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**Fuzzy entitlements and common property resources:
struggles over rights to communal land in Namibia**

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Summary

The concept of 'entitlement' is constructed by Amartya Sen in terms of legal property rights that map commodities or resources onto individual owners. This paper addresses some conceptual difficulties of applying the entitlement approach to contexts such as common property regimes, where overlapping institutions or groups of individuals all exert valid claims over a single resource endowment, and where claims on resources are socially sanctioned rather than legally enforceable. Property rights are deconstructed into *de jure* ownership and *de facto* control, access and influence. These rights are asymmetrically distributed within social institutions such as communities and households, following complex eligibility and prioritisation rules. Sen's 'cooperative conflict' model is adapted from the 'new household economics' to explain the increasing stratification within rural African communities associated with commodification of land rights. These theoretical arguments are underpinned empirically by case studies drawn from conflicts over land in Namibia. The key policy conclusion is not to clarify 'fuzzy' property rights by privatising natural resources, but to support the positive features of common property regimes, while minimising the discrimination and tenure insecurity that women and marginalised groups within rural communities invariably face.

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1 Introduction

...there can be ambiguities in the specification of entitlements.in pre-capitalist formations there can be a good deal of vagueness on property rights and related matters. In many cases the appropriate characterization of entitlements may pose problems, and in some cases it may well be best characterized in the form of 'fuzzy' sets and related structures . . .

(Sen 1981:49)

In his formulation of the entitlement approach to famine and poverty analysis, Amartya Sen was concerned only with legal ownership of commodities. He ignored possibilities for weaker claims over resources, such as control and access, and he failed to consider contexts where property rights are exercised institutionally rather than individually. Also, Sen shifts between several units of analysis (households, occupation groups, classes), essentially by collapsing each aggregation to a 'representative individual'. This paper, therefore, identifies two related dimensions of 'fuzziness' in the entitlement approach: fuzziness in terms of *property rights* and in terms of *units of analysis*.

Section 2 notes that property rights over natural resources in rural Africa are often held by multiple individuals and institutions (households, communities, the state), and argues that the allocation of these rights occurs according to institutional rules that first screen applicants (eligibility rules) and then prioritise their claims (queuing rules and payment rules). This process is analogous to the intrahousehold division of entitlements, with household heads replaced by community leaders.

Section 3 observes that common property regimes are characterised by a separation between ownership of natural resources and usufruct rights over those resources - as when the state owns land which is managed by communities but farmed by individual households. Deconstructing property rights illuminates the sources of 'fuzziness' in situations where entitlement relations are guided by social norms rather than legal contracts.

Section 4 examines three axes of conflict over land rights in Namibia: between communities and the state (the forced relocation of communities under apartheid); between households within communities ('illegal' fencing of communal rangeland); and between individuals within households (women's restricted access to land under both civil and customary law). While focusing on land, the analysis could apply equally to other natural resources, such as water, trees and wildlife.

2 Fuzziness with respect to units of analysis

The basic unit of analysis is an individual person. For practical purposes, however, the analysis can also be conducted at collective levels such as household, group, or class by using the standard device of assuming a "representative individual".

(Osmani 1995:254)

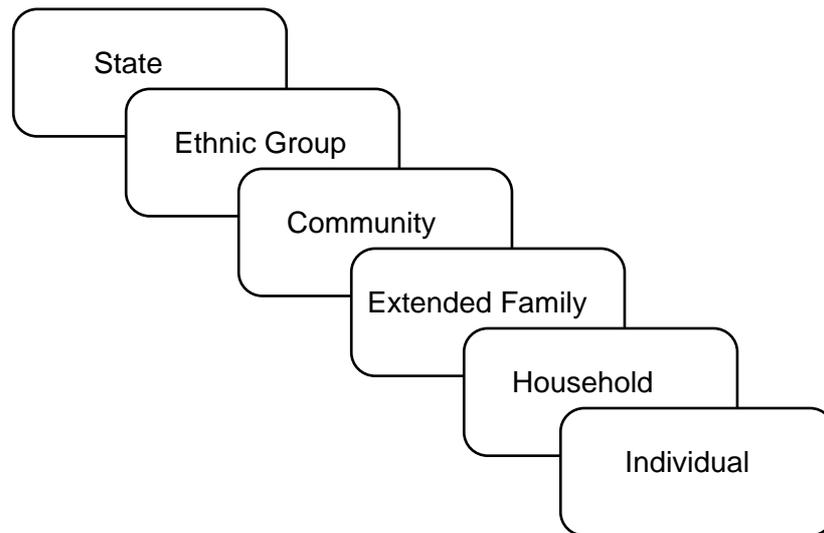
In his elaboration of the entitlement approach to famine and poverty analysis, Sen (1981) chooses the individual, the household, or some homogeneous 'economic class' of people (sharecroppers, pastoralists) as his unit of analysis, and he shifts seamlessly between these levels of aggregation, almost as if they are interchangeable.² This device neatly sidesteps the reality that any group of people is composed of diverse individuals who are neither homogeneous nor 'representative'.

In fact, in any context where ownership relations between individuals or institutions and resources or commodities are multi-layered, complex and even contested by different individuals or groups of people, the 'standard device' that Osmani endorses becomes very difficult to justify. This is particularly the case when 'fuzziness' in terms of units of analysis is vertical rather than horizontal – when different aggregations from the same pool of individuals exercise distinct claims over the same resource or commodity, rather than the more familiar situation where discrete individuals or groups (having non-overlapping membership) contest exclusive ownership or access rights over the same resource. The latter problem is simply one of arbitration – establishing which claimants have the more valid claim to the resource, and settling in their favour. In the former case, rules and norms must be established for allocating rights over the resource to the various claimants. When several groups of people each hold different - but valid - rights over the same resource, the notion of a 'representative individual' simply cannot be applied.

Throughout Africa, natural resources are owned (de jure) or controlled (de facto) by individuals, households, extended families or lineage groups, communities, ethnic groups or 'tribes', and the state. In Figure 1 these multiple units of analysis – or 'resource decision units' (Bromley 1989:870) – are represented as overlapping categories, in a cascade format, since most individuals are simultaneously members of most of the institutional groupings as well.

² For instance: 'It is, in fact, possible for a group to suffer both direct entitlement failure and trade entitlement failure, since the group may produce a commodity that is both directly consumed and exchanged for some other food. For example, the Ethiopian pastoral nomad both eats the animal products directly and also sells animals to buy foodgrains (thereby making a net gain in calories), on which he is habitually dependent.' (Sen, *Poverty and Famines*, 1981:51.)

Figure 1. UNITS OF ANALYSIS, OR 'RESOURCE DECISION UNITS'



Conflicts and ‘ambiguities’ can occur at or between any of these levels. At the national level, for example, the issue of restitution of ancestral land in Namibia is currently a source of confrontation between the state and various ethnic groups or communities who were dispossessed by the South African colonial administration (see section 4.1 below). Within rural Namibian communities, a crisis is developing over the ‘illegal’ fencing of communal rangelands (see section 4.2), a phenomenon which can be explained as an attempt to clarify and individualise access rights, in a context of ambiguous ownership relations at the community level, over increasingly scarce grazing land. Within Namibian households, a married woman’s access to land is secured through her husband, under both civil and customary law, and if she is widowed she is at risk of being dispossessed of her residential and farming land by her late husband’s relatives (section 4.3).

The point is that institutional ownership or control of a resource such as land does not necessarily imply equal or equitable access to that resource by each individual member of that institution. Land that belongs to the state is the property of the state, not of its citizens. Assets such as land and livestock might belong to a ‘household’ in theory, but in practice ownership rights - specifically, the right to buy and sell these assets and retain the profits - are often vested in the (male) household head, and are denied to women and children in the same household.

Whenever individuals are aggregated into institutions - whether these are formal (the state, a firm) or informal (households, communities) - access to rights and resources accruing to the institution as a collective entity (and to entitlements derived from these endowments) is strictly regulated by formal rules and informal norms, which establish criteria of both eligibility and precedence. These criteria typically include indicators of ‘belonging’ (citizenship, ethnicity, religion) as well as seniority (age, social standing, political power) and, of course, gender. When rights and resources become commodified, however, these axes of inclusion or exclusion can be partially or wholly subverted by the allocation mechanism of crude economics - ability to pay.

It might be useful to conceptualise access to rights and resources in common property regimes as being allocated in two stages, and in accordance with three sets of “institutional rules”:

1st stage - Screening:	• eligibility rules
2nd stage - Prioritisation:	• queuing rules
	• payment rules ³

At the first stage, whether an applicant is entitled even to be considered for certain rights is determined by inflexible criteria of inclusion or exclusion, such as ethnicity and gender. These are first level screening criteria, or ‘eligibility rules’. In rural Africa, a number of screening criteria are applied by community leaders, which serve to selectively allocate common property resources to those community members with the preferred combination of characteristics and to decisively exclude others who do not share these characteristics - even though these are often inherited or demographic attributes which individuals are unable to change or modify (their ethnicity, lineage group, sex, age). To the extent that a society is meritocratic it might be possible to overcome an unfavourable allocation of personal attributes, for example by acquiring skills through education, which enhances an individual’s potential access to income and assets. To the extent that a society is structured along non-negotiable rules or norms of inclusion and exclusion, however, each individual’s personal characteristics become a major determinant of her or his ability to access resources and rights.

When community leaders are responsible for allocating rights over common property resources, it must be recognised that communities are defined and bounded ethnically as much as geographically. In many parts of Namibia, there are pockets of San people (formerly ‘Bushmen’) living in the same territory as Oshiwambo or Otjiherero speakers, yet the impoverished and marginalised San are in no sense regarded as members of these communities. They are excluded from community decision-making fora and are simply ‘screened out’ when local leaders distribute goods and services such as food aid or places on public works projects - even when these goods and services are provided by the state and are intended to be allocated on the basis of need.

Eligibility rules, or screening criteria, establish complex patterns of ‘insider-outsider’ dichotomies, between and within both communities and households. But there are other, subtler forms of discrimination in the allocation of property rights. Even if screening rules are unambiguous and are ‘correctly’ applied, it should not be presumed that every applicant will be treated equally, even after he or she passes the eligibility test. For at this stage, second level prioritisation criteria, or ‘queuing rules’, come into effect.

Certain people will invariably find it more difficult than others to secure certain rights, even if they are not explicitly denied those rights. For example, customary law might state that all adults living in the

³ These terms are adapted from Schaffer (1975, quoted in Gore 1993), who identified ‘admission rules’, ‘line rules’ and ‘counter rules’ for the process of accessing services from public institutions.

(ethnically and geographically bounded) community are entitled to an allocation of farming land. But customary norms might dictate that women and young men have lower priority than older men, who enjoy precedence by virtue of their age and sex over all other claimants. These rules of precedence – based in this case on seniority and gender – determine, in effect, the order in which applicants queuing for rights to resources will be ‘served’. Women and other ‘second class citizens’ will typically have to queue for land for longer than men or members of the chief’s extended family. Alternatively, queuing might be reflected in women receiving smaller allocations of land, or their rights over resources might be less secure. For instance, while men in patrilineal African societies enjoy secure and lifelong access to land simply by being born into their lineage group, women’s access to land is often acquired through marriage, and this access can be highly vulnerable to the marriage ending in separation or the husband’s death, as noted above.

The third level of institutional rules governs the actual transaction between applicants and institutional representatives, and this provides the third axis of access to rights: ability to pay. Historically, usufruct rights to land and natural resources in rural Africa were granted to community members free of charge, or for a nominal payment made to the community leaders under whose jurisdiction these resources fell. Where fees were levied, payment was often made in kind - some poultry, or a portion of the harvest. In contemporary Africa, where monetisation has penetrated to the remotest communities, and as natural resources become scarcer and more valuable, payment for rights over common property resources is increasingly demanded in the form of cash, and is no longer nominal, but instead reflects scarcity values or market prices.

The effect is to ration rights over natural resources by relative wealth, rather than - or as well as - by ethnicity, seniority and gender. In a recent study into the fencing of communal rangeland in northern Namibia (as discussed below), Fuller and Nghikembua (1996:10) found that the tradition of paying the relevant headman, senior headman, or the King for land [means] that wealthy individuals can offer large sums of money for a piece of grazing land which is later fenced off. We were told that the “prices” for some parcels ran into the tens of thousands of [Namibian] dollars. This practice excludes communal farmers who have limited access to the cash economy.⁴

As the allocation of rights becomes commercialised, it becomes possible for those with cash reserves to invest in rent-seeking behaviour to ‘jump the queue’ and buy rights. Financial muscle conveys bargaining power. This is happening with usufruct rights to communally managed land in many parts of Africa. The commercialisation of land rights is steadily eroding traditional rules of access, as ability to pay supersedes ethnicity and other eligibility and queuing rules which historically had served to retain the use value of natural resources within the community, and also paid some attention to need.

Useful parallels can be drawn here with the ‘new household economics’ and its emphasis on the intrahousehold distribution of ‘jointly owned’ property between household members. In the following

⁴ In mid-1996, one pound sterling was equivalent to approximately six Namibia dollars.

discussion – with some qualifications⁵ – the socially constructed institutions of ‘the household’ and ‘the community’ can be regarded as broadly substitutable for each other, with the household head playing a role analogous to that of a village headman or chief.

The new household economics divides into two broad categories – ‘unitary’ and ‘collective’ models – with the latter subdividing into ‘cooperative’ and ‘noncooperative’ models (Haddad 1994:349). Conventional neoclassical economics modelled the household as a unitary institution, whose members work cooperatively and pool their resources to maximise a single joint welfare function. When social choice theorists demonstrated that a unique ranking of preferences cannot be obtained for a set of individuals simply by aggregating their preferences, this assumption was replaced with the notion that the household welfare function reflects the preferences of the household head, constructed as a ‘benevolent dictator’ whose objective is to maximise the welfare of all household members (Alderman et al. 1995). But this assumption proved to be empirically unfounded, given the existence of ‘despotic dictators’ who clearly put self-interest ahead of the welfare of their spouses and children. Unitary models can account for cases of inequitable distribution of resources within households – provided this is demonstrably economically ‘rational’ at the household level – but not for situations when this inequity is systematically directed against weaker household members, such as female children (Folbre 1986).

Collective models of the household (sometimes called ‘bargaining models’) were developed to take account of these realities. Collective models recognise that individual household members might be pursuing quite different objectives, so that no single welfare function can be derived for the household as a unit. Also, that the intrahousehold distribution of entitlements is a matter for negotiation, not consensus. Collective models construct the household as ‘a site of bargaining and conflict’ (Kabeer 1994:96), with those members who have the greatest bargaining power (notably the household head) securing a disproportionate amount of household resources for themselves - but on the basis of their negotiating strength rather than any principles of economic rationality or allocative efficiency.

While the distribution of entitlements within households can be predicted under unitary models of the household (because they assume identical preferences and Pareto-efficient outcomes), under collective models the value of entitlements accruing to each individual cannot be determined a priori, because the proportion of individually earned entitlements that is made available for redistribution within the household is either voluntary or is bargained over. In some versions, the extent of intrahousehold redistribution depends on the altruism of the ‘benefactors’ within the household; in others, it depends on the bargaining power of ‘recipients’ vis-à-vis ‘benefactors’.

Perhaps the most influential collective model of household behaviour is ‘cooperative conflict’ (Sen 1984). This model recognises and attempts to reconcile two contradictory goals of each household

⁵ For example, while some axes of conflict within the household parallel those at community level - notably age (adults *v.* children) and gender (men *v.* women) - other screening and prioritisation criteria, such as ethnicity and religion, are typically less relevant in a domestic context.

member: to maximise the household's total wealth, and to maximise the individual's personal wealth or welfare. This is achieved in a two stage process: household members first 'cooperate' to generate entitlements, then engage in 'conflict' over how these entitlements should be divided. (To some extent, of course, the battle is settled in advance, as unwritten norms are typically in operation within households (as within communities) that prioritise some claims above others - children get fed before adults, women get access to land after men, and so on.)

In effect, Sen's description of 'cooperative conflict' within households implies an emphatic rejection of 'unitary' models. Yet it must be reiterated that, in his exposition of the entitlement approach, Sen routinely conflates units of analysis such as households, classes and occupation groups to 'representative individuals' - in other words, collective entitlements are modelled as if they accrue to a single person. This paper argues for the application of a collective or bargaining approach to all institutional units of analysis. It rejects unitary approaches to 'resource decision units' such as households, communities, occupation groups and the state. Within each of these institutions, the distribution of entitlements (and of decision-making power over entitlements) is usually distributed highly unequally, and is likely to be a source of negotiation and conflict rather than consensus.

The allocation of property rights within rural communities is especially pertinent to this discussion. Within communities, as within households, individuals have incentives both to maximise the welfare of the entire community, and to appropriate as much of the community's wealth for their individual gain as they can. The commodification of land rights encourages community leaders and wealthy local elites to put their individual self-interest ahead of the collective interests of their community. It divides the community and undermines its cohesion – the appropriate model shifts from a cooperative 'benevolent dictatorship' to a noncooperative bargaining scenario, where the implicit contracts between those with social and economic power (community leaders and wealthy community members respectively) and those without are being tested, undermined and broken. Vulnerable groups become increasingly marginalised and impoverished as the rights to which they were customarily entitled are sold to the highest bidder.

With this in mind, it should not be presumed that the allocation of rights by community leaders under common property regimes is any more equitable, or any less patriarchal, than any other institution which wields this power, such as the state, the market or the household. If anything, institutionalised discrimination and personalised favouritism are even more likely to privilege some claims and prejudice others at the community level than in more impersonal institutions, such as the market with its notorious 'invisible hand'. Whether it is institutional or personal, favouritism towards some individuals and discrimination against others creates distortions in the allocation of resources (economic inefficiencies) and leads to obvious injustices, from the level of the household (where females are often treated inequitably in relation to males) to society as a whole (where entire regions, ethnic or religious groups are frequently discriminated against).

The next section of this paper shifts the focus of attention from the different groups of people who hold rights over resources to the different types of rights that they hold.

3 Fuzziness with respect to property rights

In developed countries, property is often rather sharply defined in terms of ownership, implying that the owner has sole use of the resource, and has recourse to legal sanctions preventing its use by others. In village societies, such strict notions of ownership are less prevalent. Instead, people have individual or collective property rights, defined by their membership of the community.

(Ellis 1993:249)

Sen's initial conceptualisation of entitlements was excessively legalistic. It concentrated too narrowly on the ability of people to establish command over commodities through means "that are legitimised by the legal system in operation in that society" (Sen 1981:45). During the 1980s, Sen distanced himself from this narrow formulation, and moved towards a dualistic specification which incorporates both legal rights and the 'accepted legitimacy' of rights conferred by institutions other than the state, such as a community or household. Of particular relevance to this discussion is Sen's work on intrahousehold modelling, which led to the idea of 'extended entitlements', defined as 'the concept of entitlements extended to include the reality of more informal types of rights sanctioned by accepted notions of legitimacy' (Drèze and Sen 1989:11). Obvious parallels can be drawn here with Sen's 'cooperative conflict' model of household behaviour, as discussed above.

In an excellent essay on the evolution of Sen's thinking during the 1980s, Gore (1993:437) argues that Sen generally uses the narrow definition of entitlements to describe legally enforceable exchange relations in the 'public sphere', and applies the vaguer concept of extended entitlements to the distribution of entitlements in the 'domestic sphere'. The phrase 'extended entitlements' is therefore quite misleading, given its concern with pooling and sharing entitlements, rather than increasing or extending them.

In fact, the concept of 'extended entitlements' seems rather problematic for two related reasons. Firstly, it lacks the balance-sheet elegance of the original entitlement approach - the empirical market price ratios that neatly convert individual endowments into individual entitlements simply do not apply to the normative process whereby these entitlements are divided among the individual's dependants. Secondly, it obscures the fact that the focus of attention here is on the 'conflict' element of the 'cooperative conflict' model - i.e., not on the generation of entitlements (which is the household's economic project), but on the division of entitlements among several individuals, each of whom holds a valid but unquantifiable and legally unenforceable claim over these entitlements (which is a problem of domestic politics).

In the terminology of this paper, 'extended entitlements' is invoked by Sen primarily to resolve problems of fuzziness over units of analysis. Although the phrase 'accepted notions of legitimacy' is clearly broad enough to apply to problems of fuzziness over property rights in the public sphere - such as barter transactions between households - Sen has never attempted to apply 'extended entitlements' to any context other than the intrahousehold distribution of resources. Yet Sen himself realised that it is very difficult to fit the narrowly legalistic concept of entitlements to the complex reality of property rights in

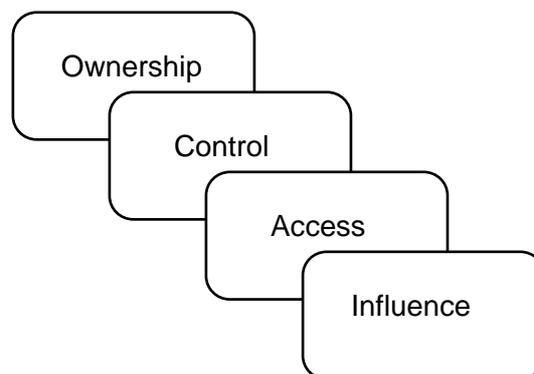
'precapitalist formations' – among which common property regimes must be regarded as a critical case in point.

Figure 2 illustrates a hierarchy of categories of valid claims or property rights over a single resource or commodity, where rights of 'ownership' are strongest and 'influence' is weakest. For present purposes, control refers to rights of determining use and exclusion, access refers to possibilities of use only, and influence is a minimal right - to have some say over access, control and ownership (Seely and Devereux 1996).

Typically, ownership of property automatically confers all other rights embedded in Figure 2: 'ownership gives rights to use and benefit from a resource, to rent the resource to others or to sell it, [and] to exclude others from benefiting from it or from reducing its value'

(Hodge 1995:32)

Figure 2. LEVELS OF PROPERTY RIGHTS



In common property regimes, as will be seen, there is often a separation between ownership of, control over, and access to a resource – specifically, a separation between owners and users. It is access and utilisation that determine what entitlements can be derived from exploiting a resource – but it is ownership and control that determine to whom these entitlements will accrue.

In terms of the four-tier hierarchy of rights in Figure 2, individuals in subordinate positions within communities (as within households) may have some say or influence over common property resources (or household assets), but they lack the substantial rights conferred by ownership and control. In a very real sense, therefore, these individuals have no *a priori* entitlements to jointly owned resources or assets at all, since they are entirely dependent on the goodwill of community leaders (or their bargaining power vis-à-vis the household head) for access to these endowments and entitlements.

It is precisely this fragmentation of property rights that distinguishes common property regimes from the three other resource regimes identified by Bromley (1989:871) – private property, state property, and open access. Under private and state property regimes, ownership is vested in individuals or institutions and the rules establishing the legitimacy of ownership are transparent. Sen's concern in Poverty and

Famines is with private property regimes, in which neat chains of legally enforceable entitlement relations can be identified, and there is no 'fuzziness':

Consider a private ownership market economy. I own this loaf of bread. Why is this ownership accepted? Because I got it by exchange through paying some money I owned. Why is my ownership of that money accepted? Because I got it by selling a bamboo umbrella owned by me . . . And so on.

(Sen 1981:1–2)

In many respects, state property is similar to private property, at least for the case of assets such as land, which are subject to rivalry and exclusion.⁶ 12 per cent of Namibia's surface area is designated as 'national parks', ownership of which is vested in the state. The Ministry of Environment and Tourism controls access to these parks by fencing them and charging entry fees, and it maintains the value of natural resources inside the parks by legislating against poaching and cutting down trees. The Ministry's management of Namibia's national parks is little different from the way many commercial farmers in Namibia manage private game reserves for tourists.

Under open access regimes, by contrast, resources are freely available to anyone who chooses to utilise them. Consider the case of a river, which is not owned by any individual or institution. Since it belongs to nobody, no-one can be excluded from swimming in this river, no charges can be imposed for drinking river water, and unless the river becomes over-utilised or polluted there should be no competition over this resource among its users.

Common property regimes are not the same as open access regimes, though the two have often been confused in the literature – most famously by Hardin (1968), in his influential but wrongly premised paper on 'The Tragedy of the Commons'. According to Turner (1995), common property regimes are closer to private property than open access regimes, since communal management of a resource implies that rights to benefit from its use are denied to 'outsiders'. In effect, as Bromley (1989:872) points out: 'common property represents private property for the group (since all others are excluded from use and decision making)'.

At the group level, therefore, entitlement relations under common property regimes are clear and unambiguous – not 'fuzzy' at all. In fact, common property regimes bestow well defined rights and duties on the community members who manage and utilise communal resources (Scoones 1995). Most sources

⁶ *Rivalry and exclusion* are two defining characteristics of private goods, as opposed to public goods. Natural resources can be either private or public goods. If they are scarce, so that one person's use or consumption of the resource constrains another person's use of it, these are private goods (e.g. land in Manhattan); if they are effectively unlimited (e.g. land in the Sahara) they are public goods, so tend to remain under state property or open access regimes, rather than private property or common property regimes. There is no economic need to establish exclusive property rights over a resource until it becomes subject to rivalry in consumption.

of ‘fuzziness’ occur vertically (between individuals and their institutions, or between different types of institutions). One common source of ‘vertical fuzziness’ occurs between individuals applying for rights to common property resources and the institutional representatives (community leaders) who allocate these rights; another is between communities as *de facto* owners of natural resources within their territory and the state as *de jure* owners of these same resources.⁷

In order to deconstruct the sources of ‘fuzziness’ in entitlement relations within common property regimes, it is useful to separate ownership, control and access to a resource (endowment) from ownership, control and access to the benefits or utilities derived from that resource (entitlement). Take the case of ‘communal land’ which is owned by the state, controlled at community level by ‘traditional leaders’ and accessed or utilised by individual pastoralists. The owner of any asset logically exerts the strongest claim over it. Yet in this case the ‘owner’ (the state) derives the least direct economic benefit from this endowment. Instead it is the pastoralists who gain most from having access to the land. Although they do not own the land or even control its allocation, they earn their living from livestock which they do own and which depend on the land (for grazing and water) for their survival.

In return for granting pastoralists access to the land, the headman who allocates it might extract a rent for these usufruct rights, in the form of a tribute or ‘gifts’. The State might also extract a rent in the form of a head tax on livestock, or grazing fees.⁸ There is, in this example, a clear reversal in rankings between endowment of a natural resource (or strength of claims on the resource) and entitlement (or value of utilities) derived from that resource.

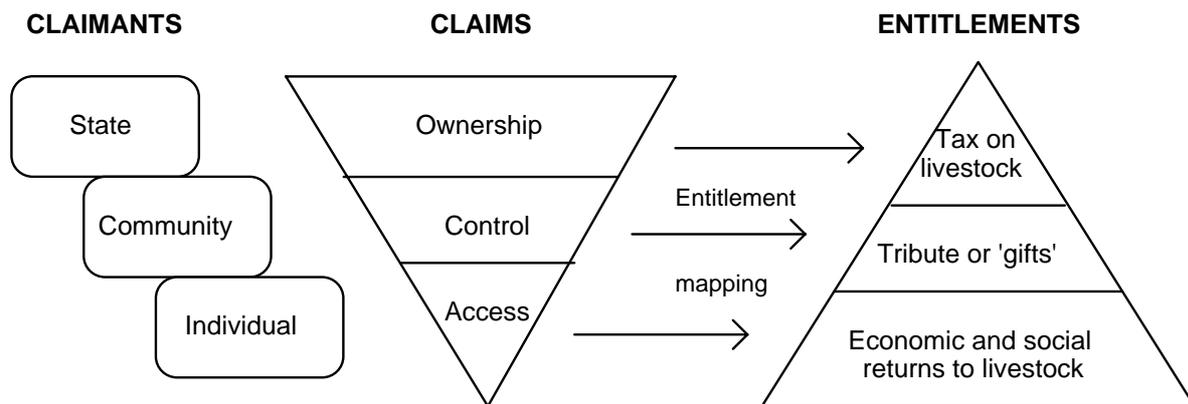
Figure 3 expands the standard framework for analysing entitlements, in terms of which a set of resources (endowments) is transformed into a set of utilities (entitlements), via an entitlement mapping relationship.⁹ The example chosen is communal land. Note that land is defined as an endowment, not an entitlement – the actual entitlement is the economic and social value of the livestock that live off the land. Under common property regimes, it could be argued that land *per se* is not even an endowment. Rights of access and use of the land and its resources are the endowment - and since these rights are divided among several actors, no single individual or institution can claim communal land as their ‘endowment’.

⁷ Mearns (1996:300) extends this distinction between *de jure* and *de facto* natural resource rules to the relationship between ‘government’, being a *de jure* set of rules’, statutes and policies, and ‘governance’, being the ‘endogenously evolved sets of rules . . . that apply *de facto*’, including customary rules that regulate access to and management of ‘common-pool’ resources.

⁸ In Namibia before independence, pastoralists were required to pay annual grazing fees to the colonial administration, at a fixed rate per head of ‘small stock’ or ‘large stock’ owned.

⁹ For simplicity, the six categories of ‘resource decision units’ in Figure 1 are reduced to three categories of ‘claimants’ in Figure 3, and ‘influence’ in Figure 2 is dropped as one of the four categories of ‘claims’ or ‘rights’.

Figure 3. ENDOWMENTS, ENTITLEMENTS, AND COMMUNAL LAND



In Figure 3, the pyramid under 'claims' is inverted to indicate that the strongest claim on communal land rests with the state, which legally owns it. Individuals have the weakest claim - they can be required to pay taxes for the use of land to both community leaders and the state, and they can even be forcibly relocated should the government decide, for example, to convert the land they occupy into a state farm, a dam or a game park - or a military base (see section 4.1).

Entitlements, unlike claims, increase as rights to land decrease: farmers derive most entitlements, and often the bulk of their income, from using the land; community leaders can derive a significant proportion of their income from the patronage associated with allocating usufruct rights; but the state derives very little of its revenue from livestock taxes or grazing fees. Often the state either does not tax smallholders and pastoralists in communal areas at all, or it makes little effort to collect the nominal taxes it does legislate. Even if the taxes and tributes demanded are nominal, though, the existence of these 'transaction rules' serves to clarify and reinforce the various claims, property rights and relationships between all the individuals and institutions involved.

Most crucially, households which do not enjoy security of tenure over the land that they farm under common property regimes face threats to their livelihoods on two fronts: exclusion from access to land (loss of endowment) if the community or state exercises its greater authority over this land to dispossess the household; and reduced income (loss of entitlement) if the taxes and tributes demanded for rights of access become prohibitively expensive.

Of course, it may be argued that usufruct rights over land amount to de facto ownership of that land by the individual or household concerned, and that de jure ownership of land and other natural resources by the state is no more than a notional power that is rarely exercised. This is generally true, but often it is not, as the peasants who were forcibly resettled in the name of drought rehabilitation in Ethiopia in the 1980s, or for purposes of 'villagisation' during Tanzania's ujamaa period, would testify - as would the millions of black South Africans and Namibians who were 'relocated' in the early decades of apartheid.

To take a specific Namibian example, the San people of east Namibia have been systematically dispossessed of land during the course of this century by a variety of processes and policies: colonial

occupation (first by Germany, then South Africa), the establishment of 'Native Reserves' under apartheid ideology, a gradual but inexorable encroachment by commercial farmers, and the proclamation of game parks in their traditional hunting grounds. The end result was that the San "found themselves living in areas that were designated for other ethnic groups, for 'nature conservation' or for commercial farming" (Widlok 1994:5).

The story of the San is one of many where 'fuzziness' with respect to land tenure has worked to the detriment of a vulnerable section of the population. The next section explores three more cases of insecurity over property rights in Namibia, involving several institutions (the colonial and post-colonial state, rural communities and households) and individuals (pastoralists, women).

4 Entitlements to land in Namibia

Namibia was administered by South Africa under a League of Nations mandate from 1920 until the United Nations revoked this mandate in 1966, whereafter Namibia remained under illegal South African administration until independence in March 1990. During the colonial period a dual land tenure system developed, with white settlers occupying designated 'commercial areas' and black Namibians confined to so-called 'communal areas'. 'While in the Commercial Areas the prevailing form of land ownership is the freeholding, in the Communal Areas communal or customary ownership prevails' (Hangula 1995:3).

At independence, Article 124 of the Constitution of the Republic of Namibia transferred legal ownership of all communal lands (formerly vested in the colonial administration) to the newly elected government. Article 100 of the Constitution states that: 'Land, water and natural resources . . . shall belong to the State if they are not otherwise lawfully owned' (Republic of Namibia 1990). During the 1990s, several conflicts over land in communal areas have developed – over the politically charged questions of restitution of 'ancestral lands', the 'illegal' fencing of communal rangelands, and women's rights to land under both civil and customary law. These issues highlight problems of 'fuzziness' in terms of ownership, control and access rights over common property resources at several levels – between communities and the state, between individual households within rural communities, and between men and women within households. To illustrate these conflicts, three case studies are discussed below.

4.1. The State v. communities: forced removals under apartheid

Ever since the Native Administration Proclamation of 1922, the legal power to allocate rights of access to land in Namibia's communal areas has been vested in government officials such as local magistrates, but in practice the de facto allocation and management of communal land was devolved to 'traditional leaders' - the local headman, chief, king or queen (Adams and Werner 1990:95). Nonetheless, the state retained ultimate power over the disposition of this land and its inhabitants – and when prosecuting its Native Reserve policy in the 1920s and 1930s it had no hesitation in exercising this absolute power.

Rural land in Namibia was divided along racial lines by the Native Reserves Commission in 1921. All land that was designated for white settlement was systematically cleared of its black residents. In many

cases this required the forcible removal of large numbers of people who had occupied their land for generations, but who were now decreed to be squatting illegally on land owned by white settlers holding freehold title deeds. Resistance to 'resettlement' was met with violence - in one case, bombs were dropped by military aircraft to terrify pastoralists into moving to the Native Reserve of 'Hereroland' (Adams and Werner 1990:30). The resulting distribution of land became known colloquially as 'apartheid's footprint'. White commercial ranches occupied (and still occupy) the best pasture land in central Namibia, in the shape of a giant foot, while blacks were forced into ecologically marginal territories bordering the Namib desert to the west and the Kalahari to the east.

In 1974, several hundred black South Africans were forcibly removed from their homes in northern Cape Province and relocated to the uninhabited fringes of the Namib desert, when the South African Defence Force decided to convert part of the northern Cape into a military camp. At the time of Namibia's first elections in November 1989 the legal status of these people - known as 'Riemvasmakers' - was so unclear that they were denied the right to vote, and until the transition to democracy in South Africa in 1994 they were unable to return home - by which time, after twenty years, many had applied to become Namibian citizens (Næraa *et al.* 1993). The state's absolute control over the disposition of land had stripped the Riemvasmakers not only of their homes and farmland, but even of their citizenship - their right to 'belong' to their country of birth. Similar problems of legal identity faced the millions of black South Africans who were either removed to, or declared citizens of, the 'independent bantustans' of Bophuthatswana, Ciskei, Transkei and Venda.

Within Namibia itself, the South African colonial administration was responsible in 1956 for moving 400 Damara-speaking people from their ancestral land at Aukeigas near Windhoek to an abandoned (because unviable) commercial farm called Sorris-Sorris ('Sun-Sun'), also on the edge of the Namib desert - not far from the home since 1974 of the Riemvasmakers - in order to create a game park for the use of tourists and Windhoek's white residents. In this harsh environment, rainfall averages 100-200 mm per annum, rainfed crop farming is impossible, and the displaced families subsisted on goat rearing, pensions and remittances from relatives employed elsewhere.

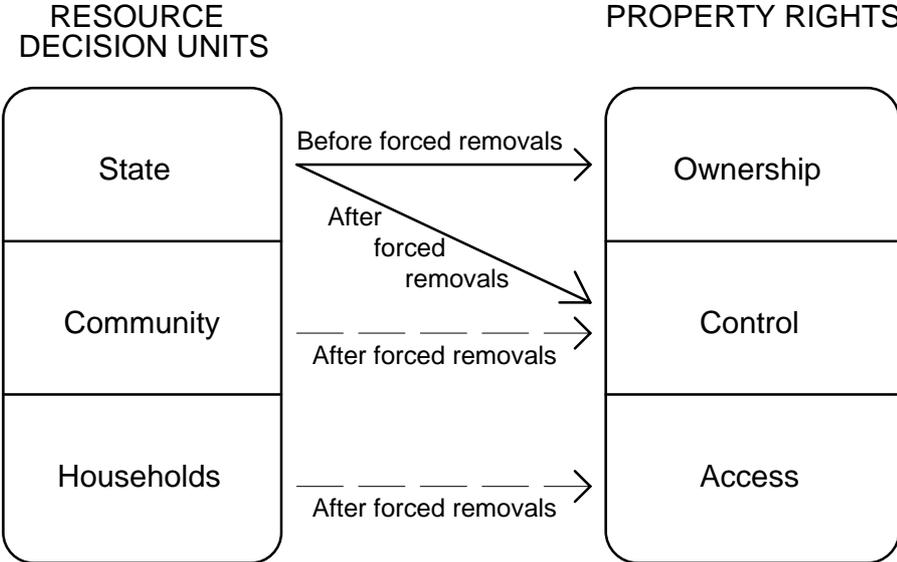
In 1992, the new Namibian government had to cope with one of the worst droughts this century. The drought had its epicentre in western Namibia, and the people of this region suffered the heaviest livestock loss rates in the country. A survey of 66 goat-owning households in the Sorris-Sorris area found that drought-related mortality had halved the average herd of goats from 142 to 74 in just twelve months (Devereux *et al.* 1993:75). At the height of the drought, in December 1992, the plight of the people of Sorris-Sorris became a focus of national media attention, when the families of the 400 who had been displaced in 1956 mobilised themselves and marched with their surviving livestock to Daan Viljoen Game Park (named after the South African Administrator who had implemented the removals) and squatted outside its entrance, demanding restitution of their ancestral land.

This confrontation proved to be a severe embarrassment to the government. While recognising the validity of the Aukeigas people's case, the Ministry of Lands, Resettlement and Rehabilitation was wary of setting a precedent for historical claims to land. Following a stalemate that lasted several months, a

compromise was eventually negotiated whereby the squatters at Daan Viljoen were allocated some good quality grazing land – but explicitly as a drought rehabilitation measure – 400 kilometres northeast of Windhoek (Næraa *et al.* 1993). By failing to reverse the gross injustice perpetrated against the people of Aukeigas by the apartheid administration, the new government of Namibia had in effect continued to assert its absolute right, as legal owner of the Daan Viljoen Game Park, to control the use of this land and regulate access to it.

Figure 4 illustrates these struggles over land between the (colonial and post-colonial) state, communities and households in Namibia, in diagrammatic form.

Figure 4. FORCED REMOVALS IN NAMIBIA



Before forced removals, the state owned all communal land in Namibia, but communities controlled its allocation at local level and individual households had rights to access and utilise these resources. The forced removal policy amounted to the state seizing control of communal lands, taking the right to allocate usufruct rights away from certain communities and denying access to the households who had been living and working on this land. The dotted lines in Figure 4 lines indicate the rights (or ‘implicit contracts’) that were violated by the colonial state during this process - and which are currently a locus of contestation between the democratically elected post-colonial government and several thousand of its disaffected citizens.

4.2 Households v. communities: fencing of communal rangeland

Historically, livestock herders in the communal areas of northern and eastern Namibia (formerly Owamboland and Hereroland) have migrated seasonally to cattle posts far from home, tracking available grazing and water in a semi-arid environment characterised by low and locally variable rainfall. The sustainability of this informal range management system, which guarantees security of access to grazing

and water for all herders in the area, has been maintained by observing the principles of flexibility and reciprocal access.¹⁰ However, these principles, and the effectiveness of the entire range management system, are currently under severe threat - not from the state, as is often the case when governments try to 'sedentarise' pastoralists or formalise their land rights, but from some of the livestock herders themselves.

Namibia has seen a *de facto* privatisation of its communal rangelands on an unprecedented scale since independence in 1990. Although isolated cases of enclosure of rangelands by pastoralists and agro-pastoralists have been reported since the 1970s, the incidence of 'illegal fencing' has accelerated in the past few years. The objective behind fencing is to secure guaranteed access to grazing and water, in a context of intensifying population pressure and competition over natural resources. Livestock owners who are able to invest in fencing reap the rewards in the form of better quality animals, since they retain access to communal grazing land while having the option of retreating into their 'privatised' enclosures in the dry season, when the vegetation outside the fence becomes depleted.

This strategy is pre-emptive in two senses. First, it anticipates increasing competition over grazing and water supplies, as the growth of human and livestock populations tests the 'carrying capacity' of the communal areas - which were already fragile and overexploited because of the colonial administration's inequitable land distribution policies. Population pressure in rural Namibia was further exacerbated by the return of thousands of exiles after independence. Fencing tracts of land for private use thus becomes a pre-emptive move by livestock farmers to prevent their neighbours from alienating land to the point where their livestock are excluded from grazing. Second, the 'land grab' since independence was a response to the perception that land reform was imminent, and that it could take the form of converting communal lands into freehold title. Again, fencing was designed to establish a prior territorial claim, based on occupancy (which is 'nine-tenths of the law', after all). These two factors together explain the exponential increase in 'defensive fencing' (Fuller and Turner 1996:23) in recent years - everybody was rushing to assert exclusive rights to land before it was too late.

In terms of the 'ownership, control, access and influence' hierarchy of property rights, fencing of communal land can be interpreted as an attempt to exert a higher level of claim over this resource - using financial and political influence to upgrade rights of access and use to rights of control and, ultimately, to register this land as freehold title so that it is owned by the person who fenced it off. However, this practice goes directly against customary law, which allows households to exert exclusive claims only over land around the homestead itself. It also violates customary norms, which regulate access to rangeland for community members on the basis of 'socially accepted' eligibility and queuing rules - not on ability to pay.

¹⁰ This 'flexibility' extends even across national boundaries, as Namibian herders often move their cattle north into Angola and east into Botswana, in search of grazing - which underscores the artificiality of these colonial demarcations (Hangula 1993).

According to the Native Administration Proclamation of 1922, which remained in force until after independence in 1990, chiefs and headmen were delegated authority to allocate communal land to community members, but they were prohibited from receiving any payment for doing so. The 1922 Proclamation devolved legal responsibility to chiefs and headmen 'for the proper allotment, to the extent of the authority allowed them by law, of arable lands and residential sites in a just and equitable manner, without favour or prejudice'. At the same time, these chiefs and headmen were also warned that they 'shall not use any compulsion or other arbitrary means to extort or secure from any person, any tribute, fee, reward or present' (cited in Yaron *et al.* 1992:183).

In reality, three factors determine whether an individual has the capacity to fence land: the ability to pay headmen for usufruct rights, the ability to pay for fencing materials – often this is the only limiting factor to the size of the area that is fenced off – and the individual's influence with traditional authorities or local government. 'This implied that from the outset only the wealthy and powerful had access to this form of enclosure' (Tapscott and Hangula 1994:7). Since wealthy businessmen and powerful politicians were involved in this practice from the start, it soon acquired a kind of tacit legitimacy, and there was little political incentive to stop it. Besides, there is no law that explicitly forbids the fencing of land in communal areas (Corbett and Daniels 1996:14), notwithstanding the resolution of the 1991 National Land Conference that 'illegal fencing must be stopped and all illegal fences must be removed' (Republic of Namibia 1991:32). Although the state has the legal and constitutional right to intervene, to date the disposition of communal rangeland remains at the discretion of local traditional leaders.

Fencing of communal rangelands has negative environmental and socioeconomic implications. The predictable environmental consequence has been rapid overgrazing of the remaining open areas, particularly in the corridors between enclosures. Where fences run for several miles on either side, it is often impossible for herds to survive the journey through these denuded corridors, so access to open grazing on the far side is also cut off. Fencing also accelerates socioeconomic differentiation, as those livestock herders who are able to fence build larger and healthier herds than those who are unable to fence, whose herds are shrinking in the face of deteriorating and declining communal grazing areas. During the 1992 drought, livestock owners who had access to private grazing and boreholes suffered lower losses than those who depended entirely on communal grazing land and shared water points (Tapscott and Hangula 1994:1). Finally, a political consequence of fencing is that the legitimacy enjoyed by community leaders is being undermined, as local people see their communal endowments of land and other natural resources being sold to the highest bidder - local elites or (perhaps even worse) wealthy outsiders.

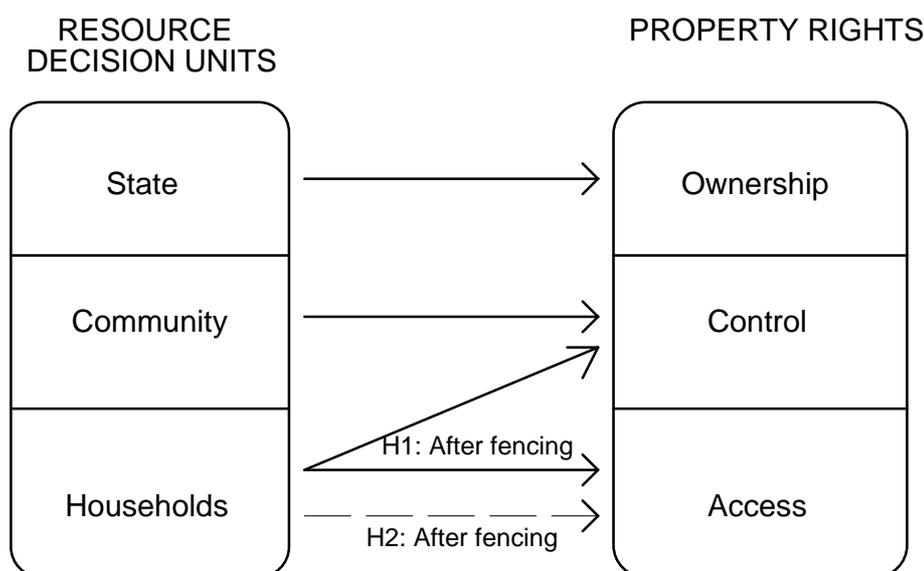
Marginal groups such as the San are particularly disadvantaged by the enclosure by others of their ancestral lands. One observer warns that the continuation of de facto or de jure privatisation of communal land will lead to the majority of Namibians, including most of the San, becoming 'landless dependent workers with poor prospects for controlling their own economic destiny' (Widlok 1994:14). Once a group of people loses their rights over natural resources, their ability to generate and retain entitlements from those resources will be at the whim of those to whom the rights are transferred. The state has already

restricted the ability of the San to extract entitlements from wildlife on ‘their’ land, by legislating against hunting of wild animals in all communal areas.¹¹

It is worth recalling at this point that the entitlement approach has been criticised as apolitical, ahistorical and even ‘amoral’, because of its failure to consider the political economy of entitlement generation – its acceptance of endowments at any point in time as given and therefore legitimate (Devereux 1993:80). The case of ‘illegal’ fencing in communal areas of Namibia underlines the importance of an analysis that considers how entitlements are generated. Fencing creates exclusive rights to land which are used to generate entitlements for some Namibians at the expense of their poorer neighbours. Wealth is literally breeding wealth for those sitting securely behind their fences, and is deepening the poverty of those who are left outside.

Figure 5 illustrates the effects of individuals ‘upgrading’ their rights over rangeland in communal areas. In this case, no institutional rights are violated – the state continues to be the de jure owner of this land, and community leaders continue to allocate access rights and regulate land use. For some households, however, the implicit contract between community members and community leaders has been broken. In Figure 5, when Household 1 [H1] pays the local headman for control over a tract of rangeland and then fences it, this denies access to Household 2 [H2], which loses its right to utilise this common property resource. (This effect is illustrated by the dotted line.) Before fencing, both households enjoyed equitable access and usufruct rights over the land. After fencing, Household 1 has privatised access and exercised exclusivity over these resources.

Figure 5. 'ILLEGAL' FENCING OF COMMUNAL RANGELAND IN NAMIBIA



¹¹ According to the Nature Conservation Ordinance of 1975, ‘protected game’ may be killed only in self-defence, or to protect domestic livestock against predators (Corbett and Daniels 1996:18). During the drought of 1992, this prohibition on hunting led to a highly publicised court case in Windhoek, when a San man was charged with killing a giraffe with a bow and arrow. The accused’s defence was that he and his family were starving, and that the law against hunting was depriving him of his only means to feed his family.

4.3 Queuing for entitlements: women and other minors last

Civil and customary law in Namibia both serve to entrench deep gendered inequalities in terms of access to land and security of tenure, to the detriment of women. 'Indeed, under both civil and customary systems, women are treated as de facto minors' (Girvan 1995:15). Women in either civil or customary marriages cannot register land in their own names, and are dependent on the authority of their husbands to sell property or enter into contracts. Within civil marriages, women are subject to 'marital power', which gives the husband control over his wife's property. Similarly, 'under customary law, decision-making over property within marriage is generally dominated by the husband and male members of the extended family' (Republic of Namibia 1995:119).

In the rural communal areas, usufruct rights over land – for residential purposes, crop cultivation, or grazing – are allocated by traditional authorities to 'households', through the household head, who is usually male. Married women have no direct or independent rights to land - they secure access to land through their husbands – while unmarried women gain access to land through male relatives (their fathers or brothers). In general, therefore, women's access to land is entirely conditioned by their relationship to men. Even in those areas which do not explicitly exclude women from holding land in their own right, 'they still face discrimination. For example, headmen may give priority to the applications of men, who are seen to be more productive. Alternatively, women may be granted smaller or degraded portions' (Girvan 1995:16).

The statement that land in rural areas is allocated preferentially to men because they 'are seen to be more productive' reflects a benign, 'unitary model' view of rural communities, in which resource decisions are made by 'benevolent dictators' on the basis of economic rationality and utility maximisation principles. In reality, institutionalised discrimination against women in the allocation of land reflects not their alleged lower economic productivity, but their weaker bargaining position within the patriarchal institutions of traditional leadership, from which women have 'traditionally' been excluded: 'Women are virtually absent from positions of traditional leadership . . . traditional authorities and traditional courts are totally dominated by men' (Republic of Namibia 1995:54).

The benign view of the role of customary law is reinforced by writers who present 'traditional leaders' - many of whom were installed or empowered by the South African colonial administration – as being merely 'trustees' of the land, who allocate usufruct rights on the basis of need, for only nominal fees:

The traditional leader is a trustee rather than the owner of the land, and he [sic] only allocates or leases it to needy members of the community. Although in some areas, such as the former Owamboland, traditional authorities have set a nominal administrative fee for the portion of land allocated, ancestral land can never be bought, alienated or sold. Individuals only make use of it.

(Hangula 1995:3)

The truth is that land allocations are made very much on the basis of ethnicity, seniority, and gender, and that fees for usufruct rights are commonly expected or demanded by chiefs and headmen. In the northern communal regions, 'households acquire the right to use arable land in their own "tribal" areas through the head of the household, who makes a payment to the local headman or chief' (FAO 1994:28). In some areas the exact amount of this so-called 'tribal tax' is fixed, whereas elsewhere it is negotiated on a case by case basis. As competition over land intensifies with the inexorable growth of human and livestock populations, the value of these charges is steadily rising. This constitutes an economic barrier of entry against the majority of rural women, whose cash incomes and access to disposable property such as cattle (which could be sold to raise the cash needed to buy land rights) are considerably lower than those of men.

The devastating implications of these discriminatory laws and practices are seen most starkly in the experience of widows in rural areas. In northern Namibia, under customary law, when a woman's husband dies, ownership of her husband's property, and all jointly owned assets - including livestock, grain stores, even the house itself - reverts to her husband's family. A widow can therefore be dispossessed of all her property and evicted from her home - and she often is (Hubbard 1991). Her entitlement to these assets (and even to those assets she brought into the household herself, since these then become joint property, under her husband's control) is a 'secondary entitlement' which is secured only through her husband. When he dies, all 'primary entitlements' to household assets pass not to her, but to his family. At the same time, usufruct rights over land revert to the community leaders who allocated these rights to the household. Widows who want to continue living and farming on their land can find themselves having to buy back the rights to do so - which is patently unjust, as one widow complained:

I paid the headman N\$300 to cultivate the field. I do not want widows to pay for a field that has already been paid. Widows should not be chased out of the house. I paid for a field that me and my husband already paid for. I want widows to have security.

(Quoted in Republic of Namibia 1995:100)

One year after independence, the 1991 Land Conference resolved that: 'Women should have the right to own the land they cultivate and to inherit and bequeath land and fixed property' (Republic of Namibia 1991:30). Five years later, no action has been taken to implement this resolution, despite the fact that it was fully endorsed by the government. The only positive progress is that some traditional leaders in northern Namibia agreed recently that widows should not be evicted from their homes, nor should they be charged for land they already 'own'.

Finally, it should be noted that the difficulties faced by Namibian women in accessing land are by no means unique to Namibia, but are common throughout the region. In Zimbabwe, women's access to communal land is secured only 'on a secondary level' (Gaidzanwa 1995:9), and this access is being steadily eroded as land rights become commercialised in response to inexorable land pressure. In neighbouring South Africa, 'under most systems of land tenure, social norms exclude women from gaining access to land' (Small and Mhaga 1996:55). Throughout southern Africa, in fact, black women have found

themselves excluded from ownership of commercial land by poverty and racially discriminatory laws, and they have had to queue for usufruct rights to communal land because of customary practices which subordinate their claims to those of men.

5 Conclusion

This paper has examined two sources of confusion or ‘fuzziness’ in the entitlements literature, and applied these specifically to the context of natural resources in developing countries. The two issues are identified as the unit of analysis problem and the property rights problem.

The entitlement approach is seen to be too individualistic to extend to institutional property rights, where institutions are broadly defined to include households and ‘traditional’ rural communities as well as firms, markets and the state. Recent developments in intrahousehold modelling offer lessons for the analysis of communal decisions about common property resources. Politicised household models such as ‘cooperative conflict’ are demonstrably more useful than the vague notion of ‘extended entitlements’.

Disaggregating property rights into ownership, control, access and influence clarifies the complex claims over resource endowments exercised by distinct individuals and institutions, in contexts where rights are neither individualised nor legally exclusive. Conflicts over natural resources and the entitlements they generate can arise when ownership and usufruct rights are held separately by multiple ‘resource decision units’, each holding valid claims to the resource.

Within ‘informal’ institutions such as households and communities, institutional rules and norms govern the allocation of resources and of rights over resources. Three sets of rules are identified: eligibility, queuing and payment rules. These ‘screening’ and ‘prioritisation’ criteria amount to institutionalised discrimination against certain people’s claims, both within households and under common property regimes. Case studies from Namibia reveal that women and marginalised ethnic groups face particular risks of exclusion from rights to ‘jointly owned’ commodities and resources.

Finally, at the policy level, the preceding discussion is not an apology for the ‘privatisation’ of rights over communal land and other natural resources. As the case study of ‘illegal’ fencing in Namibia demonstrates, incipient individualisation of common property rights is deeply destructive of social cohesion and is economically stratifying. Policy interventions have been devised that circumvent problems of intrahousehold inequality without destroying the household as an institution. Similarly, ways and means must be sought that support the positive features of common property regimes, while avoiding or redressing the problems of discrimination and insecurity that they can create for marginalised individuals, households and communities.

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