THE RIGHT TO LAND VERSUS THE OBLIGATION OF THE STATE TO CONSERVE SUCH LAND

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HELVI KAULINEEKELWA HALUDILU

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SUPERVISOR: MR. CLEVER MAPAURE

SUPERVISOR'S CERTIFICATE

I, Mr. Clever Mapaure, hereby certify that research and writing of this dissertation

was carried out under my supervision.

……..... **.....……..**

Mr. Clever Mapaure **Date**

DECLARATION

I, the undersigned, hereby declare that the work contained in this dissertation for purposes of obtaining my honours degree of bachelors of laws, is my original work and that I have not used any other sources than those listed in the bibliography and/ or quoted in the references.

…….....…..... **.....……...**

Ms. Helvi Kaulineekelwa Haludilu **Date**

This dissertation is dedicated to my beloved mom Magdalena Ndilimeke Haludilu

for her undying support, being the inspiration in my life

and for always believing in me!

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Abstract

The community – Based Natural Resource Management (CBNRM) programme which promote conservation and sustainable management of biodiversity and wildlife is one of the most successful initiatives by the government of the Republic of Namibia. This programme came into being after the independent government realise that rural communities can also gain the same rights of use and benefit from wildlife as the commercial farmers and ain rights over tourism concessions by forming a management institution called a conservancy. This in turn gave the rural community residents the same rights over wildlife as the commercial land residents who have been doing so before independence. Despite the success of the programme, one of the challenges that it still face is the issue of land. This is mainly because since the pre independence era, the communal land tenure remains unclear. This has resulted into two conflicting views were communal land residents claim ownership of land while the government through its interpretation of the constitution and the communal land reform Act claim ownership of such land. The establishment of communal conservancies is a voluntary act on the part of the community members. However some community members still see conservancies as an initiative by the government that is taking up the land they would normally use for various activities in order to make a living. Another challenge that faces the communal conservancies is the unavailability of fund to compensate those who lost their land to wildlife through the creation of a core area in conservancies which is fenced odd exclusively for wildlife. This has resulted in negative attitude that some communal land residents have over conservancies. As a result, these factors prove to be one of the main challenges that the CBNRM programme faces. It is against this background that this research aim to answer the question whether the establishment of communal conservancies trump with the right to own and use such land?

Abbreviations

CBNRM – Community Based Natural Resource Management

IRDNC – Integrated Rural Development and Nature Conservation

MET – Ministry of Environment and Tourism

NACSO – Namibian Association of CBNRM Support Organisations

NGO – Non Governmental Organisation

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Chapter 1

Introduction to the study

Background to the study

Namibia is one of the few countries in the world that are blessed with a rich heritage of spectacular biodiversity. As part of the international community, Namibia has the duty to preserve its biological diversity and as a result, Namibia is said to be the only country in the world which specifically addresses habitat, conservation and protection of natural resources in her constitution.[1] This is apparent in the non justiciable Article 95 (1) of the Namibian Constitution which provides that 'in the interest of the welfare of the people, the state shall adopt policies at maintaining ecosystems, ecological processes and biodiversity for the benefit of the present and future generations.'

One of the most important ways in which the government can achieve its objective of protecting the biodiversity is through the conservation of natural resources. History tells us that the laws that relate to nature conservation in Namibia dates back as far as 1909, when Namibia was still under the German colonial administration. During this area, the German Hunting *Verordnung* of 1909 was enacted and its aim was to regulate the hunting of wild animals which according to the Act were *rus nullius* (not privately owned), but instead the government took control of wildlife and managed it.[2] After 1919 when the South African colonial administration took over the territory of Namibia from Germany, other Acts that relate to nature conservation were enacted which includes the Nature Conservation Ordinance,[3] the Game Preservation Proclamation

[1] Anyolo, P. (2010). *An analysis of Uukwaluudhi Communal Conservancy: Alleviating or advancing poverty?* A thesis submitted in partial fulfilment of the requirements for the degree of Master of Laws. Faculty of Law: University of Namibia, p 5.
[2] Hinz M.O. (2003). *Without Chiefs there would be no game: Customary law and nature conservation.* Windhoek: Out of Africa publishers, p 21.
[3] 4 of 1921.

Amendment Proclamation,[4] and the Prohibited Areas Proclamation.[5] All these laws had one thing in common and that was to conserve biodiversity.

However, it was in 1975 when the Nature Conservation Ordinance Act[6] was enacted that conservancies evolved. In terms of this Act, farmers are allowed to join their farm land and establish a conservancy within a particular boundary from which they could generate an income.[7] However, this Act only made provisions that only commercial farmers could establish conservancies as it is clear under section 1 of the Act that the owner of the famer that is referred to by the Act is only a commercial farm owner. This provision meant communal farmers were not authorized to establish conservancies and as a result discriminated against.

As it has been mentioned earlier, Article 95 (1) of the Namibian Constitution aim at ensuring that the government of the Republic of Namibia 'adopt policies that deals with maintaining ecosystems, ecological processes and biodiversity for the benefit of all Namibians, both present and future.' This is one of the non justiciability rights in the Namibian constitution which according to Nakuta[8] are not enforceable under the current constitutional dispensation. This Article aim at improving people's lives and standard of living and in order to do this, the government came up with policies that deal with maintaining the biodiversity for the benefit of all Namibians.

On its first mission to ensure the protection of the biodiversity, the Ministry if Environment and Tourism (MET) embarked on a journey soon after independence in order to conduct surveys in communal area where it was believed that wildlife population was declining. After the surveys, the Ministry approved a policy titled National Nature Conservancy Policy of 1991 with the aim

[4] 7 of 1924.
[5] 26 of 1928.
[6] 4 of 1975.
[7] Anyolo (2010:2)
[8] Nakuta J. (2008). The justiciability of Social economic and cultural rights in Namibia and the role of the non-governmental organizations. In Horn N. and Bösl A. (Eds.). *Human Rights and the Rule of Law in Namibia.* Macmillan Namibia: Windhoek p 89.

of recovering wildlife population of Namibia's communal lands by creating equitable rights to wildlife between freehold and communal residents.[9]

With the aim of making this a law, the legislature enacted the Nature Conservation Amendment Act[10] with the aim of establishing conservancies on communal area by amending the Nature Conservation Ordinance of 1975. Section 1 of the Nature Conservation Amendment Act of 1996 define communal conservancies as areas in which rural communities gain rights to use, manage and benefit from consumptive and non-consumptive use of wildlife within defined boundaries. From this definition Davies[11] avers that 'conservancies are self-selecting social units or communities of people that choose to work together and become registered with the Ministry of Environment and Tourism.' This means that if people residing in communal land group themselves together and decide to have the area in which they live or any part of such area be declared a conservancy they can register themselves with the Ministry of Environment and Tourism and from there they can then work together by conserving and using wildlife sustainably in terms of regulations set up by the 1996 Amendment Act. It is said that by doing so, the local communities are able to add sustainable use of wildlife and tourism to their existing land use and income resources.[12]

However, as much as this initiative by the government is an important milestone in the history of nature conservation in Namibia, it didn't come without predicaments. In the process of the implementation of the Nature Conservation Amendment Act of 1996, problems arose as some rural farmers lost their ancestral land which they use for farming activities. This is part of the decision that community members together with their traditional leaders make in the process of establishing a conservancy or after its establishment. The decision to move farmers caused conflict between conservancy management and the farmers to the extent that the government had to interfere in some cases. The farmers argue that such relocation is an infringement of the rights that they have over such land. Some farmers agreed to make way for conservancy; however

[9] Long S.A. (2004). Introduction. In Long S. A. (Ed.) *Livelihoods and CBRNM in Namibia*. WILD Project, Department for International Development: Windhoek, p 10.
[10] 5 of 1996.
[11] Namibian Association of CBNRM Support Organisations (NACSO), (2008). *Namibia's Communal Conservancies: A Review of Progress and Challenges in 2007*. Windhoek: NACSO, p 11.
[12] Ibid.

others refused to move at all, thus making it difficult for the government to fulfil its mandate to conserve the biodiversity that is found in communal land.

Problem Statement

The promulgation of the Nature Conservation Amendment Act of 1996 rectified an imbalance of rights between communal farmer and commercial farmers as they were the only one who could be awarded legal right to establish conservancies under the Nature Conservation Ordinance of 1975. The establishment of conservancies in communal area was an initiative by the government of the Republic of Namibia to ensure the conservation of the natural resources in the country. Due to the fact that one of the requirements of establishment of conservancies is a defined geographical area,[13] it cannot be ignored that this conservation legislation affects the rights of land owners by placing restriction, limitation and duties with regard to such land.

One of the challenges that have been facing the success of the Community Based Natural Resources Management (CBNRM) is the issue of land. This is mainly because the policy framework for land reform in communal areas has and is still unclear. While the Namibian government claims ownership of communal land through the Communal Land Reform Act[14] and the Constitution, there are different views among the communal land residents as well as various authors as to the ownership of such land. These conflicting views make it difficult for CBNRM programme to be fully accepted by the communal residents and as a result this holds back the objective of the state to ensure that that communal land and its resources are conserved.

The setbacks to the success of the CBRNM programme are evidenced by the incidence which took place on the 3 December 2010 when the community members of the Ngandjera Traditional Community took to the streets and held a demonstration where they alleged that they have lost their land to the Sheya Uushona Conservancy and that the establishment of the conservancy limit their access to other natural resources. The conflict emerged when the community was presented with a plan to establish a core area within the conservancy. The plan was for the core area to be fenced off for the wildlife only and thus the local people will not have access to it. Since there

[13] Section 24A of the Nature Conservation Amendment Act of 1996.
[14] 5 of 2002.

were some cattle posts on the area that was earmarked as a core area, it was suggested that those farmers have to move but they refused. These reports have encouraged the researcher to take up this matter and do research on this area and therefore apart from the analysis between environmental protection and the ownership of communal land that will be made, the dissertation will also include the discussion of the findings of the empirical research.

Research questions

The following research questions will be posed in order to find the answers to the legal problem.

a) Who owns communal land?
b) Does the right to conserve trump with the right of communities to own the land and use it?
c) Is there legal protection to communal land residence whose land rights are affected by conservation?

Research methodology

This research is qualitative in nature and the methodology employed was both empirical field research and desktop research. The desk study involved the collection of published information and analysis of secondary material relevant to the research topic. Sources such as relevant policies, legislation, constitution, academic papers as well as media reports were explored.

Another method that was employed was the empirical field research which was conducted through personal interviews. Due to time and financial constraints, only 8 interviews were conducted during the period of 4 – 13 July 2011. The interviewees include one government official of the Ministry of Environment and Tourism in Oshakati, one member of the Sheya Uushona Conservancy Management as well as six community members of the Ngandjera Traditional community in Okahao and they are all registered members of the Sheya Uushona Conservancy.

The interviewees were chosen because of their knowledge and familiarisation with the affairs of the Sheya Uushona Conservancy. Furthermore, Sheya Uushona Conservancy was chosen for the purpose of this research due to the conflict between the community members and the

conservancy management on land issues and other affairs of the conservancy which led to a demonstration by the community members on 5 December 2010.

Study limitations

The limitations applicable this study was the participation aspect of the respondents, which was voluntary. As a result the researcher was not able to interview as many people as planed because of the politics surrounding the Sheya Uushona Conservancy. Time and funds did not allow the researcher to cover all villages in the Ngandjera Traditional Community as the interviews with the Sheya Uushona management was only conducted in Okahao as this was the only place the researcher could reach. On the other hand, when the researcher went to the offices of the Ministry of Environment and Tourism in Oshakati, only one officer Mr. Mwanyangapo could help with the research because according to them he is the one who works closely with the Sheya Uushona Conservancy. Due to the above mentioned constraints, the field work of the study was only carried out in respect of Sheya Uushona Conservancy but the research findings can be generalised to other communal residents whose land rights have been affected by conservancies.

Literature review

In Namibia the issue of communal land ownership is a controversial one. In analysing the research question whether the right to conserve land trump with the right to own and use such land, it is important that one look at the issue of who really own communal land as literature show that there are conflicting views in this regard.

Article 100 of the Namibian Constitution provides that: Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned.
Furthermore, schedule 5 of the Constitution as well as Section 17 of the Communal Land Reform Act provides that communal land vest in the Government of the Republic of Namibia.

For political, legal and economic reasons, the government of the Namibia claims ownership of communal land in the country based on its inheritance of South African title on these land. This shows that the on the government side, communal land belong to the state. This is evidenced by

the speech made by Dr. N Iyambo, in 1996,[15] when he clearly said that communal land is owned by the state in terms of Article 100. He however went further to address the issue that land ownership is disputed by some traditional authorities and this position has never been directly tested in Namibian courts because the government, for the most part, has left these lands in the hands of traditional authorities.[16]

The above politician's speech reflects that the government interpret the above constitutional provisions and section 17 of the Communal Land Reform Act of 2002 to mean that communal land is owned by the state. However, these provisions have been interpreted differently by various authors and the government's interpretation is not conclusive in determining the ownership of communal land. The Legal Assistance Centre and the Namibian National Farmers Union[17] (NNFU) agree with the government's interpretation that confers ownership of communal land to the state. This is evidenced by statement that "section 17 of the Communal Land Reform Act makes it very clear that all communal land vest in (belong to) the state." This booklet even defines communal land as the land that belongs to the state. This booklet is relevant to this study as it provide the view which the authors have on communal land ownership but it does not cover other views and as a result other literature have to be consulted on this.

Turner[18] whose focus was on the distinction between the land tenure during the apartheid era and post independence is of the view that Article 100 of the Namibian Constitution officially awarded ownership of all land not otherwise lawfully owned – in other words, including the communal areas to the state. However, Turner admits that there is a vacuum in basic land law and administrative infrastructure and the ongoing uncertainty about the nature and meaning of land ownership in these areas. According to him, Namibian communal areas residents still cannot own land in any clear legal sense.[19]

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[15] Iyambo I. (1997). The role of traditional authorities in a changing Namibia. In Malan J and Hinz M.O (eds.), *Communal Land Administration: Second National Traditional Authority Conference.* Windhoek: Centre for Applied Social Sciences.
[16] Ibid at page 18
[17] Legal Assistance Centre (LAC) and Namibian National Farmers Union (NNFU), (2003). *Guide to the Communal Land Reform Act No 5 of 2002*. Windhoek: LAC & NNFU.
[18] Turner S.D. (1996). Conservancies *in Namibia: a model for successful common property resource management?* (SSD Discussion Paper No. 13). Windhoek: Social Sciences Division Multidisciplinary Research Centre, University of Namibia.
[19] Ibid page 8

Harring and Odendaal[20] on the other hand are of the view that even though the government rely on Article 100 and Schedule 5 of the Constitution to claim ownership of communal land, this interpretation is wrong. This is because the communal land resident legally owned the land prior to the arrival of the colonial administration. The apartheid law that the colonial administration passed cannot be relied on by the Namibian government to take over ownership based on these laws because they are illegal and do not go along with the values and aspirations that our constitution is advocating for. Muenjo[21] share strong sentiments with these authors and based on these arguments conclude that the government does not own communal land but the land is owned by the traditional communities themselves. These literatures are relevant to this study as they provide an in depth discussion of communal land ownership and they show that even though the government interpret the provisions of the law to claim ownership of communal land, the authors shows that this is not necessarily correct as the provisions have been interpreted to confer ownership to communal land residents themselves.

Mapaure's[22] interpretation of section 17 of the Communal Land Reform Act questioned the concept of communal land being held in trust. He stressed the point that if the government holds the land in trust, does it own it? Considering that the concept of trust does not connote ownership, if the state holds the property in trust only, it implied that there are owners – i.e. the communities – on whose behalf such a trust is formed.[23] This is important in determining ownership of communal land because the word "trust" in the Communal Land Reform Act is central to the various views by authors on communal land ownership.

Shifotoka[24] share the same sentiments as Mapaure that although the government has interpreted section 17 of the Communal Land Reform Act to mean that communal land belongs to the state,

[20] Harring S.L. and Odendaal W. (2006). Our land they took: San land rights under threat in Namibia. Windhoek: Legal Assistance Centre, p 43.
[21] Muenjo C.D. (2009). What *is the legality of state ownership of communal lands?* A dissertation submitted in partial fulfilment of the requirement of the award of the degree of Bachelor of Laws. Faculty of law: University of Namibia, p 30.
[22] Mapaure C. (2009). Jurisprudential aspects of proclaiming towns in communal areas in Namibia. *Namibia Law Journal*. 1(2): 23-48.
[23] Ibid, p 32.
[24] Shifotoka E. (2009). *The Implications of declaring communal lands into towns*. A dissertation submitted in partial fulfilment of the requirement of the award of the degree of Bachelor of Laws. Faculty of law: University of Namibia.

there is a view that the state is not the owner of communal land, but they merely hold the land in trust for the benefit of traditional communities. Taking from Mapaure, she wrote that 'vesting does not mean ownership; neither does the concept of trust connote ownership. If the state holds the land in trust, this means that there should be an owner on whose behalf the trust is formed; in this case the traditional communities.'[25] These literatures also show that the interpretation of the word 'vest' and 'trust' can have different meanings and ownership is not one of them.

Hinz[26] who wrote in the panorama of land ownership and customary law found in his research that despite the fact that communal land is vested in the state, there are different views under customary law as to who own communal land. He noted that some scholars are of the view that the term 'ownership' reflects a concept that is foreign to the law of most traditional communities as this is evidenced by the fact that traditional authorities use ownership with respect to communal land in order to point at their authority over land, which is as exclusive towards the outside world as is the case with the competence of the land owner under general law.

Hinz further points out that irrespective of the fact that the legislative and the constitution provide that communal land belong to the state, in the perception of the people, communal land is owned by the respective traditional authorities. "The land is for the chief, which means the land is entrusted to the chief for the community under his/her jurisdiction.[27] This literature is relevant to this research in that, despite the fact that the constitution and the legislative confer ownership of communal land to the state, the views of the communal land residents are different since they believe that the land belong to the chief. Hinz's book therefore helps in finding out who really owns communal land despite what the constitution and legislative provide.

The view by Hinz is supported by Namwoonde[28] who conducted an empirical research in Caprivi and Kavango Region in 2009. Her research found that ownership of communal land is perceived differently from the State's side and also from the community's side. She further emphasize that

[25] Ibid page 10.
[26] Hinz (2003).
[27] Ibid.
[28] Namwoonde E.N. (2010). Legal impact of biofuel (Jatropha Curcas) production on communal land in North-East Namibia. A thesis submitted in partial fulfillment of the requirements for the degree of Master of Laws. Faculty of Law: University of Namibia.

although the general question, "who owns the land?" provokes disagreement, there seems to be agreement about concrete details of ownership. Most people agreed that the land belongs to the traditional authority; this is because it is the traditional authority that has the mandate to allocate it. At a family level, most respondents agreed that the land belongs to the family.[29] This literature also shows that there are different views pertaining to communal land ownership and this will help in answering the research question about who owns communal land.

Another research question that this paper intend to answer is whether the right to conserve trump with the right of communities to own the land and use it? This part of the research require one to look at the conservancy concept and thereafter how conservation affect the land rights of communal land residents. According to Turner,[30] "a conservancy is an area of land whose residents have dully constituted themselves so that wildlife ownership and management rights can be devolved to them."[31] He further add that one of the reason for encouraging the set up for these conservancies is because it is believed that effective management of natural resources is best achieved by giving it focused value for those who live with them.[32] This literature is relevant to this research as it entail an in depth discussion on communal conservancies and it also focus on the how communal land tenure have an effect on effective conservation.

Tjipitua[33] states that communal conservancies play a fundamental role in biological diversity conservation. However, this dissertation focuses on the relationship between communal conservancies and community forest. It is relevant to this study in a way that the study includes a discussion on the general information on communal conservancies as well as on the Nature Conservation Amendment Act of 1996 although it does not answer the question of how communal conservancies affect the land rights of communal residents.

[29]Ibid, p 38.
[30] Turner (1996:IV).
[31] Ibid.
[32] Ibid, p 5.
[33] Tjipitua E. N. 2008). The relationship between Communal Conservancies and Community Forests: Application of the Nature Conservation Amendment Act and the Forest Act. A dissertation submitted in partial fulfilment of the requirements of the award of the degree of Bachelor of Laws. Faculty of law: University of Namibia, p 9.

Henghali[34] wrote that in 1995 the government approved a community based wildlife management approach whereby communities would be granted rights to manage and benefit from wildlife within their boundaries. This conservation practice have proved to be among the most effective means for promoting conservation, since local communities derive benefit from biodiversity conservation practice.[35] She further adds that the feelings and beliefs of local people towards wildlife and land use play a vital role in either sustaining or degrading wildlife populations. This is why it is important that the implementation of conservation programmes is successful in Namibia.[36] This thesis provides a historical background to nature conservation in Namibia as well as the importance of conservation of wildlife which is important in understanding the communal conservancies. However, this thesis does not provide the discussion of the history of nature conservation in details as it was only discussed briefly.

On the effect that communal conservancies have on land rights, Jones[37] wrote that conservancies are established on communal land to which all local residents would normally have access for grazing, collecting wood etc. This therefore means that the land that the local residents would normally utilise for different activities is now taken up by the conservancy and this lead to some community members to feel that the set up of a conservancy have a negative effect on their land rights. Jones further add that the amended law also fails to address the crucial issue of right to just compensation for either loosing communal land to conservancies or compensating individuals for crop damage or loss of livestock to escaping predators from the proclaimed conservancies.[38]

After doing an extensive research on Uukwaluudhi conservancy, Anyolo[39] wrote that Uukwaluudhi people had to give up their land when the core area which is fenced off for wildlife was created. She further adds that the relocation of farmers caused economic losses and social

[34] Henghali J. N. (2006). Conservation Attitudes and Patterns of Biodiversity Loss in the Ohangwena and Oshikoto Regions of Namibia. A research thesis submitted in partial fulfilment of the requirements of the award of the degree of Master of Science in Conservation Biology. Faculty of Agriculture and Natural Resources: University of Namibia.
[35] Ibid, p 23.
[36] Ibid, p 30.
[37] Jones B. *et al.* (2003) *Contextualizing CBNRM in Namibia.* Available at: http://www.met.gov.na/programmes/wild/finalreport/Ch.3/Chapter3/ Accessed 25 July 2011, p 17.
[38] Ibid.
[39] Anyolo (2010).

disruption to the community members because the land which people lost was the environment from which people extract their basic needs for food, shelter, fuel, grazing and water. This land is now fenced off and people no longer have access to these natural resources.[40] This literature provide important information to this study as the research conducted was primary, and it clearly show the effect that the conservancy have on the land rights of the people and how the effect that this have on the livelihoods of those affected.

On discussing human wildlife conflict which also has an effect on the land rights of communal land residents, Hinz[41] aver that conflicts between those living inside nature conservation areas and conservationists have not been resolved and are still a matter of lively debates. According to him, in many instances, people were moved from their ancestral lands, without any rights, not even visiting rights to sacred locations. Hinz further wrote that a purist approach to nature conservation was adopted and this approach primarily focused on animals, and mechanisms to deal with the conflict between humans and animals were not adopted. This focus can thus be said that it affect the rights of communal land farmers to ownership of such land.

Hinz outlook on wildlife and human conflict is the same as the one shared by Marsh and Seely[42] who aver that there is no legal protection available to the communities who suffered costs from damage by wildlife. The available legal instrument at their disposal is the Nature Conservation Amendment Act which does not provide for either rights based on communal land occupation under customary law or for loss of life or property due to a lot of human/animal conflicts. These studies are relevant to this research because they focus on the effect that the communal conservancies have on the land rights of people as well as whether there is legal protection to communal land residents who are affected by the establishments of such conservancies.

[40] Ibid, p 59.
[41] Hinz (2003: 2).
[42] Marsh A. And Seely M.M. (Eds), (1992). *Oshanas, sustaining People Environment and Development in Central Owambo Namibia.* Windhoek: Desert Research Foundation of Namibia, p 26.

Organisation of the Dissertation

Chapter 2 is titled "*Ownership of communal land*" and it helps in answering the research question on 'who owns communal land.' In order to do this, the chapter focus on the analysis of the ownership of communal land in Namibia by looking at various literatures written on the topic. The chapter therefore determine who really own communal land.

Chapter 3 is titled "*Communal Conservancies in Namibia and the effect that they have on community member's land right*." The chapter provide an overview of communal conservancies by looking at the historical background of conservancies in Namibia until the current position in Namibia. An understanding of how communal conservancies are formed is also provided for. The chapter further gives a discussion of how communal conservancies affect the land rights of the communal land residents. This chapter is important because it helps in answering the research question of 'whether the right to conserve trump with the right of communities to own and use it and that of whether there is legal protection to communal land residents whose land rights have been affected.

Chapter 4 is titled "*Study: report on the findings of the empirical part of the study*" and it helps in answering the research question of 'whether the right to conserve trump with the right of communities to own and use it. This chapter is important in that it focus on the findings of the empirical research that was conducted with the aim of looking at the real life situation on whether conservancies how conservancies affect the land rights of the communities.

Chapter 6- *Discussion of research findings and conclusion*: The research findings will be discussed in this chapter and thereafter, a conclusion will be made.

Chapter 2

Ownership of communal land

Introduction

The issue of communal land ownership is unclear. This is because the constitutional and legislation provisions that deal with communal land have been interpreted differently, both by the government, various authors as well as by the habitants of communal land. This have a negative effect on the rights of communal land residents because unlike the commercial land owners, communal land residents cannot claim ownership of their land in a clear legal sense. This chapter aim at making an in depth analysis of the ownership of communal land in Namibia by looking at the history of the land tenure up until the current position. This is so because by understanding the history of the Namibian land tenure it is then easy to understand why the government, various authors and communal land residents reason the way they do. This chapter also serve as a backbone to understanding how conservation affect the land rights of communal land residents which is an issue central to this dissertation.

Historical background of the land tenure system in Namibia

Namibia under the German Administration

Namibia was formally colonized in 1884 by Germany. When the Germans arrived in Namibia, they signed the so-called 'friendship treaties' with indigenous communities, which later led to the colonisation of these communities. The Germans then divided the land into two sections. One of these sections was named the Police Zone which was the southern part of the territory. The Northern part of the country suffered relatively less land dispossession and direct colonial rule while the Police Zone was policed directly by the German Administration. This was done with the purpose of protecting known economic resources and the best agricultural land (at least to

them). It was in this zone where they established what were called settler farms which were only owned by whites.[43]

Namibia under the South African Administration

German colonial rule came to an end with the surrender of the German armed forces in 1915. South West Africa became a Protectorate of Great Britain, with the British King's mandate held by South Africa in terms of the Treaty of Versailles signed in 1919. Under the Treaty and the South West Africa Act 49 of 1919, land held by the German colonial administration effectively became Crown (or State) land of South Africa. The Governor-General of the Union of South Africa had the power to legislate on all matters, including land allocation.[44] As a result, South Africa's homeland policies and other discriminatory policies were extended to Namibia.

In 1903, the South African administration had enacted an ordinance the Transvaal Crown Land Disposal Ordinance which gave power to the colonial government to declare land inhabited by active groups as crown land which divided the land on the basis of settler native dichotomy.[45] The passage of transference of the Crown Land Disposal Ordinance of 1903 meant that all land that was under the ownership of tribal groups became state land. Therefore the land belonged to the colonial government and as a result the native owners were deprived of their dominium and rights to land.

In 1922, the Native Administration Proclamation was passed which led to the foundation of native reserves meant for occupation by Native groups only. According to Amoo,[46] as early as the end of 1923 about 14 native reserves were established. This according to Muenjo meant that tribal communities who claimed rights to their land by virtue of occupation from time immemorial lost their land and land rights.[47] Furthermore, the Native Reserve Regulations[48] took away the powers of the traditional leaders to allocate land in reserves. This is because in terms of

[43]Muenjo (2009:10).
[44]Adams A. & Werner W. with contributions from Vale P. (1990). *The Land Issue in Namibia: An Inquiry*. Windhoek: Namibia Institute for Social and Economic Research, University of Namibia, p 94.
[45] Amoo S.K. (2001). Towards Comprehensive Land Tenure systems and Land Reform in Namibia. South African Journal of Human Rights (SAJHR). 1(17):87. P 91.
[46] Ibid, p 92.
[47] Muenjo (2009:15).
[48] 68 of 1924.

this regulation, the ownership of land vested in the colonial administration and the consent of the bicameral parliament of the South African Administration was required for any alienation to take place.[49]

The land reserves for the local communities was further divided into eleven ethnic homelands following the 1964 Odendaal Commission report that envisaged the homelands as separate state with separate citizenships. These homelands were created by the Development of Self Government for Native Nations in South West Africa Act[50] this Act gave various pieces of land assembled in the Development Trust special status by transforming them into areas for native nations.[51] The areas that had been designated for native reserves were later declared communal land by various pieces of legislation which include Caprivians Proclamation AG;[52] the Representative Authority of the Kavangos Proclamation AG[53] and the Representative Authority of the Ovambos Proclamation AG.[54]

Communal lands were those lands reserved for the natives and on which African customary law was applied only to the extent to which it did not grant any land to any to any native under complete ownership.[55] The only rights granted on such lands were those of occupation and the right of use known as usufructuary as the colonial administrative was made the trustee of communal lands.[56]

Namibia after independence

Namibia got independent on 21 March 1990 and was established as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all.[57] When the Constitution was adopted the whole question of land tenure in the

[49] Ibid.
[50] Act 54 of 1968.
[51] Section 2 of the Act listed Damaraland, Hereroland, Kaokoland, Okavangoland, Eastern Caprivi and Ovamboland as such areas.
[52] 29 of 1980.
[53] 26 of 1980.
[54] 23 of 1980.
[55] Amoo (2001:91).
[56] Muenjo (2009:28).
[57] Article 1 of the Namibian constitution.

post-apartheid era was deliberately left undetermined.[58] As previously discussed, under apartheid, formal land titling was a legal process held in reserve almost exclusively for whites. For blacks, a separate system of land tenure was legally required, this being communal land ownership which was occupied by blacks and had no legal right to buy or sell such land. Turner[59] expressed that since 1990, the pace of change has been slow, despite a major national conference on land reform and the land question in 1991. The tenure map of Namibia still looks much as it did at independence.[60]

The Namibian Constitution

The Namibian Constitution contains provisions that address the constitutional status of land rights in communal lands but these provisions contradict each other. This view emanate from the bill of rights under article 16 of the constitution which provides that "all persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property....."

This Article has been interpreted to mean that it only protects freehold property rights and does not include communal land rights because this title does not exist in communal land but only in commercial land area. Harring and Odendaal propose that this Article should be interpreted to include communal property which was in the hand of about 70% of the Namibian population at the time when the Constitution was drafted because the word "all" in the Article would in translation mean "all Namibian persons" including communal property holders.[61] The authors further added that failure to include communal property serve as a great injustice to communal land holders who lost their land due to the apartheid regime.[62]

On interpretation of Article 16, Harring[63] is of the view that the word "all" which appears in the clause and which refers to all persons having the right to acquire, own and dispose of land,

[58] Harring and Odendaal (2006:42).
[59] Turner(1996:6).
[60] Ibid.
[61] Harring and Odendaal (2006:44).
[62] Ibid.
[63] Harring S. L. (1996). "The Constitution of Namibia and the 'Rights and Freedoms' Guaranteed Communal Land Holders: Resolving the Inconsistency between Article 16, Article 100 and Schedule 5." *South African Journal on Human Rights*, Vol. 12, p. 467.

should be interpreted to give full protection to communal land ownership provided that the word is given is plain and ordinary meaning. This would then mean that the forms of property to be acquired in Namibia would include communal property. The same view is supported by Harring and Odendaal that 'the wording of article 16 that 'all forms of property' should clearly mean all forms of property held in Namibia in 1990, including communal property. But the Government has denied that this is the case, apparently in violation of the Constitution.'[64]

If article 16 is to be interpreted to include commercial property only this would be a discriminatory interpretation as communal farmers whose rights were taken away from them by the colonial administration are discriminated against. It would not be the aim of the drafters of the constitution to create such great injustice because this would in turn be in violation of a very important constitutional provision which is Article 10. This article affords all Namibian equal treatment before the law and therefore there is a duty on the constitution itself to bring on par the rights of all land holders in the country as this was not the case under the apartheid era as blacks could not acquire the same land rights as whites.

In light of the famous case of *S v Acheson*[65] which sets out the manner in which the Constitution is to be interpreted, it cannot be the aim or purport of the constitution to condone such inequality. Therefore all forms of property must be treated with equal respect otherwise it renders article 10 meaningless with regard to property land rights. However in the High Court case of *Cultural 2000 & Another v Government Republic of Namibia & others*,[66] it is evident that the courts give a very narrow approach in interpreting Article 16 and as such this article is more aimed at protecting property owned under a title deed and as such exclude communal land rights. This interpretation according to Harring[67] undermines the communal land rights which are so important to the vast majority of Namibian and thus creates an imbalance and inequality with regard to property rights in Namibia especially when read in context of the legacy of apartheid laws.

[64] Harring and Odendaal (2006:44).
[65] 1991 (2) SA 805 (NM).
[66] 1993 (2) SA 12 (NmHC).
[67] Harring 1996, p 470.

Another constitutional provision that strengthens this argument is the Preamble to the Constitution which states that the purpose of the Constitution is to promote equality to restore rights so long denied by colonialism, racism and apartheid law. This language is not law, but a statement of legal policy that provides a framework for understanding the meaning of the rest of the Constitution.[68] Clearly, and understood by all, the denial of land rights to the peoples of Namibia by colonialism, racism and apartheid was one of the most egregious of the many violations of human rights under apartheid. It led to the impoverishment of the peoples of Namibia on their own lands. In an agricultural society as Namibia, land is human life itself.

The rationale for the exclusion of communal land under article 16 is because the Namibian Government claims ownership of communal land[69] by virtue of Article 100 and schedule 5. Article 100 which provides that:

> Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned.

The term 'if not otherwise lawfully owned' opens up a different view with regards to assessing whether communal land was not already owned prior to the Namibian government claiming title to communal land. Muenjo opines that ownership rights that existed prior to the colonial regime should indeed be addressed and recognised by the government. Therefore if the colonial government illegally owned this land and the Namibian government takes over such land rights from the colonial regime, it can indeed be contended that the state holds title ship of communal land illegally.[70] This article must thus be interpreted by bearing in mind all other existing ownership rights.

It should also be recognised that Article 16 is one of the "fundamental human rights and freedoms" of the Constitution, and that it therefore has precedence over Article 100 in interpreting the Constitution. This means that Article 100 must be read in such a way that it

[68] Harring and Odendaal. 2006, p 43.
[69] Which comprise of over 50% of Namibian land and occupied by 70% of the Namibian population.
[70] Muenjo (2009:30).

defers to the fundamental human rights and freedoms of Articles 16 and 10.[71] Such interpretation will come to a conclusion that the property clause under article 16 will include communal land as the inhabitants of communal land cannot be discriminated against as such discrimination will be against article 10 and therefore the property that is not lawfully owned under article 100 cannot be said to include communal land.[72]

Schedule 5 provides that: "All property in the ownership and control … of the Government of the Territory of South West Africa or South Africa … shall vest in or be under the control of the Government of Namibia."

The government of the Republic of Namibia also relies on this provision to claim ownership of communal land because in terms of the apartheid laws, communal land was owned by the South African Administration and not by the communal land residents themselves. The question that arise is 'whether communal land should be included in the list of properties that were transferred from South Africa to Namibia seeing that Namibia's title emanates from South African's title which was illegal.' According to Muenjo[73] 'the case of *Spanish Sahara*[74]implicitly provides that indigenous land title is not extinguished by colonial powers.' This means that South Africa may never have legally gained title over communal lands in Namibia and therefore communal land does not form part of schedule 5 of the Constitution.

The language of Article 10, providing for equality, read together with the anti-colonial, anti-racism, antiapartheid language of the Preamble, makes clear that the Government of Namibia cannot accept a racist, apartheid-era definition of land ownership from South Africa for incorporation into the Constitution or any Namibian law. The Government of Namibia cannot argue that it owns the communal lands because the South African Government deprived the black people there of all of their land rights. Such an argument is inconsistent with the Namibian Constitution; it is unconstitutional. The Constitution itself directly spells this out in Article 23: "The practice of racial discrimination and the practice and ideology of apartheid … shall be prohibited …." This is clear as both law and policy: apartheid-era laws and practices are in

[71] Harring and Odendaal (2003:45).
[72] Harring (1996:472).
[73] Muenjo (2009:31).
[74] International Court of Justice, Advisory Opinion on the Spanish Sahara, 1987.

themselves illegal. The apartheid-era system of legal titling of white lands but not black communal lands is currently illegal under Namibian law and this inequality must be redressed.[75]

There is also an argument that the South African Government lacked authority under the League of Nations and United Nations mandates to take communal land. Under international law, the terms of the guardianship required not merely the protection of the peoples of Namibia, but positive legislation to advance them to a fully self-governing political status. Therefore the apartheid-era assertion of South African state title over black lands, and the separate system of black land ownership, was illegal all along, and no good title can ever pass from an unlawful title.[76]

Communal Land Reform Act

Section 17 of the Communal land Reform Act provides that:

> (1) Subject to the provisions of this Act, all communal land areas **vest** in the State in trust for the benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non agricultural business activities.
>
> (2) No right conferring freehold ownership is capable of being granted or acquired by any person in respect of any portion of communal land.

The meaning of 'vest'

The government have interpreted this section to mean that communal land belong to the state. This is supported by the Legal Assistance Centre and NNFU as they interpreted the term vest to mean state ownership of communal land. They wrote that 'Section 17 makes it very evident that all communal land areas vest (belong to) in the state, which must keep the land in trust for the benefit of the traditional communities living in those areas.'[77] It was further added that because the communal land belongs to the state, the state must put systems in place to make sure that

[75] Harring (1996:472).

[76] Harring and Odendaal ibid. Taking authority from Gordon R. (1989). "Can Namibian San Stop Dispossession of their Land." In Wilmsen E.N. (Ed.) *We Are Here: Politics of Aboriginal Land Tenure*. Berkeley: University of California Press, p 153.

[77] LAC and NNFU (2003:xvii).

communal lands are administers and managed in the interests of those living in those areas.[78] However, this section has been interpreted differently by various authors to mean that the wording of the section that communal land 'vests' in the state does not confer ownership to the state.

Mapaure[79] is of the view that the terms 'vest' used in this section raises controversial issues with regard to communal land and that section 17 (1) is now surrounded by some controversy regarding actual meaning of the word vest in the context of the section. He found that found that the word 'vest' has numerous meaning but none refer to ownership. The author referred to *Macquarie Dictionary*[80] which defines the word vest as "settled or secured in the possession of a person/persons as complete or fixed right, an interest sometimes possessing, sometimes future, which has a substance because of its relative certainty."

Another definition that the Macquarie Dictionary gave on the word but this one relates to property is:

> To effectively transfer ownership or powers to another or place property in the possession or control of another; when a legal or interest accrues to a person on the happening of the contingency or condition precedent to its vesting such as lapse of time or determination of a prior interest.

Van Der Merwe[81] who describe ownership as the most complete real right a person can have in relation to a legal object conclude that the vesting of a right does not mean that a right of ownership in the thing is obtained. He referred to the case of *Jewish Colonial Trust Ltd v Estate Nathan*[82] which according to him is always quoted when the meaning of the phrase vested rights is analysed. The judge in this case distinguished two uses of the word 'vested' one indicating ownership of a right not ownership of the benefit or asset as such, while the other one an

[78] Ibid.
[79] Mapaure 2009, p 33.
[80] Mapaure 2009. Taking authority from, Delbridge A., Bernard J.R.L., Blair D., Butler S., Peters P. & Yallop C. (Eds.). 2005. *The Macquarie Dictionary* (Fourth Edition). Australia: Macquarie Library.
[81] Van der Merwe B.A. (2000). Meaning and relevance of the phrase 'vested right' for Income and Tax Law. *South African Mercantile Law Journal*. 12(2), p 319.
[82] 1940 AD 163, p 175.

unconditional right. This shows that there is no uniform interpretation of the word 'vesting' and it can therefore be argued that its interpretation is subject to the context within it is used.

Van der Merwe in interpreting the *Jewish Colonial Trust* case wrote that the first use of vest refers to the ownership of a right and not to the ownership of the benefit or asset as such. The vesting of a right does not mean that ownership in the thing is obtained. A vested right indicates that its beneficiary is the holder of a complete real or personal rights. Property may be vested in someone purely for purposes of administration.[83] This therefore means that the fact that communal land is vested in the state does not mean that the state own communal land but the traditional communities are the ones that owns communal land.

This view has been supported by Mapaure[84] who is of the view that in the Namibian context, 'communal land is a community resource that gives rise to community based resource rights like the right to land. The fundamental characteristic of community-based property rights is that their primary legitimacy is drawn from the community in which they exist, and not from the nation state in which they are located. In other words, community property rights are derived from the customs of a community, which are a form of a constitution for that community.'

The meaning of 'trust'

The other part of section 17(1) that one has to look at is the part that the government holds 'communal land in *trust* of the people living there.' According to Kodilinye[85] a 'trust' may be defined as an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called beneficiaries) of whom he may himself be one, and anyone of which may enforce the obligation.[86]

This definition highlights the crucial features which are obligatory nature of trusts and the notion that control is vested in the trustees on behalf of the beneficiaries who are entitled to protect their

[83] Van der Merwe 2000. P 329.
[84] Mapaure 2009, p 33.
[85] Kodilinye G. (1996). *Trusts texts, cases and materials.* London: Cavendish Publishing Unlimited.
[86] Ibid, p 3.

interests. This means that the trustees bear the responsibility of controlling and managing the trust property solely for the benefit of the beneficiaries. From this, one can therefore see that trust obligation does not mean that the trustee is the owner of such trust property but the beneficiaries are indeed the owners.

On this point, Mapaure[87] argues that 'if the government holds the land in trust, does it own it? Considering that the concept of trust does not connote ownership, if the state holds the property in trust only, it implies there are owners which in this case may most appropriately be the communities on whose behalf such trust is formed.

This view is the same view held by Hinz[88] who stated that section 17 of the Act avoids the use of the terms ownership, but stipulates that communal land is vested in the state, however in trust for the benefit of the communities which occupy it. In other words, the authority of the state over communal land is not to be confused with the ownership of state land. This ownership is subject to trusteeship the state holds for various communities.

Shifotoka[89] share the same sentiment with Mapaure and Hinz that although the government has interpreted section 17 of the Communal Land Reform Act to mean that communal land belongs to the state, there is a view that the state is not the owner of communal land, but they merely hold the land in trust for the benefit of traditional communities. Vesting does not mean ownership; neither does the concept of trust connote ownership. If the state holds the land in trust, this means that there should be an owner on whose behalf the trust is formed; in this case the traditional communities.[90]

Shifotoka went further to write that if the state rightly interpret section 17 to mean that communal land belong to the state, then what is the purpose of section 16 which requires just compensation to be paid to the traditional communities, in order for the state to successfully

[87] Mapaure 2009, p 32.
[88] Hinz 2003, p 2.
[89] Shifotoka E. (2009). *The Implications of declaring communal lands into towns.* Windhoek: University of Namibia. A dissertation submitted in partial fulfilment of the requirement of the award of the degree of Bachelor of Laws. Faculty of law: University of Namibia.
[90] Ibid, p 10.

withdraw communal land from traditional communities, and thereafter dispose of it as it deems fit. One will therefore ask that 'why would a holder of a right (in this case the state as owners of communal land) compensate someone who is not entitled to such right (unlawful occupation or 'ownership' of such land?).' In essence this may mean that the traditional communities are unlawfully occupying land in the communal areas. Thus it would further then not require the state to pay compensation or follow any procedure to acquire the land for that matter.[91]

In interpreting the word trust, Shilongo[92] wrote that 'land in trust can be said to be controlled, the word 'control' does not denote 'ownership.' Therefore trust created in terms of section 17 does not denote ownership of communal land to the government or its representatives but rather indicated that it is controlled by the government for the benefit of traditional communities who owns such land.

Beside the interpretation of the various constitutional provisions and that of section 17 of the Communal Land Reform Act, Hinz[93] wrote that 'in the perception of the people, communal land is owned by the respective traditional authorities. They are of the view that the land is entrusted to the chief for the community under his/her jurisdiction. This view is supported by Namwoonde who conducted an empirical research in Caprivi and Kavango region. Her research found that ownership of communal land is perceived differently from the State's side and also from the community's side. Despite the state's claim of ownership over communal land her research found that most community members agree that the land belongs to the traditional authority who have the mandate to allocate it even though at family level the community members are of the view that the land belongs to the family.[94]

[91] Ibid at page 10 – 11.
[92] Shilongo L. (2010). *The Namibian Government's Compensation Policy on Occupiers of Communal Land and its Implication in the Context of Administrative Law.* A dissertation submitted in partial fulfilment of the requirement of the award of the degree of Bachelor of Laws. Faculty of law: University of Namibia.
[93] Hinz (2003).
[94] Namwoonde (2010:38).

Conclusion

In conclusion, the government and various authors have interpreted the provisions of the constitution and the communal land reform Act differently. The government interpreted Article 16 to mean that the only property that is protected under this Article is freehold title and that communal land is among the natural resources that are provided for by Article 100 as not lawfully owned when the government of the Republic of Namibia came into power. As a result of this interpretation, the state claims ownership of communal land relying on Article 100. The state also interpret schedule 5 to include communal land among the properties that was owned by the colonial regime. The interpretation by the government have been criticised heavily on the grounds that such interpretation in respect of Article 16 is discriminatory and therefore against Article 10. Another criticism is that communal land have always been owned by the communal land residents and the colonial regime's ownership over the land was based on the apartheid laws which will not stand the test of law in the independent Namibia.

On the interpretation of Section 17 of the Communal Land Reform Act, various authors are of the view that the government's interpretation of the words 'vest and 'trust' to mean that the government own such land is totally wrong. This is because the definition of these words does not connote ownership but merely control over such property. It is because of this that control must not be confused with ownership and this will mean that the beneficiaries of communal land which is under the control of the government are the owners. Furthermore, this chapter reveal that the communal land residents are of the view that they own such land and not the government. The views by the different authors and the communal land residents themselves are convincing enough to conclude that the communal land is owned by communal land residents and the state's claim of ownership over such land is wrong.

Chapter 3

Communal Conservancies and the effect that they have on community member's land rights

Introduction

Conservation of natural resources is no strange concept to Namibian law as the first piece of legislation was enacted by the German Colonial Administration a century ago.[95] From then, conservation legislation have undergone through various amendment and the law as it is today provide for the establishment of communal conservancies which was not the case during the pre independence era.[96] The Community Based Natural Resource Management (CBNRM) programme which recognises the importance of granting rural communities a stake in conservation of wildlife is said to be one of the most innovative and advance CBNRM models in Africa.[97]

However, despite the success of the programme, one of the challenges that still face this programme is the issue of land. This issue remain a challenge because the policy framework for land reform in communal areas has and is still unclear and the fact that there are different views with regard to communal land ownership were some are of the view that this land is owned by the government while others are of the view that the traditional communities own such land. These conflicting views make it difficult for the CBNRM programme to be fully accepted by the communal land residents. This chapter comprise of a discussion of communal conservancies in Namibia, as well as how communal land rights are affected by the establishment of communal conservancies despite the fact that their establishment is a voluntary act on the part of the communal residents.[98]

[95] This was the German Hunting Verordnung of 1909.
[96] Communal conservancies are established in terms of the Nature Conservation Amendment Act of 1996.
[97] Kashululu R. P. (2009). *Conservancy an Arena of Power Struggle: A Case Study of Uukwaluudhi Conservancy in Namibia*, MSc thesis Rural Development Sociology RDS-80430. Wageningen: Wageningen University and Research Center, p ix.
[98] This is provided for by section 24A of the Nature Conservation Amendment Act of 1996 which requires communal land residents who want their area to be declared a conservancy, to apply to the Minister themselves.

Development of nature conservation law in Namibia

Under the colonial administration

In Namibia, conservation laws date back as far as 1909 when the German Hunting *Verordnung* was enacted. This legislation regulated the hunting of wild animals, which at the time was considered to be res nullius (not privately owned). According to Hinz,[99] during colonial times, the state took control of wildlife and managed it from central government and as a result the local people were alienated of their resources.

The immediate successor of the German Hunting *Verordnung* was the Game Preservation Ordinance 13 of 1921 which was enacted by the South African Administration after they took over the territory of South West Africa from the German Administration in 1919.[100] The Game Preservation Ordinance introduced the categories of Royal Game, Big Game and Small Game to categorise animals for the purpose of the ordinance. For one to hunt Royal Game, a permission was required which could only be obtained from the administrator and hunting other than by shooting was allowed when especially permitted by the administrator, a restriction that is still upheld up to today in terms of the Nature Conservation Ordinance 4 of 1975.[101]

After the 1921, more Acts were promulgated with the aim of conserving the nature with a particular emphasis on the wildlife. However the communal area was ignored by these laws until 1964 when the South African colonial policy of so called separate developments (RSA Odendaal Plan 1964) came into being. The Odendaal Plan resulted in enactment of two pieces of legislation that provided for some decentralisation in the law of hunting: the Owambo Nature Conservation Enactment[102] and the Kavango Nature Conservation Act.[103] The two acts contained mechanisms to co-administer wildlife by delegating the authority to issue hunting licences in certain cases to local offices. The executive Council of Owambo, for example,

[99] Hinz (2003:21).
[100] Ibid.
[101] Hinz (2003:22).
[102] 6 of 1973.
[103] 4 of 1974.

received the authority to determine the hunting season and to issue licences to hunt specially protected game which among others included buffalos, lions and elephants.[104]

Furthermore the Nature Conservation Ordinance of 1975 was enacted. This Act gave ownership over huntable game (Buffalo, Kudu, Oryx, Springbok, and Warthog) to white commercial farmers, but these same rights were not extended to the communal area inhabitants. If anything, they were further alienated from wildlife, as all wildlife on communal land was declared state property, and only the state had any say over them. This situation led to a booming wildlife industry on commercial land as wildlife became a valued income generating resource. The reverse of this situation however occurred on communal lands, leading to declining wildlife numbers in some cases even some species disappearing from areas where they naturally occurred in the past, due to poaching by both insiders and outsiders, as well as unsustainable harvesting practices by the state (including the former South African Defence Force) and those granted permits to hunt on communal lands.[105]

Post independence

Following independence in 1990, Namibia developed a new Constitution, of which its Article 95 is dedicated to the issued of environmental management. Thereafter, the Namibian government through its agency the Ministry of Environment and Tourism (MET) begin addressing conservation issues. This was done by focusing on involving local people in the management of wildlife as it was believed that the involvement of local community groups and leaders could lead to significant conservation success.[106] Building on these new insights and approach, the Ministry of Environment and Tourism initiated a community-based planning process which resulted in the conduction of socio-ecological surveys with the help of the organisation of Integrated Rural Development and Nature Conservation (IRDNC) and other NGOs with local

[104] Hinz (2003:23), see also Anyolo (2010).
[105] Skyer P. (2003). *Community Conservancies in Namibia: An effective institutional model in achieving sustainable and equitable Common Property Resource Management?* A paper presented at the: Promoting Common Property in Africa: Networks for Influencing Policy and Governance of Natural Resources (Co-Govern) Workshop on 6-9 October 2003 in Cape Town, South Africa. Windhoek: Namibian Association of CBNRM Support Organisations (NACSO), p 3.
[106] Long S.A. (2004). Introduction. In Long S. A. (Ed.) *Livelihoods and CBRNM in Namibia*. WILD Project, Department for International Development: Windhoek, p 10.

experience.[107] The conduct of these studies identified key issues and problems from the community perspective concerning wildlife and conservation which included the fact that the local people were unhappy with the attendant costs of living with wildlife, for example crop damage by elephants and livestock losses to predators. While the communities did not want the wildlife to disappear, they also hoped to have the same rights over wildlife that had previously been granted to white farmers. The results of these studies helped the government of Namibia to realise that in order to have a successful conservation mechanism in place, the Nature Conservation Ordinance of 1975 would have to change.[108]

In December 1991, the MET approved the National Nature Conservancy Policy which was aimed at enabling rural communities to gain the same rights of use and benefit from wildlife as commercial famers and to gain rights over tourism concessions by forming a management institution called a conservancy under the Community Based Natural Resource Management Programme (CBNRM).[109] This policy defined a conservancy as 'a group of farms on which the neighbouring land owners have pooled their resources for the purposes of conserving and utilizing wildlife on their combined properties.' Furthermore, the policy on "Wildlife Management, Utilisation and Tourism in Communal Areas" of 1995 was approved by MET which created suitable institutional conditions to allow the implementation of conservancies. The primary objectives of this policy are:

"to establish … an economically based system for the management and utilisation of wildlife and other renewable living resources on communal land … ; to redress past discriminatory policies and practices …; to allow rural communities on state land to undertake tourism ventures, and to enter into co-operative agreements with commercial tourism organisations to develop tourism activities on state land."[110]

As a result the establishment of Community Based Natural Resource Management (CBNRM) came before parliament. Parliament approved the Nature Conservation Amendment Act of 1996 which amended the 1975 Nature Conservation Ordinance to give communal area residents the

[107] Anyolo (2010:3).
[108] Kashululu R. P. (2009). *Conservancy an Arena of Power Struggle: A Case Study of Uukwaluudhi Conservancy in Namibia*, MSc thesis Rural Development Sociology RDS-80430. Wageningen: Wageningen University and Research Center, p 20.
[109] Ibid, p 21.
[110] Ministry of Environment and Tourism, Republic of Namibia, (1995). *Wildlife Management, Utilisation and Tourism in Communal Areas.* Policy Document.

same right over wildlife and tourism as freehold farmers. This is done by allowing communal land residents to establish conservancies on their land as these rights were only given to commercial farmers before the Nature Conservation Ordinance of 1975 was amended. In short, the aims of CBNRM in Namibia are to promote wise and sustainable use of natural resources: to devolve rights over and responsibilities for wildlife and tourism to rural communities by creating enterprise and income generating opportunities, and to encourage and assist communities to acquire skills to manage their areas and actively pilot their own future.[111] The ministry assists and guides conservancies on wildlife management and related matters during the formative years of the conservancy.

The communal conservancy programme in Namibia is said to be among the successful programmes in Africa. The first communal conservancy, the Torra Conservancy, was gazetted in 1998[112] and according to NACSO's report in 2010, today there are 59 registered communal conservancies, which cover up to 132,697 square kilometres of communal land and embracing approximately 234 300 residents.[113]

How conservancies are formed

The 1999 Conservancy policy and Section 24A of the Nature Conservation Amendment Act of 1996 define communal conservancies as areas in which rural communities gain rights to use, manage and benefit from the consumptive and non consumptive use of wildlife within defined boundaries. Establishing a conservancy is on voluntarily basis. Therefore, any group of persons residing on communal land who choose to work together for the purpose of conserving and using wildlife sustainably, and who desire to have the area on which the inhabit or any part thereof can apply for that area to be declared a conservancy and subsequently become registered with MET.[114]All the relevant information that communities need in order to establish a conservancy are provided by the Ministry of Environment and/or NGOs. This ensures that the community establish a conservancy in a manner that is provided by the law in order for their application to be approved and have the conservancy gazetted.

[111] Tjiramba S. and Odendaal W. (2005). *A review of environmentally sustainable land use practices and their benefit to Namibia's communal communities.* Windhoek: Legal Assistance Centre, p 5.
[112] Gazette No. 1891.
[113] NACSO 2010, P 12.
[114] Section 24A of the Nature Conservation Amendment Act of 1996.

Section 24A of the 1996 Nature Conservation Amendment Act sets out requirements that need to be met by traditional communities that want to apply and establish a conservancy: The main requirements include the following:

- **A conservancy committee:** this is the representative body of the community residing in the conservancy and which has the ability to effectively manage the income and funds of the conservancy and has appropriate methods for equitable distribution of the financial benefits to members.
- **A conservancy constitution:** the constitution must show a commitment to, and strategy for the sustainable management and utilisation of wildlife within the conservancy.

  The constitution of the conservancy aims to do the following:

  i. Meet the legal requirements of the amended Nature Conservation Ordinance which makes provision for communal area conservancies;
  ii. Meet the requirements for giving the conservancy constitution legal status under common law;
  iii. Satisfy MET that there is a real commitment to sustainable management of wildlife and that the conservancy will draw up a management Plan once established;
  iv. Provide for the operational arrangements of the conservancy; and
  v. Express the particular objectives, interests, needs etc of a specific community.
- **A map:** the map which identifies clearly the conservancy's geographical features.
- **Boundary:** the conservancy must be legally constituted with clearly defined boundaries that are not in dispute with neighbouring communities.
- **A defined management plan:** for the distribution of conservancy benefits to members which clearly illustrates and expresses goals and objectives of a specific community.
- **Membership:** a conservancy must have clearly defined membership.

Once these conditions have been met and approved by the Ministry of Environment and Tourism, a conservancy is then registered and gazetted in the Government Gazette. Once registered, a conservancy acquires new rights and responsibility with regard to the consumptive and non-consumptive use and sustainable management of game "in order to enable the members of such community to derive benefits from such use and management."[115] The rights over

[115] Section 6 of the Nature Conservation Amendment Act of 1996.

wildlife conferred on a conservancy committee on behalf of the community in the conservancy, are for the ownership of huntable game,[116] the capture and sale of game, hunting and culling and the right to apply for permits for the use of protected and specially protected game. The Nature Conservation Amendment Act further gives conservancies rights over non-consumptive utilisation of game which is the right over commercial tourism activities within the conservancy.[117]

The effect of Communal Conservancies on people's land rights

The above discussion gives an understanding of how communal conservancies came into being in Namibia and how they function. This is necessary in answering the research question of how conservancies affect the land rights of communal land residents which were discussed in chapter 2. It is a clear fact that the establishment of conservancies do affect the land rights of communal land residents because a defined geographical area is one of the requirements of the establishment of a conservancy. As Jones[118] puts it that conservancies are established on communal land to which all local residents would normally have access for grazing, collecting wood etc. This therefore means that the land that the local residents would normally utilise for different activities is now taken up by the conservancy and this lead to some community members to feel that the set up of a conservancy have a negative effect on their land rights. This is despite the fact that section 2A of the Nature Conservation Amendment Act provides that a conservancy should be set up on the initiation by the community members to the ministry on the establishment of the conservancy. Some community members still find the set up of a conservancy to have a negative effect on their land rights.

The issue of land on the establishment of conservancies have been on the mind of communal land residents right from the point when the Ministry of Environment and Tourism introduced conservancies to these communities. Sullivan[119] explains that the conservancy policy since its

[116] Which include Oryx, Springbok, Kudu and Warthog.
[117] Long S. A. and Jones B. T. B. (2004). Contextualising CBNRM in Namibia. In Long S. A. (Ed.)Livelihoods and CNNRM in Namibia. WILD Project, Department for International Development: Windhoek, p 33.
[118] Jones (1996:6).
[119] Sullivan S. 2002. 'How sustainable is the communalising discourse of 'new' conservation? The masking of difference, inequality and aspiration in the fledgling 'conservancies' of Namibia'. In Chatty, D. and Colchester, M. (eds.) 2002 *Conservation and Mobile Indigenous people: Displacement, Forced Settlement and Sustainable Development*, Berghahn Press, Oxford. pp. 158-187, p 165.

inception has been understood and appropriated by local people in communal areas primarily as a land issue, and secondarily as a wildlife management issue, with local meetings dominated by debate regarding claims to land rather than to wildlife. This shows that the concern for land by the local people has been there right from the time when the government came up with conservancy policies.[120] Communal communities heavily depend on land and their livelihoods depend on natural resources and this is the main reason why the question of land has been in the minds of these communities from then up until today.

According to Turner,[121] the problem with conservancies in light of land rights is still there because the rural people building community conservation systems still cannot claim to own the land on which the resources live as the creation of communal areas conservancies does not offer any form of land ownership to the majority of Namibia's rural population.[122] Turner gave a case study of the establishment the Salambala conservancy. He wrote that when the Salambala conservancy was set up, there was a problem with relocating the people who were living on the area that was earmarked for the conservancy but the situation was resolved when it was agreed that a conservancy can have people living in it, and can support multiple land uses including grazing.

The idea of having people living in the conservancy led to the idea of a core area which would be reserved for wildlife, and a broader area also part of the conservancy which would contain a number of villages and other land uses.[123] On the issue of Salambala Conservancy, Jones add that on the establishment Salambala Conservancy, problems with regard to land were experienced because four families refused to vacate the core area which according to the constitution of the conservancy should be fenced off for wildlife. This according to Jones is a stark illustration of what a small minority of dissidents can do to destroy the positive developmental work of the community."[124] The Legal Assistance Centre had to intervene and only one family agreed to move while the other three still live in the core area.[125]

[120] Policies such as the National Conservancy Policy of 1991.
[121] Turner (1996).
[122] Ibid p 14 and 16.
[123] Ibid, p 21.
[124] Jones (2003:8).
[125] Ibid, p 22.

Another case study is that of Uukwaluudhi Conservancy where Anyolo[126] conducted an extensive empirical research. Her research found out that the core area of the conservancy was established on an area which was used by the community members for stock farming as well as for crop production. As a result people had to give up their land for the conservancy and this lead to serious economic loss and social disruption for those who had to move away from the land.[127] Anyolo further adds that the economic loss and social disruption was mainly caused by the fact that the land which people lost was the environment from which people extract their basic needs for food, shelter, fuel, grazing and water. This land is now fenced off and people no longer have access to these natural resources.[128]

Anyolo's findings are supported by the study by Marsh and Seely[129] who wrote that the fencing off of the large area of Uukwaluudhi communal area for the protection of wildlife is somehow not well appreciated by the rural communities in Uukwaluudhi especially the traditional healers who depend upon the natural resources for herbal production hence they use wild vegetation as medicine sources.

The major impact that conservancies have on land rights of communal land residents is that like in the case of Uukwaluudhi conservancy, the community members expressed that 'no negotiations were held with the affected community and no compensation arrangements were offered to them.'[130] This is the same finding that Turner[131] found in his research on Uukwaluudhi conservancy when he wrote that the farmers whose cattle posts were within the boundaries of the core area had to be relocated but since they were not happy with the decision they decided to protest against the fencing off of the core area. However despite the protest, this did not stop the establishment of the conservancy as the then President Dr. Sam Nujoma intervened in the affairs of the community and ordered this group of herd owners to comply with the decision by the majority of the community and their traditional leaders. The reason for the intervention was that

[126] Anyolo (2010).
[127] Ibid, p 55.
[128] Ibid, p 59.
[129] Marsh and Seely (1992).
[130] Anyolo (2010:59).
[131] Turner (1996).

those who are forced to make way for the conservancy who are usually few do make these sacrifices for the greater good of the many.[132]

Jones[133] argues that although the ministry of Environment and Tourism has initiated the development of new policy and legislation to provide communal area residents with the same access to wildlife as commercial conservancies, experience has shown that the Nature conservation Amendment Act of 1996 deprives local people the right to access to some other natural resources that they depend on for survival. As a result the local people develop negative feelings towards conservancies because they feel that the large portion of communal land that is zoned for wildlife and tourism is for nothing since they feel that such wildlife and tourism enterprises have not contemplated their livelihood.[134]

The blame is put on the Nature Conservation Amendment Act of 1996 which is silent about the right of land ownership and use rights under customary law. Further the Act does not provide any remedy to those affected by the change in land tenure system. That is when local people lose their land to conservancies.[135] On this Anyolo suggests measures of law reform that would abridge the gap between the statutory conservancy law and the right of communal land residents when they lose their land to conservancies.[136]

According to Jones, there is sufficient evidence to suggest that despite the problems that are encountered in the operations of conservancies, rural people in conservancies value the benefits that are derived from conservancies.[137] This is because not only does conservancies provide a platforms for local communities to manage natural resources sustainably, conservancy reports shows that direct financial benefits has also accrued to community members and contribute greatly to the development of their livelihoods.[138]

[132] Ibid, p 23.
[133] Jones (2003:17 – 18).
[134] Ibid, p 18.
[135] Anyolo (2010:110).
[136] Ibid, 114.
[137] Jones (2003:19).
[138] NACSO (2010:42).

For example in 2007, up to 36 conservancies were reported to have earned cash income which range from N$ 10 000 to over N$ 2 million per conservancy. Some payments were made directly to members or to villages in areas were the number of members was too large to make individual payments viable and some payments are made to members involved in craft production.[139] Furthermore, conservancies offer employment to the local people and in 2006 it was reported that Conservancy funded jobs have increased more than threefold from N$480,906 (US$ 68,895) in 2003 to N$1,660,758 (US$ 237,920) in 2005. Further it was reported that there was 355 full-time and 1,029 part-time people employed by joint ventures and community-based campsites, other tourism enterprises, and trophy hunters in conservancies.[140] However, not all conservancies make direct payments to households, as many benefits are provided through social projects and many are intangible (such as empowerment and capacity building). These reports show that the CBNRM programme has been successful in uplifting the lives of some people and as a result some feel that even though conservancies do affect their land rights and had to move without compensation, they feel that their sacrifices have paid off.

Human wildlife conflict

Another aspect that has an effect on the land rights of communal land residents is human wildlife conflict. According to Marsh and Seely[141] communal residents suffers costs of living with wildlife as this often result in crop damage by elephants, livestock looses to predators and some even happen to lose their lives over lions and elephants attacks. This is a great infringement on people's land rights as they cannot enjoy the use and enjoyment of their land freely anymore. For example it was reported in the New Era[142] newspaper that inhabitants of several villages in the Omatandeka conservancy in the Kunene Region suffered crop damage by elephants leaving them with nothing or little to feed on.

On this subject, Hinz[143] wrote that a particular problem exists with people living close to parks. In some cases, such park borders are on paper only, meaning that animals come and go. Instead

[139] NACSO, ibid.
[140] NACSO (2006).
[141] Marsh and Seely (1992:26).
[142] Tjaronda W. (17 June 2005). New era Archive, http://www.newera.com.na/article.php?title=&articleid=7614 accesed on 4 July 2011.
[143] Hinz (2011:169).

of promised returns from cooperation with the official conservation policy, people often suffer from so-called problem animals which are raiding fields and livestock. This is particularly true as over the years there have been several reports by the communities that live near parks and conservancies with regard to the problems that they have with wild animals, and their main concern is the inadequate arrangements by the Ministry of Environment and Tourism to deal with such problems. As a result, people feel that their land rights are infringed upon as they cannot use and enjoy these rights freely as they should since they are not allowed to do anything to the animals but to rather report such incidents to the ministry and without compensation for their loss.[144]

Villagers in Uukwaluudhi conservancy and many others have also experienced the problem of human wildlife conflict. Despite this happening, Anyolo's study found that there is no legal protection available to communities who suffer costs of living with wildlife. This is because the available legal instrument at their disposal, which is the Nature Conservation Amendment Act does not provide for loss of life or property due to human wildlife conflict. She further adds that such legal ignorance has an effect to communal area conservancies' administration and therefore legislative remedy is required.[145]

Jones and Barnes[146] wrote that successful sustainable development requires the harmonisation of both environmental and human development goals, and resolving human wildlife conflict is central to this aim. Conservationists agree that the CBNRM programme played a major role in the increase of wildlife which in turn leads to increased human wildlife conflict. Human wildlife conflict has a high impact on rural households and the government does not pay compensations to human wildlife conflict because of the administrative problems that a scheme presents but uses CBNRM as an approach to try to internalise the costs and benefits of living with wildlife at the community level.[147]

[144] Hinz (2011:171).
[145] Anyolo (2010:25).
[146] Jones B.T.B and Barnes J.I (2006). Human Wildlife Conflict Study: Namibian Case Study. Found on http://www//hwc_namlastfinal.pdf , last accessed on 3 September 2011.
[147] Jones and Barnes (2006:7).

This is supported by the government's National Policy on Human Wildlife Conflict Management[148] which provide that it is not a government's policy to provide compensation to farmers for losses due to wild animals, but the policy have established a 'Human Wildlife Self Reliance Scheme' to be run by the conservancies in order to assist affected families with funeral costs and to use revenue from problem causing animals to avoid future conflict and to address the losses of affected persons.[149] To date, conservancies in Kunene and Caprivi region have worked to the Namibian NGO Integrated Rural Development and Nature Conservation (IRDNC) to establish the 'Human Wildlife Conflict Self Insurance Scheme (HACSIS) which provides funding to offset the livestock losses caused by predators. However only four conservancies[150] have such scheme in place and the other 55 do not have it. This shows that despite the establishment of the insurance scheme by the policy, its implementation remain to be slow and thousands of communal land residents continue to suffer at the hands of wildlife without compensation.

Conclusion

This chapter focused on answering the research questions 'whether the right to conserve trump with the right of communities to own and use such land' and 'whether there is legal protection to communal land residents whose land rights are affected by conservation.' The findings in this chapter were that the establishment of conservancies do trump with the land rights of communal land residents. This is so because several community residents like in the case of Salambala and Uukwaluudhi conservancy had to give up their land for the establishment of the core area which is not open to the community members as it is fenced off for wildlife. In the case of Uukwaluudhi conservancy the community members protested against the decision for them move and the government had to intervene and ordered them to move. The intervention by the government shows that even though the conservancies are established and managed by the community members themselves, the government continue to have an interest in their affairs.

[148] Of 2009.
[149] National Policy on Human Wildlife Conflict Management of 2009.
[150] Namely #Khoadi //hoas Conservancy, Kasika Conservancy and Kwandu Conservancy.

On the issue whether communal land residents have legal protection against loss of land t conservation, research reveal that there is no legal protection as the Nature Conservation Act is silent on ownership of communal land. As a result, no compensation is offered to the residents, and this is seen as a major legal lacuna in our law. The community members own that land and they deserve compensation.

Another way in which conservation trump with the right to land is through human wildlife conflict. This is so because the wildlife in the conservancies often makes it to the areas where people live and cause crop destruction, livestock loss and in some cases loss of human lives. In this way, the community members can no longer enjoy the occupation of their land and this is made worse by the fact that in most conservancies there is no scheme to compensate those who become victims. This is despite the fact that the government's policy on Human Wildlife Conflict Management establishes Human Wildlife Self Reliance Scheme but so far only four conservancies have such schemes in place.

Chapter 4

Study: reports on the findings of the empirical part of the study

Introduction

In December 2010, the local media reported that some community members in Onganjera traditional area took to the streets and demonstrated against the Sheya Uushona Conservancy. The media reports included allegations that the salt pan which form an integral part in the lives of the community members has been sold. Other allegations were that the community members were forced to move in order to make way for tourism and that the some community members are not happy with the management of the conservancy. These reports have prompted the researcher to take up the matter and as a result, empirical research was conducted during the period of 4 – 13 July 2011 on how land rights of the Ngandjera Traditional Community are affected by the Sheya Uushona conservancy. It is against this background that this chapter entail an in depth discussion of the empirical research.

Sheya Uushona Conservancy Profile

Sheya Uushona is a communal conservancy that was registered in September 2005 and it is situated on the Northern border of the Etosha National Park in the Omusati Region. The conservancy was named after King Sheya Uushona who reigned in Ongandjera between1862 – 1872. It covers an area of 5066 square Kilometre and there are about 35 000 people who live in the conservancy. The wildlife that is found on the conservancy includes hartebeest springbok, red hartebeest, kudu, Oryx, elephant, lion, leopard, caracal, black-faced impala, duiker, steenbok, spotted hyena, black-backed jackal, warthog and on occasions, black rhino. There are many salt pans in the area, of which the Ngandjera Pan is the best known because of the high quality salt that is harvested there over hundreds of years by people from all over the north-central of Namibia.[151] The conservancy has a management committee of 88 members, of which 50 are

[151] Information from Kemp L., Mandelsohn J. and Jones B. (2009). Sheya Uushona Booklet. Windhoek: Namibia Nature Foundation on behalf of the Natural Resources Working Group of NACSO, p 3-5.

women. An executive of 20 is formed from this committee of which 11 are women and 9 are men. The conservancy also employ 10 staff members of which 4 are women and 6 are men.[152]

Empirical Research Conducted

Conservancy set up

The news about the CBNRM programme by the Namibian government which provide local communities with a number of incentives to manage natural resources sustainably came to the attention of the Ngandjera traditional community as well. This was after witnessing the establishment of the Uukwaluudhi conservancy which is established in their neighbouring traditional community. This gave the Ngandjera traditional community a very good example that they too, can benefit from wildlife and at the same time preserve their environment.[153]

The interest of the Ngandjera community to set up a conservancy came to the attention of the Ministry of environment and tourism which in conjunction with the Rössing foundation held meetings in order to pass on information to the community about the requirements of setting up a conservancy as well as how to register the conservancy with the Ministry of environment and tourism. Such information helps the community to make decisions that are important with regard to the establishment of their conservancy and the information serve as a driving force to meeting all the requirements and finally gazette their conservancy.[154]

Furthermore, the Rössing foundation provided the community with the support that they needed during the early stages of formation of the conservancy.[155] The support that they received included help with the writing of the constitution of the conservancy which is a very important document for each and every conservancy ever established. Other support included the registration of conservancy members and demarcation of the geographical boundaries of the conservancy. The constitution of the conservancy was accepted in 2003 at Okahao which is the

[152] NACSO (2010).
[153] Kemp *at el* (2009:5).
[154] Field note 2 and 8.
[155] Ibid.

only town in the Ngandjera traditional area. After resolving the boundary dispute which took long to resolve, Sheya Uushona Conservancy was registered in September 2005.[156]

Ownership of land

The research has found that most of the community members are of the opinion that the land belongs to the traditional authority and it is the traditional authority that has the power to administer the land for example by allocating to the people and deal with land disputes when they arrive. This is so because the land has been in the hands of the King as the supreme leader, and this has been practice even before the arrival of the white colonial government.[157]

When asked whether they know if according to the constitution the communal land belongs to the state, the response was that they don't know of this and in their mind the fact remain that the land belong to the traditional authority as this has been the practice for as long as they could remember. If a person receive a portion of land that land then belong to that person and can utilise it in any way they see fit and can pass it on to their heirs but cannot sell that land and should they decide to move from that land it goes back to the traditional authority who can then locate it to another person.

However there are few community members who know and understand that in terms of the law, communal land belong to the state, even though it is administered by the traditional authority. They add that despite the fact that this is what they law provides, the fact remains that in the minds of the people, it is their land and they can do whatever they want with it once they get it from the traditional authority. They further add that they do not understand how the concept of state ownership of the land works.[158]

This shows that the people themselves who are affected by the provisions of the Constitution and the Communal Land Reform Act are not aware of state ownership of land, and those who are aware do not quite understand the concept but be believe that even though this is what the law provides, it is their land and they can do whatever they seem deem fit. This can be said to be the

[156] Field note 2 and 8.
[157] Field note 2, 3, 4 and 5.
[158] Field note 5, 6, 7 and 8.

reason why disputes arise between the government and communal land residents because while the government put in place policies for the good of the people, on occasions, residents might have different views that they do not want implementation of such policies on their land.

Politics of Sheya Uushona Conservancy

Just like other communities, politics among community members is no exception in Ongandjera. As mentioned earlier, on 3 December 2010 some community members of Ngandjera traditional community held a demonstration were they alleged that the slat pan has been sold and that the Sheya Uushona conservancy has forced community members in order to make way for tourism. The allegations also includes that the community members are not happy with the management of the conservancy.[159]

During the empirical research, some interviewees informed the researcher that the reason why the demonstration took place was due to politics and power issues that were going on in the community. The politics and the power issues are that, there are certain members of Sheya Uushona conservancy who want to vote out the current chairperson Mr. Sakeus Shikongo from his position. This is because this group of people is in support of one traditional leader who the interviewees refused to give a name. This according to the interviewees was done despite the democratic elections that were held in which the traditional leader lost.[160]

According to the interviewees, the traditional leader who want to be in power has since been on a mission to tarnish the conservancy's image when he and some individuals spread information that the salt pan was sold by the Sheya Uushona conservancy management and that the conservancy is forcing residents to vacate their land. The community was further informed that the conservancy is not properly managed by the current management committee and that it was time for the committee to be voted out. The interviewees expressed that this turn out to be false information even though based on this information the community members decided to hold a demonstration on 5 December 2010. The information was found out to be false after the

[159] Field note 1 and 8.
[160] Field note 3 and 4.

management committee held meetings with the community members and the issues that the community members were concerned about were cleared up.[161]

One of the interviewees informed the researcher that he is of the opinion that most of the members of the conservancy do not want the traditional councillor who wants to be in power to serve as a chairperson of the conservancy management because there are known cases by the community that he illegally sold land to people who wanted land. He did this despite the fact that the law is clear that communal land should not be sold. This according to the interviewee shows that he is not a good leader and therefore not fit and proper to lead the conservancy to success.[162]

When asked why the community members believed the information that they were told without confirmation, the interviewees said that the construction of the trophy hunting camp near the salt pan is what made them even more suspicious. This, they thought was the construction of the buyer of the slat pan and as a result this led to the demonstration that attracted the media all over the country. Media coverage included reports such as "villagers forced to make way for tourism,"[163] "Ongandjera demonstrates against land sell out"[164]

Effect of the Sheya Uushona conservancy on the land rights of the Ngandjera community members' land rights

Relocation of farmers

Sheya Uushona is set up in a way that there are still people who live within the boundaries of the conservancy. Due to this, a need arose to separate the human beings and the wildlife that lived together in the conservancy. The separation was needed because there have been cases of human wildlife conflicts that made many of the residents very angry. Another reason was that without a separate area for the wildlife, its population will not increase and this is not good for the

[161] Field note 1, 3, 4 and 8.
[162] Field note 2.
[163] Ashipala P. (2010). Namibian Sun archives 6 Dec 2010.
[164]Namibia's National Human Rights Organisation (4 December 2010). Ongandjera demonstrates against 'land sell out'. http://www/nshr.org.na/index.php?module=News&func-display&sid=1477 accessed on 5 July 2011.

conservancy as it will mean less money from trophy hunting which is one of its main sources of income. On the other hand, less wildlife will also attract few tourists to the conservancy which will result in less income.[165]

This led to the creation of a core area which requires to be fenced off exclusively for wild animals. The proposal for the creation of a core area was given to the community as this is what other established conservancies have done in order to protect their wildlife and to prevent human wildlife conflict. The plan for the zoning of the conservancy to fit in the core area was presented to the community members but the plan affected some of the farmers who have cattle posts in the area. The proposition was that those who are within the boundaries of the core area will have to move and this affected around 10 cattle posts. The places which were affected by the core area were Onkulumba, Okakewa, Uuthima and Johannes Inicho Farm.[166]

However, the farmers refused to move at all giving reasons such as that the area is good for their animals and they will never find one like that. Another main reason that the farmers gave was that the area were their cattle posts are based is their ancestral land and they cannot leave it for wildlife and that there are lakes (*Omadhiya*) that they did not want to leave behind because they are an important feature of their livelihood and they have known them ever since they could remember. Money was also another reason why they refused to move because there was no compensation to be offered to the farmers for the loss of their land.[167]

The conservancy received funds from donors but the money that was received was only for relocation of the farmers and not for compensation. They money could therefore only be used to put the farmers in the same position they were before relocation or at least close to that. For example if a farmer had a borehole at his cattle post, the conservancy can then build him another one at the new area of relocation and the money was also to help the farmers with transport or fuel in order for them to move their belongings.

[165] Field note 8.
[166] Ibid.
[167] Field note 2, 3, 5 and 8.

Since the farmers refused to move at all, the money from the donor had to go back and the conservancy management was faced with another challenge. The core area had to be remapped in order to keep out the farmers that were affected by the initial proposition. This according to the conservancy management is not good because the smaller the core are, the few animals they can keep there and as a result the fewer benefits for the conservancy. The management is of the view that the farmers must move just like other farmers who moved for example in Uukwaluudhi conservancy as well as other conservancies. However, there is nothing they can do, but the fact remain that the refusal of the farmers to move is a setback in the conservation of wildlife.

Some community members are of the view that the refusal of the farmers to move is a good decision on their part because the area where they were told to move from is a good area and one would not give it up especially to wildlife. The community members further said that the conservancy was supposed to at least compensate the farmers for the loss of their land because moving from an area which one have known for their whole life is not easy. Furthermore, the conservancy management have to respect the rights of the few farmers that had to move and this would have been achieved through some form of compensation.[168]

Access to the conservancy resources

As mentioned earlier, the 5066 square kilometre that Sheya Uushona conservancy occupy accommodate residential areas, cattle posts and wildlife. This means that the people of Ongandjera still have access to the resources that are within the boundaries of the conservancy as they use to before its establishment. Most of the conservancy area has been used for seasonal grazing for many decades and this is still the case, even though some temporary cattle posts have developed into permanent settlements which consist of several or more resident households. This has resulted in residential villages which include Amarika, Uutsathima and Onamatanga. These three villages are big that they have their own schools, clinics and businesses.[169]

The residents of the conservancy still engage in the activities such as farming. In fact, the conservancy offered them more opportunities such as income from mopane worms harvesting as

[168] Field note 3 and 8.
[169] Kemp L., Mandelsohn J. and Jones B. 2009, p 5.

the conservancy is said to earn about N$ 25 000 from harvesting permits. Residents also engage in other projects such as crafting which form part of an extra income for them.[170] Furthermore, the conservancy contain many salt pans with the Ngandjera salt pan well known because of the high quality salt that residents harvest. Because the conservancy is not fenced off, the residents within the conservancy boundaries and beyond still have access to harvesting salt as they have always done for decades.[171]

Because of the creation of the core area, this is the only area which the people do not have access to as it is fenced off like the core areas of other conservancies. Through the meetings that the conservancy management held, most of the residents understand the fencing off of the core area and they are happy with it. They understand that the core area will enhance the value of the conservancy for tourism and this will mean more income for the conservancy and its members. The core area also helps restore some of the diversity of wildlife that has been lost for years. However, there are few of those who have concerns that the core area reduces the land available for their livestock.[172]

Management of the conservancy

Sheya Uushona Conservancy has 81 members in the management committee with 20 members of the executive committee. The executive committee is headed by Mr. Sakeus Shikongo who is the current chairperson. Not all community members have the same view with regard to the operations of the management of the conservancy. One of the issues that some community members demonstrated against on 3 December 2011 was about the management of the conservancy. The demonstrators claimed that the dealings of the conservancy are not transparent and therefore they are not happy with the way the conservancy is managed. The demonstrators even suggested that a new management must be elected.[173]

On the other hand, some community members are happy with the management of the conservancy citing that "our conservancy is well managed as it is evident that there is progress

[170] Ibid, p 6.
[171] Field note 6 and 7.
[172] Field note 6, 7 and 8
[173] Field note 1 and 8.

made since the conservancy was established. The progress made is for example the increase in the number of tourists that visit the conservancy, the successful crafting initiative were members earn income for themselves and the yearly income that is distributed to the members which comes from the operations of the conservancy." [174] The community members who are happy with the management also added that the success of the conservancy will not have been possible without the hard work and dedication of the management.[175] However, research has found out that apart for those who are happy and those who are unhappy with the management, there are some of the community members who do not have interests in the affairs of the conservancy.

Response from the government

When the Ministry of Environment and Tourism official Mr. Mwanyangapo was interviewed at Oshakati, he expressed that the conflict regarding Sheya Uushona conservancy is a difficult one because a lot is going on within the Ngandjera community. The researcher was informed that the main cause of the conflict is the fact that there is a traditional leader who wants to become the chairman of the management committee and as a result he spread false information that conservancy is not properly managed and that the management sold the salt pan. The community was also informed that the conservancy management is forcing people off their land. based on this information, the community held a demonstration and the ministry decided to conduct an independent research on the matter. The research found out that the allegations that were made against the conservancy to the media serve only the interests of the few, because they were false and unfounded. The conservancy management held meetings with the community members to tell their side of the story.[176]

When asked about the effect that the conservancy have on the land rights of the community members, the researcher was informed that even though Sheya Uushona conservancy covers up to 5066 square kilometres which is a big piece of land, the community members still have the same land rights that they used to have before the establishment of the conservancy. This is because the whole of the conservancy is not fenced off but the only area which has been fenced off is the core area and this has been a practice on other conservancies to. Sheya Uushona

[174] Field note 2.
[175] Field note 2 and 3.
[176] Field note 1.

conservancy still homesteads within the boundaries of the conservancy and community members still practice farming activities as they used to. However, additional rights over wildlife and tourism were added to their existing rights which make the establishment of the conservancy more beneficial to the community members.[177]

Some community members' land rights were to be affected by the proposed creation of the core area which is to be fenced off for wildlife. The core area that was proposed affected up to 10 families and 3 water holes. These families had to be relocated to another area in order to make way for wildlife but they refused to do so. Due to this, the core area size had to be minimised and this meant fewer land for wildlife. This is not good for conservation purpose, because more land for wildlife would have increased the number of wildlife and there would have been more unspoiled land which is the main mission of the government for putting in place the initiative of Community Based Natural Resource Management (CBNRM).[178]

Compensation for loss of land

When it was proposed that the farmers who were within the boundaries of the core area were to move, no compensation was to be offered to them for losing their grazing land. because in terms of the Nature Conservation Amendment Act of 1996 no compensation is to be offered to community members for losing their land to the conservancy. However, the conservancy received funds from a donor and since cattle posts are only temporary structures, the conservancy was only to provide transport for relocation or fuel if a farmer has own transport. The money for the donor was also to be used to build boreholes for the farmers at the new cattle posts area. The establishment of core areas has worked well with other conservancies in region, for `example when the Uukwaluudhi core area was fenced off there are farmers who were relocated and for other conservancies like Okongo conservancy no farmers had to be relocated to make way for wildlife.[179]

[177] Ibid.
[178] Ibid.
[179] Field note 1.

Conclusion

The establishment of Sheya Uushona Conservancy mark as one of the major milestone in the history of Ongandjera people. However, since its establishment in 2005, the conservancy have not been without problems. One of the challenges that the conservancy faced even resulted in a demonstration that took place on 3 December 2010, but at least when this research was conducted most of the issues were resolved. With regard to the effect that the conservancy have on the land rights of the community members which was one of the research questions that this study aimed at answering, empirical research found that even though Sheya Uushona conservancy have people living within its boundaries, the creation of the core area is did have an effect on the land rights of the community members. This is because the core area is fenced off for wildlife, and the community members do not have access to the resources within the boundaries of the core area as they use to. Research also reveals that the way in which land issues are handled by the conservancy management have a negative effect on the way the community members view the conservancy. This is the case because no compensation is offered to those who have to give up their land to wildlife and until today those who were requested to move refused to do so and this is a set back to the government and conservancy's mission to conserve biodiversity sustainably.

On the research question of 'who own communal land,' empirical research found out that community members do not understand the concept of state ownership of communal land as they strongly believe that the land belong to the traditional authority. The traditional authority then administers the land for the benefit of the whole community. They further believe that once a person acquires a piece of land from the traditional authority, they then become the owner of such land. The ownership of the land means that no one and not even the government can take the land away unless just compensation is offered. This is the main reason why the farmers who were requested to move in order to make way for the conservancy refused to do so because they believe that since they are occupying their land, they can only move when they feel that it is right for them to move and the request to move in order to make way for the conservancy is not one of them.

Chapter 5

Discussion of research findings and conclusion

Introduction

One of the government's missions is to protect the environment that the Namibian people live in. One of the ways in which the government has made sure of this is through the establishment of conservancies by communal land residents throughout the country. Ever since the passing of the Nature Conservation Amendment Act of 1996 which allow communal land residents to set up conservancies like the commercial farmers, this is one of the most successful initiatives by the government. Today, there are 59 registered conservancies, and more are still in the pipeline for registration. However, the land issue surrounding the establishment of communal conservancies remain a challenge because the geographical boundary of a conservancy is one of the main requirements. The following chapter entail an in depth discussion of both the desk and empirical research that was conducted on how the establishment of conservancies affect the land rights of communal residents.

Discussion of research finding

Communal land ownership

One of the research questions that this research aimed at answering is 'who own communal land?' This question is necessary because the communal land tenure remains unclear and open to debate and it is therefore important that this communal land ownership is discussed in order to make an analysis between the rights to land versus the obligation of the state to conserve such land which is the main aim of this dissertation. Research has found out that the provisions in our law that deals with the ownership of communal land have been interpreted differently by the government, by the communal land residents themselves as well as by different authors such as Harring and Odendaal, Van der Merwe, Mapaure, Hinz and Muenjo and Shifotoka.

The research conducted reveal that the government interpret Article 16[180] of the constitution to mean that the property that is protected by this article is only freehold property and not communal land property because it belongs to the state. However, this interpretation was seen as a discriminatory interpretation which is contrary to the values and the aspirations of the constitution as the famous case of *S v Acheson* sets out that it cannot be the aim of the constitution to condone such inequality. Another argument that was raised is that the wording of the preamble even though it is not law but a statement of legal policy cannot condone the inequality interpretation by the government.

Another interpretation by the government is one with regard to Article 100 of the constitution which the government interpret to mean that unlike commercial land, communal land is one of the resources that is not lawfully owned by anyone and therefore the government claim title ship of such land. Authors like Harring and Odendaal retaliate to this the interpretation by the government that the government cannot rely on this article because the colonial government illegally owned communal land in the first place and therefor communal land was always owned by the traditional communities that reside on communal land. This means that communal land is legally owned, and the government cannot rely on Article 100 to claim ownership.

Schedule 5 provides a list of properties that was owned and controlled by the colonial administration. In terms of the apartheid laws, communal land is owned and controlled by the colonial administration. Schedule 5 then transferred the properties which were owned and controlled by the colonial government to the Namibian government which according to the interpretation of the Namibian government includes communal land. However authors like Harring and Odendaal and Muenjo argues that the colonial government never legally gained title over communal land in Namibia and therefore communal land cannot form part of schedule 5 of the Constitution.

Another provision of the law that the government relies on to claim ownership over communal land is section 17 of the Communal Land Reform Act of 2002. The government interpret this section to mean that communal land is owned by the state and the Legal Assistance Centre

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(LAC) and the Namibian National Farmers Union (NNFU) even adds that it is evident that all communal land areas belong to (vest) in the state which must keep the land in trust for the benefit of the traditional communities living in those areas. This interpretation have been highly criticised by various authors like Van der Merwe who argue the word vest refers to the ownership of a right and not to the ownership of an asset as such. Therefore the fact that communal land is vested in the state does not mean that the state own communal land but the traditional communities are the ones that own such land.

Mapaure concur with Van der Merwe's interpretation and he went further on to interpret the word trust in the section. He interpret 'trust' to mean that the concept of trust does not connote ownership and therefore if the state holds the property in trust it implies that it is doing so for the benefit of the owners who in this case is the traditional communities. Hinz, Shifotoka and Shilongo interpreted the word trust as Mapaure did. However, Hinz went further to add that the authority of the state over communal land should not be confused with the ownership of state land. This means that just because the state has authority over communal land does not mean that it owns it.

The way various author interpreted the Constitution and the Communal Land Reform Act is supported by the views of the communal land residents themselves. Empirical research by Hinz and Namwoonde reveal that beside what the constitution and legislation provide, the communal land residents are of the view that communal land belong to the traditional authority which administer it for the good of the whole community and when a person acquire land from the traditional authority they then become legal owner of such piece of land. Hinz's and Namwoonde's research is supported by the views of the Ngandjera community member after empirical research was conducted. Furthermore, empirical research found that the community members do not even understand the concept of state ownership and they remain to believe that the land is owned by the traditional authority on behalf of the whole community.

In conclusion, research reveal that how the government and the various authors view communal land ownership is a matter of interpretation of the law. The government interpret various constitutional provisions and the Communal Land Reform Act to mean that communal land is

owned by the government while various authors interpret the same provisions to mean that the land is owned by the traditional communities themselves. Beside the interpretation of the law, communal land residents are of the view that communal land is owned by their traditional leaders on behalf of the whole community as this have been the practice since time immemorial.

Communal conservancies and the effect that they have on people's land rights

This part of the research was discussed in order to answer the research question 'whether the right to conserve trump with the right to own and use such?' Another research question that this part of the study aimed at answering is 'whether there is legal protection to communal land residents whose land rights are affected by conservation.'

On this regard, research reveal that even though the CBNRM programme in Namibia is one of the successful CBNRM models in Africa, this programme continue to face challenges and land is one of the main challenges that it face since the time of conception. This is fuelled by the fact that the policy framework of land reform in communal area has and is still unclear and the fact that there are different views with regard to communal land ownership as the earlier part of the study revealed is also making the matter worse. This is so because these conflicting views are making it difficult for the CBNRM programme to be fully accepted by the communal land residents. Despite the fact that section 24A of the Nature Conservation Act of 1996 provides that the establishment of a conservancy is a voluntary act on part of the community and the role of the government is to help with the information that the community may need as well as establishment, research reveal that some communal land residents still view the conservancies as an initiative by the government that take away their land.

Some communal land residents mainly view conservancies as taking away their land because the fact is that communal land residents heavily depend on natural resources to make a living. As a result they now feel that the land which they would normally have access to for utilising different activities such as grazing, collecting wood, crop production is now taken up by conservancies. The two case studies of Salambala conservancy in Caprivi region and Uukwaluudhi Conservancy in Omusati region as well as the empirical research conducted on Sheya Uushona conservancy

show a good example of the negative effect that the establishment of conservancies have on the land rights of the communal land residents.

In the case of Salambala conservancy, even though the conservancy accommodate people who live within the boundaries of the conservancy and who continue to utilise the land for various purposes, a core area was established and this part of the conservancy is fenced off for wildlife. It is this part of the conservancy that the community members do not have access to. The problem arose when community members had to vacate the part of the land which was declared as a core area as four families refused to give up their land. When the legal assistance centre intervened, one family finally decided to move but the other three remain to live there. This case study indicates that the land issues can negatively affect the operation of conservancies. However the land rights of the residents cannot be ignored either.

Another case study that the research discussed is that of Uukwaluudhi conservancy. just like Salambala conservancy, this conservancy also has people living within its demarcated boundaries and the part of the conservancy that the community members had to give up was the core area which is fenced off for wildlife. The community members who had to give up their land refused to do so when they were told about the plan to fence off part of the conservancy and they decided to protest against the decision. The government in this regard intervened and ordered the community members who were protesting to move. The reason for government intervention was that those who are forced to make way for the conservancy make these sacrifices for the greater good of the many.

Anyolo's study reveal that giving up of land by the community members to the conservancy led to serious economic loses and special disruption which was mainly caused because the environment from which the community members extract their basic needs for food, shelter, fuel, grazing is lost. Until today, some Uukwaluudhi residents still see the conservancy as an infringement of their right to land and they remain to have negative feelings towards the conservancy even though the idea to conserve the biodiversity is equally important.

The empirical part of the study on Sheya Uushona conservancy reveals that just like Salambala and Uukwaluudhi conservancy, the land rights of the local community have also been affected by the establishment of the conservancy. Sheya Uushona conservancy also accommodates community members and there are even villages within the boundaries of the conservancy. However, the creation of the core area is the one that have an effect on the land rights of the community members as it was proposed that the farmers who were within the boundaries of the core area had to move. These farmers refused to do so and this resulted in the demonstration were the community members alleged that the conservancy is taking up their land. Until today, the famers refused to move at all and the size of the core areas had to be reduced.

To answer the research question 'whether there is legal protection to communal land residents whose land rights are affected by conservation,' the research found out that the Nature Conservation Amendment Act of 1996 is silent on the right of land ownership and use rights under customary law. As a result of this omission, the Act does not provide any remedy to those affected by the change in land tenure system. This means that communal land residents are not given compensation when they lose their land to conservancies. The non-compensation of community members who lost their land has been seen as a failure on the government to protect them. This explains why until today some of the community members have negative feelings toward conservancies. On this regard, it is suggested that measured of law reform that would recognise the communal land residents right to land and compensation in case they give up such land will be required. This will not only protect the rights of the communal land residents, but this will also ensure success of CBNRM programme.

The research also found out that there are some communal land residents who are happy with the benefits that are derived from conservancies. This is because conservancies provide a platform for local communities to manage their resources sustainably and at the same time uplifts their livelihood through financial benefits, creation of employment and establishment of social projects that aim at uplifting the livelihood of the community members. Some therefore feel that the sacrifices that they made have paid off and they choose to focus on the benefits that they receive from conservancies.

Another aspect that has an effect on the land rights of communal land residents is human wildlife conflict. On many occasions communal land residents suffer costs of living with wildlife through crop damage, livestock loses to predators and in some cases loss of human lives. These conflicts are an infringement on the land rights of local communities because they can no longer use and enjoy their land freely. This is fuelled by the fact that in most cases the communities suffer these losses without compensation. The government came up with the National policy on Human Wildlife Conflict Management of 2009 which established a 'Human Wildlife Self Reliance Scheme' which assist affected families with funeral costs and use revenue from problem causing animals to avoid future conflict and further address the losses of affected persons. This scheme is to be run by the conservancies but research found that the implementation of this scheme is slow as only 4 conservancies have such a scheme in place. The majority of conservancies do not have the scheme in place and as a result people continue to suffer at the hands of wildlife without compensation.

Conclusion

The main aim of this dissertation was to make an analysis between the right to land versus the obligation of the state to conserve such land. The main aim of this research was to find out whether conservation trump with the right own communal land because the establishment of conservancies take place on communal land and geographical boundaries is one of the main requirements. In order to find answers to the research problem, three research questions served as guidance to the whole research. The first research question was 'who own communal land.' research in this regard found that the provisions of the constitution and section 17 of the Communal Land Reform Act were interpreted differently. The government interpret it to mean that communal land is owned by the state. However various authors disagreed with this interpretation and they interpret the provisions to mean that traditional communities own communal land and not the state. This interpretation is supported by the communal land residents themselves who believe that the land belongs to the traditional communities and it is then administered by their traditional leaders. The conclusion that is made on this issue is that communal land is indeed owned by the traditional communities who occupy such land and not by the state.

Another research questions that there posed is whether the right to conserve trump with the right to own and use such land' and 'whether there is legal protection to communal land residents whose land rights are affected by conservation. Research found that the establishment of conservancies do trump with the rights of people to own communal land because in some cases communal land residents had to give up the land that they usually utilise to make a living and human wildlife conflict also affect the use and enjoyment of their land. Some community members refuse to give up their land but in some cases the government had to intervene and ordered them to move. The communal land residents feel that giving up their land is an infringement on their right of ownership of communal land and this is fuelled by the fact that there is no legal protection on compensation when they lose their land. This in turn proves to be the main reason why some community members continue to have negative feelings towards conservancies. Research also found that many conservancies do not offer compensation to those who suffer at the hands of wildlife despite the fact that the government introduced Human Wildlife Self Reliance Scheme which aims at assisting affected families with funeral costs and use revenue from problem causing animals to avoid future conflict and further address the losses of affected persons. It was found that only four conservancies have implemented such scheme and the rest of the community members continue to suffer without compensation. In terms of the above research finding, it can therefore be concluded that conservation does trump with the right of communal land residents to own such land.

List of Field notes

1. Field note 1 – 04 July 2011; Mr. S Mwanyangapo – Warden Officer Ministry of Environment and Tourism; Oshakati.
2. Field note 2 – 05 July 2011; Mr. K H – Community Member, Okahao
3. Field note 3 – 05 July 2011; Mrs. F S – Community Member, Okahao
4. Field note 4 – 05 July 2011; Anonymous – Community Member, Okahao
5. Field note 5 – 05 July 2011; Anonymous – Community Member, Okahao
6. Field note 6 – 05 July 2011; Anonymous – Community Member, Okahao
7. Field note 7 – 05 July 2011;Anonymous– Traditional authority, Okahao
8. Field note 8 – 05 July 2011; Mrs. Hilde Nathinge – Sheya Uushona Conservancy officer, Okahao.

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