Land, Environment and Development Project
LEGAL ASSISTANCE CENTRE
January 2021

Institutionalisation and Institutional Voids of Namibia's Communal Land Reform Act

By **Paul Hebinck**

Paul Hebinck is emeritus associate professor at Wageningen University and Adjunct Professor at the University of Fort Hare and Senior Research Associate, Department of Environmental Science, Rhodes University, Grahamstown, South Africa. **Contact:** Paul.Hebinck@wur.nl; www.wur.eu/Paul-Hebinck

Introduction

The purpose of this paper is to draw attention to the intended and unintended consequences of a communal land governance structure in Namibia consisting of Communal Land Boards (CLBs) and Traditional Authorities (TAs). In terms of the Communal Land Reform Act 5 of 2002 (CLRA), these institutions perform key communal land governance and administration roles in regulating and democratising land-people relationships. In ideal situations, where and when there is no conflict or dispute about access to and use of communal land, CLBs and TAs use the CLRA as a guideline. The Act assigns authority to the CLB and TA to interfere in cases where disputes arise over the rights to communal land. But when situations of conflict or dispute[1] unfold, their nature and the complexities involved with designing institutions that are supposed to collaborate unfolds in front of our eyes. Constructing institutions is not a linear, straightforward process, but one that often has intended and unintended outcomes. The reality reveals that these institutions do not always or cannot perform their tasks as the CLRA stipulates. In some situations, there is a rivalry between the CLB and TA. In other situations, the CLBs or TAs do not perform or do not know how to handle situations of conflict or lack the proper authority, expertise, experience and human capacity to act.

In this paper we explore the institutional complexities of land governance in Namibia's communal areas against the background of the recurrent disputes over land and natural resources, notably the 'illegal' construction of fences and the 'illegal' grazing of cattle. Many such conflicts and disputes are reported to the TAs and CLBs. While legislation dealing with fencing has been in place since 2002, addressing the issue of illegal fencing has been a slow process and illegal fences continue to remain a source of conflict in the communal areas. Illegal fences, as was the case during the National Land Conference in 1991,[2] were again put onto the political agenda during the Second National Land Conference in 2018, next to several other pressing land issues such as expropriation of agricultural land, ancestral land claims and resettlement policies.[3] The legal and policy instruments are available to remove illegal grazers and their cattle, but disputes over grazing are plenty.

How many of these disputes and conflicts exist and are reported, let alone documented, is unknown. The construction of illegal fences and illegal grazing are supposed to be reported to both the CLB and the TA. Both could, in terms of the CLRA, investigate the claims and instruct the removal of fences and cattle without starting a court case. Both institutions are charged with the task of documenting the complaints and storing the information in an appropriate database. Retrieving

1 We distinguish between "conflict" and "dispute". Disputes are usually short term and the disputants come to an arrangement. Conflicts usually span long periods of disagreement.

2 https://www.namibian.com.na/199007/archive-read/Illegal-Fencing-and-the-Law-%E2%80%9CILLEGAL.

3 *The Villager* newspaper staff writer, "Resolutions of the 2nd National Land Conference", 8 October 2018. Retrieved from https://www.thevillager.com.na/articles/14012/resolutions-of-the-2nd-national-land-conference.

this data appears not to be an easy and straightforward process. This implies that there is little detailed knowledge about how many and how these disputes and conflicts are solved. Only a few of the disputes are documented as disputants attempt to resolve them through litigation. These lawsuits are guided by the legislation for the communal areas, i.e. the CLRA and the Constitution. There are also quite a few studies of academics about the conflicts and disputes around fencing and grazing and other natural resources in the communal areas.[4]

We focus our analysis on the way that conflicts and disputes are handled, and the roles performed by the institutions that are tasked to handle these conflicts and disputes. The case material we use points at two important processes. In some cases, institutional voids emerge and are occupied and used by several social actors in the communal areas. Secondly, the conflicts and disputes are composite and supported by multiple discourses rather than through a legal discourse only. Our analysis requires that we critically reflect on the CLRA and its underlining ideas and ideologies.

We draw on documented case material from situations in communal lands. We reflect on the legal struggle of the N‡a Jaqna Conservancy Committee against illegal fencing in their territory. We also draw on case material about illegal grazing in Nyae Nyae Conservancy and in the Kavango Regions. The grazing dispute case material adds other dimensions and perspectives compared to the fencing cases as the state and polity got involved in an attempt to mitigate the problems.

The Communal Land Reform Act 2002[5]

To date, the CLRA is the most important piece of legislation dealing with land matters on communal land. It codifies land-people relations in communal areas, notably the allocation and registration of land rights. Those who reside within a communal area can obtain a customary land right for farming and/or residence, up to a maximum of 50 hectares. This area may be fenced if permission is granted. Regulation 26 of the CLRA allows for fences existing at the commencement of the Act that are used to fence in homesteads, cattle pens, water troughs or crop fields to be retained. An application for authorisation to erect a new fence must be made on Form 15 and in accordance with Regulation 27(3) of the Act. No authorisation for the erection of a fence is needed if the holder of a customary land right or right of leasehold wishes to fence in homesteads, cattle pens, water troughs or crop fields.

4 See for instance Michael Bollig and Diego Menestrey Schwieger, "Fragmentation, Cooperation and Power: Institutional Dynamics in Natural Resource Governance in North-Western Namibia", *Human Ecology*, Vol. 42, No. 2 (2014), pp. 167-181; Robert K. Hitchcock, "Refugees, Resettlement, and Land and Resource Conflicts: The Politics of Identity Among !Xun and Khwe San in Northeastern Namibia", *African Studies Monographs*, Vol. 33, No. 2 (2012), pp. 3-132; Rodgers Lubilo and Paul Hebinck, "'Local Hunting' and Community-Based Natural Resource Management: Resistance and Livelihoods in Namibia", *Geoforum*, Vol. 101 (2019), pp. 62-75; Diego A. Menestrey Schwieger, "Negotiating Water on Unequal Terms: Cattle Loans, Dependencies and Power in Communal Water Management in Northwest Namibia", *Nomadic Peoples*, Vol. 23, No. 2 (2019), pp. 241-260; and Michael Schnegg and Richard Dimba Kiaka, "The Economic Value of Water: The Contradictions and Consequences of a Prominent Development Model in Namibia", *Economic Anthropology*, Vol. 6, No. 2 (2019), pp. 264-276.

5 Republic of Namibia, Communal Land Reform Act 5 of 2002, *Government Gazette No. 2787*, Windhoek, 12 August 2002; Legal Assistance Centre and Namibia National Farmers' Union, *Guide to the Communal Land Reform Act, 2002 (No. 5 of 2002)*, LAC and NNFU, Windhoek, 2009.

The CLBs have to maintain registers of customary land rights and rights of leasehold to control the allocation and use of communal lands. The role of the TA is to confirm whether an applicant is a member of the community and whether any ongoing land disputes must be settled before a land right can be allocated. Headmen and headwomen perform a mediating role in the process of allocating land or responding to requests for the construction of a fence. The decision to allocate land or to construct a fence becomes legal only once it is ratified by the relevant CLB. The role of CLBs is to verify that plots indeed do not exceed the maximum size. Over the years, the Ministry of Land Reform (MLR)[6] has been actively encouraging people (men and women) to claim their communal and customary rights to land. The allocation of customary rights does not necessarily grant individuals the right to natural resources in the allocated area. For example, in terms of the Nature Conservation Amendment Act 5 of 1996, only communities can obtain rights to wildlife, by establishing a conservancy.[7] If people seek to graze in a gazetted Community Forest, they need to seek permission from the relevant committee. Grazing on the commonage requires seeking permission from the TA in terms of the Traditional Authorities Act 25 of 2000 and/or the CLRA. The latter Act has regulations specifying the number of livestock allowed per farmer. The CLRA also contains certain other restrictions, in consonance with its introduction of a new land governance structure consisting of CLBs and TAs. Given that ultimately all communal land is vested in the state and held in trust for the communities, private ownership is not possible, which limits commercial activity on communal land to situations where one has applied for a right of leasehold. This legislation implies that the communal areas are in the process of becoming socio-spatially differentiated, and in turn represent different development trajectories based on diverse institutional and land-use dynamics. We make a distinction between areas that are (and, according to the CLRA, are supposed to remain) *open-access resource areas*, subjected to communal management practices, with no restrictions placed on the movement of people and their cattle, or on game, and areas hinging on the use of land managed or held under a right of leasehold in accordance with the CLRA. *De facto* this usually means that the land is being held and managed as *private property*. In quite a few cases the 'owners' acquired these lands illegally, meaning without having been granted permission from the TA.[8] These development trajectories labelled as accumulation based on the *homestead* and on *private* or *entrepreneurial* arrangements manifest the ongoing processes of transformation in the communal areas. These trajectories are sustained by different land-use practices, discourses and institutional connections. They also co-exist in the same region.[9] Their co-existence is not always peaceful and neutral. The reported illegal fencing and the illegal grazing are, however, indications of a competition for key resources such as land and grazing. Previous research on the fencing and grazing problem, and the case material we use in this paper, show that illegal grazing and fencing predominantly involves the use of land without the consent of

6 In March 2020, several ministries were restructured. The MLR became the Ministry of Agriculture, Water and Land Reform (MAWLR), and the Ministry of Environment and Tourism (MET) became the Ministry of Environment, Forestry and Tourism (MEFT). We continue to refer to "MLR" and "MET" when the situation discussed pre-dates these name changes.

7 Or a community forest in terms of the Forest Act 12 of 2001. Other resources are regulated through other Acts, such as water which is regulated through water-point committees under the Water Management Act of 2008, and mineral claims which are regulated through the Mines Act of 1992.

8 See Rose-Mary Popyeni Kashululu and Paul Hebinck, "The Fencing Question in Namibia: A Case Study in Omusati Region", in Willem Odendaal and Wolfgang Werner (eds), *"Neither here nor there…": Indigeneity, Marginalisation and Land Rights in Post-Independence Namibia*, Legal Assistance Centre, Windhoek, 2020, pp. 163-183.

9 Ibid., pp. 174-177.

the authorities and community, or beyond the maximum 50 ha allowed by the CLRA for fencing of areas held under customary land rights. Terms such as "illegal grazing" and "illegal fencing" do not follow the current legislation. The expansion beyond 50 ha in most (not all) cases concern those that befit the so-called entrepreneurial accumulation trajectory. Illegal grazing and illegal fencing are considered to be a form of *land grabbing*. This is a widely shared opinion in the affected areas (e.g. N‡a Jaqna, Nyae Nyae and Kavango) and in Namibia's leading newspapers and NGO circles.[10] In most cases the grabbing of land involves members of the political and business elites in Namibia.[11]

In terms of the CLRA, all fences erected after its enactment in 2002 are illegal unless permissions to retain them were granted by the TA and the CLB.[12] The Act authorises the TA and the CLB to remove the illegal fences.

Case material

Here we present and explore some case material about documented conflicts and disputes. The purpose of this exploration is to expose the variation in dynamics of the institutionalisation processes. The outcomes of these dynamics and processes vary and can be explained by the nature of the socio-political relationships between the key actors involved. Simultaneously we aim to show that the conflicts and disputes cannot be explained by any single discourse derived from the CLRA alone. We thus need to account for the multiple discourses that compound the conflict and dispute, and we need to question whether, how and when these contrasting discourses complicate the matter.

Illegal fencing in N‡a Jaqna Conservancy[13]

The actors that play key roles in this fencing conflict are many: The !Kung TA, the Otjozondjupa CLB, the N‡a Jaqna Conservancy Committee, the illegal fencers, the Ministry of Environment and Tourism (MET), the Ministry of Land Reform (MLR), the Legal Assistance Centre (LAC) and the

10 *The Namibian* staff writer, "Illegal fencing is land grabbing – LAC ... 1991 land conference resolution should be implemented", 3 October 2018, p. 3. Retrieved from https://www.namibian.com.na/181937/archive-read/Illegal-fencing-is-land-grabbing-%E2%80%93-LAC--1991-land-conference-resolution-should-be-implemented.

11 See Willem Odendaal, "Land Grabbing in Namibia: A Case Study from the Omusati Region, Northern Namibia", paper presented at the International Conference on Global Land Grabbing, Sussex, 2011; "Elite Land Grabbing in Namibian Communal Areas and Its Impact on Subsistence Farmers' Livelihoods", *PLAAS Policy Brief No. 33,* 2011, pp. 1-7. *The Namibian* newspaper reports on several of the grabs – see for instance https://www.namibian.com.na/146351/archive-read/Kavango-land-battle-heats-up-AT-LEAST-45; https://www.namibian.com.na/138102/archive-read/Army-commander-fences-off-communal-land-SIVARADI; https://www.namibian.com.na/186088/archive-read/Rundu-elite-scramble-for-Kavango-timber---Part.

12 Republic of Namibia, Communal Land Reform Act 5 of 2002. Section 28(2) specifies that it is the CLB to which an application for the retention of fences is to be made. The CLB, in essence, decides whether a fence can remain or not. Section 28(5)(b) specifies that the application has to be accompanied by a letter from the Chief or TA.

13 We draw on Christa van der Wulp and Paul Hebinck, "Fighting Fences: The N≠a Jaqna Conservancy caught between state policies, overlapping authorities, the lawsuit and land-grabbers", submitted to *African Affairs*, 2020; Jennifer Hays and Robert Hitchcock, "Land and Resource Rights in the Tsumkwe Conservancies – Nyae Nyae and N‡a Jaqna", in Odendaal and Werner (eds), *Neither here nor there*, pp. 183-215; Hitchcock, "Refugees, Resettlement, and Land and Resource Conflicts"; and Cameron Welch, *Land Is Life, Conservancy Is Life: The San and the N‡a Jaqna Conservancy, Tsumkwe District West, Namibia*, *Basel Namibia Studies Series*, Namibia Resource Centre and Southern Africa Library, Basel, 2018.

High Court of Namibia. All stand for and employ different discourses that together compound the case beyond just a legal perspective.

The Conservancy Committee reported several illegal fences that were constructed between 2002 and 2013 to the !Kung TA and the CLB to whom the CLRA assigns the authority to remove illegal fences. When these bodies failed to do so, the Conservancy, with LAC legal support, filed a lawsuit in 2013 against the fencers, the TA and the CLB, and the relevant departments (MET and MLR). The Conservancy's objection to the fences is that they restrict the free movement of wildlife, which directly affects the income generated from eco-tourism and trophy hunting, and interferes with the gathering of *veldkos*.[14] However, a leading argument presented in the High Court was that the fencers should not have been granted customary land rights because they are not from the !Kung "traditional community".[15] The fencers are consequently earmarked as illegal owners of the land.[16] In response, the defence lawyer claimed that Article 21 of Namibia's Constitution gives all Namibians the right to settle anywhere they want in the country.[17] The fencers or settlers – who are viewed as elites because they have the capital to purchase fencing materials and hire labour to construct fences – introduced a discourse and a vision of farming cattle in the Conservancy on a larger scale than ever before, and have justified fencing on the grounds that it supports this type of land use, which they consider to be the only way to conduct modern 'commercial' agriculture on communal land and to accumulate wealth. Investing in the construction of fences is easier and cheaper than acquiring commercial land in other regions.[18] Fencers also say that fences protect their cattle from the poisonous "*gifblaar*" and prevent cattle from inflicting damage to the area.[19]

14 See *Founding Affidavit of Sarah Zungu, Case Na276/13. In the High Court of Namibia, Main Division, Windhoek, in the Matter between the N#Ajaqna Conservancy Committee and the Minister of Lands and Resettlement & 35 Others*, 2013. *Veldkos* is also referred to as wild foods. See Richard Lee, "'In the Bush the Food Is Free': The Ju/'Hoansi of Tsumkwe in the Twenty-First Century", in Brian Codding and Karen Kramer (eds), *Why Forage? Hunters and Gatherers in the Twenty-First Century*, School for Advanced Research Press, Albuquerque, 2016, pp. 61-88. *Veldkos* is vital for daily caloric intake and food security.

15 *Founding Affidavit of Sarah Zungu*.

16 Van der Wulp and Hebinck, "Fighting Fences"; and Hitchcock, "Refugees, Resettlement, and Land and Resource Conflicts".

17 Some argue that Article 21(h) of the Namibian Constitution, providing that "All persons shall have the right to reside and settle in any part of Namibia", gives anyone the right to settle in any communal area. But this interpretation, in treating all communal lands as "government land" freely available for any kind of settlement, does not support any right of existing communal landholders. Indeed, it denies most communal landholders any property right at all, and seems inconsistent with the provisions of the Communal Land Reform Act that give the Traditional Authorities, in conjunction with the Communal Land Boards, the right to allocate customary land rights within communal areas. See Sid Harring and Willem Odendaal, *"Our Land They Took": San Land Rights under Threat in Namibia*, Legal Assistance Centre, Windhoek, 2006.

18 Wolfgang Werner, *"What Has Happened Has Happened": The Complexity of Fencing in Namibia's Communal Areas*, Land, Environment and Development Project of the Legal Assistance Centre, Windhoek, 2011; and Kashululu and Hebinck, "The Fencing Question in Namibia".

19 See the *Answering Affidavit in Respect of the 9th Respondent Case Na276/13 - in the High Court of Namibia, Main Division, Windhoek, in the Matter between the N#Ajaqna Conservancy Committee and the Minister of Lands and Resettlement & 35 Others*, 2013; the *Answering Affidavit in Respect of the 16th Respondent Case Na276/13 - in the High Court of Namibia, Main Division, Windhoek, in the Matter between the N#Ajaqna Conservancy Committee and the Minister of Lands and Resettlement & 35 Others*, 2013; and the *Answering Affidavit in Respect of the 17th Respondent Case Na276/13 - in the High Court of Namibia, Main Division, Windhoek, in the Matter between the N#Ajaqna Conservancy Committee and the Minister of Lands and Resettlement & 35 Others*, 2013.

Fencing is said to contribute to a reduction of overgrazing,[20] Fences simultaneously allow farmers to benefit from exclusive access to resources such as water. Moreover, some view fences as a necessary means to rectify the land inequalities created during the colonial period.[21] Once areas have been fenced, the 'owners' often behave aggressively in protecting their fences – often using armed guards – which adds to the widely felt feeling of insecurity and unsafety among the San people.[22] Violent conflicts have erupted between fencers and San members of N‡a Jaqna Conservancy in places where fencers also fenced boreholes, thereby restricting access to water.[23]

After a long procedure spanning about three years, the High Court ruled in August 2016 in favour of the Conservancy that 22 out of 32 illegal fencers must vacate the land they fenced and remove their fences.[24] During a visit by the LAC in November 2019, a conservancy staff member reported that at the end of 2018, 14 of the 22 fences that the High Court ordered to be removed were still standing.[25] The Conservancy Committee and the LAC have since contemplated a new court case to ensure that fences are removed and that vacant possession is given to the Conservancy.

The case, or rather the conflict, is further complicated by the community being divided between a faction that supports the Conservancy Committee and a faction that supports the Chief, Glony Arnold, and the TA. The rift is embedded in a conflict about who is the chief and who has the right to select chiefs. The struggle for leadership goes back to the years before N‡a Jaqna Conservancy was established. The current Chief, who was appointed by the Government, and who fears that the Conservancy would encroach on the chiefly powers, is accused of corruption and colluding with those who illegally fence the land. Whereas the Conservancy Committee has rejected government plans to establish small-scale farming units, the Chief supports this idea. This shows that solving the matter involves more than only a legal follow-up.

Illegal grazing in Nyae Nyae Conservancy[26]

There are many actors involved in this dispute: the Conservancy Committee; the Community Forest Committee; the Ju|'hoansi TA; the Namibian Government; the Herero livestock farmers; the

20 See Eduard Gargallo, "Conservation on Contested Lands: The Case of Namibia's Communal Conservancies", *Journal of Contemporary African Studies*, Vol. 33, No. 2 (2015), pp. 213-231; and Peter Klintenberg and Anton Verlinden, "Water Points and Their Influence on Grazing Resources in Central Northern Namibia", *Land Degradation & Development*, Vol. 19, No. 1 (2008), pp. 1-20.

21 Werner, *What Has Happened Has Happened*.

22 Van der Wulp and Hebinck, "Fighting Fences".

23 Ibid.

24 *Judgement in the Matter between the Njagna Conservancy Committee V the Minister of Lands and Resettlement and 35 Others (a 276-2013)*, 18 August 2016.

25 Van der Wulp and Hebinck, "Fighting Fences".

26 We draw on published material: Jennifer Hays, "The Invasion of Nyae Nyae: A Case Study in on-Going Aggression against Indigenous Hunter-Gatherers in Namibia", paper presented at the Forum Conference on Indigenous Peoples 2009: Violent Conflicts, Ceasefires, and Peace Accords Through the Lens of Indigenous Peoples, Forum for Development Cooperation with Indigenous Peoples, Tromsø, Norway, 2009; Hays and Hitchcock, "Land and Resource Rights in the Tsumkwe Conservancies"; Megan Biesele and Robert K. Hitchcock, *The Ju/'Hoan San of Nyae Nyae and Namibian Independence: Development, Democracy, and Indigenous Voices in Southern Africa*, Berghahn Books, Oxford, 2010; and *Tsamkxao Oma vs Minister of Land Reform* (HC-MD-CIV-MOT-GEN 2018/00093) [2020] NAHCMD 162 (07 May 2020).

LAC; and the High Court. Many discourses come together in this particular case: overgrazing and land degradation; the land rights and justice discourse; and the Government's promise years ago to assist the Herero farmers returning from Botswana[27] in their quest for land in Namibia.

Unpacking the grazing dispute requires going back in time. Herero farmers whose ancestors had managed to escape the genocide at the turn of the last century by fleeing to Botswana were promised land by the Namibian Government in the Gam area upon their return to Namibia. They settled at Gam with their cattle, but, according to many sources, the pastures were overstocked, overgrazed and hence severely degraded. In a search for greener pastures, they invaded the Nyae Nyae Conservancy communal area. This conservancy is known for its effective management of the veld for grazing and gathering purposes. In April 2009, some five Herero pastoralist families totalling about 300 people broke through the veterinary fence that forms the border between Gam and the Nyae Nyae communal lands. The fence serves to contain animal diseases and to safeguard meat exports from the south of the fence line to the world market. These farmers have also located themselves in a municipality area within the conservancy that is not controlled by the Ju|'hoan people, but their cattle cause damage to nearby conservancy land. They brought 1300 cattle into Nyae Nyae. Although most of these were confiscated by the Namibian Police upon the Government's instruction, the Herero in Tsumkwe have since brought in new cattle. They also have large numbers of horses, donkeys and small stock in Tsumkwe, where keeping livestock is illegal.

Chief Tsamkxao ǂOma, Chief of the Ju|'hoansi and head of the TA, tried to solve the matter without litigation but through negotiation and persuading the Herero farmers to vacate the area with their herders and cattle. The Otjozondjupa Regional Governor's proposal to solve the matter by asking the TA to give up a quarter of the Conservancy's "unutilised land" to the Herero was wholeheartedly rejected. The Chief did not accept the proposal because it is an area that is utilised intensively for agriculture, livestock production and wild-resource collection purposes. Thus the illegal grazing by the Herero farmers continued. The grazing dispute was brought to court in April 2018. The case was heard with the key argument that their rights to land were being ignored and that the land use that forms the basis of the livelihoods of many of the Ju|'hoansi is jeopardised by overgrazing by the invaders. The illegal grazers' defence hinges on their constitutional rights as citizens of Namibia.[28] In their defence of the invasion they also stated that they lack good grazing land, that poisonous plants on their side of the fence kill their cattle, and that their ancestors are buried in the Nyae Nyae area. Moreover, they feel that the Conservancy has plenty of land.

The High Court judgment handed down in 2020 was disappointing for the applicants. The case was dismissed based on a technicality raised by the Herero farmers' lawyer that the affidavit was not properly commissioned. An appeal against the decision has been filed with the Supreme Court.

27 Most of the Herero farmers who are the respondents in this case returned to Namibia around 1992 when repatriated after their ancestors fled from the German colonial forces in the 1904-1908 Herero/Nama uprising against the German colonial government in German Southwest Africa. The returnees were resettled at Gam, a small settlement just south of the veterinary fence shared with Nyae Nyae Conservancy. When grazing conditions became untenable in the area due to overgrazing, the occurrence of "*gifblaar*" (a poisonous plant that can kill cattle which eat it) and prolonged droughts, the farmers broke through the veterinary fence to search for better grazing conditions for their cattle.

28 See footnote 14.

Grazing dispute in Kavango[29]

Theodor Muduva considers the grazing dispute in Kavango Region to be the first of its kind in the country. This dispute involves many actors. The origins of the dispute go back to the early 1980s when Oshivambo-speaking livestock farmers from Ohangwena and Oshikoto Regions invaded and occupied land for grazing in the area governed by the Ukwangali TA. When the boundary restrictions between Kavango and Ohangwena were removed after Namibia's Independence (1990), more and more farmers with herders and cattle entered the Ukwangali area without seeking the TA's permission to graze there. As the numbers of herders and cattle increased, conflicts about overgrazing, crop damage, trespassing and violence escalated. Upon investigating the complaints by local residents and the TA, the police intervened to prevent further escalation. The TA tried to solve the matter through negotiation and deliberation with key political figures from the ruling party, the South West Africa People's Organisation (SWAPO). When these talks failed, the dispute was presented to the Kavango CLB in 2003 to intervene. In 2005, the CLB instituted an eviction order against the farmers. The eviction order was challenged in the High Court, which ruled that this order was illegal as it was issued by a CLB, not a court of law.

The dispute first made a turn through the High Court when the nine cattle owners whose herders and animals had been chased out of Kavango Region obtained a court order allowing their animals to remain in the area which they had been using for grazing for years. That court order came with the added condition that Ukwangali Chief Daniel Sitentu Mpasi and his TA could at a later stage take legal action under the CLRA to attempt to have the cattle removed from their area. In 2007, the TA under Chief Mpasi, together with the Kavango CLB and the Government, filed a lawsuit asking for a court order to evict the cattle owners whose livestock were grazing in areas in the west of Kavango. These farmers were accused of illegal grazing, trespassing and violating national laws. They were evicted, and the solution to the dispute was to resettle them at Farm Six, located 50km north-west of Tsintsabis in Mangetti West, Oshikoto Region.

Farm Six is managed by the Namibia Development Corporation (NDC). The Government, on behalf of the Ovambo farmers, signed a lease agreement with the NDC, and promises were made to upgrade the farm, improve the fences and fix the numbers of livestock units that the farm can hold. Cattle exceeding the carrying capacity were supposed to be either sold or relocated to Kavango from where they had come. The resettled farmers, however, complained that the Government and the NDC were not honouring their obligations to upgrade the infrastructure (boreholes and fences). The relocation to Farm Six was meant to be temporal, but these farmers are still there in 2021, and their cattle numbers are increasing and competing with other users of the land for water and grass.

29 We draw on Theodor K. Muduva, "Grazing Rights in Communal Areas of a Post-Independent Namibia: A Case Study of a Grazing Dispute in Western Kavango Region", unpublished dissertation, University of the Western Cape, 2014; Werner Menges, "Kavango Grazing Dispute Lands Back in Court," *The Namibian*, 12 March 2007; and Martin K. Shapi, *Grazing Land Dispute between Vakwangali and Ovakwanyama and Ovandonga Speaking People in Mpungu Constituency in the Kavango Region*, Multidisciplinary Research Centre, Social Science Division, University of Namibia, Windhoek, 2006. See also https://www.nbc.na/news/rukoro-calls-government-address-tsumkwe-land-and-grazing-dispute.28900; and https://www.namibian.com.na/22685/archive-read/Govt-dragging-feet-in-grazing-dispute. https://www.namibian.com.na/93844/archive-read/Ukwangali-chief-accused-of-grabbing-land-for.

The relocation of the Ovambo farmers to Mangetti West is problematic: it was done without the consent of the Hai||om living in this area. The Hai||om claim Farm Six as part of their ancestral lands. The Ovambo have thus moved their cattle to graze in an area belonging to the Hai||om. The Hai||om feel squeezed on a small piece of land, and maintain that this jeopardises their hunting and gathering land-use practices.[30] The Hai||om are currently engaged in a legal battle with the Government for recognition of their ancestral rights and claims to their land.

This dispute is complicated by a multiplicity of discourses that operate in the same political space. There are corruption allegations against Chief Mpasi (receiving benefits by granting land rights to politicians),[31] evoking response from the side of the illegal grazers that this is a politically motivated process of seeking solutions. The Ovambo farmers complain that the Government's policies are discriminatory in that they are anti-pastoralist and initiate ethnic rivalry. Ovambo livestock farmers problematise the lack of free (meaning fenceless) land in their regions of origin, and say the reason they moved to Kavango was to access free grazing land. Rights over grazing are not applied to the relevant TA. Land resettlement is a major vehicle for sorting out land-related problems and optimising ways to improve the use of 'underutilised' land. However, resettlement without negotiations results in disputes shifting to other areas and involving new sets of actors, and post-resettlement promises not being fulfilled. All these issues point to a problematic role of the Government in coordinating ways to mitigate the conflict. Worse, one conflict spills over to other lands and creates a new conflict over access and rights to land.

Analysis

In considering how these disputes are handled in the courts, we cannot, on the one hand, ignore the influence of the political arena, by which we mean that the conflicts and the legislation are embedded in an arena of struggle, for land, for rights, for access to resources, for dignity and so on, and this context is highly volatile. On the other hand, we need to situate these disputes and the litigation in the context of the transformation of governance towards decentralised forms of governance.

With respect to these two aspects, this paper sets out to elaborate on two kinds of argument. In one argument explored here, we view the handling of disputes from the perspective that the lack of institutions performing their tasks – or more neutrally formulated, the way that the institutions perform – shows that their crafting (and re-crafting) is guided by an understanding of institutions that is rather linear, with the transformation from one to another system of governance occurring straightforwardly, as intended and planned. The second, associated, argument we put forward is that conflicts and disputes are composite, in that they are constituted by both past and present practices and relationships, promises and actions. Disputes or conflicts about the use of and access to resources are not singular and certainly do not have one single cause-and-effect component. This complicates their coherent handling and arriving at solutions.

30 Ute Dieckmann, "From Colonial Land Dispossession to the Etosha and Mangetti West Land Claim – Hai||om Struggles in Independent Namibia", in Odendaal and Werner (eds), *Neither here nor there*, pp. 95-121.

31 https://www.namibian.com.na/93844/archive-read/Ukwangali-chief-accused-of-grabbing-land-for.

Authority in the making and crafting of institutions

As Frances Cleaver[32] argues, the idea to craft institutions according to a range of design principles[33] is based on concepts that are inadequately socially informed and which ill-reflect the complexity, diversity and ad hoc nature of institutional formation. The process of scaffolding new institutions such as the CLBs and refurbishing the TAs is not a static and straightforward one in which aims, objectives, instruments of power and authority are settled and recognised in the ways designed. The building of institutions entails a complex process of learning, adjusting and sedimenting authority through performance. Christiaan Lund describes this process as "authority in the making",[34] which implies that the different normative orders of property and rights (e.g. customary and state law) that underlie the performance of these institutions (still) need to be aligned. This is an evolving process and not one fixed by a piece of legislation. There is no pre-defined state authority; instead, claims are brought forward to various statutory and non-statutory institutions, and during the process of recognition, the authority of different institutions is legitimised.[35] In situations where different institutions are involved, this leads to competition over jurisdiction, and the question of 'who is the legitimate authority' becomes contested and (re-)negotiated.[36] This is particular relevant in situations of competition over land and resources intersecting with relations of authority and opportunity in contemporary Namibia and elsewhere in Africa.[37]

An 'authority in the making' argument is certainly relevant for Namibia which adopted a legal pluralist system of governance, implying that different legal and political normative orders co-

32 Frances Cleaver, "Reinventing Institutions: Bricolage and the Social Embeddedness of Natural Resource Management", *European Journal of Development Research*, Vol. 14, No. 2 (2002), pp. 11-30; Frances Cleaver, *Development through Bricolage: Rethinking Institutions for Natural Resource Management*, Routledge, London, 2012; and Frances Cleaver and Jessica De Koning, "Furthering Critical Institutionalism", *International Journal of the Commons*, Vol. 9, No. 1 (2015), pp. 1-18.

33 Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action (Political Economy of Institutions and Decisions)*, Cambridge University Press, Cambridge, 1990. Ostrom's approach and focus on the idea that we can design initiated numerous publications about design principles of common property resources, irrigation schemes and conservation projects (such as the Namibian Conservancy Programme). See for instance Timothy M. Chana and Panate Manomaivibool, "Examining Co-Management of National Parks through the Lens of Common-Pool Resource Design Principles: A Comparative Case Study of Liwonde and Majete in Malawi", *Applied Environmental Research*, Vol. 38, No. 2 (2016), pp. 77-92; Brian Child, *Sustainable Governance of Wildlife and Community-Based Natural Resource Management: From Economic Principles to Practical Governance*, Routledge, London, 2019; and Duan Biggs et al., "Insights on Fostering the Emergence of Robust Conservation Actions from Zimbabwe's Campfire Program", *Global Ecology and Conservation*, Vol. 17 (2019), pp. e00538.

34 Christiaan Lund, "Rule and Rupture: State Formation through the Production of Property and Citizenship", *Development and Change*, Vol. 43, No. 6 (2016), p. 1200, pp. 1199-1228.

35 Thomas Sikor and Christiaan Lund, "Access and Property: A Question of Power and Authority", *Development and Change*, Vol. 40, No. 1 (2009), pp. 1-22.

36 Christiaan Lund, *Local Politics and the Dynamics of Property in Africa*, Cambridge University Press, Cambridge, 2008; and Thomas Bierschenk and Jean-Pierre Olivier de Sardan, "Powers in the Village: Rural Benin between Democratisation and Decentralisation", *Africa*, Vol. 73, No. 2 (2003), pp. 145-173. See also Fiona A. MacKenzie, "Land and Territory: The Interface between Two Systems of Land Tenure, Murang'a District, Kenya", *Africa*, Vol. 59, No. 1 (1989), pp. 91-109.

37 See Sara Berry, "Struggles over Land and Authority in Africa", *Africa Studies Review*, Vol. 60, No. 3 (2017), pp. 105-125; Amanda Hammar, "'The Day of Burning': Land, Authority and Belonging in Zimbabwe's Agrarian Margins in the 1990s", unpublished dissertation, Roskilde University, 2007; and Jeffrey Herbst, *States and Power in Africa: Comparative Lessons in Authority and Control*, Princeton University Press, New Jersey, 2014.

exist.[38] Legal pluralism manifests as "a plurality of property ideologies and legal institutions, often rooted in different sources of legitimacy, including local or traditional law, the official legal system of the state, international law or religious legal orders".[39] What is important for investigating and evaluating how institutions perform and bureaucracies operate is to consider what we frame here as how holders of positions of authority (e.g. chiefs, committee members and judges), but also elites and commoners, '*navigate everyday life*'. Such navigation displays how they strategise and use certain discourses to defend their position and interests in situations of dispute and conflict, and how they organise themselves by forming alliances with other key social actors (e.g. litigators, politicians, NGOs, donors and academics). Scholars such as Vigh[40] and Cleaver[41] coined the term *navigating* to express how social actors patch social arrangements together "*from cultural resources available to them in response to changing conditions*". This focus allows us to explore how in everyday life situations including conflicts and disputes and interaction with others, social actors generate their own rules, and in doing so are influenced by (a plurality of) rules and institutional elements that have been, and continue to be, generated and maintained in other interaction settings such as law schools, bureaucracies and courts. 'Authority in the making' is an aspect of this and involves learning to use and employ authority in the new dispensation in response to claims to property and rights as well as how to apply the new legislation and to perform the roles that the new legislation assigns to them. Learning how to deal with authority, or rather how to navigate the space where authority is exercised, includes dealing with corruption and claims about corruption.[42] 'Authority in the making' implies the significance of looking closely at who wields authority and at which level of social interaction (e.g. in the TA or the CLB or the villages), and at how land claims and relations of authority have changed and interacted over time (e.g. illegal fencing and grazing are not recent phenomena; some disputes go back 40 years). A plurality of normative socio-political and ethical orders and arenas in society thus becomes the point of departure for a political and legal practice as well as empirical research.

Processes of institutionalisation and decentralising land governance decisions are, to various degrees, embedded in plural legal systems, but there is a hierarchical relationship with the laws

38 See Oliver C. Ruppel and Katharina Ruppel-Schlichting, "Legal and Judicial Pluralism in Namibia and Beyond: A Modern Approach to African Legal Architecture?", *Journal of Legal Pluralism and Unofficial Law*, Vol. 43, No. 64 (2011), pp. 33-63; and Manfred O. Hinz, "The Ascertainment of Namibian Customary Law Completed: What Has Been Done and What Lies Ahead", in Nico Horn and Manfred O. Hinz (eds), *Beyond a Quarter Century of Constitutional Democracy*, Konrad Adenauer Foundation, Windhoek, 2017, pp. 1-17.

39 Franz von Benda-Beckmann, Kebeth Von Benda-Beckmann, and Melanie C. Wiber, "The Properties of Property", in Franz von Benda-Beckmann, Kebeth von Benda-Beckmann and Melanie C. Wiber (eds), *Changing Properties of Property*, Berghahn Press, Oxford, 2006, p. 3, pp. 1-39. See also Ruth S. Meinzen-Dick and Rajendra Pradhan, "Implications of Legal Pluralism for Natural Resource Management", *IDS Bulletin*, Vol. 32, No. 4 (2001), pp. 10-17; Sally Engle Merry, "Legal Pluralism", *Law & Society Review*, Vol. 22, No. 2 (1988), pp. 869; and Franz Von Benda-Beckmann, "Comment on Merry", *Law & Society Review*, Vol. 22, No. 5 (1988), pp. 897-902.

40 Henrik Vigh, "Crisis and Chronicity: Anthropological Perspectives on Continuous Conflict and Decline", *Ethnos*, Vol. 73, No. 1 (2008), pp. 5-24.

41 Cleaver, "Reinventing Institutions".

42 See Jean-Pierre Olivier de Sardan, "A Moral Economy of Corruption in Africa?", *Journal of Modern African Studies*, Vol. 37, No. 1 (1999), pp. 25-52; Gonne Beekman, Erik Bulte and Eleonora Nillesen, "Corruption, Investments and Contributions to Public Goods: Experimental Evidence from Rural Liberia", *Journal of Public Economics*, Vol. 115 (2014), pp. 37-47; and Innocent Chirisa, "Touts and the Control of Facilities in 'Bleeding' Harare: A Theoretical Explanation of the Dynamics of Corruption in an African City", *Social Change*, Vol. 47, No. 2 (2017), pp. 264-280.

of the state as the first and most important system. This makes High Court decisions predominant. However, legal pluralism implies that the state law is not the only normative order. Social actors involved in struggles over land and resources adhere to different discourses and apply different legal rules tapped from different legal repertoires. Franz von Benda-Beckmann and colleagues understand this as "forum shopping".[43]

Namibia began to reorient its land policies after 1990, and it took approximately 12 years for the legislation that fixes rights and access to communal land and resources, i.e. the Communal Land Reform Act 5 of 2002, to be authorised and approved by Parliament. The National Land Policy of 1998 is an indication of the Government's intention to transfer authority over the administration of rights to communal land to the state-recognised regional CLBs and TAs. During the previous dispensations the authority to register land rights rested in the hands of the TA and tribal leaders. The responsibilities of traditional leaders were reframed in the Traditional Authorities Act 17 of 1995 and later repealed by the Traditional Authorities Act 25 of 2000 (TAA). The assumption behind the strategic role of the TA in handling disputes and land registration issues is that its role can be aligned with the role of the CLB and that both bodies adhere to the same political alliances, affiliations and agendas. Nothing is less true, as our exploration of case material about disputes reveals. The cases included in this paper clearly show that not all TAs act and perform the same. The !Kung TA of N‡a Jaqna Conservancy, whose legitimacy is contested, is embroiled in a leadership conflict with the Conservancy Committee about fencing and future land-use plans. This is in stark contrast to the situation in neighbouring Nyae Nyae Conservancy. The Ukwangali TA acted in the grazing dispute in defence of the community it represents, but Chief Mpasi was associated with corruption charges. Like his !Kung counterpart, Chief John Arnold, he was accused of favouring (political) friends and elites when it comes to allocating land. This points at a situation where downward accountability of authority structures to rights holders is absent. A check on abuse of authority helps to ensure that the rights and benefits are shared.

The analysis of the practice of handling the disputes displays conflicting and/or overlapping of authority leading to situations that create institutional voids. One of the reasons for fencing or grazing remaining recurrent conflictive issues is that these institutional voids exist and continuously unfold in and during the implementation of the CLRA. These voids emerge as moments of opportunity for a range of social actors that operate in the communal areas to continue to implement their political and development agendas and to increase their room for manoeuvre, thereby perpetuating the dispute. These actors could be the line ministries (MET or MLR), Conservancy Committees, TAs or CLBs, but also the new entrepreneurial type of elite communal farmers who extend their fencing beyond what legally is allowed, or invading pastoralists. The voids that emerge while the land governance institutions are performing are what Lund refers to as "ruptures".[44] These occur during periods of transformation from one dispensation of governance to another. These are the sites or moments where the rearrangement of previous institutional relations and 'authority in the making' takes place. The post-1990 idea to reform the governance of the communal land which took 12 years to complete, created a political vacuum for a range of new and old actors to create

43 Franz von Benda-Beckmann, Kebeth von Benda-Beckmann and Melanie C. Wiber, *Changing Properties of Property*, Berghahn Press, Oxford, 2006. See also Meinzen-Dick and Pradhan, "Implications of Legal Pluralism for Natural Resource Management".

44 Lund, "Rule and Rupture", p. 1202.

space for themselves. The fencing and land grabbing ongoing before the CLRA was approved and enacted are condoned. The refusal of some of the TA and CLBs, like in the N‡a Jaqna case, extends the fencing question and related problems for the conservancy. Yet, the fact that the High Court has accepted the *locus standi* of the N‡a Jaqna Conservancy Committee which was needed to ask for the remedy of an interdict, created the perhaps unintended consequence that the Committee has been accepted as an institution with a role to play in matters of land, land use and rights – a role that the CLRA has assigned to the CLB and the TA. This simultaneously creates more space for "forum shopping", which is occurring in N‡a Jaqna Conservancy.[45]

The N‡a Jaqna investigation also showed that next to the CLB composition issues, CLBs are relatively new institutions which lack funding and capacity, and more importantly the confidence to use the legal powers allocated to them by the CLRA. A CLB representative in the N‡a Jaqna matter once remarked that the Board is afraid to act and make an error similar to that in the Wapulile matter where the High Court found that the CLB wrongly ordered the removal of the fences.[46]

Composite nature of conflict discourses

A second complicating issue in handling conflicts and disputes is that these are composite. They are constituted by past and present practices and relationships, promises and actions.[47] Disputes or conflicts about resources, their use and access are not singular and certainly do not have one single cause-and-effect component.[48] Resource conflicts are not solely reduceable to only rights to land. Claims or political promises to land or grazing may be just as important for engaging legal property holders about their rights. Disputes often persist due to their interconnection with other disputes and conflicts which may have their roots in situations of the past. The composite or multi-dimensional nature of disputes extends the "forum shopping": the different claims are made at different legal and non-legal fora, ranging from the High Court to regional political sites. This again creates conditions for disputes to perpetuate, despite High Court judgments to act. Methodologically, this implies a plea to closely observe the different sites or fora where claims over land or pastures are made and how the actors involved in the dispute or conflict navigate these sites and fora.

Overlapping and contrasting discourses that are engaged from a legal, and more specifically, a rights perspective, complicate matters in dispute and conflict handling. Discourses do not convey a

45 Van der Wulp and Hebinck, "Fighting Fences".

46 In 2013 the High Court ruled that the Ohangwena Land Board had unlawfully removed an illegal fence. However, this ruling was overturned in the Supreme Court in 2017. For more information regarding the Ohangwena case, see Supreme Court, *The Chairman of the Ohangwena Communal Land Board V Tileinge Wapulile* (Sa 81-2013), 8 June 2017, Government of Namibia, Windhoek, 2017.

47 See for instance Arjaan Pellis, Annemiek Pas and Martijn Duineveld, "The Persistence of Tightly Coupled Conflicts: The Case of Loisaba, Kenya", *Conservation and Society*, Vol. 16, No. 4 (2018), pp. 387-396; and A. Kronenburg García and H. van Dijk, "Towards a Theory of Claim Making: Bridging Access and Property Theory", *Society & Natural Resources*, Vol. 33, No. 3 (2019), pp. 1-17.

48 See Norman Fairclough, "Critical Discourse Analysis", *International Advances in Engineering and Technology*, Vol. 7 (2012), pp. 452-487; Jean-Pierre Olivier de Sardan, *Anthropology and Development: Understanding Contemporary Social Change*, Zed Press, London, 2006; Maaike de Vette, Rose-Mary Popyeni Kashululu and Paul Hebinck, "Conservancies in Namibia: A Discourse in Action", in Bas Arts et al. (eds), *Forest-People Interfaces*, Wageningen Academic Publishers, Wageningen, 2012, pp. 121-139.

single truth, nor a single dimension. Discourses are always multiple, conveying multiple realities and ontologies.[49] Discourses embedded in claims about overgrazing and degradation are contested, both in the fields and in the literature.[50] That land uses in conservancies or communal areas by members of the conservancy as well as the illegal grazers and fencers are not in line with the land-use plans agreed upon between the MET and the conservancy is evidence for such contestation. The uses of land cannot be disconnected from the rights (or claims) to land. Namibia is a legal pluralist society, and legal pluralism, Von Benda-Beckman argues, "... forces us to question what is meant by 'land'? ... We are likely to be confronted with a situation that ... categorisation of resource elements may be different and contradictory in different legal subsystems within the state organisation, with different rights and obligations flowing from such differences – a source of legal uncertainty and many socioeconomic and often political conflicts."[51] Rights over land thus also concern the right to practise land use according to locally shared ideas. This is or should be included as aspects of human rights.

The coupling of lawsuits to protect rights and to seek legal justice for communities with lawsuits to settle development issues provides litigation with a legitimate legal practice. Litigation builds on community as *locus standi* and necessarily involves partaking in a legal discourse that is framed outside the politico-legal and cultural repertoires of many of the communities that seek the benefits of such legal position.[52] This simultaneously implies that the embedded notion of community and indigeneity, which has proven to be extremely problematic in rural studies in Africa, becomes a real notion. The outcomes, however, are diverse and depend on the local political circumstances. This works out rather well in the Nyae Nyae case, whereas in the N‡a Jaqna situation, community has unfolded as conflictive and controversial, inhibiting litigation from being effective and emancipatory.

Conclusions

A few conclusions can be drawn. In short: Not all TAs are the same, in that they display different affiliations and leadership crises. CLBs are understaffed and lack human and financial resources. The role of the state is ambiguous, to say the least, given that the Government is attempting to depoliticise issues which have become highly politicised over the years and involve high-ranking politicians and business elites. The Government is also interfering with local politics by appointing chiefs and relocating illegal grazers to land belonging to others, this being extremely problematic

49 Olivier de Sardan, *Anthropology and Development*.

50 See for instance Melissa Leach and Robert Mearns, *The Lie of the Land: Challenging Received Wisdom on the African Environment*, James Currey, Oxford, 1996; James C. McCann, "The Political Ecology of Cereal Seed Development in Africa: A History of Selection", *IDS Bulletin*, Vol. 42, No. 4 (2011), pp. 24-35; Ben Cousins and Ian Scoones, "Contested Paradigms of 'Viability' in Redistributive Land Reform: Perspectives from Southern Africa", *Journal of Peasant Studies*, Vol. 37, No. 1 (2010), pp. 31-66; and Paul Hebinck, Derek Fay and Kwandi Kondlo, "Land and Agrarian Reform in South Africa's Eastern Cape Province: Caught by Continuities", *Journal of Agrarian Change*, Vol. 11, No. 2 (2011), pp. 220-240.

51 Franz von Benda-Beckmann, "Legal Pluralism and Social Justice in Economic and Political Development", *IDS Bulletin*, Vol. 32, No. 1 (2001), p. 53, pp. 46-56. See also Tanja Murray Li, "What Is Land? Assembling a Resource for Global Investment", *Transactions of the Institute of British Geographers*, Vol. 39, No. 4 (2014), pp. 589-602.

52 Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia*, Cambridge University Press, Cambridge, 1985.

and undemocratic. The role and rule of law are shaped by clearly defined legal rules, assuming there a single, coherent legal system. The reality of what we called 'authority in the making' tells us that it is more useful to be aware of the ambiguity and contested nature of rules. Moreover, the legal separation of rights to land and the ontology of land cripples the litigation. This separation makes it impossible to incorporate the reality that unfolded over time in the N‡a Jaqna and Nyae Nyae Conservancies and the Ukwangali territory in Kavango. The controversy is as much about (human) rights as about the use of land and the resources. In the end, the issue is what constitutes the future for N‡a Jaqna, Nyae Nyae and the Ukwangali, and who has the right to determine that.

By way of recommendation

Going beyond the noted and observed controversies and litigation would require harmonising policy processes to arrive at consistent policies to avoid contradictions between the various departmental agendas and land-management plans. This was suggested by Wolfgang Werner during the Second National Land Conference held in 2018. However, this would demand that state is staffed by a well-trained and non-technocratic-oriented bureaucracy capable of translating legal pluralism into policies that revolve around plural legal orderings as well as land having different ontological meanings. Such policies would resonate with locally accepted and shared notions of development, and would further pave the way for conservancies and other resource communities in an alliance with land-based NGOs in the rural, peri-urban and urban domains in Africa to become involved in dealing with land issues beyond rights only.

A second area would be to strengthen CLBs by screening membership and providing support for registering and social analysis of existing and looming disputes and conflicts. An in-depth study of the frequency of illegal fencing and grazing reporting is required at CLB and TA level. Such a study would provide further insights into the capacity issues that these institutions have to deal with. Disentangling and documenting the multiple dimensions of the conflicts and disputes is a necessary instrument for handling the controversy. CLBs would perform more accurately if given the necessary resources to operate. This includes financial and human resources, and the latter would include adding, on a temporal basis, trained anthropologists and/or rural sociologists as fieldworkers. This would increase the capacity to explore the nature and history of disputes and conflicts. This in turn would allow for negotiations that increase the opportunity to solve matters before they go to court. Litigation, after all, is the last resort when dealing with disputes.

A third area would be recommending that High Court judges take account of all dimensions of legal pluralism. This would include basing legal judging on a socially informed analysis of the nature and dynamics of disputes and conflicts, rather than on their form alone. This is an area where public litigators and legal academics should engage at the socio-academic level with the Judiciary to establish a legal culture that fosters emancipation.

This paper forms part of a series of papers on land matters in Namibia. These papers are available on the LAC website. Hard copies can be obtained from the LAC office.

LEGAL ASSISTANCE CENTRE
Land, Environment and Development (LEAD) Project
4 Marien Ngouabi Street, Windhoek • P.O. Box 604, Windhoek, Namibia
Telephone: (+264) (0)61-223356 • Fax: (+264) (0)61-234953
Email: info@lac.org.na • Website: www.lac.org.na