

The fencing question in Namibia: A case study in Omusati Region

Rose-Mary Popyeni Kashululu and Paul Hebinck

1 Introduction

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| 6 new fences have recently been erected. | Onanyalala | "These six fences have been set up, not long ago, but the TA do not know the owners. They are just there." |
| 30 new fences have recently been erected. | Onanyalala area next to Olunkeyama | "These fences are recently done, claimed worked during the night with headlights of cars on. The Headman and his committee do not know who the owners are." |

The introductory quotes are from a report of the Ongandjera Traditional Authority (TA) to the Ministry of Land Reform (MLR), Omusati Region, in 2018.¹ Fences are "illegal" when they demarcate lands that are regarded as communal. If land is communal, it is vested in the state and held in trust for those that reside on the commons. Communal land also implies that the residents have the right to claim their customary land rights and practise their customary land use practices (e.g. residential, cropping, grazing). Communal land also implies that these lands are considered by the MLR in its rural development policies as an open-access resource for grazing cattle and wild animals. This characteristic of the commons is a fundamental aspect of the Communal Land Reform Act (No. 5 of 2002) (CLRA).² Regulation 26 of the Act allows for fences around homesteads, crop fields, water

1 Ongandjera Traditional Authority, 'Identification of Illegal Fences in Ongandjera Communal Area, Okahao, 2018', a report compiled as part of the outcomes of the Second National Land Conference held in Windhoek in 2018.

2 Republic of Namibia, Communal Land Reform Act (No. 5 of 2002), Windhoek, 2002.

troughs or cattle pens on portions of land parcels. Fences that are fenced in line with the Act are recorded in the databases of MLR as “legal”. Section 44 of the CLRA also states that it is an offence to erect a fence on a piece of land without first being granted a land right certificate.

The fencing of communal lands in Namibia is not a recent phenomenon. Older case material and reports,³ databases from the regional Division: Land Reform offices, and reports from TAs such as the one quoted above show that the fencing of communal lands has been taking place over more than 40 years. The first cases of illegal fencing had already been reported in the early 1970s, when local businessmen began to seek and obtain approval from local chiefs and headman for large areas of communal land to be allocated to them for grazing.⁴ Fencing expanded rapidly in the 1980s and accelerated thereafter. Towards the end of 1990, it was estimated that in the densely populated Oshikoto Region of northern Namibia, between 25% and 50% of the communal land had been fenced off into large private ranches. In parts of some regions, the enclosure of land has now effectively been completed.⁵ The recent Ongandjera TA report confirms what was found during a fact-finding mission in 2011 in Omusati Region, in which one of the authors participated. On the basis of a comparison with the results of the 2011 fact-finding mission and of conversations with many residents in the field and MLR office personnel, the researchers noted that the clear pattern that emerged was that fencing had escalated and intensified.

There is some agreement in Namibian society, as well as in scholarly and grey literature and reports that fencing in communal lands is problematic. Fencing is primarily associated with issues concerning access to key resources. A Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) report published 1991 highlighted that not only have many illegal fences recently been erected, but also that fencing increasingly generates conflict between fencers and non-fencers.⁶

3 Cox, J., ‘The Research Context’, in Cox, Jonathan, Carol Kerven, Wolfgang Werner & Roy Behnke (eds), *The Privatisation of Rangeland Resources in Namibia: Enclosure in Eastern Oshikoto*, Overseas Development Institute, London, 1998, pp. 8–18; Fuller, B., S. Nghikembua & T. Forbes Irving, ‘The Enclosure of Range Lands in the Eastern Oshikoto Region of Namibia’, *SSD Research Report 24*, Social Sciences Division, Multi-Disciplinary Research Centre, University of Namibia, Windhoek, 1996.

4 Cox, J., ‘The Research Context’, in Cox, Jonathan, Carol Kerven, Wolfgang Werner & Roy Behnke (eds), *The Privatisation of Rangeland Resources in Namibia: Enclosure in Eastern Oshikoto*, Overseas Development Institute, London, 1998, pp. 8–18; see also Devereux, S., *Fuzzy Entitlements and Common Property Resources: Struggles over Rights to Communal Land in Namibia*, Institute for Development Studies, Brighton, 1996.

5 Fuller, B., S. Nghikembua & T. Forbes Irving, ‘The Enclosure of Range Lands in the Eastern Oshikoto Region of Namibia’, *SSD Research Report 24*, Social Sciences Division, Multi-Disciplinary Research Centre, University of Namibia, Windhoek, 1996.

6 Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), *Sustainable Livestock Production in the Less Developed Areas of Namibia*, GTZ, Eschborn, 1991.

The title of the chapter suggests that our perspective on illegal fencing as a developmental question is that it is rather similar to the agrarian or land question. The land question literature focuses on land as a key resource, debates the distribution of benefits from the use of the land, and so on.⁷ Identifying fencing as part of the series of development issues and making fencing a central component of the analysis allows us to generate a series of key questions, such as who fences and for what purpose; who benefits most and who is losing out; and perhaps more importantly, what is the social and material effect of fencing and thereby (re) ordering the communal areas. We will not be able to answer questions related to material or ecological changes such as biodiversity loss, soil degradation, and so on.⁸ Our focus is on what fencing does to property and property relations, on processes related to exclusion and the future of the commons in Namibia, and on how the struggle to remove fences is organised. We proceed from the following understanding of fencing:

- 1) Fencing is an act that lays claim to the land and the natural resources on that piece of land, such as water and grass.⁹ This is classically studied under the heading of enclosure of property and privatisation of land.¹⁰ The claim-making is sanctioned by authorities which in turn legitimise the claim.¹¹ This aspect of legitimizing and authority has, as we will see, unfolded in Namibia as an essential instrument in the defence of fencing by fencers.
- 2) Fencing or enclosing land is the material infrastructure that reduces and limits livelihood opportunities for quite a number of communal farmers, who because of the fences have been disconnected from their communally owned and managed land and its related resources. This aspect is usually associated with historical processes of exclusion and dispossession which is for many the reason to associate

7 See for example Moyo, S., 'The Land Question in Southern Africa: A Comparative View', in Ntsebeza, L. & R. Hall (eds), *The Land Question in South Africa: The Challenge of Transformation and Redistribution*, Human Sciences Research Council, Cape Town, 2007, pp. 60–87; Bernstein, H., '“Changing before Our Very Eyes”: Agrarian Questions and the Politics of Land in Capitalism Today', *Journal of Agrarian Change*, Vol. 4, No. 1–2, 2004, pp. 190–225.

8 See, for a first attempt, Verlinden, A. & A.S. Kruger, 'Changing Grazing Systems in Central North Namibia', *Land Degradation & Development*, Vol. 18, No. 2, 2007, pp. 179–197.

9 For a more theoretical explanation about claims and access, see Ribot, J., & N. Peluso, 'A Theory of Access', *Rural Sociology*, Vol. 68, No. 2, 2003, pp. 153–181; Kronenburg García, A.J.N. & H. van Dijk, 'Towards a Theory of Claim Making: Bridging Access and Property Theory', *Society & Natural Resources*, 2019, pp. 1–17.

10 See for example van Sittert, L., 'Holding the Line: The Rural Enclosure Movement in the Cape Colony, C. 1865–1910', *Journal of African History*, Vol. 43, No. 1, 2002, pp. 95–118; Woodhouse, P., 'African Enclosures: A Default Mode of Development', *World Development*, Vol. 31, No. 10, 2003, pp. 1705–1720.

11 This point is eloquently made by T. Sikor and C. Lund in 'Access and Property: A Question of Power and Authority', *Development and Change*, Vol. 40, No. 1, 2009, pp. 1–22.

fencing with issues of privatisation and enclosure, social differentiation, and elites capturing land and resources.¹² Besides, it raises concerns within circles of the Government of the Republic of Namibia (GRN), NGOs, activists and observers of the fencing processes in Namibia that fencing negatively affects herd mobility. Many communal farmers and development practitioners complain that their seasonal transhumance routes have been disrupted.

In other words, fencing drives transformations with intended, but perhaps also with unintended and unwanted consequences. Enduring poverty and the loss of rights to land are important consequences mentioned in the literature, and it is argued that action is required from the GRN with support from the NGO sector to adequately respond to these challenges. Fences manifest that the outcome of these transformations does not provide equal opportunities for all commoners. The former Minister of Lands and Resettlement stated in Parliament on August 1990 that “the fencing of communal land is continuing to endanger the important right of all people in those particular areas to have access to land”.¹³ Despite these political statements and the enactment of the CLRA in 2002, the fencing has increased over the years and the issues that render it problematic have become more and more revealing.

This chapter first presents more recent data on fencing and attempts to explain the process that leads to fences generating problems with development, and access and rights to land. Field visits and the MLR database reveal that not all fences and fencers are alike. We took the categorisation and inherent ordering of the commons that the MLR applies as a starting point for our analysis. The MLR distinguishes between fences on the basis of their legality or illegality, the date of their construction, and whether or not they have been removed. Some of the fences are from before independence in 1990; some have been removed, while some remain in place still despite action taken by the TA or MLR; other fences have even been extended. We add to this that there is also a need to differentiate between the fencers themselves. Some of the fencers are commoners who are or claim to be law-abiding citizens; for others, the label “elites” is fitting. Also, some are from nearby villages, while others are from further afield, and have no prior connection to the land or the village. The section that follows is a sociopolitical analysis of the

12 Tapscott, C. & L. Hangula, *Fencing of Communal Range Land in Northern Namibia: Social and Ecological Implications*, Social Sciences Division, Multi-Disciplinary Research Centre, University of Namibia, Windhoek, 1994; Twyman, C., A. Dougill, D. Sporton & D. Thomas, ‘Community Fencing in Open Rangelands: Self-Empowerment in Eastern Namibia’, *Review of African Political Economy*, Vol. 28, No. 87, 2001, pp. 9–26; Werner, W., “What Has Happened Has Happened”: *The Complexity of Fencing in Namibia’s Communal Areas*, Land, Environment and Development Project, Legal Assistance Centre, Windhoek, 2011.

13 Quoted in Odendaal, W., *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, p. 13.

fencing problem. We explain the processes at play in the communal areas that on the one hand contribute to fencing, or alternatively streamline the struggle against fences. This includes a further expansion of the commodity economy and changes in land use, as well as the post-independence type of state interventions to maintain and reshape the commons as a common property resource. Apart from initiating reforms at the level of land rights, the CLRA of 2002 also contains perspectives for the future of the commons and makes allowance for contestation of decisions related to the construction and removal of fences. In the concluding section, we explain why fences in Namibia are and will remain problematic for some time to come. We argue that this has to do with the upholding of contrasting communal lands development discourses, as well as with the existence of what we refer to as institutional voids.

The data sources for this chapter are multiple. We accessed the MLR Outapi database and read the older case material and reports. We examined the recent report of the Ongandjera TA, and in a week in June 2019 set out to trace and measure the 14 illegal fences in Etilyasa District, in the villages Ombwata A and B, Okeendapa, Oshandumbala and Amarika. Together with a local informant and the headmen and women of the villages, we visited the fenced areas. During our investigations, we tried to measure these fenced areas, determine when they had been fenced, establish whether approval had been sought and granted, and record whether or not the fenced areas were currently in use, and if they were, for what purpose. We tried to establish who the owners of the fenced areas were, and whether they were from the village or from elsewhere. We also interviewed land users in Oshakati and Okahao who felt themselves to be disadvantaged by the fencing activities of others. We interviewed them to gain an understanding of fencing practices and what constitutes being disadvantaged by the erection of fences. We also interviewed the Ongandjera TA Council to establish their experiences of and procedures regarding fencing. The King of Ongandjera, the chairperson and his deputy, senior and deputy councillors, and an advisor to the King were present. This data complements and provides contextual depth regarding what has already been recorded by the MLR for Omusati Region and what was discovered during a fact-finding mission headed by an investigative team from the MLR and the Legal Assistance Centre (LAC) in November 2011.

2 Categorising fences and fencers

The fencing cases which we further investigated from the Ongandjera TA report¹⁴ show that every fence has a story to tell about the dynamics and transformations occurring in the communal areas. No two fences are identical, and they differ with

14 Ongandjera Traditional Authority, 'Identification of Illegal Fences in Ongandjera Communal Area, Okahao, 2018', a report compiled as part of the outcomes of the Second National Land Conference held in Windhoek in 2018.

respect to their age and state of maintenance. Some fencers belong to commoners who are making a part-time living by using communal resources. Other belong to the so-called elites¹⁵ whose aim is to privatise communal areas in order to benefit from their resources. Some of the fences date back to the period before independence, when approval for the erection of fences was given by headman and chiefs. The latter involved decisions that were taken based on their interpretations of customary law concerning land. Some of these decisions were not properly entered in the records of the administration at the time, and these decisions and interpretations of customary law may very well be disputed by the MLR for purposes of the CLRA.

Five of the fences we investigated were not well maintained and required re-erecting to be effective for the purpose they were erected for. The other 10 fences appeared to be well maintained; the fenced land, however, in most cases appeared not to be used, and the “owners” were nowhere to be seen. None of the 15 fenced fields we inspected showed any sign of agricultural use at all – no cattle were grazing, and no *omahangu* had been planted. Regarding *omahangu* cultivation, the Ongandjera TA notes that there are two categories of fencers, and this was confirmed by our visits. It is important to point out that most of the fences listed in the Ongandjera TA report had been erected by people that were not from the village. They had no kinship or other relationship with the village where they had asked for permission to fence a piece of land for either a cattle post or an *omahangu* field. One of the headwomen who accompanied us to the field mentioned that the “outsiders” come with a letter from the headman in their village stating that there is a shortage of land (see Annex 1 for an example of such a letter). With this letter, they seek permission from the headman/woman of the village to fence a piece of land. This is usually granted, the headwoman said, as they cannot deny people access to land. They go out and stake the land together, and the fences are erected. Initially, the plots are not larger than 50 ha, as specified in the CLRA. Of the illegal fences that are known to and reported by the Ongandjera TA,¹⁶ most were erected by outsiders and have been expanded beyond the 50 ha without any permission having been sought. The fencing erected by outsiders, in particular, may be instances of people claiming land for future use or for speculative motives. “Locals” also request permission to erect fences, and stake a piece of land with their headman in the same manner, but this does not always mean that the fencing is erected in accordance with the provisions of the CLRA. One of the illegal fences we examined in the Okahao area was erected by a local resident enclosing a communal grazing area which includes a

15 *The Namibian*, 15 June 2015, alerts the reader in a front-page article that ‘Army commander fences off communal land’. Similarly, *Namibian Sun* published a news item on 2 February 2013 headlined ‘Pensioner accuses government official of snatching his land’. The official allegedly fenced an area of 2 000 ha.

16 Ongandjera Traditional Authority, ‘Identification of Illegal Fences in Ongandjera Communal Area, Okahao, 2018’, a report compiled as part of the outcomes of the Second National Land Conference held in Windhoek in 2018.

GRN-constructed water point. Before it was fenced, the grazing area was frequently used by several cattle owners that had long collaborated in a cattle post system. After the fence had been constructed, the cattle post partners were denied access to grazing and water. When interviewed about this illegal fence and how it affects their cattle rearing, the former partners pointed out that they had not yet launched a lawsuit as they hoped to be able to settle the matter out of court. They had brought it to the attention of the MLR, however.

The MLR distinguishes between four categories of fences for its fencing policies.

The first category is that of **fences that were erected before the promulgation of the CLRA**. The fenced areas range between 120 ha and 5 000 ha. These were reported to the then MLR North-North West Regional Office in Oshakati on 19 December 2001 by a whistle-blower. In 2003, the Ongandjera TA issued notices requiring the removal of illegal fences erected by 10 fencers, as per section 44 of the CLRA. The fencers challenged the decision of the TA, and on 16 February 2006, they applied through their legal representative to the Omusati Communal Land Board (OMUCLB) for the retention of their fences. They claimed that they had been allocated the land and authorised to fence it by the Ongandjera TA. Upon scrutinising the applications, however, the OMUCLB realised that the applications had not been consented to by the TA. Several communications were issued by the Ongandjera TA in an attempt to clarify its position on the legality of the fences, but to no avail, as the TA members were divided on the matter. Meanwhile, the existence of these fences without legal authorisation as per section 28 of the CLRA has created a precedent that has encouraged other farmers to start fencing land illegally in other areas of the region. Moreover, the existence of these fences continues to be objected to and questioned by other community members who graze in the same areas. The Ongandjera TA is thus under increasing pressure to provide a clear explanation and to give direction as to what should be done with these illegal fences.

It is rumoured that one of the fencers in this category was a top GRN official in the MLR who advised friends and business associates to acquire large tracks of land before the CLRA was enacted. Some of the fenced lands contain GRN-funded and constructed boreholes. The Department of Water Affairs is silent about the way in which GRN resources are said to have been captured, and it does not interfere.

The second category is of **fences that were erected after the promulgation of the CLRA**. The lands that are fenced off are all situated in areas that are designated as communal. These range in size from 70 ha to 300 ha. The areas fall under the Vita TA in Ruacana Constituency. The fences were reported by villagers who grazed their livestock there and complained about reduced access to good grazing land. Since 2010, these cases have been dealt with by the OMUCLB. Following section 44 of the CLRA that specifies that communal lands should not be fenced, the Board ordered fencers to remove their fences. However, they have remained defiant, and the fences remain intact. Some of the fencers reduced the extent of their fenced areas (e.g. from 300 ha to 70 ha or 30 ha) in an attempt to escape legal consequences. They also

wrote to the OMUCLB requesting to be allowed to fence off lands up to 50 ha, which is now the permitted size as per the CLRA. The Board has requested the Vita TA to seek clarity on the land uses of the area. In 2010, the TA informed the OMUCLB that the area is used for grazing and that the area for cultivating and fencing is in Volwater, where communities can till. The matter has still not been resolved, and the Board is said to be closely monitoring the situation.

One of the fencers challenged the decision of the Board by appealing to the Minister. The Appeal Tribunal sat on 28 May 2019. The case is, however, still pending. This particular fencer fenced large tracks of land in the areas designated for communal grazing and in the area where customary land is to be allocated to other Namibian land seekers at Oluhalu in the Uukwaluudhi TA region. He was allocated 16.8 ha in 2013 and went on to expand to 189.11 ha, but without the TA's permission. He allegedly bribed the assistant of the village headman with a sum of N\$1,800.00 (see Annex 2 and Annex 3 for a situational sketch of the case and the corresponding communication between the Board and the lawyers of the fencer). The headman's assistant has no power to allocate land without the headman's knowledge. He managed through bribery to arrange all this because the headman was blind. The headman meanwhile passed away. The extended allocation is not registered in the village books and not reported at the TA's head office. The extension he argued is for his 4 sons and daughters who currently live in Sweden and are adopted by a Swedish national and who carry his surname. This case was reported by Uukwaluudhi TA to the OMUCLB to intervene. This happened after the Board approached all the fencers who have excess land at the village and who are occupying grazing land without permission. The Board investigated in July 2016 and decided he should remove his fences and reduce the fenced area to the original 16.8 ha he had legitimately been allocated by the headman. He was not happy with the Board's decision and appealed to the Minister as per the provisions of the CLRA. The appeal tribunal sat in June 2018 and was postponed and again later to 31 August 2018. The appeal tribunal finally sat again on 28 May 2019 then and the results are not communicated yet. The Board is still in communication with the rest of fencers in this category and MLR expects that these will be removed eventually.

A third category is of **illegally erected fences located in an area designated for agricultural purposes as per section 30(2)–(3) of the CLRA**. The area in question is customarily grazed by members of the Owambo and San communities. The intention of these fencers was to become members of the Project of Communal Land Development Cooperatives, for which the GRN has provided infrastructure consisting of water points and perimeter fences. They hoped that once completed, the fencing would enable them to reap the benefits of GRN investments. They effectively leapfrogged those farmers who had been farming in the area for a long time, and who had already been identified and listed as beneficiaries under this scheme during the planning process (their names are recorded in the Cooperative Registration Documents with the Division of Cooperative Development and Regulation at the

Ministry of Agriculture Water and Forestry. The current fencers were never part of that process, and they are depriving other farmers of their grazing rights and the use of the commonage. The TA and the Land Board are currently notifying the fencers that they are required to remove their fences from the community project areas. A number of cases dealt with at the Appeal Tribunal¹⁷ between 2010 and 2014 concerned appeals against decisions of the relevant institutions requiring the removal of fences that had been erected. In most cases, the appeals were rejected as the fencers had erected fences in zones designated for communal grazing.

The fourth category is that of **fences that were successfully removed, either voluntary or pursuant to a court order**. The communications that are available about voluntary removals show that, as one interviewee commented, “people want to be and are law-abiding people and citizens”. There are seven cases within the Vita TA in Ruacana Constituency where fencers were first served with 30-day notices to remove their illegal fences. This was followed by an awareness-raising meeting on the CLRA held on 25 January 2013, and attended by fencers, the OMUCLB, the Outapi prosecutor, affected TAs, and the Namibian Police. At the end of the meeting, fencers were issued with the final removal notices which informed them that should they fail to comply, the Board would take steps to remove the fences. Three fencers decided after this to voluntarily remove their fences, and notified the Board accordingly in writing.

Four fencers appealed to the Minister of Lands and Resettlement against the Board decision, however, whereupon the Minister appointed a three-member Appeal Tribunal who reviewed the case and dismissed the appeal. The fencers were not happy with the outcome and now appealed against the Minister’s decision to the High Court. The High Court heard the appeal and ordered the fencers to remove their fences as they had not been erected in accordance with the provisions of the CLRA. The court order was issued to the Board on 3rd April 2014 with instructions to remove the fences. While preparing the procedures to remove the fences, the four fencers called the Board’s Secretary at the beginning of October 2014 requesting the Board to allow them to remove the fences themselves. They were informed by the Secretary to put this in writing and channel the communication through the Government Attorney Offices. They did so through their lawyer, indicating that the fences would be removed by 31 December 2014. The Board had no objection and so it allowed the fencers to remove their fences themselves. However, and to the Board’s surprise, the fencers did not adhere to this agreement, and when its representatives visited the area on 2 January 2015, they found that all four fences were still intact, and that there was no indication of even an attempt having been made to remove a single wire or pole.

17 Republic of Namibia, Ministry of Lands and Resettlement & Land, Environment and Development Project of the Legal Assistance Centre, *Appeal Tribunal Cases in Namibia’s Land Reform Process: Record of Decisions 2010–2014*, MLR/LAC, Windhoek, 2014.

The Board wrote to the Attorney General with a brief visit report, indicating that they intended to remove the fences due to the fencers' failure to honour their agreement. The Attorney General agreed and ordered the Board to remove these fences. In March 2015, following an open tender process, the MLR appointed a contractor, and the fences were removed. The costs of the operation were recovered by the sale of the fencing materials.

3 Background to the fencing problem

The fencing problem is complex and multidimensional, and can be viewed from differing perspectives. Various stakeholders such as communal farmers, headmen, chiefs, MLR officials, NGOs, conservancies and businessmen, perceive fencing differently. To unravel the complexity, we situate fences and the act of fencing in the context of, on the one hand, the ongoing processes of the social and material transformation of the communal areas of Namibia; and on the other, vis-à-vis the attempts of the state to maintain the communal areas as a common property resource, thereby preventing the privatisation of the commons.

The transformation of the communal areas is itself multidimensional, and set in motion by a series of state interventions such as land and agrarian reform policies, and programmes aimed at reducing poverty which triggered a neoliberal process of development that gives prominence to the markets as an institution governing the use of resources. These policies, in turn, accommodated new opportunities for some but certainly not all the inhabitants of the communal areas to enhance their livelihoods. The new policies are embedded and governed by a set of institutions (e.g. TAs, communal land boards (CLBs)); it is assumed of such institutions that they possess power and authority over land and resources matters in communal areas and that the interpretation of statutory and customary laws and rights is commonly shared.

The transformations and interventions that occur have winners and losers and have created institutional confusion as authority and power over land and resource issues has gradually but varyingly shifted from TAs to elite and business networks. Fencing implies changing ownership of communal land and makes the owner the de facto sole user of that land. Communal land is, as we have pointed out earlier, increasingly under pressure of privatisation through a process of illegal fencing. Fencing does not allow inclusive development and growth. It deprives others of access to land and the resources it contains, such as water and grass.¹⁸

18 Odendaal, W., *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; Fowler, M., 'The Current Status and Impact of Fencing in the Communal-Tenure Areas of Northern Namibia', *Agrekon*, Vol. 37, No. 4, 1998, pp. 435–462; Werner, W., *What Has Happened Has Happened: The Complexity of Fencing in Namibia's Communal Areas*, Land, Environment and Development Project, Legal Assistance Centre, Windhoek, 2011.

3.1 Transforming the communal areas “from within”

Residents of communal areas attempt to transform and reshape the areas in which they live. Putting up fences is a further instance of the commoditisation of cattle and natural resources and an attempt to reshape the communal areas. The transformation that occurs regarding land, land use and rights over land exhibits two distinct patterns enacted by two different categories of social actors that inhabit the communal areas, and who can claim rights to communal land. Fencing serves for some to demarcate one's land and to claim usufruct; for others, fencing off land implies claiming ownership (i.e. privatising land ownership) and in effect also claiming land for future use. Some of the social actors may be considered as “commoners” who use the communal areas as a common property resource for their customary practices of cultivating *omahangu* and grazing cattle. Some command substantial societal, financial and political powers and can transform the communal landscape to suit their aspirations and interests. These are “elites” for whom fencing off large tracks of land is part of their material means to reshape the communal landscape and to de facto privatise the land. These elites have the means (e.g. vehicles to scout the area for “empty” land and the political connections and resources to bribe local authorities) that allow them to construct fences illegally. They are in most cases absentee “landowners” who leave the management of cattle to hired herders or farm workers and combine their farm and non-farm capital sources to continue livestock operations.¹⁹ They are seemingly well connected to influential politicians in Windhoek and at the same time maintain good relationships with the local tribal authorities. Before independence, TAs were responsible for granting permission to fence communal land. There is some evidence that, in contrast to the experience of elites, for commoners it was not always so easy to get permission to enclose land. Fencing thus tells us something about power relations between “fencers”, “commoners”, chiefs and headmen.

One can also argue that fencing is part of an environmental strategy by communal landowners. Fencing for them means preventing others from invading community land to access their water and grass resources.²⁰ Such fencing is defended as a response to drought conditions aimed at protecting their resources for the future.

The communal areas have for long been managed and owned collectively. The system of communal tenure ensured that every homestead had access to land.

19 Cox, J., ‘The Research Context’, in Cox, Jonathan, Carol Kerven, Wolfgang Werner & Roy Behnke (eds), *The Privatisation of Rangeland Resources in Namibia: Enclosure in Eastern Oshikoto*, Overseas Development Institute, London, 1998, pp. 8–18; see also Greiner, C., ‘Migration, Translocal Networks and Socio-Economic Stratification in Namibia’, *Africa*, Vol. 81, No. 4, 2011, pp. 606–627.

20 This point is made by C. Twyman, A. Dougill, D. Sporton and D. Thomas in ‘Community Fencing in Open Rangelands: Self-Empowerment in Eastern Namibia’, *Review of African Political Economy*, Vol. 28, No. 87, 2001, pp. 9–26. The extent to which this occurs is unknown and requires scrutiny.

Landowners and users customarily established homesteads and constructed cattle sheds and fields for cultivating *omahangu*. Cattle ownership was rather skewed, forming the basis for social differentiation processes and informal wage labour relations.²¹ Cattle ownership and the distribution of cattle are difficult to measure, partly because of huge variations over time due to drought, and partly also because of a complex loan system whereby “poor” homesteads “own” cattle on loan from relatively “rich” homesteads. Managing the herds occurs individually or collectively in the cattle post system. Smaller and bigger herds are merged and jointly herded. These were usually established in the flood plains, notably during the long dry period from June to December. To conserve precious water and forage resources during the dry period, herdsmen herd the cattle to distant cattle posts outside of the Owambo floodplain until the return of the rains.²² Whereas the homestead areas are restricted in terms of access, the grazing areas are open access areas with no restrictions placed on the movement of people and their cattle, or on game. Fencing restricts this kind of mobility, and it is this loss of mobility that motivates most people who report fencing activities to the headman or the TA.

At the same time, due to the deepening of a commodity economy which is also a result of increasing cross-border trade with Angola since the end of the civil war, new opportunities for generating monetary income emerged which could serve as the basis for further accumulation through investments in cattle, shops, small businesses and acquiring shares in companies. While previously, such accumulation was restricted to seeking opportunities in communal farming,²³ GRN positions (as teachers, etc.) or labour migration to Windhoek or commercial farming areas, communal mining and tourism have since expanded opportunities for collectives and individuals to generate monetary incomes. New business opportunities, investments by Chinese entrepreneurs, trade across borders, and new types of jobs (notably in GRN departments) have fuelled the growth of cities like

21 Werner, W., ‘A Brief History of Land Dispossession in Namibia’, *Journal of Southern African Studies*, Vol. 19, No. 1, 1993, pp. 135–146; see also Clarence-Smith, G. & R. Moorsom, ‘Underdevelopment and Class Formation in Ovamboland, 1845–1915’, *Journal of African History*, Vol. 16, No. 3, 1975, pp. 365–381; Werner, W., ‘What Has Happened Has Happened’: *The Complexity of Fencing in Namibia’s Communal Areas*, Land, Environment and Development Project, Legal Assistance Centre, Windhoek, 2011.

22 Kreike, E., *Re-Creating Eden: Land Use, Environment, and Society in Southern Angola and Northern Namibia*, Heinemann, Portsmouth, 2004; and ‘De-Globalisation and Deforestation in Colonial Africa: Closed Markets, the Cattle Complex, and Environmental Change in North-Central Namibia, 1890–1990’, *Journal of Southern African Studies*, Vol. 35, No. 1, 2009, pp. 81–98. The dry-season cattle-post areas in the 1890s included the Kaokoveld to the west of the floodplain, Etosha Pan to the south and Oshimolo to the northeast.

23 Euphemistically, communal farming is always associated with subsistence farming. Subsistence is analytically an inadequate qualification for portraying the cattle economy in the north-central regions. See for instance Kreike, E., ‘De-Globalisation and Deforestation in Colonial Africa: Closed Markets, the Cattle Complex, and Environmental Change in North-Central Namibia, 1890–1990’, *Journal of Southern African Studies*, Vol. 35, No. 1, 2009, pp. 81–98.

Outapi, Oshakati and Oshikango.²⁴ Moreover, the establishment of a community-based natural resource management (CBNRM) programme²⁵ stimulated a further circulation of money in the communal areas – money that people seek to invest in assets. Land and cattle are important assets forming the basis for two types of development trajectories:

- **Development based on accumulation through commercialising cattle for national and global markets:** Excluding communal farmers and other commoners from productive and well-watered grazing areas is the core of the strategy of the accumulators owning large numbers of cattle.²⁶ Fencing reduces the number of cattle that utilise existing water points.²⁷ Fencing also advances cattle production beyond previously existing levels of production and productivity.
- **Development founded upon a homestead economy:** This is based on local forms of exchange to secure food for the homestead and money for buying food in local supermarkets and for school fees and education. Access to good grazing areas in the dry period as well as government constructed water points is essential for the homestead economy.

These two ideal type trajectories of development occur side by side in the north-central regions and elsewhere in the country. To varying degrees, both trajectories structurally and historically involve straddling positions in the rural economy as land and cattle owners, and in an urban economy in wage labour positions in the region as well as in the capital Windhoek. These two trajectories of development, we argue here, can also be associated with the two distinct patterns of fencing, as well as with two different types of fencers.

24 For a detailed analysis of these processes, see the work of Gregor Dobler: Dobler, G., 'From Scotch Whisky to Chinese Sneakers: International Commodity Flows and New Trade Networks in Oshikango, Namibia', *Africa*, Vol. 78, No. 3, 2008, pp. 410–432; 'Oshikango: The Dynamics of Growth and Regulation in a Namibian Boom Town', *Journal of Southern African Studies*, Vol. 35, No. 1, 2009, pp. 115–131; 'The Green, the Grey and the Blue: A Typology of Cross-Border Trade in Africa', *Journal of Modern African Studies*, Vol. 54, No. 1, 2016, pp. 145–169; and 'China and Namibia, 1990 to 2015: How a New Actor Changes the Dynamics of Political Economy', *Review of African Political Economy*, Vol. 44, No. 153, 2017, pp. 449–465.

25 We will not go into the dynamics generated by the CBNRM programme in the country. For an overview, see for example Nuulimba, K., & J. Taylor, '25 Years of CBNRM in Namibia: A Retrospective on Accomplishments, Contestation and Contemporary Challenges', *Journal of Namibian Studies: History Culture Politics*, Vol. 18, 2015, pp. 89–110.

26 Available data on livestock show that ownership is concentrated in a few hands.

27 Klintonberg, P. & A. Verlinden, 'Water Points and their Influence on Grazing Resources in Central Northern Namibia', *Land Degradation & Development*, Vol. 19, No. 1, 2008, pp. 1–20.

3.2 Government interventions to reform the communal areas

Fencing and the struggle to remove fences should also be situated in the post-independence drive to embrace the communal areas of the country in the land and agrarian reform process and to stimulate processes of social transformation and market-oriented development. The CLRA aims to secure land rights for the communal land user; hence communal farmers, both men and women, are asked to claim their communal and customary rights to land in the process. Securing such rights should provide the inhabitants of the communal area with security of access to key resources, enabling them to participate in the commodity economy and get a fair share of the proceeds from nature. Land and agrarian reforms and the implementation of the CBNRM programme serve to support these objectives.

The CLRA also sets out to jointly maintain the social and physical landscape that shapes customary land use practices and to create opportunities for commoditising land and cattle. The CLRA specifically and intentionally contains a zonation policy to maintain and create space for homestead agriculture (that is keeping cultivation close to the homestead in the villages, and specifically for cultivating *omahangu*). The fencing of fields up to 50 ha is allowed. These are separate from zones for cattle farming, where farmers can either individually manage their cattle or make use of the cattle post system for joint herding. These should remain open access zones where no restrictions on the movement of cattle are in place. The zonation policy also serves to concentrate the supply of services (water, electricity, extension, clinics) close to existing villages. To encourage sustainable land management, the GRN has intensified the construction of water points for cattle. Fencing complicates the implementation of the zonation policy and the maintenance of the customary land use system in the communal areas. This explains why the GRN, notably the MLR with assistance from the CLBs and TAs, is keen to remove the fences.

3.3 Institutional repertoires and fencing

The period leading up to independence in 1990 is characterised by the absence of a clear land policy and the lack of customary land rights in the communal lands of the country. The lack of a legislative framework at the time and the formulation of reform policies provided, and still provide, ample space for fencing communal land illegally,²⁸ in this way subtly reinterpreting customary rights to (grazing) land. Fencing thus occurs in the politico-economic arena where different actor groups (elites, commoners, state bureaucrats and NGOs) operate, collide and struggle with each other on how to organise access to and the use of natural resources like land, grass and water. This unfolding arena is not static – it evolves and is heterogeneous.

28 This point is made by W. Odendaal in 'Elite Land Grabbing in Namibian Communal Areas and its Impact on Subsistence Farmers' Livelihoods', *PLAAS Policy Brief No. 33*, 2011, pp. 1–7.

Not all TAs and CLBs operate in similar ways. More importantly, the CLRA provides the institutions responsible for the management of communal areas and resources with the legal means to remove illegal fences. However, this is not always achieved, as the fencing cases reported below will indicate. This is partly because of the role of the TA is not always clear, because TAs are not always aware of their powers, and because not all members of TAs understand and interpret customary rights to land and fencing in similar ways. On top of that, there are reported disputes over boundaries between TAs.²⁹ For example, the boundary between Ongandjera TA and Uukwambi TA is currently disputed. These disputes and the way some TAs handle cases of illegal fencing create more space for yet more fencing. It can thus also be associated with the problem of the CLRA not being enforced.

Based on the interview we held with Ongandjera TA members, we can unpack the constitution of what we understand as the institutional void. The ongoing disputes mentioned earlier constitute only one aspect of the institutional void. Other key elements, as the Ongandjera TA members admitted, are that it took time for them to understand the law, and the CLRA in particular. They hastened to add, however, that by now they do know what illegal fencing is and how the TA should act. The TA managed to remove around 10 illegal fences in Okaanka and Onanyalala villages and auctioned the material to recover the costs. These are listed in the report sent to the MLR which we consulted. However, other fenced lands are situated in the area over which the Uukwambi TA also claims authority. The removal of these fences was stopped by the office of the Omusati Governor with the assistance of the Namibian Police. The Governor instructed the two TAs to first resolve their dispute, and both were instructed to refrain from allocating any land in the disputed area. In other areas, the TA's decisions to remove fences are contested by the fencers, as they argue that their fences were erected prior to the promulgation of the CLRA. It remains unclear, however, whether, how and from whom the fencers received permission at the time, as the records are unclear. The TA acknowledged that the headmen and headwomen who play a key role in the allocation of land rights, and thus fencing, are not always or equally equipped with the means to administer and monitor fences. They referred to situations where fences are erected in the bush far away from the village and they do not have the resources to monitor the construction. Moreover, the TA admitted that the administration and recording of *ombanduyekaya* (the administrative fees paid to the TA in the north-central regions for land allocation) before and also after the CLRA became law was often incomplete and not transparent. In defence of the TA, some illegal fencers also fenced the land without even informing headmen or head women. The TA is aware that fencers also sell off parts of the land at a later stage, despite the fact that the law prohibits the sale and purchase of communal land.

29 See also Dobler, G., 'Boundary Drawing and the Notion of Territoriality in Pre-Colonial and Early Colonial Ovamboland', *Journal of Namibian Studies: History Politics Culture*, Vol. 3, 2008, pp. 7–30.

One other interesting aspect mentioned by the TA council was that headmen, headwomen and villagers alike have been discouraged from reporting illegal fences because they feel that not much is being done to address their complaints. Fences are not always removed when they submit their reports to the TA, CLB or MLR. It is felt that the responsible authorities are not enforcing the law. They also said that fencers are not afraid of the law and they can do as they wish, as they know it takes long before a fence is removed.

4 Discussion

The bigger picture we argue here is that the state has, perhaps unintentionally, created an institutional space in which the illegal fencing problem can flourish. In this section, we pay specific attention to the fact that the state has created a policy and legal framework for both the contestation of findings and the defence of offences. We also argue that there is a development policy dimension that ensures that the fencing continues to emerge as problematic, creating the basis for ongoing conflict.

A fascinating dimension of the fencing problem that triggers the sociological imagination is that fences can be both contested and defended, both socially and legally. The CLRA, notably in sections 28 and 44, provides the MLR, the CLB's and TAs with the legal means to order offenders to remove the fences. Section 39(1) of the Act also provides that "any person aggrieved by the decision of a Chief or Traditional Authority or any board under this Act, may appeal in the prescribed manner against that decision to an appeal tribunal appointed by the Minister for the purpose of the appeal concerned."

Fencing and the struggle against or in favour of fences thus produces court cases, appeal court cases and legal hearings. The fencing struggles takes place in multiple ways with multiple forms of discourse³⁰ and in multiple sites. The defending occurs mostly in lawyers' offices and courtrooms, with judges interpreting the law and lawyers defending their clients' interests. It can be argued that the defence of fencing is also silently manifest in the floodplains of the communal north, in that individuals, mostly elites of some sort, are simply erecting and extending fences without permission, or circumventing the rules and regulations. There are plenty of rumours of fencers not paying *ombanduyekaya* and of the fees that are paid not being recorded in the books of the TA, as effectively confirmed in the interview with the Ongandjera TA Council. That most fences in the Ongandjera TA report were not known to the MLR office in Outapi and were therefore not recorded in the

30 The notion of discourse classically refers to texts such as policy documents and laws. Policymakers fix their views in policy documents and laws. The CLRA of 2002 is a perfect example. However, we also treat and interpret discourse as a practice (e.g. land use). The practices of land use and the way actors talk about it and act can also be taken as an indication of how they perceive (in different ways) the future of the communal lands. See MacDonald, C., 'The Value of Discourse Analysis as a Methodological Tool for Understanding a Land Reform Program', *Policy Sciences*, Vol. 36, No. 2, 2003, pp. 151–173.

department's GIS (geographic information system) lends support to the rumours. The contestation of the fences also occurs through villagers talking about fencing and pointing out illegal fences, but not taking any action. In some cases, however, the contestation occurs openly. Villagers report illegal fences to their headmen or headwomen; MLR officials measure and document the illegal fences; in various ways, TAs take fencing seriously and take steps to remove them.

The quote at the opening of the chapter signifies a key institutional dimension of the fencing problem in the communal areas of Namibia: they are mostly constructed without the consent of the authorities. Furthermore, in situations where permission has been granted by a headman/woman or a chief, the fenced areas have been gradually enlarged afterwards without any permission having been obtained. On the one hand, because of the flaws in the systems for recording illegal fences, the full extent of the problem is not known. If a fence is not filed in the MLR databases as "illegal", there is unlikely to be any institutional pressure to pursue legal actions to have it removed. On the other hand, the various actions undertaken to have illegal fences removed, and the differing degrees of success such actions have met with, point both to the limitations on the enforceability of the CLRA and to the existence of institutional voids and overlapping spheres of authority.³¹ Not all institutions operate as the CLRA specifies in the endeavour to remove illegal fences, nor are the institutions sufficiently equipped to perform their roles in the removal of fencing. An additional aspect, which may in turn aggravate the existing institutional voids, is that so-called "elites" (e.g. businessmen and people with good political connections in Windhoek or with the TA) are among the illegal fencers. The TA stated in communications with us that they are sometimes threatened by fencers who send letters written by their lawyers. This also signifies the kinds of sensitivity fencing and fencers generate.

Ribot³² and Bierschenk and Olivier de Sardan³³ argued that many states in Africa have transferred or shifted authority from the central state to local bodies and institutions of governance and given these a pivotal role in land governance (e.g. the TAs and CLBs in Namibia), but have failed to set up adequate institutional infrastructure that is required for local institutions to deal with land issues

31 See the work of Bierschenk, T. & J.P. Olivier de Sardan, 'Local Powers and a Distant State in Rural Central African Republic', *Journal of Modern African Studies*, Vol. 35, No. 3, 1997, pp. 441–468; and Bierschenk, T., 'Powers in the Village: Rural Benin between Democratisation and Decentralisation', *Africa: Journal of the International African Institute*, Vol. 73, No. 2, 2003, pp. 145–173.

32 Ribot, J., 'Democratic Decentralisation of Natural Resources: Institutional Choice and Discretionary Power Transfers in Sub-Saharan Africa', *Public Administration and Development*, Vol. 23, No. 1, 2003, pp. 53–65; and Ribot, J.C., *Waiting for Democracy: The Politics of Choice in Natural Resource Decentralization*, World Resources Institute, Washington D.C., 2004.

33 Bierschenk, T. & J.P. Olivier de Sardan, 'Local Powers and a Distant State in Rural Central African Republic', *Journal of Modern African Studies*, Vol. 35, No. 3, 1997; Bierschenk, T., 'Powers in the Village: Rural Benin between Democratisation and Decentralisation', *Africa: Journal of the International African Institute*, Vol. 73, No. 2, 2003, pp. 145–173.

(for example allocating land and settling land disputes). This makes it difficult for institutions dealing with matters associated with land to react adequately to the claims and disputes brought forward by the various actors involved. The resulting ambiguity creates room for manoeuvre, especially for those that have the means, technically and financially, to devise extra-legal strategies to gain access to resources and de facto ownership through the exclusion of others. The fencing problem in Namibia attests to this.

Erecting fences and the social struggle against fences represent diametrically opposed institutionalised and entrenched views and interpretations about how to use land and other natural resources. Netz³⁴ and Razac³⁵ associate fences and fencing (or the extension of barbed wire in the landscape) with the tensions that unfold when modernity spreads. Fences stand for both the enclosing or demarcating of land and the controlling (i.e. restricting or managing) of mobility and the space of human and non-human actors. The wider southern African region has since the times of colonial expansion been the stage of the construction of fences in what were then communally owned and managed territories.³⁶ Their construction and expansion generated violence and conflict between and amongst human actors regarding the interpretation of what constitutes modernity for the communal lands which we previously associated with two distinct, co-existing development trajectories: accumulation, and homestead production. The potential conflict between these two futures of the commons profoundly involves many social actors. In Namibia these include various categories of cattle owners, local San communities, conservancy members, GRN departments and officials, and NGOs. The control exerted over space through fencing is at the forefront of the fencing problem, and encompasses the clash between different forms, interpretations and means of bringing about modernity and development in the northern communal areas, and Namibia at large. The fencing off of parts of the commons is evidence that social exclusion also occurs in collective systems and not only in systems where property is regulated by private, state or associative relations.³⁷ In essence, the fencing-related court cases initiated by the enforcement of the CLRA are about the questions: “Whose modernity counts?” Whose future is deemed to be more important in the communal areas?³⁸ Is it the future of the fencers, whether elite

34 See Netz, R., *Barbed Wire: An Ecology of Modernity*, Wesleyan University Press, Middletown, Connecticut, 2004.

35 Razac, O., *Barbed Wire*, New Press, New York and London, 2002.

36 See for example van Sittert, L., ‘Holding the Line: The Rural Enclosure Movement in the Cape Colony, C. 1865–1910’, *Journal of African History*, Vol. 43, No. 1, 2002, pp. 95–118.

37 For a summary of the debate see Shucksmith, M., ‘Class, Power and Inequality in Rural Areas: Beyond Social Exclusion?’, *Sociologia Ruralis*, Vol. 52, No. 4, 2012, pp. 377–397.

38 The making of modernity or the mutation of modernity is well elaborated and problematised by Alberto Arce and Norman Long in ‘Reconfiguring Modernity and Development from an Anthropological Perspective’, in Arce, Alberto & Norman Long (eds), *Anthropology, Development and Modernities: Exploring Discourses, Counter-Tendencies and Violence*, Routledge, London, 2000,

or commoners; or of those that struggle against fences; or of those from the MLR and related GRN institutions and ministries that formulate policy documents and interventions advancing their visions regarding the future of the communal lands? The overarching question, then, is whose modernity counts.³⁹ Fencing only further complicates that question.

5 Conclusion

The fencing problem has multiple dimensions. It embodies the problem of overlapping and conflicting spheres of authority, power relations and the capture of resources by elites, and multiple legal contexts in the communal areas. These are the by-products of the creation of new institutions following the decentralisation of resource management after independence to local and regional institutions such as the CLBs, TAs and regional MLR offices, but also a private business network strategically associating itself with the state. The fencing brings to the fore the ambiguities that neo-liberalism generates. State policies generate both spaces for social inclusion and the protection of (land) rights through the promulgation of the CLRA. The CLRA, combined with agricultural support for the further commoditisation of the (rural) economy simultaneously creates spaces for elites to emerge and to invest in land and related resources for accumulation, often at the expense of others. This is a global trend. Besides, the question of how to interpret customary laws about land and usufruct and whose interpretations are taken as a guide for solving the fencing problem emerge as key political questions in post-colonial Namibia. The fencing question will endure as long as the institutional void exists. It is good to have good laws, but if these are subject to inconsistent interpretation and can be manipulated in many ways, illegal fencing will remain an intractable problem.

The fencing question raises an additional issue that requires further consideration and elaboration. Fencing, we feel, challenges the optimistic view on land management that communal farmers (i.e. herders, agriculturalists, natural resource harvesters, fisherfolk) are rational resource users that design ways to sustainably exploit and maintain their common property resources. The conflict and struggles that fences generate is at least evidence of the uncertain future of the communal lands, and raises the question of whether they should be managed collectively or privately for purposes of production, grazing and conservation. It may also be that a combination of collective and private management defines the future of the communal lands, although such systems are not always so easily combined.

pp. 1–31. See also Hebinck, P., L. Bosma & G.J. Veldwisch, 'Petrol Pumps and the Making of Modernity Along the Shores of Lake Victoria, Kenya', *Water Alternatives*, Vol. 12, No. 1, 2019, pp. 13–29.

39 Here we paraphrase Chambers, R., *Whose Reality Counts? Putting the First Last*, Intermediate Technology Publications, London, 1997.

Acknowledgements

We thank Matheus Nuukunde from the Outapi MLR office and Samwel Martin from Etilyasa village for their insights into the fencing question and support during the field visits to the fenced sites.

