Question in South Africa, p. 87–106; C Walker, The Limits of Land Reform: Rethinking ''the Land Question (2005) 31 Journal of Southern African Studies 805–24

[790] Development Trust and Land Act, 18 of 1936, The Act expanded the reserves to 13.6 per cent of the land in South Africa (for 80 per cent of the total South African population).

[791] S Hofsta¨ tter 'Whites Stake Land Claim', This Day (5 August 2004)1

[792] B de Villiers, Land Reform: Issues and Challenges: A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia (Johannesburg: Konrad Adenauer Foundation, (2003) 46.

[793] As above.

[794] Surplus People Project, Forced Removals in South Africa (Cape Town: Surplus People Project, 1983).

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and 1985, were evicted from designated white land.[795] When apartheid ended, Blacks owned little of South Africa. The African National Congress government has ever since it assumed power, been trying to deal with the injustices of the past and the unequal distribution of land. However, the government has been hugely critiscised, the major criticism being that the land reform program is sporadic. This has paved way for the call to amend the Constitution in order to allow for expropriation without compensation to speed up land reform.

5.3 Land and Politics in South Africa

Politics is a highly influential factor regarding the land question. During the colonial and apartheid epoch, the governments influenced the passing of laws that had a huge influence on land.[796] With the coming of democracy, politics still has influence on the land issue.[797] South Africans recognise the land question as a very significant issue.[798] However, considering that South Africa is a multi-racial country, Gibson contends that Black South Africans are more concerned about the historical past and the land issue is no exception.[799] In my view, the general concern is the question regarding the legitimacy of the whites huge land holdings in South Africa. Political parties are aware of these grievances and wounds within the African Community at large; hence, some have preyed on these in order to achieve political mileage.

Zimbabwe is an example of how politicians can rely on the land issue to gain advantage over their rivals. It is trite that land issues in Zimbabwe vary to those in South Africa. However, it is my view that for some South Africans, Zimbabwe is a perfect example of how politicians can influence and mobilise the public in quest of

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[795] C Villa-Vicencio and S Ngesi, 'South Africa: Beyond the "Miracle"', in Doxtader, E & Villa-Vicencio, (eds), Through Fire with Water: The Roots of Division and the Potential for Reconciliation in Africa (Claremont, South Africa: David Philip, 2003), p 266–302, p. 283.
[796] See the Pretoria Convention 1881, Article 13; Natives Land Act No. 27 of 1913.; Native Administration Act, 38 of 1927; The Development Trust and Land Act, 1936
[797] The African National Congress influenced the passing of a series of laws in favour of land reform, see (note 201 above),
[798] P du Toit Tzxhe Rule of Law, Public Opinion and the Politics of Land Restitution in South Africa, (paper delivered at the conference on Land, Memory, Reconstruction and Justice: Perspectives on Land Restitution in South Africa, Houw Hoek, South Africa, 2006)
[799] J L *Gibson Land Redistribution/Restitution in South Africa: A Model of Multiple Values, as the Past Meets the Present* (2006).

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solving the land question. Cousin elabourates on this aspect when he stated the following:

> Events in Zimbabwe have catapulted land reform into the headlines. Across the region, a variety of interest groups (including political parties, NGOs, farmers' unions, trade unions and donors of foreign aid) have responded to the implicit question: does the slow pace of land reform in their own country presage large-scale land invasions supported by powerful political interests?[800]

South Africa is no excpetion to political influence. Both the Pan Africanist Congress and, South African Communist Party have tried to rally Black South Africans on the land issue.[801] The public no doubt is potentially a form of political capital to pursue political advantage.[802]

The study will not dwell much on the political aspect of the land issue. The purpose of this study is to examine the legality of expropriating land without compensation regardless of whether this proposal is politically motivated or not. Hence, this chapter will focus mainly on expropriation laws in South Africa in order to determine if such laws are adequate in dealing with the land question and if it is legal and necessary to amend the current laws to allow for expropriation of land without compensation.

5.4 Expropriation laws in South Africa

Several laws on expropriation exist in South Africa. However, this study will focus on the Expropriation Act[803], Interim Constitution, the land Reform Act, Restitution of Land Rights Act [804] and lastly section 25 of the Constitution.

[800] B Cousins Two Economies Agrarian reform and the 'two economies': transforming South Africa's countryside (2015).
[801] L Ntsebeza, Land Redistribution in South Africa: The Property Clause Revisited, in Ntsebeza, L and Hall, R (eds), The Land Question in South Africa, pp. 107–31, p. 128).
[802] The African National Congress (ANC) is increasingly facing challenges to its leadership of the country; it seems quite likely that radical land reform might become a vehicle to amas votes in the forthcoming 2019 elections. The ANC supported the call by EFF to expropriate land without compensation, a topic that is highly emotional and at the heart of the majority Black South Africans. This stance is identical to the 2008 period where South Africa was facing an uncertain political future. Jacob Zuma had been selected as the leader of the ANC, and was expected to become president of the country in 2009. However, Zuma had been accused of corruption in the notorious arms deal scandal that had dogged him for years. It was apparent that Zuma being a consummate populist would effectively exploit land politics in order to seek political advantage against the elite opposition.
[803] Expropriation Act, 63 of 1975
[804] Restitution of Land Rights Act, 22 of 1994

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5.4.1 Expropriation Act 63 of 1975

The Expropriation Act of 1975 came into effect with the aim to provide the expropriation procedures and compensation.[805] This Act entirely repealed the 1965 Expropriation Act. Therefore, the Act unified all expropriations. According to section 26 (1) of the Expropriation Act, if the expropriation has been authorised by another Act that is not the Expropriation Act [806], 'compensation owing in respect thereof shall *mutatis mutandis* be calculated, determined and paid in accordance with the provisions of this Act'. The overall effect of this Act is that all expropriations fall within the ambit of this Act thus it prescribes the expropriation procedures and calculation of compensation even for expropriations authorised by another Act. In determining the compensation payable, the Act incorporated the 'willing buyer, willing seller principle' together with the market value concept.

The Act obliges the expropriating authority to comply with section 2 (1) of the Expropriation Act [807] in order for the expropriation to be valid. The section authorises the Minister of Public Works to expropriate property or temporarily use the property for a public purpose subject to payment of compensation. Therefore, for expropritation to be valid in terms of the Expropriation Act the following must be evident, public purpose, authority to expropriate, it must be procedurally fair and there should be payment of compensation. The Act does not limit expropritation to moveable and immoveable property only but even extends it to incorporeal and personal rights.[808] As clearly elabourated in Chapter 1 of this study expropriation relates to 'acquisition of property by the expropriater'[809] and a 'loss of such property by the expropriatee'.[810] The interesting aspect of expropriation is that it does not require the consent of the seller; it may take place even in the absence of any agreement.[811] In other words

[805] A Gildenhuys *Onteieningsreg* (2001) 44.
[806] Expropriation Act 63 of 1975
[807] Expropriation Act 63 of 1975, sec 2(1)
[808] Gildenhuys (note 800 above) 62.
[809] *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) 515 A
[810] As above.
[811] See *Mathiba & Others v Moschke* 1920 AD 354-463, where Innes CJ held that 'in my opinion the meaning of the Besluit is clearly that the Government was empowered to take private land required for a location and to give by way of compensation, not what the owner is willing to take but equal land or a fair price, whether the latter concurred in the offer or not and whether he was willing or not to dispose of his land on such compensation'

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expropriation terminates all rights in property and confers an obligation on the acquiring authority to compensate for the property expropriated. I now proceed to give a brief discussion of the requirements of a valid expropriation in terms of the Expropriation Act.

5.4.1.1 Authority to expropriate property

The state's power to expropriate property derives from statute in South Africa.[812] Therefore, in order to determine whether the state is authorised to expropriate property, reference must be made to legislation rather than common law. The fundamental basis of the Expropriation Act as a statute is to provide for the expropriation of land and property in general to the benefit of the public. The Act outlines the expropriation process. Section 2 of the Expropriation Act empowers the state to expropriate property. It reads:

> (1) Subject to the provisions of this Act the Minister may, subject to an obligation to pay compensation, expropriate any property for public purposes or take the right to use temporarily any property for public purposes.
> (2) The power of the Minister in terms of subsection (1) or any other law to expropriate any property, shall include the power to expropriate, when any property is so expropriated, so much of any other property which, in the opinion of the Minister, is affected by such expropriation as the Minister may for any reason deem expedient. (3) The power of the Minister in terms of subsection (2) to expropriate property which, in the opinion of the Minister, is affected by an expropriation, shall, in the case where only a portion of a piece of land is expropriated in terms of this section, include the power to expropriate the remainder of such a piece of land if the owner so requests and satisfies the Minister that due to the said partial expropriation the said remainder has become useless to the owner, or if the Minister, after consultation with the Minister of Agriculture, is satisfied that the said remainder is or is likely to become an uneconomic farming unit.
> (4) If the Minister negotiates with an owner of property for the acquisition thereof by means of agreement and the owner requests the Minister that the property be expropriated, the Minister may, subject to the other provisions of this Act, expropriate such property.

The Act as illustrated above gives the state power to expropriate property. However, the power is not absolute. The provision clearly demonstrates that the state does not intend to encroach on existing rights without payment of compensation. Section 24 of the Expropriation Act makes it possible for the said Minister to delegate the power to expropriate to other government officials.[813] The provision safeguards private property rights but at the same time authorises the state to encroach on same rights subject to

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[812] Joyce & McGregor v Cape Provincial Administration 1946 AD 658 671, where the court ruled that the state derives its authority from statute and not Roman Dutch law.
[813] Expropriation Act 63 of 1975, sec 24.

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payment of compensation. Therefore, the Expropriation Act safeguards the states power of *eminent domain*

5.4.1.2 Public Purpose

Expropriation of property by the Minister in terms of the Act must be for a public purpose.[814] The general effect of the public purpose requirement entails that the expropriation must profit the community as a whole as opposed to an individual.[815] The public purpose requirement is twofold. It is either in the narrow sense or in the broad sense. The broad sense requires that the expropriation should benefit the whole community as opposed to a private purpose benefiting an individual person. In simple, the broad sense is inclusive of everything that affects the country at large.[816] Public purpose in the narrow sense is limited to government purposes.[817]

The court in the *Fourie v Minister van Lande en 'n Ander* [818] held that 'public purpose should be interpreted in the wider sense, that includes government purposes, but that is not restricted to it'. The court in *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development*[819] confirmed this view when it held that 'the wide meaning of public purpose is applicable in South Africa'. The term public purpose differs to public interest. The distinction is explained in the case of *Administrator, Transvaal and Another v J van Streepen (Kempton Park) (Pty).*[820] The court held that 'the expropriation for the benefit of a third party cannot be for a public purpose, but it maybe possible in certain circumstances that it is in the public interest'. In essence, the overall effect is that the Expropriation Act[821] requires that for the expropriation to be valid, it must have been for a public purpose.

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[814] Expropriation Act 63 of 1975, sec 2(1).
[815] J Murphy Interpreting the Property Clause in the Constitution Act of 1993 (1995) 10 *SAPR/PL* 107 25.
[816] *Slabbert v Minister van Lande en 'n Ander* 1963 (3) SA 620 (T).
[817] As above.
[818] Fourie v Minister van Lande en 'n Ander 1970 (4) SA 165 (O) 170.
[819] *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development* 1984 (3) SA 785 (N).
[820] *Administrator, Transvaal and Another v J van Streepen (Kempton Park) (Pty) Ltd.* (640/88) [1990] ZASCA 78; 1990 (4) SA 644 (AD); [1990] 2 All SA 526 (A
[821] Expropriation Act 63 of 1975.

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5.4.1.3 Fair Procedure

The judicial and administrative methods are the renowned methods of expropriation. The administrative method regards expropriation as an 'administrative act based on statute.[822] The judicial method on the other hand calls for the court to order the expropriation.[823] South Africa subscribes to the administrative method were expropriation is viewed as an administrative act based on statute. Title to property only passes upon serving of notice taking into consideration that expropriation is an administrative act. The court in *Durban City Council v Jailani Café,* held that for expropriation to be administratively valid the following is peremptory, (i) the expropriation must be consistent with the purpose outlined in the legislation (ii) the authority is obliged to abide by the procedure stated in the legislation and lastly (iii) the expropriation must be in good faith (bona fide).[824] In essence, the authority must strictly comply with all the statutory requirements.[825] The general effect in cases of non-compliance with the stated procedure is that the expropriation maybe regarded invalid.[826]

Consequently, rules of natural justice are applicable in expropriation cases were individual rights are adversely affected.[827] The *audi alteram partem* principle is also applicable in expropriations though its utility is minimal.[828] Therefore, the authority is obliged to furnish the expropriatee with all the relevant information to enable such to make an informed decision.[829] The Promotion of Justice and Administration Act[830] makes it necessary that the affected person is given an opportunity to object to the expropriation if (s) he wants to. The authority must give notice to expropriate and such

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[822] *Durban City Council v Jailani Café* (1978) (1) SA 151 (D) 154.
[823] With this form of expropriation, the Court determines compensation. This approach is applicable to the Water Act 53 of 1956 expropriations.
[824] Durban City Council v Jailani Café (1978) (1) SA 151 (D) 154
[825] *Opera House (Grand Parade) Restaurant (Pty) Ltd ve Cape Town Municipality* 1989 (2) SA 670 (K).
[826] Gildenhuys (note 800 above) 80.
[827] In *Pretoria City Council v Modimola* 1966 (3) SA 250 (A), the court held that 'expropriation is a state decision, and therefore not subject to *audi alteram partem* rule'.
[828]Gildenhuys (note 800 above) 80.
[829] *Pahad v Director of Food Supplies & Distribution* 1949 (3) SA 695 (A) 709.
[830] Promotion of Justice and Administration Act, 3 of 2000, however the Act is only applicable to state expropriations only.

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notice must contain all the necessary information that is sufficient to enable the affected party to object if necessary.[831]

The notice must give a clear description of the property concerned.[832] In addition, the notice must also indicate the date of expropriation.[833] Morever, the notice may also indicate the amount of compensation and the Act which authorises the expropriation.[834] In essence, the notice must be clear and unambiguous.[835] The notice must be served on the proprietor or registered landholder.[836] To conclude, the expropriation must be consistent with the authorising Act.

5.4.1.4 Compensation

Expropriations require the payment of compensation.[837] However, the compensation payable must not necessarily be full compensation.[838] The Minister is obliged in terms of section 2 (1) of the Act[839] to pay compensation for property expropriated. Section 12 of the said Act regulates the amount of compensation payable. Compensation must be determined in terms of the Expropriation Act even when authorised by another Act.[840] The Expropriation Act[841] is still applicable in South Africa to date as long as it is *intra vires* the Constitution. It is trite to note that payment of compensation is not a requirement for transferring ownership considering that it is possible to pay compensation after *dominium* has vested in the Expropriator. In other words ownership can be transferred before compensation has been paid.[842]

Judges during the pre-constitutional period reasoned differently on issues regarding compensation. Some judgments state that the affected party is not entitled to compensation. On the contrary, some judgments indicate that the expropriatee has a

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[831] Promotion of Justice and Administration Act, 3 of 2000, however the Act is only applicable to state expropriations only.
[832] Expropriation Act 63 of 1975, sec 7(2)(a)
[833] Expropriation Act 63 of 1975, sec 8 (1).
[834] See *Minister of Defence v Commercial Properties Ltd and Others* 1955 (3) SA 324 (D), where the court held that the expropriatee is entitled to know which Act the expropriator relies.
[835] See *Provinsiale Adminisitrasie, kaap die Goeie Hoop v Swart* 1988 (1) SA 375 (C) 379 where the court held that a vague and ineptly worded notice is invalid since it creates legal uncertainity.
[836] Expropriation Act 63 of 1975, sec 7(2), (3) and (4).
[837] *Jooste v The Government of the South African Republic* 1897 (4) OR 147.
[838] *Joyce v McGregor Ltd v Cape Provincial Administration* 1946 AD 658 671.
[839] Expropriation Act 63 of 1975, sec 2(1).
[840] Expropriation Act 63 of 1975, sec 26 (1).
[841] Expropriation Act 63 of 1975.
[842] *Government of the Repubic of South Africa v Motsuenyane and Another* (1963) 2 SA 484 (T) 488

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right to compensation.[843] The court in *Simmer & Jack Pty Mines Ltd v Union Government (Minister of Railways & Harbous), Union Government (Minister of Railways & Harbous) Simmer & Jack Proprietary Ltd* stated that 'the state may expropriate property without compensation if such intention is clearly expressed in legislation'.[844] The courts in instances were legislation is silent on compensation; could create the duty.[845] In *Belinco (Pty) Ltd, v Bellville Municipality and Another,* the court held that 'an Act that does not provide for compensation is also not giving the authority to expropriate'.[846] Hence, payment of compensation was obligatory under the Expropriation Act of 1975 even prior the coming into effect of the Final Constitution.

The payment of compensation establishes that it is not the intention of the lawmaker to take away rights without compensation.[847] Therefore, the presumption is that for rights to be taken, compensation must be payable. The crux of the reasoning is that an individual cannot sacrifice his/her rights in property without compensation in favour of public interest. As a result, whenever an individual involuntarily contributes unequally to something that benefits the public, compensation is due.[848] It is important to note that compensation is only due when property is expropriated and this excludes ordinary deprivations.[849] Compensation is not alyways in monetary form, it is possible to compensate with an alternative portion of land.[850]

According to section 12 (1) of the Expropriation Act, [851] the phrase 'shall not exceed' implies that the court must stay close to an estimation based on market value plus 10% solatium in terms of section 12 (2) of the said Act except when it has congent reasons to depart from it.[852] According to the Expropriation Act 63 of 1975, compensation is paid for value of the property taken, which value is in most cases equated to market value. Nevertheless, the court in the *Geekie v Union Government and Another case* held that it is possible for compensation to be in excess of market

[843] *Cape Town Municipality v Abdulla* (1976) 2 SA 370 (C) 375.
[844] *Simmer & Jack Pty Mines Ltd v Union Government (Minister of Railways & Harbous), Union Government (Minister of Railways & Harbous) Simmer & Jack Proprietary Ltd* (1915) AD 368 398.
[845] *Tongaat Group Ltd v Minister of Agriculture* (1977) 2 SA 961 (A) 975.
[846] *Belinco (Pty) Ltd v Bellville Municipality and Another* 1970 4 SA 589 (A) 587.
[847] *Sandton Town Council v Erf 89 Sandown Extension (Pty) Ltd* 1986 (4) SA 576 (W) (579).
[848] The general view globally is that every member of the public is expected to contribute to society's burdens according to their abilities; See Gildenhuys (note 780 above) 3.
[849] An example of deprivation includes forefeiture and confistication by the state.
[850] *Government of the Republic of South Africa v Motsuenyane and Another* 1963 (2) SA 484 (T) 487.
[851] Expropriation Act 63 of 1975, sec 12 (1).
[852] *Jacobs v Minister of Agriculture* 1972 (4) SA (W) 648.

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value.[853] Interestingly the court in the case of *Kerksay Investments (Pty) Ltd v Randburg Town Council*[854] stated that compensation under the Act could be less than market value.[855] This is because the factors listed in the Act, are just but guidelines to determine 'just and equitable' compensation. This implies lack of consistency and uniformity in the interpretation of the phrase 'shall not exceed.'

In conclusion, the Act provides that compensation is payable for the value of property. The value is equated to market value. The 'willing buyer, willing seller principle', in general determines market value. The principle looks at what a willing buyer would pay a willing seller.[856] Therefore, the Act ties expropriation to market value compensation.

5.4.2 Interim Constitution

Intergrating a property clause in the Interim Constitution was a contentious issue. Some advocated for the incorporation of the property clause in the Bill of Rights while the other group was in favour of discarding such a clause.[857] Those in support of incorporating the property clause in the Constitution centred their basis on, among others, the need to guarantee against the recurrence of anything reminiscent of apartheid from happening again and the need to safeguard existing property rights. On the contrary, incorporation of the property clause in the Interim Constitution was perceived inimical to land reform. It was contended that inception of the property clause would protect existing property rights to the detriment of land reform.[858] Therefore, the inclusion of section 28 into the Interim Constitution was a compromise. Ntsebeza argues that 'it is widely accepted that section 28 represented a compromise between the ANC and NP positions.'[859]

Section 28 was short and precise. It however, did not precisely provide for land reform. Rather, it provided for the expropriation of property or rights in property for a public

[853] *Geekie v Union Government and Another* 1948 (2) SA 494 (N).
[854] *Kerksay Investments (Pty) Ltd v Randburg Town Council* [1997] AZSCA 68; 1998 (1) SA 98 (SCA).
[855] Expropriation Act 63 of 1975.
[856] A Gildenhuys *Maakwaarde as Vergoedingsmaatstaf by Onteiening* 1977 *TSAR* 1 3.
[857] M Chaskalson Stumbling towards section 28: Negotiations over the protection of property rights in the interim Constitution (1995) *SAJHR* 222-240.
[858] L Ntsebeza Land redistribution in South Africa: the property clause revisited in Ntsebeza L and Hall R (eds.) The Land Question in South Africa - The challenge of transformation and redistribution (2007) Cape Town: HSRC Press 107-131.
[859] As above.

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purpose, subject to payment of a 'just and equitable compensation.'[860] Section 28 was considered too limited for land reform purposes due to the fact that it only provided for expropriation of property for public purposes.[861] However, the general position is that the Interim Constitution authorised the state to expropriate property, land included for a public purpose. The power to expropriate property was subjected to payment of compensation that is just and equitable. The compensation regime under the Interim Constitution identifies with the one that was adopted in the Final Constitution. Section 121, 122 and 123 of the same Constitution, although not forming part of the Bill of Rights made provision for statute to be drafted to regulate the restitution process.[862] The Restitution of Land Rights Act 22 of 1994 was subsequently enacted to make provision for the land restitution programme as well as the establishing of the Land Claims Court.

5.4.3 Restitution of Land Rights Act 22 of 1994

Section 35 (3) of the Act provides for the power of the state to expropriate land. However, the Act does not oust the power of the state to expropriate property in terms of the Expropriation Act[863] and section 25 of the Constitution.[864] The Act extends the branch of land reform in South Africa. It is therefore, vital to examine how compensation is determined in terms of the Restitution of Land Rights Act of 1994. Gildenhuys J in *Ex parter Former Highland Residents; In re: Ash and Others v Department of Land Affairs*[865] outlined how compensation is determined in terms of the Restitution of Land Rights Act.[866] In *casu*, the court determined compensation based on market value at the time of expropriation.[867] According to the court, this constituted a 'just and equitable' compensation. However, the court made no

[860] P J Badenhorst, J M Pienaar & H Mostert Law of Propertyy 2006:590-591; D LCarey-Miller & A Pope *Land Title* (2000)282-286; M Chaskelson The property clause: section 28 of the Constitution (1994) *SAJHR* 131-141; Interim Constitution, sec 28 (3).
[861] Ntsebeza (note 851 above).
[862] CG Van der Merwe and JM Pienaar Land reform in South Africa in Jackson P and Wilde DC (eds.), Reform of property law 1997:347.
[863] Expropriation Act 63 of 1975
[864] Constitution of the Republic of South Africa Act, 108 of 1996.
[865] *Ex parter Former Highland Residents; In re: Ash and Others v Department of Land Affairs* (2000) 2 All SA 26 (LCC) par 36.
[866] Restitution of Land Rights Act, 22 of 1994
[867] *Ex parter Former Highland Residents; In re: Ash and Others v Department of Land Affairs* (2000) 2 All SA 26 (LCC) par 81.

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adjustments in terms of section 25 (3) of the Constitution.[868] The approach by the court was curious considering that the Act constitutes one of the pillars of land reform, especially with land reform being a constitutional objective.

The court in *Hermanus v Department of Land Affairs: In re Erven 3535 and 3236, Goodwood*[869] decided on the compensation issue in terms of the Land Restitution Act.[870] In *casu,* the claim was for restitution of a dispossession under the Group Areas Act. The crux of the claim was that the claimant had endured colossal hardship, as he had not received a 'just and equitable' compensation following the dispossession back then. The court had to make a determination whether applicant had been paid a 'just and equitable' compensation and if not, what constituted a 'just and equitable' amount. The court stated that unlike the Expropriation Act,[871] the 'Land Restitution Act[872] does not break down compensation into different categories'.

In *casu*, the court granted compensation for market value[873] and financial loss.[874] The decision by the court is consistent with the Expropriation Act.[875] No doubt, the court still aligned itself to pre-constitutional measures to the disadvantage of transformation. The compensation awarded by the court was neither just nor equitable considering that the court forced the applicants claim to fit within market value, financial loss and *solatium* despite the glaring truth that such a claim did not fit within the ambit of these headings. The court instead of treating the case based on its own facts and circumstances, contrary to the spirit of transformation, decided to rely on pre-constitutional procedures and measures, which it was familiar with. To conclude, courts as illustrated have adopted market value and financial loss compensation in restitution cases under the Act.

[868] Ex parter Former Highland Residents; In re: Ash and Others v Department of Land Affairs (2000) 2 All SA 26 (LCC) par 81, Neither of the parties made mention of such in their particulars of claim.
[869] *Hermanus v Department of Land Affairs: In re Erven 3535 and 3236; Goodwood* 2001 (1) SA 1030 (LCC)
[870] Restitution of Land Rights Act, 22 of 1994
[871] Expropriation Act, 63 of 1975
[872] Restitution of Land Rights Act, 22 of 1994
[873] *Hermanus v Department of Land Affairs: In re Erven 3535 and 3236; Goodwood* 2001 (1) SA 1030 (LCC) par 29.
[874] *Hermanus v Department of Land Affairs: In re Erven 3535 and 3236; Goodwood* 2001 (1) SA 1030 (LCC) par 30.
[875] Expropriation Act, 63 of 1975

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5.4.4 Constitution of the Republic of South Africa Act 108 of 1996

The Interim Constitution was superceded by the Final Constitution of 1996 on the 4th of February 1997. Section 28 of the Interim Constitution was replaced by section 25 in the new Constitution. Section 25 of the Constitution regulates the land question in South Africa. It is apparent that the land issue was and continues to be a significant issue in South Africa. Hence, the Constitution aimed to redress the injustices of the past and at the same time respect private property rights. Section 25 manages a political tension that surrounded the constitutional negotiations.[876] Its objective was to deal with the historical injustice wherein whites despite constituting only ten per cent of the population owned roughly eighty-seven percent of the land.[877] The National Party in conjunction with other commercial enterprises endeavored to safeguard the existing white property rights in land.

On the contrary, the African National Congress together with other liberation movements advocated for land restitution and redistribution in order to redress the colonial and apartheid injustices.[878] Therefore, the property clause is a product of compromise as it endavoured to protect the rights of whites in property despite the huge ownership percentage disparity against the rights of the underpriviledged blacks. Section 25 was successful in safeguarding the existing white property rights by ruling out the 'arbitrary deprivation of property'.[879] Yet, at the same time, the property clause mandates land reform in the public interest subject to payment of compensation in order to guarantee an equitable access to natural resources in South Africa.[880]

The land issue is at the core of the current political deliberation just as it has been since 1994. This has led to the contestation of the property clause.[881] Section 25 is perceived as a hindrance to transformation. The Black First Land First stated that

[876] K Heinz *Constituting Democracy: Law, Globalisation and South Africa's Political Reconstruction* (Cambridge) (2002) p. 124-136.
[877] As above
[878] Heinz (note 869 above).
[879] Section 25 (1) of the Constitution of the Republic of South Africa Act, 108 of 1996 prohibits arbitrary deprivation of property.
[880] Section 25(2) of the Constitution provides that property may be expropriated only in terms of a law of general application 'for a public purpose or in the public interest' and subject to compensation. Section 25(4) of the Constitution highlights that 'the public interest' includes 'the nation's commitment to land reform'.
[881] Constitution of the Republic of South Africa Act, 108 of 1996.

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> Section 25 legalises land theft and legitimizes colonialism…Section 25 in its entirety is a yoke around the necks and shackles in the feet and hands of our people. It makes us slaves in our own land[882]

The National Assembly, following the proposal by the Economic Freedom Fighters (EFF) and the African National Congress (ANC) mandated the Constitutional Review Committee to research on amending the property clause to allow for a paradigm radical shift in favour of land expropriation without compensation. In the same vein, the Azanian People's Organisation (AZAPO) is also advocating for the nationalisation of land as well as the scrapping of section 25 of the Constitution.[883] Bernard Magobe also contends that section 25 is 'a fatal obstacle to the objective of achieving justice for indigenous black South Africans'.[884] Therefore, some South African citizens and politicians are in favour of the scrapping of section 25 in order to redress the historical injustices.

However, a contrasting school of thought exist were it is contended that section 25 is not an obstacle to land reform hence, it is not necessary to amend the property clause. The argument is that history is biased and the historical injustices alleged are a fallacy. Roets contends that

> The argument that whites stole the land is a single biggest fallacy. There are three ways in which whites acquired land, namely resettlement on empty land, the purchase of land through treaties, cooperation and agreements and through conquest.[885]

Goerge McCall Theal argues that 'the land upon which European settlers established their farms was unoccupied and that the black Africans who challenged the settlers for title of the land were actually invaders from the north.' Afriforum criticised the proposed amendment and said in a statement, 'land expropriation without compensation would have catastrophic results ... like in Venezuela and

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[882] Black First Land First (4 August 2015) 'Return the stolen land – that's the only real solution! Sankara policy and political school submission to the Portfolio Committee of Public Works on Public Hearing on the Expropriation Bill [2015]': https://black1stland1st.wordpress.com/2015/08/04/return-the-stolen-land-thats-the-only-real-solution-sankarapolicy-and-political-school-submission-to-the-portfolio-committee-of-public-works-on-public-hearing-on-theexpropriation-bill/ (accessed 5 February 2019).
[883] Input by AZAPO representative, Lepeto Nkubela, at UNISA debate on expropriation without compensation, Pretoria 30 April 2018: https://www.enca.com/south-africa/catch-it-live-unisas-land-expropriation-debate (accessed 5 February 2019).
[884] M B Ramose & D Hook) *'To whom does the land belong' 50 Psychology in Society* (2016).
[885] Roets (note 96 above).

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Zimbabwe'.[886] Kallie Kriel, Afriforum's Chief Executive, went further to say 'international investors are unwilling to invest in a country where property rights are not protected'.[887] Some investors hold the view that the speech by President Cyril Ramaphosa is aimed at winning political points ahead of the election in 2019.[888] Ernest Roets argued that the proposed amendment was not necessary because section 25 is not an obstacle to land reform but corrupt government officials are the hindrance.[889] He stated that despite all the money reserved and time passed, there is nothing to show for it.[890] Against this background, the study will examine section 25 in order to understand to what extent the property clause is a hindrance to land reform and whether it is legal and necessary to amend the provision.

The property clause is the longest provision in the Bill of Rights with eight sub-sections. The first sub-sections which include section 25 (1) - (3) are defensive contrary to section 25 (4)-(8) which are reformist.[891] In line with the argument above, the general assumption was that the defensive sub-sections would benefit the historically white priviledged minority who no doubt constitute the majority property holders. On the contrary, the belief was that the reformist sub-sections would benefit the historically disadvantaged Blacks. It is however, common cause that due to the passing of time, some black South Africans now own land and properties hence, the provision now protects everyone that owns property. The other perception is that section 25 is a response to colonial and apartheid discriminating laws wherein the provision protects rights that were previously disadvanataged. The court in *Port Elizabeth Municipality v Various Occupiers (Port Elizabeth Municipality)* held that:

> The blatant disregard manifested by racist statutes for property rights in the past makes it all the more important that property rights be fully respected in the new dispensation, both by the state and private persons. Yet such rights have to be understood in the context of

[886] AfriForum's Chief Executive Kallie Kriel https://www.iol.co.za/news/politics/afriforumcallsanclandexpropriation-plancatastrophic16356815AfriforumcallsANC#LandExpropriationplan'catastrophic' (accessed 1 August 2018).
[887] As above.
[888] D Sibeko see https://www.iol.co.za/news/politics/afriforumcallsanclandexpropriation-plancatastrophic16356815AfriforumcallsANC#LandExpropriationplan'catastrophic' (accessed 1 August 2018).
[889] E Roets Afriforum vs EFF - This Land question is going too Far available at https://www.youtube.com/watch?v=fay4dODrCb4 (accessed 6 February 2018).
[890] As above.
[891] J Pienaar *Land Reform* (2014) p167 argues that section 25 embodies a 'clearly more reform centred and expansive land reform approach' than its precursor section 28 of the Republic of South Africa Act 200 of 1993.

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> the need for the orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past.[892]

Section 25 tries to balance conflicting interests and this makes it complicated and leads to conflicts and tensions.[893]

5.4.4.1 Deprivation

Section 25 (1) of the Constitution provides 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'. Section 25 does not give a positive guarantee to property. It does not establish a right to property per se.[894] Rather section 25 (1) establishes a negative right. It safeguards individual property rights of landholders, whether historically advantaged or disadvantaged against arbitrary deprivation.[895] The court in *Phoebus Apollo Aviation CC v Minister of Safety and Security* held that 'deprivation demands limitations on the use and enjoyment of property in the public interest, for example nuisance laws and fire regulations.'[896] In *Davies and Others v Minister of Lands, Agriculture and Water Development* the court defined deprivation as an 'attenuation or deleterious restriction of certain rights that come with private ownership.'[897] Van der Walt opines that 'deprivations relate to uncompensated, authorised and forced limitations on the use, enjoyment or discarding of property for public interest.'[898]

Nevertheless, the provision permits state intereference with the same property right. The provision though conservative, has received a more transformative interpretation by the Courts. The provision distinguishes between deprivation and expropriation. Andre van der Walt distinguished between the two and stated that

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[892] *Port Elizabeth Municipality v Various Occupiers (Port Elizabeth Municipality)* 2005 (1) SA 217 (CC) par 15
[893] Pienaar (note 884 above) 175.
[894] Pienaar (note 884 above); Section 25 (1) is liberal and weaker as opposed to the precursor Section 28 of the Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution) which provided that 'No deprivation of any rights in property shall be permitted otherwise than in accordance with a law'.
[895] Deprivation restricts or limits the use of private property in the public interest without necessarily taking away the property – it affects everyone in that situation more or less equally. See Andre van der Walt *Law of Property* (5th edition) p 313.
[896] *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 CC at par 4
[897] *Davies and Others v Minister of Lands, Agriculture and Water Development* 1996 (1) ZLR 681 (S).
[898] Van der Walt (note 111 above).

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Deprivation restricts or limits the use of private property in the public interest without necessarily taking away the property – it affects everyone in that situation more or less equally, whereas expropriation entails taking away the property permanently from one owner for the public use.[899]

Expropriation constitutes the harshest, radical and permanent form of deprivation.[900] Courts in South Africa have interpreted deprivation broadly and at the same time have interpreted expropriation narrowly.[901] This form of interpretation is highly progressive considering that expropriation requires payment of compensation whereas deprivation does not require compensation; hence, a narrow interpretation of what constitutes expropriation and a broad interpretation of what constitutes deprivation guarantees less expenses on public funds to compensate landowners.

Section 25 (1) is clear in that it prohibits arbitrary deprivations and not general deprivations. It is possible that a landholder may be deprived of land without receiving compensation. The court in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (Blue Moonlight),* dealt with an application by a private property developer who intended to evict at least eighty six desperate and poor unlawful occupiers from its property.[902] The court held that

…although the property owner could not be expected to be burdened with providing accommodation to the occupiers indefinitely, 'a degree of patience should be reasonably expected of it' while the municipality lined up alternative accommodation.

In order to give effect to its decision the court ordered the municipality to provide the illegal occupiers with alternative accommodation within 4 months of the judgment; hence, eviction was subject to the provision of alternative accommodation.[903] The provision prohibits the arbitrary deprivation of property but at the same time, it redresses grossly imbalanced social disorders. Despite the fact that the above-mentioned case reconciled section 23 and 25 of the Constitution in dealing with the

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[899] Andre van der Walt *Law of Property* (5th edition) p 313.
[900] See *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC)
[901] J Dugard & N Seme 'Property Rights in Court: An Examination of Judicial Attempts to Settle Section 25's Balancing Act re Restitution and Expropriation", (2018) 34(1) *South African Journal on Human Rights* p 33-56 at 51-55.
[902] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (Blue Moonlight),* 2012 (2) SA 104 (CC)
[903] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (Blue Moonlight),* 2012 (2) SA 104 (CC) p 104

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eviction case, it is vital in demonstrating that the state has the power to limit or deprive a landholder's rights in the public interest.

5.4.4.2 Expropriation

The study proceeds to examine Section 25 (2), (3), and (4). This provision provides for expropriation for a public interest or purpose. Expropriation refers to the power of the state to take or encroach on private property rights in order to pursue public purpose responsibilities such as the building of dams, hospitals *etcetera*.[904] As already explained above, the court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a v Minister of Finance* held that 'expropriation is a smaller category that falls within the larger category of deprivation'.[905] Hence, all expropriations constitute deprivations yet not all deprivations amount to expropriations. Van der Walt states that expropriation 'denotes the power of the state to terminate all rights that come with property rights for public interest.'[906] The court in *Phoebus Apollo Aviation CC v Minister of Safety and Security*[907] defined expropriation as the 'compulsory taking over of property by the state to obtain public benefit at private expense'. The court in *Davies and Others v Minister of Lands, Agriculture and Water Development* case,[908] held that expropriation 'involves the transferring of rights in property from the title holder to the state without the previous consent of the title holder'. In summary expropriation is the transferring of property rights from owner to state without the consent of the owner.

South Africa is no exception, and section 25 of the Constitution stipulates the procedures that the government must conform to when exercising the power of *eminent domain*. Section 25 (2) states that:

> Property may be expropriated only in terms of law of general application—
>
> (a) for a public purpose or in the public interest; and

[904] The power of the state to expropriate private property – sometimes referred to as *eminent domain* – is a common feature of most legal frameworks and is regularly used by governments around the world to pursue the public purpose responsibilities. This mandates that the taking must benefit the public at large. In South Africa, this form of power obliges the payment of compensation.
[905] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a v Minister of Finance* 2013 (4) SA 768 (CC) par 46
[906] Van der Walt (note 111 above).
[907] *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 CC at par 4
[908] *Davies and Others v Minister of Lands, Agriculture and Water Development* 1996 (1) ZLR 681 (S).

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> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed

The provision goes beyond the public purpose requirement. Section 25 (4) empowers the state to expropriate private property 'in the public interest'.[909] It reads:

> 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 all South Africa's natural resources; and
>
> (b) property is not limited to land.

The 'public interest' requirement aims to include and achieve land reform, restitution and guarantee an 'equitable access to natural resources'. The provision also clarifies that 'property is not limited to land'.[910] However, the property clause is criticised for being hostile to transformation. The main reason is its reliance on a 'willing buyer, willing seller' compensation approach—a market driven approach.

To begin with, it is apparent that section 25 of the Constitution guarantees private ownership of land. However, just like other jurisdictions globally, the right is not absolute as the state enjoys the right of *eminent domain*.[911] Nonetheless, it is peremptory that such interference by the state is subject to compensation that is 'just and equitable'. In essence, the provision bestows the power of *eminent domain* upon the state for land reform purposes. It nevertheless, encumbers the power by imposing an obligation that the encroachment must be in the public interest and subject to payment of 'just and equitable compensation'.

Section 25 (3) reads:

> 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

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[909] Juanita Pienaar (note 884 above) p 170; Pienaar states that 'Section 28 of the Interim Constitution provided a limited scope for expropriation. It only allowed expropriation for a public purpose. Section 25 reformulated this position specifically to acknowledge the need for land reform and restitution.

[910] The provision gives the state an opportunity to undertake a systematic transformation of property regimes. See Water Services Act, 108 of 1997 and the National Water Act, 36 of 1998.

[911] See section 25 (1) of the Constitution provides 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' and section 25 (2) which reads: 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

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of those affected, having regard to all relevant circumstances, including –

a. the current use of the property;

b. the history of the acquisition of the property 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.

In South Africa, there exist varying opinions regarding the interpretation of section 25 on what constitutes a 'just and equitable' compensation. There exist different opinions regarding the proper approach to compensation. The court in the *Du Toit v Minister of Transport* first considered the market value of the property before applying the rest of the factors listed in section 25 (3) of the Constitution.[912] In applying these factors, the court reasoned that the public purpose requirement would be frustrated if the market value of the gravel were to be paid to the owner in full. This reasoning identifies with the reasoning in *Khumalo v Potgieter* where the court held that 'in order to calculate compensation in terms of the Constitution one should start at market value, since it is quantifiable.'[913] The court in *Msiza v Director General, Department of Rural Development and Land Reform and Others* held that

> In this trial, the third and fourth respondents [the affected property owners] were insistent upon the payment of market value for compensation. I must dispense with this argument at this early stage. Market value is not the basis for the determination of compensation under s 25 of the Constitution where property or land has been acquired by the state in a compulsory fashion. The departure point for the determination of compensation is justice and equity. Market value is simply one of the considerations to be borne in mind when a court assesses just and equitable compensation. It is not correct to submit, as was done on behalf of the landowners, that the jurisprudence of this court has installed market value as a pre-eminent consideration. Properly understood, the jurisprudence of this court shows that market value is regularly used as an entry point to the analysis because it is the most tangible factor in all of the factors listed in s 25(3). This is not to make market value the most important factor in the analysis of just and equitable compensation; the object is always to determine compensation, which is just and equitable, not to determine the market value of the property… The Constitution is a rejection of the market-based approach to land reform and compensation in cases of expropriation. Market value is one of the factors forming part of a number of other considerations. Compensation must be just and equitable.[914]

[912] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC).
[913] *Khumalo v Potgieter* 1999 ZALCC 59.
[914] *Msiza v Director General, Department of Rural Development and Land Reform and Others* LCC 133/2012 p 11

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As already stated above, the court in the case of *Mhlanganisweni Community v Minister of Rural Development and Land Reform,* reasoned that 'there is no sound reason why a landowner whose parcel of property is expropriated for land reform, ought to receive compensation less than a landowner whose property is taken for an ordinary purpose.'[915] According to this reasoning by the court, land reform is not superior to any other legitimate purpose thus; it deserves no special treatment from any other expropriation. Claasens also contends that 'entrenching compensation at market value would make land reform unaffordable.'[916] According to Dugard, Section 25 does not mandate market value compensation.[917] This implies that reliance on market value is a misdirection following the reasoning of the above-mentioned jurisprudence.

Dugard opines that

> Section 25's expropriation framework has been popularly cast as being inimical to transformation because of its supposed reliance on a 'willing buyer, willing seller', market value-driven compensation approach – an approach that, for largely unexplained reasons, has to date been pursued by the government, despite not being mandated by the Constitution.[918]

The argument by Dugard suggests that the government is still rooted in market value compensation in expropriation cases. The court in *Former Highlands Residents, in re: Ash v Department of Land Affairs* held that 'market value and the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property are the only factors which lend themselves to easy quantification in monetary terms'.[919] Gildenhuys J held that market value should serve as the starting point for the determination of compensation because it is quantifiable. Interestingly, it was noted on page 14 of the judgment in the *Msiza* case above-mentioned that

> In valuing the affected land, the first, second, third and fourth respondents have accepted market value as the method to be used in valuation. In its terms of reference for the valuation dated 25 November 2014, the department instructed the valuer to provide the

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[915] *Mhlanganisweni Community v Minister of Rural Development and Land Reform* 2012 ZALCC 7 par 73.
[916] Claasens (note 132 above).
[917] Dugard (note 894 above).
[918] J Dugard Unpacking Section 25: Is South Africa's Property Clause an Obstacle or Engine for Socio-Economic Transformation? CCR Article On the Potential and Limits of Section 25 (2008)
[919] *Former Highlands Residents, in re: Ash v Department of Land Affairs* 2002 2 All SA 26 (LCC)

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> market related value, which will enable the DRDLR to table an offer to purchase on market value of the land.[920]

This case demonstrates that the state still insists on purchasing land for land reform purposes at market related rates. As stated earlier in chapter 1 Gildenhuys contends that 'compensation in excess of market value is plausible, because the Constitution only provides for the nethermost principles to be complied with.'[921]

Dugard questions the persistence of a market value driven approach when she states that:

> It is probable that the persistence of a 'willing buyer, willing seller', market value-driven compensation approach in the post-apartheid era is at least partially explained by a mistaken continued reliance on section 12(a)(i) of the Expropriation Act 63 of 1975 (Expropriation Act), which refers to compensation for expropriation reflecting 'the amount which the property would have realised if sold on the date of notice in the open market …' – a clause that, under the apartheid regime, certainly did mandate a 'willing buyer, willing seller' market value driven approach. Crucially, however, as a pre-constitutional piece of legislation, the Expropriation Act must comply with the Constitution to be lawful. This means that section 25(3) of the Constitution's formulation for compensation must take precedence.[922]

The discussion above clearly illustrates that there is a continued reliance on the market value based approach regardless of the factors listed in section 25 (3) of the Constitution. As already explained, this approach is criticised for being hostile to land reform. Claasens contends that 'rooting compensation at market value would make land reform too expensive.'[923] She emphasises that this would 'defeat equitable distribution and access to land.' It is her further contention that 'this has the effect of fuelling tension by shielding land rights of whites at the cost of friable land rights of blacks.' However, in spite of the critiscim it is apparent that the market value factor still holds a huge influence in determining compensation for land reform.

In my view a continued reliance on the market value based approach is unjustified but not illegal. Market value is one of the factors listed in the property clause. The regime of compensation prescribed by the Constitution is 'just and equitable' compensation. Market value compensation is appropriate and legally acceptable if it is 'just and

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920 *Msiza v Director General, Department of Rural Development and Land Reform and Others* LCC 133/2012 p 14
921 Gildenhuys (note 849 above).
922 Dugard (note 894 above).
923 Claasens (note 132 above).

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equitable' in the circumstances. However, a continued reliance on market value compensation is unjustified in South Africa. Market value is just one of the factors listed and must not be applied in isolation. Market value compensation is expensive and has hindered any meaningful and progressive land reform. A continued reliance on market hinders the transformation contemplated about by the property clause as it confirms a continued reliance on section 12 of the Expropriation Act of 1975.

It is apparent that section 25 (2) (b) suggests that in all land expropriations, some form of compensation is required. Each case depends on its circumstances. Compensation is not rigid on market value. It can either be at market value, above market value, below market value, little or nothing depending on the circumstances of the case after taking into account all the factors listed in the Constitution. Nonetheless, South Africa has alyways relied on the market value related approach. This concludes that the interpretation of section 25 concerning the compensation issue remains a contentious issue in South Africa.

Section 25 (5) and (6) authorise the state to implement programmes that guarantee access to land and land tenure. In order to guarantee land access, the state assists in facilitating land proprietorship or the securing of land for use and occupation. Section 25 (5) obliges land redistribution, expropriation included.[924] In compliance with this provision, the legislature enacted the Land Reform (Labour Tenants) Act[925] discussed above and the Provision of Land and Assistance Act.[926] However, the Provision of Land and Assistance Act of 1993 is heavily underutilised.[927] Section 25 (6) obliges the state to safeguard occupation and use land rights irrespective of whether such rights

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[924] Section 25 (5) reads - 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.
[925] Land Reform (Labour Tenants) Act 3 of 1996.
[926] See the Provision of Land and Assistance Act 126 of 1993. Under this Act land is designated by the Minister of Rural Development and Land Affairs for the purposes of redistribution to persons who have no land or limited access to land, persons wishing to upgrade their land tenure or persons who have
been dispossessed of their right in land but do not have a right to restitution.
[927] See the Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (November 2017) (HLPR), chapter 3, pp. 205-231: https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf The report gives a miserable picture on the governments attempt to comply with section 25 (5)

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clash with land ownership rights.[928] This section works hand in glove with section 25 (9). Section 25 (9) provides that 'Parliament must enact the legislation referred to in subsection (6)'.

Section 25 (7) provides 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.

The subsection provides for land restitution. This is a complicated and emotive process of land reform in the property clause. Cousins contend that

> It has also been one of the least successful processes in terms both of the relatively low number of instances in which land has been restored to claimants, and the questionable success of restitution where this has occurred.[929]

The complexity of the process has resulted in the majority of claimants opting for a rather measly cash settlement than undergoing the lengthy restitution process.[930] The Land Claims Commission's lack of implementation of the processes and the judicial interpretation of the said provision is the cause of the said failures. The Restitution of Land Rights Act[931] above-mentioned gives flesh to section 25 (7). It however, adds a deadline to the claims of 31 December 1998. The Amendment Act of 2014 subsequently amended the Restitution Act.[932] The Constitutional Court in the case of *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* declared the amendment unconstitutional for want of consultation.[933]

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[928] Section 25 (6) reads- 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.

[929] B Cousins & R Hall (2015) 'The Restitution of Land Rights Amendment Act of 2014', technical analysis commissioned by the Legal Resources Centre pp 1-2 available at http://www.plaas.org.za/staff member/hall (accessed 15 February 2019).

[930] See the Department of Rural Development and Land Reform in August 2017, which states that of the approximately 80,000 claims settled to date, all but 7,478 claimants opted for cash settlements rather than land transfers: https://www.notesfromthehouse.co.za/opinion/item/54-questions-that-leave-more-questions-than-answers.

[931] Restitution of Land Rights Act, 22 of 1994

[932] Restitution of Land Rights Amendment Act 15 of 2014. The amendment extended the land claim process to 30 June 2019.

[933] *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* 2016 (5) SA 635 (CC).

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Section 25 (8) provides that

> 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)

This provision has received little or no attention. It is yet to be litigated. It is broad and flexible to the extent that it may possibly pave way for expropriation without compensation. Dugard argues that

> … it is conceivable that, should action be pursued, and/or a law be adopted that enables the state to expropriate property for the purpose of land restitution without any compensation, this could be deemed constitutional if found 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom …[934]

The provision is highly transformative and only requires the state to enact a law consistent with section 36 of the Constitution. This raises a question on whether it is necessary and legal to amend the property clause. Justice Albie Sachs, former Judge at the Constitutional Court and Anti-Apartheid struggle stalwart contended that

> …the current constitutional provisions already allowed for land expropriation without compensation provided the expropriations met the general limitations clause in section 36 of the Constitution.[935]

He further argued that:

> Section 25 was an empowering section that called for land reform, giving the state very far-reaching powers in the public interest. However, while it was permissible to amend the Constitution, amendments should not destroy constitutionalism, and should be subject to judicial review.

Henk Smith a land rights attorney also weighed in and argued that 'the emancipatory potential of Section 25 had not been realised and that had to be addressed.'[936] In the same vein Dan Kriek, Agriculture South Africa (AGRISA) argued in support of maintaining the *status quo* when he stated that

> …changing the Constitution would not fix the country's problems but could instead exacerbate them. The major obstacle to land reform was not the Constitution but the failure amongst stakeholders to cooperate. Changing the Constitution would not fix anything but

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[934] Dugard (note 894 above).

[935] Justice Albie Sachs, former Judge at the Constitutional Court and Anti-Apartheid struggle stalwart, presentation at the Constitutional Review Committees colloquium on the- land reform through Expropriation Without Compensation Topic on 8 June 2018 available at https://pmg.org.za/committee-meeting/26615/Search (accessed 16 March 2019)

[936] H Smith Land Reform through Expropriation Without Compensation (2018) available at https://pmg.org.za/committee-meeting/26615/Search (accessed 16 March 2019)

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would create more problems. The commercial farming sector recognised the historic land dispossession of black people and was ready and willing to play a positive role in an orderly, legal process of land redistribution and security of land tenure in which expropriation without compensation was the last resort. Priority had to be given to food security and the development of agriculture through private-public partnerships.[937]

Terrence Carigan further argues in favour of abstaining from amending the Constitution. Therefore, he holds the view that section 25 (8) is sufficient read together with the property clause as a whole. He contends that

There is a strong odour of fraud and deception about this. By shifting the blame for South Africa's land reform malaise onto the constitution, not only is its legitimacy damaged, but the real problems – plentifully attested to in a large body of research, including that sponsored by Parliament – ignored, and left unaddressed. If nothing else, what is underway signals a willingness to trade the principles of constitutional governance for the seductions of venal politics and destructive ideology. What is at work is very sinister indeed. It is also a threat to us all, with a precedent that the country will one day regret. Those who value South Africa's future and a constitutional state would do well to keep this in mind. It would be of great service if they were to find their voices.[938]

On the contrary, Vuyo Mahlati a representative of the African Farmers association of South Africa (AFASA), was in support of amending the Constitution. He advocated for a departure from the current property clause, section 25 (8) included. He stated that

…the African Farmers Association of South Africa was in full support of expropriation without compensation not only for purposes of speeding up land reform but because expropriation of land without compensation was a strategic approach to the transformation of a whole industry. Expropriation should be the central legislative mechanism for dealing with the entire programme of agrarian reform and land resettlement for socio-economic and sustainable development in South Africa. It should also be a way of restoring food security as opposed to perpetuating the current status quo where the majority of black people were experiencing food insecurity.[939]

Section 25 (8) of the Constitution allows for the expropriation of land without compensation. However, the provision mandates compliance with section 36 of the Constitution. Matome Chidi contends that

Section 25 (8) of the South African Constitution allows "any departure" from the provisions of section 25, including sub-section (2) (b), the right to compensation. Departure means, in the context of expropriation, that when the state expropriates it may do so without compensation. How that works may be a question? However, the answer is in section 25 (8). The section requires compliance with the provisions of section 36 (1) of the

[937] D Kriek Land Reform through Expropriation Without Compensation (2018) available at https://pmg.org.za/committee-meeting/26615/Search (accessed 16 March 2019)
[938] Terence Corrigan One should be nervous about changing Section 25 available at https://www.politicsweb.co.za/opinion/one-should-be-nervous-about-changing-section-25 (accessed 16 March 2019).
[939] V Mahlati Land Reform through Expropriation Without Compensation (2018)available at https://pmg.org.za/committee-meeting/26615/Search (accessed 16 March 2019)

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Constitution. Further it is required that expropriation be for land, water and related reforms. Furthermore, expropriation should be governed by a statute.[940]

It is my view, that indeed section 25 (8) is highly transformative. The subsection empowers the state to enact legislation to achieve land reform. It is therefore, the responsibility of the state to take initiative and utilise the power bestowed upon it. The emancipatory power available to the state has not been used fully to the benefit of the public. The provision as highlighted above has not been litigated upon. It is however, a stubborn fact that even if the government is to adopt the call not to amend the Constitution and rely upon section 25 (8) of the Constitution as proposed, expropriation without compensation would be constitutional. The existence of section 25 (8) does not render an amendment to the Constitution illegal.

Most of the concerns raised are unsubstantiated and based on speculation. Amending the Constitution to allow for land expropriation without compensation is legal. Section 25 (8) of the Constitution is not a new provision. As correctly stated by judge Sachs the provision has not been afforded any litigation. It is surprising as to why there is a sudden sympathy towards section 25 (8). Land reform has been sporadic. Advocate Ngcukaitobi in his address to the Parliament argued that at least R54 billion has been wasted on land reform in exchange of a meagre 7% commercial land.[941] Reliance on section 25 (8) is an option that the government may adopt. However, the glaring truth is that land reform under the property clause has failed to achieve its intended result.

Courts and legislatures had an opportunity to explore section 25 (8) all these years since the adoption of the final Constitution of 1996. The land issue is volatile and requires an immediate attention in order to avoid public unrest as well as equipping politicians with an opportunity to manipulate the situation in their favour. Despite the concerns raised, there is nothing that renders an amendment of the Constitution illegal. The only obligation imposed both at national and international level is that of compensation.

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[940] M Chidi Land expropriation without compensation is constitutional (2018) available at https://www.news24.com/MyNews24/land-expropriation-without-compensation-is-constitutional-20180423 (accessed 16 March 2019).

[941] M Ntsabo Advocate Ngcukaitobi: Government has wasted billions on unhelpful land reform available at https://ewn.co.za (accessed 16 March 2019)

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In conclusion, the Constitution contains both a negative and positive effect. It safeguards existing property rights and at the same time allows intereference with the same rights in the public interest. The Constitution allows for the enacting of legislation to guarantee land reform. The Land Reform (Labour Tenants) Act 3 of 1996 forms part of the land reform programme anchored in section 25 of the Constitution.

5.4.5 Land Reform (Labour Tenants) Act 3 of 1996

The Act allows labour tenants to get into agreements with farm workers on issues regarding land expropriation for the purposes of ensuring security of tenure for labour tenants.[942] As soon as the Director-General of Land Affairs agrees that the price agreed upon is 'just and equitable', the tenants can get a subsidy.[943] In cases were the Director-General is of the view that the price agreed upon is not 'just and equitable' s/he can refer it to the Land Claims Court to regulate a 'just and equitable' amount.[944] The Land Reform Act[945] seeks to grant security of tenure to labour tenants.[946] The Act also aims to guarantee financial compensation to labour tenants.[947] In addition, the Act protects labour tenants from unlawful evictions. The court in the *Msindo* case also stated that 'in appropriate cases the Act seeks to ensure the fullest possible substantive benefit of labour tenants by way of an award in land which would constitute ownership'.[948] The Act is relevant in that its application provides for some form of

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[942] The Labour Tenants Act exists to benefit a particular category of land user, a person who resides on or has the right to reside on the farm or another farm of the owner; who has or has had the right to use cropping or grazing land on the farm in exchange for labour; and whose parent or grandparent resided or resides on such farm or had the use of cropping or grazing land in exchange for labour. See *Khumalo and Others v Potgieter & Others* 2000 All SA 456 LCC where the applicant and respondents entered into an agreement for the purchase of respondent's property under the Land Reform Act.

[943] The Director-Generals consent on the price is a requisite considering that the funds from which the compensation must be paid in order to secure land for the benefit of labour tenants emanate from the public purse.

[944] *Khumalo and Others v Potgieter & Others* 2000 All SA 456 LCC; this is why the parties in *casu* approached the Land Claims Court.

[945] Land Reform (Labour Tenants) Act, 3 of 1996

[946] Section 3 of the Act provides that 'a person who was a labour tenant on 2 June 1995 shall have the right with his or her family members to occupy and use' that part of the farm which 'he or she or his or her associate was using and occupying on that date'; or 'the land which he or she or his or her family occupied or used during a period of five years immediately prior to the commencement of this Act, and of which he or she or his or her family was deprived contrary to the terms of an agreement between the parties'; or 'rights in land elsewhere on the farm or in the vicinity which may have been proposed by the owner of the farm. See also *Msindo Phillemon Msiza v Director-General for the Department of Rural Department and Land Reform and Others* LCC 123/2012.

[947] *Msindo Phillemon Msiza v Director-General for the Department of Rural Department and Land Reform and Others* LCC 123/2012.

[948] As above.

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expropriation. In *Khumalo and Others v Potgieter & Others*, Dodson J stated that 'It is quite clear that a form of expropriation is contemplated if the section 16 (Labour Tenants Act) application is successful'.[949] In addition, Meer J in the second *Khumalo* case held that the Act 'introduced a new scheme for the expropriation of land to secure the position of labour tenants'.[950] The court giving reference to the judgment by Dodson J in the first *Khumalo* case held that the granting of the properties by the Court constituted 'a judicial expropriation'.[951] The Court in *Msiza*[952] also stated that

> The award of land to the applicant in this Court's 2004 judgment therefore constitutes an expropriation under section 25 of the Constitution read together with the Act. I consider the principles applicable for payment of compensation pursuant to an act of expropriation.[953]

This emphasises the aspect that the Act forms part of the land reform programme anchored in section 25 of the Constitution.

In the event of land expropriation in terms of the Labour Tenants Act, payment of compensation is required. Section 23 of the said Act requires that 'just compensation must be paid as prescribed by the Constitution'. It is apparent from this phrasing and reference to the Constitution that the Land Reform (Labour Tenants) Act 3 of 1996 authorises expropriation in both substance and form. As stated earlier, if the parties fail to agree on the compensation payable, the court has the power to determine what is 'just and equitable' compensation in the circumstances.[954] The wording of the Act in this regard is consistent with the provisions of section 25 of the Constitution[955], which requires payment of a 'just and equitable compensation' in the event of expropriation. It is however, unfortunate that the administration of the Act has been highly

[949] Khumalo and Others v Potgieter & Others LCC 34/99.
[950] Khumalo and Others v Potgieter & Others 2000 All SA 456 LCC.
[951] *Khumalo and Others v Potgieter & Others* 2000 All SA 456 LCC.
[952] *Msindo Phillemon Msiza v Director-General for the Department of Rural Department and Land Reform and Others* LCC 123/2012.
[953] The court reffered to the case of *Msiza v Director-General, Department of Land Affairs, and Others*, case number LCC39/01, where Moloto J delivered judgment on 16 November 2004.
[954] See *Msindo Phillemon Msiza v Director-General for the Department of Rural Department and Land Reform and Others* LCC 123/2012, where the question presented before the Court concerned the determination of compensation in accordance with section 23(1) of the Land Reform (Labour Tenants) Act 3 of 1996 due to the applicant.
[955] Constitution of the Republic of South Africa Act, 108 of 1996, sec 25 (3).

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problematic. To the knowledge of the present writer, apart from the *Msiza* case, no other section 16 claim has been resolved.[956]

To conclude, the Act is *intra vires* the Constitution regarding expropriation and compensation. The Act requires that in the event of expropriation for public interest, the compensation payable must be in tandem with the provisions of section 25 of the Constitution. Hence, the compensation principles and factors listed in the Constitution are applicable *mutatis mutandis* the Act.[957] The overall position is that the Act provides for a 'just and equitable' compensation in land expropriations by the state for public benefit.

5.4.6 The Draft Expropriation Bill of 2019

The Minister for Public Works recently published the Expropriation Bill of 2019 for public comment. The draft law is meant to regulate expropriation of property in South Africa. Section 2 of the Expropriation Bill prohibits the arbitrary deprivation of property.[958] This is consistent with the provisions of section 25 (1) of the Constitution. The same provision also makes it mandatory for the expropriating authority to first engage the landholder and try reach an agreement before expropriating property.[959] Property, according to the Bill can only be expropriated if the parties fail to reach an agreement.

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[956] J Dugard & N Seme 'Property Rights in Court: An Examination of Judicial Attempts to Settle Section 25's Balancing Act re Restitution and Expropriation", (2018) 34(1) South African Journal on Human Rights p 33-56 at 51-55
[957] See section 25 (3) which provides that:
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.
[958] Expropriation Bill of 2019, sec 2
[959] Expropriation Bill of 2019 Sec 2 (3) reads Subject to section 22, a power to expropriate property may not be exercised unless the expropriating authority has without success attempted to reach an agreement with the owner or the holder of an unregistered right in property for the acquisition thereof on reasonable terms.

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Section 12 of the Bill demands payment of a just and equitable compensation upon expropriation.[960] Section 12 (3) provides that it may be just and equitable if the following property is expropriated with nil compensation:

- Where the land is occupied or used by a labour tenant, as defined in the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996);
- where the land is held for purely speculative purposes;
- where the land is owned by a state-owned corporation or other state-owned entity;
- where the owner of the land has abandoned the land;
- where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement on the land

The Bill is designed in such a manner that aims to preserve the *status quo*. If the Expropriation Bill is promulgated, there will be no need to amend the the Constitution. It is my view that the Bill does not conform to the proposed methodology of expropriating land without compensation. It would likely suggest that the land issue that has caused so much uncertainity was just a tool used for political purposes and gathering popularity by political actors. It is arguable that political parties such as the ANC apparently took a cue from the ideology of the EFF but never at any time did the ANC intend to expropriate land without compensation. The Bill is consistent with section 25 (8) of the Constitution which commands the state to enact legislation that will regulate compensation. It seems the Bill is the legislation at last. The Bill has no intention to depart from the existing property clause. It is in fact, in compliance with the current property clause. It is apparent that the Bill makes it impossible to expropriate commercial farms that have no state subsidies without paying compensation. The Bill like its predecessors fails to address how landless black people in South Africa will be helped to own their own land. The Bill omits to explain how thousands of black aspirant farmers will posses a piece of farming land. The ANC-led government appears to have allowed itself to be drawn into the contentious issue of amending the Constitution to allow for land expropriation without compensation because it did not want to be outdone by the EFF. The Bill in my view, is a departure from the expropriation of land without compensation. It aims at preserving the existing property rights of the current

[960] Expropriation Bill of 2019 Section 12 (1)- The amount of compensation to be paid to an expropriated owner or expropriated holder must be just and equitable reflecting an equitable balance between the public interest and the interests of the expropriated owner or expropriated holder, having regard to all relevant circumstances…

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landholders. The property listed for expropriation without compensation is a mockery towards any meaningful land reform.[961]

In conclusion, the current laws on land expropriation in South Africa mandate payment of compensation that is 'just and equitable'. The conundrum is on the interpretation of a 'just and equitable compensation'. There exist different opinions on the interpretation of the acceptable form of compensation. The government has been insistent on its reliance on a market-based approach in determining what constitutes a 'just and equitable' form of compensation. This has led to the criticsm of section 25. Section 25 is percieved to be inimical to land reform. Other scholarly views contend that Section 25 does not mandate a market value based approach thus; the continued reliance on such an approach is misdirected. I now proceed to Chapter 6 in order to make recommendations on the way forward.

[961] The property listed does not include private commercial farms and how black aspirant black South Africans will be helped to own their land. The Bill has no intention of departing from the current position but rather it appears to be the legislation reffered to in section 25 (8).

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CHAPTER SIX

'It is conceivable that, should action be pursued, and/or a law be adopted that enables the state to expropriate property for the purpose of land restitution without any compensation, this could be deemed constitutional if found 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'[962]

RECOMMENDATIONS AND CONCLUSIONS

6.1 Introduction

The study aimed to ascertain whether expropriation of land without compensation and the amendment of section 25 of the Constitution to enable expropriation of land without compensation is legal in the context of regional and international law approaches to land expropriation and compensation. In essence the purpose of the study is to establish whether expropriating land without paying compensation is legal and in conformity with regional and international law principles. The study examined the compensation regimes that exist at international, regional and national level in order to achieve the above-mentioned objective. At national level the study focused on South Africa, Zimbabwe and China. The purpose of this chapter is to outline the main arguments and thereafter comment on the findings of the research in order to make recommendations which could guide policy makers on the subject of expropriating land without compensation in South Africa.

6.2 A Brief Summary of the Main Arguments

The focal problem anchoring this study as discussed in chapter one, is that there is no consensus on the legality of expropriating land without compensation in South Africa in light of international and regional laws. It is therefore, imperative to understand this proposed compensation policy within the context of this reality.

The study in chapter two gave a brief exposition on the history of the land question in South Africa. It is apparent in this chapter that history is a contested terrain. The majority Black South Africans contend that land dispossessions under colonial and apartheid laws were not just unlawful but rather cruel and unjust. Europeans unfairly enriched themselves through discriminating and segregatory laws. These laws created wounds within the black community and such wounds still exist even in the present day. This explains why there is a proposition that land laws in particular section 25 of the Constitution must be amended in order to rectify the historical injustices. The

[962] Dugard (note 896 above).

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main contention is that no compensation was paid by Europeans when they took the land, therefore, likewise no compensation must be paid for expropriating the same land. On the contrary white landholders contend that the land they occupied was vacant and also that Africans in South Africa are also migrants from the north thus, do not have any legal right superior to theirs to claim land ownership. White landholders further contend that they legally acquired the land and the amendment of section 25 to allow for land expropriation without compensation is a total disregard of their right to land.

Chapter three illustrates that there exists more than one compensation approach at regional and international level. Compensation at international and regional level can be at market value, above market value and below market value. The compensation issue is uncertain, lacks uniformity and is far from being settled. All the three regimes mentioned above remain applicable in property expropriations. All binding international instruments including the International Convention on Civil and Political Rights and the International Convention on Economic Social and Cultural Rights lack any meaningful guidance on the issue of compensation and expropriation. There is no specific acceptable compensation regime. International instruments do not codify land as a fundamental right that forms part of international law. The major international conventions and instruments are silent on land reform issues. As a result, these instruments are not suitable for addressing the issue of expropriation aimed at redressing land inequalities created by colonialism and apartheid.

Chapter four demonstrates that the constitutional and legal framework in Zimbabwe guarantees compensation from market value to below market value upon expropriation. However, the government is exempted by the Constitution from paying compensation for land expropriated for land redistribution purposes. In essence, Zimbabwe permits land expropriation without compensation save for the developments and improvements on the land. The compensation regimes in Zimbabwe, are to a certain degree, consistent with international law compensation principles. However, these compensation regimes are not comprehensive and entertain grey areas that need clarification. The key notable concern within the Zimbabwean legal framework that is *ultra vires* international law, norms and standards is the restriction imposed on white commercial landholders from negotiating compensation for improvements on the land. In addition, to prohibit same from

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claiming compensation for all losses suffered due to the land takings is not only unlawful but rather an outright disregard of international law. Such conduct is unjustified and illegal. The compensation regimes in Zimbabwe do not make provision for any form of unbiased, impartial and independent assessment and neither do they provide any alternative form of compensation.

Chapter four also examined the compensation regimes in China. In China private land ownership is alien. No individual person can privately own land in China. All farm or rural land is collectively owned by the farmers. It is not permissible for any individual land occupier to sell the land. This position is also similar to urban land. All urban land in China is wholly owned by the government. Land users are granted land use rights. China is unique in that the state does not expropriate land but rather resumes ownership. This process is termed land resumption. The deprived lessee is only entitled to claim compensation for the improvements on the land and not for the land itself. Therefore, in both Zimbabwe and China compensation is payable. However, the compensation payable upon expropriation is not for the land but rather for the improvements on the land only. The undeniable fact is that both jurisdictions to some extent comply with the international law principle that compensation must be paid upon expropriation. The only notable variance is that the compensation payable is not for the land but improvements on the land.

Chapter five dealt with South African laws on expropriation and compensation. The crux of chapter five was to determine compensation regimes that currently exist in South Africa. Furthermore, chapter five examined whether the current laws in South Africa are consistent with international norms and standards. In South African jurisprudence it is evident as demonstrated in chaper five that payment of compensation is peremptory following any form of expropriation. The Constitution of South Africa provides a framework of factors that must be considered in determining what constitutes a ‘just and equitable’’compensation. The legislature in South Africa has enacted laws on compensation and expropriation. The general trend in South Africa is that all legislations must be *intra vires* the Constitution. Courts and the government of South Africa have generally adopted market value compensation which is also generally termed ‘the willing buyer, willing seller principle’. The government has been criticised for relying on market value compensation. Scholars argue that such an interpretation is against section 25 considering that market value is just one of many

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factors that must be considered in calculating a 'just and equitable' compensation. The continued reliance on market value led to the public and politicians advocating for an amendment of section 25. Therefore, the purpose of the current chapter is to recommend new policies and propose law reforms where necessary.

6.3 Recommendations

As a result of the above-mentioned, the study recommends the following adjustments in order to realise a compensation regime that does not only conform to international norms and standards but also contribute to resolving the land question in South Africa. It is hoped that the recommendations will bridge the gap and unify the nation irregardless of race, colour and origin. There is a need to guarantee equality among South African citizens.

6.3.1 Amendment of Section 25 of the Constitution

South African law recognises and allows constitutional amendments. According to section 74 (2) of the Constitution, for an amendment to ensue, a majority vote of two thirds of the National Assembly is required, coupled with at least six provinces out of nine voting in favor of the amendment in the National Council of Provinces. Therefore, it is legal and possible to amend any provision of the Constitution, section 25 included. There is nothing that stops the government from amending section 25 of the Constitution as long as such an amendment is consistent with section 74 of the Constituion. It is therefore, important to establish whether expropriating land without compensation is consistent with international law as illustrated in the preceding chapters of the study.

The study recommends the following amendments:

a) Seperating the general property clause and the land reform clause

The proposed amendment must separate the general property clause and the land reform clause. It is trite that the right to property must be protected. Protection of the right to property in general is of significant importance for a stable economy and upholding investor confidence. The separation will clearly reveal that it is not the aim of the government to interfere with property rights in general. Land expropriations are temporary and necessary to redress the injustices of the past and once the issue is attended to, the land provision is automatically overtaken by events and becomes redundant.

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The separation recommended would cure the fears and concerns by the general population that the proposed amendments are likey to interfere with their general property rights, for example private residential premises in the urban areas. The general property clause must clearly guarantee property rights. It must prohibit any form of arbitrary deprivation and it must demand payment of a 'prompt, adequate and effective' compensation upon expropriation. In a nutshell, the general property clause must adhere to the prescribed international law standards.

b) Introducing Legislation regulating expropriation

It is recommended that the amendment must make provision for the enacting of a statute that regulates land expropriations for land reform purposes. The statute must clearly outline the amount of land to be owned by an individual person. The responsibility of demarcating and calculating the land must be vested in an independent and impartial Committee. It is recommended that the statute after stating the maximum amount of land to be owned by an individual person, should empower the committee to demarcate the existing commercial farms and give the current landowners the first right to choose a portion of land they are interested in. It is recommended that the current occupiers must be given a preferential right to choose the portion of land that surrounds their improvements and infrastructure. This includes personal properties like houses and so on.

The Act must be clear that any form of expropriation adopted or approved does not include private property but is solely restricted to land. South Africa should not adopt the cruel and unlawful 'rush and grab' procedure that was adopted by Zimbabwe. The current owner's right to private property must be preserved. If the current landholders are permitted to continue occupying the land housing their infrastructure and developments, a continued and undisrupted agricultural programme is guaranteed. Hence, food security, stable economy and investor confidence is guaranteed. It is recommended that to achieve this, the Act must in actual fact nationalise all agricultural land. In order to minimse expenses and costs as it is evident that land reform has been sporadic due to lack of funds or due to the expensive nature of the land reform program.

c) Capacity to Use the Land

It is recommended that the appointed Committee must also oversee the redistribution of the expropriated land to the African majority. Land must be allocated as per

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capacity. The Committee is recommended to investigate the financial status of the prospective applicants. The applicants must prove that they have the capacity to engage in commercial farming in order to guarantee a smooth transition and continued agriculture. Commercial agriculture plays an important role in the economy. It gurantees food security, economic stability and investor confidence. South Africa is recommended to learn from the mistakes that were done by Zimbabwe in redistributing land. All commercial land redistributions must guarantee against future unused or underutilised land. It is further recommended that the land allocations must be initially done on a provisional basis, for example, a 5-year lease period. The Committee will then use the initial provisional period to supervise and monitor whether the allocated land is being fully utilised. Once satisfied the Committee will then recommend to the relevant ministry for at least a 50-year lease or a 99-year lease whichever is proper in the circumstances. The lessee must be given permission to access loans using the land as security in order to guarantee a source of income. During the provisional period the lessee may also be allowed to mortgage the land. However, there is need to impose a restriction on the amount to be mortgaged and also a timeframe within which the loan must be paid. The period granted should not exceed the lease period.

Colonial and apartheid laws forced Africans into reserves and bantustants. These areas are still overpopulated and congested until now. There is a need to decongest these areas as well. In order to achieve this objective, it is recommended that the expropriated land should be divided into two segments. The two should consist of A1 Farms for commercial purposes and A2 plots for subsistence farming and residential purposes. Those who qualify to fall under A1 as per their capacity would be allocated commercial farms. Those who do not have capacity to venture into commercial farming would then be allocated A2 plots for subsistence farming and residential purposes. This recommendation would guarantee a proper and justified land reform based on capacity and continued production. Such a procedure would guarantee against agricultural breakdown and vast unused and underutilised land like the situation in Zimbabwe. To add, such a procedure will undermine the underlying logic of settler-colonial agrarian relations founded on racial monopoly control over land.[963] Further, it

[963] J Hanlon et al *Zimbabwe Takes Back its land* (2013).

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will "enlarge the peasantry and expand the number of mid-sized farms while downsizing the number, farm size and area of large-scale capitalist farms".[964]

Furthermore, the government should introduce financial and educational programmes to capacitate aspiring farmers. However, regarding the financial aid, it is recommended that the government purchases the required items under an agricultural command programme then forward them to farmers. This is to ensure that the funding is not abused. The farmers would then enter into contracts with the government to ensure that the advanced aid is repaid to the government. In order to guarantee production, the government should introduce regular workshops and consistent monitoring by agricultural experts. A combination of the two policies would capacitate the aspirant farmers to become productive.

6.3.2 Departure from Market Value Compensation

There is currently a call to expropriate land without compensation in South Africa. The basis for this reason is premised on the fact that European settlers unlawfully dispossessed Africans of their land. In doing so they did not pay compensation, so there is no need to pay compensation as well when expropriating land. Those advocating for this proposal further contend that the market value based approach adopted by the government since independence is inimical to any meaningful land reform. Other authors argue that market value compensation would hinder land reform and safeguard existing property rights to the detriment of the majority landless people. More than twenty-five years have passed since independence but there is little or nothing to show for it. As illustrated in the study, 54 billion rands has been spent by the government but only in exchange for 7% commercial land. Some scholars even argue that a continued reliance on market value compensation is a misdirection on the part of the government and there is no justification to that effect.

The study recommends that the government should move away from the market value based approach. Compensation is at the core of expropriation. The acquiring authority has an obligation at law to pay compensation to dispossessed landholders. In the same vein, the landholder has a right to compensation upon expropriation. This position is the acceptable norm and standard at international, regional and sub-

[964] S Moyo & W Chambati *Beyond White Settler Capitalism: Land and Agrarian Reform in Zimbabwe* (2013) Dakar: Codesria.

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regional level. However, there is no consensus on the regime of compensation that is acceptable. Different norms of compensation exist. Compensation at regional, international and national level can either be at market value, below market value and above market value. It is possible for compensation to be non monetary. This illustrates that there is no universally accepted standard of compensation at national, regional and international level to which South Africa is expected to conform.

Expropriating land without using market-value compensation is acceptable in international law where there is no prescribed formula. States are flexible to adopt pragmatic policies and legislative approach to the domestic problems of land reform. This is akin to the lessons from China and Zimbabwe where they adopted a method that suits them: compensation is not for the land but improvements on it. South Africa just like any other state has the latitude to adopt policies that rectify their domestic land reform problems. The crux of the land issue in South Africa is tied to the manner in which land was acquired by European landholders. No compensation was paid for the land, therefore, the general view is that in the same vein no compensation must be paid for the same land now.

It is recommended that South Africa adopt a policy where they would only pay compensation for the improvements on the land but not for the actual land itself.[965] This approach is equivalent to the proposed approach of no compensation for land. The study is cognizant of the fact that advocates of amendment are saying they want the Constitutional amendment because they want the Constitution to specifically and expressly mention land expropriation without compensation. This proposal is illegal as it amounts to a rush and grab scenario. The landholders retain their right to own the improvements or developments on the land, for example houses, tractors, and irrigation pipes and so on. This property cannot be expropriated without paying compensation. South Africa would have complied with international law obligations if they pay compensation for the improvements on the land only and not for the land

[965] The recommendation is made cognisant to the Basic Structure Doctrine. The argument against the proposed regulation is predicated on the claim that, though it is legal to amend section 25 it is potentially unconstitutional giving reference to the doctrine. This is because the amendment carries the effect of replacement. Paying compensation is the international accepted practice. However, adopting the notion of affirmative action and equality, expropriating land without paying compensation is justified. Further, compensation must be paid only for the improvements on the land and not the land taking into account the historical injustices surrounding how the same land was acquired.

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itself. This proposed policy would also confirm a departure from the market-value based compensation which is evidently inimical to land reform.

6.3.3 Land compensation

The study illustrated that land reform has been slow and extremely taxing on the government. A lot of money has been spent but in return there is nothing to show for it. The study recommends a non-monetary form of compensation for the improvements on the land expropriated. The recommendation would settle all dispossessed commercial farmers who would opt for land compensation as opposed to monetary compensation. This recommendation would reduce the budget and speed up land reform. After the committee has divided the land, the dispossessed landholder must be given an opportunity to choose the land accomodating his private property or improvements.[966] If the landholder, accepts the offer, the land offered would then be used as a form of compensation for the improvements that fall outside the allocated land. If there are variations the responsible committee and Ministry would be responsible to determine the compensation payable.

Notice must be given to the expropriatee to enable him/her to also prepare for the expropriation and also challenge the compensation offered in case of variations. The expropriatee may also refuse to accept land compensation. The committee is responsible in the circumstances to determine the compensation due to that expropriatee for the improvements on the land. The dispossessed landholder must be given an opportunity to respond and all expropriations must be placed under judicial review in the case of disputes. Compensation for the improvements, when the dispossessed landowner prefers cash not land must be just and equitable taking into account the history of land dispossessions. In such cases, payment must be prompt, adequate and effective. Each case must be dealt with based on its own circumstances. The factors listed in the Constitution must be adopted *mutatis mutandis* when determining compensation for the improvements.

It is recommended that the dispossessed landholder may not be able to challenge expropriation. However, they must be given an opportunity to challenge the compensation offered for the improvements on the land in cases where the landowner

[966] See para 6.3.1. (a)

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refuses to accept land compensation or were land compensation alone is not sufficient to compensate the improvements effected on the dispossessed land.

6.3.4 Expropriating Power to be given to a particular Ministry

It is recommended that the power to expropriate land for land reform purposes must be bestowed to one particar Ministry. Just like the proposal in the 2019 Expropriation Bill, the power to expropriate is granted to the Ministry of Public Works. It is the Ministry that may delegate its power to expropriate to any other government ministry. The Ministry through legislation would be responsible for appointing and electing a committee constituted of land experts to spearhead the expropriation. The recommendation guarantees checks and balances and allows the auditing of the land reform programme. It would also make it easy to hold the Ministry accountable for any failures or setbacks. The Ministry would also be accountable for the land reform budget and it would be expected to give quarterly updates on the land reform progress. This would ensure transparency, accountablility and efficiency. However, a separate audit committee specifically designed for this programme must be put in place so as to curb any abuse of office that may arise as a result of bestowing all responsibilities to one Ministry.

In conclusion, states are allowed to adopt pragmatic policies and legislative approach to the domestic problems of land reform. This implies that it is acceptable to expropriate land without using market-value compensation in international law where there is no prescribed formula. In that regard it is recommended that South Africa adopts policies that confirm a departure from market value-compensation approach. It is recommended that the government should pay compensation for improvements on the land but not for the land itself.

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Word Count – 73 845 Words

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