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The legal aspects of governance in CBNRM in Namibia

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1. NATIONAL CONTEXT

Namibia's arid climate (average rainfall ranges from 0-25mm in the Namib Desert in the west to 500-600 in the north-east) has been a major influence in shaping the country's current socio-economic circumstances. Population growth is limited by the lack of water and even though Namibia has a total land area of approximately 825 000 sq. km., it has a population of around 1,6 million. Water is crucial for the development of industry. Despite Namibia having stocks of strategic minerals, it is uneconomic to exploit some of them because they are located in remote areas with no infrastructure and limited water supplies.

Rainfall is erratic both temporally and spatially leading to large localised differences in precipitation and large fluctuations annually. Drought is a regular occurrence. Only 8% of the country receives more than 500 mm annually, the minimum considered necessary for dryland cropping (Byers 1997). There are no perennial rivers between the country's northern and southern borders.

Namibia's economy is heavily dependent on natural resources. Two-thirds of the population live in rural areas and are directly dependent upon the soil and living natural resources for their livelihoods (Brown 1996). By far the highest proportion of the workforce is involved in subsistence agriculture (dryland cropping and/or livestock farming). Unemployment is estimated at around 20% with a further 40% estimated to be under-employed. Population growth is estimated at 3,2% a year (UNDP 1996).

Another important factor that has shaped socio-economic development is the legacy of *apartheid* and German colonial rule. Namibia gained independence from South Africa in 1990 and the legacy of South African racial policies and German colonial rule is still evident in the wide gap between rich and poor, unequal access to land and natural resources, and poor education, health and housing for the rural majority. In 1995 *per capita* income was US \$1 956, but income distribution is highly skewed between urban and rural households. The richest 10% of the

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population receive 65% of total income (Ibid). At independence from South Africa in 1990, 40,8% of the land had been allocated to black homelands which supported a population of about 1,2 million, while 43% had been allocated as freehold land to white commercial farmers. 13,6% was allocated to conservation and a small percentage was unallocated land. The former black homelands are now recognised as communal lands to which rural residents have access for the use of the land and its natural resources (although communal land ownership is vested in the State).

The freehold farmland is divided into about 6 300 farms owned by about 4 200 still mostly white farmers. These farms occupy the better quality pastoral land of the central savanna. On communal land in many areas traditional mechanisms of land and resource allocation and management have broken down. Under South African colonial rule, land allocation was the function of government officials, but in practise, traditional leaders believed that the land was owned by the chief or king and allocated land in terms of customary law. (Corbett and Daniels 1996). However, the gradual erosion of the power and status of traditional leaders has contributed to the development of 'open access' situations on much of Namibia's communal rangeland. Traditional common property resource management systems for grazing land appear to have endured in the more remote areas where it is less easy for outsiders to disrupt informal community agreements (Blackie and Tarr 1999).

The SWAPO Government which came to power in democratic elections in 1990, and which gained a two-thirds Parliamentary majority in 1994, has publicly committed itself to multi-party democracy, a mixed economy and to decentralisation of decision-making. A decentralisation policy sets out government functions which should be shifted to Regional Councils created after independence. There is no administrative unit below the Regional Council except for municipalities, thus creating a governance gap in rural areas. The Regional Councils currently have little power, no authority to raise revenue and few officials of their own. Within the ruling party and within the higher echelons of the civil service there are competing ideological tendencies representing on the one hand democracy and decentralisation, and on the other, command and control through the retention of centralised political control.

The purpose of this paper is then to describe the legal framework for CBNRM in Namibia, shed light on the institutional arrangements for natural resource management and finally to assess the impact of the legal environment for governance of CBNRM in Namibia.

2. LEGAL FRAMEWORK FOR CBNRM

Independence has brought a number of important policy reforms impacting directly upon the national community-based natural resource management (CBNRM) programme. There have also been a number of significant legislative initiatives which have resulted in a number of new laws being passed whilst others are currently before Parliament or on their way to the National Assembly. These initiatives have had and will continue to have a profound impact on the lives of very many rural Namibians. The reforms of most significance for CBNRM are in the area of communal land, wildlife, forestry, rural water, inland fisheries and community based tourism. Decentralisation policy, the Traditional Authorities Act and the provisions of customary law also impact on the programme.

The origins of the CBNRM approach in Namibia are to be found in indigenous examples, the experience of neighbouring countries with similar programmes (notably Campfire in Zimbabwe) and common property resource management theory implemented by the Ministry of Environment and Tourism. Further impetus came from efforts of the NGO, IRDNC, which had since 1982 helped local communities establish a network of community game guards to combat poaching and to conserve wildlife with a view to earning tourism revenue as an economic incentive.

2.1 Customary Law

Customary, or "indigenous law" as it is sometimes called, is a source of law relevant to CBNRM in that it provides a set of legal rules, particularly for the allocation and use of communal land. It can be distinguished from western or general law in that it is generally unwritten and therefore survives in an oral tradition. This makes its ascertainment more difficult and its rules unsystematic and subject to diverse interpretation. It only has authority where people are amenable to its acceptance. Consequently, its enforcement and efficacy is largely dependent upon the respect and legitimacy enjoyed by the traditional authority structures charged with its implementation (Corbett and Daniels, 1996). Whilst there are reasonably developed customary rules relating to land administration, hunting and forests (Hinz, 1995), the rules applicable to the management of other resources, such as water and inland fisheries, are less clear. It is also uncertain as to the degree to which such rules are adhered to in Namibia.

The entitlement of communities to these resources can be termed "fuzzy" (Devereau, 1996) and can be contrasted from western notions of property rights, as described in the following passage:

In developed countries, property is often sharply defined in terms of ownership, implying that the owner has sole use of the resource, and has recourse to legal sanctions preventing its use by others. In village

societies, such strict notions of ownership are less prevalent. Instead, people have individual or collective property rights, defined by their membership of the community (Ellis, 1993).

Nevertheless, the Namibian Constitution states that the customary law in force at the date of independence shall remain in force to the extent that it does not conflict with the Constitution itself or any other statutory provision (Article 140(1)). Some commentators argue that chiefs and headmen have retained important powers over the allocation of land according to customary law (Hinz, 1995), whilst others are of the opinion that they in reality enjoy extremely limited legally sanctioned authority over land administration since such customary rules have been overridden by statute (Van der Byl, 1992). However, despite the formal interpretations of law, the reality on the ground is that a parallel system of indigenous law continues to operate alongside and impact upon CBNRM legislative provisions.

2.2 Communal Land

The Namibian national CBNRM programme targets residents of communal land. However, the policy framework for land reform in communal areas has for most of the duration of the programme been unclear. In the communal areas many people are concerned about the lack of clear policy and administrative structures for land allocation and management. The National Land Policy (NLP), adopted in 1997, recognises that clear steps need to be taken to remove uncertainty about legitimate access and rights to land, and the ways in which land is administered. In some areas, traditional authorities currently undertake land administration with varying degrees of efficiency and legitimacy. In other areas, there is no clear or broadly accepted authority over land. In several parts of the country, there is growing tension between those who are fencing large areas of land for their private use, and the majority who are thereby excluded from access to this land.

Whilst the steps taken by government to ensure secure tenure for communal area residents to the land they have occupied for so long, is to be welcomed, the Communal Land Reform Bill, currently before Parliament, raises a number of concerns as far as the national CBNRM programme is concerned. These can be summarised as follows:

(a) The types of tenure

The Bill provides for the allocation of three types of "customary land rights" in respect of (a) a farming unit (b) a residential unit (c) and to any other form of customary tenure recognised in the discretion of the Minister of Lands. The national programme has been advocating that communal tenure be specifically provided for in the Bill, but there has been resistance to the concept by officials in government apparently based on a misconception that communal tenure would result in the reimposition of "bantustans" in Namibia. Nevertheless, the third

category of discretionary right would seem to allow flexibility for the Minister to declare an area to be allocated as common property for a number of purposes. These would include community resource management of the rangeland, for the establishment of a wildlife conservancy or a community forest, or for a combination of these purposes. In any event the Bill specifically makes mention of common property when it further provides that the commonage is available for use by the lawful residents for grazing purposes subject to any conditions which may be imposed by the chief.

(b) The types of resources

The second main category of land right which may be allocated is rights of leasehold for a period not exceeding 99 years. However, in September 1999 the CBNRM Association of Namibia expressed concern to the Parliamentary standing committee on natural resources that the Bill does not explicitly state that the right of leasehold, which may be allocated in terms of the Bill, refers to anything more than land. In a submission to the standing committee it was accordingly strongly contended that a clear reference should be made in the Bill to the need for leasehold rights to cover *rights of utilisation over all natural resources* occurring on the land subject to the right of leasehold. This right would then be exercised subject to any conditions which may be provided for in sectoral legislation.

(c) Holders of rights

The Bill is silent on who may be the holder of land rights, but the NLP clearly envisages that conservancies or other common property management institutions can hold such rights. Again it would be important for this to be made explicit in the Bill or the regulations which will be issued pursuant to it.

(d) Land administration

In the Bill the power to allocate customary grants resorts with the chief or traditional authority, but any such allocation must be ratified by the Communal Land Board. However, the power to allocate leasehold rights lies only with the Communal Land Board. It is by no means clear what guidelines the Board would follow should it, for instance, be confronted with conflicting land use needs such as where an application were to be made for exclusive grazing rights to an area which had previously been registered as a wildlife conservancy.

(e) The role of traditional leaders

A major political and social implication of the approach taken by the Bill is the effective transfer of ultimate authority over and rights to the allocation of communal land from traditional leaders to Communal Land Boards. Whilst traditional authorities will continue to have primary allocation responsibilities at the local level, this power will be exercised subject to a veto right by the Board. In

the context of the national programme the interplay between the traditional authority and the Board will become crucial. Where there is a good understanding this arrangement would not complicate matters, but one can imagine that where there is no shared vision these tensions could be disruptive to the advancement of CBNRM. An example would be where the traditional authority has agreed to the establishment of a conservancy and the Board will not go along with the idea.

(f) Land enclosure

The NLP recognises that land enclosure or fencing of communal land is a growing problem with fields being fenced to protect crops from livestock or to secure exclusive grazing areas with or without the permission of traditional authorities. This problem clearly has severe implications for individual farmers who no longer have access to the rangeland and for the philosophy underpinning the CBNRM approach. Currently there is no statutory authority to prevent such fencing. In terms of the Bill, the enclosure of land in this manner would be construed as unlawful abrogation of rights and would be an offence. After the establishment of Customary Land Boards, all those who have fenced land would be given three years to negotiate proper rights to this land with their respective Boards. Again the approach adopted by the Boards on fencing in the future will be crucial to the success of the CBNRM programme, particularly in the case of wildlife conservancies.

2.3 Wildlife

The national programme has to date focused primarily on wildlife. The Nature Conservation Amendment Act of 1996 thus constitutes, with its provisions for the formation of conservancies, the most important model at an institutional level for the implementation of the CBNRM approach in Namibia. There are currently 10 conservancies registered under the Act with a further 15 in the process of being formed. This represents valuable institutional experience upon which to base the further design of the national programme.

(a) The conservancy model

The new policy and legislative framework permits residents of communal areas to form conservancies which, once registered, then have exclusive rights over the use of game (conditional upon sustainable use) and commercial tourism. In order to register the community must establish a conservancy committee representative of the people residing within the conservancy and the boundaries must be sufficiently identified. The method by which representation is to be measured is not prescribed and it can thus be assumed that this might be established by an election or by some less formal process. The informal option takes into account the distances, undeveloped communications infrastructure and the meagre resources available to people living in rural areas. Although the

committee must include one traditional leader to promote linkages and collaboration with traditional authorities, the selection of members is by and large left to community initiative and choice. There is no requirement that the committee must be sanctioned by local or regional political structures. Further requirements include a constitution showing a commitment to CBNRM and a plan for the equitable distribution of benefits. In spite of the progress made in establishing conservancies, the legislative framework and its practical implementation have not been without their complications.

(b) Tourism and hunting rights

The Act provides that the conservancy committee enjoys, upon declaration of its area as a conservancy, the right to "the consumptive and non-consumptive use and sustainable management of game in such conservancy". Non-consumptive use would normally take the form of tourism. However, at present all tourism and hunting concessions are still granted by the state with conservancies not having a particularly strong say in who is awarded concessions within the boundaries of existing or emerging conservancies. Accordingly, if conservancies are to take more responsibility for the management of game it would make sense for the Act to reflect this devolution of managerial responsibility in a more meaningful way by making the conservancies the contracting party with the concession holder rather than the state.

It also makes sense from the point of view of emphasising the critical link between community income and wildlife conservation. The advantages of devolution of management authority and rights to benefit community level is a lesson well learnt from the CAMPFIRE experience, as is the need for communities to retain all revenue from wildlife and not to have to share the income with government.

(c) Dispute resolution

The development of conservancies has on the whole been a process engaged in with surprisingly few intractable disputes. With the formalisation of boundaries in the formation of conservancies there are bound to be disputes between communities as to the exact geographic area to which they lay claim. The delimitation of conservancy boundaries should also be seen in the context of communities staking out territorial claims in advance of the formalisation of tenure through the implementation of the Communal Land Reform Bill.

A fundamental process takes place in that:

The community must delimit the resource and obtain control of the resource. But the very act of delimitation is the staking of a claim and brings reactions from neighbours. Many disputes originate with the reactions of those whom the community asserts a right to exclude. The

assertion of community control is a profoundly political process. A shift in power relations is taking place, and new claims are being asserted against the state and against competing private interests. Often a local dispute will only be adequately resolved by a resolution of policy questions at a much higher political level (Bruce, 1999).

In terms of the Act the boundaries of the conservancy have to be sufficiently identified "taking into account also the views of the Regional Council...". This formulation has led some Regional Governors to misconceive their functions as "approving" the application for declaration as a conservancy and resulted in political conflicts which should otherwise have been avoided.

There has also been some tension particularly in the Kunene Region regarding the boundaries of conservancies, based in part on concerns regarding the ethnic makeup of the conservancies but also on a desire to have a smaller, more manageable management unit. Sesfontein is an example where this conflict has led to considerable delays in the development plans for the area and resulted in negative consequences in the form of lost economic opportunities and general frustration amongst the community due to the difficulties in resolving the matter. On the other hand, sceptics were pleasantly surprised to hear that the boundary dispute between the Kwandu and Mayuni Conservancies in East Caprivi was amicably resolved in a relatively short space of time when a pragmatic solution was found- by taking the centre line of the Trans-Caprivi Highway as the joint boundary!

Intra-conservancy conflict has also played a role in some areas. This is not surprising since conservancies mark a fairly radical departure from the traditional power relations found in some communities. That there might not be consensus amongst all members as to the appropriate form the conservancy should take is to be expected. The ongoing dispute in Salambala in East Caprivi with four families holding the conservancy to ransom by refusing to vacate the core area is a stark illustration of what a small minority of dissidents can do to destroy the positive developmental work of the community. Yet the manner in which such disputes are dealt with presents a significant challenge to the national programme to make effective and expeditious mechanisms available to conservancies to help contain and resolve conflict before it does unnecessary damage.

2.4 Forests

An approach similar to the conservancy model has been adopted in policy and the Forestry Bill. Most of the valuable forests are found in the north of the country and are situated on communal land. Forests accordingly constitute an important resource for rural communities not only because of their more obvious wood products but also on account of the habitat they provide for a variety of flora and fauna and their potential role in providing scenic locations for community-based

tourism. The forestry policy objectives make specific mention of the need to encourage the participation of rural communities, and particularly women, in all forestry and conservation activities. Thus communities are identified as key players in the management of the resource and in entitlement to benefit from its sustainable utilisation. In terms of the Bill (currently before Parliament) community forests would be managed by a committee established under substantially the same conditions and subject to the same procedures as conservancies. The use of a community forest would require a licence or other permission, although local use by members of the community would normally be permitted by the management plan. Fees for use of a community forest would be retained by the management body, subject to requirements for reinvestment and for equitable use or distribution of the surplus to members.

There is nothing in the Bill, as it is presently drafted, preventing the community forestry committee from constituting itself in a similar way to a conservancy and then collapsing its functions into those of the conservancy committee, or functioning as a sub-committee of the conservancy or perhaps as a community natural resource committee.

2.5 Water

In the draft Rural Water Supply Management Bill water point associations are provided for which replicate the organisational structures of conservancies. However, by the nature of the particular resource being considered, the water point associations would perhaps have to retain discreet functions. This is particularly true where there are scattered settlements with poor communication networks and where the association manages a pipeline scheme which crosses conservancy boundaries.

2.6 Inland Fisheries

The White Paper on Inland Fisheries foresees the enforcement of legislation being undertaken by traditional authorities and local authorities in conjunction with fishery control officers. It further lends support to the CBNRM approach by stating that local people in communal areas should share in the income "generated by commercialization or use of communal resources".

2.7 Community Tourism

The Promotion of Community Based Tourism policy, approved in 1995, complements the approach advocated in terms of the national CBNRM programme. The focus has been to take active steps to empower communities to participate in an industry which has primarily been the terrain of large commercial interests and excluded the smaller indigenous operators. The policy recognises that where tourism is linked to wildlife and scenic landscapes, the benefits to local communities can provide important incentives for conservation of these

resources. However, much still has to be done. For instance, legislation needs to provide that within a declared conservancy the conservancy committee would have the right to veto the granting of permissions to occupy communal land. In the absence of such an approach the Ministry of Lands would be able to authorise the granting of PTOs for tourism to individuals, either from within or even outside the conservancy. This would make room for elite interests to capture the economic benefits of tourism at the expense of the community on whose wise and sustainable management of the natural resources tourism viability depends.

3. EXISTING INSTITUTIONAL ARRANGEMENTS FOR NRM

A number of institutional actors can be identified that influence how natural resources are actually used. Generally new institutional arrangements are being established as government seeks to decentralise functions to regional authorities and in some cases is devolving authority to local communities.

3.1 Central Government

Currently central government still plays a strong role in directing policy formulation and implementation. The major NRM Ministries are: Agriculture, Water and Rural Development (MAWRD), Environment and Tourism (MET), Lands, Resettlement and Rehabilitation (MLRR) and Fisheries and Marine Resources (MFMR). Several departments of these ministries have decentralised their activities to the regional level such that regional offices have their own senior staff and budgets. Some Ministries have introduced or are planning legislation that devolves rights and responsibilities to a range of bodies at regional and community level. These regional and community level institutions that affect NRM are set out in Table 1. The move towards decentralisation and devolution is to some extent motivated by the recognition that central government has neither the financial nor the human resources to provide services throughout the country and to enforce laws governing the use of natural resources.

Although policy development in NRM remains the mandate of central government, some ministries have engaged in consultative processes during policy formulation. These processes involve the various sub-national levels through meetings at national, regional and local community level. Increasingly central government has to involve the new regional government structures in policy formulation. However, where central government has a strong agenda the consultative process is often subverted. For some years, the Namibian government has backed plans to develop a dam on the Kunene river bordering Angola to produce hydro-electric power. A process of consulting residents (mainly semi-nomadic Himba cattle herders) and other stakeholders was built in to the pre-feasibility study for the dam. An alliance of politicians, government officials and business people succeeded in seriously undermining the consultative process and bringing considerable pressure to bear on

residents to support the dam. This included in July 1997 heavily armed personnel from the Namibian Police breaking up a private meeting between the Epupa community and their lawyers which necessitated obtaining a High Court interdict to ensure that meetings could take place without fear of intimidation and harassment from government agents.

3.2 Regional Government

Government is currently implementing a new decentralisation policy which will ultimately transfer many central government functions to new regional authorities, the Regional Councils. These functions include agriculture, water, forestry and wildlife conservation. At present the Regional Councils have no significant budgets or staffing of their own. They are however, beginning to play a greater role in regional planning with a number of donor funded projects aimed at increasing their capacity. The Regional Councils are responsible for the establishment of regional, constituency and local level development committees for the co-ordination and planning of development at these different levels and to promote communication between local levels and the regional level of government. Much development planning is now carried out at a regional or sub-regional level through the regional government structures with direct implications for CBNRM, and particularly how local level institutions will be integrated into land use planning processes.

3.3 Traditional Authorities

A major political and social implication of the approach in the NLP would be the effective transfer of authority over and rights to the allocation of communal land held by traditional leaders and other customary authorities on behalf of communal area residents, to Communal Land Boards.

In the Communal Land Reform Bill it has been proposed that out of a Land Board of a minimum of 11 members only one person may be appointed to represent the traditional authority. Their exclusion has been motivated by a desire to modernise and make more efficient and transparent the land administration procedure in respect of communal land. However, in recognition of the central role that traditional leaders currently play in especially land allocation and their knowledge of the area and its inhabitants, the Bill retains for chiefs and traditional authorities the right to allocate customary land rights, but only subject to the control of the Boards.

In practice, this would probably be the principal means whereby land administration at the local level would continue to be implemented for some years to come, during the long transitional period during which Communal Land Boards are established and develop the required capacity. There would therefore be no abrupt change in land administration practice or *de facto* authority in the communal areas. Yet all allocations of communal land by traditional authorities would be subject to ratification by the relevant Communal Land Board.

3.4 New Community Management Bodies

As mentioned above, government policy on CBNRM envisages a legal body with the capacity to hold rights, meet obligations and enforce legal regulations. In the conservancy legislation the precise form the institution should take is not spelt out in detail beyond that it should be representative of the community it serves and have a constitution which conforms to broad criteria to ensure transparency and accountability.

The national programme has developed a fairly standard form constitution for conservancies and it now remains to be seen in the light of some conservancies working in terms of their constitutions whether they are adequate or need revision. A further challenge is to determine whether the model conservancy constitution will be an appropriate institutional form for the management of other resources, such as forests and water.

Already a lot is being expected of communities in terms of time and human resources and the thrust is accordingly to develop a policy and legislative framework which consolidates the management of natural resources at the community level into one management institution. This would allow for better co-ordination of functions, more cost-effective use of community time and resources and the potential for higher revenue activities such as wildlife conservancies to cross-subsidise the management activities of the community based natural resources institution around less lucrative activities such as forestry management.

In developing this approach the challenge remains to adhere to the national policy to avoid ethnic compartmentalisation, while also using institutional structures that fit the traditions of rural society and are thus socially acceptable. A further challenge has been to develop a system flexible enough to meet the needs of Namibia's cultural and environmental diversity. The system has to cater for small scattered settlements in the arid north west where people, livestock and wildlife move over large areas to survive, compared to the wetter north east with its large villages, more settled population and a greater emphasis on crop farming. It has furthermore to take into account that in some areas of the country traditional institutions are still strongly supported by local people, while in other areas they have become much weaker.

3.5 Indigenous Community Based Resource Tenure Systems

There is broad acknowledgment that the CBNRM approach builds on the knowledge and experience of indigenous resource tenure systems. However, in some communities that have a large population and significantly less resources, and particularly sparse wildlife, the national CBNRM programme needs to look for a less elaborate tenure form. An ongoing project in Okashana serves as an example which builds on the responsibilities traditional authorities have always

had as environmental guardians. This approach is strengthened by the powers expressly provided in the Traditional Authorities Act requiring that chiefs ensure that members of their traditional community use natural resources at their disposal on a sustainable basis. Bearing these powers in mind a subcommittee has been established by the traditional authority to assist in setting up a representative body to oversee the management of natural resources. It has the advantage that the community does not have to incorporate itself into a legally recognised body and can simply 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. A trust fund to manage the funds of the Natural Resources Committee may also be established.

4. IMPACTS OF THE LEGAL FRAMEWORK

This section analyses the impacts of the recent changes in the legal framework that attempt to devolve rights over natural resource management to the local level. The changes in wildlife policy and legislation that give rights to communities that form communal area conservancies are used as a case study. Reference is also made to developments in other sectors. The impacts of the new wildlife policy and legislation are analysed in terms of five main themes.

4.1 The Gap between the Intent of Policy and Legislation and its Interpretation and Implementation

The drafting and approval of policy and legislation is normally carried out by centrally-based policy planners, senior government officials and politicians. Those involved at this stage of the policy cycle (hopefully) have a clear vision of what the policy and legislation are intended to achieve. They will have their own vision of how the policy and legislation will be implemented in practice. However, it is usually a different set of actors who are responsible for implementing the policy directives and the legal instruments deriving therefrom. In the case of the "conservancy" policy and legislation of the Namibian Ministry of Environment and Tourism (MET) it was formulated following participatory community level surveys. However, the process was driven by a policy and planning directorate in the MET, the Directorate of Environmental Affairs (DEA). The DEA has no regional or field staff, and within the MET, the Directorate responsible for implementation is the Directorate of Resource Management (DRM). Other actors involved in implementing the conservancy approach are NGOs and the communities themselves. In an attempt to ensure that the different actors would share an understanding of the intentions of the policy and legislation, MET produced a "Toolbox for Communal Area Conservancies" (DEA undated). Containing the relevant policies and legislation and some notes on interpreting aspects of these, it was hoped that the toolbox would help guide the establishment of conservancies.

However, after nearly five years of conservancy implementation a number of gaps have emerged between the intentions of the policy and legislation and what is being implemented on the ground. These are highlighted in Table 2.

The reasons for these gaps are varied. They include a natural propensity for policy to be reformulated and even forged by action and implementation. Individuals will have different interpretations of specific provisions and implement policy according to these interpretations. Another reason could be the fact that one Ministry directorate took the leading role in formulating policy and legislation, while another was expected to implement it. Bureaucratic conservatism and the desire to hold on to control also play a role and another factor could be a lack of confidence amongst officials that rural communities can manage wildlife sustainably (Jones 1999a).

Whatever the reasons, the cumulative effect of the gap between policy intention and implementation is an increasing tendency towards what has been called "aborted devolution". This is where governments have introduced policy and legislation with the intent of devolving authority over natural resources to local communities, but in practice this devolution is not taking place. A well-known example is Zimbabwe where the original intent of the CAMPFIRE project was for local communities to gain rights over wildlife. However mostly the devolution of rights has stopped at the level of the Rural District Councils .

If "aborted devolution" takes place, then communities will believe they are being cheated. They will realise that the rhetoric of community ownership and control does not match the reality and will return to the way they viewed wildlife before policy changes were made – they will view game as belonging to the state and return to poaching. As a result the incentives for sustainable use of wildlife contained in policy and legislation will not work, undermining the whole CBNRM approach.

4.2 The Development of Legally Sanctioned Community Management Bodies

Ten communal area conservancies, covering an area of approximately 2,5 million ha, have been registered by government and there are another 15 emerging conservancies i.e. those carrying out the steps to meet the conditions for registration (MET 2000). The conservancies are at different stages of development, but most have concluded safari hunting and/or photographic tourism contracts with commercial operators and have begun generating income. Some have distributed income to residents or initiated community projects and started to develop management plans for integrating wildlife and tourism with the other livelihood activities of residents.

Clearly there has been a positive response by rural communities to the opportunities presented by the new policy and legislation. However the experience

in establishing conservancies has highlighted a number of key issues in the development of legally sanctioned community management bodies:

(a) Definition of community

The conservancy policy and legislation leaves communities to define themselves and does not rely on administrative or political boundaries to determine who gains rights and benefits. This approach has worked mostly where there are relatively small cohesive “communities” and where the community of residents coincides with the community of resource users. However, conflicts have emerged where there are large numbers of people, where there is high ethnic diversity and where for example cattle owners from up to 100 kilometers away use grazing lands within a proposed conservancy. These problems indicate that the conservancy approach is not necessarily institutionally appropriate for all circumstances in communal areas in Namibia (Jones 1999b, Jones 1999c)

(b) Relationships with traditional authorities

Conservancies are new institutions being given responsibility by government for areas of natural resource management that once fell under traditional authorities. In many cases, conservancy committees are dominated by younger community members and include several women. This contrasts with the mostly elderly male dominated traditional authorities. In some cases, conflict has arisen between traditional authorities and the new conservancy committees, particularly over the patronage involved in endorsing applications for developing tourism facilities. In one case a headman who failed to get elected to a conservancy committee tried illegally to sell game animals to the private sector (he was quickly adopted as an *ex officio* member of the committee). In the north-east of Namibia where traditional leadership is still strong, a model has emerged where the traditional leaders delegate authority to the conservancy committee to manage natural resources on their behalf. Institutionally, this strengthens the committee as it derives authority not only from the central government, but also local traditional leadership. In the north west of Namibia where traditional leadership is weaker (perhaps reflecting more dispersed settlement patterns) a different model has emerged. Traditional leaders are viewed as patrons of the conservancy and act as watchdogs for the community. (Jones 2000b, Jones 1999b)

(c) Relationships with Regional Councils

Relationships with regional councils, regional governors and individual councillors also varies. The conservancy policy and legislation does not provide for institutional links with regional councils except that the regional governor should be consulted over the conservancy boundaries. Regional councillors were largely left out of the consultations around conservancy formation, partly because the councils were newly emerging institutions and partly because of a fear that as in the case of Zimbabwe, the councils would want to capture the rights, revenues and resources

associated with conservancies. As a result, regional governors were reluctant to support the first emerging conservancies and used various bureaucratic means to block their progress. In some cases, these early problems were overcome as governors and councillors became more familiar with the conservancy approach (Jones 1999b). However, the councillors are elected on party political platforms and sometimes ethnicity influences party allegiance. Their decision-making is therefore informed by a number of other agendas and perspectives which do not always coincide with support to conservancy formation.

(d) Legal constitutions

One of the conditions set by legislation for registration of a conservancy is the need for a legal constitution. This is so that the conservancy gains legal status, making it easier to receive rights from government, handle community funds and enter into business contracts. Most importantly the constitution also describes the rights and obligations of conservancy members and provides for accountability by the committee to members. However, there are question marks over the extent to which these constitutions are really developed with community involvement and are understood by community and committee members alike. Bell (2000) suggests that rural communities operate on the basis of informal "constitutions" which have different bases for their legitimacy. He proposes that the ideal constitution is one that provides no more than a mechanism or a linkage between the traditional informal constitution of the community and the formal administration and laws of the state. One possible assumption is that where the establishment of conservancies has been supported by NGOs and organisations such as the Legal Assistance Centre in Namibia, understanding of constitutions and the accountability of conservancy committees will probably be higher than where there has been no external support. There is some evidence for this assumption in Namibia, but further research is required to validate it. If it is true then, it has important implications for the conservancy approach as there are not sufficient resources to provide high quality facilitation to all conservancies.

(e) Communal rights vs individual rights

In some conservancies, individual community members have begun to take advantage of the improved climate for local entrepreneurs to develop tourism facilities. They are beginning to establish campsites and traditional villages. Conflict has arisen between individual entrepreneurs and conservancy committees over the rights to develop such facilities (Jones and Mosimane 1999). These facilities are being developed on communal land to which all local residents would normally have access for grazing, collecting wood etc. Even though the facilities take up a relatively small amount of land there are still opportunity costs to other residents. In one case in the arid north-west of Namibia, residents have demonstrated against a local entrepreneur who appropriated a local spring for the site for his campsite. Other costs to residents include the disturbance of tourists driving around the area, and sometimes interacting negatively with residents.

Mechanisms need to be found at local level for dealing with these conflicts. Individual entrepreneurs from the community need access to business opportunities, and conservancies need to avoid imposing the tyranny of the group over the individual. At the same time individuals need to recognise that they are appropriating communal resources for personal gain and imposing other costs on residents. One mechanism to deal with this issue is that the individuals should pay some form of levy to the conservancy as a body representing the group.

(f) Need for appropriate dispute resolution mechanisms

As mentioned earlier, whilst the level and incidence of disputes is likely to rise within CBNRM, the resources to deal with them remain inadequate. Government appears not to want to readily involve itself in such disputes because of the time and human resources needed and the sometimes difficult political circumstances surrounding such conflict. There are also differing cultural approaches to conflict resolution with government preferring to resort to more traditional approaches, such as reliance on chiefs and headmen to resolve conflict. NGOs, on the other hand, also have personnel constraints both in terms of sufficient personnel and more experienced people who would have the necessary skills and status with the parties to play an effective mediating role. The issue is further complicated by the fact that some NGOs, which might be able to play such roles, already have an existing working relationship with one of the parties thus opening themselves up to a charge of bias.

It is accordingly crucial to the success of the national programme to carefully look into this matter with a view to establishing a more structured dispute resolution mechanism within the sector which is efficient, credible and effective. Particular consideration should be given to traditional alternative dispute resolution approaches.

Their pervasiveness is due to their virtues in small, close communities, but is also a reflection of the weakness of formal adjudicatory institutions, and of the formal legal infrastructure in general. When one is working with disputes within communities, or disputes between communities that fall within common authority structures in the larger indigenous society, there is every reason to seek to utilize local approaches to dispute resolution that seek to restore harmony (Bruce, 1999).

Consideration should be given to whether it would not be appropriate to entrench such a process in legislation to lend it more weight.

4.3 Development of sector-specific community institutions

The development of community-based approaches to resource management in several sectors such as wildlife/tourism, forestry and water poses potential institutional problems for local communities (Jones 1999d). There is a risk that a

plethora of sector-specific committees each under the authority of a specific Ministry or government department is created at community level. There is in fact a large degree of compatibility between the institutional attributes of water point committees, forest committees and conservancies, partly because one of the authors of this paper has been involved in the drafting of legislation for all three. However, there is little concerted effort by the government departments concerned to integrate the approaches although one or two isolated examples exist. There is a need for greater co-operation at both the policy and the extension level. There is also a need to understand the different levels at which resource management decisions are taken. Water might be managed at village level on the basis of a single water point, while forest management might involve several villages. The conservancy might cover a larger area and number of people that includes more than one forest management committee. Links need to be made between these different institutional levels of decision-making and management. While government might be compartmentalised into sectors, communities manage resources more holistically.

4.4. Replication of Northern Bureaucratic Approaches

There is a tendency among agencies implementing CBNRM (e.g. government and NGOs) to replicate their own bureaucratic systems and formalistic approaches to planning and decision-making. CBNRM programmes are littered with committees and sub-committees. The rationale for the emphasis on committees is probably three-pronged. Firstly, there is the need for government to devolve rights to a community body which has some focal point for decisions making; secondly government and other outside agencies require some form of representative body to work through instead of visiting every single household or village in an area; and finally there is also the influence of what has been called the "new institutionalism" (Cousins) that has dominated common property resource management theory for nearly a decade.

However, it is questionable whether communities really make resource management decisions through committees. Resource management is to some extent the sum of the every day decisions of individuals and households. Is it possible for a committee to control these decisions? Again, there are probably appropriate levels for decision-making for different resources, and there is evidence that communities are using various committees for different types of planning and decision-making. But these dynamics need to be better understood in the Namibian context. Further, there are huge demands made upon individuals in the community to attend committee meetings and go through numerous planning processes (conservancy management plans, forest management plans, tourism plans, land-use plans, monitoring and evaluation etc.). Communities, like the Namibian government, run the risk of becoming bogged down in an endless round of committees and planning meetings.

4.5 The Need for the Defence and Restitution of Land and Resource Rights

Communities do not only need to assert their rights over natural resources, but are also called upon to defend their newly won gains. Governance in CBNRM has also to take account of the realities of unwise government planning agendas. A case in point is that of a San group, the Kxoe, of West Caprivi whose land and resource rights were threatened by a proposed taking by government of a significant section of river frontage on the Kavango River. The Kxoe had developed a community tourism enterprise at the site and the government wished to use the site to extend a prison farm. An urgent application was filed in the High Court asserting that the Kxoe as the original inhabitants of the area had aboriginal title to the land which had not been extinguished by colonial occupation. The case was one of the first of its kind in southern Africa. Government, fearing an unfavourable precedent, retracted the eviction notices and the Kxoe continue to manage their land and resources without interference from government.

A further governance issue is the question of how to deal with communities who can attest to being removed from their land for the creation of national parks in Namibia, and others who continue to reside in parks and reserves with ambiguous rights and responsibilities. There is no commitment by government to return the land to the dispossessed and there is probably a fair national consensus that parks and game reserves are national assets worth preserving. Nevertheless, the national CBNRM programme has identified the need to look more carefully into the restitution of resource rights to communities who have been dispossessed of their rights during the more recent colonial period. The communities which come to mind are the Haikom who traditionally occupied the southern part of the Etosha Park, the Topnaar who reside in the Namib-Naukluft Park, the Kxoe of West Caprivi as well as other communities living on the borders of protected areas in Kavango and East Caprivi. The form of restitution could range from the granting of secure tenure rights to continue to reside in the park to the authorising of a long term concessions to engage in tourism activities in the area they formally occupied, limited rights to hunt or benefit from the meat derived from the culling of game in the Park, or even profit sharing arrangements between the dispossessed community and the parks.

5. CONCLUSIONS

Impact on overall governance:

Democracy in NRM governance in Namibia is being improved by the establishment of various community-based NRM institutions, in which residents are electing representatives, learning how to hold them to account, and how to ensure that communally generated income is used or distributed equitably. Communities have

gained in confidence in dealing with outsiders, particularly government and donors, and are beginning to set their own development agendas instead of being dependent upon government experts. In the absence of statutory government administrative structures in rural areas below the regional level conservancies and other resource management institutions have the potential to fill the vacuum in local governance. According to Blackie (1999:13) "Eventually it seems likely that community based resource management bodies will effectively be the lowest, and most democratic, level of government, and that groups of these will be able to wield substantial influence over government on behalf of their members."

However, while Namibia is making significant progress in developing policy and legislation that promote the formation of community-based institutions, there are important gaps between policy intent and implementation that limit the effectiveness of the legal and policy instruments. These gaps are in danger of resulting in "aborted devolution". Communities face a number of problems in meeting the conditions set by the policy instruments for gaining rights over resources. In some cases these problems are being solved, while in others the policy approach is proving to be inadequate. In some cases, emerging community resource management institutions are managing to develop healthy relations with existing institutions, but in other cases there is more conflict. There is a need for the development of institutional arrangements that supplement or replace the current policy approach in certain areas of the country (e.g. to deal with the problems of overlapping resource rights and where the community of residents does not necessarily correspond to the community of resource users). Policy also needs to provide mechanisms to strike a balance between community rights and individual rights.

Perhaps of more profound impact is the political context within which these developments are taking place. Government has given explicit recognition to the notion that communities must be given a stake in the management and sustainable utilisation of natural resources. It recognises that the natural resources people have lived with for centuries belong to the community through its traditional leadership structures according to customary law. The act of giving ownership of huntable game to communities through a conservancy committee or the management rights over forests and water through local level institutions constitutes the re-empowerment of communities in thinking of themselves as holders of rights and the bearers of responsibility as to how such rights are exercised. The institutional form that these various bodies may take also has deep implications concerning the future of democratic practices in those particular areas. On the one hand government is devolving authority and responsibility to specific communities, but on the other hand those communities need to establish a democratic and accountable way of managing these resources which they own. This requires not only adaptable and appropriate legal forms but mature and responsible leadership.

The future policy and legal framework must accordingly provide entry points for natural resource management institutions in the communal areas into the

national, regional and local planning processes. Failure to do so might lead to the undermining of the conservancy approach by planning institutions competing for the right to utilise scarce resources and the benefits which accrue from them.

Table 1. Regional and local institutions for resource management

Institution	Level of responsibility	Membership	Powers	Status
Communal land boards	Regional	Appointees, including CBO reps.	Land allocation and registration with traditional authorities	Legislation awaited
Wildlife Councils	Regional	Governor, MET officials, appointees including traditional leaders	Wildlife & tourism mgt. Outside conservancies	Provided for in legislation, but none formed
Rural Water Management Agency	Regional	Reps. Of stakeholders in water mgt.	Co-ordination of regional water mgt.	Legislation awaited, but some established
Inland Fisheries Regional Advisory Board	Regional	Governor & appointees	Recommendations on Inland Fisheries mgt.	Planned
Regional Councils	Regional	Elected politicians	Existing: Development planning Planned: take over of many central govt. functions	Established. No revenue raising powers as yet
Regional Land Use and Environmental Boards	Regional	To be finalised	Land Use Planning & NRM	Planned
Regional Development Committees	Regional	Regional Officer, Govt. officials, reps. Of traditional leaders, NGOs, & CBOs	Co-ordinate regional development planning	Legislation awaited But some established
Constituency Development Committee	Constituency (smaller than region, larger than community)	Regional Councillor, traditional leaders, Govt. officials, reps. Of NGOs, & CBOs	Co-ordinate constituency development planning	Legislation awaited but some established
Community Forest Committees	Community	Community reps.	Mgt. of natural resources in local forests	Legislation awaited, but some established
Conservancies	Community	Local residents with elected committee	Wildlife & tourism mgt.	10 gazetted in terms of legislation, several more being established
Rural Water User Associations	Community	Local residents/water users with elected committee	Water point mgt.	Legislation awaited, but many committees established
Traditional Authorities	Varies	Elected/appointed through customary law & ratified by Govt.	Responsibility for NRM (not well defined) & land allocation by customary grant	Function in terms of legislation, but powers & legitimacy stronger in some regions than others

(Jones 2000a adapted from Blackie and Tarr 1999)

Table 2. Comparison of policy intentions, legal provisions and implementation of Namibia's communal area conservancy approach

Policy Intention	Legal Provision	Implementation
Communal area conservancies should gain the same rights as freehold farmers especially the right to use huntable game for own use without permits or restrictions on numbers	Nature Conservation Amendment Act (1996) makes provision for communal area conservancies to have same rights as freehold farmers	<i>MET officials insist on communal area conservancies receiving quotas that include huntable game for own use and that permits must be acquired</i>
Conservancies expected to develop management plans once they have been registered	No legal provision for conservancies to develop management plans	<i>Government officials starting to demand a management plan before a quota (for trophy hunting and own use) will be issued</i>
Conservancies expected to set own quotas to be endorsed by MET	No legal requirement for quotas to be set for own use. Legal requirement for quotas for trophy hunting.	<i>Government officials decide quota often arbitrarily – in at least one case the official quota far exceeded that requested</i>
Conservancies should receive concessionary rights to commercial tourism	Nature Conservation Amendment Act (1996) gives weak tourism rights (gives rights to “non-consumptive” use of wildlife which includes for “recreational” purposes No relevant tourism legislation	<i>Government officials have renewed expired concessions held by the private sector within registered conservancies</i>
Hunting concessions previously held on communal land by the private sector should be transferred to conservancies	Nature Conservation Amendment Act (1996) gives conservancies trophy hunting rights	<i>Government officials have issued new hunting private sector concessions where there are registered and emerging conservancies</i>
Conservancies be able to enter into joint venture partnerships and other business arrangements with the private sector	Policy on Promotion of Community-based Tourism (1995) promotes joint venture approaches and aims to create a “supportive and enabling legal framework”	<i>Tendency by government to interpret policy as giving it the right to approve joint venture agreements</i>
Conservancies should take over greater role in managing wildlife including problem animals	Nature Conservation Ordinance (1974) enables citizens to shoot a predator that threatens the lives of people or livestock. Shooting of lions has to be reported within 24 hours. Elephants may only be shot by special permit.	<i>Officials recently refused to allow a problem lion to be shot by trophy hunters in a conservancy denying residents compensation for stock losses.</i>

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