**Land, Environment and Development Project**
**LEGAL ASSISTANCE CENTRE**
January 2021

# Land Governance on Communal Land in Namibia

By **Wolfgang Werner**

**Wolfgang Werner** is a former Associate Professor in Land and Property Sciences at the Namibia University of Science and Technology and has published widely on land reform and land administration in Namibia.

**Contact:** wwerner@iway.na

# Acknowledgements

I am indebted to Willem Odendaal for his comments on an earlier version of this paper. He suggested several references to legislation that have enriched the text. But his contribution to this short paper goes beyond reading a draft. Many fruitful discussions about land administration and governance during our shared travels in the country over the years have informed much of my thinking on land issues. These have blurred the lines of how much of this paper is his and how much is mine.

This notwithstanding, responsibility for the accuracy of the information provided in this report as well as the interpretation of legal and policy issues relating to the process of securing land rights to groups of customary land rights holders, remains solely with the author.

# Abbreviations

| | |
|---|---|
| **CBNRM** | Community-Based Natural Resource Management |
| **CLB** | Communal Land Board |
| **CLR** | Customary land right |
| **CLRA** | Communal Land Reform Act 5 of 2002 |
| **LAC** | Legal Assistance Centre |
| **MCA** | Millennium Challenge Account |
| **MLR** | Ministry of Land Reform |
| **NCLAS** | Namibian Communal Land Administration System |
| **TA** | Traditional Authority |
| **TAA** | Traditional Authorities Act 25 of 2000 |

# Contents

# 1. Introduction

The systems of land administration in Namibia correspond to different land tenure systems. On the one hand, 43% of the land area is held under freehold title by individual landowners, close corporations or companies. This land is registered in the Deeds Office in terms of the *Deeds Registries Act (SA), 1937*. The Registrar of Deeds is appointed in terms of the Act and is responsible for the "recording of [freehold] land rights and transfers of [freehold] land rights, registration and cancellation of mortgage bonds, registration of leasehold agreements, servitudes and other real rights as well as to register general plans for plots and sub-divisions within the different land tenure systems."[1]

This system provides accurate descriptions of land parcels, their legal owners, and the rights and obligations that apply.

Another 39% of the land area is commonly referred to as "communal". In 2014, just over 40% of Namibia's population of 2 234 million lived in agricultural households in communal areas. The Namibia Census of Agriculture 2013/2014[2] recorded 169 984 agricultural households, with a total population of 907 715, holding tenure rights to agricultural land in communal areas. Ninety-two per cent of these households lived in the seven northern-central and eastern communal areas in which rainfed cropping and livestock husbandry are the main agricultural activities. Only 8% lived in the other seven regions which rely primarily on extensive livestock farming for their livelihoods.[3]

Strictly speaking, the term 'communal' is a misnomer in so far as not all tenure rights in these areas are communal, and they differ across communal areas. Households in communal areas have private tenure rights to their homesteads, cropping fields and cattle pens, which are held as customary land rights in terms of the *Communal Land Reform Act 5 of 2002 (CLRA)*. In many areas these rights are exercised on land parcels that are clearly defined by enclosures of one kind or another. Private rights to communal land do not amount to outright ownership, but are defined by the fact that these rights include rights of exclusion and inclusion of outsiders. What is common to all communal areas in Namibia is that, with the exception of formal townships which are declared in terms of the *Local Authorities Act 23 of 1992*, freehold title cannot be acquired for any land. Referring to these areas as non-freehold areas is therefore more fitting.

Apart from private land rights, access to land and natural resources for a majority of agricultural households and the rights under which these are held are governed by various forms of customary tenure. The CLRA refers to these areas as the "commonage". This type of tenure is informal in so far as land rights and their legitimate holders are not recorded in a formal written form, unlike private customary land rights. The security of these customary tenure rights is provided primarily by group membership. In addition to customary tenure rights, the CLRA has introduced long-term leasehold tenure in clearly defined parts of communal land to encourage economic development. Traditional Authorities still play a central role in the allocation and cancellation of existing

1 De Villiers, S., Christensen, Å., Tjipetekera, C., Delgado, G., Mwando, S., Nhitevelekwa, R., Awala, C. and Katjiua, M., *Land Governance in Namibia*, paper presented at the 2019 Land Governance in Southern Africa Symposium, NUST-NELGA Hub, Windhoek, 2019, p. 12.

2 Namibia Statistics Agency / Ministry of Agriculture, Water and Forestry, *Namibia Census of Agriculture 2013/2014 – Communal Sector*, Namibia Statistics Agency, Windhoek, 2015, p. 22.

3 Ibid.

customary land rights as well as the allocation of new rights. They are the primary land governance institutions, implementing and changing local customary laws and practices. However, various factors conspired to render customary land governance systems increasingly ineffective in securing people's legitimate tenure rights, rendering land rights holders increasingly vulnerable to infringements of their rights.[4] The increasing demand and competition for land have brought pressures to bear on customary governance frameworks. Across many countries the driving forces for the increased demand and competition for land include:

- increased food production, which in turn is driven by a growing global population;
- increasing urbanisation rates which expand the share of the world's population that depend on food purchases;
- food for export as a result of security concerns in investor countries;
- changing consumption patterns (e.g. growth in meat consumption) that require more land-intensive production;
- searches for alternative sources of energy (such as bio-energy); and
- the growth of commercialised agricultural production.[5]

In addition, environmental changes such as the increase in longer droughts and the unpredictability that this brings put pressure on grazing areas, leading to the conflict. This is exacerbated by the negative impact of private enclosures which reduce communal grazing areas and contribute to overgrazing in Namibia's communal areas.

In addition to these drivers, the political changes that followed Independence further eroded the capacities of Traditional Authorities to administer customary land tenure in an efficient manner. While customary laws and practices were generally well known, the ability of Traditional Authorities to enforce these diminished rapidly. To understand this, a brief history of governance is necessary.

# 2. Land governance

The *Framework and Guidelines on Land Policy in Africa*[6] defines land governance as,

> the political and administrative structures and processes through which decisions concerning access to and use of and resources are made and implemented including the manner in which conflicts are resolved.

This definition suggests that the State has a central role in the overall governance of a country's economic and social resources, and specifically, "how the competing priorities and interests of different groups are reconciled".[7] While the central state provides the overall policy and legal

4 Nghitevelekwa, R., Shapi, M. and Kambatuku, J., *The land question and land reform in Namibia: Review of the implementation of Consensus Resolutions of the 1991 National Conference on Land Reform and the Land Question*, University Central Consultancy Bureau (UCCB), University of Namibia, Windhoek, 2018, p. 85.

5 Palmer, D., Arial, A., Metzner, R., Willmann, R., Müller, E., Kafeero, F. and Crowley, E., "Improving the governance of tenure of land, fisheries and forests", *Land Tenure Journal*, No. 1 (2012), pp. 39-62, 55.

6 AUC-ECA-AfDB Consortium, *Framework and Guidelines on Land Policy in Africa,* AUC-ECA-AfDB, Addis Ababa, 2010, p. xiii.

7 FAO, 2007, as quoted in Enemark, S., "Module 6: Land policy and regulatory frameworks (Final Draft)", Global Land Tool Network / UN Habitat, 2017, p. 12.

framework for land governance, the actual process of 'governing' involves both formal and informal institutions. "Governance is concerned with the processes by which citizens participate in decision-making, how government is accountable to its citizens, and how society obliges its members to observe its rules and laws."[8]

Land governance includes techno-legal procedural and political aspects. Much of its importance in rural economic development stems from the fact that the control over land rights is "a means of accumulating and dispensing political and economic power and privilege through patronage, nepotism and corruption".[9] Poor governance frameworks open the door for these and other malpractices, which invariably lead to tenure insecurity and make land rights holders vulnerable to infringements of their legitimate rights.

What then constitutes good governance? Enemark[10] has summarised the characteristics of good governance as follows:

- **Sustainable and locally responsive:** It balances the economic, social and environmental needs of present and future generations, and locates its service provision at the closest level to citizens.
- **Legitimate and equitable:** It has been endorsed by society through democratic processes, and deals fairly and impartially with individuals and groups providing non-discriminatory access to services.
- **Efficient, effective and competent:** It formulates policy and implements it efficiently by delivering services of high quality.
- **Transparent, accountable and predictable:** It is open and demonstrates stewardship by responding to questioning and providing decisions in accordance with rules and regulations.
- **Participatory and providing security and stability:** It enables citizens to participate in government, and provides security of livelihoods and freedom from crime and intolerance.
- **Dedicated to integrity:** Officials perform their duties without bribe and give independent advice and judgements, and respect confidentiality. There is a clear separation between private interests of officials and politicians and the affairs of government.

Against Enemark's discussion of what land governance means, this paper will provide a brief overview of land administration and land governance in the communal areas of Namibia. This will be preceded by a short history of land governance before Independence.

# 3. Governance: A brief history

Before Independence, land in communal areas was managed through a combination of Traditional Authorities and colonial officials. The system of "native administration" – and hence the administration of land – in native reserves in the Police Zone differed from the system pursued in areas outside the Police Zone. The existence of strong and relatively well-defined traditional leaders outside the Police Zone made it possible for the colonial administration to implement a system of indirect rule.

8 Ibid.
9 AUC-ECA-AfDB Consortium, *Framework and Guidelines on Land Policy in Africa*, 2010, p. 20.
10 Enemark, S., "Module 6: Land policy and regulatory frameworks (Final Draft)", 2017, p. 12.

By contrast, genocide and the large-scale dispossession of land and livestock of communities in the Police Zone destroyed the traditional leadership of affected communities. This was used as a pretext by the colonial administration to fashion an administrative system that minimised the powers of traditional leaders and gave colonial officials extensive powers to administer native reserves. An "authoritarian local administrative structure" was established in native reserves, "which combined a strict line of command running from central offices in Windhoek via the district magistrate to the reserve Superintendent".[11]

The *Treaty of Peace and South West Africa Mandate Act 49 of 1919* provided for all land held by the German colonial administration to become Crown Land, with the South African Parliament retaining authority over land rights. In addition, section 4(2) of the 1919 Act stipulated that "no grant of any title, right of interest in State land or minerals" within South West Africa could be made without the authority of the South African Parliament. In 1920, the *Crown Lands Disposal Proclamation 13 of 1920* authorised the Administrator of South West Africa to set aside Crown Land for the establishment of "native reserves".[12] In the wake of the Native Reserves Commission which was appointed in 1920, the South African colonial administration established 10 reserves between 1923 and 1926, and another 3 in 1932, 1947 and 1951 respectively.[13]

The Administrator was not only empowered to establish native reserves, but also "to make regulations regarding the management and control of native reserves". The *Native Reserves Regulations, GN 68 of 1924*, which were promulgated in terms of the *Native Affairs Proclamation 11 of 1922*, stipulated in more detail how "native reserves" were to be administered. These regulations applied only to the reserves established in the Police Zone.

Proclamation 11 of 1922 authorised the Administrator not only to establish native reserves, but also to prescribe the restrictions and regulations pertaining to their use and management. Magistrates were put in general control of native reserves in their districts. Their duties included the division of reserves into wards "where necessary", to allocate land situated in reserves and to transfer any residents to any other place. Headmen were explicitly prohibited from allocating any land, "either to newcomers or by way of redistribution of land already occupied or of depriving any person of any land or of granting permission to any person to reside in a reserve, except upon an express order of the magistrate". They were also not permitted to deprive any reserve resident of their legitimate land rights "except upon the express order thereto of the Superintendent". If residents wanted to change their place of residence, they had to obtain prior permission from the magistrate. In addition, magistrates had to keep registers of all people living in a reserve.[14]

The Administrator of South West Africa was empowered to appoint superintendents in reserves. They were responsible for the day-to-day administration with the assistance of headmen[15] under

11 Kössler, R., *In search of survival and dignity: Two traditional communities in southern Namibia under South African rule*, Gamsberg Macmillan, Windhoek, 2005, p. 49.
12 Hubbard, D., *Communal lands in Namibia: The legal background*, Legal Assistance Centre, Windhoek, 1991, p. 2.
13 Werner, W., "A brief history of land dispossession in Namibia", *Journal of Southern African Studies*, Vol. 19, No. 1 (1993), pp. 142, 145.
14 Van der Byl, P.C., "Legal opinion: Legal position relating to land occupied in Namibia on a communal basis", Advocates Chambers, Pretoria, 1992, p. 11; Hubbard, D., *Communal lands in Namibia*, 1991, p. 6.
15 *Uazengisa & 3 Ander v Die Uitvoerende Kommittee van Administrasie van Hereros & 11 Anders*, Annexure "D", Antwoordende Beëdigde Verklaring: Barend Daniel Bouwer, 21.3.1988, pp. 57-58.

the supervision of magistrates, whose instructions they had to follow. Magistrates could also appoint headmen in reserves who "were to be under the strict control of the Superintendents".[16] These headmen were put in control of wards, but their "functions were purely of a limited delegated administrative character, excluding either the allotment or deprivation of land and expressly excluding any criminal judicial jurisdictions".[17]

The *Native Administration Proclamation 15 of 1928* provided for the Administrator to exercise all powers of a paramount chief, including the appointment and/or recognition of chiefs and making regulations prescribing their duties, powers and privileges. "His orders were to be implemented by officials, not chiefs or headmen. Similarly, judicial functions were to be performed by officials, not chiefs". The Administrator could also remove any resident from a native reserve to another.[18] In addition, a Chief Native Commissioner, native commissioners and assistant native commissioners were appointed and native commissioners' courts established.[19]

The *Regulations Prescribing the Duties, Powers and Privileges of Chiefs and Headmen, GN 60 of 1930*, described the duties, powers and privileges of chiefs and headmen. It differentiated between chiefs (*kapteins*), who were to be appointed to manage tribal affairs, and headmen. The latter were to be appointed by the Administrator and put in charge of wards, but excluded the headmen who were appointed by chiefs to assist them. These were required to assist officials entrusted with the administration of reserves with "the efficient administration of the laws relating to the allotment of lands and kraal sites and to commonages and the prevention of illegal occupation of or squatting upon land". In addition, chiefs and headmen were given the responsibility "for the proper allotment to the extent of the authority allowed them by law of arable lands and residential sites in a just and equitable manner without favour or prejudice".[20]

By 1930, therefore, traditional leaders in the Police Zone were stripped of all their powers relating to the allocation and cancellation of land rights, "with no independent authority over the allocation of land in the 'native reserves'".[21] Hubbard[22] noted that,

> … the individual acts, proclamations and government notices setting aside the reserves are all silent on the issue of allocation of land within the reserves; this was still governed by the two Native Administration Proclamations (Proc. 11/1922 and Pro. 15/1928 [original emphasis].

Against this background, Kössler[23] argued that "the headman was clearly regarded as being subservient to the Superintendent: the lowest echelon of white officialdom was given the powers of direct control within the reserves", subjecting residents of native reserves to stringent colonial controls.

A significant change to "native administration" and hence land governance occurred in the 1960s. In 1962 the South African Government appointed the Commission of Enquiry into South West

16 Hubbard, D., *Communal lands in Namibia*, 1991, p. 6.
17 Appeal between *Muundjua and Others v Pack and Muundjua and Others vs Tjipetekera*, 1989, p. 14.
18 Ibid., p. 16.
19 Hubbard, D., *Communal lands in Namibia*, 1991, p. 6.
20 Cited in ibid., p. 7.
21 Ibid., pp. 6, 8.
22 Ibid., p. 13.
23 Kössler, R., *In search of survival and dignity*, 2005, p. 51.

African Affairs, commonly referred to as the Odendaal Commission. The Commission recommended the establishment of "homelands" for each ethnic group, and, in accordance with its terms of reference, caused *A Five Year Plan for the Development of the Native Areas*[24] to be developed. This Plan established "more or less homogenous agro-ecological areas"[25] in the country, and estimated the economic viability of all such proposed homelands. It assumed that economic development required a transition from subsistence to commercial farming, but recommended concrete changes in land tenure only in the case of the Herero reserves, where it recommended the fencing of communal land.[26]

The *Development of Self-Government for Native Nations in South West Africa Act 54 of 1968* provided for self-governance and ultimately independence of so-called native nations. Implementation of these proposals, however, was uneven across the country. The South African State President had powers to establish legislative councils for each of the proposed homelands to make legislative enactments on specified matters including farming and agricultural methods. The allocation of communal land was not included initially, but was added in subsequent amendments. An executive council – also to be established by the State President – was to administer matters falling under the jurisdiction of legislative councils. Legislative and executive councils were established for Ovamboland, Okavangoland and Eastern Caprivi in 1968, 1970 and 1972 respectively, and were declared self-governing areas in 1973 and 1976.[27] A Nama Council was established in 1976 and a Damara Representative Authority with legislative powers in 1977.

No land was transferred to these self-governing entities, leaving uncertainty as to who the land belonged to.[28] Concern was also expressed that the powers and functions vis-à-vis land allocations and administration of tribal councils and magistrates' offices were vague. In Ovamboland, the Planning Advisory Committee, established in the early 1970s by the Ovamboland government, therefore recommended that all land in Ovamboland be vested in the new government, and that all applications for land allocations be channelled through it.[29]

Hereroland was set aside as an area for the Herero "native nation", but it did not have legislative and executive council until 1980. Instead, Proclamations 177 and 178 of 1974 established community Authorities in Rietfontein and Okamatapati respectively. The allocation of land and control of livestock numbers became the responsibility of these community authorities.[30] Although this was never stated explicitly, the main purposes of these community councils was to facilitate farming on fenced units in Rietfontein which were added to Hereroland in the wake of the Odendaal Commission, and to establish fenced farming units in Okamatapti. The powers conferred upon community authorities included the "development and improvement of land within the area", which included the fencing off of communal land for private farming.[31]

24 South West Africa, *A Five Year Plan for the Development of the Native Areas*, Windhoek, 1966.
25 Ibid., p.14.
26 Ibid., p. 166.
27 Hubbard, D., *Communal lands in Namibia*, 1991, pp. 22-24.
28 OVA 45 6/8/1-7(ii), "Ovambo Beplanningsadvieskomitee, Notule van 'n Vergadering gehou op 21 Augustus 1973", p. 2.
29 Ibid.
30 Werner, W., "From communal pastures to enclosures – the development of land tenure in Herero reserves", in Bollig, M. and Gewald, J.-B. (Eds), *People, Cattle and Land: Transformation of a Pastoral Society in Southwestern Africa* (First Edition), Rüdiger Köppe Verlag, Köln, 2000, p. 264.
31 Ibid., p. 267; Hubbard, D., *Communal lands in Namibia*, 1991, p. 10.

In 1980 the *Representative Authorities Proclamation, 1980 (AG. 8 of 1980)* was promulgated, which "authorised the establishment of second-tier representative authorities for eleven 'population groups'". Representative Authorities were given legislative powers over defined matters, including "the acquisition, alienation, grant, transfer, occupation and possession" of communal land as well as farming settlements on communal land. An executive committee had powers over defined matters.[32] AG. 8 also gave Representative Authorities powers to appoint, recognise, replace or dismiss paramount chiefs, chiefs and headmen, and determined their powers.[33]

An anomaly of the Proclamation was that although "Sec 48bis (3) of the Proclamation made provision for the executive authorities of representative authorities to confer a valid title to the ownership of, or any other right in, to or over, any portion of such (communal) land,"[34] the ownership of land did not pass from the Government of SWA to Representative Authorities.[35]

These interventions in land rights and governance fuelled contestations about the legitimacy of fencing off communal pastures, which culminated in a few court cases in the 1980s. At issue in these cases was "the relationship of customary law and the statutory schemes in the communal areas", specifically with regard to the administration of land rights.[36] Those opposed to enclosing communal pastures at Okamatapati argued that it was against Herero custom in so far as the Ovaherero did not know private property in land, and that the Okamatapati Community Authority had no powers to subdivide the land.[37] However, the appeal court found that although it may have been Herero custom to not fence off communal grazing land, the Community Authority of Okamatapati had acted in terms of the law stating clearly that a statutory body had superseded any customary land use practices as may have existed.

## 3.1 Representative Authorities

The *Representative Authorities Proclamation, AG. 8 of 1980*, introduced major legal changes in the administration of communal land in Namibia, in that it provided for the establishment of second-tier representative authorities for all eleven ethnic groups in Namibia. Each of these had legislative authority over defined matters, and executive authorities with administrative powers in relation to these specified matters.[38]

Under AG. 8, proclamations were promulgated for each second-tier authority. These provided for the recognition of laws and customs of each ethnic group. Chiefs and headmen were explicitly recognised. Their status would "take precedence over the Chairman and other members of the Executive Committee in respect of ceremonial and tribal matters". The legal provisions contained in AG. 50 which established the Representative Authority for the Hereros applied to several other Representative Authorities, where it stated that,

32 Hubbard, D., *Communal lands in Namibia*, 1991, pp. 25-26.
33 Ibid., p. 26.
34 Hinz, M., *Customary Land Law and the Implications for Forests, Trees and Plants* (No. TCP/NAM/4453), FAO Technical Co-operation Programme, Windhoek, 1996, pp. 25-26.
35 For more detail on who owned communal land see Hubbard, D., *Communal lands in Namibia*, 1991, pp. 26-27.
36 Ibid., p. 65.
37 *Uazengisa and 3 Others v Executive Committee of the Administration for Herero's and 11 Others*, Appeal Judgement 22.9.1989, p. 3.
38 Hubbard, D., *Communal lands in Namibia*, 1991, p. 25.

> The duties, powers, authorities and functions lawfully exercised immediately before the date of commencement of this section by any chief or headman, recognised or appointed as such under the laws governing the recognition or appointment of chiefs and headmen of the Hereros, shall remain in force until altered or cancelled by a competent authority.[39]

However, while Executive Committees could determine the powers, functions and duties of tribal or community authorities,[40]

> The proclamation did not give [traditional leaders] additional powers nor did it amend or repeal those regulations or proclamations which had given or which restricted their powers. It merely recognised the powers which they had as restricted by existing legislation, including Government Notice 68 of 1924.[41]

With regard to the alienation of communal land, Executive Committees of Representative Authorities had powers "to confer a valid title to the ownership of, or any other right in, to or over, any portion of such (communal) land".[42] Section 33 of Proclamation AG. 50, dealing with the establishment of a Representative Authority for the Hereros, for example, stipulated that,

> Any surveyed portion of the communal land of the Hereros … shall cease to be such communal land if -
> (a) the ownership of such portion has at any time been transferred to any person by or under the authority of the Executive Committee or under any ordinance of the Assembly or any other law administered by or under the control of the Executive Committee, by means of the registration of a title deed in any deeds office; and
> (b) a period of fifteen years, or such shorter period as may be determined by ordinance of the Assembly has lapsed after the date of registration, regardless of the registration of any other transfer of such portion, to whomsoever. During the relevant period.

In 1982 the South West Africa Supreme Court confirmed these powers, but added that Proclamation AG. 50 "does not state under what circumstances the [Executive Committee] is competent to transfer such land".[43]

This suggests that until Independence in 1990, the powers of traditional leaders to administer communal land were severely circumscribed in law, specifically by the *Native Reserves Regulations, GN 68 of 1924*. In the judgement in *Kakujaha and Others v The Tribal Court of Okahitwa*[44], it was argued that,

> As far as Hereroland is concerned, the common and statutory law … exist side by side with native law and custom and the latter is not replaced or amended by the former except for those instances where legislation specifically so provides as in the case of Government Notice 68 of 1924.

39 South West Africa, AG. 50 – Establishment of a Representative Authority for the Hereros, and provision for matters connected therewith, Windhoek, 1980; Hubbard, D., *Communal lands in Namibia*, 1991, p. 53.
40 Hubbard, D., ibid.
41 *Ndisiro v Mbanderu Community Authority and Others* 1986(2) SA 532 (SWA), 1985b, p. 538E.
42 Hinz, M., *Customary Land Law and the Implications for Forests, Trees and Plants*, 1996, pp. 28-29.
43 *Kaputuaza & Another v Committee of the Administration of the Hereros* 1984 (4) SA 295 (SWA), 1984, p. 313.
44 Justice Strydom in *Kakujaha & Others v The Tribal Court of Okahitwa & Others*, 1989, pp. 2-3.

These provisions were found to be still in operation in Namibia in 1992.[45]

## 3.2 Dispute resolution

The extent to which these new governance structures effectively replaced customary regimes on the ground has not been established and is likely to have differed across native reserves. However, the legitimacy of this system was contested in the 1980s, when the need to clarify the validity of customary laws and the powers of traditional leaders resulted in several court cases.[46]

The *Native Administration Proclamation, 15 of 1928*, vested the jurisdiction over land disputes in communal areas in ordinary courts, "regardless of whether or not native law and custom are involved". Residents of "native reserves" had the right to appeal to the Magistrate's Court against any decision of the Superintendent or headman.[47] This Proclamation also provided for the establishment of a "native commissioner's court" to hear criminal cases in the jurisdictional area of the native commissioner and any civil cases between residents of a reserve. The native commissioner decided in matters among natives according to prevailing customary laws and practices in so far as they were not in conflict with statutory law or natural justice. The Proclamation provided for the recognition of the authority of headmen, while the native commissioner was responsible for administrative and judicial functions.

In the wake of the recommendations of the Odendaal Commission, *the Development of Self-Government for Native Nations Act 54 of 1968* provided for the establishment of tribal and community authorities, with powers to "exercise civil and criminal jurisdiction in accordance with the law and customs observed by tribes and communities."[48] The *Representative Authorities Proclamation, AG. 8 of 1980*, repealed the form legislation but empowered individual representative authorities to administer justice "in accordance with traditional laws and customs".[49] Proclamation AG. 50 of 1980 which established the Herero Representative Authority gave Chiefs, headmen and others the authority to head and decide civil matters between "black people". They could also hear and judge criminal cases arising between black people according to customary laws and practices. In *Ndisiro v Gemeenskapsowerheid van die Mbanderu Gemeenskap van die Rietfonteinblok in Hereroland and Others*,[50] the Paramount Chief of the Ovaherero argued that when a person was aggrieved by a decision and sentence of a headman, that person could appeal to the Herero Chief's Council. If the person is dissatisfied with the outcome of such an appeal (s)he could take the matter to an Appeal Court consisting of its chairperson and two headmen. Its decision was final.

This assertion was rejected by the court, not because it may not have existed, but because the existence of such an appeal procedure had not been proven in court.[51] Moreover, unless headmen

45 Van der Byl, P.C., "Legal opinion", 1992, p. 17.
46 See *Ndisiro v Gemeenskapsowerheid van die Mbanderu Gemeenskap van die Rietfonteinblok in Hereroland en 9 ander: Uitspraak*, 1984; *Uazengisa & Another v The Executive Committee of the Administration for Herero's and 11 Others*, Judgement, 1989a.
47 Hubbard, D., *Communal lands in Namibia*, 1991, p. 69.
48 Ibid., p. 70.
49 Ibid., pp. 26, 71.
50 *Ndisiro v Gemeenskapsowerheid van die Mbanderu Gemeenskap van die Rietfonteinblok in Hereroland en 9 ander: Uitspraak*, 1984.
51 Ibid., pp. 3-4.

"had had the necessary authority conferred on [them] by the Minister or the relevant official of the Department of Bantu Administration and Development, he did not have the power or right to try appellant for any offence arising out of statute".[52] To the extent that traditional leaders were appointed in terms of Government Notice 68 of 1924, "they had no power to deprive anyone of land without the authority of the authority of the Superintendent; have no authority to order anyone to take up residence elsewhere; and cannot impose a fine without the authority of the magistrate".[53]

It would appear, therefore, that traditional leaders had very few legal powers with regard to the administration of communal land up to Independence, unless they were specifically given those powers by the relevant Minister. In the *Ndisiro* case, the court found that "native law and custom means only so much of the native law and custom which still survives at the present time. There has been from time to time inroads into native law and custom made by various statutes," including the Native Administration Proclamations of 1924 and 1928.[54]

# 4. Land governance at Independence

The Namibian Constitution, by means of Schedule 5, vested ownership of all moveable and immovable property that prior to Independence "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 (Proclamation AG 8 of 1980) or in the Government of Rehoboth" in the Government of Namibia.[55] It also provided for "all laws which were in force immediately before the date of independence … [to] remain in force until repealed or amended by an Act of Parliament, or until declared unconstitutional by a competent court". The Native Administration Proclamations of 1922 and 1928 still governed the allocation and control of land in 1990.[56] The former was repealed in its entirety by the *Local Authorities Act 23 of 1992* (GG 470), effective 31 August 1992, and the surviving portions of the latter (OG 284) (sections 17, 18, 23, 24, 25, 26 and 27 and any regulations made in terms of those sections) deal primarily with marriage and succession in respect of "natives".[57]

It is commonly believed that the Government is the owner of communal lands. However, section 17 of the *Communal Land Reform Act 5 of 2002* states that communal land "vest(s) in the State in trust for the benefit of the traditional communities residing in those areas". State ownership of communal land is thus limited by the State's obligations as trustee.[58] Trusteeship implies that "the State must put systems in place to make sure that communal lands are administered and managed in the best interests of the people living in those areas".[59] As will be discussed in more

52 *Ndisiro v Mbanderu Community Authority and Others* 1986(2) SA 532 (SWA), 1985a, p. 536; Hubbard, D., *Communal lands in Namibia*, 1991, p. 71.
53 Hubbard, D., ibid., p. 72.
54 *Ndisiro v Mbanderu Community Authority and Others* 1986(2) SA 532 (SWA), 1985a, p. 536.
55 Republic of Namibia, *The Constitution of the Republic of Namibia*, 1990, p. 77.
56 Hubbard, D., *Communal lands in Namibia*, 1991, pp. 29-30.
57 See Legal Assistance Centre, *Namlex*, under "Blacks" – at http://www.lac.org.na/laws/NAMLEX_2020.pdf). I am indebted to Willem Odendaal for having pointed this out.
58 Hinz, M., "Traditional governance and African customary law: Comparative observations from a Namibian perspective", in Horn, N. and Bösl, A. (Eds), *Human Rights and the Rule of Law in Namibia*, Macmillan Namibia, Windhoek, 2008, p. 76.
59 Legal Assistance Centre, *Guide to the Communal Land Reform Act, 2002 (No. 5 of 2002) (2nd Edition)*, Windhoek, 2009, p. 7.

detail further on, it did so by retaining Traditional Authorities in the land administration process and by creating Communal Land Boards.

The overlapping competencies with regard to the administration of customary land rights created before Independence weakened customary land administration and governance, and gave rise to considerable dissatisfaction. Popular support for this system of land administration through Traditional Authorities differed between regions. A socio-economic survey conducted in 1990-1991 in preparation of the National Conference on Land Reform and the Land Question found that only in Caprivi did a majority of people interviewed (80%) feel that their tribal authorities should allocate land.[60] The survey found that the customary system of land administration was "respected and valued by the people".[61] Moreover, people felt secure on their land, and claimed "that no-one could take their land", with the exception of some women who feared losing their land after the deaths of their husbands.[62]

Only approximately 40% in Kavango and approximately two-thirds of respondents in the north-central regions were in support of traditional leaders allocating land. However, in Kavango people expressed a lack of clarity with regard to the powers, responsibilities and relationships of the district authorities and central government with respect to planning and implementation of land development projects.[63] More than 50% of people in the north-central regions favoured government to allocate land. The latter were found to be "angry that the current system of land allocation in Owambo, by the tribal authorities who require payment, has not been changed by the government" (sic).[64]

The survey generated little information on land governance in the southern, predominantly livestock farming communal areas, but found that nearly two-thirds of respondents in the southern communal areas favoured government to allocate land.[65]

The abolition of Representative Authorities, and the constitutional rights of all Namibians to move freely and reside and settle in any part of Namibia provided for by Article 21, exacerbated the unresolved issues about jurisdiction and authority.[66] The institutional and management vacuum created by the abolition of Representative Authorities further undermined the ability of Traditional Authorities to enforce customary laws applying to land administration. As Fuller[67] argued, traditional leaders were unsure about their continued role in land administration. Some felt that they had lost all authority over land administration, while others continued as before, albeit without a clear policy and legal framework. Enforcing decisions taken by Traditional Authorities was difficult

60 Office of the Prime Minister (Ed.), *National Conference on Land Reform and the Land Question*, Republic of Namibia, Windhoek, 1991, p. 193.
61 Ibid., pp. 249, 264.
62 Ibid., p. 263.
63 Ibid., p. 245.
64 Ibid., p. 193.
65 Ibid., p. 172.
66 Cousins, B. and Claassens, A., "Communal tenure 'from above' and 'from below': Land rights, authority and livelihoods in rural South Africa", in Evers, S., Spierenburg, M. and Wels, H. (Eds.), *Competing Jurisdictions: Settling Land Claims in Africa*, Brill, Leiden/Boston, 2005, p. 31.
67 Fuller, B., "Improving Tenure Security for the Rural Poor: Namibia Country Case Study", *LEP Working Paper No. 6*, Food and Agricultural Organization of the United Nations (FAO), Windhoek/Rome, 2006.

if not impossible, which helps to explain the mushrooming of private enclosures of communal grazing areas after Independence.

Three broad land governance issues with regard to communal land had manifested themselves at Independence:

- the lack of clear policy and administrative structures for land allocation and management,
- uncertainties about legitimate access and rights to land, and
- the ways in which land is administered.[68]

The National Land Policy described the situation prevailing in communal areas in the following way:

> … in some areas, traditional authorities currently undertake land administration with varying degrees of efficiency and legitimacy. In other areas, there is no clear or broadly accepted authority over land. In several parts of the country there is growing tension between those who are thereby excluded from access to this land. The roles and rights of the government, the chiefs, the rich and the poor are still uncertain. Under these circumstances, many people continue to see the communal areas, and communal land tenure, as receiving second class treatment and offering second class land rights to the Namibians who live there.[69]

## 4.1 Traditional Authorities

It is clear that by 1990 traditional authorities had lost credibility and legitimacy as central land governance institutions in communal areas. To exacerbate matters, the ruling party and the independent government appeared to have had an ambiguous relationship with traditional leaders.[70] Apart from the ambiguous role that many traditional authorities played during the struggle for liberation, it is conceivable that they were possibly perceived as contenders for political power. This needs to be understood against the background of Namibia's political system. At national level, political leaders are elected to the National Assembly in terms of party lists. Crucially, these elected representatives at national level do not have a constituency to which they are answerable. Since they are political party nominations for the National Assembly, they are answerable to their respective political parties. At the next, lower level, Regional Councillors are elected by constituencies in all 14 regions, to whom they are answerable. This newly established political structure and its elected agents had to assert themselves in a context where traditional authorities enjoyed considerable legitimacy and influence in areas under their jurisdiction. Traditional authorities, with their well-established areas of jurisdictions in the rural areas, might have been perceived by many politicians as threats to attempts by the new state to establish itself in rural areas. At least one senior politician was reported to have expressed fears that strong traditional leaders "might … marginalise the function of constitutionally-established institutions and offices such as the regional governor and councillors".[71]

68 Ministry of Lands, Resettlement and Rehabilitation (MLRR), *National Land Policy*, MLRR, Windhoek, 1998, p. iv.
69 Ibid.
70 Werner, W., "Land, resource and governance conflicts in Kunene involving conservancies", in Odendaal, W. and Werner, W. (Eds), *"Neither here nor there": Indigeneity, marginalisation and land rights in post-independence Namibia*, Land, Environment and Development Project, Legal Assistance Centre, Windhoek, 2020, p. 279.
71 *New Era*, 3 November 1993, as cited in Werner, W., "Land and land tenure policy: Briefing paper for GTZ Project Appraisal Mission", *NEPRU Documents*, Namibian Economic Policy Research Unit, Windhoek, 2000, p. 2.

Given their prominent position in the rural balance of power, the issue of traditional leaders needed to be addressed. That this was regarded as an important political issue is reflected in the appointment of the *Commission of Inquiry into Matters Relating to Chiefs, Headmen and other Traditional or Tribal Leaders*[72] while preparations for the National Conference on Land Reform and the Land Question were underway. The Commission submitted its report in 1991. Included in its terms of reference was to inquire and report on the appointment and recognition of traditional leaders as well as their powers, duties and functions. It was also required to make recommendations on "the viability or otherwise of traditional or tribal authorities, regard being had to the provisions of the Namibian Constitution".[73] The role of traditional leaders in communal land administration was explicitly omitted from the terms of reference in order to not pre-empt the proposals and recommendations of the National Conference on Land Reform and the Land Question, which was held in the same year.

The first Traditional Authorities Act was gazetted in 1995, and was repealed in 2000 by section 20 of the *Traditional Authorities Act 25 of 2000* (TAA). In terms of this Act, the powers of Traditional Authorities include the ascertainment and codification of customary law in consultation with members of their community, and to administer and execute customary laws. Customary laws are defined as the rules and procedures as well as practices of a community in so far as they are not in conflict with the Constitution or any statutory law. They were also authorised to hear and settle disputes between members of a traditional community in accordance with the customary laws of that community. It must be assumed that the administration of communal land falls within the ambit of these provisions.

With regard to land administration, the TAA stipulates in section 3(2)(c) that, "A member of a traditional authority shall in addition to the functions referred to in subsection (1) have the following duties, namely … (c) to ensure that the members of his or her traditional community use the natural resources at their disposal on a sustainable basis and in a manner that conserves the environment and maintains the ecosystems for the benefit of all persons in Namibia;".

As discussed further on, the *Communal Land Reform Act 5 of 2002* (CLRA) would confirm the central role that Traditional Authorities played in communal land administration. In the words of a former Minister of Lands, Resettlement and Rehabilitation and later President of Namibia, Traditional Authorities are the ones "who administer the communal land on behalf of the State".[74]

## 4.2 National Conference on Land Reform and the Land Question

In view of the complexity of the land question in Namibia, the Government decided to consult all stakeholders on their specific issues. To facilitate a common understanding among stakeholders that were until 1990 divided by racially defined access to land, the National Conference on Land Reform and the Land Question was held under the auspices of the Office of the Prime Minister in 1991. In his opening address, the Prime Minister and Chairperson of the Conference acknowledged that traditional leaders as the main administrators of communal land had "been left powerless" as a result of the dissolution of second-tier authorities. At the same time, it was not clear what the

72 Republic of Namibia, *Report by the Commission of Inquiry into Matters Relating to Chiefs, Headmen and other Traditional or Tribal Leaders*, Windhoek, 1991.

73 Ibid., p. 1.

74 Cited in Chiari, G.P., *Report of the UNDP Mission on Rural Livelihoods and Poverty in Namibia*, UNDP, Windhoek, 2004, p. 9.

lowest levels of local government would be, and whether conference participants would come up with proposals.[75]

The Conference passed 24 resolutions, 13 of which pertained to communal land. Resolution No. 13, concerning "Access to Communal Land", acknowledged the constitutional right of Namibian citizens to settle anywhere in Namibia, but participants resolved that, in doing so, people should "take account of the rights and customs of the local communities living there".[76] This is a clear acknowledgement that occupiers of communal land had legitimate tenure rights to that land, which rights should be respected. Resolution No. 16 resolved that people should not have to pay for land allocations, and that, where this was desirable – obtaining land for business purposes, for example – it should be paid to the State, not to traditional leaders.[77]

A fairly long resolution on the rights of women called for equal rights of women to own, inherit and bequeath land, and for a programme to support women through training etc. to compete on equal terms with men. Also, discriminatory laws should be abolished and women fairly represented on all future local-level institutions dealing with land matters.[78]

Resolution 18 dealt with land allocation and administration. It stated that,

> The role of the traditional leaders in allocating communal land should be recognised, but properly defined under law.
>
> The establishment of regional and local institutions is provided under the constitution. Their powers should include land administration.
>
> Land boards should be introduced at an early date to administer the allocation of communal land. The said boards should be accountable to the government and their local communities.[79]

The Technical Committee on Commercial Farmland, which was appointed in terms of Resolution 8, made a few observations on the topic of land administration in communal areas, although its focus was on freehold or commercial farmland. It argued that Namibia could learn from the experiences of Botswana, and recommended that a National Task Force be established to work out strategies together with Traditional Authorities to address land administration issues in communal areas, and to "ensure the establishment of permanent land boards under the overall supervision of the Ministry of Lands, Resettlement and Rehabilitation".[80]

## 4.3 Reforming governance: contested territory

A first step in this direction was taken in 1993, when the Ministry of Lands, Resettlement and Rehabilitation sent a small team to Botswana to acquaint itself with land administration in that

75 Office of the Prime Minister (Ed.), *National Conference on Land Reform and the Land Question*, 1991, pp. 15-16.
76 Ibid., p. 35.
77 Ibid., p. 36.
78 Ibid., p. 37.
79 Ibid., pp. 37-38.
80 Office of the Prime Minister, *Report of the Technical Committee on Commercial Farmland*, Office of the Prime Minister, Windhoek, 1992, pp. 134-135, 182.

country, and in particular the roles and functions of Communal Land Boards and land use planning. The team supported the recommendations to the National Land Conference, which included:

- devolution of decision making to community organisations,
- development of a clear legal framework to clarify ownership of commonage resources,
- formalisation and strengthening of land use planning,
- rights of local communities to raise revenues, and
- traditional land managers to continue 'to have a voice' in the allocation and administration of land.[81]

Regarding implementing these recommendations, the team proposed that the establishment of land boards would provide a sound institutional framework, and that this would "enable rural communities to retain some control over land use in the face of growing pressures on their land". The team held that interim land authorities should be established to set the process of establishing land boards in motion.[82] However, the team did not recommend that communal land should vest in land boards as is the case in Botswana.

In the mid-1990s, the Government developed the Communal Land Reform Bill and a draft "Outline of a National Land Policy". Both proposed to establish the State as administrator of all customary land rights – a proposal that was informed by the perception that in terms of Article 100 of the Namibian Constitution, all communal land "shall belong to the State". As the perceived owner of such land, the State sought to take over land administration functions in communal areas through the creation of regional land boards, albeit not to "dilute the authority of traditional leaders, but rather to assist them in the difficult task they have".[83] Section 72 of the Outline of a National Land Policy proposed to transfer "all authority over and rights to communal land which are currently exercised or held by traditional leaders and other customary authorities on behalf of communal area residents to the Regional Land Boards". Section 74 stated that Traditional Authorities duly recognised under the Traditional Authorities Act could be designated to perform such land administration functions as Regional Land Boards might have specified.[84]

The Communal Land Reform Bill proposed the establishment of Regional Land Boards comprised of members appointed by the Minister. Chiefs and traditional leaders were excluded from serving as members, and the proposed land boards were to be responsible for the regulation of, and control over, "the occupation and use of communal land within its region". The Bill proposed to transfer powers, duties and functions that vested in Traditional Authorities to land boards. By definition, this included the allocation and cancellation of customary land rights.[85]

At the same time, the Council of Traditional Leaders Bill was drafted in pursuance of Article 102(5) of the Constitution, whose task it would be to advise the President on the control and utilisation

81 Werner, W., Tjipueja, H., Namugongo, F. and Huesken, J., *Report on the study trip of a delegation of the Ministry of Lands, Resettlement and Rehabilitation to Botswana*, Ministry of Lands, Resettlement and Rehabilitation, Windhoek, 1993, pp. 22-23.

82 Ibid., p. 23.

83 Iyambo, N., "The role of traditional authorities in a changing Namibia", in Malan, J. and Hinz, M. (Eds), *Communal Land Administration: Second National Traditional Authority Conference – Proceedings,* Centre for Applied Social Sciences, Windhoek, 1997, p. 18.

84 Malan, J., Hinz, M., ibid., p. 181.

85 Ibid.

of communal land.[86] In terms of this policy and legal framework, traditional leaders were to be stripped of their powers to administer customary land rights, serving only as advisors to the President on customary land administration issues.

Both Bills and the Outline of a National Land Policy were submitted to a Consultative Conference on Communal Land Administration in Windhoek in September 1996. Approximately 200 participants were invited, including high-ranking politicians of the ruling party and many powerful kings and chiefs from across the country. The Government faced fierce opposition from traditional leaders to its proposals to relegate traditional leaders to a subordinate position, which was regarded as an assault on their traditional powers and rejected out of hand. Their sentiments were put very succinctly in a submission by seven Traditional Authorities from Owambo (sic), which stated that "the traditional leaders should not be made to be the back-yard boys of what should be technical and advisory bodies, namely the Regional Land Boards".[87]

The outcome of the Consultative Conference in 1996 was that the draft National Land Policy and the Communal Land Bill had to be revised to provide for the continued participation of Traditional Authorities in the administration of customary land tenure. Section 4(1) of the Communal Land Bill, which proposed transferring to Regional Land Boards the powers of regulating and controlling the occupation and use of communal land, was deleted. The Minister was to appoint members of land boards selected from people recommended by Traditional Authorities.[88] These amendments put Traditional Authorities back at centre stage in land administration in communal areas.

## 4.4 Governance and the role of Traditional Authorities: Communal Land Reform Act, 2002

In 2002, six years after the Consultative Conference in 1996, the National Assembly passed the *Communal Land Reform Act, 2002 (Act No. 5 of 2002)* (CLRA). This Act and its regulations govern the official land reform programme in the communal or non-freehold areas. It left the powers of Traditional Authorities to allocate and cancel customary land rights untouched, but, in an attempt to improve land governance, subjected these acts of land governance to the scrutiny of Communal Land Boards.

The CLRA also defined the powers of Traditional Authorities. It empowered them to lay down conditions for the use of commonages, which may include conditions as to the type and numbers of livestock grazed, and which areas of a commonage should rest. Currently, the regulations state that no more than 300 large stock units, or the small stock equivalent, may be grazed by a resident on communal land. Regulation 10 also states that people who are not regarded as residents of a particular area may not bring livestock onto a commonage, except with the permission of the Chief or Traditional Authority. Rights to grazing may be withdrawn if the holder of a legitimate right does not observe the conditions imposed by the Traditional Authority or has access to other grazing land.

The CLRA is a major intervention for improving land governance in communal areas, but it does not adequately address a number of land governance issues. To start with, the CLRA does not

86 Ibid., p. 199.
87 Ibid., p. 69.
88 Ibid., p. 196.

differentiate between different tiers of traditional authority. All communal areas in Namibia, with the exception of the San areas, have tiered traditional authority structures, typically consisting of a king or chief, senior traditional councillors and headmen. Each tier has specific mandates and powers. The Traditional Authorities Act of 2000 (TAA) states that a traditional authority "means a traditional authority of a traditional community established in terms of section (2)". It may consist of a chief or head of that traditional community and senior councillors and traditional councillors. A chief is "the supreme leader of a traditional community". A traditional leader "means a chief, a head of a traditional authority, or a senior traditional councillor designated and recognised or appointed or elected, as the case may be, in accordance with this Act". The TAA requires that traditional leaders be recognised by the Government in order to perform the functions and duties defined in the Act, and prescribes the procedure for being recognised. The names of recognised traditional leaders are published in the *Government Gazette*. The Government pays allowances for up to a maximum of 12 councillors per traditional authority.

The CLRA adopts these definitions for purposes of implementing the Act. As mentioned above, it does not explicitly differentiate between different tiers of traditional authority, which raises the question of whether village headmen are included in the definition of traditional leaders. Arguably, village headmen are at the coalface of land administration in communal areas, being responsible for the allocation and cancellation of customary land rights. Hinz[89] argues that in the strict sense of the word, headmen are "executive leaders in their respective areas", not councillors. By implication, therefore, they are not included in this broad definition. In reality, however, "the gazetted councillors may also include leaders of this lowest level of traditional governance". Mendelsohn[90] cites Article 20 of the CLRA which gives a chief the power to delegate the allocation and cancellation of customary land rights to lower levels of traditional authority. However, "it is clear that the process of CLR [customary land registration] is intended to have the endorsement from senior levels of leadership". This is confirmed by the fact that the N$25 application fee is paid to the head office of the traditional authority, "and applications are forwarded through his office to the MLR for further processing". The procedures for the registration of customary land rights do not "directly mention, require or imply the participation of the local headmen in the sequence of events needed to establish CLR (customary land registration)". Mendelsohn concludes that the exclusion of headmen from the registration process "is a serious problem, as local headmen …are best placed to confirm those rights". In practice, village headmen are part and parcel of the verification of existing customary land rights on the ground before they are mapped by technical staff of the Ministry. They also decide whether to grant an application for a new customary land right.[91]

The CLRA provides no guidance on how headmen should allocate or cancel customary land rights. Hence, no legal instruments exist to enforce constitutional principles of equity and in particular gender equality with regard to land allocations. Women, the youth and marginalised groups are likely to be disadvantaged by this omission.[92] A study on gender rights commissioned by the Legal Assistance Centre in 2008 found that despite some progress having been made, women's

89 Hinz, M., "Traditional governance and African customary law", 2008, pp. 79-80.

90 Mendelsohn, J., *Customary and legislative aspects of land registration and management on communal land in Namibia*, Ministry of Lands and Resettlement, Windhoek, 2008, p. 18.

91 Meijs, M. and Kapitango, D., "Communal land registration", *Namibia Land Management Series*, Ministry of Lands and Resettlement, Windhoek, 2012, p. 15.

92 Chiari, G.P., *Report of the UNDP Mission on Rural Livelihoods and Poverty in Namibia*, 2004, p. 12.

rights to customary land are still determined by patriarchal practices and customs.[93] Lendelvo[94] confirmed that "women are fully aware of their right to register for land rights in communal areas, but cultural and socio-economic conditions seem to be barriers for them to freely apply for land". The absence of clear guidelines also leads to other practices that impact negatively on tenure security. Mendelsohn and Nghitivelekwa[95] reported in 2017 that Traditional Authorities in Tsumkwe West and Kavango East and West sold land over which households had customary land rights to individual investors, with "residents in those farming areas losing also their homes and commonage land".

Traditional Authorities also have no obligations towards land claimants. Chiari,[96] for example, states that the CLRA does not lay down a specific time period within which applications are either approved or rejected. He observed that "the CLRA avoids interfering in relationships between land claimants and traditional authorities, whereas it regulates those between the latter and Land Boards".[97] While section 3(1)(a) of the TAA states that Traditional Authorities or members thereof have to "ascertain the customary laws applicable in that traditional community after consultation with members of that community", the CLRA does not require Traditional Authorities or Communal Land Boards (CLBs) to consult their members or account to them about land allocations.[98] Large tracts of communal land were allocated to supposed developers for irrigation projects, particularly in Kavango East and West, without affected customary land rights holders being consulted or adequately informed beforehand. In one case the CLB issued a leasehold to an investor after the TA had consented to the project. "The contents of the agreement between the investor and the TA on behalf of communities is not known by the local people, nor the conservancies, including key stakeholders like the Constituency Councillor in whose jurisdiction the project would have been implemented".[99]

The CLRA refrains from interfering in local customary practices, thus implicitly acknowledging that these practices differ across communal areas and permitting them to continue to operate. This diversity is borne out in section 3 of the TAA which states that the powers of Traditional Authorities or members thereof shall "administer and execute the customary law of that traditional community (and) uphold, protect and preserve the culture, language, tradition and traditional values of that traditional community". It also confers powers to make customary laws.[100] In exercising those powers, Traditional Authorities should support the policies of government, regional councils and local authorities, "and refrain from any act which undermines the authority of those institutions" (section 16).

93 Werner, W., *Protection for Women in Namibia's Communal Land Reform Act: Is it Working?*, Land, Environment and Development Project, Legal Assistance Centre, Windhoek, 2008.

94 Lendelvo, S., *Women's access to land: A case study of the area under the jurisdiction of the Ondonga Traditional Authority, Oshikoto Region*, Gesellschaft für Technische Zusammenarbeit (GTZ), Windhoek, 2008, p. 21.

95 Mendelsohn, J. and Nghitevelekwa, R., *An enquiry into land markets in Namibia's communal areas – Final Report*, Namibia Nature Foundation, Windhoek, 2017, p. 16.

96 Chiari, G.P., *Report of the UNDP Mission on Rural Livelihoods and Poverty in Namibia*, 2004, p. 9.

97 Ibid.

98 Thiem, M. and Muduva, T., "Commercialisation of land in Namibia's communal land areas: A critical look at potential irrigation projects in Kavango East and Zambezi regions", *Research Report No. 49*, Institute for Poverty, Land and Agrarian Studies, University of the Western Cape, Belville, South Africa, 2015, p. 23.

99 Ibid.

100 Office of the Prime Minister, *Traditional Authorities Act, 2000 (Act No. 25 of 2000)*, promulgated in *Government Gazette No. 2456*, 22 December 2000.

However, customary land governance and practices frequently do not comply with constitutional and other statutory provisions. Contrary to a common belief that customary governance systems are inherently egalitarian, not least because land in communal areas belongs to the people collectively, in reality "land access and control are hierarchical, inegalitarian and discriminatory against women, foreigners and the poor". Traditional Authorities are expected to uphold and administer the customary laws and practices of specific communities, while respecting the fundamental principles of equality and non-discrimination laid down in the Constitution. But neither the CLRA nor the TAA lay down guidelines as to how customs should be adapted and applied to do justice to both customary and statutory legal requirements and practices.

Local customs include, for example, matrilineal inheritance systems[101] which continue to impact negatively on women's rights to land and productive resources in many cases, because they permit what is referred to as property grabbing. Considerable progress has been made as a result of a decision taken in 1993 by Traditional Authorities in the north-central regions and the subsequent enactment of the CLRA to stop the eviction of widows from land that they and their deceased husbands utilised. However, neither this decision nor the provisions of the CLRA have stopped members of the family of a deceased husband from grabbing moveable property such as livestock and agricultural implements. These actions are usually justified and legitimised by reference to the matrilineal inheritance system, i.e. a customary practice that has evolved over time. Traditional Authorities, as the legal custodians of customary law, find it difficult to prohibit the practice and are limited to negotiating a solution where an inheritance issue has been brought to their attention.[102]

Thus, there is an urgent need to bring customary laws and practices in line with the constitutional principles of equity and non-discrimination on the grounds of gender, race, ethnic origin and social or economic status.

## 4.5 Unrecognised TAs and areas of jurisdiction

A major problem arises in communal land administration as a result of the fact that only those chiefs and TAs can exercise functions and powers under the Act as are recognised in terms of the TAA. In those areas where traditional leaders are not recognised, the procedures set out in the CLRA for the recognition of customary land rights and the approval of new applications cannot be implemented.[103] This situation is exacerbated by the fact that the provisions of the CLRA assume that even recognised traditional leaders have specific areas of jurisdiction. This is generally true in the north-central and north-eastern communal areas where most households practise cultivation in combination with animal husbandry, but areas of jurisdiction are not always clearly defined in communal areas south of the Red Line.

In communal areas where the predominant form of agricultural production consists of extensive livestock farming, it is common that traditional leaders exercise their powers over subjects who are not necessarily residing in areas where the TA is located. This is in line with the provisions of the TAA, which do not associate the mandates of traditional leaders to geographic areas. In terms of section 2(2),

101 Mendelsohn, J., *Customary and legislative aspects of land registration*, 2008, p. 81.
102 Werner, W., *Protection for Women in Namibia's Communal Land Reform Act,* 2008, p. 29.
103 Hinz, M., *Customary Land Law and the Implications for Forests, Trees and Plants*, 1996, p. 81.

> A traditional authority shall in the exercise of its powers and the execution of its duties and functions have jurisdiction over the members of the traditional community in respect of which it has been established.[104]

A traditional community "may include the members of that traditional community **residing outside the common communal area**".[105]

Overlapping areas of jurisdiction of recognised TAs and the existence of unrecognised TAs create serious issues for land governance. These appear to be particularly acute in Omaheke and Otjozondjupa Regions. At a Stakeholders' Consultative Meeting in 2014, the Omaheke CLB stated that the areas of jurisdiction of seven registered TAs were overlapping. These "seem to be merely based on where communities reside rather than area specific".[106] The negative impacts of this situation on land governance were listed as follows:

> That some communities are left out in the registration of land rights;
>
> That some traditional authorities allocate land to its [sic] people in areas where they do not have jurisdiction;
>
> That double allocation of land rights occurs, where more than one Traditional Authorities [sic] exist – due to unclear boundaries.
>
> Applications from some Traditional Authorities could not be considered by the Board due to lack of jurisdiction by such Traditional Authorities in such areas.[107]

Otjombinde Constituency was cited as an example where four TAs claim jurisdiction over one particular area and allocate land rights to their subjects. Applications cannot be approved by the CLB, "due to a lack of jurisdiction of these Traditional Authorities in that Constituency".[108] This and the existence of unrecognised TAs imply that "a very substantial part of the Ovaherero are not part of the procedures before Land Boards that finalise the allocation of land under customary law".[109]

Similar issues are the cause of great discontent in northern Kunene Region.[110] The crisis reached such proportions that the Ministry of Land Reform dispatched two of its officials to investigate the situation. They stated in their report[111] that 162 fenced land parcels averaging 10 hectares were identified in Omakange, Kunene Region, in 2014. Seventy applications for the recognition of

104 Office of the Prime Minister, Traditional Authorities Act 25 of 2000.
105 Ibid., my emphasis.
106 Omaheke Communal Land Board, *Stakeholders' consultative meeting: Traditional authorities recognition and areas of jurisdiction in relation to communal land rights registration*, Omaheke Communal Land Board, Gobabis, 2014, p. 3.
107 Ibid., pp. 3-4.
108 Ibid., p. 4.
109 Hinz, M., "Traditional governance and African customary law", 2008, p. 81.
110 Werner, W., "Land, resource and governance conflicts in Kunene involving conservancies", in Odendaal, W. and Werner, W. (Eds), "*Neither here nor there*", 2020, p. 261.
111 Namwoonde, I.H. and Karunga, M.H., *Investigation on the fences erected along the Kamanjab road between Okapundja and Otjomukandi* Ministry of Lands and Resettlement, Windhoek, 2014.

customary tenure rights could not be submitted to the Kunene CLB, because these applications had been lodged with the Uukwaluudhi TA in Omusati Region, which had no standing in the registration of tenure rights in Kunene. They listed several other villages where land allocations were made by the Uukwaluudhi TA and the unregistered Otjerunda TA, with both TAs claiming jurisdiction over those villages. Double allocation of the same land parcel was not uncommon, giving rise to land disputes within this area.

In view of these problems, the Omaheke CLB recommended that the TAA be amended so that recognised TAs have jurisdiction over areas rather than communities. Where areas of jurisdiction remain poorly defined, the CLB should be empowered to consider land allocations.[112]

## 4.6 Disputes

Good governance systems provide clear guidelines on dispute resolution. Land disputes typically arise where no written records exist about rights to land and natural resources, and where the exact areas over which rights are claimed are not clearly defined. Under such circumstances, poor and weak households may find it difficult to defend their rights against more powerful contestants. Increasing pressures on communal land through population increases and gradual urbanisation may fuel disputes.[113] Improved tenure security thus requires clear and accessible mechanisms for dispute resolution.

The most common disputes in the communal areas of Namibia include boundary disputes between one or more parties, the extension of allocated land parcels, the double allocation of a parcel of land and illegal fencing, conflicting claims over land, illegal evictions, inheritance conflicts, and unclear validity in term of the prescribed procedures of land allocation.[114] Section 3 of the TAA empowers TAs or members thereof to "hear and settle disputes between the members of the traditional community in accordance with the customary law of that community".[115] That this is still the case was confirmed by Mendelsohn,[116] who found that the "lower levels of authority indeed appear to play important functions in resolving local disputes and maintaining discipline". He observed in the north-central regions that,

> Matters concerned with land are also covered by several articles in each traditional authority's statutes. Disputes over land are first assessed by local headmen, and then taken to successively higher levels of authority if they cannot be settled to the satisfaction of the claimants or defendants. Disputes may even be taken beyond the highest court of a traditional authority to be heard and settled in a magistrate's court.[117]

112 Omaheke Communal Land Board, *Stakeholders' consultative meeting*, p. 5.

113 FAO, "Good governance in land administration", *FAO Land Tenure Studies*, Food and Agriculture Organization of the United Nations, Rome, 2007, p. 19.

114 Ministry of Lands and Resettlement, *Operational Manual for Communal Land Boards*, Ministry of Lands and Resettlement, Windhoek, 2006, p. 37; Brankamp, H., *Communal land disputes in Namibia: Actors, patterns, procedures*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Windhoek, 2012, p. 11; Land, Environment and Development Project, *Appeal Tribunal Cases in Namibia's Land Reform Process: Record of decisions 2010-2014*, Legal Assistance Centre and Ministry of Lands and Resettlement, Windhoek, n.d. [2014].

115 Office of the Prime Minister, Traditional Authorities Act 25 of 2000.

116 Mendelsohn, J., *Customary and legislative aspects of land registration*, 2008, p. 12.

117 Ibid., p. 82.

For a large number of customary land rights holders, traditional courts are relatively easily accessible. However, the extent to which local headmen and higher levels of traditional authority are able to give 'a fair trial' is questionable, not least because administrative (allocations), judicial (disputes) and legislative (making customary laws) powers are not separated. A traditional leader typically performs all three functions. Given that it cannot be assumed that all traditional leaders are fully aware of the provisions of the existing legal framework, it must be assumed that in hearing disputes, they bring customary laws to bear on cases.

The procedures to be followed by TAs in addressing disputes are not spelt out in the CLRA. While the CLRA gives them powers to enforce certain provisions of the Act, such as those pertaining to the removal of fences or the eviction of people from the commonage and cancellation of their land rights, "the procedural rules to be followed in executing these enforcement powers" are not provided.[118] This is leading to ambiguity of the powers and roles of different law enforcement agencies in protecting land rights. A study on private enclosures on communal land found in 2011 that although the law was in place, there was no backup from government to enforce its provisions. There was an assumption that if people transgressed the law, traditional leaders could report them to the police to be charged. In practice this has not happened. Moreover, the limited enforcement of the law sent a message to people that it was acceptable to fence off commonages, since the lack of enforcement implied that this was not illegal.[119]

Provisions that could include the resolution of disputes are provided in section 8 of the CLRA, which gives CLBs the power to establish committees to investigate any matters that a CLB may refer to such a committee. It must be assumed that such matters include land disputes, but only where these are brought to a CLB. The Legal Assistance Centre pointed out that these committees have to be distinguished from investigating committees provided for in section 37 of the Act, which can be established to deal with claims relating to existing land rights.[120] Such committees can be set up by the Minister in consultation with a CLB to investigate claims to customary land and other occupational rights and the retention of fences, "even if no one has applied for existing rights to be recognised".[121] There were only a few occasions when the Minister established such an investigative committee.[122]

Section 37 of the CLRA and Part 3 of the Regulations provide an important mechanism for the adjudication of land rights, particularly land enclosures. Together with section 44 of the Act, which prohibits the erection of fences and empowers TAs and CLBs to order the removal of such fences, these provisions provide an important tool for establishing the legality of claims to communal land. It is not clear how often these provisions have been used in practice. But they provide the mechanisms to regularise all private fences on communal grazing areas.

In 2003 the Community Courts Act was passed. It allows traditional communities to apply for the establishment of community courts. These shall be presided over by one or more Justices as well

118 Thiem, M., *A Decade of Communal Land Reform: Review and Lessons Learnt, with a Focus on Communal Land Rights Registration,* Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Windhoek, 2014, p. 24.
119 Werner, W., *"What has happened has happened": The complexity of fencing in Namibia's communal area,* Legal Assistance Centre, Windhoek, 2011, p. 42.
120 Legal Assistance Centre, *Guide to the Communal Land Reform Act*, 2009, p. 14.
121 Ibid., p. 46.
122 Brankamp, H., *Communal land disputes in Namibia*, 2012, pp. 21-22.

assessors appointed by the Minister. They have jurisdiction "to hear and determine any matter relating to a claim for compensation, restitution or any other claim recognized by the customary law". Proceedings before a community are to be guided by the customary laws and practices of the traditional community residing in its area of jurisdiction, and its decisions can be appealed to in a Magistrate's Court. However, as Hinz[123] pointed out, the Community Courts Act only applies to recognised communities. Although a number of Community Courts have been established since 2003, little information about their operation, in particular with regard to land disputes, is in the public domain.

The CLRA establishes a procedure for land claimants to appeal against a decision taken by traditional leaders and/or land boards. The Minister may set up an Appeal Tribunal as prescribed in section 39 of the CLRA. This requires that an aggrieved party must lodge an appeal on the prescribed form to the Executive Director within 30 days after the decision that gave rise to the disagreement was taken. The latter will notify the Minister to appoint an Appeals Tribunal, whose decision is binding.[124] An appeal must include, "(a) particulars of the decision appealed against; (b) the ground for the appeal; and (c) any representation that the appellant wishes to be taken into account in the hearing of the appeal."[125] An appellant who is aggrieved by the decision of an Appeal Tribunal may appeal the decision either to a Magistrate's Court or the High Court.[126]

The appeal system as provided for in section 39 of the CLRA incorporates the basic legal principles of "administrative justice and fair trial concepts".[127] However, it is doubtful that this system is appropriate in rural contexts where many land claimants are not able to formulate their grievances in writing and in the official language. In addition, distances to CLBs are a major inhibiting factor in following the prescribed procedures within the prescribed time.[128]

Implementing the prescribed appeal procedures proved challenging in some instance, specifically concerning investigations of disputes. The Legal Assistance Centre pointed out that in many cases put before an Appeal Tribunal, investigation reports prepared by CLBs were incomplete. Without complete investigation reports, Appeal Tribunals are unable to decide whether the decision taken by a CLB or traditional leader was correct or not. Like in a court of law, "an Appeal Tribunal should base its decision solely on the existing full report received from the applicable CLB". In some cases, members of the Appeal Board had to carry out their own investigations to arrive at decisions. This involvement in investigating a land dispute "could well jeopardise their ability to deliver an objective decision".[129]

Legal provisions intended to make land rights more secure are only as good as the willingness and capacity to enforce them. The weakness of the CLRA in laying down clear enforcement procedures for TAs has been raised above. An issue of a much more profound nature is the fact that the State appears unwilling to enforce the law, even where the courts have ordered it to do so. The most

123 Hinz, M., "Traditional governance and African customary law", 2008, p. 81.
124 Legal Assistance Centre, *Guide to the Communal Land Reform Act*, 2009, p. 50.
125 Section 39 as cited in Land, Environment and Development Project, *Appeal Tribunal Cases in Namibia's Land Reform Process*, n.d. [2014], p. vii.
126 Ibid.
127 Ibid.
128 Werner, W., *Protection for Women in Namibia's Communal Land Reform Act*, 2008, p. 25.
129 Land, Environment and Development (LEAD) Project, *Appeal Tribunal Cases in Namibia's Land Reform Process*, n.d. [2014], p. viii.

prominent example involves the enclosure of large tracts of land for private grazing in the N‡a Jaqna Conservancy. In 2013 a legal case was brought against the individuals who had fenced farms in N‡a Jaqna in contravention of the CLRA. In 2016 the High Court found in favour of the N‡a Jaqna Conservancy Committee, the Applicant in this matter, and ordered the removal of fences. However, the Court's decision was not implemented by the Otjozondjupa CLB and the !Kung TA. Only a few of the fences had been removed by 2019, and the issue has become the subject of further litigation. "Thus, although the legal rights of the conservancy have technically been upheld in court, in practice these rights are still being violated".[130]

# 5. Communal Land Boards

The establishment of CLBs was an important step in improving the administration of customary land rights. In terms of section 3 of the CLRA, they must "control the allocation and cancellation of customary land rights by Chiefs and Traditional Authorities [and] decide on applications for rights of leasehold".[131] Land Boards must ratify decisions taken by TAs with regard to the allocation of new land rights and the confirmation of existing ones before registration.[132] They must also ensure that allocations do not exceed the maximum size prescribed for communal land. The objectives of these provisions are to hold TAs accountable for their decisions regarding not only land allocations but also cancellations.

CLBs also have powers to allocate leaseholds, provided that the land applied for is less than 50 ha. Anything exceeding that size must be referred to the Minister.[133] However, TAs have to consent to the granting of leaseholds. Where they refuse to do so, CLBs can refer the matter to an arbitrator appointed by the Minister.[134]

The CLBs have at least 12 members, to ensure that widespread interests in land are represented. The members are drawn from a wide range of backgrounds, ranging from TAs to line ministries. They are appointed by the Minister for a period of three years, and are required to hold quarterly meetings.[135] Women are represented by a prescribed quota.[136] Conservancies have a representative in the CLB, but the CLRA makes no provision for representatives of community forests or water point associations.[137]

A major role of CLBs is to oversee the allocation and cancellation of customary land rights. These rights become legal rights only once a CLB has ratified the decisions of a TA.[138] The CLRA states that a CLB can only ratify a decision of a TA if such decision was taken in accordance with the Act.

130 Hays, J. and Hitchcock, R., "Land and resource rights in the Tsumkwe conservancies – Nyae Nyae and N‡a Jaqna", in Odendaal, W. and Werner, W. (Eds), *"Neither here nor there": Indigeneity, marginalisation and land rights in post-independence Namibia,* Legal Assistance Centre, Windhoek, 2020, p. 213.
131 Legal Assistance Centre, *Guide to the Communal Land Reform Act*, 2009, p. 11.
132 Thiem, M., *A Decade of Communal Land Reform*, 2014, p. 26.
133 Ibid.
134 Section 30 of the CLRA, in Legal Assistance Centre, *Guide to the Communal Land Reform Act*, 2009, p. 90.
135 Ibid, p. 12; Thiem, *A Decade of Communal Land Reform*, 2014, p. 26.
136 Nghitevelekwa, R., *Communal land and land reform: People's lived-realities in North-central Namibia*, UNAM Press, Windhoek, forthcoming, p. 126.
137 Jones, B.T.B. and Kakujaha-Matundu, O., *Promoting Environmentally Sound Decision-making of Communal Land Boards*, Ministry of Environment and Tourism, Windhoek, 2008, p. 11.
138 Thiem, M., *A Decade of Communal Land Reform*, 2014, p. 26.

However, the CLBs have no powers to ensure that CLRA Regulations 31 and 32, for example, are observed. These provide for the protection of pastures, and place a responsibility on customary land rights holders to manage the land in accordance with the Soil Conservation Act 76 of 1969. If any activities of land rights holders are found to cause soil erosion, their rights can be suspended or withdrawn by the TA or the CLB.[139] However, the CLRA provides no criteria and procedures to enforce these regulations.[140]

## 5.1 Land registration

A major function of the CLBs is to register both existing and new customary land rights as well as create and maintain appropriate land registers. The compulsory registration of existing and new customary tenure rights is an important intervention for improving tenure security and transparency. However, only private rights in communal areas can be registered, not tenure rights to commonages. Typically, private tenure rights in communal areas encompass the homestead, an adjacent field for cultivation, and some land on which to keep livestock. The land parcel is normally well demarcated by some kind of enclosure – either palisades or increasingly wire. Apart from private rights, members of traditional communities enjoy undivided rights to commonages to graze livestock and collect natural products on land belonging to a more or less well-defined community. The registration of customary land rights commenced in 2003. In 2014 it was estimated that a total of 245 000 customary had to be registered.[141]

Registered TAs play a central role in the registration of customary land rights. They must approve or reject applications for new customary land rights as defined above, as well as the recognition of existing customary land rights or an existing fence. Applications for new and existing land rights must be made in writing on a prescribed form. In the Ndonga area in Oshikoto Region, the process of land registration starts with village headmen.[142] The headman must inspect the land parcel applied for, and communicate the request to the Chief. The Chief provides the prescribed form, which the headman passes on to the applicant for completion. A senior headman receives the completed form, and after verifying that the form contains all the required information, issues a receipt to the applicant and forwards the form to the CLB.

Before a new customary land right is allocated, the Chief or the TA must publicise the application on a noticeboard of the TA for seven days, to allow members of the public to lodge objections, if they have any. Then the CLB must ratify the allocation before it has legal effect (CLRA section 24). The same procedure applies for the recognition of existing customary land rights, except that these applications have to be advertised for seven days by the CLB.[143] The law also requires that all existing rights have to be registered within a time frame specified by the Minister.

Field verification of applications forms an important part of land registration. The demarcation of boundaries of the land and validation of claims to specific parcels of land are carried out through

139 Legal Assistance Centre, *Guide to the Communal Land Reform Act*, 2009, p. 127.
140 Jones, B.T.B., Kakujaha-Matundu, O., *Promoting Environmentally Sound Decision-making of Communal Land Boards*, 2008, p. 11.
141 Thiem, M., *A Decade of Communal Land Reform*, 2014, p. 32.
142 Chiari, G.P., *Report of the UNDP Mission on Rural Livelihoods and Poverty in Namibia*, 2004, p. 15.
143 Ministry of Lands and Resettlement (MLR), *A guide on communal land registration*, MLR, Windhoek, n.d., p. 2.

a participatory process at village level.[144] This includes teams consisting of support staff from the MLR and members of the CLB and the TA. During this process, all parcels are digitally mapped, with their sizes calculated and combined with the applicants' details. Once this process is complete, all the applications are displayed in public for seven days, before being submitted to the CLB for approval or rejection. Once the CLB has approved a right, a certificate of registration is issued.[145]

Progress in registering customary land has been slow. The deadline for this registration has been extended a few times, and in March 2014 was extended "until further notice". By 2018 only 39% or 95 917 of the estimated 245 000 existing customary land rights had been registered, and 43 599 new customary land rights.[146] One reason for this was that the mapping was initially done by means of a hand-held GPS. In 2008, with the support of technical advisors, the MLR pioneered the use of high-resolution aerial photographs to map land parcels.[147] This method proved particularly cost-effective in communal areas with a high density of land parcels, such as the crop-growing areas. In order to maximise the cost and time benefits, all parcels were mapped in a particular area, regardless of whether individual households had applied for recognition of their rights. However, in communal areas where extensive livestock farming was the primary land use, land parcels were too scattered.[148]

## 5.2 Namibian Communal Land Administration System

The MLR established a comprehensive digital recording system called the Namibian Communal Land Administration System (NCLAS),[149] which was rolled out to all CLBs in 2008. Designed to integrate the freehold and non-freehold registration systems, the NCLAS consists of two parts, namely Communal Deeds and Communal Cadastre. The former stores data relating to an applicant or land rights holder, while the latter contains "the geometries of parcels". These two components are linked via a Unique Parcel Identifier (UPI), which, as the name suggests, gives each land parcel a unique number. The NCLAS enables the CLBs to issue to people who hold a customary or leasehold right a simple certificate that reflects the particulars of the rights holder, a description of the right, the location and size of the land parcel, and a map of the parcel. In 2014 the MLR introduced a web-based application of NCLAS.

The NCLAS was designed to, amongst other things, manage the history of a land parcel,[150] but it is not clear to what extent this will be possible. Given that for many land rights holders the distances to the relevant CLB are considerable, it is reasonable to assume that the information captured by the NCLAS may not be up to date in all areas.

## 5.3 Maximum land sizes

The CLRA limits the sizes customary land rights, presumably to prevent land concentration and to ensure equal access to communal land. However, this limitation has caused confusion and

144 Thiem, M., *A Decade of Communal Land Reform*, 2014, p. 40.
145 Ibid.; Meijs, M. and Kapitango, D., "Communal land registration", 2012, p.15.
146 Nghitevelekwa, R., Shapi, M. and Kambatuku, J., *The land question and land reform in Namibia*, 2018, p. 119.
147 Thiem, M., *A Decade of Communal Land Reform*, 2014, p. 35.
148 Ibid., p. 36.
149 The following summary is based on ibid., pp. 42-44.
150 Ibid., p. 44.

tenure insecurity in many parts of the country, and in two regions, namely Kavango East and West, it has met with an outright refusal to register existing customary land rights. Originally the CLRA determined that CLBs could only approve and register customary land rights that did not exceed 20 hectares, ostensibly to curb "land grabbing". However, this limit has been increased to 50 ha. Larger areas need the Minister's approval. As many existing legitimate land rights exceeded the prescribed limit, a significant number of applications were sent to the Ministry of Land Reform for approval. This has been identified as one of the reasons for the registration of customary land rights slowing down.[151]

It would appear that the size limitation was applied to all applications, i.e. confirmation of existing land rights as well as new applications. In *Petrus Kaleka v Oshikoto Regional Land Board*, the Appeal Tribunal argued in February 2012 that a customary land right is distinct from an existing customary land right. It considered that section 23 of the CLRA means that,

> … any customary land right to a farming unit that was allocated before the commencement of this act by the Traditional Authority under customary law is not subject to any limitation in terms of the Act. The reality is that the Act does not prescribe for the recognition of existing customary rights a limitation on size.[152]

It also argued that in terms of section 28(9), CLBs have the discretion to determine whether an existing customary land right exceeds the prescribed size or not, but that "it must recognise the right if it is satisfied to the validity of the claim".[153] The Appeal Tribunal expressed the following opinion about this difference between discretionary powers regarding existing land rights and mandatory powers regarding new rights:

> In our view the Statute should be interpreted broadly in order to preserve pre-existing rights in line with the principle against retrospectivity and legal certainty. If it was the intention of the legislature to deprive people of rights without compensation the statute would, *inter alia*, fall short of the Constitutional requirements for compensation articulated under Article 16.[154]

The provisions on size limitations have caused confusion and tenure insecurity, particularly in communal areas that primarily practise extensive livestock farming. As Mendelsohn[155] pointed out, the minimum size of 50 ha clearly applies to crop farming only, since livestock husbandry on such small parcels of land is not possible. However, many livestock owners in southern communal areas were alarmed at having to limit their grazing areas to 50 ha, and expressed concern about the future of their common grazing areas, should every household apply for 50 ha. Mendelsohn found that in all those areas, people believed that "everyone would be allocated 20 hectares, or should attempt to obtain 20 hectares, since this would be the last chance that anyone would have of registering a property".[156]

151 Nghitevelekwa, R., *Communal land and land reform*, forthcoming, p. 134.
152 Land, Environment and Development (LEAD) Project, *Appeal Tribunal Cases in Namibia's Land Reform Process*, n.d. [2014], p. 24.
153 Ibid., p. 25, original emphasis.
154 Ibid.
155 Mendelsohn, J., *Customary and legislative aspects of land registration*, 2008, p. 15.
156 Ibid.

## 5.4 Land transfers and land markets

Section 38 of the CLRA provides for the transfer of customary or leasehold rights on the forms prescribed in the Regulations. In the case of customary land rights, the Chief or TA must give their written consent, whereas CLBs have to do so in the case of leaseholds.[157] According to the Legal Assistance Centre, this is necessary to enable the CLBs to make the necessary changes in the land registers, and to protect the rights of married women and their children.[158] Where land rights are transferred, compensation for improvements on the land may be negotiated.

There is mounting evidence that the transfer of customary land rights is rapidly evolving into a substantial informal land market.[159] While the legal provisions on land transfers are clear, questions have been raised as to whether many of the land rights transfers observed in communal areas should be termed 'legal trading in land rights' or rather an 'illegal transfer of rights'.[160] The existence of informal land markets implies that access to land is no longer limited to customary practices, i.e. through TAs, but is mediated through the availability of capital. Communal land, particularly close to urban areas, is increasingly becoming a monetised commodity. This requires a review of the current policy and legal framework to regulate the transfer of customary land rights more tightly. Failing to do so may put an increasing number of poor and marginalised households at risk of losing their land rights as a result of land sales. This is particularly important in view of the fact that a growing number of rural households are unable to survive on agricultural production alone, and depend on off-farm income streams.

## 5.5 Group rights

Governance of commonages remains weak. One manifestation of this is that some TAs appear to regard communal land as their personal fiefdoms, to be sold to individuals without consulting people under their jurisdiction. Apart from the cases of "land grabbing" referred to above, a report was published in mid-2019 in local weekly newspaper on how "hundreds of struggling farmers" had to pay large amounts of money to the Uukwangali Traditional Authority to secure access to communal grazing land controlled by the TA. Some farmers reportedly owed between N$23 000 and N$100 000 in fees which were backdated to 2014. It was claimed that part of the payment required goes to the TA for administrative purposes, while the other part goes to the Chief as a "token of appreciation". The standard fees were reported to be N$6 000 for administration, N$6 000 for the Chief and N$50 per head of cattle. It was alleged that some farmers who refused to pay had been expelled from the area.[161]

In 2005 the Cabinet accepted the National Land Tenure Policy of 2005.[162] This Policy addresses the issue of group rights by proposing that traditional villages should be given "the status of a juristic person".[163] This process would involve the demarcation of village boundaries in conjunction with

157 Legal Assistance Centre, *Guide to the Communal Land Reform Act*, 2009, p. 49.
158 Ibid., p. 50.
159 Mendelsohn, J. and Nghitevelekwa, R., *An enquiry into land markets in Namibia's communal areas*, 2017.
160 Ibid., p. 9.
161 Nangoya, P. and Nghidengwa, M., "Uukwangali milks farmers", *Confidénte*, 11 July 2019.
162 Dentlinger, L., "Land tenure policy adopted", *The Namibian*, 17 February 2005; Ministry of Lands and Resettlement, *National Land Tenure Policy – Final Draft*, Ministry of Lands and Resettlement, Windhoek, 2005.
163 Thiem, M., *A Decade of Communal Land Reform*, 2014, p. 11.

CLBs and TAs, the adoption of a constitution for the management of village land, and subsequent registration. A record of all rightful members of a registered village would be kept by the CLB. They would obtain "formal rights over land and all resources in the village", including the right "to accept or reject individuals or families wishing to join a community".[164] Despite Cabinet approval, the National Land Tenure Policy has never been released into the public domain.

This Policy goes a long way in proposing more localised and more democratic land governance. However, the powers proposed for village management councils would clearly weaken the powers of traditional leaders. This might be one of the reasons for not implementing its provisions on a national scale.

This notwithstanding, the Programme for Communal Land Development (PCLD) is supporting the establishment of group rights in its project areas. The PCLD is implemented by the MLR with financial support from international development partners. The MLR implements the programme by establishing groups as legal entities to improve land governance in a context in which the State and international partners have made substantial investments in infrastructure development. It is assumed that a group which is constituted as a legal entity and hence "with legal force will be better managed than one without". It will be able to make its own commercial transactions, sue [and be] sued, own assets, owe debts, give credit, etc."[165] While in theory the groups are free to choose an appropriate legal entity, the MLR has opted for cooperatives.

This initiative goes some way to secure and protect legitimate land rights for groups by establishing them as legal entities. But the motivation to do so is driven by a quest to commercialise agriculture in communal areas, particularly where big investments of capital are made. The approach does not cater for a large majority of villages that presently do not have intentions to commercialise agricultural production, or any immediate prospects of large-scale investments in infrastructure. Their rights to commonages remain unprotected.

The issue of providing legally protected rights to commonages by groups of users is gradually being addressed. New application forms issued in 2014 have made it possible for groups and legal entities to apply for customary and leasehold rights.[166] In addition, detailed guidelines on how to secure customary land rights to commonages have been developed by the MLR with the support of the Millennium Challenge Account Namibia under the latter's Communal Land Support Sub-activity.[167]

164 Ibid.

165 Sikopo, A., Mulofwa, J. and Mwilima, W., "Enhancing tenure security for communities in communal areas designated for agricultural purposes", paper presented at the 2016 World Bank Conference on Land and Poverty, Washington DC, 2016, p. 29.

166 Millennium Challenge Corporation / Orgut COWI, *Proposed working policy for group land rights* (Communal Land Support Activity), Millennium Challenge Account Namibia, Windhoek, 2014, p. 2.

167 Ibid.; Millennium Challenge Corporation / Orgut COWI, *Legal requirements for group land rights* (Communal Land Support Activity), Millennium Challenge Account Namibia, Windhoek, 2014; Millennium Challenge Corporation/ Orgut COWI, *Proposed guidelines for group land rights in communal areas* (Communal Land Support Sub-activity), Millennium Challenge Account Namibia, Windhoek, 2014. See Meijs, M., Hager, C.-P. and Mulofwa, J., "Local level participatory planning, an approach towards tenure security and development planning", paper presented at the "Annual World Bank Conference on Land and Poverty: Integrating Land Governance into the Post-2015 Agenda: Harnessing Synergies for Implementation and Monitoring Impact", World Bank, Washington DC, 2014, for an overview.

## 5.6 Group rights and governance: CBNRM

The practice of granting local communities rights over land and natural resources and establishing local governance bodies without the need to register legal entities has a rich history in Namibia. In the mid-1990s the Government established the principle of Community-Based Natural Resources Management (CBNRM). The objective of CBNRM in Namibia is to improve the management of land-based natural resources such as water, wildlife, forest, fisheries and rangelands.[168] Fundamental to this approach is "the assumption that if the benefits to communities outweigh the costs and communities gain sufficient proprietorship (authority and control) over (natural resources), then sustainable use is likely". A policy and legislative framework was developed to establish common property resource management institutions to facilitate this.[169] Current legislation provides for the establishment of conservancies in terms of the Nature Conservation Amendment Act 5 of 1996, community forests in terms of the Forest Act 12 of 2001 and local-level management institutions in terms of the Water Resources Management Act 11 of 2013, to involve local communities in the management of wildlife, forests and rural water supplies. A challenge is that all three land-based resources have their own legislation governing them, although the legal governance requirements are similar.

With regard to wildlife, communities can apply to the Minister to establish conservancies. The conditions under which such applications are approved include the establishment of governance structures that include, inter alia, a conservancy constitution, the election of a representative conservancy committee, and "defined and recorded … boundaries of the geographic area of the conservancy".[170] In the absence of any legislation that protected the rights of groups of people to common pool resources, conservancy legislation was regarded as a potential model to provide groups of people with legally protected rights.

Crucially, conservancies have no powers with regard to the administration of land rights, but a recent court case ruled that they have the right to sue and be sued.[171] They have no powers to make or allocate land rights in communal areas, and lack the legal powers to enforce any land use and management plans. Moreover, the definition of community in the Nature Conservation Amendment Act of 1996 is not inclusive of all members of a geographically designated conservancy area. Instead, a community is defined as "*registered members*".[172]

The Forest Act of 2001 provides for the establishment of community forests. In many respects the community model resembles the conservancy model. Similar to conservancies, the objectives of community forests include the creation of employment opportunities and the improved management of forest resources by providing for communities to benefit from the controlled harvesting of forest products for subsistence and/or commercial purposes.[173] The consent of TAs is required for setting

168 Long, S.A., "Introduction", in Long, S.A. (Ed.), *Livelihoods and CBNRM in Namibia*, Ministry of Environment and Tourism, Windhoek, 2004, p. 4.

169 Ibid.

170 Ibid., as cited in Werner, W., "Tenure reform in Namibia's communal areas", *Journal of Namibian Studies*, Vol. 18 (2015), p. 80.

171 NAHCMD 250 (A 276/2013), *The N#jagna Conservancy Committee v The Minister of Lands and Resettlement*, 13 September 2016.

172 Ibid., original emphasis.

173 Grimm, J. and Humavindu, M., "Analysis of community forests", in Schuh, C. (Ed.), *Economics of Land Use: Financial and Economic Analysis of Land-Based Development Schemes in Namibia*, Gesellschaft für Technische Zusammenarbeit (GTZ), Windhoek, 2006, p. 84.

up a community forest, and the geographical boundaries of the forest must be identified. In terms of section 15 of the Forest Act of 2001, a management authority must be established to manage the community forest in accordance with a management plan. These management plans are prescriptive in that they determine resource utilisation.

Unlike conservancy management committees, whose powers are limited to the controlled use of natural resources for consumptive and non-consumptive purposes, most commonly game, forest management authorities have extensive powers over the utilisation of natural resources in a community forest. These powers include the conferral of rights "to manage and use forest produce and other natural resources of the forest, to graze animals and to authorise others to exercise those rights and to collect and retain fees and impose conditions for the use of forest produce or natural resources". Community forest management authorities thus have extensive legal powers to protect group rights to land and natural resources through the principle of inclusion and exclusion.

The management of rural water supply was also devolved to local communities of users. The National Water Policy and the Water Resources Management Act 11 of 2013 provide for the establishment of water point committees and local water committees to manage and control rural water supply at local water points and rural water supply schemes. The Water Resources Management Act 24 of 2004 provided local-level water management institutions with powers to permit non-members to use water as well as to exclude any person from the water point who is not complying with the rules, regulations and constitutions of these committees.

The powers given to water point user associations by the Water Resources Management Act 24 of 2004 went beyond simply controlling access to water points. These associations also had the power "to plan and control the use of communal land in the immediate vicinity of a water point in co-operation with the Communal Land Board and the traditional authority concerned".[174] It is not clear how the immediate vicinity of a water point is defined, but control over access to water points implies the effective control over access to grazing, simply because livestock cannot utilise grazing without access to water. These powers are limited by the fact that the Water Resources Management Act of 2013 does not confer any rights to water point committees to control access to seasonal water pans. These open water points are important for livestock owners for as long as they last, which is usually until around August-September in the north-central regions.

There is no legal obligation to include or exclude traditional leaders from these new governance structures. Members of management communities are usually elected, but in one documented case in Zambezi Region, a community forest constitution provided for forest management committees to be elected by TAs.[175] It is not uncommon that this new governance framework gives rise to disputes and even conflict between management committees and traditional leaders. The provisions of the Water Act, for example, that water point committees can plan and control the use of land in the vicinity of a water point, clearly infringes on the powers of local headmen and TAs to exercise such powers. Conflicts are general avoided by the non-implementation of these powers.

174 Section 19 as cited in Werner, W., "Integrated Land and Water Management: Policy and institutional issues", *CuveWaters Papers No. 1*, Institute for Social-ecological Research, Frankfurt/Main, 2007, p. 17.

175 Muhongo, M., "Forest conservation and the role of traditional leaders: A case study of the Bukalo Community Forest", in Hinz, M.O. and Ruppel, O.C. (Eds), *Biodiversity and the Ancestors: Challenges to Customary and Environmental Law – Case Studies from Namibia*, Namibia Scientific Society, Windhoek, 2008.

In at least one case, a community in eastern Namibia has used the legal instruments provided in the Water Act to fence off its village grazing.[176] The community extended the mandate of its local water point committee to include the general management of grazing and other community matters without any involvement of the State.

## 5.7 Individual rights: leasehold and enclosures

The CLRA has introduced leaseholds over communal land. The aim is to promote economic development in the communal areas by enabling farmers to obtain long-term leases over their land which can be registered in the Deeds Office. This, it is assumed, will enable them to use their land as collateral to raise loans for agricultural development.

The CLRA distinguishes between rights of leasehold which replace the old Permission to Occupy (PTO) and "rights of leasehold for agricultural purposes".[177] The aim of the latter is to support the gradual commercialisation of communal land in a controlled way. These provisions give effect to a Cabinet decision in 1997 to identify "un- or underutilised land" in communal areas for commercial agricultural development, a decision which is contrary to a resolution taken at the National Land Conference not to extend the areas being fenced by private individuals for commercial farming. In 2000, the then Ministry of Lands, Resettlement and Rehabilitation commissioned consultants to identify un- and underutilised land in seven regions. A total area of 5,24 million hectares was identified as being available for development.[178]

In terms of the CLRA, leaseholds for agricultural purposes can only be granted in designated areas. Designation of a portion of communal land can only be effected after consultation with TAs and CLBs, and amounts to alienating a portion of communal land from the customary governance system in order to enable the State to obtain a Certificate of Registered Government Title. Once government has obtained title, it can enter into long-term lease agreements with private lessees. Through this process, the TAs lose control over the designated land. The Ministry of Lands and Resettlement began the process of designation and surveying of communal land in 2003 to pave the way for the implementation of the Small-Scale Commercial Farm (SSCF) development project. A total of 621 parcels of land in Zambezi, Kavango East and West and Ohangwena Regions were surveyed and gazetted.

The process of granting long-term leases in designated areas is controlled by the CLBs and the Minister. The CLBs have the powers to grant rights of leasehold to any portion of communal land up to a size of 50 hectares. If the size applied for exceeds this limit, the application must be referred to the Minister.

Interested parties can apply for leaseholds in any area that has been designated or over which the State holds Registered Government Title. This includes the 96 farms that were surveyed in the

176 Twyman, C., Sporton, D., Thomas, D. and Dougill, A., "Community fencing in open rangelands: A case study of community self-empowerment in eastern Namibia", in Benjaminsen, T., Cousins, B. and Thompson, L. (Eds), *Contested Resources. Challenges to the Governance of Natural Resources in Southern Africa*, PLAAS / University of the Western Cape, Cape Town, 2002.

177 Legal Assistance Centre, *Guide to the Communal Land Reform Act*, 2009, pp. 35-36, 50.

178 International Development Consultants, "Executive summary. The communal land development studies", Windhoek, n.d., p. 3.

Owambo Mangetti before Independence. It is a little-known fact the State also holds a Certificate of Registered Government Title (dated 9 November 1998) over Farm No. 792 (Eastern Reserve), measuring 1 279 265 hectares. The application to obtain the Certificate of Registered Government Title over this portion of communal land straddling Otjozondjupa and Omaheke Regions was made by the then Ministry of Works, Transport and Communication, not the MLR.

It is not clear how many lease agreements the MLR has entered into, and how many have been registered.

The issue of private enclosures of commonages is dealt with in the CLRA in so far as new enclosures after the Act came into force are prohibited. But the Act does not explicitly deal with the need to regularise the fences that were erected before 2002. While it is fashionable to refer to all these fences as illegal, evidence suggests that they span the entire legal spectrum from legal to illegal as a result of the ambiguous legal framework that existed before 2002. This calls for the regularisation of these fences through an arbitration process, which is provided for in the CLRA. The main problem appears to be that the political will to make use of these provisions is lacking. Section 37 of the CLRA provides for what amounts to an adjudication procedure. The Minister, in consultation with the CLB, can set up investigation committees to establish the facts around "the occupation, use or control of land by a particular person; the existence of a fence on land … [and] any other matter that the Board itself may investigate under the Act or which a Board may choose". Such investigations may be carried out even if no one has applied for them.[179]

## 5.8 Capacity in Communal Land Boards

The effectiveness of CLBs in improving tenure security and land governance in communal areas in accordance with the CLRA are compromised in several ways. There is no reason to doubt that a majority of CLB members have intimate knowledge about local customary laws and practices which they are able to bring to bear on their responsibilities. However, their responsibilities and functions include implementing the provisions of the CLRA, which proved to be challenging in some respects.

The Record of Decisions taken by the Appeal Tribunal during the period 2010-2014[180] suggests that many CLBs are ill-equipped to deal with cases of a legal nature, such as when they have to review decisions taken by Traditional Courts in terms of local customary law and practices. The Otjozondjupa CLB, for example, endorsed a decision of the Kambazembi TA to deny a widow continued access to the land that she and her late husband shared with her stepchildren, without having conducted an investigation pursuant to the provisions of the CLRA. The CLB did not "act fairly and reasonably", and failed to apply the *audi et alteram partem* rule, leading the Tribunal to find that the CLB had "not properly applied its mind to the matter".[181] The CLB had not "availed itself of … crucial facts that ought to have been considered in determining the allocation of a Land Right in terms of Section 26 of the Communal Land Reform Act".[182] The Tribunal "determined that a failure of justice has occurred", not "purposely designed to prejudice or disadvantage the

179 Legal Assistance Centre, *Guide to the Communal Land Reform Act*, 2009, pp. 46-47.
180 Land, Environment and Development (LEAD) Project, *Appeal Tribunal Cases in Namibia's Land Reform Process*.
181 Ibid., p.7.
182 Ibid., p. 8.

appellant", but rather because "the Traditional Authority Council and the Communal Board is comprised of lay persons who set out to give the appellant a full fair hearing but, for the reasons stated, did not succeed".[183]

In another example, the Appeal Tribunal had to carry out its own *in loco* investigation after having received documents from the CLB of Omusati in a matter where the Otuzemba TA had allocated land to four individuals in contravention of the CLRA and its regulations.[184] Appeal Tribunals should base their decisions "solely on the existing full reports received from the applicable CLB", but a study found that "many CLB investigation reports … are incomplete in that, for example, key details of the case … and minutes of meetings are missing".[185]

Misinterpretation and misreading of the provisions and procedures of the CLRA have also led some CLBs to take and implement decisions that the High Court had found to be unlawful. An example occurred in Ohangwena Region, where the Ohangwena CLB demolished an enclosure of approximately 4 354 ha before it conducted an investigation as prescribed by section 28(9) of the CLRA in order to arrive at an informed decision. As a result, the Court found that the removal of the fence by the CLB was illegal and the fence had to be restored.[186]

A final example suggests that in some instances the Government and CLBs do not have the political will to enforce decisions handed down by courts of law. This continues to be the case in respect of the privatisation of communal land in the N‡a Jaqna Conservancy, an area of about 9 120 km with approximately 5 000 San people.[187] In 2008 the Conservancy approached the Otjozondjupa CLB and the Minister of Land Reform to intervene and stop the erection of fences in the Conservancy, but to no avail. Another written request to the Minister to issue notices in terms of section 44 of the CLRA to all persons who erected fences had no consequences. In June 2013 the Conservancy instituted legal proceedings after the Otjozondjupa CLB still had not acted. The Court found in favour of the Conservancy and ordered the fences to be taken down. In the event of any transgressor failing to remove their fence in contravention of the CLRA, the Court ordered the Otjozondjupa CLB and the TA to take the necessary action to have the fences and livestock removed.[188] Both the Ministry and the CLB have failed in the intervening years to remove all fences and stop new ones from being erected.

The coexistence of customary laws and practices and statutory law in the administration of communal land gives rise to complex legal issues that ordinary members of CLBs are ill-equipped to deal with. Administrative and legal issues are not separated in defining the mandates and functions of the CLBs, giving rise to decisions that do not do justice to aggrieved parties. The existence of Appeal Tribunals is an important mechanism to rectify mistakes. For the Tribunals to function effectively, their decisions should be based "on the existing information",[189] which

183 Ibid., pp. 10-11.
184 Ibid., p. 16.
185 Ibid., p. viii.
186 NAHCMD 340 (A 256/2013), *Wapulile v Chairman, Ohangwena Communal Land Board*
187 NAHCMD 250 (A 276/2013), *The N#jagna Conservancy Committee v The Minister of Lands and Resettlement*, 13 September 2016, p. 14.
188 Hays, J. and Hitchcock, R., "Land and resource rights in the Tsumkwe conservancies", 2020, p. 209.
189 Land, Environment and Development (LEAD) Project, *Appeal Tribunal Cases in Namibia's Land Reform Process*, n.d. [2014], p. viii.

is not always adequate or is even non-existent. One option to improve the situation would be to develop the capacity of CLBs to deal with legislative issues or encourage them to obtain legal advice from government attorneys. However, the risk of members being replaced by new members after their three-year tenure makes this an expensive option. An alternative would be to provide paralegal training to staff members of the Ministry of Agriculture, Water and Land Reform serving on CLBs.

# 6. Conclusion

The introduction and implementation of the CLRA has undoubtedly brought about improvements in communal land administration and tenure security – the former through the establishment of Communal Land Boards to control the allocation and cancellation of customary land rights, and the latter through a process of registering customary land rights. However, several shortcomings have been identified, including the following:

- Traditional leaders continue to play a central role in communal land governance. The CLRA introduced CLBs to control the allocation and cancellation of customary land rights to make Traditional Authorities more transparent and accountable. A weakness of the Act, however, is that while TAs are accountable to CLBs, i.e. upwards, there is no legal obligation to consult their subjects on land alienations for example.

- The CLRA does not distinguish between different tiers of Traditional Authorities. As a result, the Act does not offer any legal procedures and guidelines for the allocation and cancellation of customary land rights by village headmen, thus in this respect the Act does not reflect the constitutional principles of equality and non-discrimination.

- The CLRA provides procedures to address disputes and appeals. With regard to disputes, the CLBs can initiate processes to investigate. But this only happens when disputes reach a CLB. A majority of disputes continue to be heard by village headmen and higher tiers of TAs. But the CLRA does not provide any guidance on how these disputes handled by TAs should be addressed in an equitable and fair manner.

- Appeal procedures in the Act are adequate, but probably inaccessible to a large majority of customary land rights holders. To lodge a complaint, appellants must be proficient in the official language, and able to read and write. Moreover, an application for an appeal must reach the Executive Director of the MLR within 30 days of the decision of a TA. It is necessary to identify ways to simplify this appeals procedure by bringing it closer to the people.

- Some communities in communal areas are not protected by the CLRA for the simple reason that they either do not have a registered TA or a registered TA does not have clearly defined areas of jurisdiction. The Traditional Authorities Act gives TAs jurisdiction over people, not geographic areas. In the former case, TAs are excluded from performing any function under the Act, while in the latter case, several TAs claim jurisdiction over subjects spread over entire communal areas. This leads to double allocations and contestation over who should confirm customary land rights. Two possible solutions exist: either recognise all TAs and define their roles and functions more precisely, or allow the CLBs to carry out these functions.

- In general, improved governance in the customary sector requires that executive, administrative and legal powers of traditional leaders be separated.

- The CLRA is a 'one-size-fits-all' kind of law. It lays down one set of provisions and regulations for all communal areas. The maximum parcel size prescribed for a customary land right enables people in mixed farming areas to register their private rights (homestead, fields and cattle pens), but leaves communal grazing areas unprotected. As a result, the impact of the CLRA on improved tenure security for communal farmers in the livestock-farming communal areas in the south of the country has not improved. It is proposed that a more flexible Act be developed, which lays down some fundamental principles of good governance, but allows local communities to administer communal land according to local customary practices.

- Tenure rights to communal grazing areas are ill-defined in the CLRA and do not receive legal protection. This has led to the large-scale privatisation of commonages in some communal areas. Currently, legal protection of group rights is premised on such groups forming legal entities. However, this should not be a precondition for the legal protection of group rights. The *Proposed working policy for group land rights* developed by the Millennium Challenge Account in Namibia provides for this, and should be reviewed together with the Ministry's own draft National Land Tenure Policy of 2005 to come up with a comprehensive policy framework and appropriate legal instruments.

- In this regard, provisions for local-level management of land-based resources need to be harmonised into one national land policy. Currently the water, forestry and wildlife sectors provide local communities with various powers to manage land and land-based resources, and these powers contradict each other at times.

- A growing informal land market exists in communal areas. For a variety of socio-economic reasons, customary land rights are increasingly becoming commoditised and are being sold in an unregulated manner. Government should not hold back the development of a land market, but should rather encourage it in a regulated manner. This applies equally to leaseholds over resettlement land.

- Existing enclosures of communal grazing areas – illegal fencing in popular discourse – need to be regularised. In 2018, after the Second National Land Conference, the President of Namibia directed that illegal fences erected in communal areas be identified, and that notice be given to those who erected the fences to remove them within a given time frame. This is an ongoing process, but it fails to recognise that these enclosures span the entire spectrum of (il)legality and need to be subjected to an adjudication process with the aim of bringing them onto the same legal level as the surveyed farms currently being developed by the MLR in some northern communal areas.

# References

## Case materials


Justice Strydom in *Kakujaha & Others v The Tribal Court of Okahitwa & Others*, 1989.

*Kaputuaza & Another v Committee of the Administration of the Hereros* 1984 (4) SA 295 (SWA), 1984.

*Muundjua and Others v Pack and Muundjua and Others vs Tjipetekera*, 1989.

NAHCMD 250 (A 276/2013), *The N#jagna Conservancy Committee v The Minister of Lands and Resettlement*, 13 September 2016.

NAHCMD 340 (A 256/2013), *Wapulile v Chairman, Ohangwena Communal Land Board.*

*Ndisiro v Gemeenskapsowerheid van die Mbanderu Gemeenskap van die Rietfonteinblok in Hereroland en 9 ander: Uitspraak*, 1984.

*Ndisiro v Mbanderu Community Authority and Others* 1986(2) SA 532 (SWA), 1985.

*Uazengisa & 3 Ander v Die Uitvoerende Kommittee van Administrasie van Hereros & 11 Anders*, Annexure "D", Antwoordende Beëdigde Verklaring: Barend Daniel Bouwer, 21.3.1988.

*Uazengisa & Another v The Executive Committee of the Administration for Herero's and 11 Others*, Judgement, 1989.

*Uazengisa and 3 Others v Executive Committee of the Administration for Herero's and 11 Others*, Appeal Judgement 22.9.1989.


## All other references


AUC-ECA-AfDB Consortium, *Framework and Guidelines on Land Policy in Africa,* AUC-ECA-AfDB, Addis Ababa, 2010.

Benjaminsen, T., Cousins, B. and Thompson, L. (Eds), *Contested Resources. Challenges to the Governance of Natural Resources in Southern Africa*, PLAAS / University of the Western Cape, Cape Town, 2002.

Bollig, M. and Gewald, J.-B. (Eds), *People, Cattle and Land: Transformation of a Pastoral Society in Southwestern Africa* (First Edition), Rüdiger Köppe Verlag, Köln, 2000.

Brankamp, H., *Communal land disputes in Namibia: Actors, patterns, procedures*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Windhoek, 2012.

Chiari, G.P., *Report of the UNDP Mission on Rural Livelihoods and Poverty in Namibia*, UNDP, Windhoek, 2004.

Cousins, B. and Claassens, A., "Communal tenure 'from above' and 'from below': Land rights, authority and livelihoods in rural South Africa", in Evers, S., Spierenburg, M. and Wels, H. (Eds.), *Competing Jurisdictions: Settling Land Claims in Africa*, Brill, Leiden/Boston, 2005.

De Villiers, S., Christensen, Å., Tjipetekera, C., Delgado, G., Mwando, S., Nhitevelekwa, R., Awala, C. and Katjiua, M., *Land Governance in Namibia*, paper presented at the 2019 Land Governance in Southern Africa Symposium, NUST-NELGA Hub, Windhoek, 2019.

Dentlinger, L., "Land tenure policy adopted", *The Namibian*, 17 February 2005.

Enemark, S., "Module 6: Land policy and regulatory frameworks (Final Draft)", Global Land Tool Network / UN Habitat, 2017.

Evers, S., Spierenburg, M. and Wels, H. (Eds.), *Competing Jurisdictions: Settling Land Claims in Africa*, Brill, Leiden/Boston, 2005.

FAO, "Good governance in land administration", *FAO Land Tenure Studies*, Food and Agriculture Organization of the United Nations, Rome, 2007.

Fuller, B., "Improving Tenure Security for the Rural Poor: Namibia Country Case Study", *LEP Working Paper No. 6*, Food and Agricultural Organization of the United Nations (FAO), Windhoek/Rome, 2006.

Grimm, J. and Humavindu, M., "Analysis of community forests", in Schuh, C. (Ed.), *Economics of Land Use: Financial and Economic Analysis of Land-Based Development Schemes in Namibia*, Gesellschaft für Technische Zusammenarbeit (GTZ), Windhoek, 2006.

Hays, J. and Hitchcock, R., "Land and resource rights in the Tsumkwe conservancies – Nyae Nyae and N‡a Jaqna", in Odendaal, W. and Werner, W. (Eds), "*Neither here nor there": Indigeneity, marginalisation and land rights in post-independence Namibia,* Legal Assistance Centre, Windhoek, 2020.

Hinz, M., "Traditional governance and African customary law: Comparative observations from a Namibian perspective", in Horn, N. and Bösl, A. (Eds), *Human Rights and the Rule of Law in Namibia*, Macmillan Namibia, Windhoek, 2008.

Hinz, M., *Customary Land Law and the Implications for Forests, Trees and Plants* (No. TCP/NAM/4453), FAO Technical Co-operation Programme, Windhoek, 1996.

Hinz, M.O. and Ruppel, O.C. (Eds), *Biodiversity and the Ancestors: Challenges to Customary and Environmental Law – Case Studies from Namibia*, Namibia Scientific Society, Windhoek, 2008.

Horn, N. and Bösl, A. (Eds), *Human Rights and the Rule of Law in Namibia*, Macmillan Namibia, Windhoek, 2008.

Hubbard, D., *Communal lands in Namibia: The legal background*, Legal Assistance Centre, Windhoek, 1991.

International Development Consultants, "Executive summary. The communal land development studies", Windhoek, n.d.

Iyambo, N., "The role of traditional authorities in a changing Namibia", in Malan, J. and Hinz, M. (Eds), *Communal Land Administration: Second National Traditional Authority Conference – Proceedings,* Centre for Applied Social Sciences, Windhoek, 1997.

Jones, B.T.B. and Kakujaha-Matundu, O., *Promoting Environmentally Sound Decision-making of Communal Land Boards*, Ministry of Environment and Tourism, Windhoek, 2008.

Kössler, R., *In search of survival and dignity: Two traditional communities in southern Namibia under South African rule*, Gamsberg Macmillan, Windhoek, 2005.

Land, Environment and Development (LEAD) Project, *Appeal Tribunal Cases in Namibia's Land Reform Process: Record of decisions 2010-2014*, Legal Assistance Centre and Ministry of Lands and Resettlement, Windhoek, n.d. [2014].

Legal Assistance Centre, *Guide to the Communal Land Reform Act, 2002 (No. 5 of 2002) (2nd Edition)*, Legal Assistance Centre, Windhoek, 2009.

Legal Assistance Centre, *Namlex*, under "Blacks" – at http://www.lac.org.na/laws/NAMLEX_2020.pdf.

Lendelvo, S., *Women's access to land: A case study of the area under the jurisdiction of the Ondonga Traditional Authority, Oshikoto Region*, Gesellschaft für Technische Zusammenarbeit (GTZ), Windhoek, 2008.

Long, S.A. (Ed.), *Livelihoods and CBNRM in Namibia*, Ministry of Environment and Tourism, Windhoek, 2004.

Long, S.A., "Introduction", in Long, S.A. (Ed.), *Livelihoods and CBNRM in Namibia*, Ministry of Environment and Tourism, Windhoek, 2004.

Malan, J. and Hinz, M. (Eds), *Communal Land Administration: Second National Traditional Authority Conference – Proceedings,* Centre for Applied Social Sciences, Windhoek, 1997.

Meijs, M. and Kapitango, D., "Communal land registration", *Namibia Land Management Series*, Ministry of Lands and Resettlement, Windhoek, 2012.

Meijs, M., Hager, C.-P. and Mulofwa, J., "Local level participatory planning, an approach towards tenure security and development planning", paper presented at the "Annual World Bank Conference on Land and Poverty: Integrating Land Governance into the Post-2015 Agenda: Harnessing Synergies for Implementation and Monitoring Impact", World Bank, Washington DC, 2014.

Mendelsohn, J. and Nghitevelekwa, R., *An enquiry into land markets in Namibia's communal areas – Final Report*, Namibia Nature Foundation, Windhoek, 2017.

Mendelsohn, J., *Customary and legislative aspects of land registration and management on communal land in Namibia*, Ministry of Lands and Resettlement, Windhoek, 2008.

Millennium Challenge Corporation / Orgut COWI, *Legal requirements for group land rights* (Communal Land Support Activity), Millennium Challenge Account Namibia, Windhoek, 2014.

Millennium Challenge Corporation / Orgut COWI, *Proposed guidelines for group land rights in communal areas* (Communal Land Support Sub-activity), Millennium Challenge Account Namibia, Windhoek, 2014.

Millennium Challenge Corporation / Orgut COWI, *Proposed working policy for group land rights* (Communal Land Support Activity), Millennium Challenge Account Namibia, Windhoek, 2014.

Ministry of Lands and Resettlement, *A guide on communal land registration*, Ministry of Lands and Resettlement, Windhoek, n.d.

Ministry of Lands and Resettlement, *National Land Tenure Policy – Final Draft*, Ministry of Lands and Resettlement, Windhoek, 2005.

Ministry of Lands and Resettlement, *Operational Manual for Communal Land Boards*, Ministry of Lands and Resettlement, Windhoek, 2006.

Ministry of Lands, Resettlement and Rehabilitation (MLRR), *National Land Policy*, MLRR, Windhoek, 1998.

Muhongo, M., "Forest conservation and the role of traditional leaders: A case study of the Bukalo Community Forest", in Hinz, M.O. and Ruppel, O.C. (Eds), *Biodiversity and the Ancestors: Challenges to Customary and Environmental Law – Case Studies from Namibia*, Namibia Scientific Society, Windhoek, 2008.

Namibia Statistics Agency / Ministry of Agriculture, Water and Forestry, *Namibia Census of Agriculture 2013/2014 – Communal Sector*, Namibia Statistics Agency, Windhoek, 2015.

Namwoonde, I.H. and Karunga, M.H., *Investigation on the fences erected along the Kamanjab road between Okapundja and Otjomukandi* Ministry of Lands and Resettlement, Windhoek, 2014.

Nangoya, P. and Nghidengwa, M., "Uukwangali milks farmers", *Confidénte*, 11 July 2019.

Nghitevelekwa, R., *Communal land and land reform: People's lived-realities in North-central Namibia*, UNAM Press, Windhoek, forthcoming.

Nghitevelekwa, R., Shapi, M. and Kambatuku, J., *The land question and land reform in Namibia: Review of the implementation of Consensus Resolutions of the 1991 National Conference on Land Reform and the Land Question*, University Central Consultancy Bureau (UCCB), University of Namibia, Windhoek, 2018.

Odendaal, W. and Werner, W. (Eds), "*Neither here nor there": Indigeneity, marginalisation and land rights in post-independence Namibia,* Legal Assistance Centre, Windhoek, 2020.

Office of the Prime Minister (Ed.), *National Conference on Land Reform and the Land Question*, Republic of Namibia, Windhoek, 1991.

Office of the Prime Minister, *Report of the Technical Committee on Commercial Farmland*, Office of the Prime Minister, Windhoek, 1992.

Omaheke Communal Land Board, *Stakeholders' consultative meeting: Traditional authorities recognition and areas of jurisdiction in relation to communal land rights registration*, Omaheke Communal Land Board, Gobabis, 2014.

OVA 45 6/8/1-7(ii), "Ovambo Beplanningsadvieskomitee, Notule van 'n Vergadering gehou op 21 Augustus 1973".

Palmer, D., Arial, A., Metzner, R., Willmann, R., Müller, E., Kafeero, F. and Crowley, E., "Improving the governance of tenure of land, fisheries and forests", *Land Tenure Journal*, No. 1 (2012).

Republic of Namibia, *Report by the Commission of Inquiry into Matters Relating to Chiefs, Headmen and other Traditional or Tribal Leaders*, Windhoek, 1991.

Republic of Namibia, *Communal Land Reform Act, 2002 (Act No. 5 of 2002)*

Republic of Namibia, *The Constitution of the Republic of Namibia*, 1990.

Republic of Namibia, *Traditional Authorities Act, 2000 (Act No. 25 of 2000).*

Schuh, C. (Ed.), *Economics of Land Use: Financial and Economic Analysis of Land-Based Development Schemes in Namibia*, Gesellschaft für Technische Zusammenarbeit (GTZ), Windhoek, 2006.

Sikopo, A., Mulofwa, J. and Mwilima, W., "Enhancing tenure security for communities in communal areas designated for agricultural purposes", paper presented at the 2016 World Bank Conference on Land and Poverty, Washington DC, 2016.

South West Africa, *A Five Year Plan for the Development of the Native Areas*, Windhoek, 1966.

South West Africa, *Representative Authorities Proclamation, AG. 8 of 1980.*

South West Africa, *Establishment of a Representative Authority for the Hereros, and provision for matters connected therewith, AG. 50 of 1980.*

Thiem, M. and Muduva, T., "Commercialisation of land in Namibia's communal land areas: A critical look at potential irrigation projects in Kavango East and Zambezi regions", *Research Report No. 49*, Institute for Poverty, Land and Agrarian Studies, University of the Western Cape, Belville, South Africa, 2015.

Thiem, M., *A Decade of Communal Land Reform: Review and Lessons Learnt, with a Focus on Communal Land Rights Registration,* Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Windhoek, 2014.

Twyman, C., Sporton, D., Thomas, D. and Dougill, A., "Community fencing in open rangelands: A case study of community self-empowerment in eastern Namibia", in Benjaminsen, T., Cousins, B. and Thompson, L. (Eds), *Contested Resources. Challenges to the Governance of Natural Resources in Southern Africa*, PLAAS / University of the Western Cape, Cape Town, 2002.

Van der Byl, P.C., "Legal opinion: Legal position relating to land occupied in Namibia on a communal basis", Advocates Chambers, Pretoria, 1992.

Werner, W., "A brief history of land dispossession in Namibia", *Journal of Southern African Studies*, Vol. 19, No. 1 (1993).

Werner, W., "From communal pastures to enclosures – the development of land tenure in Herero reserves", in Bollig, M. and Gewald, J.-B. (Eds), *People, Cattle and Land: Transformation of a Pastoral Society in Southwestern Africa* (First Edition), Rüdiger Köppe Verlag, Köln, 2000.

Werner, W., "Integrated Land and Water Management: Policy and institutional issues", *CuveWaters Papers No. 1*, Institute for Social-ecological Research, Frankfurt/Main, 2007.

Werner, W., "Land and land tenure policy: Briefing paper for GTZ Project Appraisal Mission", *NEPRU Documents*, Namibian Economic Policy Research Unit, Windhoek, 2000.

Werner, W., "Land, resource and governance conflicts in Kunene involving conservancies", in Odendaal, W. and Werner, W. (Eds), *"Neither here nor there": Indigeneity, marginalisation and land rights in post-independence Namibia*, Land, Environment and Development Project, Legal Assistance Centre, Windhoek, 2020.

Werner, W., *Protection for Women in Namibia's Communal Land Reform Act: Is it Working?*, Land, Environment and Development Project, Legal Assistance Centre, Windhoek, 2008.

Werner, W., "Tenure reform in Namibia's communal areas", *Journal of Namibian Studies*, Vol. 18 (2015).

Werner, W., *"What has happened has happened": The complexity of fencing in Namibia's communal area,* Legal Assistance Centre, Windhoek, 2011.

Werner, W., Tjipueja, H., Namugongo, F. and Huesken, J., *Report on the study trip of a delegation of the Ministry of Lands, Resettlement and Rehabilitation to Botswana*, Ministry of Lands, Resettlement and Rehabilitation, Windhoek, 1993.

This paper forms part of a series of papers on land matters in Namibia. These papers are available on the LAC website. Hard copies can be obtained from the LAC office.

**LEGAL ASSISTANCE CENTRE**
**Land, Environment and Development (LEAD) Project**
4 Marien Ngouabi Street, Windhoek • P.O. Box 604, Windhoek, Namibia
Telephone: (+264) (0)61-223356 • Fax: (+264) (0)61-234953
Email: info@lac.org.na • Website: www.lac.org.na