

## **LEGAL REVIEW**

**TO STRENGTHEN THE TENURE FOR CONSERVANCIES**

**ON COMMUNAL LAND**

**PREPARED FOR NACSO / WWF**

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## 1 Background

The Report on *Customary and Legislative aspects of land registration and management on communal land in Namibia*<sup>3</sup> by John Mendelsohn was the impetus for this project for a legal opinion on the possibility of conservancies applying for Rights of Leasehold under the Communal Land Reform Act.

Freehold owners of agricultural land have always had the right to the full use of the wildlife resources on their land, as the Nature Conservation Ordinance 4 of 1975 bestows full ownership rights over wildlife on private farms onto the owner of the farm. Section 29 of the ordinance stipulates that the owner of a farm or a piece of land of at least 1000 hectares in size and enclosed in a game proof fence is the owner of all huntable game on the land.

In 1996 the Nature Conservation Ordinance 4 of 1975 was amended by the Nature Conservation Amendment Act 5 of 1996 which bestowed similar rights over wildlife to communal farmers, subject to the conditions that communal land residents form conservancies. Since the introduction of the 1996 amendment, the conservancies have attained some success in the management of natural resources through use of the wildlife, particularly by way of trophy hunting and tourism.

However, the conservancy legislation does not give the communal land residents any rights of tenure, and more importantly, it does not give any powers to the conservancies to protect themselves from the predatory land and resource claim practices from more wealthy individuals who have alternative income from formal employment or businesses, usually outside the communal area.

The Communal Land Reform Act 5 of 2002 requires people having customary rights to occupy land to register their properties. This is termed the Registration of Customary Land Rights (CLR), and provides the first steps in giving property owners security of tenure. The properties are limited to those used for residential and/or farming purposes. In terms of Regulation No. 37 (Regulations made in terms of the Communal Land Reform Act) issued on 24 February 2003, the Minister of Lands & Resettlement sets the maximum allowable size of

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<sup>3</sup> Customary and legislative aspects of land registration and management on communal land in Namibia, December 2008, John Mendelsohn (RAISON – Research & Information Services Namibia) Report prepared for the Ministry of Lands & Resettlement and the Rural Poverty Reduction Programme of the European Union

properties that may be approved by the Communal Land Boards at 20 hectares. Other communal land may be registered as leaseholds or will remain unregistered commonage to which local residents have rights of access and use.<sup>4</sup>

The lack of control over commonages is particularly true for forage and water, the two commodities of highest value used by all livestock on all commonages, and it is these commodities that are also of high value for wildlife and other natural resources (such as timber, fire wood and plant foods and medicines) in conservancies. The absence of control has not gone unnoticed by the wealthy and elite who increasingly secure commonage resources for their personal benefit. Pressures on commonages are likely to increase and will become particularly severe when livestock farmers run short of pastures during dry years or droughts. The recent incursion by cattle farmers and their animals into the Nyae Nyae Conservancy provides a good example of what will happen increasingly. Similar incursions have recently occurred into communal areas in Kunene, Kavango and Erongo.

Securing commonage resources for the personal benefit of the elite happens in two ways. The first is by fencing off large tracts of land, which is accomplished in various ways in different areas: by paying a local headman in Owambo to secure his agreement for the allocation of land to be enclosed; by forming land and farming committees to plan and allocate farms in each of the Kavango TAs; and by drilling boreholes and then fencing off private farms in eastern Herero areas. In total, there are about 190 such farms in Owambo, over 400 in Kavango and an unknown, but significant number in eastern Herero. All the farms are substantial, most varying between 2,500 and 10,000 hectares. While some farms have been acquired in unoccupied or unused areas, others have led to local residents losing commonages, seasonal or emergency grazing areas and even their homes.

The second way in which commonage resources are exploited is through domination by livestock. Livestock ownership is highly skewed in most communities, with the result that most animals are owned by a few 'weekend farmers' who are wealthy businessmen or salaried employees that spend much of their time living in towns. They often make up 15 to 25% of all livestock owners in any one area, but cumulatively may own 70 to 90% of all animals. As a result 70-90% of pasture and water is used by animals belonging to wealthy, mostly absentee farmers, leaving 10-30% of these resources for local permanent residents

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<sup>4</sup> Ibid, page 6

who depend largely, or solely on livestock farming. In addition, freehold farms often move their cattle to graze on communal land until the pastures and/or water has been exhausted, usually at the end of winter. They then move their stock back to the freehold farms where the pastures have remained unused. This practice is known as dual grazing.<sup>5</sup>

It is clear that there is little to no government or traditional leadership control over the use of most communal land.<sup>6</sup> Much of it is a free-for-all that does not serve the stated intention of communal land being a safety net for the poor. Quite the reverse is true: it is more a poverty trap where the rich get richer, and environmental resources are degraded. In as much as communal land is free for the poor, it is also free for the rich. Most communal land is a veritable example of Hardin's 'tragedy of the commons'. As Seretse Khama said in 1975: "Under our communal grazing system, it is no one individual's interests to limit the number of his animals. If one man takes his cattle off, someone else moves his cattle in." While referring to Botswana, his comments have equal validity for Namibia's communal land. What can be done to fix this situation?

While the Registration of Customary Land Rights process seeks to formalize and document 'ownership' of tiny residential areas of individually-owned farmland, people in many pastoral communities have no agricultural land to claim as their own. Their residential plots are also really of little consequence because they are small and have to be placed close to water points. For these people, it is their shares in commonage grazing that makes land valuable and worth 'owning', especially in the face of the land grab by the wealthy and elite. What is therefore needed is a system to formalize and legally register 'ownership rights' to commonages. It is also on these commonages that the most valuable wildlife and tourism resources for conservancies are to be found.

A second aim of this review is to consider whether the registration of leaseholds by conservancies might enable residents of communal land to have capital assets in their land, perhaps as shareholders in a 'conservancy company' that can develop the capital value of its

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<sup>5</sup> Ibid, p 26

<sup>6</sup> The study by Mendelsohn showed that with few exceptions, traditional authorities are only and primarily 'gate keepers' who control who may settle on communal land, but thereafter exercise no control over the use of commonage resources such as pastures and water. There are also no controls over the number of livestock that any person may hold.

conservancy. The interest in this arises from the legally defining consequence of communal land that denies residents the opportunity to develop the capital wealth that everyone in freehold tenure systems takes for granted and seeks to accumulate. Indeed, this difference between communal and freehold is more than reminiscent of the discriminatory policies that held before independence. Those policies were based on colour, while current policy is based on place of residence.

Moreover, since residents have no capital value in communal land, their land cannot be used as savings or collateral, and residents cannot sell or transfer any property or other assets that go with land. All of this has direct consequences on land productivity, mainly because occupants of communal land have little incentive to invest in assets tied to land. This is one reason for many people in communal areas being poor. It also contributes to land degradation.

## **2 Theoretical Tenure Model for Investigation**

Several options are available. Individual ownership is a desirable option, but most commonages cannot be divided up into units that are economically viable since options for grazing diminish exponentially as farm size declines. Commonages need to be kept open to allow livestock to move between pastures; the larger the commonage the more options there are for movement between grazing areas. This means that some kind of group ownership and/or control should be developed, which raises questions of who would control the group, how rights of use can be assigned to legitimate 'owners', how rights can be transferred, liquidated and inherited, and what kind of legal title would be accorded jointly-owned land. After consideration of various options, the following model appeared most useful:

1. Local management institutions, such as conservancies, water point associations, farmers' associations, community forests etc should be given long-term leasehold tenure over areas of common property. All these management institutions have – to a greater or lesser degree, and according to local circumstances, proved their potential to organize communities for better decision- making and collective management of their surrounding resources, including grazing and water for domestic livestock. These management institutions are also democratically controlled, unlike traditional authorities where power is inherited and controlled by certain families.

2. Boundaries between common property areas should be surveyed and registered in long-term leaseholds.
3. Legitimate residents and/or users of the common property should be registered as members of the leaseholds as a first step. The leaseholders may also register a company in which members would have shares. The shares would amount to capital assets which will thus provide people on communal land with the opportunity of benefiting from the capital value of land. In addition, as shareholders, residents will then have more reason to care for and develop the value of their land.
4. Each community should decide how newcomers can be admitted: as shareholders, free residents with their own residential properties, or whether newcomers may not be admitted. Pockets of commonage can be left open and available for free access to small pieces of residential farmland at the discretion of traditional authorities and conservancies as a safety net and for retirement.
5. Measures should be implemented at the beginning to avert the risk of management of commonage tenure being misused by the elite.
6. This model of group ownership should be vigorously encouraged and promoted, but not imposed. The system should grow according to demand and create management and shareholding systems that are most appropriate for local circumstances.<sup>7</sup>

This paper is a review of legislation and policy to establish whether conservancies can:

- a) become holders of rights of leasehold; and
- b) whether obtaining such rights will enable the conservancies to effectively protect and manage commonage resources for the benefit of residents.

The review includes an investigation into the status of conservancies as landowners, the requirements of the land registration legislation, as well as the legislation governing

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<sup>7</sup> Ibid, p 29

traditional authorities and the powers they exercise. This document further investigates whether there could be an area of conflicting powers granted over the land registered under the leasehold rights in terms of the Communal Land Reform Act 5 of 2002 and the powers of traditional authorities under the Traditional Authorities Act 25 of 2000. The purpose of this investigation is to establish whether the commonage, once registered under a Right of Leasehold is automatically usurped from the powers and jurisdiction of traditional authorities.

### **3 Legal Capacity of Conservancies to Hold a Right of Leasehold**

In order to answer the question whether conservancies can be used to strengthen the position of residents of communal land, regard must most importantly be had to the legislation which creates conservancies. The importance of this is the fact, that conservancies, being entities created in terms of the Nature Conservation Ordinance, have primarily the powers and functions which the enabling legislation bestows on them. However, in addition to viewing the legal capacities of conservancies only with regard to the Ordinance, they must also be recognized as associations which meet the common law requirements for recognition as juristic persons (legal entities). These common law requirements provide that the organization must continue to exist despite fluctuations in its membership, it should be the bearer of its own rights and duties, irrespective of the rights and duties of its individual members; and the entity should strive towards a predetermined goal, on condition that the goal is not illegal.<sup>8</sup>

Furthermore, the Communal Land Reform Act 11 of 2005 in terms of which rights of leasehold are granted must be investigated to determine whether conservancies can be holders of rights of leasehold. Holders of rights of leasehold have greater tenure rights over the portion of communal land to which the right refers than ordinary communal land residents who only have communal land rights bestowed by traditional authorities.

Reading section 24A of the Nature Conservation Ordinance, as amended, it becomes clear that the intention of the legislator was to bestow rights of commercial consumption over wildlife and commercial rights to tourism development on communal land onto conservancies. The legislator was not thinking of granting rights of tenure over the land itself to the conservancies. The relevant parts of section 24A read as follows:

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<sup>8</sup> CJ Davel & RA Jordaan *Law of Persons, Students' Textbook*, 3<sup>rd</sup> Ed. p.4

*(4) Notwithstanding section 28 and subject to subsection (5) of this section, a conservancy committee shall on behalf of the community in a conservancy or in respect of which a conservancy has been declared have rights and duties with regard to the consumptive and non-consumptive use and sustainable management of game in such conservancy, in order to enable the members of such community to derive benefits from such use and management.*

*(5) The provisions of Part III shall mutatis mutandis [means subject to the necessary changes] apply to a conservancy committee insofar as it confers rights and privileges and imposes duties and obligations on an owner or a lessee of land in relation to game on such land, except that no requirement of any such provision with regard to any fence or the extent of any land or any provision classifying land for a prescribed type of fence shall apply to any conservancy.*

Section 28 of the Ordinance reads as follows:

*(1)(a) Subject to the provisions of sections 24A and 24B and Chapter IV, no person shall, without the written permission of the Minister hunt any huntable game, huntable game bird or exotic game or any other wild animal on any land, including communal land, owned by the State.*

*(b) For the purpose of paragraph (a), land leased by the Government of Namibia shall, unless an intention to the contrary appears from the lease, and unless, in the case of communal land, the land leased is an unsurveyed piece of land, be deemed not to be land owned by the State.*

Chapter III of the ordinance referred to in the above quoted section 24A(5) contains all the rights which an owner of freehold land has over game, and so conservancies now also have the same commercial rights over their game as freehold land owners. This includes the right to develop and conduct tourism establishments.

#### **4 The Communal Land Reform Act 11 of 2005**

The other piece of legislation which must be considered is the Communal Land Reform Act 11 of 2005 and especially the sections which deal with the allocation of Rights of Leasehold.

Section 19 of the Act determines that the rights that may be allocated under the Act are divided into

- a) Customary land rights and
- b) Rights of leasehold

Reading the further provisions of the Communal Land Reform Act it is clear that the rights of leasehold which can be granted pertain to rights to use the land for commercial purposes, ie not for subsistence farming purposes. In other words, the intention is that the leaseholder will either run a tourism enterprise, a commercial wildlife production enterprise or a large scale agricultural business for the purpose of selling the produce from the operations. The situation of a family or individual using the land only for own consumption as most communal residents do (ie subsistence farming), is not envisaged in the right of leasehold. The subsistence farmers' needs for land must be met under the provisions of the customary land rights which can be granted in terms of the Act.

Section 21 of the Communal Land Reform Act lists the customary land rights that may be allocated, namely: a right to a farming unit, a right to a residential unit; a right to any other form or customary tenure that may be recognized and described by the Minister by notice in the Gazette for the purposes of this Act.

## **5 Conservancies as Legal Entities Capable with Full Legal Capacity**

The Definition section of the Communal Land Reform Act does not contain a definition for the word "person". Section 30 of the Act reads that a communal land board may grant to "a person" a right of leasehold in respect of a portion of communal land. It is trite law that legal entities such as companies are also persons, and that is why with regard to this particular legislation many rights of leasehold are in fact being granted to companies.

In terms of the common law, associations are juristic persons if they meet the common law requirements for the establishment of juristic persons.<sup>9</sup> These requirements provide that the organization must continue to exist despite fluctuations in its membership; it should be the bearer of its own rights and duties, irrespective of the rights and duties of its individual

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<sup>9</sup> See Pienaar 1984 Tydskrif vir die Heedendaagse Romeins Hollandse Reg THRHR 92 especially 97 - 98

members;<sup>10</sup> and the entity should strive toward a predetermined goal, on condition that the goal is not illegal.<sup>11</sup> It is submitted that conservancies do meet the common law requirements for recognition in law as juristic persons, with full capacity of any legal subject, irrespective of the provisions of the Nature Conservation Ordinance. This would mean that the restrictions which are contained in the Ordinance can only relate to the provisions of the ordinance itself, but cannot function as generally applicable restrictions on what conservancies can do and which rights and obligations they can acquire in terms of other laws and the common law. More specifically, the fact that the Nature Conservation Ordinance does not make provision for conservancies to apply for Rights of Leaseholds, does not, in our opinion, negate the Conservancy's ability to apply for a right of leasehold under the Communal Land Reform Act, because this latter piece of legislation does not prevent conservancies from doing so.

There is further no clause in the Communal Land Reform Act which would suggest that the legislator wanted to exclude conservancies from being the holders of rights of leaseholds. In fact it would be more correct to say that this possibility was not considered by the legislator, as the Act is clear on the intention that granting of a right of leasehold would be subject to any pre-existing rights of a conservancy, if there were any conservancy in the area. This is expressed in section 31((4) of the Act, which reads as follows:

*(4) Before granting a right of leasehold in terms of subsection (1) in respect of land which is wholly or partly situated in an area which has been declared a conservancy in terms of section 24A of the Nature Conservation Ordinance, 1975 (Ordinance 4 of 1975), a board must have due regard to any management and utilization plan framed by the conservancy committee concerned in relation to that conservancy, and such board may not grant the right of leasehold if the purpose for which the land in question is proposed to be used under such right would defeat the objects of such management and utilization plan.*

This however also means that the Communal Land Reform Act operates from the legal premise that conservancies only have rights over the wildlife in their areas. However, this premise in the Communal Land Reform Act does not in any way affect the inherent legal

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<sup>10</sup> Moreover, the organization should, eg own property or at least have the ability to acquire property separate from that owned by the members in their personal capacity

<sup>11</sup> Pienaar 1985 Tysdskrif vir die Suid Afrikaanse Reg, TSAR 77, Regsubjektiwiteit en die Regspersoon 59

capacity of conservancies as legal commercial entities to apply for and be granted rights of leasehold as any other legal entities do.

## **6 Purpose for Conservancy as Rights of Leasehold Holder**

What this study is seeking to determine is firstly, whether conservancies can use the right of leasehold for the purpose of protecting their members against practices which infringe on their rights other than wildlife consumption rights. In fact, the protection which this study seeks to establish for communal residents is against exploitation of their agricultural and other natural resources such as grazing, in other words, resources for the protection of which ownership-type tenure over the commonage would be required by the communal land residents. The key is to protect, manage and benefit from the commonage, since no legal provisions are available to protect commonages for the equitable use of people with customary rights to do so, who have few other livelihood options.

Secondly, this study seeks to establish whether the conservancy or any other form of legal entity such as the company, could be the ideal structure to protect, manage and benefit from the commonage. The need for this second aspect of this study arises out of the fact that the current legal provisions pertaining to communal land are unable to protect the commonages for the equitable use by people with customary land rights to benefit from the commonage. The precarious situation of the communal land residents is exasperated by the fact that they have few or at times no other livelihood options.

The distinguishing factor between the consumptive rights in terms of the Nature Conservation Ordinance and the right of leasehold is that the right of leasehold gives its holder an exclusive area distinct from the commonage and where the leaseholder may restrict access of the general public. Thus the position of the leaseholder is more akin to that of a freehold land owner as far as right of access restriction is concerned. In practice this right is not always applied in totally absolute terms in the sense that nobody is allowed to set foot within the leasehold area. Usually the leaseholder is a lodge operator, who uses the powers in terms of the leasehold to restrict access to livestock and especially the establishment of a competing tourism enterprise into the area of the right of leasehold. Similarly, leases for newly established large farms exclude access of other person's livestock to the leasehold area.

## 7 Customary Land Right to an Agricultural Unit

By logical conclusion, the customary right which can be granted for agricultural purposes in terms of the Communal Land Reform Act also contains the power to keep all others out of the area which falls under the allocated customary agricultural land right. The problem with this is however that it is implicit in the law that this customary agricultural land right is granted only to natural persons, or individual households, but not to legal entities. Any legal entity such as a conservancy would have to apply for a right of leasehold if it wanted to have the right to protect the commonage of part thereof from exploitation or even access by persons who are not members of that conservancy. Furthermore, the area in terms of a customary agricultural land right is limited to 20 hectares. The consequences of this for a conservancy are discussed further below.

Section 30 of the Communal Land Reform Act reads in full as follows:

- (1) Subject to subsections (3) and (4) and section 31, a board may, upon application, grant to a person a right of leasehold in respect of a portion of communal land, **but a right of leasehold for agricultural purposes may be granted only in respect of land which is situated within a designated area referred to in subsection (2)** (my emphasis).*
- (2) The Minister, after consultation with the Traditional Authority and the board concerned, must designate by notice in the Gazette, in respect of the communal area of each traditional community, an area within which that board may grant rights of leasehold for agricultural purposes.*
- (3) Notwithstanding subsection (1) a person may apply to the Minister for approval for the grant of a right of leasehold in respect of land which is wholly or partly situated outside a designated area, and the Minister may grant the application if the Minister, after consultation with the Traditional Authority and the board concerned, is satisfied that-*
  - (a) the grant of the right of leasehold will not unreasonably interfere with or curtail the use and enjoyment of the commonage by members of the traditional*

*community; and*

*(b) in the circumstances of the particular case, reasonable grounds exist for the grant of approval.*

The implications of the above quoted sections of the Communal Land Reform Act are the following:

Although there is no express provision to this effect, the only deduction which can be made from the provisions is that only individuals or individual households can be holders of customary land rights. Customary land rights cannot be bestowed upon a membership based organization such as a conservancy or an association or a membership trust. This surely explains why section 23(1) contains limitations on the size of land that may be held under customary land rights. In addition, customary rights cannot be held over land used for commercial purposes. The Regulations made in terms of the Communal Land Reform Act<sup>12</sup> are in fact more explicit about customary land rights being allocated only to individuals. Regulation 5(1)(a) determines that a board must keep a register in respect of allocated customary land rights and enter *inter alia* the following particulars in respect of each customary land right: name, sex, nationality and date of birth of the customary land right holder, and the names of the spouse and other dependants.

In terms of Communal Land Reform Regulation 3(1) the maximum size of land subject to a customary land right may not exceed 20 hectares. Therefore, the fact that one of the customary rights which can be granted is a right to a farming unit, cannot be used by conservancies, because

- 1) conservancies are not individuals or individual households; and
- 2) the size of the land allocated under customary land rights provisions is too small for a conservancy.

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<sup>12</sup> Regulations in Government Notice 37 of 2003, Government Gazette No 2926 of 1 March 2003

In terms of Communal Land Reform Regulation 3(2) an applicant can ask for a piece of land under a customary land right bigger than 20 hectares, but then the application must be referred by the traditional authority together with adequate reasons and motivations by the applicant and the traditional authority to the Minister of Lands for his or her approval in terms of section 23(1) of the Communal Land Reform Act.

The most important defect in an application for a customary land right for a conservancy, is of course that, other than the commercial right of leasehold, the customary land right is not registered in terms of the Deeds Registries Act 47 of 1937. Allocated customary land rights are only captured in a registry of the Communal Land Board. This does not meet the required level of tenure and protection which this study seeks to establish for communal residents. Without this requisite tenure, the communal land residents are also not able to really increase the value of their land and they will not have a tradable commodity. The idea of somehow creating a tradable commodity from the right to communal land is further discussed below.

## **8 Grant of Right of Leasehold for Customary Land Use**

As mentioned above, any right of leasehold which can be granted under the Communal Land Reform Act is for **commercial** use of the land. This is again something which is not expressed verbatim in the Act, as the possibility of a conservancy applying for a right of leasehold was not considered at the time of enacting this legislation. The assumption which is implicit in the formulations of the commercial right of leasehold and the customary right to a farming unit is that communal land residents will always only apply for customary land rights over communal land units and that they will not apply for commercial land rights, nor that they will use their rights over communal land for commercial purposes. The important rethinking which is required on the part of the land boards is that communal land residents, individually and especially when organized into a formal body such as a conservancy, use the rights granted to them over communal land for commercial purposes. There is no provision in the Communal Land Reform Act which compels one to the interpretation that a commercial land use by the communal land residents is not provided for. In fact, if land boards fail to see this possibility, it must be pointed out that the refusal to grant a commercial right of leasehold to communal land residents amounts to discrimination, which hampers the right of the communal land residents to develop their land and extract as much value out of it, as businesses of non-communal land residents are enabled to do with the grant of rights of leasehold to them.

The fact that conservancies were intended by the legislator to have commercial rights over wildlife has been viewed by Communal Land Boards as reason for Rights of Leaseholds to be granted to conservancies. However, in all these cases, the commercial activity underlying the right of leasehold was limited to a tourism venture such as a lodge or guided tours through the conservancy. We are not aware of any right of leasehold granted to communal land residents for the purposes of a different commercial kind of land use such as agriculture by the residents themselves, as is specifically provided for in section 30(1) of the Communal Land Reform Act.

We cannot anticipate whether a Communal Land Board would refuse a leasehold application by communal land residents for any reason, but our basic argument why such an application should always be granted is that:

Firstly, communal land residents when applying for such a right of leasehold, albeit not for the purpose of running a tourism venture, do so for the purposes of exercising a commercial land right, and

Secondly, nothing in the Communal Land Reform Act prohibits the communal land residents from applying for commercial land rights, instead of customary land rights (for whatever use they want to put the land to).

Below is a short discussion of possible other organizations which communal land residents could form, such as a company, for the purpose of holding the right of leasehold, and which organization would be the best option for the residents as a group and also individually to realize an asset value for themselves through the right of leasehold.

## **9 Traditional Authorities Act**

Traditional authorities are represented on the Communal Land Boards to which applications for rights of leasehold are made. An application by a group of communal land residents for a right of leasehold is likely to be perceived as an attempt to usurp the direct jurisdictional powers of the traditional authority over the applicant (conservancy) community. This may conceivably also lead to Communal Land Boards being reluctant to grant rights of leasehold to conservancies in circumstances where the right of leasehold is not being applied for a

lodge development or other tourism venture. Conservancies therefore need the traditional authority structures to strengthen their position with regard to unsustainable exploitation of the land. The relevant provisions of the Traditional Authorities Act 25 of 2000 for the purposes of joint efforts to protect communal land residents seem to be in sections 3 and 16.

Section 3 which is entitled *Powers, duties and functions of traditional authorities and members thereof* specifies in subsection 3(1) the following:

*3(1) Subject to section 16, the functions of a traditional authority, in relation to the traditional community which it leads, shall be to promote **peace and welfare** amongst the members of that community, supervise and ensure the observance of the customary law of that community by its members, and in particular to-*

*(g) **promote affirmative action** amongst the members of that traditional community as contemplated in Article 23 of the Namibian Constitution, in particular by promoting gender equality with regard to positions of leadership; (our emphasis)*

It is submitted that a legal case could be made out by a communal land community, against its traditional authority for neglecting its functions in terms of the law by not promoting the welfare of the local community and by failing to promote affirmative action in the sense of reserving access to resources only for local residents. Allowing any person who is not a full-time local resident to unsustainably exploit the grazing and watering resources in fact is contrary to promoting welfare of the local traditional community. Contrary to their mandate of promoting peace and welfare amongst traditional communities, traditional authorities are party to a lot of the land grab practices, as they grant and allocate the customary land rights to powerful and wealthy individuals who bring in large herds onto the communal land commonage, at the expense of the local residents who have much smaller herds and whose only subsistence is the communal land.<sup>13</sup>

The fact that land invasions and other instances of resource grabbing are illegal, irrespective of whether they occur with or without the co-operation of traditional authorities, in theory gives the communities who are subject to these illegal practices recourse to the courts of law for protection. However, in reality, the availability of legal recourse is of little help to

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<sup>13</sup> Mendelsohn: Customary and legislative aspects of land registration and management on communal land in Namibia, 2008

communal land residents who do not have the financial resources to start and see through a legal process to have the invaders and resource grabbers removed.

Section 29 of the Communal Land Reform Act, which deals with grazing rights, stipulates in subsection 29(1) that the commonage in the communal area of a traditional community is available for use by the *lawful residents* of such area. Neither the Act nor the Regulations contain a definition of who the lawful residents of a traditional area are. Subsection 29(2) does however contain the provision that the traditional authority may grant a grazing right to a non-resident subject to the right of cancellation in the event that such cancellation would be in the interest of the residents of the traditional area. The penalty contained in section 29(5) for violating the grazing rights regime in a traditional area is only N\$ 4,000.00 or a maximum of one year imprisonment. This is such a low amount, that it is actually financially worth it for an invader to factor in this cost for the unlikely event that he would be held criminally liable for violation of this Act. At this point it must however also be pointed out that most of the resource grabbing does not happen from outsiders in the sense of people who are not part of the local community, but by part time members of the local community itself who have alternative and additional livelihoods, such as paid jobs in town.

Section 16 of the Traditional Authorities Act 25 of 2000 is entitled *Relationship of traditional authorities with government organs*, and reads as follows

*A traditional authority shall in the exercise of its powers and the performance of its duties and functions under customary law or as specified in this Act give support to the policies of the Government, regional councils and local authority councils and refrain from any act which undermines the authority of those institutions.*

Before investigating whether traditional authorities are complying with this provision, it is interesting to highlight the findings which were made about the real extent of the spheres of influence of traditional authorities. The report on *Customary and legislative aspects of land registration and management on communal land in Namibia*<sup>14</sup> indicates that the levels of influence of traditional authorities are weakening. *With respect to custodianship and management of land, a host of newly created institutions either challenge the role of*

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<sup>14</sup> John Mendelsohn, report prepared for the Ministry of Land & Resettlement, Rural Poverty Reduction Programme of the European Union, December 2008, p 12

*traditional authorities or are gradually taking over certain of their functions. The most prominent are water point associations, farmers' associations, conservancies, community forests, village development committees, regional councils and communal land boards (CLBs).*<sup>15</sup>

The further two factors which are mentioned in the article as undermining traditional authorities are firstly the fact that traditional authorities lose authority over land and communities that fall within the boundaries of declared settlements and towns. These urbanized areas fall under the administration of local councils and are supervised by central government. Secondly, more educated and affluent community members often ignore or bypass traditional authorities<sup>16</sup> or use their influence to get the traditional authorities to agree to their practices.

There are two important deductions which we can make from the abovementioned findings: Firstly, that traditional authorities are a significant part of the *problem* of land grab, and secondly, that given the already precarious situation of the sphere of influence of traditional authorities, they might view a right of leasehold application by a local conservancy under the circumstances contemplated herein as a further erosion of their influence. As traditional authorities are part of the land boards which grant the rights of leasehold, they might be inclined to influence the rest of the land board against granting a right of leasehold to a conservancy. Such a refusal should however at most pose a challenge instead of an insurmountable obstacle to a successful leasehold application. The Communal Land Reform Act does not contain an appeal provision against decisions of the Land Board. Section 30(4) only contains an arbitration provision in the event that a traditional authority refuses to give consent to the granting of a right of leasehold whereas the Land Board is of the opinion that a right of leasehold should be granted.

In practice, any dispute between a Land Board and an applicant should involve the Minister as a possible final arbiter, as the Minister is empowered in section 30(3) to grant a right of leasehold for agricultural purposes in respect of land which is wholly or partly situated outside an area designated for agricultural purposes. This provision does not state that the Minister is an appeal body for an aggrieved applicant against decisions of the Land Boards, and

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<sup>15</sup> Ibid, p 13

<sup>16</sup> Ibid, p 13

therefore the Minister's intervention might not be accepted as a valid next step to have the board's decision reversed or overturned, and therefore the Minister's intervention can be no more than of a mediating or arbitrating nature.

As a last resort, an aggrieved party would have to use the courts of law to overturn the decision of a Land Board, if the applicant can prove that the decision of the Land Board to refuse the leasehold application was contrary to the Land Board's duties in terms of the Communal Land Reform Act, and generally contrary to the provisions of the Act.

## **10 Concessions on State Land**

A concession is also a right which bestows a certain level of exclusivity upon its holder, but concessions only apply for certain commercial operations and do not provide any measure of permanent control or ownership over land and its assets. In other words, the same problems which a conservancy faces when intending to apply for a customary land use will be even more of a restriction to being granted a concession on state land. It is therefore not necessary to investigate this option further.

## **11 Governing the Commons with a right of leasehold**

Another aspect under which the appropriateness of a conservancy as the holder of a right of leasehold must be examined is whether the conservancy is in the context of the legal framework of the right of leasehold and the traditional laws the ideal organization to lead to successful commonage resource management. Regard must be had to the elements which in the theories of the 2009 Nobel Peace Prize winner for economics, Elinor Ostrom, are identified as the *design principles for long enduring CPR (common –pool resource) institutions*<sup>17</sup>. In Namibia the debate about natural resource management in commonages reflect the theoretical debate between the views of G Hardin (1968)<sup>18</sup> and Elinor Ostrom (1990).

*When G Hardin develops his "tragedy of the commons" theory, he illustrates it, notably through the example of a stock farmer who makes his cattle graze on a communal space. It*

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<sup>17</sup> Elinor Ostrom (1990) *Governing the Commons, the Evolution of Institutions for Collective Action*. Cambridge University Press,

<sup>18</sup> G Hardin (1968) *The Tragedy of the Commons*, in Hardin G, Baden J (1977), *Managing the commons*, W H Freeman & Company, New York

*is interesting to note that his contribution is mainly inclined to prove the need to limit population growth.*

*E Ostrom on her side publishes “Governing the Commons” partly reacting to the article of G Hardin, but also to other theories dealing with natural resource management such as that of nationalization. She however explains in her introduction that each situation is particular. So, “Instead of there being a single solution to a problem, I argue that many solutions exist to cope with many different problems”. From the observation of different situations where there is a community management of resources by a sustainable self managed system, she draws lessons that, according to her, are fundamental for successful community management. This perspective is interesting because E Ostrom does not claim that community management is the solution to all situations of management of common natural resources. In Namibia, after having evoked the “Tragedy of the Commons” in an attempt to privatize the communal grazing areas in communal lands, the trend would be to apply the community management (translated by CBNRM) to the whole country.*

*The principle of the CBNRM approach in Namibia is: “if local communities have control over the use of resources and can derive direct financial (i.e. commercial) benefit from this use, they will look after the resources carefully and use them sustainably.”<sup>19</sup>*

The design principles illustrated by long-enduring CPR (common-pool resource) institutions identified by Elinor Ostrom (1990) are the following:

1. **Clearly defined boundaries:** Individuals or households who have rights to withdraw resource units from the CPR must be clearly defined, as must the boundaries of CPR itself
2. **Congruence between appropriation and provision of rules and local conditions:** Appropriation rules restricting time, place, technology and/or quantity of resource units are related to local conditions and to provision rules requiring labor, material and/or money.
3. **Collective-choice arrangements:** Most individuals affected by the operational rules can participate in modifying the operational rules.

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<sup>19</sup> Gwladys Mathieu and Vanessa Méline, Natural resources management rules and practices in a context of legislative changes in North Central Namibia (May 2005) Master’s Thesis of Tropical Agriculture Development Sciences, p 104

4. **Monitoring:** Monitors, who actively audit CPR conditions and appropriator behaviour, are accountable to the appropriators or are the appropriators.

5. **Graduated sanctions:** Appropriators who violate operational rules should be sanctioned. Sanctions should be gradual (depending on the seriousness and context of the offence) by other appropriators, by officials accountable to these appropriators, or by both.

6. **Conflict-resolution mechanisms:** Appropriators and their officials have rapid access to low cost local arenas to resolve conflicts among appropriators or between appropriators and officials.

7. **Minimal recognition of right to organize:** The rights of appropriators to devise their own institutions are not challenged by external authorities.

*For CPRs that are part of larger systems:*

8. **Nested enterprises:** Appropriation, provision, monitoring, enforcement, conflict resolution, and governance activities are organized in multiple layer of nested enterprises.<sup>20</sup>

With specific regard to the aim which this paper seeks to achieve, namely determine whether conservancies are the appropriate organizations to hold rights of leasehold in order to protect the local residents from unsustainable resource exploitation from outsiders, there are three of Ostrom's Design Principles whose applicability to the conservancy as leaseholder must be investigated.

***Design Principle 2 Congruence between appropriation and provision rules and local conditions.***

Is there indeed this congruence in the conservancy setting, or is the congruence disrupted or negated by the parallel existence of other natural resource management bodies such as water point committees and forest committees?

The granting of a right of leasehold over an area would not nullify the roles of other resource management bodies each of which could continue to manage and develop the value of

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<sup>20</sup> Quoted from Mathieu & Méline, supra, p 105

resources within its sphere. Indeed, the resource management bodies would become more effective if security of tenure is strengthened.<sup>21</sup>

In certain areas it may be more useful for water point associations, community forests or other management institutions to take the lead in acquiring leaseholds, rather than conservancies. This is obvious where there are no conservancies, and it would also be useful where conservancies are weak. In fact, it would be desirable for the strongest local management body to have a leasehold as long as the management body was democratically representative of the community (which traditional authorities are not) and had the ability to manage and control commonage resources.

It should be noted that legislation for community forests provides for greater control and benefits over natural resources than the legislation for conservancies.

Just like other communities, rural communities on communal land have various factions, interest groups and organizations. Notwithstanding the potential for congruence described above, the incumbents of some groupings may perceive their power bases as being threatened by leaseholds. This is likely to be the case for traditional authorities, not least because it would undermine their ability to receive payments for land<sup>22</sup> and to allocate land preferentially to their allies.

Pre-existing customary land rights will also have to be considered when a leasehold application is made over an area. Section 31(2) of the Communal Land Reform Act stipulates that

*A right of leasehold may not be granted in respect of a portion of land which another person holds under a customary land right, unless such person agrees to relinquish his or her right in respect of the land, subject to the payment of compensation as agreed to by such person and suitable arrangements for his or her resettlement on alternative land.*

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<sup>21</sup> Advocate Corbett, who kindly reviewed an earlier version of this paper concluded in his opinion dated 24 February 2010 that leasehold rights do not confer any tenure rights in the real sense since the Minister of Lands can cancel rights of leasehold. However, it is unlikely that the Minister would cancel a long-term leasehold, particularly one allocated to an institution that represents a community. In any case, freehold tenure rights can also be lost when land is expropriated by the state.

<sup>22</sup> These payments are in any case illegal in terms of the Traditional Authorities Act 25 of 2000.

It is submitted that an arrangement whereby the customary land holder and the leaseholder agree that the customary land holder remains on the land can be reached between the parties despite the provisions of section 31(2).

### **Design Principle 8: *Nested Enterprises***

Might Ostrom however view the co-existence of the various resource management organizations not as a problem, but to the contrary as a benefit falling within the principle that various aspect of common pool resource management and governance activities are organized in multiple layers of nested enterprises? This paper does not seek to be a study in economic theory, but rather to determine with reference to legal and locally applicable facts whether conservancies can be holders of rights of leasehold and thus effectively keep out outsiders who would exploit the commons unsustainably. A deeper examination of Ostrom's definition of a 'nested enterprise' and whether the various resource management organizations in the Namibian context fall within this definition, is therefore not warranted here. Suffice it therefore to say that in our opinion and experience, the various resource management bodies can view themselves and each other as multiple layers of a larger unit of common interest holders.

Although many of Ostrom's design principles are applicable to conservancies if reference is only had to internal equity of access to resources, they do not help in internally strengthening a long enduring CPR (common-pool resource) institution against violations from outside the clearly defined membership of the institution (Design Principle 1). Thus even if Design Principle 6 *Conflict resolution mechanism* is adhered to by all conservancy members, in that they all respect and adhere to the decisions of the local low cost arenas to resolve conflict, this will not protect the local community against an outsider who does not recognize the local conflict resolution arenas and is of a sufficiently affluent and powerful position that they can afford to disregard any decision or direction by the local arena, be it a traditional court or the arena and mechanisms of the conservancy in terms of its governing statutes.

## **12 The Company as Leaseholder**

The idea has been mooted that the communal land residents could establish a share company as holder of the right of leasehold. The communal land residents would each hold shares in the company. The share value would increase as the quality of the land and the infrastructure on the land improved. The final answer on the question whether such a model

would really enable communal land households to build assets which can be turned into cash when needed can only come from an actual case study spanning a couple of years. Our contention, which will have to be proved or refuted by the results of the long term study, is that the share company model would start a trade in shares of companies holding leasehold rights, and that the holders of such shares could build up assets and continue to increase the value of such assets by increasing the value of the land over which the right of leasehold extends.

This would be the first step toward closing the discriminatory gap between on the one hand urban dwellers and commercial farmland owners who can establish and increase an asset based on the land they own and on the other hand the communal land dwellers who are currently denied this opportunity. The importance of eliminating this discriminatory regime is to achieve the aim of enabling communal land residents to lift themselves out of poverty by managing and developing their land and the natural resources on it.

The idea of communal land residents as shareholders in a company cannot be viewed without reference to the institutional challenges known to exist around issues of accountability, administrative capacity and internal democracy present in social structures such as conservancies, traditional authorities, community forests, communal land boards and many more. To run a company and even to just exercise all rights and obligations of a shareholder are difficult endeavours for which urban dwellers pay substantial fees to experts such as lawyers, accountants, auditors and company secretaries. In our view this will remain a challenge for the majority of rural communal land residents for many decades, not only because of the costs involved, but also due to their unfamiliarity with the issues involved and their remoteness from the abovementioned experts who are intricately involved in company management and shareholdership. However these challenges should not be interpreted as insurmountable obstacles, and they should not be used to perpetuate the discrimination experienced by communal land residents over the past 20 years and before independence. In addition, with the general commitment by various stakeholders to find a lasting solution to the problem of the communal land as poverty traps, now is the right time to harness the available goodwill to start a pilot project at four sites identified on the basis of the available resource and the organizational structure and strength of the communal residents.

### 13 Conclusion

As institutions established to derive commercial benefits from resources in communal areas, it is clear that conservancies are well-placed legally to apply for leasehold rights. These rights might be termed Community-based Leaseholds, and the conservancies would have the further potential to evolve into shareholding companies (i.e. Community-based Companies). The same is true for other institutions that can manage commonage resources and are democratically representative of the community, such as community forests and water point associations.

The key advantage offered by the leasehold and future shareholding model is that it provides the **potential** for much greater security of tenure than is now possible, and it provides communal residents with the **potential** for owning and developing capital assets in natural resources on land to which they have customary rights. Stemming from both of these advantages, there is the further **potential** to alleviate poverty and to improve the condition and value of natural resources.

However, it is recognized that a variety of technical and perhaps political hurdles will have to be tackled if the leasehold model is to be implemented. For example, traditional authorities may see their roles as being undermined, and considerable legal support will have to be provided to conservancies in applying for leaseholds. Likewise legal, accounting and management support will be needed if conservancies wish to later developing into shareholding companies.

There is a growing belief that the government intends to dismantle differences between communal and freehold land, perhaps through legal provisions to be made in a new Land Bill, and by allowing communal land to be privatized. This is certainly congruent with government support now being given to the fencing of large areas of communal land as leasehold farms. Some of the large private leaseholds are even being allocated within existing conservancies, which are certain to be increasingly challenged by the privatization of commonage land and resources in the future. The adoption of a leasehold model by conservancies may thus provide a useful and preparatory way of countering privatization and the further 'grabbing' of communal land and resources.<sup>23</sup>

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<sup>23</sup> This is not to imply that private freehold land is undesirable, but to emphasize the value of retaining large areas of unfenced land where livestock and wildlife can move. This is

In the light of the above and general findings of this review, the following recommendations are made:

1. That a consultative process led by NACSO be started to share and discuss the findings of this review, and to gauge and gather support for conservancies to apply for leaseholds.
2. That subject to the above consultations, applications be made for leaseholds in two conservancies and two community forests. These should be in areas where the membership of the conservancies and community forests is clear and where there are significant commercial benefits.
3. Subject to the success or otherwise of the applications, the process be extended to other conservancies, community forests and water point associations.
4. That a process be started to develop those management institutions with leaseholds and significant commercial interests into shareholding companies.

Windhoek, 31 March 2010

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of particular importance in arid and semi-arid environments where small, fenced farms are not viable.