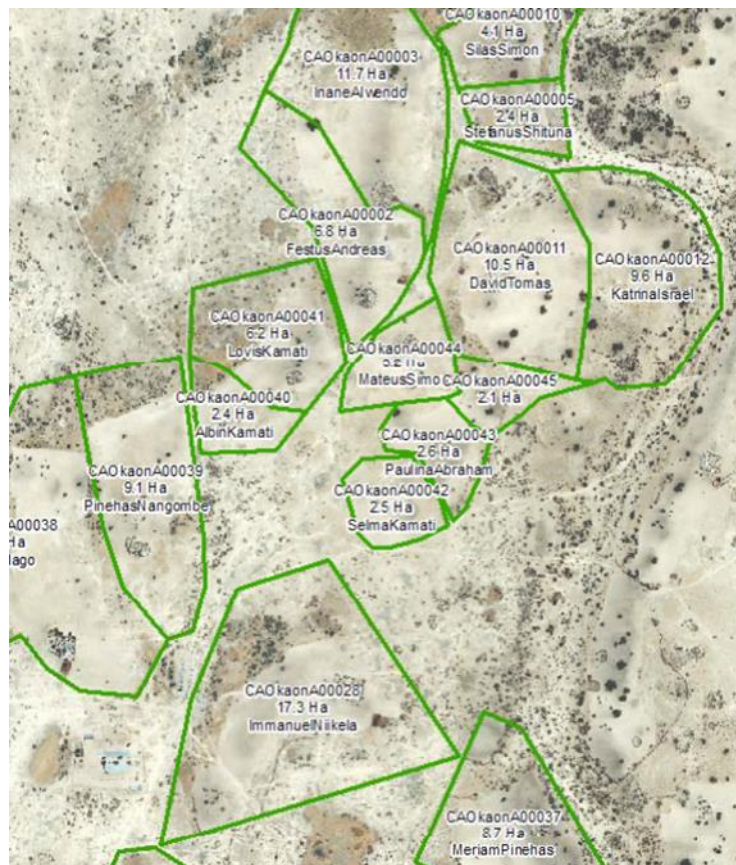


Land tenure and governance on communal land in Namibia

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Abbreviations

CLB	Communal Land Board
CLRA	Communal Land Reform Act
LAC	Legal Assistance Centre
MCA	Millennium Challenge Account
MLR	Ministry of Land Reform
NCLAS	Namibian Communal Land Administration System
TA	Traditional Authority

1 Introduction

At Independence Namibia faced a multitude of land administration issues. At the most general level, land tenure was – and continues - to be characterised by two broad tenure systems. About 44% of the land area is owned under registered freehold title and is commonly referred to as the commercial farming sector. Another 41% consist of land that is administered under various customary governance systems where use rights to land are allocated, typically for life. Freehold ownership is still not permitted, but in recent years long-term lease agreements can be obtained over parts of these areas. These areas are referred to as communal land.

2 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. By contrast, the large-scale process of land dispossession of livestock farming communities in the Police Zone also destroyed their traditional leadership. This was used as a pretext by the colonial administration to fashion an administrative system that minimized the powers of traditional leaders and gave colonial officials extensive powers to administer native reserves (*Uazengisa & 3 Ander v Die Uitvoerende Kommittee van Administrasie van Hereros & 11 Anders, Anexure “D”, Antwoordende Beëdigde Verklaring: Barend Daniel Bouwer, 21.3.1988, n.d., pp. 57–58*). 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” (Kössler, 2005, p. 49).

In terms of colonial legislation, traditional leaders in the Police Zone were stripped of all their powers relating to the allocation and cancellation of land rights. These now became the exclusive preserve of colonial officials and in particular reserve superintendents. 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 as late as the 1980s, when the need to clarify the validity of customary laws and the powers of traditional leaders resulted in several court cases (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*).

In the mid 1960s the South African government introduced a new governance structure for communal areas, then still referred to as native reserves. On the basis of the recommendations of the Odendaal Commission, 10 homelands based on ethnicity were established in South West Africa, ‘each with a form of self-government’ (Lawrie, 1965, p. 5). The specific form this self-government took varied across the homelands. But the homelands of Owamboland, Kavango, Kaoko, Damaraland, Hereroland and Caprivi (now Zambesi) all had a Legislative Council of *ex officio* chiefs and headmen and elected members and an Executive Committee consisting of Chiefs and members elected by the Legislative Council (Ibid., p. 6).

These homelands were adapted in 1980 to the changed political situation, which included the establishment of an interim government of SWA/Namibia. Various Proclamations issued by the Administrator-General established so-called Representative Authorities for specific ethnic groups, each with a Legislative Assembly and Executive Committee (See for example South West Africa, 1980). Communal land was vested in the Executive Committees of Representative Authorities, which had the powers to alienate communal land under freehold title. Section 32 of the 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 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.

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 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 (South West Africa, 1980 Section 27).

However,

The proclamation did not give them 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 (*Ndisiro v Mbanderu Community Authority and Others 1986(2) SA 532 (SWA)*, 1985, p. 538E).

It was argued in the judgement in *Kakujaha and Others v The Tribal Court of Okahitwa* (Justice Strydom in *Kakujaha & Others v The Tribal Court of Okahitwa & Others*, 1989, pp. 2–3) 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.

This suggests that until Independence in 1990, the powers of traditional leaders to administer communal land were severely circumscribed in law, specifically by GN 68 of 1924. These provision were found to be still operation in Namibia in 1992 (van der Byl, 1992, p. 17).

In some communal areas, the recommendations of the Odendaal Commission and subsequent refinement by the so-called Internal Government of SWA/Namibia resulted in fierce contestations over what customary tenure and land administration entailed. In some instances unresolved issues about jurisdiction and authority became the subject of court cases in the 1980s.

3 Land governance after Independence: the CLRA, 2002

The Constitution of the Republic of Namibia dissolved all Representative Authorities by repealing the enabling legislation in Schedule 8. It also 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 (Republic of Namibia, 1990, p. 77). Although it is commonly believed that the government is the owner of communal lands, Section 17 of the Communal Land Reform Act, 2002 (No. 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 (Hinz, 2008, p. 76). 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' (Legal Assistance Centre, 2009, p. 7). As will be discussed in more detail below, it did so by retaining traditional authorities in the land administration process and by creating Communal Land Boards (Ibid.).

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 (Cousins and Claassens, 2005, p. 31). An institutional and management vacuum was created that further undermined the ability of traditional authorities to enforce customary laws applying to land administration. As Fuller (2006, p. 4) argued, traditional leaders were unsure about their continued role in land administration. Some felt 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 if not impossible, which helps to explain the mushrooming of private enclosures of communal grazing areas after Independence.

Against this background, the National Land Policy of 1998 summarised the main concerns of rural people as

- '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' (Ministry of Lands, Resettlement and Rehabilitation, 1998, p. iv).

It went on to describe 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' (Ibid.).

3.1 Traditional authorities

The focus of any discussion of land governance in communal areas must be on the role of traditional leaders play in the process. Particularly in the crop growing areas of north-central and north-eastern Namibia they played a central role in the allocation and cancellation of land rights and dispute resolution. At Independence popular support for this system of land administration 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 (Office of the Prime Minister, 1991, p. 193). It found that the customary system of land administration was 'respected and valued by the people' (Office of the Prime Minister, 1991, pp. 249, 264). Moreover, people felt secure on their land, and claimed 'that no-one could take their land', with the exception of some women who feared to lose their land after the deaths of their husbands (Ibid., p.263).

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 (Office of the Prime Minister, 1991, p. 245). 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) (Office of the Prime Minister, 1991, p. 193).

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 (Office of the Prime Minister, 1991, p. 172).

The ruling party and the independent government appeared to have had an ambiguous relationship with traditional leaders. Hinz (2008, p. 69) found that the *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'.

In addition, traditional leaders were possibly perceived as contenders for political powers. 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 itself in a context where traditional authorities enjoyed widespread legitimacy and considerable influence in areas under their jurisdiction. It is conceivable that traditional authorities, with their well-established areas of jurisdictions in the rural areas, might have been perceived as threats to attempts by the new state to establish itself in rural areas. 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 (New Era, 3.11.1993 as cited in Werner, 2000, p. 2).

The issue of traditional leaders was regarded as important enough though to appoint the *Commission of Inquiry into matters relating to Chiefs, Headmen and other Traditional or Tribal Leaders* (Republic of Namibia, 1991). It 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' (Republic of Namibia, 1991, p. 1). The role of traditional leaders in communal land administration was explicitly omitted from the terms of reference in order not to pre-empt the proposals and recommendations of the *National Conference on Land Reform and the Land Question*, which was held in the same year.

These ambiguities towards traditional leaders notwithstanding, the status of Traditional Authorities in land administration was confirmed by the CLRA. A former Minister of Lands, Resettlement and Rehabilitation and Presidents was quoted as having said in 2003 that Traditional Authorities are those 'who administer the communal land on behalf of the State' (Cited in Chiari, 2004, p. 9).

3.2 National Conference on Land Reform and the Land Question

At that Conference, 12 resolutions pertaining to communal land were taken. With regard to access to communal land, Resolution 13 acknowledges the Constitutional right to settle anywhere in Namibia, but resolved that in doing so, people should 'take account of the rights and customs of the local communities living there' (Republic of Namibia, 2001, p. 35). This is a clear acknowledgement by Conference participants that occupiers of communal land had rights to that land which should be respected. Resolution 16 resolved that people should not have to pay for land allocations and that where this was desirable – obtaining land for business purposes, e.g. – it should be paid to the state and not traditional authorities (Ibid., p. 36).

A fairly long resolution on the rights of women called for equal rights of women to own, inherit and bequeath land as well as 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 matter (Ibid. p. 37).

Closer to the topic of this paper, the Resolution on land allocation and administration stated that

- a) 'The role of the traditional leaders in allocating communal land should be recognised, but properly defined under law.
- b) The establishment of regional and local institutions is provided under the constitution. Their powers should include land administration.
- c) 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' (Ibid, pp. 37-38).

3.3 Reforming governance: contested territory

As the name of the committee suggests, the Technical Committee on Commercial Farmland focused on issues related to freehold agricultural land. But it did make a few observations on the topic of land administration in communal areas, arguing that Namibia could learn from the experiences of Botswana. It 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 'ensure the establishment of permanent land boards under the overall supervision of the Ministry of Lands, Resettlement and Rehabilitation' (Office of the Prime Minister, 1992, pp. 134–135, 182).

In 1993 the Ministry of Lands, Resettlement and Rehabilitation sent a small team to Botswana to acquaint itself with land administration in that 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 the

- 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
- traditional land managers to continue 'to have a voice' in the allocation and administration of land (Werner et al., 1993, pp. 22–23).

To implement these recommendations, the team recommended that Land Boards would provide a sound institutional framework, and that this would 'enable rural communities to retain some control over land use in face of growing pressures on their land'. Interim land authorities should be established to set the process of establishing land boards in motion (Ibid., p.23). The team did not go as far as recommending that communal land should vest in land boards as is the case in Botswana.

However, the provisions of the Communal Land Reform Bill which was submitted to a *Consultative Conference on Communal Land Administration* in September 1996 in Windhoek amounted to

stripping traditional authorities of their powers of 'regulat(ing) and exerci(sing) control over the occupation and use of communal land within (their) regions, either under customary rights or common law rights'. This included the granting or cancellation of rights of occupation or use of communal land and 'the adjudication of appeals against decisions of traditional authorities...' (Malan and Hinz, 1997, p. 177).

The attempts to establish the state as administrator of all customary land rights was informed by the perception that in terms of Article 100 of the Constitution 'all communal land is owned by the state'. As the owner of such land, the state proposed to create regional land boards to take over land administration functions in communal areas, albeit not to 'dilute the authority of traditional leaders, but rather to assist them in the difficult task they have' (Iyambo, 1997, p. 18). Sec. 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'. Sec. 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 (Malan and Hinz, 1997, p. 165).

These proposed changes in land governance were submitted to the *Consultative Conference on Communal Land Administration* in September 1996. Approximately 200 participants were invited and included high-ranking politicians of the ruling party and many powerful kings and chiefs from across the country.

The state's proposals to relegate traditional leaders to a sub-ordinate position was regarded as an assault on their traditional powers and rejected out of hand by traditional leaders. Their sentiments were put very succinctly in a submission by 7 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 (Malan and Hinz, 1997, p. 69).

The outcome of the conference was that the draft land policy and Communal Land Bill had to be revised to allow the continued participation of traditional authorities in the administration of customary land tenure. Section 4(1) of the Communal Land Bill which proposed to transfer the regulation and control over the occupation and use of communal land to Regional Land Boards was deleted. The minister was to appoint members of land boards selected from people recommended by traditional authorities (Malan and Hinz, 1997, p. 196). These amendments put traditional authorities back onto centre stage of land administration in communal areas.

3.4 Communal Land Reform Act, 2002

It took another 8 years after the Consultative Conference in 1996 for the Communal Land Reform Act 2002 (No. 5 of 2002) to be passed by the National Assembly. This Act and its regulations govern the official land reform programme in the communal or non-freehold areas. The official land reform programme should be distinguished from an unofficial land reform that turned large tracts of communal land into private farms through private enclosures. This reform amounted to the expropriation of land 'owned' by communities by people who had the financial means to fence off large tracts of land and develop water points.

3.5 Governance and the role of traditional authorities

The contestation of the role assigned to traditional authorities in the first Communal Land Reform Bill in the mid-1990s has paid off. The Communal Land Reform Act, 2002 (No. 5 of 2002) leaves them with powers to allocate and cancel customary land rights. They are also empowered to lay down conditions for the use of commonages, which may include the type and numbers of livestock grazed, as well as which areas of a commonage should rest. Currently, the regulations state that not 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 commonages, except with the permission of the Chief or Traditional Authority. Rights to grazing may be withdrawn if a rights holder does not observe the conditions imposed by the Traditional Authority, or has access to other grazing land.

All communal areas in Namibia, with the exception of the San, have tiered traditional authority structures, typically consisting of a King or Chief, Senior Traditional councillors and headmen. Each tier has specific mandates and powers (Mendelsohn and Nghitevelekwa, 2017, p. 8). This situation is not acknowledged in legislation. The Traditional Authorities Act of 2000, for example, simply 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 simply '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 provides for the recognition of traditional leaders and payment of allowances to a maximum of 12 councillors. Recognised traditional leaders are published in the Government Gazette.

The CLRA adopts these definitions for purposes of implementing the Act. It also does not explicitly differentiate between different tiers of traditional authority, which raises the question 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 allocation and cancellation of customary land rights. As a result, Hinz (2008, pp. 79–80) argues that in the strict sense of the word headmen are 'executive leaders in their respective areas' and 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 (2008, p. 18) 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, 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)'. He concludes that the exclusion of headmen from the registration process is a serious problem, as local headmen...are best placed to confirm those rights'. Endorsements of customary land rights are only required from senior levels in a traditional authority.

No guidance is provided in the CLRA 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 (Chiari, 2004, p. 12). A study on gender rights commissioned by the Legal Assistance Centre in 2008 found that despite some progress having been made, women's rights to customary land are still determined by patriarchal practices and customs (Werner, 2008). Lendelvo (2008, p. 21) found 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'. Mendelsohn and Nghitevelekwa (2017, p. 16) reported 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'.

Moreover, traditional authorities have no obligations towards land claimants. Chiari (2004, p. 9) states, for example, that the CLRA does not lay down a specific time period within which applications are either approved or rejected. He concludes that 'the CLRA avoids interfering in relationships between land claimants and traditional authorities, whereas it regulates those between the latter and Land Boards' (Ibid.). While Section 3(1)(a) of the TAA (Office of the Prime Minister, 2000) 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 CLBs to consult their members or account to them about land allocations (Thiem and Muduva, 2015, p. 23). 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 having been 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' (Thiem and Muduva, 2015, p. 23).

Land governance in communal areas continues to be compromised by an unresolved contradiction between customary laws and statutory law requirements. As Chiari (2004, p. 9) pointed out, 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. Section 3 of the Traditional Authorities Act of 2000 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 (Office of the Prime Minister, 2000). Local customs by definition include inheritance systems, which in many areas is matrilineal (Mendelsohn, 2008, p. 81). 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 (Sec. 16).

One manifestation of this contradiction has been shown to arise in dealing with the rights of access to land by widows in the north-central regions. Considerable progress has been made as a result of a decision taken in 1993 by Traditional Authorities and the subsequent enactment of the CLRA to stop the eviction of widows from land they and their deceased husbands utilised. However, neither this decision nor the provisions of the CLRA could stop 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 a matrilineal inheritance system, that is, 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 (Werner, 2008, p. 29).

3.6 Unregistered TAs and areas of jurisdiction

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. 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 (Hinz, 2008, p. 81). 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 practice cultivation, areas of jurisdiction are not always clearly defined in communal areas south of the Red Line.

It is common that traditional leaders exercise their powers over subjects not residing in areas where the traditional authority is located. The result is that several traditional leaders claim jurisdiction over one particular area. Apart from historical reasons emanating in part from the need to practice transhumance, this is in line with the provisions of the Traditional Authorities Act 2000. These do not link the mandates of traditional leaders to geographic areas. In terms of Section 2(2)

‘A traditional authority shall in the exercise of its powers and the execution of its duties and functions have jurisdiction over the members of the traditional community in respect of which it has been established’ (Office of the Prime Minister, 2000).

A traditional community ‘may include the members of that traditional community **residing outside the common communal area**’ (Ibid., p. 3).

Problems with regard to the role of unrecognised traditional leaders in the allocation and cancellation of land rights under the CLRA are particularly acute in Omaheke and Otjozondjupa regions. At a Stakeholders’ Consultative Meeting in 2014 the Omaheke Communal Land Board stated that the areas of operation of the (registered) Traditional Authorities were overlapping. These ‘seem to be merely based on where communities reside rather than area specific’ (Omaheke Communal Land Board, 2014, p. 3). The negative impacts of this situation on customary land rights registration were listed as follows:

- a) That some communities are left out in the registration of land rights;
- b) That some traditional authorities allocate land to its people in areas where they do not have jurisdiction.
- c) That double allocation of land rights occurs, where more than one Traditional Authorities (sic) exist – due to unclear boundaries.
- d) Applications from some Traditional Authorities could not be considered by the Board due to lack of jurisdiction by such Traditional Authorities in such areas (Ibid. pp. 3-4).

In Otjombinde constituency four Traditional Authorities claimed jurisdiction and allocated land to their subjects. The result of this state of affairs is ‘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’ (Hinz, 2008, p. 81).

In view of these problems, the Omaheke Communal Land Board recommended that the TAA be amended so that recognised Traditional Authorities have jurisdiction over areas, rather than communities (Omaheke Communal Land Board, 2014, p. 5).

3.7 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 (FAO, 2007, p. 19). 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 (Ministry of Lands and Resettlement, 2006, p. 37; Brankamp, 2012, p. 11). Section 3 of the TAA empowers traditional authorities or members thereof to ‘hear and settle disputes between the members of the traditional community in accordance with the customary law of that community’ (Office of the Prime Minister, 2000). That this is still the case was confirmed by Mendelsohn (2008, p. 12) 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' (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 doubtful, 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 CLRA also does not provide clear procedures how disputes should be addressed by Traditional Authorities. While it gives them powers to enforce certain provisions of the Act such as powers to remove fences, evict people from the commonage and cancel land rights, 'the procedural rules to be followed in executing these enforcement powers' are not provided (Thiem, 2014, p. 27). This is leading to ambiguity of the powers and roles of different law enforcement agencies in protecting and rights. A study on private enclosures on communal land found in 2011 that although the law was in place, there was no backup from the side of the state to enforce its provisions. There was an assumption that if people transgressed the law, Traditional Leaders could report them to police to be charged. In practice this has not happened. Moreover, the absence of law enforcement sent a message to people that it is acceptable to fence off commonages as the lack of enforcement implied that it was not illegal (Werner, 2011, p. 42).

The CLRA provides dispute resolution procedures. But these only apply only to cases that are brought to the Boards. Section 8 of the Act gives Communal Land Boards the powers to establish committees to investigate any matters the Boards may refer to such a committee. The LAC pointed out that these committees have to be distinguished from investigating committees provided for in Section 37 (Legal Assistance Centre, 2009, p. 14). Such committees can be set up by the Minister in consultation with a land board 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' (Ibid., p. 46). There were only a few occasions when the Minister established such an investigative committee (Brankamp, 2012, pp. 21–22).

Section 37 and Part 3 of the Regulations provide an important mechanism for the adjudication of land rights, particularly land enclosures. Together with sec 44, which prohibits the erection of fences and empowers traditional authorities and land boards to order such fences to be removed, this provides an important tool to establish 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.

The CLRA establishes a procedure for land claimants to appeal against decisions taken by traditional leaders and / or land boards. To facilitate this, 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 Permanent Secretary 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 (Legal Assistance Centre, 2009, p. 50). An appeal must include '(a) particulars of the decision appealed against; (b) the ground for the appeal; and (c) any representation the appellant wishes to be taken into account in the hearing of the appeal (Section 39 as cited in Land, Environment and Development (LEAD) Project, n.d., p. vii). 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 (Ibid.).

The appeal system as provided for in Section 39 of the CLRA has been hailed as incorporating the basic legal principles of 'administrative justice and fair trial concepts' (Ibid.). However, it is doubtful whether it 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 land boards are major inhibiting factors to follow the prescribed procedures (Werner, 2008, p. 25).

Implementing the prescribed procedures also proved challenging in some instance, specifically concerning investigations of disputes. The Legal Assistance pointed out that in many cases put before an Appeal Tribunal, investigation reports prepared by Communal Land Boards were incomplete. Without complete investigation reports Appeal Tribunals are unable to decide whether the decision taken by a land board 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' (Land, Environment and Development (LEAD) Project, n.d., p. viii).

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 Traditional Authorities 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.

4 Communal Land Boards

The establishment of Communal Land Boards was an important step to improve 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' (Legal Assistance Centre, 2009, p. 11). Land Boards must ratify decisions taken by traditional authorities with regard to the allocation of new land rights and the confirmation of existing ones before registration (Thiem, 2014, p. 26). They must also ensure that allocations do not exceed the maximum size prescribed for communal land. The objectives of these provisions are to hold traditional authorities accountable for their decisions not only regarding land allocations, but also cancellations.

Communal Land Boards also have powers to allocate leaseholds, provided the land applied for is less than 50 ha. Anything exceeding that size must be referred to the Minister (Ibid.). However, Traditional Authorities have to consent to the granting of leaseholds. Where they refuse to do so, Communal Land Boards can refer the matter to an arbitrator appointed by the Minister (Section 30 of the CLRA in Legal Assistance Centre, 2009, p. 90).

Communal Land Boards have at least 12 members. These members are nominated by key stakeholder organisation ranging from Traditional Authorities to line ministries. A minimum of four women must serve on CLBs. While conservancies have a representative on CLB, the CLRA makes no provision for representatives of community forests or water point associations (Jones and Kakuja-Matundu, 2008, p. 11). Once nominated, the Minister appoints members for a period of 3 years (Legal Assistance Centre, 2009, p. 12; Thiem, 2014, p. 26).

A major role of CLBs is to oversee the allocation and cancellation of customary land rights. These rights only become legal rights once CLBs have ratified the decisions of Traditional Authorities (Thiem, 2014, p. 26). The CLRA states that CLBs can only ratify decisions by Traditional Authorities if such decision were taken in accordance with the Act. But not all provisions are controlled by the CLBs. Regulation 31 and 32 of the CLRA, for example, provide for the protection of pastures and places a responsibility on customary land rights holders to manage the land in accordance with the Soil Conservation Act, 1969 (Act No. 76 of 1969). If any activities of land rights holders are found to cause soil erosion, their rights can be suspended or withdrawn by a Traditional Authority or the CLB

(Legal Assistance Centre, 2009, p. 127). However, the CLRA provides no criteria and procedures to enforce these regulations (Jones and Kakuja-Matundu, 2008, p. 11).

They also play a central role in the registration of customary land rights and are responsible for the creation and maintenance of land registers. The NCLAS system was designed amongst other things to manage the history of a land parcel (Thiem, 2014, p. 44), it is not clear to what an extent this was possible. Given that for many land rights holders the distances to CLBs are considerable, it is reasonable to assume that the information captured by NCLAS may not be up to date in all areas.

5 Land tenure in communal areas

5.1 What is communal tenure?

The dichotomy of land ownership in Namibia juxtaposes a production system (commercial) with a broad tenure system (communal). This is inaccurate in so far as commercial production is taking place under communal or rather customary tenure, while some subsistence farming is likely to occur on freehold farms. It is therefore more accurate to refer to these sub-sectors as non-freehold and freehold areas respectively. This captures a fundamental characteristic of communal areas, namely that land is not owned under registered title and hence cannot be bought and sold in a formal market. However, while reference to communal implies that all resources are communally owned and production happens collectively, in reality and more accurately, communal refers to 'a degree of community control over who is allowed into the group, thereby qualifying for residence and cropping as well as rights of access to the common property resources used by the group' (Cousins and Claassens, 2004, p. 139). Access to land is usually dependent on group membership. Members of a group receive rights for homesteads and cultivation that typically last a lifetime. Apart from these private rights, group members also enjoy rights to common property such as grazing and natural products (Bruce, 1993, p. 3). Cousins and Claassens (2005, p. 22) have summarised the nature of communal tenure as a system in which

rights to land and natural resources are *shared and relative*, with *flexible boundaries* between a variety of social units, but nevertheless conferring *high levels of security of tenure*. Relative rights are nested within a hierarchy of social and administrative units or levels.

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 (Ibid.).

Communal tenure is not, however, as egalitarian as the term may suggest. It masks class and gender inequalities. Some have argued that communal tenure is a colonial construct, 'part of an effort to build an effective basis for indirect rule and control land resources through the chiefs'. Traditional authorities are not the impartial administrators of communal land, but are part of a larger struggle between themselves, 'families, individuals and the state for control over land' (Office of the Prime Minister, 1991, p. 357). Customary tenure and tenure security are thus directly linked to customary governance structures that is traditional authorities.

The generic definition of customary tenure and governance presented above applies generally to communal areas in Namibia (For a concise description see Mendelsohn, 2008). Colonial legislation had little impact on the continued existence of this form of tenure. However, in the mid 1960's the Odendaal Commission (Republic of South Africa, 1964) formalised a discourse that regarded customary tenure as inimical to economic development, a legacy that continues to have considerable traction in current land debates. Based on the notion that customary tenure is inferior, or in current parlour, second class, it recommended the transformation of customary tenure into a more formal, individual tenure system.

5.2 Tenure change

The Commission argued that customary tenure was inimical to economic development and had to be transformed into individual tenure (Werner, 2015, p. 73). To achieve this, the Five Year Plan for the Development of Native Areas (South West Africa, 1966) that was developed in its wake, recommended 'a large scale fencing programme' for the predominantly Otjiherero speaking reserves. While similar recommendations for large-scale fencing programmes were not specifically made for all communal areas, the privatization of communal rangelands by way of fencing became firmly embedded in agricultural planning in communal areas generally. Native Affairs officials soon promoted the individualization of customary rangeland tenure through the introduction of fencing in other communal areas. In 1970 a sub-committee of the 'Planning and Co-ordinating Committee' in Owamboland submitted that:

the present system of land ownership and utilization had a limiting influence on the administration (extension) and production (lack of continuity) as economic asset (*sic*) (Cited in Werner, 2015, p. 73).

Land tenure issues were referred to a Select Committee on Land Tenure and Utilisation by the Legislative Council, 'to sound out the feelings of every tribe on the old system of land ownership, and on the most suitable new system for the future development of Owamboland' (Töttemeyer, 1978, p. 77). In view of the tension between the 'old and new', the Select Committee steered clear of any radical proposals. As a result, it did not recommend any changes to the ownership of land at household level and proposed that the system of lifelong usufruct to arable land be retained. In a curious twist, however, the Committee recommended that the ultimate ownership of land be transferred to the Owambo Government and 'that the monies owing no longer went to the traditional leader but via the tribal fund to the Owamboland Government.' In addition it recommended that 'sub-headmen should no longer pay for their respective districts and wards, while for their subjects a fixed though reasonable price for land was recommended, which was to be the same everywhere in Owamboland.' Further, traditional leaders should be compensated for the loss of income from land 'sales' by receiving a stipend from the tribal fund (Ibid, p. 78).

The Select Committee on Land Tenure and Utilisation reflected the view of the more traditional sectors of Owambo society. Thirty out of the eighty-three people invited for consultations consisted of 'reliable' sub-headmen, while another forty were considered to be 'reliable' also. It would appear as if the recommendations of the Select Committee sought to retain customary forms of access to land, while increasing the powers of traditional leaders through the newly created Owambo Government.

These tenure reforms had a class and political agenda that resonated with a small but incipient black middle class that was unable to buy freehold land of any nature until well into the 1980s. The recommendations of the Odendaal Commission and the Five Year Development plan deviated from previous native policies in so far as native reserves were no longer to be regarded simply as labour reservoirs, but as potential sites of capital accumulation. The Commission acknowledged that "social stratification according to income and level of occupation" had taken place among black people as "the traditional system of supplying their own needs" had gradually been "supplanted by a *money system* peculiar to the system of the Whites" (Republic of South Africa, 1964, p. 425 as cited in ; Werner, 2015, p. 72). It proposed to capitalize on this by providing blacks with "the opportunity, necessary assistance and encouragement to find an outlet for their new experience and capabilities" (Republic of South Africa, 1964, p. 429 as cited in; Werner, 2015, p. 72).

The implementation of the recommendations of the Five Year Plan started in earnest in the Okamatapati area of former Hereroland East 1970/71 (*Uazengisa & 3 Ander v Die Uitvoerende Komitee van Administrasie van Hereros & 11 Anders, Annexure "D", Antwoordende Beëdigde Verklaring: Barend Daniel Bouwer, 21.3.1988, n.d., p. 54*). Due to the shortage of underground

water, a pipeline from Berg Aukas was constructed to Okamatapati with the objective of opening up new pastures for individual livestock farmers. Branch lines from the main pipeline supplied water to 56 farming units, covering approximately 275,000 ha. Surveys were carried out for the erection of fences (Adams and Werner, 1990, p. 161). No research has been carried out to assess the impact of this development on agricultural output, the environment and adjacent communities. However, the new water points attracted large numbers of livestock, and within a year of water having been supplied to the northern parts of Okamatapati the areas was reported to have been overstocked (Adams and Werner, 1990, p. 111). In the Owambo Mangetti. Now part of Oshikoto Region, 96 farms were surveyed and allocated to individuals and another 42 In the Kavango Mangetti, now Kavango West region.

These interventions encouraged the unauthorised enclosure of large tracts of communal land from the 1980s onwards. The Aandonga Traditional Authority authorised the fencing of more than 100 farms in what is now Oshikoto region (Werner, 1998, pp. 38–39). It fostered and reinforced a perception that the freedom to privatise communal land, previously enjoyed by European settlers, should not be applicable to indigenous Namibians' (Kerven, 1998, p. 93).

5.3 The Communal Land Reform Act, 2002

A central objective of the CLRA 2002 is to improve tenure security of customary land rights and to remove uncertainties about legitimate rights and access to land. On the one hand it provides for the recognition of existing customary land rights and applications for new customary land rights and provides a procedure to formalise these. On the other hand, the CLRA still does not permit freehold title over communal agricultural land, but introduces long-term leaseholds under certain conditions in an attempt to encourage economic development in the communal areas.

5.4 Private customary land rights

Customary land rights are defined in a very simplistic manner as consisting of rights

- 'A right to a **farming unit**.
- A right to a **residential unit**.
- A right to **any other form of customary tenure** that is recognised and described by the Minister in the **Government Gazette**' (Section 21 as cited in Legal Assistance Centre, 2009, p. 20 original emphasis).

Moreover, Traditional Authorities may 'use any part of the commonage for **allocation of a right** under the Act' (Ibid., p. 33).

These rights amount to private rights, as they give land rights holders the right to exclude people from their fields and homesteads. Existing customary land rights consist of those rights which traditional leaders have authorised prior to the enactment of the law (Alden Wily and Nakamhela, 2013, p. 18). The CLRA provides for the mapping of these private rights and subsequent registration in registers to be created and maintained by Communal Land Boards.

The definition of customary land right as a right to a farming and residential unit not exceeding 20 hectares appears to exclude any other economic activity. Moreover, a farming in the definition appears to mean cultivation only, given that the maximum size of a holding granted under customary practices are too small for livestock farming (Mendelsohn, 2008, p. 15).

Rights to grazing and other natural resources harvested on commonages are not defined in the CLRA. Section 29 of the CLRA simply states that such rights will be enjoyed 'by the lawful residents of such an area for grazing of their stock'. They are subject to such conditions as the Traditional Authority may impose and can be cancelled if these conditions are contravened. People who are not residents of a particular area can obtain access to grazing by applying to the relevant Traditional Authority, who may grant such rights for a specified or indefinite period. The same section also

provides a number of prohibitions related to the use of commonages with the intention to protect access to grazing by lawful residents. These include the erection of buildings, cultivation on the commonage, obstruction of access to watering places and any activity other than grazing. However, Chiefs or Traditional Authorities may give written permission to any of these uses.

Significantly, no reference is made in the CLRA that the 'lawful residents of such an area' have to be consulted before a Traditional Authority grants a grazing right to an outsider or allows people to make use of the commonages for purposes other than grazing. The CLRA falls short of defining what the content of these rights to commonages are and provides no protection to individual or group claimants.

5.5 Group rights

The Draft Land Tenure Policy of 2005 (Ministry of Lands and Resettlement, 2005) addresses the issue of group rights by proposing that traditional villages should be given 'the status of a juristic person' (Thiem, 2014, p. 11). This process would involve the demarcation of village boundaries in conjunction with CLBs and Traditional Authorities, 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' (Ibid.).

This draft policy goes a long way in proposing more localised and democratic land governance. However, the powers proposed for village management councils would clearly weaken the powers of traditional leaders. This may be the main reason for not approving the policy and 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 Programme is implemented by the MLR with financial support from international development partners. It does so by establishing groups as legal entities in order to protect the substantial investments in infrastructure development. It assumes that a group which is constituted as legal entity and hence 'with legal force will be better managed than one without'. It will be able to make its own commercial transactions, able to sue, being sued, own assets, owe debts, give credit etc.' (Sikopo et al., 2016, p. 29). While in theory groups are free to choose an appropriate legal entity, the MLR has opted for co-operatives.

These initiatives go some way to establish groups as legal entities with protected land rights. 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 now make it possible for groups and legal entities to apply for customary and leasehold rights (Millennium Challenge Corporation / Orgut COWI, 2014a, p. 2). 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 in its Communal Land Support Sub-activity (Millennium Challenge Corporation / Orgut COWI, 2014b, 2014c, 2014a) and the Programme for Communal Land Development (See Meijs et al., 2014 for an overview).

5.6 Group rights and governance: CBNRM

Granting rights over land and natural resources to local communities and establishing local governance bodies without the need to register legal entities has a rich history in Namibia. Since the mid-1990s the government of Namibia 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 (Long, 2004, p. 4). 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 (Ibid.). Current legislation provides for the establishment of conservancies, community forests and water user association to involve local communities in the management of wildlife, forests and rural water supplies respectively. 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 inter alia include a conservancy constitution, the election of a representative conservancy committee and 'defined and recorded...boundaries of the geographic area of the conservancy' (Long and Jones, 2004, as cited in Werner, 2015, p. 80). 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. 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*' (Ibid, p. 81, original emphasis).

The Forest Act, 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 (Grimm and Humavindu, 2006, p. 84). The consent of traditional authorities is required to set up a community forest and the geographical boundaries of the forest must be identified. In terms of Article 15 of the Forest Act, 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 use, 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 resource through the principle of inclusion and exclusion.

The management of rural water supply was also devolved to local communities of users.² The objectives of the National Water Policy and the Act are to provide for the full transfer of ownership of water points to communities of users. New governance structures in the form of Water Point User Associations were established. These consist of community members who permanently use a particular water point for their supply needs, and any rural household, which regularly uses a particular water point, qualifies for membership. The development of a constitution is a legal requirement before a Water Point User Association can be registered. Typically these Constitutions provide WPAs 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 constitution of a Water User Association. Each Association establishes water point committees to do the day-to-day management of specific water points.

The powers of Water Point User Associations go beyond simply controlling access to water points. They also have 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' (Section 19 as cited in *Ibid*, p.17). 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 Act 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, usually until about 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. However, in one documented case in Zambezi region, a community forest constitution provided for forest management committees to be elected by traditional authorities (Muhongo, 2008). It is not uncommon that this new governance framework has given 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 traditional authorities to exercise such powers. Conflicts are generally avoided by the non-implementation of these powers.

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 (Twyman et al., 2002). 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 Land registration

The CLRA seeks to improve tenure security by the compulsory registration of existing and new customary tenure rights. However, this only refers to private rights in communal areas, and not commonages. The registration of customary land rights was begun in 2003. In 2014 it was estimated that a total of 245,000 customary had to be registered (Thiem, 2014, p. 32).

Communal Land Boards have to establish land registers to register all customary land rights.

Registered Traditional Authorities 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, the process of land registration starts with village headmen (Chiari, 2004, p. 15). They must inspect the land parcel applied for and communicate the request to the Chief. The Chief provides the prescribed form,

² The following is based on (Werner, 2007).

which the headmen pass on to the applicants 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. It is then forwarded to the CLB.

Before a new customary land rights is allocated, the Chief or Traditional Authority must publicise the application on a notice board of the Traditional Authority for seven days to allow members of the public to lodge objections, if they have any. After that, the Communal Land Board must ratify the allocation before it has legal effect (Section 24). The same procedure applies for the recognition of existing customary land rights, except that applications for recognition have to be advertised for 7 days by the respective Communal Land Boards (Ministry of Lands and Resettlement, 2011, p. 2). The law also requires that all existing rights have to be registered within a time frame specified by the Minister.

Field verification of applications form an important part of land registration. The demarcation of boundaries of the land and validation of claims to specific parcels of land is carried out through a participatory process at village level (Thiem, 2014, p. 40). This includes teams consisting of support staff from the MLR together with members of the CLB and Traditional Authority. During this process, all mapped parcels are then digitally mapped, their sizes calculated and combined with the details of applicants. Once this process is complete, all applications are displayed in public for seven days, before being submitted to CLB for approval or rejection. Once a right has been approved by the Communal Land Board, a certificate of registration is issued (Thiem, 2014, p. 40; Meijs and Kapitango, 2012, p. 15).

Progress in registering customary land has been slow. The deadline for doing so has been extended a few times, and in March 2014 was extended 'until further notice'. By that time only 30% of the estimated 245,000 customary land rights had been registered (Thiem, 2014, pp. 25, 40). One of the reasons for this was that mapping was initially done by using handheld GPS. With the support of technical advisors, the MLR pioneered the use of high-resolution aerial photographs in 2008 to map land parcels (Thiem, 2014, p. 35). This method proved particular 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 (Ibid., p. 36).

5.8 NCLAS

The MLR has established a comprehensive digital recording system referred to as the Namibian Communal Land Administration System (NCLAS).³ The system was rolled to all CLBs in 2008 and consists of 2 parts. The communal deeds stores data relating to an applicant or land rights holder and the communal cadastre 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. This system, which is designed to integrate the freehold and non-freehold registration systems, enable CLBs to issue people who hold a customary or leasehold right with simple certificates that reflect the particulars of the rights holder, a description of the right, its location and size as well as a map. In 2014 the MLR introduced a web-based application of NCLAS.

5.9 Land transfers and land markets

Section 38 of the CLRA provides for the transfer customary or leasehold rights on the forms prescribed in the Regulations. In the case of customary land rights, the Chief or Traditional Authority must given their written consent, whereas CLBs have to do so in the case of leaseholds (Legal Assistance Centre, 2009, p. 49). According to the LAC, this is necessary to enable CLBs to make the

³ The following summary is based on (Thiem, 2014, pp. 42–44).

necessary changes in the land registers and to protect the rights of married women and their children (Ibid., p. 50). 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 (Mendelsohn and Nghitevelekwa, 2017). 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 (Ibid., p. 9). The existence of informal land markets imply that access to land is no longer limited to customary practices, i.e. through Traditional Authorities, but 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.

5.10 Securing tenure?

The CLRA limits of the sizes customary land rights. This has caused confusion and tenure insecurity. Originally, the CLRA determined that Land Boards could only approve and register customary land rights that did not exceed 20 hectares, ostensibly to curb 'land grabbing'. However, this has been increased to 50 ha. Larger areas need approval by the Minister.

Limitations on sizes of customary land rights appear to apply to new land rights only. 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 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 (Land, Environment and Development (LEAD) Project, n.d., p. 24).

It also argued that in terms of Section 28(9) land boards 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' (Ibid., p. 25, original emphasis). The Appeal Tribunal expressed the opinion that this difference between discretionary powers regarding existing land rights and mandatory powers regarding new rights 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 (Ibid.).

These considerations notwithstanding, the provisions on limitations have caused confusion and tenure insecurity, particularly in communal areas that primarily practice extensive livestock farming.

Mendelsohn (2008, p. 15) points out the minimum size of 50 ha clearly applies to crop farming only, as 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. He found 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' (Ibid.).

While the CLRA is clear about the size of land parcels to be allocated, it does not explicitly prohibit the registration of more than one property (Ibid., p. 17). Section 23 dealing with maximum land sizes implicit acknowledges that many applicants have more than one farming unit when it states that in considering an application for a customary land right larger than the prescribed maximum, the Minister must, amongst other things, consider the total extent of land an applicant holds 'whether communal land or otherwise...under any right which permits the beneficial use of such land for a purpose similar to which the land held under a customary land right may be used'. Although CLRA does not provide for legally protected rights to commonages used for grazing, a grazing right may be withdrawn if a resident 'has access to other land, whether communal or otherwise' if the total extent of such land is equal to or more than the maximum prescribed by the Minister 'and which the Chief or Traditional Authority considers to offer sufficient grazing for the stock of such resident' (section 29(2)(9c)).

Apart from private rights, members of traditional communities enjoy undivided rights to commonages, which are used communally. These rights to commonages 'are expressed solely in terms of grazing rights'. Shared resources such as water, fuel wood, plants, foods and thatching, to name only a few, are not included (Ibid). Access to water and forests is governed by separate laws, which will be discussed briefly below.

5.11 Individual rights: leasehold and enclosures

The CLRA has introduced leaseholds over communal land. It distinguished between a rights of leasehold which replace the old Permission to Occupy (PTO) and 'rights of leasehold for agricultural purposes' (Legal Assistance Centre, 2009, pp. 35–36). 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 Ministry of Lands and Resettlement and Rehabilitation commissioned consultants to identify un- and underutilised land in 7 regions. A total area of 5,24 million hectares were identified as being available for development (International Development Consultants, n.d., p. 3).

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 done after consultation with Traditional Authorities and CLBs and amounts to alienating a portion of communal land from customary governance system in order to for 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 Traditional Authorities 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.

CLBs have 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, 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 Owambo Mangetti before Independence. It is a little known fact the state also holds a Certificate of Registered 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 the Otjozondjupa and Omaheke regions was made by the then Ministry of Works, Transport and Communication and not the MLR.

It is not clear how many lease agreements have been entered into by the MLR 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 it does not explicitly deal with the need to regularise those 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.

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. These need to be discussed and addressed during the Land Conference. The shortcomings include 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 is, however, that while Traditional Authorities 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, it does not offer any legal procedures and guidelines for the allocation and cancellation of customary land rights by village headmen.
- The CLRA provides procedures to address disputes and appeals. With regard to disputes, CLBs can initiate processes to investigate. But this only happens when disputes reach a Land Board. A majority of disputes continue to be heard by village headmen and higher tiers of Traditional Authorities. But the CLRA does not provide any guidance on how disputes 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 be able to read and write. Moreover, an application for an appeal must reach the Permanent Secretary of the MLR with 30 days of the decision of a Traditional Authority. Ways need to be identified to simplify this appeals procedure by bringing it closer to the people.
- Some communities in communal areas are not protected by the CLA for the simple reasons that they either do not have a registered Traditional Authority or that a registered Traditional Authority does not have clearly defined areas of jurisdiction. The Traditional Authorities Act gives Traditional Authorities jurisdiction over people, not geographic areas. In the former case, Traditional Authorities are excluded from performing any function under the Act. In the latter case, several Traditional Authorities claim jurisdiction over subject 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 Traditional Authorities and define their roles and functions more precisely or allow 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 kind of ‘one size fits all’ law. It lays down one set of provisions and regulations for all communal areas. The maximum size prescribed for a customary land right enables people in mixed farming areas to register their private rights (homestead, fields and cattle pens) but leave communal grazing areas unprotected. As a result, the impact of the CLRA on improved tenure security for communal farmers in the southern, livestock farming communal areas has not really improved. It is proposed that a more flexible Act is 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 group 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 MCA 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, which are contradicting 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 sold in an unregulated manner. Government should not hold back the development of a land market but 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. These enclosures span the entire spectrum of (il)legality and need to be subjected to an adjudication process with the aim to bring them onto the same legal level as the surveyed farms currently being developed by the MLR in some northern communal areas.

7 References

- Adams, F., Werner, W., 1990. The land issue in Namibia: an inquiry (Research Report No. 1). Namibia Institute for Social and Economic Research, Windhoek.
- Alden Wily, L., Nakamhela, U., 2013. Group rights in communal lands, Communal Land Support Activity. Millennium Challenge Account Namibia, Windhoek.
- Brankamp, H., 2012. Communal land disputes in Namibia: Actors, patterns, procedures. GIZ (Deutsche Gesellschaft fuer Internationale Zusammenarbeit), Windhoek.
- Bruce, J.W., 1993. A review of land tenure terminology. Land Tenure Centre, University of Wisconsin-Madison.
- Chiari, G.P., 2004. Report of the UNDP Mission on rural livelihoods and poverty in Namibia. UNDP, Windhoek.
- Cousins, B., Claassens, A., 2005. Communal tenure “from above” and “from below”. Land rights, authority and livelihoods in rural South Africa., in: Evers, S., Spierenburg, M., Wels, H. (Eds.), *Competing Jurisdictions. Settling Land Claims in Africa*. Brill, Leiden, Boston.
- Cousins, B., Claassens, A., 2004. 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.
- FAO, 2007. Good governance in land administration, FAO Land Tenure Studies. Rome.
- Fuller, B., 2006. Improving Tenure Security for the Rural Poor: Namibia Country Case Study. Food and Agricultural Organization of the United Nations (FAO), Windhoek, Namibia. (No. 6), LEP Working Paper. FAO, Rome.
- Grimm, J., Humavindu, M., 2006. Analysis of community forests, in: Schuh, C. (Ed.), *Economics of Land Use. Financial and Economic Analysis of Land-Based Development Schemes in Namibia*. Gesellschaft fuer Technische Zusammenarbeit, Windhoek.
- Hinz, M., 2008. Traditional governance and African customary law: Comparative observations from a Namibian perspective, in: Horn, N., Bösl, A. (Eds.), *Human Rights and the Rule of Law in Namibia*. Macmillan Namibia, Windhoek Namibia.
- International Development Consultants, n.d. Executive summary. The communal land development studies. Windhoek.
- Iyambo, N., 1997. The role of traditional authorities in a changing Namibia, in: Malan, J., Hinz, M. (Eds.), *Communal Land Administration. Second National Traditional Authority Conference. Proceedings.*, CASS Paper. Centre for Applied Social Sciences., Windhoek.
- Jones, B.T.B., Kakujaha-Matundu, O., 2008. Promoting environmentally sound decision-making of Communal Land Boards. Windhoek, Namibia.
- Kakujaha & Others v The Tribal Court of Okahitwa & Others, 1989. , Unreported.
- Kerven, C., 1998. “The knife cuts on both blades: redefining property rights in eastern Oshikoto Region, Namibia.,” in: Cox, J., Kerven, C., Werner, W., Behnke R (Eds.), *The Privatisation of Rangeland Resources in Namibia*. Overseas Development Institute (ODI), London and Windhoek.
- Kössler, R., 2005. In search of survival and dignity: two traditional communities in southern Namibia under South African rule. Gamsberg Macmillan, Windhoek.

- Land, Environment and Development (LEAD) Project, n.d. Appeal Tribunal cases in Namibia's land reform process. Record of decisions 2010-2014. Legal Assistance Centre and Ministry of Lands and Resettlement, Windhoek, Namibia.
- Lawrie, G., 1965. New light on South West Africa. Some extracts from and comments on the Odendaal Report. Witwatersrand University Press, Johannesburg, South Africa.
- Legal Assistance Centre, 2009. Guide to the Communal Land Reform Act, 2002 (No. 5 of 2002), 2nd ed. Windhoek.
- Lendelvo, S., 2008. Women's access to land: A case study of the area under the jurisdiction of the Ondonga Traditional Authority, Oshikoto Region. GTZ, Windhoek, Namibia.
- Long, S.A., 2004. Introduction, in: Long, S.A. (Ed.), Livelihoods and CBNRM in Namibia. The Findings of the WILD Project. Directorate of Environmental Affairs, Ministry of Environment and Tourism, Windhoek, Namibia.
- Long, S.A., Jones, B.T.B., 2004. Contextualising CBNRM in Namibia, in: Long, S.A. (Ed.), Livelihoods and CBNRM in Namibia. Ministry of Environment and Tourism, Windhoek, Namibia.
- Malan, J., Hinz, M. (Eds.), 1997. Communal land administration. Second National Traditional authority Conference. Proceedings, CASS Paper. Centre for Applied Social Sciences., Windhoek.
- Meijs, M., Hager, C.-P., Mulofwa, J., 2014. Local level participatory planning, an approach towards tenure security and development planning. Presented at the Integrating land Governance into the post-2015 Agenda. harnessing synergies for implementation and monitoring impact. 2014 Annual World Bank Conference on Land and Overtly, World Bank, Washington DC.
- Meijs, M., Kapitango, D., 2012. Communal land registration, Namibia Land Management Series. Ministry of Lands and Resettlement, Windhoek, Namibia.
- Mendelsohn, J., 2013. Rapid survey of farms in Kavango. Ministry of Lands and Resettlement / KfW /Gopa / Ambero, Windhoek.
- Mendelsohn, J., 2008. Customary and legislative aspects of land registration and management on communal land in Namibia. Ministry of Lands and Resettlement, Windhoek, Namibia.
- Mendelsohn, J., Nghitevelekwa, R., 2017. An enquiry into land markets in Namibia's communal areas. Final report. Namibia Nature Foundation, Windhoek.
- Millennium Challenge Corporation / Orgut COWI, 2014a. Proposed working policy for group land rights, Communal Land Support Activity. Millennium Challenge Account Namibia, Windhoek.
- Millennium Challenge Corporation / Orgut COWI, 2014b. Legal requirements for group land rights, Communal Land Support Activity. Millennium Challenge Account Namibia, Windhoek.
- Millennium Challenge Corporation / Orgut COWI, 2014c. Proposed guidelines for group land rights in communal areas, Communal Land Support Sub-activity. Millennium Challenge Account Namibia, Windhoek.
- Ministry of Lands and Resettlement, 2011. A guide on communal land registration. Ministry of Lands and Resettlement, Windhoek, Namibia.
- Ministry of Lands and Resettlement, 2006. Operational manual for Communal Land Boards. Ministry of Lands and Resettlement, Windhoek, Namibia.
- Ministry of Lands and Resettlement, 2005. 'National Land Tenure Policy. Final Draft.' Ministry of Lands and Resettlement, Windhoek, Namibia.

- Ministry of Lands, Resettlement and Rehabilitation, 1998. National Land Policy. Ministry of Lands, Resettlement and Rehabilitation, Windhoek, Namibia.
- Muhongo, M., 2008. Forest conservation and the role of traditional leaders: a case study of the Bukalo Community Forest, in: Hinz, M.O., Ruppel, O.C. (Eds.), *Biodiversity and the Ancestors. Challenges to Customary and Environmental Law. Case Studies from Namibia*. Namibia Scientific Society, Windhoek.
- 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.
- Office of the Prime Minister, 2000. Traditional Authorities Act.
- Office of the Prime Minister, 1992. Report of the Technical Committee on Commercial Farmland. Office of the Prime Minister, Windhoek, Namibia.
- Office of the Prime Minister (Ed.), 1991. National Conference on Land Reform and the Land Question. Republic of Namibia, Windhoek, Namibia.
- Omaheke Communal Land Board, 2014. Stakeholders' consultative meeting. Traditional authorities recognition and areas of jurisdiction in relation to communal land rights registration. Omaheke Communal Land Board, Gobabis.
- Republic of Namibia, 2001. National Development Plan 2 (NDP 2). National Planning Commission, Windhoek, Namibia.
- Republic of Namibia, 1991. Report by the Commission of Inquiry into matters relating to chiefs, headmen and other traditional or tribal leaders. Windhoek, Namibia.
- Republic of Namibia, 1990. The Constitution of the Republic of Namibia.
- Republic of South Africa, 1964. Report of the Commission of Enquiry into South West Africa Affairs 1962/1963 (No. RP 12/1964). Government Printers, Pretoria.
- Sikopo, A., Mulofwa, J., Mwilima, W., 2016. Enhancing tenure security for communities in communal areas designated for agricultural purposes. Presented at the 2016 World Bank Conference on Land and Poverty, Washington DC.
- South West Africa, 1980. AG.50 Establishment of a Representative Authority for the Hereros, and provision for matters connected therewith. Off. Gaz.
- South West Africa, 1966. A Five Year Plan for the Development of the Native Areas. Windhoek.
- Thiem, M., 2014. 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.
- Thiem, M., Muduva, T., 2015. 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.
- Tötemeyer, G., 1978. *Namibia Old and New*. C. Hurst and Co., London.
- Twyman, C., Sporton, D., Thomas, D., Dougill, A., 2002. Community fencing in open rangelands: a case study of community self-empowerment in eastern Namibia, in: Benjaminsen, T., Cousins, B., Thompson, L. (Eds.), *Contested Resources. Challenges to the Governance of Natural Resources in Southern Africa*. PLAAS / University of the Western Cape, Cape Town.

- Uazengisa & 3 Ander v Die Uitvoerende Komitee van Administrasie van Hereros & 11 Anders, Annexure "D", Antwoordende Beëdigde Verklaring: Barend Daniel Bouwer, 21.3.1988, n.d.
- Uazengisa & Another v The Executive Committee of the Administration for Herero's and 11 Others, Judgement, 1989.
- van der Byl, P.C., 1992. Legal opinion. Legal position relating to land occupied in Namibia on a communal basis. Advocates Chambers, Pretoria.
- Werner, W., 2015. Tenure reform in Namibia's communal areas. *J. Namib. Stud.* 67–87.
- Werner, W., 2011. "What has happened has happened". The complexity of fencing in Namibia's communal areas. Legal Assistance Centre, Windhoek, Namibia.
- Werner, W., 2008. Protection for women in Namibia's Communal Land Reform Act: is it working? Land, Environment and Development Project, Legal Assistance Centre, Windhoek, Namibia.
- Werner, W., 2007. Integrated Land and Water Management: Policy and institutional issues (No. 1), CuveWaters Papers. Institute for Social-ecological Research, Frankfurt / Main.
- Werner, W., 2000. Agriculture and land, in: Melber, H. (Ed.), *Namibia. A Decade of Independence 1990-2000*. The Namibian Economic Policy Research Unit, Windhoek, Namibia.
- Werner, W., 1998. The evolution of land tenure in Oshikoto, in: Cox, J., Kerven, C., Werner, W., Behnke, R. (Eds.), *The Privatisation of Rangeland Resources in Namibia: Enclosure in Eastern Oshikoto*. Overseas Development Institute (ODI), London.
- Werner, W., Tjipueja, H., Namugongo, F., Huesken, J., 1993. 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, Namibia.