

Citizenship, communal land rights and “New” cultural communities in Namibia

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Abstract

The crisis around the land issue in Namibia has worsened arguably as a result of little or no thought being placed around the notion of citizenship. Citizenship can be an indicator of the substantive differences in the quality of life between a landless African in the colonial and post-colonial societies and one who has land in both the aforementioned eras. It appears that little effort has been put in expanding upon the conventional notions of citizenship to include citizenship as not only a claim to rights but also a claim to full societal belonging which includes struggles for recognition and redistribution and how citizenship ought to be socially construed. At the center of such critique is the issue that there is no worth in Namibian citizenship without citizens' right of access to land, more specifically communal land. This places significance on an undying need to realise an equitable communal land tenure reform programme in the country. In Namibia, such policy and legislative reforms have taken place within the broader context of restructuring societal relations in the country's communities. This chapter explores how the desire to fulfill the promise of Namibian citizenship has led to state ownership of land and a principle that all Namibians irrespective of traditional linkages of consanguinity and customary belongings are entitled to communal lands. It will be argued, that state ownership of land and universal access to customary land rights in Namibia has arguably led to the re-definition of the nature and extent of Traditional Authorities who are custodians of communal land. Most importantly though, it will be argued that the allocation of customary land rights irrespective of consanguinity is giving rise to new cultural communities in Namibia at the same time enriching formal citizenship of Namibians.

Keywords: Citizenship, new cultural communities, cultural diversity, communal land rights, Traditional Authorities

1. Introduction

In the greater parts of Namibia, the land question remains a fundamental subject with regards to food security, efforts to reduce poverty and the quest to realise the much sought after yet “elusive” economic development. In principle, the land question is of fundamental significance to Namibian societies and their economies of scale. In Namibia, the land issue assumes greater significance should it be construed from the lances of the notion of

citizenship, more so cultural citizenship. The traditional concept of citizenship has largely focused on formal membership, including access to rights in a national community.¹ However, the same notion of citizenship has largely been limited as its definition has not gone beyond citizenship as a legal status to focus on struggles for societal inclusion of and justice for marginalised populations, or citizenship as both a social and symbolic boundary of exclusion.² Nowhere is this conceptualization important than it is when matters of customary land rights and communal land claims are discussed. Customary land rights and communal land claims can determine a Namibian's inclusion or exclusion from accessing socio-economic development and realising substantive citizenship. This perception is attributed to the fact that, in Namibia, land has a significant and direct bearing on the livelihood of over 80% of the country's land-based population.³ Further, land also impacts on the country's Gross Domestic Product (GDP) as well as wealth and employment creation. Regrettably, due to the never-ending scramble for African land, it has become insufficient in many areas.⁴ To that end, the crisis around the land issue in Namibia has worsened arguably as a result of little or no thought being placed around the notion of cultural citizenship. Citizenship can be an indicator of the substantive differences in the quality of life between a landless African in the

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¹J Beaman 'Citizenship as cultural: Towards a theory of cultural citizenship' (2016) 10 *Sociology Compass* 849.

² Beaman (n 1 above) 849.

³ H Becker 'Women and land rights' in J Malan J & M Hinz (eds) *Communal Land Administration: Second National Traditional Authority Conference – Proceedings* (1997). See also JI Barnes 'The value of non-agricultural land use in some Namibian communal areas: A database for planning' DEA Research Discussion Paper 6 (1995); B Fuller 'Returning their rights: A case study of Namibia's communal areas' in J Oglethorpe (ed) *Tenure and sustainable use* (1999) 111-117; B Fuller 'A Namibian path for land reform' in J Hunter (ed) *Who should own the land?* (2004) 83-86; N Horn 'Eddie Mabo and Namibia: Land reform and pre-colonial land rights' (2005) 3 *Sur - International Journal on Human Rights* 81; P Kaapama 'Commercial land reforms in post-colonial Namibia. What happened to liberation struggle rhetoric?' in H Melber (ed) *Transitions in Namibia. Which changes for whom?* (2007); H Melber 'Land politics in Namibia' (2005) 103 *Review of African Political Economy* 135; H Melber 'Transitions in Namibia. Which changes for whom?' (2007); J Mendelsohn, A Jarvis, C Roberts, & T Robertson *Atlas of Namibia. A portrait of the land and its people* (3rd ed) (2009); and J Mendelsohn *Customary and legislative aspects of land registration and management on communal land in Namibia* (2008).

⁴ TV Warikandwa & A Nhemachena 'Human rights to land or land rights? Charting a new roadmap to land ownership in Africa' in TV Warikandwa, A Nhemachena & Mtapuri *Transnational Land Grabs and Restitution in an Age of the (De-) Militarised New Scramble for Africa: A Pan African Socio-Legal Perspective* (2017) 529.

colonial and post-colonial societies and one who has land in both the aforementioned eras.

Population growth and unrelenting pressure on the land as a resource, due to globalisation processes, has led to its inadequacy.⁵ Incessant pressure on land has been attributed to a sharp increase in competition for land between different multiple land users.⁶ Such land users include but are not limited to the following: 1) foreign investors, 2) well connected political and urban elites, 3) white livestock and crop farmers, 4) an emerging class of black bourgeoisie livestock and crop farmers, and 5) the marginalised small-scale farmers.⁷ The globalisation driven socio-economic transformation has also eroded the rules and institutions of Traditional Authorities as well as customary norms that were used in administering land rights in most African communities, including Namibia.⁸ However, it appears that little effort has been put in expanding upon the conventional notions of citizenship to include citizenship as not only a claim to rights but also a claim to full societal belonging which includes struggles for recognition and redistribution and how citizenship ought to be socially construed. In principle, citizenship in Namibia must not just be a status accorded by the State but must also involve individuals' ability to claim recognition by the State. It is, therefore, crucial to critique the prevalence of incessant cases of unequal access to land in Namibia. At the centre of such critique is the issue that there is no worth in Namibian citizenship without citizens' right of access to land, more specifically communal land. This places significance on an undying need to realise an equitable communal land tenure reform programme in the country. In Namibia, such policy and legislative reforms have taken place within the broader context of restructuring societal relations in the country's communities. It is therefore not surprising that Namibia has adopted a Constitution inspired by principles

⁵ TV Warikandwa & A Nhemachena 'Human rights to land or land rights? Charting a new roadmap to land ownership in Africa' in TV Warikandwa, A Nhemachena & O Mtapuri (n 4 above) 529.

⁶ Bank of Namibia 'Unlocking the Economic Potential of Communal Land' (2012) Available at <https://www.bon.com.na/CMSTemplates/Bon/Files/bon.com.na/7d/7dafdec3-24a1-4817902a-c4a686f57489.pdf> (accessed 12 December 2019).

⁷ Bank of Namibia (n 6 above) 11.

⁸ L von Carlowitz & P Mandimika 'Promoting Dialogue and Raising Awareness: Land Reform and the Arts in Namibia' A paper prepared and presented at the 2015 World Bank Conference on Land and Poverty- The World Bank- Washington DC, March 23-27 (2015).

of human rights,⁹ freedom,¹⁰ "democratic" culture¹¹ and good governance.¹² This Constitution enshrines fundamental principles on land relations which in turn are articulated through the relevant legislation.¹³

This chapter explores how the desire to fulfill the promise of Namibian citizenship has led to state ownership of land and a principle that all Namibians irrespective of traditional linkages of consanguinity and customary belongings are entitled to communal lands. It will be argued, that state ownership of land and universal access to customary land rights in Namibia has arguably led to the re-definition of the nature and extent of Traditional Authorities who are custodians of communal land.

2. Communal land rights and customary law: A historical overview

This section undertakes a historical overview of communal land rights to provide a context for the ensuing discussions. Namibia is characterized by a dual land tenure system. About 43% of Namibia's land area is held under freehold title (generally referred to as the commercial sector), whereas 15% consists of proclaimed state land such as game parks.¹⁴ The remaining 42% consists of non-freehold or communal land.¹⁵ After independence, the post-colonial Namibian Government initiated an ambitious land reform programme.¹⁶ It sought to improve access to agricultural land for previously disadvantaged communities as added to secure the tenure of households and individuals who hold land under different customary land tenure regimes.¹⁷

⁹ See Chapter 3 of the Constitution of the Republic of Namibia 21 March 1990.

¹⁰ Art 21 of the Namibian Constitution.

¹¹ Art 19 of the Namibian Constitution.

¹² Art 18 of the Namibian Constitution.

¹³ See Art 16 of the Namibian Constitution. Art 16(1) of the Namibian Constitution guarantees all persons the right to acquire, own and dispose of all forms of property in any part of Namibia. Art 16(2) gives the power to Parliament to make laws that would allow the state or a lawfully established body or organ to expropriate property in the public interest, on the condition that the state pays what is termed "just compensation" to those affected by such an expropriation. See also the Agricultural (Commercial) Land Reform Act 6 of 1995; and Communal Land Reform Act 5 of 2002.

¹⁴ W Werner 'Tenure reform in Namibia's communal areas' (2015) 18 *Journal of Namibian Studies* 67.

¹⁵ Werner (n 14 above) 67.

¹⁶ Werner (n 14 above 67). See also J Malan & MO Hinz (eds) 'Communal Land Administration. Second National Traditional Authority Conference Proceedings' (1997).

¹⁷ Werner (n 14 above) 67.

A National Conference on Land Reform and the Land Question was hosted by the Namibia Government, in 1991, to discuss how the country's land reform programme in the freehold and non-freehold sectors should be conceptualized and implemented.¹⁸ The consensus at the Conference was "that the communal areas should be retained, developed and expanded where necessary", as communal lands sustained a majority of the Namibian population, "especially poor farmers".¹⁹ To protect the rights of access to communal land for farming households, it was resolved that new applicants for access to communal land "should take account of the rights and customs of the local communities living there" and that "farmers with the potential to become commercial farmers can be encouraged, if necessary through government schemes, to acquire land in the commercial sector".²⁰ Lastly, it was resolved that "farmland now used by large farmers in the communal areas should not be expanded and in future should be reduced to make space for small farmers".²¹

The Traditional Authorities Act (TAT)²² defines communal area as that land which is "habitually inhabited by a specific traditional community".²³ A traditional community, in turn, is defined as an "indigenous, homogenous, endogamous social grouping of persons that shares a common language, culture, and customs and recognizes a traditional authority".²⁴ The legal definition alludes to a common characteristic of communal tenure systems across the African continent, which includes "a degree of community control over who is allowed into the group, and thus being able to obtain residential and farming rights, which are usually strong and secure".²⁵ The legal definition also alludes to homogenous groups of people, suggesting a high degree of social equity in communal systems.²⁶

The reality in Namibia's communal areas at independence and since then has been much more complex than simple legal definitions suggest. To

¹⁸ J Mendelsohn *Farming Systems in Namibia* (2006) 39. See also B Cousins & A Claassens 2004. 'Communal Land Rights, Democracy and Traditional Leaders in Post - Apartheid South Africa' in M Saruchera (ed) *Securing Land and Resource Rights in Africa: Pan- African Perspectives*, Bellville, Programme for Land and Agrarian Studies (2004) 139.

¹⁹ Werner (n 14 above) 67.

²⁰ Werner (n 14 above) 68.

²¹ Werner (n 14 above) 68.

²² Traditional Authorities Act 17 of 1995 (hereinafter TAT).

²³ Sec 1 of the TAT.

²⁴ Sec 1 of the TAT.

²⁵ Sec 1 of the TAT.

²⁶ Sec 1 of the TAT.

start with, communal areas were characterized by growing inequalities. It was estimated in the early 1990s that approximately 50% of farming households in the north-central regions, for example, did not own any livestock.²⁷ Farming was no longer restricted to subsistence farming but was becoming commercial in orientation, at least for a small but growing group of farmers.²⁸ Increasing inequalities in asset ownership characterized communal areas across the country.²⁹ The individualization of communal grazing areas for private farming supports this assertion.

The growing enclosures of communal grazing areas were also a manifestation of the weakening of customary governance systems in some communal areas. The legitimacy of traditional authorities to administer customary land rights in some areas was called into question.³⁰ A socio-economic survey conducted across Namibia in preparation for the First National Land Conference found widespread dissatisfaction with the system of land allocation in the war-ravaged north-central regions.³¹ The treatment of women's rights and private enclosures was singled out. By contrast, traditional authorities in Caprivi - now Zambezi-Region - were "highly respected" and their continued role in land governance was widely supported. In the southern communal areas, issues of privatization of communal land rather than a lack of legitimacy of traditional leaders were more prominent.³² This, in turn, pitched the interests of a "rich, politically powerful minority ... at odds with those of the poor majority".³³ Tenure reform in Namibia thus had to address a complex situation, characterized by significant regional differences.³⁴

The only commonality across the country was that under the Namibian Constitution, the state is the legal owner of all communal land.³⁵ This, as Adams *et al* have argued, "can be an opportunity or a difficulty, depending on how tenure reform is perceived to affect the interests of those with power

²⁷ Werner (n 14 above) 69. See also J Cox, C Kerven, W Werner, & R Behnke *The Privatisation of Rangeland Resources in Namibia: Enclosure in Eastern Oshikoto* (1998).

²⁸ Werner (n 14 above) 69.

²⁹ Werner (n 14 above) 69.

³⁰ Werner (n 14 above) 69.

³¹ Werner (n 14 above) 69.

³² Werner (n 14 above) 69.

³³ Werner (n 14 above) 69.

³⁴ Werner (n 14 above) 69.

³⁵ See schedules 5(1) and 5(3) of the Namibian Constitution.

and influence".³⁶ The state had the power to give effect to the consensus resolutions of the First National Land Conference, which called for the development of communal land in the interests of poorer sections of society or assert the interests of the new elite by promoting the commercialization of communal areas through a transformation of customary tenure systems to individual rights.³⁷

3. State Ownership of Land and Universal Access to Communal Land

The Government of the Republic of Namibia metaphorically owns communal land in the country. Traditional authorities are regarded as the emblematic custodians of such communal land as is owned by the State. In terms of schedule 5(1) of the Constitution of Namibia, all communal land vests in the State, in other words, communal land belongs to the State. In furtherance of the constitutional endowment of State ownership, Section 17 of the Communal Land Reform Act (CLRA), provides that;

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

The State has therefore inherited, as successor in title to communal lands, social obligations and has to use land for "public good". The State's obligations relate to the need for it to respect the interests held by affected communities in communal land. Such communities are largely composed of people who heavily rely on communal land for survival and livelihood.

Article 16 of the Constitution of Namibia, which is largely referred to as the property clause, provides that all persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and moveable property individually or in association with others and to bequeath their property to their heirs or legatees: Provided that Parliament may by

³⁶ A Martin, S Sibanda, & S Turner 2000 'Land Tenure Reform and Livelihoods in Southern Africa' in C Toulmin & J Quan (eds) *Evolving Land Rights, Policy and Tenure in Africa* (2000) 1-15. See in general, A Fiona & W Werner *The Land Issue in Namibia: An Inquiry* (1990).

³⁷ Werner (n 14 above) 70.

legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens. Section 16(1) of the Constitution of Namibia, by implication, can be interpreted to imply that every Namibian citizen has a right to customary land rights.³⁸

The Supreme Court of Namibia in providing meaning to Article 16(1) of the Constitution and section 17 of the Communal Land Reform Act (CLRA), in so far as communal land rights are concerned, pointed out that Namibia has two mainland tenure systems: the freehold land tenure system and the customary land tenure system on communal land. In the case of *Kashela v Katima Mulilo Town Council*³⁹ Damaseb DCJ observed that:

... the concept of communal land defies precise definition. Despite the fact that the concept of communal land defies precise definition, it has, in Namibia, generally been understood that communal land includes land owned in trust by the government but administered by traditional authorities who make allocation of parcels of land to members of the community, ordinarily but not exclusively to live thereon, till and or graze thereon and generally to make a living, without acquiring ownership or title to that land.⁴⁰

In distinguishing the communal land and freehold land tenure systems, the Supreme Court pointed out that the freehold land tenure system is largely applicable in respect of pieces of land in urban areas and commercial farms.⁴¹ As such, under the freehold land tenure system, the land is surveyed and is capable of being privately owned (regardless of whether such land is in the urban area or a commercial farm).⁴² On the other hand, under the communal land tenure system, whilst the State is symbolically regarded as the owner of the land, it holds the land in trust on behalf of traditional communities and their members who live there.⁴³ Section 16 of

³⁸ However, sect 16(1) of the CLRA authorises the President of Namibia to, with the approval of Parliament, by proclamation "withdraw from any communal land area, subject to . . . subsection (2) any defined portion (of communal land) which is required for any purpose in the public interest, and in such proclamation make appropriate amendments to Schedule 1 (which defines the boundaries of communal land areas) so as to. . . redefine any communal land area affected by (the withdrawal of land from a communal area)"

³⁹ *Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others*: Case No: SA 15/2017 delivered on 16 November 2018.

⁴⁰ *Ndevahoma v Shimwooshili* (HC-MD-CIV-ACT-OTH-2017/03184) [2019] NAHCMD 32(25 January 2019), para 18.

⁴¹ *Ndevahoma* case (n 40 above) para 19.

⁴² *Ndevahoma* case (n 40 above) para 19.

⁴³ *Ndevahoma* case (n 40 above) para 20.

the CLRA provides that the President, with the approval of the National Assembly, may by proclamation, "...declare any defined State land to be communal, add any State land to an existing communal land area, or withdraw a defined area from communal land". More importantly, section 17 of the CLRA then makes it succinctly clear that whilst there is a property right conferred in terms of Article 16 of the Constitution, all communal land belongs to the State which must keep the land in trust for the benefit of traditional communities living in those areas. The emphasis in this regard is not placed on consanguinity but on residence. As such, the State is enjoined to make sure that communal lands are administered and managed in the interests of persons living in those areas.⁴⁴ This, in essence, gives rise to "new" cultural communities as one does not need to be related to someone who lives in the area to be able to access communal land. These "new" cultural communities have translated to the spread of infrastructure across larger groups of people in Namibia and facilitated economic diversification for improved livelihoods.⁴⁵ However, in some regions, such as Kavango East and Kavango West, communities have opted out of the communal land registration programme as they regard as not conforming to the norms and cultural values of their people.⁴⁶

It is imperative to take note that the CLRA makes it clear that communal land cannot be sold as freehold to any person.⁴⁷ Section 19 of the CLRA then stipulates that the rights that may be allocated in respect of communal land under the Act are divided into customary land rights and rights of leasehold. The customary rights that may be allocated in respect of communal land rights are set out in section 21 of the CLRA.⁴⁸ Significantly, in the context of citizenship and customary land rights in Namibia, section 28 of the CLRA recognises existing customary land rights and provides that any person who immediately before the commencement of the Act held a right in respect of the occupation or use of communal land, being a right of

⁴⁴Ministry of Land Reform 'Mid-term Report Evaluation, Programme for Communal Land Development' Windhoek (2017).

⁴⁵ Ministry of Land Reform (n 44 above).

⁴⁶ P Mandimika & J Mulofwa 'Securing customary land rights for development in Namibia: Learning from new approaches, opportunities and social settings' Paper prepared for presentation at the 2018 World Bank Conference on Land and Property, The World Bank – Washington DC, March 19-23 (2018) 3.

⁴⁷*Ndevahoma* case (n.40 above) para 22.

⁴⁸ Customary land rights that may be allocated in respect of communal land are as follows: a) A right to a farming unit; b) A right to a residential unit; and c) A right to any form of customary tenure that may be recognised and described by the Minister by notice in the Gazette for the purposes of the CLRA.

nature referred to in section 21, and which was granted to or acquired by such person in terms of any law or otherwise, shall continue to hold that right.⁴⁹ Section 29 of the CLRA which deals with grazing rights stipulates that the commonage in the communal area of a traditional community is available for use by the lawful residents of such area for the grazing of their stock but the right is subject to such conditions as may be prescribed or as the Chief or Traditional Authority concerned may impose. Section 30 of the CLRA confers the power to grant rights of leasehold in respect of any portion of communal land on a Communal Land Board. This right of leasehold can only be granted if the Traditional Authority of the community in whose communal area the land is situated consents to the right of leasehold.

In the case of *Ongwediva Town Council v Jonas*⁵⁰ it was pointed out that Article 16(1) of the Constitution of Namibia recognises the fundamental right of all persons to acquire, own and dispose of property in Namibia. Article 16(2) of the Constitution then protects ownership rights. The protection afforded in article 16(2) is against expropriation without just compensation. With regards to expropriation, a citizen's land rights can only be withdrawn once such person's rights as held in respect of communal land have been acquired by the State. If the land in question is communal land withdrawn after 2002, the rights of the communal land rights holder would be against the State represented by the Minister of Lands and Resettlement. In the *Kashela* case, Agnes Kahimbi Kashela approached the High Court and on appeal the Supreme Court, seeking compensation for communal land "expropriated" by the Katima Mulilo Town Council (KTC). The communal land initially belonged to Kashela's father but she later acquired a right of exclusive use and occupation of the communal land after the death of her father. Kashela argued that the KTC was unjustly enriched (to her prejudice) by unlawfully renting out the land in dispute. She also claimed that, by offering to sell the land, KTC unlawfully "expropriated" her land "without just compensation" "at market value". The appellant relied for those allegations on Article 16(1) of the Constitution which guarantees property rights and Article 16(2) which provides that property may only be expropriated upon payment of just compensation. She also relied on section 16(2) of the CLRA which states that land may not be removed from a communal land area without just compensation to the persons affected. The High Court had initially ruled in favour of KTC but this decision was reversed on appeal by the Supreme

⁴⁹ *Ndevahoma* case (n 40 above) para 28.

⁵⁰ *Ongwediva Town Council v Jonas* (HC-NLD-CIV-MOT-GEN-2018/00001) [2018] NAHCNLD 22(12 March 2018).

Court which found that the communal land right in dispute remained existent after the passing of Kashela's father. The right thus survived and attached to the land even after its proclamation as town land.⁵¹

In the case of *Halidulu v The Council for the Town of Ondangwa*⁵² the finding of the Supreme Court in the case of *Kashela* was applied. Halidulu was allocated land before Namibia's independence to habituate on and use. Schedule 5(3) of the Namibian Constitution created a right in favour of Halidulu over communal land that was succeeded to by the Government of the Republic of Namibia. Such right continued to exist, even though not registered in terms of the Deeds Registries Act 47 of 1937, when the land was transferred to the Ondangwa Town Council, a local authority council. The defendant failed to establish any defence known to the law in challenging Halidulu's ownership of the land. The Court accordingly protected Halidulu's right to the property by declaration.

4. Universal Access Traditional Authorities and Customary Land Rights

This part of the chapter explores the process by which Namibians access customary land rights and the consequences of such allocation. The issues that will be addressed include which parties have the power to allocate customary land rights; whether such an allocation makes the allottee a member of the customary community who is bound by the customary laws of that community in instances of marriage succession and inheritance; and the nature and extent of the control by the Chief or Traditional Authority.

The first issue which this section explores is the authority to allocate customary land rights. Sections 20 and 21 of the CLRA provide that the Chief of a traditional community, or if the Chief so decides, the Traditional Authority of the particular traditional community is empowered to allocate customary land rights for purposes of residence and a farming unit. Only once this decision has been made, will the matter be referred to the Communal Land Board for ratification of the decision by the Chief or Traditional Authority.⁵³ Section 22 of the CLRA sets out the procedure(s) which must be followed when one is applying for communal land rights. It provides that an

⁵¹*Kashela* case (n 39 above) para 81.

⁵² *Halidulu v The Council for the Town of Ondangwa* (I 389/2015) [2019] NAHCMD 460 (7 November 2019).

⁵³ Sec 3 of the CLRA.

application for the allocation of a customary land right in respect of communal land must be made in writing in the prescribed form; and be submitted to the Chief of the traditional community within whose communal area the land in question is situated. The section further provides that an applicant for a land right in respect of a communal land must, in his or her application for the land right, furnish such information and submit such documents as the Chief or the Traditional Authority may require for purposes of consideration of the application. The section furthermore provides that when considering an application for a customary land right in respect of communal land, a Chief or Traditional Authority may make investigations and consult persons in connection with the application; and if any member of the traditional community objects to the allocation of the right, conduct a hearing to allow the applicant and such objector to make representations in connection with the application, and may refuse or, grant the application.

For the purposes of ascertaining fairness and equality in the process of allocating customary land rights, it is imperative to establish whether or not the nature and composition of Traditional Authorities are crucial to a determination of how these Authorities have addressed applications for customary land rights. In this regard, it will be ascertained if the CLRA by including women has changed the ability of Traditional Authorities to ensure that the landless are allocated customary land in Namibia. Traditional Authorities have largely involved themselves in matters related to land management by controlling people's applications to reside on communal land. Such applications have traditionally been assessed not solely on the basis of consanguinity but related issues such as an applicant's familiarity with the community as well as the need to avoid future disputes.⁵⁴ Traditional authorities are thus considered as mediators and gatekeepers with regards to communal land. For example, Nama and Damara Traditional Authorities consider the availability of water and grazing before granting newcomers to the community, customary residential and farming rights. Further, some San Traditional Authorities in granting communal land rights impose restrictions on the number of livestock a resident may keep at any given time. However, regardless of these attendant issues regarding Traditional Authorities, there remains much debate around gender in land matters. It, therefore, has to be ascertained whether or not Traditional Authorities consider the interest of

⁵⁴J Mendelsohn 'Customary and legislative aspects of land registration and management on communal land in Namibia' A Report prepared for the Ministry of Land and Rural Resettlement and the Rural Poverty Reduction Programme of the European Union, December 2008, (2009).

women on access to communal land rights. This should be considered in the context that for women to realise substantive citizenship in Namibia, their centrality in agricultural and domestic production and reproduction in the country must be given due regard. This discussion unravels from the context that in Africa, governments have put in place land policies to promote men and women having equal access to land and land rights. More importantly, section 3(g) of the Traditional Authorities Act 25 of 2002 provides that traditional authorities should promote affirmative action, specifically about positions of leadership, as required by Article 23 of the Constitution of Namibia. At present, most of the Traditional Authorities are men with a few being women.

The Communal Land Reform Act does not provide specific provisions on women's land rights. This poses significant challenges to Traditional Leaders in their efforts to strike a balance between customary law and the requirements of common law and the Constitution.⁵⁵ For example, the Traditional Authorities Act 25 of 2000 provides that Traditional Authorities and their members are in charge of the administration and execution of the customary laws of specific communities, and must "uphold, promote, protect and preserve the culture, language, tradition and traditional values" of these communities.⁵⁶ They are also responsible for hearing and settling disputes among members of a specific traditional community in accordance with customary laws. Chiefs and Headmen, in turn, are expected to "exercise [their] powers and perform [their] duties and functions ... in accordance with ... customary law". At the same time, they are called upon to promote affirmative action as required by Article 23 of the Constitution, "in particular by promoting gender equality with regard to positions of leadership".⁵⁷

Chiari pointed out, this twofold role is particularly pertinent with regards to women's land and property rights.⁵⁸ The Communal Land Reform Act fails to address the fact that in terms of customary law, access to land and its transfer after a spouse's death is subject to power relationships that

⁵⁵ W Werner 'Protection for women in Namibia's Communal Land Reform Act: Is it working?' A report published by the Land, Environment and Development Project Gender Research and Advocacy Project, Legal Assistance Centre, March 2008 (2008).

⁵⁶ See sec 3 of the Traditional Authorities Act 25 of 2002.

⁵⁷ See Arts 3 and 7 of the Namibian Constitution.

⁵⁸ GP Chiari 'Draft Report: UNDP Mission on Rural Livelihoods and Poverty in Namibia' (2004) 90.

are based on gender roles.⁵⁹ For example, the grabbing of property by relatives of a deceased husband is considered by the perpetrators to be legitimate in terms of customary law, in so far as this law is claimed to follow matrilineal inheritance rules.⁶⁰ However, statutory law regards such an act as theft and thus a criminal offence. When cases of property grabbing were brought before the Traditional Authority of Ondonga, for example, the Authority attempted to negotiate acceptable solutions but did not fine the perpetrators because their actions were not regarded as criminal offences - unlike stock theft.⁶¹ On the contrary, the Traditional Authority regards property grabbing as constituting a matrilineal system of inheritance, whereby the family of a deceased husband claims his property and assets.⁶² The Traditional Authorities Act emphasises the importance of customary laws and practices in administering the affairs of traditional communities without questioning the inequalities that such laws and practices may perpetuate, particularly in the case of women. This vacuum provides opportunities to continue some unconstitutional practices. The CLRA does not provide much guidance in this respect either. As Chiari pointed out, the CLRA pays "insufficient attention ... to the concepts of rights and legitimacy", and appears to be too legalistic in the way that it seeks to address gender issues.⁶³ Since the CLRA is administered from the top-down, statutory provisions that conflict with customary laws run the risk of being ignored. Chiari thus pleaded for an approach that encourages community participation in implementing and controlling land tenure reform as a key factor in contributing to increase social security and to reverse the material and non-material social sanctions taken against women - and, particularly, divorcees and widows.⁶⁴

Revised customary laws have nevertheless provided for the protection of widows and the property belonging to the household. Widows were previously not only allowed to stay on the land of their husbands but were no longer required to pay to acquire husbands' land rights.⁶⁵ The

⁵⁹ Werner (n 55 above) 13.

⁶⁰ J Malan *Peoples of SWA/Namibia* (1980) 83-84. See also J Lebert 'Inheritance practices and property rights in Ohangwena Region' in Gender Research and Advocacy Project *The Meanings of Inheritance: Perspectives on Namibian inheritance practices* (2005) 79-81.

⁶¹ Werner (n 55 above) 13.

⁶² Werner (n 55 above) 13.

⁶³ Werner (n 55 above) 19.

⁶⁴ Werner (n 55 above) 13.

⁶⁵ Traditional Authority of Ondonga 'Ooveta (oompango) dhoshilongo shondonga/The Laws of Ondonga' (1994) 35-36.

CLRA, in turn, codified these provisions in law. The revised customary laws also responded to a dynamic and changing social and economic environment which has brought about changes in inheritance systems and practices. Women's land rights are now shaped not only by marital status but also by laws of inheritance and divorce. These rules and practices, in turn, are shaped by changes in the wider socio-economic sphere.⁶⁶

The Chief or the Traditional Authority constitute part of the administrative process and work together with the Communal Land Boards in allocating communal land. Section 20 of the CLRA provides that the Chief of a traditional community or - if the Chief so decides - the Traditional Authority of a particular power has the primary power to allocate or cancel any customary land rights. In principle, the Chief or Traditional Authority has the first duty of deciding whether or not to grant an application for a customary land right. Once the decision has been made by the Chief or the Traditional Authority, the matter will then be referred to the Communal Land Board for ratification. The Chief or Traditional Authority thus has the following powers: a) Investigating the matter and consult the people about the application; or b) Hold a hearing if a member of the community objects to the allocation of the customary land right. At this hearing, both the applicant and the objector are given the chance to state their reasons for and against the application. Once the chief or Traditional Authority has considered the matter, they may either a) refuse the application or b) grant the application. Once the application for a farming unit or residential unit is granted, the Chief or Traditional Authority may: a) allocate the right to the specific area of land applied for; b) allocate the right to another area of land by agreement with the applicant; and c) determine the size and boundaries of the area of land for which the right has been granted.

It is also important to note that the powers of Traditional Authorities are to be exercised in accordance with the Namibian Bill of Rights.⁶⁷ For example, in the case of *Tjiriange v Kambazembi* where in adjudicating over a dispute, the court also placed emphasis on the significance of administrative justice entrenched by Article 18 of the Namibian Constitution. Article 18 requires administrative bodies to follow rules of natural justice in adjudicating over disputes. Such administrative bodies should give parties

⁶⁶ M Hinz & P Kauluma 'The laws of Ondonga - introductory remarks' in Traditional Authority of Ondonga, Ooveta (oompango) dhoshilongo shondonga/The Laws of Ondonga (1994) 33-34.

⁶⁷ *Kapia v Minister of Regional and Local Government Housing and Rural Development* (A333/2012) [2013] NAHCMD 13 (24 January 2014)

an opportunity to be heard as failure to do so could lead to fatal consequences. To that end, the exercise of power by Chief Kambazembi as a traditional authority, pursuant to the Traditional Authorities Act,⁶⁸ is plainly the exercise of public power, and in exercising those powers the Chief was an administrative body as contemplated in Article 18 of the Namibian Constitution. The Traditional Authorities must also: 1) protect the fundamental rights and freedoms of communal land rights holders;⁶⁹ 2) promote equality and freedom of discrimination;⁷⁰ 3) protect the right to family especially where women's rights to succession of communal land are concerned;⁷¹ 4) protect children's rights in so far as inheritance of communal land is concerned;⁷² 5) protect the right to property for both men and women;⁷³ 6) promote cultural rights;⁷⁴ 7) protect fundamental freedoms especially the right to reside and settle in any part of Namibia;⁷⁵ and 8) promote Affirmative Action in Traditional Authorities especially women empowerment.⁷⁶

Since the scheme of universal access to customary land is facilitated by the attenuated powers of Traditional Authorities, it is imperative to observe that such Traditional Authorities do not just exercise their powers arbitrarily. The functions of Communal Land Boards are set out in section 3 of the CLRA. Key amongst the functions of the Communal Land Boards are the following: 1) controlling the allocation and cancellation of customary land rights by Chiefs or Traditional Authorities; 2) deciding on applications for rights of leasehold; and 3) creating and maintaining registers for the allocation, transfer and cancellation of customary land rights and rights of leasehold.

The CLRA stipulates that Land Boards may only approve and register customary land rights that do not exceed 20 hectares, ostensibly to curb "land grabbing". The narrow definition of rights to communal land potentially compromises the objective of removing uncertainty about legitimate access and rights to communal resources. The registration of customary land rights began in 2003. The initial estimate of customary land

⁶⁸ Traditional Authorities Act 25 of 2000.

⁶⁹ Art 5 of the Constitution of Namibia.

⁷⁰ Art 10 of the Constitution of Namibia.

⁷¹ Art 14 of the Constitution of Namibia.

⁷² Art 15 of the Constitution of Namibia.

⁷³ Art 16 of the Constitution of Namibia.

⁷⁴ Art 19 of the Constitution of Namibia.

⁷⁵ Art 21(6) of the Constitution of Namibia.

⁷⁶ Art 23 of the Constitution of Namibia.

rights to be registered was based on census data, but has been revised to an estimated total of 245,000 in 2014.⁷⁷ The registration of customary land rights follows a process of demarcating the boundaries of the land and validating the claim to a specific parcel of land through a participatory process at the village level.⁷⁸ All land parcels are then digitally mapped and combined with the details of applicants. Once this process is complete, all applications are displayed in public for seven days, before being submitted to the Communal Land Board (CLB) for approval or rejection.⁷⁹ Once a right has been approved by the CLB, it becomes a registered land right. The registration of customary land rights in the communal areas is very important because it: 1) gives security to landholders, their spouses, children and/or dependants; 2) ensures that a land holder has documentary proof of their right to the land and know the boundaries and exact size of the legally allocated land parcel; 3) allows each parcel of land to be owned by one person at a time which rules out any form of land grabbing; 4) It indicates the CLBs and the Traditional Authority as to which land is occupied and which land is available for allocation; and 5) avails a right for compensation when the parcel or part of it is claimed by the Government for public purposes that include building of new roads or expansion of towns.⁸⁰

Section 24 of the CLRA empowers a CLB to ratify an allocation of customary land rights that may be made by a Chief or a Traditional Authority. If the allocation by a Chief or Traditional Authority is not ratified by the relevant board, such allocation has no legal effect. As such, in the case of *Chairman Ohangwena Communal Land Board N.O. v Wapulile*,⁸¹ Tileinge Wapulile (the respondent) was involved in a protracted dispute with the Ohangwena CLB regarding the erection of a fence around the Odjele Grazing Farm. The farm was allocated to the respondent by the Ondonga Traditional Authority in the late 1980's. The allocation of the farm was confirmed on 7 August 1996 in a letter from the Ondonga Traditional

⁷⁷ M Thiem *A Decade of Communal Land Reform. Review and Lessons Learnt, with a Focus on Communal Land Rights Registration* (2014) 32.

⁷⁸ Sec 25 of the CLRA.

⁷⁹ Millennium Challenge Corporation/Orgut COWI, *Legal Requirements for Group Land Rights*, Windhoek, Millennium Challenge Account Namibia (2014). See also *Proposed Guidelines for Group Land Rights in Communal Areas*, Windhoek, Millennium Challenge Account Namibia (2014); and *Proposed Working Policy for Group Land Rights*, Windhoek, Millennium Challenge Account Namibia, (2014).

⁸⁰ Sec 25 of the CLRA.

⁸¹ *Chairman Ohangwena Communal Land Board N.O. v Wapulile* (SA 81/2013) [2017] NASC 19 (08 June 2017).

Authority which stated that the Authority “gave permission” to respondent “to own” the farm known as Odjele Grazing Farm on 2 September 1988. In October 2012 the *Ohangwena Communal Land Board* served the respondent with a letter headed “Notification order to remove the fence”. The notification required the respondent to remove the perimeter fence around the Odjele Grazing Farm within 30 days of receipt of the letter. After the notification, the respondent contacted his legal representatives and the Ondonga Traditional Authority that had granted the respondent the right to occupy the Grazing Farm. The Chief invited the Minister of Lands and Resettlement to his Palace and the Minister was requested to stop the removal of the fences. With the interventions of the Chief and his lawyers and the fact that the 30 days notification had expired without any action from the appellant, the respondent thought all was well. On 26 July 2013, officials from the Ministry of Lands accompanied by Police officers arrived at the respondent’s farm and started dismantling the fence regardless of the authorisation granted from the Chief. The removal of the fence was later deemed as being unlawful by Judge Smuts in the case of *Wapulile v Chairman, Ohangwena Communal Land Board*.⁸²

The customary land rights last for the natural life of the holder.⁸³ It comes to an end only when the occupant dies,⁸⁴ or decides to give up (relinquish) the right before his or her death.⁸⁵ The customary land right is, therefore, an occupation in perpetuity; and the holder need not fear eviction or expropriation without just compensation.⁸⁶ Registered customary land rights are thus formal and enjoy official recognition and protection and thus are secure.

In addition to customary land rights, the CLRA empowers the CLBs to grant Rights of Leasehold to any portion of communal land, but this Right of Leasehold may only be granted if the Traditional Authority of the traditional community, in whose area of jurisdiction the land is situated, gives consent.⁸⁷ If the land to be leased falls within a Conservancy, the use of the land must be in conformity with the Conservancy’s management or utilization plan.⁸⁸ To date over 314 leaseholds for agricultural purposes have

⁸² *Wapulile v Chairman, Ohangwena Communal Land Board* N.O (A 265/2013) [2013] NAHCMD 340 (15 November 2013).

⁸³ Sec 26(1) of the CLRA.

⁸⁴ Sec 26(2) of the CLRA.

⁸⁵ Sec 26(1) of the CLRA.

⁸⁶ Sec 26(1) of the CLRA.

⁸⁷ Sec 3 of the CLRA.

⁸⁸ Sec 4(f) of the CLRA.

been issued in Kavango region and 47 leaseholds issued for tourism enterprises and over a 113 for commerce activities such as the building of supermarkets and Petrol Service stations across communal areas of Namibia. After an application of Right of Leasehold is granted, and a Deed of Leasehold is signed, the CLB Secretary ensures that the Right of Leasehold is registered in the name of the applicant in the prescribed register and the applicant is issued with a Certificate of Leasehold.⁸⁹ It is the responsibility of the leaseholder to register the lease in the Deeds Registry Office.⁹⁰ The Leasehold thus grants the lessees the opportunity to access financial capital to invest in their properties and this improves their living standard.

It would appear that residence is a factor in the use of customary land rights thereby complementing allocation in determining universal access to customary land rights. Part of the powers of Traditional Authorities is with respect to grazing areas. Section 29 deals with grazing rights. That section, amongst other things, provides that the commonage in the communal area of a traditional community is available for use by the lawful residents of such area for the grazing of their stock, but the right is subject to such conditions as may be prescribed or as the Chief or Traditional Authority concerned may impose. The conditions that may be imposed include conditions relating: (a) to the kinds and number of stock that may be grazed; (b) to the section or sections of the commonage where stock may be grazed and the grazing in rotation on different sections; (c) to the right of the Chief or Traditional Authority or the relevant board to utilise any portion of the commonage which is required for the allocation of a right under this Act; and (e) to the right of the President under section 16(1)(c) to withdraw and reserve any portion of the commonage for any purpose in the public interest. In the case of *Tjiriange v Kambazembi*,⁹¹ a dispute arose amongst members of the Ova-Herero traditional community who had resided and conducted farming activities since 1979, in a village called Ondjamo No.1 situated in the communal area known as Otjituuo in Namibia. The colonial government fenced off the area of Ondjamo village No.1 into about four camps. Two of the camps being, Camp A and B, since 1979, had been utilized by the Tjiriange family. A dispute arose between the Tjiriange siblings about the utilization of the camps. On the 28th day of May 2015 Chief Sam Kambazembi, a certain Alexander Tjihokoru, Erastus Tjihokoru,

⁸⁹ Sec 33(1)(b) of the CLRA.

⁹⁰ Sec 33(1)(b)(2) of the CLRA.

⁹¹ *Tjiriange v Kambazembi* (A 164/2015) [2017] NAHCMD 59 (24 February 2017).

four police officers, together with Theodor Tjiriange, Ambrosius Tjiriange and Willem Tjiriange arrived at the applicant Godfried Tjiriange's residence at Ondjamo No. 1. Chief Kambazembi there and then informed the applicant that he considered the matter and divided the grazing rights. The court in addressing the dispute pointed out that Section 29(1) of the CLRA confers on a person the right to graze their livestock on a commonage because they are lawful residents of a communal area and not because it has been allocated to them by the Traditional Chief or Traditional Authority. Section 17 read with section 29(1) makes it impossible to deny a resident of a communal area the right to graze his or her livestock in the commonage area of that communal land. A proper reading of section 28(1) of the CLRA suggests that the occupation of communal land continues unless the claim to the land is rejected upon application or the land in question is reverted to the State. Therefore, if the land has reverted to the State, then the right to hold or occupy the land in terms of section 28 of the Act thus ceases. On the contrary, if a Certificate of Registration of Recognition of Existing Customary Land Right for Residential Units is issued, such right to hold or occupy the land in terms of section 28 of the CLRA never ceases and the holder remains a lawful resident. Section 29(1) confers lawful residents of communal land the right to graze their livestock on commonage. That right derives from the fact that a party is a lawful resident of the commonage and not because it has been allocated to them by the Traditional Chief or Traditional Authority. It thus follows that section 17 read with section 29(1) make it impossible to deny a lawful resident of a communal area the right to graze his or her livestock in the commonage area of a specific communal land.

In *Vita Royal House v The Minister of Land Reform and 10 others*⁹² the applicant brought an application seeking orders to evict the respondents from a communal area under its jurisdiction. According to the applicant, between the years 2002 and 2015 the respondents moved and settled permanently into the communal area without permission having been granted to them by the applicant in terms of section 29 (4) of the Communal Land Reform Act, 2002. Initially, some of the respondents were granted temporary grazing rights during the drought period. After the expiry of the temporary grazing right, they were requested to leave the area but failed and/or refused to vacate the area. Other respondents simply moved into the area and settled without the necessary permission from the applicant. The respondents opposed the application on varied grounds. Some of the

⁹²*Vita Royal House v The Minister of Land Reform & 10 Others* (A 109/2015) [2016] NAHCMD 339 (7 November 2016).

respondents contended that they were granted permission by the Chief, others by the traditional councillors and others by the members of the community⁹³ and others even by the applicant or by a Traditional Authority adjacent to the applicant's area. The court held that the respondents did not have valid permission as envisaged by section 29(4) of the CLRA, which entitled them to permanently reside in the communal area under the jurisdiction of the applicants. Accordingly, the respondents were held to be in unlawful occupation of the area under the applicant's jurisdiction. As such, it was held that once a traditional community has established a Traditional Authority, the authorized body to act on behalf of the traditional community is the Traditional Authority, and not the Chief. The overall import of the *Tjiriange v Kambazembi* and *Vita Royal House v The Minister of Land Reform and 10 others* appears to be that all Namibians irrespective of traditional linkages of consanguinity and customary belongings are entitled to communal lands as long as they are lawfully resident in a specific communal area.

Once a customary land right is granted, it is evident that a dual-process is developing around the allocation of communal land rights in Namibia. New cultural communities are being formed as one does not need to be related to someone (consanguinity) to access communal land rights in any part of Namibia. People of mixed cultural backgrounds are thus settling together to form new communities at the same time socio-economically enriching the formal citizenship of Namibians who through the constitution and legislation become new members of cultural communities. It is imperative to interrogate whether or not such new communities, as being formed, fit into the definition of traditional communities and Article 19 of the Namibian constitution. Section 1 of the Traditional Authorities Act provides that, "Traditional community means an indigenous homogenous, endogamous social grouping of persons comprising of families deriving from exogamous clans which share a common ancestry, language, cultural heritage, customs and traditions ..." This definition must be construed within the context of the supreme law of Namibia, the Namibian Constitution. Article 19 of the Namibian Constitution provides that, "Every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or

⁹³See the case of *Mutrifa v Tjombe* (I 1384/2016) [2017] NAHCMD 162. In this case, it was held that a customary land right is a personal right, inseparable from its holder. Accordingly, the holder of such land rights is entitled to the exclusive enjoyment of the benefits conferred upon him under those rights.

religion subject to the terms of the constitution and further subject to the condition that the rights protected by this article do not impinge upon the rights of others or national interest.” Whilst section 1 of the TAT appears to refer to specific cultural groupings with specific cultural practices, Article 19 of the Namibian Constitution makes reference to a broader concept of “any culture”. The use of the concept “any culture” is indicative of the drafters of the Namibian Constitution's deliberate attempt at promoting unity in diversity where all Namibians through mutual understanding, respect and tolerate one's practice of any culture, within the scope of the constitution. The new cultural communities are regarded as a feature of cultural diversity, a process through which new cultural communities can be constitutionally recognised.

The existence of the new cultural communities in Namibia can be justified by the policy position of the Office of the United Nations High Commissioner for Human Rights (OHCHR) to the effect that, “States are encouraged to create an environment of tolerance and understanding where indigenous people's languages and culture are celebrated within the State, promoting an understanding of the value of cultural difference within the society at large.”⁹⁴ Cultural differences or the development of new cultures, as is the case in Namibia, are given rise to by the inescapable fact that customary law is “living law” which evolves and develops to meet changing communal needs.⁹⁵ Cultural communities can therefore not be expected to be fixed and formally classified in a transforming society. People in Namibia are likely to develop their patterns of life or change them to meet the changing needs of their communities. Such changing needs could be informed by a need to develop new cultural practices to accommodate new land occupants coming from different cultural groupings and who are allocated land in new communities within Namibia. Such a practice cannot be regarded as being unconstitutional as it aligns with the principle of cultural diversity in Namibia.

5. Conclusion

⁹⁴ OHCHR, Thematic Advice of the Expert Mechanism on the Rights of Indigenous Peoples: A compilation (2009-2013) 26.

⁹⁵ AC Diale 'The concept of living customary law: A critique' (2017) 49(2) *The Journal of Legal Pluralism and Unofficial Law* 143. See also *Bhe & Others v Khayelitsha Magistrates & Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004) para 81.

This chapter explored how the desire to fulfill the promise of Namibian citizenship has led to state ownership of land and a principle that all Namibians irrespective of traditional linkages of consanguinity and customary belongings are entitled to communal lands. It has been argued, that state ownership of land and universal access to customary land rights in Namibia has arguably led to the redefinition of the nature and extent of Traditional Authorities who are custodians of communal land, especially where gender issues are concerned. It has been outlined that the scheme of universal access to customary land rights is facilitated by the attenuated powers of Traditional Authorities. It has also been ascertained that residence is a factor in the use of customary land rights thereby complementing allocation in determining universal access to customary land rights. The nature and composition of Traditional Authorities have also emerged as being crucial to a determination of how these Authorities have addressed applications for customary land rights, especially where the recognition of women's customary land rights is concerned. It is thus anticipated that the arguments advanced in this chapter will curb the incessant cases of unequal access to land in Namibia. Key to curbing unequal access to land in Namibia is the observation that Namibian citizenship is of no worth without access to land hence the need to realise equitable communal land tenure reform for all Namibia citizens regardless of consanguinity. Most importantly though, it has been argued that the allocation of customary land rights irrespective of consanguinity is giving rise to new cultural communities in Namibia at the same time enriching formal citizenship of Namibians.

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