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PREFACE AND OVERVIEW

Preface

The fifth Annual Symposium of the Bank of Namibia on the topic Poverty, Income Inequality and Economic Development took place on August 22, 2003 at the Windhoek Country Club Resort. One of the objectives of the conference was to discuss the link between poverty and income inequality and their impact on economic development in Namibia.

It is important to point out that the Bank of Namibia supports and promotes economic policies that help to achieve sustainable economic growth, and which can reduce poverty and improve equity in the economy. On that basis, another main objective was therefore to identify effective policy strategies that assure that the benefits of the growth are shared equally among the population. For this reason, international experts in these fields have been invited by the Bank of Namibia to participate in the Annual Symposium and to share their knowledge and experiences with the view to contribute to the reduction of poverty in Namibia.

Overview and Reflections

Mr. Tom K. Alweendo, the Governor of the Bank of Namibia in his opening speech emphasized the importance of reducing poverty and achieving a more equal income distribution, so that everybody can benefit from economic growth. He emphasised that while, the interest of the Bank of Namibia is to promote economic policies that maintain monetary and financial stability and lead to economic growth, these policy should also be consistent with poverty alleviation and the improvement of equity.

Dr. Anne Epaulard from the International Monetary Fund presented a paper on Growth, Income Inequality, and Poverty Reduction in Namibia . The paper gives an overview of the key economic variables that describe the current status of poverty and income inequality in Namibia. Namibia has one of the highest GDP per capita among the Sub-Saharan African countries, but also has one of the most unequal income distribution in the world. The paper identifies three different scenarios for the evolution of income inequality and growth in Namibia. The plausible scenario, which takes into account a slow reduction of the inequality (the gini-coefficient of 0.63), shows that the annual growth rate needed to half the poverty rate within 10 years is 3.7 percent. These projections appear to be quite achievable. Finally, sectoral policies are believe to be more effective than overall macroeconomic policies in reducing income inequality.

In the paper "Economic Diversification, Income Inequality and Economic Development in Namibia , Prof. Samwel Wangwe from the Economic and Social Research Foundation, Tanzania, addresses the question how strategies that involve economic diversification can be formulated to reach a high and sustainable level of economic growth and simultaneously lead to poverty alleviation and a more equal income distribution. The paper concludes that economic diversification should be implemented on different levels, namely within the same sectors, into new sectors as well as in diversifying exports. Furthermore, Prof. Wangwe identifies productivity as a key contributor towards diversification and advises a shift from low to high productivity production systems. Special attention should be paid to the agriculture, the SME and the informal sector as well as to tourism, manufacturing and education.

Mr. R.L. Ritter (Economist), as a discussant, pointed out that economic diversification is a product of pursuing a policy of wealth creation through competitive advantages. He believes the objective rather should be to pursue competitive advantages and learning clusters within a framework of sustainable development. He further argues that Namibia has a small internal market and its future ability to grow will depend more on growing exports.

Prof. A. O. Akinboade from the University of South Africa presented a paper on Fiscal Policy, Income Inequality and Poverty Alleviation in Namibia . First, The paper acknowledges that Namibia has already made important strides in poverty reduction policies, which can be seen e.g. in the consistent fiscal spending on social services in several areas. The paper also gives a poverty profile of Namibia, revealing e.g. the fact that the vast majority of the poor lives in rural areas, and that the households headed by women are living in poverty more often than those headed by men. It is also affirmed that poverty is more pronounced, especially among the unemployed. The paper suggested that the tax policy could be considered and used as an instrument to achieve a more equal income distribution. A number of policy suggestions are made by the paper, which include the reforms of the school fee system, the health sector and the implementation of a revised social safety nets program. The discussant, John Steytler of the Bank of Namibia, complemented the paper for its detailed analysis on the role of fiscal policy. However, he cautioned that the analysis would be more meaningful if placed in the in the context of the Namibian economy.

COMMENTS ON LAND REFORM, INCOME INEQUALITY AND POVERTY ALLEVIATION BY DR. WOLFGANG WERNER AND LESSON TO BE LEARNED FROM OTHER AFRICAN COUNTRIES LAND REFORM PROCESSES

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1. INTRODUCTION

Namibia s colonial and apartheid experience mirrors that of other former settler colonies in Southern Africa, Central Africa and North African sub regional systems. The former settler colonies of South Africa, Zimbabwe, Kenya and Algeria experienced in their respective histories the following characteristics:

. a racially skewed land distribution with a minority settler population having a disproportionate share of the productive land resources;

. a dispossessed majority of the indigenous African population confined to the former home lands and ex-South African Development Trust areas (13 percent of the land surface area) in South Africa; the reserves in Zimbabwe comprising 40, 698.5 million hectares; the scheduled areas or reserves in Kenya which were located outside the so-called Kenyan highlands; and the traditional sector in Algeria;

. a dual system of land tenure rights (registrable, tradable and transferable land tenure rights for the minority settler population on the one hand and land tenure rights granted on the basis of unregistered customary law rights on the other hand for the majority of the indigenous African populations); and an agricultural productivity crisis in the peasant agricultural sub-sector accessioned by high levels of unemployment, low levels of incomes and consumption levels.

Following the attainment of independence, these former settler countries embarked on land tenure reforms[1] in order to redress the legacies in the land and agrarian

[1] According to Professor John Bruce (1998), land tenure reform refers to an institutional and structural process of redistributing not land but rights in land. It starts with property rights (such as ownership, leases, servitudes (praedal servitudes, personal servitudes, usurfruct, habitatio, sectional title and a bundle of rights as embedded in customary forms of tenure) which are formed of a bundle of more specific rights and duties. Tenure reform consists of the removal of some of these rights from the bundle and awarding them to others. It has also to do with the adjusting of the relative powers and responsibilities among the State, communities and individuals. While land may not change hands, the changes in the rights and responsibilities have long-term distributive implications in so far as the clans, communities, families, households or persons gain certain rights. Tenure reform therefore, is not just a matter of changing the rules regarding the property rights, but it has to do also with the implementation of the rules. The changing of the rules dealing with property rights requires the recognition and reorientation of the existing land administration institutions or the creation of new institutions to administer the land tenure rights on behalf of the owners of land.

sectors and to implement the reforms within the broader context of rural development. The extent to which these countries managed to bring about a symbiotic relationship between land tenure reform and rural development is an empirical question beyond the realm of this paper. However, the available literature suggests that none of these countries have been able to link land tenure reform with the general rural development strategy with the result that there has been a disjunctive between land policy and rural development strategy. The discussion that follows seeks to examine and analyse Namibia s approach to land tenure reform and rural development as articulated in Dr Werner s paper on land reform, income inequality and poverty reduction. The paper is divided into five sections. The first section of the paper deals with the general issues that need to be noted. The second section of the paper examines other substantive issues arising out of Dr Werner s paper. Section three examines and analyses Dr Werner s strategic options for dealing with the inherited colonial and apartheid legacy in land and agrarian relations. Section examines other possible options that could be entertained to deal with the same inherited legacies in the land and agrarian sectors in Namibia. Finally, section five brings into the examination and analysis of Dr Werner s paper, lessons from comparative experience with the implementation of land tenure reform programme.

SECTION 2: THE GENERAL ISSUES TO BE NOTED

2.1 The Current Conceptualization Issue of Land and Agrarian Reform Programmes in Namibia and South Africa: an Anomaly

The land and agrarian reform[2] programme in Namibia has been conceptualised as follows:

- redistributive land reform programme; tenure reform programme;

- development of unutilised communal land programme; and the affirmative action land scheme programme.

These programmes are designed to deal with the inherited legacies in the land and

[2] If land tenure reform has to do with the redistribution of property rights or rights in land as well as the forms of rights and their administration, agrarian reform according to F. Kuhnen (1982) can be defined as a bundle of measures for overcoming the obstacles to economic and social development that are based on the shortcomings in the agrarian structure. The bundle of measures for overcoming the obstacles to the economic and social development include both the conditions for land tenure (such as ownership, leases, servitudes (praedal servitudes, personal servitudes, usufruct, habitatio, sectional title and a bundle of rights as embedded in customary forms of tenure) known as reform of land ownership and those aspects of land use (such as farm size, supporting institutions) often called land management and administration reform.

agrarian structures in Namibia. The Namibian political economy is characterised by structural and institutional anomalies. The structural and institutional contours of inequality and poverty have their genesis in the colonial and apartheid inherited unequal distribution of land. According to Dr Werner, at independence in 1990, the land and agrarian structure was divided along racial lines. The commercial agricultural sub-sector, which was dominated by the white landowners and transnational corporations, had 36.2 million hectares of land and represented 44 percent of the total land area[3] . This agricultural sub-sector was held under freehold title. The sub-sector is still dominated by the white landowners and transnational corporations thirteen years after the attainment of independence.

The communal land areas on the other hand are made up of 33.4 million hectares of land and comprise 41 percent of the total land area[4]. The communal land agricultural sub-sector suffers from a number of constraints. Large tracts of land in this agricultural sub-sector are semi-desert and experience an annual rainfall ranging between 50 to 100mm. This means that a farming regime based on the growing of crops is impossible in the absence of any irrigation potential.

The inequalities in the income levels and consumption patterns are in large part a function of these colonial and apartheid legacies in the land and agrarian sectors. According to Dr Werner s paper, between 50 and 67 percent of all households are poor and 85 percent of these live in communal land areas. The skewed distribution of income and consumption patters in Namibia is not different from trends obtaining in other developing countries where only a small percentage of the population enjoys access to the means on the country's productive resources and wealth whilst the majority of the population lives in abject poverty. As purported by Werner, the richest 10 percent of the population receives 65 percent of income and consumes 44 percent of the total private consumption while 90 percent of the households consumes 56 percent of the total private consumption. Therefore, the gap between the poor and the rich is widening with the poor getting poorer and the rich becoming richer.

Unlike the Namibian programme, the South African land and agrarian reform programme rests on three legs namely, the restitution programme; the redistribution programme; and the tenure reform programme.

3 Ibid, p. 2.

4 Ibid, p. 2.

In South Africa, the restitution programme deals with the persons or communities disposed of property after 19 June 1913. The programme is a direct response to section 25(7) of the Constitution, which states that:

A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress [5].

Persons or communities described in section 25(7) of the Constitution were up to 31 December 1998 entitled to lodge a claim for restitution of that property or comparable redress. The Restitution of Land Rights Act, 1994 (Act No. 22 of 1994) was promulgated in 1994 to give effect to section 25(7) of the Constitution. In terms of this Act, claimants have a right to restitution of their rights in land. The restitution process addresses all options in terms of a possible restitution package. In this regard, restitution can take many forms such as:

. restoration of the land dispossessed; provision of alternative land; payment of compensation; alternative relief, including a combination of the above; and access to development.

By implication, there is neither guarantees of restoration to specific land of which a person or community was dispossessed nor is there any pre-determined position that a person or community may not be restored to such land.

The redistribution programme is the second leg of the South African land and agrarian reform programme. It aims to provide poor people including rural women with land for residential and productive purposes in order to improve their livelihoods. In this regard, the programme seeks to respond to the widely differing needs and aspirations of the rural people in a manner that is both equitable and affordable, and at the same time contributing to national economic growth and rural poverty reduction. The programme is also a response to the constitutional imperative, which states that

The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis [6].

5 The Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), p. 12.

6 Ibid, p. 12.

A formula was developed to deal with the unequal distribution of land along racial lines. To this end, land held by the white commercial farmers can only be acquired for the land and agrarian reform programme on a willing-buyer-willing-seller basis or expropriated with just and equitable compensation in terms of section 25 of the Constitution. The willing- buyer-willing-seller principle implied in the Constitution as well as the Expropriation Act, 1975 (Act No. 63 of 1975) provide for the ideological and legal basis for the implementation of the land and agrarian reforms in South Africa.

In terms of the Provision of Land And Assistance Act, a single and yet flexible grant mechanism to a maximum of R16 000 per household has been used to purchase land from the white commercial farm owners on a willing-buyer-willing-seller principle for the benefit of the rural poor including rural women. Between 1994 and 1999, land redistribution took several forms such as group settlement with some production; group production; commonage schemes; on and off-farm settlement of farm workers and farm occupiers; and farm worker equity schemes.

A range of additional financial resources have supported the basic grant. In this regard, the planning grant, facilitation and dispute resolution services have been provided to the land and agrarian reform beneficiaries as well. This approach to land and agrarian reform has been application or demand driven in that it has not involved the prior acquisition of land by the State for subsequent resettlement. As land has been both relatively costly and unavailable in small grant-sized parcels, people wishing to acquire land with the grant have had to form themselves into groups to acquire land on the open market.

Since June 1999, the scope for land and agrarian reform in South Africa has broadened to include bringing on board the black commercial farmers. The Land Redistribution for Agricultural Development sub-programme (LRAD) is de-signed to provide grants to black South African citizens to access land specifically for commercial agricultural purposes. In the context of the struggles against abject poverty characterising the vulnerable groups in society, LRAD

. provides an excellent vehicle for redressing gender imbalances in land access and land ownership;

. serves as a means of creating opportunities to enable the rural folk including women to develop in various spheres of life, thus giving them security against poverty and providing them with an independent economic status;

. ensures that the rural folk including women participate fully in asset redistribution and agrarian reforms; and

. helps government to meet its international commitments, for example in terms of the Beijing Platform for Action (1995) and the Convention on the Elimination of All Forms of Discrimination Against Women (1996).

The third leg of the land and agrarian reform in South Africa has been christened the tenure reform programme. It is seen as a distinct programme from the other two programmes. It aims to

. provide people with secure tenure in situ, that is on the place; or comparable redress where the security of tenure in situ is not possible;

. prevent arbitrary evictions of farm dwellers on white commercial farmland; provide for independent tenure rights for farm dwellers on white commercial farmland; and

. fulfill the constitutional requirement that all South African citizens must have access to land and legally secure tenure in land.

This programme, like the restitution and the redistribution programmes has its foundation in the Constitution. Section 25(6) of the Constitution states that

A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of parliament, either to tenure which is legally secure or to comparable redress[7].

It covers three main focal areas, namely; the former homelands and ex-South African Development Trust (SADT) areas; the former coloured areas; and the white commercial farm areas and peri-urban areas where farm workers, farm dwellers and labour tenants[8] are mainly found.

On the basis of the definition of land tenure reform provided for in footnote number one, it is argued that land tenure reform is the basis for the restructuring of the proprietary regime including the latter s institutional and administrative apparatus and that anything else other than land tenure reform is nothing but a mechanism for

7 Ibid, p. 12.

8 Labour tenants are people who are living on commercial farms with the right to occupy and use a piece of a farm in exchange for their labour to the white farm owner.

achieving land tenure reform. To appreciate this reasoning one needs to understand conceptually what land tenure and land tenure reform mean respectively.

2.2 The Conceptualisation of Land Tenure and Land tenure Reform in Namibia and South Africa

Land tenure has to do with the relationship between a community or group or a person and the physical entity called land. It defines the socio-economic and political relations between a category of people in respect of an object of tenure, that is land. This category of people could constitute a social phenomenon called a clan or a community or a person. In this context, there is a system which defines the ways in which clans, communities families, households or persons acquire, hold, transfer or transmit property rights in land. It is culture specific and at the same time dynamic.

In many African countries, the customary land tenure systems have undergone profound changes as a result of colonisation of the continent by the former imperial powers, the emergence of new land use practices, the commercialisation of land as well as the rising populations and so on. As a result of this customary tenure systems have been transformed. However, there has been change and continuity.

Such a land tenure system is made up of a bundle of rights. The bundle of rights relates to the following:

. the right of avail or access to land in order to gather fruits, grass and minerals and other essential s of life from the wilderness amongst other things.

. the right to use land for a variety of land use purposes such as

. cultivation, grazing livestock;

. making permanent structures and improvements on the land

. burying the dead; the right to occupy land; and

. the right to alienate land (that is the right to transmit land, transfer land, sell, lease, bequeath, subdivide and donate land).

Land tenure reform on the other hand refers to a planned change in a given land tenure system in the terms and conditions on which land is held, used, occupied,

held, owned, transmitted and transacted. It refers to the purposeful changing and implementing of the rules regarding how clans, communities or groups or persons relate to the land in terms of the bundle of rights alluded to above as well as how these entities organize themselves around an asset called land. Such planned change amongst other things requires the restructuring and the reorientation of the existing proprietary regime and the institutions or the administrative machinery that supports a particular proprietary regime or the creation of new institutions or structures to be responsible for administration of land and land rights[9] in order to facilitate the attainment of security of tenure by the clans, communities, groups, families, households or persons.

A major goal of land tenure reform is to enhance peoples land tenure rights with a view to delivering or securing tenure security. Tenure security is achieved when the members of a clan or members of a community or persons have rights to occupy a homestead; use the land for cultivation; graze livestock; to make permanent improvements on the land; bury the dead on the land; have access to the common property for various purposes.

Tenure security is also achieved when the members of a clan or the members of a community or persons have rights to transact; own the land and exclude others from the above listed bundle of rights at every level of social and political organization; and enforcement of the legal and administrative provisions of the law in order to protect their rights.

9 Land administration has to be understood within the context of a land tenure system. According to Dylan Rawlins and Ashley Westaway, (2000), a land tenure system differentiates between individuals exercising their rights within their bundle and a body of governance that must serve in the interest of the public good . In this context, land administration refers to a system of governance around the land and land tenure rights. It refers to a system of governance that underwrites the land tenure rights of communities or groups or households or families or individuals. It is through land administration that there is the authoritative allocation of the goods and services to the various members of a community or society. In this case, it is useful to see land administration as an instrument of a tenure system in so far as the regulation of the various rights in the bundle and the management of the communities natural resources are concerned. In concrete terms, the underwriting of the security of tenure of the members of clans or the members of communities or groups or households or families or persons is achieved by:
the enactment of laws relating to land tenure rights and the management of the land resources, setting norms and standards in regulations;
overseeing land surveying and conveyancing of land parcels, by coming up with land use plans to cater for various land needs;
providing spatial information for various land use purposes;
providing for an accessible system of mediation of disputes;
the surveying; and
the registration of deeds of transfer, or
the registration of notarial leases or certificate of registration as provided for in the Namibian Agricultural (Commercial) Land Reform Act, 1995 and the Communal Land Reform Act, 2003.

The nature and strength of property rights affect economic decision-making through their effects on the people s expectations of a return on their investment of labour and capital. In this regard, land tenure reform in Namibia and South Africa will indeed facilitate development and investment decisions and actions by rural folk, government institutions, and the private sector and will in turn benefit rural livelihoods, facilitate infrastructure developments, service provision and economic development if only it is accompanied by institutional and extension support. In this regard, land tenure reform is therefore, a necessary but not on its own, a sufficient condition for socio-economic development. It has to be accompanied by access to inputs, credit, extension services, transport, markets and government complementary actions to stimulate the rural economy. Only then can the full benefits of tenure reform be realised in terms of increased production of goods and services, growth and investment.

Having given a conceptual definition of land tenure and land tenure reform, it is abundantly clear that land tenure reform has to do with the reorganisation of society in terms of how the clans, communities or groups or persons relate to land and the strengthening of the clans, communities or persons security of tenure through the various land administration instruments. As noted in the discussion immediately above, land tenure reform is the basis for the restructuring or reorganization of a proprietary regime and the institutional and administrative order that sustains such a proprietary system. What is called redistributive land reform programme, development of unutilized communal land programme and affirmative action land schemes in Namibia and the restitution programme as well as the redistribution programme in South Africa are but instruments or mechanisms for achieving land tenure reform as defined in footnote number one. It is therefore, time that land tenure reform is properly located in Namibia as well as in South Africa political economies.

2.2.1 Asset Redistribution and the attendant tenure forms as elements of Land Tenure Reform in Namibia

With this understanding of land tenure reform as a basis structural and institutional change in the proprietary regime and the associated institutions, it stands to reason therefore, that the Land Reform Act and the National Resettlement Act in Namibia and the Restitution of Land Rights Act and the Provision of Land and Assistance Act in South Africa provide the legal framework for the implementation of land tenure reforms in the respective countries. These pieces of legislation are instruments for implementing the land tenure reform programmes in these two countries. They

facilitate the respective Governments efforts aimed at the restructuring and reorganisation of the proprietary regimes and the attendant institutions in order to achieve the development visions of the two countries. Dr Werner has in his paper uncritically the Namibia Government s problematic conceptualization of the land tenure reform programme. The perpetuation of this erroneous conceptualisation of the land tenure reform programme only leads to conceptual confusion.

Within the context of this argument, it is therefore, fitting to argue that land tenure reform in Namibia is being realised through the mechanisms such as

- redistributive land reform;

- development of unutilised communal land; and

- the affirmative action land schemes.

Redistributive land reform as mechanism for implementing a land tenure reform programme involves the purchasing of land from the white landed gentry on a willing-seller-willing-buyer principle and allocating it to clearly identified land tenure reform beneficiaries on the basis of a leasehold form of tenure. In this case, land tenure reform amongst other things, deals with the restructuring of a defective land tenure system that does not promote the participation of the majority of Namibian citizens in the generation of wealth, employment and income opportunities through the productive use of part of the 36.2 million hectares under freehold title.

Furthermore, from the vantagepoint of the reconceptualised land tenure reform programme in Namibia, the development of unutilised land in communal land areas is a second mechanism for implementing the land tenure reform programme. Seen from this perspective, land tenure reform in Namibia has also to do with the development of unused communal land for agricultural purposes. This is intended to deal with the malevolent neglect of the communal land areas by the colonial and apartheid State. It is planned that unutilised communal land will be brought to production thorough rearing of livestock primarily. Currently, approximately 1, 370 000 hectares of communal pasture have been identified in the central regions of the country and another 889 000 hectares of land in the Kavango region for the purposes of raising livestock on a commercial basis by the previously historically disadvantaged Namibians. The intention is to develop this hectarage into commercial farming units ranging in size between 3, 600 and 4, 000 hectares.

The Affirmative Action Loan Schemes are a third mechanism for implementing the land tenure reform programme. Through the Affirmative Action Loan Schemes, the previously historically disadvantaged persons are enabled to purchase commercial farms to participate in the macro economy on a full time or part time basis. These were first implemented in 1992. All in all, the implementation the land tenure reform programme in Namibia through the above mentioned mechanisms is aimed at the attainment of the development trajectory contemplated in the NDP 2 for the period 2001/2-2005/6.

Land tenure reform does not only entail asset redistribution through the mechanisms of redistributive lad reform as well as the development of unutilised communal land and the affirmative action loan schemes. It also involves institutional and administrative reforms. To this end, there are three institutional reforms contemplated in the Namibian land tenure reform programme. The first institutional reform relates to the introduction of new forms of tenure and the provision of legal recognition to the existing forms of tenure. However, those who have access to land through the redistributive land reform mechanism or the development of unutilised communal land mechanism or the Affirmative Action Loan Scheme mechanism do so on the basis of registrable leasehold rights as opposed to freehold title. It is clear from Dr Werner s paper that in the resettlement areas, there is one dominant tenure form, that is the leasehold right. According to Dr Werner s paper, the Agricultural (Commercial) Land Reform Act, 1995 provides for the granting of 99-year leasehold rights. Initially, the 99 year leasehold rights were granted with an option to buy an allocation after five years. However, the option to buy an allocation is no longer applicable.

However, those who receive land through the customary law processes do so on the basis of registrable customary law rights. The registration of customary law rights is a major achievement considering the fact that these rights have operated on the periphery of the formal legal system throughout the colonial and apartheid eras. The recognition of customary law rights through the registration process and procedures within a unitary survey and registration system in Namibia is an indication of the acceptance of the fact that these rights are indeed property rights. Colonialists did not want to accord such rights proprietary attributes. There was an assumption that such rights were like weeds and as such they were destined to wither away by virtue of their internal contradictions. The customary tenure system and the attendant land tenure rights have proved to be resilient contrary to the expectations of colonialists and their ideologists and they have afforded security of tenure to the majority of Namibians living under such tenure regimes.

Dr Werner informs his readers that in the communal land areas, two tenure forms are provided for and these are as follows: customary land rights; and leasehold rights.

Both the customary land rights and leasehold rights are registrable in terms of the Deeds Registry Act, 1937 (Act No.47 of 1937). In the case of a communal land right that has been registered, a certificate of registration is issued to the applicant. The Communal Land Reform Act, 2002 provides that a customary land right can be inherited through the offices of the Traditional Authority of a particular area. Leasehold rights in communal land areas are granted to the land tenure reform beneficiaries who access land in terms of the development of the unutilized communal land mechanism.

The provision of these tenure forms in the resettlement as well as in the communal land areas raises a number of questions that are not dealt with in Dr Werner s paper. The questions that arise areas follows:

. Why is the State in Namibia seeking to perpetuate the paternalistic notions of holding on behalf persons? What is the rationale for the retention of the State s ownership of land in the resettlement and communal land areas through the leasehold system?

. Does the provision of a leasehold system in communal land areas not lead to the reduction of communal land held in terms of customary law?

. How are gender issues taken care of in the registration of leasehold rights and customary land rights? and

. Can women own land independent of their spouses?

The granting of leasehold rights to the beneficiaries of tenure reform is problematic. A leasehold right is a limited right and the result of giving such a limited right to anyone is that the citizen remains perpetually dependent on the nanny State which continues to be the owner of the land in question. Since the leasehold rights are much weaker than freehold ownership rights, the implication of such an approach to institutional land tenure reform in Namibia is that at no point in the lives of the beneficiaries of land tenure reform will they ever become owners of land in their own right on an equal footing with their white compatriots. A further weakness of granting the leasehold tenure forms to beneficiaries of land tenure reform is that

this approach to institutional restructuring leaves a stronger element of discretion in the hands of the State with the consequent reduction in the strength and the status of the holder s rights.

This approach to institutional restructuring does not bring the previously disadvantaged persons in Namibia on an equal footing with the white owners of land in so far as the ownership of land is concerned. In so far as the ownership of land in title is concerned, there is no discretion given to the State. The law governing the ownership of land is not easy to change. It applies more evenly across the board to everyone. The discretion inherent in the leasehold system permits a possibility of unevenness in the exercise of that discretion. Do the Namibian people want such a system, which has its origins in the apartheid era? During the apartheid days, a leasehold system was developed specially for the Black people.

Dr Werner s paper does not give an insight into the rationale for the provision of a leasehold system. It can only be assumed that this tenure form has been motivated by the need to protect the vulnerable citizens of Namibia from the risks associated with the freehold tenure form. In South Africa, the opponents of the State divesting itself of the ownership of communal land have cited the example of Kenya as a bad model to follow in so far as the provision of freehold tenure form to persons is concerned. The critics of the Communal Land Rights Bill s approach to tenure reform in South Africa have argued that

> *Comparative experience in countries such as Kenya indicate that the titling approach has delivered few of the anticipated benefits. The net effect has been to increase landlessness with poorer families selling up their holdings and moving to the cities. The ongoing fragmentation and subdivision of plots have led to the creation of holdings that are not economically viable and worsen the circumstances of overcrowding with only real benefits accruing to the local elites* [10].

From the vantagepoint of the Kenyan experience with the titling programme it is the critics considered view that,

> *Private ownership by one individual/group, as established under the Bill,*

10 COSATU, Submission on the Draft Communal Land Rights Bill, Submitted to the Department of of Agriculture and Land Affairs, 17 December, 2002, p. 4.

may extinguish existing cropping and grazing rights of another person[11] .

Other critics of the South African approach to institutional land tenure reform have also argued that the granting of freehold ownership to communities and persons

would quickly lead to the destruction of rural, land-based communities. In pursuit of short-term benefit (the sale price of the individual s piece of land), long-term problems would be exacerbated. Such individuals-and their families and descendants- would no longer enjoy the self-sustaining link to land, crops or livestock which has historically guaranteed a minimum level of sustenance. An increase in urbanisation is likely, resulting in further growth of informal settlements[12].

In its criticism of the communal land Rights Bill, the Southern African Bishops Conference has maintained that

a commitment to environmental standards to the upgrading of agricultural skills, to the improvement of transport and marketing infrastructure, and to the provision of water and other essential inputs, can legitimately be expected of the owner if it is in a position to satisfy these needs[13]

and to this end, it is only the State that

... is in such a position, but the same cannot be said of the thousands of small, separate communities which will each assume ownership of discrete parcels of land [14] .

As part of the argument justifying the retention of the State s ownership of communal land the critics of the Communal Land Rights Bill in South Africa have pointed out that

what is urgently needed is rural development in the widest sense, not merely the handing-over of land to new owners who lack the resources to carry out the development themselves [15] .

11 Ibid, p. 4.

12 Southern African Catholics Bishops Conference, Comment on the Communal Land Rights Bill, 2002 (As published in the Government Gazette 23740 of 14th August 2002), pp. 3.

13 Ibid, p. 3.

14 Ibid, p. 3.

15 Ibid, p. 3

It is not clear from Dr Werner s paper whether the granting of leasehold rights in the resettlement and communal land areas in Namibia is motivated by similar considerations. In the South African situation, experience shows that neither the granting of ownership of land nor the denial of ownership of land or State ownership of land is the answer to the risks and problems identified by land activists, organs of civil society and church bodies. If the risk is the

. alienation of land leading to a social and economic problems of landlessness and land fragmentation; unwise disposals of land;

. lack of capacity and support to understand the roles and responsibilities associated with the ownership of land, its management and development;

. lack of resources; orpower struggles leading to the exploitation of the vulnerable sections of society and corruption

the answer does not lie in the nature of the right held by a community, family, household or a person but in the exercise, control and disposal of those rights and the provision of what is lacking such as

. the policy, legislative, institutional, material and technical support to communities, families, households or persons in an integrated governmental manner to enable the beneficiaries of land tenure reform to participate in the micro and macro social and economic environments;

. the empowerment of communities, families, households or persons in the ownership and sustainable management and administration of their land asset;

. the provision of the necessary resources and capacity and support to the land tenure reform beneficiaries so that they are able to understand the roles and responsibilities associated with the ownership of land, its management and development; and effective inter-governmental institutional arrangements.

The denial of ownership to a community, family, household or a person smacks of a gross injustice. Such denial of ownership rights to the land tenure reform beneficiaries may precipitate a constitutional challenge to such a policy position. It stands to reason therefore, that this anomaly must not be perpetuated. The policy of

providing only leasehold rights to Africans in communal land areas is in fact a continuation of the model adopted by the apartheid government. It is the continuation of a bifurcated State. It is a State in which the whites and well-resourced blacks are able to acquire land in full title. They are also able to take full advantage of the opportunities that full title in land presents to them. But the majority of the African people living in depressed rural communities are being confined to a different land dispensation and they have no choice but to continue to live as tenants on land owned by the state and are subject to the whims of that State.

Furthermore, the provision of leasehold rights to Africans in communal land areas amounts to the nationalization of communal land. If the intention is to nationalise communal land, the same policy should apply to the rest of the country presently held under freehold common law tenure form. In this case, there is a need to go first through the Tanzanian and Mozambican experience with the nationalisation of all land in order to level the playing field otherwise if this is not done the outcome will be socialism in one sector in so far as the socialisation of the means of production, that is communal land in the former homelands and the ex-South African Development Trust areas is concerned.

South Africa experience in this regard is different. The country is moving away from the inherited leasehold system because the State is of the view that the ownership of land is the strongest right that a clan, community, family, household or person can have. South Africa does not seek to own the land in the resettled land as well as in the communal land areas. In terms of the resettlement programme, the beneficiaries of land tenure reform are encouraged to come together as a group in order to consolidate their grants for the purposes of buying land as a group. The land so purchased by the State on a willing-buyer/willing-seller principle is then allocated to the beneficiaries. The beneficiaries then obtain a collective title deed to the land. The individual members rights are determined in terms of a trust deed or the Communal Property Association Constitution. However, access to land made available to individuals in terms of LRAD is on the basis of the individual freehold title. In the communal land areas, the State seeks to divest itself of the ownership of communal land. This means that the State or the Ingonyama Trust in KwaZulu-Natal will transfer communal land to the clans, communities, families, households or persons in ownership.

On the transfer of this land to its rightful owners, communal land will be privatised in the sense that this land will be owned privately by the clans and communities. The transferred land will cease to be registered in the name of the State or to be

held in trust by the Minister for Agriculture and Land Affairs or the Ingonyama. To this end therefore, the clans and communities will receive a title deed conveying the clan s or the community s ownership of the outer boundary of the land within the framework of a customary or communal land tenure system. Clearly therefore, the Communal Land Rights Bill empowers the Minister and the Ingonyama to divest themselves of the nomineeship or trusteeship status that they have on communal land. In this regard, the clans and communities are made the direct legal owners of communal land in the former homelands and ex-South Africa Development Trust areas. The paternalistic way in which communal land is now being held will be a thing of the past on the promulgation of the Communal land Rights Bill.

The Communal Land Rights Bill, 2003 contemplates introducing a new model of land ownership in communal land areas in South Africa. In setting out the new model of land ownership in communal land areas in terms of section 26(3), the Minister may determine that:

(a) the whole of an area of communal land which is or to be surveyed is to be or remain registered in the name of a specified community;

the whole of an area contemplated immediately above is to be subdivided into portions of land, each of which is to be registered in the name of a person and not a community; or

a part of an area contemplated in paragraph (a) is to be or remain registered in the name of a specified community, and part of such land is to be subdivided and registered as contemplated in paragraph (b);

an old order right is to be-

converted into ownership or into a new order right , and must determine the nature and the extent of such a right; or

cancelled in accordance with Chapter 4 and —

the land to which such right relates being incorporated into land held or to be held by a community; and

(bb) the holder of such right being awarded specified comparable redress as contemplated in Chapter 4 [16] .

16 I The Communal Land Rights Bill , 2003, pp. 22-23.

This new model of land ownership translates into the following tenure forms:

On one hand, section 26(3)(a) makes it possible for a clan or a community or a group to choose to hold and own land in terms of commonhold title. In terms of this tenure option, the outer boundary of the land would be registered in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937) in the name of the relevant community and not in the name of institutions or structures. The clan or community or group would be the owner of the outer boundary of land in full and free property/all rights or title or freehold ownership as the juristic persona. Within the framework of commonhold title, the members of a clan, community or group will have their old order rights confirmed or converted into ownership or a new order right or cancelled in accordance with Chapter 4 of the Bill by the Minister as contemplated in section 26(3)(d).

Section 26(3)(b) on the other hand provides for the individual freehold title to land. This gives effect to the wishes of many people to hold and own land in terms of freehold ownership. The effect of this is that those persons who wish to have their old order rights determined in terms of section 26(3)(b) will be able to enjoy the benefits of freehold ownership subject to the same common law, case law, statutory laws, the survey and the registration systems as they exist presently in South Africa. This is just an option provided for the beneficiaries of land tenure reform. It is not imposed on people. Furthermore, it is in line with the requirements of the White paper on South African Land Policy to the extent that the latter states that:

> *One of the options available to members of the group ownership systems will be to convert their rights into individual ownership as long as the decision is taken by the democratic majority*[17] .

Finally, section 26(3)(c) provides for the elements of both the communal form of tenure and individual freehold tenure. In this regard, there is a provision for a hybrid system of communal and freehold ownership of immovable property, that is land. This option is akin to the Communal Property Association model. However, unlike the Communal Property Associations model, the communal ownership of land in this model is diminished by the amount of land excised as a consequence of the formal surveyed residential, arable and business areas with consequent registration. This option is consistent with the requirements of the White Paper on South African Land Policy, which provide amongst other things that in some

[17] The White paper on South African Land Policy, September, 1998, p. 64.

situations, the members of the group ownership systems may

> *choose to individualize only certain areas and impose particular conditions in these areas* [18].

The guiding principles of tenure reform as stated in the White Paper on South African Land Policy provide that

> *Tenure reform must allow people to choose the tenure system which is appropriate to their circumstances* [19] .

In this regard, the National Government policy states that persons or communities contemplated in section 25(6) of the Constitution must be provided with a variety of tenure options to meet the differing needs and circumstances of all South African citizens. In terms of the White Paper on South African Land Policy, persons or communities are entitled to security of tenure under a variety of forms of tenure. It is abundantly clear therefore, that in terms of section 26(3), that the National Government has lived up to its promise as contemplated in the White paper on South African Land Policy to provide:

> *"forms of ownership which accommodate different choices including a combination of individually owned areas within group ownership systems. This may be done by amending existing laws to make current legal options accessible to people living under isolated rural conditions. The intention is to provide people with a range of options from which they can choose, it is also to design the system to be flexible to accommodate change over time "* [20].

Dr Werner s paper also points to the fact that both the customary land rights and leasehold rights are registrable in the Deeds Office. However, the paper is silent on how gender issues have been factored into the reform processes although there is mention of the fact that out of 1, 479 families resettled, a third of these families are female headed households. It is not clear whether the allocations of land are registered in the names of the women who head the 493 households that have been resettled to date. It is a commonly held view amongst many people that customary law is not gender sensitive.

18 Ibid, p. 64.
19 Ibid, p. 57.
20 Ibid, p. 64.

The assigning of the sole role to allocate land tenure rights to eligible applicants in terms of customary law to traditional leaders is problematic in the sense that it likely to perpetuate the gender inequities in the use and allocation, and ownership of land and access to land. Traditional leaders in Southern Africa come from a system of patriarchy. As long as this system of patriarchy remains what it is there is no hope that women issues will be taken seriously by the men folk. Despite the fact that a system of checks and balances exists in the sense that the Communal Land Rights Boards will control customary land and land tenure rights allocations and revocation of land tenure rights, Dr Werner s does not provide any clues as to the composition of the Communal Land Rights Boards. There is a possibility that these Boards are predominantly male in their composition.

The approach to vesting of land tenure rights to persons has not been taken lightly in South Africa especially where gender issues are at stake. In all the three tenure forms contemplated in section 26(3) of the Communal Lnad Rights Bill, the gender issues are taken on board actively. The new order rights of persons regarding residential sites, arable land and business sites are to be conferred and registered in the Deeds Office following the Minister s determination without gender discrimination as contemplated in section 26(4)(b). The subsequent new order rights granted by land administration committees in terms of section 32(2)(a)(i) following the Minister s determination as contemplated in section 26 will similarly be governed by section 26(4)(b) in so far as the gender relations are concerned.

In securing the position of a woman and her dignity, section 26(4)(b) states that in making a determination in terms of section 26(3), the Minister may:

(a) confer a new order right on a woman-

(i) who is a spouse of a male holder of an old order right, to be held jointly with her spouse;

(ii) who is the widow of a male holder of an old order right, or who otherwise succeeds to such right, to be held solely by such woman; or

(iii) in her own right and

validate a putative old order right which was acquired in good faith; and declare invalid such right which was not acquired in good faith; and

must determine the holder or the holders of a new right[21] .

This is a revolutionary statutory provision in that it provides justifiable discrimination in favour of the women. This is a necessary discriminatory provision intended to rectify the past discrimination against women in terms of law and practice. In terms of section 26(4)(b), a new order right can be held jointly by a man and woman who are married. Such a right can also be conferred on a woman who is a widow of a male holder of an old order right . She now qualifies to inherit such a right in her own right. Finally, section 26 makes it possible for a new order right to be conferred on a woman in her own right.

Dr Werner further informs his readers that the Communal Land Reform Act in Namibia also provides for the inheritance of customary allocations through the Traditional Authority of a particular area. He maintains that in terms of the provisions of the law, the

> *.rights to land will remain in a particular family for as long as the family wishes to keep them. Any other transfers of customary rights can only occur with the written consent of the Chief or Traditional Authority of a particular area*[22] *.*

This is indeed a scurry statutory provision. This statutory provision provides for the unstructured institutions of traditional leadership to make such fundamental decisions affecting the persons land tenure rights. Furthermore, Dr Werner s paper does not clarify what the future of the principle of male primogeniture in the proprietary regime is going to be in the scheme of things in Namibia. Does the Communal Land reform Act nullify the principle of male primogeniture in the same way as section 26(4)(b)(ii) and (iii) of the Communal Land Rights Bill does in South Africa? If it does not do so, gender inequities and inequalities in inheritance and succession procedures are protected within the existing legal system in Namibia.

On the issue of the registration of customary land tenure rights within a unitary registration system Namibia and South Africa share the same vision. In this regard, both the Communal Land Reform Act and the Communal Land Rights Bill seek to:

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21 Ibid, pp. 23-24.

22 Wolfgang Werner, Land Reform, Income Inequality and Poverty Alleviation , Paper presented at the Bank of Namibia Annual Symposium on Poverty, Income Inequality and Economic Development, 22 August 2003, Windhoek, p . 11.

. give legal recognition to customary land tenure rights ;

. confer legal security of tenure in terms of such rights;

. provide for the registration of customary land tenure rights within a unitary registration system; and make the rights secure and enforceable in courts.

However, Dr Werner s paper is not clear on the process followed in Namibia to recognise, confirm, confer and register the customary land tenure rights. In South Africa, the recognition, confirmation, conferment and registration of land tenure rights in situ upon communities and their members, families, households or persons as required by section 25(6) of the Constitution takes place where the factual and legal situation makes it is possible to do so. The objective situation can only be ascertained through a land rights inquiry process, which aims to unscramble the egg. In this regard, the strengthening and registration of land tenure rights in situation where it is possible must be considered as the first prize.

Where the factual and legal situation on the ground demonstrates that it is unlikely that the recognition, confirmation and conferral and the registration of land tenure rights in situ would lead to a legally secure tenure, it would not be prudent to proceed on the principle of obtaining the first prize at what ever cost. Where it is not possible to secure the first prize, the second best prize becomes the logical thing to aim for. The second best prize relates to the provision of comparable redress as contemplated in section 25(6) of the Constitution. This is one of the fundamental principles underpinning the Communal Land Rights Bill.

2.2.2 The Land Administration System of an element of Tenure Reform in Namibia

The second, institutional reform observable in the Namibian land tenure reform programme has to do with the setting up of the land administration system to manage and administer the land and land tenure rights of the members of the clans as well as the members of the respective communities in communal land areas. Land administration within a customary or communal tenure system is understood to refer to the management and administration of the land tenure rights of members of an African traditional community vis- -vis each other and the group as a whole as well as the sustainable management of the land resources of the community or group. In terms of customary law or the shared rules or the established practice of a clan or community, land administration refers to a system of determining access to land. Access rights granted in terms of customary law or shared rules or

established practice of a clan or community are trans-generational and carry an obligation of stewardship for the benefit of the present members of a clan or community as well as for posterity.

Furthermore, the access rights acquired by members of a clan or community are permanent and hence secure within the context of such a system. The fact that these rights vest in terms of specific functions also means that the use of the resources of the community is available to individuals as well as the collectives whether exclusively, concurrently or sequentially. The land tenure rights have a minimum content, such as secure access to a site on communal land etc, and a variable content, such as whether or not the rights may be alienated to people who are not members of the community.

In the regulation of the land tenure rights and the management of the natural resources whether in terms of classical western land administration systems or customary law or shared rules or established practice of a clan or community, a regulatory body is required to ensure that the members of a clan or a community exercise their land tenure rights and manage their natural resources in the interests of individuals and society and in a sustainable manner. To this end, the Communal Land Reform Act, 2003 provides for the recognition of the role of traditional leaders and the Traditional Authorities in the administration of communal land. In addition to providing a regulatory body to manage and administer the land tenure rights of the members of a clan or a community in Namibia, the Communal Land Reform Act also provides for the establishment of Communal Land Rights Boards whose purpose is to

. provide a system of checks and balances on the exercise of power and authority in land administration by traditional leaders and Traditional Authorities;

. control customary allocations and revocations of rights;

. recognise customary land rights;

. register a land right and issue a certificate of registration to the applicant; and

grant the leasehold rights subject to the consent of Traditional Authorities.

The role of traditional leaders in the administration of communal land in most of the Southern African Countries has been a subject of intense political debate.

Traditional leaders in these countries would like to have carte blanche powers in land administration in terms of customary law. There have been various responses to the issue of the role, powers and duties of traditional leaders in a democratic dispensation in the various countries in the Southern African sub-regional system. In Botswana, in terms of the Tribal Land Act of 1968, the power to allocate land tenure rights was taken away from the traditional leaders and given to the Land Boards. Since 1968, the traditional leaders in Botswana have operated on the periphery of the land administration in communal land areas. In the case of Namibia, Dr Werner s paper does not examine and analyse the nature and the extent of the political debates surrounding the issue of the role, powers and duties of traditional leaders in land administration in Namibia.

In Namibia, the Communal Land Reform Act recognizes and confirms the powers of traditional leaders to allocate and revoke land tenure rights within a status quo framework provided by the inherited colonial and apartheid laws dealing with land administration and traditional leadership. Dr Werner is not critical of the Namibian Government s approach to accept the status quo approach to the role of traditional leaders in the administration of communal land in Namibia. Despite this lack of critical awareness by Dr Werner regarding this approach to land administration in communal land areas in Namibia, he however tells his readers that the traditional leaders powers and duties to allocate land tenure rights to members of a communities is subject to approval of such allocations by the Communal Land Boards. This means that the wings of traditional leaders have been clipped in so far as their substantive powers and duties in land administration are concerned. They cannot do much because everything that they do is subject to the approval of the Communal Land Board. On the face of it, the traditional leaders think that they are important when in actual fact they are not. It is the role of the Communal Land Board to register the right so allocated by traditional leaders and to issue a certificate of registration to the applicant.

Dr Werner also does not tell his reader why the powers and duties of traditional leaders in land administration have been circumscribed. In a constitutional and democratic State such an action is an imperative. This is so because customary law, which governs land administration in communal land areas in Namibia, is weak on issues of fairness, accountability and the democratic forms of political suffrage. It appears that the subjecting of the decision-making processes of traditional leaders in matters related to land and land tenure rights of communities or persons to approval of the Communal Land Rights Boards in Namibia is therefore, aimed at

dealing with this lacuna.

South Africa s approach to the issue of the role, powers and duties of traditional leaders in land administration is far more radical than the position adopted by Namibia. South Africa has addressed the concerns of traditional leaders within the framework of the White Paper on South African Land Policy and the Constitution. The traditional leaders concerns have been accommodated in the

. establishment of the land administration committees;

. the composition of the land administration committees (traditional leaders have a participative role within the new institutional and administrative order as opposed to being given carte blanche power and duties in land administration);

. the composition of the Land Rights Boards(the traditional leaders are represented); and

. dispute resolution mechanisms through the customary courts as one of the courts of first instance.

The Communal Land Rights Bill provides that a community must in terms of its rules establish a land administration committee, which will be responsible for the administration of the community s land and the land tenure rights of persons. This statutory provision also provides for the de-establishment of a land administration committee if the latter is no longer required.

In so far as the accommodation of the traditional leaders concerns within the new institutional and administrative order is concerned, the Communal Land Rights Bill provides that a land administration committee established in terms of section 29 must comply with section 30(2) to (7) in its composition. In this regard, (2) (a) The recognised chieftainess, chief, headwoman or headman of the community concerned or her or his nominee must be a member of the relevant land administration committee by virtue of her or his office and, if provided for in the community rules, an additional number of persons nominated by the traditional leader to represent the traditional leadership of the community may be members of such committee up to a maximum of 25 percent of the total membership.

However, section 30(2)(b) introduces a proviso. This statutory provision states that there is dispute concerning the traditional leadership of a community, such a dispute

must be resolved as provided for in legislation governing such matters, or failing such legislation, by the Minister in the prescribed manner after consultation with the Minister of Provincial and Local Government and the Premier of the relevant province [23].

Furthermore, in an effort to democratise land administration in communal land areas, section 30 provides that

(3) The remainder of the members of the land administration committee must be persons not holding any position in traditional leadership and must be elected by the community.

(4) At least one third of the total membership must be women.

(5) Where applicable —

(a) one member must represent the interests of households headed by minors; and

(b) one member must represent the interests of persons with disabilities.

(6) One member must represent the interests of the youth as defined in section 1 of the National Youth Commission Act, 1996 (Act No. 19 of 1996) [24].

In addition to the processes contemplated in subsections 2 to 6 above, section 30(7) provides that each of the Minister for Agriculture and Land Affairs, the chairperson of the Land Rights Board, the relevant provincial Member of the Executive Committee for agriculture, the relevant provincial Member of the Executive Committee for provincial and local government and the council of the relevant local municipality or, failing a designation by such council, the council of the relevant district or metropolitan municipality, may designate an official or a member to attend meetings of a land administration committee as a non-voting but participating member of such committee [25].

The participation of the designated officials from the Department of Land Affairs, Department of Agriculture and organised local government are an assurance to all and sundry that the National Government is not abdicating its responsibility for the

23 Communal Land Rights Bill, op cit, pp.26.

24 Ibid, p. 27-28.

25 Ibid, pp. 26

development of these areas. As non-voting but participating members of land administration committees, these officials will be an invaluable asset to the land administration committees. The officials will be able to educate the owners of land about the Government policies and any matter related to their socio-economic and political development. Very often, expertise of various sorts is lacking in communities and these officials will thus provide the necessary expert advice regarding the management of the land and land tenure rights and the general development of these areas.

Unlike the Communal Land Reform Act in Namibia, the Communal Land Rights Bill in South Africa seeks to make a clean break with the past. It makes it clear that it will not be business as usual in so far as the administration of communal land is concerned. The role, powers and duties of traditional leaders in land administration as conferred upon them by the Black Authorities Act, 1951 (Act No. 68 of 1951) and the KwaZulu Amakhosi and Iziphakanyiswa Act, 1990 (Act No. 9 of 1990) will be governed by the Bill within the context of the new institutional and administrative order contemplated in sections 29, 30 and 32 of the Bill.

In South Africa, the transformational impact of the Communal Land Rights Bill is evident. It makes the composition of land administration committees broad based in order to overcome the legacy introduced and perpetuated by customary law as modified by colonialism and apartheid in terms of the Black Authorities Act and the KwaZulu Amakhosi and Iziphakanyiswa Act. It also includes the participation of other actors who hitherto have been excluded from participation in such institutions or structures. The compulsory inclusion of women in such institutions or structures is thus an indication of the National Government s commitment to gender equality and gender equity.

Although section 30(4) removes the dominance of males in the decision-making processes of the land administration committees in number, women can be their own enemies to the extent that they may because of the inertia of custom defer to men in so far as the making of decisions is concerned. In this regard, in order to maximise womens effective participation in land administration committees, the National, Provincial and local Governments must provide the necessary training to the land administration committees and in particular to women in order to reap the benefits of the Communal Land Rights Bill.

The land administration committees will perform the powers and duties contemplated in section 32 of the Communal Land Rights Bill. It is abundantly clear

that section 32(2)(a)(i) and (ii), (b) and (e) provides the most prized generic powers and duties of a land administration committee in land administration. This duty relates to the allocation of land and land tenure rights for residential and arable purposes to eligible members of a community and the resolution of land and land tenure rights disputes at the micro level of social and political organization, subject to rules and customs adapted to the requirements of the Bill of Rights.

Historically, the existing customary institutions or structures of traditional leadership have performed this function either within the framework of colonial and apartheid modified customary law following well-known community processes and procedures or within the framework of the administrative law introduced by the colonial State since the 1800s. Their role has been to grant residential and arable rights to eligible members of a community in terms of the colonial and apartheid modified customary law.

The land tenure rights so allocated remained outside the framework of the South African legal regime. They were partly brought into the framework of the South African legal regime only when the traditional leaders recommended to a magistrate the issuance of Permissions to Occupy (PTO) certificates. In KwaZulu-Natal, the Department of Traditional and Local Government Affairs under delegated authority from the Minister for Agriculture and Land Affairs issues the Permissions to Occupy to eligible applicants.

The envisaged role of traditional leaders in the new institutional and administrative order in South Africa differs markedly from that which obtains in Namibia. The role of traditional leaders in land administration is defined in terms of their participation in the land administration committees by virtue their offices. The land administration committees, of which the traditional leaders will be full members, will be responsible for the allocation of residential and arable allotments in terms of section 32 of the Communal Land Rights Bill amongst other things. The traditional leaders will also be represented in the Land Rights Boards. As members of the Land Rights Boards, they will be able to advise the minister on various land and land tenure rights issues affecting the members of the clans and communities. Furthermore, the traditional leaders will have a critical role to play in the resolution of land and land tenure rights disputes in terms of customary law in customary courts as one of the courts of first instance as contemplated in Chapter 6 of the Communal Land Rights Bill.

2.2.3 Provision of Institutional Support as an element of Land Tenure Reform

There is a third institutional reform, which is referred to, in Dr Werner s strategic options. The third institutional reform has to do with the provision of access to inputs, credit, extension services, transport, markets and government complementary actions to stimulate the rural economy. As argued in section 2.1 of this paper, it is only when this institutional reform is operationalised that the full benefits of land tenure reform delivered through the mechanisms of redistributive land reform, the development of unutilised communal land and the Affirmative Action Loan Schemes will lead to the attainment of the sustainable and equitable improvement in the quality of life of all people in Namibia . The discussion in section 3.1 makes a point that because of the existence of a disjunctive between land policy and rural development, the increased production of goods and services, growth and investment both at the micro and micro levels of the economy and the improvement of the quality of the life of the wretched of the earth remains an illusive goal for a number of countries in the Southern African sub regional system including Namibia.

2.3 The Speculative Analysis of the Impact of Tenure Reform Programme on the Socio-economic Situation of the Previously Historically Disadvantaged and Vulnerable Groups

Dr Werner s paper is weak on the impact analysis. Thirteen years following the attainment of independence, one would have expected that some evaluation studies would have been carried out either through the concerned Ministry s monitoring, research and evaluation systems as well as independent academic research. There is a need to know how Namibia has fared in the implementation of its tenure reform programme in terms of the following indicators:

- the extent and procedures of reform;
- land tenure structure; the macro-economy and its relation to reform;
- support and supplementary measures such as the following:
- extension and credit services;
- machinery;the provision of fertiliser, pesticides and improved seeds;
- the organisation of irrigation, transport and marketing facilities; and

. the provision of social infrastructure such as school and health facilities;

. farm investment, agricultural production and productivity;

. employment opportunities; income distribution;

. the incidence or the extent of rural-urban migration;

. beneficiary participation in decision-making processes related to planning and implementation of land tenure reform;

. the gender mainstreaming of the programme; and

. the HIV/AIDs mainstreaming of the programme;

There are a number of reasons that could be advanced to account for this gap in Dr Werner s paper. Assuming that data and information exists on the performance of the Namibian land tenure reform programme, it is possible that there was no adequate time given to the assembling, collation and analysis of data and information on the performance of the programme. There is also a possibility that data and information on the performance of the programme exists but it is not accessible for bureaucratic and political reasons. It is also possible that there is absolutely no data and information available to do an impact analysis of the Namibian land tenure reform programme. If this is the case, Dr Werner is not to blame. Given this situation, one wonders how the Ministry concerned plans its work in the absence of concrete data and information on the performance of the programme.

SECTION 3: OTHER SUBSTANTIVE ISSUES ARISING OUT OF DR WERNER S PAPER

A number of issues arise out of Dr Werner s paper, which needs to be flagged for discussion and consideration beyond this symposium. The issues are as follows:

. A misfit between land policy and rural development in Namibia;

. the slow pace of land delivery ;the criteria for participation in tenure reform as a beneficiary;

. the situation of farm workers within the Namibian land tenure reforms;

. tenure forms in the resettlement land and communal land areas;

. other institutional reforms in communal land areas; and the strategic options.

3.1 A Misfit between Land Policy and Rural Development in Namibia

Not withstanding the gaps apparent in Dr Werner s paper, he deserves to be given credit for acknowledging that there is a disjuncture between land policy and rural development strategy in Namibia. Faced with the legacy of colonialism and apartheid, Namibia s greatest challenge in the past thirteen years has been to balance the economic growth imperatives with the urgent need to redress the past injustices in the land and agrarian sectors. This balancing act has not been easy to attain. It is true that often in an attempt to strike this balance, the livelihood and development issues are compromised in favour of delivery on scale in terms of the numbers game. South Africa s experience with the implementation of its land tenure reform programme has demonstrated that such reforms should not be limited only to providing the previously disadvantaged persons with access to land but that the reforms should also address issues of sustainable livelihoods and development.

Dr Werner notes correctly that

> *While land reform is widely regarded to play a major role in alleviating poverty in the country, policy statements in this regard remain ambiguous* [26]

and

> *The Poverty Reduction Strategy for Namibia, does not accord* redistributive land reform a long -term role in poverty alleviation [27] .

The rationale for this disjunctive between the national land policy and Poverty Reduction Strategy has its basis in the policy makers putting a major emphasis on the deliverables that are tangible. The result of this has been that the equity considerations in so far as the asset distribution is concerned have been placed above strategies that deal with rural development. Furthermore, this approach has been justified in terms of the perceived weaknesses of the agricultural base in particularly in communal land areas in stimulating a sustainable basis for the socio-economic transformation in these areas.

26 Werner, op cit, p3
27 Ibid, p.3

Given this scenario, it is has been the view of the policy makers in Namibia that rural development will give way in the next twenty-five years to urban development. This is an erroneous view given the fact that both the industrial and manufacturing sectors are ill equipped to absorb large numbers of persons into productive employment in the near future. Furthermore, the State does not have the capacity to cater for the health, housing and other social needs of the persons migrating to the urban areas. The conclusion that the large majority of the country s inhabitants would have moved to the cities in a quarter century reflects no medium to long-term plan for rural development. This is a serious indictment for any country that has just emerged from the ashes of colonialism and apartheid. Namibia is not alone in this predicament. South Africa also suffers from a similar indictment. Recently, a Think Tank on land and agrarian reform noted that

The South African Government as well as some provincial governments have made several attempts to develop a viable rural development strategy, Yet land reform, particularly redistributive land reform, has remained an appendage to these policies rather than the central and driving force envisaged in the 1994 Reconstruction and Development Programme of the ANC [28].

According to the Think Tank ,

> *The misfit between land policy and rural development is most evident where land reform is being pursued by a government primarily as a quasi-constitutional right or a means of redressing past injustices, rather than as a basis for sustainable rural livelihoods. Even in the latter case, redistributive land reform is proving to be extremely difficult process to carry through. Redressing gross racial imbalances in land ownership is one thing; recreating sustainable livelihoods on the land is infinitely more difficult* [29].

In this regard, Dr Werner s introductory Chapter makes an important contribution to the debate on this issue. Land tenure reform should not merely be about asset redistribution in order to deal with the skewed land ownership patterns in Namibia. It should form part of a wider strategy of poverty reduction within the framework of rural development[30]. Asset redistribution should indeed be supported by the provision of institutional and structural support such as the provision of clinics,

28 Seeking Ways Out of the Impasse on Land Reform in Southern Africa: Notes From an Informal Think Tank Meeting, held at Manhattan Hotel, Pretoria, South Africa, 1-2 March 2003, p. 5.

29 Ibid, pp. 5-6.

30 Department of Land Affairs, Focus on Land Month in Land News, Volume 1 No.2 2003, p. 18.

roads, schools, and agricultural inputs and markets in order to provide for sustainable livelihoods and development[31]. To this end, Dr Werner s strategic options dealing with financial support, capacity building, monitoring and research become relevant.

3.2 The Slow Pace of Land Delivery

The Namibian tenure reform is similar to the South Africa s land reform programme; Zimbabwe s resettlement programme; and Kenya s Million acre schemes to the extent that these programmes have relied on a legal regime based on a willing-buyer/willing-seller principle to provide for asset redistribution. Algerian had a different experience. The flight of the French settlers following the workers revolution lead to an administrative vacuum in the management of the large and small commercial farms. The State was thus forced to take over the management of the farms in the interim pending decisions on how to allocate the farms to workers and the peasantry. Namibia s transition to independence notwithstanding the armed struggle that was waged for many years, did not lead to a chaotic situation in the land and agrarian sectors similar to the situation that obtained in Algeria, Angola and Mozambique following the violent decolonisation processes. In order to have the confidence of the commercial farming sector, the State in Namibia adopted the willing-buyer/willing-seller principle to effect asset redistribution. As a consequence of this strategy, the commercial farmland in the hands of white landowners has since 1990 been the target of the tenure reform programme.

How has Namibia fared in the area of asset redistribution through redistributive land reform mechanism? According to Dr Werner, by March 2003 the State had acquired 118 commercial farms comprising 709 568 hectares at a cost of N$ 105.4 million on the basis of the willing-buyer/willing-seller principle. Working within this framework, the amount of land that has been acquired is below a million hectares. In total, 1, 479 families or 8, 874 persons had been resettled by March 2003. Of the total numbers of persons resettled, 493 were female-headed households. Because of dearth of information, it is not clear whether or not the total figure of resettled persons includes those resettled on resettlement schemes on non-freehold land.

Namibia s performance in the area of asset redistribution over a period of thirteen years has been hardly impressive. Why is this so? According to Dr Werner, the reasons for this slow delivery of land to the land tenure reform beneficiaries can be

31 Ibid, p 18.

attributed to a number of factors. The limiting factors amongst other things

> *include a perceived unwillingness of commercial farmers to offer quality land to the state, inflated land prices, the lack of accredited valuation institutions resulting in prolonged negotiations and the cumbersome provisions of the Commercial (Agricultural) Land Reform Act of 1995* [32] *.*

Other factors that have hampered the implementation of the programme include the lack of adequate funding and a critical shortage of skills. These are the issues that the Namibian Government has to address to avoid a tinderbox situation that characterised Zimbabwe in 2000.

Although Dr Werner does allude to the issue of the slow pace of land delivery being in part a function of the willing-buyer/willing-seller principle, nowhere in the paper does he provide a clear conceptual definition of this principle. Furthermore, he is also silent on the debates surrounding the efficacy of this principle in the redistribution of wealth and power in agrarian societies. In the debates regarding the efficacy of the willing-buyer/willing-seller principle in dispensing redistributive justice to the poorest of the poor, there is a view, which holds

> *that in the market-led redistribution, the state works to correct for any market failures that exist (in land, capital, etc), and then stands back and allows the market mechanisms to drive the more efficient distribution of land* [33] *.*

This is a *laissez-faire* approach to the redistribution of wealth and power in the rural political economy. There is also a Statist argument surrounding the concept of willing-buyer/willing-seller. The proponents of the Statist approach to land tenure reform within market framework anticipate a significant ongoing role of the State in the form of the provision of capital to the willing buyers amongst other things[34]. Within these two perspectives, three levels of debates have ensued regarding the willing-buyer/willing-seller principle. At one level,

> *the debate concerns the question whether market mechanisms are preferable to non-market methods in pursuing the redistribution of land* [35]*.*

32 Werner, op cit, p. 22.
33 Ibid, p 1.
34 Ibid, p 1.
35 Ibid, p 1.

At another level, the debate has been about the efficacy of the market-based approaches in improving the quality of life of the poor, especially in the light of the various market imperfections that almost automatically discriminate against the poor. For example, it is argued that

> *those having acquired land through some sort of redistribution are likely to end up forfeiting it because imperfections in the capital markets are such that they are not able to use the land as profitably as would otherwise be possible* [36].

Finally, at a much more fundamental level, the debate is also about

> *whether the introduction of a market-oriented approach is an arbitrary legitimisation of the status quo pattern of land ownership- i.e. it presumes the assertion of property rights to existing property owners, regardless of the dubious means by which the land came into their ownership in the first place* [37].

Citing, Jeffrey Riedinger et al, 2000, Michael Aliber and Reuben Mokoena argue that an epic moment in these debates was reached at the International Conference on Agrarian Reform and Rural Development (ICARRD), held in the Philippines in December 2000. Jeffrey Riedinger presented a paper at this conference in which he came to the following conclusions:

. A market —based approach to agrarian reform will redistribute little land and benefit few landless families.

. A market-based approach to land reform is likely to be unaffordable to the would-be beneficiaries because the market value of land exceeds the agronomic value of the land.

. If implemented, large-scale market-based agrarian reform will drive up land prices, effectively excluding poor farmers from the benefits of reform.

. Would-be beneficiaries of market-based agrarian reform lack access to affordable private credit markets to finance their share of the land cost.

36 Ibid, p 2.
37 Ibid, p 2.

. The empirical record of market-based reforms offers little evidence that this approach will result in rapid or significant redistribution of land.

. Uncertainty in the agricultural sector can best be addressed by a clear commitment to rapid completion of conventional — compulsory acquisition-based-agrarian reform[38].

3.3 The Issue of the Criteria for Participation in the Tenure Reform Programme as a Beneficiary

The question of who is entitled to participate in the tenure reform programme in Namibia is a crucial one because amongst other things it has a bearing on the extent of land tenure reform in terms of the numbers game. In Namibia, one qualifies to participate in the programme on the basis of falling within the definition of previously historically disadvantaged Namibian as well as on the basis of one s lack of access to land. On reading Dr Werner s paper, it appears that no importance is placed on a discriminatory criterion. Income or class as a criterion for participation in the land reform programme is not a determinant. The implication of such a broad-based approach to beneficiary participation in the land tenure reform is that both the haves and the have-nots qualify to participate in the programme. If the objective is provide land to the tenure reform beneficiaries and particularly the poorest of the poor in order to reduce poverty envisaged in the Poverty Reduction Strategy, a policy and legislative approach that does not discriminate on the basis of income and class within a category of people dubbed previously historically disadvantaged Namibians is destined not to meet the needs of the poorest of the poor in Namibian society. Such an approach is likely to benefit the rich at the expense of the poorest of the poor with the result that the gap between the rich and the poor will increase exponentially.

It appears that the rich in the private and public sectors qualify for land allocation as long as they demonstrate a land need and also fall within the definition of the previously historically disadvantaged population. To what extent can such a broad approach to the question of the definition of a tenure reform beneficiary lead to the poorest of the poor (the San community, demobilised soldiers, the displaced, the destitute, people living with disabilities and persons from the overcrowded communal land areas) benefiting in reality and in practice from land tenure reform contemplated in the Land Reform Act and the National Resettlement Act? Although

38 Ibid, p 3.

the land tenure reform beneficiaries with more than 150 large stock units are excluded from participation in the resettlement programme, it is possible that such people have also benefited from the resettlement programme at the expense of the poorest of the poor in the absence of any monitoring and enforcement mechanisms. Given the opportunities that exist in this programme for the haves in the Namibian society to benefit disproportionately from the programme in relation to the have-nots, a discriminatory criterion should be factored into the selection processes.

In South Africa, LRAD offers grants to previously historically disadvantaged persons. The LRAD gives grants on a sliding scale with the effect that those with other resources getting access to a bigger grant. The poor by virtue of their station in life remain at the lowest point of the sliding grant system. Both the Namibian and South African approaches to land reform are flawed in that in terms of the income criterions, the poorest of the poor are not necessarily the targets.

Over and above purchasing land and allocating such land to the broad categories of tenure reform beneficiaries, the tenure reform programme in Namibia also seeks to bring about an improvement in the standards of living of the previously historically disadvantaged persons by transforming the large scale commercial farm land into small-scale units. The National Land Policy makes provision for the subdivision of large scale farming units into smaller but economically viable units. It is unclear what an economically viable unit is. In South Africa, there is an ongoing debate in respect of the LRAD regarding the issue of an economically viable farming unit. Although there is an attempt by the Namibian Central Bureau of Statistics to provide guidance on this issue, this question is dependant on a variety of factors e.g., type of enterprise, quality of land (soils, grasses and rainfall) Skills, the list is endless. Using these guidelines, it is unclear from Dr Werner s paper what constitutes an economically viable farm size in Namibia.

3.4 The Situation of Farm Workers within the Namibian Land and Agrarian Reform Programmes

There is no indication in Dr Werner s paper of why there is no specific programme in Namibia, which targets farm workers specifically. It appears that there are no advocacy groups lobbying for the inclusion of the issues affecting the farm workers into the broader tenure reform policy. In South Africa, the Non-governmental organizations (NGOs) that represent the interests of farm workers and labour tenants are in regular contact with government and often add richness to the debate

that would be otherwise missing. The experience in South Africa is that if the issues of farm workers are left to the redistribution programme as currently constituted, they get left behind or forgotten about. In the context of the existing tenure reform programme in South Africa the State has introduces legislation, which is specific to farm workers and labour tenants. The programme looks at and tries to address the issues, which lead to illegal evictions, joblessness and landlessness among farm dwellers.

The response to the crisis in the Omaheke Region seems which was to follow the recommendations of the Commission of Inquiry into Labour-related Matters Affecting Agricultural and Domestic employees seems to be a step in the right direction. However, in the absence of a clear programmatic approach from government, the well-intentioned recommendations from this Commission could have a negative impact on the lives of farm dwellers. For example, one of the recommendations cited relates to the government considering purchasing privately owned land in selected areas for the resettlement of currently employed or retired agricultural employees and their dependants[39]. The South African experience has been that the focus on tenure reform for farm dwellers often is narrowly on the need for residential security and leaving out any livelihood issues. The South African experience has shown that farm workers or farm dwellers are in need of more than a residential site, but also access to productive land. Access to productive land will give the rural poor an opportunity to engage in mixed livelihood activities that allow them to supplement their household nutritional needs and/or continue to provide their labour to commercial farmers.

The recommendation that loans be made available to agricultural workers to buy into going concerns has risks. The agricultural workers are best protected if their tenure rights are separate from the business concern. If this is not done the workers will be left landless and homeless if the business fails. The allocation of State land should only be considered if it is nearby or adjacent to commercial agricultural land. In South Africa, most of the communal land areas are not situated near productive commercial farms. Offering State land to farm workers therefore, takes them far away from agricultural employment. If workers want to remain with their families, have access to some productive land, and also have the option of providing their labour in the agricultural sector, then they will have to be given land that is situated in these areas, not in remote areas that forces them to travel long distances for farm employment and to become tenants on commercial farms.

39 Werner, op cit, p.20.

In the absence of a clear programmatic approach to land rights for farm dwellers, it is impossible for any government to adequately address the complex issues and develop appropriate policy and legislation to guarantee that this vulnerable group is not left out of tenure reform.

SECTION 4: DR WERNER S STRATEGIC OPTIONS FOR DEALING WITH THE APARTHEID LEGACY IN THE LAND AND AGRARIAN SECTORS

It is abundantly clear that Riedinger et al have no faith in the market-based land and agrarian reforms. It is within the context of these debates and the position taken by Jeffrey Riedinger et al on the efficacy of the market-based mechanisms in facilitating the redistribution of wealth and power in agrarian societies, that Dr Werner s discussion regarding the slow pace of land delivery to the previously historically disadvantaged Namibians and the presentation of the strategic options should have been located.

Without giving the reader the benefit of engaging with the arguments presented in the debates, Dr Werner goes on to present a number of strategic options aimed at dealing with the slow pace of land delivery in Namibia. The following are some of the options examined and analysed in Dr Werner s paper:

. encouraging the subdivision of commercial farms; use of town lands to provide for future expansion of towns;

. decentralisation of land acquisition and resettlement;

. settler selection and access to off-farm income; financial support;

. joint venture partnerships; capacity building; and monitoring and research.

Of the eight strategic options Dr Werner examines and analyses, only four of these are relevant to the discussion related to speeding up land delivery to the land tenure reform beneficiaries. The strategic options in question relate to the need to encouraging the subdivision of commercial farms; using town lands to increase access to land; the provision of joint venture partnerships; and decentralising land acquisition and resettlement.

Each of the strategic options presented by Dr Werner is examined and analysed in the discussion that follows.

4.1 The subdivision of Commercial Farms

Dr Werner is of the view that one way of making land available on the market is by way of subdividing white commercial farmland in Namibia. This is also motivated by the philosophy articulated by R Schumaker that small is beautiful. This allows the benefits of agriculture to be shared amongst large numbers of people in an equitable and sustainable manner. While the subdivision of commercial farms may have this effect, in the Namibian agro-ecological and climatic conditions, it is clear that such a proposal is an enemy of the of the economies of scale. There is also the vulnerability of small-scale farms to drought in Namibia that has to be taken into account. Since drought is a permanent feature of the Namibian agriculture, small-scale farms are unable to pursue several strategies to cope with drought. In the Namibian agro-ecological and climatic conditions, small is not necessarily beautiful. It could have disastrous consequences for the socio-economic development of the land tenure reform beneficiaries.

The subdivision of commercial farms could have an unintended consequence of fragmentation of land unless there are strict controls. Fortunately, the sub division of commercial farms in Namibia is still governed by the Sub-Division of Agricultural Land Act, 1970 (Act No. 70 of 1970). The Act requires that the Minister of Agriculture has to give consent before a subdivision of a land can take place. In effect, the Act optimises the minimum size of land. Despite the existence of this Act, sub division by inheritance in terms of customary law may continue to take place. This is the most natural process by which land in agrarian societies becomes subdivided. The sub division of land by inheritance could lead to a situation where there are sub-economic units of land that cannot be used to generate wealth, employment opportunities as well as income earnings.

The efficacy of this strategic option in accelerating asset redistribution is questionable. In any case, commercial land has to be obtained in the market place on a willing-buyer/willing-seller principle before it can be subdivided and allocated to a number of tenure reform beneficiaries. One has to remove whatever constraints have existed in the past thirteen years militating against the accelerated land delivery before considering the issue of the subdivision of commercial farmland. Furthermore, given the unfavourable agro-ecological and climatic conditions obtaining in Namibia, it would not be a prudent policy to subdivide commercial farmland willy-nilly.

4.2 The Use of Townlands Option as a way of Increasing Access to Land

Dr Werner is also of the view that the use of townlands can go a long way towards increasing access to land by the previously historically disadvantaged Namibians for the purposes of improving their quality of life. He argues that there are approximately 350 000 hectares of land registered in the name of municipalities. Most of this land is fairly well developed into grazing camps and stock watering points. Currently, this land is leased to stock farmers for grazing purposes on a tender basis. Although the target population for this strategy is the urban poor, it is not immediately clear whether the beneficiaries of this strategy will be collectives or groups or individuals. Since the focus of this strategy is the urban poor, by implication the rural poor are excluded from benefiting from the provision of access to land in terms of the townlands strategic option. The exclusion of the rural poor from this strategy seems to contradict the policy providing for urban development in the next twenty-five years. However, the exclusion of the rural poor from this strategy is probably

called for otherwise the inclusion of the rural poor would lead to rural-urban migration. Assuming that there was an open policy, the amount of land available for allocation to the beneficiaries is not sufficient to meet the demand for land. The townlands approach to asset redistribution is a possible option. But it is limited way of increasing access to land for the benefit of the previously historically disadvantaged Namibians. It can only contribute minutely to the reduction of the 36.2 million hectares of land currently in the hands of the white landowners.

4.3 The Joint Venture Partnerships in Land-based Enterprises as a Way to Increase Access to Land

The implementation of joint venture partnerships is also proposed as a possible strategic option in the efforts to speed up land delivery to the previously historically disadvantaged Namibians. According to Dr Werner, joint venture partnerships are mechanisms for the participation of workers as co-owners of land-based enterprises. In South Africa share equity schemes have been developed to achieve a similar purpose. In South Africa, in terms of the share equity schemes, the farm workers are enabled through the governmental grant system to buy into an ongoing land-based business enterprise. The grant given to the farm workers is used to purchase shares in the enterprise in question.

In practice a number of problems have surfaced in South Africa in the opreationalisation of the equity share schemes. Although technically, the farm

workers are equal partners in the enterprise with the former enterprise owners, the latter have tended to treat the former farm workers as ordinary farm workers to be used to enrich the white enterprise owner. Notwithstanding the partnership that has been created, in practice it has been business as usual. Experience gained in South Africa shows that the former white enterprise owners have not imparted business and management skills to former farm workers who are now co-owners of the land-based business enterprise. To the extent that this has been the case, the share equity schemes in general have not been the viable mechanisms for socio-economic transformation in favour of the former farm workers.

The relationship between the former white land-based enterprise owner and the former farm workers has been in general unequal from the point of view of the benefits arising from the enterprise as well as the provision of the necessary skills to run the enterprise. There have been cases in South Africa where the former white enterprise owners have walked out of the partnership leaving the former farm workers vulnerable. Lacking in the business and management skills, such enterprises have tended to collapse. Where loans have been obtained from financial institutions, the latter have sequestrated the land-based enterprises leaving the former farm workers landless and with no means for generating a living. Given such an experience, the joint venture partnerships can hardly be taken seriously as vehicles for speeding up access to land for the benefit of the previously historically disadvantaged Namibians.

4.4 The Decentralisation of Land Acquisition and Resettlement as a Way to Speed up Land Delivery

The decentralisation of land acquisition and resettlement is proposed as yet another strategic option that can facilitate the speedy delivery of land in Namibia. According to Dr Werner, the current processes of land acquisition remain highly centralised. The decentralisation of land acquisition and its allocation to the beneficiaries in this manner is likely to accelerate the process of asset redistribution. It may also facilitate a better match between the available land and the needs and expectations of the prospective settlers as well as the increased involvement of the beneficiaries in the planning and implementation of their own resettlement. It is conceded that this option is

only feasible if more resources are made available to the Ministry of Lands, both financial and technical [40].

40 Ibid, p 27.

This option is indeed endorsed in the light of the direction South Africa has taken in the last two years towards decentralising the implementation of land tenure reform.

If the position taken by Jeffrey Riedinger et al at the ICARRD in December 2000 is anything to go by, it is abundantly clear that the pursuit of the suggested strategic options would have a minimal impact in speeding up land delivery to the poor in Namibia. The options only provide a palliative solution. They all operate within the framework of a market-based agrarian reform that Riedinger et al have condemned[41]. This suggests that non-market mechanisms such as expropriation of the land belonging to the landed gentry coupled with the payment of just and equitable compensation or in Riedinger s terminology-the compulsory acquisition-based-agrarian reform, may enable Namibia to get out of the quagmire of the slow pace of land delivery to the previously historically disadvantaged Namibians.

The other strategic options dealing with financial support, capacity building and monitoring and research that Dr Werner examines and analyses have nothing to do with the speeding up of land delivery to the previously historically disadvantaged Namibians. These strategic objectives are only necessary to support asset redistribution. Once land has been acquired from the white landowners on a willing-buyer/willing-seller principle and allocated to the land tenure reform beneficiaries, the financial support, capacity building and monitoring and research kick in to provide the necessary support in the generation of wealth, employment and income opportunities for the wretched of the earth to use Frantz Fanon s concept.

SECTION 5: OTHER POSSIBLE OPTIONS THAT COULD BE USED TO DEAL WITH THE APARTHEID LEGACY IN THE LAND AND AGRARIAN SECTORS

Apart from the strategic options presented in Dr Werner s paper, what other options can be explored to facilitate the speeding up of land delivery to the previously historically disadvantaged Namibians? The following options also needed to have been explored in Dr Werner s paper:

. the implementation of a solatium option; the expropriation of commercial farmland; and the land invasions by the wretched of the earth

41 According to F Kuhnen, 1982, agrarian reform can be defined as a bundle of measures for overcoming the obstacles to economic and social development that are based on the shortcomings in the agrarian structure. Agrarian reform includes both the conditions for land tenure (like ownership, lease etc) known as the reform of land ownership and those aspects of land use (like farm size, supporting institutions) called land management reform.

5.1 The Implementation of a Solatium Option

It is common knowledge that not every white landowner in Namibia is prepared to get out of the farming business at this point in time. It stands to reason therefore, that one of the options the Namibian Government can adopt is to consider making an offer the white landowners cannot refuse. This may take the form of paying the white commercial farm owners the market value of their land plus a minimum of 10 percent over and above the market value of the land in question. This is what is called a solatium option. This option is used in many countries including South Africa. The beauty of this option is that it can be operationalised outside the context of expropriation law. The effect of this option is that it creates the incentive for the white landowners to release land for the land tenure reform programme. It is not immediately clear from Dr Werner s paper why the Namibian Government has not considered the solatium option in its dealings with the white landowners in the past thirteen years. In the absence of such an incentive, there is nothing that will make the white landowners to voluntarily give up their farmland in order to provide land for the land tenure reform programme.

This option has fundamental problems that effect the essence of land tenure reform. Namibia cannot afford to pay a solatium to the landed gentry and still have a land tenure reform that will benefit a large number of landless and land needy persons. Tenure reform implies much more than the purchase of land or resale of real estate. Land tenure reform involves the redistribution of wealth and power in the rural landscape. Paying a solatium to the landed gentry in Namibia would be inconsistent with the major thrust of tenure reform dealing with the redistribution of wealth and power in the rural political economy. Furthermore, there may be problems with the operationalisation of the solatium option in the sense that the Government fiscus is always limited and it has to be utilised within the context of competing priorities. At the end of the day, it is up to the Namibians to decide whether or not this option will enable them to achieve their development vision as contemplated in the NDP 2 for the period 2001/2-2005/6.

5.2 The Expropriation of Commercial Farmland

It is interesting to note also that notwithstanding the statutory provision providing for the preferential right of the State to purchase commercial farmland and the expropriation of the white commercial farmland provided for in the Agricultural (Commercial) Land Reform Act, 1995, the speedy delivery of land to the land tenure

reform beneficiaries has eluded the post-colonial State in Namibia. The statutory provisions alluded to above clearly empower the State to intervene in the land market. Why have these statutory provisions not been applied in the past thirteen years? Dr Werner s paper does not provide any clues at all on whether or not these provisions have ever been applied. There is virtually no discussion of the expropriation of white commercial farmland as a possible strategic option to the slow delivery of land to the tenure reform beneficiaries.

One would like to think that expropriation law exists in Namibia and that it is used many a time in the expropriating land for roads, parks and other public infrastructure. If this is the case, there is reason to believe that the same law can be used to expropriate white farmland with just and equitable compensation[42]. The content of the expropriation provisions must amongst other things provide for the legal classification as to which white commercial farmlands are subject to expropriation as well as the various criteria that condition their acquisition. The existence of this legal classification of the targeted land and the criteria for the acquisition of the land in question provide an accurate indicator of the potential reach of any land tenure reform law. However, it would appear that there is no legal classification of the commercial farmland to be targeted for expropriation in Namibia. Furthermore, there is no criteria guiding the acquisition of such land. In the absence of these, it stands to reason that there is no readiness or political will to use the expropriation provisions of the existing law as a means to acquiring land for land tenure reform purposes. If this is a plausible scenario, why should any white landowner sell their land when the Government is not in a position to compelling them to doing so? The white landowners are not desperate to sell their land and they can only do so if the Government is in a position to making an offer they cannot refuse. Alternatively, the white landowners can only part with their land through legal compulsion in the form of expropriation law that takes into account the legal

42 In terms of the South African Constitution, just and equitable compensation refers to a compensation reflecting an equitable balance between the public interest and the interests of those whose properties are to be expropriated, 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. In the formulation of section 25(3) of the Constitution of the Republic of South Africa, the drafters of this legal document may have been influenced by the fact that South Africa could not afford to base compensation for expropriated properties solely on their market value and still have a land tenure reform that will benefit a large number of landless and land needy persons. As seen from the discussion of the solatium option in section 3.2.6 of this paper, tenure reform implies much more than the purchase of property or resale of real estate. In essence, it involves the redistribution of wealth and power. In this case, the compensation of the expropriated properties solely on their market value is inconsistent with this objective.

classification of land to be expropriated and the criteria for expropriating such land.

In the absence any information on why the State has not used the available expropriation mechanisms to acquire white commercial farm land, anything that one says is speculative. However, it is possible that the expropriation option has not been seriously countenanced in Namibia notwithstanding the fact that there are over 120 properties earmarked for expropriation. There are problems associated with delays and costs. Furthermore, expropriation evokes negative connotations that make the politicians to be wary of venturing into a terrain where angels fear to tread.

Notwithstanding whatever problems exist regarding the use of expropriation mechanisms in Namibia, the mere presence of the expropriation provisions giving legal classification of land to be expropriated and the criteria for the acquisition of such land coupled with the State s obligation to pay just and equitable compensation could lead to a market situation where the white commercial land owners would be more willing to sell land at negotiated market related prices. The rationale for subjecting the white commercial farmland in Namibia to expropriation would amongst other things include the following factors:

. the unequal distribution of land along racial lines;

. the excess land not fulfilling a social and economic function[43] ;

. the corporate ownership of large tracks of land[44] ;

. the pending expropriation cases[45] ;

. the unauthorised sub-divisions of land[46] ;

43 In terms of this criteria of acquisition of land for land tenure reform purposes, all rural properties in excess of a particular size of irrigated land regardless of their efficiency would be expropriated.

44 This refers to all farms owned by corporations and legal persons.

45 This refers to properties over which expropriation proceedings are pending. In Namibia, according to news paper reports, there are about 120 properties targeted for expropriation. It is not immediately clear what the basis for targeting these properties for expropriation is.

46 This refers to sub-divisions of land that take place informally by the landed gentry in anticipation of expropriation laws. There could be properties larger than is socially acceptable that were subdivided informally before the enactment of the Agricultural (Commercial) Land Reform Act, 1995 by the landed gentry in Namibia to in order to avoid this law.

47 This refers to land that is abandoned or poorly exploited farms of any size, that is unutilised or underutilised farms.

48 These are farms owned by absentee land owners living in South Africa or Germany or elsewhere outside Namibia.

. the low productive land[47] ; and the absentee ownership of land[48]

If the legal classification of land to be expropriated and the criteria for the expropriation of white commercial farmland does not exist in the current land reform laws in Namibia, the Government would have to engage the services of lawyers, agronomists and economists to come up with the necessary legal requirements. The services of these professionals do not always come cheap.

The threat of expropriating the land so classified would thus provide the necessary incentives to white landowners to sell commercial farmland required for the purposes of land tenure reform to the State voluntarily. This would have the effect of increasing the numbers of farms offered to the land tenure reform programme by the white farm owners. With the presence of the expropriation provisions in the land reform law, any white land owner who is not willing to sell their land at all despite the fact that the land in question is needed for tenure reform purposes, would be more inclined to sell if they know that expropriation of their land is the only option available to effect asset redistribution in terms of the rationale for subjecting properties to expropriation and that the Government is committed and fully prepared to apply the provisions of the law without fear or favour. Furthermore, any white land owner who is willing to sell their land but at an inflated price, will know that in the event of any expropriation of their land, they would only be entitled to a just and equitable compensation as provided for in the Constitution and not necessarily to market prices although the market value of the land would form the basis for any transaction between the protagonists, that is the Government and the landed gentry. In this regard, the expropriation of commercial farmland for tenure reform purposes in Namibia would thus go a long way towards preventing the development of a tinderbox situation.

5.3 Encouragement of Land Invasions by the Wretched of the Earth to Effect the Redistribution of Wealth and Power

It is interesting that Dr Werner s paper is singularly silent on the issue of land invasion as a way to speed upland delivery in Namibia. There is a need to examine and analyse the efficacy of the land invasion or occupation approach as a strategy for dealing with the inherited institutional and structural legacies in the land and agrarian sectors in Namibia. Land invasions or occupations can have the effect of altering the wealth and power balance between the landed gentry and the wretched of the earth provided that there is a vanguard political party to canalise the aspirations of the wretched of the earth . International experience on this

phenomenon shows that in instances where land invasions or occupations have occurred, nationalistic Governments have tended to prioritize those areas that have been illegally occupied in their land tenure reform agendas by bringing all the resources to bear on the event associated with the land invasions or occupations. However, from the perspective of the South African Government, land invasions or occupations are incidents, which are not part of the total strategy to effect wealth and other resource transfers in land and agrarian sectors from the privileged landed gentry to the wretched of the earth .

The land invasion or occupation approach distracts Government from its central vision of bringing about an orderly implementation of the constitutionally mandated land tenure reform programme. It interferes with the balancing act. The balancing act refers to the tradeoffs that need to be made in order to maximize the achievement of both the equity and production with growth imperatives. Time and resources are lost in this crisis management situation. This in turn sets a wrong precedent to all land hungry people, and those who are awaiting their turn in the queue. In effect, land invasion as an approach to speeding up land delivery prejudices those who abide by the law and reward lawbreakers.

SECTION 6: LESSONS FROM A COMPARATIVE PERSPECTIVE WITH THE IMPLEMENTATION OF LAND TENURE REFORM PROGRAMME

Namibia is certainly not alone in experiencing the slow delivery of land to the land tenure reform beneficiaries. From a comparative perspective, it is interesting to note a similar slow pace of delivery has punctuated South Africa s experience with asset redistribution between 1994 and 2003. What factors have impinged on the South African Government s ability to deliver land to the land tenure reform beneficiaries at scale? The discussion that follows examines and analyses some of the birth pangs experienced by South Africa in its implementation of the land tenure reform programme through the restitution of land rights and the land redistribution mechanisms.

6.1 The Implementation of Land Tenure Reform through the Restitution of Land Rights Mechanism

Table 1 shows the progress made to date in the implementation of the land tenure reform programme through the restitution of land rights mechanism.

Table 1: Land Claims Settled from 1995 to 2003

Fin Year	Claims	Households	Beneficiaries	Hectares	Total Awards Cost
1996/1997	1	350	2100	2420	5,045,372.00
1997/1998	6	2589	14951	31108	15,568,746.00
1998/1999	34	569	2360	79391	2,988,577.10
1999/2000	3875	10100	61478	150949	155,045,907.00
2000/2001	8178	13777	83772	19358	321,526,061.00
2001/2002	17783	34860	167582	144111	994,168,313.25
2002/2003	6809	21416	111759	89573	402,717,408.17
Total	**36686**	**83661**	**444002**	**516910**	**1,897,060,384.52**

Progress in the resolution of claims rose from only one claim settled during the financial year 1996/1997 to 17 783 claims in the financial year 2001/2002. In so far as the restitution of land rights of those who were dispossessed of their land and land rights by the colonial and apartheid State is concerned, the following factors have affected the speedy delivery of land to the respective beneficiaries:

. the long and burdensome judicial approach to the restitution of land rights;

. late lodgement of claims;difficulties surrounding the rural claims;

. exorbitant land prices and uncooperative white farmers; and

. protracted negotiations, disputes and mediation.

In addition to these inhibiting factors, the negotiations between claimants, the current white landowners and the government have tended to take too long a time. The issues, which take long to resolve, include the following:

. the agreement on the beneficiaries; the validity of the claim;

. the identification of rightful claimants;

. the extent of land (property description), land use, settlement and so on;

These are there fore, some of the factors that have contributed to the slow

processing and finalisation of the restitution claims in the past nine years. The implementation of the land tenure reform through the land redistribution mechanism has similarly experienced some inhibiting factors. The discussion that follows examines and analyses some of these constraints.

6.2 The Implementation of the Land Tenure Reform Programme through the Land Redistribution Mechanism

Within the limitations imposed by the limited financial resources, experience, capacity and skills required to implement the land tenure reform programme, approximately 87,000 households benefited from the implementation of the tenure reform programme through the land redistribution mechanism between 1994 and 2001 both in terms of accessing land for settlement and the use of the land for production purposes. The figure of 87,000 households translates to 435 000 people based on the average family size of 5 persons per household . By the end of 2001, close to one percent of the country's total private agricultural land had been redistributed to 87, 000 households at a total cost of R959 143 174.00. The general picture that emerges from these figures is that a small inroad had been made towards reducing the white monopoly control of the 82 percent of the land surface of South Africa by the end of 2001. However, it needs to be noted that the numbers of people benefiting from the asset redistribution in a period of eight years remained relatively small.

In the first five years of the implementation of the tenure reform programme through the mechanism of the land redistribution, emphasis was placed on redistributing land to the rural poor. While the focus on the rural poor people had been largely successful, this approach neglected the development of black commercial farmers. Under the second African National Congress (ANC) government, the scope of land tenure reform programme has been broadened to include assistance to the black commercial farmers. The emphasis on the development of the black commercial farming class will not lead to the neglect of the rural poor. The beneficiaries of the programme in the main continue to be the farm workers, farm occupiers, labour tenants, the landless in general, the youth and women.

Since the end of 2001, with the accelerated implementation of land tenure reform through the mechanism of LRAD, there has been a phenomenal progress in asset redistribution. Over-achievement has been recorded in terms of the number of hectares delivered and the number of people assisted through LRAD during the 2002/2003 financial year. It is estimated that of the total number of persons

resettled, 32,6 percent of the land tenure reform beneficiaries were from the marginalised groups such as the labour tenants and farm workers, who received approximately 22 474 hectares of land. The expenditure patterns during the past eighteen months were in the region of 97 percent of the total budget allocated by Parliament to the programme. Such an expenditure is indeed significant considering the fact that in the last seven years the Department of Land Affairs was not able to spend much of the budget allocated for this purpose. The expenditure patterns on the asset redistribution remained between 50 and 60 percent of the total budget allocated for this purpose between 1996 and 2000.

The implementation of the tenure reform programme through the land redistribution mechanism has been affected by a number of inhibiting factors such as the following amongst other things:

- lengthy project cycles and excessive bureaucratisation and centralization of the land acquisition and resettlement processes;

- unwillingness of owners to sell land to black beneficiaries;

- Government's lack of strategy to promote redistribution of land in areas with an active land market;

- lack of a "supply-led" land reform delivery system; and

- lack of high level capacity and skills to mention only a few.

Some analysts of the South African land tenure reform programme have argued that the operation of a land market in South Africa is a contributory factor to the slow land delivery. However, empirical evidence suggests that this is merely a perception and not a reality. There is no concrete evidence to support the hypothesis that the land market operations have an inhibiting effect on the speedy delivery of land in South Africa for the purposes of the land tenure reform programme. From a recent study conducted by M. Aliber and M.R. Mokoena (2002), there is an active and vibrant land market in South Africa. However, the asset redistribution activity in terms of the land tenure reform programme within the broader land market activity has been very low. Why has this been the case?

According to M.R. Mokoena and G. S. Thomas 2001 M. Aliber and M. R. Mokoena, 2002, the land market cannot be blamed for the slow delivery of land to the land tenure reform beneficiaries. One of the major factors accounting for the slow pace

of land delivery within the context of the overall active and vibrant land market activity has to do with the lengthy project cycles which are a result of excessive bureaucracy and over centralization of the land acquisition and resettlement processes. The effect of this is that the applicants can often not take advantage of the good opportunities presented in the land market as a result of the bureaucratisation and centralisation of the processes. Hence the need for a decentralised system of land acquisition and resettlement. It is in this respect that the efficacy of Dr Werner s strategic option regarding the decentralisation of land acquisition and resettlement becomes salient. This strategic option is supported. The solution to this problem indeed lies in the South African experience lies in the decentalisation of the land acquisition and resettlement processes.

Other people have blamed the Constitution for the slow delivery of land. Whether or not the Constitution is a constraint to land reform delivery depends on one s ideological disposition. The principle of willing-seller-willing-buyer as set out in section 25(3)(c) of the Constitution has been perceived in South Africa as a constraint to the speedy delivery of land to the land tenure reform beneficiaries. In terms of this principle, the market value of property is determined by what any willing-buyer is able to pay to the willing-seller. In reality in South Africa, the principle of willing-buyer/ willing-sellerr in itself is not a constraint to land delivery per se in a situation where there is an active and vibrant land market. But, it is a constraint only in so far as the landowners are unwilling to sell land to the would-be land tenure reform beneficiaries at a price the beneficiaries can afford. Also, it is a constraint to the extent that it requires the financial, human and material resources to implement the land tenure reform programme.

The critics of the Constitution also point to the property clause as another inhibiting factor to the speedy delivery of land to the land tenure reform beneficiaries. In terms of the property clause in the Constitution, any landowner or any individual citizen can be deprived of property and any right in land only in terms of the law of general application. If property is expropriated in the public interest, the State is obliged to compensate the property owner or an individual citizen for whatever it takes. Section 25(3) of the Constitution sets out minimum criteria for the calculation of compensation. This minimum criterion for calculating compensation in the event of expropriation of any property has been confirmed in the recent decisions taken by the Land Claims Court. The Re Former Highlands Residents: Ash and Others v Department of Land Affairs, LCC 116/98 and Khumalo and Others v Potgieter and Others, LCC 34/99 are cases in point.

It has to be noted that the Court has taken a conservative approach in these cases in the determining the market value as a starting point for the calculation of compensation. However, it has discounted the market price by taking into consideration other factors as set out in section 25(3) of the Constitution. The principle is that compensation will not exceed the individual s own personal investment in the land. In this regard, the Constitution per se is not a constraint to the speedy delivery of land. However, meeting the requirements of the Constitution does result in financial, human and material resource constraints. These financial, human and material resources constraints affect the speedy implementation of the land tenure reform programme whether in terms of the restitution of land rights or the land redistribution mechanisms.

It is abundantly clear therefore, that the Constitution of the Republic of South Africa measured in terms of the operationalisation of the willing-buyer/willing-seller principle or the property clause is not a real constraint to the speedy implementation of land tenure reform. This is so from the point of view of the operation of the rule of law. The Constitution provides for an enabling environment for the implementation of an orderly land tenure reform programme. It requires that all interests should be balanced. In this regard, it provides for a balancing act in a situation where there are competing interests. It does not pose insurmountable constraints with regard to the issue of calculating "just and equitable compensation", as it clearly sets out a formula with various options and factors to be taken into account. The Constitution does not ignore the rights of individual citizens or place the responsibility for the implementation of land tenure reform on their shoulders. On the contrary, it accepts the State s responsibility for the cost of implementing the land tenure reform programme. It can only be said that the Constitution is a constraint only against theft.

Outside the commercial privately owned land, the unencumbered land registered in the name of the State, has problems that affect the speedy delivery of land to the land tenure reform beneficiaries. The legal requirements dictate that such land should be valued when it is disposed of. This indeed imports the market value concept into the use of State land for land tenure reform purposes. This could therefore, in the same way be a constraint on land delivery. However, this constraint could possibly be removed by permitting the State to dispose of State land that is not needed for other State domestic purposes or land that is not already encumbered for land tenure reform purposes without having to place a value on it. The placing of value on State land imposes an additional financial, financial and material resources burden on the State.

Furthermore, the South African experience with the implementation of the land tenure reform programme demonstrates that when the State intervenes in the land market on behalf of the wretched of the earth there are price hikes. The price hikes add another constraint to the "willing-buyer-willing-seller" approach. When the price of the land becomes a deterrent as a result of the State s intervention in the land market or the collapse of negotiations around the price of the land, what other options have been available to the State? The State in South Africa has at its disposal, the expropriation as a mechanism for implementing land tenure reform. However, the expropriation provisions in the Expropriation Act of 1975, the Constitution as well as in the other land tenure reform laws have not be utilised in practice to date to effect the wealth and power redistribution in the rural political economy. Why has this been the case given the slow pace of land delivery in the past nine year?

This is so for the following reasons. The State in South Africa does not wish to coerce its citizens to achieve particular objectives. As a matter of policy, it prefers to negotiate with individuals in order to achieve a particular outcome. This is a sensible policy because the State does not want to play the role of big brother. The State has also preferred not to get involved in legalistic debates and formalistic defenses that are often raised about whether or not the State is entitled to expropriate the properties of its individual citizens. In this regard, the State has come to the conclusion that to negotiate around the prices of land in order to implement an orderly land tenure reform programme is the correct thing to do. In the South African experience, the State considers this to be a cost-effective way of implementing the constitutionally mandated land tenure reform programme.

However, the only instance where expropriation of property of the landed gentry has been countenanced is in the Boomplaats restitution of land rights case in Lydenburg District, in the Mpumalanga Province. In the Boomplaats case, the Minister for Agriculture and Land Affairs withdrew the notice of expropriation on the advice of the legal team acting on behalf of the Department. The reason for the withdrawal of the expropriation notice was that the notice itself was defective in that it included a portion of land, which was not under claim. Another problem that arose was related to the fact that the way in which the Department interpreted the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994) did not afford the Minister the necessary locus standi or powers to expropriate the land in question. In terms of the legal team’s interpretation of the Restitution Act, only the Minister of Public Works could expropriate the land in question and not the Minister for Agriculture and Land

Affairs. Serious shortcomings were also identified in the applicable legislative framework, where the Expropriation Act of 1975 which is administered by the Department of Public Works in cases of expropriation for a public purpose, was found to be inapplicable in land reform cases where expropriation would be required in the public interest as provided for in the Constitution.

Beyond the threat of expropriation used in the Boomplats restitution of land rights case, no extra-legal methods have been contemplated or actively encouraged by the State for the purposes of facilitating the speedy delivery of land to the land tenure reform beneficiaries. There were sporadic instances of land invasion that were reported on in the press in the year 2001. These instances of land invasion were related to the following:

> *the burning of cane-sugar fields in Kwazulu-Natal where a land claim had been lodged and still needed to be resolved, the threatened land invasions in the Wakkerstroom district in Mpumalanga; and the Kempton Park land invasion to mention only a few of such instances.*

The instances of land invasion that occurred during the year 2001 were not State sponsored extra-legal methods to deal with the slow pace of land delivery. These and a few other cases of land invasion were however, sporadic incidents and have not been large-scale orchestrated "tinderbox" events. In all such instances, the rule of law has prevailed.

What else has the State in South Africa done to deal with the inhibiting factors to the delivery of land to the land tenure reform beneficiaries? In order to overcome the problems experienced in the South African land tenure reform programme, the State is developing a pro-active land acquisition strategy amongst other things. This pro-active land acquisition strategy is to be utilised by the State where it seeks to purchase land up-front in the market place for allocation to the identified beneficiaries. This means that the State will no longer rely exclusively on the demand-driven approach to the implementation of land tenure reform programme. The State now seeks to complement the demand-driven approach to the implementation of the land tenure reform with a supply-driven approach.

The State is also currently reviewing the expropriation legislation. To this end, the Expropriation Act of 1975 and the Restitution of Land Rights Act, 1994 (Act No. of 1994) are currently under review. The expropriation Act was promulgated in 1975

and as such it is out of line with the constitutional order in so far as it does not refer to public interest as contemplated in the Constitution in the justification for any expropriation of property. In order to make the Expropriation Act to be in line with the new constitutional and democratic order, amendments to this Act are being considered. Section 42D of the Restitution of Land Rights Act is being amended in order to empower the Minister for Agriculture and Land Affairs to deal with the problems experienced in the land delivery. In so far as the principal Act is concerned, it is being amended by the Restitution of Land Rights Amendment Bill, 2003. Currently, this amendment Bill is in Parliament for consideration. The amendment to section 42D of the principal Act reads as follows:

> *42E. (1) The Minister may purchase, acquire in any other manner or expropriate land, a portion of land or a right in land for the purpose of restoring or awarding such land, portion of land or right in land to a claimant in terms of this Act or for any other land reform purpose.*
>
> *(2) Subject to this Act, the Expropriation Act, 1975 (Act No. 63 of 1975), shall with the necessary changes apply to an expropriation under this Act and any reference to the Minister of Public Works in that Act, must be construed as a reference to the Minister for the purpose of such expropriation.*
>
> *(3) Where the Minister expropriates land, a portion of land or a right in land under this Act, the amount of compensation and the time and manner of payment shall be determined either by agreement or by the Court in accordance with section 25(3) of the Constitution.*
>
> *(4) The rules of the Court made under section 32 shall govern the procedure of the Court in the determination of compensation in terms of subsection (3)* [49].

It is hoped that this amendment to section 42D of the Restitution of Land Rights Act will provide an enabling environment for the speedy delivery of land to land tenure reform beneficiaries. Learning from a sister country, Namibia may want to have a similar expropriation provision in the Commercial (Agricultural) Land Reform Act of 1995. However, such provisions are meaningless if there is no willingness by the powers that be to apply the law in order to achieve the stated objectives of land tenure reform.

49 Republic of South Africa, Restitution of Lands Rights Amendment Bill, [B42-2003], p3

The implication of the policy developments around the pro-active land acquisition strategy and legislative amendments relating to the expropriation provisions is that the Government has to provide adequate financial, human and material resources to enable the land to be delivered at scale to the land tenure reform beneficiaries. For the Department of Land Affairs, through the mechanism of a willing-buyer-willing-seller to deliver land on scale and to provide the entire support infrastructure, it needs ernoumous resources for this purpose. It is expected that 30 percent of white commercial farmland will be redistributed over a period of 20 years. If the Department had to deliver at scale, it would need to have more money than is currently allocated for the acquisition of land. Currently, the land redistribution budget stands at R300 million per year. Delivery at scale would require that the Department receives between R800 000 to R1 billion a year if the set targets are to be realized. South Africa unlike Zimbabwe relies on its domestic resources to finance the implementation of land tenure reform. The budget is thus a critical variable for the success of the implementation programme in South Africa. As long as the Department of Land Affairs operates on the basis of the current budget, delivery at scale in order to reach the stated targets will remain an illusive goal. Despite the fact that the South African land tenure programme is implemented in terms of the rule of law, if delivery on the ground does not meet the landless peoples need for land for various purposes, one cannot rule out a situation of the radicalization of the landless persons in the near future.