



SUMMARY OF

LANDREFORM DOCUMENT

COMPILED & PRESENTED

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THE LAND REFORM AND LAND QUESTION IN NAMIBIA.

SUMMARY OF ACN'S OPINIONS AND RECOMMENDATIONS.

FOREWORD:

Land reform and the land question in general is the most important and challenging issue in reaching the objective to do justice to all citizens of our country, also as far as rights to land are concerned, to broaden opportunities for all while preserving lawfully acquired rights for communal and commercial owned land.

One of the most vital issues of reconciliation to be settled in Post-independent Namibia is to create a better and stable future for all in our country and to find an affordable, accountable and acceptable solution for the distribution and utilisation of land in national interest.

Land is the one resource which binds us all together in a common destiny. If commercial farmers, communal land owners and those who dream of having a piece of land of their own, want to co-exist in peace and prosperity, we will have to find and explore common ground in dealing with the various land issue facing our country.

THE MOST IMPORTANT ISSUES TO RESOLVE ARE:

1. The pattern and desirability of land ownership in the commercial areas.
2. The future of traditional tribal land ownership.
3. The development of a land tenure and financing system which makes land ownership accessible and secure to all.
4. Ensuring the sustainable and productive use of land to benefit both present and future generations. Land ownership is not only a right, it carries certain responsibilities. One such responsibility is to ensure that land is put to best use, otherwise the land is a liability to owner and country alike.

In addressing this burning and highly emotional issue on land reform and the land question in general (detail) every conclusion and recommendation must be based on just and reliable historic, judiciary, social and economic facts. This specific paper is thus also free from political connotations and emotion.

HISTORICAL BACKGROUND.

South West Africa came into being under agreements and boundary settlements between interested powers of the time, Germany, Portugal and Britain.

There is no reliable information about the exact extent of the areas inhabited by the various population groups of SWA prior to the second half of the previous century. Especially in the southern part the population groups were nomadic herdsmen, hunters and gatherers of veld food.

The Nama and the Herero represented the herdsmen, the Bushmen and the Damara the gatherers of veld food and the hunters. Claims to specific areas and encroaching on grazing grounds gave rise to the continual clashes between these groups. The Bushmen and the Damara were gradually forced out by the Nama and the Herero into the more inaccessible mountainous and desert parts, and throughout the 19th Century clashes over claims to land were the cause of a bloody war between the Nama and the Herero, which did not end until the German occupation of the Territory.

With the commencement of German rule in the Territory, the question of devision of land arose. Imperial proclamations of 1898 and 1903 made provision for the establishment of areas for occupation by indigenous population groups.

On taking over the responsibility in the Territory in 1915 by the SA Government, therefor, the position as regards land rights was a complimented one. In the southern part of the Territory the land was devided into:

Farms for Whites and individual ownership, home areas for some groups recognised under original treaties, allocated areas for occupation and stock-grazing and Government lands.

In the north, on the other hand, the Kaokoland, Ovamboland, Okavango Territory and Caprivi, the various population groups occupied their home areas in accordance with traditional rights.

In terms of the Treaty of Versailles (the Treaty of Peace and SWA Mandate Act, 1919, Act No. 49/19191) the rights over State lands in the Territory passed to the Government of SA as Mandatory. This Act provided inter alia as follows:

"No land within the said territory now or here-after set apart as a reserve for natives or colloured persons, shall be alienated save under the authority of Parliament: Provided that nothing in this section contained shall be deemed to prohibit the Governor-General, in respect of land contained in any such reserve, to grant individual title to any person lawfully occupying and entitled to such land."

Thus today still certain areas belong to individual population groups, while on the other hand, it should also be taken into consideration that in the so-called commercial areas, surveyed land today belongs to private owners. In the search for finding an acceptable just and peaceful solution for the land reform and land question, ownership must be recognised whether it be communal or private. It is clear from the above mentioned historical facts that land was aquired by population groups as well as by individuals and strictly in accordance with the ancient and present internationally recognised norms, namley:

- 1) By conquering it
- 2) By means of negotiation
- 3) By occupying unoccupied land
- 4) By means of donation, and
- 5) Through inheritance.

If one does not accept this, the Bushmen inevitably will be the only one justifiably lay claim to land in Namibia as they were the first to have occupied the country.

No-one can therefor justifiably claim that land should merely be distributed by taking it away from rightful owners and redistributing it at will.

EXPROPRIATION OF LAND UNDER THE
NAMIBIAN CONSTITUTION 1990 AND FROM A
COMPARATIVE LAW PERSPECTIVE.

THE GUARANTEE OF PROPERTY.

Article 16(1) of the Constitution of Namibia guarantees every person the right to own immovable property in any part of Namibia.

The Constitution acknowledges that the individual has inalienable and undisposable fundamental rights and freedoms. These rights and freedoms are not only a stated programme to be pursued by the government but constitute an essentially private sphere of freedom of the individual; thus they serve to protect the individual against interference by the state.

That the constitutional guarantee of individual ownership rights is also obvious from Art. 16(1) itself. It states that all person shall have the right to own, acquire, and dispose of property.

The basic principle is thus that property is guaranteed comprehensively as a fundamental right and freedom. Thus, every regulation pertaining to property will constitute a limitation of a fundamental human right and freedom. For any such limitation the Constitution must provide for expressly, as is set out in Article 25(1).

This clearly confers the right to expropriate onto the state. The question is to which extent and when the state may do so, the possible scope of, and requirements, for expropriations, and the position of Article 16 in the system of the fundamental rights and duties and general principles created by the Constitution.

CONDITIONS FOR EXPROPRIATIONS:

Public Interest.

Guarantee of Property.

As the guarantee of property is a fundamental right it has to be ensured

that an expropriation is suitable to achieve the public interest the attainment of which is intended. From this it is to be deduced that an expropriation may only go as far as necessary to achieve the end or the objective being in the public interest. Additionally, the expropriation has to be indispensable (necessary) for the envisaged application. Expropriation thus is only the last feasible mean. It is only lawful if there is no other legally or economically justifiable solution which would guarantee a better protection of private property, put differently, expropriation is ruled out if the property can be acquired by normal transaction or if the intended project can be realised on property already belonging to the state or otherwise available without having to interfere with the rights of others.

JUST COMPENSATION.

The Namibian Constitution requires in Art. 16(2) for an expropriation to be accompanied by "just compensation".

Under international law just compensation has been interpreted as prompt, adequate and effective payment.

In all cases where the just compensation clause is applied the market values is of utmost importance in determining the value to be played.

CONSEQUENCES FOR NAMIBIA.

It is perfectly legitimate under the Namibian Constitution to expropriate. However, expropriation has to be the ultima ratio if state legislation and action. Before it is possible to resort to expropriation, all other means which are less infringing upon the individual's human rights and freedoms, have to be considered and, if possible, employed. Where the state can promote the public interest without infringing individual rights and freedoms, such approach must be given preference, by virtue of the Constitution.

A land reform would thus require, constitutionally speaking, to be in accordance with the principle of proportionality and the "theory of action by stages", with the resulting following schedule of consecutive steps of action:

- (1) utilization of unused land already belonging to the state;
- (2) distribution of underutilized land, already belonging to the state;
- (3) other measures below the level of expropriation, e.g. imposition of certain taxes. Limitation of the right to use the land, preliminary restrictions, etc;
- (4) expropriation of land whose owners have alienated or abandoned the property. According to the constitutional requirement of necessity, such expropriation can only may be partial and may only in the last consequence be complete;
- (5) as a last resort, expropriation of property whose owners have proven their interest in and solidarity with the property. Again the extent of the permissible expropriation is limited by the necessity requirement.

Whether this process has been adhered to will be subject to judicial review.

The compensation which is payable serves to indemnify for the limitation of the right of property. Thus, the compensation constitutes an integral part of the constitutional protection of the right of private ownership of property. The Court must not only review, according to the standards as described above, any expropriation law or action, but must review equally the amount offered as compensation. Both questions are inseparable and equally subject to judicial review. This follows finally from the fact that Article 16(2) confers a right to just compensation onto the expropriated person. This right thus constitutes part of the fundamental rights and freedoms as set out in Chapter III of the Namibian Constitution.

Summary:

The present system of land tenure is the product of the past. Historical settlement patterns, past policy trends and broad socio- and democratic processes, all to some extent played a role. All these factors and many others contributed to the current problems that exist as regards land ownership and land utilisation.

These problems cannot be solved merely by expropriation and redistribution of land. The right to own land must be respected and be treated in accordance with the Namibian Constitution because land reform and the land question involves many other issues such as the economical use of land, rural and urban development, urbanisation, housing, squatting, community development, the establishment of community life, the quality and security of the title in land, land registration systems, the advancement of agriculture and the protection of the environment.

In the traditional areas, ethnic and tribal communities are realities that evolve naturally in Black community life. A tribe's identification with its land and the communal tenure are essential for the continued existence of tribal community life. These realities cannot be ignored when determining a general land policy.

The Government should rather enable tribes to eventually convert to individual tenure, but in such way that this will not lead to a breakdown in established social structures.

Thus it is believed that any forced programme for the restoration of land to individuals and communities who had to give up their land on account of past policies or for other historical reasons, would not be feasible and not in accordance with the Namibian Constitution.

Apart from the vast potential for conflict inherent in such a programme, overlapping and contradictory claims to such land, well as other practical problems, in particular the financing there-of, would make its implementation extremely difficult, if not impossible.

Furthermore, the fact that the present private owned land was legally acquired cannot be ignored and therefore no-one can rightfully claim that such property be expropriated or restricted.

It must therefore be regarded as in the interest of peace and progress, that the present position should be accepted and that the opportunities afforded by the new land policy, should be exploited to bring about a more equitable dispensation. An attempt to return to the previous order, will only disrupt the country's pace of development to the detriment of all.

THE SOCIO-ECONOMIC SCENE.

The Structure of Agriculture:

Agriculture is the second most important productive sector in Namibia, after mining, in terms of contribution to the GDP and exports. It is the largest employer, supporting either directly or indirectly some 70% of a population of 1.5 million.

Agricultural land is dominated by two systems of tenure. On the one hand there is private ownership of agricultural land, which is utilised for agricultural production on a commercial basis and according to modern farming practices and methods.

On the other hand there is the traditional communal occupation of land, which entails the utilisation of small-scale farming practices and methods on a subsistence or even sub-subsistence basis.

The Government should appreciate the role and importance of the commercial agricultural sector, as well as the difficult position in which that sector finds itself in from time to time. The fact that substantial State funds have been voted over the years to assist agriculture, bears testimony to this. The Government should within the limits of its resources, continue to assist agriculture where this is merited. However, in future it will also be necessary to give serious attention to unlocking the agriculture potential particularly of those areas where subsistence farming practices predominate.

The communal sub-sector has the greatest potential for new growth. Indeed, unless communal agriculture can be revitalised, there is little hope for growth or for employment. Rural poverty will relocate itself to the cities with the gravest possible consequences. Namibia will face a long period beset by social and economic difficulty while it attempts to lift the levels of skills and abilities in the workforce to a level where widespread industrialisation is possible.

To summarise: There are still vast areas in the north of Namibia which presently are either under-utilised or virtually unused due to a lack of water and farming infrastructure. Provision of adequate systems emanating from the major rivers, would enhance the agricultural potential of the region and improve the position of the subsistence farmer.

Above all the development of new agricultural land is of great necessity to cater for the future agricultural needs of the people of Namibia.

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SUMMARY:

In conclusion, ACN reiterates that this paper is a sincere attempt to assist the Government of the Republic of Namibia in meeting its commitments to the people of Namibia with the minimum disruption to the economy as a whole. In seeking to achieve this, it is trusted that the Government will bear the following objectives in mind:

- 1) Existing productive farmers, must be able to - and indeed be encouraged to - remain farming without prejudice or fear of losing their livelihood and homes. Unqualified expropriation of commercial farms shall lead to decline in agricultural products and escalation of unemployment.
- 2) Namibia's sound economic base must not be eroded or jeopardised for short-term expediency.
- 3) Namibia's communal farming be upgraded and developed with the full consent and co-operation of communal farmers.
- 4) That even unused land be developed to the full but also in line with Namibia's constitution, that is, with the consent and co-operation of the owners.
- 5) That the government's policy for proposed economic restructuring and liberalisation, its regional food security responsibilities, its export promotion and proposed employment creation, and the upliftment of the living and educational standards of all citizens of Namibia are totally and unequivocally supported by ACN.
- 6) That nevermind who had come to Namibia first and who had come here last. The crux of it all is that we are all here together now and we need each other to create a better tomorrow for God, man and country.
- 7) That agricultural land will be used for agricultural purposes only.
- 8) That agricultural land will be conserved in terms of the national conservation strategy.
- 9) That the production of crops and livestock, in terms of national policy, must be related to domestic requirements and export market opportunities.
- 10) That appropriate levels of productivity and utilisation, as determined by the appropriate authority, must be maintained.
- 11) That the infrastructure, credit, input, delivery, transport systems and marketing constraints in the communal, small scale commercial and resettlement areas will be overcome in order to ensure productivity. Further, the infrastructure, should be in place before farmers are resettled.
- 12) Employment opportunities must be maximised.
- 13) That the rate of resettlement matches up to the resources available, to meet the aspirations of the people, but without jeopardising national productivity.
- 14) That recommendations for the establishment of viable resettlement models appropriate to each agro-ecological region be made.
- 15) That special emphasis be placed on resettlement of farms on land with an undeveloped irrigation potential.

- 16) That recommendations be made on the qualifications and resources of persons to be resettled.
- 17) That all proposals and recommendations take into account resources available and be capable of successful implementation on the ground.
- 18) That all farmers be given the best available training, thus laying a solid foundation for the future of commercial agriculture.
- 19) That a body of responsible people, led by an eminent person whose impartiality and integrity is beyond reproach, be formed at national and regional levels, with full representation of all interested parties, who will determine the course of the resettlement programme, taking due cognisance of the Government's political requirements and the nation's stability and progress.
- 20) That in order to acquire land for resettlement with a minimum or no economic disruption, it will be essential to observe certain priorities. These having been worked out as follows, with categories (1) through (5) being the first priority for resettlement to the last:
 - 20.1) Existing unoccupied communal land.
 - 20.2) Unproductive land, irrespective of ownership.
 - 20.3) Land voluntarily offered for sale to the Government.
 - 20.4) Unproductive land owned by multi-national companies.
- 21) Land currently owned by the Government and or communally owned land, but not yet settled must clearly be the first priority for resettlement, together with land offered freely to the Government for purchase.
- 22) With regard to State's land, in view of land hunger and limited resources, there can be no justification whatsoever for the State participation in commercial farming operations other than through the role of core development of infrastructure for resettlement purposes.
- 23) The ACN, however, has no problem with land held by commercial farmers foreigners or multi-national organisations as it is our belief that there should be no discrimination of landowners in terms of either the number of properties they own and operate or the size of those properties, provided they are fully utilised and productive and create employment opportunities. One of the most serious issues facing Namibia at present is the question of unemployment, and as long as a producer is utilising his holdings fully, is productive and maximises employment opportunities, he should be no more prejudiced than a chain store owner, bus company or transport fleet owner.
- 24) History has repeated itself over and over through the years that when someone makes any attempt to take another man's land without at first reaching absolute consensus over the issue, such action inevitably leads to conflict, whether such land be undeveloped, communal or privately owned. Conflict is definitely not in the interest of economical development or national reconciliation and the promotion of foreign aid, investment and development.
- 25) The principle of land tax applied to commercial farmers is acceptable, but it must be based on economic principles to assure that it does not disrupt or harm economic production in any way.

- 26) It is evident that the first priority to be addressed is the development and upgrading of the communal farms, the creation of markets for their products, the acquiring and surveying of unoccupied land, the provision of infrastructure such as water supply, roads and fencing for these areas, the settling of prospective farmers.

It is realised that the cost of such an undertaking would run into hundreds of millions of Rands. It is clear that Namibia cannot generate this kind of money from own revenue. Only loans and grants from the international community could finance such a programme which is a prerequisite in settling this burning issue of land reform in national interest.

- 27) The colonial powers, the Republic of South Africa and West Germany, is indebted to Namibia to contribute through financial and other means, to an extraordinary development plan for the north, north-eastern and north-western regions of Namibia as both colonial powers had only developed those parts of Namibia that profited them best. The International Community as well as the United Nations are also indebted to contribute to the development of the northern regions as they in turn did nothing at all to compel the colonial powers to develop the said regions.

The magnitude of the part played by agriculture in the national economy, social dimensions and in political stability of our beloved country, demands that the land reform and land question be so resolved that it promotes above objectives. Namibia gained international acclaim not only with its democratic constitution, but more due to the fact that the Constitution was compiled after all the political parties in the National Assembly had reached consensus on the matter. More so Namibia must endeavour to become the pinnacle of democracy in Africa in yet again reaching consensus on land reform and the land question.

For its part, the ACN will not be found wanting in working with Government, at both the regional and national level, to map out a land strategy that will encourage farmers and those who wish Namibia to develop and prosper.