

[Customary law and institutions - Protecting or undermining community land rights in Southern Africa?](#)

Namibia

Google form returns summarised

Approximately what percentage of land used for grazing, farming, forests and conservation is held under customary tenure systems?

- 90% (Respondent misread this question - her data refers to conservancies)
- 30%
- 40%
- 30%
- 40%

Data source

[The State of Community Conservation in Namibia.](#)

[NAMIBIA LAND STATISTICS BOOKLET SEPTEMBER 2018](#)

Namibia Statistics Agency

Are there established chiefdoms and customary decision making fora playing a role in land allocation and governance?

Yes. Land managed under customary tenure is administered by the traditional authorities which function under their respective customary laws, the Traditional Authorities Act and the Communal Land Reform Act. Traditional Authorities have hierarchical structures comprising of different fora where decision making is done. For example at the lower level of traditional authorities' structure there are headmen or Councillors who are supported by village level leadership committees in land allocation. The next level of hierarchy is a district and then high level office of the particular Traditional Authority. Because of the diversity of traditional authorities, the processes may differ.

Yes. The processes strongly depend on the ethnic group. I am familiar esp. with Kavango, Herero and Nama customary laws.

Yes. There are Traditional Authorities that may allocate land in specific traditional authority areas as defined in the Traditional authorities act. These allocations must be ratified by Land Boards that are constituted for specific areas in accordance with the Communal Land Reform Act.

Yes. Traditional leaders continue to play a central role in the allocation, verification and cancellation of private customary land rights to land. Private rights refer to land for cultivation and residential purposes, which by custom include rights of inclusion and exclusion. Their roles in managing access to commonages for communal grazing are very weak, if existing at all.

Is there national legislation governing the role of traditional leadership institutions?

Yes

Traditional Authorities Act (Act No. 25 of 2000)

https://laws.parliament.na/cms_documents/traditional-authorities-38f13b9891.pdf

Communal Land Reform Act (Act No. 5 of 2002)

https://laws.parliament.na/cms_documents/communal-land-reform-75a65055b0.pdf

Yes

<https://laws.parliament.na/annotated-laws-regulations/law-regulation.php?id=393#:~:text=To%20provide%20for%20the%20establishment,provide%20for%20matters%20incidental%20thereto.>

Yes. Customary laws and traditional authorities are recognised by the constitution. Diverse laws refer to the roles of TAs.

On a general level: Traditional Authorities Act, No 25 of 2000; Community Courts Act, No 10 of 2003.

Land specifically: Communal Land Reform Act, No 5 of 2002. Most Namibian legislation can found on the website of the Legal Assistance Centre at www.lac.org.na

Status of customary law

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- It is legally recognised alongside statutory law
 - There are legally recognised traditional courts
 - There is a reliance on codified customary law
 - There is a reliance on living customary law

Legislation provides for the establishment of Community Courts to hear matters in terms of customary laws. The extent to which the former have been established is not clear. Such courts will only be established when a traditional authority applies for it.

Is traditional leadership hereditary?

- Yes
- Not necessarily
- Yes
- Yes
- Yes
- Not necessarily

Are there instances when traditional leaders are locally elected by their community?

- Yes
- Yes
- Yes
- Yes
- Yes
- Yes

Are there mechanisms in customary law to replace a hereditary traditional leader if they lose the confidence of the community?

Yes. Over the past years, in some 'traditional communities' as defined by the Traditional Authorities Act, upon death of the traditional leader (mostly at village level) have elected new leadership who is not family to the deceased and therefore breaking that hereditary system of leadership. Perhaps there are not particular mechanisms in place, but this happens on a needs basis.

Yes Again, it depends on the community. In Kavango for instance it is a mix between hereditary and democratic selection rules.(Your questionnaire is far too simple to capture the complexity of customary law even in one country.)

Likely to differ from traditional community to traditional community. But the Traditional Authorities Act, 2000 provides for the removal of a traditional leader from office 'in accordance with the customary laws of that community'. There is no clear evidence on how traditional leaders are appointed. Historically, traditional leadership was inherited in many communities. There is evidence however, that calls for elected leadership have been made in many communities. Legislation provides for the election of appointment of senior traditional leaders.

Can women assume traditional leadership positions?

- Yes
- Yes
- Yes
- Yes

Do recognised traditional leaders receive salaries or stipends from the state?

- Yes
- Don't know
- Yes
- Yes
- Yes

Can they legitimately impose levies or fines on communities they represent?

Yes. Traditional authorities have powers and these are instituted in the customary laws -- for some, there are even booklets published on levies and fines. Traditional Authorities of the Aawambo people in north-central Namibia for example impose levies on land allocation, they impose fines on different transgressions for example, misuse of natural resources, impregnating a married woman, insults, killing etc.

Yes. As per the recognition of customary law by the constitution. In addition, different sectoral laws give responsibilities and governance rights to TAs, e.g. the Communal Land Reform Act.

Yes In settling disputes traditional authorities may often resort to fines or payments for compensation. These remedies are always subject to the court of law if the party fined does not consent to the process.

No. Legislation does not provide for this. Community courts can only have jurisdiction over matters relating to 'claims for compensation, restitution or any other claim recognised by the customary law'. Powers of traditional leaders to fine people under their respective jurisdictions has been regularly contested in court before Independence

How would you rank the political influence of traditional leadership institutions?

[8] There is a strong political influence on traditional leadership institutions. It has even become more common that retiring political elites are joining traditional leadership institutions.

[8]

[6] Despite the clear legal recognition of customary laws and TAs, statutory law clearly dominates. The Council of Traditional Leaders has mainly advisory roles. At the same time, given the low capacity of the state to reach to local rural citizens, traditional authorities are very important for the actual governance of esp. rural life and resource management.

[6] Real power has diminished over the years but increasingly people are resorting to and aligning with traditional authority structures.

[9] Traditional leaders particularly in the crop growing areas which account for a majority of the rural population continue to be powerful political players. Part of the reason must be sought in Namibia's system of proportional representation which, in short, boils down to politicians at national level joining Parliament on a party list, i.e. have no constituency they are accountable to. Regional Councillors on the other hand are elected by constituencies. At the sub-regional, rural level they are competing with traditional leaders for support and power. In this power triangle, traditional leaders are important allies of national politicians. - Apart from that, many

communities are increasingly mobilising their members around ethnic and hence traditional authorities. The genocide issue of 1904-107 and demands for restitution are an important factor in this. It is fair to say that traditional leaders in the predominantly livestock farming communal areas in the central and southern parts of the country do not wield much political influence.

What role do traditional leaders and customary institutions play in allocating land to those living in areas under customary tenure?

Traditional leaders and customary institutions have been mandated with the primary function of land allocation and in general land administration in communal land (managed under customary tenure). This mandate is provided for by the Communal Land Reform Act, 2002.

This depends on the communities and is at least in some a complex procedure. I wrote more about this in <info:7v53sNXHoLcJ:scholar.google.com>

No answer

In law they have been accorded a central role in the allocation and cancellation of customary land rights. In practice, however these powers are only exercised with regard to land required for cultivation and residential purposes. Traditional leaders do not manage and control access to commonages across all communal areas. Customary rights to communal grazing areas of groups of users do not enjoy legal protection

How is land inherited and passed down the generations?

After the institution of Communal Land Reform Act, 2000, land is inherited by surviving spouse and the children.

This depends on the communities and is at least in some a complex procedure. I wrote more about this in <info:7v53sNXHoLcJ:scholar.google.com>

No answer

Not sure. Different communities have different inheritance systems. In addition, it would appear that there is an uneasy relationship between customs and the law.

Do customary law and institutions enable women to access land independently of men?

Under certain conditions but there is discrimination.

Theory and practice differ. During research done in the north of the country, traditional leaders answered this question in the affirmative. The picture on the ground suggested otherwise. Amongst other things social sanctions (witchcraft, allegations of wanting land for prostitution) were invoked to dissuade women to apply for land in their own right.

How would you rank the security of women's land rights under customary tenure systems in Namibia

[8] The security of women's land rights is increasingly becoming secure. While under the old customary tenure systems women had no security of tenure, today's customary tenure is largely influenced by state processes that made it possible to secure women's rights to land. However, there are still some few pockets of women experiencing insecurity over land, especially on generationally inherited land (See Nghitevelekwa (2020) Securing Land Rights: Communal Land Reform in Namibia).

No answer

[4] It is certainly still an issue

[7] The response above is a guess for lack of hard evidence. The legislation naturally seeks to protect the rights of women to land, but once again the situation on the ground may be very different.

What role do traditional leaders and customary institutions play in mediating land related disputes?

Traditional Authorities play a key role in dealing with land related disputes on communal land. Cases are first addressed at village level, then district levels, then the high office of the particular traditional authority). When these structures are exhausted and either parties are not satisfied with the outcomes, they can appeal to the Minister of Agriculture, Water and Land Reform, who will direct the Communal Land Boards to institute an investigation committee into the dispute. However, you do find some cases where grieved parties would approach private lawyers directly.

No answer

This depends on the communities and is at least in some a complex procedure. I wrote more about this in info:7v53sNXHoLcJ:scholar.google.com

They probably are the first ports of call in land disputes because they are the most accessible institution for land rights holders. But legislation and regulations do not provide any guidelines to make this process more transparent at local level. In many cases aggrieved parties seek relief by going to Communal Land Boards. However, the latter have no legal powers to hear and decide on disputes. Women have been found to follow this route, hoping to get a fairer 'hearing' than at village level. A big majority of traditional leaders at local, village level are men.

Which statement best describes customary institutions in the country under review?

- There are examples of both types of practice - accountable and responsive and corrupt and authoritarian
- There are examples of both types of practice - accountable and responsive and corrupt and authoritarian
- There are examples of both types of practice - accountable and responsive and corrupt and authoritarian
- There are examples of both types of practice - accountable and responsive and corrupt and authoritarian

General remarks and additional information

Traditional Authorities remain important institutions in land administration, however, there is need for capacity building so as to be able to manage contemporary land related transformations.

Despite the central role that traditional leaders play in the administration of customary land rights, the current legislation does not provide for improved accountability and transparency downward. Communal Land Boards have been introduced to ensure that land allocations and cancellations are done according to the law, i.e. introducing accountability towards the state. But traditional leaders are not obliged by law to consult members of their community on major land alienation decisions such as for large scale irrigation projects or oil exploration.

Traditional leaders can only perform the functions provided for in the Communal Land Reform Act if they are recognised by government in terms of the Traditional Authorities Act, 2000. The process of

determining whether a traditional leader should be recognised or not is not transparent and it is widely believed, with some evidence to support this belief, that political expediency rather than any other consideration is the determining factor. Many communal areas fall under the jurisdiction of traditional leaders that are not recognised. This means, in practice, that the customary land rights of people under their jurisdiction cannot be validated before registration as required by law. In addition, disputes have arisen between recognised traditional leaders who have extended their jurisdictions over areas under the control of non-recognised leaders.

The Communal Land Reform Act, 2002 provides for the registration of customary land rights in communal areas. Traditional leaders play a key role in confirming such rights before they are mapped and registered. This system has only been applied to 'private' land rights (land for cropping and residential purposes) not exceeding 50 ha. Customary land rights to commonages do not enjoy any legal protection.