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The Seditious State: How to shake the poor from the communal-land safety net

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> ***Sedition*** *is overt conduct, such as speech and organisation, that tends toward rebellion against the established order. Sedition often includes subversion of a constitution and incitement of discontent toward, or rebellion against, established authority.*

Land reform has remained a source of deep-rooted anxiety throughout Namibian society for a long time, and certainly it is for the various well-documented, sometimes complex competing reasons, passions and other interests that continually re-emerge in the literature and law as "land reform" takes place under the not-so-always-watchful eye of the constitutional rule of law,[1] where transitional justice[2] struggles in an uneven playing field pitted with the scars of a repeating history replete with elitist interests often dominating the playing rules in the age-old game of power and patronage, where the fractured state is a vehicle for personal interests.

Given this scenario, it is surprising that the current reality for marginalised, sometimes indigenous and splintered groups such as the !Kung San of Tsumkwe West, when looking back at the common struggle for national identity in the struggle for emancipation from immoral and ruthless foreign state domination, is one of disempowerment and subjugation. This national concern for equality and dignity[3] is seemingly lost in the discourse on indigeneity, where ethnic concerns sometimes obscure the causes which keep certain segments of society prisoners and dependants of the State in a cycle of poverty, disempowered and politically marginalised. This is the lot of the members of the N‡a Jaqna Communal Conservancy and Community Forest, who helplessly bear witness as other, more affluent, members of Namibian society reap the benefits of their lawfully acquired resource and land rights given to the !Kung local community by the State in terms of the laws of Namibia. As such, environmental destruction, landlessness and loss of livelihoods and distrust in human rights-based outcomes in a rights-based constitutional state[4] remains the common experience of the members of N‡a Jaqna.

1 In a constitutional environment where the vaunted inalienable, universally accepted fundamental human rights are enshrined (in Chapter 3), and are effectively maintained and protected in a properly democratic society, where the people are entitled to freely elect their own representatives, operating under a supreme Constitution that also establishes the liberal State with a free and independent Judiciary.

2 "What Is Transitional Justice?: A Backgrounder", 20 February 2008, at https://www.un.org/peacebuilding/sites/www.un.org.peacebuilding/files/documents/26_02_2008_background_note.pdf.

3 Article 10 of the Namibian Constitution.

4 "Whereas these rights have for so long been denied to the people of Namibia by colonialism, racism and apartheid; …" – "Preamble", *Constitution of the Republic of Namibia*, Government of the Republic of Namibia, Windhoek, 1990.

To see the essence of the Namibian people's struggle as a whole[5] for the emancipation of human dignity[6] encapsulated in the spirit and purport of the Constitution of Namibia[7] is no surprise. Now, after more than three decades of legal discourse, it is also time to question the morality[8] of the modern independent Republic of Namibia, with reference to its own institutional moral conduct against its marginalised people in light of the constitutional dispensation that, on paper at least, signified the end of inequality and restoration of human dignity.[9]

The main focus and trend of the ongoing debates and policies around land reform and transitional justice in Namibia thus far have largely concerned[10] themselves with the terms, capacities and mechanisms[11] to address the inequitable distribution of privately owned or commercial agricultural land, which remains mostly in the hands of White owners,[12] against the clear and unambiguous demands for the restoration of land rights to the descendants of the pre-colonial occupiers of that land.[13] As such, communal land rights[14] complexities have been somewhat understated in the general discourse[15] of land reform, perhaps in part because the northern regions' land tenure rights and customary law administrative structures were left relatively intact by colonial impacts, despite the plethora of land administration laws[16] aimed at the Black populations of Namibia in comparison with the almost complete dispossession of the actual tribal land itself in the central and southern regions of Namibia, where under colonial rule the concomitant destruction of the very predecessor societies that occupied them in terms their own customs and laws was experienced.

The lingering grief occasioned by actual dispossession of land and destruction of cultural societies is an experience felt more intensely by the various peoples[17] from the central and

5 The need for a holistic approach to human rights was acknowledged in Agenda Item 10 of the 1993 United Nations World Conference on Human Rights: "Agenda Item 10: Consideration of the relationship between development, democracy, and the universal enjoyment of all human rights, keeping in view the inter-relationship and indivisibility of economic, social, cultural and political rights."

6 See Article 8 of the Namibian Constitution.

7 The Constitution is framed and premised upon the internationally negotiated Geneva Principles concerning the Constituent Assembly and the Constitution of an Independent Namibia of 12 July 1982. The Constitution contains a permanently entrenched Bill of Rights (i.e. Chapter 3) which is wholly compatible with the International Covenant on Civil and Political Rights (ICCPR).

8 See Léon Duguit, "The Law and the State", *Harvard Law Review*, Vol. 31, No. 1 (November 1917), pp. 1-185. "The moral law considers man in the fulness of his being, both with respect to his mental states and his outward conduct. The jural principle (*la regle de droit*) looks only to the outward manifestations of the human will. It applies only to wills entering into relation with other wills."

9 The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all.

10 Much concern has also been given to various urban tenure regimes.

11 See *Günther Kessl v Ministry of Lands and Resettlement and 2 others*, Case No 27/2006 and 266/2006.

12 Henning Melber, "Colonialism, Land, Ethnicity, and Class: Namibia after the Second National Land Conference", *Africa Spectrum*, Vol. 54, No. 1 (April 2019).

13 See, inter alia, "Resolutions of the Second National Land Conference, 1st-5th October 2018", at https://cms.my.na/assets/documents/p1cq5q2c0a1mvjo921i9113mmeo54.pdf (accessed 12 January 2021).

14 See *Agnes Kahimbi Kashela v Katima Mulilo Town Council & Others* NASC 2018: "The state, as owner of [communal] land, in the context of Schedule 5, has social 'obligations' which a private owner does not have. It has to use that land for the public good … . I do not see what public good is served by a construction of Schedule 5 which has the effect of perpetuating injustices of the past which the Constitution has removed."

15 See also the reference to the First National Land Conference in Melber cited in footnote 12.

16 See *Kashela* above and also *Rehoboth Bastergemeente v Government of the Republic of Namibia and Others (SA 5/95).*

17 These would also include the Herero, Nama and Damara, various San groups (e.g. the Hai||om), the Owambo, Kavango and Silozi, and other groups.

southern regions of Namibia.[18] The local community that constitutes the members of the N‡a Jaqna Communal Conservancy and Community Forest in Tsumkwe West is facing similar issues of land dispossession under a disinterested, morally deficient post-colonial State. After 30-plus years, the post-colonial situation in Namibia demands a new critical tradition in evaluating its moral progress in legal development and to reaffirm, inter alia, the right of the !Kung people, also a minority indigenous San group, to once again seize the initiative of history in their humanness as communal land dwellers separate from labels of cultural and ethnic differences and economic prejudice.

These days few people, having the benefit of hindsight, would deny that prior colonial state conduct was inherently wrong from a human rights[19] or natural justice perspective.[20] Colonial imperialism of the 19th Century was also founded on legal fictions and institutionalised juristic personalities to give moral credence and expression to expansionist policies of states and state institutions driven by elite interests.

It was thus as history reveals, that common political, social and economic interests found common resonance and expression in the prevailing international laws gestated by the "international community"[21] in which the prerogatives and objectives of the primary beneficiaries of the plundered resource wealth of Africa were paramount. In pursuit of these colonial imperialist-natured ambitions on this continent, the era of colonial expansion into Africa's interior continued unremorsefully. It remained uncurbed on the tail end of that ever-present fickle and desolate social morality which had fashionably asserted itself against the capture, kidnap and trade in human slaves,[22] but simultaneously heralded and fashioned the law to justify the concerted plunder of foreign territories of Africa.[23] The colonisation process was just as easily driven then as it is these days by the legitimisation of state action by public morality in generally accepting human rights abuses as legitimate state action or by apathy or by condonation. The similarly oriented modern unwritten oligarchical state structures enable the facilitation of individual political ambitions and economic interests, much to the prejudice of the poorer, unimportant echelons of general Namibian society.

The growing divide between the N‡a Jaqna local community and the! Kung Traditional Authority interests and objectives is symptomatically apparent. The systemic destruction of this community's

18 *Per Ueitele J The Na#jaqna (sic) Conservancy Committee v The Minister of Lands and Resettlement* (A 276-2013) [2016] NAHCMD 250 (18 August 2016): "By 1925 a total of just 2 813 741 hectares of land south of the Police Zone accommodated a black population of 11 740 people while 7 481 371 hectares (880 freehold holdings) were available for 1 106 white settlers. The process of allocating farms to whites was completed in 1960, by that time Namibia had 5 214 farming units (all in the hands of white settlers) comprising approximately 39 million hectares of land."

19 Human rights include aspects such as life, liberty, and the pursuit of happiness that are due to every human. These rights are not granted by governments to their citizens, but are fundamental to attainment of human dignity for all persons.)

20 The report on "The Natives of South-West Africa and their Treatment by Germany", prepared in the Administrator's Office, Windhoek, South West Africa, January 1918.

21 The international community is a vague and subjective phrase used in geopolitics and international relations to refer to a nebulous group of people and governments of the world. It does not literally refer to all nations or states in the world.

22 Richard Hellie, *Slavery,* August 24, 2020, at https://www.britannica.com/topic/slavery-sociology (accessed 29 December 2020). The final cessation of the export of slaves from Africa to the Americas took place toward the end of the 1860s. The decisive factor was the abolition of slavery in the United States in 1865. Slavery was then legal only in Cuba and Brazil – and only up to the 1880s.

23 Colonial expansion into the interior of Africa.

legally established communal conservancy[24] and community forest institutions by land invaders serves to make way for illegal settlement and cattle ranching by wealthier outsiders without any reference to the rule of law, other than consent from the !Kung leader. Both of these community-based natural resource management entities[25] are in themselves juristic persons capable of holding land rights[26] specific to the attainment of their purposes and insofar as it is necessary to perform its functions and attain its objectives on that area of communal land. However, the personal social statuses afforded by public office and the autocratic administrative style of the !Kung Chief has revealed a discordant local-level dynastically fashioned state-sanctioned political administrative apparatus in a remote enclave, free from the constraints of morality. The performance of its state obligations, which include upholding the law and constitutional values of Namibia is sorely lacking. By individual empowerment, the supreme control over the lives of the members of the !Kung Traditional Community is complete, and the local community conservancy interests are traded on trinkets as the !Kung Traditional Authority allows, in a fairly systematic and calculated manner, incursion by social, economic and political elites to set up farming and other businesses.[27] These favourites include those who remain interdicted by court order but openly continue to lay claim to tracts of the conservancy and forest without due process of law or regard to the rights of the conservancy to conduct its affairs in accordance with its management plans on behalf of its members.[28]

Where public institutions are commanded by the prevailing rule of law in an ordered society, the legitimacy of the particular brand of rule of law peddled by the administration in itself becomes questionable when its practical application or effect on the marginalised recipient is patently unjust and contrary to his or her legitimate interests as a human being. Thus whenever a decision or lack thereof by the state organ detracts from the clear rights of the poor, it is unlikely to be seen by the poor as an authentic and legitimate expression of the libertarian constitutional rule of law. Rather, practical Namibian rule of law strives towards the social and economic displacement of legitimate but marginalised recipients – their marginally regarded interests in communal land becoming displaced by the dominance and quantity of elite interests.

We can observe that when law is deliberately not put to the service of preventing the mischief for which it is designed by the State, the failure invariably advances elitist land-grabbing interests where, for example, the application of the rule of law protecting the conservancy interests is subverted and people are allowed to subvert it with impunity.

Since the inception of the conservancy, the !Kung local community, the State and its Chief were always in agreement that the local community members had acquired rights to conduct themselves

24 The Nature Conservation Amendment Act, 1996 (Act No. 5 of 1996), makes the right of a community to manage and benefit from wildlife resources conditional upon meeting specified requirements, including a constitution. Most of the requirements relate to good governance and must appear as written provisions in the conservancy's constitution. The required constitutional provisions are listed in the Amendment to Regulations relating to Nature Conservation, Government Notice No. 304 of 1996.

25 The community forest and the communal conservancy.

26 As a *universitas ad personorum*.

27 Most of the unlawful settlers interdicted in the case of *The N#jagna Conservancy Committee v The Minister of Lands and Resettlement*, NAHCMD 250 (A 276/2013), stated under oath that they acquired rights from the Traditional Authority, either the Chief or a headman, without further ado in their opposing affidavits. Many have been assisted to this day to evade implementation of the court order against them.

28 See "Climate Change Vulnerability and Adaptation Assessment for Namibia's Biodiversity and Protected Area System", in Ministry of Environment and Tourism, *Guidelines for Management of Conservancies and Standard Operating Procedures*, May 2010.

through the legally established juristic Conservancy Committee on behalf of its members. The law enabled the members to advance, among other things, the purpose for which they established the conservancy and community forest in pursuit of the very same underlying objectives of the Communal Land Reform Act, 2002 (Act No. 5 of 2002) (CLRA).[29] In this case the predictable demise of the conservancy is a result of intentionally morally unacceptable standards being applied in the administrative conduct against a particular group of people. This style of administration, where the ethical or moral content of the rule of law is constitutionally determined, is clearly just as easily subverted in the modern state institutions as it was in the old, where the agenda was also driven by dominant interests that do not necessarily cater directly to the interests of the directly affected ordinary residents on communal land.

As such, one should not be too critical when, even with the benefit of hindsight and knowledge of the stated direction of the moral development of the national society and laws, the colonial era of law and inequality is conveniently forgotten and the moral lessons learned are repeated. Law and inequality remain. That uneasy institutionally sanctioned construct of state and legal development of previous regimes were also overseen by the finest jurists, noblemen, politicians and economists of the time, all doyens of privileged society. Those constructs left their abhorrent spectre as a caution as to state excesses. That colonial brand of the rule of law contrived to resist the notion of extending human rights[30] or natural justice in colonial administration, because to admit that all humans are equal in law would negate the true nature of the colonial states' ambitions in their colonies where unhindered resources extraction necessarily required dehumanisation and subjugation of local populations as they were civilised.[31] As a result, colonial policy was confounding in itself and could not admit natural-law principles and apply the equal rights paradigm to heathen savages, lately the merchandise of the slave trade. Certainly, this conflicting equality of human dignity would undermine its expression to its moral society of the noble intent of bringing the torch of civilisation to Africa and the Holy Bible[32] to boot. This perverse outlook on equality is much the same as the way that maladministration finds sufficient justification in society for the systemic erosion of marginal peoples' human rights which are morally irrelevant in the advancement of other dominant political and socio-economic agendas. The fact of persistent poverty makes people vulnerable to state abuse and control by others, making a complete mockery of aspirations of human dignity for all and equality before the law.

Even back then, to the societies of Europe's allied states, the international community's economical pursuit against the dehumanised (Black) population of Africa (and elsewhere) was also self-justified by the "enlightened and benevolent" legal delusions of advancing industrial societies moved by the winds of their own prevailing social acceptance and interests of their capitalist economy and expansionist politics. The social morality legitimised the political rhetoric, resulting in laws which enabled the wholescale plunder and dispossession of foreign territories, lands and resources. Abuses of human rights were pursued as principles of state policy by the international political and

29 Section 17(1).

30 The expression "human rights" did not appear in the English language until 1781, the year in which Part I of Thomas Paine's *The Rights of Man* appeared, according to Suheil Badi Bushru in "The Spiritual Foundation of Human Rights: A Baha'i Perspective", Baha'i Center for International Development and Conflict Management, University of Maryland, College Park, MD, USA, 15 November 1997.

31 For a full discussion on this, see Graham J Costello, MA, "Natural Law And Natural Rights In Nineteenth Century Britain", thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy, School of Philosophical and Historical Inquiry, Faculty of Arts and Social Sciences, University of Sydney, 2014.

32 Johnson Kĩriakũ Kĩnyua, "The Agĩkũyũ, the Bible and Colonial Constructs: Towards An Ordinary African Readers' Hermeneutics", a thesis submitted to The University of Birmingham for the degree of Doctor of Philosophy, Department of Theology and Religion, College of Arts and Law, The University of Birmingham, February 2010.

economically empowered communities, without any tangible benefit whatsoever to the colonised and subjugated populations whose only hope at the time was that one day they would be free.[33] Namibia, of course, was no exception to the colonial onslaught against human dignity. It is this common identity that drives the national spirit of Namibia, it would seem.

Today, any novice-minded jurist poring over the extensive written human rights discourse that has informed the development of the Namibian constitutional order would undoubtedly consider this apparently toxic, once heroic pursuit, a perverse inversion compared to the modern constitutionally endorsed brand of rule of law. That discourse recalls a past in which institutionalised inequality is the norm, with poverty as the morally acceptable price for the excesses of an artificially engineered racist society as it applied to advance the interests of those who dominated that state order.

However, that discourse also reminds us that in the absence of legitimising moral ethics, even where a substantive constitution-bound rule of law and equitable principles of state obligations are supreme on paper, the rule of law is incapable of advancing any meaningful social values for which it is designed when the unequal application of law seeks to diminish rather than empower individual rights. Within broader society, human rights are only as secure and benevolent as the morality that a politically and economically empowered society permits. Where the State fails to perform its duties or to effectively implement its laws, or do anything at all, and the tangible effect of such abstention is to advance specific elitist interests to the detriment of vulnerable communities, this suggests that the moral fabric is frayed in the decision-making processes that the lawyers and courts say are designed to protect rights and advance the socio-economic development of marginal people.

For the takers, the risk of legal intervention ensuing from the most vulnerable and marginalised people in Namibian society is also low, because, albeit that the right of access to law is enshrined in Article 12 of the Constitution, this right is only realised at a high price, and few Namibians, let alone the poor, can afford a lawyer, hence few have meaningful access to law.[34] In Namibia, the interests of a traditional community may only be advanced by its government-approved Chief and usually by the Government Attorney,[35] and the community is only to be represented in the higher political order by the appointed Traditional Authority administrator, with a result much the same as would be expected when placing a fox in the chicken run.

Namibia is a fractured nation in many respects.[36] A largely inherited institutionalised skewed economic demographic profile exists between a small wealthier sector of society and a largely disproportionate number of poor on an extremely low rung of the economic empowerment ladder – notably the rural population occupying communal lands. Much of this extreme socio-economic inequality is undeniably inherited from the predecessor apartheid system which persists as a vestige

33 See, inter alia, *Mabo and Others V. Queensland* (No. 2) [1992] HCA 23; (1992) 175 CLR 1; *Delgamuukw* v. *British Columbia* [1997] 3 S.C.R. 1010; *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); and 2003 (12) BCLR 1301 (CC) (14 October 2003) regarding the legal fiction of *terra nullius*, for example.

34 Legal Aid provides some assistance in some cases, and the Legal Assistance Centre (LAC) is the only public interest law firm in Windhoek that seeks to, among other things, assist marginalised communities in their efforts to realise their human rights, including providing access to law to a limited number of people – the limit being due to the LAC's own capacity constraints as a donor-funded organisation.

35 *Tsumib v Government of the Republic of Namibia* (A 206-2015)[2019] NAHCMD 312 (28 August 2019).

36 Multiple ethnic groups, political groups, economic and political groups, and multiple languages, cultural identities and histories.

of the past.[37] In the *Kashela* matter, the Supreme Court of Namibia itself was not constrained to point out the self-evident fact that at Independence on 21 March 1990, Namibian society's wealth and income distribution was stratified on clear racial lines. The minority White population owned most of the country's wealth and land, whilst the majority and indigenous Black population was at the lower end of the socio-economic spectrum, with only a small middle class. The country was carved up into urban metropolises and surveyed farmland on which the Whites lived, and, conversely, a cluster of largely arid and undeveloped so-called "homelands" for Blacks.[38] In the 1960s, the Odendaal Commission recommended that "development" be based on the ethnic division of Namibian society.[39] The creation of so-called homelands for each ethnic group was proposed, not because it was believed that this would provide a better way of promoting development, but because it was argued that a unitary Namibia would lead to constant conflict caused by ethnic rivalry.[40] Independent Namibia's Traditional Authorities Act, 2000 (Act No. 25 of 2000) (TAA) more or less fulfils this function of ethnic division on communal land, and while new political and socio-economic elites have also emerged from rural roots since Independence, the plight of the poor has generally remained challenging. Be that as it may, Namibian society remains stratified by the economic and political divides that have ordered this society around an oligarchical state over the last three decades.

Namibia has just a few more than 2,5 million[41] people for the State to concern itself with. A large proportion of Namibia's people fall in the poorer categories or echelons of society, and remain vulnerable and economically incapacitated, and, being marginalised, they have basic education or less, and remain uninformed and excluded as to the technocratic ways of the modern central state development agendas.[42] The trust and interests of the traditional communities are supposed to be represented through the Traditional Authority structures set in place to advance, among other things, the objectives of section 17(1) of the CLRA. Many residents of conservancies are not directly engaged in a capital economy and rather eke out livelihoods on communal land constrained by economic circumstances.[43] In this sense, "traditional authorities" and "traditional communities" are also both juristical conceptions of statute,[44] the former being the administrative organs of state appointed to rule the ethnically defined groups of people who self-identify as such and are relegated to their marginal place in an ordered society.

As a case study, the N‡a Jaqna Communal Conservancy and Community Forest and its local !Kung community conservancy members are the archetypical section 17(1) communal land beneficiary, bearing all the qualities for such marginal status to afford them a right in poverty to some security of the communal land safety net to uplift their economic conditions and social development. In exchange they have collectively undertaken to preserve the environment and the ecosystems as

37 See for example "The World Bank in Namibia: Overview", 2019/20, at https://www.worldbank.org/en/country/namibia/overview.

38 *Agnes Kahimbi Kashela v Katima Mulilo Town Council 7 Others* (SA15-2017) [2018] NASC (16 November 2018).

39 See Commission of Enquiry into South West Africa Affairs (Odendaal Commission), *Report of the Commission of Enquiry into South West Africa 1962-1963*, Government Printer, Pretoria, 1963.

40 Melber, cited in footnote 12.

41 United Nations, Department of Economic and Social Affairs, Population Division, *World Population Prospects 2019, Volume I: Comprehensive Tables* (ST/ESA/SER.A/426), 2019.

42 After becoming an independent state in 1990, Namibia had initially achieved notable progress in reducing poverty, halving the proportion of Namibians living below the national poverty line to 28.7% by 2009/10. In 2015/16 that number was further reduced to 17.4% – see https://www.worldbank.org/en/country/namibia/overview.

43 Namibia Statistics Agency, *Poverty dynamics in Namibia: A comparative study using the 1993/94, 2003/04 and the 2009/10 NHIES surveys*, November 2012, accessed at https://d3rp5jatom3eyn.cloudfront.net/cms/assets/documents/p19dnar71kanl1vfo14gu5rpbkq1.pdf.

44 Creatures of statutory law, not customary law.

custodians for the benefit of all Namibians. The Traditional Authority has a similar statutory duty to ensure that its obligations in relation to the environment are implemented, and to ensure a harmonious pursuit, together with the local community, of a better life for all community members. The environmental aspect of natural resource management finds its domestic origins in Article 95(l) of Namibia's Constitution.

However, despite all of these laws, a common quality among all N‡a Jaqna Conservancy members is the ongoing shared experience of social, political and economic disempowerment. They continue to bear the blunt force of exploitation, cultural subjugation and politically instigated inter-tribal strife[45] when the unabated incursions, influx and land grabbing by dominant political and economic elites occurs, and no relief can be obtained from the State.

The N‡a Jaqna Conservancy's development of its natural capital within the conservancy area has obviously become increasingly enticing for outsiders from dominant ethnic groupings elsewhere in Namibia. The southern and central regions of the country[46] were not represented by those respondents interdicted by the High Court who hail from traditional communities whose history did not include the pre-colonial horrors of land dispossession and social destruction experienced in the central and southern regions, perhaps remote from those moral convictions alluded to in the preamble to the Namibian Constitution.

As misery and frustration rule the day-to-day experience of the majority of the conservancy and community forest members while the elite and the rich continue with their accumulation of wealth and property at the conservancy's expense, the systemic erosion of the rights gained by the !Kung local community since the establishment of their conservancy in Tsumkwe West continues unabated despite any court order. It is a case of the Government giving with one hand and taking with the other. Thus it is also the case that the Traditional Authority, having betrayed the trust placed in it by the local community, lacks legitimacy, and the rule of law is meaningless in the context of its non-application to the local community conservancy and forest members.

Since Independence the Government has attempted, with varying success, several poverty reduction policies, strategies and programmes, and has also overseen the increase in the production of agricultural and non-agricultural concerns, not only on freehold land and green schemes, but also with reference to farming on communal land. The Government is also inspired by its development goals articulated in its Vision 2030, which are in line with the Millennium Development Goals.[47] The agricultural and development focus on communal land resources is largely due to the potential for increased primary production where it is deemed viable and where the majority of poor Namibians live.[48] In addition to these development initiatives, large areas of communal land have been set aside for local communities to conduct communal conservancies and community forests in line with the Government's overall acclaimed Community-Based Natural Resource Management (CBNRM) agenda and to beneficially share in the resources.

However, some fundamental constraints to elitist capital development arise from communal land tenure systems, management and use rights and administrative styles, which impede progress

45 Reports and complaints have regularly emerged from local community members about the conflict created between the local !Kung and the "Angolan" !Kung by the latter's Chief.

46 All of the affidavits filed by the respondents in the *Na#Jaqna* case (cited at footnote 27) indicated that most of the respondents were generally ethnically linked to the northern tribes of Namibia.

47 United Nations, *Millennium Development Goals Report 2011*, June 2011, ISBN 978-92-1-101244-6, available at https://www.refworld.org/docid/4e42118b2.html (accessed 30 January 2021).

48 *World Population Prospects 2019, Volume I*, cited in footnote 41.

towards achieving these social and economic development objectives.[49] One, being the most salient, is that communal land cannot be bought or sold – that is to say it is incapable of private ownership.[50] It is public land held by the State in a trust relationship for the benefit of the people who lawfully occupy it. It follows that it also may not be hypothecated.[51] As a result, people lack either the means or incentive to develop communal land. But communal land also provides a publicly beneficial and affordable, secure environment for many of Namibia's poorer people. A customary tenure right is a personal right and may not even be bequeathed in a will.[52] The CLRA itself incorporates principles of African customary law concerning the notion of exclusivity of ownership,[53] which is usually not found as individual ownership rights in indigenous peoples' traditional approach to land usage. Traditional modes of tenure are usually based on collective and shared usage of the land.[54] Second, many cases decided through the land appeal tribunals or the High Court have shown, for varying reasons, that there is a lack of effective state administration or control over certain areas of communal land, particularly areas which do not appear to outsiders to be subject to any other prior or exclusive registered right, such as commonages, conservancies and community forests, or more specifically, because they are occupied by San.

The Constitution of Namibia exhorts courts to develop a human rights-based jurisprudence of tolerance and temperance seasoned with equity in its domestic common and statutory laws by way of judicial decision making. These judgements over the years of independence have generally provided clear boundaries and guidelines[55] for fair administration action to take place, and various statutory laws establish exactly that which should inform decision-making processes required in public offices. It therefore cannot be realistically argued that people's use of common resources (such as communal land) for development is not guided, mediated, regulated, constrained and determined by rights frameworks, institutions and policies as amplified by this unequivocal jurisprudence.

Rather, it is suggested that somewhere a moral ethic of personal constraint must necessarily exist to guide the state administrator in wielding powers of state office over, among other things, resources for the administration to be legitimate. A lack of moral constraint negatively influences administrative decision making. Thus it follows that who benefits from resource extraction and who bares the obligations for sustainable management is indicative of where personal moral preferences of state administration lie. Put differently, if there were no unlawful incursions, land grabbing, illegal fencing, poaching, resource destruction, timber harvesting, private farming or cattle ranching, this would suggest that there is a high moral ethic vigilantly guarding against

49 See also John Mendelsohn, Louise Shixwameni and Uda Nakamhela, "An Overview of Communal Land Tenure In Namibia: Unlocking Its Economic Potential – Corresponding author: John Mendelsohn, Research & Information Services of Namibia (RAISON)", undated, accessed at https://www.bon.com.na/CMSTemplates/Bon/Files/bon.com.na/d2/d2d1748a-1e9f-4b9a-8291-94c8589e52d7.pdf.

50 Section 17(2) of the CLRA provides that "No right conferring freehold ownership is capable of being granted or acquired by any person in respect of any portion of communal land.

51 See section 17(2) of the CLRA. Certain mechanisms exist for transferring communal land rights between parties, including compensation mechanisms for authorised improvements as provided for under section 38 and in the accompanying regulations.

52 See section 26 of the CLRA.

53 Customary rights endure only for the lifetime of the holder and are therefore in the nature of personal rights. Section 26 of the CLRA requires the right to revert to the Chief, who must forthwith reallocate it in accordance with the order of preferences set out under section 26, with reference to its customary laws.

54 Jeremie Gilbert and Ben Begbie-Clench, "Mapping for Rights": Indigenous Peoples, Litigation and Legal Empowerment", *Erasmus Law Review*, Issue 1 (2018).

55 See *Günther Kessl v Ministry of Lands and Resettlement and 2 others*, Case No 27/2006 and 266/2006.

the vestiges of the past to prevent the loss and destruction of resources and displacement of the people under that administration. Or, conversely, the amount of illegal activity in the conservancy that is tolerated by the administrator is inversely proportional to the personal moral constraint of that administrative officer, and more so when it is significant that empowered economic and connected elites are unlawfully benefiting in terms of the exercise of powers given to that particular administrator as an officer of the State at the expense of the local communities.

On the one hand in Tsumkwe West is the N‡a Jaqna Communal Conservancy[56] and Community Forest[57] which represents the manifestation of the desires and aspirations of approximately 1 800[58] people to realise a semblance of their dignity, who rely on their constitutional rights of equality, and perhaps a little bit of the universally accepted (but limited) right of self-determination, and the hope of a sustainable future derived from the inherent conservation culture in the use of the natural resources on which they can depend.

On the other hand is a government-appointed administrator, Chief and supreme leader by virtue of the TAA and a challenged election process. For the local community members occupying the area, the option to institutionalise the conservancy as enabled by law was realised to a large extent when, after years of effort, the community finally lawfully acquired rights from the constitutional State in 2003 to conduct a communal conservancy and a community forest[59] on a geographically defined portion of communal land set aside for that very purpose and encompassing the area where the local community already lived. And the !Kung Traditional Authority consented and agreed to become bound to the terms of its constitution insofar as the exercise of its land administrative powers in the N‡a Jaqna Conservancy are concerned. The Traditional Authority limited its powers to intervene in the business of the conservancy, including compliance with the zoning and management of the conservancy for its future development when making customary right allocations or granting consent for leaseholds within the conservancy.

However, the general performance of the !Kung Traditional Authority – as it had already emerged from the respondents' affidavits in the High Court case of *N‡a Jaqna Communal Conservancy Committee v Minister of Lands and Others* – shows the lack of any prospects of rights-based outcome for the N‡a Jaqna Conservancy and its members when the Traditional Authority ignores it and continues to breach all it agreements and statutory obligations by aiding and abetting unlawful occupation of the conservancy by persons already interdicted and from outside of the traditional and local community in the conservancy.

The judgement in the above-mentioned case which found that no interdicted respondent had any lawful right of occupation afforded by the Traditional Authority or the CLRA or any other law, when it ordered the removal of illegal fences and occupiers. The State's obligations to execute the order against the bulk of the respondents remains unfulfilled; not much has changed for the conservancy other than it is clearly evident that political and socio-economic elites have the upper hand against the judiciary in the unfair and unlawful acquisition and distribution of communal land and resource rights in the N‡a Jaqna Conservancy and Community Forest.

56 Gazetted under GN 162 published in the *Government Gazette*, No. 3027, dated 24 July 2003, in terms of section 24A of the Nature Conservation Ordinance (as amended).

57 In terms of section 15 of the Forest Act and by way of an agreement between the Minister of Agriculture, Water and Forestry, and with the consent of the TA.

58 Membership recorded at N‡a Jaqna Annual General Meeting of members in 2020. Communication with Loretta Kirkpatrick 12 December 2020 Nyae Nyae Foundation.

59 There are two community forests congruent to the conservancy, if one includes M'Kata Community Forest.

Apart from the constitutional crisis presented by such contempt of court, the rights of the local community as a conservancy are usurped and the economically and politically empowered and able to systemically remove the local community benefits attained from its custodianship over renewable natural resources, and to undermine the community's ability to conduct a communal conservancy and community forest by occupying the land.

The !Kung Traditional Authority's policy of disengagement from local community participatory processes tends to undermine efforts, interests and rights of the local community in developing and using their natural resources. It also negates the objectives of section 17(1) of the CLRA, serves to deny the community access to information and participation in their own development, and there is no objective possibility of free prior informed consent regarding unlawful settlement and illegal activities authorised by the Chief in the conservancy.

In this local-level modern-day performance of the persistent drama of inequality, the conservancy members are, ironically, represented by the democratically elected Conservancy Committee entrusted to manage the interests of the conservancy and its members, on that communal land, and are custodians of a vast wealth of natural resources and ancillary income streams to which they have attained legal rights.[60] The local community acquired rights from the State by the due process of law, and lost them as quickly by the very same state administration that lawfully granted them without any process of law. The !Kung local community members are largely poor when measured in material terms, but the community has demonstrated that its wealth lies in self-organisation, accountability, and well-administered benefit schemes underwritten by the conservancy constitution and rules and supported by the Ministry of Environment, Forestry and Tourism. As determined human beings, the members of the conservancy and forest have already realised a measure of community ownership of their achievements, and have tackled their own poverty. They are able to rely on the improved mixed economy[61] of the conservancy benefit-sharing schemes for their improved livelihoods. All of these benefits deriving from the members' efforts are the quid pro quo for performing custodial duties in accordance with the State's expressed policy of Community-Based Natural Resource Management. Efforts of the !Kung local community have proven to realise natural resource management at its best value to address the needs of the landless and poor as well as giving effect to Article 95(l) of the Constitution, thereby making the communal land occupied by the conservancy and forest serve its useful purpose under section 17(1) of the CLRA. And its people are not a burden on the State, but have the full means to live in dignity.[62]

On the other hand, the !Kung Traditional Authority, with its self-proclaimed Queen[63] or royal house, is the typical product of a statute with public powers and a title that precludes democracy. The style of administration at the local community level, being by royal decree, denies rather than advances marginalised people's legitimate interests and rights. Institutionalised maladministration follows as the norm, disguised with a cloak of elevated superiority and social class commensurate with the range of statutory permissible and exclusive titles to choose from.[64] Such arrangements enable economic and political elites to grab conservancy land to serve their own private interests. These administrators and elites couldn't care less about the effect of their misconduct on the economies

60 In terms of the conservancy's constitution, an AGM is held where office bearers are nominated at village level and elected to the Executive Management Committee.

61 Including Cultural Villages, the Living Museum, trophy hunting, small businesses, tourism, small-scale farming projects and benefit sharing under the conservancy benefit-sharing mechanisms.

62 See the discussion in *The N#jagna Conservancy Committee v The Minister of Lands and Resettlement*, NAHCMD 250 (A 276/2013).

63 See section 11 of the TAA 25 of 2000.

64 Ibid.

of the conservancy and its members as settlements, illegal fencing and cattle numbers increase daily in a haphazard and unplanned manner.

The N‡a Jaqna Conservancy and Community Forest[65] have interests and rights as juristic persons, but the conservancy members also have direct and personal interests and rights in the conservancy scheme as well as personal customary rights of tenure in the conservancy area of that communal land. The conservancy area encompasses an amalgamation of existing customary rights of the local community (i.e. the conservancy members), based on the *n!ore* system (a *n!ore* being an area over which local people have rights of access and resource use).[66] *N!oresi* (plural) contain natural resources on which people depend, and host a communal customary tenure system that pre-dates the CLRA and this conservancy.[67] The conservancy itself lawfully acquired rights to beneficially occupy the specifically defined geographical portion of communal land set aside for, among other important considerations, the purpose of conducting a conservancy. The subsistence and social development of the local community are derived from a proper functioning conservancy where conservancy members and the general community benefit from the benefit-distribution scheme, which includes donations by the conservancy to the Traditional Authority for community-based development purposes.[68] However, despite the initial poverty alleviation successes of social and economic development initiatives, these lawfully acquired rights are not measuring up to the challenges of the onslaught perpetuated by the imposition of unlawfully sanctioned land rights through decision making that serves only to welcome the incursion of wealthier elites to grab land or exploit natural resources, without any reference to the due process of law.

The N‡a Jaqna Conservancy and the !Kung Traditional Authority are equally "creatures of statute."[69] Both having been established in terms of provisions of the Nature Conservation Ordinance 4 of 1975 as amended in 1996, and the Forest Act 12 of 2001[70] and TAA 25 of 2000,[71] respectively.

The chief of a traditional community as a public institution is a personalised titular position as well as[72] the supreme head[73] of the traditional community. It is a statutory and customary law mix-match fiction of law, a creative legal product bearing an administrative personality, clothed as a fictional customary law Queen and invested with social status demanded of public office by

65 Defined under the Forest Act 12 of 2001 and the Forest Amendment Act 13 of 2005.

66 Jennifer Hays and Robert Hitchcock, "Land and resource rights in the Tsumkwe conservancies – Nyae Nyae and N‡a Jaqna", in Odendaal, W. and Werner, W. (Eds), "*Neither here nor there": Indigeneity, marginalisation and land rights in post-independence Namibia,* Legal Assistance Centre, Windhoek, 2020.

67 The implication being that these rights fall to be dealt with under section 28 of the CLRA if no conservancy was established.

68 These funds have never been accounted for in terms of actual benefits achieved or how the funds were utilised by the Traditional Authority, and such funds are often solicited on demand.

69 *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* (SA-2008/51) [2009] NASC 17 (14 December 2009) – insofar as it deals with the nature of juristic rights in the Constitution.

70 Section 15.

71 Sections 2 and 6. There is also a certain measure of irony in the following remark by the judge in the Supreme Court in 1996, since this is more or less what the TAA does on communal land: *"There is a lingering question in the minds of people listening to arguments in this appeal. That question is: Why does the Rehoboth Baster Community want back its property? Is it because they want to perpetuate the structures set up under the Odendaal Plan?"*

72 Section 11 of the TAA provides that, "Nothing in this Act contained shall be construed as precluding the members of a traditional community from addressing a traditional leader by the traditional title accorded to that office, but such traditional title shall not derogate from, or add to, the status, powers, duties and functions associated with the office of a traditional leader as provided for in this Act."

73 Defined in the TAA as follows: "'head', in relation to a traditional community, means the supreme traditional leader of that traditional community designated in accordance with section 4(1)(a) or (b), as the case may be, and recognised as such under section 6".

the TAA.[74] This elevated rank of political and characteristic social status is also maintained by the public payroll of the State and for the !Kung Queen, coming second to a full-time job as an Air Force Captain in Grootfontein some 160 km away from Tsumkwe West's people.[75]

Apart from having an absentee Chief, there is also much discontent among the !Kung community about the Chief having been appointed by the State, in what seemed to be an arranged or coerced "election" by political agendas for her to succeed her late father who was also appointed by the State. Once "recognised" by the ruling party's Minister as the statutory head of the Traditional Authority, the Chief claimed the customary title akin to a hereditary Queen. The customary law decree ensuing from this "democratically elected" administrative state officer is contrary to the !Kung customary laws and social norms experienced prior to her appointment. At the outset, this decree derailed any further notion of democratic institutional decision making that would give anyone in the !Kung community the opportunity to realise the !Kung people's constitutional rights to freely engage in political and public processes.[76]

In terms of the TAA,[77]an election must be held if there is no ascertainable customary law or there is a dispute as to what the content of the customary law is. It therefore follows that as far as the !Kung are concerned, no customary law pertaining to a royal lineage existed, and an election should have been orchestrated as a result.

The succeeding Chief, by adopting such a grand title as "Queen" (*!hao Gaoxahn* or Royal House Head), as encouraged by the TAA – with reference to other tribes' customary laws, and despite the lack of authentic ancestral heritage informing the formulation of such a decree – has single-handedly established a royal lineage at the same time. Thus a self-proclaimed *de lege*[78] and *de facto* administrative autocrat emerged from Namibia's democratic institutions of state administration exhibiting a style of state administration that is tainted by the personal morality reflected in the outcome of the !Kung leader's personal administrative decree to subjugate her peers. The resultant leadership remains aloof, illegitimate and weak, and is seemingly guided without constitutional or statutory or even any supporting consensus of the local community in the exercise or failure to exercise lawfully sanctioned administrative powers delegated to that institution or organ of state to at least further the objectives of section 17(1). While the Namibian Constitution does not appear to suggest that anybody should have any absolute powers over other equals[79] arbitrarily, such is the reality of the condition of the! Kung people. Indeed, in law, such powers given to a Chief of a Traditional Authority as a juristic office bearer are adequately constrained by substantive legal mechanisms and institutional power-sharing arrangements,[80] with procedures to limit the scope for biased decision making, unless these procedures are ignored and bypassed altogether, or where the due process of law is not deemed applicable.

If it is an acceptable notion that law always needs state authority as a condition for its enforcement, then it equally needs moral acceptance as a condition for its social recognition and legitimacy.

74 See Manfred O. Hinz (ed.), *Customary Law Ascertained Vol. 3: The Customary Law of the Nama, Ovaherero, Ovambanderu, and San Communities of Namibia,* African Books Collective, 2016 (accessed at Project MUSE, muse.jhu.edu/book/44976).

75 *Namibia News Digest*, "New Kung San chief crowned at Tsumkwe", at https://www.namibianewsdigest.com/%EF%BB%BFnew-kung-san-chief-crowned-at-tsumkwe, 29 March 2015 (accessed 13 January 2021).

76 See Article 17 of the Namibian Constitution.

77 Section 5(10).

78 In terms of the (constitutionally invalid) customary law decree. (*De lege* means 'on the basis of new law'.)

79 All power shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State.

80 The Communal Land Board plays a far more dominant role than the Traditional Authority in the processes of ratifying the allocations made by the Chief, granting registration and verifying communal land rights.

Morality, on one hand, could be about the obligations of the individual to the socially conditioned group in which he or she conforms (and moralists are unclear on what those individual obligations are). On the other hand – and to avoid this discourse that explores the conditioned social moral standards moulding an individual's conformance and acceptance in the abidance of social norms and varying values of social morality – we rather seek the moral convictions of Namibian society as claimed in the Constitution for the true basis for the proper fulfilment of all state obligations by state administrators to all their people, and then see if the individually empowered state administrators have the personal ability to discern their own moral character in the conduct of public state affairs.

In much the same way, the moral basis of 19th Century German[81] and British public law doctrine is reflected by the administrative style extended to the administered colonies by the administrators. Laws of both colonial powers came to be effected in Namibia in one way or the other. To a large extent, traditional British segregationist policy[82] informed the development of South Africa's apartheid social engineering legal framework as it applied in Namibia. Put somewhat bluntly, these predecessor regimes formulated and relied on legal doctrines that were mere apologies for the use of force and guile. The salient common underlying jurisprudential formulation on the matter of territorial conquest and colonisation process demonstrates that these colonial countries had only, for their real object, the absolutism of imperialism and expansionism of the colonial state.[83] Yet, options for state morality existed alongside such imperialistic and Machiavellian attitudes,[84] and were already available to guide administrative action. The quest for human dignity arising from the popular French legal doctrine had already persisted from 1789 to the present, and always sought to discern the moral basis for the limitation of state action.[85]

Namibian human rights jurisprudence follows the basic French course, in terms of the content of the principles of human liberties and rights enshrined in Chapter 3 of the Namibian Constitution and, by extension, statutory law. These provide the substantive legal mechanisms for limitation of state action.[86] Human rights content is generally and substantively determined by the Namibian Constitution as the supreme law. Thus, the persistent consideration here deals with the limitation of state action by underlying morality and ethics of the natural personality of public office bearers who are responsible for the objective and proper performance of the constitutionally directed state administrative mechanisms. That morality demands absolute adherence to the constitutional legal framework of the rule of law and the rights of individuals.

Perhaps, then, the systemic invasion in the N‡a Jaqna Conservancy is symptomatic of an amoral disinterest and lack of accountability by the administrative organ. Or, lack of accountability is

81 See also George Steinmetz, *The Devil's Handwriting: Precoloniality and the German Colonial State in Qingdao, Samoa, and Southwest Africa*, University of Chicago Press, Chicago, 2007.

82 One of the key legislations that laid down the foundation for a spatially divided South Africa was the Glen Grey Act passed in 1894. Subsequently the Native Lands Act 27 of 1913 was also implemented, shortly before South Africa's Namibian mandate which had a profound effect on the African population across the country. It also laid down the foundation for other legislation which further entrenched dispossession of African people and segregation later in Namibia.

83 This political doctrine refers to the practice of unlimited centralised authority and absolute sovereignty, as vested especially in a monarch or dictator. The term, in its simplest form, is also useful terminology to describe regimes of failed democracy in oligarchical, single-party or tyrannical states which lack rule of law based on universal values of individual rights.

84 A doctrine which in part suggests that there is no construct for abstract freedoms or overt limitations on political interventions of the state, since the state is deemed to have an absolute 'ethical' component, giving it priority over the individual.

85 Edmund H. Hollands, "Nature, Reason and the Limits of State Authority", *The Philosophical Review*, Vol. 25, No. 5 (1916), pp. 645-661 – *JSTOR*, www.jstor.org/stable/2178605 (accessed 14 January 2021).

86 Article 21 of the Namibian Constitution.

occasioned by the fact that the local community's link to the broader human rights experience and access to justice is too weak. The latter may apply since, firstly, marginalised rural communities and disempowered residents of communal land may not even recognise themselves as members of any political society when they are marginalised and excluded by a customary decree based on myth, and secondly, proper procedural and substantive redress are effected only through[87] the very Traditional Authority appointed by the relevant government Minister[88] to represent local-level community interests.[89] Then too, the !Kung community generally is buffered from proper access to justice by the lack of representation through these statutorily established administrative legal bodies in circumstances where a reticent Traditional Authority and unsympathetic Communal Land Board persistently fail to perform their statutory and constitutional obligations.

If all exercise of state powers is legitimately linked to an underlying shared principle of moral limitation which subjects it to both positive and negative obligations, then the state organ's players have to be, on the whole, committed to such an underlying principle of objective morality. This not only imposes on them the duties which are socially sanctioned, but at the same time also implies that the corresponding power of social intervention may be exercised to ensure that this moral imperative by the state administrator is directed towards satisfying those obligations which it imposes on its conduct as a result.

The legal source of the spirit that morally informs public officials' acts is perhaps only heard in the whispers of the "spirit and purport" of the Namibian Constitution. C.J. Mahomed pointed out in *Government of the Republic of Namibia and Another v Cultura 2000 and Another*[90] when referring to a fundamental premise of the Constitution where it is the supreme law, that, "A Constitution … must broadly, liberally and purposively be interpreted … to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its government."

It may be that often-complex social relationships[91] and power dynamics are at play between the approximately 52 Traditional Authorities and the community-based conservation programme that currently encompasses at least 86 communal conservancies covering just over 20% of Namibia's communal land, with nearly 223 000 people[92] and about 43 community forest committees.[93] Many line ministries are involved in communal land management, in tandem with social interventions and development planning and programmes. In the eyes of local inhabitants, these sometimes reflect disjointed and competing interests between various ministries, without proper consultation as to specific functions and obligations in respect of the overall management of communal land in a conservancy. The extent of individual participation and quality of informed consent in policy decision making is also the extent of the affected people's ability to maintain access to primary

87 *Jan Tsumib and Others v Government of the Republic of Namibia and Others*, Case Number A206/2015.

88 Minister of Urban and Rural Development.

89 In terms of Article 66 of the Namibian Constitution, "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 or common law does not conflict with this Constitution or any other statutory law." Paradoxically enough, it is where no customary law exists that an election may be held. Thus the !Kung Chief cannot lawfully make such a decree.

90 1994(1) SA at 418.

91 Correspondence from the !Kung Chief in March 2016, explaining why she will not execute any High Court order obtained by the conservancy in relation to the interdicting of illegal occupiers, cattle farmers and illegal fencers.

92 MET/NACSO, *The state of community conservation in Namibia (Annual Report 2018)*, MET/NACSO, Windhoek, 2020.

93 Community forests fit into the overall CBNRM programme, which, among other things, transfers forest resource management rights to local communities in accordance with the Forest Act of 2001. Several community forests are congruent on areas of established communal conservancies.

natural resources and livelihoods. These administrative relationships can be mutually supportive and inclusive participatory relationships that serve to provide the much-needed safety net for the rural poor,[94] or they may be exploited by politically appointed opportunists to systemically deny the poor their rights and access to law to attain objectives other than those prescribed by law.

In the construction of the CLRA, the Forest Act and the Nature Conservation Ordinance, power-sharing institutions exist within the overall administrative bodies connected to communal land. For example, the Traditional Authority[95] is created under the TAA as a creature of statute with limited powers, while the Communal Land Board is similarly established under the CLRA.[96] These two organs of state have powers delegated to them by the statutes under which they are established. For the Traditional Authorities to become included in communal land administration, so that they do not feel deprived of powers, additional powers are granted to them under the CLRA,[97] which powers are limited by the doctrine *of ultra vires* and are overseen by the Communal Land Board.[98] Usually this sort of institutional arrangement supports good governance and institutional accountability because the statutory and procedural mechanisms in themselves provide inherent checks and balances to limit powers between these two organs of state, each tasked with communal land administration to differing degrees to properly perform their state functions. However, this power-sharing arrangement may in itself be the result of economic elites' successful attempts to represent their interests in the political system, jeopardising democratic accountability.[99] The creation of power-sharing institutions under the CLRA and the TAA, for example, is an outcome of contentious relationships between similarly influential groups within the economic and political elite.[100]

It suffices for the purposes of this discourse to stereotypically fashion the cartoon-like characters of Marx-styled elitism in the broader Namibian population as including those socio-economic and political categories of individuals who own or control the means of production and extraction in the economy. It is within this elite set that multiple subgroups emerge and then manage, through patronage, nepotism and common linkages between public officers of state and private interests, the extraction, processing, consumption or use or exchange or trading of specific resources, goods and their products, usually for profit or gain.

Each of these groups has a quest in advancing the interest with which the group is identified, and this invariably involves compromises with other groups who are also part of the economic elite and

94 The Nyae Nyae Conservancy and the Traditional Authority work together.

95 A Traditional Authority is that traditional body which has authority over a traditional community, and which comprises the traditional leaders of that community who have been designated and recognised as such in accordance with the provisions of the Act.

96 At section 2.

97 Under customary law governance it can probably be accepted that the Chief, King or Queen is the supreme ruler who has the primary and ultimate power to allocate land. This power finds accommodation in section 20 of the CLRA.

98 Mark Elliott, "The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law", *The Cambridge Law Journal*, Vol. 58, No. 1 (1999), pp. 129-15, at http://www.jstor.org/stable/4508533 (accessed 5 January 2021). The *ultra vires* principle assumes that judicial review is legitimated on the ground that the courts are applying the intent of the Legislature. Parliament has found it necessary to accord power to ministers, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The courts' function is to police the boundaries stipulated by Parliament.

99 Clever Mapaure, in "Jurisprudential aspects of proclaiming towns in communal areas in Namibia", *Namibian Law Journal*, Vol. 1, Issue 2 (July 2009), observes the following: "The power to control communal land use and or the means of production on communal land is one of the props of traditional authority. These props, which reinforced the leadership of Kings, Queens and Chiefs, have slipped away and given in to modern statutes."

100 This would apply even to the Constitution itself, negotiated to accommodate a variety of interests.

political elite. This also involves adopting policies and collusive decision-making strategies that might be at odds with the interests of other social groups, particularly those who are economically and politically stratified, or marginalised from the general national society with little recourse to realise their Article 12 rights.

Such interlinkages and strategies can range from unlawful land grants to social and political elites outside of a traditional community's customary laws, to a purposeful lack of political will to implement and enforce laws that are designed to curb land grabbing and extensive illegal fencing by wealthier elites invading a conservancy. Ethical administrative decision making or apathetical lack of decision making or lack of political will to implement existing laws has proved to mostly benefit wealthier elites from other regions of Namibia, invariably at great expense to others at the lesser end of the economic scale who remain marginalised, disenfranchised, poor and without any scope for further development as the communal conservancy is plundered. Accompanied by insecure land tenure rights and little hope of relief from the State in which they are equal shareholders, the future is one of displacement and poverty.

As is apparent from the N‡a Jaqna court case, the conservancy areas are invariably treated as commonages or as private landholdings to be indiscriminately allocated by the !Kung Chief and Traditional Authority.[101] However, as is argued, the Traditional Authority and Chief have already by consent delegated their powers to administer these areas to the Conservancy and Community Forest Committees on behalf of their members, concerning the aspects of management planning and zoning of these areas for specific purposes to further the conservancy and forest objectives.

It follows that the exercise of the Traditional Authority's statutory powers insofar as it relates to the conservancy area may not, without the prior consent of the Conservancy Committee[102] or the Forest Committees, authorise or otherwise allocate any rights whatsoever in a conservancy or community forest area. Simply stated, these statutory powers of the Traditional Authority are further limited by statutorily mandated agreements during the course of the establishment of the communal conservancy and community forest by their members, who usually are the local community members.[103] As such, where the Traditional Authority has relinquished certain of its powers, as enabled by the Nature Conservation Ordinance and the Forest Act, to the Conservancy Committee or Forest Committee as the case may be, it may act in respect of that conservancy only to the extent that the conservancy constitution allows it to, and as agreed as a condition for its establishment. The regionally established Communal Land Boards are also confined in respect of where or when they may grant any right of leasehold[104] in a conservancy, such determination being subject to the conservancy's ratification.[105]

101 According to personal sources on the Council of the !Kung, few meetings are ever held to discuss the business administration and particularly the allocation or authorisation or consent to rights on the communal lands by illegal occupiers, illegal fencers and other unauthorised resource users.

102 In terms of the conservancy constitution, the Traditional Authority is represented on the Conservancy Committee without decision-making powers.

103 Since the programmes of communal conservancies and forests and the Traditional Authority involve different line ministries, the failure or undermining of such projects raises serious questions about cooperative government in the interest of good governance.

104 Only members may hold customary tenure rights subject to the limitations imposed by the conservancy constitution and by-laws. At inception, existing local community members would have asserted rights akin to those under section 28 of the CLRA, known as existing customary rights, i.e. acquired prior to 1 March 2003.

105 No communal land occurs in Khomas Region, hence there is no regional Communal Land Board through which traditional authorities are established to administer communal land in line with the provisions of the TA Act and the constitutional rights to culture.

Further, the law is clear that a Traditional Authority has customary law[106] authority or jurisdiction over its own traditional community members who subscribe to that particular customary law.[107] It is not a requirement for the establishment of a Traditional Authority that the traditional community occupy communal land. Also, the "traditional community" as defined in the TAA does not necessarily have the same legal label or status as the "local community" that establishes a communal conservancy under the Nature Conservation Ordinance or section 12 of the Forest Act, as the case may be, because ethnicity is not a pre-condition of the establishment of a conservancy in the same way as it is for a traditional community or Traditional Authority under the TAA. The main consideration is whether or not the conservancy advances the objectives of section 17(1) of the CLRA and the policies and laws made in line with Article 95(l) of the Constitution of Namibia.

The TAA is not clear on any precise mathematical or geographical formula[108] to underpin any traditional community's claim of domain over a specific area of communal land which may be claimed by any particular group of people who fit the bill[109] as a traditional community when they want to ask the Minister to recognise a Chief and a Traditional Authority.

Indeed, the TAA requires only that the "communal area" claimed for the administrative jurisdiction purposes is a "geographic area habitually inhabited by a specific traditional community, excluding any local authority area as defined in section 1 of the Local Authorities Act, 1992 (Act No. 23 of 1992)". In other words, the Traditional Authority has jurisdiction over its people mainly, but in relation to communal land that the state-recognised traditional community may habitually inhabit, it has an administrative role too. Part of the "uniqueness aspect" of a traditional community is that, as a defined entity, it also follow the same customary laws that are unique. A traditional community's rights to land are derived from its own customary laws.

These geographical jurisdictional boundaries concerning the Traditional Authority's domain on communal land are, in the norm, part and parcel of the content of the application and procedures required for such recognition, and are usually agreed between already recognised[110] neighbouring traditional communities who have been recognised as such, with their own Traditional Authorities and Chiefs as recognised by the Minister, after due administrative processes have taken place – although conflicts may and do still exist regarding jurisdiction over territory.[111]

The CLRA thus extends additional powers to a Traditional Authority to enable the administration of communal land at the local level as a decentralised organ of state with specific statutory powers, functions and obligations in relation to land rights and terms of beneficial occupation of the commonages. Basically, the Chief has powers to allocate rights that are subject to ratification by

106 The term "customary law" means "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 in Namibia".

107 See *Adcock v Mbambo* (A 87/2010) [2012] NAHCMD 35 (24 October 2012), available at https://namiblii.org/na/judgment/high-court/2012/276.

108 The term "communal area" means the geographic area habitually inhabited by a specific traditional community, excluding any local authority area as defined in section 1 of the Local Authorities Act, 1992 (Act No. 23 of 1992)".

109 See definition of "traditional community" in the TAA.

110 Many unrecognised traditional groups with customary law institutions exist in much the same way as an association of people would under the common law, without any written constitution – an example being the Khwe San living in the Bwabwata National Park in north-eastern Namibia.

111 *Government Republic of Namibia v Kamunguma and Others* (HC-MD-CIV-ACT-OTH-2017/00069) NAHCMD 260 (30 June 2020).

the Communal Land Board before anyone may reside there. A Traditional Authority has jurisdiction over its people, and certain powers relating to the administration of communal land on behalf of the State for the benefit of the Namibian people, given under the CLRA.

The provision in Article 21(h) of the Namibian Constitution that all persons shall have the rights to reside and settle in any part of Namibia does not mean that people may reside anywhere unlawfully; it means that people are free to choose where they want to lawfully reside – free from the racist restrictions employed by the previous state regimes.

The !Kung Traditional Authority is accordingly not allowed to make allocations of communal land available for customary law rights to a person unless that person is entitled to acquire such customary rights as a member of the traditional community to which such customary law applies.[112] It has been argued[113] that such ethnic or tribal discrimination would fall foul of the provisions of Article 21(h). However, with consideration, the implications arising from the *Adcock* case are reconciled. The CLRA, to cater for the first category of people mentioned under section 17(1) who are not capable of acquiring customary law rights – being of a personal nature held under customary law by a member of that traditional community – may rather apply for a leasehold right. Both forms of tenure have the same result. Both are personal rights and include the right to live or reside on communal land under Article 21(h) of the Constitution. In that way, no discrimination occurs, and the customs and cultural norms of traditional societies remain protected under the Constitution insofar as customary tenure rights are concerned.

Much loss of sustainable economy for the local community of the N‡a Jaqna Conservancy has been occasioned at the latitude of the !Kung Traditional Authority in failing to take action to evict unlawful persons entering and occupying the conservancy, or harvesting its produce, without any lawful authorisation. Thus large areas have been "allocated" or appropriated for the use of wealthier people from elsewhere at the sole discretion of the !Kung Traditional Authority when exercising administrative powers on behalf of the !Kung people in the conservancy and forest.

Section 17(1) of the CLRA identifies two distinct categories of people to benefit from communal land: generally all Namibians in the first instance, and then in particular the poor who rely on the communal land tenure for subsistence due to their economic statuses.[114] However, for reasons already mentioned herein, it remains the case that administrators' decisions that lack fundamental administrative fairness often go unchallenged and are often left to arbitrary discretion at whim.[115]

These constraints place local communities who rely on communal land for their livelihoods at a disadvantage compared to other Namibians who enjoy secure tenure on freehold land or leased

112 Section 3(b) of the TAA provides that one obligation of the chief is to administer and execute the customary law of that traditional community, i.e. it does not extend to persons other than those subscribing to that customary law.

113 Christa van der Wulp and Stasja Koot, "Immaterial Indigenous Modernities in the Struggle against Illegal Fencing in the N‡a Jaqna Conservancy, Namibia: Genealogical Ancestry and 'San-ness' in a 'Traditional Community", *Journal of Southern African Studies*, DOI: 10.1080/03057070.2019.1605693.

114 Founding Affidavit *Blommaert v Minister of Land Reform and Others* (settled). Provisions of the CLRA include rights of foreign nationals to apply for the acquisition of leasehold rights.

115 This is despite that section 39 of the CLRA provides a readily accessible, uncomplicated dispute mechanism to challenge decisions of chiefs and Communal Land Boards through the establishment of an ad hoc land appeal tribunal established on appointment by the Minister of Agriculture, Water and Land Reform which permits disputes to be escalated to the Higher Courts of Namibia on appeal or review. The limited powers of the tribunal is to confirm, set aside or amend a decision and to make any ancillary order in connection with the confirming, amending or setting aside of the decision of the administrator.

state-owned land under the commercial farm resettlement scheme which is largely managed in the owner's or lessee's personal interests and not necessarily the interests of the community in which they live.

For a community forest and a communal conservancy, natural resource capital is the basis of the local community's economy. The local community members are the members of the conservancy, and they derive all of their rights and obligations from the conservancy and forest constitution approved by the Minister of Environment, Forestry and Tourism. The conservancy entitlements on behalf of its members include not only sustainable utilisation of renewable natural resources and wildlife, but also the obligation of custodianship over the biodiversity and ecosystem functions and services, and by implication the confirmation of existing land tenure rights of the local community members who have established a conservancy.

Attachment to the land and resources in a potential conservancy can be regarded as an unwritten pre-condition for the establishment of the envisaged conservancy by a local community, because that community will have custodial obligation over the other natural resources and wildlife on the communal land that the conservancy occupies. Various statutes and international laws[116] acknowledge the juristic fact that people do not have to be ethnically arranged in law as a "traditional community" to retain existing tenure rights. For example, the existence of the !Kung San as human beings is not dependent on a defined "traditional community" concept under the TAA, and the !Kung people do not necessarily have to establish a conservancy to enjoy human rights and fair administrative action.[117] Tenure rights existed for individuals apart from within a local community, and these rights pre-empted the establishment of the conservancy,[118] which is not an initiative of the Traditional Authority. Similarly, the protection of traditional knowledge as a proprietary right under the Nagoya Protocol[119] to the Convention on Biological Diversity also demonstrates the international community's acceptance that the traditional knowledge acquired is a direct result of attachment to the land and the use of natural resources. It is a universally acceptable fact that the traditional knowledge base relating to natural resources of a specific society evolved over time immemorial in relation to specific territories and environments occupied. For the conservancy to function properly, not only must its natural resources be safeguarded and restored by, in part, the application of such traditional knowledge by the environmental custodians, but also, its productivity must be increased to meet the needs of the members of the conservancy and to provide a national sanctuary to the benefit of all Namibians. This requires not only an integration of the dimensions of the land tenure right, but also an approach that necessarily considers the ecosystem interlinkages and economic and political dynamics of the conservancy itself, and the right to free, prior and informed consent, along with the necessary opportunity to engage in the decision-making processes affecting the conservancy and forest. This is the philosophy on which Namibia's CBNRM policy is founded.[120]

116 See Richard B. Bilder, "International Law and Natural Resources Policies", *National Resources Journal*, Vol. 20, Issue 3 (Summer 1980), at https://digitalrepository.unm.edu/nrj/vol20/iss3/3.

117 See for example the African Charter on Human and People's Rights and the Nature Conservation Ordinance itself which provides for "local communities", rather than "traditional communities" per se.

118 See for example section 28 of the CLRA which allows the recognition of rights that pre-existed the implementation of the CLRA on 1 March 2003. It follows that if these tenure rights on communal land did not exist, there would be no local community to establish a conservancy in the first place.

119 The Protocol On Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization.

120 See Article 95(l) of the Constitution, the Environmental Management Act, the TAA and the Ombudsman's Act, which have incorporates the constitutional values of environmental protection into the various post-independence laws.

In itself, communal land administration in Tsumkwe West has taken on a plethora of complexities in its own administrative schizophrenic role, either as a safety net for the poor or as a frontier of opportunity for political and economic elites to privatise and develop the conservancy to benefit their individual interests to the detriment of the poor, and in so doing, to undermine the objectives of the CLRA.[121]

The ultimate result is that the local community members, the custodians of the natural resources, are reduced to mere slaves to conserve the ecosystems for the benefit of marauding cattle barons and wealthier farmers. These illegal intruders reward the local community with little in return for the systematic destruction of the conservancy. The unsustainable damage to the very natural ecosystems and renewable resources on which the conservancy relies, renders its outlook bleak. The disturbances of wildlife migration and other habits of the species concerned, along with increased poaching and fencing of large tracts of land in a "*terra nullius*" complex, conjure a spectre of past abhorrent practices. Similarly, the pattern of occupation that emerges in the conservancy is one of a dominant group subjugating the meek, caring little, if at all, about any management plans. Thus, despite the conservancy being a potentially and proven viable poverty barrier and the only source of income for many who rely on subsistence-based livelihoods, the poor are shaken from the safety net by the seditious State which undermines its own institutions, this sedition being shrouded in constitutional democracy in which the rule of law only serves to further elitist interests.

The Traditional Authority, with the Chief as its head, is an organ of state bound by the principle obligations imposed on it in terms of Article 18 of the Namibian Constitution. The statutory duties and obligations imposed on the Traditional Authority towards members of the !Kung Traditional Community, including the members of the conservancy and community forest, are to, inter alia: promote peace and welfare amongst the members of that community; administer and execute the customary law of that traditional community; uphold, promote, protect and preserve the culture, language, tradition and traditional values of that traditional community; assist the Namibian police and other law-enforcement agencies in the prevention and investigation of crime and, subject to the provisions of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), the apprehension of offenders within their jurisdiction; assist and co-operate with the Government, regional councils and local authority councils in the execution of their policies and keep the members of the traditional community informed of developmental projects in their area; and ensure that the members of his or her 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 in Namibia.[122]

Another requirement of the TAA is that the Chief be ordinarily resident in the communal area of the traditional community which he or she leads. Then too, the Traditional Authority is required to: allow all members of the traditional community to freely exercise and enjoy their constitutional rights; administer communal land under its jurisdiction lawfully; and uphold the Constitution of Namibia.

However, despite such obligations and duties, the !Kung Traditional Authority openly, systematically and continually abuses its statutory powers and duties, reneging on any and all agreements, undertakings, obligations, duties, rights and laws, by, inter alia, rather allowing or commissioning unlawful acts of despoliation against the resources, rights and property of the N‡a Jaqna Communal Conservancy and Community Forest and their members.

121 Section 17(1).
122 Section 3 of the Traditional Authorities Act 25 of 2000.

It is thus not a case of management and tenure rights of conservancy members not being well established in law. The conservancy itself has been duly established in law, and given its own juristic personality, and vested with certain right, duties, powers and obligations over a specific geographically defined portion of communal land set aside for the purpose of conducting a communal conservancy and community forest. The conservancy in itself is an administrator of communal land.

In *The N#jagna Conservancy Committee v The Minister of Lands and Resettlement*, the conservancy, – already seeking relief from the uncontrollable influx of wealthy cattle farmers and other illegal occupiers in 2007 – instituted these proceedings to evict 32 unlawful occupiers. There are many more such occupiers. For various reasons it took almost four years for the matter to find its way through the court process, including procedural delays by the Court of the actual judgement for almost two years. On the upside, the community members felt much relieved when orders were finally granted to interdict[123] most of the 32 occupiers, and the conservancy members found new hope in the Court's judgement. The Court ordered the respondents to give vacant possession of the conservancy areas to the conservancy, and ordered the Chief and Communal Land Board to remove the illegal fences. Along with such fences, the occupiers were ordered to remove/vacate their cattle, homesteads and improvements, and to take along all those who illegally occupied under them. However, the State did not want to properly assist in carrying out the order issued against it, and has continually reneged on its obligations, obscuring the matter as a political issue or claiming that the fences were removed, when interdicted people and fences still remain for everyone to see, and remain protected by the Queen.

In its discussion of the linkages between poverty, inequality and environmental degradation, the Brundtland report in 1987 already identified these self-evident facts: "Poverty is not only an evil in itself, but sustainable development requires meeting the basic needs of all and extending to all the opportunity to fulfil their aspirations for a better life. A world in which poverty is endemic will always be prone to ecological and other catastrophes."[124] Meeting essential needs required not only a new era of economic growth for nations in which the majority are poor, but an assurance that those poor get their fair share of the resources required to sustain that growth. In the final analysis, sustainable development must rest on political will.

With Namibia's Independence in 1990, there was already an urgent need to address the injustices of the past. Since the apartheid State had based its racist regime on, inter alia, wildlife and water policies, natural resource management required immediate attention in independent Namibia. In this societal context, it became imperative for Namibia's environmental legislation to transfer the responsibility of managing wildlife and water from the State to local user groups. Namibia's Community-Based Natural Resource Management programmes sought to heed Brundlandt's dire warning soon after Independence.

If an acceptable primary meaning of "rule of law" is that the ruler and ruled must be bound by the same law, it is also trite that the moral content of the rule of law is one of the crucial parts and marks of a civilized human rights-based society devoid of inequality and economic discrimination. In fact, no civilized nation can run without the proper application of the enlightened rule of law and the largely unarticulated content of its moral code. Like the Constitutions of every independent

123 In terms of the CLRA, only a Chief or Communal Land Board may evict persons from communal land. The interdict approach thus allowed the conservancy to seek the relief it obtained.

124 G. Brundtland, "Report of the World Commission on Environment and Development: Our Common Future", United Nations General Assembly document A/42/427, 1987.

civilized modern country, the rule of law is the fundamental basis of Namibia's Constitution which is the supreme law.

However, the moral application of Namibia's rule of law remains a myth in the daily lives of the N‡a Jaqna Conservancy members, who are struggling against the illegitimate brand of rule of law meted out at that marginal local level. Failing state morality, the substance of any rule of law as a constitutional concept can then only have meaning in a society which has an independent and enlightened Judiciary to scrutinise another institution of state. But then again, this constitutional idea in itself is premised on the myth that all people have equal access to law in order to meaningfully realise their Article 12 rights under the Namibian Constitution. Paradoxically, access to law requires economic empowerment, which cannot be achieved because unlawful state action precludes any social and economic development and upliftment for the Na‡Jaqna Conservancy and local community members to afford the luxury of realising these rights.

With the !Kung community still denied access to justice and fair administrative action, the game of dressing up organs of state as customary thrones continues, the economic and political elite thrive and resources are plundered as an indifferent society looks on, while the naïve and disempowered poor are shaken from the safety net of communal land by an uncaring and indifferent State, the latter undermining its own Constitution and inciting hostility towards the State as a result.

This paper forms part of a series of papers on land matters in Namibia. These papers are available on the LAC website. Hard copies can be obtained from the LAC office.

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