"What has happened has happened"

The Complexity of Fencing in Namibia's Communal Areas

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Land, Environment and Development Project
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Contents

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Notwithstanding these inputs, the responsibility for factual correctness and interpreting facts rests with the author.

A note on orthography

The spelling of indigenous names adheres to Hinz and Namwoonde (2010). However, the spelling has not been changed in verbatim quotations in this report.

Section 1
Introduction

In July 2008 the Omusati Communal Land Board received 11 applications to have enclosures of communal land recognised by the Land Board and registered. Lawyers acting on behalf of the applicants referred to section 28(1) of the ***Communal Land Reform Act, 2002 (Act No. 5 of 2002)*** (CLRA), which provides for the recognition of existing customary land rights. In other words, the applicants claimed that they were granted rights to fence off communal land under customary land and land tenure rights, presumably on the strength that the respective traditional authorities approved these applications before the CLRA came into force in 2002.

The areas applied for ranged in size from 2 000 hectares (ha) to 10 400 ha. All of them had boundary fences, and 10 of the 11 had internal camps. The communal land in question falls under the customary jurisdiction of the Ongandjera and Uukwambi traditional authorities. In just about all cases, the applicants provided documentary proof that the applicable traditional authority (either Ongandjera or Uukwambi) had approved their applications for fencing off large tracts of communal land. Claimed approvals for such applications date back to 1975, but in 8 of the 11 applications, the approvals were granted in the 1990s. Seven of the 11 applicants were also granted permits in the 1990s to catch wild ostriches. Such applications had to be approved by traditional authorities before the Ministry of Environment and Tourism (MET) gave its final approval.

After receiving the applications, the Omusati Regional Office of the Ministry of Lands and Resettlement (MLR) approached the Legal Assistance Centre (LAC) for legal advice on how to deal with the applications. Apart from pointing out a few technical mistakes in the applications, the MLR hinted at the possibility that the enclosures of the applicants were illegal. As the LAC pointed out, section 28 of the CLRA requires that Communal Land Boards evaluate applications to have existing customary and other rights recognised on two grounds:

- **Technical**: This entails the forms and documentation required by law for applications.
- **Substantive**: This essentially entails a 'balancing act' with regard to an individual's right to be free from retroactive application of the CLRA, i.e. the abrupt divestment of land which a person lawfully acquired on the one hand, and on the other hand "the right of the poor, unemployed and powerless to communal lands as envisioned by the CLRA" (LAC 2010: 1).

The issue of communal land enclosures has been the subject of many debates since Independence in 1990. These debates, with a few exceptions, were characterised by two main features: firstly, all enclosures in communal areas were generally regarded as illegal, and secondly, the legality or otherwise of enclosures was mostly questioned – or claimed – in terms of some form of customary law. In other words, the dominant question was whether or not traditional leaders had the legal powers to allocate large tracts of land for purposes of fencing.

What compromised the usefulness of these debates is that, in most instances, opponents and proponents of enclosures conflated rights and equity issues. Put differently, they conflated legal and political arguments. In addition, it is submitted and argued below that people who questioned the legality of enclosures in communal areas in terms of customary law made assumptions about customary law, and by implication "traditional" societies (as they are called in the *Traditional Authorities Act*), which are conceptually too ambiguous to be useful. More specifically, customary law is commonly perceived to be static. Communities which are governed by customary law are also regarded as largely homogenous. However, as this report will argue, customary law is constantly evolving as it adapts to new socio-economic and political circumstances. Moreover, "traditional" communities have become increasingly differentiated in terms of access to wealth and resources.

The latter process was encouraged by a discourse on modernisation in the communal areas that received its first coherent expression in the Report of the Odendaal Commission (RSA 1964) and subsequent interventions. This discourse survived the revolutionary fervour of the armed struggle, and continues to dominate thinking about the future of our communal areas. It stands to reason that, as modernisation or the increasing incorporation of communal populations into the market economy progressed, the proponents and beneficiaries of this course of development began to contest aspects of customary law which were perceived to hold back modernisation. A more appropriate conception of customary law would therefore be to regard it as contested space and dynamic. To the extent that this is true, it is almost impossible to judge the legality of fencing in terms of customary law – which may explain why 20 years after Independence, we still have not concluded the argument.

A more fruitful approach to this issue is to try to understand the political economy of fencing, and the politics of policy-making and legal drafting. This approach will produce a much more differentiated and dynamic picture of the process than is produced by the simple question of whether fencing is legal or illegal in terms of customary law. It is likely to reveal the complex dynamics underlying enclosures in communal areas and the respective interests shaping those dynamics. Such an understanding makes possible the development of a policy and legal framework which systematically take the diverse interests into account. It can be argued that the interests of those sectors which fence off communal land have been adequately taken into account through, for example, the Affirmative Action Loan Scheme and the Small Scale Commercial Farms in Communal Areas Project. The situation is very different with regard to legal requirements aimed at,

for example, restoring and improving the accountability of traditional leaders vis-à-vis their subjects, and protecting the rights of communal residents to commonages.

1.1 Objectives of the study

In view of the request to provide advice on how to deal with the applications in Omusati Region, the LAC commissioned a study to "review and analyse existing literature dealing with illegal fencing, customary land rights, 'land grabbing' and privatisation of communal land", and to "make recommendations on issues concerning 'illegal fencing' and how it is perceived to impact on the livelihoods of communities living on communal land". Questions that guided this review and analysis included the following:

1. What is illegal fencing? It is defined under the CLRA, but how is it defined under customary law?
2. What were the powers of traditional leaders (chiefs, headmen, etc.) before Independence regarding the allocation of land? What processes had to be followed in order to get customary land rights recognised? Who was entitled to such rights? Was what is defined today as illegal fencing regarded as a customary land right in the past, and if so, under which circumstances?
3. What legislation dealt with communal land and particularly land rights before Independence? Is any pre-Independence legislation relating to customary land rights still in place?
4. Is there any existing case law regarding communal land rights and disputes before and after Independence? Which communal areas (regions) are mostly affected by 'illegal fencing'?
5. How were customary land rights defined before Independence? How much land (in hectares) could be allocated under a customary land right?

This report is the outcome of a desk study. The sources consulted include previous studies of customary law and enclosures, archival materials, and debates in the Owambo Legislative Assembly, the National Assembly of Namibia and the Omusati Regional Council. The LAC will decide whether the desk study presented here should be complemented and improved upon by fieldwork. It was not possible to conduct any fieldwork during the desk study phase.

The report begins with a short discussion of what customary law is and is not. This discussion deals with some conceptual issues surrounding customary law and tenure. Section 3 describes customary law with regard to land matters specifically. The question of how colonial "native policy" and legislation impacted on customary law is the subject of Section 4, which is based primarily on work done by Hubbard (1991), Van der Byl (1992), Hinz (1995) and Corbett (2009). The analysis of Sections 3 and 4 is followed by a brief historical discussion of socio-economic and political developments since the 1960s, to assess how these might have shaped customary law and the process of enclosing communal land.

Section 2
The Nature of Customary Law and "Traditional Communities"

Customary law and its content are never defined in policy, legislation or debates on fencing in particular. Although the ***Traditional Authorities Act, 2000 (Act No. 25 of 2000)*** (TAA) does provide a formal legal definition, it is devoid of any content. It simply defines "customary law" as –

> ... the customary law, norms, rules of procedure, traditions and usages of traditional community in so far as they do not conflict with the Namibian Constitution or with any other written law applicable in Namibia.

This definition amounts to a tautology, and does not say much about what customary law is in reality. It implies a set of laws that is static and accepted by all members of a traditional community. According to the TAA, a "traditional community" is –

> ... an indigenous *homogenous*, endogamous social grouping of persons comprising of families deriving from exogamous clans which *share a common ancestry, language, cultural heritage, customs and traditions*, who recognise a common traditional authority and inhabit a common communal area, and may include members of that traditional community residing outside the common communal area. (Author's emphasis)

These notions of customary law and traditional communities are constructed on assumptions of homogeneity, and present a static picture of "traditional communities" and the rules governing them. Contestation and conflict are excluded from these definitions. These notions have dominated both popular debate and legal discourse on communal land enclosures. In his opinion on "Legal procedures for dealing with illegal fencing in communal areas", Corbett (2010: 3) approvingly quotes Judge Bethune's argument in the context of Herero communal land in *Kaputuaza and Another vs Executive Committee of the Administration for the Hereros and Others*[1] that –

[1] *Kaputuaza and Another vs Executive Committee of the Administration for the Hereros and Others*, 1984 (4) SA 295 (SWA) (hereinafter "*Kaputuaza* case"), p. 318.

> **... the fencing-off of certain areas in the reserve is incompatible with the notion that all the land in the reserve is communal land. It is accordingly contrary to Herero customary law and also contrary to the intention of the legislature as reflected in the laws relating to Herero reserves.**

In this formulation, customary law was assumed to be a harmonious compendium of rules and practices that was accepted by all members of a specific community without contestation. The only transformation of customary law that legal discourse could conceive of was when statutory law explicitly changed aspects of customary law. Customary law was always subordinate to statutory law. This was illustrated in another court case when the enclosure of communal land at Okamatapati was contested in 1987.[2] Those farmers who were opposed to fencing based their opposition on the notion that –

> **Such sub-division is contrary to Herero customary laws and practices. A communal land is not held in outright ownership and rights pertaining to land are exercised by customary law.[3]**

The court did not agree with this interpretation of events. Reiterating an earlier judgement on a similar issue, the judge made it clear that insofar as it still existed, the customary law of the Herero or any other community in Namibia was "only applicable subject to the legislative enactments" of the country, and then only if aspects of it had not been repealed or modified by common law.[4] Such modification had come about at Okamatapati as a result of the *Establishment of a Community Authority for the Herero community of Okamatapati – Hereroland Proclamation (Proc. 178/1974).*[5] This had tasked the Community Authority of Okamatapati with, inter alia, the "development and improvement of the land within the area". The court held that the enclosure of communal land in Okamatapati fell within these provisions, arguing that enclosures were "the logical development of the policy of grazing control started some sixty years ago and, of course, as a result whereof the Herero customary law was substantially modified", thus such enclosures were legal.[6] In a subsequent application for leave to appeal against the judgement, Judge Levy argued that –

> **... the control of grazing on communal land may well require fences and such control is not inconsistent with communal ownership of land. In elaboration of this proposition, I point out that the control of trading by the issue of licenses or health and cleanliness certificates or by the regulation of shop hours or by the regulation of wages, does not constitute the abolition or wrongful interference of the right of citizens.[7]**

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2 The following section is drawn from Werner 2000, pp. 266-267.

3 *Abuid Uazengisa and Others v The Executive Committee of the Administration for Hereros and 11 Others*. 1987. Unreported. (hereinafter "*Uazengisa* case"), Affidavit, A. Uazengisa, 20 October 1987, p. 21.

4 Ibid., judgement delivered on 19 October 1988, p. 9.

5 A similar Proclamation, namely *Establishment of a Community Authority for the Herero community of Rietfontein – Hereroland Proclamation (Proc. 177/1974),* was passed in 1974.

6 *Uazengisa* case (op. cit. n3), judgement delivered on 19 October 1988, pp. 16-17.

7 First *Uazengisa* appeal case, judgement delivered on 21 February 1989, p. 2.

In the case of Okamatapati, therefore, the courts found that customary law as it pertained to land was no longer valid as customary institutions and rules were superseded by the establishment of Community Authorities. An appeal judgement in September 1989 confirmed the earlier judgement that Community Authorities had the legal powers to fence off communal land in order to develop such land.[8]

The judgements discussed above are very clear in terms of the relationship between customary and statutory law. However, they do not spell out whether the enclosures of communal land in terms of authority given by traditional authorities are by definition illegal. For opponents of enclosures, the answer to the question of the legality of communal land enclosures was always very simple: customary law never provided for enclosures, and for that reason traditional authorities never had the right to authorise fencing.

The simplicity of this line of reasoning is as seductive as it is misleading. It is misleading because it rests on assumptions about customary law and "traditional communities" which are shaped by colonial ideology and unable to stand up to critical historical and/or anthropological analysis. Underlying this line of reasoning is not only a rather romantic assumption about the inherent equality of "traditional communities", but also a static concept of customary law which by definition precludes the possibility of it changing and adapting to external and internal changes. As such, this line of reasoning also precludes asking the question of whether enclosures, under specific historical conditions, could have been the result of an evolving and "modernising" customary land tenure system.

In this school of thought, customary land tenure is referred to in the abstract as an entity that is the same now as it was at Independence and in the mid-1950s. The fallacy of this line of reasoning can be demonstrated very easily by referring to changes of customary law in the 1990s. In 1992, the traditional authority in the north-central regions unanimously agreed to prohibit the expulsion of widows from land on which they resided and cultivated with their late husbands (cf. Hinz and Namwoonde 2010: 92f). Moreover, before Independence, unmarried people normally lived with their families. Today, even unmarried women can apply for a piece of land. Wealthy individuals can also buy plots of land for their young children (LAC 2010b: 5). It is submitted that these changes did not receive as much attention as enclosures because the majority of people – rightly – approved of them. But they still manifest changes in aspects of customary law, supporting the view that customary laws are not static but adapting to new situations.

It follows from this brief introduction that any reference to customary law without reference to a specific historical point in time is problematic. When customary tenure is debated or used in arguing the legitimacy of a specific practice, it is important to be clear whether reference is made to the set of customary rules that prevailed when polygamy was still in full swing and widows lost access to land upon the passing away of their husbands, for example, or to a more recent set of rules.

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8 Second *Uazengisa* appeal case, judgement delivered on 22 September 1989, p. 3.

2.1 Notions of "traditional communities"

It is submitted that the judgements referred to above (and below) were based on notions of customary law and "traditional communities" which are flawed and rejected by modern anthropology and sociology. Apart from oral evidence presented in court, Judge Bethune, for example, has drawn on what he described as "standard works in connection with Herero customary law", namely Vedder, C.H.L. Hahn and J.S. Malan.[9] Their writings on Namibia were informed by a school of historiography and anthropology commonly known as British structural functionalism.[10] In brief, this school of thought –

> ... regarded the functioning of societal entities with some kind of political cohesion, for example 'tribes', as being balanced within themselves and as such not influenced by colonial domination. They therefore did not regard these 'tribes' as having undergone any form of historic development. (Lau 1982: 13)

The most notable critic of this school of thought in the Namibian context was Brigitte Lau (1982). In an excerpt from her Honours dissertation published in *The Namibian Review* in 1982, she argued that "the concept of 'tribe' [or 'traditional community'] has never been adequately defined ... and has even been considered useless" (ibid.: 13). She pointed out that Vedder postulated a Herero "tribe" when it did not exist as a coherent "traditional community" under the leadership of one accepted leader, and argued that notions of tribes were essential for racist policies of separate development, but had no historical basis. She concluded that –

> By not questioning concepts which have received prominence in white settler politics and by trying to put them to use in 19th century enquiries, 'history' is not written but is at best a chronicle of events and at worst thinly-veiled political propaganda from a settler point of view. Vedder's book certainly comprises both. (Ibid.: 14-15)

More recently, Leach et al (1999) have interrogated the concept of communities as static and relatively homogenous entities. They also criticised the structural functionalism school of thought for regarding individual members of a social system as "united by culture into 'moral communities', sharing common interests and mutual dependence". They continued to argue that structural functionalists saw –

> Social structure ... to drive rules which unproblematically governed people's behaviour and maintained social order, and to comprise parts that interlocked functionally to fulfil society's needs and maintain an equilibrium. (Ibid.: 229)

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9 *Kaputuaza* case (op. cit. n1), pp. 301-302.

10 Structural functionalism reached the peak of its influence in the 1940s and 1950s, and by the 1960s was in rapid decline. By the 1980s, its place was taken in Europe by more conflict-oriented approaches, and more recently by "structuralism" (Wikipedia).

However, social science has produced ample empirical evidence which suggests that the opposite may be true of communities: "gender, caste, wealth, age, origins and other aspects of social identity divide and cross-cut so-called 'community' boundaries". Instead of shared beliefs and interests, conflicting values and resource priorities pervaded societies (ibid.).

Leach et al (ibid.: 230) develop Lau's point about "tribes" not having been influenced by colonial policies and practices further by arguing that –

> **Communities cannot be treated as static, rule-bound wholes, since they are composed of people who actively monitor, interpret and shape the world around them.**

In other words, communities are composed of 'actors, action and agency'. Structures, rules and norms emerge as products of people's practices and actions. Social change is the result of complex interactions between external and internal actions and events. Consequently, there is no inherent homogeneity in "traditional communities". Customs and forms are often contested, sometimes to the point of conflict.

To be sure, communities do exist, but they are more appropriately characterised as representing 'a more or less temporary unity of situation, interest and purpose'. On some issues, communities may appear as united while on others they may be split.

2.2 Notions of customary law

The concept of dynamic communities composed of actors implies that customary law also needs to be conceptualised as dynamic, as changing, as living law and as contested space. That the judgements referred to above do not allow for any contestation is borne out by Judge Bethune's argument that customs in specific communal areas (but not customary law) "can be proved in the same manner as any other custom, i.e. by ordinary persons who have knowledge of the nature of the customs and the period over which they have been observed".[11] This statement assumes that any member of a "traditional community" will give the same information about customary law because communities are homogeneous and customary law is uncontested. This line of reasoning does not allow for conflicting interpretations of customary law based on evolving and changing sectional interests.

Customary law is "living law", consisting of "a set of rather flexible principles and rules" that "the community has authority to amend" (Hinz and Namwoonde 2010: 7, 8). It is for this reason that Hinz and Namwoonde were careful not to present their recently published compendium of customary laws from across the country as a *codification* of customary law, but rather as *self-statements* of customary law. They pointed out that –

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11 *Kaputuaza* case (op. cit. n1), pp. 301.

> **Codification will … destroy one of the most important qualities of customary law, namely its openness to accommodate reconciliatory solutions to problems instead of allowing the law to win the parties over.** (Ibid.: 8)

Moreover, *codification* would transform customary law into an Act of Parliament, which would imply that it no longer belonged to "the communities in which it developed" (ibid.: 5). Self-stated customary law, on the other hand, "refers to a process of ascertaining customary law by the owners of the law to be ascertained: the people, the community, the traditional leaders as the custodians of customary law" (ibid.: 6).

Underlying the arguments presented by Hinz and Namwoonde is the notion that customary law is not cast in stone but constantly evolves. They argued that communities could amend customary laws as the need arose. Put differently, the flexibility provided by customary law allows new interests and changed political and socio-economic environments to be accommodated. The clearest proof of this happening is the revision of customary laws in 1992 to provide for the protection of land rights of widows in the north-central regions (cf. Werner 2008: 25).

The reasons for Hinz and Namwoonde to have embarked on the ascertainment of customary law reveal something about the changes that have taken place in rural communities. The initiative to do so was taken by several traditional leaders, raising the question as to why that should have been the case. The answer provided by traditional leaders was that traditional communities were no longer as homogenous as they might have been in the past. Factors that may have contributed to this include the gradual incorporation into a money economy, increased mobility of people especially after Independence, and possibly the return of exiles in 1989 and after. A higher degree of homogeneity in the past facilitated traditional ways of communicating knowledge particularly to young people so that "basically everybody knew what the law of the community was" (Hinz and Namwoonde 2010: 7-8). The subtext of this answer may very well be that customary laws needed to be ascertained against the background of increasing contestation by wealthy and politically powerful interests, which undermined its continued legitimacy. It is conceivable that the ascertainment of customary laws may be regarded as a first step towards a more codified set of laws.

The criticism of the notion that "traditional communities" and customary laws are static and homogenous entities without any conflict and contestation in favour of dynamic, differentiated social entities that shape customary laws and tenure rules, makes it possible to argue that customary land tenure rules and laws have indeed adapted to increasing class formation processes and new socio-political environments. In this regard it is helpful to be reminded of Peters' (1987: 177) observation that, in seeking to understand the history of tenure change and specifically the enclosure of communal land, it is important to recognise that enclosure through fencing is the "culmination and not the commencement of the processes that transformed the communal lands" – processes characterised by "conflict among users and among different rights and competing uses in a situation of political and economic change". Bruce (1986: 10) has identified a number of possible sources of tenure

change: "innovation in agricultural technology ... changes in population densities ... drought and famine." In the Namibian context, the reforms introduced in the late 1960s in the wake of the Odendaal Commission certainly have to be added.

This report considers only the gradual differentiation of social entities in the north and the discourse on modernisation as the most prominent factors changing customary tenure regimes. The emphasis is on agricultural modernisation and related transformations of land tenure practices.

The implication of this brief discussion is that if customary law is contested, and as a result is constantly responding and adapting to internal and external factors, then the possibility cannot be excluded that it gradually provided for the enclosures of communal areas. To the extent that this is true – and Section 5 of this report will provide some evidence in support of this argument – the issue of rangeland enclosures in communal areas cannot be judged in terms what customary law permitted or did not permit. It is significant to remind the reader that many applications passed on to the LAC appear to have been approved by the Chief of the area. The possibility that the same Chief might argue now that it was against customary law to fence off communal land would only support the argument about customary law being a contested space. In the early 1990s when there was no legislation governing communal areas, traditional leaders may have found it opportune to approve applications for fenced units, particularly when they came from senior politicians and civil servants. Currently, with legislation clearly spelling out that enclosures are no longer tolerated, the tide of popular opinion may have turned against traditional leaders, resulting in some taking different views on the matter.

Section 3
Cultural Practices in the North-Central Regions[12]

The area formerly known as Owamboland and today encompassing the four north-central regions of Omusati, Oshana, Ohangwena and Oshikoto, is occupied by eight different population sub-groups. Since all of these sub-groups speak different dialects of the same language and practise the same kind of agriculture, conventional wisdom has presented a rather static and uniform picture of land tenure systems in the area. In particular, the powers of chiefs with regard to land allocation and administration, and the importance of ethnicity in obtaining access to land, seem to have been overstated (NEPRU 1991b). The *Report presented by the Government of the Union of South Africa to the Council of the League of Nations concerning the administration of South West Africa for the year 1929* (Union of South Africa 1930: 99) carried this portrayal of Owambo land tenure beyond the boundaries of the then South West Africa (SWA) to international fora. The following excerpt exemplifies this portrayal:

> **Each tribe inhabits a well-defined area in which it carries on an independent system of government. There is no such thing as individual ownership of land as understood in our law. The chief is the undisputed ruler over the whole tribal area and the land is regarded as his property, though he administers it for the benefit of his subjects. No native may reside or cultivate land within a tribal area without first becoming a member of the tribe.**

These "independent systems of government" did create "clear differences in rules to land tenure and land use within Owamboland" (NEPRU 1991b: 549), and to some extent these differences reflected the differential impact that colonial domination had on indigenous communities. In the Oukwanyama and Ombalantu communities, for example, former kings had been replaced by councils of headmen (Union of South Africa 1930). Nevertheless, despite some regional differences, land tenure in all eight communities of former Owamboland was broadly structured as per two categories of land (NEPRU 1991b):

- Settled or inhabited land (*shilongo*) on the one hand, and uninhabited land or bush areas (*ofuka*) on the other; and
- Residential, arable and grazing land.

[12] This chapter is taken largely from Werner 1998.

In the inhabited areas or *shilongo*, land for cultivation and residence was allocated through a hierarchy of traditional leaders. In pre-colonial and early colonial times, "the Chiefs or Kings of the various communities in Owamboland had the ultimate right to allocate land in the inhabited parts within their jurisdiction" (NEPRU 1991b: 555). However, in some parts, allocation rights had been transferred to headmen. For example, among the Oukwanyama, who did not have a king, eight principal headmen exercised the rights of the chief in respect to land allocations.[13]

Where kings still existed, their territory was subdivided into a number of "districts" under the authority of "headman-councillors" (later referred to as "senior headmen") who were "responsible to the tribal council". Districts, in turn, were composed of several wards or *omikunda (*singular *omukunda*). *Omikunda* were granted to people who could afford to pay a certain amount of cash or cattle. Upon payment, the new "owner" became a headman with certain rights and responsibilities. Apart from "exercising native administration and judicial authority"[14] in their *omikunda*, headmen were entitled to "sell" portions of their *omikunda* to individual homesteads which had to pay a certain number of cattle for the allocation (Hinz 1995: 31). The sizes of *omikunda* varied, but "comprise[d] anything from 10 to 100 or more kraals [homesteads]".[15]

Generally, the payment for land applied only in the inhabited areas or *shilongo*, and changed according to the degree of land pressure. In the less densely populated parts of the north-west, payments were lower than in the Cuvelai area. In the 1920s, allocation fees for residential and arable plots were applicable in the Ondonga, Ongandjera, Uukwambi and Uukwaluudhi areas. No payments were required in other communities. Payments depended on the size of the plot, ranging "from two goats or sheep to three or four Pounds Sterling in Ukualuthi (sic) ... to one or two head of cattle in Ondonga ..." (NEPRU 1991b: 551). As pressure for land increased and settlement extended eastwards, payments followed, and payments for land in the eastern Oukwanyama area were reported for the first time in the late 1940s (ibid.). It appears to have been the custom in the Ondonga area that "should it become necessary to eject an allottee before he has reaped at least one crop this payment must be refunded".[16]

Customary law regards the highest traditional authority of a community as the "owner" of communal land. Allocations of land for residential and cultivation purposes are granted at the lowest level, i.e. by village headmen. Higher levels of traditional authority – senior councillors and the king/chief – are involved only in cases where foreigners are applying for land. "However, in all cases of allocating land, the consent of the people living in the area affected by land allocations is necessary" (Hinz 1995: 53).

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13 From the section on "Property Rights" in a typed manuscript of the "Tribal Customs of the Owambos", National Archives Record A 450, Vol. 9 2/38 (n.d.), p. 29. See also NEPRU (1991b: 556-7).

14 *Annual Report 1937*, National Archives Record A 450, Vol. 7 2/18, 22 December 1937, p. 13.

15 Ibid.

16 *Native Tribal System of Land Tenure in Owamboland*, National Archives Record NAO, Vol. 9 2/12 (n.d.) [1929], p. 5.

A feature of customary land law that appears to be relevant to this study is that it provided the flexibility to consult and negotiate agreements over access to and allocations of land. The government, for example, acquired large tracts of land for specific projects. This included land for agricultural projects, for example. Hinz (ibid.: 53-54) stated that payments for such big projects were common in an attempt to benefit the communities affected by the land allocations. The fact that such land was communal did not prevent traditional authorities from making large tracts available for projects. By the same token, it is conceivable that traditional authorities were prepared to negotiate with private individuals who applied for large pieces of land for private use.

It is interesting, in this regard, that several applications submitted to the LAC for legal opinion were accompanied by permits to catch and farm ostriches. Such a permit clearly does not constitute a land right, but may have served to legitimise the applications in terms of the contribution fenced units were perceived to make to economic development in the communal areas.

3.1 Rights and responsibilities

In general, payment of a fee ensured access to residential and arable land and use rights "which can best be described as being a sort of permanent usufruct, subject to good behaviour and loyalty to his chief".[17] With the exception of marula trees, the rights of heads of homesteads "included not only unlimited use of the land itself, but also rights of first access to waterholes, wells, and trees on or near the plot" (NEPRU 1991b: 554).

> **Within the inhabited area (*shilongo*) a waterhole situated in a cornfield or closely contiguous, accedes to the corn field. The occupier of such field becomes the occupier of the waterhole. This right cannot be alienated; the accession is complete.**[18]

The ownership of waterholes outside a field was determined by the "importance of the man who made it or caused it to be made":

> **If he was an important, rich or influential person, the waterhole is inalienable and accordingly his relatives cannot inherit it. The rights over it pass to the person who succeeds him**, i.e. **the person who is appointed in his place.**[19]

While use rights of allocated land were extensive, the latter could not be allocated to anyone else by the head of a homestead, "be it through sale, gift or inheritance" (NEPRU 1991b: 554). Upon the death of the head of the homestead, the headman of the *omukunda* could reallocate the land against a payment. Rights obtained under customary law to

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17 Ibid., p. 3.

18 From a typed manuscript of the "Tribal Customs of the Owambos" (op. cit. n13), p. 31.

19 Ibid.

communal land are lifelong usufruct. Communal land cannot be sold and reverts back to the traditional authority for redistribution in cases of non-utilisation (Hinz 1995: 53).

With these rights to residential and arable land also came certain responsibilities regarding the protection of resources and the protection of persons using the resources (see NEPRU 1991b for further details).

3.2 Grazing land

Available written records reveal very little about land tenure arrangements regarding grazing land. The section dealing with this issue in the report to the League of Nations in 1930 devoted only four lines out of two pages to the subject. It stated that only the chief could reserve any place for grazing:

> **The grazing grounds are common to all members of the tribe both in the inhabited and the uninhabited portions of the tribal area. The chief alone has the right to reserve any place for grazing.** (Union of South Africa 1930: 99)

During the early part of the 20th century, Owamboland had large reserves of unused land. Interstitial areas between different areas of jurisdiction such as the Ondonga and Oukwanyama were kept as long as possible for grazing purposes. In addition, herd owners made use of cattle posts in the bush or *ofuka*. Large areas in the south-western parts of Omusati Region continue to be very sparsely populated on account of water shortages.

Despite the long distances to most cattle posts, rights of "ownership" were exercised in some cases. Given the importance of water, ownership rights to a cattle post "usually hinged on ownership of the water supply which sustained the site as a cattle post" (Kreike 1994: 25). It had also been noted that –

> **... well established cattle posts (with waterholes) have definite owners ... [while] at other posts the first man on the post each year acquires the right of user. Every new waterhole dug in the bush belongs to the man who digs it.**[20]

More generally, while the 'owner' of a waterhole at a cattle post had the right to satisfy his needs first, "the water itself is incapable of ownership".[21] It could not be alienated by sale, for example, but could be passed on to heirs (Kreike 1994a). Neighbours were allowed to draw water, "provided that they have assisted in the annual opening up and cleaning of the waterhole after the rains.'[22] Rights to a waterhole often lapsed through continued disuse and neglect (Kreike 1994).

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20 From a typed manuscript of the "Tribal Customs of the Owambos" (op. cit. n13), p. 32.

21 Ibid.

22 Ibid.

3.3 Access to land after Independence

With the exception of Oshikoto, customary tenure regimes after Independence have not been well documented. Accepting that there may be slight differences in tenure regimes between different jurisdictions, the Oshikoto narrative may help to understand how customary tenure operated in the post-Independence era.

In Oshikoto Region, access to land was obtained in the following way: if a family decided to construct a homestead at a cattle post, it had to consult prospective neighbours to ascertain whether there was enough space for its cattle and whether the community would accept it as a new neighbour. Once that was done, the sub-senior headman (sub-*elenga enene*) had to be approached with the request for land. Against payment of a fee determined by the size of the land, land for a homestead was allocated (Kerven 1998: 69).

The process for areas in which no homestead had been erected was slightly different. Unsettled land by definition belonged to the tribal authority, and they could allocate the right to graze livestock in a particular area. However –

> **Generally, reciprocal rights of access prevail on grazing land in Oshikoto. Settlements do not have exclusive rights over the open grazing areas in their vicinity, but usage of grazing land is controlled *de facto* through the ownership and control over water points, especially in the dry season.** (Ibid.)

Hence, property rights over land which have not been delegated to a lower structure remain vested in the tribe represented by the king or chief.

With regard to rights to water, the person who developed a water point was usually regarded as owner of a cattle post. This position could be inherited but not sold or exchanged. By virtue of "owning" a water point, the "owner" was able to control the grazing area within a two-day walking distance for cattle (ibid.: 70).

Section 4
The Impact of Colonial Laws on Customary Law

It was argued above that customary law was constantly evolving; was "living law". Its trajectory was shaped by a multitude of internal and external factors. With the advent of colonialism, and more specifically the onset of South African rule in SWA, the issue of ownership to and rights in communal land became "governed by a mixture of general law and customary law" (Hinz 1995: 4). The challenge of analysing the legality of enclosures against this mixture of different legal frameworks is to determine the extent to which customary law has been changed and/or amended by statutory law. This question was addressed in the matter between ***Abuid Uazengisa and Others v The Executive Committee of the Administration for Hereros and 11 Others*** in 1988. At issue was the enclosure of communal land at Okamatapati. In his judgement, Judge Levy stated, inter alia, that –

> **... customary law is only applicable subject to legislative enactments of this country and in view of the fact that the Common Law applicable in the Cape Province was introduced by legislative enactment only such customary law that has not been repealed on [sic] modified by the Common Law or by Legislation still remains.**[23]

It is therefore important to consider "in how far such traditional law was altered by legislation after the reserves were established" (Judge Bethune in *Kaputuaza*, op. cit.: 308), or, to quote Hinz (1995: 18), "to what extent the power of traditional authorities to allocate land has survived inroads into customary land law".[24]

4.1 Periodisation of "native policy"

The analysis can be periodised into three more or less distinct periods. While there were overlaps, each period was characterised by distinct socio-political and socio-economic changes.

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[23] *Uazengisa* case (op. cit. n3), Affidavit, A. Uazengisa, 20 October 1987, p. 9.

[24] The following section is based on Hubbard (1991), Van der Byl (1992) and Hinz (1995). All three authors are lawyers and consequently are more qualified than the author of this report to discuss the legal framework and its impact.

The first period started in 1915 and lasted until the late 1960s. During this first phase, colonial legislation established a system of divide and rule, but kept 'the lid' on socio-economic differentiation. Native reserves served mainly as labour pools for the colonial economy (see e.g. Werner 1998).

The report of the Odendaal Commission in 1964 (RSA 1964) ushered in the second phase of "native policy". This period coincided with the onset of the armed struggle for the liberation of SWA and increasing internal resistance to South African rule. The Odendaal Commission presented proposals for a comprehensive reform programme aimed at complementing its strategy of military force. A cornerstone of these reforms was to nurture the development of a black middle class. However, this process was to take place within ethnic homelands. Legislation was introduced to set up ethnic homelands with their own Legislative Councils and Executive. This amounted to the establishment of an institutional framework parallel to customary institutions, although senior traditional leaders were heavily represented in the new institutions. It is during this second phase, i.e. the late 1960s and the 1970s, characterised as it was by a modernisation discourse, that the enclosure of communal land started.

The third phase represented a refinement of the homeland approach of the second phase. Homelands were reinvented as "Representative Authorities" in the early 1980s, and were provided with legislation that gave them substantial powers with regard to land administration. Simultaneously, legislation that restricted access to land in the freehold sector to whites was repealed so that black farmers were able to buy freehold commercial farms. Prior to this, residents of communal areas who wanted to farm commercially were forced to do so within the confines of their respective communal areas.

4.2 Phase 1: 1915-1968

The ***Treaty of Peace and South West Africa Mandate Act, 1919 (Act No. 49 of 1919)*** was the first piece of legislation introduced by the South African government with a bearing on land matters. In terms of this Act, all land held by the German colonial administration effectively became Crown Land with the South African Parliament retaining authority over land rights. Grants of any title, right of interest in state land or minerals in SWA could be made only with the authority of Parliament, "except pursuant to the provisions of several specified laws ... which included the Crown Lands Disposal Ordinance 1903 of the Transvaal which authorised the setting aside of native reserves without specific Parliamentary authority". The Governor-General of South Africa authorised the Administrator of SWA in 1920 to set aside Crown Lands in terms of the Crown Lands Disposal Ordinance 1920 "for the use and benefit of aboriginal natives, coloured persons and asiatics" (Hubbard 1991: 2-4). Although the Act gave powers to the colonial administration "to take land out of the customary land law regime and put it under a different regime ... it did not encroach into the provisions of customary law to allocate land as such" (Hinz 1995: 19).

The Native Reserves Commission of 1921 made recommendations on the locations and sizes of "native reserves" across the country. In a report to the Secretary for SWA in June 1921, the Commission observed that, although the general administration of native reserves was in the hands of magistrates, they did not have the time to exercise proper control over matters in reserves. Consequently, they had to rely on "the integrity of native headmen, some of whom are in receipt of remuneration for their services and others not" (SWA 1921: 8). The Commission recommended "the appointment of a capable official of considerable experience in native government who should be granted practically a free hand in dealing with their affairs ...". This official, in turn, should be represented in reserves by superintendents working through magistrates of various districts. Despite these recommendations, the Commission also stated that –

> **Whilst we do not of course advocate a return to tribal rule, we consider that the old native system might to a great extent be usefully applied through more personal control by approved officials than has been the case hitherto. The system has worked inexpensively and satisfactorily in Ovamboland.** (Ibid.: 14-15)

The recommendations of the Native Reserves Commission were followed by two pieces of legislation that defined the powers of the Administrator in regard to native reserves: the ***Native Administration Proclamation, 1922 (Proc. 11/1922)*** and the ***Native Administration Proclamation, 1928 (Proc. 15/1928)***.

With regard to the former, section 16 gave the Administrator the powers to set aside land for native reserves subject to restrictions and regulations that the administration may prescribe. Hinz (1995: 20) argued that this piece of legislation did not deal with rights under customary law or the practices of traditional authorities, and therefore "did not make specific inroads into customary law". The Proclamation did give rise to a set of regulations pertaining to native reserves. These became known as the ***Native Reserve Regulations, 1924 (GN 68 of 1924),*** and represented the first formalisation of reserve administration.[25] According to these regulations, magistrates had general control over reserves in their districts. Subordinated to them were reserve superintendents, who were in charge of individual reserves. Reserves themselves were to be subdivided into wards, with each ward under the control of a headman.[26] The *Native Reserve Regulations* vested reserve superintendents with management powers regarding communal land. The allocation and control of rights to communal land and natural resources were formally centralised in the reserve superintendent. The Regulations identified five different rights, namely:

- rights of access to reserves;
- residential rights;
- grazing rights;
- rights to wood; and
- access to water.

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[25] The following section is based on Werner 2000, p. 254ff.

[26] *Native Reserve Regulations, 1924 (GN 68 of 1924)*, sections 1 and 2.

Rights of access were to be controlled at different levels, depending on the skin colour of the applicant. Access of "Europeans" to reserves could be granted only by the Administrator. In all other cases, however, the reserve superintendent was responsible for granting rights of entry. In terms of section 9(f), headmen were not permitted "to give permission to anyone to reside in the Reserve without the previous consent thereto of the superintendent". Permission from the latter was necessary not only for temporary residence in a reserve, but also for any reserve resident leaving a reserve. Movement from one reserve to another had to be authorised by the magistrate of the district. Regulation 27 authorised magistrates, subject to the approval of the Administrator, to order "an undesirable person to leave a reserve".

Reserve superintendents were charged with the allocation of sites. In terms of regulation 11 –

> **The Superintendent shall allot a site[27] to any native permitted to reside in the Reserve and it shall be lawful for him to transfer any resident to some other site should it become necessary so to do [sic]. No native shall change his residence without the sanction of the Superintendent in writing.**

With regard to the Herero reserves, Judge Levy came "to the conclusion that the requirement of s11 of Proc [sic] 68 of 1924 were more honoured in the breach than the observance", suggesting that in the Herero reserves customary law still governed many aspects of land administration.[28]

Regulation 20(1) of the *Native Reserve Regulations* gave powers to the Administrator to limit the number of cattle that any inhabitant may keep in a reserve, while regulation 22 provided that superintendents could prohibit grazing in portions of a reserve for improved rangeland preservation for periods of time determined by them.[29] Regulation 25 ensured that public watering places in native reserves were kept accessible to all inhabitants. Judge Levy found that the Regulations of 1924 restricted the customary right of people in a reserve to graze and water their cattle anywhere on communal land, by virtue of the fact that the superintendent had the powers to control access to portions of the reserve. The Judge continued:

> **I am satisfied that the Regulations of 1924 did restrict those rights but it is true there is no mention in such regulations of fences as such. However, if the only way the Superintendent could give effect to the provisions of Reg. 22 referred to above, was by erecting a fence, I have no doubt that he could have erected such a fence lawfully.[30]**

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27 The Afrikaans version of section 11 refers to "building site" rather than just "site". See *Kaputuaza* case (op. cit. n1), p. 307.

28 Ibid., p. 308.

29 *Uazengisa* case (op. cit. n3), judgement delivered on 30 September 1988, p. 14.

30 Ibid., p. 15.

The *Native Reserve Regulations* did not deal with grazing rights in any great detail. Regulation 9 stipulated that a headman –

> **... shall not make any allotment of land, either to newcomers or by way of redistribution of land already occupied, nor shall he under any circumstances deprive any person of any land of which such person shall be in occupation except upon the express order thereto of the Superintendent.**

Instead, the "allotments of land" were the responsibility of the superintendent in terms of Regulation 3. However, these allocations referred to newcomers to reserves and were a measure to control access to reserves. They did not stipulate anything with regard to allocations of grazing land to residents of reserves.

The Technical Committee on Commercial Farmland (RoN 1992) and Van der Byl (1992) argued that Regulations 11 and 9(c) repealed any customary law powers that chiefs and headmen may have had to allocate land (Hinz 1995: 21). However, the *Native Reserve Regulations* did not apply to and had no effect in the former Owamboland[31](Hubbard 1991: 5 n12; Hinz op. cit.: 21-22). This led Hinz to conclude that the *Native Reserve Regulations* made no inroads into customary law in Owamboland as they did not apply there.

In 1928, the ***Native Administration Proclamation, 1928 (Proc. 15/1928)*** provided for the establishment of an institutional framework for "native affairs". It placed the Administrator in the position of "supreme or paramount chief" and provided for the appointment of Chief Native Commissioner, Native Commissioners, etc. The Proclamation also gave powers to the Administrator to appoint and dismiss chiefs and headmen. It lay within his powers to appoint the latter on a temporary, acting or permanent basis. Section 1(g) authorised the Administrator to exercise all political powers and authority which were vested in a paramount chief in terms of "the laws, customs and usages of the natives ... held ... by any supreme or paramount native chief' (cited in Hinz 1995: 24).[32]

The proclamation also divested traditional leaders of some of their legal powers. They were no longer authorised to hear civil cases (Gordon 1991:6). Instead, the proclamation established native commissioners' courts which could hear cases between reserve residents concerning customary issues. These courts could make findings according to customary laws.

The ***Regulations Prescribing the Duties, Powers and Privileges of Chiefs and Headmen, 1930 (GN 60 of 1930)***, stipulated that chiefs were "appointed to exercise tribal government and control", but also to perform other administrative functions prescribed by the Regulations. Headmen, on the other hand, were persons –

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31 The reasons for this exclusion are not clear.

32 See also *Ndisiro vs Gemeenskapsowerheid van die Mbanderu Gemeenskap van die Rietfonteinblok in Hereroland*, judgement delivered on 6 July 1984, p. 12.

> **appointed to control a minor tribe or location under the direction of the Native Commissioner [and were not to include] persons commonly called headmen or indunas appointed by chiefs to assist in the administration of their tribes.** (Cited in Hubbard 1991: 7)

The Regulations required chiefs and headmen to assist in the "efficient administration of the laws relating to the allotment of lands and kraal sites and the prevention of illegal occupation of or squatting on land". In terms of Regulation 19, they were –

> **... responsible for the proper allotment to the extent of the authority allowed them by law of *arable lands and residential sites* in a just and equitable manner without favour or prejudice.** (Cited in ibid. and Hinz 1995: 24-25; emphasis added)

Hubbard (1991: 8) concluded that the implication of these Regulations were that chiefs and headmen were subordinated to colonial officials with no independent authority over the allocation of land in native reserves. Hinz (1995: 25), on the other hand, argued that the limitations of powers of chiefs and headmen set out in the Regulations applied only to headmen appointed by the government in terms of the *Native Reserve Regulations*. These were not necessarily headmen in a traditional hierarchy. For "ordinary" chiefs and headmen, i.e. those not specifically appointed by the Administrator in terms of the *Native Reserve Regulations*, Regulation 19 "meant a confirmation and to some extent specification ('just and equitable') of their customary law power to allot lands". From this Hinz concluded that these Regulations *did not* make "any inroad into customary land law to the effect that traditional authorities had been deprived of the power to allot land under customary law".

In 1954, the ***South-West African Native Affairs Administration Act, 1954 (Act No. 56 of 1954)*** transferred the administration of "native affairs from the Administrator of South West Africa to the responsible Minister of South Africa". Consequently, all land "set apart and reserved for the sole use and occupation of natives" became vested in the South African Development Trust which was established by the ***Development Trust and Land Act, 1936 (Act No. 18 of 1936)*** (Van der Byl 1992: 13-14). As a result –

> **the control and management of such land was clearly brought within the ambit of the provisions of the South African Development and Trust Land Act, 1936, and the regulations made thereunder and published in Government Notices 494 of 2 April 1937 and R.188 of 1969.** (Ibid.: 15)

The ***Bantu Areas Land Regulations, 1969 (R188 of 1969)*** were framed under the *Development Trust and Land Act, 1936 (Act No. 18 of 1936)*. These regulations provided, inter alia, that (ibid.: 41-42):

- all reserve land shall be under the control of the Native Affairs Commissioner (Regulation 5);
- the magistrate may grant permissions to occupy land for arable or residential purposes and the Secretary may, under the authority of the Minister, but only after consultation

with the tribal or community authority concerned, or, if no such authority has been established, the chief or headman concerned, grant permission to occupy land for any other purpose (Regulation 47(3);
- [the] Minister may order an enquiry by a magistrate into the distribution of arable and residential allotments (Regulation 48);
- a magistrate may, after consultation with the traditional or community authority concerned, allot one or more portions of land as an arable or residential allotment to, inter alia, the widowed female head of a family (Regulation 49);
- a widow may continue the occupation of an allotment after her husband's death until her death or remarriage (Regulation 53(2)); and
- a magistrate shall have the power to investigate and settle administratively disputes in connection with the occupation of communal land as well as disputes in connection with grazing rights, rights of way or any other rights (Regulation 67).

These regulations were interpreted by Van der Byl (1992) to have curtailed the powers of traditional leaders to allocate communal land. Hinz (1995: 26-28), however, argued differently. He argued that Regulation 5 simply delegated powers held by the South African State President to Native Affairs officials, but contained nothing that affected customary law. Secondly, the Regulations introduced the Permission to Occupy (PTO) system into communal areas. This was –

> **... defined as permission in writing granted or deemed to have been granted in the prescribed form to any person to occupy a specified area of Trust land for a specific purpose.** (ibid.: 26)

A PTO could be granted by the responsible Minister or the person to whom the Minister's powers were delegated only "after consultations with the tribal or community authority". Although these powers of the Bantu Affairs Commissioner did represent a curtailment of the powers of traditional leaders, according to Hinz, this "did not lead to the absolute abolition of the traditional power to allocate communal land". He continued to argue that, although the role of traditional leaders in allocating PTOs was confined to consultations, "the Regulations did not spell out the needed explicit invalidation of customary law with regard to the allocation of land". This reasoning follows the judgement in ***Kakujaha v Tribal Court of Okahitua*** (Supreme Court of SWA, 20 March 1989, unreported), in which Judge Strydom stated that common law and statutory law did not automatically replace native law and custom. Instead –

> **... the common and statutory law ... (can) exist side by side with native law and custom and the latter is not replaced or amended by the former except for those instances where the legislation specifically so provides as in the case of Government Notice 68 of 1924.** (Cited in ibid.: 5)

Moreover, the Regulations did not appear to apply in situations where land rights were granted without formalised PTOs. This raises the question of whether "certain rights to occupy land can be granted outside the Regulations". The answer provided by Hinz is that –

> ... land allocations outside the Regulations appear to be rightful as can be seen from the heading of the chapter of the Regulations in which the rules on the PTOs are placed. The heading reads "Occupation of Land under Permission to Occupy", thus leaving space for occupation not under (formal) permission to occupy. (Ibid.: 27)

In addition, even if the intention of the Regulations was that traditional leaders should be excluded from making land allocations, theywere never implemented in Namibia. Hinz stated that it was not easy to say what the legal consequences of the non-implementation of laws were. But –

> ... in view of what the Namibian courts have said about the need for statutes to spell out explicitly the repeal of customary law, the position is held that the steady non-implementation of law equally does not affect the validity of customary law. (Ibid.: 27-28)

4.3 Homeland administration: 1968-1979

From the late 1960s, Owamboland underwent a series of constitutional changes as recommended by the Odendaal Commission. The Owamboland Legislative Council was established in 1968, and in 1973 the area was declared a self-governing area in accordance with the ***Development of Self-Government for Native Nations in South West Africa Act, 1969 (Act No. 54 of 1969)*** (Hubbard 1991: 52). As these proclamations did not transfer any land to the new Owambo government, "nobody was certain to whom the land belonged".[33] Concern was also expressed that the powers and functions vis-à-vis land allocations and administration of tribal councils and magistrates' offices were vague. The Planning Advisory Committee which was established in the early 1970s therefore recommended that all land in Owamboland be vested in the new government, and that all applications for land allocations be channelled through it.[34]

As will be argued in Section 5 of this report, this period of so-called self-government in an ethnically defined homeland marked the beginning of land enclosures in former Owamboland.

4.4 Ethnic government: 1980-1989

The recommendations of the Planning Advisory Commission to have all land vested in the so-called Owamboland government was not followed up with the appropriate legislative changes until 1980, when the ***Representative Authorities Proclamation, 1980 (AG 8 of 1980)*** was promulgated. Separate proclamations were issued for each "Representative Authority", which gave them wide-ranging powers over land administration. According to (Hinz 1995: 28-29) –

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[33] Owambo Beplanningsadvieskomitee, "Notule van 'n Vergadering gehou op 21 Augustus 1973", National Archives Record OVA 45 6/8/1-7(ii), p. 2.

[34] Ibid.

> Sec 48bis (3) of the Proclamation made provision for the executive authorities of representative authorities to confer a valid title to the ownership of, or any other right in, to or over, any portion of such (communal) land.

The ***Representative Authority of the Owambos Proclamation, 1980 (AG 23 of 1980)*** was issued in terms of AG 8. It replaced the Owambo Legislative Council with a Representative Authority. While AG 23 provided for the continued retention of the powers and functions which traditional leaders enjoyed prior to the establishment of the new Representative Authority, it also applied Sec. 48bis of AG 8 to Owamboland. In law, therefore, the executive committee of the Representative Authority was entitled to alienate communal land and grant freehold title over it, "provided that a period of 15 years (or a shorter period determined by ordinance of the Legislative Assembly) elapsed after such registration". AG 8 and AG 23 thus provided for the establishment of new forms of land tenure (i.e. freehold title) without necessarily affecting the powers of traditional authorities to allocate land.

The legal right of Representative Authorities to grant freehold title has not been made use of ever, as far as could be ascertained. The fact that they had those legal powers also did not automatically mean that the powers of traditional authorities to make land allocations were limited as a result. However, since many senior traditional leaders served in Representative Authorities, the boundaries between statutory and customary law became blurred. This, it is submitted, contributed to the difficulties of establishing whether an enclosure of communal land was legal or illegal. Did a traditional authority allocate land in terms of customary law alone, or in terms of one of the AG Proclamations, or both? No research has been done so far to improve our understanding of this.

The Representative Authority of the Owambos was composed of elected and appointed members, with both categories divided equally between seven sub-tribes. "The Executive Committee was also to consist of one person from each of these tribes" (Hubbard 1991: 52-53). The new situation created a curious overlap of customary and statutory law, and, according to Hubbard (ibid.: 62) –

> [made] it more likely that traditional customs (sic) relating to land allocation and use would be incorporated into statutory law in the form of ordinances enacted by the Representative Authorities. This situation may also have given traditional leaders in these areas an added status by virtue of their central position with regard to the statutory governing structure of South West Africa.

Although the Representative Authority of the Owambos had powers to transfer title to surveyed portions of the communal area, this provision was never made use of in Owamboland (Hinz 1995: 28).

To conclude, Hinz (1995) argued that the transfer of general law ownership of communal areas from the Development Trust to Representative Authorities to the Administrator-General and finally to the Government of Namibia "did not automatically affect customary

land law by curtailing the traditional mechanisms to allocate land according to customary law" (ibid.: 51-52). None of the laws analysed by Hinz "could be found to have made inroads into customary land law to the effect that the powers of traditional authorities in land matters were taken away and transferred to agencies of the state". To be sure, colonial legislation made inroads into customary law to obtain communal land for special purposes. But even this, Hinz argued, "did not abolish the powers of traditional authorities with regard to the allocation of land under PTO" (ibid.: 52). He added that even if the powers of traditional authorities with regard to the allocation of land were abolished by statutory laws, "the practice in former Owambo ... does not reflect such an abolition at all". Instead, customary laws governed land administration in Owamboland (ibid.: 52-53). This was briefly described in Section 3 of this report.

The findings of this academic analysis of the legal situation prior to Independence was borne out by the perception of a key informant of the Legal Assistance Centre in the Uukwambi area of jurisdiction, who stated that –

> **before Independence there was no law regulating the allocation of communal land. Traditional Authorities had the ultimate authority to allocate land. The TAs referenced the Odendaal report. They explained that the northern area of Namibia was "homeland". No commercial farms were allowed, but otherwise, there were no restrictions in terms of land allocation. The area was self-governing.** (LAC 2010a: 4)

4.5 Addendum: The current situation – the *Communal Land Reform Act*

This observation raises a question about the extent to which the ***Communal Land Reform Act, 2002*** (CLRA) (as amended) impacts on customary law.[35] The CLRA emphasises that traditional leaders will continue to play a central role in the administration of communal land generally and customary land specifically. As a consequence, any allocation of communal land needs the consent of traditional leaders.[36] However, the Act does not interfere in customary land administration practices. With the exception of restricting the sizes and numbers of allocations per household, the CLRA does not provide any criteria or guidelines aimed at regulating customary land administration practices, particularly at the local level where the day-to-day administration of land takes place. In practice, therefore, village headmen continue to administer land in the only way they know, i.e. in accordance with customary laws and practices (Werner 2010: 8).

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35 The following brief comments are taken from Werner 2010.

36 The CLRA consistently refers to traditional leaders in a generic way. It fails to recognise that the tiered structure of traditional authorities also implies different responsibilities and mandates with regard to the administration of communal land in those communal areas where small-scale cereal production and livestock farming are the main forms of land use.

To be sure, the CLRA introduced changes to the system as it was known until the Act became law. It introduced Communal Land Boards (CLBs) to oversee the customary land administration system, and more specifically to ensure that land allocations made by traditional leaders meet the legal requirements for regulating land sizes, for example. Moreover, the CLBs are responsible for the registration of customary land rights – old and new – after the land allocated has been properly demarcated and mapped. Leaseholds for less than 50 ha and running for less than 10 years are also registered by CLBs. These powers are formal powers which do not interfere with the day-to-day administration of communal land.

The CLRA also prohibits any new enclosures of communal land, unless traditional authorities agree to them and they fall within a designated area, i.e. an area of communal land which the President may – with the consent of the traditional authority involved – designate for purposes of agricultural development. This means that the Act gives the state, through its President and/or Minister of Lands and Resettlement, the power to alienate communal land for private use. To the extent that some traditional leaders regard it as their right to allow fencing of communal land, the stipulations prohibiting the enclosure of communal land must be seen as an inroad into customary land allocation practices.

Despite its prohibition of communal land enclosures, the CLRA does not provide any guidance or legally binding stipulations as to how communal grazing areas are to be managed. This implies that access to these areas continues to be governed by custom, even if this means that this amounts to open access for all practical purposes.

To conclude: The CLRA does not make significant inroads into customary land administration practices. It regulates the relationship of traditional leaders and newly created state structures such as Communal Land Boards, but provides little that could have improved the customary land administration system. Traditional leaders' accountability to their subjects, for example, is badly in need of proper regulation. This should not be misconstrued as a plea for the abolition of customary land administration. Instead, the latter should be brought into line – where necessary – with the human and legal rights and values enshrined in the Namibian Constitution. Another area that would have benefited from a more proactive piece of legislation is that of land rights for women. And, last but not least, the content of customary land rights needs to be spelled out more clearly.

Section 5
Colonial Discourse on Modernisation and Customary Tenure

The discussion so far suggests that, although colonial legislation regarding traditional authorities and customary land law gave colonial officials substantial powers over land administration in communal areas, pre-Independence legislation did not fundamentally affect customary practices regarding the allocation and utilisation of grazing land until the 1970s at least. There appear to be very few, if any, enactments that specifically repealed and/or limited the powers of traditional leaders to implement customary land laws and rules. In ***Ndisiro v Mbanderu Community Authority and Others***, a bench of three judges found that "after 1928 there is no statute on the statute book which in any way deals with the jurisdiction of headmen until the year 1980".[37] And in 1989, Judges Mouton, Strydom and Hendler argued that section 9 of the *Native Reserve Regulations (GN 68 of 1924)* did not define the power of headmen, "but provide(d) what they could not do".

In ***Benjamin Tjerije and Justus Muteze v The Executive Committee of Administration for Hereros***, Judge Levy stated that –

> **It has been repeatedly said in this court that customary laws, only to the extent that they have not been repealed or modified by the Common Law or Statutory Law, form part of our law.**[38]

Moreover, the legislation reviewed above is explicit only with regard to the allocation of land for residential and cultivation purposes. The allocation and administration of grazing land is not dealt with specifically, and none of the legislation discussed above explicitly repealed any customary laws with regard to grazing in the communal areas. There is no legislation that stipulates, for example, limits to land areas that traditional

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37 *Ndisiro v Mbanderu Community Authority and Others*, 1986 (2) SA 532 (SWA).

38 *Benjamin Tjerije and Justus Muteze v The Executive Committee of Administration for Hereros, the Cabinet for the Interim Government for the Territory of South West Africa and Ngeenpendepi Muharukua*, 7 November 1988, unreported, p. 6.

leaders may allocate. Although it could be argued that Regulation 22 of the *Native Reserve Regulations (GN 68 of 1924)*[39] placed restrictions on the rights of communal farmers to graze their cattle wherever they wished, section 11 dealing with the allocation of "sites" did not affect their grazing rights. These provisions were tested in court in the 1980s in the context of Herero reserves. In the judgement passed in ***Kaputuaza and Another v Executive Committee of the Administration for the Hereros and Others***, the judge argued that despite the regulations governing land allocations in native reserves, grazing rights in Herero communal areas continued to be acquired under Herero customary law.[40]

To the extent that pre-Independence legislation – indeed, legislation passed before the *Communal Land Reform Act* of 2002 – did not specifically repeal or amend customary land law or specify the powers of traditional leaders with regard to the allocation of customary land rights, it must be argued that colonial legislation did not prevent customary law from evolving and changing either as it responded to changing internal and external developments. It is the contention of this report that customary law did change before Independence to accommodate the interests of a small but growing middle class. The gradual differentiation of communities in the north-central regions received support from a discourse on modernising communal agriculture that was developed by the Odendaal Commission. This section will trace some of these developments by looking at developments and changes within the Ondonga jurisdiction. Time constraints did not allow for similar archival research to be done for the western jurisdictions.

5.1 Modernising agriculture: The Odendaal Commission

The 1960s witnessed a gradual departure from "native administration", as it was known as from 1915. More specifically, the South African colonial regime embarked on limited reforms in the reserves of SWA.[41] These efforts coincided with the first stirring of national resistance against continued South African rule in SWA. The first nationalist movement, namely the South West Africa National Union (SWANU), came into existence in 1957, and the South West Africa Peoples Organisation (SWAPO) was established in 1960. With these developments, the South African colonial state was faced for the first time with "organised mass resistance to its political domination" (Innes 1980: 576). It responded to this challenge in two ways. First, it sought to smash any nationalist organisation through increased physical repression. Second, and more importantly for the discussion here, it set out to split SWA up into a number of separate, tribally demarcated *Bantustans* (ibid.).

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39 Regulation 22 of GN 68 of 1924 provided that the superintendent of any reserve "may for the better preservation of the grazing therein prohibit for any period to be fixed by him the grazing of animals ... in any portion of the common grazing ground". *Uazengisa* case (op. cit. n3), unreported, judgement delivered on 19 October 1988, pp. 13-14.

40 *Kaputuaza* case (op. cit. n1), p. 318.

41 What follows is based on Werner 1998.

To achieve the latter objective, certain political and economic reforms had to be initiated. In 1962, the South African state set up the Commission of Enquiry into South West Africa Affairs under the chairmanship of F.H. Odendaal.[42] The Commission was required to come up with "recommendations on a comprehensive five year plan for the accelerated development of the various non-white groups of SWA", and –

> **... to ascertain how further provisions should be made ... for their social and economic advancement ... proper agricultural, industrial and mining development in respect of their territories and for the best form of participation by the Natives in the administration and management of their own interests.** (RSA 1964: 3)

The Commission argued that the first aim of economic development, namely the establishment of "a modern economy in the Southern Sector by the White group", and concomitant "selective transformation" of the "traditional socio-cultural background" of indigenous communities, had been achieved in SWA. It saw SWA to be on the verge of a second phase of economic development, "namely where non-White groups have increasingly to be given the opportunity, necessary assistance and encouragement to find an outlet for their new experience and capabilities" (ibid.: 429). The Commission characterised this process as the transition from a subsistence economy to a money economy, where "the traditional system of supplying their own needs and of self-support was gradually supplanted by a *money system* peculiar to the system of the Whites" (ibid.: 425). Future development programmes in SWA (or Namibia) had to build on these tendencies by "consolidat[ing], expand[ing] and convert[ing]" existing reserves into homelands "in which groups concerned could develop their own viable economy" (ibid.: 429). Economic activities had to be brought to the reserve areas through a "broad programme of capital expenditure" in which "the various population groups can participate" without "disrupting their existing strong traditional family and homeland ties" (ibid.: 333, as quoted in Innes 1980: 577).

Among other things, the Commission made some specific recommendations for the modernisation of agriculture in Owamboland. It –

> **consider[ed] the development of animal husbandry in all its branches to be vitally important to the inhabitants of these areas. In this development the efficient marketing of livestock and of meat is a decisive factor ...** . (Ibid: 277)

It recommended the establishment of a special trust of livestock producers, whose responsibilities would include, inter alia –

> **improv[ing] animal husbandry in Owamboland in order to make it more remunerative for producers ... Success could be ensured by giving advice on more efficient breeding and marketing methods.** (Ibid.)

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[42] This Commission is commonly referred to as the "Odendaal Commission", after its chairman.

As far as the Commission was concerned, the improvement of livestock husbandry was primarily a matter of improving animal health and the quality of breeding stock. It did not discuss customary forms of land tenure and range management, and how these might have affected animal husbandry, except to say that the proposed trust should be given land on a long-term lease basis in order to establish quarantine farms for the fattening of livestock and subsequent marketing south of the veterinary fence.

With regard to land ownership, the Odendaal Commission expressed the opinion that among indigenous communities in SWA, "the interests of the group ... still largely prevail", rather than private land ownership (ibid.: 425). It did not put forward any major recommendations on land matters, except to propose that future homeland governments should take over and manage land tenure, but it did not specify how this task should be accomplished (Pankhurst 1996). In the case of former Owamboland, all land within its boundaries was to be transferred to the new Legislative Council "in trust for the population" –

> **Provided that the Legislative Council may, with the permission of the State President of the Republic of South Africa, release certain parts of the land added to Owamboland for alienation to individual citizens, and further that the Executive Committee or a citizen shall not have the right to alienate any land to a non-citizen [i.e. non-Owambo] except with the approval of both the Legislative Council and the State President of the Republic of South Africa.** (Ibid: 85)

The recommendations of the Odendaal Commission thus restricted the agricultural development to the homeland area. Allocation of communal land to individuals was possible only on the 1.4 million hectares which the Commission had recommended adding to Owamboland. This 1.4 million hectares comprised a small portion of the Etosha Game Reserve, and an area of approximately a million hectares in the district of Okavango, and 247 000 ha of government land in the south-east (ibid.: 83).

5.2 The Five Year Development Plan

Since the primary objective of the Odendaal Commission was political rather than agricultural, it was left to the *Five Year Plan for the Development of the Native Areas* (SWA n.d. [1966]) to develop specific interventions to improve agricultural production in the "native reserves" or "homelands". It operated on the premise that "agricultural planning must ... pave the way in converting an existing subsistence economy to an exchange economy" (ibid.: 94). The basis for "scientific agricultural planning" hinged on two main elements:

- the subdivision of reserves into agro-ecological zones in order to capture the ecological characteristics of each area; and
- an "assessment of the carrying capacity of the grazing and the determination of the size of economic farming units" in order to estimate the "ultimate human carrying capacity for the region to be planned" (ibid.: 95).

In conjunction with "scientific agricultural planning", the Five Year Plan also proposed the establishment of training and research projects to support the process of "modernising" agriculture in Owamboland. It identified fields for agricultural research to support the five-year development programme. These included grazing systems for saline soils; improvement of sanga cattle, sheep and goat breeds; and livestock management practices with special reference to diseases and parasites (ibid.: 102). Proposed developments in the livestock sector concentrated on the improvement of herd quality and livestock disease control, particularly the eradication of lung sickness (*pleuro pneumonia contagiosabovum*). Quarantine facilities with appropriate paddocks were to be established over the next five-year period in order to facilitate livestock marketing to the south.

Despite the fact that much of the Five Year Plan was geared towards the modernisation of agriculture in Owamboland, and thus the transition from subsistence to commercial farming, it completely ignored issues of transforming the customary land tenure system towards more individualised land tenure. This is particularly interesting in view of the fact that "a large scale fencing programme" was proposed for former Hereroland, for example, where "proper pasture rotation" was "a prerequisite for optimal utilisation of available resources" and could only be achieved through enclosure:

> **With the erection of fences, grazing camps can be given the necessary rest periods during certain times of the year and thus offer more abundant and better grazing to animals.** (Ibid: 163)

It is not clear why similar recommendations for fencing were not made for Owamboland. As it turned out, colonial officials filled this gap by propagating enclosures as a means to achieve a "modernised" agricultural sector in the homeland. This resonated well with demands by an incipient middle class to bring about changes to customary land tenure.

5.3 Colonial officials and fencing

The new homeland government experienced administrative problems. More specifically, Tötemeyer (1978: 82) argued that the traditional elite which was appointed to the legislative and executive branches of the Owambo homeland were not able to meet the demands which the White authority made on it, as a result of poor educational backgrounds. Political progress, or, to put it differently, the implementation of South Africa's reform agenda, did not progress as envisaged and planned. The result was increasing resistance by the modernising elite on the one hand, and greater support from the South African government to prop up conservative elements on the other. Within this power vacuum, White administrative personnel had to direct, initiate and determine policy, and even perform executive tasks in addition to fulfilling an administrative role. Hence its political role was much more significant than had originally been intended (Tötemeyer 1978: 82, as cited in Du Pisani 1986: 187).

In terms of economic development generally and agricultural development in the homeland in particular, white officials were imbued with the modernisation discourse as developed by the Odendaal Commission and subsequent interventions. As a result, the fencing of communal land was perceived to be of particular importance in promoting agricultural development. The Chief Agricultural Officer in Ondangwa argued in 1969 that "fencing and water will be needed to promote sound veld and stock management practices".[43] A year later, a sub-committee of the "Planning and Co-ordinating Committee" submitted that –

> **the present system of land ownership and utilisation had a limiting influence on the administration (extension) and production (lack of continuity) as economic asset [sic].**[44]

Officials generally agreed that serious attention needed to be paid to the transformation of the traditional system of land ownership of Owamboland, which should be settled on "a healthy and economic basis". At the same time, they were aware that such a course of development would require considerable negotiation and persuasion of the population by the Executive Committee.[45]

The concepts of agricultural planning, and more specifically farm planning, were introduced for the first time in Owamboland in the late 1960s. This symbolised the new approach to agricultural development and "modernisation" which followed in the wake of the Odendaal Commission and the development philosophy spelled out in the Five Year Plan. While agricultural planning was regarded as the mechanism for transforming the existing subsistence economy into an exchange economy, farm planning was seen as taking care of pasture management. Anticipating that the Owambo public would be very critical of "farm planning", it was proposed that these efforts be initiated in the more lightly settled areas in the west (Uukwaluudhi and Ongandjera) and east (land added to former Owamboland as a result of the recommendations of the Odendaal Commission). In time, the process was to be extended into more densely settled areas, and targets of converting 200 000 ha per annum between 1971 and 1974 were proposed.[46]

A report produced in 1971 on the future development of Owamboland also recommended the introduction of "economic units" in Owamboland. It determined the size of an economic unit to correspond to 100 large-stock units or 400 small-stock units.[47] This recommendation was approved by the Owambo Cabinet and applied to farm planning.[48]

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43 "Hooflandboubeampte Ondangua: Insake vraelys", National Archives Record OVA 49, 6/9/1, 25 June 1969, p. 4.

44 "Vergadering van die Onderkomitee oor Dorpsbeplanning en ontwikkeling en Landbouontwikkeling van die Beplannings- en Koordinerende Komitee op Woensdag 2 September 1970", National Archives Record OVA 49, 6/8/4/1, p. 2.

45 "Die Sekretaris" (no other title), National Archives Record OVA 49, 6/10/2-7(I) (n.d.), p. 13.

46 "Direkteur: Landbou aan BENBO", National Archives Record OVA 45, 6/8/1-7(I), 4 May 1971, pp. 1-2.

47 "Sekretaris Departement van Landbou en Bosbou aan Sekretaris van die Hoofminister, Ondangua", National Archives Record OVA 49, 6/10/2-7 (II), 2 July 1973, p. 2.

48 It should be recalled that the so-called Cabinet at that time consisted of representatives of the seven sub-tribes of Owamboland.

The South African government appointed the Bantu Investment Corporation (BIC) to initiate and oversee economic development in Owamboland. The BIC was concerned primarily with commercial development, and established a number of factories and businesses (Tötemeyer 1978: 151). The South African Department of Bantu Administration and Development also appointed the BIC as the sole agent for cattle marketing in Owamboland and Kaokoveld in 1973. Since the marketing of cattle to the south of the country was not possible because of the veterinary cordon fence, an abattoir had to be built in Oshakati. In addition, the BIC needed land to store unfinished and young animals, which represented 50-75% of the cattle on offer. To facilitate this, the BIC obtained 104 000 ha of land in the Ondonga area between Etosha and the western part of the Mangetti game reserve.[49] Much of this land had been allocated to about 40 white farmers for emergency grazing in the early 1970s. In February 1972, 11 200 cattle owned by whites grazed on this land.[50]

5.4 Capital accumulation and class formation

The proposals to introduce reforms of "native policy" in the mid 1960s resonated well with a small but growing middle class in the region. It will be argued that this growing middle class put pressure on traditional leaders to authorise the enclosure of communal land for private use, thereby contributing to a change in customary land tenure. The reforms which brought about the establishment of a homeland government in Owamboland provided this "modernising elite" with a platform to articulate their interests and create a framework that would facilitate the accumulation of capital by individuals.

The First Legislative Council of Owamboland was established in 1968 in terms of the ***Self-Government for Native Nations in South West Africa Act, 1968 (Act No. 54 of 1968)***. This was composed of up to 42 members, with each of the seven traditional authorities nominating six members each. An Executive Council consisted of one councillor from each traditional authority (Hubbard 1992: 52). In 1973, Owamboland was declared a self-governing area and a new Legislative Council was established. The new Council was a mixture of traditional leaders and a small but growing elite of clergy, farmers and traders, signalling a weakening of traditional leaders in the Legislative Council. While members of traditional authorities were appointed to the Council, the remaining members were elected. A Cabinet consisting of one member of each of the seven electoral districts was also established (ibid.).

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[49] "Sekretaris Binnelandse Sake aan Sekretaris, Bantoe Administrasie en Ontwikkeling, Pretoria", National Archives Record OVA 51 16/17/1, 13 September 1974, p. 2.

[50] "Telex to Secretary: Bantu Administration and Development, Pretoria", 28 February 1973, and "D.J. Booysen aan Direkteur: Gemeenskapssake, Ondangwa", 15 March 1973, National Archives Record OVA 47 6/8/2/3-7, Vol. II.

Traders were generally conservative, but enjoyed considerable status and influence on account of "the possession of cash to which more value is probably attached than to mere ownership of land and cattle".[51] The "modernising elite" may have been small in number, but they were able to use the Legislative Council to articulate their views on such matters as agricultural and economic development in the region.

The most persuasive manifestation of this new trend towards accumulating personal wealth is found in attempts to have the customary inheritance system changed. That this process was indeed driven by the new elite is supported by Tötemeyer's (1978: 145-6) finding that more than 90% of the teachers, religious leaders, civil servants and nurses in his sample thought that the matrilineal inheritance system should be changed. Support among traditional leaders for such a change was much more muted, with only 38% of traditional leaders in favour of change. The main issue with the matrilineal system was that, when the head of a family died, the matrilineal relatives were the heirs rather than the deceased person's family. But, to accumulate and create more wealth, an inheritance system based on legally binding private wills had to be introduced.

In 1977, the Owambo Legislative Council started discussions on a Bill on wills and the administration of certain estates and succession. Tara Imbili, a so-called minister in the homeland government and subsequently senior leader in the DTA, contextualised the need for this debate by arguing that –

> **Customary Law or traditional law ... was good for its period, but now, now that the time is ripe, we must move away from those old traditional habits and therefore, we must make Laws such as this Law which is now before the House.**[52]

The need for a new inheritance law was –

> **... [the] result of outside influences, and here I refer particularly to the influences that the Western way of life has had on the Owambo nation, as well as in the lights [sic] of our changing living conditions a need has arisen for change, yes, even drastic change in our system of succession, since there are clear indications of exchanging the traditional matrilinear [sic] principle for a patrilinear [sic] system of succession.**[53]

The Bill was not intended to replace customary inheritance rules and practices. Instead, it was to introduce a new inheritance system that co-existed with matrilineal rules and practices. On the one hand, this was in recognition of the fact that the assets of most households were inherited within families. This included cattle. Land rights were excluded from the Bill as "the ground belongs to the community, that is to say, the nation".[54]

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51 RSA (1970), *Verbatimverslag van die Ovambolandse Wetgewende Raad: Derde Sessie, Eerste Wetgewende Raad, 16.3.1970-25.3.1970*, p. 69.

52 OLC, "Proceedings 3rd Session, 3rd Owambo Legislative Council, 12.4.1977-11.5.1977", p. 196.

53 Ibid., p. 189.

54 Ibid., p. 192.

Therefore, the objective of the Bill was not to replace matrilineal inheritance practices, but rather, it was to accommodate the small and growing sector of the community which had accumulated wealth in the money economy, by providing a legal framework that would enable them to pass on their wealth to people of their choice and not according to the matrilineal inheritance system. Assets not belonging to a person – such as rights to land – could not be transferred. Although a testator had usufruct to land and some other traditional assets (bangles, bracelets and other ornaments), these assets "[did] not belong to him in property", and therefore could not be disposed of in a will.[55] This effectively created two parallel inheritance systems.

The gradual trend to accumulate wealth on an individual basis impacted negatively on the wider community, and particularly on its structures of accountability. To the extent that individual accumulation of wealth became more widespread, the dependence of this growing group of accumulators on communities for livelihoods through the allocation of rights to resources, for example, decreased. Consequently, the authority of communities and customary norms, rules and practices on this group of society weakened as well.

This gradual loss of authority was compounded by the fact that the newly created homeland structures – a Legislative Council and Cabinet – transferred certain powers from local to higher government (Vlachos 1995: 14). Moreover, the overlap of customary and statutory rules and practices in the Legislative Council and Cabinet also led to a loss of legitimacy of traditional leaders. Moreover, the accountability of the latter towards their subjects decreased. Tapscott and Hangula (1994: 6-7) pointed to these changes in arguing that the establishment of ethnic government in Owamboland in the early 1970s formalised the co-option of traditional leaders. Chiefs assumed senior positions in the new ethnic administration, and in being set up in opposition to SWAPO, lost much of their popular legitimacy.

> **At the same time, however, with their popularity underwritten by the colonial state, they were simultaneously relieved of popular accountability and the reciprocities which historically governed relationships between a chief or headman and his subjects. They were thus largely free to interpret traditional law as they saw fit. This included the right to allocate land.** (Ibid.)

That this indeed happened was traced for the Ondonga traditional authority by Werner (1998: 38-39). In the wake of the recommendations of the Odendaal Commission, and within the modernisation discourse discussed above, the BIC obtained land in the Mangetti Block after consultations with the Ondonga traditional authority. This land was surveyed and allocated to 96 individual farmers. From the allocation of fenced farms by government in the Mangetti, "it was just a small step for traditional leaders to permit enclosure of communal land in areas outside this designated zone" (Tapscott and Hangula 1994: 7). The Ondonga traditional authority not only gave permission, but also

[55] Ibid., p. 197.

encouraged people under its jurisdiction to fence off land. This must be seen as an attempt to retain control over land allocations and ensure that people under its jurisdiction, rather than beneficiaries chosen by the South African government, benefitted from fenced units.

An important aspect of this process is that the traditional authority sought to control and keep records of enclosures. To this effect, it devised a procedure for applying for large-scale land allocations to individuals, and designed a simple form to document and keep record of approvals of such applications (Werner 1998: 38-39). The limit of areas to be considered was 3 600 ha (Kerven 1998: 71). In the second half of the 1990s, a file with approximately 120 approved applications was kept in the offices of the traditional authority (Werner 1998: 39). This suggests that the traditional authority was not opposed to enclosures, but wanted to stay in control of this process.

Another way of putting this is to argue that this process reflects an endogenous land tenure change in response to political and socio-economic changes in the region. In this context, the "legality" of an enclosure hinged on whether or not it was approved by the traditional authority (ibid.). Conversely, enclosures that were carried out without the authorisation of the traditional authority were regarded as "illegal".

It remains a moot point whether traditional authorities had legal authority to authorise such allocations. Suffice to say that the discussion above has shown that pre-Independence legislation did not specifically stipulate that such allocations were not allowed under customary law, and that traditional leaders did not have the powers to authorise them. And, even if there was legislation that proscribed the powers of traditional leaders with regard to allocations of communal grazing land for individual use, this was not implemented. Most of the enclosures came about with the knowledge of pre- and post-Independence officials, and no steps were taken to stop the process. This suggests that non-compliance with any legal stipulation that may have had a restrictive bearing on enclosures was not regarded in a serious light by the pre- and post-Independence governments.[56]

5.5 The Select Committee on Land Tenure and Utilisation

What most members of the new accumulating elite shared was a perception that Owambo farmers could no longer earn enough from agriculture alone. Of the people interviewed by Tötemeyer (1978: 143) in the early 1970s, 85% ascribed this to the fact that "too many people were farming in Ovamboland". The general solution to this problem was widely believed to lie in the modernisation of agriculture: 70% of the respondents in Tötemeyer's survey were of the opinion that yields could be improved by improving farming methods.

[56] Judge Bethune made similar observations with regard to certain stipulations of GN 68 of 1924 in *Kaputuaza* (op. cit. n1), p. 318.

Central to this process was to be the transformation of customary land allocation and control. Certain sectors of the population, particularly the educated and traders, rejected "the communal system of land ownership and the dominant role played by the headmen and chiefs in allocating land ...". These feelings resulted in a "fervent desire for permanent private land ownership". On the other hand, 80% of the traditional leaders interviewed opposed the proposals that land should be removed from the control of headmen.

To address the issue of land tenure, the Legislative Council referred the issue to a Select Committee on Land Tenure and Utilisation, "to sound out the feelings of every tribe on the old system of land ownership, and on the most suitable new system for the future development of Ovamboland" (ibid.: 77).[57] The need to refer the matter to a Select Committee underlines the fact that opinion was split on whether to continue with the customary land tenure system, or whether to introduce a new system based on private rights to communal land. This contestation can be conceptualised as a struggle or negotiation process between small groups of communal farmers and residents who embraced the proposals of the Odendaal Commission and subsequent development plans that were framed in its spirit, and those who did not support the transition from subsistence farming to commercial farming on communal land.[58] The case of the former was strengthened by colonial – "native affairs" – officials who were called to testify. They were imbued with the discourse on modernisation developed by Odendaal.

The issue appears to have been so controversial that the Select Committee steered clear of any radical proposals. As a result, it did not recommend any changes to the ownership of land at household level, and proposed that the system of lifelong usufruct to arable land be retained. In a curious twist, however, the Committee recommended that the ultimate ownership of land be transferred to the Owambo government, and that "the monies owing no longer went to the traditional leader but via the tribal fund to the Ovamboland Government". In addition, it recommended that "sub-headmen should no longer pay for their respective districts and wards, while for their subjects a fixed though reasonable price for land was recommended, which was to be the same everywhere in Ovamboland" (ibid.). Further, traditional leaders should be compensated for the loss of income from land "sales" by receiving a stipend from the tribal fund (ibid.: 78).

The Select Committee on Land Tenure and Utilisation reflected the view of the more traditional sectors of Owambo society. Thirty of the 83 people invited for consultations were "reliable" sub-headmen, and another 40 were also considered to be "reliable". It would

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57 The report on Land Tenure and Utilisation could not be traced anywhere. An attempt to obtain some information on this from King Taapopi, who was the so-called Minister of Agriculture at the time, proved fruitless.

58 In *Abuid Uazengisa and Others v The Executive Committee of the Administration for Hereros and Others* in 1988, mention was made of a so-called *kleingroep* (small group) which accepted the recommendations of the Odendaal Plan as opposed to the majority of Hereros who rejected the Plan and its proposals and regarded the *kleingroep* as collaborators with the South African government.

appear that the recommendations of the Select Committee sought to retain customary forms of access to land while increasing the powers of traditional leaders through the newly created Owambo government.

Although the Select Committee did not propose radical changes to customary land law, the fact that it deliberated on the issue was symptomatic of the changes that communities in the north-central regions experienced. These changes reflected the fact that agricultural production gradually became integrated into a market economy while the available land became scarcer on account of population increases. These changes were also fundamentally shaped by the new elite who were able to accumulate wealth outside the subsistence farming sector, and had an interest in reinvesting some of that money, as it were, in agricultural production. Benefits from fencing were tangible. An enclosed unit provided more security for livestock in times of drought, but also, the financial returns from farming with livestock on a large scale were more attractive than those from crop production, not least because the post-Odendaal period saw financial support being provided for the development of a livestock market through the construction of an abattoir in Oshakati (Tapscott and Hangula: 11).

5.6 Enclosures after Independence

In the decade after Independence, the government issued various directives intended to curb communal land enclosures. In mid 1991, just before the Conference on Land Reform and the Land Question, Cabinet took a decision that "illegal fencing should be declared null and void and all communal farmers, whether big or small, should have equal access to pastures in the communal areas" (Wiley 1993: 13). In March 1997, the Founding President issued a moratorium on fencing, and more specifically, on the allocation of more than 10 ha of communal land. In a speech to traditional leaders, he stated that "potential land grabbers should note that I intend, within the law, to make the effect of such moratorium retroactive to today's date". Significantly, the former President added that –

> **... there would be no more illegal fencing off of land in communal areas without the express authorisation of Chiefs, Headman (sic) and Traditional Leaders who are responsible for land administration in their respective jurisdictions.** (Cited in Cox 1998: 15)

As Cox commented, there was a basic ambivalence in this statement: "On the one hand there is a perceived need on the part of government to be seen to be taking a firm stance on fencing; on the other there are problems, practical and otherwise, in seeing such edicts through" (ibid.). There certainly was no legal framework that would have enabled the government to place limitations on the powers of traditional leaders to authorise communal land enclosures. At the same time, the former President's statement implied that if traditional leaders had given their approval for fencing, the fencing would be considered as legal.

Despite the political rhetoric in threatening to come down heavily on people who had fenced off communal land "illegally", the pace of enclosure appears to have increased after Independence. One major factor that facilitated this process was that, with the repeal of several pre-Independence laws and proclamations – particularly those governing the so-called Representative Authorities – a veritable legal vacuum existed with respect to the administration of communal land and the powers of traditional authorities. In addition, the new government was slow to establish regional and local government. Tapscott and Hangula (1994: 9) argued that the involvement of senior politicians in fencing off communal land reinforced the legitimacy of the process. Moreover, there was a perception that, because of the tacit approval of chiefs for fencing, "those enclosing land [w]ere not ... officially breaking any laws as all communal land vested in the state and colonial laws remained in force until specifically repealed" (Tapscott and Hangula 1994: 9).

This analysis was confirmed by an informant of the LAC in the Uukwambi jurisdiction who stated that when government officials started to enclose land in Uukwambi in the mid 1990s, "others followed suit" (LAC 2010a: 6). This, in turn, appears to have fuelled what is referred to as "defensive" fencing. Several people interviewed by the LAC criticised existing fences because they impacted negatively on their farming operations. However, they requested the traditional authorities' permission to put up their own fences. Two of the reasons cited for having done so were that "the custodians of the law (were) fencing in their own properties" and "if everyone had control over their own property (i.e. were also able to put up fences) the depletion of natural resources such as grazing land and firewood may be prevented" (LAC 2010c: 2-4).

Respondents in the research carried out in eastern Oshikoto in the late 1990s mentioned two main reasons for enclosure:

- redressing past injustices; and
- improving livestock husbandry and commercialisation.

The first reason must be considered against the background of racist pre-Independence policies, which precluded black farmers from obtaining land in the freehold areas.[59] From this followed the reasoning that –

> **If we cannot get commercial farms, then we will make them in the so-called communal areas. Why should we call them "communal areas"? Those people who are now in the commercial farms, those areas used to be communal areas.** (Kerven 1998: 72)

Struggle ideology – "we have fought for the land" – contributed to people fencing off land after Independence without the permission of traditional authorities. Considering the

[59] It was only in the 1980s that restrictions on the purchase of freehold farming land by black Namibians was lifted. But farmers in the north-central regions faced the problem of taking their livestock beyond the Veterinary Cordon Fence into the freehold areas.

high prices of commercial farms, the only option for aspiring commercial farmers in the communal areas was to fence off communal land, arguably at the expense of small-scale subsistence farmers. This was much cheaper than buying a commercial farm (ibid.: 72-73). Moreover, many people felt that the freedom to privatise, as the whites had done, should be extended to all previously disadvantaged Namibians (ibid.: 93).

New government boreholes in hitherto marginal areas also contributed to enclosures as more non-residents came in to water their livestock. These boreholes opened up areas for permanent settlement, and the elites captured the benefits (ibid.: 73f). Among other things, they were able to provide fuel for the engines, which poorer sections either could not afford, or they lacked transport to procure fuel. This increased the power of the elites (ibid.: 75).

In addition, the process of privatising boreholes was in all probability facilitated by the fact that property rights to water and land lay in two different jurisdictions: the boreholes belonged to the government, and traditional authorities allocated land rights. The traditional authorities could claim to act within their respective mandates (ibid.: 76). Kerven concluded that "fencing is less about grazing control than about controlling access to water" (ibid.: 77).

In Oshikoto Region, the process of enclosing communal land amounted to an "intentional redefinition of customary property rights" by the traditional elite. This was justified by stating that new property rights were necessary for modern livestock farming, and that fencing was a means to rectify historical injustices inflicted on black Namibians by a racist pre-Independence government (ibid.: 73, 90). That this argument was not simply idle talk of individuals who wanted to grab land for the sake of it is borne out by the finding that farm management practices of many of the famers who had privatised boreholes by fencing them in differed markedly from those of surrounding small-scale farmers (ibid.: 81). The former were "clearly choosing to invest (sometimes misguidedly) in a package of improved management, rather than only trying to appropriate land and water resources" (ibid.: 83). These evolving interests of a small but growing class of people who wanted to make money out of farming were supported by an entire discourse on modernising communal economies.

The post-Independence period also witnessed an unparalleled decrease in the legitimacy of traditional leaders with regard to land administration. New sources for the perceived legitimation of appropriating and fencing off communal land – struggle ideology ("we have fought for the land"), and the constitutional right to settle anywhere in Namibia – undermined the ability of traditional leaders to control the land under their jurisdiction. A key informant of the LAC stated that community members in Ongandjera complained to the village headman about the allocation and subsequent fencing of a piece of land. In turn he complained to the senior headman who in turn addressed the complaint to the MLR without any effect (LAC 2010b: 7).

A similar story emerged in Uukwambi where people complained to their headmen about the deleterious effect of fences on access to water. However, the headmen were said not to know what to do. After Independence, traditional authorities felt that the new government supported them in controlling enclosures. Before long, however, they learned that government officials themselves were fencing off land.

> Trust in TAs is being diminished because they haven't been able to deal with the illegal fences. People affected by illegal fences don't want to rely on TAs for other problems because they don't trust them or their ability to deal with problems. Some are angry with TAs because they believe that TAs authorized the fences. (LAC 2010a: 2)

The contention that the period after Independence saw the decline of the legitimacy of traditional leaders is further supported by information supplied to the LAC by an informant in Ongandjera:

> [The roles of traditional authorities after Independence] were negatively affected by the new laws (i.e. legislation governing changes in land allocation). Previously, TAs had the power to conduct hearings and punish individuals in relation to illegal activities in their area. Now, there are higher courts. Furthermore, following Independence, their decisions became subject to appeal. Their power has diminished significantly. Now it seems that everything has to go through the central government.
>
> At the time of Independence, there was no uncertainty as to their role because the TAs were expecting good peace and a strong relationship with the government.
>
> Uncertainty arose in the gap between Independence and the formulation of the laws. The TAs did not know if they should continue their roles or stop. As a result, many did not act in their capacity as TAs because they were waiting for direction from the government. Now that the laws are being implemented, the situation is not what they expected.
>
> The laws enacted haven't changed much about TA operations, but TA power has been minimized. Pre-Independence, it would have been unheard of for an individual to retain the services of a lawyer to help him with an issue such as fencing in land. This change has been very difficult for the TAs. (LAC 2010b: 6)

Before Independence, traditional authorities were the highest authority with regard to land allocations. The perception was expressed in Ongandjera that only the San needed permission from a higher authority regarding land issues (LAC 2010b: 5; LAC 2010a: 5). This statement appears to lend credence to the argument of Hinz that, although the colonial state introduced legislation that put magistrates, and subordinated to them, reserve superintendents, at the head of native reserve administration, customary law was left to run its course with regard to the administration of customary land matters. Against this background, it is not surprising that a key informant told the LAC that –

> The TAs feel that the colonial government respected and protected their authority more than the current government does. In the colonial era, there was no written law in communal areas; the TAs were entrusted to implement customary law. (LAC 2010b: 5)

Evidence suggests that the government, through the MLR, tacitly condoned the enclosure of communal lands. While it is true that the legal framework for communal areas was either non-existent or highly confusing until the CLRA was passed, the government would have been able to act on illegal fencing had it wanted to. The lack of support for senior traditional leaders to address unauthorised fencing must be interpreted as support for enclosures (LAC 2010b: 9). Even after the passing of the CLRA, there was little support for traditional authorities to assist in the prevention of unauthorised enclosures.

> **The Chief said that the law is in place, but there is no back up or support for the TAs to enforce the law. He believes that if he takes down a fence, the fence owner will report him to the police and he'll be charged. He believes there is no protection for TAs. For people to appreciate the seriousness of the problem, the TAs believe that at least one individual who has fenced off land illegally must be prosecuted and made an example of.** (LAC 2010a: 3)

Because the state has never taken action against any enclosures, many people appear to have fenced off land not knowing that it was illegal, and "[f]or this reason they figure it is ok" (ibid.: 3).

The argument that the MLR did not act on communal land enclosures because high-ranking and powerful political figures were involved in the process is too persuasive to be dismissed, even though documented evidence on this is weak or non-existent. At the same time, there may have been tacit approval for the way in which communal resource control evolved as a result of the modernisation paradigm which is still holding sway in government. The government's programme to survey and allocate small-scale commercial farming units in communal areas lends credence to this argument. It is not without a sense of historical irony that the consultancy reports which proposed the small-scale farming model (IDC 2000) are not very different from the model presented in the *Five Year Plan for the Development of the Native Areas* (SWA n.d. [1966]).

Future analysis will have to provide an answer to the perplexing question as to how it was possible that, despite rhetoric to the contrary – and often from the highest political offices – the enclosure of communal land continued unabated after Independence. The development of small-scale commercial farms in the north-central and eastern communal areas represents an attempt to satisfy the land hunger of the post-Independence elite in a planned and ordered way. At the same time, the act of surveying such land and allocating it to individuals removes it from the jurisdiction of traditional leaders and hence customary law.

Finally, it is possible that some people enclosed communal land without the knowledge of traditional authorities. This was confirmed by information obtained by the LAC in the Ongandjera area where current traditional leaders claimed to have no knowledge of the allocations for which registered rights were applied for. Without further fieldwork, it can only be speculated why that is the case. On the one hand, the absence of written records

may have contributed to this state of affairs. However, in many villages without written records on allocations, headmen have a fairly accurate idea of who held what kinds of rights where:

> **This knowledge was passed on through oral tradition. There was no need for written records.** (LAC 2010a: 5)

It is also conceivable that some enclosures were erected in areas where the control of traditional authorities was either weak or non-existent. Such a process was documented for Oshikoto Region by Cox et al (1998). In the Uukwambi area of jurisdiction, where there were very few people in the mid 1970s, a few applicants obtained their rights and fenced off land at that time.

> **This in itself wasn't a problem, but because there were so few people in the area, it was easy for the fence owner to expand his plot of land. There was no one to complain about what he was doing.** (LAC 2010a: 2)

Clearly, the development of land for farming purposes in such remote areas requires considerable financial resources, and is therefore an option available only to wealthy people.

Section 6
Conclusion

This report has provided some flesh to Peters' (1987) statement that the fencing off of communal lands for private use does not manifest the commencement of a process, but rather its culmination. Starting with a brief but critical review of notions of customary law and "traditional communities" (to use the politically correct terms for "tribes"), this report argues that the notions of customary law and traditional communities which informed court decisions in the 1980s, and continue to inform debates on customary land law, are flawed and hence of little use as they do not allow for change and contestation. Against this background, the report argues for the adoption of a more dynamic concept which sees customary law as constantly adapting to changing circumstances. The implication of this is that the question of whether or not communal land enclosures could be permitted in terms of customary law becomes more complicated. That customary laws did not provide for the enclosure of communal land several decades ago is conceivable, but it is equally conceivable that some traditional authorities gradually permitted enclosures as customary law adapted to the interests of a new elite – as the example from the Ondonga kingdom demonstrates. The legality or otherwise of communal land enclosures requires a differentiated assessment. Against the background of the analysis provided, the only fencing that could be characterised as illegal is fencing that was erected without the authorisation of traditional leaders.

Another important question is the extent to which colonial legislation shaped customary law. Did legislation explicitly make inroads into customary law by pre- and proscribing the powers and mandates of traditional leaders with regard to the administration of communal land? To acquire a better understanding of these issues, this report assesses the impact of colonial legislation on customary law based on work done by several lawyers since Independence. This assessment suggests that although colonial legislation gave colonial officials powers to administer communal land, nothing in that legislation explicitly prescribed the powers and mandates of traditional leaders with regard to land allocations. No limitations as to the maximum size of areas to be allocated, for example, could be found in pre-Independence legislation either. Moreover, colonial – and indeed post-Independence – legislation dealt only with allocations of land for residential and cultivation purposes. The management of communal grazing areas was left unregulated, despite certain proclamations having given colonial officials powers to manage access to such areas. No examples were found where such regulations were made use of.

An important factor which has facilitated the enclosure of communal land is that the accountability of traditional leaders downwards has diminished over the years. As a result, rural communities lost their say in decisions about communal land. This remains an issue as the *Communal Land Reform Act of 2002* does not provide for improved accountability of traditional leaders for their decisions regarding land allocations (Werner 2010). While the Act has finally provided the legal means to prohibit or at least regulate the fencing of communal land by individuals, it does not appear to go far enough to regulate the allocation of large tracts of land to foreign companies for agricultural and/or energy projects. Unless the rights of ordinary customary land rights holders to commonages are protected and traditional authorities are encouraged to be more accountable, land grabbing in whatever form is likely to continue.

Finally, the desire to fence off communal land for private use is shaped by class formation in the communal areas. This report discusses changes in the socio-economic and political environments which have impacted on customary tenure. More specifically, it argues that the gradual differentiation of "traditional communities" as well as a modernisation discourse that sought to support the development of a black middle class in the homelands put customary land laws under pressure. The tendency of a growing elite to accumulate personal wealth has also contributed to the weakening of group values and customary practices, and to the loss of power and legitimacy of traditional leaders.

What are the implications of this analysis for the implementation of the *Communal Land Reform Act*? Several stipulations in the Act deal with existing and new enclosures in communal areas. With regard to the latter, section 18 states very clearly that "[no new fences may] be erected or caused to be erected by any person on any portion of land situated within a communal land area" subject to exemptions that may be prescribed in terms of the Act. With regard to existing fences, the Act provides for the retention of these subject to specific conditions spelled out in section 28(8). The first such condition is that the fence was erected "in accordance with customary law or the provisions of any statutory law". Secondly, a fence can be retained only if it does not "unreasonably interfere with or curtail the use and enjoyment of the commonage by members of a traditional community". Thirdly, a fence can be retained if "reasonable grounds exist to allow the applicant to retain the fence or fences concerned". In the event of conflicting claims being made on any piece of land, or if reasonable doubts exist as to the validity of an applicant's claim, the Act requires that the Communal Land Board in question initiate a hearing into the matter. The procedures for such a hearing are set out in section 37.

Based on the foregoing analysis, it will be necessary to follow the procedures set out in section 37 to ascertain the legitimacy and legality or otherwise of existing fences. Those fences which were erected with the authorisation of traditional authorities will have to be considered as legal. How to apply the law to fences where such authorisation cannot be proved will remain a legal challenge. Any investigation will have to approach the matter with a more appropriate concept of customary law than is reflected in many judgements and much of the common wisdom on the subject.

It is the contention of this report that the discussion of communal land enclosures has conflated legal and political issues. Political disagreement with a process that appears to amount to self-enrichment by a few at the expense of the majority does not automatically imply that the process was illegal. While all possible legal means need to be explored to redress the injustices that may have occurred as a result of communal land enclosures, the problem also requires an appropriate political strategy and policy framework to defend the rights of small-scale customary land holders. The development of such a political strategy needs to be informed by a thorough understanding of the class forces that shape access to land – whether in the freehold or non-freehold sector. It is hoped that this report will contribute to this process.

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