

**Controlling access to water and  
land: *De jure* and *de facto* powers  
of Water Point Committees**

Wolfgang Werner

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### **Authors**

Wolfgang Werner  
DRFN Associate  
Desert Research Foundation of Namibia



### **General Editor**

CuveWaters research co-operation  
[www.cuvewaters.net](http://www.cuvewaters.net)

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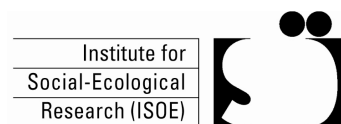
Institute for Social-Ecological Research (ISOE)  
Hamburger Allee 45  
60486 Frankfurt/Main, Germany  
Download: [www.cuvewaters.net](http://www.cuvewaters.net)

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## The Research Partners

Institute for Social-Ecological Research (ISOE)  
Dr. Thomas Kluge (Project Head)  
Hamburger Allee 45, 60486 Frankfurt/Main, Germany  
Tel. ++49 (0) 69 707 6919-0  
E-mail: [cuvewaters@isoe.de](mailto:cuvewaters@isoe.de)



Fraunhofer Institute for Interfacial Engineering  
and Biotechnology (IG) /  
Prof. Dr. Walter Trösch  
Nobelstrasse 12, 70569 Stuttgart, Germany  
Tel. ++49 (0) 711 970 4221  
E-mail: [walter.troesch@igb.fraunhofer.de](mailto:walter.troesch@igb.fraunhofer.de)



Technische Universität Darmstadt  
Chair of Water Supply and Groundwater Protection  
Prof. Dr. Wilhelm Urban  
Petersenstrasse 13, 64287 Darmstadt, Germany  
Tel. ++49 (0) 6151 16 2748  
E-mail: [w.urban@iwar.tu-darmstadt.de](mailto:w.urban@iwar.tu-darmstadt.de)



Namibian Partners:  
Desert Research Foundation of Namibia (DRFN)  
German Technical Cooperation (GTZ)  
Ministry of Agriculture, Water and Forestry (MAWF)  
And other Namibian ministries, institutions and organisations

Contact in Namibia: Water Desk Coordinator (DRFN)  
Tel. ++264 (0) 61 377 500

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## 1 Introduction

Demands on water and land in Namibia are increasing steadily as the population and the economy grow. Although only a few households can survive on subsistence agriculture alone, access to agricultural land remains central to livelihoods strategies particularly in the non-freehold or communal areas of Namibia. The importance of agriculture is not only likely to remain, but will increase to the extent that population growth continues to exceed the creation of employment opportunities.

Apart from rising demands on water and land by an increasing rural population, competition for land and water is also increasing steadily. The driving factor behind this is the growing need to commercialise and diversify agricultural activities in the communal areas. *The National Agricultural Policy* identified agricultural production in the northern communal areas as having the biggest potential for intensification and diversification. Amongst other things, it therefore proposes to convert some of the 7 million hectares of under-utilised land north of the Veterinary Cordon Fence into extensive livestock production systems and increase irrigation activities up to five-fold (MAWRD 1995: 14, 29).

Specific interventions have been implemented to achieve these objectives. By 2007, 721 small-scale commercial farms had been surveyed in the northern communal areas, with the proclaimed aim of integrating 'communal subsistence farmers into the mainstream of the Namibia agricultural economy by creating a favourable environment for them to increase agricultural productivity' (MLR 2007: 4). Most of this land requires the development of water points to become productive. Along similar lines, Namibia's Green Scheme proposes to develop up to 43,000 ha for irrigation along Namibia's perennial rivers over the next 30 years. Most of this will happen in the Kavango and Caprivi regions. The objectives of the Green Scheme include the creation of a class of agricultural entrepreneurs who come from previously disadvantaged communities who will be enabled to produce commercially for regional markets and beyond. It is anticipated that the Scheme will improve nutrition at household level, create employment, diversify the agricultural base and provide secure livelihoods for growing rural populations (Grimm and Werner 2005: 12–15).

Sectoral approaches to land and water management provide fertile ground for conflict, as each sector has its specific objectives and mandate (DRFN 2005: 23). Development Plans with their specific targets and implementation strategies are developed with little regard of other sector plans. The need to balance national objectives as articulated in Vision 2030 and National Development Plans with equity concerns is becoming increasingly acute, as more demands are being made on land and water for economic development.

To compound matters, the existing institutional framework particularly at local level, is increasingly unable to regulate these conflicting pressures 'because the current water and land rights are too loosely coordinated' (Kluge et al 2006: 21). Two related issues can be identified that may have contributed to this state of affairs.

Firstly, different sectoral objectives are not integrated into a comprehensive regional, let alone water basin development plan. Consequently, there is no agreement on how competing demands on land and water can be solved. How important is the role of access to land and water for poverty alleviation as opposed to the commercial development of communal pastures for commercial farming or production of irrigation for export, for example? And: is the development of wildlife utilisation more or less important than commercial livestock farming?

The absence of an agreed vision leads to the second issue. Because there is no cross sectoral development plan, rights to land, water and other natural resources are determined by sectoral, rather than overarching national and regional development objectives. As this paper will show, this has created a situation where rights over resources conferred to individuals and groups by sector policies are not only inconsistent, but even contradictory. This is an important point, particularly in view of the fact that customary tenure rules governing access to land and water have changed over the years. Amongst other things, the increasing integration of rural economies into a market economy has led to the gradual separation of communal and private interests. As opportunities arose for private profit possibilities, dependence on the group decreased 'which in turn reduce[d] its authority' (Vlachos 1995: 14).

These developments, coupled with post-Independence policies that put more emphasis on human rights and increased participation of subjects in managing their own affairs has brought about a plethora of new policies and institutions, which to a greater or lesser extent were designed to promote local participation in development planning and management. The principle of community based management of natural resources was introduced before Independence in the wildlife sector. After Independence this approach was applied to the water sector.

The aim of this paper is to review the policy and legal framework guiding regional and local level institutions in the sector. The functions and powers of these will be briefly discussed and assessment provided on how these are likely to impact on access to land. This assessment requires a critical review of land related policies and laws in order to obtain an understanding about the extent to which the rights to natural resources conferred in these two sectors are similar or perhaps contradictory.

Before discussing water and land related policies and legislation, a few general observations on participation are useful to obtain more conceptual clarity where rhetoric frequently obscures rather than enlightens policy impacts.

## **2 Participation and decentralisation: general observations**

Decentralisation and increased popular participation in development issues has its origins in the SWAPO Election Manifesto of 1989, which committed the ruling party to the establishment of democratically elected authorities in urban and rural areas 'in order to give power to the people at grassroots level, to make decisions on matter affecting their lives'. From this commitment flowed a Constitutional requirement to establish Regional and Local Government structures (RoN 2004: 205). In terms of the Constitution, Local Authority structures 'include all municipalities, communities, village councils and other organs of local government defined and constituted by Act of Parliament' (RoN n.d.: 54). A Decentralisation Policy was formulated in 1997 to give effect to these Constitutional principles (See Werner 2007: 8).

The political importance attached to meaningful participation as a key component of democratic governance is reflected in Vision 2030. It states that many social and environmental issues are better managed at the local level, 'where authority, proprietorship/tenure, rights and responsibilities are devolved to appropriate local institutions and organisations' including aspects of water point and rangeland management, wildlife and forest management (RoN 2004: 204). Vision 2030 holds that effective governance in support of long term sustainable development is dependent on decentralising and devolving government functions to the lowest effective level and to ensure coherence between policy options pursued at different levels. Finally, people at



the local level have to be able to exercise options to participate (Ibid: 205). The vision is that by 2030

Local communities and regional bodies are empowered, and are fully involved in the development process; they actually formulate and implement their respective development plans, while national government – working hand in hand with civil society organisations – provides the enabling environment ... for the effective management of national, regional and local development efforts (Ibid: 206).

This vision formulates very concisely what several sector policies have professed to do since the early 1990s. Policies in the land, water, agricultural and environmental sectors all commit government to participation of local communities in managing their resources by decentralising government functions. Upon closer examination, however, it appears that concepts such as participation, decentralisation and devolution have different meanings in different contexts. Decentralisation, as a catch all phrase for ‘bringing power to the people’ subsumes a wide spectrum of actual power transfer, ranging from very little to actual ownership of a resource. However, meaningful participation – and management – implies that local communities have the powers to do so.

According to Töttemeyer (1996: 28) a fundamental feature of decentralisation is

the transfer of authority, power and responsibility outwards and downwards from central government. The emphasis is on self-government, on self-management and self-administration.

But decentralisation, or the transfer of power from higher to lower levels of decision making, can take several different forms, depending on the degree to which powers and responsibilities are transferred (Toulmin 2000: 230). The Decentralisation Policy (RoN 1997: 11) identified three different forms of decentralisation:

- **Deconcentration:** This refers to a process where central government decentralises staff to lower levels of government to carry out regular line functions closer to the target population. This aspect of decentralisation *‘does not allow any participation by the population in any form of decision making’* (my emphasis).
- **Delegation:** In this case, government allocates some of its functions to sub-national levels to carry out. These sub-national levels *do not take full responsibility* for these actions. Delegation is usually done by the executive, rather than the legislature.
- **Devolution:** This involves central government *‘giving full responsibility and public accountability for certain functions to the sub-national level’* (my emphasis).

In terms of the Decentralisation Policy, the preferred model in Namibia is ‘devolution of power to lower tiers within the context and the overall authority of the unitary state’ (RoN 1997: 13). Put differently, it amounts to a transfer of power from a larger to a smaller unit (Toulmin 2000: 230).

In terms of Article 100 of the Namibian Constitution, all natural resources below and above the surface of the land, including land and water belong to the state unless they are not otherwise lawfully owned. Devolving responsibilities and accountability with regard to the management of natural resources requires that the state transfer rights to and powers of management over resource to the users of those resources. The content of those rights determines the extent of power the holders of such rights have to enforce them and take decisions.

Implementing Integrated Land and Water Management is premised on the active participation of resource users. A major challenge in this regard is that land and water policy and legislation confer different rights to users. Consequently, individuals and local communities are empowered to different degrees to take decisions with regard to the use of land and water. Instead of being complementary, these different rights and obligations often contradict each other. In the lands sector, the state has only granted secure rights to residential and arable land, while pasture land remains the property of communities. By contrast, water points on communal land are leased from the state, conferring rights to communities of water users that amount to ownership rights. It will be shown below, that this fundamental difference has significant implications for integrated land and water management.

### **3 ILWM and BMCs**

In 1993 Cabinet approved the principle that community ownership and management of water facilities should be ‘the strategy of choice’ in the water and sanitation sectors in rural areas. It was assumed that an improvement of services would be brought about by co-operation between government and beneficiaries, based on community involvement and participation. This implied that communities in rural areas should have the right to determine which solutions and service levels are acceptable and affordable to them. Based on these policy directives, Cabinet approved the Community Based Management approach for rural water supply in 1997.

Fundamental to the strategy of involving rural communities in the management of their water supplies was the establishment of water point committees and the gradual transfer of ownership of water points to these committees. Initially, the functions of water point committees were limited to managing individual water points. The driving force behind this initiative was government’s desire to shift the financial costs of providing water to rural communities to the users of water.

As a result of the Namibia Water Resources Management Review policies in the water sector were amended and broadened to incorporate wider environmental and economic issues. This reflected the realisation that the abstraction of water impacted on land use, health the environment and a host of other issues. Particularly in agriculture, which continues to form the basis of livelihoods for the vast majority of people in Namibia, land and water use could not be managed separately. Integrated Land and Water Management gradually evolved as the most appropriate approach to manage these resources in a holistic manner. In early 2004 planning in this direction started in all earnest.

Within this new context, the powers and functions of Water Point Committees are likely to change from their initial, more limited briefs of managing water to more holistic ones. Before discussing the powers and functions of Water Point Committees, it is useful to look briefly at Integrated Land and Water Management and the institutional framework for its implementation.

The Global Water Partnership defined integrated water resources management as

a process which promotes the coordinated development and management of water, land and related resources, in order to maximise the resultant economic and social welfare in an equitable manner without compromising the sustainability of vital ecosystems (Huppert 2006b: 20).

The most appropriate scale for integrated water and land management was considered to be a basin. This is defined as an

area from which any rainfall will drain into the watercourse or watercourses or part of a watercourse, through surface flow to a common point or common points (MAWRD 2000: 44).

This definition was broadened at a later stage to include groundwater into basin delineation.

The Ministry of Agriculture Water and Forestry argued that in arid areas such as Namibia where ‘water is the most constraining natural resource for development ... a decentralised development and management policy is logically to be organised on a water basin basis’. A water basin as a management unit facilitates more than any other approach ‘the relationship between water, land, vegetation and fauna and the water basin’s ecosystems’ (Nehemia in MAWRD 2004: 17).

Altogether 24 individual basins were identified in Namibia. The geographical size of some basins was regarded as too big for the development of effective community-based management of land and water. Consequently, some basins were divided into sub-basins. Others were considered too small and were amalgamated, resulting in 11 basins by 2008.

While the use of water basins as units for integrated water and land management is perfectly sensible for sustainable environmental policy, it is at odds with existing political, administrative and social units in so far as basins typically cover different areas of jurisdiction. The Etosha Basin, into which the Cuvelai-Iishana Sub-Basin falls, cuts across four administrative regions and eight traditional authority areas, for example. In addition, it includes a large number of constituencies, some conservancies and a national park. In addition, local communities obtain water from an extensive pipeline network, boreholes, hand-dug wells and open water pans during the rainy season. Rights to land consist of usufructory customary rights to arable and residential land, commonage for grazing and land fenced off for private use.

This brief summary of some salient features of the Etosha Basin serves to illustrate the tremendous governance challenges that a basin approach generates in trying to move towards integrated water and land management. The key question in this regard is how to co-ordinate the activities of such a large number of relatively independent actors so that they all contribute in a complimentary way towards the integrated management of water and land (Huppert 2006a).

In order to address these challenges, the *National Water Policy White Paper* and the *Water Resources Management Act of 2004* provide for the establishment of basin management committees. These have been identified as the most appropriate units for operational management. Basin management committees are expected to enhance local empowerment and participation in decision making and planning. Empowering local communities to manage the water resources in their basins will not be limited to water, but will increase capacity to manage the overall development process ‘as water is the basis for all development’ (Nehemia in MAWRD 2004: 17).

Fundamental to the successful implementation of the basin management approach is that management and planning functions are devolved to local government and organisations. The political will must exist to transfer power and resources to individual farmers, citizens and community organisations to facilitate meaningful and active participation by stakeholders, particularly at the local level. Simultaneously, the state has to continue its governance functions, e.g. ensuring that a balance is struck between equity concerns and national priorities (DRFN 2005: 24).

The Water Resources Management Act, 2004 does not spell out in any detail how stakeholders at the local level will participate in the functions of basin management committees. More specifically, the role of local Water Users Associations and Water Point User Associations in Basin

Management Committees is unclear. Section 13(b) of the Act which simply states that Basin Management Committees should 'promote community participation in the protection, use, development, conservation, management and control of water resources in its management area' raises a number of questions. Is the generic concept of *community* referring to local Water Users Associations and Water Point User Associations only, or are other community based associations that are stakeholders included? It is also not clear what degree of participation the Act foresees. Does it mean that 'communities' need to be consulted from time to time or should they have the power to take decisions? If so, what kinds of decisions? What are the powers that the state or its agents retain? (Alden-Wily 2000a: 3–4).

The Act also does not state explicitly that stakeholders have to be actively involved in developing water resources plans for their basins (Section 13(c)). There is therefore a risk that the development needs of local communities may be disregarded in formulating those plans. This point seems particularly pertinent in view of the fact that members of Basin Management Committees are not elected by stakeholders but appointed by the Minister responsible for water affairs. The onus is on the Minister to ensure 'that every basin management committee is broadly representative of all interested persons' (Section 12(4)), but stakeholders have no legal mechanism to ensure that this is the case.

The Minister has the power to dissolve basin management committees 'for purposes of re-organising water management institutions in [their] area[s] of jurisdiction in the interests of effective water resources management' or because the circumstances that gave rise to the establishment of basin management committees have changed (Section 15). Neither the responsible Minister nor the Basin Management Committee is accountable to stakeholders for their actions. This suggests that despite rhetoric to the contrary, the basin management approach as provided for in the Water Resources Management Act of 2004 potentially limits the scope for meaningful participation of local communities in integrated water and land management beyond their communities. While that the state as the ultimate owner of water and land has an obligation to ensure that these and other resources are used in a sustainable manner for the national good, the content of rights to water and land need to be spelled out in more detail to ensure that the needs of marginal communities are adequately represented and acknowledged at Basin level. Without such specific rights, local communities are vulnerable to claims the state may make on resources in communal areas.

Basin Management Committees do not have any powers to make rules and enforce them. In essence, their functions are limited to facilitating the sustainable management of water resources in their basin areas and perform advisory functions with regard to water and land management issues (MAWRD/GTZ 2004: 7). Although the Water Resources Management Act requires Basin Management Committees to prepare water resources plans for their basins, these have to be submitted to the responsible Minister for consideration when developing a National Water Master Plan. To the extent that this procedure facilitates a mechanism that allows the state to balance equity concerns with national objectives these provisions are reasonable. However, it must be assumed that such basin management plans will only acquire any legal status once the Minister has approved them.

## 4 Land and water rights

### 4.1 Water rights and institutional framework

Although policy documents on rural water supply regularly point out that the ownership of water points is transferred to local communities of users, it is necessary to draw attention to the fact that ownership of water resources below and above the surface of the land in Namibia vests with the state. In the interest of improved service delivery to rural communities at lower budgetary costs to the state, it devolved the management of water points to the lowest level, that of water users. In practice this means that the state leases the facilities of rural water points and supply schemes to Water Point User Associations and local Water User Associations. Lease agreements lay down specific conditions of the lease and spell out each party's technical and financial responsibilities with regard to the operation and maintenance of a water point or water scheme (MAWRD 2004: 31; MAWRD 1994: 1). Water policy and legislation thus do not transfer full ownership rights of water points to local communities. However, the lease agreements confer significant powers to Water Point User Associations and local Water User Associations.

The functions and powers of Water Point User Associations and Water Point Committees have been summarised in Werner (2007: 16–17). It will suffice therefore, to mention only a few pertinent points here.

The Water Resources Management Act (Section 16(1) states that households using a particular water point for their water supply needs *may* form Water Point User Associations. Where a number of Water Point User Associations make use of a rural water supply scheme, i.e. pipeline, they are obliged to form local Water User Associations to co-ordinate the activities and management of water points. Rights to utilise a water point are open to all households who make regular use of a water point. However, these rights may be terminated by a Water Point User Association or a local Water User Association subject to the provisions of the Constitutions of these institutions.

Section 16(1) of the Act suggests that it is up to communities of water users to decide whether they want to establish a Water Point Users Association or not. However, Section 16(10) introduces a measure of compulsion to form both kinds of associations under threat of having water points or rural water supply schemes concerned closed down by the Minister responsible for water affairs for failing to do so.

Water Point User Associations and local Water User Associations have powers to make rules for the use of rural water supply schemes or water points by members and non-members. They also have powers to exclude people who do not comply with the rules from using a particular water point. In order to be able to this, the Water Resources Management Act requires that Water Point User Associations and local Water User Associations develop and agree on Constitutions. Once agreed to, Constitutions have to be submitted to the Minister responsible for water affairs for approval. Upon approval, Water Point User Associations/Water User Associations will be registered and become 'legal person[s] with full capacity to sue and be sued in court, to contract and acquire rights and duties, and to own and dispose of properties' (Section 16(9)).

Members of Water Point User Associations must elect Water Point Committees. These consist of between 5 and 7 people. Women are represented in more or less equal numbers as men on Water Point Committees. The main responsibility of Water Point Committees is to see to the day-to-day management of a water point. This includes the maintenance of water points and ensuring that users make their payments for water.

Of particular interest to integrated water and land management is a provision in the Water Resources Management Act that Water Point User Associations and local Water User Associations have ‘the power to plan and control the use of communal land in the immediate vicinity of the water point in co-operation with the communal land board and the traditional authority’ (Section 19(e)). These powers are potentially significant in view of the fact that Section 19(e) of the Act is the only legal provision for communities to get involved in the management of communal grazing areas. As the next section will show, Communal Land Reform Act does not provide for such powers.

## **4.2 Land rights and powers to manage land**

Formal legal ownership of land in non-freehold or communal areas vests in the state

in trust for the benefit of traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people in Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agricultural business activities.

The Communal Land Reform Act explicitly prohibits the granting of freehold rights to communal land. The nature and content of land rights in communal areas flow from this fundamental tenet of tenure reform in communal areas, which has two main objectives:

1. improving tenure security for customary land rights holders by introducing an obligation to have existing and new customary allocations of land for residential and cultivation purposes spatially defined and registered in a regional land register; and
2. introducing leasehold as a form of land tenure to encourage the commercial development of so-called unused communal land.

The Communal Land Reform Act acknowledges that land rights in communal areas are governed by customary tenure regimes. In brief, this means that land rights are derived primarily from accepted membership of a group or social unit. Outsiders may join the group by way of specific mechanisms and procedures (Cousins 2007: 300). Traditionally, households obtained ‘exclusive’ rights to residential and arable land, while grazing areas were utilised on a communal basis. Customary land rights usually last a lifetime and do not confer ownership but rather usufructory rights to the land. Powers to guarantee access to land, enforce customary land rights and regulate common pool resources vest in a hierarchical system of traditional authority. Many of these functions are located at the lowest level, namely the village headman, who allocate land to those who applied for it against a one off payment.

Customary tenure in communal areas is widely regarded as insecure, although little evidence in support of this assumption has been produced. In addition, customary tenure has been characterised as ‘retarding progress of extending development facilities to communal areas’ and is associated with land degradation (Minister Iivula-Ithana in Malan and Hinz 1997: 12, 131). While the factual accuracy of these statements can be debated, circumstantial evidence suggests that traditional authorities are increasingly unable to enforce customary tenure regimes. The increasing integration of rural economies into the wider market based economy, a gradually rising population and a growing number of people pursuing their own personal enrichment have conspired to undermine traditional authority. The most prominent manifestation of this is the large scale enclosure of communal land for private use (Cox et al 1998).

Against his background, the Communal Land Reform Act seeks to improve tenure security of customary land rights holders. In terms of the Act, existing customary land rights holders and al

new allocations are required to apply for these land rights to be certified and registered in land registers which Communal Land Boards are required to establish and maintain. This process requires that customary land holdings are spatially defined. Tenure security provided by the Act only applies to residential and arable land. Rights to communal grazing areas are not covered by the Act.

The registration of customary land rights improves tenure security in so far as individual rights are protected against infringement by other individuals. However, the Communal Land Reform Act provides no protection of land rights against the state (Odendaal 2006: 25). This is a pertinent point in so far as the state has an interest in acquiring communal land for various purposes. As Odendaal has argued, the state will always be a party in land reform processes. To improve tenure security, the content of land rights such as the right to mortgage, for example, need to be defined in law, which must also provide some kind of protection against the state. Customary land rights, even if ill defined, are easy to protect when they are not challenged. Proper tenure security implies that customary land rights can be claimed and defended in terms of statutory legislation. Traditional authorities are only able to protect land rights and solve land disputes if land rights holders recognise a common traditional authority. But they are ineffective in any disputes involving encroachments by the state or people who do not recognise the legitimacy of a traditional authority (Ibid: 26–27).

The security of tenure provided for by the registration of land rights is further compromised if it is considered that the Act does not provide for downward accountability of traditional authorities. The Act regulates the relationship between traditional authorities, Communal Land Boards and the state, but does not require traditional authorities to consult with their communities and obtain their consent where important decisions such as the demarcation or disposal of communal land are concerned. This lack of accountability potentially makes customary land rights holders vulnerable to losing access to land as a result of major commercial agricultural developments such as the Green Scheme or the surveying and fencing of communal land for agricultural development. In both instances, the Act provides that ‘leasehold for agricultural purposes’ be granted. However, this requires that the Minister, after consultation with the respective traditional authority, *must* designate an area in each ‘communal area of a traditional community’ where leaseholds may be granted (Section 30(2), my emphasis). In terms of the Act, traditional authorities can take a decision without having to consult their subjects on the issue.

#### **4.2.1 Conservancies and community forests**

The principle of extending specific rights to communities of users has been implemented in the wildlife and forest sectors. The most common form this takes is rural conservancies and community forests. With regard to wildlife, legislation provides for the transfer of rights to consumptive and non-consumptive use of wildlife in communal areas as well as the management thereof. Consumptive use is defined as

The conditional ownership and use of game that can be hunted as trophies or for local consumption by conservancy members, cropped for commercial sale of meat, or captured and sold as live game (Davis 2004: 16).

Non-consumptive rights enable communities to establish tourism enterprises (Ibid). In both instances do communities enjoy the material benefits of these rights. While registered members of conservancies have rights to manage wildlife and natural resources, they have no rights to the land itself (Odendaal 2006: 32).

The Nature Conservation Amendment Act of 1996 provides for the establishment of a legal entity known as a conservancy to apply for and exercise the rights to wildlife. Any community living on communal land can apply to the Minister of Environment and Tourism to establish a conservancy. However, communities have to fulfil certain requirements before registration and subsequent transfer of rights and responsibilities occurs. These include the following:

- the community must elect a representative committee and supply the names of the committee members;
- the community must agree to a legal constitution which provides for the sustainable management of game in the conservancy; and
- the community must define the boundaries of the geographic area of the conservancy (Jones and Kakujaha 2006: 12).

In addition, the community must have the ability to manage funds and have an approved method for distributing benefits derived from the use of wildlife to its members (Ibid).

It has been the policy intention that registered conservancies should develop management plans for their conservancies. A policy document prepared on land-use planning by the Ministry of Environment and Tourism in 1994 laid down some principles in this regard. It stated that the success of any development project rested 'on the extent to which local communities have participated in the planning of land use and have real decision making power'. More specifically, appropriate institutions were required to take decision on land use and the use of other natural resources. They should have jurisdiction within a geographically defined area and should decide on land and resource allocation and utilisation (Ministry of Environment and Tourism 1994: 2, 3, 5).

Jones and Corbett (2000: 23) noted that officials were demanding management plans before quotas for trophy hunting and own use would be issued. However, while conservancies could undertake land-use planning and zoning of land within a conservancy for specific purposes, they had no legal powers to enforce such plans (Long 2004: 34–35). The Communal Land Reform Act also does not provide communities with such powers.

The Forestry Act of 2001 follows a model similar to conservancies to transfer management and use rights to communities in the form of community forests, but differs in some important aspects from legislation governing conservancies. To start with, the Act does not appear to provide for communities living in and/or close to forests to apply for establishing a community forest. Instead, the responsible Minister may, with the consent of the chief or traditional authority or any other body authorised to allocate land in communal areas, enter into an agreement with anybody the Minister believes reasonable represents the interests of that community and is willing to and able to manage communal land as a community forest (Jones and Kakujaha-Matundu 2006: 12). While the Act does not require community forests to have constitutions like conservancies, the *Community Forest Guidelines* suggest that a community forest management body needs to develop a constitution as part of its establishment. An integral part of any agreement is a management plan for a proposed community forest. Amongst other things, the management plan will spell out rights and obligations of communities with regard to the community forest (Ibid: 12–13). It must include an assessment of land use, wildlife, water resources and livestock farming as well as management plans for water and livestock (Corbett 2002: 36). The management authority of a community forest may permit the grazing of animals and other agricultural activities in a community forest (Ibid: 40–41).



### 4.3 Group rights to land

As the discussion has shown, granting property rights to natural resources to communities is highly uneven. This has led Bollig and Corbett (n.d.: 74–75) to argue that

in a sense things are happening back to front by communities getting statutorily enforceable common property rights to resources on their land without having any such security to the land on which the resources are situated.

They concluded from this that ‘the ultimate goal would be to obtain registered rights to land on which [resource] rights occur’ and observe that government has been hesitant to consider group tenure as a tenure option ‘on the mistaken belief that any such recognition would encourage the development of ethnically exclusive along the lines of Bantustans’ (Ibid: 76).

Government’s unwillingness at present to consider granting land rights to groups of users was highlighted during a National Stakeholders Conference on land issues which was held 1995. The purpose of the meeting was to review the Communal Land Reform Act with a view to propose possible amendments. The issue of group rights to communal land was also discussed. The 20 proposals for amendments that were rejected included that ‘customary land rights users committee[s] be established in communal areas to manage grazing areas’; the establishment of Land Administration Committees to consider applications and give consent for applications for customary land rights in areas with no recognised chiefs; and to ‘amend the Act to allow for grassroots Commonage Land Users Association that will be in charge of the day to day management of the commonage. Commonage Land User Associations will be more or less like a water point committee or a conservancy’ (Ministry of Lands and Resettlement 2005a: 21–22).

The decision by conference participants to reject these proposals aimed at establishing property rights to land and natural resources to groups of users seems to be at odds with the National Land Policy, which includes ‘legally constituted bodies as institutions to exercise joint ownership rights’ as a category of land rights holder (Ministry of Lands, Resettlement and Rehabilitation 1998: 3). Moreover, the principle to grant land rights to groups was approved by Cabinet in the form of the Final Draft Land Tenure Policy of 2005 (Ministry of Lands and Resettlement: 2005d: 9). At the time of writing it still had not been submitted to the National Assembly.

The Draft Policy proposes that the boundaries of traditional villages be demarcated by Communal Land Boards in conjunction with recognised traditional leaders. Once this has been completed and a village constitution drawn up, ‘the village would be registered and the effect of such registration should be that the village becomes a juristic person in order to give better security to the land tenure of village members’. The Draft Policy proposes to establish registers of ‘rightful members of the village community’ who ‘will be given formal rights over land and all resources in each village’. Rightful residents will also have the right to accept or reject a person who wishes to enter the community (Ministry of Lands, Resettlement and Rehabilitation 2005b: 17).

Parallel to the Draft Land Tenure Policy of 2005 the Permanent Technical Team on Land Reform also recommended that ‘village development committees and land use associations’ be established to act as advisory bodies on land use and land allocations to traditional authorities (Ministry of Lands and Resettlement 2005c: 38). Cabinet, after considering the Report of the Permanent Technical Team, approved a recommendation made by the PTT ‘that community-based policies on resource management are expanded beyond wildlife and tourism to incorporate other natural resources like water, land and land-based economic activities’ (Republic of Namibia 2006: 3).

The discussion suggests strongly that government is ambivalent with regard to granting groups rights to land. While the highest political level appears to have approved in principle the introduction of group rights to land, there appears to be resistance at the lower, administrative level. A possible explanation for this ambivalence is that the political impact of group rights to land on the existing power structures in communal areas is uncertain. Extending property rights to land to groups vests them with all the powers associated with controlling access to land. These powers have to be taken away from someone else, in this case traditional authorities. Chiari (2004: 20) has argued that one of the reasons why the state is not willing to effect such transfer of property rights to the local level has to be sought in the political importance of traditional leaders in the north-central regions. It is from these regions that SWAPO continues to draw major political support. 'The loyalty of traditional authorities is obviously crucial ... (Ibid).

#### **4.4 Land use planning**

Integrated land use planning will be an important tool to bring about integrated land and water management. At present, National Development Plans are the main planning tool for socio-economic development. However, these do 'not necessarily take into account spatial development in terms of present and future land use options to meet the objectives of sustainable development' (IDC 2002: 3). The explanation for this may be the fact that the status of land use plans is not clear in policy and legislation.

By dint of its mandate 'to be the custodian of Namibian land' (Ministry of Lands and Resettlement 2007: 6) the central responsibility for producing national land use plans rests with the Ministry of Lands and Resettlement. The Agricultural (Commercial) Land Reform Act of 1995 spells out very clearly what the functions of land use planning are in terms of freehold land acquired for redistribution. There are no similar provisions in law applying to communal areas. In addition, there is no approved policy on land use planning as yet. In 2002 a Draft National Land Use Planning Policy was prepared and submitted to the Ministry of Lands and Resettlement but does not appear to have been approved.

At the sub-national level, Regional Councils are the only institutions that have a clear legal mandate to produce development plans for their regions, including communal areas. In terms of the Regional Councils Act of 1992, regional development plans must take into account the physical, social and economic characteristics, urbanisation patterns, natural resources, economic development potential, infrastructure, land utilisation patterns and sensitivity of the natural environment' (Ibid, Annexure A: 1-2).

Despite the absence of a national policy and legal provisions governing land use planning, the Division of Land Use Planning in the Ministry of Lands and Resettlement has produced Regional Integrated Land Use Plans for 8 of the 13 regions. Included are land use plans for Oshikoto, Ohangwena, Omusati and Oshana (Ministry of Lands and Resettlement 2007: 4). Integrated land use plans thus exist for the entire Etosha Basin. However, 'none of these plans can ... be legally enforced in terms of existing legislation and were/are merely guidelines for spatial development, proposed land use options or budgetary purposes' (IDC 2002: 4). For reasons that could not be established, existing land use plans are not known outside the Ministry of Lands and Resettlement.

The National Land Policy proposed to establish a Land Use and Environmental Board (LUEB) to ensure that all land use planning; land administration, land development and environmental protection are co-ordinated on a national and regional basis (Ministry of Lands, Resettlement

and Rehabilitation 1998: 16). This does not appear to have happened. Instead, an Environmental Management Bill has been submitted to the National Assembly in 2007. Amongst other things, it proposes to establish an Environmental Development Commission to oversee that the principles of sustainable land use planning are adhered to (IDC 2002 Annexure A: 7). The Commission will promote co-operation and co-ordination of all planning activities, and every regional land use plan will have to be submitted to it so that the environmental implications thereof can be assessed (Ibid).

The importance of local level participation in land use planning and real decision making powers at that level have been identified as a key to successful implementation of development projects (Ministry of Environment and Tourism 1994: 2). For this to happen, appropriate institutions need to be established with jurisdiction within a geographically defined area' (Ibid: 5). To date, the only local level institutions with legal status are Water Point User Association and local Water User Associations. These institutions have limited powers to carry out land use planning in the vicinity of their water points. However, as a result of the absence of a clear policy and legal framework that provides for local level, participatory land use planning, there is a risk that local level land use plans will not be recognised by government institutions. This may make enforcement of land use plans difficult. However, attempts should be made to initiate participatory, local level land use planning with water user associations on a pilot basis.

#### **4.5 Communal Land Boards**

In view of the growing urgency to enforce sustainable water and land management, there is a widespread expectation that Communal Land Boards will play that role. During a basin management planning workshop in 2004 the view was expressed that Land Boards and settlement initiatives need to integrate the issue of sustainable water use into their decision-making process (MAWRD/GTZ 2004: 7). International Development Consultancy (2002: 4) stated that Communal Land Boards in collaboration with Traditional Authorities 'will have a profound influence on what type of land use and in which manner it is exercised in communal areas. They will largely be able to control resource management and farm productivity'. The National Land Policy proposed that Communal Land Boards should be able to cancel 'a title' after consulting the Land Use and Environmental Board if the land rights holder does not use the land in a sustainable manner or inflicts environmental damage (Ministry of Lands, Resettlement and Rehabilitation 1998: 16).

Communal land Boards are the only decentralised land administration structures provided for in law. It is therefore understandable that institutions which are involved with integrated water and land management expect Communal Land Boards to play a central role in ensuring that land and water is used in a sustainable manner. Considerable efforts have gone into making recommendations on how to assist Communal Land Boards to make environmentally sound decisions (Jones and Kakujaha 2006). On the basis of this a training manual has been developed and the training of members of Communal Land Boards is ongoing (Republic of Namibia 2007).

However, despite these expectations, Communal Land Boards do not have any direct legal powers or responsibilities to consider wider environmental issues in ratifying the allocation of customary land rights (Jones and Kakujaha 2006: 10).

The roles and functions of Communal Land Boards are considerably narrower than is commonly thought. These can be summarised as follows:

- Exercise control over the allocation and cancellation of customary land rights
- Consider and decide on applications for a right of leasehold
- Establish and maintain a land register for customary land rights and leasehold rights
- Advise the minister (Republic of Namibia 2007:17)

Communal Land Boards therefore have no powers to allocate land. This function remains in the hands of traditional authorities. In exercising their powers to control customary allocations, the Regulations to the Communal Land Reform Act provide some criteria that need to be considered when ratifying allocations. These include limitations on the size of land applied for and the numbers of livestock that any lawful resident may graze on communal land. With regard to the former, the regulations stipulate that a livestock owner may not graze more than 300 large stock or 1,800 small stock on the commonage of a communal area. Customary land rights may also not exceed an area of 20 hectares.

The powers of Communal Land Boards are equally limited with regard to the development of 'unutilised' communal land for agricultural purposes. Although the Communal Land Reform Act provides Communal Land Boards with the powers to survey any area of communal land and cause diagrams and plans to be prepared, this can only happen with the approval of the Minister (Section 41). Put differently: Communal Land Boards administer decisions taken about land use at higher political level. They do not have any powers to make such decisions. Their jurisdiction is further curtailed by provisions in the regulations that they may grant leaseholds only to areas not exceeding 50 hectares. Applications for larger areas must be approved by the Minister (Regulation 13). It would therefore appear that Communal Land Boards have no jurisdiction with regard to the development of communal land for agricultural purposes.

## **5 The role of traditional authorities in water and land management**

### **5.1 Issues of legitimacy**

The impact of new institutions in the water and land sectors is dependent on the degree of legitimacy these new institutions can acquire vis a vis other sources of legitimacy such as traditional leaders (Toulmin 2000: 232). That this is a highly contested issue was shown in the process of developing the Communal Land Reform Act.

The first draft of the Communal Land Reforms Act provided for the vesting of communal lands in Land Boards, very similar to the situation in Botswana. Communal Land Boards were to be given far reaching powers to grant rights for the occupation and use of land as well as the cancellation of such rights. In addition, such Land Boards would have been empowered to impose conditions or restrictions for the occupation and use of land under customary rights (Malan and Hinz 1997: 177). However, these rights could be transferred to traditional authorities (Ibid: 183).

Chiefs and traditional leaders were not permitted to be members of Land Boards. Members of Land Boards were to be appointed by the responsible Minister. Land Boards were also to be empowered to hear appeals against decisions taken by traditional leaders (Ibid: 176–177).

The proposed new Act was presented to a conference on communal land administration in 1996. Participants were traditional authorities from all over the country. The majority of these perceived the provisions of the Bill to undermine their authority. Traditional leaders from the north-central regions, for example, objected to the proposals in the Bill that Land Boards would take over all land administration in communal areas, thus relegating traditional leaders to mere advisors of Land Boards with no executive powers. They stated that ‘Traditional Leaders should not be made to be (sic) back-yard boys of what should be technical and advisory bodies, namely the Regional Land Boards’ (in Malan and Hinz 1997: 69). In their views, it was wrong to vest envisaged Land Boards with power to

exercise control over the occupation and use of communal lands. Instead, the Regional Land Boards should be advisory bodies whose primary function is to assist the Traditional Leaders to come up with rational, transparent, fair and, where possible, uniform procedures of land allocation and utilisation in the communal areas (Ibid: 68–69).

They based their arguments on the legitimacy traditional leaders enjoyed on account of their long standing responsibilities.

In view of such opposition, which was shared by many traditional leaders from other regions, the Bill was amended. The result was that the Communal Land Reform Act in its present form retains and in some respects increases the roles of traditional leaders in land administration in communal areas.

Despite this, the perception persists among some Traditional Leaders that government policy is designed to reduce their powers. In 2007 the Chief of Uukwaluudhi expressed his concerns about whether Traditional Leaders or politicians were in control of communal land. Although he acknowledged that Traditional Leaders continued to allocate communal land, he was of the opinion that politicians were busy reducing the powers of Traditional Authorities (Werner 2008: 15).

A critical analysis of the fundamental thrust of land policy in communal areas suggests that these perceptions are not far off the mark, if it is considered that the Communal Land Reform Act provides for the alienation of communal land for allocation to small-scale commercial farmers under long-term leasehold tenure. The net effect of this is that the areas of jurisdiction of Chiefs and consequently their main source of power will be gradually reduced. Leasehold implies that customary law no longer applies, and Traditional Leaders consequently have no more power over such land rights.

The process of demarcating communal land for agricultural development is at an advanced stage. In early 2007 altogether 721 farms were surveyed in the northern communal areas (Ministry of Lands and Resettlement 2007: 4). The sizes of surveyed farms range between 2,000 ha in Caprivi and 2,500 ha in Kavango (Schuh et al 2006: 20). There appears to be no official guidelines on how these farms will be allocated, save to say that future beneficiaries are expected to farm independently on a commercial basis. They are therefore required to have previous farming experience as well as the capacity to meet possible financial obligations. In Omusati, traditional leaders were hesitant to make any land available for fencing while no land was available in Oshana Region. An important factor in this regard was the fact that the fencing of land would preclude people from other parts of the regions with no grazing to continue utilising pastures on a communal grazing. Put differently: the fencing programme would deny many people access to grazing and leave them with no alternatives.

The situation in Oshikoto Region is complicated by the fact that large-scale unauthorised fencing has occurred since the 1980s. Invariably, this process started when powerful individuals privatised boreholes that were sunk by government as part of drought relief (See Cox et al 1998). The full extent of unauthorised fencing is still not known, but it is believed that large tracts of land particularly in eastern Oshikoto Region have been effectively privatised in this way. A major concern is to survey these enclosures and bring their sizes in line with national policy (Schuh et al: 21)

The negative impact of enclosures of communal land on transhumance patterns has been demonstrated for Oshikoto Region (Cox et al 1989). The single most important negative impact of fences is that they restrict the mobility of livestock herds in search of seasonal grazing and water. As much of the land that was surveyed in recent years is located in areas with no existing water points, new water points must be developed in order enable people to farm. It must be assumed that these water points will be owned and managed by beneficiaries of this programme. No evidence was found that social and ecological impact studies were carried out prior to surveying communal land for commercial agricultural development. It is also unlikely that any monitoring of this programme is taking place, partly because it has not become fully operational.

Traditional Leaders appear to have accepted the introduction of property rights to water and wildlife without much resistance. Fundamental to this difference is that powers to control access to land, rather than water or wildlife, continue to be the source of power of Traditional Leaders. The ownership of water points does not impact on the powers of traditional leaders and in particular village headmen to allocate and cancel customary land rights. The same argument applies to the establishment of conservancies, where linkages and collaboration with traditional authorities are regarded as beneficial. Where conservancies 'function in terms of operating guidelines based on customary law principles of resource management buttressed by both the Traditional Authorities Act and natural resources legislation' the need to establish themselves as a legal bodies is obviated (Corbett and Jones 2000: 12–13).

The broad acceptance by traditional leaders of the principle that communities 'own' their water points provides a potential opportunity to develop the legal mandate of local level water institutions with regard to land management towards a more integrated approach. This will require a carefully planned strategy of developing such an approach together with traditional leaders at local and higher levels.

Moreover, the careful preparation of the process of transferring management responsibilities regarding water points contributed to the general legitimacy of the approach. Preparations included widespread consultations with a variety of stakeholders. Strategy papers were prepared and discussed at workshops in all regions. Whether the non-payment of water by many people in the region can be interpreted as a sign of resistance is a moot point. The reason for non-payment is not only poverty. Available information suggests that many people who are able to pay simply refuse. While the reasons for this are not well researched, this could be interpreted as a way of negating the legitimacy not so much about the institutions involved as of the principle to have to pay for water delivery.

## 5.2 Land allocation and administration

Despite perceptions that the Communal Land Reform Act will gradually reduce the powers of traditional authorities, it acknowledges and buttresses the central role of traditional authorities in land administration in communal areas. The allocation and cancellation of customary land rights remains the responsibility of traditional authorities. Where people apply for leaseholds, Communal Land Boards can only grant these with the consent of the traditional authority concerned. The consent of traditional authorities is also required to demarcate communal land for agricultural development purposes.

The Communal Land Reform Act also provides traditional authorities with powers to manage commonages and impose conditions on the use of communal grazing areas. These include the kinds and numbers of livestock that may be grazed and the section of the area under their jurisdiction which may be grazed, i.e. they may introduce rotational grazing. Should land rights holders not observe these conditions, a Chief or traditional authority may cancel their rights. The same sanctions apply if a land right holder engages in the following activities without the written consent of the traditional authority and ratified by the Communal Land Board:

- erects or occupies any building or structure on a commonage
- ploughs or cultivates any portion of the commonage
- obstructs the ways to any watering place on the commonage, or somehow interferes with the use of watering places or damages them
- does something other than lawful grazing on the commonage that prevents or restricts the other residents' rights to grazing (Legal Assistance Centre 2003: 20–21).

Moreover, customary land rights may also be cancelled if 'the land is being used predominantly for a purpose not recognised under customary law' (Section 27(1)(b)). In addition, the Regulations empower the Chief, traditional authority and/or Communal Land Board to cancel the land rights of a person who utilises land in such a manner that it causes soil erosion.<sup>1</sup> Land rights holders are also compelled to manage their land in accordance with accepted farming practices in the area concerned, but have to comply with provisions of the Soil Conservation Act of 1969 and any requirements of the Ministry of Agriculture, Water and Forestry. But the Regulations do not specify any sanctions for transgressing these general provisions and do not place any authority on either Communal Land Boards or traditional authorities to enforce them (Jones and Kakujaha 2006: 11).

Finally, the Operational Manual for Communal Land Boards states that in checking applications for existing or new customary land rights, traditional authorities have to ascertain whether location of the proposed land use is in conformity with the zoning of the area (Ministry of Lands and Resettlement 2006: 23). Needless to say, this not only presupposes the existence of land use plans, but also that they are known and understood at the local level.

Of particular interest are provisions in the Regulations to the Communal Land Reform Act that give Chiefs and Traditional Authorities the power to protect access to water. In terms of Regulation 33(2) it is an offence to obstruct approaches to watering places on the commonage or prevent a person from drawing water from or water livestock at such a watering place; pollute water at a watering place or interfere with the operation of a windmill, water pump, water pipe,

<sup>1</sup> It is interesting that the Soil Conservation Act of 1969 is invoked in this regard. Although a very appropriate piece of legislation regarding the conservation of soil, it has all but disappeared from public memory after Independence (See de Klerk 2004: 207).

dam or storage tank or other installation at a watering place. Contravention of any of regulation is a criminal offence, punishable with a fine not exceeding N\$ 4,000 or imprisonment of up to one year (Legal Assistance Centre 2003).

### 5.3 Nested institutions

In general policies on land and natural resources refer to traditional authorities in a generic sense. It is important to recognise, however, that control over land and natural resources 'is often located within a hierarchy of nested systems of authority' (Cousins 2004: 293). In the north-central regions, traditional authorities generally consist of three tiers: the Chief or King, a number of Councillors and at the lowest level, village headmen. Each level has distinct functions and powers with regard to land and water. These may differ slightly from one area of jurisdiction to another. The following discussion, therefore, does not claim to be representative of all areas, but serves to illustrate the point.

All land in a traditional community falls under the jurisdiction of a Chief or King. He/she presides over the tribal council consisting of a number of Senior Headmen or *omalenga enene*, ranging between 8 and 10 in number. Each Senior Headman is in charge of a district. Where such districts were too big, they were divided into sub-districts which are headed by junior headmen. Senior Headmen allocated villages or *omikunda* to persons who could afford to pay for this right. The 'buyers' of a village subsequently became headmen of these villages. Headmen in turn allocated land to individual households against payment of a fee (Hinz 1995: 30–31, Kerven 1998: 68).

Most functions concerning land administration continue to be handled by village headmen. Under customary law it was not permitted to claim land for residential and cultivation purposes without the permission of the village headman (Hinz 2003: 63). Hinz (1995: 32) described the process of acquiring land rights as follows:

After identifying the land for which one is to apply, the applicant approaches the responsible headman who will then in turn with his/her assistants and the applicant inspect the piece wanted. If the land is available, the boundaries and the price will be fixed. If the applicant accepts, he/she will inform the headman and the payment agreed upon will be made.

If the occupant intends to change the boundary fence of his homestead, he/she has to consult the headman (Hinz 2003: 62).

The laws of the Uukwambi Traditional Authority state that companies wanting land in the communal area also have to request permission from the village headman (Ibid).

Recent research (Werner 2008) suggests that women are entitled to apply for land in their own rights. However, a number of traditional beliefs and perceptions make this difficult. By tradition, it was only married men who applied for land to establish his homestead. However, as more women generate their own incomes they can afford to pay for a customary allocation. They are further encouraged to do so by the gender equality provisions of the Communal Land Reform Act.

The extent of controlling access to grazing land is not entirely clear. In the Ondonga area King Eliphaz stated that 'any community member can go and graze his or her cattle'. His definition of community included people from Ongandjera, Oukwanyama and Kavango. There were also no limits on the number of animals individuals could graze (Hinz 2003: 60).



The situation in Uukwambi differed slightly from the Ndonga area. Chief Ipumbu of the Uukwambi Traditional Authority stated that everybody, regardless of area of origin, had a right to graze cattle on the commonage, provided he/she had the permission of the responsible headman. However, people who do not originate from Uukwaludhi had to obtain the permission from the King. The decision on whether to grant such permission or not depended on the availability of water and grazing (Ibid: 65, 67).

Applications for land rights for purposes other than residential or cultivation have to be decided by the Council of Senior Headmen in the Oukwanyama area (Hinz 1995: 32–33). This included the issue of fencing communal land for private use. In the 1980s individuals could apply to a Senior Headman to fence off land in the sparsely populated parts of eastern Oshikoto. The Senior Headman submitted the application to the King and his Council. The King caused an inspection of land to be carried out and the boundaries established. Before approving an application the, the Council had to ascertain that the applicant was a Namibian citizen with a good character and no criminal record and that he did not have any fenced land elsewhere (Werner 1998: 38).

Regulations formulated in customary laws regarding water appear to be in conflict with water legislation and the powers of Water User Associations and Water Point Associations. The Laws of Ondonga, for example, permit people to ‘drill’ wells, provided they have entered into an agreement with the headman. If somebody ‘establish[es]’ a well without such agreement, the well will become the property of the headman (Laws 1994: 68–69). The customary laws of Uukwambi state that ‘the Traditional Authority feels a strong responsibility to protect water’ and place the responsibility to protect water in wards in the hands of headmen. Cases of ‘water vandalism’ are regarded as a punishable offence and have to be reported to the headman (Hinz 2003: 63).

The Communal Land Reform Act recognises only registered Chiefs and traditional authorities as defined in the Traditional Authorities Act of 2000 as executive authorities with regard to communal land management. The most important institution in customary land administration, village headmen, is not considered in the Act. Their functions and powers are not defined, despite the fact that they are responsible for allocations and cancellation of customary land rights and continue to be the main dispute resolution institution at local level. This also explains why the Act has prohibited the tradition of paying headmen for allocations of land. These payments are the main source of income for village headmen and the only compensation for performing land administration functions at village level. Recent research suggests that in some instances village headmen have become indifferent towards their traditional functions on account of non-payment (Werner, forthcoming). Some Communal Land Boards in the north-central regions have lobbied government to revise the prohibition to enable village headmen to obtain some income.

The effect of the Communal Land Reform Act appears to shift the balance of power away from individuals and households and local authority structures to the traditional authority and the Minister. One can conclude with Cousins and Claasens (2004: 290) that if push comes to shove, ‘ownership at the level of the traditional council/ chieftaincy will “trump” the rights that exist at lower levels, such as household and individual rights to residential and arable land’.

#### **5.4 Water institutions as basis of community based natural resources management**

However, despite the partial and erratic empowerment of rural communities, each acknowledgement and enhancement of local level institutions in law or in practice opens windows of opportunity to influence the use and control of resources (Wiley 2000b: 2). Conservancies, for

example, have provided an ‘impetus for the full recognition of communal tenure to land itself’ (Bollig and Corbett n.d.: 75). It was reported that in the absence of clear legal rights to commonages, the establishment of conservancies was regarded by many traditional leaders and local communities as a mechanism to stake out territorial claims to communal grazing areas, facilitating their active participation (Corbett and Jones 2000: 7).

The argument also applies to local institutions in the water sector. Recognising Water Point User Associations and Water Point Associations as legal entities provides them with a basis that could serve as a basis for managing resources outside the water sector.

That this is not simply a theoretical possibility is illustrated by the case of the village of Okonyoka in the Aminuis communal area.<sup>2</sup> The village was founded by a few Herero households who moved there in 1959 in search of water and grazing. The area was used primarily for grazing with only seasonal water available. After the sinking of boreholes, permanent settlement became possible and in 1999 Okonyoka was a village of approximately 150 people. Drought is endemic in the area and government subsidies became a major coping mechanism for drought years. They enabled farmers to keep their livestock during droughts, contributing to increased livestock numbers. In addition, communities increasingly placed restrictions on livestock movements. These factors encouraged a trend to secure exclusive grazing rights by individuals and groups for droughts and dry seasons.

Against the background of changed drought-coping strategies, the establishment of a water point committee ‘provide[d] a forum for community discussions of natural resource issues and decisions regarding access to rangeland grazing resources, especially during times of drought’ (Twyman et al 2002: 132). At Okonyoka the water point committee quickly took on wider responsibilities such as regulating access to village pastures for emergency grazing. A system of considering applications for emergency grazing and laying down specific conditions under which it was granted was established.

The water point committee faced serious challenges in enforcing their decisions. The drilling of new boreholes in the mid-1990s on land considered to be part of Okonyoka village attracted new settlers and put increased pressures on grazing. After one new settler fenced off a paddock on land considered to belong to Okonyoka, the community decided to fence off their village land. The youth in particular felt that a fence was needed to protect their resources and the issue of constructing a community fence was discussed through the water point committee. After having reached agreement, the community spent a year negotiating the boundaries of Okonyoka with neighbouring villages. The entry point in each village was the water point committee. Once agreement was reached, the construction of the fence was started in 1998.

Erecting a community fence had a number of social and environmental implications which will not be discussed here. Suffice to conclude therefore, that

This fencing scheme represents a clear manifestation of community empowerment caused by a range of both external pressures and internal community issues similar to those faced at other settlements in Namibia (Ibid: 133).

The community fence boosted the confidence of the community to manage their own resources. They were contemplating to apply for conservancy status to formalise their rights to land.

The impact of the community fence on individual households in Okonyoka has been positive. Active participation in the water point committee has increased community control over re-

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<sup>2</sup> The following discussion is based on Twyman et al 2002 unless otherwise stated.

sources and livelihoods. However, the process impacted negatively on access to land by marginal groups. Large numbers of people are likely to become landless if more villages resort to fencing their land. The formalisation of procedures for granting emergency grazing to outsiders in years of drought may also impact negatively on traditional drought-coping strategies, which are based on mobility.

A set of specific local conditions gave rise to the utilisation of water point committees to advance the interests of the community at Okonyoka. Conditions in the north-central regions differ in some significant aspects, however. In particular, the central role of traditional authorities in controlling access to land and the widespread legitimacy they continue to enjoy (Hinz 2003: 49–50) is likely to limit the possibilities of similar developments. Moreover, with approximately half the population not owning cattle or other livestock, pressures to fence village land may not be the same.

Despite these caveats, the possibility does exist for Water User Associations and Water Point Associations to assume wider powers in community based natural resources management. Although no information exists on the issue, it is conceivable that villages depend entirely on piped water. In such cases, local Water User Associations will consist of all households of the village, and their areas of jurisdiction will coincide with that of the village headmen.

Even if Water Point User Associations or local Water User Associations were to use the powers provided for in the Water Resources Management Act, they would encounter some intractable problems. To start with, defining the geographical area in the vicinity of a water point or water scheme is difficult. Identifying the community of regular users of a water point or water scheme is relatively simple. However, the regular users of a water point may not necessarily coincide with the people who use parts of the grazing land around a water point but who do not regularly draw water at the water point. Access to open water during the rainy season makes it possible for people to take their livestock into areas far away from home. Such water is open to anybody without restriction, the proverbial open access situation. Moreover, hand dug wells play a significant part in water provision in parts of north-central. These are also not governed by the Water Resources Management Act. Traditionally, such wells are owned by the person or persons who dug them. By virtue of such ownership, they control access to water.

Access to water is a precondition for having access to grazing. Without water, the best grazing cannot be utilised. Water user associations therefore potentially have a key role in controlling access to grazing. At present access to water and hence grazing is guaranteed for as long people pay for their water consumption. Water user associations and their water point committees do not appear to make use of their legal powers to plan and control communal land in the vicinity of their water points. Water user associations should be encouraged to make more use of their legal powers to manage land and water in an integrated fashion. A useful start in this direction would be to initiate a process of participatory land use planning. This is not likely to introduce any radical departures from existing land uses, but is likely to facilitate more sustainable land and water use. Moreover, by involving communities in the process, the final land and water management plan will enjoy wider legitimacy than a top down approach. The methodology adopted by conservancies to develop management plans will be very useful in this regard. While water user associations are legally constituted bodies with legally defined powers, it will be essential to start participatory land use planning in close consultation with traditional leaders.

## 5.5 Development of water infrastructure

Water policy and legislation deals explicitly with the devolution of management powers to local water institutions. The powers of these institutions with regard to the development of water infrastructure are less clear. The distinction between management and development is important, in so far as the former involves already existing water sources and includes pricing and supervision of allocation. Water development, on the other hand, entails raising funds often from external sources for new water points and for establishing programmes for water delivery. The single biggest concern of households in rural areas is the need to have more water sources developed closer to their homes (Peters 2002: 10).

It must be assumed that proposed water abstractions and new water developments by different user associations acting as legal entities are governed by the stipulations of the Water Resources Management Act as it applies to all other persons. These appear to deal primarily with the abstraction of water, but not with the introduction of technologies such as small-scale desalination plants, which are designed to decrease the dependence on sub-terranean water.

The abstraction of any water including brackish and marine water requires a license from the responsible minister. The application for such a license must include a description of the waterworks necessary to accomplish the proposed abstraction and treatment that will be given to the abstracted water. An impact assessment of the proposed abstraction of water on the environment and existing water users and water resources must accompany the application (Section 33). An application is then forwarded to the Basin Management Committee for investigation and recommendation.

The Act sets out a number of criteria which must be considered before approval of a license is granted. Apart from applications having to be consistent with the Water Master Plans, criteria include aspects of safe yields of aquifers from which water is abstracted, efficient and beneficial use of water and the impact on water users and water resources. The need to redress the effects of past racial and gender discrimination will also be considered, as well as the existence of traditional communities which may depend on the water resource to which an application for a license is made (Section 35).

The drilling, enlargement or construction of boreholes can only happen once a permit to do so has been acquired from the Minister concerned. Applications are checked to ensure what the safe yield of an aquifer is and that the proposed use of the water is in conformity with efficient water management practices.

In both instances – licenses to abstract water and permits to drill boreholes – the existence of any customary rights and practices in or dependent on the water resource to which the license or application relates must be considered. Licenses to abstract water are issued subject to the protection of existing and potential uses of the water resource, including uses by virtue of customary rights and practices (Sections 35, 37). Where basin management committees exist, applications for a license to abstract and use water must be submitted to the committee for investigation and recommendation. A similar provision has not been inserted in the Act regarding drilling of boreholes.

The Act provides the Minister responsible for water affairs with extensive powers in regard to drilling of boreholes. These include the power to

- drill a borehole or sink a well to obtain supplies of water from underground sources, and conserve water so obtained and supply or deliver it to any person for use for any purpose without payment or upon payment of charges; and

- to drill a borehole or sink a well for any person on the application of such person (Section 5)

These powers flow from a basic principle in Namibia's water policy to separate the ownership of land from the ownership of water. Property rights to land, be they ownership or customary rights, do not imply ownership rights over water below or above the surface of the land. The state owns all water resources and is under legal obligation to ensure that these resources are managed and used to the benefit of all people.

## 6 Conclusion and way forward

The concept of integrated land and water management has been adopted in Namibia as the most appropriate way to promote sustainable development. A well developed policy and legal framework has been drawn up to facilitate the implementation of this approach. Implementation is in its beginning stages and will face many challenges ahead. These relate to inconsistent policies and a plethora of institutions with overlapping mandates. Harmonising and integrating sectoral policies, particularly with regard to property rights granted to land and other natural resources are of paramount importance.

The discussion above has shown that the process of granting property rights to water land, wildlife and forest resources has been erratic and uneven, making it difficult for local communities to manage their resources in a meaningful way. Specific areas where current legislation is not harmonised include the following:

- **Group rights to resources:** under wildlife legislation, groups of resource users can obtain limited rights for the consumptive and non-consumptive use of wildlife and benefit materially from revenues generated thereby. Similar legislation exists in the forestry sector. With regard to water, users of water point obtain property rights to amount to ownership rights.

However, land legislation does not provide for exclusive group tenure to grazing land. However, control over access to water effectively provides water user associations with control over access to grazing.

Rights to communal grazing are also not defined in land legislation. While traditional authorities have the power to control grazing both in terms of numbers of livestock grazed and the areas in which they are grazed. The rights of conservancies over wildlife do not extend to the control of grazing. Community forest management agencies have powers to control the use of grazing and other agricultural activities in community forests, subject to a forestry management plan.

- **Institutional mandates:** Water legislation transfers 'ownership' of water points to communities. The powers of water user associations include the planning and control of land. Land legislation, however, provides powers to traditional leaders to ensure that access to communal water points is not denied. A further problem is that no clear policy and legal framework exists for land use planning. Conservancies develop management plans, but these have no legal standing due to the absence of legislation in this regard.

The powers of the most significant land management institutions at local level, village headmen, have not been defined in law. The Communal Land Reform Act vests all powers of land allocation in recognised Chiefs and/or Traditional Authorities.

Despite these contradictions in legislation it should be remembered that reforms in the natural resources sector are an iterative process. They take place in a complex socio-political environment, where the political balance of forces is shifting constantly as new policies and laws are implemented and new institutions arise. On this road, each new step in empowering and enhancing the capacities of local communities to manage their resources provides opportunities to exert some influence on how resources are managed. This is most likely where reforms have resulted in a large degree of local level participation, such as in water user associations and conservancies. As these institutions develop further, they will be able to assert their interests and demands for more meaningful participation in reforms that were initiated by the state and are implemented in a top down fashion. The latter includes the Communal Land Reform Act.

Water development projects, and in particular those that are supported by donors, will have to find appropriate entry points to achieve acceptance by target communities. It goes without saying that in areas with an established basin management committee, proposed interventions have to be discussed with the committee. But there appear to be no legal requirements or mechanisms that link basin management committees and local level water institutions. Projects seeking to support water development at the local level through new technology or any other means will thus also chart new territory in involving local communities in water development within a water basin context.

At the local level, Water Point User Associations and local Water User Associations present themselves as a starting point for water development initiatives by dint of the fact that they are constituted as legal entities. Their powers to take decisions regarding water development, however, are limited on account of the fact that the ultimate owner of water is the state. But they are entitled to identify water needs and propose possible solutions, which will have to be dealt with according to the procedures prescribed in the Water Resources Management Act.

It must be recognised that local level water institutions operate within a wider social and political context which is characterised by overlapping resource rights and nested institutions. Although most of these do not enjoy formal legal status, they have to be acknowledged in the process on account of the fact that they play central roles in land administration. Consultations and negotiations with village headmen and through them the Traditional Authority and Chief or King will have to form part of any initiative to develop water infrastructure. The Regional Councillor of the constituency in which the proposed development is to take place needs to be part of the process too. Where conservancies or community forests exist, their respective management committees need to be consulted and informed. Table 1 summarises the mandates of the most important institutions at national, regional and sub-regional level with regard to the management of key natural resources such as land, grazing and water.

*Table 1. Institutional mandates over key natural resources*

<b>Resource/ Activity</b>	<b>Central Govt.</b>	<b>Regional Govt.</b>	<b>Communal Land Boards</b>	<b>Traditional authority</b>	<b>Water user associations/ water point committees</b>
Land	Overall control by MLRR. Traditional authority decides on allocation of customary title for residential and crop growing land, endorsed by Land Board. Land Board allocates leases, endorsed by TA	No specific powers, but development coordination and planning impacts land use	No direct powers of allocation. Certification and registration of customary land rights. Approval and allocation of leases not exceeding 50 ha.	Allocation of residential and grazing land	Mgt. and maintenance of water points/right to exclude non-members. Legal powers to plan and control land in the vicinity of water points
Water	Overall control by MAWF. Rights and responsibilities over water points devolved to local communities	Regional Water Management Agency responsible for coordination & planning (planned)	No powers	No specific powers except duty to ensure sustainable resource management	Management and maintenance of water points/right to exclude non-members
Grazing		No specific powers	No specific powers	No control but in some areas grant permission to outsiders for access to grazing land	No specific powers
Land use planning	MLLR has overall control of land and ultimate responsibility for land use planning.	Responsible for development planning	No specific powers. Need to consulted by water user associations in drawing up plans for land use and control	No specific role or powers. Important stakeholder through land allocation powers. Need to consulted by water user associations in drawing up plans for land use and control	Powers to plan and control the use of communal land in the vicinity of a water point in co-operation with communal land board and traditional authority concerned
Development planning	MRLGH & MAWRD responsible for community development. Line ministries carry out planning for own projects	Responsible for development of regional development plans & establishing constituency and local development committees	No specific powers	No specific roles or powers. Important stakeholder because of land allocation	No specific roles or powers. Important stakeholder through control of water points

*This table was adapted from a similar table originally developed by Brian Jones. His permission to use it is gratefully acknowledged.*

Existing water legislation deals primarily with conventional water sources such as boreholes, for example. However, new technologies exist that seek to decrease the reliance on groundwater resources. The issue of ownership of new water developments, particularly where they employ new technology, needs to be addressed. Access rights to such infrastructure, responsibilities for maintenance and replacement are just some of the issues that need to be solved. At present there appear to be no ready made answers to this and a solution will have to be negotiated within the provisions of the law.

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