

The Law is Not Enough: Illegal Fencing Crisis at the Nǀa Jaqna Conservancy

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The post-apartheid legacy of the inequality and racial discrimination in Namibia has many manifestations, but the land reforms that systematically disempowered the San indigenous groups, diminishing their ownership and capacity, are among the most evident reminders. With a history marked by romanticized notions of isolation, exploitation by their neighbours, and widespread societal discrimination, the !Kung San of the Nǀa Jaqna Conservancy are familiar with human rights abuses that occur within their colonial-defined borders. In particular, the Nǀa Jaqna Conservancy has been struggling with an illegal fencing crisis since gazetted in 2003. As a historical issue, this reality is rooted in past injustices from colonial era land loss, and the problem has worsened since 2012 with the ongoing national drought and the region's deficient institutional frameworks.

Namibia is home to roughly 33 000-36 000 San who comprise less than 2% of the national population. The San, commonly referred to as 'Bushmen,' are the earliest inhabitants of Namibia, occupying the area for at least 2 000 years (Anaya, 2013). As an indigenous group, they are disadvantaged vis-à-vis other ethnic groups in the country, in almost every socio-economic indicator; landlessness, a lack of education, social stigmatization, extreme poverty and dependency combine to prevent the San from breaking out of the self-perpetuating cycle of marginalization in which they are trapped (Suzman, 2001). In the early era of colonial expansion, classification of land through juridically constructed land rights became widespread in Namibia, where protection treaties and rights of conquest were the most prominent tools of land appropriation and estrangement (Chigara, 2012). Under German control, property rights were implemented in a systematic manner by legislation, resulting in the categorization of land that can be deemed the genesis of the imbalances in land distribution and ownership in present-day

Namibia. Colonial powers used the settler-native dichotomy as a basis for dividing land, declaring indigenous territory as Crown land, and then as tribal and trust land or communal land. With each successive declaration, ownership of the demarcated land vested in the state, whilst part of the land was reserved for occupation and use by indigenous peoples, affirming the rights of usufruct (Chigara, 2012).

At independence in 1990, the promulgation of the Namibian Independence Constitution rendered customary law as one of the two sources of law in Namibia. However, Article 66(1) of the Constitution recognizes the application of customary law as valid only to the extent that it does not conflict with the Constitution or to any other statutory law (Constitution 66(1), 1990). Furthermore, customary law and its content are never defined in policy or legislation, especially related to illegal fencing. Though the *Traditional Authorities Act* (TAA) (Act No. 25 of 2000) provides a formal legal definition of customary law, it is without meaning: “‘customary law’ means the customary law, norms, rules of procedure, traditions and usages of traditional community...” (TAA s1, 2000). This definition constitutes a pleonasm, and says nothing of what customary law is in practice (Werner, 2011). Further problematic is the definition of a traditional community according to the TAA: a traditional community is “an indigenous homogenous, endogamous social grouping of persons,” (TAA s1, 2000) wherein all Namibian traditional communities are indigenous, providing no specific provisions to protect the distinct rights of indigenous peoples (Vermeylan, 2009).

The *Communal Land Reform Act* (CLRA) (Act No. 5 of 2002) addresses all issues of administration and titles to communal land within indigenous territory (Chigara, 2012). Specifically, the CLRA provides for the establishment of Communal Land Boards. These land boards exercise control over the allocation of customary land rights by chiefs or Traditional

Authorities, and they administer the system of granting and cancelling of these rights to applicants, upon consultation with the traditional authorities. The land boards are comprised of representatives of the traditional authorities, farmers, women, and conservancies in their area of jurisdiction (Odendaal, 2011). Yet this system is not without flaws, even in areas where San are granted customary land rights to their communal land they are frequently dispossessed of those lands because the state does not provide them with adequate protection, as is the case at the Nǀa Jaqna Conservancy.

Nǀa Jaqna Conservancy is home to over 2 650 community members of two traditional San indigenous groups, the !Xun and the !Kung; the latter of whom make up the majority (UNDP 2012). San make a living from a range of economic activities including hunting game; gathering firewood, fruits, and Devils Claw (*Harpogophytum procumbens*, a herb used for medicinal purposes); craft-making; crop and livestock farming; and occasionally wage labour for communal or commercial farmers, state institutions or tourism projects (Hohmann, 2003). Nǀa Jaqna conservancy is situated in Tsumkwe West, in the Otjozondjupa region of northeastern Namibia. Tsumkwe district, formerly known as Bushmanland during the apartheid era, was developed as a resettlement scheme between 1959 and 1961 by the SWAA (South West African Administration) in attempt to transform San into wage labourers (Suzman, 2001). This project failed miserably; unemployment and alcohol abuse was widespread, and health levels worsened quickly. In 1978, the South African Defense Force (SADF) sought to militarize Bushmanland and, in doing so, relocated approximately 1 000 !Xun San to Tsumkwe West, many of whom continue to call Tsumkwe West their home. In 1990, the San in Tsumkwe West were not prepared for independence; a heterogeneous group, they were divided along socio-linguistic lines and had no state or non-governmental support (Suzman, 2001). Owing to the San's lack of land

rights, fear of lack of ownership, and history of oppression, community leaders in Tsumkwe West expressed interested in establishing a conservancy in January 1998 (Suzman, 2001 and Hohmann, 2003). Two local NGOs helped the community members apply for conservancy status, WIMSA (Working Group of Indigenous Minorities in Southern Africa) and CASS (the Namibian Centre for Applied Social Sciences) (Hohmann, 2003).

The Nǀa Jaqna Conservancy encompasses an area of approximately 9,120km² and was gazetted in December of 2003 under the Ministry of Environment and Tourism's (MET) Community-based Natural Resource Management (CBNRM) Programme (UNDP, 2012). To the East, it borders the Nyae Nyae Conservancy, home to the Ju/'hoansi San who are culturally and linguistically related to the !Kung San from Nǀa Jaqna Conservancy (Hohmann, 2003). Apart from the San inhabitants, there are an increasing number of outsiders arriving in the district, namely pastoralists of Kavango and Herero origin, who are looking for land upon which their cattle can graze (Pakleppa, 2004).

Since 2003, the !Kung San in the Nǀa Jaqna Conservancy have been subject to an illegal fencing crisis on their communal land; a problem that has escalated in the past twelve months. Under the CLRA, communal land is part of the commonage, which is a "portion of the communal area of a traditional community which is traditionally used for the common grazing of stock," (CLRA s1, 2002). Section 18 outlines that "no fence of any nature...may be erected by any person on any portion of land situated within a communal land area," (CLRA s18, 2002). The illegal land invasions are perpetrated by hundreds of farmers coming from other areas, namely from the Oshikoto, Ohangwena, Oshana, Otjuzondjupa and Khomas regions. Some farmers in the greater Kano Vlei area set up boreholes for their livestock, while others have fenced areas as vast as 20 square kilometers. Nearly the entire communal area of Tsumkwe West

is covered with illegal fences, particularly in core wildlife zones and mixed farming zones, minimizing the mobility of trophy hunters and creating a challenging environment for conservancy members to practice livelihood activities. While “all communal land areas vest in the state,” (CLRA, 2000 s17) the Otjozondjupa Communal Land Board (OCLB) has the legal authority to remove illegal cattle farmers and their fences from San communal lands allocated under customary law. Yet the lackluster operations of the OCLB make it easy for illegal farmers to take advantage of the system; for example, farmers are known to deliberately defy police orders to vacate the area knowing that the slow administrative process affords them just enough time for their cattle to survive before they can return home (Tjihenuna, 12 Aug 2013). The failure of state enforcement on the issue since 2003 can be correctly seen as a continuation of the legacy of disrespect and discrimination afforded to the !Kung San (Pakleppa, 2004).



Outsiders with illegal fences driving into Tsumkwe West. Photograph by Kirsten Marsh, July 2013.

In 2012, under the direction of the Legal Assistance Centre (LAC), an official complaint was made to the Otjozondjupa Communal Land Board (OCLB) requesting that it exercised its

statutory powers to remove the illegal fences. Sara Sungu, member of the Nꞛa Jaqna Conservancy Management Committee and Senior Councilor of the !Kung Traditional Authority, affirmed that “authorities move at a snails’ pace,” (Tjihenuna, 4 Jun 2013) and it took months of persistence by the LAC before eight fences were investigated in early 2013 and found to be illegal (Press Release, 2013). These findings merely scratched the surface of the problem. In the following weeks, the Ministry of Lands and Resettlement finally intervened in the matter. Otjozondjupa Regional Deputy Director at the Ministry, Ndiyakupi Nghituwamata, told Nampa Press Agency that her technical team of nine employees had completed mapping of the Omatako and Janju communal areas in the Tsumkwe West District. They discovered 33 000 hectares of communal land that had been fenced-off. More communal areas in the surrounding area such as Boebie Pos, Kano Vlei and Mangetti Dune included an additional 75 illegal fences, 26 000 hectares of illegally fenced-off land, that was discovered in a successive mapping project at the end of August 2013 (Nampa, 5 Sept 2013).



Illegal fencing near Omatako Valley in Tsumkwe West. Photograph by Kirsten Marsh, July 2013.

With these overwhelming findings and considerably slow administrative responses by the OCLB, the LAC applied for eviction against thirty-six illegal farmers on behalf of the !Kung community of the Nǀa Jaqna Conservancy (Tjihenuna, 12 Aug 2013). On Friday, August 9 2013, the High Court of Namibia gave permission to the local Namibian Police Force to serve court documents on the group of farmers accused of illegally occupying communal land in the District (Tjihenuna, 12 Aug 2013). Documents were served to the farmers from September 9-20 2013, and the civil procedure began, with the respondents filing their opposing affidavits. Given the enormity of the task of dealing with thirty-six respondents, the LAC agreed to relax the procedural time requirements for filing the necessary documentation. In many cases, the LAC was able to settle on the basis that the respondents agreed to voluntarily remove their fences and apply for registration of customary land rights in accordance with the CLRA. To date, the majority of the respondents have removed their fences and, accordingly, the LAC has not taken the matter any further, for now.

The reasons why such large numbers of outsiders have moved into the Tsumkwe West District with such ease are not entirely clear. Some speculate that the intruding farmers are bribing the !Kung Traditional Authorities to obtain land illegally, while others argue that self-proclaimed acting chief in Omatako is selling sections of land to non-community members without the authority to do so (Odendaal, 6 Aug 2013 and Press Release, 2013). Section 20 of the CLRA states that “the primary power to allocate 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,” (CLRA s20, 2002). Though the *Traditional Authorities Act* (TAA) (Act No. 25 of 2000) states that the chief of the Traditional Authority is elected or appointed by the community, it is not clear to whom they should be accountable first and foremost (Pakleppa,

2004 and TAA, 2000 s4-6). Since the passing of late chief John Arnold, the !Kung Traditional Authority has lacked a clear leader, and a democratic election has yet to be organized. Sara Sungu fears that without assistance in organizing a democratic election, the illegal fencing problem in Tsumkwe West will only escalate to intolerable levels (Tjihenuna, 4 Jun 2013).

Other possibilities for the crisis are that land in other regions land is becoming scarcer as rich elite fence off more of these areas and the on-going national drought drives cattle farmers to desperately search for grazing land. This may not be a short-term development, as the intruding farmers have entered with both their families and cattle, intending to settle “not just [during] the drought but... permanently,” says Police Commissioner Josef Anghuwo (Graig, 5 June 2013). Following a prolonged dry period between November 2012 and June 2013, crop development has been severely impacted in Northern parts of the country (FAO, April 2013). Veld fires have continued to destroy huge tracts of communal land since July 2013 and on May 17, 2013 the Namibian President, Hifikepunye Pohamba, declared a state of emergency in the country because of the national drought (Nampa, 22 Aug 2013). Since its inception, over 300 000 people have been classified as food insecure and over 4 000 livestock have died from the drought (New Era, 20 May 2013). Grazing in communal areas is already overcrowded and depleted with the presence of illegal farmers; the on-going drought only exacerbates the problem.

Meanwhile, the Ministry of Agriculture, Water and Forestry, the Ministry of Lands and Resettlement and the Ministry of Regional and Local Government, Housing and Rural Development have restricted livestock movement into Tsumkwe West until further notice. The livestock movement problem is escalating alongside the illegal fencing crisis in Tsumkwe West. Though the government is mindful of the national drought, continued animal movement encourages illegal fencing of communal land by outsiders (Tjihenuna, 12 Aug 2013).

The illegal fencing invasions at the Nꞛa Jaqna Conservancy escalated just after the visit from the United Nations Special Rapporteur on Indigenous Issues on September 20-28, 2012. During his visit he assessed the situation of human rights among Namibia's indigenous communities. In his report, published in April 2013, he raises concerns about the Namibian government's inability to address the land invasion of the San. In particular, he argues that the communal land system, governed by the CLRA, continues to be problematic, as "the tenure afforded to the occupants of communal lands is one of mere usufruct and not full ownership, in contrast to the freehold titles by which private commercial farms typically are held," (Anaya s24, 2013). The CLRA was anticipated to provide a sound basis for protection of San rights in relation to their communal land by consolidating unwritten customary law into statutory law based on constitutional principles and improving overall communal land management (Odendaal, 2011). In reality, the legislation has proved ineffective for the San in their fight for rights recognition on land issues (Odendaal, 6 Aug 2013). While the San enjoy equal constitutional rights under Namibian law, they continue to be dominated by stronger groups and their human rights, are repeatedly abused (Pakleppa, 2004).

The CLRA includes some strategies to challenge illegal fencing on communal land. Section 44 outlines that should any fences be erected after the promulgation of the Act, the person responsible is punishable by "a fine not exceeding N\$4000 or to imprisonment for a period not exceeding one year or to both," (CLRA, 2002 s44(1)). Section 44 (2) creates further sanctions for a continued offence after conviction of "a fine not exceeding N\$50 for every day on which the offence is continued," (CLRA, 2002 s44(2)). Though legally sound, these strategies are rarely reached, in practice.

The !Kung Traditional Authority and the Otjozondjupa Communal Land Board lack coordination, administering capacity, and leadership skills, creating an environment in which land encroachment occurs in an anarchist form (Odendaal, 6 Aug 2013). Traditional leaders have lost control over the administration of their communal land, and their power has diminished over a long period of time that people, now, no longer seek their guidance and rather seek direction from external actors such as the LAC. Nǃa Jaqna Conservancy has a long history of poor management, fragile leadership, and disparate populations. For many San, including several of Nǃa Jaqna Conservancy, there is little understanding the separation of the legal and executive powers of the state. Perceptions are that the law and state are often one of the same, creating an assumption that any action against the state is unlawful. A human rights culture where law enforcement officials are challenged from a position of confident knowledge of one's rights is still very much in its infancy among the San. What is more, it is not taken as fact by the San that they are equal before the law or that they have human rights enshrined in the Constitution. The overwhelming force of memory and experience has created a very negative image and expectation of authority; authorities are seen to have superior power that should not be challenged (Pakleppa, 2004).

The ongoing issues of exploitation of indigenous land and resources are not recent developments in Namibia. The illegal fencing crisis facing the Nǃa Jaqna Conservancy has emerged out of a context of national land reform processes that have undermined indigenous perceptions of power, authority, and ownership. Although legal frameworks that protect indigenous interests exist, such as the *Communal Land Reform Act* (Act No. 5 of 2002) and the *Traditional Authorities Act* (Act No. 25 of 2000), institutional weaknesses render them insufficient. The current system is easily manipulated and top-down processes remain the norm.

In a fragmented conservancy with a weak understanding of human rights and state processes, an environment of human rights abuses festers and political action by indigenous peoples is infrequent. Though the overwhelming history of colonial-era land loss and oppression cannot be forgotten, the possibility of strengthening indigenous peoples' capacity exists through grassroots human rights education, building of advocacy networks and legal support through external actors such as the LAC; actors and stakeholders at all levels must work together to ensure the protection of the fundamental rights and freedoms of the vulnerable San communities in northern Namibia.

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