1996

The Constitution of Namibia and the Land Question: The Inconsistency of Schedule 5 and Article 100 as Applied to Communal Lands with the "Rights and Freedoms" Guaranteed Communal Land Holders

Sidney Harring
CUNY School of Law

How does access to this work benefit you? Let us know!
Follow this and additional works at: http://academicworks.cuny.edu/cl_pubs
Part of the Law Commons

Recommended Citation
Harring, Sidney, "The Constitution of Namibia and the Land Question: The Inconsistency of Schedule 5 and Article 100 as Applied to Communal Lands with the "Rights and Freedoms" Guaranteed Communal Land Holders" (1996). CUNY Academic Works.
http://academicworks.cuny.edu/cl_pubs/294

This Article is brought to you for free and open access by the CUNY School of Law at CUNY Academic Works. It has been accepted for inclusion in Publications and Research by an authorized administrator of CUNY Academic Works. For more information, please contact AcademicWorks@cuny.edu.

SIDNEY L HARRING*

Schedule 5 of the Constitution of Namibia provides that ‘all property of which the ownership or control immediately prior to the date of Independence’ was vested in the Government of South West Africa ‘shall vest in the Government of Namibia’. More extensive provisions go on to define this as including any kind of property interest, any trust, and ‘any right or interest therein’. Article 100, under the title ‘Sovereign Ownership of Natural Resource’, provides that: ‘Land, water and natural resources below and above the surface of the land ... shall belong to the State if they are not otherwise lawfully owned.’ The Government of Namibia takes the position that this language gives it the ownership of communal lands.¹ All governmental policy relating to communal lands stems from this state ‘ownership’. Prime Minister Hage Geingob has gone further when, relying on Art 100, he stated that ‘people in the communal lands (some 65 to 70 per cent of the population) have no acknowledged right, independent of the will of the State, to live and farm in the Communal Areas’.² This asserted legal position, that the State ‘owns’ the communal lands and could therefore dispossess at will 70 per

* Professor of Law, City University of New York School of Law.
1 ‘Legal Opinion: Legal Position Relating to Land Occupied in Namibia on a Communal Basis’ Adv PC van der Byl, for the Ministry of Lands, Resettlement and Rehabilitation, (1992) 67-8. This opinion was prepared for the official purpose of determining the legal ownership of communal lands in Namibia, along with other purposes.
cent of the Namibian population,\(^3\) is wrong for a number of reasons.

I. COLONIAL AND APARTHEID ERA SEIZURE OF NATIVE LAND

Native\(^4\) land in Namibia and South Africa was generally seized by colonial authorities without compensation.\(^5\) Surely there is no need here to cite South African or British colonial law for the proposition that the Crown 'owns' native land. Among the most infamous cases in the common-law world is a southern African case, Re Southern Rhodesia upholding the summary dispossession of the Ndebele from their lands in Matabeleland\(^6\):

'The estimation of the rights of Aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usage's and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.'\(^7\)

No court in the world today would give effect to such legal reasoning, but it is precisely such reasoning that made native land 'crown land' in southern Africa.\(^8\)

---

\(^3\) The proposition has never been tested in the courts of Namibia, but would probably be accepted by most lawyers. The Legal Assistance Centre takes the same position as the government, stating that 'the Namibian Constitution clearly transfers ownership of all the communal lands which previously vested in any governmental authority . . . to the Government of Namibia. . . . Thus, after a confusing history of reservation and ownership, it seems clear that the ownership of all the land in Namibia (that) has been set aside for "native" occupation over the years now vests in the Government of Namibia' Legal Assistance Centre, 'Communal Lands in Namibia: The Legal Framework, Its Application, and Existing Practices' Republic of Namibia, National Conference on Land Reform and the Land Question, Windhoek, 25 June – 1 July, 1991, Office of the Prime Minister, vol 1, 61-97, at 71-72.

\(^4\) There are always difficulties of language when referring to tribal peoples. The early land laws used the term 'native' and I have often stuck to that usage. I have also used 'black' and 'tribal' where appropriate, but recognize that there are problems with each of these terms.

\(^5\) There is a large literature on the process of the alienation of Native land in Southern Africa and around the world. See Robin Palmer Land and Racial Domination in Rhodesia (1977); Sol T Plaatje Native Life in South Africa (1987); Colin Bundy The Rise and Fall of the South African Peasantry (1989); William Miller Macmillan Bantu, Boer, and Briton: The Making of the South African Native Problem (1983).

\(^6\) [1919] AC 211 CD 7509. Southern Rhodesia, Papers relating to a Reference to the Judicial Committee of the Privy Council on the Question of the Ownership of Land in Southern Rhodesia (1914). The context of the case is discussed in Robin Palmer op cit note 5.

\(^7\) Re Southern Rhodesia at 233-234.

\(^8\) The leading common-law case on not giving effect to such racist and colonial decisions is Mabo v State of Queensland 107 ALR 1 (1992). Among other holdings, Mabo requires that native title to communal lands must be determined by reference to traditional laws and customs, and not merely to colonial legal processes that native people did not have access to. Brennan J at 38-51; Dean and Gaudron JJ at 64-71 (both majority opinions.) Mabo is directly on point throughout in relation to the communal land issue in Namibia. Because of the lack of constitutional jurisprudence in Namibia, Namibian courts routinely make reference to applicable constitutional cases from other jurisdictions. Gino Naldi Constitutional Rights in Namibia (1995) 29.
While Adolf Luderitz purchased the original German lands from the Nama, the rest of the native lands in Namibia passed into white hands through a wide range of different processes, including private sale, lease, treaties, war and genocide. The fact of the agreements and the wars, however, proves that the lands of Namibia were not 'terra nullius', vacant lands that automatically became the 'property' of their discoverer. However acquired, all of this theft of land was probably 'legal' under German, British, and South African law, but there are serious problems with asserting this legality as the present basis of Namibian governmental ownership of communal lands. Indeed, the early British authorities in South West Africa authored a Report on the Natives of South West Africa and Their Treatment by Germany, explicitly to prove that the German's had brutalized the native people of the country and deprived them of their lands. While no modern authority would cite these seizures of native land as either legal, or justifying modern Namibian land law, the fact is that these land seizures are the modern basis of the idea that the state 'owns' Crown land, and the derivative idea that communally held land is a form of Crown land.

There can be no question that tribal peoples held land in complex land tenure arrangements that included clear recognition of individual or family rights to use certain parcels of land. Legal anthropologist Martin Chanock has exposed the myth of 'communal' land-holding as the convenient product of colonial legal systems that needed to define native land tenure as something other than 'individual' ownership. Numerous studies make it clear that native people inherited land rights as definite as European land rights. Native land was not 'communal land'

11 There is a complex colonial law that governs title to land seized in colonial enterprises. Namibia was largely (but not entirely) seized by Germany through conquest. Conquerors were obligated to recognize the private property rights of white citizens but, at common law, took title to all state property. Since African tribes did not fit easily into Eurocentric models, communal lands were seized by colonial authorities as 'Crown lands'. Since most often this seizure was in theory only, that is no direct exercise of dominion was exercised, it was many years later, after colonial power was consolidated, before native people were even aware that they had lost title to their communal lands.
until colonial authorities defined away all other forms of native land tenure.14

Various South African statutes, going back to 1913 and before, provide for government ‘ownership’ of communal lands. Presumably all of these statutes were valid under South African law. The Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1980), s 48bis was the last of these measures, and it is this measure that provides the basis for the Namibian government’s ownership of tribal communal lands. The Act created the homelands in Namibia. Up to that time, Namibian communal lands had been administered under the Bantu Trust and Land Act (1936) (Act No 18 of 1936).15

The original Crown Land Disposal Proclamation, 1920 (Proclamation 13 of 1920) extended the Crown Land Disposal Ordinance, 1903, of the Transvaal to South West Africa. Nothing more need be said about the details of these laws: the ‘ownership of native land’ was not only seized by colonial authorities as part of a racist regime of domination and deprivation, but native people were forbidden to own land in *fee simple*16 in ‘white’ areas, covering most of South Africa, later extended to South West Africa.17

Article 140 of the Constitution provides for a continuity of the rule of law after independence by stating that ‘subject to the provisions of this Constitution, all laws which were in force immediately before the date of independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court’. This provision leaves all of the racist apartheid era laws of South Africa part of the law of Namibia until the National Assembly or the courts either change the law or hold the law unconstitutional. It seems obvious, therefore, that some portion of the original law in force in Namibia at independence was unconstitutional.

15 Here it should be obvious that I have deliberately avoided a detailed statutory interpretation of the various land laws currently operating in Namibia because they are substantially irrelevant to my analysis, which focuses on the meaning of Schedule 5 within the broader framework of constitutional interpretation. This does not mean to deny the importance of this work in other contexts, nor that others may have different interpretations of the meaning of those land laws under Schedule 5.
16 Editor’s note: Fee simple is an American and English common law property term which in its absolute form means ‘an estate limited absolutely to a person and his or her heirs and assigns without limitation or condition. An absolute or fee-simple estate is one in which the owner is entitled to the entire property, with unconditional power of disposition during one’s life, and descending to one’s heirs and legal representatives upon one’s death intestate. Such estate is unlimited as to duration, disposition, and descendibility’. *Black’s Law Dictionary* 6 ed (1990) 615. Other *limited* forms of fee simple include fee simple conditional, fee simple defeasible, fee simple determinable. The closest translation for South African property law would probably be ownership or dominium.
17 Bundy op cit note 5 at 221-36; AJ Christopher *The Atlas of Apartheid* (1994) shows the racial basis of land allocation in both South Africa (at 32-33) and South West Africa, (180-184).
Of course, any law under the Constitution, no matter how blatantly racist or offensive, is not unconstitutional until a Court holds it to be so. A more difficult question, however, is what happens when two constitutional provisions conflict with one another. No provision of the Constitution, like Schedule 5 providing for the government ownership of communal lands, can be 'unconstitutional'. Rather, when any provision is ambiguous or two or more provisions of the Constitution are prima facie inconsistent then a competent court must resolve the conflict by looking to the document as a whole and the political system it envisages.

II. Schedule 5, Article 100, and Communal Lands

Two arguments exist which limit the scope of Schedule 5 and Art 100 in relation to communal lands. The most basic is that Schedule 5 and Art 100 provisions in so far as they are applied to communal lands are inconsistent with other provisions of the Constitution, specifically Art 16 and Art 10 fundamental rights to property and equality. The second, while it might concede at least 'control' of communal lands to the government, would impose on the government a duty to administer the communal lands for the benefit of the native population that lives there. Therefore, even if the government 'controls' or even 'owns' communal lands, the people who live there have common law or natural law property rights to that land that the government must protect. The government has a kind of trust relationship with those lands. In this analysis actual ownership of the land, while never irrelevant, is not of great importance since the government cannot dispose of those lands without carrying out its trust obligation to the people who live there.


The preamble of Namibia's Constitution tells us that the Constitution cannot be understood outside of the context of the country's war against colonialism, racism, and apartheid. It creates an interpretive context for all of the language that follows. Although it cannot itself define the meaning of substantive rights, the preamble remains a powerful analytical device. Indeed, it has been described as 'an important internal aid to the construction of provisions of the constitution, particularly where those articles are ambiguous, but not restricted to articles which are ambiguous'.18 Armed with the preamble, one might well feel confident that the Constitution must be understood to preclude any bold assertion of the primacy of white colonial property rights over the traditional or communal property rights of native people.

18 Kauesa v Minister of Home Affairs 1995 (1) SA 51 (NmH), quoted in Naldi op cit note 8 at 28.
1. *The Meaning of Article 16: A Fundamental Right to 'All Forms of Property'*

The natural law and public policy language of the preamble, when read in connection with Article 16, protecting the right of 'all persons' to 'acquire, own and dispose of all forms of immovable and movable property individually or in association with others... must protect the traditional or communal property rights of black people in the same way that it protects the fee simple property rights of white people. Article 16 is intended to apply broadly to all forms of property rights, and that must include 'all' property rights short of fee simple ownership, as well as fee simple ownership.19 An interest in communal lands, grounded in traditional customary law must be understood to be a property interest under the common law.

To hold otherwise is inconsistent with the broad provisions of the Constitution providing for racial equality (Art 10). Black people's property rights must be protected at the same level as white people's property rights. Under the colonial and the apartheid regimes, black people's right to fee simple ownership of land was severely restricted: black people, even if they had the financial resources, could not purchase farm lands on the open market. Broad communal lands were set aside for black people as a specific alternative to fee simple ownership as part of an overall apartheid era governmental scheme that included the allocation of all property rights to land into one ownership scheme or another, black or white. The Constitution must require as strong a protection of black people's rights to their property interest, whether divided or undivided, whether in trust, as part of some communal entity known as a tribe, band, or family, or in any other form.

There is also precedent in both the common law and South African law that native people's property rights are accorded a legal status, even if less than fee simple ownership. Some South African courts held that while tribes might have an absolute or alloidal title to land (depending on the particular colonial legal status of that land) individual members of a tribe had only a 'usufructuary' right.20 This 'usufructuary' right was a Roman law principle seized upon by the Privy Council in *Attorney General of Ontario v St Catherine's Milling and Lumber Company*, the most elaborate and detailed nineteenth century common law aboriginal land

19 The opposite of 'all forms of property' would appear to be simply 'private property'. Yet, it is clear that even 'private property' refers to a wide range of property rights, and is not limited to any specific form of 'lawful' ownership of property. For one discussion of this see Jeremy Waldron *The Right to Private Property* (1988).
20 *Noveliti v Nwayi* 2 NAC 170 (1911); *Dyasi* 1935 NAC (C&O) 1 at 9; *Gaboetloelo v Tsikwe* 1945 NAC (C&O) 2; cf Luke 4 NAC 133 (1920). An official SWAPO document, *Namibia: Perspectives for National Reconstruction and Development,* (Lusaka: United Nations Institute for Namibia, 1986) refers to the communal land tenure system as one in which 'the legal rights are usually usufruct, impermanent and governed by customary law' (at 133).
title case. The case concerned the inherent land title of a tribe of Saulteaux Ojibway Indians in Canada to unsurrendered aboriginal land. While the Privy Council held that the Crown had the absolute title to aboriginal lands as Crown land, the tribes had underlying legal rights, usufructuary rights, to use that land. This interest in the land was good against all except the Crown, and represented a legal interest in the land. The judgment of the Privy Council, the highest legal authority in the British Empire, was binding throughout the Empire, including South Africa after 1888 and in South West Africa after 1919.22

The precise nature of any individual’s or tribe’s communal property interest need not be defined in order for Art 16 to be effective: it is sufficient simply that there exists any property interest at all, no matter what its nature. A ‘usufructuary right’, therefore, is a property right fully actionable under the law. We must, at the same time, remember that there were no colonial land offices extant for the purpose of recording tribal or communal interests in land.23

This distinction in legal status of land ownership derives completely from colonialism and apartheid, a legal regime that reserved land ownership to whites and prohibited it to blacks. This same regime then legally defined white property rights as rights held in fee simple, according to British and Roman-Dutch legal principles, and denied an equivalent property right, held customarily in the form of communal lands, under various African principles of law, to land held communally by black people. Since the Constitution directly recognizes this, referring in the preamble to the legal rights denied by apartheid, and was created explicitly to end this discrimination, it must follow that the pre-existing tribal land law under which black people held land communally must be constitutionally recognized, and accorded a legal status at least the equal of Roman Dutch or common-law principles.

This conclusion also follows from the logic of the derivative ‘just compensation’ provision of Art 16(2). All property may be expropriated by the State for any public benefit, subject to the principle of just compensation. Unless communal lands are protected under this provision, it necessarily means that all property owned in fee simple can only be acquired by the State at very high cost, an additional protection of largely white property rights that is purely economic. Any political measure to secure property substantially belonging to whites has

23 This lack of any legal record of the precise nature of the early land transactions gives rise to a reverse usufruct thesis that Native tribes only leased but never sold their lands to white settlers, therefore it is the colonizers who have the usufructuary title and the tribes who hold absolute title. See, for example, Frieda-Nela Williams Pre-colonial Communities of Southwestern Africa: A History of the Ovamboland Kingdoms, 1600-1920. (National Archives of Namibia, 1989) 147 (referring to colonial title to valuable agricultural lands in the Grootfontein-Otavi region).
an added economic cost. It forces the government to add an extra measure of thought and resources to any such scheme. If communal lands are not ‘property’ under Art 16(2) then they are not subject to the principle of just compensation, and the State can engage in encroachments on this property, entirely black property, with only political costs at issue, and without added economic cost.

2. Article 100: Land Not ‘Lawfully’ Owned

Article 100 can be approached in several ways. But, however Art 100 is approached, it emerges as a highly confused and ambiguous statement of state ownership of communal lands. The simplest approach is to recognize that the whole provision only applies to land that is ‘not otherwise lawfully owned’. If Art 16 property rights are extended to communal lands, then they are ‘otherwise lawfully owned’ and there is no conflict.

Obviously, there is another interpretation of the term, one that narrowly applies to land owned in fee simple, with title legally recorded. The term ‘lawfully owned’ cannot be used in this narrow sense to refer to the formal requirements of land title that were legally unavailable to black people under apartheid. Indeed, this is the only place the term ‘lawfully owned’ is used in the Constitution. It is not used in Article 16 to define property rights, nor in Schedule 5, two places where property rights are more specifically, and more broadly defined. The Namibian Constitution was written in 1989 at a time when native land title was recognized as a ‘lawful’ title in liberal democratic countries. Therefore, it would seem that when the Constitution defined property rights, those rights were cast in broad terms. Even if they were not cast in such broad terms through such an interpretation, it would seem to follow from the abolition of apartheid that a narrow apartheid era ‘lawful ownership’ definition cannot be the only one incorporated into the Constitution of Namibia.

Support for this position comes from the location of Art 100 within the Constitution. It is located in Chapter 11, ‘Principles of State Policy’. These directive principles, like those found in the Indian Constitution, are declared by Art 101 to ‘not of and by themselves . . . be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of said principles. . .’. These ‘principles’ are not only specifically inferior to ‘rights and freedoms’, but are ‘not of and by themselves enforceable by any Court’.

24 The Government of Namibia has used the term ‘lawfully owned’ in this context, contrasting the ‘lawfully owned’ commercial farming areas, with the communal lands. Hage Geingob ‘Prime Minister’s Address’, National Conference on Land Reform and the Land Question, Consensus Document, July 1991, Office of the Prime Minister, 12.

The interrelationship between Art 100 and Schedule 5 also presents a problem of interpretation. Since Schedule 5 is intended to specify which South African state property vests in the Government of Namibia, the provision in Art 100 providing for state ownership of land is redundant unless there existed some category of land not ‘under the ownership or control’ of the Government of South Africa that was ‘not otherwise lawfully owned’. It would seem obvious that this strained reading cannot have been intended. The more compelling reading of the relationship between Art 100 and Schedule 5 is that the land ownership provision of Art 100 must be interpreted consistently with the much more detailed definition of the broader term, ‘property’ in Schedule 5, a schedule specifically set out to define what property vests in the state. Schedule 5’s broad definition of property in para (2), ‘movable and immovable property, whether corporeal or incorporeal, . . . and shall include any right or interest therein’ clearly includes land, as well as any right or interest in land short of actual fee simple ownership. Thus, Schedule 5 is drafted to transfer to the Government of Namibia land rights of less than a fee simple ownership ‘owned or controlled’ by the Government of South Africa.

Schedule 5 must also be read consistently with the structure of the Constitution. A schedule cannot add or subtract substantive rights set forth in other parts of the Constitution. The eight schedules of the Namibian Constitution serve what are basically ‘housekeeping’ functions attendant to implementing the Constitution. Three of the eight schedules of the Namibian Constitution specify the language of the oaths of government officials. One specifies the design of the flag. One specifies procedures for electing the first National Assembly. The last repeals a number of South African statutes otherwise in effect in Namibia. None of these matters was constitutionally necessary: all could have simply been adopted by statute immediately upon the convening of the National Assembly. They were included in the Constitution because they were urgent.

In this context Schedule 5 should be read as nothing more than a housekeeping measure defining the scope of the transfer of extensive governmental property from South Africa to Namibia, mostly lands and buildings held for governmental purposes. Schedule 5 is not a complete legal definition of the law of any form of property, communal or otherwise, for constitutional purposes, equal to Art 16, although it can be used for interpretive purposes. Therefore, Schedule 5 can neither define, nor define away communal or any other property rights protected under Art 16. Rather, it defines fully which South African state property ‘vests’ in the Government of Namibia.
4. Resolving the Conflict Between Art 16, Art 100, and Schedule 5

Any of the apartheid era laws that structure racist or unequal relationships within Namibia may be challenged as unconstitutional under Art 10's equality provisions. However, principles of national reconciliation impose some limits on bold interpretations of this overriding principle. Some of the vestiges of apartheid were embodied in the Namibian Constitution in order to promote other national values, or to reflect the spirit of compromise present when diverse political forces sit down together in a constitution-making process. Among the most obvious of these vestiges is the fact that whites own almost all of the land in Namibia, and these property rights are at the core of the protections guaranteed in Art 16. It would have been impossible to agree on a Constitution for Namibia without the protection of these unequal property rights.

Nothing in the recognition of parallel property rights in communal lands undermines the principles that protect existing (primarily white) property rights in Art 16. Rather, Art 16 specifically protects all forms of property, including property interests less or other than real property in fee simple. The plain meaning rule requires that interpreters of the Constitution give full effect to the plain meaning of the words 'all persons shall have the right to . . . own . . . all forms of immovable and moveable property'. Similarly, the wording of a constitutional document is to be given a 'wide and liberal meaning'. The words 'all forms of property' are absolutely clear and can mean nothing else than 'all forms of property'. Property held under customary, traditional, trust, or other legal forms have a long legal history in Namibia, Southern Africa, the rest of Africa as well as Roman-Dutch and common-law regimes.

Every major scholarly work on the social, economic, and political systems of the peoples of Africa includes some reference to their form of customary land holding. These are clearly 'forms of property' in African customary law and are incorporated into the British common law. This property ownership is also recognized in Roman-Dutch law, although every one must recognize that fifty years of apartheid legislation warped and distorted the principles of Roman-Dutch law.

25 The Rehoboth Baster Gemeente and Johannes Gerard Adolf Diegaardt v The Government of the Republic of Namibia High Court of Namibia 26 May 1995, unreported at 25. Naldi op cit note 8, argues that the bill of rights provisions of Chapter Three should be read as 'expressing values and ideals which are consonant with the most enlightened view of a democratic society existing under law, . . . in light of the liberal democratic values expressed in the preamble' (at 28).


27 Albie Sachs Protecting Human Rights in a New South Africa (1990) Chapter 9, 'Rights to Land' 104, 138. There is an extensive literature on the legal basis of apartheid. See, for example, Brian Bunting The Rise of the South African Reich (1964). The land law of South Africa is not primarily a product of apartheid, but dates back to British colonial law of the pre-apartheid era.
Namibian Constitution recognizes the right of persons (almost entirely whites) who acquired their lands in fee simple under apartheid era law to keep those property rights, that principle does not impart only apartheid era notions of property law into the Namibian Constitution. In fact the principles enumerated in the preamble make clear that the opposite presumption exists: all of the legal vestiges of apartheid are preemptively rejected, unless they are specifically protected by the Constitution because they serve some necessary social function. Property rights acquired under apartheid are protected for clear political, economic, and social reasons. But this has nothing to do with the Constitution's protection of black and traditional property rights. At a minimum these rights must be equally protected through Art 10.

Similarly, Art 131 prohibits repealing or amending any of the provisions of Chapter 3 – Fundamental Human Rights and Freedoms – so as to 'diminish or detract' from those rights and freedoms. The logic of this section extends beyond the formal process of constitutional amendment. Article 131 would also appear to support the proposition that the rights enshrined in Chapter 3 cannot be 'diminished or detracted' indirectly through overbroad and sweeping interpretations of other parts of the Constitution.

Just as Art 10's equality provisions and Art 16's property guaranteed may be in contradiction without undermining the right to private property, Art 21(g) freedom of movement and Art 21(h) freedom to reside anywhere in Namibia may be in partial contradiction with Art 16 without detracting from Art 16's fundamental provisions. The right to move or reside anywhere in Namibia does not give the right to move across, or reside on someone else's property. Such rights to travel not only say nothing about property rights of any kind, but cannot diminish them in any way. If various property rights are alienated, then one might, under Art 21, acquire some kind of a right to travel or reside there. But if these same property rights are never alienated, no person has a right to reside or travel there. Communal lands, like other forms of property, may be subject to legislation governing various kinds of access or usages, even expropriation (with compensation) in the national interest. But no outsider has any more right under the Constitution to travel and reside on those lands than on any other form of property.

The fundamental rights enumerated in the Constitution are intended to impose a limitation on governmental action: they cannot be abridged except by the National Assembly in accordance with clear principles that involve various national interests. Any governmental attempt to assert

28 Kauesa v Minister of Home Affairs supra note 18, is the leading discussion of this complex constitutional process of balancing fundamental rights and freedoms with other public interests. The court distinguished fundamental freedoms from fundamental rights, entering into a complex balancing process regarding Kauesa's freedom of speech that may not apply to Arts 10 and 16, which are fundamental rights. The distinction that the Court makes between rights and freedoms may well be mistaken.
state ownership of communal, tribal, or other property rights is fully subject to the provisions of Art 16. The language of Schedule 5 does not circumvent Art 16, nor in any way define the meaning of Art 16. 'All forms of property, moveable or immovable' protected under Art 16 were not South African state property transferred to the Government of Namibia under Schedule 5. This is true even if the apartheid-era Government of South Africa which transferred that property to the Government of Namibia in 1989 believed that, under its own laws, communal or tribal land was 'owned' by the Government of South West Africa.

B Trust Doctrine and the Legal Irrelevance of Fee Simple Ownership of Communal Lands

A second, largely unrelated, framework of analysis would hold that the actual governmental ownership of communal lands is irrelevant to their disposition. Even if the government 'owns' those lands – a point not conceded – the lands are held in a trust or quasi-trust relationship that forbids their alienation except subject to a legally recognized native title, protected under Art 16. This native title derives from either natural law, the British or Roman-Dutch common law, or customary law, or any combination of these sources. There is a voluminous literature on the various sources of native land title that defies simple restatement. Some of the easiest arguments to make follow from natural law. Under various forms of European law virtually every single parcel of land in Africa became the 'property' of some European nation, depriving the millions of people who farmed, hunted, herded, or otherwise used those lands of any property rights whatever, a proposition illegal when applied to the various peoples within Europe, or later, to the various European peoples who held land within Africa under European title. This legal process was inherently unfair. It led to the creation of two systems of property ownership, one for Europeans, well protected by law, one for Africans, largely unprotected by law.

While all of the legal regimes of the European countries sanctioned this dual system of land control all over the world in the eighteenth, nineteenth, and twentieth centuries, an evolving body of international law has begun to reject this colonial jurisprudence. Such cases as Spanish Sahara, Mabo, Sparrow and Sioui have each proceeded to reject racist and colonial jurisprudence, and begin to write a new jurisprudence of native rights to their lands. Whether or not Re Southern Rhodesia has been overturned by a higher court, no one would argue that any of the

legal principles stated there are legally in force.\textsuperscript{30} An early twentieth century colonial court decision that holds that native people have no land rights violates modern legal principles and therefore cannot stand – even if it has never been expressly overruled by subsequent decisions or statutes. This is true even without a policy statement as strong as the Namibian Constitution’s direct rejection of all legal principles that follow from apartheid, colonialism, and racism.

The application of modern trust doctrine to native lands has not generally been a product of statute law. Rather, common-law courts faced with the problem of governmental encroachment on native lands have derived trust doctrine from the complex nature of the relationship between modern governments, tribal peoples, and tribal land tenure. While it might take a formal legal instrument to create a trust, courts have used the model of the trust to hold that a trust-like relationship exists de facto between a government and its native people. This quasi-trust doctrine substantially eliminates any need directly to decide the issue of native ownership of communal lands. As long as this trust relationship exists, the state must administer native land for the benefit of the native people, and may not alienate that land except in ways consistent with that trust relationship.\textsuperscript{31} While this leaves the ‘ownership’ question unresolved, it does accord a substantial measure of protection of native land rights. Essentially, it divides the proverbial baby in half, permitting the state to continue as if it ‘owned’ native land, but at the same time it protects native land tenure from arbitrary interference by the government. Native interests, for example, must be compensated if the land is converted to uses inconsistent with their welfare.

In South Africa and South West Africa the trust relationship over native lands was not judicially created, but statutorily created in the South African Development and Trust Act of 1936 and in the South-West African Native Affairs Administration Act, 1954. These trusts were

\textsuperscript{30} Lone Wolf \textit{v} Hitchcock 187 US 553 (1903) holds that Indian land is not private property subject to the Fifth Amendment’s prohibition against taking private property without just compensation. Without ever being explicitly overturned, this result has been simply abandoned by American courts, including the United States Supreme Court in favour of other doctrines, including the trust doctrine. Blue Clark \textit{Lone Wolf \textit{v} Hitchcock, Treaty Rights \& Indian Law at the End of the Nineteenth Century} (1994) 107-111.

\textsuperscript{31} Common-law trust doctrine in relation to native lands was developed in the United States, and later adopted in Canada. See Reid Peyton Chambers ‘Judicial Enforcement of the Federal Trust Responsibility to Indians’ (1975) 27 \textit{Stanford LR} 1213; Robert N Clinton ‘Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self Government’ (1981) 33 \textit{Stanford LR} 979; Note: ‘Rethinking Trust Doctrine in Federal Indian Law’ (1984) 98 \textit{Harvard LR} 422. The Canadian Supreme Court applies trust doctrine to Indian lands in \textit{R \textit{v} Sparrow} (1990) 1 SJ 1075. The facts of that case are of interest in a Namibian context. The Canadian government leased the lands of a British Columbia tribe to a private golf course in the suburbs of Vancouver at a very low rate. The tribe sued the government for damages. The Supreme Court of Canada held that the government had breached its duty as trustee because it had a duty to administer those lands for the benefit of the Indian tribe and awarded the tribe damages in the millions of dollars.
extended in the various Representative Authorities Proclamations of 1980, identical laws that specifically put native land in trust for particular native tribes, creating the various homelands in Namibia. The former statute created the framework for preserving native reserves and was primarily concerned with legalizing those reserves, defining land there as belonging to the South African Development Trust, a governmental agency created to hold and administer native lands held in trust for the various tribes. This was extended to Namibia in the South-West African Native Affairs Administration Act, 1954 which held in s 4(1) and (2) that the land described in the Act was reserved for natives and was 'vested' in the South African Development Trust established by s 4 of the Development Trust and Land Act of 1936. This was the legal statement of the status of communal lands in Namibia at that time, a legal status that never changed between 1954 and Independence. Later legislation altered Namibia's native reserves in different ways, but none of this legislation touched on the question of the ownership of those reserves, which was 'vested' in the Development Trust. This development trust did not hold 'communal land' for the general benefit of all people, or even all native people. Rather, it was held for the various members of specific tribes.

Schedule 5 apparently recognized that such a trust relationship existed by providing that 'all property of which the ownership or control . . . vested in the Government of the Territory of South West Africa or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 . . . . Until these governments controlled property that they did not own this language is redundant, and it is presumed that no language in a constitution is redundant. This property that either the Government of South West Africa or the various Representative Authorities 'controlled' but did not own is not defined elsewhere in Schedule 5 or the Constitution.

The distinction between 'own' and 'control' is clearly not a mistake because later in Schedule 5 it specifically differentiates between ownership and control in the form in which the Government of Namibia takes land under this schedule: the property 'shall vest in or be under the control of the Government of Namibia'. Obviously, only land 'owned' by the Government of South West Africa, 'vested' in the Government of Namibia. All land 'controlled' by that government or the

32 Some of these statutes 'vest' the Development Trust in a governmental official, an administrator. Through Art 140 of the Constitution 'all powers vested by such laws . . . in a Minister or other official of the Republic of South Africa shall be deemed to vest in the Government of the Republic of Namibia or in a corresponding Minister or official. Following this language, it might be argued that the President of Namibia has succeeded the various native administrators as 'trustee' of Native land. I have not addressed this issue, but assumed that any government trust, no matter how administered, was a public trust and not vested in any particular individual or office. In any case, for these purposes it makes no legal difference which governmental office holds a governmental trust: it lies in the government.
various Representative Authorities merely came under the 'control of the Government of Namibia'. Lands in trust might be said to be 'controlled', therefore it is difficult to imagine what else this clause refers to.\(^{33}\)

Whether created by statute or common-law usage, if the Government of Namibia somehow 'owns' the communal lands, presumably a title derived from its inheritance of Crown land, than it holds those lands in trust. Any interest in property held in a trust, property of whatever form, is a property interest held by the beneficiaries of the trust. Thus, interests in property held by the native people who use communal lands are protected under Art 16 of the Constitution as Art 16 protects 'all forms of Property'.\(^{34}\)

III. THE CONSTITUTION OF NAMIBIA, TRIBAL PEOPLES, AND COMMUNAL LAND

There can be no question that the analysis thus far establishes a significant blindness in the Namibian Constitution: a failure to either recognize or explicitly protect communal lands, the most important property rights of a majority of Namibian citizens. Ironically, this is true whatever view one takes of the actual form of legal ownership of such lands. Even if the state 'owns' communal land, it should provide for this directly through the political process of constitution-making and not derive its 'ownership' indirectly through conscious avoidance, tricks of language, colonial law, or rules of constitutional or statutory construction.

This constitutional failing is part of a broader failing in the Constitution to define tribal interests generally, including tribal or communal lands, customary law, tribal government and governmental sovereignty, and tribal culture. Again, depending on one's political views on this question, this definition could properly take a variety of forms, ranging from according a high level of constitutional protection to tribal and customary matters, to simply recognizing that they exist in modern

33 The view had been advanced before the Supreme Court of Namibia by Advocate Jeremy Gauntlett, arguing for the Government of Namibia in the Rehoboth Baster Gemeente and Johannes Gerard Adolf Dieggaardt v The Government of the Republic of Namibia, appeal on 11 October 1995 that the word 'control' was used because so much moveable property of unclear title and origin was physically present in Namibia as a result of the war. Since the 'ownership' of this property would be difficult or impossible to prove, the word 'control' was used. Even assuming that Gauntlett's view is correct as to immovable property, it still leaves unsettled the question of whether the word 'control' was used to apply to communal lands as well. Gauntlett, in addition, represents the Government of Namibia in a communal lands case and is clearly aware of the implications of the use of the phrase 'ownership or control' in this schedule if it is applied to lands. Clearly, most of the 'property' covered by Schedule 5 was real property, both buildings and lands, thus limiting the word 'control' to moveable vehicles and war materials is a very narrow interpretation. In addition, the use of the Representative Authorities in this section, specifically includes governmental bodies that administer native trust land and do not 'control' large numbers of unregistered vehicles.

34 The Constitution never distinguishes 'private' property from other forms of property.
Namibia and explicitly stating the extent of diminished tribal interests.

The drafters of the Namibian Constitution were aware that the legal status of communal lands was left ambiguous. In the discussion of the basic principles of the Constitution two parties raised the legal status of communal lands as an important issue that needed to be directly addressed in the Constitution.

M Muyongo of the DTA argued as follows:

Another thing that I want to make reference to is the fact that very important things . . . were left out and that is the issue of communal land. In this Constitution there is no reference to it, except customary and common law which, to my mind, don’t tie in with the very important issue of communal land. We have our people living in these areas, the land belongs to them, but our Constitution has not made reference to it. So, Mr Chairman, I wish to ask that a few of these issues be tackled again . . . so we can allay the fears of our people wherever they may be, that nothing that belongs to them is forgotten, that nothing that belongs to them in terms of land is going to be snatched away in a dubious manner.35

J Garoeb of the UDF took on the same issue:

We believe that almost all parties represented in the Constituent Assembly are aware of the importance and the sensitivity of the issue of communal land, but most of them have until now skilfully evaded or side-stepped the issue . . . The UDF wishes to address this issue because we want this honourable House to be cognizant of the fears and concerns of the traditional leaders and the vast majority of the people living on communal land. . . . [W]e thus believe, in the first place, that in respect of every tribe occupying communal land, a trust should be established which will be a juristic person. Secondly, that the affairs of each trust should be administered by the traditional authority of that tribe. In the third place, that the ownership of the communal land occupied by the tribe concerned, should be transferred from the government of the territory to the trust established for that tribe.36

No clear conclusions can be drawn from the fact that issues raised in the Constituent Assembly were not acted on. However, the raising of these issues does give rise to some helpful inferences about the meaning of various ambiguous provisions. The most important inference is that all present at the Constituent Assembly knew that there was a problematic legal issue with the ownership of communal lands and that the majority chose to address the issue indirectly through Article 100 or Schedule 5. Therefore, the failure of the Constitution to clarify the question of the legal ownership of communal lands was deliberate.

Since the actual process of drafting the Constitution was done in secret and no minority reports and no minutes were kept of the sub-committees that debated and drafted the different sections, nothing is known about the reasons why Schedule 5 was not redrafted to deal explicitly with the ownership of communal lands.37 While some provisions of the

36 Ibid at 89-90.
Constitution were vigorously debated on the floor of the Constituent Assembly; Schedule 5 was agreed to without discussion. The Namibian Constitution is a lengthy and detailed document, running to eighty-one pages including schedules. It was the product of a complex political compromise between a right wing, racist South African government and a leftist, nationalist SWAPO government in exile, brokered by the United Nations. As such it sets out a number of political relationships in a very detailed way. There is no direct mention of tribes as governments, tribal sovereignty or communal lands. However, customary law is recognized in Article 38 to the extent that it is in force and not inconsistent with the Constitution. Since apartheid era South Africa recognized customary law, and since all South African law remained in force, this concession to customary law is not only not especially significant, it is irrelevant: customary law would have been recognized anyway to the same extent is was recognized in South African law. This constitutional silence on tribal or communal interests cannot have been an accident given the length and detail of the Namibian Constitution and the size and political importance of communal land holdings.

The well-known Rehoboth Baster Community case – still the subject of litigation and really demanding a lengthy analysis of its own – is of limited assistance in resolving the issues addressed in this paper. As it stands, it may be simply wrongly decided. And as it is still the subject of litigation, it is not particularly compelling precedent. More directly on point, however, is that it refers to Rehoboth Baster community land rights, which were specifically vested under South African rule in the Government of Rehoboth, then ceded to the Government of Namibia in Schedule 5, representing a transfer of vested land rights from a communal basis to one government, then to another. The case turns on a provision of the Self-Government Act that directly abolishes the Rehoboth Baster Community on the ground that its government had ceased to function. Neither of these provisions apply to communal land generally, traditional land rights that are not ‘vested’ in any governmental authority. Similarly, neither tribal nor community self government is protected under Article 16 as land rights are, and the two sets of rights are distinguishable under the Constitution.

IV. CONCLUSION

This recognition of communal land rights held on a tribal basis is not without complex legal problems of its own that will require the attention

38 Ibid at 36-8.
39 Namibian Constituent Assembly Debates 1 February 1990 16 March 1990 vol 2, 40.
of the National Assembly in the form of new communal land law. But the need for further legislation to clarify, define, and administer these rights is as irrelevant to the core issue of Art 16 protection of communal land rights as an extensive need for laws to regulate problems of private property ownership is irrelevant to the central protection of property under Art 16. Legal interests in land are among the most complex legal matters that exist in any human society, witness the complexity of the law of property under either common law or Roman-Dutch law traditions. However, this complexity is never used as an argument against the right to private property.

The tragedy of the Namibian Constitution's slippery approach to communal land is that it was unnecessary. Recognition of property rights in communal land does not bring any great burden to Namibian democracy. Most of the best land in the country is in private hands and is fully protected by Art 16. Requiring the state to pay in full for communal lands imposes only a small burden compared to that already imposed. Not only is about 57 per cent of the usable land in private hands, but it is the most expensive and developed 57 per cent.41 Black communal lands not only amount to much less of the usable land – about 43 per cent – but it is much less valuable land with less valuable improvements.

The solution is a simple one, one without major economic or political costs: a carefully thought out recognition scheme, spelled out in the Constitution or by statute, that includes all forms of traditional land rights as protected by Art 16 rights under the Constitution, subject to the same kind of expropriation (with full compensation) in the national interest as other forms of property. Many of the vestiges of apartheid and colonialism cannot be immediately redressed because of the constitutional compromise that protects white property rights. The legal recognition of the title of native people to their communal lands places no such burden on the state: these lands are already in native hands. At stake is the recognition of black land rights defined away through a racist and colonial legal process, a process rejected on every level by the Constitution of the new Republic of Namibia. Any 'large and liberal' construction of that Constitution in the context of modern legal interpretations of the land rights of native peoples must leave Namibia's people with a legally recognized property right to their communal lands.