

**LEGAL IMPACT OF BIOFUEL (JATROPHA CURCAS)  
PRODUCTION ON COMMUNAL LAND IN NORTH-EAST  
NAMIBIA**

**A THESIS SUBMITTED IN PARTIAL FULFILMENT  
OF THE REQUIREMENTS FOR THE DEGREE OF  
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## ABSTRACT

However, research also revealed that, despite the fact that most traditional authorities regard other institutions as wearisome, they nevertheless seek assistance from these institutions when faced with conflicts involving external parties such as *Jatropha* companies.

The research also focused on the socio-economic benefits that farmers stand to gain from *Jatropha*. This emanated from the fact that many researchers question the claimed benefits of *Jatropha* and believe that the current rush to develop *Jatropha* production on a large scale is ill-conceived, under-studied and could contribute to an unsustainable trade that will not solve the problems of climate change, energy security or poverty.

The ‘food vs biofuel’ debate also focuses in the study, as it is feared that *Jatropha* could replace the production of crops aimed at securing food for communal farmers. Although *Jatropha* is not farmed on a scale large enough to fully determine this aspect in the Namibian context, in other countries research has shown that *Jatropha* is planted in direct replacement of food crops by subsistence farmers. However, it is noted that communal farmers in Namibia are in essence subsistence farmers, i.e. they produce what they consume, and major concerns arise when one considers the plan to encourage subsistence farmers to plant large amounts of *Jatropha*. This is made worse because subsistence farmers have very weak links to markets and their lack of storage capacity, communication and information will make it difficult to benefit from *Jatropha*.

Research also showed that some investors opt for contracts of farming as a land acquisition method. However, the obligations in farming contracts are mostly aimed at protecting the interests of the investment companies, whilst at the same time exploiting the farmers. It is

also clear that many of the farmers did not understand the concepts stated in the agreements and their decisions to sign these agreements were clouded by the promise of huge profits and other developmental agendas. It is common cause that communal land is mostly used for subsistence farming and the introduction of commercial activities such as *Jatropha*, is interfering with this mode of farming and leading to the commercialisation of the land. It is therefore, also important to ensure that the legal framework that operates in the communal arena is geared to protect the farmers from exploitation of their communal resources by *Jatropha* investors and other communal land inhabitants.

The *Jatropha* experience demonstrates that although procedures under both the Communal Land Reform Act as well as the customary law are used to allocate land for *Jatropha* farming, the two are not properly geared to protect the communal farmers from exploitation by investors. The lack of a remedial mechanism can be attributed to the lack of a harmonious co-existence between customary and statutory law. It is therefore, recommended that the Communal Land Reform Act be revisited by the legislature and that the Act incorporate customary land law practices and principles. There is also need to ensure that the ever growing gap between customary law and statutory law is bridged. However, the major recommendation of the study is the introduction of a *National Policy for Biofuels*. It is recommended that the policy will be an important tool in facilitating the farming of *Jatropha* in the country.

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## **DEDICATION**

**TO MY PARENTS**

# ENDEGINA AND VEIKKO NAMWOONDE

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**Date**

# CHAPTER 1

## INTRODUCTION

### 1.1 ORIENTATION OF STUDY

The current debate on climate change and rising oil prices has greatly increased interest in renewable energy, such as biofuels (Muok & Källbäck, 2008, p.1). Consequently, many industrialized countries and more advanced developing countries are seeking to promote biofuels as a way of reducing fossil fuel consumption and mitigating the adverse effects of climate change (Ibid). In Namibia, the past few years have witnessed the emergence of an energy industry, one which is primarily based on oil-plants (GRN, 2008, p.1).

The energy industry is premised on biofuels. Biofuels is a catch-all term for a set of very different crops and cropping systems, end-products, policy goals and business models (Cotula et al, 2008, p.43). In Namibia, the perennial oil-nut bearing tree, *Jatropha Curcas* (hereinafter referred to as *Jatropha*), is viewed as the most feasible for dry-land cultivation (GRN, 2008, p.2). *Jatropha* is a multiple, drought resistant biofuel tree, (belonging to the *Euphorbiaceae* or *spurge* family), originating from central and south America, but now growing pan tropic. The tree produces seeds containing 27-40% inedible oil, which is easily convertible into biodiesel (Ibid, p.3).



**Source: E Namwoonde**

Although even some basic agronomic characteristics of *Jatropha* are not fully understood, the plant enjoys a booming interest the world over (Achten, 2007). Some plant oil production could take place on freehold land, but the bulk of production is expected to occur on communal land (GRN, 2008, p.3). The landscapes situated in Caprivi, Kavango and the Maize Triangle (Tsumeb, Grootfontein and Otavi) have, therefore, been identified as the most suitable for *Jatropha* farming (Ibid, p.2).

In Kavango, *Jatropha* production is led by local farmers in collaboration with *Jatropha* producing companies. These companies are foreign direct investment companies, who have sought collaboration with traditional authorities on communal land. Under this project, families who wish to become *Jatropha* farmers are contracted to grow *Jatropha* on communal land. The farmers contribute communal land and labour, and the companies cover capital costs and compensate participating farmers with food and cash for loss of maize and millet (Cotula et al, 2008, p.5).

In as far as Kavango is concerned, the following excerpt from Christians (2006, p.4) sums up the background:



The project area is communal land. Traditional authorities allocate land to individual families, and mahangu (and a little maize) is cultivated, mainly on a subsistence basis rather than as cash crops. Families, who choose to become Jatropha farmers, will be contracted to grow the trees on land that was cleared prior to 1990.

A family may decide to use all or part of their maize and mahangu fields or previously cleared fields that are lying fallow. Prime Investment will assist families to obtain a long term lease on their land from the Ministry of Lands. This will cost the Company an estimated N\$ 35 million. The participating families will thus maintain control over the land which they commit to Jatropha plantations. One of the requirements of the Kyoto Protocol is that if a farmer commits land to such a project, he/she may not clear new lands (virgin forest) to compensate.

This requirement will be strictly audited and enforced because non-compliance would disqualify the project from receiving Carbon Credits. However, lands that were cleared after 1990 but are now fallow may be used for maize or mahangu. Once Jatropha trees are producing well, the Jatropha growers should have cash to spare, and should be able to afford fertiliser to maintain the fertility of their remaining mahangu fields. The Kavango Jatropha Farmers Association has been established to represent the interests of the farmers in each district.

Prime Investment will provide all the trees, fertiliser and materials for planting, at no cost to the farmers. Where watering is needed, this will also be provided by the Company by means of water carts. The farmers will have to dig the holes, prepare the soil, plant the trees, protect and maintain the trees, and harvest the seeds which they will sell to the factory.

For the first six years the Company will subsidise the participating farmers with food and cash to compensate them for the maize and mahangu that they can't grow anymore (refer Section 6 below). Thus the farmers' contribution to the project will be land and labour, while all the capital costs will be met by the Company.

Most of the 24,000 rural families in Kavango are concentrated near the river. If participating families use an average of 10 hectares for Jatropha, then an estimated 8,000 to 13,000 families could participate in growing the trees.

Obviously not all the people will have access to land that was cleared prior to 1990. This fact raises some concerns about inequalities arising. Therefore, the intention is that those people who do not have access to land that qualifies, would be considered first for other project-related opportunities e.g. tractor drivers, administrators, and factory workers if the factory is located in Kavango. Substantially more money circulating in Kavango would also create opportunities for the development of secondary businesses that are not directly related to the project.

The land in Kavango is relatively close to the Okavango River and covers a large area. Most of the water from the Okavango River is largely used for domestic

purposes. Irrigation activities exist at subsistence level, with a few home gardens for those who live along the river. Inland farming and livestock production is also an agricultural activity found in the area. The limitations are that there is no continuity of areas, the land being interrupted by small privately managed plots or small settlements. Moreover, only a small area is currently under cultivation and therefore, considerable debushing is required (GRN, 2008, p.3).

In Caprivi, the traditional authorities have earmarked large areas of land for *Jatropha* farming. The Strip enjoys a relatively high precipitation (600-800 mm per year) and is therefore, more suitable for rain fed crops (GRN, 2008, p.6). Land for possible development is situated at a significant distance from the Zambezi River and therefore, irrigation support is not feasible (GRN, 2008, p.6).

The main problem in this area is the remoteness from seaports and potential markets, threatening the profitability of the biodiesel project because of high costs of transportation and the need for large volume storage facilities at the refinery as well as intermediate storage facilities at logistic centre's enroute to or at seaport (*Ibid*).

In assessing the social and economic impacts of *Jatropha* farming in, two major conditions need to be borne in mind (Mendleson, 2007, p.2). The first is the increasing demand for biofuels, which reduce dependence on the fossil fuels that are becoming increasingly expensive. The planting of biofuel crops-such as *Jatropha*- can also help reduce atmospheric concentrations of carbon dioxide, one of several gases known to cause global warming, and they may be used to sell carbon credits (*Ibid*).

The second major condition to be considered is the fact that rural farmers live under conditions, made difficult by shortages of fertile soils, poor crop yields, and limited

markets for any surplus farm production. There are also few other economic or job opportunities open to rural households (Ibid).

Mendleson (2007, p.2) cautions that it is against this background that, there are plans to plant *Jatropha* on large areas of cleared land belonging to thousands of farmers and there are a number of social and economic impacts as well as impact on land use and land availability that may be anticipated.

## 1.2 Statement of the problem

The problem of this study is guided by the following hypothesis: statutory law reforms and the introduction of commercial activities on communal land undermine security of customary land tenure with negative consequences for rural livelihoods and natural resources. The main problem of this study is whether the introduction of *Jatropha* on communal land has negative consequences on the customary land tenure and livelihoods of communal land inhabitants and if so, whether the existing legal framework offers any protection?

This problem is extended to look at how the growth of *Jatropha* on communal land impacts on the socio-economic conditions of communal residents and what benefits, if any, the communal residents stand to gain from *Jatropha*. The problem that will be investigated also touches on land use and land availability, with special emphasis on how it affects the traditional use of communal land i.e. subsistence farming. The need

to look at the impact of *Jatropha* on communal land also necessitates a look into the impact that the introduction of new concepts such as contracts of farming and commercialisation of land will have on customary land tenure.

At the same time, the thesis will also investigate whether the legal framework that exists is adequate to protect the communal farmers from the negative impacts that will be highlighted in the thesis. In essence, the problem of the study is to look at whether the growth of *Jatropha* has any impact on communal land, with specific emphasis on the aspects entrenched above.

Before I proceed, it is necessary to give a clear factual description of the environment from which I draw the problems. In doing so, the reader is referred to the excerpt from Christians above.

As indicated above, recent years have seen a global boom in the interest of biofuels. These are attributed to climate change and the escalation of fuel prices. As a result of this, companies around the world have invested in acquiring land for biofuel production.

In Caprivi, the investor (LLB Biofuels Namibia) received a leasehold and is growing *Jatropha* on 15 hectares of land at Katima Farm. Although some investors have received consent from the traditional authorities, there are no other *Jatropha* activities taking place in the area. The land board has, however, received applications for leaseholds, on which people intend to grow *Jatropha*.

There are also some investors who went to the traditional authority and requested for land. The authority then allocated 125 thousand hectares of land for *Jatropha* farming. This allocation was done after the investor created a trust for the community accompanied by promises of developmental agenda, such as roads, schools and employment opportunities. The investor received a letter of consent which was then used by the company in support of its application for leasehold to the land board.

It is, however, clear that the land so allocated is not a customary land right as stipulated in the Act, nor is it leasehold, because traditional authorities do not have the mandate to issue leaseholds (Section 30(1) Communal Land Reform Act). More so, the allocation cannot be freehold, because section 17(2) expressly prohibits the allocation of freehold title on communal land. In terms of the Communal Land Reform Act, a customary land right may not be transferred without the written consent of the chief or Traditional Authority concerned (Section 38(1)).

If the rights given by the traditional authority do not fall within the ambit of the Act, then the traditional authority in allocating the land was exercising its rights under customary law and not under the Act. If such an argument were to hold water, then this necessitates an investigation into the affiliation between customary law and statutory law as enunciated in Article 66 of the Namibian Constitution, where customary law is held to be valid to the extent to which it does not conflict the Constitution or any other statute.

In Kavango, the proponent of the business venture is Prime Investment (Pty) Ltd, a Namibian registered company. The project area lies along the Namibian section of the Okavango River from Katwitwi (near Nkurenkuru) via Rundu to Divundu. It lies within an area that receives an annual rainfall of more than 500mm. The main mode of business been used is contract farming.

In addition, the Kavango experience is a bit more complicated because the Communal Land Reform Act makes provision for the registration of customary land rights (Section 25). However, the communities in Kavango, citing their traditional practice called *okudiruka* (shifting cultivation) and other socio-economic reasons, have refused to register. The Act is hushed on the consequences of non-registration, but research has shown that, failure to register will ultimately render occupation of the field illegal (Namwoonde, 2008). If their occupation is indeed illegal, the question on the legality of the lease is further justified.

It should, at this point, be observed that customary tenure is a system that is well practiced in most communal set-ups. It is also appreciated for the balance that it creates amongst the residents, more especially as far as land allocation and natural resource management is concerned. This balance emanates from the adherence of the community members to the allocation procedures put in place by their traditional leaders.

For this reason, these problems of allocation and transfer of rights shoot from the fact that, in terms of section 17(2) of the Communal Land Reform Act, the free disposal of communal land is not legally possible. This principle has its genesis in the concept of

communal ownership under customary law. According to Bennett (2004, p.41), under customary law, land is subject to multiple interests.

Family heads and individual members of a family have rights of benefit; traditional leaders have powers of allotment and control. It is, therefore, arbitrary to permit one of these interest-holders to dispose of an object, when others have concurrent rights and powers (Bennett, 2004, p.41).

It should, however, be noted that customary law does not place a restriction on the size of a field. Moreover, the Communal Land Reform Act makes provision for those who want more than 20 hectares to apply to the Minister, which consequently means that the Act is not absolute and an allocation of more than 20 hectares by the chief is not necessarily void but voidable on the instance of the aggrieved party.

The absence of clarity on the types of rights that the companies get brings the issue of commercialisation of communal land into play. The key question in this regard is whether it is *de facto* or *de jure* commercialisation. The concept of communal land was intended to avoid *de facto* commercialisation. The Act on the other hand makes an exception to this, by the inclusion of leaseholds that can be granted for commercial activities (*de jure* commercialisation).

In addition, as it has been depicted above, most land acquired for *Jatropha* purposes, especially in the Kavango region, was via the customary law realm.

The land earmarked for *Jatropha* is mostly idle land, but as will be discussed in the chapters below, idle land is a subjective term. In some communities, idle land is land

that is no longer in use, for others its land that is resting and will be used again. Hence it becomes a problem because , for example in Kavango, if the land was just resting, the moment it is allocated for *Jatropha* farming, then it disturbs the on-going system of shifting cultivation.

It is trite knowledge that customary land tenure is the tenure system that is mostly practised on communal land. Now, customary law has been praised for its flexibility, but there is still a danger that the introduction of new modes of farming into the communal arena is encouraged by this flexibility and in the long run customary law is abused for the benefit of the investors. Concepts such as contract farming are alien to customary land tenure and as will be discussed below, have been used to exploit farmers' in Kavango.

As indicated above, most communal farmers are subsistence farmers, i.e. they produce what they eat. One of the benefits that *Jatropha* has been praised for is that it is a cash crop from which many farmers stand to make extra earnings. In a nutshell, this amounts to commercialisation of communal land. It has been argued that the introduction of commercial activities on communal land has the potential to result in poor community members losing their land on which they survived on.

Given all these factors, there is a need for communal land to be protected from all this modern developments and to maintain this system. However, customary land tenure can only be maintained if customary law can shield itself from these types of interferences and also if it can develop in conformity with modern changes and developments. In the same vein, statutory laws should also be formulated in such a



way that it protects communal land. However, the most important consideration should be the customary law/statutory law relationship.

### 1.3 OBJECTIVES OF STUDY AND RESEARCH QUESTIONS

The study on the legal implications of growing *Jatropha* on communal land has the following objectives: To make traditional leaders and policy makers aware of the consequences of *Jatropha* farming, especially issues pertaining to land allocation and acquisition and also determine the legality of contracts of farming and to make the farmers aware of the legal consequences that arise there from them.

The following are the research questions for this study:

- a. What are the overall impacts of *Jatropha* on communal land and the livelihoods of its inhabitants?
- b. What is the impact of *Jatropha* on the availability of land and to what extent does it interfere with the traditional use of Communal land?
- c. How and to what extent does *Jatropha* farming interfere with communal land rights and the use of communal land
- d. Whether there are mechanisms in place that protects communal farmers from land grabbing and exploitation by investors?
- e. How does the introduction of new concepts such as contract farming impact on the concept of communal land?

- f. Whether there are any socio-economic benefits that communities stand to gain from *Jatropha*?

#### **1.4 SIGNIFICANCE OF STUDY**

This study is significant in that it is been conducted at an opportune time, a time when Namibia's biofuel industry is still in its infancy and hence can be used to investigate current and future legal problems that could emanate from biofuel production. Consequently, the findings of the study will be used to make recommendations on how the system can be improved and formulate guidelines to be used by traditional authorities and land boards when allocating land. These guidelines will indicate the factors that should be considered when allocating land for commercial uses or investment, community facilities and other land uses.

#### **1.5 LIMITATION OF STUDY**

This research ventures into a highly political area, thus evidence of any problems underlying land allocation may be difficult to get. The research touches on special interest of investment companies, who are bent at making profit. This became evident when questionnaires were send out to the one of the investment companies and although they had initially agreed to participate in the research, they later objected to the nature of the questions and never completed the questionnaire.

Traditional authorities are posed for benefit with this investment, albeit a veil of ignorance, hence their perceptions about investment companies may be clouded by their expectations for profit. This was evident, especially in Caprivi, because even though the

researcher had documents from them, where they made the allocation, they claimed not to know anything about the allocation.

Another limitation is the fact that, in Kavango the investment company has entered into supply contracts with the farmers and then “disappeared”. This situation left the farmers feeling very frustrated and most did not want to be interviewed, as they want nothing concerning *Jatropha* and those that agreed to be interviewed gave answers tainted with dissatisfaction.

At the outset it must be indicated that although the research title indicates Kavango and Caprivi, *Jatropha* farming is much more advanced in Kavango than in Caprivi. For example in Caprivi the only place where they are farming *Jatropha* is at Katima Farm, whilst in Kavango Prime Investment (Pty) Ltd has entered into contracts with a number of farmers to grow *Jatropha*. In addition most literature on *Jatropha* in Namibia, including government documents mainly focus on Kavango. Owing to the above, at times the study might just focus on Kavango, but different aspects of Caprivi will also be discussed as we proceed,

## 1.6 LITERATURE REVIEW

The first pieces of literature that will be reviewed are those that deal with the type of land that is required for *Jatropha* farming. Cotula et al (2008) have examined the implications of the spread of commercial planting of biofuel crops for *land* use and access in producer countries on communal land and indicated that several governments have taken steps to identify idle,

underutilized, marginal or abandoned *land* and to allocate it for commercial biofuel production.

Njari (2007, p.1) explains that the strategy for the acquisition of the land often takes the following course: The imagination of a few influential leaders in the community is captured. They are told about prospects for the community due to the project and they are swayed with promises of positions in the company of monetary inducements (Njari, 2007, p.1). The idea is that these people do the necessary “footwork” in the villages, where they spread the word about job opportunities. A document is then prepared, essentially a contract or an agreement (Ibid).

Makunike (2009) portrays how land acquisition procedures being employed by investors exploit communal land occupants. The author argues that, bypassing official development authorisation and using methods that hark back to the dark years of colonialism, an investor claimed ownership of land by deceiving an illiterate chief to sign away 38000 hectares of land with his thumb print (Makunike, 2009, p.8). The author argues that the above illustration is the story of how a biofuel investor took advantage of Africa’s traditional communal land ownership system (Makunike, 2009, p.8).

The land acquisition methods discussed by the above authors are exactly those that have been used in Kavango and Caprivi and the example portrayed by Makunike is significant in that it shows some of the anticipated dangers of the spread of biofuels.

Hangula (1998, p.87) contends that unlike the Western system, which is based on freehold title, Africa’s traditional tenure is based on common use and/or lease of land and its

resources. The author further stated that what makes Africa's indigenous tenurial system unique is their guarantee of access to the use of land for every member of society, regardless of social status and origin (Hangula, 1998, p.87).

Massyn (2007, p.382) on the other hand, illustrates the significance of tenurial security by arguing that, generally investors require secure rights to land and associated resources that enable reasonable returns on the capital and expertise invested in their businesses. He maintains that, reputable investors tend to either avoid areas with insecure tenure or, if they invest, to select only those opportunities that offer the prospect of a quick return on a limited investment (Ibid).

The author's case is that, such businesses flourish in conditions of informality, relying on personal relationships with local-often tribal-elements and the lack of enforceability typical of areas within which they function (Massyn, 2007, p.383). Prahalad (2005, p.79) reasons that this is a classic instance of a weak and fragmented property rights system creating conditions under which the private sector activity is 'informal, fragmented and local'.

Business models for *Jatropha* farming include purchase agreements, joint ventures and contract farming. In determining the genesis of contract farming, Little and Watts (2000, p.7) argue that, in a backdrop of internationalisation of production, radical changes in technology, and the enhanced capacity to manipulate nature, contract farming surfaced in the 1980's as one strategy for rural transformation. The process of contract farming involves cultivating and harvesting for and on behalf of big business establishments or Government agencies and forwarding the produce at a pre-determined price (Ibid).

Cotula et al (2008, p.36) highlight that all countries have basic laws that govern contracts and that farming contracts, whether written or oral, should comply with the minimum legal requirements that apply in a particular country. Makunike (2009) argues that when the legality of the process is not adequately scrutinized, the developers have their way, but subject to proper scrutiny, it emerges that these contracts are not legally binding, as they have not gone through the correct legal channels.

Eaton and Shepherd (2001, p.2) criticize contract farming for the inequality that exists between the parties to the contract, this is because, in their opinion, contract farming is viewed as essentially benefiting sponsors by enabling them to obtain cheap labour and to transfer risks to growers. On the contrary, Little and Watts (2000, p.25) maintain that the contract enables social unequal's to negotiate and enter binding agreements as legal and political equals.

With regard to power asymmetries, joint ventures bring together stakeholders with varying degrees of power and influence; farmers lack sufficient information on market trends and enjoy very little power to influence producer prices (Tapela, 2005, p.23). By contrast, private investor partners have greater access to information on market trends, a stronger vested interest in the produce, and yet carry a relatively lower risk (Ibid, p.23). In the same vein, Cotula et al (2008, p.29) argue that while in some instances negotiations between companies and local people resulted in enforceable written agreements, in others they led to oral agreements that have very weak status under the law.

Cotula et al (2008, p.36) reasons that use of land for oil palm (for example) does not diminish the legal rights, or customary rights of other users, without their free, prior and informed consent and that no new plantings are established on local peoples' land without their free,

prior and informed consent, dealt with through a documented system that enables indigenous peoples, local communities and other stakeholders to express their views through their own representative institutions (Ibid).

Internationally, though, there are also broader questions of the extent to which “prior informed consent” can be freely granted by a community or user group when basic development services, such as roads or education, may be contingent on accepting the incoming commercial land use project (Freeman et al, 2008.) On the concept of understanding legal obligations arising from the agreements, Colchester et al (2006) argue, in as far as compensation is concerned, that in the eyes of the community compensation tends to be seen not as a price obtained for a permanent transfer of land, while companies understand compensation to extinguish the land claims of local groups.

Njari (2007,p.3) argues that, this argument fails to appreciate the African view of the meaning of the land to the community. He states that while the initial temptation to give up the land to earn a wage is great, it portends of an ominous future, were the community’s sovereignty, identity and their sense of community is lost, because of the fragmentation that the community will suffer (Ibid).

Cotula et al (2008, p.37) admonish that where competing resource claims exist among local resource users, governments and incoming biofuels producers, and where appropriate conditions are not in place, the rapid spread of commercial biofuels production may result - and is resulting - in poorer groups losing access to the land on which they depend.

Mendleson (2007, p.12) points out that on environmental grounds, the predicted additional clearing of more natural woodland and forest is cause for alarm, because it will lead to further losses of natural woodland or forest and reduce the availability of commonage

resources for the poorest households that really need those resources. The author counters this argument by stating that measures should be put in place to ensure that the environment is not degraded through *Jatropha* farming (Ibid).

The author also points out that an additional consequence of planting *Jatropha* on a large scale will be the loss of pastures, both on fallow or abandoned fields and perhaps as a result of clearing of virgin woodland (Ibid). However, in Mendleson's view (Ibid, p.9), these losses will be offset by the benefits of *Jatropha* generated income.

According to Massyn (2007,p.389) customary law cannot provide the robust tenure over land and associated resources and that such rights must be acquired in terms of the Communal Land Reform Act. But whatever statutory rights are acquired and whatever the formal interpretations of the law, the reality on the ground remains ambiguous: a parallel system of deeply rooted customary law continues to operate alongside and impact on any investor's tenure rights (Ibid, p.390).

Procedures for accessing land may perform a useful role in establishing safeguards for local land rights. These safeguards aim to ensure that, at a minimum, local groups are not arbitrarily dispossessed of their land as this is made available to investors (Cotula et al, 2008, p.33). In this regard, a particularly interesting example is provided by Mozambique, where investors are legally required to consult local communities holding rights in the land area sought for the investment project (Cotula et al, 2008, p.33). Massyn concludes that, the uneasy co-existence of traditional and modern tenure systems creates an unsettled environment where rights formally acquired sit uncomfortably within the 'fuzzy' context of customary practices and entitlement.



Read conjunctively, the authors above illustrate the status *quo*. They depict how customary land allocation procedures are used for land acquisition for *Jatropha* farming. They also portray the role played by traditional authorities in land allocation. Evident is also the flexibility of customary tenure systems and how this flexibility can be abused in order to acquire land for biofuel production.

Security of tenure has been argued to be a pre-requisite for investment. On the contrary, a lack of security can at the same time be abused and may result in loss of land by the communities. It has been stated above that some investors use contract farming as a mode of land acquisition. Literature portrays that where investors cannot obtain land rights, they enter into such agreements and the legality of such contracts and also their terms need to be considered.

One of the consequences of the introduction of biofuels on communal land is that of clearing of further land in order to grow *Jatropha*, which could further result in losses of natural woodland and also a reduction in the availability of common resources.

## METHODOLOGY

### 2.1 RESEARCH DESIGN

It is argued that quantitative studies are often strong in terms of generalizability, precision, and control over extraneous variables (Polit and Hungler, 1999, pp.257-258). The strength of qualitative research lies in its flexibility and its potential to yield insights into the true nature of complex phenomena through a wealth of in-depth information (Polit and Hungler, 1999, pp.257-258).

In light of the above, the qualitative method was mainly used, however, there are some aspects of the study area where information was best achieved via the quantitative method (for example the number of people growing *Jatropha* or the size of the land being used for *Jatropha*), and hence a multi-method approach was used.

As indicated above, the research focused on a lot of issues that pertain to communal land, traditional authorities and the use of natural resources. It is owing to this that, it was necessary to conduct empirical research in order to get the communities perspectives on these issues and also to understand the communal setup and the communities understanding of certain concepts, such as the ownership of communal land and natural resources. Empirical research was further necessitated by the fact that the farming of *Jatropha* on communal land is a relatively new concept and there is little literature on the subject. It was therefore, necessary to do field work in order to gauge the situation better.

As indicated above, *Jatropha* is a relatively new cash crop that has been introduced in Namibia, the dynamics of which are not fully known yet. Similarly the literature that is available mostly pertains to other countries, except for a few government documents. In light of the above, it was necessary to conduct field research, in order to find out further information about the crop. The information that necessitated field work include inter alia: the need to know how many people are growing *Jatropha*, to find out their perceptions, how *Jatropha* was introduced to them etc. It was also important to get the perception of traditional authorities especially with regard to how they allocated land for *Jatropha* farming and also how the introduction of this crop has affected their natural resource management powers.

## 2.2 POPULATION

The population of interest for this study were the people living under the Masubia, Shambyu and Mafwe Traditional Authorities. The Caprivi is an area, with high temperatures and much rainfall during the November to March rainy season, making it the wettest region of Namibia. The climate is marked seasonally by changes in temperature and rainfall.

Mafwe and Masubia Traditional Authorities were chosen because the chiefs of these areas have given consent for land under their jurisdiction to be used for *Jatropha* farming and because of the intention of the company to enter into a joint venture agreement with the communities to produce *Jatropha*. In Kavango, research was done in Kambowo, Mashare and Kayengona Village. These villages were chosen because the farmers have entered into farming contracts with the investor Prime Investment and also because the company has left the farmers without fulfilling its contractual obligations. The villages are particularly interesting because the traditional authority has consulted with the investment company and they have given a go-ahead for the company to start growing *Jatropha*.

## 2.3 SAMPLE

Simple random sampling was used. In Shambyu, a list of all the households in the community growing *Jatropha* was obtained from the office of the traditional authority. The list was then numbered and marked "A" and a separate paper was also numbered with the same numbers and marked "B" as on the list "A". Then blindly, random numbers were picked by placing a figure on the separate list and if number 23 is picked, for example, the person corresponding with number 23 was the first subject selected to participate in the interview and so on. For

group discussions, the same was done and each group comprised of the 4 people following each other consecutively on the sample list.

The sampling was subject to the willingness of respondents to cooperate in the research. In case a household rejects being on the sample list, a new one has to be randomly selected. In interviewing stakeholders, snowball sampling was used -that is asking early informants, e.g. senior traditional councillor, to make referrals to other study participants. This sampling method helped me gain access to people who were difficult to identify.

Although this sampling method was effective at first, later it could not really be followed as there are only 16 households under the Shambyu Traditional Authority which are growing *Jatropha* and upon obtaining the list from the authorities' secretary, some of the people had already indicated that they do not wish to be interviewed.

It should at this point be noted that, given the complexity of *Jatropha*, only those community members that are involved in the actual farming of the plant were in a position to comment on the issue. I tried to interview those that are not growing the plant, but many expressed the view that they do not know anything about the plant, some have not even heard about it. Owing to this, the sampling method could not be used in Caprivi, as none of the farmers are actually involved in *Jatropha* farming yet.

However, in as far as other stakeholders are concerned, snowball sampling proved to be a very effective method.

## 2.4 RESEARCH INSTRUMENTS AND PROCEDURE

Both primary and secondary data sources were used during the research process. Primary data sources included, informal conversations and discussions, semi-structured informal in-depth interviews, questionnaires, focus group discussions, and networking with relevant researchers.

Using the sampling method described above, the research framework began with the identification of relevant stakeholders. Semi-structured interviews were conducted with farmers that are growing *Jatropha* and key informants such as chairperson of Kavango land board and the chairperson of *Jatropha* Growers Association.

Interviews were held with the chairpersons of the Kavango and Caprivi land boards. There was also a chance to attend the Caprivi Land Board meeting for the month of July in which one of the *Jatropha* investors made a presentation in support of his application for leasehold. After the meeting, an interview was also conducted with the director of this company. Meetings were also held with the traditional authority members of the Masubia, Mafwe and Shambyu traditional authorities.

Although not the main study area of the research, an interview was also conducted with the Chief of the Mbunza Traditional Authority. Additionally, interviews were held with the ministry of land officials in Kavango; however same could not be done in Caprivi as the person in charge of that office indicated that she does not know anything about *Jatropha*. Interviews were also held with the chairperson of the Kavango *Jatropha* Growers Association.

Another meeting was also held with a Company that wants to grow *Jatropha* in Kavango and this company also facilitated a visit to its *Jatropha* nursery. In Caprivi, an interview was

conducted with the supervisor of Katima Farm, which is the only place where *Jatropha* is being farmed in Caprivi.

Desk based study was done and this involved the collection of secondary data sources such as documents pertaining to relevant policy, legislation, plans, strategies, programmes and projects, community records, electronic databases, statistical survey reports, published and unpublished literature and other document sources compiled by government, civil society and the private sector.

## 2.5 DATA ANALYSIS

Owing to the fact that a multi-method data collection approach was used, data analysis did same. However, although the overall aim of both qualitative and quantitative analysis are to organise and elicit meaning from research data, an important difference is that, in qualitative studies, data collection and data analysis usually occur simultaneously, rather than after data collection (Polit and Hungler, 1999, p.573).

Hence during data analysis before empirical research, I looked for patterns in data and for ideas that help explain the existence of that pattern. Ideas that were developed on the topic, before field work, were tested against the observations and answers during field work. During field research, data analysis included looking for consistencies and inconsistencies among informants and also established why informants disagree about important things.

Qualitative data analysis depends heavily on the presentation of selected anecdotes and comments from informants (Bernard, 1994, p.363). Consequently, quotes from informants that lead the reader to understand quickly what it took the researcher months to figure out, are also included in the study. These quotes have also been explained and contextualised.

After field work, both desk based and field data was analysed and I strived to make sense of the data and to learn ‘what is going on’ i.e. what are the implications of growing biofuels on communal land? After comprehension of this, I was able to use the data to prepare a thorough and rich description of these legal implications. After comprehension, the data was sifted and pieces were put together and at this stage established what is typical of the legal implications of growing biofuels on communal land. At this point the data was also used to make some generalisations about the research problem, as well as the study participants.

Another important process of qualitative analysis is theorising, which involves systematic sorting of data (Polit and Hungler, 1999, p.575). During this process, data was used to develop alternative explanations to the topic, which were integrated into the study. Owing to the fact that quantitative data was also collected, descriptive statistics are used to describe and synthesize this data. Averages of the number of people growing *Jatropha* in a given area of research are examples of some of the descriptive statistics that are included in the thesis.

However, descriptive statistics are useful for summarising empirical information, but usually the researcher wants to do more than simply describe data (Ibid, p.469). In this regard, inferential statistics were used to help draw conclusions about the study population, given the data obtained from the sample. Inferential statistics help us understand for example: what do I know about the authority of a traditional leader, after finding out that 70% of the sample gave land to a *Jatropha* Company without the endorsement of such leader? With the help of inferential statistics, the researcher is able to make a judgement on the powers of the chief as natural resource custodian on communal land and to generalise it to the entire community, based on information obtained from the sample.

## 2.6 RESEARCH ETHICS

Research that involves human beings requires a careful consideration of the procedures to be used to protect their rights (Polit and Hungler, 1999, p.149). Hence, the essential purpose of research ethics is to protect the welfare of research participants (Blanche et al, 2008, p.61). In conducting this research, the following three major ethical principles were observed (Polit and Hungler, 1999, p.150):

- a. The Beneficence principle involves the protection of participants from physical harm and the non- exploitation of participants.
- b. The principle of respect for human dignity includes the right to self-determination, which means that participants have the freedom to control their own activities, including their voluntary participation in the study.
- c. The third principle, justice, includes the right to fair treatment and the right to privacy. Privacy of participants can be maintained through anonymity or through formal confidentiality procedures.



### 3. STRUCTURE OF THE THESIS

Chapter 1 is a basic introduction chapter, and contains the statement of the problem, objectives of the study, research questions, significance of the study, research methodology and literature review. The purpose of this chapter is to give the reader a background about the topic of research and the issues that have been discussed in the rest of the thesis.

Chapter 2 deals with the availability of land for *Jatropha* farming and the land allocation methods used both under the Communal Land Reform Act and customary law. It also looks at how *Jatropha* impacts on land use in communal areas. The chapter identifies the distinctive features of customary tenure systems, which are the dominant systems in most communal setups.

Chapter 3 looks at how the introduction of new farming practices interferes with the traditional use of communal land. The chapter acknowledges that communal land is mostly used for subsistence farming and further outlines the duties of traditional authorities. In identifying the impact of *Jatropha* on communal land, the chapter specifically looks at issues surrounding the use of common resources and the privatisation of communal land. The premise of the discussion is ownership of communal land.

Chapter 4 looks at contract farming, which is one of methods being used by most investors for *Jatropha* farming. The chapter looks at the elements of contract farming and also has a critical analysis of the provisions of one of the contracts entered into by a communal farmer in Kavango and an investor company.

Socio-economic benefits mostly persuaded communal farmers to engage in *Jatropha* farming. Research conducted has shown that most of these benefits are not tangible, as most of them are believed to be speculator. Hence Chapter 5 discusses the benefits that can be derived from *Jatropha*.

Having regard to the recent development in *Jatropha* farming in Namibia (where investors disappeared leaving the farmers behind) and also experiences in other countries (Land grabbing in Ghana and Brazil by *Jatropha* investors), it is necessary to investigate whether the existing legal frame work is geared to offer the necessary protection to communal residents. Hence chapter 6 looks at the legal protection that is offered by our legal system. The premise of the discussion is Article 16 of the Constitution, followed by an analysis of the Communal Land Reform Act and customary law.

Chapter 7 highlights the major conclusions of the thesis, as well as recommendations.

## **CHAPTER 2**

### ***JATROPHA!* IMPACT ON LAND AVAILABILITY & LAND USE**

#### 2.1 INTRODUCTION

The process of land reform does not occur in a political, social, or economic vacuum. Any system of land tenure has an impact on the social order in which it exists. The land tenure structure of Namibia today is basically what it was in the 1950s, 1960s, and 1970s. The legal structures that control land are powerful constructs that shape the social order in many different ways (Harring & Odendaal, 2002, p.18).

The question that comes up concerning expected increases in consumption of food and energy – especially *Jatropha* - is whether the available land area can support and produce the required amounts of food and biomass for energy and industrial applications (Ibid, p.24). If one has regard to the climatic and water-resource constraints discussed above, the options for biofuels crops are confined to the north-eastern corner of the country. In this region, although it has a relatively high concentration of people, there are large areas of land available. These areas however, are distinguished by two things: a communal property regime and relatively low levels of soil fertility (GRN, 2006, p.22).

In addition, a large percentage of the land area has been subjected to slash-and-burn agriculture for Mahangu production, which has further depleted the soil, and has sometimes resulted in the degradation of the land to a point that people no longer use it for that purpose. This chapter will look at the availability of land for *Jatropha* farming and how this impacts on access to land.

For a biofuels industry, competition for land, the problem of proper security of tenure, and the risk of further land degradation are major considerations (GRN, 2006, p.23). It has been discussed above that production of biofuels is mainly targeting communal land, which consequently means that the production systems must be designed to be compliant with traditional tenure arrangements, the provision of the Communal Land Reform Act and Namibian policies for land reform and land resettlement (Ibid, p.26).

Another point of concern which was mainly experienced in Caprivi is the impact of *Jatropha* on communal conservancies, community forests and tourism. This is a point of concern because some of the land allocated for *Jatropha* has already been gazetted as either communal conservancies or small scale commercial farms. This chapter is therefore aimed at discussing the impact that *Jatropha* farming will have on the land use systems that are in place and also on the tenure system that is being practiced on communal land.

## 2.2 COMMUNAL LAND TENURE SYSTEMS IN CAPRIVI AND KAVANGO

I now turn to discuss the land tenure systems of Caprivi and Kavango. It is important to do so, because as was stated earlier, *Jatropha* farming in communal areas is a relatively new concept and in order to fully ascertain the impact of this exercise in communal areas, there is a need to define the tenure systems as they are presently.

According to Hinz (1998, p .119), it is common language that among the traditional leaders in the former Ovamboland, and in Kavango, Caprivi and Bushmanland, communal land is ‘owned’ by the chief or king, the *hompa or fumu* in Kavango, or *mulena* in Caprivi (1998, p 119). This was recently confirmed by *Hompa* Kaundu when he stated that: “In Kavango, the culture is that a person is given a piece of land only to make a field and to cultivate on that piece of land, but the land and the trees belong to the *Hompa* and the Mbunza tribe” (Namwoonde, 2008, p.66).

Traditionally, the Kavango people are pastoralist. In fact, more than three-quarters of the populace of rural Namibia are entirely or partially dependent on livestock for subsistence, meaning that in one way or another, they are livestock farmers, although in some cases they also cultivate rain-fed crops such as maize and Mahangu (Hangula, 1998, p .87).

Historically, in Kavango, people settled where water and soils were most suited to farming. That created a pattern of unevenly distributed settlements within the region. A ribbon along the river, approximately 10 kilometres wide, is most densely populated (Mendleson, 2007, p.5).

The procedure of acquiring land is as follows:

The applicant would approach the headman or headwoman of the village where he wants to settle. The headwoman/man would investigate the personal circumstances of the applicant and thereafter, allocate a piece of land to the applicant. The consensus of the community was a requirement prior to the allocation of such land. If, however, the applicant comes from another community, the headwoman/man would call a meeting with the applicant, the relatives and inhabitants of the area concerned. The purpose of the meeting is to examine the applicant. The outcome of this meeting will be communicated to the *Hompa* (chief), who makes the final decision (Hinz, 1998, p.204). It must be noted that this procedure is similar in Kavango and Caprivi.

According to Falk, the right to veto of local residents is a very important control mechanism for biodiversity maintenance. It ensures that benefits from the residents' investments, such as pasture improvements, cannot be appropriated by strangers. This security device is an incentive to improve range management. The residents also know best whether the natural resources can sustain another household and whether a new person will fit into the settlement (2007, p. 87).

No payment is required for the allocation of land. It is also the general pattern for all Kavango communities that land remains with the family, as long as it is used by them. Grazing ground is communal in the sense that everybody from the community is allowed to use it for his/her livestock (Falk, 2007, p .87). In the northern regions, which included Kavango and Caprivi, the indigenous population combine settled agriculture with animal husbandry and land is owned by the community as a whole (Amoo, 2001, p.189). Land disputes fall under the jurisdiction of the headmen, but if they are unresolved, they may be referred to the *hompa or fumu* (Falk, 2007, p .87).

Farming in Kavango, especially along the Okavango River, where *Jatropha* is planned to be grown, consists very largely of a mix of small-scale dry land crop and livestock farming. Almost all rural households practice this kind of agriculture, the main purpose of which is to provide food for domestic consumption. Mahangu is the dominant crop, being planted on about 95 % of all cultivated land (Mendleson, 2007, p.5). The remaining 5% is cultivated with maize, sorghum and vegetables such as melon, groundnuts, beans, spinach and pumpkins. Mahangu predominates because it is the only cereal that grows relatively well on sandy, nutrient-poor soils where the climate is characterised by low, erratic rainfall and long spells of weather (Ibid).

A lack of open, arable land and grazing along the river has led people to seek areas which they could find, the provision of water from boreholes, the opening of roads allowed people easier access to unsettled areas, and wealthier farmers with large cattle herds established cattle posts which later expanded into small villages (Ibid).

Living conditions in small, remote villages away from the river and main roads are difficult, however. The people are far from services and they have little chance of participating in Kavango's retail and cash economy. Land available for crop cultivation is often limited. As a result, many of the villages have shrunk, often causing local public services such as schools to become redundant or uneconomical ( Mendleson, 2007, p.5)).

As far as resource management is concerned , Mendleson argues that whilst at the risk of being accused of making a value judgment, his overall impression was that the Traditional Authorities are much less influential than is generally assumed. While lower levels of authority indeed appear to play important functions in resolving local disputes and maintaining discipline, the role of more senior members of traditional authorities seem less than clear (2008, p.12-13).

The Caprivi Strip is a narrow strip of land in the far northeast of Namibia, about 400 kilometres long. East Caprivi, bordered by the Kwando, Linyanti, Chobe and Zambezi Rivers, is a region of swamps and flood plains. It was obtained from Great Britain by Germany in 1890 to give German South West Africa (now Namibia) access to the Zambezi River west of Victoria Falls. Originally part of Botswana -- then Bechuanaland -- the Caprivi was ceded by Britain to the Germans in a complicated land exchange deal designed to link German colonies from west to east Africa.

### 2.3 "WHO OWNS THE LAND?"

In order to understand the power relations that come with allocation of land, it is fitting to first understand the concept of ownership of land in a communal setup. During empirical

research, it became clear that ownership is perceived differently from the States' side and also from the community's side. 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.

Ownership has been said,

To signify a title to a subject matter, whether moveable or immovable, that is good against the whole world. The holder of the title, such as the owner of a motor car, is the absolute owner. This position is illustrated by the Roman doctrine of dominium, under which the *dominus* was entitled to absolute and exclusive right of property (Burn, 1972, p.27; See also Parker, 2002, p.129).

Cooter (1989, p.10) questions the fact that people agree about details of ownership and disagree about who owns the land. The author illustrates that the paradox arises because people have different rights in mind when they answer the question, "who owns the land?"

The author further points out that:

Those who think about the responsibility to defend the land say it belongs to the clan. But those people who think about a parcel of land that a particular person has used for a long time- planted a garden, built a house, put in permanent crops, buried the dead- will say it belongs to the family.

Cooter further argues that:

Neither answer is wrong. The difficulty lies, not in the answers, but in the question. Full ownership of land consists in possessing a bundle of rights, such as the right to occupy, use, develop, bequeath, inherit, sell and exclude others. It is argued that, if all these rights belong to one person, the question "who owns the land?" does not have a right answer. In some circumstances, however, no one possesses some of these rights. To illustrate, customary law may specify inheritance, in which case no one has the



right to choose an heir (1989, p.15).

Similarly, Saunders (1969, p.61) defines ownership as consisting of, with regard to immovable property, 'the rights of exclusive enjoyment, of destruction, alteration and alienation, and of maintaining and recovering possession of the property from all other persons.

The problem with these definitions is that they do not reflect the perception of ownership under customary law. Interestingly Parker (2002, p.129), contends that 'ownership may also signify not title but interest.' The author cites the Canadian case of *Zed vs Fullerton*, where Baxter CJ noted that, 'at common law "owner" is an indefinite expression, and may mean anyone who has an interest.' The definition of Baxter CJ is much closer to that under customary law.

In as far as ownership of communal land is concerned, the State takes the stance that communal land vests in the State, but is held in trust for the benefit of the communal-holders. This is the import of section 17 of the Communal Land Reform Act, which states that:

17 (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-agriculture 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 LAC (2006, p.55) argues that, if land is held in trust, 'then there should be additional

legislation detailing how these trust lands must be administered for the benefit of the respective communities'. From this, one can pre-empt that natural resource management on communal land also vests in the state.

However, some authors have questioned the concept of communal land *being held in trust*. For example, 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 – i.e. the communities – on whose behalf such a trust is formed' (Mapaure, 2009, p.32). According to Ostrom, 'communities of individuals have relied on institutions resembling neither the state nor the market to govern some resource systems with reasonable degrees of success over long periods of time' (1992, p.1).

One of the reasons land ownership is important is that it indicates who is free to make decisions regarding land allocation and use (Adams & Werner, 2000, p.111). Unfortunately, it is still very common for communal farmers to have no decision-making power regarding the land which they use (Ibid, p.117; Classens & Cousins, 2000, p.129).

State ownership creates confusion amongst communal farmers when it comes to allocating use and decision-making rights. When rights are not clearly assigned, there is a reluctance to invest in resources and assets (Adams et al, 2000, p.118). According to Falk, in this context, the restricted nature of State tenure seems to provide, both in Namibia and South Africa, stable and secured use rights (2007, p.243).

It is not uncommon in southern Africa for people to enjoy *de facto* tenure security under State ownership and to have the opportunity to fully benefit from the land, even in the long run (Adams et al,2000,p.118; Makopi,2000,p.145). Another disadvantage of pure state ownership

is that no land markets for permanent transfers can evolve as land markets can theoretically lead to a more efficient resource allocation (Falk, 2007, p.245).

To summarize, State ownership in its restricted form creates a situation where the secure rights to use encourages resource maintenance. State ownership seems to encourage governmental infrastructure and service provision although it has been shown that alternative tenure systems would not formally stop the government from providing these services (Falk, 2007, p.246).

It is, however, also suffice to mention that the legal framework in Namibia regulates government's role in natural resource management on communal land, as there are measures put in place and designed to complement those of the traditional authorities in resource management.

Section 16 of the Traditional Authorities Act outlines the relationship between government and traditional authorities, whereby traditional authorities are expected, in the execution of their duties, to support the policies of government, regional councils and local authorities. The section cautions traditional authorities to refrain from undermining such policies. The section is, however, one sided as it does not reciprocate the obligation on the part of government.

The LAC (2006, p.55) puts this neatly when they argue that; "The communal land Reform Act's provisions that enable Traditional Authorities to administer communal lands are quiet worthless if the government does not recognize Traditional Authorities and empower them to enforce communal land laws."

It has however, been argued that, no matter who owns the land, local government should take on certain components of land administration (Lebert & Westaway,2000,p.245). The next

question that will be dealt with is: how exactly can one ensure that these resource management powers, be it traditional authorities or those of government are not weakened or affected, which consequently culminates in exploitation of resources, both by communal residents and *Jatropha* investors?

Heilbroner (1974) opined that "iron governments," perhaps military governments, would be necessary to achieve control over ecological problems. In a less draconian view, Ehrenfeld (1972, p. 322) suggested that if "private interests cannot be expected to protect the public domain, then external regulation by public agencies, governments, or international authorities is needed."

It has been argued in the introduction to this chapter that, the effect of growing *Jatropha* on the property rights of communal residents is intrinsically linked to the land regime found on communal land. The different property regimes found in Namibia arose as a result of the land reform policies that were adopted after 1990.

In the words of Cooper et al, (1996, p.1), "land reform can also be seen as a way of experimenting with new property regimes through the transfer of resources to individuals or groups previously disadvantaged by existing land rights systems, which are either inadequate or further disadvantage the poor."

The type of land regime in a given area plays a role in the protection of property rights on communal land. According to Amanor & Moyo (2008, p.4);

“Secure ownership provides an enabling environment for economic and productive growth and provides producers with the confidence to invest in the long-term betterment of their land. It creates

conditions that encourage investment in land and enables credit and security markets to develop and to be used as collateral”.

In order to evaluate the exactness of Amanor’s statement, in as far as communal tenure in Namibia is concerned; there is a need to look into the elements of communal land tenure in Namibia.

For political, legal and economic reasons, the government of the Namibia claims ownership of all communal lands in the country based on its inheritance of South African title of these lands. This is a very complex legal matter, never tested in court, but one which has a great legal impact on land use in the communal areas. Landowners outside communal land areas own their land as a freehold, and under Article 16 of the Namibian Constitution are entitled to state protection of their land rights. Blacks, however, could not hold legal title to lands under apartheid, and thus owned land “communally” in an entirely distinct land holding system (LAC, 2006, p.8).

The LAC (2006, p.55-56) further argues that:

“In keeping with basic principles of international law, and recognizing that the communal areas of Namibia have been owned by their occupants for hundreds of years, Namibia should declare, as a matter of national policy that the communal lands belong to their traditional occupants and were wrongfully alienated from them under colonial apartheid rule. The government could then establish a statutory regime for the administration of those lands for the benefit of the people who live there through the existing traditional authorities and or Communal Land Reform Act. The same statutes should clearly state that any land taken by the state for purposes of development must be legally acquired under Article 16 of the Namibian Constitution, which gives these lands the same protections as commercial agricultural land.”

In contrast, the political economy approach argues that inequitable access to land prevents

the rural poor from acquiring plots of land that are economically viable. Land shortage creates pressures on natural resources and constrains their sustainable management (Amanor & Moyo, 2008, p.4).

In other instances, strengthening customary authority results in the creation of rural elites with powers to alienate land to private and international capital. This equally results in the decline of the natural resources and land of the rural poor. Thus land and natural resource management needs to be placed in a context in which it addresses particular processes of accumulation (Ibid, p.6)

In summary, in as far as ownership of communal land is concerned, there are two conflicting views: the import of section 17 of the Communal Land Reform Act is that communal land is owned by the state and held in trust by the state for the benefit of those who reside on communal land. The second view is that which is held by the communal residents themselves, i.e. communal land is owned by the traditional authorities who simultaneously also have the allocation and management duties.

#### 2.4 LAND AVAILABILITY AND ALLOCATION

In Namibia, the availability of land is crucial for the establishment of *Jatropha* projects. As indicated above, land if otherwise not lawfully owned, (Article 100) is owned by the state, consequently, communal land is owned by the state, but held in trust for the benefit of its residents. Most communal land residents have obtained land through the customary tenure system. The rights held under this system can be legitimized by application to the land board and through the issuance of a certificate.

For investment companies and outsiders, the process for obtaining land has been discussed above and includes inter alia, allocation by the chief, communities consent and ratification by the land board. It should however, be noted that, the procedure to be followed is dictated by the size of the land. This is because people that require more than 20 hectares must apply to the land board and those that require more than 50 hectares need the approval of the Minister of Lands.

The spread of commercial planting of biofuel crops, whether for export or for internal markets, has a significant implication for land use and access in producer countries. These implications reflect complex relations among the diverse production systems for the cultivation of biofuels, on the one hand, and diverse land access relations, on the other (Cotula et al, 2008, p.16).

The question of land availability is central to the production of biofuels in Namibia, because most opportunities for crop energy lie in communal land, the institutional question of tenure regime is central. Consequently, no project will qualify if it reduces biodiversity; hence the need to identify degraded land for possible projects (GRN, 2006, p.27). As indicated above, the question of availability of land is central because before embarking on the production of biofuels, suitable land needs to be identified, but this needs to be done in such a way that land viable for subsistence farming is not sacrificed for biofuels.

In Kavango, families who choose to become *Jatropha* farmers were contracted to grow the trees on land that was cleared prior to 1990. A family may decide to use all or part of their maize and Mahangu fields or previously cleared fields that are lying fallow. One of the

requirements of the Kyoto Protocol is that if a farmer commits land to such a project (*Jatropha*) he/she may not clear new lands (virgin forest) to compensate (Christian, 2006, p.4).

In addition, it was stated that this requirement will be strictly audited and enforced because non-compliance would disqualify the project from receiving carbon credits. However, lands that were cleared after 1990, but are now fallow may be used for maize or Mahangu (Ibid).

Drawing from this, degraded land is to be used for *Jatropha*, and seen in this light this is probably ideal, especially for the maintenance and protection of biodiversity. Steps have therefore, been taken to identify “idle” land and to allocate it for commercial biofuel production. However, during empirical research in Kavango, it was evident that at times farmers give up their existing fields for *Jatropha* and clear new land to grow Mahangu. Hence, *Jatropha* farming is indirectly leading to deforestation and consequently impacting on biodiversity.

Additionally, it has been argued that the contention that *Jatropha* grows well on arable or idle land is a myth. Research conducted in Mozambique portrays that, no cases from the literature or from any of the communities; industry experts or individuals interviewed could even mention a single example of this being true in Mozambique. On the contrary, almost all of *Jatropha* planted in Mozambique has been on arable land, with fertilizers and pesticides, but have still fallen short of the claimed growth rates and yields (JA & UNAC, 2009, p.6).

The same is true in the Namibian context. If regard is had to the contracts of farming signed by the farmers, for example, one would see that the company undertook to provide the



farmers with fertilizer and pesticides. It is unfortunate that the investor left and the farmers abandoned the plant as it would have been interesting to see the end result.

Growing evidence raises doubts about the concept of “idle” land. In many cases, lands perceived to be “idle”, “under-utilised”, “marginal” or “abandoned” by government and large private operators provide a vital basis for the livelihoods of poorer and vulnerable groups, including crop farming, herding and gathering of wild products (Dufey et al, 2007).

In Kavango, most of the farmers argued that they were told to use their old fields, in order for them to earn carbon credits and also expressed the view that some of them did not use idle land or old fields, but instead used their current fields, because they are not interested in earning credits (Field Note 1). In Caprivi, the land ‘eyed’ by *Jatropha* investors cannot be termed idle as most of it is situated on small scale commercial farms, which are aimed for agricultural production.

Cotula et al (2008, p.23) questions the legal status of idle land. The authors argue that the tenure status of such lands may also be complex, with governments asserting land ownership, but exercising little control at local level, and local groups claiming resource rights based on local (“customary”) tenure systems that may lack legally enforceable status. The contention by Cotula is true of Caprivi, where although gazetted as such, tradition authorities still exercise control over small scale commercial farms.

In Kavango and Caprivi, idle land is been managed by the traditional authorities and therefore, customary land tenure is applicable. The enforceability of this type of tenure depends on the status that the respective customary law enjoys, not just from its subjects but also from the investors that are engaged in *Jatropha* farming.

One of the main reasons why the North-eastern regions were identified suitable for *Jatropha* is because of the high rainfall in those areas. It was held that due to the good rains that occur in Caprivi and Kavango, there would be no need for irrigation. However, at Katima Farm, (bearing in mind that this farm is situated on the banks of the Zambezi River and also in Caprivi, a region that receives close to 800mm of rain per annum) *Jatropha* plants are being irrigated for two hours per day. The water is pumped from the Zambezi River. The farm supervisor indicated that each plant must get 5 litres of water per week (Field Note 2).

In Mozambique it was found that irrigation was required during the early development phase, even in areas where the rainfall ranged between 800mm and 1400mm. In the southern region of the country where the lower range is around 600mm, constant irrigation was often required and even some areas that received around 800mm of rain still found it useful to irrigate their crops (JA & UNAC, 2009, p.7).

## 2.5 ACCESS TO LAND AND LAND USE

According to Cotula et al (2008,p.16) the spread of commercial planting of biofuels crops, whether for export or for internal markets, has significant implications for land use and access in producer countries. These implications reflect complex relations among the diverse production systems for cultivation of biofuels on the one hand, and diverse land access relations, on the other hand.

In dealing with access to land for *Jatropha*, there is a need to distinguish between direct linkages and indirect linkages. Direct linkages relate to effects on land access that can be directly ascribed to the spread of cultivation of biofuel crops. Possibly the most straightforward example is where the government takes (“expropriates”, “dis-allocates”,

“withdraws” – depending on the country context) land from local users and allocates it to biofuel producers, based on the assumption that biofuel crop production is more economically viable than existing forms of land use (Cotula et al,2008,p.23).

This impact is not felt in Namibia, because government has not yet pronounced itself on *Jatropha*. Withdrawal of land for biofuel production in Namibia will only be observed, if the Caprivi Land Board, for example, de-gazettes land as a small scale farm and gazettes it as leasehold for *Jatropha* farming or if those parts of a conservancy or community forest (earmarked for *Jatropha*) are dedicated totally to *Jatropha* farming and cease to be a conservancy or community forest.

It must be noted, however, that the counter argument to the small scale commercial farmer argument could be that, the farms are demarcated for agricultural purposes and *Jatropha* farming is also regarded as an agricultural exercise, therefore directing the use of such farms for *Jatropha* farming would not amount to a change in land use, as it will still be used for agricultural production. This argument will be dealt with further below, as it will become palpable that changes in the type of crop also amount to changes in land use.

Indirect linkages between biofuels and land access refer to effects on land access which are produced not directly by the spread of biofuel crop production, but rather by other factors which are in turn caused by the spread of production of biofuels crops (Cotula et al, 2008, p.23). Increases in food prices linked to the spread of biofuels may change the economic terms of trade between agriculture and other sectors of the economy, and between rural and urban areas. Higher rates of return in agriculture will reinforce trends towards higher land values, particularly in more fertile lands (*Ibid*).

It is, however, noted that Namibia's biofuel industry is still in its infancy and there is therefore, no ample statistics to establish the relationship between the spread of biofuel crops and the other sectors of the economy. The two types of linkages discussed above are important in that they demonstrate the ways in which biofuels can bring a change in land use.

Land use change may involve conversion from one crop to another, from pasture to cropland, from unutilised to utilised farmland, or from low intensity management (e.g. shifting cultivation) to high intensity (Cotula et al, 2008, p.24).

In Kavango, those farmers who had entered into contracts of farming had to allocate a hectare of land to grow *Jatropha* and the rest of the field they grew Mahangu. The small scale farms in Caprivi were supposed to be used for livestock or crop farming, but are instead targeted for *Jatropha*. The above are illustrations of how the introduction of biofuels is impacting on land use. One of the farmers that have a *Jatropha* nursery has indicated that he plans to engage communal farmers to grow *Jatropha*, and further indicated that he intends to encourage farmers to practice inter-cropping (Field Note 7).

He maintained that with inter-cropping, the farmers can use the *Jatropha* subsidy to properly plough their fields and also buy fertilisers which will help increase Mahangu yield (Ibid). This is an example of how the spread of biofuels may cause changes in land use that do not impact in any way on land access (a simple change from one crop to another crop under the same communal or individual system of management) (Cotula et al 2008, p.26).

Another important form of biofuel-induced land use change involves conversion of forest. Large-scale land use changes from forest and conservation areas to biofuels crops are predicted (Fargione et al., 2008). In other countries, vast land use changes from forest to cash

crops have already occurred. The spread of oil palm in Indonesia, for example, has resulted in the clearance of 18 million ha of forest over the past 25 years, although only 6 million ha have actually been planted (Colchester et al., 2006)(See also Cotula et al,2008,p.26).

Cotula (Ibid, p.27) cautions that not all impacts of biofuels cultivation on land access will be negative. Biofuels may be able to strengthen land access for some poorer land users. It is further argued that, experience shows that higher crop and land values can renew people's interest and investment in land and encourage small scale farmers to seek more secure individual or communal tenure over their land resources.

## 2.6 'DOUBLE ALLOCATIONS' OF LAND

Empirical research conducted in Caprivi has shown that one of the greatest challenges to land allocation for *Jatropha* in Caprivi and Kavango is double allocations, i.e. most of the land targeted for *Jatropha* has already been gazetted either as conservancies, community forests or small scale commercial farms.

The situation of 'double allocations' is summed up by Mr Simba as follows:

“Traditional authorities rarely say no to new activities or projects, even if there is already a project. Some areas are conservancies, community forests and at the same time leaseholds are being applied for *Jatropha* and they give their consent, nevertheless” (Field note 3).

The Mafwe Traditional Authority indicated that some of the land that has been earmarked for *Jatropha* is indeed already demarcated by the Ministry of Lands and Resettlement as small scale commercial farms, but claimed that the land has not been used for anything, hence the decision to allocate it for *Jatropha* (Field Note 4).

According to the chief conservationist in the Ministry of Environment and Tourism for the Kavango/Capriivi office, the land board should consider the interests of the conservancy in dealing with leasehold of land situated on a conservancy. This is in line with section 31(4) of the Communal Land Reform Act, which states as follows:

“ Before granting a right of leasehold in terms of subsection (1) in respect of land which is wholly or partly situated in an area which has been declared a conservancy in terms of section 24A of the Nature Conservation Ordinance, 1975 (Ordinance No. 4 of 1975), a board must have due regard to any management and utilization plan framed by the conservancy committee concerned in relation to that conservancy, and such board may not grant the right of leasehold if the purpose for which the land in question is proposed to be used under such right would defeat the objects of such management and utilization plan”.

Sub-Section 31(4) can be viewed as a protection mechanism aimed at protecting communal conservancies. It should be noted that the allocation done by the Masubia and Mafwe traditional authorities is viewed by the land board as an expression of their consent to the granting of leasehold and hence the letters containing the demarcation can be used by the investors to apply for leasehold. The protection in terms of section 31(4) is not afforded to community forests.

Although section 31(4) calls for the interests of the conservancy to be taken into account, some investors are trying to push for leaseholds to be granted on conservancies, even without the consent of the conservancies and at times without the knowledge of the Ministry of Environment and Tourism . It should be borne in mind that most of the investors are looking for land that will be cleared to make room for *Jatropha* farming. If for argument sake, leasehold for *Jatropha* is granted on a community forest, clearing of land will have to take place, which will lead to loss of vegetation and deforestation. Additionally, if part of a

communal conservancy is turned into a *Jatropha* plantation, this will negatively impact on the wildlife ecosystem.

Both communal conservancies and community forests are aimed at producing an income for the benefit of communal residents. Communal Conservancies make it possible for traditional people living in rural areas to benefit from the natural resources. This is only right as these people are directly responsible for the conservation of the game and the overall improvement of conditions within the area.

The benefits of community forests have been highlighted as: Empowerment of local communities and traditional authorities with rights for improved area and resource control; income generation through commercial use of wood and non-wood resources; improved land use; Improved availability of resources for subsistence needs; improvement of management capacities and technical skills and job opportunities (MET,2008).

These benefits are tangible and communities have benefited from them, since their inception. The benefits of *Jatropha*, on the other hand, are only on paper. Hence, if such entities are destroyed for the sake of *Jatropha*, it will result in a loss of a viable source of income for the communities.

In as far as small scale commercial farms are concerned; Namibia Agricultural Renewable (an investment company) has applied for leasehold for land between 100000-150000 hectares which is demarcated as a small scale commercial farm. One of the respondents argued that, small scale commercial units are competing with new projects such as *Jatropha* (Field note 5).

The company initially applied for leasehold to grow *Jatropha*, but after the Land Board expressed concern over the uncertainty regarding *Jatropha*, the company revamped their proposal and decided to submit a new proposal for the production of agricultural food products. The Caprivi Land Board expressed the view that, if a leasehold is granted for *Jatropha* in respect of these commercial farms, it could amount to double gazetting of the land in question i.e. as a small scale farm and leasehold (field Note 6).

The board also questioned whether if it decides to allocate the leaseholds in respect of the small scale commercial farms, it should then at the same time apply for de-gazetting of the land as small scale commercial farms (Ibid). This argument can be taken further in that, if the land is gazetted as a small scale commercial farm, then it does not amount to communal land. If this argument were to suffice, the land board will not have jurisdiction to hear matters pertaining to small scale farms and applying for leaseholds in respect of such land is indeed a futile exercise. The legal status of small scale commercial farms is therefore, brought into issue.

The issue of double allocation, as the case maybe, is further attributed to the lack of inter-ministerial coordination. This owing to the fact that, small scale commercial farms fall under the Ministry of Lands, community forests under Ministry of Forestry and conservancies under that of Environment and Tourism.

## 2.7 *JATROPHA* MODELS

Before discussing access to land for *Jatropha* farming, it is first prudent to identify the four models that can be used for *Jatropha* farming. It will later in this chapter be observed that only two of the models are used (or planned to be used) in Namibia (communal land and



leaseholds). Hence this discussion will provide a clear explanation as to why these models are being implemented.

### 2. 7.1 Small Scale Farming (Household Level)

This model makes provision for hedges and small plantings on margins of crop fields on communal land, tended by the household. This would involve the use of land already deforested. The household is not envisaged to own processing plants, but rather to sell harvested seed to oil pressers associated with larger institutional models or local industries. This does not exclude more entrepreneurial households to grow their plantings or to acquire small processing plants (e.g. oil presses and soap making) (GRN, 2006, p.42). It is noted that this method was mainly used in Kavango, where the farmers at a household level entered into supply agreements with the farmers to grow *Jatropha* on their fields.

Although the household's seasonal calendar of work is flexible, it is very demanding. It is likely that the household's capacity to establish and maintain a *Jatropha* plantation will be relatively small, perhaps not exceeding 200 trees (i.e. 0.2 ha, the figure assumed in this analysis). Therefore, assuming nearly full participation of all households of approximately 40,000 in number, it may be expected that the Homestead Model could yield 8,000 ha of *Jatropha* plantations (GRN, 2006, p.37). Although the estimation in this regard was 0.2 ha per household, research has revealed that in Kavango, 15 households had allocated a minimum of 1 ha for *Jatropha* farming. In essence, if 40 000 hectares were to each allocate 1 ha, this would mean 40 000 hectares of viable land is being used for growing *Jatropha*.

### 2. 7.2 Dry land Plantations on irrigation schemes

Within leaseholds of irrigation schemes, scattered portions of rain-fed land (“loslappies”) exist which may be planted with *Jatropha* (GRN, 2006, p.42). In order for this to materialize, prospective farmers will have to apply for leaseholds. The cumbersome process of applying for leaseholds, as well as the uncertainty of government’s position in re *Jatropha* farming, is a hindrance to the successful implementation of this model.

It is further expected that for every 100 ha of irrigated area, approximately 60-70 ha of dry land potential exist. Therefore, for an expected 15,000-20,000 ha of irrigation potential in the North, approximately 10,000-13,000 ha of dry land-based *Jatropha* growing potential exists (Ibid). It should be noted that this 10 000- 13000 ha in question, is normally land that is classified as a common resource used as a livelihood for the rural poor.

## 2. 7.3 CONCESSIONS

This model will be applicable to new leases on communal land, in the order of 10,000 to 20,000 planted hectares. The plantings will be rain-fed, and should be confined to deforested land. This model may also accommodate smaller farmers leasing up to 50 ha plantings, in a similar arrangement to the Green Scheme. The legislative framework for this model exists in the Communal Land Rights Act. However, it is expected that there may be competition for well-located land. It would be advisable to use degraded land, but the extent of these are uncertain (GRN, 2006, p.48).

## 2. 7.4 Resettlement farmers

There are extensive areas of land in the Caprivi and Kavango Regions that have been assigned to resettled farmers. These are new farmers requiring substantial support, as part of the same system that would apply to households. These farmers may grow up to 10 ha on a farm, with an average of 5 ha. It is envisaged that these farmers could be integrated into the value chain of the concession model and share the same support system. The resettlement

land in Caprivi and in the vicinity of Sibbinda in Kavango would be especially suitable for this purpose (GRN, 2006.p 47).

## 2. 7.5 Commercial farms

Commercial farmers in Namibia are ready for *Jatropha*, and welcome a perennial crop in their crop portfolios. They, however, await markets to sell *Jatropha* seed or oil into. Such markets may be created through possible on-farm diesel production, sales to off-grid generators or localized soap manufacturing. It is expected that these farmers may plant up to 10 ha of *Jatropha* per farm, with an initial average planting of 5 ha per farm.

These farmers may therefore have to form *Jatropha* processing co-operatives to ensure reasonable processing economies of scale. Some extension support services may therefore also be provided through such co-operatives (GRN, 2006, p.47). The only example of *Jatropha* production on a large scale in the study area is at Katima farm, where 15 hectares of land have been set aside for *Jatropha*.

Five institutional models exist through which the industry may be rolled out. For each of these developments, assistance of various degrees of intensity is required. Through a combination of these models, 60,000 ha may be established within a seven-year goal time-frame, so that, by 2030, the planted area could be between 100-500 thousand ha (GRN, 2006, p.45).

## **CHAPTER 3**

### ***JATROPHA!* IMPACT ON CUSTOMARY LAND TENURE SYSTEMS**

#### 3.1 INTRODUCTION

Since independence, the policy and legislative environment affecting natural resource management in Namibia's communal areas has undergone significant reform (Massyn, 2007, p.381). In rural African setting- often characterised by a shortage of skills, insecure land rights and a high degree of informality-external interests typically capture a large portion of the benefits generated by (Ibid) biofuels.

In large parts of the developing world, the ability of the poor to trade in land have, however, been constrained by the lack of formal tenure rights. This is especially true in the so-called communal areas of Southern Africa, where contemporary land regimes are a legacy of colonial policies that effectively curtailed the tenure rights of rural African residents (Massyn, 2007, p.382).

For purposes of this chapter, the impact on customary land tenure denotes the following issues: impact on the traditional use of the land, impact on the natural resource management powers of traditional authorities and impact on the use of common property resources.

As indicated in chapter 2 above, the introduction of biofuels on communal land has ample impact on the customary land tenure systems that are in place. It is common gen that one of the attributes of customary law is its flexibility. In the same vein, it is feared that this may be abused by investors and in the long run result in the loss of land by traditional communities. Additionally, the introduction of Biofuels will have an impact on the traditional use of communal land. This chapter will thus look at how customary law is been abused to enhance the commercialisation of communal land and at the same time altering the customary tenure systems that are in place.

Additionally, the chapter will discuss the effect of growing biofuels on the natural resource management powers of traditional authorities. The presumption is that, once communal farmers start growing commercial plants, this will interfere with the powers of the chief. The impact on property management on communal land has been linked to property rights regimes. This chapter will thus also look into the property regimes found on communal land and how this affects natural resource management.

The issue of power dynamics is momentous, not just in terms of resource management, but also in terms of land allocation. It is feared that were community members might be against the allocation of resources to *Jatropha* investors, the chief may be influenced and give away land or other resources. Conversely, the community members may also lease out resources to investors without the prior consent of the traditional authority.

### 3.2 CHARACTERIZING ‘CUSTOMARY’ LAND TENURE IN AFRICA

Before discussing the elements of the tenure systems in the two regions (Caprivi and Kavango), there is a point *in limine* that needs to be answered: Do African communal tenure systems have 'distinctive features'? This section of the thesis attempts to delineate the key features of contemporary systems of communal tenure in Africa.

The answer lies in the types of rights and powers that communal residents are afforded. Okoth-Ogendo's (1989) argues that a 'right' signifies a power that society allocates to its members to execute a range of functions in respect of any given subject matter; where that power amounts to exclusive control one can talk of 'ownership' of 'private property'.

According to Hangula (1998, p.87), Africa's indigenous tenurial system is commonly known as 'customary' or 'traditional' land tenure. Customary tenure sets out rules not only for land use, but also for its allocation and administration (Hangula 1998, p. 87). Unlike the Western system which is based on freehold title, African's traditional tenure is *mutatis mutandis* based on common use and/or lease of land and its resources. What makes Africa's indigenous tenurial system unique is their guarantee of access to the use of land for every member of society, regardless of social status and origin (Ibid). As will be discussed below, there is a thin line between traditional authorities and land tenure systems in communal set ups.

There is a profound connection between the use of the chieftaincy as an institution of colonial government and the development of the customary law of land tenure. The development of the concept of a leading customary role for the chiefs with regard to ownership and allocation of land was fundamental to the evolution of the paradigm of customary tenure..... the chiefs were seen as the holders of land with rights of administration and allocation. Rights in land were seen as flowing downward (Chanock, 1991, p.64).

This 'feudal' model fitted well with British ways of thinking about states and societies, linked British land law and colonial contexts, and served the interests of regimes seeking to acquire land for settlers. The Privy Council pronounced in 1926 that 'the notion of individual ownership is foreign to native ideas. Land belongs to the community not to the individuals (ibid, p. 66; See also Cousins, 2009).

In as far as ownership is concerned, there is need to distinguish between who 'owns' land under customary tenure and under freehold, because the ownership and management of land (under customary tenure) are not organised in the same way as for freehold land. In freehold, the person (or people) who have their names on the title has the rights to use land as they wish, as long as the planning regulations of the authorities (e.g. the Town Council) are followed.

In terms of customary land tenure, the question 'who owns the land?' is not really useful. Instead, there is need to try to make clear who has which rights and responsibilities regarding the land in communal areas. In customary law, rights and responsibilities are not organised the same way. Owning land does not mean the same thing, because the rights and responsibilities are different. This does not mean that people are not 'really' the owners of their land. They do 'really' own their land, but 'owning' land means something slightly different.

Some people have the responsibility for administering land. This is usually the clan elders. This duty does not exist in the freehold system, because there are no responsibilities for freehold owners to provide others with access to land. It would be legal for one person to own

all the (registered) land in the country, and for him or her to refuse to allow anyone else to farm. This cannot happen under customary law (Okoth-Ogendo's, 1989).

Okoth-Ogendo's (Ibid) however argues that, it is not essential that power and exclusivity of control coincide in this manner. The author further argues that:

In Africa, land rights tend to be attached to membership of some unit of production; are specific to a resource management or production function or group of functions; and are tied to and maintained through active participation in the processes of production and reproduction at particular levels of social organization. Control of such access is always attached to 'sovereignty' (in its non-proprietary sense) and vested in the political authority of society expressed at different levels of units of production (ibid).

### **3.3 FUNCTIONS OF TRADITIONAL AUTHORITIES**

The discussion above depicts that traditional authorities are synonymous with customary land tenure systems. Hence the following discussion is aimed at highlighting the function of traditional authorities.

The Traditional Authorities Act (Act 25 of 2000) was enacted with the aim of integrating the institution of traditional authorities into the national context. According to Propper (2009, p.277), traditional leaders are rather highly respected trustees of their groups and continue



now, as ever, to represent the legislative, executive and judicative roles in one embodiment. Furthermore, traditional leaders are responsible for the quite problematic allocations of rights of using land and resources (Ibid), as well as the protection of resources (Hinz, 2003, p.102).

As stated above, land tenure in Namibia is regulated by the Communal Land Reform Act. In terms of the Act, a communal area is defined, in relation to a traditional community, to mean the area comprising the communal land inhabited by the members of the community (Section 1). Natural resource management and land allocation on communal areas is synonymous with traditional authorities. Similarly, land allocations procedures that are used are those developed and practiced by the traditional communities since time immemorial and are incorporated into legislation.

It has been contended that in as far as chiefs are concerned, probably the most important land management right is the granting of access to resources (Falk, 2007, p.247). Therefore, the overwhelming number of Namibian communal farmers ascribes the power to grant access to land to traditional authorities (Falk, 2007, p.247 See also Fuller & Turner 1996, p. 3; Hinz, 2000, p.88). In Kavango, for example, a person who wants to cut wood in the forest should first get a letter from the traditional authority before going to get authorization from the forestry office.

The Communal Land Reform Act stipulates that the primary power to allocate or cancel any customary land right in respect of any portion of land in the communal area of a traditional community vests in the chief of that traditional community; or where the chief so determines, in the Traditional Authority of that community(Section 20). Empirical research confirmed the

role of the chief in both Kavango and Caprivi. This can be established by the role that the chiefs played in the introduction of *Jatropha* in both regions.

Traditional authorities also have a role to play in the sustainable use of natural resources.

According to the LAC (2006, p.60):

“The implications of the Traditional Authorities Act for the compilation of regional land use plans are clear: Traditional Authorities must be fully involved in the planning of land use and development in their areas. In addition they must be sensitized to sustainable resource management and how this must be implemented in their communities. It is their duty under the law to ensure sound resource management.”

Traditional authorities are also vested with the responsibility of ensuring that the members of their traditional community use the natural resources at their disposal on a sustainable basis, and in a manner that conserves the environment and maintains the ecosystems for the benefit of all persons of Namibia (LAC, 2006, p.60).

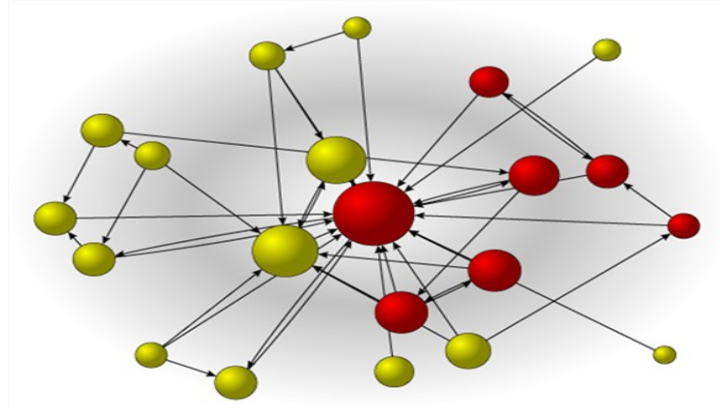
Additionally, in order for traditional authorities to perform the above stressed functions adequately, governmental institutions should refrain from ‘interfering’ in their (traditional authorities) decisions; more especially if such interference is unreasonable and unfair. If the chief for instance decides not to allocate land to an investor, because the land in question is a common grazing pasture for the community, the land board must shy away from overturning this decision.

In a nutshell, the role played by traditional authorities in any given communal setting can be depicted as follows:

## Role of traditional authorities in land allocation

Clearing of forest and distribution of land for cultivation de facto regulated by traditional authorities;

**Complete Social Network Analysis of all Household heads in Epingiro (N=21):** Whom would you contact in cases of detrimental resource uses?



Source: (Falk et al, 2008)

The biggest red ball in the middle represents the traditional authority and the small red and green balls represent the community members. On being asked whom they will contact if they needed land, they all indicated that it is the chief and that is why most arrows are pointing to the big red ball (the chief).

### 3.4 USE OF COMMON RESOURCES UNDER CUSTOMARY LAW

The discussion in this section is aimed at portraying the relationships under customary law and how the different actors use resources. As indicated above, the tenure system mostly practiced on communal land is customary land tenure. It is still the contention of this thesis that customary land tenure system is being abused and exploited for the benefit of *Jatropha* investors. The distinctive features of this system have also been

discussed in above. In order to understand the impact that *Jatropha* will have on this tenurial system, it is trite to first familiarize oneself with the use of land under customary law and later identify the impact of *Jatropha*

As was discussed above, *Jatropha* is supposed to be grown on idle land. It must be noted that the concept of idle land is a subjective one. In some contexts, idle land is that land which is not been used, but in some communities, idle land is part of the commons and is for example being used for communal grazing. The impact that *Jatropha* will have on common resources is of concern, especially because in most communities, idle land is been used as a common grazing area, for example, and if it is used for *Jatropha*, the community members will lose out on grazing land.

Hunter, (2004, p.51) defines common property resources as; those resources not controlled by a single entity. Access to these resources is limited to an identifiable community that has set rules on the way those resources are to be managed and can exclude others. There are separate entitlements to the commons for each user and no one user has the right to abuse or dispose of the property.

In Kavango, for example, most of the unutilised land is used as grazing areas for the community. It should also be noted that some Kavango communities still practice shifting cultivation and hence land that may be perceived as unutilised could simply be left to ‘rest’ by the community and will again be used after a number of years. It is hereby stressed that, the practice of shifting cultivation is a kin to rotational grazing and does not only prevent soil degradation, but also deforestation, as it prevents the further clearance of new land.

It must be noted that customary systems generally have a collective element to resource management, e.g., forms of group decision-making that determine access and use, or joint use and management of resources in common areas. According to Hunter (Ibid):

Any dealing with the property has to take into account the entitlements of others and is subject to approval by the community. Users of common property share rights to the resource and are subject to rules and restrictions, embedded in cultural or religious customs, governing the use of those resources.

Beyond providing the basic rules that determine who can access what resource, when and with what responsibility, customary institutions are the basis of norms of reciprocity among subsets that have authorized access to resources (2009)

In light of the above, the use of the commons for *Jatropha* farming is not the only danger to the sustainability of common resources on communal land. This is due to the fact that, at times investors do not understand, or simply do not respect, the rules and restrictions that pertain to the use of common resources and will therefore, not adhere to them.

It is also clear that sometimes only those that belong to a certain traditional authority or community will pledge allegiance to the rules and norms of that community. That is why ‘group identity and the respect for customary authorities may play a role in deterring violations of collective tenure arrangements’ (2009). ‘Compliance is more often than not based on collective respect for local authorities over and above the possibility of punishment for infringements (Ibid).

‘Another factor that will contribute to the sustainable use of natural resources and which will go a long way in preventing exploitation of the said resources by investors is a paradigm for sustainable development which focuses on power relations’ (Ibid). This can

occur where the chief may dispose off a common resource to a *Jatropha* investor, without the consent of the community, which could result in conflicts. Conversely, it should be noted that, although a bit difficult in practice, community members too may allocate common resources to investors without the sanction of the chief. However, if this occurs, the chief as the 'grudnorm' can simply overturn the decision of the community members. Desolately, the same cannot be said for the latter situation (chief allocating without community consent).

In the words of Bennett, (1996,p.127) 'every member of a political unit has access to its common natural resources, in particular to pasture, but also to wood (for building and fuel), grass and reeds (for thatching and weaving), clay (for pottery) and edible fruits and plants'. The author (1996, p.127) further emphasised that:

“The freedom to use common resources is subject to the local ruler's power to regulate access if and when this becomes necessary in the interests of the community as a whole. Customary law gives traditional authorities all the powers they need to conserve the environment, and there is ample evidence to show that they have reacted swiftly when resources were in danger of running out.”

Since Garrett Hardin's challenging article in *Science* (1968), the expression "the tragedy of the commons" has come to symbolize the degradation of the environment to be expected when many individuals use a scarce resource in common(Ostrom, 1990, p.2).

The elements of tragedy of the commons used in Hardin's article are not equivalent to those present in this scenario. However, there is already a shortage of fertile land on communal areas, therefore if more of this, already- scarce land is given to *Jatropha* production, then degradation to the environment is expected, because of the scramble and over-use of an already scarce resource, hence “tragedy of the commons”.

Hardin explains the tragedy of the commons as follows:

“... Each man is locked into a system that compels him to increase his herd without limit - in a world that is limited; ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons” (Hardin, 1968, p.244).

Evident from the above discussion, is the fact that the customary tenure system is very flexible. Although the chief of the supervisor of the use of natural resources, the community at large has a say in the use of resources. The chief's power to control natural resources depends largely on the level of respect accorded to him/her by his community members.

Concern about the commons was identified as one of the constraints in the National Land Policy, as far as Communal land tenure is concerned. This was done in the form of the misuse and mismanagement of grazing resources by farmers in all grazing are (GRN, 1992).as. The policy emphasised that free access to common resources leads to over-exploitation of these resources leading to deforestation and overgrazing and on the long-term breakdown of the ecosystem (Ibid).

In reaction to this policy, the Communal Land Reform Act, stipulates that ploughing and cultivating on the commonage is only allowed with the written permission from traditional authorities and ratification by the board (Section 29(4) (b)), and that any person who contravenes that provision is guilty of an offence and may, if convicted, be liable to a fine which does not exceed N\$4000 or imprisonment for a period not exceeding one year (Section 29(5)).

It is also evident that the flexibility of the system can be abused by either the chief or the community members. In Kavango, for example, some community members claimed that they were not happy about the introduction of *Jatropha* in their area, but because the chief has the final say, there was nothing they could do. In Caprivi, one community member alleged the following:

‘Sometimes the community members are not in support of an envisaged project, and additionally there is no proper consultation but the investors convince the chiefs through *Kombanda yekaya* ( giving them gifts) so that the chiefs can approve whatever project they (the investors) would like to introduce(field note 8).

At this point it seems as if the governing of natural resources is dependent on the concept of security of tenure and ownership of communal land. Within customary systems of common property, balancing the rights of the individual and the group in an equitable manner may be a challenge.

‘Externally, customary systems often have little or no legal standing relative to state-backed systems. This creates difficulty for resource-users to defend their rights to common property as established under customary tenure, particularly if other groups or interests bring forth resource claims that have backing under state law’ (2009).

Thus far, I have outlined where resource management powers on communal land vest and how these two institutions relate to one another in this regard. I have also identified how resources are used and managed under customary law. Having done that, it is evident that whatever new activities are introduced on communal land, there is a need to accommodate customary land tenure systems and resource use principles that are in place. The reverse is also true, i.e. customary law needs to react swiftly to the changes



that occur.

The danger however, lies in the fact that in most communal set-ups customary tenure principles are so well entrenched that any new system (In this case *Jatropha* farming) will have to be structured in such a manner that it falls on all fours with the existing customary tenure systems.

This is more so because, sometimes the expectation of customary law to react to modern introductions can be farfetched, because most of its followers are reluctant to try new things and if forced on them, the results are usually catastrophic. The discussion below will focus on one such instance, where a new concept is introduced into a customary land tenure system.

### 3.5 CUSTOMARY LAW AND THE PRIVATISATION OF COMMUNAL LAND

‘It is increasingly accepted that modern policies and planning strategies *both at government and traditional authorities level (my emphasis)*; regarding land use and natural resource management should account for “unpredictable’s” and “unknowns”, hence uncertainty in land use and natural resource management’ (Dubois, 2009).

Dubois (Ibid) further maintains that

‘They should be adaptive, following a learning process and involving continuous monitoring of the dynamics of environmental and socio-economic changes. And they should take into account the political dimension of land use and natural resource management, including power relationships, and develop approaches to deal with this dimension. Government policies that encourage commercialization of natural resources, marginalize indigenous and customary institutions, or simply

overlap and create confusion among resource users, are all contributing factors to the pressures on communal resources’.

*Jatropha* production is targeted for North –eastern Namibia. It is common course that these areas are mostly communal and a lot of the inhabitants live under customary law regimes. However, it is feared that, *Jatropha* farming being a relatively new concept, customary land law may not be equipped to deal with this alien concept.

According to Cooter (1989, p.13) ‘changing circumstances have created novel activities that customary law did not formerly contemplate, such as sale of land to outsiders, building permanent structures, and offering title as security on a loan’. Additionally, the planting of commercial cash crops, such as *Jatropha*, on communal land is one of those activities that customary law did not anticipate. This is because the traditional use of land under customary law is subsistence farming.

In light of the above, one will notice that the existing customary land laws cannot cope with the introduction of commercial activities on communal land. Cooter, (Ibid, p.14) suggests that ‘one possible response is to scrap customary law as quickly as possible and replace it with freehold or something similar’.

According to Waigani (1984, p.7):

Customary land tenure is unsuitable for economic development... the long term objective of the State must be to register all customary land presently held under customary tenure so that individual or group titles can be issued. This will reduce the frequency of land disputes; will provide surety of title, feeling of permanency and enable easier conveyancing of land without fear. It will enable owners to mortgage their properties in order to develop their land.

On the contrary, Cooter (1989, p.14) argues as follows:

The whole replacement of customary ownership, however, could have disastrous effects. Customary law provides an incentive structure through which people can cooperate with their relatives in the production and distribution of goods. Land law is an important part of that incentive structure. If customary law is destroyed and replaced by something similar to freehold, the traditional incentive structure will break down and traditional forms of production and redistribution will be paralyzed.

This perspective acknowledges that private title does not necessarily bring security of tenure, and that "unsuccessful attempts to substitute state titles for customary entitlements may reduce security by creating normative confusion, of which the powerful may take advantage" (Bruce et al, 1994, p.260). Titling activities should be directed only towards localities where the need for titles has been expressed, as a result of changing social norms or a need for credit, and in particular to areas where valuable land is subject to competition and dispute (e.g. urban and peri-urban areas) or in resettlement areas where no customary system exists (Bruce et al, 1994, p.261).

Customary law will, in time, evolve new concepts of ownership in response to new opportunities to increase production and raise the standard of life (Cooter, 1989, p.14). Some experts think this process will inevitably lead towards greater individualism, while others believe that strengthened clans will become the locus of business decisions. The choice between these two alternatives should be made through the evolution of customary ownership, not by a central policy decision. Customary groups can work out for themselves the best response to new opportunities and risks (*Ibid*).

It has been stated above that the traditional use of communal land is subsistence farming. Therefore, the introduction of cash crops, such as *Jatropha*, can be viewed as a form of commercialization of communal land. It is trite knowledge that land allocation

and natural resource management on communal land is the duties of traditional authorities. It is also feared that, somehow these powers are threatened by *Jatropha* investors, who mostly resort to other methods in order to gain communal land for *Jatropha* production and who also do little to honor natural resource management procedures and conservation methods of the communities in which they farm.

It has been suggested that, perhaps the best way to curb this problem is to privatize the land and let each resident do as they please, i.e. to do away with the concept of communal land.

In the words of Smith (1981, p.467), “the *only* way to avoid the tragedy of the commons in natural resources and wildlife is to end the common-property system by creating a system of private property rights”. The author further stipulated that it is "by treating a resource as a common property that we become locked in its inexorable destruction"(Ibid, p. 465).

The danger of individualisation has been summed up as follows:

The expansion of agriculture is creating new opportunities for rural households to earn cash income, but also poses the risk that common lands may be individualized, with poorer or marginalized groups (e.g., pastoralists or indigenous forest communities) being excluded (2009).

When one talks of privatization in this thesis, there are two instances that need to be borne in mind. One form of privatization will occur if the whole model of communal land is done away with and a new form of title is introduced. The other form of privatization is where the land retains its communality status but the activities that take

place, such as *Jatropha* farming, are commercial in nature as opposed to subsistence.

It has been argued that:

‘State actions and policies may contribute to nationalization or privatization of the commons in a variety of ways. States may assume or claim direct control over the commons, such as through the establishment of protected areas. Policies and legal reforms may encourage private land rights either directly, by opening up community lands to the market, or indirectly, by supporting investments in sectors (e.g., commercial ranching) that tend to be based on individual property rights. As discussed earlier, state actions and policies may also undermine customary institutions that manage the commons, or generate overlapping claims to the commons (land and other resources) that make it more difficult for groups to establish secure rights’.

The examples above are suggestive of the fact that perhaps ‘customary systems are able to adapt to new types of conflict, particularly if facilitation or assistance is made available to support this adaptation’ (2009).

It must be noted that indeed facilitation is an important aspect, because in many cases when projects of this nature are introduced and conflicts arise the investors merely argue that they are not subject to the traditional laws of the community and will not sit in community courts and prefer the State courts. The sad reality is that many community members do not have faith in the formal judicial system and others simply do not understand the procedures followed in these courts. However, it has been argued that:

In cases where horizontal conflicts emerge between different user groups, steps can be taken to strengthen the capacity of local institutions that manage the commons also to manage and prevent disputes. In cases where there is a vertical conflict, i.e., one where there is a power imbalance between the parties in conflict, support to community organizing and collective action can help to even the

playing field, increasing the ability of community groups to negotiate more secure access to the commons, which is the issue most often at the heart of such disputes (2009).

Hardin (1978, p.12) argues that, 'privatization of the commons was the optimal solution for all common-pool problems'. The issues of how best to govern natural resources used by many individuals in common are no more settled in academia than in the world of politics. Some scholarly articles about the "tragedy of the commons" recommend that "the state" control most natural resources to prevent their destruction; others recommend that privatizing those resources will resolve the problem (Ostrom, 1990, p.1).

However, to manage and conserve natural-resource systems effectively and sustainably, it is essential that local stakeholders participate. Decentralization to local communities has shown that local users have a comparative advantage over government agents in managing resources; they can design more efficient rules and more easily monitor and enforce them (IFAD, 2001,p.26).

Privatization of communal land, will introduce a new regime into the communal arena, the freehold title regime. This is so because by giving the land to investors for *Jatropha* farming, the land is been privatized and this has a direct impact on the resource management powers of traditional authorities. It is feared that a reduction or even the slightest threat to the management powers of the traditional authorities can lead to the destruction of the communal area, in which *Jatropha* is being grown.

Privatization of communal land whether in a formalistic approach or indirectly by allocating pieces of land for *Jatropha* farming will have a negative impact on the sharing of common resources.

Policies around natural resource tenure have not been exempt from the global trend to promote economic liberalization, creating pressure for the privatization of land and other natural resources. Privatization policies are also increasingly linked to the state's promotion of foreign direct investment in extractive industries such as mining and logging, but also agriculture (2009).

Privatization and complete individualization of land are uneven and contested, and in many places the nature and the content of land rights remain quite distinct from 'Western-legal' forms of property. In these situations, individual titling is not a feasible solution, and adapted and democratized versions of communal tenure should be promoted by law and policy (Cousins, 2009, p.17).

In a nut shell;

On the one hand, customary systems remain a common means of providing or managing access rights to the commons by individuals, households and groups. This may include groups and individuals that are not necessarily 'members' for as long as the non-members are willing to negotiate and follow the general rules of access, particularly those rules that discourage the creation of permanent rights that may compete with legitimate members. On the other hand, customary systems are vulnerable to non recognition by state systems and often fall short of being representative of the interests of all relevant community members (2009).

## **CHAPTER 4**

### ***JATROPHA: SOCIO-ECONOMIC IMPACTS/BENEFITS***

#### **4.1 INTRODUCTION**

In the words of Surge (2008, p.1);

**Biofuels have been put forward as an opportunity for small scale rural farmers to stimulate rural local economic development and this potential certainly exists, particularly given the extreme poverty found in these parts of the world. Africa and South America are particularly seen as continents with vast tracts of “underutilised land”. But there are concerns about the social impacts that could result from biofuel projects; these include, amongst others, food security issues, labour and human rights and land rights.**

However, it is a challenge to develop biofuel systems that will truly satisfy local needs and contribute to poverty reduction and food security (Dubois, 2009). For example, the connections among employment, environmental impacts and beneficiaries of the energy produced are strictly local and could be made clear to everyone, but this rarely happens when planning and implementation are supply driven and top-down. Moreover, rural energy should be part of a much broader development approach if it is to have positive and sustainable impacts on the rural poor (Ibid).

In many parts of the developing world attention is being given to marginal or degraded land as it is thought that this land may offer greater benefits and less social impacts (Netshiluvhi, 2003).

The development of a crop-oil energy industry offers multiple advantages for the people of Namibia. These include development of new areas of agricultural potential, improved energy



security, new economic and technological opportunities and improved air quality through the reduction of the burning of fossil fuels (GRN, 2006, p.6).The opportunity for this crop-oil energy industry arises from high and rising crude oil prices, scientific innovation in technology, and market mechanisms introduced through the Kyoto Protocol (Ibid).

During empirical research, it became evident that the introduction of *Jatropha* on communal land will have several socio-economic impacts on the communal residents of both Kavango and Caprivi. The purpose of this chapter is therefore; to explore the socio-economic benefits that the community members will get from the project as well as the potential impact that *Jatropha* will have on their social and cultural structures.

The discussion will also focus on the impact of land availability for traditional food crops. This is a major cause of concern as today there is an international debate about the relationship between food production and biofuels production. Carbon credits, as entrenched in the Kyoto Protocol and the Clean Development Mechanism will also be discussed, as a form of benefit that could arise from *Jatropha* farming.

In aspiring to a hydrogen-energy economy, different countries have to develop different pathways (or roadmaps) that integrate and align the resources, constraints and opportunities that are unique to each country (GRN, 2006, p.9). This requires a systems approach that integrates natural and human resources, financial resources, technology, and market opportunities in a coherent strategy for advancing to the new energy economy, signposted by the objectives to be achieved on the way (Ibid).

## 4.2 SOCIO-ECONOMIC AND CULTURAL STRUCTURES

Surge (2008) sums up the socio-economic impacts of biofuels as follows:

**Lack of information on options and opportunities, low income and lack of access to financing services in the rural areas, lack of conducive legal, policy and regulatory frameworks (incl. poor energy pricing regimes that do not consider the environmental cost of energy / subsidise fossil), lack of capacity to operate and maintain technologies related to biofuels, absence of institutions that would support the promotion of such technologies, difficulty in accessing land can also be a major problem for developing biofuel feedstock cultivation in certain developing countries.**

**According to Mendleson (2007, p.13);**

Kavango's rural landscape and its many small farms provide the overall impression that subsistence agriculture is the predominant economic activity in the region. The idea of subsistence furthermore implies conditions that: (a) incomes consist largely of home or farm produce, (b) the availability and use of cash is limited, (c) the food requirements of rural homes are met largely by domestic production, and (d) farmers would not be accustomed to farming on a commercial basis. Against that background, questions may be raised about whether greater cash incomes as a result of jatropha farming might be disruptive in some way to household economies, and how people might spend new cash incomes.

Mendelson (2007, p.13) however, argues that the above questions would only be valid if subsistence farming was indeed a predominant activity on communal land, especially in Kavango; this is because 'farms yields are far too low to provide most income or the nutritional needs for the majority families'. In using the following table, the author depicts how most households in Kavango depend on 'off- farm cash incomes' for their livelihoods.

### Proportions of rural households in Kavango reporting different main sources of income

|                    | <i>2001 Population &amp;<br/>Housing census</i> | <i>2004 Income &amp; Ex<br/>Penditure Survey</i> |
|--------------------|---|--|
| Farming            | 63%   | 42%  |
| Business           | 11%   | 10%  |
| Wages and salaries | 13%   | 21%  |
| Pension            | 5%  | 13%  |
| Remittances        | 4%  |  |
| Other              | 3%  | 14%  |
| <b>Total</b>       | <b>100%</b>                                     | <b>100%</b>                                      |

Source: 2001 Population & Housing census and 2004 Income & Expenditure Survey. Note that "Remittances" were not reported in the 2004 data.

Mendelson (Ibid) explains the table as follows:

These figures usually reflect the main source of income of the head of the household, rather than the major source of all income for a home. Indeed, the figures over-emphasize farming because the heads of most household are elderly, less educated and unemployed people, with the result that the more lucrative incomes of younger and more economically active family members are not reported.

It must also be noted that most of the interviews conducted with growers of *Jatropha* in the villages of Okambowo and Kayengona took place in Rundu, because most of these growers already have formal jobs in town. Be that as it may, farming still contributes the largest percent to the income of most households and if disturbed by the introduction of a crop, whose viability is not confirmed and whose economic benefits are only know on paper, and this can have a negative impact on the economic status of rural farmers.

The use of land that is not currently under commercial production in the developing world, for the purposes of producing biofuels, could result in social impacts amongst poor rural people unless safeguards are put in place; projects will need to be developed with the particular and specific purpose of uplifting the affected poor community (Surge, 2008).

Additionally, the dangers of falling for the glamour of growing biofuels could potentially be fatal for poor families. Because of this, we need to make sure to educate these families about the drawbacks of growing biofuel crops. Without more knowledge about changing crops, they cannot make decisions that are beneficial to their community and family. Each family must be able to weigh the costs and benefits for themselves (Westendorf, 2009).

Wealth generation implies a level of social change, which is already in progress. Communities will have to choose which cultural values they wish to retain (GRN, 2006, p.44). The use of land that is not currently under commercial production in the developing world, for the purposes of producing biofuels, could result in social impacts amongst poor rural people unless safeguards are put in place; projects will need to be developed with the particular and specific purpose of uplifting the affected poor community (Surge, 2008,p.4).

The main constraints to the acceptance of *Jatropha* have been identified as:

- **A steady transformation of most cultivated land near the Okavango River from food production to *Jatropha* farming.**
- **A corresponding change in the use of labour and land for purposes of domestic consumption to purposes of commercial agriculture for cash incomes.**
- **Perhaps a doubling or more of the amount of cash in circulation in rural Kavango increases to the incomes of large numbers of households.**
- **Potentially large increases in areas cleared for cultivation.**

- **Labour shortage for harvesting, due partly to the effects of HIV/AIDS.**
- **Time available, particularly for the women, who have chores, water and firewood collection and care of children before they spend time in the fields.**
- **Suspicion of new crops, particularly in the light of recent disappointment with cotton (GRN, 2006, p.44).**

The suspicion surrounding the new crop has also been observed during field work. One of the respondents, on being questioned why she did not grow *Jatropha* had the following to say:

*“I heard that if we start growing Jatropha, the women will become infertile and those that do give birth, their babies will be born blind”* (Field note 9).

Another respondent complained that their child ate the *Jatropha* seeds and is now epileptic and he suspects that this could have been caused by *Jatropha* (field Note 10). In one of the villages in Kavango, there is a myth that *Jatropha* kills pigs; this was after some of the pigs in that village ate *Jatropha* seeds and died (field Note 11).

Additionally, during empirical research, most respondents indicated that they do not really know the exact benefits that they will get from *Jatropha*, but indicated that the investor promised them that they will make a lot of money to subsidise their maize and Mahangu yields. Mendelson (2007, p.16) has attempted to depict the monetary benefits as follows:

**Estimated seed production of jatropha in Kavango**

| Year   | Kilograms per hectare | Income per hectare |
|--------|-----------------------|--------------------|
| Year 2 | 70                    | N\$25              |
| Year 3 | 100                   | N\$35              |
| Year 4 | 370                   | N\$130             |
| Year 5 | 1,730                 | N\$606             |
| Year 6 | 3,900                 | N\$1,36            |
| Year 7 | 4,200                 | N\$1,470           |

**Source: Prime Investment (Pty) Ltd project. Document**

The table is explained as follows:

**Based on yields given in the following table (above), an annual income of N\$1,470 per hectare could be achieved in the 7<sup>th</sup> years of the project. At that kind of income, about N\$90 million could be earned on the approximately 60,000 hectares that were cleared before 1990. It is our understanding that other, longer term incomes are expected from jatropha since participating farmers will be shareholders of the farming and industrial companies, as stated in the project document. What these incomes are likely to amount to remains unclear.**

Discourse about the use of “underutilized” or marginal land needs to take cognizance of the complex traditional and customary practices of indigenous people in the developing world. Land constitutes the basis of economic livelihood of indigenous people and small scale rural farmers and landowners; dispossession of land and territories is thus a major problem for indigenous people (Surge, 2008, p.3).

The real issue is how the projects are designed and implemented. If projects are done in a way that takes full cognizance of the wishes and concerns of the community, designed to give optimum benefits to the poor, carefully addresses gender issues and maximizes the local economic development loops, such projects can generally be of significant benefit to the rural poor(Ibid).

Finally, some comments on the question of who will benefit most from the jatropha project? This is not to detract from wealth-creation goals, but it is desirable that the benefits be spread widely and that households that are really poor, with little land and no other economic opportunities earn incomes from jatropha. The latter aspect is of greatest concern since the farmers who will probably now earn most from jatropha are those that are already comparatively wealthy in having large areas available for planting jatropha. Poorer households, by contrast, will have less land and labour available for jatropha (Mendelson, 2007, p.17).

#### 4.3 FOOD VS BIOFUELS (*JATROPHA*)

The increases in the level of food prices in 2007 and 2008 are mostly due to the combination of temporary factors (shortfalls in cereal harvests of the main world suppliers in 2006 and 2007) and of structural factors (rising demand for food and feed from emerging markets). In this already tight market situation, the additional demand and market speculation for biofuels has contributed to an extra rise in commodities prices. In the longer term, this has a net small but detrimental effect on the poor that may be significant in specific locations (Surge, 2008)

The use of agricultural land to grow energy crops also competes with the use of land and water for food and animal feed production, driving up the prices of commodities like cereals. On the other hand steady raising prices for agricultural commodities are necessary for rural

development. The growing demand for biofuels is beginning to adversely affect food supplies worldwide, and could eventually lead to serious economic and political instability (Brown, 2002). The relationship between biofuels and food has been argued as follows: “*In effect what we have are 800 million motorists who want to maintain their mobility and two billion people who want to survive*” (Ibid).

In Mozambique, for example, *Jatropha* is planted in direct replacement of food crops by subsistence farmers, and given that around 87% of Mozambicans are subsistence farmers and produce 75% of what they consume, major concerns arise when one considers the plan to encourage subsistence farmers to plant large amounts of *Jatropha*. This concern is even further exacerbated because subsistence farmers have very weak links to markets and their lack of storage capacity, communication and information makes it difficult to benefit from cash crops (FA & UNAC, 2009, p.7).

However, Mendelson (2007, p.17) argues that ‘while subsistence farming has been a widespread traditional activity, it is particularly unproductive and does not provide food self-sufficiency or security to rural households’ and further that rural people have increasingly sought and obtained cash incomes from business and wages. Rural homes now use these incomes to buy most of the food, in addition to the other commodities they require as members of modern society.

Seen from this light perhaps it must be stressed that the argument is not that communal farmers depend completely on subsistence agriculture for their livelihoods, but that the products that they produce via subsistence agriculture go a long way in ensuring that they have food at the end of the day.



It is at the same time acknowledged that at times the yields are not sufficient for the family to rely on until the next harvest. Additionally, there is also no guarantee that turning to *Jatropha* will ensure food security because what happens if the trees do not produce enough yield or better yet what if the entire project fails as is the case in Kayengona and Kambowo? Mendelson (2007, p.12) answers promptly;

**What will be the impact if the project fails, or if yields and production prove too low to bring anticipated economic benefits? This will prove a great disappointment, furthering the ‘wounded buffalo’ syndrome and suspicions of enterprises initiated from outside Kavango. Note that, the Namibia Development Corporation (NDC) farms were started 40 years ago in Kavango, and the lack of benefits to local people have left a deep distrust of big projects and their associated promises and managers. Although some *Jatropha* might be used for domestic and limited commercial uses (for example, oil, soap, fertilizer or compost, and the protection of fields from livestock), the consequences of failure will be serious.**

Note that the limitation section of this thesis indicates that, some of the respondents answers are given out of frustration, because the project has already failed and the company, Prime Investment has disappeared. I therefore, contend that it is better to take the risk with food crops because their benefits are known and the people have grown them over the years, as opposed to *Jatropha*, whose benefits are not even settled in theory.

As experienced at Katima Farm, for *Jatropha* to produce better yields, it needs constant irrigation. In Namibia this option is not recommended as a main element of strategy, because of conflict with food security goals, however, it must be left as an option to individual farmers to grow these crops, if feasible, at a farm level (GRN, 2006, p.26). The discussion on the Food vs. Biofuels is tainted by the presumption that our biofuels industry is quite young and hence the impact of biofuels on food security cannot really be assessed at this point in time. However, the experiences of other countries (like Mozambique) indicate that there is need to be concerned about this issue.

In responding on the impact that *Jatropha* will have on food security, the chairperson of the Kavango land board argued as follows:

*“Communal farmers should be allowed to produce agricultural products. You cannot eat Jatropha; hence this will impact food security at a household level”* (Field Note 12).

In the same vein, *Hompa Kaundu*, stated that:

*“Mahangu is important because Jatropha is inedible and poisonous”* (Field Note 13). The Ngambela of the Masubia Traditional authority equally reiterated the importance of food security (Field Note 14).

As was made clear above, the majority of people depend on cash incomes to provide most of their nutritional needs, and their production of staples is not a requirement for food self security. Cash is therefore already the important contributor to food security, and cash security is much more important than food security. Research demonstrated that most farmers are of the view that *Jatropha* offers an opportunity to earn additional (not alternative) cash incomes. As such, most farmers are enthusiastic to try *jatropha* (Mendelssohn, 2007, p.12).

Farmers expressed the view that one cannot grow *Jatropha* on the whole field, but should subdivide the field and also grow other staple food, such as Mahangu. They further argued that, those who want to grow only *Jatropha* can do so and use the money that they get from selling seeds, to buy food (Field Note 15). The chief of Mashare village argued that he does not know the output of *Jatropha* and would prefer to only grow Mahangu, which he is familiar with (Field Note 16).

It has been suggested by Prime Investment (Pty) Ltd that food be provided as part of an initial subsidy to participating farmers over the first few years (Mendelson, 2007, p.17). However, it is recommended that food not be provided since this would undermine the project's business-like wealth creation aim (Ibid). Mendelson further argues that 'food handouts would also suggest a "food for work" approach, which has not had useful consequences in Namibia. The provision of food would furthermore be logistically complicated. Finally, it suggests a patronising attitude, given that it has been partially justified by some people that the provision of too much cash will lead recipients to spend too much on alcohol, perhaps at the expense of providing food' (Mendelson, 2007, p.17).

One of the investor companies that envisage growing *Jatropha* in Kavango has indicated that food security is one of the companies priorities and also highlighted that the plan is to empower subsistence farmers, not just to produce food for consumption but also to have the financial means to supplement what they produce (Field Note 17). On the contrary, it was submitted that, *Jatropha* affects food security, more especially because the beneficiaries from the project is the investors and not the farmers (Field Note 18).

The dominant arguments about *Jatropha* as a food-security safe biofuels crop, a source of additional farm income for rural farmers, and a potential driver of rural development were misinformed at best and dangerous at worst. However, some researchers are of the opinion that the Food vs. biofuels issue is something that can be managed.

Ms Coetzee argues that fields that do not yield food can be used to produce biofuels. She further maintained that:

*“This is an arrangement that cannot be forced onto people nor regulated by legislation, but something that traditional leaders and community members need to learn, appreciate and practice”* (field Note 19).

In summary, because of Africa’s water scarce climate and the continent’s large extent of supposedly 'marginal' land, *Jatropha* has been given the most attention as a potential agro fuel crop. However, many question the claimed benefits of *Jatropha* and believe that the current rush to develop *Jatropha* production on a large scale is ill-conceived, under-studied and could contribute to an unsustainable trade that will not solve the problems of climate change, energy and food security and poverty reduction (JA & UNAC,2009,p.6).

#### 4.4 BENEFITS UNDER KYOTO PROTOCOL (CARBON CREDITS) AND THE CLEAN DEVELOPMENT MECHANISM

Another form of benefit that farmers can earn from the production of biofuels is carbon credits as stipulated in the Kyoto Protocol. It is argued that, dry-land agronomic farmers (small and large scale) are very keen to pursue the production of biodiesel based on plant-oil

crops, but that growing crops for biodiesel alone would be marginal without additional income from carbon credits(GRN, 2006, p.6).

The Kyoto Protocol, through the Clean Development Mechanism (CDM) has introduced a market-based instrument to promote carbon emissions control (GRN, 2006, p.34). This initiative has in turn led to the development of ancillary carbon markets such as the European Union Emission Trading System (EU ETS) and a number of other country carbon trading exchanges (in the UK, Australia, USA, South Africa). These trading exchanges are the market-place access points for various Kyoto established carbon emission reduction certificates (GRN, 2006, p.34).

Although no specific Clean Development Mechanism (CDM) provision makes reference to technology transfer, the CDM was conceived by the United Nations as a project-based technology transfer mechanism under the Kyoto Protocol. It allows investments in projects that reduce or avoid emissions to generate emission reductions credits, or Certified Emission Reductions (CERs), which may be used to contribute towards Kyoto compliance by an Annex I Kyoto signatory country (GRN, 2006, p.34). The CDM principles require that a part of the CER proceeds shall be used to assist vulnerable developing countries to adapt to the effects of climate change through a technology transfer mechanism (GRN, 2006, p.6).

Namibia is a signatory to the Kyoto Protocol, and therefore qualifies as a potential seller of carbon offset certificates under the CDM instrument. This is a complex instrument which yields a saleable certificate known as Certified Emissions Reduction (CERs), or Verified Emissions Reduction (VERs) in the case of voluntary carbon markets. In either case, the trade is based upon a verified and audited proof of carbon gain or offset according to the

“Kyoto Protocol” rules which are contained in a limited set of instruments called CDM methodologies, each being different for different kinds of projects (Ibid, p.34).

At the project level, the recent Kavango Biofuel Project in Namibia, which involves the cultivation of *Jatropha* on communal land, has paid specific attention to compliance with Kyoto Protocol requirements: project staff collected evidence to show that the project area had already been cleared in the past, and that “much of that land” was no longer cultivated (Jull et al., 2007).

The process used is also very complex; one which the farmers have found very difficult to comprehend. No trade is possible under the CDM provisions unless a Project Design Document (PDD) for a given project has the approval of the UN’s CDM Executive Board. The process requires the following steps (*Ibid*):

- Project identification, design and financial modelling
- Project Identification Note (PIN) submitted to Designated National Authority (DNA) (optional) as a first test of adherence to country sustainability criteria
- Regulatory approvals (EIA, certifications, permits or licences that may be required)
- PDD submitted to DNA for approval
- Validation of project emission reductions by the Designated Operational Entity (DOE)
- Submission to CDM Executive Board (EB) for approval and registration and
- Project Implementation.

Thereafter the project emission reductions are monitored and verified annually for verification by the EB. Therefore, it provides incentives for Annex I countries to work with

non-Annex I (developing) countries to further sustainable development and the overall objectives of the Climate Convention. This is to be achieved through the project-based transfer of technology (in particular environmentally sustainable technology) that may be independently audited and verified. These aspects clearly facilitate technology transfer between Annex I and non-Annex I countries (Source: UNEP).

It was however, noted during empirical research that most community members do not understand the Kyoto Protocol. Additionally the contracts entered into by the investor and the farmers contain a clause wherein the farmers cede their rights to carbon credits to the investors. This is discussed in more detail in chapter above.

#### 4.5 MITIGATING IMPACTS

The foregoing discussion illustrates the socio-economic problems and benefits that accompany the production of *Jatropha*. This part of the discussion will focus on what measures can be taken to mitigate these problems.

According to Surge (2008, p.4);

‘Because the issues involved in land use and land use rights are so complex and variable, it is difficult to design a set of guidelines that would cover all eventualities. What would be the best way to ensure that impacts are mitigated is to design a comprehensive community consultation process that can be adapted and used in each case where a bio-energy programme is planned on indigenously owned land. In this way, the process can be used to, amongst others, collect data, illicit responses from various sector of the community and develop a set of project specific guidelines and agreements’.

In essence, consultation is a crucial step in the introduction of biofuels in any community. In Kavango, for example, the farmers do not have conclusive information about *Jatropha* due to

poor consultation at the time of introducing the crop. The lack of proper consultation further resulted in the spread of myths about *Jatropha*, e.g. some members heard that *Jatropha* makes women infertile.

In 2005, the UN issued a paper that arose from a workshop that deals specifically with land use and resource rights of indigenous communities (UN, 2005). During this UN workshop, the principle of Free, Prior and Informed Consent were set as the basis for the consultation process and can be summarized as follows: (i) information about and consultation on any proposed initiative and its likely impacts; (ii) meaningful participation of indigenous peoples; and, (iii) representative institutions (*Ibid*).

Before the introduction of a biofuel project it is also important that government reviews existing legislation to ensure that it caters for the envisaged project. A successful process will involve review of existing laws and information especially about the nature of the land use at the time of project identification. It is also important to do base line social and economic assessments alongside any environmental assessments that are required as this will allow measurement of the success or progress of the project towards its stated goals (Surge, 2008, p.4).

Surge (2008, p.4) further highlights that:

Critical to the success of a process is to illicit the views of a community and determine if they wish to engage with a biofuel programme; for this they need to be able to access the necessary information to be able to make an informed decision. Experience also shows that involving then affected community in designing the process is also important so that they can say how, where and in what way the consultation will take place. It is critical that the consultation is held in good faith and that if the existing users of the land decide that the project is not in their best interests that they have the right to leave the process. Traditional governance structures need to be built up and utilized in the consultation processes.



# **CHAPTER 5**

## **CONTRACTS OF FARMING**

### **5.1 INTRODUCTION**

In Kavango, the major mode of land acquisition used by the companies is that of entering into contracts of farming with the community members. The purpose of this chapter is to analyse the contents of such agreements. Up for analysis is a contract entered into by Prime Investment (Proprietary) Limited and a certain Mr Mutende (not the real name of the farmer).

Additionally, it is noted that contract farming is not the only mode of land acquisition for *Jatropha* farming, as customary law is also been used by investors to acquire land. In fact, it is the argument of this chapter that even the method of contract farming that is been followed by investors has been facilitated by the abuse of customary law.

This is owing to the fact that the Communal Land Reform Act does not provide for contracts of farming in respect of communal land. The investors merely went to the traditional authorities, who then authorised them to enter into such contracts with the farmers.

Whilst reading through this chapter, the reader should bear in mind that customary land law in its entirety does not make provision for this type of arrangement, i.e. contracts of farming. This arrangement was merely introduced due to the flexibility of the system; in fact I contend that there exists a loophole in the system- hence the opportunity to enter into these types of arrangements.

## 5.2 WHAT IS CONTRACT FARMING?

In an age of market liberalization, globalization and expanding agribusiness, there is a danger that small-scale farmers will find difficulty in fully participating in the market economy. In many countries such farmers could become marginalized as larger farms become increasingly necessary for a profitable operation. A consequence of this will be a continuation of the drift of populations to urban areas that is being witnessed almost everywhere (Eaton & Shepherd, 2001, p.13).

Consequently there was a need to come up with strategies to modify the economic position of communal farmers, hence the introduction of contract farming. The contracting of crops has existed from time immemorial. In ancient Greece, the practice was widespread, with

specified percentages of particular crops being a means of paying tithes, rents and debts (Ibid).

Contract farming is defined as follows:

“An agreement between farmers and processing and/or marketing firms for the production and supply of agricultural products under forward agreements, frequently at predetermined prices. The arrangement also invariably involves the purchaser in providing a degree of production support through, for example, the supply of inputs and the provision of technical advice. The basis of such arrangements is a commitment on the part of the farmer to provide a specific commodity in quantities and at quality standards determined by the purchaser and a commitment on the part of the company to support the farmer’s production and to purchase the commodity” (Eaton & Shepherd, 2001, p.13).

According to Jackson et al (1994), the approach is widely used, not only for tree and other cash crops but, increasingly, for fruits and vegetables, poultry, pigs, dairy produce and even prawns and fish. Indeed, contract farming is characterized by its “enormous diversity” not only with regard to the products contracted, but also in relation to the many different ways in which it can be carried out (Ibid, p.15). The contract farming system should be seen as a partnership between agribusinesses and farmers (*Ibid*).

The definition of contract farming discussed above is of crucial importance. Hence before discussing other aspects of this chapter, it is trite that we look at the contents of the agreement at hand and establish whether it fits the definition of contract farming.

**a. Agreement for production of agricultural products**

Here it is elementary that there must be an agreement between a farmer and a processing or marketing firm. The firm in *casu* is Prime Investment and the farmer is Mr Mutende. The object of the agreement conforms to that in the definition, i.e. the supply of an agricultural product- *Jatropha*.

**b. At pre determined prices**

The returns farmers receive for their crops on the open market depend on the prevailing market prices as well as on their ability to negotiate with buyers. This can create considerable uncertainty which, to a certain extent, contract farming can overcome (Eaton & Shepherd, 2001, p.25). Frequently, sponsors indicate in advance the price(s) to be paid and these are specified in the agreement (Ibid, p.22). The price at which the firm will buy the products from the farmer should also be determined in the contract. Clause 7.2 of the supply agreement states that the farmer is to deliver seeds at the designated delivery area as determined by the company and the seed shall be bought by the company at N\$ 350.00 per tonne.

**c. Provision of production support by firm**

Many contractual arrangements involve considerable production support in addition to the supply of basic inputs such as seed and fertilizer. Sponsors may also provide land preparation, field cultivation and harvesting as well as free training and extension (Eaton & Shepherd, 2001, p.23). This is primarily to ensure that proper crop husbandry practices are followed in order to achieve projected yields and required qualities (Ibid).

In Clause 5, Prime Investment undertakes to render to the farmer all such support services, which include inter alia: Training of farmers, Supply of trees, Supply of

fertiliser, pesticides and equipment, and the furnishing of advice and best practice in respect of planting and caring for the trees as well as harvesting of the fruit.

**d. Farmer to provide a specific commodity**

Clause 7.2 clearly states that the farmer is to deliver jatropha seeds at a maximum moisture content of 13%. If the moisture content as measured exceeds 13%, the excess moisture mass will be subtracted from the total mass of the seed mass delivered. The farmer is also to make sure that the bag contains only the seeds, and no foreign material.

**e. Company to support the farmer's production and to purchase the commodity**

The prime advantage of a contractual agreement for farmers is that the sponsor will normally undertake to purchase all produce grown, within specified quality and quantity parameters (Eaton & Shepherd, 2001, p.22). Although the agreement does not clearly state that Prime Investment is obliged to buy the seeds, clause 5 obligates them to take delivery of the seeds produced by the farmer and the farmer also acknowledges that all seeds will be sold to Prime Investment.

The above exercise has portrayed that indeed the agreements entered into by the farmers and Prime Investment are contracts of farming. The discussion will now focus on some of the provisions of the contract in detail.

### 5.3 WHY CONTRACT FARMING?

Eaton et al, sums up the justification of contract farming as follows:

“Most of the world's plantations were established in the colonial era when land was relatively plentiful and the colonial powers had few scruples about either simply annexing it or paying landowners minimal compensation. That is, fortunately, no longer the situation. Most large tracts of suitable land

are now either traditionally owned, costly to purchase or unavailable for commercial development. Moreover, even if it were possible for companies to purchase land at an affordable price, it would rarely be possible to purchase large enough parcels of land to offer the necessary economies of scale achieved by estate agriculture. Contract farming, therefore, offers access to crop production from land that would not otherwise be available to a company, with the additional advantage that it does not have to purchase it” (2001,p.23).

In a nutshell, investment companies opt for contract farming because of a lack of available land on which they can start their projects. This was recently confirmed by a farmer in Kavango. This farmer has a nursery with 1.4 million *Jatropha* seedlings and is currently looking for investors. He too would like to enter into farming contracts and upon being asked why wants to use contract farming, the farmer replied as follows:

*“Our project will not be based on having our own fields but only planting on the fields of the farmers.”*(Field note 20)

The farmer further explained that the leasehold process is very cumbersome and strenuous more especially because of the politics between the community members, the *Hompa* and the land board and that there are some people who see a gap to make money in the process (Field Note 21). In further substantiating why contract farming is the way to go, the farmer stressed that the biggest advantage is because he does not have to employ people and by involving the communities in the project they too will benefit. The farmer summarises it as follows:

*“Contract farming is a win-win situation for both the farmer and the company”* (Ibid, Fn 21).

According to the chairperson of the land board, the Ministry of Lands and Resettlement has made it very clear that no leaseholds will be granted for *Jatropha* farming and that those companies that want to grow *Jatropha* must apply for customary land rights (Field Note 22).

The chairperson further argued that, despite the directive from the Ministry, they too were very reluctant to issue leaseholds to *Jatropha* investors. He gave an example of the company Prime Investment, which had applied for leasehold to build a residential factory at Mupapama. The factory would contain an airport, staff accommodation, and a factory to process the seed. The land required was 400 hectares (Ibid, Fn 22).

The Chairperson stated that this application was turned down due to environmental considerations; because the land is situated on the banks of the river and that the major deciding factor was also the fact that once the company fences off the land, this would limit the accessibility of people and livestock to the river (Ibid, Fn 22).

In conclusion, the chairperson summed up the situation as follows: *“The Kavango Land Board will not issue leaseholds for Jatropha”* (Ibid, Fn 22).

#### 5.4 CONSTRAINTS OF CONTRACT FARMING

Although hailed as a good initiative for agricultural production, especially for small scale commercial farmers, contract farming is not without flaws and the following is a discussion of some of the constraints that come with this mode of farming.

##### **a. Social attitudes**

In communities where custom and tradition play an important role, difficulties may arise when farming innovations are introduced. Before introducing new cropping schedules, sponsors must consider the social attitudes and the traditional farming practices of the

community and assess how a new crop could be introduced(Eaton& Shepherd, 2001,p.35). Customary beliefs and religious issues are also important factors. For example, Easter for some Christians is an inappropriate time for sowing vegetable crops. Harvesting activities should not be programmed to take place during festivals, and failure to accommodate such traditions will result in negative farmer reaction. It must also be recognized that farmers require time to adjust to new practices (Ibid).

In Kavango this did not prove to be a point of concern as the farmers indicated that they were satisfied with the types of farming innovations introduced by the investors, although some were concerned about the fertilisers and pesticides that they will be required to use as they are not familiar with them.

#### **b. Land availability and Tenure Security**

Contract farming can involve a wide diversity of land ownership and tenure arrangements. Farmers under contract must have unrestricted access to land on which to plant their crops. In the majority of projects, sponsors contract directly with farmers who either own land or have customary land rights within a communal landowning system (Eaton & Shepherd, 2001.p.46). Despite the occasionally flexible nature of customary land tenure, the dominant factor now controlling land tenure under contract farming is the rent demanded by the landowner (*Ibid*).

Farmers must have suitable land on which to cultivate their contracted crops. Problems can arise when farmers have minimal or no security of tenure as there is a danger of the sponsor's investment being wasted as a result of farmer-landlord disputes (Ibid, p.34). Tenure security



in Kavango is a huge concern. This once again stems from the issue of registration of land rights. Section 25 of the CLRA makes provision for the registration of land rights, and as stated earlier the Kavango communities are opposed to registration.

The argument is therefore the fact that, if the farmers have not registered their land rights, then their occupation of the fields is in essence illegal. If that is the case, how then can they lease out land to which they have no rights?

Some contract farming ventures are dominated by customary land usage arrangements negotiated by landless farmers with traditional landowners (Eaton & Shepherd, 2001, p.34). While such a situation allows the poorest cultivator to take part in contract farming ventures, discrete management measures need to be applied to ensure that landless farmers are not exploited by their landlords. Before entering into contracts, the sponsor must ensure that access to land is secured, at least for the term of the agreement (Eaton & Shepherd, 2001, p.34).

In *casu*, clause 5.1.10 of the agreement provides that the company is to assist the farmers in registering their land rights. This in fact is an acknowledgement on the part of the company that the farmer's access to land is not secured for as long as the land rights are not registered. In the same vein, the CLRA does not state the consequences of non-registration, however research on the subject suggests that failure to register will render occupation illegal (Namwoonde, 2008, p.66). If that is the case, then access to land is not secured, because if for argument sake, government were to expropriate the unregistered land, then the contract will also come to an end.

### **c. Dissatisfaction of farmers**

A number of situations can lead to farmer dissatisfaction. Discriminatory buying, late payments, inefficient extension services, poor agronomic advice, unreliable transportation for crops, a mid-season change in pricing or management's rudeness to farmers will all normally generate dissent (Eaton & Shepherd, 2001, p.35). Most of these situations were never experienced in Kavango. However, it must be noted that KJP has since left and without giving any explanation to the farmers or even giving them notice. This situation has left the farmers feeling very frustrated. One of the farmers had the following to say:

*"We do not know why they stopped, he (investor) use to come here and work in the fields with us, brought us simba chips every day, and then he just disappeared without telling us"*(Field Note 23).

Although the company went to the traditional authority when they first arrived, they did not do same when they decided to leave; hence even the senior traditional councillors that were interviewed did not know what happened to Prime Investment (Pty) Ltd. Upon enquiry with the land board, the chairperson contended that there are no active *Jatropha* companies at the moment and that as far as Prime Investment (Pty) Ltd is concerned, the company has sold all infrastructures. The chairperson also stated that he has tasked a sub - committee of the land board to investigate the matter (Field Note 24). This issue will be discussed in detail below under the sub-heading 'restraints and breach of contract'.

### **3.6.4 The Contractual obligations**

As stated above the contract stipulates the obligations of both parties and also lays out the relationship inter parties. The obligations are summarised above and will not be repeated here. It is however, necessary to pin out some issues of concern contained in these obligations.

#### **a. Registration of Land Rights**

Clause 5.1.10 states that KJP will assist the farmer in obtaining a registered Customary Land Right for the land on which the farmer will be growing *Jatropha*. This clause is oblivious of the fact that farmers in Kavango have refused to register their land rights and have cited the practice of shifting cultivation (*okudiruka*) as a defence thereto. Hence, the status quo *vis- a -vis* the registration of land rights in Kavango is that all the 5 traditional authorities have declined registration. It is therefore, a concern whether indeed the farmers who signed this contract would like to register or if consenting to register their land rights was a prerequisite for them to enter into this agreement? The issue of registration and its consequences thereof is discussed in detail elsewhere in this thesis.

#### **b. Relationship**

It is stated that the farmer in terms of the agreement is an independent contractor for his or her own account and that no employment relationship is constituted between the parties (Clause 10.1). The agreement further states that nothing contained in the agreement should be construed as creating a relationship of agency, employment, partnership or joint venture. Additionally, neither the farmer nor KJP shall have any authority to incur any debt, enter into any agreement, and undertake any promise or obligation on behalf of another nor to bind, or purport to bind the other in any way (Clause 10.3).

### **3.6.5 COMPENSATION**

Compensation is a crucial issue under contracts of farming. The danger of compensation under contracts of farming lies in the manner in which the different parties to the contract perceive the concept of compensation. Clause 7. 1 provides for the farmer to initially receive a minimum compensation (annual) in the amount of N\$ 1200.00 per hectare, payable in twelve months instalments (N\$200.00). The agreement does not state the purpose of compensation.

One farmer expressed the view that, the N\$ 200.00 which they received was to pay them because the Company was using their land. Basically, this farmer perceived the money as a kind of 'rental payment' (Field Note 25). If this view were to hold water, it would mean that the supply agreements are in essence 'lease agreements' where the company is leasing the land and pays a rental of 200.

Another view was that, the money was for the farmers to clear the land and if they had employed workers to do the job, then the money was to be utilised to pay such workers (Field Note 26). Another farmer contended that, the money was for them to buy fertilisers and equipment to use for growing the plants. Once again, these explanations are clouded with uncertainty, especially if one has regard to clause 5, which deals with the duties and obligations of Prime Investment. The company is supposed to provide training, supply trees, fertilisers, pesticides and equipment. Hence there is no way that the farmers could have been expected to use the money for those items.

However, in practice, several agreements between communities and investors emphasize one-off compensation for loss of land rights rather than long term benefit sharing. They usually involve very small payments compared to the value of the forest concessions acquired by the investor (Cotula et al, 2008, p.33). In addition, there are no established mechanisms to

monitor compliance with the agreement on the part of the investor. No effective sanctions exist in case of non-compliance (Ibid).

## **5.5 RESTRAINT, INDEMNITY AND BREACH**

### **a. Restraint of trade**

The sale of produce by farmers to a third party, outside the conditions of a contract, can be a major problem. Extra-contractual sales are always possible and are not easily controlled when an alternative market exists (Eaton & Shepherd , 2001, p.35). Clause 11.1 of the agreement states that the farmer irremovably undertakes in favour of Prime Investment and its successors in title, that he shall not at any time during the initial period anywhere in the prescribed areas be engaged in, directly or indirectly, or support, any business competing with the business or the project.

Further the farmer acknowledged that the restrained imposed upon him in terms of this clause are reasonable as to subject matter, area and duration and are reasonably necessary to protect the proprietary interest of Prime Investment, its successor in title in the business and its underlying assets and in respect of the entire project (clause 11.2.1).

The agreement further stipulates that the restraints in 11.2.1 and 11.1 are independent of each other and that each constitutes a separate and independent restraint severable from and independent of each other. And further that should a court of law should for any reason hold that one such restraint is defective, this will not necessarily affect the other restraints.

## **b. Indemnity**

Clause 12 of the agreement states that the farmer should indemnify Prime Investment against loss, liability, damage or expense which Prime Investment may suffer as a result of, or which may be attributable to, a breach by the farmer of his/her obligations in terms of section 6 (of the agreement).

## **c. Breach**

Given the nature of the current status of this contract, this clause is very important. Clause 13 provides that, should Prime Investment commit breach of any of the provisions of the agreement and fails to remedy such breach within thirty days after receiving written notice from the farmer requiring Prime Investment to do so, then the farmer shall be entitled, without prejudice to the farmers other rights in law, to cancel this agreement or to claim specific performance, without prejudice to the farmers right to claim damages.

On the other hand, if the farmer commits a breach of any of the provisions of this agreement and fails to remedy such breach within thirty days after receiving written notice requiring the farmer to do so, then Prime Investment shall be entitled to invoke the provisions of section 14 (Which deals with the rights of cancellation), cancel the agreement, claim specific performance and or damages.

It must be noted here that section 14 of the agreement, states that Prime Investment shall be entitled to cancel the contract summarily if the farmer defaults in respect of his/her obligation in section 6. As stated above, the breach clause is very important because the farmer has now 'disappeared' and is also not fulfilling his obligations in terms of the contract, which therefore, means that KJP has breached the contract. The rest of this section will now discuss the remedies available to the farmers.

## **Chapter 6**

# **LEGAL PROTECTION FOR COMMUNAL FARMERS IN NAMIBIA**

### **6.1 INTRODUCTION**

As noted earlier, in Kavango, the community members who have entered into farming contracts with the company were left with *Jatropha* in their fields and the company

‘disappeared’ and the farmers are left with no remedies. Hence the purpose of this chapter is to analyze whether there are any legal mechanisms that can be employed to protect the farmers from this type of exploitation.

The purpose of this section is to look at the specific clauses of the Namibian Constitution, as well as the Communal Land Reform Act and customary law, and to identify mechanisms aimed at protecting the holders of land rights on communal land. The discussion on the mechanisms under customary law will draw from the land allocation procedures discussed above. The discussion will also try and identify, whether there is a link between the different statutes that deal with administration of communal land in Namibia.

## 6.2 PROTECTION MECHANISM UNDER THE NAMIBIAN CONSTITUTION

The land tenure system in Namibia is based upon the principles enunciated in the Constitution and the subsequent legislations. The national commitment to redress the social and economic injustices inherited from the colonial past also forms part of these fundamental principles (Kaakunga & Ndalikokule, 2004, p.6).

Before the Independence Constitution came into force, land in Namibia was classified as state (crown) land, communal land, and private land. According to Amoo, this classification, by and large, has been maintained under the Constitution (2001, p .95). Article 100 and Schedule 5(1) of the Constitution maintains the status of state (crown) land; Art 16(1) affirms the fundamental right to acquire, own and dispose of all forms of immovable and movable



property and by virtue of s 11(2) (c) of the Interpretation of Laws Proclamation 38 of 1920 and Art 102(5) of the Constitution, it can be authoritatively inferred that the status of communal land has been maintained (Ibid).

However, according to Harring (2000,p.274), the failure of the Namibian constitution to adequately either define or protect communal land rights also impacts on the failure of land reform. Land reform, by definition, requires the redistribution of land from one group of people to another for some social purposes.

The author further submits that:

Since under the Namibian Constitution, the private property to be redistributed has a distinct legal form, clearly defined and a different form, undefined under the constitution; land reform has been delayed, mired in a maze of political, social and legal complexity. What kind of title follows from land reform? Indeed, as long as the government takes the position that it “owns” the communal lands, it substantially weakens the possibility of land reform within the communal lands system, as the only system that half of the Namibian population holds land rights under (Harring, 2000, p.274).

Article 16 of the Namibia Constitution states as follows:

16(1) All persons shall have the right in any part on Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it seems expedient the right to acquire property by persons who are not Namibian citizens.

16(2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with the requirements and procedures to be determined by Act of Parliament.

According to Harring (2000, p.271):

“Article 16 language “in any part of Namibia” in race-neutral language, equates the right of whites to purchase communal lands with the rights of Blacks to purchase apartheid era white farms, a political statement of judicial equality that is surely hollow”.

So what was the purpose of this so called race-neutral language? Harring (2000, p.271) stipulates that:

“The clear political statement here against tribalism and confining Black people to the former Odendaal-era “homelands” is understood, but there are implications here that undermine and confuse the legal basis of communal land rights, the only land that most Blacks have”.

The author, however, cautions that, “Weakening communal land rights carries significant economic and political rights” (Harring 2000, p.271).

Apart from divesting residents in non-freehold areas of all ownership of land, some of the provisions of the Constitution may have the unintended effect of undermining whatever tenure security people may enjoy under customary tenure arrangements. An example of this are some of the provisions contained in Article 21(1) and (2), which provide for the free movement of people throughout Namibia and the right to settle in any part of Namibia (Government Republic of Namibia, 1998).

In the same vein, Resolution 13 (made at the National Land Conference) recommended that access to communal land be provided regardless of tribal or ethnic criteria and stated, inter alia, that all Namibians have the right to live wherever they chose within the national territory (Government Republic of Namibia (1991)).

However, Article 16 is not without demerit and the author of this study concurs with Harring when he stated that:

“Even if Article 16 is one day interpreted or amended to include the protection of communal land rights, the failure of the constitution to take the same account of Black property as white property creates, for the present an imbalance, an inequity, especially when read in the context of the legacy of apartheid era land laws: Blacks could not legally buy the thousands of farms that are protected as private property under article 16 (Harring 2000, p.271).”

Although Resolution 13 also stated that in requesting access to communal land applicants should take account of the rights and customs, this was more conveniently ignored when stronger communities elbowed their way into valuable grazing areas of weaker and more marginal communities (Werner, 2000, p. 4).

As indicated above, *Jatropha* will be grown on communal land. The discussion has portrayed that the protection mechanisms entrenched in the Namibian are essentially aimed at protecting land held under freehold title and that communal land inhabitants cannot enjoy similar protection.

### 6.3 PROTECTION MECHANISMS UNDER THE COMMUNAL LAND REFORM ACT

At independence, the government of Namibia was faced with a lot of problems pertaining to land issues and had the imminent challenge of formulating and reforming land reform policies. As far as communal land is concerned, the biggest statutory reform after independence came in the form of the Communal Land Reform Act (Act 5 of 2002). In terms of the preamble of the Communal Land Reform Act, the Act is aimed to provide for the allocation of rights in respect of communal land; to establish Communal land boards; to

provide for the powers of chiefs and traditional authorities and boards in relation to communal land and to make provision for incidental matters (Preamble of Act 5 of 2002).

The Act also gives to the Communal land board's responsibilities to administer the allocation, cancellation, transfer and registration of customary land rights and leasehold rights. In the course of deciding whether a person should be granted a right or whether someone was properly granted a right in the past, the communal land board may discover some dispute, or doubt, as to whether the claim is valid. The Act also provides some powers and procedures for how to investigate a claim and how persons should approach the communal land board to handle a dispute (LAC, 2007).

The introduction of land boards was held to be advantageous in that, while land boards will tap the traditional leader's experience of customary land rights allocation, the difficulties of creating and legitimising a totally alien institution are avoided. A fundamental disadvantage of the traditional authorities, as an institution, however, is that they are patriarchal by nature and have created a male-biased land ownership system (Harring, 2000, p.174).

The Act provides for two types of land rights that may be allocated on communal land namely: customary land rights and rights of leasehold. (Section 19 (a) –(b)).The following customary land rights may be allocated in respect of communal land: a right to a farming unit, a right to a residential unit and a right to any other form of customary tenure that maybe recognized and described by the minister by notice in the Gazette for the purposes of the Act (Section 21 (a)-(c)).

#### **a. Customary land Rights**

Customary land rights are those rights that may be allocated in respect of communal land, which include *inter alia* rights for a farming unit or a residential unit that are allocated by a chief or traditional authority (Section 1 and 21 (a)(b) & (c)). Currently, these units must not exceed 20 hectares. (Section 23) .Section 24 of the Act provides for ratification of allocation of such a right by the communal land board of the specific community.

#### **b. Rights of leasehold**

Leasehold rights are for business purposes and are allocated by the communal land board (LAC, 2007, p.11). Section 30 (1) stipulates that, a right of leasehold for agricultural purposes may be granted only in respect of land which is situated within a designated area (designated by notice in government gazette. (Sec 30(2)).Currently, leasehold should not exceed 50 hectares, except with the approval of the minister and the consent of the traditional authority (LAC, 2007, p 11).

No one can question the difficult challenges that the Traditional Authorities Act and the Communal Land Reform Act face, but these Acts address difficult social questions in remote parts of Namibia. The current day-to-day operation of these laws falls far short of the needs of the different peoples in the communal areas (ibid).

In countries where legal and political frameworks are contested and difficult to implement, securing access to land for biofuel feedstock's can involve more direct, aggressive land seizures (Cotula et al, 2008, p.43). According to Falk, the Communal Land Reform Act has the potential to influence the regulation of access to communal land (2007, p.248).

In order to protect communal farmers from corrupt traditional authorities, the Act stipulates that no consideration, neither in cash nor in kind, is paid for the allocation of customary land rights (Section 42(1)). Nonetheless, as soon as customary land rights are officially registered, the Communal Land Reform Act – at least *de jure* – improves the protection of communal farmers against negative externalities arising through socio-economic change and new scarcities (Falk, 2007, p.250).

The Act also stipulates that registered customary land rights, in line with the Communal Land Reform Act, can be inherited. This overrules customary rights that require the return of the land to traditional authorities in case of the death of the right holder (see also Hinz, 2000a, p.133). The fact that under the Communal Land Reform Act traditional authorities will be controlled by land boards is often interpreted as a loss of their power (Corbett & Jones, 2000, p.4, 11; Jones & Mosimane 2000, p.10).

It is a major shortcoming of the Act that it does not explicitly recognise residents' rights to decide over the access to and use of natural resources. The reform, in its current form, shifts powers for land allocation to the regional level of government and to traditional authority rather than to local levels such as local land users (Blackie, 1999, p.12).

Land boards are the only instrument for the central government to control Communal land administration. The reform therefore, has a centralising component and the hegemonic approach continues (Rohde et al. 2000b: 343f). Customary law, which provides different

control mechanisms for traditional authorities' actions, is not mentioned as a guiding principle (Falk, 2007, p.251).

Section 22 of the Act makes provision for the application of a customary land right, in respect of communal land. Additionally, Section 24(4) (a) makes provision for the ratification of such rights by the Land Board of the respective area. Moreover, Section 25 of the same Act stipulates that, "if a board ratifies the allocation of a customary land right under section 24(4) (a), it must cause such right to be registered in the prescribed register, in the name of the person to whom it was allocated and issue to that person a certificate of registration".

Since the Communal Land Reform Act came into force, the registration process has begun in all communal land areas, but Kavango. The Kavango people have refused to register because they claim that registration is in conflict with their customary practices. It has also been observed that:

"The registration of customary land rights is in conflict with the customary practice of *okudiruka*, practiced by the Kavango people. As far as the rest of the country is concerned, it is contended that the registration process is inappropriate and ineffective in the realm of customary law in Namibia, because it introduces Western notions of ownership which assume that property rights are absolute and exclusive, whilst as Nyerere (1978) puts it, "in Africa land was always recognized as belonging to the communities" and land tenure systems are relative and shared, inclusive and not exclusive" (Namwoonde, 2008, p.74).

In the same light, Amanor et al (2008, p.11) argues that:

"From the 1950's to the 1980's, the dominant framework for land reform was one of promotion of land titling and land registration under a dominant modernization theory paradigm. It was theorized

that, titling would enable farmers to gain loans against their land, which could be used for land improvement and agricultural development. However, land titling has had limited success in Africa and has supported the expansion of elite farmers and their appropriation of land lying in the customary sector, without secure rights in formal legal institutions.”

One of the most common arguments for registration of customary land rights is that communal residents will get security of tenure and they can use their certificates of registration to access credit at financial institutions. However, according to Kaakunga & Ndalikokule (2006, p.5), the certificate is not mortgageable or transferable outside the family members. Additionally it was also stipulated that:

“Communal area cannot facilitate access to credit; this is mainly due to insecure land rights in the area. This tenure system makes it difficult for financial institutions to accept land as collateral security. Specifically, reasons which contributed to insecure land rights are: (i) the ownership of communal land is entrusted in the state on behalf of communities; (ii) the land is registered in the name of the government and not in the name of the private individuals (Kaakunga & Ndalikokule, 2006, p.5).”

In general registration runs the risk of producing a "most unwieldy system" which loses the flexibility of procedurally-based (as opposed to codified and rights-based) local systems (Lavigne Delville, 1999, p.10). Additional problems which are anticipated include the costs of the administrative systems for managing and updating registers, the possibility of information becoming obsolete, the resort to informal mechanisms for tenure security, and consequent confusion surrounding rights.

As discussed earlier, the potential benefits of managing resources through common property regimes may be possible so long as tenure is secure. Practitioners and scholars often consider tenure security as a function of the breadth of rights, the duration of those rights and whether



the rights are assured, i.e., can be exercised without disruption or threats into the future (Ibid). While breadth and duration are important features of security, some scholars suggest that the assurance of the rights or whether the rights can be exercised continuously without threat or disruption is a superseding aspect (Ostrom, 2000).

In summary, the main protection mechanism introduced by the Communal Land Reform Act is registration of land rights. The registration process is aimed at ensuring that the rights held under customary law are secure. It is however, the argument of this thesis that, for as long as the Kavango traditional authorities are not registering their land rights, they will not enjoy the realm of this protection mechanism.

Moreover, given the experience that they have had with Prime Investment, it is trite that registration is not a sufficient mechanism to protect them from this type of exploitation. It is further submitted that if, for argument sake, they had registered, would registration have protected them from entering into this malicious contracts and moreover, how would it have prevented the company from breaching the contract and leave the community members without the platform to enforce their rights?

Additionally, although the land boards are entrusted with the duty of protecting communal residents, many a times it has been observed that the land boards are left in the dark. In Kavango, for example, the company only negotiated with the Hompa and the land board was only involved after the community members had already entered into the contract. On the other hand, even if the land board was involved from the beginning, the arrangement that occurred between the Hompa, company and community members is not catered for in the Act.

The Land board only has the power to intervene when it is an allocation done in terms of the provisions of the Act; however this arrangement does not even fall within the ambit of the Act. Hence the question; does the land board have a mandate to ‘interfere’ in contracts of farming?

These question is further strengthened by the fact that, Kavango residents do not have registered land rights, hence their occupation of land was facilitated by principles of customary law (and not by those of the Communal Land Reform Act) and more so because customary land law does not make provision for external parties, such as land boards.

#### 6.4 PROTECTION MECHANISMS UNDER CUSTOMARY LAW

Customary law and practice forms the basis of group tenure and collective resource management in many parts of the world. According to a recent UNDP discussion paper, more than 90 percent of the rural population in Africa accesses land and natural resources via customary tenure systems; among this figure, there are an estimated 370 million people defined as poor (2009).

In order to understand the protection offered by customary law, it is first important to ascertain the recognition and enforceability of customary law, in other words the amount and validity of protection that customary law can afford any communal land holder against exploitation and land grabbing, is determined by the status of customary law in such a community and the respect accorded to customary law.

Empirical studies in Namibian communal areas show that an overwhelming majority of respondents support the institution of traditional authorities (Keulder 1997: 18; Hinz 2000a:85; Katjaerua 2002, p.6) (Falk, 2007, p.279).

The Namibian Constitution states that the customary law in force at the date of independence shall remain in force to the extent that it does not conflict with the Constitution itself or any other statutory provision. Article 66 of the Namibian Constitution, being the clause that imparts this recognition reads as follows:

“ (1) Both the customary law and the common law of Namibia in force on the date of independence shall remain valid to the extent to which such customary law or common law does not conflict with this constitution or any other statutory law. (2) Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods”.

At this juncture, it is important to indicate that, the protection to be afforded by customary law will first and foremost depend on the type of recognition that it enjoys, not just in the Constitution but also from governmental institutions. If customary law is to provide tangible protection, the decisions of traditional authorities, to for example, refuse to allocate land to an investors, if such refusal is in the interest of the community, should not be overturned by state institutions.

In Mozambique, for example, the land law designed to protect local communities has been manipulated by Government by unconstitutional decrees weakening communities land rights (JA & UNAC, 2009, p.7-8).

The Traditional Authorities Act defines customary law as:

The customary law, norms, rules of procedure, traditions and usages of a traditional community in so far as they do not conflict with the Namibian constitution or with any other written law applicable to Namibia (Section 1).

Evidently the definition clause in the Traditional Authorities Act echoes the sentiments of Article 66 in subjecting the validity of customary law on the proviso that it does not conflict the Constitution or any other statutory law.

These conditions for the legal protection of customary rights give government agencies wide discretion in determining whether customary systems are still functioning effectively and whether their operation is consistent with the national interest, which opens the door to abuse and limits the ability of local groups to exercise their land rights (Colchester et al., 2006).

According to Massyn (2007, p.388), recent legal reform in Namibia has taken place against the background of deeply rooted traditional land practices. Forms of tenure over land and associated resources have existed under customary law for many centuries. Customary law provides a set of legal rules, not only for the allocation and use of communal land, but also for the award of other resource rights (Ibid).

According to Bennett (1996, p.126), traditionally a ruler's most important power was land allocation. According to Hinz (1995, p.29-30), "even the power to grant a 'permission to occupy' under the 1969 Black Land Regulations Act is not exercised without the blessing of

a traditional authority". Many local resource users gain access to resources through customary rules, customary land rights are legally protected only so long as customary systems still exist and their exercise is consistent with the national interest and with legislation (Colchester et al., 2006).

According to Massyn, this implies that indigenous practices in regard to natural resources that have been formalized into traditional rules will be enforceable amongst members of a particular traditional community by its traditional authority (2007, p.388).

The author however, argues that such rules are not enforceable against people who do not belong to such a traditional community. This means that in practice, for instance, should a person from one traditional community trespass on another traditional community's traditional area such person may not be evicted in terms of that traditional community's (Massyn,2007,p.388).

In relating this point to the two case studies, it can be concluded that even if the community members entered into farming contracts with the company (Kavango) or even if land is allocated, which land falls within the jurisdiction of a specific traditional community (Caprivi), the laws of both traditional authorities cannot be enforced or implemented against the company.

Consequently, this will mean that, although conducting their affairs on communal land, *Jatropha* investors will not function under the rules and principles of the customary laws of that community. This, it will be later argued, will have a serious impact on the effect of customary law as a protection mechanism. According to Woodhouse (2000, p.15) since most

rural land is held under customary tenure, it was argued that strengthening recognition in law of local customary jurisdiction over resources would provide protection for community – based management from interference by the state or market.

Without the approval of the Hompa/chief as well as that of the community members, land cannot be allocated (see also Hinz 1995: 29; Ntsebeza 1999: 17). An important protection mechanism for biodiversity maintenance is the fact that the granting of access depends on the agreement of local residents (see also Corbett & Daniels 1996: 15) as residents know best whether their local natural resources can sustain another household and whether the new person will fit into the social and economic structure of the settlement (Falk,2008,p.247).

This can be seen as an important protection mechanism, but only to such an extent that community members are consulted and their views are taken into account. In Kavango, for example, the investors had negotiated with the Hompa, who in turn held a meeting and informed the community members about the project and prospects of their participation. It is however, not clear whether the purpose of the meeting was merely to inform the people about the project, or if it was also used as a platform to gauge their consent and opinions about the initiative.

In addition, the law identifies the importance of local community leaders in dealing with community rights, as well as, the prevention and resolution of conflicts at a local level (JA & UNAC, 2009, p.7-8). It must however, be emphasized that sometimes, investors and Government abuse the communities rights through bribes to leaders to gain community consent without community consultation (Ibid).

It is additionally contended that, when they do take place, community consultations are often not transparent and loaded with promises that are never delivered. These abuses are facilitated by weak dissemination of community rights, information and lack of translation of documents into local languages (FA UNAC, 2009, p.7-8). When abuses are uncovered, resolution is usually very difficult, especially for communities that lack the resources and information around the legal processes. These problems have made large land grabs of community land a likely reality in Mozambique's drive for *Jatropha* production (Ibid).

The case of Caprivi, where the investors merely went to the chief and got the necessary consent, seems to suggest that perhaps the focusing of power in the traditional authority, who sometimes makes decisions without consulting the people, is suggestive of the fact that, customary law's protection mechanisms can sometimes be hindered by the concentration of the absence of separation of power. This is due to the fact that, although sometimes the community members might be opposed to the idea of farming *Jatropha* in the area, due to the power possessed by the chief, the chief might nevertheless go ahead and approve the project.

Drawing from the above, it is obvious that the amount of respect yielded to the chief by his people is a decisive factor. The majority of Kavango Residents not only respect traditional authorities, but also have a very positive attitude towards them (Katjaerua, 2002,p.9) and deal with their traditional leaders on a day to day basis on issues affecting land rights and resource management, amongst others.

Section 3 of the Traditional Authorities Act makes it the duty of the traditional leaders to ascertain the customary laws of their specific community. As the research was done in the Sambyu traditional authority, it warrants a need to look into the self-stated laws of this

community and to try and identify the land allocation procedures and the protection mechanisms aimed at safeguarding communal land against exploitation by the investors.

Section 24 of the Constitution of the Kavango Traditional Authorities (2008) makes it a criminal offence for a person to settle in an area without the authorisation of the chief of that tribal area and if found guilty a fine of one head of cattle is payable. The provision also sets out the procedure to be followed before one settles in a certain tribal area. This provision is meritorious in that it brings about a degree of control as to who settles where and also puts the traditional authorities in a position to monitor the movements and activities that take place in their areas of jurisdiction.

Section 24 is a clear illustration of how customary law is being used to protect farmers against occupation by outsiders. The fact that illegal occupation (that is occupation without the authority of the chief) is punishable with a fine is illustrative of the fact that, traditional authorities are strengthening their protection mechanism. Section 34 of the same laws also places the authority over land in the chief of each specific area. The customary laws of Shambyu Traditional authority also make selling of land a punishable offence (Section 10).

Section 10 of the self-stated laws of the Shambyu traditional authority is imperative in that it prevents the selling of land by community members. The Laws, however, do not deal with the leasing out of land to investors. They do not also give account of the obligations of communal holders, e.g. what may be done or may not be done with the land and who is allowed to use communal land and for what purposes. However, it is noted that, the laws referred to are not a codification of the laws of the Kavango Traditional Authorities, as there are still some practices that are not written down, but are well know to the Kavango



communities and are practiced as such, e.g. the traditional use of land is that of subsistence farming.

However, traditional authorities in southern Africa have been challenged for failing to meet the demands of the new socio-economic order where the call for improved governance has taken centre stage. Generally, chiefs are not democratically elected and are often accused of fomenting conflicts over land through favouring clan members in the allocation of land or getting involved in illegal sale of land (Hinz, 1995, p.24-25).

The freedom to use common resources is subject to the local ruler's power to regulate access if and when this becomes necessary in the interests of the community as a whole. Customary law gives traditional authorities all the powers they need to conserve the environment, and there is ample evidence to show that they have reacted swiftly when resources were in danger of running out (Bennett, 1996, p.127). Harring, however, argues that a fundamental disadvantage of the traditional authorities, as an institution, however, is that they are patriarchal by nature and have created a male-biased land ownership system.(2000, p.174)

In the same light, Karuuombe (2003, p.8) argues that:

“Women more than men have access, but no control or ownership over the land they cultivate and the endorsement of traditional leader's historical role in customary land rights is simply a perpetuation of the status *quo* . It should also be borne in mind that the popularity and, indeed, the legitimacy of traditional leaders vary from community to community and the monetary reward from government for their positions after independence has led to an increase in conflicts and disputes.”

A central issue in tenure reform is authority over land matters and the design of appropriate institutional frameworks for land administration, i.e. 'land governance'. If land governance is

to be democratic as well as efficient, questions of accountability, transparency and participation are essential (Cousins, 2009).

From an analytical perspective, authority and power dynamics are key to understanding how tenure regimes work in practice, since 'struggles over property are as much about the scope and constitution of authority as about access to resources' (Lund 2002: 11).

Karuuombe (2003, p.8) points out some of the factors that could render customary law as weak in the protection of community members from outsiders. Additionally, the disparity in the participation between men and women is not the only factor, but in some instances, the issue of power asymmetries plays a crucial role in weakening the customary law structures aimed at protection of communal residents.

In most of the cases, when resources from the commons are captured by external investors, local residents are not enjoying any benefits. There is often a power imbalance between communities and outside investors, which makes it more challenging - though not impossible - for community groups to establish grounds for negotiating shared rights to the commons (2009).

Woodhouse (2002,p.20) states that 'community-based' models of natural resource management fail to take account of conflicting interests within communities and similarly mistakenly assume a welfare function can be ascribed to 'customary' rights to land.

Hence the issue of power asymmetries is an important concept as far as *Jatropha* production is concerned because of the different stakeholders who are involved in the allocation of land,

e.g. land board, chiefs, traditional community, ministry officials, and *Jatropha* companies. It is feared that, while some community members may be opposed to *Jatropha* companies coming into their area, local elites such as chiefs may strike a deal with government and the private sector to the detriment of the community. The reverse is also true. The concept of power asymmetries under the customary realm is crucial, especially because of the sacred light in which traditional leaders are seen by their subjects.

There is often the fear that customary law conceals ethnic tensions and tribalism because it refers to a specific ethnic group (Mamdani, 1996: 184). Any group has incentives to keep outsiders off the land because they may disregard basic social values and reciprocal obligations of the group (see also Claassens, 2000: 135)

Woodhouse (2002, p.16) argues that the flexibility (or ‘negotiability’) of access to land through kinship under customary law offers the possibility of re-allocation of land to poorer community members on the basis of need. One of the basic assumptions of these arguments, that customary tenure is characterised by allocation on the basis of kinship or membership of a community (and thus, implicitly, a refuge from market forces) has come under increasing scrutiny and challenge (Woodhouse et al, 2000).

The Traditional Authorities Act limits the powers of traditional leaders to the members of their traditional community and those who submit themselves to customary law (RoN 2000b:248 sec. 14 (b)). This limitation operates as an incentive for them not to allocate land to members of other ethnic groups even if this may contradict the basic principles of the Namibian Constitution (RoN 1990: sec. 10, 21(1) (h))

Lund (2002) argues that customary tenure is neither egalitarian nor in any way inimical to privatisation and sale of land. The perception of customary rights being 'inalienable' is attributed to their (re)constitution under colonial administration, which resulted from a convergence of two sets of interests. Upon incorporation as the base of colonial administration, the customary authorities or 'chiefs' were able to overstate their land allocation authority, a tendency that suited the colonial authorities as it strengthened administrative control over the rural population.

The author further states that, there is widespread evidence of land markets operating informally, and in some contexts illegally, under customary tenure regimes. (Lund,2000).The flexibility of customary law has also been criticised on the ground that, due to less formalities and rules to be observed, communal farmers can easily enter into formal rental or sharecropping agreements with 'strangers' as a means of formalising their individual rights over the land and deflecting claims based on kinship (Francis, 1984;Woodhouse et al. 2002, Southgate and Hulme, 2000) or they may enter into formal sharecropping arrangements with other members of their own family (Amanor, 2001).

Having identified the weakness of customary law as a system applied on communal land, it is now the right time to give proposals on how this system can be improved to help ensure protection of communal land holders.

Woodhouse (2002, p.17-18) argues that issues of transparency and accountability are key in implementing these proposals; however, from the point of view of poorer land users, there are two key issues that need to be addressed.

First is that of representation, which, in addition to customary authority and locally elected officials, must be broadened to include representatives of resource users with only subordinate rights under customary tenure, such as women, immigrants, and pastoralists and other users of 'common property' (Woodhouse,2000,p.18-19). Second, is the question of the political context within which 'land boards' will operate: "(T) heir impact in practice also depends on the policies which they are required to implement" (Quan, 2000, p.205).

Some authors question the relevance of customary law in modern southern African societies because they see it as a static concept which reflects pre-colonial traditions (see e.g. Mamdani 1996; Ntsebeza 1999: 65). What is commonly meant with the vaguely defined and misleading term 'traditional' is, however, not a static, inflexible and outdated system of customs and traditions, which was practiced prior to colonisation (Hinz 2004: 2).

Customary laws have to be understood rather as the currently practiced informal institutional frameworks of different communities which govern day-to-day activities (Hinz 2000: 14)

The authors conclude that the resulting vacuum has allowed influential people with substantial non-farming incomes to acquire and privatize large areas of commonage, and to over-exploit grazing in commonages shared with permanent residents, who depend largely on stock farming for their livelihoods. Large areas of communal land thus suffer from the 'tragedy of the commons' where the rich get richer, the poor become poorer, and environmental degradation intensifies (Cotula, Dyer and Vermuelen, 2008).

The issue of protection under customary and statutory law can be summarised as follows:

Is there a way, then, to secure and rights within communal tenure systems without replicating problematic versions of 'custom', and in a manner that promotes democratic decision-making? Can policy both secure rights on the ground, and also allow rights holders to adapt or alter their tenure system through deliberate choices over time in response to changing circumstances). These require that the law be brought in line with *de facto* realities, but that these realities also be transformed to bring them in line with constitutional principles of democracy and equality, and thus to include freedom of choice in relation to both land rights and the institutions that will administer those rights (Cousins, 2009, p.16)

Moreover, Namibia lacks a clearly defined national land policy to provide some coherence between different land-related laws, as well as some procedural constraints for access and management of collective resources.

## **CHAPTER 7**

### **FINDINGS AND CONCLUSIONS**

#### **7.1 Findings**

- Kavango and Caprivi have large tracts of marginalised land, however, some of the land although marginalised on the face of it, is actually still been used by the community members and the rights to such pieces of land are known.

- *Jatropha* impacts on land use because in Kavango, for instance, most farmers that were engaged in *Jatropha* farming had to allocate half of their land to *Jatropha* and use the other half for Mahangu and maize.
- Similarly, *Jatropha* will also impact on some existing communal conservancies, because some of the land earmarked for *Jatropha* farming is located on communal conservancies.
- Customary land tenure system is practised on communal land and traditional authorities are entrusted with land allocation and natural resource management. This is confirmed by the role that traditional authorities in both Caprivi and Kavango played in the introduction of *Jatropha* in their communities.
- The introduction of *Jatropha* also impacts on the sharing of common resources, such as grazing pastures.
- The introduction of *Jatropha* on communal land is leading to the privatisation of communal land and contracts of farming are a result of the abuse of the flexibility of the customary land tenure system.
- The socio-economic benefits of *Jatropha* are only in theory, as there is no practical evidence to support this. Those farmers in Kavango, who had started growing *Jatropha*, have had huge economic blows, as they had invested a lot of money in clearing land and maintain the tress, but have not received any income from *Jatropha*.

Biofuels are not necessarily bad news for communal land users. Indeed, biofuels could be instrumental in bringing an agricultural renaissance that revitalises land use and livelihoods in rural areas. Subsidies being paid to communal farmers could increase both yields and

incomes, securing real, long-term poverty reduction in countries that have a high dependence on agricultural commodities.

Additionally, large-scale biofuels cultivation could also provide benefits in the form of employment and skills development. However, these possibilities depend on security of land tenure. Where competing resource claims exist among local resource users, governments and incoming biofuel producers, and where appropriate conditions are not in place, the rapid spread of commercial biofuel production may result in poorer groups losing access to the land on which they depend.

It is evident that the introduction of *Jatropha* on communal land has an impact on the availability of land and on land use. Some of the land targeted for *Jatropha* is already gazetted either as conservancies, community forests or small scale commercial farms. It has been established that there is uncertainty regarding the legal status of small scale commercial farms. Changes in land use will be felt were farmers will have to start practising inter-cropping, in order to accommodate *Jatropha*.

As far as land tenure is concerned, the customary tenure system is appreciated and well practised on communal land and research has shown that the introduction of externalities, such as *Jatropha*, into this tenure system will negatively affect it, as traditionally this form of tenure is subsistence farming.

Land allocation procedures under the CLRA Act do not adequately ensure that land is equitably distributed for *Jatropha* farming; this is because the only way that investors can get land via the Act is by applying for leaseholds and it seems as if both the Kavango and Caprivi land boards are hesitant to grant leaseholds for *Jatropha*. Land allocation for *Jatropha* has



taken place under customary law, although the research could not establish to what extent, it is feared that it could interfere with subsistence farming.

The interpretation adopted for Article 16 suggests that communal residents' rights are not protected by Article 16 of the Namibian Constitution. The Communal Land Reform Act only recognises leaseholds and customary land rights as forms of rights that can be held on communal land. The Act has introduced section 25- registration of land rights – as a protection mechanism.

In Caprivi, the registration of customary land rights is not at issue and perhaps the residents in that area can seek refuge under the provisions of the Act, because their rights are recognised, provided of course that they register. In Kavango, on the other hand, the community members do not accept the registration of land rights. This in essence means that although they hold land under the customary tenure system, they can not enjoy the protection of the provisions of the Act.

Additionally, customary law emerged as the best form of protection for the farmers. However, the Kavango experience demonstrates that, although customary law can protect communal residents from exploitation by other residents, it is not so effective when external parties, such as *Jatropha* companies, come into the picture.

Additionally, it seems as if the uncertainty surrounding the relationship between *Jatropha* and food security is a major cause of concern and it has been suggested that, given the trend in evidence emerging internationally and demonstrating the failures of *Jatropha* to meet expected outcomes, and in fact endangering food sovereignty and rural livelihoods, it is recommended that support for *Jatropha* development in (Namibia) be halted until some of

the major development issues surrounding subsistence farming are addressed and rural communities obtain food

sovereignty.

The study dealt with a number of issues pertaining to *Jatropha* in Caprivi and Kavango. Having analyzed these issues and paying attention to experiences in other countries, the major recommendation of this study, is the drafting of a *National Policy for Biofuels*.

As *Jatropha* is identified as the biofuels most suitable for Namibia, the policy should focus on its promotion, but should not exclude other forms of biofuels. In using the Mozambican policy as a model, it is recommended that the policy encourage international cooperation in re biofuels, strengthen the implementation of mechanisms and instruments of the Kyoto Protocol, inter alia, the Clean Development Mechanism and Carbon Credits, prepare criteria for sustainability of biofuels and develop an operational manual for the purchase of biofuels. The policy should also provide for the method of price fixation as well as the creation of a biofuels commission.

The seemingly uphill challenge of developing and implementing laws and policies that support common property reflects, at least in part, the need to increase the visibility and voice of rural peoples who depend on the commons for their livelihoods. So long as communities that manage resources as common property are left out of decision-making, their rights to these resources will be at risk, and the tenure systems through which they manage resources will be threatened. Increasing not just participation in, but also leverage over the processes and institutions that determine land tenure and natural resource management policies should be an important element of efforts to strengthen common property regimes.

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## **FIELD NOTES**

Field Note 1

29 June 2009: Meeting with Senior Traditional Councillors (T Hausiku; Harupe Paulus Haindira & Tame Laurencius)-Shambyu Traditional Authority, Kayengona.

- Field Note 2 09 July 2009: Farm Supervisor-Katima Farm, Katima Mulilo.
- Field Note 3 07 July 2009: Mr Elvis Simba-CBNRM Warden, Ministry of Environment and Tourism, Katima Mulilo.
- Field Note 4 08 July 2009: Meeting with Ngambela and Induna's-Mafwe Traditional Authority Khuta, Linyanti, Caprivi.
- Field Note 5 07 July 2009: Mr Elvis Simba-CBNRM Warden, Ministry of Environment and Tourism, Katima Mulilo.
- Field Note 6 08 July 2009: Mr Matamba- Chairperson Caprivi Land Board, Linyanti.
- Field Note 7 01 July 2009: Mr Spairon-Shankara Nursery- Kavango.
- Field Note 8 07 July 2009: Mr Cedric-CBNRM, Ministry of Environment and Tourism, Katima Mulilo.
- Field Note 9 29 July 2009: Group discussion with 3 Jatropha growers in Okambowo Village, Kavango.
- Field Note 10 29 July 2009: Group discussion with 3 Jatropha growers in Okambowo Village, Kavango.
- Field Note 11 29 July 2009: Group discussion with 3 Jatropha growers in Okambowo Village, Kavango.
- Field Note 12 30 June 2009: Mr Kanyinga-Chairperson Kavango Land Board, Rundu.

- Field Note 13 03 July 2009: Hompa Alfons Kaundu, Kapako.
- Field Note 14 06 July 2009: Ngambela Innocent Simasiku-Masubia  
Traditional Authority, Bukalo Khuta, Caprivi.
- Field Note 15 30 July 2009: Ms Theresia Murunga, Okambowo  
Village, Kavango.
- Field Note 16 01 July 2009: Mr Tame Laurencius-Mashare Chief and  
Senior Traditional Councillor, Mashare, Kavango.
- Field Note 17 01 July 2009: Mr Mathews Wakundumo, Shambyu,  
Kavango.
- Field Note 18 01 July 2009: Mr Spairon-Shankara Nursery- Kavango.
- Field Note 19 10 October 2009: Mrs Mariena Coetzee- Chief  
Agricultural Research Analytical Officer from the  
Ministry of Agriculture, Water and Forestry, Windhoek.
- Field Note 20-24 01 July 2009: Mr Spairon-Shankara Nursery- Kavango.

