

Panel: Transformations of Land Tenure Systems in Africa

The role of traditional authorities in the debate on communal land titling and governance

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Abstract

Namibia’s multiple land rights system divided into state land, communal, and commercial areas, although legally instituted since independence, is still under fierce debate and adaptation. By including the Traditional Authorities into the governance system and processes around communal land rights, the communal land reform meets crucial reconciliation claims of community self-governance. At the same time, a strong centralizing tendency of documentation undermines various vital corner stones of what used to ensure those traditional authorities local legitimacy.

Qualitative observation and interviewing methods unveil the various strategies of self-assertion and legitimisation within this transition process of law and practical interpretation. The claims to land as property or tenure, as commodity or commodity-producer appear in daily discourses, disputes and decision-taking processes. In sum, the application of the law and macro-political approaches onto local realities is proving to be a continuous path of adjustment, which leads to new social dynamics and property relations, within which the traditional authorities are important and conclusive players.

1. Namibian Land Governance – two land reforms

The land governance system in Namibia comprises two different reform programmes. The commercial and the communal land reform.

They are spatially divided within the national territory: In commercial areas, land is a freehold property, while in the communal areas, former colonial homelands or native areas, where no titles to land have existed before Independence in 1990, land is neither acknowledged as 'private' nor as 'property'.

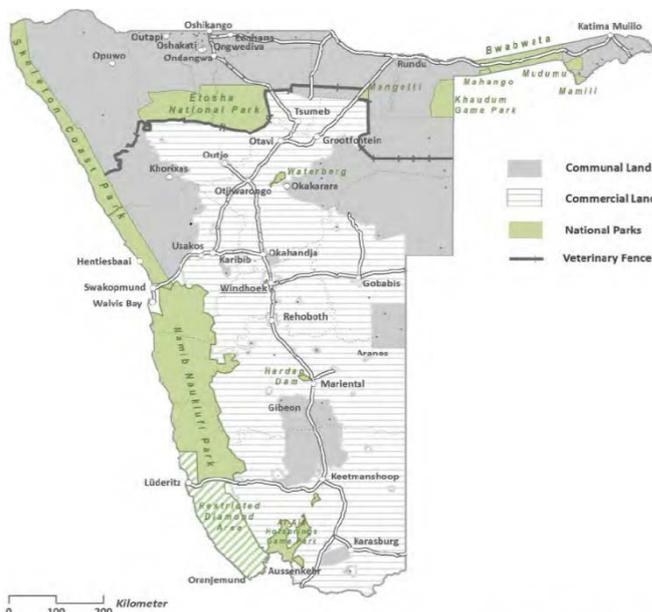


Figure 1 Communal Land and Commercial Lands (Thiem & Caplan 2014. 5)

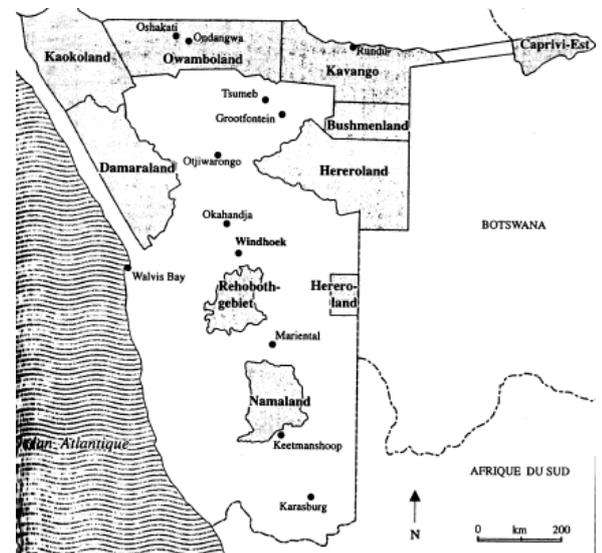


Figure 2 Namibia's Homelands: Ethnic Territories during South African rule (-1990) (Diener & Graefe 2001. 13)

The communal areas now continue to be state owned land. The Communal land reform Act of 2002 states that it is “vest in the State in trust for the benefit of the traditional communities residing in those areas ...” (CLRA 2002. Art 17)

This legal discrimination between commercial and communal land is of course strongly challenged by advocates of basic democratic rights, because the two land governance systems make the citizens’ rights to own land dependent on their spatial location. However, it is accepted on the basis of the right for cultural identity (Human rights Article 22¹), and also because it is meant to support the government in spreading its services to the country’s peripheries, which have suffered most from infrastructural isolation in colonial times (cf. Platteau 1996).

The territorial division of land holding-systems is the political answer to multiple reconciliation claims of the postcolonial society of Namibia: The commercial areas cater for the claim for Development (on the basis of individual enterprises), while the communal areas promise the reduction of poverty and the integration of all citizens in the modern economic system.

In communal areas, the predominant form of land use is a traditional homestead, with an adjacent agricultural field for subsistence farming. This is land use is also described in the definition of *communal land* which was adopted in the Communal land reform Act (Parliament of the Republic of Namibia August 2002, p. 11).

¹ Article 22 of the Human Rights Declaration: “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. United Nations UN 1948



Figure 3 Customary Land Use in the Ohangwena region. Homestead and adjacent subsistence agricultural field, all based on natural and local (building) materials (L. Weidmann 2013)

1.1. Legal pluralism or legal hierarchy?

The communal areas are further distinguished from the commercial areas by their more complex set-up of land authorities:

The Traditional Authorities and customary laws have been included in the legal texts and the communal administration. This acknowledgement is a very sensitive and highly debated matter. How far should or must the central government restrict the TA authorities and definitions? In the formulation of legal Acts, this spatially bound legal pluralism often appears as a very clear and undisputable line. (E.g. the customary laws apply as long as they do not interfere with the state law or constitution.²)

When it comes to the practical differentiation, it suddenly becomes much more ambivalent, because the fundamentally different concepts of authority and resource claims surface. Sarah Berry and Christian Lund share the idea that struggles over land in African context extend to a fundamental negotiation over authority (Berry 2002, pp. 639–640; Lund 2011, p. 10).

And in that sense, I believe that the Namibian land reforms are still part of this negotiation struggle, and not the end or the solution to it - as is often suggested in the political discourse.

² Traditional Authorities Act (TAA 1995) 14. (a): “any custom, tradition, practice, or usage which is discriminatory or which detracts from or violates the rights of any person as guaranteed by the Namibian Constitution or any other statutory law, or which prejudices the national interest, shall cease to apply” Parliament of the Republic of Namibia 22 December / 2000, p. 12

2. Institutional and Legal pluralism

To cater for a systematic form of these negotiations, a number of institutional and procedural changes have been introduced in connection with the Communal Land Reform. One of them is the establishment of regional Communal Land Boards (CLB).

2.1. Communal Land Boards

They are established to mediate between traditional leaders, government representatives and representatives of various interest groups. These groups also pose the members of the board.



Figure 4 A Communal Land Board at one of their monthly meetings (L. Weidmann 2014)

The main tasks of the CLB are the accreditation of customary land titles and to settle disputes which cannot be solved by the Traditional Authority.

2.2. Traditional Authorities

As I have shown up to this point, there are quite a number of claims at stake – which ask for the retention of Traditional authorities in the land governance system.

Often, in the margins of the postcolonial state, they are the gatekeepers to reach the undocumented citizens.

Due to their direct and personal knowledge of the local population and its needs, and most of all due to their ascribed trust by local citizens, they are an important pillar to make the registration possible.



Figure 5 A Village Headman leading a monthly meeting with his villagers, passing information on new regulations or laws from state and customary authorities. (L. Weidmann 2013)

Today, there are around 42 different Traditional Authorities recognised by the Namibian government (Hipondoka 2008), each characterised by “a common ancestry, language, cultural heritage, customs and traditions” (TAA 2000, pp. 3). It is hard to come by official numbers and personal accountability is limited to the superior Traditional leaders, or to single representatives of a Traditional Authority. The majority of Traditional leaders – Village Headmen are not registered or identified by the state offices.

The traditional leaders have become official partners of the government in the administration of Communal land. During the registration process they have an important role to fulfil; but as it is a temporarily restricted process, it remains unclear, how their role will evolve after the titling is concluded. There are certain state laws, which (may) in fact threaten the TA’s ‘traditional forms of legitimacy’.

The most discussed in public debates are modern moral norms such as democracy, gender equity, and inheritance rights. Probably one of the most perceivable changes for the TA’s is their new accountability to the state law and the government. Even if they are not closely controlled, this upward-accountability is a new and important structural change for them. To a certain extent it withdraws their customary authority basis, by removing the right to property.

I will get further into that in the strategy analysis, but for now, this leads me to my first hypothesis:

- 1. Traditional land governance builds on a fundamentally different concept on property – authority relations than the central government.**

A range of academic disciplines is engaged in the fundamental discussion on how indigenous property or politics³ must or mustn't be compared and harmonised with western democratic concepts. These range from the study of the "Commons" - or common property, to the matter of legal pluralism. (cf. Alden-Wily 2012; Peters 2009; Benda-Beckmann 2001)

My second hypothesis claims that

- 2. Communal land reform is not a neutral formalisation of existing land rights, but has deep impacts on authority and property claims, and requires an active adjustment of all actors.**

Pauline Peters summarises the core of this process neatly, as she claims that "Gaining "title" to land has never been a "simple" recognition of unused capital but has always involved severe social struggles with distinct winners and losers" (Peters 2009: 1322).

The laws and strategies are continuously under renegotiation and adaptation, and this exact dynamic of the communal land governance is the matter of this presentation. With the help of some empirical examples, I will highlight how claims to land are pursued through different narratives and strategies.

Based on the test of these two hypotheses on some empirical material, I want to answer the question:

→ **What is the role of TA's in strategies of assertion and legitimisation of land rights?**

3. Strategies to claim land rights and authority: Anthropological reflections

Christian Lund suggests that we often tend to mix up categories such as property rights, ownership rights, and titles (Lund 2000, p. 18)⁴. I claim that there is a good reason for these mix-ups.

The results from my ethnographic field work show a striking common ground of all strategies: that is the aspiration to transform any rights over land into 'property'; in the sense of an undisputed and unlimited personal access. And this, we must keep in mind, in an area, where property of land is legally prohibited.

To put this in a historical and local context, I will tell you about how a village is a property in the traditional concept: A VHM used to pay a **Lobola** of six cows in exchange for the leadership of a village. This exchange took place if a new village was founded (at the moment when at least one other family settled in the area which was claimed to be

³ What Arun Agrawal calls the "Politics of indigeneity"³ is a dominant factor in discourses on land in Namibia. Indigeneity is actually the fundamental reasoning for the Communal areas, the Communal land reform, and with them the inclusion of the TA in the administrative body.

⁴ "In the 'developed world' the social, institutional and legal consensus in favour of specific private forms of ownership is so strong that we often do not perceive the distinction between them and they become one; private equals certain. However, this is not generally the case in most African societies [...].

In such cases, 'private' is not very certain, and in many places in Africa other types of tenure than 'private' are more certain for the rightholders." Lund 2000, p. 18

discovered by the claiming Headman), if the previous Headman passed away and a new leader took over (either through the appointed by testament or by a superior traditional committee), or if a village was subdivided (mostly due to an increasing number of 'subjects', so that one VHM would only be responsible for a certain number of community members). This Lobola price was paid both for the land of the village and the people who lived on and off this land. Until this day, this symbolic payment is still practiced, as the TA's have stated in interviews.

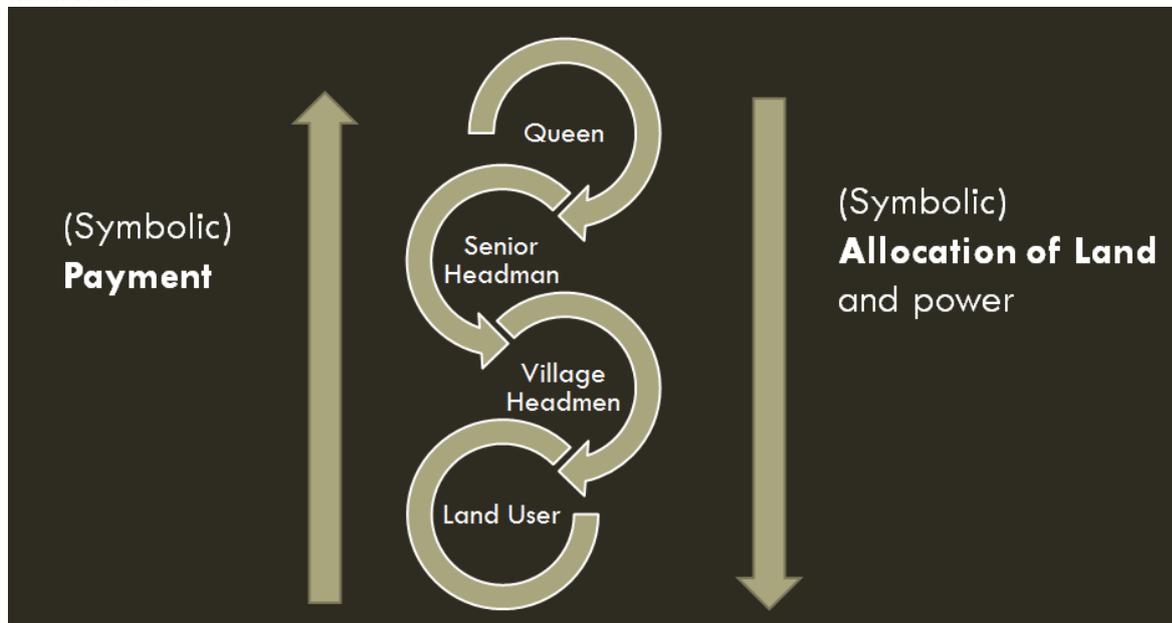


Figure 6 The 'customary' cycle of payment and allocation of land and power - disrupted by a legal prohibition of land payments by the CLRA (2002)

However, they do not receive the same powers in return for this payment any longer: the law prohibits the selling of land to land users, so that TA's cannot ask for their customary share of the exchange, because they are now no longer the land owner, but only its administrator.

But, in reality the traditional payment for land allocation continues to be widely practiced. However, a strategic option has now appeared for the land users: in case any disagreement arises in the village (on any issue at all), the Headman can be pressurised or even indicted of corruption. As a result, custom – and the inroads made by modern moral narratives, turns into a constant threat for the TA.

The moral language of corruption, democracy, or gender equality is a way to force the government to intervene and undermine customary governance principles. And this strategy may be used legitimately, if a headman indeed abuses his power, but also illegitimately, to support any private aspirations of a villager.

Another case represents a further strategy pattern, which involves a circumventing of laws and institutions. It is about a man who claims a land in the eastern part of the region, which is not densely populated, and has been known as a cattle herding place, as it is far off infrastructures and commercial centres.

This man is a rich business man, and he claims a very big plot of land. It is also located in an area heatedly competed for between two different traditional authorities' jurisdictions: while one claims they allocated the land to this man, the other denies them the authority

over this area. The lack of an official demarcation of territories Traditional Authorities makes this case an almost unresolvable one for the government institutions. As the man realised that the registration of his land may be delayed almost endlessly by this dispute, he erected a fence. And an expensive one too, with cement poles drilled deep into the soil.

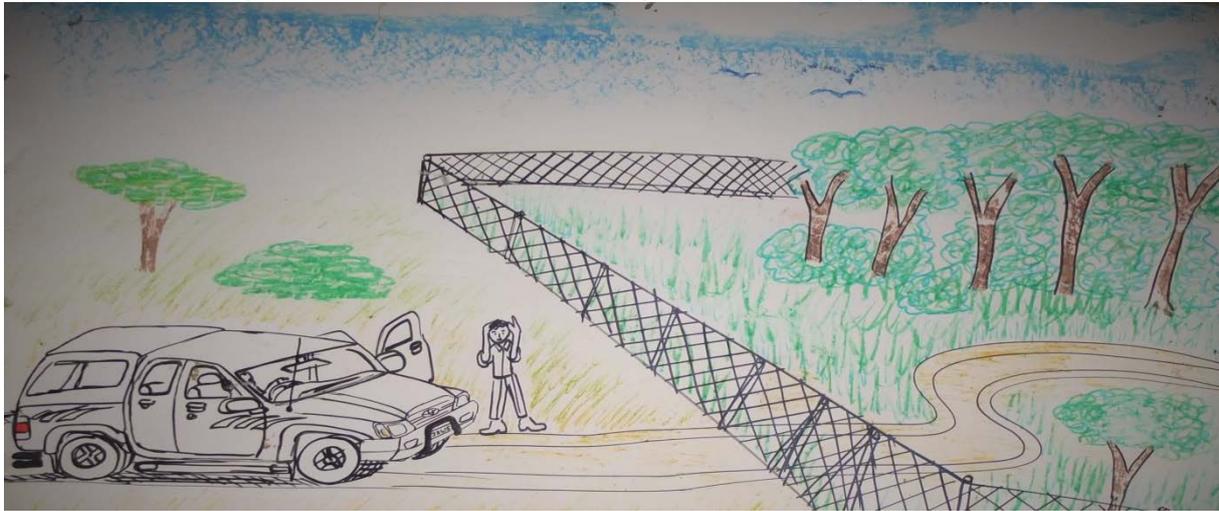


Figure 7 A symbolic image of the difficulties faced in communal land management; Drawing is part of an educational equipment for legal training of Traditional Authorities. (Copyright by the Communal Land Support Project)

This is when neighbours started to lay complaints with the Communal land board, against his illegal fencing. The CLB held several meetings and investigation committees, and finally ruled that the fence was indeed illegal and had to be removed.

The man didn't just let that happen. He brought a case to the high court, accusing the Land Board of damage to property. Now, the court ruled in his favour! The High Court rendered the verdict that the Communal Land Board was to re-install the fence and pay any material damages.

By giving the man's material property priority over the customary authority's verdicts, the High Court annulled and unsettled the executive authority of the traditional leaders and the Communal land board that were involved. The process and authority of allocation can be completely omitted if the narrative is shifted to the exclusive material aspect of the claims. This High Court judgement proves how a de facto property of land can be achieved in communal areas, in spite of an explicit anti-property legislation. Quoting Martin Sikor and Christian Lund, this is an issue to be carefully followed up: "Property is only property if socially legitimate institutions sanction it" (Sikor, Lund 2009, p. 1). In the Communal Land management in North-Central Namibia, it is quite unclear at this point, which institution remains socially legitimate. To reliably sanction and thus validate ones' authority and land title, is only possible with an efficient controlling and executive system in place. Title givers who lack executive power do not offer any security – instead they may even raise the insecurity on rights and accountabilities.

On the other hand, a land holder with a socially legitimate land right, de facto *owns* it, but not only as a free-hold title with the duties and rights connected to it, but also in the sense that they may govern its use and further distribution. This indicates that a fundamental distinction of power and property in such customary and plural legal contexts is inadequate.

4. Concluding Remarks

In the complex Land governance system of Namibia, there is not only a legal pluralism at play, but apparently a more fundamental pluralism of concepts, which differ in the way they relate to property and power.

1. In the customary concept, authority and property go hand in hand: Authority is a personal, irremovable 'property', while the state's modern democratic paradigm makes a clear distinction between the power to govern, to use, or to own a resource.
2. The legal pluralism, which in fact is rather a legal hierarchy, can be manipulated to such an extent, that traditional authority and land rights can be circumvented with similar strategies. (E.g. material investment, or moral narratives on corruption for example)

However, both examples I have presented, prove how many practices around land claims may be de-legitimised on the grounds of a moral narrative. What is socially legitimate can be easily opposed and overruled for the sake of personal aspirations. The plurality of institutions and laws in communal land governance has also provided space for a greater flexibility of individual strategies.

On this note, it is clear that the role of Traditional Authorities is shaken in its very foundations, but it is their task to re-identify their options between the requirements of state law and those of their communities.

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