

Land reform in Namibia: Beyond 2018

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1 Introduction

At the time of the attainment of independence and sovereignty, Namibia inherited a skewed land tenure system which had to be redressed by the duly elected Government of the Republic of Namibia (GRN). The subsequent land reform policies and the legal regime embarked upon by the GRN have been premised on underpinnings and imperatives such as the concepts of sovereignty emanating from relevant provisions of the United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962 on Permanent Sovereignty Over Natural Resources; the right to property under Article 17 of the Universal Declaration of Human Rights; and Article 14 of the African Charter on Human and Peoples' Rights. These conventions guarantee the right to property and the right to housing under the UN-Habitat standards, which in turn are based on international human rights law that recognises everyone's right to an adequate standard of living, including adequate housing.

On the basis of the imperatives of these international conventions, similar provisions in the Namibian Constitution and the dire need for access to land and adequate housing, the GRN has adopted policies and promulgated various pieces of legislation to address and ameliorate the land question inherited at the time of independence.

For almost three decades of independence, however, the land question in Namibia has remained an issue of national concern. Pronouncements by the GRN, activists, and a sector of traditional authorities all attest to the fact that matters such as informal settlement in peri-urban areas and the redistribution of GRN land, whether unalienated or acquired in terms of the provisions of the Namibian Constitution, the Agricultural (Commercial) Land Reform Act (No. 6 of 1995) (ACLRA) or the land

rights provided for by the Communal Land Reform Act (No. 5 of 2002) (CLRA), must be addressed. The question of the right to ancestral land, which does not seem to have been adequately addressed by policy or a legal instrument, has also featured prominently in the land reform debate.

To address these concerns, the Second National Land Conference was held in October 2018. The papers presented and debates from the floor covered, inter alia, areas such as expropriation of private property without compensation, the effectiveness of the willing buyer, willing seller option, the recognition of the right to occupy state land occupied illegally or informally in peri-urban areas, rent control, and the right to ancestral land, including the related principle of public trust that has been the legal underpinning for the pedigree of rights of use provided for by the CLRA.

Whilst recognising the dire need for reform in areas such as access to land in the urban centres, the redistribution of land to the landless members of the Namibian community, and the reappraisal of the question of rights to ancestral land, participants also generally reaffirmed the recognition of the existing legal regime of the land tenure system in Namibia and both the substantive and procedural rights of persons whose properties are earmarked for expropriation by the state.

Recommendations also included the establishment of various committees to be vested with the mandate to consult and make appropriate recommendations for the effective implementation of the conference resolutions or recommendations.

The implementation of some of the resolutions on land reform in Namibia will require a legislative process. However, for purposes of legitimacy, one would expect the legislative process to be preceded by national consultative conferences for an objective evaluation of the resolutions, especially on decisions relating to ancestral land rights and restitution claims.

2 Land reform since independence

Land reform is among the most challenging processes allowed for by the law. This is because it requires a major transformation of property rights in impoverished and skewed agrarian societies, of which Namibia is one, through peaceful, legal means. The recent calls for ancestral land titles and the reforms we see in customary land tenure regimes is a vivid manifestation of not only rising contestations as far as land claims are concerned, but also the potential of law in addressing the “land question”.¹ These challenging possibilities of law in the land reform process can

1 A Commission of Inquiry into Claims of Ancestral Land Rights and Restitution has been established to make recommendations to the President regarding claims to ancestral land rights and restitution. See also *Centre for Minority Rights Development (Kenya), Minority Rights Group International and Endorois Welfare Council (On Behalf of the Endorois Community) v Kenya* (276/2003).

also be traced to the potential that law and legal mechanisms have in transforming inherited and existing political, social and economic conditions of the most vulnerable in society. In Namibia, the *Grundnorm* for land reform can be traced to the sovereign right over natural resources and the right to expropriate private property in the public interest subject to the payment of compensation vested in the state in terms of Articles 100 and 16 of the Namibian Constitution respectively.

2.1 Reform of agricultural commercial land

Just as land dispossession has its history, so does the white agricultural order which followed. Namibian agriculture, under colonialism and apartheid, took on particular forms. In a state where farm ownership is politically and racially charged, it is not easy to determine exactly who owns the land, because some ownership is concealed through various legal devices.² However, the statistics provided in the Executive Summary of the presentation of Hon. Utoni Nujoma, the Minister of Land Reform, indicate that at the time of independence, out of the 69.6 million hectares available for agricultural purposes, a total area of 36.2 million hectares (or 52%) was deemed freehold land or commercial land and was occupied by some 4 200 (predominantly white) farming households.³ Conversely, some 33.4 million hectares (48%) were deemed communal, or rather, non-freehold land, with this area providing for the livelihood of some 70% of the Namibian population. National parks, forests, mining areas, agricultural research stations and conservancies constituted approximately 12.7 million hectares (15%). This is all state land occupied and used by some state agencies.⁴ He concluded that this illustrated how skewed land distribution in Namibia is, and hence the need for land reform.

Pursuant to various national conferences on the land question⁵ and consistent with its avowed policy of land reform, the GRN had the ALCRA promulgated. This Act is meant to provide the GRN with the necessary legal tools to acquire commercial farms for the resettlement of displaced persons, and for the purposes of land reform. To date, the implementation of the policy has been facilitated by the state and by market-assisted acquisition schemes based on the “willing seller, willing buyer” principle.

In his presentation at the Second Land Conference, Hon. Utoni Nujoma indicated that “the acquisition of 549 farms measuring 3.2 million hectares through the willing

2 Because some of these various legal arrangements are secret and private, it is not possible to say precisely how common these devices are, or even exactly what they are.

3 Government of the Republic of Namibia, *The State of Land Reform Since the 1991 National Conference on Land Reform and the Land Question*, Ministry of Land Reform, Windhoek, October 2018, p. 12.

4 Ibid.

5 The Namibian Government has held a number of consultative conferences on the land question since the National Conference in 1991. These led to the enactment of legislation on land and related matters, and to the drafting of the National Land Policy (1998).

seller – willing buyer principle at a cost of N\$1.9 billion and the resettlement of 5 338 beneficiaries is one of the notable achievements of the [land reform] programme to date”.⁶ He added, however, that the escalating land prices had impinged on the ability of the Ministry to meet its set target of 5 million hectares by 2020.⁷ Similar concerns had been expressed by two former ministers who had equally bemoaned the problems associated with the implementation of the Act and the programme. As pointed out by the then Minister of Lands, Resettlement and Rehabilitation, Hon. Pendukeni Ithana, the GRN’s willing seller, willing buyer policy “has imposed constraints on its ability to acquire fertile and more productive commercial farms”.⁸

In terms of the acquisition scheme known as the National Resettlement Programme (NRP) (or currently the Land Acquisition Programme), the state acquires land for resettlement purposes in the market under the auspices of the Ministry of Lands and Resettlement (MLR). The Affirmative Action Loan Scheme (AALS) is a programme implemented by the Agricultural Bank of Namibia (Agribank) on behalf of the Ministry of Agriculture, Water and Forestry. This programme was introduced by the Agricultural Bank Amendment Act (No. 27 of 1991) and the Agricultural Bank Matters Amendment Act (No. 15 of 1992) with the aim of, inter alia, resettling well-established and strong communal farmers on commercial farmland so as to minimise the pressure on grazing in communal areas. It assists formerly disadvantaged persons to acquire land themselves on the open market at subsidised interest rates. The recent figures provided by the Namibia Statistics Agency indicate that a total of 12 382 commercial farms and portions of farms in Namibia cover an area of 39.7 million hectares, of which 97.7% is owned by Namibians. Much of the 39.7 million hectares of land (43 million hectares) is privately owned (86%) while the GRN owns the remaining 5.4 million hectares of land (14%). Previously advantaged Namibians own 27.8 million hectares (70%) of the freehold agricultural land, while previously disadvantaged Namibians own only 6.4 million hectares (16%). Under the NRP, a total of 3 million hectares have been acquired since 1990, with 5 352 beneficiaries. The programme also acquired 496 farms benefiting households. Under the Affirmative Action Scheme, a total of 6.4 million hectares of land were acquired through Agribank between 1992 and 2018. Of this, 3.4 million hectares (54%) of commercial farmland were acquired through the AALS Programme, while commercial banks funded 2.8 million hectares (46%) Only 10% of females benefited through the AALS Programme compared to 60% males.⁹

6 Government of the Republic of Namibia, *The State of Land Reform Since the 1991 National Conference on Land Reform and the Land Question*, Ministry of Land Reform, Windhoek, October 2018, p. 3.

7 Ibid.

8 See Nandjaa, T., ‘The land question: Namibians demand urgent answers’, *Namibia Review*, 1997, pp. 1–4.

9 Namibia Statistics Agency, *Namibia Land Statistics Booklet*, NSA, Windhoek, September 2018, p. 44.

The figures also indicate that companies including both close corporations and limited liability companies owning agricultural (commercial) land in Namibia are registered to be more than 96%. The remaining 4% is registered under estates, churches, farmers' associations, foundations and trusts. Trusts own 672 153 hectares. A total of 2 859 farms are registered under companies, of which close corporations account for 1 568 farms (55%) and limited liability companies for the remaining 1 291 farms (45%).¹⁰

However, an option that is open to the GRN as a possible solution to the constraints of the willing buyer, willing seller option may be found under the provisions of Chapter IV of the ALCRA. Section 20, read with section 14(1), empowers the Minister to expropriate any commercial land for purposes of land reform in case of a failure to negotiate the sale of property by mutual agreement. Under Article 16 of the Constitution, the GRN has the sovereign power to expropriate private property¹¹ in accordance with the norms of international law.¹² The Namibian Constitution provides for the justification of such expropriation on grounds of public interest and the payment of compensation. The power to expropriate is therefore a legal matter, while the decision to expropriate and determine the public interest is a political one. In the case of *Gunther Kessl & Others v Ministry of Lands and Resettlement*,¹³ it was held that the welfare of farm workers constitutes public interest and also that the exercise of this mandate must comply with the provisions of Article 18 of the Namibian Constitution. It is also worth mentioning that this clause is not entrenched, and can therefore be derogated from should a state of emergency be declared under Article 24(3) and Article 26 of the Constitution.¹⁴ The GRN has to date expropriated about nine farms. At the Second National Land Conference, there were suggestions that the expropriation laws be amended to allow for expropriation without compensation. This was, however, rejected.

These commercial farms are at the core of an agrarian social structure that may provide jobs for the unskilled sector of population. In this context, it was reported that the Ministry of Labour, Industrial Relations and Employment Creation has enacted legislation providing for the protection of farm workers' rights and that under the Ministry of Land Reform, the resettlement criteria prioritised the allocation of land to generational farm workers. The report concluded that a total of 119 farm workers out of 5 338 beneficiaries have been resettled to date.¹⁵

10 Ibid., p. 31.

11 See Article 16(2) of the Namibian Constitution and sections 14(1) and 20 of the Agricultural (Commercial) Land Reform Act (No. 6 of 1995).

12 See UN General Assembly Resolution 1803 (XVII) of 14 December 1962, 'Permanent sovereignty over natural resources', adopted in the case of *Texaco v Libya* (1977) 53 ILR 389.

13 2008 1 NR 167 (HC).

14 This clearly means that the government, under such a state of emergency, can expropriate private property without compensation.

15 Government of the Republic of Namibia, *The State of Land Reform Since the 1991 National Conference on Land Reform and the Land Question*, Ministry of Land Reform, Windhoek, October 2018, p. 55.

2.2 Access to urban land and tenure in the informal areas in urban centres

The unavailability of affordable land and adequate housing and the lack of security of tenure over land in the informal settlements were also raised at the Second National Land Conference. It was suggested that measures to ameliorate the problem of the high cost of land in urban centres should include the effective implementation of rent control strategies. The non-existence of a more secure tenure system for urban settlements in the former Bantustan areas can be traced back to the deliberate policy of the colonial administration to deny these urban centres official recognition as municipalities.¹⁶

The first democratic GRN responded to this situation by establishing local authorities in these areas under the Local Authorities Act (No. 23 of 1992). The formalisation of urban centres in terms of this statute involves, firstly, the proclamation of the area as an urban area under the jurisdiction of the relevant local authority. This step is then followed by the registration of the town in the name of the state or relevant local authority. The proclamation and subsequent registration enable the local authority to subdivide the area and create plots or erven of urban land. The occupants of such plots receive freehold titles. In the formal areas the intention is to sell existing erven to the relevant local authority, “subject to the holders of Permissions to Occupy being given the first option on the plots they occupy at the sale date”.¹⁷

Although these measures may to some degree have corrected the injustices of the skewed colonial land policies, the effects of past racial discrimination and urbanisation had their own inherent problems. Whilst the right to freehold titles has been made accessible to all Namibians as a result of the combined effect of Article 16(1) of the Namibian Constitution and the promulgation of the Local Authorities Act, there has been an increased influx of people into urban areas. This has led to considerable growth of informal settlements in the peri-urban areas. The City of Windhoek, for example, grew rapidly following independence, from 141 562 inhabitants in 1991 to 322 300 residents in 2011, this constituting growth of 128% at an annual growth rate of 4.2%. At that rate, the population in 2017 can be estimated to have been about 413 000 people. Much of this growth occurred in the city’s informal settlements. While in 1991, only 3% of all houses in Windhoek were shacks, they made up about one-third (32%) of all homes by the time of the 2011 census.¹⁸ This growth means

16 The National Land Policy (1998, p. 4) requires the establishment and proclamation of urban and urbanising areas as townships and municipalities, where appropriate, to promote decentralisation of government and the close involvement of communities in their own administration.

17 National Land Policy (1998), p. 12.

18 Weber, Beat & John Mendelsohn, *Informal Settlements in Namibia: their Nature and Growth: Exploring Ways to Make Namibian Urban Development More Socially Just and Inclusive*, NCE/DW/German Cooperation/GIZ, 2017 (<https://www.raison.com.na/sites/default/files/Informal-Settlements-in-Namibia-Book-Web.pdf>), p. 73; see also Christensen, S.F. & P.D. Hojgaard, *Report on Flexible Land Tenure System for Namibia*, Ministry of Lands, Resettlement and Rehabilitation, Windhoek, 1997.

that there is not only need for more land for urban settlement but also for security of tenure for people whose rights are not recognised by the existing system.¹⁹ Most of these residents are squatters on land belonging to individuals or local authorities.

The GRN responded by creating alternative forms of land title that are simpler and cheaper to administer but still provide security of title for persons who live in these informal settlements. This was done through the Flexible Land Tenure Act (No. 4 of 2012). The basic objectives of the Act are the formalisation of the settlements by the granting of legal recognition, and the provision of formal land rights and security of tenure over the land occupied informally in the peri-urban areas by the vast majority of the urban poor, thereby promoting affordable access to land and tenure rights in these peri-urban areas.

The Flexible Land Tenure Act also seeks to address the issues of land registration. The informal settlement areas are almost invariably not surveyed for demarcation and subdivision of the land into plots for eventual registration. But the present land registration system is too procedurally and technically bureaucratic to accommodate the needs of the vast majority of the urban poor. Another burden experienced under the current system is the fact that local authorities demand high standards for infrastructure, which are expensive to satisfy.

Furthermore, freehold title, besides being costly, is complex, and requires high levels expertise for the surveying and transfer of land. It is therefore not responsive to the needs and financial capabilities of the rural poor. The Flexible Land Tenure Act seeks to remedy this situation by introducing a parallel interchangeable land system, where the initial secure right is not only simple and affordable, but also upgradable over time. This it does by creating starter and land hold title schemes, both of which are models for a parallel interchangeable property registration system. Therefore, the most basic feature or characteristic of the Flexible Land Tenure System is its parallelism and interchangeability.

The Flexible Land Tenure System is meant to operate parallel to the existing registration system. This means that the same land parcel would be the subject of registration in both the starter and land hold title registry at the Deeds Office. However, the deeds registry would only reflect the ownership of the whole block erf of land and the fact that a starter and land hold title registry exists. Individual starter title and land hold title rights within that block erf would not be visible in the main registry, but only in the starter and land hold title registry. Interchangeability, on the other hand, makes reference to the fact that the different tenure types listed in the parallel registries can be upgraded over time from a basic security of tenure into individual freehold title granting full ownership.²⁰

A starter title provides the holder of such a title with the right to occupy and erect a dwelling on a block erf at a specified location. Such occupation can be in

19 Weber, Beat & John Mendelsohn, *op. cit.*, p. 72.

20 Sections 14 and 15.

perpetuity depending on whether the holder of the title in question opts to upgrade to another form of tenure. The holder can bequeath the dwelling to his or her heirs or lease it to another person.²¹ A starter title therefore constitutes a right of use and not a right of ownership. However, it does provide a statutory form of security over a piece of land on the block erf. Provisions are made for the upgrading of a starter title over time to a land hold title, or where appropriate directly to freehold title.²² Upgrading from a starter title, to any other title is only possible if the majority occupying the block of land agree on this decision.²³ A land hold title enables the holder of such a title to exercise rights over the land acquired that an owner would have in respect of the land under common law.²⁴ Therefore, a land hold title holder may perform all the juristic acts in respect of the plot concerned that an owner may perform in respect of his or her erf or land under the common law.²⁵ Land under land hold title may be sold, donated, inherited and mortgaged, and as such be sold in execution. The Act also provides for the upgrading of a land hold title to full ownership.²⁶

2.3 Tenure in communal land areas

The Namibian land programme has to be understood not only against the background of the misdistribution of land along racial lines, but also from the perspective of customary land tenure systems that operated in the communal areas within the general context of customary law. One of the legacies of colonisation in Africa is the juxtaposition of the received law emanating from the legal systems of the colonial countries alongside the customary law of the indigenous African communities. This juxtaposition subjected the application of customary law to various tests of recognition. As Max Gluckman²⁷ and other students of the jurisprudence and legal systems of traditional African societies have acknowledged, before the advent of colonialism, African communities had their own laws and legal systems regulating the behaviour of individuals in society. These laws covered areas like civil and criminal liability, marriage, inheritance and succession, and land tenure systems.

Faced with the problem of accommodation, the colonial administration accorded limited recognition to customary law by subsuming it under the received law and

21 Section 9(1)(a)–(e).

22 Section 14(1).

23 Section 15(3).

24 Section 10(a).

25 Section 10(b).

26 Section 15(1).

27 Gluckman, M., *Judicial process among the Barotse of Northern Rhodesia*, Manchester University Press (published on behalf of the Institute for Social Research, University of Zambia), Manchester, 1967.

by subjecting it to the all-too-familiar repugnancy clause test for equity, good conscience, and morality. This precondition for the recognition of customary law still exists in the constitutions and statute books of many African countries.

Customary law principles relating to criminal law generally did not withstand scrutiny under the repugnancy clause test. In the area of land law, however, the recognition and survival of indigenous legal principles depended upon different factors and considerations, including the ultimate colonial intent and design, economic factors, public domain concerns, and environmental and land use preoccupations. The general pattern was that in territories where the colonial administration did not intend to settle immigrants from the colonial country or from elsewhere in Europe, customary law relating to land tenure was given a fair amount of recognition.²⁸ In territories where the settlement of immigrants from Europe was the ultimate goal of the colonial powers, indigenous land tenure systems and property rights were given only marginal recognition, and the indigenous communities were dispossessed of their property rights in favour of the immigrants and their property rights regimes. By legislation, land was classified into crown (or state land) and native reserves (or communal lands) so that, as pointed out by T.W. Bennett,²⁹ “the authority of customary law recognised in the administration of communal lands was a creation of colonial authorities.” In other words, native land was not communal land until the colonial authorities defined away all other forms of native land tenure. The latter pattern was more prominent in southern Africa so that in these areas the characteristic feature of the customary law of land tenure is either the adulteration or lack of development of the indigenous systems. The Namibian pattern of classification, as described earlier, fits into this general southern African pattern.

With the promulgation of the Namibian Constitution, customary law was recognised as one of the sources of law in Namibia. In its recognition of customary law as a source of law,³⁰ the Constitution removes the repugnancy clause and puts customary law on an equal footing with Roman-Dutch common law. However, although the Constitution left open the question of whether the new constitutional status of customary law in Namibia means that ownership of the communal lands is vested in the indigenous people as the holders of allodial titles to their ancestral

28 Da Rocha, B.J. & C.H.K. Lodoh, *Ghana Land Law and Conveyancing*, 1995, state that in Ghana, for example, neither in theory nor in practice can it be said that all land is held from the state. Land in Ghana is held from various stools (skins) or families or clans, which are the allodial owners. The state holds lands only by acquisition from these traditional allodial owners. This right was recognised by C.J. Rayner in a report on land tenure in West Africa, cited in the Judgment of the Privy Council in the case of *Amodu Tijani v Secretary, Government of Southern Nigeria* 19212 AC 399.

29 Bennett, T.W. & N.S. Peart, *A sourcebook of African customary law for Southern Africa*, 1991, pp. 384–96.

30 Article 66(1) of the Constitution states that both the customary law and the common law of Namibia in force on the date of independence shall remain valid to the extent to which such customary and common law does not conflict with this Constitution or any other statutory law.

lands, the argument can be made that communal land rights must be defined in terms of Article 16(1), and therefore that holders of rights over communal lands should be granted freehold titles.

Article 100 of the Constitution vests ownership of all land in Namibia in the state, except for land that is otherwise lawfully owned. The application of customary law in the communal areas, coupled with the fact that communal lands were the creation of legislation, has left many uncertainties regarding the exact rights of the indigenous people who occupy the communal lands and the administrative authority of the chiefs.

The position reflected in the National Land Policy of 1998 is that in terms of Schedule 5(1) of the Constitution, communal land is vested in the state to be administered in trust for the benefit of traditional communities and for the purpose of promoting the economic and social development of the Namibian people. This position constitutes one of the underlying principles of the CLRA.

As stated above, Article 100³¹ of the Constitution and section 17 of the CLRA have maintained the position that the communal lands are vested in the state in trust for the benefit of the traditional communities residing in those communal areas and for the purpose of promoting the economic and social development of the people, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agricultural activities. This position supports the rights of the inhabitants of communal lands to a greater degree than such rights had been supported at the time of independence, as is explained hereafter.

The GRN's proposals on communal land reform in the National Land Policy of 1998 have been taken up in the CLRA.³² The primary purpose of the Act is to make the process of land allocation and land administration fair and transparent, and to enhance security of tenure in the communal areas by giving statutory recognition to existing land rights and by creating new rights. The Act also seeks to introduce a certain degree of uniformity in land policy throughout the country by laying down new procedures regarding land allocation, utilisation, and transfer or inheritance. It addresses, inter alia, issues relevant to administration of communal land, titles to communal land, and security of tenure, and as stated earlier, it reiterates the position articulated in the National Land Policy that ownership of rural land is vested in the state.

With regard to rights over communal land, whilst recognising the underlining principle that the ownership of communal lands is vested in the state, the Act

31 Article 100 provides that: “[I]and, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned”.

32 The Communal Land Reform Act contains the proposed provisions on the question of ownership, types of titles, security of tenure and administration of communal land. In addition to this, the Traditional Authorities Act (No. 17 of 1995) and the Council of Traditional Leaders Act (No. 19 of 1997) provide for jurisdiction with regard to certain matters pertaining to the allocation and administration of communal land to the traditional authorities.

creates two rights that may be allocated in respect of communal land: customary land rights, and rights of leasehold.³³ The Act thus reaffirms customary rights of usufruct³⁴ granted to occupiers of communal land and seeks to confer statutory recognition on this tenure system. In this regard, the Act does not go beyond the customary right of usufruct. It does, however, specify the duration of customary land rights³⁵ and makes provision for their registration.³⁶ Registration only constitutes publicity or proof of title. It does not confer on the holder any additional power, for example, the power to use the title as collateral.

The other right created by the Act is the right of leasehold, or statutory leasehold.³⁷ This right has replaced the Permission to Occupy (PTO). In terms of the Act, the power to grant leasehold rights is vested in the Communal Land Board.³⁸ The right is granted for a maximum statutory period of 99 years. If the right is granted for a period exceeding 10 years, it is invalid unless it is approved by the Minister.³⁹ The grant of leasehold rights is subject to registration.⁴⁰ If the land in respect of which the right of leasehold is granted is surveyed land, in other words land which is shown on a diagram as defined in section 1 of the Land Survey Act (No. 33 of 1993), and the lease is for a period of 10 years or more, the leasehold must be registered in accordance with the Deeds Registries Act (No. 47 of 1937).⁴¹ These provisions therefore guarantee security of tenure, and could serve as a catalyst for the development of commercial activities in the communal areas.

The Act recognises the role of traditional authorities in communal land administration by vesting in the chiefs and the traditional authorities the power to allocate customary land rights, subject to supervision by the communal land boards.⁴² This provision should not be interpreted as a potential threat to the rights of traditional leaders under Article 102(5) of the Constitution, which provides for the establishment of a Council of Traditional Leaders by Act of Parliament “to advise the President on the control and utilization of Communal land”.

The Act⁴³ vests the right to grant the right of leasehold in the board concerned. It is therefore within the remit of the board to consider applications for the grant of leasehold over designated communal land, but in the process of exercising this mandate, the interests of harmonious relationships and propriety will require

33 See section 19 of the Act.

34 See section 21.

35 See section 26.

36 See section 25.

37 See section 19(b).

38 See section 30(1).

39 See section 34(1) and (2).

40 See section 33.

41 See section 33(2).

42 See section 20.

43 See section 30(1).

the consent of the traditional authority concerned.⁴⁴ The mandate of a traditional authority with respect to the approval of an application for the grant of the right of leasehold in relation to the powers and functions of the board as provided for by sub-section 30(4) are as follows:

Subject to subsection (5) a board may grant a right of leasehold only if the Traditional Authority of the traditional community in whose communal area the land is situated consents to the grant of the right.

A traditional authority is not vested with the absolute right to grant a right of leasehold. This is also supported by the principles relating to the exercise of powers granted to statutory bodies as stated by LA Rose-Innes in his work, *Judicial Review of Administrative Tribunals in South Africa* at 91 and also quoted in the case of *Gunther Kessl v Ministry of Lands Resettlement and Others*,⁴⁵ as follows:

Administration is thus the exercise of power which is conferred upon specifically designated authorities by statute, and which however great the power which is conferred may be, and however wide the discretion which may be exercised, is a power limited by statute. The Administration can only do what it has statutory authority to do, and it must justify all its acts by pointing to a statute. If a public authority exceeds these powers, it acts unlawfully.

A traditional authority is a creation of an Act of Parliament. It is vested with statutory mandate. Its powers and functions and the exercise of these powers and functions are prescribed by the Act, more specifically, section 30 of the Act. Ueitele J in the case of *Chaune v Ditshabue and Others*,⁴⁶ with reference to the exercise of the powers conferred on traditional authorities stated thus:

There is nothing private or personal about the exercise of the powers conferred on traditional authorities. The powers are given to the traditional authorities in the interests of the proper conduct of the affairs of traditional communities. In my view therefore the exercise of power by traditional authorities pursuant to the Traditional Authorities Act 2000 is plainly the exercise of a public power, and in exercising those powers the traditional authority is an administrative body as contemplated in Article 18 of the Namibian Constitution.

This comment was made with respect to the exercise of the mandate of the traditional authorities as provided for by the Traditional Authorities Act of 2000. However, the principle is relevant and applicable in the context of the exercise of the mandate of the traditional authorities as provided for by the CLRA.

44 See section 30(4).

45 2008 (1) NR 167 at 206 (HC).

46 Case No A5/2011 [2013] NAHCMD111.

In the Supreme Court case of the *Chairperson of the Immigration Control Board v Elizabeth Frank and Others*,⁴⁷ the Court laid down the principle that the provisions of Article 18 of the Namibian Constitution demand that, inter alia, the exercise of a discretionary power granted by a statute must comply with the principles of natural justice, including the *audi alteram partem* rule and the provision of reason(s) for a decision or action taken by the repository of such statutory power. In that case O'Lynn J stated thus:

The principles of administrative justice require that in circumstances such as the present, the Board should have disclosed such facts, principles and policies to the applicant for the resident permit and allowed an opportunity to respond thereto by letter or personal appearance before the Board or both.

The Court *a quo* misdirected itself in regard to interpretation and application of the law and applicable procedure. That Court should have set aside the decision of the Board but for the reason that the Board had failed to apply the *audi alteram partem* rule properly. In the premises, the application should have been remitted to the Board for rehearing, where the applicants are given the opportunity to respond to the contents of the aforesaid paragraphs 10 and 12 of the Board's replying affidavit.

This was not the case where exceptional circumstances existed, e.g. where there were long periods of delay, where applicant would suffer grave prejudice or where it would otherwise be grossly unfair.

This affirms the position of Namibian jurisprudence on the exercise of the statutory powers given to both the traditional authorities and the communal land boards; that is, that the exercise of such powers is subject to the provisions of Article 18 of the Namibian Constitution.

The Act also makes provisions for the legal status of rights over communal lands granted before the commencement of the Act and the change in the designation of a communal land area following the establishment of a local authority area within the boundaries of a communal land area.

Before the independence of Namibia and the promulgation of the CLRA, certain rights had been created over the communal lands. This category of land rights included PTOs, but the PTO-s are not included in the customary land rights and the right of leasehold created by the Act.⁴⁸ These rights are separately recognised by the Act⁴⁹ and provisions are made for the holders of such rights to be granted the rights of leasehold upon application to the relevant communal land board for the recognition of the offer of a right of leasehold in respect of the land.⁵⁰ The statutory requirements for the recognition of the existing land right include a letter with

47 2001 NR 107 (SCA) 65. See also *Sikunda v Government of the Republic of Namibia* (3) 2001 NR 181(HC).

48 Section 19 of the Communal Land Reform Act.

49 Section 35(1)(a).

50 Section 35(2)(a)-(b).

prescribed information from the chief or traditional authority of the traditional community within whose communal area the land in question is situated.⁵¹ The mandate conferred upon the communal land boards, the chiefs and traditional authorities in terms of the decisions in the cases of *Chaune v Ditshabue and Others*,⁵² and *Chairperson of the Immigration Control Board v Elizabeth Frank and Others*,⁵³ must, as stated above, be exercised in compliance with the principles of natural justice.

Another aspect of the legal status of land rights granted over lands situated in communal land was addressed by the Supreme Court of Namibia in the case of *Agnes Kahimbi Kashela v Katima Mulilo Town Council*.⁵⁴ The Act provides that where a local authority area is situated or established within the boundaries of any communal land area, the land comprising such local authority area shall not form part of that communal land area and shall not be communal land.⁵⁵ A person whose customary land right has been terminated under such circumstances, i.e. due to the establishment of a local authority area within the boundaries of a communal land area, is entitled to compensation only in respect of any necessary improvement effected by that person.⁵⁶ Such person is not entitled to compensation with respect to the loss of the title to the land since he or she has not been vested with a freehold title.⁵⁷

In the case of *Agnes Kahimbi Kashela v Katima Mulilo Town Council*,⁵⁸ the appellant's late father was allocated a piece of land in 1985 in the then Caprivi Region (now Zambezi Region) by the Mafwe Traditional Authority on communal land. Following independence on 21 March 1990, all communal lands in Namibia became the property of the state of Namibia by virtue of Article 124 read with Schedule 5(1) of the Namibian Constitution – but, in terms of Schedule 5(3) of the Constitution, subject to, amongst others, the “rights”, “obligations” and “trusts” existing on or over that land.

The appellant's father was still alive at the time of independence and continued to live without interference on the land (the land in dispute) allocated to him by the Mafwe Traditional Authority with his family, including the appellant.

In 1995, the GRN, which by certificate of state title owned the communal land of which the land in dispute was part, transferred a surveyed portion of it to the newly created Katima Mulilo Town Council (KTC) in terms of the Local Authorities Act. The appellant's father was still alive then and continued to live on the land

51 Section 35(5)(b).

52 Case No. A5/2011 [2013] NAHCMD111.

53 2001 NR 107 (SCA) 65.

54 Case No. SA 15/2017.

55 Communal Land Reform Act (No. 5 of 2002).

56 Section 40.

57 Section 17(1)–(2).

58 As above.

as aforesaid. He died in 2001, with the appellant as the only surviving heir, who continued to live on the land – according to her as “heir” to the land in terms of Mafwe customary law.

Whilst the appellant was living on the land in dispute, the KTC as the newly registered title holder of the land, rented out certain portions of the land.

The appellant issued a summons in the High Court (Main Division) claiming that the KTC was unjustly enriched by unlawfully renting out the land in dispute. She also claimed that, by offering to sell the land, the KTC unlawfully “expropriated” her land “without just compensation” “at market value”. The appellant relied for those allegations on Art 16(1) of the Constitution, which guarantees property rights, and Article 16(2), which provides that property may only be expropriated upon payment of just compensation. She also relied on section 16(2) of the CLRA, which states that land may not be removed from a communal land area without just compensation to the persons affected.

The appellant therefore claimed as damages the rental amounts received by the KTC as claim one, and under claim two, the amount for which the lands were offered for sale as being reasonable compensation for the “expropriation”.

The KTC pleaded that the appellant was not entitled to the relief sought because at independence and also upon transfer of the land to the KTC, the land in dispute ceased to be communal land and the appellant could not claim any communal land tenure right in that land. The KTC, having become the absolute owner of the land, could deal with it as owner without any encumbrance thereon.

The High Court agreed with the KTC and dismissed the appellant’s claim with costs, holding in the main that in terms of section 15(2) of the CLRA, the land in dispute had ceased to be communal land and that no communal land right claimed by the appellant could exist therein. The court *a quo* also held that if the appellant had any right to compensation it would be enforceable only against the GRN and not the KTC, and that in any event, such a claim was prescribed.

On appeal it was held that, inter alia, Schedule 5(3) of the Constitution creates a *sui generis* right in favour of the appellant and those similarly situated over communal lands succeeded to by the GRN, and that such right continued to exist even when transferred to a local authority such as the KTC.

In rejecting the respondents’ argument to the contrary, the Court held that such right did not need to be registered in terms of section 16 of the Deeds Registries Act to be enforceable.

It was also held that a right created by Schedule 5(3) of the Namibian Constitution did not necessarily have to be vindicated in terms of Article 16(2) of the Constitution because the framers of the Constitution must have intended a remedy to be fashioned by the courts to give effect to the right created by the schedule. In other words, where there is a right, there must be a remedy.

3 Registration of communal lands in Namibia

The distinction between communal land and land held under a freehold title, including commercial land, creates a dual system of land ownership and an even more complicated system of land registration.⁵⁹

Namibia has a dual land registration system: a deeds registry system (as opposed to the Torrens system) applies under the provisions of the Deeds Registries Act,⁶⁰ except in the Rehoboth Gebiet, which historically operated under a different registry system, which resembles the Torrens system of registration.

Under the deeds registry system (the “notarial system”), title deeds are executed and registered by the Registrar of Deeds. Other documents such as antenuptial contracts, lease agreements, and servitudes are registered in the Deeds Office (in Windhoek) after they have been prepared and executed by a notary public.

Before the adoption of the Namibian Constitution,⁶¹ the Rehoboth Baster Community or the Rehoboth Gebiet was administered as a self-governing entity within the South West African territory, under the provisions of the Rehoboth Self-Government Act (No. 56 of 1976).⁶² The governing authority (“Kaptein’s Council” and Legislative Council) passed the Registration of Deeds in Rehoboth Act.⁶³ It applies still, in amended form, but only to the Rehoboth District.⁶⁴ This Act is based on the endorsement of titles system which is consistent with the Torrens system.⁶⁵ For ease of reference it is referred to here as “the Rehoboth system”.

The two registration systems mentioned are fundamentally different. One major difference is that the notarial system requires the services of a qualified conveyancer or a notary public for the preparation of deeds or other documents for registration.⁶⁶ The Rehoboth system,⁶⁷ by contrast, does not contain a similar requirement. In terms of the system of registration of land rights provided for by the CLRA, the services of a qualified conveyancer or a notary public will be required

59 Amoo, S.K. & C. Mapaure, ‘Registration of Communal Lands in Namibia: Critical Analysis of Practical Legal Intricacies’, in Hanri Mostert et al. (eds), *Land Law and Governance: African perspectives on land tenure and title*, Juta & Co., Cape Town, 2017, pp. 171–187.

60 Act 47 of 1937.

61 Act 1 of 1990.

62 Act 56 of 1976, in accordance with the Paternal Law of 1872. The Rehoboth Self-Government Act provided for, inter alia, the establishment of a Kaptein’s Council and a Legislative Council.

63 Act 93 of 1976.

64 As defined in section 6 of the Rehoboth Self-Government Act (No. 56 of 1976).

65 Currently there is a draft Deeds Bill which is intended to harmonise and consolidate the Registration of Deeds in Rehoboth Act (No. 93 of 1976) and the Deeds Registries Act (No. 47 of 1937).

66 It is provided for under the Deeds Registries Act (No. 47 of 1937), specifically section 15, that no deed of transfer, mortgage bond or certificate of title or registration of any kind mentioned in the Act shall be attested, executed or registered by a Registrar unless it has been prepared by a conveyancer practising within the province within which his registry is situate.

67 Registration of Deeds in Rehoboth Act (No. 93 of 1976).

for the registration of a right of leasehold in accordance with the provisions of the Deeds Registries Act⁶⁸ if the land in respect of which the right of leasehold is granted is surveyed land and the term of lease is for a period of 10 years or more.⁶⁹ On the other hand, if the right to be registered is a customary land right⁷⁰ or the right of leasehold is in respect of un-surveyed land and the term of the leasehold is for a period of less than 10 years, then the law requires mere registration in the prescribed register.⁷¹ This will not require the services of a conveyancer or a notary public.

Registration, apart from evidence of ownership, affords security of title needed for the land to serve as collateral for the advancement of loans by financial institutions and building societies.

In Namibia, the registration of land rights is governed by the deeds registry system, which is meant to ensure certainty and security of land rights and title, but the CLRA generally governs the registration of land titles over communal lands. Land registration facilitates the flow of and access to capital from financial institutions to holders of registered rights, generally through mortgages.⁷² Flow of capital is therefore underpinned by registered rights. However, given the differing interests in land, registration *per se* does not guarantee equity in access to capital. Rights created by short-term leases, or even statutory leases, created over communal lands and customary land rights do not attract the level of security that financial institutions require for the release of capital. This is attributed to the basic fact that because the holders of these land rights are not vested with ownership rights, there are uncertainties surrounding sureties in cases of defaults in repayment of the loans.

As a matter of principle, since customary land rights amount to limited real rights,⁷³ they qualify to be registered under the Deeds Registries Act.⁷⁴ However, in practice, since these rights are short of the right of ownership, they are inherently incapable of creating the security needed to access loans from commercial banks and building societies.

The current communal land registration process is not comprehensive, and is fraught with shortcomings. This point has been raised on several consultative meetings and conferences with the relevant line-ministry. In its response, since 2007 the Ministry of Lands and Resettlement has undertaken a Communal Land

68 Section 15.

69 See section 33(2) of the Communal Land Reform Act.

70 See section 25 of the Communal Land Reform Act.

71 See sections 33(1)(a)–(b) and 33(2) of the Communal Land Reform Act.

72 It would be interesting for one to conduct research into the various ways of accessing credit in Namibia through the registration of various land titles, as mentioned in the text.

73 See section 63(1) of the Deeds Registries Act and the doctrine of subtraction from the test as laid down in the case of *Ex parte Geldenhuys* (1926) OPD 155.

74 See section 63(1).

Administration System (CLAS) which consists of two components, namely a communal deeds component (based on an MS Access database) and a communal cadastre component (based on an ArcGIS geodatabase).⁷⁵ The former stores any applicant-related data whilst the latter contains the geometries of the parcels sampled. Although separate in operation, the two databases are linked by a UPI (unique parcel identifier) system. The overall objective of the CLAS is eventually to integrate the commercial and communal land registration systems.

As stated earlier, one of the handicaps experienced by occupiers of communal land is their inability to access credit from financial institutions, because of their inability to use their titles as collateral. This is primarily the social responsibility of the GRN, but financial institutions and building societies must be encouraged to adopt proactive strategies to assist the GRN in its efforts to reform land rights in the communal areas and ensure access to credit. There might be the need for an appropriate legislative intervention and the adoption of progressive policies by these institutions to roll out credit facilities to develop the communal lands. Some banking institutions have initiated the granting of loans for the purpose of building houses in communal lands or un-proclaimed areas, against a guarantee issued by a pension fund to which the member belongs, in terms of the provisions of the Pension Funds Act (No. 24 of 1956).⁷⁶

4 Settlement areas in the land reform strategies of Namibia

The GRN's land reform strategies have included the resettlement programme, which also falls under the general rubric of the decentralisation programme,⁷⁷ and as discussed above, is interlinked with reform of the communal land system,⁷⁸ the provision of affordable and more secure land rights in the informal settlements under the jurisdiction of the local authorities, especially in peri-urban areas,⁷⁹ and the AALS.

Decentralisation in Namibia is a constitutional requirement which should give certain powers and responsibilities to the regions. The GRN's decentralisation programme has been seen as an effective implementation strategy of the Namibian Land Reform and Resettlement Programme. Namibia has a three-layer government

75 Ministry of Lands and Resettlement, *A Decade of Communal Land Reform in Namibia: Review and Lessons Learnt, with a Focus on Communal Land Rights Registration*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), 2014, p. 42.

76 Section 19 of the Act.

77 Article 16(2) of the Namibian Constitution and sections 14 and 20 of the Agricultural (Commercial) Land Reform Act (No. 6 of 1995).

78 Communal Land Reform Act (No. 5 of 2002).

79 Flexible Land Tenure Act (No. 4 of 2012).

structure, made up of the central government, local authorities and regional councils. Key services like health and education are centralised under line ministries, while the regional government is responsible for specified service delivery in rural areas. Local authorities share the responsibility with central government for service delivery in urban areas.

One area where both the local authorities and central government share such responsibility is in the development of settlement areas in the communal land areas under the jurisdiction of the traditional chiefs, traditional authorities and the land boards, and until the subsequent declaration of such areas as settlement areas.

In terms of section 31(1) of the Regional Councils Act (No. 22 of 1992), a regional council may by notice in the *Gazette* declare any area falling within the region in respect of which a regional council has been established, but outside any such local authority area, as a settlement area. Such declaration will be necessitated by reason of the fact that the prevailing circumstances in such area demand that provision should be made for the management, control and regulation of matters pertaining to the health and welfare of the inhabitants of such area, and consequently *ipso facto* such area ought to be developed and established as a local authority. The declaration is a step in the process of the eventual upgrading of the area to the status of a local authority. The process includes an application by the GRN for the issue of a Certificate of Registered State Title under the provisions of section 18 of the Deeds Registries Act (No. 47 of 1937) in respect of the unalienated State land which has been declared a settlement area. This will be followed by the endorsement of the name of the relevant regional council on the Certificate of Registered State Title, symbolising that the land is vested in the regional council. Such declaration affords the legal basis for the provision of services and land rights by the regional councils. Settlements in Namibia are non-self-governed populated places under the jurisdiction of the regional councils. There are currently about 70 settlement areas in Namibia.

In the context of land reform and development strategies in Namibia, the establishment of a settlement affords access to serviced land. It is a catalyst for development and therefore contributes to the arrest of rural-to-urban migration. In terms of section 32 of the Regional Councils Act, the declaration of a settlement area vests the mandate for the management and control of such settlement area in a regional council “as if such regional council were a village council, with the proviso that certain sections of the Local Authorities Act will not be applicable”. Through comprehensive and intensive development involving relevant line ministries, the council ought to be capable of providing certain services in the settlement areas. These will include services such as community development and early childhood development; rural water development and management; primary health care; pre-primary education; forest development and management; physical and economic planning (including capital development projects); emergency management; vehicle

testing and licensing; responsibility and accountability for electricity distribution; full responsibility for town planning schemes within the framework of approved master plans; business registration; housing provisions; electricity distribution; liquor licensing; full responsibility for the environment and conservation; social services; youth, sports and recreational activities; collection of some form of taxes; non-personal health services; libraries; agency services to towns, villages and settlements; traffic control; control of aerodromes, etc.

As stated earlier, one fundamental principle of decentralisation is the provision of structures for the concentration of development at the regional level. In the context of land reform, it provides access to serviced land and helps reduce the incidence of rural-to-urban migration resulting in the proliferation of informal settlements in the peri-urban areas. However, regional councils have been confronted with limitations and challenges in the implementation of their mandate in the context of land reform generally, and the development of their respective regions as envisaged under the decentralisation policy.

A major principle of local government in Namibia is that the local authorities should ideally be financially autonomous. However, with respect to the existing finance system of the settlement areas, this fiscal autonomy is fictional. Firstly, under the Regional Councils Act,⁸⁰ upon the declaration of an area as a settlement area, the assets of the area, and all rights, liabilities and obligations connected with such assets, shall vest in the regional council concerned. Furthermore, in terms of the State Finance Act (No. 31 of 1991), the budget of the settlement area cannot be submitted directly to the Ministry of Finance/Treasury, but must be submitted through the regional council responsible for the administration and management of the settlement area. By way of contrast, local authorities enjoy more fiscal autonomy. This deprives the settlement areas of the fiscal autonomy that is a prerequisite for their effective management and development. It is recommended that regional councils should get a direct vote from Treasury, but not through the line ministry, for the running of settlement areas.

Secondly, The Traditional Authorities Act (No. 25 of 2000) recognises traditional authorities (e.g. chiefs, headmen) as legal entities, provides for their designation as leaders, and defines their powers and duties. Traditional authorities have, in terms of this Act, the obligation to supervise and ensure observation of customary law, to assist the local government with the development of land use plans, and to ensure that their communities are using natural resources in a sustainable manner. Growth points that can potentially be declared settlement areas come under the jurisdiction and management of the traditional authorities and the communal land boards. There have been reported cases where the process of declaration of settlement areas has been fraught with tensions between the traditional authorities and officials of the regional councils. Regional councils are advised to build good

80 Section 33(1)(b).

working relationships with traditional authorities and engage them on issues concerning the management and development of undeclared areas or areas under their jurisdiction. Legislation may not be an effective tool for resolving tension.

A related challenge pertains to the tenure rights that are available to the residents of the settlement areas. Under current law, residents of settlement areas cannot be vested with freehold titles. In terms of section 32(1)–(4) of the Regional Council Act, the regional councils are empowered to manage the settlement areas as if such regional council were a village council, but there are limitations which hamper a comprehensive execution of this as a result of the provisions of section 30(1)(s)–(t) of the Local Authorities Act. These provisions vest in the local authorities the power to acquire both movable and immovable property and to hypothecate and alienate both movable and immovable property under their jurisdiction. But the regional councils do not have the mandate to grant freehold titles to the residents of the settlement areas. They can only grant leasehold titles. There is evidence that this has discouraged investors from investing in the settlement areas, as leasehold titles do not attract the security attached to freehold titles. There is therefore the need for the residents of the settlement areas to be vested with freehold titles, especially for development purposes. It is therefore recommended that section 30(1)–(t) of the Local Authorities Act on land alienation and disposal be made applicable to the settlements areas to facilitate the provision of serviced land to attract investors. This will ultimately involve the amendment of the relevant provisions of the Regional Councils Act.⁸¹ It is also recommended that the process of proclamation of settlement areas to village councils be expedited where conditions justify such proclamation to enable residents to benefit from the rights of ownership over immovable properties of the proclaimed areas.

5 Conclusion

Access to land and tenure of land were among the most important concerns of the Namibian people in their struggle for independence. Consequently, since independence, Namibia's democratically elected government has maintained and developed its commitments to redressing the injustices of the past in the spirit of national reconciliation and to promoting sustainable economic development. Land reform in Namibia is premised on the need to correct the imbalance created by the apartheid-skewed land dispensation. It is driven by the policy of reconciliation and it is geared towards poverty alleviation and social and economic equity. In this sense, it is aimed at redistribution and restitution, which are necessary to ensure the long-term stability of the country. Poverty alleviation in the context of land reform can be realised through the effective and productive utilisation of the

81 Section 28(c), (i) and (j) of the Regional Councils Act (No. 22 of 1992) will be amended to grant residents the right of ownership of properties.

distributed land, which in turn contributes to increased agricultural productivity and improvement in gross national income.

The Land Reform and Resettlement Programme has followed a trajectory of broad policy positions on the acquisition of commercial agricultural land (either through the willing buyer, willing seller option, or expropriation), and of urban and communal lands, implemented under a legal regime of constitutional and legislative enactments. It is expected that this trajectory will be followed after the Second Land Conference held in 2018, with the strong possibility of a definite GRN position on the right to ancestral land and restitution being formulated.

Land reform is a complex undertaking, and its effective and successful implementation requires more than the existence of an enabling legal regime. One can cite the Flexible Land Tenure Act as a classic example of successful implementation requiring capital, civic education and cooperation between both public and private sectors. It requires a healthy economic environment that is capable of providing the requisite fiscal cushioning and integrity for the GRN to execute a meaningful land reform programme. It will further require the cooperation and partnership of the public and private sectors alike.

