

LEGAL ASSISTANCE CENTRE



**COMMENTS ON THE DRAFT BILL BROUGHT
VIA PETITION BY AFFIRMATIVE
REPOSITIONING MOVEMENT**

**ON REGULATION OF LAND OWNERSHIP BY
FOREIGN NATIONALS**

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INTRODUCTION: CONSTITUTIONAL FRAMEWORK

ARTICLE 16(1) – RIGHT TO PROPERTY

All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees.

RIGHT TO PROPERTY

The constitutionally guaranteed right to property effectively means:

- a) the right to buy and own property (whether jointly or alone);**
- b) the right to use, access and enjoy the property;**
- c) the right to sell the property or dispose of in any other way e.g. donation or in a will to your heirs**

**This refers to all property (and land)
i.e urban, communal or farm land**

RIGHT TO PROPERTY – INTERNATIONAL LAW

- **The right to own property is also guaranteed by Article 17 of the Universal Declaration of the Rights and Duties of Man: everyone has the right to own property alone as well as in association with others and that no-one may be arbitrarily deprived of property.**
- **This right is guaranteed in many other international instruments to which Namibia is a signatory.**
- **Any limitation of this right in the domestic context must thus be weighed against international laws pertaining thereto**

ARTICLE 16(1) & 16(2) – LIMITATIONS

- **Provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens**
- **The State or a competent body or organ authorised by law may expropriate property in the public interest, subject to the payment of just compensation, in accordance with requirements and procedures to be determined by an Act of Parliament**

ARTICLE 22 – GENERAL LIMITATION CLAUSE

Whenever or wherever in terms of this Constitution, the limitations of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for limitation shall:

- be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual**
- specify the ascertainable extent of such limitations and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest**

PROPERTY RIGHTS MAY BE LIMITED

- **As a point of departure, Parliament is permitted to limit and regulate foreign land ownership in Namibia.**
- **Parliament may also provide for the expropriation of property in the public interest, subject to just compensation**
- **The right to own property is therefore not unqualified or absolute**
- **The question then turns not on whether limitation is possible but the manner of limitation and what it seeks to achieve**

PROPERTY RIGHTS MAY BE LIMITED

- **No expropriation process or foreign ownership prohibition requirements and procedures are set out in Article 16**
- **The Agricultural (Commercial) Land Reform Act (6 of 1995) is currently the only legislation that explicitly deals with the “requirements and procedures” for expropriation, as authorised under article 16(2) – read together with article 16(1) of the Constitution**
- **Article 16 represents a balancing act – or political compromise of sorts – between Government’s Land Reform intend and the guarantee of private property rights**
- **The public interest requirement under Article 16 must further be understood against the backdrop of Article 23(2) – Affirmative Action Clause**

PROPERTY RIGHTS MAY BE LIMITED

AFFIRMATIVE ACTION CLAUSE: ARTICLE 23(2)

- **Nothing contained in Article 10 shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programs aimed at redressing social economic or educational imbalances arising out of discriminatory laws or practices**

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OVERVIEW OF EXISTING LIMITATIONS UNDER AGRICULTURAL (COMMERCIAL) LAND REFORM ACT

ACLRA – EXISTING LIMITS ON FOREIGN LAND OWNERSHIP

The Agricultural (Commercial) Land Reform Act (6 of 1995) currently already makes provision for **compulsory expropriation of agricultural land under section 14(2) under four different categories:**

- a) expropriation of under-utilised land;**
- b) expropriation of excessive land;**
- c) expropriation of land owned by foreigners; and**
- d) expropriation of land where the state has failed in applying the willing seller – willing buyer principle**

ACLRA – EXISTING LIMITS ON FOREIGN LAND OWNERSHIP

In terms of the ACLRA (section 1) **agricultural land refers to all land, except:**

- a) land situated in a local authority area ITO Local Authorities Act;**
- b) land situated in a settlement area ITO Regional Councils Act;**
- c) land owned by the State; and**
- d) any other land which the Minister excludes from expropriation.**

ACLRA – EXISTING LIMITS ON FOREIGN LAND OWNERSHIP: EXPROPRIATION

- **Part IV of the ACLRA specifically gives the Minister power to expropriate agricultural land**
- **Is there a need for a further legislative provisions governing expropriation of agricultural land or is it implementation of the existing provision that is the issue?**
- **Ultimately, the question of expropriation of land (where the law already provides for it) is not a legal question, but a question of political will and financial means (i.e. just compensation)**
- **Providing additional legal mechanisms to exercise powers which already exist does not change whatever the bottle necks have been in the past, which is not necessarily due to a gap in the law, the law already provides for it**

ACLRA – EXISTING LIMITS ON FOREIGN LAND OWNERSHIP: EXPROPRIATION

- **Agricultural land that has been categorized as excessive, under-utilised or that is owned by foreigners can already currently be expropriated by Government**
- **Part IV of the ACLRA thus already makes provision for the expropriation of foreign owned land**
- **There has however generally been a reluctance by Government to call on and implement these provisions of ACLRA e.g. by classifying an absentee landlord's land as under-utilised**

ACLRA – EXISTING LIMITS ON FOREIGN LAND OWNERSHIP: EXPROPRIATION

- **It is unclear how the passing of the **Regulation of Land Ownership by Foreign Nationals Bill** and bringing additional powers would change this, or if it would at all. It would in any event amount to a duplication and could potentially create confusion and erode legal certainty**
- **One approach to counter this would be to insert additional categories or grounds of expropriation in the existing legislation**
- **There is however no clear gap that has been addressed by the Draft Bill that is not already covered by the ACLRA**

ACLRA – EXISTING LIMITS ON FOREIGN LAND OWNERSHIP – STATE’S PREFERRENT RIGHT

In terms of the ACLRA (section 17) :

- **the State has a preferrent right (or right of first refusal) whenever an owner of **agricultural land** (foreign or local) intends to alienate such land;**
- **Any owner (foreign or local) of agricultural land who wants to sell his **agricultural land** must first offer that land to the State, and only if the State declines may the land be offered to someone else**
- **Should land be sold without a *certificate of waiver*, then such sale is invalid and the land may not be registered by the Registrar of Deeds**

ACLRA – EXISTING LIMITS ON FOREIGN LAND OWNERSHIP – PART VI

In terms of section 58 of the ACLRA, “no foreign national shall, without the prior written consent of the Minister, be competent -

- to acquire agricultural land through the registration of transfer of ownership in the deeds registry; or**
- to enter into an agreement with any other person whereby any right to the occupation or possession of agricultural land or a portion of such land is conferred upon the foreign national...for a period exceeding 10 years”**

ACLRA – EXISTING LIMITS ON FOREIGN LAND OWNERSHIP – PART VI

The remainder of Part VI of the ACLRA deals more extensively with the other restrictions on foreign land ownership, which are, amongst others:

- the grounds under which a Minister may grant an exemption to a foreigner to own land e.g. economic benefit, job creation etc. [section 58(6)]**
- Minister may impose restrictions/conditions on the land directly on Deed of Transfer [section 58(7)]**
- No person may acquire or hold agricultural land as a nominee owner, on behalf of a foreign national, without the Minister's written consent [section 59]**

ACLRA – EXISTING LIMITS ON FOREIGN LAND OWNERSHIP – PART VI

- **if the controlling interest of a company or CC that owns agricultural land is transferred to a foreign national, then this too shall be regarded as the sale or transfer of land to a foreign national (which is prohibited) [section 58(2)]**
- **the Registrar of Deeds is prohibited from registering any transfer of agricultural land, unless the request for registration is accompanied by a statement under oath confirming the nationality of the transferee and whether the land is held on behalf of someone else [section 61]**

PROHIBITIONS AGAINST FOREIGN LAND OWNERSHIP

PREVIOUS BILLS PROPOSED:

- **Land Bill (2016)**
- **Local Authorities Amendment Bill (2015)**
- **Regional Councils Amendment Bill (2015)**

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OVERVIEW OF PROVISIONS OF: REGULATION OF LAND OWNERSHIP BY FOREIGN NATIONALS BILL

REGULATION OF LAND OWNERSHIP BY FOREIGN NATIONALS BILL

As a general point of reference, it is submitted that any technical limitations or omissions in the **Draft Bill could and would in any event be cured and addressed in the consultative and legislative drafting process, and as such these would not be bars to preliminary or initial “approval” of the **Draft Bill**, but just aspects that need further refinement and clarity, and must thus be highlighted and addressed during this ongoing consultative process**

REGULATION OF LAND OWNERSHIP BY FOREIGN NATIONALS BILL

The **Draft Bill** proposes the following in respect of “**commercial land**”:

- a) No land in Namibia shall be owned by a Foreign National, foreign nationals may only utilize land in Namibia, subject to Section 6 (correction: section 5)**
- b) Foreign nationals are only permitted to utilize “**commercial land**” for purposes of economic development, and then only in partnership with Namibians – and the Namibian national must own at least 51% of the controlling interest of such partnership**
- c) The utilization of commercial land by foreign nationals is subject to 10 year renewable leases**

REGULATION OF LAND OWNERSHIP BY FOREIGN NATIONALS BILL

Comment on Draft Bill proposals in respect of “commercial land”:

- a) There is no definition of what constitutes commercial land in the Draft Bill. It is thus hard to ascertain precisely what is meant by commercial land.**
- b) As referenced earlier the ACLRA already deals with the regulation and limitation of foreign ownership of agricultural land, it would therefore suggest that commercial land in this sense refers to a different kind of land, but in the absence of a definition therefore in the Draft Bill, it is difficult to determine specifically to what category of land the prohibition against foreign ownership of commercial land entails**
- c) The Draft Bill provision for lease renewals but does not state the requirements and procedures that would have to be followed in pursuit of such renewal. This leaves a critical gap in the Draft Bill, which whilst not fatal, would certainly leave a lot of room for constant litigation, by virtue of the failure to provide clear procedures and requirements**

REGULATION OF LAND OWNERSHIP BY FOREIGN NATIONALS BILL

The **Draft Bill** proposes the following in respect of “**Urban Land**”:

- a) Urban land owned by foreign nationals prior to the commencement of the Act shall remain vested in such foreign nationals, but may not be sold, transferred or bequeathed to another foreign national, and may only be transferred to a Namibian National**
- b) If it is in the public interest and to allow for ownership of land by Namibians in general, and indigenous Namibians in particular, the state shall expropriate urban land owned by foreign nationals in the public interest**

REGULATION OF LAND OWNERSHIP BY FOREIGN NATIONALS BILL

Comment on Draft Bill proposals in respect of “Urban Land”:

- a) The limitation proposed here is similar to the one in respect of agricultural land under the ACLRA; in that existing ownership is not terminated, but continued ownership is prohibited (in ACLRA continued ownership of agricultural land is only limited or regulated, not prohibited as is the case here)**
- b) Urban Land is currently regulated under the Local Authorities Act (1992): there are currently no outright restrictions placed on foreign land ownership under the Local Authorities Act**
- c) Foreigners can at present acquire residential property without any restrictions or any special consent from state officials**

REGULATION OF LAND OWNERSHIP BY FOREIGN NATIONALS BILL

Comment on **Draft Bill** proposals in respect of “**Urban Land**”:

- a) Whilst a limitation on foreign ownership of urban land is potentially necessary, a blanket prohibition which does not set out any requirements or procedure to be followed when being implemented and also does not provide for just compensation in the event of expropriation would in all likelihood not hold up to international law requirements and the requirements in built into Article 16**
- b) Expropriation as a state right is inherent and indivisible from sovereignty. Expropriation is thus permissible and *prima facie* lawful, provided that the conditions therefore established by domestic and international law are satisfied**

REGULATION OF LAND OWNERSHIP BY FOREIGN NATIONALS BILL

Comment on **Draft Bill proposals in respect of “**Urban Land**”:**
The 1962 UN General Assembly Resolution on Permanent Sovereignty over Natural Resources stated as follows:
“...expropriation shall be based on grounds or reasons of public utility, security, or the national interest, which are recognised as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law.”

REGULATION OF LAND OWNERSHIP BY FOREIGN NATIONALS BILL

**Comment on Draft Bill proposals in respect of “Urban Land”:
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REGULATION OF LAND OWNERSHIP BY FOREIGN NATIONALS BILL

Comment on Draft Bill proposals in respect of “Urban Land”:

- 1) The suggested proposal relating to the expropriation of urban land is not in and of itself problematic, as the State is under local and international law empowered to do so, what is however more concerning is the absence of clear procedures and requirements therefore, as well as a stated intent that just compensation would be paid in the event of expropriation**
- 2) It is therefore submitted that in their current blanket format, the proposals pertaining to prohibition against foreign land ownership and expropriation of urban land fail to rise to the standard for the “requirements and procedures” set by the Constitution and International Law**
- 3) There is further no specific definition or delineation provided for what constitutes urban land. Whilst this may be “obvious” to most of us, it would still be essential for purposes of legal certainty and to avoid problems down the line to provide one within the Act**

REGULATION OF LAND OWNERSHIP BY FOREIGN NATIONALS BILL

The **Draft Bill** proposes the following in respect of “**Agricultural Commercial Land**”:

- a) Agricultural Commercial Land owned by foreign nationals prior to the commencement of the Act must be expropriated **within three years** from commencement of the Act (**in accordance with the provisions set out in the ACLRA**)**
- b) Foreign nationals who own agricultural commercial land can avoid expropriation by entering into partnerships with Namibian nationals – in which partnership the Namibian national must own at least **50%** controlling interest**

REGULATION OF LAND OWNERSHIP BY FOREIGN NATIONALS BILL

Comments on Draft Bill proposals in respect of “Agricultural Commercial Land”:

- a) The only genuinely new proposal pertaining to the expropriation of agricultural commercial land which represents a departure from the ACLRA is the three year requirement**
- b) The three year requirement is ambitious out of necessity perhaps, in light of the landlessness and homelessness facing Namibians, but given the history of the implementation of the expropriation procedures contained in the ACLRA the practicality and implementability thereof is uncertain**
- c) This raises the question whether it is wise to make laws that the state would potentially struggle to implement, but then that is a question of policy and budget, and not law making**

REGULATION OF LAND OWNERSHIP BY FOREIGN NATIONALS BILL

The Draft Bill proposes the following in respect of “Communal Land”:

- a) No foreign national shall be allowed to utilize communal land for any purpose**
- b) Any allocation of communal land to a foreign national before this Act shall be deemed to have been an illegal transaction and shall be repudiated**

REGULATION OF LAND OWNERSHIP BY FOREIGN NATIONALS BILL

Comment on Draft Bill proposals in respect of “Communal Land”:

- a) The ownership and registration of rights in respect of communal land is currently regulated under the Communal Land Reform Act (5 of 2002)**
- b) The power to grant and recognise rights falls within the power of the Communal Land Board and Traditional Authority of the respective area in question**

REGULATION OF LAND OWNERSHIP BY FOREIGN NATIONALS BILL

Comment on Draft Bill proposals in respect of “Communal Land”:

- a) The rights that may be held in respect of communal land are generally either customary land rights or rights of leasehold, and in lesser cases, rights of occupation**
- b) These rights to communal land do not rise to the level of private ownership, but they can however exclude outsiders (especially in the case of a long term right of lease hold) and thus indirectly having similar consequences to ownership**

REGULATION OF LAND OWNERSHIP BY FOREIGN NATIONALS BILL

Comment on Draft Bill proposals in respect of “Communal Land”:

- a) Foreigners are not currently prohibited from applying for customary land rights nor rights of leasehold or occupation, however, these rights are ordinarily granted to community members according to their assertion to the customs and tradition of that particular area**
- b) The only limitation present pertaining to foreign ownership is that Section 17B of the Communal Land Reform Act specifically requires that foreign nationals must first obtain a written authorization from the Minister before applying for rights under the Communal Land Reform Act**
- c) There is however nothing in the Act that prohibits a Namibian National who has a right of leasehold or other customary land right from sub-leasing this right to a foreign national or foreign investor, or entering into an unequal “middle-man” style partnership with a foreign national**

REGULATION OF LAND OWNERSHIP BY FOREIGN NATIONALS BILL

Comment on Draft Bill proposals in respect of “Communal Land”:

- a) Whilst ordinarily communal land is normally held in the hands of Namibian Nationals and this is generally the case, a blanket ban may harm the communal communities and stifle investment, tourism and economic opportunities in communal areas**
- b) Perhaps a similar proposal (as seen under section 5 of the Draft Bill) or limitation in respect of partnerships with Namibians having a 51%+ controlling interest would be a more practical and feasible solution that would be more beneficial to the local communities**
- c) A blanket ban without clear procedures and requirements leans itself towards being potentially arbitrary and being subject to legal challenges**

REGULATION OF LAND OWNERSHIP BY FOREIGN NATIONALS BILL

Comment on Draft Bill proposals in respect of Dispute Resolution:

- a) Unlike the ACLRA which establishes the Lands Tribunal and other dispute resolution mechanisms, the Draft Bill does not specifically address dispute resolution mechanisms**
- b) This is an unfortunate omission as experience has taught us that land rights dispute resolution needs to specifically provided for given the many points of difference and contestation that could arise**
- c) Providing for clear dispute resolution mechanisms would also lessen the burden on the main stream courts to deal with land rights litigation and should provide a faster, cheaper, more accessible and efficient procedure to protect and safeguard any rights that may be affected by implementation of the Bill**

REGULATION OF LAND OWNERSHIP BY FOREIGN NATIONALS BILL

General Concluding Comments on **Draft Bill**:

- a) The proposed **Regulation of Land Ownership by Foreign Nationals Bill** canvasses prohibitions, restrictions and limitations on foreign ownership and utilization of commercial land, urban land, agricultural land and communal land**
- b) It is clear that the **Draft Bill** is born from the well documented national crisis of landlessness and homelessness which needs to be urgently addressed**
- c) However in so doing, one must safeguard against creating laws which create duplicity with existing laws and raise more questions than they answer, **especially how additional laws would address the lack of enforcement and implementation of pre-existing laws in relation to land****

REGULATION OF LAND OWNERSHIP BY FOREIGN NATIONALS BILL

General Concluding Comments on **Draft Bill**:

- The **Draft Bill** is a welcome addition to the discourse on accessing land rights, but still needs significant refinement and re-consideration before it can be turned into law
- The **Draft Bill** in any event contains necessary policy and legislative proposed amendments that would serve to enhance and expedite the Land Reform process, in particular land reform as it pertains to urban land, the progress of which has generally been undisputedly slow
- The **Draft Bill** need not be a stand alone Act, but its provisions could be co-opted into existing legislation (in the form of amendments thereto) such as the ACLRA, Local Authorities Act, Regional Councils Act and the Communal Land Reform Act – as an addition to, to fill missing gaps, to expedite implementation and to action enforcement of the current legislation

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THANK YOU !!!