



Land Grabbing in Namibia: A Case Study from the Omusati Region, Northern Namibia

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Introduction

Large scale land acquisitions by foreign investors in Africa for agricultural purposes continue to capture attention worldwide. In recent years Namibia has received some proposals from multi-national agricultural corporations to develop large scale irrigation projects, mainly in Namibia's water rich northeastern regions.¹ However, to date none of these proposed large scale projects have materialized. But, while foreign investors might not have been making headways into acquiring land in Namibia's communal areas, another form of "land grabbing" driven by politically well-connected locals² is taking place.

The aim of this paper is to examine through a case study some of the emerging trends around the changing dynamics of power relations within rural communities in Namibia as a result of the emerging of new elites and how subsistence farmers access to communal land and its natural resources are threatened in the absence of poorly implemented land reform policies.

In order to achieve the aim of this paper, I will first in brief present the case study on land-grabbing³ in the Omusati Region. To fully comprehend the aim set for this paper, an overview of Namibia's environmental conditions, agricultural practices, land ownership history and an investigation into the development of Namibia's land reform legislative process is required, after which an analysis of the case study in Omusati follows, followed by recommendations.

The Case Study

In 2006 the Omusati Communal Land Board received 11 applications through a private lawyer for the retention of fences in the Ongandjera and Uukwambi communal areas in the Omusati Region totalling some 51,500ha of land. In 2008, the Ministry of Lands and Resettlement Regional Office in the Omusati Region requested advice from the Legal Assistance Centre (LAC)⁴ concerning the legality of the fencing-off of large areas of communal land for private use, and the related issue of what legal steps could be taken to have these fences removed. The Omusati Communal Land Board noted that the sites

¹ Two proposed large scale agricultural projects did not come to realization in 2010. Both projects were planned in the northeastern communal areas of Namibia. Plans to develop a 10,000ha commercial crop production farm within the Bwabwata National Park were dropped after an environmental assessment showed that it was not feasible for the developer Demeter to continue with the project. The second project, a 10,000ha sugarcane development by PGBI in the Eastern Caprivi also did not come to realization after what appeared to have been a confrontation between two traditional authorities over the land to be allocated to PGBI.

² The owners of all the exclusive farms are typically wealthy people with significant local status. Many are civil servants, political figures or self-made businessmen who derive most of their income from non-farming activities. They seldom live on their farms and few have received any training in agriculture. In short, these are new farms owned by a new generation of entrepreneurs pursuing business enterprises new to communal land. Mendelsohn, J et al (2006) *Farming Systems in Namibia* Published by Raison for NNFU. ABC Press, South Africa at p. 46

³ Throughout this paper the terms illegal fencing, (land) enclosures and land-grabbing are used basically to describe the same action.

⁴ The LAC is a public interest law centre advocating human rights in Namibia by making the law accessible to those with the least access. The author of this paper is the Coordinator of its Land, Environment and Development Project.

applied for are located in areas that are known to have illegal fences in the Omusati Region. The Land Board raised their concern that the applicants are also aware of the legal status of their fences and this might be the reason why they have opted to apply through a private lawyer to protect their interest.

Background

The Environment and Agricultural Practices

Namibia is situated in the southwestern corner of Africa, bordering the Atlantic Ocean in the west, South Africa in the south, Angola in the north, Botswana in the east, and Zambia and Zimbabwe in the northeast respectively. With a geographical land area of 824 295km² and an estimate population of approximately 2, 1 million people⁵, Namibia is not only one of Africa's most sparsely populated countries, but also one of its most arid. Namibia is a dry country situated between two deserts; the Namib Desert which stretches along Namibia's west coast, while the Kalahari Desert borders its eastern and southern neighbours, Botswana and South Africa. Water is Namibia's most limited natural resource. Rainfall is extremely variable with a mean annual rainfall ranging from less than 50mm in some of the desert areas to approximately 700mm in the in the Kavango and Caprivi Regions. Only 8% of Namibia receives an annual rainfall of over 500mm. About 92% of Namibia's total surface area is classified as arid or semi-arid. Most of the country's rainfall occurs in summer between December and March, often in localized cloudburst. The rate of evaporation generally exceeds that of rainfall, because the soil has a low water retention capacity. It is estimated that only 1% recharges the ground water reservoirs.⁶

Beef is the agricultural sector's main export product. Namibia's commercial farms are large and mainly orientated towards red meat production for local and export markets. For purposes of marketing livestock, Namibia is divided into two distinct areas by the veterinary control fence (known as the "red line"). The area south of the red line is free of food-and-mouth disease and lung sickness assuring that livestock raised south of the red line has ready access to South African and the European Community markets. North of the red line, diseases like foot-and-mouth and lung sickness are endemic. For decades, northern communal farmers have dreaded the "red line", which they continue to associate with apartheid colonialism rather than the control of animal diseases.⁷ Government has recently announced plans to do away with the fence by 2015 which will allow communal farmers to sell their meat to international markets. However, before this is to happen, Government first has to strengthen disease control measures in the communal areas in accordance to international standards.⁸

⁵ Obtained from National Planning Commission, 9 February 2011

⁶ Republic of Namibia, *The Draft National Land Use Policy*, "Annexure A: Applicable Legislation, Policies and Regulations on Land Use Planning", Ministry of Lands, Resettlement and Rehabilitation, 2002, at 2.

⁷ Haring S & Odendaal W (2002). *One day we will all be equal: A socio-legal perspective on the Namibian land reform process*. Windhoek: Legal Assistance Centre at 7.

⁸ Ekongo J *Namibia: Red Line could go by 2015*, New Era, 23 September 2010

Land Ownership History

After Namibia became a German Protectorate in 1884, the colonial administration negotiated a number of land purchases and protection treaties with local leaders to give the German Government and German companies rights to use land. Many of these agreements were speculative, made in the hope that the gold and diamond rush of the 1880s in South Africa would be replicated in Namibia. During this period, many European settlers in Namibia bought or leased land for commercial farming purposes, thereby formally defining the areas occupied by indigenous communities. By 1902, freehold farmland accounted for 6% of Namibia's total land service area while 30% was formally recognised as communal land. After the 1904-1907 war between Germany and forces of the Herero and Nama, large tracts of land were confiscated from the Herero and Nama by proclamation. By 1911, some 21% of the total land service area had been allocated as freehold farmland while the recognised communal land area had shrunk to just 9%.⁹

German colonial rule came to an end with the surrender of the German armed forces in 1915. South West Africa became a Protectorate of Great Britain, with the British King's mandate held by South Africa in terms of the Treaty of Versailles signed in 1919. Under the Treaty and the South West Africa Act 49 of 1919, land held by the German colonial administration effectively became Crown (or State) land of South West Africa. The Governor-General of the Union of South Africa had the power to legislate on all matters, including land allocation.¹⁰

During the intervening period of military rule from 1915 to 1920, no legislation existed under which land settlement could be carried out. When martial law came to an end in 1920, land settlement laws in force in the Union of South Africa were applied to South West Africa.

During the 1920s, South Africa followed a policy of settling poor South African whites in South West Africa, and the South West African Administration supported white settler farmers financially and logistically despite the drought conditions, lack of markets and financial depression prevailing at the time.¹¹

To clear land designated for white settlement, the Administration introduced the Native Administration Proclamation 11 of 1922. This law provided that natives not employed by land owners or lessees were not permitted to squat on land without a magistrate's permission. It also authorised the Administrator to set aside areas as "native reserves" for the sole use and occupation of natives generally or for any race or tribe in particular. However, the Native Reserve Proclamation did not affect Owamboland, Okavango and a few other areas in the north located outside the white farming areas and under the administration of government-appointed Commissioners.¹² The South African

⁹ John Mendelsohn et al., *Atlas of Namibia: A Portrait of the Land and its People*, David Philips Publishers (imprint of New Africa Books), Cape Town, 2003, at 134-137.

¹⁰ Fiona Adams & Wolfgang Werner with contributions from Peter Vale, *The Land Issue in Namibia: An Inquiry*, Namibia Institute for Social and Economic Research, University of Namibia, Windhoek, 1990, at 94.

¹¹ Union of South Africa, *Report of the Commission on the Economic and Financial Relations between the Union of South Africa and the Mandate Territory of South West Africa* (Pretoria, 1935), U.G. 16, 1935, at 205-206, as quoted in Fiona Adams & Wolfgang Werner, op cit.

¹² United Nations Institute for Namibia, 1988, *Namibia: Perspectives for National Reconstruction and Development*, at 36.

Administration maintained the German colonial policy of using the term “Police Zone”¹³ to distinguish between two areas in the country, and continued German policies restricting movement between the two areas.

While the South African Administration did everything in its power to support white farmers settling in Namibia, it paid little attention to the needs of the native black farmers living in native reserves. The Administration granted generous loans to white farmers to build dams, drill boreholes and buy livestock, and gave white farmers expert advice, back-up services, drought relief and regular access to the already subsidised South African marketing system. By contrast, almost nothing was spent on black farmers living in native reserves during the same period.¹⁴ The Native Reserves Commission recommended in 1922 that 9% of the land within the Police Zone (5 million hectares) should be set aside for native reserves. However, by 1925 a total of just 2 813 741 hectares south of the Police Zone accommodated a black population of 11 740 people, while 7 481 371 hectares (880 holdings) were available for 1 106 white settlers.¹⁵

By 1946, land use in Namibia was well established in two areas. Areas within the Police Zone were identified as surveyed farms, urban areas, native reserves, the Rehoboth Gebiet, unsurveyed Crown land, prohibited areas and diamond areas. Areas outside the Police Zone, including Owamboland, Kavango, the Caprivi Zipfel, the Namib Desert and game reserves, were all identified as communal land.

One of the most significant events in the future of black Namibians was the appointment of a Commission of Enquiry into the Affairs of South West Africa, which came to be known as “the Odendaal Commission”. With apartheid policies already functioning in South Africa, Prime Minister H.F. Verwoerd appointed the Odendaal Commission in 1962 to advise the South African Government as to how a similar policy of separate development could be introduced in South West Africa.¹⁶

The Commission's report, publicised on 12 December 1963, recommended the granting of self-government to the “homelands” and the transfer of all land within homeland boundaries to all the respective ethnic Legislative Assemblies. This meant that the Assemblies would have the authority to release land for the alienation to individual ‘citizens’ of the various homelands, subject to permission from the South African Prime Minister. Alienation to a ‘non-citizen’ was allowed only with the permission of both the Legislative Assembly and the Prime Minister.¹⁷

¹³ The boundary that divided the Police Zone from the northern and north-eastern parts of the country spanned the north-central sector of the country, extending from the Atlantic Ocean to Botswana in a northward-arching semi-circle. Administration in the “homelands” was left in the hands of the traditional leaders. Communities north of the Police Zone were formally incorporated into the colonial administration only after 1900.

¹⁴ United Nations Institute for Namibia, *Perspectives for National Reconstruction and Development*, 1988, at 38.

¹⁵ Statistical data obtained from Union of South Africa, “Administrator's Reports 1923-1925” and “Administrator's Report 1925”, U.G. 26-26, 1926, at 59, in T. Emmett, 1999, *Popular Resistance and the Roots of Nationalism in Namibia, 1915-1966*, *Basel Namibia Studies Series 4*, P. Schlettwein Publishing, Switzerland, at 103; and United Nations Institute for Namibia, *Namibia: Perspectives for National Reconstruction and Development*, 1988, at 39.

¹⁶ Republiek van Suid-Afrika, *Verslag van Kommissie van Ondersoek na aangeleenthede van Suidwes-Afrika*, Pretoria, R.P. No. 12/1964, at 2, in G. Töttemeyer, *Namibia Old and New: Traditional and Modern Leaders in Owamboland*, C. Hurst & Co., London, 1978, at 49, 50.

¹⁷ Odendaal Commission, at 85, 87, 97, 107, in Fiona Adams and Wolfgang Werner with contributions by Peter Vale, op cit., at 94-95.

The Odendaal Commission's directive in 1964 led to the establishment of 10 reserves (homelands) for black people of South West Africa, as proclaimed in the Development of Self-Government for Native Nations in South West Africa Act 54 of 1968. This Act recognised Owamboland, Hereroland, Kaokoland, Okavangoland, Damaraland and Eastern Caprivi as "native nations". The Act was purportedly introduced in South West Africa to assist native nations in the territory to develop in an orderly manner towards attaining self-governance and independence.¹⁸ In some ways the Odendaal Plan merely extended and rationalised an administrative system created in the 1920s by the Native Reserve Commission.

The Representative Authorities Proclamation 8 of 1980, better known as "AG 8", provided for the establishment of "second-tier" governments for 11 ethnic groups, each having an executive and a legislative body with the power to issue ordinances relating to its area of jurisdiction.

AG 8 enabled Representative Authorities to become trustees of land in the homelands. Land ownership, however, continued to rest with the central government based in South Africa. AG 8 gave Representative Authorities the power to allocate, sell or lease communal land under their jurisdiction to a specific ethnic group, provided that the South African Cabinet issued a certificate confirming that such land was not required for public or official purposes. AG 8 was in effect a legacy of the Odendaal Commission principles prevailed in Namibia until 1990 when it was repealed and replaced by the Constitution of the Republic of Namibia.

At independence, the unequal distribution of agricultural land and high rates of unemployment draw the attention of the newly elected government to land redistribution. The government found itself caught between two opposing parties concerning the land question. White farmers argued that the redistribution of commercial farms in order to resettle communal farmers would have a devastating effect on the economy, environment and would cause massive unemployment among black farmworkers. Among black communal farmers there was an increasing demand to obtain commercial farms in order to relieve the pressure on grazing land in the communal land.

Arguably, the Namibian land reform process since independence has focused more on reforming freehold land than communal land. After independence the government of Namibia embarked upon two parallel land reform programmes, namely the Resettlement Programme and the Affirmative Action Loan Scheme (AALS).¹⁹ The Resettlement Programme is run by the Ministry of Lands and Resettlement in order to resettle poor and landless on state-acquired commercial farmland. The aim of the Resettlement Programme is to make settlers self-reliant, either in terms of food production or self-employment and income generating skills. The AALS is implemented by the Agricultural Bank of Namibia (Agribank) primarily to assist strong communal farmers to acquire commercial farms through subsidised interest rates and loan guarantees by the state.

¹⁸ *Index to the Laws of Namibia (NAMLEX)*, Legal Assistance Centre, Windhoek, 2004 update, at 7.

¹⁹ Odendaal, W. (2005) *Our Land We Farm – An analysis of the Namibian Commercial Land Reform Process*. Windhoek: Legal Assistance Centre at 15.

Communal land use, statutory and customary law - pre independence

The colonial legislation relating to “native reserves” and land allocation developed in a piecemeal and unstructured manner, making it very confusing to interpret. It appears, however, that colonial legislation made few “inroads” into traditional power to allocate land and that in most areas the allocation of land effectively remained the responsibility of traditional leaders in their respective areas.

Below follows a short summary of the most relevant pre-independence legislation and their application to “native reserves” or communal areas.

The *Crown Land Disposal Proclamation* (Proclamation 13 of 1920) authorized the Administrator of South West Africa to set aside Crown Lands as reserves “for the use and benefit of aboriginal natives, coloured persons and Asiatics”. The *Native Administration Proclamation*, 1922 (Proclamation 11 of 1922) gave the administrator the power to set aside areas as native reserves ‘for the sole use and occupation of natives generally or of any race or tribe of natives...’ It also made the inhabitants of those reserves subject to such restrictions and regulations as the administration may prescribe. The *Native Reserve Regulations*, GN 68 of 1924, which were issued pursuant to the *Native Administration Proclamation*, made the magistrate the overall controlling agency for the reserve, and even in case a superintendent was appointed to work under him, the magistrate retained the power to perform the duties of such a superintendent. Most notable are sections 3 and 9, which charged the Superintendent with the duty of making allotments of land and prohibited the headman from making any allotments of land. The general understanding is that the *Native Reserve Regulations* are still in force; however, their application is limited. *Regulation GN 238 of 1930* amended the *Native Reserve Regulations* by excluding the Berseba Hottentot Territory and the Bondels reserve. *Regulation GN 29 of 1941* amended the *Native Reserve Regulations* further by excluding the Zessfontein reserve, several Kaokoveld reserves, and the Ovamboland reserve. Therefore, whatever inroads into customary law the *Native Reserve Regulation* provided for, these inroads never came into effect in the above areas. The *Native Administration Proclamation*, (Proclamation 15 of 1928) provided for the appointment of the traditional authorities, chiefs and headmen, and later, paramount chiefs. It also provided for the exercising of all political powers and authorities according to the laws, customs and usages of natives held by any supreme chief. The *Regulations Prescribing the Duties, Powers and Privileges of Chief and Headmen*, GN 60 of 1930, which were issued pursuant to the *Native Administration Proclamation*, 15 of 1928, set out a catalogue of duties that chiefs and headmen were to perform in assisting the colonial administration. Section 19 provides that the chiefs and headmen shall be responsible for the proper allotment to the extent of the authority allowed them by law of arable lands and residential sites in a just and equitable manner without favour or prejudice.

The *Development Trust and Land Act*, 18 of 1936 established the South African Development Trust. Section 4 of the Act spelled out the legal principles of the Trust.²⁰

²⁰ The *Bantu Areas Land Regulations*, R188 of 1969 were issued pursuant to the *Development Trust and Land Act*

The South West African Native Affairs Administration Act, 1954, No 56 of 1954 transferred the administration of black affairs from the Administrator to the South African Minister of Plural Relations and Development, vested in the South African Development Trust the state lands that had been reserved and set apart as black reserves. These acts transferred the administration of 'native affairs' from the South West African Administrator to the responsible South African minister, and vested all land 'reserved and set apart for the sole use and occupation of natives in the South African Development Trust, established under the Development Trust and Land Act, 18 of 1936.

Development of Self-Government for Native Nations in South West Africa Act, No. 54 of 1968 aimed to provide for self-government for the various population groups (Native nations) in certain areas reserved.

The provisions of this Act were repealed by the *Representative Authorities Proclamation, 1980* (Proclamation AG 8 of 1980) in relation to every population group in respect of which a representative authority had been established (Caprivians, Damaras, Hereros, Kavangos, Namas, Ovambos).

In *AG 8 of 1980*, the ownership of the land referred to in a series of subsequent Proclamations was declared to be communal land of the population groups concerned, and was transferred from the South African Bantu Trust to the Government of South West Africa. This Proclamation provided the framework for establishing representative authorities for eleven population groups.

The powers, duties and functions conferred on the Administrator-General (in previous Acts and Proclamations) in relation to the communal land of all the population groups in respect of whom representative authorities were established were thereby transferred to the executive committees of the respective representative authorities. The Representative Authority Powers Transfer Proclamation, AG 8 of 1989 dissolved the representative authorities and transferred their powers back to the administrator-general.

Hinz²¹ has made an in-depth analysis of all the relevant pre-independence legislation in view of possible inroads into the traditional powers to allocate land. He concludes that in none of the laws analyzed, and applied to the former Ovambo, Kavango, Caprivi and Bushmanland, could a provision be found that made inroads into customary land law to the effect that the powers of traditional authorities in land matters were taken away and transferred to agencies of the state.

Notwithstanding colonial laws relating to the allocation of land, it appears, as indicated above, that communal land allocation effectively remained the responsibility of

²¹ Hinz, MO, 1995, "Chapter 10 - Communal land, natural resources and traditional authority" in *Traditional Authority and Democracy in Southern Africa*, New Namibia Books, Windhoek at 213.

traditional authorities.²² Chiefs, who were the ultimate authority in allocating land, customarily awarded small plots of land in exchange for a nominal fee.

It is argued that “traditional land tenure” as it affects Ovambo communal land areas today, is distorted in several ways that blur the underlying basic elements of land tenure arrangements.²³ Firstly, it is asserted that in contrast to colonial claims, chiefs and headmen were not “owners” of the land, but merely acted as high level managers of communal land.²⁴ Secondly, a distinction between “private” land and communal land exists under customary law. In many ways, a plot consisting of a homestead (“kraal”) and fields, allocated by a chief or headman to the head of the homestead could be seen as “private property” since the person occupying it was given it in lifetime tenure. On the other hand, communal areas, which included the communal grazing areas, hunting and gathering grounds outside the inhabited areas, were accessible to all residents of Ovamboland. Adams et al²⁵ also point out that communities in the Ongandjera and Uukwambi areas traditionally practiced dry land cropping, and the land was divided into residential and agricultural sections on the one hand, and grazing land on the other. Each section was governed by slightly different forms of tenure: while agricultural land was held and tilled by individual families, pastures were utilized communally. At the same time, traditional political structures were still largely intact.

The management of communal land was supervised by field managers, who channelled access, coordinated maintenance and guarded against overexploitation.²⁶

According to the Ongandjera Traditional Authority²⁷, they were not aware of any pre-Independence legislation regarding land allocation. The colonial government entrusted them to enforce customary laws. Headmen and Chiefs normally had the power to allocate land. They would show an individual the boundaries of his plot. There were no written records kept of land allocations, but people respected their boundaries. The average plot of land was about 4 – 6 ha, depending on the size of the family. People were given small plots of land for cultivation, but not for grazing. A typical payment in exchange for land was a head of cattle. Land allocations were typically made to married men.

According to the Uukwambi Traditional Authority, there was no law before Independence regulating the allocation of communal land. Traditional Authorities had the ultimate authority to allocate land (the Chief being the highest level of authority). No commercial farms were allowed on communal land, but otherwise, there were no

²² Various Native Commissioner Reports found in Namibian Archives; interviews with Ongandjera and Uukwambi Traditional Authorities

²³ *Historical Dynamics of Traditional Land Tenure in Ovamboland* (article begins at page 546, prepared by NEPRU for the National Land Conference on Land Reform and the Land Question)

²⁴ Ibid.

²⁵ *The Land Issue in Namibia: An Inquiry*, by Fiona Adams, Wolfgang Werner and Peter Vale for the Namibia Institute for Social and Economic Research

²⁶ Ibid, 546

²⁷ Interviews with the Ongandjera and Uukwambi Traditional Authorities took place during November and December 2010.

restrictions in terms of land allocation. The area was self-governing. According to Uukwambi customary law, people were only allocated land for cultivation and not for grazing. As for size, they were only granted enough to cultivate. It used to be that an individual never had more than one plot of land.

No official or formal written record was kept. Village headmen knew their villages well and could show who owned what. This knowledge was passed on through oral tradition. There was no need for a written record.

Plots of land that were big enough to cultivate were allocated. Land was not granted for grazing. An average size plot was approximately 10 ha, although people with more than 5 wives would be allocated more to accommodate the size of their families. Higher lands and not floodplains (“oshanas”) were generally allocated.

Normally, the payment was 1 head of cattle for a piece of land. If a person did not have cattle, he might do a favour for the Traditional Authority, such as collecting firewood. A widow might make a basket for the Traditional Authority in lieu of payment. If an individual was a member of the Traditional Authority, he would be given a plot of land for free, so he could be located centrally. A person was typically granted land after he was married through a traditional wedding ceremony. Women or children were not given land, but people from outside the area were not discriminated against when it came to allocation of land.

The Land Reform Legislative Framework after Independence

The Namibian Constitution was created in a few months before Independence on 21 March 1990. At the time, it was seen as a political compromise between SWAPO, the South African Government, Namibia’s Whites and other Namibian groups not aligned with SWAPO. The drafters of Article 16²⁸ of the Constitution which is the primary protector of mainly private property rights in Namibia anticipated the land reform process. Article 16 commits the Government to guarantee the right of all persons to own private property as well as to pay just compensation for all land acquired. This is clearly provided for under the Agricultural Commercial Land Reform Act of 1995. However, no similar provision exists under the Communal Land Reform Act of 2002. Communal land in Namibia it is generally argued to be vested in the State through article 100 and schedule 5 of the Namibian Constitution. The State is under a duty to administer communal lands in trust for the benefit of the traditional communities residing on these lands. However, the insistence of the Namibian government that the State “owns” the communal lands is a position that is not universally accepted in the communal lands or

²⁸ Harring S & Odendaal W (2002). *One day we will all be equal: A socio-legal perspective on the Namibian land reform process*. Windhoek: Legal Assistance Centre at 11.

by some legal scholars.²⁹ One of the difficult legal implications is that while the acquisition of commercial land for the land reform programme is very expensive, the state could acquire land in communal land for nothing because it is already “owned” by the State. This could potentially undermine a delicate power between government, communities and their traditional leaders in the sense that it does not treat citizens of Namibia on an equal basis. Someone whose commercial land is made available for land reform purposes will receive “just compensation” while someone who occupies communal land would in all probabilities not receive “just compensation” on the same basis.

At independence the Namibian Government had little capacity to deal with land reform management, land reform planning and drafting legislation on land reform. The then Ministry of Lands, Resettlement and Rehabilitation³⁰ started from nothing after the formation of the initial Government. These factors arguably increased the delay in establishing a comprehensive land reform legislative framework. The first major piece of legislation on land reform, the Agricultural (Commercial) Land Reform Act, dealing specifically with freehold land reform, was not passed until 1995. Its counterpart, the Communal Land Reform Act was only passed in 2002 by parliament, more than 12 years after Independence³¹. During this time, various drafts of the Communal Land Reform Bill exchanged hands in parliament, the National Council and the Council for Traditional Leaders for comment.³² For the duration of this over a decade long negotiation process, the absence of any constitutional recognition of customary land tenure rights in communal areas resulted in communal farmers and traditional authorities having no statutory law remedy to defend their rights. As a result, powerful interest groups often used this policy and administrative vacuum to their advantage and ignored customary land tenure rights to fence off large tracts of communal land.³³

Shortly after Independence the government has voiced its recognition that illegal fencing is a pressing concern in Namibia. This is apparent, for example, in former State President Sam Nujoma’s opening statement at the 1991 Land Reform Conference, wherein he acknowledged that wealthy Namibians had embarked on illegal fencing-off of communal lands. His recognition was echoed in the Consensus of the Conference, which resolved that illegal fencing must be stopped and that all illegal fences must be taken down.

The issue of illegal fencing has come up repeatedly in the debates of the National Assembly. On 24 July 1990, the then Minister of Lands, Resettlement and Rehabilitation, Minister Haufiku declared in parliament that it should be the right of every community member to have as much land as he needs to sustain himself and his family.

²⁹ See for example, Harring, SL “The Constitution of Namibia and the Land Question: The Inconsistency of Schedule 5 and Article 100 as Applied to Communal Lands with the Rights and Freedoms Guaranteed Communal Land Holders”, 12 South African Journal on Human Rights 467 (1996).

³⁰ The Ministry of Lands, Resettlement and Rehabilitation was renamed the Ministry of Lands and Resettlement in March 2005.

³¹ The Act came into effect when it was published in the Government Gazette on 1 March 2003.

³² According to a member of the Law Reform and Development Committee, it is estimated that about 9 drafts of the bill was circulated during the 12 years of its preparation.

³³ Cox, J.; Kerven, C.; Werner, W. and Behnke, R. 1998 *The privatisation of rangeland resources in Namibia: enclosure in eastern Oshikoto*. London: Overseas Development Institute at 39.

But due to disposition many Namibian community members have lost this important right. In addition to that, the Minister said, “members of our communities are starting to fence off communal land and the fencing of communal land in communal areas is an activity which is continuing to endanger the important right of all people in those particular areas to have access to land.”³⁴

The Minister stated that the Government should take action and members of the community should report the activities of fencing off communal land. Communal leaders and members are to report these activities to government offices for immediate action. The Minister concluded that, “...Government fully understands the need of changing the present practice regarding use of communal land, but it is the belief of the Government that well-planned programmes are necessary and it is only through well-planned programs that the Government, together with the Namibian people, will have a proper land-use distribution.”

The declining role that traditional leaders are playing in the management and allocation of communal land was given as one of the reasons why the occurrence of illegal fencing has escalated since Independence. The then Minister of Lands, Resettlement and Rehabilitation, Pendukeni Iivula-Ithana stated in 1996 that “Many traditional leaders have lost control over the administration of communal land. The power of traditional leaders has diminished over time and people do not longer seek their guidance.”³⁵

Notwithstanding this widespread recognition of the problem illegal fencing poses to the livelihoods of subsistence farmers, little has been done to address the issue, particularly since the CLRA was passed.

The Government’s statement that it will “... undertake an urgent census of private enclosure to help enforce the moratorium and to determine the exact extent, nature and impact of private enclosure,” has not been adhered to (from the Consensus of the Land Reform Conference). In fact, it would appear that government officials are not simply ignoring the issue, but some are guilty of the practice themselves. On 15 February 2000, Minister Iivula-Ithana not only recognizes the problem of illegal fencing, but accuses other Ministers of engaging in the practice by stating, “Even up to this moment some communities are finding it difficult to live in communal areas because we are fencing off the land illegally. And it is you people with money. It is not the poor people who are fencing off the land. What Ministers? It is you! It is you yourselves. And you thought by playing all manoeuvres to delay the passing of the law, you will be forcing this Government to change communal land tenure to freehold – that is not going to be allowed.”

The situation today is that the new elite are able to enclose communal-tenure rangeland for private use without obtaining authorisation from anyone. Seely et al argue that the land-grab is encouraged by the realisation amongst some enclosers that good returns can be obtained from market-orientated livestock husbandry and that fences are needed if such a system is to be operated efficiently.³⁶

Fowler argues that the fast pace in which communal land was enclosed in the 1990s was done in anticipation that legislation of de facto private ownership of land was likely

³⁴ Debates in Parliament, Hansard, 24 July-8 August 1990 at 42.

³⁵ The Association of Regional Councils Consultative Conference, Swakopmund, 19-21 September 1996

³⁶ Seely, M. Kambatuku, J and Shanyengana, E. (1994). *The Namibian environment and desertification. In Proceedings of Namibia’s National Workshop to Combat Desertification*. Windhoek: DRFN. At 16.

in the future. The enclosers most likely reasoned that with any new law they would be able to keep such land at minimal cost while simply obtaining formal title to the land which they hold.³⁷

Blackie and Tarr is of the opinion that traditional authorities themselves were condoning the practice of illegal fencing before the Communal Land Reform Act was in place, arguing that the income they are earning from allocating land for enclosure will dry up once the Act has been enacted.³⁸

Communal land use and customary law - post Independence

It is asserted that “traditional” systems of land tenure are far from static and that they are in fact highly dynamic.³⁹ Customary law relating to land distribution in communal areas has been impacted upon by the Namibian Constitution and the development of statutory law. As discussed above, in the past, traditional leaders were in complete control of communal land. Moreover, traditional law favoured men as decision-makers over the allocation and use of communal land which also implied controlling the fields for livestock production and grazing. The Constitution provides for an equitable approach. Article 10 guarantees equality before the law and disallows discrimination on the grounds of sex, race, colour, ethnic origin, religion, creed, or social or economic status. Article 23(3) promotes the role of women to play a full, equal and effective role in all aspects of developing the nation. Article 95(a) provides for legislation that ensures gender equality, while article 66 obliges the State to repeal any discriminatory part of common or customary law. A clear example of how legislation has adopted constitutional principles of affirmative action could be found in section 3(1)(g) of the Traditional Authorities Act 25 of 2000 which states that traditional authorities are to “promote affirmative action amongst the members of a traditional community as contemplated in Article 23 of the Namibian Constitution, in particular by promoting gender equality with regard to positions of leadership”.

Given Namibia’s pre independence policy history of racial segregation and restricting movement, article 21(g) was introduced to guarantee freedom of movement within Namibia, and 21(h) provides for the right to reside and settle anywhere in the country. The implication of Article 21(g) and (h) is that land use policy and plans may not inhibit Namibians to move, settle and acquire land in any part of the country. However, it clearly does not confer a right to settle on the land of others. Against the abovementioned constitutional provisions, the Communal Land Reform Act 5 of 2002 came into being to consolidate often unwritten customary law into statutory law based on constitutional principles as well as improving overall communal land management.

³⁷ Fowler, M. (1998) *The Current Status and Impact of fencing in the Communal-tenure areas of Namibia*, Agrekon, Vol 37 Number 4 at 442

³⁸ Blackie, R and Tarr, P (1998) Government policies on sustainable development in Namibia. Research Discussion paper Number 27. Windhoek: Directorate of Environmental Affairs, Ministry of Environment and Tourism at 3

³⁹ NEPRU working paper National Conference on Land Reform p 545

The Communal Land Reform Act provides for the establishment of Communal Land Boards, for the whole, a part or a combination of parts of various regions. The main function of these boards is to exercise control over the allocation of customary land rights by Chiefs or Traditional Authorities. Boards also administer the entire system of granting, recording and cancelling of these rights to various applicants, upon consultation with traditional authorities. They comprise representatives of the traditional authorities, farming community, regional council, women, the public service and conservancies in their area of jurisdiction.

Rights that may be allocated in respect of communal land include:

- The right to a farming unit,
- The right to a residential unit; and
- A right to any other form of customary tenure as recognised by the Minister.

Section 23 (1) determines that customary land rights are limited in size (maximum of 20 hectares), as prescribed by the Minister, according to the area, the purpose for which the land is to be used, or between persons according to the extent of other land held by them.

Section 29 describes the conditions under which the commonage in the communal areas may be used for grazing and includes kinds and numbers of livestock and sections of the commonage which may be used for grazing in rotation. These rights may be withdrawn if conditions are not adhered to.

Rights of leasehold may similarly be granted in communal areas, subject to conditions as may be determined by the Minister, upon advice by the Communal Land Boards. These are aimed particularly at business activities.

Section 40 provides that the Communal Land Boards may have portions of communal areas surveyed in conjunction with the Traditional Authority concerned. An important implication of the Communal Land Reform Act is that it provides Boards, in collaboration with Traditional Authorities, significant powers to manage land use and allocation in the communal areas.

The Communal Land Reform Act and Illegal Fencing

The context, in which the Act deals with illegal fencing, is that traditional communities in Namibia have claims to the use of land in their traditional area in terms of the customary law of their particular area. The communal land inhabited by members of particular traditional communities includes “*commonage*”, which is defined in the Communal Land Reform Act as “*that portion of the communal area of a traditional community which is traditionally used for the common grazing of stock*”.

Section 17 (1) of the Act provides that all communal land vests 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-agricultural business activities”. This section in explicit terms ensures that the focus for those who should benefit from communal land is the landless and those with insufficient access to land. This category of beneficiaries is distinguished from those who are in “formal employment or engaged in non-agricultural business activities”. Accordingly, benefits from communal land should accrue to those in the informal sector who are actually intent on using and benefiting from agricultural land in communal areas.

Section 17 (2) accordingly provides that no right conferring freehold ownership may be granted to any person in respect of communal land. The core principle is that individuals who wish to farm commercially and in so doing require large tracts of land should do so within the commercial farming areas and not within the communal farming areas. This principle underpins the concept of a safety net which communal land provides for the poor and those who cannot find employment in the formal sector.

This notion of communal land and the purpose for its use has been re-enforced by an earlier decision of the Namibian High Court prior to independence in the matter of *Kaputuaza v Executive Committee of the Administration for the Hereros, 1984 (4) SA 295 (SWA)*. Bethune J, in the context of Herero communal land, stated as follows:

“It is clear that the fencing-off of certain areas in the reserve is incompatible with the notion that all the land in the reserve is communal land. It is accordingly contrary to Herero customary law and also contrary to the intention of the legislature as reflected in the laws relating to Herero reserves.”

The regulation of fencing prior to Independence

In the *Kaputuaza* case, *above*, the Court was concerned with the fencing-off of the approaches to public watering places within the Herero traditional area. The Court ordered the removal of the fence obstructing the watering place to ensure that the communal farmers could use the grazing and water in the area for farming purposes. Reliance was, however, placed more on regulations regulating the obstruction of public watering places provided for in 1924 legislation. In this case an area of 5,000 ha around a borehole had been fenced off.

There is also further specific legislation relating to fencing, namely the Fencing Proclamation, No. 57 of 1921. This Proclamation deals essentially with the erection and maintenance of dividing fences between adjoining property, but has no impact upon the

legality of fencing in communal areas nor does it provide any procedures for the removal of illegal fences.

There was a substantive amendment to the Fencing Proclamation by way of the Fencing Ordinance, No. 4 of 1928 and a number of proclamations thereafter until the last one, being Ordinance No. 26 of 1965. However, none of these amendments had any particular application to communal areas or to fencing erected thereon.

Regulation of fencing in communal areas by the 2002 Act

The Act introduced express provisions relating to the regulation of the fencing-off of communal land. Section 18 of the Act provides as follows:

“Subject to such exemptions as may be prescribed, no fence of any nature –

- (a) shall, after the commencement of this Act, be erected or caused to be erected by any person on any portion of land situated in the communal land area; or
- (b) which, upon the commencement of this Act, exists on any portion of such land, by whomsoever so erected, shall after such date as may be notified by the Minister by notice in the *Gazette*, be retained on such land,

unless authorization for such erection or retention has been granted in accordance with the provisions of this Act.”

The Minister has made regulations under section 45 of the Act providing for exemptions in respect of the prohibition on the erection of fences in communal areas. Regulation 27 (3) reads as follows:

“No authorization for the erection of a fence is required if the holder of a customary land right or a right of leasehold wants to fence in homesteads, cattle pens, water troughs or crop fields.”

The fences envisaged in terms of this exemption would accordingly be relatively small areas of land that an individual or a family would want to fence off in order to properly manage their agricultural activities, such as providing for cattle pens, protecting water troughs and crop fields and providing for more security around their homesteads. This regulation cannot be understood to entitle any holder of a customary land right or a right of leasehold to fence off large tracts of grazing land.

This conclusion is borne out by the express intention of the legislature in enacting section 29 of the Act relating to grazing rights, which provides:

- “(1) Subject to the provisions of this section, 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...”.

This right of members of the community to graze their stock in the commonage, is then made subject to certain conditions, including the right of the Chief or Traditional Authority to impose conditions relating to the number of stock that can be grazed or where such stock can be grazed, or the Chief or Traditional Authority or the relevant Land Board to utilize some of the commonage for a right of leasehold or any other customary right granted under this Act. Section 29 (1) (c) also gives the President the right to withdraw a portion of the commonage for any purpose which may be in the “*public interest*”.

Access to the commonage by communal farmers is further reinforced by section 29 (4) where the Act provides that except with the written authority of the Chief or Traditional Authority, and ratification by the Land Board concerned, no person shall –

- “(a) erect or occupy any building or other structure on the commonage;
- (b) plough or cultivate any portion of the commonage;
- (c) take up his or her abode on or occupy any portion of the commonage; or
- (d) obstruct the approaches to any watering place on the commonage, or prevent or attempt to prevent any person from drawing water from, or watering stock at such a watering place...;
- (e) carry on any activity on the commonage, other than the lawful grazing of stock, which may prevent or restrict the residents of the traditionally community concerned from a reasonable exercise of their grazing rights.”

This again emphasizes the entitlement of communal farmers to the reasonable exercise of grazing rights in respect of commonage and their further entitlement to unhindered access to watering places on the commonage. These provisions also echo the pre-independence legislation relating to communal areas.

Section 28 deals with the recognition of existing customary land rights, and in particular to authorization for the retention of any fence erected on communal land and prior to the Act coming into force.

When application is made for a retention of a fence, the application must be supported by documentary evidence supporting the claim and a letter from the Chief or Traditional Authority within whose communal land the land in question is situated indicating whether the application is supported and including any other relevant information [section 28 (5) of the Act read together with Regulation 7 (3)]. In terms of the Regulation there is also a requirement that the application be displayed on the notice board of the

relevant Land Board and invite interested parties to lodge any objection regarding the application (Regulation 7 (4) of the Act).

In exercising its discretion whether or not to grant the application, the Land Board must in terms of section 28(8) be satisfied that:

- “(a) the fence or fences were erected in accordance with customary law or the provisions of any statutory law;
- (b) the fence will not unreasonably interfere with or curtail the use and enjoyment of the commonage by members of the traditional community; and
- (c) in the circumstances of the particular case, reasonable grounds exist to allow the applicant to retain the fence or fences concerned ...”.

The Board can also conduct a hearing should there be conflicting claims in relation to the land or doubts exist as to the validity of the applicant’s claim (section 28 (9) of the Act).

When the Land Board is not satisfied as to the validity of the applicant’s claim to retain the fence, it may instead of rejecting the claim refer the matter to the Chief or Traditional Authority concerned for consideration (section 28 (11) of the Act). On referral of the claim to the Chief or Traditional Authority, the claim must be considered as a new application for the allocation of the right in question.

Strategies to challenge ‘illegal fencing’ on communal land

Should fences have been erected after the promulgation of the Act, then in terms of section 44 of the Act any such person would be guilty of an offence and liable to a fine not exceeding N\$4,000.00 or to imprisonment not exceeding 1 year, or to both such fine and imprisonment. Section 44 (2) creates a continuing offence where a person does not remove the fence after conviction and provides further sanctions of a fine not exceeding N\$15.00 per day for every day the offence is continued. In terms of section 44 (3) the Chief or Traditional Authority or the Land Board concerned may remove the fence and dispose of the material used for the erection of the fence. In terms of Regulation 27 (4) (b) any cost related to the removal of the fence may be recovered from the owner of the fence or the fence material may be sold to defray costs.

Depending on the intention of the person erecting the fence on communal land in the first place, such person might be disentitled to remove the fence where it has been found that the fence was erected in contravention of the Act. In the matter of *Shingenge v Hamunyela, (2004) NR 1 (HC)*, the Court dealt with an area of land near Okahau in the North where an area of land had been fenced off and the question arose as to who was the owner of the fence. The Court found that the owner of the fence was not the owner of the land on the basis that in terms of Article 124 read with Schedule 5 of the

Constitution, communal land is owned by the Government of Namibia. The question then arose as to whether or not the party who had erected the fence had ceased to be owner of the fencing material at the time that it was used in the construction of a boundary fence on the land or, conversely, whether the Government did not acquire ownership of the fence at that point in time. At stake was the Roman law principle that the owner of immovable property also becomes the owner of the attached thing by *inaedificatio*. The Court held that the relevant principles to determine the purpose of the attachment of the fence to the land were as follows:

“(a) the nature and function of the attached object; (b) the manner of attachment; (c) the subjective intention (*intentio*) or aim (*destinatio*) of the owner of the attachment at the time of the attachment; (d) the act or conduct (*factum*) of the owner of the attachment; and (e) any other relevant facts or circumstances.”

The Court then concluded that:

“After the construction of the fences, the appellant and her husband did not treat the fencing material as if retained as a separate and movable identity. They left it in place to serve its intended purpose.

It is these considerations that lead me to conclude that the fencing material in question acceded to the land by means of *inaedificatio*. As a result, it became part of the land and the owner of the land also acquired ownership thereof”.

Based on this authority where an illegal fence is constructed in contravention of the Act, and particularly section 44 thereof, would not only lead to criminal proceedings but would also entitle the State to take possession of the fencing materials, unless the person who erected the fence was able to convince the Court that the fencing materials retained a separate and movable identity. The State could accordingly sell the fencing materials either to defray costs or perhaps to use them for the benefit of the community either through funding to the Land Board or for development purposes for communal farmers in the area.

If a fence was erected after the promulgation of the Act, then section 44 of the Act would be of application and a criminal charge could be laid against the person concerned. This could be followed by the invocation of the further provisions of section 44 relating to the removal of the fence and the disposal of the fencing material. Should the Chief or Traditional Authority or the Land Board refuse to take action, then the client could with the assistance of the Centre make application to Court for a mandamus requiring that they take action by removing the fence as they are empowered to do in terms of section 44 (3) of the Act.

The Act provides for a process to apply to the relevant Land Board for authorization for retention of a fence existing on the land should the applicant wish to retain such fence. Section 28 (3) provides that any such application must be made within a period of 3 years of a date notified by the Minister of Lands in terms of section 28 (2) of the Act but such period may be extended by the Minister for such further period as the Minister may

determine. Currently, the period for applications to be lodged in terms of section 28 has been extended until 2012.

Where the fence was erected prior to the promulgation of the Act, section 28 of the Act would apply. The difficulty here is with the extension of the time within which to make application, such period being extended to 2012. The question arises whether any client who wished to challenge the retention of such fences, would have to wait until the owner of the fence had in fact applied for authorization for the retention of the fence, or whether any remedies exist in law prior to that date. Should client be prepared to wait until 2012, two scenarios would open up, namely:

Either the person who fenced off the area would apply in terms of the Act and be granted authorization to retain the fence. In this case a client could take the decision of the Board on review raising the various issues relating to the denial of the use of the commonage for grazing in terms of section 29 of the Act and the fact that the decision-maker did not properly consider the factors mentioned in section 28 (8) of the Act relating to unreasonable interference with the enjoyment of the commonage by members of the traditional community and the unreasonableness of permitting the retention of the fence; or

The person would not apply for the retention of the fence before the cut-off date, in which case the fence would be in contravention of section 18 (b) of the Act, read together with section 44 (1) thereof, and could be removed in terms of the Act.

It should be borne in mind that the application in terms of section 28 (2) for the authorization to retain a fence presumes that the applicant already has a customary land right or has applied for the recognition and registration of such right under the Act. This much can be gleaned from the provisions of section 28 (2) of the Act. In other words, nobody can obtain authorization to retain a fence which fences-in an area over which such person has no customary land right. Accordingly, it would be competent to challenge illegal fencing by virtue of challenging the underlying right to a customary land right which was granted by a Traditional Authority prior to the promulgation of the Act in 2002, alternatively allocated by the Chief or Traditional Community in terms of section 20 of the Act.

Illegal Fencing in Omusati Region - an analysis

The factual circumstances which gave rise to request for advice are that a number of politically well connected individuals have fenced off large tracts of communal areas, particularly in the Omusati Region, claiming that the authority to do so was obtained from the Traditional Authority having jurisdiction over the particular area. In some cases individuals have applied to the relevant Communal Land Board having jurisdiction over the area for authorization for the retention of any such fence on existing land. The areas of land which have been fenced off vary in size but in some cases are as large as

10,000 ha. The effect of this fencing-off means that powerful individuals have appropriated communal land for their personal use at the expense of many communal farmers who have inadequate access to land for grazing.

The LAC conducted over a period of a year, several interviews with the Uukwambi and Ongandjera Traditional Authorities, subsistence farmers who are affected by the illegal fencing as well as field staff working for the Ministry of Lands and Resettlement in the Omusati Region.

It appears from our own field interview observations that the farmers most adversely affected by illegal fencing are small scale subsistence farmers. While these farmers express considerable dissatisfaction with the process of enclosure, most fear some form of retribution should they openly challenge the practice. Whereas the wealthier farmers (not illegal fencers) we interviewed have the means to buy fodder to supplement poor grazing, it is unlikely that poor farmers are able to do the same.

The most common complaint raised by subsistence farmers against illegal fencing is the negative effect it has on diminishing grazing land, both in size and quality, and the inability to look for lost animals in the fenced-in area. The diminished grazing land has resulted in weaker animals that develop at a slower rate. To ensure their animals receive adequate nutrition, the owners frequently have to buy fodder to supplement their diets.

In relation to the Omusati Region, for the great majority of households affected by illegal fencing, the absence of controls has the immediate effect of depriving them of grazing, in some cases of arable land, and of disinheriting their children. The dry season routes by which herders take cattle to pasture in the southern parts of the Omusati Region are being blocked by the new fencing.

In addition, fencing of communal rangelands has negative environmental and socioeconomic implications. The predictable environmental consequence has been rapid overgrazing of the remaining open areas, particularly in the corridors between enclosures. Where fences run for several miles on either side, it is often impossible for herds to survive the journey through these denuded corridors, so access to open grazing on the far side is also cut off. Fencing impacts on the poor, as those who are able to fence build larger and healthier herds than those who are unable to fence, whose herds are shrinking in the face of deteriorating and declining communal grazing areas.

Tapscott and Hangula⁴⁰ observed that not only is the practise of enclosure disrupting age old patterns of transhumance, confirming seasonal grazing into ever smaller areas with the concomitant danger of environmental degradation, but it also runs the risk of accelerating social differentiation within the communal areas.

The reality for most subsistence farmers is that those who lack the means to fence are forced to graze their cattle on ever smaller areas of grazing. The chances of their

⁴⁰ Tapscott, C and Hangula, L. 1994. *Fencing of Communal Range Land in Northern Namibia: Social and Ecological Implications*, Social Sciences Division, Multi Disciplinary Research Centre, University of Namibia at 13.

livestock surviving drought diminish accordingly and, under these conditions, richer farmers will survive with their wealth intact while poorer farmers will not.

Both the Ongandjera and the Uukwambi Traditional Authorities stated that in the absence of government action and support that they have been powerless to do anything to prevent the illegal fencing. As a result, community members have expressed anger towards them and no longer trust their ability to deal with other problems. One Senior Uukwambi Headman feels that the Ministry of Lands and Resettlement is “sleeping” and is therefore not very helpful. He feels that the law should become as powerful as other laws in the country – it needs more force behind it.

Another Senior Uukwambi Headman said that many of the people fencing in land do not appreciate the illegality of it because no one has been prosecuted for fencing in land yet. For this reason, they figure it is acceptable. He knows of more than twenty cases of illegal fencing, but does not know what to do. There is no higher level of central government authority giving them direction on these matters. As a result new fences continue to be erected almost “on a daily basis”. He stated that the government must deal with the illegal fencing issue immediately. “There is so much of it happening that if the government doesn’t step in now, the problem will get harder to deal with” the Uukwambi Chief concluded.

Recommendations

Against the above sombrely sketched picture of the impact of illegal fencing on the livelihoods of ordinary subsistence farmers, is there any remedy available to curb the spread of illegal fencing in Namibia’s communal areas?

Legal Proceedings

As discussed earlier, legal proceedings can be brought against the person who has fenced off large tracts of land, requiring them to elect whether or not they intend to apply for a retention of the fence, and furthermore, requiring that they do so by a certain date, failing which their right to apply would lapse. To bring such an application, Corbett suggests finding a suitable client who is prepared to challenge this inadequate system. The ideal client would be someone who has a customary land right that he exercises close to the area fenced off and who traditionally raised livestock in the area fenced off and is now prevented from doing so. The subsistence farmers affected by illegal fencing have agreed during a meeting in December to approach the LAC for legal representation on this matter against 11 farmers who have fenced off areas in the Omusati Region. However, the LAC is still waiting for the farmers to put their request in writing for us to assist them with possible legal action.

Government Action

Despite widespread criticism against illegal fencing in forums such as parliament etc., government yet has to speak out against illegal fencing. The Government could

immediately take action against illegal fencing by formulating and publishing a policy on the issue and by using the most serious cases as test cases for adjudication. This would eliminate “good faith” on the side of the fencers and it would have a preventative effect.

Registration of Group Rights

Mendelsohn⁴¹ recommends that some kind of group ownership and/or control should be developed. He suggests that local management institutions should be registered as companies that have full controls over areas of common property; boundaries between common property areas should be surveyed and registered in as long-term leaseholds; legitimate residents should be registered as shareholders of the companies; each community should decide how newcomers may be admitted; measures should be implemented to avert the risk of management of commonage tenure being misused by the elite; and this system should be encouraged, but not imposed.

Recommendations from Traditional Authorities

The Ongandjera Traditional Authority recommends that stakeholders, including the government, must come up with a decision to review the fences with the following points in mind: (1) if a fence has obstructed a road, access must be given; (2) similarly, if an individual has fenced off anything belonging to the community, they must give a right of way; and (3) fencing off any piece of land that exceeds the CLRA’s specified maximum size must not be permitted. Alternatively, the TA suggested moving towards a model of small scale farming unions.

Conclusion

Once people see that illegal fencing will not be tolerated, it will hopefully have a preventative effect. For example, the men we interviewed have all bought their own fencing materials, but have not actually erected fences for fear of them being taken down. We suspect that if they do not see anything done to address illegal fencing, they would not hold off outing up their fences indefinitely. Should this be the case, the face of communal areas in Namibia will change forever with potential devastating consequences for the poorest of the poor in Namibia who mostly rely on access to the commonage for their livelihoods.

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⁴¹ *Customary and legislative aspects of land registration and management on communal land in Namibia*, by John Mendelsohn at 30

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