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Land, resource and governance conflicts in Kunene Region involving conservancies

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1 Introduction

Since independence, the discourse on the land question and land administration in Namibia has been dominated by the unequal distribution of land between black and white Namibians. A legal framework for the redistribution of freehold agricultural land was in place within six years of independence. A law to govern land administration in communal[1] areas was approved only in 2002, despite the fact that over 50% of the Namibian population living in those areas were faced by unresolved issues of jurisdiction and authority over land, impacting negatively on customary land rights. With the abolition of homelands-turned-representative authorities in 1990, a legal vacuum was created in the communal areas. Fuller[2] argued that as a consequence, traditional leaders were unsure about their continued role in land administration. Some felt they had lost all authority over communal land administration, while others continued as before, albeit without a clear policy and legal framework. Enforcing decisions taken by traditional authorities (TAs) was difficult if not impossible, increasing the vulnerability of many holders of customary land rights. The most obvious manifestation of this is the mushrooming of private

1 The term 'communal land' is a misnomer; such land is more accurately referred to as non-freehold land on account of the fact that no freehold title can be obtained on communal land. Communal land and non-freehold land will be used interchangeably.

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

enclosures of communal grazing areas that has taken place since independence. The National Land Policy[3] described the situation prevailing in the country 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.

A survey was carried out in preparation for the National Conference on Land Reform and the Land Question in 1991 to identify land issues in all regions of the country. One of the main issues in northern Kunene Region, or Kaokoland (also known as Koakoveld),[4] was fear on the part of Ovaherero and Ovahimba residents that people who had no traditional rights in the area would move in to occupy land. The constitutional right to settle in any part of Namibia exacerbated these fears, and the authors of the survey expressed the opinion that "The implications of these respective rights for the more vulnerable groups in Namibia will … need careful consideration by Government."[5]

The survey made no attempt to explain why communities in Kaokoland should be referred to as most vulnerable. Unlike for other regions, the survey provided no information on land governance, and in particular on the role of headmen in land administration, in Kaokoland. As this paper will argue, the security of customary land rights is inseparable from land governance in communal areas generally. Customary land governance systems are in place in Kaokoland but do not have any legal protection. It will be argued that by not recognising these local-level institutions, the Communal Land Reform Act (No. 5 of 2002) (CLRA) has increased vulnerability instead of reducing it. It is not customary tenure *per se* that renders it ineffective for providing tenure security, but the absence of legal sanctions.

Customary land rights holders in the sub-region faced another potential threat to their customary rights of access to grazing, as the future development of these

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3 Government of the Republic of Namibia, Ministry of Land Reform, National Land Policy, 1998 (http://www.mlr.gov.na/documents/20541/634749/National+Land+Policy.pdf/5fc90cc9-0850-443f-ac6d-c17939b1278f).

4 The study area in Kunene Region is still officially referred to as Kaokoland in Schedule 1 of the Communal Land Reform Act (No. 5 of 2002). This is ironic, as it is the name given to the proposed homeland in the wake of the Odendaal Commission.

5 GRN, *National Conference on Land Reform and the Land Question: Windhoek, 25 June-1 July 1991, Volume 1*, Consensus No. 14, Office of the Prime Minister, Windhoek, 1991.

grazing areas was contested. A strong lobby articulated the view that overgrazing and the perceived backwardness of the Himba people could only be addressed meaningfully by sub-dividing the land into fenced economic units for commercial farming. These views were opposed by those who were "born in the district, or who [had] long associations with it", who defended "the present system of land use which involves extensive grazing over large tracts of land, unimpeded by fencing" as well adapted to the arid conditions of Kaokoland.[6]

The survey results from across the country informed the deliberations of the National Conference on Land Reform and the Land Question in 1991. Conference participants discussed a range of land issues in communal areas and passed 13 consensus resolutions on communal land.[7] As the Conference was of a consultative nature, the resolutions were not binding on the Government of the Republic of Namibia (GRN). The CLRA therefore gives legal expression only to some of these resolutions. Its main objective continues to be to improve land administration and tenure security in areas that are governed by customary rules and practices. Traditional leaders continue to play a central role in the administration of customary land rights. The Act seeks to improve their accountability through communal land boards, whose task it is to ensure that land allocations and cancellations by traditional authorities comply with the law. Tenure security will be gradually improved through the mapping and registration of existing and new customary land rights.

The provisions of the CLRA do not appear to have removed the uncertainty about legitimate access and rights to land in Kaokoland. This is borne out by the land issues that people identified during regional consultations in preparation of the Second Land Conference held in October 2018 in Windhoek. These fall into five broad thematic areas:

1) **Unrecognised traditional authorities and the absence of clear areas of jurisdiction**: While not raised explicitly in the deliberations, the study will document how decentralised structures of natural resources management articulate with traditional authorities and the disputes that arise.

2) **Access to the communal areas of Kunene**: Cases of people from other regions making claims to land in Kaokoland without prior consultations with TAs are well known. Illegal fencing is often associated with such claims. Some traditional leaders were accused of conniving in these activities.

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6 Ibid.

7 See Nghitevelekwa, R., M. Shapi & J. Kambatuku, *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, p. 78 for a review of implementation.

3) **Wildlife management**: Concerns were raised during regional consultations that many people had lost their say over land matters as a result of concession areas and that too much land was allocated for conservation at the expense of farming.

4) **Transhumance**: Transhumance was blamed for land degradation, and some participants called for improved grazing management systems to be implemented. This would impact on customary land rights.

5) **Mining and land rights**: The allocation of mining rights was done by the MME without any consultations with or regard for people's land rights.

This chapter will discuss these concerns in a broader historical context. It will show that the recognition of traditional leaders has long colonial antecedents that an independent Namibian government has uncritically adopted. It will also argue that the issues identified by communities in 2018 are largely the result of the current policy and legal framework dealing with traditional leaders and land administration, which fail to recognise and build on local customs and practices with regard to tenure systems and land administration.

2 Land and resource rights

2.1 Legislation and litigation

The pre-independence period was characterised by "an absence of a coherent system of laws and rules that protected the rights of the people who lived on [communal land]".[8] Following independence, Schedule 5 of the Constitution transferred all moveable and immoveable property held by the previous government and representative authorities to the GRN, "subject to any existing right, charge, obligation or trust on or over such property …".[9] This created the misconception that the holders of customary land rights in communal areas "lost whatever rights they might have had in communal land upon that land becoming state land [at independence] and, subsequently, municipal or town land".[10] In addition, many people believed that because customary land rights could not be registered in the Deeds Office, the Constitution could not recognise such rights in terms of Schedule 5.

These misconceptions were removed in a recent judgment in the Supreme Court of Namibia. The case was brought to court as a result of Katima Mulilo Town Council opposing the claims of a customary land rights holder to compensation

8 See *Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others* (SA 15/2017) [2018] NASC 409 (16 November 2018).

9 Republic of Namibia, *The Constitution of the Republic of Namibia*, Windhoek, 1990, p. 77.

10 Ibid., p. 23.

as a result of her land becoming part of the proclaimed town. The Town Council argued that

> … the land in dispute ceased to be communal land and the appellant could not claim any communal land tenure right in that land. [The Katima Mulilo Town Council], having become the absolute owner of the land, could deal with it as owner without any encumbrance thereon.[11]

Against this the judges ruled:

> It cannot be correct that the State's succession to communal land areas at Independence extinguished the communal land tenure rights that subsisted in that land such that the interference with them would not attract a remedy within the scheme created by para (3) of Schedule 5, regardless of whether or not it falls within the ambit of Art 16 (2).[12]

Customary land rights were not extinguished as a result of ownership of communal land passing to the state, not even in cases where new towns were proclaimed, and such rights could be enforceable by courts of law.[13] The judges argued that when the state took ownership of communal land at independence, "it assumed an obligation, at a bare minimum, to look after the interests of the people who lived on it … an obligation which involves recognition [of] and respect for the rights of the members of the community to live on the land, work it and sustain themselves". The state, as owner of the land, "has social 'obligations' which a private owner does not have."[14] They also rejected the argument that customary land rights were not enforceable because they could not be registered in terms of section 16 of the Deeds Registries Act (No. 47 of 1937).[15]

This judgment strengthens the provisions of section 28(1) of the CLRA, which stipulate that a customary right "in respect of the occupation or **use** of communal land" (author's emphasis) that "was granted to or acquired … in terms of any law or otherwise" before commencement of the Act will continue to be valid unless a claim to such right is rejected by the Communal Land Board (CLB) or reverts back to the state on account of holders missing the deadline for registration. The deadline has been extended indefinitely. The right to **use** communal land by definition includes grazing rights. People holding customary land rights are obliged to apply to relevant CLBs for the ratification and registration of such rights. Only once a customary land right has been registered does it become a legally protected right.

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11 *Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others* (SA 15/2017) [2018] NASC 409 (16 November 2018), p. 3.
12 Ibid., p. 26.
13 Ibid., pp. 30–31.
14 Ibid., pp. 27–29.
15 Ibid., p. 16.

Provisions in the CLRA to obtain legal protection of a customary land right through registration apply only to private rights on communal land.[16] Typically these are rights for a residential and a farming unit as specified in section 19 of the Act. What a farming unit is exactly is not spelt out in the Act, but its maximum size of 50 ha suggests that it involves land for a residential unit, cropland and limited grazing.[17]

The CLRA does not provide similar protection for customary land rights to grazing on commonages. Grazing rights are dealt with in section 29, which simply states that commonages are available to the legal residents of such areas for grazing subject to such conditions as the chief or traditional authority (TA) may impose. These conditions may include the type and numbers of livestock grazed, as well as which areas of commonage should rest. Currently, the regulations state that a resident may not graze more than 300 large stock units, or the small stock equivalent, on communal land. Chiefs or TAs must also give permission for people who are not regarded as residents of a particular area to bring livestock onto commonages (Regulation 10). Rights to grazing may be withdrawn if a rights holder does not observe the conditions imposed by the TA, or has access to other grazing land.

These provisions evince a one-size-fits-all approach to securing land rights to commonages across diverse communal areas, and have failed to make customary land rights more secure in Kaokoland. The CLRA is imposing a centralised system of governance that does not fit local laws and customs that are characterised by multi-layered governance. Bollig[18] and Behnke[19] have shown how land tenure and land governance in Kaokoland operate at different levels and that rights to commonages were well-defined. Contrary to the assumption in the legislation that commonages fall under the jurisdiction of a chief or TA, both authors have shown that important decisions over land and natural resources are not taken by chiefs, but at a lower level. Writing about Etanga, Behnke[20] noted that the grazing system was decentralised, where "most critical decisions are left to the individual households or small clusters of households with minimal interference from any outside authority". Typically, "pastoral households 'owned' specific places that had reliable water, from which they organized grazing in the adjoining hills ...

16 The term 'private rights' is preferred to 'individual rights', as it includes powers of exclusion. However, these private rights do not amount to the same private rights commonly associated with freehold title.

17 See Chiari, G.P., *Report of the UNDP Mission on Rural Livelihoods and Poverty in Namibia*, UNDP, Windhoek, 2004, p. 7.

18 Bollig, M., 'Probleme Kommunalen Ressourcenmanagements in ländlichenn Gemeinschaften des Südlichen Afrika: Transformationen des Bodenrechts zwischen Staat, Markt und lokaler Gemeinschaft', in Apelt, W. & J. Motte (eds), *Landrecht. Perpektiven der Konfliktvermeidung im Südlichen Afrika*, Wuppertal, Foedus Verlag, 2002; Bollig, M., 'Towards an Arid Eden? Boundary-Making, Governance and Benefit-sharing and the Political Ecology of the New Commons of Kunene Region, Northern Namibia', *International Journal of the Commons*, 10.2, 2016.

19 Behnke, R., *Range and Livestock Management in the Etanga Development Area, Kunene Region*, Northern Regions Livestock Development Project (NOLIDEP), Windhoek, 1998.

20 Ibid., p. 33.

The heads of these place-owning households were addressed as *oveni vehi*, 'owners of the earth/land'".[21] People who want to settle in a community needed to obtain permission from the *oveni vehi*. They were usually relatives of the *oveni vehi*.[22]

Land use rights in Kaokoland are flexible and negotiated to facilitate seasonal movements of livestock. Behnke[23] observed that despite seasonal movements of livestock and people, "households are identified with home villages which appear to have a stable composition". These villages appear to be close-knit social and kinship units, which provide stability. There are no hard and fast boundaries and access to land and resources is negotiated among small communities. Clear rules of land use and utilisation laid down how livestock was to be herded and how to coordinate cattle movements with other cattle posts. Himba communities could not migrate to wherever they wanted. Instead, user groups of commonages were relatively well defined and fairly stable. Sanctions existed for transgressing these rules.[24]

These local level powers to manage the land notwithstanding, Behnke[25] argued that final authority over land use decisions rested with the senior headman at Etanga. However, he only involved himself in issues that could not be amicably agreed and decided upon at the local level.

This discussion suggests strongly that customarily, chiefs and TAs in Kaokoland do not have any of the powers given to them by the CLRA. The current legal framework governing the appointment of traditional leaders and land administration provides aspiring headmen and chiefs with a framework within which they can assume those powers and other benefits that come with recognition. It has opened the door for recognised TAs to interfere with land access rights in areas that are under the jurisdiction of non-recognised traditional leaders, leading to increased disputes and vulnerability.

While the CLRA states that grazing on commonages should be available to legal residents of a specific area, it fails to stipulate what a legal resident of an area is, or more generally, how the claim of a customary land right to commonages can be verified, let alone registered. A first step in addressing this issue is to recognise that customary land is typically "owned" by communities, and that access to land is dependent on group membership. Individual or collective property rights to land and natural resources in communal areas are defined by membership of a specific community.[26] It follows from this that in order to improve tenure security

21 Bollig, M., 'Towards an Arid Eden?' p. 776.

22 Bollig, M., 'Probleme Kommunalen Ressourcenmanagements', p. 79; Behnke, R., 'Range and Livestock Management', p. 34.

23 Ibid.

24 Bollig, M., 'Probleme Kommunalen Ressourcenmanagements', p. 80.

25 Behnke, R., 'Range and Livestock Management'.

26 Ellis 1993 as cited in Bollig, M. & A. Corbett, *An Assessment of the Namibian Conservancy Programme*, Evangelischer Entwicklungsdienst (EED) and Legal Assistance Centre (LAC), Windhoek, 2002, p. 49.

to commonages, the law must provide procedures to enable local communities to confirm customary rights to commonages.

A first foray in this direction was presented in the Draft National Land Tenure Policy.[27] It proposes to recognise, define and demarcate traditional villages, which by definition include large commonages:

> Once a village is demarcated and a constitution is drafted in line with an Act of Parliament, the village should be registered and the effect of such registration should be that the village becomes a juristic person, in order to give better security to the land tenure of the members of the village.[28]

It continues to propose that residents of the village be registered and that such register be kept up to date:

> The village residents will have the discretion to accept or reject persons or families wishing to enter its community, as long as this does not infringe on Article 16(1) of the Constitution of Namibia.[29]

These proposals have never been opened to public debate and have not been submitted to the National Assembly. This notwithstanding, similar proposals have been made more recently in connection with group rights.

There appears to be a good understanding that the provisions in the CLRA to register customary land rights are not appropriate in Kaokoland. Mendelsohn[30] reported that among the multitude of objections raised by the Otjikaoko TA to the requirements of customary land rights was that they were "contrary to the tradition of its people, and that the only acceptable registration would be group registration over the old headman wards". Underlying this assessment was probably the realisation that the individualisation of customary land rights through a process of registration may lead to increased land conflicts, as it amounts to imposing individual rights on "pre-existing systems of multiple rights".[31]

Defining the content of customary land rights to commonages as pertaining only to grazing does not do justice to the complex nature of customary tenure systems. Bruce (1999) argued that "indigenous tenure systems have customised tenure arrangements for land under different uses [...] A community's tenure system is composed of several tenures, each of which defines different rights and

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

28 Ibid., p. 17.

29 Ibid., p. 18.

30 Mendelsohn, J., 'Customary and Legislative Aspects of Land Registration and Management on Communal Land in Namibia', Ministry of Lands and Resettlement, Windhoek, 2008, p. 48.

31 Quan, J., 'Land Tenure, Economic Growth and Poverty in Sub-Saharan Africa', in Toulmin, C. & J. Quan (eds), *Evolving Land Rights, Policy and Tenure in Africa*, DFID/IIED/NRI, London, 2000, p. 37.

responsibilities for resource use."[32] A customary right to cultivate a parcel of land, for example, does not automatically imply rights to hunting or the collection of specific natural products. As Bollig and Corbett[33] have argued, "different sets of rules (may apply) over the same locations". The notion of communal tenure refers to a bundle of rights and duties that different levels such as individuals, family, sub-groups and the larger group enjoy to a variety of natural resources.[34]

Information obtained during a field visit in June 2019 confirmed that that rules of access to commons as well as the broad boundaries of wards and sub-wards were well-known, but do not enjoy any legal protection. If anything, the implementation of the CLRA has made communities with unrecognised traditional leaders vulnerable to outsiders coming into their areas without proper authorisation at the local level. Several instances were reported during the field visit of recognised TAs who authorised the settlement of people in areas of unrecognised traditional leaders and even conservancies. These actions are based on the perception that as recognised TAs they are the only traditional leaders with powers to implement the CLRA. These powers include rights to allocate and cancel customary land rights in areas under the jurisdiction of unrecognised traditional leaders. The CLRA increased contestation between recognised and unrecognised headmen at the expense of ordinary land rights holders. The most explosive example of this can be found in Omakange.

Omakange is part of Kunene Region and the recognised Otjikaoko TA claims jurisdiction over it. A small portion of land under the Otjikaoko TA lies east of the main tar road and is in Omusati Region, bordering the Uukwaluudhi TA in the east, which is a recognised TA. Both TAs are contesting under whose control the Omakange area falls. Over a number of years, 162 land parcels of 10 ha on average were fenced in the area of Okapundja to Otjomukandi, allegedly by people from Uukwaluudhi. The land was used for crop production and animal husbandry. The Uukwaluudhi TA, which is recognised, and the unrecognised Otjerunda TA allocated customary land rights in Okomakuara, Omateteue and half of Omakange. Both claim jurisdiction over the villages. The Ovandu Vovivapa and Tjeura TAs (both unrecognised) allocated land for residential and cropping purposes in Okapunja and Otjomukandji, but did not permit any fences.[35]

This situation has created insecurity and confusion, in particular with the granting and registration of customary land rights. Seventy rights claimants

32 Bruce 1999 as cited in Bollig & Corbett, *An Assessment of the Namibian Conservancy Programme*, p. 47.

33 Ibid., p. 48.

34 Cousins, B. & A. Claassens, 'Communal Land Rights, Democracy and Traditional Leaders in Post-Apartheid South Africa', in Saruchera, M. (ed.), *Securing Land and Resource Rights in Africa: Pan-African Perspectives*, PLAAS, Bellville, Cape Town, 2004, p. 22.

35 Namwoonde, I.H. & M.H. Karunga, *Investigation on the Fences Erected along the Kamanjab Road between Okapundja and Otjomukandi*, Ministry of Lands and Resettlement, Windhoek, 2014, p. 4.

have lodged their applications for recognition of a customary land right with the Uukwaluudhi TA. However, even though being approved by the latter, these rights cannot be registered by the Kunene Communal Land Board "because the Uukwaluudhi [TA] is not recognised in the Kunene region". In 2014 only eight of the 162 fenced land parcels had been registered in terms of the provisions of the CLRA with the Kunene Communal Land Board.[36] Mendelsohn[37] stated that the Uukwaluudhi TA was "accused of expanding its control by soliciting [communal land rights] applications from Owambo residents who settled illegitimately in areas claimed to be under the jurisdiction of the Otjikaoko TA."

The CLRA provides only limited *de jure* land rights over commonages, and TAs are not able to invoke statutory law to enforce customary laws and practices.[38] Section 43(2) of the CLRA provides for a chief, TA or communal land board to "institute legal action for the eviction of any person who occupies any land in contravention of [the Act]", but this provision has never been used in a court of law. However, the provisions of the CLRA were successfully adduced in some cases to have illegal fences removed from communal land. An example of this involved a Supreme Court judgment authorising the Ohangwena Communal Land Board to order the removal of a fence erected by a certain Wapulile, the respondent in the that case.[39] However, these legal provisions cannot be used by unrecognised traditional leaders. As a result, the rights of livestock farmers in Kaokoland, who are dependent on flexible access to grazing, remain precarious; rights holders are vulnerable, particularly to outsiders appropriating land. In their review of the implementation of the resolutions taken at the first Land Conference in 1991, Nghitevelekwa et al.[40] have argued that

> … the lack of clarity and lack of clear pronouncement on the protection and security of commonage in the Communal Land Reform Act, 2002 represent the main breeding ground for people to fence off large tracts of communal land.

2.1 Conservancies

In the absence of legal protection of group rights to land and natural resources in the CLRA, many rural communities turned to other natural resources legislation, and in particular the legislation governing communal conservancies. The establishment of conservancies required that the area of the conservancy be accurately determined, that a constitution be developed to govern the activities of the conservancy, and that the members of the conservancy be recorded in a register. The rights of conservancies

36 Ibid.
37 Mendelsohn, J., 'Customary and Legislative Aspects of Land Registration and Management', p. 48.
38 Bollig and Corbett, *An Assessment of the Namibian Conservancy Programme*, p. 49.
39 NASC 19, 08 June 2017, *Chairman Ohangwena Communal Land Board N.O. v Wapulile* (SA 81/2013) (https://namiblii.org/na/judgment/supreme-court/2017/18).
40 Nghitevelekwa et al., 'The Land Question and Land Reform in Namibia', p. 107.

involved primarily the sustainable utilisation of wildlife and other natural resources for consumptive and non-consumptive use, with limited powers with regard to managing land rights. They have no rights to allocate or cancel customary land rights, but, as interested parties in terms of the CLRA's regulation 7(4), they can object within seven days to applications for customary land rights to be recognised and registered. In addition, section 31(4) of the Act provides conservancies with rights to object to applications for leaseholds, if these are found to be wholly or partly situated within a declared conservancy area.

While this community-based approach represented a form of devolution of powers, the central state retained substantive rights over the land and conservancies. These restrictions notwithstanding, the establishment of conservancies gave rise to a perception among the people involved "that more substantive rights to land were gained when a conservancy was gazetted, or that the institutions they devise to govern the communal resources – game – actually have a much broader mandate than that".[41] More specifically, Bollig[42] argued:

> Although legally the state did not cede land ownership rights to local communities, but only devolved specific management and transfer rights to them, the delimitation of territorial boundaries fostered the idea held by local people that they had in fact wrenched land rights from the government.

Bollig[43] also argued that in some instances the establishment of conservancies had more to do with traditional authority politics than conservation. He referred to the process of establishing conservancy boundaries as "a new type of territorialisation" with

> … new territorial entities conform(ing) to the ideas and strategies of traditional and newly established leaders alike; in their view, bounded territories precluded unwanted immigration, (re-)legitimized and (re-)territorialized traditional leadership, reconfirmed communal ownership of pastures and other natural resources, and also opened venues for investment from the outside.

This may help to explain why Kunene Region has the largest percentage of communal land falling under proclaimed conservancies countrywide. In 2017, the area covered by conservancies in the region was 58 943 km^2, or 79.5% of communal land in Kunene, with 59 207 people, or 81.7% of Kunene communal area residents, living in conservancies.

In terms of a recent judgment in the High Court of Namibia, conservancies are not as powerless with regard to protecting their members' customary land rights

41 Bollig, M., 'Towards an Arid Eden?', p. 775.
42 Ibid., p. 780.
43 Ibid.

as had been assumed for a long time. In a recent judgment in *N#jagna Conservancy Committee v The Minister of Lands and Resettlement*,[44] Judge Ueitele found that the N‡a Jaqna Conservancy – and by implication other conservancy committees recognised under the Nature Conservation Amendment Act (No. 3 of 2017) – had *locus standi* to bring an application for an eviction of persons, thus indicating that the committee had a right to the land in order to assert their rights over wildlife utilisation. The significance of this judgment is that the Court accepted that there was *locus standi* of a different entity, not just the TA or the Communal Land Board.[45]

Apart from the inherent shortcomings of the CLRA to protect customary rights to land and natural resources, the very same Act excludes a substantial part of the Ovahimba and Ovaherero livestock owners in Kaokoland from the provisions of the Act on account of the fact that a large number of headmen are not recognised, and are therefore not able to implement the procedures set out in the CLRA for the recognition of customary land rights and the approval of new applications.[46] In terms of the Act, customary land rights become legally valid land rights only after a communal land board has verified or ratified such a right. With regard to new allocations, the Act specifically states that the allocation "by the Chief or Traditional Authority is not enough to give the applicant the right to use the land".[47] This implies that for as long as a customary land right is not registered, it does not have any legal standing in terms of the CLRA, and hence enjoys no legal protection. And in many parts of Kaokoland, this cannot happen. This is the reason why unrecognised traditional leaders have enrolled the Legal Assistance Centre to assist with their applications to be recognised.

3 Himba headmen and the state

The recognition or non-recognition of headmen in Kaokoland is a major point of dissatisfaction among traditional leaders. Regardless of the possible personal interests of individual headmen in being recognised, the current situation has a negative impact on tenure security and land administration in the sub-region. But the relationship between Ovahimba headmen and the state – whether colonial or post-independence – has always been characterised by ambiguities and tensions. The requirement that headmen needed to be recognised was a colonial invention

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

45 Willem Odendaal, personal communication.

46 Hinz, M., 'Traditional Governance and African Customary Law: Comparative Observations from a Namibian Perspective', in Horn, N. & A. Bösl (eds), *Human Rights and the Rule of Law in Namibia*, Macmillan Namibia, Windhoek, 2008 (http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/hinz.pdf).

47 Legal Assistance Centre, *Guide to the Communal Land Reform Act, 2002 (No. 5 of 2002)*, 2nd Edition, Windhoek, 2009, p. 23.

which was uncritically adopted by the independent Namibian government, and probably for the same reasons. Both the colonial and independent state had to ensure that traditional leaders, particularly in areas where the state was not well represented, could be trusted politically. Most traditional leaders enjoy widespread legitimacy and considerable influence in areas under their jurisdiction.

Against this background, it is conceivable that TAs might have been perceived as threats to attempts by the new state to establish itself in rural areas after independence. At least one 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".[48] Political expediency rather than customary legitimacy were and continue to be the main criteria for recognising traditional leaders.

A major challenge for the South African colonial regime was that there were no traditional chiefs among the Ovahimba. In a sense, the colonial state was faced with what Mamdani[49] referred to in a different context as "stateless communities" where

> … colonial imposition could not resonate with any aspect of tradition. Often tribes were created on the basis of territorial contiguity as villages were brought together under a single administrative authority. Chiefship was similarly manufactured and chiefs were imposed.

When Major Manning visited Kaokoland for the first time in 1917, he reportedly "could not identify distinctive geographically bounded tribes. Instead, he noted the existence of so-called sections of people living under the authority of individual leaders". Chieftainship had to be "manufactured", and Manning proceeded to "establish more familiar and workable structures through which the South African Administration could rule in Kaoko" by appointing Vita Thom, Muhona Katiti and Kakurukouye as chiefs.[50] Bollig[51] observed that "all three chiefs appointed in 1920 had careers as war lords or mercenary leaders and had only vague claims to traditional forms of leadership."

Traditional leaders of one kind or another were an essential component of colonial rule. And Koaoko was no exception, as the Native Commissioner of Ovamboland pointed when he stated that:

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48 Werner, W., 'Tenure Reform in Namibia's Communal Areas', *Journal of Namibian Studies*, Vol. 18, 2015, p. 76.

49 Mamdani, M., *Citizen and Subject: Contemporary Africa and the Legacy of Colonialism*, James Curry, London, 1996, p. 41.

50 Friedman, J.T., 'Making Politics, Making History: Chiefship and the Post-Apartheid State in Namibia', *Journal of Southern African Studies*, Vol. 31, No. 1, 2005; Bollig, M., 'Chieftancies and Chiefs in Northern Namibia: Intermediaries of Power between Traditionalism, Modernization and Democratization', in Dülffer, J. & M. Frey (eds), *Elites and Decolonization in the Twentieth Century*, Palgrave Macmillan, Basingstoke, 2011, p. 160.

51 M. Bollig, 'Chieftancies and Chiefs in Northern Namibia', p. 160.

> The political aspect of native administration in the Kaokoveld is similar to that followed in Ovamboland. It is a form of indirect rule whereby the rank and file are controlled through their traditional leaders. It is of first importance therefore to uphold the influence and status of such leaders. Without their aid and co-operation it would be impossible to carry out the policy of the Administration satisfactorily.[52]

It was therefore imperative to develop a system of centralised traditional leadership among the Ovahimba. Unlike the Ovahimba sections in Kaoko, the Ovaherero sections were quite familiar with a centralised system of governance. This process was characterised by tensions and conflicts between kin-based organisation and leadership, and the "administrative mode of organisation" introduced by the colonial state.[53] Twenty years after the advent of South African colonial rule, the Officer-In-Charge of Native Affairs in Kaokoland wrote to the Chief Native Commissioner (CNC):

> The Ovahimbas have never submitted to tribal control and their headmen are faced with an impossible task. The Native Commissioner of Ovamboland tried for nearly 20 years to get the Ovahimbas to co-operate but could not even persuade them to attend meetings and had to travel from place to place to discuss matters with a few at a time.[54]

A prominent Himba headman, Uaripaka, confirmed this assessment when he lamented the fact that his subjects did not respect him as headmen and refused to carry out instructions:

> The Ovahimbas treat us [headmen] like dirt; we are nothing. The head of every family considers himself the headman of his people and will not listen to us. When I tell my people what work you have given us to do or communicate any order to them, they say: "You have been to the White man about work; do it yourself and go to hell!" The Government must not think that the Ovahimbas are like the Europeans who respect their superiors. They do not listen to their headmen and treat us like dogs because every stock owner is a big man.[55]

This situation had not changed much by the early 1950s when the Officer-in-Charge of Native Affairs in Ohopoho (present-day Opuwo) observed that the Himba headmen had no control over their subjects, who treated the former "as being just another Ovahimba. They are unable to deal with complaints brought to them and in such cases always consult me and one of the Herero headmen, usually Willem Tjerije."[56]

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52 NAN SWAA 2513 A 552/1 Vol. 2 Monthly Reports OIC of NA Ohopuho to CNC Windhoek 1.10.1940.

53 Mamdani, M., 'Citizen and subject', pp. 42–43.

54 NAN SWAA 1168 A 158 40/2 Minutes of a general meeting held at Okorosave on the 2nd October 1939.

55 Ibid.

56 NAN NAO 61 12/3 Officer-in-Charge Native Affairs Ohopoho to Chief Native Commissioner, Annual Report on Native Affairs 1952, 31.12.1952.

In theory, for the system of indirect rule to work, the autonomy of traditional leaders vis-à-vis the colonial state had to be reduced by making chieftainship or headmanship "subject to appointment, transfer and dismissal".[57] Headmen were often given warnings if they failed to carry out the instructions of colonial officials and threatened with removal from Kaokoland.[58] In some specific cases, police action and/or deportation were proposed "to maintain law and order" among the Ovahimbas, especially followers of Mariha and Veripaka, who were regarded as being "entirely out of hand", seemingly because they ignored an instruction by the Officer-In-Charge to provide labour for road construction.[59]

But the colonial administration was careful not to take drastic action too quickly. This was partly the result of not having been able to assess whether these headmen derived their power from being recognised as headmen by the Administrator, or by the "tribe". With no tradition of headmanship, colonial officials were left guessing whether the successor of a deposed headman would be recognised as leaders by the "tribe".[60] The CNC in Windhoek argued as follows:

> [It would be an] unhappy position if the Himbas were to continue to recognise their deposed headmen and that a successor headman would not enjoy the confidence of the tribesmen which might have an unfortunate reaction on the present relations existing between the Administration and the tribe.
>
> …
>
> Under the system of indirect rule, at present obtaining in the Kaokoveld, the governing power, in order to maintain their tribal authority, generally accepts leaders nominated by the tribe and will not depose them except for very serious cause or because they have lost the confidence of the tribesmen and with it their real power and status. In the latter case the request for deposition would have to come from the tribesmen and not from the governing power and the fact that they are negligent in attending meetings is not regarded as sufficient cause for the Administration to depose them.[61]

The policy of the colonial administration towards Himba headmen in particular was characterised by ambiguity. "No one – including the colonial officials themselves – seemed certain whether they were 'chiefs', 'headmen' or just 'leaders' …".[62]

A major issue in appointing and recognising headmen, and later chiefs, was whether these should be elected or inherit their headmanship. It would appear that until the late 1980s, a hybrid system was used. Potential headmen and councillors

57 Mamdani, M., 'Citizen and subject', p. 55.
58 Friedman, J.T., 'Making Politics, Making History', pp. 29–30.
59 NAN SWAA 1168 A 158 40/2 Undesirable features evidenced by report of meeting held at Ohopuho in the Kaokoveld on 31st January and 1st and 2nd February 1940.
60 NAN SWAA 2513 A 552/1 Vol. 2 Monthly Reports NC Ondangua to CNC Windhoek 5.12.1949.
61 NAN SWAA 2513 A 552/1 Vol. 2 Monthly Reports CNC Windhoek to NC Ondangua 28.2.1950.
62 Friedman, J.T., 'Making Politics, Making History', p. 29.

were proposed at meetings and then confirmed through elections. Whatever the outcomes of these processes were, the names had to be approved by the Native Commissioner in Ohopoho and then forwarded to the CNC in Windhoek. The names of newly appointed headmen in Kaokoland had to be sent for the approval of the Administrator.[63]

In the mid-1970s, "villages" were said to elect their headmen. The Council of Headmen then had to approve and submit the results to the Bantu Affairs Commissioner in Ohopoho. He made a comment on the outcomes and forwarded the same to the CNC in Windhoek for ratification. The CNC in Windhoek then forwarded it to the Department of Bantu Administration and Development in Pretoria for approval. The approval or otherwise of the Minister of Bantu Affairs and Development in Pretoria was then communicated back to the CNC in Windhoek and then to Opuwo.[64] In the late 1970s the powers of the Minister were transferred to the Administrator-General in terms of Proclamation 3 of 1977.[65] Before being forwarded to the Administrator-General for approval, the recommendations to appoint headmen in Kaokoland were first submitted to the Paramount Chief (Riruako) to be discussed by Herero headmen in Okakarara.[66]

Ambiguities about appointing and recognising headmen continued until independence. The colonial administration appears to have supported the election of new headmen instead of simple succession, presumably to retain control over traditional leaders. In 1985, the Secretary of the Administration of Hereros argued that all leadership positions from headman to councillor in Kaokoland were regarded as inheritable and that this practice was wrong and not legal. That, he felt, was why there were so many headmen and councillors in Kaokoland. He felt that the issues needed to be addressed urgently and proposed that Kaokoland be divided into wards – six or eight, depending on size; that headmen be appointed according to wards; that a distinction be drawn between official positions (*ampstoele*) and ordinary positions (*stoele*) that are inheritable according to custom; and that appointments should also be made through elections.[67]

Historically, Kaokoland had a disproportionate number of headmen relative to the population. In 1952 the number of principal and sub-headmen among the Ovaherero and Ovahimba sections were given as follows:

63 NAN SWAA 2513 A 552/1 Vol. 2 CNC to NC Ondangua, 1.4.1950.

64 See NAN AHR 32 10/5/2 (A-06) Vol. 1 Hohorua Kakuwa (councillor) and 35 others, Otjorunda to Bantoesakekommissaris, Opuwa (sic) 1.4.1976 and Bantoesakekommissaris Opuwo to Hoofbantoekommissaris Windhoek, 1.8.1976; Sekretaris van Bantoe-Administrasie en – Ontwikkeling Pretoria to Hoofbantoesakekommissaris, Windhoek 18.2.1977.

65 NAN AHR 32 10/5/2 (A-06) Vol. 1 Hoofbantoesakekommissaris S.W.A. Windhoek to Bantoesakekommissaris Opuwo 24.11.1977.

66 NAN AHR 32 10/5/2 (A-06) Vol. 1 Hoof Naturellekommissaris vir SWA to AG Memo: Aanstelling van Hoofmanne te Kaokoland 17.10.1978.

67 NAN AHR 30 10/4/2 (5) Skretaris: Administrasie vir Hereros. Die ondersoek van die 7-man komitee oor die beswaar van Hoofman Kephas Muzuma n.d. [1985].

- **Herero:** seven principal and six sub-headmen; estimated population: 1 555
- **Ovahimba:** nine principal and three sub-headmen; estimated population: 2 917
- **Ovatjimba:** no headmen; estimated population: 3 987[68]

Among the Himba, this amounted to one headman for 324 people. Over the years, the colonial administration expanded the number of traditional authorities. In 1990, 27 "territorial headmen" were counted among the Ovahimba,[69] while the Commission of Inquiry into Matters relating to Chiefs, Headmen and other Traditional or Tribal Leaders recorded 35 traditional leaders in the Kaokoland region.[70] Today, however, only three TAs are recognised in northern Kunene:

- **Otjikaoko TA:** Chief Paulus Tjavara, four senior councillors, two traditional councillors. All of them were designated in August 1996 and recognised in March 1998.[71]
- **Vita Royal House TA:** Chief Kapuka John Thom, six senior traditional councillors, 13 traditional councillors. Some councillors were designated as far back as 1950 and 1960 and recognised in March 1998 (GN 65 31.3.1998 GG 1828).[72]
- **Kakurukouje TA:** Vemuii Tjambiru was designated as Chief (*ombara*) of the Kakurukouje TA on 21 March 2008 and recognised in July of the same year.[73] The following year, two senior traditional councillors and five traditional councillors were also recognised.[74]

Many headmen in Kaokoland feel aggrieved at not being recognised. At the time of writing, approximately 28 headmen were working through the Legal Assistance Centre to be recognised. A major part of the problem is that "a very substantial part of the [Ovahimba] are not part of the procedures before Land Boards that finalise the allocation of land under customary law"[75] as their unrecognised headmen cannot approve any applications for customary or leasehold rights. The three recognised TAs believe that their areas of jurisdiction, although not clearly defined among themselves, extend over all Ovahimba and Ovaherero communities. In the event of customary land rights holders in areas without a recognised TA wanting to apply or register a customary land right or apply for a right of leasehold, they have to work through a recognised TA, which may not enjoy any legitimacy in the particular area. This in turn legitimises their claim of jurisdiction. It is also alleged that recognised

68 NAN NAO 051 NC Ovamboland to CNC Windhoek, 30.4.1952; the Ovatjimba were said to have lived primarily with Ovaherero communities.

69 Government of the Republic of Namibia, *The State of Land Reform Since the 1991 National Conference on Land Reform and the Land Question*, Ministry of Land Reform, October 2018, p. 282.

70 Republic of Namibia, *Report by the Commission of Inquiry into matters relating to chiefs, headmen and other traditional or tribal leaders*, Windhoek, 1991, p. 98.

71 See Friedman, J.T., 'Making Politics, Making History', p. 38 for origins of OtjiKaokoland and Big Group.

72 See ibid. p. 35 for information on the Vita Royal House.

73 Proc. 26 of 2008, GG 4090, 30.7.2008.

74 GN 2005 of 2009.

75 Hinz, M., 'Traditional governance and African customary law', op. cit., p. 81.

TAs appoint their headmen in areas that do not necessarily recognise them and allocate land and grazing rights in conservancies and areas that are traditionally not regarded as under their control.

In short, the authority of a large number of unrecognised headmen is simply ignored by recognised chiefs on the strength that they are recognised and hence have the power to administer land even in areas where their powers are contested by unrecognised headmen. This has given rise to demands expressed during regional consultations in 2018 that clear areas of jurisdiction are established, each under a recognised (or newly recognised) traditional leader.

3.1 Areas of jurisdiction

The clear delimitation of areas of jurisdiction in societies practising transhumance is a major challenge, as this particular form of land use requires flexibility and the opportunity and capacity to negotiate access to grazing and other resources outside one's home area. As much as South African colonial officials were hoping to define the areas of jurisdiction of their appointed headmen, in reality this remained wishful thinking.

In theory, the basic area of jurisdiction under colonial rule was the ward, but the history of wards in Kaokoland is not entirely clear. What is clear, however, is that continuous disputes among headmen included contestations over areas of jurisdictions. This notwithstanding, in 1968 Kaokoland was divided into the following wards:

- **Ovahimba:** 10 wards; ± 7 000 subjects
- **Ovatjimba:** six wards; ± 2 000 subjects
- **Herero:** seven wards; ± 4 000 subjects

Each headman was assisted in the management of his ward by a number of sub-headmen.[76] A report and recommendations on management development in South West Africa found that "currently this system was working excellently".[77]

However, realities on the ground belied this generous assessment, as continuous rivalries among emerging headmen called ward boundaries or areas of jurisdiction into question. To aggravate matters, a map indicating ward boundaries was said to have existed many years ago, but could no longer be found.[78] The only map indicating areas of individual headmen appeared in *Notes on the Kaokoveld (South West Africa) and its people* (van Warmelo[79]). In June 2019 participants in a focus

76 NAN BOP 66 N11/2/2 Verslag en aanbevelings van komitee insake bestuursontwikkeling in Suidwes-Afrika: Administratiewe en bestuursontwikkling: Damaraland: Kaokoland: Hereroland, September 1968.

77 Ibid.

78 NAN AHR 33 10/5/2 (A-06) Notule van vergadering gehou te Okatumba op die 10de Januarie 1989.

79 Van Warmelo, N.J., 'Notes on the Kaokoveld (South West Africa) and its People', *Ethnological Publications 26*, Department of Bantu Administration, Pretoria, 1962 (1951).

group discussion in Opuwo not only confirmed that the only map indicating wards was van Warmelo's but held it as part of the documentation supporting their claims to areas of jurisdiction and legitimacy as headmen.

The disunity and disputes can be traced back to 1952, when members of the Ovatjimba objected for the first time to being dominated by the Herero, an event that "marked the rooting of political consciousness, an awareness of oppression".[80] They felt they were treated unfairly and that the government "only allowed 'outsiders' to become headmen".[81] The Ovahimba wanted their own headmen, but the Native Commissioner in Ohopoho commented:

> The Ovahimba Headmen serve no purpose whatsoever. They have no control over their subjects and in some instances appear to be afraid of them. Whenever a complaint is brought to them they seem unable to settle such but come to the office for assistance. I have warned Ovahimbas that whenever it comes to my notice that they simply ignore instructions issued to them by their headmen, they will be punished most severely.'[82]

The conflict took the form of headmen belonging to either the *groot groep* (big group) and *klein groep* (small group). Native Kaokolanders – Ovahimba – became the *groot groep* (big group) (*otjimbumba*) ("a reference to their majority status in Kaokoland") and the Herero were referred to as the *klein groep* (*okambumba*, or sometimes *ndamuranda*).[83] The severity of these tensions became apparent when the colonial administration wanted to use headmen as enumerators in the 1970 census, only to find out that the *groot groep* did not want to talk to the *klein groep*. The latter were regarded as traitors because they cooperated with the whites and offered their livestock for tests and inoculations. Both groups recognised Clemens Kapuuo as their leader and accepted his political views and orders. This division and resulting tensions between headmen of these two groups lasted through the 1970s until independence.[84]

The *groot groep* and *klein groep* each appointed their own headmen in the respective headmen's wards. This led to a mushrooming of wards, as people in the concerned wards were sub-dividing existing wards into up to three units to

80 Friedman, J.T., 'Making Politics, Making History', p. 30.

81 Cited in ibid., p. 31.

82 NAN SWAA 2513 A 552/1 Vol. 2 OIC NC Ohopoho to CNC Windhoek 31.12.1952 Report of the Officer-in-Charge, Native Affairs, Kaokoveld for the quarter ended 31st December 1952, p. 2.

83 Friedman, J.T., 'Making Politics, Making History', pp. 32–33. These generalisations need to be qualified. A submission to the Administration for Hereros in 1985 argued that the dispute was between the Tjimba and Hereros, but that this was also misleading. The Tjimba claim they are the owners of Kaokoland and that the Herero were emigrants who did not have much say in Kaokoland. But this is the wrong point of departure. 'There are Tjimba who support the Hereros and vice versa'; NAN AHR 33 10/5/2 (A-06) Voorlegging aan die Uitvoerende Komitee van die Administrasie vir Herero's 7.1.1985.

84 NAN AHR 32 10/5/2 (A-06) Vol. 1 Bantoesakekommissaris Opuwo to Hoofbantoesakekommissaris Windhoek, 10.12.1976.

accommodate rival headmen. The number of wards stood at 27 at the time, catering for a population estimated to have been 13 000, which suggests that the number of headmen and councillors was disproportionately high relative to the population.[85] A former Native Commissioner in Kaokoland, Ben van Zyl, stated that there were 36 headmen's wards in Kaokoland in the latter half of the 1970s. Each headman "was autonomous in his own area".[86]

3.2 1980s: Second Tier Representative Authorities

The advent of representative authorities in 1980 exacerbated the sense of neglect and domination by the Ovaherero among the Ovahimba. The representative authorities represented a new system of government based on ethnic affiliation rather than geographically demarcated homelands. The Herero Representative Authority supposedly "represented" the interests of all Ovaherero-speaking communities, including the Ovahimba.[87] But there was a strong perception among the Ovahimba that this was not the case, in particular with regard to the appointment of headmen.

In the mid-1980s, the powers to appoint headmen rested with the Executive Committee of the Representative Authority, subject to the prior approval of the Administrator General. The latter's mandate was subsequently transferred to the "Cabinet" of the Interim Government established in June 1985.[88] As Friedman[89] pointed out, delegates of the *small group* and *big group* "alike used the power of the new governing body to appoint their own group's headmen throughout Kaokoland". Examples abound in the archival records of headmen of the *small group* being appointed in areas under the control of the *groot groep*. In one instance, headman Mbumbijazo Muharukua alleged that Paramount Chief Riruako had forced a headman on them twice before under pressure from the *klein groep*. He stated that the Ovahimba would not allow that they were only recognised in elections for national government but ignored in choosing their own leaders. They would not allow that their democratic rights be taken away illegally and granted only to certain Hereros. He continued that headmen in Kaokoland were not elected by government office but by the people themselves and the Council of Headmen. "Not even the Bantu tribal and apartheid government of Odendaal forced headmen onto us."[90]

85 NAN AHR 32 10/5/2 (A-06) Vol. 1 Bantoesakekommissaries Opuwo to Hoofbantoesakekommissaris Windhoek 26.7.1976.

86 NAN AHR 42 11/4/1 Sekretaris: Adminstrasie vir Herero's to Die Beheerlandros Windhoek: Afskrif: Hofsaak nr 35/88 Opuwo. Aanhangsel A Die staat teen Ruben Inpinge (sic) 12.9.1988.

87 Friedman, J.T., 'Making Politics, Making History', p. 34.

88 NAN AHR 30 10/4/2 (5) Aanstelling van Hoofmanne: Kaokoland. Die Uitvoerende Kommitee 31.7.1985.

89 Friedman, J.T., 'Making Politics, Making History', p. 34.

90 NAN AHR 30 10/4/2 (5) Mbumbijazo Muharukua to Sekretaris, Admin van Hereros 2.10.1982 writing on behalf of 22 headmen and councillors.

A year later the appointment of a second headman caused Ngeendepi Muharukua to write a letter to the Administrator General to draw his attention to the "irregularities, corruption and monopoly" in the Second Tier Authority. He wanted to inform him that the Tjimba were oppressed and discriminated against by the Herero Administration. They brought this to the attention of Mr van Zyl – both orally and in writing – but to no avail. They had also informed Chief Riruako but he had communicated, through his behaviour, that he would not to listen to them. The actions of appointing second headmen in some villages was done solely to undermine the leadership of the Tjimba and establish "*alleenheerskappy*".[91]

In a letter to the Chairman of the DTA, Dirk Mudge, Headman Mumbiazo Muharukua requested that the Herero Representative Authority be completely abolished and replaced with an Executive Committee that was not influenced by Riruako and his privileged group. If the Chairman of the DTA and Minister of Finance would not act within 14 days, '"you will have to excuse us if we take our own decisions". He argued that their "struggle was not against SWAPO or the Odendaal Plan but against our own elected administration which was born from the DTA, and which later on changed into a dictatorship which started to belittle and oppress us". This would ultimately drive them out of the DTA and everything that Dirk Mudge and Clemens Kapuuo left them with.[92]

This was followed by the submission of a motion of no confidence in the Executive Committee of the Hereros to the Paramount Chief of the Hereros, President of NUDO and the DTA, Kuaima Riruako in February 1987 by 13 headmen from Kaokoland, writing on behalf of the Council of Headmen and the people of Kaokoland. Amongst other things, they accused the Herero Administration of having discriminated against Koaokolanders (Otjikaoko) and oppressed them from the start: "It started with the undemocratic appointment and imposition of headmen in our wards against our will … The administration is still doing this and it is busy exploiting traditional headmen's authority and to rob us of our traditional ownership and authority over communal land in an unjustified and brutal manner."[93]

A confidential report on the political situation in Kaokoland in the mid-1980s stated that the *groot groep* and the *klein groep* were united in their opposition to Paramount Chief Riruako and/or the Herero Administration. Their grievances included neglect, underdevelopment, poor treatment of pensioners, poor maintenance of boreholes and weak communication between Windhoek and Kaokoland. Both groups wanted to withdraw from the Administration and continue on their own. A few young people of the OtjiKaokoland party were opposed to

91 NAN AHR 32 10/5/2 (A-06) Ngeendepi Muharukua to Aministrateur-Generaal van SWA/Namibië 23.3.1983.

92 NAN AHR 30 10/4/2 (5) Headman Mbumbijazo Muharukua on behalf the Kaokolanders to die Voorsitter van DTA en Minister van Finansies en Owerheidsake, 22.7.1985.

93 NAN AHR 30 10/4/2 (5) Hoofman Mbumbiazo and 12 others to Die Opperhoof van die Hereros 12.2.1987.

Proclamation AG8 of 1980 and would have welcomed its repeal. This would have opened the door for them to break away from the Herero Administration.

The report also mentioned that reference to *groot groep* and *klein groep* was now replaced with the following:

- **Otjikaoko (former *groot groep*):** the Himba, Tjimba-Himba and a part of the Tjimba. They regarded Mbunibijazo Muharukua as their leader, "but behind the scene it is the young men who manipulate everybody". It included people such as Edward Mumbuu, Johannes Muharukua, Lukas Tjoola and Gersom Tjirora. Edward was regarded as the behind-the-scenes adviser.
- **Otjimaruru (former *klein groep*):** mainly Kefas Muzuma, who was regarded as the leader. This grouping also included Matjihurie Muhenje, Johannes Ruiter and a few others with their followers. Their numbers were not close to those of former *groot groep*.[94]

The foregoing discussion has shown that Ovahimba headmen in Kaokoland were at the receiving end of the Paramount Chief and tribal politicians that were running the Herero Representative Authority. The appointment and recognition of headmen in Kaokoland became a tool to try and entrench certain political interests aligned to the DTA. Political expediency rather than long established traditions about local level leadership determined who would be an officially recognised headman and who would not.

This principle continued well into independence. Although little information about the recognition process reaches the public, there is a widespread perception that politics plays a major role. A recent court case involving headman Hikuminue Kapika and the line ministry supports this view.

The headmanship of Kapika at Okonguati has been mired in controversy and contestation since before independence. In September 1982, 200 residents of Okanguati/Omuramba ward held a meeting and unanimously elected Hikuminue Kapika as successor to his late father Muniomuhoro Kapika.[95] The following year the Kaokoland Legislative and Executive discussed the inheritance of headmanship and found that it was wrong and anti-democratic and should be stopped. Headmanship was considered to be completely independent of a last will and testament, and it should be left to voters to elect who should govern them.[96] His appointment was contested by J. Thom of the *klein groep*, who also based his claim on being the descendant of a former headman. The Kaokoland Legislative and Executive "explicitly recommended" that he was entitled to his father's chair within law and custom and recommended the termination of his position as headman so that he

94 NAN AHR 30 10/4/2 (5) Vertroulik. Politieke onderstrominge in Kaokoland, n.d. [1986?].

95 NAN AHR 33 10/5/2 (A-06) Kommissaris Opuwo to Sekretaris Administrasie vir Herero's: Aanstelling van Hikuminue Kapika as Hoofman n.d.

96 NAN AHR 30 10/4/2 (5) Vergadering van die Kaokoland Wetgewende en Uitvoerende verteenoordigers vanaf 19 Februarie 1983 tot 21 Februarie 1983.

could be elected and appointed in a lawful, just and honest manner, according to tribal customs and practices.[97]

An election was duly held, and Thom won with 202 votes against Kapika's 194 votes.[98] A meeting of the Council of Ovaherero Headmen held at Okakarara on 12 April 1984 endorsed the results of the election and "stated explicitly that the winners must be appointed and the losers must be discarded [sic]". However, the Administrator General was of the opinion that the difference in votes between Kapika and Thom (eight votes) was small, and that both should be appointed. The meeting of the Council of Ovaherero Headmen held at Okakarara on 12 April 1984 accepted this.[99] Kapika did not accept the outcome and alleged that his people had not been informed about the election. He also alleged that Tom was trying to chase him out of Okanguati and alleged that Thom was hardly ever in Okonguati, but lived at Kaoko-Otavi.[100]

Chief Kapika rose to prominence as the main opponent of the proposed Epupa Dam in the early 1990s.[101] He caused the ire of the GRN when he stated that "the goats had more of a right to the land than the government did because at least the goats lived here". He also argued "that the current Namibian government was treating them worse than the South Africans had".[102]

Against this background it is not surprising that Chief Kapika's applications to be recognised by the GRN as Chief in terms of the Traditional Authorities Act (No. 17 of 1995), the Council of Traditional Leaders Act (No. 13 of 1997) and the Traditional Authorities Act (No. 25 of 2000) were unsuccessful.[103] His prospects of being recognised improved dramatically after 2013 when three Namibian business people "who [were] involved in the construction of dams" paid him a visit to obtain his support for the construction of the Epupa Dam. In the wake of this visit, the Chief sent a delegation to China in November 2013 "to learn about the construction of hydro-electric dams and to see those types of dams".[104] In January 2014 when the

97 NAN AHR 30 10/4/2 (5) Vergadering van die Kaokoland Wetgewende en Uitvoerende verteenwoordigers vanaf 19 Februarie 1983 tot 21 Februarie 1983.

98 NAN AHR 30 10/4/2 (5) Aanstelling van Hoofmanne: Kaokoland. Die Uitvoerende Komitee 31.7.1985.

99 NAN AHR 30 10/4/2 (5) Paramount Chief of the Hereros. Okakarara. Recommendations of the Committee of Ten (10), 9.7.1984.

100 NAN AHR 33 10/5/2 (A-06) Commissioner (F. Nicklaus) to Sekretaris Admin vir Herero's Windhoek: Hoofman geskille – Okanguati Wyk 9.6.1989.

101 Harring, S.L., '"God gave us this land": the Ovahimba, the proposed Epupa Dam, the independent Namibian state, and law and development in Africa', *Georgetown International Environmental Law Review,* 14(1), 2001, p. 61ff; NAHCMD 51, HC-MD-CIV-MOT-REV-2016/00331, 9 March 2018, *Mutaambanda Kapika v Minister of Urban and Rural Development and Others*, p. 4.

102 Harring, S.L., 'God gave us this land', p. 62.

103 NAHCMD 51, HC-MD-CIV-MOT-REV-2016/00331, 9 March 2018, *Mutaambanda Kapika v Minister of Urban and Rural Development and Others*, p. 14.

104 Ibid., p. 4.

delegation was expected to provide feedback to the community about their trip to China, the Chief disappeared and was found a month later on the farm of the three business people who advised and presumably facilitated the trip to China. After he returned to his home village, Ombuko, he was guarded by 15 policemen. He told the national television station, NBC, that he would no longer oppose the construction of the Epupa Dam.[105]

Kapika's prospects of being recognised undoubtedly improved even further after he joined SWAPO in June 2014. He was said to have explained that "he joined Swapo because his community had allegedly turned against him and [planned] to dethrone him … he joined the Swapo-Party by choice as it is a party where he would find peace and where his leadership would be guaranteed".[106]

In March 2015 Chief Hikumine Kapika applied for recognition, and the Minister of Urban and Rural Development, Sophia Shaningwa, immediately appointed an investigation committee to provide her with relevant information on the application of Chief Kapika. Amongst other things the Committee reported that:

> Kapika's last wish is to leave a legacy in the area of socio-economic development for this community. They further substantiated their support for Kapika's vision as he promised to be a cooperative partner with the Government in development for the sake of his future generation. They pleaded with Government to bury their past differences of not being cooperative with the Government and further promised to join hands with it in any area of development …".[107]

In April 2016 the Chief's application for recognition was approved.[108] However, on 8 March 2018 the decision of the Minister to approve the designation of Hikemuine Kapika as Chief of the Ombuku Traditional Community in terms of sections 4, 5, 8 and 12 of the Traditional Authorities Act was set aside. The court held that there was no evidence that the requirements set out in section 5(1) of the Act had been met, and secondly that the Minister had also failed to establish that the jurisdictional facts required under section 12 existed for her to establish the ministerial investigation committee that she did, and on whose report she relied to arrive at her decision to designate the fourth respondent as Chief of the Ombuku Traditional community. Thus, in short, the Minister had acted *ultra vires*, based on the irrational and unlawful exercise of her powers. The decision has been appealed by Hikuminue Kapika and was due to be heard on 9 October 2019 in the Supreme Court of Namibia.[109]

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105 Ibid., p. 5.

106 'Chief Kapika joins Swapo-Party', 21 July 2014 (https://www.lelamobile.com/content/27007/Chief-Kapika-joins-Swapo-Party/) (thanks to Willem Odendaal for pointing this out and providing the reference).

107 HC-MD-CIV-MOT-REV-2016/00331, 9 March 2018, *Mutaambanda Kapika v Minister of Urban and Rural Development and Others*, p. 17.

108 Ibid., p. 6.

109 Willem Odendaal personal communication.

3.3 Traditional leaders after independence

The ruling party and the independent government appear to have had an ambiguous relationship with traditional leaders. Hinz[110] found that *Perspectives for National Reconstruction and Development* published by UNIN before independence "did not have a word to say about traditional authorities". Moreover, the drafters of the Namibian Constitution

> ... did not envisage much of a role for traditional authorities beyond providing for the establishment of a Council of Traditional Leaders to advise the President on communal land matters. The drafters of the Constitution were rather sceptical about this sector of governance, mainly because of the sometimes ambivalent position of some traditional leaders during times of colonialism.[111]

It was clear, however, that government needed to come up with a policy on traditional leaders. It appears to have accorded this issue similar prominence to the land question, given that the President appointed the Commission of Inquiry into Matters Relating to Chiefs, Headmen and other Traditional or Tribal Leaders[112] while the first Land Conference was underway.

The Commission provided a platform for traditional leaders to put forward arguments that would strengthen their positions. It observed that "the submissions ... of those consulted ... would suggest a strong preference for the traditional leaders to be of 'Royal blood' or be chosen from the 'Royal House'".[113] With regard to Kaoko, Senior Headman Kephas Muzuma claimed that Herero succession was by inheritance and "not by means of election". To support his assertion he cited the case of "King Vita Thom of Kaoko" whose "traditional leadership is God created" and who was "born out of the Royal House of Zeraua, who is his uncle".[114] Uaundjisa Muharukua of Opuwo supported this view, arguing that "leaders should be from Royal Families or people who traditionally played leadership roles". He identified three royal families in Kaoko: Mureti Ua Tjavara; Kakurukouje uaTjambiru; and Muhonakatiti uaMbendura.[115] The disadvantage he saw in elected leaders was that such a leader

> ... is a victim of insults as those who have elected him threaten him that they can out vote him with the same votes they brought him with to that position.[116]

110 Hinz, M., 'Traditional governance and African customary law', op. cit., p. 69.
111 Ibid.
112 Republic of Namibia, *Report by the Commission of Inquiry into matters relating to chiefs, headmen and other traditional or tribal leaders*, Windhoek, 1991.
113 Ibid., p. 57.
114 Ibid., p. 26.
115 Ibid., p. 27.
116 Muharukua, U., 'Proposal on traditional leadership presented by Uaundjisa F.G. Muharuka of Opuwo on 25 April 1991 to Chairman of the Commission on Traditional Authorities, Opuwo', p. 1.

The Commission recognised that many "Royal Houses" were 'divided amongst themselves as to the choice of the particular person from their ranks to become the king'.[117]

In its recommendation, the Commission found "that the traditional systems is not only necessary but also viable" and that it should be retained. On the appointment and recognition of traditional leaders, it recommended "that a Chief be designated by his/her community assembled in a meeting convened for that purpose and in accordance with customary law". Once the responsible Minister had satisfied him/herself that such an assembly had been properly convened, the person so appointed should be recognised by the Minister. The criteria for recognition and appointment should be decided by the "Community in Assembly".[118] In view of the Land Conference, the Commission abstained from making any recommendations regarding the role of traditional leaders in land administration.

The Traditional Authorities Act of 2000 gives legal expression to some of these recommendations. Section 4 provides for the designation of a chief or head of a traditional community by election or hereditary succession "or any other method of instituting a chief or head of a traditional community recognised under customary law".[119] Section 6 provides for the recognition of a Chief or traditional leader.

It was argued above that a major problem arises in communal land administration as a result of the fact that only those chiefs and traditional authorities can exercise functions and powers under the Act as are recognised in terms of the Traditional Authorities Act of 2000.[120] 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.[121]

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, but areas of jurisdiction are not always clearly defined in communal areas used mainly for extensive livestock farming, such as Kaokoland and communal areas south of the Red Line. The Traditional Authorities Act of 2000 does not link the mandates of traditional leaders to geographic areas. In terms of section 2(2):

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117 Republic of Namibia, *Report by the Commission of Inquiry into matters relating to chiefs, headmen and other traditional or tribal leaders*, Windhoek, 1991, p. 58.

118 Ibid., pp. 73–74.

119 Cited in NAHCMD 51, HC-MD-CIV-MOT-REV-2016/00331, 9 March 2018, *Mutaambanda Kapika v Minister of Urban and Rural Development and Others*, Heads of Argument, p 9.

120 For a more general discussion see Werner, W., 'Land Tenure and Governance on Communal Land in Namibia', paper presented at the Second National Land Conference, Windhoek, Namibia, 2018, p. 9.

121 Hinz, M., 'Traditional governance and African customary law', op. cit., 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.[122]

A traditional community "may include the members of that traditional community residing outside the common communal area".[123]

Moreover, the Traditional Authorities Act of 2000 is imprecise with regard to the boundary demarcation of a TA's area of jurisdiction. The Act only once refers to what a "geographic area" is, in that it refers to "communal area" as the geographic area habitually inhabited by a specific traditional community, excluding any local authority area as defined in section 1 of the Local Authorities Act (No. 23 of 1992).[124]

4 Conclusion

Removing uncertainties about peoples' customary land rights and providing tenure security depends to a large extent on the policy and legal framework. It has been argued above that it is questionable whether the current legislation is successful in achieving this. There is mounting evidence that the provisions of the CLRA and Traditional Authorities Act are increasing land disputes and social tensions in northern Kunene Region primarily as a result of the non-recognition of traditional leaders, despite the fact that most of them enjoy local legitimacy.

A fundamental flaw in the CLRA is that it offers a one-size-fits-all framework for very different tenure situations in Namibia's communal areas. The Act fails to recognise local customs and practices and is therefore inappropriate in Kaokoland for protecting customary land rights to commonages. In practice, this means that 30 years after independence, pastoralists in Namibia's north-west do not enjoy legally protected rights.

Namibia needs a new land policy and legal framework that is simultaneously specific enough to provide for good governance in land administration and flexible enough to protect local customs and practices. It must acknowledge and enable customary land rights holders to elect local level leadership and participate in the administration of their land rights. Local level institutions to administer customary land rights do exist and are well known. These need to be supported and modernised if the country is serious about making land rights more secure. Downward accountability and consultation with customary land rights holders need to be dramatically improved.

With the Draft Land Tenure Policy, the GRN took the first step in this general direction to identify group rights to land and natural resources and provide

122 Office of the Prime Minister, Traditional Authorities Act (No. 25 of 2000).
123 Ibid., p. 3.
124 Willem Odendaal, personal communication.

legal protection for such rights. In subsequent years, and most recently as part of the Communal Land Support Activity of the Millennium Challenge Account, a substantial amount of work has been done to introduce and implement group rights. This includes a proposed working policy[125] and proposed guidelines for group land rights in communal areas.[126] These documents should be dusted off and moulded into a policy and legal framework on group rights as part of the implementation plan of the Second Land Conference. Whether the political will exists to do so remains to be seen. The fact that the Draft Land Tenure Policy has been in hibernation since 2005 suggests that it is not a GRN priority to provide legal protection for customary land rights to common grazing areas.

Finally, for policies and laws to be successful, they need to be implemented conscientiously. This is not always the case. In *N#jagna Conservancy Committee v The Minister of Lands and Resettlement*[127] the judge expressed his disappointment with the Otjozondjupa Communal Land Board, which resorts under the Ministry of Land Reform and the Ministry of Environment and Tourism, not to have assisted the community in the conservancy to remove illegal fences. His judgment, that all fences must be removed within 60 days has still not been implemented. A line ministry whose mandate it is to protect the land rights of half the Namibian population which can ignore a judgment with impunity does not instil confidence in its sincerity to fulfil its mandate. To conclude, as noted by the judge:

> The state institutions must therefore do all in their power to ensure that we do not denigrate or further impoverish any section of our community.[128]

125 Millennium Challenge Account, *Proposed working policy for group land rights in communal areas*, Millennium Challenge, Account Communal Land Support Activity, Windhoek, 2014a.

126 Millennium Challenge Account, *Proposed guidelines for group land rights in communal areas*, Millennium Challenge Account Communal Land Support Activity, Windhoek, 2014b.

127 NAHCMD 250 (A 276/2013), *The N#jagna Conservancy Committee v The Minister of Lands and Resettlement*, 13 September 2016, p. 34.

128 Ibid.