Expropriation without Compensation

amendment of the property clause in the South African Constitution

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Abstract

The newly introduced amendment of the South African Constitution is regarded as an important framework to deal with the inequalities in society. South Africa has been a democracy for 25 years; however, the government are still dealing with serious issues of landlessness and poverty. The amendment of the Constitution will allow the government to expropriate property without compensating the victims, and the research shows that mainly white farmers will be targets of the new expropriation Bill. Therefore, this thesis aims to investigate whether race-based expropriation without compensation could amount to a violation of the African Charter of Human and Peoples’ Rights.

Keywords: Expropriation, compensation, South Africa, redistribution, restitution, development, poverty, inequality
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ABBREVIATIONS

ANC         African National Congress
AU          African Union
ECtHR       European Court of Human Rights
EFF         Economic Freedom Fighters
IACtHR      Inter-American Court of Human Rights
ICCPR       International Covenant on Civil and Political Rights
ICESCR      International Covenant on Economic, Social and Cultural Rights
NGO         Non-Governmental Organisation
SADC        Southern African Development Community
Definition of Terms

Restitution/ Restoration:
Means restoring the right in land. Restitution of land is the process of returning land that was forcibly taken.¹

Land reform:
Refers to amendments of legislation in order to redistribute agricultural land. The purpose of the reform is mainly to improve the standard of living and includes both redistribution of land and security of tenure.²

Redistribution:
Is the process which by land is taken and redistributed to landless people.³

Expropriation:
Refers to the compulsory acquisition of land by the government.⁴

³ Ibid.
Introduction

1.1 Background

The South African government have been challenged with the inequalities concerning land since the country transitioned from apartheid to democracy, 25 years ago. During the apartheid era, Africans were forcibly removed from their properties and laws were developed in order to create a legally segregated State. The apartheid government had mass relocated Africans to townships and reserved the majority of the land for themselves. This was the beginning of the socio-economic challenges that the current government is facing. When the apartheid system collapsed, corrective measures were needed to deal with the imbalances in society. Hence, the newly elected government passed laws and policies aimed to address crucial issues, such as landlessness and poverty. The land reform laws in South Africa are not intended only to redress injustices faced by the Africans who want to claim restitution. The objectives of the land reform is to improve all Africans lives and also provide tenure security and rural development.\(^5\)

In 2017, the government conducted a land audit which revealed that white people own 72\% of the land, i.e. agricultural land and farms.\(^6\) The restitution and redistribution process has been slow, and citizens have been demanding restitution and redistribution of property to deal with poverty and landlessness. Finally, in February 2018, the government passed a motion to amend the Constitution of South Africa, which will allow the government to expropriate land without compensating the owner.\(^7\) Media have covered the amendment of the Constitution in South Africa around the world, and there is a fear that South Africa will follow their neighbouring country Zimbabwe and permit illegal land invasions of white owned farms.\(^8\)

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Nevertheless, this research has been limited to examine whether the amendment to the Constitution will violate the white farmers rights in the African Charter of Human and Peoples’ Rights (African Charter). However, this research will also discuss the Southern African Development Treaty and includes a case study of the land reform in Zimbabwe. A theoretical perspective is also included in this paper to critically evaluate the concept of historical entitlement to land.

1.2 Purpose and Research Questions

The purpose of this thesis is to discuss the amendment of the Constitution of South Africa, which will entail expropriation of land without compensation. This research will specifically examine the expropriation of property from the perspective of white farmers in South Africa. The newly introduced Bill will allow the government to expropriate land without compensation and, this provision is examined in relation to the African Charter. The aim is to determine whether the no compensation clause in the Bill will violate article 2, 19,14 and 21 of the African Charter. Article 2 and 19 of the African Charter concern discrimination and this perspective was included because the research indicated that it is linked to the no compensation clause in the Bill. Furthermore, this paper will examine whether the white farmers constitute a “people” according to the definition in the African Charter. The reason behind this evaluation is to determine if the white farmers could access both the individual and the group rights in the African Charter.

Furthermore, a case study of Zimbabwe and their land reform is analysed, and cases from the Tribunal of the Southern African Development Community (SADC) concerning the expropriation of white farmers land in Zimbabwe is examined. The purpose behind including Zimbabwe in this research is to discuss the Tribunals reasoning on the question of expropriation of white farmers land without compensation. Because the amendment of the Constitution of South Africa has yet to be implemented, there are no cases from the South African farmers that can be used to interpret the provisions in the African Charter. Therefore, the Zimbabwean case study is an important example to understand the issue of expropriation without compensation.

The last part of this thesis will consist of a critical review of the property legislation based on Robert Nozick and Jeremy Waldron’s perspective on entitlement to land as redress for historical injustice. The purpose of including a theoretical perspective is to point out the significance of
racial equality in the South African society and disclosing a possibility for historical justice through land expropriation. Therefore, the examination of the legality of the land reform is combined with an analysis and discussion of historical justice based on Nozick’s theory on entitlement and Waldron’s argument on superseding injustice.

The investigation seeks to address the following questions:

Could the white farmers in South Africa claim that the no compensation clause in the amendment of the Constitution violates article 14 and article 21 of the African Charter? Furthermore, could the white farmers claim that they are being discriminated against by the government, according to article 2 and 19 of the African Charter?

1.3 Delimitation

This research is limited to discuss the amendment of the South African Constitution relating to the expropriation of property without compensation. Further, the purpose of this research is to examine the conformity of the amendment with mainly the African Charter. This research is limited to only examining article 14 the right to property, article 2 the right to freedom from discrimination, article 19 the right to equality and article 21 the right to free disposal of wealth and natural resources. However, the South African government’s responsibility to ensure and respect the rights of the Charter, as well as the consequences if they violate them, will not be discussed. Furthermore, cases of the African Court of Human and Peoples’ Rights are not examined because it is not used as much as the African Commission on Human and Peoples’ Rights. The Treaty of the Southern African Development Community is also examined in this thesis. However, the research is limited to discussing the Treaty in relation to Zimbabwe and their land reform laws. Therefore, other examples of land reform will not be described because the investigation has shown that the land reform in Zimbabwe is the most relevant example for this research paper.

Lastly, the scope of the research has been limited to the above-mentioned frameworks. Therefore land policies, legislation and Acts concerning the implementation of the land reform in South Africa are not examined. Moreover, international human rights law will only be referred to in this research as examples or to emphasise arguments. Hence, international human rights law will not be researched in depth.
1.4 Method

1.4.1 Legal Dogmatic Method

Part of the present study is based on a legal dogmatic method. This method is appropriate when the investigation aims to determine, systematise and interpret relevant sections of the law, using accepted sources of law as a tool. Since the purpose of the paper is to examine South African property law and determining whether the expropriation without compensation will amount to a violation of the African Charter, a legal dogmatic method is suitable. According to Sandgren, the legal dogmatic method is appropriate for discussions of existing law (de lege lata) and arguments of what the law should be (de lege ferenda).\(^9\)

The aim of the legal dogmatic method is to use accepted sources of law, to search for answers to legal questions. However, what is sometimes described as a weakness of the legal dogmatic method is that it does not focus on how different authorities should implement legal norms. After determining the relevant legislation in an investigation, the importance is the normative content. Therefore, it is common to analyse legal rules and how the provisions should be perceived in a particular context. Furthermore, when using the legal dogmatic method it is possible to include moral values, however, only indirectly because it is essential to determine the applicable law according to accepted legal sources.\(^10\)

Kleinman maintains that describing the legal dogmatic method can sometimes make the method appear unclear and even contradictory. Therefore, it is easier to simply describe how the method is used.\(^11\) Hence, in order to answer the research question, the legal dogmatic method will be used in this research to analyse the South African Constitution, land Acts and policies relating to the expropriation of property. The dogmatic method will also be used when discussing the provisions in the new amendment to the Constitution. The purpose of this research is to determine whether the government will violate the white farmer’s rights, by expropriating their property without compensation. Therefore article 14 the right to property, article 2 the right to freedom from discrimination, article 19 the right to equality and article 21

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the right to free disposal of wealth and natural resources in the African Charter, will be
examined to determine whether the white farmers could argue the South African government
are violating their Charter rights. Furthermore, the legal reasoning of the Tribunal of the
SADC in cases regarding white farmers land in Zimbabwe, are also analysed and interpreted.

1.4.2 Legal Analytical Method

As mentioned above, it is possible to include moral values using a legal dogmatic method;
however, only indirectly. Therefore, the legal analytical method is included to supplement the
legal dogmatic method. When using a legal analytical method, it is not rare that part of the
analysis in the research includes determining the law; however, the study goes further. There
are no strict rules on choosing a subject; therefore, the legal analytical method is different
from other legal methods. Moreover, there is room to incorporate philosophical perspectives
and discuss moral standards. Hence, the possibility to analyse the material with a specific
approach is possible with the legal analytical method.\textsuperscript{12} For this research, Waldron and
Nozick’s theories on historical justice will be used in order to analyse and critically evaluate
the findings in the legal provisions this thesis. The legal analytical method is appropriate
because it allows an open argumentation without merely looking for the correct answer to the
legal problems.\textsuperscript{13}

The aim of this research paper is twofold. Firstly, the objective is primarily to investigate,
determine and analyse legal norms according to the legal dogmatic method. Secondly, the
author will analyse the legal provisions and include a critical review of Waldron and Nozick’s
theories on historical entitlement to property. The purpose of the selection of Waldron and
Nozick’s theories is that they represent two different and conflicting theories regarding
historical justice and property rights. Their theories will also help the author to analyse the
problems regarding historical entitlement to property. Hence, in order to critically review and
discuss the land reform from different perspectives, the legal analysis method is imperative.
The critical evaluation of the legal provisions is in the final section of this thesis.

\textsuperscript{12} Ibid, p 52.
\textsuperscript{13} Sandgren, p 51.
1.5 Materials

The selection of sources for this thesis was based on relevance to fulfil the purpose of this research. The second chapter deals with the historical background of South Africa; therefore, the sources mainly consist of literature and journals describing the history of South Africa. In chapter three, the principal focus is on Section 25 of the South African Constitution. Therefore, primary sources of law, such as cases from national courts and property, Acts, are examined. However, this paper is limited to, only reviewing the Restitution Act and the Provision of Land and Assistance Act. Furthermore, secondary sources of law such as, the White Paper on Land Reform and the Green Paper on Land Reform, which are policy documents developed by government institutions to ensure implementation and to provide an understanding of the land reform, are included. Finally, articles in the newly introduced draft regarding expropriation are also discussed.

The fourth chapter is dedicated to examining the relevant articles mentioned above and cases from the African Commission. Furthermore, in order to interpret and analyse the legal provisions, soft law regulations such as; the Pretoria Declaration on Economic, Social and Cultural Rights in Africa, State Party reporting guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights and the Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights are used. These frameworks are not legally binding sources of law; however, they are used to understand the meaning behind the articles and just like the legal doctrine, they will be used to discuss the primary sources.

Furthermore, the treaty of the SADC will be only be mentioned in the fifth chapter, in relation to the case study concerning Zimbabwe. This chapter aims to describe how the land reform in Zimbabwe was executed. Therefore, literature and journals will be used to discuss the history and background of the land reform. Subsequently, cases from the SADC regarding expropriation of white farmers land will also be analysed and discussed in this chapter. To describe the recent developments in Zimbabwe regarding the land reform, news articles are used as a source. The reason is that there is limited information about the recent developments regarding compensation in Zimbabwe, and the government has not issued any official documents about it.
The following chapter of this research relates to equality from a historical justice perspective in post-apartheid South Africa. The purpose behind the selection of sources in this section is to analyse Nozick and Waldron’s ideas on entitlement to land and connect them to the findings and discussions in the legal part of this research. Hence, the primary and secondary sources in this chapter are used to describe the perspectives of Nozick and Waldron regarding historical entitlement to land. The secondary sources are used because they discuss and explain the ideas of Nozick and Waldron’s theories. Furthermore, Nozick and Waldron’s theories do not specifically deal with the question of compensation for victims of expropriation by the government. Waldron only discusses compensation for historical confiscations of indigenous people’s land. Therefore, secondary sources are used in order to analyse the ideas of both Waldron and Nozick. Furthermore, other authors perspectives will be included to emphasise and support arguments and ideas.

1.6 Research paper outline

The second chapter will describe the theoretical framework of this thesis. A description of Jeremy Waldron and Robert Nozick’s theories on historical entitlement to property is provided. The third chapter will aim to describe the historical background of South Africa and the establishment of the apartheid regime. It is important to describe the history of the disposessions of land in South Africa in order to understand the current discussions regarding the land reform. The succeeding chapter will examine and discuss the constitution and the current property laws in South Africa. The requirements of expropriation and the exceptions will be explored and discussed. Chapter five will present the African Charter and legal provisions this research aims to examine. The succeeding chapter will describe the land reform in Zimbabwe and discuss the case law from the SADC Tribunal. The seventh chapter is dedicated to a critical review of the property provisions discussed in this research in relation to Nozick and Waldron’s theories on historical entitlement to property. The final chapter will provide a concluding summary of the discussions and findings in this thesis.
2 Theoretical Frameworks

2.1 Historical Justice

The concept of historical justice can be examined from many different perspectives. However, for this research, historical justice will only be discussed in relation to entitlement to land as a result of colonisation. Land is viewed by many as a being “bound up” with history according to Meisels.\(^\text{14}\) Furthermore, Smith claims that historical land is part of the national identity and maintains that historical land is “one where terrain and people have exerted mutual, and beneficial, influence over several generations. The homeland becomes a repository of historic memories and associations, the place where our sages, saints and heroes lived, worked, prayed and fought.” Hence, the resources of the land exclusively belong to the people.”\(^\text{15}\) This understanding of land rights is a reason why historical entitlement often is demanded by native groups and individuals to correct past injustices.

Thompson provides that demands of reparation after historical injustices can be put into mainly three categories. Firstly, individuals who were affected by the injustice that claim reparations, who could not make reparative claims in the past for various reasons. Secondly, claims of reparations made by communities and members of tribes for the confiscation of their land. Land claims by different indigenous groups are primarily demands of redress for unlawful and aggressive confiscation of their homes, and the final category of claims is for restitution or compensation by descendants of the victims of dispossession.\(^\text{16}\)

In this research, the concept of historical justice is critically evaluated from the perspectives of Nozick and Waldron. As mentioned in the previous section, Nozick and Waldron present two different perspectives regarding historical entitlement to property. The main differences are that Nozick’s idea represent a corrective justice perspective,\(^\text{17}\) whereas Waldron’s idea stresses the importance of distributive justice according to needs.\(^\text{18}\) Corrective justice and distributive justice can be described as two different forms of justice. The focus in corrective justice, when it relates to transactions, is that one party has committed a wrongful act and another party has

suffered because of that action. Corrective justice then deals with the preservation and restoration of the assumed equality between the parties in the transaction. Equality is that the person who committed the injustice will be deprived of what was illegally acquired.\textsuperscript{19} Whilst distributive justice concerns the allocation of goods by comparing parties in a society based on distributive criterions.\textsuperscript{20} This is a general outline of Nozick and Waldron’s perspective on entitlement to land, and will be described further in the next section.

2.1.1 Robert Nozick: Principles on Entitlement

Nozick is a libertarian and a strong advocate for individualism. Individual rights are central to his theory and he argues that “individuals have rights and there are things no person or group may do to them (without violating their rights).” He advocates his theory of “entitlement” which is a general outline of his idea on historical justice.\textsuperscript{21} According to Nozick, the distribution should be assessed according to how the distribution took place. If the transaction was a result of deception or if a holding was forcefully taken, then the transaction is considered unjust.\textsuperscript{22}

Moreover, Nozick contends that only a minimal State can be justified because a State with more extensive power would violate people’s natural rights. The purpose of a minimal State is to protect citizens and a more extensive State can only be justified if the purpose is to achieve distributive justice. The concept of distributive justice is not neutral, according to Nozick. When distributing shares, there is a possibility that errors have been made. Therefore, there should be a discussion regarding whether redistribution should take place in order to repair the mistakes. Furthermore, Nozick maintains that there is no central legal entity that is entitled to control and distribute all resources. In a free society, holdings are controlled by various people, and new holdings are acquired through voluntary exchanges and actions of individuals.\textsuperscript{23}

Nozick’s idea of justice relating to property consist of three comprehensive principles. Firstly, it is the principle of justice in acquisition. It sets out the circumstances in which someone can

\textsuperscript{20} Ibid, p 354.
acquire holdings. A person that acquired goods legitimately is entitled to it. Hence, a property that has had no previous owner can be obtained by anyone. However, Nozick does not describe the method of acquisition in detail. Secondly, the principle of justice in transfer, which describes how holdings can be transferred justly. The distribution can only be considered just if the holding that is transferred was legitimate in the first place. Hence, if a transfer of property is conducted, the person that acquired the land must have done it from a person who was entitled to it. Moreover, Nozick recognises that holdings have not always been transferred in accordance with the principle of acquisition and the principle of justice. Some people engage in fraud and some unlawfully confiscate people’s properties. Therefore, he argues that transfers of holdings acquired in such a manner are not permissible and because past injustices regarding property already exist, the third principle concerns the rectification of past injustices.  

However, if an injustice has occurred and it shapes the present, how far is it appropriate to go to wipe the historical slate? How can the victims of injustice remedy the injustices that have been done to them? Nozick’s answer to these questions is that he does not know, and he does not have an in-depth theory to address these issues. However, the principle of rectification is supposed to be a model in order to determine how to rectify failures arising from not ensuring the first two principles, e.g. what to do if the property has been acquired through deception. This will be done by using historical information to establish past events and injustices committed. The principle of rectification will then be used in order to estimate what would have happened had the injustice never occurred. Conclusively, the general outline of the justice theory is that holdings can only be considered just if a person is entitled to them according to the three principles. Hence, if everyone’s holding can be considered just, then the distribution of holdings are also just.

2.1.2 Jeremy Waldron: Superseded Injustice

Waldron has in many of his publications dealt with issues regarding the justification of private property. However, in this investigation, only his theory regarding superseding historical injustices will be analysed. The term Waldron uses when discussing historical injustices is “supersession.” He specifically discusses his theory on supersession when it comes to

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24 Nozick, pp 150–151.
injustices regarding land rights, and he is a known critic of corrective justice. Waldron’s main argument is that “just” holdings are susceptible to be re-evaluated. However, circumstances change; therefore, it is possible to justify the continued holding of property, which initially was acquired unjustly, for instance, through colonisation.26

Waldron recognises that there has been a long history of white settlers violating indigenous populations rights all over the world. Indigenous groups have been defrauded, enslaved, deprived of their land and belongings. Ultimately, leaving them vulnerable and in need of support. An important aspect when dealing with past injustices is that such action should always be condemned and suffering of others in the past should never be forgotten. Remembering the past is important for individuals, communities, families, tribes and nations who have experienced abuse and injustice. People who benefit from their ancestor’s injustice may convince themselves that their good fortune is because of the virtue of their race. While decedents of the victims of the injustice accept the story that their “race” is not good enough. Therefore, because many societies are mixed with people who are benefitting from their ancestor’s injustice and decedents of the victims of the abuse, it is imperative that the past is never neglected, according to Waldron. The recollection of history may sustain the moral and cultural truth of self and community.27

Nevertheless, Waldron’s main argument against restitution of indigenous land is based on what he calls “superseding historic injustice.” He argues that circumstances always change; hence the legitimacy of acquisition of land and the attitudes towards “just” holdings are susceptible to be re-evaluated. Changing circumstances can, therefore, justify the continued holding of property, which initially was acquired unjustly. Property acquired by settlers during colonisation or slavery was de facto unjust. However, Waldron maintains that times and circumstances in society have changed. Therefore, he argues that property obtained in a manner which is considered unjust could be transformed to be considered just, if the current situation is different from when the first violation took place. Consequently, circumstances of past injustices that have changed, are what Waldron calls “superseded” injustice.28

Historical entitlement to land that was stolen cannot be viewed as having a significant role in “original” owners’ life, according to Waldron. However, he recognises claims of land that concern the identity of the dispossessed groups. For instance, burial places and other religious

27 Waldron, pp 4-6.
significant lands may remain sacred to groups. Even though the dispossession took place decades ago, the loss may still be significant to the group. Therefore, it should be returned, since their claims of restitution of the land are beyond material or economic wealth. The core of Waldron’s idea of historical justice is equality. He stresses the importance of distributing resources in a way that benefits the whole population. He also recognises that past injustices such as colonisation led to contemporary issues regarding inequality in ownership; however, the exclusive ownership of land by a tribe would eventually have been transformed.  

Waldron disagrees with the idea in Nozick’s theory of entitlement where historically stolen resources could remain a big part of the original owner’s life. However, not when the moral entitlement is conjoined with the entitlement to a holding. Then it is reasonable to suggest that continued possession of the property is imperative for the possessor’s autonomy. Nevertheless, Waldron withholds that when holdings have been disrupted for a long period of time there is not a strong claim to it. Therefore, the focus should be on the present issues of deprivation. Hence, focusing on peoples’ demands for justice based on what will happen if their present circumstances are not changed. Consequently, instead of focusing on what would have happened had the injustice never occurred, the focus should be on real issues such as relief of poverty and equal distribution of resources in the society.

2.1.3 Theoretical Approach

Nozick’s represents an idea where it is important to look backwards and correct past mistakes. Whereas Waldron’s theory does not entirely disagree with the notion of correcting past mistakes, his theory represents a forward-looking idea which entails that injustices that happened in the past should not affect the present. Hence it is essential to recognise the needs of people in society in the present. Their perspective on historical justice represents two perspectives which will be used to critically review and discuss primarily the amendment of Section 25 of the Constitution, which entails that expropriation will not give rise to the obligation to compensate those affected. The theories are used as a basis for a discussion regarding restitution, redistribution and compensation. The analysis will mainly concern Nozick and Waldron’s understanding of historical entitlement to property, however, because

29 Waldron, Superseding Historic Injustice, p 19.
30 Ibid.
compensation is a central question in this thesis the analysis will also include a discussion regarding compensation. Nozick and Waldron’s theories primarily deal with the issues regarding property rights. Therefore, regarding compensation the author will through an analysis of Nozick and Waldron’s theories discuss the issue of compensation for white farmers. Lastly, as mentioned in the Materials section, other authors perspectives regarding justice and historical justice will also be used to give examples and support arguments.
3 Historical Background

3.1 The Dutch and British Settlement on the Cape

The South African government have since the democratisation 1994, faced issues regarding inequalities of land caused by the previous apartheid regime. The dispossession of land in South Africa, however, started long before the apartheid laws. It first started with violent dispossession of indigenous peoples’ land by Dutch settlers. The first serious settlers were the Dutch East India Company (the Company) in the Cape in 1652. The Company eventually set up a permanent settlement in the Cape, motivated by economic interests in the region. The location of the Cape was good for passing ships and the Company could generate great income by selling cheap food and livestock. The land was regarded as “terra nullius,” meaning that the settlers did not recognise the indigenous peoples’ who inhabited the land as legitimate owners of it. Eventually, the Company gained control over the Cape, and they began leasing land to other whites. They offered them land to graze cattle and required symbolic payment as rent. Some of the European chose to travel to the countryside instead and settle in a place they considered appropriate. These settlers entered the indigenous Khoikhoi peoples’ land and shortly there were settlements reaching thousands of square miles of their land. As the settlements grew, the land acquisitions became more structural. Ultimately Afrikaners, which are an ethnic group predominately of Dutch descent established themselves as the rightful owners of the Cape.

Nevertheless, as mentioned above, the indigenous people of the Cape were still living on the land when the Dutch settled there. The Company ruled with tyranny slavery was allowed and even encouraged. In the late 17th century, slavery had become an integral part of the Dutch colony. Slaves were imported from many regions in Africa and Asia.

In the eighteenth century, the Company began declining, and it motivated the British to occupy the Cape. For the British, the region was crucial for military activities. The Cape was a strategic point because of the Indian Ocean, which was a direct route to their colony in

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33 Ibid, p 11.
India. Another major incentive was that the region was profitable because of its gold and minerals. When the British arrived, the land grab continued, and gradually vast lands of modern-day South Africa was dominated by the British. The prevailing opinion during that time was that treaties could not be entered with the natives. Therefore, the British typically acquired land through confiscation. Eventually, the British administrators developed policies to legalise confiscation of land, and they distributed and sold it at public sales. During this time a series of wars took place between the natives who were losing more and more of their land and the settlers. Therefore, the British rewarded men with land for taking part in the war and defending it from the natives. Ultimately, huge parts of the land were declared British territory, which also meant the loss of the Afrikaners right to the land. However, the Afrikaners were not prepared to give up their rights to the land without a fight, which consequently lead to very bloody and long wars.35

3.2 Land Confiscation Acts

The expansion of the colony inevitably had to be protected through legislation. For eight decades, several Acts were passed to displace the native groups systematically. The Native Land Act No 27 of 1913, the Native Trust and Land Act 18 of 1936 and the Group Areas Act No 36 of 1966 were the main instruments that were significant in order to deprive the indigenous people of their rights to the land. The Native Land Act was the first legislation enacted by the parliament and was the basis for the allocation of land according to races. The whites made up about 13 per cent of the population, and through the Act, they controlled over 80 per cent of the land. The small percentage of land that was allocated to blacks was not enough to accommodate their needs, and as a consequence, it created extreme poverty. The intention behind the Native Trust and Land Act 18 was to “release” parts of the land back to the Africans for mainly farming. However, large parts of the land that was “released” was already owned by the black natives, either directly or indirectly. Lastly, the Groups Areas Act aimed to control the ownership and utilization of the land based on race. Furthermore, the Act classified the population into three racial groups; white, black and coloured. Within the group coloured there were three “distinct units;” Indians, Chinese and Malays. Consequently, this was the beginning of the prohibition of mixing between the races.36

35 Yanou, pp 12–14.
36 Yanou, pp 14-17.
3.3 The Fall of the Apartheid Regime

The era of segregation started in 1910, and during this period, racist ideologies became widespread. Both the rich Englishmen and the poor Afrikaners exploited black native labour. The era of apartheid ended in 1993; however, all the years of apartheid ruling caused the critical housing situation that still exists today. Many factors contributed to the end of the apartheid regime. Nevertheless, the main reasons for the fall of apartheid were the black resistance groups and the pressure from international organisations such as the United Nations (UN). The South African government first repealed some of its segregation laws in 1978, but the significant amendments were passed in 1990. That is when the former president F.W. de Klerk and his government announced that legislation of apartheid such as the Group Areas Act, the Land Act and the Population Registration would be repealed. The government also started negotiations about democratic rights for all South Africans. The abolition of the discriminatory land Acts was the beginning of the democratic change in the country. Therefore, the complicated and painful history regarding land in South Africa is a vital aspect to raise in order to understand why land reform is vital for many South Africans today.37

3.4 Access to Property in Post-Apartheid South Africa

The history of South Africa proves that land has been a valuable asset to secure wealth and power. The settlers recognised that in order to build a strong colonial rule, that would become profitable, the natives had to be removed from their land. Hence, it was beneficial for the white minority to maintain the discrimination laws of apartheid for their economic well-being. Ownership of land has been significant in the socioeconomic structure of the country since the apartheid era. Therefore, the land reform, which will allow transfers of agricultural land to disadvantaged Africans, has been a critical question for the current government.38

In 1994, a new Constitution was drawn up by the newly elected Parliament in the first non-racial and democratically held election. The elected political party the African National Congress (ANC), were faced with many pressing needs in the “new South Africa,” such as landlessness and poverty. Redistribution was viewed as a measure to deal with issues

38 Smith, p 271.
regarding poverty and landlessness, whilst restitution of property was conceived mainly as redress for the inequalities resulting from the unlawful disposessions. The government has succeeded in improving the standard of living for many South Africans since the democratisation of the country. However, despite the many achievements, the land reform has been slow and ineffective. The desperate need of housing has led to landless poor people resorting to land invasions to access land. Groups of people are moving to areas and illegally occupying it because there is an acute need of housing. Many have blamed the failures of the land reform on the government and their policies. Therefore, the political party Economic Freedom Fighters (EFF), demanded an amendment of the Constitution in 2017. They submitted a motion for the amendment of the Constitution to allow expropriation of land without compensation. The ANC first rejected this motion, however, in a national conference held the same year, they changed their position and supported the motion. In the next section the Constitutional provisions relating to property expropriation and the policies concerning restitution and redistribution of land will be examined further.

39 Yanou, p 49.
40 Government of the Republic of South Africa and Others v Grootboom and Others, case no CCT11/00, 2000, paras 4-6.
4 Constitution of the Republic of South Africa

4.1 Expropriation in Section 25 of the Constitution

The current Constitution of South Africa,\(^{42}\) was approved by the government on the 4\(^{th}\) of December 1996. The Constitution took legal effect on the 4\(^{th}\) of February 1997, hence replacing the interim Constitution of 1993. Internationally the Constitution of South Africa is regarded as one of the most progressive in the world.\(^{43}\) The preamble of the Constitution recognises the past injustices of the nation and honours the people who suffered injustices and fought for the freedom of the country. Further, the preamble provides that South Africa belongs to “all who live in it.” The Constitution is recognised as Supreme law and will aim to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.”\(^{44}\) The legal sources in South Africa are complex and the Constitution does not clarify the relationship between the various property laws. Apart from the legislation, both uncodified common law and customary law are considered valid sources of law. Courts must also consider legislation enacted before and after 1994 when South Africa transitioned from the apartheid system. Though the sources of property law are complicated and sometimes even conflicting, it is crucial to first refer to the Constitutional provisions, as it is considered the supreme law of the nation.\(^{45}\)

Section 25 of the Constitution is the basis of expropriation related legislation in South Africa. The property articles are set out in the second chapter of the Bill of rights and deals with questions regarding equitable redistribution, expropriation and restitution of land. Section 25(1) stipulates that deprivation of property is not allowed “except in terms of law” and it forbids legislation permitting arbitrary deprivations of property. Section 25(2) provides that property may be expropriated for “public purpose or in the public interest.” Further, expropriation is also “subject to compensation,” and the manner of payment should be agreed by the affected parties or by a Court. The term expropriation was explained by the Constitutional Court in *Harksen v Lane*,\(^{46}\) to involve a “compulsory acquisition” of land by


\(^{44}\) Constitution of the Republic of South Africa, Preamble.


\(^{46}\) Harksen v Lane NO and Others, case no. CCT9/97, 1997.
public authority. The Court further explained that deprivation of an owner’s land must be permanently in order to amount to expropriation.47

Moreover, Section 25(1) and (3) explicitly forbid the government from arbitrary deprivations of property, and lawful interferences with property must reflect a fair balance between “public interest” and the interest of the owners that are affected by the expropriation. Hence, the expropriations by the government must reflect an “equitable balance between the “public interest and individual interest.” In the First National Bank,48 the Constitutional Court favored an interpretation of public interest that takes the historical injustices of the nation into consideration. However, this does not mean that expropriations could only be based on historical injustices. Expropriations of property only based on profit is considered unconstitutional. Nevertheless, it will not be considered unconstitutional if the motive behind the expropriation is to benefit the general public.49 The Courts reasoning, in this case, is also in line with section 25(4) which stipulates that “public interest” entails a commitment to “bring about equitable access to all South Africa’s natural resources.”

The ideology of historical justice permeates the Constitution of South Africa. The equality of all South Africans and their equal rights as citizens was essential for the legislator to emphasize considering the history of the nation. However, there is also a clear indication of forgiveness as the preamble states that the aim is to “heal” and establish a society built on democratic values.50 Hence, my understanding is that the government aims to build relationships and move forward, despite the nation’s past. The requirements concerning the expropriation of property are clear. Therefore, the legality of the expropriation of private property is not relevant to discuss, and also State has the right to limit property rights. The procedure of how property rights can be limited is usually the primary concern. Property restitution in South Africa is special in the sense that historical injustices should be taken into consideration. Hence, if the State is considering an expropriation based on the condition of public interest, the government should consider the historical injustices of the nation. However, this does not allow them to interfere with people’s private property arbitrarily. Though historical injustices should be considered, it is necessary to strike a fair balance between all peoples interests and rights.

47 Harksen v Lane, para 32.
48 First National Bank of SA Ltd t/a Wesbank v Commissioner South African Revenue Service and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance, case no. CCT19/01, 2002.
49 First National Bank, para 64.
50 Constitution of the Republic of South Africa, Preamble.
4.2 Compensation Clause in Section 25

Regarding the question of compensation, 25(2) of the Constitution provides that expropriation of land is permissible on the grounds of public purpose or public interest. However, 25(3) guarantees “just and equitable” compensation for the expropriation of property. Further, it requires that the amount that ought to be paid for the acquisition of property should reflect its market value. Even though the ANC was a strong opposition party fighting against the unjust laws of apartheid, they accepted the compensation clause in the Constitution. As a newly elected party after the fall of the apartheid regime, the ANC was careful when negotiating itself into power and did not want unnecessary conflict with the dominant white minority government. However, because the Constitution demands that the amount of compensation should be in line with the market value of the property, many argue that it has contributed to the slow restitution processes in South Africa.\(^51\)

The Constitution guarantees “just and equitable” compensation; however, the legislator has not defined how “just and equitable” should be understood in the context of expropriation. Hence, it has been left to the Courts to determine in a case by case basis what the term entails. The main disagreement regarding the issue of compensation in South Africa has revolved around whether “just and equitable” compensation must be determined according to the market value of the property. Nonetheless, Mostert argues that the criterion of market value in Section 25(3)(c) is not the most important requirement that should be considered when evaluating the amount of compensation for the property.\(^52\)

In the Certification case,\(^53\) the Court mentions that after examining foreign Constitutions that it is not common that matters of compensation for expropriation are mentioned in the Constitution. The Court, however, held that the requirements of compensation that are set out in Section 25 are in line with the universally accepted understanding of the right to property. Further, internationally the criterions of compensation are that it should be determined in a “fair” “adequate” “full” “equitable and appropriate” and “just” manner, which also is in line with the South African Constitution.\(^54\) As mentioned above, in the First National Bank, the Constitutional Court noted that the historical injustices that left many Africans without land


\(^{54}\) Certification of the Constitution of the Republic of South Africa, para 73.
should be considered when determining compensation. Further, they held that the purpose of Section 25 is not simply to protect an individual’s private property, but also to advance the public interest. Thereby highlighting why the property clause came into existence in the first place and encouraging that a fair balance should be struck between the competing interests.\textsuperscript{55}

The history of dispossessions in South Africa is taken into consideration throughout Section 25 in the Constitution. The confiscation of African land during the colonisation of South Africa and the discrimination laws that permitted the injustices must be considered when determining expropriation of land according to Section 25(7). Section 25(3) provides that a criterion when determining compensation for expropriation is how the property was dispossessed. Hence, the Constitution provides that all deprivations of individual or community land during apartheid, that was later sold to white owners for a fraction of its real worth, should be considered when determining compensation. In the \textit{Khumalo} case,\textsuperscript{56} after Court analysed the circumstances in the case and how the property was acquired, they concluded that the property was bought at a time when the price for it was extremely low. Hence, the Court accepted that for the expropriation a lower amount than the actual worth could be paid.\textsuperscript{57}

In \textit{Ash and Others v Department of Land Affairs},\textsuperscript{58} the Land Claims Court held that compensation reflecting the market value of the property is only the starting point, which means that the criterion of compensation provided in section 25(3) can either increase or reduce the amount that should be paid.\textsuperscript{59} Whereas in the \textit{Dulabh} case,\textsuperscript{60} the Court argued that the interpretation of compensation should be broad and generous and requires that equity and justice are considered.\textsuperscript{61} Nevertheless, the Constitution clearly states in Section 25(3) that the amount of compensation should consider both the public interest and the people affected by the expropriations. Van der Walt also suggested that expropriation without compensation can only be legitimate if the requirements in 25(3) are fulfilled.\textsuperscript{62} Lastly, Section 25(8) holds that no provision in Section 25 may hinder the State from enacting legislation or other measures to “achieve land, water, and related reform” to redress the outcomes that followed from the

\begin{footnotesize}
\begin{itemize}
\item[55] First National Bank, para 64.
\item[56] Khumalo and Others v Potgieter and Others, case no. LCC 34/99, 1999.
\item[57] Khumalo and Others, para 95.
\item[58] Ash and Others v Department of Land Affairs, case no. LCC116/98, 2000.
\item[59] Ash and Others, para 69.
\item[60] Dulabh and Another v Department of Land Affairs, case no. LCC14/96, 1997.
\item[61] Dulabh, para 56.
\end{itemize}
\end{footnotesize}
historical racial discrimination. Hence, the requirements that are provided in Section 25(3) allows the Courts to determine the amount that ought to be paid and decide what a “just and equitable” amount of compensation is.

To conclude, the Constitution stipulates that equitable compensation is guaranteed for expropriation but does not provide a definition or criterions of how to determine what equitable compensation is. Nevertheless, in my opinion, it is better to leave it up to the Court to determine how to deal with compensation in a specific case, especially, regarding compensation for expropriation of land for redistribution. The legislator has left room for interpretation because many different factors need to be considered when determining compensation. Nonetheless, the Constitution provides that the basis should be the market value of the property in question. This requirement could be considered unjust, mainly because the purpose of the expropriations is to achieve equality between all citizens. Nevertheless, this is a requirement that can be viewed from many different angles and will be discussed further in another section.

4.3 Land Reform Programme in South Africa

4.3.1 White Paper on Land Reform

In 1997, the Department of Land Affairs adopted the White Paper on South African Land Policy (White Paper) which is a comprehensive policy document regarding land reform, addressing “restitution, redistribution and tenure form.” According to the White Paper, people or communities who were deprived of their land after 19 June 1913, are entitled to restitution or just compensation for their loss.63 The date was set after 1913 because it was the year the Native Land Act was passed, which systematically displaced people, as mentioned earlier. The land reform is described as a “need,” because the political and economic conditions that were caused by apartheid is still reflected in post-apartheid South Africa. Therefore, land reform is necessary for the country in order to create “sustainable growth and development.”64 Furthermore, the White Paper provides that the Bill of Rights in the 1996 Constitution, guarantees existing property rights. However, at the same time, it also obliges the State to take

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64 White Paper, pp 6-7.
reasonable steps in order to ensure that all who were deprived of their land as a result of discriminatory laws are recompensed for their loss. Moreover, the Constitution highlights that the right to equality includes everyone’s right to “equal enjoyment of all rights and freedoms,” which involves positive action from the State regarding the implementation of the land reform.\(^{65}\)

The White Paper also acknowledges the requirement of “justice and equity” and stresses the importance of identifying different ways people have suffered discrimination through dispossessions. Thereby, the government will be able to develop a suitable approach to deal with restitution claims. Nevertheless, claims of restitution should be led by both the principles of fairness and the principles of justice. However, States development interests should also be considered in processes regarding restitution.\(^{66}\)

4.3.2 Land Restitution Programme

The Land Restitution Programme aims to return land to people who have been dispossessed or to seek alternative remedies for them. The Restitution of Land Act (Restitution Act) is substantial in achieving the objectives of the land reform. As the White Paper on land reform describes, the Restitution Act is designated to restore the land to dispossessed populations because of the racially discriminatory laws in the past.\(^{67}\) This will be executed with the overall regard of fairness and justice for individuals and communities in the whole country. The procedures for land claims are set out in the Restitution Act, and it describes qualification criterions and forms of redress in detail.\(^{68}\) The preamble to the Restitution Act provides that the purpose is to ensure peoples’ and communities rights to restitution. It also establishes the Commission on Restitution of Land Rights and the Land Claims Court in order to deal with issues regarding dispossessed land.\(^{69}\) Article 1 of the Restitution Act, stipulates that both communities and “direct descendants can bring claims of entitlement to land.” Direct descendants also include “spouse or a partner in customary union” registered and unregistered. Further, the article describes that “right in land” also include registered and unregistered property. The definition of “right in land” is broad, as it to some extent also

\(^{65}\) Ibid.
\(^{66}\) Ibid, pp 75-76.
\(^{67}\) Ibid, p 14.
\(^{68}\) Ibid, pp 14-15.
include the interest of labor tenants and sharecroppers. Article 33, states that the objective of the Act is the desire to provide restitution or compensation for the land that was taken due to racially discriminatory laws and practices.

4.3.3 Land Redistribution Programme

The purpose of the Land Redistribution Programme is to improve the life of the poor by providing them with financial assistance or property to help them break patterns of poverty created during apartheid. Land redistribution is also addressed in Section 25(4) and 25(5) of the Constitution, relating to the conditions in which the State is encouraged to help citizens to access land. The Land Redistribution Programme is considered to be an extensive program, to deal with complex issues regarding inequities of land ownership, as a result of colonialism. However, the White Paper stipulates that the government’s method of redistribution of property have been voluntary. Hence, land acquisitions depend on a “willing-buyers and willing-sellers” transaction, and expropriation of land will only be the last resort. If there are urgent land needs that cannot be dealt with through voluntary transactions, then expropriation can be used as a method.

The Provision of Land and Assistance Act, (Land Act) was enacted to deal with “designation of certain land,” and it regulates the subdivision and matters of such land. The redistribution of land is intended to assist people in order to improve their living situation. Therefore, article 10 and 11 of the Land Act allows the State to grant financial aid in order to acquire land. The government can hand out subsidies to assist poor people in changing their living situation. The Act, however, does not oblige people to sell their land. Land that is distributed for settlement according to 2(1) is controlled by the State or has been purchased or acquired by the State. Article 5 of the Land Act provides that land can also be designated and subdivided for business purposes or even small-scale farming.

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70 White Paper, p 12.
71 Ibid, 61.
4.3.4 Land Tenure Reform Programme

The Land Tenure Reform Programme involves the protection of land rights, and the objective is that the rights will be equal for all South Africans in the future.\textsuperscript{73} The Green Paper on Land Reform (Green Paper),\textsuperscript{74} is a policy document adopted to address these issues. Article 2(1) provides that there is a need to instil “national identity, shared citizenship and autonomy-fostering service delivery.” Therefore, it is necessary that the State continues to invest and strive to transform land relations in the country. The Tenure Reform is intended to provide tenure options which conform to Section 25(6) in the Constitution. Furthermore, the aim is to develop new legislation and policies to set up viable institutions that deal with issues regarding land insecurity and inequality. Hence, the vision is that the system of tenure ensures that all South Africans, especially rural black people, have equal access to land. The goal is also to create new ways of securing tenure that reflects modern society. Therefore, important developments have been made to reform insecure and rural tenure, through the Tenure Reform program.\textsuperscript{75}

To sum up, the White Paper provides that a sound land policy will be a requirement for South Africa to attain “peace, reconciliation and stability.” Without it, the government will not be able to ensure its population economic growth and secure livelihoods. Therefore, the land programs should contribute to the development of the nation and the improvement of poverty among African citizens. The White Paper provides that the reader should view the land policy as a “cornerstone in the development” of the nation.\textsuperscript{76} In general, it can be argued that the White Paper mainly support what is described in the Constitution. The land reform is considered essential in order for the country to grow and thrive, and the nation will be unable to do so as long as a massive part of the population still is struggling to survive. Therefore, recognising that direct descants and partners in customary unions also may have a right to restitution, enables people today to demand redress for the loss of their family’s properties. It is necessary that they can claim the land of their ancestors since many of the people who were deprived of their land are dead and never had the chance to get redress for the confiscation of their land.

\begin{itemize}
\item \textsuperscript{73} White Paper, p 16.
\item \textsuperscript{74} Department of Rural Development and Land Reform Green Paper on Land Reform (Green Paper), 2011.
\item \textsuperscript{75} Article 3, Green Paper.
\item \textsuperscript{76} White Paper, p 22.
\end{itemize}
Furthermore, the Land Redistribution program is imperative in South Africa, because the main goal is to assist people who need help and improve their living situation. The systematic separation of people and the black-white wealth gap that was created as a result of it, has yet to be improved. Hence, the purpose of redistribution is to break the patterns of poverty that were created by the apartheid government. Even though many factors cause poverty, the historical injustices in South Africa is a major contributing factor to the unequal society, as mentioned above. Africans have less wealth than whites and have had no opportunities to build wealth to pass down to future generations. Even in post-apartheid South Africa, the majority black population have fewer assets than the whites. Africans still face systematic challenges in narrowing the wealth gap; therefore, redistribution laws are needed to help reduce them. Through Land Redistribution legislation the government may grant people in need financial aid, to help them purchase land. The policies do not focus on expropriating people’s land instead through grants the focus is on improving people’s living conditions.

4.4 Motion to Amend the Constitution

On the 27 February 2018, a motion to amend the Constitution was adopted by the National Assembly. The motion aimed to revise the Constitution to allow expropriation of land without compensation. The National Assembly referred the matter to the Constitutional Review Committee, which started a nation-wide public hearing starting from June to August 2018.

The process to amend the Constitution has been met with conflicting views. Some support the amendment and advocate for land restitution without compensation in order to redress past injustices. However, some people also do not support the amendment of Section 25 and contend that the amendment will lead to an economic collapse. However, the government contends that land reform is an economic, moral and social necessity. The intention is to accelerate the restitution process; however, still respecting the rule of law and aiming to act in the best interest of the country. By expropriating land, one of the goals is also to realise the full economic potential of the land. Therefore, the government will support restitution and redistribution of land, which in turn will help strengthen farming and investment. In doing so, the government’s wish is to use the land more productively and

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creating more opportunities for sustainable livelihoods. Thereby securing the development of the nation.\textsuperscript{78}

Moreover, the government urges citizens to be patient and trust that the parliamentary process will ensure that questions such as “land dispossessions, rural development, and food security. They emphasised that the motion to amend the Constitution will seek to clarify and strengthen the fundamental rights provided in Section 25. Hence, the goal of the land reform is to strengthen all South Africans rights, not only those who own land. Historical dispossessions of land has held back the economic potential and development of the country; therefore, by amending the Constitution, the government aims to create opportunities for millions of South Africans that live in poverty or are unemployed.\textsuperscript{79}

4.5 The Draft Expropriation Bill

The Draft Expropriation Bill,\textsuperscript{80} (Expropriation Bill) was published by the government on the 21 December 2018. The Draft was introduced in the National Assembly, and invites the public to comment on it.\textsuperscript{81} The preamble of the Draft stipulates that purpose is to provide a framework for the expropriation of property under public purpose or in the public interest. It is important to note that while the Constitution of South Africa permits expropriation of land, Section 25 and Section 33(1) of the Constitution also provides that everyone has the right to a lawful administrative action, with a fair and reasonable procedure. Further, Section 34 of the Constitution grants individuals fair and public hearings before a Court of law or another independent and impartial tribunal.

The second chapter of the Bill deals with the powers of the Minister to expropriate property. The Minister may, according to 3(1) expropriate property on the ground of public purpose or in public interest. The chapter further explains the Ministers authority relating to the expropriation of property. Subsequently, chapter three of the Bill deals with how the authority should investigate and gather information before deciding to expropriate property. Article 5(1) requires that the authority must fulfill specific requirements before considering the

\textsuperscript{79} Ibid.
\textsuperscript{80} Department of Public Works. Draft Expropriation Bill: 2019, no 1409.
\textsuperscript{81} Expropriation Bill, p 118.
expropriation of property. Hence, the following must be established before an expropriation is considered; “(a) the suitability of the property for the purpose for which it is required, and (b) the existence of registered and unregistered rights in such property and the impact of such rights on the intended use of the property.” The fourth chapter aims to describe how the expropriation authority shall notify the owner of their intention to expropriate. Article 7(1) stipulates that the owner must be served a notice informing them about the intention of the expropriating authority, and the notice must also be published.

The chapters mentioned above in the Expropriation Bill provide a comprehensive process regarding expropriation of property. All articles in the mentioned chapters are not described in detail because they deal specifically with issues regarding the procedure of expropriation. Even though it falls out of the scope to examine the European Court of Human Rights (ECtHR) cases, they have developed a “rule of law” test, in order to determine whether an interference with a right has been legal. The measure should be based on a domestic provision, it should be accessible to the people, and they should be able to predict the consequences that the legislation will impose on them.\footnote{Kruslin v France, Application no. 11801/85, ECtHR (24 April 1990) para 27.} What can be established from the above-mentioned criterions in the Expropriation Bill is that the government of South Africa has aimed to develop a detailed framework to ensure that the expropriations of property are not arbitrary.

Regarding the question of compensation for expropriation of property, the government dedicated the fifth chapter to deal with the issue. Article 12(1) determines the amount of compensation that should be awarded need to reflect an “equitable balance between the public interest and the interests of the expropriated owner or expropriated holder.” Furthermore, the requirements that are set out in Section 25(3) in the Constitution also apply. Hence, all the relevant circumstances must be taken into consideration, particularly the following: “(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.”

Article 12(2)(a) provides that when determining the amount that should be paid for the expropriation, the expropriating authority “must not” unless in special circumstances where it is “just and equitable,” consider the fact that the owners were deprived of their property
without their consent. Moreover, article 12(3) highlights that it may be “just and equitable” to not compensate owners for expropriated land according to the public interest when having taken consideration to all relevant circumstances including; “(a) Where the land is occupied or used by a labor tenant, as defined in the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996); (b) where the land is held for purely speculative purposes; (c) where the land is owned by a state-owned corporation or other state-owned entity; (d) where the owner of the land has abandoned the land; (e) where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land.” However, the article provides that expropriation without compensation is not limited to these criterions. Hence, there needs to be a balance between the relevant circumstances and the public interest.

4.6 Conclusion

When reading the draft of the Expropriation Bill, it is clear that the main objectives are the development of the nation and creating a long-term solution for poverty. That is why the government maintained that a goal is to restore and redistribute land for economic purposes. Hence, the government's vision for the restitution of property is partly to redress historical injustices, but also to create opportunities for people in order to develop the nation. Consequently, the expropriation is therefore an economic, moral and social necessity in South Africa, as the government maintained.

Furthermore, the Bill provides that the amount of compensation should to be an equitable balance between the public and individual interest. As mentioned above, the Bill provides several requirements that need to be taken into consideration before deciding that a property should be expropriated. The Expropriation Bill does not, in fact, revoke compensation for property completely. Compensation for expropriating land is still relevant and the requirements that are to be considered are not much different from the criterions provided in Section 25(3) of the Constitution. The Expropriation Bill does recognise that there may be some instances were compensation should not be paid. However, the government must consider the requirements before deciding not to compensate the owner. Furthermore, the government must also consider the requirement of “just and equitable.” Nonetheless, it is crucial that the Court tries cases concerning expropriation in order to clearly define what is
meant by equitable compensation. My initial thought when reading the Constitution and the property legislations were that it is obvious that the nation still is deeply affected by historical injustices. By incorporating the historical injustice perspective in the Constitution and land reform policies, it shows that it is important for the South Africans that their history is not forgotten. However, there is no explicit reference to race in the Expropriation Bill, even though it might be implicit. The articles do not explicitly provide that white farmers properties will be expropriated. Nevertheless, the Bill maintains that historical injustices should be taken into consideration when considering expropriation, which clearly refers to the dispossession of Africans land during colonisation.

Lastly, the objective of the land reform is to attain social justice, transforming racial inequality and reducing poverty in South Africa. So, why is the question of compensation a controversial subject in South Africa? As I discussed earlier, the government developed legislation and a process that ought to be followed when determining expropriation of property and also when considering not to compensate the owners. However, in Zimbabwe (which will be discussed in the next chapter) the government introduced land reform legislations and a legal procedure for expropriation of property that was considered legitimate. Nevertheless, it ended up with violence and arbitrary confiscations of property. This could be a reason why there is a lot of negativity regarding the land reform in South Africa today. The next chapter will examine the African Charter of human rights. The purpose of examining the instrument is to determine if South Africa would violate the farmers rights if they would expropriate their land without compensation.
5 African Charter on Human and Peoples’ Rights

5.1 Objectives and Main Features of the Instrument

South Africa acceded to the African Charter on Human and People’s Rights (African Charter) on 19 July 1996. Article 30 of the Charter establishes the African Commission on Human and Peoples’ Rights (African Commission) in order to promote and protect human rights in the Region. The mandate and procedure of the Commission are set out in the second and third chapter of the African Charter. The Commission has inter alia jurisdiction to examine situations of human rights through state reports and country visits and may also adjudicate in “communications,” which are complaints that can be submitted by the Member States, individuals and Non-Governmental Organisations (NGO). The African Court on Human and Peoples’ Rights (African Court) was established by virtue of article 1 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court (Protocol). The Court was created to “complement the protective mandate” of the African Commission, and the Commission may also submit communications to the African Court. The jurisdiction of the African Court extends to all submitted cases and disputes concerning the interpretation and application of the African Charter. However, only nine of the thirty Member States have recognised the jurisdiction of the Court to receive claims from NGOs and individuals.

As established in the previous chapter, an important limitation of Section 25 of the South African Constitution is provided in Section 39 in the Bill of Rights. Provision 39(2) requires that Courts consider international law when interpreting the rights provided in the Constitution. Therefore, South African Courts should not take decisions that may violate international law and the rights and obligations that derive from the African Charter must be considered by the government of South Africa.

In the next section the right to property, the right to free disposal of wealth and natural resources and the right to equality and non-discrimination are discussed. The articles are

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limited to only discuss the rights in relation to the possible deprivation of white farmers property in South Africa. Initially, a general outline of what the rights encompass is determined. Subsequently, the rights will be discussed with regard to the purpose of this research.

5.1.1 Right to Property

Article 14 of the African Charter stipulates that the right to property is guaranteed. The right may be encroached upon because of “interest of public need or in the general interest of the community.” Furthermore, the article provides that the limitation of a person’s property rights must conform to “appropriate” legislation. Thereby, forbidding arbitrary deprivations of property. In the communication Mouvement Ivoirien de Droits de l’Homme, 87 the African Commission held that confiscating private property without an attempt of striking a fair balance between the public interest and individual interest was in violation of article 14 and constituted an arbitrary deprivation of property.88 The Commission has even ruled that by confiscating someone’s equipment, the government could deprive them of their source of income and livelihood, which amounts to a violation of their right to property.89

The Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Implementation Guidelines) provide a more detailed explanation on how the economic, social and cultural rights ought to be implemented by the Member States. It does not provide a comprehensive interpretation of the articles; however, it highlights important parts of the rights that should be considered. The duties that arise from the Guidelines should be read in light of the general obligations and the responsibility States parties to the Charter already have committed to.90 Regarding the right to property, the guidelines define it as a “broad” right that protects “real rights of individuals and peoples,” which includes property inherited or property that has been part of a person’s family. The owners must also be notified because they are entitled to have a legitimate expectation if the government is planning on expropriating their property. Primarily because everyone has a

87 Communication 262/02, Mouvement ivoirien de droits de l'Homme (MIDH) v. Cote d'Ivoire, ACHPR, 2008.
88 Ibid, paras 76-78. (Communication 262/02)
right to peaceful enjoyment of their possessions. Nevertheless, the Guidelines provide that the right is not absolute and may be subject to restrictions. The restrictions should not be arbitrary, but proportional and in conformity with the law.  

The African Commission maintains that the right to property in article 14, includes two main principles. The first principle is general and relates to ownership and peaceful enjoyment of property. The second principle relates to conditions of how it may be possible to expropriate property and the circumstances relating to it. Article 14 does recognise that the right to property may be limited by the State in certain circumstances. The primary role of the State is to ensure people’s right to peaceful enjoyment of their possessions. However, if the State can prove that it is necessary to infringe the right due to public interest, the deprivation of property could be permitted.  

The prohibition from interfering with private property in article 14 of the Charter, refers to both State and third parties and obliges them to refrain from arbitrary deprivations. In the Mauritania communication, black Mauritanians land had been confiscated and destroyed by the government, ultimately forcing them to flee and go abroad. The Commission ruled that the expropriation of their land amounted to a violation of the right to property, as guaranteed by article 14. However, article 14 does not specify who the beneficiaries of the right are and do not explicitly give rise to compensation. The main victims in the case were black Mauritanian officials that were suspected to be affiliated with a black opposition party. Therefore, those officials were targeted and oppressed by the government. The Commission ruled that the acts of the government violated article 14 however, did not address the issue of compensation for the black Mauritanians loss.  

Since the right to property in the Charter is broadly formulated, the Commission has in several communications dealt with issues that amount to a violation of the article 14. As mentioned earlier, the right to property may be encroached upon in certain circumstances. The Commission has therefore attempted to clarify the circumstances in which people’s property

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91 Implementation Guidelines, para 52-53.
95 Ibid, para 128.
rights may be limited through a case by case basis. For instance, in *Modise v. Botswana*, the complainant alleged that he had been deported four times from Botswana. He claimed that the deportations caused him major financial losses because the government also confiscated his possessions and his property. The Commission found that Botswana had violated the complainant’s right to property. The actions of the government, in this case, did not only amount to a violation of article 14 of the African Charter. Hence, the Commission urged the government of Botswana to take appropriate measures and also compensate the complainant for his suffering. However, the Commission did not explicitly state that confiscation of people’s private property gives rise to compensation. They simply urged the government to pay the applicant compensation for violating his rights in the African Charter.

The African Commission has been given mandate to promote human and people’s rights and article 45(a) of the African Charter provides that the Commission should organise “seminars, symposia, and conferences.” Therefore, in a seminar in Pretoria representatives from the African Commission, human rights institutions and NGOs adopted the Pretoria Declaration on Economic, Social and Cultural Rights in Africa (Pretoria Declaration). The Declaration comments on several economic, social, and cultural rights provided in the Charter. However, paragraph 5 of the Pretoria Declaration, concerns the right to property. It provides that article 14 of the African Charter entails among other things, that property should be protected from arbitrary deprivations, and that “adequate compensation” should be paid for “public acquisition, nationalisation or expropriation” of property. Furthermore, the State Party reporting guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights (Tunis Guidelines), also is an implementation tool provided to guide the Member States. States may use the Guidelines when reporting on the legislative measures taken in order to give effect to the rights of the Charter. Under article 62 of the Charter, reports must be submitted every two years by the Member States. Paragraph 3 of the Guidelines deal with the question of property. It provides that States should specify what measures that have been taken to compensate people for public acquisition of land. It also provides that the sum should balance the rights of the dispossessed people and the interest of society in a fair way.

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*97 Ibid, paras 94-97.*


The question regarding compensation is discussed further in the Implementation Guidelines. The Guidelines stipulate that States should ensure that compensation is awarded for the acquisition of land, and the amount should “fairly balance” the right of the affected individual and the “wider interest of society.” Generally, compensation should reflect the market value. However, in some instances the Guidelines provide that limitation because of public interest may require that the amount of compensation is less than the market value. Also, in some instances that no compensation is paid at all.100

The right to property is not an absolute right and is therefore subject to limitations, as stated above. However, under no circumstances is it allowed to confiscate anyone’s property arbitrarily. Hence the government must be able to justify a possible expropriation on the grounds of public need or public interest. Since the right to property is broadly formulated the Commission has attempted to clarify what the right entails. Nevertheless, the question of compensation is unclear under article 14 of the Charter. The article does not explicitly mention compensation, nor is it clear when examining case law if compensation is a requirement. Compensation has been raised as a condition for deprivation of land; however, in soft law regulations. Furthermore, the Implementation Guidelines stipulate that the amount should reflect a fair balance between the individual and the wider interest of society and that it generally should reflect the market value of the property. Nonetheless, the Guidelines also provide that the amount can be less than market value, and even in some cases none at all. However, in my opinion, it is not clear if the white farmers could rely on article 14 to claim compensation if their property is expropriated. The case law of the Commission is not clear on the question of compensation for deprivations. Because the guidelines are considered soft law and the Commission has not explicitly commanded States to compensate when violating article 14, it could be considered a recommendation.

5.1.2 Right to Free Disposal of Wealth and Natural Resources

Article 21(1) of the African Charter provides that all peoples are free to dispose of their “wealth and natural resources” and that under no circumstance shall they be deprived of it. Further, article 21(2) of the Charter stipulates that dispossessed people have the right to restitution of property and adequate compensation for their loss. Article 21 of the Charter is

100 Implementation Guidelines, para 55.
considered a group right, and in order for the white farmers to rely on the article they must be considered a “people.” The concept “peoples” is interpreted in the Implementation Guidelines as “any groups or communities of people that have an identifiable interest in common, whether this is from the sharing of ethnic, linguistic or other factors.” However, the Guidelines state that this is the interpretation of “peoples” for the purpose of the Guidelines, not for the Charter.101

In the *Endorois* communication,102 the African Commission notes that the concepts of “peoples” and “indigenous peoples” are both challenging terms to define. There is no clear and universal understanding of the concept “indigenous peoples,” and the Commission maintained that there is no single definition that could capture the “diversity of indigenous cultures, histories and current circumstances. The same applies to the concept of “peoples,” which the Commission recognises may carry political connotations.103 Initially, the African Commission avoided to interpret the concept “peoples,” and the drafters of the African Charter had intentionally left the term undefined. No inspiration could be taken from the International Covenant on Civil and Political Rights (ICCPR) or the International Covenant on Economic, Social and Cultural Rights (ICESCR) because they do not define the concept, and there was not enough international jurisprudence that defined the term “peoples.”104 However, in the *Endorois* case, it was crucial for the Commission to determine whether the Endorois people could be considered a “people” and thereby claim the group rights in the Charter. The Commission claims that there is a consensus on some objective criterions that could provide an understanding of the concept “peoples.” Firstly, it should be clear that the collective individuals are considered a “people” through a shared “historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy.” Secondly, the group must suffer collectively from the deprivation.105

Moreover, the Commission also drew inspiration from international law and the case law of the Inter American Court of Human Rights (IACtHR) in order to determine the rights of the Endorois people.106 The applicants in the case contended that the Kenyan government violated

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101 Implementation Guidelines, para 1(c).
102 Communication 276/03, Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council), ACHPR, 2009.
103 Communication 276/03, paras 146-147.
104 Ibid, para 147.
105 Communication 276/03, para 151.
106 Communication 276/03, paras 155-158.
the rights of Endorois people by forcibly removing them from their ancestral lands, without consulting or compensating them. The applicants argued that both article 14 and article 21 provide a right to property and the right to freely dispose of ones’ wealth and natural resources. They argued that the rights are closely linked, however, that article 21 explicitly guarantees them the right to compensation for their loss.\textsuperscript{107} The African Commission relied on the interpretation of the IACtHR regarding the deprivation of indigenous people’s land in the \textit{Saramaka} case.\textsuperscript{108} The IACtHR provided that the protection of property is not an absolute right and should therefore not be open for a strict interpretation. Furthermore, they established that the right to property is subject to limitations, and a State may restrict the enjoyment of the right to property if the restriction is “previously established by law, necessary, proportional, and with the aim of achieving a legitimate objective in a democratic society.”\textsuperscript{109} Moreover, regarding article 14 and 21 in the \textit{Endorois} case, the Commission concluded that individuals and groups that have been deprived of their land may rely on article 14 and 21 to claim their rights. The Commission highlighted that the right to property in fact can be restricted “in the interest of public need or in the general interest of the community” and it needs to be “in accordance with appropriate laws.” Nevertheless, in the \textit{Endorois} case, the Commission addressed the question regarding compensation under article 21, not article 14 and ordered the State to compensate the victims for violating their rights.\textsuperscript{110}

It is clear when examining the \textit{Endorois} case that the beneficiaries of the rights in the African Charter benefit from the fact that the Commission is allowed to draw inspiration from international law regarding human and people’s rights. Article 60 and 61 of the Charter encourages the Commission to consider “subsidiary measures to determine the principles of law, other general or special international conventions.” Therefore, it is not unusual that the Commission considers cases from the IACtHR or the European Court of Human Rights (ECtHR) to analyse cases, as they have adjudicated far more cases than the African Commission. In the \textit{Endorois} case, the Commission considered case law from ECtHR and IACtHR when examining whether the government had violated the applicants right to property. Hence, the Commission was able to determine the right of the Endorois with support in both international and regional human rights law.\textsuperscript{111}

\begin{footnotes}
\item[107] Ibid, para 122.
\item[109] Communication 276/03, para 265.
\item[110] Ibid, paras 267-268.
\item[111] Communication 276/03, paras 188-190.
\end{footnotes}
With regards to the white farmers in South Africa, it is imperative first to determine if the farmers could claim group rights in the Charter. As mentioned above, there is no clear explanation of how the concept “peoples” should be defined. However, in the *Endorois* case, the Commission provides a set of criterions that could more or less be used as the basis for an understanding of the concept. One of the criterions is that the “people” must suffer from deprivation as a group. Judging by the circumstances in the *Endorois* case, the Endorois suffered as a group because they shared the land as a traditional community. Hence, my understanding is that the Commission expects that the deprivation affects the group as a “people,” meaning that they should have shared the land that was confiscated.

Regarding the question of compensation, the Endorois also argued that they were not compensated by the State for their loss of property. The Endorois invoked both article 14 and article 21 to argue that their rights to property had been violated. However, the Commission ordered the State to compensate the victims under article 21, not article 14. As mentioned above, article 21 explicitly orders the State to pay adequate compensation to the dispossessed for their loss. Even though soft law regulations also provide that compensation should be awarded to victims under article 14, the claims for compensation are stronger under article 21 of the Charter.

Lastly, the situation regarding expropriation of white farmers’ land in South Africa, is completely different from the circumstances in the *Endorois* case. However, it seems unlikely that the white farmers could argue that they constitute a “people,” and therefore should be able to claim group rights under the Charter. Nevertheless, it is difficult to predict how the Commission would judge in such a case since indigenous groups bring most cases under article 21. Since the white farmers cannot be considered an indigenous group, it is through case law, it could be clarified if they could claim their rights under article 21 as a “people.” Furthermore, the Commission’s ability to draw inspiration from other jurisdictions could broaden the scope of the right, thereby, including groups such as the white farmers. In the next section, the concept of “peoples” will be discussed further in relation to the right to equality, which also is a group right.

### 5.1.3 Right to Equality and Non-Discrimination

Article 2 in the African Charter ensures the right to freedom of discrimination and is similar to the non-discrimination provision provided in article 2 in the ICCPR. Article 2 of the Charter, provides that the Member States are obliged to recognise the enjoyment of all the
rights in the Charter irrespective of “race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.” In *Good v. Botswana*, the Commission recognised that the principle of non-discrimination is a “fundamental principle in international human rights law,” and all international and regional human rights frameworks contain prohibitions against discrimination. Hence, the prohibition against discrimination guarantees that all people should be treated “equally” in the same circumstances. Unless the difference in treatment is objective and may be justified because it is reasonable and proportionate to its intended aim. Therefore, in certain instances, positive discrimination is allowed in order to correct imbalances, and State parties should take measures in favor of marginalised people’s.

Furthermore, article 19 of the African Charter provides that “all peoples shall be equal” and should, therefore, enjoy the same respect and enjoy the same rights. In *Legal Resources Foundation v. Zambia*, the African Commission stated that the right to equality is “very important,” therefore, all citizens should expect fair and just treatment by the legal system. Furthermore, citizens should be ensured equality before the law and enjoy all rights equally as citizens. The Commission also claimed that the right to equality is important because without equality the capacity to enjoy several rights will be affected. The right to equality and non-discrimination, are connected since both can be infringed because of acts of discrimination and unequal treatment. However, the right to equality is considered a group right, hence it only protects vulnerable “peoples” who are targeted.

Initially when analysing the concept “peoples” in the African Charter, the history of colonisation by foreign powers, as well as the groups of people fighting against oppression for their liberation, were taken into consideration. However, the African Union (AU) submitted in the Constitutive Act of the AU which has the purpose of eradicating all forms of colonialism, that the Region has moved past the need to eradicate colonialism. Therefore, their opinion is that Charter provisions should be defined with regard to the present realities of the continent.

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113 Ibid, para 128-129.
114 Communication 276/03, para 196.
116 Ibid, para 63.
117 Ibid, para 73.
118 Evans and Murray, pp 251-252.
As previously mentioned, the concept “peoples” is defined in the context of historical injustice. Therefore, the white farmers of South Africa do not necessarily fit into the description of the intended rightsholders of article 19. It is also apparent when researching cases that have been brought to the Commission under article 19 and 21, that they mainly concern marginalised and prosecuted groups of people. According to Murray and Evans, article 19 in the African Charter has not been invoked in many communications and have therefore remained relatively untested by the Commission.

Nevertheless, article 19 and article 2 were both invoked in the case *Crawford v Zimbabwe*. The applicant argued that the government of Zimbabwe confiscated his property because of his race, and he did not receive compensation for the loss of his possessions. Therefore, the applicant claimed that the government violated his right to equality in article 19 and non-discrimination in article 2 of the African Charter. The African Commission ended up declaring the case inadmissible because the applicant waited almost eight years before filing a complaint with the Commission. Furthermore, the Commission maintained that he did not have a good or compelling reason for waiting eight years before bringing his case before the Commission. Thus, the case was determined as an inordinate delay.

Although the Committee did not examine the merits of the *Crawford* case, they raised a few relevant points that are worth mentioning. The Commission addressed amendment no. 17 of the Zimbabwean Constitution, which permits the compulsory acquisition of land. The amendment prevents anyone who has been deprived of land from seeking compensation or restitution of their property. The only compensation that can be awarded is for improvements to the land. Moreover, it also prohibits the Courts from hearing any cases regarding expropriation of land, meaning that the farmers were deprived of their right to access the Courts in Zimbabwe. The Commission noted that in order for a remedy to be considered available to a victim it must exist in law and be accessible in practice. Therefore, they found that the complainant, in fact, did not have any remedy available to challenge the expropriation. Regarding compensation, the Committee provided that the Respondent State

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120 Evans and Murray, pp 251-252.
121 Communication 477/14, Crawford Lindsay von Abo v. The Republic of Zimbabwe, 2015.
122 Communication 477/14, para 7.
124 Ibid, para 76.
125 Communication 477/14, 80-83.
must award the victim an “effective and sufficient remedy” and stated that compensation of improvement of the land is not considered sufficient.\textsuperscript{126}

Consequently, the South African government will need to consider the rights of equality and non-discrimination if they aim to follow through with the amendment to the Constitution. In the \textit{Crawford} case, the Commission did not accept that the government legislated that no claims of compensation could be brought to a court of law in Zimbabwe. Thus, prohibiting them from the right to access to court. Furthermore, granting compensation simply for the improvements of the land was not considered sufficient, by the African Commission. Hence, the \textit{Crawford} case demonstrates that there is a standard of compensation that should be paid if the government expropriates land. Since the Commission did not examine the merits of the case there is no explanation on whether the Zimbabwean government's actions amounted to discrimination. The Commission recognised the importance of the right to access domestic Courts and also to be compensated for one’s losses. However, the Commission did not confirm that the applicant had been racially discriminated, as he claimed.

As mentioned above, in the \textit{Good} communication, the Commission emphasises that the non-discrimination article is fundamental in all of the international human rights treaties and governments should take measures to ensure that all people are treated equally. However, the Charter also allows positive discrimination to some extent. The expropriation of land in South Africa will most likely affect the white farmers. However, the main goal of the land reform in South Africa is to reverse racial imbalances and achieve equality for all citizens. Hence, the amendment of the Constitution should not be conceived as a punishment for the historical injustices the Africans endured.

\section*{5.2 Conclusion}

In conclusion, the African Charter does, in fact, ensure that individuals and groups should be granted compensation for expropriation of property. The research has, however, found that the white farmers in South Africa will not be able to claim the group rights in the Charter. As mentioned above, the right to freely dispose of one’s natural resources explicitly states that victims should be awarded compensation for their loss. However, the requirement is that the

\textsuperscript{126} Ibid, para 86.
group is considered a “people.” According to my research, the white farmers do not constitute a “people” and can, therefore, not invoke neither the right to freely dispose of one’s natural resources nor the right to equality. However, this is according to my assessment, because there has not been a similar case decided on the merits before the Commission yet.

Nevertheless, if the government of South Africa expropriates white farmers land without compensation, the white farmers could argue that their rights under article 14 of the Charter have been violated. However, as mentioned above, article 14 does not explicitly oblige the Member States to compensate victims of dispossessions. Nevertheless, the above-mentioned soft law regulations recommend that State Parties provide victims with compensation for their loss of property. Furthermore, in the Crawford case, the Commission instructed the government of Zimbabwe to award the victim an “effective and sufficient remedy.” Taking everything into consideration, it is not clear whether the white farmers would be awarded compensation under article 14 in the Charter. The right to compensation for deprivation of land seems to be stronger under article 21.

Lastly, regarding the issue of discrimination, the white farmers could argue that they have been discriminated against under article 2 of the Charter. However, it is not clear how the Commission would view their claims of discrimination. In my opinion, the expropriation of property in South Africa is aimed to reduce poverty and create jobs in order to develop the society, as mentioned above. Therefore, it would be difficult to claim that the actions of the government simply are based on racially discriminatory grounds. Nevertheless, the question of discrimination is addressed by the Tribunal of the Southern African Development Community, which will be examined further in the next chapter.
6 The Treaty of the Southern African Development Community

6.1 Objectives and Main Features of the Treaty

The Southern African Development Community (SADC) is an organisation formed in 1992, and it consists of fifteen Member States. The organisation established the Treaty of the Southern African Development Community (SADC treaty) which mainly focuses on sustainable economic development in southern Africa. Further, the objectives of the SADC is to “achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration.” The greatest contribution of the SADC is creating a sense of a shared identity and destiny in southern Africa. Hence, their goal is to tackle issues of exploitation and deprivation through economic co-operation between the southern African countries.

Moreover, the treaty of the SADC also establishes an institutional mechanism, including a Tribunal. The Tribunal has the mandate to interpret the provisions of the treaty and to adjudicate claims that are referred to it. Individual claims could be brought before the Tribunal; however, after the Tribunal ruled against the government of Zimbabwe in several cases, it was suspended in 2010. Since then, the mandate of the Tribunal has been negotiated and it was confirmed in a summit that the mandate should be limited to disputes between State parties only.

The treaty of the SADC is not necessarily a human rights instrument. However, article 4(c) provides that State parties should act in accordance with the principles of “human rights, democracy and the rule of law.” Furthermore, article 6(2) of the treaty stipulates that State parties should not discriminate any person on the grounds of “gender, religion, political views, race, ethnic origin, culture or disability. Before the Tribunal was suspended white

127 South Africa, Botswana, Angola, DR Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Swaziland, Tanzania, Zambia and Zimbabwe
129 Southern African Development Community. SADCAT. https://www.sadc.int/about-sadc/sadc-institutions/tribun/
farmers invoked these articles in cases against Zimbabwe for land expropriations. In the following section, two fundamental cases relating to the land reform in Zimbabwe will be assessed. Moreover, a brief history of the land reform in Zimbabwe and the recent developments regarding compensation for white farmers in Zimbabwe is also discussed.

6.2 History of the Land Reform in Zimbabwe

The land question in Zimbabwe has, for a long time, been a controversial subject. The country was formerly known as Southern Rhodesia and was colonised by the British after the South African Company discovered minerals there, in 1890. Subsequently, the British and South African settlers established a racially segregated colony and imposed various legislations that elevated the whites to a higher class. Finally, in 1923, the settlers declared the nation a part of the British Crown. Thereby, the dominance of the nation and the expropriation of land was secured legally, and the economy of the white population was also assured.\textsuperscript{130}

It took many years of guerrilla warfare until rebels overthrew the British colonialist. The nation won its independence in 1980, and the same year Robert Mugabe was elected as president of Zimbabwe. One of the most important objectives of the Mugabe administration was to deal with the land question. The government promised radical reforms by amending land laws and dealing with the injustice concerning the imbalance of ownership of property.\textsuperscript{131} However, during the years that followed independence, the government had limited abilities to deal with the land question in an effective way. In 1980, the government implemented land reforms that simply were on a “willing buyer, willing seller” basis, which worked because some landowners decided to leave the country after the liberation war. In 1990, the government amended the Constitution to allow expropriation of property. Further, they enacted the Land Acquisition Act in 1992, in order to acquire land for resettlement purposes. Despite the developments that had been made regarding the land laws, the reforms were considered to be slow and the government were eventually pressured into speeding up the expropriation and resettlement process. Finally, in the year 2000, the government introduced the Amendment Act no 2. It established that the United Kingdom, as the former colonial power of Zimbabwe, is responsible for compensating the white farmers for their


\textsuperscript{131} Ibid, pp 379-380.
losses. If the United Kingdom refused to compensate the dispossessed farmers, the Zimbabwean government considered that they also were under no obligation to pay for the expropriation of white farms.\footnote{132}

Although the amendments and newly adopted legislation had proper procedures that the Zimbabwean government had to abide by, they were either “unwilling” or “unable” to follow their procedures. The result was that the year 2000, white-owned farms were invaded by war veterans and other rebels who forcefully and violently took over farms. Law enforcement did not intervene, and the government did not condemn the lawlessness and extreme violence. However, the violent confiscation of white farmers land was condemned by the Courts in Zimbabwe. The Supreme Court even called it “unconstitutional,” because the government allowed people to interfere with the white farmer's private property arbitrarily. The Supreme Court also held that the land reform program was important and necessary, yet, the government failed to obey its laws and procedures relating to the land reform. Therefore, the Supreme Court advised the government to follow the legal procedures and execute the land reform according to the law.\footnote{133}

The Court’s critique of the government’s actions was not received well. The government responded to the accusations by attacking the judiciary and removing them from office. The government replaced the judges with compliant Supreme Court judges that upheld the lawfulness of the land resettlement program and the actions of the government. Lastly, in 2005, Amendment Act no 17 was introduced, which revoked landowners’ rights to challenge the expropriation before a court of law.\footnote{134} This amendment revoked the white farmer's right to access the court system, and because the farmers right to access the domestic Courts was revoked, applications to the tribunal of the Southern African Development Community have been lodged by several farmers. In the next section, landmark cases from white farmers that challenged the legality of the acquisitions in Zimbabwe will be discussed.

\footnote{133}{Ibid, p 308.}
\footnote{134}{Ibid, pp 308-309.}
6.3 Cases Concerning Land expropriation in Zimbabwe

6.3.1 Mike Campbell v Zimbabwe

The Mike Campbell case,\textsuperscript{135} was the first ruling of the Tribunal and it involves the land expropriations of white farmers in Zimbabwe. There are seventy-nine applicants in the case, and all of them are farmers that have lost their land due to the land reform policies in Zimbabwe. The applicants claimed that the government of Zimbabwe violated their rights in the SADC treaty by denying them access to court, racially discriminating them and denying them compensation for confiscating their properties. The Tribunal observed that the Supreme Court of Zimbabwe did, in fact, not have jurisdiction to adjudicate cases relating to the acquisition of land. Therefore, the Tribunal emphasised that the concept of the rule of law includes “at least” two essential rights, which are “the right of access to the courts” and “the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation.”\textsuperscript{136} Subsequently, the Tribunal referred to Article 4(c) of the SADC Treaty which obliges State parties to respect principles of “human rights, democracy and the rule of law.” They also referred to the jurisprudence of the African Commission that condemned “ouster clauses” and stressed the importance of the right to a fair trial and the right to have one’s case heard.\textsuperscript{137} The Tribunal finally concluded that the expropriation of land by the government constituted a violation of article 4(c) of the Treaty.\textsuperscript{138}

The second issue the applicants raised was that the land reform discriminated against them based on their race. They argued that the land reform violated article 6(2) in the Treaty because it only targeted white-owned farms. The Tribunal argued that both international and regional instruments strictly forbid racial discrimination, and 6(2) in the SADC Treaty also prohibits discrimination based on race.\textsuperscript{139} The Tribunal noted that the SADC Treaty does not define what racial discrimination is and does not offer any guidelines on how to understand it. However, they contended that an explicit mention of race or ethnicity in Amendment 17 of the Zimbabwean Constitution would have been in breach of article 6(2). Hence, because Amendment 17 does not mention that expropriation should be based on race or ethnicity, the Tribunal found that the white farmers had not been directly discriminated. However, because

\textsuperscript{135} Mike Campbell and Others v. Republic of Zimbabwe, SADC (T) Case no. 2, 2007.
\textsuperscript{136} Mike Campbell, p 26.
\textsuperscript{137} Ibid, pp 31-33.
\textsuperscript{138} Ibid, p 41.
\textsuperscript{139} Ibid, pp 41-45.
the land reform policies in Zimbabwe only affected white owners of agricultural lands, the Tribunal examined whether the farmers had been subjected to indirect discrimination. They concluded that the effects of the land reform had an “unjustifiable and disproportionate” effect on the applicants because of their race. Therefore, the actions of the State amounted to discrimination because the difference in treatment and the application of the land laws were arbitrary and based merely on race.\textsuperscript{140}

Further, the Tribunal explained how the government could have adopted a legitimate land reform in Zimbabwe. They first highlighted that the land should have, in fact, been distributed to the poor, landless and disadvantaged people’s or individuals in society. The criterions of the land acquisitions should be reasonable and objective, and fair compensation is essential for the expropriation of people’s private property. Thus, if the Zimbabwean government had acted in accordance with the mentioned criterions, the treatment of the applicants would not have been considered racial discrimination, according to the Tribunal.\textsuperscript{141}

Lastly, regarding the question concerning compensation, the Tribunal drew inspiration from international law and argued that the government could not rely on provisions in their Constitution to avoid the obligation in international law to pay compensation for expropriation. Moreover, in international law, it is the expropriating State that is responsible to pay compensation to the victims. Therefore, the Tribunal maintained that the government cannot place the responsibility on Britain to pay the victims of expropriation. Thereby, the Tribunal held that the government of Zimbabwe violated article 4(c) and 6(2) of the SADC treaty.\textsuperscript{142}

6.3.2 Fick and Another v Republic of Zimbabwe

The failure of the Zimbabwean government to comply with the decision of the Tribunal in the Mike Campbell case, led to more cases being lodged to the Tribunal regarding expropriation of property. The Tribunal criticised the government of Zimbabwe for not taking appropriate action and following the judgments. According to 32(3) of the Protocol on Tribunal in the SADC, all of the Tribunals decisions are binding and should be enforced by the parties in the dispute. Despite the orders from the Tribunal, the government of Zimbabwe continued to disregard the decisions. In the Fick case, the Tribunal claimed that enough evidence had been

\textsuperscript{140} Mike Campbell, pp 48-54.
\textsuperscript{141} Ibid, p 54.
\textsuperscript{142} Ibid, pp 56-57.
presented to conclude that the decisions which were meant to protect people’s rights were endangered.  

Finally, after the Tribunal criticised the government in several cases, on August 12, 2000, the Minister of Justice and Legal Affairs of Zimbabwe sent a letter to the Tribunal stating:

“We hereby advise that, henceforth, we will not appear before the Tribunal and neither will we respond to any action or suit that may be instituted or be pending against the Republic of Zimbabwe before the Tribunal. For the same reasons, any decisions that the Tribunal may have made or may make in the future against the Republic of Zimbabwe, are null and void.”

The Fick decision was issued in 2010, and not long after that, the functions of the Tribunal were suspended. The government of Zimbabwe openly expressed their discontent with the Tribunal and held that they were displeased with the rulings and criticism from the Tribunal. Therefore, on the 2010 SADC Summit, the Tribunal was de facto suspended and could therefore not receive any more complaints.

6.4 Recent Developments Regarding Compensation

In April 2019, the government of Zimbabwe released an unexpected statement. The government stated that they would begin a process to compensate the white farmers who lost their land following the implementation of the land reform policies 19 years ago. In a press statement, the government of Zimbabwe claimed that it is committed to compensating all the white farm owners who were dispossessed of their land as a result of the land reform. An Ad Hoc Compensation Working Group that will include government officials and representatives of the dispossessed farm owners will develop a comprehensive farm valuation that will be completed at the end of May 2019. After 19 years of fighting against the farmers and denying them any justice for their claims, the government decision is ground-breaking. However, many argue that it is the economic situation in Zimbabwe that has prompted the
government to pay the farmers for their loss. The nation has suffered because of financial debts, resulting from among other sanctions imposed by the U.S and UK. Therefore, it is claimed that the government is paying the farmers in order to improve the economy of the nation, not because they acknowledge their fault and want to correct them.\footnote{The South African. Zimbabwe: Thousands of white farmers to receive compensation for land. https://www.thesouthafrican.com/zimbabwe-news-white-farmers-land-compensation/ (last accessed 2019-04-20)}

6.5 Conclusion

In conclusion, many lessons can be learned from how the land reform was implemented in Zimbabwe. The initial aim of the government when they enacted the land reform was not that land would arbitrarily be taken from the white farmers. The reason that it lead to the violence and arbitrary confiscation of properties was that the government were not effective, and the process of restitution was too slow. Furthermore, the land reform policy was initially considered fair and just by the Courts in Zimbabwe. The expropriations would therefore not have been condemned had the government followed the proper legal procedure. The events that led to the imbalance in ownership of land in Zimbabwe are not much different from the history of dispossessions in South Africa. Both nations have suffered at the hand of colonial rulers and been deprived of their land as a result. However, the main difference is that when the rebels in Zimbabwe had overthrown the government and the land reform process began, not long after that, the arbitrary confiscations began. The Zimbabwean government allowed people to forcefully take land, which ultimately forced many whites to leave the country. Therefore, it is not strange that the new Expropriation Bill in South Africa has been met with resistance and anger. Zimbabwe is the nightmare scenario for any white farmer in South Africa.

Nevertheless, there has been no indication in South Africa that farms could be taken forcefully. As mentioned in the previous chapter, the government has involved government institutions and also invited the public to comment on the draft. Hence, the government aims to include all relevant actors and also the public before implementing the Bill. Furthermore, the articles in the Bill are inclusive and, in my opinion, they pass the rule of law test, as mentioned above. Also, the government has been very clear from the beginning that the expropriations of land are to be conducted in a “fair and just” manner. Hence, arbitrary confiscations of property are not allowed because the aim is to achieve equality, not create...
more injustice. As previously mentioned, the land reform is considered a necessity in South Africa. The need to correct the imbalances in ownership and inequality in society is crucial in order for South Africa to continue to develop. The unlawful invasions in Zimbabwe could not have been predicted; however, judging from the present situation and the legislation in South Africa, in my opinion, it does not seem likely that it would occur.

Further, the fact that Zimbabwe recently decided to compensate the white farmers shows the difficulty in trying to avoid compensating victims for their loss entirely. Even though the government of Zimbabwe’s discontent with the SADC Tribunal led to its suspension, the nation is also part of the larger international community. The implications of violating human rights on an international level fall out of the scope of this research, however, it is important to note that government of Zimbabwe did not agree to compensate the white farmers because of their rights in the SADC treaty. The sanction that has been imposed by the U.S and the U.K have had devastating effects on the country and its economy, which have ultimately led to the transformation of the government and commitment to follow their human rights obligations.

Arbitrary deprivations of land without a possibility to challenge the expropriation in a Court of law is not in conformity with neither the SADC treaty nor the African Charter. This is not an issue in South Africa because the land reform has not revoked the ability to access domestic Courts. Nevertheless, the Tribunal claimed that the treatment of the white farmers amounted to discrimination. They argued that the land reform had an unjustifiable and disproportionate effect on the white farmers because of their race, hence resulting in indirect discrimination. Since the SADC Tribunal concluded that the white farmers were subjected to indirect discrimination due to their race, it raises concerns on whether the South African government could justify the new land reform, which will entail the expropriation of white farmers land, without violating their rights in the African Charter.

The Tribunal highlighted a few points in the Mike Campbell case, regarding how the Zimbabwean government could have adopted a legitimate land reform. The Tribunal criticised the government for how the acquisitions took place but also for not distributing the majority of the property to the poor and landless. Furthermore, the Tribunal maintained that the criterions of land acquisitions ought to be reasonable and objective, and owners should be awarded equitable compensation. If the government had acted according to these criterions, the Tribunal claims that the land reform would not have been considered racially discriminating. However, in my opinion, the Tribunal should have clarified how a land reform could be objective when in reality the majority of farmland was owned by white farmers. This
is the case in South Africa also, and the land reform will, therefore, affect white farmers. Nevertheless, as stated above, the land reform in South Africa is not about race. It is about securing the economy for many South Africans and achieving equality by improving peoples living standards in society.

Thus far, the research paper has examined the issues regarding expropriation in South Africa from a legal perspective. In the next section the land reform in South Africa will be analysed based on Nozick and Waldron’s ideas on historical entitlement to land. The issues that are analysed concern restitution redistribution and compensation.
7 Analysis of Historical Justice in a South African Context

7.1 Land Restitution

The history of injustice and the discrimination Africans faced at the hands of the apartheid regime has shaped the current debate on land restitution in South Africa. The legal frameworks mentioned in this research, such as the Constitution of South Africa, the property Acts and land policies all require that the history of acquisition should be considered regarding expropriation. Section 25 of the Constitution was a reaction to the unlawful dispossessions under the apartheid rule, and it was important for the legislator to emphasise that South Africa belongs to “all who live in it.” It was essential to remind the citizens of everyone’s equality in the new South Africa, after having lived in a segregated nation for a long time.

The South African Constitution and the policies regarding the land reform do not only focus on the restitution of land to correct historical injustices. The government aim to improve society by addressing inequalities and taking measures to improve all citizens lives. One of the fundamental values in the South African Constitution is the aim to achieve equality between all citizens. The Constitution emphasises that the right to equality includes everyone’s right to “equal enjoyment of all rights and freedoms.” Further, it explicitly forbids unfair discrimination and requires the State to take measures to redress the outcomes caused by colonisation. Hence, it would seem that the government considers important aspects of both Nozick and Waldron’s theories of historical justice. Even if restitution of property is considered to be important, there is a balance between expropriation and the distribution of resources based on forward-looking values.

Nozick has a distinct interpretation of historical justice regarding ownership of land acquired under unfair circumstances. As previously mentioned, his model of entitlement is based on an idea of corrective justice, which is a form of justice concerned with rectifying or reversing wrongdoings. The white farmers in South Africa today, have not illegally acquired their

148 See e.g. Constitution of South Africa Section 25(3)(b).
149 Constitution of South Africa, Preamble.
150 See e.g. Section 25(8) of the South African Constitution.
property according to the definition of Nozick’s principle of acquisition. The discrimination laws enacted under apartheid merely helped white people acquire land which they could then pass down to their families. Nevertheless, the farmers today have benefited from the oppression of their ancestors because the distribution of the property was not fair, thereby violating the principle of justice in transfer. Nozick believes that to the extent it is possible historical information should be used in order to trace back the property to its rightful owner. This is similar to what the government of South Africa is attempting to do according to article 1 of the Restitution Act. The government is aiming to restore property to the descendants of victims of dispossession to the greatest extent possible. However, limiting claims of restitution to the disposessions that took place after 1913.

There are many groups of people around the world that have claimed restitution of historically controlled land. For instance, the Zionist demanded reinstitution of the “promised land,” which the Jews used to control. After the second world war, they were seeking territorial control of the land which they had lost two thousand years before the horrific aftermath of the Holocaust. The severity of the crimes committed against them during the second world war and the millions of refugees and displaced persons that were left with nothing may have been the reason why the international community decided to grant them land as redress. The case of the European Jews and the formation of Israel shows that groups can have a strong connection to land and the memory of hurt and longing for that land can be passed down through generations. The injustices of the apartheid system in South Africa was not long ago, and the aftermath is still affecting the majority of the population. Therefore the historical justice perspective in the Constitution of South Africa is reasonable. Many of the Africans today still have a connection to the land and are, therefore, claiming restitution as redress.

Nevertheless, tracing the history of property ownership, according to Nozick’s principle of rectification could be challenging. Theunis Roux claims that most modern-day property rights systems consist of several holdings that would violate Nozick’s principles on entitlement. Nozick’s theory focuses mainly on if the distribution was legitimate, fair and in line with the first two principles of historical entitlement. He fails to focus on the moral harm the injustice has caused the victims, as the aim behind the principles of entitlement is merely to restore

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Holdings to where they would have been, had the injustice not taken place.\textsuperscript{153} Hence, Nozick’s perspective on private property is not prescribed in a way which defends the greater good nor conditions for effective development of society. It simply guarantees that specific circumstances could give rise to special rights to particular individuals.\textsuperscript{154}

In my opinion, it is difficult to rectify historical unfair actions by simply restoring property to the families of the dispossessed people. Especially, when the dispossession took place a long time ago. In that sense, Nozick’s view on historical entitlement to property could encounter many problems if implemented. As mentioned above, the laws concerning the restitution of property in South Africa resemble aspects of Nozick’s entitlement theory. Nevertheless, the purpose behind the provisions concerning the restitution of property in South Africa is partly to correct historical injustices. A historical justice perspective permeates the Constitution of South Africa; however, the Constitution explicitly forbids arbitrary deprivations of property and the government must ensure that a fair balance is struck between the “public interest” and the victims of expropriation.\textsuperscript{155} Furthermore, in the Preamble of the Constitution, the legislator also included that the aim is to build a society on democratic values. Hence, the idea of historical justice in South Africa, could, in my opinion, be considered legitimate because the objective is not simply to confiscate property to correct past injustices. It is equally important for the government that everyone’s rights and interests are protected as well. Additionally, if the government of South Africa intended to expropriate white people’s farms purely based on historical justice, it would be considered unconstitutional and also constitute a violation of the property and equality rights under the African Charter.

Waldron’s idea regarding unlawfully attained property differs from Nozick’s. Although he recognises that property confiscated during colonisation and slavery, in fact, was unjust, his main argument against the restitution of native land is that circumstances have changed. Therefore, property that initially was acquired unjustly could be considered just, because the injustice has superseded.\textsuperscript{156} Consequently, Waldron’s idea on supersession means that in certain circumstances holdings should not be returned, nor should there be any attempt to find

\textsuperscript{155} See, Section 25(1) and (3) in the Constitution of South Africa.
the “legitimate” owner of the holding. Nevertheless, his theory does not describe who will decide when injustice has superseded. In South Africa, some traditional societies still have a deep connection to the land because it connects them to their roots. Furthermore, believers in traditional African religions tend to assign land a deep religious meaning. The land is a part of their identity, and it ties them and their families to a specific place. Therefore for some African groups, the land question goes beyond redistribution of wealth. Land is viewed as an “inalienable inheritance” that it passed down to family members from generation to generation. Therefore, for many South Africans, land is not mainly a source of income, but also a connection to their ancestors and their roots.

Tamar Meisels argument against restitution of aboriginal land is in line with Waldron’s supersession theory. Meisel claims that modern-day sovereignty has changed and is clearly different from the political control that was exercised over territory by indigenous people before the settlers came. Therefore, in the South African context, the Africans demanding restitution of their land believe that they possess what Meisels calls “sovereignty right.” She argues that some indigenous groups that are demanding sovereignty right today are demanding rights to something that was never “theirs” to begin with.157 Waldron similarly argues that it is impossible to predict what tribal owners of land would have done with their property had settlers never unjustly appropriated it. Hence, according to Waldron, the consequence of “rectificatory transfers” will be that all private possessions will be open for questioning if we start searching for the “rightful” owners.158

Meisels and Waldron raise important perspectives on native groups entitlement to land. Nevertheless, in order to claim restitution of land in South Africa the criterions set out in the Restitution Act must be fulfilled. Therefore, all citizens in South Africa cannot demand the restitution of property. As mentioned above, the procedure set out by the Constitution and land reform Acts requires non-arbitrariness. The policies are also clear on who the beneficiaries of the right to restitution of property are. Therefore, Waldron’s perspective in this sense is not valid, in my opinion. Although, both Nozick and Waldron’s arguments regarding entitlement should be considered, Nozick’s entitlement theory seems to be more in line with how the South African government has decided to approach issues regarding entitlement to property. Restitution of property is considered to be important and the government aims to return land to families that were deprived of their properties. Still, the

157 Meisels, pp 55-56.  
restitution of property will not include all South Africans, there is a clear process that needs to be followed, as described above.

7.2 Land Redistribution

My discussion in the previous chapter concerned the white farmers and the requirement to be recognised as a “people” to claim group rights in the Charter. Generally, indigenous groups can claim that they have a strong and clear connection to the land they have lost. Waldron also recognises that land could be returned to communities for cultural and religious purposes. He acknowledges that land that has had a sacred meaning to peoples’ may be returned, as their claim to the land is not simply based on acquiring wealth. Hence, he recognises that there are exceptions to his supersession argument. Nevertheless, Waldron mainly focuses on what he considers to be the pressing issues in society, which is poverty and in particular generational poverty. Therefore, he maintains that defenders of natives claim to land have to be realistic and accept the supersession of historic injustice because there are needs that are greater in society. Waldron, therefore, argues that the resources should be distributed fairly amongst all citizens society.

As previously mentioned, the South African government developed land reform policies to deal with issues of inequality regarding ownership of land. The aim of the Land Redistribution Programme is to provide poor and landless people with financial assistance, in order for them to improve their living situation. Furthermore, the goal is to assist Africans to break the patterns that were created during apartheid to marginalise them. Hence, through the Redistribution Programme, the focus is on improving people’s situation and not depriving the white farmers of their property. Waldron’s idea of historical entitlement has, in my opinion, a similar purpose as the Land Redistribution Programme and the Tenure Reform Programme, which is to ensure that all South African rights are equal in the future. Hence, the property laws and regulations are in line with the ideas Waldron presents on equality and fair distribution in society. The government did not simply enact restitution laws and policies to

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162 White Paper, p 16.
expropriate land in order to achieve historical justice. They also recognised the importance of redistribution of land and security of tenure.

Waldron’s focus on the pressing needs in society is an important aspect that should be taken into consideration by the legislator in South Africa. Waldron recognises that descendants of the people who were dispossessed often live in poverty, compared to the descendants of the settlers. However, he maintains that the objective of redistribution should be to achieve justice, not the rectification of wrongdoings of conditions that no longer apply. As previously mentioned, the government does recognise the need to improve the lives of the people who have been marginalised due to the discriminatory practices of apartheid. Hence, in order to deal with the issues of generational poverty, the government has enacted measures that are supposed to make it easier for people to overcome the challenges they are facing.

Nevertheless, Waldron’s perspective on supersession fails to recognise how land also is closely linked to economy. As previously mentioned, the African Commission also held that in certain instances, positive discrimination is allowed in order to correct imbalances and State parties should take measures in favor of marginalised people. Therefore, in my view it cannot be considered equal or fair for the government to refrain from expropriating white farmers property, because the injustice has superseded. White farmers in South Africa own the majority of the agricultural land; therefore, the argument of supersession cannot apply in a South African context. However, the argument about superseding injustice is not entirely wrong, in my opinion. Redistribution amongst all citizens is essential because all citizens will not be able to claim restitution of property. Nonetheless, there needs to be a balance between redistribution and restitution of property to achieve true equality.

7.3 Compensation for Expropriation

In this research, the question of compensation has been discussed for the white farmers who might have their land expropriated by the South African government without compensation. It has already been established that the motion to amend the South African Constitution to allow expropriation of property without compensation, has been passed by the government. Hence, if the Bill is promulgated, the government could legally expropriate white farms without

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163 Waldron, Superseding Historic Injustice, p 27.
164 Communication 276/03, para 196.
Nozick’s model on entitlement does not describe if property owners should be compensated for property, which was unlawfully obtained. The Nozickian perspective on property is whether the land was bought or inherited if it is originally stolen land, it should be returned. Hence the farmers in South Africa have no moral entitlement to their land. Further, by owning agricultural land the white farmers, have been able to secure their own and their families future for generations. Therefore, from my understanding of the Nozickian perspective, because the farms were acquired through dispossessions, the farmers right to compensation would not be prioritised. Moreover, Nozick’s position is that there is a possibility to affect the moral significance of historical events. The course of history cannot be changed; however, it is possible to change the present and make sure it looks like how it should have been had the injustice never occurred. Not compensating the white farmers for their property is, therefore, my interpretation of the Nozickian model on historical entitlement. However, this is uncertain because as mentioned above, Nozick’s principles on entitlement are not fully developed.

Nevertheless, is the entitlement argument enough to exempt the State from compensating the farmers? William Shaw suggests not. He critically examines the confiscation of land based on entitlement arguments in Zimbabwe and contends that entitlement arguments should be based on a “broader moral perspective.” He claims that it is evident that improving the lives of the nation’s poor and least advantaged should be considered a moral importance. However, the entitlement argument fails to consider the democratic principles, the rule of law and respect for people’s rights, which are prerequisites for a justifiable and economically viable land reform program.165 Furthermore, he argues that it does not mean that all efforts in trying to correct imbalance and economic inequality require the respect of peoples “basic moral and civic rights.” However, the violence in Zimbabwe and the lack of transparency could not be justified as an acceptable method by any normative theory.166

As mentioned above, arbitrary confiscation of property because of entitlement would be considered unlawful in South Africa. Also, the confiscation of white farmers land in Zimbabwe was not in accordance with the Charter nor the SADC treaty. In South Africa the Expropriation Bill is comprehensive and the goal is not to arbitrary confiscate land as a corrective measure, but, to create a long term solution for all citizens through restitution and

166 Shaw, p 87.
redistribution of land. Therefore, the requirement market value compensation could be considered unjust, because it has contributed to the slow and lengthy restitution process. This was the case in Zimbabwe before the violent land invasions took place. The restitution process took so long that rebels decided to confiscate land unlawfully. The government of South Africa also identified that the slow restitution processes have led to people unlawfully invading land and has linked the slow processes to the illegal settlements. Ben Cousins, however, argues that the compensation debate is only a distraction from there real issues of the land reform. In his opinion, the land reform should focus on how to distribute land and who should benefit from the land reforms.\textsuperscript{167}

My view concerning compensation is partly in line with Waldron and Cousins arguments. They stress the importance to focus on the bigger picture and justice is imperative. Therefore, instead of debating about the compensation, the focus should be on how to execute the land reform and make it as fair and just as possible. There are also a lot of modern-day problems that the government must take into consideration before expropriating property without compensation. This is not a perspective that is considered by the Nozickian model on entitlement. Nevertheless, in my opinion, it is crucial to consider all modern day issues before an expropriation. Furthermore, it could be argued that by not compensating the farmers for their property it would be as if the government commits another injustice. Hence, my opinion is that there needs to be a balance and the government must do their due diligence before deciding to expropriate property without compensation. Because in some cases not paying compensation would maybe affect the owner in a way which could have a detrimental effect on their lives.

Nonetheless, as mentioned above, the Constitution requires that compensation should reflect market value, and it has, therefore, delayed the restitution processes because of disagreements with the white farmers. Therefore, the no compensation clause in the Expropriation Bill could, in fact, motivate some farmers to accept lower than market value compensation and the restitution processes could go much faster.

8 Summary of Findings and Concluding Remarks

8.1 Summary of Findings

The overall aim of this thesis was to determine whether the amendment of the South African Constitution, which allows the government to expropriate property without compensation, could violate white farmer’s rights in the African Charter. Firstly, the study examined the Constitution of South Africa, its property legislation and policy documents, regarding expropriation of land. A historical justice perspective permeates the Constitution of South Africa; however, my findings were that the government aims to create a long-term solution for people in society and views the restitution of land as an economic, moral and social necessity. Restitution of property is not merely a measure to correct the historical injustices committed by the apartheid government. The objective of the land reform and the Expropriation Bill in South Africa is to achieve social justice, reduce poverty and to transform the inequalities in society.

Secondly, the research aimed to determine whether the expropriation of white farmers land could be viewed as discriminatory and if the no compensation clause would amount to a violation of the African Charter. My research indicated that the white farmers are not a “people” according to the definition of the African Commission. Therefore, they would not be able to access article 21, which is a group right and explicitly refers to compensation. The right to property under article 14 of the African Charter is not clear on the question regarding compensation. Therefore, the conclusion was that the white farmer's claims of compensation under article 14 would not be strong.

Furthermore, regarding the question of discrimination, my research showed that it is unclear whether the African Commission would view the amendment of the South African Constitution as discriminatory. The Commission has only received one application from a white farmer claiming that the land reform discriminated his rights according to article 2 and 19 of the Charter. However, because the Commission did not examine the merits of the case, it is difficult to conclude what their reasoning regarding discrimination would be.

Nevertheless, the SADC Tribunal recognised that the treatment and the expropriation of white farms in Zimbabwe amounted to discriminatory treatment. Hence, the Zimbabwean government was ordered to pay the victims for their loss. However, the land invasions in
Zimbabwe were also condemned by the Tribunal because of the violence and arbitrary interferences with private properties. Therefore, the Tribunal found that the land reform had an “unjustifiable” and disproportionate effect on the white farmers. The SADC maintained that criterions of the land reform must be reasonable and objective and that the victims should also be awarded compensation for their loss. Nevertheless, by evaluating the arguments of the SADC Tribunal my conclusion was that they found a violation of the SADC treaty because of the violent confiscation of white farms. Consequently, because the land expropriations in South Africa is not simply based race, my opinion is that the expropriations should not be regarded as discriminatory acts.

8.2 Concluding Remarks

The most obvious finding to emerge from this research is that the white farmers may not be able to claim compensation if the government expropriates their land according to the newly passed amendment of the Constitution. However, as stated above the land reform has a deeper meaning than merely expropriating white farmers land. The history of discrimination has left a minority of the population, with the majority of the land. This has contributed to serious housing issues and poverty. However, in my opinion, the historical justice perspective is also important. My opinion regarding the entitlement to land is a mixture of both Waldron and Nozick’s theories of historical justice. Many Africans still have a connection to the land and from that perspective, I believe that restitution of land is important as a corrective measure. However, I agree with Waldron’s ideas as well, because the pressing needs in society are imperative and everyone’s equality should be considered. Nevertheless, as mentioned above, the market value compensations have led to the slow restitution processes in South Africa. People are in desperate need of housing and the socio-economic conditions in society need to improve. Therefore, my view is that the no compensation clause might hurry up the process of restitution and redistribution and create a more equal society.
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