

Elite land grabbing in Namibian communal areas and its impact on subsistence farmers' livelihoods

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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 north-eastern regions. However, to date none of these proposed large scale projects have materialised. In 2010 two proposed large scale agricultural projects in the north-eastern communal areas of Namibia did not come to fruition. 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 PG&I Engineers & Constructors (Pty) LTD in the Eastern Caprivi did also not materialise after what seemed to have been a confrontation between two traditional authorities over the land to be allocated to PG&I. But while foreign investors might not have been making headway in acquiring land in Namibia's communal areas, another form of 'land grabbing', driven by politically well-connected locals, is taking place. The occupiers 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 *et al* 2006).

This brief examines some emerging trends and dynamics in changing power relations in rural Namibian communities due to emerging new elites and the threats to subsistence farmers' access to communal land and natural resources.

A history of contested land ownership

Namibia became a German Protectorate in 1884. The German colonial administration negotiated several land purchases and protection treaties with local leaders to give the German government and German companies the rights to use land. Many European settlers bought or leased Namibian land for commercial farming, 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, 21% of the total land service area had been allocated as freehold farmland while the recognised communal land area had shrunk to just 9% (Mendelsohn 2003).

With the end of German colonial rule 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 (Adams et al 1990). Starting in the 1920s, the South African Administration granted generous loans to white farmers to build dams, drill bore-holes and buy livestock and gave them expert advice, back-up services, drought relief and regular access to the already subsidised South African market-ing system. By contrast, almost nothing was spent on black farmers living in native reserves at the time (UNIN 1988).

With apartheid policies already functioning in South Africa, in 1962 Prime Minister HF Verwoerd appointed the Odendaal Commission to advise the South African Government on how to introduce a similar policy of separate development in South West Africa (RSA 1978). As a result in 1964, ten reserves (homelands) for black people were established in South West Africa, as proclaimed in the Development of Self-Government

for Native Nations in South West Africa Act 54 of 1968, which recognised Ovamboland, Hereroland, Kaokoland, Okavangoland, Damaraland and Eastern Caprivi as 'native nations'. The Act was purportedly introduced to help 'native nations' develop in an orderly way to attain self-governance and independence (Namlex 2004).

The Representative Authorities Proclamation 8 of 1980 (AG 8) established 'second-tier' government for eleven ethnic groups, each with an executive and legislative body empowered to issue ordinances in its area of jurisdiction. AG 8 made Representative Authorities trustees of homeland land, but the South African-based central government still owned the land. 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 prevailed in Namibia until 1990 when it was repealed and replaced by the Constitution of the Republic of Namibia.

Land use and the law before independence

Colonial legislation made few inroads into traditional power to allocate land. In most areas, traditional leaders were still responsible for allocating land.

In contrast to colonial claims, chiefs and headmen were not owners, but merely acted as high-level managers of communal land. Secondly, a distinction between private land and communal land exists under

customary law, so 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 had lifetime tenure. On the other hand, communal areas, including communal grazing areas, hunting and gathering grounds outside inhabited areas, were accessible to all residents of Ovamboland. Field managers managed communal land, channelled access, coordinated maintenance and guarded against overexploitation.

Many present-day traditional authorities are not aware of any pre-independence statutory legislation on land allocation. The colonial government entrusted them to enforce customary laws and the area was self-governing. Headmen and Chiefs normally had the power to allocate land and would show an individual the boundaries of his plot (normally 4–6ha depending on family size); no written records were kept of land allocations, but people respected their boundaries and village headmen knew their villages well and could show who owned what — knowledge that was passed on through oral tradition. People (usually married men) received small plots of land for cultivation, but not for grazing, typically paying a head of cattle in exchange for 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 could be allocated land. Grazing land was communally shared.

Under customary law, commercial farms were not allowed on communal land, but there were no other restrictions on land allocation, although an individual never had more than one plot of land.

Land reform after independence

At the time of independence in 1990, the unequal distribution of agricultural land and high rates of unemployment drew the attention of the newly elected government to land redistribution. But on the land question, the government found itself caught between two opposing parties: white farmers argued that the redistribution of commercial farms to resettle communal farmers would have a devastating effect on the economy and environment and would cause massive unemployment among black farmworkers, but black communal farmers increasingly demanded that they obtain commercial farms to relieve pressure on grazing land in communal areas.

Arguably, since independence, the Namibian land reform process has focused more on reforming freehold land than on reforming communal land, as evidenced by parliament passing the *Agricultural Commercial Land Reform Act* in 1995, but only passing the *Communal Land Reform Act* in 2002 after a lengthy process in which

various drafts exchanged hands in parliament, the National Council and the Council for Traditional Leaders for comment (according to a member of the Law Reform and Development Committee, about nine drafts of the bill were circulated during twelve years of preparation). During the decade-long negotiation process, the lack of 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. Powerful interest groups often used this policy and administrative vacuum to their advantage and ignored customary land tenure rights when they fenced off large tracts of communal land (Cox *et al* 1998).

Given Namibia's pre-independence policy history of racial segregation and restricting movement, article 21(g) of the Namibian Constitution sought to guarantee freedom of movement in Namibia, while article 21(h) creates the right to reside and settle anywhere in the country, implying that land use policy and plans may not inhibit Namibians from moving, settling and acquiring land in any part of the country, but it clearly does not confer a right to settle on the land of others.

Article 16 of the *Constitution and the Agricultural Commercial Land Reform Act of 1995* commits the government to guarantee the right of all persons to own private property and to pay just compensation for all land acquired. No similar provision exists under the *Communal Land Reform Act of 2002*. The *Communal Land Reform Act* 5 of 2002 came into being

to consolidate often unwritten customary law into statutory law based on constitutional principles and to improve overall communal land management. Communal land is generally argued to be vested in the state through article 100 and schedule 5 of the Constitution, which charges the state with administering communal lands in trust 'for the benefit of the traditional communities residing on these lands'.

However, government's insistence that the state *owns* communal land is not universally accepted in communal areas or by some legal scholars (e.g. Harring 1996). Contestations about ownership create legal difficulties in that acquiring commercial land for land reform is very expensive, but the state could potentially acquire communal land for nothing because it is already 'owned' by the State. However, this might undermine delicate power relations between government, communities and their traditional leaders as, unlike commercial land owners, citizens using communal land do not receive 'just compensation'.

Communal land enclosures

The *Communal Land Reform Act* deals with communal land enclosures (and illegal fencing) in the context of traditional communities' claims on land use in their traditional area, based on the customary law of their particular area. The communal land inhabited by members of particular traditional communities includes *commonage* — 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 landless and those with insufficient access receive the main benefit from communal land under the Act. This category of beneficiaries is distinguished from those in 'formal employment or engaged in non-agricultural business activities'. However, benefits from communal land should accrue to informal sector practitioners 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 acquire large tracts of land for commercial farming should do so in commercial farming areas, not communal farming areas, based on the principle that communal land should provide a safety net for the poor and those who cannot find employment in the formal sector.

As indicated earlier, the lengthy negotiation process over the Communal Land Reform Act meant communal farmers and traditional authorities had no statutory law remedy to defend their rights, and powerful interest groups often made use of this policy and administrative void when they fenced off large tracts of communal land. The government has recognised illegal fencing as a pressing concern affecting the livelihoods of subsistence farmers (e.g. Former State President Sam Nujoma's opening statement at the 1991 Land Reform Conference acknowledged that wealthy Namibians had embarked on illegally fencing-off communal lands; the Consensus of the Conference resolved to stop illegal fencing and take down all illegal fences; in 1990, then Minister of Lands, Resettlement and Rehabilitation Haufiku declared in a parliamentary debate '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.'). However, little has been done to address the issue, particularly since the Communal Land Reform Act was passed in 2002.

The government has not adhered to its statement at the Consensus of the Land Reform Conference that it would

[...] undertake an urgent census of private enclosure to help enforce the moratorium and to determine the exact extent, nature and impact of private enclosure.

Instead, it seems that while government officials are not

simply ignoring the issue, some are guilty of illegally fencing land for themselves. In 2000, Minister liluva-Ithana not only recognised the problem of illegal fencing, but accused other ministers of engaging in the practice:

It is not the poor people who are fencing off the land. It is you [referring to ministers]! 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.

Meanwhile, as then-Minister of Lands, Resettlement and Rehabilitation Pendukeni Iivula-Ithana stated in 1996:

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.

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

The declining role traditional leaders play in managing and allocating communal land has led to escalated illegal fencing since independence. A new elite were able to enclose communal-tenure rangeland for private use without any authorisation. However, there is some conjecture that traditional authorities condoned illegal fencing before the Communal Land Reform Act was in place so that they could earn income from allocating such land immediately because they speculated that such income

would dry up when a new Act was enacted (Blackie&Tarr 1998). The anticipated legislation increased the pace of communal land enclosure as enclosers reasoned that de facto private land ownership would be formalised at minimal cost under the new legislation, allowing them to obtain a formal title deed on any land they held (Fowler 1998). The land enclosures mean that powerful individuals have appropriated communal land for personal use at the expense of many communal farmers who do not have sufficient access to grazing land.

Illegal Fencing in Omusati Region: A case study analysis

In Omusati Region a number of politically well-connected individuals have fenced off large tracts of communal areas, claiming that they obtained authority to do so from the relevant Traditional Authority. In some cases, individuals applied to the relevant Communal Land Board for authorisation to retain fences on currently fenced-off land. These areas vary in size but in some cases are as large as 10,000 ha.

Over a year, the Legal Assistance Centre (LAC) conducted several interviews with Uukwambi and Ongandjera Traditional Authorities, subsistence farmers affected by the illegal fencing and field staff working for the Ministry of Lands and Resettlement in Omusati Region. Subsistence farmers commonly complained of the negative effects of illegal fencing: diminishing grazing land in size and quality and preventing them from looking for lost animals in the fenced-in area. Diminished grazing land has resulted in weaker animals that develop at a slower rate and subsistence farmers incurring additional costs of buying fodder to supplement livestock diets. While subsistence farmers express much dissatisfaction with enclosures, most fear some form of retribution if they openly challenge the practice.

In Omusati Region, poor law enforcement on illegal fencing immediately deprives most affected households of access to grazing, and in some cases of arable land, in effect, it also disinherits their children. New fences block the dry season routes by which herders take cattle to pasture in the southern parts of the Omusati Region and have negative socioeconomic and environmental implications. The practice is not only disrupting age old patterns of transhumance,

confining seasonal grazing into ever smaller areas with the related danger of environmental degradation, but it also runs the risk of accelerating social differentiation in communal areas (Tapscott & Hangula 1994).

Rapid overgrazing of remaining open areas has already occurred, particularly in the corridors between enclosures. Where fences run for several kilometres 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, whose herds are shrinking in the face of deteriorating and declining communal grazing areas, while those able to fence can build larger and healthier herds.

In the absence of government action and support, Traditional Authorities argue they are powerless to prevent the illegal fencing, so community members have expressed anger towards them and no longer trust their ability to deal with other problems. One senior Uukwambi headman feels the Ministry of Lands and Resettlement is 'sleeping' and unhelpful. He says the Communal Land Reform Act should be enforced with as much power as the country's other laws.

Another senior Uukwambi headman said many people enclosing land do not appreciate the illegality of it because no one has been prosecuted for illegal fencing yet. He knows of more than twenty cases of illegal fencing, but does not know what to do and no higher level central government authority is given on such matters. So new fences continue to be erected almost 'on a daily basis'. He concluded: 'There is so much of it happening that if the government doesn't step in now, the problem will get harder to deal with.'

Recommendations

- Bring legal proceedings against persons who have fenced off large tracts of land however, this will require some organisation and co-ordination of farmers, since subsistence farmers affected by illegal fencing are uneasy about challenging the inadequate system and standing up to powerful elites responsible for enclosures.
- Government must immediately take action against illegal fencers by formulating and publishing a policy on the issue and by using the most serious cases as test cases for adjudication. This would slow down infringement on the side of the fencers and it would have a preventative effect against future enclosures.

Conclusion

Once people see that illegal fencing will not be tolerated, it will have a preventative effect. For example, many of the subsistence farmers interviewed have bought their own fencing materials, but have not actually erected fences as they fear their fences will be removed. However, they also say they will not hold off indefinitely in putting up their own fences if nothing is done to address illegal fencing. If this happens, the face of communal areas in Namibia will change

forever with potentially devastating consequences for the poorest of the poor who mostly rely on access to the commonage to sustain their livelihoods.

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