THE

VOLUNTARY GUIDELINES ON THE
RESPONSIBLE GOVERNANCE
OF TENURE (VGGT)

POPULAR VERSION
FOR COMMUNAL LAND ADMINISTRATION
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FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS
WINDHOEK, 2021
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ACKNOWLEDGEMENTS

This assignment would not have been possible without the support of several individuals and institutions. The FAO office in Windhoek provided administrative support where required. A special word of gratitude goes to Mr Mackay Rigava, Land Tenure Officer – PSPL of the Sub-Regional Office for Eastern Africa (SFE) of FAO and his technical colleagues for his patience to discuss improvements to the assignment. He meticulous read and provided critical comments on earlier drafts. Staff members of the Ministry of Agriculture, Water and Land Reform generously gave of their time to provide important comments on an earlier draft and to confirm the suggested land governance issues identified in the report.

Responsibility for the accuracy of the information provided in this report as well as the interpretation of legal and policy issues relating to the process of securing land rights to groups of customary land rights holders, remains solely with the Food and Agriculture Organization of the United Nations.
INTRODUCTION AND BACKGROUND

Communal areas of Namibia comprise about 42% of the total land area, accommodating approximately half the population. Despite the steady decline of the importance of agricultural production in rural household incomes, access to communal land remains important to its inhabitants. It ‘provides a valuable safety net as a source of shelter, food and income in times of hardship’ (Palmer et al., 2009), particular in an environment of high unemployment and precarious employment opportunities. But land is more than just an economic asset. It is also associated with the identity of peoples.

‘Improved access to land may allow a family to produce food for household consumption, and to increase household income by producing commodities for sale in the market. Tenure reforms can promote land use practices that enhance the environment. Farmers are more likely to invest in improving their land through soil protection’ (Ibid).

However, with insecure land rights and poor land governance, people are becoming more vulnerable and risk being marginalised. Evictions become more likely as competition for land especially close to perennial rivers increases (Ibid). At the very beginning of formulating a legal and policy framework for Namibia, the Government of Namibia hosted a National Conference of Land Reform and the Land Question in 1991. Five hundred stakeholders from across the country were invited to deliberate for five day to identify land issues in the country as accurately as possible. A socio-economic survey was conducted in all regions by professional researchers, and the results were summarised and presented to the National land Conference. A total of 24 resolutions were passed on the basis of these deliberations which informed the future policy and legal framework.

In 2018 the Second National Land Conference was held in Windhoek. The objectives of the 2nd National Land Conference were to

1. review the progress made in the implementation of the resolutions of the 1991 land conference;
2. take stock and address the encountered challenges;
3. discuss the emerging land related issues;
4. come up with strategic resolutions informed by the identified challenges and future aspirations of the Namibian people.

In preparation of the Second Land Conference, the Ministry of Land Reform embarked on a process of consulting stakeholders in all 14 regions. The aim of these consultations was to sensitize the Namibian people for the 2nd National Land Conference and engage all stakeholders at the grassroots level on the agenda of the 2nd National Land Conference. Moreover, the consultations aimed to provide regions with an opportunity to contribute inputs on various land related matters and create regional platforms to organise inputs. The deliberations were recorded for each region and subsequently summarised in a Consolidated Report on Regional Consultations (Republic of Namibia, 2018).

An important outcome of these consultations was that ‘regions strongly supported that communal areas be retained, developed and expanded. The general consensus appears to have been that more resources should be directed at the development of communal areas ‘to the level of commercial areas’ (Republic of Namibia, 2018).

Communal areas are faced by a number of land administration and land governance issues and challenges. Since 2003 the Communal Land Reform Act, 2002 (CLRA) provided the legal framework to improve security of tenure, land governance and land administration in communal areas, but customary land rights holders continue to face governance challenges. A review conducted in preparation of the Second National land Conference in 2018 found that

‘Pressure on communal land is exacerbated by population increase, but importantly, by the emerging threats in the manifestations of appropriations of communal land. These appropriations are both by the government for other uses, and by individuals for private use. Appropriations of communal land by the government are often done with the justifications of uses for public purposes or in the public interests’ (Nghitevelekwa et al., 2018).

In addition, implementation mandates are contested as the regional consultations have shown. At the apex of communal land administration is the Ministry of Agriculture, Water and Land Reform (MWLR) with its overall responsibility to administer and implement the CLRA. Communal land boards (CLB) were established in terms of the CLRA in 13 regions to ensure that the allocation and/or cancellation of customary land rights in communal areas was done according to the provisions of the CLRA. Once they confirmed this, applications for new customary land rights or the recognition of existing rights are ratified by CLBs and acquire legal protection. However, ‘some traditional leaders were of the view that they are undermined and disrespected by influential people in the administration of communal land with their administrative activities (sic)’. They called for traditional authorities (TA) to be empowered by law to implement the CLRA (Republic of Namibia, 2018).

Resolution 11 taken at the Second National Land Conference called on government to amend Section 28 of the CLRA to accord traditional authorities recognition of existing land rights but not the Communal land boards as the Board came only into existence after the enactment of the Act in 2003.
The major governance issues facing customary land rights holders were summarised by the former Minister of Land Reform at the inauguration of Communal land boards in April 2018. While these are not exhaustive, they serve as a useful starting point. They include:

- Illegal fencing;
- Land disputes;
- Unrecognised traditional authorities;
- Undefined and unresolved areas of jurisdiction for traditional authorities;
- Recognised traditional authorities without areas of jurisdiction;
- Overlapping traditional boundaries;
- Some traditional authorities not implementing certain provisions of the Act – against their custom and beliefs;
- Different stakeholders interpreting the provisions of the Act differently leading to confusion and negative misconceptions;
- Public awareness of the benefits and importance of communal land registration, particularly registration of land rights (Nujoma, 2018).

There is growing recognition that the Voluntary Guidelines on the Responsible Governance of Tenure in the Context of National Food Security (VGGT) that were endorsed by the Committee on World Food Security (CFS) in 2012, are helping countries to improve livelihoods through improved governance of tenure. The VGGT serve as a reference and set of principles and internationally accepted standards for practices for the responsible governance of tenure and provide a framework that countries can use when developing their policies, legislation, strategies, programmes and activities for enhancing the governance of tenure. They promote full, effective and meaningful participation of all stakeholders and provide an opportunity for governments, civil society, the private sector and citizens to judge whether their proposed actions and the actions of others constitute acceptable practices.

The Parliament of Namibia has requested FAO for support in VGGT training of traditional authorities and regional institutions to enhance their capacity to administer communal land within their jurisdictions in line with the Communal Land Reform Act, Act 5 of 2002 and taking into consideration the resolutions of the 2nd National Land Conference and to enhance the capacity of parliamentarians to deliver their law-making, budgetary allocation and oversight roles. To facilitate the VGGT training at the local level, the government of Namibia has requested the translation of the VGGT into two main languages spoken by those sections of society that suffered extensive dispossessions of land during the colonial era – Herero, Damara and Nama people. To further enhance the delivery of the training, this simplified version of the VGGT carries the key messages that are aligned with the Communal Land Reform Act and the resolutions of the 2nd National Land Conference.

The VGGT Popular Version for Communal Land Administration in Namibia is the first output of Government’s request. It will serve as a basis for the preparation of an animated manual that will make access to the VGGT easier. The VGGT Popular Version was developed on the basis of having identified 14 pertinent land governance issues in Namibia’s communal areas. These issues were validated by the MAWLR. Each issue is discussed briefly and followed by identifying key messages of the VGGT that are relevant within the context of communal land administration in Namibia. The last section under each issue demonstrates briefly how the principles and guidelines of the VGGT can be used to resolve the challenges. It is not the mandate of the Popular Version of the VGGT to make concrete recommendations to the Government of Namibia on how specific issues and challenges should be addressed but to suggest how the VGGT can be of assistance to government to address land governance issues.
Illegal fencing and dual grazing impact negatively on access to communal land by restricting access to land and water by legitimate tenure rights holders.
The former Minister of Land Reform identified two major issues that continue to impact negatively on access to communal land. These are illegal fencing and dual grazing rights to pastures. These are two separate issues, but both restrict access to land and water in communal areas by legitimate tenure rights holders.

Illegal fencing commonly refers to enclosures of large tracts of communal land for the exclusive benefit of individuals and their families without official permission. It is distinct from the customary practice of fencing off homesteads and fields for cultivation with palisade fences or increasingly steel wire.

The enclosure of large tracts of communal grazing land for exclusive private use is a process that started in the 1970s but has accelerated after Independence. The aim was to commercialise agricultural production in communal areas. The extent of land fenced off like this is not well documented, but it resulted in depriving small livestock owners who depend on commonages for grazing. Furthermore, privately fenced tracts of land cut many pastoralists off from dry season grazing areas, exacerbating overgrazing. The declining ability of traditional leaders to control access to commonages and enforce customary tenure practices as well as the absence of a clear legal framework on the privatisation of communal land before 2002 have facilitated this process. At the same time, some traditional authorities have been accused of giving permission to powerful individuals to fence off large tracts of communal land.

Access to grazing is further restricted by some farmers who enjoy dual grazing rights. This means that while they either have private, fenced farms on communal land or large freehold farms in the freehold sector, they are able to graze their livestock on commonages as well. Several national leaders and well-known public figures have been linked to one or both of these practices. TAs may withdraw tenure rights to communal pastures in cases where individuals have access to land under any right that exceeds the prescribe maximum size (section 29).

Holders of customary land rights have reported cases of illegal fencing and dual grazing practices to Communal land boards, which have not always been successful in enforcing the legal provisions with regard to illegal fencing. In such instances the matter was referred to statutory courts.

The Communal Land Reform Act of 2002 is very clear on the importance of commonages for “the landless and those with insufficient access to land who are not in formal employment or engaged in non-agricultural business activities”. It stipulates that commonages in communal areas should be available for use by all lawful residents of the area. It prohibits freehold ownership of communal land and the erection of new fences after its commencement but does not provide legal protection of group rights to communal grazing. Fences that existed before commencement of the Act may be retained after authorisation has been obtained in accordance with the Act. The CLRA provides for a procedure to establish whether someone has legal rights to a fenced unit of land or not. Despite these provisions, the fencing off of large tracts of land has continued after 2003.

The National Land Policy of 1998 explicitly prohibited dual grazing rights. It stated that persons with exclusive access to grazing will not have access to communal grazing except with the permission of the communities holding rights to such communal land. In addition to section 29 of the CLRA which deals with dual grazing rights, Regulation 10 prescribes that a person who owns or hires any agricultural land may not graze any livestock on the commonage of a communal area.
REGISTRATION OF LAND RIGHTS IN OMAHEKE

The Batswana Ba Namibia traditional authority, Bakgalagari traditional authority and the !Xoo traditional authority are the only traditional authorities with Traditional Leaders in the region that allocate/administer communal land in a well-known and confined area, being the Aminuis Constituency as well as the /Gobain traditional authority that is only based in Ojinene Constituency.

The Maharero Royal House, Ovambanderu TA and Ovaherero TA are the only TAs in the Region that have Traditional Leaders (recognized and unrecognized) operating in various areas such as the Ojinene, Aminuis, Epukiro and Otjombinde Constituencies respectively. As per the provisions of the CLRA, the eight traditional authorities are empowered to consider the allocation of communal land rights. However, areas of jurisdiction for the Maharero, Ovambanderu and Ovaherero TAs seem to be overlapping as most of them are spread across the Region. In the process, some communities are excluded in the registration of customary land rights; and double allocations of land rights occur where more than one TA has jurisdiction due to unclear boundaries i.e. at Aminuis RC where some applicants were allocated a right over the same land parcel by both Batswana Ba Namibia and Bakgalagari TAs. In addition, some TAs allocate land to their people in areas where they are alleged not to have jurisdiction by MLR and the Omaheke Communal Land Board (OMACL). As a result, applications from some traditional authorities are not considered by the OMACLB due to the lack of or undefined jurisdictions by such traditional authorities in such areas. All applications for customary land rights are expected to be submitted to the concerned recognized traditional authority for approval and subsequently to the Land Board within that region. However, in the Omaheke Region, the recognized Traditional Councilors residing and operating in Constituencies where their TA offices are not situated are not authorized to allocate or handle applications for customary land rights under the CLRA as they are deemed to be operating in areas where they do not have any jurisdiction.


Many illegal fences are not removed, and new ones erected in some communal areas. The main breeding ground for the continued enclosure of communal pastures is the lack of a clear pronouncement on the protection and security of commonages in the Communal Land Reform Act (Nhiteveleleka et al., 2018). It is also not clear which law enforcement institutions have which mandate with regard to the implementation of the CLRA. As a result, several institutions are involved in the process: traditional authorities, communal land boards, the police and the line ministry.

KEY PLAYERS THAT NEED TO BE ENGAGED AND CONSULTED WHEN DEALING WITH ACCESS TO LAND DISPUTES
One of the core procedural requirements in the Guidelines is participation and consultation: engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes (Paragraph 3B.6).

Paragraphs 4.4 and 4.5 call on States to legally recognise those legitimate rights which are yet to be officially recognised and/or recorded, and to ensure that people are not subject to arbitrary expulsion.

Paragraph 5.3 underscores the need for States to ensure that the policy, legal and organisational framework for the governance of tenure recognises and respects legitimate tenure rights. In particular, this applies to legitimate customary tenure rights which do not currently benefit from legal protection. The paragraph continues stating that States should facilitate, develop and protect the assertion of tenure rights.

Paragraph 7.1 stipulates that States should protect secondary tenure rights, such as the right to collect.

Paragraph 7.3 emphasises that States should identify all existing rights and rights holders prior to recognising or assigning tenure rights. It continues by saying that indigenous peoples and other communities with traditional tenure systems, as well as farmers, fisherfolk and pastoralists, should be involved in the consultation process.

The CLRA and its regulations clearly prohibit the enclosure of large tracts of communal grazing land for individual utilisation and dual grazing rights. Despite these provisions, fencing continued after 2002 and implementing the law has not always been implemented successfully. In addition, many private enclosures have been erected before the CLRA came into being. Their legal status is ambivalent. The situation is facilitated by the absence of clear pronouncements on the protection and security of commonages.

In line with these legal provisions, the MAWLR should consider to provide legal recognition, respect and protection for all legitimate tenure rights, their rights holder and related tenure systems, and to promote and facilitate their enjoyment and full realization (FAO, 2015). This should apply also to those rights that have not yet been recorded.

The MAWLR should recognise all forms of customary land rights and provide legal protection without the need for formal documentation. This will protect land rights holders against infringements of their grazing rights even if these rights are not registered.

To ascertain the validity of claims to customary tenure rights to communal grazing, the participation of local traditional communities is essential, as they are most familiar with local customs and practices governing access and land use rights. The Ministry, CLBs and non-governmental organisations should support members of traditional communities to participate fully in these processes. Rights that have been confirmed by local communities must be mapped and recorded.
ISSUE 2
REGISTRATION OF LAND RIGHTS
IN THE CONTEXT OF COMMUNAL AREAS IN NAMIBIA

Not all holders of customary land rights are able to secure their land rights in terms of the CLRA. For a number of reasons, the procedures set out in the CLRA for the legal recognition of customary land rights and the approval of new applications cannot be fully implemented in all communal areas. The reasons include:

- Not all traditional leaders are recognised by government.
- Traditional boundaries overlap.
- Areas of jurisdiction for traditional authorities are sometimes undefined and unresolved.
The CLRA, 2002 recognises the central roles and powers that traditional authorities have in confirming as well as allocating and cancelling customary land rights. All communal areas have traditional leaders who, to a greater or lesser extent, play an important role in customary land administration. The CLRA stipulates that only those traditional leaders which have been recognised in terms of the traditional authorities Act of 2000 are legally entitled to administer the CLRA. But not all traditional leaders are recognised by government. This means that in those areas where traditional leaders are not recognised, the procedures set out in the CLRA for the legal recognition of customary land rights and the approval of new applications cannot be implemented.

Disputes also arise in situations where recognised traditional leaders are asserting their legal powers in areas that customarily are under the jurisdiction of a traditional leader who is not recognised by Government. A typical example would be where a recognised TA allocates land rights in an area that falls under the jurisdiction of an unrecognised TA which does not recognise the legitimacy of the officially recognised TA. Frequently such allocations are made to people who are not recognised members of a specific traditional community.

Several resolutions taken at the Second National Land Conference strongly favour strengthening of the role of traditional leaders in land administration and governance. Resolution 11 for example, states that

- The status quo of communal land allocation and administration by traditional authorities and Land Boards must be upheld. Government should continue rendering support to the implementation of the Act to enhance effective tenure rights in communal areas.
- The CLRA and its regulations should be revisited to redress the current challenges.
- All communal communities should have traditional authorities to deal with land matters in their areas of jurisdiction.
- Resolution 13 of the Second National Land Conference suggests that in those areas where there are no recognised traditional authorities, government should establish delimitation committees to address the issue of recognised and unrecognised traditional authorities and overlapping of traditional authorities jurisdictions.

Governance of tenure is also compromised where areas of jurisdictions of recognised traditional authorities are not well defined. Poorly defined boundaries between recognised traditional authorities may lead to situations where several traditional leaders claim jurisdiction over one geographic area and allocate customary land rights. In most crop growing communal areas, areas of jurisdiction of TAs are relatively well defined. But there are cases where boundaries overlap. In communal areas where extensive livestock farming is the primary agricultural activity, TAs do not normally have well defined areas of jurisdiction. It is not uncommon that such TAs exercise their powers over subjects not residing in areas where the traditional authority is located. 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.

The negative impacts of this situation on customary land rights registration include:

a. that some communities are left out in the registration of land rights;

b. that some traditional authorities allocate land to their subjects in areas where they do not have jurisdiction;

c. that double allocation of land rights occurs, where more than one Traditional authority exists due to unclear boundaries;

d. applications from some traditional authorities could not be considered by CLBs due to lack of jurisdiction by such traditional authorities.

The issue of areas of jurisdiction was raised in some regions during pre-conference consultations. The Consolidated Report on Regional Consultations (Republic of Namibia, 2018, pp. 13–14) stated that:

“The issue of communal land be handled by the traditional authorities and the mapping/demarcation of communal land be clear in terms of boundaries and jurisdiction (sic) of traditional authorities”.

Resolution 13 of the Second National Land Conference, which was discussed above, includes a recommendation to establish delimitation committees to address the issue of overlapping jurisdictions of traditional authorities.
The guidelines set out principles and internationally accepted standards of responsible governance of tenure of land, fisheries and forests. They provide guidance for improving the policy, legal and organizational frameworks that regulate tenure rights; for enhancing the transparency and administration of tenure systems; and for strengthening the capacities and operations of public bodies, private sector enterprises, civil society organizations and people concerned with tenure and its governance.

The guidelines are the first comprehensive, global instrument on tenure and are intended to contribute to the progressive realization of the right to adequate food, poverty eradication, environmental protection and sustainable social and economic development.

Paragraph 386 deals with consultation and participation and implores States to engage with and seek the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions. This should take into account existing power imbalances between different parties and ensure active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.

Paragraphs 5.1 and 5.2 call on States to provide and maintain policy, legal and organizational frameworks that promote responsible governance of tenure of land, fisheries and forests. These should be consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments.

Paragraph 5.6 implores States to place responsibilities at levels of government that can most effectively deliver services to the people. States should clearly define the roles and responsibilities of agencies dealing with tenure of land, fisheries and forests. States should ensure coordination between implementing agencies, as well as with local governments, and indigenous peoples and other communities with customary tenure systems.

Paragraph 7 recommends that safeguards be established by States to avoid infringing on or extinguishing tenure rights of others, including legitimate tenure rights that are not currently protected by law.

Paragraph 9.2 reiterates that effective participation of all members, men, women and youth, in decisions regarding their tenure systems should be promoted through their local or traditional institutions, including in the case of collective tenure systems. Where necessary, communities should be assisted to increase the capacity of their members to participate fully in decision-making and governance of their tenure systems.

With regard to the drafting of tenure policies and laws, paragraph 9.7 emphasises the necessity of States to take into account the social, cultural, spiritual, economic and environmental values of land, fisheries and forests held under tenure systems of indigenous peoples and other communities with customary tenure systems.

There should be full and effective participation of all members or representatives of affected communities, including vulnerable and marginalized members, when developing policies and laws related to tenure systems of indigenous peoples and other communities with customary tenure systems.

To enable holders of legitimate tenure rights in communal areas where TAs are not recognised to register their tenure rights, the MAWLR should consider an amendment of the policy and legal framework to provide for the establishment of local level land committees to perform the functions of recognised TAs. This process should be carried out by the MAWLR with the full, effective, meaningful and informed participation of men and women, vulnerable and marginalised groups of affected communities. The Ministry and CLBs must ensure that such land committees are established in a democratic manner and that its members are representative of all sections of the traditional community.

Where areas of jurisdiction overlap, the MAWLR may consider initiating a process of determining boundaries through a participatory process and negotiations in order to obtain maximum consensus.
Women constitute the majority of agricultural producers in Namibia’s communal areas. Despite the progress made in promoting gender equality, women continue to obtain land rights generally through men, who could be husbands or fathers.
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Men are generally regarded as the owners of land. Women’s rights to land and other resources thus continue to be determined by their marital status, by the laws of inheritance and divorce and institutions that are themselves deeply embedded within patriarchal structures. An important implication of this is that a change in a woman’s marital status, be it through divorce or the death of her husband, could be catastrophic. While tenure security of widows has improved, many still face being stripped of moveable assets on the land in terms of matrilineal inheritance rules and practices.

In principle, single women are allowed to apply for land in communal areas. But in many instances social pressures emanating from local customs make this difficult. In some regions the perception prevails among older people that it is against tradition for young single women to apply for land in their own right. They should not be allocated land until they get married and are ridiculed for being unmarried. Men normally look for land. Although many women are fully aware of their right to register customary land rights in communal areas, cultural and socio-economic conditions seem to be barriers for them to freely apply for land.

Land and property rights of widows remain a sensitive issue in many communal areas. Considerable progress has been made since Independence to stop the eviction of widows from land they and their deceased husbands utilised. While the land rights of widows seem to be more secure now than before Independence, it is still happening that family members of a deceased husband are 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, often find it difficult to prohibit the practice and are limited to negotiating a solution where an inheritance issue involving land and property issues has been brought to their attention.

Women, much more than men, enjoy secondary tenure rights to land and natural resources. These include rights to harvest natural products on land over which someone else holds a customary land right. Although not researched and documented yet, the mapping and registration of private land parcels may impact negatively on such rights.

The policy and legal frameworks in Namibia have gone a long way to promote and protect the rights of women. Article 10(2) of the Constitution stipulates that no person may be discriminated against on the grounds of sex, race, colour, ethnic origin, creed or economic status. Article 23 dealing with Apartheid and Affirmative Action specifically states ‘that women in Namibia have traditionally suffered special discrimination and they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation’.

The National Conference on Land Reform and the Land Question in 1991 resolved that ‘women should have the right to own the land they cultivate and to inherit and bequeath land and fixed property’. The same resolution further states that women should be assisted through training and low interest loans to compete on equal terms with men, and that all discriminatory laws, ‘whether statutory or customary’ and practices which disadvantage women be abolished or amended. Article 95(a) of the Constitution commits the state to pass legislation to ensure equality of opportunity for women to enable them to participate fully in all spheres of Namibian society.
Based on Article 95(a) of the Constitution, the National Land Policy accords women “the same status as men with regard to all forms of land rights, either as individuals or as members of family land ownership trusts. … Every widow (or widower) will be entitled to maintain the land rights she (or he) enjoyed during the spouse’s lifetime”. The Policy goes on to state that in practical terms this means that:

- women would be entitled to receive land allocations and to bequeath and inherit land;
- government would actively promote the reform of civil and customary laws which impeded women’s ability to exercise rights over land; and
- policy would promote practices and systems that took into account women’s domestic, productive and community roles, especially in regard to housing and urban development, agricultural development and natural resources management.

In terms of the Land Policy, the state undertook to introduce certificates of land rights under customary tenure. These would provide more tenure security and could be inherited by immediate family members, i.e. husband or wife and ‘natural children’, but would not be mortgageable or transferable outside the limits of consanguinity. Customary land rights in this context refer to land rights for residential and subsistence farming purposes only.

The CLRA has strengthened the right of women to apply for and hold customary land rights. Women have the right to be allocated land in their own names and to remain on the land after the death of their spouses. Women accounted for more than 40% of all registered customary land rights in 2018.

In addition, the Act stipulates that at least four women need to serve on Communal land boards. This is a minority of the total number of members. The principle to have at least 50% female representation has been discussed but not implemented. Representation of women in Traditional authority structures is still very low, with women typically featuring in secretarial functions.

The benefits of granting women de jure equal rights to men are compromised to some extent in the implementation process. Many women are not aware of their rights and hence unable to claim them. To the extent that this is happening, customary laws and practices are likely to continue to relegate women to a subordinate position vis a vis men. It is also doubtful whether CLB members, traditional authorities and staff of the MAWLR have been sufficiently sensitised to gender issues. What the CLRA cannot prevent is ‘property grabbing’ from widows, which is widely regarded as part of matrilineal inheritance systems. The CLRA also does not protect subsidiary tenure rights enjoyed mostly by women.

PERCEPTIONS ABOUT FEMALE-HEADED HOUSEHOLDS

Traditionally in Ovambo culture women have been discriminated against or left out in the decision-making process. A woman in Ovambo culture does not have decision-making powers as she is considered like a child, although they may make suggestions. Becoming a household head as a result of death or separation is not by choice and consequently puts women in a vulnerable situation. They are left in a situation where they have to start making decisions for the households on their own and find alternatives to deal with these situations. In most cases, they are also left with limited assets or resources to continue their normal life. In some of these households, property is inherited among many dependents which makes it even more difficult for these widows to sustain.

Furthermore, the village headmen revealed that women are generally weak and hence they are vulnerable and unable to manage their households. Some indicate that the lack of discipline among the children and youth is on the increase in areas with increasing numbers of female-headed households. The youth in their society has little respect for women, be it their mothers, grandmothers or other female guardians. The cultural attitude towards women also emerged from interviews with the headmen by saying that “some women are looking for land to leave their husbands”. This suggests that village headmen, when given a chance, would regulate the number of female-headed households in their villages.

Becoming a female household head by choice is not common. Omangundu village is not a very old village, its first settlers arrived in the early 1970s. The headman of this village indicated that he settled some unmarried women in his village who were rejected in one or the other way from other areas within the north-central regions of Namibia. All village headmen were not in favour of allocating land to young unmarried women as they reckon that they should stay with their parents until they are married.

Source: Lendelwo, S. 2008. Women's access to land: A case study of the area under the jurisdiction of the Ondonga Traditional authority, Oshikoto Region. Windhoek: GTZ.
WHAT DO THE VOLUNTARY GUIDELINES SAY?

The first general principle raised in paragraph 3.1 of the Voluntary Guidelines calls on States to recognize and respect all legitimate tenure right holders and their rights and record and respect legitimate tenure right holders and their rights, whether formally recorded or not.

**Paragraph 3.B.4** emphasises the importance of gender equality in tenure rights. It specifically guarantees equal rights for women and men. Furthermore, States must ensure that women have the same tenure rights and access to land, fisheries and forests, independent of their civil or marital status.

**Paragraph 3.B.6** draws attention to the importance of consultation and participation by engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.

With regard to rights and responsibilities related to tenure, **paragraph 4.6** calls on States to remove and prohibit all forms of discrimination related to tenure rights, including those resulting from change of marital status, lack of legal capacity, and lack of access to economic resources. Equal tenure rights for women and men, including the right to inherit and bequeath these rights must be ensured.

In terms of **paragraph 4.7** States should consider providing non-discriminatory and gender-sensitive assistance where people are unable through their own actions to acquire tenure rights to sustain themselves, to gain access to the services of implementing agencies and judicial authorities, or to participate in processes that could affect their tenure rights.

**Paragraphs 5.3 to 5.5** emphasise the importance of policy, legal and organisational frameworks to recognise rights including legitimate customary tenure rights that are not currently protected by law. In particular, States should consider the particular obstacles faced by women and girls with regard to tenure and associated tenure rights and take measures to ensure that legal and policy frameworks provide adequate protection for women and that laws that recognize women’s tenure rights are implemented and enforced. Policies should be developed through a process of participation in which both men and women are involved from the beginning.

Safeguards need to be put in place by States to avoid infringing on or extinguishing tenure rights of others, including legitimate tenure rights that are not currently protected by law. In particular, safeguards should protect women and the vulnerable who hold subsidiary tenure rights, such as gathering rights (**paragraph 7.1**).

**Paragraph 9.2** calls on indigenous peoples and other communities with customary tenure systems to promote and provide equitable, secure and sustainable rights to those resources, with special attention to the provision of equitable access for women. Effective participation of all members, men, women and youth, in decisions regarding their tenure systems should be promoted through their local or traditional institutions, including in the case of collective tenure systems. Where necessary, communities should be assisted to increase the capacity of their members to participate fully in decision-making and governance of their tenure systems.

States should consider adapting their policy, legal and organizational frameworks to recognize tenure systems of indigenous peoples and other communities with customary tenure systems. Where constitutional or legal reforms strengthen the rights of women and place them in conflict with custom, all parties should cooperate to accommodate such changes in the customary tenure systems (**paragraph 9.6**).

Negotiating agreements between contracting parties of big investments need to be non-discriminatory and gender sensitive (**paragraph 12.11**).

**Paragraph 21.1** calls on States to ensure that dispute resolution services should be accessible to all, women and men, in terms of location, language and procedures.
HOW CAN THE VGGT BE USED TO RESOLVE THE CHALLENGES?

The policy and legal framework across different sectors has brought about a higher degree of gender equality since Independence. However, women are still relegated to subordinate positions in many traditional communities, deriving tenure rights mostly through men. Secondary tenure rights held by women are not protected by the CLRA.

To improve gender equality, the Ministries of Agriculture, Water and Land Reform, Urban and Rural Development (MURD) should collaborate very closely with the Ministry of Gender Equality, Poverty Eradication and Social Welfare (GEPESW) to co-ordinate efforts to raise the public’s awareness of the importance of effective participation by both women and men in land tenure governance institutions at all levels, from the national to the district. This should include CLBs as well as local level institutions such as water user association and water point and conservancy and forest management committees. Because of the central role of TAs in land governance, special efforts need to be made in particular by MURD and GEPESW to explain the importance of gender equality to TAs and provide support to assist them to implement gender sensitive land governance practices. Attitudes towards gender-equitable governance of land tenure may be difficult to change because they are deeply held. Changing values and attitudes is therefore a long-term project requiring much time and effort, and sensitization of donors and funders to ensure the availability of resources for supporting communication and awareness-raising strategies.

The success of such an awareness raising campaign depends to a large extent on the gender sensitivity of all government officials involved in land policy making and implementation. Ongoing sensitisation of officials should therefore be part of a wider campaign.

The MAWLR should also develop and implement a gender-equitable communication strategy to inform women in particular and the public in general of the tenure rights of women. Gender-equitable communication methods and tools include community conversations, rural radio, and participatory and visual tools. Advocacy and legal literacy campaigns are also important communication activities (FAO, 2013).

The land policy and legislative framework have been developed with a high degree of participation of interest groups across the country. The MAWLR may want to consider mobilising more resources to facilitate a more meaningful participation of women in the policy making process. This will facilitate the incorporation of governance issues affecting women in the CLRA that men may not necessarily be conscious of. Secondary tenure rights to the harvesting of natural resources on commonages, for example, should be incorporated into legislation in this way.

To achieve gender-equitable land governance, women need to participate on an equal basis as men in land related governance institutions. The CLRA stipulates a minimum number of women to be serving on CLBs. These are appointed by the Minister. The MAWLR may want to, in a consultative and participatory process, review this quota and consider amending the legislation to encourage more equal gender representation in TAs.

To encourage more effective participation of women in land governance, the MAWLR should consider specific capacity building initiatives and continually review and develop institutional capacity to address gender equity in land tenure governance (FAO, 2013). All line ministries should identify obstacles faced by girls and women with regard to tenure rights and take measures to remove them. This may require strengthening current laws, but also to engage with TAs. The Guidelines advise that where the strengthening of womens’ tenure rights brings them into conflict with customary rules and practices, line ministries and TAs need to co-operate to bring about changes in such rules and practices.

Access to justice is not always gender equitable. The CLRA provides an appeal procedure for instances where people are dissatisfied with a decision of a TA or CLB. The MAWLR should consider to review the Act to not only to make the appeal procedure more accessible to women, but also to lay down procedures for legal redress that include both formal and customary justice systems, and both local and customary dispute resolution mechanisms to achieve gender equity. Together with the Ministry of Justice innovative approaches to legal support should be identified, such as community watchdog groups and community paralegals. The level and type of support needed in each context should be carefully assessed (FAO, 2013).
THE MONETISATION OF RURAL LIFE HAS NOT SPARED CUSTOMARY LAND

Although unintended, the process of selling customary land seems to have been encouraged in some instances by the mapping and registration of customary land rights.
The increasing monetisation of rural life has not spared customary land. Historically, people in communal areas obtained land rights through traditional authorities. But increasingly, access to land is obtained through an informal market where customary land rights are sold and bought with minimal or no involvement of traditional authorities. Demand for land held under customary tenure is particularly high in peri-urban areas, but not restricted to them. The growth of the informal land market is driven by a demand for land to conduct business, farming, develop housing and investment. In some regions, evidence suggest that villages were expropriated to enable traditional leaders to sell large tracts of land to wealthy and well-connected individuals.

Although unintended, the process of selling customary land seems to have been encouraged in some instances by the mapping and registration of customary land rights. Some landholders are now using the customary land right certificates as proof of ownership of their land and believe that they therefore can use it for any purpose, including selling off parts of their landholding. Large customary landholdings are sub-divided and portions sold off.

Anecdotal evidence suggests that traditional authorities are involved in land sales, particularly in areas where there are many tourism facilities.

This informal market is unregulated. traditional authorities are seldom involved in negotiations between private buyers and sellers and in most cases no paper trail of transactions exists. Disputes over rights to land are common and lawyers are frequently engaged to prove ownership of aspirant sellers. Double sales of a single landholding are also not uncommon.

There are only a few references in the CLRA to the transfer of customary land rights, but no explicit provision is made for land markets. Section 38 provides for the transfer of customary land rights with written consent of the relevant Traditional authority while section 40 stipulates that a person who wants to transfer a customary land right may be compensated for improvements by the buyer. The Regulations determine that applications for transfers must be made on a specific form and submitted in triplicate. However, ‘the Act does not expressly make provision for land units to be divided, or to put it differently, to allocate additional rights over a land unit already subject to a customary land right’. In sections 40 and 26 the CLRA speaks of customary land rights in the singular, meaning ‘that a single right pertains to a single land unit’ (Land, Environment and Development (LEAD) Project).

The challenges posed by the informal land market to customary tenure were not explicitly discussed at the Second Land Conference. The Consolidated Report on Regional Consultations stated that suggestions were made in some regions ‘that there should be different categories of land tenure systems with land tradability options that can be used as collateral for communal farmers to access financial resources and enhance productivity’ (Republic of Namibia, 2018). Some regions suggested ‘that Government explores other avenues to commercialise certain portions of communal land through the PCLD and support services must be provided to such small-scale farmers to ensure productivity’ (Ibid).

In 2012 Ndinelago Perehupiho Mokosha decided to sell a portion of her land. The reasons she gave was that she had problems she wanted to solve. The portions she sold were priced depending on her problems. ‘When my husband died, my children and I were in poverty and that is why I decided to sell our mahangu field, so that we can solve our poverty problems. The land is strategically located and the demand was high, as many people were willing to pay’, she was reported to have said.

Anecdotal evidence suggests that traditional authorities are involved in land sales, particularly in areas where there are many tourism facilities.

PAYING FOR LAND RIGHTS IN KAVANGO WEST

Hundreds of struggling farmers are being charged bucket-loads of money to secure access to grazing land controlled by the chief of Uukwangali Traditional authority, Eugene Siwombe Kadumo, with some farmers said to be in arrears of between N$23,000 and N$100,000...a part of the payment required goes to the traditional authority for administrative purposes, while the other part goes to the chief as a ‘token of appreciation’. Affected farmers...revealed that they were each made to pay N$6,000 for administration, N$6,000 for the chief, and N$50 per head of cattle. However the grazing rights payments have also been backdated to as far as 2014, leaving many of the drought-affected farmers under piles of debt.

Source: Nangoya, F. and Nghidengwa, M. Uukwangali milks farmers. Confidénte, 11.7.2019

Source: Nandjalo, I. ‘Illegal communal land sales unearthed’, Namibia Sun, 26.9.2018
SELLING COMMUNAL LAND FOR REINVESTMENTS

‘I am 56 years old. I acquired this landholding 12 years ago. I have a certificate for my land. My land is big, I think it is about 12 hectares. I was using this land for my homestead and crop field. However, I was not making much from the land in terms of productivity, so I thought hard on how I can use my land efficiently. I therefore decided to sub-divide my land into small plots for residences which I sell. These plots are in demand – the town is the regional centre for government services – there are many government officials. Thus my buyers are civil servants working for government. People want to live near towns services (sic), but do not want to pay for rates and taxes charged in towns. Therefore, they find relief in communal areas close towns. For me I decided to take on that opportunity. I know that the town is expanding and will soon reach this place. By the time the town’s boundary reaches here, I have already ripped benefits from my land. Because I know the compensation they give is little. I intend to demarcate roads on the land. I have already put in a transformer which I bought together with some plot owners. There is water supply. I even plan to give it a name. This is going to be the Klein Windhoek of the fast-expanding town. It is purely a residential area.

I got permission for this use from the senior headman but not from the village headman – the village headman is against it because he said I cannot sell land, but I know that it is just because the money is not going to him. In addition to that, I have my certificate which certifies that this is my land, therefore I can do anything I choose to with this land. I pay the individual subdivisions’ umba ku yekaya (N$ 600) into the bank account of the traditional authority. There are no agreements between me and the buyers. But a certain lawyer advised me to get an affidavit from Ondangwa court. I am in the process of getting that. The Ondangwa court will be the mediator in the transactions, so that the buyers may feel at peace with their lands. Through the sales of these plots, I have managed to buy three farms (still in central north) and many cattle, and I have good infrastructures at these farms and I employ other people. I employed 12 people through my businesses.’

Source: Mendelsohn, J. and Ngiambale, R., 2017 An inquiry into land markets in Namibia’s communal areas. Windhoek, p.13

KEY PLAYERS THAT NEED TO BE CONSULTED WHEN DEALING WITH TRANSFER OF CUSTOMARY LAND RIGHTS

TRADITIONAL AUTHORITIES

MAWLR

LARGE LAND HOLDERS
Paragraph 3.1. of the general principles of the Guidelines states that States should promote and facilitate the enjoyment of legitimate tenure rights and take active measures to promote and facilitate the full realization of tenure rights or the making of transactions with the rights, such as ensuring that services are accessible to all.

Paragraph 3.2 States that non-state actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights and should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others. They should include appropriate risk management systems to prevent and address adverse impacts on human rights and legitimate tenure rights.

Paragraph 11 focuses on promoting good governance in land markets.

Paragraph 11.1 calls on States to recognize and facilitate fair and transparent sale and lease markets as a means of transfer of rights of use and ownership of land, fisheries and forests. Transactions of tenure rights to land, fisheries and forests should comply with national regulation of land use and not jeopardize core development goals.

Reinforcing the previous paragraph, paragraph 11.2 underscores the responsibility of States to facilitate the operations of efficient and transparent markets to promote participation under equal conditions and opportunities for mutually beneficial transfers of tenure rights which lessen conflict and instability. States should also take measures to prevent undesirable impacts on local communities, indigenous peoples and vulnerable groups that may arise from, inter alia, land speculation, land concentration and abuse of customary forms of tenure.

Policies, laws and regulatory systems and agencies should be established by States to ensure transparent and efficient market operations, to provide non-discriminatory access, and to prevent uncompetitive practices. Information on market transactions and information on market values should be transparent and widely publicized, subject to privacy restrictions. (paragraphs 11.3 and 11.4).

Paragraph 11.6 calls on States to establish safeguards to protect the legitimate tenure rights of spouses, family members and others who are not shown as holders of tenure rights in recording systems, such as land registries.

Paragraph 11.8 highlights the importance of small-scale producers for national food security and social stability and calls on States to protect their tenure rights in market transactions of tenure rights.

The VGGT not only acknowledges the importance of land markets but advises States to facilitate the efficient and transparent operations of such markets. The CLRA provides for the legal transfer of tenure rights and compensation for improvements, subject to an application procedure. These provisions may not be known by all and appear not be implemented. The MAWLR should consider raising awareness on the procedures or review them with a view to make them easier to follow and implement. As a footnote: a holder of freehold right does not need to apply for permission to transact in his land.

This review should lead to the development of a policy and legal framework to facilitate the development of an efficient and transparent land market in communal areas to create opportunities for mutually beneficial transfers of tenure rights which promote food security. It should be doing so in full recognition of its responsibility to safeguard legitimate tenure rights in communal areas against threats and infringements but also to take active measures to promote and facilitate the full realization of tenure rights or the making of transactions with the rights.

In order to achieve this, the Ministry should develop regulations to ensure that a land market does not impact negatively on local communities, in particular marginalised and vulnerable people. Regulations should also provide safeguards against land concentration and land speculation. While the MAWLR will clearly play a leading role in developing a land market and an appropriate policy and legal framework, this should be done in close consultation with and participation of affected parties. In this way the Ministry will ensure a high level of buy-in from affected communities. The aim of such a policy and legal framework should not only be to ensure transparent and efficient market operations, but also to protect the rights and interests of holders of legitimate tenure rights.

Available evidence suggests that setting the value and price for customary land rights is an arbitrary process. The Directorate of Valuation and Estate Management in the MAWLR should consider reviewing the current valuation and compensation guidelines through a consultative and participatory process in order to develop valuation standards and procedures agreed with holders of tenure rights in communal areas. The valuation methodology should recognize that the value of a parcel of land in communal areas should include social, cultural, religious and other values.
Large tracts of land and long-term leases were granted to private agribusinesses by traditional authorities, communal land boards and the MAWLR.
Large tracts of communal land were allocated to supposed investors for irrigation projects particularly in Kavango East and West without full, free, prior informed consent and participation of affected customary land rights holders. 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.).

The Programme for Communal Land Development (PCLD) which is being implemented by the Ministry of Agriculture, Water and Land Reform similarly seeks to encourage economic development in communal areas by developing small-scale commercial farms on large tracts of land. Land for this purpose was designated with the consent of relevant TAs. Although not publicly acknowledged, evidence suggests that in Eastern Kavango Region small villages of mostly San people have been incorporated into the surveyed units, seemingly without their consent. The development of surveyed commercial farms on communal land has taken place with the full support of traditional authorities.

It is not known to what extent consultations were held with local communities holding customary land rights. Thiem and Jones (2014, pp. 337, 347) reported that in 2014 about 50 people who resided in a remote village called Xeidang in Kavango East Region were incorporated into a small-scale commercial farm which the Shambyu TA had allocated to an individual farmer. The Shambyu TA and Regional Councillor subsequently asked the Ju‘hoansi of Xeidang if they would vacate the village and move to an area near Taratara because Xeidang had been allocated as an individual farm. The villagers claimed that they had been living on that land long before it was allocated to the farmer. “...They had lived at Xeidang for a very long time – since before Independence. Their parents and grandparents had always moved through the area, but then later discovered good water points at Xeidang so they decided to settle there permanently. They were emphatic that they had been living at Xeidang in colonial times, and said “This is our place!”.

Major land acquisitions by foreign investors and the Namibian government for the development of large-scale agricultural projects have occurred in Namibia, mostly along perennial water courses in the north-east of the country. Large tracts of land and long-term leases were granted to private agribusinesses by traditional authorities, Communal land boards and the then Ministry of Land Reform. Compensation for loss of access to customary land as a consequence of large-scale land transfers remains unclear and communities lack basic information regarding their land rights.

Since the Okavango River is a shared watercourse, water abstraction at such huge volumes must be agreed on by all countries sharing the river. Wildlife and tourism experts also fear human–wildlife conflict, as the loss of 10 000 hectares to agriculture would mean loss of habitat for wildlife and thus reduced tourism. There might also be problems with traditional land tenure arrangements and conflict between the Hambukushu and Kwe communities, according to the leaflet.

The Integrated Rural Development and Nature Conservation (IRDNC) organisation said the Kyaramacan Trust, which represents the interests of the Mbukushu and Kwe or Barakwena community who are of San origin, declared Bwabwata National Park. The people who live there are predominantly of the Mbukushu and Kwe or Barakwena community who are of San origin.

The Katondo Farming Project (KFP) intends to employ a minimum of 150 local people. KFP will also assist the local community to grow labour-intensive vegetable and other crops that can be sold locally, the company promises.

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.).

The KFP intends to employ a minimum of 150 local people. KFP will also assist the local community to grow labour-intensive vegetable and other crops that can be sold locally, the company promises.

Wildlife and tourism experts also fear human–wildlife conflict, as the loss of 10 000 hectares to agriculture would mean loss of habitat for wildlife and thus reduced tourism. There might also be problems with traditional land tenure arrangements and conflict between the Hambukushu and Kwe communities, according to the leaflet.

The Integrated Rural Development and Nature Conservation (IRDNC) organisation said the Kyaramacan Trust, which represents the interests of the Mbukushu and Kwe people living in the Bwabwata National Park, was left out of the project. “They are not part of the joint venture of this Demeter company. The park is about to receive an international organic certification for the harvesting of Devil’s Claw, which is used for medicinal purposes.

The Working Group of Indigenous Minorities in Southern Africa (Wimsa), which represents San people, was surprised about the apparent progress of the envisaged project. “The Kwe have for many years trying to secure their land rights [with Government] in that area. It is surprising that a 10 000 hectare irrigation project would enjoy such quick progress. There are also important gravesites of Kwe ancestors in the area, that might be an issue.”

While the engagement of the Shambyu TA and Regional Councillor suggests that consultations about moving the community had taken place, the authors argued that ‘it was not clear whether the information they received was sufficient for them to make an informed decision about moving. Furthermore, it seems that sometimes the decision to move was based on promises made by the government that might or might not actually be fulfilled.’

It could not be confirmed whether the community of Xeidang finally moved away and if so, under what conditions.

The CLRA provides for the commercial development of communal agriculture and has introduced long-terms leases over surveyed communal land to encourage investments. It also defines clearly what the roles and responsibilities of different parties are in the allocation and administration of customary and leasehold rights are. traditional authorities have rights to allocate or cancel customary land rights, a process that is checked by communal land boards. Only once communal land boards have ratified an allocation does a customary land right become a legal right. Long-term leaseholds can only be granted by communal land boards subject to the consent of traditional authorities.

In terms of Section 16 of the CLRA the President may withdraw land from communal land areas with the approval of the National Assembly and after the state has acquired all the rights of people affected and paid just compensation. The Minister must designate such land after consultation with the traditional authority of the area. But the CLRA does not require traditional authorities to obtain the consent of the communities affected by such land alienation before they agree to it. The only reference to the legal obligation of TAs to consult community members under their jurisdictions is provided for in Article 3 of the traditional authorities Act, 2000 in relation to ascertain the customary law applicable in their traditional communities.

The CLRA does not adequately deal with compensation for people whose rights of occupation or use of communal land have been terminated as a result of the withdrawal of land for a purpose in the public interest. Although it provides for regulations to be made for such compensation, this has not happened yet.

The commercialisation of communal areas featured in regional consultations in preparation of the Second Land Conference as well during the Conference. The Consolidated Report on Regional Consultations (Republic of Namibia, 2018, p. 11) stated that suggestions were made in some regions ‘that there should be different categories of land tenure systems with land tradability options that can be used as collateral for communal farmers to access financial resources and enhance productivity’. Government should undertake a study on the current land tenure system to determine its impact on and productivity for sustainable land management with a view to unlock the commercial value of communal land. Avenues should be explored by Government to commercialise certain portions of communal land through the Programme for Communal Land Development (PCLD) and support services must be provided to such small-scale farmers (Ibid).

These suggestions were passed in Resolution 18 which stated that

- There should be different categories of land tenure systems with land bankability options that can be used as collateral for economic activities in the communal areas to access financial assistance and enhance productivity.
- Government should conduct a study on the current land tenure systems to determine its impact on and productivity for sustainable land management.
- A study be conducted to assess alternative tenure systems to harmonise gaps in the current tenure system so as to unlock the commercial value of communal land.

KEY PLAYERS THAT NEED TO BE CONSULTED WHEN DEALING COMMUNAL LAND SALE FOR INVESTMENT PURPOSES

TRADITIONAL AUTHORITIES

MAWLIR

PRIVATE INVESTORS

PARASTATAL INVESTORS
WHAT DO THE VOLUNTARY GUIDELINES SAY?

The aim of the Guidelines is to improve governance of tenure for the benefit of all groups but specifically marginalised groups.

Paragraph 3.B.6 sets out an international standard for consultation and participation, which, amongst other points, emphasises that existing power imbalances between parties (namely between communities, businesses, state bodies etc) should be taken into account.

Paragraph 3.2 states that non-state actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights. Business enterprises should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others. They should include appropriate risk management systems to prevent and address adverse impacts on human rights and legitimate tenure rights. Business enterprises should provide for and cooperate in non-judicial mechanisms to provide remedy, including effective operational-level grievance mechanisms, where appropriate, where they have caused or contributed to adverse impacts on human rights and legitimate tenure rights. Business enterprises should identify and assess any actual or potential impacts on human rights and legitimate tenure rights in which they may be involved.

Paragraph 12 deals with investments. It acknowledges the importance of responsible investment by State and non-state actors to improve food security. States should also support investments by smallholders as well as public and private smallholder-sensitive investments.

Paragraph 12.2 highlights that smallholder producers and their organizations in developing countries provide a major share of agricultural investments that contribute significantly to food security, nutrition, poverty eradication and environmental resilience. States should support investments by smallholders as well as public and private smallholder-sensitive investments.

Responsible investments should be made in partnership with the state and local holders of tenure rights, which should be respected. Transactions in tenure rights should be made transparently (paragraph 12.3).

Paragraph 12.5 states that States should also, with appropriate consultation and participation, provide transparent rules on the scale, scope and nature of allowable transactions in tenure rights and should define what constitutes large-scale transactions in tenure rights in their national context.

Paragraph 12.6 calls on States to protect the legitimate tenure rights for example by introducing ceilings on permissible land transactions and regulating how transfers exceeding a certain scale should be approved and by promoting a range of production and investment models that do not result in the large-scale transfer of tenure rights to investors, and should encourage partnerships with local tenure right holders.

Paragraph 12.8 implores States to ensure that consultations among all affected parties about investments are taking place to determine the conditions that promote responsible investments. Transfers of tenure rights should also be consistent with the principles of consultation and participation of the Guidelines.

In paragraph 12.10 the Guidelines recommend that prior independent assessments be carried out on the potential positive and negative impacts that large-scale investments could have on tenure rights, food security and the progressive realization of the right to adequate food, livelihoods and the environment. Existing legitimate tenure rights should be systematically identified as well as the rights and livelihoods of other people affected by a project. Consultations with all affected parties should be done.

According to paragraph 12.11 contracting parties should also provide comprehensive information to ensure that all relevant persons are engaged and informed in the negotiations and should ensure that the agreements are documented and understood by all who are affected. The negotiation process should be non-discriminatory and gender sensitive.

Paragraph 12.14 provides that States and affected parties should contribute to the effective monitoring of the implementation and impacts of agreements involving large-scale transactions in tenure rights, including acquisitions and partnership agreements. States should take corrective action where necessary to enforce agreements and protect tenure and other rights and provide mechanisms whereby aggrieved parties can request such action.
The VGGT acknowledge the importance of investments in communal areas, not only capital intensive agri-businesses but also investments by small-holders. This is in line with the development policies and legal framework of the MAWLR which aims to achieve national food security through the promotion of large-scale irrigation along perennial rivers, but also small-scale projects. The implementation particularly of large-scale irrigation projects has not always respected the tenure rights of local communities. In the past TAs have frequently given consent for land to be made available for agricultural investments without consulted affected communities under their jurisdictions. To avoid similar mistakes in future, it is recommended that the MAWLR should, guided by the VGGT, consider putting in place gender sensitive procedures that facilitate attainment of responsible agricultural investments by promoting active, free, effective, meaningful and informed participation of local holders of tenure rights. This will require a high degree of transparency of transacting tenure rights.

In close consultation with and participation of communities likely to be affected by large-scale investments, the MAWLR should develop rules on the scale, scope and nature of allowable transactions in tenure rights and possible land ceilings on permissible transactions. The Ministry must also ensure that business enterprises should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others. They should include appropriate risk management systems to prevent and address adverse impacts on human rights and legitimate tenure rights. It is recommended that the MAWLR consider the three basic steps which the VGGT suggest should be taken during the due diligence and project design phase: (1) identify and recognize all land rights; (2) assess potential impacts the project may have on those rights; and (3) modify the project to avoid harm or move on to another opportunity (FAO, 2016a).

These steps require a basic understanding of national formal and customary land tenure laws – including the extent to which the formal law accommodates the customary law – as well as the relevant government institutions, administrative processes, dispute-resolution mechanisms and practices. Official land records need to be reviewed to reveal how the government categorizes the land (public, private or customary), whether the land has some sort of protected status (such as for conservation or forest preservation) and, possibly, the extent to which people claim use rights for some or all of the year. This process will be impossible without consultation, participation and negotiation of affected people.

The Ministry of Environment and Tourism should ensure that the potential positive and negative impacts that proposed large-scale investments could have on tenure rights and food security be included in the Environmental and Social Impact Assessments (ESIA) required by law for any changes in land use. These should also include possible mitigation measures.

The MAWLR must also ensure that all affected parties be sufficiently informed about the proposed project and have an opportunity to represent their interests. The CLRA should be strengthened to improve transparency and accountability of TAs towards the people under their jurisdiction in line with their duty under the traditional authorities Act. The CLRA should make it obligatory for TAs to consult with their local communities regarding any large scale transfer of tenure rights to investors using the VGGT guided free, prior and informed consent (FPIC) process. Care needs to be taken to ensure that marginalised groups and women are not excluded from this process. This is important to enable local communities to give or withhold their free, prior and informed consent (FPIC) or a veto – the right to say no – to a project being implemented in their territory (Ibid).

The MAWLR may want to consider appropriate grievance or dispute-resolution procedures to be available to affected parties to supplement more formal processes which can be time consuming. Such procedures should be designed with the community and be culturally appropriate and transparent. They should allow communities to present their grievances and concerns in a way that will allow prompt and fair resolution. A neutral arbiter should have ultimate power to decide grievances that the parties cannot resolve through consultation and negotiation.
Expropriation and evictions happen mostly in towns established after Independence and because of the privatisation of communal areas by wealthy and powerful individuals.
Expropriation and evictions are happening mostly in towns established after Independence and the privatisation of large tracts of communal grazing areas by wealthy and powerful individuals.

Typically, towns in communal areas gradually developed when members of rural communities obtained permission from their respective headmen to settle closer to existing freehold areas such as existed in Oshakati or other service areas. These settlers were not able to obtain freehold title to such land before Independence and hence remained under customary tenure systems. Once towns and townlands were proclaimed in terms of the Local Authorities Act, the areas that were occupied under customary tenure fell under the jurisdiction of newly created town councils. This process resulted in many households losing their homesteads and fields for cultivation. It is not clear how the proclamation of new townships affected rights to communal grazing areas.

With proclamation, the official land tenure regime suddenly changed from customary into statutory tenure. As a result, the traditional homesteads and informal settlers became liable to register with the local authority and to pay a monthly plot rent. When local authorities need land for new developments, they need to relocate and compensate the customary homesteads located on townlands. However, compensation is frequently regarded as inadequate by the claimants.

Relevant laws are silent on the issue of compensating people who lost their customary land rights as a result of new townships being proclaimed. The main reason for this may be the perception expressed in the Compensation Guidelines for Communal Land of 2009 that ownership of communal land is vested in the State for the benefit of the community’s use. The implication of this perception is that customary land rights are held at the behest of the state and are lost when new townships are proclaimed subject to payment of compensation in line with the Compensation Guidelines for Communal Land.

A problem with regard to compensating individuals who have lost their customary rights to communal land is that there are no legal procedures determined by an Act of Parliament for assessing the amount of compensation payable. Instead of assessing the value of property and rights lost in a case by case manner, the Compensation Guidelines provide compensation amounts for cultivated land, grazing / uncultivated land, various kinds of structures and different kinds of fruit trees. In addition, a disturbance allowance is paid on a sliding scale, but not exceeding N$ 15,000. It is not clear whether local authorities arrive at a fair valuation of the assets to be compensated by negotiating a compensation package based on the Guidelines.

The Compensation Guidelines state that the person has an option to choose either to get two plots but no money, while the second option offers one to be paid in full which is in monetary terms for the value of the homestead and other improvements. The only persons without an option are those that are in industrial or business area and are paid money in full.

In order to make land in local authorities (and eventually in settlements) available the authorities have to create extensions in town lands and/or expand the outer boundaries of urban areas into communal land. This requires the cooperation of traditional authorities and the preparedness of communal landholders to make land available. After initial problems of working out compensations for landholders who had to be moved, local authorities would like to formalise these areas and grant formal rights to residents on the land. Such moves are hampered, however, by inappropriate legislation.

In 2008, new compensation guidelines have been approved by Cabinet, giving landholders a choice of options. The purpose of these options is to allow a communal landholder whose land is incorporated into a town land jurisdiction or has been acquired for other public sector development purposes, to either own two residential erven in the proclaimed town; or subject to availability, be given alternative land of similar size as the one which has been taken away from them in order to continue with their farming activities and in cases where no land of similar size is available, the landholder shall be provided with reasonable land. In addition, the landholder is compensated monetarily for fields, unutilised land, improvements and structures and fruit trees.

The compensation policy argues that the practice is in line with all constitutional and jurisdictional provisions. However, it is not mentioned that the Prescription Act of 1969 allows an individual to obtain ownership rights to land that he or she has openly possessed for an uninterrupted period of 30 years. The act applies without regard to the land’s underlying ownership (LAC 2005).

Even after the review of the policy communal landholders are still reluctant to make land available. In some instances they are advised by traditional leaders who are residing on town lands but lost jurisdiction over land after local authorities and settlements had been proclaimed. This has led to major conflicts between traditional authorities and local authorities.

Some landholders have become ‘property wise’ after learning the ‘real’ value of land, once it was sold to developers by local authorities and have adopted the illegal practice to enter into property deals directly with the investor. Whilst this practice has made some land available, it cannot be developed due to the illegality of ownership with major disputes between business people, traditional and local authorities and Ministries. However, the practice demonstrates that land could become available faster if landholders were given the right to the town and formalize their land rights for commercial purposes.

WHAT DO THE VOLUNTARY GUIDELINES SAY?

In accordance with paragraph 3.A.3.1. of the Guidelines, state and non-state actors should recognize and respect all legitimate tenure right holders and their rights. They should take reasonable measures to identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not; to refrain from infringement of tenure rights of others; and to meet the duties associated with tenure rights. In addition they should recognize the equality of individuals in terms of gender, age and vulnerability within the national context and engage with and seek the support of those with legitimate tenure rights who could be affected by decisions, prior to decisions being taken, and respond to their contributions, taking into consideration power imbalances and ensuring active, free, effective, meaningful and informed participation in decision-making processes.

Section 6 of the Guidelines recognizes that the efficient and fair delivery of services related to tenure (which includes recording and valuation services) depends upon adequate human, physical, financial capacity to implement laws and policies. In line with this provision of the VGGT, the MAWLR should develop the required competencies of staff to deliver services at decentralized levels.

Paragraph 7.6 recommends that States should prevent forced evictions. This is reiterated in Paragraph 9.4 which states that indigenous communities and other communities with customary tenure systems should not be forcibly evicted from ancestral land.

Paragraph 16.1 reafirms that expropriation is only justified when it is for the general or public purpose and calls on States to clearly define the concept of public purpose.

Paragraph 16.2 highlights the need to inform and consult with all those who will be impacted during each stage of the expropriation process, to consider alternatives to expropriation and evictions, and to be particularly sensitive when the areas hold cultural, religious or environmental interest, or areas which are important for the livelihoods of those affected.

Paragraph 16.3 recommends that States should ensure a fair valuation and prompt compensation in accordance with national law. Among other forms, the compensation may be, for example, in cash, rights to alternative areas, or a combination.

Paragraphs 16.7 and 16.8 emphasise that States should avoid evictions and only permit them in cases of general interest, explore alternatives to eviction and involve and consult with the affected communities.

HOW CAN THE VGGT BE USED TO RESOLVE THE CHALLENGES?

Namibia’s policy and legal framework allow for the expropriation of land in the public interest subject to appropriate compensation. In communal areas customary tenure rights were expropriated only where new towns were proclaimed or land was needed for infrastructure development such as roads, railway lines, pipelines etc. The Compensation Guidelines offer several options for compensation including money, rights to alternative land areas or both, but the amounts offered are frequently considered too low.

The MURD in close co-operation with the Directorate of Valuation and Estate Management in the MAWLR should consider revising the Compensation Guidelines in close consultation with and participation of holders of customary tenure rights in line with Resolution 29 of the Second Land Conference. More specifically, the Directorate of Valuation and Estate Management should develop an appropriate valuation methodology that takes into account not only the economic value of assets expropriated, but also their cultural, spiritual, social and environmental values. This should be done with the participation of all affected parties. A new methodology for valuation should consider incorporating the right of affected parties to negotiate a compensation package as directed by Cabinet. As many women have fewer financial resources than men, it is particularly important that women are not discriminated against in the determination of compensation.

Paragraph 16.9 emphasises the need for States to ensure that evictions do not lead to the loss of homes and loss of access to productive resources for the communities affected, nor to put them in a situation where their human rights might be violated.

On valuation, Section 18 of the Guidelines recommends that:

- States ensure appropriate systems are used for the fair and timely valuation of tenure rights and that these systems promote social, economic, environmental and sustainable development objectives.
- As well as economic value, valuation systems take into account social, cultural, religious, spiritual and environmental values where applicable.
- Valuation standards are developed that are consistent with international standards and that are publicized so valuers and other stakeholders are aware of them.
- Valuations of tenure rights and valuation information and methods are transparent, publicized and accessible.
A major objective of the CLRA is to provide security of tenure through the registration of land rights in communal areas.
Namibia has put into law procedures to verify, map and register customary land rights in its attempt to make tenure rights more secure. However, the process proved more time consuming than anticipated, and a large number of tenure rights holders still have not been able to register their tenure rights.

The National Land Policy of 1998 states that all forms of recognised tenure will be accorded equal recognition and status and will be registered with the appropriate land board or approved authority. A major objective of the CLRA is to provide security of tenure through the registration of land rights in communal areas. This includes customary land rights and leasehold rights. Having land rights in communal areas mapped, surveyed and registered will enable the MAWLR, Communal land boards as well as traditional authorities to improve land administration and ensure that legitimate tenure rights are secure.

The MAWLR developed a cost-effective system to determine boundaries of customary land rights and map them to a spatial accuracy that meets local needs and is able to link information on the rights, the holders of those rights, and the spatial units related to those rights. A first step is for the TA to approve an application for recognition of an existing CLR or allocation of a new right. Once provisionally approved, support staff of the MAWLR together with the CLB and TA representatives will go to the field to verify and map the land parcel. This step is typically carried out in close consultation and participation of village members. On the basis of the field information, the CLB will either reject the application, refer it back to the TA or ratify it. Before final approval, the CLB has to display all applications on notice boards at its or other public offices for seven days to enable those who might have objections to raise them. If no objections are received the CLB ratifies the right and issues a certificate of registration.

The Namibia Communal Land Administration System (NCLAS) was developed to store, process and manage information on communal land. Awareness campaigns through print, radio and television were conducted to highlight the importance of the registration process and manage information on communal land. Awareness campaigns through print, radio and television were conducted to highlight the importance of the registration process and manage information on communal land. Awareness campaigns through print, radio and television were conducted to highlight the importance of the registration process and manage information on communal land. Awareness campaigns through print, radio and television were conducted to highlight the importance of the registration process and manage information on communal land.

The implementation of these provisions has faced several challenges. According to the MLR as it was at the time, these include the following:

- Misinterpretation and misinformation of the provisions of the CLRA by different role players;
- High volume of disputes that take a long time to resolve;
- Some areas do not have recognised TAs;
- Unclear boundaries of TAs, overlapping areas of jurisdiction;
- Financial constraints.

A consequence of these challenges is that the deadlines for the registration of customary land rights as prescribed in the CLRA has been postponed indefinitely and the process is still ongoing. Approximately 40% of the estimated 245,000 customary land rights had been registered at the end of 2018, implying that many rights continue to have no full legal protection.

Approximately 40% of land rights were registered in the name of women in 2018. It should be noted that the sections dealing with the registration of customary land rights in the CLRA are written in a gender-neutral way. The Act specifically mentions women only in the sections relating to the composition of Communal land boards and inheritance. In the latter case, the Act protects the rights of widows to land she and her deceased husband cultivated.

A limitation of the CLRA is that it only applies to what is often referred to as private customary land rights on communal land, i.e. rights to a homestead and a field for cultivation. These are typically enclosed by a palisade fence or increasingly steel fencing. Customary land and resource rights to commonages are not covered by the provisions on registering customary land rights.

The Consolidated Report on Regional Consultations (Republic of Namibia, 2018, p. 11) found that some ‘regions are opposed to the registration of customary land rights stating that they are comfortable with their current customary land rights allocation as per traditions and customs’. These regional concerns notwithstanding, participants at the Second National Land Conference passed several resolutions that spoke to the need of establishing and maintaining proper records on tenure and to speed up the process. These include

Resolution 11 which stated that

- Land Boards (should) ensure that all family members/siblings are consulted, and investigation is done before the land is registered in the name of the family.

Resolution 12 which recommended to

- Fast-track the registration of land rights in communal areas and capacitate the regional offices to efficiently register.

Resolution 15:

- Government should develop and maintain a database containing names of beneficiaries to avoid multiple land ownership within one region and between different regions at the expense of the landless Namibians.
- Non-residents when applying for land should respect and uphold the customs and traditions of the local traditional community of the area.
- Land administration should be done procedurally through the traditional authorities. Legislations (sic) should make provisions for consulting farmers in the area before allocating land to other people.
WHAT DO THE VOLUNTARY GUIDELINES SAY?

The general principles of the Voluntary Guidelines state that States should recognize and respect all legitimate tenure right holders and their rights and take reasonable measures to identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not and to safeguard legitimate tenure rights against threats and infringements (paragraph 3.A.3.1).

One of the principles of implementation which is regarded as essential to contribute to responsible governance of land and other resources calls on States to continuously improve mechanisms for monitoring and analysing tenure governance in order to develop evidence-based programmes and secure on-going improvements (paragraph 3.B.10).

Paragraph 5.6 states that States should place responsibilities at levels of government that can most effectively deliver services to the people. They should clearly define the roles and responsibilities of agencies dealing with tenure of land, fisheries and forests and ensure coordination between implementing agencies, as well as with local governments, and indigenous peoples and other communities with customary tenure systems.

Policy, legal and organizational frameworks should be reviewed regularly and monitored by States and other parties to maintain their effectiveness (Paragraph 5.8).

On service delivery, paragraph 6.1 suggests that States should ensure that implementing agencies and judicial authorities have the human, physical, financial and other forms of capacity to implement policies and laws in a timely, effective and gender-sensitive manner. Staff at all organizational levels should receive continuous training and be recruited with due regard to ensuring gender and social equality.

Paragraph 17.2 speaks to the problem of rights not being registered. It implores States to take particular care to prevent the registration of competing rights in those areas where it is not possible to record tenure rights of indigenous peoples and other communities with customary tenure systems, or occupations in informal settlements.

Paragraph 17.3 reiterates the importance of States to strive to ensure that everyone is able to record their tenure rights and obtain information without discrimination on any basis. Where appropriate, implementing agencies, such as land registries, should establish service centres or mobile offices, having regard to accessibility by women, the poor and vulnerable groups.

Paragraph 17.5 underscores the need for States to ensure that information on tenure rights is easily available to all, subject to privacy restrictions. Such restrictions should not unnecessarily prevent public scrutiny to identify corrupt and illegal transactions.

HOW CAN THE VGGT BE USED TO RESOLVE THE CHALLENGES?

The legal provisions for the registration of customary tenure rights are clear and a methodology has been developed to implement them. Progress has been slower than anticipated and less than 40% of all customary tenure rights have been registered so far. Tenure rights to communal grazing areas have not been mapped and registered as yet.

It is recommended that the MAWLR mobilise more financial resources to register and record all legitimate rights in a more timely manner. The Ministry may also want to consider devolving more of the registration tasks to lower than CLB level. Traditional authorities may not at this point in time be the most effective agency to deliver land registration services, but with appropriate capacity building they may be able to assume more responsibilities currently carried by the Ministry. The Ministry needs to define the roles and responsibilities of agencies dealing with land tenure very clearly and monitor implementation.

Records of tenure rights to communal grazing areas remain a challenge. The MAWLR should develop a methodology to identify and define group rights to commonages in order to map and record legitimate rights. Identifying and defining distinct groups is challenging and can only be carried out in full consultation with and participation of group members. The same approach should be applied to defining boundaries of specific grazing groups. Once established and verified these rights as well as group rights to community forests and conservancies should be captured on the NCLAS system and be made available as widely as possible.

The recording of legitimate tenure rights to the commons can be addressed by adopting one of the core implementation principles of the VGGT; namely consultation and participation. The important task of determining who has legitimate customary land rights to the commons should be carried out by engaging those who are likely to be affected in any decisions in this regard and obtaining their support.
ISSUE 8
COMMONAGES
THE CLRA HAS IMPROVED SECURITY OF ‘PRIVATE’ TENURE RIGHTS

It does not provide any legal protection of customary resource rights to commonages by groups of users.
The CLRA has improved security of ‘private’ tenure rights on communal land, i.e. rights to a homestead and cropping field through mapping and registration. It does not provide any legal protection of customary resource rights to commonages by groups of users. The CLRA narrowly defines commonages as common grazing areas for the members of a traditional community, whereas commonages provide more resources than only grazing. Section 31 of the Land Bill (2020) addresses this shortcoming by including rights to fishing and hunting in established conservancies, the gathering of wood fuel, building materials, forest resources for food and medicinal purposes and other purposes as are traditionally accepted by the community using the land communally.

The absence of formal legal recognition of groups’ rights to commonages makes customary land rights holder vulnerable to land grabs. A major form of this is the illegal enclosure of large tracts of communal grazing for individual grazing purposes. The absence of enforceable land rights to a clearly demarcated area of jurisdiction also implies that local communities are not able to manage their local resources in a sustainable manner. Increasingly, access to communal grazing areas resembles an open access tenure regime.

The issue of providing legally protected rights to commonages by groups of users is gradually being addressed. New application forms for customary land rights issued in 2014 now make it possible for groups and legal entities to apply for customary and leasehold rights. 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. In addition, the Programme for Communal Land Development (PCLD) is supporting the establishment of group rights in its project areas. It does so by establishing groups as legal entities in order to protect the substantial investments in infrastructure development. However, this still needs to be incorporated into the policy and legal framework.

At the same time, the Namibian government has extended legal rights over some natural resources to groups in communal areas in line with a Community Based Natural Resources Management (CBNRM) approach. Current legislation provides for the establishment of conservancies, community forests and water user associations to involve local communities in the management of wildlife, forests and rural water supplies respectively. Although the legal governance requirements are similar across resource sectors, the different laws are not always harmonised, leading to potential disputes and conflict. In addition, institutional co-ordination between relevant line ministries is not always optimal.

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 fails short of defining what the content of these rights to commonages are and provides no protection to individuals or group claimants.

The Consolidated Report on Regional Consultations (Republic of Namibia, 2018) stated that in some regions group rights in line with customary land rights were regarded as the best land tenure system for communal land. Others suggested that government should provide freehold land titles in communal areas. Equally pastoral land rights be introduced to allow extensive livestock producers to manage the land sustainably.

**GROUP RIGHTS TO COMMUNAL LAND**

Group rights abundantly exist within Communal Lands in Namibia although these are currently unregistered, vaguely defined, and only awkwardly registrable under the Communal Land Reform Act, 2002.

Group rights traditionally exist in relation to thousands of hectares of commonage (commons). Without supported formalisation opportunities, rights to these resources are left uncertain and weak. The worst affected are poorer residents, who have little or no private farmland to support themselves or alternative sources of livelihoods. These families are a substantial sector of communal land residents and prominently female headed. . . .

Group land and resource rights in customary tenure exists at different levels. In practice, the most ubiquitous set of rights is located not at tribal or sub-tribal level, but at village level. A common norm is for each village/settlement to exert primary jurisdiction and use rights to promote commonage. In practice this means that an outsider, including even a person from a neighbouring village, will think twice before setting up his house or kraal without consulting the headman who holds de facto jurisdiction over that area.
Some of the recommendations presented in Paragraph 8 dealing with public land, fisheries and forests owned by the State apply to commonages in Namibia.

Paragraph 8.2 states that States should recognize, respect and protect the legitimate tenure rights of individuals and communities, and to clearly define and publicise categories of legitimate tenure rights.

Paragraph 8.3 calls on States to recognize and protect publicly-owned land, fisheries and forests that are collectively used and managed (the commons) and their related systems of collective use and management.

Paragraph 9.2 Indigenous peoples and other communities with customary tenure systems that exercise self-governance of land, fisheries and forests should promote and provide equitable, secure and sustainable rights to those resources, with special attention to the provision of equitable access for women. Effective participation of all members, men, women and youth, in decisions regarding their tenure systems should be promoted through their local or traditional institutions, including in the case of collective tenure systems. Where necessary, communities should be assisted to increase the capacity of their members to participate fully in decision-making and governance of their tenure systems.

Paragraph 9.4 states that States should provide appropriate recognition and protection of the legitimate tenure rights of indigenous peoples and other communities with customary tenure systems, consistent with existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments. Such recognition should take into account the land, fisheries and forests that are used exclusively by a community and those that are shared and respect the general principles of responsible governance. Information on any such recognition should be publicized in an accessible location, in an appropriate form which is understandable and in applicable languages.

Paragraph 9.7 implores States to develop tenure policies and laws, taking into account the social, cultural, spiritual, economic and environmental values of land, fisheries and forests held under tenure systems of indigenous peoples and other communities with customary tenure systems. There should be full and effective participation of all members or representatives of affected communities, including women, and vulnerable and marginalized groups, when developing policies and laws related to tenure systems of indigenous peoples and other communities with customary tenure systems.

Paragraph 9.8 calls on States to protect indigenous peoples and other communities with customary tenure systems against the unauthorized use of their land, fisheries and forests by others.

As a first step, policymakers and the MAWLR should acknowledge that people in communal areas have legitimate rights to commonages, whether such rights have been formalised or not, and respect and protect those rights. The policy and legal framework should be amended and strengthened to provide procedural rules to accommodate the complexity, diversity and flexibility of tenure rights to commons. This requires that members of communities in all communal areas participate effectively in the process, to capture different customary practices across the regions. Boundaries of commonages need to be negotiated between adjacent communities and mapped. The MAWLR can build on the experiences gained by its staff in verifying and mapping private rights in communal areas, but the capacities of staff to negotiate boundaries with large groups of contenders need to be supported. They need to be sensitized to unequal power relations within and among contesting communities to ensure that all members participate.

The MAWLR, through the PCLD, has a framework in place to confer leasehold rights to groups of communal farmers after having established the boundaries of their grazing areas. The current practice requires groups to establish themselves as legal entities with appropriate governance structures before entering into a formal leasehold agreement with the state. The MAWLR should develop a legal framework for the devolution of authority to govern commons to democratically elected management institutions, without the requirement to become legal entities similar to those of conservancies and forest management committees. Such bodies should have the legal powers to develop access rules to the commons and their utilization.

The MAWLR with support from competent NGOs should empower especially marginalized and vulnerable sections of traditional communities to participate effectively in the management of the commonages. This may include training in specific skills such as holding meetings and keeping minutes, for example.
RESOLUTION OF DISPUTES OVER TENURE RIGHTS

LAND DISPUTES ARE A COMMON PHENOMENON IN COMMUNAL AREAS

In terms of most customary rules and practices, traditional authorities are regarded as the first instance to address disputes.
ISSUE 9 – RESOLUTION OF DISPUTES OVER TENURE RIGHTS

Land disputes are a common phenomenon in communal areas. The most common tenure disputes 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 terms of the prescribed procedures of land allocation. In some instances, disputes arise between members of different traditional communities over access rights to communal grazing lands. With the exception of providing for an appeals procedure, the CLRA and its regulations do not explicitly spell out which institution is responsible for the resolution of any of the conflicts mentioned above. As a result, it is not uncommon that traditional authorities, Communal land boards, and the Police may be looking into a particular dispute simultaneously. The Operational Manual for Communal land boards (2006) discusses the procedure for Land Boards to deal with people transgressing the provisions of the CLRA.

In terms of most customary rules and practices, traditional authorities are regarded as the first instance to address disputes. 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 is likely that in hearing disputes, they bring customary laws to bear on cases. These may be biased against women.

Section 3 of the traditional authorities Act 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’. In addition, the Community Courts Act, 2003 allows traditional communities to apply to establish community courts. Community courts shall be presided over by one or more Justices as well assessors appointed by the Minister. They have jurisdiction ‘to hear and determine any matter relating to a claim for compensation, restitution or any other claim recognized by the customary law’. Proceedings before a community are to be guided by the customary laws and practices of the traditional community residing in its area of jurisdiction.

Lower levels of traditional authorities – village headmen - appear to play important functions in resolving local disputes and maintaining discipline in terms of customary practices. But they are frequently ignored with some claimants taking their grievances directly to CLBs. Many women believe that village headmen, who are mostly men, are not able to grant them a fair hearing and therefore go directly to CLBs. The general practice, however, is that if no agreement can be reached at the local level, the matter is taken to successively higher levels of authority. If no solution can be found, Communal land boards will mediate between different parties. The CLRA does not explicitly invest Communal land boards with powers to address disputes but stipulates that they may perform any functions which are assigned to it by the Act. The Operational Manual for Communal land boards provides a guideline on how boards should deal with disputes. However, Traditional authorities and Communal land boards are comprised of lay persons who are not always succeeding in giving a full and fair hearing.

Section 39 of the CLRA provides for the right of customary land rights holders to appeal decisions of a traditional authority or Communal Land Board. Appeals must be lodged in writing to the Executive Director within 30 days of the decision which gave rise to such an appeal. An Appeal Tribunal will then hear the case. If the appellant is not satisfied with the outcome of the Tribunal (s)he has a right to appeal to a Magistrate’s Court or the High Court.

Important as the appeals system is in law, it is reasonable to assume that it is not easily accessible for land claimants who are not able to formulate their grievances in writing and in the official language. In addition, distances to appropriate centres to mail or send their appeals electronically are major inhibiting factors to follow the prescribed procedures.

Implementing the prescribed appeal procedures also proved challenging in some instances. The Legal Assistance Centre 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.

Participants at the Second Land Conference passed Resolution 11 which stated that
• All land related matters in communal areas must be dealt with at Traditional Courts before they are dealt with at High Court.
ISSUE 9 – RESOLUTION OF DISPUTES OVER TENURE RIGHTS

DISPUTE RESOLUTION BY TRADITIONAL LEADERS

Feedback from the Communal land boards has shown that the process of dispute settlement does not run smoothly. Communal land boards encounter obstacles to their work on a daily basis. These include the slowness of the dispute management process in cases where complaints are referred to MLR Head Office as well as the fact that many illegal land occupants appeal against CLB decisions through their private lawyers. Additional problems include:

- non-compliance with/ignoring legal procedures and provisions of the CLRA;
- reluctance of the disputing parties to submit information relevant to the dispute;
- failure/refusal to communicate and listen;
- general distrust of authority;
- political interference;
- social status;
- insufficient focus on underlying inconsistencies that give rise to the actual conflicts;
- partisan perception;
- misunderstanding the loss/risk analysis;
- failure to give new CLR applicants tolerance and respect.

Information flows from the TAs to the Land Boards are slow sometimes. A factor that further complicates dispute settlement is that some dispute parties report their contention to more than one institution at the same time (e.g. CLB, TA, and police). The police is often not aware of the CLRA’s provisions. This leads to the involvement of many different actors which creates the need for special coordination and communication. In addition, CLBs have only very limited means for the enforcement of their decisions. The CLRA does not give any clear-cut guidelines as to which cases are within the mandate of the CLBs and which cases should be handled by the TAs.


DISPUTE RESOLUTION BY TRADITIONAL LEADERS

Traditional Leaders are also limited in their ability to enforce the provisions of both the Act and the revised Laws of Ondonga adopted in 1993. Although these revised laws are widely known, evidence suggests that Traditional Leaders find it difficult to enforce them, particularly when land and inheritance disputes arise. This is due partly to many Traditional Leaders not knowing the provisions of the Act, and partly to the fact that an increasing number of people hire lawyers to defend their claims, which is said to intimidate Traditional Leaders. In addition, allegations of bribery of Traditional Leaders persist.

Traditional Leaders are also unsure about who should prosecute offenders. This conundrum has been particularly acute in cases of illegal fencing, which was alleged to be perpetrated mostly by politicians, senior government officials and wealthy and powerful people. In some instances these people are said to have bribed Traditional Leaders to obtain a piece of land. Once obtained, they fence it. When asked to remove the fences, they respond that the Traditional Leader gave them permission to erect them.

The police do not intervene in land disputes as they regard such disputes as traditional matters. They are also not familiar with the provisions of the Communal Land Reform Act. The Ministry of Lands and Resettlement was thin on the ground which limited its capacity to enforce the law.


KEY PLAYERS IN RESOLUTION OF DISPUTES

TRADITIONAL AUTHORITIES

MAWLR
The general Principles of the VGGT state in paragraph 3.A.3.1 that States should provide access to justice to deal with infringements of legitimate tenure rights. They should provide effective and accessible means to everyone, through judicial authorities or other approaches, to resolve disputes over tenure rights; and to provide affordable and prompt enforcement of outcomes. States should provide prompt, just compensation where tenure rights are taken for public purposes.

Paragraph 6.6 implores States and other parties to consider additional measures to support vulnerable or marginalized groups who could not otherwise access administrative and judicial services. These measures should include legal support, such as affordable legal aid, and may also include the provision of services of paralegals or parasurveyors, and mobile services for remote communities and mobile indigenous peoples.

Paragraph 9.11 calls on States to respect and promote customary approaches used by indigenous peoples and other communities with customary tenure systems for resolving tenure conflicts within communities consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments. For land, fisheries and forests that are used by more than one community, means of resolving conflict between communities should be strengthened or developed.

Paragraph 21 deals with the resolutions of disputes over tenure rights. As part of this paragraph 21.1 calls on States to provide access through impartial and competent judicial and administrative bodies to timely, affordable and effective means of resolving disputes over tenure rights, including alternative means of resolving such disputes, and should provide effective remedies and a right to appeal. Such remedies should be promptly enforced. States should make available, to all, mechanisms to avoid or resolve potential disputes at the preliminary stage, either within the implementing agency or externally. Dispute resolution services should be accessible to all, women and men, in terms of location, language, cost and procedures.

Paragraph 21.3 states that States should strengthen and develop alternative forms of dispute resolution, especially at the local level. Where customary or other established forms of dispute settlement exist, they should provide for fair, reliable, accessible and non-discriminatory ways of promptly resolving disputes over tenure rights.

Paragraph 21.6 states that where States are providing dispute resolution mechanisms, they should strive to provide legal assistance to vulnerable and marginalized persons to ensure safe access for all to justice without discrimination. Judicial authorities and other bodies should ensure that their staff have the necessary skills and competencies to provide such services.

The CLRA has introduced new forms of dispute resolution that enable claimants to bypass customary dispute resolution mechanisms. CLBs, the police and the Ministry are potentially involved in solving local level disputes. The CLRA provides for an appeal procedure but does not give clear guidelines on procedures and mandates for dispute resolution.

The CLRA is very clear regarding appeal procedures. But the MAWLR should introduce clear guidelines on the procedure to be followed in addressing land disputes from the local level upwards to prevent claimants playing off one institution against another. This should be done by harmonising the provisions of the traditional authorities Act and the Community Courts Act with the provisions of the CLRA. The revised procedures must clearly define the responsibilities of different actors and should be guided by the principle that where customary forms of dispute settlement exist, these should be strengthened to facilitate free and fair settlement processes. They must also be linked to the national legal framework. Local level dispute resolution mechanisms need to be non-discriminatory and sensitive to the needs of marginalised and vulnerable groups, including women. Training and capacity development is required to transform and adapt local level mechanisms (FAO, 2016). While previous skills training for handling disputes yielded satisfactory results, there is a need to continue imparting these skills to CLBs and TAs. Such training will also improve the quality of reports submitted by CLBs to the Appeal Tribunal for consideration.

Dispute settlement procedures also need to emphasise the importance of timeous delivery of decisions and their enforcement. Clear time frames should be set for hearing and deciding on a case at each level of TAs, the CLBs and the responsible section in the MAWLR.

The MAWLR should also explore different ways to provide support to aggrieved parties in disputes. It should consider approaching the Legal Assistance Centre with a view of reviving paralegals that existed until funding dried up.

It is also recommended that the MAWLR should identify the causes of land disputes in order to eliminate them before they develop into serious disputes. Often this simply involves implementing those provisions of the CLRA conscientiously and consistently which are clear in their intent, such as for example the provisions on illegal fencing.
MINING IN NAMIBIA IS A MAJOR SOURCE OF REVENUE
MINING OPERATIONS, IN THE FREEHOLD SECTOR, ARE WELL DOCUMENTED

Little is known about mineral resource extraction in communal areas despite the rising importance of mining in terms of rural development and household incomes more.
Mining in Namibia is a major source of revenue for the State and provides many people with employment. Large-scale mining operations, mostly in the freehold sector of the country, are well documented. But little is known about mineral resource extraction in communal areas despite the rising importance of mining in terms of rural development generally and household incomes more specifically.

Conditions for mining in the freehold sector differs from mining in communal areas as ‘the ownership and distribution of the benefits of land and resources are differently organised’. In the former, mining companies negotiate access and mining rights with the state and private landowners. In the latter access to mining rights needs to be negotiated with the state and community representatives such as traditional authorities and conservancies, as communities hold tenure rights to the land, or in the case of conservancies, rights to utilise wildlife.

Little has been documented as to where and how such negotiation takes place in Namibia and what kinds of controversies and tensions mineral resource extraction spawns between miners, mining companies, brokers, villagers, local authorities and the state with regard to governance of the mining operations and the distribution of the value derived from it. It is clear, however, that mining on communal land introduces a series of institutional complexities which include the following:

• Several actors such as brokers, foreign companies, community members, traditional authorities and the state are involved in mining operations and decision-making. These have different agendas and different positions of power.
• Overlapping rights of different actors frequently result in conflict amongst them. This does not only involve conflicts among operators and community members, but importantly also among different sections of communities, which contest mining claims. In terms of local customs, ‘rights and resources in communal conditions are considered the inalienable property of the community, given to a member and inherited according to lineage membership’. In addition, in terms of the CLRA people may registered customary land rights or lease agreements. This legal pluralism challenges the exclusiveness and self-evidence of a single systems, an arena where different systems ‘are contested and used as ‘weapons’ in the struggle with others over land and resource benefits’. This in turn leads to different types of interactions or encounters between actors and social practices (pp. 7-8).
• Overlapping and conflicting laws and regulations with regard to land management and the environment. Communal resource extraction is governed by a set of laws that sometimes overlap, and sometimes contradict each other. These laws are administered by different ministries. The Nature Conservation Ordinance 4 of 1975 for example was amended to create communal conservancies and is administered by the Ministry of Environment and Tourism. The CLRA sets out to create an institutional framework to ensure that customary and other land rights in communal areas are protected and is administered by the Ministry of Agriculture, Water and land Reform. While the Act itself does not refer to mining, Regulation 30 provides that every person who wants to carry out any prospecting or mining operations on communal land must notify the Chief or traditional authority of the traditional community and the relevant Communal Land Board (pp. 8-9).
• The Minerals Act, however, which is the responsibility of the Ministry of Mines and Energy, ‘is silent on the rights of those living on communal land who may be affected by mining developments’ (p. 9).

Specific issues that are not addressed in the current legislation and policies include the absence of any compensation for land lost to mining and the importance of local communities participating in negotiating fair deals with mining companies.

**Mining in communal areas was discussed at the Second National Land Conference and the only resolution on the theme states**

• That government (should) co-ordinate closely activities with regard to mining and the protection of small miners including shares by traditional authorities in such mines (Resolution 11).
The Guidelines do not say anything specifically on mining. However, the Preface states that responsible governance of tenure of land, fisheries and forests is inextricably linked with access to and management of other natural resources, such as water and mineral resources.

Paragraphs 3.A.3.1 of the general principles of the Guidelines implore States to recognise and respect legitimate tenure rights and safeguard them against threats and infringements. In addition to promoting and facilitating the enjoyment of legitimate tenure rights, States should also take active measures to promote and facilitate the full realization of tenure rights or the making of transactions with the rights, such as ensuring that services are accessible to all. States should also provide access to justice to deal with tenure problems and prevent disputes, violent conflicts and corruption.

The general principles also deal with non-state actors, which includes businesses. Paragraph 3.A.3.2 calls on business enterprises to act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others. They should include appropriate risk management systems to prevent and address adverse impacts on human rights and legitimate tenure rights. Business enterprises should provide for and cooperate in non-judicial mechanisms to provide remedy, including effective operational-level grievance mechanisms, where appropriate, where they have caused or contributed to adverse impacts on human rights and legitimate tenure rights. Business enterprises should identify and assess any actual or potential impacts on human rights and legitimate tenure rights in which they may be involved. Where business enterprises are owned by the state, the latter should take additional steps to protect against abuses of human rights and legitimate tenure rights.

Paragraph 3.B discusses ten principles of implementation. These include a holistic and sustainable approach which recognizes that natural resources and their uses are interconnected and adopting an integrated and sustainable approach to their administration.

The principle of consultation and participation raised in paragraph 3.B.6 runs through the Guidelines and means engaging with people who are having legitimate tenure rights that could be affected by decisions, prior to decisions being taken and responding to their contributions. In this process, existing power imbalances between different parties need to be taken into consideration to ensure active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.

Paragraph 5.6 calls on States to clearly define the roles and responsibilities of agencies dealing with tenure of land, fisheries and forests and should ensure coordination between implementing agencies, as well as with local governments, and indigenous peoples and other communities with customary tenure systems. The same recommendations can be applied to mining in communal areas.

Paragraph 6.5 suggests that States should establish policies and laws to promote the sharing, as appropriate, of spatial and other information on tenure rights for the effective use by the State and implementing agencies, indigenous peoples and other communities, civil society, the private sector, academia and the general public. National standards should be developed for the shared use of information, taking into account regional and international standards.

Paragraph 6.6 implores States and other parties to consider additional measures to support vulnerable or marginalized groups who could not otherwise access administrative and judicial services. Such measures should include legal support, such as affordable legal aid, and may also include the provision of services of paralegals or para-surveyors, and mobile services for remote communities and mobile indigenous peoples.

Paragraph 8.2 states that apart from recognising legitimate tenure rights on land owned by the state, the state should clearly define and publicize categories of legitimate tenure rights through a transparent process, and in accordance with national law.

Paragraph 8.6 calls on States to develop and publicize policies covering the use and control of land, fisheries, forests and other natural resources such as minerals that are retained by the public sector and should strive to develop policies that promote equitable distribution of benefits from State-owned land, fisheries, forests and other natural resources such as minerals. Such policies should recognize the range of tenure rights and right holders. Policies should specify the means of allocation of rights, such as allocation based on historical use or other means.

Paragraph 9.9 reiterates paragraph 9.4 and adds that before initiating any project or before adopting and implementing legislative or administrative measures affecting the resources for which the communities hold rights, States and other parties should hold good faith consultation with indigenous peoples. Such projects should be based on an effective and meaningful consultation with indigenous peoples, through their own representative institutions in order to obtain their free, prior and informed consent.
The MAWLR must ensure that any mining activity in communal areas should benefit local communities. In this regard, a resolution taken at the Second Land Conference recommended that TAs should benefit through shares in mining operations. The line ministry should consider this resolution. It is recommended, however, that regulations need to be developed to ensure that such shares and related dividends do not benefit TAs personally but are spread as equally as possible through affected communities. The MAWLR must ensure that where mines are developed in marginalised communities such as the Ovahimba, their rights are respected and protected and that they reactive their fair share of benefits. The Ministry should seek the assistance of civil society and other non-governmental institutions to develop targeted interventions aimed at supporting marginalised communities to engage meaningfully with Government and mining businesses.
Tenure rights of the San featured strongly as a concern of marginalised groups during consultations in preparation of the Second National Land Conference.
Current land law legislation does not refer to marginalised communities specifically. But Government has acknowledged their special plight in a number of ways. An example is, the Division of Marginalised Communities, in the Office of the Vice President to protect and promote the interests of marginalised people. More pertinent perhaps is that the MAWLR has settled many San households on resettlement farms and provided support in the form of a resident official. The Office of the Prime Minister has bought several farms adjacent to Etosha in support of San communities.

These supportive measures notwithstanding, San communities in communal areas continue to be vulnerable to land invasions. Tenure rights of the San are treated strongly as a concern of marginalised groups during consultations in preparation of the Second National Land Conference. Many members of the San community did not know whether they had any right to the land they were settled on and wanted their tenure rights clarified. Hunter gatherer communities practice lower impact land use strategies than livestock farmers, leading to perceptions by the latter that their land is underutilised and should be made available for grazing of cattle. San communities constantly have to defend their land rights against incoming groups, mostly cattle farmers, who are more powerful and have more resources.

Threats to San land rights have taken several forms. The first involved cattle farmers driving in their cattle to graze on pastures claimed by the San after cutting the southern veterinary fence. Government acted swiftly to confiscate the livestock, but invasions continued. A criminal legal case against the invaders in 2015 was filed in terms of the Forst Act of 2001 that dragged on for 3 years. A civilian case before the High Court followed in 2018 which decided in favour of the marginalised communities and ordered the illegal grazers to leave (p. 205).

A second infringement on San land rights involved the enclosure of large tracts of land for private grazing in NââJanga conservancy. In 2013 a legal case was brought against the individuals who had fenced farms in contravention of the CLRA. In 2016 the court found in favour of the San and ordered the removal of fences. However, the court’s decision was not implemented by the Otjozondjupa Communal Land Board or the !Kung traditional authority. Only a few of the fences had been removed in 2019. ‘Thus, although the legal rights of the conservancy have technically been upheld in court, in practice these rights are still being violated’ (p. 213).

In another context, Kwe communities in the Babwata National Park Kwe stated that the government did not consult them when the core area was demarcated and fenced. In 2016 the core area was extended, once again without adequate community consultation. These combined actions have impacted negatively on the seasonal collection of veld foods, access to traditional medicine, and the application of other traditional knowledge and cultural livelihood practices (Begbie-Clench and Gravotta, 2020, p. 350). Living in a conservation area had many disadvantages such as restrictions on movement, dispossession of land and limitations and conflicts regarding livelihood activities. Some believed that ‘the disadvantages living in a conservation area outweighed the benefits’ (Ibid.).

More recently, the then Ministry of Land Reform with financial support from Germany and the EU had planned to develop 9 small-scale farms in Tsumkwe West through the Programme for Communal Land Development. The NââJaングa conservancy successfully stopped the project, fearing that illegal fencers from the west would simply occupy the newly developed farms. The MLR revised its plan and agreed to develop only one model farm for training purposes as well as water and tourism infrastructure.

Hays and Hitchcock (2020) concluded their discussion of land rights of the San by arguing that ‘even in these conservancies, which are the best scenarios in the country… San communities must constantly defend their land against incoming groups, who are stronger, have more resources, and engage in more intensive land use strategies’.

Respect for local tenure customs and practices was enshrined in Resolution 13 of the National Conference on Land Reform and the Land Question in 1991. It acknowledged the constitutional right of Namibians to live anywhere in the country but resolved that ‘in seeking access to communal land, applicants should take account of the rights and customs of the local communities living there’.

The National Land Policy of 1998 was developed around the Constitutional provision that all persons shall be equal before the law and no one shall be discriminated against on the grounds of sex, colour, ethnic origin, religion, creed or social or economic status. It also states that tenure rights granted in terms of the Policy and subsequent legislation will include all renewable natural resources on the land, conditional on sustainable use and subject to details of sectoral policy and legislation. The National Land Policy also recognises the freedom of movement, residence and settlement of Namibian citizens in terms of Article 21 of the Constitution, but states that rights to settlement are contingent upon the availability of suitable land and the approval by competent local authorities. It does not mention land rights of marginalised communities specifically it focused on the poor.

The National Resettlement Policy of 2001 lists the San community on top of its list of main target groups for resettlement.

The CLRA does not deal with land rights of marginalised groups specifically. Its aim is to improve tenure security of all customary land rights-holders and provide alternative forms of tenure in the form of long-term leasehold. It explicitly provides for the designation of parts of communal land for agricultural development purposes subject to the relevant TAs consenting. With regard to granting leaseholds to communal land, the CLRA requires that CLBs must have due regard to the management and utilisation plans of conservancies and refuse to grant a right of leasehold if the land in question was to be used in a way that defeated the objectives of such a plan.
LAND INVASIONS AND ILLEGAL FENCING OF LAND OF THE IKUNG TRADITIONAL COMMUNITY

The !Kung Traditional Community is one of the many traditional communities existing in Namibia. In July 2003 the !Njagna Conservancy was registered as a Communal Conservancy and the !Njagna Conservancy Committee was also registered in terms of s 24A of the Ordinance. The !Njagna, Communal Conservancy covers an area of 9120 square kilometres and is inhabited by approximately 5000 people of the San origin. The members of the Conservancy are responsible for protecting and managing their own resources sustainably, particularly the wildlife populations. In pursuance of their goal to protect and sustainably manage the natural resources of the Conservancy the Conservancy Committee adopted a management plan which divides the Conservancy into various zones; namely the core wildlife zones, the mixed farming zones, tourism zones, current settlement zones and the sensitive zone.

During the years between 2002 and 2013 people from other Regions (mainly the Oshikoto, Ohangwena, Oshana, Oshana and Khomas Regions) started to arrive in the !Njagna Communal Conservancy and started to settle there. (They) set up boreholes and erected fences on the areas they occupy. (The !Njagna conservancy committee) alleged that the fences which the respondents have erected were not erected in respect of a homestead, cattle pen or water trough or crop field as envisaged in Regulation 27 of the Regulations in respect of the Communal Land Reform Act, 2005 (it) furthermore alleged that apart from the fact that the fences were erected in contravention of the Regulations, the settlement by the respondents disregarded the management plan of the conservancy and the settlement and erection of fences interfered with the movement of the wildlife and denied or severely restricted the rightful inhabitants’ access to grazing and other resources.

(Paragraph 3.1) calls on States to recognize and respect all legitimate tenure right holders and their rights and should take reasonable measures to identify, record and respect such rights, whether formally recorded or not; to refrain from infringement of tenure rights of others; and to meet the duties associated with tenure rights. These rights should be safeguarded against infringements.

Paragraph 3.4 implores States to provide access to justice to deal with infringements of legitimate tenure rights. They should provide effective and accessible means to everyone, through judicial authorities or other approaches, to resolve disputes over tenure rights; and to provide affordable and prompt enforcement of outcomes.

The principles of implementation outlined in Paragraph 3B 1-10 are essential to contribute to responsible governance of tenure of land, fisheries and forests. These include the following:

**Human dignity:** recognizing the inherent dignity and the equal and inalienable human rights of all individuals.

**Non-discrimination:** no one should be subject to discrimination under law and policies as well as in practice.

**Holistic and sustainable approach:** recognizing that natural resources and their uses are interconnected, and adopting an integrated and sustainable approach to their administration.

**Equity and justice:** recognizing that equality between individuals may require acknowledging differences between individuals, and taking positive action, including empowerment, in order to promote equitable tenure rights and access to land, fisheries and forests, for all, women and men, youth and vulnerable and traditionally marginalized people, within the national context.

**Rule of law:** States should adopt a rules-based approach through laws that are widely publicized in applicable languages, applicable to all, equally enforced and independently adjudicated, and that are consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments.
Paragraphs 4.4 and 4.5 call on States to legally recognise those legitimate rights which are yet to be officially recognised and/or recorded, and to ensure that people are not subject to arbitrary expulsion and that their legitimate tenure rights are not otherwise extinguished or infringed. All forms of tenure should provide all persons with a degree of tenure security which guarantees legal protection against forced evictions that are inconsistent with States’ existing obligations under national and international law, and against harassment and other threats.

Paragraph 4.9 reiterates that States should provide access through impartial and competent judicial and administrative bodies to timely, affordable and effective means of resolving disputes over tenure rights, including alternative means of resolving such disputes, and should provide effective remedies, which may include a right of appeal, as appropriate. Such remedies should be promptly enforced and may include restitution, indemnity, compensation and reparation.

Paragraph 5.3 underscores the need for States to ensure that policy, legal and organizational frameworks for tenure governance recognize and respect, in accordance with national laws, legitimate tenure rights including legitimate customary tenure rights that are not currently protected by law; and facilitate, promote and protect the exercise of tenure rights. Frameworks should reflect the social, cultural, economic and environmental significance of land, fisheries and forests. Frameworks should reflect the interconnected relationships between land, fisheries and forests and their uses, and establish an integrated approach to their administration.

Paragraph 7.1 calls on States to establish safeguards to avoid infringing on or extinguishing tenure rights of others, including legitimate tenure rights that are not currently protected by law; and facilitate, promote and protect the exercise of tenure rights. In particular, safeguards should protect women and the vulnerable who hold subsidiary tenure rights, such as gathering rights.

Paragraph 9 is dealing with tenure rights of indigenous communities with particular focus on marginalised groups. Paragraph 9.4 reiterates the need for States to provide appropriate recognition and protection of the legitimate tenure rights of indigenous peoples and other communities with customary tenure systems, taking into account the land and forests that are used exclusively by a community and those that are shared, and respect the general principles of responsible governance.

In terms of Paragraph 9.8 States should protect indigenous peoples and other communities with customary tenure systems against the unauthorized use of their land and forests by others.

Paragraph 9.9 calls on States and other parties to hold good faith consultation with indigenous peoples before initiating any project or before adopting and implementing legislative or administrative measures affecting the resources for which the communities hold rights. Such consultations should involve their own representative institutions in order to obtain their free, prior and informed consent under the United Nations Declaration of Rights of Indigenous Peoples and with due regard for particular positions and understandings of individual States. Consultation and decision-making processes should be organized without intimidation and be conducted in a climate of trust.

The policy and legal framework of the Government on tenure rights of all customary tenure rights holders is clear. While it does not single out marginalised groups for protection in the CLRA, the Ministry of Land Reform has come to the defense of San land rights on several occasions. These efforts notwithstanding, infringements on the tenure rights of marginalised communities continue. In line with the policy and legal framework the MAWLR should increase its efforts to protect the legitimate rights of marginalised groups by providing groups of land users legal protection against infringement of their rights. The provisions of the CLRA should be implemented without fear or favour.

In line with the CLRA marginalised groups have exercised their rights to turn to statutory courts to obtain relief with regard to illegal fencing. The court found in their favour and ordered illegal fences to be taken down, but the decision was not fully implemented. The MAWLR and CLBs should therefore not only ensure that marginalised groups have access to impartial courts, but that the decisions of such courts are implemented promptly. This includes possible restitution, and compensation rulings.

The CLRA provides that if applications for leasehold rights interfere with management plans of conservancies, such applications should be rejected. The MAWLR and MET should improve the co-ordination of their efforts to ensure that the legitimate tenure rights of the San and other marginalised groups to conservancies and agricultural land be respected and protected. Any transfer of tenure rights to a project should be discussed with affected communities and the FPIC obtained. Where the co-operation of TAs and conservancy management committees is poor, both line ministries should seek the assistance of NGOs to mediate.
Corruption remains a thorn in the flesh in terms of equitable land allocation and management across Namibia

Allegations of corruption in the allocation of customary land rights in Namibia are made regularly. These are mostly based on anecdotal evidence.
Corruption involving civil servants, chiefs, monarchs, banks and corporates, among others, remains a thorn in the flesh in terms of equitable land allocation and management across southern Africa and Namibia is no exception.

Paying for an allocation of land for residential and cropping purposes is not uncommon in Namibia’s communal areas. In crop growing regions such payments to traditional leaders, mostly headmen, were reasonably modest and were not regarded as a price paid for owning land, but rather as symbolic payment in recognition of the headman’s jurisdiction and are referred to in central northern Namibia as ombadu yekaya. Increasingly traditional authorities seem to deviate from the agreed amount of N$ 600 for an allocation, raising the price in relation to the perceived wealth of a buyer.

Allegations of corruption in the allocation of customary land rights in Namibia are made regularly. These are mostly based on anecdotal evidence. However, the frequency of newspaper reports on corrupt land allocation practices in communal areas suggest that there is a problem of governance and accountability.

Chiefs and traditional authorities are accused from time to time of being corrupt because they are selling communal land to private investors for their own benefit at the expense of poor communities. These allegations are most frequent in the north-eastern parts of the country, where perennial rivers make large-scale irrigation possible.

Corrupt practices involving the allocation of customary land rights are more difficult to prove largely due to their informal nature. It is alleged corruption hinders women’s access to land ownership and affects their use and control over land. Moreover, the increasing monetisation of customary land rights and the concomitant development of an unregulated informal land market where customary land rights are transacted by private people and traditional authorities, increases the risks of traditional authorities in particular abusing their customary powers.

The CLRA is rather weak in terms of providing a comprehensive governance framework for traditional authorities at various levels. In terms of the Act, traditional authorities are accountable to Communal land boards for allocating or cancelling customary land rights. The latter have to ensure that allocations have been made within the provisions of the Act and that new allocations conform to maximum land sizes prescribed in the regulations.

Section 42 of the CLRA prohibits the payment for customary land rights with the exception of payments prescribed in the regulations for having customary land rights registered. However, in 2004 the then Ministry of Land Reform agreed to continue to allow the payment of ombadu yekaya in central northern Namibia (Mendelsohn and Nghidengwa, 2017). The Regulations of the CLRA specify the amounts payable for applications in terms of the Act, the issuing of a certificate or other documents and appeals as lodged.

PAYMENTS FOR LAND, UUKWANGALI

Hundreds of struggling farmers are being charged bucket-loads of money to secure access to grazing land controlled by the chief of Uukwangali traditional authority, Eugene Siwombe Kudumo, with some farmers said to be in arrears of between N$ 23,000 and N$ 100,000…a part of the payment required goes to the traditional authority for administrative purposes, while the other part goes to the chief as a “token of appreciation”. Affected farmers…revealed that they were each made to pay N$ 6,000 for administration, N$ 6,000 for the chief, and N$50 per head of cattle. However the grazing rights payments have also been backdated to as far as 2014, leaving many of the drought-affected farmers under piles of debt.

Source: Nangoya, P. and Nghidengwa, M. Uukwangali milks farmers. Confidénte, 11.7.2019

ILLEGAL LAND SALES

In 2012, Ndinelago Penehupifo Mockachwa decided to sell a portion of her mahangu field at Chakweenyanga village near Ogwediva to businessman Tobias Kutumbeni for N$ 230 500. Kutumbeni relates the story: “On the 24th of September 2012, I bought a piece of land from Miss Mockachwa at the agree price of N$230 500, which I paid in full. [Headman Daniel] Kayili refused to give me a letter so that I can get the leasehold right from the Oukwanyama traditional authority. On 1 June 2015 Kayili took me to [Senior Headman of Onamutayi village] Shipanga, so that I can get the leasehold right. Shipanga then requested me to pay him N$5 000 in cash and to excavate an earthen dam for him at his homestead at Onamutayi. I paid he amount in full and I also completed the excavation of the dam to the value of N$ 195 000. On 25 September 2015 I also paid Kayili N$ 11 000 and he issued me with the leasehold right.” Shipanga confirmed the payment, while Kayili at first refused to issue the leasehold right to Kutumbeni. [Headman] Kayili said: “At first I did not want to get implicated in the illegal sale of land and that is why I refused to issue him with a consent letter to occupy land in my village. Sales of communal land are illegal and if anything goes wrong, as a village headman, I will be implicated. I only gave him permission after the Senior headman get (sic) involved”.

Paragraph 3.1.5 of the general principles calls on States to prevent corruption in all forms, at all levels, and in all settings. In addition, implementing agencies and judicial authorities should engage with civil society, user representatives and the broader public to improve services and endeavour to prevent corruption through transparent processes and decision-making (paragraph 5.8).

Paragraph 6.9 calls on States and non-state actors to endeavour to prevent corruption with regard to tenure rights. States should do so particularly through consultation and participation, rule of law, transparency and accountability and by adopting and enforcing anti-corruption measures including applying checks and balances, limiting the arbitrary use of power, addressing conflicts of interest and adopting clear rules and regulations.

Paragraph 9.12 of the Guidelines highlight the need for States and non-state actors to endeavour to prevent corruption in relation to tenure systems of indigenous peoples and other communities with customary tenure systems, by consultation and participation, and by empowering communities.

This is reiterated in paragraph 10.5 adding the importance of increasing transparency, holding decision-makers accountable, and ensuring that impartial decisions are delivered promptly.

With regard to the unregulated sales of customary tenure rights, paragraph 11.7 calls on the State and non-state actors to adhere to applicable ethical standards. They should publicize and monitor the implementation of these standards in the operation of markets in order to prevent corruption, particularly through public disclosure.

All forms of transactions in tenure rights as a result of investments in land, fisheries and forests should be done transparently in line with relevant national sectoral policies and be consistent with the objectives of social and economic growth and sustainable human development focusing on smallholders (paragraph 12.3).

Contracting parties should provide comprehensive information to ensure that all relevant persons are engaged and informed in the negotiations and should seek that the agreements are documented and understood by all who are affected (paragraph 12.11).

Paragraph 17.5 stresses the importance of making information on tenure rights easily available to all, subject to privacy restrictions. States and non-state actors should further endeavour to prevent corruption in the recording of tenure rights by widely publicizing processes, requirements, fees and any exemptions, and deadlines for responses to service requests.

The CLRA has improved accountability of TAs in particular through the establishment of CLBs. These have to ensure that the confirmation of existing customary tenure rights and allocation of new ones are done in accordance the CLRA. But the Act does have any provisions that enhance accountability downwards. The MAWLR should therefore consider to revise and amend the CLRA to reflect a no-tolerance to corruption approach through improved transparency and accountability of institutions involved in land governance. It should put checks and balances in place to reduce the risks of corruption. CLBs, for example, should be explicitly empowered to investigate alleged corruption in the allocation or cancellation of land. The CLRA must be amended to improve transparency and accountability by making it obligatory for TAs to be accountable to their subjects at all levels of customary land administration for decisions taken on land transactions. The Ministry should consider empowering local communities and civil society to act as watchdogs by involving them in land allocation and cancellation decisions. Where large-scale tenure transactions are contemplated, the law should require that communities in whose areas such transfers are proposed be given all available information and be included in consultations and negotiations. The principle of FPIC should become a legal requirement for large-scale land transactions.
The objective of CBNRM in Namibia is to improve the management of land based natural resources such as water, wildlife, forest, fisheries and rangelands.
Under the Community Based Natural Resources Management (CBNRM) approach, communities in rural areas can obtain tenure rights to certain natural resources. 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). 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.

One challenge is that all three land-based resources have their own policy and legal framework providing for community based natural resources management, which is not equalled in the land sector. The multiplicity of sector-specific management committees is not only a drain on community resources but increases the risk of disputes.

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). 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. However, conservancies have no powers with regard to the administration of land rights. They have no powers to allocate or cancel 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).

A frequent problem encountered in conservancies is human wildlife conflict and a general perception that compensation for losses suffered as a result of wildlife are not adequate. During the Regional Consultations participants recommended that Government should increase compensation ‘and that the Ministry of Environment and Tourism puts proper measures in place to reduce conflicts while problematic animals be removed from the community. It was stressed that compensation/offset be equivalent to the market value of the animal killed by predators and crops destroyed by wild animals. Regions also felt that they be afforded rights to utilise wild animals for personal use/consumption’ (Republic of Namibia, 2018).

Although the management of conservancies falls outside the scope of the CLRA and the MAWLR, the National Land Policy proclaimed in 1998 that ‘tenure rights allocated according to this policy and consequent legislation will include all renewable resources on the land, conditional on sustainable use and subject to details of sectorial policy and legislation’.

The CLRA provides for representation of conservancies on Communal land boards and stipulates that where an application for leasehold for land which forms part of a conservancy is received, the Communal Land Board may only approve such application if it is satisfied that the land applied for does not defeat the aims of the management or utilisation plan of the conservancy.

### CHALLENGES OF INTEGRATED RESOURCES MANAGEMENT

The development of community-based approaches to resource management in several sectors such as forestry, wildlife/tourism and water poses potential institutional problems for local communities. There is a risk that a plethora of sector-specific committees each under the authority of a specific Ministry or government department will be created at community level.

In reality there is a large degree of compatibility between institutional attributes of forestry management committees, water point committees and conservancies. However, there is little concerted effort by the government departments concerned to integrate the approaches, although some isolated attempts exist. There is a need for greater cooperation at both the policy and the extension level. Water might be managed at village level on the basis of a single water point, whilst forest management might involve several villages. Similarly, the conservancy might cover a large area and include within its boundaries more than one forest management committee.

Links need to be made between these different institutional levels of decision-making and management. While government might be compartmentalized into sectors, communities manage resources holistically. Already a lot is being expected of communities in terms of time and human resources and the ideal would be to develop a policy and legislative framework which consolidates the management of natural resources at the community level into one management institution...The absence of statutorily recognized community property rights is viewed by some as a major constraint to the CBNRM approach.

Resolution 18 of the Second Land Conference deals with wildlife utilisation and management and resolved that

- Traditional authorities should avoid allocating land to people in wildlife ‘corridors’.
- The Nature Conservation Ordinance, 1975 (Ord. 4 of 1975) should be repealed and Protected Management Areas Bill should provide proper administration and management of human wildlife conflict (sic).
- Any measure to settle people or for people to settle in wildlife corridors should be discouraged/not considered

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. 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. The objectives of the National Water Policy and the Act are to provide for the full transfer of ownership and management 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 (WPA) 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’. 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.

The extent to which these different community-based governance structures have used their powers is not known. On a formal legal level, however, some of these powers make inroads into the powers customarily enjoyed by TAs. Although not well documented, conflicts over jurisdiction between TAs and community-based institutions have occurred from time to time. Overlapping legal mandates of several institutions and ministries contributes to this.
Paragraph 1.1 of the Guidelines states that the aim of the Guidelines is to improve the governance of tenure of land, fisheries and forests for the benefit of all stakeholders, but with a specific focus on marginalised groups. Specific aims of the Guidelines are to achieve food security, the progressive realisation of the human right to adequate food for all, eradication of poverty, social stability, rural development and protection of the environment.

Paragraph 1.2 of the Guidelines seeks to strengthen the capacities and operations of implementing agencies; judicial authorities; local governments; organizations of farmers and small-scale producers, of fishers, and of forest users; pastoralists; indigenous peoples and other communities; civil society; private sector; academia; and all persons concerned with tenure governance as well as to promote the cooperation between the actors mentioned.

Paragraphs 3B5 and 3B6 respectively refer to a holistic and sustainable approach to land, fisheries and forestry and consultation and participation. The holistic approach should recognize that natural resources and their uses are interconnected and adopting an integrated and sustainable approach to their administration. Consultation and participation requires engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.

On policy and legal frameworks related to tenure, paragraph 5.3 calls on States to provide frameworks that are non-discriminatory and promote social equity and gender equality. Frameworks should reflect the interconnected relationships between land, fisheries and forests and their uses, and establish an integrated approach to their administration. Paragraph 5.6 emphasizes the need for States to clearly define the roles and responsibilities of agencies dealing with tenure of land, fisheries and forests. They should ensure coordination between implementing agencies, as well as with local governments, and indigenous peoples and other communities with customary tenure systems. States and other parties should regularly review and monitor policy, legal and organizational frameworks to maintain their effectiveness (Paragraph 5.8).

Paragraph 25.4 advises that when conflicts arise, States and other parties should strive to respect and protect existing legitimate tenure rights and guarantee that these are not extinguished by other parties.
Developing a land reform programme in both the freehold and communal sectors of Namibia was accompanied by national consultation and participation processes.
The process of developing a land reform programme in both the freehold and communal sectors of Namibia was accompanied by national consultation and participation processes. The start to this was the first National Conference on Land Reform and the Land Question in 1991, where 500 participants from across the country discussed land issues and passed 24 resolutions. Although these were not binding, they provided government with important guidelines for the development of a policy, legal and institutional framework for land reform.

In 1996 government hosted a Consultative Conference on Communal Land Administration. Just over two hundred representatives of traditional authorities from across the country deliberated for three days on the Communal Land Bill. The outcome of these deliberations were several amendments to the Bill, in particular with regard to the proposed land boards, which were incorporated into the Communal Land Reform Act of 2002.

At the end of 2005 the Ministry of Land Reform invited about 70 people representing Land Boards, traditional authorities, line ministries and other stakeholders to a National Stakeholders Conference for three days to share their experiences with and assessments of the Communal Land Reform Act and propose amendments to the Communal Land Reform Act, Act No.5 of 2002. The theme of the Conference was Improved Land Legislation for Communal Land Administration. According to the proceedings of the Conference, a total of 15 presentations were made by 12 Communal land boards, the Ministry of Environment and Tourism, Namibia National Farmers’ Union and the Division of Land Boards, Tenure and Advice (Ministry of Lands and Resettlement, 2005). Fifty-five resolutions were discussed at the Conference, of which 25 were rejected and 30 adopted.

In the late 2000s, the then Minister of Lands and Resettlement initiated a process to amend and consolidate the Agricultural (Commercial) Land Reform Act 1995 (ACLRA) (as amended) with the Communal Land Reform Act, 2002 (CLRA) (as amended) into one Land Act. The Acts were consolidated into the Draft Land Bill and subjected to four regional consultations before being discussed at the Land Bill Stakeholders' National Consultative Workshop in Windhoek in July 2010. The purpose of the regional consultations and the national conference was to give key stakeholders a chance to discuss the proposed amendments and consolidation of the two Acts.

Another set of regional consultations followed in preparation for the Second Land Conference in 2018. The Consolidated Report on Regional Consultations in Preparation for the Second National Land Conference (Republic of Namibia, 2018) described the nature of regional consultations as follows:

In line with the Government Policy regarding consultation of people in any decisions affecting them, the workshops mainly focused on updating Regions on the progress made with regard to the implementation of the Twenty Four (24) Resolutions that were adopted during the 1st National Land Conference and Land Question in 1991. At the same time, the consultations accorded the Regions an opportunity to propose measures that could enhance the sustainable Land Reform Programme informed by the aspirations of the Namibian people.1

Discussions were structured around 12 key issues that emerged during consultations in 2017 and regions were expected to express their views on the implementation of the 1991 Land Conference resolutions through validation of the 2017 Regional Consultative Reports.

The Second National Land Conference was held in the capital in October 2018. Over 825 invited participants discussed land issues over a period of 5 days. An estimated 70% of invited participants were representatives of central, regional and local government, political parties and traditional authorities. A large number of resolutions were passed, some of which were implemented almost immediately, such as the Commission of Inquiry into Ancestral Land Rights, while others require more planning and preparation.

These initiatives have shown government’s willingness to consult with stakeholders in the land sector and to take recommendations and suggestions on board. However, it is the opinion of the author that the scope of discussions and resolutions taken at the Second National Land Conference could have been more comprehensive if invited participants were more representative of customary land rights holders. The time and resources availed to regional consultations were limited to two or three days of consultations per region, thus precluding visits to villages. This meant that many pressing land administration and governance issues experienced by local land rights holders were not captured and presented to the Land Conference. Examples include dispute resolution mechanisms discussed above, as well as the issue of TAs not being required to consult communities under their jurisdiction about major land alienations or to be held accountable for their actions by their subjects. Specific governance issues affecting women such as secondary tenure rights to natural resources, for example, were also largely ignored. In some instances, written inputs of women’s organisation were listed as appendices but not attached to regional reports, as for example in Kavango East and West. Their specific concerns could thus not be shared with conference participants, which may help to explain why the word ‘women’ does not appear once in the resolutions regarding communal areas.
Paragraph 3.B.6 of the Implementing Principles sets out the importance of engaging with and seeking the support of people with legitimate tenure rights who could be affected by decisions before such decisions are being taken and responding to their contributions. This should take existing power imbalances between different parties into account and ensure active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.

Paragraph 3.B.8 highlights transparency as an important implementation principle. It states that policies, laws and procedures decisions are clearly defined and widely publicized in applicable languages and in formats accessible to all. States should also improve mechanisms for monitoring and analysis of tenure governance in order to develop evidence-based programmes and secure on-going improvements (paragraph 3.B.10).

Paragraphs 4.4 and 4.10 emphasise the importance of participation and consultation in the recognition of different forms of tenure. In particular, States should facilitate the participation of users of land, fisheries and forests in formulation and implementation of policy and law.

On policy, legal and organisation frameworks, paragraph 5.5 calls on States to develop relevant policies, laws and procedures through participatory processes involving all affected parties, ensuring that both men and women are included from the outset. Where States own or control land, fisheries, forest and other natural resources they should develop and publicize policies covering the use of these and should strive to develop policies that promote equitable distribution of benefits from State-owned land, fisheries and forests. Policies should take into account the tenure rights of others and anyone who could be affected should be included in the consultation process consistent with the principles of consultation and participation of these Guidelines (Paragraph 3.B.10).

Paragraph 26.2 calls on States to set up or to use existing national multi-stakeholder platforms to implement, monitor and evaluate the impact of the Guidelines on tenure, food security, the realisation of the right to adequate food, and sustainable development. This process should be inclusive, participatory, gender sensitive, implementable, cost effective and sustainable.

How can the VGGT be used to resolve the challenges?

It is recognized and adequately provide for a deep engagement with Civil Society Organizations (CSOs). These organizations can provide necessary checks and balances on government decision-making during the development and implementation of land policies. Effective opportunities for feedback and iterative processes with CSOs and other special interest groups should therefore be built into the consultative process. The deeper the engagement with such groups, the more enriched and the higher the degree of public acceptance and ownership will the policy be.

The MAWLR should also

‘...can be done in a variety of ways including the publication and circulation of discussion papers or representation of various categories of land users before Commissions of Enquiry or policy steering committees backed by strong inter-disciplinary expert support. In doing this, care must be taken to ensure that all categories of the land using public, especially women, are reached. In this way, dominance of established land sector institutions and other interest groups whose roles and mandates may need to change in the course of land reforms, will be neutralized.’

The MAWLR should also

‘recognize and adequately provide for deep engagement with Civil Society Organizations (CSOs). These organizations can provide necessary checks and balances on government decision-making during the development and implementation of land policies. Effective opportunities for feedback and iterative processes with CSOs and other special interest groups should therefore be built into the consultative process. The deeper the engagement with such groups, the more enriched and the higher the degree of public acceptance and ownership will the policy be.

It is imperative the MAWLR ensures that women have ‘equal access to and representation on all structures that are responsible for land management and administration’. The Framework and Guidelines on Land Policy in Africa developed by the AUC-ECA-AfDB Consortium advises that ‘this is all the more necessary in the context of land policies which seek the documentation of land rights [and] the empowerment of decentralised institutions in the administration of land at the local level...’

The Implementation Principles of the Guidelines also suggest that the MAWLR makes relevant policies, laws and decisions available to affected parties in vernaculars and formats that people can understand. It should consider how best to disseminate relevant reports of subject matter specialists on land governance. One possibility is to simplify sections of such reports that are directly relevant to land users. Another would be to integrate relevant findings into a draft land policy which could then be disseminated for local discussions.
CONCLUSION

The VGGT draw attention to the importance of monitoring the appropriateness and impacts of land policy and law. One of its implementing principles calls on States to continuously improve mechanisms for monitoring and analysis of tenure governance in order to develop evidence-based programmes and secure ongoing improvements. In addition

Paragraph 5.8 recommends that States and other parties should regularly review and monitor policy, legal and organizational frameworks to maintain their effectiveness. Implementing agencies and judicial authorities should engage with civil society, user representatives and the broader public to improve services and endeavour to prevent corruption through transparent processes and decision-making. Information about changes and their anticipated impacts should be clearly stated and widely publicized in applicable languages.

Paragraph 8.11 states that States should monitor the outcome of [land] allocation programmes, including the gender-differentiated impacts on food security and poverty eradication as well as their impacts on social, economic and environmental objectives, and introduce corrective measures as required. This can be facilitated by the continuous collection of sex desegregated data on land allocation. With regard to the implementation of the VGGT.

Paragraph 26.2 encourages States to set up multi-stakeholder platforms and frameworks at local, national and regional levels or use such existing platforms and frameworks to collaborate on the implementation of these Guidelines; to monitor and evaluate the implementation in their jurisdictions; and to evaluate the impact on improved governance of tenure of land, fisheries and forests, and on improving food security and the progressive realization of the right to adequate food in the context of national food security, and sustainable development. This process should be inclusive, participatory, gender sensitive, implementable, cost effective and sustainable. In carrying out these tasks, States may seek technical support from regional and international bodies.

The MAWLR must mobilise sufficient resources, both financial and human, to strengthen its capacity to monitor the impact of tenure policy on land users in general, and women, vulnerable and marginal groups in particular. It should review its current monitoring methodology and continuously develop capacity of its staff to carry out this process. Monitoring will be most cost effective if it is devolved to regional offices.