

A Comparative Study of Black Rural Women's Tenure Security in South Africa and Namibia

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Declaration

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Summary

The South African land question presents complex legal and social challenges. The legal aspects of land are inextricably linked to other socio-economic aspects, such as access to housing, healthcare, water and social security. The Constitution provides for land reform in the property clause - section 25. This clause, while seeking to redress the colonial land dispossessions, by means of a tripartite land reform programme, also protects the property rights of all. The different legs of the land reform programme are redistribution, which is aimed at enabling citizens to access land on an equitable basis; restitution, which sets out to restore property rights or grant equitable redress to those dispossessed of land as a result of past racially discriminatory laws or practices and finally tenure reform. Tenure reform is premised on transforming the landholding system of those with legally insecure tenure as a result of past racially discriminatory laws or practices or granting comparable redress. The primary focus of this thesis is on tenure security for black rural women in South Africa, while using the Namibian experience with regard of the same group as a comparison.

Historically, before colonialism, landholding was governed by the customary law of the various tribes in South Africa. This landholding system underwent extensive change through the colonial era that ultimately led to a fragmented and disproportionate distribution of land based on race, with insecure land rights particularly in rural areas, where women are the majority. With the dawn of the Constitutional era, South Africa embarked upon a social justice project, based on a supreme Constitution, embodying human dignity, equality, non-racialism, accountability and the rule of law. Land reform forms part of the social project and is governed by the Constitution and influenced by both the civil and customary law.

With the South African tenure context, policy documents, legislation and case law will be analysed. In this process the role of the stakeholders and other related factors, for example customary practices are also considered. The analysis indicates that case law has played a significant part in addressing women's plight with regard to equality, tenure reform and abolishing suppressive legislative provisions and

practices. It is furthermore clear that the different categories of women are affected differently by the overarching tenure and other related measures.

For a legal comparative study, Namibia was chosen for the following reasons: (a) both South Africa and Namibia have a shared colonial and *apartheid* background; (b) both countries have a Constitutional foundation incorporating human rights and equality; and (c) both countries have embarked on land reform programmes. However, contrary to the South African position, both the Namibian Constitution and its National Land Policy are more gender-specific. Tenure reform is an on-going process in Namibia in terms of which specific categories of women have benefitted lately. To that end the gender inclined approach may be of specific value for the South African situation, in general, but in particular concerning black rural women. Consequently, particular recommendations, linked to the specific categories of women, are finally provided for the South African position, in light of the Namibian experience.

Opsomming

Die Suid-Afrikaanse grondkwessie beliggaam ingewikkelde regs- en sosiale uitdagings. Die regsaspekte wat verband hou met grond is ook onlosmaaklik gekoppel aan sosio-ekonomiese kwessies, soos byvoorbeeld toegang tot behuising, gesondheidsdienste, water en sosiale sekuriteit. Die Grondwet maak vir grondhervorming in die eiendomsklousule, artikel 25, voorsiening. Die eiendomsklousule beoog om koloniale grondontnemings (deur 'n drie-ledige oorhoofse grondhervormingsprogram) aan te spreek en terselfdertyd eiendomsregte te beskerm. Die oorhoofse grondhervormingsprogram bestaan uit herverdeling, waarmee billike toegang tot grond vir alle burgers bewerkstellig word; restitusie, waarvolgens herstel (of ander billike vergoeding) vir persone en gemeenskappe wat grond en regte as gevolg van rasdiskriminerende maatreëls verloor het, bewerkstellig word en laastens grondbeheerhervorming. Grondbeheerhervorming behels die aanpas of opgradeer van grondbeheervorme (of die betaal van billike vergoeding) in gevalle waar regte onseker (of swak) is weens rasdiskriminerende maatreëls en praktyke van die verlede. Die hoofokus van die tesis is op die regsekerheid (al dan nie) van grondbeheer van swart landelike vrouens in Suid-Afrika, met die Namibiese ervaring as regsvergelende komponent.

Histories, voordat kolonialisme ingetree het, was grondbeheer deur die tradisionele inheemse reg van die verskillende gemeenskappe in Suid-Afrika gereguleer. Hierdie grondbeheersisteme het grootskaalse verandering gedurende die koloniale tydperk ondergaan. Dit het eindelijk tot 'n rasgebaseerde, gefragmenteerde sisteem gelei waarvan die verdeling van grond disproporsioneel was en die grondbeheervorme regsonseker, veral in die landelike gebiede waar vrouens die meerderheid van die bevolking uitmaak.

Toe die grondwetlike era in Suid-Afrika aanbreek, is daar met 'n sosiale geregtigheidprojek (heropbou en ontwikkeling) begin. Hierdie benadering is op die Grondwet gefundeer waarin menswaardigheid, gelykheid, nie-rassigheid, rekenskap en regsorde beliggaam is. Grondhervorming vorm deel van die oorhoofse projek en

word deur die Grondwet bestuur en deur beide die nasionale en die Inheems reg beïnvloed.

Met betrekking tot die Suid-Afrikaanse grondbeheeristeesem word beleidsdokumente, wetgewing en regspraak geanaliseer. In hierdie proses word die rol van belanghebbendes en ander verwante aspekte, soos byvoorbeeld Inheemse partyke, ook oorweeg. Die analise dui aan dat dit veral ontwikkelings in regspraak is wat 'n groot bydrae gelewer het om vrouens se stryd om gelykheid en sekerheid van grondbeheer te bevorder en wat gelei het tot die afskaffing van onderdrukkende wetgewende maatreëls en praktyke. Dit is verder ook duidelik dat verskillende kategorieë van vrouens verskillend deur die oorhoofse grondbeheer- en ander verwante maatreëls, geaffekteer word.

Namibië is vir die regsvergelende analise geïdentifiseer omdat (a) beide Suid-Afrika en Namibië 'n koloniale en apartheidsgeskiedenis deel; (b) beide jurisdiksies 'n grondwetlike basis het waarin menseregte en gelykheid beliggaam word; en (c) beide lande grondhervormingsprogramme van stapel gestuur het. In teenstelling met die Suid-Afrikaanse benadering, is die Namibiese Grondwet en die nasionale grondbeleid egter meer geslag-spesifiek. Grondbeheerhervorming in Namibië is 'n aaneenlopende proses waaruit veral sekere kategorieë vrouens onlangs voordeel getrek het. Om daardie rede mag die geslag-spesifke benadering wat in Namibië gevolg word vir Suid-Afrika ook van waarde wees, nie net in die algemeen by grondbeheer nie, maar spesifiek ook met betrekking tot swart landelike vroue. In die lig van die Namibiese ervaring word daar ten slotte spesifieke aanbevelings tot die Suid-Afrikaanse sisteem, gekoppel aan bepaalde kategorieë van vroue, gemaak.

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Tangi.

Dedication

Sakarias Tangeni Kamkuemah

9 March 1948 - 23 September 2002

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List of abbreviations and acronyms

CEDAW	Convention on the Elimination of Discrimination Against Women
CLARA	Communal Land Rights Act
CLRA	Communal Land Reform Act
CPA	Communal Property Association
DLA	Department of Agriculture and Land Affairs
<i>D.Kol.Gesetzgeb.</i>	<i>Deutsche Kolonial Gesetzgebung</i>
DRDLR	Department of Rural Development and Land Reform
DWCPD	Department of Women, Children and People with Disabilities
ESTA	Extension of Security of Tenure Act
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic, Social and Cultural Rights
IPILRA	Interim Protection of Informal Land Rights Act
LAWSA	Law of South Africa
MDG	Millennium Development Goal
NADEL	National Association of Democratic Lawyers
NmSC	Namibian Supreme Court
PLAAS	Institute for Poverty, Land and Agrarian Studies
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law
Stell LR	Stellenbosch Law Review
SWA	South West Africa
SWAPO	South West African People's Organisation

THRHR Tydskrif van Heendendaagse Romeins-Hollanadse Reg
TSAR Tydskrif vir die Suid-Afrikaanse Reg

CHAPTER ONE

INTRODUCTION

1 1 Introduction

Before colonisation in South Africa, landholding was governed by traditional customary law of the various local tribes.¹ During the colonial era, colonial authorities not only officially “discarded” the traditional landholding system but embarked upon a system that was premised on dispossessing the land from local inhabitants, creating a forced labour system and finally segregation, based on race.² These colonial developments had severe consequences for the indigenous cultural systems, especially in the rural areas, where as a result, these areas are now overcrowded and poverty stricken, with the population generally having legally insecure rights to the land they live on.³

With the advent of the Constitutional era, the Interim Constitution, 1993 introduced the national commitment to transformation of society and remnants of the colonial landholding system. Later the Final Constitution of the Republic of South Africa, 1996⁴ included the property clause⁵ which guarantees land reform. Section 25(6) of the property clause states that:

¹ Keegan T *Colonial South Africa and the Origins of the Racial Order* (1996) 15; Mqoke R *Customary Law and the New Millennium* (2003) 102-103.

²Carey Miller D L & Pope A *Land Title in South Africa* 1 ed (2000) 1; Holomisa P “Securing Rights on Communal Land” in Roth M, Nxasana V, Sibanda S & Yates T (eds) *National Land Tenure Conference: Finding Solutions, Securing Rights* (2004) 113 115. See Chapter 2 below.

³Maylam P *A History of the African People of South Africa: from the Early Iron Age to the 1970s* (1986) 139; Keegan T *Colonial South Africa and the Origins of the Racial Order* (1996) 42; DLA *White Paper on South African Land Policy*,1997 4.17 box 4.9. See also Chapter 3 below.

⁴Hereafter the Constitution. See Chapter 3.

⁵S 25.

“A person or a community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress”⁶

This is the constitutional mandate for tenure reform. Tenure reform forms the third leg of the overall land reform programme, alongside redistribution and restitution.⁷ Tenure refers to the rights and interests of individuals or communities in relation to land; how it is held, used and transacted.⁸ Tenure reform in turn, entails the transformation of the landholding system that resulted essentially from the colonial and later, *apartheid* administrations.

Increased competition for land with local and global foreign actors increases poor people’s vulnerability to loss of access to land; and linked to that, the loss of the opportunity to obtain secure tenure.

In that light, the focus of the thesis is South African tenure reform, more specifically tenure reform for black rural women. Women make up fifty nine percent of the rural population,⁹ which are the poorest and most marginalised parts of the country.¹⁰ These rural women do not enjoy rights fully, as

⁶S 25(6) of the Constitution.

⁷S 25(5) and s 25(7) respectively of the Constitution.

⁸Carey Miller D L & Pope A *Land Title in South Africa* 456; Smith H & Pienaar K “Forms of Tenure for Community Ownership” in Roth M, Nxasana V, Sibanda S & Yates T (eds) *National Land Tenure Conference: Finding Solutions, Securing Rights* (2004) 138 142-143. See Chapter 3 below.

⁹Cross C & Hornby D *Opportunities and Obstacles to Women’s Land Access in South Africa* (2002) 42; Analysis of the raw data of the 10 per cent sample of the 2001 census by Debbie Budlender on Companion Compact Disk of Claassens A & Cousins B (eds) *Land Power & Custom: Controversies generated by South Africa’s Communal Land Rights Act* (2008); Chenwi L & McLean K “A Woman’s Home is Her Castle?” – Poor Women and Housing Inadequacy in South Africa” in Goldblatt B & McLean K (eds) *Women’s Social and Economic Rights* (2011) 128 141.

¹⁰Amien W & Paleker M “Women’s Rights” (1997) 8 *SAHRY* 321 321,330; Cousins B “Contextualising the controversies: dilemmas of the communal tenure reform in post-apartheid South Africa” in Claassens A & Cousins B (eds) *Land, Power & Custom: Controversies generated by South Africa’s Communal Land Rights Act* (2008) 3 3-4, 10; Claassens A & Ngubane S “Women, land and power: the impact of the Communal Land Rights Act” in Claassens A & Cousins B (eds) *Land Power & Custom*; UN Women “CSW56-Facts and Figures on Rural Women” *UN Women* <<http://www.unwomen.org/how-we-work/csw/csw-56/facts-and-figures/>> (accessed 07/08/2012); Women Watch “Facts and Figures: Rural Women and the Millennium Development Goals” *Women Watch* <<http://www.un.org/womenwatch/feature/ruralwomen/facts-figures.html>>(accessed 07/08/2012).

guaranteed in the Constitution, due to these conditions, but also since they have legally insecure tenure to the land they reside on.

The comparative section of the study will be based on the Namibian tenure reform programme, with the aim to establish possible recommendations for the improvement of South African's tenure reform programme.

1 2 Rationale

Based on South Africa's historical background,¹¹ it transpires that the tenure system was based on race, fragmented and insecure before the new Constitutional era. This necessitated an overhaul or transformation of the landholding system.¹² The tenure reform programme is open to the wide majority of those who suffered under discriminatory policies in the past and has the potential to improve the livelihood of its beneficiaries and create new forms of landholding.

As referred to above,¹³ the Constitution provides in the property clause for the securing of tenure for specific persons as part of the overall land reform programme. The other leg of the land reform programme, namely the redistribution programme, aims to redistribute thirty percent of all agricultural land by 2014.¹⁴ The tempo of this programme has been described to be too slow and that insufficient land has been redistributed thus far to be able to reach the set target by the set date. The restitution programme is only open to persons or communities who had lodged their claims before 31 December 1998 and only if they have met all the necessary legal requirements.¹⁵

¹¹See 1 1 and Chapter 2 below.

¹²Pienaar J M & Kamkuemah A "Farm Land and Tenure Security: New Policies and Legislative Developments" (2011) 22 *Stell LR* 724 726.

¹³See 1 1 above.

¹⁴Department of Rural Development and Land Reform *Annual Report 1 April 2009-31 March 2010* 27. See also Carey Miller D L & Pope A *Land Title in South Africa* 398-455; Badenhorst P, Pienaar J M & Mostert H Silberberg and Schoeman's *The Law of Property* 5 ed (2006) 593-607 and Chapter 3 below.

¹⁵S 25(7) of the Constitution.

Approximately 79 000 claims had been lodged by the said date, with the target still remaining to settle outstanding claims.¹⁶

Compared to the other two sub-programmes, the tenure reform programme is a more complex leg of the all-encompassing land reform programme. This is mainly because it has to grapple with over-lapping rights in the communal areas, the patriarchal nature of society in these areas and its aims are generally unquantifiable.

The near collapse of the land administration system that prevailed in the so-called former homelands before the new Constitutional era and the exclusion of women from most decision-making structures necessitate an all-encompassing tenure reform programme. Apart from that, the main Act that envisaged more secure tenure for women, the Communal Land Rights Act 11 of 2004, has been found to be unconstitutional.¹⁷ As a result there is now a *lacuna* in tenure reform legislation that protects the land rights of women in communal areas and the need for tenure forms with a focus on women has arisen anew. The tenure reform programme will be explored against this background, with a gendered dimension and will also include the legislative developments in the course of 2010 and 2011.

1 3 Research Aims

It thus follows that the tenure reform programme will be analysed in order to determine the shortcomings in securing tenure for black rural women and how the different levels of tenure insecurity affect different groups of women. In this regard, the different role players in the process of securing tenure for rural women will also be identified and assessed as important sources of transformation. All in all the study seeks to determine if the tenure reform

¹⁶Department of Land Affairs *Annual Report 1 April 2008 – 31 March 2009* 5-7; DRDLR *Annual Report 1 April 2010 – 31 March 2011* 34. See also Carey Miller D L & Pope A *Land Title in South Africa* 313-397 ; Badenhorst P *et al The Law of Property* 629-651.

¹⁷*Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC).

programme as implemented by Government has been effective, particularly for black rural women.

1 4 Methodology

Given the constitutional guarantee of tenure security for those with insecure tenure, it is imperative to determine to what extent existing legislation, customary law and case law in this regard is promoting secure tenure or still falls short of doing so. To this end, an all-encompassing analysis of legislative measures, policy documents and case law developments will be done.

Through analysis of policy documents, legislation and case law, the state of black rural women's tenure security will be assessed in relation to its position pre-1994 in order to determine whether it adheres to constitutional imperatives. Where there are positive laws and practices that provide for secure tenure for black rural women, these will be highlighted and further recommendations will be made to provide for improvement of the tenure reform programme. Where there are shortcomings, these will be identified and recommendations will be made accordingly.

The main focus of the thesis will be on the post-1994 tenure reform measures. More recent developments, such as the Draft Land Tenure Security Bill, 2010,¹⁸ its concomitant Draft Tenure Security Policy¹⁹ and the Green Paper on Land Reform, 2011²⁰ will furthermore be scrutinised to determine whether they address prevailing insecure rights with regard to tenure reform.

Although a full-scale legal comparative study will not be embarked upon, reference will be made to the Namibian tenure reform programme. Namibia was specifically chosen because of the similarity in the history of racial

¹⁸ DRDLR Draft Land Tenure Security Bill in GN 1118 GG 33894 of 24/12/2010.

¹⁹ DRDLR *Draft Tenure Security Policy* GN 1118 in GG 33894 of 24/12/2010.

²⁰ DRDLR *Green Paper on Land Reform*, 2011.

segregation in that country, using predominantly the same legal language as South Africa and its adoption of a national commitment to redress *apartheid* injustices through affirmative action and land reform. In this regard, tenure reform also forms a distinctive leg of their overall land reform programme.

Chapter two and part of Chapter five provide a historical background of the development of each jurisdiction so as to determine the need for tenure reform and how it is being implemented. Given the local circumstances, Government political orientation and social context of South Africa and Namibia, a comparison of the legal measures relating to tenure reform for black rural women may go a long way in indicating possible improvements for South Africa. In this context the post-independence tenure reform measures in Namibia will also be analysed. The aim of the comparative section is to formulate possible recommendations for the South African tenure reform programme in order to contribute to the realisation of the constitutional guarantee of tenure security for black rural women.

1 5 Hypothesis

Inequality resulting in insecure tenure was embodied in the general approach to black women's land rights and general discrimination in the past.²¹ Discrimination against women was also evident under customary law as women were not allowed to own land in rural areas, especially if they were single or widowed.²² An underlying assumption of the study is that the fight against colonial powers and *apartheid* did not provide rural women the same benefits that are enjoyed by their male counterparts.²³

²¹Mushunje M T "Land Administration: Women's Access to Land in Communal Areas" in Roth M, Nxasana V, Sibanda S & Yates T (eds) *National Land Tenure Conference: Finding Solutions, Securing Rights* (2004) 98 100-101.

See also Chapters 2 and 4 below.

²²Bennet T W *Customary Law in South Africa* 1 ed (2004) 395; Pamla S "The struggles continues for women" (2006) 4 *Landnews* 5 7. See also Chapter 3 to 5 below.

²³Pamla S "The struggles continues for women" (2006) 4 *Landnews* 5 7.

For many years after colonisation the customary law of succession did not allow women to inherit property, including land, and traditional leaders were reluctant if not against, making land available to black rural women. This situation was exacerbated further by the unequal power relations in rural areas²⁴ where men dominate decision-making roles in the household and community. Pamla appropriately states that:

“The war against apartheid might be over, but women are still not economically free, especially rural women who still find themselves tied by the shackles of patriarchy. The rights of women are still being trumped upon by customs and traditions in rural areas.”²⁵

Thus, the point of departure is that rural women’s security of tenure is inferior to that of all men in general and to that of white women as a result of historical development and modern day customary law.

Accordingly, as early as 1991,²⁶ discrimination on the basis of race and gender within the tenure paradigm was identified as one of the problems to be addressed within the new political dispensation that would follow. Despite the subsequent repeal of racially based measures,²⁷ rural women were still perceived to be inferior to men. Inevitably this also impacted on tenure security.

The constitutional guarantee of tenure security in section 25(6) and section 25(9) of the South African Constitution, in addition to the equality clause in section 9 and section 10 on human dignity, that form the cornerstone of the South African constitutional democracy, in unison underline the priority of

²⁴Claassens A & Ngubane S “Women land and power: the impact of the Communal Land Rights Act” in Claassens A & Cousins B (eds) *Land, Power & Custom* 154 165-167.

²⁵Pamla S (2006) *Landnews* 5. The author holds that the struggle for women is now against poverty, abuse and any kind of deprivation.

²⁶RSA *White Paper on Land Reform* (1991) 1-2.

²⁷2, 7, Abolition of Racially Based Land Measures Act 108 of 1991.

women's tenure reform in society. More so as secure tenure is linked to economic stability, improved health and assists in poverty alleviation.²⁸

1 6 Structure of thesis

The thesis comprises seven chapters. Chapter one is this introductory chapter which discusses the rationale, research aims and framework of the study. This also contributes to the background of the study. Chapter two focuses on the historical background preceding the tenure reform programme, dominated by colonial authorities. The need for tenure reform is evident after the colonial and *apartheid* developments occurred as well as from the customary law practices that continued post-1994. The need for tenure reform is thus a continuing struggle, even under the new Constitutional dispensation.

It follows that Chapter three deals with the overarching land reform measures that seek to tackle this struggle in general, but in particular regarding tenure reform post-1994. In this regard the chapter provides a comprehensive overview of policy documents, legislative measures and relevant international law. Chapter four draws on the exposition in Chapter three to determine black rural women's tenure security in particular, in line with the research aims. The chapter goes on to examine how specific categories of women are affected differently by the overarching tenure legal framework.

This is followed by the exposition of black rural women's tenure security in Namibia in Chapter five, which forms the comparative basis for the study from which several recommendations for the South African tenure reform programme will be drawn. Chapter six contains the comparative analysis of the South African and Namibian tenure reform programmes in relation to the respective legal frameworks, institutions, role players and the different

²⁸ UN "Facing the Future Together: Report of the United Nations Secretary General' Task Force on Women, Girls and HIV/AIDS in Southern Africa" 10 *UNAIDS* <http://data.unaids.org/publications/External-Documents/sgreport_facingfuture_en.pdf> (accessed 14/05/2012); Albertyn C "Gendered Transformation in South African Jurisprudence: Poor Women and the Constitutional Court" (2011) 22 *Stell LR* 591-613.

categories of women in both countries. The chapter particularly assesses gender participation based on the relevant criteria.

The final chapter provides an overview of the study, recommendations, drawn from the comparative analysis and the study as a whole, for the formulation of various approaches or possible solutions aimed at promoting black rural women's tenure security. It also recommends various tenure forms that could be made available as options to rural dwellers and concludes by wrapping up the analysis of the study.

CHAPTER TWO

HISTORICAL BACKGROUND

2 1 Introduction

This chapter focuses on the historical background preceding the tenure reform programme. It gives an account of the features and evolvement of the South African tenure system from pre-colonisation times until before 1994. This will be done with reference to legislation, customary law and case law. The historical exposition will explain the need for tenure reform during the new Constitutional dispensation after 1994. This chapter will therefore provide a foundation for the tenure reform programme discussed in Chapter three, in which a detailed exposition of tenure reform measures since 1994 will be given.

The point of departure is that traditional customary landholding was the prevailing system when the colonial authorities made contact with South Africa inhabitants.¹ Thereafter, depending on the particular colonial authority in power and linked with specific measures aimed at segregation, either directly or indirectly, various phases of dispossession occurred. These phases will be set out and discussed in detail.

¹ Keegan T *Colonial South Africa and the Origins of Racial Order* (1996) 15.

Once the various phases of dispossession have been discussed, a concise exposition of existing tenure forms pre-1994 will be provided. This exposition underlines the urgent need for tenure reform that was embarked upon post-1994. Before the new Constitutional dispensation will be explored in Chapter three, Chapter two will conclude with a focus on women's tenure position pre-1994.

2 2 Prevailing Traditional customary landholding system before Colonialism

There existed certain customary forms of landholding before the colonial authorities came to South Africa. The various tribal groups in South Africa had different customs and practices related to land. A common trend is that land was and still is a source of livelihood and a precious resource.¹

The San and the Khoi were pastoralists and hunter-gatherers in the area of the Western Cape² where the first European colonialists settled in the seventeenth century.³ The traditional tenure system of other black South Africans further east was communal in nature⁴ and their livelihood was based on land cultivation and pasturage.⁵ This means that the enjoyment of the rights forming part of the tenure was not limited to one individual but shared by a group of people by reason of kinship or residence in a particular area.⁶

¹Mqoke R *Customary Law and the New Millennium* (2003) 102; Beinart W & Delius P "Approaches to South African Agrarian History" in Beinart W, Delius P & Trapido S (eds) *Putting a plough to the ground: accumulation and dispossession in rural South Africa, 1850-1930* (1986) 1 2.

²Keegan T *Colonial South Africa* 15; Du Plessis W & Pienaar J M "The more things change, the more they stay the same: The Story of Communal Land Tenure in South Africa" in van den Bergh R, van Niekerk G & Wildenboer L (eds) *Libellus ad Thomasium: Essays in Roman Law, Roman-Dutch Law and the Legal History in Honour of Phillip J Thomas* (2010) 73 75.

³Keegan T *Colonial South Africa* 15.

⁴Mqoke R *Customary Law* 102 – 103.

⁵Fagan E "Roman-Dutch Law in its South African Historical Context" in Zimmerman R & Visser D (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 33 34.

⁶Clauson G *Communal Land Tenure* A Food and Agricultural Organization of the United Nations Land Tenure Study 17 1953; *AmudoTijani v The Secretary, Southern Nigeria* [1921] 2 AC 399 PC 404; Bennett T W "'Official' vs 'living' customary law: dilemmas of description and recognition" in Claassens A & Cousins B (eds) *Land, Power & Custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) 138 142-143. Also, the religious significance of land was rooted in the belief that it belonged to the ancestors and those still to be born as much as the living occupiers: Allot A "Modern Changes in African Land Tenure" in Cotran E and Rubin N (eds) *Readings in African Law* (1970) 238.

This highlights the distinguishing feature of customary law, namely that it was group-orientated.⁷ The interest of the community or family took precedence over individual rights.⁸

The South African communal tenure system in particular displayed the following features: the land belonged to the people who formed a traditional community or tribe as the legal owner, while the chief was the trustee.⁹ Bennett holds that trusteeship is a “highly specialised concept of common law” and that customary tenure appears to be a system of “complementary interests held simultaneously” and not a relationship of trusteeship, as the community has none of the common law remedies in a case where the chiefs abuse power.¹⁰

The system of tenure in pre-colonial times vested overall control in traditional authorities,¹¹ who allocated land to men upon marriage, where after the men administered the land on behalf of the community or family. A married woman usually accessed land through a male figure.¹² Titles and boundaries were undefined,¹³ grazing rights were uppermost in the scheme of things and

⁷Mqoke R *Customary Law and the New Millennium* 102.

⁸ Cousins B “Characterising ‘communal’ tenure: nested systems and flexible boundaries” in Claassens A & Cousins B (eds) *Land, Power & Custom* 109-110; Mamashela M “New families, new property, new laws: The practical effects of the Recognition of Customary Marriages Act” (2004) *SAJHR* 616 621.

⁹Mqoke R *Customary Law and the New Millennium* 104; Mqoke R *The Impact of Land Reform on African Land Tenure Practices in the Eastern Cape* (2010) 5 unpublished paper presented at a conference hosted by Rhodes University in honour of the then Judge President, Justice Cecil Somyalo and Justice Josh Jones of the Eastern Cape Division of the High Court (copy on file with the author); The Cape Government Commission on Native Laws and Custom : Commission Report 1883, acknowledged the rules and existence of customary law; *AmoduTijani v The Secretary, Southern Nigeria* [1921] 2 AC 399 (PC) 404; Mushunje M T “Land Administration: Women’s Access to Land in Communal Areas” in Roth M, Nxasana V, Sibanda S & Yates T (eds) *National Land Tenure Conference: Finding Solutions, Securing Rights* (2004) 98 102.

¹⁰Bennett T W *Customary Law in South Africa* 1 ed (2004) 38. Letsoalo argues that legislative interference has corrupted the notion of ‘communal land tenure’ in Du Plessis W & Pienaar J M “The more things change, the more they stay the same” in *Essays in Roman Law, Roman-Dutch Law* 74. Also see Bennet’s argument on the misconception of ‘communal’ customary tenure in Bennett T W “‘Official’ vs ‘living’ customary law: dilemmas of description and recognition” in *Land, Power & Custom* 143-144.

¹¹Bennett T W *Customary Law in South Africa* 402.

¹²Mamashela M (2004) *SAJHR* 621.

¹³Bruce J W & Migot-Adholla S E (eds) *Searching for Land Tenure Security in Africa* (1994) 5; Allot A in *Customary Law and the New Millennium* 103; Mqoke R *The impact of Land Reform*

people did not register their inherited titles.¹⁴ This traditional tenure began to change upon the arrival of colonial white settlers.

2 3 Colonial authorities and concomitant powers of segregation

2 3 1 Introduction

Various colonial authorities in South Africa used authoritarian powers that resulted in different phases of dispossession that affected land and the land rights related thereto. The exposition that follows describes how these colonial authorities promulgated legislation and enforced rules and policies which formed part of the process that distorted the customary landholding system, and inevitably resulted in racial territorial segregation. Sadly, the denial and deprivation of rights is a central feature of South African history.¹⁵

As dispossession characterised the South African land control system to a large extent, the various phases of dispossession will be used to set out the different periods of tenure since the Dutch colonialists came into contact with the indigenous South Africans at the Cape during the 1700s.

2 3 2 Phase I: Dutch Colonial Authorities

During the Dutch establishment and occupation of the Cape of Good Hope colony during the 1600 - 1700s,¹⁶ there were already attempts to take land from the indigenous people, which were met with resistance and wars.¹⁷

on African Land Tenure practices in the Eastern Cape 5: he says that boundaries were undefined because communal land was not surveyed.

¹⁴Mqoke R *The Impact of the Land Reform on African Land Tenure practices in the Eastern Cape* 5; Cousins B "Characterising 'communal' tenure: nested systems and flexible boundaries" in Claassens A & Cousins B (eds) *Land, Power & Custom* 111.

¹⁵Carey Miller D L & Pope A *Land Title in South Africa* (2000) 1.

¹⁶The Dutch settled in the Cape from 1652 to 1795 and in 1802 to 1806. See Keegan T *Colonial South Africa* 15-34 and Ramerini M *The Dutch in South Africa: Dutch Portuguese Colonial History* [WWW.COLONIALVOYAGE.COM](http://www.colonialvoyage.com) <<http://www.colonialvoyage.com/SouthAfrica.html>>(accessed 03/02/2011).

¹⁷Keegan T *Colonial South Africa* 31.

The Dutch East India Company,¹⁸ one of the major trading companies in the world at the time, began to take part in the Cape colony economy by trading in cattle and hunting objects.¹⁹ The Company occupied land in the Cape and later in the Boland to allow its employees, and from 1685 Dutchmen, to establish farms for sustenance.²⁰ They introduced Western-style private property relations over the indigenous land, which were all linked with advancing the aims of the Company at the Cape.²¹

The Company granted different forms of tenure to the Dutch settlers. *Eigendom*, a type of permanent freehold tenure was subject to the condition that the grantee and his successors would grow produce for sale to the Company.²² Informal loan farms or *leeningsplaats* were developed in 1714 by the Dutch in some of the rural areas. Loan farms or loan tenure was land lent by the Company on condition that an annual fee was paid.²³ It was a means of regulating the occupation of land in the grazing areas and encouraged extensive pastoralism. Loan tenure in practice became as secure as quitrent or *erfpacht*²⁴ and these farms were freely alienated.²⁵ Some Dutch farmers occupied land without any official authority, appropriating new land whenever they could.²⁶ There was no specific formal policy on land tenure²⁷ as the Cape was mainly of interest and value as a way-station for ships on a major trade route between the Netherlands and the East Indies.²⁸

The San and Khoi were hunter-gatherers and later sheep and cattle herders in

¹⁸Subsequently referred to as the Company.

¹⁹Legassick M "Gold, Agriculture, and Secondary Industry in South Africa, 1885 – 1970: from Periphery to Sub – Metropole as a Forced Labour System" in Palmer R & Parson N (eds) *The Roots of Rural Poverty in Central and Southern Africa* (1977) 175 176.

²⁰Keegan T *Colonial South Africa* 15; Carey Miller D L & Pope A *Land Title in South Africa* 4.

²¹ 3.

²² 4. The Company was under an obligation to buy the produce at a fair price.

²³Bennet T W "African Land – A History of Dispossession" in Zimmerman R & Visser D (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 65 68.

²⁴ These were fifteen year quitrent leases: 68.

²⁵ 25.

²⁶Bennett TW "African Land – A History of Dispossession" in *Southern Cross: Civil Law and Common Law in South Africa* 67.

²⁷ Carey Miller D L & Pope A *Land Title in South Africa* 4-5.

²⁸Keegan T *Colonial South Africa* 42.

the Cape area and were the first to be dispossessed of their traditional land by the Dutch.²⁹ Gradually the colonial authorities wanted land control and therefore imposed laws and regulations to effect that.³⁰ This was done in disregard of any other existing forms of land ownership. The authorities accordingly faced retaliation and violence from the San and Khoi who wanted to protect their water resources, hunting areas and cattle, and social and cultural structures.³¹ These wars resulted in the breakdown of their tribal living customs, poverty and marginalisation. The colonialists exploited the Khoi further as the extensive economy that was established by the Dutch East India Company was dependent on Khoi labour. Various other practices effectively bound the Khoi to farms for labour without them having rights to the land.³² Gifts and flattery were also used to gain permission to occupy the locals' land.³³ On the other hand, the Dutch had no fixed policy towards the locals, but wanted to advance the interests of the Company; they sometimes sought good relations with the locals and negotiated treaties with their leaders rather than forcefully appropriating their land and resources.³⁴

All in all the tenure system in this period was informal and dependent on the approaches and commercial interests of the Company, with the loan tenure system prevailing in rural areas. After about 150 years from the establishment of the Cape colony, the frontier had shifted and the Dutch occupied areas as

²⁹ De Villiers B *Land Reform: Issues and Challenges. A comparative overview of experiences in Zimbabwe, Namibia, South Africa and Australia* (2003) 45. See also an account of the San of Namibia in Chapter 5.

³⁰ The colonial powers declared the land as 'state' land: 46.

³¹ Du Plessis W & Pienaar J M in "The more things change, the more they stay the same" in *Essays in Roman Law, Roman – Dutch Law and Legal History* 76; De Villiers B *Land Reform Issues and Challenges* 45.

³² Keegan T *Colonial South Africa* 26. The Khoi could were unable to resist the Dutch authority as they had limited resources, diseases plagued them and repeated conflicts with the settlers caused them to flee into the interior of the country or submit to the colonial authority: Bennet TW "African Land – A History of Dispossession" in *Southern Cross: Civil Law and Common Law in South Africa* 66.

³³ Carey Miller D L & Pope A *Land Title in South Africa* 7-8.

³⁴ Bennett T W "African Land – A History of Dispossession" in *Southern Cross: Civil Law and Common Law in South Africa* 66.

far as Stellenbosch, Swellendam, Graaf Reinet and Uitenhage.³⁵ The control of all colonised areas was later passed to Britain.

2 3 3 Phase II: British Colonial Authorities

2 3 3 1 Introduction

The British settlers arrived at the Cape in 1795 and took over the existing Dutch administration and judicial system. Dutch officials continued to run the courts and administer justice.³⁶ This is because this period of occupation was temporary³⁷ and it was British policy to respect the indigenous law of its colonies and the existing land titles or the law which they found in existence at the time.³⁸ Despite this, in the Cape the British recognised Roman-Dutch law as the indigenous law and ignored the customary rights and interests that the Khoi and San people had.³⁹

After the British permanently annexed the Cape in 1806, official steps were taken to establish a formal and structured land tenure system.⁴⁰ The Cape became a British colony in 1815 and remained so until 1910.⁴¹ There were various wars during this period between the British and different local tribes or communities and the annexation of more land to the British Cape colony continued. It was during the British rule that discrimination, which later formed the core of the *apartheid* era, began.

2 3 3 2 1806 – 1910

After further colonisation in the 1800s, customary interests became more individualised as the colonial Governments started to disrupt the traditional

³⁵Fagan E “Roman-Dutch Law in South African Historical Context” in *Southern Cross: Civil Law and Common Law in South Africa* 36.

³⁶Keegan T *Colonial South Africa* 47.

³⁷The British temporarily occupied the Cape from 1795 to 1803, and then there was a period from 1803 to 1806 when the Cape reverted to Dutch control and Britain reoccupied the Cape in 1806.

³⁸This was in terms of the so-called Articles of Capitulation.

³⁹Bennett T W “African Land – A History of Dispossession” in *Southern Cross: Civil Law and Common Law in South Africa* 67.

⁴⁰Carey Miller D L & Pope A *Land Title in South Africa* 6.

⁴¹Fagan E “Roman-Dutch Law in South African Historical Context” in *Southern Cross: Civil Law and Common Law in South Africa* 46.

communal land tenure through multiple legislative measures and regulations.⁴² Gradually population pressure and land acquiring more social and economic value led to the assertion of individual rights, which resulted in moving away from the traditional communal system.⁴³

The British colonial Government adopted segregation policy in 1806 that purposefully crafted the dispossession of land from indigenous South Africans for white occupation through the use of legislation and state policies.⁴⁴ The British settlers desired more land thus pushing the boundary of the Cape colony further east. The state extended its territory through treaties. Many of the treaty agreements were invalid as South African local communities never intended to alienate their land.⁴⁵ The Government, settlers and the local people knew the economic, social and political value of land,⁴⁶ and coupled with discriminatory policies, the dispossession of land was not a smooth process, but was accompanied by resistance, wars, violence and civil discontent.⁴⁷ These practices continued despite instruction from the British Colonial Office in London that relations with the aborigines in Southern Africa

⁴²Mamashela M (2004) *SAJHR* 621.

⁴³Bennett T W "African Land – A History of Dispossession" in *Southern Cross: Civil Law and Common Law in South Africa* 71 -72; Mqeke R *Customary Law and the New Millennium* (2003) 105 – 111.

⁴⁴Mushunje M T "Land Administration: Women's Access to Land in Communal Areas" in *National Land Tenure Conference: Finding Solutions, Securing Rights* (2004) 98-99; Carey Miller D L & Pope A "South African Land Reform" 2000 44(2) *JAL* <http://www.jstor.org/stable/1587455> 167 168 (accessed 8/11/2010).

⁴⁵The concept of sale was unknown in African customary law.

⁴⁶This was after the first European colonialists settled in areas of the Western Cape in the seventeenth century: Keegan T *Colonial South Africa* 15.

⁴⁷5; Du Plessis W & Pienaar J M "The more things change, the more they stay the same" in *Essays in Roman Law, Roman-Dutch Law and the Legal History* 75-76, 78; Mqeke A *The Impact of Land Reform on African Land Tenure practices in the Eastern Cape* 2. After some wars the chiefs and their followers would be chased away from their land and their livestock was confiscated. The Xhosas were expelled from the Zuurveld from 1811-1812 during the Fourth Frontier War. The Fifth Frontier War took place from 1819 – 1820, in which the British drove the Xhosa away from the area between Kei and Keiskamma rivers and declared it a neutral area. During the Sixth Frontier War from 1834-1835, the Xhosas initiated a large-scale invasion to recover lost land. The War of the Axe in 1847 saw the Cape governor Harry Smith expand the Cape to the Orange River, prompting widespread opposition. The Eighth Frontier war also between the Xhosa joined by the Kat River rebels took place in 1850: Giliomee H & Mbenga B *New History of South Africa* (2007) 4, 122.

had to be conducted on the basis of justice, humanity and principles of international law.⁴⁸

The Frontier Wars between the British and the Xhosas and other indigenous tribes,⁴⁹ saw huge displacement of local people from their ancestral land.⁵⁰ Thereafter, land legislation, regulations and segregation policies⁵¹ were deliberately used as instruments of territorial segregation to provide land to whites,⁵² and caused great impoverishment among indigenous communities in rural areas. Colonialists also used intimidation of traditional leaders or chiefs to gain control over vast areas of land⁵³ and severed traditional leaders' authority in areas they controlled. Interestingly, registration of perpetual quitrents was granted to Khoi, San and blacks who fought with the British forces.⁵⁴

The practice of labour tenancy or sharecropping developed on the white farms, especially in the districts of the Orange River Colony. Labour tenancy involved mainly the Khoi and other indigenous people who lived with their families, grazed their cattle and cultivated land on a piece of white-owned land as tenants in return for their labour services. A cash wage may or may not have been included and the labour tenancy contract could pass on from one generation to another.⁵⁵ This practice was only possible on large landholdings and was dependant on the provision of labour. However, once such labour services were terminated or the owner sold the land, the tenant invariably lost

⁴⁸Mqeke R *The Impact of Land Reform on African Land Tenure practices in the Eastern Cape* 2 and footnote 4.

⁴⁹Ross R "The Origins of Capitalist Agriculture in the Cape Colony: A Survey" in Beinert W, Delius P & Trapido S (eds) *Putting a Plough to the Ground: Accumulation and Dispossession in Rural South Africa 1850-1930* (1986) 56 74-76; Keegan T *Colonial South Africa* 218 – 219; Mqeke R *The Impact of Land Reform on African Land Tenure Practices in the Eastern Cape* 1. See note 47 above.

⁵⁰ See notes 30 – 32 above.

⁵¹This legislation included the Native Location Act of 1879, the Location Act of 1884 and Glen Grey Act 25 of 1894 and their Regulations.

⁵²Bruce J W & Migot-Adholla S E *Searching for Land Tenure Security in Africa* 8.

⁵³ See note 9 above.

⁵⁴Maylam P *A History of the African People of South Africa: from the Early Iron Age to the 1970s* (1986) 136-138.

⁵⁵138-139; Budlender G & Latsky J "Debating the Land Issue: Unravelling Rights to Land and Agricultural Activity in Rural Race Zones" (1990) *SAJHR* 171, the authors refer to labour tenancy as "African land tenure in 'white' rural areas".

the piece of land. There was also no land made available for independent hunting and living for the Khoi, or other indigenous people.⁵⁶ This is because labour tenancy did not grant a right in the land itself. Sharecropping involved the black family ploughing and sowing the white farm owner's land with their own equipment and in return for a share of their crop, the black family had opportunities that were closed to him in the overcrowded black reserves.⁵⁷ This land was often their ancestral land.

In 1822 English law reform started, *inter alia* with amending of the judicial proceedings, the official language changed from Dutch to English and English settlers were allowed to devise their property according to English law, regardless of the Roman-Dutch Law.⁵⁸ At the same time, the British also set out on further quests to annex more land.

In 1836 a group of Dutchmen, later known as the Boers,⁵⁹ departed from the Cape Colony. The Boers were semi-nomadic European pastoralists and hunters, who migrated towards the north and the east, in a movement called the "Great Trek".⁶⁰ They migrated *inter alia* because of the non-ending wars with the local inhabitants and the British rule, from which they wanted to escape. The Boers thereafter formed their own Republics in the Orange Free State and Transvaal. In 1880 to 1881 there was a Boer revolt against the British rule during which the Transvaal Boers defeated the British force and received independence of Transvaal, also called the South African Republic. The Boers were politically weak and militarily divided, with the result that the

⁵⁶Keegan T *Colonial South Africa* 124; Du Plessis W & Pienaar J M "The more things change, the more they stay the same" in *Essays in Roman Law, Roman – Dutch Law and Legal History* 77. This arrangement today provides access to land and secure tenure in terms of the Land Reform (Labour Tenants) Act 3 of 1996.

⁵⁷Maylam PA *History of the African People of South Africa*139.

⁵⁸This was done in terms of Somerset's Proclamation of 1822, he was the Governor of the Cape Colony from 1814 to 1826: Edwards A B *The History of South African Law: An Outline* (1996) 78.

⁵⁹Which is the Dutch word for a farmer.

⁶⁰Fagan E "Roman-Dutch Law in South African Historical Context" in Zimmerman R & Visser D *Southern Cross: Civil Law and Common Law in South Africa* 36.

British were able to annex the Transvaal Republic in 1877 in a minor struggle.⁶¹

Britain already had control over the Cape Colony and Natal,⁶² which led them to war with the politically independent Orange Free State and Transvaal, and annexed them in 1899.⁶³ These territories would all later form the Union of South Africa in 1910.⁶⁴ The British wanted to join their colonies and to gain possession of the Transvaal gold mines and diamond areas that were part of the Transvaal and Orange River colonies. This war is known as the “Anglo-Boer War” which was fought by Britain and her Empire against the Boer Republics from 1899 to 1902. Maylam indicates that the label “Anglo-Boer War” is misleading, thus calling it the South African War.⁶⁵ This is because blacks were also involved in the war on both contending sides, endured much of its suffering and were greatly affected by its outcome.

The British racially-based segregation policies, coupled with the migrant labour system⁶⁶ caused divide and major imbalances in communal areas.⁶⁷ There was a large increase in migrant labourers, especially with the discovery of diamonds,⁶⁸ gold and other minerals during the last part of the nineteenth century in South Africa as mine owners needed a cheap working force. This also applied to farms. These mineral discoveries had a profound effect on the

⁶¹Kemp A “March of the Titans: A History of the White Race” (1999) *The Boer Republic and British Rule* <<http://www.white-history.com/hwr56ii.htm>> (accessed 09/02/2011).

⁶²Natal was annexed to the Cape in 1844.

⁶³Legassick M “Gold, Agriculture, and Secondary Industry in South Africa, 1885 – 1970: from Periphery to Sub – Metropole as a Forced Labour System” in *The Roots of Rural Poverty in Central and Southern Africa* 180. Basutoland was annexed as a British protectorate in 1868. The British also annexed Zululand in 1887, Pondoland in 1894 and Bechuanaland in 1895: Giliomee H & Mbenga B *New History of South Africa* 122.

⁶⁴Established by the Union Constitution of South African Act 1 of 1909.

⁶⁵Maylam P *A History of the African People of South Africa* 137. The War will subsequently be referred to as the South African War.

⁶⁶Keegan T *Colonial South Africa* 13.

⁶⁷Legassick M “Gold, Agriculture, and Secondary Industry in South Africa, 1885 – 1970: from Periphery to Sub – Metropole as a Forced Labour System” in *The Roots of Rural Poverty in Central and Southern Africa* 175.

⁶⁸Diamonds were discovered at Hopetown, south of the Orange River in 1867 and gold was discovered in 1881 at Barbeton and in 1886 on the Witwatersrand: Giliomee H & Mbenga B *New History of South Africa* 122, 184.

whole Southern African sub-continent.⁶⁹ Through loss of their land, rural dwellers lost the economic, social and cultural value attached to the land.

In 1905, Lord Milner⁷⁰ appointed the Native Affairs Commission, which was in support of and indicated the beginning of racial segregation and the restriction of land purchases by Africans⁷¹ to areas to be prescribed by legislation.⁷² Based on these racial policies, the British administration intervened to assist and subsidise whites but not black farmers and landowners. This assistance to whites included providing loans to purchase land, gave grants for farming or mining equipment and took remedial action against pests and diseases. This was despite the fact that both blacks and whites were faced with the detrimental effects of the South African War, which for example, hampered the growth of large-scale farming.⁷³ These advantages for whites only meant they could now use their land for independent direct production instead of partially relying on labour tenancy and sharecropping agreements with blacks as described above. Though the British Government specifically removed some of the black tenants from farms,⁷⁴ neither sharecropping nor labour tenancies were completely eliminated.⁷⁵

In 1910 the four individual colonies united to form the Union of South Africa with Louis Botha as South Africa's first Prime Minister.

⁶⁹A *Brief History of the ANC* <<http://www.anc.org.za/kids/main.php?include=../docs/kidstxt/2010/kidstxt0316a.html>>(accessed 19/11/2010).

⁷⁰ He was a High Commissioner to the Cape colony from 1880 – 1897: Worsfold W B *Lord Milner's Work in South Africa: From its Commencement in 1897 to the Peace of Vereeniging in 1902* (2008) <<http://www.gutenberg.org/files/26490/26490-h/26490-h.htm>>(accessed 22/11/2011); Maylam PA *History of the African People of South Africa* 138.

⁷¹The word "Africans" is used interchangeably with "blacks".

⁷²Maylam PA *History of the African People of South Africa*138.

⁷³139.

⁷⁴139 -140.

⁷⁵ 143.

2 3 3 3 1910 - 1961

2 3 3 3 1 *The Land Acts*

Immediately following the formation of the Union in 1910, Land Acts, as described below, were used officially as the first race-based legislation dealing with land.

The Black Land Act 27 of 1913 was directly used to dispossess land from black people, and relocated blacks to “scheduled areas” in order to confine them to certain areas of the country.⁷⁶ The Act also aimed to control communal land tenure, which was seen by the colonial Government as being in conflict with individual land tenure.⁷⁷ Black people’s movements were regulated and controlled. They could live outside the “scheduled areas”, but only on a temporary basis. Black people could not own land outside the “scheduled areas”, which made up a mere 7.3 percent of the total land area in South Africa, thus leaving vast areas of South Africa under white control⁷⁸ and generally advance white social, economic and political interests.⁷⁹

Another Land Act, the South African Development Trust and Land Act 18 of 1936, which is the successor of the Black Land Act 27 of 1913, established a statutory trust known as the South African Development Trust.⁸⁰ This trust became the owner of all state-owned land reserved for black people.⁸¹ Du Plessis and Pienaar,⁸² state that a practice developed, in terms of which the

⁷⁶Badenhorst P, Pienaar J M & Mostert H *Silberberg and Schoeman’s The Law of Property* 5ed (2006) 585; *White Paper on Land Reform* 1991 2.5; the land so designated for black occupation was listed in a schedule to the Act, hence it was referred to as the “scheduled” areas: Van der Merwe C G & Pienaar J M “Land Reform in South Africa” in Jackson P & Wilde D C (eds) *The Reform of Property Law* (1997) 334 335.

⁷⁷ Du Plessis W & Pienaar J M in “The more things change, the more they stay the same” in *Essays in Roman Law, Roman – Dutch Law and Legal History* 79.

⁷⁸ De Villiers B *Land Reform: Issues and Challenges* 46.

⁷⁹Carey Miller D L & Pope A *Land Title in South Africa* 19-21; Makopi S “Awards to Provide Security of Tenure and Comparable Redress” in Cousins B (ed) *At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century* (2000)143 144.

⁸⁰ This is not the common law trust, Kerr argues that it “resembles trusteeship in the law of sovereignty”: Budlender G & Latsky J (1990) *SAJHR* 164.

⁸¹ 164.

⁸² Du Plessis W & Pienaar J M “The more things change, the more they stay the same” in *Essays in Roman Law, Roman – Dutch Law and Legal History* 79.

Minister of Black Affairs registered the land in his name, thus endorsing all communal land in the Deeds Office⁸³ as state land regardless of any proof of ownership a community might have had.

The Act referred to the new black areas as “released areas” to expand the “scheduled areas” which were overcrowded. A mere thirteen percent of South African land was allocated to black people in terms of this Act, although they made up one-third of the country’s population.⁸⁴ Ownership could not be vested in land in “released areas” - the occupants could only lease it. Upon death of the occupant, the trust land reverted back to the commonage; even the son could not obtain the land as it did not belong to the family, but to the Trust. Widows with children were allowed to stay on her husband’s land as long as she stayed at his homestead, if she changed her residence, she lost the right to the land.⁸⁵

The Group Areas Act 41 of 1950 comprehensively regulated the acquisition, alienation and use of land in areas where blacks were prohibited from acquiring any rights. The creation of group areas saw the use of various means, such as forced removals and evictions of blacks and other people from white areas in order to achieve racial segregation and generally deny black people, rights in land.⁸⁶ The Group Areas Act was mainly applied in urban areas, while the focus of the study is on rural areas. However, restricted settlement in urban areas for blacks would have a detrimental impact in rural areas because people would be restricted to the rural areas.

Overall, most of the land described above in rural black areas was owned by the state. There was however, land that exclusively belonged to blacks,

⁸³ This was done in terms of s 1 and 18 of the Deeds Registries Act 47 of 1937 which is still in force today.

⁸⁴ Adams M, Cousins B & Manona S “Land Tenure and Economic Development in Rural South Africa: Constraints and Opportunities” in Cousins B (ed) *At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century* (2000) 111 111.

⁸⁵ Mamashela M (2004) SAJHR 625.

⁸⁶ Carey Miller D L & Pope A *Land Title in South Africa* 241; See also *Tongoane v Minister of Agriculture and Land Affairs* (2010) 6 SA 214 (CC) para 10 – 29.

known as the “black spots”, where black people had successfully resisted eviction.⁸⁷ Most of this land is owned in freehold by black communities and the individuals have registered the freehold title in their names,⁸⁸ in most cases the land was acquired before the 1913 Land Act.

The Status of the Union Act 69 of 1924, passed by the South African Parliament, affirmed the position of the Union as a sovereign independent state along with Australia, Canada and the other Dominions, tied by a common allegiance to the British crown, known as the Commonwealth.⁸⁹ The Republic of South Africa was declared after a referendum in 1961, on 31 May 1961.

2 3 3 3 2 *Political Developments*

These oppressive land tenure measures saw the establishment of the current ruling party, the South African Native National Congress, later called the African National Congress, in 1912,⁹⁰ that aimed to mobilise all Africans against the racial legislation, fight land dispossession and generally defend black rights and freedoms.

A white opposition party, the National Party was founded two years later in 1914. In 1948, the National Party won the election under D F Malan and the Sauer Committee established by the National Party recommended *apartheid*.⁹¹

⁸⁷Budlender G & Latsky J (1990) *SAJHR* 165.

⁸⁸Examples are Driefontein, Daggakraal and Mathopestaad all in Transvaal.

⁸⁹184.

⁹⁰Maylam P *A History of the African People of South Africa: from the Early Iron Age to the 1970s* (1986) 152-165; ANC “A Brief History of the ANC” ANC <<http://www.anc.org.za/kids/main.php?include=../docs/kidstxt/2010/kidstxt0316a.html>>(accessed 19/11/2010).

⁹¹Giliomee H & Mbenga B *New History of South Africa* 306.

2 3 4 Phase III: South African Authorities

2 3 4 1 Introduction

This phase was when the *apartheid* Government reigned. It saw the increase in national states and self-governing territories all in line with the *apartheid* ideology. Although still within the Union context, the National Party officially came to power in 1948, after which racial segregation in general and land measures in particular, increased. For purposes of this discussion, the focus is on the period post 1961 when South Africa became a Republic.

2 3 4 2 1961 – 1991

Essentially colonialists sought to introduce individualisation of title⁹² whilst the Africans were in favour of retaining the communal tenure system.⁹³ The foundations of developments that occurred in the 1960s were laid in the second half of the nineteenth century already. In this regard Government had introduced individual tenure in the form of quitrent tenure and leasehold in a few villages and the districts of Ciskei and Transkei.⁹⁴ This was made possible by the Glen Grey Lands and Local Affairs Act 25 of 1894,⁹⁵ which made provision for the issuing of quitrent title after the survey of land.⁹⁶ The size of individual lots was provided for in terms of the Act⁹⁷ and did not allow the emergence of successful African farmers who could compete with white farmers. The Glen Grey Act was repealed by Proclamation R188 in 1969, which introduced “permission to occupy”⁹⁸ and quitrent⁹⁹ as forms of land tenure in South African Development Trust areas and other black rural areas.

⁹²Mqoke R *The Impact of Land Reform on African Land Tenure practices in the Eastern Cape* 3 where he notes that the aim of individualization of title was only achieved in the surveyed areas.

⁹³Mqoke R *The Impact of Land Reform on African Land Tenure practices in the Eastern Cape* 4 – 5.

⁹⁴6 – 7.

⁹⁵Du Plessis W & Pienaar J M “The more things change, the more they stay the same” in *Essays in Roman Law, Roman-Dutch Law and Legal History* 77. This Act was concerned with the landholding of Africans especially in areas of the Eastern Cape.

⁹⁶Ss 14-16.

⁹⁷Part I on the Creation of Locations and granting of Allotments therein, set out that land shall not be allocated lawfully within the locations situated in the district of Glen Grey without the permission of the Governor.

⁹⁸Reg 47-61.

⁹⁹Reg 12-46.

Both these forms of tenure provide the holder with a permanent right of occupation, subject to certain conditions and rights to use of the commonage, but do not confer all of the rights usually connected to common law ownership.¹⁰⁰ The Proclamation was issued in terms of the Black Administration Act 38 of 1927.

Permission to occupy is the statutory form of communal land tenure, providing for the unregistered protected use of unsurveyed communal land.¹⁰¹ Permission to occupy is issued by a district magistrate and this may be done subject to conditions. Consultation with the traditional authorities concerned is not necessary.¹⁰² The Commissioner exercises the powers relating to transactions of permission to occupy.¹⁰³

Quitrent title on the other hand, applies to surveyed allotments of land, registered in the name of the holder.¹⁰⁴ This results in a limited real right that embodies the right to possess the land in perpetuity. A holder is required to pay an annual lease for the quitrent tenure¹⁰⁵ and any transaction with a black person burdening quitrent land may only take place with the consent of the relevant Chief Commissioner, otherwise the relevant minister's consent is required.¹⁰⁶ Quitrent title can be inherited by the customary law heir, whose identity is based on male primogeniture and could not be disposed of in a will.¹⁰⁷

The impact of years of dispossession and racially discriminatory land tenure was severe. According to De Villiers:

¹⁰⁰Budlender G & Latsky J (1990) *SAJHR* 166.

¹⁰¹Kleyn D, Boraine A & Du Plessis W *Silberberg and Schoeman's The Law of Property* 3 ed (1992) 498; Du Plessis W & Pienaar J M in "The more things change, the more they stay the same" in *Essays in Roman Law, Roman-Dutch Law and Legal History* 79.

¹⁰²Reg 47 and 48(2).

¹⁰³Reg 47; 49; 55 – 56.

¹⁰⁴Mamashela M (2004) *SAJHR* 624. Land is surveyed after consultation with the tribal authority concerned and the lawful occupiers of the land: reg 14(1); See note 44 above.

¹⁰⁵Reg 17(1).

¹⁰⁶Reg 20(1) & 21.

¹⁰⁷S 23(1) Black Administration Act 38 of 1927, this Act was promulgated to provide for better management of Black Affairs by Government of the day.

“The extent of dispossession in South Africa, the low quality of land available in the communal areas, and the violence that accompanied resettlement, coupled with the overpopulation of such areas impacted more severely on South Africa’s black population than was the case in Zimbabwe, Namibia or arguably in any other part of Africa (footnote omitted).”¹⁰⁸

2 3 4 3 1991 – 1994

This phase saw the transition to democracy and concomitant reform, on various levels. This period saw also the enactment of legislation which sought in particular to “strengthen the precarious African land tenure system”.¹⁰⁹

A racially based land control system until 1991¹¹⁰ interfered with and distorted the communal tenure system. Important here is the White Paper on Land Reform, 1991 and corresponding legislation. The focus of the White Paper was on land reform which emerged from negotiations and debates that sought to make a commitment to social justice, prior to the new political dispensation.¹¹¹ The White Paper further set out the policy for addressing the legacy of land ownership in South Africa and abolishing racially based land legislation, while broadening access to land rights for all South Africans.

The Abolition of Racially Based Land Measures Act 108 of 1991 eliminated race as a criterion for determining capacity to acquire and exercise rights in land.¹¹² The Act repealed all the racially based Land Acts, such as the Black Land Act 27 of 1913, the South African Development Trust and Land Act 18 of 1936 and the Group Areas Act 36 of 1966, amongst others.¹¹³ The Abolition of Racially Based Land Measures Act however, did not repeal the regulations and proclamations issued in terms of the Land Acts and the Black

¹⁰⁸ De Villiers B *Land Reform: Issues and Challenges* 46.

¹⁰⁹ Mqoke R *The Impact of Land Reform on African Land Tenure practices in the Eastern Cape* 3.

¹¹⁰ Badenhorst PJ, Pienaar J M & Mostert H *Silberberg & Schoeman’s Law of Property* 5 ed (2006) 585.

¹¹¹ Walker C “Piety in the Sky? Gender Policy and Land Reform in South Africa” in Razavi S (ed) *Agrarian Change, Gender and Land Rights* (2003) 113 118.

¹¹² Ss 1 and 11.

¹¹³ Ss 1 – 2 Act 108 of 1991.

Administration Act, resulting in all existing rights still remaining in force. Van der Walt¹¹⁴ fittingly states that:

“the mere abolition of racially based statutes will not succeed in eradicating apartheid land law and establishing a more just and equitable post-apartheid land law.”

The Upgrading of Land Tenure Rights Act 112 of 1991 makes provision for the upgrading of and content of certain forms of tenure, including permission to occupy and quitrent, to freehold tenure.¹¹⁵ Pending conversion of Schedule 1 rights, the holder of such a land tenure right is deemed to be an “owner” but will be subject to all conditions burdening the land.¹¹⁶

A very important legislative measure in this phase was the Interim Constitution 200 of 1993, which contained the Bill of Rights and the constitutional values enshrined in it. This was the supreme law, thus making all laws subject to it. The Interim Constitution commenced in April 1994.

The Restitution of Land Rights Act 22 of 1994 entitles individuals or communities or their descendants who had been dispossessed of a right in land, to lodge claims with the state.¹¹⁷ This Act also by definition included a customary law interest as a “right in land”,¹¹⁸ thus acknowledging the role and place of customary law in the legal tenure system.

¹¹⁴Van der Walt A J *Constitutional Property Law* 1 ed (2005) 308 - 309. See also *White Paper on Land Reform* 1991 1.

¹¹⁵ Preamble of the Act; s 2 and 3 of the Act provides for conversion of the rights referred to in Schedule 1 and 2 respectively.

¹¹⁶S 4.

¹¹⁷S 2. Further readings on restitution are Carey Miller D L & Pope A *Land Title in South Africa* 313-397; Barry M “Now another thing must happen: *Richtersveld* and the dilemmas of land reform in post-apartheid South Africa” (2004) 3 *SAJHR* 355-382; Badenhorst P *et al The Law of Property* 629-651.

¹¹⁸S 1 (xi). *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA) paras 24-26. The Constitutional Court confirmed this decision in *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 62, but rejected the SCA’s finding that the community’s customary law interest was ‘akin to that held under common law ownership’ paras 49-50.

2 4 Concise exposition of tenure forms immediately before new Constitutional dispensation dawned

2 4 1 Introduction

The land in the so-called black rural areas was occupied in terms of different land tenure systems and governed by various legislation and proclamations. Tenure in coloured rural areas was governed by the Rural Areas Act (House of Representatives) 9 of 1987 while the rest of South Africa was controlled by the Group Areas Act 36 of 1966.¹¹⁹ The different forms of land tenure control applicable in the black areas just before the 1994 political dispensation dawned will be set out clearly. This is important as the tenure reform that was to take place after 1994 would have to deal with the existent tenure forms.

Prior to the new Constitutional dispensation South Africa was divided up into four provinces, four homelands or independent national states,¹²⁰ six self-governing territories¹²¹ and the South African Development Trust areas. The latter areas formed the constitutional territories of the black ethnic groups¹²² and each had its own measures relating to rural land and measures relating to urban land. In each of the areas, rural and urban, there were different measures relating to the different population groups.¹²³ Different measures furthermore prevailed in relation to deeds and registries and surveys. This approach was in line with the explicitly racist colonial policy which organised societies based on racial background.¹²⁴

2 4 2 Black land tenure system in urban areas

Blacks were only allowed to reside in urban areas for recognised reasons. These usually referred to the provision of labour or matters connected

¹¹⁹With its successors.

¹²⁰ Transkei, Bophuthatswana, Venda and Ciskei, referred to as the TBVC states.

¹²¹Gazankulu, KaNgwane, KwaNdebele, KwaZulu-Natal, Lebowa and QwaQwa.

¹²²RSA *White Paper on Land Reform*, 1991.

¹²³Kleyn D G & Boraine A *Silberberg and Schoeman's The Law of Property* 494 – 495.

¹²⁴Badenhorst P, Pienaar J M & Mostert H *Silberberg and Schoeman's The Law of Property* 585; Legal Assistance Centre "Our land they took" - *San land rights under threat in Namibia* (2006).

therewith.¹²⁵ Territorial segregation was effected in these areas by the Native (Urban Areas) Act 21 of 1923 which established “locations” for black occupation. The Blacks (Urban Areas) Act 25 of 1945 expansively segregated white and black urban land. From 1984 onwards black townships were established in terms of the Black Communities Development Act 4 of 1984. In this regard the land that was made available for townships was referred to as “development areas”.¹²⁶

Land tenure in black urban areas was codified in the Regulations Governing the Control and Supervision of an Urban Bantu Residential Area and Related Matters of 1968¹²⁷ and in the Black Communities Development Act 4 of 1984. The Regulations allowed blacks to occupy these areas based on determined permits on the basis that occupation was temporary and for as long as their presence was demanded by the needs of the white population.¹²⁸ The permits only created contractual rights between the holder thereof and the relevant public authority in terms of the strict Regulations.¹²⁹ None of the permits resulted in ownership or a limited real right, but a mere statutory personal right.¹³⁰ The Regulations all stipulated that a “male person” who had dependents could apply for these permits, with the exception of the Lodger’s permit which both males and females could apply for. The available permits were:

- a) site permits;¹³¹
- b) residential permits;¹³²
- c) certificates of occupation;¹³³

¹²⁵ Van der Merwe C G & Pienaar J M “Land Reform in South Africa” in Jackson P & Wilde D C (eds) *The Reform of Property Law* 338.

¹²⁶ 339.

¹²⁷ GN R 1036 in GG 2096 of 14/06/1968 as amended by the Department of Bantu Administration and Development. See Van der Merwe C G & Pienaar J M “Land Reform in South Africa” in Jackson P & Wilde D C (eds) *The Reform of Property* 340.

¹²⁸ Giliomee H & Mbenga B *New History of South Africa* 184.

¹²⁹ Kleyn D G & Boraine A *Silberberg and Schoeman’s The Law of Property* 495. The Regulations set out many requirements that a black person had to adhere to before the permit could be awarded.

¹³⁰ Kleyn D G & Boraine A *Silberberg and Schoeman’s The Law of Property* 495.

¹³¹ Ch 2 regs 6, 10 and 13.

¹³² Ch 2 regs 7 and 10.

- d) lodger's permits;¹³⁴ and
- e) hostel permits.¹³⁵

The Black Communities Development Act allowed blacks to obtain unregistered¹³⁶ statutory leasehold for a period of 99 years,¹³⁷ in contrast to the permit system of land tenure above. The latter Act and the Conversion of Certain Rights into Leasehold Act 81 of 1988 (which repealed the above Regulations), enabled the recognition of leasehold as a limited real right on land which remained the property of the local authority.¹³⁸ Leasehold was granted subject to certain conditions and payment that amounted to the value of the leasehold and improvements on the site. A leasehold certificate confirmed the registered leasehold.¹³⁹

In 1986, black South Africans were allowed to own land in black urban areas for the first time in South African history. This was enabled by the Black Communities Development Amendment Act 76 of 1986 that expressly provided for the conversion of statutory leasehold into ownership.¹⁴⁰ This provision was not abolished by the Abolition of Racially Based Land Measures Act in 1991.

In the areas mentioned here, specific provision was made to improve security of tenure for black persons. This development did not, however, address the major overcrowding in the relevant areas.

¹³³Ch 2 regs 8 and 10.

¹³⁴Ch 2reg 20.

¹³⁵Ch 7 reg 5.

¹³⁶The lease was not registered in terms of the Deeds Registries Act 47 of 1937 but in terms of Black (Urban Areas) Amendment Act 97 of 1978.

¹³⁷Ss 52 – 57.

¹³⁸S 11 of the Conversion Act 81 of 1988 allowed holders of residential permits and certificates to retain GN R 1036 rights until leasehold was granted. Site permits and Certificates of occupation were also upgraded to leasehold upon the land being surveyed and investigation by the provincial secretary: s 2 – 5. In term of s 6, Lodger and Hostel permits are converted into contracts of lease.

¹³⁹S 53 of the Black Communities Development Act 4 of 1984. Van der Merwe C G & Pienaar J M "Land Reform in South Africa" in Jackson P & Wilde D C (eds) *The Reform of Property Law* 341 – 342.

¹⁴⁰S 57A.

2 4 3 Black land tenure system in the rural areas

2 4 3 1 Towns

2 4 3 1 1 **Self-governing territories**

The self-governing territories were KwaNdebele, QwaQwa, Gazankulu, Lebowa, KwaZulu-Natal and KaNgwane. These territories were constituted by the Self-Governing Territories Constitution Act 21 of 1971, in terms of which some scheduled and released land was transferred to the territories.¹⁴¹ The purpose of self-governing territories was that they would eventually become independent states. However, this did not happen as the whole South Africa became an independent democratic country after the 1994 elections. Only KwaZulu-Natal and QwaQwa made use of the power conferred by the Self-Governing Territories Constitution Act to promulgate their own legislation on land matters. The majority of pre-1991 land tenure measures still apply in the self-governing territories as none of the land regulations were repealed by the Abolition of Racially Based Land Measures Act.

Land tenure in towns in these areas was regulated by the Regulations for the Administration and Control of Townships in Black Areas promulgated by the Department of Bantu Administration and Development in Proclamation 293 of 1962.¹⁴² The Land Survey Act 9 of 1927 and the Deeds Registries Act 47 of 1937 were excluded from application in these areas.¹⁴³ Therefore, local deeds registries were established where immovable property in the township was registered.¹⁴⁴ The following land tenure forms were provided for in Proclamation 293:

- a) ownership units for which deeds of grant were issued;¹⁴⁵
- b) certificates of lease;¹⁴⁶

¹⁴¹ Van der Merwe C G & Pienaar J M "Land Reform in South Africa" in Jackson P & Wilde D C (eds) *The Reform of Property Law* 338.

¹⁴² Kleyn D G & Boraine A *Silberberg and Schoeman's The Law of Property* 497.

¹⁴³ Reg 3(2).

¹⁴⁴ Proc 293 Ch 9 reg 1.

¹⁴⁵ Ch 2 reg 9.

¹⁴⁶ Ch 2 reg 8.

- c) lodgers' permits;¹⁴⁷
- d) building permits;¹⁴⁸
- e) trading permits¹⁴⁹ and
- f) statutory leasehold.¹⁵⁰

The Upgrading of Land Tenure Rights Act 112 of 1991 allowed for deeds of grant for ownership units and rights of leasehold to be upgraded to ownership. This process is still continuous as many sites still have to be surveyed.¹⁵¹

2 4 3 1 2 *South African Development Trust land*

The same legal measures that applied in the self-governing territories also applied to land acquired by the South African Development Trust.¹⁵² After 1988 different legal measures were introduced in respect of land tenure rights in towns. The South African Development and Trust Land Act was applicable to Trust land in terms of which Proclamations R29 and R30 of 1988¹⁵³ were issued.

The South African Development Trust was abolished in 1992 in terms of the Abolition of Racially Based Land Measures Act and the land was transferred to the relevant self-governing territories, to the different provincial administrators, the Minister of Public Works and the Minister of Land and Regional Affairs.¹⁵⁴ The regulations pertaining to land tenure forms have not been repealed yet, thus all existent land tenure rights on land that was formerly part of the South African Development Trust remained in force.¹⁵⁵

¹⁴⁷Ch 2 reg 19.

¹⁴⁸Ch 2 reg 20.

¹⁴⁹Ch 3.

¹⁵⁰Ch 2A.

¹⁵¹Kleyn D G & Boraine A *Silberberg and Schoeman's The Law of Property* 498.

¹⁵² Van der Merwe C G & Pienaar J M "Land Reform in South Africa" in Jackson P & Wilde D C (eds) *The Reform of Property Law* 346.

¹⁵³Procs R29 and R 30 in GG 11166 of 09/03/1988 Regulations Concerning Land Tenure in Towns.

¹⁵⁴S 12.

¹⁵⁵Kleyn D G & Boraine A *Silberberg and Schoeman's The Law of Property* 500-501.

The following land tenure rights are provided for in these areas by Proclamations R29 and R30:¹⁵⁶

- a) ownership, for which deeds of grants are issued;¹⁵⁷
- b) lease;¹⁵⁸
- c) certificate of occupation;¹⁵⁹
- d) building permits;¹⁶⁰
- e) trading permits¹⁶¹ and
- f) leaseholds.¹⁶²

A deed of grant was a limited real right, which was registered in respect of surveyed land. Permission had to be obtained to burden the land and the grantor, often the local authority, had the right to repossess the land. On South African Development Trust land deeds of grant could be converted into ownership through the opening and formalisation of a township register.¹⁶³

2 4 3 1 3 *Independent national states*

The independent national states were Transkei, Bophuthatswana, Venda and Ciskei. Proclamation 293 of 1962 also applied in these areas. Sometimes ownership was also provided.

2 4 3 2 *Rural Land*

2 4 3 2 1 *Self-governing territories*

Land tenure in rural areas of the self-governing territories was regulated by the Black Areas and Land Regulations Proclamation R188 of 1969. The

¹⁵⁶ Other enactments containing these land tenure forms were GNS 402, 403 and 405 GG 11166 of 09/03/1988.

¹⁵⁷ Proc 29 regs 4 – 8 and regs 3, 5 and 6 of GN R403.

¹⁵⁸ Regs 6 – 8, 10, 15 – 16 of GN R402.

¹⁵⁹ Reg 18 of GN R403.

¹⁶⁰ Reg 8 – 12 of GN R405.

¹⁶¹ Proc R29 reg 12 and reg 9 of GN R402.

¹⁶² Proc R29 regs 9 – 10, reg 4 of GN R403 and reg 41 of GN R405.

¹⁶³ Van der Merwe C G & Pienaar J M “Land Reform in South Africa” in Jackson P & Wilde D C (eds) *The Reform of Property Law* 348.

Proclamation provided for two main forms of land tenure, namely quitrent¹⁶⁴ and permission to occupy.¹⁶⁵ Quitrent is a limited real right over surveyed land, while permission to occupy provided the unregistered protected use of unsurveyed communal land. These forms of tenure have already been fully described above.¹⁶⁶

In terms of the Upgrading of Land Tenure Rights Act, permission to occupy may be upgraded to full ownership. This process will take time as many areas need to be surveyed and conflicts might arise between neighbours whose rights are still communally based.¹⁶⁷

2 4 3 2 2 *South African Development Trust land*

This land was also regulated by Proclamation R188 of 1969, providing for quitrent and permission to occupy as forms of rural land tenure. Although the South African Development Trust was abolished, the regulations are still in place as they have not been repealed.¹⁶⁸

2 4 3 2 3 *Independent national states*

Proclamation R188 also applied in these areas with the indicated tenure forms above. Communal tenure was also dominant in these areas.

The Interim Constitution¹⁶⁹ stated that all laws which were in force immediately before its commencement in any area which forms part of the national territory shall continue in force in such area, subject to any repeal or amendment of such laws by a competent authority. Various land tenure enactments are thus still in force. The above land tenure forms are critical as

¹⁶⁴ Regs 12 – 46.

¹⁶⁵ Regs 47 – 61. Provision was also made for the allocation of land for grazing (regs 10 – 11) and land for churches (regs 7 – 9).

¹⁶⁶ See 2 3 3 2 and 2 3 4 2 above.

¹⁶⁷ Kleyn D G & Boraine A *Silberberg and Schoeman's The Law of Property* 498.

¹⁶⁸ 501.

¹⁶⁹ S 229.

they are the ones that require reform and need to be brought in line with the new constitutional values.

2 5 Black rural women's tenure security pre – 1994

2 5 1 Introduction

In light of the historical background and the exposition of tenure forms already provided, it is important to focus on the position of black rural women in particular.

2 5 2 Black rural women's tenure security

The most common form of rural tenure for women in Africa is communal tenure, which is characterised by group ownership rights, sometimes equated with Western-style *usufruct* and secondary rights.¹⁷⁰ The land is usually accessed through traditional leadership. However, traditional customary law did not operate on the principle of gender equality¹⁷¹ and its patriarchal nature did not easily allow women to obtain secure land tenure. This state of affairs was made worse by the colonial administration and *apartheid* Government that established a new codified version of individualised customary law rights,¹⁷² “thus causing it to lose its dynamism, flexibility and adaptability to new developments”.¹⁷³

Widows were sometimes allocated land on the death of their husbands,¹⁷⁴ but other women could usually not acquire land in their own right, as land and other capital assets were the preserve of men. Women usually accessed land

¹⁷⁰Mushunje M T “Land Administration: Women's Access to Land in Communal Areas” in *National Land Tenure Conference: Finding Solutions, Securing Rights* 98 101. In this regard one should note the problematic use of Western-style forms to attempt to describe communal or customary terminology.

¹⁷¹Bohler-Muller N “Does the Communal Land Rights Act Really Protect the Rights of Rural Women to Own Land?” 2009 *Afrigrowth Agenda* 26 27.

¹⁷²Mamashela M (2004) *SAJHR* 621.

¹⁷³618.

¹⁷⁴Du Plessis W & Pienaar J M “The more things change, the more they stay the same” in *Essays in Roman Law, Roman – Dutch Law and Legal History* 74.

rights and other assets through men, who could be fathers, husbands, brothers or sons.¹⁷⁵

The Natal Code of Zulu Law of 1987, for instance, made the kraal head the “absolute owner” of all the property belonging to his kraal.¹⁷⁶ This meant that he could alienate the property without consulting any of the family members. This left not only other kraal members without any right to the family property, but also his wife, if he was married. Traditionally, under customary law, a wife owned and managed her personal property.¹⁷⁷ However, as married women fell under the authority of her husband, it sometimes happened that husbands also controlled the personal property of their wives as it formed part of the overall household property.¹⁷⁸

Proclamation 227 of 1898, provided for “one man one lot”, which meant women could no longer own land in their own names. To elaborate, even though access to land by women was already restricted, Proclamation 227 made the situation worse. When women’s husbands died, their sons had to provide for them as widows were only allowed a sort of *usufruct* over a right to use the land. When the widow died the land reverted to the head of the family, a male figure, in whom the land initially vested, although the widow had a right to use the land. In 1905 the widow or widows could stay on the land if the governor so decreed.¹⁷⁹

In the Transkei, Proclamation 142 of 1910 as amended: Marriage and Succession conferred on certain widows the servitude of use and occupation in respect of their late husband’s land.¹⁸⁰

¹⁷⁵Mamashela M (2004) *SAJHR* 616; Cousins B “Characterizing ‘communal’ tenure: nested systems and flexible boundaries” in Claassens A & Cousins B *Land, Power & Custom* 120.

¹⁷⁶S 68 of the Code.

¹⁷⁷Mamashela M (2004) *SAHRJ* 622.

¹⁷⁸622.

¹⁷⁹Proclamation 16 of 1905.

¹⁸⁰S 9(1).

“The administration of customary law at the level of white-staffed Native Commissioner Courts¹⁸¹ ironically provided (new) opportunities for women and youth to challenge patriarchal authority and the unitary, unchanging conception of tradition expressed in the customary law regime.¹⁸² The records of litigation in those courts provide windows into domestic struggle and contests over tradition among rural South Africans in the apartheid era.”¹⁸³

The Native Commissioner Courts were initially receptive of black women’s claims,¹⁸⁴ and had the discretion to apply customary or common law.¹⁸⁵ An example is the case of *Dyasi v Dyasi*¹⁸⁶ that considered the servitude of use and occupation which was regulated by Proclamation 142 of 1910.¹⁸⁷ In *Dyasi v Dyasi* the widow sought ejectment of the heir from her late husband’s property to which she had a *usufructuary* right. The court held that *usufruct* has no equivalent in Native Law; that the legislator intended widows to have certain rights and in case of a disagreement between widow and heir, the widow’s right to the use and occupation of the late husband’s land should be paramount. Thus the widow could use the property exclusively as long as she complied with the relevant Proclamations.¹⁸⁸

The Native Court officials therefore provided black women “indirect access” to land. However, as courts had to apply the law, they could not prohibit the exclusionary laws, policies and practice that did not allow women to acquire land rights.

Even when quitrent and permission to occupy were introduced in 1969,¹⁸⁹ women were not allowed to inherit quitrent land except if so decreed by an

¹⁸¹Which were originally established to administer justice according to Native law and custom: Lewin J “Native Courts and British Justice in South Africa” 1944 *Journal of the International African Institute* 448 448 <http://www.jstor.org/stable/1156303> (accessed 08/11/2010).

¹⁸² 448.

¹⁸³McClendon T V *Genders and Generations Apart: Labour Tenants and Customary Law in Segregation-Era South Africa 1920s to 1940s* (2002) 3.

¹⁸⁴8.

¹⁸⁵Lewin J 1944 *JIAI* 448.

¹⁸⁶1935 NAC C & O 1. The Native Appeals Court (NAC) was the court of appeal from the Native Commissioner Courts.

¹⁸⁷See note 93 above. The servitude was overlooked in *Wormald NO and Another v Kambule* 2006 3 SA 562 (SCA).

¹⁸⁸*Dyasi v Dyasi* 1935 NAC C & O 1 p 9 – 10.

¹⁸⁹By Proclamation R 188 of 1969. See 2 3 3 2 and 2 3 4 2 above.

official.¹⁹⁰ This is because the regulations and rules of Proclamation R188 of 1969 were supposed to be in accordance with the customary law of succession and as quitrent land devolved through the principle of male primogeniture, it only allowed inheritance by the first male heir.¹⁹¹ This law greatly disadvantaged widows who could not inherit their deceased husbands' allotments. However as described above,¹⁹² in 1905 the law was amended to allow the widow to use the land. This only allowed her a *usufructuary* right and not ownership rights, because the property still vested in the son on the father's death. Due to the son's superior right, he could therefore expel the widow at any time.¹⁹³ Furthermore, it was against the law to grant approval to transfer quitrent land to a black woman, except in circumstances specifically provided for in the Regulations.¹⁹⁴ An example where it was indeed possible was the allotment of Trust land to a widowed female head of a family by the Bantu Affairs Commissioner.¹⁹⁵

Where permission to occupy was concerned, the right was granted to the head of the family, which could include females,¹⁹⁶ but in practice was usually issued to men only.¹⁹⁷ Only if a widow was the head wife of a holder of permission to occupy, could she continue to occupy the land after her husband's death until her own death or entry into another customary union.¹⁹⁸ The right to occupy lapsed if the land was not occupied or beneficially cultivated for a period of six to twelve months after the death of the registered holder.¹⁹⁹ The land remained registered in the name of the deceased, thus upon lapsing of the right to occupy, the Commissioner allotted the land to the

¹⁹⁰Reg 12(4) read with reg 37 (1); Du Plessis W & Pienaar J M "The more things change, the more they stay the same" in *Essays in Roman Law, Roman-Dutch Law and the Legal History* 73

¹⁹¹See 2 3 4 2 above.

¹⁹²See 2 5 2 above.

¹⁹³Mamashela M (2004) *SAJHR* 624.

¹⁹⁴Reg 20 (4)(c)(i).

¹⁹⁵Reg 49 (1)(b). Also see reg 56(5)(b)(i).

¹⁹⁶Reg 49 (1)(b).

¹⁹⁷Claassens A & Ngubane S "Women, land and power: the impact of the Communal Land Rights Act" in Claassens A & Cousins B (eds) *Land, Power & Custom: Controversies generated by South Africa's Communal Land Right Act* (2008) 154 165 – 167.

¹⁹⁸Reg (53)(1)-(2).

¹⁹⁹Reg 53(2)(a)-(c).

heir of the deceased or if no such heir existed to any person who was legible in terms of the Regulations.²⁰⁰

Mamashela²⁰¹ describes how a significant number of black women abandoned rural areas as a result of the social, agricultural and economic downgrade in these areas resulting from the Land Acts and other *apartheid* laws. The Government was not in favour of this, as its policies preferred rural women to maintain the rural home for the male migrant labourer and inevitably kept blacks out of towns. Some women became illegal immigrants wherever they worked outside the rural confines. Some women resorted to living with men in their mining compounds, thus causing men and women to desert their rural partners. More recently these practices also contributed to the spread of diseases such as HIV/AIDS, as some men still kept their rural partners. Some women could not return to the rural areas as the land they left behind belonged to the husband's family. This caused a breakdown of family structures in rural areas and wages intended for the rural household were now being used to maintain the new families. All of these factors acting together stripped black people, particularly women, of their basic human right to dignity, freedom to move in their country and a right to shelter, let alone land.

2 6 Conclusion

This chapter set out to describe the prevailing customary landholding before colonialism, which was governed by customary law without fixed boundaries. After the arrival of the colonial authorities, first the Dutch in 1652 and later the British in 1795, the existing traditional land system was ignored and individualised landholding systems, based on racial segregation, were gradually enforced. The discriminatory policies were introduced by the British colonial authorities and embedded further by the South African colonial administration by means of *apartheid*. Different forms of land control prevailed

²⁰⁰Reg 53(3)(a)-(b).

²⁰¹In Mamashela M (2004) *SAJHR* 626-628. See also UN "Facing the Future Together: Report of the United Nations Secretary General' Task Force on Women, Girls and HIV/AIDS in Southern Africa" 10*UNAIDS*<http://data.unaids.org/publications/External-Documents/sgreport_facingfuture_en.pdf> (accessed 14/05/2012).

in different areas of South Africa with rural black women mainly accessing land through male relations while widows were sometimes allowed use rights to the land, in terms of the colonial laws and customary law. The Native Courts were more lenient towards women and granted them “indirect access” to land.

The chapter indicated clearly that waves of dispossession have resulted in insecure tenure and extremely limited, if any, access to land for non-white South Africans. Although all non-whites were detrimentally affected, it was particularly black rural women whose tenure was especially insecure and vulnerable. The racial approach to land control, coupled with limited, insecure forms of tenure, resulted in a diverse, fragmented tenure system.²⁰² It was within this context that tenure reform had to be embarked upon. In the next chapter the new political dispensation and resulting land reform programme and measures promulgated there under, will be discussed.

²⁰²Pienaar J M & Kamkuemah A “Farm Land and Tenure Security: New Policy and Legislative Developments” (2011) 22 *Stell LR* 724-727.

CHAPTER THREE

NEW CONSTITUTIONAL DISPENSATION

3 1 Introduction

This chapter explores the tenure reform measures that were adopted post 1994, based on the historical foundation of land tenure forms discussed in Chapter two. Firstly, a short account of the overall land reform programme will be given before looking at the existent land policy. Thereafter an exposition of the interim tenure reform measures and the long-term measures employed to bring tenure reform in line with the new Constitutional dispensation will be set out. This exposition gives a broad general overview of the tenure overarching framework, policies and international law, and in so doing initiate the analysis of the impact of these measures on black rural women in particular, in Chapter four below.

3 2 The land reform programme

The commencement of the Interim Constitution 200 of 1993¹ and later the final Constitution, 1996, saw the introduction of a tripartite land reform programme, namely redistribution, restitution and tenure reform. The White Paper on South African Land Policy, 1997 identifies eight reform principles which include social justice, poverty alleviation and gender equity. This is a clear indication that the programme is specifically (or ought to be) gender-orientated.²

¹The property clause, s 28 of the Interim Constitution, 1993 did not expressly provide for land reform, its ss 121 to 123 referred to future land reform legislation, in particular restitution. The national commitment to land reform was confirmed in the property clause of the final Constitution 109 of 1996, s 25.

² The other five land reform principles are Needs-based response, Government as facilitator, Flexibility, Participation, Accountability and Democratic decision making and Economic viability and Environmental sustainability: DLA *White Paper on South African Land Policy*, 1997 12 ; Pienaar J M "Broadening access to land: The case of African rural women in South Africa" (2002) 2 *TSAR* 177 200.

The land reform programme's key components are land administration and land control measures, financial assistance and the three inter-connected parallel land reform programmes mentioned above.³ These land reform programmes are contained in the Bill of Rights of the final Constitution of the Republic of South Africa, 1996, in section 25. Section 25(5) expressly provides for the redistribution programme:

“The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”

The purpose of the redistribution programme is to give landless poor, labour tenants, farm workers and emerging farmers access to land, for residential and productive purposes, in order to improve their livelihood.⁴ The programme would also pay special attention to the needs of women. Thus, the target was set and still is to redistribute thirty percent of all agricultural land by 2014.⁵ This programme makes it possible for the poor and disadvantaged people to buy land with assistance from the Government's Settlement/Land Acquisition Grant,⁶ in accordance with the willing-buyer-willing-seller arrangement.⁷ According to the statistics on land redistribution, 322,844.9931 hectares have been delivered through land reform to date,⁸ indicating that its targets have not been met more than eighteen years into the new Constitutional dispensation. Accordingly, there has been a reprioritisation in the Department of Rural Development and Land Reform to provide clear support to land reform beneficiaries that have acquired farms since 1994 through

³DLA *White Paper on South African Land Policy, 1997* 9.

⁴ 4.3.

⁵ DRDLR *Annual Report 1 April 2009 – 31 March 2010* 27; Greenberg S Research Report 4 of PLAAS *Status Report on Land and Agricultural Policy in South Africa 2010* 4. However, Government contemplates the possible extension of the deadline for the transfer of 30% of agricultural land from 2014 to 2025. To meet the current target of 2014, 19.8m ha of land would have to be transferred: Legalbrief “Possible extension of 30% land target” (13/11/2008) *Legalbrief Today* <<http://www.legalbrief.co.za/article.php?story=20081113080403727>> (accessed 01/12/2011).

⁶DLA *White Paper on South African Land Policy, 1997* 4.1.

⁷ 4.3.

⁸ DRDLR *Annual Report 1 April 2010 – 31 March 2011* 36; PLAAS “Land Reform Summary (as at 31 March 2010)” PLAAS *Umhlaba Wethu* 10 (12/2010) 1; Davies R “Nkwinti spells out land reform target” (01/03/2012) *The Citizen* <<http://www.citizen.co.za/citizen/content/en/.../local-news?oid=262516&sn=Detail&pid=146861&Nkwinti-spells-out-land-reform-target>> (accessed 06/03/2012).

redistribution and restitution.⁹ This reprioritisation is proposed in the Green Paper on Land Reform, 2011 through the recapitalisation and development programme and through partnership with commercial farmers on a risk-sharing basis.¹⁰ This was necessary because of an estimated ninety percent of land reform projects in which productive farms that have been transferred to new owners ran aground due to lack of support from, *inter alia*, Government.¹¹

The mandate for the restitution programme¹² is expressly set out in section 25(7) of the Constitution, 1996:

“A person or a community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.”¹³

Restitution is only available to those who meet the legal requirements in section 25(7) and who had lodged their claims before 31 December 1998. Initially, the objectives of restitution were that the Commission on Restitution of Land Rights, created in terms of the Restitution of Land Rights Act 22 of 1994, would finalise all claims within a period of five years and all court orders would be implemented within a period of ten years.¹⁴ Apart from material restitution where possible, the purpose of the programme is also to provide settlement support to beneficiaries. Approximately 79 000 valid claims had been lodged.¹⁵

⁹DRDLR *Annual Report 1 April 2009 – 31 March 2010* 6; DRDLR *Annual Report 1 April 2010 – 31 March 2011* 36.

¹⁰Green Paper on Land Reform, 2011 5. This is along with other programmes and institutions for an improved trajectory of land reform. See 3 5 2 4 below for the discussion of the Green Paper; DRDLR *Annual Report 1 April 2010 – 31 March 2011* 14, 36.

¹¹ Hartley W “Data show serious slowdown in resolution of land claims” *Business Day* (28/10/2010). See also 3 5 2 4 4 for the current challenges and weakness in land reform identified in the Green Paper on Land Reform, 2011 5. 3 5 2 4 5 provides for improvement on these challenges.

¹² The Restitution of Land Rights Act 22 of 1994 is the legislative measure giving content to s 25(7) of the Constitution of the Republic of South Africa, 1996 for the restitution of rights in land to those dispossessed of land in terms of racially based past policies.

¹³ The 19 June 1913 was the date of commencement of the Black Land Act 27 of 1913.

¹⁴ Department of Agriculture and Land Affairs *White Paper on South African Land Policy*, 1997 4.13; Badenhorst P J, Pienaar J M & Mostert H *Silberberg and Schoeman’s The Law of Property* 5 ed (2006) 629.

¹⁵Department of Land Affairs *Annual Report 1 April 2008 – 31 March 2009* 5-7.

Because not all the restitution claims have been settled yet, as envisaged in the White Paper on South African Land Policy,¹⁶ the target remains to settle all outstanding claims and in addition, to provide settlement support to beneficiaries.¹⁷ Statistics indicate that a total of 457 land claims were finalised between 1 April 2010 and 31 March 2011. The Commission on Restitution of Land Rights furthermore continued finalising research on outstanding claims.¹⁸ The Report does not specify how many claims are still outstanding, although on 31st October 2009 there were still 4222 outstanding claims.¹⁹ Thus the objectives of the restitution programme have also not been met. The Department of Rural Development and Land Reform acknowledges a decline in the pace of settling outstanding claims, attributing this to budgetary constraints during the period from 2009 to 2010.²⁰ In many instances where land was restored by way of going concerns, projects have failed. In this context mention was already made above of the recapitalisation programme, in order to revitalise these projects.²¹

In contrast to restitution and redistribution, tenure reform is inherently difficult to quantify and furthermore has no specific target or deadline. In this regard the focus will be on assessing whether the main aims of the tenure programme have been met. Section 25(6) of the Constitution, 1996 provides for tenure reform by stating that:

“A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.”

Section 25(9) mandates Parliament to enact legislation referred to in section 25(6) above. As a result of the race-based tenure forms passed down from

¹⁶DLA *White Paper on South African Land Policy*, 1997 4.13.

¹⁷DRDLR *Annual Report 1 April 2010 – 31 March 2011* 34.

¹⁸34.

¹⁹ Commission on Restitution of Land Rights “Statistics on Settled Restitution Claim Cumulative Statistic: 1995-31 October 2009” (31/10/2009) DRDLR<http://www.ruraldevelopment.gov.za/DLA_Internet/content/pages/Programmes_Restitution_Statistics.jsp> (accessed 28/11/2011).

²⁰DRDLR *Annual Report 1 April 2009 – 31 March 2010* 27.

²¹DRDLR *Annual Report 1 April 2010- 31 March 2011* 36.

the pre-1994 Government,²² it is not a simple task to provide legally secure tenure or comparable redress. Not only are the tenure forms complex and varied, but they are also numerous, as explained in Chapter two. Untangling the pre-1994 tenure system is therefore a complex process, but one which essential for South Africa.²³

Tenure is the legal basis under which land is held, accordingly tenure reform is the transformation of the legal basis under which land is held, acquired and controlled.²⁴ The tenure reform programme has three main aims, namely: shifting from permit-based tenure to legally enforceable rights to land, allowing people to choose the specific tenure system that is appropriate to their practical circumstances and recognising and protecting *de facto* tenure rights.²⁵ These aims are furthermore subject to the imperatives of equality and dignity contained in the Constitution.

Where the first aim of tenure reform is concerned, the Abolition of Racially Based Land Measures Act 108 of 1991 did not repeal the Proclamations and Regulations pertaining to land tenure forms pre-1994. Accordingly old order rights remained in place²⁶ until specifically abolished or amended. This aim to move away from the old order rights has therefore only been fulfilled partially as some rights have been upgraded, but not all.²⁷

²² See Chapter 2.

²³ See 3.3 below.

²⁴ Carey Miller DL & Pope A *Land Title in South Africa* (2000) 456-461; See also Jacobs P J *Tenure Security under the Communal Property Association Act 28 of 1996: An Analysis of Establishment and Management Procedures with Comparative Reference to the Sectional Titles Act 95 of 1986* LLM thesis University of Stellenbosch (2011) 6-8. See also the detailed explanation under 3.4.3 below.

²⁵ DLA *White Paper on South African Land Policy, 1997* 4.16; Badenhorst P J *et al Silberberg and Schoeman's The Law of Property* 607.

²⁶ Such as Proc 188 of 1969 that provides for quitrent tenure and permission to occupy. See 2.3.4.2 above.

²⁷ Pienaar J M "Tenure reform in South Africa: Overview and challenges" (2011) 1 *Speculum Juris* 108-133.

3 3 The need for tenure reform

As explained, under the new Constitutional dispensation, tenure reform is now a constitutional imperative contained in section 25(6), read with section 25(9) of the Bill of Rights.

Given the *apartheid* legacy which resulted in inferior forms of landholding and resources for blacks and the consequential unequal distribution of land, the current Government is seeking to correct the unequal distribution of land, and everything connected therewith, through land reform.²⁸ South African land reform seeks to bring about both corrective and distributive justice.²⁹ This is evident in the principles of the Constitution centered on human dignity, equality and freedom.³⁰ Also, subsections 25(4)³¹, 25(5)³² and 25(8)³³ of the Bill of Rights signify a national commitment, through reform, to equitable distribution of all natural resource in an attempt to rectifying the results of past racial discrimination.

At the same time, the aim is to bring about social cohesion to repair the social fragmentation and underdevelopment caused by colonialism in the rural areas.³⁴ This can be done by redressing the injustices of *apartheid*; fostering national reconciliation and stability; *inter alia* to underpin economic growth and to improve household welfare and alleviate poverty.³⁵ Consequently, tenure

²⁸ Constitution of the Republic of South Africa, 1996 s 25(4) and 25(5).

²⁹ Walker C "Piety in the Sky? Gender Policy and Land Reform in South Africa" in Razavi S (ed) *Agrarian Change, Gender and Land Rights* (2003) 113 118.

³⁰ Constitution of the Republic of South Africa, 1996 s 7 and the limitation clause s 36.

³¹ "For the purposes of this section –

- (a) the public interest include the nation's commitment to land reform, and to reforms in bringing about equitable access to all South Africa's natural resources; and
- (b) property is not limited to land."

³² "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

³³ "No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1)."

³⁴ Maylam P *A History of the African People of South Africa: from the Early Iron Age to the 1970s* (1986) 138-144; DRDLR Green Paper on Land Reform, 2011 1. See Chapter 2 above.

³⁵ DLA *White Paper on South African Land Policy, 1997 v.*

reform must not only provide redress for insecure title, but must also address the gender inequalities with regard to land in rural areas, which is the focus of this study.

The approach in the White Paper on Land Reform, 1991,³⁶ indicates that “[a]ccess to land is a basic human need” and “[f]ree enterprise and private ownership [is] the appropriate system to fulfil this need”. More importantly, land is an integral part of rural livelihood. South Africans need access to land and strong secure tenure therein. The right or opportunity to use the land alone will not protect against arbitrary eviction, but it is essential to limit and avoid eviction, to use land as a national asset and to attain constitutional redress.³⁷

Given the history of women’s access to land, there is a need to strengthen and protect rural black women’s tenure.³⁸ This will empower them so they can be economically viable and successful in food or resource production; which in turn contributes to sustainable rural development.³⁹ However, merely repealing racially discriminatory measures will not in itself effect change:

“[T]his will not in itself result in a system of land law which meets the needs and aspirations of South Africans in a domestic South Africa. There will be a need to construct a new system which will be based on a clear understanding of how the existing property relations have developed, and why those relations do not satisfy people’s needs.”⁴⁰

The success of all the land reform programmes requires more than mere access to land.⁴¹ Access to land entails the opportunity to use the land and is

³⁶ RSA *White Paper on Land Reform, 1991* B-91; Mokgope K *Land reform, sustainable rural livelihood and gender relations: A case study of Gallawater A farm* PLAAS Research Report 5 17 23.

³⁷ Pienaar J M (2002) *TSAR* 177-200; Badenhorst P J *et al Silberberg and Schoeman’s The Law of Property* 588; Jacobs P J *Tenure Security under the Communal Property Association Act* 5.

³⁸ See 2 5 above.

³⁹ Claassens A & Ngubane S “Women, land and power: the impact of the Communal Land Rights Act” in Claassens A & Cousins B (eds) *Land, Power and Custom: Controversies generated by South Africa’s Communal Land Rights Act* (2008) 154 178-179.

⁴⁰ Budlender G & Latsky J “Debating the Land Issue: Unravelling Rights to Land and to Agricultural Activity in Rural Race Zones” (1990) *SAJHR* 155 155.

⁴¹ DLA *White Paper on South African Land Policy*, 1997 2.1.

linked to access to food and non-commoditised resources.⁴² However, the person with such access does not necessarily have secure legal rights in the land. It is clear that, as set out in Chapter two, black people were denied access to land and were restricted to certain areas. Most black people were disinherited of their land rights and although some may have access to land they do not have legal rights to it, let alone secure tenure therein. Specifically women in rural areas have access to a land, *inter alia* through marriage, and produce about eighty percent of food growth in Africa. However, they own only two percent of all agricultural land.⁴³ Of the 25 483 beneficiaries of land reform in the Department of Rural Development and Reform statistics, only 5 795 of them are female.⁴⁴ Although both access to land and secure tenure in the land are required, women's access to land is substantially limited,⁴⁵ which inevitably has an adverse effect on attaining secure tenure.

Even so, access to land and secure tenure are not enough. Legal reform alone will not make secure tenure possible as discriminatory social behaviour and practices, especially in the rural areas, still continue.⁴⁶ However, law as the authority, has to reflect respect and awareness for women's rights, which the society then conforms to. Law is very important in this regard, but as a legal instrument and tool, it has limitations. The following section will give a detailed exposition of all the legal post-1994 tenure reform developments and measures.

⁴² These include grazing, firewood, craft materials, medicinal herbs etc: Walker C "Piety in the Sky?" in *Agrarian Change, Gender and Land Rights* (2003) 117.

⁴³ Pienaar J M (2002) TSAR 180; Manuel T, Speech delivered at Fourth World Congress on Rural Women in Durban, 24 April 2007 2 <http://www.nda.agric.za/docs/WCRW/Speech_Trevor_WCRW.pdf> (accessed 20/04/2011); Claassens A & Ngubane S "Women, land and power: the impact of the Communal Land Rights Act" in Claassens A & Cousins B (eds) *Land, Power & Custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) 154 178-179.

⁴⁴ DRDLR *Annual Report 1 April 2009 – 31 March 2010* 29.

⁴⁵ Bohler-Muller N & Daniels B "Does the Communal Land Rights Act Really Protect the Rights of Rural Women town Land?" *Africagrowth Agenda* 27. This issue is dealt with in detail in Chapter 4.

⁴⁶ Bohler-Muller N & Daniels B "Does the Communal Land Rights Act Really Protect the Rights of Rural Women town Land?" *Africagrowth Agenda* 27. Also see 2 5 2 above and 3 4 5 2 – 3 4 5 3 below.

3 4 Tenure reform post – 1994

3 4 1 Introduction

This section will describe tenure reform after the new Constitutional dispensation was embarked upon. Firstly, tenure reform will be looked at in an international context. Thereafter the definition of “tenure reform” will be given and the specific tenure reform approach in South Africa will be set out. The main aim of tenure reform in South Africa is to move away from the *apartheid* permit-based approach to a rights-based approach. The Constitution of the Republic of South Africa, 1996 and various legislative measures promulgated under the tenure reform programme, to a greater or lesser extent, all contribute to this aim.⁴⁷

3 4 2 International Context

Many tenure reform debates are currently concerned with the communal areas of Africa, the indigenous areas of Latin America, Asia and the Pacific region where customary communal interests exist side-by-side with private ownership.⁴⁸ Overall, it has been recognised that secure land rights are a public good.⁴⁹ Thus, provision is made in various international and regional instruments which oblige state parties to advance and protect the general well-being and rights of their people, which include measures that are relevant to tenure reform.⁵⁰

The main relevant measures are the International Covenant on Economic, Social and Cultural Rights, 1966⁵¹ which makes provision for the right to

⁴⁷Pienaar J M (2002) *TSAR* 199.

⁴⁸ For an African perspective see Bruce J W & Migot-Adholla S E (eds) *Searching For Land Tenure Security in Africa* (1994) 41-264;

⁴⁹Adams M, Cousins B & Manona S “Land Tenure and Economic Development in Rural South Africa: Constraints and Opportunities” in Cousins B (ed) *At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century* (2000) 111 112.

⁵⁰Also relevant in this context are the international instruments’ obligation to member states to do away with all laws and practices that discriminate against women.

⁵¹ South Africa signed the ICESCR on 3rd October 1994, but has not ratified it yet: United Nations Treaty Collection “International Covenant on Economic, Social and Cultural Rights” (03/11/2011) <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en> (accessed 03/11/2010); Office of the United Nations High

adequate food and housing.⁵² The main sources of interpreting the provisions of the Covenant are the General Comments adopted by the Committee on Economic Social and Cultural Rights.⁵³ General Comment Twelve interprets the right to “adequate food” to entail physical and economic accessibility and that:

“Economic accessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food. Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes.”⁵⁴

In South African rural areas’ access to food and housing is inevitably linked to access and secure tenure in land as a means of production and residence. Thus, access to adequate food and housing as set out in the Covenant, is achievable through the tenure reform programme.

In addition, the Convention on the Elimination of All Forms of Racial Discrimination, 1966 is aimed at the elimination of all forms of racial discrimination and encouraging universal respect for human dignity without distinction on any grounds.⁵⁵ Another international instrument, the Convention on the Elimination of All Forms of Discrimination Against Women, 1979,⁵⁶ requires signatory states to ensure that women have equal rights to men in

Commissioner for Human Rights “Committee on Economic, Social and Cultural Rights-General Comments” (2007) OHCHR <<http://www2.ohchr.org/english/bodies/cescr/comments.htm>> (accessed 10/03/2011).

⁵²Article 11.1. Also see 3.3 above on access to land.

⁵³The CESCR has adopted 21 General Comments to date: Office of the United Nations High Commissioner for Human Rights “Committee on Economic, Social and Cultural Rights-General Comments” (2007) OHCHR <www2.ohchr.org/english/bodies/cescr/comments.htm> (accessed 18/05/2012).

⁵⁴ CESCR General Comment 12 Para 13: United Nations: Economic and Social Council “Committee on Economic, Social and Cultural Rights: Twentieth Session” (2007) OHCHR <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/420/12/PDF/G9942012.pdf?OpenElement>> (accessed 16/05/2011).

⁵⁵Office of the United Nations High Commission for Human Right “Committee on Economic, Social and Cultural Rights- General Comments” OHCHR.

⁵⁶ South Africa signed the Convention on 29th January 1993 and ratified it on the 15th December 1995: United Nations Treaty Collection “Convention on the Elimination of All Forms of Discrimination Against Women” (2012) <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en> (accessed 03/10/2010).

the field of education, employment, healthcare and other areas of economic life.⁵⁷

Furthermore, the African Charter on Human and Peoples' Rights, 1981 seeks to protect the rights and freedoms of all inhabitants of the party states, *inter alia* the right to equality, the protection of moral and traditional values recognised by the community and the right to a generally satisfactory environment favourable to their development.⁵⁸

The Constitution of the Republic of South Africa mandates the courts, tribunals and forums to consider international law, such as the above, when interpreting the Bill of Rights.⁵⁹ These international instruments all give a description of the kinds of rights that humans should enjoy and contribute to defining the content and standard of, in this regard, tenure security. Thus, providing that tenure reform should *inter alia* grant access to adequate housing, it should not be discriminatory and it should be based on equality. This supports the necessity to provide secure tenure to rural black women.⁶⁰

3 4 3 "Tenure Reform"

Drawing from the above international context to determine the meaning of tenure reform, it is evident that land not only determines socio-economic status, but also incorporates numerous traditional values in Africa.⁶¹ Tenure is the legal basis under which land is held and occupied. It defines the legal rights of the rights holder and can be attained through ownership, lease, tenancy or any other kind of landholding.⁶² The kind of tenure has an impact

⁵⁷ CEDAW Arts 10 – 13, Art 14 specifically deals with the rights of rural women.

⁵⁸ Arts 3, 17 and 24 respectively.

⁵⁹ Constitution, 1996 s 39(1)(b).

⁶⁰ See 2 5 and 3 3 above.

⁶¹ Cousins B "Contextualising the controversies: dilemmas of communal tenure reform in post-apartheid South Africa" in Claassens A & Cousins (eds) *Land, Power & Custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) 3.

⁶² Carey Miller D L & Pope A *Land Title in South Africa* 308-309; Mokgope K *Land reform, sustainable rural livelihood and gender relations: A case study of Gallawater A farm* 17. See also 3 2 above and 7 3 4 below.

on the individual, the household as a unit, the community and at a national level, thus there needs to be an institutional framework that regulates it.⁶³

As people are more likely to use land intensively and productively if their right to the land are secure,⁶⁴ tenure security is essential for sustainable rural livelihood. Rural livelihoods are especially heavily reliant on natural resources,⁶⁵ which are obtained through access to land and security therein.

Accordingly, tenure reform is the transformation of the legal basis under which land is held, acquired and controlled. It is focused on securing the legal rights-basis of different forms of landholding.⁶⁶ Therefore tenure reform has potentially greater implications for reform of property law, compared to the redistribution and restitution programmes, as it is concerned with providing for the allocation of new rights within the existing and adapting property system.⁶⁷

South Africa has developed a two-fold approach to tenure reform comprising interim and long-term measures, explained in more detail below.

3 4 4 The South African approach

3 4 4 1 Introduction

The tenure reform programme is probably the most complex programme of the three land reform programmes as it deals with complex and overlapping rights of use, access and ownership.⁶⁸ The White Paper on South African Land Policy, 1997 and a variety of legislation seek to *inter alia* address the

⁶³ Jacobs P J *Tenure Security under the Communal Property Association Act* 17-18.

⁶⁴ Martins A *et al* "Land Tenure and Economic Development in Rural South Africa: Constraints and Opportunities" in Cousins B (ed) *At the Crossroads: Land and Agrarian Reform in South Africa* 112, 114.

⁶⁵ Mokgope K *Land reform, sustainable rural livelihood and gender relations: A case study of Gallawater A farm* 15-17.

⁶⁶ Carey Miller D L & Pope A *Land Title in South Africa* 456-461. See more detail at 3 2 above and 7 3 4 below.

⁶⁷ Carey Miller D L & Pope A *Land Title in South Africa* 577.

⁶⁸ 456-457.

challenges of land reform programmes⁶⁹ and particularly tenure reform in this regard. The state commenced post-1994 with two main categories of tenure measures, the interim tenure reform measures and the long term measures. The Acts promulgated in line with both these categories of measures will be analysed to determine what they seek to achieve and how they do this. This exercise will also be focused on establishing whether they effectively strengthen land tenure in accordance with the tenure reform programme and the land reform programme as a whole. The point of departure will be the White Paper on South African Land Policy, 1997 before looking at the legislative measures.

3 4 4 2 Policy

The White Paper on South African Land Policy acknowledges that land is a special resource because it sustains our livelihood and economy.⁷⁰ As explained above, past land policies were a major cause of insecurity, landlessness, homelessness and poverty in South Africa.⁷¹ Tenure reform must address these problems that were created in the past, but at the same time address present and continuing insecurity as well. Thus, as part of the new Constitutional dispensation the White Paper on South African Land Policy set its main goals to effectively deal with,

- (a) the injustices of racially based land dispossession of the past;
- (b) the need for a more equitable distribution of land ownership;
- (c) the need for land reform to reduce poverty and contribute to economic growth;
- (d) security of tenure for all; and
- (e) a system of land management which will support sustainable land use patterns and rapid land release for development.⁷²

⁶⁹See 3 2 above.

⁷⁰DLA *White Paper on South African Land Policy*, 1997 2.1.

⁷¹7. See also 2 3 above.

⁷²DLA *White Paper on South African Land Policy*, 1997 7.

The Policy emphasised that the success of the land reform programme is dependent on more than mere access to land.⁷³ Instead, its success lies mainly in an integrated Government policy and delivery system, as well as the establishment of cooperative partnership between the state and private and non-governmental sectors.⁷⁴ The Policy sets out various issues to be addressed that include Land Redistribution, Restitution and Land Tenure Issues.⁷⁵ As part of the Land Tenure Issues, the Policy advocates that one of the first priorities of tenure reform must be to relieve the overcrowding on land rather than to make it worse. This overcrowding is further exacerbated by overlapping land rights.⁷⁶ Overcrowding has to be stabilised in a manner which accommodates the vested interests and needs of all parties. This may mean that Government will have to make additional land available so that those who have weaker rights are provided with a viable alternative when land rights are formalised.

An important Policy principle is to build a unitary non-racial system of land rights for all South Africans. In achieving a rights-based approach, all tenure reform processes must recognise and accommodate the *de facto* vested rights which exist on the ground. Furthermore, new tenure systems and laws should be brought in line with reality as it exists on the ground and in practice.⁷⁷ This implies a bottom-up approach to formulating and promulgating new tenure laws, as opposed to top-down law implementation which does not effectively deal with the situation on the ground and excludes the voices of those that will be affected by these laws.⁷⁸

⁷³ See 3.3.

⁷⁴ DLA *White Paper on South African Land Policy*, 1997 7. Also see 4.3.2 and 4.4 below.

⁷⁵ 27-34. Other issues the Policy focuses on are the Constitutional, Land Market, Institutional, Environmental and Budgetary Issues 15-35.

⁷⁶ DLA *White Paper on South African Land Policy*, 1997 3.19.

⁷⁷ 60-61.

⁷⁸ Mnisi Weeks A & Claassens A "Tensions between Vernacular Values that Prioritise Basic Needs and State Versions of Customary Law that Contradict Them" (2011) 22 *Stell LR* 823 833-837.

3 4 4 3 Legislation

3 4 4 3 1 *Interim measures*

The interim measures were implemented to protect historically insecure tenure on an interim basis only, while the legislature formulated and assessed means and conditions to promulgate long-term legislative measures to provide for secure tenure under the new Constitutional dispensation.⁷⁹ These interim measures include:

The Interim Protection of Informal Land Rights Act 31 of 1996 which was promulgated as an interim measure for the protection of insecure interests in land which are otherwise not adequately protected by law, while awaiting long term comprehensive legislative measures envisaged in terms of section 25(6). This is in line with section 25(9) that mandates Parliament to enact the legislation referred to in section 25(6). The White Paper on Land Policy, 1997 states that:

“[T]he Act recognizes the fact that most long-term occupiers of rural land in the former homeland and South African Development Trust areas are not able to establish a clear legal right to the land they occupy. This is despite the fact that they reside on and occupy the land as if they are owners and have invested in the land on the assumption of permanent rights to it. They are also recognized by their neighbours and other community members as the uncontested “owners” of the land.”⁸⁰

The Interim Protection of Informal Land Rights Act was supposed to lapse at the end of 1997, but it was amended by the Land Affairs General Amendment Act 61 of 1998. This Act authorises the Minister to extend application of the former Act for a twelve month period at a time.⁸¹ The application of this Act is

⁷⁹ DLA *White Paper on South African Land Policy, 1997* note 4 box 4.1 & 4.17; See also Van Aswegen A “Land” in Mostert H, Pienaar J M & Van Wyk J *LAWSA* 14 2 ed (2010) paras 121-126; Pienaar J M & Kamkuemah A “Farm Land and Tenure Security: New Policy and Legislative Developments” (2011) 22 *Stell LR* 724 726-727.

⁸⁰ 4.17 box 4.9. See 3 4 3 above.

⁸¹ Preamble of the Act and s 7.

presently still extended annually due to the complexity and slow pace of tenure reform.⁸²

This Act has contributed to elevating informal rights to provide more secure tenure as opposed to their status pre-1994, especially in areas within the former national states, self-governing territories and South African Development Trust land.⁸³ The Act widely defines an “informal right to land” to mean:

- a) the use of, occupation of or access to land in terms of:
 - (i) any tribal, customary or indigenous law of the tribe;
 - (ii) the custom, usage or administrative practice in a particular area or community, where the land in question at any time formed part of the South African Development Trust land, the self governing territories or the independent national states;
- b) the right or interest in land of a beneficiary under a trust agreement in terms of which the trustee is a body or functionary established under an Act of parliament or the holder of a public office;
- c) beneficial occupation⁸⁴ of the land for a continuous period of not less than five years prior to 31 December 1997; or
- d) the use or occupation of any *erf* as if the person is the holder of Schedule 1 or 2 rights under the Upgrading Act, although that person is not formally recorded as such in the land rights register.⁸⁵

The protection lies in the provision that no person may be deprived of their above rights without his/her consent.⁸⁶ It remains an essential legislative instrument as it grants the main protection for communal land tenure,

⁸² Rural Development and Land Reform General Amendment Act 4 of 2011 in GG 34300 of 16 May 2011; Du Plessis W & Pienaar J M “The more things change, the more they stay the same” in *Essays in Roman Law, Roman-Dutch Law and Legal History* 83.

⁸³Badenhorst PJ *et al Silberberg and Schoeman's The Law of Property* 619.

⁸⁴ “Beneficial occupation” means the occupation of land by a person, as if he or she is the owner, without force, openly and without the permission of the registered owner: s 1(1)(i).

⁸⁵ Interim Protection of Informal Land Rights Act s 1(1)(iii).

⁸⁶S 2(1) - (3). See also Claassens A “Land Rights and Local Decision Making Processes: Proposals for Tenure Reform” in Cousins B (ed) *At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century* (2000) 129 130.

especially after the Communal Land Rights Act was declared unconstitutional in 2010.⁸⁷

Another interim legislative measure, the Upgrading of Land Tenure Rights Act 112 of 1991 was already promulgated pre-1994. The Act was amended by the Upgrading of Land Tenure Rights Amendment Act 34 of 1996 to bring it in line with the tenure policy and to ensure that the opinions of rural people are sought before any major decisions are made about their land.⁸⁸ In terms of the Act, a “land tenure right” is defined as,

“any leasehold, deed of grant, quitrent or any other right to the occupation of land created by or under any law and, in relation to tribal land, includes any right to the occupation of such land under the indigenous law or customs of the tribe in question.”⁸⁹

This Act provides for the upgrading of land tenure rights, *inter alia* permission to occupy, leasehold, deeds of grant and quitrent to ownership, if these were conferred on surveyed land.⁹⁰

3 4 4 3 2 Long-term measures

3 4 4 3 2 1 Introduction

The legislative measures that fall within this category are all aimed at altering the existing tenure system as a whole, as opposed to the interim measures.⁹¹ They include those that address the organisation of tenure and those pertaining to customary leadership structures.

3 4 4 3 2 2 Laws regarding the organisation of tenure

Firstly, the Communal Property Associations Act 28 of 1996 provides for the establishment of an accountable land holding entity - communal property

⁸⁷See 3 4 4 3 2 2 and 4 3 3 4 below.

⁸⁸S 3(1)(a)-(1B); Ntsebeza L “Traditional Authorities, Local Government and Land Rights” in Cousins B (ed) *At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century* (2000) 280-292.

⁸⁹S 1(c).

⁹⁰S 2 and Schedule 1. Carey Miller DL & Pope A *Land Title in South Africa* 579; Badenhorst PJ *et al Silberberg and Schoeman’s The Law of Property* 620-622.

⁹¹See 3 4 4 2.

associations - enabling disadvantaged communities and groups to acquire, hold and manage property under a written constitution on the basis of equity. In this way, the legislature established a new accessible land control form that allows landholding on a communal basis via the communal property association. Previously, it was possible for communities to acquire joint or common ownership, by way of a trust or juristic person, which required extensive capital resources and complex administrative systems. The Act thus aims to give broader legislative effect to the economic and social role that communal property tenure plays in customary tradition, while many people benefit from being in the group.⁹² This is the case as long as the group is organised according to the principles of democracy.⁹³

Secondly, the Extension of Security of Tenure Act 62 of 1997 was promulgated to specifically improve the tenure security of occupants on commercial farms. The Extension of Security of Tenure Act protects the tenure security of persons living on land belonging to another, prevents arbitrary evictions and seeks to secure tenure by ensuring the prerequisites for evictions are met.⁹⁴ It also provides for state-subsidised development for long-term security of tenure for occupiers. However, it has been argued that the Act has been ineffective in stemming the tide of evictions and has not achieved its goal of long term tenure security.⁹⁵ This Act will be discussed in further detail in Chapter four below.⁹⁶

Thirdly, the Land Reform (Labour Tenants) Act 3 of 1996 provides for the security of tenure of labour tenants and their associates and the acquisition of land by labour tenants. This is in light of the fact that the system of labour tenancy was borne out of *apartheid* legislation, thus the Act is necessary to

⁹² DLA *White Paper on South African Land Policy*, 1997 box 4.11; Carey Miller DL & Pope A *Land Title in South Africa* 467.

⁹³ S 2 and 9.

⁹⁴ Preamble and Long title of the Act.

⁹⁵ *Draft Tenure Security Policy*, 2010 1 and 8. See also Pienaar J M & Kamkuemah A (2011) *Stell LR* 727-728.

⁹⁶ See 4 3 3 3 below.

provide for tenure for labour tenants on commercial farms and protect against evictions and oppressive labour practices developing in future.⁹⁷

Last of all, the Communal Land Rights Act 11 of 2004 was promulgated and signed by the president in July 2004, but it never came into operation. This Act sought to give effect to subsections 25(6) and (9) of the Constitution, by providing for legal security of tenure and by replacing insecure “old order rights” with “new order rights”, then registering the “new order rights”. It sought to do this by recognising and formalising the traditional system of communal land tenure held both individually and communally and bringing it in line with the Constitution.⁹⁸ The entire Act was, however, declared unconstitutional by the Constitutional Court on the 11th of May 2010 because Parliament followed the incorrect tagging procedure, of the Act.⁹⁹

The constitutional challenge was brought before the North Gauteng High Court, Pretoria in the case *Tongoane v The National Minister for Agriculture and Land Affairs*,¹⁰⁰ by four rural communities from the Limpopo Province in 2008. The four applicant communities alleged that the use and occupation of the land that they occupy was regulated by customary law.¹⁰¹ Their challenge was based on two constitutional grounds, namely on the procedural ground that the manner in which the Communal Land Rights Act was enacted was

⁹⁷Badenhorst PJ *et al Silberberg and Schoeman's The Law of Property* 595.

⁹⁸622.

⁹⁹*Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 8 BCLR 741 (CC) para 66 and 97. See also Cousins B “Communal Land Rights Act Declared Unconstitutional” PLAAS *Umhlaba Wethu* 10 (12/2010); Khunou F S “Judgment takes the heart out of CLARA on procedural grounds: The Constitutional Court in *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* ZACC CCT 100/09/11-5-2010” (2010) 503 *De Rebus* 26-29; Claassens A & Mnisi S “Rural Women Redefining Land Rights in the Context of Living Customary Law” in Goldblatt B & McLean K (eds) *Women's Social and Economic Rights* (2011) 80-104.

¹⁰⁰Case no 11678/2006 decided 30 October 2009 per Lebowa J, unreported; Smith H “An overview of the Communal Land Rights Act 11 of 2004” in Claassens A & Cousins B (eds) *Land, Power & Custom: Controversies generated by the South African Communal Land Rights Act* 39.

¹⁰¹Paras 31-32. A challenge was also brought against ss 5 and 20 of the Traditional Leadership and Governance Framework Act. The High Court held that the role that traditional leaders play in respect of the latter sections is not unconstitutional as customary traditional leaders played an important role in land administration which is not in conflict with the Constitution: paras [55]-[58].

incorrect and on a substantive ground that the Act undermined their security of tenure as set out in the Constitution.¹⁰² Thus their arguments were that the Act had a significant impact on the provinces, thus the manner in which it was enacted was procedurally incorrect; that certain provisions of the Act undermined their security of tenure by giving traditional leaders undemocratic and unprecedented powers; that the Act discriminated against black owners of property as white owners in similar positions have full title to their land. The communities feared that their indigenous law based system of tenure would be replaced by the new system introduced by the Communal Land Rights Act. The High Court held that Parliament erred in good faith when it adopted the idea prescribed in section 75 of the Constitution and there was no suppression of the views of the provinces and that there was a public hearing on the matter.¹⁰³ On the substantive challenge the High Court held that the impugned provisions of the Communal Land Rights Act were inconsistent with the Constitution.¹⁰⁴ The order of invalidity was referred to the Constitutional Court for confirmation.

The Constitutional Court unanimously agreed that the Communal Land Rights Act replaced the living customary law regimes and traditional leadership institutions and rules and thus its enactment substantially affected the provinces. The Constitutional Court did not make a finding on the substantive issues as was done in the in the High Court. The Court only pronounced on the procedural issue that the procedure in section 76 of the final Constitution had to be followed, instead of section 75 that was followed. Parliament had failed to comply with its constitutional obligation to facilitate public involvement in the law-making process.¹⁰⁵ During the Constitutional Court proceedings the Minister of the Department of Rural Development and Land Reform stated that the Act did not accurately reflect current Government policy regarding

¹⁰²*Tongoane v Minister of Agriculture and Land Affairs* 2005 (1) SA 580 (CC) 4.

¹⁰³Para 19.

¹⁰⁴Paras 27-64. The following sections were declared unconstitutional and invalid: ss 2(1)(a); 2(1)(c) and (d); 2(2); 3;4(2); 5; 6; 9; 18; 19(2); 20 – 24 and 39.

¹⁰⁵See Cousins B “Communal Land Rights Act Declared Unconstitutional” PLAAS *Umhlaba Wethu* 10 (12/2010).

communal land, and could therefore be repealed *in toto*.¹⁰⁶ The court, however, ruled and gave an extensive account of the proper tagging of the Bill.¹⁰⁷ The court found that the Communal Land Rights Act was incorrectly tagged as a section 75 Bill, instead of section 76, thus declaring the Act unconstitutional and invalid.¹⁰⁸

This decision outlines the problems that need to be addressed by tenure legislation. The result of the judgment is that permit-based and other insecure land rights are still in existence.¹⁰⁹ There is now a gap in tenure legislation after the decision in *Tongoane*. One would expect the Department of Rural Development and Land Reform to correct the shortcomings of the Communal Land Rights Act and fill the gap it has left in tenure reform legislation through the new policy and legislative developments.¹¹⁰ However, the Department has excluded communal land in both the Draft Land Tenure Security Bill and the Green Paper on Land Reform, 2011.¹¹¹ Therefore, because these insecure rights still in existence have not been addressed in 2010 and 2011 policy and legislative measures, all the people's rights in these areas are still in limbo, despite the constitutional guarantees which seek to rectify the *apartheid* dispossessions.¹¹² The gap in tenure reform legislation has to be filled in order to fulfill the constitutional mandate and address the effects of racial land dispossessions as addressed in Chapter two. The drafters of tenure reform law have to promulgate legislation that is compatible with the supreme constitutional rights as well as national and international human rights standards, while also developing customary law,¹¹³ in order to provide secure tenure in communal traditional areas. This should take place after effective

¹⁰⁶Para 40.

¹⁰⁷Paras 55-82.

¹⁰⁸Para 97 and 110. The court however did indicate that land restitution and security of tenure must be treated by Parliament with the urgency and diligence they deserve: Paras 122-127, 133.

¹⁰⁹Pienaar J M & Kamkuemah A (2011) *Stell LR* 727.

¹¹⁰See 3 5 2 4 for a discussion of the Green Paper.

¹¹¹See 3 5 2 below.

¹¹²Cousins B "Communal Land Rights Act Declared Unconstitutional" *PLAAS Umhlaba Wethu* 10 (12/2010) 8.

¹¹³S 39(2) of the Constitution; Bohler-Muller N & Daniels B "Does the Communal Land Rights Act Really Protect the Rights of Rural Women to Own Land?" *Africagrowth Agenda* 27.

consultation with communities and leaders that will be affected by the tenure legislation.

A discussion of the long-term tenure measures pertaining to the customary leadership structures will follow.

3 4 4 3 2 3 Laws pertaining to customary leadership structures

These laws particularly provide for the recognition of traditional communities and traditional councils and their powers. They have an effect on customary law with regard to the acquisition of tenure, its regulation and related matters.¹¹⁴

The Traditional Leadership and Governance Framework Act 41 of 2003, provides for the recognition of traditional communities, traditional councils and its leaders and for the observation of customary law by these bodies. This Act, together with the now defunct sister Act, the Communal Land Rights Act,¹¹⁵ is criticised, in that it reverts back to the old state of affairs by giving far-reaching state-endorsed powers to (usually male) traditional leaders in rural communities.¹¹⁶ In addition, the Act re-established artificial boundaries demarcated by the *apartheid* Bantu Authorities Act 68 of 1951 and denies rural dwellers the right to opt out of a traditional leaders' jurisdiction. The powers to be exercised under the Act are essentially by an untransformed institution.¹¹⁷ Therefore, it is doubtful how this institution will provide for secure tenure according to the constitutional dictates. In *Tongoane and Others v*

¹¹⁴Mnisi Weeks and Claassens –criticised these laws in that they “undermine the vernacular values and the conditions for effective rights protection”: Mnisi Weeks S & Claassens A “Tensions Between Vernacular Values that Prioritise Basic Needs and State Versions of Customary Law that Contradict Them” (2011) 22 *Stell LR* 823 833.

¹¹⁵See 3 4 4 3 2 2 above and 4 3 3 4 below.

¹¹⁶Claassens A & Ngubane S “Women, land and power: the impact of the Communal Land Rights Act” in Claassens A & Cousins B (eds) *Land, Power & Custom: Controversies generated by the South African Communal Land Rights Act* 154 174 -175; Mnisi S *Reconciling Living Customary Law and Democratic Decentralization to Ensure Women’s Land Rights Security* PLAAS Policy Brief 32 (Nov 2010) 1; DLA *White Paper on South African Land Policy, 1997* 3.24; *Tongoane* para 80; Mnisi Weeks S & Claassens A (2011) *Stell LR* 833-837.

¹¹⁷S 28; Mnisi Weeks S & Claassens A (2011) *Stell LR* 834.

*Minister of Agriculture and Land Affairs and Others*¹¹⁸ the Chief Justice emphasised the relationship between the *apartheid* laws and the new traditional councils:

“The Black Authorities Act gave the State President the authority to establish ‘with due regard to native law and custom’ tribal authorities for African ‘tribes’ as the basic unit of administration in the areas to which the provisions of CLARA apply. ... It is these tribal authorities that have now been transformed into traditional councils for the purposes of s 28(4) of the Traditional Leadership and Governance Framework Act, 2003. ... And, in terms of s 21 of CLARA, these traditional councils may exercise powers and perform functions relating the administration of communal land.”¹¹⁹

Another legislative measure, the Traditional Courts Bill¹²⁰ seeks to align the traditional court system with the Constitution.¹²¹ The Bill achieves this by giving senior traditional leaders, as contemplated by the Traditional Leadership and Governance Framework Act, the power to become presiding officers in traditional courts in their communities.¹²² This Bill is controversial as there is no clear indication of how granting traditional leaders further legal decision-making powers, will guarantee securing land rights of ordinary rural people.¹²³

3 4 4 3 2 4 Conclusion

All in all, the legislative measures promulgated under the tenure reform programme provide for certain forms of landholding and protection of tenure. However, there are still various insecure rights that do not fall under the protection of any of the post-1994 land measures.

¹¹⁸2010 6 SA 214 (CC): the case that resulted in CLARA being declared unconstitutional.

¹¹⁹Para 24.

¹²⁰[B 15-2008]. See generally Mnisi Weeks S “The Traditional Courts Bill: Controversies around process, substance and implications” (2011) 35 SACQ 3-10 <<http://journals.sabinet.co.za.ez.sun.ac.za/WebZ/ej/AdvancedQuery?sessionid=01-60222-691878601>> (accessed 18/04/2012).

¹²¹S 3(1)(a).

¹²²S 4(1).

¹²³ See details in Mnisi Weeks S & Claassens A (2011) *Stell LR* 834-837. See also 4 3 3 4 below.

3 4 4 5 State administration of tenure reform

The management of tenure and tenure reform at national level as opposed to the local level of traditional leaders has its own ministerial department, which was formerly the Department of Agriculture and Land Affairs. In line with the National Strategic Plan¹²⁴ and the attempts at bringing about effective land and ultimately tenure reform, in May 2009, the Department of Rural Development and Land Reform was established from the erstwhile Department of Agriculture and Land Affairs. The Department's new vision is "Vibrant, Equitable and Sustainable Rural Communities."¹²⁵ Where the previous department was focused in agriculture and land reform, the new department places an emphasis on rural development linked to land reform and agrarian transformation, which ultimately has an effect on the momentum of land reform. The principles underlying the department's new approach to sustainable land reform are:

- a) de-racialisation of the rural economy for shared and sustained growth;
- b) democratic and equitable land allocation and use across gender, race and class; and
- c) strict production discipline for guaranteed national food security.¹²⁶

In order to achieve its goals the Department has also undergone a restructuring process that pooled together key Chief Directorates to enhance service delivery, communication and information flow among people and to encourage individual responsibility and decision-making.¹²⁷ The Department developed and implemented the Comprehensive Rural Development Programme which is aimed at being an effective response against poverty and food security. All three land reform programmes are linked to the

¹²⁴ See 3 5 2 1 below.

¹²⁵ DRDLR *Strategic Plan 2011-2014* 7.

¹²⁶ 4.

¹²⁷ 5.

Programme, which has been expanded to sixty rural wards in eighteen months.¹²⁸ The plan is to roll the Programme out to all rural municipalities.

3 5 Recent Developments

3 5 1 Introduction

Recent developments resulting in measures that are, to a large extent, still in draft form, need to be discussed before a final conclusion regarding black rural women's tenure can be reached. However, as the measures are still in the process of debating and have not been promulgated yet and as only a Green and not a White Paper was produced, it is difficult to ascertain at this stage, what the final impact of these measures would be. To that end only the main provisions of the Department of Rural Development and Land Reform Strategic Plan 2010-2013, the Draft Tenure Security Policy, 2010 together with its parallel Draft Tenure Security Bill, 2010¹²⁹ and the Green Paper on Land Reform, 2011 will be set out here.

3 5 2 Tenure Reform measures from 2010¹³⁰

3 5 2 1 Strategic Plan

The Strategic Plan 2010-2013 places an emphasis on rural development which is in line with the name, vision and mission of the new Department of Rural Development and Land Reform.¹³¹ The Strategy sets out to ensure sustainable land reform and food security for all, while ensuring that land reform is a key priority for the Government.¹³² In the mission to establish a clear land tenure system, the Department is proposing two options: all productive land will become a national asset and a quitrent land tenure system, either with perpetual or limited rights, is envisaged. All tenure

¹²⁸ 4, 14; Du Plessis W, Pienaar J M & Olivier N "Land matters and rural development: 2009 (2)" (2009) 24 *SAPL* 588 608.

¹²⁹ Both published in GN 1118 in GG 33894 of 24/12/2010.

¹³⁰ For a comprehensive account of these measures see Pienaar J M "October to December 2010 (4): JQR Land Reform 2010 (4)" 2010 (4) *JUTA* <<http://ipproducts.jutalaw.co.za.ez.sun.ac.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>> (accessed 22/06/2011); Pienaar J M & Kamkuemah A (2011) *Stell LR* 728-741.

¹³¹ See 3 4 4 5 above.

¹³² DRDL *Strategic Plan 2010 – 2013* 7, 11.

legislation will be subsequently reviewed and brought under a single national land policy framework. The second option will entail the review of current tenure policies and legislation in order to maintain the current freehold title system but within the ambit of a land ceilings framework linked to categorisation of farmers. This option will also investigate a State Land Management Board to facilitate the management of state-owned agricultural land and leases.¹³³ Accordingly, a Tenure System Reform Bill was tabled in December 2010.¹³⁴

3 5 2 2 Draft Tenure Security Policy, 2010

The Strategic Plan recognises that the tenure of farm dwellers and labour tenants “remains precarious leaving them vulnerable to abuse and exploitation”.¹³⁵ In response, the Draft Tenure Security Policy and its Bill were published on 24 December 2010 by the Department of Rural Development and Land Reform.¹³⁶ This Bill and its Policy seek to address the issues of farm evictions and tenure security and to give effect to sections 25(5), 25(6) and section 26 of the Constitution.¹³⁷

The Policy aims to do the following for farm dwellers, namely to protect relative rights, enhance security of tenure, effect peaceful and harmonious relationships and to sustain production discipline on the land in the interest of food security.¹³⁸ The point of departure of the Policy is based on section 25(9) of the Constitution that allows the state to take legislative and other measures to achieve land reform. Thus the Policy states that land rights and tenure

¹³³11.

¹³⁴The Strategic Plan states that it has been working on a draft Green Paper on Agrarian Transformation, Rural Development and Land Reform. This is evidently the Green Paper on Land Reform published on 31 August 2011, which seeks to address the shortcomings of the defunct CLARA: 15. The Green Paper is discussed at 3 5 2 4 below.

¹³⁵DRDL *Strategic Plan 2010 – 2013* 17.

¹³⁶Which was formerly called the Department of Agriculture and Land Affairs. This Act is now correctly being proposed by the Department of Rural Development and Land Reform that the Bill be dealt with in accordance with the procedures established by s 76 of the Constitution, since it contains provisions which affect the provinces: s 6 of the Memorandum of the Bill. Thereby, correcting the reason for the declaration of invalidity of the Communal Land Rights Act.

¹³⁷ See in general Pienaar J M & Kamkuemah A (2011) *Stell LR* 724-741. See 4 2 2 3 for a discussion of the Policy in relation to the *White Paper on South African Land Policy*.

¹³⁸DRDLR *Draft Tenure Security Policy, 2010* 4.

forms may not “be unduly hamstrung by reluctance to depart from the traditional system of the common law”.¹³⁹

The Policy proposes four critical areas that must be given attention to in ensuing policy and legislation:

- a) tightening up legislation by creating substantive rights in land for occupiers;
- b) information dissemination, support to farm dwellers and enforcement of tenure laws;
- c) creating new sustainable settlements in farming areas; and
- d) effectively monitoring arbitrary evictions.¹⁴⁰

The Policy further focuses on fostering efficiency in farm relations and extensively provides for the following:

3 5 2 2 1 *Power Relations*

The Policy acknowledges that the historic and current forces that effect those who work on farms and their dependents. The issues that come about as a result of these forces will be addressed through law and engagement with role players in the farming community.¹⁴¹

3 5 2 2 2 *Resettlement-Agri-Villages-Onsite and Offsite*

In addressing power relations and dealing with tenure security on farms, the Policy proposes to use a mix of both on-site and off-site resettlement. The aim is to allow farm dwellers in general, those evicted and those prone to eviction, to choose to be resettled in agri-villages (resettlement villages). A Farm Worker’s grouping would be the initial title deed holder of the land, which will be state land, land that is acquired through sale or donation or land that is

¹³⁹ 3.

¹⁴⁰ 4.

¹⁴¹ 5.

expropriated.¹⁴² The rules that will govern the agri-villages will however be formulated and agreed upon by the “village community”, the financier and municipality. The advantages of these agri-villages, according to the Policy, are that individuals will have *security of tenure*, Government will provide services and “increased levels of support and organisation”¹⁴³ and basic infrastructure for “successful agricultural production”.¹⁴⁴

Interestingly, the land in the resettlement villages may be held under a temporary permit system and the beneficiaries thereof will have “the right of use of the land for as long as he does not violate the provisions of the permit”.¹⁴⁵ Provision will be made for the transfer of freehold title to those who “make better use of allotted land”¹⁴⁶ and land may be taken away from those who do not perform according to the agreed rules.

The inclusion of agri-villages is however not a new innovation as it was introduced by the Extension of Security of Tenure Act.¹⁴⁷ The basis is that accommodation and employment on farms should be separate and reduce the dependency of farm workers and labour tenants on commercial farmers.¹⁴⁸ This would allow workers independence to move between employers and have secure tenure in their land. This will also protect temporary, casual and/or seasonal workers who are not covered by the Extension of Security of Tenure Act or the Land Reform (Labour Tenants) Act. Resettlement-villages have not been successful,¹⁴⁹ therefore it seems the Policy seeks to revitalise them and emphasises that “land owners are critical role players in the proposed approach”.¹⁵⁰

¹⁴² 6.

¹⁴³ 7.

¹⁴⁴ 6-7, 10.

¹⁴⁵ 6.

¹⁴⁶ 6.

¹⁴⁷ S 1, 4(1),4(2). See 3 4 4 3 2 2 and 4 3 3 3 below.

¹⁴⁸ 10.

¹⁴⁹ Pienaar J M & Kamkuemah A (2011) *Stell LR* 724 729.

¹⁵⁰ *Draft Tenure Security Policy* 6. See also 4 4 below.

The Policy suggests that land could be held on a temporary permit system, such as permits for communal pasturage, residential permits and for cultivation. This is in contrast with the proposals in the White Paper on South African Land Policy which advocate a move from the permit-based to a rights based system. Furthermore, tenure as proposed in the Policy is not secure, as land may be taken away from non-performers.¹⁵¹ Freehold title will only be available for those who make better use of the land, in accordance with rules that will be “instituted”.¹⁵² Unfortunately, no mention is made of the provision of secure rights-based tenure in legislation.

3 5 2 2 3 *Challenge in Land Acquisition*

The Policy recognises the persistent challenge of acquisition of suitable land for farm dwellers. Thus the policy proposes more forcible interventions by the state, *inter alia* by using its power to expropriate land for farm dwellers and ultimately security of tenure for them.¹⁵³ This should be done by working closely with intended beneficiaries, over a long period of time and providing support in order to “achieve sustainable development and alleviate poverty”.¹⁵⁴ The gist of this proposal in this regard links the White Paper on South African Land Policy, although it places an emphasis on expropriation and long-term support, which could mean post-settlement support.

3 5 2 2 4 *Arbitrary Evictions*

Arbitrary evictions are also specifically addressed in the Policy. The Policy recognises the lack of compliance with the Extension of Security of Tenure Act, thus it proposes a Land Rights Management Board to pro-actively deal with evictions in general.¹⁵⁵ Legislation will define conditions for and limitations on evictions.¹⁵⁶

¹⁵¹ 6-7.

¹⁵² 6.

¹⁵³ 7.

¹⁵⁴ 7.

¹⁵⁵ See 3 5 2 4 4 5 for the composition, functions and powers of the LRMB as set out in the Green Paper on Land Reform, 2011 7-8.

¹⁵⁶ 8. See further matters specifically addressed by the Policy at 3 5 2 2.

Further sections of the Policy relate to the duty on the state to provide legal aid for those whose tenure is threatened or breached and development of farm land within the framework of the Comprehensive Rural Development Programme. The Land Rights Management Board will play a major role in compliance and enforcement of legislation and the tenure system in general.¹⁵⁷ The Policy finally emphasises the necessity of institutional support in order to realise implementation of new legislation from the legislative process to practice.

3 5 2 3 Draft Land Tenure Security Bill, 2010

The Bill was drafted in relation to the above Policy.¹⁵⁸ It purports to repeal the Extension of Security of Tenure Act and the Land Reform (Labour Tenants) Act and to incorporate all measures into one new law.¹⁵⁹ The Bill has a clear application to farm workers, persons residing on farms and agricultural land, but excludes land occupied by traditional communities.¹⁶⁰

The Bill has a broader category of persons to whom it applies, as it includes family members of the person residing on the farm,¹⁶¹ compared to the narrower definition of occupiers in the Extension of Security of Tenure Act, which included lawful occupiers and farm workers in rural and peri-urban areas.¹⁶² Also, there is no longer a distinction between short term and long term occupiers and consent includes both express and tacit consent.¹⁶³ A person residing on the farm now would also have the right to bury his/her family members on the farm¹⁶⁴ and a refusal to allow burial on the farm amounts to a constructive eviction, which is included in the scope of

¹⁵⁷9-10. See 4 2 2 for an analysis of the Policy.

¹⁵⁸ The Bill has ten chapters: ch 1 has definitions and objects, ch 2 deals with the application of the Act, ch 3 states the categories of persons covered by the Act, ch 4 deals with relative rights and duties, ch 5 deals with the management of evictions, ch 6 sets out the agr-villages and development measures, ch 7 deals with the management of resettlement units and agr-villages, ch 8 provides for the Land Rights Management Board, ch 9 contains the dispute resolutions and courts and ch 10 contains miscellaneous provisions.

¹⁵⁹S 48.

¹⁶⁰ Long title and Preamble; cl 2 and the category of persons covered by the Bill in ch 3.

¹⁶¹Cl 7. Also see cl 20(7) of the Draft Land Tenure Security Bill.

¹⁶²S 1 – 3 ESTA.

¹⁶³Cls 11(2) and (3) Draft Land Tenure Security Bill.

¹⁶⁴Cl 15 (1)(g) and (h).

eviction.¹⁶⁵ Interesting developments are the provision for meaningful engagement¹⁶⁶ and more importantly, the clause 20(11) requirement that an eviction may not result in the persons affected being rendered homeless or vulnerable to the violation of human rights. This section seems to be supported by the mechanism in clause 25 that upon the court granting an order of eviction, the court shall:

“direct the municipal manager of the local municipality within whose jurisdiction the subject land is located, the Board and the owner, to jointly submit to court a plan indicating relevant details for the provision of suitable alternative land for the affected person residing on the farm.”¹⁶⁷

The period of two months suggested within which to submit the plan, is practically insufficient as the municipal manager, the Land Rights Management Board and the owner are required to work together. There is a provision for the temporary right of use of a piece of land of the owner for resettlement purposes;¹⁶⁸ it is not clear what this implies for the land owner.

Apart from the vague provisions in the Bill, it does not correlate with its Draft Policy. Although the Policy states that a critical area to be pursued is the creation of substantive rights for occupiers in land, the Draft Tenure Security Bill does not contain a section on how rights are vested nor what their content and scope are. In this regard the Policy sets out that land will be held under a temporary permit system and that “rules will be instituted to afford the transfer in freehold title to those who make better use of allotted land”.¹⁶⁹ This permit system is arguably in line with the tenure reform objectives, which require a

¹⁶⁵CI 19. This changes the position of the requirements of “established practice” in *Nhlabati v Fick* 2003 2 All SA 323 LCC and *Dlamini v Joosten* 2006 3 SA 342 (SCA). Also see *Draft Tenure Security Policy* 9 and Pienaar J M “October to December 2010 (4): JQR Land Reform 2010 (4)” 2010 (4) 6 JUTA <<http://ipproducts.jutalaw.co.za.ez.sun.ac.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>> (accessed 22/06/2011).

¹⁶⁶CI 20(10)(a) Draft Tenure Security Bill. The meaningful engagement takes place during the eviction procedure and where persons are evicted during the resettlement phase: s 27(5)(d).

¹⁶⁷CI 25(2). Pienaar J M “October to December 2010 (4): JQR Land Reform 2010 (4)” 2010 (4) 7 JUTA <<http://ipproducts.jutalaw.co.za.ez.sun.ac.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>> (accessed 22/06/2011).

¹⁶⁸CI 29.

¹⁶⁹*Draft Tenure Security Policy* 2010 4.

move away from the *apartheid* permit-based system. Also there is no mention of the Farm Worker's groupings in the Bill.¹⁷⁰

It is doubtful how the overlapping rights of farm residents and workers will be realised in practice. There also does not seem to be an obligation in the Bill on Government to provide for the rights of persons residing on farms.¹⁷¹

Overall the 2010 measures on tenure reform appear to be focused on bringing about rural development and socio-economic growth in those areas. How this will happen was expected to be addressed in the Green Paper on Land Reform, 2011 discussed below.

3 5 2 4 *Green Paper on Land Reform, 2011*

3 5 2 4 1 Introduction

The Green Paper on Land Reform, 2011 was published on the 31st August 2011. The Paper recognises that land is a national asset and that it will review the current land tenure system within this context.¹⁷² The Department of Rural Development and Land Reform's approach is Agrarian Transformation meaning "a rapid and fundamental change in the relations (systems and patterns of ownership and control) of land, livestock, cropping and community",¹⁷³ with the long-term goal of social cohesion and development.¹⁷⁴ This will be done with the aim of repossessing land and restoring *ubuntu*. The Green Paper's problem statement is that the current economic structure produces factors which undermine social cohesion and development amongst

¹⁷⁰ See Pienaar J M & Kamkuemah A (2011) *Stell LR* 737-740 for further lacunae in and uncertainty between the Policy and the Bill.

¹⁷¹ Pienaar J M "October to December 2010 (4): JQR Land Reform 2010 (4)" 2010 (4) 10 *JUTA* <<http://ipproducts.jutalaw.co.za.ez.sun.ac.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>> (accessed 22/06/2011).

¹⁷² DRDLR *Green Paper on Land Reform, 2011* 1, 3.

¹⁷³ 1.

¹⁷⁴ 3, 4: "Development" means shared growth and prosperity, full employment, relative income equality and cultural progress, while its antithesis "underdevelopment" refers to poverty, unemployment, relative income inequality and cultural backwardness.

those dispossessed of their land.¹⁷⁵ The Green Paper further specifically addresses the following issues:

3 5 2 4 2 *Vision for Land Reform*

The vision for land reform is a “re-configured single coherent *four-tier system of land tenure*.”¹⁷⁶ This will include:

- (a) state and public land held under leasehold;
- (b) privately owned land held under limited freehold;
- (c) land owned by foreigners held under conditional freehold and precarious tenure; and
- (d) communal tenure with institutionalised use rights.¹⁷⁷

The underlying idea is that the four-tier system would ensure that all South Africans, particularly rural blacks, have reasonable access to secure land rights.¹⁷⁸

Furthermore, it is proposed firstly that there will be clearly defined property rights maintained by an equitable and accountable land administration system. Secondly, secure forms of long-term land tenure for resident non-citizens engaged in investments which enhance food and livelihood security and finally effective land use planning and regulatory systems which promote optimal land use in rural and urban areas.¹⁷⁹

3 5 2 4 3 *Principles Underlying Land Reform*

The Green Paper proposes three principles for land reform, namely (a) de-racialising the rural economy, (b) democratic land allocation and use across

¹⁷⁵ 4.

¹⁷⁶ 4.

¹⁷⁷ 5-6. See also DRDLR *Strategic Plan 2011-2014* 14.

¹⁷⁸ DRDLR *Green Paper on Land Reform* 4.

¹⁷⁹ 4.

race, gender and class and (c) a sustained production discipline for food security.¹⁸⁰

3 5 2 4 4 *Current Challenges and Weaknesses*

The current challenges identified in the Green Paper form the rationale for reform and these include the unsuccessful willing-buyer willing-seller model, a fragmented beneficiary support system, land governance - especially in communal areas,¹⁸¹ meeting the thirty percent redistribution target by 2014, unrelenting increases in rural unemployment and a problematic restitution model and the communal property institutions.¹⁸²

3 5 2 4 5 *Improved Trajectory for Land Reform*

The proposals in the improved trajectory for land reform attempt to improve former and current land reform perspectives without majorly interfering with agricultural production and food security and to avoid or minimize land redistribution and restitution which do not provide sustainable livelihoods.¹⁸³

The trajectory is supported by new institutions and programmes, namely:

3 5 2 4 5 1 Recapitalisation and Development Programme

The goal of the programme is to ensure all land reform farms are a hundred percent productive through partnership with commercial farmers on a risk-sharing basis.¹⁸⁴

3 5 2 4 5 2 Single four-tier land tenure system

This system will integrate communal, state, public and private land ownership, as set out above.¹⁸⁵

¹⁸⁰ 4. Emphasis author's own. These principles underlying land reform are similar to those in the White Paper on South African Land Policy and the Strategic Plan.

¹⁸¹ Though these areas have been identified as problem areas in the Green Paper, these areas are specifically excluded from its scope and that of the Draft Land Tenure Security Bill, 2010.

¹⁸² DRDLR *Green Paper in Land Reform, 2011* 5.

¹⁸³ 5.

¹⁸⁴ 5.

¹⁸⁵ 6. See 3 5 2 4 1 above for more detail.

3 5 2 4 5 3 Land Management Commission

The Commission will be autonomous but accountable to the Minister through the Department of Rural Development and Land Reform. The Commission will be composed of all stakeholders in land and specialists appointed by the Minister. Furthermore, it will function as an advisor to land-related departments and state organs, ensure coordination of land management agencies, departments and other organs of state, manage the regulatory environment that ensures that land is managed in a manner that protects quality and value, audit the state inventory of state and public lands and monitor its use and function as a reference point.¹⁸⁶ The Commission will also have the power to subpoena any person and entity, enquire about any land question, verify or invalidate individual or corporate title deeds, demand a declaration of any landholding, grant amnesty and/or initiate prosecution at its own discretion and seize or confiscate land acquired through fraudulent or corrupt means.¹⁸⁷

3 5 2 4 5 4 Land Valuer-General

The Office of the Valuer-General will be a statutory office with extensive responsibilities. These include the provision of fair and consistent land values, determining financial compensation for expropriation in terms of legislation and the Constitution, the provision of specialist valuation and property-related advice to Government, setting norms and standards and monitoring service delivery, undertaking market and sales analysis, setting guidelines required to validate the integrity of valuation data and creating and maintaining a database of valuation information.¹⁸⁸

3 5 2 4 5 5 Land Rights Management Board and Land Rights Management Committees

The Land Rights Management Board will be composed of representatives from sectors with land rights and specialists appointed by the Minister. The

¹⁸⁶DRDLR *Green Paper on Land Reform* 6.

¹⁸⁷ 6.

¹⁸⁸ 7.

Land Rights Management Committees will be made up of representatives of residents in rural communities.¹⁸⁹ The Board will be responsible for communication of legal reforms to farm owners, farm dwellers and potential land beneficiaries, build institutional capacity to advise and support rights holders, develop efficient systems for registering land rights in conjunction with the Chief Deeds Registrar, encourage the importance of social solutions to social problems, provide legal representation for unlawful evictions for example and to establish an integrated support system for state, civil society and private sector participation in development measures in rural communities.¹⁹⁰ The Board will have the following powers with regard to Land Rights Management Committees: a) to establish and dissolve them, b) set their norms and standards, c) delegate certain powers to them, and d) hear appeals on matters heard by them and over-rule their decisions. The Board also has the power to enforce observance of rights of farm dwellers.¹⁹¹ The final two institutions that will support the improved trajectory for land reform are properly aligned Communal Property Institutions and the Land Tenure Security Bill, 2010.¹⁹²

3 5 2 4 6 *Strategic Thrust of Land Reform*

Land reform is located within the Comprehensive Rural Development Programme¹⁹³ and is based on broad-based agrarian transformation, an improved land reform programme and strategic investment in economic, cultural and information and computer technology for rural communities.¹⁹⁴ The Green Paper acknowledges the link between the land question and agriculture, but realises that demand for land may be for other productive but non-agricultural uses.¹⁹⁵

The Green Paper further sets out a superficial comparative section that looks

¹⁸⁹7.

¹⁹⁰8.

¹⁹¹8.

¹⁹² 5. See 3 5 2 3 above.

¹⁹³ See 3 4 4 4 above.

¹⁹⁴ *Green Paper on Land Reform*, 2011 8.

¹⁹⁵8.

at the land reform experiences in Asia, Latin America and Egypt,¹⁹⁶ which demonstrated state intervention in land management through the use of state regulation and expropriation. It is not clear how this comparative section is relevant to the South African land reform context.

3 5 2 4 7 *Challenges and Constraints*

The Green Paper identifies the main challenges that have to be confronted in order for land reform to proceed successfully. These challenges are a) entrenched vested interests in commercial and communal land, b) Poor coordination and integration of effort and resources between the public and private sector, and c) the *poor capacity of organs of state to implement*.¹⁹⁷

The Green Paper concludes that the failure of land reform in general and particularly in securing the rights and tenure of farm dwellers, is a “total-system failure...rather than that of a single piece of legislation”.¹⁹⁸

3 6 Conclusion

The objective of this chapter was to provide an overview of land-related legislative and policy measures that were promulgated after 1994. In this regard, the international context as well as the constitutional foundation for tenure reform in South Africa was also explained. Recent developments including a Strategic Plan, a Draft Tenure Security Policy and a Land Tenure Security Bill and the Green Paper, which are still being debated, were addressed thereafter. Despite all these measures, the need for tenure security in general still remains. Existing legislative measures only go so far and are still not effective, especially if all the factors that impact on women’s status, elaborated on in Chapter four below, are also considered. Similarly, envisioned new measures also fall short of achieving the constitutional imperative.

¹⁹⁶8-9.

¹⁹⁷10. Emphasis author’s own.

¹⁹⁸10.

Despite having employed old and new measures to address tenure insecurity, there is still an overall demand for tenure legislation that meets the needs of all South Africans and specifically of black rural women. As this chapter has laid the foundation for the overarching framework within which tenure reform in general is to take place, the next chapter will focus on black rural women in particular.

CHAPTER FOUR

BLACK RURAL WOMEN'S TENURE SECURITY

4 1 Introduction

Based on the historical background in Chapter two and the laws promulgated with regard to tenure reform within the new Constitutional dispensation set out in Chapter three, it has been established that there is still a dire need to address insecure tenure. Keeping in mind that women constitute approximately fifty nine percent of the seventeen million people living in the rural former homeland provinces, which are the poorest parts of South Africa,¹ the aim of this chapter is to underline major shortcomings in respect of women's tenure in particular. This is necessary so as to ascertain the extent of black rural women's tenure security or insecurity. Before the analysis of the policy documents, legislation and case law can take place, however, an exposition of factors that inform the interpretation and application of these measures is necessary. This is important as the factors identified below interact with and determine the status of women and the different categories of women, despite the overarching framework of policies and legislation. Following this exposition of relevant factors, is a two-pronged investigation into a) legal mechanisms, as set out and provided for in policy documents; case law and legislation; and b) the major role players within this process.

¹Claassens A & Ngubane S "Women, land and power: the impact of the Communal Land Rights Act" in Claassens A & Cousins B (eds) *Land Power & Custom: Controversies generated by South Africa's Communal Land Rights Act* (2008); UN Women "CSW56- Facts and Figures on Rural Women" <<http://www.unwomen.org/how-we-work/csw/csw-56/facts-and-figures/>>(accessed 07/08/2012); Women Watch <<http://www.un.org/womenwatch/feature/ruralwomen/facts-figures.html>> (accessed 07/08/2012).

4 2 Factors that inform interpretation and application of legal measures

4 2 1 Introduction

South Africa has a pluralistic legal system in which common law, statutory law and customary law co-exist alongside each other, which all in turn fall under and are subject to the final Constitution.² There are various sections in the Constitution that acknowledge existing rights and laws. Some of these contained in the Bill of Rights are the right to equality, the right to human dignity, the right to religion, the right to language and culture and the right to cultural, religious and linguistic communities.³ Thus a legal pluralistic society exists, with different dimensions and forms, including for example, religion-based and cultural-based. These different dimensions create different legal systems, potentially all have factors impacting on women's tenure security. These factors are underlying considerations when policy documents and legislation are interpreted and applied.

4 2 2 Factors

The point of departure is that the White Paper on South African Land Policy, 1997 specifically identifies women as a focus group in the tenure reform programme.⁴ Rural black women still face difficulties in obtaining financial assistance to access and secure land as the criteria for granting assistance are gender neutral and work on a first-come-first-serve basis.⁵

²See Albertyn C H, Fedler J & Goldblatt BA "Gender" in Bonthuys E, Field TL, Mills S, Pieterse-Spies A & Wolhuter L *LAWSA* 10 2 ed (2005) para 432; Van Niekerk G J "Legal Pluralism" in Rautenbach C, Bekker JC & Goolam NMI (eds) *Introduction to Legal Pluralism* 3 ed (2010) 1 3-4; Bekker JC & Rautenbach C "Nature and Sphere of Application of the African Customary Law in South Africa" in Rautenbach *et al* (eds) *Introduction to Legal Pluralism* 3 ed (2010) 43; *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) paras 84-98, 107-116.

³Ss 9, 10, 15, 30 and 31 respectively.

⁴DLA *White Paper on South African Land Policy, 1997* 1 2 1, 1 2 2, 2 5 1, 3 24.

⁵3.20.2, 3.24; Pienaar J M "Broadening access to land: The case of African rural women in South Africa" (2002) *TSAR* 177 200-201; Walker C "Piety in the Sky? Gender Policy and Land Reform in South Africa" in Razavi S (ed) *Agrarian Change, Gender and Land Rights* (2003) 113 113-115.

Further factors that impact on black rural women's tenure are their status of being black and female. Though black women's status has developed to some extent, it continues to have an impact on their tenure. For example, black rural women's tenure is also dependent on whether they are single, married, widows or divorced. This issue will be explained in more detail below.⁶ Claassens and Ngubane state that single women are particularly vulnerable when it comes to land tenure.⁷ Furthermore, it has been argued that particularly because women are vulnerable, financially weaker and make up the majority of the rural poor, this would inhibit them to use the land they may be allocated for productive purposes.⁸ However that argument falls blind to the overall purpose of the land reform programme, which aims to redress past injustices that resulted in poverty and unequal land distribution⁹ and to provide financial assistance to all land reform beneficiaries.

Marital status is further linked to succession. The case of *Bhe & Others v Magistrate Khayelitsha & Others*¹⁰ dealt with customary law of intestate succession and the rule of male primogeniture that discriminated against black women since it prevented them from inheriting from their husbands. The case declared section 23 of the Black Administration Act 38 of 1927 which dealt with customary intestate succession and the rule of male primogeniture, unconstitutional. This section did not allow women to inherit intestate under customary law, as intestate succession took place according to the principle of male primogeniture. Therefore, women could not legally inherit quitrent title. Customary law intestate succession is now regulated by the Intestate Succession Act 81 of 1987,¹¹ thus allowing women to inherit land that formally

⁶ See 4 5 below.

⁷ Claassens A & Ngubane S "Women, Land and Power: the impact of the Communal Land Rights Act" in Claassens A & Cousins B (eds) *Land, Power & Custom: Controversies generated by the South Africa's Communal Land Rights Act* (2008) 154 154.

⁸ Mokgope K *Land reform, sustainable rural livelihood and gender relations: A case study of Gallawater A farm* PLAAS Research Report No.5 24.

⁹ See Chapter 2 above.

¹⁰ 2005 1 SA 580 (CC). See also 4 3 3 2 below for a discussion of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 that resulted from the *Bhe* case.

¹¹ The Act commenced on the 18th March 1988 and has been amended by the Law of Succession Amendment Act 43 of 1992 and the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 discussed under 4 3 3 2 below.

resorted under customary law. Unfortunately, various practices of living customary law are still not accommodating to gender equity, thus the principle of male primogeniture is still used in practice with regard to intestate succession.

Another important factor that has an impact on women's tenure, are the Government social grants, even if just minimally. These assist rural women in accessing land, by purchasing land with assistance of the Department of Rural Development and Land Reform or by pooling their grants together to purchase land or in order to invest in the land and thereby contribute to poverty alleviation.¹² These grants are also independent of household and/or male control. All the above factors translate to legal measures.

4 3 Legal framework

4 3 1 Introduction

In order to determine the extent of black women's tenure security, the following account will assess the laws that are effective in securing tenure and specifically for black women in the rural areas. Rural areas comprise former national states, self-governing territories and privately owned commercial farms. The shortcomings and problem areas will be set out, through policy framework, legislation and case law developments.

4 3 2 Policy Framework

4 3 2 1 Introduction

Tenure reform is focused on the rights of people living on privately owned land, namely farm workers and labour tenants, as well as on communal land,

¹² Walker C "Piety in the Sky?" in *Agrarian Change, Gender and Land Rights* 119, 122, where she discusses the use of state grant packages under the redistribution programme. The same can be done with state social grants to access land amongst other things; Ferguson J *How to do things with the land: a distributive perspective on rural livelihoods* (2010) unpublished paper presented at the colloquium on Land reform, agrarian change and rural poverty in Southern Africa hosted by the Institute for Poverty, Land and Agrarian Studies at the Stellenbosch Institute for Advanced Study 08/03/2011.

largely made up of the national states and self-governing territories.¹³The relevant tenure reform policies addressed in this regard are the White Paper on South African Land Policy, 1997, which has a strong focus on bringing about tenure security for all persons with insecure tenure in line with section 25(6) of the Constitution, and the Draft Tenure Security Policy, 2010, which proposes

“...change and restructuring of the economic, legal and political arrangements governing the ownership, management and relations on agricultural land in line with overall national economic development.”¹⁴

Only the policy proposals in relation to women will be set out here.

4 3 2 2 White Paper on South African Land Policy, 1997

The White Paper proposes that Government has to find a way in which the procedures governing the exercise of group-based rights, such as the communal system, ensure that there is equal participation and equality. In this light, the White Paper acknowledges that women are discriminated against under various tenure systems, including under tribal, communal and private tenure in terms of family law and succession.¹⁵

4 3 2 3 Draft Tenure Security Policy, 2010

The aims and proposals of the Draft Tenure Security Policy have been set out in Chapter three above.¹⁶ The focus here is on the proposals of the Policy in light of those of the White Paper on South African Land Policy above in relation to women.

The Draft Tenure Security Policy shifts away from the approach in the White Paper on South African Land Policy as it focuses on achieving long-term security of tenure, specifically for labour tenants, farm workers and farm

¹³ DLA *White Paper on South African Land Policy 1997*; Cousins B “Contextualising the controversies: dilemmas of the communal tenure reform in post-apartheid South Africa” in Claassens A & Cousins (eds) *Land, Power & Custom: Controversies generated by South Africa’s Communal Land Rights Act* (2008) 3 3.

¹⁴DRDLR *Draft Tenure Security Policy*, 2010 1.

¹⁵ 34. See also 3 4 5 2 above.

¹⁶See 3 5 2 2.

dwellers¹⁷ and totally excludes land occupied by traditional communities (communal land). It is important to note that the majority of inhabitants in these areas are women. The focus on women in the White Paper on South African Land Policy¹⁸ is not reflected or continued in the Draft Tenure Security Policy.

4 3 3 Legislation

4 3 3 1 Introduction

In Chapter three an overview was provided of all relevant tenure-related legislative measures post-1994. This section will analyse the impact of certain legislation on black rural women's tenure in particular.¹⁹ Although all inter-related, the land reform legislation will be discussed (a) according to laws that generally have a direct or indirect impact on women's tenure, thereafter (b) those that give content to securing rural women's tenure and finally (c) that govern the powers over the allocation and management of land rights.

4 3 3 2 Laws generally impacting on black rural women's tenure

Where marital status is concerned, the Recognition of Customary Marriages Act 120 of 1998 becomes relevant. The Act places customary marriages and civil marriages on the same footing. This Act seeks *inter alia* to provide for the equal status and capacity of spouses in customary unions, by bringing their personal and proprietary consequences in line with the Constitution. Black rural women are often parties to customary unions, so this Act ultimately has an impact on their tenure and is aimed at improving their status in that regard. The Act defines customary law as the

¹⁷DRDLR *Draft Tenure Security Policy* 1-2.

¹⁸ See note 11 above.

¹⁹ DLA *White Paper on South African Land Policy*, 1997 3.24; Bohler-Muller N & Daniels B "Does the Communal Land Rights Act Really Protect the Rights of Rural Women to Own Land?" (2009) *Africagrowth Agenda* 26 – 27.

“customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples”.²⁰

Women traditionally married under customary law were regarded as minors and could not own property, while their husbands were their legal guardians.²¹ Section 6 of the Act gives a wife full status and capacity, identical to that of her husband. This means that a wife in customary marriage is no longer subject to the marital power of her husband and she has the capacity to acquire property, including land, and dispose of it, to enter into contracts and to litigate.²² However, section 7(1) of the Act qualified this equality and provided that:

“The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law.”

This limited the new proprietary consequences of marriages entered into after 15 November 2000.²³ However, this position was altered by the Constitutional Court’s decision in *Gumede v President of the Republic of South Africa*,²⁴ which declared section 7(1) unconstitutional as far as it related to monogamous customary marriages.²⁵ The effect of this order is that all monogamous customary marriages are now by default in community of property,²⁶ except where the spouses agree otherwise. Thus, the wife to such

²⁰S 1 (ii), whereas a customary marriage is a marriage concluded in accordance with customary law.

²¹Pienaar J M (2002) 2 *TSAR* 182; Mamashela M “New families, new property, new laws: The practical effects of the Recognition of Customary Marriages Act” 2004 *SAJHR* 620.

²²S 6; Jansen RM “Customary Family Law” in Rautenbach C et al (eds) *Introduction to Legal Pluralism* 3 ed (2010) 60.

²³See s 7(2) and Jansen RM “Customary Family Law” in Rautenbach C et al (eds) *Introduction to Legal Pluralism* 3 ed (2010) 45, 60-61, 80.

²⁴2009 3 BCLR 243 (CC). See further Bekker J & Van Niekerk G “Gumede v President of the Republic of South Africa: Harmonisation, or the creation of new marriage laws in South Africa?” (2009) 24 *SAPL* 206 206-222.

²⁵Para 58. In the same vein, s 7(2) was also declared invalid “insofar as it distinguishes between a customary marriage entered into after and before the commencement of the Recognition Act”, s 20 of the KwaZulu Act on the Code of Zulu Law 16 of 1985 and ss 20 and 22 of the Natal Code of Zulu Law published in Proc R151 in GG 10966 of / /1987 , both of which provide in their s 20 that the husband in a customary marriage is the family head and the owner of all family property were also declared unconstitutional. S 22 of the Natal Code states that the “inmates” of a family home irrespective of sex or age shall in respect of all family matters be under the control of and owe obedience to the family head. These measures applied to the area where the Gumedes were domiciled.

²⁶Para 51.

a union has a claim to the family property, including land during and upon dissolution of the marriage.

The court stated that the proprietary consequences of polygamous marriages will be regulated by customary law until the legislature intervenes.²⁷ This means that discrimination on the basis of gender and race for women in polygamous marriages still remains.²⁸ There is no satisfactory explanation why the court did not decide on this matter as it was argued by the *amicus curiae*.²⁹ A purposive meaning of the aims of the Act, “to transform spousal relations in *customary marriages*”³⁰ could surely have provided for the Act to apply to the proprietary consequences of polygamous marriages too. This is especially relevant as polygamy can be seen as part of the patriarchal system that violates the constitutional principle of women’s rights to equality.³¹

Concerning succession as a factor that influences women’s tenure security, the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009³² came into operation on 20 September 2010, resulting from the *Bhe*³³ case. The purpose of this Act is to “modify the customary law of succession so as to provide for the devolution of certain property in terms of the law of intestate succession.”³⁴ The Act specifically sets out in its preamble that its purpose is to address protection of widows³⁵ and children who do not enjoy adequate protection and benefit under the customary law. The Act gives a woman under customary law the freedom to

²⁷ Para 56.

²⁸ They are thus “expressly excluded from meaningful economic activity in the face of an active redefinition of gender roles in relation to income and property” (para 35) as was the position for wives in monogamous customary unions.

²⁹ Women’s Legal Centre Trust.

³⁰ Paras 32 and 42.

³¹ Southern African Rural Women’s Assembly at Limpopo, 28th to 30th October 2009: Guardians of Land, Life and Love – *Declaration Southern African Rural Women’s Assembly* <<http://www.amandlapublishers.co.za/home-menu-item/266-declaration-southern-africa-rural-womens-assembly>> (accessed 20/06/2011); Andrews M “Southern African Rural Women’s Assembly” PLAAS *Umhlaba Wethu* 10 (12/2010).

³² See Rautenbach C & Du Plessis W “Customary Law of Succession and Inheritance” in Rautenbach et al (eds) *Introduction to Legal Pluralism* (2010) 117 135-138.

³³ See 4 2 2 above and preamble of the Act.

³⁴ Long title of the Act.

³⁵ See 4 5 4 below.

dispose of property allotted to her or her house in a will.³⁶ Furthermore the Act protects the property rights of women by providing that a civil marriage entered into, on or after 1 January 1929, but before 2 December 1988 will not affect the proprietary rights of any spouse of a customary marriage.³⁷ This is because until 2 December 1988, a man could dissolve his customary marriage by concluding a civil marriage with another woman. The Act thus improves the status of women married under customary law and gives widows of a civil union and a customary marriage the same status.³⁸

4 3 3 3 Laws pertaining to the content of land rights

The Interim Protection of Informal Land Rights Act 31 of 1996 protects existing interests in land until new long term tenure legislation is in place.³⁹ The Act is crucial for rural women's rights to land as it recognises their weak and insecure use and occupation rights in land, by providing interim protection of these rights. Given that informal rights may not be taken away without consent, if a woman has such an informal right it has the status of a real right.⁴⁰ Further guaranteed protection is that any sale or disposition of land is subject to any existing informal right in relation to the land in question.⁴¹

The Upgrading of Land Tenure Rights Act 112 of 1991, as described in Chapter three,⁴² recognises women's customary use and occupational rights. The former and latter rights are defined as "land tenure rights" in the Act, thus allowing women to upgrade their precarious tenure rights to enforceable legally recognised tenure.

Another Act, the Communal Property Associations Act 28 of 1996, was particularly enacted for group-based landholding and allows women to choose to be part of the group, governed by equity, in order to secure land rights.⁴³

³⁶ S 4(1)

³⁷ S 7(1).

³⁸ S 7(2).

³⁹ See 3 4 4 3 1.

⁴⁰ S 2(1)-(3). See also 3 4 4 2 for more detail on the Act.

⁴¹ S 3.

⁴² See 3 4 4 3 1.

⁴³ See 3 4 4 3 2 above.

This is in line with the White Paper on South African Land Policy proposal that allows people to choose a tenure system which is in line with their circumstances. The rules of the group need to be in accordance with the Act, which requires *inter alia* that the internal rules of the Communal Property Associations provide for equal rights for women and democratic decision-making processes.⁴⁴ Furthermore, the Act allows the entity of the communal property association to be established in light of the traditional and cultural circumstances under which rural women live. Accordingly, it incorporates the “concept of communally held property optimally”⁴⁵ and establishes women’s tenure security on this basis, which was not possible before the Act. Also, land in the Communal Property Association has great development potential in that it can be utilised for economic purposes and thus empowers rural women financially.⁴⁶ The success of the Communal Property Associations Act is, however, also dependent on the support of traditional leaders, especially because of the complex legal framework for the establishment of a communal property association.⁴⁷ The Communal Property Associations Act can thus be effectively employed to improve gendered participation in securing land rights, but its success has generally been limited, mainly because of a lack of support from the Department of Rural Development and Land Reform to implement the provisions of the Act.⁴⁸

Where the Land Reform (Labour Tenants) Act and the Extension of Security of Tenure Act are concerned, women benefit as labour tenants and occupiers respectively, usually because of being part of the family as their land rights

⁴⁴Preamble of the Act and s 9.

⁴⁵Mostert H, Pienaar J M & Van Wyk J “Land” in Van Aswegen A (Reissue text by Scheepers JHL) *LAWSA* 14 1 ed (2010) para 125. This is an improvement from joint or common ownership which do not take cultural and traditional circumstances into consideration. The CPAs are also in line with the right cultural practices in the Constitution s 30 and 31.

⁴⁶ DLA *White Paper on South African Land Policy*, 1997 3.20.2, 3.20.3; Pienaar J M (2002) *TSAR* 201.

⁴⁷201.

⁴⁸Jacobs P J *Tenure Security under the Communal Property Association Act 28 of 1996: An Analysis of Establishment and Management Procedures with Comparative Reference to the Sectional Titles Act 95 of 1986* LLM thesis University of Stellenbosch (2011) 55-70, 137-147; Cousins B “Communal Land Rights Act Declared Unconstitutional” *PLAAS UmhlabaWethu* 10 (12/2010) 8.

are embedded in the rights held by the family.⁴⁹ The Land Reform (Labour Tenants) Act was promulgated to improve the tenure security of labour tenants and to regulate their evictions. This Act is essential as being labour tenants entails that their accommodation or residence is linked to their employment. This poses a problem, because when labour tenants lose their employment, they lose the land they reside on together with their associates. The Act thus provides security of tenure for rural women, subject to their employment or that of a related person, being terminated as there is no provision for joint registration of the land.⁵⁰ In *Brown v Mbhense*⁵¹ the majority of the court held that women also qualify as labour tenants in their own capacity and it is not dependent on the labour tenancy status of males, such as their husbands and fathers.⁵² Being a labour tenant on the second of June 1995, gives that person a vested interest to occupy the land with her family,⁵³ this is linked to protection against arbitrary eviction. Secure tenure and rights in the land can also be obtained by labour tenants through lodging a claim in terms of the Labour Tenants Act, on or before 31st March 2001.⁵⁴ These claims also contribute to land redistribution.⁵⁵

The Extension of Security of Tenure Act⁵⁶ seeks to accommodate the interests of both occupiers and land owners on commercial farm land, in line with the Bill of Rights, by providing for procedural and general requirements for “just and equitable” eviction orders. Tenure security is essentially on two levels a) by regulating and restricting evictions and mainly b) by providing

⁴⁹Mnisi S *Reconciling Living Customary Law and Democratic Decentralization to Ensure Women’s Land Rights Security* PLAAS Policy Brief 32 (Nov 2010) 3. See also the discussion on ESTA and the LTA in Chapter 4 at 4 2 3 2 below.

⁵⁰Pienaar J M (2002) *TSAR* 201. See also Claassens A & Ngubane S “Women, land and power: the impact of the Communal Land Rights Act” in Claassens A & Cousins B (eds) *Land, Power & Custom: Controversies generated by the South African Communal Land Rights Act* (2008) 155.

⁵¹2008 5 SA 489 (SCA). See also 4 3 4 below.

⁵²See 4 2 4 below for a discussion of the case.

⁵³S 3(1) LTA.

⁵⁴Ss 16 and 17.

⁵⁵Badenhorst P, Pienaar J M & Mostert H *Silberberg and Schoeman’s The Law of Property* 5ed (2006)601.

⁵⁶See 3 4 4 3 2.

long-term tenure security.⁵⁷ Unfortunately, farmers have resisted the long-term security of tenure for occupiers, who include women.⁵⁸

An occupier may only be evicted once all the procedural and substantive requirements in the Act have been met.⁵⁹ A positive development was made in *Univegg Operations SA (Pty) Ltd v & Heldervue Estates & H Diedericks*,⁶⁰ with regard to regulating evictions, where the court decided that evidence of meaningful engagement in the Extension of Security of Tenure Act evictions is a requirement for the court to properly consider “all relevant circumstances” in determining whether an eviction should take place.⁶¹ As there was a lack of information as to whether alternative accommodation will be available in determining a just and equitable date of eviction after fourteen years’ occupation, the matter was remitted to magistrate’s court.⁶² This means that farm owners have to prove in court that they had engaged with the litigants and authorities before an eviction order can be made. This makes it possible for the relevant circumstances of female dependants and/or spouses to be placed before the court in line with section 26(3) of the Constitution.

Long-term tenure security measures are provided for in Chapter two of the Act. The mechanisms provided for in this regard provide for on-site and off-site developments.⁶³ An on-site development is a development that provides the occupiers with an independent long-term tenure right on the land on which they reside or previously resided which belongs to the land owner. An off-site development grants long-term tenure rights on land owned by someone other than the owner of the land on which the occupants resided immediately prior to such development. Despite the provisions of these forms of long-term tenure security, both these mechanisms have not been successful. This may

⁵⁷Preamble of the Act; Pienaar J M “Farm workers: security of tenure in terms of recent legislation” 1998 *SAPL* 423 429-431.

⁵⁸Cousins B “Communal Land Rights Act Declared Unconstitutional” *PLAAS Umhlaba Wethu* 10 (12/2010) 8.

⁵⁹Ch IV ESTA.

⁶⁰LCC 18/2011 par 16; ESTA 11(3).

⁶¹Para 16.

⁶²Para 21.

⁶³S 4(1). See also 3 5 2 2 2 above.

be due to the lack of detail in the Act on how this tenure should function and the various options available.⁶⁴

Internal reviews of both farm dwellers legislation have shown weakness at interpretation, enforcement and general implementation levels.⁶⁵ These problems are also underlined by the Draft Tenure Security Policy.⁶⁶ Examples of these challenges are that farm owners who wish to evict farm dwellers and labour tenants have found ways to use the legislation to their own advantage,⁶⁷ and include protracted labour disputes and limited state enforcement capacity.

A further problem is the poor protection of wives, partners and/or widows with regard to their status as occupiers.⁶⁸ The Extension of Security of Tenure Act makes provision for two types of occupiers. The first is the short-term “occupier”, defined as, a

“...person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so”.⁶⁹

The other is a long-term occupier, who is a person who has resided on the land belonging to the owner for ten years and has reached the age of sixty or is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner

⁶⁴Mostert H, Pienaar J M & Van Wyk J “Land” in Van Aswegen A (Reissue text by Scheepers JHL) *LAWSA* 14 1 ed (2010) para 129. See also 3 5 2 2 above for the discussion of the proposals in the *Draft Tenure Security Policy*.

⁶⁵DRDLR *Memorandum on the Objects of the Land Tenure Security Bill*, 2010 1; Pienaar J M & Geysers K (2010) *THRHR* 249.

⁶⁶DRDLR *Draft Tenure Security Policy* 1.

⁶⁷Cousins B “Communal Land Rights Act Declared Unconstitutional” *PLAAS Umhlaba Wethu* 10 (12/2010) 8.

⁶⁸For an elaborate exposition which is relied on here see Pienaar J M & Geysers K (2010) *THRHR* 265.

⁶⁹S 1 ESTA, the definition excludes persons who use the land for industrial, mining, commercial or commercial farming purposes and persons who earn more than R 5000 per month.

or person in charge.⁷⁰ Long-term occupiers have more rights and protection in relation to the land they occupy and may generally retire in the land.⁷¹

Although the Extension of Security of Tenure Act defines “consent” as either express or tacit consent,⁷² the cases dealt with thus far regard consent as express consent.⁷³ There has to be a legal *nexus* between the owner or person in charge and the person, in order for that person to qualify as an “occupier”, the right to a family of the family members does not automatically make them occupiers.⁷⁴ These approaches ignore tacit consent as defined in the Act⁷⁵ and are in conflict with section 26(3) of the Constitution, in that the spouse, who was not part of the proceedings, could be evicted without her specific circumstances having been placed before the court.⁷⁶

The other ground for occupier status, “another right in law to do so” is not defined in the Act. The courts have decided that marriage is not a basis for occupation as “another right in law to do so”.⁷⁷ “Another right in law to do so” has been interpreted to exist when an occupier has waived her rights in terms of section 25(1) of the Act or on the death of an occupier. The right of residence of a spouse or dependent of a deceased occupier may be

⁷⁰S 8(4) ESTA.

⁷¹Mostert H, Pienaar J M & Van Wyk J “Land” in Van Aswegen A (Reissue text by Scheepers JHL) *LAWSA* 14 1 ed (2010) para 127.

⁷²S 1 ESTA.

⁷³*Conradie v Hanekom* 1999 4 SA 491 (LCC), stated that an existing contract between the wife and the owner made the wife an occupier as she and her husband had entered into separate agreements with the owner; Pienaar J M & Geyser K (2010) *THRHR* 251, 260.

⁷⁴*Landbounavorsingraad v Klaasen* 2005 3 SA 410 (LCC) stated that the wife is an occupier in her own right if the landowner *directly* consented to the wife staying on the land, with emphasis placed on the existence of an agreement. *Simonsig Landgoed (Edms) Bpk v Vers* 2007 5 SA 103 (C) in which the court concluded that the two respondents had to be evicted in terms of ESTA as their right of occupation for the twelve-month period following the death of the partner and spouse, constituted occupation under “another right in law to do so”. Where tacit consent is concerned, the courts agreed that a legal *nexus* existed in *Atkinson v Van Wyk* LCC 7R/98, where a landowner was aware of the second defendant’s occupation, with the consent of the employee and did nothing to object to it. See also Pienaar J M & Geyser K (2010) *THRHR* 253-260.

⁷⁵Pienaar J M & Geyser K (2010) *THRHR* 260.

⁷⁶Mostert H, Pienaar J M & Van Wyk J “Land” in Van Aswegen A (Reissue text by Scheepers JHL) *LAWSA* 14 1 ed (2010) para 127.

⁷⁷*Venter v Claasen* 2001 1 SA 720 (LCC); *Dique v Van der Merwe* 2001 2 All SA 289 (T). Both these cases dealt with marriage to the former land owner.

terminated only on twelve calendar months' written notice to leave the land⁷⁸ or where a lease agreement exists.⁷⁹ Pienaar and Geyser submit that these cannot be the only examples of vesting of occupation by way of "another right in law" for purposes of the Act.⁸⁰

Therefore in practice, the status of female "occupiers" is dependent on males (relatives or spouses) and she can only establish independent status where there is an agreement between her and the owner. It is questionable how often this happens in practice. This stance is in contrast with the position of female "labour tenants", who may establish independent status as labour tenants, as was developed in *Mbhense*.⁸¹ Apart from these shortcomings, the measures in the Land Reform (Labour Tenants) Act and the Extension of Security of Tenure Act still do not effectively protect rural dwellers' tenure security generally as evictions have increased post-1994.⁸² These weaknesses are sought to be addressed in the Draft Land Tenure Security Bill, which seeks to repeal the two Acts above.

The Draft Land Tenure Security Bill, 2010 has a clear focus on farm land and is geared towards limiting evictions and assisting the evicted and those who stand to be evicted with settlement on land or the provision of alternative land.⁸³ The Bill proposes extensive rights for persons residing on farms⁸⁴ and to uphold tenure security for occupiers through subdivision and expropriation. The Bill excludes the traditional communities' areas which the Extension of Security of Tenure Act would have covered. The proposal of the Bill now takes away general protection for all people in the communal rural areas.⁸⁵ In effect the Bill is thus not applicable to the former self-governing territories or other

⁷⁸S 8(5) ESTA. *Simonsig Landgoed (Edms) Bpk v Vers* 2007 5 SA 103 (C).

⁷⁹*Van Zyl v Maarman* 2000 4 All SA 212 (LCC); 2001 1 SA 957 (LCC).

⁸⁰Pienaar J M & Geyser K (2010) *THRHR* 261.

⁸¹See 4 3 4 below.

⁸²Nkuzi Development Association *Still Searching for Security: The Reality of the Farm Dweller Evictions in South Africa* (2005) 40-48.

⁸³Draft Tenure Security Bill 2; Chapter 6 on Agri-villages and land development measures. See 3 5 2 3 above.

⁸⁴CI 15.

⁸⁵Pienaar J M & Kamkuemah A (2011) *Stell LR* 730-731.

areas that would have been covered by the Communal Land Rights Act, had it not been declared unconstitutional.⁸⁶ Therefore, these new measures would not bring any relief for black women resident in rural areas compromising communal land. Chapter III on the Acquisition of Ownership or other Right in Land by Labour Tenants in the Land Reform (Labour Tenants) Act still applies in relation to labour tenancy claims that have already been instituted.⁸⁷ It is submitted that the Bill shows no clear indication of how black rural women in these areas can legally secure their tenure, even though they “experience extremely tenuous access to land and housing”.⁸⁸ There are no clearly defined rights in the poorly drafted Bill and it fails to address the fundamental issue of *real* tenure security on farms.⁸⁹ Moreover, the Bill sets out complicated, onerous procedures with regard to evictions.⁹⁰ There are numerous shortcomings and problems, for example the Bill does not make provision for restoration of residence and use of land and payment of damages in the event of an unlawful eviction as is currently provided for in the Extension of Security of Tenure Act.⁹¹

4 3 3 4 Laws pertaining to the powers over land rights

These laws are to be examined in light of the already existing patriarchal power relations in the rural areas and the factors addressed earlier⁹² which pose a critical challenge for rural black women to access land, let alone secure tenure.⁹³

⁸⁶Pienaar J M “October to December 2010 (4): JQR Land Reform 2010 (4)” 2010 (4) 4 *JUTA*<<http://ipproducts.jutalaw.co.za.ez.sun.ac.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>> (accessed 22/06/2011); Pienaar J M & Kamkuemah A (2011) *Stell LR* 739. See also a discussion of the Act at 3 4 5 3 above and 4 2 4 below.

⁸⁷The claims are in terms of ss 16 and 17 of the Land Reform (Labour Tenants) Act.

⁸⁸Pienaar J M “Farm workers: security of tenure in terms of recent legislation” (1998) *SAPL* 423 437.

⁸⁹PLAAS “Current Policy Processes & Legislative Reforms” (2011) 1 *PLAAS*<<http://www.plaas.org.za/pubs/public-workshop-presentations>> (accessed 29/08/2011).

⁹⁰Pienaar J M & Kamkuemah A (2011) *Stell LR* 739-740.

⁹¹S 14.

⁹²See 4 2 2 above.

⁹³Claassens A -& Ngubane S “Women, Land and power: the impact of the Communal Land Rights Act” in Claassens A & Cousins B (eds) *Land Power & Custom: Controversies generated by South Africa’s Communal Land Rights Act* (2008) 154 155. See also 4 2 above.

Despite the Communal Land Rights Act being declared unconstitutional in *Tongoane*,⁹⁴ a discussion here is still warranted to point out the substantive problems and shortcomings inherent in the Act because these were not addressed in the Constitutional Court judgment. In other words, because the Constitutional Court only focused on the procedural matters and declared it unconstitutional on that basis *alone*, there is a possibility that a new Act could, essentially contain the same provisions with the same scope and impetus.

The Communal Land Rights Act 11 of 2004⁹⁵ sought to upgrade and formalise “old order rights”.⁹⁶ These old order rights, which include quitrent and permission to occupy, were only allocated to the male heads of the family.⁹⁷ In addition, customary law also unfairly discriminates against women in relation to land allocation and security of tenure.⁹⁸ The Commission for Gender Equality thus argued that the then Communal Land Rights Bill, the provisions of which were also included in the Communal Land Rights Act, by securing old order rights derived from discriminatory laws, reinforced a system in which there is structural discrimination against black women. Furthermore, it argued

⁹⁴The facts of the case and the CLARA were discussed earlier as part of the long-term measures for tenure reform at 3 4 4 3 2 2. Here the discussion is focused on women’s issues in the Act and those in the case.

⁹⁵ See 3 4 4 3 2 2 above for the discussion of the unconstitutional declaration of the Act.

⁹⁶ CLARA s1: An “old order right” means a tenure or other right in or to communal land which-

- (a) is formal or informal
- (b) is registered or unregistered;
- (c) derives from or is recognised by law, including customary law, practice or usage; and
- (d) exists immediately prior to a determination by the Minister in terms of section 18 but does not include -
 - (i) any right or interest of a tenant, labour tenant, sharecropper or employee if such right or interest is purely of a contractual nature; and
 - (ii) any right or interest based purely on temporary permission grant by the owner or lawful occupier of the land in question, on the basis that such permission may at any time be withdrawn by such owner or lawful occupier”.

⁹⁷ See 2 3 4 2.

⁹⁸ DLA *White Paper on South African Land Policy*, 1997 34; Claassens A & Mnisi S “Rural Women Redefining Land Rights in the Context of Living Customary Law” in Goldblatt B & McLean K (eds) *Women’s Social and Economic Rights* (2011) 80 80-81. Jara M K “Retribalisation in post-apartheid South Africa: new “traditional” laws & their impacts on rural women” (25/08/2011) PLAAS< <http://www.plaas.org.za/pubs/public-presentations/Jara%20presentation-New%20laws%20-%20women%20-%20UWC%20-%20August%202011.pdf/>> (accessed 29/08/2011).

that the insecure tenure held by black women is the result of racially discriminatory laws. Other women are not subjected to the gender discrimination embedded in the Black Administration Act, the South African Development Trust and Land Act and the Black Areas Land Regulations.⁹⁹

The Act also provided that converted new order rights would be potentially alienable.¹⁰⁰ This introduced the risk that land could be sold from underneath family members, including women, whose rights were not explicitly protected and whose names were not registered. At the same time there was no direct provision that the spouse should consent to the alienation.

Section 4(2) and 4(3) of the Act, sought to protect the security of tenure of married women by providing that an old order right held by a married person is deemed to be held by both spouses by stating that:

“4(2) An old order right held by a married person is, despite any law, practice, usage or registration to the contrary, deemed to be held by all spouses in a marriage in which such person is a spouse, jointly in undivided shares irrespective of the matrimonial property regime applicable to such marriage and must, on confirmation or conversion in terms of section 18(3), be registered in the names of all such spouses.”

This meant that section 4(2) had the likely effect that land would be registered in the names of two spouses, to the exclusion of other family members. This would have decreased the tenure security of female family members who were not wives, including widows, unmarried women or divorced sisters. Also, once a single woman marries, her land rights would (without choice), be jointly owned by her husband to the exclusion of her children, including those she had before marriage. If the purpose of section 4(2) was to address past discrimination against women it was unnecessary for it to have been worded reciprocally in this way. The section was likely to impact negatively on processes of changes in relation to customary law.¹⁰¹ It also meant that land women managed to acquire despite past discrimination would have vested

⁹⁹ Commission on Gender Equality, Submission to the Portfolio Committee on Agriculture and Land Affairs, Communal Land Rights Bill [B67-2003] 17 November 2003 6 23-25.

¹⁰⁰ S 9, 18(3)(d)(ii) and 24(3)(b).

¹⁰¹ See 4 4 2 below.

jointly in their current or future husbands.¹⁰² Thus the section did not adequately secure women's tenure.¹⁰³ Furthermore, Claassens argues that:

“[t]he [Act] as a whole superimposes the western construct of absolute and exclusive land rights on inclusive African systems of relative and ‘nested’ rights, thereby fundamentally changing them.”¹⁰⁴

Also, the Act did not provide for accountability of the traditional councils to the people they serve.

The *de facto* reality for many women in South Africa is that they are the ones who manage and work the land available to them¹⁰⁵ and make up the majority of the rural poor population.¹⁰⁶ As already explained above, the Communal Land Rights Act was declared unconstitutional.¹⁰⁷ Inevitably, this decision leaves women's tenure in communal areas legally insecure after eighteen years of independence. This is aggravated by the customary law practices, that often do not allow women to acquire land as they are “highly patriarchal and historically have underpinned the subordination and oppression of women”.¹⁰⁸

The Communal Land Rights Act was also linked to the Traditional Leadership and Governance Framework Act 41 of 2003 which establishes traditional councils¹⁰⁹ which the former Act authorised to represent communities as land administration committees which allocate land in communal areas.¹¹⁰ These traditional councils are in many cases not elected on the basis of their knowledge and the ability to provide guidance to the communities. Many of

¹⁰² Claassens A (2005) *Acta Juridica* 59-60; Claassens A & Mnisi S “Rural Women Redefining Land Rights” in *Women's Social and Economic Rights* 96-97.

¹⁰³ Here also the section of the now invalid CLARA is addressed to inhibit similar provisions in future legislation.

¹⁰⁴ Claassens A (2005) *Acta Juridica* 63.

¹⁰⁵ Carey Miller DL & Pope A *Land Title in South Africa* (2000) 475.

¹⁰⁶ UN “Facing the future together” Report of the United Nations Secretary-General Task Force on Women, Girls and HIV/AIDS in Southern Africa 2004 10; Women Watch <<http://www.un.org/womenwatch/feature/ruralwomen/facts-figures.html>> *Women Watch* (accessed 07/08/2012).

¹⁰⁷ See 3 4 4 3 2 2 above and 4 3 4 below.

¹⁰⁸ Commission for Gender Equality Submission to the Portfolio Committee on Agriculture and Land Affairs, Communal Land Rights Bill, 10 November 2003.

¹⁰⁹ S 3, 28(4).

¹¹⁰ S 21 an 24.

these positions are obtained through patronage systems which discriminate against those who are poor or do not see eye to eye with the dominant traditional leaders in some areas.¹¹¹ Both Acts centralise power to levels or fora where women have been marginalised for decades.¹¹² These fora are critical for women as the fora decide to whom the land is allocated or to whom it belongs. The Traditional Leadership and Governance Framework Act,¹¹³ maintains and its sister Act, the Communal Land Rights Act, maintained the *apartheid* boundaries, regardless of boundary disputes and different ethnic groups in the relevant areas.¹¹⁴ Coupled with this, is the issue that both Acts gave perpetual life to traditional powers as established under the *apartheid* Bantu Authorities Act 68 of 1951¹¹⁵ and reinforced institutions in which women were not equally represented.

This indicates a reluctance to allow people in general and rural women in particular to choose the kind of tenure system they prefer, as they are restricted to a certain tribal area and their tenure rights are dependent on the traditional authorities in these areas. These traditional authorities are deemed to be traditional councils established by the Traditional Leadership and Governance Act. Only a third (or lower thresholds) of these councils are to be women, who are selected by the senior traditional leader.¹¹⁶ This is a low representation and lack of respect for women's interests and needs, especially in light of the fact that these bodies have extensive unprecedented Government powers, which include land administration, agriculture, administration of justice, safety and security, the registration of births, deaths, customary marriages, economic development and the dissemination of

¹¹¹ Gasa N "Millions will lose their citizenship" (25/03/2012) *IOL* <<http://www.iol.co.za/news/politics/millions-will-lose-their-citizenship-1.1263279>> (accessed 18/04/2012).

¹¹² See 3 4 4 3 2 and 3 4 4 3 3; Claassens A (2005) *Acta Juridica* 63-64.

¹¹³ See also 3 4 4 3 3.

¹¹⁴ TLGFA ss 28(1) and (3); Claassens A (2005) *Acta Juridica* 69-70; Ntsebeza L "Chiefs and the ANC in South Africa: the reconstruction of tradition" in Claassens A & Cousins B (eds) *Land, Power & Custom: Controversies generated by the South African Communal Land Rights Act* (2008) 238 238-239.

¹¹⁵ Claassens A (2005) *Acta Juridica* 43, 45.

¹¹⁶ S 3(1)(b) & (d).

information relating to Government policies and programmes.¹¹⁷ It is furthermore disconcerting as these bodies operate in areas where the majority of people are women. These powers sometimes extend beyond those of elected municipal councilors who form the third tier of Government.¹¹⁸ There has been abuse of these powers by the traditional authorities as far back as the *apartheid* era, especially with regard to land allocation and often to the detriment of rural women.¹¹⁹ Therefore the core of this Act cannot be said to embrace the proposal to bring land reform in line with constitutional guarantees and values.

To elaborate, Claassens and Mnisi argue that “rural development”, “community empowerment” and socio-economic rights security are undermined by prioritising the powers of senior traditional leaders over those of ordinary rural people.”¹²⁰

A problematic Traditional Courts Bill has furthermore been proposed.¹²¹ Although the Bill seeks to transform traditional courts,¹²² it bases its jurisdiction on *apartheid* boundaries and does not allow rural people a choice as to whether they want their matters to be heard by a traditional court or not. This undermines the constitutional principles. This is also regardless of whether or not the boundaries and king or queen or senior traditional leaders,

¹¹⁷S 20.

¹¹⁸Ntsebeza L “Chiefs and the ANC in South Africa” in *Land, Power & Custom* 238-255.

¹¹⁹257; Some headmen demanded and received a fee for each piece of land they allotted, while others used their powers to accumulate considerable landholding and reward their relatives and supporters: Delius P “Contested terrain: land rights and chiefly power in historical perspective” in Claassens A & Cousins B Cousins B (eds) *Land, Power & Custom* 226-227, 230-231; Mnisi Weeks A & Claassens A (2011) *Stell LR* 833-837.

¹²⁰Ntsebeza L “Chiefs and the ANC in South Africa” in *Land, Power & Custom* 257-258. Mnisi Weeks S & Claassens A (2011) *Stell LR* 824.

¹²¹ See generally South African Crime Quarterly (2011) 35 SACQ 1-47 <<http://journals.sabinet.co.za.ez.sun.ac.za/WebZ/ej/AdvancedQuery?sessionid=01-60222-691878601>> (accessed 18/04/2012); Mnisi Weeks S *Traditional Courts Bill: Process, Substance and Implications for Women* (2012) presented at Department of Women, Children and People with Disabilities (DWCPD), Rural Women’s National Consultative Meeting, 12 April 2012 hosted by the Department of Women, Children and People with Disabilities (copy on file with author) and generally University of Cape Town: Law, Race and Gender Research Unit (15/03/2012) LRG <<http://www.lrg.uct.ac.za/research/focus/tcb/>> (accessed 18/04/2012).

¹²²Traditional Courts Bill 2; cl 3(1). See also 3 4 4 3 2 3 above.

who are the presiding officers in these traditional courts, are legitimate¹²³ or whether the people within the boundaries have any historical ties to the chief. The Bill is premised on the need to repeal the Black Administration Act 38 of 1927,¹²⁴ but the above indicates that it merely an extension of the Traditional Leadership and Governance Framework Act.

Furthermore, apart from the definition of the “presiding officer” in the Bill, which,

“means a king, *queen*, senior traditional leader, headman, *headwoman* or member of a royal family who has been designated as a presiding officer of a traditional court by the Minister in terms of section 4 and who –

- (a) presides over proceedings in the resolution of disputes contemplated in this Act; or
- (b) pronounces judgment at the end of such proceedings after being advised in terms of customary law and custom”,¹²⁵

there is no reference to female representatives in these traditional courts. In addition, the provision in clause 9(2)(a)(i), that a presiding officer must ensure that the rights in the Bill of Rights are observed and respected, and particularly that women are afforded full and equal participation in the proceedings as men are, there is no direct provision that women must be included in the composition of the court. These courts are mostly made up of men who are often biased in favour of men in court disputes.¹²⁶ Women in mourning face particular restrictions which worsen the position for widows facing evictions.¹²⁷ The Bill reinforces this discrimination by providing that husbands can *inter alia* represent wives and *vice versa*, during traditional court proceedings. Also, legal representation during traditional court

¹²³ Traditional Courts Bill cl 4-5; Jara M K “Retribalisation in post-apartheid South Africa: new “traditional law and their impact on rural women” *PLAAS*.

¹²⁴ See 2 3 4 2 and 2 3 4 3 above. See also Gasa N “Millions will lose their citizenship” (25/03/2012) *IOL* <<http://www.iol.co.za/news/politics/millions-will-lose-their-citizenship-1.1263279>> (accessed 18/04/2012).

¹²⁵ Cl 1 of the Bill, emphasis author’s own.

¹²⁶ Claassens A & Ngubane S “Women, Land and power: the impact of the Communal Land Rights Act” in Claassens A & Cousins B (eds) *Land Power & Custom* 174.

¹²⁷ Jara M K “Retribalisation in post-apartheid South Africa: new “traditional laws and their impact on rural women” *PLAAS*. See 4 5 4 below for a discussion of this.

proceedings is not allowed for any party,¹²⁸ which is contrary to section 35(3)(f) of the Constitution. It is thus no surprise that women are the ones opposing this Bill the most.¹²⁹ However, Holomisa¹³⁰ argues that this provision is necessary so disputes are not decided on the basis of the party with the most expensive legal representation, but that disputes are decided by community members in terms of their custom by peers of the parties in dispute.

The Bill, like the now defunct Communal Land Rights Act, does not promote substantive equality. At the same time it does not recognise decision-making authority and dispute resolution at family and village level¹³¹ and centralises power in the hands of senior traditional leaders.

Ultimately, as the Bill affects areas where rural black women reside and governs bodies that are the direct authorities in these areas, it also contributes to limiting black rural tenure security because of the problems pointed out above. It therefore continues to propose further inequality for securing tenure for rural black women compared to men and moving away from the objectives of the White Paper on South African Land South Policy, 1997. All in all, it is doubtful whether this Bill will pass constitutional muster if it is enacted.

Therefore, where the laws pertaining to the content of land rights are concerned, there is some reflection of the proposals in the White Paper on South African Land Policy to provide tenure security in line with the constitutional values. This is evident in the Interim Protection of Informal Land Rights Act and the Upgrading of Land Rights Act. The legislation that seeks to

¹²⁸ CI 9(3)(a) and (b) respectively.

¹²⁹ The CGE, WLC and the RWM in KZN; Claassens A & Mnisi S "Rural Women Redefining Land Rights in the Context of Living Customary Law" in Goldblatt B & McLean K (eds) *Women's Social and Economic Rights: Developments in South Africa* (2011) 80 99-100.

¹³⁰ Holomisa K "Balancing law and tradition: The TCB and its relation to African systems of justice and administration" SACQ 17 19, 21 <<http://journals.sabinet.co.za.ez.sun.ac.za/WebZ/ej/AdvancedQuery?sessionid=01-60222-691878601>> (accessed 18/04/2012).

¹³¹ Claassens A & Mnisi S "Rural Women Redefining Land Rights" in *Women's Social and Economic Rights* 98-99.

protect rural farm dwellers leaves room for improvement and the upgrading and amendment thereof was expected. However, the laws pertaining to the control of land rights require more reform as they reinforce past discriminatory laws and practices under the disguise of post-1994 legislation, which is the opposite of the White Paper on Land Policy proposals.

4 3 3 5 Impact of recent developments¹³²

Where the Draft Land Tenure Security Bill is concerned, clause 7, on the inclusion of family members to its category of persons residing on farms, is more favourable to black rural women as it includes a wider scope for female occupiers. This section provides certainty where cases such as *Conradie v Hanekom and Another*¹³³ and *Landbounavorsingsraad v Klaasen*¹³⁴ are concerned, which fell under the Extension of Security of Tenure Act.¹³⁵ In relation to said cases, this section clarifies that wives are occupiers in their own right and a wife must now also be served with a notice of eviction. Furthermore, clause 27(5)(a) of the Bill requires that the Land Rights Management Board ensures that the rights of women, children and other vulnerable groups are recognised in any resettlement measure for those affected or likely to be affected by an eviction. A positive development for women is also that the Board will grant legal aid for unlawful evictions. Overall, one can accept the establishment of a Land Rights Management Board and Committees as a positive endeavor as they would focus on issues of tenure reform and attempt to address the “total-system failure”¹³⁶ through their roles and functions. Unfortunately, the Bill presents no clearly defined legislative measures for rural women’s tenure in line with equality, tenure security and/or comparable redress. The powers given to the Land Management Commission to subpoena anyone or any entity, to grant amnesty and/or initiate prosecution are questionable.

¹³² See 3 5 2 above.

¹³³ 1999 4 SA 491 LCC.

¹³⁴ 2005 3 SA 410 LCC.

¹³⁵ See 4 2 3 3 below.

¹³⁶ *Green Paper on Land Reform*, 2011:10.

The Green Paper on Land Reform also does not clarify how the Commission will solve the problems affecting tenure reform. The Green Paper acknowledges the failures of land reform¹³⁷ and submits to the need for an improved, coordinated and integrated land reform programme.¹³⁸ Yet its proposals do not give a specific and clear role for traditional authorities or guidance on how the state will acquire land for expropriation. The most discouraging aspect of the Green Paper, however, is that it does not mention women at all. It emphasises the need to protect farm dwellers from eviction and provide them with secure tenure, but there is no indication how this will be done and what the content of their rights would be. Du Toit states that the Green Paper provides no policy direction on how to resolve the conflicts of tenure rights in the rural constituencies and does not clarify how women's rights to land can be secured.¹³⁹

Apart from the above, there is no clear new comprehensive provision for the protection and securing of black rural women's land rights in the Strategic Plan. Most of its proposals towards securing gender-orientated tenure include women as a member of a vulnerable group that includes the youth, disabled, old people and people living with HIV/AIDS. Generally the underlying idea is that this vulnerable group will be empowered, but not how this will be done.¹⁴⁰

The practical implementation of the Strategic Plan will be eagerly awaited and hopefully will not take as much time as previous legislative attempts in providing long term secure tenure for a majority of South Africans, especially for rural black women. As there are no gender specific provisions, it cannot be said that these new developments will successfully put black rural women's tenure in a more legally certain position than they were at any period post-1994.

¹³⁷9-10.

¹³⁸8.

¹³⁹Du Toit A "Comment on the newly released Green Paper on Land Reform, from the Institute of Poverty Land and Agrarian Studies (PLAAS)" (01/09/2011) *PLAAS*<<http://us2.campaign-archive1.com/?u=1ef2bf75c99750631a09a7141&id=0d793df2c0>> (accessed 10/09/2011).

¹⁴⁰DRDLR Green Paper on Land Reform, 2011 10.1. The same was the case in the defunct Communal Land Rights Act s 22(4).

Having set out the impact of the existent tenure laws and more recent developments on rural black women, there is generally no picture painted by these laws for long-term tenure security. As indicated in the discussion above, legislation alone as a legal instrument is aided by case law developments to bring about reform which directly or indirectly affects rural women's tenure. Thus case law developments relating to women's tenure will now be addressed.

4 3 4 Case Law

In the context of the tenure reform legislation above, it will be shown how the courts have dealt with rural women's tenure security and matters related thereto.

In the first judgment, *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa*,¹⁴¹ the court heard two different cases in one hearing which dealt with the "official customary law" rule of male primogeniture. In terms of the rule, on the death of a man who has not made a will, including a married man, the land and the house pass to a male relative.¹⁴² The issues before the court were the constitutional validity of section 23 of the Black Administration Act 38 of 1927, which dealt *inter alia* with the intestate deceased estates of blacks¹⁴³ and the constitutionality of the principle of male primogeniture in customary law of succession. The principle was found to discriminate unfairly against women and section 23 of the latter Act was declared unconstitutional.¹⁴⁴ This judgment enables women to inherit intestate from their husbands and

¹⁴¹2005 1 SA 580 (CC). See also 4 2 2 and 4 3 3 2 above.

¹⁴²*Madolo v Nomawu* 1896 1 NAC 12; *Mthembu v Letsoalo* 2000 3 SA 867 (SCA) para 8.

¹⁴³ The Act was said to discriminate on the basis of gender and race. It was subsequently repealed in its entirety.

¹⁴⁴See further Bennet T "'Official' vs 'living' customary law: dilemmas of description and recognition" in Claassens A & Cousins B (eds) *Land, Power & Custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) 138 144-150; Kingwill R "Custom-building freehold title: the impact of family values on historical ownership in the Eastern Cape" in Claassens A & Cousins B (eds) *Land, Power & Custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) 184 194-198; Rautenbach C & Du Plessis W "Customary Law of Succession and Inheritance" in Rautenbach C, Bekker JC & Goolam NMI (eds) *Introduction to Legal Pluralism* 3 ed (2010) 117 127-143; Kerr AJ "The Constitution and Customary Law" (2009) 126 SALJ 39 39-50.

daughters to inherit from their fathers even if they are illegitimate. This means that rural women can obtain secure tenure in land from their husbands or fathers. As referred to earlier, reform was brought about by the *Bhe* case in the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.¹⁴⁵ This Act places grants women in customary marriages the same status as those in civil marriages, thus allowing women from customary unions to inherit intestate from their deceased husbands.

Brown v Mbhense briefly referred to above,¹⁴⁶ addressed an appeal by a farm owner against the decision of the Land Claims Court that the illiterate sixty seven year old female respondent is a “labour tenant”,¹⁴⁷ in terms of the Land Reform (Labour Tenants) Act. The respondent had lived on the farm all her life. She was born there, married there and had been working on the farm. Her parents had also lived and worked on the farm for the owner and were buried on the farm.¹⁴⁸ Her husband also worked for the owner of the farm until he passed away. In return for their labour, the respondent and her husband had cropping rights on the farm, which she insisted formed part of the pay for their labour.¹⁴⁹ She continued cropping after her husband’s death. The main enquiry was whether she personally had the right to use cropping land and whether she provided labour in consideration of such right.¹⁵⁰ The appeal was thus based on whether the respondent had proved requirements (b) and (c) of the definition of “labour tenant”.¹⁵¹ In deciding the matter the majority of the

¹⁴⁵ See 4 3 3 2 above.

¹⁴⁶ See 4 3 3 3 above.

¹⁴⁷ S 1: “Labour tenant’ means a person-

- (a) who is residing or has the right to reside on a farm;
- (b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and
- (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm, including a person who has been appointed a successor to a labour tenant in accordance with the provisions of section 3 (4) and (5), but excluding a farmworker.”

¹⁴⁸ Para 5.

¹⁴⁹ Para 8.

¹⁵⁰ Para 10.

¹⁵¹ Para 17. See note 576 above for the definition of labour tenant.

court looked at the background of labour tenancy, particularly that parties contracted on an unequal basis with the white farmer who had the dominant position while the black farmer had the subordinate position.¹⁵² Based on the preamble of the Land Reform (Labour Tenants) Act, the majority of the court decided that a “generous construction over a merely textual or legalistic one” should be followed.¹⁵³ More importantly is that when labour tenants enter into these agreements they have no legal representation and are at most times unschooled.¹⁵⁴ Thus the court concluded that the respondent did have the right to use cropping land during her employment and thereafter in consideration of which she provided labour. She thus fulfilled requirement (b) of the definition of labour tenant. Furthermore, having regard to the “meagre salary”¹⁵⁵ paid to the respondent’s father, it is clear that he provided labour in consideration of the right also to use cropping or grazing land on the farm. Thus the respondent also fulfilled requirement (c) and all the requirements for labour tenancy.¹⁵⁶ All in all, having regard to the background against which labour tenancy contracts are concluded, the rural female labour tenants may establish independent status as labour tenants. The Land Reform (Labour Tenants) Act can be interpreted to provide protection to rural women as part of the family but also as independent labour tenants and thus protection against arbitrary evictions.¹⁵⁷

Another judgment, *Gumede v President of the Republic of South Africa*, declared section 7(1) of the Recognition of Customary Marriages Act unconstitutional as far as it relates to monogamous customary marriages. This case opened up the property system and allows the wife to such a union a claim to the family property including land during and upon dissolution of the marriage.¹⁵⁸

¹⁵²Para 22; Carey Miller DL & Pope A *Land Title in South Africa* (2000) 526.

¹⁵³Para 25. The majority of the court based this on the approach of Moseneke DCJ in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para 53 and 55.

¹⁵⁴Para 27.

¹⁵⁵Para 35.

¹⁵⁶ Para 35-36.

¹⁵⁷Pienaar J M & Geyser K (2010) *THRHR* 263-264.

¹⁵⁸ See 4 3 3 2 above.

Tongoane v The National Minister for Agriculture and Land Affairs addressed the law applicable to rural tenure security that resulted in the declaration of invalidity of the Communal Land Rights Act. The judgment has already been referred to above.¹⁵⁹ It is discussed here in relation to specific women's issues that arose in the case, which were as follows:

Firstly, the establishment and composition of the land administration committee were addressed. The Act gave unilateral power to traditional councils acting as land administration committees to administer communal land. The peremptory terms of section 22, which provided for the composition of these committees, stated that at least one third of the land administration committee should be women and that one person on the committee "must represent the interests of vulnerable community members including women, children and the youth, elders and the disabled".¹⁶⁰ To elaborate, rural women have trouble gaining maximum if any socio-economic benefits, especially if the structures involved in formulating solutions do not embody representation of women with critical decision making roles.¹⁶¹ The Communal Land Rights Act did not improve rural women's status as it limited women's representation and participation in its decision-making fora.¹⁶² The provisions did not have the effect of freeing women from their minority status. The court said that, because of section 21(2) the functions of the land administration committee could be performed by the non-democratically elected traditional council. Accordingly, the interests of women, children and the elderly may not effectively be represented by such a council. The section trumped the village and family forums that currently mediate power and allow all people to

¹⁵⁹ See 3 4 4 3 2 2 and 4 3 3 4 above.

¹⁶⁰ S 22(3) and 22(4).

¹⁶¹ Pienaar J M (2002) *TSAR* 200. Concern has however been raised that even if women actively and effectively participate in community decision-making structures, this does not necessarily mean that their interests are met as gender issues might not be part of the agenda or the issues for discussion may be determined by others: Mokgope K *Land reform, sustainable rural livelihood and gender relations: A case study of Gallawater A farm* PLAAS Research Report No.5 17. Nevertheless, having women as part of such decision making structures is a step in the right direction to create a system of rules that includes them and caters for their interests.

¹⁶² S 22(3)-(4) CLARA; Bohler-Muller N & Daniels B "Does the Communal Land Rights Act Really Protect the Rights of Rural Women to Own Land?" (2009) *Africagrowth Agenda* 26 27. See also the discussion below of the Traditional Leadership and Governance Framework Act.

participate in land rights decisions.¹⁶³ Thus the provision of constitutional equality was infringed. Furthermore, the provision in section 21(2) had the capability of undermining the tenure security of the Makuleke community, which is located within the jurisdictional boundaries of a large traditional council, if that traditional council carried out the task of the land administration committee.¹⁶⁴

Secondly, the court accepted that the Act introduced new regime for the administration of communal land and for the security of tenure. However, the Act did not harmonise the right of the Makuleke and Kalkfontein communities to make rules in relation to the role of traditional leaders. This was the result because, in spite of section 5(2),¹⁶⁵ the Minister could still interfere and make a determination of rights in terms section 18, which put their and rural women's tenure at risk and is unconstitutional.¹⁶⁶

The judgments of the Courts above and generally those of the Constitutional

¹⁶³Claassens A & Mnisi S "Rural Women Redefining Land Rights" in *Women's Social and Economic Rights* 98.

¹⁶⁴*Tongoane & Others v National Minister for Agriculture & Land Affairs & Others* [2010] JOL 25446 (GNP) para 42.

¹⁶⁵ S 5(2) stated that "Despite any other law—

- (a) on the making of a determination by the Minister in terms of section 18, the ownership of communal land which is not State land but which is registered in the name of—
 - (i) a person;
 - (ii) a traditional leader or traditional leadership whether recognised in terms of law or not;
 - (iii) a communal property association contemplated in the Communal Property Associations Act, 1996 (Act No. 28 of 1996); or
 - (iv) a trust or other legal entity, vests in the community on whose behalf such land is held or in whose interest such registration was effected, and such land remains subject to limitations and restrictions in relation to and rights or entitlements to such land;
- (b) the community referred to in paragraph (a) succeeds in all respects as the successor in title to such person, traditional leader or traditional leadership, communal property association, trust or other legal entity;
- (c) the title deed relating to land contemplated in paragraph (a) and any mortgage bond or other deed registered in respect of such land must, in the prescribed manner, be endorsed by the Registrar of Deeds to reflect the community as the registered owner of such land; and
- (d) the provisions of this Act must apply with the necessary changes to land contemplated in paragraph (a)."

¹⁶⁶Para 63.

Court,¹⁶⁷ uphold women's claims to substantive gender equality, security of tenure and constitutional redress. The Constitutional Court does so in a manner that is in line with the White Paper on South African Land Policy. At the same time, the judgments acknowledge the "customary law" referred to in the Constitution¹⁶⁸ as the customary law which is lived and developed through practice by the people who follow it. However, the legislature's reaction to these judgments sometimes reveals a "stubborn persistent gap between principle and practice, and the power of patriarchal norms",¹⁶⁹ especially because of the time that has elapsed since the beginning of the new Constitutional dispensation.

Clearly, courts are one of the major role players involved in securing black rural women's tenure. The transformative role or possible role of other relevant role players in the tenure reform process will be set out below in more detail.

4 4 Stakeholders involved in securing black rural women's tenure

4 4 1 Introduction

The White Paper on South African Land Policy, 1997 states that the success of the land reform programme lies partially in the "establishment of cooperative partnership between the state and private and non-governmental sectors."¹⁷⁰ This section will assess the roles, functions and contributions of specific role players in relation to land reform in general and particularly to tenure reform regarding black rural women.

¹⁶⁷ *Shilubana v Nwamitwa* 2009 2 SA 66 (CC).

¹⁶⁸ Ss 30, 31, 39(2), 211(1)-(3).

¹⁶⁹ Walker C "Elusive Equality: Women, Property Rights and Land Reform in South Africa" in Goldblatt B & McLean K (eds) *Women's Social and Economic Rights* (2011) 105 121.

¹⁷⁰ DLA *White Paper on South African Land Policy* 7. See also 3 5 2 2 4 above on the position of the *Draft Tenure Security Policy, 2010* in this regard and 4 3 2 and 4 4 below.

4 4 2 Role Players

4 4 2 1 Farmers

The Department of Rural Development and Land Reform specifically states that emergent farmers and land owners are part of their core clients.¹⁷¹ Farmers play a role in bringing about the realisation of tenure reform by adhering to tenure legislation such as the Extension of Security of Tenure Act and the Land Reform (Labour Tenants) Act. Long-term security of tenure for farm dwellers is hereby promoted and where an eviction is justified, it is imperative that the eviction is carried out in accordance with the law. Farmers must at the same time promote constitutional imperatives, especially bearing in mind past dispossessions and the status of rural women as occupiers or labour tenants as described earlier.¹⁷² The success of proposals in the Draft Tenure Security Policy on agri-villages and Land Rights Management Boards is also dependent on the cooperation of farmers.¹⁷³

4 4 2 2 Communities and Civil Society

In the same vein, civil society should uphold a constitutional spirit and their social practices and attitudes should not marginalise or continue to marginalise rural women. Both informal and legally enforceable practices endorsed by traditional leaders and communities, disadvantage women as described earlier.¹⁷⁴ It is also essential that civil society practice and develop the living customary law, where relevant.

¹⁷¹ Other core clients are Rural Communities, Landless and tenure insecure communities, all spheres of Government, Users of special information, Non-governmental organizations and the Private Sector: Department of Rural Development and Land Reform <http://www.ruraldevelopment.gov.za/DLA-Internet/content/pages/About_Us_The_Department.jsp> (accessed 27/08/2011).

¹⁷² See 4 3 3 3 and 4 3 4 above.

¹⁷³ See 3 5 2 2 2 and 3 5 2 4 5 5 above.

¹⁷⁴ Cross S & Friedman M "Women and tenure: marginality and the left hand power" in Meer S (ed) *Women, Land and Authority: Perspectives from South Africa* (1997) 17 17. See 4 2 above.

4 4 2 3 National Government

National Government in this sense refers to the Department of Rural Development and Land Reform, the Deeds Registries Office and other state departments that can influence rural women's lack of or secure tenure. Their political will, funding on land reform and accountability are essential elements in this regard. While the task of enabling rural women's tenure security should be a focus across all three spheres of Government, national Government as the highest level of authority should be leading the realisation of land reform.

All spheres of Government are core clients of the Department of Rural Development and Land Reform, alongside *inter alia* farmers and rural communities.¹⁷⁵ Important spheres of Government in this regard would be sister departments such as the Department of Women, Children and People with Disabilities, the Department of Labour and the Department of Agriculture, Forestry and Fisheries. All of these departments should, inevitably be focused on service - especially regarding women on farms.¹⁷⁶ The Department of Labour is also a major player where farm workers are concerned in order to curb abuses and monitor their situation. These state departments and organs need to coordinate and communicate in order to facilitate the process of securing tenure for black rural women.¹⁷⁷

Together with traditional leaders, national Government must protect the spaces for change or transformation that rural women have opened up.¹⁷⁸ At the same time they must give effect to both formal and substantive equality in securing rural women's tenure. After all,

¹⁷⁵ Department of Rural Development and Land Reform <http://www.ruraldevelopment.gov.za/DLA-Internet/content/pages/About_Us_The_Department.jsp> (accessed 27/08/2011).

¹⁷⁶ Parliamentary Monitoring Group "Minister of Rural Development and Land Reform on the Outcome 7 Delivery Agreement, and the Department on progress with targets set in the Performance Agreement" *PMG* <<http://www.pmg.org.za/report/20110615-minister-rural-development-land-reform-outcome-7-delivery-agreement-d>> (accessed 18/08/2011).

¹⁷⁷ Unfortunately, the Department of Rural Development and Land Reform admitted to have been done poorly *in the Green Paper on Land Reform, 2011* 10.4.

¹⁷⁸ Claassens A & Mnisi S "Rural Women Redefining Land Rights" in *Women's Social and Economic Rights* 84. See 4 4 2 below.

“[n]ational-level discourses and laws have a far-reaching impact on the local power relations within which rural people contest, challenge and construct both custom and rights at a local level.”¹⁷⁹

The Department of Rural Development and Land Reform underwent restructuring in 2009¹⁸⁰ and now has a Chief Directorate on Tenure Reform that falls under the branch of land reform. There is however no indication that the tenure reform directorate as an extended branch will focus on women’s tenure in particular.¹⁸¹

4 4 2 4 Non-Governmental Organisations

Role players in this regard are *inter alia* Women on Farms, Landless People’s Movement, Environmental Monitoring Group, Trust for Community Outreach and Education and Chapter 9 Institutions. The latter includes the Commission for Gender Equality, whose main aim is to work towards a society that is free of gender oppression and inequality.¹⁸² These organisations can help women access the judiciary in order to make the law enforceable,¹⁸³ by submitting comment on Bills that affect women’s status and legal rights or be involved as *amicus curiae* during court proceedings.

Non-governmental organisations also have a role to play by responding to the crisis of widows and divorcees, who face eviction from their husbands’ land.¹⁸⁴ The Treatment Action Campaign, for example, can and has become relevant

¹⁷⁹ Claassens A & Mnisi S “Rural Women Redefining Land Rights” in *Women’s Social and Economic Rights* 83.

¹⁸⁰ See 3 4 4 5 above.

¹⁸¹ DRDLR “Structure for the Department of Rural Development and Land Reform” (2011) DRDLR <<http://ruraldevelopment.gov.za/DLA-Internet/content/images/Dept%20Structure11.jpg>> (accessed 03/08/2011).

¹⁸² Commission for Gender Equality “Mission and Vision” (23/05/2012) CGE <http://www.cge.org.za/index.php?option=com_content&view=article&id=46&Itemid=68> (accessed 23/05/2012).

¹⁸³ The CGE was *amicus curiae* in the *Bhe* case. See also Ndashe S “Making the law known and enforceable” in Izimu K (ed) *Reclaiming our lives: HIV and AIDS, women’s land and property rights, and livelihoods in southern and East Africa, Narratives and responses* (2006) 49 49.

¹⁸⁴ See 4 5 4 below.

in relieving the effects of HIV or the infection rate and reduce women's vulnerability in this manner.

4 4 2 5 Traditional Leaders

Traditional authorities' power and support is mainly based on their role of allocating land, an important source of livelihood especially in rural areas. These role players are essential as they play a crucial role in developing and enforcing living customary law and effectively implementing state law on the ground. In this regard they are instrumental to either reinforcing patriarchal power relations or minimising them. More so as they constitute constitutionally recognised institutions,¹⁸⁵ although they are not democratically elected and it is argued that the central role they play in development and interpretation of customary law is in fact a colonial invention.¹⁸⁶

As rural land that forms the focus of this study was mostly registered as state property in the past,¹⁸⁷ authorities and other people may decide to use the land without realising the underlying ownership thereof.¹⁸⁸ This makes traditional authorities important agents of the rural people as they are more accessible to the people and have more knowledge of possible underlying and overlapping rights in the land, than provincial and national authorities. Their active role in this regard would avoid or mediate power struggles between parties claiming ownership of the land. Traditional authorities thus need to be strong institutions in order to *inter alia* protect communities against exploitation by individuals and other authorities.

Legislation such as the Traditional Leadership and Governance Framework Act briefly discussed above,¹⁸⁹ which gives traditional leaders extensive

¹⁸⁵ Chapter 12 of the Constitution s 211-212.

¹⁸⁶ See 2 3 3 2 and 2 5 2 above. Gasa N "Millions will lose their citizenship" (25/03/2012) *IOL* <<http://www.iol.co.za/news/politics/millions-will-lose-their-citizenship-1.1263279>> (accessed 18/04/2012).

¹⁸⁷ See the historical account in Chapter 2.

¹⁸⁸ DLA *White Paper on South African Land Policy* 1997 30.

¹⁸⁹ See 3 4 4 3 2 3 and 4 3 3 4 above.

powers, means they are in a position to directly affect tenure reform at ground level.

Some traditional leaders manipulate constructs of the “customary” to favour their and men’s interests,¹⁹⁰ for tenure reform to work, this should not prevail as the exercise of cultural or customary rights should not infringe on the right to equality, including that of women in gaining access to land. Premised on the living customary law that is founded on a culture of co-sharing, respect and humility, there should not be a clash between rural practices and equality, if traditional leaders act in accordance with their core values of *ubuntu*.¹⁹¹

4 4 2 6 Courts/Judges/Lawyers

Courts can play a significant role regarding securing land rights, especially where Parliament is less amenable to doing so.¹⁹² Ultimately the value of court judgments not only effects social practices, such as allocation of land to women in communities, but also gives an opportunity for transformative legal action.¹⁹³ Albertyn¹⁹⁴ stresses that when poor women bring cases to court, judges and lawyers need to understand their context of gender inequality, poverty and social attitudes. Elaborating that, significantly lawyers make a number of strategic choices in framing the case, and as such are “*important gatekeepers to transformative outcomes*.”¹⁹⁵ The factors listed above that impact on women’s tenure need to be kept in mind in this context as well.¹⁹⁶

Accordingly, all these role players have an important role to play in developing

¹⁹⁰ Claassens A & Ngubane S “Women, Land and power: the impact of the Communal Land Rights Act” in Claassens A & Cousins B (eds) *Land Power & Custom: Controversies generated by South Africa’s Communal Land Rights Act* (2008) 154 -175.

¹⁹¹ See 4 4 2 below.

¹⁹² Albertyn C “Gendered Transformation in South African Jurisprudence: Poor Women and the Constitutional Court” (2011) 22 *Stell LR* 591 600-607.

¹⁹³ 597.

¹⁹⁴ 600-604.

¹⁹⁵ 604. Emphasis author’s own.

¹⁹⁶ See 4 2 above.

a rights-based approach and achieving substantive equality to rural women's tenure.¹⁹⁷

4 4 2 7 Rural Women

Given the poor track record of the legislature thus far, with regard to promulgation of legislation that directly and comprehensively deals with rural women's tenure security, black rural women and women in general bear the responsibility of making their grievances acknowledged and addressed.¹⁹⁸

This can be done through traditional leadership structures¹⁹⁹ and via those women in provincial and national decision-making positions *inter alia*. This is not a futile task and some advances have already occurred through contestation led by rural women.²⁰⁰ They furthermore have recognition and support from non-governmental organisations, Government itself and the courts who are influential role players in this regard, as explained above. More importantly, the inherent flexibility and developmental and transformative potential of customary law that directly governs the areas they live in, is integral to their struggle.²⁰¹ In light thereof, rural women should, in solidarity, oppose discriminatory practice in their communities. Through mobilisation they can, for example, oppose Bills in Parliament as was done with regard to

¹⁹⁷ As was done with regard to property in *Gumede v President of the Republic of South Africa and Others* 2009 (3) BCLR 243 (CC). See also Chenwi L & McLean K "A Woman's Home is Her Castle?" – Poor Women and Housing Inadequacy in South Africa" in Goldblatt B & McLean K (eds) *Women's Social and Economic Rights* (2011) 128 144.

¹⁹⁸ See specifically with regard to women's development UN "Facing the Future Together: Report of the United Nations Secretary General' Task Force on Women, Girls and HIV/AIDS in Southern Africa" UNAIDS<http://data.unaids.org/publications/External-Documents/sgreport_facingfuture_en.pdf> (accessed 14/05/2012).

¹⁹⁹ As in *Shilubana v Namwita* 2009 2 SA 66 (CC) it was accepted that women may be traditional leaders.

²⁰⁰ See 4 5 2 below.

²⁰¹ See *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) 45; Claassens A & Mnisi S "Rural Women Redefining Land Rights" in *Women's Social and Economic Rights* 82, 100 where the authors other new developments include the emergence of development committees alongside 'tribal' authorities and adoption of 'tribal' constitutions to check potential abuse of power.

the Communal Land Rights Bill²⁰² and is currently being done with the Traditional Courts Bill.²⁰³

4 5 Categories of women

4 5 1 Introduction

Various factors impact on women's status and tenure security in general. These factors inform policy documents and legislation. The above exposition has set out the particular policy and legislative provisions dealing specifically with women's tenure. The developments in case law in this regard have also been referred to. Apart from the overall policy and legislative framework, the stakeholders and their roles in securing tenure for rural women have also been set out above. Though it has often been stated in the study that black rural women generally face challenges with regard to tenure security, it is crucial to understand that "women" as a category is not a homogenous entity. Class, age and marital status all create differences in power relations and access to land resources that have implications for tenure reform.²⁰⁴

Generally, the changing composition of the family and the declining rate of marriage among black women in South Africa and unequal power relations remain important considerations in this regard.²⁰⁵ Coupled with other social factors, such as their reproductive roles and primary-care giving responsibilities for children and other dependents,²⁰⁶ the HIV/AIDS epidemic,²⁰⁷ endemic poverty, especially in the former homelands, and

²⁰² The opposition of the Bill led to a few changes before it was promulgated. Claassens A (2005) *Acta Juridica* 42. See also Pamela S "Solidarity is important for African women" (2006) 4 *Landnews* 3 3.

²⁰³ Claassens A & Mnisi S "Rural Women Redefining Land Rights" in *Women's Social and Economic Rights* 99.

²⁰⁴ Meer S- "Introduction" in Meer S (ed) *Women, Land and Authority* 3. In this regard we must understand that difference is an aspect of equality: Albertyn C (2011) 22 *Stell LR* 605.

²⁰⁵ Claassens A & Ngubane S "Women, land and power" in *Land, Power & Custom* 177.

²⁰⁶ Albertyn C (2011) 22 *Stell LR* 592.

²⁰⁷ UN "Facing the Future Together: Report of the United Nations Secretary General' Task Force on Women, Girls and HIV/AIDS in Southern Africa" *UNAIDS* <http://data.unaids.org/publications/External-Documents/sgreport_facingfuture_en.pdf> (accessed 14/05/2012); Knox A & Giovarelli R "Land Tenure, Property Rights and HIV/AIDS" (14/11/2011) *USAID* <<http://winafrica.org/wp-content/uploads/2011/11/USAID-Land-Property-HIV11.pdf>> (accessed 22/11/2011).

domestic violence, makes the position of different women with regard to land rights is even more insecure,²⁰⁸ as:

“...lacking secure property rights deprives women of the bargaining power that could be a factor in diminishing their risk of contracting HIV that results from sexual violence and from experiencing other forms of violence.”²⁰⁹

The aim of this section is to assess how different levels of tenure insecurity affect different women.

4 5 2 Single unmarried women/mothers

Single unmarried women are usually discriminated against on the basis of gender and marital status²¹⁰ as per customary practice, only married men or their households are eligible for land allocation. This is the case despite the Constitution stating that no person may be directly or indirectly discriminated against on grounds of *inter alia* gender or marital status.²¹¹ This category is different from the other categories of women below, as the latter categories have the opportunity, through marriage or a previous marriage, to own, acquire and retain land rights of a male household head.²¹²

The reality is that a number of women choose not to marry and instead have children on their own, because they regard marriage to be dangerous to their long-term security interests.²¹³ Thus these women are in need of land to establish independent households. Legislation does not directly make provision for single rural women to be allocated land. The Traditional Leadership and Governance Framework Act, for example, does not address

²⁰⁸Walker C “Elusive Equality” in *Women’s Social and Economic Rights* (2011) 105 113 -114.

²⁰⁹Swaminathan H, Walker C & Rugadya M A *Women’s Property Rights, HIV and AIDS & Domestic Violence: Research Finding from Two Districts in South Africa and Uganda* (2008) vii.

²¹⁰Claassens A & Ngubane S “Women, Land and power” in *Land, Power & Custom* 155.

²¹¹S 9(3) of the Constitution.

²¹²Delius P “Contested terrain” in *Land, Power & Custom* 226.

²¹³Other factors are that women had seen their female relatives evicted with nothing from their married homes, they were told that married women had put up with abuse and violence because of fear of losing everything if their marriage ended, some are advised by their mothers never to marry as there is no longer social stigma to having children without a husband and that nowadays women are respected for independently looking after their children: Claassens A & Ngubane S “Women, Land and power” in *Land Power & Custom* 177.

the reality of unmarried women living on family-held land.²¹⁴ Traditional leaders will generally not allocate land to single women except, in some instances, in the name of her son.²¹⁵ Like widows and divorced women, single women often have to depend on the whim of the traditional authority to make decisions about their rights in land.²¹⁶

Recently, there have however been changes on the ground with regard to land allocation to single never married women,²¹⁷ on the basis of a range of arguments to advance their claims and challenge traditional authority structures. These claims are, for example, that all members of the community have a birthright to land to fulfil their basic needs and support their children and that men are and were allocated land in the past on the registration of permission to occupy certificates and quitrent, when they married and established families. Thus women are entitled to be allocated land on an equal basis as men because of the changing structure of the family and women's role as the providers.²¹⁸ Linked to the latter, is also the prioritisation of need for land, especially for residential purposes.²¹⁹ Rural women also use arguments based on equality and in this regard constitutional values and *ubuntu* are helpful tools. To elaborate,

“[t]he system of shared and relative land rights in African rural areas embodies the culture of *ubuntu*, in that each person's rights and status is mediated by the needs, strength and cohesion of the wider groupings within which he or she derives their rights, identity and security.”²²⁰

²¹⁴ See 4 2 3 3 above and Claassens A & Ngubane S “Women, Land and power” in *Land, Power & Custom* 176.

²¹⁵ 174.

²¹⁶ Meer S “Introduction” in Meer S (ed) *Women, Land and Authority* 3.

²¹⁷ Claassens A (2005) *Acta Juridica* 58; Claassens A & Ngubane S “Women, land and power” in Claassens A & Cousins B (eds) *Land, Power & Custom* 177; Claassens A & Mnisi S “Rural Women Redefining Land Rights” in *Women's Social and Economic Rights* 88-91; Mnisi Weeks A & Claassens A “Tensions between Vernacular Values that Prioritise Basic Needs and State Versions of Customary Law that Contradict Them” (2011) 22 *Stell LR* 823-844.

²¹⁸ Claassens A (2005) *Acta Juridica* 58-59. Claassens A & Ngubane S “Women, Land and power” in *Land, Power & Custom* 177.

²¹⁹ Mnisi Weeks A & Claassens A “Tensions between Vernacular Values that Prioritise Basic Needs and State Versions of Customary Law that Contradict Them” (2011) 22 *Stell LR* 823-844.

²²⁰ Claassens A (2005) *Acta Juridica* 63.

However, these land allocations to single women appear to be an exception rather than the rule. While some women succeed in their request for land, the land may be allocated in the name of a male relative.²²¹ In Keiskammahoeck and Ramabatlama the land allocation was as a result of democratic community processes while in Makuleke it was a traditional council decision.²²² On the other hand, in KwaZulu-Natal women said that single women, especially widows, and women who do not have sons, were seldom allocated residential sites, citing that the problem was worse in areas controlled by traditional authorities compared to trusts and communal property associations that allocate land to women on a more equal basis.²²³ In Sekhukhuneland, stands are not allocated to single women unless they are over forty years of age and have children.²²⁴ This links back to the role of traditional authorities and the capacity they have to change and adapt to the reality on the ground.²²⁵

Ultimately, land allocation takes place after women struggle for it. This resistance to allocate land to women has been likened to the resistance of farmers or land owners to deny occupiers and farm workers tenure rights in land, as it is the right to land that determines the unequal power relations between men and women and between the farmer and farm worker.²²⁶

4 5 3 Wives

Married women's access to or rights in land are often dependent on their links to husbands who are allocated land on behalf of the household, both under customary law and indirectly under current legislation. This is, however, a distortion of pre-colonial customary law, as it ignores women's strong rights of

²²¹ 58; Claassens A & Mnisi S "Rural Women Redefining Land Rights" in *Women's Social and Economic Rights* 88.

²²² 90.

²²³ Claassens A (2005) *Acta Juridica* 58.

²²⁴ 58; Claassens A & Mnisi S "Rural Women Redefining Land Rights" in *Women's Social and Economic Rights* 88.

²²⁵ See 4 4 2 5 above.

²²⁶ Cross C & Hornby D *Opportunities and Obstacles to Women's Land Access in South Africa* (2002) 42.

tenure and use of land.²²⁷ The changes described above with regard to land allocation to single women, could possibly be attributed to the reverting back to the pre-colonial position when women, whether married, unmarried or widows, were sometimes allocated land directly before this custom was distorted by the colonial laws that systemically discriminated against women.²²⁸

Wives are thus often forced to stay in problematic and/or abusive relationships in order to secure their stability and that of their children,²²⁹ thereby retaining the link to access to land through the household head.

4 5 4 Widows and Divorcees

This group of women, together with their children, often bear the brunt of forced eviction and the accompanying violence, perhaps even more than other categories of women and this at the hands of their in-laws or ex-husbands.²³⁰ This situation is worsened by the HIV/AIDS pandemic, stigmatisation and the social and economic vulnerability of widows and orphans generally.²³¹

Local practices degenerate the position of widows. For example, widows in

²²⁷ Colonial laws distorted land allocation and secure tenure for women: *Bhe v Magistrate, Khayelitsha and others (Commission for Gender Equality as amicus curiae)*; *Shibi v Sithole and Others, SAHRC v President of RSA and Another* 2005 (1) SA 580, 2005 (1) BCLR 1 (CC) para 89; Cross C & Hornby D *Opportunities and Obstacles to Women's Land Access in South Africa* (2002) 41; Claassens A (2005) *Acta Juridica* 48-49, 62,72-73; *Tongoane & Others v National Minister for Agriculture & Land Affairs & Others* [2010] JOL 25446 (GNP) 29; Claassens A & Mnisi S "Rural Women Redefining Land Rights" in *Women's Social and Economic Rights* 81.

²²⁸ These laws included the Black Land Areas Regulations and the South African Development Trust and Land Act 18 of 1936. Native Commissioners also repeatedly intervened in land allocation processes to prohibit land being allocated to women: Schapera I *Native land tenure in the Bechuanaland Protectorate* (1943) 136; Claassens A (2005) *Acta Juridica* 48-50. See also Chapter 2 above.

²²⁹ Meer S "Introduction" in Meer S (ed) *Women, Land and Authority* 3; Chenwi L & McLean K "A Woman's Home is Her Castle?" in *Women's Social and Economic Rights* 142. See also 4 3 3 3 above with regard to the position of wives, partners and widows in relation to the Extension of Security of Tenure Act.

²³⁰ Claassens A (2005) *Acta Juridica* 54. See 3 4 5 3 for a reference to widows under the Reform of Customary Law of Succession and Regulations of Related Matters Act 11 of 2009.

²³¹ Chenwi L & McLean K "A Woman's Home is Her Castle?" in *Women's Social and Economic Rights* 144-150.

mourning dress are not allowed to speak during tribal court proceedings,²³² in which tribal councillors' decisions have a potentially major impact on land rights.

On the death of a man who has not made a will, including a married man, the land and the house originally passed to a male relative on the principle of male primogeniture.²³³ The *Bhe* decision changed this situation and now allows widows to inherit land from their husbands,²³⁴ but practices on the ground paint a different picture. Nevertheless, women continue to contest and sometimes defeat evictions on the basis that these are in conflict with "proper" customary law and family law.²³⁵ As a result, sometimes even if a widow did not have secure tenure in the land, she retained the right to continue working fields which she worked as a wife.²³⁶

Based on the assessment of the different categories of women and their respective levels of tenure insecurity, it is true that the problems they face stem partially from the failure of the legislature to engage with the critical issues with regard to the content of women's rights in family-held land²³⁷ and white-owned commercial land. At the same time, change can be effected through engaging with their local community structures and in the same way the legislature can bring about effective change through engaging with rural women. In the same vein one should keep in mind the symbolic value of

²³²Claassens A & Ngubane S "Women, Land and power" in *Land, Power & Custom* 176; See also Mnisi Weeks S *Traditional Courts Bill: Process, Substance and Implications for Women* (2012) presented at DWCPD Rural Women's National Consultative Meeting, 12 April 2012 hosted by the Department of Women, Children and People with Disabilities (copy on file with author) generally with regard to women's position *vis a vis* the proposed Traditional Courts Bill.

²³³*Madolo v Nomawu* (1896) 1 NAC 12; *Mthembu v Letsoalo* 2000 (3) SA 867 (SCA) at [8].

²³⁴ See 4 2 2 and 4 3 3 2 above for a detailed discussions of the case.

²³⁵Claassens A & Ngubane S "Women, land and power" in Claassens A & Cousins B (eds) *Land, Power & Custom* 168.

²³⁶Delius P "Contested terrain" in *Land, Power & Custom* 226.

²³⁷Claassens A & Ngubane S "Women, land and power" in *Land, Power & Custom* 155; Claassens A (2005) *Acta Juridica* 63.

legislation, even if it is not implemented, as it moulds, to some extent, the terrain within which rural people struggle for change.²³⁸

4 6 Conclusion

The aim was to focus on rural women's tenure in particular, in light of the factors that impact on status, the overarching policy and legislative framework and how the latter has been interpreted and applied in case law. Regarding policy documents, it has been established that there is a proposed shift in policy to specific groups on land that is not necessarily focused on women. Though land reform legislation generally has tried to reflect women's issues, there is still a lack of strong and long-term protection of women's rights. Generally, case law has been more progressive in realising women's tenure security and developing law in other fields that contribute to women's livelihood and inevitably secure tenure. The discussion of stakeholders and their roles in promoting tenure security highlighted their importance in the overall land reform programme. Finally, the exposition of the different categories of women illustrated clearly that different categories of women have different tenure needs that may require different approaches and/or solutions.

In most cases where women are the holders of tenure rights, these are generally secondary use and occupational rights which leave them prone to eviction, except in areas where there has been a wave of change and women have been granted primary secure tenure. At this point there is a need for policy and tenure legislation that explicitly protects vulnerable categories of women; by, *inter alia*, including procedures that protect and assert women's rights during and after formalisation processes.²³⁹ This should be done in line with the Constitution, in order to, amongst other reasons, break the cycle of poverty that women are invariably caught up in, especially in rural areas. Ultimately, secure tenure rights are linked to access to credit and Government

²³⁸ 78.

²³⁹ 52.

services.²⁴⁰ Our courts, changing customs and current policy framework do provide for substantive equality for black rural women. This is crucial in or to obtain security of tenure.

Before embarking on recommendations for the legislature and an ultimate conclusion, the position in Namibia with regard to the state of black rural women's tenure security will be set out to form the basis of the comparative section of the study.

²⁴⁰ United Nations Commission on Human Rights "Human Rights Resolution 2005/25 "Women's Equal Ownership, Access to and Control over Land and the Equal Rights to Own Property and to Adequate Housing" (15/04/2005) *UNHCR* <<http://www.unhcr.org/refworld/category,LEGAL,UNCHR,,45377c420,0.html>> (accessed 14/09/2011) which recognises the impact of poverty on women's housing, land and property rights.

CHAPTER FIVE

BLACK RURAL WOMEN'S TENURE SECURITY IN NAMIBIA

5 1 Introduction

The aim of this chapter is to provide an exposition of the tenure security of black rural women in Namibia. Thus this chapter will set out the initial historical customary landholding system in Namibia¹ before colonialism, followed by the colonial history of Namibia under different colonial rulers until 1990. This historical exposition will encompass customary law and land legislative developments. The chapter will also discuss the prevailing tenure system immediately prior to independence, before addressing the development of the land reform programme post-independence. Finally the chapter will assess black rural women's current tenure security, specifically with reference to the different female categories. Inevitably this chapter lays the foundation for the comparative analysis that follows in Chapter six below.

5 2 Prevailing Traditional customary landholding system before Colonialism

Property relations, including the land tenure system, were determined by the customary law of the indigenous people before colonialism.² The land was held in trust by traditional leaders and vested in the whole tribal community as

¹Namibia was previously referred to by colonial authorities as German South West Africa, then after the South African conquest in 1915 as South West Africa. It will be referred to here as Namibia.

²Goldblatt I *History of South West Africa from the beginning of the nineteenth century* (1971) 1-2; Amoo S K "Towards comprehensive land tenure systems and land reform in Namibia" (2001) 17 *SAJHR* 87 88.

the title holder of a particular area.³ Before the colonial era different indigenous tribes occupied and ruled separate territories. These tribes used the land mainly for agricultural and pastoral purposes.⁴

Indigenous communities in northern Namibia combined settled agriculture with cattle herding,⁵ with permanent rights of use of land granted mainly to men.⁶ If the man was in a polygamous marriage, he distributed the land amongst his wives or amongst his wives and married sons or cousins residing in their homestead.⁷ Husbands claimed the largest and most fertile portions of the land. Women were required to cultivate their own plots as well as their husbands'.⁸ During these times women were expected to live with a man. Hence they accessed land through a male relation.⁹ In light of the theme of this study, the focus throughout this chapter will be on black rural women in particular.

The land belonged to the community as a whole.¹⁰ Communities in southern and central Namibia, namely the Hereros, Namas, Damaras and Basters, were mainly pastoralists.¹¹ As a result of the harsh dry climate, pastures were scarce. These communities thus spread widely over the territory to utilise resources efficiently.¹² When the pastoral economy of one tribe produced a surplus, the tribe engaged in regional distance trade with other tribes.¹³ The

³ 88.

⁴ 88.

⁵ Adams F & Werner W (with contributions by Vale P) *The Land Issue in Namibia: An Inquiry* (1990) 9.

⁶ Werner W *Protection for Women in Namibia's Communal Land Reform Act: Is it Working?* (2008) 18.

⁷ 18.

⁸ Werner W *Protection for Women in Namibia's Communal Land Reform Act* 18; Ambunda L & de Klerk S "Women and custom in Namibia: A research overview" in Ruppel O C (ed) *Women and Custom in Namibia: Cultural Practice versus Gender Equality?* (2008) 43 5-52, 56.

⁹ Werner W *Protection for Women in Namibia's Communal Land Reform Act* 18.

¹⁰ Amoo S K (2001) *SAJHR* 88.

¹¹ Kienetz A *Nineteenth-Century South West Africa as a German Settlement Colony* PhD thesis University of Minnesota (1976) 158-162; Adams F & Werner W *The Land Issue in Namibia* 9.

¹² Adams F & Werner W *The Land Issue in Namibia* 9.

¹³ Werner W *An Economic and Social History of the Herero of Namibia: 1915-1946* DPhil thesis University of Cape Town (1989) 2627.

San, who were nomads of the Kalahari Desert,¹⁴ hunted over great distances for their livelihood.¹⁵

Therefore, as a rule no fixed boundaries existed among the different communities. However, the exception was in relation to the clearly defined boundaries in areas of jurisdiction of certain Nama and Herero chiefs.¹⁶ The present-day boundaries of Namibia were laid down in the late nineteenth century when the major European imperial nations divided the world among themselves as colonies.¹⁷

5 3 Colonial authorities and concomitant powers of segregation

5 3 1 Introduction

“With the advent of colonialism, expropriation and privatization of land became the new order.”¹⁸

In the following exposition, details on the different phases of colonial authorities in Namibia will be discussed. Foreign invasion of the territory began in the early 1760s, with the colonial history being divided into three phases before independence. Firstly the period from 1760 to 1884, then the period of German colonisation from 1884, during which land was expropriated and alienated mainly through protection treaties and finally the period under South African administration from 1915 to 1990, during which the German pattern of land ownership was reinforced.¹⁹ In addition, the South African

¹⁴The European misnomer of the Kgalagadi.

¹⁵ Union of South Africa Government Information Office *South West Africa and the Union of South Africa: the history of a mandate* (1946) 10; Department of Information and Publicity, SWAPO of Namibia *To Be Born A Nation: The Liberation Struggle for Namibia* (1981) 2; Schrank G I *German South West Africa: Social and Economic Aspects of its History, 1884-1915* PhD thesis New York University (1974) 8.

¹⁶ Adams F & Werner W *The Land Issue in Namibia* 10; Amoo S K (2001) SAJHR 88.

¹⁷Department of Information and Publicity, SWAPO of Namibia *To Be Born A Nation* 1.

¹⁸ Government of the Republic of Namibia, Ministry of Lands and Resettlement *Poverty Impact Assessment of the Various Land Reform Programmes* (2010) 3.

¹⁹ Adams F & Werner W *The Land Issue in Namibia* 2.

colonial administration systemically, through legislation, implemented a new race-based property rights regime.²⁰

5 3 2 Phase I: Exploration pre-1884

Though little is written about this phase pre-1884, it is evident that the Portuguese were the first Europeans to come to Namibia in 1484.²¹ They were, however, focused on trading with India and did not move further inland. The Dutch colonialists of the Dutch East India Company²² were the first to explore the Namibian interior from 1670 onwards to determine if there was any advantage to be gained by them.²³

The country and its land thus remained under the rule of the independent tribes during this period, while Europeans slowly started to influence local trade from the 1850s. English and German missionaries arrived in the territory from as early as 1802, with their activities paving the way for British and German interest in the territory.²⁴

5 3 3 Phase II: German Colonial Authorities 1884-1915

5 3 3 1 Introduction

During the 1800s when the German and British traders and missionaries came to Namibia, there were conflicts and wars among and between the local tribes, particularly between the Namas and Hereros.²⁵ These conflicts were

²⁰Kössler R *In search of survival and dignity: Two traditional communities in southern Namibia under South African rule* (2006) 14; Amoo S K "Towards comprehensive land tenure systems and land reform in Namibia" (2001) 17 *SAJHR* 87 91-95.

²¹ Union of South Africa Government Information Office *South West Africa and the Union of South Africa: the history of a mandate* 3-4; du Pisani A *SWA/Namibia: The Politics of Continuity and Change* (1986) 13.

²²See Chapter 2 above at 2 3 2.

²³Union of South Africa Government Information Office *South West Africa and the Union of South Africa* 4; Goldblatt I *History of South West Africa* 1.

²⁴ The missionaries played an important political, economic and educational role in Namibia and in that sense they became associated with colonialism. Their role became even more political when after the establishment of German rule in 1884, they requested the military commanders to institute a system of reserves so as to control the movements of local black groups: SWAPO of Namibia *To Be Born A Nation: The Liberation Struggle for Namibia* (1981) 151-153; du Pisani A *SWA/Namibia: The Politics of Continuity* 13 -16.

²⁵ See the account in Goldblatt I *History of South West Africa* 15-79.

mainly for economic resources, notably land and water.²⁶ Upon the outbreak of the Nama-Damara war in 1880, several European missionaries and traders were forced to leave their stations, resulting in the disappearance of protection for traders and missionaries in the territory.²⁷ Prior to the Nama-Damara war, individual missionaries had drawn attention of the German Government, which had become a great power through the defeat of France, to the question of German protection in Namibia. In 1880 the German Government extended its protection to the German missionaries and tradesmen as it intended to secure the lives and property of its own subjects. This became the campaign which resulted in the colonisation of Namibia.²⁸

Namibia was formally declared a German Protectorate in 1884. The territory was then a German colony until 1915 when it was occupied by South African forces.²⁹ During this period German colonial rule in Namibia had three key elements. Firstly, land was taken from the indigenous Namibian people and made available to German settlers. Secondly, traditional social structures were destroyed in order to try and make Namibians subservient to colonial settlers, in what was known as the “detrribalisation policy”. Thirdly, Namibians were used as forced labourers on the white-owned land.³⁰

5 3 3 2 Land Policies post-1884

During the mid-1870s major chieftaincies³¹ were identified by and among the indigenous communities. Although this arrangement did not deprive communities of land, the concentration of power in the hands of individual chiefs enabled the manipulation of customary rights regarding land allocation and land use.³² Chief Maharero for instance, set aside certain areas in Hereroland as reserves for pastoralists, in order to allow selected Europeans

²⁶Du Pisani A *SWA/Namibia: The Politics of Continuity* 16-17.

²⁷Goldblatt I *History of South West Africa* 79.

²⁸Du Pisani A *SWA/Namibia: The Politics of Continuity* 14-17.

²⁹Goldblatt I *History of South West Africa* 1.

³⁰ See 79-197; Katjavivi P H *A History of Resistance in Namibia* (1989) 7-12. See 2 3 2; 2 3 3 2 and 2 4 2 with regard to the forced and migrant labour in colonial South Africa.

³¹Such as those of the Owambo and the Nama.

³² Adams F & Werner W *The Land Issue in Namibia* 10. See also 5 2 above.

to settle on the remainder of the land.³³ In 1883, a German trader, Adolf Lüderitz obtained land from King Joseph Fredericks in the south. By mid-1885 he acquired ownership of a vast portion of the country and the mineral rights in a considerable portion of the remainder of the country.³⁴ Lüderitz appealed to the German Government for protection of his interests, which had also stirred German interest in Namibia as a whole. Unable to financially exploit his “right to the land”, Lüderitz sold the land to a company of prominent German business men and industrialists. This contributed to diplomatic exchanges between Germany and Great Britain and ultimately the proclamation of the German protectorate in 1884 over Namibia.³⁵

Increasingly, German colonial officials acquired land by signing “protection treaties”³⁶ with indigenous rulers. This was done under the German treaty system, which was an effective way of political and economic control over the mobility of indigenous population groups.³⁷ By exploiting local conflicts between the indigenous tribes³⁸ the German colonialists promised protection to indigenous groups and tribes from one another.³⁹ Signatories of the protection treaties were in turn not allowed to alienate any land to anyone without the consent of the German Emperor. Indigenous rulers thus abrogated their right to enter into any other treaties with foreign governments.⁴⁰ Although a vast area of land was signed away in these “protection treaties”, there was hardly any alienation of land until 1897, as chiefs generally refused to sell land to the Europeans.⁴¹ This situation was changed mainly by persistent drought and the *rinderpest* pandemic in the country in 1897, which killed most of the

³³ Adams F & Werner W *The Land Issue in Namibia* 10.

³⁴ Goldblatt I *History of South West Africa* 102; Katjavivi P H *A History of Resistance in Namibia* 7-8.

³⁵ Du Pisani A *SWA/Namibia: The Politics of Continuity* 22-23.

³⁶ Known as Schutzvertraege.

³⁷ Du Pisani A *SWA/Namibia: The Politics of Continuity* 25.

³⁸ These conflicts occurred predominantly between the Namas and Hereros. Union of South Africa Government Information Office *South West Africa and the Union of South Africa: the history of a mandate* 12-13. See 5 3 3 1 above.

³⁹ Adams F & Werner W *The Land Issue in Namibia* 10.

⁴⁰ 11.

⁴¹ 11.

cattle stock.⁴² This forced the indigenous people to become migrant labourers, eliminated the use of cattle in barter agreements and made land the object of these transactions.⁴³ The communal land was sold at low prices and chiefs were often paid in kind, with the price arbitrarily determined by the settlers.⁴⁴ Dispossession thus increased rapidly, by 1902 only 31.4 million hectares out of a total of 83.5 million hectares of land remained in African ownership.⁴⁵

The Police Zone was established,⁴⁶ which was made up of the dispossessed land in southern and central Namibia and was occupied by both Europeans and natives. This area encompassed all the regions where an effective police presence could be established after the dispossession and subjugation of the indigenous population. The area was open for white settlers, with the administration employing policies of direct control. The northern boundary of the Police Zone, which separated the Police Zone from the population centre in northern Namibia,⁴⁷ was known as the Red Line. The northern region, above the Red Line, was administered through a system of indirect rule as opposed to the direct rule in the Police Zone, and was reserved solely for native occupation.⁴⁸

The period 1904-1907 saw the Herero and Nama wars of resistance against the Germans,⁴⁹ which were sparked by anger over the land dispossession and the deceitful trading practices of the German settlers in their attempts to

⁴² 11; Schrank G I *German South West Africa: Social and Economic Aspects of its History, 1884-1915* PhD thesis New York University (1974) -131.

⁴³ Adams F & Werner W *The Land Issue in Namibia* 11.

⁴⁴ 12.

⁴⁵ 12. The word African here is used interchangeably with black people.

⁴⁶ Amoo S K (2001) *SAJHR* 89. The German colonial authorities were unable to control the northern regions either by military or police thus they confined the police protection to those areas which fall within the sphere of influence of the railway line or main roads, thus the Police Zone arose out of these circumstances: Adams F & Werner W *The Land Issue in Namibia* 9.

⁴⁷ Northern Namibia consists of what is today still known as Owamboland, Kaokoland, Kavango and Caprivi.

⁴⁸ The Red Line is a tangible fact even today, "serving" as a veterinary cordon to prevent uncontrolled traffic in livestock between the northern communal areas and the rest of the country: Kössler R *In search of survival and dignity* 14 261; Union of South Africa Government Information Office *South West Africa and the Union of South Africa* 30, 67.

⁴⁹ Katjavivi P H A *History of Resistance in Namibia* 8-9.

acquire land and cattle from the Hereros and Namas.⁵⁰ With an “extermination order”,⁵¹ the German army killed mainly Hereros, Namas and Damaras from 1904. By the end of the war in 1907, sixty percent of the population of central and southern Namibia had perished,⁵² while those who remained were scattered and impoverished. This allowed the German colonial authorities to appropriate the local tribes’ land in the Police Zone,⁵³ depriving the indigenous communities of their ancestral land and their customary land tenure system.⁵⁴ This tribal land in the Police Zone was handed out to white settlers.⁵⁵

5 3 3 3 Native Regulations 1905-1907

At the end of 1905, the German colonial authority issued Imperial Ordinance of 26 December 1905,⁵⁶ a formal order which announced the expropriation of all tribal land, including that given to the missionaries by the chiefs. The order covered all movable and immovable property of the tribes specified in the Ordinance. In 1906⁵⁷ and 1907,⁵⁸ by virtue of the power awarded in terms of the aforementioned Imperial Ordinance of 1905, the colonial state further

⁵⁰ Union of South Africa Government Information Office *South West Africa and the Union of South Africa* 15; Adams F & Werner W *The Land Issue in Namibia* 12.

⁵¹ In terms of this order, General von Trotha wished to destroy the Herero as a nation: Department of Information and Publicity, SWAPO of Namibia *To Be Born A Nation* 13.

⁵² Union of South Africa Government Information Office *South West Africa and the Union of South Africa* 16; Department of Information and Publicity, SWAPO of Namibia *To Be Born A Nation* 13-14, 18. Many more suffered the same fate in the concentration camps and the labour gangs as the colonial Government imposed cruel forced labour system on the survivors.

⁵³ Adams F & Werner W *The Land Issue in Namibia* 12.

⁵⁴ Amoo S K (2001) SAJHR 90; Department of Information and Publicity, SWAPO of Namibia *To Be Born A Nation* 13-15. Only the Owambo tribe survived the full rigour of the German rule as they the Germans never tried to administer the border zone above the Red Line, where the Owambo resided.

⁵⁵ Department of Information and Publicity, SWAPO of Namibia *To Be Born A Nation* 16-17; Katjavivi P H A *History of Resistance in Namibia* 11.

⁵⁶ See *Die deutsche Kolonial-Gesetzgebung, Neunter Band 1905 (D. Kol. Gesetzgeb. 1905, Nr. 151 S. 284) Kaiserliche Verordnung, betreffend die Einziehung von Vermögen Eingeborener im südwestafrikanischen Schutzgebiet. Vom 26. Dezember 1905.*

⁵⁷ Through the *D. Kol. Gesetzgeb. 1906, Nr 47 S. 142 Bekanntmachung des Gouverneurs von Deutsch-Südwestafrika, betreffend Einziehung des Stammesvermögens der Herero, Zwartbooi- und Topnaar-Hottentotten. Vom 23. März 1906; Bekanntmachung des Gouverneurs von Deutsch-Südwestafrika, betreffend der Einziehung des Stammesvermögens der Herero usw. Vom 8. August 1906.* See also Bley H & Ridley H *South-West Africa under German Rule* 171-172.

⁵⁸ Through the *D. Kol. Gesetzgeb. 1907, Nr. 135 S. 233 Bekanntmachung des Gouverneurs von Deutsch-Südwestafrika, betreffend Einziehung des Stammesvermögens der Witbooi-usw. Hottentotten sowie der Roten Nation und der Bondelzwards-einschl. Der Swartmodder-Hottentotten. Vom 8. Mai 1907 und Vom 11. September 1907.* Bley H & Ridley H *South-West Africa under German Rule* 171-172; Goldblatt I *History of South West Africa* 151.

expropriated tribal land from the Herero, Swartboois of Franzfontein, Topnaars of Tsesfontein, Witboois, Bethaniens, Fransmans, Veldskoendraers, the Red Nation of Hoachanas, the Bondelswarts and Swartmodder Hottentots.⁵⁹

Further legislative measures influencing indigenous land rights and intended to regulate and control the indigenous people were issued on 18 August 1907, these were:

- a) the order of the governor pertaining to the measures for the control of natives.⁶⁰ This Regulation stated *inter alia* that the natives could only acquire land rights with the permission of the governor,⁶¹ that the natives had to register with the Government, that not more than ten native families or individual native labourers could live on one plot and that squatting on uninhabited or unsettled land be strictly controlled,⁶²
- b) secondly, the order which required every native eight years of age and above in the Police Zone to carry an identity card.⁶³ This did not apply to the Basters so long as they were in their own territory, namely in Rehoboth; and
- c) thirdly, the regulation relating to service and labour contracts with natives.⁶⁴ This regulation required all natives above fourteen years old to carry a “service book” which was in effect a second identity card intended to keep track of the movements of Africans.

⁵⁹Bley H & Ridley H *South-West Africa under German Rule* 172.

⁶⁰*D. Kol. Gesetzgeb. 1907 Nr. 212 S. 345 Verordnung des Gouverneurs von Deutsch-Südwestafrika, betreffend Massregeln zur Kontrolle der Eingeborenen. Vom 18. August 1907.*

⁶¹On this permission depended their right to breed cattle and keep horses, consent for which also had to be obtained from the governor. Such permission was however not granted until 1912 and then only in a few individual cases. Only Rehobothers were excluded from this regulation: Bley H & Ridley H *South-West Africa under German Rule* 172.

⁶²Clauses 1, 3, 7 and 9 -11 respectively. See also Goldblatt I *History of South West Africa* 154; Adams F & Werner W *The Land Issue in Namibia* 12.

⁶³*D. Kol. Gesetzgeb. 1907 Nr. 213 S. 347 Verordnung des Gouverneurs von Deutsch-Südwestafrika, betreffend die Passpflicht der Eingeborenen. Vom 18. August 1907 clause 1(1).*

⁶⁴*D. Kol. Gesetzgeb. 1907 Nr. 214 S. 350 Verordnung des Gouverneurs von Deutsch-Südwestafrika, betreffend Dienst- und Arbeitsverträge mit Eingeborenen des südwestafrikanischen Schutzgebiets. Vom 18. August 1907.*

Through the above regulations, a system of forced labour was created and the definite distinction between “whites” and “blacks”, for the first time in Namibia, created legal discrimination.⁶⁵ With the destruction of the tribal system, with its chiefs and *kapteins*, in most of the Police Zone, coupled with the generous financial assistance for whites from the colonial authority, Namibia rapidly became a white settlement.⁶⁶ A positive development is that the German colonial authority laid the foundation for further socio-economic development for both the indigenous people and the white settlers.⁶⁷ Tribal land which had been converted into Crown land was allotted to the white farmers and private owners in the urban areas, while labour was provided by the indigenous people.⁶⁸ Large numbers of indigenous inhabitants managed to avoid the forced labour by living in the bush as “squatters” on land in the Police Zone.⁶⁹

The Owambo and Kavango communities in the north, which were a source of wage labour,⁷⁰ were not affected as badly by the German colonial policies. This is because the German colonial authority had no jurisdiction over their territory.⁷¹ Therefore their traditional land tenure system that existed before the colonial era, remained intact.⁷²

5 3 3 4 Categories of land and land control forms

The categories of land and land control forms in 1915 were as follows: land in the Police Zone was all classified as Crown land and vested in the colonial German state.⁷³ Certain land was held by white settlers and concession companies under individual title derived from the administration or from indigenous communities.⁷⁴ Indigenous Namibian groups held and controlled a mere six percent of the total land area in the Police Zone. Most of this land,

⁶⁵ Adams F & Werner W *The Land Issue in Namibia* 12.

⁶⁶ 12-13; Goldblatt I *History of South West Africa* 150.

⁶⁷ Du Pisani A *SWA/Namibia: The Politics of Continuity* 36-37.

⁶⁸ Goldblatt I *History of South West Africa* 150; Katjavivi P H A *History of Resistance in Namibia* 11-12; Adams F & Werner W *The Land Issue in Namibia*: 13.

⁶⁹ 13.

⁷⁰ 13.

⁷¹ 16.

⁷² See 5 2 above.

⁷³ Du Pisani A *SWA/Namibia: The Politics of Continuity* 30.

⁷⁴ 30.

excluding Rehoboth, consisted of reserves⁷⁵ granted by the German colonial authorities to communities. An example of such a community, were the Nama, who the German colonial authority regarded as loyal during the anti-colonial wars of 1904-1907.⁷⁶ These reserves were relatively small and scattered, with little political or economic viability.⁷⁷

A problem with regard to land ownership during this period resulted from the fact that for the indigenous people, ownership of land did not imply an exclusive individual and legal right to it, as in European law. Land was regarded as communally owned and the boundaries of grazing land were not fixed.⁷⁸ Accordingly, land above the Red Line in northern Namibia, where German colonial authorities had not obstructed the notion of land ownership, was governed by the customary land tenure system in terms of which land was held in trust by the traditional leader, similar to the customary landholding in South Africa at that stage. The traditional leader handed the land to (usually) married males who had the right of use of the land. Traditional commonage provided for pasturage and hunting ground.⁷⁹ All in all the general categories of land and land control forms were:

- a) Crown land vested in the German colonial administration;
- b) land under individual title held by white settlers;
- c) land held by concession companies;
- d) land held by various indigenous Namibian groups; and
- e) mineral rights and concessions granted in terms of the Imperial Mineral Decree of 8 August 1905.⁸⁰

⁷⁵The reserves were Berseba, Bondels, Soromas, Okombahe, Zesfontein and Fransfontein: Robertson E *Subject list and index of the laws of South West Africa from 1915, in force in 1969* (1973) 49.

⁷⁶ Werner W *An Economic and Social History of the Herero of Namibia 1915-1946* DPhil thesis University of Cape Town (1989) 8; Adams F & Werner W *The Land Issue in Namibia* 15.

⁷⁷Du Pisani A *SWA/Namibia: The Politics of Continuity* 36.

⁷⁸36.

⁷⁹ Adams F & Werner W *The Land Issue in Namibia* 94-96.

⁸⁰See generally Du Pisani A *SWA/Namibia: The Politics of Continuity* 21-45.

In addition to the dispossession of land and land control by the German colonial administration the indigenous population was excluded from political participation in decision-making, which became a characteristic of the divided plural society.⁸¹ On 4th August 1914, Britain declared war against Germany. As a result, South Africa, acting on the instructions of the British Government, set out to conquer and annex “German South West Africa”.⁸² In July 1915 German colonial forces were defeated by troops of the Union of South Africa, who seized the territory.⁸³

5 3 4 Phase III: South African Colonial Authorities

5 3 4 1 Introduction

South Africa occupied Namibia in 1915. At the time, Namibia was politically fragmented, with a political and economic domination by the minority, the Germans.⁸⁴ In the years that followed, a period of martial law ensued which came to an end in 1920.⁸⁵ A form of labour tenancy developed on the farms. However, the general direction of land policy was unclear as no land legislation existed from 1915 to 1919.⁸⁶ Extensive white settlement on land continued while the black population resorted to squatting, legally insecure land possession and labour tenancy arrangements on white owned farms. After the official mandate in 1920, land settlement laws in force in the Union of South Africa were applied to Namibia.⁸⁷ South African authorities set out to divide the land on the basis of race through extensive discriminatory legislation, which formed the cornerstone of *apartheid* until independence in 1990. The land developments under South African colonial authorities are the

⁸¹ 37.

⁸² Goldblatt I *History of South West Africa* 202-204.

⁸³ Department of Information and Publicity, SWAPO of Namibia *To Be Born A Nation* 15.

⁸⁴ Du Pisani A *SWA/Namibia: The Politics of Continuity* 37, 42.

⁸⁵ The martial law was declared in the Proclamation of Martial Law 15 of 1915 (13 August 1915). Goldblatt I *History of South West Africa* 208; Adams F & Werner W *The Land Issue in Namibia* 16.

⁸⁶ Adams F & Werner W *The Land Issue in Namibia* 16-20.

⁸⁷ Odendaal W “Land Grabbing in Namibia: A Case Study from the Omusati Region, Northern Namibia” *Future Agricultures* 5. Examples of South African Acts that were also made applicable to Namibia were the Black Land Act 27 of 1913 and the Group Areas Act 41 of 1950.

See also 2 3 3 3 above.

main reason behind the current tenure reform programme and are important to the land question in Namibia.

5 3 4 2 1915-1920

This period was after the formation of the Union of South Africa in 1910 and during the period of implementation of the various Land Acts.⁸⁸ South Africa's system of Roman Dutch Law was proclaimed the common law of the Territory on 1st January 1920. The German law was preserved and remained in force in certain respects, to preserve existing rights and to make the transition from German to Roman-Dutch Law as gradual as possible. German law was eventually eliminated over time,⁸⁹ but the traits of the German colonial rule that laid the foundation of colonialism, through dispossession, and cheap forced contractual arrangements, continued.⁹⁰

Colonial rule created a skewed pattern of land ownership.⁹¹ As a result of the 1904-1907 war disruptions, large numbers of farm labourers deserted their work and regained control of their ancestral land by "squatting" on unoccupied settler farms and Crown land. The colonial authority reacted by issuing a circular in 1915, which provided for a system of occupation licenses. Squatters were obliged to pay grazing fees under the circular, which amounted to tacit approval of rent-paying "squatters".⁹²

This policy however, was really an attempt to increase the supply of labour,⁹³ because of low levels of productivity on farms. The main form of labour tenancy was a system whereby farm labourers were permitted to graze a certain number of cattle on white owned land *in lieu* of wages or against

⁸⁸ See 2 3 3 3 above.

⁸⁹ Union of South Africa Government Information Office *South West Africa and the Union of South Africa* 62.

⁹⁰ Department of Information and Publicity, SWAPO of Namibia *To Be Born A Nation* 20; du Pisani A *SWA/Namibia: The Politics of Continuity* 35.

⁹¹ Government of the Republic of Namibia, Ministry of Lands and Resettlement *Poverty Impact Assessment of the Various Land Reform Programmes* 4.

⁹² Adams F & Werner W *The Land Issue in Namibia* 17-18.

⁹³ 18.

payment of a grazing fee.⁹⁴ During this period the Union Government was not allowed to alienate land or allocate any land on a permanent basis.⁹⁵

5 3 4 3 *Land classification post-1920*

5 3 4 3 1 *Introduction*

When the First World War came to an end in 1918,⁹⁶ Germany renounced all its overseas assets. A mandatory system was created in terms of which those countries previously belonging to Germany would be entrusted to the mandate of advanced nations. Thus 1920 saw the beginning of the South African League of Nations' Mandate in Namibia.⁹⁷ This meant that all land previously held by the German Government was transferred to South Africa, as well as the right to grant permission to search for and mine minerals on all Namibian land in the Police Zone.⁹⁸ In terms of the Treaty of Peace and South West Africa Mandate Act 49 of 1919,⁹⁹ South Africa was instructed "to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory". The Mandate thus allowed South Africa to develop a definite land policy.¹⁰⁰ Instead, the South African colonial administration suppressed the people under *apartheid* legislation and organised brutality.¹⁰¹

Various pieces of legislation were used by the South African Government to classify the land into state, private and communal land and to introduce new concepts of land tenure, while subdividing land according to race.¹⁰² The discussion of said legislation hereunder focuses on its application in communal areas only.

⁹⁴ 17.

⁹⁵ 18, 20.

⁹⁶ This was as a result of the Versailles Peace Treaty, 28 June 1919.

⁹⁷ Goldblatt I *History of South West Africa* 207. The Mandate was signed in Geneva on 17th December 1920 and came into effect on the 1st January 1921, when the period of South African martial rule ended. See 5 3 4 2 above.

⁹⁸ Adams F & Werner W *The Land Issue in Namibia* 20; Amoo S K (2001) *SAJHR* 108 n 14.

⁹⁹ This Act provided for the exercise by the Governor-General of the Union of powers for the Government of the territory. Lejeune A *The Case of South West Africa* (1971) 13.

¹⁰⁰ S 2 and 4 of the Treaty of Peace and South West Africa Mandate Act, 1919.

¹⁰¹ Department of Information and Publicity, SWAPO of Namibia *To Be Born A Nation* i; Katjavivi P H A *History of Resistance in Namibia* 13-14.

¹⁰² See Amoo S K (2001) *SAJHR* 91-95 for a discussion of the land tenure classification legislation addressed here.

5 3 4 3 2 Crown Land

All land inhabited or owned by tribal communities in the territory was initially declared as Crown land.¹⁰³ This was achieved by various pieces of legislation. In terms of the Treaty of Peace and South West Africa Mandate Act 49 of 1919, only the Governor-General¹⁰⁴ of the Union had the power to legislate with regard to the individual allocation of Crown land, to any person lawfully occupying land in a reserve.¹⁰⁵ This provision introduced the concept of private ownership to tribes whose land tenure system was community-based.¹⁰⁶ Although the creation of Crown land meant that the received law was to be used to determine property relations, this did not completely rule out the application of the relevant customary law. In areas where the majority of the community in the area belonged to a specific tribal group, that tribe kept up their customary practices.¹⁰⁷

Firstly, the Mandate enabled the Governor-General to apply by proclamation to the territory, the Land Settlement Act 12 of 1912.¹⁰⁸ A Land Board¹⁰⁹ was established in terms of the Land Settlement Act in order to facilitate settlement. Secondly, the Transvaal Crown Land Disposal Ordinance 57 of 1903 applied; which vested ownership of the tribal land in the Government of South Africa¹¹⁰ and provided that certain areas of the Crown land could be reserved “for the use and benefit of the aboriginal natives.”¹¹¹ This Ordinance was extended to Namibia by virtue of the Crown Land Disposal Proclamation 13 of 1920.

¹⁰³ This was done under the Mandate in terms of the Peace Treaty of Versailles: Du Pisani ASWA/Namibia: *The Politics of Continuity* 57.

¹⁰⁴ The Governor-General was the official representative of the King of Britain on whose behalf South Africa administered the mandate.

¹⁰⁵ S 4(3) Treaty of Peace and South West Africa Mandate Act, 1919.

¹⁰⁶ Amoo S K (2001) *SAJHR* 92.

¹⁰⁷ 92.

¹⁰⁸ This Act was amended by the Land Settlement Act Amendment Act 23 of 1917.

¹⁰⁹ In effect the Land Board and the Legislative Assembly had no influence over land policy as land policy was entirely in the hands of the Administrator: Adams F & Werner W *The Land Issue in Namibia* 20.

¹¹⁰ S 2.

¹¹¹ S12.

The South West African Constitution Act 39 of 1968 was passed by the Union Parliament in 1925. The Constitution allowed for the territory to have its own laws apart from those extended to it from the South African Acts. It provided for the constitution of a Legislative Assembly, an Executive Committee and an Advisory Council. The Assembly was given power to legislate for the territory on all matters, except those specifically excluded from its competence.¹¹² Later, the Reservation of State Land for Natives Ordinance 35 of 1967 was promulgated to reserve land for the use and occupation of natives.

5 3 4 3 3 *Native Reserves*

The extensive dispossession of land was as much intended to provide white settlers with land, as it was to deny black pastoralists access to the same land. In addition, the South African colonial authorities effectively denied black people access to commercial pastoral production and forced them into wage labour.¹¹³ Thus colonial land policies were enacted in Namibia with the aim of capital accumulation for colonial powers. Such capital accumulation was furthermore facilitated by the establishment of “native reserves”, which, as in South Africa,¹¹⁴ provided cheap labour and allowed colonial authorities to exert political control over the people through co-opting traditional leaders and appointing local headmen who administered the native areas.¹¹⁵

The Native Administration Proclamation 11 of 1922¹¹⁶ authorised the administrator to set aside areas as “native reserves”.¹¹⁷ The native reserves were for the sole use and occupation of natives generally or for any race or tribe in particular. The land in the native reserves was held communally, according to the native custom and no individual was allowed to acquire ownership of land in the reserve.¹¹⁸ For each native reserve, headmen were

¹¹² These include “Bantu affairs”, courts, the military, police forces and immigration *inter alia*.

¹¹³ Adams F & Werner W *The Land Issue in Namibia* 7, 30.

¹¹⁴ See 2 3 3 2 and 2 3 3 3 above.

¹¹⁵ Adams F & Werner W *The Land Issue in Namibia* 7.

¹¹⁶ Proc 22 in GN 122 of 1923.

¹¹⁷ The creation of reserves along racial lines was meant mainly to accommodate white settlers on the prime land and to push the indigenous people onto more marginal land: Amoo S K (2001) *SAJHR* 108 n 15; Adams F & Werner W *The Land Issue in Namibia* 30-32.

¹¹⁸ Native Reserve Regulation 68 of 1924.

appointed to control the reserve under the supervision of a white superintendent. The Proclamation also provided that natives not employed by land owners or lessees were not permitted to squat on land without a magistrate's permission. The Proclamation did not affect the northern areas above the Red Line as well as a few other areas outside the white farming areas. The Police Zone contained eighteen native reserves¹¹⁹ for natives and coloureds, where white people were not allowed to acquire land or enter onto without a permit.¹²⁰ Ownership of the land in the reserves was vested in the Administration by the Native Reserve Regulation 68 of 1924. Furthermore, the Regulations provided for the allocation and utilisation of land in the reserves. This also included that after land had been set aside as a reserve, the land may not be alienated or used for any other purpose, except with the consent of both the Houses of the Union Parliament.¹²¹ Although the regulations did make provision for a communal land tenure system, the traditional leaders in the Police Zone had no powers with regard to the allocation of land in reserves. Allocation for residential and agricultural purposes could only be made by Reserve Superintendents.¹²² Odendaal states that the general understanding is that the regulations that have not been repealed are still in force, but their application is limited.¹²³ The boundaries of the native reserves were extended from time to time.¹²⁴ The areas north of the Red Line were classified as communal land.¹²⁵

The Native Administration Proclamation 15 of 1928 empowered the administrator to define tribal areas. The Proclamation also provided for the appointment of traditional leaders and for the exercise of all political powers and authorities according to the laws, customs and usages of natives held by

¹¹⁹See n 75 above. Other reserves were Gibeon, Waterberg East, Neuhof, Tses, Ovitoto, Otjituo, Epukiro, Aminuis, Kaokoveld and Kaokoveld – Ombapera: Robertson E *Subject list and index of the laws of South West Africa from 1915, in force in 1969* (1973) 49.

¹²⁰Union of South Africa Government Information Office *South West Africa and the Union of South Africa* 30.

¹²¹Adams F & Werner W *The Land Issue in Namibia* 31.

¹²² 31.

¹²³Odendaal W "Land Grabbing in Namibia: A Case Study from the Omusati Region, Northern Namibia" *Future Agricultures* 8. See also Art 66 of the Constitution.

¹²⁴Robertson E *Subject list and index of the laws of South West Africa from 1915, in force in 1969* (1973) 48-49.

¹²⁵See 5 3 4 3 6 below.

any supreme chief.¹²⁶ Thus the creation of native areas detached natives from their ancestral land, “adding another dimension to the classification of land” in Namibia.¹²⁷

5 3 4 3 4 *Native Trusts*

With the coming into effect of the South African Trust and Development Land Act 18 of 1936,¹²⁸ the native reserves as discussed above, were placed under trust, known as the Development Trust. The administration of native affairs under the trust was vested in the Administrator of Namibia. However, in 1954 the administration of native affairs was transferred to the South African Minister of Native Affairs in terms of the South West African Native Affairs Administration Act 56 of 1954.¹²⁹ In addition, all land under the Development Trust was declared the property of the state¹³⁰ and had to be administered by the State President of South Africa as the trustee. Thereafter in 1978, the Administration of the South African Bantu Trust in South West Africa Proclamation 19 of 1978 obligated the transfer of the trusteeship from the South African State President to the Administrator General of Namibia.¹³¹

5 3 4 3 5 *Areas for Native Nations*

A further development in the colonial South African land policy was the promulgation of the Development of Self-Government for Native Nations in South West Africa Act 54 of 1968. This Act aimed to assist the various population groups to develop into independent self-governing nations, thus establishing various governing bodies to that effect.¹³² The Act transformed the land in the Development Trust into areas for native nations¹³³ and

¹²⁶ S 19 of the Regulations Prescribing the Duties, Powers and Privileges of Chiefs and Headmen, GN 60 of 1930, which were issued pursuant to the Native Administration Proclamation 15 of 1928 provided that the chiefs and headmen shall be responsible for the proper allotment to the extent of the authority allowed them by the law of arable lands and residential sites in a just and equitable manner without favour or prejudice.

¹²⁷ Amoo S K (2001) *SAJHR* 92.

¹²⁸ For a detailed discussion of this Act see 2 3 3 3 1 above.

¹²⁹ The Act came into operation on 1st April 1955. S 4(1) and (2).

¹³⁰ S 5(2).

¹³¹ S 2.

¹³² Preamble of the Act.

¹³³ In terms of s 2, the areas for the different native nations were Damaraland, Hereroland, Kaokoland, Okavangoland, Eastern Caprivi and Owamboland.

empowered the President of South Africa to “reserve and set apart for the exclusive use of and occupation by any native nation” any other land by proclamation.¹³⁴

The Development of Self-Government for Native Nations in South West Africa Act 54 of 1968 was promulgated to implement the results of a Commission of Enquiry into the Affairs of Namibia which came to be known as “the Odendaal Commission”.¹³⁵ With *apartheid* policies already having taken root in South Africa, Prime Minister Verwoerd appointed the Odendaal Commission in 1962 to advise the South African Government on how a similar policy could be introduced in Namibia. One of the recommendations in the report was that Namibia should be divided into a number of self-governing homelands or Bantustans for Africans, which would remain perpetually dependent on the white areas, and through them, on South Africa.¹³⁶ These were the areas of the native nations proclaimed by the Development of Self-Government for Native Nations in South West Africa Act, which had the effect of entrenching both territorial *apartheid* in Namibia and the distribution of land along racial lines.

5 3 4 3 6 Communal Land

Finally, in the areas north of the Red Line, particularly in Owamboland and Kavango, tenure was different from that in the Police Zone reserves. The land in the former areas was divided into residential and agricultural sections on the one hand and grazing land on the other. Agricultural land was held by individual families, while pastures were utilised communally.¹³⁷ The respective traditional leaders were regarded as the owners of the land and in that capacity they allotted arable land to heads of homesteads or “kraal heads”, who were mainly married men. In some areas a nominal fee was paid to the

¹³⁴S 2(g).

¹³⁵ See Katjavivi P H *A History of Resistance in Namibia* 72-23.

Odendaal W “Land Grabbing in Namibia: A Case Study from the Omusati Region, Northern Namibia” *Future Agricultures* 6

¹³⁶ Amoo S K (2001) *SAJHR* 108 n 38.

¹³⁷ Adams F & Werner W *The Land Issue in Namibia* 31-32; Odendaal W “Land Grabbing in Namibia: A Case Study from the Omusati Region, Northern Namibia” *Future Agricultures* 10-11.

traditional leader on allocation of the land.¹³⁸ The allocation of the land conferred permanent *usufruct* on the allottee, “subject to good behaviour and loyalty to the chief”.¹³⁹ Upon the death of the allottee, the allottee’s heirs took possession of the land.

On the other hand, the areas for native nations, as described above¹⁴⁰ were declared communal land by virtue of the Representative Authorities Proclamation 8 of 1980.¹⁴¹ The Proclamation repealed the provisions of the Development of Self-Government for Native Nations in South West Africa Act in relation to every population group in respect of which a representative authority had been established.¹⁴² The land referred to in a series of subsequent proclamations¹⁴³ was declared communal land of the population groups concerned, or homelands, while the representative authorities became the trustees of the land. Ownership formerly vested in the South African Native Trust was vested in the Government of Namibia.¹⁴⁴

The Administrator General was made trustee of the communal land in 1981 by virtue of the Representative Authorities Amendment Proclamation 4 of 1981. The Proclamation also gave the executive authority of the representative authority the power to confer ownership or any other right into or over, any portion of such communal land, thereby maintaining the concept of private individual ownership amongst the tribal communities.¹⁴⁵ Shortly before 1990, the representative authorities were dissolved and their powers were

¹³⁸ Adams F & Werner W *The Land Issue in Namibia* 32; Odendaal W “Land Grabbing in Namibia: A Case Study from the Omusati Region, Northern Namibia” *Future Agricultures* 10.

¹³⁹ Adams F & Werner W *The Land Issue in Namibia* 32.

¹⁴⁰ See 5 3 4 3 5 above.

¹⁴¹ AG 8 of 1980.

¹⁴² S 52. The population groups include the Damaras, Hereros, Kavangos, Caprivians, Owambos and Namas.

¹⁴³ Examples of these proclamations were the Representative Authority of the Owambos Proclamation AG 23 of 1980; Representative Authority of the Kavangos Proclamation AG 26 of 1980 and the Representative Authority of the Caprivians Proclamation AG 29 of 1980.

¹⁴⁴ Odendaal W “Land Grabbing in Namibia: A Case Study from the Omusati Region, Northern Namibia” *Future Agricultures* 6-8. For a detailed account of whether communal land is ‘owned’ by the Government of Namibia, see Harring S L “The Constitution of Namibia and the ‘Rights and Freedoms’ guaranteed communal land holders: Resolving the inconsistency between Article 16, Article 100, and schedule 5” (1996) 12 *SAJHR* 467-483.

¹⁴⁵ S 48(3).

transferred back to the Administrator-General.¹⁴⁶ The representative authorities' proclamations were repealed by the Namibian Constitution, 1990.¹⁴⁷

Odendaal maintains that “[n]otwithstanding colonial laws relating to allocation of land, it appears...that communal land allocation effectively remained the responsibility of traditional authorities”¹⁴⁸ in accordance with customary law and was not transferred to state agencies.¹⁴⁹

5 3 4 4 Political Developments immediately before 1990

The South West African People's Organisation was formed on the 19 April 1960¹⁵⁰ and drew together various anti-colonial forces in Namibia. It later became Namibia's first post-independence Government and has remained in power to date.

South Africa's Mandate to administer Namibia was revoked by the United Nations in 1966, and in 1971 its presence in Namibia was declared illegal by the International Court of Justice in The Hague.¹⁵¹ Nevertheless, South Africa refused to withdraw from Namibia. Thus the armed liberation struggle was launched on 26 August 1966.¹⁵²

In 1978 the Transitional Government of National Unity was established,

¹⁴⁶This was done by the Representative Authority Powers Transfer Proclamation AG 8 of 1989 which amended the Representative Authorities Proclamation 8 of 1980 and those proclamations establishing representative authorities as referred to at note 117 above.

¹⁴⁷Corbett A & Daniels C *Legislation and Policies Affecting Community-Based Natural Resources*

Management in Namibia (1996). See 5 5 below.

¹⁴⁸Odendaal W “Land Grabbing in Namibia: A Case Study from the Omusati Region, Northern Namibia” *Future Agricultures* 9-10.

¹⁴⁹Hinz M O “Communal land, natural resources and traditional authority” in Centre for Applied Social Sciences, University of Namibia (eds) *Traditional Authority and Democracy in Southern Africa* (1995) 213.

¹⁵⁰Department of Information and Publicity, SWAPO of Namibia *To Be Born A Nation*; Leys C & Saul J S *Namibia's Liberation Struggle: The Two-Edged Sword* (1995) 2-7.

¹⁵¹This was done in terms of Resolution 2145 (XXI) passed by the General Assembly of the United Nations which declared the Mandate terminated.

¹⁵²Department of Information and Publicity, SWAPO of Namibia *To Be Born A Nation* i.

followed by the installation of the Interim Government in 1980. The drafting of the Constitution started in 1989 and on 21st March 1990 Namibia became independent. In 1991 the National Conference on Land Reform and the Land Question was the foundation on which Namibia developed its subsequent land reform programme.¹⁵³

Similar to the approach in South Africa, after the colonial land dispossessions, the Namibian Government committed itself to redressing the injustices of the past in the spirit of national reconciliation and to promoting successful economic development for all citizens.¹⁵⁴

5 4 Concise exposition of tenure forms immediately before the new Constitutional dispensation dawned

5 4 1 Introduction

Immediately before 1990, land in Namibia was all classified respectively as state or Crown land, communal land and private land. This classification was also maintained under the Namibian Constitution Act 1 of 1990.¹⁵⁵ The applicable laws governing state and private land are the general laws of Namibia, while customary law governs land tenure systems in communal areas in addition to the general laws.¹⁵⁶

5 4 2 Black land tenure system in urban areas

Urban centres developed in the areas in the Police Zone which were reserved principally for white settlers who acquired freehold title of the land.¹⁵⁷ Black settlement was only allowed as a source of labour,¹⁵⁸ with the black workforce living in separate locations. These areas were made up of less developed

¹⁵³Werner W & Odendaal W *Livelihoods after land reform: Namibian country report* (2010) 3.

¹⁵⁴Ministry of Lands, Resettlement and Rehabilitation *National Land Policy, 1998* iv.

¹⁵⁵Hereafter it will be referred to as the Constitution. Amoo S K (2001) *SAJHR* 95. See 5 5 2 below for further detail in this regard.

¹⁵⁶Amoo S K (2001) *SAJHR* 95.

¹⁵⁷97.

¹⁵⁸See 2 4 2 above.

formal settlements and undeveloped informal settlements. Black residents in the formal settlements who satisfied the registration requirements in terms of surveying and adequate planning were granted freehold title to the properties in locations.¹⁵⁹ However, this form of tenure was the exception rather than the rule. Residents in informal settlements on the other hand, did not have any security of tenure.¹⁶⁰

Another form of tenure, permission to occupy, was principally granted to black persons in urban areas.¹⁶¹ This was especially the case because of the social and legal constraints on black people to obtain freehold title as set out above. Permission to occupy¹⁶² was introduced by the Development Trust and Land Act.¹⁶³ It allowed the holder of the certificate a limited right to occupy state land under the conditions attached to the permission to occupy certificate.¹⁶⁴ The permission to occupy did not convey any right of ownership, but it did have an option for the holder to obtain secure title to the land at any time during the period of the permission to occupy, when such title became available.¹⁶⁵

5 4 3 Black land tenure system in rural areas

In the rural areas permission to occupy was also introduced by the Development Trust and Land Act. It had the same terms and conditions as contained in permission to occupy certificates, as set out above.¹⁶⁶

5 4 4 Black rural women's tenure pre-1990

Although widows were allocated land in the communal areas, as Odendaal indicated that “widow might make a basket for the Traditional Authority *in lieu*

¹⁵⁹ Amoo S K (2001) *SAJHR* 97.

¹⁶⁰ 97.

¹⁶¹ 98.

¹⁶² See 2 3 4 2 for details on the permission to occupy.

¹⁶³ See 2 3 3 1 for a discussion of the Act.

¹⁶⁴ Amoo S K (2001) *SAJHR* 98.

¹⁶⁵ 99.

¹⁶⁶ See 5 4 2.

of payment”,¹⁶⁷ women and children were generally not allocated land.¹⁶⁸ Women thus accessed land through their husbands or male relatives. There is no indication that permission to occupy certificates were issued to them.

Overall, the German and South African colonial policies condemned the vast majority of Namibian blacks to poverty, be it in the reserves or as wage labourers in urban locations. The independent Government thus faced the task of addressing the skewed land ownership, racial segregation, political fragmentation and poverty of the majority of its citizens.

5 5 New Constitutional dispensation

5 5 1 Introduction

The Namibian Government introduced the land reform programme immediately following independence in 1990.¹⁶⁹ This is especially important in the rural areas where access to and secure rights in land are a crucial component of the livelihoods of people, as they depend on subsistence farming as a main source of income.¹⁷⁰ The land reform programme is governed by customary law and statutory law which form Namibia’s dual legal system. The primary objectives of the land reform programme are to:

- a) bring about a more equitable distribution of access to land;
- b) promote sustainable economic growth;
- c) lower income inequalities; and
- d) reduce poverty.¹⁷¹

¹⁶⁷ Odendaal W “Land Grabbing in Namibia: A Case Study from the Omusati Region, Northern Namibia” *Future Agricultures* 11.

¹⁶⁸ 11.

¹⁶⁹ The land reform programme was first initiated by the National Conference on Land Reform and the Land Question in 1991. Article 16 of the Constitution is the Constitutional provision relating to land reform.

¹⁷⁰ Adams F & Werner W *The Land Issue in Namibia* 7.

¹⁷¹ Government of the Republic of Namibia, Ministry of Lands and Resettlement *Poverty Impact Assessment* 16.

The emphasis of land reform in Namibia is especially on the redistribution of commercial farm land and the reform of the communal land tenure system.¹⁷²

Though the focus on rural women would mean an emphasis on communal land, some discussion of the redistribution of commercial land is warranted on the basis that secure tenure is to some extent, linked to access to land in principle.

5 5 2 The Namibian Constitution

The preamble of the Namibian Constitution states that the Constitution must be interpreted with regard to or in the context of past wars of colonialism, racism and *apartheid*.

Article 100 and Schedule 5(1) of the Constitution vest communal land in the state. Article 16 of the Constitution is the primary protection measure for private property in Namibia. It states that:

“(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

(2) The State or a competent body or organ authorized by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with the requirements and procedures to be determined by Act of Parliament.”¹⁷³

This Article anticipated the land reform programme.

Given the history of racial segregation and restricting freedom of movement, Article 21(g) was introduced to guarantee freedom of movement within Namibia. Furthermore, Article 21(h) guarantees the right of all persons to reside and settle in any part of the country. The implication of these provisions

¹⁷² 4.

¹⁷³ For a detailed discussion on the consistency between Article 16, Article 100 and Schedule 5, see Haring S L (1996) *SAJHR* 467-483.

is that, though land policy may not inhibit Namibians to move, settle and acquire land in any part of the country, it does not confer the right to settle on the land of others.¹⁷⁴ These constitutional provisions have impacted upon customary law relating to land distribution in communal areas.

5 5 3 Land Policy

5 5 3 1 National Resettlement Policy

The two key policy documents focusing on the aims and objectives of land reform in Namibia are the National Resettlement Policy of 1997 and the National Land Policy of 1998.¹⁷⁵ The National Resettlement Policy's objective is to resettle eligible people in an institutionally, economically and environmentally sustainable manner and in such a way that they become self-supporting.¹⁷⁶

5 5 3 2 The National Land Policy

The National Land Policy of 1998 contains the main policy on land reform in Namibia providing for a unitary land system. The Policy aims to redress "the problem of dispossession, discrimination, and inequitable distribution of land that characterised the pre-independence era."¹⁷⁷ The policy divides the land in the country into urban land defined as:

"all land in human settlements, of any size, under the jurisdiction of a separate authority other than a traditional authority, such as a municipality or town or village council."¹⁷⁸

All other land is rural land. The Policy is premised on eleven fundamental principles:

- a) equality before the law as provided for in Article 10 of the Constitution;

¹⁷⁴Odendaal W "Land Grabbing in Namibia: A Case Study from the Omusati Region, Northern Namibia" *Future Agricultures* 14

¹⁷⁵The focus in this study is on the *National Land Policy* which contains provisions directed specifically at tenure reform.

¹⁷⁶*National Resettlement Policy, 2001* ii.

¹⁷⁷*National Land Policy, 1998* iii.

¹⁷⁸v.

- b) a mixed economy based on public, private, co-operative, joint public-private, co-ownership and small-scale family ownership;
- c) a unitary land system, as under the colonial regime, first and second class systems of land tenure were created that were divided along racial lines, thus now the full range of tenure systems should be given equal status and validity before the law;
- d) with a focus on promoting the interests of the poor, that includes a commitment to ensure equity. To determine “the poor” the following will be a guide: “the landless or those with little or insufficient access to land, who are not in formal employment or engaged in non agricultural business activities”;¹⁷⁹
- e) the rights of women in accordance with Article 95(a) of the Constitution which accord women the same status as men with regard to all forms of land rights;
- f) security and protection, which will protect all legally held land rights regardless of the income, gender or race of the rights holder;
- g) sustainable use of land and natural resources in accordance with Article 95(l) of the Constitution;
- h) public accountability and transparency with regard to land administration;
- i) land as property which is owned by the state if it is not otherwise lawfully owned, while lawful land tenure is defined as all forms of land rights recognised by the policy and consequent legislation;
- j) “land” as a renewable natural resource. Tenure awarded in accordance with the policy and subsequent legislation will include all renewable natural resources on the land, conditional on sustainable use; and
- k) multiple forms of equal land rights, which include customary grants, freehold, leasehold, licenses, certificates or permits and state

¹⁷⁹1.

ownership. This is in conjunction with several categories of land rights holders.¹⁸⁰

Namibia's Vision 2030, the Policy Framework for Long-Term National Development guides all development in Namibia. It states that:

“Land is used appropriately and equitably, significantly contributing towards food security at household and national levels, and supporting the sustainable and equitable growth of Namibia's economy, whilst maintaining and improving land capability.”¹⁸¹

5 5 4 The land reform programme

5 5 4 1 Introduction

After independence, Namibia set the wheel turning for implementation of land reform. Thereafter, the Government embarked upon four parallel land reform programmes, namely

- a) the National Resettlement Programme;
- b) the Affirmative Action Loan Scheme;
- c) the creation of Small-scale Commercial Farming Units; and
- d) the issuing of Communal Land Rights Certificates to farmers in communal areas.

Item a) complements b) above and they both make up the redistribution of commercial farm land, while items c) and d) above make up the communal land tenure reform programme.

Restitution *does not* form part of Namibia's National Land Policy, but the existing policy is committed to special support to all landless or historically

¹⁸⁰ The categories of land rights holders will be individuals, families that are legally constituted as family trusts in order to secure specified individuals and their descendants of shared land rights, legally constituted bodies and institutions to exercise joint ownership rights, duly constituted co-operatives and the state. The other fundamental principles are a mixed economy, sustainable use of land and natural resources, public accountability and transparency, and 'land' as a renewable natural resource. *National Land Policy* 3.

¹⁸¹ Government of the Republic of Namibia, Office of the President *Namibia Vision 2030: Policy Framework on for Long-Term National Development* (2004) 144. The National Development Plans (NDPs) identify specific medium-term interventions as part of the long-term development vision of 2030.

disadvantaged persons or communities.¹⁸² The land reform programmes will be addressed below.

5 5 4 2 The Redistribution of Commercial farm land

5 5 4 2 1 Introduction

The redistribution of commercial farm land is discussed here as redistribution or access to land is linked to tenure reform. The key elements for the land redistribution programme are to:

- a) develop un/under-utilised communal areas where this is environmentally sustainable;
- b) purchase commercial farms in blocks and/or neighbouring to existing communal areas wherever possible in order to increase efficiency by for instance lowering support costs, maintaining links with traditional farming systems and relieving local pressure on existing cultivated and grazing land; and
- c) to encourage the movement of large scale commercial farmers from communal areas to freehold tenure areas, thereby providing for small holders to remain on the land.¹⁸³

The qualifying criteria for resettlement are:

- a) Namibian citizenship;
- b) at least eighteen years old;
- c) an applicant must have no more than 150 Large Stock or 800 Small Stock; and
- d) an applicant must not own land, other than for residential purposes.¹⁸⁴

¹⁸² *National Land Policy*, 1998 14.

¹⁸³ 14-15.

¹⁸⁴ Government of the Republic of Namibia, Ministry of Lands and Resettlement *Poverty Impact Assessment* 22. Ministry of Lands and Resettlement *Criteria* 2011 2.

5 5 4 2 2 **National Resettlement Programme**

Resettlement is run by the Ministry of Lands and Resettlement¹⁸⁵ in line with the National Resettlement Policy and the National Land Policy provision that Government will promote a more just and equitable distribution of agricultural land to benefit formerly disadvantaged Namibians.¹⁸⁶ The Government will procure land for redistribution from the freehold sector, either through the exercise of the Minister's right of first refusal when land is sold, or by compulsory acquisition of excessive and/or under-utilised land. Arrangements will be made to extend the use and/or disposition of land already held by Government, to maximum social, economic and environmental advantage, while also taking into account the rights of those living there.¹⁸⁷ The land procured by the Government will be distributed by sale, lease or customary grant to Namibian individuals, companies or other legally constituted groups who do not have adequate landholdings. Priority will be given to those who will use the land for production, including agriculture, game ranching and tourism.

Against this background, the Agricultural (Commercial) Land Reform Act 6 of 1995 was enacted. It provides the legislative basis for the acquisition and distribution of agricultural land.¹⁸⁸ The Act allows the state to acquire land under the National Resettlement Programme based on the willing-buyer-willing-seller principle. Expropriation is also used for land acquisition as provided for in the Constitution, Article 16(2), if it is in the public interest.¹⁸⁹

By August 2010, a total of 1 502 935 hectares of land in various regions of the country had been acquired for resettlement. It was allocated to over 3-725

¹⁸⁵ See 5 5 4 5 below.

¹⁸⁶ Government of the Republic of Namibia, Ministry of Lands and Resettlement *Poverty Impact Assessment* 22. Ministry of Lands and Resettlement *Criteria* 2011 14.

¹⁸⁷ 14.

¹⁸⁸ Preamble of the Act.

¹⁸⁹ Part IV of the Act on Compulsory Acquisition of Agricultural Land. See Government of the Republic of Namibia, Ministry of Lands and Resettlement *Poverty Impact Assessment* 21.

beneficiaries.¹⁹⁰ Since 2009 the Agricultural Bank of Namibia has started to take part in providing post-resettlement support for resettled farmers.¹⁹¹

5 5 4 2 3 *Affirmative Action Loan Scheme*

The Affirmative Action Loan Scheme was established in 1992 and is implemented by the Agricultural Bank of Namibia on behalf of the Ministry of Agriculture, Water and Forestry, primarily to provide subsidised loans to previously disadvantaged Namibians to acquire large-scale commercial farms under freehold title.¹⁹² The Scheme's main objective is to resettle well-established formerly disadvantaged Namibians, mainly from communal areas, on commercial farms.¹⁹³ This is in order to help minimise the pressure on grazing in communal areas.

From the period of implementation of the scheme to 2010 a total of 604 farmers, on land covering 3 241 352 hectares in the country's freehold land,¹⁹⁴ have benefited from the programme.

The Scheme also aims to assist small-scale communal farmers to gain ownership of land and to develop into fully fledged commercial farmers who can contribute to the national economy.¹⁹⁵

5 5 4 3 *The Communal Land Tenure Programme*

5 5 4 3 1 *Introduction*

The Communal Land Reform Act 5 of 2002 sets out the description of communal areas which include Kaokoland, Damaraland, Owamboland, Kavango, Caprivi, Bushmanland, Hereroland West, Hereroland East, and

¹⁹⁰ 21.

¹⁹¹ 17; 36-40; 54-55.

¹⁹² Werner W & Odendaal W *Livelihoods after land reform: Namibian country report* (2010) 3; Government of the Republic of Namibia, Ministry of Lands and Resettlement *Poverty Impact Assessment* 22.

¹⁹³ 22.

¹⁹⁴ 22.

¹⁹⁵ 22; 41-44; 55.

Namaland.¹⁹⁶ Communal areas cover approximately forty one percent of the country's surface, while the freehold sector covers 44 percent.¹⁹⁷ Tenure reform in communal areas is essential in addressing poverty in the country, which has one of the most unequal distributions of income in the world.¹⁹⁸ The tenure reform programme comprises two programmes, as set out below.

5 5 4 3 2 *Creation of Small-scale Commercial Farming Units*

The Small-scale Commercial Farming Units programme was developed in terms of the Communal Land Reform Act 5 of 2002.¹⁹⁹ The aim of this programme is to develop under-utilised land in communal areas for commercial farming purposes.²⁰⁰

The Agricultural (Commercial) Land Reform Act provides for the granting of 99-year leasehold rights to allocated farming units and subsequent registration of the lease agreement with the Deeds Office. Leasehold rights are circumscribed in the sense that, any action that may in any way encumber a farming unit allocated by the Ministry of Lands and Resettlement, is subject to the Minister's written approval. A total of 563 small-scale commercial farming units were surveyed in the Kavango, Caprivi and Ohangwena region by 2010.²⁰¹

¹⁹⁶Schedule 1 of the Act.

¹⁹⁷ The remainder of the land is arid desert land. Werner W & Odendaal W *Livelihoods after land reform* 18.

¹⁹⁸ 9; Bösl A "Promoting women's rights and gender equality in Namibia" in Ruppel O C (ed) *Women and Custom in Namibia: Cultural Practice versus Gender Equality?* (2008) 27 27-28; Trading Economics "Income Share held by lowest 20% in Namibia" (06/06/2012) *Trading Economics* <<http://www.tradingeconomics.com/namibia/income-share-held-by-lowest-20percent-wb-data.html>> (accessed 28/03/2012); Indexmundi "Namibia Distribution of family income- Gini index" *Indexmundi* (09/01/2012) <http://www.indexmundi.com/namibia/distribution_of_family_income_gini_index.html> (accessed 07/06/2012); The World Bank "Data: Namibia" (2012) <<http://data.worldbank.org/country/namibia>> (accessed 15/08/2012).

¹⁹⁹ GG 2787 of 12/08/2002. S 31.

²⁰⁰ Government of the Republic of Namibia, Ministry of Lands and Resettlement *Poverty Impact Assessment* 23.

²⁰¹ 23; 44-46; 55.

5 5 4 3 3 Issuing of Communal Land Rights Certificates to farmers in communal areas

5 5 4 3 3 1 Customary land rights

Based on constitutional principles as described above,²⁰² the Communal Land Reform Act was promulgated to consolidate the customary law measures²⁰³ into statutory law as well as to improve communal land management overall. The Act provides for the allocation of rights in respect of communal land, establishes Communal Land Boards for the various regions and to provide for the powers of chiefs and traditional authorities.

The Act provides that all communal land vests in the state in trust

“for the benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities.”²⁰⁴

This means that the right of the people to the land is not a right of ownership but a right to use the land. Also, the benefits of communal land should accrue to those in the informal sector who are intent on using and benefitting from agricultural land in communal areas.²⁰⁵ The Act furthermore prohibits rights conferring freehold ownership to be granted to any person in respect of communal land.²⁰⁶ The idea behind this is that persons who wish to farm commercially and in need of large tracts of land should do so within the commercial farming areas and not within the communal farming areas. In this manner the Act underpins the concept of a safety net which communal land

²⁰² See 5 5 2.

²⁰³ See 5 3 3 4 above.

²⁰⁴ S 17(1). The case *Shingenge v Hamunyela* 2004 NR 1 (HC) confirms that in terms of Art 124 read with Schedule 5 of the Constitution, communal land is owned by the Government of Namibia.

²⁰⁵ Odendaal W “Land Grabbing in Namibia: A Case Study from the Omusati Region, Northern Namibia” *Future Agricultures* 16.

²⁰⁶ S 17(2).

provides for the poor and those who cannot find employment in the formal sector,²⁰⁷ but subject to limits such as being a member of a community.

The Communal Land Reform Act states that the chief of a traditional community has the primary authority to allocate and/or revoke customary land rights. All existing and new²⁰⁸ customary land rights have to be registered with the Communal Land Board. Existing customary land rights are those that were held, immediately before the commencement of the Act, in respect of the occupation or use of communal land being a right of the nature referred to in section 21. Such an existing right must have been granted to or acquired by such person in terms of any law or otherwise.²⁰⁹ New customary land rights are those that may be applied for as set out in section 21:

“The following customary land rights may be allocated in respect of communal land –

- (a) a right to a farming unit;
- (b) a right to a residential unit;
- (c) a right to any other form of customary tenure that may be recognised and described by the Minister by notice in the *Gazette* for the purposes of this Act.”

In the same vein a “customary land right” is any of the rights referred to in section 21 (a), (b) and (c) above. The Act recognises pre-existing customary land rights. Section 28 of the Act stipulates that any person who immediately before the commencement of the Act held a right in respect of the occupation or use of communal land, being a right of a nature referred to in section 21,²¹⁰ shall continue to hold that right. Persons who hold such rights shall apply for recognition and registration of such rights.²¹¹ Thus, rights acquired pre-

²⁰⁷Odendaal W “Land Grabbing in Namibia: A Case Study from the Omusati Region, Northern Namibia Land” *Future Agricultures* 16.

²⁰⁸S 22.

²⁰⁹S 28(1).

²¹⁰S 21 Communal Land Reform Act (CLRA) 5 of 2002.

²¹¹ Chapter IV deals with the Allocation of Rights in respect of Communal Land, containing s 19 setting out the rights that may be allocated, ss 20-29 which provide for Customary Land Rights and ss 30-36 providing for the Right of Leasehold.

independence, such as the permission to occupy in rural areas,²¹² may now be registered in terms of this Act.

The Communal Land Reform Act also allows for the allocation of new customary land rights by providing that:

“An application for the allocation of a customary land right in respect of communal land must –

- a) be made in writing in the prescribed form; and
- b) be submitted to the Chief of the traditional community within whose communal area the land in question is situated.”²¹³

In terms of the Act, the primary power to allocate or cancel any customary land rights in respect of any land in the communal areas is vested in the chief of the traditional community or if he/she so decides, in the Traditional Authority of that traditional community.²¹⁴ The rights so allocated by traditional leaders only become legal rights after they have been ratified by the Communal Land Boards, which ensure that such allocation complies with regulations and national laws.²¹⁵ The Boards are a new institutional framework introduced by the Act to *inter alia* survey land parcels and register rights over them.²¹⁶

Once the right is ratified, the Land Board registers such rights in the name of the land rights holder in a register and issues a certificate of registration.²¹⁷ The Act codified the customary law with regard to the traditional leaders' role in administering customary land rights²¹⁸ and attempts to improve transparency in the process of customary land allocation.²¹⁹ All in all, the Act,

²¹² See 5 4 3 above.

²¹³ S 22.

²¹⁴ S 20.

²¹⁵ S 24.

²¹⁶ S 3.

²¹⁷ S 25.

²¹⁸ Werner W *Protection for Women in Namibia's Communal Land Reform Act* 13.

²¹⁹ 15.

through the establishment of the Communal Land Board, improves the security of tenure of customary land rights holders.²²⁰

Before the implementation of the programme, disputes over land had been common. Many communal farmers thus supported the programme, because it provides proof of ownership and security of tenure for them and future generations. There was also a strong agreement that the programme afforded farmers protection from illegal or unfair eviction, which is one of the primary aims of tenure reform.²²¹

The Communal Land Reform Act 5 of 2002 was passed more than twelve years after independence. Thus in the years prior to its promulgation, the absence of statutory recognition of the customary land tenure rights in communal areas led to illegal fencing off of communal land, mostly by elite Namibians.²²² This still remains a major concern for the land reform programme. Though this situation has been exacerbated by the lack of a provision in the Communal Land Reform Act that deals with land disputes among land rights holders, ironically the issuing of communal land rights certificates has played a role in decreasing disputes over land.

²²⁰ See the registration in Oshikoto, Oshana and Omusati: Werner W *Protection for Women in Namibia's Communal Land Reform Act* 16.

²²¹ Government of the Republic of Namibia, Ministry of Lands and Resettlement *Poverty Impact Assessment* 48.

²²² For a detailed discussion of this problem and recommendations see Odendaal W "Land Grabbing in Namibia: A Case Study from the Omusati Region, Northern Namibia" *Future Agricultures* 6; Ashipala P "Privatisation of communal land in the North gaining momentum" (23/09/2011) *The Namibian* <[http://www.namibian.com.na/index.php?id=28&tx_ttnews\[tt_news\]=87620&no_cache=1](http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=87620&no_cache=1)> (accessed 01/02/2012); Sasman C "Political elite 'capturing' communal land" (22/11/2011) *The Namibian* <[http://www.namibian.com.na/index.php?id=28&tx_ttnews\[tt_news\]=90305&no_cache=1](http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=90305&no_cache=1)> (accessed 22/11/2011).

5 5 4 3 3 2 Right of leasehold

In addition to the customary land rights, rights of leasehold may also be allocated on communal land,²²³ subject to conditions as may be determined by the Minister, upon advice by the Communal Land Board.²²⁴

In addition to the above programmes of the tenure reform programme, community-based natural resource management models developed by the Ministry of Environment and Tourism, taking the form of conservancies and community forests, are a positive and thus far successful development for communal areas.²²⁵

The community courts in the communal areas apply customary law. These community courts were established in terms of the Community Courts Act 10 of 2003.²²⁶ The community courts not only removed the burden of costs for potential litigants in traditional communities, but also allow people in the rural communities to institute legal proceedings under the laws they know and trust.²²⁷ The community courts have an administrative role. According to Ambunda and de Klerk,²²⁸ these courts are obliged to act fairly and reasonably and have to comply with the requirements imposed on them by the common law and any relevant legislation in line with Article 18 of the Constitution. Thus any person aggrieved by the exercise of the community courts' powers has the right to seek redress from a competent court. Decisions of the community courts are not final.

²²³The *National Resettlement Policy, 2001* 6 states that settlers will be able to use lease agreements as collateral for agricultural credit.

²²⁴Chapter IV Part 2 of the Act.

²²⁵Ministry of Lands and Resettlement: The Permanent Technical Team (PTT) on Land Reform *Background Research and work and Findings of the PTT Studies: November 2005* (2005) ix; See further Ministry of Environment and Tourism *Conservation of the Environment in Namibia 2010/2011: Namibia's Communal Conservancy Tourism Sector* (2011).

²²⁶Preamble of the Act and s 13.

²²⁷Ambunda L & de Klerk S "Women and custom in Namibia" in *Women and Custom in Namibia* 46.

²²⁸ 46.

Generally, the registration of customary land rights, or rights of leasehold protect the beneficiaries from eviction and grant a right to compensation if their parcel of land or part of it is expropriated by Government bodies.²²⁹

5 5 4 4 State administration of land reform

As the principal administrator of land in Namibia, the Ministry of Lands, Resettlement and Rehabilitation, was established in 1990 to act as a custodian of the interests of citizens relating to land matters. The Ministry was renamed the Ministry of Lands and Resettlement in 2005, with its main vision to accelerate the land reform process and ensure visible empowerment of targeted beneficiaries.²³⁰ The Ministry's Directorate on land reform has a separate Division for Land Boards, Tenure and Advice. This division is tasked with fairly administering land policies and legislation, to coordinate Communal Land Boards and to develop communal areas.²³¹ There is no specialised department for gender issues in the Ministry. Nonetheless, the Ministry of Gender Equality and Child Welfare established in 2000, guarantees that Namibian women have a representative at Cabinet level with a vote and also serves as an effective platform for the advancing of gender-orientated activities including land reform.²³²

5 5 5 Conclusion

The land reform programme embarked on by the Namibian Government post-1990 is premised on the constitutional guarantee of the right to property for all Namibians. Generally the land policy is focused on providing secure tenure for previously disadvantaged Namibians in order to provide for their sustenance and to make them part of the mainstream economy through distribution of commercial farm land. Tenure reform specifically seeks to protect the interests and rights in land that existed pre-1990 and provides for new land tenure

²²⁹S 16(2)-(3) and 30(2) CLRA.

²³⁰Ministry of Lands and Resettlement *Annual Report 2008/2009* 3.

²³¹17.

²³²Ambunda L & de Klerk S "Women and custom in Namibia" in *Women and Custom in Namibia* 61.

rights, while relying on minimal legislation that grapples with the issues in the various programmes. This leaves room for legislative expansion to improve the programme, which keeps adapting and is an on-going process. With the collaboration between different state organs, such as the Ministry of Lands and Resettlement, The Ministry of Environment and Tourism and the Development Bank of Namibia, the land reform programme directly engages extensive role players. In light of the overarching legislative measures and policies, the focus shifts to black rural women's tenure in particular.

5 6 Black rural women's tenure security post 1990

5 6 1 Introduction

The poorest households in rural areas are those headed by women, which amount to about 43 per cent of all households in rural areas and are more likely to be dependent on subsistence agriculture.²³³ There has been past discrimination against black rural women as they historically had little decision-making power in household matters and were typically not part of traditional authorities. This inability to exert control over community decisions *inter alia*, negates women's access to material wealth and to land.²³⁴ However, the Constitution, being the supreme law of Namibia,²³⁵ provides for an equality approach and directly provides for the protection and guarantee of women's rights in policy and legislative development.

This section is aimed at providing an exposition of black rural women's tenure in particular, in light of the general overarching framework discussed above. In this regard the factors that affect black rural women's tenure security in general, will first be dealt with. Thereafter the overarching framework will again be analysed, but this time with a particular gendered emphasis in that

²³³ Rural Poverty Portal "Rural Poverty in Namibia" *Rural Poverty Portal* <<http://www.ruralpovertyportal.org/web/guest/country/home/tags/namibia#>> (accessed 28/03/2012).

²³⁴ In Okavango region women have however been known to be traditional leaders: Ambunda L & de Klerk S "Women and custom in Namibia" in *Women and Custom in Namibia* 54.

²³⁵ Art 1(6).

the provisions and developments relating to women in particular, will be highlighted. Similar to the South African position elaborated on in Chapter four above, women's position differ, according to their particular circumstances and status. Thus the chapter will conclude in setting out the different categories of black rural women and how tenure differs within these categories.

5 6 2 Factors that impact on black rural women's tenure security in general

Factors that impact on black rural women's tenure security in Namibia are diverse and generally date back to the pre-colonial era as customary law favoured men over women as decision-makers regarding the allocation and use of communal land.²³⁶ Historically, women were not allocated land.²³⁷ Succession is also affecting women's tenure security as the right of women to inherit and own land is affected by the customary rule of male primogeniture. In this regard, the toll of the HIV/AIDS pandemic has also had an effect on women's tenure.²³⁸

The Married Persons Equality Act 1 of 1996 abolished the marital power in civil marriages and aimed to amend the matrimonial property law of marriages in community of property by giving equal powers to spouses married in community of property.²³⁹ Despite this Act, women still often have no legal right to the land and are susceptible to property grabbing after the dissolution of the marriage or upon the death of their spouse, as illustrated in more detail below.²⁴⁰ Furthermore, the Act does not deal with gender inequalities in customary marriages relating to their joint estate.

To sum up, the main factors impacting on gender equality, as also highlighted by the Committee on the Elimination of Discrimination against Women, are a)

²³⁶Odendaal W "Land Grabbing in Namibia: A Case Study from the Omusati Region, Northern Namibia" *Future Agricultures* 14. See also 5 3 4 3 6 above.

²³⁷ See 5 4 4 above.

²³⁸ Werner W *Protection for Women in Namibia's Communal Land Reform Act* 3.

²³⁹Preamble of the Act and ss 2 and 5 respectively.

²⁴⁰See 5 6 4 below.

discrimination arising from customary law, b) the general lack of public knowledge of human rights and the law and c) poverty which prevents the majority of women in Namibia from fulfilling their aspirations.²⁴¹

5 6 3 Legal framework

5 6 3 1 Policy framework

The National Resettlement Policy 2001 does not refer to gender at all and is worded in gender neutral terms. However, the National Land Policy still aims to improve gender equality in land rights and tenure security. This is done by according all people equal status in the law in accordance with Article 95(a) of the Constitution.²⁴² According to the Policy it means that:

- a) women will be entitled to receive land allocations and bequeath and inherit land;
- b) Government will actively promote reform of civil and customary law which impede women's ability to exercise rights over land; and
- c) policy will promote practices and systems that take into account women's domestic, productive and community role, especially with regard to agricultural development and natural resource management.²⁴³

The National Gender Policy 1997, in line with the Third United Nations Millennium Development Goal to promote gender equality and empower women, defines the focal point of the tension between gender equality and customary practices in Namibia.

²⁴¹ Ambunda L & de Klerk S "Women and custom in Namibia" in *Women and Custom in Namibia* 63.

²⁴² *National Land Policy* 1.

²⁴³ 2.

5 6 3 2 *The Namibian Constitution*

The Constitution is particularly gender sensitive and generally has an equitable approach.²⁴⁴ In its chapter on Fundamental Human Rights and Freedoms it guarantees equality before the law and prohibits discrimination on the grounds of *sex, race, colour, ethnic origin*, religion, creed or social or economic status.²⁴⁵ It also specifically states that:

“(3) In the enactment of legislation and the application of any policies and practices...it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation.”²⁴⁶

The above is the constitutional principle of affirmative action which has also been adopted in legislation.²⁴⁷

At the formal political level, the promotion of gender equality has been a guiding principle in policy development. This is provided for in the Namibian Constitution in an exclusive chapter on “Principles of State Policy” that the state should adopt policy aimed at “enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society”.²⁴⁸ This, however, begs the question why the National Resettlement Policy 2001 is gender-neutral.²⁴⁹

²⁴⁴ This is in line with Namibia’s obligation as a signatory to the Millennium Declaration of 2000, thus participating in the process of achieving the United Nations Millennium Development Goals (MDGs), particularly MDG 3, which promotes equal rights and intends to strengthen the rights of women. Furthermore, Namibia’s Third National Development Goal commits itself to the principles of sustainable development and concern for the poor and gender equality. Moreover, Namibia has ratified relevant international and regional legal instruments such as the ICCPR, the ICESCR, the CEDAW and the Protocol of the African Charter about women’s rights in Africa, as well as the Southern African Development Community’s various undertakings as regards enhancing the status of women. In terms of Art 144 of the Constitution, these international instruments that Namibia has ratified form part of Namibian law. See Bösl A “Promoting women’s rights” in Ruppel O C (ed) *Women and Custom in Namibia* 27-28.

²⁴⁵ Art 10. Emphasis author’s own.

²⁴⁶ Art 23(3). Article 23 is titled Apartheid and Affirmative Action.

²⁴⁷ See 5 6 3 3 1 below.

²⁴⁸ Art 95(a).

²⁴⁹ See 5 6 3 1.

Article 66 obliges the state to repeal any discriminatory part of the common or customary law. Various laws have thus been passed in accordance with these constitutional principles.²⁵⁰ However, the Constitution also states that both common law and customary law in force on the date of independence remain valid until they are amended or abolished by Parliament.²⁵¹ Hence, discriminatory laws still exist *de facto*. This affects women in rural areas in particular, for example by way of having limited control over property, or access to estates or small loans.

5 6 3 3 Legislation

5 6 3 3 1 *Laws pertaining to the powers over land rights*

The Traditional Authorities Act 25 of 2000 provides for the establishment of traditional authorities within traditional communities and makes traditional authorities responsible for the administration of customary law of specific communities.²⁵² Traditional authorities must “uphold, promote, protect and preserve the culture, language, tradition and traditional values of that traditional community”.²⁵³ The Act simultaneously adopted the constitutional affirmative action principle²⁵⁴ by stating that traditional authorities are to “promote affirmative action amongst the members of that traditional community as contemplated in Article 23 of the Namibian Constitution, in particular by promoting gender equality with regard to positions of leadership”.²⁵⁵ The Act further defines the scope of the mandate of traditional leaders, and thus limits the autonomous or oppressive use of power by

²⁵⁰These include the Married Persons Equality Act 1 of 1996, the Affirmative Action (Employment) Act 29 of 1998 and the Communal Land Reform Act 5 of 2002 amongst others. See Legal Assistance Centre “Namlex: Index to the Law of Namibia”(30/06/2010) LAC<<http://www.lac.org.na/laws/pdf/namlex2010.pdf>> (accessed 22/03/2012).

²⁵¹ Art 66.

²⁵²S 3(1)(b). This Act is linked to the fundamental right to enjoy, practice and promote any culture in accordance with Art 19 of the Constitution and Art 15(1)(a) of the ICESCR, in terms of which the Government is obliged to take legislative and administrative measures to ensure the fulfillment of these rights.

²⁵³ S 3(1)(c).

²⁵⁴See 5 6 3 2 above.

²⁵⁵S 3(1)(g).

traditional leaders.²⁵⁶ The Act also obliges traditional leaders to observe certain regulations before adjudicating on disputes.²⁵⁷ In terms of the Act, the Minister of Regional and Local Government, Housing and Rural Development has the responsibility to supervise traditional authorities. In this manner traditional leaders can be held accountable for failing to observe constitutional and statutory provisions.²⁵⁸ These provisions of the Act thus actively promote the legal reform which formerly impeded women from exercising their land rights in accordance with the National Land Policy.²⁵⁹

However, Werner²⁶⁰ argues that the Traditional Authorities Act emphasises the importance of customary law and practices without questioning the inequalities that such laws and practices may perpetuate, especially in relation to women. This vacuum provides opportunities to continue practices that may be unconstitutional. The Communal Land Reform Act does not provide guidance in this regard either. Furthermore, the Traditional Authorities Act does not contain provisions aimed at improving governance and accountability at a local level.

5 6 3 3 2 *Laws pertaining to the content of land rights*

The Communal Land Reform Act 5 of 2002 is gender neutral in discussing the registration of land rights and does not define the content of land rights. This leaves traditional leaders with the task of striking a balance between customary law, the requirements of the Constitution and the common law.²⁶¹ Historically²⁶² and nowadays, men applied for customary land rights upon marriage and hence are regarded as the rights holders. The Act is silent on whose name household property should be registered in, which is an important consideration in a context where power relations are structured

²⁵⁶ Ambunda L & de Klerk S "Women and custom in Namibia" in *Women and Custom in Namibia* 45.

²⁵⁷ S 12 and 14.

²⁵⁸ Ambunda L & de Klerk S "Women and custom in Namibia" in *Women and Custom in Namibia* 45.

²⁵⁹ *National Land Policy* 2.

²⁶⁰ Werner W *Protection for Women in Namibia's Communal Land Reform Act* 14.

²⁶¹ 14.

²⁶² See 5 4 3 and 5 4 4 above.

along gender lines.²⁶³ Nonetheless, the Act does grant women equal rights when they apply for communal land.²⁶⁴

The Communal Land Boards are typically constituted of twelve members.²⁶⁵ Four of the members on the Board should always be women,²⁶⁶ thus women play an active role in the decision-making process regarding the allocation and cancellation of customary land rights in communal areas.²⁶⁷ Two of these women should be engaged in farming operations in the board's jurisdiction and the other two should have expertise relevant to the functions of the Board.²⁶⁸ This represents only a third of the total composition of the Board. Thus it is doubtful whether this composition sufficiently provides for equal participation and allocation of land for both women and men and whether women's interests are well provided for in such a body. The inclusion of women in the decision-making structure with regard to customary land rights ratifications does not go far to guarantee substantive equality with regard to customary land allocation as the board does not allocate the rights. Even if it did, the general effect of the law would then have to be assessed to determine its impact on substantive equality.

The Communal Land Reform Act also fails to address the fact that in customary law, access to land and its transfer after a spouse's death, is subject to power relationships that are based on gender roles. An example in point is the issue of property grabbing, including land grabbing by relatives of a deceased husband from his widow.²⁶⁹ Though the perpetrators generally consider grabbing of property to be legitimate in terms of customary law, in line with the matrilineal inheritance rules, such an act is theft in terms of

²⁶³ Werner W *Protection for Women in Namibia's Communal Land Reform Act* 17.

²⁶⁴ S 22. See also 5 5 4 3 above.

²⁶⁵ S 4. Werner W *Protection for Women in Namibia's Communal Land Reform Act* 15. For the composition of women in other regional and national decision-making structures see Ambunda L & de Klerk S "Women and custom in Namibia" in *Women and Custom in Namibia* 67.

²⁶⁶ CLRA s 4(1)(d). This provision is subject to s 5.

²⁶⁷ See 5 5 4 3 3 above.

²⁶⁸ S 4(1)(d)(i) and (ii) respectively.

²⁶⁹ Chiari G P *Draft Report: United Nations Development Programme Mission on Rural Livelihoods and Poverty in Namibia* (2004) 90.

statutory law and goes against the constitutional values. It is unfortunate that this customary law practice was not formally repealed by the Communal Land Reform Act. In addition, the Act provides little protection from arbitrary decisions taken by those who wield authority over land allocation and land use, who are mostly males.²⁷⁰ The lack of a legal mandate for the Land Boards to deal with land disputes results in the Boards referring the matters back to traditional leaders. Unfortunately, these leaders, although explicitly recognised by the Communal Land Reform Act, receive no remuneration²⁷¹ for services provided nor any training or skills transfer.²⁷² Werner states that this situation is leading to a “watering down of dispute resolution mandates which is likely to weaken local institutions”.²⁷³

Furthermore, discrepancies between the provisions of the Communal Land Reform Act and practices on the ground continue to exist,²⁷⁴ especially because the Act or any other legislation, does not define the content of land rights in the rural communal areas.

5 6 3 4 Case Law

As a result of the gender-neutral nature of legislation and where legislation does not address the inequalities perpetuated by customary law or address the gendered nature of rural power relations, the courts are motivated to act pro-actively in addressing some of these issues. A few case law examples in this regard are set out below.

The notion of communal land and the purpose of its use have been reinforced by the decision in *Kaputuaza v Executive Committee of the Administration of the Herero*²⁷⁵ where it was stated that the fencing off of certain areas in the reserve is incompatible with the notion that all land in the

²⁷⁰ Werner W *Protection for Women in Namibia's Communal Land Reform Act* 31.

²⁷¹ Members of the Communal Land Boards receive remuneration in terms of s 10 of the CLRA.

²⁷² Werner W *Protection for Women in Namibia's Communal Land Reform Act* 32.

²⁷³ 31.

²⁷⁴ 3.

²⁷⁵ 1984 4 SA 295 (SWA).

reserve is communal land. It is thus contrary to Herero customary law and to the intention of the legislature. This decision indirectly provides for the protection of women's communal tenure as they often suffer as a result of illegal fencing because they rely on access to commonage for their livelihood.²⁷⁶

Another judgment, *Government of the Republic of Namibia v Cultura 2000*²⁷⁷ has had an impact on discrimination against women under customary law. The case makes it clear that the right to culture in Article 19 is not absolute as it is subject to the constitutional provisions and cannot infringe upon the rights of others. The decision thus makes it clear that any cultural practices are subject to the gender-sensitive constitutional provisions providing protection for women as set out above.²⁷⁸

5 6 4 Role players

5 6 4 1 Farmers

The aim of assessing the impact of certain role players on black rural women's tenure security is used to determine how they influence or possibly influence black rural women's tenure security. Farmers in Namibia play a role in promoting or hindering black rural women's tenure security in the rural areas specifically with regard to their role in illegal fencing of communal land.²⁷⁹ Farmers have a duty to avoid such practices so as to not deprive the poor, who are often women, of access to commonage on which they rely for grazing their animals and collecting food. This is especially important given Namibia's pre-independence history of *apartheid* and restricting movement²⁸⁰ and the current constitutional provision that indicates that land use and policy

²⁷⁶Odendaal W "Land Grabbing in Namibia: A Case Study from the Omusati Region, Northern Namibia" *Future Agricultures* 22-24.

²⁷⁷1994 1 SA 407 (NmSC). The brief facts of the case are that the respondents who were an association for the preservation of cultural activities of white Namibians argued that the State Repudiation Act 32 of 1992 whereby the Government had sought to deprive the respondents of certain monies and property allocated to them by the previous administration, was unconstitutional since it infringed their Art 19 right. The Supreme Court rejected their argument, holding that the repudiation was lawful in terms of Art 140(3) of the Constitution.

²⁷⁸See 5 6 3 2 above.

²⁷⁹Odendaal W "Land Grabbing in Namibia: A Case Study from the Omusati Region, Northern Namibia" *Future Agricultures* 22-24.

²⁸⁰See 5 3 3 and 5 3 4 above.

may not inhibit Namibians to move, settle and acquire land in any part of the country.²⁸¹ Odendaal²⁸² warns of the danger that illegal fencing could potentially change the face of the communal areas in Namibia with possibly devastating effects for the poor in Namibia.²⁸³

5 6 4 2 Communities and Civil Society

The role of communities or civil society in securing women's tenure is similar to that of farmers, as described above. Communities and civil society should promote constitutional values and the requirements in the Communal Land Reform Act.²⁸⁴ Their role is evident in the awareness raised for the necessity of women in traditional leadership structures.²⁸⁵

5 6 4 3 National Government

Government must not only protect rural women's tenure in terms of the law, but also promote formal and substantive equality within tenure legislation as highlighted in the Constitution and the National Land Policy.²⁸⁶ With collaboration between ministries such as the Ministry of Gender Equality and Child Welfare and the Ministry of Lands and Resettlement, the Government can more effectively address substantive equality issues in tenure reform.

5 6 4 4 Non-Governmental Organisations

Non-governmental organisations play an important role in assisting Government to address issues related to and affecting women's tenure security, such as HIV/AIDS, social development and education. One example of a major role player in this regard is the Women's Action for Development organisation. This organisation provides programmes, training and research and development specifically aimed at educating civil society on female-

²⁸¹ Art 21(g) of the Constitution.

²⁸² Odendaal W "Land Grabbing in Namibia: A Case Study from the Omusati Region, Northern Namibia" *Future Agricultures* 22-24.

²⁸³ See 5 6 3 4 above.

²⁸⁴ See s 18 and 44 of the Act.

²⁸⁵ Hinz M O assisted by Joas S *Customary Law in Namibia: Development and Perspective* 5 ed (2000) 133. See also 5 6 4 5 below.

²⁸⁶ See 5 5 2 and 5 5 3 2 respectively above.

related issues, such as domestic violence and identifying and addressing harmful cultural practices that impede women's development.²⁸⁷ These organisations are crucial in areas where there are still loop holes in protecting women's tenure in legislation or Government programmes.

5 6 4 5 Traditional Leaders

Traditional leaders are important role players in this regard as they apply the customary law in their respective communities and are the first authority or body that women approach for the allocation or confirmation of land rights.²⁸⁸

Women are not precluded from holding traditional leadership positions. The Sambyu, Bondelswarts and Kwanayama communities, for example, are headed by women.²⁸⁹ These are however the exception, but in most communities where there are no women in the traditional leadership structures, there is an awareness, among the community and the existing traditional leaders, that women should become more involved in the future.²⁹⁰

5 6 4 6 Courts/Judges/Lawyers

Lawyers and "western-style" courts are often inaccessible to rural women because courts are centralised and the fees entailed to access them are a hindrance for rural women. The community courts on the other hand, are more accessible to women and freely allow women to bring their cases to them, attend the court sessions and speak freely like everyone else.²⁹¹ This has been the case even before the promulgation of the Community Courts Act 10 of 2003, which provides for the regulation of the application of customary law of the traditional community residing in its area of jurisdiction.²⁹² The importance of purposive interpretation of legislative measures and gendered

²⁸⁷ Women's Action for Development WAD
<http://www.wad.org.na/index.php?option=com_content&view=article&id=1&Itemid=1> (accessed 28/03/2012).

²⁸⁸ See 5 5 4 3 3 and 5 6 3 3 1 above.

²⁸⁹ Hinz M O assisted by Joas S *Customary Law in Namibia* 133.

²⁹⁰ 133. See also 5 6 4 2 above.

²⁹¹ Hinz M O assisted by Joas S *Customary Law in Namibia* 133.

²⁹² Preamble of the Act and s 13.

implementation thereof by presiding officers has already been referred to above.²⁹³

5 6 4 7 Rural Women

Similar to the role of rural women in South Africa,²⁹⁴ black rural women are the key role players in advancing their and other rural women's tenure security. In this regard their association to civil society bodies and organisations that address issues that affect them is essential, given the sparsely populated rural areas and minimal population figures in comparison to rural population in other countries.²⁹⁵ Within their communities women can be the leaders in addressing issues that deprive them of their constitutional right and educating themselves on the laws that do so.

5 6 5 Categories of women

5 6 4 1 Introduction

In light of the above role players that have an impact on women's tenure security, it is necessary to place different categories of women into perspective as they do not all experience the same levels of tenure security or insecurity. Women's rights to land are shaped by regional and inter-regional differences,²⁹⁶ in certain areas men are still perceived to be the owners of land and assets in male-headed households.²⁹⁷ However, this situation is changing. In practice, the registration of land in a man's name does not imply that he has exclusive control over the land.²⁹⁸ Different categories of women however, experience different levels of tenure (in)security. This will be

²⁹³ See 5 6 3 4 above.

²⁹⁴ See 4 3 2 7 above.

²⁹⁵ Rural Poverty Portal <<http://www.ruralpovertyportal.org/web/guest/home>> (accessed 30/03/2012).

²⁹⁶ Werner W *Protection for Women in Namibia's Communal Land Reform Act* 18.

²⁹⁷ Particularly in the Oshikoto and Omusati regions. Whereas in the Oshana region, land was said to be owned almost equally by women and men: Werner W *Protection for Women in Namibia's Communal Land Reform Act* 18-19.

²⁹⁸ 19. See also 5 6 2 above for a discussion of the Married Persons Equality Act 1 of 1996.

addressed below with regard to marital status as it often affects women's rights and access to land.²⁹⁹

5 6 4 2 Single women

Single women can now apply for land in their own right in terms of the Communal Land Reform Act.³⁰⁰ In the Ohangwena region, anyone regardless of age, status or gender was entitled to be allocated land before legislative measures were enacted.³⁰¹ There has been a rising trend in this regard, particularly after the promulgation of the above Act, with women claiming their right to do so.³⁰² This is especially common for women aged between fifty and seventy years old. There is however, still social pressure from custom as traditionally, young women are not allowed to own a household, unless their parents had died.³⁰³ In the Ohangwena region, for example, it was customary for people under thirty five years of age, particularly women, to remain in their parent's' homestead and not be allocated land until they were married.³⁰⁴ Nevertheless, single women still face challenges from traditional leaders when they attempt to establish their own homestead by applying for land. Many applicants were rejected - with insignificant reasons cited, such as that a single woman applying for land may be running away from home.³⁰⁵ On the other hand, it is possible that the increased ability for single women to own land was due to their ability to pay for the land. Thus, the ability to apply for land is invariably linked with being financially secure.

Despite the above, it is established that single women who had obtained land rights generally had to renounce their land rights upon marriage. The land then reverts back to the chief or traditional authority to be re-allocated to other

²⁹⁹Ministry of Lands and Resettlement: The Permanent Technical Team (PTT) on Land Reform *Background Research and work and Findings of the PTT Studies: November 2005* (2005) 108-109.

³⁰⁰S 22.

³⁰¹Werner W *Protection for Women in Namibia's Communal Land Reform Act* 20.

³⁰²20.

³⁰³20.

³⁰⁴20.

³⁰⁵20.

applicants. This is the case because custom dictates that a man had to find land and that he was unlikely to move to reside on the land of his new wife.³⁰⁶

5 6 4 3 Wives

The Communal Land Reform Act does not make provision for the registration of land rights in the name of both husband and wife. However, its Regulations do require that the name of the applicant's spouse and other dependants also appear on the registration form.³⁰⁷ This is probably an attempt to have equality with regard to the act of registration, though it might not necessarily translate to substantive equality in practice.

The Married Persons Equality Act 1 of 1996 places women in marriages in community of property on an equal footing with their spouses,³⁰⁸ thus allowing for equal entitlement to land rights. The position with regard to polygamous marriages however, is uncertain as the Communal Land Reform Act does not specifically provide for it.

5 6 4 4 Widows and divorcees

Before independence widows enjoyed little protection against eviction from land that they and their deceased husbands occupied.³⁰⁹ As a result of these evictions, the National Land Policy particularly provides that "every widow (or widower) will be entitled to maintain the land rights she enjoyed during the spouse's lifetime".³¹⁰ The practice of evicting widows from their land is reported to have declined dramatically since independence, with cases of eviction being regarded as the exception rather than the rule.³¹¹ This is especially attributed to the Communal Land Reform Act, which provides that if

³⁰⁶ A reason for this was that a man who moves to his wife's land could be chased away at any time: Werner W *Protection for Women in Namibia's Communal Land Reform Act* 20.

³⁰⁷ Communal Land Reform Regulations GN 37 of 2003 cl 5(1)(a) and specifically 5(1)(b). These Regulations further repeal the regulations promulgated by Proclamation R 188 of 1969 which provided for quitrent and permission to occupy: cl 38. In that regard see also 2 3 2, 2 3 4, 2 4 3 2, 2 5 2, 3 4 4 2, 3 4 5 2, 4 4 1, 4 2 3 3, 5 4 2 – 5 4 4 above.

³⁰⁸ S 5.

³⁰⁹ Werner W *Protection for Women in Namibia's Communal Land Reform Act* 21.

³¹⁰ *National Land Policy, 1998*, 1.

³¹¹ Werner W *Protection for Women in Namibia's Communal Land Reform Act* 21.

there is no surviving spouse or if the spouse does not accept the allocation, the land reverts back to the traditional authority, which allocates the land rights either to another surviving spouse or a child of the deceased.³¹²

Most customary law systems follow the principle of male primogeniture in terms of which the eldest son inherits the land rights of the deceased. This perpetuates gender inequality and places female offspring at a disadvantage.³¹³ The issuing of Communal Land Rights Certificates to farmers in communal areas under the tenure reform programme has had a positive impact on widows attaining tenure security,³¹⁴ as widows have the opportunity to have legally secure tenure and protection from eviction, which was not possible under customary law.

In some areas, such as in the Ohangwena region, widows generally stayed on the land but only if she paid the sub-headman. In the event of the widow being unable to pay, her eldest son may make the payment and assume rights to the land.³¹⁵ This is so, despite the payment of the right to stay on the land being deleted from the customary laws of all northern Traditional Authorities in 1993.³¹⁶ The widow's continued stay on the land would depend on whether the wife of the son was willing to share the homestead with her mother-in-law. If not, the widow is evicted or allowed to build a smaller homestead on her son's land.³¹⁷ Where a widow continued to stay on the land, her rights continue to be determined by custom.

Widows who remarried could in some instances keep rights to the household

³¹²S 26(2). See also Ambunda L & de Klerk S "Women and custom in Namibia" in *Women and Custom in Namibia* 45.

³¹³Werner W *Protection for Women in Namibia's Communal Land Reform Act* 22.

³¹⁴Sasman C "Communal land rights registration to help widows" *Namibian* (07/03/2011) *The Namibian*<[http://www.namibian.com.na/index.php?id=28&tx_ttnews\[tt_news\]=78830&no_cache=1](http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=78830&no_cache=1) > (accessed 07/03/2011).

³¹⁵Werner W *Protection for Women in Namibia's Communal Land Reform Act* 21.

³¹⁶This was done at the Consultative Conference on Customary Law, Ongwediva 1993 after all traditional leaders agreed to follow the position of the Laws of Ondonga regarding land inheritance linked to matrilineal kinship.

³¹⁷Werner W *Protection for Women in Namibia's Communal Land Reform Act* 21.

land in their own names or transfer these to their new husbands.³¹⁸ In other areas, neither of the aforementioned occurs, as it is more common for widows who remarry to move to the homesteads of their new husbands. In such a case the widow lost her land rights, which were transferred to the children of her late husband. If a young widow with young children moved to her new husband's land, her land would revert to the headman for allocation to a new beneficiary.³¹⁹ Some widows, who remarried and moved, retained the rights to their land if their cases of leaving their land to that of their new husbands were not reported to the headman.³²⁰

Werner argues that the issue of evicting widows from land they have cultivated is the Namibian Government and public's most important aspect with regard to women's land rights.³²¹ Coupled with this, is also the grabbing of property and assets following a husband's death,³²² leaving many widows without the means necessary to cultivate their land and sometimes even without adequate shelter.³²³

The rights of a divorced woman to land depend on whether she divorced her husband or whether her husband divorced her. Thus, if a woman divorced her husband, she has to leave the common homestead and he retains the land rights and *vice versa*.³²⁴ The Constitution however, states that both husband and wife are entitled to equal rights during marriage and at its dissolution,³²⁵ posing a challenge to customary practices as described above for divorcees and those that exclude widows from inheriting.

³¹⁸ 21.

³¹⁹ 21.

³²⁰ 21.

³²¹ 3.

³²² 3 and 7. See 5 6 3 3 2 above.

³²³ Werner W *Protection for Women in Namibia's Communal Land Reform Act* 30.

³²⁴ 22.

³²⁵ Art 14(1).

5 7 Conclusion

Historically Namibian land tenure was under control of two major colonial powers. After the German rule, the South African Government carried on with the system of dispossession, segregation and destruction of traditional land control systems. The current independent Government of Namibia embarked upon reforming the law of the territory and addressing the poverty linked to past suppression. The tenure reform programme specifically has contributed to redistribution of land and securing the rights of both men and women. However, despite the progress made by policy and legislation, women's customary land rights are still mainly obtained through men, whether husbands or fathers.³²⁶ Women's rights to land continue to be determined by their marital status and laws of inheritance. This implies that women can lose their access or rights to land through a change in marital status. The direct protection and gender-sensitive stance of the Constitution has assisted in some progress for gender equality in tenure legislation. Positive developments have been the registration of communal land tenure certificates and the allocation of new customary rights as existent customary rights were generally only allocated to men. Thus women are now afforded greater protection from eviction. Nonetheless, women are still under-represented in decision-making positions and they are still facing challenges to their tenure rights. It follows that the exposition provided in this chapter will be used as the basis for the comparative analysis in relation to South Africa in Chapter six below.

³²⁶ Werner W *Protection for Women in Namibia's Communal Land Reform Act 18*.

CHAPTER SIX

COMPARING TENURE ISSUES: SOUTH AFRICA AND NAMIBIA

6 1 Introduction

This chapter serves as the comparative section of the study. The comparison will be based on the South African and Namibian jurisdictions with regard to black rural women's tenure as developed in Chapters two to five. The comparison is one from a legal perspective,¹ with the chosen criteria specifically selected in order to finally provide the most complete picture relating to black rural women's tenure. The aspects so compared relate to women in the respective legal frameworks, relevant institutions and role players involved, the implementation of programmes or policies, how women participate therein and how tenure legislation is drafted or the language used and whether language so used has an impact on gender. Thus, the main element of comparison is whether South Africa's legal framework is gender-orientated in respect of land rights in general and tenure in particular. Gender is the point of focus because of the specific focus on rural women, who do not enjoy constitutional freedom as a result of both legislation and practices on the ground.² Thus, gender in this case refers to the female state as opposed to male dominance within the rural power structures.³ The methodology used in this Chapter will be to first set out the South African perspective, which is then compared to the position in Namibia and finally reflecting thereon.

¹It is important to note that other approaches to or perspectives on gender issues may also be relevant for comparative purposes, for example, sociological, economic, historical or political perspectives. However, this thesis is premised on legal matters in particular and will therefore incorporate a legal comparison in relation to particular aspects only.

²See 1 5 above.

³ Gender theories and development thereof do not fall within the ambit of this study. As explained, the focus is especially on a legal comparison with focus on tenure security.

6 2 Comparison of black rural women's tenure

6 2 1 Introduction

The comparison will be based on the respective Constitutions, policies, legislation, institutions, role players and the different categories of women prevailing in South Africa and Namibia.⁴ These points of comparison are identical to those set out in Chapters four and five above. Each section will set out the reason for the chosen point of comparison, followed first by the approach in South Africa and thereafter the position prevailing in Namibia.

6 2 2 Constitutions

The advent of the South African Constitution brought a paradigm shift to human rights and freedoms, away from the patriarchal and racial nature of society pre-independence.⁵ The Constitution is chosen as a point of comparison as it is the supreme law in both jurisdictions.⁶ All conduct and activity are tested against it. In addition, the South African Constitution particularly provides for tenure reform⁷ and other guarantees, which support the study.

Besides these constitutional guarantees and values, the symbolic value of the Constitution has also played an important role in the rural areas. Therefore changes on the ground are seen, where for example, single women are being allocated land in their own right, which did not happen often, pre-1994.⁸ Furthermore, women are guaranteed equal protection and benefit of the law under the equality clause.⁹ Under the same clause women are protected from discrimination, *inter alia* on the basis of race, gender, sex, marital status, age and culture. Closely tied to this right to equality is the right for all to have their

⁴See Chapter 3 to 5 above,

⁵See Chapter 2 above.

⁶S 2 of the RSA Constitution and Art 1(6) of the Namibian Constitution.

⁷S 25 (6) RSA Constitution. See 3 3 and 3 4 4 above.

⁸Claassens A "Women, customary law and discrimination: The impact of the Communal Land Rights Act" (2005) *Acta Juridica* 42-81. See 4 5 2 above.

⁹S 9.

human dignity respected and protected.¹⁰ The latter rights to equality and dignity are further advanced by the mandatory consideration of international law by courts, tribunals or forums, when interpreting the Bill of Rights.¹¹

Likewise, the Namibian Constitution also guarantees the right to equality and dignity.¹² In addition, it makes direct reference to women in the provision authorising affirmative action.¹³ Furthermore, the Namibian Constitution directly recognises women's plight, thus affording them special consideration and protection when policy and legislation are developed.¹⁴ Legislators must thus have due regard to women's special plight and legislate accordingly. From this flows awareness for gender-specific issues when legislation is formulated and policy is adopted, as was done in the National Land Policy.¹⁵ Also important to note here, is that according to the Namibian Constitution,¹⁶ ratified international instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women, form part of Namibian law. This makes Namibian society as a whole directly accountable for non-fulfillment of international laws. Interestingly, there is no direct tenure reform clause in the Namibian Constitution.

The gender-sensitive nature of the Namibian Constitution provides supreme protection for women's rights. This translates to not only tenure legislation and land reform programmes that are more sensitive to women's plight,¹⁷ but other legislation that assist in improving women's livelihood and ultimately their opportunity to access and hold land rights.¹⁸

¹⁰S 10. See also Pamla S "It's not about land, it's about dignity" (2007) 2 *Landnews* 20-21.

¹¹S 39 (1)(b).

¹²Art 10 and 8 respectively.

¹³Art 23(3) and art 95(a). See also 5 5 2 above.

¹⁴Art 23.

¹⁵See 5 5 3 2, 5 6 3 1 above and 6 2 2 below.

¹⁶Art 144. See also note 247 in Chapter 5 above.

¹⁷See 5 5 4 3 3 and 5 6 5 above.

¹⁸See 5 6 2 and 5 6 3 2. Examples of these laws are the Married Persons Equality Act 1 of 1996 and the Affirmative Action (Employment) Act 29 of 1998.

6 2 3 Policy overview

Policies have been chosen as a point of comparison as they contain the general ideas that Government proposes to put into practice. Policies also put legislation into context, are a point of reference and give direction for the practical implementation of legislation.

The White Paper on South African Land Policy, 1997 generally proposes a focus on tenure security for all and is gender-specific in that it acknowledges discrimination of women under various tenure systems.¹⁹ Furthermore, the Policy proposes that Government has to find a way in which the procedures governing the exercise of group-based rights ensure that there is equal participation and equality.

Similarly, the Draft Tenure Security Policy, 2010 in South Africa does seek to address these power relations, but it is not applicable to traditional communal land, which is where the majority of rural women live.²⁰ Additionally, the Draft Policy is not gender-orientated at all. The Draft Tenure Security Policy identifies as one of its critical areas that legislation needs to be tightened up in order to create substantive rights in land for occupiers.²¹ As was established in Chapter four,²² usually in practice, the status of a female occupier is dependent on a male relative or spouse as she can only establish independent status as an “occupier” where there is an agreement between her and the owner. In this regard the Draft Policy’s proposals do nothing to improve this position for rural female occupiers.

In contrast, the Namibian National Land Policy is gender-specific and sets out how its aim of according women the “same status as men with regard to all

¹⁹DLA *White Paper on South African Land Policy* 1997 34. See 4 2 2 2 above.

²⁰DRDLR *Draft Tenure Security Policy* 1-2.

²¹*Draft Tenure Security Policy* 2010 4.

²²See 4 2 3 2 above.

forms of land rights” should be realised in practice.²³ This approach provides clear guidelines for further legislative developments that address gender issues in tenure reform and establish some kind of measure that tenure legislation has to encompass in order to realise and protect rural women’s tenure rights. In other words, it defines what exactly policy requires legislation and further policy to incorporate and serves as a point of reference for legislative development. This is further emphasised by the Policy’s commitment to equality and equity²⁴ in accordance with the Principles of State Policy in Article 95(a) of the Constitution.

Similar provisions as to the practical guidelines that legislation should entail in order to address the living reality of poor rural women are not contained in the South African land policy. Although the Policy does give overall guidelines,²⁵ none of these directly address the crucial aspect of power relations in the rural areas and ultimately how these impact on women’s land rights.

6 2 4 Legislation

6 2 4 1 Introduction

The values in the Constitution and the governmental ideas contained in Policy are useless if they are not supported and realised in practice. Legislation gives effect to these values and ideas. This makes legislation another important source of comparison for tenure reform. In this section “gender” under the general tenure legislative framework, will be discussed firstly, then specifically with regard to the laws pertaining to the content of land rights and finally with regard to laws pertaining to powers over land rights. This will be done by first setting out the position in South Africa, thereafter the position in Namibia and a reflection of the South African position compared to that in Namibia.

²³See 5 6 3 1 above.

²⁴*National Land Policy, 1998*, 1.

²⁵See 4 2 2 2 above.

6 2 4 2 General legal tenure framework

As set out above, the general South African tenure legislative framework is divided into interim and short-term measures.²⁶ The transition from interim measures to long-term measures for tenure reform has not taken place thus far. Moreover it seems that major protection for black rural women's tenure is provided by the interim tenure measures.²⁷

Without a division of interim and long-term tenure measures, the Namibian legislative tenure framework allows for adaptation and on-going development of a single tenure reform framework.

Apart from direct protection of women in the Namibian Constitution, the National Land Policy also requires that special attention be paid to women in the drafting of land legislation.²⁸ This alone pre-empts the nature of legislation that is required to address the issues affecting female rural inhabitants. With the Constitution and the National Land Policy as a background and foundation, the legislation with regard to land reform is an extension of this gender-sensitive approach and attempts to provide for gender equality with regard to tenure reform. Also, as a result of how the tenure reform programme is structured in Namibia, rural women are given options to venture into commercial farming through the creation of small-scale commercial farming units in order to expand agriculture and improve livelihood or apply for communal land rights certificates.²⁹ In South Africa a similar option exists in terms of the Land Redistribution and Agricultural Development sub-programme,³⁰ but in Namibia it is more gender-specific.

²⁶ See 3 4 4 1 to 3 4 4 3 above.

²⁷ See 3 4 5 3 and Chapter 4 above.

²⁸ See 5 6 3 1, 5 6 3 2, 6 2 2 and 6 2 3 above.

²⁹ See 5 5 4 3 2 and 5 5 4 3 3 respectively.

³⁰ The legal framework for this programme is the Provision of Land and Assistance Act 126 of 1993. See Badenhorst P J, Pienaar J M & Mostert H *Silberberg and Schoeman's The Law of Property* 5 ed (2006) 593-607 for details on this programme.

6 2 4 3 Laws pertaining to the content of land rights

In South Africa, the Interim Protection of Informal Land Rights Act 31 of 1996 is not gender-specific. However, as the Act protects insecure use and occupation rights,³¹ which are the main rights held by women, it thus indirectly provides gender-orientated protection, although the protection of these rights is not specifically for women and is equally applied to men. Nevertheless, clearly defined gendered law is necessary to ensure the protection of rural women's land rights and participation in tenure reform. Protection is dependent on whether rural women do have the specified rights.

The Upgrading of Informal Land Rights Act 112 of 1991 is also gender neutral and has a similar effect as the Interim Protection of Informal Land Rights Act above. The former Act further perpetuates discrimination on the basis of sex, as women were not generally awarded the rights it seeks to upgrade, in the past.³²

The Communal Property Associations Act 28 of 1996 is also phrased in gender neutral terms by constantly referring to "members"³³ of communal property associations. Of significance is that the Act specifically requires the constitutions of the communal property associations to have fair and inclusive decision-making processes, equality of membership, democratic processes and fair access to property of the association.³⁴ These principles directly link to a female representation in the communal property associations, falling narrowly short of having included a direct provision for female representation in the associations. Regardless of that, it must have been the legislature's intention to include women by referring to equality of membership, which is more than the aforementioned tenure laws have provided. As a result of limited success of the communal property associations, addressed in an

³¹ S 1 (1)(iii).

³² See 4 2 3 2 above.

³³ See Preamble of the Act, s 1, 5-13 and in its Schedule on matters to be addressed by the constitution of the CPA.

³⁴ S 9. Emphasis author's own.

earlier discussion on the Act,³⁵ the implementation of the provisions of the Act for gender-specific outcomes is thus also limited. As one of the long-term legislative measures for tenure reform,³⁶ the Act does not seem promising for gendered outcomes.

Further legislation, the Land Reform (Labour Tenant) Act 3 of 1996³⁷ makes direct mention of women in the Act by stating that it is in the objects of the Act to *inter alia*:

“(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including *women*, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation’s mineral and petroleum resources”.³⁸

Despite this, the Act does not contain a provision for the direct protection of women as labour tenants. Nonetheless, case law interpretation of the Act, such as in *Brown v Mbhense*,³⁹ has had gender positive outcomes for women as the Act was interpreted to qualify women as labour tenants in their own capacity. This allows women, who bear additional responsibilities as a result of their reproductive role and primary care-giving responsibility, to legally occupy land with their children and other dependents.⁴⁰

The Extension of Security of Tenure Act 62 of 1997 contains no provision for the registration of land in the name of the female partner. Thus, as a result of custom and male dominance, land often ends up registered in the name of male counter-parts.⁴¹ As explained above, there is also poor protection afforded to wives, partners and widows in terms of this Act.⁴² Although the Draft Land Tenure Security Bill provides for family members, thereby including

³⁵ See 3 4 5 3 above.

³⁶ See 3 4 4 3 above.

³⁷ See 3 4 4 3 2, 3 4 5 3 and 4 2 3 2 above.

³⁸ S 2(d). Emphasis author’s own.

³⁹ See 4 2 3 2 and 4 2 4 above.

⁴⁰ Albertyn C “Gendered Transformation in South African Jurisprudence: Poor Women and the Constitutional Court” (2011) 22 *Stell LR* 591 592.

⁴¹ See 3 4 5 3 above.

⁴² See 4 2 3 2 above.

women residing on farms, this protection does not extend to women residing in communal areas.

In Namibia, programmes such as the issuing of communal land rights certificates, in terms of the Communal Land Reform Act 5 of 2002, have allowed women to have legally recognised rights over land and to bequeath it in a will.⁴³ This implies that even if legislation is gender neutral, because of the gender-specific nature of the Constitution and the National Land Policy,⁴⁴ programmes implemented in terms of the legislation are geared towards having gender-orientated focuses and outcomes. This again highlights the point above,⁴⁵ that the supreme law guiding tenure legislation, namely the Constitution, needs to address gender within policy and legislative developments. Thus, the gender-specific nature of the Constitution would set the tone for the entire legislative framework, including the tenure legal framework.

An important observation in Namibian tenure law is also that there was incorporation of long existing customary law into post-independence tenure legislation. This was done, for example, by the incorporation of the Laws of Ndonga 1993 into the Communal Land Reform Act 5 of 2002. This allowed for the latter Act to be accepted more readily by the rural communities and traditional leaders. Effectively this allows for the flexible practice of customary law without it being hampered by national law that is contrary to the lived reality.⁴⁶

The Namibian Communal Land Reform Act makes provision for the registration of land in the name of any party and its regulations require that where parties are married, the names of both spouses and other dependants

⁴³ See 5 5 4 3 3 above.

⁴⁴ See 6 2 2 and 6 2 3 above.

⁴⁵ See 6 2 3 1 above.

⁴⁶ See in this regard 3 4 4 3 2, 3 4 4 3 3 and 4 2 4 above for the discussion of *Tongoane* in which the South African Communal Land Rights Act 11 of 2004 was declared unconstitutional.

appear on the registration form.⁴⁷ This allows women protection from eviction, grants them long-term tenure security and ensures their participation in transactions attached to the land.

6 2 4 4 Laws pertaining to powers over land rights

The unprecedented powers given to traditional leaders through the Traditional Leadership and Governance Framework Act 41 of 2003 in South Africa are worrying.⁴⁸ Women have a low threshold of representation in the traditional authorities which are deemed as traditional councils in terms of the Act. In addition, by entrenching *apartheid* structures through the Traditional Leadership and Government Framework Act and the proposed Traditional Courts Bill, the process of transformation will fail to truly include rural women within the constitutional climate.⁴⁹ The shortcomings of the Traditional Courts Bill,⁵⁰ as Mnisi Weeks⁵¹ elaborates, specifically with regard to women, are the lack of consultation with women, that women are not made members of the courts, women are not guaranteed the ability to represent themselves, women are not able to avoid unfair decisions and they are not awarded adequate protection from harm.

In contrast, the Traditional Authorities Act in Namibia, while determining the traditional councils' composition, takes its mandate directly from the constitutional principles of affirmative action and equality to determine traditional leadership and communities.⁵² The Communal Land Reform Act 5 of 2002⁵³ in Namibia does not attempt to bring about changes in customary law, by giving traditional leaders unprecedented powers or excluding women further than some customary practices do. The latter Act codifies the

⁴⁷ Communal Land Reform Regulations GN 37 in GG 37 of 2003 cl 5(1)(a) and specifically 5(1)(b). See 5 6 4 3 above.

⁴⁸ See 4 2 3 3 above.

⁴⁹ See 4 2 3 3 above.

⁵⁰ [15-2008.] See 3 4 4 3 3 and 4 2 3 3 above.

⁵¹ Mnisi Weeks S *Traditional Courts Bill: Process, Substance and Implications for Women* (2012) presented at DWCPD Rural Women's National Consultative Meeting, 12 April 2012 hosted by the Department of Women, Children and People with Disabilities (copy on file with author).

⁵² S 3(1)(g) Traditional Authorities Act 25 of 2000. See 5 6 3 3 1 and 6 2 2 above.

⁵³ See 5 5 4 3 3 above.

customary law with regard to the role of the traditional leaders in administering customary land rights.⁵⁴ More importantly, the Act does not lay down any obligations of traditional leaders towards a claimant. In considering an application for customary land rights, a traditional leader may investigate the application by consulting community members in the area concerned, but is not obliged to do so.⁵⁵ Thus the Act does not interfere in the relationship between the land claimant and the traditional leaders. Instead, it focuses on regulating the relationship between the traditional authorities and the communal land boards, while the Traditional Authorities Act 25 of 2000 limits the autonomous use of power by traditional leaders.

Also, the Community Courts Act 10 of 2003 does not appoint senior traditional leaders who are mainly men as presiding officers in court. The Minister appoints the justices of these courts. It is also important to note that the land reform programme in Namibia is an on-going project informed, more recently, by relevant research directives in the form of poverty impact assessments and resettlement criteria.⁵⁶

South African tenure legislation in this respect often only makes mention of women with regard to their inclusion on boards and even then the representation provided for is rather low. South African legislation tends not to tackle issues of women's role within a system that is particularly patriarchal in nature or interfere with how the role players involved should specifically address equality and gender issues in practice.

6 2 5 Institutions

The way institutions are structured, is essential for gendered participation. The accessibility and availability of institutions, whether locally, provincially or

⁵⁴ Werner W *Protection for Women in Namibia's Communal Land Reform Act: Is it Working?* (2008) 13.

⁵⁵ 13.

⁵⁶ Examples of these are Government of the Republic of Namibia, Ministry of Lands and Resettlement *Poverty Impact Assessment of the Various Land Reform Programmes* (2010) and the Ministry of Lands and Resettlement *Criteria* 2011.

nationally also has an impact on rural women's participation within the land reform programme.

Women are often excluded from traditional institutions such as tribal or village council meetings where key decisions are taken.⁵⁷ The traditional councils established in terms of the Traditional Leadership and Governance Framework Act are a point in example.⁵⁸ There is a need to transform these institutions in order to achieve actual substantive equality. The number of women that legislation prescribes to sit on these bodies alone will not achieve this. Also, appointing members of these councils from senior traditional leaders who are usually males, excludes women from participation in these structures.

The proposed Land Rights Management Board established by the Draft Tenure Security Policy, the Land Tenure Security Bill⁵⁹ and the Green Paper on Land Reform, 2011 will play a major role in compliance and enforcement of legislation and the tenure system in general⁶⁰ and deals with evictions in particular. The Bill does not specify if women should be on these boards but merely state that the board should be representative of the communities and interests affected by the Act.⁶¹ The boards are, however, directly required to recognise women's rights in any resettlement measures.⁶²

In Namibia the Minister appoints members of the communal land boards. More Ministries are tasked directly with implementing the land reform programmes and not primarily the Ministry of Lands and Resettlement. For example, the Ministry of Agriculture, Water and Forestry is responsible for the

⁵⁷Mnisi Weeks S *Traditional Courts Bill: Process, Substance and Implications for Women* (2012) 3 presented at DWCPD Rural Women's National Consultative Meeting, 12 April 2012 hosted by the Department of Women, Children and People with Disabilities (copy on file with author). Also see 4 3 2 above.

⁵⁸ See 4 2 3 3 above.

⁵⁹ Ch 8 of the Bill.

⁶⁰ *Draft Tenure Security Policy* 2010 9-10.

⁶¹ S 39(6).

⁶² S 27(5)(a).

Affirmative Action Loan Scheme through the Agricultural Bank of Namibia.⁶³ Although the Affirmative Loan Scheme itself cannot be said to have yielded success for rural women so far,⁶⁴ the impact of the programme on poverty subsists in the employment that these farms provide, with salary levels keeping employees well above poverty levels.⁶⁵ The inclusion of more public institutions, within the land reform programme contributes to gendered participation. This is because all these institutions are mandated by the Namibian Constitution to achieve a balanced structuring of the public service which enables women to “play a full, equal and effective role in the political, social, economic and cultural life of the nation.”⁶⁶

6 2 6 Role Players

The White Paper on South African Policy emphasised that the success of the land reform programme is dependent on more than mere access to land.⁶⁷ Instead, its success lies mainly in an integrated Government policy and delivery system, as well as the establishment of cooperative partnerships between the state and private and non-governmental sectors.⁶⁸ This is why role players are crucial. The role players in tenure reform are not limited to the institutions discussed above.⁶⁹ The manner in which role players approach or participate in land reform and particularly in the tenure reform programme, has an impact on women’s participation.

In assessing the actions of various role players with regard to black rural women’s tenure in both South Africa and Namibia, it appears clear that farmers generally can hinder the progress of tenure reform by not adhering to tenure legislation. They, together with the communities and civil society in general, are thus important in maintaining the livelihood of women and other

⁶³ See 5 5 4 2 3 above. Government of the Republic of Namibia, Ministry of Lands and Resettlement *Poverty Impact Assessment* 22.

⁶⁴ See 5 6 4 1 above.

⁶⁵ Government of the Republic of Namibia, Ministry of Lands and Resettlement *Poverty Impact Assessment of the Various Land Reform Programmes* (2010) 43.

⁶⁶ Art 23(2) & (3) of the Constitution.

⁶⁷ See 3 3.

⁶⁸ DLA *White Paper on South African Land Policy* 7. Also see 4 3 2 below.

⁶⁹ See 4 3 2, 5 6 4 and 6 2 5 above.

vulnerable dwellers of the rural landscape. The role of farmers and civil society in South Africa is similar to the position in Namibia.

National Governments are crucial forces for change and bear a duty to recognise the voices of rural communities and rural women in particular in order to facilitate a bottom-up approach for the development of land policy and legislation. Having departments focused on gender issues as currently exists in both South Africa and Namibia,⁷⁰ is also essential in addressing gender sensitive issues in legislation and in practice.

The relationship between national Government and traditional leaders is a crucial one, thus female representation in traditional leadership structures can also go a long way in influencing the content of tenure laws that are developed by Government. The case of *Shilubana v Nwamitwa*⁷¹ saw a positive development of customary law in this regard, by advancing gender representation in the succession to traditional leadership structures.⁷² This is also the approach in line with the Traditional Leadership and Governance Framework Act.⁷³

In some communities in Namibia women are not precluded from becoming traditional leaders and communities support their involvement in this regard.⁷⁴ If women's issues and vulnerability should be addressed effectively then having women as traditional leaders is a step in the right direction. This is also supported by the flexible and ever-changing nature of customary law, in line with the Constitution and changing the patriarchal structures in rural communities. Ultimately it cannot be highlighted enough how rural women themselves are and should be the catalysts of change to contribute to the legal recognition and protection of their tenure rights. It is essential that they be supported on all fronts, to be able to perform their duties and

⁷⁰ See 4 3 2 3 and 5 6 4 3 above.

⁷¹ 2009 2 SA 66 (CC).

⁷² This is in line with s 2(3) of the Traditional Leadership and Governance Framework Act.

⁷³ S 2 (3). The Court in *Shilubana* did not refer to this section.

⁷⁴ See 5 6 4 above.

responsibilities in this regard. In this context, sufficient information and assistance in accessing such information, is crucial.

Finally, what is essential is that all the role players should work in collaboration with each other to better provide for rural women's tenure security and achieving the aims of land reform.

6 2 7 Categories of women

Though the general categories of women are similar in both jurisdictions, the respective Government tenure reform measures have a differentiated impact on the different categories of women. Therefore the impact of these laws on the different categories of women is an important point of comparison.

Customary law practices, the non-gendered nature of legislation and the non-recognition of the effects legislation have on the various categories of women, exacerbates women's struggle for access to land and secure tenure. The South African tenure policy or legislation does not specifically provide for the protection of vulnerable categories of women, although as illustrated above,⁷⁵ different categories of women experience different levels of tenure insecurity.⁷⁶ If anything, the legislature seems to assume that women should and will continue to access land rights through their male relations. This inevitably makes women extremely vulnerable to eviction when they lose these male relations.

The Namibian National Land Policy specifically identifies the plight of widows and provides for the protection of the rights that the wife (current widow) enjoyed during the spouse's lifetime.⁷⁷ The approach in Namibia can thus be said to be more favourable as it is more category-specific and focuses more on persons who, for example, have less tenure security due to, in this case

⁷⁵See 4 4 and 4 5 above.

⁷⁶See 4 4 and 4 5 above.

⁷⁷See 5 6 5 4 above.

marital status. In other words, the particular tenure approach recognises that different categories of women suffer different levels of tenure insecurity. Furthermore, in terms of the Communal Land Reform Act, single women in Namibia may apply for land from the traditional authority in their own name.⁷⁸ This is also made possible through the programme for issuing of communal land rights certificates.⁷⁹

Even if there have been developments in practice in South Africa where single women have received land,⁸⁰ the position in Namibia is more gender-specific as the granting of land rights to this category of women, is specifically provided for in legislation.⁸¹ It is also essential for South Africa to provide for wives to have land registered in their names in addition to their husbands'.

6 3 Conclusion

In comparing black rural women's tenure security in South Africa and Namibia, it is evident that tenure reform in Namibia is clearly more gender-specific than in South Africa. This is evident from the fact that the role of women in tenure is highlighted and that, along the points of comparison, this approach is similarly adopted in tenure reform programmes and the implementation of legislation. However, the South African Constitution does provide protection for achieving formal and substantive equality with regard to tenure reform. The White Paper provides some provisions for gender-orientated tenure reform, but this is not appreciated in legislation, which is generally not gender-specific. The implementation of programmes and legislation furthermore lacks a specific gender dimension. On the other hand, the Namibian approach illustrates that gender-specific tenure reform programmes can be more effective and are better suited for women's tenure rights.

⁷⁸ See 5 6 5 2 above.

⁷⁹ See 5 5 4 3 3 above.

⁸⁰ See 4 4 2 above.

⁸¹ Communal Land Reform Act 5 of 2002 s 22.

Compared to the position in Namibia, there is still a need for South African policy and tenure legislation to be more gender-specific. This is necessary, not only in order to address women's plight in tenure reform, but also to provide protection for the different categories of women. As has been indicated above,⁸² the particular tenure insecurity they face is linked to their status as single women, daughters, wives, widows and divorcees.

The South African Constitution states that a person or community is entitled to tenure which is legally secure or to comparable redress to the extent provided for by an Act of Parliament.⁸³ As a result and based on the general context of the Constitution as a whole, the tenure reform programme has to be gender-specific and has to allow for fair and equal participation for women. This constitutional mandate has thus far not been achieved, eighteen years post-1994. It therefore follows that the points of comparisons as set out in this chapter will shape the recommendations in the final chapter that may contribute to realising the constitutional mandate of tenure reform where black rural women are concerned.

⁸² See 4.4 above.

⁸³ S 25 (6) of the South African Constitution.

CHAPTER SEVEN

OVERVIEW, RECOMMENDATIONS AND CONCLUSION

7 1 Introduction

Land reform, as provided for in the property clause, remains a lively and on-going debate in South Africa.¹ The Constitution, while guaranteeing land reform, also seeks to protect the rights of all South Africans in the Bill of Rights. Thus, the land reform debate presents various dimensions to be addressed in order for all the rights guaranteed by the property clause and the Constitution as a whole, to be realised. Forming part of this multi-dimensional debate, is the tenure reform programme, the focus of this thesis. Within the overall tenure reform programme, the *crux* of the study embodied black rural women's tenure. In this context the factors that impact on tenure in general and the various categories of women in particular, were highlighted. In addition, the study entailed a comparison with the black rural women's tenure security in Namibia, in order to develop positive recommendations for South African rural black women with regard to tenure reform.

This chapter serves to wrap up the study. It commences with an overview of the aims and summarised realisations of the various chapters. Thereafter, recommendations for the South African tenure reform programme for black rural women are formulated, based on the existing tenure forms and the observations made in the study. The recommendations will relate to the law-making processes, role players involved and rural women in particular. Recommendations regarding particular tenure forms, aimed at providing options for further promoting tenure security for black rural women, will conclude the study.

¹Cousins B "Contextualising the controversies: dilemmas of the communal tenure reform in post-apartheid South Africa" in Claassens A & Cousins (eds) *Land, Power & Custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) 3 3-31.

7 2 Overview

7 2 1 Colonial history

Chapter two sets out the historical foundation of land reform in general and the tenure reform programme in particular. The prevailing customary landholding system of the local tribes was that land was controlled by the traditional authorities, who generally allocated land to men upon marriage. Women accessed land through their male relatives. This system of tenure started changing during the different phases of colonial authorities.²

The Dutch were the first colonisers to come to South Africa in 1652. They introduced individual tenure forms, regardless of the existing local landholding system. The colonised areas were passed on to the British colonial authorities in 1795. The British adopted a policy of racial segregation, which encompassed state policy and Land Acts aimed at dispossessing land from the local South Africans,³ with the majority of the locals forced over a period of time into impoverished rural areas. Various legislative measures, most notably the successive Group Areas Acts, over time provided for separate areas for land occupation by means of forced removals and evictions. The third colonial phase from 1948 was under the South African *apartheid* administration.⁴ Towards the end of the South African colonial administration in 1991 all racially based Land Acts were repealed. However, the proclamations and regulations issued in terms of the race-based legislation were not repealed. Under the colonial systems, women were scarcely allocated land in their own right, often only accessing land through a male relative. However, widows were sometimes allocated land in their own right while in some areas they were granted insecure use rights.

Based on the above colonial developments, South Africa was divided into four independent national states, six self-governing territories and South African

² See 2 3 above.

³ See 2 3 3 3 1 above.

⁴ See 2 3 4 above.

Development Trust areas. The tenure system was diverse and fragmented before the dawn of the new Constitutional dispensation.⁵

7 2 2 Constitutional Era

Through the land reform programme the new Government seeks to address the colonial land dispossessions and the second class status of black land rights, within the constitutional framework. The land reform programme entails three parallel programmes, of which the targets of the restitution and redistribution programmes have not been met to date.⁶ Tenure reform seeks to transform and strengthen the legal rights-basis of different forms of landholding.⁷ Tenure policies, legislation, customary law and case law are used to provide a comprehensive overview of the tenure reform programme. The principles of the White Paper on South African Land Policy, 1997 indicate that the land reform programme ought to be gender-orientated.

Tenure reform comprises interim and long-term legislative measures. Informing and supporting tenure reform are the right to equality and dignity in the Bill of Rights. The Interim Protection of Informal Land Rights Act 31 of 1996 grants the main protection for communal land tenure rights, as opposed to their position pre-1994. The long-term tenure measures on the other hand have generally failed to provide for legally secure tenure or comparable redress. This leaves insecure rights in *limbo*, more so after the order of invalidity of the Communal Land Rights Act 11 of 2004.⁸ The Traditional Leadership and Governance Framework Act 41 of 2003 is the main long-term measure relating to customary leadership structures. It is objectionable how this Act, and the proposed Traditional Courts Bill, fit into the overall principles of land reform, particularly in relation to participation, accountability and democratic decision-making.⁹ More recent tenure reform measures such as the Strategic Plan, 2010, the Draft Tenure Security Policy, 2010, its concomitant Draft Land Tenure Security Bill, 2010 and the Green Paper on Land Reform, 2011 are also addressed.

⁵See 2 4 above.

⁶ See 3 2 above.

⁷Carey Miller DL & Pope A *Land Title in South Africa* (2000) 456-461. See 3 2 above.

⁸*Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC).

⁹DLA *White Paper on South African Land Policy, 1997* 2.3.

7 2 3 Black rural women's tenure security post-1994

Research has underlined that insecure rights are significantly problematic for mainly three groups of persons, namely (a) farm workers and those living on privately owned land; (b) people living in communal areas; and (c) the residents of coloured rural areas.¹⁰ This study has focused on women within groups (a) and (b). Women's status concerning race and gender has an effect on their tenure security. In this regard, their marital status is especially significant. Linked thereto is the impact that succession has on black rural women's tenure security. Although there have been positive developments for women with regard to succession, some customary practices continue to discriminate against women within the domain of intestate succession.

Where the policy is concerned, the attention given to women's issues in the White Paper is not repeated in the Draft Policy. In fact, the latter seems gender-neutral.

The legislative analysis brings to light that several legislative measures partially contribute to protecting women's tenure.¹¹ An important observation is that the Draft Land Tenure Security Bill, 2010 does not apply to communal areas, thus taking away protection of rights afforded by the Extension of Security of Tenure Act 62 of 1997 and the Land Reform (Labour Tenants) Act 3 of 1996, which the Bill seeks to repeal.

The Communal Land Rights Act 11 of 2004 is discussed to point out its substantive shortcomings that the legislature ought to address in future tenure legislation. A dominant issue is the lack of provision for single women to obtain secure tenure. The Traditional Leadership and Governance Framework Act 41 of 2003 does not provide accountability for the traditional councils which have extensive powers and on which rural women are not equally represented. In addition, after addressing the 2010 and 2011 developments in the tenure legal framework,¹² it transpires that there is a lack of protection for the rights and needs of black rural women in line with the

¹⁰ See 2 4 1 and 4 3 3 above.

¹¹ See 4 3 3 3 above.

¹² See 4 3 3 5 above.

constitutional mandate. The courts on the other hand, have had a more progressive and transformative role in aiding the promotion of black rural women's tenure security.¹³ It is clear that the interaction between various role players and rural women is a crucial part of transforming the landholding system. Possibly the most important role players in this regard are rural women themselves. Their involvement in society, including local, provincial and national decision-making roles can bring about reform, as shown in the cases of land allocation to single unmarried women in certain areas.¹⁴ Different categories of rural black women are subject to different levels of tenure insecurity.¹⁵ A common feature is that women often hold secondary use or occupational rights in land, though in most instances their access to land is still gained through a male relation.

7 2 4 Black rural women's tenure security in Namibia

The Namibian land reform programme has been in place for the past twenty two years since independence in 1990.

The prevailing pre-colonial landholding system was governed by the customary law of the indigenous tribes of Namibia.¹⁶ Similar to the position in pre-colonial South Africa,¹⁷ permanent rights of use of the land were generally awarded to men, while rural black women accessed these rights through their male relations.

The indigenous tribes remained in control of the land until Namibia was declared a German Protectorate in 1884. The German colonial authorities commenced to dispossess land from the local tribes by means of the treaty system and native regulations.¹⁸ The system of forced labour was established to provide black labour on white owned land.¹⁹ After Namibia was declared a mandate of South Africa in 1920, the Union of South Africa's *apartheid* land settlement laws were made

¹³ See 4 3 4 above.

¹⁴ See 4 5 2 above.

¹⁵ See 4 5 above.

¹⁶ See 5 2 above.

¹⁷ See 2 2 above.

¹⁸ See 5 3 3 3 above.

¹⁹ See 5 3 3 above.

applicable to Namibia.²⁰ These created new land control forms which were reclassified into Crown land, communal land and private land before the dawn of the Namibian Constitutional era in 1990.

Land reform comprises four programmes, of which the issuing of communal land rights certificates to farmers in communal areas, has been most successful thus far.²¹ The Married Persons Equality Act 1 of 1996 abolished the marital power in civil marriages but did not deal with gender inequalities in customary marriages relating to the couples' joint estate. From the outset, the National Land Policy, 1998 explicitly provides for how gender equality in land rights should be improved.²² This is in line with the gender sensitive nature of the Namibian Constitution.²³ This approach has been adopted in Traditional Authorities Act 25 of 2000. The Communal Land Reform Act 5 of 2002 does not define the content of land rights. Of significance is that the latter Act grants women equal rights when applying for communal land.²⁴ The co-operation of all role players would assist the state, in securing women's tenure. It becomes clear that women's land rights are shaped by regional and inter-regional differences.²⁵ Overall, it is evident that women still face challenges with regard to the tenure security. Nevertheless, the Constitution and tenure reform programmes have dramatically improved the access to and security of tenure for black rural women.

7 2 5 Comparative analysis: South Africa and Namibia

The comparative analysis in Chapter six is based on the South African and Namibian jurisdictions, premised on land reform in general and tenure reform in particular. Therefore, the main objective was to determine whether South Africa's tenure legal framework was gender-orientated.

The constitutional values and the symbolic value of the South African Constitution play an important role in the advancement of women's rights. The Namibian

²⁰See 5 3 4 above.

²¹See 5 5 4 above.

²²See 5 6 3 1 above.

²³See 5 6 3 2 above.

²⁴See 5 5 4 3 and 5 6 3 3 2 above.

²⁵See 5 6 5 above.

Constitution is generally gender-sensitive.²⁶ The White Paper on South African Land Policy, 1997 acknowledges the discrimination against women, while the Draft Tenure Security Policy, 2010 is not gender-orientated. On the other hand, the Namibian National Land Policy, 1998 is gender-specific and gives specific directions on how women should be accorded the “same status as men with regard to all forms of land rights”.²⁷ Such a focused approach is lacking in South African land policy. The South African tenure legal framework approach is to provide measures for the interim protection of rights while long-term tenure reform measures are formulated.²⁸ In Namibia there is a single tenure reform framework that is developed holistically. This begs the question as to which approach is better. South African tenure legislation is generally gender-neutral and does not tackle issues of the patriarchal power relations in rural areas.

There is a need to transform the institutions related to tenure reform. In Namibia these institutions have a direct obligation to and are subject to the gender-sensitive Constitution.²⁹ Furthermore, it is essential that all role players collaborate in order to achieve the aims of land reform.³⁰ The gender-neutral nature of South African tenure legislation and implementation of tenure reform programmes have failed to address the plight of specific categories of women. This is in contrast to the position in Namibia where provision is made for the plight of widows, while other categories of women have been legally allocated land in their own right.

In light of the above, recommendations are formulated below.

²⁶ See 5 5 4 3 3, 5 6 5 and 6 2 2 above

²⁷ *National Land Policy, 1998* 2. See 5 6 3 1 and 6 2 3 above.

²⁸ See Chapter 3 and 7 2 2 above.

²⁹ See 6 2 6 above.

³⁰ See 5 5 4 3 3 above.

7 3 Recommendations

7 3 1 Law-making

7 3 1 1 Introduction

Where the drafting of legislation and law-making is concerned, the recommendations will be based upon a) the procedural and b) the substantive aspects thereof. Each will be set out below in more detail.

7 3 1 2 Procedural issues

The correct procedure for drafting legislation should be followed, especially in light of the Communal Land Rights Act's declaration of invalidity. Apart from the substantive shortcomings of the Act,³¹ having followed the incorrect tagging procedure has left millions of people's rights in *limbo*.³² This has to be avoided in future.

When ideas for legislation or the need for new legislation comes to light, processes for law-making may be initiated by any of the relevant role players.³³ Rural women in particular should be able to approach traditional authorities and national Government in order to consider these ideas for potential new laws or amendment of existing legislation.

Public consultation during the drafting procedure cannot be stressed enough. Though not all role players can reasonably be consulted, those diversely affected or the majority of whom may be affected by legislation should form part of the legislative process. Legislation should appreciate the lived reality of those it affects while its formulation should never deviate from the values of freedom, public participation and democracy.³⁴ It is also necessary that women are consulted as a

³¹ See 3 4 4 3 2 2 and 4 3 3 4 above.

³² *Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC) paras 44-82.

³³ See 4 4 2 and 5 6 4 above.

³⁴ Mnisi S *Reconciling Living Customary Law and Democratic Decentralisation to Ensure Women's Land Rights Security* PLAAS Policy Brief 32 (Nov 2010) 5.

separate interest group in a space where they can speak freely,³⁵ particularly when laws affect their rural tenure rights.³⁶ Also, the legislature should take note of and include submissions by organisations which specialise in specified research in areas of legislation being developed.³⁷

In addition to following the correct procedure, Government has to continue monitoring the process of promotion of women's rights in land, because, as highlighted within the Namibian context,³⁸ tenure reform is an on-going process.³⁹ This monitoring will determine whether policy guidelines and legislative measures are being implemented effectively, with further recommendations to be made in order to improve the tenure reform programme. Technical support should also be given where necessary by the relevant role players.

All in all, women's rights should be included in the procedural and substantive aspects of any legislative initiatives regarding land and related matters.

7 3 1 3 Substantive issues

Legislation should give women's rights direct protection. In other words, South African legislation needs to be more gender-specific, as opposed to the current position reflected in the Interim Protection of Informal Land Rights Act 31 of 1996 and the Upgrading of Land Tenure Rights Act 112 of 1991.⁴⁰ As demonstrated with reference to the position in Namibia, tenure legislation that makes specific provision for women is better suited to provide for their rights and general participation within the tenure reform programme.

³⁵Mnisi Weeks S *Traditional Courts Bill: Process, Substance and Implications for Women* (2012) 8 presented at DWCPD Rural Women's National Consultative Meeting, 12 April 2012 hosted by the Department of Women, Children and People with Disabilities (copy on file with author).

³⁶See 6 2 4 above.

³⁷Mnisi Weeks S "The Traditional Courts Bill: Controversies around process, substance and implications" (2011) 35 SACQ 3 6
<<http://journals.sabinet.co.za.ez.sun.ac.za/WebZ/ej/AdvancedQuery?sessionId=01-60222-691878601>> (accessed 18/04/2012).

³⁸ See 6 2 4 4 above.

³⁹Pienaar J M "Broadening access to land: The case of African rural women in South Africa" (2002) 2 *TSAR* 177 202.

⁴⁰ See 6 2 4 3 above.

In addition, legislation has to define a way in which procedures governing the exercise of group-based rights ensure that all rights holders are able to participate effectively and equally.⁴¹ Security of tenure should be delivered through a rights-based approach, proposed in the White Paper on South African Land Policy and transform from the permit-based system adopted during the *apartheid* era.⁴² Although in Namibia only the Regulations of the Communal Land Reform Act provide for this, South African legislation should provide for the joint registration of land in the names of both male and female spouses and other dependents.⁴³

Legislation should not only provide protection for women's rights, but as a point of departure, should seek to achieve substantive equality for women regarding land rights. The Millennium Development Goals, international instruments and general comments *inter alia* provide guidance in this regard.⁴⁴ Comparative law should also be used as a tool in law-making, but within the context of the South African landscape.

It is important that the legislature does not lose sight of the developmental potential and dynamic nature of customary law when developing the substantive content of legislation, especially in light of the customary land rights allocations to single women.⁴⁵ These and similar developments should be captured in tenure legislation. Legislation (and not just the Constitution) needs to fill the gaps where customary law is still employed to entrench discrimination. Mushunje⁴⁶ holds an interesting perspective in this regard by highlighting that:

“Women continue to suffer insecure land rights because land policy and legislation in many countries have failed to adequately integrate customary tenure and common law tenure into a single policy framework. The result has been abuse of both systems in favour of a male bias towards land allocation.”

⁴¹DLA *White Paper on South African Land Policy*, 1997 3.20.2.

⁴²See 2 4 3 1 above.

⁴³ See 6 2 4 3 above.

⁴⁴ See 3 4 2 above.

⁴⁵See 4 5 2 above.

⁴⁶Mushunje M T “Land Administration: Women’s Access to Land in Communal Areas” in Roth M, Nxasana V, Sibanda S & Yates T (eds) *National Land Tenure Conference: Finding Solutions, Securing Rights* (2004) 98 100.

It has been said that a new consensus has emerged, subscribed to by major institutions such as the World Bank, that for tenure reform to work, it should build on the dynamics of customary systems and recognise and support existing social institutions.⁴⁷ Legislators thus have to obtain an understanding for processes of change underway in communities living in rural areas. This will not happen if the legislature insists on a top-down approach to promulgating laws which do not address the reality of rural women,⁴⁸ or try to disguise pre-independence structures, such as geographical boundaries, under the post-1994 legislation such as the Traditional Leadership and Governance Framework Act 42 of 2003.⁴⁹

Furthermore, legislation pertaining to the powers over land rights cannot be based on the system that created segregation and enabled land dispossession in the first place.⁵⁰ Therefore national law-making should let communities define their own boundaries in a participatory process and allow individuals a choice as to which jurisdictions they fall under.⁵¹ The study has highlighted how crucial the powers that control land rights are, it thus follows that legislation should clarify the roles of traditional leaders,⁵² especially where there are abuses of power or where customary law is still used to oppress women.⁵³ At the same time, legislation has to lay out clear procedures for the accountability of traditional leaders.

Also, accessible and affordable dispute resolution structures, which can be very

⁴⁷Claassens A "Women, customary law and discrimination: the impact of the Communal Land Rights Act" (2005) *Acta Juridica* 52, 61.

⁴⁸DLA *White Paper on South African Land Policy, 1997* 60-61. Mnisi Weeks A & Claassens A "Tensions between Vernacular Values that Prioritise Basic Needs and State Versions of Customary Law that Contradict Them" (2011) 22 *Stell LR* 823 833-837. See 4 3 2 5 and 4 3 2 7 above.

⁴⁹See 3 4 4 3 2 3 and 4 3 3 4 above.

⁵⁰See 4 3 3 4 above.

⁵¹Mnisi S *Reconciling Living Customary Law and Democratic Decentralisation to Ensure Women's Land Rights Security* PLAAS Policy Brief 32 (Nov 2010) 5. See 4 3 3 4 above.

⁵²Council for the Advancement of the South African Constitution *From Subject to Citizen: Let the People Govern. A Citizens' Response to the National Development Plan 05/2012* vii, 42-53; Mnisi Weeks S & Claassens A "Tensions between Vernacular Values that Prioritise the Basic Needs and State Versions of Customary Law that Contradict Them" (2011) 22 *Stell LR* 823 833-837.

⁵³Mushunje M T "Land Administration: Women's Access to Land in Communal Areas" in Roth M, Nxasana V, Sibanda S & Yates T (eds) *National Land Tenure Conference* 98 110. See 3 4 4 4 3 2 3, 4 3 3 4, 5 6 3 3 1 and 6 2 4 4 above.

valuable and provide necessary access to justice in especially deep rural areas,⁵⁴ should be open for women to challenge the powers that administer land rights. Traditional courts or councils and other decision-making bodies need to directly include women in their membership so as to help to develop customary law in ways reflecting concerns of women and their dependants.⁵⁵ This is extremely important as research has indicated that customary law is continually changing and that women should be part of the process of change.

Existing land administration mechanisms, for example communal property associations, have to be supported by Government and other role players to ensure that legislative initiatives that do provide for gendered participation are correctly implemented and enforced.⁵⁶

Land rights should be strengthened in conjunction with reviewing inheritance and marriage laws.⁵⁷ In other words, legislation has to address rural women's vulnerability by means of empowerment through various laws and socio-economic development.⁵⁸ Clearly, rights to land are inter-dependent on other rights affecting women's livelihood such as healthcare. Most importantly legislation has to be realistic and practical for implementation.

7 3 2 Role players

Colonisation did not only create inequalities in law but also in the society, thus the law is not the only arena that needs reform but the society and role players in general as well.

⁵⁴Mnisi Weeks S *Traditional Courts Bill: Process, Substance and Implications for Women* (2012) 30 presented at DWCPD Rural Women's National Consultative Meeting, 12 April 2012 hosted by the Department of Women, Children and People with Disabilities (copy on file with author).

⁵⁵Mnisi Weeks S *Traditional Courts Bill: Process, Substance and Implications for Women* (2012) 13 presented at DWCPD Rural Women's National Consultative Meeting, 12 April 2012 hosted by the Department of Women, Children and People with Disabilities (copy on file with author).

⁵⁶DLA *White Paper on South African Land Policy*, 1997 3.20.3. See also 3 4 5 3 and 6 2 4 3 above.

⁵⁷*National Land Policy*, 1998 2; Mushunje M T "Land Administration: Women's Access to Land in Communal Areas" in Roth M, Nxasana V, Sibanda S & Yates T (eds) *National Land Tenure Conference* 98 110. See 4 2 above.

⁵⁸Ambunda L & de Klerk S "Women and custom in Namibia: A research overview" in Ruppel O C (ed) *Women and Custom in Namibia: Cultural Practice versus Gender Equality?* (2008) 43 81; Liebenberg S *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 34-36, 44-54.

In this regard, there needs to be a change in prevailing social behaviour towards women in rural areas or generally a change in the gender role stereotypes.⁵⁹ This can be achieved through education and training of the various role players. In striving towards the promotion and protection of black rural women's tenure security, role players in tenure reform should not be working in isolation of one another.⁶⁰ Tenure reform needs support and commitment from all relevant stakeholders in order to ensure successful landholding, management and development.⁶¹ There also needs to be direct contact between the Government and role players acting on behalf of women.⁶²

In some instances the practice of cultural life⁶³ affects women's rights. Thus the potential conflict between equality and cultural practices by certain role players has to be addressed. Alongside this is also the need for role players to adhere to the laws that set out to promote women's tenure and promote the general values of the Constitution to create overall protection for women's land rights.⁶⁴ Of importance is that there generally has to be accommodation and reconciliation with the different gendered approaches to land.⁶⁵ Pienaar fittingly states that:

“Gender has to be an intricate part of any transaction, grant or subsidy scheme, programme and conference - and should never be a mere “after thought” in the department of land affairs’ approach.”⁶⁶

7 3 3 Women

As the most crucial role players in the process of securing their tenure as the focus group of this study, women are addressed as a separate group of role players here.

⁵⁹ 203.

⁶⁰ See 4 4 2, 5 6 4 and 6 2 6 above.

⁶¹ Smith H & Pienaar K “Forms of Tenure for Community Ownership” in Roth M, Nxasana V, Sibanda S & Yates T (eds) *National Land Tenure Conference* 138 145.

⁶² Pienaar J M “Broadening access to land: The case of African rural women in South Africa” (2002) 2 *TSAR* 177 203.

⁶³ S 30 and 31 of the South African Constitution and art 19 of the Namibian Constitution grant the fundamental right to practice culture.

⁶⁴ See 4 2 2 2 and 6 2 2 above.

⁶⁵ Pienaar J M “Broadening access to land: The case of African rural women in South Africa” (2002) 2 *TSAR* 177 203.

⁶⁶ 203.

Women have to play an active, instead of reactive, role and be central actors in their own development.⁶⁷ At the same time:

“[i]t is...crucial that more women become involved in the provincial and national level of the reform process. If women’s needs regarding land are to be addressed and prioritised, then the representation of women has to be promoted further”.⁶⁸

A further recommendation is that the laws that protect and promote rural women’s tenure security have to be accessible in their languages, in order for rural women to be able to use them to their advantage. This will assist them to educate themselves with regard to their rights⁶⁹ and assist in overcoming the subordinate position they hold within certain rural communities.⁷⁰ Women need to be part of joint movements to realise their rights, gain additional skills and not resign themselves to the powers of other members of their communities.

7 3 4 Forms of tenure

7 3 4 1 Introduction

Different tenure forms should be available for different women, depending on their relevant circumstances and needs. Because of the varied conditions, rural women should be able to choose their own tenure forms.⁷¹ It follows that the law in principle should provide a wide variety of mixed tenure forms that are available for a community and individuals.⁷² This section will first set out the existent tenure forms in rural areas before recommendations will be drawn from the study above. These recommendations are made, mindful of the negative conditions prevailing in rural areas, such as overcrowding, boundary disputes, unproductive land use and the

⁶⁷UN “Facing the Future Together: Report of the United Nations Secretary General’ Task Force on Women, Girls and HIV/AIDS in Southern Africa” *UNAIDS* <http://data.unaids.org/publications/External-Documents/sgreport_facingfuture_en.pdf> (accessed 14/05/2012).

⁶⁸Pienaar J M “Broadening access to land: The case of African rural women in South Africa” (2002) 2 *TSAR* 177 202.

⁶⁹ 202-203.

⁷⁰ See Chapter 4 above.

⁷¹ DLA *White Paper on South African Land Policy*, 1997 60-61.

⁷²Pienaar G “The need for a comprehensive land administration system for communal property in South Africa” (2007) *THRHR* 556 560. See also 3 5 2 4 with regard to the Green Paper proposals on the Vision for Land Reform.

minimal success of communal property associations.⁷³ Underlying these recommendations is the best interests of rural women.

7 3 4 2 Existent tenure forms in rural areas

The existing tenure forms are as follows:

- a) Leasehold, deeds of grant, quitrent title and rights of occupation of land as provided for by the Upgrading of Land Tenure Rights Act 112 of 1991;⁷⁴
- b) Informal rights to land in terms of the Interim Protection of Informal Land Rights Act 31 of 1996;
- c) Labour tenant rights in terms of the Land Reform (Labour Tenants) Act 3 of 1996;
- d) Occupier rights in terms of the Extension of Security of Tenure Act 62 of 1997; and
- e) Land rights in terms of the Communal Property Associations Act 28 of 1996.⁷⁵

The above exposition relates to rural areas comprising former South African Development Trust land, self-governing territories and independent national states, as well as communal land in general and rural land used for commercial farming in relation to labour tenants and occupiers. Recommendations that follow are made in the context of these existing tenure forms.

7 3 4 3 Communal tenure

In South Africa, communal tenure often confers secondary rights of use as the land is owned by the state.⁷⁶ Thus women cannot alienate this land or use it as collateral. The communal tenure system is ideal for rural communities because of its flexible use and occupation rights by a range of community members, who depend on the

⁷³Pienaar G "The need for a comprehensive land administration system for communal property in South Africa" (2007) *THRHR* 556 559-560, 567. Also see the Green Paper on Land Reform, 2011 5-6.

⁷⁴Schedule 1 and 2 of the Act.

⁷⁵ See Chapter 3 and 4 above for a discussion of the Acts in a) – e).

⁷⁶See 3 5 2 1 and 5 5 2 above.

communal structures and resources.⁷⁷ Communal tenure may further occur on public or private land.⁷⁸ The current tenure forms are communal property associations⁷⁹ and trusts. While common law co-ownership also provides for property to be held by more than one person, its nature is not really communal.⁸⁰

Communities can register entities for communal land ownership. Ownership should vest in the entities in terms of written agreements. Where the trust is concerned ownership would vest in the trustees, who would administer the land to the benefit of the community. Trusts can be in the form of statutory trusts.⁸¹ Legislation should also make provision for the development of customary landholding forms and provide recognition for these as they transpire through the ever changing living customary law. These institutions, however, need national and local management and structural support for their success.⁸² Thus it is important that Government and relevant role players regularly monitor these communal arrangements, by for example, running annual assessments for compliance with the written agreements and making improvements where necessary.

Another form of communal tenure is from the Namibian community-based natural resource management model.⁸³ Land would be managed by the community in the form of a conservancy or community forest in order for the natural resources to benefit the registered community members. This model is especially suitable where there are over-lapping rights to the land. These models would be monitored by the local and national Government to ensure sustainable and protected use of resources on the land.

⁷⁷Pienaar G "The need for a comprehensive land administration system for communal property in South Africa" (2007) *THRHR* 556 560.

⁷⁸Smith H & Pienaar K "Forms of Tenure for Community Ownership" in Roth M, Nxasana V, Sibanda S & Yates T (eds) *National Land Tenure Conference* 138 140.

⁷⁹ See 7 3 4 2 above.

⁸⁰Smith H & Pienaar K "Forms of Tenure" in Roth M, Nxasana V, Sibanda S & Yates T (eds) *National Land Tenure Conference* 138-155.

⁸¹ 138-155.

⁸² See 3 4 4 3 2 2 and 4 3 3 3 above.

⁸³ See 5 5 4 3 3 2 above.

7 3 4 4 Individual tenure

Not all people living in rural areas are part of a functional community or recognise the community structures and may have a need for individual land tenure rights embedded in rural communal land.⁸⁴ The existent individual tenure forms in items a) to d) above⁸⁵ can be secured through registration and recording after the land is surveyed where this is not already provided for in the existing legislation.

Forms of tenure in this regard can be similar to customary land rights as provided for in the Namibian communal tenure reform programme.⁸⁶ These rights are awarded for residential and farming purposes. The applicant for such land should identify it upon consultation with the traditional authority and the community. The application is then considered by the traditional authority in whose area the land is situated for consideration by the proposed Land Rights Management Boards.⁸⁷ Where persons do not recognise or do not live in accordance with the customary law of the area, they too should be able to apply for residential or farming rights through the Land Rights Management Boards or relevant authorities. The consideration of applications must be made public by for example placing notices where community members can access them and allow them to make objections to the applications. A hearing can be held to hear any objections. The traditional authority then approves or refuses the application with a reason, which decision should be ratified by the Land Rights Management Board. The Board then ratifies the application or it can refuse the application. The right can only be legally valid when ratified by the Board.

Small-scale Commercial Farming Units developed in terms of the Namibian Communal Land Reform Act⁸⁸ can also provide for individual tenure (or communal tenure) for a family or a household. The aim of this programme is to develop underutilised land in communal areas for commercial farming purposes. The unit can be provided under the existent leasehold tenure or as freehold tenure and recorded

⁸⁴ See the counter-arguments in Holomisa P "Securing Rights on Communal Land" in Roth M, Nxasana V, Sibanda S & Yates T (eds) *National Land Tenure Conference* 113-117.

⁸⁵ See 7 3 4 2 above.

⁸⁶ See 5 5 4 3 3.

⁸⁷ See 3 5 2 4 above.

⁸⁸ S 30.

by the relevant local authorities. These units require infrastructure support from the national Government and development banks and have high employment potential when fully developed.⁸⁹ These farming units can be registered by the local authorities.

Other individual tenure forms can be ownership, limited real rights and personal rights. The options available ought to be both secure, through registration and address the needs involved, in line with constitutional values. These and other individual tenure forms should be provided while still leaving areas for, *inter alia* communal grazing and access to roads because of the general dependence of the rural community on communal resources.

The above tenure forms should uniformly be provided for in tenure legislation that also assumes the gender aspects as contained in the above recommendations.⁹⁰

7 4 Conclusion

Generally, the study has set out that before colonialism, the customary landholding system allocated land to married men, while black women as a rule, accessed land through male relations. Rural women's land rights were what would be referred to as secondary rights today. There were generally no fixed boundaries and land was the main source of survival amongst the various tribes. During the colonial era, the customary landholding system was distorted altogether and black rural women's rights, let alone land rights, were oppressed and many lost any ties to the land that they previously enjoyed.

Upon the advent of the Constitution, the legal framework guarantees basic human rights and security of tenure for all who have insecure rights as a result of the racially discriminatory laws under the different colonial authorities. In addition, the Constitution specifically mandated Parliament to enact laws for the tenure reform

⁸⁹ Government of the Republic of Namibia, Ministry of Lands and Resettlement *Poverty Impact Assessment* 23, 44. See also 5 5 3 2 and 5 5 4 3 2.

⁹⁰See 7 3 1 above.

programme.⁹¹ As a result of the various factors at play in the rural setting and legal pluralism in South Africa, there have been attempts under both statutory law and customary law to realise secure land rights guaranteed to all, but specifically in relation to black rural women. The judiciary has also played an indispensable role in advancing the transformative project, and particularly addressing issues of equality and the recognition of the living customary law, thereby protecting and promoting women's rights further.

Despite these positive developments, permit-based and insecure land rights are still in existence, women still face discrimination as a result of social attitudes and piecemeal laws that do not seem to grasp women's lived reality or the crucial impact that law has on different categories of women. South African tenure legislation lacks a gendered dimension. The Namibian system demonstrated how gendered laws can go a long way in realising security of tenure and gendered participation in the land reform project as a whole.

Based on the study, it cannot be said that the particular objective of the land reform programme to transform the landholding system for black rural women and address issues affecting their land rights or lack thereof, have been achieved - in theory or practice. As Pienaar appropriately states, broadening access to land and securing tenure for rural women will only be effective if the land reform programme addresses issues such as expanding access to financial resources, including women in the decision-making structures and providing agricultural, educational and training support.⁹² Commitment and support from all stakeholders is essential. At the same time women themselves have to mobilise to gain support from their male counterparts, in their local communities and within the confines of living customary law⁹³ and the broader constitutional society to overcome issues of the patriarchal system of authority and ultimately contribute to the realisation of their tenure rights.

⁹¹S 25(9) of the Constitution.

⁹²Pienaar J M "Broadening access to land: the case of the African rural woman in South Africa" 2002 *TSAR* 177 203; ODS –Sédoc "Committee on Economic, Social and Cultural Rights, General Comment 12 Para 26" ODS<<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/420/12/PDF/G9942012.pdf?OpenElement>> (access 16/05/2011).

⁹³Mnisi S *Reconciling Living Customary Law and Democratic Decentralization to Ensure Women's Land Rights Security* PLAAS Policy Brief 32 (Nov 2010) 2 – 3; DRDLR *Strategic Plan 2010 – 2013* 12.

This is especially so because the status of women in communities has changed. As a result of economic and social circumstances, a large number of women have assumed responsibilities and powers previously reserved for males.⁹⁴ Therefore, even if legislation does not yet exist to effectively protect their rights, the development of social practices provides protection too. Playing on the concept of *ubuntu*, for example to obtain land, can be helpful. Overall, these factors have to be viewed in light of the current social environment and changing status of women in communities. This could mean the prioritisation on the basis of need for land and housing in order to fulfill their basic needs. In some communities this approach has resulted in communities members giving up part of their land to women in the spirit of *ubuntu*.⁹⁵ Such “sharing” of land can be done by both men and women who own land in the communities. Also, women living on family land can simply resist eviction, by relying on arguments of *ubuntu*, which entail compassion, respect, humaneness, sharing, while aimed at giving a coherent structure to the community, group solidarity and promoting peace, equality and justice for all.⁹⁶

It is a daunting task to address the continued tenure problems. This is due to the aftermath of pre-independence policies and approaches, while simultaneously attempting to address present and continuing insecurity. However, as illustrated with reference to Namibia, it is an on-going but possible task. It is a task that requires input from various role players in order to resuscitate rural livelihoods and to effectively include the black rural women in a constitutional society that is free from the guise of *apartheid* structures and patriarchal characteristics.

The study has clearly shown that tenure in South Africa has been constantly changing, starting from the customary landholding system with lack of boundaries in

⁹⁴Jansen RM “Customary Family Law” in Rautenbach C et al (eds) *Introduction to Legal Pluralism* 3 ed (2010) 45-61; *Bhe & Others v Magistrate Khayelitsha & Others* para 35; Mnisi Weeks S & Claassens A (2011) 22 *Stell LR* 825-828.

⁹⁵Mnisi Weeks S & Claassens A (2011) 22 *Stell LR* 823-844. Claassens also accords the unprecedented women’s land claims to significant processed of change and the symbolic power of the Constitution and judgments. This is often as a result of particular women who challenge the *status quo*.

⁹⁶Louw DJ *Ubuntu: And the challenges of multiculturalism in post-apartheid South Africa* (2002) 5; Bekker JC & Rautenbach C “Nature and Sphere of Application of African Customary Law in South Africa” in Rautenbach C, Bekker JC & Goolam NMI (eds) *Introduction to Legal Pluralism* 3 ed (2010) 15-27-28; See also *S v Makwanyane* 1995 (6) BCLR 665 (CC) paras 307-308.

the pre-colonial era, where women mainly accessed land through male relations. Later diverse, rather insecure rights were awarded to black people over restricted areas for occupation. More recently under the Constitution, women have been independently granted land rights. The point here is that the nature of land rights and practices on the ground are changing and will not always resemble a certain *status quo*. Therefore the tenure legal framework has to keep up with and accommodate these changes.

The preamble of the Constitution enjoins everyone to not only “recognise the injustices of our past” but also to “heal the division of the past and establish a society based on democratic values, social justice and fundamental human rights”.⁹⁷ If Government, based on the will of the people,⁹⁸ and society are serious about protecting the dignity and rights of all persons, while simultaneously upholding the communal spirit of *ubuntu*, then rural women’s land rights have to be addressed urgently. Only then will black rural women be equal citizens of South Africa.

⁹⁷Preamble of the Constitution.

⁹⁸Preamble of the Constitution.

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