Jurisprudential aspects of proclaiming towns in communal areas in Namibia
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Abstract

The proclamation or declaration of local authority areas in communal areas in Namibia has recently raised jurisprudential questions regarding the powers of both the central and traditional government structures. All communal lands in Namibia are under the jurisdiction of Traditional Authorities. This means that the declaration of local authority areas in communal land amount to a withdrawal of land from communal land, making such withdrawn land a local authority area. Thus, the declaration impacts directly on the powers and jurisdictions of Traditional Authorities. This paper considers the jurisprudential aspects of such declarations. From a legal-philosophical and anthropological perspective, the question whether traditional authorities have the jurisdiction over land that has been declared local authority area lies in the plurality of legal regimes and the concept of tradition versus modernity. The paper considers the power relationship between traditional and central government authorities through a network of statutes which regulate the declaration of areas as local authorities, and argues that the current position is a perpetuation of plurality-blind apartheid laws. Taking a philosophical and anthropological perspective, the paper considers in detail the controversy surrounding the ownership of communal land in Namibia. The paper also explores the plurality of legal codes in Namibian land law, and argues that although modernity is an inevitable reality, tradition cannot be ignored. Thus, the law regarding the proclamation of local authority areas has to be weighed up against community values and customary laws in general. Statutory law, as it stands in Namibia, cannot be applied in a way that negates traditional norms; however, although the prescribed procedures seek to strike a balance between the two legal systems, this equilibrium has not been adequately achieved. The conflict between laws will persist in an uneasy pluralism, therefore.

Introduction

Over the past few years, events in northern Namibia – particularly the official proclamation of Helao Nafidi as a town – have provoked questions regarding the powers of Traditional Authorities in parts of communal areas that have been proclaimed as towns or cities. The complexity of the matter is not necessarily in the political twists in the clashes between investors in the

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town of Helao Nafidi and the Ndonga Traditional Authority; rather, it lies in a complex network of legislation and the internal conflict of laws which will be discussed below. From a legal-philosophical and anthropological perspective, the question whether traditional authorities have the jurisdiction over land that has been declared a local authority area lies in the duality or plurality of legal regimes, and the clash between tradition and modernity. The problem at hand arises as we consider that the powers, rights and obligations of Traditional Authorities on the one hand and town councils on the other are regulated by statute. Of equal note is that the powers of Traditional Authorities go beyond mere statute: they extend into the traditional norms and values that form part of the communities’ chthonic and autochthonous laws.

Town councils are local authorities under the Local Authorities Act.1 Traditional Authorities are also local authorities, however, insofar as the Traditional Authorities Act2 limits their jurisdiction to certain localities in communal areas. Events in northern Namibia require consideration of the jurisdiction and ambit of the powers of these two types of local authorities. The critical question here is whether the declaration of an area as a city or town has any effect on the powers and/or jurisdiction of the relevant Traditional Authority when it comes to land allocation. One would normally answer in the affirmative, but the same question takes us into apartheid laws. As will be explained in detail below, it is shocking to note that the new statutes have not made changes to the old practice under apartheid. Instead, these statutes confirm the status quo, albeit in different and more polite language. This in turn offends the traditional norms which predated the statutes, and which have since taken precedence. This situation has caused conflict between Traditional Authorities on the one hand, and the Helao Nafidi Town Council (or the Government in general) and private investors in the town on the other hand – a clear issue of tradition clashing with modernity. In terms of this analysis, could one declare that Traditional Authorities have a legitimate say in the allocation of land in towns? Are town councils bound to consult Traditional Authorities whenever they deal with land allocations in local authority areas, since such areas are surrounded by communal lands under the jurisdiction of Traditional Authorities? What is the law to be applied in these processes? These are the legal questions which befuddle an issue that many would like to politicise.

Powers and laws in place

Traditional Authorities in Namibia are not part of central government structures. The Namibian Government did not follow South Africa’s wall-to-wall system, whereby traditional authorities are made part and parcel of the central governance structures through legislation which makes them part of provincial governmental bureaucracy. The amount of administrative power

1 No. 23 of 1992.
2 No. 25 of 2000.
that Traditional Authorities have in Namibia does not necessarily correspond with what one would expect after having noted the institutional guarantee of such powers in the Namibian Constitution. According to Hinz, the wall-to-wall system of local government substantially limits the executive scope of Traditional Authorities, since the system subjects the latter’s authority to that of the communities’ elected representatives. Thus, the Government forces Traditional Authorities to operate within the framework of local government structures. Indeed, from what is happening in Helao Nafidi, it seems the Namibian system does not make any significant practical difference between the two types of local government structure, especially considering that the exclusion of Traditional Authorities from the central government bureaucracy simultaneously excludes them from participating in the daily decision-making processes of government. This seems to be the genesis of the reactionary stance that Traditional Authorities have taken as regards the fate already decided for them by central government.

According to Hinz, –

[w]ith the exception of declared local authority areas (municipalities, towns or villages) Namibia is free of local authorities.

The fact that territory once under the control of Traditional Authorities can be withdrawn from their jurisdiction puts them in a subservient position where they are obliged to give way to the imperative of a proclamation or notice declaring certain territory a local authority area. Traditional Authorities are primary when it comes to allocating land in communal areas in terms of the Communal Land Reform Act. This power is not absolute, however, since there are several statutes which affect it.

For instance, the Local Authorities Act provides for the jurisdiction of town councils and their powers over certain land, but does not mention Traditional Authorities. It is regrettable that such an omission allows the powers of

7 No. 5 of 2002, section 20(a).
Traditional Authorities to be eroded when a town has been declared in their area. On the other hand, the Communal Land Reform Act provides for the powers of Traditional Authorities over communal land; the Act also prescribes the powers of the President to withdraw such communal land, but it does not mention town councils and their power to do so. In terms of the Traditional Authorities Act, a Traditional Authority is that traditional body which has authority over a traditional community, and which comprises the traditional leaders of that community who have been designated and recognised as such in accordance with the provisions of the Act.\(^8\)

Under customary governance, the Chief, King or Queen\(^9\) is the supreme ruler who has the primary and ultimate power to allocate land. This power can, however, be delegated to members of the council of the Traditional Authority concerned. This same power finds confirmation in section 20 of the Communal Land Reform Act, which grants Traditional Authorities the power to allocate land rights as follows:

20. Subject to the provisions of this Act, the primary power to allocate or cancel any customary land right in respect of any portion of land in the communal area of a traditional community vests –
   (a) in the Chief of that traditional community; or
   (b) where the Chief so determines, in the Traditional Authority of that traditional community.

It is gratifying to see that the original powers to allocate land are retained in the Communal Land Reform Act because, to a traditional community, land means life and identity, whether cultural, religious or spiritual; thus, land produces a sense of patriotism and belonging. This explains why the boundaries created by the European settlers and formalised through the Berlin Conference in 1884 are meaningless among Traditional Authorities. To note but a few examples, the Wambo community extends into Angola, as does the Kavango community in north-eastern Namibia; the Shona community of Zimbabwe extends into Mozambique, while the Venda of South Africa extend into Zimbabwe.

Members of these ‘divided’ communities remain united, even though they may need passports to visit each other. However, because the borders drawn by the Europeans are not real to these communities from a traditional perspective, their members often cross without passports or the like. This illustrates how land is a symbol of traditional community unity, power and sovereignty. This customary principle of identifying people with their land is even found in Article 1 of the Namibian Constitution, and it is one of the most important considerations of statehood under international law. Therefore, land is community in as much as the community is land and its people. Does the declaration of a town change this, either on paper or in people’s minds?

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8 (ibid.:section 1).
9 In those traditional authorities under the authority of a female ruler, like the Kwanyama.
The contrast between the powers of Traditional Authorities and those of town councils becomes apparent when we consider the provisions in other statutes that create the so-called local authorities. In terms of the Local Authorities Act, *local authority council* means any municipal council, town council or village council, and *local authority area* means the area declared under section 3 of the Act to be such municipality, town or village, as the case may be, or deemed to be so declared. Section 3 of the Local Authorities Act provides for the declaration of areas as local authority areas. The section in the Act reads as follows:

3. (1) Subject to the provisions of this section, the President may from time to time by proclamation in the Gazette establish any area specified in such proclamation as the area of a local authority, and declare such area to be a municipality, town or village under the name specified in such proclamation.

The above subsection was amended by the Local Authorities Amendment Act and the powers of the President to declare communal land a local authority area was effectively shifted to the Minister responsible for regional and local government and housing. This change was inserted by another change to the Ordinance which was passed in 2002. The current section 3, which empowers the Minister of Lands and Resettlement to declare communal land, not only shifts power to the Minister of Regional and Local Government, Housing and Rural Development, but also substitutes “notice” for “proclamation”. The section reads as follows:

3. (1) Subject to the provisions of this section, the Minister may from time to time by notice in the Gazette establish any area specified in such notice as the area of a local authority, and declare such area to be a municipality, town or village under the name specified in such notice. [Emphases added]

Section 3(b) is decisive concerning the powers of the Chief in regard to control over such proclaimed land. The section shifts the ownership and management powers regarding land to the local authority so created. This implies that the declaration of an area as a local authority shifts the balance of power regarding the assets and liabilities in the area so proclaimed in favour of the town council or local authority so created. Thus, the section stipulates as follows:

10 Section 1, Act No. 23 of 1992, as amended by the Registration of Deeds in the Rehoboth Amendment Act, 1994 (No. 35 of 1994); the Local Authorities Amendment Act, 1997 (No. 3 of 1997); the Local Authorities Second Amendment Act, 1997 (No. 14 of 1997); the Local Authorities Amendment Act, 2000 (No. 24 of 2000); the Local Authorities Amendment Act, 2002 (No. 17 of 2002); and the Local Authorities Amendment Act, 2003 (No. 27 of 2003).

11 Section 3, Act No. 24 of 2000.

12 The definition was amended by section 1, Act No. 24 of 2000.
3 (3) (a) If the area of any township or village management area established or purporting to have been established by or under any law on the establishment of townships or village management boards on communal land is, in terms of subsection (1), declared to be, or, in terms of subsection (5), deemed to have been declared to be, a municipality, town or village, the assets used in relation to such township or village management area and all rights, liabilities and obligations connected with such assets shall vest in the municipal council, town council or village council of such municipality, town or village, as the case may be, to such extent and as from such date as may be determined by the Minister.

The principle in this provision is duplicated in section 15(2) of the Communal Land Reform Act, which provides that communal land does not extend to the area declared a town or municipal area. The land declared a municipal area or town ceases to be communal area; hence, the Chief of the area ceases to have jurisdiction over that area. Section 15(2) provides the following:

15 (2) Where a local authority area is situated or established within the boundaries of any communal land area[,] the land comprising such local authority area shall not form part of that communal land area and shall not be communal land.

If a local authority area is situated within the boundaries of a communal area, therefore, Traditional Authorities will not have any say regarding land allocations in that proclaimed or declared local authority area. This stipulation answers the question as to what the powers of a Traditional Authority are in relation to communal land declared a local authority area: the Chief’s powers to allocate land in that area no longer exist. The powers of the Traditional Authority, as provided for in section 3 of the Traditional Authorities Act, do not extend to the control of urban land issues, and, thus, cannot be invoked. This position is legally sustainable since section 2 of the Traditional Authorities Act limits the jurisdiction of Traditional Authorities to traditional communities. To repeat: in terms of the Traditional Authorities Act, a **Traditional Authority** is a traditional body that has authority over a traditional community established in terms of the Act. Also in terms of section 1 of the Traditional Authorities Act, a **traditional community** is —

... an indigenous homogeneous, endogamous social grouping of persons comprising families deriving from exogamous clans which share a common ancestry, language, cultural heritage, customs and traditions, who recognise a common traditional authority and inhabit a common communal area and

13 In terms of section 2(2), “a traditional authority shall in the exercise of its powers and the execution of its duties and functions have jurisdiction over members of the traditional community in respect of which it has been established”.

14 Section 1, Traditional Authorities Act.

15 (ibid.).
may include the members of that traditional community residing outside the common communal area.

This definition of *traditional community* has its own controversial interpretation, but, aside from that, it is clear that *urban community* cannot fall under it. This means, in turn, that Traditional Authorities do not have jurisdiction over urban areas or areas declared or deemed to be under a municipal, town or village council.

**Perpetuation of apartheid laws or a two-track system of political authority?**

If an area has been declared a municipal, town or village council area, then Traditional Authorities no longer have jurisdiction over that area. It follows, therefore, that the municipal, town or village council takes charge of all land allocations and the Chief’s powers are terminated once the relevant notice declaring a certain area as a local authority area in terms of the Local Authorities Act is gazetted. This finding finds further support in an piece of legislation hailing from the apartheid era in Namibia, namely Ordinance 11 of 1963. Of importance here is section 14, which reads as follows:

> 14 (1) When a township has been proclaimed an approved township, under the provisions of this Ordinance or any other Ordinance, the dominium of the land therein comprising all public places shall ipso facto vest in the local authority within whose area of jurisdiction such land is situated, or if such land is not situated within the area of jurisdiction of a local authority, in the Executive Committee in trust for any local authority which may thereafter be constituted in respect of the area within which such land is situated.

After Independence in 1990, the Namibian legislature did not change the law in any way on this; instead, they came up with an amendment to the Ordinance, which effectively reinforced the old principle.\(^{16}\) The amended section 14 of the Ordinance now reads as follows: \(^{17}\)

> When a township has been proclaimed an approved township, under the provisions of this Ordinance or any other law, the dominium of the land therein comprising all public places shall *ipso facto* vest in the local authority within whose area of jurisdiction such land is situated, or if such land is not situated within the area of jurisdiction of a local authority, in the *State* in trust for any local authority which may thereafter be constituted in respect of the area within which such land is situated. [Emphases added]

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\(^{16}\) Section 14 of the Ordinance was amended by section 4 of the Townships and Division of Land Amendment Act, 1992 (No. 28 of 1992).

\(^{17}\) (ibid.).
Basically, the independence legislature substituted “any other Ordinance” with “any other law”. Also of great interest is the change regarding ownership of communal land. The Ordinance vested declared or proclaimed land which is not part of local authority area in an Executive Committee “in trust for any local authority which may thereafter be constituted in respect of the area within which such land is situated”. As the law stands now, declared or proclaimed land which is not part of a local authority area is vested “in the State in trust for any local authority which may thereafter be constituted in respect of the area within which such land is situated”.

Thus, if the Minister declares certain territory a local authority area under the Local Authorities Act, as amended, then such land is no longer under the relevant Traditional Authority’s jurisdiction – even if the local authority area has not yet been established. The land is vested in the state in trust for the local authority to be established. This is an interesting change in that the ownership of such land does not actually change: the section in essence only makes sure that the land is no longer vested in the state for the benefit of the community as per section 17 of the Communal Land Reform Act. This change is what sums up the change as regards the vesting of land, and it establishes the setting in which traditional powers over declared or proclaimed land are dislocated. If the land is no longer vested in trust for the communities concerned, it means that communities have no claim whatsoever against the government over such land. This finds support in sections 16(1)(c) and 29(1)(c) of the Communal Land Reform Act, which – subject to stipulated procedural imperatives (discussed below) – recognise the withdrawal of land from communal land.

There is no law granting Traditional Authorities the power to allocate land which is not communal land. The Independence Government did not change the law in this regard. In terms of section 15 of the Ordinance as amended by section 4 of the Townships and Division of Land Amendment Act, the Minister may authorise any land which is held by the state under the provisions of section 15, which land is held in trust for a future local authority to be constituted, to be used by any public body established for the township or for the portion of the township in which that land is situated, or to be devoted to the use and benefit of the inhabitants of the township in such manner and subject to such conditions as the Minister deems fit. This gives the local council concerned the power to allocate the land over which such council has thus assumed authority.

In light of the above web of statutory provisions, it can be seen that the power of traditional leaders to control all means of production in former communal

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18 Section 14, Ordinance 11 of 1963.
19 Section 14 of the Ordinance was amended by section 4 of the Townships and Division of Land Amendment Act, 1992 (No. 28 of 1992).
20 Section 14 of the Ordinance, as amended by section 4 of the Townships and Division of Land Amendment Act.
land which is now a local authority area has been seriously eroded. The power to control communal land use and/or the means of production on communal land is one of the props of traditional authority. These props, which reinforced the leadership of Kings, Queens and Chiefs, have slipped away and given in to modern statutes. To be more sympathetic to traditional leadership, the old traditional and religious beliefs faded as rural and urban Namibia became largely Christian – or at least Judeo-Christian. However, with statutory recognition of traditional structures, chiefdoms and kingdoms will never die in Namibia and cannot be regarded as an endangered social structure. Although such traditional leaders have lost much of the economic clout they had in former times, they are still legally recognised and respected. On the other hand, they remain outside the community of those who are voted to serve on local councils, but their voices are heard parallel to the elected by way of the Council of Traditional Authorities.

However, because their voice is not the final say on any matter whatever, it seems that Traditional Authorities will remain only informally influential in the politics and legal discourse of the nation. Of important note here is that, under section 16 of the Traditional Authorities Act, traditional leaders are expected to submit to modern political authorities in the arena of modern governance and national planning.\(^{21}\) It seems, however, that this is not always the case in practice – especially if we consider the planned Epupa Dam project. The project was derailed after the Himba traditional community objected to the national government’s plan to develop a dam in the Himba heartland.\(^{22}\) It appeared that customary law had trumped national developmental plans in this instance. Thus, section 16 of the Traditional Authorities Act cannot be interpreted to mean that Traditional Authorities always have to submit to the authority of elected leaders or central government authorities.

The fact that a local authority area is deemed to be held in trust by the state for the benefit of the inhabitants of an officially proclaimed local authority area and that the relevant Minister does with such land as s/he deems fit means that traditional leaders have no say in what a local authority does with former communal land. This is further supported by section 10 of Ordinance 11, which provides that the land declared a local authority area vests in such local authority. The section reads thus:

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(10) \text{If, by any subdivision in terms of this section, new public places are created, the dominium of the land comprising such public places shall } \text{ipso facto vest in the local authority within whose area of jurisdiction}\]

\(^{21}\) Section 16 of the Traditional Authorities Act requires Traditional Authorities to cooperate with central government and its decentralised offices, and to refrain from actions that would undermine the central government.

\(^{22}\) For more detailed discussions on this case, see Harring, S. 2001. “‘God gave us this land’: The OvaHimba, the proposed Epupa Dam, the independent Namibian state, and law and development in Africa”. The Georgetown International Environmental law Review, XIV(1).
such land is situated, or if such land is not situated within the area of jurisdiction of a local authority, in the State in trust for any local authority which may thereafter be constituted in respect of the area within which such land is situated. The provisions of subsections (2) and (3) of section 14 and the provisions of section 25 shall, mutatis mutandis, apply to all such land.

Ownership of communal land

General

The above discussion takes us to section 17 of the Communal Land Reform Act, which provides that all communal land is vested in the state in trust for the benefit of the communities resident on such land:

17 (1) Subject to the provisions of this Act, all communal land areas vest 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.

(2) No right conferring freehold ownership is capable of being granted or acquired by any person in respect of any portion of communal land.

The declaration of local authority areas is one of the ways through which the state can promote social and economic development. Hence, a local authority area can be declared a town to encourage urban development and business investments in former communal areas. In this light, section 17 of the Communal Land Reform Act can be used by the state to claim ownership of all communal land. The contentious issue is the meaning of the word vest, which has been interpreted by the government and some academic authors to mean “ownership”. However, some authors have questioned the concept of communal land being held in trust. For example, if the government holds the land in trust, does it own it? Considering that the concept of trust does not connote ownership, if the state holds the property in trust only, it implies there are owners – i.e. the communities – on whose behalf such a trust is formed.

The controversy of vest

Section 17 of the Communal Land Reform Act does not use the word ownership. In fact, the term is used only once in the entire Act, i.e. in section

See, for example, the position of the Legal Assistance Centre in LAC & NNFU/Legal Assistance Centre & Namibia National Farmers' Union. 2003. Guide to the Communal Land Reform Act, Act No. 5 of 2002. Windhoek: Legal Assistance Centre, p xvii.
17(2) (see previous citation), which translates as being that the ownership of land in Namibia only exists as freehold, and no such right of freehold can be granted on communal land.

Section 17(1) is now surrounded by some controversy regarding the actual meaning of the word *vest* in the context of the section. Starting from a number of definitions given for *vest* in the *Macquarie Dictionary*, for example, none refers to ownership. The most relevant sense of *vest* is as follows:

Settled or secured in the possession of a person or persons, as a complete or fixed right, an interest sometimes possessory, sometimes future, which has a substance because of its relative certainty.

The general meaning of *vest* from the *Macquarie* accords with the sense the term is given in the *Australian Legal Dictionary*, where it is said to refer to a "legal right or interest accruing". A second sense of *vest* relates property law:

To effectively transfer legal ownership, rights or powers to another or place property in the possession or control of another; when a legal right or interest accrues to a person on the happening of the contingency or condition precedent to its vesting such as lapse of time or determination of a prior interest.

At traditional governance level, communal land is a community resource that gives rise to community-based resource rights like the right to land. The fundamental characteristic of community-based property rights is that their primary legitimacy is drawn from the community in which they exist, and not from the nation state in which they are located. In other words, community property rights are derived from the customs of a community, which are a form of a constitution for that community. Lon Fuller contends that modern customary law should be seen as ...
Thus, custom stands as a constitution for the people who live according to it. This is a clear reflection of custom as a system of law. The power of custom is found in the fact that it is reflected in people's conduct toward each other. The further a society moves away from customary law systems and their internal control mechanisms, the greater is the perceived need for laws coercively enforced by the state.

In light of the above exposition about custom, it should be noted that, although the classification of legal rights as vested or otherwise is well known, it is not easy to provide a definitive statement of the meaning of the term. This is due in part to some difficulty inherent in what vest means, but the main source of trouble is that, in both popular and legal parlance, the terms vested and contingent bear different meanings in a legal rights context.\(^{29}\)

According to Cowen,\(^{30}\) a legal right is a consequence attached by law to a fact or combination of facts which the law defines, and is often referred to as the title of the right to, for example, ownership. The distinction between vested and other types of rights serves to indicate the holder of the right's title to it.\(^{31}\) Vested rights are, for example, relevant for purposes of the law of succession, estate duty, transfer duty, insolvency, trusts, and income tax. Jewish Colonial Trust Ltd v Estate Nathan\(^{32}\) is almost always quoted, as it is here too, when the meaning of the phrase vested rights is analysed:

Unfortunately the word “vest” bears different meanings according to its context. When it is said that a right is vested in a person, what is usually meant is that such person is the owner of that right — that he has all rights of ownership in such right including the right of enjoyment. … But the word is also used in another sense, to draw a distinction between what is certain and what is conditional[:] a vested right as distinguished from a contingent or conditional right.

In this light, therefore, in the case of a conditional right or interest, no vested right is acquired prior to fulfilment of the condition.\(^{33}\) Thus, in Jewish Colonial Trust, Watermeyer JA distinguishes between two uses of vest: one indicates ownership (including enjoyment) of a right; the other, an unconditional right. The answer to the question of where the right is vested can, thus, conveniently be –

\[^{30}\] (ibid.:404–405).
\[^{31}\] Durban City Council v Association of Building Societies, 1942 AD 27.
\[^{32}\] 1940 AD 163 at 175.
\[^{33}\] De Leef Family Trust & Others v Commissioner for Inland Revenue, 1993 (3) SA 345 (AD) at para. 13.
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certain. It must be determined with reference to the language … properly interpreted in the light of the admissible surrounding circumstances.

According to Van der Merwe, the first use of vest refers to the ownership of a right and not to the ownership of the benefit or asset as such. Van der Merwe says that it may not be terminologically correct to use ownership in relation to a right. When the term ownership is used to indicate the relationship between a person and a legal object, it usually contemplates the right to a physical object or thing.

As always, however, there are exceptions. For example, a usufructuary interest in a personal right or a bond in respect of a usufructuary right has been acknowledged under 69 of the Deeds Registries Act, and is basically a right to a right. Ownership usually connotes the most complete real right a person can have in relation to a legal object. Dogmatically, a person is entitled to a right, or is the holder of a right.

Incorrect use of the word vest can cause confusion, as the impression is created that the person who has a vested right to a benefit is also the owner of that benefit. A disposition in a will (or a contract, for that matter) does not transfer ownership of corporeal property to a beneficiary: it only disposes of rights in favour of beneficiaries.

Rights may be vested or conditional. Van der Merwe, taking authority from various cases and from Cowen, thus says that “[t]he vesting of a right does not mean that a right of ownership in the thing is obtained”. An example is given of a legatee who does not acquire the dominium in the property immediately on the death of the testator, but acquires a vested right to claim from the testator’s executors at some future date the delivery of the legacy – after confirmation of the liquidation and distribution account – as was decided in Greenberg & Others v Estate Greenberg.

This means that the state does not own communal land in the sense of absolute and exclusive dominion over the resources thereon. In communal areas which are not yet declared local authority areas, community-based property rights already exist among the community members; something is seriously wrong,

34 See Jewish Colonial Trust Ltd v Estate Nathan, 1940 AD 163 at 175–176.
36 (ibid.).
37 No. 47 of 1937.
38 Van der Merwe (2000:320).
39 Van der Merwe (ibid.), taking authority from Commissioner for Inland Revenue v Estate Crewe & Another, 1943 AD 656 at 667.
40 Cowen (1949:417). Thus, a vested right entails an indefensible right, including the right of enjoyment, even though it may be postponed.
41 (ibid.); see also Van der Merwe (2000:320).
42 1955 (3) SA 361 (A) at 364.
therefore, when community members are obliged to request their national governments to grant them property rights.\textsuperscript{43} In essence, this means that the notice gazetted by the Minister under the Local Authorities Act takes away these property-based rights and vests them in the state for the benefit of the local authority to be formed or already formed.

Wolfgang Werner states that that vest means “own”.\textsuperscript{44} Considering the interpretation above and the elaboration thereof, this conclusion – like others to the same effect – would be wrong. For example, the Legal Assistance Centre submits the following:\textsuperscript{45}

Section 17 makes it very clear that all communal land areas vest (belong to) in the State, which must keep the land in trust for the benefit of the traditional communities living in those areas. Because communal land belongs to the State, the State must put systems in place to make sure that communal lands are administered and managed in the interests of those living in those areas. The Act does this by incorporating the offices of the Chief or the Traditional Authority and by creating Communal Land Boards which will work together to ensure better communal land administration. [Emphases added]

In response to this it should be noted that section 17 of the Communal Land Reform Act does not make it “very clear” that all communal land is owned by the state; hence, the Legal Assistance Centre is also wrong.

The above explanation shows that the word vest does not mean “ownership”: it remains subject to a number of interpretations, none of which leads to absolute ownership. This point does not change the position of the Legal Assistance Centre and the Namibia National Farmers’ Union regarding the obligations which the state has in regard to the administration of communal land. The explanation below highlights this and expands on the position taken in this paper.

\textbf{Vest for the purpose of trust administration}

It should be noted that a right can be vested for the purpose of administration. The court in Greenberg & Others v Estate Greenberg confirms this when it

\begin{itemize}
\item\textsuperscript{44} See, for example, the conclusion by Wolfgang Werner, who says that “[i]n a formal legal sense, the State is the owner of all communal land”; Werner, W. 2000. “Land and resource rights: Namibia case study”. Case study prepared for the Inaugural Workshop of the Pan-African Programme on Land and Resource Rights, Cairo, 25–26 March 2000. p 1; available at <http://www.acts.or.ke/paprr/docs/PaperCairo-fianloutput.pdf>; last accessed 30 March 2009.
\item\textsuperscript{45} LAC & NNFU (2003:xvii).
\end{itemize}
indicates that, with reference to a beneficiary’s rights, the term _vested_ can have different meanings:46

When “vested” is used in this sense it is not however necessary that the right of enjoyment should accrue to the person in whom the property is vested. Property may be vested in someone purely for purposes of administration.

The above means that ‘transferring’ the administration of land from the declared local authority area which is envisaged under section 14 of the Ordinance and section 3 of the Local Authorities Act is misplaced: the state cannot transfer a vested right. A right is only transmissible when it forms an asset in a beneficiary’s estate and is transmissible to the heirs, representatives, or cessionary upon its cession. For clarity, the law of succession can inform us here. _Vesting_ and _transmission_ are normally so closely associated in the law of succession that they are sometimes regarded as synonyms, or at least necessary correlatives.47 This is not correct, according to Van der Merwe,48 who says that while transmission is a normal consequence of vesting, it is not a necessary consequence.49

The trust formed under section 17 is a special form of a trust – a public trust. It is unconceivable that there can be a trust of this special nature where no legal obligations arise if the state fails to develop a declared local authority area as is the motive under the section. As the trustee of communal land, the state, according to the available statutory powers, has the discretion to develop the area or not. In other words, the section prevents the community involved from claiming full control and authority over communal land. Authority for this semantic intricacy can be derived from tax law cases.50 The analysis below offers a close scrutiny of the relationship between the state and traditional communities residing on communal land, and offers a model for the state to follow in dealing with communal land.

**Procedural matters**

In terms of section 16 of the Communal Land Reform Act, the President, with the approval of the National Assembly, may, by proclamation in the _Gazette_, withdraw from any communal land area any defined portion thereof which

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47 _Samaradiwakara & Another v De Saram & Others_, 1911 AD (PC) 465 at 469–470; _Estate Kemp v McDonald’s Trustee_, 1925 AD 491 at 500.

48 Van der Merwe (2000:323).

49 _In Re Alien Trust_, 1941 NPD 147 at 156; _Commissioner for Inland Revenue v Sive’s Estate_, 1955 (1) SA 249 (A) at 257; and Cowen (1949:417).

50 _ITC_ 1570 (1994) 56 SATC 120; see also _ITC_ 1520 (1991) 54 SATC 168 for an example of a very loose application of this test in order to obtain the desired practical effect.
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is required for any purpose in the public interest, and in such proclamation may make appropriate amendments to Schedule 1 to the Communal Land Reform Act so as to redefine any communal land area affected by any change under the declaration. The fact that the President needs authorisation from the National Assembly shows a clear distinction between South Africa’s wall-to-wall system and the Namibian system, in which Traditional Authorities have no direct say in central government decision-making processes. Thus, Traditional Authorities have only an indirect voice in Parliament, and according to the latter Act, no communal land can be withdrawn without parliamentary authorisation.

In addition to the stipulated procedures described above, concerning the conversion of land from communal land to townland\textsuperscript{51} or any other type of local authority area, subsection 2 of section 16 of the Communal Land Reform Act provides that communal land may not be withdrawn unless prescribed statutory procedures are met. Section 16(2) of the Communal Land Reform Act provides the following in particular:

\begin{enumerate}
\item \text{Land may not be withdrawn from any communal land area under subsection (1)(c), unless all rights held by persons under this Act in respect of such land or any portion thereof have first been acquired by the State and just compensation for the acquisition of such rights is paid to the persons concerned.}
\end{enumerate}

This illustrates that the state does not have absolute ownership and control of land in communal areas. The position is that the community-based rights – which include the right of ownership of land – have to be respected first. Therefore, in order for land to be withdrawn and in order for the state to absolutely own the land which is to be declared a local authority area, in terms of section 16 it has to acquire the community-based rights which the community has. These community-based rights, as explained above, include the right to ownership of land or, in simple terms, the right to land. Therefore, the state first has to acquire the right of ownership before such land can be effectively withdrawn from communal land. This also explains why, under section 16(2), the state is compelled to compensate the inhabitants for loss of the rights on the land they inhabited – or, in essence, owned. It is this loss, among others, which is compensated. The said compensation payable to a person in terms of subsection (2) must be determined either –

\begin{itemize}
\item by agreement between the Minister of Lands and Resettlement and the person concerned, or
\end{itemize}

\textsuperscript{51} \textit{Townland} means the land within a local authority area situated outside the boundaries of any approved township which has been set aside for the mutual benefit of the residents in its area, and for purposes of pasturage, water supply, aerodromes, explosive magazines, sanitary and refuse deposits or other public purposes or the extension of such township or the establishment of other approved townships. See section 1 of the Local Authorities Act.
• failing such agreement, by arbitration in accordance with the provisions of the Arbitration Act.\(^{52}\)

What, one may ask, is the need for such agreement, and what is the need for arbitration should agreement not be reached? One may say that there is no vertical relationship between the Government and the community in such an agreement. The agreement is a private one: thus, the Government cannot invoke state authority to override the powers and rights of communities. This is further supported by the point that it is only when the compensation procedure has been followed that communal land can rightfully be regarded as lawfully withdrawn; any portion of a communal land area thus withdrawn and for which compensation has thus been paid ceases to be communal land, and becomes available for disposal as state-owned land. The jurisdictional question under the statute, therefore, is whether compensation has been paid so as to allow the state to withdraw communal land. In the light of this jurisdictional fact, it is clear that the Minister cannot act lawfully under section 3 of the Local Authorities Act without first respecting section 16 of the Communal Land Reform Act. It should be noted that, although this network of statutes is not well coordinated, but the procedure has to be followed.

In the case of newly declared local authority areas which have caused disgruntlement in northern Namibia, therefore, if all compensation was paid and the recent proclamation of these areas was done procedurally in terms of section 3 of the Local Authorities Act, and if section 16 of the Communal Land Reform Act was respected, then the Traditional Authority would not have a say on what is happening in Helao Nafidi – no matter how aggrieving it would be on the part of the communities who live there. Section 16 of the Communal Lands Reform Act gives validity to the notice under section 3 of the Local Authorities Act, and it gives meaning to section 14 of the Ordinance of 1963, as amended in 1992.

**Internal conflict of laws and its effect on Namibian land law**

The conflict between statutes and customary law in the proclamation of local authority areas can be explained as a clash between traditionalism and modernism. *Tradition* is a cultural force with social, economic, and political correlates.\(^{53}\) This becomes clearer as we consider that Traditional Authorities in northern Namibia can strategically use tradition to resist the homogenising, atomising, and alienating effacement of history and particularity – the cost paid by post-modernity that, to many, seems inevitable in the new global order.

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52. No. 42 of 1965.

The position of Traditional Authorities in northern Namibia finds expression in international jurisprudence as we note that the ‘founders’ of the Traditionalist School, René Guénon and Ananda Coomaraswamy, did not talk about ‘traditionalism’ but about the religious, metaphysical and esoteric traditions of the world, in light of the one truth from which all such traditions proceed, and to which they provide formally distinct but essentially equivalent paths of return. The said authors defined tradition as the transmission of a perennial wisdom, unanimous in essence, from the beginnings of the human race to this present moment: a transmission punctuated and channelled by spiritual or even divine revelations and sanctioned by community leaders who lead under the instruction of the spiritual, ‘original’ or traditional world.

The systems of modern government are not guided by perennial wisdom. In essence, the legitimacy of traditional governance under Traditional Authorities and under central government or the decentralised offices thereof stand on opposite sides. The modern government derives its legitimacy from elections, whereas there is generally no election at traditional level. The position of Traditional Authority leaders in relation to elected members of local authorities is clearly shown by the provisions of Part II of the Local Authorities Act, which deals with the election of local authority officials. Without elections and subsequent procedural issues like oaths of affirmation, there would not be a legal local authority. Thus, it is apparent that local authorities do not derive their authority from traditional structures and are not subject to customary laws. In essence, the fact that Traditional Authorities do not have jurisdiction over an area declared a local authority area implies that such areas can never be subject to customary land law. Indeed, proclaimed local authority areas are now governed by statutory laws as opposed to customary laws, which in turn entail contrasting titles to land. While local authority laws on land entitlement are derived from national legislation, native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.

It is, therefore, not surprising that Traditional Authorities in northern Namibia are clashing with local authority officials over land allocation. Of importance

56 (ibid.).
57 Mabo v Queensland [No. 2], (1992) 175 CLR 1 at 58. Many other cases were decided in this line; see e.g. Calder v Attorney General of British Columbia, [1973] SCR 313; St Catherine’s Milling and Lumber Company v The Queen, (1888) 14 App Cas 46, at 54; Kruger & Manuel v The Queen, (1977) 75 DLR (3d) 434; AG for Canada v AG for Ontario, [1898] AC 700; and Te Weehi v Regional Fisheries Officer, [1986] 1 NZLR 680, 691–692.
here is the King of the Ndonga, who is opposed to the actions of Chinese businessmen, who are blocking off *iishana*\(^58\) for the purpose of erecting business structures. From the perspective of Traditional Authorities, the change in power to control land allocation is an insult to customary authority. Can this be called a clash of civilisations? Traditional Authorities keep trying to enforce customary laws regarding land rights, in ignorance of the fact that they no longer have the right to allocate land in declared local authority areas.

This relationship of conflict between state and customary laws evidences the compelling nature of customary law. According to Woodman, *custom* means the practices of the people.\(^59\) But it is important to remember that custom is not simply what people practice: it expresses a set of values of communal life, as well as a way of maintaining order and relations of power. Chanock puts it as follows:

> This tends to be forgotten in situations in which custom derives its identity from a contrast with, and an opposition to, and a rallying point against, the law of the state. The external, written, bureaucratized, enforceable order challenges the order of the local communities. Custom seeks to establish itself as representing something special about the local societies in terms of long-lived, and therefore acceptable and right practice, or as the expression of their cultural essence.\(^60\)

Indeed, the “external, written, bureaucratized, enforceable order challenges the order of the local communities” in Namibia, and the allocation of land by Traditional Authorities is the “acceptable and right practice” in communities, and it is a strong “expression of their cultural essence”. This explains why Traditional Authorities find it hard to accept that they have no power to allocate land in a proclaimed local authority area. This has been evidenced by the events surrounding Helao Nafidi, where Traditional Authorities have been in conflict with Chinese companies which closed the *iishana* used by community members. The existence of a local authority area cannot find explanation in traditional laws but in statutes governing local authorities; thus, a Chinese businessman, for example, will not understand when a Traditional Authority asks him to stop blocking off the *iishana*. The misunderstanding is easily explained by the differences in the spheres of law in which the two men operate. According to Masaji Chiba,\(^61\) there are three spheres of law, namely –

\(^58\) The plural of *oshana* (a slight depression temporarily filled with rain water) in Oshiwambo.


While these spheres will not be explained here in more detail, suffice it to say that the example of the Chinese businessman and the local authority under which his business is operating falls under the so-called official law, whereas the Traditional Authorities operate under customary law. The Chinese businessmen who are blocking off *iishana* obtain authority to do so from local authority laws, that is, the official land law regarding municipal land allocation, which is different from the unofficial customary law which Traditional Authorities follow. Therefore, the actors in this clash are operating under two different spheres of law.

Traditional authorities often find themselves operating under unofficial laws derived from customary law originating from the obligatory nature and power of customs. The power of custom is found in the fact that it is reflected in the conduct of people toward one another. Thus, the further a society moves away from its customary law systems, the greater the need for laws coercively enforced by the state.62

The coercive enforcement of state law in the context of the Helao Nafidi incident will cause even more polarisation not only between statutory and customary law, but also between the state and Traditional Authorities, since the feelings of apartheid state brutality have not been forgotten. Indeed, the Government has been very cautious about this internal conflict of law, because it has the potential of creating political conflict. The fact that customary law is confirmed by the Namibian Constitution means that the state is obliged to respect customary structures. For this reason, the statutes provide for procedures to be followed in a case where a portion of communal land is to be withdrawn from a larger communal area. For example, section 17(2) of the Communal Land Reform Act requires compensation to be paid if the withdrawal affects customary or communal land rights, as explained above. It should be noted that the statutes may try to strike a balance between traditional and local government powers, but the internal conflict of laws will always be a living reality that may derail certain developmental projects such as the declaration of local authority areas. The constitutional confirmation of customary law is of little help in this instance, since the same confirmed customary law is subjected to the authority of statutory law when it comes to the proclamation of local authority areas.

However, with the constitutional confirmation of customary law and its appearance in a number of pieces of legislation, we see that the distinction

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between customary law and official law is blurred. This distinction shows
the difference of existence of laws in a pluralistic society whereby traditional
Authorities are governed by both state and customary laws. Some would say
that Traditional Authorities are unofficial institutions and that local authorities
are formal. Notably, a key distinction is that formal institutions are those
backed by the law – implying enforcement of rules by the state – while informal
institutions are upheld by mutual agreement, or by relations of power or
authority, and where rules are, thus, enforced endogenously. This means that
Traditional Authorities in Namibia are both formal and informal because they
are backed by the Traditional Authorities Act and unofficial customary law and,
at the same time, have rules that are enforced endogenously: their structures
are upheld by mutual agreement or by relations of power or authority.

The question that arises now is whether customary law is not official law under
Article 66 of the Constitution. This question can be answered most convincingly
in the affirmative, but again, we should note that the living customary law is not
necessarily part of the Constitution. Therefore, it can be said that the forces of
tradition and modernity are at play whenever there are conflicts between local
authorities and Traditional Authorities. Governance at central government
level is mainly viewed as being from the top down. This stands in contrast
to the traditional way of governance, where the law of the community flexibly
governs traditional life. This law is autochthonous and local, which is why it
is also called the peoples’ law as opposed to the modern central government
law, the latter often being referred to as power’s law.63

In opposing the power of local authority law in the allocation of land, Traditional
Authorities seem to be trying to assert their authority over the power’s law. That
land can only be allocated by the King, Queen or Chief seems to be the only
‘truth’ for Traditional Authorities. According to Nayar, an underlying thrust of
the conceptual and practical implication of peoples’ law as opposed to central
government law is the reclaiming of peoples’ rights to ‘truth’, manifestly in
“the reappropriation from dominant sites and processes and the narratives of
history and futures.”64 From this one can discern that, central to the politics of
peoples’ law, is the reclaiming of the right to right judgment. The withdrawal of
communal land in this regard can be regarded as a way of silencing Traditional
Authorities in the land allocation process – as indeed it is, since withdrawal of
communal land comes with the removal of traditional power. This runs counter
to the way customary structures work in the application of the peoples’ law.
The process through which peoples’ law is made rejects the negation of voice;
however, the process entails that the exclusionary tendencies of power’s law.
Hence, the Traditional Authorities Act and the Communal Land Reform Act

and Global Development Journal, 1. Available at http://elj.warwick.ac.uk/global/
64 (ibid.).
can jurisprudentially be regarded as legislative instruments which seek to emphasise the validity of peoples’ fora of judgment, of ‘doing law’. This is well supported by Nayar, who writes as follows:65

The people of peoples’ law may determine the issues of contestations for themselves; they may affirm solidarities notwithstanding these contestations. They are not fictitious ‘law-models’ in any ‘original position’; they exist in real time, real place and with real hopes, convictions, uncertainties. They do need it to be repeated unto them the patronising benevolence of ‘civilised’ law’s promise of objective and universal resolution of their conflicts. The peoples of peoples’ law are aware and conscious of their own need for critical self-reflection and corrective action. They move in fluid form and evolve into political manifestations. The peoples in peoples' law are a lived consciousness. They are self-defining. And for all their ‘messiness’ as a ‘legal concept’, they are the richer in their political voice.

It is clear from the Namibian statutory framework that there is no way Traditional Authorities can gain the power to allocate land in local authority areas or be consulted in the process of such allocation. The declaration of land as a local authority area and the removal of the Traditional Authority’s jurisdiction over such former traditional structures is a reality which Traditional Authorities have to accept, albeit painfully. The declaration or proclamation is in itself an idea which embraces the concept of urbanisation – and that with a strong Western orientation. In this light we see that the powers of Traditional Authorities are victims of the internal conflict of laws and, in particular, the triumph of Westernisation over traditional power. It can be concluded in the context of Namibia’s current statutory law that the project of Westernisation cannot fail to cause friction with traditional culture, rooted as the latter is in the unique history of each community.66 In the context of clashes between local authority officials and Traditional Authorities in respect of land surrounding Helao Nafidi, it should be noted that Westernisation elicits three principal responses from traditionalists:67

- Attempts to suppress or, if possible, eliminate traditional culture, which is viewed as an impediment to modernisation
- Bitter resistance to modernisation, which is considered a threat to the traditional culture, and
- Efforts to accommodate and develop both modernisation and the traditional culture without destroying the latter, in the recognition that modernisation is historically inevitable or otherwise indispensable to national independence.

65 (ibid.).
67 (ibid.).
The three points listed above are clearly manifested in the process of urbanisation in Namibia and, in reality, the three attitudes are of course complexly intertwined; indeed, it is inconceivable for any one of them to be present alone. The difficulties encountered in putting the third response into practice are not hard to imagine. Tradition is clearly at play against the inevitable force of urbanisation, which is an element or facet of modernisation and globalisation. In this light, the internal conflict of laws in Namibia will always evidence the tradition/modernity dichotomy. This conflict also causes problems, for example, when it comes to cooperation in developmental projects.

In the light of the above, the proclamation of a local authority area under the Local Authorities Act is a juristic act that can be categorised under the concept of modernity. Equally important is the point that modernity – with its chaos of conversation; its chaos of lifestyles; its attitude that there is nothing more sacred than supremacy of the central government, central legislature and the dictates of the rich and powerful – is viewed as an inevitable reality. Modernity, therefore, is an assault on the dictatorship of relativism. Modernity does not respect traditional structures; it is on the opposite end of the spectrum of development, and stands opposed to tradition. Tradition, therefore, has to give in to modernity. It is for this reason that Traditional Authorities lose their power over land that has been declared a local authority area.

The events in Helao Nafidi regarding the proclamation of local authority areas indicate that community resistance to tenure imposition can be vociferous. However, such resistance can easily be thwarted by a colonising power. In independent Namibia today, although force is not being used, community resistance has nonetheless been thwarted by Government land tenure programmes, and the communities’ political set-up has been seriously weakened as a result.

The reality of traditional power structures cannot be ignored by the central government, for such structures carry the voice of the majority of the Namibian populace. If the majority of rural Namibia depend on traditional power structures for daily governance and dispute resolution, then the power of custom is clearly much stronger than can be contemplated under the constitutional confirmation of customary law in Article 66. This becomes self-evident if we

68 (ibid.).
70 (ibid.).
consider Chanock, who superbly explores customary law in what he calls the “Third World”, the role of customary law in the absence of a powerful state legal system, and the impact of international organisations/international law in validating customary law.\(^\text{72}\) The transformation effected by the application of Western notions of customary law to indigenous systems across the colonised world has evidently reordered societies and rewritten ‘traditional’ ideas and notions. Chanock explores the inherently dynamic nature of customary law, stating that “[t]raditional does not mean inflexible adherence to the past: it simply means time-tested and wise”\(^\text{73}\). However, the “time-tested and wise” principles will always give way to modern pieces of legislation which promote modernity or promote adherence to international standards as opposed to customary practices at community level – as is happening under Namibian local authority land law. In this light, it is not surprising that numerous conflicting or competing rule orders exist in Namibia, as they do in most of Africa, “characterised more often than not by ambiguities, inconsistencies, gaps, conflicts and the like”.\(^\text{74}\)

Be that as it may, the two institutions continue to coexist, but also interact in a complex and dynamic manner. Sally Falk Moore asserts that reglementary processes which include modern government attempts to enforce laws and control the behaviour of traditional leaders through the use of explicit rules from formal laws take place at a multiplicity of levels within society, and within a variety of social fields.\(^\text{75}\) With regard to community-based resource management, particularly land management, institutions mediating resource use need to be located within a complex institutional ‘matrix’ which links the position of social actors at the micro-level to the macro-level conditions that prevail in the wider politico-economic context.\(^\text{76}\) Including an analysis of power and difference as central issues allows us to see that these matrices are likely to be very messy, and characterised by certain “gaps, ambiguities and conflicts”, as highlighted by Moore.

**Conclusion**

The statutory position indicates that, although Traditional Authorities have the primary power to allocate land in communal areas, these powers are


\(^\text{73}\) (ibid.).


\(^\text{76}\) (ibid.).
extinguished when such land has been declared local authority area because the land is no longer communal land. The declaration of a piece of land as a local authority area constitutes a withdrawal of communal land in terms of section 16 of the Communal Land Reform Act. This means that Traditional Authorities have no say in what happens to land which has been declared a local authority area in terms of the Local Authorities Act or the Townships and Division of Land Ordinance of 1963, as amended by the Townships and Division of Land Amendment Act of 1992.

The proclamation of local authority areas in Namibia shows the dictates of power’s law over peoples’ law in that power’s law is transforming the shape and politics of Traditional Authorities. Moore refers to the –77

… continuous making and reiterating of social and symbolic order as an active process existing orders which include traditional structures are endlessly vulnerable to being unmade, remade and transformed, sometimes conflicting, and sometimes inconsistent.

The making, repeal and re-enactment of the laws regulating Traditional Authorities in the post-colonial era is a classic example of power’s law prevailing over peoples’ law. According to Moore, institutional analysis must, therefore, include both a structural analysis of complexes of rule orders – which includes “questions of domination/autonomy, hierarchy/equivalence, proliferation/reduction, amalgamation/division, replication/diversification in the relations within and among the constitutive levels and units”78 – and a processual and actor-oriented analysis of struggle, i.e. of action which is “choice making, discretionary, manipulative, sometimes inconsistent, and sometimes conflictual”.79

This paper has shown that the internal conflict of laws in Namibia in general and the declaration of local authority areas has its jurisprudential background shrouded in legal duality and/or pluralism, and that law, whether customary or otherwise, is a system of representation: one that creates meaning within a system of power. The conflict regarding land allocation in urban and communal land evidences that the cultural significance of law as evidenced by the influence of custom should not be ignored. The general idea behind the internal conflict of laws is that customary law, as a product of custom, has inherent controversies. Even within such controversies as those regarding the declaration of communal land as local authority areas, it is observable that the powers of Traditional Authorities remain intact should the compensation procedures prescribed under section 16 of the Communal land Reform Act not be followed. This flows from the position that a declaration of communal land as a local authority area constitutes a withdrawal of communal land, and if such declaration affects the rights of the communities or communal residents concerned adversely, then the provisions of section 16 of the said

77 Moore (1975:3).
78 (ibid.:28).
79 (ibid.:3).
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Act become operational. In the context of the whole discussion, it is clear that the proclamation of local authority areas under Namibian law has its jurisprudential implications, which are philosophically evidenced in legal duality or pluralism and an internal conflict of laws.