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Land and grazing disputes and overlapping authorities in Namibia

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ABSTRACT

Illegal grazing and the fencing of land by livestock owners, elites and non-elites alike is endemic in Namibia. Fencing violates the Communal Land Reform Act of 2002. Court cases are held to stop the illegal use of land. The institutions that according to the Act have the authority to stop these practices do not perform accordingly and their authorities frequently overlap. The legal battle to remove fences or stop illegal grazing evolves as more than a struggle for justice. The case unfolds as an ontological struggle between actors, their institutions and respective policies and discourses, pivoting on conflicting visions of modernities and interpretations of the meaning of land.

KEYWORDS

Fencing; Namibia; authority; land disputes

The purpose of this paper is to reflect on the role of legal pluralism and what the discipline contributes to understanding the struggle of the commons in the global South. I take examples from my work in Namibia about illegal fencing and grazing to draw attention to the intended and unintended consequences of a recently reformed communal land governance structure in Namibia consisting of Communal Land Boards (CLBs) and Traditional Authorities (TAs). After the Communal Land Reform Act 5 of 2002 (CLRA) was approved by Parliament and consequently enacted (Republic of Namibia, 2002). The CLRA to date codifies land-people relations in communal areas, notably the allocation and registration of land rights. CLBs and TAs are assigned to perform key roles in the communal land governance and administration, 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 CLRA 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 in designing institutions that are supposed to collaborate unfolds in front of our eyes. Building institutions is not a linear, straightforward

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process. The reality, as legal anthropologists have shown that these newly created institutions do not always or cannot perform their tasks as the reform-intended laws stipulate. In some situations, there is a rivalry between the CLB representing the new democratic institutions and the TA as examples of "traditional" institutions. The rivalry occurs because their authorities overlap, creating confusion. In other situations, the CLBs or TAs do not perform their tasks or do not know how to handle situations of conflict or lack the proper authority, expertise, experience, and human capacity to act. In other situations, other newly created institutions have emerged, such as Conservancy Committees, and claim authority over land questions.

We explore here the institutional complexities of land governance in Namibia's communal areas against the background of the recurrent disputes about land and natural resources, notably the "illegal" construction of fences and the "illegal" grazing of cattle. While legislation dealing with fencing has been in place since in 2002 the CLRA has been approved, addressing the issue of illegal fencing has been a slow process and illegal fences continue to be reported. They remain a source of conflict in the communal areas of Namibia. The legal and policy instruments are available to remove illegal grazers and their cattle, but disputes over grazing are plenty. The CLRA holds that all fences that were erected after its enactment in 2002 are illegal unless permissions were granted to retain them were granted by the TA and the CLB.[2] The Act authorises the TA and the CLB to remove the illegal fences. In the many situations where either the TA or the CLB refuse to remove illegal fences, concerned actors such as the Conservancy Committee start litigation procedures. Litigation is guided by the CLRA and the Constitution.

We focus on the way 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 build on points at two important processes. In some, but not all cases, institutions emerge whose authority overlap, creating in turn room for manoeuvre for certain actors to operate. Secondly, the conflicts and disputes are composite and supported by multiple discourses, and not just through a legal discourse only. We draw on documented case material from situations in the communal lands.

The communal land reform act 2002

The CLBs role as specified in the CLRA is to maintain registers of customary land rights and of 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 allocating a land right. Headmen and headwomen perform a mediating role in the process of allocating land or requests for the construction of a fence. The decisions to allocate land or to construct a fence only become legal once they have been ratified by a CLB. Over the years, the Ministry of Agriculture, Water and Land Reform (MAWLR) has been actively campaigning that people, men, and women, should claim their communal and customary rights to land. The allocation of customary rights does not necessarily grant rights to natural resources to individuals; only communities can obtain rights to wildlife in terms of the Nature Conservation Amendment Act 5 of 1996, by establishing a conservancy. Grazing on the commonage requires seeking permission

from the TA in terms of the Traditional Authorities Act 25 of 2000 and or the CLRA. Given that ultimately all communal land is vested in the state and held in trust for the communities, private ownership is not possible. This limits commercial activity on communal land to situations where one has applied for a right of leasehold.

Land disputes: a legal anthropology perspective

In analysing how these disputes are handled in the courts, we cannot ignore that the conflicts and the legislation are embedded in an arena of struggles for land, for rights, for access to resources, for dignity and so on. This context is highly volatile. The CLRA legislation implies, and is at the same time a reflection of, the process through which the communal areas are becoming socio-spatially differentiated. It is useful at this point to make a distinction between (1) areas that are (and are supposed to remain according to the CLRA) *open-access resource areas*, subjected to communal management practices, with no restrictions placed on the movement of people and their cattle, or on game. Accumulation here is socio-spatially organised and based on a *homestead-based economy;* and (2) areas hinging on the use of land managed and held under 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, that is without having been granted permission from the TA or managed to get permission through bribes and other forms of corruption. Accumulation is here based on "*private* or *entrepreneurial*" arrangements (Kashululu and Hebinck 2020).

These two rather contrasting trajectories of accumulation are sustained by different land-use practices, discourses, and institutional connections. They also co-exist spatially, socially and politically in the same region (Kashululu and Hebinck 2020, 174-7). Their co-existence is, however, not always peaceful and neutral. The reported illegal fencing and illegal grazing are clear indications of a competition for key resources such as land and grazing. My case material on the fencing and grazing problem (e.g. in N≠a Jaqna Conservancy where fencing is rife (Hays and Hitchcock 2020; Hitchcock 2012; van der Wulp and Hebinck 2021), Nyae Nyae Conservancy which suffers from illegal grazing (Hays 2009; Hays and Hitchcock 2020; Biesele and Hitchcock 2010; Begbie-Clench 2016/2018) and in the Kavango region which has disputes about grazing (Muduva 2014; Shapi 2006; Menges 2007)[3]) shows that illegal grazing and fencing predominantly involve the use of land without the consent of the authorities and community, and often beyond the maximum 50 ha that the CLRA allows for fencing of areas held under customary land rights. The expansion beyond 50 ha in most, but not all cases concerns representatives of the so-called entrepreneurial accumulation trajectory (Kashululu and Hebinck 2020). Illegal grazing and illegal fencing are considered to be a form of *land grabbing* (van der Wulp and Hebinck 2021). This is a widely shared opinion in the affected areas, in Namibia's leading newspapers and NGO circles.[4] In most cases, the grabbing of land involves members of the political and business elites in Namibia (Odendaal 2011b, 2011a).[5]

We not only need to situate the nature and handling of disputes and the litigation against the background of a competition for resources and socio-political-spatial differentiation but also in the context of the transformation of governance towards

decentralised forms. I elaborate here the argument that the crafting (and re-crafting) of the institutions that are supposed to play a role in handling disputes is guided by a linear understanding of institutions that is rather linear and based on the assumption that the transformation from one to another system of governance occurs straightforwardly, as intended and planned. A second, associated, argument I put forward is that conflicts and disputes are composite, that is: constituted by past and present practices and relationships, promises and actions. Disputes or conflicts about resources, their use and access are not singular and certainly do not have one single cause and effect component. This complicates their coherent handling and arriving at solutions.

Authority in the making and the crafting of institutions

The idea to craft institutions according to a range of design principles inspired by the seemingly pioneering work of Elanor Ostrom (1990)[6] is, as Frances Cleaver (Cleaver 2002, 2012; Cleaver and De Koning 2015) argues, based on concepts which are inadequately informed socially and ill-reflect the complexity, diversity and ad-hoc nature of institutional formation. Scaffolding new institutions like the CLBs and refurbishing the TAs is not a static and straightforward process where aims, objectives, instruments of power and authority are settled and recognised in ways as designed. Building institutions is a complex process of learning, adjusting and sedimenting authority through performance. Christiaan Lund (2016, 1200) describes this process as "authority in the making", implying 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 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 (Sikor and Lund 2009). In situations where different institutions are involved, this leads to competition over jurisdiction: the question of "who is the legitimate authority" becomes contested and (re-)negotiated (Lund 2008; Bierschenk and de Sardan 2003; MacKenzie 1989). This is particular relevant in situations of competition over land and resources intersect with relations of authority and opportunity in contemporary Namibia and elsewhere in Africa (Berry 2017; Hammar 2007; Herbst 2014).

An "authority in the making" argument is certainly relevant for Namibia that adopted a legally plural system of governance, implying that different legal and political normative orders co-exist (Ruppel and Ruppel-Schlichting 2011; Hinz 2017). 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" (Benda-Beckmann, Benda-Beckmann, and Wiber 2006, 3). What is important for investigating and evaluating how institutions perform and bureaucracies operate is to consider what I frame here as to how holders of positions of authority (e.g. chiefs, committee members, judges), but also commoners and elites, "*navigate everyday life*". Navigating displays how they strategize and use certain discourses to defend

their position and interests in situations of dispute and conflict, and also how they organize themselves by forming alliances with other key social actors (e.g. litigators, politicians, NGO's, donors, academics). Scholars like Vigh (2008) and Cleaver (2002) 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 social actors generate their own rules in everyday life situations including conflicts, disputes and interaction with others, and how in doing so they 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 the new legislation assigns to them. Learning how to deal with authority, or rather navigate the space where authority is exercised, includes corruption and dealing with claims about corruption (Olivier de Sardan 1999; Chirisa 2017). "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 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 decentralisation of land governance decisions are, in various degrees, embedded in plural legal systems. There is, however, a hierarchical relationship with the laws of the state as the first and most important ones. 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.

Namibia began to reorient its land policies after 1990 and it took about 12 years before the legislation that fixes rights and access to communal land and resources, the Communal Land Reform Act 5 of 2002, was authorized 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 regional CLBs and the TAs that are recognised by the state. 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 in Namibia in 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 CLB and that they adhere to the same political alliances, affiliations, and agendas. Nothing is less true as our exploration of case material about disputes shows. The cases included in this paper clearly show that not all TAs act and perform in the same way. The! Kung TA of N≠a Jaqna, 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 the neighbouring Nyae Nyae conservancy. The Ukwangali TA acted in the grazing dispute in defence of the community it represents, the chief is associated with corruption charges. Like his!Kung counterpart Chief Arnold, he is 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 rightsholders 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 competition. One of the reasons why fencing or grazing remain recurrent conflictive issues is because these institutional overlaps exist and continuously unfold in and during the implementation of the CLRA. These create opportunities 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, and thus perpetuating the dispute. These actors could be the line ministries (Ministry of Environment, Forestry and Tourism (MEFT, Ministry of Agriculture, Water and Land Reform (MAWLR), Conservancy Committees, TAs, CLB's, but also the new entrepreneurial type of elite communal farmers extending their fencing beyond what legally is allowed, or invading pastoralists. These situations are the sites or the moments where the re-arrangement of previous institutional relations and "authority in the making" takes place. The create opportunities for new contestation what Lund refers to as "ruptures" (Lund 2016, p. 1202). These occur during periods of transformation from one dispensation of governance to another. 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 space for themselves. The fencing and land grabbing going on before the CLRA was approved and enacted were 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 that has a role to play in matters of land, land use and rights. A role which 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 (van der Wulp and Hebinck 2021).

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 (Pellis, Pas, and Duineveld 2018; Kronenburg García and van Dijk 2020) Disputes or conflicts about resources, their use and access are not singular and certainly do not have one single cause and effect component (Fairclough 2012; Olivier de Sardan 2006; de Vette, Kashululu, and Hebinck 2012). Resource conflicts are not reduceable to only rights to land. Claims or political promises to land or grazing may be as important to engage legal property holders about

their rights. Disputes often persist by 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 or in regional political sites. This again creates conditions for disputes to perpetuate, despite High Court judgements 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.

Overlapping and contrasting discourses complicate matters in dispute and conflict handling that are engaged from a legal, and more specifically, a rights perspective. Discourses do not convey a single truth, not a single dimension. Discourses are always multiple, conveying multiple realities and ontologies (Olivier de Sardan 2006). Discourses embedded in and claims about overgrazing and degradation are contested, both in the fields and in the literature (Cousins and Scoones 2010; McCann 1999; Leach and Mearns 1996). That land use in conservancies or communal areas by both members of the conservancy and illegal grazers and fencers are not in line with the land use plans agreed upon between the MEFT and the conservancy is evidence for such contestation. Use of land cannot be disconnected from the rights (or claims) to land. Namibia being a legally plural society, Von Benda Beckman argues "(…) forces us to question what is meant by 'land'? (…) We are likely to be confronted with a situation that (…) categorisations 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 conflict" (Benda-Beckmann 2001, p. 53; Murray Li 2014). Rights over land thus also concern the right to practice land use according to locally shared ideas. This is or should be included as aspects of human rights.

Coupling lawsuits to protect rights and to seek legal justice for communities in 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 (Chanock 1985). This implies simultaneously that the embedded notion of community and indigenous or indigeneity, which has proven to be extremely problematic in rural studies in Africa, becomes a real notion. The outcomes are, however, diverse and depend on local political circumstances. This works out rather well in the Nyae Nyae case while 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, these are that not all TAs are the same and display different affiliations and leadership crises. CLBs are understaffed and lack human and financial resources. The role of the state is, to say the least, ambiguous trying to depoliticise issues whereas these are and have become highly politicised over the years and involving high ranking politicians and business elites. The

government is also interfering with local politics by appointing chiefs and reallocating illegal grazers to land belonging to others; this is extremely problematic and undemocratic. The role and rule of law are shaped by clearly defined legal rules assuming there is a single, coherent legal system. The reality of what I refer to here, with Lund, as "*authority in the making*" tells us 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 unfolded over time in N≠a Jaqna, Nyae Nyae and Okavango. 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 Okavango, and who has the right to determine that.

The value and contribution of legal anthropology is that it helps concluding that handling the contradictions of everyday life and rural development in the commons in Namibia demands a state that is staffed by a well-trained and non-technocratically 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 further pave the way for conservancies and other resource communities in an alliance with land-based NGOs in the rural, peri-urban, and urban domain in Africa to become involved in dealing with land issues beyond rights only.

Notes

1. We distinguish between conflict and dispute. Disputes are usually short term and disputants come to an arrangement. Conflicts usually span long periods of disagreement.
2. Section 28(2) of the CLRA specifies that it is the Communal Land Board (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 needs to be accompanied by a letter from the Chief or TA.
3. See also: https://www.nbc.na/news/rukoro-calls-government-address-tsumkwe-land-and-grazing-dispute.28900. 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.
4. The Namibian staff writer (2018-10-03). *Illegal fencing is land grabbing – LAC … 1991 land conference resolution should be implemented*. 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.
5. The Namibian newspaper reports several of he grabs: 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.
6. 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).

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