CHAPTER 2

THE GENESIS OF THE SKEWED LAND POLICIES AND LAND TENURE IN NAMIBIA[1]

1 The colonial expropriation of indigenous lands

Land rights in modern societies are recognised by and defined in law. The 'land title' is the legal document that serves as a representation of land for all legal purposes: it can be sold; mortgaged; passed by inheritance; or given away. Under apartheid, as under the German regime, only whites could hold 'land titles', thus only whites had a 'legal' right to their land. Blacks held land, but under customary law, not under legal title. Any regime recognising such a system is called a regime of 'legal dualism', but it does not allow 'dual' participation because black land rights are not backed by land titles.

The 'stolen lands' issue, which is a world-wide phenomenon, refers to the process of colonial occupation of indigenous lands. In Namibia it derives more narrowly from the Herero/Nama War, one of the most violent of colonial wars. The colonial history of Namibia is complex and still, from the standpoint of the black people who live there, largely unwritten.[2] The Herero War has been the subject of a number of books, with scholars drawn to the unique character of German colonial violence.[3] While a number of meanings can be drawn from the war, the central outcome in terms of land law is clear: Germany terminated by conquest all Herero land rights in South-West Africa, leaving the Herero with no land at all. Herero lands were then 'sold' by

1 See SK Amoo 'Towards comprehensive land tenure systems and land reform in Namibia' (2000) 17 *South African Journal on Human Rights* 87; SK Amoo & SL Harring 'Property rights and land reform in Namibia' in B Chigara (ed) *Southern African development community land issues: Towards a new sustainable Land Relations Policy* (2012) 222; SK Amoo & SL Harring 'Namibian land Law: reform and the restructuring of post-apartheid Namibia' in *University of Botswana Law Journal* (9) June 2009 87-123.

2 There is a growing body of literature on this 'new' Namibian history. H Bley *South-West Africa under German rule, 1894-1915* (1981); P Hayes *et al Namibia under South African rule: Mobility and containment, 1915-1946* (1998); W Hartmann *et al The colonising camera: Photographs in the making of Namibian history* (1998).

3 JB Gewald *Herero heroes: A socio-political history of the Herero of Namibia, 1890-1923* (1999); H Drechsler *Let us die fighting: The struggle of the Herero and Nama against German imperialism, 1885-1915* (1980); JM Bridgman *The revolt of the Hereros* (1981).

colonial authorities to settlers – 90 per cent of them German – on favourable terms, with long-term loans subsidised by the colonial government.[4] These farms are now the heart of Namibian agriculture, occupying a wide swath from Omaruru to Gobabis and the Botswana border and the entire country to the west, north, and east of Windhoek. Further south, most Nama lands were also taken, although the Nama were left with reserves.

This violent dispossession followed a short colonial history. The ovaHerero were occupants of the high plains of central Namibia. They were a Bantu tribe which had moved south into this region from Angola, arriving in about 1750. A series of wars with the Nama who lived to the south, occurred in the mid-nineteenth century, destabilising the entire region.[5] Germany first arrived in South-West Africa in 1884, using the dubious private land claims of a businessman, Adolf Luderitz, as the legal basis for establishing a protectorate over a vast desert hinterland, the first German colony in Africa.[6]

The Herero were not involved in these coastal land treaties but on 29 December 1884 Chief Kamaherero, at Omaruru, entered into a treaty of protection with Great Britain, then engaged in a diplomatic dispute with Germany over what is now Namibia. Great Britain soon abandoned the contest, withdrawing to the Cape Colony and leaving the native people of South-West Africa, with or without treaties of protection, to the Germans.[7] Different chiefs may well have had different strategies to deal with colonial authority and the Germans were beginning to implement a 'divide and rule' strategy. It is also unclear what the Herero believed these 'treaties of protection meant. Such agreements apparently did not cede land or sovereignty.[8] It seems that the Germans rather agreed to 'protect' Herero interests from rival tribes.

In 1895 colonial troops intervened in Okahandja on behalf of Chief Samuel Maharero in an Herero succession dispute. This military action cemented an alliance between the Germans and Maharero that lasted for nine years. During this time, Maharero 'sold' vast tracts of Herero lands under various kinds of arrangements, some more 'legal' than others. For example, traders took vast quantities of land in exchange for trade goods, including liquor. They, in turn, sold the land to farmers at huge profits.[9] Other Herero

4 W Werner *No one will become rich: Economy and society in the Herero reserves in Namibia, 1915-1946* (1998) 48; W Schmokel 'The myth of the white farmer: Commercial agriculture in Namibia, 1900-1983' (1985) 18 *International Journal of African Historical Studies* 1; R Moorsom *Transforming a wasted land* 21-24.

5 JS Malan *Peoples of Namibia* (1995) 68-69; H Vedder *et al The native tribes of South West Africa* (1928) 153-208.

6 JH Esterhuyse *South-West Africa, 1880-1894: The establishment of German authority in South-West Africa* (1968) 46-65.

7 Esterhuyse (n 6 above) 66-83.

8 M Shaw *Title to territory in Africa: International legal issues* (1986) 46-48; MF Lindley *The acquisition and government of backward territory in international law: Being a treatise on the law and practice relating to colonial expansion* (1926) 181-206.

9 Gewald (n 3 above) 129-136; Werner (n 4 above) 43.

land was deserted as a rinderpest epidemic killed most of their cattle. Much land was simply taken with no regard for legality and it is not known how the land was alienated from black ownership. Much closer attention needs to be paid by historians to the colonial land records.

In a 1922 *Memorandum on Treaties between the Late Government and Various Native Tribes in South-West Africa* a colonial official bluntly, but confidentially, stated:

> I would like to mention here that in law there was no confiscation of the Khauash (sic) Hottentots property, and their Treaties with the late Government of the 9th March, 1894 and 4th February, 1885, are still valid. In fact the late Government confiscated their property, and omitted however to give this confiscation the force of law as prescribed in the Imperial Ordinance of the 26th December 1905. The German government in 1913 and 1914 was well aware of this mistake; as, however, nobody had yet found it out, it kept silence. Should the Khauas Hottentots come forward to-day and ask for the return of their former territory, of which a lot has been sold and is still advertised for sale, it would mean the return of one-quarter of the District of Gobabis.[10]

If this treaty is still in force, it may invalidate numerous land titles in this district.

Some black lands were lost through the actions, even duplicity, of their own chiefs. Land was 'sold' to whites, although it is unclear what the parties understood those transactions to mean. There was no history or law of land sales in Herero or Nama society at that time, and it is unclear how these legal transactions were translated into German. By 1902 the Herero only retained about 46 000 cattle of an estimated 100 000 head held ten years before. In contrast, 1 051 German farmers and traders held 44 500 head. The number of settlers increased from 1 774 in 1895 to 4 640 in 1903. Of the 83.5 million hectares of land in the colony, 31.4 million remained in African hands[11] – although these figures include much land that belonged to Nama and other tribes. In an infamous proclamation, issued on 2 October 1904, the German General, Von Trotha, ordered all Herero men to be killed, and all their land and cattle to be seized.[12] After reading the proclamation to a group of Herero prisoners, he proceeded to hang thirty men, and then, after handing out printed copies of the document in the Herero language, drove the women and children out into the Kalahari Desert.

10 'Memorandum on Treaties Between the Law Government and Various Native Tribes in South-West Africa' (author's name illegible) 4 September 1922 *National Archives of Namibia* 457, South West Africa.

11 Werner (n 4 above) 43-44. This data represents a cataclysmic social change: there were virtually no German farmers before the early 1890s. It took scarcely the decade of the 1890's for German herds to grow larger than Herero herds.

12 Quoted in Gewald (n 3 above) 172-173. Gewald has dismissed the view that Von Trotha's proclamation has been interpreted 'out of context' concluding that the proclamation meant what it threatened, a policy of genocide. The fact that it was printed in the Herero language and distributed to women and children about to be driven out into the desert, so they could widely distribute it, demonstrates that it was well planned.

The details of the Herero War are well known and are not in serious dispute.[13] Historian Jan-Bart Gewald constructs a convincing account that the war was used as a pretext by the Germans to annihilate the Herero. Whichever account is accepted, it was a war over land. At least some Herero, offended by increasing German movement on to Herero lands, and subjected to demeaning and inhumane treatment by colonists and traders, rose in revolt. Once the revolt was under way, the Germans refused all attempts for a negotiated resolution.[14] This was not the only colonial war in Namibia: there was a series of such wars. The Nama, in fact, took advantage of the Herero War, attacking the Germans from the south, and carrying on a guerrilla war for several years after the Herero were defeated.[15] But tribes in the north did not directly experience this war, or this violent dispossession of their lands. This reality structures the land reform process in Namibia: most blacks have lost no land to colonisation and therefore the demand for 'land reform' is not equally felt in all segments of the black population.[16] The government's original position of rejecting any model of restitution of ancestral land rights was changed after the Land Conference of 2018.[17] Thus, unlike South Africa where the land reform process includes a form of restitution for blacks dispossessed since 1913,[18] land reform in Namibia is not based on restitution of particular land to aggrieved parties. The purpose is to promote national unity but a model of restitution of ancestral land would provide redress to the people of central Namibia who were dispossessed of their land, as opposed to the people of Ovambo and Kavango to the north who were not so dispossessed. Accordingly there is a political advantage to this position.[19]

13 Like much of German history, there is a right wing 'revisionist' interpretation of the Herero War that denies that genocide occurred. 'Researcher into the Waterberg Tragedy of 1904 Presents a New Radical Version' *Windhoek Observer* July 21, (2001) 2, summarising a University of Hamburg (Germany) Masters thesis by an unknown author, claims that: fewer Herero were killed in the Herero War than modern scholars claim; and that these deaths were not due to the actions of the German army but to starvation. A point-by-point rebuttal was published a few weeks later: J Silvester *et al* 'Waterberg tragedy of 1904 triggers hot debate' *Windhoek Observer* 4 August 2001. The major accounts of the Herero War (n 3 above) agree on the essential details of the deaths of over 60 000 Herero people.

14 Gewald (n 3 above) 141-191 is the best account of the war. The two previous standard accounts are Dreschler (n 3 above); and JM Bridgman 'The revolt of the Hereros (1983) 17 *Canadian Journal of African Studies* 132-163. Neither accounts dispute that the immediate cause of the Herero uprising was the loss of their land but Gewald challenges the idea that it was a widely planned general revolt of the Herero people.

15 J Bridgman (n 14 above) 132-163.

16 W Werner, 'Land reform and poverty alleviation: Experiences from Namibia' NEPRU working paper, no 78, Aug (2001) 1.

17 SL Harring 'German reparations to the Herero Nation: An assertion of Herero Nationhood in the path of Namibian development?' (2001-2002) 104 *West Virginia Law Review* 393. See paragraph 5.12 of chapter 11.

18 H Klug 'Historical claims and the right to restitution' in J Van Zyl *et al* (eds) *Agricultural land reform in South Africa: Policies, markets and mechanisms* (1996) 390-422.

19 Harring (n 17 above) 3.

2 Classification of land in Namibia

In the early era of colonial expansion, as indicated above, protection treaties and rights of conquest were the most prominent tools of land expropriation and alienation. After 1915, however, land alienation by Europeans and the introduction of new property rights were implemented in a more systematic manner by legislation,[20] resulting in the classification of land which can legitimately be regarded as the genesis of the imbalances in land distribution and ownership in present-day Namibia.

The legal mechanism that was used by the colonial powers in South-West Africa was legislation that was primarily geared at dividing the land on the basis of the settler-native dichotomy. This was done by the initial declaration of the territory as crown land, followed by the declaration of tribal and trust land or communal land over land originally belonging to the natives. Ownership of land in the area demarcated as crown land vested in the colonial power, whilst part of the land was reserved for the occupation and use of the natives. Within the area of crown land the received law of the settlers was applied. Customary law applied to areas reserved for the natives. In most cases, the reservation of land for the occupation and use of the natives did not imply the complete ownership of that land by that particular tribal group. The rights of the tribal group were rather rights of occupation and use, or rights of usufruct.[21] The residual rights were vested in the colonial administration.

2.1 Creation of crown and state land

The formal declaration of land inhabited or owned by the tribal groups as crown land was effected by a series of laws. The Transvaal Crown Land Disposal Ordinance of 1903 was the initial piece of legislation used for this purpose. This ordinance was made applicable to South-West Africa by virtue of the Crown Land Disposal Proclamation 13 of 1920. Firstly, the ordinance proclaimed the territory as crown land and, secondly, in terms of section 12 certain areas of crown land could be reserved 'for the use and benefit of aboriginal natives'. The extension of Transvaal ordinances was made lawful and possible by virtue of section 4(1) of the Treaty of Peace and South-West Africa Mandate Act 49 of 1919.[22]

20 Amoo (n 1 above) 91.

21 See also MO Hinz 'Communal land, natural resources and traditional authority' in FM d'Engelbronner *et al* (eds) *Traditional authority and democracy in Southern Africa* (1998) 183-88.

22 During the conquest of Namibia by South African troops in 1915, the Union government was precluded from alienating or allocating any land on a permanent basis. However, the granting of the mandate over Namibia to South Africa in 1919 enabled South Africa to intervene more decisively on land issues. In terms of the mandate all land held by the previous German government was transferred to South Africa. Henceforth, only the Governor-General of the Union had the power to legislate in regard to the allocation of Crown Land.

The general effect of this ordinance was to vest ownership of tribal land in the state or, to be more precise, the mandatory power, South Africa. In 1967 another piece of legislation, the Reservation of State Land for Natives Ordinance 35 of 1967 was passed with similar provisions reserving state land for the use and occupation of the natives. The declaration of the territory as crown land and subsequently as state land meant, by necessary implication, that the received law was to be used to determine property relations, but this did not rule out completely the application of the relevant customary law in areas where the land was substantially occupied by tribal groups. In this regard mention should be made of section 4(3) of the Treaty of Peace and South-West Africa Mandate Act which authorised the Governor-General 'in respect of land contained in any such reserve to grant individual titles to any person lawfully occupying and entitled to such land'. The novelty of this provision was the introduction of the concept of private ownership to a community whose land tenure system was community-based. Property relations were to be determined by the received law, which allowed individual rights as opposed to the community-oriented land rights practised by the indigenous people.

2.2 Reserves and trusts

The classification of land in South-West Africa after the declaration of crown land was determined according to identifiable tribes grouped under native reserves and tribal trust areas. The Native Administration Proclamation 11 of 1922, issued by the Governor-General, the official representative of the King of Great Britain on whose behalf South Africa administered the mandate, empowered the administration to establish native reserves. In 1928 the Native Administration Proclamation 15 of 1928 *inter alia* gave the administrator the power to define tribal areas. Government Notice 122 was issued under the said Native Administration Proclamation 11 of 1922 and as early as at the end of 1923 about 14 native reserves had been established. The creation of the native reserves therefore cut the ties that natives had to their ancestral land, adding another dimension to the classification of land in South-West Africa.[23]

Land allocation and utilisation in the reserves were regulated by the Native Reserve Regulation 68 of 1924. These regulations vested ownership of the land in the Administration and further provided that, after the land had been set aside as a reserve, 'it [could] not be alienated or used for any other

23 The creation of the reserves along racial lines was meant *inter alia* to accommodate white settlers on the prime land and to push the indigenous people onto more marginal land. By 1946, surveyed farms in the Police Zone comprised 32 million hectares, representing just over 60 per cent of its area or 39 per cent of the country. By contrast, the area reserved for black Namibians in the Police Zone amounted to 4.1 millions hectares. By shifting the Police Zone further north and opening up land in the desert another 880 farmers were allotted farms between 1945 and 1954, bringing the total number of farms to 5 214. See also F Adams *et al The land issue in Namibia: An inquiry* (1990) 9-20.

purpose except with the consent of both Houses of Parliament of the Union of South Africa'. As pointed out by Adams and Werner,[24] traditional leaders in the Police Zone had no powers of their own with regard to the allocation of land in the reserves. The regulations did make provision for a communal land tenure system, but the allocation of land for residential and agricultural purposes could only be made by Reserve Superintendents.[25]

The next step in the process of depriving the indigenous people of their rights to their ancestral lands was the 'conversion' of the reserves into trusts. By virtue of the Development Trust and Land Act 18 of 1936, the native reserves were to be placed under a trust, known as the Development Trust, and the administration of native affairs was transferred from the Administrator of South-West Africa to the responsible South African Minister. Under section 5(2) of this Act, all land placed under the Development Trust was declared the property of the state, to be administered by the State President of South Africa as trustee. In 1978, by virtue of section 2 of the Administration of the South African Bantu Trust in South-West Africa Proclamation AG 19 of that year, the trusteeship was transferred from the South African State President to the Administrator-General of South-West Africa.

2.3 Creation of areas for native nations

The next development in the land policy of the colonial administration was the creation of 'areas for native nations'. This was effected by the Development of Self-Government for Native Nations in South-West Africa Act 54 of 1968. This Act gave the various pieces of land assembled in the Development Trust special status by transforming them into areas for 'native nations'. Section 2 of the Act listed Damaraland, Hereroland, Kaokoland, Okavangoland, Eastern Caprivi, and Ovamboland as such areas. Section 2(g) empowered the State President of South Africa to 'reserve and set apart such other land or area for the exclusive use and occupation by any native nation by proclamation'. This was, for example, done for Bushmanland in terms of the Bushman Nation Advisory Board Proclamation R208 of 1976. Section 2 of the Proclamation recognised Bushmanland, as defined in GN 1196 of 1970, as an area 'for members of the Bushman Nation'.[26]

2.4 Creation of communal land

By virtue of various pieces of legislation, the areas that had been designated for native nations were declared communal land. Examples of such pieces of legislation were: the Representative Authority of the Caprivians Proclamation

24 Adams & Werner (n 23 above) 31.
25 As above.
26 See also Hinz (n 21 above) 184-88.

AG 29 of 1980; the Representative Authority of the Kavangos Proclamation AG 26 of 1980; and the Representative Authority of the Ovambos Proclamation AG 23 of 1980. The Development of Self-Government for Native Nations in South-West Africa Act was repealed by section 52 of the Representative Authorities Proclamation.

In the Representative Authorities Amendment Proclamation AG 4 of 1981, the Administrator-General was made trustee of the communal lands. More importantly section 48(3) of this proclamation gave the executive authority of the representative authority – to the extent that it was authorised by an ordinance of the legislative authority or any other law – the power to confer ownership, or any other right into or over, any portion of such communal land, thereby maintaining the alien concept of private individual ownership among the tribal communities.[27] The Representative Authorities Proclamation, and those proclamations establishing representative authorities, were amended by the Representative Authority Powers Transfer Proclamation AG 8 of 1989, which dissolved the representative authorities and transferred the powers back to the Administrator-General. Article 147,[28] read with Schedule 8 of the Namibian Constitution,[29] repealed the remaining parts of the various representative authorities proclamations. However, as argued by Hinz:

> All those amendments and repeals, including the repeal by the Constitution … did not alter the status of the land being communal land … This follows from the Interpretation of Laws Proclamation 38 of 1920, which provides in section 11(2)(c) for the continuous legal validity of acts performed under the Act repealed. This appreciation for legal certainty also must apply to acts directly instituted by the repealed law itself.[30]

2.4.1 Land tenure after independence

2.4.1.1 Commercial farms

The historical classification of land is the genesis of the imbalances in land distribution and ownership in present-day Namibia. Land set aside for private ownership is for the most part owned by white settlers. At the time of

27 Note that the executive authority of the representative authorities was established under the various Representative Authorities Proclamations. See also SK Amoo (n 1 above) 88-89.

28 Article 147 of the Namibian Constitution deals with repeal of laws, and repeals all laws set out in Schedule 8 of the Namibian Constitution.

29 Schedule 8 of the Namibian Constitution is a list of repealed laws, mostly Representative Authority Proclamations.

30 Hinz (n 21 above) 185. It must be mentioned that the Namibian legislature has promulgated the Communal Land Reform Act 5 of 2002, which provides for the allocation of rights in respect of communal land. The Act under section 17 vests all communal land areas in the State in trust for the benefit of the traditional communities residing in those areas, and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agricultural business activities.

independence it was recorded that this constituted about most of the commercially viable farming land, while the remainder of such land was held by the indigenous people in the communal areas.

As stated by the Prime Minister, Hage Geingob, in his opening address to the Land Conference on Land Reform in 1991:

> There are about 6292 farms. Out of these, 6123 farms are white-owned, and cover 95 per cent of the surface area of the commercial districts (34.4 million hectares). Within this ownership category the overwhelming majority of farms belong to individual white farmers, including non-Namibians. To be more specific, a total area of 2.7 million hectares (382 farms) belong to foreign absentee farmers, that is to say 0.9 million hectares belonging to citizens from Austria, France, Italy and Switzerland, while the bulk of 1.7 million hectares is owned by South African residents. Similarly, there are individual Namibian farmers with more than two large farms, as against thousands of their landless fellow countrymen who live in squalid poverty.[31]

> In the same vein, 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.[32] 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.[33] He concluded that this illustrated how skewed land distribution in Namibia is, and hence the need for land reform.

It is therefore clear that the imbalances in the distribution of land cannot be redressed without government intervention, a process to which the SWAPO government has committed itself. Pursuant to various national conferences on the land question,[34] the Agricultural (Commercial) Land Reform Act 6 of 1995 was promulgated. This Act was meant to provide the Namibian government with the necessary legal tools to acquire commercial farms for the resettlement of displaced persons, and for the purposes of land reform. The implementation of the Act has, however, not been free from problems.

31 See Republic of Namibia National Conference on Land Reform and the Land Question *Consensus Document* (1991).

32 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.

33 As above.

34 The Namibian Government has held a number of consultative conferences on the land question since the National Conference in 1991. These have led to the enactment of legislation on land and related matters and to the drafting of the *White Paper on National Land Policy*. References to appropriate legislation and the *White Paper* are made elsewhere in this book.

As pointed out by the Minister of Lands, Resettlement and Rehabilitation, Pendukeni Ithana, the government's policy of 'willing seller, willing buyer' has imposed constraints on its ability to acquire fertile and more productive commercial farms.[35] However, a possible solution to this constraint may be found under the provisions of chapter IV of the Act. Section 20, read with section 14(1), empowers the Minister to expropriate any commercial land for purposes of land reform in case of failure to negotiate the sale of property by mutual agreement. The report adds that by April 1997, the Ministry of Lands had bought 22 farms in various regions of the country, consisting of 109 287 hectares at a cost of N$ 18 891 282 and that the land had been distributed among some landless Namibians.[36]

As indicated earlier, the government of Namibia has the sovereign power to expropriate private property.[37] Consistent with the norms of international law,[38] the Namibian Constitution provides for the justification of such expropriation on grounds of public interest and the payment of compensation. The power to expropriate, therefore, is a legal matter, while the decision to expropriate and determine the public interest is a political one. It is worth mentioning also that this clause is not entrenched and therefore can be derogated from should a state of emergency be declared under articles 24(3) and 26 of the Constitution. The Namibian government has to date expropriated about nine farms. This may be attributed both to political reasons and budgetary constraints relating to the payment of compensation.

2.4.2 Land tenure in urban centres

2.4.2.1 Freehold titles

The historical classification of land in South-West Africa along racial lines led to the development of urban centres in the southern and central parts of the country in the areas designated as non-communal areas reserved principally for white settlement. These urban centres maintained the dominance of white settlement through the pass law system, and through the reservation of property ownership to whites. Black settlement was only allowed as a source of labour. The black workforce lived in separate locations, which basically comprised less-developed formal settlements and undeveloped

35 See T Nandjaa 'The land question: Namibians demand urgent answers' *Namibia Review* (1997) 1-4.
36 As above.
37 See art 16(2) of the Namibian Constitution and secs 14(1) and 20 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
38 See the Resolution on permanent sovereignty over natural resources, 1962 adopted in *Texaco v Libya* 1977 53 ILR 389.

informal settlements.[39] Black residents in the less-developed formal settlements who were able to satisfy the requirements for registration in terms of surveying and adequate planning were granted freehold titles to the properties. This form of tenure, however, constituted the exception rather than the rule. Occupants of settlements without adequate surveying and planning could not get their properties registered and therefore did not qualify for titles. Informal settlements did not attract any grant of security of tenure.

Article 16 of the Namibian Independence Constitution guarantees everyone the right to private ownership of land. This provision means that black Namibians are constitutionally entitled to own properties with freehold titles. Freehold titles over land in urban centres may be acquired either through alienation of land hitherto vested in local authorities under the Local Authorities Act 23 of 1992,[40] or through private treaties between individuals.

2.4.2.2 The permission to occupy

Apart from freehold title, the other form of the title granted to residents in the urban centres was the Permission to Occupy (PTO). Before independence, this constituted the only form of title to land, other than rights under customary law that was available to the indigenous population of Namibia (ie considering the prevailing political, social and economic constraints on the capacity of blacks to obtain freehold title).

The PTO was formally introduced into the territory by the Development Trust and Land Act 18 of 1936. It is a licence granted by the Act which allows the licensee to occupy state land under conditions attached to the PTO certificate. There are two types of PTO: rural and urban. The former is issued by the Ministry of Lands, Resettlement and Rehabilitation, and the latter by the Ministry of Regional Local Government and Housing. The urban PTOs are issued in respect of land that falls within the 'old settlement areas'.[41] All other PTOs are in designated rural areas.

39 I Tvedten & M Mupotola 'Urbanisation and urban policies in Namibia' Discussion Paper 10, University of Namibia, (1995). See also SF Christensen & PD Hojgaard *Report on flexible land tenure system for Namibia* (1997) 6. In the proposal for the introduction and development of a flexible land tenure system for Namibia references are made to 'formal' and 'informal' areas of settlement. The former is used to denote areas that are planned and surveyed. These areas are most often serviced with water, sewage removal, roads and electricity. The latter are areas where people have not settled according to prior planning.

40 See secs 3(3)(a), 3(5)(b) and 30(1)(t) of the Local Authorities Act 23 of 1992.

41 The old settlement areas are the urban or urbanising areas where the colonial administration before independence carried out the surveying of some plots and in some cases provided water and electricity. These are also referred to as formal areas. If the PTO falls within such an area, it is an urban one and will usually be located on one of the numbered surveyed plots.

Despite the existence of the PTO since 1936, it was the establishment of the Bantustans, after the Odendaal Commission's Report in 1964[42] that resulted in the proliferation of this form of tenure. The 1960s saw the growth of the capitals of the Bantustans or the communal areas of the northern regions of the territory as a response to the administrative and military needs of the colonial administration. Since these urban centres were situated in the Bantustans, it was a contradiction in terms for the colonial administration to grant freehold titles. To suit the apartheid design, the most appropriate title in the circumstances was the PTO. PTOs were granted mainly to residents who occupied government houses in the formal areas and to private persons who developed plots in the formal areas. They were designed to provide the residents thereof with some security of tenure for the development of a surface structure which could be in the form of a house or a shop. In accordance with the overall objective of apartheid, therefore, the PTOs satisfied the colonial administration's need for a limited form of title for the indigenous population. As stated earlier, the interest granted by the PTO is a licence and as such, it is similar to leasehold. A PTO conveys no rights of ownership but it does contain an option for the holder to obtain secure title to the land if at any time during the currency of the PTO such title becomes available. As indicated by Christensen and Hojgaard,[43] a PTO provides a limited right to occupy an identified site for a limited period. As stated by Parker J the rights conveyed by the PTO do not amount to freehold tenure.[44] In theory it cannot be transferred or mortgaged. In practice, however, because PTOs are the only form of legally recognised title in unproclaimed towns, they are 'transferable', by cancellation and reissue to the purchaser. In certain instances PTOs have also been used as collateral. The inherent limitations of the PTOs have, however, created a lack of confidence in the system among the holders and also the general public.[45] Current government

42 In 1962, the South African Government appointed a commission of inquiry to make 'recommendations on a comprehensive five-year plan for the accelerated development of the various non-white groups of South-West Africa'. This Commission was commonly known as the Odendaal Commission. The recommendations made by the Commission in its 1964 report had little to do with promoting the welfare of black Namibians. One infamous recommendation in the report was that Namibia should be fragmented into a series of economically unviable self-governing homelands or Bantustans for Africans, which would of necessity remain perpetually dependent on the 'white' areas, and, through them, on South Africa. The Odendaal Plan was implemented by two pieces of legislation: the Development of Self-Government for Native Nations in South-West Africa Act 54 of 1968 and the South-West Africa Affairs Act 25 of 1969. The effect of the implementation of the plan was to entrench both territorial apartheid in Namibia and the distribution of land along racial lines. See NK Duggal *Namibia: Perspectives for national reconstruction and development* (1986) 37-41.

43 See n 39 above.

44 *Nekwaya & Another v Nekwaya & Another* (A262/2008) 2010 NAHC 8.

45 In a report prepared for the Social Sciences Division, University of Namibia, entitled *A summary review of urban land policy issues and options* (1995), JW Howard states that the public's perception of the PTO is that of a second rate form of title given to the black population by the previous regime whilst retaining the best title, freehold, for whites. He argues that if a revised form of PTO is to be accepted, then it must be marketable, trusted by the target group until it gains popular acceptance.

policy[46] is thus to phase out PTOs in the urban areas as the full range of existing and projected tenure forms becomes available.[47]

2.4.3 Land tenure in resettlement areas

As mentioned earlier, the land reform programme has land resettlement as an essential component. The Namibian Government's Resettlement involves both redefining and reconstructing of land rights that need to be vested in the settlers. The determination of appropriate land rights in these resettlement areas has been premised by the Government's objectives of resettlement. The National Resettlement Policy (2001) states two objectives of resettlement: firstly, to enhance the welfare of the people through improvement of productivity; and secondly, to develop the destination areas where people are supposed to earn a living.

In view of the fact that with the acquisition of these holdings by the state, it is not only the freehold title but logically the allodial title that are vested in the state, the position of the Government in the reconstruction of adequate titles for the resettlement areas is the retention of the freehold and allodial titles and the granting of lesser titles to the settlers. Consequently, the tenure system in the resettlement areas is based on non-freehold where the Government provides long-term leases of 99 years to current holders and future generations. The leasehold tenure system allows settlers to use a lease as collateral to secure a loan from lending institutions for agricultural production purposes. However, the reality of the actual situation on the ground is that resettlement areas cannot be used for collateral purposes for the following reasons:

(1) The state is the registered owner of the property.

(2) The ownership structure makes it difficult for the banks to repossess this land in the event of default in payment of loans.

(3) The leasehold of 99 years granted by the Government is not transferable or 'non-tradable'.

The land rights may be granted as individual, group or co-operative holdings.

2.4.4 Security of tenure in the informal areas

With the advent of independence, more Africans were absorbed into the public service and, to a lesser extent, into the private and commercial sectors. This has resulted in the influx of more affluent Africans into the urban

46 *White Paper on National Land Policy.*

47 These projected forms of tenure are the starter title and the landhold title. From the perspective of the holder, landhold or freehold title would be the more appropriate titles to obtain in the place of a PTO. For a more detailed discussion on the Flexible Land Tenure System see para 3.1 of chapter 11.

centres. The character of black settlement in the urban centres has consequently become more heterogeneous and, with the right of private ownership guaranteed by article 16 of the Constitution, more black urban dwellers are able to acquire property in the form of freehold title. Although this phenomenon may have corrected to a certain degree the effects of past racial discrimination, urbanisation has its own inherent problems. It was estimated in 1995 that urban areas in Namibia were growing at a rate of 3.75 per cent per annum on average. The fastest growing towns, Walvis Bay, Katima Mulilo and Rundu, were estimated to be growing at a rate of approximately 6.5 per cent. Windhoek, whose total population was 34.5 per cent of the entire urban population of Namibia, increased by 5.45 per cent from 1991 to 1995. It is estimated that in 1995 about 30 000 families lived in informal settlements in urban areas without security of tenure.[48] The 2001 National Housing and Population Census recorded that about 67 per cent, 1 226 718, of the Namibian population lived in rural areas with only 33 per cent, 603612 in urban areas. Out of the total 603 612 persons living in 31 urban localities, Windhoek accounted for 38.7 per cent with the remaining 61.3 per cent found in the remaining 30 urban localities recorded at that time. In 2006 the estimated population of Windhoek was 288 000 which was expected to increase to 355 000 in 2011, and to 437 000 in 2016. The population of the informal settlement was projected to reach 76 000 in 2006 and 119 000 in 2011.[49]

This growth means 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. Most of these residents are squatters on land belonging to individuals or local authorities.

One reason for the non-existence of a more secure tenure system for urban settlements in the former Bantustan areas was the deliberate policy of the colonial administration to deny these urban centres official recognition as municipalities. This would have led to the establishment of local authorities with the jurisdiction to grant freehold title after the satisfaction of infrastructural and surveying requirements.[50]

The first democratic government of Namibia reacted to this situation by establishing local authorities in these areas under the Local Authorities Act 23

48 Christensen & Hojgaard (n 39 above).

49 Namibia Planning Commission-NPC (2003). *Population and housing census 2001: National Report – Basic analysis with highlights.* Windhoek: Central Bureau of Statistics. See also F Maanda *et al Where to now? Creating a sustainable community: Case of Windhoek.* Unpublished Conference Paper.

50 The *White Paper on urban land and the proclamation of local authorities* states that prior to independence many urban areas had developed but, because of the discriminatory policies of the colonial regime, they were never proclaimed as municipalities or townships in which the administration of local authorities could develop. The *White Paper on national land policy* requires the establishment and proclamation of urban and urbanising areas as townships and, where appropriate, as municipalities, to promote decentralisation of government and the close involvement of communities in their own administration.

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 urban land into plots or erven. The occupants of such plots receive freehold title. 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'.[51] The land rights created under the provisions of the Flexible Land Tenure Act as discussed under paragraph 4.1 of chapter 11 are also meant to address the problem of informal settlements in the urban centers of Namibia.

2.5 The *Baster Gebiet*

2.5.1 Historical background

The *Basters* of Rehoboth are a mixed race of Namibian and South African ethnic group descended from White European men and Black African women, usually of Khoisan origin, but occasionally also slave women from the Cape, who resided in the Dutch Cape Colony in the 18th century. Since the second half of the 19th century, the Rehoboth *Baster* community has been concentrated in central Namibia, in and around the town of Rehoboth.

The *Basters* left the Cape Colony in 1868 to search for land in the interior north. They settled in Rehoboth and its surroundings initially through negotiations with *Kaptein* Abraham Swartbooi of the Namas and subsequently with the consent of the other Nama Chiefs. By 1872, the Basters numbered 333 in Rehoboth.[52] They founded the Free Republic of Rehoboth, Rehoboth Gebiet). They adopted a Constitution known as '*Vaderlike Wette*' in Afrikaans and in English as 'Paternal Laws'.[53] The *Basters* established a community based on birth. Under these laws, a citizen is a child of a Rehoboth citizen, or a person otherwise accepted as a citizen by its rules.[54] The area was also occupied by native Damara people, but *Basters* did not include them in population reports.[55] In 1893 the Germans established the territory of the *Basters*, known as the Rehoboth *Gebiet*, which the settlers tried to expand through negotiation. In this area the Paternal Laws were recognised. In addition, the German colony had an administrative district known as Rehoboth, which was larger than the *Baster*-governed area, with the outside

51 As above.
52 H Lang (1998) '*The population development of the Rehoboth Basters'. Anthropos.* 93 (4./6.): 381–391.
53 Shiremo, Shampapi (26 May 2011) *'Hermanus van Wyk: The "biblical Moses" of the Rehoboth Baster Community'.* New Era (Namibia). Archived from the original on 31 March 2011.
54 Lang (n 52 above).
55 As above.

areas under German (white) colonial law. Most of the land was developed as farms owned by European, especially German whites.[56]

From the beginning the German colony of South -West Africa applied two sets of laws and civil rights systems, one for each group of the colonised indigenous population including the Rehoboth *Basters* and one for the coloniser, who were subject to the laws of the German Reich. The system was taken over by the Union of South Africa in 1919 and became the genesis of the Registration of Deeds in Rehoboth Act, 93 of 1976. Through the 1880s, the community at Rehoboth were joined by other *Baster* families from Grootfontein, Okahandja, and Otjimbingwe.[57] While based on descent within the families, they also accepted both blacks and whites who applied to join the community. After the conclusion of the Great War, South Africa passed the 'Rehoboth Self-government Act' of 1976, providing a kind of autonomy for the *Basters*. It created a semi-autonomous *Baster* Homeland, known as *Baster Gebiet*, based around Rehoboth, similar in status to the South African bantustans. In the 1980s, the *Basters* still controlled about 1.4 million hectares of farmland in this territory. In 1981, the Baster population was estimated at about 25,181 by Hartmut Lang, according to his 1998 article on the Baster group.[58]

The *Baster Gebiet* operated until 29 July 1989 and following the promulgation of the Namibian Constitution the Baster community ceased to have a special legal status. In terms of Schedule 5 of the Namibian Constitution, the land that was once governed by the Paternal Laws is now under the jurisdiction of the Constitution and more specifically Schedule 5.

2.5.2 The Paternal Laws of 1872

As stated earlier, the first Kaptein's Council established the *'Vaderlike Wette'* or the 'Paternal Laws', which became the constitution of the *Baster* people in the Republic of Rehoboth. The *Kaptein* was granted the powers to appoint members of a Council, and together they formed the Executive government of Rehoboth. The Paternal Laws also provided for a Peoples Council (*Volksraad*) which was elected every five years; it formed the Legislature of the Rehoboth government. In terms of the laws of the Rehoboth *Gebiet*, every male burger or citizen of Rehoboth had the right to apply for a free piece of land at the age of 18. Although the size of this erf was decreased from 1,300 square metres to about 300 square metres, due to land shortage and servicing costs, *Basters* continued to honour this provision until the promulgation of the Namibian Constitution.[59] The newly independent Namibian government passed legislation about land use and title that took

56 As above.
57 As above.
58 As above.
59 A Salkeus (30 January 2014) *'Rehoboth* Basters *still holding on for erven'. The Namibian NAMPA*, p 6.

precedence over *Baster* traditions. *Basters* can no longer allocate land to their young men.

The land is controlled by the local town council, which replaced the Chief's Council.

2.5.3 The Registration of Deeds in Rehoboth Act 93 of 1976

As stated earlier, the German colonial administration applied two sets of laws and civil rights systems, one for each group of the colonised indigenous population including the Rehoboth *Basters* and one for the colonisers, who were subject to the laws of the German Reich. In terms of registration of land rights, land rights belonging to a Baster and situated in Rehoboth and surrounding areas were registered in the '*Raad Grond Boek'* and not in the registry in Windhoek. Based on the basic principle of two sets of laws, the governing authority of the Rehoboth Gebiet, comprising the Kaptein's Council and the Legislative Council, passed the Registration of Deeds in Rehoboth Act 93 of 1976.

It is a historical fact, therefore, that Namibia has a dual land registration system, governed by two pieces of legislation, the Deeds Registries Act 47 of 1937 which deals with the registration of land titles for the whole country apart from Rehoboth and the Registration of Deeds in Rehoboth Act 93 of 1976 which applies to the registration of deeds relating to properties in Rehoboth.[60]

2.5.4 The Paternal Laws and the Namibian Constitution

Before the independence of Namibia and the promulgation of the Namibian Constitution, the Paternal Laws constituted and were recognised as the constitution of the Rehoboth Gebiet. All rights and obligations acquired and incurred during the pre-independence era and consistent with the precepts of the Paternal Laws were recognised as valid and legitimate.

However, with the promulgation of the Namibian Constitution as the supreme law establishing Namibia as a sovereign, secular, democratic and unitary State all proprietary rights have to be defined and determined in terms of the Namibian Constitution and any other relevant laws. With respect to the property vested in the Rehoboth Baster Gebiet or in the Government of Rehoboth at the time of independence, Schedule 5 of the Namibian Constitution provides that such property shall vest in or be under the control of the Government of Namibia.

60 It must be noted that a new Deeds Registries Act of 2015, which *inter alia* is meant to provide for a unified national registration system, is in the process of being promulgated.

3 Summary and concluding remarks

The current land policies and land reform programmes in Namibia are based on a pedigree of land tenure systems and consequential titles that claim their legitimacy from constructs of colonial racist administrations that illegally dispossessed the indigenous people of Namibia of their ancestral rights to their land and, in the construction of new land tenure and land rights, deprived them of comprehensive titles to their land. The German occupation of the territory was followed by its declaration as a Protectorate and a Crown Colony. Thereafter, a series of statutes was used by the South African administration to classify the land into state land, private land and communal land. This classification was based on the native-settler dichotomy which made access to private land the exclusive right of white settlers. The communal lands were the creation of legislation which *inter alia* deprived the indigenous people of their allodial rights. Individual rights over communal land took the form of rights of usufruct or rights of use, with limited security of tenure. It follows that on the eve of Namibia's independence most private land was owned by whites. The majority of the indigenous people, with the exception of those few who held the so-called PTOs in the urban centres, held rights of usufruct or use over the communal lands.

For purposes of legal continuity and political expediency, the framers of the Namibian Independence Constitution condescended to recognise the pre-existing land titles. If the Namibian Independence Constitution is accepted and recognised as the Grundnorm that confers legitimacy on the pre-existing rights, then this approach glosses over certain fundamental questions relating to the validity of current titles and the policy of the Government relating to the right of the people of Namibia to their ancestral land.